MAHARASHTRA AUTHORITY FOR ADVANCE RULING

GST Bhavan, Room No.107, 1st floor, B-Wing, Old Building, Mazgaon, Mumbai – 400010.

(Constituted under Section 96 of the Maharashtra Goods and Services Tax Act, 2017)

BEFORE THE BENCH OF

(1) Shri. Rajiv Magoo, Additional Commissioner of Central Tax, (Member)

(2) Shri. T. R. Ramnani, Joint Commissioner of State Tax, (Member)

ARN No.		**AD270220026018N**
GSTIN Number, if any/ User-id		**27AAACE4574C1ZV**
Legal Name of Applicant		**M/s. Emcure Pharmaceuticals Limited.**
Registered Address/Address provided while obtaining user id		Emcure House, T 184, M.I.D.C Bhosari, Pune 411026
Details of application		GST-ARA, Application No. 119 Dated 28.02.2020
Concerned officer		**PUN-VAT-E-621, PUNE-LTU-002, PUNE.**
Nature of activity(s) (proposed/present) in respect of which advance ruling sought		
A	Category	**Service Provision**
B	Description (in brief) (As per applicant)	(1) Applicant has entered into a contract with a third-party outdoor catering service provider for providing cooked food, to its employees, in the canteen area facility in the factory and office premises. The catering service provider raises invoices on the Applicant. The Applicant is making recoveries at subsidized rate from its employees for the canteen facility. (2) Similarly, Applicant has also engaged bus transportation service provider for arranging transportation of its employees. The bus transportation service provider is raising invoices on Applicant who makes recoveries at subsidized rate from its employees. (3) Applicant also makes notice pay recoveries from its employees on account of not serving the full notice period
Issue/s on which advance ruling required		➢ Determination of the liability to pay tax on any goods or services or both
Question(s) on which advance ruling is required		As reproduced in para 01 of the Proceedings below.

NO.GST-ARA- 119/2019-20/B- 03 **Mumbai, dt.** 04.01.2022

PROCEEDINGS

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

The present application has been filed under Section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST

Act and MGST Act" respectively] by **M/s. Emcure Pharmaceuticals Limited.,** the applicant, seeking an advance ruling in respect of the following questions.

(a) **Whether the GST would be payable on recoveries made from the employees towards providing canteen facility at subsidized rates in the factory and office?**

(b) **Whether the GST would be payable on the recoveries made from the employees towards providing bus transportation facility? If yes, whether the Applicant is exempted under Notification No. 12/2017 Central Tax (Rate)?**

(c) **Whether the GST would be payable on the notice pay recoveries made from the employees on account of not serving the full notice period?**

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, the expression 'GST Act' would mean CGST Act and MGST Act.

2. **FACTS AND CONTENTION – AS PER THE APPLICANT**:

2.1 M/s Emcure Pharmaceuticals Limited, the Applicant, a pharmaceutical company with registered office at Emcure House, T-184, M.I.D.C. Bhosari, Pune 411026, Maharashtra, engaged in developing, manufacturing and marketing of pharmaceutical products, provides canteen and bus transportation facility to its employees as a part and parcel of the employment arrangement vide letter of employment ("**Employment Agreement**") to employees, which contains the terms & conditions of employment as per its HR Policy.

Canteen & Bus Transportation

2.2 The Applicant makes recoveries at subsidized rates for providing canteen and bus transportation facility to its employees and has engaged third party service providers to provide the said facilities and the service providers raise invoices with applicable GST. The Applicant recovers a certain portion of the consideration paid to such third-party service providers from its employees.

Notice Pay Recovery

2.3 There are instances where employees resign and leave the employment without serving the mandated notice period, in part or in full, the Applicant is entitled to monetary compensation, ("**Notice Pay Recovery**"). In such cases, the Applicant deducts salary for the tenure of notice

period not served as a compensation for breach of the terms of the Employment Agreement by the employees.

B. STATEMENT CONTAINING APPLICANT'S INTERPRETATION OF LAW

Applicant's Interpretation with respect to the recoveries made from employees for providing Canteen facilities which are without prejudice to each other.

2.4 The recoveries for providing canteen facility is not covered under the ambit of "supply" under Clause (a) of Section 7 (1) of the CGST Act.

2.5 Applicant is engaged only in the business of pharmaceutical products and is maintaining canteen as per the provisions of the Factories Act, 1948. Even if the said canteen facility were not provided, the pharmaceutical business of the Applicant would still be continuing. Thus, providing canteen facilities to its employees is not the business of the Applicant & the same cannot qualify as supply.

2.6 Reliance is placed in the case of State of Gujarat vs. Raipur Manufacturing Co. Ltd. (Civil Appeal No. 603 of 1966) wherein Petitioner was in the business of manufacturing & selling cotton textiles. Petitioner purchased coal for usage in business of cotton textiles, which was later sold by them. The Supreme Court held that the Petitioner was not engaged in the business of coal.

