ADVANCE RULING(APPEAL) NO. GUJ/GAAAR/APPEAL/2022/01
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2020/AR/19)

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

Date:09.02.2022

Name and address of the appellant	:	M/s. Amneal Pharmaceuticals Pvt. Ltd. 882/1-871, Near Hotel Karnavati, Sarkhej Bavla Highway, Village Rajoda, Bavla, Ahmedabad – 382 220 (Gujarat).
GSTIN of the appellant	:	24AAGCA0781K1ZP
Advance Ruling No. and Date	:	GUJ/GAAR/R/51/2020 dated 30.07.2020
Date of appeal	:	18.09.2020
Date of Personal Hearing	:	22.12.2020
Present for the appellant	:	Shri Satyajit D. Naik

The appellant, M/s. Amneal Pharmaceuticals Pvt. Ltd. filed an application for advance ruling before the Gujarat Authority for Advance Ruling (herein after referred to as the 'GAAR'), wherein it submitted that it enters into contract with the employees at the time of appointing any employee at their factory, by issuing 'Appointment Letter'. One of the conditions mentioned in the 'Appointment Letter' is - *"Your services can be terminated by giving three months' notice or notice pay in lieu of notice period from either side.*". Thus, as per the said condition, either parties shall serve a three months' notice, and if any employee doesn't serve the notice period after tendering the resignation, then as per the contract (Appointment Letter) condition, company is entitled to recover the notice pay from the agreed portion of salary to compensate the loss to the appellant company. It further submitted that in case the employee resigns and leaves without serving the notice period, the company is deducting the notice pay amount for unserved notice period to cover the loss of company for immediate recruitment of new candidates and also to regularize the activities not handed over to upcoming employee. It was also submitted that the notice period amount recovered/paid from/by the employee/employer should not be under the purview of GST since it is an arrangement to compensate the loss to employer/employee as per contractual arrangement. In the above backdrop, it raised the following question for advance ruling -

> *" Whether the applicant is liable to pay GST on recovery of Notice Pay from the employees who are leaving the company without completing the notice period as specified in the Appointment Letter issued as per the contract entered between Employer and the Employee?"*

2. The GAAR examined the aforesaid question and vide Advance Ruling No. GUJ/GAAR/R/51/2020 dated 30.07.2020 answered in affirmative i.e. it held that the appellant is liable to pay GST on recovery of notice pay from the employees.

3.1 Aggrieved by the aforesaid advance ruling, the present appeal has been filed by the appellant wherein it has been *inter-alia* submitted that the notice pay is a sum mutually agreed by the parties for breach of contract, therefore it can be regarded as a consideration flowing from the employment contract itself read with section 74 of the Indian Contract Act, 1872 and not under any other separate contract wherein employer has agreed to refrain from doing any act against the concerned employee. It has been submitted that once notice pay recovery is stipulated in the contract, the employer (appellant) can only sue for recovery of such amount but cannot enforce mandatory serving of the notice period. It has been argued that as the appellant cannot enforce mandatory serving of the notice period, the appellant cannot be said to have refrained from an act of suing the employee for mandatory serving against the notice pay recovery. Therefore, pay recovered cannot be said to be consideration against agreeing to the obligation to refrain from an act or to tolerate an act.

3.2 The appellant has referred to entry no. 1 of Schedule III of the Central Goods and Services Tax Act, 2017 and the Gujarat Goods and Services Tax Act, 2017 (herein after referred to as the 'CGST Act, 2017' and the 'GGST Act, 2017' respectively and the 'GST Acts' collectively)and has submitted that the notice pay recovery is nothing but deduction from the salary payable to the resigning employee; that it is not a separate consideration flowing from any independent contract and the employee is relieved from the services and issued a relieving letter once the terms of employment agreement (Appointment Letter) are fulfilled, hence it should be covered within the referred entry.

3.3 The appellant has relied upon the decisions in the cases of Nandinho Rebello Vs. Deputy Commissioner of Income Tax [(2017) 80 taxmann.com 297 (Ahmedabad – Trib.)], GE T & D India Limited Vs. Deputy Commissioner of Central Excise, Gujarat State Fertilizers and Chemical Ltd., and HCL Learning System Vs. CCE, Noida.

