

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.41331 of 2017

(Arising out of Order-in-Original No.CHN-SVTAX-001-COM-108/16-17 dated 20.03.2017 passed by the Principal Commissioner of Service Tax-I, Newry Towers, No.2054-I, II Avenue, Anna Nagar, Chennai 600 040)

General Manager (TR)

.... Appellant

Bharat Sanchar Nigam Limited
Chennai Telephones, No.2, Kushkumar Road,
6th Floor, Nungambakkam,
Chennai 600 034.

VERSUS

**The Principal Commissioner of CGST &
Central Excise**

...Respondent

Chennai I Commissionerate
Newry Towers, No. 2054-I,
II Avenue, Anna Nagar,
Chennai -600 040.

WITH

Service Tax Appeal No.42715 of 2018

(Arising out of Order-in-Original No.88/2018 CH.N. (Commr.) dated 21.08.2018 passed by the Principal Commissioner of CGST & Central Excise, Chennai North Commissionerate, No.26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai 600 034)

M/s.Bharat Sanchar Nigam Limited

.... Appellant

Chennai Telephones, No.2, Kushkumar Road,
6th Floor, Nungambakkam,
Chennai 600 034.

VERSUS

**The Principal Commissioner of CGST &
Central Excise**

...Respondent

Chennai North Commissionerate
No.26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai 600 034.

AND

Service Tax Appeal No.40250 of 2019

(Arising out of Order-in-Original No.113/2018 CH.N.GST (Commr.) dated 03.12.2018 passed by the Principal Commissioner of CGST & Central Excise, Chennai North Commissionerate, No.26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai 600 034)

M/s.Bharat Sanchar Nigam Limited

.... Appellant

Chennai Telephones, No.2, Kushkumar Road,
6th Floor, Nungambakkam,
Chennai 600 034.

VERSUS

The Principal Commissioner of CGST & Central Excise
Chennai North Commissionerate
No.26/1, Mahathma Gandhi Road,
Nungambakkam,
Chennai 600 034.

...Respondent

APPEARANCE :

Shri V. Ravindran, Advocate, for the Appellant
Shri. Anoop Singh, Authorized Representative,
Shri Sanjay Kakkar, Authorized Representative for the Respondent

CORAM :

HON’BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON’BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)

FINAL ORDER No. 40410-40412/2025

DATE OF HEARING : 06.12.2024
DATE OF DECISION : 28.03.2025

Per: AJAYAN T.V.,

The issue involved in all these appeals being similar, viz., whether the appellant is performing any declared services under Section 66E(e), they were heard together and are disposed of by this common order.

2. The details of these three appeals are tabulated below:

Service Tax Appeal No.	Period of dispute	Impugned order	SCN No Date	Service Tax demand details	Amount of Service Tax demanded + interest	Penalty Rs.
41331/2017	2013-14 & 2014-15	108/16-17 dt. 20.03.17	63 / ST.1 Adj dt. 29.7.16	On Liquidated damages	78,96,826	87,94,633 u/r.S.78 10,000 u/r.S.77
				Legal fees (RCM)	6,37,826 (paid)	
				Import Services	2,59,581 (Paid)	
Total					87,94,633	88,04,633
42715/2018	01.07.12 to 30.06.17	88/2018 dt. 21.08.18	14/2018 dt. 28.03.18 & corrigendu	Late Payment Charges	1,83,17,515	1,83,17,515 5 u/r S.78

			m dt. 10.4.18	(LPC)		
40250 / 2019	01.10.12 to 30.06.17	113/2018 dt. 05.12.18	34/2018 dt. 30.08.18	On Liquidate d damages	3,53,62,808	3,53,62,80 8 u/r S.78

