MAHARASHTRA AUTHORITY FOR ADVANCE RULING

GST Bhavan, Room No.107, 1st floor, B-Wing, Old Building, Mazgaon, Mumbai – 400010.

(Constituted under Section 96 of the Maharashtra Goods and Services Tax Act, 2017)

BEFORE THE BENCH OF

(1) Ms. P. Vinitha Sekhar, Additional Commissioner of Central Tax, (Member)

(2) Mr. A. A. Chahure, Joint Commissioner of State Tax, (Member)

GSTIN Number, if any/ User-id	**27AACCH4870N1Z4**
Legal Name of Applicant	**M/s. Hitachi Power Europe GmbH**
Registered Address/Address provided while obtaining user id	Post Hotgi Station, Solapur Super Thermal Power Project, Fatatevadi, Taluka South Solapur, Solapur, Maharashtra, 413215
Details of application	GST-ARA, Application No. 33 Dated 14.08.2019
Concerned officer	Range-IV, Division-Solapur, Commissionerate Pune-II
Nature of activity(s) (proposed/present) in respect of which advance ruling sought	
A) Category	Service Provision, Office/Sale Office, Service Recipient
B) Description (in brief)	**Main Business:** Project office of a Foreign Company established under the Foreign Exchange Management Act, 1999 for undertaking ONLY activity of execution of projects won by the Foreign Company in India.
Issue/s on which advance ruling required	(v) Determination of the liability to pay tax on any goods or services or both
Question(s) on which advance ruling is required	As reproduced in para 01 of the Proceedings below.

PROCEEDINGS

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

The present application has been filed under Section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act" respectively] by **M/s. Hitachi Power Europe GmbH,** the applicant, seeking an advance ruling in respect of the following question.

Whether the Goods and Services tax *(herein referred as 'GST')* is applicable on the accounting entry made for the purpose of Indian accounting requirements in the books of accounts of Project Office for salary cost of Expat employees.

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, the expression 'GST Act' would mean CGST Act and MGST Act.

2. FACTS AND CONTENTION – AS PER THE APPLICANT

The submissions made by the applicant is as under:-

2.1 **Hitachi Power Europe GmbH** *(Head Office) (HO),* a Company incorporated under the Laws of Germany has been awarded contracts for supply of goods and supervisory services by M/s. BGR Boilers Private Limited *(BGRB)* in relation to Projects of M/s. NTPC Limited, M/s. Meja Urja Nigam Private Limited and M/s. Damodar Valley Corporation *(hereinafter referred as 'DVC')* being Mega power projects, located in Maharashtra, Uttar Pradesh and West Bengal respectively..

2.2 Under the Foreign Exchange Management Act, 1999, *(FEMA, 1999)* a Foreign Company executing projects in India is permitted to open an office in India to undertake such project, commonly referred to as "Project Office". Accordingly, HO has constituted 3 Project Offices for undertaking onshore portion of the said Projects in India at *Chennai - 600004"*, vide Foreign Company Registration Number *(FCRN)*: F04681.

2.3 Hitachi Power Europe GmbH - Project Office *(Applicant)*, being a Project Office (PO) in India of the Hitachi Power Europe GmbH -HO, is established under the FEMA, 1999 and is permitted to undertake only activity of execution of project *(wholly or partly)* in India that is awarded to the Foreign Company i.e., the HO, outside India.

2.4 Few employees of the HO *(Expat employees)* work in the Project Office in India, for whom all the employer's obligation like Form 16 in accordance with Section 203 of the Income Tax Act,1961 are done by the Project Office.

2.5 Since most of these Expat employees have their primary bank accounts outside India, salary is paid to these employees from the HO's bank account located abroad, for administrative convenience.

2.6 As per the Indian Companies Act, 2013, any PO of a Foreign Company is required to maintain its financial books of accounts in a manner which would reflect a true and fair view of the business of the Company in India. Thus, in order to keep record of the expenses of salary cost of Expat employees working from India, the Project Office makes an accounting entry in its financial books of accounts in India for the salary cost of the Expat employees.

