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		**27AACCM1226B1Z4**
Legal Name of Applicant		**Merck Life Science Private Limited**
Registered Address/Address provided while obtaining user id		**Godrej One, 8th Floor, Pirojshah Nagar, Eastern Express Highway, Vikhroli (East), Mumbai - 400079.**
Details of application		GST-ARA, Application No. 62 Dated 02.08.2018
Concerned officer		Asstt. Commr, Div-V, CGST, Navi Mumbai Commissionerate,
Nature of activity(s) (proposed / present) in respect of which advance ruling sought		
A	Category	**Service Provision**
B	Description (in brief)	The Merck Life Science Private Limited (hereinafter referred to as 'the Applicant') has entered into business transfer agreement dated 21 June 2018 with Merck Limited (seller) wherein the seller has agreed to sell, transfer, convey, assign and deliver to the applicant or to any affiliates as directed by applicant for the BPL business which would be transferred as a slump sale on going concern basis.
Issue/s on which advance ruling required		(iii) determination of time and value of supply of goods or services or both (v) Determination of the liability to pay tax on any goods or services or both (vii) whether any particular thing done by the applicant with respect to any goods and/or services or both amounts to or results in a supply of goods and/or services or both, within the meaning of that term
Question(s) on which advance ruling is required		

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 **Merck Life Science Private Limited**, the applicant, seeking an advance ruling in respect of the following questions.

i. Whether applicant's direction to the seller (directed in agreement dated 21 June 2018) for direct transfer of BP business to MSPL and PM business to MPMPL, respectively would qualify as a 'supply between the applicant' and 'MSPL/MPMPL'?

ii. If the answer to the above question is 'affirmative' then as the parties are related, even in absence of the actual consideration does the applicant have to attribute a notional consideration and charge GST in line with schedule 1 of GST Act to be compliant?

iii. If the answer to both the questions are 'affirmative' then as the recipients (MSPL/MPMPL) are eligible to avail full input tax credit then the notional consideration (percentage of the business transfer value) would be only academic and will the invoice value be considered as open market value?

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 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 submissions, as reproduced verbatim, could be seen thus-

A. STATEMENT OF FACTS HAVING A BEARING ON THE QUESTIONS RAISED

1. **The Merck Life Science Private Limited (hereinafter referred to as 'the Applicant') has** entered into business transfer agreement dated 21 June 2018 with Merck Limited (seller) wherein the seller has agreed to sell, transfer, convey, assign and deliver to the applicant or to any affiliates as directed by applicant for the BPL business which would be transferred as a slump sale on going concern basis. BPL business means BP business, LS Business and PM business as going concern as outlined in 'Definitions and Interpretations'. Refer Exhibit 1 for details of agreements.

Pursuant to the above, another agreement executed between the seller and Merck Specialties Private Limited (hereinafter referred to as the MSPL')/Merck Performance Materials Private Limited (hereinafter referred to as "the MPMPL') for direct transfer of the BP and PM Businesses where in the applicant has only directed to seller for transfer. The applicant vide above agreements has directed the seller to transfer the BP business to MSPL and PM business to MPMPL as going concern on a slump sale basis. Accordingly, only LS Business will be sold to applicant. Refer Exhibit 2 for details of agreement.

In terms of above agreement, the Seller would be receiving lump sum consideration for each slump sale of BP business, PM business and LS business independently from the MSPL, MPMPL and the applicant respectively which is exempt from GST vide serial no 2 of Notification No.12/2017 - central tax dated 28th June 2018 as amended from time to time. Necessary intimation regarding slump sale as going concerns were filed before the regulatory authority such as National Stock Exchange of India Limited vide letter dated 21 June 2018. Refer copy of the said intimation in Exhb 3.

2. At the outset, we would like to make it clear that the provisions of both CGST Act and MGST Act are 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 purpose of this advance ruling application, a reference to such a similar provision under the CGST Act/MGST Act would be mentioned as being under the 'Goods and Service Act (GST Act).

C. APPLICANT'S INTERPRETATION OF LAW OR FACTS, AS THE CASE MAY BE

1. **Applicants direction to the seller basis which the seller would make an independent third party sale does not qualify as an activity nor as a 'supply of service' between the applicant and the third party (MSPL/MPMPL):**

In the present case, the applicant and the seller entered business transfer agreement for transfer of BPL business as going concern on slump sale basis wherein the applicant has only directed to transfer BPL business or part thereof to its affiliates.

In this regard, it is relevant to refer extract of business transfer agreement between the applicant and seller which is reproduced (refer page 4) below for ease of reference:

"....Subject to the terms and conditions set forth herein, the Seller hereby agrees to sell, transfer, convey, assign and deliver (as the case may be) to the purchaser (or to an affiliate of the purchasers, as directed by the purchaser) hereby agrees to purchase, take assignment and deliver of all of the sellers right, obligations, title and interest, liabilities, claims and demands whatsoever at law and in equity, in and to the BPL business on the closing date on a slump sale basis as going concern....."

On perusal of above, it is evident that the purchaser (i.e. in the present case applicant) can direct to the seller for transfer of BPL business (i.e. BP business, PM business and LS business) as going concern on slump sale basis to its affiliates.

As per Schedule 12 - Definition and Interpretation of business transfer agreement, the term 'Affiliates means in relation to any party, any subsidiary or any parent company of that party and any subsidiary *of any such parent companies, in each case from time to time.*

MSPL and MPMPL are fellow subsidiary (affiliates) of MLSPL, all three entities are subsidiaries of the Company's ultimate holding company, Merck KGaA, Darmstadt, Germany. Hence, in the present case, the applicant, MSPL and MPMPL qualifies as affiliates.

Further, the applicant vide agreement for transfer of BP and PM businesses has directed the seller to transfer, convey, assign, and deliver (as the case may be) BP business to MSPL and PM business to MPMPL as going concern on a slump sale basis. However, it is pertinent to note that the direction is given by the applicant to the seller and there is no activity between the applicant and its affiliates i.e. MSPL and MPMPL. In this regard, it is relevant to refer definition of 'supply' as per section 7 of GST Act which is reproduced below for reference:

"....7. (1) For the purposes of this Act, the expression "supply" includes–

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
(b) Import of services for a consideration whether or not in the course or furtherance of business, (c) The activities specified in Schedule I, made or agreed to be made without a consideration; and...."
As per section 7(1)(b) of GST Act, the term 'supply' includes supply of goods or services or transfer etc. made or agreed to be made for a consideration by a person in the course or furtherance of business. However, in the present case, as discussed supra, there is no activity which constitute goods or service to qualify as 'supply between the applicant and MSPL/MPMPL.
In the present case, the board of directors of MSPL/MPMPL have independently evaluated the opportunity and valued the businesses. Basis their independent evaluations the acceptance has been given to the seller. The direction provided by the applicant has not resulted in any economic benefits or reduction in the consideration for the related parties (MSPL/MPMPL). This further strengthen the above stand.

