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

GSTIN Number, if any/ User-id		27AADCN5504E1ZR
Legal Name of Applicant		**M/s. North American Coal Corporation India Private limited**
Registered Address/Address provided while obtaining user id		**1 st floor, Deepgrih, S.Np.50/1/2, Chhaya Society, Bhakti Marg, Off Law College Road, Erandavane, Pune - 411004.**
Details of application		GST-ARA, Application No. 07 Dated 13.04.2018
Concerned officer		PUN-VAT-C-118, Pune -2.
Nature of activity(s) (proposed / present) in respect of which advance ruling sought		
A	Category	Service Provision
B	Description (in brief)	The company is incorporated to carry on the business of providing technical consultancy relating to coal mining and related activities.
Issue/s on which advance ruling required		(i) classification of goods and/or services or both (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
Question(s) on which advance ruling is required		As reproduced in para 01 of the Proceedings below.

MEMBER, ADVANCE RULING AUTHORITY, MAHARASHTRA STATE

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 **M/s. North American Coal Corporation India Private limited**, the applicant, (hereinafter also referred to as, 'NACC) seeking an advance ruling in respect of the following question.

1. *Whether liquidated damages that may be awarded to the Applicant by the International Chamber of Commerce ("ICC") qualifies as a 'supply' under the Goods and Services Tax ("GST") law, thereby attracting the levy of GST?*
2. *If the answer to Question No. 1 is in the affirmative, what should be the time of supply, that is to say, the point of time in which NACC's liability to pay GST arises ?*
3. *If the answer to Question No. 1 is in the affirmative, what should be the value of supply on which GST is payable, that is to say, whether the Applicant is liable to pay GST on amount of liquidated damages claimed*

and awarded to the Applicant under the arbitral award or the amount which is actually received by the Applicant after conclusion of the matter before the final Appellate authority.

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".

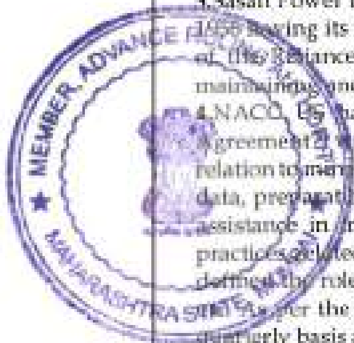
02. FACTS AND CONTENTION - AS PER THE APPLICANT

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

I. Statement of the relevant facts having a bearing on the advance ruling sought by the Applicant

1.The Applicant, North American Coal Corporation India Private Limited ("NACC India") is a private limited company incorporated under the provisions of the Companies Act, 1956 having its registered office at 1st Floor, Deepgriha, S.Np. 50/1/2, Chhaya Society, Bhakti Marg, Off Law College Road, Erandavane, Pune - 411004, India. NACC India has been incorporated to carry on the business of providing technical consultancy relating to coal mining and related activities.

2.The Applicant is a wholly owned subsidiary of the North American Coal Corporation, USA ("NACC US"). NACC US is a company formed under the laws of the State of Delaware, United States of America. NACC US is engaged in surface mining of lignite as fuel for power generation by electric utilities.



3.Sasan Power Limited ("SPL" or "Reliance") is a company incorporated under the provisions of the Companies Act, 1956 having its registered office in Mumbai. It is a wholly owned subsidiary of Reliance Power Limited and is a part of the Reliance Anil Dhirubhai Ambani Group. It carries on the business of developing, designing, operating maintaining and owning an Ultra Mega Power Project in Sasan, Madhya Pradesh, India.

4.NACC US has entered into an Association Agreement for mine development and operations ("Association Agreement") with SPL effective January 1, 2009 (Refer Annexure A) in order to provide technical know-how to SPL in relation to mine development and operations. The technical know-how, generally identified as evaluation of geological data, preparation of feasibility study, development of annual mining and life of mine plans, mine planning design, assistance in training the SPL personnel, monitoring and reviewing, training to employees, providing NACC's practices related to operating procedure, health and safety for mining operations etc. The Association Agreement defined the roles/responsibilities of both the parties, scope of work, fees structure, periodicity, manner of payment. As per the Association Agreement, specific payment for off-shore services was to be made to NACC US on a quarterly basis and expenses pertaining to the onsite services were to be reimbursed separately. The off-shore services for mining operations consisting of geological, mining, environmental, and seismic and overall mine management methodology were provided by expert teams from the United States of America.

5.The Association Agreement was first amended vide the First amendment to Association Agreement dated September 30, 2009 for amending the payment mechanics thereunder (Refer Annexure B).

6.Subsequently, in March 2011, NACC US incorporated a subsidiary, NACC India, being the Applicant, and through the Assignment and Assumption Agreement, Consent, and Second Amendment to the Association Agreement dated April 1, 2011 (Refer Annexure C), the rights and obligations of NACC US as per the original Association Agreement were transferred and assigned to the Applicant, with the consent of SPL.

7.Further, the Applicant has entered into an Intellectual Property License and US Service Agreement ("IP & Services Agreement") with NACC US dated 1st April 2011 (Refer Annexure D), for receiving services and a non-exclusive license of Intellectual Right from NACC US. The terms of the IP & Services Agreement includes the following scope for the years under consideration:

- Grant by NACC US to the Applicant of non-exclusive, non-transferable, non assignable, non-sub licensable license to use the Licensed Intellectual property in India in connection with the Applicant's provision of mining services to SPL and any other customer in India.
- Provision of US based services by NACC US to Applicant that will assist the Applicant in performing its obligations to SPL.

8.As per the Association Agreement, the Sasan Project was divided into three phases as detailed below depending on the stage of development of the mine

(i) Pre-Development Phase included the preliminary offsite activities ranging from preliminary data collection and evaluation, development of mine plans to the provision of bidding support and representation for mine plan approval.

This phase broadly covered the period from August 2007 to March 2009. As per the Association Agreement, SPL was required to pay a pre-development phase fee of USD 75,000 per quarter for each calendar quarter in the period from 01 January 2008 through 01 January 2009.

(ii) Development Phase - The development phase included on-site and offsite activities viz. implementation of mine plans and designs prepared during the pre-development phase, defining equipment specification, mine equipment

vendor selection and monitoring, mine plan modifications to suit on-ground requirements, regular troubleshooting etc. This phase broadly covered the period from April 2009 and was expected to continue till December 2014. The Development phase would continue to the first date following a period of thirty consecutive days during which the annualized rate of coal production at the Sasan mine has equalled the rate of seven million tonnes per year for such thirty days. As per the Association Agreement, SPL was required to pay a development phase fee USD 250,000 per quarter for each calendar quarter after the Pre-Development phase.

(iii) Production Phase - The production phase pertains to the period of production of coal and includes the post-production on-site and offsite activities viz. regular recommendations relating to mining operations; monitoring and review of mine operations; preparation of policies and recommending systems for mining operations, equipment maintenance and environmental compliance; audit of mining operations. This phase would broadly cover the period from January 2015 till December 2027 (the estimated life of the mine) and will commence following a period of thirty consecutive days once the annualized rate of coal production at the Sasan mine has equalled the rate of seven million tonnes per year for such thirty days. As per the Association Agreement, SPL was required to pay a production phase royalty of an amount equivalent to higher of a) USD 250,000 per annum or b) USD 0.1125 for each ton of coal produced from the mine each quarter.

9.In terms of the Association Agreement, SPL was obligated to remunerate NACC US/Applicant in the following manner:

"Section 5.4Automatic Payments/Invoicing.

(a) <u>Pre-Effective Date U.S. Services. Within five (5) days after the</u> Effective Date, NAC shall invoice Reliance for (i) any unpaid amounts described in Section 5.1(a) that were incurred prior to the Effective Date and (ii) the amount described in Section 5.1(b). The invoice shall be accompanied by reasonable supporting documentation in respect of any unpaid amounts described in Section 5.1(a). Payment by Reliance shall be due within thirty (30) days of Reliance's receipt of such invoice.

(b) <u>Post-Effective Date Services. Within fifteen (15) days after the end of</u> each calendar quarter, NAC shall invoice Reliance for (i) the amounts described in Section 5.1(a) and (ii) the amounts described in Section 5.2 that were incurred during such quarter (and after the Effective Date). The invoice shall be accompanied by reasonable supporting documentation. Payment shall be due within thirty (30) days of Reliance's receipt of such invoice.

(c) <u>Development Phase Fee. Each quarterly installment of</u> Development Phase Fee, together with the Gross-Up Payment, shall be due on the forty-fifth (45th) day of each quarter during the Development Phase. NAC shall invoice Reliance for the U.S. Dollar amount of the applicable Development Phase Fee and the estimated Gross-Up Payment not later than the first (1st) day of the quarter for which the Development Phase Fee is due.

(d) <u>Production Phase Royalty. Within five (5) days after the end of each</u> quarter during the Production Phase, Reliance shall provide NAC with written documentation reasonably evidencing the number of Tonnes of coal produced from the Mine during such quarter. Within ten (10) days after NAC receives such written documentation, it shall invoice Reliance for the U.S. Dollar amount of the Production Phase Royalty on the basis of such receipts, together with the estimated Gross-Up Payment. Payment of the invoiced amount shall be due within thirty (30) days of Reliance's receipt of such invoice."

