

**GUJARAT AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
A/5, RAJYA KAR BHAVAN, ASHRAM ROAD,
AHMEDABAD – 380 009.**



ADVANCE RULING NO. GUJ/GAAR/R/2022/30
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2022/AR/12)

Date: 11.05.2022

Name and address of the applicant	:	M/s. Adani Green Energy Ltd., 56, Shrimali Society, Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad – 380009, Gujarat
GSTIN/ User Id of the applicant	:	24AANCA1814G1ZZ
Date of application	:	26/02/22
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	:	(e)
Date of Personal Hearing	:	22/03/22
Present for the applicant	:	Shri Ankit Shah, Vice President (Finance), Shri Gopal Chosla, General Manager, Shri Sachin Agarwal, Associate Manager, Shri Vishal Agarwal, Advocate

Brief facts:

1. M/s. Adani Green Energy Ltd. (for the sake of brevity referred to as 'AGEL') submitted that it requires substantial working capital to undertake its supplies and for this purpose it has raised USD 750 million by issuing Senior Secured Notes (Notes) carrying interest coupon of 4.375% due for redemption in 2024 in terms of Subscription Agreement dated 1st September 2021 entered into with Axis Bank Limited, Singapore and others for acting as Managers. All the Managers do not have any establishment in India and have been incorporated outside India and undertake business from their establishment outside India. A copy of the Subscription Agreement was submitted.

2. AGEL submits that in terms of Section 5 of the US Securities Act, 1933 it is impermissible for an issuer to issue or offer for sale any security unless the security is registered with the U.S. Securities Exchange Commission (SEC), except in respect of securities being offered in terms of Regulation S (for sale outside US jurisdiction) or on a private placement basis. Further, it is submitted that Rule 144A of the US Securities Act, 1933 provides that resale of securities to Qualified Institutional Buyers (QIBs), which have been privately placed in the USA, would be permissible without such security being registered with the SEC. Since the registration of a security with the SEC is a

cumbersome process, virtually most of the issues are made under Rule 144A, where the entity with whom the private placement is made, (i.e. the Manager of the issue), technically purchases the Notes and simultaneously resells the same to the actual investors to the issue.

3. AGEL submitted that it identifies the Managers, whose role is to solicit and get the requisite subscribers to the issue. An informal understanding is arrived at between the issuer and the Managers, wherein it is agreed that only when the Managers have secured the requisite number of investors to subscribe to the issue at a broadly agreed coupon (interest) rate, through a book building process, would the Subscription Agreement be executed and the issue be launched. Further that in case the Managers are unable to arrange for the requisite number of subscribers at the agreed coupon rate, the issuer may choose not to launch the issue for subscription. In such a situation, the Managers would not be entitled to any fee whatsoever.

4. AGEL submitted that in the present case as well, the negotiation with the Managers to arrange for subscribers commenced much prior to the execution of the Agreement on 1st September 2021. Prior thereto, the Managers undertook the activity of coordinating between the subscribers and the AGEL so as to arrange for subscription for the issue. By the time the agreement was executed, the Managers had collectively secured subscribers, sufficient to subscribe to the entire offering.

5. AGEL submitted that the entire process of issuing Notes starts with the issue of Preliminary Offering Circular which sets out the proposed issue size, details of the issuer, etc. Basis the same, the Manager initiates the process of book building by informing potential investors about the coupon rate at which the issuer intends to offer the Notes. For this purpose, the Managers undertake a gamut of activities viz. scheduling meetings between the issuer and the investors, arrange road shows for prospective investors, liasoning between investors and the issuer, communicate with investors, collect proceeds of the subscription and transfer the same to the Note Trustee for payment to the issuer etc. The Manager also solicits counter offers from investors who are willing to invest in the issue. The offers and counter-offers are recorded in Bloomberg and then aggregated and negotiated by the Manager between the investors and the issuer. On basis of the offers received, the issuer communicates the final coupon rate. After which, the Manager seeks the final offer from potential investors and then the issuer issues a Term Sheet. The Manager proceeds to confirm the subscription amount on basis of the confirmations from the investors. Only after such confirmation, the Subscription Agreement between the Manager and the issuer is signed.

