

**GUJARAT AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
D/5, RAJYA KAR BHAVAN, ASHRAM ROAD,
AHMEDABAD – 380 009.**



ADVANCE RULING NO. GUJ/GAAR/R/2023/26
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2022/AR/48)

Date: - 12.07.2023

Name and address of the applicant	:	M/s.Hilti Manufacturing India Pvt.Ltd. Plot No.423, GIDC Estate, P.O. Kabilpore, Navsari, Gujarat-396424.
GSTIN of the applicant	:	24AADCB2566L1ZM.
Date of application	:	27.09.2022
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	:	(e)(g)
Date of Personal Hearing	:	23.03.2023 and 28.02.2023
Present for the applicant	:	Sanjeev Nair (Advocate)

Brief facts:

1. This ruling is in pursuance to the direction given vide Advance Ruling (Appeal) No. GUJ/GAAAR/APPEAL/2022/21 dated 27.9.2022, wherein the following order was passed viz [relevant extract]

"10. The appellant has now presented new facts which have not been placed before the GAAR and the ruling given by the GAAR is thus based on different facts. Further, as the appellant have got the subject advance ruling based on different set of facts, the advance ruling given is not valid in view of the provisions of Section 103(2) and 104(1) of the CGST Act, 2017.

11 In view of the above discussion we find it fit to remand the matter to the Authority for Advance Ruling i.e. the GAAR for fresh decision. The GAAR will take into consideration all aspects of the matter and decide the case afresh following the principles of natural justice.

12. In view of the foregoing, the Advance Ruling in question is set aside and the case is remanded back to the Gujarat Authority for Advance Ruling (GAAR) to issue necessary ruling after hearing the appellant afresh."

2. Briefly, the facts are that the applicant, M/s. Hilti Manufacturing India (P) Ltd., is engaged in the manufacture and supply of diamond cutting tools, other innovative tools required by the construction industry and providing in-house research & development service on diamond inserts.

3. The applicant is located at Plot No. 423, GIDC Estate, PO Kabilpore, Navsari, Gujarat-396424. Their additional manufacturing facilities are located at Plot No. 244 to 251, 48 & 29(Unit-I) and Plot No. C-IB, 53/54-1&2, GIDC



Industrial Estate, Sisodra, Navsari (Unit-3). The applicant has a separate Research and Development [for short – 'R&D'] unit wherein activities are carried out for their own purposes as well as for other customers; that they carry out R&D activities on behalf of entities situated outside India i.e. on the product samples/goods sent by the foreign entities for R&D purposes and they submit a detailed report thereafter.

4. The applicant is a part of Hilti group of entities, the principal company being Hilti Aktiengesellschaft, located at Feldkircherstrasse 100, Postfach 333, Principality of Liechtenstein, 9494 FL-9494, Leichtenstein [for short 'HAG']. In the application before the advance authority, the applicant stated that they had entered into an agreement with HAG for carrying out various R&D activities on the product samples provided to the applicant in India. A copy of the agreement was submitted as Annexure-2. The results of these activities undertaken by the applicant are then provided to the foreign company comprising of findings, performances, parameters, know-how, inventions, developed processes, objects and programs in the form of a report and an illustrative copy of such an R&D report was submitted as Annexure-3.

5. The applicant further stated that they raise periodic invoices for such services on the foreign customer for which consideration is received in foreign currency; that the invoices raised is inclusive of IGST @ 18% on the taxable value; that they are discharging IGST on the R&D services provided to foreign companies. Illustrative copy of the invoice & BRC submitted as Annexure-3.

6. The applicant is before us under the belief that the services rendered by them falls under '*export of service*' and is therefore exempt from IGST.

