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Shri Vivek Johri, IRS
Chairman-CBIC
Ministry of Finance

Sub: - Request for issuance of a clarification to overcome the difficulties created for the information technology industry consequent to the judgment of the Hon'ble Supreme Court in the case of *Northern Operating Systems Private Limited* and waiver of interest or penalty therein

Respected Sir,

Greetings from MAIT!

At the outset, we would like to take this opportunity to thank the Central Board of Indirect Taxes and Customs (CBIC) for its continued support to the Indian industries. We deeply appreciate the multiple initiatives undertaken by the Government of India to promote electronics hardware (H/w) manufacturing in the country including mobiles, laptops, tablets and other ICT products.

The **Manufacturers' Association for Information Technology** ('**MAIT'**) is the apex industry body representing the Electronic H/w sector in India. Recently, MAIT has received several requests from its members to represent for the kind intervention of the Government to address the difficulties created by the recent judgment of the Hon'ble Supreme Court of India in the case of *CC, CE&ST (Commissioner of Central Excise and Service Tax) v. Northern Operating Systems Private Limited* [hereinafter referred to as "**NOSPL**"] reported at *2022-VIL-31-SC-ST.*

In the said judgement passed by the Hon'ble Supreme Court, it has been held that the salaries paid by Indian entities for the expats who are seconded by the overseas group entity to the Indian entity is liable to service tax under reverse charge considering that the payment is towards 'manpower supply' services provided by overseas group entity to the Indian entity.

The ruling of the Hon'ble Supreme Court in NOSPL was based on following operational modalities basis which it had been ruled that the overseas group company was the real employer of the seconded employees:

a. The seconded employees remained on the payroll of the overseas group company.
b. Seconded employees had to be repatriated in accordance with global repatriation policy of the overseas group company upon cessation of the secondment period.
c. Overseas group entity reserves the right to terminate the secondment arrangement with the Indian company.

The judgement in Northern Operating Systems Pvt Ltd needs reconsideration and support from Government

With due respect to the judgement of the Hon'ble Supreme Court in case of NOSPL, it is requested that the said judgment requires a reconsideration and support from the Government for following main reasons: -

A. All previous judgements were in favour of Industry

With due respect, there have been plethora of judgments issued in favour of the industry. The same issue has been subjected to scrutiny by Courts in past and all previous judgments have been in favour of industry till now. The Courts have consistently held that such payment of salaries by Indian entity cannot be considered as a payment towards 'manpower supply' services to the overseas group entity. In other words, it has been held that the Indian entity was not liable to pay Service Tax as a recipient of services under reverse charge mechanism as the seconded personnel became employees of the Indian entity. Some of the previous judgments in favour of industry are as follows:

(i) CESTAT judgment in case of Nissin Brake India Pvt Ltd v CCE Jaipur-I (Service Tax appeal no.54238 of 2014) upheld by Hon'ble Supreme Court vide judgment dated 22nd Feb 2019 (Civil appeal Dairy No.45344/2018) through dismissal of appeal.

(ii) Computer Sciences Corporation India Pvt. Ltd. v. Commissioner of Service Tax, Noida (Allahabad High Court) 2015 (37) STR 62.

(iii) CESTAT judgment in case of Volkswagen India Pvt Ltd v CCE, Pune-I (Appeal No. ST/277/11 & ST/496 & 862/12) upheld by Hon'ble Supreme Court vide judgement dated 18th January 2016 (Civil Appeal No. 522-525 of 2016 (D. No. 35214 of 2015) through dismissal of appeal

B. Above judgment is not compatible/consistent with the treatment done under the Income Tax Act, 1961

We would like to mention that the seconded employees become formal employees of Indian entity by way of issuance of formal appointment letters by the Indian entity. Their salaries are subject to TDS provisions under Section 192 of Income Tax Act,1961 and PF provisions, in similar way as are applicable to any Indian employee engaged by the Indian entity. Form 16 is also issued to the expats for the TDS deducted on Salaries under Section 192 of the Income Tax Act, 1961. The Income Tax Authorities were also allowing remittance to overseas group entity for the salaries of expats employed by Indian entities without any deduction of TDS under Section 195 of Income Tax Act, 1961.

The Hon'ble Supreme Court has held that due to lien of expats on overseas group entity, expats actual relationship with the Indian company as Employer-Employee should be discarded and these expats, in substance should be considered as employees of overseas group entity.

As already stated, the Income Tax Act, 1961 and Income Tax Authorities in India are treating the expats as employees of Indian companies and TDS on Salaries is being deducted and paid in respect to the payments made to these seconded employees.

C. Effectively, this judgment results in levy of service tax on salaries for services rendered by employee to employer

The provision of service by an employee to the employer in course of or in relation to his employment is not covered under definition of 'service' under Section 65B (44) of Finance Act, 1994. Similarly, such activity is not considered as 'supply' even under GST regime.

As mentioned above, the Multinational Companies in India were treating the seconded personnel as their employees and under the Income Tax laws as well, these personnel were reflected as the employees of the Indian company. The said position had been upheld by the Courts in different judicial fora as well.