3. Brief facts are that M/s Bharat Sanchar Nigam Limited, Chennai Telephones, the appellant in all these appeals, are an Internet & Telecommunication Service Provider and registered under Service Tax under registration No.AABCB5576GST023. Special Audit was conducted in terms of Section 72A read with Section 83 of Finance Act by the Special Auditor appointed by the Commissioner of Service Tax, along with the officers of Internal Audit of Service Tax Commissionerate. After verification of the appellant's books of account, the Department was of the view that the liquidated damages are collected from the Vendors/Contractors to whom contracts for supply/work was awarded by the appellant, for refraining from an act, tolerate an act or situation, and that such liquidated damages are liable for service tax under Section 66 E (e) of Finance Act, 1994 and that these charges are also includible in the gross amount received for the purpose of deriving taxable value and are therefore recoverable under proviso to Section 73 (1) of Finance Act 1994. Thus, the SCN 63 / ST.1 Adj dated 29.7.16 was issued and after due process of law was adjudicated vide the impugned OIO No.108/16-17 dated 20.03.2017 as aforementioned. In the interregnum, based on intelligence that the appellant has not discharged service tax on late Fee/late payment charges (LPC), officers of DGCEI initiated summons proceedings and issued a

summons in November 2015. Thereafter, pursuant to a summon issued in 2017, statements were recorded from employees of the appellant and the appellant vide its letter dated 09.02.2018 provided details of the LPC. The officers of DGCEI were of the view that since the appellant did not resort to suspension/termination of the defaulting member's services if they paid the LPC, the appellant has tolerated the act of wilful default and thus LPC received towards such act of tolerance or forbearance are liable to service tax as 'liquidated damages' being paid as consideration for the said non-performance/delayed performance which appear to fall under clause (e) of Section 66E (e) of Finance Act, 1994 as a declared service as, "agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act' which is leviable to service tax. Thus, the demand of service tax was made on the appellant vide SCN No.14/2018 dt. 28.03.18 & corrigendum dt. 10.4.18, invoking the extended period of limitation, which came to be adjudicated after due process of law vide the impugned 88/2018 dt. 21.08.18 aforementioned. Premised on DGGI investigation, SCN No.34/2018 dated 30.08.2018 was issued to the appellant, invoking the extended period of limitation, and stating that the liquidated damages are collected by the appellant from the Vendors/Contractors to whom contracts for supply/work was awarded, for tolerating the act or situation of delay in performance of the supply of equipment and service and that such liquidated damages are liable for service

tax under Section 66 E (e) of Finance Act, 1994. After due process, this SCN was adjudicated vide OIO No.113/2018 dated 03.12.2018 as aforementioned. Aggrieved by the impugned orders in original, the appellant has preferred these appeals, details of which were tabulated above and are thus before this Tribunal.

4. Shri. V Ravindran, Learned Counsel appearing for the appellant submits that the appellant is one of the largest Public Sector Undertaking functioning under the Ministry of Telecommunications. The Ld. Counsel submits that Liquidated damages are amounts received for making good the damages, losses or injuries arising due to the breach of terms and conditions of the contract committed by the contractors/sub-contractors of BSNL in the course of performing their obligations under the contract towards supply of goods or rendering of service. The declared services under Section 66E(e) requires agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act, which the appellant is not doing and on the contrary the breach by the contractor gives rise to a cause of action in terms of the contract consequent to which the liquidated damages are recovered from the defaulting party and the same is certainly not for any service on the part of the appellant.

5. The Ld. Counsel further submits that LPC is collected by the appellant due to the default in making the payments of bills

issued for taxable service within the due date by the subscribers and not for the taxable service provided or agreed to be provided. That such non payment within the stipulated time is a default and amounts due thereunder fit into "actionable claim" which is exempt from the purview of service tax as it is covered by exclusion clause a(iii) in terms of Section 65B(44) of the Finance act, 1994. That the gross amount charged by the service provider needs to be construed as those relating to provision of service and any collection of amounts consequent to default in payment by the service provider does not partake the nature of taxable service. The Ld counsel submits that CBEC Circular No.96/07/2007-ST dated 23.008.2007 specifically clarified that amount collected for delayed payment of telephone bills is not to be considered as charge for provision of telecom service and therefore does not form part of the value of taxable service under Section 67 of the Finance Act read with service tax (Determination of value) Rules 2006.