7. In absence of the element of 'supply' between the applicant' and 'MSPL/MPMPL', the evaluation of applicability of schedule 1 does not arise.

Further, as per above agreements there is no consideration paid by MSPL/MPMPL to the applicant for transfer of business as going concerns. Hence, in the instant case, it is relevant to analyses provision of schedule 1 of GST Act.
In terms of section 7(1)(c) of the GST Act, activities specified in Schedule I to be treated as supply which are made or agreed to be made without a consideration as extracted below for reference:
"...SCHEDULE I
[See section 7] ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION
1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.
2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business...."
In the instant scenario, the applicant and MSPL/MPMPL are related parties in terms of explanation to section 15 of GST Act. Hence, any supply of goods or services between the applicant and MSPL/MPMPL even without consideration can be considered as 'supply' under GST Act. However, as discussed in foregoing para, there were no activity between the applicant' and 'MSPL/MPMPL' and there is no business consideration between the applicant' and 'MSPL/MPMPL'.
Hence, an independent direction by applicant to seller for transferring a business to a related party would not qualify as 'supply' between the applicant' and 'MSPL/MPMPL' under GST Act.

8. Since full input tax credit is available to MSPL/MPMPL the notional consideration should be considered to be open market value.

Without prejudice to above, even for argument sake it is presumed that the above transaction qualifies as supply between the applicant and MSPL/MPMPL, both being related parties, the notional consideration (percentage of business transfer value) would be an academic discussion and the invest treated as open market value as per Rule 28 of GST Rule.
Notwithstanding above, in the present case, if supply' exists between the applicant and MSPL/MPMPL than value of supply being related parties may be determined under Rule 28 of GST Rules,
In the present case, MSPL and MPMPL are affiliates (fellow subsidiary) of applicant, all three entities being subsidiaries of the Company's ultimate holding company, Merck KGaA, Darmstadt, Germany hence, they are related parties.

Hence, in absence of any consideration between the applicant and MSPL or MPMPL, value for levy of GST may be computed under Rule 28 of GST Rules. The extract of said provision produced below for reference:
" Value of supply of goods or services or both between distinct or related persons, other than through an agent. The value of the supply of goods or services or both between distinct persons as specified in subsection (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall –
(a) Be the open market value of such supply; (b) If the open market value is not available, be the value of supply of goods or services of like kind and quality; (c) If the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:
Provided that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:
Provided further that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services"
In terms of section 16 of GST Act, every registered person entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the furtherance of his business.
On perusal of above provision, it is evident that in the present case also MSPL and MPMPL are registered person under GST Act in the state of Maharashtra. Further, the transaction would be used or is intended to be used in the course or furtherance of business by MSPL and MPMPL. Hence, both MSPL and MPMPL are eligible to claim input tax credit on GST charged by the applicant. Therefore, in view of above, the applicant may adopt to value the proposed transaction as per the second proviso to Rule 28 of CGST Rules. As per said proviso, the value of the transaction may be adopted as percentage of business transfer agreement.

D. APPLICANT'S UNDERSTANDING

As discussed in above para,

- there were no activity between the 'applicant' and 'MSPL/MPMPL';
- the 'applicant' has directed to the 'seller' for transfer of business vide agreement for transfer of BP and PM business but there is no activity of supply of goods or services undertaken between the 'applicant' and 'MSPL/MPMPL';
- Consideration would be received by the seller directly from MSPL/MPMPL. There will not be any types of considerations between the applicant' received from 'MSPL/MPMPL'.

Hence, applicant's direction to seller for slump sale of BP business and PM business as going concern to its related party i.e. MSPL and MPMPL respectively without any consideration does not qualify as 'supply' and is not subject to GST

Independent of above even if it is treated as 'supply' then the value of the consideration would be academic and the invoice value would be considered as the open market value for all GST purposes. Hence, even if a percentage of sale is considered to be the value the same should be acceptable.

We shall be glad to furnish such additional information and relevant documents as the Authority may require for passing its decision where the application is admitted.

Prayer

A. In view of the above factual and legal position, it is most humbly prayed that this Hon'ble Authority may clarify that:

i. Whether applicant's direction to the seller (directed in agreement dated 21 June 2018) for direct transfer of BP business to MSPL and PM business to MPMPL, respectively would qualify as a 'supply' between the applicant' and 'MSPL/MPMPL'?

ii. If the answer to the above question is 'affirmative' then as the parties are related, even in absence of the actual consideration does the applicant have to attribute a notional consideration and charge GST in line with schedule 1 of GST Act to be compliant?

iii. If the answer to both the questions are 'affirmative' then as the recipients (MSPL/MPMPL) are eligible to avail full input tax credit then the notional consideration (percentage of the business transfer value) would be only academic and will the invoice value be considered as open market value?

Additional submissions by applicant.

We Merck Life Science Private Limited (**'Company' or 'we' or 'Applicant'**), are registered under the Goods and Service Tax Act, 2017, vide the registration no. 27AACCM1226B1Z4.

This is with reference to final hearing notice for advance ruling vide application no. 62 dated 02nd August, 2018. In this respect, we wish to submit the following additional grounds to provide the justification regarding the questions for which such advance ruling is sought.

A. **Applicant or an affiliate of the applicant had the right to buy the BPL business.**

In the instant case, it is important to note that the initial business transfer agreement between the seller and the applicant was executed on 21 June 2018 which authorizes the applicant or any of its affiliate to buy the BPL business on the closing date. On the very same date, another agreement was executed simultaneously between the seller, the applicant, MSPL and MPMPL for selling the respective business on a slump sale basis.

This clearly highlights that the applicant and its affiliates, as directed/identified by the applicant, had the right to buy out the respective BPL business under the initial agreement which was respectively identified and sold business wise in the second agreement.

Hence, it is evident from above facts that the intention was always to undertake the slump sale of BPL business to the applicant, MSPL and MPMPL independently. In the present case, a two- step approach was followed with regards to the documentation. It is also important to note that the entire transaction is between the group companies. Had there been single agreement executed between all parties then this question would not have raised before your goodself. Hence the substance of the transaction had to be looked at over the form.

Further, regulatory filling have also been made accordingly with the respective regulators. Hence, the question of the applicant parting with any rights in the second agreement does not arise at all.

B. **This would also not qualify under Schedule II as a service**

Without prejudice to submissions made herein above, it may be stated that the activity of the applicant does not fall under Schedule II, Part 5 (e) which is **activity of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act**.