6. AGEL submits that it is only to comply with the SEC requirements for seeking exemption from registration that the Subscription Agreement stipulates that the

Managers have also agreed to subscribe and pay for the Notes for the amounts set out in Schedule 4 to the Agreement. The aforesaid activity at times, is loosely referred to by the Managers as Underwriting or at times, as Initial Purchase. A redacted version of one of the subscription agreements where the expression 'initial purchase' has been used as against 'underwriting' is attached herewith as Exhibit B.

7. AGEL submitted that the expression Underwriting under the US Securities Act, 1933 has a different colloquial meaning as compared to that commonly understood under the Indian laws, where underwriting is primarily an activity wherein the bankers/managers agree to themselves subscribe to the security, in the event of not receiving subscription for the entire issue. However, under the US laws, the expression underwriting is understood to mean the purchasing of securities for reselling.

8. AGEL submits that in terms of clause 11 of the Subscription Agreement, a fee, as mutually agreed, is to be paid to the Managers. Accordingly, Fee Letter dated 28th September, 2021 has been executed by the Applicant with each Manager individually. The said Fee Letter in Annexure A sets out the specific activities that the Manager has actually performed, in addition to book building whereas Annexure B sets out the consideration to be paid to the Managers. A copy of the proposed Fee Letter was submitted.

9. AGEL submits that the service of arranging for subscribers to the Notes issued by it, through the book building process, is a service being rendered by the Managers as an intermediary, which is defined in section 2(13) of the Integrated Goods & Services Tax Act, 2017 (IGST Act) to mean "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".

a. AGEL has submitted that the Managers had been engaged to procure subscribers to subscribe and pay for the Notes being issued by it. For this purpose, the Managers were to *interalia* initiate the process of book building by informing the potential investors about the coupon rate at which the issuer intends to offer the Notes for subscription, solicit counter offers from investors who are willing to invest in the issue, record the offer on Bloomberg, aggregate the offers and counter-offers and negotiate between the investors and the issuer for finalizing the coupon rate. The Managers were also to schedule meetings between the AGEL and the investors, arrange road-shows for prospective investors, liaison between investors and the AGEL, communicate with investors, collect proceeds of the subscription and transfer the same to the Note Trustee for payment to the AGEL, ensure that the Notes are issued by the Note Trustee to the investor, etc. These

activities fall squarely within the definition of “intermediary” qua the services of arranging for potential subscribers to the Notes issued by the AGEL.

b. It is submitted that CBIC has also issued Circular No. 159/15/2021-GST dated 20.09.2021 clarifying the scope of intermediary in terms of which the activity undertaken by the Managers clearly falls within the ambit of an intermediary.

10. AGEL submits that for there to be a supply leviable to tax under Section 5 of the IGST Act, there has to be an inter-state supply of goods or services.

11. Section 7 provides for the determination of inter-state supplies. Sub-section (4) thereof provides that supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

12. The term import of services is defined in section 2(11) of the IGST Act as:

“(11) “import of services” means the supply of any service, where-

(i) the supplier of service is located outside India;

(ii) the recipient of service is located in India; and

(iii) the place of supply of service is in India;”

13. Section 13 of the IGST Act applies for determining the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India. The expression ‘location of the supplier of services’ has been defined in Section 2(15) to *inter alia* mean the location or usual place of residence of the supplier. The expression usual place of residence has been defined in Section 2(113) to mean the place where the person is incorporated or otherwise legally constituted. The Managers in question have all been incorporated or legally constituted outside India, while the location of the recipient of services i.e. AGEL is within India. Consequently, the determination of the place of supply of services would have to be under Section 13 of the IGST Act.

14. AGEL submitted that as per section 13(8)(b) of the IGST Act, the place of supply of intermediary services shall be the location of the supplier. In this case, the supplier, i.e. the Managers are located outside India, and therefore the place of supply of services is outside India.

15. The third condition in the definition of import of services is that the place of supply of services must be in India for the service to be covered. In the present case, the place of supply of intermediary services by the Managers is outside India and the said service does not qualify as an import of services.

16. AGEL submits that the intermediary services supplied by Managers outside India do not fall within the scope of interstate supplies and hence there can be no levy of GST on the same.

17. AGEL submits that since the place of supply of intermediary services supplied by the Managers is outside India, the same are not taxable and there can be no question of any GST liability on AGEL under the reverse charge mechanism.

