

THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/01/2019-20

Date- 19.06.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

Name of the Appellant	Commissioner, CGST, Mumbai East
Details of appeal	Appeal No. MAH/GST-AAAR-01/2019-20 dated 22.03.2019 against Advance Ruling No. GST-ARA-35/2018-19/B-108 dated 05.09.2018
Legal Name of the Respondent	Asahi Kasei India Pvt. Ltd
GSTIN Number/User Id	27AAKCA9444P1ZV
Registered Address/Address provided while obtaining user id	The Capital Office no. 1502-B, 15th floor, Plot No. C-70, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051

PROCEEDINGS

(under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by Commissioner, Central Tax, Mumbai East Commissionerate (herein after referred to as the "Appellant" or "the



Department" interchangeably) against the Advance Ruling No. GST-ARA-35/2018-19/B-108 dated 05.09.2018

BRIEF FACTS OF THE CASE

A. M/s Asahi Kasei India Pvt.Ltd.,The Capital Office No. 1502-B, 15th Floor, Plot No. C-70, G-Block, Bandra Kurla Complex, Bandra(East),Mumbai 400051 (here in after referred to as 'the Respondent') filed detailed application under Section 97 of the Central Goods and Service Tax Act, 2017 read with Rule 104 (1) Of the CGST Rules, 2017 before the Maharashtra Authority on advance ruling seeking advance ruling on:

1) Whether the service supplied by the Respondent under the Service Agreement dated 1 March 2013 constitute a supply of "Support Services" falling under HSN code 9985 or "Intermediary service" classifiable under HSN code 9961/9962?

2) Whether the service supplied by the Respondent under the Marketing Services Agreement dated 1 December 2012 constitute a supply of "Support services" falling under HSN code 9985 or "Intermediary service" classifiable under HSN code 9961/9962?

3) Whether the service provided by the Respondent is an export of services as defined under Section 2(6) of the Integrated Goods and Service Tax Act 2017?

Statement of facts having bearing on the question (1) :

B. Asahi Kasei India pvt. Ltd.(hereinafter referred to as the "**Respondent**") is a company incorporated in India in August 2012. The Respondent is a subsidiary of Asahi Kasei Corporation, Japan ("**Asahi Japan**").

C. The scope of the services provided by the Respondent under Service Agreement with Asahi Japan [dated 01 March 2013] as amended on 05 January 2017 are highlighted at Clauses 4 to 8 of the Agreement. The relevant extract of the agreement is reproduced hereunder:



"4. Party B (i.e. the Respondent) agrees to conduct from time to time, as and when requested by Party A (being Asahi Japan), research on the matters related to the functions of the holding company, such as corporate accounting, corporate finance, corporate personnel and labor relations, corporate research and development, quality assurance and corporate intellectual property, and provide Party A with its report of the research thereon.

5. Party B agrees to provide Party A from time to time, as and when requested by Party A, with economic, industrial and technical information on the products falling under the category of the 'Products' and their markets, trends and outlook together with similar information concerning such other industries in the Territory (i.e. India or any other mutually agreed territory) as Party A may from time to time request. In the event Party A should require more detailed information than that so provided by Party B, Party B shall exert its best efforts to obtain such further or more detailed information.

6. At such time and from time to time, as and when representatives of Party A, or its related business circles or customers visit the Territory and Party A so requests, Party B shall provide necessary assistance in business activities (including interpreting) to such representatives.

7. From time to time, as and when requested by Party A, Party B shall make market surveys of the Products in the Territory and report the results thereof to Party A.

8. Party B shall perform services, as directed by Party A, resulting from the assignments pursuant to paragraph 4 through 7 of this Agreement, including, but not limited to, those services with regard to finance, accounting, and patent and legal matters."



- D. As per Clause 9 of the Agreement, Service consideration received by the Respondent is the direct cost+prorated overhead expenses+10% mark-up+applicable taxes.
- E. It was seen that the Respondent is engaged in the activities for the party A, such as corporate accounting, corporate finance, corporate personnel and labour relations, corporate research and development, quality assurance and corporate intellectual property, provide with economic, industrial and technical information on the products falling under the category of the Products and their markets, trends and outlook together with similar information concerning such other industries in the Territory and shall make market surveys of the Products in the Territory and report the results thereof etc to Party A.
- F. In view of the above, it was submitted that the marketing services, advertisement and promotion services, customer relationship management, evaluation of prospective customers etc would qualify to be in the nature of **business support services**.
- G. Therefore, since the services provided by the Respondent to Asahi Group were similar, the supply of services provided by the Respondent to the Asahi Group appear to be covered under **"Business Support Service" classifiable under HSN CODE 9985.**

Statement of facts having bearing on the question (2):

H. Marketing Services Agreement:

- a. Agreement with Bioprocess Division of Asahi Kasei Medical Co. Ltd. ("AM")
[dated 01 December 2012];