2.7 As per clause (b) of Section 2 (17), business also includes any activity which is in connection with or incidental or ancillary to the activities covered under clause (a) of Section 2 (17) of the CGST Act. In this regard, activities which are having direct nexus with the main business can be said to be ancillary or incidental. However, canteen facility is not related to or connected with the principle business of supply of pharmaceutical goods. Hence, the same is not incidental or ancillary to the main business of the Applicant. Thus, said canteen facility cannot be taxed under GST.

2.8 In support of the above contention, the Applicant relies on the case of Deputy Commissioner of Commercial Taxes vs. Thirumagal Mills Ltd. [1967 (20) STC 287 Mad].

2.9 Applicant also relies on the decision of the Hon'ble Delhi High Court, in the case of Panacea Biotech Limited vs. Commissioner of Trade and Taxes [(2013) 59 VST 524 (Del.)] wherein the Hon'ble Court held that, selling of used cars cannot by any stretch of the imagination be characterized as "ancillary" or incidental to the business of a pharmaceutical company.

2.10 Without prejudice to the above, the canteen facility provided by Applicant is excluded from the scope of supply in terms of Clause (a) of Section 7 (2) of the CGST Act.

2.11 The canteen facility provided by the Applicant is specifically excluded from the coverage of 'supply' under GST as per Clause (a) of Section 7 (2) of the CGST Act which begins with a non-obstante clause and overrides Section 7 (1) of the CGST Act. Entry (1) of Schedule-III covers services provided by employee to its employer in the course of employment or in relation to employment. Any activity or transaction, in this case, canteen services, which is undertaken in the course of employment or in connection with employment has been specifically excluded from the ambit of supply. By virtue of Section 7 (2) read with Entry (1) of Schedule III, the canteen facility does not amount to supply. Also, as per the Press release issued by the Ministry of Finance dated 10 July 2017 any services provided by the employer to the employees in terms of the contractual agreement entered into between the employer and employee will not be subjected to the GST.

2.12 Without prejudice to the above, it is settled position under GST regime that employee recoveries does not amount to 'supply'.

2.13 Employee recovery would not qualify as 'supply' under GST and hence, not taxable. Reliance is placed in the case of M/s Jotun India Private Limited, [2019-TIOL-312-AAR-GST] as well as M/s POSCO India Pune Processing Centre Private Limited [2019 (2) TMI 63].

2.27 <u>Applicant's Interpretation with respect to the recoveries made from employees for providing Bus Transportation facilities are provided below without prejudice to each other.</u>

The employee recoveries for providing bus transportation facility is not covered under the ambit of "supply" under Clause (a) of Section 7 (1) of the CGST Act.

2.27.1 The Applicant is procuring bus transportation services, for transportation of its employees in Non-AC buses, from a third-party bus transportation service provider who issues tax invoice with applicable GST to the Applicant. Applicant recovers subsidized amount for the said transportation facility from its employees.

2.27.2 The Applicant is not engaged in the business of bus transportation and accordingly, the said facility provided by the Applicant to its employees does not amount to supply under the GST regulations.

2.28 Without prejudice to the above, the bus transportation facility provided by Applicant is excluded from the scope of supply in terms of Clause (a) of Section 7 (2) of the CGST Act.

2.28.1 The submissions made by the Applicant in respect of canteen recovery equally applies so far as the bus transportation is concerned. Therefore, bus transportation facility is excluded from the purview of 'supply' in terms of Section 7 (2) (a) read with Schedule-III to the CGST Act.

2.29 Without prejudice to the above, it is settled position under GST regime that employee recoveries does not amount to 'supply'.

2.29.1 The Applicant further submits that the recovery towards bus transportation facility does not amount to 'supply' in light with the advance rulings pronounced by this Hon'ble Authority.

2.30 **Applicant's Interpretation with respect to the applicability of exemption from GST in respect of provision of Non-AC bus transportation facility to its employees.**

2.30.1 Transportation of employees by the Applicant through usage of Non-AC buses would merit classification under the Tariff 9964 as "Passenger Transportation Services". It is submitted that the Annexure for Scheme of classification of services appended to Notification 11/2017-CTR provides the manner for classification of services. Local transportation services of passengers through buses are covered under Tariff 996411. Further, the Explanatory Notes issued by the CBIC also provides that the services provided by bus within city limits would be very well classified under Tariff 996411. The Explanatory Notes also provides that the renter defines the travel routes in case of passenger transportation services. In the given case, the said conditions are satisfied. Hence, without prejudice to above submission, in case the bus employee recovery qualifies as supply of service, the said service would be classified under Tariff 9964 only.

2.30.2 Therefore, without prejudice to the above submissions, even in case where the bus transportation facility provided by the Applicant to its employees amounts to supply, the said services would be exempted by virtue of Notification No. 12/2017-CTR dated 28.06.2017 ('**Exemption Notification**').

