$~20 to 24

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment delivered on: 22.10.2024***

\+ W.P.(C) 14945/2023 & CM APPL. 59655/2023 (Interim Relief)

METAL ONE CORPORATION INDIA PVT. LTD
.....Petitioner

Through: Mr. Tushar Jarwal and Mr. Rahul Sateeja, Advocates.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Ms. Uma Prasuna Bachu, SPC for UOI.
Mr. Harpreet Singh, Sr. St. Counsel with Ms. Suhani Mathur, Adv.
Ms. Sonu Bhatnagar, Sr. St. Counsel with Ms. Apurva Singh and Ms. K.S.Mary, Advocates for R-4.

21

\+ W.P.(C) 2039/2024 & CM APPL. 8537/2024 (Stay)

IDEMITSU LUBE INDIA PVT. LTD .....Petitioner

Through: Mr. Rupender Sinhmar, Advocate.

versus

UNION OF INDIA & ORS. .....Respondent

Through: Mr. Ranvir Singh, CGSPC for R-UOI.
Mr. Anurag Ojha, Sr. SC with Mr. Subham Kumar, Mr. Vipul Kumar, Adv. for R-2.

22

\+ W.P.(C) 4834/2024 & CM APPL. 19730/2024 (Stay)

SONY INDIA PRIVATE LIMITED .....Petitioner

Through: Mr. V. Lakshmikumaran, Mr. Yogendra Aldak, Mr. Kunal Kapoor and Mr. Yatharth Tripathi, Advocates.

versus

DIRECTORATE GENERAL OF GST INTELLIGENCE & ORS. .....Respondents

Through: Mr. Harpreet Singh, Sr. St. Counsel with Ms. Suhani Mathur, Adv.

23

\+ W.P.(C) 4979/2024 & CM APPL. 20374/2024 (Stay)

PETRONAS ENERGY INDIA PVT. LTD. .....Petitioner

Through: Mr. Akhil Gupta, Advocate.

versus

UNION OF INDIA AND ORS .....Respondents

Through: Ms. Shagun Shahi Chug and Ms. Shreya Mittal, Adv. for R/UOI.

Mr. Aditya Singla, SSC, CBIC with Mr. Ritvik Saha, Mr. Raghav Bakshi and Mr. Umang Misra, Advocates.

24

\+ W.P.(C) 9801/2024 & CM APPL. 40176/2024 (Interim Relief)

MITSUI AND CO INDIA PRIVATE LIMITED .....Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Kishore Kunal, Ms. Runjhum Pare, Mr. Jayesh Sislani and Mr. Devansh Garg,

Advocates.

versus

ADDITIONAL COMMISSIONER, CGST AUDIT-II, DELHI & ORS. .....Respondents

Through: Mr. Aditya Singla, SSC, CBIC with Mr. Ritvik Saha, Mr. Raghav Bakshi and Mr. Umang Misra, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. These writ petitions impugn the **Show Cause Notices**[1] which had come to be issued by the respondents and pertained to a perceived liability of tax under the **Central Goods and Services Tax, Act 2017**[2] on supply of services and which in turn was connected with the placement of foreign expatriates to aid and assist in the functions being carried out by the writ petitioners.

2. Although the existence of seconded employees in India and secondment itself appears to have been originally contested, the petitioners went on to state that they did not propose to agitate those issues in light of subsequent developments. The petitioners contended that those issues may no longer be of relevance in light of the clarification issued by the **Central Board of Indirect Taxes and**

[1] SCNs
[2] Act

Customs[3] and which we propose to notice in the following parts of this order.

3. Since most of the SCNs proceed on identical lines, we propose to extract the charge as laid and stands embodied in the SCNs which came to be issued to the writ petitioner in W.P.(C) 14945/2023, namely, Metal One Corporation India Pvt. Ltd. In those SCNs dated 29 September 2023, the respondents had alleged as follows:

> **"15.** Now, therefore, M/s Metal One Corporation India Ltd., (GSTIN- 07 MFCM1225R1Z7) having Principal Place Business: Sood Tower, Barakhamba Road, New Delhi 110001is required to show cause to the Additional/Joint Commissioner of CGST, Delhi North Commissionerate, 1st Floor, CR Building, LP. Estate, New Delhi-l 101091within 30 days of receipt of this notice as to why: -
>
> **15.1** IGST of Rs.1,94,28,551/- (Rupees One Crore Ninety Four Lakh Twenty Eight Thousand Five Hundred And Fifty One Only) not paid on import of Services received from their Overseas company under Reverse Charge Mechanism for the period July-17 to March-23 should not be demanded, recovered from them under Section 73(1) of the CGST Act, 2017 (as amended) read with the relevant provisions of Section 20 of IGST Act, 2017 (as amended).
>
> **15.2** Interest at the appropriate rates on the amount of GST demanded at Sr. No. 15.1 above, should not be recovered from them, under Section 50 of the CGST Act, 2017 (as amended) read with relevant provisions of Section 20 of IGST Act, 2017 (as amended);
>
> **15.3** Penalty under Section 73(9) of the CGST Act 2017 read with Section 122 (2) (a) of CGST Act, 2017 (as amended) further read with Section 20 of IGST Act, 2017 (as amended),should not be imposed upon: them;
>
> **16.** Now, therefore, M/s Metal One Corporation India Ltd., (GSTIN-27AAFCM 1225R1Z5) having Principal Place of Business: Office No. 809-B, 8th Floor, C-Wing, ONE BKC, G-Block, Bandra Kurla Complex, Bandra East, Mumbai, Mumbai Suburban, Maharashtra, 400051 is required to show cause to the Additional/Joint Commissioner of CGST, Delhi North

[3] CBIC

Commissionerate, 1st Floor, CR Building, I.P. Estate, New Delhi-I 10 l 091 within 30 days of receipt of this notice as to why: -

16.1 IGST of Rs. 58,95,317/- (Rupees Fifty Eight Lakh Ninety Five Thousand Three Hundred And Seventeen Only) not paid on import of Services received from their Overseas company under Reverse Charge Mechanism for the period July-17 to March-23 should not be demanded, recovered from them under Section 73(1) of the CGST Act, 2017 (as amended) read with the relevant provisions of Section 20 of IGST Act, 2017 (as amended).

16.2 Interest at the appropriate rates on the amount of GST demanded at Sr. No. 16.1 above, should not be recovered from them, under Section 50 of the CGST Act, 2017 (as amended) read with relevant provisions of Section 20 of IGST Act, 2017 {as amended);

16.3 Penalty under Section 73(9) of the CGST Act 2017 read with Section 122 (2) (a) of CGST Act, 2017 (as amended) further read with Section 20 of IGST Act, 2017 (as amended), should not be imposed upon them;"

4. From the facts as they obtain in the petition of Metal One Corporation India Pvt. Ltd., we note that the petitioner is an entity which stands duly registered under the Act in the States of Delhi, Maharashtra and Tamil Nadu. It is stated to have entered into individual employment agreements with the employees of Metal One Corporation Japan, its parent entity, who then also became employees of the writ petitioner.

5. It is averred that the Supreme Court in **CCE & Service Tax vs. Northern Operating Systems (P) Ltd.**[4] had held that transactions in which an overseas entity had seconded employees to an Indian entity and then charged the employees' salaries borne by the Indian company in the form of reimbursement, the same would qualify as manpower supply by the overseas group company to the Indian

[4] (2022) 17 SCC 90

subsidiary. It is this decision which appears to have triggered the respondents into action and the various SCNs coming to be consequently issued.

6. We note that in W.P.(C) 14945/2023, during the investigation, the petitioner appears to have asserted before the authorities that the judgment in *Northern Operating Systems (P) Ltd.* could not be *ipso facto* applied to all cases irrespective of the factual scenario which may obtain.

7. The petitioner then discloses the factum of a tax demand coming to be raised in terms of Section 73(5) of the Act on 20 September 2023. This was followed by the issuance of SCNs impugned before us in these proceedings.

8. The respondents in their counter affidavit which has been filed in these proceedings have essentially taken the following position:

> "13. That as per provisions of Section 25 of CGST Act, 2017 read with Section 20 of IGST Act, 2017 and Rule 28 of the CGST Rules, 2017, the value of the services in the facts of the present case shall be the open market value of the supply. Further, as the service under consideration is the supply of seconded employee and supply of such seconded employee is common global practice between overseas group company and related party based in India; and for valuation of such services rendered by overseas group company, total consideration given to the "employee" working on temporary deputation in India shall be considered. Therefore, the transaction value of supply of manpower service to the Petitioner shall be the total of consideration actually paid or payable by the Petitioner including the expenses incurred in foreign currency (salary paid by Overseas Group Company in Japan and charged from the Petitioner) as well as in Indian Rupees (salary paid to expats in India in INR).
>
> 14. That the Petitioner, itself admitted, in para 9 of the present petition, that the seconded employees in dispute were employees of its parent overseas company. These seconded employees were hired for a short span of time by the Petitioner and subsequently

repatriated to its parent overseas company. Therefore, it is pertinent to say that a relationship of employer-employee is not established between the Petitioner and the seconded employees. The Petitioner has availed the services, which fall under the definition of supply and subsequently, falls under the ambit of Import of Service as well. The said fact is also collaborated with the contract of Employment between the Petitioner and seconded employee, submitted by the Petitioner during the investigation."

9. We had, on hearing learned counsels for respective sides at some length on 03 October 2024, flagged the principal issues which appeared to survive. That order reads as follows:

> **"W.P.(C) 9801/2024 & CM APPL. 40176/2024 (**INTERIM RELIEF)
>
> 1. We take note of the principal challenge which stands raised to the Show Cause Notice dated 31 May 2024 as well as the Intimation Notice dated 16.05.2024.
>
> 2. In terms of the aforesaid notices, a GST liability has come to be foisted upon the petitioner in connection with the secondment of employees to its India Office. Shorn of unnecessary details, Mr. Gulati, learned senior counsel, draws our attention to Rule 28 of the Central Goods and Services Tax Rules, 2017 [**"Rules"**] which is extracted hereinbelow:
>
> > **"Rule 28 – Value of supply of goods or services or both between distinct or related persons, other than through an agent**
> >
> > The value of the supply of goods or services or both between distinct persons as specified in sub-section (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall-
> >
> > (a) be the open market value of such supply;
> >
> > (b) if the open market value is not available, be the value of supply of goods or services of like kind and quality;
> >
> > (c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:
> >
> > **PROVIDED** that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:
> >
> > **PROVIDED FURTHER** 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."
>
> 3. Mr. Gulati laid emphasis on the Second Proviso to Rule 28

and which prescribes that where the recipient is eligible for full input tax credit, the value as declared in an invoice would be deemed to be the open market value of goods and services. It was, thus, submitted that even if it were assumed that the secondment entailed an import of services, the only tax liability which could arise would be the one which would be governed by the Second Proviso.

4. Our attention was also drawn to para 3.7 of the Circular No.210/4/2024-GST and which reads as follows:

> "3.7 In view of the above, it is clarified that in cases where the foreign affiliate is providing certain services to the related domestic entity, and where full input tax credit is available to the said related domestic entity, the value of such supply of services declared in the invoice by the said related domestic entity may be deemed as open market value in terms of second proviso to rule 28 (1) of CGST Rules. Further, in cases where full input tax credit is available to the recipient, if the invoice is not issued by the related domestic entity with respect to any service provided by the foreign affiliate to it, the value of such services may be deemed to be declared as Nil, and may be deemed as open market value in terms of second proviso to rule 28 (1) of CGST Rules."

5. In view of the aforesaid position as taken by the Department itself, it was Mr. Gulati's submission that the impugned notices would not sustain.

6. In order to enable Mr. Singla, learned counsel appearing for the respondents to address submissions in light of the above, let the matter be called again on 22.10.2024.

7. Interim orders granted earlier to continue till the next date of listing.

W.P.(C) 4834/2024 & CM APPL. 19730/2024 (STAY)

8. Since this writ petition raises issues identical to those which are engaging our attention in W.P.(C) 9801/2024, this matter shall also stand tagged with the aforesaid matter to be called again on 22.10.2024.

9. Interim orders granted earlier to continue till the next date of listing.

W.P.(C) 4979/2024 & CM APPL. 20374/2024 (STAY)

W.P.(C) 14945/2023 & CM APPL. 59655/2023 (INTERIM RELIEF)

W.P.(C) 2039/2024 & CM APPL. 8537/2024 (STAY

10. Let the matters be tagged with W.P.(C) 9801/2024 to be called on 22.10.2024.

11. Interim orders granted earlier to continue till the next date

of listing."