4. There has been change in one of the two Members of this authority consequent upon the transfer and posting of the Chief Commissioner, Gujarat Goods and Services Tax, after Personal Hearing has been held in this case. The appellant was therefore asked whether they require fresh hearing or not. The appellant vide their mail dated 03.01.2022 informed that by virtue of recent AAAR ruling issued by Madhya Pradesh Appellate Authority for Advance Ruling

which held that "GST is not applicable on payment of notice pay by an employee to the applicant in lieu of notice period", they find that their case is similar and no GST should be leviable on recovery of notice pay. They attached the copy of order dated 8.11.2021 passed by the Madhya Pradesh AAAR in the case of M/s. Bharat Oman Refineries Ltd., M.P. They further informed that they do not require personal hearing in the matter.

FINDINGS (AS PER SEEMA ARORA) :-

5. We have considered the submissions made by the appellant in the appeal filed by them as well as at the time of personal hearing, Ruling given by the GAAR and other evidences available on record.

6. As per the terms of contract, in the form of 'Appointment Letter', entered into between the appellant and its employees, in case of resignation by an employee, such employee is required to give three months' notice to the appellant. In case of failure of the employee in giving such prior notice, the appellant is entitled to recover the amount equivalent to the salary of such notice period. The issue involved in the present case is whether such amount recovered by the appellant from the employee, for failure to give prior notice, is leviable to the Goods and Services Tax or otherwise.

7.1 The notice period is stipulated in the employment contract so that in case of resignation by an employee, new employee may be recruited, the work being performed by him may be assigned to some other person and activities of an organization are not disrupted. As submitted by the appellant, it recovers the agreed sum of money from the employees for unserved notice period to cover the loss of the company for immediate recruitment of new candidates and also to regularize the activities not handed over to upcoming employees.

7.2 Thus, it may be said that though the employee is required, as per the terms of the contract (Appointment Letter), to give the appellant three months' prior notice before leaving the job so that the appellant may make alternate arrangements, in case the employee does not give such notice, the appellant is agreeing to tolerate such an act against the consideration in the form of an amount equivalent to salary of the notice period. As the said stipulation or condition is part of contract entered into between the employees and the appellant in the form of 'Appointment Letter' at the time of joining of the job, it may be termed as 'liquidated damage'.The meaning of the term 'liquidated damages' has been given in the Black's Law Dictionary as under -

> *"An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have agreed on liquidated damages, the sum fixed is*

the measure of damages for a breach, whether it exceeds or falls short of the actual damages."

In the present case, the appellant and the employees have agreed that in case of leaving of job by the employee without giving three months' notice, the amount equivalent to salary of unserved period of notice would be the measure of damages, which the appellant would receive from the employee concerned. The appellant would tolerate the hardship due to employee leaving the job without three months' prior notice in breach of the terms of contract (Appointment Letter) and the appellant would be receiving the amount of 'liquidated damages' for the same.

7.3 As per para 5(e) of Schedule II read with section 7 of the GST Acts, 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' is treated as supply of service. Therefore, the tolerating, by the appellant, of the act of employee leaving the job without giving three months' notice against the consideration in the form of amount equivalent to salary of unserved notice period, is covered under the 'supply of service' under section 7 read with para 5(e) of Schedule II of the CGST Act, 2017 and the GGST Act, 2017.

7.4. The classification of service has been provided in the Annexure to Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 and corresponding Notification No. 11/2017-State Tax (Rate) dated 30.06.2017(the Central Tax (Rate) Notification herein after referred to includes the reference to corresponding State Tax (Rate) Notification also]. As per the said scheme of classification of services, Group 99979 for 'other miscellaneous services', *inter-alia* covers the following –

Service Code (tariff)	**Description of service**
999792	Agreeing to do an act
999793	Agreeing to refrain from doing an act
999794	Agreeing to tolerate an act

Thus, in the scheme of classification of service, the service of 'agreeing to tolerate an act' is covered under Service Code (tariff) 999794.

8.1 It is evident from the foregoing that the services provided by way of tolerating non-performance or breach of contract for which consideration in the form of liquidated damages is payable, is leviable to Goods and Services Tax, unless it is otherwise exempted from payment of Goods and Services Tax.

