

**THE AUTHORITY ON ADVANCE RULINGS
IN KARNATAKA
GOODS AND SERVICES TAX
VANIJYA THERIGE KARYALAYA, KALIDASA ROAD
GANDHINAGAR, BENGALURU - 560 009**

Advance Ruling No. KAR ADRG 56/ 2019

Dated: 19th September, 2019

Present:

1. Sri. Harish Dharnia,
Additional Commissioner of Central Tax, Member (Central Tax)
2. Dr. Ravi Prasad M.P.
Joint Commissioner of Commercial Taxes Member (State Tax)

1.	Name and address of the applicant	M/s McAfee Software (India) Pvt. Ltd. Embassy Golf Link Business Park, 2 nd Floor, Pine Valley, Domlur, Bengaluru 560071
2.	GSTIN or User ID	29AABCN3175H1ZC
3.	Date of filing of Form GST ARA-01	30.08.2018
4.	Represented by	Sri Bindumadhavan Harish, Advocate
5.	Jurisdictional Authority - Centre	Pr Commissioner of Central Tax, Bengaluru-East, BMTB Bus Stand Bldg, Domlur, Bengaluru
6.	Jurisdictional Authority - State	LGSTO-045, Bengaluru
7.	Whether the payment of fees discharged and if yes, the amount and CIN	Yes, discharged fee of Rs.5,000/- under CGST Act 2017 & Rs.5,000/- under KGST Act 2017 vide CIN 18082900325910 dated 21.08.2018

**ORDER UNDER SECTION 98(4) OF THE CENTRAL GOODS AND
SERVICES TAX ACT, 2017 AND UNDER SECTION 98(4) OF KARNATAKA
GOODS AND SERVICES TAX ACT, 2017**

1. M/s McAfee Software (India) Private Limited, (called as the 'Applicant' hereinafter), having GSTIN number 29AABCN3175H1ZC, has filed an application for Advance Ruling under Section 97 of CGST Act, 2017 read with Rule 104 of CGST Rules 2017 and KGST Act, 2017 read with Rule 104 of KGST Rules 2017, in FORM GST ARA-01 discharging the fee of Rs.5,000-00 each under the CGST Act and the KGST Act.

2. The Applicant is a Private Limited Company incorporated in India and is registered under the Goods and Services Act, 2017. The applicant has sought advance ruling in respect of the following questions:



- a) Whether the marketing service provided by the application is taxable under the GST provisions and if yes, what is the SAC and the applicable rate of tax?
- b) Whether the services provided by the applicant to McAfee Singapore qualifies as export of services under the provisions of the IGST Act considering the fact that:
- The applicant is located in India
 - The overseas entity is located in Singapore
 - The place of supply is outside India
 - The consideration for providing the services is received by the applicant in foreign currency; and
 - The applicant and overseas entity are two separate legal entities established under the laws of India and Singapore respectively.
- c) That the services are not "intermediary" services.
3. The applicant furnishes some facts relevant to the stated activity:
- The applicant states that he is a subsidiary of McAfee (Singapore) Pte. Ltd, which is inter alia engaged in the sale of security software products and services. In relation to the business of McAfee (Singapore) Pte Ltd ('McAfee Singapore') the applicant has entered into Marketing Services Agreement to provide marketing support services.
 - The applicant has provided the details as enumerated in the marketing services agreement and the same are explained in further detail in the table below:

Relevant Extract from the agreement	Detailed Explanation
Identifying potential business and contacts for the sale of products by the company to prospective and existing customer in the territory (Clause (a))	<ul style="list-style-type: none"> This scope of work provided by the applicant entails activities in the nature of market research and forecasts It entails gathering of data on target market either based on past experience or through specifically targeted research This activity is a pure support activity undertaken to overcome the challenges any business is likely to face in a local market. This would also involve the applicant identifying potential customers who would buy the products of McAfee Singapore. In other words, identify potential business opportunities.
Liaising with current and prospective customers of products in the territory by facilitating technical communication between Company and customers and	<ul style="list-style-type: none"> This scope of work provided by the applicant entails it acting as a point of contact in India. The activity is limited to acting

