



\$~40

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

+ W.P.(C) 16611/2024 & CM APPL. 70221/2024 (Stay)

THALES INDIA PRIVATE LIMITED,Petitioner

Through: Mr. Rupesh Kumar, Sr. Adv.
with Mr. Jitin Singhal & Mr.
Aditya Kumar, Advs.

versus

ADDITIONAL COMMISSIONER OF CGST,
AUDIT-II, DELHI & ANR.Respondents

Through: Mr. R. Ramachandran, SSC
with Mr. Prateek Dhir, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

% **07.01.2025**

1. The present petition has been preferred impugning the **Show Cause Notice¹** dated 31 May 2024 and in terms of which the respondents have challenged the liability that would arise upon the petitioner in connection with the supply of seconded employees. For the purposes of disposing of the present writ petition, we propose to take note of the following undisputed facts.

2. The petitioner is an entity registered under the **Central Goods and Services Tax Act, 2017²** and is stated to be engaged in providing diverse services such as administrative support, business auxiliary services, consulting engineering services and management consulting services. The petitioner purportedly engaged in deputing employees from foreign entities for a specified term under an arrangement

¹ SCN

² CGST Act



involving the “*secondment of employees*” by means of which those seconded employees were to be employed in India for the discharge of duties in the capacity of an employee of the petitioner.

3. It is the case of the petitioner that the transactions between the petitioner and the foreign entity with respect to the seconded employees would not be exigible to tax as the expenses incurred for those seconded employees are solely with respect to their employment. This particularly because there was no agreement entered into between the petitioner and the foreign entity but only between the petitioner and the person so employed by it.

4. Notwithstanding the above, the petitioner had reassessed the expenses incurred for seconded employees from foreign entities, calculated tax and paid an amount of INR 8,99,61,147/- on 20 March 2024 under protest, so as to avoid any future liabilities. The factum of this transaction was accordingly communicated to the audit team. The petitioner had also informed the Assistant Commissioner on 01 April 2024 about the payment being made under protest, contending that in the absence of any tax liability there ought not to be any liability for interest and penalties.

5. The respondent had come to issue DRC-01 on 14 May 2024 asking the petitioner to make interest and penalty payments, to which the petitioner had responded on 27 May 2024, stating that the said transaction would not attract any liability to tax.

6. However, the impugned SCN came to be issued on 31 May 2024 under Section 74, requiring the petitioner to show cause as to why the amount of INR 8,99,61,147/- should not be demanded and recovered in terms of Section 74(1) of the CGST Act read alongside



with Section 20 of the **Integrated Goods and Services Tax Act, 2017³**, along with consequential interest and penalty payments. It is the issuance of the said SCN which forms subject matter of challenge before us today.

7. At this juncture and given that the dispute involves determining the tax liability on expenses incurred from seconded employees and the value ascribed to the supply of goods and services between distinct persons, we propose to take note of Rule 28 of the **Central Goods and Services Tax Rules, 2017⁴** and which reads as follows:

“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.”

8. As is manifest from a reading of the second Proviso to Rule 28, it becomes apparent that the value declared in invoices generated by an entity receiving the requisite goods or services, in the present

³ IGST Act

⁴ CGST Rules



context the services from the seconded employees, shall be deemed to be the open market value of the said goods and services.

9. Pertinently, a clarification came to be issued by the **Central Board of Indirect Taxes and Customs**⁵ in terms of paragraph 3.7 of its **Circular No. 210/4/2024-GST**⁶ dated 26 June 2024 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.”

10. As is manifest from a reading of the above, in circumstances where no invoice is raised in respect of services rendered by its foreign affiliate, the value of such services will be “*deemed*” to have been declared as ‘nil’ and it is this ‘nil’ value which shall be treated as the market value of the services in question, in terms of the second Proviso to Rule 28 of the CGST Rules.

11. Undisputedly and as is manifest from a reading of the record, no invoices appear to have been raised by the petitioner in connection with services provided by the foreign entity.

12. However and as was noticed in the decision of **Metal Corporation Pvt. Ltd. v. Union of India**⁷ dealing with an identical

⁵ CBIC

⁶ Circular

⁷ 2024 SCC OnLine Del 7499



controversy and which has been copiously reproduced by us on the previous occasion, while the tenability of the Circular may be disputed on the ground of the same being contrary to the intent of Rule 28 or allowing the value ascribed to goods and services to be determinable based on seemingly random decisions made by parties to either generate or refrain from generating invoices for the said services, the Court is not obliged to question the tenability of the CBIC in issuing the Circular in question. This particularly so because the Circular is binding upon the respondents and is unchallenged by the latter in the present proceedings.

13. The relevant portions of the decision in *Metal One Corporation* and which dealt with an identical controversy is accordingly reproduced hereinbelow:-

“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. 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 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 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 entities. 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’, any further tax implication under the Act would arise.

13. While the correctness of the position as advocated in terms of that Circular and 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.

17. Insofar as W.P.(C) 4834/2024, 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 of the Act, read 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 assessee 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"

14. We had, on the previous occasion, not only restrained the respondents from taking further steps pursuant to the impugned SCN but had also accorded liberty to Mr. Ramachandran to obtain instructions in light of the decision rendered in *Metal One Corporation*, which, we opined, squarely covers the dispute in the present case.

15. However and as conceded before us today, learned counsels for parties are *ad idem* that the present petition is liable to be disposed of



bearing in mind the decision rendered in *Metal One Corporation* and that the petitioner would be entitled to identical reliefs.

16. Accordingly and for all the aforesaid reasons, we allow the instant writ petition and quash the SCN dated 31 May 2024 issued by the respondent.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

JANUARY 07, 2025/kk