8.2 Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 provides exemption to specified services from payment of Goods and Services Tax. Sl. No. 62 of the said Notifications reads as follows -

Sl. No.	***Chapter, Section, Heading, Group or Service Code (Tariff)***	***Description of services***	***Rate (per cent.)***	***Condition***
62	*Heading 9991 or Heading 9997*	*Services provided by the Central Government, State Government, Union territory or local authority by way of tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Central Government, State Government, Union territory or local authority under such contract.*	*Nil*	*Nil*

The aforesaid Sl. No. 62 provides exemption to services provided by the Central Government, State Government, union territory or local authority by way of tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable. In the present case, the appellant is a private limited company, therefore, it is not entitled to the said exemption of Sl. No. 62 of Notification No. 12/2017-Central Tax (Rate) and 12/2017-State Tax (Rate).

8.3 Schedule III of the GST Acts covers various activities or transactions, which shall be treated neither as a supply of goods nor a supply of services. Para 1 of the said Schedule III covers 'services by an employee to the employer in the course of or in relation to his employment'. However, the present case is not covered by the said Para 1 of Schedule III inasmuch as the service of tolerating of the act of breach of the contract is on the part of the employer. Neither the employee is providing the service, nor it is in the course of or in relation to his employment.

8.4 Thus, the said service by way of tolerating non-performance or breach of contract for which consideration in the form of liquidated damages is payable to the appellant is neither exempted under Notification nor covered under para 1 of Schedule III of the GST Acts.

9. The appellant has referred to several case laws. It has been observed that the decisions in the cases of GE T & D India Limited Vs. Deputy Commissioner of Central Excise, Gujarat State Fertilizers and Chemical Ltd., and HCL Learning System Vs. CCE, Noida were rendered in the context of Services Tax (Finance

Act, 1994) and therefore are not squarely applicable in the facts of the present case. The decision in the case of Nandinho Rebello Vs. Deputy Commissioner of Income Tax pertains to the provisions of Income Tax Act, 1961 and hence is not applicable in the facts of the present case.

10. We find that the appellant has relied upon Order dated 8.11.2021 issued by the Appellate Authority for Advance Ruling(AAAR), Madhya Pradesh in the case of M/s. Bharat Oman Refineries Limited, Madhya Pradesh to support their contention. In this regard, we have to emphasize here that decisions of Advance Ruling Authorities cannot be relied upon by the appellant, since, as per the provisions of Section 103 of the CGST Act, 2017, the Advance Ruling pronounced by the Advance Ruling Authority or the Appellate Authority shall be binding only on the applicant who had sought it in respect of any matter referred to under sub-section(2) of Section 97 for Advance Ruling and the concerned officer or the jurisdictional officer in respect of the applicant.

11. In view of the foregoing, we confirm the Advance Ruling No. GUJ/GAAR/R/51/2020 dated 30.07.2020 of the Gujarat Authority for Advance Ruling, by holding that the appellant M/s. Amneal Pharmaceuticals Private Limited is liable to pay Goods and Services Tax at applicable rate on the amount of notice pay (liquidated damages) received from the employees leaving the job of the appellant without completing the notice period as specified in the contract entered into (Appointment Letter) between the appellant and its employees, and reject the appeal filed by M/s. Amneal Pharmaceuticals Private Limited.

FINDINGS (AS PER MILIND TORAWANE)

12. As per the terms of contract, in the form of 'Appointment Letter', entered into between the appellant and its employees, in case of resignation by an employee, such employee is required to give three months' notice to the appellant. In case of failure of the employee in giving such prior notice, the appellant is entitled to recover the amount equivalent to the salary of such notice period. The issue involved in the present case is whether such amount recovered by the appellant from the employee, for failure to give prior notice, is leviable to the Goods and Services Tax or otherwise.

13.1 Whenever an employee joins or leaves an organization, he/she is bound by the terms of employment. An employee is usually required to serve the agreed notice period before he/she resigns. But, most of the employee agreements have a clause stating that if an employee wants to leave the company without serving the agreed notice period, then he is required to pay an amount equal to the unserved notice period. This is called notice pay recovery, which is either recovered from the employee or deducted from the salary payable to him. Before finalizing whether tax is leviable on notice pay recovery, we have to decide whether the said transaction constitutes "supply" in terms of section 7 of the CGST Act and whether employer can be termed as "supplier"?

13.2 The term "supplier" is defined in clause (105) of section 2 of the CGST Act, which is reproduced as under:

> *Section 2 (105) :- "supplier" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;*

Thus, in term of above definition, to qualify any person as "supplier", such person should be engaged into supply of goods or services or both.