7. The applicant has further stated the following facts viz:

- that in terms of the agreement with HAG they are required to conduct R&D, testing & engineering activities for developing new products & processes;
- the results are communicated to HAG by way of detailed reports;
- that prototypes required for performance testing are manufactured by the applicant;
- that they purchase raw material/consumables, etc, hire personnel & undertake R&D activities;
- that certain material [which are not substantial] such as consumables/capital goods including tools, reference material such as

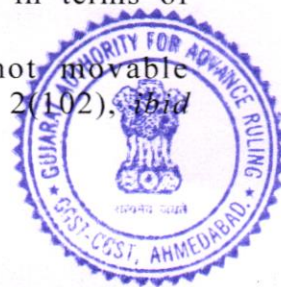


competitor products, showpiece products, batteries are provided by HAG; that this is made available only as a matter of convenience otherwise most of the materials can be sourced directly from the third party;

- that no service is performed on the consumables, tools, reference materials etc received from HAG; that they further are consumed in the process of R&D ;
- prototypes on which testing activity is done gets exhausted in the process and is not supplied by the applicant to M/s. HAG;
- that it is not mentioned in the agreement dated 18.3.2014 that the goods on which the applicant needs to carry out the R&D activities are supposed to be supplied by HAG;
- that the applicant raises periodic invoices & the consideration is received by the applicant in convertible foreign currency.

8. On the merits, the applicant has stated as follows viz:

- a conjoint reading of sections 2(52), 2(102), 9(1), 7(1)(a), of CGST Act, 2017, & section 5(1) of the IGST Act, 2017, clearly show that scientific R&D carried out by the applicant is not movable property & hence would qualify as service;
- that it would fall within the ambit of section 13(2) of the IGST Act, 2017 as service under GST;
- 'location of supplier' & 'place of supply' will determine whether the transaction is an intra state supply or inter-state supply;
- R&D services provided to HAG by the applicant does not fall under any of the subsections from 3 to 13 of section 13 of IGST;
- that the place of supply of the applicant's R&D services would fall under the default provision of section 13(2) of IGST Act, 2017;
- that when service is consumed outside India, tax is not leviable in India; that where goods ceased to exist in the form in which it has been supplied it cannot be said that the services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods;
- that they would like to rely on the following case laws viz
 - Indeus Life Science P Ltd [2019 (370) ELT 678]
 - BA Research India Ltd [2010(18) STR 439]
 - KSH International P Ltd [2010(18) STR 404]
 - TNS India P Ltd [Final Order No. 30064-30065/2022]
 - Bayer Bio Science P Ltd [2019 (25) GSTL 230]
- the summary of the above cases clearly depict that the place of supply in case of R&D services would be the location of service recipient in terms of section 13(2) of IGST Act, 2017;
- that the payment of such service is received in convertible foreign exchange;
- that in terms of judgement of Dow Chemical International P Ltd [2020 (33) GSTL 424] since goods were physically not made available by the recipient of service to the service provider, such R&D service falls under Rule 3 of POPS rules [the erstwhile rules under the Finance Act '94];
- that they would like to rely on the case of Fertin Pharma Research & Development India P Ltd [2020(38) GSTL 33], Advinus Therapeutics Ltd [2016-TIOL-3138-CESTAT-Mum], ;
- that the provision of erstwhile Finance Act, 1994 and the Place of Provision of Service Rules, 2012 are pari materia to the CGST and IGST Act;
- that the activity carried out by them amounts to 'service' in terms of Section 2(102) of the CGST Act, 2017;
- that *scientific research and development* carried out is not movable property and hence not 'goods'; that 'service' as defined u/s 2(102), *ibid*



includes any activity other than goods, & thus their activity of scientific research and development would qualify as service;

- the applicant has satisfied the conditions stipulated u/s 2(6) of the IGST Act;
- the **location of the applicant** is in India in terms of section 2(15)(a) of IGST Act, 2017;
- the **recipient of services** are located outside India in terms of Section 2(14)(d) of the IGST Act;
- the export of service shall qualify as '**zero rated supply**' and can be supplied without payment of IGST;
- that R&D services provided by the applicant would qualify as *zero-rated supply* in terms of section 16 of the IGST Act, 2017;
- as per section 13 of the IGST Act, **place of supply of services** shall be the location of the recipient in terms of Section 13(2), except for services specified under section (13)(3) of the IGST Act; that section (13)(3) of the IGST Act does not apply in this case;
- that as per section 13(3)(a) of the IGST Act, place of supply of service shall be the location where services are performed in case it is supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services.