2.30.3 Further, as per Sl. No. 15 (b) of the Exemption Notification, "Non-air-conditioned contract carriage other than radio taxi, for transportation of passengers, excluding tourism, conducted tour, charter or hire" is exempt from GST. The buses in the given case also qualifies as 'contract carriage' as defined in the Explanation given in the Exemption Notification.

2.30.4 The definition of contract carriage as per clause (7) of Section 2 of Motor Vehicles Act, 1988, is very wide to include any motor vehicle which carries a passenger for hire or reward from one point to another and therefore, the said buses in question used for employee transportation would be covered under the definition of contract carriage.

2.30.5 Thus, even where the bus transportation facility amounts to service, the said supply of service by the Applicant to its employees would be exempted from GST.

2.31 **Applicant's Interpretation with respect to the notice pay recoveries made from the employees for not serving the notice period, are provided in the below grounds which are without prejudice to each other.**

2.31.1 Without prejudice to the above, the notice pay recovery by Applicant is excluded from the scope of supply in terms of Clause (a) of Section 7 (2) of the CGST Act.

2.31.2 The Applicant also submits that the notice pay recovery is specifically excluded from the coverage of 'supply' under GST as per Clause (a) of Section 7 (2) of the CGST Act

2.31.3 Entry (1) of Schedule-III covers services provided by employee to its employer in the course of employment or in relation to employment. Thus, any activity/transaction undertaken in course of employment or in connection with it has been specifically excluded from the ambit of supply.

2.31.4 As per the "Employment Agreement", notice pay recovery is merely a recovery of the salary paid by the Applicant to its employees. Therefore, the same is an integral part of the salary benefits and deduction which is provided in the course of employment services. Hence, GST will not be payable on such recovery made by the Applicant.

2.31.5 In the case of GE T&D India Limited [2020 (1) TMI 1096], the Hon'ble Madras High Court held that the notice pay recovery will not attract service tax as it a part of the employees' salary.

2.31.6 Further, the Hon'ble Tribunal in the case of HCL Learning Ltd. [2019 (12) TMI 558] has also held that notice pay recovery is not liable to service tax.

2.31.7 In the above case laws notice pay recovery has been held as a part of the salary only and not as any separate transaction and should be treated as a deduction in the course of employment services only. Since, services provided by the employee is not liable to GST, therefore, tax cannot be applied on notice pay recovery which is deducted in the course of employment services. Reliance is placed on the Tribunal's decision in the case of Uniparts India Ltd V/s. Commissioner (Appeals), C.Ex.Meerut, [2020 (33) G.S.T.L. 233 (Tri – All.)

2.31.8 The applicant also relies on the decision of the Hon'ble Supreme Court in Sundaram Finance Limited v State of Kerala [AIR 1966 SC 1178], as well in the case of Ishikawajima-Harima Heavy Industries v CIT in 2007, 288 ITR 408, 440 (SC), wherein the Hon'ble Supreme Court laid the principle for interpreting the contract.

2.31.9 Further, Applicant submits that, by collecting notice pay for defaults of the employees under the Employment Agreement, it cannot be said to have provided the service of 'agreeing to the obligation to tolerate an act'. The Madras High Court in the case of GE T&D (*supra*) has also held that the notice pay recovery cannot be equated with tolerating an act.

2.31.10 Similarly, reliance can also be placed on Order-in-Original No. 47/ADC/ST/GZB/2015-16 dated 30.03.2016, passed by the Ld. Additional Commissioner, Central Excise & Service Tax, Ghaziabad in the case of Glaxo Smithkline Consumer Healthcare Ltd.

2.31.11 Therefore, based on the above cited cases, the notice pay recovery collected by the Applicant are in the nature of penalty, and there is no obligation on the part of the Applicant to tolerate the act of non-compliance by the employees. Hence, the notice pay recovery does not amount to tolerate an act to qualify as supply of service and hence, GST cannot be levied.

2.32 **The notice pay recovery made by Applicant does not come qualify as "consideration" and hence, does not come under the ambit of "supply" under Clause (a) of Section 7 (1) of the CGST Act.**

2.32.1 As per Section 7 (1) (a) of CGST Act, any activity of supply of goods/services which is done without any consideration would not qualify as supply under Section 7 (1) (a). Only amounts received towards the supply of goods/ services can be treated as consideration. Notice pay recovery is not a consideration which is being received by the Applicant towards the activity carried out by the Applicant. Notice pay recovery should be treated as a penalty for mere non-compliance of the terms of the agreement only.

2.32.2 Also, in the service tax regime, it was settled position that any amount charged towards any default should not be treated at par with consideration under service tax regulations. The said analogy would equally be applicable in respect of the definition of consideration provided in the CGST Act.