Activity of agreeing to the obligation to refrain from an act - This act is an act of abstinence for which consideration is received by the service provider (the person who abstained from doing an act) and economic benefit accrues to the recipient of service. For example, the Service Tax Guidelines dated June 2012 issued by the Central Board of Excise & Customs vide para 6.7.1 have clarified that when a person refrains from completion and received an anti- compete fee, then such abstinence is treated as deemed service as per Schedule-II. The case of the applicant does not fit into it.

Activity of agreeing to the obligation to tolerate an act or a situation, or to do an act - As per dictionary meaning, 'tolerate' means 'accept or endure (someone or something unpleasant or disliked) with forbearance'. In our case, neither the applicant nor its affiliates are tolerating any act on behalf of each other. The entire transaction is happening between the seller and applicant independently without any aspect of tolerating an act or situation. An obligation to tolerate an act or a situation or to do an act flows from the contractual agreements between the parties. For example if

A has taken a loan from the Bank and B has stood guarantor for the said loan. In case of default in repaying the loan by A to the bank, B would be under obligation to do an act of repaying the Bank. Hence, it is evident that such obligation flows expressly from the contractual terms and agreements. Such agreements stipulates the obligation in the course or furtherance of business. In the instant case, such a situation is absent.

Further, the Applicant does not have an inherent right that he is relinquishing. Such right to direct sale to its affiliates emerges out of the delegation of the said authority by the affiliates. It is the right that he has acquired from the affiliates, which he is relinquishing. In case of facilitation service, an existing right is relinquished in favor of the affiliates. Here, there is no such existing right with the applicant. It is merely an agreement for administrative convenience of all the parties involved. All the parties are involved from the very beginning and have consensus ad idem. Hence, no economic benefits accrues to the Applicant in whatsoever form. Thus, no service provided by the applicant in the course or furtherance of business.

C. **Slump sale is not in course or furtherance of business**

Historically there were disputes as to whether the slump sale is goods or not. It was consistently held that the slump sale is not goods because it is not done in course of the business. In the case of ***M/s. Paradise Food Court, vs The State of Telangana, on 18 April, 2017*** **(2017-VIL-238-AP)**, the Hon'ble High Court of Andhra Pradesh held that slump sale if not goods and cannot be sold in the course of trade or business. Relevant extract is cited below for your reference;

"…..As we have pointed out earlier, sale of business as a whole is not made taxable even now under the charging provision. It is only the sale of goods which is chargeable under Section 4(1). The definition of the expression sale would apply to a case only if the sale takes place in the course of trade or business, as per section 2(28). A business in entirety, cannot be sold in the course of trade or business, as there will be no business left thereafter, to deal with….."

Further, in the recent advance ruling in Karnataka of ***M/s Rajashri Foods Private Limited, (2018-VIL-37-AAR)***, has clearly stated that sale of business as a going concern is **not supply in the course or furtherance of business**.

D. **Activity of directing the seller to sell to the affiliates is not a service covered by Schedule-I**

As per Schedule- I of CGST Act, 2017 transaction to be treated as supply even when made without consideration, includes *supply of goods or services or both between related persons or between distinct persons as specified in section 25, **when made in the course or furtherance of business**:*

In the present case, the facilitation activity of directing the seller to sell to the affiliates are not in course of or for furtherance of business of the applicant.

Section 2(17) of CGST Act defines –

"business" includes– (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, **whether or not it is for a pecuniary benefit;**

The Pecuniary benefit is nothing but the economic benefit accrued to the service provider immediately in exchange for the said service provided, directly or indirectly and is co-relatable with the service provided. There has to be a direct nexus between the service provided and the economic benefit accrued whether direct or indirect.

This means if the economic benefit is accrued in future and the said benefit is not co-relatable with the service provided, then the said economic benefit is not covered by the pecuniary benefit mentioned in the definition. In such a case, it would be treated as provision of service without any pecuniary benefit.

Hence if the economic benefit accrues in future and is not co-relatable with the service provided, then it is to be treated as *no pecuniary benefit accrued* to the service provider as per the definition of the 'business'. Pecuniary benefit is immediate, direct or indirect and co-relatable. But the economic benefit is a wider term and it includes the pecuniary benefit as mentioned in the definition of business and also the future benefits, indirect and not co-relatable. For example if the holding company provides service to the subsidiary company without consideration, then it fulfills the condition that the activity is not for any pecuniary benefits and hence fulfills the definition of 'Business' as per CST law and hence said service is in course or furtherance of business.

However, strictly speaking, the said service helps the subsidiary company to grow its business which results into increased outflow of dividend income to the Holding company. Hence the economic benefits accrues to the service provider in the long run but it is in distant future and also the said economic benefit is not co-relatable with the service provided by the holding company.

In view of the above, if an economic benefit accrues in future and is not co-relatable with the service provided, then it would be treated as provision of service without any consideration. Such service if provided to a related person would qualify as supply of service without consideration in course or furtherance of business as per Sch.- I of the CGST Act.

In order to qualify any service as in course of business, the said service should be provided with the intention of deriving economic benefits. If the benefits are not immediate and direct and also not co-relatable, then apparently it looks like without consideration as per Schedule- I. There is no other situation when the service is provided without consideration in course of business. **If the service is provided in course of business, then economic benefits must accrue.** If it accrues immediately, directly or indirectly, then the same is treated as provision of service against consideration. If the economic benefit is not immediate, direct and not co-relatable, then the said service is treated as provided without consideration in course of business.

There cannot be a situation when the service is provided absolutely FREE and still considered as provided in course of business. If that view is taken, then the implication of *in course of business* does not make any sense. Then there would be no difference between business and charity. Any service without economic benefit in whatsoever form, cannot qualify as in course of business.

If the service provided free is considered as in course of business, then the definition of business is distorted. There cannot be an activity in course of business which does not have the economic benefit implications, directly or indirectly or immediate or in future or co-relatable or un-co-relatable.

In the present case, relinquishing the right to buy the business division of the Merck in favour of the affiliate group companies is not for any economic benefits whatsoever, whether direct or indirect, immediate or in future or co-relatable or un-co-relatable. Department cannot prove that there is any economic benefit, whatsoever, attached to such relinquishing of the rights. Hence such activity of relinquishing the right is not in course of business. According, said activity does not qualify as an activity mentioned in Schedule-I

If the intention of law was to include activities not in course or furtherance of business, then there would have been no mention of **"in course or furtherance of business"** in the definition of supply under section 7 of CGST Act. There is no legal construction to declare slump sale as supply of service by inferences or implications or indirect interpretation. That is not the object and purpose of the construct of Schedule-II. The settled rule of legal construction is to presume the legislature to have meant what they have actually expressed. The intent of the parliament must be deduced from the language used. It is a settled principle of law, that question of law has to be understood in the context in which it is framed and not out of context.