9. The following questions were raised before the Authority of Advance Ruling viz

- Whether the services provided by the applicant to the entities located outside India is covered under Section 13(2) of the Integrated Goods and Services Tax Act, 2017?*
- Whether the services provided by the applicant is liable to Central Goods and Service Tax and State Goods and Service Tax or Integrated Goods and Services Tax or is it eligible to be treated as a 'zero rated supply' under Section 16 of the Integrated Goods and Services Tax Act, 2017.*

10. The GAAR vide its order No. GUJ/GAAR/R/26/2021 dated 9.7.2021, while deciding the issue, held as follows:

- that goods were sent by HAG to the applicant on which he conducts various tests and R & D activities and prepares the result and supplies the subject report to the recipient;
- this situation is covered u/s 13(3)(a) of IGST Act;
- with respect to the services provided by the applicant in the form of R&D activity undertaken on the sample goods provided by the recipient, the place of supply of service will be the location where the services are actually performed, which in this case is Gujarat;
- section 8(2) of the IGST Act, 2017 provides that in case of supply of services where the location of the supplier and the place of supply of services are in the same State, it shall be treated as intra-state supply.
- that in terms of Section 2(6)(iii) of IGST Act, for 'Export of service' to be satisfied one of the conditions is place of supply should be outside India & this condition is not satisfied in this case.

11. The GAAR, vide its earlier order dated 9.7.2021 concluded that the subject services did not fall within the ambit of section 13(2), IGST Act and hence were liable to CGST and SGST.



12. Feeling aggrieved, the applicant filed an appeal before the Gujarat Appellate Authority for Advance Ruling [GAAAR]. The GAAAR, vide its aforementioned order dated 27.9.2022 supra, held as follows:

- the appellant vide his letter/mail dated 15.09.2022, submitted that inadvertently wrong facts were mentioned in their application dated 31.3.21 filed before the Advance Ruling Authority;
- that the GAAR had given its ruling based on the submission that the foreign customer sends the product samples/goods for R&D testing purposes to the appellant in India and that the appellant carries out R&D activity on such goods provided to them by the foreign customer;
- that the goods on which R&D services are carried out are manufactured in India by the appellant and the detailed report is provided to the foreign customer after carrying out R&D testing thereon;
- that there has been significant change in the facts of the case presented before the GAAR and now made before the appellate authority;
- The appellant having presented new facts, which were not been placed before the GAAR; that the ruling given by the GAAR was based on different facts; that as the appellant have got the subject advance ruling based on different set of facts, the advance ruling given is not valid in view of the provisions of Section 103(2) and 104(1) of the CGST Act, 2017.

On the aforementioned findings, the matter was remanded back to the GAAR with the directions as mentioned in para (1) supra.

13. The applicant vide his submission dated 28.2.2023, has now stated as follows viz:

- that he is required to conduct R&D, testing and engineering activities for developing new products & process; the result are then communicated to HAG; the prototypes required for performance testing are manufactured by the applicant;
- a substantial portion of the raw material involved in making the prototype is sourced by applicant; that certain material are provided by HAG; that these are made available by HAG, as a matter of convenience;
- that no services are performed on such small portion of consumables, tool, reference material etc;
- that the prototypes developed by the applicant on which testing is carried out gets exhausted and is not supplied to HAG;
- that the reports & findings derived by the applicant is supplied to HAG.

14. Personal hearing was held virtually in the matter on 23.3.2023 wherein the applicant reiterated his submission. They relied on the case of M/s. Sutherland Mortgage Services Inc delivered by the Kerala High Court further adding that Revenue had not filed any appeal against the same. It was further informed that they will submit a list of consumables/goods supplied by HAG. Thereafter, in their additional submission dated 30.3.2023, it was stated that

- certain material (which are not substantial) such as consumables/capital goods including tools, reference material such as competitor products, showpiece products, batteries etc are at times provided by HAG.