"a) Conducting market surveys and providing the service recipient with the information on Indian market trends and features so as to assist in determining the nature and scope of the Indian market potential;



b) Assisting the service recipient in the adaptation and implementation of its advertising policy,

c) Assisting the service recipient in conducting sales prospection through participation in industry events such as scientific gatherings, exhibitions, trade shows and the like;

d) Liaising with Customers and potential Customers and to collect their product development plans and strategy and "road-maps", as well as their product specifications, and reporting the same to the service recipient the information obtained through such interactions;

e) Providing any feedback to the service recipient that would help improve the service recipient's marketing; Facilitating the service recipient in arrangement of discussions and provision of interpretation services and cross culture advice; for the sake of clarity, neither AKI (i.e. the Respondent) nor any of its representatives shall have any authority to conduct negotiations on behalf of the service recipient;

f) Connecting Customers with representatives of the service recipient for the purpose of obtaining orders and establishing and maintaining close commercial relationships between service recipient and customers;

g) Providing staff of the service recipient or its customers visiting the territory with such assistance as may be reasonably requested by them, including but not limited to providing information, guide, escort and interpreting services during Customers visits; for the sake of clarity, the premises of AKI will not be the premises of the service recipient and the same shall not be made available to employees or other personnel of service recipient who may visit India;



- h) Providing information on products and its functioning or similar such services to service recipient's customers and notifying service recipient of any consumer complaints;
- i) Monitoring regulatory developments (including, where possible, establishing and maintaining contact with regulatory agencies) and reporting the same to the service recipient; and
- j) Any other assistance in the context of the above, regarding service recipient's marketing activities that may be reasonably requested by service recipient after the effective date in writing to AKI."
- I. In view of the above, it could be said that the marketing services, advertisement and promotion services, customer relationship management, evaluation of prospective customers etc would qualify to be in the nature of business support services.
- J. Therefore, since the services provided by the Respondent to Asahi Group are similar, the supply of services provided by the Respondent to the Asahi Group appear to be covered under **"Business Support Service" classifiable under HSN CODE 9985.**

Statements of facts having bearing on the question (3) :

- K. The Term "export of services" as defined under Section 2(6) of the IGST Act. The relevant extract is set out hereunder:

"(6) "export of services" means the supply of any service when-

- (i) The supplier of service is located in India;
- (ii) The recipient of service is located outside India;
- (iii) The place of supply of service is outside India;
- (iv) The payment for such service has been received by the supplier of service in convertible foreign exchange; and



- (v) The supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation in Section 8;"

L. The Respondent, M/s Asahi Kasei India Pvt. Ltd. has submitted that they are fulfilling all the above conditions discussed in detail hereunder:

a. Condition I – Supplier of service is located in India.

The Respondent is registered under GST and providing the service from Maharashtra, India. Hence fulfilling the first condition with reference to term "location of the supplier of service" as defined under Section 2(15) of the IGST Act.

b. Condition-II- Recipient of service is located outside India.

In the instant case the service recipient M/s Asahi Kasei group is not registered in India and therefore their registered place of business will be their registered address(i.e. outside India). Hence fulfilling the first condition with reference to term "The recipient of service is located outside India" as defined under Section 2(14) of the IGST Act.

c. Condition-III place of supply of Service is outside India.

From (a) and(b) above it appears that service provider is located in India and service receiver is located outside India.

The services provided by the Respondent is in nature of "Support Services" classifiable under HSN code 9985. The place of supply in the instant case is determined as per general rule i.e Section 13(2) of IGST Act. The said sub section provides that the location of the recipient of services shall be the place of supply of services. In the present case the place of supply of Service is outside India i.e Asahi Kasei group (Japan).

d. Condition IV Payment is received in convertible foreign exchange.

The Respondent receives payment in freely convertible foreign exchange i.e. Japanese Yen / United States Dollar.



- e. Condition V – Supplier of service and recipient of service are not merely establishment of distinct person.

Explanation 1 to Section 8 of IGST Act provides that

.—For the purposes of this Act, where a person has,—

- (i) an establishment in India and any other establishment outside India;*
- (ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or*
- (iii) an establishment in a State or Union territory and any other establishment being a business vertical registered within that State or Union territory, then such establishments shall be treated as establishments of distinct persons.*

In the instant case, the service recipient i.e. Asahi group is not an establishment formed by the Respondent and consequently, it cannot be treated as an establishment of distinct person.

In view of the above, it could be construed that the Respondent fulfils all the conditions for treating the supply of services as an export of services in terms of Section (6) of IGST Act except for the fact that in order for a service to qualify as export of service one condition amongst the others is that 'the place of supply of service is outside India'. In the case of the Respondent it was seen that the Service is provided in India and therefore the service provided by the Respondent cannot be said to be export of service.

- M. The Advance Ruling Authority vide Order No.GST-ARA-35/2018-19/B-108 dated 05.09.2018 received by this office on 23.01.2019 held as under:

Question-1

- A. The services provided by the respondent in the nature of Research on the matter related to functioning of the holding of company such as – corporate accounting, corporate finance, corporate personnel and labour relations, corporate research and development, quality assurance and corporate intellectual property, and provide Party A with its report of the research thereon would fall under service code tariff 99859 as other support services nowhere else classified.