Further, we understand that it is a settled position of law that if there is any ambiguity in the interpretation of law for the purpose of imposition of any levy, the benefit of doubt should go in favor of the assesse. In the case of ***Commissioner of Customs (Import), Mumbai v. Dilip Kumar and Company & Ors, 2007 (S.C.)*** (TS-336-SC-2018-CUST), the constitutional bench of Supreme Court analysed issue in detail and held that *ambiguity or doubtful fiscal statute must receive a construction in the favor of the assessee*. Thus, in the present case also, in absence in clarity of taxability, GST Act should be interpreted in favour of the applicant and it should not be taxable service.

Relying upon the decision of the Hon'ble Supreme Court, in the case of ***Mauri Yeast India Pvt. Ltd. v. State of U.P.***, **2008 (225) E.L.T. 321 (S.C.)**, the Learned Counsel submitted that, when a commodity has been accepted to be of a particular nature by the Assessing Officer for a long time, it should remain to be classified as such without any change, and the common parlance test, or user test, cannot be said to be decisive in such a situation, and the onus would be on the Department to show, as to why, a different interpretation should be resorted to, when there is no change in the statutory provision, and **if two views are possible, then, one, which is favorable to the assessee has to be adopted**

Also, the applicant and its affiliates (i.e. MSPL and MPMPL) are related person as per explanation to section 15 (5) of GST Act, relevant extract of which is reproduced as under:

"(a) persons shall be deemed to be "related persons" if—

(i) .....

*(vi) Both of them are directly or indirectly **controlled by a third person**..."*

Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.

We understand that Schedule-I of CGST Act stipulates that the supply should be **in course or furtherance of business.** In the present scenario, an instruction (right to direct) to the seller to sale the business to its affiliates is not an activity in course or furtherance of business of the Applicant.

Such direction in no way affect or is related to the business of the applicant. It is also not for the purpose of the continuation or performance of the business of the applicant. **In course of business is like running the business and furtherance of business is like doing something for the growth of the business**. Running the business and growing the business are integrally connected and an entangled phenomenal. It is not commercially or technically possible to say that slump sale is not in course of business but for furtherance of business. It is similar to saying that it is not for running the business but for growing the business. If the business itself does not exist it cannot be stated that it is in course of business or for furtherance of business.

The Government of India vide exemption **Notification No. 12/2017- Central Tax (Rate) dated 28th June, 2017** has exempted *"Services by way of transfer of going concern, as a whole or independent part thereof."*

The above notification fails to have any relevance on taxability of slump sale because if there is no levy on slump sale, then it cannot be treated as taxable service. It is evident in law from a harmonious reading and interpretation of law and the context in which the Goods and Service Tax law is framed as apparent from the object and purpose of the legislation, that slump sale is neither goods nor services. In view of the above it may be stated that if the levy is not there, the question of exemption does not apply.

It is a cardinal principle of law that it has to be interpreted as a whole and an effort has to be made so that there is no contradiction in the different provisions of the law. The law has to be interpreted harmoniously so that there is a cohesive meaning emanates from such interpretation and also serves the object and purpose of law without any contradiction or ambiguity. In the light of the above, it may be submitted that the purport of the exemption notification has to be read as to mean that it exempts services in connection with slump sale and NOT the activity of slump sale per se. This line of interpretation is in sync with the overall object and purpose of the legislation and does not give rise to any controversy or ambiguity. It is like reading the law as a whole and interpreting the same harmoniously so that effect can be given to each of the aspect and provision of the law without creating any contradiction or attrition.

In case if slump sale is construed as service by way of impermissible inference as per the context of the law, still it can be stated that such slump sale is not in course or furtherance of business and will not qualify as supply of service

Further, mere exclusion of present transaction and slump sale from ***"Schedule III - activities or transactions which shall be treated neither as a supply of goods nor a supply of services"***, should not be construed as that the particular activity is under the ambit of GST law.

In the proposed amendment to GST Act there was inclusion of multiple activities under Schedule III, which were earlier not part of the said schedule. However, this doesn't imply that these activities were earlier leviable to tax under GST law. GST law like any other tax law is an evolving law and accordingly there are always amendments to incorporate what was missing hitherto. Hence there is no exhaustive list of non-goods or non-service.

E. The applicant will not qualify as "Intermediary"

Without prejudice to above submissions, it may be stated that facilitation activity provided by the applicant connects the seller and the buyer and hence such direction to the seller to sell their business units to applicant's affiliates would take the character of an Intermediary as per the GST law.

As per section 2(13) of Integrated Goods and Services Tax Act, 2017 (IGST Act) *"intermediary" means a broker, an agent or any other person, by whatever name called, **who arranges or facilitates the supply of goods or services or both, or securities**, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;*

If the facilitation service is provided by the taxpayer then the person qualifies as Intermediary. In the present case, the applicant had never arranged and facilitated transaction of slump sale to its affiliates. The slump sale was directly undertaken by the seller to MSPL and MPMPL. Only for administrative purpose two sets of agreement was entered. Hence the applicant is not qualify as an 'Intermediary' and not liable to pay tax.

F. Direction by the applicant for facilitation of any non-service (in the present case slump sale), will not qualify as supply of service.

It is arguable that slump sale is neither supply of goods nor supply of service. In the instant scenario also, the applicant's direction to its seller is neither "supply of goods" nor will qualify as "supply of service" under GST Act. If the intention of legislature was to levy tax on facilitation of non-service (i.e. slump sale) then they would have made specific inclusion in the definition of "Service", "Supply" or Schedule II of GST Act.

In this regard, it may be mentioned that although security is excluded from the definition of 'service', facilitating or arranging transaction in securities is included in the definition of 'Service' through an explanation to section 2 (102) in the proposed amendment in the GST Act for the purpose of removal of doubts with retrospective effect from July 2017. Further, the definition of "service" clearly includes activities relating to use of money although money is excluded from the definition of 'Service'. This implies that even if the transaction in money is excluded from the definition of service, activities in relation to transaction in money i.e. not the transaction in money per se, is "service" and hence, it is taxable.

In view of the above, it may be observed that in case of any facilitation service in connection with non-service (like money or security) it is generally not a taxable service. This is all the more evident from the fact that such facilitation service is specifically included as taxable service. It is a cardinal principle of law that if an activity is specifically included as taxable service, then if such activity is not included, then such activity would not be taxable. There is no scope for automatic inclusion by assumption / presumption / inference / implications. Hence, in order to tax activity in relation slump sale there has to be specific inclusion in the definition of service or in Schedule-II.

It is evident from the GST law that there is no specific inclusion of such facilitation service / activity in connection with slump sale, in the definition of Service or in Schedule-II. Hence such activity in connection with slump sale (which is a non-service) is also outside the purview of the definition of Service both in Section 2(102) and also in Schedule-II and accordingly non-taxable.

