

**HARYANA APPELLATE AUTHORITY FOR ADVANCE RULING**

**(Constituted under Section 99 of the Haryana Goods and Services Tax Act,  
2017 read with Central Goods and Service Tax Act, 2017)**

**BEFORE THE BENCH OF**

Sh. Upender Gupta, IRS (C&IT) Chief Commissioner Central Goods and Service Tax Zone Panchkula Member, Appellate Authority for Advance Ruling, Haryana	Sh. Ashok Kumar Meena, IAS Commissioner Excise & Taxation Department Haryana Member, Appellate Authority for Advance Ruling, Haryana
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HAAAR Order-In-Appeal No.: -HAAAR/ 2021-22/03

**Date: 23.11.2023**


(Passed by Haryana Appellate Authority for Advance Ruling under Section 101(1) of the Haryana Goods and Service Tax Act, 2017 read with Central Goods and Service Tax Act, 2017)

**Preamble**

1. In terms of Section 102 of the Central Goods & Service Tax, Act 2017/Haryana Goods & Service Tax Act 2017 ('the Act', in Short), this Order may be amended by the Appellate Authority, so as to rectify any error apparent on the face of the record, if such error is noticed by the Appellate Authority on its own accord, or is brought to its notice by the concerned officer, the jurisdictional officer or the Appellant within a period of six months from the date of the Order.
2. In terms of Section 103(1) of the Act, this advance ruling pronounced by the Appellate Authority under Chapter XVII of the Act shall be binding only: -
  - (a) on the Appellant who had sought it in respect or any matter referred to in sub-section (2) of Section 97 for advance ruling:
  - (b) on the concerned officer or the jurisdictional officer in respect of the Appellant.
3. In terms of Section 103 (2) of the Act, this advance ruling shall be binding unless the law, facts or circumstances supporting the said Advance Ruling have changed.
4. In terms of Section 104(1) of the Act, where the Appellate Authority finds that advance ruling pronounced by it under sub-section (1) of Section 101 has been obtained by the Appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void ab-initio and there upon all the provisions of this Act or the rules made there-under shall apply to the Appellant as if such advance ruling has never been made.

**DETAILS OF THE APPELLANT:**

Name and Address of the Appellant	M/s. Subway Systems India Private Limited, (Now Eversub India Pvt. Ltd.) Unit No. 20-24, 3rd Floor, MGF Metropolis, MG Road, Sector-28, Gurugram-122002, Haryana
GSTIN/User id of the Appellant	06AAGCS5808MIZZ
Advance Ruling Order against which appeal is filed	HR/ARL/02/2021-22 dated 08.12.2021 (received by the 'Appellant' on 13.12.2021)
Date of Filing of Appeal	12.01.2022
Represented By	Sh. Abhishek A. Rastogi & Sh. Pratyushprava Saha, Advocates
Jurisdictional Authority-Centre	CGST Commissionerate, Gurugram
Jurisdictional Authority-State	Deputy Excise & Taxation Commissioner (ST), Gurugram
Whether payment of fees for filing appeal is discharged. If yes, the amount and Challan No.	<b>No, Partly Paid ₹ 10,000/- in Tax HEAD (5000/- CGST &amp; 5000/- HGST) vide CIN No. HDFC22010600033348 dated 11.01.2022</b>

  
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**Order under Section 101 of Central Goods and Service Tax Act, 2017 /  
Haryana Goods and Service Tax Act, 2017**

1. The present appeal has been filed by M/s. Subway Systems India Private Limited (Now Eversub India Pvt. Ltd.,) (hereinafter referred to as 'the Appellant') under Section 100 (1) of Central Goods and Service Tax Act, 2017/Haryana Goods and Service Tax Act, 2017 (hereinafter referred to as "the Act") against the Advance Ruling No. HR/ARL/02/2021-22 dated 08.12.2021.

2. A copy of order of the Advance Ruling Authority (herein after referred to as 'AAR') issued on 08.12.2021 was received by the 'Appellant' on 13.12.2021 and the appeal has been filed on 12.01.2022 which is within time in terms of Section 100(2) of the Act.

**1. BRIEF FACTS OF THE CASE:**

1.1 M/s Subway Systems India Private Limited, Gurugram (Now Eversub India Pvt. Ltd) a Company registered under HGST Act, 2017 in the State of Haryana vide registration number 06AAGCS5808MIZZ and having its business situated at Unit No 20-24, 3rd floor, MGF Metropolis, MG Road, Sector 28, Gurugram 122002, Haryana.

1.2 This appeal is preferred by the Appellant, who is the authorized licensee in India of a "system" developed for establishing and operating quick services restaurant featuring sandwiches and salads.

1.3 The system preferred above is an intellectual property developed by Subway group and comprises of the brand name "SUBWAY" along with proprietary and confidential information such as recipes, formulas, food preparation procedures, business methods, policies, trade secrets, etc. The Appellant has been licensed to establish, operate and franchisee others to operate SUBWAY restaurants in India using the System.

1.4 The aforesaid license has been granted to the Appellant by way of a Master License Agreement dated 01 October 2002 ("MLA") by Subway International B.V., Netherlands. The said MLA also authorized the Appellant to further license the System and the brand name 'Subway' to franchisees in India. The relevant extracts of the MLA are reproduced below:

*"1.00 The Company hereby grants to Master Licensee the right to franchise itself and others to establish and operate Sandwich Shops in the Territory, Master Licensee shall use the System and the Proprietary Marks solely in connection with the development and franchising of Sandwich Shops pursuant to this Agreement. The Company grants to Master Licensee the license to use all of the Company's rights in and to the System and the Proprietary Marks, and to license the System and the Proprietary Marks to Franchisees in the Territory....."*

1.5 The Appellant has also been granted the right to use and sub-license others to use the System and trademark in India by way of Trademark License Agreement



("TLA") dated 18.11.2019 entered into between Subway IP LLC, USA, Subway Internal B.V., Netherlands and the Appellant. The relevant extracts of the TLA are reproduced below:

*"WHEREAS the parties wish to grant SSIPL the right to use the Trademarks in India under the terms and conditions set forth in this Agreement.*

*(...)*

**1. GRANT OF LICENSE**

*SIP, through a series of license agreements described above, has granted SSIPL a non-exclusive right to use and sub-license others to use the System, the System IP and the Trademarks in India and the right to use the System, the System IP and the Trademarks for the purpose of entering into franchise agreements with qualified individuals and certain approved entities so they may establish and operate SUBWAY restaurants in India"*

1.6 The TLA makes it clear that only a limited license and right to use the System and Trademarks, and to sub-license the said System and Trademarks had been granted to the Appellant, and the substantive rights in the System and Trademarks had not been transferred and remained with the foreign entities. The relevant extracts of the TLA in this regard are reproduced below:

**"3. TRADEMARK RIGHTS AND OWNERSHIP**

*SSIPL agrees and acknowledge that;*

- a) SIP is the exclusive owner of all right, title and interest in and to the System IP and the Trademarks including any goodwill associated therewith, subject to the license and right to use the Trademarks granted to SSIPL hereunder.*
- b) except as provided in this Agreement, SSIPL acquires no right, title or interest in or to any of the System IP and the Trademarks;*
- c) any use of the System IP and Trademarks by SSIPL and the goodwill arising from such use shall inure to the benefit of SIP."*

1.7 The aforesaid extracts indicate that the Appellant had been authorized only to license or sub-license the System to franchises in India and the Appellant had not been authorized to transfer the right to use the System to such franchise.

**FRANCHISE MODEL FOLLOWED BY THE APPELLANT**

1.8 Through a franchise agreement, the Appellant has licensed the franchisees the right to access and use the system (including the brand name, trademarks, proprietary and confidential information) for setting up and operating a SUBWAY restaurant in India, serving sandwiches, salads and other food items. The relevant extracts of a sample Franchisee agreement is reproduced below:

**"3. PERMITTED ACCESS TO THE SYSTEM AND MARKS** During the term of this Agreement we grant to you:

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*@*  
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- a. Continued access to the system including the loan of a copy of the operations Manual and same being a confidential information as defined in Sub Paragraph 5(n), subject to restrictions and terms and conditions stated in Subparagraph 5(n) applicable to a Confidential Information and or access to the electronic version of the operations Manual on our website.
- b. Continued access to information pertaining to new developments, improvements, techniques and process in the system.
- c. A limited, non exclusive sublicense to use the marks in connection with the operation of the Restaurant at One (1) location at a site we and you approve."

1.9 Along with the aforesaid License, the Appellant also conducts a training and assistance program for the franchisees and provides on call consultation services concerning operation of the restaurant.

1.10 The Franchisees are responsible for making their own business a success. The franchisees independently run their respective restaurants. However, the Appellant ensures minimum quality and safety standards to ensure similar service offerings in all SUBWAY restaurants.

1.11 As a consideration of granting license to the franchise for the right to use the system, the Appellant *inter alia* charges royalty calculated at a specified percentage of the gross sales made from the restaurants operated by the Franchisee. In the above referred agreement, royalty has been stated to be payable by the franchisee on a period basis, at the rate of 8% of gross sales.

#### ***Classification of services and applicable GST rate***

##### **SERVICE CODE ADOPTED BY THE APPELLANT:**

1.12 The Appellant classified the licensing services provided by it pursuant to the Franchisee Agreement under service code 997336 based on Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017.

1.13 The services such as training, assistance and consultation provided by the appellant to the franchisee are merely ancillary to the principal services of providing a license to use the System.

Since, without such license the franchisee would not be entitled for these ancillary services, accordingly considering that these ancillary services are naturally bundled with the principal service of providing a license to use the System and thus together form part of a composite supply" the appellant has adopted the same service code and GST rate as determined for the aforesaid principal service, for the ancillary service as well. This is in accordance with Section 8 of the Central Goods and Service Tax Act, 2017 (CGST Act).

