

MAHARASHTRA AUTHORITY FOR ADVANCE RULING

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

BEFORE THE BENCH OF

(1) Shri B. V. Borhade, Joint Commissioner of State Tax (Member)

(2) Shri Pankaj Kumar, Joint Commissioner of Central Tax (Member)

GSTIN Number, if any/ User-id		27AAACI7163H1ZI
Legal Name of Applicant		INA Bearing India Private Limited
Registered Address/ Address provided while obtaining user id		Plot NO. A-3, Talegaon Industrial & Floriculture park, Village Ambi, Navalakha Umbre, Tal. Talegaon Dabhade, Dist. Pune 410507
Details of application		GST-ARA, Application No. 04 Dated 09.04.2018
Concerned officer		PUN-VAT-E- 610, PUNE
Nature of activity(s) (proposed / present) in respect of which advance ruling sought		
A	Category	Factory/Manufacturing
B	Description (in brief)	Manufacturer and trader of Bearings & other parts to cater to the needs of customer's majorly in automotive sector and also in other industries. A fully owned subsidiary of Schaeffler Technologies AG & Co. Kg, Germany with state of the art manufacturing facilities at our Talegaon works.
Issue/s on which advance ruling required		(iv) admissibility of input tax credit of tax paid or deemed to have been paid (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"] by INA Bearing India Private Limited, the applicant, seeking an advance ruling in respect of the following question.

- a) Whether the sale of goods, which are located outside India, would be liable to tax in India under section 7(5) (a) of Integrated Goods and Services Tax Act, 2017?
- b) If answer to (a) is yes, then whether the recipient, to whom such goods are sold, be eligible to avail the input tax credit of such goods?

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

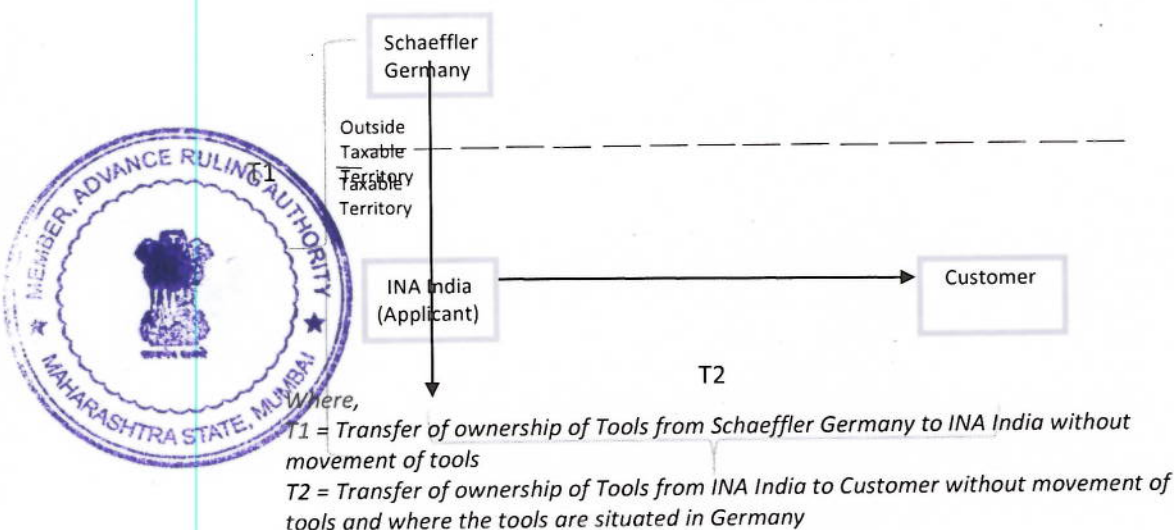
02. **FACTS AND CONTENTION - AS PER THE APPLICANT**

The submission (Brief facts of the case), as reproduced verbatim, could be seen thus -

STATEMENT OF THE RELEVANT FACTS HAVING A BEARING ON THE QUESTIONS AS PROVIDED IN ANNEXURE 1

Brief Background of the Transaction:

- ▶ INA Bearings India Private Limited (hereinafter referred to as 'Applicant') is engaged in supply of bearings and tools. The Applicant supplies bearings to a wide range of customers which *inter-alia* include Original Equipment Manufacturers (OEM).
- ▶ It is pertinent to note that for manufacture of bearings for specific customer, a specific type of tool is required. These tools are developed basis the requirements of the customers. Using these specially designed tools, child parts are manufactured and supplied to our customer. Typically, while entering into a contract for supply of bearings, the customer issued two purchase orders viz:
 - ▶ PO No. RNAIPL/2013/B4A/PTVT/230 dated 13.09.2013 for supply of tools and
 - ▶ PO No. RN15-MP-113W-K316 dated 28.05.2015 for supply of tappets.
- ▶ The Applicant in-turn raised a purchase order on Scaeffler Technologies AG & Co. KG (for the purpose of brevity herein after referred as "Scaeffler Germany") for supply of tools. The tools which are required for manufacturing is developed outside India by Scaeffler Germany. Once the tool was developed, Scaeffler Germany had raised an invoice bearing number 130213462 dated 16.03.2018 on the Applicant for the tools and the ownership of the said tools got transferred to the Applicant, however, there was no physical movement of tools i.e. the tools continue to remain in the possession of Scaeffler Germany.
- ▶ The Applicant had in turn raised an invoice bearing number 1045197 dated 16.03.2018 on its customer in India and thereby the ownership of the tools got transferred to the customer, however, the tools physically continue to remain under the possession of Scaeffler Germany.
- ▶ The diagrammatic representation of the transactions executed is as below:



- ▶ The issue under consideration is
 - ▶ whether transfer of ownership to customer without physically moving goods from Germany would make the transaction liable to GST in light of provisions of section 7(5)(a) of Integrated Goods and Services Tax Act, 2017 (IGST Act, 2017) and will the Applicant be required to charge IGST on the tools sold to its customer in India.
 - ▶ If IGST is applicable on the transaction under consideration, then whether Applicant's customer would be eligible to avail the input tax credit of IGST charged by the Applicant.
- The Applicant is making detailed submission herein below to demonstrate why IGST should not be applicable on the transaction under consideration.

Statement containing the applicant's interpretation of law and/or facts, as the case may be, in respect of the questions(s) on which advance ruling is required

- A. **Levy of IGST cannot be extended beyond territorial jurisdiction of the said legislation.**
Evaluating IGST provisions to understand possibility of levying IGST
- A1. With reference to facts of the applicant summarized in Annexure 2, the transaction of supply of tool to customer in India by Applicant needs to be evaluated in terms of IGST Act to understand nature of transaction and to evaluate applicability of IGST.
- A2. Section 7 of IGST Act, 2017, lays down the principles to determine nature of transaction as inter-state transaction. In this regard, attention is invited to provision of section 7(5) which reads as under:
'(5) Supply of goods or services or both,--
(a) when the supplier is located in India and the place of supply is outside India;
(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or

(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section, shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.'

(Emphasis provided)

A3. In order to evaluate applicability of section 7(5)(a), it is pertinent to evaluate following aspects of transaction in question –

- Supplier
- Place of supply

Supplier - IGST Act has not separately defined the term 'supplier' and hence the definition of CGST Act can be adopted in terms of section 2(24) of IGST Act. Section 2(105) of CGST Act defines 'supplier' as "supplier in relation to any goods or services shall mean the person supplying the said goods or services and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied"

Accordingly, in case of T2 in question, tool is supplied by Applicant to customer even if there is no movement of tool and hence, Applicant would be construed as 'Supplier'.

Place of Supply - Section 10 of IGST Act provides for various scenarios to determine the place of supply of goods. In case of T2, the supply does not involve movement of goods. Hence, without prejudice to Applicant's submission herein below, it appears that the said supply would get covered under section 10(1)(c) of IGST Act which is reproduced below:

"10. (1) The place of supply of goods, other than supply of goods imported into, or exported from India, shall be as under,--

- (a)
- (b)
- (c) where the supply does not involve movement of goods, whether by the supplier or the recipient, the place of supply shall be the location of such goods at the time of the delivery to the recipient;
- (d)
- (e)"

In view of said Section 10(1)(c) of IGST Act, in case of T2, the place of supply appears to be location of such goods at the time of delivery to recipient. The tool is supplied to customer, however, goods continue to remain outside India and hence the same could be construed to be delivered to customer outside India. Accordingly, without prejudice to Applicant's submission herein below, the place of supply would be location of goods at the time of delivery i.e. outside India.

From the conjoint reading of 'supplier' and 'place of supply' in case of T2, it appears that supplier is located in India and Place of supply could be construed as outside India. Hence, the said transaction could get covered under the ambit of 'inter-state supply' in terms of section 7(5)(a) of IGST Act.

A4. GST would be levied on all inter-State supplies of goods or services or both in terms of Section 5 of IGST Act. From the conjoint reading of abovementioned provisions, it appears that T2, could get covered within the purview of 'Inter-State supply' and hence could become liable to IGST.