- that no services are performed on such small portion of consumables, tools, reference material etc. received from HAG. They are merely used/consumed in the process of R&D services i.e. in designing and manufacturing of prototypes and its testing thereon;
- that the said materials (though not substantial) are made available by HAG as a matter of convenience only (as they are readily available with HAG) otherwise most of these materials can be bought/sourced directly from the third party.
- the details of goods received from HAG by the applicant for the VORTEX-2 Project and the manner of use of such items is as under

VORTEX 2.0 Project – Items imported from HAG	Purpose	Unit consumed in the process
Cutting Disc (competitor blades)	To compare the performance of prototype blades with competitors' blades. (Competitor blades are locally available.)	~ 2.5 hrs of use
Hilti Angle Grinder With Accessories (125- 19SE; 125-13S; AG230)	For prototype cutting blade performance evaluation. (Available in the local market.)	~ 80 hrs of use
Sharpening Plate	Used for cutting blade prototype development. (Available in the local market.)	~ 100 blades sharpened
Concrete Block	For checking prototype performance under higher or lower abrasive concrete conditions. (Available locally.)	~ 50 mins of cutting
Setplate	Part of cold press equipment; used in developing prototypes with differing properties.	~ one set of blade prototypes

Above listed materials are imported from HAG to support faster execution (immediate availability) for the development project. Listed products (except for set plate) can be purchased in India.

- that in addition to the above consumables/goods supplied by HAG for the said VORTEX 2.0 project, a substantial amount of consumable/goods are procured directly by the applicant from third parties, which are consumed in the process for providing R&D activity;
- that during the span of such project which was for approximately 2 years, more than 900 items were procured during the year 2019 – 2021 for multiple projects (including VORTEX 2.0) whereas only 6 items were sourced from HAG. Moreover all these items (both directly procured and sourced from HAG) have been consumed in the R&D process.

Discussion and findings

15. At the outset, we would like to state that the provisions of both the CGST Act and the GGST 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 GGST Act.

16. We have considered the submissions made by the applicant in their application for advance ruling as well as the submissions made during the course of personal hearing and additional submission post the said personal hearing. We have also considered the issue involved, the relevant facts & the applicant's



submission/interpretation of law in respect of question on which the advance ruling is sought.

17. Before dealing with to the submissions made by the applicant, we would like to reproduce the relevant sections, for ease of reference:

CENTRAL GOODS AND SERVICE TAX ACT, 2017

Section 95. Definitions of Advance Ruling.-

In this Chapter, unless the context otherwise requires,-

(a) "advance ruling" means a decision provided by the Authority or the Appellate Authority¹ [or the National Appellate Authority] to an applicant on matters or on questions specified in sub-section (2) of section 97 or sub-section (1) of section 100² [or of section 101C], in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant;

Section 96. Authority for advance ruling.-

Subject to the provisions of this Chapter, for the purposes of this Act, the Authority for advance ruling constituted under the provisions of a State Goods and Services Tax Act or Union Territory Goods and Services Tax Act shall be deemed to be the Authority for advance ruling in respect of that State or Union territory.

Section 97. Application for advance ruling.-

(1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and manner and accompanied by such fee as may be prescribed, stating the question on which the advance ruling is sought.

*(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.*

[emphasis added]

INTEGRATED GOODS AND SERVICE TAX ACT, 2017

"2 (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 ¹[or in Indian rupees wherever permitted by the Reserve Bank of India]; and
- (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;"

Explanation 1 of the Section 8 of the IGST Act

Explanation 1.—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.

Section 5. Levy and collection.-

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962.

Section 7. Inter-State supply.-

(5) Supply of goods or services or both,-

- (a) when the supplier is located in India and the place of supply is outside India;
- (b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or
- (c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,
- shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

Section 13. Place of supply of services where location of supplier or location of recipient is outside India.-

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.



(3) The place of supply of the following services shall be the location where the services are actually performed, namely:-

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

¹[**Provided** further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;]

(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

(5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:-

(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) intermediary services;

(c) services consisting of hiring of means of transport, including yachts, but excluding aircrafts and vessels, up to a period of one month.