10.NACC US, in the initial phase of mine development and later the Applicant, rendered significant services to SPL under the abovementioned agreements which contributed immensely to the progress of the project in Sasan. However, SPL curtailed the activities of the Applicant and engaged its in-house international consultants. The last invoice paid by SPL pertained to the period up to September 2013 and it stopped making payment of invoices of the Applicant pertaining to services performed after the period October 1, 2013. The total unpaid invoices raised on SPL are detailed below:

Invoice No.	Invoice Description	Invoice Date	Terms	Due Date	Amount USD	Amount INR
2013/14-008	Q4 2013 Dev. Fee	01-Oct-13	45 days	15-Nov-13	311,046.27	
2013/14-011	Q1 2014 Dev. Fee	02-Jan-14		16-Feb-14	311,046.27	
2013/14-012	Q4 2013 **exp.**	16-Jan-14	30 days	15-Feb-14		5,032,790
2014/15-001	Q2 2014 Dev. Fee	01-Apr-14	45 days	16-May-14	315,602.34	
2014/15-002	Q1 2014 **exp.**	11-Apr- 14	30 days	11-May-14		6,628,189
2014/15-003	Q1 2014 **exp.**	11-Apr- 14	30 days	11-May-14	71,235.97	
2014/15-004	Interest	23-May-14	Receipt	23-May-14	44,320.42	
2014/15-005	Interest	23-May-14	Receipt	23-May-14		212,646
2014/15-007	Interest	01-Jul-14	Receipt	01-Jul-14	14,626.54	
2014/15-008	Interest	01-Jul-14	Receipt	01-Jul-14		169,050
2014/15-009	Q2 2014 **exp.**	10-Jul-14	Receipt	10-Jul-14		4,949,343
2014/15-010	Q2 2014 **exp.**	10-Jul-14	Receipt	10-Jul-14	104,303.95	
2014/15-11	Interest	23-Jul-14	Receipt	23-Jul-14	8,227.81	
2014/15-12	Interest	23-Jul-14	Receipt	23-Jul-14		95,095
2014/15-13	Q3 2014 Dev Fee upto July 23, 2014	23-Jul-14	Receipt	23-Jul-14	78,900.59	
Total Amounts due					1,259,310.16	17,087,113

11.The Applicant has charged Service tax on the invoices raised by it for the services rendered under the Association agreement and has also duly deposited the same with the Government exchequer even for the invoices where the payment has not been received from SPL.

12.In compliance with the procedures set out in the Association Agreement, the Applicant repeatedly expressed serious concerns over non-payment of aforementioned invoices. Despite several written and in person requests from the Applicant, SPL did not honour its obligations under the agreement and therefore, the Applicant was constrained to terminate the Association Agreement with SPL. In this regard, the relevant Articles of the Association Agreement are reproduced below:

ARTICLE VI

TERM AND TERMINATION

"Section 6.1 Term. Under earlier terminated in accordance with Section 6.2, the term of this Agreement shall commence on the Effective Date an shall continue until the end of the Production Phase (the "Initial Term"). Following the Initial Term, the parties may extend this Agreement by written agreement for any number of one (1) year terms (each, an "Extended Term" and, together with the Initial Term, the "Term") until the Agreement is terminated pursuant to Section 6.2.

Section 6.2 Termination. This Agreement may be terminated :

a) At any time by mutual agreement of the parties;

b) By either parties in accordance with Article VII (Force Majeure); or

c) By either parties in accordance with Article VIII (Events of Default).

<u>Section 6.3 Effect of Termination</u>

(a) Upon termination of this Agreement for any reason, NAC shall furnish to Reliance (a) within sixty (60) days after the effective date of termination, an initial invoice for settlement of all costs incurred prior to the termination date and (b) within twenty (20) days of incurring such costs, additional invoices for (i) the On-Site Costs incurred as a result of the repatriation of the On-Site Consultants and (ii) the On-Site Costs relating to the tax-equalization payments for the On-Site Consultants. Reliance's payments of such invoices shall be subject to the provisions of Sections 5.3 and 5.6.

(b) If Reliance terminates this Agreement pursuant to Section 6.2(c), any damages recoverable by Reliance shall be limited to the amount of the Development Fees and/or Production Phase Royalties actually paid by Reliance during the year in which Reliance terminates this Agreement pursuant to Section 6.2(c), in no event to exceed U.S. $1,000,000 in the aggregate.

(c) If NAC terminates this Agreement pursuant to Section 6.2(c), Reliance shall pay to NAC, as liquidated damages and not as a penalty or other punitive amount, the amount specified below:

If Termination Occurs During: Then the Termination Payment is U.S.: Year 1 of the Development Phase $11 million Year 2 of the Development Phase $13 million Year 3 of the Development Phase $15 million Year 4 or later of the Development $17 million Phase Any year in the production phase $17 million, less the aggregate amount of the Production Phase Royalties received by NAC prior to the termination date"

ARTICLE VIII

EVENTS OF DEFAULT

Section 8.1 Default by Reliance. If Reliance shall at any time be in breach of its (a) payment obligations, (b) other obligations pursuant to this Agreement, including failure to provide reasonable access to the Mine, the Preparation Plant or any of the Project that are relevant to the duties and obligations of NAC hereunder and the failure to timely provide presentations Section 13.2(1, NAC may give written notice of such default to Reliance, in which case Reliance shall have twenty-one (21) days within which to cure the default. If, at the end of the twenty-one (21) day period, Reliance has not cured the default NAC shall have the right, (i) if the default is of the type described in subclause (a) above, to immediately cease providing the Services until such time as the event of default is cured, (ii) if the default is of the type described in subclause (b) above, to cease providing such Services as NAC determines, in its reasonable discretion, cannot be performed due to Reliance's default until such time as the event of default is cured, or (iii) if any such default is not cured within sixty (60) days and NAC is not then in breach of this Agreement, to terminate this Agreement. Reliance shall continue to be responsible for the On-Site Costs during the period of the default and prior to the termination of the Agreement.

Section 8.2 Default by NAC. If NAC shall at any time be in breach of its obligation to provide Services hereunder, Reliance may give written notice of such default to NAC, in which case NAC shall have ten (10) days within which to cure the default. If, at the end of the ten (10) day period, NAC has not cured the default Reliance shall have the right (i) to cease reimbursing NAC for Services not actually provided until such time as the event of default is cured or (ii) if the default is not cured within sixty (60) days and Reliance is not then in breach of this Agreement, to terminate this Agreement. Reliance shall not be responsible for the On-Site Costs during the period of default and prior to the termination of this Agreement, other than the repatriation and tax equalization costs identified in Annex C and, if any, on the On-Site Consultants Schedule"

13.On May 23, 2014, the Applicant served notice on SPL in accordance with Section 14.1 of the Association agreement for an event of default as defined in Section 8.1 for failure by SPL to make payments as required under Article 5 of the Association Agreement. The notice of default provided SPL with 21 days to cure the default as stipulated in the aforesaid agreement.

14.On June 13, 2014, after 21 days lapsed without SPL curing its payment default, the Applicant became entitled to cease provision of services to SPL pursuant to Section 8.1 and the same was done by way of correspondence dated June 19, 2014. The Applicant continued to engage in a good faith dialogue to enable SPL to cure its default and avoid termination of agreement. However, SPL failed to make the due payments and continued the default.

15. Following the completion of 60 days from the notice of default, the Applicant sent a notice for termination of the Association Agreement on July 23, 2014 for continued breach of the terms of the aforesaid Agreement for SPL's failure to pay the Applicant for services it performed for the period after October 1, 2013 in terms of default mentioned in section 8.1 (a) of Article VIII of the Association Agreement.

16.The termination affected by the Applicant under the terms of Association Agreement resulted in the Applicant

claiming from SPL the past due and amounting to USD 1,259,310 for development fee and INR 17,087,113 for reimbursement of expenses (including interest thereon) and of liquidated damages to the tune of USD 17 million as per Section 6.3 of the Association Agreement. A copy of the said notice for termination of the Association Agreement is attached as Annexure E.

17. Upon SPL's refusal to pay the aforesaid claims due to Applicant under the Association Agreement, the Applicant filed a request for arbitration on August 8, 2014 with the International Chamber of Commerce (ICC) in London pursuant to the dispute resolution terms/ procedure set out in section 12.2 of the Association Agreement. The relevant section of the Association Agreement is reproduced below

"*Section 12.2 Dispute Resolution: Arbitration*

(a) Any and all claims, disputes, questions or controversies involving Reliance on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, "Disputes") which cannot be finally resolved by such parties within 60 (sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the "ICC") in accordance with its commercial arbitration rules then in effect (the "Rules"). The place of arbitration shall be London, England. Each party shall appoint one (1) arbitrator and the two (2) arbitrators so appointed shall together select and appoint a third arbitrator. If either Reliance, on the one hand, or NAC, on the other hand, fail to appoint their respective arbitrator within thirty (30) days after receipt by respondent(s) of the demand for arbitration or if the two (2) party-appointed arbitrators are unable to appoint the chairperson of the arbitral tribunal within thirty (30) days of the appointment of the second arbitrator, then the ICC shall appoint such arbitrator or the chairperson, as the case may be, in accordance with the listing, ranking and striking provisions of the rules. Save and except the provision under Section 9, the provisions of the Part 1 of (Indian) Arbitration and Conciliation Act, 1996, as amended (the "Arbitration Act") shall not apply to the arbitration. The arbitrators shall not award punitive, exemplary, multiple or consequential damages. In connection with the arbitration proceedings, the parties hereby agree to cooperate in good faith with each other and the arbitral tribunal and to use their respective best efforts to respond promptly to any reasonable discovery demand made by such party and the arbitral tribunal.

(b) All arbitration proceedings shall be conducted in the English language and the arbitral award (the "Award") shall be rendered no later than six (6) months from the commencement of the arbitration or as otherwise provided by the Rules, unless otherwise extended by the arbitral tribunal for no more than an additional six (6) months for reasons that are just and equitable.

(c) Except as otherwise required by Applicable Laws of India, the arbitration proceedings and the Award shall not be made public without the joint consent of each party and each party shall maintain the confidentiality of such proceedings and the Award.

(d) Each party shall bear its own arbitration expenses and Reliance on the one hand, and NAC, on the other hand, shall pay one-half of the ICC's and the chairperson's fees and expenses, unless the arbitrators determine that it would be equitable if all or a portion of the prevailing party's expenses should be borne by the other party. Unless the Award provides for nonmonetary remedies, any such Award shall be made and shall be promptly payable in (i) U.S. Dollars if payable to NAC or (ii) Rupees if paid to Reliance net of any tax or other deduction. The Award shall include interest from the date of any breach or other violation of this Agreement and the rate of such interest shall be specified by the arbitral tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full.

(e) All notices and other communications by any party to the other party or by the arbitral tribunal to any disputing party in connection with the arbitration hereunder shall be in accordance with the provisions of Section 14.1.

(f) Each of the Parties expressly understands and agrees that the Award shall be the final and binding remedy between them regarding any and all Disputes presented to the arbitral tribunal."