G. The present transaction would be revenue neutral in the hands of the government

Notwithstanding above, in case the above transaction gets taxable under GST in the hands of applicant the recipient (MSPL and MPMPL) would qualify for input tax credit. Hence, it will be a revenue neutral transaction.

H. Applicant's Understanding

As discussed in above para,

- the 'applicant' has directed to the 'seller' for transfer of business vide agreement for transfer of BP and PM business but there is no activity of supply of goods or services undertaken between the 'applicant' and 'MSPL/MPMPL';
- the present transaction is neither supply of goods nor supply of services;
- the applicant also doesn't qualify as an intermediary under the instant case;
- the transaction is not in the course of furtherance of business;
- the transaction will also not qualify under Schedule II;
- the transaction is also revenue neutral in the hands of the government.

Without prejudice to above, in case above transactions are considered as taxable by your goodself, then the **open market value should be the value declared in the invoice**. Further, as the transaction would be used or is intended to be used in the course or furtherance of business by MSPL and MPMPL. Hence, both MSPL and MPMPL are eligible to claim full input tax credit on GST charged by the applicant. Hence the discussion on the valuation would just be an academic exercise.

We Merck Life Science Private Limited (**'Company' or 'we' or 'Applicant' or 'us'**), are registered under the Goods and Service Tax Act, 2017, vide the registration no. 27AACCM1226B1Z4.

This is with reference to final hearing for advance ruling vide application no. 62 dated 02nd August, 2018 attended on 19th September, 2018. In continuation to the additional submission made by us 19th September, 2018, we are hereby submitting summary of final discussion held before your goodself:-

- The applicant and its affiliates entered in two agreements with the seller for slump sale of BPL business. In the first agreement, 'the Applicant' has entered into business transfer agreement with seller wherein the seller has agreed to sell to the applicant or to any affiliates as directed by applicant as a slump sale on going concern basis. Second agreement, which was an extension to the first agreement, was entered on the same day immediately after the execution of first agreement. In the second agreement both the applicant and its affiliates (MSPL and MPMPL) were purchasers. Applicant purchased LS business, MSPL purchases BP business and MPMPL purchased PM business as per the second agreement read conjunctively with the first agreement. Hence, the right to purchase BPL business from seller was already vested with applicant and its affiliates conjointly in first agreement itself.
- Intention was always to do slump sale of BPL business by seller to applicant and its affiliates, which was evident from intimation filed on 27th April, 2018 before the regulatory authorities **(Refer Exhibit 1)** and also in the letter dated 21st June, 2018 filed with NSE, for announcing the signing of the agreements.
- Based on above discussion, it is apparent that the transaction of slump sale would happen between the seller and the applicant alongwith its affiliates independently. There is no activity between the applicant and its affiliates to qualify as "supply of goods/services" under GST Act.
- Without prejudice to above, in case direction by applicant qualifies as an "activity of agreeing to the obligation to do an act" (i.e. qualify as a supply of service under schedule II of GST Act), then also in absence of consideration, GST should not be applicable. An obligation means a contractual obligation in legal parlance. In the present case, there is no contractual obligation between the applicant and its affiliates to do any act. Hence, the activity of giving a direction cannot be classified as an "activity of agreeing to the obligation to do an act".
- Further, the applicant and its affiliates are related parties hence, there is a possibility that it may be considered as supply under schedule I of GST Act even without consideration. However, the direction by the MLSPL to Seller (i.e. Merck Limited) is not in the course or furtherance of business hence, it will again not qualify as 'supply' under schedule I of GST Act.

Thus, based on the above discussions, it is evident that in substance direction of applicant to seller for slump sale of BPL business doesn't qualify as a service since the affiliates mentioned in the first agreement were already party to the agreement. Therefore, it is outside the purview of GST law.

Further as required by your goodself, find below the computation of stamp duty discharged under the agreement alongwith legal provision for your ready reference:

Business Transfer Agreement (BTA)

- Overall consideration payable under the BTA: **INR 10,520,000,000/-**
- Stamp duty payable:

Article reference under Schedule I of the Maharashtra Stamp Act	Description of head under which stamp duty is payable	Amount of stamp duty
Article 5(h)(A)(iv)(b)	Agreement which creates any obligation, right or interest and having monetary value above INR 1,000,000	0.2% of overall consideration under the BTA = 0.2% of INR 10,520,000,000 = INR 21,040,000
Article 35	Indemnity provision	INR 500
Article 5(h)(B)	Arbitration provision (covered under the residuary provision)	INR 100
Total Stamp Duty Payable		**INR 21,040,600**

BP and PM Transfer Agreement:

- Consideration payable by MSPL to Merck Limited under the BP and PM Transfer for the transfer of the BP Business: INR 6,781,500,000
- Consideration payable by MPMPL to Merck Limited under the BP and PM Transfer for the transfer of the PM Business: INR 808,400,000
- Stamp duty payable:

Article reference under Schedule I of the Maharashtra Stamp Act	Description of head under which stamp duty is payable	Amount of stamp duty
Article 5(h)(A)(iv)(b)	Agreement which creates any obligation, right or interest and having monetary value above INR 1,000,000	0.2% of consideration paid under the BP and PM Transfer Agreement = 0.2% of INR (6,781,500,000 + 808,400,000) = 0.2% of INR 7,589,900,000 = INR 15,179,800
Article 35	Indemnity provision	INR 3000 (INR 500 * 6 sets of indemnities under the agreement)
Article 5(h)(B)	Arbitration provision (covered under the residuary provision)	INR 100
Total Stamp Duty Payable		**INR 15,182,900**

Legal Entity Wise Split of Stamp Duty:

Basis the above stamp duty computation, split of stamp duty attributable to Merck Life Science Private Limited (MSPL), Merck Specialties Private Limited (MSPL) and Merck Performance Materials Private Limited (MPML) was arrived at as follows:

Parties	Overall Business Valuation	BTA		BP & PM Transfer Agreement		Total Stamp Duty liability
		Stamp Duty	Indemnity + Arbitration	Stamp Duty	Indemnity + Arbitration	
MLSPL	2,93,01,00,000	58,60,200	600	0	0	58,60,800
MSPL	6,78,15,00,000	1,35,63,000	0	1,35,63,000	1550	2,71,27,550
MPMPL	80,84,00,000	16,16,800	0	16,16,800	1550	32,35,150
TOTAL	10,52,00,00,000	2,10,40,000	600	1,51,79,800	3,100	3,62,23,500

03. CONTENTION – AS PER THE CONCERNED OFFICER

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

In this regard, applicant (M/s Merck Life Science Pvt. Ltd.) had sought Advance Ruling in respect of question number (c), (e) and (g) of point No. 4 at Para B i.e. Applicant's eligibility to file present Advance Ruling Application. In the light of the facts as per (c), (e) and (g) of point No. 4 at Para B, applicant wishes to seek clarification on the following matters from the Authority for Advance Ruling established under GST Act:

1. Whether applicant's direction to the seller (directed in agreement dated 21 June 2018) for direct transfer of BP business to MSPL and PM business to MPMPL, respectively would qualify as a 'supply' between the 'applicant' and 'MSPL/MPML'?
2. If the answer to the above question is 'affirmative' then as the parties are related, even in absence of the actual consideration does the applicant have to attribute a notional consideration and charge GST in line with schedule 1 of GST Act to be compliant?
3. If the answer to both the questions are 'affirmative' then as the recipients (MSPL/MPMPL) are eligible to avail full input tax credit then the notional consideration (percentage of the business transfer value) would be only academic and will the invoice value be considered as open market value?

