

**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/2021-22/04**

**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.

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**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	06AAGCS5808M1ZZ
Advance Ruling Order against which appeal is filed	HR/ARL/07/2021-22 dated 10.01.2022 (received by the 'Appellant' on 09.02.2022)
Date of Filing of Appeal	03.03.2022
Represented By	Sh. Abhishek A. Rastogi & Sh. Pratyushprava Saha, Advocates
Other Office (Jurisdiction - Centre)	CGST Commissionerate, Gurugram
Administrative Office (Jurisdiction - State)	Deputy Excise & Taxation Commissioner (ST), Gurugram (East), Ward - 5
Whether payment of fees for filing appeal is discharged. If yes, the amount and Challan No.	<b>No, Paid ₹ 10,000/- under the Head of Tax (IGST) vide CIN No. HDFC22020600173423 dated 23.02.2022</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/07/2021-22 dated 10.01.2022.

2. A copy of order of the Advance Ruling Authority (herein after referred to as 'AAR') issued on 10.01.2022 was received by the 'Appellant' on 09.02.2022 and the appeal has been filed on 03.03.2022 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 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 any other asset pertaining to the franchise.

1.8 In consideration of the licensing services rendered by SIBV to SSIPL, classifiable under CTH 9973, the Appellant is required to remit 33% (Thirty-Three Percent) of all fees and royalties collected from franchisees in India, to SIBV.

1.9 As a Master Licensee in India, for granting license to the franchisees 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 restaurant operated by the franchisee

vide a Franchise Agreement. In the agreement, royalty has been stated to be payable by the franchisee on a periodic basis, at the rate of 8% of gross sales.

1.10 Such permissive use of IPR constituted a supply of taxable services and fell within the fold of taxability by virtue of Section 7 of the Central Goods and Services Tax Act, 2017 ("CGST Act") read with Entry 5(c) and Entry 5(f) of Schedule II to the CGST Act. Relevant extract of Entry SC of Schedule II of the CGST Act is as under:

**5. Supply of services**

*The following shall be treated as supply of services, namely: -*

*(c) temporary transfer or permitting the use or enjoyment of any intellectual property right*

*(f) transfer of right to use any goods for any purpose (whether or not for specified period) for cash, deferred payment or other valuable consideration.*

1.11 The Appellant is liable to pay Integrate Tax ("IGST") on import of services from SIBV, under reverse charge in terms of Section 5(3) of the Integrated Goods and Services Tax Act ("IGST Act") read with Sl. No. 1 of Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017 ("Reverse Charge Notification").

**Classification of services and applicable GST rate**

**SERVICE CODE ADOPTED BY THE APPELLANT:**

1.12 The Appellant classified the licensing services received from SIBV under MSA read with the TSA under service code 997336 (hereinafter referred to as "Entry 1"), The classification is based on the extant Scheme of Classification of Services annexed to Notification No. 8/2017-Integrated Tax (Rate) dated 28 June 2017 (the "Rate Notification") for the purpose of payment under reverse-charge.

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

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

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		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 resources nowhere else classified.</b>

1.15 As per Notification No. 8/2017-Integrated Tax (Rate) dated 28 June 2017 ('Service Rate Notification'), both the aforesaid service codes carried a CGST rate of 12% 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	(1) Temporary or permanent transfer or permitting the use or enjoyment of	12	-

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service without operator)	Intellectual Property (IP) right in respect of goods other than Information Technology Software		
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**Thus, the combined GST rate for the aforesaid service codes was at 12% for intra- state supply of services.**

1.16 Vide Notification No. 06/2021-Integrated Tax (Rate) dated 30 September 2021 (the "Amending Notification"), Government has effectuated certain changes in the Service Rate Notification. By virtue of the amending Notification, Entry 17(i) has been omitted from the Service Rate Notification with effect from 1.10.2021. As a consequence, Entry 17(i) ceases to exist with effect from 1 October 2021.