A5. However, Applicant intends to draw your kind attention to section 1(2) of IGST Act which determines the extent of applicability of IGST Act. As per the said section IGST Act extends to whole of India except State of Jammu and Kashmir. 'India' has been defined in section 2(56) of CGST Act read with section 2(24) of IGST Act to mean 'the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and subsoil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters;'

A6. Hence, Applicant wishes to contend that scope of IGST Act is limited to territorial jurisdiction to which it extends. Thus, IGST levy can be introduced only to supplies within the territorial jurisdiction of the IGST Act. In case of T2, the supply could be construed to take place outside the territorial jurisdiction of IGST Act. Hence, the levy in case of T2 in terms of section 5 of IGST Act read with section 7(5)(a) would mean traveling beyond the jurisdictional powers to levy IGST. In light of this, Applicant contends that levy of IGST on said transaction would be ultra vires the IGST Act.

A7. Further as discussed above, GST is limited to the territorial waters of India and hence all the applicable sections in terms of supply, time of supply, place of supply etc would be limited to goods or services or both as much as they take place in India. In order for section 7(5)(a) to come into play, the place of supply should be outside India and to determine the place of supply the provisions of Section 10(1)(c) seems to be relied on. The Applicant contends that the provisions of GST are travelling beyond its powers by stating that for the transaction under question where the goods are lying outside India i.e. in Germany, the place of supply shall be outside India. Hence, the Applicant pleads it is outside the jurisdictional powers of the GST law to determine the place of supply for goods when such goods are not located in India.

A8. Given the aforesaid, the tax cannot be said to be payable on the transaction under consideration as the subject i.e. goods (tools), on which tax is payable in outside India i.e. beyond the jurisdictional extent of IGST Act, 2017.

B. Tax cannot be demanded on the said transaction as the collection, if at all tax is leviable, itself will be unconstitutional

B1. It is no more *res-integra* that no tax shall be collected unless there is constitutional validity to levy the same. The Constitution of India was amended vide 101st Constitution (Amendment) Act, 2016 to empower the Central Government and State Governments to levy GST.

B2. To empower the Parliament to levy and collect IGST on inter-state transaction, Article 269A was inserted. The said article reads as under:

"269A. (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation. – For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

.....'

B3. From the above, it is quite clear that Article 269A enables levy and collection of GST for supplies in the course of inter-state trade of commerce. An explanation has been inserted stating that import transactions will also be considered as inter-state supply of goods or services or both. If we consider the common parlance an inter-state transaction would mean transaction effected between two states and or union territories. It would be important to note that the Constitution has not defined the above transaction that is, where the supplier is located in India and the place of supply is outside India to be an inter-state supply. The provisions of section 7(5)(a) is ultra vires since the law has defined a specific transaction to be an inter-state supply without having adequate powers to do so. Since the Constitution of India has neither defined such transactions to be an inter-state transaction nor given powers to determine so, the provisions ought to be treated as ultra-vires.

C. Cross-border transactions are being covered under 'Inter-State supply' only to exclude the same from purview of State Government, however, that would not conclude IGST applicability unless authorised

C1. Applicant wishes to submit that section 7 and section 8 of IGST Act have been enacted to lay down principles to determine nature of supply to be 'inter-State supply' and 'intra-State supply' respectively. Thus, the objective appears to be to delineate powers of State Government to levy respective GST only on 'intra-State supply' and not to cover 'Inter-State supply'. However, section 7 or section 8 should not, in isolation, be read as sections enabling levy of IGST on all supplies covered therein. IGST Act needs to be read in harmonious manner considering the constitutional empowerment and extent of its applicability to determine levy. Merely because a transaction gets covered under section 7(5)(a) would not empower Central Government to levy and collect IGST on the said transaction, unless there is express provision to that extent and unless it is covered under territorial jurisdiction of IGST Act.

Applicant wishes to draw your kind attention to proviso to section 8 which states that following supply of goods shall not be treated as intra-State supply –

- (i) Supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;
- (ii) Goods imported into territory of India till they cross the Customs frontiers of India; or
- (iii) Supplies made to a tourist referred to in section 15

The above mentioned list has been excluded from ambit of 'intra-State supply' so that administrative and jurisdictional powers would vests with Central Government and not State Government.

C3. In view of above submission, Applicant contends that section 7(5)(a) should be read only to exclude such transactions from the purview of State Government and said section should not be considered as piece of legislation which is empowering Central Government to travel beyond territorial jurisdiction and levy IGST on all transactions covered therein.

D. The term 'Zero-rated supply' should be read in liberal manner and should not be restricted only to taking of goods outside India

D1. Attention is invited to section 16 of IGST Act, which provides that 'Zero rated supply' means any of the following supplies of goods:

- 1. Export of goods; or
- 2. Supply of goods to a Special Economic Zone developer or unit

D2. Section 2(5) of IGST Act defines 'export of goods' with its grammatical variations and cognate expressions, means taking goods out of India to a place out of India.