2.7 The Reserve Bank of India *(RBI)* has framed the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 (FEMA Regulations) and as per Notification No: FEMA 22 (R)/2016-RB dated: 31 March 2016, a *'Project Office' means a place of business in India to represent the interests of the foreign company executing a project in India but excludes a Liaison Office.* The RBI has granted general permission to **foreign companies to establish Project Offices in India**, provided they have secured a contract from an Indian company to execute a project in India. The contract for execution of project in India would be executed by the Foreign Company in its own name with the Indian Company prior to setting up a Project Office in India. The Project Office is set up for a specific project and hence cannot engage in any other activity/business other than the business in relation to the Project. The project should be funded directly or indirectly from abroad by the Foreign Company to the Project Office. The funds arising out of the Project can be remitted to the Foreign Company subject to the condition that the remittance of funds to Foreign Company should not affect the completion of projects in India. Any shortfall of funds for meeting any liability of the Project Office in India would be met by the Foreign Company by way

of inward remittance. Hence, the Foreign Company would be responsible for the liabilities outstanding for the Project Office. The Project Office cannot directly sign or enter into any contracts/ agreements in India for supply of goods/services from the said Project Office. The Project Office should close down its operations in India after completion of the specified project.

2.8 Applicant has discussed a 'Foreign company', it's definition and responsibilities and the obligations of a Project Office in India, under the Companies Act, 2013.

2.9 Further, it is also submitted that a Project Office has to obtain a **Permanent Account Number** *(PAN)* **and** ***Tax Deduction and Collection Account Number*** *(TAN)* to **be issued in the name of the Foreign Company.**

2.10 In the subject case, HO has obtained the PAN for the Project Office in India and HPE Germany's Project Office in India supplies goods and services for undertaking onshore portion of the project on payment of applicable GST to customers in relation to the specific projects carried out at the various sites in India and for this purpose, the Project Office has obtained registration under the GST legislation in various States in India.

2.11 For carrying out the projects in India, the Expat employees would work from the Project Office in India. As the Project Office is not a separate legal entity and merely an extension of Head Office in India, these Expat employees are employees of Project Office. With regard to these Expat employees, the Applicant has submitted that :

a VISA has been issued by mentioning the name of HO i.e., *'Hitachi Power Europe GmbH'* under the column 'Organizational Name' with the address of the Project Office in India.

b Applicant has deducted TDS under the head *'Income under Salaries'* for these employees under the Income Tax Act, 1961 in India.

c Form 16 under the Income Tax Act, 1961 for salary deduction has been issued in India for these employees by the Applicant for FY 2018-19.

d The quantification of the above salary cost and payment of the same to most of these Expat employees were made from the Head Office's bank accounts to the employees' bank account outside India.

2.12 As per the Companies Act, 2013, the Foreign Company is required to prepare its financial statement accounting for all expenses and its corresponding income earned in India from

the India Projects and in order to comply with the above requirements, the Foreign Company makes an accounting entry amongst others for the cost of Expat employees' salary cost in its books of accounts based on the accounting debit note provided by the Head Office.

2.13 The accounting of the salary costs is made for the purpose of compliances under the Indian Companies Act, 2013 and the Project Office is not obligated to make any remittances to HPE Germany Head Office for the above entry. Hence the Applicant has filed this application to obtain clarity on whether accounting of salary cost for the purpose of compliance under Indian Companies Act, 2013, with no obligation to pay any consideration would be treated as a services and be subject to levy of GST in India under Reverse Charge Mechanism.

2.14 The Applicant has also submitted that their Project Office is merely an extension of the Foreign Company in India and maintains Financial Statements only for the requirements under the Companies Act, 2013. The rights and responsibilities of the Project Offices in India are not independent from that of the Head Office. The Project Office does not enter into contracts directly and it only executes the contract executed by the Head Office and is completely funded by the Head Office and any surplus of the Project Office is repatriated to Head Office.

2.15 The applicant has made various submissions supporting their contention that accounting of Salary of the Expat Employees in their Books of Accounts even though the salary is paid by the HO, is not taxable under GST. They have also cited various case laws in support of their contention.

2.16 They have further submitted that Services provided by an employee to an employer in the course of employment are outside the ambit of GST as per Schedule III of the CGST Act, 2017.

2.17 The Applicant submits that the Project Office is an office of the Foreign Company in India and not a separate entity and does not have any independent legal or contractual obligations as per provisions of FEMA/by virtue of PO being an extended arm of HO. Further, the Income Tax Act, 1961 does not differentiate a Project Office from its Head Office for the purpose of tax assessments, as the Head Office and Project Office are treated as 'Single Assessee' for the purpose of tax assessments, filing of returns etc. It is also important that

the Project Office pays tax at the rate which is higher and equal to a rate at which the Foreign Companies are taxed in India, under the Income tax Act, 1961. Hence PAN and TAN has been issued in the name of the Head Office (i.e., *Hitachi Power Europe GmbH)* instead of issuing in the name of Project Office. Applicant has deducted TDS under the head ***'Income under Salaries'*** for such employees working in India under Section 192 of the Income Tax Act, 1961 in India.