1.17 A tabular summary of the legal position prior to 1 October 2021 and the position pursuant to the amending Notification is set out below:

Taxing Entry	Till 30.09.2021 (Before operation of Amending Notification)	Post 01.10.2021 (After operation of Amending Notification )	Applicable Tax Rate
Entry 17(i)	<i>Temporary or permanent transfer or permitting the use of enjoyment of Intellectual Property(IP) right in respect of goods other than Information Technology software</i>	Entry omitted, ceases to exist	12%
Entry 17 (ii)	<i>Temporary or permanent transfer or permitting the use of enjoyment of Intellectual Property(IP) right in respect of Information Technology software</i>	<i>Temporary or permanent transfer or permitting the use of enjoyment of Intellectual Property(IP) right</i>	18%

1.18 It is pertinent to note that Entry No. 17(i) was a specific entry dealing with licensing of Intellectual Property (IP) right in respect of Subway System and the Subway Trademark. Post amendment, vide the Amending Notification, Entry No. 17(i) ceases to exist and the only specific entry that deals with IP rights is Entry No. 17(iii) read with entry No. 243 of Notification No. 1/2017-Integrated Tax (Rate), dated 28.06.2017 (the "Goods Rate Notification"), which exclusively deals with Intellectual Property (IP) rights. Relevant extracts of the said entries are as under:



Entry No.17(iii) of Service Rate Notification (i.e. Notification No. 8/2017-IT(Rate) dated 28 June 2017)				
Sl. No.	Chapter, Section or Heading	Description of Service	Rate (percent)	Condition
(1)	(2)	(3)	(4)	(5)
17	Heading 9973 (Leasing or rental services, with or without operator)	(iii) 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	Same rate of integrated tax as on supply of like goods involving transfer of title in goods	-

Entry No. 243 of Goods Rate Notification [i.e. Notification No. 1/2017-IT(Rate)dated 28 June 2017]		
Sl. No.	Chapter/Heading/Sub-heading/Tariff item	Description of Goods
(1)	(2)	(3)
243	Any Chapter	Permanent transfer of Intellectual Property (IP) right in respect of goods other than Information Technology software

1.19 It appears that the Amendment Notification has been issued without sanction of the GST Council as mandated under Article 279A of the Constitution and accordingly, such amendment is arbitrary. The Appellant understands that this forum may not have jurisdiction to decide on constitutional matters. However, the unconstitutionality of government action may be recorded by way of absence of minutes of meeting of the 45th GST Council Meeting, in public domain, pursuant to which the Amending Notification came to be issued. It is also evident from the press release of the 45th, GST Council meeting, that there is nothing to suggest that amendment of the rate has been recommended by the GST Council vis-a-vis licensing services in respect of Quick Service Restaurants, as the Amending Notification purports.

1.20 The Appellant has therefore preferred this application to ascertain whether with effect from 1 October 2021, licensing services received by it from SIBV, under the MLA

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and the TLA will be taxable at 18% under Entry 17(ii) or continue to be taxable at 12% under Entry 17(iii) of the Service Rate Notification, with effect from 1st October 2021.

STATEMENT CONTAINING THE APPLICANT'S INTERPRETATION OF LAW AND/OR FACTS AS THE CASE MAY BE IN RESPECT OF THE AFORESAID QUESTION(S):

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

**Services received under codes 997336/997339 were taxable at 12% prior to 1 October 2021**

1.21 From 01.07.2017 till 30.09.2021 Tax rate covering royalty payments in respect of licensing of Intellectual Property Rights ("IPR") was determinable at 12% under Entry 17(i) of the Service Rate Notification which covers temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property ("IP") in respect of "goods" other than Information Technology software (CTH 9973).

1.22 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).

1.23 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)]

1.24 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.

1.25 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

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permissive use of the underlying IP and in that sense, confer a very limited and conditional right.

1.26 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.

1.27 By way of the Master License Agreement dated 1 October 2002 ("MLA") and the Trademark License Agreement dated 18 November 2019 ("TLA"), the Appellant has been granted/assigned the right the license to sub-license use of the System (including the brand name, trademarks, proprietary and confidential information) for setting up and operating a SUBWAY restaurant franchise in the Indian territory. The said license or permission is a very limited right and subject to various conditions and restrictions.