D3. From the conjoint reading of the abovementioned provisions it can be inferred that any inter-state supply would qualify to be zero-rated only if it falls within the purview of export or supply to SEZ.

D4. In order to identify these supplies as Zero-rated the same have been covered under the purview of inter-State supply. However, this cannot be interpreted to mean that all other supplies falling within the purview of Section 7(5)(a) of IGST Act but not covered under section 16 of IGST Act would be considered as liable to IGST.

D5. The terms 'Export' covers the cases of taking goods out of India, however, principally even tool being supplied to customer at a location outside India should get covered under the purview of term 'Export'. Interpreting the term 'Export' to only cover supplies where goods are taken out of India would be restrictive and would disregard the principle of consumption based tax. 'Export of goods' should be interpreted in a broader way to cover such cross-border transaction where goods are delivered to a customer outside India even if not taken from India. Restricting the concept of export only to cases involving movement from India would mean disregarding the fact that place of supply is outside India. Thus, Applicant pleads for extending the meaning of 'export of goods' even to cases where goods are delivered to customer outside India even if not taken from India.



- D6. Assuming without accepting that this transaction of tool supply would not qualify as 'zero rated supply', however, the same should at least be treated as not liable to GST since the concept of 'exports' could be deemed to be covering a case where the goods are consumed/ used outside India. Under erstwhile Service Tax legislation, if the place of provision of service was outside India but other conditions of 'Export' were not getting fulfilled then the export linked benefits would not be made available to such services, however, the same would still not be liable to service tax. Accordingly, Applicant pleads that even if transaction in question may not be considered as 'Export of goods', the same should be considered as not liable to IGST even though no benefits of 'Zero rated supply' could be granted.

E. Place of Supply of Service specifically covers case where recipient is located outside India, unlike Place of Supply of Goods

- E1. Applicant submits that Section 12 and Section 13 of IGST Act delineates place of supply of service between the cases where location of both supplier and recipient is in India as against cases where either of the party is located outside India. Whereas in case of goods, place of supply is to be determined in terms of section 10 or 11 of IGST Act which provides for determining place of supply separately for domestic supplies and for export/ import transactions.
- E2. Your kind attention in this regard, is invited to proviso to section 12(3) of IGST Act, 2017, which provides that in case of supply of service in relation to immovable property is outside India and if both the supplier and recipient are in India then the place of supply shall be the location of recipient.
- E3. For your reference we have reproduced relevant portion of section 12(3) of IGST Act, 2017

(3) The place of supply of services,--

(a) directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work; or

(b) by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel; or

(c) by way of accommodation in any immovable property for organizing any marriage or reception or matters related thereto, official, social, cultural, religious or business function including services provided in relation to such function at such property; or

(d) any services ancillary to the services referred to in clauses (a), (b) and (c), shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located:

Provided that if the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient.

- E4. It can be observed from the aforesaid provisions that there is specific provision in case of services wherein it is specifically provided that the place of supply shall be the location of immovable property, however, if both the supplier and recipient are in India and location of immovable property is outside India then the place of supply for the purpose of GST will be location of recipient of service.

- E5. Similar provisions were provided in Rule 8 of Place of Provision of Services Rules, 2011 under Service Tax regime. We have reproduced the said provisions below:

'8. Place of provision of services where provider and recipient are located in taxable territory

Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the location of the recipient of service.'

- E6. It can be observed that in case of services the legislatures have always specifically provided for levying tax basis the location of supplier and recipient. However, in case of goods there is no such provision which states that, even where goods are situated/ used/ consumed outside India and the location of the supplier and the recipient is in India, the place of supply shall be outside India.

- E7. Accordingly, it can be inferred that for the purpose of levy of GST on services location of supplier and recipient would be relevant and if both are in India then the same would be liable to GST. However, in case of goods location of supplier and recipient is not relevant and levy would then get linked to location of goods. Thus, in case of transaction in question, since location of goods is outside India the levy should not arise in India in the absence of specific provision in this regard.

F. Circular issued for High Sea Sales will be applicable to the transaction under consideration

- F1. The CBEC vide Circular No. 33/2017-Customs dated 1st August 2017 clarified that in case of High Sea Sales the levy and collection of tax will be only at the time of importation of goods in India i.e. when import declarations are filed before Customs Authorities for customs clearance for the first time.

- F2. The relevant para of the circular is reproduced below:

'4. GST Council has deliberated on the levy of Integrated Goods and Services Tax on high sea sales in the case of imported goods. The council has decided that IGST on high sea sale (s) transactions of imported goods, whether one or multiple, shall be levied and collected only at the time of importation i.e. when the import declarations are filed before Customs authorities for the customs clearance purposes for the first time. Further, value addition accruing in each such high sea shall form part of the value on which IGST is collected at the time of clearance.'