2.18 Salary cost paid to Expat employees working for the Indian Project which are accounted in the books of accounts to reflect the true and fair view of the financial statements of Project Office to comply with the provisions of the Companies Act, 2013 does not qualify as 'Service' as there is no recipient of service in the instant case, allocation of salary cost of employees of the Holding Company to its Subsidiary Company would not be subject to levy of GST as per Schedule III of the CGST Act, 2017 and there is no understanding or agreement to import any service, as the Project Office is only extension of HPE Germany.

2.19 Applicant has placed reliance on the recent decision held by the Honourable CESTAT, New Delhi in the case of **CCE & ST Vs Nissin Brakes India Private Limited [2018-TIOL-1976-CESTAT-DEL]**, which has been upheld by the **Honorable Supreme Court [TS-230-SC-2019-ST]** by dismissing the Department's appeal, wherein the forum observed the following:

a. Appellant has deducted tax at source from salary and other perks given to employees.

b. Appellant did not pay any direct/indirect consideration to its parent company towards deployment of the employees. Thus, it cannot be said that there is any agency and client relationship between the parent company and the appellant.

c. When the employee/employer relationship exists, the method of disbursement of salary cannot determine the nature of transaction.

2.19. In view of said ruling, tax would not be applicable in cases where there is employer-employee relationship irrespective of manner of disbursement of salary by the Holding or Subsidiary Company. Hence Applicant submits that when a transaction between a Holding Company and Subsidiary Company, which are treated as two separate legal entities under various Indian laws (i.e., The Companies Act, 2017, the Income Tax Act, 2017, the CGST

Act, 2017) is itself exempt from the levy of GST, the same ratio should be applied even in the context of the Head Office and the Project Office, considering the fact that the above Indian legislation treats the Head Office and the Project Office as single legal entity.

2.20. Applicant, citing the definition of a 'Project Office' under FEMA, 1999, has submitted that the Project office is merely a place of business of a Foreign Company to carry out business in India and does not constitute an establishment. Head Office and Project Office are not separate establishments under the GST legislation and would accordingly be not subject to levy of GST. Applicant has also referred to a recent ruling held by the Authority for Advance ruling, Rajasthan in the case of **M/s. Habufa Meubelen B.V. [2018 (14) G.S.T.L. 596 (A.A.R. - GST)], in support.**

03. CONTENTION – AS PER THE JURISDICTIONAL OFFICER:

The jurisdictional officer has not made any written submissions.

04. HEARING

4.1 Preliminary hearing in the matter was held on 17.11.2019. Shri Hari Sudhan M., Partner, Shri Hariganesh V., Director, appeared, and requested for admission of their application. Jurisdictional Officer Sh. G. Datta Sainath, Inspector, Solapur Division (CGST) also appeared.

4.2 The application was admitted and called for final hearing on 11.02.2020. Shri Hari Sudhan M., Partner, Shri Hariganesh V., Director, Authorized Representative, appeared and made both, oral and written submissions. Jurisdictional Officer Sh. G. Datta Sainath, Inspector, Solapur Division (CGST) Appeared and made submissions. We heard both the sides.

05. DISCUSSION AND FINDINGS:

5.1 We have gone through the facts of the case, documents on record and submissions made by both, the applicant as well as the jurisdictional office. The basic issue before us is whether a foreign company and its Project Office in India can be considered as distinct entities or as part of the same entity.

5.2 Master Direction No.10/2015-16 dated 01.01.2016 as updated from time to time, issued by the Reserve Bank of India states that "Establishment of branch office/ liaison office /

project office or any other place of business in India by foreign entities is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Notification No. FEMA 22(R)/2016-RB dated March 31, 2016".

5.3 Section 6(6) of Foreign Exchange Management Act, 1999 states that "*Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business*".

5.3.1 In exercise of the powers conferred by sub-section (6) of Section 6 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 22/2000-RB dated May 3, 2000, as amended from time to time, the Reserve Bank of India has made certain regulations to prohibit, restrict and regulate establishment in India of a branch office or a liaison office or a project office or any other place of business by a person resident outside India, vide Notification No. FEMA 22(R)/ 2016-RB dated 31.03.2016, as amended from time to time (Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016), (hereinafter referred to, as the FEMA Regulations).

