Service Tax - Manpower Recruitment or Supply Agency - Section 65 (68) of the Finance Act, 1944 - service by an employee to the employer in the course of or in relation to his employment – Deputation of employees, quid pro quo in secondment agreement - Demand of service tax under Manpower Recruitment or Supply Agency service with regard to secondment of employee to the appellant by the foreign group companies – Demand invoking extended period - HELD - 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 - 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 - 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 - 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 - the orders of the CESTAT, affirmed by this court on question of revenue neutrality, in the case of Volkswagen and Computer Sciences Corporation, are unreasoned and of no precedential value - 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 - the invocation of the extended period of limitation in both cases, by the revenue is not tenable - the assessee is held liable to discharge its service tax liability for the normal period – The impugned order of the CESTAT is set aside and appeal is partly allowed

Case History
CESTAT Order - 2020-VIL-562-CESTAT-BLR-ST

2022-VIL-31-SC-ST

IN THE SUPREME COURT OF INDIA

CIVIL APPEAL NO. 2289-2293 OF 2021

Dated: 19.05.2022

C.C.,C.E. & S.T.

Vs

M/s NORTHERN OPERATING SYSTEMS PVT LTD.

BENCH
HON'BLE JUSTICE UDAY UMESH LALIT
HON'BLE JUSTICE S. RAVINDRA BHAT
HON'BLE JUSTICE PAMIDIGHANTAM SRI NARASIMHA

J U D G M E N T

S. RAVINDRA BHAT, J.

1. The Commissioner of Central Excise and Service Tax (hereafter variously described as "the revenue" or "the appellant") has preferred appeals(*Under Section 35L (b) of the Central Excise Act, 1944.*) , directed against the impugned orders of the Customs, Excise and Service Tax Appellate Tribunal (hereafter "CESTAT")*(Dated 23.12.2020 -* 2020-VIL-562-CESTAT-BLR-ST *in Service Tax Appeal (STA) Nos. 22573-74/2014; STA No. 21502/2017, Service Tax/CROSS/21077/2017 and Service Tax/CROSS/20255/2018.)* which set aside two orders dated 03.03.2014 and 04.03.2014 by the Commissioner of Service Tax (hereafter "the Commissioner"). The Commissioner had confirmed demands, made through show cause notices, for service tax along with interest and penalty. The commissioner had discharged, by an order (dated 27.02.2017/16.06.2017) the proceedings arising from another show cause notice (hereafter "SCN") in respect of a similar demand. That led to the revenue's appeal to CESTAT, challenging that order, discharging proceedings initiated by the revenue for the subsequent period. The CESTAT, by its common

order, rejected the revenue's appeals, and allowed that of the respondent, Northern Operating Systems (Pvt.) Ltd. (hereafter "the assessee" or "NOS").

Facts of the case

2. The assessee was registered with the revenue, as a service provider under the categories of "Manpower Recruitment Agency Service", "Business Auxiliary Service", "Commercial Training and Coaching Service", "TTSS", "Telecommunication and Legal Consultancy Service" etc., under the Finance Act, 1994 (hereafter "the Act"). Following an audit of the records by the revenue's officials, proceedings were initiated against the assessee alleging non-payment of service tax concerning agreements entered into by it with its group companies located in USA, UK, Dublin (Ireland), Singapore, etc. to provide general back office and operational support to such group companies.

3. The nature and contents of the agreements, are discernible in their description, extracted from the impugned order - where the assessee has been referred to as "the appellant" by the CESTAT - which is as follows:

> *"The relevant terms of the agreement to understand the activity are as follows:*
>
> *a) When required Appellants requests the group companies for managerial and technical personnel to assist in its business and accordingly the employees are selected by the group company and they would be transferred to Appellants.*
>
> *b) The employees shall act in accordance with the instructions and directions of Appellants. The employees would devote their entire time and work to the employer seconded to.*
>
> *c) The seconded employees would continue to be on the payroll of the group company (foreign entity) for the purpose of continuation of social security/retirement benefits, but for all practical purposes, Appellants shall be*

the employer. During the term of transfer or secondment the personnel shall be the employee of Appellants. Appellants issue an employment letter to the seconded personnel stipulating all the terms of the employment.

d) The employees so seconded would receive their salary, bonus, social benefits, out of pocket expenses and other expenses from the group company.

e) The group company shall raise a debit note on Appellants to recover the expenses of salary, bonus etc. and the Appellants shall reimburse the group company for all these expenses and there shall be no mark-up on such reimbursement."

As a matter of fact, the assessee issues the prescribed forms to the seconded employees, in terms of the Income Tax Act, 1961 (hereafter "IT Act"). Those individuals too file income tax returns and contribute to the provident fund. Furthermore, NOS remits the above amounts in foreign exchange, which are reflected in its financial statements. The assessee is reimbursed (by the foreign entity, Northern Trust Company - hereafter described as such) for the amounts it pays as salaries, to these seconded employees. The assessee pays for certain services received from the group companies. The assessee used to discharge service tax on payments for such services in terms of Section 66A of the Act. The appropriate major expense heads were 'Salaries & Allowances', 'Relocation expenses', 'Consultancy Charges', 'Communication Expenses' and 'Computer Maintenance and repairs.'