2.32.3 In the present case, the notice pay is not recovered by the Applicant in lieu of or in return for any activity performed and therefore, cannot be treated as a consideration for performance of any activity. Since, there is no consideration involved in the notice pay recoveries, the said transaction will not amount to supply as per Section 7 (1) (a) of the CGST Act and hence, no GST would be payable by the Applicant on this transaction.

2.33 <u>Notice pay collected by the Applicant from its employees are in the nature of compensation for damages for breach of contract.</u>

2.33.1 The Applicant submits that upon breach of contract, the aggrieved party is entitled to claim compensation for the breach of contract. Such compensation is a legal and statutory right provided under Section 73 and 74 of the Indian Contract Act, 1872, and even without any specific clause in the contract for the damages or compensation payable upon the breach of contract, the party suffering such breach has the statutory right to claim damages or compensation from the party who has broken the contract.

2.33.2 Notice pay recovered by the Applicant can at best be treated as compensation towards the loss of the Applicant for the breach of the contract by the employee. In the present case, the penalty

imposed by the employer on its employee is a part of the contract which is a legal document and is binding on both the parties. The nature of notice pay recovery is the compensation for the loss incurred by the employer due to breach of the terms of the agreement, which cannot be equated with consideration under the GST Regulations. Hence, there cannot be a supply to attract GST.

2.34 **Without prejudice to the above, the notice pay recovery does not amount to "supply" under Section 7 (1) (c) read with Schedule I to the CGST Act.**

2.34.1 The Applicant submits that the transaction of notice period recovery does not amount to 'supply' and hence, GST is not applicable.

2.34.2 In view of the provisions of Section 7 (1) (c) and Schedule I of the CGST Act, a supply between *related person* even without consideration would tantamount to supply and GST would be applicable. However, such supply should be in course or furtherance of business. It is submitted that the notice pay recovery does not amount to 'business' of the Applicant, as the Applicant is a pharmaceutical company involved in the business of developing, manufacturing and marketing a broad range of pharmaceutical products globally.

2.34.3 The definition of service under GST Laws is very wide. In order to qualify as service, the presence of activity is required and the meaning of 'activity' is mentioned in the CBEC Education Guide. Therefore, in order to qualify as service, there has to be certain activity which is being carried out or any work which is being performed. In absence of such an act or deed, there cannot be any activity. Accordingly, in case of lack of activity involved in any transaction, as in the subject case, the said transaction does not amount to service. The said analogy would equally be applicable in respect of the definition of service provided in the CGST Act.

2.34.4 Hence, notice pay recovery cannot be treated as 'supply' even under Section 7 (1) (c) read with Schedule I to the CGST Act.

2.35 **APPLICANT SUBMISSION DATED 25.11.2021:-**

2.35.1 The Applicant is not availing any ITC on the input services of canteen and bus transportation. The Applicant has reversed the entire tax amount on monthly basis on canteen services at the month end to the expenditure account. With regard to bus transportation services, vendor, a proprietor, has not charged any GST which is paid reverse charge mechanism by applicant and no ITC has been availed on the same.

2.36.1 In light of the submissions and judicial precedents, it is submitted that no GST shall be payable on Notice Pay Recoveries made by the Applicant. Further, reliance is placed on the decision In the

case of K.N. Foods Industries Pvt. Ltd. [2020 (1) TMI 6 - CESTAT ALLAHABAD] wherein the revenue authorities alleged that the receipt of ex-gratia payment is towards 'obligation to tolerate an act'. The Hon'ble Allahabad CESTAT held that the amount received as compensation towards recovery of loss from unintended events cannot be treated as 'obligation to tolerate an act' and said amount cannot be said as payment towards any service.

2.36.2 Reliance is also placed in the decision in the case of South Eastern Coalfields Ltd. [2020 (12) TMI 912], wherein the Tribunal held that the recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se.

2.36.3 In this regard, the following cases can also be relied upon:

- Lemon Tree Hotel [2019 (7) TMI 767 - CESTAT NEW DELHI]
- Amit Metaliks Ltd. [2019 (11) TMI 183 - CESTAT KOLKATA]
- Monnet Ispat & Energy Ltd. [2018 (9) TMI 1514 - CESTAT NEW DELHI]

03. CONTENTION – AS PER THE CONCERNED OFFICER:

OFFICER SUBMISSION DATED 30.11.2021

3.1 As per Schedule I {Sec 7(1) (c)} any transaction between related persons when made in the course or furtherance of business shall be treated as supply and GST shall be leviable on such transaction. Explanation to Section 15 of the CGST ACT provides the list of persons who would be considered as a related person under this act. The Applicant and its employee falls under the definition of related person by virtue of serial no (iii) of point (a) of Explanation to section 15 of CGST Act.