<p>other pre-sale and after-sale customer liaison activities (Clause (b))</p>	<p>as a communication channel between McAfee Singapore and the customer in India.</p> <ul style="list-style-type: none"> • However, it is pertinent to note that the employees of the applicant engaged in this activity do not have the authority to conclude contracts on behalf of the overseas entity. Their role is to facilitate technical communication between the overseas entity and the customer.
<p>Advising and assisting in complying with the laws, regulations, business and financial practices in effect in the territory, including providing assistance in obtaining necessary local licenses, permits, and authorisations (Clause (c))</p>	<ul style="list-style-type: none"> • This scope of work provided by the applicant as evident from the description of the service is an independent scope de hors from the marketing research and allied activities. • It involves advising on compliances required under the local laws.
<p>Assisting Company in the demonstration of the products. Provider agrees that a minimum level of samples and demonstration equipment may be required in order to provide such support activities. Such inventory will be maintained in a manner consistent with levels recommended by the Company. Provider will receive samples from Company at no charge. Provider agrees to acquire demonstration equipment from Company according with the then current Standard Sales Order Terms and Conditions of Company (Clause (d))</p>	<ul style="list-style-type: none"> • The inventory for carrying out these demonstration are kept with the applicant as a custodian
<p>Keeping Company advised and informed regarding the above matters in the territory that may of interest or concern to Company in connection with the carrying on of Company's business (Clause (e))</p>	<ul style="list-style-type: none"> • The applicant informs the overseas entity about the developments in the markets. • Keep McAfee Singapore informed about the market trends, local factors, etc.
<p>Providing Company with such reports concerning the above matters as may from time to time be reasonably required by Company (Clause (f))</p>	
<p>Otherwise assist Company in serving existing and prospective customers</p>	

Regarding the manner of compensation, the applicant states that for the marketing support services provided, the applicant is compensated on a cost plus basis. The relevant extract from Para 3.2 of the agreement is provided below:



"In consideration for services described in Exhibit A, Company agrees to pay Provider an amount equal to (a) any and all direct costs and allocable indirect operating overhead and out of pocket costs and expenses attributable to the Services performed by Provider based on US GAAP (Generally Accepted Accounting Principles), but excluding non-operative costs such as currency gains or losses, taxes on income and interest charge in U.S. Dollars and (b) an additional profit amount of ten percent (10%) of such costs and expenses. Payment shall be subject to all applicable governmental regulations including the withholding of any taxes required by law."

Hence, the applicant claims that the compensation is independent of any sales volume or value by the service recipient, if any, during the specific period.

4. Regarding the issues on which the advance ruling is sought, the applicant makes the following submissions:

4.1 Part A – Legal submissions in relation to questions raised

(a) The services provided by the applicant to McAfee Singapore are covered under HSN 9983 covering Management Services in relation to Marketing.

(i) Unlike under the pre-negative list service tax regime, there is no definition prescribed for the various categories of services under GST.

(ii) However, the CBIC has released explanatory notes to the scheme of classification of services applicable under GST.

(iii) As per the said document, HSN 998311 covering "Management consulting and management services including financial, strategic, human resources, marketing, operations and supply chain management" includes:

"providing advice, guidance and operational assistance concerning the marketing strategy and marketing operation of an organisation. Marketing management consulting assignments may deal with one or a combination of the following:

- i. Analysis and formulation of a marketing strategy
- ii. Formulation of customer service programmes, pricing, advertising and distribution channels;
- iii. Sales management and sales staff training;
- iv. Organisation of marketing channels (sale to wholesalers to directly to retailers, direct mail, franchise, etc.), package design and other matters related to the marketing strategy and operations of an organisation."

(iv) The applicant claims that the activities undertaken by the applicant clearly fall under the aforementioned category of service and the same will not qualify as intermediary as these services are provided by the applicant on his own account and the relationship is that of a principal to principal basis as explained below:

(b) Services provided by the applicant do not qualify as "intermediary services" as defined under Section 2(13) of the IGST Act, 2017

a. In this regard, the applicant states that Section 2(13) of the IGST Act defines the term "intermediary". Definition provided under the Act is extracted below:

"intermediary" means a broker, an agent or any other person, by whatsoever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account"

b. The above definition of intermediary talks about three categories:

- i. Broker or an agent
- ii. Any person who arranges or facilitates supplies of goods or services or both or securities between two or more persons; or
- iii. Person who supplies goods or services or both or securities on his own account, which is specifically excluded from the definition.

c. While the first two categories are covered under intermediary, the third category is excluded from the intermediary.

(c) The applicant is not an "agent, broker or any other person"

Regarding this the applicant states that as evident from the definition, the supplier i.e. "intermediary" should "mean", a broker or an agent or any other person, by whatever name called. It is important to note the use of the word 'means'. It is trite law that the word 'means' in a definition governs the words following and has a restrictive meaning. In the present case an intermediary can mean only a broker, an agent or any other person, by whatever name called.

(d) The first two words in the clause are broker or an agent. The words 'broker' and 'agent' have been defined in the Black's Law Dictionary as:

Broker

"An agent employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called brokerage."

"One who represents and acts for another under the contract or relation of agency, q.v. Classification. Agents are either general or special. A general agent is one employed in his capacity as a professional man or master of an art or trade, or one to whom the principal confides his whole business or all transaction or functions of a designated class; or he is a person who is authorised by his principal to execute all deeds, sign all contracts, or purchases all goods, required in a particular trade, business, or employment."