- B. The services provided by the respondent in the nature of information or Market in the territory which included – Economic, industrial and technical information on the products falling under the category of the Products and their markets, trends and outlook together with similar information concerning such other industries in the Territory, To provide necessary assistance in business activities (including interpreting) to such representatives, To undertake market surveys of the Products in the Territory and report the results thereof to Party and Ancillary services to all above services, including, but not limited to, those services with regard to finance, accounting and patent and legal matters would fall under service code tariff 99837 with service description market research services.

Question-2:

- A. The services supplied by the respondent under the Marketing Services Agreement would fall under Group 99837 as Market Research Services.

Question-3:

Answered in the affirmative in view of the facts of the present case as per discussion held.

Now, aggrieved by the above Advance Ruling Order, the Appellant, in this case, the Department has filed an appeal before us on the basis of grounds, detailed herein under:

Grounds of Appeal

1. With regard to Question No.1, there are two possible classifications for the services supplied by the Applicant. The relevant HSN code along with its description is tabulated hereunder:

SR.NO.	HSN CODE	TARIFF ENTRY
i	9961 / 9962	Intermediary service – Services in Wholesale trade and Services in retail trade
ii	9985	Support service



2.1 Para 8 of subject Marketing Service Agreement dtd. 01.12.2012 reads as follows

:-

*"Assisting AM in the adaptation and implementation of AM's advertising policy appears to fall under **"Advertising services under heading no. 998361 and will be covered under section 13(2) of the IGST Act, 2017 and place of supply of service or shall be the location of the recipient of services;"***

However, in the comments dtd. 17.07.2018 it was submitted by the department with regard to said para 8 that Advance Ruling cannot be given without proper and full facts. In this Para, conditions like 'but not limited to' is mentioned, which does not give a clear picture of what services it pertains to.

2.2 In view of above, it may be seen that advance ruling requires complete and total information. However, the same were not provided and the advance ruling has been given on the basis of incomplete information.

3. With regard to Question No. 2 the provisions of section 182 of the Indian Contract Act, 1872 are relevant. As per Section 182 of the Indian Contract Act, 1872 'an agent is a person employed to do any act for another, or to represent another in dealing with the 3rd person, the person for whom such act is done, or who is to be represented is called a principal'.

3.1. In view of the above, agent wears two hats. On close examination of the act of an agent, it will transpire that it is not the contract between the agent and principal which decides the question as to whether the person is an agent or not. Actually, it is the involvement of 3rd person which decides the question if a person is an agent or not. The Advance Ruling authority decided the question of status of the applicant as being non intermediary inter alia on the basis of :

1. *Marketing Services Agreement:*

a. *Agreement with Bioprocess Division of Asahi Kasei Medical Co. Ltd. ("AM") [dated 01 December 2012];*



"a) Conducting market surveys and providing the service recipient with the information on Indian market trends and features so as to assist in determining the nature and scope of the Indian market potential;

b) Assisting the service recipient in the adaptation and implementation of its advertising policy;

c) Assisting the service recipient in conducting sales prospection through participation in industry events such as scientific gatherings, exhibitions, trade shows and the like;

d) Liaising with Customers and potential Customers and to collect their product development plans and strategy and "road-maps", as well as their product specifications, and reporting the same to the service recipient the information obtained through such interactions;

e) Providing any feedback to the service recipient that would help improve the service recipient's marketing; Facilitating the service recipient in arrangement of discussions and provision of interpretation services and cross culture advice; for the sake of clarity, neither AKI (i.e. the Applicant) nor any of its representatives shall have any authority to conduct negotiations on behalf of the service recipient;

f) Connecting customers with representatives of the service recipient for the purpose of obtaining orders and establishing and maintaining close commercial relationships between service recipient and customers;

g) Providing staff of the service recipient or its customers visiting the territory with such assistance as may be reasonably requested by them, including but not limited to, providing information, guide, escort and interpreting services during Customers visits; for the sake of clarity, the premises of AKI will not be the premises of the service recipient and the same shall not be made available to employees or other personnel of service recipient who may visit India;

h) Providing information on products and its functioning or similar such services to service recipient's customers and notifying service recipient of any consumer complaints;

i) Monitoring regulatory developments (including, where possible, establishing and maintaining contact with regulatory agencies) and reporting the same to the service recipient; and



j) Any other assistance in the context of the above, regarding service recipient's marketing activities that may be reasonably requested by service recipient after the effective date in writing to AKI."

It may however be noted that the scope of service for the marketing services agreement with APNA do not include the points (c), (g) and (i) as mentioned above.