Explanation . - For the purposes of this sub-section, the expression, -

(a) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;

(b) "banking company" shall have the same meaning as assigned to it under clause (a) of section 45A of the Reserve Bank of India Act, 1934;

(c) "financial institution" shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934;

(d) "non-banking financial company" means, -

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or

(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

(9) The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation .-For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following non-contradictory conditions are satisfied, namely:-

(a) the location of address presented by the recipient of services through internet is in the taxable territory;

(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;

(c) the billing address of the recipient of services is in the taxable territory;

(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.

18. On a bare reading of section 97(2) of the CGST Act, 2017, we are mindful of the fact that rulings under AAR can be sought only on seven issues, listed under



sub-clauses 2(a) to (g). 'Export of services' is further defined under section 2(6) of the IGST Act, 2017. We are also aware of the directions in the appellate order asking us to take into consideration all aspects of the matter and decide the case afresh following the principles of natural justice.

19. Thus, ideally, AAR cannot admit an application seeking a ruling on a question pertaining to place of supply, more so since it does not find a mention under section 97(2) of the CGST Act, 2017. We are of the considered view that being a creature of the Act, we cannot go beyond the diktats of what is spelt out in the Act. However, having said so we are also mindful of the fact that in the first round when the application was made before the Authority, the same was entertained and a ruling was given. In-fact we are also aware of the fact that no appeal was preferred against the ruling dated 9.7.2021 challenging the jurisdiction of the AAR to rule on the question of place of supply. This being the factual position, we proceed to decide on the merits of the matter in the backdrop of the judgement of the Hon'ble High Court of Kerala in the case of M/s. Sutherland Mortgage Services Inc. [WP(C) No. 32634/2019(D) dated 3.2.2020.

20. Now the applicant is before us arguing that the correct facts were not presented before the GAAR in the earlier round, the applicant we observe has taken a complete U turn and stated that he is required to conduct R&D, testing and engineering activities for developing new products & process; the result are then communicated to HAG by way of detailed reports; that the prototypes required for performance testing are manufactured by the applicant. On being specifically asked during the course of personal hearing, the applicant has also submitted the details of goods received from HAG and the manner of use of such items.

21. On summarizing what is stated before us, we find that the applicant develops a prototype. Some of the materials/goods that go into the making of the prototype are supplied by HAG [the recipient]. The prototype is not supplied to the recipient as it gets consumed in the process. After conducting the R&D, testing and engineering activities for developing new products & process, the applicant communicates the result to HAG. It is on this activity that the applicant seeks a ruling from the GAAR.



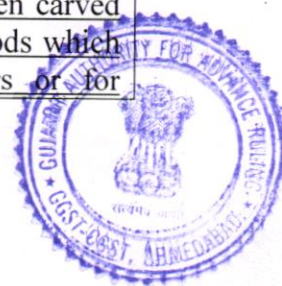
22. Provisions of section 13 of the IGST Act, 2017 shall apply in so far as determining the place of supply of services, is concerned.

23. We have gone through the sub-clauses 2 to 13 of section 13 of the IGST Act, 2017, mentioned *supra*. We find that that sub-clause 4 to 13, are not related to the issue on hand. What is in contention is sub-clause 2 and 3 of section 13 of IGST Act, 2017. On examining section 13(3)(a), we find that the place of supply of services in respect of goods which are required to be made physically available by the recipient to the supplier, or to a person acting on behalf of the supplier of services in order to provide the services shall be the location where the services are actually performed. There are two proviso to this sub-clause. The first proviso states that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services. The second proviso talks about a situation wherein goods which are temporarily imported into India for repairs or for other treatment or process further holding that clause 13(3) shall not be applicable in such cases. Section 13(3)(b) further deals with a situation wherein services are supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

24. On the other hand, section 13(2) of the IGST Act, 2017, states that the place of supply of services shall be the location of the recipient of services, except for the services specified in sub-sections (3) to (13). The only proviso in this sub clause goes on to state that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

25. In this regard, we find that vide circular No. 103/22/2019-GST dated 28.6.2019, following clarification has been issued viz