- (e) The dictionary meanings extracted above, clearly indicate that there is an element of 'representation' or 'acting on behalf of the other person' present in the words. In other words, an agent and a broker does not work at their own behest or instruction but as a representative or on behalf of their principal.
- (f) The most appropriate rule of interpretation which is to be used while interpreting the phrase 'whatever name called' is the legal principle of Eiusdem Generis.
- (g) The application of this Rule is necessitated because of the use of a general phrase preceded by specific words. The words 'ejusdem generis' mean 'of the same kind or nature'. Eiusdem generis is a rule of interpretation that where a class of things is followed by general wording that is not itself expansive, the general wording is usually restricted things of the same type as the listed items.
- (h) The Golden Rule of Interpretation enunciated and espoused by various judicial pronouncements states that the words of a statute must be given their plain grammatical meaning. If the intention of the legislature has to be gathered and deciphered in its proper spirit having due regard to the language uses therein. When the words are unclear or ambiguous, aid of other rules on interpretations must be used.
 - a. The statute enumerates the specific words;
 - b. The subjects of enumeration constitute a class or category
 - c. That class or category is not exhausted by the enumeration;
 - d. The general terms following the enumeration; and
 - e. There is no indication of a different legislative intent.
- (i) The applicant has cited the judgement of the Punjab and Haryana High Court in the case of CIT v. Rani Tara Devi held as below:

"The expression 'by any other name' appearing in Item (a) of clause (iii) of Section 2(14) of the Income Tax Act has to be read ejusdem generis with the earlier expressions i.e. municipal corporation, notified area committee, town area committee, town committee."

- (j) The phrase "by any other name" and "by whatever name called" have a proximate purpose in a statute and hence the principle laid down by the P&H High Court supra will apply on all squares.
- (k) Further, the Supreme Court in the case of Commissioner of Income Tax, Udaipur v. McDowell & Co. Ltd. held as follows:

"10. It would be pertinent to note that the expression now used in Section 43B (i)(a) is "Tax, Duty, Cess or fee or by whatever name called". It denotes that items enumerated constitute species of the same genus and the expression 'by whatever name called' which follows preceding words 'Tax', 'Duty', 'Cess' or 'Fee' as a group of its specie belong vis. Compulsory exaction in the exercise of State's power of taxation where levy and collection is duly authorised by law as distinct from amount chargeable on principle as consideration payable under contract."

- (l) Thus, applying the principle laid down by the Hon'ble Supreme Court, supra, and the interpretive rule of Eiusdem Generis, the phrase; by whatever name called will include a person in the same genus as that of a broker or an agent. In other words, the phrase whatever name called, will mean a person who is also appointed in a representative capacity.
- (m) The applicant claims that he is thus clearly neither appointed to act as broker nor an agent, not it is appointed in any manner similar to that of a broker of agent. If that were the case, the same would have been apparent from the agreement itself and thus the first condition to be satisfied for a person to qualify as an "intermediary" is not fulfilled.

4.2 The applicant claims that he is not arranging or facilitating the provision of services or supply of goods and submits as under:

- a. that the second part of the definition of the term "intermediary" defines the nature of transactions which if provided by a broker or an agent or by any person (by whatever name called) would be covered under the services provided by an "intermediary".
- b. The applicant claims that this second condition needs to be cumulatively fulfilled i.e., it should entail "arrangement" or "facilitation" of a 'main supply of goods or services' between the service recipient, i.e. the overseas entity and its customers in India. In other words, an 'intermediary' is expected to play an active role in arranging or facilitating the actual provision of service or supply of goods between the real service provider and real service recipient. Hence, there should be an interaction or facilitation with the feature of supply of the (main) service and the 'intermediary' should have a role in the main supply of goods or services being rendered by the service recipient to its customer in India.

- c. The applicant states that as per the definition of 'intermediary service', the words that have been used in the definition are (a) arranges and (b) facilitates. It would be pertinent to understand the meaning of these words:

Facilitate (verb) : Oxford English Dictionary - 'to make an action or process easy or easier'.

Arrange (verb) - Oxford English Dictionary - 'organise or make plans for (a future event)'

From the above definitions, the applicant claims that it is clear that the "intermediary" must be a broker or an agent or any person acting on behalf of the principal, who arranges or facilitates the supply of services or supply of goods between two or more persons. The applicant specifically submits that not all facilitating or arranging qualify as an 'intermediary'. The applicant states that the reasons for stating that the second condition is not satisfied are as under:

- (i) The applicant states that the arrangement between the applicant and McAfee Singapore is on a principal to principal basis. In the present case, the applicant is providing the services on its own account. Therefore there is no arranging or facilitating of provision of service or supply of goods and hence the test of intermediary services is thus not satisfied in the present case.
- (ii) In addition to defining the nature of person, the nature of supply, the definition of the term 'intermediary' contains an exclusion in as much as any person (including a broker, agent or any other person) who provides the main supply on his own account. In other words, the applicant submits that even if the supplier satisfies the nature of the supplier of service as an agent / broker, if such a person provides the supply on his own account, then such a supply is not covered under the definition of the term "intermediary".