18. The ICC had accepted jurisdiction on August 11, 2014 and, at the request of the Applicant and NACC US, which had instituted a separate arbitration proceeding against SPL, consolidated the two arbitrations into one arbitration proceeding on March 12, 2015.

19. Thereafter, SPL filed a civil suit against the Applicant in the District Court in Singrauli at Waidhan contending that both the parties to the dispute, SPL and the Applicant, being companies incorporated under the Companies Act, 1956 in India, cannot participate in the arbitration proceedings which have seat of arbitration outside India. The Singrauli District Court granted an ad-interim ex-parte injunction restraining the Applicant from proceeding any further with the arbitration proceedings before ICC in London. The Applicant got a relief from the Hon'ble Madhya Pradesh High Court vide order dated March 9, 2015 directing the Singrauli District Court to dispose of the suit filed by SPL. Pursuant to the order of the Hon'ble Madhya Pradesh High Court, the Singrauli District Court passed an order dated March 19, 2015 vacating the ad-interim injunction.

20. SPL filed an appeal against the order of the Singrauli District Court dated March 19, 2015 before the Hon'ble Madhya Pradesh High Court. The Hon'ble Court delivered its final order on September 11, 2015 dismissing the appeal of SPL by holding that when the parties have agreed to resolve all their disputes by arbitration, they cannot be permitted to avoid arbitration.

21. Aggrieved by the order of the Madhya Pradesh High Court, SPL filed a Special Leave Petition ("SLP") on September 19, 2015 before the Hon'ble Supreme Court of India against the above mentioned judgement of the Hon'ble Madhya Pradesh High Court which is pending disposal.

22. By way of Order dated August 24, 2016, the Hon'ble Supreme Court disposed of the SLP filed by SPL by ruling that the parties can participate in arbitration proceedings outside India despite being companies incorporated under Companies Act, 1956, in India.

23. Pursuant to the aforesaid Order of the Hon'ble Supreme Court, the parties have initiated the arbitration proceedings before ICC. ICC has fixed the date of hearing in the matter from 3 April 2018 to 8 April 2018.

24. The Applicant mentions that, when the Applicant had approached the Hon'ble Authority for Advance Ruling ("Authority") that functioned under the erstwhile service tax regime, the Authority had rejected the Application of the Applicant vide its Ruling dated 6 May 2017 observing, inter alia, as follows:

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- The question of whether or not the Applicant ought to pay service tax on liquidated damages is not liable to be entertained as it is not certain today whether the liquidated damages would be granted at all in the arbitration proceedings.
- The question posed to Authority is not a valid question since it depends on uncertain event of the Applicant succeeding in arbitration proceedings.
- It may happen that after the Authority gives its ruling, the Applicant may eventually fail in its attempt to earn liquidated damages.
- In view of the uncertainty of the event, it would not give a finding on an event that had not occurred as yet.

A copy of the Ruling dated 6 May 2016 of the Authority is annexed herewith as Annexure F.

25. The Applicant humbly submits that the above order of the Authority should not, in any manner, whatsoever, stand in Applicant's way of approaching your good self yet again as there is no bar prescribed in this regard under the GST law and the questions posed by the Applicant in the instant application qualifies as questions in respect of which an advance ruling can be sought by the Applicant under the CGST Act, 2017 in terms of Section 97(2) of the Act.

26. Further, the Applicant being a wholly owned subsidiary of a foreign holding company is eligible to approach this Hon'ble Authority for an advance ruling and qualifies as an applicant under Section 97 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act").

27. The Applicant submits that there are no pending proceedings against the Applicant or initiated by the Applicant in relation to the questions raised herein before any authority, Tribunal or Court.

Additional Submissions for NACC India Private Limited on 13.07.2018

1. Under the GST law, all supplies of goods and services attract GST and section 9 of the CGST Act, 2017 is the charging section. The said section provides that there shall be a levy of a tax called the central goods and services tax on all intra-state supplies of goods or services or both on the value determined under section 15 of the CGST Act, 2017.

2. In this regard, section 7 of the CGST Act, 2017 defines the term 'supply' and the relevant portion of the same is reproduced hereunder as follows for the sake of brevity:

"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, license, 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.

3. Section 7 of the CGST Act, 2017 defines the term 'supply' to include all forms of supply of goods or services or both and it expressly seeks to include all activities treated as supply of goods or supply of services as referred to schedule II of the CGST Act, 2017. In this regard, clause 5(*e*) provides that agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to act shall be treated as a supply of services. The relevant portion in Sch II is as below:

SCHEDULE II
(Section 7)

5. Supply of services
The following shall be treated as supply of services, namely:
(a)
....
(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and....."

4. Detailed submissions in respect of the aforesaid are presented below.

<u>Applicant's obligation under the Association Agreement doesn't constitute as supply of</u> service:

5. As submitted in its application, the Applicant would like to reiterate that the claim of liquidated damages doesn't qualify as a 'service' itself, as it lacks the element of reciprocity which forms sine qua non for a transaction to qualify as a service. Therefore, there is no question of the claim of liquidated damages leading to any 'supply of service.'

6. Without prejudice to the aforesaid, even if one were to argue that the claim of liquidated damages amounts to a 'service', such claim cannot be regarded as being in the course or furtherance of business. The termination of the Association Agreement puts an end to the business of the relationship of the Applicant with the service recipient. It results in complete and absolute cessation of the business of the Applicant and not its furtherance. All the obligations of the Applicant qua the service recipient under the Association to exist once the Association Agreement is terminated and the same cannot be said to be in furtherance of the Applicant's business. Also, the act of termination cannot be called 'in course of any business as the usage of the term 'in course' indicates the continuity of an activity. When the Applicant terminates the Association Agreement, there is no continuation of any business of the Applicant with the service recipient as all obligations under the Association Agreement cease to exist. In the light of the above, the damages claimed for such termination can, therefore, not be regarded as being in the course or furtherance of business. Therefore, such claim cannot be regarded as being towards 'supply of any service'.

7.The Ld. Sales Tax Officer appears to be of the view that liquidated damages claimed for nonperformance of a contract gets covered under Clause 5(*e*) of Schedule II to the CGST Act, 2017. The Applicant doesn't agree with such interpretation of the Ld. Sales Tax Officer. The Applicant's submissions in this regard are detailed below.

Conditions for levy of GST under Clause 5(e) of Schedule II

8. To qualify as a 'supply of services' as envisaged under clause 5(e) of Schedule II appended to the CGST Act, 2017, the following conditions ought to be satisfied:

- There should be agreement between parties towards discharging a contractual/agreement-linked obligation by the supplier of service;
- <u>The obligation should be to either 'refrain from an act' or to 'tolerate an</u> act or a situation';

- The obligation should be discharged in lieu of certain consideration.

9. In order to examine the provisions under Clause 5(e) of Schedule II to the CGST Act, 2017, it should first be relevant to understand as to what should qualify as an "Obligation"

10. GST law does not contain any definition of the term "Obligation". Therefore, it would be relevant to examine the definition of the said term under other legislations/ judicial pronouncements and understand its dictionary meaning.

11.The term "Obligation" has been defined under Section 2(a) of the Specific Relief Act, 1963 as follows:

"2. *Definitions.*

(a) "Obligation" includes every duty enforceable by law;

12. The Andhra Pradesh High Court in case of Hyderabad Stock Exchange Ltd vs Rangnath *Rathi & CO (AIR (1958) AP 43] has held that 'An obligation is a tie or a bond which constraints a person to do or suffer something'.*

13. As per the Black's law dictionary, the term "Obligation" has been defined as:

"A legal or a moral duty to do or not do something."

14. As per Wharton's law lexicon, the term "Obligation" has been defined as:

"An act, which binds a person to some performance; or for the performance of a covenant etc."

15. From conjoint reading of the previously mentioned definitions, it is clear that an "Obligation" is imposition of duty to perform an agreed act or a covenant, which is enforceable under law

16. The occurrence of the term 'obligation' under Clause 5(e) of Schedule II of the CGST Act,2017, mandates that the tolerance must be of an act or a situation and such tolerance must be enforceable.

17. Based on the terms of the Association Agreement, it is clear that the "Obligation" on part of the Applicant is to provide technological know-how to the service recipient based in India. There is no other obligation on the Applicant per se apart from provision of technological knowhow to the service recipient based in India,

18. The obligation to provide technological know-how is the only obligation enforceable under the Association Agreement by the service recipient. Service recipient's failure to discharge its obligations under the Association Agreement gives the Applicant a right/entitlement to terminate the Association Agreement. There is no obligation on the Applicant to terminate the Association Agreement. Also, there is no consideration assigned for any obligation to terminate it.

19. The intention of the contracting parties emanating from the Association Agreement clearly indicates that the Applicant intends to supply and the recipient intends to receive technical know-how. There is nothing whatsoever in the Association Agreement that indicates that the intention of the contracting parties is really to effect a breach of the contract, which is to be tolerated by the either of them.

20. It is critical to note that there is no clause in the Association Agreement that obligates the Applicant to tolerate the act or default on part of the service recipient, and continue to supply services despite such default.

21. On the contrary, Section 6.2. (c) read with Section 8.1 the Association Agreement provides that the Applicant has a right to terminate the contract upon occurrence of any of the specified Events of Default. In fact, upon occurrence of a specified Event of Default, the Applicant has actually terminated the Association Agreement. Therefore, any obligation under the contract ceases thereafter for the Applicant.

22. In the instant case, when the Applicant had terminated the Association Agreement, it was relieved from its entire obligations thereunder to supply services to the service recipient. The claim of liquidated damages is an act subsequent to the act of termination of the Association Agreement.

23. Had there been any tolerance of an act or a situation by the Applicant in the instant case when the service recipient defaulted in making payments, the Applicant would have continued to provide its services despite a default by the service recipient. The Applicant would not have terminated the Association Agreement had there been any tolerance on its part. The Applicant terminated the Association Agreement and sought liquidated damages only because there is no tolerance on its part of the breach effected by the service recipient.