1.28 As per the MLA and TLA, the Appellant enjoys only the right to sub-license the "System" and the 'SUBWAY®' trademark to franchisees in the territory for limited permissive use to operate respective sandwich restaurants. 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.

1.29 The Bombay High Court, in the Appellant's own case examined franchise agreements of the Appellant [Subway Systems India Private Limited v Union of India & Ors, 2016 (8) TMI 717-Bombay HC]. The Hon'ble Bombay High Court has held that the franchisee 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 agreements.

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."

1.30 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.

1.31 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/ 01111.08.2016.

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."

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

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"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."**

1.33 The Bombay High Court has clearly held that the Franchise Agreement entered into by the Applicant 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 nonexclusive conditional right to use the system and no transfer of right to use goods had taken place. The Franchise Agreement between the Appellant and the SIBV is nothing but a result of assignment of right to sub-license IPR received by the Appellant from SIBV through the MLA and TLA.

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***Services received under codes 997336/997339 should continue to be taxable at 12% under Entry 17(iii) of the Service Rate Notification read with Entry 243 of the Goods Rate Notification with effect from 1 October 2021.***

1.34. Entry No. 17(iii) of the Service Rate Notification read with Entry 243 of the Goods Rate Notification, is the only specific entry in the Service Rate Notification that deals with the service of licensing of IPR in respect of goods other than Information Technology Software.

1.35. Entry No. 17(ii) is a general entry that deals with temporary or permanent transfer or permitting use or enjoyment of all IPR.

***A specific entry should prevail over a general entry when classifying a product for a particular entry.***

1.36. 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.).

1.37. 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.

1.38. 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.

1.39. Relying on the above, the Appellant submits that the services received by the Appellant should be classified under Entry 17(iii) which is a specific entry, instead of Entry 17(ii), which is a general entry for all IPRs (including Information Technology related IPRs) and therefore, must continue to be taxable at 12%.

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

Whether with effect from 1 October 2021, licensing services received by the Appellant from SIBV, under the MLA and the TLA will be taxable at 18% under Entry 17(ii) of the Service Rate Notification or continue to be taxable at 12% under Entry 17(iii) of the Service Rate Notification.

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**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 licensing services received by the applicant from SIBV, under the MLA and the TLA will be taxable at 18% under Entry 17(ii) of the Service Rate Notification and will not be taxable at 12% under Entry 17(iii) of the Service Rate Notification.

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

- a) To quash the impugned ruling from advance ruling Authority dated 10.01.2022 for being passed without application of mind and without considering facts, records, arguments presented before the Authority in the Advance Ruling, and for going beyond the remit of question before the Authority, through the Advance Ruling;
- b) In the alternative, modify the impugned advance ruling passed by the Authority for Advance Rulings and hold that the services received by the Appellant under the MLA and TLA, for which a periodic consideration is charged by SIBV, are liable to IGST at the rate of 12% under Entry 17(iii) of Notification No. 8/2017-IT(Rate) dated 28 June 2017 read with the Entry No. 243 of the Notification No. 1/2017-IT(Rate) dated 28 June 2017;
- c) Grant a personal hearing through video conferencing mode in view of COVID pandemic;
- d) 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. AUTHORITY HAD VERY LIMITED QUESTION TO DEAL WITH:**

5.1 It is submitted that the Appellant had preferred the Application to ascertain whether with effect from 01.10.2021, licensing services received by it from SIBV, under the MLA and TLA will be taxable at 18% under Entry 17 (ii) or continue to be taxable at 12% under Entry 17(iii) of the Service Rate Notification, w.e.f. 01.10.2021.

5.2 In view of the foregoing, it is indicated that, the Appellant approached the Authority to seek limited clarification on the applicability of said Notification on the licensing services received by it from SIBV pursuant to 01.10.2021. However, the authority has failed to provide any discussion or finding in ruling in respect to the specific clarification requested. More so, the Authority acted beyond the limit of the Application and provided a ruling in respect of classification which was not asked for. The Authority transgressed the limit of application which was restricted to the question of applicability of a specific entry over a general entry with effect from 1 October 2021,



which was not discussed at all in the Impugned Ruling. A ruling on classification was completely needless and shows non-application of mind on part of the Authority while assessing the Appellant's Application.