The importance of this condition has been explained in the Education Guide released under the erstwhile service tax era, which provides that a person 'who arranges or facilitates a provision of a service, but provides the main service on his own account is also excluded from the definition of 'intermediary'. The Education Guide specifically recognises and well explains that all situations of provision of services on a client's behalf, will not qualify as an "intermediary". Where the service is provided on the "own account" of the service provider, the categorization as an "intermediary" does not arise. The applicant has reproduced the relevant extract of the Education Guide issued by the CBEC in June 20, 2012:

"5.9.6 What are "Intermediary Services"? . . .

Similarly, persons such as call centres, who provide services to their clients by dealing with the customers of the client on client's behalf, but actually provided these services on their own account, will not be categorized as intermediaries."

More so, the clarification above fully recognises an arrangement between a service provider and a service recipient, where customers of the service recipient are dealt with by the service provider, shall not qualify to be an "intermediary". This principle well covers all sub-contracting arrangements.

Hence the applicant submitted that the marketing supporting services provided by the applicant are on its own account. The applicant also submits that the relationship between the parties are that of independent contractors and not as principal-agent.

4.3 The applicant states that he receives consideration on cost plus basis and does not receive any commission amount as in the case of "intermediary" as brokerage and further they do not negotiate on behalf of the service recipients. He states that they do not have any express or implied authority to negotiate any agreement on behalf of the service recipients. The applicant states that the payment received is independent of the quantum of sales made by McAfee Singapore and the yardstick for payment is based on the costs incurred on periodic basis.

4.4 The applicant further states that he does not conclude the sale but merely facilitate technical communication with the prospective customers of McAfee Singapore. He submits that the from the definition discussed supra, an agent is a person who has the right to conclude contracts on behalf of the principal and the services provided by the applicant does not fall within the ambit of intermediary service.

4.5 The applicant argues that since the definition of intermediary provided under the IGST Act is identical to the definition of intermediary provided under the erstwhile Service Tax law, the guiding principles provided under the erstwhile service tax law for determining whether the person is acting as an intermediary or not would become applicable. These guiding principles are:

- (a) Nature and Value: An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediate to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf and any discounts that the intermediary obtains must be passed back to the principal.
- (b) Separation of Value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of sale or purchase price. Generally, the

amount charged by an agent from his principal is referred to as "commission".

(c) Identity and title: The service provided by the intermediary on behalf of the principal is clearly identifiable.

In light of the above parameters, the services provided by the applicant needs to be determined whether they are intermediary services or not.

Sl.No.	Nature of service/ activity	Criteria to qualify as intermediary	Applicability in case of the applicant
Nature and Value			
1	Relation of principal and agent	Yes	Not fulfilled - Relationship between the applicant and McAfee Singapore is that of independent contractors and not of principal and agent
2	Power to make contract on behalf of other party which will bind the other party	Yes	Not fulfilled - The applicant shall not have any right to sign any document in the name of or on behalf of McAfee Singapore
3	Power to alter the nature or value of service	No	Not applicable - the services provided by the applicant to McAfee Singapore are independent of the transaction between McAfee Singapore and the customers
4	Power of negotiation on behalf of principal	Yes	Not fulfilled - McAfee Singapore can only communicate the terms to customers
5	Arrangement or facilitation of supply of goods	Yes	Not fulfilled - as explained above in the facts that the applicant's role is limited to <ul style="list-style-type: none"> - Identification of customers, - Initial information gathering of prospective customers - Ensuring compliance with McAfee Singapore supplier standards - Undertake demonstration of the products
Separation of Value			
6	Value of service is invariably identifiable from the	Yes	No - Value is not linked with the sale by McAfee Singapore to the customers (service cost charged by the applicant is

	main supply		calculated on the basis of costs and expenses incurred wholly and properly attributed to the provision of services and paid independent of whether any sale is undertaken or not)
7	Consideration is generally an agreed percentage of the sale or purchase price which is called commission	Yes	Not applicable - there is no consideration paid to the applicant by McAfee Singapore which is dependent on the volume of the sale made by McAfee Singapore i.e. there is no commission
Identity and title			
8	Service provided on behalf of the principal is clearly identifiable	Yes	Not applicable - the applicant is not providing any services on behalf of principal, as the marketing services explained in the facts above, are provided by the applicant in its own capacity directly to McAfee Singapore on principal to principal basis and are independent of the sale of products by the McAfee Singapore.