Liquidated Damages received for breach/termination of contract cannot qualify as 'consideration'

30. Under the GST law, the term consideration has been defined under Section 2(31) of the Central Goods Service Tax Act, 2017, as follows:

"(31) "consideration" in relation to the supply of goods or services or both includes (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any actor forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government: Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply"

31. From the definition of the term 'consideration', it is apparent that consideration can be monetary or non-monetary and that same should be 'in respect of', 'in response to', 'or for the inducement of the supply of goods or services or both, meaning thereby that it should be identified with a supply of service and have nexus with the said supply of service

32. The Applicant submits that liquidated damages paid by the service recipient is neither in 'in respect of 'nor 'in response to any supply made by the Applicant. Instead, it is paid to make good the loss/ injury suffered by the Applicant as a result of the premature termination of the Association Agreement entered into between the Applicant an the service recipient. It is submitted that the liquidated damages in the instant case cannot be regarded as consideration for any provision of service as payments made on early termination by the lessor because of a lessee's default cannot qualify as consideration as the payments made i) are damages for the loss suffered by the Applicant and ii) have no nexus with any identified supply. The payment of liquidated damages by the service recipient is made

as a consequence of a breach leading to termination and is not a fee or remuneration for any obligation or tolerance undertaken by the Applicant.

33. The nature of damages claimed on termination of a contract was examined by the Apex Court in Maharashtra State Electricity Distribution Company v. Datar Switchgear Limited & Others, (2018) 3 SCC 133. The principle laid down by the Court is that the injured party should be placed as good a situation as if the contract had been performed. In other words, it is to provide to damages for pecuniary loss, which naturally flows from the breach. The Court placed its reliance on an earlier decision of the Apex Court in Union of India v. Sugauli Sugar Works (P) Ltd v., (1976) 3 SCC 32:

"Once it is established that the party was justified in terminating the contract on account of fundamental breach thereof, then the said innocent party is entitled to claim damages for the entire contract i.e. for the part which is performed and also for the part of the contract which it was prevented from performing".

34. Under the service tax law, which had identical requirements, it was settled law that mere flow of money cannot be subject matter of service tax and consideration/money should have 'nexus' with an identified supply of service. It was also equally settled that payment for damages made were not for any provision of service and were instead were made to make good the loss suffered. Reference is invited by the Applicant to the following case laws:

- In the case of Cricket Club of India v. Commissioner of Service Tax [(2015) (40) STR973], the Hon'ble CESTAT (Mumbai Bench), observed as under:

  "11 ....Consideration is undoubtedly, an essential ingredient of all economic transactions and it is certainly consideration that forms the basis for computation of service tax. However, existence of consideration cannot be presumed in every money flow. The factual matrix of the existence of a monetary flow combined with convergence of two entities for such flow cannot be moulded by tax authorities into a taxable event without identifying the specific activity that links the provider to the recipient.

  12. Unless the existence of provision of a service can be established, the question of taxing an attendent monetary transaction will not arise. Contributions for the discharge of liabilities or for meeting common expenses of a group of persons aggregating for identified common objectivities will not meet the criteria of taxation under Finance Act, 1994 in the absence of identifiable service that benefits an identified individual or individuals who make the contribution in return for the benefit so derived.

  13........ Neither can monetary contribution of the individuals that is not attributable to an identifiable activity be deemed to be a consideration that is liable to be taxed merely because club" or association is the recipient of that contribution."

  (Emphasis supplied)

- Mormugao Port Trust v. Commissioner of Customs, Central Excise and Service Tax, Goa; 2016 TIOL 2843 CESTAT Mum, highlighting the importance of nexus of a service with the element of consideration to render a transaction liable for service tax, the Hon'ble Jurisdictional CESTAT (Mumbai) observed as follows:

  "18. In our view, in order to render a transaction liable for service tax, the nexus between the consideration agreed and the service activity to be undertaken should be direct and clear. Unless, it can be established that a specific amount has been agreed upon as a quid pro quo for undertaking any particular activity by a partner, it cannot be assumed that there was a consideration agreed upon for any specific activity so as to constitute a service."

- *In [illegible] Jewellery Show v. CCE & ST, Jaipur-1, 2017 (49) STR 313 (TRI), dealing with* service tax liability on cancellation charges, the Hon'ble Tribunal held as follows:

  "6. .... that the same are being retained, as regards the cancellation charges, we note by the appellant from the initial amounts given to them for booking a booth, when the same is subsequently cancelled by the customer and the amount is refunded to them. Admitted position, which emerges is, that no booths are ultimately rented out by the appellant to their customers. As explained, such cancellation charges are for putting the appellant into inconvenience by initially booking the booths and subsequently cancelled. Inasmuch as no service stand provided by the appellant to their customers and for which purpose no consideration was ever received by them, we are of the view that the cancellation charges recovered by the appellant cannot be held as consideration for providing business exhibition services. The same are thus not liable to service tax."

- In Reliance Life Insurance Company Ltd. v. Commissioner of Service Tax, MumbaiII, Appeal No. ST/85584/2015, the Hon'ble Mumbai Tribunal had dealt with the question of payment of service tax on surrender or partial withdrawal charges under the category of 'Management of Investment under ULIP services' for the period 01.04.2009 to 30.06.2012. These charges were collected by the assessee when a policy holder dilutes the policy completely or partially and had no nexus with the provision of main service of management of funds. In these circumstances, the Hon'ble Mumbai Tribunal held that there cannot be any levy of service on the surrender and partial withdrawal charges collected by the assessee as such charges i) cannot be considered as charges towards provision of services of management of an investment, ii) are in the nature of penalty or liquidated damages and iii) ULIP is primarily a contract between the insurer and the insured and when seen in the context of sections 73 and 74 of the Indian Contract Act, 1972, surrender of policy is nothing but ending of contract for which damages are paid and the same cannot be termed as charges towards management. In the words of the Hon'ble Tribunal:

  "........... The fact which emerges from the above shows that the charges are either in the nature of 'penalty' or liquidated damages or a combination of both. Thus in no way it can be considered as charges towards providing of any services of management of investment under Unit Linked Insurance Plan. ......We find that ULIP is primarily a contract between the insurer and insured and thus when seen in the context of Section 73 and 74 of the Contract Act, 1872 what transpires is that surrender of policy is nothing but ending of contract for which compensation in the form of damages which cannot be termed as charges towards management.

  In view of our above discussion and on perusal of the facts of the case we are of the view that the surrender charges are not part of taxable service of management of funds. Rather it is in the nature of penalty of liquidated damages which is not a service and hence cannot be made liable for tax during the period involved..

35. Further, it is important to keep in mind that the sum received by the Applicant is liquidated damages for the loss suffered by it as a result of premature termination of the contract. Recovery and payment of liquidated damages is a post termination event having no connection with the main supply of provision of technical know-how. Since the

Applicant is wronged by the service recipient's default in performing its obligations under the contract, liquidated damages is recovered by the Applicant to make goods the loss suffered by it and the said amount, it is re-iterated is not towards provision of any service.

36. On application of the above definitions and the above case laws to the Applicant's case, it is submitted that the flow of money from the service recipient is not for any provision of supply of service of tolerating any default in payment by the service recipient.

37. Instead, the claim of liquidated damages is against the loss suffered by the Applicant on account of the default committed by the service recipient. Any payment received as genuine damages or loss flowing from early termination as a result of a default one party, can not be regarded as a consideration for a supply. Therefore, it is submitted that there can be no taxable supply in the instant case as the payment for genuine damages is no consideration for any earlier or current supply.

38. The submission of the Applicant that damages received by it is not consideration for any supply is also substantiated from the following foreign case laws dealing with similar issues and having provisions with identical language:

- In GSTR 2003-2011, the Australian Taxation Office (ATO) had to consider the applicability of GST on payments made on an early termination of a lease of goods by a lessor on account of a lessee's default. Under the Australian GST law, section 9-5 provides that a taxable supply is made if a) the supply is for a consideration, ii) the supply is made in the course of furtherance of an enterprise that one carries on, iii) the supply is connected with Australia and iv) the person making the supply is registered or required to be registered.
- As for the definition of the term 'supply, section 9(10) (2) of the Australian GST law provided a non-exhaustive list of activities or occurrences that are included the meaning of supply. The list included supply of goods and an entry into, or release from, an obligation i) to do anything, ii) to refrain from an act, and iii) to tolerate an act or situation as supply. Further, much like under the Indian law, the Australian GST law required that a supply should be made for consideration and for this requirement to be met, there i) had to be payment/any act or forbearance consideration for supply and ii) the said payment/any act or forbearance or consideration is 'in connection with', 'in response to' or 'inducement of a supply'. Therefore, there had to be any payment/act/forbearance and the said act/payment/forbearance ought to have sufficient nexus with the supply in question.
- In the said background, the Australian Tax Office ruled that payments made on early termination of a lease by the lessor does not constitute a supply as the same is nothing but genuine damages for the loss suffered by the lessor. In support of its conclusion, it observed as below:

"**70.** *Where a lease is terminated early because of the lessor exercising a right to terminate early arising out of a default by the lessee, the termination does not occur as a consequence of any mutual agreement between the lessor and the lessee. It is the action of the lessor in exercising the lessor's right to terminate which brings the lease to an end.*

71. *The lease may require payment to be made by the lessee to the lessor to compensate the lessor for any damage or loss suffered because of the early termination. Genuine damage or loss cannot be characterized as a supply made by the lessor, because the damage or loss does not in itself constitute a supply under section 9-10.*

72. *A payment received to compensate the lessor for genuine damage or loss flowing from early termination as a result of a default by the lessee is not consideration for a supply .... There is no taxable supply because a payment for genuine damages, which is not consideration for any earlier or current supply, is not made in connection with any supply.......*"

- **Financial and General Print Ltd. v. Commissioner of Customs and Excise, (1995) VAT Dec. No. 13795:-** The case involved early termination of an agreement and payment of certain damages amount by the lessee to the lessor following the appointment of a receiver to the lessee. Where the sum received by the lessor was sought to be taxed on the ground that the same amounted to supply, the UK VAT Tribunal observed as below:

"*In summary and looking at the entire transaction' the position is this. While the lease is running, the lessee provides consideration in the form of rent for the quarter and in return the lessor supplies or continues to supply possession of the equipment. If the lessee fails to pay his quarter's rent (or commits any other act of 'default' ...) the lease may be terminated and the lessor may recoup possession. If So, the lessor's obligation to provide the service is spent and any termination payment compensates the lessor for the latter's loss of opportunity to provide that service ...*

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the lessor's termination of the lease was not a supply of services. It was simply a unilateral act of the lessor. It terminated the lease and so terminated all further supplies of the services of granting possession of the equipment to the lessee ... There was no relevant service to which the compensation payment could be directly linked. The termination cannot, therefore, be properly described as a supply of services effected for consideration ...".

