LKS UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

18 DECEMBER 2023

INDIRECT TAX

Secondment – Applicability of SC decision in *Northern Operating Systems* in GST regime

UPDATE NO. 45 OF 2023

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The GST Policy Wing of Central Board of Indirect Taxes and Customs ('CBIC') issued Instruction No. 05/2023-GST dated 13 December 2023 in respect of proceedings being initiated by authorities under section 74(1) of the CGST Act pursuant to the Supreme Court decision in *Northern Operating Systems Pvt. Ltd. (**'NOS'**)* 2022-VIL-31-SC-ST on the issue of nature of secondment of employees by overseas entities to Indian firms under the Service Tax regime.

APPLICABILITY OF *NOS*

On the applicability of the decision, the instruction provides as follows:

1. Secondment as a practice is not restricted to Service Tax and the issue of taxability on secondment shall arise in GST also.

2. The decision shall not be applied mechanically in all cases. Investigation in each case requires a careful consideration of its distinct factual matrix, including the terms of contract between overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Hon'ble Supreme Court's judgment in *NOS* case.

   The same was instructed for the following reasons:

   - The Hon'ble Supreme Court *inter alia* took note of various facts of the case like the agreement between NOS and overseas group companies to hold that the secondment of employees by the overseas group company to NOS was a taxable service.

   - Reference was made to decision of the Hon'ble Supreme Court in *CCE* v. *Fiat India (P.) Ltd.* 2012-VIL-01-SC-CE, where it was noted that *"66. ....Each case depends on its own facts and a close similarity between one case and another is not enough because either a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*

   - On the basis of the said decision, it was noted that there may be multiple types of arrangements in relation to secondment of employees of overseas group company in the Indian entity. In each arrangement, the tax implications may be different, depending upon the specific nature of the contract and other terms and conditions attached to it.

INVOCATION OF EXTENDED PERIOD OF LIMITATION UNDER SECTION 74(1)

It was observed that extended period of limitation under Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful mis-statement or suppression of facts to evade tax.

Only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis-statement or suppression of fact to evade tax on the part of the taxpayer, section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.

LKS COMMENTS

The instruction has been issued in the light of notices mechanically being issued to the taxpayers for payment of tax in cases of secondment of employees in light of decision in the matter of *NOS.*

This instruction is expected to provide a sigh of relief to the taxpayers who are in a position to differentiate that ratio laid down in the case of *NOS* would not apply on account of factual differences. Further, it has been clarified that extended period of limitation under Section 74(1) of the CGST Act cannot be invoked merely on account of non-payment of GST.

However, it is to be seen how the said Instruction is applied by the departmental authorities in issuing Notices and adjudicating cases where Notices have already been issued invoking the extended period of limitation. In such cases, the ITC of tax paid pursuant to such notice would not have been availed in terms of Section 17(5)(i).

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