5. The applicant has placed reliance on the following decisions in support of the claims

- a. The decision of the Advance Ruling Authority under Service Tax Law in the case of GoDaddy India Web Services Pvt. Ltd [2016 (46) STR 806 (AAR)] - where in it is held that the business support service provided by GoDaddy India to GoDaddy US will not fall under the definition of intermediary service as the services are provided on principal to principal basis and not to the customers.
- b. The decision of the Advance Ruling Authority under Service Tax Law in the case of Universal Services India Pvt Ltd [2016 (42) STR 585 (AAR)] - wherein it was held that the business support services provided by the applicant to the entity abroad will not qualify as intermediary services, since the applicant is providing main service on its own account directly to foreign entity and not to its customers in India.
- c. The decision of CESTAT, Chandigarh in the case of M/s Evalueserve Com Pvt. Ltd v. CST, Gurgaon [2018 (3) TMI 1430- CESTAT CHANDIGARH] - wherein it was held that when a person is providing the services to the client as the main service provider on principal to principal basis, then the activity undertaken would not qualify as intermediary as defined in Rule 2(f) of the Place of Provision of Service Rules, 2012.
- d. The decision of the Advance Ruling Authority under Service Tax Law, in the case of Global Transportation Services Pvt. Ltd v. CST, Mumbai [2016 - TIOL

-20 ARA-ST] – wherein it was held that the activity of logistics solution undertaken by the applicant is not “intermediary” service as the service agreement is on principal to principal basis and not as agent.

e. The decision of CESTAT, Chandigarh in the case of Sunrise Immigration Consultants Private Limited v. CCE & ST, Chandigarh [2018 – VIL – 539-VESTAT-CHD-ST] wherein it was held that activity undertaken by the applicant was in the nature of business auxillary service and will not be covered under the definition of intermediary as business auxillary services are not the main service provided by the main service providers namely banks and universities.

6. Regarding the place of supply of the marketing activities undertaken by the applicant, the applicant claims that the same is outside India and argues the same stating that McAfee Singapore is the recipient of Services and the location of McAfee Singapore is Singapore, which is a place of supply of services provided by the applicant.

7. Based on the above, the applicant argues that the services provided by him to McAfee Singapore qualifies as Export of Services under the provisions of the IGST Act as it qualifies all the conditions laid down to treat a transaction as export of services under section 2(6) of the IGST Act. The claims are summarized as under:

Sl.No.	Export Condition	Services by the Applicant
1	The supplier of service is located in India	The supplier of service, i.e., the applicant is registered in India, hence located in India
2	The recipient of service is located outside India	The recipient of service i.e., McAfee Singapore is incorporated outside India, i.e. in Singapore – hence located outside India
3	The place of supply of service is outside India	McAfee Singapore has no establishment or branch in India and the service to be received by it from the applicant is meant for and will be used in its business conducted abroad, therefore, the place of supply of ‘services’ provided by the applicant is the location of McAfee Singapore which is Singapore (outside India)
4	The payment for such service has been received by the supplier of service in convertible foreign exchange	The payment for providing the marketing service is received by the applicant in convertible foreign exchange from McAfee Singapore
5	The supplier of service and the recipient of service are not merely establishments of a distinct person	McAfee Singapore and the applicant are separate legal entities, whereby McAfee Singapore is registered under the laws of Singapore and the applicant is registered under the Indian Laws, therefore, both entities cannot be treated as establishment of distinct person, hence the condition is satisfied.

In light of the above, the applicant claims that the services provided by him to McAfee Singapore satisfies all the conditions of exports and thus qualify as 'exports' in terms of Section 2(6) of the IGST Act. The applicant further submits that in terms of section 16 of the IGST Act, exports of goods or services are zero-rated supplies, meaning thereby, there would be no GST applicable on such supplies, even though such option of zero-rated can be availed upfront or by way of refund.

8. Regarding the admissibility of the application for advance ruling the applicant has states the application is related to "determination of liability to pay tax on any services". The applicant states that it would be pertinent to refer to the provisions of the erstwhile Finance Act, 1994 and the Central Excise Act, 1944, more specifically section 83 and section 35G respectively and both these sections created a distinction on the jurisdiction of the High Court and Supreme Court on entertaining statutory appeals from the Tribunal. As per the Sections referred above, if the question of law related to the determination of rate of duty, then the appeals from the Tribunal were before the Supreme Court under Section 35L of the Central Excise Act, 1944.

8.1 The applicant also relies on the decision of this Authority in the case of Gogte Infrastructure Development Corporation Limited, wherein has examined the place of supply in the case of accommodation services. The question before the Authority was whether the hotel accommodation and restaurant services provided within the premises of the hotel to the employees and guests of SEZ units should be treated as supply to SEZ Units.

8.2 The applicant states that the Hon'ble High Court of Karnataka in its judgement in the case of CST v. Scottwilson Kirkpatrick [2011 (23) STR 321 (Kar)] had interpreted the phrase 'determination of rate of duty' and relying on the decision of the Supreme Court in the case of Navin Chemicals [1993 (68) ELT 3 (SC)] had held that the jurisdiction of the High Court does not extend to question relating to :

- (a) Dispute relating to the service tax payable in any service / taxable service
- (b) The value of the taxable service for the purposes of assessment
- (c) A dispute as to the classification of services
- (d) Whether those services are covered by an exemption notification or not
- (e) Whether the value of services for the purposes of assessment is required to be increased or decreased.
- (f) The question of whether any services are taxable services or not
- (g) Whether an activity is a service rendering activity or not, so as to attract levy of service tax
- (h) Whether a particular service falls within which heading, sub-heading of section 65(105) of the Service Tax 1994 which defines 'taxable service'

8.3 The applicant states that the Delhi High Court in the case of CST, New Delhi Menon Associates [77 VST 168 (HC-Delhi)] had held that issue relating to export
Menon Associates Software (India)



of service would be brought under the phrase 'determination of rate of duty / tax/ value of goods or services'.