10. The question thus stands restricted to the value to be ascribed to the supply of goods and services and which is regulated by Rule 28 of the **Central Goods and Services Tax Rules, 2017**[5]. That Rule is reproduced hereinbelow:

> **"Rule 28 – Value of supply of goods or services or both between distinct or related persons, other than through an agent**
>
> The value of the supply of goods or services or both between distinct persons as specified in sub-section (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall-
>
> (a) be the open market value of such supply;
>
> (b) if the open market value is not available, be the value of supply of goods or services of like kind and quality;
>
> (c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:
>
> **PROVIDED** that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:
>
> **PROVIDED FURTHER** 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."

11. However, and as was noticed by us in our order of 03 October 2024, it is **Circular No. 210/4/2024-GST**[6] of the CBIC which seeks to place all disputes beyond contestation. We had in our previous order taken note of the clarification rendered in Para 3.7 and which stands extracted hereinabove. As per Para 3.7 of that Circular, the CBIC clarifies that where no invoice is raised by the related domestic entity in respect of services rendered by its foreign affiliate, the value of

[5] Rules
[6] Circular

such services would be "deemed" to have been declared as 'Nil' and that 'Nil' value liable to be treated as the market value for the purposes of the Second Proviso to Rule 28.

12. Undisputedly, although payments, as asserted in the counter affidavit, were made, no invoices came to be raised by the writ petitioners entities in connection with the services provided by their related foreign. It is in the aforesaid backdrop that learned counsels had drawn our attention to the prescriptions contained in Para 3.7 of the Circular. It would perhaps be impossible for any of the respondents to assert that once the value of such services were to be treated or accepted to be 'Nil', no further tax implication under the Act would arise.

13. While the correctness of the position as advocated in terms of that Circular may be questioned on the ground of whether it would be consistent with the statutory provisions or may be viewed as being contentious or contrary to the intent of the Second Proviso to Rule 28 itself, we are today constrained to proceed further on the basis thereof. We so observe since it may possibly be asserted that the Circular is founded on the tenuous thread of parties choosing to either generate an invoice or simply avoiding to do so. However, in the present matters, it is not for this Court to be boggled by or question the wisdom of the CBIC as the Circular in any case binds the respondents.

14. In the facts of the present writ petitions, it is conceded that no invoices were generated. In view of the above and in light of the explicit terms of the Circular, the value of the service rendered would have to be treated as 'Nil'. This would lead one to the inescapable

conclusion of no perceivable or plausible tax liability possibly being created. Consequently, we are of the considered opinion that the proceedings initiated in terms of the impugned SCNs' and their continuance would be futile and impractical. The impugned SCNs are essentially rendered impotent and would serve no practical purpose.

15. In view of the above, we allow the instant writ petitions and quash the impugned SCNs dated 29 September 2023 [W.P.(C) 14945/2023], 28 September 2023 [W.P.(C) 2039/2024], 27 September 2023 [W.P.(C) 4834/2024], 28 September 2023 [W.P.(C) 4979/2024] and 31 May 2024 [W.P.(C) 9801/2024] to the extent as clarified in Para 19 below.

16. We further quash the consequential impugned Orders-in-Original dated 29 December 2023 in W.P.(C) 4834/2024 and 30 December 2023 in W.P.(C) 4979/2024 for reasons aforenoted.

17. Insofar as W.P.(C) 4834/2024 is concerned, we note that a final Order-in-Original came to be passed on 29 December 2023. The petitioner, Sony India Private Limited, had of its own violation and undisputedly, discharged the tax liability proceeding on the basis of Rule 28 and a perceived obligation to pay tax under the Act. The Order-in-Original however imposes a liability of interest and penalty upon that writ petitioner by invoking Section 15 along with Section 73(9). It is also undisputed before us that Sony India Private Limited had not only paid the tax but had also taken credit on a reverse charge basis.

18. In our considered opinion, once the position to govern all assessees pan-India came to be clarified by the CBIC, the continuation

of penalty proceedings or for that matter the imposition of interest would not sustain. In light of the stand taken by the CBIC, the petitioner, Sony India Private Limited, would have stood absolved of all tax liabilities and implications flowing from the Act.

19. All the writ petitions thus stand disposed of on the aforesaid terms. Though needless to state, we hereby clarify that the present order shall be confined to the issue of seconded employees alone. All other issues which are raised in the impugned SCNs' shall be open to be adjudicated by the respondents. We clarify that we have not expressed any opinion insofar as the other issues which form part of the impugned SCNs' are concerned. All rights and contentions of respective parties in that respect are kept open.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

OCTOBER 22, 2024/ib