13.3 Before, determining any person as supplier, the activity or transaction of goods or services carried out by such person should be covered within the scope of "supply". The scope of "supply" is denoted in section 7 of the CGST Act which is reproduced as under:

> ***Section 7. Scope of supply.—*** *(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; and*
> *(c) the activities specified in Schedule I, made or agreed to be made without a consideration;*
> *(d) *****.*
> *(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either 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.*

13.4 Thus, as per section 7 of the CGST Act, any transaction should pass through the following tests as in order to be qualified as a "supply",

(a) *agreement for transaction or activity* i.e. the transaction or activity should be made or agreed to be made;
(b) transaction or activity should be *relating to goods / services*;
(c) an *element of consideration* should be present in transaction or activity;

(d) transaction or activity should be carried out in the course and furtherance of business;

(e) activityspecified in Schedule I, made or agreed to be made even though without a consideration;

(e) the transaction should not be specified in Schedule III.

In order to qualify any transaction or activity as supply, it is pertinent that **all** of the above conditions are satisfied. In the instant case, it is required to ascertain whether the said activity satisfies all the element of supply or not.

13.4.1 **No agreement for transaction or performance of activity:** The contract of employment is a contract between the employer and an employee where the employee promises to provide employment services to an employer in return for a consideration i.e. "salary". The **essential purpose of the contract is for employment service and not to recover notice pay.** Recovery of notice pay arises only as a condition of breach of contract or at time when the contract comes to an end. Therefore, the clause containing the notice pay recovery in the contract of employment does not extend an option to the employee whether or not to perform. It protects the employer in case of early cessation of service by the employee. The term ***"made or agreed to be made"*** used in the definition of "supply" **suggests a certain degree of voluntary act on part of the service provider**. The act of notice pay recovery is only an extinguishment of the obligation of the employee which does not constitute an independent/voluntary act by the employer. Thus, the act of notice pay recovery arises as a condition of breach of contract and is not a contract in itself to qualify as a supply.

13.4.2 **Absence of service element:** As the activity is not relating to tangible goods, it is required to be ascertained whether it involves the element of services, especially "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*". The involvement of above service element in the contract can only be ascertained, when there is a **specific performance obligation** to do so, to honor the contract. As the 'toleration of breach' by the employer is not a voluntary act, the condition of breach indicated in the contract, by no stretch of imagination can be inferred to mean as "toleration of an act". Thus, **notice pay recovery is a compensation for injury and not a benefit arising to the employer.** The promise is made by the employee in the contract of employment to serve the notice period. However, the employee, at his own choice, seeks not to serve the period of notice pay, which subsequently leads to a breach of contract requiring a remedy. The remedy in the form of liquidated damages already envisaged in the contract, becomes enforceable. Thus, the recovery of notice pay serves as a cure for such damage. Accordingly, it can be said that there is no "supply of service" as such effected by the employer on recovering a pre-agreed sum for breaching the contract of employment.

13.4.3.1 **Absence of consideration**: The term consideration is defined in clause (31) in section 2 of the CGST Act, which is reproduced as under:

(31) "consideration" in ***relation to the supply of goods or services*** *or both includes–*

(a) ……;

(b) ……:

13.4.3.2 In the above definition of "consideration", the words "in relation to" are used. In the case of 'Doypack Systems Pvt. Ltd. v. Union India & Ors.1988 AIR 782, 1988 SCR (2) 962,the Apex Court has categorically held that the phrase "in relation to" is equivalent to the phrases "concerning with" and "pertaining to". Therefore, the phrase "In relation to" used in the definition of the term "consideration" suggests a connection with the act of supply.**Therefore, it can be deduced that any consideration should have a direct nexus to the voluntary act of supply.**

13.4.3.3 The notice pay recovery originates only when a contract of employment has come to an end. The purpose of the contract was only to sign up an employee on his role for the employment service and not to recover notice pay. **Therefore, in the context of the contract of employment, notice pay recovery does not attain the character of a consideration for the very reason that they are not linked to any voluntary act of the supplier.** In the ruling in case of *"M/s Bhayana Builders (P) Ltd & Others vs. CST Delhi, & Others"*, it was emphatically held that the architecture of the law is such that the consideration should always flow from the service recipient to the service provider and should accrue to the benefit of the latter. Applying the same analogy of the ruling and the explanations above, it can be inferred that notice pay recovery neither is a consideration, nor does it flow at the discretion of the service provider. **Further, there is no benefit accruing to the employer, moreover he has suffered from the sudden exit of the employee.**