8.4 Applying the above principles, the applicant states that the question of whether a supply is export or not directly relates to the determination of liability to pay tax and hence admissible for advance ruling.

9. Sri Harish Bindumadhavan, Advocate and Duly Authorised Representative of the applicant was heard and he made the following submissions:

- a. that the agreement was an intra-group agreement between the companies of the same group. The applicant has not entered into any agreement with other affiliates of McAfee other than McAfee Singapore.
- b. that there is no principal - agent relationship

He explained the cost allocation method followed while invoicing, but did not furnish the shareholding pattern. He also argued that the activity is not for facilitation of supply of goods or services and is only for creating a possible market, but did not provide for the details of customers to support his claim. He argued that there is no conclusion of contract by the applicant. He further stated that there is no other contract which governs the business transactions between the applicant and McAfee Singapore.

10. FINDINGS & DISCUSSION:

We have considered the submissions made by the applicant in their application for advance ruling as well as the arguments put forth by made by Sri. Harish Bindumadhavan, Advocate during the personal hearing. We also considered the issues involved on which advance ruling is sought by the applicant and relevant facts. At the outset, we would like to state that the provisions of both the CGST Act and the KGST 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 provisions under the KGST Act.

10.1 The transaction of the applicant is verified and found that the applicant supplier of service and the recipient of service are group companies and the applicant has not provided any shareholding pattern of the recipient of service.

10.2 On careful perusal of the application and the adjunct documentary evidences and also the submissions of the applicant and his representative, the following issues emerge:

- (a) whether the applicant is acting as an intermediary of McAfee Singapore?
- (b) Whether the services supplied by the applicant to McAfee Singapore is marketing services or intermediary services

- (c) Whether the services supplied qualifies as export of services and hence zero-rated?

10.3 Regarding the first question, the definition of the "intermediary" as provided under section 2(13) of the Integrated Goods and Services Tax is examined and the clause reads as under:

"(13) 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;"

The intermediary means, as per the above clause, the following persons

- (a) A broker by whatever name called, or
- (b) An agent by whatever name called, or
- (c) Any other person by whatever name called

Hence the terms broker and agent are elucidatory, but involves any person and the second part of the definition qualifies the first part.

10.4 The second part states that the person to be covered under "intermediary" must arrange or facilitate the supply of goods or services or both or securities between two or more persons. This is the operating part of the definition and any person, by whatever name called, if he is arranging or facilitating the supply of goods or services or both or securities between two or more persons, he would be covered under the definition of "intermediary". He may be a broker (by whatever name called) or an agent (by whatever name called) or any other person (by whatever name called).

10.5 The word "any other person" is to be analyzed and this inclusion of word "any other person" excludes all persons other than broker and agent and hence a broker or an agent or any person (other than a broker or agent) can be an intermediary. This means that any other person would naturally exclude a broker or an agent. Hence the contention of the applicant that he is not an intermediary just because he is in a principal to principal relationship is not acceptable as the words in the definition states very clearly that any person other than a broker or an agent can also be an intermediary, if he is involved in arranging or facilitating the supply of goods or services or both or securities. No qualification is made in the definition stating that persons having principal to principal relationship are excluded from the definition of "intermediary". What is important in this definition is the question whether the service provided by the service provider amounts to arranging or facilitating the supply of goods or services and not the nature of the service provider and service recipient.

10.6 The reliance placed by the assessee on the judgements based on *ejusdem generis* is not applicable in the present case as the judgements are related to "other names" and not "other persons". When the term "other" is related to the other names given for a class of persons, then the principle of *ejusdem generis* is applicable. But in the definition, it is clear that the word "other" is used as an adjective to the person and hence it is commonly understood to exclude the other persons who are preceding it and hence the argument of the applicant cannot be accepted.

10.7 The arguments of the applicant have been analysed and it is found that the support he has taken on the various decisions of the advance ruling authorities of the erstwhile service tax regime are all related to the service tax era and has no applicability during the GST regime. Hence the same needs to be verified in light of the GST Act.

10.8 The argument of the applicant that he is receiving the consideration on cost plus basis and not commission and hence he cannot be termed as intermediary is examined and it is seen clearly in the definition that there is no qualification that needs to be satisfied other than arranging or facilitating the supply of goods or services to be called intermediary. The consideration may be based on the turnover of supply made on behalf of the supplier or any other method and this does not have bearing on the nature of supply. There is nothing in the definition to states that if the person supplying the service receives the consideration other than as commission, that would make exclude his from being an intermediary and hence the argument of the applicant cannot be considered favourably.