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1.14 The relevant extract of the scheme is reproduced below (showing the service code adopted by the Appellant):

Chapter, Section, Heading or Group	Service code (Tariff)	Service Description
Chapter 99		All Services
Section 7		Financial and related services; real estate services; and rental and leasing services
Heading 9973		Leasing or rental services without operator
Group 99733		Licensing services for the right to use intellectual property and similar products
	<b>997336</b>	<b>Licensing services for the right to use trademarks and franchises.</b>

1.14 Alternatively, another reasonably plausible service code applicable to the services provided by the Appellant could be service code 997339. This is because the Appellant not only receives right to use the brand name "SUBWAY", but also receives right to use other intellectual property products such as recipes, trade secrets, business policies and other knowhow.

The relevant extract of the scheme for the said code is reproduced below:

Chapter, Section, Heading or Group	Service code (Tariff)	Service Description
Chapter 99		All Services
Section 7		Financial and related services; real estate services; and rental and leasing services
Heading 9973		Leasing or rental services without operator
Group 99733		Licensing services for the right to use intellectual property and similar products
	<b>997339</b>	<b>Licensing services for the right to use other intellectual property products and other</b>

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		<b>resources nowhere else classified.</b>
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1.15 As per Notification No. 11/2017-Integrated Tax (Rate) dated 28 June 2017, both the aforesaid service codes carried a CGST rate of 6% up to 30 September 2021. The relevant extract of the Notification is provided below:

Chapter, Section or Heading	Description of Service	Rate (Percent)	Condition
Heading 9973 (Leasing or rental service without operator)	(i) Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of goods other than Information Technology Software	6	-

**Thus, the combined GST rate for the aforesaid service codes was at 12% for intra- state supply of services.**

#### **COMPETING SERVICE CODE**

1.16 The Appellant is conscious that "Trademarks and Franchises" are covered under service code 998396. However service code 998396 does not cover the licensing services provided by it. The relevant extract of the scheme for the said code is reproduced below:

Chapter, Section, Heading or Group	Service code (Tariff)	Service Description
Chapter 99		All Services
Section 8		Business and Production Service
Heading 9983		Other Professional, Technical and Business Services
Group 99839		Other Professional, Technical and Business Services
	<b>998396</b>	<b>Trademarks and Franchises</b>

1.17 As per Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 (the aforesaid service code carries a CST rate of 9%. The relevant extract of the Notification is provided below:

Chapter, Section or Heading	Description of Service	Rate (Percent)	Condition
Heading 9983 (Other Professional,	Other Professional services other than (i) and (ia) above and serial technical	9	-

Technical and Business Services)	and number 38 below		
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Thus the combined GST rate for the aforesaid service code (including state GST) would be 18% for intra-state supply of services.

1.20 The Appellant has preferred this application to ascertain whether licensing services provided by it under the Franchise Agreement are correctly classifiable under service code 997336/997339 or under Service Code 998396 or under any other Service Code.

**STATEMENT CONTAINING THE APPLICANT'S INTERPRETATION OF LAW :**

The Appellant's interpretation of the law and/or facts in respect of the questions mentioned in their application is re-produced as under:

**Scope of Service codes 997336/997339 and 998396**

1.21 It is well settled that intellectual property rights are considered as "goods" for the purpose of tax legislations. Reliance in this regard is placed on the decision of the Supreme Court in *Vikas Sales Corporation vs. Commissioner of Commercial Taxes*, [1996] 102 STC 106 (SC) and *Tata Consultancy Services vs. State of Andhra Pradesh*, (2004) 137 STC 620 (SC).

1.22 However, it is equally well settled that temporary transfer or permitting the use of intellectual property rights is a supply of "services". In the context of GST laws, reference in this regard is made to Schedule II of the CGST Act, which deems the following transactions to be supply of services:

- a) Any transfer of right in goods without the transfer of title thereof [Para 1(b)]
- b) Temporary transfer or permitting the use or enjoyment of any intellectual property right [Para 5(c)]:
- c) Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration [Para 5(f)]

1.23 It is the case of the appellant that:

transaction (b) and transaction (c) above i.e. permitting the use or enjoyment of IPR (in other words, licensing the right to use IPR, being the Appellant's services under the Franchise Agreement) and transfer of right to use IPR are covered under service codes 997336/997339; and

transaction (a) and (c) above, i.e. transfer of right to use goods or in goods, in the context of trademarks and franchises, are covered under service code 998396.

**Re: Service Codes 997336/997339**

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1.24 The Scheme of Classification of Services adopted for the purposes of Indian GST Law is a modified version of the United Nations Central Product Classification (UNCPC) and the explanatory Notes for the said scheme are based on the Explanatory Notes to the UNCPC (refer Para 1-2 of the preface of the Explanatory Notes). The relevant extracts of the Explanatory Notes are reproduced below

Explanatory Note to Group 99733

*"This group includes permitting, granting or otherwise authorizing the use of intellectual property products and similar products.*

Note: This covers rights to exploit these products, such as licensing to third parties; reproducing and publishing software, books, etc.; using patented designs in production processes to produce new goods and so on. Limited end user licences, which are sold as part of a product (e.g., packaged software, books) are not included here.

Explanatory Note to Group 997336:

*"This service code includes licensing services for the right to use trademarks and to operate franchises".*

Explanatory Note to Group 997339:

*"This service code includes licensing services for the right to use other kinds of intellectual property products, such as architectural and engineering plans, industrial designs etc".*

1.25 The term "Trade mark" has been defined under Section 2(2b) of the Trade Marks Act, 1999 as follows:

*".... "trademark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and—*

*(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and*

*(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark."*

1.26 The mark SUBWAY and other mark have been duly registered in India under the Trade Marks Act, 1999. Accordingly, these marks fall within the meaning of the term "Trademark" as referred in the scheme of classification of services for the purpose of

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Indian GST Law. Sample certificates evidencing registration of the mark name SUBWAY in India under the Trade Marks Act, 1999 were provided.

1.27 The term "license" means "permitting someone to do something". Accordingly, the services covered under the said codes involve a permissible use certain IP products with certain conditions and restrictions. The said service codes contemplate a permissive use of the underlying IP and in that sense, confer a very limited and conditional right.

1.28 This is further substantiated by the fact that the explanatory note to Group 99733 specifically states that the group includes permitting, granting or otherwise authorizing the use of intellectual property products, which covers licensing to third parties.

1.29 By way of the Franchise Agreement, the Appellant grants to the franchisees the license to use/permissive use of the System (including the brand name, trademarks, proprietary and confidential information) for setting up and operating a SUBWAY restaurant franchise. The said license or permission is a very limited right and subject to various conditions and restrictions.

**Re: Service Code 998396**

1.30 The relevant extract of the explanatory Notes are reproduced below

Explanatory Notes to Service Code 998396

" This service code includes original trademarks and franchises, i.e. the legally registered ownership of a certain brand name. Note: These products are produced on own account with the intent of deriving benefits from allowing others to use these trademarks or franchises.

This service code does not include:

-licensing services for the right to use trademarks and franchises, :- 99733

1.31 At the outset Appellant submits that the explanatory Note to Service Code 998396 expressly states that licensing services are not included within the said code. Since the services provided by the Appellant to the franchisees constitute a license or permission to use the system for operating a SUBWAY restaurant (franchise), they are automatically excluded from the ambit of the said service code.

1.32 In the case of Appellant (from the explanatory note reproduced above) the service code 998396 covers transactions amounting to *transfer of right to use trademarks/franchise or transfer of right in trademarks franchises* which specifically excludes licensing of trademarks franchises. As has been explained further below, the aforesaid concepts are broad and involve transfer of more sustentative rights (as opposed to a mere license to use).



1.33 In any case, as per the MLA and TLA, Subway International BV Netherlands and Subway IP LLC, USA have granted the Appellant only the right to sub-license the "System" and the 'SUBWAY® trademark to franchisees in the territory. The Appellant is not authorized to transfer the right to use the system and the SUBWAY trademark to franchisees as per the MLA or TLA. It is well-settled that a person cannot transfer a better title than he himself has (as enshrined in the Latin maxim *nemo dat quod non habet*). Accordingly, the question of the Appellant transferring such right to use to franchisees does not arise.

***Distinction between transfer of right to use goods "and license to use permissive use"***

**Re: Transfer of right to use goods**

1.34 The meaning and scope of the expression "transfer of right to use goods" has been expounded in several landmark Judgements such as 20<sup>th</sup> Century Finance Corporation Limited vs State of Maharashtra, (2000) 6 SCC 12; Rashtriya Ispat Nigam Limited vs Commercial Tax Officer (1990) 77 STC 182, Aggarwal Brothers vs State of Haryana (199) 9 SCC 182, State of Andhra Pradesh vs Rashtriya Ispat Nigam Limited (2002) 3 SCC 314; BSNL vs UOI 2006 (2) STR 161 (SC), GS Lamba and Sons vs State of Andhra Pradesh (2011) 43 VST 323 (AP HC), McDonalds India Pvt Ltd vs Commissioner of Trades & Taxes, New Delhi 2017 (5) TMI 999-Delhi-HC and finally in the Appellants own case in Subway Systems India Private Limited v Union of India & Ors, 2016 (8) TMI 717-Bombay HC.

1.35 Based on the law laid down in the aforesaid precedents, the general features of the expression "transfer to right to use" are given below:

- a) Transfer should not be of the property (ownership) in goods, but of the right to use property in goods;
- b) The transfer must be divested of the right or goods and the same should be vested in the transferee, to the exclusion of all others;
- c) Effective or general control; over the goods must pass to the transferee. Effective or general control does not always mean physical control and even if the manner, method, modalities and the time of the use of goods is decided by the transferee, it would be under the effective or general control over the goods.
- d) The approvals, concessions, licenses and permits in relation to the goods would also be available to the transferee, even if such licenses or permits are in the name of the transferor of the goods; and
- e) The transferee should have a legal right to use the goods and consequently all legal consequences should fall upon the transferee.