- 3.2. Out of above list of services, it may be seen for instance that services of 'Connecting customers with representatives of the service recipient' may be provided both with and without involvement of a 3rd person. The applicant's activities related to said services indicate the applicant may be performing the said activity for M/s. Asahi Kasei. If that is the case, the applicant can be held to be a principal only if they first purchase the subject goods on their own account and then supply it to various clients. However, if the applicant sells the goods relating to M/s. Asahi Kasei, they cannot be held to be a principal due to presence of 3rd person. In that case, the applicant would be acting as an intermediary / agent who bring M/s. Asahi Kasei and prospective customers together.
- 3.3 Clause (f) of the Marketing Services Agreement clearly shows that applicant is bringing M/s. Asahi Kasei and the customers together and connecting them for the purpose of obtaining orders. This activity clearly falls under the scope of the definition of agent under section 182 of the Indian Contract Act, 1872 and section 2(13) of the IGST Act, 2017.
- 3.4 The complete end to end disclosure of information about the process and the payments on account of various activities mentioned in the Marketing Services Agreement may reveal that the intermediary activity at Clause (f) is actually the principal supply among all the different supplies incorporated in the Marketing Services Agreement. In that situation, the entire set of activities of the applicant will qualify as intermediary services under HSN Code 9961/9962.



- 3.5 In any case, it may be seen that M/s. Asahi Kasei are procuring different supplies from applicant only for the sole purpose of sale of their goods. Therefore, the supply at clause (f) of the MSA constitutes the principal supply. If the element of sale goods is removed or taken away the entire edifice of supplies by applicant will crumble down. Therefore, the entire composite supply appears to be in nature of intermediary services.
4. It is submitted that the answers to question no. 3 is entirely dependent on the answer to Q. No. 2. If the applicant is an intermediary in terms of Section 13(8)B of the IGST Act, 2017, the supply of applicant cannot qualify as exports because in that case place of supply of services will be India. Therefore, the services of the applicant would not merit as exports in terms of section 2(6) of IGST Act, 2017.
5. Due to the above said diverged possibilities, this office prayed the Original Advance Ruling Authority to enable this office to examine the end to end transactions of the list of services provided in order to ascertain the true nature of the activities of the applicant.
6. However, the Advance Ruling Authority failed to appreciate the vital importance of the said key information about the end to end transactions of the applicant.
7. The Appellant, inter-alia, have also prayed, vide the Misc. Application filed for the condonation of the delay in filing the appeal, that the delay in the filing of the appeal may be condoned, which they have attributed to the initial teething problem being faced by them after the introduction of the GST regime.

Respondent's Submissions:

8. The respondents have submitted that prior to GST, they used to claim a refund of service tax vide Rule 5 of the CENVAT Credit Rules, 2004 and such claims were sanctioned from time to time after due examination by the jurisdictional service tax authorities after due scrutiny of the facts.
9. Independent of the above, it is also submitted that in the appeal memorandum to the effect that usage of the phrase "but not limited to" does not



give a clear picture of what it pertains to is ex-facie incorrect on facts. Clause 8 of the Services Agreement entered into by the Respondent actually contains the phrase "Party B shall perform services, as directed by Party A, resulting from the assignments pursuant to Paragraph 4 through 7 of this Agreement, including, but not limited to, those services with regard to finance, accounting, and patent and legal matters. " Hence, the scope of services is specified, clear, distinct and not vague as claimed by the Appellant.

10. It is submitted that the definition of 'intermediary' under the erstwhile Finance Act, 1994 as also under the IGST Act has remained identical. In view of this fact that the Respondent was regularly sanctioned refunds for this very services as are questioned in the present facts, and the fact that the definition remained the same, it is submitted that no cause arises to assail the validity of the Order under challenge. On this ground itself, the appeal should be dismissed forthwith.
11. Without prejudice to the above, it is submitted that even on merits, the Respondent does not qualify to be an intermediary. This is for the following two reasons:
12. The Respondent is not an agent/ broker or akin to the same. In this regard, it is submitted that the phrase "any other person, by whatever name called" should have the characteristics similar to that of an agent/ broker. It is submitted that if the intention of the legislature was to cover persons of all hue and cry under the phrase 'any other person' then words preceding thereto namely "broker, an agent" becomes redundant as also the words succeeding thereto namely "by whatever name called". In such case, "intermediary" ought to have been simply defined to mean any person who arranges or facilitates the supply of goods or services or both.... but that is not the case in the present,
13. It is submitted that the subsequent words take colour from the preceding terms, i.e., the legal doctrine of ejusdem generis. Hence, for a supplier of services to be treated as an intermediary basis "any other person, by whatever name called" should be in a similar status as that of an agent or broker. Same understanding was displayed by the Central Board of Indirect Taxes and Customs in Circular No. 83/1/2006-ST dated 04 July 2006 while interpreting any other person in the



context of banking or other financial services. The relevant extract is reproduced below for ready reference:

14. *"3. Banking and other financial services are defined under section 65(12). Such services provided to a customer by a banking company or a financial institution including a non-banking financial company or any oilier body corporate or any other person to a customer are liable to service tax under section 65 (105) (zm).The expression 'any other person ' appearing in section 65(105)(zm) is to be read ejusdem generis with the preceding words. The expression 'other financial services' appearing under section 65(12)(a)(ix) is a residuary entry and includes; those services which are normally rendered by banks or financial institutions.*
15. *"4. Hence, banking and other financial services provided by a banking company or a financial institution or a non-banking financial company or any other service provider similar to a bank or a financial institution are liable to service tax under section 65(105)(zm) of the Finance Act, 1994. Department of Posts is not similar to a bank or a financial institution and hence does not fall within the category of any other similar service provider.*
16. As explained supra, the Respondent does not in any manner arrange or facilitate the supply of goods. The very consideration payable by the Respondent itself shows that there is no intrinsic interest in consummating a transaction. On the contrary, the Respondent merely provides services as and when requested by the associate entity without there actually being an underlying sale/ supply or the like. Hence, in these terms, it is submitted that the Respondent cannot be termed as an intermediary. Reliance is placed on the following judgments/rulings:
 - Commissioner of Central Excise and Service Tax, Bangalore — V vs Analog Devices India Pvt. Ltd.
 - Order dated 16 March 2018 passed by the CESTAT in M/S. Sunrise Immigration Consultants Private Limited and Appeal No. ST/52205/2015
 - Lubrizol Advanced Materials India Pvt. Ltd. vs CCE, Belapur [2019 (22) GSTL 355 (Tri. - Mumbai)]
 - Commissioner of Goods & Service Tax, Gurgaon — II vs Orange Business Solutions Pvt. Ltd. [2019-VIL-332-CESTAT-CHD-ST]



- G.E. Power India Limited vs Commissioner of Service Tax [2019-VIL-232CESTAT-DEL-ST]
- Godaddy India web Services PM. Ltd. [2016(46) STR 806 (AAR)]

Additional Submissions filed by the Appellant

17. One round of personal hearing for condonation of delay was held on 14.06.2019, and two hearings on merits of the case were held on 17.06.2019 and 19.06.2019. Pursuant to the personal hearing conducted on 14.06.2019, the Appellant filed an additional submissions dated 17.06.2019, which are detailed hereinunder:

17.1 The Appellant has quoted the provision of Section 98(2) of the CGST Act 2017, which is reproduced herein under:

“(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorized representative and the concerned officer or his authorized representative, by order, either admit or reject the application:

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act:

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant:

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.”

Thus, Section 98(2) of the CGST Act, 2017 talks about admission or rejection of the applications received for advance ruling provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in case of an applicant under any of the provisions of CGST Act. On scrutiny of the subject Advance ruling application dated 30.05.2018 in form CGST ARA-01, it is found against Sr. No. 17 that the party has declared that NO proceeding is pending in any case under any provision of the Act against the applicant whereas applicant himself attached the letter issued from DGGI, MZU, Mumbai dated 23.01.2018 as Annexure-K to the said application. It is clear from above letter that there is a pending proceeding against the applicant in



DGGI, Mumbai Zonal Unit under the provisions of the subject CGST Act and hence the above said application is contrary to the provisions of the CGST Act, 2017 and does not hold good.

17.2 Further, the Appellant has quoted the text of section 97(2) of CGST Act is reproduced below:

“(2) The question on which the advance ruling is sought under this Act, shall be in respect of,—

- (a) classification of any goods or services or both;*
- (b) applicability of a notification issued under the provisions of this Act;*
- (c) determination of time and value of supply of goods or services or both;*
- (d) admissibility of input tax credit of tax paid or deemed to have been paid;*
- (e) determination of the liability to pay tax on any goods or services or both;*
- (f) whether applicant is required to be registered;*
- (g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term.*

On scrutiny of the Advance Ruling application dated 30.05.2018 in form CGST ARA-01, it is found against Sr. No. 13 that the applicant has preferred this application in sub-headings of (i) Classification of any goods or services or both and (ii) determination of the liability to pay tax on any goods or services or both. However, the question No. 3 of the said application is as " Whether the services provided by the applicant is an export of service as defined under section 2(6) of the IGST Act 2017?" which is not in sync with the provisions and scope of the advance ruling authority as mentioned above (Section 97 of CGST Act). Advance ruling authority does not have jurisdiction to decide the place of supply of service, which is one of the pre-requisites to determine the export of services in terms of section 2(6) of the IGST Act 2017. It is further reiterated that the giving ruling on subject question is out of the purview of the advance ruling authority and hence the ruling given vide subject order has no merits and is contrary to the Act.

18. Thus, the Appellant, on the basis of the above additional submissions, has prayed to set aside the ruling, pronounced by the Advance Ruling Authority in respect of the application filed by M/s. Asahi Kasei India Pvt. Ltd.



Personal Hearing

19. Pursuant to the additional submissions filed by the Appellant, the personal hearing in the matter was scheduled on 19.06.2019, which was attended by Shri Shreyansh Mohan, Asstt. Commissioner, CGST as representative of the Appellant, and by Shri Dinesh Kumar Aggarwal as representative of the Respondent. During the course of the personal hearing, the representatives of both the sides reiterated their written submissions and made averments in their defense.