5.3 The subject query of the Application filed by the Appellant has been neglected by the Authority as the requested clarification has not been addressed by the Authority which has frustrated the purpose of the Application. It is submitted that the basic purpose of seeking advance ruling from the authority with the aim to provide certainty to with respect to their obligations and provide an expeditious ruling, so that the relationship between the taxpayer and administration is smooth and transparent and in furtherance, to avoid unnecessary litigation.

## **B. AMENDMENT NOTIFICATION AND ITS IMPACT IGNORED**

5.4 Vide Notification No. 06/2021-Integrated Tax (Rate) dated 30 September 2021 (the "Amending Notification"), Government effectuated certain changes in the Service Rate Notification. The Appellant submits that the Amendment Notification was issued without sanction of the GST Council as mandated under Article 279A of the constitution and accordingly, such amendment is arbitrary.

5.5 By the way of amending Notification, Entry 17(i) has been omitted from the Service Rate Notification w.e.f 1.10.2021. Consequently, Entry 17(i) ceases to exist w.e.f 01.10.2021. A tabular summary of the legal position prior to 1 October 2021 and the position pursuant to the amending Notification is set out below:

Taxing Entry	Till 30.09.2021 (Before operation of Amending Notification)	Post 01.10.2021 (After operation of Amending Notification )	Applicable Tax Rate
Entry 17(i)	Temporary or permanent transfer or permitting the use of enjoyment of Intellectual Property (IP) right in respect of goods other than Information Technology software	Entry omitted, ceases to exist	12%
Entry 17 (ii)	Temporary or permanent transfer or permitting the use of enjoyment of Intellectual Property (IP) right in respect of Information Technology	Temporary or permanent transfer or permitting the use of enjoyment of Intellectual Property (IP) right	18%

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	software		
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5.6 The Appellant understands that this forum may not have the jurisdiction to decide on the constitutional matters. However, the unconstitutionality of the government action may be recorded by way of absence of minutes of meeting of the 45th GST Council Meeting, in public domain, pursuant to which the amending Notification cannot be issued. It is also evident from the press release of the 45th GST Council vis-a-vis licensing services in respect of quick Services Restaurants, as the Amending Notification purports.

**C. 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 NON- SPEAKING ORDER:**

5.7 It is submitted that the Impugned Ruling dated 10.01.2022 passed by the Hon'ble AAR is a non-speaking order and has hence been passed in violation of the principles of natural justice.

5.8 The Impugned Ruling in paragraph 2.4 notes that the license in question received by the Appellant was granted by way of a Master License Agreement. In paragraph 2.5 of the Impugned Ruling, it is further observed that the Appellant has been granted the right to use and sub-license others to use "System and Trademark" in India by way of a Trademark License Agreement. In Para 2.6 of the Impugned Ruling, the AAR notes that the Trademark License Agreement makes it clear that only a limited license and right to use the "System and Trademark" and to sublicense 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. In Para 2.7 of the Impugned Ruling, the AAR notes that the Appellant has been authorized only to license or sub-license the System to the Franchises in India and the Appellant had not been authorized to transfer the right to use any other asset pertaining to the franchise.

5.9 It is submitted that the submissions of 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 violative of natural justice being non-speaking and is liable to be set aside on this ground alone.

5.10 The AAR has conveniently ignored critical terms of the Master License Agreement and the Trademark 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

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decisions relied upon by the Appellant in its submission. Therefore, the impugned order passed by AAR non-speaking.

5.11 The Appellant submits that the impugned ruling has been passed by the Hon'ble AAR without providing adequate reasons/justifications for holding that the licensing services received by the Appellant from SIBV under the MLA and TLA will be taxable at 18% under Entry 17(ii) of the Service Rate Notification and will not be taxable at 12% under Entry 17(iii) of the Service Rate Notification. Therefore, it is evident that elaborate and critical facts that have been duly recorded in the 'Background' section were completely neglected while arriving at Conclusion.