1.36 The Appellant states that since the Franchise Agreement entered into by it do not possess the aforesaid features; the services provided do not constitute a "transfer of



right to use goods." This has been demonstrated in detail in the following section by referring to specific clauses in the enclosed agreement.

**Re: License to USE/Permissive use**

1.37 At the outset, the Appellant states that the Bombay and Delhi High Court, in the Appellant's own case have held that the franchisee Agreement entered into by the Appellant merely granted permissive use of defined intangible rights to the franchisees and the agreement, in substance, was nothing more than a mere license.

1.38 Based on the law judicially laid down in this regard, the general features of the expression "license to use/permissive use" are given below:

- a) License must be granted merely to access or use the rights or goods subject to conditions laid down by the licensor;
- b) At the end of the period for which the license is granted, the rights or goods must be returned to the licensor;
- c) The licensor must have the right to terminate and repossess and deny further access to that intangible;
- d) The license must not be able to sub license the permission it obtains under the agreement; and
- e) the transfer must be on a non-exclusive basis.

1.39 Based on clause 3, 5(m), 11(m), 5(o), 8(g), 11(b) and several others of the Franchisee agreement, the Appellant submits that since the Franchise Agreements entered into by it possess the aforesaid features, the services provided constitute a mere "license to use/Permissive use of" goods. This has been demonstrated in detail in the agreement.

1.40 In simple terms, the Appellant submits that if Microsoft Corporation USA were to transfer to Microsoft India the right to use the windows operating system source code and develop copies thereof for sale, on an exclusive basis, within the territory of India, the transactions would be regarded as a "transfer of right to use" goods in the hands of Microsoft Corporation, USA. On the other hand, if one Mr. ABC were to purchase a Windows Operating system license for its personal computer from Microsoft India, the transactions would be regarded as a mere license/permission to use goods.

***Extracts from the Franchisee Agreement:***

1.41 The Appellant wishes to highlight certain clauses from the enclosed sample Franchise Agreement demonstrating the fact that the services provided by it constitute a mere permissive use of the System and the SUBWAY® brand for operating Subway restaurant franchise, subject to several restrictions and conditions:

- a) The Appellant permits the franchise to access the System, including the Operations Manual subject to restrictions, terms and conditions of the Franchise Agreement. The

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Franchisee is granted a limited non exclusive sub license to use the SUBWAY trademark in connection with the operation of the restaurant [clause-3]

b) The franchisee is obliged to use or display trademarks on materials and stationary only as permitted by the Appellant. The franchisee is required to specify at a prominent place in the restaurant that it is an independent franchised operator of the restaurant and a licensed user of the SUBWAY trademarks. [clause 5(m)]

c) The Appellant has exclusive and unrestricted right to sell food products and beverages under the SUBWAY trademark at any location and the Franchise would not have any right to impose any conditions in this regard. [clause 11(m)]

d) The term of the Franchise Agreement has been specified to be twenty years with provisions for further renewal [clause-7]

e)The franchise has not been conferred any territorial rights and the appellant possesses unlimited rights to compete with the franchisee or license others to do so [clause-K]

f) Prior to the opening the restaurant, the franchise owner must complete a mandatory training program followed the training code of business conduct and pass a standardized test [clause 5(a)(ii)]


g)The location of the SUBWAY restaurant must be approved by the Appellant [clause5(a)(iii)]

h) The restaurant must be operated in accordance with Operation Manual provided by the Appellant and all quality control standards must be followed. The franchise must not conduct any business or sell any products from the restaurant which is not approved by the Appellant. Procurements of food, equipment, beverages and other products and services should be made in the manner as approved by the Appellant [clause 5(b)(i)]

i) The appellant is authorized to verify books, records and electronic data of the franchisee as part of a audit to verify the amount of sales. [clause 5(h)]

j) The franchisee is required to use the name and word SUBWAY only as specified by the Appellant. The franchise owner agrees not to contest the validity or ownership of the SUBWAY® trademark. The Franchise acknowledges that it will not acquire any ownership rights in the SUBWAY® trademark. [clause 5(o)]

k) Upon Termination of the Franchisee agreement, the franchisee is required to change the appearance of the restaurant, stop using the System and return the Operations Manual. The Franchisee owner is not allowed to engage directly or indirectly in any sandwich business within 5 Kilometers of the location of any SUBWAY restaurant [clause 8(g)].

  
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l) The franchise rights and privileges under the Franchise Agreement would return to the Appellant upon the franchise surrendering, abandoning or suffering revocation if its rights and privileges. [clause 11(b)]; and

m) The Appellant would enter into a primary lease with the landlord and a corresponding leave and license agreement with the franchise owner. In case the franchise owner is authorized to directly sign a lease with the landlord, the franchise owner would be required to get the lease terms approved from the Appellant and provide the Appellant with an assignable interest in the lease. [clause 5(a)(iv)]

1.42 The above referred clauses demonstrate that the license to use the System is not absolute and the appellant exercises considerable control over the franchisees use of the System and operation of the restaurant. The License granted is non exclusive, for a defined period of time and is subject to several restrictions and conditions required to be met by the franchisee.

1.43 The franchisee required to use the SUBWAY trademark only as directed by the appellant and is not authorized to sub license the same. The Appellant is authorized to terminate the agreement in case of the franchisee's failure to comply with the conditions. Upon termination the franchisees rights and privileges would return to the Appellant and the appearance of the restaurant must be changed so that it can no longer be identified as a SUBWAY restaurant.

1.44 The Franchise neither obtains general or effective control over the system nor does it acquire any rights in the System to the exclusion of the Appellant or other Licensors. The license in the System is not territorial in nature and the Appellant has unlimited rights to compete with the franchisee. The franchisee does not possess any property rights in the SYSTEM and is only conferred with a limited, representational right.

1.45 Based on the above it can be concluded that the Franchisee Agreement is nothing but a licensing agreement having the effect of granting permissive use of the System for operating a SUBWAY restaurant franchise.

## **2. QUESTION(S) ON WHICH ADVANCE RULING WAS REQUIRED:**

1. Whether the licensing services provided by the Appellant under the Franchise Agreement, for which a periodic royalty is charged, are correctly classifiable under:

- i. Service Code 997336, which covers licensing services for the right to use trademarks and franchises, and liable to GST at the Rate of 12%.
- ii. Service Code 997339 which covers licensing services for the right to use other intellectual property products and other resources nowhere else classified, and liable to GST at the rate 12%.



2. If the answer to the Question No. 1 above is in the Negative i.e. if the Appellants services are not classifiable under services codes 997336 or 997339 both, the Appellants desires to understand:
- Whether its services are correctly classifiable under service code 998396, which covers trademarks and franchises and liable to GST at the rate of 18%; or
  - If not, then the services code under which its services are correctly classifiable and the corresponding GST rate.

**3. ADVANCE RULING AUTHORITY PASSED ORDER ON ABOVE QUESTION AS UNDER:**

We have gone through the records of the case and considered the submissions made by the Appellant at the time of virtual hearing. The matter was examined in detail keeping in view the provisions of GST, we rule that Franchisee Agreement from the Franchisee for the right to use its trademark, brand name and proprietary Knowledge (Intellectual Property) fall under Chapter Heading 9983 as Other Professional, Technical and Business Services and service code (Tariff)-998396 Trademarks and franchises, attracting GST @18%.

**4. PRAYER OF 'APPELLANT':**

- Modify the impugned advance ruling passed by the AAR and hold that the Licensing services provided by the Appellant under agreement with Franchisee for which a periodic royalty is charged, are correctly classifiable either under service code 997336 (entry 1) or 997339 (entry 2) and are accordingly liable to GST @ 12%.
- Hold that given the nature of MLA & TLA between the Appellant and Subway IP LLC, USA & Subway International BV, Netherland, the doctrine of *nemo dat quod non habet* is squarely applicable to the present case.
- Hold that given the pith and substance of the Trade mark, MLA and corresponding sub-license agreement with franchisees entered by the Appellant, the decision of Gujarat AAR in RE; M/s Tea Post Pvt. Ltd., 2001(1)TM1424-AAR I not applicable in the facts and circumstances of the present case
- Grant a personal hearing through video conferencing mode in view of COVID pandemic; and
- Pass any such further or other order(s) as may be deemed fit and proper in facts and circumstances of the case.