2	Doubts have been raised about the place of supply in case of supply of various services on unpolished diamonds such as cutting and polishing activity which have been temporarily imported into India and are not	Place of supply in case of performance based services is to be determined as per the provisions contained in clause (a) of sub-section (3) of Section 13 of the IGST Act and generally the place of services is where the services are actually performed. <u>But an exception has been carved out in case of services supplied in respect of goods which are temporarily imported into India for repairs or for</u>
---	---	--



put to any use in India?	<p>any other treatment or process and are exported after <u>such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process</u></p> <p>In case of cutting and polishing activity on unpolished diamonds which are temporarily imported into India are not put to any use in India, the place of supply would be determined as per the provisions contained in sub-section (2) of Section 13 of the IGST Act.</p>
--------------------------	---

26. Vide Notification No. 04/2019-Integrated Tax dated 30.9.2019, CBIC has further clarified as under viz

Sr. No.	Description of services or circumstances	Place of Supply
1	Supply of research and development services related to <u>pharmaceutical sector</u> as specified in Column (2) and (3) from Sl. No. 1 to 10 in the Table B by a person located in taxable territory to a person located in the non-taxable territory	<p>The place of supply of services shall be the location of the recipient of services subject to fulfillment of the following conditions:-</p> <p>(i) Supply of services from the taxable territory are provided as per a contract between the service provider located in taxable territory and service recipient located in non-taxable territory.</p> <p>(ii) Such supply of services fulfills all other conditions in the definition of export of services, except sub-clause (iii) provided at clause (6) of Section 2 of Integrated Goods and Services Tax Act, 2017 (13 of 2017).</p>

27. It is here that the agreement entered into between HAG and the applicant assumes significance. The extracts relevant for the issue at hand, is reproduced below in verbatim for the ease of reference viz

***Contract Development & Testing Agreement
between
Hilti Aktiengesellschaft [referred to as 'Hilti'] (recipient of service)
&
Hilti Manufacturing India P Ltd [referred to as 'HMI'] (applicant)***

2. Services

An overview and specifications of the Services rendered by HMI to Hilti according to Article 1 is provided in Appendix 1.

4. Right to Results

4.3 If Results are eligible for intellectual property right protection Hilti shall be entitled to file or apply for the relating intellectual property rights, both first filings and/or foreign filings in its own name and at its own cost and expense. HMI shall notify Hilti in writing of any and all Results that may be eligible for intellectual property right protection immediately in writing. Upon Hilti request HMI shall transfer to Hilti any



such Result that was generated by HMI's employees free of charge. HMI shall ensure that it has the power to dispose or transfer such result to Hilti. HMI will do such acts and deeds necessary including making any filings with any governmental authority and executing any instruments or agreements that may be required or as may be requested by Hilti, to transfer such Result to Hilti.

4.6 If Results are subject to a copyright or similar right, HMI hereby grants to Hilti the sole and exclusive, worldwide, perpetual and unlimited right of use in these copyrights for any and all types of use, whether with or without copyright reference/author's note. This shall include, without limitation, copyrighted software programs which HMI shall be obliged to hand over to Hilti in both, source and object code, saved to a data carrier in a machine readable format, together with all relating documentation. HMI will do all such acts and deeds necessary, including making any filings with any governmental authority and executing any instruments or agreements that may be required or as may be requested by Hilti, to grant and vest the aforementioned rights and benefits in Hilti. The right of use in the copyrights or similar rights shall include, without limitation, the right of Hilti to copy, to transmit and/or save on picture, sound and data carrier, to edit, to alter and to translate such results and to divulge and spread them, whether in original or modified format, without having to obtain the consent of HMI.