Discussions and findings

20. At the outset of proceedings, we observe that there is a delay of 28 days in filing the said appeal by the appellant and the appellant has, accordingly, filed an application for condonation of the delay which they have attributed to the initial teething problem after the introduction of the GST regime. The above ground for delay in filing the appeal, put forth by the Appellant, was not opposed by the respondent. We also find merit in the argument put forth by the jurisdictional officer and are satisfied to the extent that the appellant was prevented by sufficient cause from presenting the appeal within period of thirty days from the receipt of the said ruling of AAR, and accordingly allow the appellant to present the appeal within a further period of 30 days in terms of proviso to sub section 2 of section 100 of the CGST Act 2017.
21. We have gone through the entire records, facts of the case, and have also considered the written as well as oral submissions made by the appellant as well as by the respondent. We have also gone through the impugned order, issued by the Advance Ruling Authority, which rules that the activities performed by the Respondent i.e. Asahi Kasei India Pvt. Ltd. as detailed in the Service Agreement entered with Asahi Japan [dated 01 March 2013] as amended on 05 January 2017 and another Marketing Service Agreement entered with Bioprocess Division of Asahi Kasei Medical Co. Ltd. ("AM") [dated 01 December 2012] will be covered under the Business Support Services having SAC 9985 and Marketing Services having SAC 9983 respectively, and accordingly has held that the service provided



by the Respondent is an export of services as defined under Section 2(6) of the Integrated Goods and Service Tax Act 2017.

22. On the perusal of the facts of the case, the records placed before us and various submissions including the additional submissions made by the Appellant on 17.06.2019, we are of the opinion that before going into the merits of the case, we need to examine the maintainability of the Application dated 08.06.2018 filed by the Respondent before the Advance Ruling Authority, in light of the additional submissions filed by the Appellant, wherein they have pointed out that the Respondent itself has attached the letter issued from DGGI, MZU, Mumbai dated 23.01.2018 as Annexure-K to the said application, thereby alleging that there is a pending proceeding against the applicant in DGGI, Mumbai Zonal Unit and hence the above said application filed by the Respondent before the Advance Ruling Authority is not maintainable, as the filing the Advance Ruling Application before the Advance Ruling Authority is contrary to the provisions of the Section 98(2) of the CGST Act, 2017, which states that :

“(2)The Authority may, after examining the application and the records called for and after hearing the applicant or his authorized representative and the concerned officer or his authorized representative, by order, either admit or reject the application:

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act:

.....”

23. In order to examine the maintainability of the Advance Ruling application filed by the Respondent before the Advance Ruling Authority in light of the Annexure K to the Advance Ruling application, the said Annexure K, which is a letter issued by DGGI, MZU, pertaining to the Service Tax enquiry against the Respondent for the period ranging from 01.04.2013 to 30.06.2017, is perused. On perusal of the said enquiry letter dated 23.01.2018, it is observed that the said Service Tax enquiry was initiated to ascertain the facts relating to the payment of service tax, wherein various financial documents and statements including the Income/expenditure ledger, Cenvat Credit ledger, Audited Annual Financial Reports for the period from



01.04.2013 to 30.06.2017 were called for from the Respondent. Thus, from the said Annexure K, it is revealed that the enquiry was restricted to the service tax matter only as the period of the enquiry was before the introduction of the GST regime, and hence does not include any issue pertaining to the GST, whatsoever.

24. Now, coming to the legal provisions relating to the maintainability of the Advance Ruling application, which have been laid out in Section 98(2) of the CGST Act, 2017 reproduced herein above in para 22, it is expressly clear that only those application will not be admitted before the Advance Ruling Authority, wherein the questions raised in the application are already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act. Since there is no issue pertaining to the GST Act which is pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act, the Advance Ruling application filed by the Respondent before the Advance Ruling Authority is clearly maintainable.
25. Thus, we conclude that the additional submissions filed by the Appellant i.e. the Jurisdictional Officer is not sustainable and therefore we do not find any reason to disagree with the Advance Ruling Authority, which has admitted the application filed by the Respondent on 08.06.2018.
26. Having decided upon the maintainability of the Advance Ruling application, we move on to the merits of the case, wherein the core issue before us is to decide the classification of the supply of services by the Respondent to its parent company i.e. Asahi Kasei Japan in the context of the two Agreements i.e. one Service Agreement dated 01.03.2013 as amended on 05.01.2017, and another Marketing Services Agreement dated 01.12.2012 .
27. After going through the facts of the case and the submissions made in respect thereto, it is observed that the Respondent have been supplying a gamut of services in integrated manner to its parent company under each of the above said two agreements i.e. (i) Service Agreement with Asahi Japan [dated 01 March 2013] as amended on 05 January 2017 and (ii) Marketing Services Agreement with Bioprocess Division of Asahi Kasei Medical Co. Ltd. ("AM") [dated 01 December 2012], the extract of which are detailed above in para C and H.