39. From the terms of the agreement, is evident that there is no obligation cast upon the Applicant to tolerate the act of breach of the contract and receive consideration for such tolerance. Therefore, the conditions required for invoking the levy under section 5(e) of the Schedule || of the CGST Act, 2017 are not satisfied. Accordingly, the liquidated damages claimed by the Applicant should not be liable to GST.

Relevance and Applicability of the aforesaid decisions

40. The Indian GST law is in its formative stages. There is no jurisprudence on certain expressions employed under the Act and taxability of damages under the indirect tax law, particularly the GST law, is still uncertain and unclear. In such circumstances, recourse ought to be had to international cases and rulings understand the meaning and import of certain expressions.

41. The Supreme Court of India and High Courts across the country routinely follow international rulings and commentaries, where there is little or almost no jurisprudence on a given subject, for sufficient guidance. As a result, where the rulings in aforesaid foreign rulings cited by the Applicant shed sufficient light on the taxability of damages in the context of the expression 'tolerate an act', such rulings ought to be taken into consideration before deciding the

issue at hand before this Authority considering the fact that the expression examined by the foreign authorities in the decisions relied upon by the applicant exactly the same as the expression used under the GST law.

42. The aforesaid ruling of the ATO specifically considered and decided on taxability of damages in the context of the expression 'tolerating an act'. Such a ruling, therefore, ought not to be disregarded without sufficient reasons for doing so. Likewise, the decision in case of Financial and General Print Ltd (supra) holds sufficient persuasive value and ought not to be disregarded without providing explicit and sufficient reasons.

Mere inclusion of specific clause for payment of damages and quantification thereof should not change the nature of transaction to transform a lawful right of termination into an 'obligation to tolerate'

43. It is a business prudence that contracting parties foresee an act of breach by the other party and take measures to safeguard themselves against any consequent loss/ injury arising out of such breach. In this regard, it is a standard practice to include specific clauses in the agreements providing aggrieved party a right to seek damages against loss/ injury. These clauses act as a deterrence against breach of terms by the other party.

44. Mere fact that such a clause is included in the contract for protection of the aggrieved party would not result in creation of an obligation to tolerate a breach of the agreement. On the contrary, it gives the aggrieved party a right to sue/ enforce the terms and claim damages.

45. Similarly, mere quantification of liquidated damages payable to the service provider on termination of the Association Agreement should not, and would not, alter the nature of transaction and transform into a supply of a service in as much as what is paid to the service provider is nothing but damages for the loss/injury suffered.

46. The Applicant exercised its right/entitlement to terminate the Association Agreement on account of the service recipient's default in complying with its obligations to make payment to the Applicant for services rendered. Due to such default by the service recipient, the Applicant has suffered an injury/ loss. The Indian law recognises the Applicant's right to be compensated for such injury/ loss. To safeguard Applicant's interest under the Association Agreement, the parties had agreed to stipulate and incorporate specified amount which shall be payable as damages by the recipient to the Applicant. The rationale behind insertion of a clause stipulating payment of liquidated damages is only to avoid long-drawn litigation between contracting parties.

47. Mere mention of a clause stipulating quantum of damages payable would not in any way alter the underlying reasons for payment of the damages, which remains to be the injury/ loss caused to the Applicant. Had there been no mention of the quantum of such damages, the only difference would have been that the parties would have then approached the courts/ arbitral tribunal for determination of the quantum of damages. The quantum adjudicated by the courts/ arbitral tribunal would still be in respect of the injury/ loss caused. The mechanism for determination of the damages cannot have any bearing on the nature of the transaction. Even in the instant case, it may so happen, that the arbitral tribunal may alter the amount of liquidated damages claimed.

48. It is submitted that, in principle, there is no qualitative difference in a claim of liquidated damages and a claim of unliquidated damages as there would be arbitral proceedings (in lieu of long-drawn court proceedings) between the parties to adjudicate and assess the amount of liquidated damages payable to the Applicant and the Applicant would still be required to adduce adequate proof of the loss suffered as the requirement of proving the loss suffered by the Applicant is not dispensed with' by merely incorporating a clause with liquidated damages.

49. The aforesaid argument of the Applicant has sufficient backing under Indian law and had been constantly appreciated by Indian Courts. Amongst others, the Supreme Court, appreciating the aforesaid aspect, observed as below in **Union of India v. Raman Iron Foundry and Ors., (1974) 2 SCC 231:**

"Now, it is true that the damages which are claimed are liquidated damages under clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages...........It, therefore, makes no difference in the present case that the claim of the Appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred".

50. Based on the above, it is clear that the Applicant's right to receive liquidated damages is not guaranteed and crystallized by a mere reference to the payment of liquidated damages in the contract. The receipt of liquidated damages is dependent on the finality of the proceedings before the highest appellate forum.

51. The Applicant receives damages to make good its injury even it approaches any court of law in ordinary course and the mere fact that the Applicant chose to incorporate clause stipulating a genuine pre-estimate of the damages to make goods its injury by fighting out its claim before an arbitral tribunal instead of a court of law should not alter the nature of the transaction entered into by the Applicant and make the damages received by it amenable to the levy of GST.

There cannot be an agreement to tolerate a breach, which is illegal as per the terms of the Association Agreement

52. The Applicant submits an agreement to tolerate an illegal act is not a valid agreement under the Indian law. Assuming without admitting that the Applicant is tolerating a default by the service recipient in discharging its obligations under the Association Agreement, it is submitted that such an agreement to tolerate an illegal act of non-payment can have no enforceability under law. This being so, the Association Agreement entered into by the parties cannot be construed to cast an obligation on the Applicant to tolerate an illegal act or situation as the same would have the effect of rendering the said agreement unenforceable.

53. It is re-iterated that the damages claimed by the Applicant are for the loss/injury suffered by it on account of an illegal act of the service recipient. When the service recipient fails to pay the service provider in time as required under the Association Agreement, the Applicant is put to irreparable loss/injury as a result of such non-payment.

Comments on submissions made by the jurisdictional officer:

54. The jurisdictional officer had opined in its written submissions that non-performance of a contract is an activity or transaction which is treated as supply of service and the person is deemed to have received the consideration in the form of liquidated damages and is accordingly required to pay tax on such amount.

55. In this regard, the Applicant submits that mere non-performance of a contract by the service recipient would not trigger the levy of GST on liquidated damages paid by the service recipient. The jurisdictional officer had not appreciated the true import of clause 5(e), which requires an agreement to discharge an obligation to refrain from an act or tolerate an act or a situation. The jurisdictional officer does not explain how the Association Agreement in question is for discharge of an obligation towards refraining or tolerating any act or a situation.

56. The Applicant submits that there is no agreement to discharge an obligation for tolerating any act of default by the service recipient between the parties. The payment of liquidated damages is nothing but damages for the loss suffered by the Applicant and the same does not qualify as 'consideration' for the purpose of GST law.

57. Unless it is demonstrated that there is an obligation under the agreement to refrain from an act or tolerate an act or a situation and this obligation is coupled with the presence of consideration, there can be no levy of GST. In any event, the Applicant submits that payment of LD to the Applicant for a default on the part of the service recipient cannot qualify as consideration for the purpose of the levy of GST.

Time of Supply and valuation of the liquidated damages for the purpose of payment of GST

58. Even assuming arguendo that GST is payable on liquidated damages claimed by the Applicant, the Applicant submits that no GST is payable on liquidated damages unless the same is actually received by the Applicant once the arbitral award attains finality.

59. This view of the Applicant is supported by the jurisdictional officer who observed in its written submissions to this Authority that time of supply for the liquidated damages may be the date on which the liquidated will be credited in the bank account of the Applicant or the date on which Applicant shows the receipt of liquidated damages in its books of accounts, whichever is earlier.

60. The fact that receipt of liquidated damages is uncertain is also acknowledged by the Authority for Advance Ruling (AAR) under the erstwhile service tax law, which had observed that it would not give a finding on an event that has not occurred as yet and regarding which there is no certainty. Therefore, even assuming arguendo that there would be levy of GST on the liquidated damages due to the Applicant, it ought to be only on the actual receipt of liquidated damages by the Applicant.

61. The jurisdictional officer has provided similar views in respect of the valuation of the liquidated damages, observing that the value of supply of services will be determined based on the actual receipt of the liquidated damages by the Applicant.

62. Without prejudice our submissions on applicability of GST on liquidated damages, it is highlighted that the comments of the jurisdictional officer are in line with the observations of the Apex Court in Union of India v. Raman Iron Foundry and Ors., (1974) 2 SCC 231, where the Hon'ble Apex Court observed as below:

"Now, it is true that the damages which are claimed are liquidated damages under clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages.......It, therefore, makes no difference in the present case that the claim of the Appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred".

63. In light of the above observations, it is clear that the question for time of supply and valuation cannot arise for adjudication till the claim of liquidated damages is finally adjudicated in the favor of the Applicant by the highest appellate forum and the Applicant actually receives the liquidated damages.

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

Statement containing the applicant's interpretation of law and/or facts, as the case may be, in respect of the aforesaid question(s) (i.e. applicant's view point and submissions on issues on which the advance ruling is sought);

The position of law and our understanding of the same

28.It is important to note various statutory provisions which have a bearing on the questions raised for the Advance Ruling in the present Application. The relevant statutory provisions are extracted hereunder for the ready reference of the Hon'ble Authority :

Relevant Provisions of the Central Goods and Service Tax Act, 2017 and the Applicant's interpretation of the same

29.Under the GST law, all "supplies' of goods and services should attract GST (unless specifically exempted). Section 9 of the Central Goods and Services Tax Act, 2017 (CGST Act) is the charging Section which provides that there shall be a levy of a tax called the central goods and services tax on all intra-state supplies of goods or services or both on the value determined under section 15 of the CGST Act, 2017 at such rates not exceeding twenty percent as may be notified by the Government. As is clear from the aforesaid Section, the key pre-condition for the levy of GST is presence of a "supply" of services.