5.12 Further, the conclusion drawn in the impugned order, that "licensing services received by the Appellant from SIBV under MLA and TLA will be taxable at 18% under Entry 17(ii) of the Service Rate Notification and will not be taxable at 12% under Entry 17(iii) of the Service Rate Notification." is not backed by any reason, independent discussion or finding.

5.13 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. Apretense of reasons or rubber-stamp reasons is not to be equated N/f/ha 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."*

#### **No reference has been placed on MLA or TLA**

5.14 It is submitted that authority has failed to even consider the MLA and TLA filed along with the Application. The authority has acted in complete ignorance of the Agreements while ruling against the Appellant's in the present case. It is submitted that, authority is of the opinion that they have carefully analysed the records however, the ruling completely fail to consider the clauses of the MLA and TLA extracted and submitted along with the application.

5.15 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 Entry17(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 ifs 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. Oryx Fisheries Pvt. Ltd. V. Union of India, [2011(266) E.L.T. 422 (S.CT)**

"...(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."

5.16 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.

5.17 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.

**D. THERE IS NO FRANCHISEE FEE FOR SIBV ONLY ROYALTY IS PRESENT:**

5.18 As per the findings of impugned advance ruling dated 10.01.2022 the classification of services for which "Franchisee Fee" received in lump sum by them at the time of entering into Franchise Agreement with franchisee and "Royalty" amount received on monthly basis, at a pre-determined rate on gross sales revenue of the franchisee or fixed pre-determined amount, whichever is higher from the franchisee, for right to use their trademark, brand name and other proprietary knowledge (Intellectual Property).

  
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5.19 However, it is submitted that there is no franchise fee for SIBV in the present case, instead there is only collection of Royalty. The same fact was made immensely clear in the Application filed by the Appellant; however, the AAR has failed to even go through the facts provided by the Appellant and has mechanically passed a ruling on the last day of the statutory time limit. The impugned ruling evidences that the same has been passed in a haphazard manner as the reasoning, facts and submissions made in the Application has not been addressed by the AAR. The impugned ruling has been passed in a mechanical manner without attempting to understand the ambiguity which is prevalent in respect of the genuine query of the Appellant. It is further submitted that the services under MLA and TLA are not professional, technical and business services in relation to trademarks and franchises.

***SIBV doesn't enter into franchise agreement***

5.20 The finding of the impugned ruling that the Appellant has entered into franchise agreements with the third parties whereby the Appellant transfers the right to use its trademark, brand name and other proprietary knowledge (Intellectual Property) to the franchisee is entirely erroneous and illogical.

5.21 It is submitted that, both franchisee fee and royalty are covered under the Serial No. 17, Heading 9973 (Leasing or rental services with or without operator) of the Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 attracting GST at 12%. It is humbly submitted that the scheme of classification of services, under service code 997336 as "Licensing services for the right to use trademarks and franchises" has been erroneously lifted from the previous Advance Ruling Order dated 8 December 2021. The transaction is not qua SSIPL and Franchisee Agreement.

***Definition of "franchise" irrelevant in present context***

5.22 The advance ruling has delved into defining the term "franchise" which is meaningless considering the facts in the present matter. It is submitted that, since there is no franchisee fee collected by the Appellant, it is utterly futile and irrational to define the term "franchise" under law.

5.23 The elaborate reference of "franchise" services in the impugned ruling evidence that it has been prepared in a mechanical manner, without going in depth of the issue involved. The impugned ruling is merely based on the initial ruling sought by the Appellant on a separate issue. The AAR has failed to acknowledge the essence of filing of two separate applications by the Appellant. Further, the AAR has failed to understand the time and resources invested by the Appellant to receive a well- reasoned ruling to be able to make pragmatic business decisions accordingly. However, the Impugned Ruling makes the attempt of timely approaching the AAR frivolous and no effort of providing a reasoning or analysis has been attempted by the AAR.

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

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

5.25 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, 1952 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.