**5. GROUNDS OF APPEAL:**

- A. SEVERAL SUBMISSIONS HAVE NOT BEEN CONSIDERED BY AAR; THE RULING HAS BEEN PASSED WITHOUT ANY INDEPENDENT APPLICATION OF MIND AND THIS RENDERS THE ORDER A NONSPEAKING ORDER

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- 5.1 It is submitted that the Impugned Ruling dated 08.12.2021 passed by the Hon'ble AAR is a non-speaking order and has hence been passed in violation of the principles of natural justice.
- 5.2 It is submitted that the Written Submissions filed by the Appellant were ignored by the AAR, while some of the submissions are reproduced in the Ruling, there is no finding given to that effect in the impugned order. To this extent, the impugned order is violating of natural justice being non-speaking and is liable to be set aside on this ground alone.
- 5.3 The AAR has conveniently ignored critical terms of the Franchise Agreement and the Master License Agreement to bring out the true nature of the transaction the Appellant is involved in. The Appellant submits that AAR has summarily rejected the submissions made by it without giving any independent findings. That the impugned RULING does not discuss the correct factual position, legal position or judicial decisions relied upon by the Appellant in its submission. Therefore, the impugned order passed by AAR is non-speaking.
- 5.4 The Appellant submits that the Impugned Ruling has been passed by the Hon'ble AAR without providing adequate reasons/justifications for holding that the Appellant has made a 'Franchise Agreement' and not the 'License Agreement', and that the services in question cannot be said to be "Licensing Services". It is submitted that elaborate submissions have been made by the Appellant in its application which has been entirely neglected.
- 5.5 Reliance in this regard is placed on the decision of Hon'ble Supreme Court in case of *Kranti Associates Pvt Ltd vs. Masood Ahmed Khan* [2011 (273) ELT 345 (SC)], wherein the Hon'ble Supreme Court, relying several landmark decisions relating to the principles of natural justice, laid down comprehensive guidelines as follows:
- "51. Summarizing the above discussion, this Court holds*
- a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
  - b) A quasi-judicial authority must record reasons in support of its conclusions.*
  - c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
  - d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
  - e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.*
  - f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
  - g) Reasons facilitate the process of judicial review by superior Courts.*
  - h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions on relevant facts.*



*This is virtually the Life blood of judicial decision making justifying the principle that reason is the soul of justice.*

*i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*

*j) Insistence on reason is a requirement for both judicial accountability and transparency.*

*k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*

*l) Reasons in support of decisions must be cogent, clear and succinct. A pretense of reasons or rubber-stamp reasons is not to be equated with valid decision-making process.*

*m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny."*

5.6 Therefore, the AAR ought to have recorded reasons and relevant provisions for holding as to how licensing services received by the Appellant from SIBV under the MLA and TLA will be taxable at 18% under Entry 17(ii) and not at 12% under Entry 17(iii) without sanction of the GST Council as mandated under Article 279A of the Constitution. The AAR has merely proceeded mechanically and denied the Appellant's contention without recording any reasons. On this aspect, reliance in this regard is also placed upon the following judgments:

**a. State of Orissa vs. Dhaniram Luhar [(2004) 5 SCC 568]**

*"In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974 ICR 120) (NIRC) it was observed: "Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right of reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made,' in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."*



*"...(b) A quasi-judicial authority must record reasons in support of its conclusions.*

*(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*

*(d) Recording of reasons also operates as a valid restraint on and possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*

*(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.....*

*(I) Reasons in support of decisions must be cogent, clear and succinct. A pretense of reasons or 'rubber-stamp reasons is not to be equated with a valid decision-making process....*

*(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process."*

5.7 It has been clearly established in the above decisions that a quasi-judicial order should contain proper reasons and the absence of the same is in gross violation of the principles of natural justice. The action of the Hon'ble AAR in making such classification of the Appellant without adducing any reason/ relying upon any provisions for the same is grossly in violation of the principles of natural justice.

5.8 Hence, it is submitted in this regard that impugned ruling is non-speaking and arbitrary in its very essence and shall be set aside to the extent it is against the Appellant on this count alone.

**THE IMPUGNED RULING HAS BEEN PASSED WITHOUT AN ADEQUATE OPPORTUNITY OF BEING HEARD PROVIDED TO THE APPELLANT AND IS IN GROSS VIOLATION OF THE PRINCIPLES OF NATURAL JUSTICE.**

5.9 The Appellant submits that the Appellant was not provided with the adequate opportunity of being heard, as stated in the Impugned Ruling itself. Further, the submissions of the Appellant were blatantly ignored by the Hon'ble AAR, and the Impugned Ruling has been passed without paying any heed to the Appellant's submissions. It is submitted that this action is in gross violation of the principles of natural justice and the Impugned Ruling should be set aside on this ground alone.

5.10 As per Section 98(4) of the CGST Act, an order for Advance Ruling can be passed only after concluding hearing on admissibility and merits of the Application and after giving due and fair opportunity to the Appellant to address any adverse



apprehensions of the Authority. Conduct of AAR was heavily prejudiced against the Appellant and stands against the principle of natural justice. The concerned officer has not only acted in discretion but also took away the right of the Appellant to make an adequate representation to establish his case in front of the authorities.

5.11 The Appellant submits that despite the requisite of a report, the concerned officer did not deem fit to submit the same and therefore, the Appellant's right to make a complete representation was done away with. Further, post such submission made by the concerned officer, the Appellant was not given any chance of being heard and the Ruling was passed in gross violation of the principles of natural justice.

5.12 The Appellant submits that during the admission hearing conducted by AAR on 02.11.2021, the Appellant was not given an opportunity to represent its submission on merits, on the basis that an investigation proceeding is pending against the Appellant. After some argument on admission, AAR informed the Appellant that it will verify the status of the investigation and grant another opportunity of hearing to the Appellant. The Appellant made repeated reminders to the AAR, however, no hearing was granted in respect of by the AAR. The Appellant directly received the final order against the AAR dated 09.09.2021 came to be passed without hearing the Appellant, in terms of Section 98(4) of the CGST Act on 08.12.2021 and was communicated vide email dated 13.12.2021, 4 days after due date of passing the order was over.

5.13 In support of adherence of the principles of natural justice in affording the opportunity of personal hearing, the Appellant relies on the following judgments:

- (1) Swadeshi Cotton Mills v. Union of India [1981(1) SCC 664];
- (2) JT (India) Exports vs. UOI [2002(144) ELT 288 (Del)];
- (3) Alfred Berg & Co.(1)(P) Ltd. vs. Cestat, Chennai [2011(273) ELT 373 (Mad)];
- (4) Automotive Tyre Manufacturers Association vs. Designated Authority [2011(263) ELT 481(SC)];
- (5) Khaitan Chemicals & Fertilizers Ltd. vs. UOI [2013(292) ELT 44(Bom)];
- (6) Tinsplate Co. of India Ltd. vs. UOI [2013(288) ELT 59 (Jhar)];
- (7) Manohar Vs. State of Maharashtra [2013(295) ELT 358 (SC)];
- (8) Reema Gases (P) Ltd. vs. Commissioner [2014(309) ELT A50 (Cap)];
- (9) Kantilal B. Mobile vs. UOI [2014(306) ELT 51 (Bom)];
- (10) Baboo Ram Hari Chand vs. UOI [2014(304) ELT 371 (Guj)];
- (11) Logic Transware India Pvt. Ltd. vs. CC. [2014(302) ELT 228(Del)];
- (12) Adhunik Power Transmission Ltd. vs. UOI [2015(325) ELT 865 (Jhar)];
- (14) CC, Bangalore vs. Fly Jac Logistics Pvt. Ltd. [2015(323) ELT 730 (Kar)];
- (15) Shrushti Plastics Pvt. Ltd. vs. CCE, Puducherry [2015(323) ELT 515(Mad)];
- (16) Confidence Petroleum India Ltd. vs. ADDL. C.C., C.E. & S.T., Coimbatore [2015(322) ELT 237 (Mad)];
- (17) General Mills India Pvt. Ltd. vs. UOI [2015(322) ELT 95(Bom)];

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- (18) Deputy Commissioner of Central Excise, Chennai vs. Dorcas Market Makers Pvt. Ltd., [2015(321) ELT 45(Mad.)];
- (19) ,ISL Lifestyle Ltd. vs. Union of India (2015(326) ELT 265(P&H));
- (20) Panoli Intermediate(India) Pvt. Ltd. vs. Union of India [2015(326)ELT532(Guj)];
- (21) Data Field India Ltd., vs. Dy. Commissioner of Customs (EOU), Chennai [2016(331) ELT 557 (Mad)]I: and
- (22) Electronics Corporation of India Ltd. vs. U01 [2018-TIOL-484- HC-AP-CX-L13].

5.14 The Appellant thus submits, that such action of the Hon'ble AAR of not providing an opportunity of being heard and providing a ruling without providing the chance of adequate representation to the Appellant is in gross violation of principles of natural justice and should be set aside on this count alone.

**THE ADVANCE RULING AUTHORITY FAILED TO FOLLOW THE STATUTORY MANDATE PROVIDED UNDER SECTION 98 OF THE CGST ACT**

- 5.15 It is submitted that when a statute explicitly prescribes for specific time limits through its provisions, the authorities is bound to act in accordance with the same and cannot delay the process as the provision is mandatory in nature.
- 5.16 The AAR has subverted the procedure laid down under Section 98 of the CGST Act issued a copy of the order manually on 13.12.2021, after due date of passing the order was over. Further, AAR failed to upload the GST Portal thereby leaving the Appellant incapacitated to challenge the order in any manner, In Appeal.
- 5.17 Mandatory time limit for issuing a ruling in 90 days from date of filing the ARA. Admission hearing for the AAR was conducted on 02.11.2021. Thereafter, no further hearing was granted despite repeated reminders filed by the Appellant.
- 5.18 It is submitted that the procedure to be adopted by the AAR Authorities is laid down in Section 98 of the CGST Act, which provides:

*"98. (1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the concerned officer and, if necessary, call upon him to, furnish the relevant records:*

*Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the said concerned officer.*

***(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:***

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

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the concerned officer.

(4) Where an application is admitted under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority and after providing an opportunity of being heard to the applicant or his authorised representative as well as to the concerned officer or his authorised representative, pronounce its advance ruling on the question specified in the application.

(5) Where the members of the Authority differ on any question on which the advance ruling is sought, they shall state the point or points on which they differ and make a reference to the Appellate Authority hearing and decision on such question.

**(6) The Authority shall pronounce its advance ruling in writing within ninety days from the date of receipt of application.**

(7) A copy of the advance ruling pronounced by the Authority duly signed by the members and certified in such manner as may be prescribed shall be sent to the applicant, the concerned officer and the jurisdictional officer after such pronouncement. (Emphasis supplied)

5.19 A bare perusal of Section 98(2) and its proviso, as reproduced herein above, makes it clear that the AAR is required to firstly issue a hearing notice and admit or reject the Application filed for seeking advance ruling. The AAR Authority is required to provide an opportunity of hearing to the respective Appellant without which no Application can be rejected. Further, the AAR in case of rejecting the Application is required to provide a reasoned order.