13.4.3.4 **Damage vs consideration:** Damage in its general connotation means money compensation for loss or injury caused by the wrongful act of the other. Notice pay recovery is a damage arising out of breach of the contract of employment which curtails the time period of the employer to find a competent and suitable replacement. It also hampers the smooth administration of the work which was hitherto carried out by the employee. Damages are never an alternative mode of performance. It is not the voluntary act of the employer to recover the notice pay damages for injury caused by the employee. It is also relevant to note that **the** Honourable CESTAT Chennai in the case of Commissioner of Service Tax vs. Repco Home Finance Limited STA No.511 of 2011 LB-2018 dated 08.07.2020 has distinguished "damages as a condition of contract and consideration". In the said ruling, the CESTAT held that the *foreclosure charges are imposed by the banks in order to protect the loss of interest on account of foreclosure of the loan by the customers.* ***Mere mentioning of foreclosure charges do not give the customers any option to perform or not perform***. The Honourable CESTAT on analysis of various concepts under The Indian Contract Act, 1872

and the distinction drawn between damage and consideration under the Australian GST Law, has ruled that the foreclosure charges are in the nature of damages and not consideration. *Thus*, notice pay recovery cannot be deliberated as "*consideration*" of *any voluntary act of the supplier***.**

13.4.4 **Transaction or activity is not in the course and furtherance of business**: As stated above, the contract of employment between the employer and an employee, where the employee promises to provide employment services to an employer in return for a consideration (i.e. "salary") is the transaction in the course and furtherance of business. The employee at his own choice decides to serve during the period of notice pay or not to serve during the said period along with compensating the damages for injury caused by him to the employer. There is no discretion on the part of the employer i.e. so called service provider. No benefit is accrued to the employer from the sudden exit of the employee. Therefore, no activity is involved on part of employer except to be compensated himself against the damages caused by sudden exit of the employee. Thus, the act of notice pay recovery is only an extinguishment of the obligation of the employee which does not constitute an independent/voluntary activity by the employer.

13.4.5.1 **No such activity is specified in Schedule I**: As per section 7 (1) (c) of the Act, supply includes the activities specified in Schedule I, made or agreed to be made even without a consideration. Schedule I specifies the lists of certain activities, made without consideration. Generally, consideration is required for any activity or transaction to be treated as supply. However, the activities specified in Schedule I are to be treated as supply even though made without consideration.

13.4.5.2 The following activity, as specified in Para 2 of schedule I, is treated as supply, even though made without consideration.

> *2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business:*
>
> *Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.*

Now, it is required to be ascertained whether act of notice pay recovery by the employer is included in para 2 of Schedule I or not.

13.4.5.3 As per sub-clause (iii) of clause (a) in the explanation to section 15 of the Act, employer and employee are deemed to be considered as related persons. Therefore, supply of goods or services between employer and employee, when made in the course or furtherance of business, may be considered as supply.

13.4.5.4 In the instant case, though employer and employee are deemed to be considered as related persons, there is no supply of either goods or services. In addition, as the act is not made in the course or furtherance of business, it is not covered under Schedule I of the Act.

13.4.6.1 **Transaction is not covered in Schedule III**. As per section 7 (2) of the act, activities or transactions specified in Schedule III shall be treated neither as a supply of goods nor a supply of services. Para 1 of Schedule III covers services by an employee to the employer in the course of or in relation to his employment. However, In the instant case, the act of notice pay recovery by the applicant from his employee isn't covered in Para 1 of Schedule III as neither the employee is providing the service, nor it is in the course of or in relation to his employment. Thus, as the said act is not covered in Para 1 of Schedule III, the activity can't be treated as 'supply of goods or services'.

13.4.6.2 Provision in clause 5(e) of the Schedule II of the CGST Act is similar to the earlier Service Tax law i.e. Section 66E(e) of the Finance Act, 1994. With reference to the said earlier Act, the Central Board of Excise and Customs (CBEC) had issued "Taxation of Services: An Education guide" dated 20th June, 2012. In para 2.9.3 of the said guidance note, the following issue was clarified.