On examination of the application this office is of the opinion that

1. Applicant's direction to the seller (directed in agreement dated 21 June 2018) for direct transfer of BP business to MSPL and PM business to MPMPL, respectively will qualify as a 'supply' between the 'applicant' and 'MSPL/MPML'.
2. Since activity of transfer of going concern constitute supply of service, applicant being facilitator of slump sale between Merck Specialities Pvt. Ltd. and Merck Performance Material Pvt. Ltd. (different entities) and said being taxable supply. The MLSPL (applicant) appears to be liable to GST even though there is no consideration and as such the entities are related as per agreement of business transfer and transfer of BP and MP business.
3. Since MLSPL (applicant) liable to GST and being taxable supply, it seems the recipients MSPL/MPMPL are eligible to avail full ITC even though there is no consideration, subject to condition specified in ITC Section/Rules.

04. HEARING

The case was taken up for Preliminary hearing on dt. 04.09.2018 when Sh. Gurudas Pai C.A. , Sh. Abhijit Saha, Advocate, Ms. Pooja Singh, C.A. along with Sh. Mangesh Wagle, Manager Indirect tax appeared and made oral and written submissions for admission of application . Jurisdictional Officer, Sh. B. S. Manat, Division – V, CGST, Navi Mumbai Commissionerate appeared and stated that they would be making submissions in due course.

The application was admitted and called for final hearing on 19.09.2018, Sh. Gurudas Pai C.A., Sh. Abhijit Saha, Advocate, Ms. Pooja Singh, C.A. along with Sh. Mangesh Wagle, Manager Indirect tax appeared and made oral and written contentions as per details given in their application. Jurisdictional Officer, Sh. M S A Khan, Supdt., Division – V,CGST, Navi Mumbai Commissionerate appeared and stated that they have made written submissions.

05. OBSERVATIONS

We have gone through the facts of the case as per ARA, oral and written submissions made by the Applicant as well as the jurisdictional officer.

We find that the Applicant has entered into a Business Transfer Agreement with Merck Ltd (seller) wherein the seller has agreed to sell, transfer, convey, assign and deliver to the applicant or to any affiliates as directed by the applicant for the BPL business which would be transferred as a slump sale on a going concern basis. The Applicant has stated that BPL business means BP business,LS business and PM business as going concern as outlined in Definitions and Interpretations.

In view of the above agreement, it is stated --

--- One agreement has been executed between the seller, M/s Merck Ltd and M/s Merck Specialities Pvt.Ltd. (MSPL) for transfer of BP business to MSPL by and from seller.

Second agreement has been entered into between the seller (M/s Merck Ltd) and and M/s Merck Performance Material Pvt. Ltd. (MPMPL), for transfer of PM business to MPMPL by and from seller.

In respect of the above two agreements, the applicant has only directed the seller to transfer these above referred business to the affiliates of MSPL and MPMPL as required, as per the terms of the first agreement between the seller and the applicant referred above.

It is further stated that the applicant, vide the two agreements referred above has directed the seller to transfer the BP business to MSPL and PM business to MPMPL as going concern on slump sale basis. As a result only LS business is sold by the seller to the applicant.

It is further stated in the application that in terms of the above referred agreement, the seller could be receiving lump sum consideration for each slump sale of BP business, PM business and LS business, independently from MSPL, MPMPL and the applicant respectively and further it is stated that this lumpsum consideration received by the seller is exempt from GST vide Sr.No. 2 of Notifcation No. 12/2017- Central tax (Rate) dated 28.06.2017 as amended from time to time.

In view of the above facts, we find that the applicant has raised the subject three questions in their application which are discussed below:-

First of all we take up the first question raised by the applicant which reads as under:-

Question 1:- *Whether applicant's direction to the seller (directed in agreement dated 21 June 2018) for direct transfer of BP business to MSPL and PM business to MPMPL, respectively would qualify as a 'supply between the applicant' and 'MSPL/MPMPL'?*

We are required to ascertain if the direction given by the applicant as per agreement dated 21.06.2018 for direct transfer of BP business to MSPL and PM business to MPMPL would qualify as a supply between the applicant and MSPL/MPMPL.

To examine whether the above direction of the applicant would qualify as a supply between the applicant and MSPL/MPMPL, we refer to the scope of Supply as given under Section 7 of the CGS Act, 2017 which reads as under:-

'7 (1) For the purposes of this Act, the expression "supply" includes

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business;

(c) the activities specified in Schedule 1, made or agreed to be made without a consideration, and

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.'

Here we are required to refer to Schedule-I and Schedule-II as well attached to Section 7 to examine the question as raised by the applicant.

From the details submitted before us we find that in respect of transfer of BP business to MSPL and PM business to MPMPL by the seller apparently it is seen and also claimed in the application by the applicant is that the applicant is only directing the seller to transfer these businesses to MSPL and MPMPL and this direction is as per the first agreement between the seller and the applicant.

Thus we find that apparently the applicant has directed the seller for transference of these businesses to MSPL and MPMPL as above.

We find that this act of direction on the part of the applicant to be a supply or not would have to be examined only in respect of it being a service under the scope of para 5(e) of Schedule-II in respect of the scope of supply as given in Section 7 of the CGSTT Act. We find that para 5 (e) reads as under:-

(e) Agreeing to the obligation to refrain from an act or to tolerate an act or a situation or to do an act.

In view of the above, first we examine the terms of the agreement dated 21.06.2018 between the applicant and the seller and then the agreement between the seller and MSPL and between the seller and MPMPL to ascertain if the act of giving direction by the applicant would fall in the scope of supply between the applicant and MSPL and MPMPL.