30.Section 7 of the CGST Act, 2017 defines the term "supply" and the relevant portion of the same is reproduced hereunder as follows:

"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, license, 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 made without a consideration; and

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

(emphasis supplied)

31.Section 7 of the CGST Act, 2017 defines the term "supply" to include all forms of supply of goods or services or both. Also, it expressly seeks to include all activities treated as supply of goods or supply of services as referred to in Schedule II of the CGST Act, 2017. In this regard, Clause 5 of Schedule II provides for the list of activities that shall be treated as supply of services. Inter alia, Clause 5(e) of the Act provides that agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to an act shall be treated as a supply of services. The relevant portion of the Schedule II is extracted hereunder for your ready reference:

SCHEDULE II

(Section 7)

5. Supply of services

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

(a).........

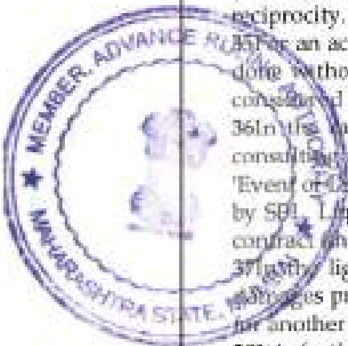
(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and....."

32Further, although there is no comprehensive definition of the term "service" (as it existed under the erstwhile service tax regime), the term "service" is defined as follows under section 2(102) of the CGST Act, 2017:

> *"services means anything other than goods, money and securities but includes activities relating to the use of money or conversion by cash or by any other mode, from one form, currency or denomination, to another form currency or denomination for which a separate consideration is charged."*

33A plain reading of the aforesaid provisions indicate that for a transaction to qualify as a supply of service', it is necessary there is an underlying 'activity performed by one person for another for consideration.

34In order to qualify as a 'supply of service for a consideration there has to be a service provider and a service recipient who have agreed to perform/receive specified services. The contract/agreement should involve contractual reciprocity.



35For an activity to qualify as a 'service', the same has to be performed at the behest of the service recipient. An act done without corresponding desire or without reciprocate contractual obligation of the service recipient cannot be considered as an activity for a consideration.

36In the case at hand, the claims of liquidated damages are not payable as consideration towards rendition of consulting advisory services. The claim of liquidated damages preferred by Applicant stems from occurrence of an 'Event of Default' in terms of Section 8.1 of the Association Agreement, which includes breach of payment obligations by SPL. Liquidated damages are in the nature of compensation for losses incurred on account of termination of the contract (in other words loss of source of business/ revenue).

37In the light of the aforesaid submissions, it is submitted that any claim and subsequent receipt for liquidated damages preferred by the Applicant against SPL should not qualify as a 'supply of service performed by one person for another for a consideration. Accordingly, it should not qualify as "supply of service for the purpose of levy of GST.

38It is further submitted that section 7 of the CGST Act, 2017 specifically includes within its ambit activities which are deemed to be treated as supply of services under Schedule II of the CGST Act, 2017. Inter alia, clause 5(e) of Schedule II of the CGST Act, 2017 is the relevant clause for the purpose of the instant application.

39It is submitted that for a transaction to be covered under the list of clause 5(e) of Schedule II as agreeing to the obligation to tolerate an act, there has to be a concurrence to assume an obligation to refrain from an act or tolerate an act or a situation etc. In the absence of such an obligation between the parties, it is submitted that the said clause cannot be invoked and there can be no levy of GST.

40It is submitted that the claim of liquidated damages is made towards making good the damages, losses or injuries arising from unintended' events and does not emanate from any 'obligation' on the part of any of the parties to tolerate an act or a situation.

41It is submitted that suffering a damage or incurring a loss cannot be equated or considered to be making a supply of taxable service falling within the ambit of the above sub-clause (e) of clause 5 of Schedule II of the CGST Act, 2017, which can possibly be invoked only when there is an 'obligation' or 'consensus' amongst the parties 'to tolerate an act or a situation.

42In the case at hand, it is submitted that there is no obligation on part of the Applicant to tolerate any breach of payment obligations by SPL. The liquidated damages contemplated under the Association Agreement were incorporated to safeguard the interest of the Applicant against an adverse contingency which may or may not occur.

43Considering the aforesaid factual matrix and legal position, as explained above:

- The liquidated damages claimed by the Applicant are not in lieu of any activity/obligation which it has agreed to perform at the behest of the service recipient. Such liquidated damages are claimable on account of breach of contract (default in payment obligation) by SPL. The Applicant cannot be considered to have performed any activity for a consideration for SPL with regard to liquidated damages claimed.
- Also, there is no contractual reciprocity or concurrence to assume an obligation to refrain from an act or tolerate an act between the Applicant and SPL, which are indispensable and essential for a transaction to qualify as a

'supply of service'.

- Accordingly, the transaction in question does not qualify as a 'supply of service and hence is not subject to levy of GST.

44In light of the above, it is clear that the liquidated damages which may be awarded by ICC to the Applicant do not qualify as a 'supply of service for purpose of levy of GST under the CGST Act, 2017 and would, therefore, not attract the levy of CGST Act, 2017.

45It is further submitted that the receipt of liquidated damages by the Applicant would depend on the final award of the ICC which would be pronounced only post conclusion of the arbitration proceedings on April 8, 2018.

46It is submitted that, since the transaction would not attract GST, the questions regarding valuation of the transaction and the point of time when the GST liability shall be triggered do not arise.

47The Applicant, therefore, humbly submits that, although the arbitration proceedings will commence in the month of April 2018, the award by ICC may be pronounced only in later part of this year or early months of next year. Hence, even if the liquidated damages were held to be liable to GST, the question with regard to the value exigible to GST and the time of supply can only be ascertained once the Applicant's eligibility to receive the liquidated damages attains finality before the appellate forum/ Court of law.

PRAYER

In the light of the above, it is prayed that the Hon'ble Authority may be pleased to rule that:

A. Liquidated damages which may be awarded by ICC shall not qualify as 'supply of any goods or services and hence would not be exigible to the levy of GST; and

B. Since liquidated damages are not exigible to the levy of GST, the questions regarding valuation of supply and point of time of supply for the purpose of levy of GST do not arise.

C. Pass any other order your good self may deem fit in the interests of justice.

03. <u>CONTENTION - AS PER THE CONCERNED OFFICER</u>

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

Comments and submission regarding above referred application as fallows.

<u>Questions asked by the applicant for advance ruling</u>

1. Whether liquidated damages that may be awarded to the applicant by International Chamber of Commerce (ICC) qualifies as a 'supply ' under Goods and Services Tax (GST) law, thereby attracting the levy of GST?
2. If the answer to the question No. 1 is in affirmative, what should be the time of supply, that is to say, the point of time in which NACC's liability to pay GST arise?
3. If the answer to the question No. 1 is in affirmative, what should be the value of supply on which GST is payable, that is to say, whether the applicant is liable to pay GST on the amount of liquidated damages claimed and awarded to the applicant under the arbitral award or the amount which is actually received by the applicant after conclusion of the matter before the final appellate authority?.

Classification of service :

Chapter Section Heading	Description of Service	CGST Rate (%)	SGST/UTG ST Rate (%)	IGST Rate (%)	Condition
Heading 9997	Other services (washing, cleaning and dyeing services; beauty and physical well-being services; and other miscellaneous services including services nowhere else classified).	9	9	18	-

1. **Scope of Supply :**

Section 7 of the Central Goods and Services Tax Act 2017 (CGST 2017) defines scope of supply.

As per Section 7(1) (d) the activities to be treated as a supply of good or supply of services as referred in the sch. 2

As per schedule 2 para 5 clause (e) "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"

As per above provision liquidated damages may be awarded to applicant NACC India for non-performance of a contract by SPL. Non-performance of a contract is an activity or transaction which is treated as a supply of service and the person is deemed to have received the consideration in the form of liquidated damages, fine or penalty and is accordingly, required to pay tax on such amount.

2. **Time of Supply :**

Section 13(2) of the Central Goods and Services Tax Act 2017 (CGST 2017) defines time Of supply of services shall be the earliest of the following dates.

a) *The date of issue of invoice by the supplier , if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment , whichever is earlier: or*

b) *the date of provision of service , if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment whichever is earlier: or*

The date on which the recipient shows the receipt of services in his books of account, in case where the provisions of clauses (a) and (b) do not apply.

Prescribed time for issue of invoice:

Sec 31(2) *A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed.*

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As per Rule 47 of CGST Rules 2017 the invoice referred to in rule 46, in the case of the taxable supply of services, invoice shall be issued within a period of thirty days from the date of the supply of service.

NACC India issued an Invoice Dt. 23rd July 2014 for claiming Liquidated Damages from SPL along with notice of Termination of Association Agreement after the completion of 60 days from the date of notice of default. The issue date of invoice is before the effective date of GST Act 2017.

As per section 13 Time of Supply may be the date on which Liquidated Damages will be credited in the Bank account of NACC India or the date on which NACC India will show the receipt of Liquidated damages in his books of account whichever is earlier.

Or

As per sub-section 5 of section 13 Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—(a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or (b) in any other case, be the date on which the tax is paid.

3) **Value of Supply:**

As per sub-section 1 of section 15 the value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

Or

As per Rule 30 of CGST Rules 2017 Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter IV, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.

NACC India issued an invoice Dt. 23rd July 2014 amounting 17 million USD to SPL for liquidated damages. The decision on dispute regarding liquidated damages is pending before ICC, London. Invoice date is before the effective date of GST Act 2017. As per Arbitration clause of Association Agreement decision of ICC, London is final & binding remedy between the parties. In such situation value of supply of services will be determined on the basis of actual receipt of liquidated damages by NACC India from SPL after award of ICC, London.