5.20 More importantly, Section 98(6) of the CGST Act provides that the Authority is required to pass its ruling within ninety days from the date of receipt of Application. It is submitted that the word "shall" used in Section 98(6) Act strengthens the mandatory nature of the provision prescribing time limit within which the AAR is required to perform its duty. Further, the Apex Court has held in various judgements that tax statutes are to be strictly construed [Refer: **Rajasthan Ru/va Sahakari Spinning & Ginning Mills Federation Ltd. v. Deputy CIT, Jaipur, (2014) 11 SCC 672; State Bank of Travancore v. Commissioner of Income Tax, (1986) 2 SCC 11; Commissioner of Customs, (Import) Mumbai vs Dilip Kumar And Company, (2018) 9 SCC**]. Therefore, the time limit prescribed in the aforesaid section is mandatory in nature which should be duly adhered by the ARA.

5.21 It is further submitted that the above explained approach of the AAR is against a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it is to be done in that manner and in no other manner [Refer: **Nazir Ahmad v. King Emperor, AIR 1936 PC 253; Rao**



*Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1954 SC 322; State of U. P. v. Singhara Singh, AIR 1964 SC 358 and Chandra Kishore Jha Mahavir Prasad, [1999] 7 JT 256 (SC)]*

5.22 The AAR has in grave non-compliance of the procedure laid down in section 98, it is submitted that firstly, no opportunity of hearing was granted to the Appellant to present its case and facts; the Impugned Ruling was received beyond the period of 90 days i.e. on 13.12.2021; till date the AAR has failed to upload the Impugned Ruling on GST Portal; and the Impugned Ruling has been passed neglecting the submissions of the Appellant and is in non-speaking in nature.

**GROSS FAILURE OF THE MACHINERY OF ADVANCE RULING AUTHORITY IS ATTRIBUTED TO ABSENCE OF A JUDICIAL MEMBER:**

5.23 In absence of a judicial member, the constitution of Authority for Advance Rulings, (Respondent no. 2) is unconstitutional.

5.24 In support of this contention, the Petitioners rely on the judgment of the Hon'ble Supreme Court in *Columbia Sportswear Company vs. Director of Income Tax, Bangalore*, reported at (2012) 11 SCC 224, wherein it was held that the Authority for Advance Ruling constituted under the provisions of Income Tax Act, 1962 is a 'tribunal' within the meaning of Article 136/227, as it is exercising judicial powers. In terms of the test laid by the Hon'ble Supreme Court in *Columbia Sportswear Co. (supra)*, the Respondent No. 2 is also a Tribunal as it is determining the rights and liabilities of various stakeholders.

5.25 It is submitted that appointment of a judicial member is a *sin qua non* for any authority which is performing judicial functions of determining rights and liabilities of a person. To the extent an authority undertakes such functions, it is acting in the capacity of a 'court' and therefore it becomes imperative to appoint a judicial member with expertise and experience in dealing with legal and interpretational issues. Reliance is placed on the judgments of the Hon'ble Supreme Court in ***Madras Bar Association vs. Union of India, reported at (2015) 8 SCC 583, and Madras Bar Association vs. Union of India, reported at 2010 (11) SCC 1 and L. Chandra Kumar vs Union of India and Others, reported at 1997 (3) SCC 261.***

5.26 It is thus submitted that the constitution of Ld. Authority is against the judgment of the Hon'ble Supreme Court as all members appointed are technical members.

5.27 Constitution of Ld. Authority is also against the judgment of the Hon'ble Supreme Court on the count that the administrative support is under the Ministry of Finance and not under the Ministry of law and justice. Further, this is in violation of Article 50 of the Constitution which requires State to separate judiciary from the executive in the public services of the State.



5.28 Appointment of a judicial member to create and maintain the balance in functioning of Ld. Authority is necessary. In absence of any judicial member, the constitution of Ld. Authority is defective. Consequently, the impugned order passed by the Ld. Authority is unconstitutional and it liable to be quashed.

#### **APPELLANT'S INTERPRETATION OF LAW AND FACTS:**

##### **Scope of service code 997336, 997339 and 998396**

5.29 It is well settled that intellectual property rights are considered as "goods" for the purpose of tax legislations. Reliance in this regard is placed on the decision of the Supreme Court in **Vikas Sales Corporation vs. Commissioner of Commercial Taxes, [1996] 102 STC 106 (SC)** and **Tata Consultancy Services vs. State of Andhra Pradesh, [2004] 137 STC 620 (SC)**.

5.30 However, it is equally well settled that temporary transfer or permitting the use of intellectual property rights is a supply of "services". In the context of GST laws, reference in this regard is made to Schedule II of the CGST Act, which deems the following transactions to be supply of services:

- (a) Any transfer of right in goods without the transfer of title thereof [para 1(b)];
- (b) Temporary transfer or permitting the use or enjoyment of any intellectual property right [para 5(c)];
- (c) Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration [para 5(f)].

5.31 It is the case of the Appellant that:

- transaction (b) above i.e. permitting the use or enjoyment of intellectual property right (in other words, licensing the right to use intellectual property right, being the Appellant's services under the Franchise Agreement) is covered under service codes 997336 (Entry 1)/997339 (Entry 2); and
- transactions (a) and (e) above, i.e. transfer of right to use goods or in goods, in the context of trademarks and franchises, are covered under service code 998396 (Entry 3).
- transactions (a) and (e) above, i.e. transfer of right to use goods or in goods, in the context of trademarks and franchises, are covered under service code 998396 (Entry 3).

Re: Service Code 997336 (Entry 1)/997339 (Entry 2)

5.32 The Scheme of Classification of Services adopted for the purposes of Indian GST Law is a modified version of the United Nations Central Product Classification (UN CPC) and the explanatory Notes for the said scheme are based on the Explanatory Notes to

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the UNCPC (refer Para 1-2 of the preface of the Explanatory Notes). The relevant extracts of the Explanatory Notes are reproduced below

Explanatory Note to Group 99733

*"This group includes permitting, granting or otherwise authorizing the use of intellectual property products and similar products.*

Note: This covers rights to exploit these products, such as licensing to third parties; reproducing and publishing software, books, etc.; using patented designs in production processes to produce new goods and so on. Limited end user licenses, which are sold as part of a product (e.g., packaged software, books) are not included here.

(...)"

Explanatory Note to Group 997336 (Entry 1)

*"This service code includes licensing services for the right to use trademarks and to operate franchises".*

Explanatory Note to Group 997339: (Entry 2)

*"This service code includes licensing services for the right to use other kinds of intellectual property products, such as architectural and engineering plans, industrial designs etc."*

5.33 The term "Trade mark" has been defined under section 2(zb) of the Trade Marks Act, 1999 as follows:

*".... "trademark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and—*

*in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and*

*in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark."*

5.34 The mark SUBWAY and other mark have been duly registered in India under the Trade Marks Act, 1999. Accordingly, these marks fall within the meaning of the term "Trademark" as referred in the scheme of classification of services for the purpose of Indian GST Law. Sample certificates evidencing registration of the mark name SUBWAY in India under the Trade Marks Act, 1999 were provided.



5.35 The term "license" means "permitting someone to do something". Accordingly, the services covered under the said codes involve a mere permission to use certain Intellectual Property products with certain conditions and restrictions. The said service codes contemplate a mere permissive use of the underlying Intellectual Property products and in that sense, confer a very limited and conditional right.

5.36 This is further substantiated by the fact that the explanatory note to Group 99733 specifically states that the group includes permitting, granting or otherwise authorizing the use of intellectual property products, which covers licensing to third parties.

5.37 By way of the Franchise Agreement, the Appellant grants to the franchisees the license to use/permissive use of the System (including the brand name, trademarks, proprietary and confidential information) for setting up and operating a SUBWAY restaurant franchise. The said license or permission is a very limited right and subject to various conditions and restrictions. Accordingly, the Appellant's services are classifiable under service code 997336 (Entry no.1)/997339 (Entry No.2).

*Re: Service Code 998396 (Entry 3)*

5.38 The relevant extract of the explanatory Notes are reproduced below

Explanatory Notes to Service Code 998396 (Entry 3)

*" This service code includes original trademarks and franchises, i.e. the legally registered ownership of a certain brand name.*

*Note: These products are produced on own account with the intent of deriving benefits from allowing others to use these trademarks or franchises.*

*This service code does not include:*

*-licensing services for the right to use trademarks and franchises, :- 99733*

*(...)"*

5.39 At the outset, the explanatory Note to Service Code 998396 expressly states that licensing services are not included within the said code. Since the services provided by the Appellant to the franchisees constitute a license or permission to use the system for operating a SUBWAY restaurant (franchise), they are automatically excluded from the ambit of the said service code.

5.40 Accordingly, the services provided by the Appellant to the franchises are not covered under the ambit of the said service code.

*Re: Nemo dat quod non habet*

5.41 In any case, as per the MLA and TLA. Subway International RV., Netherlands and Subway IP LLC, USA have granted the Appellant **only the right to license**



or sublicense the System and the 'SUBWAY' trademark to franchisees in the territory. The Appellant has not been authorised to transfer the right to use the System and the 'SUBWAY' trademark to franchisees as per the MLA or TLA. It is well-settled that a person cannot transfer a better title than he himself has (as enshrined in the Latin maxim *nemo dat quod non habet*). Accordingly, the question of the Appellant transferring such right to use to franchisees does not arise.