We find that the agreement dtd. 21.06.2018 between the applicant and seller provides as under:-

"This agreement is made on 21st June, 2018

PARTIES

(1) MERCK LTD., a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Godrej One, 8th floor, Pirojshanagar, Eastern Express Highway, Vikhroli (East), Mumbai-400079 and corporate identity number L99999MH1967PLC013726 (hereinafter referred to as the

Seller, which expression shall, unless the context otherwise requires, includes its successors and permitted assigns, and

(2) MERCK LIFE SCIENCE PVT. LTD., a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Godrej One, 8th floor, Pirojshanagar, Eastern Express Highway, Vikhroli (East), Mumbai - 400079 with company identification number U24100MH2005PTC152680 (hereinafter referred to as the *Purchaser*, which expression shall, unless the context otherwise requires, includes its successors and permitted assigns (the Seller and the Purchaser together the *Parties* and each a *Party*).

Words and expression used in this Agreement shall be interpreted in accordance with Schedule 12 (*Definitions and Interpretations*)

IT IS AGREED

1. SALE AND PURCHASE

Subject to the terms and conditions set forth herein, the Seller agrees to sell, transfer, convey, assign and deliver (as the case may be) to the Purchaser (or to an Affiliate of the Purchaser, as directed by the Purchaser) and the Purchaser agrees to purchase, take assignment and delivery of, all of the Seller's rights, obligations, title, and interest, liabilities, claims and demands whatsoever at law and in equity, in and to the BPL business on the Closing date, on a Slump Sale basis as going concern. The consideration for the Slump Sale shall be discharged by payment of the consideration by the Purchaser to the Seller in accordance with clause 3 (*Price*)

2. PRICE

2.1 **Aggregate Price :** The aggregate price for the BPL business is ten billion, five hundred twenty million rupees (INR 10,520,000,000) (BPL Business Price)

2.2 The BPL business Price has been determined based on the value of the BPL business as a whole and shall be paid as a lump sum consideration for transfer of the BPL business by the Seller to the Purchaser on a going concern basis. No values have been assigned to and of the individual assets or Assumed Liabilities comprised in the BPL business. The Parties agree that the determination of the value of any asset for the purpose of payment of stamp duty, registration fees, or other similar Taxes shall not be regarded as assignment of values to individual assets.

7. PAYMENTS ON CLOSING

7.1 Purchaser Payments At closing, the Purchaser shall pay to the Seller in accordance with clause 22.1 (Payments made by the Purchaser)

(a) the BPL business price; plus

(b) the Determined VAT to the extent it is due as at closing.

8. TERMINATION

8.1 Seller and Purchaser options to terminate. This Agreement may be terminated and the Transaction abandoned at any time prior to the Closing:

(a) by mutual written consent of the Seller and the Purchaser;

(b) by the Seller, if a Condition set forth in clause 4.1(a) (*Closing Conditions*) is not satisfied or waived on the Long Stop Date;

(c) by the Purchaser, if a Condition set forth in clause 4.1(a) (*Closing Conditions*) is not satisfied or waived on the Long Stop Date; or

(d) automatically in the event that the Condition set forth in clause 4.1(a) (*Closing Conditions*) is no longer capable of being satisfied.

8.2 **Notice of termination.** In the event of a termination of this Agreement pursuant to and in accordance with clause 8.1(a) or (b) or (c) (*Seller and Purchaser Options to terminate*), written notice thereof shall be given by the Part seeking termination to the other Party and this Agreement shall (in the event such Party had the right to terminate this Agreement hereunder) be terminated, without further action by any Party.

8.3 Effect of Termination. If this Agreement terminates or is terminated pursuant to this clause 8 (Termination), neither the Seller nor the Purchaser (nor any of their Affiliates) shall have the claim, obligation or liability of any nature against any other Party (or any of its Affiliates) under this Agreement or under any of the Surviving Provisions; provided, that nothing herein shall relieve a defaulting or breaching Party from any liability or damages out of its Wilful Breach.

11. INDEMNIFICATION

11.1 **Purchaser Indemnification Obligations.** The Purchaser hereby undertakes that.with effect from Closing, the Purchaser will indemnify on demand and hold harmless the Seller and its current and former Directors, officers, employees, and agents against and in respect of any and all:

(a) Liabilities actually suffered or incurred by any of them to the extent arising out of or resulting from any Assumed Liabilities; and

(b) Losses actually suffered or incurred by any of them to the extent arising out of or resulting from non-receipt of consents referred to in clause 6.3 (Non-Required Consents) or Third Party Consents.

11.2 **Exclusion of Taxes.** Clause 11.1 (*Purchaser Indemnification Obligation*) shall not apply to any Losses or Liabilities with respect to Taxes.

Thus from the details of the agreement as reproduced above it is very apparent that the agreement for sale and purchase is between the seller and the applicant and sale to the affiliate of the applicant can only be as per the directions of the applicant and thus the act of direction of the applicant is very crucial and further sale to affiliates cannot take place without the direction of the applicant.

The crucial and central position of the applicant is also very clear from the other terms of the agreement in respect of price, payments on closing, termination and indemnification clauses of the agreement as referred and reproduced above.

Further, with respect to the applicant being the central pillar of these slump sale business transfer agreement would also be clear from the relevant paras of the consequent agreement to the first agreement

referred above. The consequent agreement i.e "Agreement for transfer of the BP and PM businesses" is also dated 21.06.2018.

We reproduce the relevant paras of the same which are as under:-

AGREEMENTFOR THE TRANSFER OF THE BP AND PM BUSINESSES dated 21 June 2018

PARTIES:

(1) MERCK LTD., a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Godrej One, 8th floor, Pirojshanagar, Eastern Express Highway, Vikhroli (East), Mumbai-400079 and corporate identity number L99999MH1967PLC013726 *(Seller);*

(2) MERCK LIFE SCIENCE PVT. LTD., a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Godrej One, 8th floor, Pirojshanagar, Eastern Express Highway, Vikhroli (East), Mumbai - 400079 with company identification number U33100MH1986PTC221693, India (Merck l);

(3) MERCK SPECIALITIES PVT. LTD., a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Godrej One, 8th floor, Pirojshanagar, Eastern Express Highway, Vikhroli (East), Mumbai-400079 company identification number U24100MH2005PTC152680, (Merck 2); and

(4) MERCK PERFORMANCE MATERIALS PVT. LTD., a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Godrej One, 8th floor, Pirojshanagar, Eastern Express Highway, Vikhroli (East), Mumbai - 400079 with company identification number U51900MH1987PTC043235 (Merck 3) (Seller, Merck 1, Merck 2, Merck 3 together the parties and each a Party, and Merck 1, Merck 2, Merck 3 together the Merck Parties and each a Merck Party).

Words and expressions used in this Agreement shall be interpreted in accordance with Schedule 5 (Definitions and Interpretations).

WHEREAS Merck 1 has entered into a business transfer agreement dated on or around the date hereof with the Seller (the Business transfer Agreement) under which Merck 1 will acquire the BPL Business from Seller.

WHEREAS under the Business Transfer Agreement, Merck 1 has the right to direct the Seller to transfer the BPL Business or part thereof to an affiliate of Merck 1.