- F3. The Circular clearly mentions that the tax is leviable only at the time of importation of goods in India and not when the goods are sold while they are in High Seas. Similarly, when the goods are in Germany i.e.



outside India, it can be said that since, the goods are outside India, no GST is applicable on the same as the subject on which tax is being levied is outside the territory of India.

- F4. Another circular was issued by CBEC to clarify the tax applicability of goods lying in bonded warehouse. Circular No. 46/2017-Customs dated 24th November 2017, provided that in case the goods are sold while the same lying in bonded warehouse, the same shall be chargeable to GST.
- F5. It is pertinent to note that one of the basic reasons behind differential tax treatment in both the circulars above is that in case of High Seas the goods are not in India while in case of warehoused goods, the goods are in India.
- F6. Given the aforesaid, the Applicant hereby submits that the tax on supply of tools will not be applicable when the same are sold to its customers in India and where the physical location of the goods is outside India.
- G. **No state code available in GST returns to mention the Place of Supply in case of these transactions**
- G1. A taxpayer is required to report all the transactions carried out by him in his GST returns i.e. GSTR-1 and GSTR-2. Further, the supplier of goods and/ or services has to mention State code of place of supply for each invoice in the GSTR-1 while reporting the outward supply.
- G2. Without prejudice to the aforesaid, even if the transaction is made taxable in GST, the place of supply, in accordance with section 10(1)(c) of IGST Act, 2017, is outside India. There is no mechanism in the GST returns to report the transaction in GSTR-1 mentioning the place of supply to be a place outside India. Accordingly, the collection mechanism of such IGST is unclear and consequently it is unclear as to whether only Central Government or both Central and State Government would receive this revenue.
- G3. In the absence of ambiguity around collection mechanism and revenue sharing of such GST, it appears that intention of legislatures was never to levy and collect IGST on such type of transaction.
- H. **The transaction was not taxable under erstwhile indirect tax laws and hence, the same should not be liable to GST.**
- H1. GST has been introduced with a view to subsume majority of indirect taxes applicable in India like service tax, central excise, entry tax, VAT, CST etc. The intention of the legislator has not been to tax the transactions which were not taxable under existing laws but to have a uniform tax regime throughout the country.
- H2. In the type of transaction under consideration, no tax was leviable under Customs Act, 1962, Central Excise Act, 1944, Central Sales Tax Act, 1956 and other State VAT laws prior to implementation of GST in India.
- H3. As per Article 286 of Constitution of India, the States were not empowered to levy tax on sale or purchase of goods which was carried outside the State or in the course of import or export of goods. Further, vide 101st Constitution (Amendment) Act, 2016, article 286 was amended to bring the same in line with provisions of GST law. Also, that Parliament is empowered to formulate the principles to determine when the supply is said to be made outside the State or in the course of import or export. However, no such principles have been formulated till date for GST.
- H4. The levying section 6 of CST Act provided that CST shall be levied on all inter-State sale of goods. Similar to GST, CST Act specifically defined inter-State supplies, sale in the course of import, sale in the course of export and intra-State sale out of which only inter-State sale was made liable to CST.
- H5. Section 5 of CST Act, 1956 provided for the principles to determine whether the transaction is a sale or purchase in the course of import or export and the same are reproduced below:
- (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.
- (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.
- (3)
- (4)
- (5)
- H6. From the above, it can be understood that even under CST Act, similar type of transaction was not liable to CST. Since, the transaction of sale/ supply was not taxable under erstwhile Indirect Tax laws the GST should not be payable on the said transaction. The intention behind introduction of GST was to bring uniformity in tax laws keeping the taxability principles as is. Hence Applicant pleads that such transaction should also not be made liable to tax under GST regime.
- I. **VAT is payable on the said transaction under European VAT Laws**
- I1. Applicant wishes to draw your kind attention to the fact that in case of supply of tools by INA Germany to Applicant, EUVAT is leviable since the goods are located in Germany at the time of supply.
- I2. As per Article 31 of EU VAT Law the place of supply of goods which does not involve dispatch or transfer of goods, shall be the place where goods are located at the time of supply. We have reproduced the said provisions below:
- 'Article 31
Where goods are not dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place.'
- I3. It can be observed from the aforesaid provision of EU VAT that the place of supply for the transaction under consideration will be Germany and has already attracted EU VAT. Hence, the same should not be made liable to GST in India. Levying GST on such transaction in India would lead to supply to same tools being taxed in

Germany as well as in India. Globally, various countries are adopting place of supply principles in a way to avoid double taxation. Hence, if the same goods have already been taxed under EU VAT they continue to remain in Germany the same goods should not be made subject to GST.