This judgment of Hon'ble Supreme Court is effectively resulting in levying of service tax on salaries paid for services rendered by employee to employer.

D. Concept of Dual Employment/Joint Employment

We would like to submit that the concept of dual employment/joint employment has been recognized under European Union VAT as well, wherein it has been provided that there is no supply for VAT purposes between the joint employers in case the staff are jointly employed.

The said view has been taken by Indian courts as well.

Thus, the industry at large was under a belief no tax is required to be paid in cases of dual/joint employment.

In view of our above submissions, we would like to highlight that the entire industry was under a bonafide belief that no service tax is liable to be paid by the recipient Indian entities in case of secondment of employees by overseas group companies. The Courts have time and again rendered judgements in favour of the recipient in such cases.

We would like to bring to your notice that this judgment of Hon'ble Supreme Court is creating contradiction and would create confusion/issues amongst all Multinational companies.

We would like to state that levy of Service Tax/GST on these payments would be against present Government's broad policy of 'Ease of doing Business'.

Relief being sought in this Representation

(i) **Notification for waiver of tax:** It is requested that a notification be issued under Section 11C of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and under GST law, granting full waiver from payment of service tax (till June 2017) and GST liability (July 2017 till March 2022), along with interest on this issue.

(ii) **Allow Service tax paid as input tax credit**: Alternatively, the service tax paid in GST regime under Reverse charge basis on this issue be allowed to be taken as transitional Input tax credit to taxpayers under Section 142(3) of CGST Act by way of carrying forward the accrued credit to electronic credit ledger, to the extent the taxpayers were

eligible to avail credit of service tax paid. In this regard, we would like to provide the following:

a. It is highlighted that if the service tax would have been paid in service tax regime, the same could have been availed as CENVAT credit by some of the taxpayers. Thereafter, the said credit would have been allowed to be transitioned in GST regime in electronic credit ledger in view of transitional provisions enumerated under GST law by filing GST TRAN-1 application, to the extent the taxpayers were eligible to avail CENVAT credit of service tax paid.

b. However, since the service tax was not paid in Service Tax regime as the entire industry was under bonafide belief that no service tax is required to be paid, the credit could not be transitioned in GST regime at the time of shifting to GST regime. Thus, due to non-payment of Service tax under bonafide belief, the entire industry should not be placed in an adverse situation.

c. A similar benefit was recently allowed by Hon'ble High Court of Madras in case of Ganges International Pvt Ltd & Others (W.P.Nos.528, 1092 & 1160 of 2019- copy enclosed for ready reference).

(iii) **Refund of Service Tax:** In case the service tax paid is not allowed to be transitioned in GST regime, refund of the amount paid as Service Tax should be allowed to us.

(iv) **Waiver of Interest**: The industry should be granted a relief by way of complete waiver of interest on service tax as well as GST paid/to be paid (till April 2022) on this issue due to the recent decision of Hon'ble Supreme Court. The reasons for the same is provided below:

a. Had the companies across the industries paid the tax, most of them were also simultaneously eligible for input tax credit. So, it was a revenue neutral position both for Government as well as for companies, to the extent the taxpayers were eligible to avail CENVAT credit of service tax paid/GST paid.

b. Interest is basically compensatory in nature for any delayed receipt of revenue by Government. In the instant case, since the tax paid was cenvatable/ available as input tax credit for the companies simultaneously, so even if tax is held to be paid now, there is no effective delay in receipt of any revenue by the Government.

c. In this regard, we would also like to refer to the UK VAT Notice No. 700/43 which provides the guidance on Default Interest. The said notice also provides that no interest is required to be paid in case of delayed payment of tax where the input tax credit is available.

d. In similar instances in the past, notifications waiving off the interest liability have been issued under Section 50(1) read with Section 148 of the CGST Act.

An illustrative list of notifications issued is mentioned in the table below:

Notification No.	Class of Persons	Effective Rate of Interest
31/2020 – Central Tax dated 03.04.2020 (Issued to relieve the taxpayers from Interest burden during Covid-19)	Class of taxpayers having turnovers ranging from 0 to 1.5 crores, 1.5 crores to 5 crores and more than 5 crores.	Interest on delayed filing of GSTR-3B was waived off for a specified period for the months of February 2020 to April 2020 with specified conditions.
18/2021-Central Tax dated 01.06.2021 (Issued to relieve the taxpayers from Interest burden during Covid-19)	Class of taxpayers having turnovers ranging from 0 to 5 crores and more than 5 crores.	Interest on the delayed filing of GSTR-3B was either waived off or reduced to half i.e., 9% for the months of March 2021 to May 2021 with specified conditions.
08/2022 - Central Tax dated 07.07.2022	E-Commerce operators who could not file GST TCS returns due to technical glitch on the GST portal	NIL rate of Interest

e. On similar lines, a notification for waiving off interest amount for the period beginning from July 2017 to April 2022 can be issued. In this regard, your goodself may consider incorporating the following wordings in the Notification.