5.26 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.**

5.27 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.

5.28 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.

5.29 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.

**F. APPELLANT'S INTERPRETATION OF LAW AND FACTS:**

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

5.30 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

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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)**.

5.31 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)].

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).

5.32 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.

5.33 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.

5.34 It is submitted that as per the MLA and TLA, the Appellant enjoys only the right to sub-license the "System" and the 'SUBWAY®' trademark to franchisees in the territory for limited permissive use to operate respective sandwich restaurants. 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.

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

5.35 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."*

5.36 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.

5.37 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. "*

5.38 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 presentcase, 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."*

5.39 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. The Franchise Agreement between the Appellant and the SIBV is nothing but a result of assignment of right to sub-license IPR received by the Appellant from SIBV through the MLA and TLA.

***Services received under codes 997336/997339 should continue to be taxable at 12% under Entry 17(iii) of the Service Rate Notification read with Entry 243 of the Goods Rate Notification with effect from 1 October 2021***

5.40 Entry No. 17(iii) of the Service Rate Notification read with Entry 243 of the Goods Rate Notification, is the only specific entry in the Service Rate Notification that deals with the service of licensing of IPR in respect of goods other than Information Technology Software.

5.41 Entry No. 17(ii) is a general entry that deals with temporary or permanent transfer or permitting use or enjoyment of all IPR.

***A specific entry should prevail over a general entry when classifying a product for a particular entry.***

5.42 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.).

5.43 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*.

5.44 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.

5.45 Relying on the above, the Appellant submits that the services received by the Appellant should be classified under Entry 17(iii) which is a specific entry, instead of Entry 17(11), which is a general entry for all IPRs (including Information Technology related IPRs) and therefore, must continue to be taxable at 12%.

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

6.1 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.

6.2 The Appellant filed CWP No. 23895 of 2023 in the High Court of Punjab & Haryana for directions to dispose the appeals 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.

6.3 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 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 has not been fulfilled. As per Section 20 of IGST Act, 2017, certain provisions of CGST Act, including Advance ruling, Appeals and Revision, shall, mutatis mutandis, apply, so far as may be, in relation to Integrated Tax as they apply in relation to Central Tax. The corresponding provisions of CSGT Act, 2017 which govern appeal against advance ruling are Section 100 (3) and Rule 106 (1) which 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 under IGST Act 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. 22020600173423 dated 23-02-2022, the Appellant has paid only ₹ 10,000/- as Tax under IGST head and not the required fee. Since the application of the Appellant is incomplete for want of deposition of requisite fee (which is to be deposited in the manner specified in Section 20 of the IGST Act read with Section 49 of the CGST and HGST Act respectively), the appeal of the Appellant is not admitted.



## ORDER

In view of the above discussions and findings, we are of the view that the appeal 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.

*(Signature)*

23/11/2023

(Upender Gupta), IRS (C&IT)

Member  
Chief Commissioner  
Central Goods and Service Tax Zone  
Panchkula  
जोएसटी भवन, सेक्टर-25, पंचकुला  
CGST & CX Zone Panchkula  
Place: -Panchkula

*(Signature)*

23/11/23

(Ashok Kumar Meena), IAS

Member  
Commissioner  
Excise & Taxation Department  
Haryana



### Copy to (Regd AD/Speed Post/Email):-

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: 06AAGCS5808MIZZ

### Copy for information and necessary action to: -

1. The Member, GST, CBIC, North Block, New Delhi-110001
2. The Special Secretary, Goods and Services Tax Council, 5<sup>th</sup> Floor, Tower-II, Jeevan Bharti Building, Connaught Place, New Delhi- 110001
3. The Chief Commissioner, Central Goods and Service Tax Zone, Panchkula
4. The Commissioner, Excise & Taxation, Haryana
5. The Pr. Commissioner, CGST Commissionerate, Gurugram
6. The Deputy Commissioner, Excise & Taxation (ST), District-Gurugram
7. The Master/Guard File- 2023-24

Registrar,  
Appellate Authority for Advance Ruling,  
Haryana