***Distinction between "transfer of right to use goods" and 'license to use/ permissive use"***

*Re: Transfer of right to use goods*

5.42 The meaning and scope of the expression "transfer of right to use goods" has been expounded in several landmark judgments such as *20<sup>th</sup> Century Finance Corporation Limited v State of Maharashtra*, (2000) 6 SCC 12; *Rashtriya Ispat Nigam Limited v Commercial Tax Officer*, (1990) 77 STC 182; *Aggarwal Brothers v State of Haryana* (1999) 9 SCC 182; *State of Andhra Pradesh v Rashtriya Ispat Nigam Limited*, (2002) 3 SCC 314; *Bharat Sanchar Nigam Limited v Union of India*, 2006 (2) STR 161 (SC), *G.S. Lamba & Sons v State of Andhra Pradesh* (2011) 43 VST 323 (AP HC), *McDonalds India Private Limited v. Commissioner of Trade and Taxes, New Delhi*, 2017 (5) TMI 999 — Delhi HC; and finally in the Applicant's own case in *Subway Systems India Private Limited v Union of India & Ors*, 2016 (8) TMI 717 — Bombay HC.

5.43 Based on the law laid down in the aforesaid precedents, the general features of the expression "transfer of right to use" are given below:

- a) Transfer should not be of the property (ownership) in goods, but of the right to use property in goods;
- b) The transferor must be divested of the right or goods and the same should be vested in the transferee, to the exclusion of all others;
- c) Effective or general control over the goods must pass to the transferee. Effective or general control does not always mean physical control and even if the manner, method, modalities and the time of the use of goods is decided by the transferee, it would be under the effective or general control over the goods;
- d) The approvals, concessions, licenses and permits in relation to the goods would also be available to the transferee, even if such licenses or permits are in the name of the transferor of the goods; and
- e) The transferee should have a legal right to use the goods and consequently all legal consequences should fall upon the transferee.

5.44 The Appellant states that since the Franchisee Agreements entered into by it do not possess the aforesaid features, the services provided do not constitute a "transfer of right to use goods". This has been demonstrated in detail in the following section by referring to specific clauses in the enclosed agreement.

*Re: License to use / permissive use*

5.45 At the outset, the Appellant states that the Hon'ble Bombay and Delhi High Courts, in the Appellant's own case have held that the Franchisee Agreement



entered into by the Appellant merely granted permissive use of defined intangible rights to the franchisees and the agreement, in substance, was nothing more than a mere license.

5.46 Based on the Law judicially laid down in this regard, the general features of the expression "license to use /permissive use" are given below:

- a) License must be granted merely to access or use the rights or goods subject to conditions laid down by the licensor;
- b) At the end of the period for which the license is granted, the rights or goods must be returned to the licensor;
- c) The licensor must have the right to terminate and repossess and deny further access to that intangible;
- d) The licensee must not be able to sub-license the permission it obtains under the agreement; and
- e) The transfer must be on a non-exclusive basis.

5.47 Based on clauses 3, 5(m), 11(m), 5(o), 8(g), 11(b) and several others of the Franchise Agreement, the Appellant submits that since the Franchise Agreements entered into by it possess the aforesaid features, the services provided constitute a mere "license to use/permissive use of goods". This has been demonstrated in detail in the following section by referring to specific clauses in the enclosed agreement.

5.48 In simple terms, the Appellant submits that if Microsoft Corporation, USA were to transfer to Microsoft India the right to use the Windows' operating system source code and develop copies thereof for sale, on an exclusive basis, within the territory of India, the transaction would be regarded as a "transfer of right to use" goods in the hands of Microsoft Corporation, USA. On the other hand, if one Mr. ABC were to purchase a Windows® operating system license for its personal computer from Microsoft India, the transaction would be regarded as a mere license / permission to use goods.

#### ***Extracts from the Franchise Agreement***

5.49 The Appellant wishes to highlight certain clauses from the enclosed sample Franchise Agreement demonstrating the fact that the services provided by it constitute a mere permissive use of the System and the SUBWAY® brand for operating a SUBWAY restaurant franchise, subject to several restrictions and conditions:

- a) The Appellant permits the franchisee to access the System, including the Operations Manual, subject to restrictions, terms and conditions of the Franchise Agreement. The franchisee is granted a limited, non-exclusive sub-license to use the SUBWAY trademark in connection with the operation of the restaurant [clause 3];
- b) The franchisee is obliged to use or display trademarks on materials and stationery only as permitted by the Appellant. The franchisee is required to specify at a prominent place in the restaurant that it is *an independent franchised operator of the restaurant and a licensed user of the SUBWAY' trademarks* [clause 5(m)];

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- c) The Appellant has exclusive and unrestricted right to sell food products and beverages under the SUBWAY® trademark at any location and the Franchisee would not have any right to impose any conditions in this regard [clause 11(m)].
- d) The term of the Franchise Agreement has been specified to be twenty years, with provisions for further renewal [clause 7];
- e) The franchisee has not been conferred any territorial rights and the Appellant possesses unlimited rights to compete with the franchisee or license others to do so [clause K];
- f) Prior to opening the restaurant, the franchisee owner must complete a mandatory training program, follow the Training Code of Business Conduct and pass a standardized test [clause 5(a)(ii)];
- g) The location of the SUBWAY restaurant must be approved by the Appellant [clause 5(a)(iii)];
- h) The restaurant must be operated in accordance with the Operations Manual provided by the Appellant and all quality control standards must be followed. The franchisee must not conduct any business or sell any products from the restaurant, which are not approved by the Appellant. Procurements of food, equipment, beverages and other products and services should be made in the manner as approved by the Appellant [clause 5(b)(i)];
- i) The Appellant is authorised to verify books, records and electronic data of the franchisee as part of an audit to verify the amount of sales [clause 5(h)];
- j) The franchisee is required to use the name and word SUBWAY only as specified by the Appellant. The franchise owner agrees not to contest the validity or ownership of the SUBWAY® trademark. The franchisee acknowledges that it will not acquire any ownership rights in the SUBWAY® trademark [clause 5(0)];
- k) Upon termination of the Franchise Agreement, the franchisee is required to change the appearance of the restaurant, stop using the System and return the Operations Manual. The franchisee owner is not allowed to engage directly or indirectly in any sandwich business within 5 kilometers of the location of any SUBWAY restaurant [clause 8(g)];
- l) The franchisee's rights and privileges under the Franchise Agreement would return to the Appellant upon the franchisee surrendering, abandoning or suffering revocation if its rights and privileges [clause 11(b) and
- m) The Appellant would enter into a primary lease with the landlord and a corresponding leave and license agreement with the franchise owner. In case the franchise owner is authorised to directly sign a lease with the landlord, the franchise owner would be required to get the lease terms approved from the Appellant and provide the Appellant with an assignable interest in the lease [clause 5(a)(iv)];

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5.50 The above referred clauses demonstrate that the license to use the System is not absolute and the Appellant exercises considerable control over the franchisee's use of the System and operation of the restaurant. The license granted is non-exclusive, for a defined period of time and is subject to several restrictions and conditions required to be met by the franchisee.

5.51 The franchisee is required to use the SUBWAY<sup>®</sup> trademark only as directed by the Appellant and is not authorised to sub-license the same. The Appellant is authorised to terminate the Agreement in case of the franchisee's failure to comply with the conditions. Upon termination, the franchisee's rights and privileges would return to the Appellant and the appearance of the restaurant must be changed so that it can no longer be identified as a SUBWAY restaurant.

5.52 The franchisee neither obtains general or effective control over the System nor does it acquire any rights in the System to the exclusion of the Appellant or other licensors. The license in the System is not territorial in nature and the Appellant has unlimited rights to compete with the franchisee. The franchisee does not possess any property rights in the System and is only conferred with a limited, representational right.

5.53 Based on the above, it can be concluded that the Franchise Agreement is nothing but a licensing arrangement, having the effect of granting permissive use of the System for operating a SUBWAY restaurant franchise.

***Judgment of the Bombay and Delhi High Courts in the Appellant's own case:***

5.54 The Bombay High Court, in the Appellant's own case [Subway Systems India Private Limited v Union of India & Ors, 2016 (8) TMI 717-Bombay HC], has held that the Agreement entered into by the Appellant merely granted permissive use of defined intangible rights to the franchisees. The relevant extracts of the judgment are reproduced below:

*"69. We believe that Mr. Shroff is correct when he says that the agreement between Subway and its franchisees is not a sale, but is in fact a bare permission to use. It is, therefore, subject only to service tax. In our opinion, the fact that the agreement between Subway and its franchisee is limited to the precise period of time stipulated in the agreement is vital to Subway's case. At the end of the period of the agreement, or before in case there was any breach of its terms, the right of the franchisee to display the mark Subway and its trade dress, and all other permissions would also end...In Subway's case, there are set terms provided by the agreement which have to be followed. A breach of these would result in termination of the agreement. We believe that there is no passage of any kind of control or exclusivity to the franchisees. In fact, this agreement is a classic example of permissive use. It can be nothing else..."*



72...The so-called 'system' is controlled by Subway and it is exclusive to Subway. At the end of the franchise term, it cannot be used. Some (though not all) of the ingredients - breads, salad dressings and other 'key' items are to be sourced from Subway or Subway-authorized vendors and nowhere else. This gives Subway deep and pervasive control and dominion over the franchisee's daily operations, without, at the same time, ceding to the franchisee the slightest hint or latitude in what it may do with the permitted marks and technology...

73... Indeed, it seems to us clear that if we accept that a franchise agreement is, by definition, one that requires territorial exclusivity, then the Subway agreements are not franchise agreements at all, but purely licensing agreement.

74... What must be looked at is the real nature of the transaction and the actual intention of the parties. The agreement must be considered holistically, and effect must be given to the contracting parties' intentions. The label or description of the document is irrelevant. An agreement styled as a franchise might, on a proper examination, turn out to be nothing more than a mere license (as in Subway's case)...

...As discussed above, we find that Subway's franchise agreement grants to the franchisee nothing more than mere permissive use of defined intangible rights."