04. HEARING

The case was taken up for preliminary hearing on dt. 12.06.2018, with respect to admission or rejection of the application when Sh. N. Venkatraman Sr. Advocate alongwith Sh. Govardhan Purohit, Advocate, Sh Amit Bhagat Advocate and Sh. Aditya Khanna, Advocate appeared and made request for admission of ARA application as per their written and oral submissions. They specifically point out that they had earlier approached Service Tax Advance Ruling Authority at Delhi and the authority had rejected their application as premature at that time. They stated that presently also final arbitration award is awaited by October, 2018 only. From the company's side Sh. Hans Weber Sr. Tax Director appeared. Jurisdictional Officer, Ms. V. M. Wadkute, State Tax Officer (PUN-VAT-C-118) Pune appeared and made written submissions.

The application was admitted and final hearing was held on 03.07.2018 , Sh. N. Venkatraman Sr. Advocate alongwith Sh. Govardhan Purohit, Advocate, Sh Amit Bhagat Advocate and Sh. Aditya Khanna, Advocate, Sh. Prashant Agarwal and Sh. They appeared and made oral & written submissions. They also requested for time to make further submissions latest by 10.07.2018 which was granted. The jurisdictional officer, Ms. V. M. Wadkute, State Tax Officer (PUN-VAT-C-118) Pune appeared and made written submissions.

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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.

We find that the applicant M/s North American Coal Corporation India Pvt.Ltd., (NACC India) is a Private Limited Company incorporated under the Companies Act, 1956 to carry on the business of providing Technical Consultancy relating to Coal Mining and related activities. It is a wholly owned subsidiary of M/s North American Coal Corporation, USA (NACC US).

We find that NACC, US has entered into an association agreement for mine development and operations with M/s Sasan Power Ltd. (SPL or Reliance) a company which is a part of Reliance Anil Dhirubhai Ambani Group which is in the business of developing, designing, operating, maintaining owning an Ultra Mega Power Project in Sasan, Madhya Pradesh, India. The Association Agreement as referred above is effective from 1st January, 2009 in order to provide technical know how to SPL in relation to mine development and operations.

We further find that later on in March, 2011, NACC, US incorporated a subsidiary, NACC, India and the rights and obligations of NACC, US as per the original Association Agreement were transferred and assigned to the applicant with the consent of SPL.

The Sasan Project as per the Association Agreement was divided into three phases being, (1) Pre-development phase, (2) Development phase and (3) Production phase. The details of terms and conditions of the agreement during these phases are as mentioned at relevant places in the Applicant's submission above.

We find that NACC, US in the initial phase and later NACC, India had rendered significant services to SPL as per terms and conditions of Association Agreement referred above. However it is alleged by the applicant that after some time SPL curtailed the activities of the applicant and engaged its Inhouse Consultants. The applicant further states that the last invoice against which, payment was made by SPL to the applicant pertained to the period up to September, 2013 and it stopped making payment against invoices of the applicant pertaining to services performed after the period 1st October, 2013.

The applicant further stated that they were constrained to terminate the Association Agreement with SPL as per the relevant articles of the Association Agreement.

The applicant states that several suits and counter suits were filed by the applicant and SPL against each other and it was finally ordered by the Hon'ble Supreme Court that the parties could participate in arbitration proceedings outside India despite being companies incorporated under the Companies Act, 1956, in India. The applicant further stated that accordingly the applicant and SPL have initiated arbitration proceedings before the International Chamber of Commerce (ICC) which are pending finalization.

We find that in view of the above details, the applicant has raised three questions for decision of this authority which are as under:-

1. *Whether liquidated damages that may be awarded to the Applicant by the International Chamber of Commerce ("ICC") qualifies as a 'supply' under the Goods and Services Tax ("GST") law, thereby attracting the levy of GST ?*
2. *If the answer to Question No. 1 is in the affirmative, what should be the time of supply, that is to say, the point of time in which NACC's liability to pay GST arises ?*
4. *If the answer to Question No. 1 is in the affirmative, what should be the value of supply on which GST is payable, that is to say, whether the Applicant is liable to pay GST on amount of liquidated damages claimed and awarded to the Applicant under the arbitral award or the amount which is actually received by the Applicant after conclusion of the matter before the final Appellate authority.*

We find that in respect of the above, the applicant in their oral and written submissions with regard to their interpretation of the issue have made contentions as under:-

(I) Firstly they have contended that their obligations under the Association Agreement do not constitute as supply of services. They contended that the claim of liquidated damages does not qualify as a 'service' itself as it lacks the element of reciprocating which forms the *sine qua non* for a transaction to qualify as a service.

(II) Secondly they have contended that even if one were to argue that the claim of liquidated damages amounts to a service such claim cannot be regarded as being in course or furtherance of business. The termination of the Association Agreement puts an end to the business relationship of the applicant with the service recipient. It results in complete and absolute cessation of the business of the applicant and not its furtherance. That the act of termination cannot be called in course of any business as the usage of the term 'in course' indicates continuity of an activity.

(III) Thirdly they have contended that the situation in view of the facts of the present case would not get covered under clause 5 (e) of Schedule II of the CGST Act, as there is no obligation to refrain from an act or to tolerate an act or a situation or to do an act.

(IV) Fourthly, they have contended that liquidated damages received for breach/termination of a contract cannot qualify as consideration, stating that liquidated damages paid by the service recipient is neither in respect of nor in response to any supply made by the applicant, instead it is paid to make good, loss/injury suffered by the applicant as a result of premature termination of the Association Agreement.

(V) They stated that mere inclusion of specific clause for payment of damages and quantification thereof should not change the nature of transaction to transform a lawful right of termination into an 'obligation to tolerate'.

We find that the applicant has referred to various case laws in support of their above contentions which are given in detail in the submissions and contentions portion of their application referred above.

We find that in view of the above detailed facts and contentions of the case, we need to examine the issue at hand as under:-

We find that as per Section 9(1) of the CGST Act regarding levy and collection

Section 9(1) ---*Subject to the provisions of sub-section 2 there shall be levied a tax called the Central Goods and Services Tax on all Intrastate supplies of goods or services or both except on the supply of Alcoholic Liquor for human consumption, on the value determined under Section 15, at such rates not exceeding twenty percent, 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 taxable person.*

From the above we find that CGST is leviable on Intra-State supplies of goods or services or both.

We find that Section 7 of the CGST Act gives scope of 'supply'.

Section 7 of the CGST Act 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 I, 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.

(2) Notwithstanding anything contained in sub-section (1),––

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as –

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

We find that Section 7(1) provides that 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

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

Here the word 'include' is of specific importance which implies that all the activities that are given in Section 7(1) (a), (b), (c), and (d) would be included in 'supply'. For the purposes of this Act which implies that otherwise than the scope as covered in this Section and Act, the word 'supply' may even have a broader connotation and scope.

Thus as per the scope of the word 'supply' in the Act and the present facts of the case, we find that supply includes:-

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal

(i)made or agreed to be made for a consideration by a person

(ii)in the course or furtherance of business.

Apart from the above provisions we also need to refer to Sr. No. 5(e) of Schedule II as given in Section 7(1)(d) of the CGST Act which is regarding the activities to be treated as supply of goods or supply of services. We find that Sr. No. 5(e) of Schedule II states that the following shall be treated as supply of services, namely:-

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

Thus in view of the provisions as above we are required to examine the facts of the present case and details of the Association Agreement as submitted, to ascertain whether tax liability would be there or not on the applicant in context of detailed transactions/acts presented before us.

We find that first of all there was an Association Agreement first between NACC, US and SPL with effect from 1st January, 2009 and with effect from March, 2011, the rights and obligations of NACC, US as per the original Association Agreement were transferred and assigned to the applicant with the consent of SPL and we clearly find that this agreement was in respect of providing technical knowhow to SPL in relation to mine development and operations.

We find that as per the Association Agreement referred above, the provision of services in the Sasan project was to be carried out in three phases as per agreed terms and conditions of payment and services provided and referred as under:-

(i) Pre-development phase.

(ii) Development phase.

(iii) Production phase.

We find that there is no dispute with respect to provision of services and applicability of levy of taxes in respect of the above services provided between the applicant and the service recipient SPL as it clearly falls within the scope of supply as given in Section 7(1)(a) of the CGST Act.

However we find that the Association Agreement as referred above did not last for the whole period as envisaged in the Association Agreement and the agreement is claimed to be terminated for breaches on the part of the service recipient SPL by the applicant in view of the existent provisions as were already there in the Association Agreement entered into between the applicant and SPL.

Now we refer to the relevant clauses in respect of termination of the agreement that were included in it as per the mutual agreement as per terms given in Association Agreement between the applicant and SPL.

We find that Article VI of the Association Agreement as referred above provides for term and termination which is as under:-

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ARTICLE VI

TERM AND TERMINATION

"Section 6.1 Term. Under earlier terminated in accordance with Section 6.2, the term of this Agreement shall commence on the Effective Date an shall continue until the end of the Production Phase (the "Initial Term"). Following the Initial Term, the parties may extend this Agreement by written agreement for any number of one (1) year terms (each, an "Extended Term" and, together with the Initial Term, the "Term") until the Agreement is terminated pursuant to Section 6.2.

Section 6.2 Termination. This Agreement may be terminated :

a) At any time by mutual agreement of the parties;

b) By either parties in accordance with Article VII (Force Majeure); or

c) By either parties in accordance with Article VIII (Events of Default).

Section 6.3 Effect of Termination

(a) Upon termination of this Agreement for any reason, NAC shall furnish to Reliance (a) within sixty (60) days after the effective date of termination, an initial invoice for settlement of all costs incurred prior to the termination date and (b) within twenty (20) days of incurring such costs, additional invoices for (i) the On-Site Costs incurred as a result of the repatriation of the On-Site Consultants and (ii) the On-Site Costs relating to the tax-equalization payments for the On-Site Consultants. Reliance's payments of such invoices shall be subject to the provisions of Sections 5.3 and 5.6.

(b) If Reliance terminates this Agreement pursuant to Section 6.2(c), any damages recoverable by Reliance shall be limited to the amount of the Development Fees and/or Production Phase Royalties actually paid by Reliance during the year in which Reliance terminates this Agreement pursuant to Section 6.2(c), in no event to exceed U.S. $1,000,000 in the aggregate.