18. AGEL submits that though the real purport of the transaction is one as explained in the facts above, however, only with a view to comply with the provisions of SEC, the Managers technically purchase the securities and resell the same to the investors. Accordingly, if one does not go by the substance of the transaction, then the same is a transaction for purchase and sale of securities, which is outside the scope of GST. Consequently, the amount nomenclated as fee, paid to the Managers, is nothing but a discount offered to the Managers on the face value of the security, for their agreeing to initially purchase the Notes, on which no GST is leviable.

Question on which Advance Ruling sought

19. Whether the Applicant is liable to discharge GST under the reverse charge mechanism in respect of the services of arranging for subscription supplied to the Applicant, by the Managers located in the non-taxable territory?

Personal Hearing

20. Shri Ankit Shah, Vice President (Finance), Shri Gopal Chosla, General Manager, Shri Sachin Agarwal, Associate Manager, Shri Vishal Agarwal, Advocate attended the Virtual Hearing on 22-3-22 and reiterated the submission.

Revenue's Submission

21. Revenue has neither submitted its comments nor appeared for hearing.

Findings:

22. At the outset, we would like to state that the provisions of both the CGST Act and the GGST 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 GGST Act.

23. The issue before us hinges whether the Manager is an intermediary.

24. We have carefully studied the submissions before us and find the following facts emerging:

- i. Manager arranges & facilitates coordination between the AGEL who issues the Notes and the (potential) Investors subscribing to the Notes. Manager solicits and arranges investors for subscribing to Notes issued by AEG.

- ii. Manager initiates the process of book building by informing potential investors about the coupon rate at which the AGEL intends to offer the Notes. For this, Managers undertake a gamut of activities viz.
 - a. scheduling meetings/ liasoning between the AEG and the investors,
 - b. arrange road-shows for prospective investors.
 - c. Manager also solicits counter offers from investors who are willing to invest in the issue. The offers and counter-offers are recorded in Bloomberg and then aggregated and negotiated by the Manager between AGEL and investors. Then after, AGEL communicates the final coupon rate, after which, the Manager seeks the final offer from potential investors. The Manager proceeds to confirm the subscription amount on basis of the confirmations from the investors. Manager is required to secure a requisite number of investors to subscribe to the Notes at a broadly agreed coupon rate, then after the Subscription Agreement would be executed and Issue be launched.
 - d. communicate with investors; collect proceeds of the subscription and transfer the same to the Note Trustee for payment to the AGEL.
- iii. Manager distributes the disclosure documents prepared by AGEL in connection with the offering and sale of Notes.
- iv. In case the Manager is unable to arrange for the requisite number of subscribers at the agreed coupon rate, AGEL may choose not to launch the issue for subscription. In such a situation, the Manager would not be entitled to any fee whatsoever.

25. We refer to Section 2(13) IGST Act, 2017, reads as follows:

“2(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;”

25.1 The words facilitate/ arrange are not defined in CGST Act. We refer to Merriam Webster Dictionary for meaning of words facilitate and arrange:

‘Facilitate: to make (something) easier, to help cause (something); to help (something) run smoothly and effectively.

***Arrange:** to bring about an agreement or understanding concerning; to make preparations, to move and organise (things) into a particular order or position, to organise the details of something before it happens, to plan (something).’*

26. We find that AGEL issues Notes which are subscribed by Investors. We find that the Senior Secondary Notes issued by AGEL are in the nature of securities. The main supply of Notes is between AGEL and investors both acting as Principals and the Manager is supplying ancillary supply of arranging the main supply between the Principals. We note that an intermediary includes a person who arranges/ facilitates supply of securities between two or more persons. We find that Manager has the characteristics of an agent and a broker, performing subsidiary role in arranging the said main supply. We note that Manager’s role is supportive in main supply. We find the Manager satisfying the definition of Intermediary as per IGST Act. We agree with AGEL that place of

supply in present case is determined as per Section 13(8)(b) IGST Act which is the location of Manager. Both the Manager and Place of Supply both being in non-taxable territory, subject transaction is not an import of service as place of supply is outside India.

27. In conspectus of aforementioned Findings, We pass the Ruling,

Ruling

GST is not leviable on subject transaction under RCM by AGEL.

(ATUL MEHTA)
MEMBER (S)

(ARUN RICHARD)
MEMBER (C)

Place: Ahmedabad

Date: 11.05.2022