3.2 As per **Haryana Authority of Advance Ruling (AAR) in case of M/s.** Beumer India Pvt. Ltd. advance ruling NO.HAR/HAAR/2020-21/1 dated 29/10/2020, it is held GST is leviable on amount recovered from employee by employer for transport facility. Same analogy is applicable in case of canteen recovery also.

3.3 Hence, GST is leviable on amount recovered from employees on account of canteen facility and bus transportation facility.

3.4 Notice pay is a sum mutually agreed between the employer and the employee for breach of contract. It can be regarded as a consideration to the employer for **"tolerating the act"** of the employee to not serve the notice period, which was the employee's agreed contractual obligation. It is further noted that GST is applicable on supply of taxable goods or services. Section 7(1) of the CGST Act, 2017, includes activities referred to in Schedule II in the scope of supply. Clause 5(e) to Schedule II to CGST Act 2017, declares that **'agreeing to the obligation to refrain from an act**, or to **tolerate an act** or **a situation**, or **to do an act'** shall be treated as

supply of service. The condition to pay an amount as notice pay in lieu of notice period, for the employer to agree to let go an employee, normally forms part of the terms and conditions of employment. This would mean that the employee while accepting the offer of employment, has not only understood the intent on the part of the employer in prescribing this exit condition, but has also accepted it. In other words, the employee has understood and accepted the condition that in the contingency of his inability to provide the prescribed notice period, he can exercise the option of paying the notice pay as the consideration for the employer to agree to the obligation of letting him go, which the employer is bound to do as it is part of the terms and conditions already agreed to and settled between them. In our view, therefore, this transaction of the employer agreeing to the obligation of tolerating an act (quitting without any advance notice) on the part of the employee, for payment of a sum (notice pay), will be covered under Clause 5(e) to Sch. II to CGST Act 2017, as a declared service.

4 The above contention is also endorsed by Hon Gujarat authority for advance ruling in case of M/s Amneal Pharmaceuticals Pvt. Ltd. Advance ruling No.GUJ/GAAR/R/51/2020 DATED 30/07/2020. Hence, GST is leviable on notice pay recovery

04. HEARING

4.1 Preliminary e-hearing in the matter was held on 02.06.2021. Authorized Representatives of the applicant, Shri. Rinku Panbude (C.A), Shri. Pranav Mundra (Advocate) and Shri. Narendra Adwadkar were present. Jurisdictional officer Shri. Santosh Uttarwar, Deputy Commissioner, PUN-VAT-E-621, PUNE-LTU-002, Pune was also present. The Authorized Representatives made oral submissions with respect to admission of their application.

4.2 The application was admitted and called for final e-hearing on 23.11.2021. The Authorized representative of the applicant, Shri. Rinku Panbude Learned C.A, Shri. Pranav Mundra learned Advocate and Shri. Narendra Adwadkar were present. Jurisdictional officer Shri.Vijay Desai, learned Deputy Commissioner, PUN-VAT-E-621, PUNE-LTU-002, Pune was also present. The case was heard.

05. OBSERVATIONS AND FINDINGS:

5.1 We have perused the documents on record and considered the oral and written submissions made by the applicant and jurisdictional officer.

5.2 M/s Emcure Pharmaceuticals Limited, the Applicant, a pharmaceutical company with its registered office at Emcure House, T-184, M.I.D.C. Bhosari, Pune 411026, Maharashtra has

various marketing and distribution regional offices and factories located at various other places in India. The applicant has raised three questions which are discussed and held as under:

5.3 Question No. 1 : Whether the GST would be payable on recoveries made from the employees towards providing canteen facility at subsidized rates in the factory and office?

5.3.1 The Applicant is providing canteen facilities to its employees based on its Human Resource (**HR**) Policy for which it avails services of third party service providers who are raising tax invoices on the applicant, with applicable GST and to whom the Applicant pays consideration. Further the applicant recovers certain portion, a subsidized amount, as deduction from the employee's salary. The applicant has also submitted that, the canteen is mandatorily required to be maintained by it as per the provisions of Section 46 of the Factories Act, 1948. Finally, the applicant has also submitted that, it is not availing any ITC on the input services of canteen.

5.3.2 The Applicant has made various submissions in support of their contention that, by virtue of Section 7 (2) read with Entry (1) of Schedule III, the subject canteen facility provided to their employees, does not amount to supply.

5.3.3 In terms of Section 7 of the Central Goods and Services Tax Act, 2017 (**CGST Act**), for a transaction to qualify as supply, it should essentially be made **in the course or furtherance of business**. We find that, the applicant is engaged in the business of developing, manufacturing and marketing a broad range of pharmaceutical products from its various manufacturing units, Research and Development Centres and branch offices. The employees are vital resources to carry out the day to day affairs of the Applicant Company. Accordingly, in order to carry out its business of output supply mentioned above, the Applicant is providing canteen facility to its employees. The provision of canteen facility to the employees is a welfare measure, also mandated by the Factories Act and is not at all connected to the functioning of their business of developing, manufacturing and marketing pharmaceutical products. Further, the said activity is not a factor which will take the applicant's business activity forward.