5.55 Further, the Delhi High Court, in the Appellant's own case [Subway Systems India Private Limited v. Government of NCT of Delhi & Ors., W.P. (C) 5340/2018] has also taken an identical view. In doing so, the High Court followed its previous decision dated 17 May 2017 in McDonalds India Private Limited v. Commissioner of Trade and Taxes, New Delhi, 2017 (5) TMI 999 - Delhi HC, which had held that the franchisee agreements entered into by the petitioners therein permitted a limited right to use the system of the petitioners to the franchisees and the intention therein was not to transfer the right to use goods.

5.56 The relevant extracts of the judgment delivered by the Delhi High Court in Subway Systems (supra) are reproduced below:

**"This Court is of the opinion that it would be appropriate to follow the judgment of 17.05.2017 because the issues are identical,** however, in the event the final judgment is in any way set aside, modified or clarified by the Supreme Court in the pending proceedings before it, that decision will be binding upon the parties... **It is pointed out on behalf of the petitioner that similar judgment was delivered by the Bombay High Court [Subway Systems India Private Limited vs. State of Maharashtra, W.P. (C) No.497/2015 decided] on 11.08.2016.**

Writ petition is accordingly disposed of in terms of the judgment dated 17.05.2017 in Writ Petition (C) No. 4453/2013 and Writ Petition (C) No. 3404/2015. "



5.57 The relevant extracts of the judgment delivered in McDonalds India (supra) are reproduced below:

*"46. For a transfer of the right to use goods to be effective, such transfer of right should be one that the transferee can exercise in exclusion of others; which is not the case in the present appeals and petitions, as the franchise agreement only grants a non-exclusive right, retaining the franchisor's right to transfer the composite bunch of services to other parties, apart from it retaining ownership to the same. The ownership in the trade mark, logo, service marks, and brand name is solely vested in Appellant and the Petitioners and has not been transferred; as is clearly manifested in the various clauses of the franchise agreements. The Appellant and the Petitioners grant a non-exclusive license to the franchisees, which can be revoked upon non-compliance of the terms and conditions as stipulated in their franchise arrangement. Clearly, this does not amount to a transfer of the right to use goods.*

*47...In the case of the franchise agreements involved in the present case, none of the franchisees or in the case of the trade mark licensee(or in GSK's petition the trade mark licensee), are empowered to safeguard violation of the mark, through enforcement mechanisms, such as filing suits for injunction or damages. This underlines that the most important attribute of ownership or transfer (even in the most evanescent sense) is absent. Furthermore, by reason of Section 48 of the Trade Marks Act, the utilization of the mark by the franchisee/licensee would accrue to the trade mark owner. Therefore, the reputation or brand building which accrues on account of increased volume of business because of the franchise/licensing arrangement, continues to be with the owner. No brand building or brand benefit accrues or arises to the franchisee/licensee.*

*48. From the above analysis, what irrefutably follows is that the franchise agreements in the three cases (and trade mark licensing agreement in GSK's petition) permit a limited right to use the composite system of the respective businesses of the Appellant and the Petitioners to the franchisors/licensee, and the dominant intention, as well as the specific provisions arising from the franchise agreements are not of a transfer of the right to use goods."*

5.58 The Bombay High Court has clearly held that the Franchise Agreement entered into by the Appellant is essentially a license since it involves a mere permission to use of defined intellectual property rights. Similarly, the Delhi High Court, by following the decision in McDonalds India (supra) and recording an observation that the facts in the Appellant's case were identical, has held that the relevant agreements merely involved grant of a non-exclusive conditional right to use the system and no transfer of right to use goods had taken place.

5.59 Based on this, it follows that the Franchise Agreement entered into by the Appellant contemplate a mere license to use the System (comprising of certain



intellectual property products) and operate a SUBWAY restaurant franchise without involving transfer of right to use any goods.

5.60 It is well-settled that when one entry/code is specific and the other is general/residuary, the concerned product or service should be classified in the specific entry/code. Reliance in this regard is placed on the decisions of the Supreme Court in *Moorco (India) Ltd., Madras v. Collector of Customs, Madras*, 1994 (74) ELT 5 (S.C.) and *Speedway Rubber Co. v. Commissioner, Central Excise, Chandigarh and Ors*, 2002 (143) ELT 8 (S.C.).

5.61 Further, a commodity cannot be classified in a residuary entry, in the presence of a specific entry. A residuary entry can be taken refuge of only in the absence of a specific entry; that is to say, the latter will always prevail over the former. Reliance in this regard is placed on the decision of the Supreme Court in *Commissioner of Central Excise v. M/s Wockhardt Life Sciences Ltd*, 2012 (3) TMI 40-SC.

5.62 Moreover, para 3 of the preface to the Explanatory Notes states that where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

5.63 Relying on the above, the Appellant submits that the services provided by it are correctly classifiable under service codes 997336 (Entry 1) / 997339 (Entry 2), being specific entries, instead of service code 998396 (Entry 3), which is a general / residuary' entry.

#### ***Contrary decision of the Gujarat Advance Ruling Authority***

5.64 The Appellant refers to a ruling issued by the Gujarat Advance Ruling Authority ("Gujarat AAR") in *Re: MIs Tea Post Private Limited*, 2021 (1) TMI 424 — AAR, Gujarat, wherein the authority laid down a test to determine whether an arrangement constitutes "licensing" or "franchising". Briefly, the Appellant in the said case had entered into a franchise agreement whereby the Appellant therein had granted its franchisees the right to use trademark, brand name and other proprietary knowledge, against a periodic royalty calculated as a percentage of the sales made by the franchisee. The question before the Gujarat AAR was whether the services would be classified under service code 997336 (Entry 1) or 998396 (Entry 3). The Gujarat AAR ruled that the services would be classified under service code 998396 (Entry 3).

*Re: Test laid down by the Gujarat AAR has no universal applicability*

5.65 The Appellant submits, at the outset, that the Gujarat AAR has not considered the fact that the service code 997336 (Entry 1) does not cover licensing services *simpliciter* but covers licensing services in the context of franchisees. The test laid



down by the Gujarat AAR compares "licensing" *simpliciter* and "franchising". The Appellant submits that the aforesaid test is not relevant to the present discussion, because the term "licensing" as per service code 997336 (Entry 1) needs to be understood as a "permission to use certain intellectual property rights to operate franchisees" and not a permission to generally use any goods or services.

5.66 Since the themes that form the subject matter of service codes 997336 (Entry 1)/997339 (Entry 2) and 998396 (Entry 3) *prima facie* overlap, a straitjacket test as laid down by the Gujarat AAR cannot be made applicable. Instead, a harmonious reconciliation of the services governed by the said codes should be attempted based on whether the given agreement contemplates transfer of right to use or a mere license to use.

5.67 The Appellant submits that certain important practical aspects apply equally to licensing and franchising arrangements and as such, the test laid down by the Gujarat AAR cannot be made applicable in every scenario. This has been demonstrated in a tabular form below:

Sr. NO.	Test laid down by the Gujarat AAR in para 14 of the ruling	Appellant's remarks
		General remark: The Gujarat AAR has failed to consider that service code 997336 (Entry 1) includes licensing services in the context of franchisees and not licensing services <i>simpliciter</i> .
1.	<i>Licensing refers to an arrangement between licensor and licensee where latter party would acquire the right to use products and goods where the ownership remains with the licensor. However, Franchising refers to an arrangement between franchiser and franchisee where the latter will enjoy the ownership of a business on behalf of the franchiser in lieu of a fee where the processes are closely controlled by franchisor. Therefore, it is generally seen that</i>	i) Ownership enjoyed by franchisee is not "on behalf of franchisor. Franchisees can be operated even without a profit-sharing arrangement i.e. without sharing ownership (for example, the Appellant's present case);  ii) Processes can be closely controlled in a licensing arrangement also (for example, the Appellant's

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	<p>licensing is for products and goods whereas the franchising model is used more in service providing industry</p>	<p>present case where the Franchisees are expected to meet minimum quality and safety standards);</p> <p>iii) Franchising also usually involves licensing of a right to use intellectual property (for example, the Appellant's present case).</p>
2.	<p>Franchising is an agreement between two parties where the, one party (henceforth referred as the franchisor), permits another party (henceforth referred as the franchisee) to use its brand name or business model for a fee in order to conduct the business as an independent branch of the franchisor. However, Licensing is an agreement between two parties where the, one party (henceforth referred to as the Licensor), sells another party (henceforth referred to as the Licensee) the rights to use its intellectual property or manufacture the licensor's products in exchange of royalty.</p>	<p>1) It appears that the Gujarat AAR has agreed that franchising and licensing can both involve permitting another use one's intellectual property:</p> <p>2) Licensing arrangements are not restricted to the manufacturing sector and are equally prevalent in the service sector (for example, the Appellant's present case).</p>
3.	<p>Licensing deals with Products &amp; Goods</p> <p>However, Franchising is mostly related to service businesses like food chains, Service Centres of automobiles, etc</p>	<p>i) Licensing arrangements are restricted to goods and are equally prevalent in the service sector;</p> <p>ii) Similarly, franchising arrangements are not restricted to service sector and are equally prevalent for goods (for example, the Appellant's present case).</p>
4.	<p>The licensee is governed by the licensor's terms of use as prescribed in the licensing agreement for the licensed product. Licensor, however, has no autonomy over the business of the licensor Franchisor exercises enormous control</p>	<p>There can be no general rule and the level of autonomy can differ on a case to-case basis.</p>

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	over the business of the franchisee in terms of quality of service provided, marketing & selling strategies, etc	
6.	Licensing is governed by a licensing agreement, which involves a one-time transfer of property or rights for a fee. There is no technical support or assistance provided by the licensor in most cases. While, Franchising is governed by an elaborate agreement specking the responsibilities & duties of both the parties involved. The franchisor assists in setting up the service provider with adequate skill & knowledge to emanate its brand to the customers	<p>i) Licensing agreement may provide for a periodic license fee as opposed to a one-time fee. Licensor may also agree to provide technical support of assistance to the licensee (for example, the Appellant's present case).</p> <p>ii) The features of franchisees enumerated here are also equally applicable for licensing arrangements in the context of franchises.</p>
8.	In franchising, complete training and support are provided by the franchisor to franchisee which is absent in licensing	Licensor may also agree to provide complete training and support to the licensee (for example, the Appellant's present case).
9.	The licensor has control on the use of intellectual property by the licensee but has no control over the licensee's business. However, the franchisor exerts considerable control over franchisee's business and process.	<p>i) The features of franchisees enumerated here are also equally applicable for licensing arrangements in the context of franchises;</p> <p>ii) Licensor may also exercise control over the licensee's business, by prescribing adherence to minimum quality and safety standards (for example, the Appellant's present case).</p> <p>iii) Franchisees are also licensed users of intellectual property rights of the franchise that they operate (for example, the Appellant's present case).</p>

5.68 The Appellant therefore submits that the text laid down by the Gujarat AAR should not be applied and preference should be given to the terms of the Franchise Agreement.