J. **If at all tax is applicable on the transaction, than input tax credit of the same should be available to the recipient of supply**

J1. One of the major objective of introducing GST in India was to allow the seamless flow of credit to the trade and industry to make the Indian business and Indian products cost effective and competitive in the international market.

J2. It is pertinent to note that provisions of section 16 of CGST Act, 2017 read with section 20 of IGST Act, 2017, input tax credit of all the goods and/ or services may be available to the registered person. Further, section 16 of CGST Act, 2017 lays down various conditions for a person to become eligible to avail input tax credit which *inter-alia* include receipt of goods and/ or services.

J3. The relevant provisions of section 16 of CGST Act, 2017 is reproduced below:

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation. — For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a eligibility and conditions for taking input tax credit period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

J4. Without prejudice to the aforesaid submission, if at all tax is payable on the transaction under consideration then the recipient of supply should be eligible to avail input tax credit of the supply made to him and the condition of receipt should be deemed to have been complied with by applying explanation to section 16(2)(b) of CGST Act, 2017.

J5. The Applicant contends that if a transaction is held to be liable qua the supplier and not the goods or services or both, then in the same analogy on the very transaction, the credit of input tax needs to be allowed based on the recipient and not whether the goods or services or both had been received or not.

J6. If the transaction is deemed to be an inter-state supply and if the same is made liable to GST then it should be deemed that such goods have been received from recipient's perspective and the credit should accordingly, be made available to him.

J7. Further, in order to achieve the objective of introduction of GST, the seamless flow of credit should be maintained and the recipient of goods should be made eligible to avail the input tax credit.

J8. Also, if the input tax credit is denied the domestic products may become expensive and that may have implications on 'Make in India' initiative of Government of India and State Governments as well.

CONCLUSION

1. In view of the above submissions, the transaction of sale/ supply of goods by the supplier in India **should not be made liable to IGST** under section 7(5) (a) of IGST Act, 2017 since, the intention behind section 7(5) (a) was to specifically provide that export or import of goods and/ or services should be treated as inter-state transaction and not to tax the transactions under consideration.

2. If at all the transaction is made taxable, the recipient should be eligible to avail the input tax credit.

03. CONTENTION - AS PER THE CONCERNED OFFICER

The submission, as reproduced verbatim, could be seen thus-

Question raised.

(a) Whether the sale of goods, which are located outside India would be liable to tax in India u/s 7(5) (a) of IGST Act 2017?

Explanation:

As per section 7(2) of IGST Act 2017 which is reproduced below:'

Supply of goods imported into the territory of India, shall be treated to be a supply of goods in the course of inter-state trade or commerce.

In this case goods doesn't move into the territory of India. Hence IGST Act will not apply in this case.

Also section 10 of IGST Act provides for various scenarios to determine the place of supply of goods. In case of T2, the supply does not involve movement of goods. Hence, without prejudice to Applicant's submission herein below, it appears that the said supply would get covered under section 10(1) (c) of IGST Act which is reproduced below:

"10(1) The place of supply of goods, other than supply of goods imported into, or exported from India, shall be as under,

(a).....

(b).....

(c) where the supply does not involve movement of goods, whether by the supplier or the recipient, the place of supply shall be the location of such goods at the time of the delivery to the recipient;

(d).....

(e).....

In view of said Section 10(1)(c) of IGST Act, in case of T2, the place of supply appears to be location of such goods at the time of delivery to recipient. The tool is supplied to customer, however, goods continue to remain outside India and hence the same could be construed to be delivered to customer outside India. Accordingly, without prejudice to Applicant's submission herein below, the place of supply would be location of goods at the time of delivery i.e. outside India.

Thus in this type of transaction IGST will not be leviable u/s 7(5) (a) of IGST Act (i.e. when the supplier is located in India and the place of supply is outside India).

04. HEARING

The case was taken up for preliminary hearing on dt. 16.05.2018, with respect to admission or rejection of the application when Sh. Nitin Shah, Advocate, Sh. Niraj Menon, C.A., and Sh. Anant Joshi, Manager Taxation appeared and requested for admission of application as per their contentions in ARA application. The jurisdictional officer, Sh. Y. A. Lokre, Dy. Commr. Of S.T. (PUN-VAT-E-610), Pune appeared and made written submissions.

The application was admitted and final hearing was held on 26.06.2018, Sh. Nitin Shah, Advocate, Sh. Niraj Menon, C.A., and Sh. Anant Joshi, Manager Taxation appeared and made oral and written submissions as per their ARA. The jurisdictional officer, Sh. Sanjay Shinde, Dy. Commr. Of S.T. (PUN-VAT-E-610), Pune appeared and made written submissions.