(c) If NAC terminates this Agreement pursuant to Section 6.2(c), Reliance shall pay to NAC as liquidated damages and not as a penalty or other punitive amount, the amount specified below:

If Termination Occurs During: Then the Termination Payment is U.S.: Year 1 of the Development Phase $11 million Year 2 of the Development Phase $13 million Year 3 of the Development Phase $15 million Year 4 or later of the Development $17 million Phase Any year in the production phase $17 million, less the aggregate amount of the Production Phase Royalties received by NAC prior to the termination date"

ARTICLE VIII

EVENTS OF DEFAULT

Section 8.1 Default by Reliance. If Reliance shall at any time be in breach of its (a) payment obligations, (b) other obligations pursuant to this Agreement, including failure to provide reasonable access to the Mine, the Preparation Plant or any o Mining Project that are relevant to the duties and obligations of NAC hereunder and the failure to timely provide presentations in Section 13.2(1, NAC may give written notice of such default to Reliance, in which case Reliance shall have twenty-one (21) days within which to cure the default. If, at the end of the twenty-one (21) day period, Reliance has not cured the default NAC shall have the right, (i) if the default is of the type described in subclause (a) above, to immediately cease providing the Services until such time as the event of default is cured, (ii) if the default is of the type described in subclause (b) above, to cease providing such Services as NAC determines, in its reasonable discretion, cannot be performed due to Reliance's default until such time as the event of default is cured, or (iii) if any such default is not cured within sixty (60) days and NAC is not then in breach of this Agreement, to terminate this Agreement. Reliance shall continue to be responsible for the On-Site Costs during the period of the default and prior to the termination of the Agreement.

Section 8.2 Default by NAC. If NAC shall at any time be in breach of its obligation to provide Services hereunder, Reliance may give written notice of such default to NAC, in which case NAC shall have ten (10) days within which to cure the default. If, at the end of the ten (10) day period, NAC has not cured the default Reliance shall have the right (i) to cease reimbursing NAC for Services not actually provided until such time as the event of default is cured or (ii) if the default is not cured within sixty (60) days and Reliance is not then in breach of this Agreement, to terminate this Agreement. Reliance shall not be responsible for the On-Site Costs during the period of default and prior to the termination of this Agreement, other than the repatriation and tax equalization costs identified in Annex C and, if any, on the On-Site Consultants Schedule"

Further, in view of default as above we find that Article XII of the Association Agreement clearly provides for Governing law and dispute resolutions as under:-

Section 12.1 – Governing Law : This agreement shall be governed by, and construed and interpreted in accordance with, the laws of the United Kingdom with regard to its conflicts of laws principles

"Section 12.2 Dispute Resolution: Arbitration

(a) Any and all claims, disputes, questions or controversies involving Reliance on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, "Disputes") which cannot be finally resolved by such parties within 60 (sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the "ICC") in accordance with its commercial arbitration rules then in effect (the "Rules"). The place of arbitration shall be London, England. Each party shall appoint one (1) arbitrator and the two (2) arbitrators so appointed shall together select and appoint a third arbitrator. If either Reliance, on the one hand, or NAC, on the other hand, fail to appoint their respective arbitrator within thirty (30) days after receipt by respondent(s) of the demand for arbitration or if the two (2) party-appointed arbitrators are unable to appoint the chairperson of the arbitral tribunal within thirty (30) days of the appointment of the second arbitrator, then the ICC shall appoint such arbitrator or the chairperson, as the case may be, in accordance with the listing, ranking and striking provisions of the rules. Save and except the provision under Section 9, the provisions of the Part 1 of (Indian) Arbitration and Conciliation Act, 1996, as amended (the "Arbitration Act") shall not apply to the arbitration. The arbitrators shall not award punitive, exemplary, multiple or consequential damages. In connection with the arbitration proceedings, the parties hereby agree to cooperate in good faith with each other and the arbitral tribunal and to use their respective best efforts to respond promptly to any reasonable discovery demand made by such party and the arbitral tribunal.

(b) All arbitration proceedings shall be conducted in the English language and the arbitral award (the "Award") shall be rendered no later than six (6) months from the commencement of the arbitration or as otherwise provided by the Rules, unless otherwise extended by the arbitral tribunal for no more than an additional six (6) months for reasons that are just and equitable.

(c) Except as otherwise required by Applicable Laws of India, the arbitration proceedings and the Award shall not be made public without the joint consent of each party and each party shall maintain the confidentiality of such proceedings and the Award.

(d) Each party shall bear its own arbitration expenses and Reliance on the one hand, and NAC, on the other hand, shall pay one-half of the ICC's and the chairperson's fees and expenses, unless the arbitrators determine that it would be equitable if all or a portion of the prevailing party's expenses should be borne by the other party. Unless the Award provides for nonmonetary remedies, any such Award shall be made and shall be promptly payable in (i) U.S. Dollars if payable to NAC or (ii) Rupees if paid to Reliance net of any tax or other deduction. The Award shall include interest from the date of any breach or other violation of this Agreement and the rate of such interest shall be specified by the arbitral tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full.

(e) All notices and other communications by any party to the other party or by the arbitral tribunal to any disputing party in connection with the arbitration hereunder shall be in accordance with the provisions of Section 14.1.

(f) Each of the Parties expressly understands and agrees that the Award shall be the final and binding remedy between them regarding any and all Disputes presented to the arbitral tribunal."

Thus we find clearly from the terms and conditions as referred above in respect of Article VI, Article VIII, and Article XII of the Association Agreement as refereed above that as per the terms and conditions of the agreement referred above there was clearly an agreement between the applicant and SPL to tolerate an act or situation in case such act was done by the other or such a situation arose because of default on part of one or the other during the course of the project covered under the Association agreement and in case of default of terms of the agreement by one of the parties to this Association

Agreement, the defaulting party was required to compensate the other party as per the terms and conditions of the Agreement. However we find that if there was further dispute in respect of the claims to be recovered/received by the one party from the other in view of violations or termination of the Agreement then they could approach the ICC for arbitration on the issue and to receive suitable amounts as claims cum consideration in view of the violations on the part of the party violating or defaulting on the Association Agreement.

Further as per the Association Agreement presented before the Authority it is very clear that the amount or consideration to be received by one party i.e. the applicant if any after arbitration from the defaulting party are suitable compensation only for tolerating the act of default or situation of default by one party on the part of the other party as per the terms and conditions of the Association Agreement and are not liquidated damages as claimed by the applicant as would be clear from the specific mentioned under Section 12.2 Dispute Resolution: Arbitration which clearly states as under:-

"The Arbitrators shall not award punitive, exemplary, multiple or consequential damages"

Thus we find that the consideration if any as received by the applicant after arbitration by the ICC would clearly qualify as 'supply' as per Sr. No. 5(e) of Schedule II of the CGST Act which reads as under:-

(5) Supply of Services : The following shall be treated as supply of services:-

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

In the present case as per details presented before us, we clearly find that there is a clear understanding or agreement between the parties in the present case to foresee and tolerate an act or a situation of default on the part of either of them for a monetary consideration which is actually a consideration received by them, though in the agreement they may be giving this consideration, other names such as 'damages' or 'compensation' as thought proper by them, but these different nomenclatures in their Agreement would in no way change the actual nature of monetary "consideration" which would clearly be taxable for the supply of services as per Sr.No. 5(e) of Schedule II of the CGST Act, 2018.

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Further we find that the case laws relied upon by them are not relevant in respect of the present facts of the case and Association Agreement as submitted in respect of the present case and therefore cannot be considered.

Now we take one by one the questions posed by the applicant before this authority

1. Whether liquidated damages that may be awarded to the Applicant by the International Chamber of Commerce ("ICC") qualifies as a 'supply' under the Goods and Services Tax ("GST") law, thereby attracting the levy of GST ?

Answer :- The consideration that may be awarded to the applicant by the ICC would qualify as supply of service as per Section 5(e) of Schedule II of Section 7(1) of the CGST Act as per detailed discussions above in this regard.

2. If the answer to Question No. 1 is in the affirmative, what should be the time of supply, that is to say, the point of time in which NACC's liability to pay GST arises ?

Answer :- The provisions of Section 13 of the CGST ACT will determine the time of supply in cases of supply of services. In the subject case the liability of tax would arise on the applicant as per Sr.No.5(e) of Schedule II of Section 7(1) of the CGST Act and the time of supply would be determined as per the

provisions of Section 13 of the CGST Act after the award of arbitration proceedings is given by the Arbitration Tribunal as administered by the ICC as per the Association Agreement by the parties to dispute, in the present proceedings.

3. If the answer to Question No. 1 is in the affirmative, what should be the value of supply on which GST is payable , that is to say, whether the Applicant is liable to pay GST on amount of liquidated damages claimed and awarded to the Applicant under the arbitral award or the amount which is actually received by the Applicant after conclusion of the matter before the final Appellate authority.

Answer :- In view of the facts presented before us, the value of supply of services will be actual liquidated damages cum consideration as decided and pronounced in the award administered by ICC.

06. 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- 07/2018-19/B- 63 **Mumbai, dt.** 11/07/2018

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

1. *Whether liquidated damages that may be awarded to the Applicant by the International Chamber of Commerce ("ICC") qualifies as a 'supply' under the Goods and Services Tax ("GST") law, thereby attracting the levy of GST ?*

Answer :- Answered in the affirmative.

2. *If the answer to Question No. 1 is in the affirmative, what should be the time of supply, that is to say, the point of time in which NACC's liability to pay GST arises ?*

Answer :- The time of supply would be determined as per the provisions of Section 13 of the CGST Act after the award of arbitration proceedings is given by the Arbitration Tribunal as administered by the ICC as per the Association Agreement by the parties to dispute, in the present proceedings.

3. *If the answer to Question No. 1 is in the affirmative, what should be the value of supply on which GST is payable , that is to say, whether the Applicant is liable to pay GST on amount of liquidated damages claimed and awarded to the Applicant under the arbitral award or the amount which is actually received by the Applicant after conclusion of the matter before the final Appellate authority.*

Answer :- The value of supply will be the actual amount of damages received by the applicant from SPL after the award by ICC.

PLACE- Mumbai

DATE- 11/7/2018

-sd-

B. V. BORHADE

(MEMBER)

-sd-

PANKAJ KUMAR

(MEMBER)

CERTIFIED TRUE COPY

MEMBER

ADVANCE RULING AUTHORITY

MAHARASHTRA STATE, MUMBAI

Copy to:-

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

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