28. The activities to be performed by the Respondent in terms of the Service Agreement entered with its Parent company i.e. Asahi Japan, [dated 01 March 2013] as amended on 05 January 2017 include corporate accounting, corporate finance, corporate personnel and labour relations, corporate research and development, quality assurance and corporate intellectual property, provide with economic, industrial and technical information on the products falling under the category of the Products and their market trends and outlook together with similar information concerning such other industries in the Territory, and making market surveys of the Products in the Territory and reporting the results thereof etc to its parent company. Looking into the above activities performed by the Respondent, it is observed that the Respondent is undertaking a gamut of activities which are in the nature of accounting services having SAC 9982 and other professional, technical and business services having the SAC 9983, which are specified under Section 8 of the Chapter 99 having description Business and Production services in the scheme of the classification of the services given in Annexure to the Notification No. 11/2017 -C.T. (Rate), dated 28.06.2017. Since all these activities undertaken by the Respondent could have been performed separately and independently with each other, the fact that the Respondent is raising a singly consolidated invoice in accordance with Clause 9 of the Service Agreement dated 01.03.2013 as amended on 05 January 2017 makes these supplies stipulated under this Agreement as mixed supply in terms of the provision of Section 2(74) of the CGST Act, 2017, which is reproduced herein under:

(74) "mixed supply" means two or more individual supplies or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute composite supply."

Thus, from the above discussion, it may verily be inferred that the services performed by the Respondent in terms of the above Service Agreement dated 01.03.2013 as amended on 05.01.2017 is the mixed supply.

29. Now, coming to the supply elements ingrained in the Agreement dated 01.03.2013 entered between the Respondent and its parent company, it is observed that the Respondent is obliged to perform services which are enumerated herein under:



- a) Conducting market surveys and providing the service recipient with the information on Indian market trends and features so as to assist in determining the nature and scope of the Indian market potential;
- b) Assisting the service recipient in the adaptation and implementation of its advertising policy,
- c) Assisting the service recipient in conducting sales prospection through participation in industry events such as scientific gatherings, exhibitions, trade shows and the like;
- d) Liaising with Customers and potential Customers and to collect their product development plans and strategy and "road-maps", as well as their product specifications, and reporting the same to the service recipient the information obtained through such interactions;
- e) Providing any feedback to the service recipient that would help improve the service recipient's marketing; Facilitating the service recipient in arrangement of discussions and provision of interpretation services and cross culture advice; for the sake of clarity, neither AKI (i.e. the Respondent) nor any of its representatives shall have any authority to conduct negotiations on behalf of the service recipient;
- f) Connecting Customers with representatives of the service recipient for the purpose of obtaining orders and establishing and maintaining close commercial relationships between service recipient and customers;
- g) Providing staff of the service recipient or its customers visiting the territory with such assistance as may be reasonably requested by them, including but not limited to providing information, guide, escort and interpreting services during Customers visits; for the sake of clarity, the premises of AKI will not be the premises of the service recipient and the same shall not be made available to employees or other personnel of service recipient who may visit India;
- h) Providing information on products and its functioning or similar such services to service recipient's customers and notifying service recipient of any consumer complaints;



- i) Monitoring regulatory developments (including, where possible, establishing and maintaining contact with regulatory agencies) and reporting the same to the service recipient; and
 - j) Any other assistance in the context of the above, regarding service recipient's marketing activities that may be reasonably requested by service recipient after the effective date in writing to AKI."
30. Thus, from the above list of services, performed by the Respondent for its parent company, it is revealed that the Respondent is performing a spectrum of services, of which the following services can be classified under the service Heading "Research and Development services" having SAC 9981 :
- i) Conducting market surveys and providing the service recipient with the information on Indian market trends and features so as to assist in determining the nature and scope of the Indian market potential;
31. The following services, performed by the Respondent, will be covered under the Heading " Other professional, technical and business services" bearing SAC 9983:
- i) Assisting the service recipient in the adaptation and implementation of its advertising policy,
 - ii) Assisting the service recipient in conducting sales prospection through participation in industry events such as scientific gatherings, exhibitions, trade shows and the like;
 - iii) Providing any feedback to the service recipient that would help improve the service recipient's marketing; Facilitating the service recipient in arrangement of discussions and provision of interpretation services and cross culture advice; for the sake of clarity, neither AKI (i.e. the Respondent) nor any of its representatives shall have any authority to conduct negotiations on behalf of the service recipient;
 - iv) Providing staff of the service recipient or its customers visiting the territory with such assistance as may be reasonably requested by them, including but not limited to providing information, guide, escort and interpreting services during Customers visits; for the sake of clarity, the premises of AKI will not be the premises of the service recipient and the same shall not be made available to employees or other personnel of service recipient who may visit India;



- ii. The supply arranged or facilitated must be between two or more persons.
- iii. He should not be the person who supplies the goods or services or securities on his own account.