11. Coming to the nature of the transaction, the agreement for supply of services by the applicant to McAfee Singapore is verified and found that work entrusted to the applicant are as under:

11.1 The agreement entered is termed as "Marketing Services Agreement" and the applicant has undertaken the role of service provider to McAfee Singapore who is in the business of manufacturing and selling hardware and software products and the applicant has accepted a non-exclusive right to provide Marketing Support Services in the territory.

11.2 McAfee Singapore may from time to time request the applicant to perform certain additional ancillary services, the exact nature of which will be agreed by both parties at the time the request of services is considered.

11.3 The applicant has provided a copy of the agreement entered by the applicant with McAfee Ireland Limited (which is termed as the Company) in Exhibit A which governs the nature of services supplied by the applicant to McAfee Ireland and the same reads as under:

"Marketing Support Services:

Provider shall perform services to support and facilitate the selling, marketing and distribution of Products by Company and its affiliates. Typical functions in this area include but are not limited to the activities listed below:

- (a) Identifying potential business and contacts for the sale of the Products by Company to prospective and existing customers in the Territory;*
- (b) Liaising with current and prospective customers of Products in the Territory by facilitating technical communication between the Company and customers and other pre-sale and after-sale customer liaison activities. Investigating customer inquiries received by Company and referred to Company;*
- (c) Advising and assisting in complying with the laws, regulations, business and financial practices in effect in the Territory, including providing assistance in obtaining necessary local licences, permits and authorisations;*
- (d) Assisting Company in the demonstration of the Products. Provider agrees that a minimum level of samples and demonstration equipment may be required in order to provide such support activities. Such inventory will be maintained in a manner consistent with levels recommended by Company. Provider will receive samples from Company at no charge. Provider also agrees to acquire demonstration equipment from Company according in accordance with the then current Standard Sales Order Terms and Conditions;*
- (e) Keeping Company advised and informed regarding the above matters in the territory that may be of interest or concern to Company in connection with the carrying on of Company's business;*
- (f) Providing Company with such reports concerning the above matters as may from time to time be reasonably required by Company; and*
- (g) Otherwise assist Company in serving existing and prospective customers."*

11.4 The applicant has also provided another agreement called "Master Services Agreement" entered between the applicant (called Provider) and McAfee Singapore Pte Ltd (called Company) governing the nature of the contract and the same reads as under:

"1. Provider's Obligations:

- 1.1 Provider agrees to provide to Company the Services as described in Exhibit A. In providing services, Provider agrees to use commercially reasonable efforts to maintain the high quality and integrity standards as established by Company from time to time otherwise used by Company with respect to Products.*

- 1.2 Company may from time to time request Provider to perform certain additional ancillary services (as may be further*



specified in an addendum to Exhibit A or otherwise in writing). The exact nature of services requested will be agreed by both Parties at the time of Company requesting for such additional services, which shall be deemed to be "Services" hereunder.

- 1.3 "Products" shall be defined as all products and services which Company has the right to distribute within the Territory, regardless of whether the product bears the "McAfee" name or logo and regardless of whether the product or service is manufactured and/or assembled by McAfee or by an affiliate or subcontractor of Company."
- 1.4 "Territory" shall be defined as the geographical area(s) specified in Exhibit A, provided that the Parties may agree to amend the Territory from time to time by mutual written agreement.

2. *Independent Contractor - Non Agency:* Provider shall have no power or authority whatsoever to lease or licence Products or provide services to third parties under this Agreement on behalf of Company or to conclude or accept any contracts or agreements of any kind whatsoever on behalf of Company or legally bind or obligate Company in any way whatsoever. In the performance of the Services, Provider at all times shall act as its own principal in its own name, and as an independent contractor, and not in any respect as an agent, attorney-in-fact, employee or representative of Company. Provider at all times shall refrain from declaring, representing, or implying to any third party that Provider is in any respect an agent, attorney-in-fact, employee or representative of Company. Nothing contained herein shall be construed as constituting or creating a joint venture, partnership or other relationship between the Parties. "

11.5 Exhibit A annexed to the above agreement reads as under:

"Marketing Support Services:

Provider shall perform services to support and facilitate the selling, marketing and distribution of Products by Company and its affiliates. Typical functions in this area include but are not limited to the activities listed below:

- (a) Identifying potential business and contacts for the sale of the Products by Company to prospective and existing customers in the Territory;
- (b) Liaising with current and prospective customers of Products in the Territory by facilitating technical communication between the Company and customers and other pre-sale and after-sale customer liaison activities. Investigating customer inquiries received by Company and referred to Company;