05. OBSERVATIONS

We have perused the records on file and gone through the facts of the case and the submissions made by the applicant and the department. The factual matrix of the case is as below:

Applicant is engaged in supply of bearings and tools. The Applicant supplies bearings to a wide range of customers which *inter-alia* include Original Equipment Manufacturers (OEM). For manufacture of bearings for specific customer, a specific type of tool is required. These tools are developed on the basis of the requirements of the customers. Using these specially designed tools, child parts are manufactured and supplied to their customer. The sample transactions are submitted by the applicant before us which were entered into for supply of bearings between the applicant and one of the customer M/s. Renault Nissan Automotive India Pvt Ltd, Tamil Nadu. Applicant have two purchase orders as below:

- a. PO No. RNAIPL/2013/B4A/PTVT/230 dated 13.09.2013 for supply of tools and
- b. PO No. RN15-MP-113W-K316 dated 28.05.2015 for supply of tappets.

In order to comply with purchase orders received by the applicant, applicant in turn places purchase orders for manufacture of tools on M/s. Schaeffer Technologies AG & Co. KG, Germany (for the purpose of brevity herein after referred as "Scaeffler Germany"). The tools which are required for manufacturing are developed outside India by Schaeffer Germany. Once the tools are developed, Schaeffer Germany raise

an invoice on applicant at Pune and as corollary of this the ownership of the said tools get transferred to the Applicant, without physical movement of tools from Germany to India i.e. the tools continue to remain in the possession of Scaeffler Germany. It means that there is no transfer of goods [Tools] in physical form and the Tool remain under the possession of Schaeffer Germany. The Applicant in turn raises an invoice to their customer M/s Renault Nissan Automotive India Pvt Ltd, Tamil Nadu and thereby the ownership of the tools get transferred to the customer without physical movement of tools, and the tools physically continue to remain under the possession of Schaeffer Germany. Thus we find that there are two different transactions effected in present matter between the parties for the supply of same tools. One from foreign supplier to the applicant (in short T1) and second between applicants to customer within India (in short T2). The transaction covered by the present application herein after will be referred to as T2 transaction. Applicant has laid much emphasis that the impugned transactions will not be liable to GST as per provisions of section 7(5) (a) of the IGST Act. In support of their contention applicant has made detailed submission to demonstrate why IGST would not be applicable on the transaction under consideration by virtue of transaction having following attributes:

1. Levy of IGST cannot be extended beyond territorial jurisdiction of the said legislation.
2. Tax cannot be demanded on the said transaction as the collection, if at all tax is leviable, itself will be unconstitutional.
3. Cross-border transactions are being covered under 'Inter-State supply' only to exclude the same from purview of State Government, however, that would not conclude IGST applicability unless authorized
4. The term 'Zero-rated supply' should be read in liberal manner and should not be restricted only to taking of goods outside India.
5. Place of Supply of Service specifically covers case where recipient is located outside India, unlike Place of Supply of Goods
6. Circular issued for High Sea Sales will be applicable to the transaction under consideration.
7. To state code available in GST returns to mention the Place of Supply in case of these transactions
8. The transaction was not taxable under erstwhile indirect tax laws and hence, the same should not be liable to GST.
9. VAT is payable on the said transaction under European VAT Laws.
10. If at all tax is applicable on the transaction, then input tax credit of the same should be available to the recipient of supply

In view of the above, applicant submits that the transaction of sale/ supply of goods by the supplier in India **should not be made liable to IGST** under section 7(5) (a) of IGST Act, 2017 since, the intention behind section 7(5) (a) was to specifically provide that export or import of goods and/ or services should be treated as inter-state transaction and not to tax the transactions under consideration. Alternatively the applicant submit that if at all the transaction is made taxable, the recipient should be eligible to avail the input tax credit.

We feel the need to examine only the contentions of the applicant at (4), (5) and (6) above, as these would be sufficient to answer the questions raised by the applicant.

From the facts of the case we find that the applicant would be purchasing from Schaeffer Germany, who is a manufacturer on principal to principal basis. The ownership of the said goods get transferred to the applicant without any physical movement of the goods from Germany to India. However the goods

remain in the possession of Schaeffer Germany. Once the first transaction takes place applicant transfers the ownership of the goods to Indian customer by way of sale. In this case also the goods remain under the possession of Schaeffer Germany. In short, the order received by the applicant from their customer in India and the order placed by applicant on Schaeffer Germany is in the nature of back to back order.

On the basis of the above set facts we would be required to refer to the provisions of IGST Act, 2017. First of all to confirm the nature of supply of present goods i.e. whether inter-state or intra-state we are required to refer to Chapter IV of the IGST ACT, 2017, which reads as under:-

CHAPTER IV DETERMINATION OF NATURE OF SUPPLY

Inter-State supply

7. (1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in,-

- (a) two different States;
- (b) two different Union territories; or
- (c) a State and a Union territory,

shall be treated as a supply of goods in the course of inter-State trade or commerce.