WHEREAS the Parties have agreed that the BPL Business shall be transferred from Seller directly to Merck 2 upon the terms set out in this Agreement.

WHEREAS the Parties have agreed that the PM Business shall be transferred from Seller directly to Merck 3 upon the terms set out in this Agreement.

WHEREAS the LS Business will be transferred from Seller to Merck 1 pursuant to the terms of the Business Transfer Agreement.

IT IS AGREED

1. TRANSFER OF THE BP AND PM BUSINESSES

1.1 Subject to the terms and conditions set forth herein and in the Business Transfer Agreeent and in consideration for the mutual covenants herein Merck 1 herby directs Seller, as permitted under the Business Transfer Agreement to transfer, convey, assign and deliver (as the case may be);

(a) The BP business directly to Merck 2, and Merck 2 herby agrees to take assignment and delivery of, and accept, observe, perform, and discharge, all of the rights, obligations, title and interest, liabilities, claims and demands whatsoever at law and in equity, in and to the BP Business, as a going concern on a Slump Sale basis, simultaneously with the BTA Closing; and

(b) The PM business directly to Merck 3, and Merck 3 herby agrees to take assignment and delivery of, and accept, observe, perform, and discharge, all of the rights, obligations, title and interest, liabilities, claims and demands whatsoever at law and in equity, in and to the PM Business, as a going concern on a Slump Sale basis, simultaneously with the BTA Closing; and

3. PRICE

3.1 The Parties agree that the purchase price to be paid to Seller pursuant to clause 3.1 (Aggregate Price) of the Business Transfer Agreement shall be paid by Merck1, Merck 2 and Merck 3 as follows:-

(a) Merck 1 shall, pursuant to and in accordance with the Business Transfer Agreement, pay to the Seller the proportion of the BPL Business Price (as defined in the Business Transfer Agreement) which relates to the LS Business, being two billion, nine hundred thirty million, one hundred thousand rupees (INR 2,930,100,000) (the LS Business Price) together with the LS determined VAT to the extent it is due as at BTA Closing, it being understood that the LS Business Price has been determined based on the value of the LS Business as a whole and shall be paid to Seller as a lump sum consideration for transfer of the LS Business by Seller to Merck 1 on a going concern basis;

(b) Merck 2 shall pay to the Seller the proportion of the BPL Business Price (as defined in the Business Transfer Agreement) which relates to the BP Business, being six billion, seven hundred eighty one million, five hundred thousand rupees (INR 6,781,500,000) (the BP Business Price) together with the BP determined VAT to the extent it is due as at BTA Closing, it being understood that the BP Business Price has been determined based on the value of the BP Business as a whole and shall be paid as a lump sum consideration to Seller for transfer of the BP Business by Seller to Merck 2 on a going concern basis; and

(c) Merck 3 shall pay to the Seller the proportion of the BPL Business Price (as defined in the Business Transfer Agreement) which relates to the PM Business, being eight hundred eight million, four hundred thousand rupees (INR 808,400,000) (the PM Business Price) together with the PM determined VAT to the extent it is due as at BTA Closing, it being understood that the PM Business Price has been determined based on the value of the PM Business as a whole and shall be paid as a lump sum consideration to Seller for transfer of the PM Business by Seller to Merck 3 on a going concern basis.

8. TERMINATION

8.1 Options to Terminate. This Agreement may be terminated at any time prior to BTA Closing:

(a) by mutual written consent of Merck Parties;

(b) by ant Merck Party, if BTA Closing does not occur before the Long Stop Date;

(c) automatically in the event that the Business Transfer Agreement is terminated in accordance with its terms.

Thus from the details above, it is reiterated and clear that the role of the applicant is very crucial in respect of both the agreements as discussed above and without the directions of the applicant, the second agreement could not have materialized and further, in respect of all the terms of the second agreement as detailed above the applicant is an active party in the agreement as well and he and his directors have an active role in all aspects of the agreement, starting from terms relating to parties to agreement, transfer of the BP and PM business, Price and Termination which is very clear from these details of agreement reproduced above.

Thus we clearly find that this role of the applicant is clearly a service covered in para 5 (e) of Schedule-II of Section 7 of the CGST Act, wherein the applicant is doing the act of giving direction to the seller for transfer of BP and PM businesses to MSPL and MPMPL respectively as per his directions and terms and conditions agreeable to him due to special authority in this regard, vested in him through the first agreement dated 21.06.2018 between him and the seller.

Now we proceed to Question No. 2 raised by the applicant which is as under:-

Question 2 :- If the answer to the above question is 'affirmative' then as the parties are related, even in absence of the actual consideration does the applicant have to attribute a notional consideration and charge GST in line with schedule 1 of CGST Act to be compliant?

In respect of Question No. 2 we find that the present case involves provision of service as per para 5 (e) of Schedule-II to Section 7, between related person where the applicant is stating that there is no consideration. In view of this in this case the value is to be determined in terms of Rule 28 of the CGST Rules, 2017.

Now we come to Question No. 3 as raised by the applicant which is as under:-

Question 3 :- If the answer to both the questions are 'affirmative' then as the recipients (MSPL/MPMPL) are eligible to avail full input tax credit then the notional consideration (percentage of the business transfer value) would be only academic and will the invoice value be considered as open market value?

In respect of this Question we find that the value is to be determined as per Rule 28 of the CGST Rules, 2017 and therefore there is no requirement on our part to answer this question.

05. 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- 62/2018-19/B- 133 Mumbai, dt. 30.10.2018

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

Question 1:- Whether applicant's direction to the seller (directed in agreement dated 21 June 2018) for direct transfer of BP business to MSPL and PM business to MPMPL, respectively would qualify as a 'supply between the applicant' and 'MSPL/MPMPL'?

Answer :- Answered in the affirmative as per details discussed above.

Question 2 :- If the answer to the above question is 'affirmative' then as the parties are related, even in absence of the actual consideration does the applicant have to attribute a notional consideration and charge GST in line with schedule 1 of GST Act to be compliant?

Answer :- The value is to be determined as per Rule 28 of the CGST Rules, 2017

Question 3 :- If the answer to both the questions are 'affirmative' then as the recipients (MSPL/MPMPL) are eligible to avail full input tax credit then the notional consideration (percentage of the business transfer value) would be only academic and will the invoice value be considered as open market value?

Answer :- Not answered in view of answer in respect of Question No 2 above.

MEMBER, ADVANCE RULING AUTHORITY ★ MAHARASHTRA STATE, MUMBAI

PLACE - Mumbai

DATE - 30/10/2018

B. V. BORHADE
(MEMBER)

PANKAJ KUMAR
(MEMBER)

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
5. Joint commissioner of State tax , Mahavikas for Website.

CERTIFIED TRUE COPY

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