- (c) *Advising and assisting in complying with the laws, regulations, business and financial practices in effect in the Territory, including providing assistance in obtaining necessary local licenses, permits and authorizations;*
 - (d) *Assisting Company in the demonstration of the Products. Provider agrees that a minimum level of samples and demonstration equipment may be required in order to provide such support activities. Such inventory will be maintained in a manner consistent with levels recommended by Company. Provider will receive samples from Company at no charge. Provider also agrees to acquire demonstration equipment from Company according in accordance with the then current Standard Sales Order Terms and Conditions;*
 - (e) *Keeping Company advised and informed regarding the above matters in the territory that may be of interest or concern to Company in connection with the carrying on of Company's business;*
 - (f) *Providing Company with such reports concerning the above matters as may from time to time be reasonably required by Company; and*
 - (g) *Otherwise assist Company in serving existing and prospective customers."*
- "Territory" shall mean the country in which Provider is domiciled."*

11.6 The above agreements clearly state that the applicant is performing services to support and facilitate the selling, marketing and distribution of Products by the Company and other affiliates. Hence this is clearly in line with the definition of the term "Intermediary" who is a person who facilitates the supply of goods or services or both, between two or more persons.

11.7 The exception clause in the definition states that the term "intermediary" does not include a person who supplies such goods or services or both or securities on his own account." The applicant is not supplying the goods or services on his own account and the ultimate supply of goods or services is made by the parent company directly and hence the applicant is not covered under the exception clause as well. It is pertinent to note the use of words "such" and this relates to the supply of such goods or services which is facilitated by the applicant and not the services provided by him.

11.8 It is clear from the above agreement the applicant is providing services to the foreign affiliates as an intermediary. The Explanatory Notes to SAC 998599 Support Services reads as under:

- 9985** **Support services**
99859 **Other support services**
998599 **Other support services not elsewhere covered**

*This service code includes business brokerage and appraisal services other than for real estate; **business services of intermediaries and brokers**; specialist advice other than for real estate, insurance and engineering (specialist services in art, specialist services for courts of law, etc.); services by agencies and agents on behalf of individuals seeking engagements in motion pictures, theatrical productions, modelling or other entertainment or sports attractions; placement of books, plays, artwork, photographs, etc., with publishers, producers, etc.; issue of reduced-price coupons and gift stamps; management services for copyrights and their revenues (except from films); management services for rights to industrial property (patents, licences, trademarks, franchises, etc.); auctioning services other than in connection with legal procedures; reading of electric, gas and water meters; data preparation services; specialized stenotype services such as court reporting; public stenography services; other business support services not elsewhere classified*

This service code does not include: -

- *maintenance of electricity, gas and water meters, cf. 996911, 996912, 996921*
- *services related to advertising and sales promotion, cf. 99836*
- *management services for motion picture rights, cf. 999614*
- *art facilities operation services, cf. 999623*
- *management services for artistic rights, cf. 999629*
- *sports events organization services, cf. 999651"*

From the above, it is clear that the business services of the intermediaries are covered under the SAC 998599.

12. Regarding the question of whether the services provided by the applicant qualifies as export of services, the issues involved are verified and found there is no doubt that the applicant, i.e., the supplier of services is located in India, the recipient of service is located outside India and the consideration is received in convertible foreign exchange and also that the applicant and overseas entity are two separate legal entities as per the agreement. The only issue to be decided is whether the place of supply is outside India or not and this is outside the jurisdiction of this authority. Unless this is decided, there is no question of determining whether the transaction is that of export of services or inter-State supply of services. Hence this authority cannot give a ruling on this issue.


13. Regarding the third question it is clear from the above discussion that the services are supplied as an intermediary.


14. In view of the foregoing, we pass the following

RULING

1. The services supplied by the applicant to McAfee Singapore are covered under the SAC 998599 (if not treated as Export of Services) and -
 - a. Under the CGST Act - are covered under the sub-entry no. (ii) of Entry No. 23 of Notification No. 11/2017 - Central Tax (Rate) dated 28-06-2017 attracting a tax of 9% under CGST Act.
 - b. Under the SGST Act - are covered under the sub-entry no. (ii) of Entry No. 23 of Notification (11/2017) No. FD 48 CSL 2017 dated 28-06-2017 attracting a tax of 9% under KGST Act.
 - c. Under the IGST Act- are covered under the sub-entry no. (ii) of Entry No. 23 of Notification No. 08/2017 - Integrated Tax (Rate) dated 28-06-2017 attracting a tax of 18% under IGST Act.
2. No advance ruling is given on this issue as the question involves the determination of place of supply which is outside the jurisdiction of this Authority.
3. The services provided by the applicant are in the nature of services supplied by an intermediary.




19.09.2019
(Harish Dharnia)
Member


(Dr. Ravi Prasad M.P.)
Member

Place : Bengaluru,
Date : 19.09.2019

To,
The Applicant

Copy to:

1. The Principal Chief Commissioner of Central Tax, Bangalore Zone, Karnataka.
2. The Commissioner of Commercial Taxes, Karnataka, Bengaluru.
3. The Pr Commissioner of Central Tax, Bangalore-East, BMTB Bus Stand building, Domlur, Bengaluru.
4. The Asst. Commissioner, LGSTO-045 ,Bengaluru.
5. Office Folder.