APPENDIX 1

Services provided by HMI to Hilti

HMI provides Services in the following areas:

- Testing activities related to Hilti items, specified in detail by Hilti
 - Standard Performance test – GCS
 - Grinding Cup wheel – 4" to 7"
 - Cutting blades – handheld 4"-16"
 - Slitting blades – handheld 5"-7"
 - Standard Performance test - floor saw blades – 12"-24"
 - Standard Performance test – bench saw blades – 12"-20"
 - Standard Performance test – Core bits
 - Misuse/Robustness test - GCS
 - Other testing activities as agreed between parties from time to time
- Product development and engineering related to Hilti items, specified in detail by Hilti
 - Defining the project.
 - Conducting the benchmark testing and feasibility studies.
 - Analyzing data and targets (Performance and Cost)
 - Designing the product and its requirements
 - Making prototypes and conducting performance testing till reach the targets
 - Verifying and validating the process and product
 - Other product development and engineering activities as agreed between the parties from time to time.
- Product development, testing and engineering activities related to Original Equipment Manufacturer items.

APPENDIX 2

Calculation of the Services Fee payable by Hilti to HMI

Hilti shall compensate HMI in accordance with the cost plus approach. Based on the concept described below, all costs and expenses incurred by HMI in the provision of the Services for Hilti shall be invoiced to Hilti including a mark-up.



Cost basis

The cost basis for the calculation of the Service Fee shall include the following direct and indirect costs of all HMI departments involved in the provision of the Services

- *Employee compensation costs (salaries, wages, social security charges and similar payroll cost)*
- *Training expenses for internal or in housing training.*
- *Overhead and administrative expenses*
- *Rents for office space*
- *Travel expenses (airfares, transportation, lodging, food, etc.)*
- *External consulting costs*
- *External training costs*
- *Telecommunication and other communication expenses*
- *Costs for material, testing equipment, office equipment and office supplies*
- *Charges / cost reimbursements from other related parties*
- *Other relevant expenses*

A specific cost allocation concept will be developed in order to split the aforementioned costs into

- *costs incurred by HMI in the provision of the Services for Hilti, and*
- *costs incurred for its own benefit/benefit of other service recipients.*

Mark-up

On the sum of the costs incurred by HMI in the provision of the Services for Hilti a mark up of 10% shall be added.

28. On going through Appendix I, [which depicts an overview & specification of the service rendered by the applicant to HAG], we find that the services provided by the applicant to HAG, is in respect of the following areas viz

- (A) *Testing activities related to HAG items, specified in detail by HAG*
- (B) *Product development & engineering related to HAG items, specified by HAG*
- (C) *Product development, testing & engineering activities related to OEM items.*

29. Vide the additional submission dated 30.3.2023, applicant has further submitted that the materials supplied by HAG are not substantial, viz consumables/capital goods including tools, reference material etc. They have also listed some items which were provided by HAG, which is mentioned at para 14, supra. They have also stated that the listed materials are imported from HAG to support faster execution, further stating that except for set plate, the rest of the items can be purchased in India.

30. Sub-clause (3) of section 13 of the IGST Rules, 2017, primarily covers the following viz



- Under this sub-clause, services related to goods, which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, **are covered**;
- Under this sub-clause, the goods temporarily come into the physical possession or control of the service provider because without this the service cannot be rendered.
- To fall under this sub-clause, the service involves movable objects or things that can be touched, felt or possessed.

Now let us compare these conditions with the type of service rendered by the applicant in the present case. The applicant, as is mentioned *supra*, provides [a] testing activities related to HAG items, specified in detail by HAG; [b] product development & engineering related to HAG items specified in detail by HAG and [c] product development, testing & engineering activities related to OEMs. In providing this service, it is the applicant's say that some of the materials are being provided by the recipient *ie* HAG. Further, the applicant is on record before us that a substantial amount of consumable/goods/capital goods are procured directly from third parties. What is interesting is also that these materials get consumed in the process of the said R&D activity as stated by the applicant. Thus we find that the parameter listed out in sub-clause 3, as mentioned above is not met viz that the prototype is developed by the applicant and is not supplied by HAG [recipient]. We find that it would not make much of a difference since what is supplied by the applicant is only some materials which go into making of the prototype and not the entire prototype. The question therefore that pops up is whether it would make a mark-able difference if the entire materials is supplied by the recipient (HAG in this case). Would it then put this supply under sub-clause 3 of the Section 13, *ibid* ? We have no hesitation in answering that even in such a situation, since the prototype on which R&D is conducted and whose report is supplied to HAG is not being supplied by HAG, this service would not fall within the ambit of sub-clause 3 of section 13 of IGST Act, 2017.