  
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Re: The ruling of the Gujarat AAR cannot be regarded as a precedent on contentions / grounds which have passed *sub-silentio*

5.69 Without prejudice to the above, it is submitted that the Gujarat AAR has not considered *inter alia*, the following contentions raised by the Appellant in this application:

- a) Distinction between a mere "license to use / permissive use" and "transfer of right to use";
- b) Existence of licensing services in franchisee models;
- c) Specific entries [service codes 997336 (Entry 1) / 997339 (Entry 2)] vs. General / residuary entry [service code 998396 (Entry 3)].

5.70 Accordingly, the decision of the Gujarat AAR cannot be regarded as a precedent on the aforesaid contentions / grounds which have passed *sub-silentio*. The principle of *sub-silentio* and its application in the present case is explained below.

5.71 In certain matters, more than one point of law may be involved in a case. If the Court has decided a case on only one point either because other points were not argued or because of inadvertence or conscious negligence, such other points are said to pass *sub-silentio* and the decision cannot be applied as a precedent on those other points. This principle is accepted by Courts when an earlier judgment on which reliance is sought to be placed had been passed without making a particular point of the matter in question in the judgment. The Appellant refers to the following authorities in support of the above:

- a) *Salmond on Jurisprudence, Twelfth Edition, by P F Fitzgerald at pages 153-154 (referred by the Hon'bk Supreme Court in Municipal Corpn. of Delhi v. Gurnam Maur [(1989) 1 SCC 101])*

*"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.*

*A good illustration is Gerard v. Worth of Paris, Ltd There, a discharged employee of a company, who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of the priority of the claimant's debt, and, on this argument being heard, the Court of Appeal granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal (I), the court held itself not bound by its previous decision. Sir Wilfrid Greene, MR., said that he could not help thinking that the point now raised had been deliberately passed*



*sub silentio by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed.*

*The rule that a precedent sub silentio is not authoritative goes back at least to 1661 (in), when counsel said: 'An hundred precedent sub silentio are not material'; and Twisden, J., agreed: 'Precedents sub silentio and without argument are of no moment'. This rule has ever since been followed."*

b) *Tika Ram v. State of U.P.* [(2009) 10 SCC 689]

*"104. We do not think that the law laid down in these cases would apply to the present situation. In all these cases, it has been basically held that a Supreme Court decision does not become a precedent unless a question is directly raised and considered therein, so also it does not become a law declared unless the question is actually decided upon. We need not take stock of all these cases and we indeed have no quarrel with the propositions settled therein."*

c) *Arnit Das v. State of Bihar* [(2000) 5 SCC 488]

*"20. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 14]. **That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined.**"*

d) *State of UP v. Jeet S. Bisht* [(2007) 6 SCC 586]

*"18. No doubt in the aforesaid decision various directions have been given by this Court but in our opinion that was done without any discussion as to whether such directions can validly be given by the Court at all. The decision therefore passed sub silentio."*

5.72 Relying on the above, the Appellant submits that the ruling of the Gujarat AAR cannot be considered to be a precedent or authority as regards those contentions / grounds which the Gujarat AAR has not analysed or provided any finding/observation on (as mentioned above). In any event, in terms of section 103 of the CGST Act, the ruling of the Gujarat AAR is binding only on the parties involved therein.

5.73 Till date of filing of the present appeal, copy of the order was not uploaded in the GST portal despite reminders from the Appellant. The Petitioner was not furnished with any certified copy of the Order passed by the Ld. Advance Ruling Authority.

5.74 It is submitted that the Hon'ble Supreme Court (in *Suo Motu Writ Petition (C) No. 3 of 2020*) vide order dated 10.01.2022 has ordered that the period from 15.03.2021 till

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28.02.2022 will be excluded from the period of limitation as may be prescribed under any general or specific laws in respect of all judicial and quasi-judicial proceedings. This judgment applies to all litigants in the country filing appeals in all quasi-judicial proceedings within the period of limitation prescribed under a general law of limitation or under any special law (both Central and/or State) due to outbreak of COVID-19 pandemic.

## **6. Record of Personal Hearing:**

6.1 Personal Hearing was held in the light of directions of Hon'ble High Court.

6.1.1 As per the records available, an enquiry was initiated by the DGGI-Gurugram Unit against the Appellant and DRC-01A bearing CBIC DIN 202307ADGEE000000ACA dated 17.07.2023 issued for Tax amount ₹ 499918567/- for the period July-2017 to March-2022 due to mis-classification of services provided and received, short payment of IGST on import of services under RCM and nonpayment of GST on account of not raising the invoices in respect of services provided to distinct entities without consideration for supply of Trademark/license fees. In reply to the DRC-01A, the Appellant submitted that the Liability is not acceptable because their submissions have not been considered and GST on the said transactions has already been discharged. As connected AAAR was pending on the issue and writ petition was coming for hearing on 03.07.2023, they requested for a virtual hearing on 09.07.2023. The Appellant, received letter bearing CBIC DIN 202308ADGEE000210645 dated 03.08.2023 for Personal Hearing before issuance of SCN on 16.08.2023.

6.1.2 The Appellant filed CWP No. 23895 of 2023 in the High Court of Punjab & Haryana for directions to dispose the Appeal against the advance ruling No. HR/ARL/02/2021-22 dated 08.12.2021 in time bound manner as the same is pending and it has been directed by the Hon'ble High Court vide Order dated 19.10.2023 to complete the proceedings within 6 weeks and that the notice of hearing be given in 10 days advance to the Appellant.

6.2 The Appellant was offered the opportunity of Personal Hearing on 27.10.2023 vide letter dated 20.10.2023 and the Appellant vide their e-Mail dated 27.10.2023 submitted that they have no objection for appearing on 27.10.2023 as per the directions of the Hon'ble Punjab & Haryana High Court's Order dated 19.10.2023.

6.4 Sh. Abhsihek A. Rastogi & Sh. Pratyushprava Saha, Advocates appeared on behalf of the 'Appellant' for personal hearing on 27.10.2023 and reiterated the written submissions made earlier. They also submitted the paper book of case laws relied by them in their favour during the hearing proceedings.

## **7. Discussions and Findings:**

7.1 We have gone through the records of the case and considered the submissions

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made by the Appellant in the grounds of appeal as well as at the time of personal hearing.

7.2 Before going into the merits of the case, it is noteworthy to mention that perusal of records of the case reveal that the pre-requisite of payment of fee for filing appeal as per Section 100 (3) read with Rule 106 (1) of CSGT Act, 2017 has not been fulfilled. The same are reproduced below for ready reference:

**Section 100 (3): Every appeal under this section shall be in such form, accompanied by such fee and verified in such manner as may be prescribed.**

**Rule 106 (1) An appeal against the advance ruling issued under sub-section (6) of section 98 shall be made by an applicant on the common portal in FORM GST ARA-02 and shall be accompanied by a fee of ten thousand rupees to be deposited in the manner specified in section 49.**


The corresponding Section 100 (3) and Rule 106 (1) of HGST Act, 2017 also have not been adhered to by the appellant.

7.3 After the concurrent reading of both the provisions, it transpires that the Appellant was mandated to deposit a total of ₹ 20,000/- as fee (₹ 10,000/- CGST and ₹ 10,000/- HGST) as a mandatory statutory precondition for filing appeal against the order of the Authority for Advance Ruling, Haryana. However, it is found that vide challan No. 22010600033348 dated 11-01-2022, the Appellant has paid only ₹ 10,000/- as tax (₹ 5000/- CGST and ₹ 5000/- as HGST), not the required fee. Since the appeal of the Appellant is incomplete for want of deposition of requisite fee (which is to be deposited in the manner specified in Section 49), the appeal of the Appellant is not admitted.

### ORDER

In view of the above discussions and findings, we are of the view that the application of the appellant, being incomplete for want of deposition of requisite fee as mandated under the GST law, deserves to be rejected. Therefore, the appeal filed by M/s. Subway Systems India Private Limited (Now Eversub India Pvt. Ltd.,) Gurugram-122002, Haryana, is not admitted.

The appeal filed by M/s Subway Systems India Private Limited (Now Eversub India Pvt. Ltd.,) Gurugram-122002, Haryana, is disposed in above terms.

  
(Upender Gupta), IRS (C&IT)

Member  
Chief Commissioner  
Central Goods and Service Tax Zone  
Panchkula

Place: -Panchkula

उपेंद्र गुप्ता  
Upender Gupta  
मुख्य आयुक्त  
Chief Commissioner  
केन्द्रीय वस्तु और सेवा कर एवं  
केन्द्रीय उत्पाद शुल्क क्षेत्र पंचकुला  
CGST & CX Zone Panchkula  
जीएसटी भवन, सेक्टर - 25, पंचकुला  
GST Bhawan, Sector-25, Panchkula

  
(Ashok Kumar Meena), IAS

Member  
Commissioner  
Excise & Taxation Department  
Haryana