5.3.2 As per Sr No. 2 (f) of the FEMA Regulations, a "*Project Office' means a place of business in India to represent the interests of the foreign company executing a project in India but excludes a Liaison Office.*

5.3.3 Sr No. 3 of the FEMA Regulations states that "*No person resident outside India shall without prior approval of the Reserve Bank open in India a branch office or a liaison office or a project office or any other place of business by whatever name called except as laid down in these Regulations*".

5.3.4 The eligibility conditions for opening a Project Office, the permissible activities that can be carried out by the Project Office, the application form for opening a Project Office, etc are all mentioned in the FEMA Regulations and therefore it is seen that such offices are regulated by law.

5.4 We find that as per the above provisions a company, resident outside India, may initiate business in India by setting up a project office or any other place of business by whatever name called after taking prior approval of the RBI. A foreign company can establish a

project office in India either on a temporary basis or a permanent project office, provided the foreign company has been awarded a project to be executed by them in India from the government or private sector. Registration of Project Office with Reserve Bank of India & Registrar of Companies must be completed before it starts operating and certain conditions are required to be fulfilled before an application can be made for registration of a Project Office.

5.5 A project office can be considered as a branch office set up with the limited purpose for executing a specific project and to execute the project. The Project Office can enter into transactions for receipt of supply of goods and services which would enable them to complete the project. Foreign companies engaged in turnkey construction or installation projects normally set up a project office for their operations in India. A 'Project Office' represents the interests of the foreign company executing a project in India and undertakes commercial activities related to the particular project.

5.5 Applicant has stated that, as a Project Office in India they supply goods and services for undertaking onshore portion of the project on payment of applicable GST to customers in relation to the specific projects carried out at the various sites in India and for this purpose, the Project Office has obtained registration under the GST legislation in various states in India.

5.6 The Project Office has its own employees and also some employees of the Head Office *(Expat employees)* who work in the Project Office in India, for whom all the employer's obligation like Form 16 in accordance with Section 203 of the Income Tax Act,1961 are done by the Project Office.

5.7 As per the provisions of the Companies Act, 2013, applicant is required to maintain its financial books of accounts in a manner which would reflect a true and fair view of the business of the Company in India. Thus, in order to keep record of the expenses of salary cost of Expat employees working from India, the Project Office makes an accounting entry in its financial books of accounts in India for the salary cost of the Expat employees even though the salary is paid by the Head Office. We also observe that the PAN and TAN has been allotted to the Project office in the name of the Head Office situated abroad, by the Income Tax Authorities. Hence we find that a project office is an extension of the foreign Head Office, and as in the subject case shall carry on all activities relating and incidental to

execution of the Project in India. Thus we find that the expat employees are employees of the employer i.e. the Head Office and since the Project Office is an extension of the Head Office, there is a relation of employer and employee between the Project Office and the expat employees.

5.9 For GST to be applicable on the accounting entry made for the purpose of Indian accounting requirements in the books of accounts of Project Office for salary cost of Expat employees paid by the Head Office, such accounting entry should be seen as a supply of goods, services or both. Since we find that there is a relation of employer and employee between the Project Office and the expat employees, the provisions of Schedule III of the CGST Act comes into play in this case as per which services by an employee to the employer in the course of or in relation to his employment will not be considered as a supply and therefore will not attract GST.

06. In view of the above discussions, we pass an order as follows:

ORDER

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 38/2019-20/B- 27 **Mumbai, dt.** 11/03/2020

For reasons as discussed in the body of the order, the questions are answered thus –

Question 1. Whether the Goods and Services tax *(herein referred as 'GST')* is applicable on the accounting entry made for the purpose of Indian accounting requirements in the books of accounts of Project Office for salary cost of Expat employees

Answer:- Answered in the negative.

PLACE - Mumbai

DATE - 11/03/2020

MEMBER, ADVANCE RULING AUTHORITY MAHARASHTRA STATE, MUMBAI

—sd— **A. A. CHAHURE**
(MEMBER)

—sd— **P. VINITHA SEKHAR**
(MEMBER)

CERTIFIED TRUE COPY
MEMBER
ADVANCE RULING AUTHORITY
MAHARASHTRA STATE, MUMBAI

Copy to:-

1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
4. The Chief Commissioner of Central Tax, Churchgate, Mumbai
5. Joint Commissioner of State Tax, Mahavikas for Website.

Note :- An Appeal against this advance ruling order shall be made before The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15th floor, Air India building, Nariman Point, Mumbai – 400021.