31. On the basis of the foregoing, we hold that the supply of services would therefore fall under section 13(2), as in paras 23 & 24, we have already concluded that it would not fall within sub-clauses 4 to 13. However, this would apply only in case of the services specified in (B) and (C) of Appendix I, as mentioned in para 28 *supra*. A bare reading of (A) of Appendix I, in para 28 *prima facie* depict that the testing activities related to HAG items - meaning thereby that the R&D service is performed on the **goods provided by HAG** and



hence as far as this portion of the service is concerned, it would fall within the ambit of sub-clause 3 of section 13 of IGST Act.

32. IGST is levied u/s 5(1) of the IGST Act, 2017 on all inter-state supplies of goods or services or both. Further, under section 7(5) of the IGST Act, 2017, supply of services wherein the supplier is located in India and the place of supply is outside India, will be treated as supply in the course of inter-state trade or commerce. Thus IGST is payable unless the supply is 'export of service'.

33. The applicant is on record stating that they are a part of HAG group. Supply of services by a subsidiary/sister concern etc of a foreign company, which is incorporated in India under the Companies Act, 2013 to establishments of the said foreign company located outside India is not barred by section 2(6) of the IGST Act, supra from being considered as export of services since they are not to be treated as supply between merely establishments of distinct persons under explanation I of section 8 of IGST Act, 2017.

34. We further rely on Circular No. 161/17/2021-GST dated 20.9.2021, wherein it is clarified as follows viz

4.4 From the perusal of the definition of "person" under sub-section (84) of section 2 of the CGST Act, 2017 and the definitions of "company" and "foreign company" under Section 2 of the Companies Act, 2013, it is observed that a company incorporated in India and a foreign company incorporated outside India, are separate "person" under the provisions of CGST Act and accordingly, are separate legal entities. Thus, a subsidiary/ sister concern/ group concern of any foreign company which is incorporated in India, then the said company incorporated in India will be considered as a separate "person" under the provisions of CGST Act and accordingly, would be considered as a separate legal entity than the foreign company

Clarification:

5.1 In view of the above, it is clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as "merely establishments of a distinct person in accordance with Explanation 1 in section 8".

5.2 Therefore, supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Explanation 1 of section 8 of IGST Act 2017. Similarly, the supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person under



Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as 'export of services', subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act.

35. In view of the foregoing, the aforementioned service rendered by the applicant would fall under 'export of service', more so in view of the fact that all the five conditions as enumerated under section 2(6) of the IGST Act, 2017, are met viz

- (i) The applicant [being supplier of service] is located in India;
- (ii) The recipient of service [HAG] is located outside India
- (iii) We have already held that the place of supply is the location of the recipient of service
- (iv) The applicant on record has stated in the application that the payment of the supply is received in foreign exchange
- (v) The supplier of service and recipient of service are not merely establishment of a distinct person in accordance with explanation 1 of section 8.

36. In view of the foregoing, we rule as under:

RULING

(i) The services provided by the applicant to the entities located outside India is covered under Section 13(2) of the Integrated Goods and Services Tax Act, 2017 in respect of the services mentioned in (B) and (C) under Appendix-I as per para 28. This is subject to the condition that the services supplied in respect of goods/prototypes which are required to be made physically available by HAG to the applicant. Further, in respect of the service listed in (A) under Appendix-I of para 28, it does not merit to be covered under section 13(2), of IGST Act

(ii) The services provided by the applicant is eligible to be treated as a 'zero rated supply' under Section 16 of the IGST Act, 2017 in respect of the services mentioned in (B) and (C) under Appendix-I as per para 28. In respect of the service listed in (A) under Appendix-I of para 28, the subject services are liable to CGST and SGST.

(MILIND KAVATKAR)
MEMBER (SGST)

(AMIT KUMAR MISHRA)
MEMBER (CGST)

Place: Ahmedabad

Date: 12 /07/2023