"In exercise of the powers conferred by sub-section (1) of section 50 read with section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Government, on the recommendations of the Council, hereby notifies the rate of interest per annum to be 'Nil', for the class of registered persons who had discharged the tax under Reverse Charge Mechanism on the procurement of services of the employees seconded by the overseas entities where such taxpayers are eligible to claim full Input Tax Credit of the tax paid."

(v) **Issuance of clarification:**

a) In the facts before the Hon'ble Supreme Court, there were principally two agreements entered between Indian entity and foreign entity. One agreement related to provision of back-office support services by Indian entity to foreign entity on cost plus markup basis.

b) Through second agreement, Indian entity requested its foreign entity for secondment of its managerial and technical personnel in India.

c) The Hon'ble Supreme Court emphasized that a host of factors need to be weighed together to conclude employer-employee relationship and noted that 'Direction and Control Test' solely will not be determinative. The Court analysed the agreements and facts of the case to conclude that employer-employee relationship does not exist between Indian entity and seconded employees. Accordingly, the Court held that secondment of employees by

foreign entity qualifies as manpower supply service and thus leviable to service tax under reverse charge in the hands of Indian entity.

d) The Court itself noted that Indian entity had operational / functional control over employees, but surprisingly disregarded the same for concluding employer-employee relationship. It further overlooked the Income Tax compliances performed by Indian entity as employer of seconded employees.

e) We wish to highlight that the facts considered by the Hon'ble Supreme Court may not be squarely applicable in each and every case being investigated.

f) Most of the companies do not provide back-office support to the parent company. The expatriates of most of the companies work for Indian Company purely but not for Overseas Company.

g) Further, in the NOSPL decision, the parent company charges admin cost related to the dispatch of the expatriates to the Indian company. While it is a pure reimbursement for most of the Industry Players.

h) Accordingly, your goodself may consider issuing a circular / directions to the field officer to consider the peculiar facts in each and every case being investigated and not apply the NOSPL decision directly.

i) Further, as mentioned above, the Hon'ble Supreme Court in the case of NOSPL also mentions that there was no malafide at the end of the assessee. Accordingly, your goodself may consider issuing directions that larger period of limitation should not be invoked and penalty should not be levied.

(vi) **Non-application of the Service Tax judgment in GST regime:** The liability to pay GST cannot be upon presumption and thus, should be conclusively determined for a given transaction. Given that the NOSPL judgment pertains to the erstwhile regime, it is therefore requested that the same should not be applied directly to the GST regime considering the possibility of difference in the interpretation of the legal provisions.

(vii) **Applicability of GST prospectively (w.e.f. May 2022):** Notwithstanding to above requests and taking into account the ambiguous nature of the taxability position of the instant matter, we hereby request your goodself that in case and on account of any reason if the tax liability is determined to be discharged by the authorities, the same should be applicable prospectively i.e., post May 2022. The said request is being placed before your goodself to preclude the taxpayers from any additional tax burden arising pursuant to the pronouncement of conflicting decisions by the courts and creation of a disputable position on this issue.

(viii) **Investigations should be kept in abeyance pending the outcome of the proceedings initiated in the case of Komatsu India Pvt. Ltd.:** We wish to highlight that the Supreme Court in the case Commissioner of GST and Central Excise Chennai vs Komatsu India Pvt. Ltd has issued notice in a plea to consider the limited issue that whether salary paid on secondment of employees is a taxable service under Section 65(105) (k) of the Finance Act, 1994.

The Hon'ble Supreme Court has directed the Registry to list and tag the plea with another petition titled Commissioner of Service Tax, Delhi-IV vs Nortel Networks India Pvt. Ltd., which raises the same issue and the adjudication is pending.

In view of the above, we request your goodself to issue a clarification to keep the investigations in abeyance till the judgment in the case of Komatsu India Pvt. Ltd. is pronounced.

Our Prayer

a. Issuance of notification waiving off the tax liability both under the service tax regime as well as the GST regime.

b. Allowing input tax credit / refund of the service tax deposited.

c. Issuance of notification waiving off the interest liability for the period up to April 2022.

d. Issuance of a clarification for not applying the NOSPL decision pronounced under erstwhile regime directly in GST regime and also considering the facts and agreements differentiating the actual transaction from the same as covered in the judgment.

e. Issuance of notification for applicability of GST prospectively (w.e.f. May 2022) to preclude the taxpayers from any additional tax burden arising pursuant to the pronouncement of conflicting decisions by courts and creation of a disputable position on this issue.

f. Putting the investigations on hold pending the outcome of the Supreme Court decision in the case of Komatsu India Pvt. Ltd.

We wish to meet you and explain the difficulties faced by our members. Please give us some of your valuable time.

Warm regards,

Col. Ali Akhtar Jafri, Retd.
Director General

CC: Ms. V. Rama Mathew, Member-GST Legal, CX & ST, CBIC
CC: Shri Sanjay Mangal, Principal Commissioner (GST-I)