5.3.4 We also find that the applicant is not supplying any canteen service to its employees in the instant case. Further, the said canteen facility services are also not the output service of the applicant since it is **not in the business of providing canteen service**. Rather, we find that, this canteen facility is provided to employees by the third party vendors and not by the applicant. Therefore, in the subject case, the applicant is not providing any canteen facility to its employees, in fact the applicant is a receiver of such services.

5.3.5 We observe that the GST is discharged on the gross value of bills raised on the applicant by the third party vendors, providing canteen facility. We also observe that the partial amounts recovered by the applicant from its employees in respect of use of such canteen facility are a part of the amount paid to the third party vendors which has already suffered GST.

5.3.6 Since the provision of canteen facility by the applicant to its employees is not a transaction made in the course or furtherance of business, and since in terms of Section 7 of the CGST Act, 2017, for a transaction to qualify as supply, it should essentially be made **in the course or furtherance of business,** we find that the canteen services provided by the applicant to its employees cannot be considered as a "supply" under the relevant provisions of the CGST Act, 2017 and therefore the applicant is not liable to pay GST on the recoveries made from the employees towards providing canteen facility at subsidized rates.

5.4 Question No. 2: Whether the GST would be payable on the recoveries made from the employees towards providing bus transportation facility? If yes, whether the Applicant is exempted under Notification No. 12/2017 Central Tax (Rate)?

5.4.1 The applicant has submitted that, its submissions made in respect of canteen facilities provided by it to employees equally applies in the case of Bus Transportation facility provided to the employees. Therefore, Applicant has stated that, it is not engaged in the business of bus transportation and accordingly, the said facility provided by the Applicant to its employees does not amount to supply under the GST regulations.

5.4.2 In terms of Section 7 of the Central Goods and Services Tax Act, 2017 (**CGST Act**), for a transaction to qualify as supply, it should essentially be made **in the course or furtherance of business**. We find that, the applicant is engaged in developing, manufacturing and marketing of pharmaceutical products. The provision of bus transportation facility to the employees is a welfare, security and safety measure and is not at all connected to the functioning of their business. Further, the said activity is not a factor which will take the applicant's business activity forward.

5.4.3 We also find that the applicant is not supplying any bus transportation service to its employees in the instant case. Further, Bus transportation service is also not the output service of the applicant since they are not in the business of providing transport service. Rather, this bus transportation facility is provided to employees by the third party vendors and not by the applicant. Therefore, in the subject case, the applicant is not providing bus transportation facility to its employees, in fact the applicant is a receiver of such services.

5.4.4 We observe that the GST is discharged on the gross value of bills raised on the applicant by the third party vendors. We also observe that the partial amounts recovered by the applicant from its employees in respect of use of such bus transportation facility are a part of the amount paid to the third party vendors which has already suffered GST.

5.4.5 In the case of an application filed by M/s Tata Motors Limited, a similar question was raised as to whether GST was applicable on nominal amounts recovered by Applicants from employees for usage of employee bus transportation facility. This authority vide Order No. GST-ARA-23/2019-20/B-46 dated 25 August, 2020 has held that, GST is not applicable on such nominal amounts recovered from its employees.

5.4.6 Further reference is also made to the decision of the Uttar Pradesh Advance Ruling Authority in respect of the advance ruling application filed by M/s North Shore Technologies Private Limited. In the said matter a similar question was raised by the applicant as to whether the subsidized shared transport facility provided to employees in terms of employment contract through third party vendors, would be construed as "Supply of service" by the company to its employees. The said authority has observed that, the applicant was in the business of software development and staff augmentation services and not in the business of providing transport service. The facility provided to their employees was not integrally connected to the functioning of their business and therefore, providing transport facility to its employees cannot said to be in furtherance of business.

5.4.7 We also refer to a recent ruling passed by this authority in an advance ruling application filed by M/s. Integrated Decisions And Systems India Pvt Ltd,[GST-ARA-116/2019-20 dated 16.12.2021] wherein the facts in respect of provision of transport facility are similar to the facts in the subject case and it has been held that, part recovery of amounts from employees in respect of the transport facility provided to them would not be treated as 'supply' as per provisions of GST Laws and therefore GST would not be leviable on the same.

5.4.8 Accordingly, we are of view that for the applicant, arranging bus transportation facility for their employees is definitely not an activity which is incidental or ancillary to the activity of developing, manufacturing and marketing of pharmaceutical products, nor can it be called an activity done in the course of or in furtherance of developing, manufacturing and marketing of pharmaceutical products as it is not integrally connected to the business in such a way that without this, the business will not function. Hence, it is held that, GST would not be payable on the recoveries made from the employees towards providing bus transportation facility

5.5 Question No. 3: Whether the GST would be payable on the notice pay recoveries made from the employees on account of not serving the full notice period?