> *2.9.3 Would amounts received by an employee from the employer on premature termination of contract of employment be chargeable to service tax?*
>
> *No. Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would not be chargeable to service tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act.*

13.4.6.3 The issue raised here relates to a contra situation. In case where the amount is received by an employee from the employer by reason of premature termination of contract of employment, the CBEC has answered in the negative, pointing out that such amounts would not be related to the rendition of service. In the instant case, the employer has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. Therefore, the employer cannot be said to have rendered any service *per se* as the employer has not 'tolerated' any act of the employee but has permitted a sudden exit upon being compensated by the employee in this regard.

13.4.7 In case of GE T & D India Limited Versus Deputy Commissioner of C. Ex., Chennai (2020 (35) G.S.T.L. 89 (Mad.)), Hon Madras High Court, in para 12 of the judgement, has made the following remarks on the issue whether the

amount received from employee by the employer as notice pay in lieu of sudden termination gives rise to rendition of service either by employer or by employees under section 65 of Finance Act, 1994.

> *Though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee.*

13.4.8 Thus, in view of the foregoing para 13.4.1 to 13.4.7, the act of recovery of an amount by the appellant from the employee, for failure to give prior notice is **outside the scope of supply of service as specified in section 7 of the Act**.

14.1 As per para 5 (e) of Schedule II of the GST Acts, 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' is treated as supply of service. Therefore, it is argued that the tolerating, by the appellant, of the act of employee leaving the job without giving three months' notice against the consideration in the form of amount equivalent to salary of unserved notice period, is covered under the 'supply of service' under section 7 read with para 5 (e) of Schedule II of the Act.

14.2 However, the above argument of covering the activities or transactions under para 5 (e) of Schedule II of the CGST Acts can be accepted only in case where such activities or transactions are covered within the scope of supply as specified in section 7 of the Act. As specified in para 13.4.8, recovery of an amount by the appellant from the employee, in the present case, for failure to give prior notice is outside the scope of service as specified in section 7 of the Act. Para 5 (e) of Schedule II of the CGST Act becomes applicable only in those cases where the activities or transactions are treated as supply and are covered within the scope of supply. Therefore, as the act of recovery of an amount by the appellant from the employee, for failure to give prior notice is outside the scope of service as specified in section 7 of the Act, the question of applicability of para 5 (e) of Schedule II doesn't arise.

15. The appellant, in the given case, does not provide any service in the form of "tolerance of an act" but facilitates the employee for sudden exit from the employment services. The termination clause of the "Appointment Letter" provides simply cessation of employment services and to compensate loss to either of the parties due to sudden termination. The appellant and its employee enter into contract to receive and supply employment services and not to tolerate an act of each other. The employer does not provide any independent identifiable service to the employee in exchange of the amount received or recovered in lieu of notice period. In fact, he receives such amount in consequence of the sudden termination of the employment service to compensate the loss due to such termination of

service. The termination of the employment services does not result in supply of any other service. Therefore, the transaction of the appellant in the form of notice pay recovery does not fall within the scope of "supply" as provided in section 7 of the GST Acts, and where the activity or transaction does not amount to supply, the amount received by the employer has no relevance for levying tax under the GST Acts.

16. The appellant has submitted the copy of advance ruling in case of M/s. Bharat Oman Refineries Limited issued by the Madhya Pradesh Appellate Authority for Advance Ruling on 8th November, 2021 wherein it was held that **GST is not applicable on payment of notice pay by an employee to the applicant-employer in lieu of notice period**. Though, as per provision of section 103 (1), ruling is binding only on the concerned applicant and the jurisdictional officer in respect of that applicant, the ratio in the said ruling is in consonance to the findings of the present case.

17. In view of the foregoing, I allow the appeal filed by the appellant M/s. Amneal Pharmaceuticals Private Limited and modify the Advance Ruling No. GUJ/GAAR/R/51/2020 dated 30.07.2020 of the Gujarat Authority for Advance Ruling, by holding that the appellant is not liable to pay Goods and Services Tax on recovery of notice pay from employees who leave the company without completing the notice period as specified in the Appointment Letter issued as per the contract entered between employer and employees.

18. **Also, as the members of appellate authority are differing, Section 101 (3) of CGST Act, 2017 shall apply**.

(Milind Torawane)
Member

(Seema Arora)
Member

Place : Ahmedabad
Date : 09.02.2022