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

(3)-----
(4)-----

5. Supply of goods or services or both,--

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

Intra-State supply

8. (1) Subject to the provisions of section 10, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply: Provided that the following supply of goods shall not be treated as intra-State supply, namely:-

- (i) supply of goods to or by a Special Economic Zone developer or a Special Economic Zone unit;
- (ii) goods imported into the territory of India till they cross the customs frontiers of India; or
- (iii) supplies made to a tourist referred to in section 15.

From the reading of Section 7(2) of the IGST Act We find that Supply of goods imported into the territory of India till they cross the customs frontier shall be treated as supply of goods in the course of inter-state trade or commerce.

In addition to what is stated above we find that the location of the applicant as a supplier of goods is in India and the place of supply of goods is outside India i.e. Germany and such impugned transaction get clearly covered by the scope of section 7(5) (a) of the Act. As a result the transaction is in the nature of interstate trade and commerce.

Thus from the harmonious reading of Section 7(2) and Section 7(5)(a) of the IGST Act and the discussion held in this behalf herein above we clearly find that the transaction referred to as T2 gets covered under the ambit of Interstate trade and commerce. And thus liable to tax as per Section 5 of the IGST Act which reads as under:

5. Levy and collection.

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

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

(2) The integrated tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The integrated tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.



From the transactions placed by the applicant before us there is no doubt that the goods of the applicant would be imported goods if they are brought from outside the country into India and it is clear that when the location of the supplier is in India and the said goods are delivered/supplied from a place outside India to a place outside India, these goods have not crossed the customs frontiers of India, thus clearly the transaction in these goods are in the nature of inter-state supply as per Section 7(2) and 7(5)(a) of the IGST Act.

We find that proviso to Section 5(1) of the IGST Act states that "Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962".

Thus from the above it is clear that integrated tax on goods imported into India is to be levied and collected in accordance with Section 3 of the Customs Tariff Act, 1975 and Section 12 of the Customs Act, 1962 and the same is to be levied and collected at the time of import into India. The goods are considered to be imported into India only after they clear the customs frontier after compliance of applicable procedures and payment of duty as applicable.

Thus as per Section 7(2) and 7(5) (a) of the IGST Act and proviso to Section 5(1) of the IGST Act it is very clear that in respect of imported goods into the territory of India there is no levy and collection except in accordance with the provisions of Section 12 of the Customs Act, 1962 and Section 3 of the Customs Tariff Act, 1975. Section 12 of the Customs Act, 1962 provides that custom duties which includes integrated tax in respect of imported goods would be levied only at the time of import or export of goods.

Thus in case of goods supplied on an out an out basis as is in the present case, there is no levy till the time of their customs clearance in compliance with Section 12 of the Customs Act and Section 3 of the Customs Tariff Act. In view of this the imported goods sold from and to a non-taxable territory, though they are clearly in the nature of inter-state supply would come in the category of "exempt supply" as no duty is leviable on them except in accordance with proviso to Section 5(1) of the IGST Act.

We find that in the definition of exempt supply as given in Section 2(47) of the CGST Act is as under:-

Section 2(47) of the Central Goods and Services Tax (CGST) Act, 2017, "exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be "wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply".

Further we find that Section 2(78) of the CGST Act defines non-taxable supply which is as under:- "As per Section 2(78) of the Central Goods and Services Tax (CGST) Act, 2017, "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act".

Thus it is very clear that the goods sold in the subject transaction are non-taxable supply as no tax is leviable on them till the time of customs clearance in accordance with and compliance of Section 12 of the Customs Act, 1962 and Section 3 of the Customs Tariff act, 1975.



We find that the above legal position is further reiterated and confirmed by Circular No. 3/1/2018 - IGST dated 25.05.2018 issued by the Central Board of Indirect Taxes and Customs, GST Policy Wing.
6. In view of the extensive deliberations as held hereinabove, 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- 04/2018-19/B-

60 Mumbai, dt. 09/07/2018

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

Question:-Whether the sale of goods, which are located outside India, would be liable to tax in India under section 7(5) (a) of Integrated Goods and Services Tax Act, 2017?

Answer: - Answered in the Negative.

Question: - If answer to (a) is yes, then whether the recipient, to whom such goods are sold, be eligible to avail the input tax credit of such goods?

Answer: - Not relevant in view of answer to Question No. 1 above.



sd
B. V. BORHADE
(MEMBER)

sd
PANKAJ KUMAR
(MEMBER)

CERTIFIED TRUE COPY

Copy to:-

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

MEMBER
ADVANCE RULING AUTHORITY
MAHARASHTRA STATE, MUMBAI

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.