5.5.1 We have considered the applicant's submissions, the relevant facts and interpretation of GST Laws made by the applicant with respect to the question whether the applicant is liable to pay GST on recovery of Notice Pay from the employees who are leaving the Applicant company without completing the notice period as specified in the Employment Letter entered into, by both, the Applicant as well as the concerned employees.

5.5.2 The applicant has submitted that, at the time of appointing any employee, they enter into an 'Employment Agreement' wherein it is mentioned that, either parties shall serve a certain time period's mandatory notice to terminate the said Agreement. As per the relevant clauses of the Employment Agreement (submitted on a sample basis), the Employee shall have a right to resign by serving prior written notice of 30/90 days applicable to the Employee's grade, as company policy or **upon payment of money compensation in lieu of notice period** as mentioned in the company policy as per Employee's Grade at the time of separation. Thus, one to three months' notice is mandatory for all employees/employer. In case, if any employee doesn't serve the notice period after tendering the resignation, then as per contract (Appointment Letter) condition, company is entitled to recover the notice pay from the agreed portion of salary to compensate the loss to company. Thus, Employees who resign from their job are expected to serve notice period as mentioned in the appointment letter. If the employee does not serve such notice period, the salary of the unserved portion of notice period is retained by the employer, which is called as "Notice Pay Recovery".

5.5.3 Similar issue was before the Madhya Pradesh Advance Ruling Authority in an application filed by M/s Bharat Oman Refineries Limited, wherein the applicant had queried whether GST was applicable on payment of notice pay by an employee to the applicant-employer in lieu of notice period under clause 5(e) of Schedule II of GST Act. On this point the Ld. AAR found that the applicant employer was tolerating the act by relieving the employee without following the notice period clause upon payment of an amount and therefore the situation was covered under clause 5(e) of the Schedule II of the CGST Act i.e. (e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; which is liable to GST.

5.5.4 M/s Bharat Oman Refineries Limited, preferred an appeal before the Madhya Pradesh Appellate Authority for Advance Ruling (MPAAAR) against the order of the AAR, Madhya Pradesh. The

MPAAAR ***[Advance Ruling No. MP/AAAR/07/2021 dated November 8, 2021]*** observed as under:-

3. We find that 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 a guidance note dated 20.6.2012. Para 2.9.3 of the said guidance note reads as under:-

> *2.9 Provision of service by an employer is outside the ambit of service*
>
> *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 the employment. Hence, amounts so paid would 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.*

4. The said query raised pertains to the opposite situation i.e. where the employer pays the employee for premature termination of service and in this situation it was clarified that premature termination was treatable as amounts paid in relation to services provided by the employer in the course of employment. As regards the present situation where the employee had paid the employer for waiver of notice period, the matter had come up before the Hon'ble Madras High Court in W.P. Nos 35728 to 35734 of 2016 in the case of GE T&D India Ltd Vs Deputy Commr of Central Excise, LTU, Chennai - 2020-VIL-39-MAD-ST. The Hon'ble high court applying the CBEC's clarification observed that "the employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit". The Hon'ble Court further held that 'the definition in clause (e) of Section 66E is not attracted to the scenario before me as, in my considered view, 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. 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."

5. In the GST era also services provided by an employee to the employer is treated as neither supply of goods or services under Schedule III of the CGST Act. Schedule III pertains to activities or transactions which shall be treated neither as a supply of goods nor a supply of services. Clause 1 reads as under -

> *1. Services by an employee to the employer in the course of or in relation to his employment.*

6. Thus services by an employee to the employer in the course of or in relation to his employment have been placed out of the purview of GST. In present case also the said compensation which accrues to the employer is in relation to the services provided by the employee. Such compensation is related to the services not provided by him to the employer during the course of employment. In other words, the employer is being compensated for the employee's sudden exit. Merely because the employer is being compensated does not mean that any services have been provided by him or that he has 'tolerated' any act of the employee for premature exit.

7. We are of the considered view that the ratio the decision of the Hon'ble Madras High Court in GE T&D India Ltd Vs Deputy Commr of Central Excise, LTU, Chennai quoted above, is squarely applicable to the present case. Though the said judgment pertains to the Service Tax period we do not find any change in the position of law in this regard after introduction of GST. In view of the above finding, we hold that the Ld. AAR had erred in concluding that such activity was leviable to GST.