35. Now, from the services specified above, it is expressly evident that the Respondent is arranging or facilitating the business of its parent company i.e. Asahi Kasei Japan by liaising with the customers, prospective customers of its parent company i.e. Asahi Kasei Japan by way of collecting their product development plans and strategy and "road-maps", as well as their product specifications, and reporting these information to its parent company, by connecting Customers with representatives of the service recipient for the purpose of obtaining orders and establishing and maintaining close commercial relationships between service recipient and customers, and by providing information on products and its functioning or similar such services to service recipient's customers and notifying service recipient of any consumer complaints. Thus, it can conclusively be deduced that the Respondent is playing a very significant role in this supply chain of the Products manufactured and distributed by its parent company to its distributors located in India. Some of the activities e.g. collecting the product development plans and strategy and "road-maps", as well as the product specifications from the customer of its parent company, providing information on products and its functioning or similar such services to service recipient's customers, are undertaken by the Respondent on behalf of its parent company, thereby, fulfilling the criteria of the Agent as defined under Section 2(5) of the CGST Act, 2017, which is being reproduced herewith for ease of reference:

(5) "agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

Thus, a person will be considered as an agent if he carries on the business of supply or receipt of goods or services or both on behalf of another. Now, by applying this proposition in the instant case, it is revealed that the Respondent is carrying on the business of supply of services as detailed and discussed above on behalf of its



parent company. Further, the Respondent is also facilitating the supply of goods between its parent company and its customers in India by connecting Customers with representatives of the service recipient for the purpose of obtaining orders, and establishing and maintaining close commercial relationships between service recipient i.e. its parent company and its customers.

36. Thus, we hold that the first criterion of the intermediary i.e. He must be a '**broker**' or an '**agent**' or '**any other person by whatever name called, who arranges or facilitates the supply of goods or services or both or securities**', as specified under para 30 has been aptly fulfilled.
37. Now coming to the second criterion i.e., The supply arranged or facilitated must be between two or more persons, is also fulfilled as this facilitation services performed by the Respondent is between the two persons i.e. its parent company and its customer.
38. Now coming to the third criterion i.e., He should not be the person who supplies the goods or services or securities on his own account, is also fulfilled as the goods which are supplied to the customer of its parent company belong to its parent company, and not to the Respondent.
39. Thus, all the essential ingredients of the intermediary have been fulfilled by the Respondent.
40. Now, as regards the issue as to whether the entire gamut of services provided by the Respondent as a package comprising the services envisaged under the Marketing Services Agreement dated 01.12.2012, against a lump sum amount can be considered as composite supply, or mixed supply, it is seen that the Services, which have been sub-categorised under the Heading "Research and Development services" having SAC 9981, under the Heading "Other professional, technical and business services" bearing SAC 9983, and under the Heading "other miscellaneous services" bearing SAC 9997, can be supplied separately and independently, as there is no intrinsic relationship between these services, thus rendering the entire gamut of supply as mixed supply and not the composite supply as these services are not naturally bundled.

41. As regards the question (3) of the application filed before the Advance Ruling Authority, wherein it was asked from the Advance Ruling Authority as to whether



the service provided by the Respondent is an export of services as defined under Section 2(6) of the Integrated Goods and Service Tax Act 2017, it is observed that whereas the determination of the place of supply of services is one of the pre-requisites for determining any supply of services to be export of services, determining the place of supply of services or goods is not in the jurisdiction of the Advance Ruling Authority as is clearly evident from Section 97(2) of the CGST Act, 2017, which prescribes the set of 7 questions in respect of which Advance Ruling can be sought under the provision of the CGST Act, 2017 and the said 7 questions excludes the question related to the determination of the place of supply.

42. Thus, the Advance Ruling Authority has clearly transcended its scope and jurisdiction by deciding upon the question related to the export of services.

In view of the above discussions and findings, the order of the AAAR is being modified under the provision of Section 101(1) of the CGST Act, 2017 to the extent of the above discussions and findings made herein above, and accordingly the following order is being passed.

ORDER

We, hereby, modify the ruling made by AAR by pronouncing the following rulings in respect of the questions raised by the Respondent in the Advance Ruling application filed the Advance Ruling Authority:

- 1) Whether the service supplied by the Respondent under the Service Agreement dated 1 March 2013 constitute a supply of "Support Services" falling under HSN code 9985 or "Intermediary service" classifiable under HSN code 9961/9962?

The service supplied by the Respondent under the Service Agreement dated 1 March 2013 constitutes a mixed supply of services falling under the Heading "accounting services" having SAC 9982, and under the Heading "other professional, technical and business services" having the SAC 9983.

- 2) Whether the service supplied by the Respondent under the Marketing Services Agreement dated 1 December 2012 constitute a supply of "Support



services" falling under HSN code 9985 or "Intermediary service" classifiable under HSN code 9961/9962?


The service supplied by the Respondent under the Marketing Services Agreement dated 1 December 2012 constitutes a mixed supply of Services falling under the Heading "Research and Development services" having SAC 9981, under the Heading "Other professional, technical and business services" bearing SAC 9983, and under the Heading "other miscellaneous services" bearing SAC 9997.

- 3) Whether the service provided by the Respondent is an export of services as defined under Section 2(6) of the Integrated Goods and Service Tax Act 2017?

We cannot pass any ruling in relation to the export of services, as the same would require the determination of the place of supply of services, which is not under the jurisdiction and scope of the Advance Ruling Authority.


(RAJIV JALOTA)
MEMBER




(SUNGITA SHARMA)
MEMBER

- Copy to- 1. The Appellant
2. The AAR, Maharashtra
3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai
4. The Commissioner of State Tax, Maharashtra
5. The Respondent.
6. The Web Manager, WWW.GSTCOUNCIL.GOV.IN
7. Office copy