5.5.5 The relevant provisions of law are reproduced and analysed below.

Section 7 of CGST ACT, 2017 : 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) Omitted vide Notification No. 02/2019-CT dated 29.01.19

1(A) 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." (amended retrospective effect from 1.7.2017)

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

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

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

3. xxxxxxx

***SCHEDULE III of Section 7 –** Activities or transactions which shall be treated as neither supply of goods nor supply of services.*

1. Services by an employee to the employer in the course of or in relation to his employment.

2. xxxx

From the above, it is clear that the levy under **CGST Act, 2017** is on **"supply"** of goods or services or both. The word "such as" used preceding the words sale, transfer, barter, exchange, etc. indicates that the forms of supply shall be those which are enumerated therein or of similar character but not of other dissimilar forms of supply. The expression "such as" indicates the character of the transactions.

Furthermore, the CGST (Amendment) Act, 2018 introduced sub section (1A) to Section 7 of the CGST Act, 2017 with retrospective effect 01-07-2017 in place of Section 7 (1)(d), which seeks to levy tax on certain declared "supply" of goods or services referred to in Schedule II of

the CGST Act, 2017. As per Section 7 (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 wherein it has been prescribed that, a particular activity shall be treated either as Supply of goods or as Supply of services. However, Schedule II comes into play only if an activity is qualifies as supply under Sec 7 of CGST Act.

Besides above, Services by an employee to the employer in the course of or in relation to his employment are activities or transactions which shall be treated as neither supply of goods nor supply of services under **Schedule III of Section 7 of CGST Act 2017**.

2.4.2. **Clause 5(e) of schedule (II) to Section 7 of CGST Act is reproduced below.**

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

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

Whether any activity or transaction in question can be said to be covered under clause 5(e) of Schedule II to section 7 which seeks to declare agreeing to the obligation to refrain from an act or tolerate an act or a situation or to do an act, as declared supply of services.

The said clause 5(e) has the following ingredients: –

- one party is under obligation, as agreed, to refrain from an act;
- one party is under obligation, as agreed, to tolerate an act or situation;
- one party is under obligation, as agreed, to do an act; all against consideration

The clause 5(e) treats an act of forbearance (refrain) or tolerating an act or situation where one of the parties is under obligation, as agreed upon, to forbear, refrain or tolerate an act or situation, against consideration.

Section 2(31)(b) of CGST Act 2017 defines consideration in relation to supply of goods and services or both and includes the monetary value of any act or forbearance. The word "Service" defined under Section 2(104) of the CGST Act, 2017 means anything other than goods, money and securities. It is pertinent to understand before levy ;

(i) whether the receipt or deduction of salary in lieu of notice period by an employee can be said to be consideration for an act of forbearance and

(ii) whether the act of accepting the resignation without contractual period of notice from an employee can be said to be an act of toleration.

The employee opting to resign by paying amount equivalent to month of salary in lieu of notice, has acted in accordance with the contract and that being the case no question of any forbearance or tolerance does arise. Further, as per the agreement, the resignation by the employee is not subject to any acceptance or approval and employee is free to tender his resignation, make payment of notice period salary to leave. Hence, there is neither any activity nor any passive role played by the employer. It must be noted here, that there is no consideration within the meaning of Sec.2(31)(b) of the CGST Act, 2017 flowing from an act of forbearance in as much as there is no breach of contract, as a question of any consideration for forbearance would arise in case of breach of contract.

5.5.6 So, by taking into account the decisions as well as analysis, made in detail as above, it may be concluded that, recovery of notice pay from dues of employee / payment of notice pay by the employee who could not serve the notice for the period as per contractual agreement / appointment letter does not amount to supply and therefore as per Section 7 (1A) of the CGST Act, 2017, the provisions of Schedule II does not come into play. Thus, also relying on the reasoning and decision given by the MPAAAR, mentioned above and the decision of the Hon'ble Madras High Court in W.P. Nos 35728 to 35734 of 2016 in the case of GE T&D India Ltd Vs Deputy Commr of Central Excise, LTU, Chennai - 2020-VIL-39-MAD-ST, we hold that, the notice pay recovered by the applicant from its employees is not liable to GST.

06. In view of the above discussions, we pass an order as follows:

ORDER

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

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

Question 1: - Whether the GST would be payable on recoveries made from the employees towards providing canteen facility at subsidized rates in the factory and office?

Answer: - **Answered in the negative.**

Question 2: - Whether the GST would be payable on the recoveries made from the employees towards providing bus transportation facility? If yes, whether the Applicant is exempted under Notification No. 12/2017 Central Tax (Rate)?

Answer: - **Answered in the negative.**

Question 3: - Whether the GST would be payable on the notice pay recoveries made from the employees on account of not serving the full notice period?

Answer: - **Answered in the negative.**

PLACE - Mumbai
DATE - 04.01.2021

RAJIV MAGOO
(MEMBER)

T.R. RAMNANI
(MEMBER)

Copy to:-

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

Note:-An Appeal against this advance ruling order shall be made before, The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15th floor, Air India Building, Nariman Point, Mumbai – 400021. Online facility is available on **gst.gov.in** for online appeal application against order passed by Advance Ruling Authority.