6. The Ld Counsel also submitted that the appellant being a Public Sector Undertaking, the averment of suppression of facts with intent to evade tax is non sustainable and thus the invoking of extended period is also unsustainable. Since the notice proceedings leading to the impugned orders were based merely on the appellant's own records, the allegation of suppression of facts cannot sustain. It is submitted that there should be something positive to make allegation of suppression of facts with intent to evade payment of service Tax. The Ld. Counsel

also submits that in the case of the proceedings leading to the second and third appeals listed above, the invocation of the longer limitation cannot be justified, as the Respondent department was aware of the facts in these subsequent proceedings and the ratio of Apex Court's Judgement in Nizam Sugars Ltd. would apply. Lastly, the Learned Counsel submits that the issue involved in this case, that is, exigibility of liquidated damages to service tax is no more res integra and the same has been decided in favour of the assessee in a number of Tribunal decisions, a few of which has been filed as relied upon.

7. Shri. Anoop Singh and Shri Sanjay Kakkar, Learned Authorised Representatives for the respondents reiterate the rationale advanced by the adjudicating authority in the respective orders in Original. Shri. Anoop Singh also submitted a Circular No.178/10-HGST/2022-GST dated 05th September 2022 issued by Excise and Taxation Commissioner-cum-Commissioner of State Tax, Haryana to contend that liquidated damages paid for breach of contract and late payment charges collected by any service provider for late payment of bills have been cited therein as examples of transactions answering the description "agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" and thus it can be seen that liquidated damages is distinct and separate from late payment charges. It is the submission of the Ld. AR that therefore the demand confirmed in the OIO 88/2018 dated 21.08.18 in so far as LPC is concerned, being different from liquidated damages, the

decisions of the Tribunal on the issue of liquidated damages have no application. Ld. AR submits that LPC is nothing but a consideration for refraining from disconnecting or terminating the service and the demand has been rightly confirmed by the adjudicating authority. Shri. Sanjay Kakkar, Ld AR draws attention to the finding of the adjudicating authority in para 16.1 of the OIO No.113/2018 dated 03.12.2018 wherein it is stated that the agreement for supply of goods and service contain necessary clause for enforcing payment of liquidated damages and contends that this would reveal the true nature of liquidated damages being a consideration for tolerating the breach of contract by the contractors, in that the non-payment of such damages has been contractually made enforceable.

8. We have heard both sides in these matters. We have also gone through the records of all these appeals and perused the citations and circular submitted as relied upon.

9. At the outset, we cannot help notice that in the Appeal No.42715/2018 in which alone the demand on LPC arises, the Adjudicating Authority vide the impugned OIO No.88/2018 dated 21.08.2018 has rendered dichotomous findings as elucidated infra. The adjudicating authority, after framing the issue as "Whether the late payment charges are needed to be included in the assessable value for the purpose of payment of service tax", has thereafter noted the appellant's submission placing reliance on CBEC Circular No.96/07/2007-ST dated

23.08.2007 which specifically clarified that amount collected for delayed payment of telephone bills is not to be considered as charge for provision of telecom service, and proceeded to examine whether the circular is applicable to the period after 01.07.2012. The adjudicating authority goes on to reproduce the relevant provisions of the Finance Act as amended, defining taxable service, charging section 66 of the Finance Act *ibid*, Valuation of taxable services for charging service tax as provided in Section 67 of the Finance Act *ibid*, Definition of Service as provided in Section 65B(44) for the period from 01.07.2012, charging section on and after Finance Act 2012 as provided in Section 66B of the Finance Act *ibid* and once again noticing Section 67 of the Finance Act, proceeds to render a finding in para 4.2.3 of the impugned OIO, *inter-alia*, as under:

*" I am of the considered opinion, upon CBEC's clarification under Circular No.96/07/2007-ST dated 23.8.2007 **that an amount collected for delayed payment of a telephone bill is not to be treated as consideration charged for providing of telecom service and, therefore, does not form part of the value of taxable service under Section 67 read with Service Tax (Determination of Value) Rules, 2006, holds good to the period after 01.07.2012. In the present case the notice itself admits that LPC amounts were charged by BSNLCT from their subscribers on the outstanding billed amount, if not paid within the due date i.e. 21 days from the bill date. In view of the legal position and factual position, I am of the view***

that late payment charges need not be included in the taxable value of telecommunication service provided."

(emphasis in italics boldened)

10. Thereafter, citing the judgement of the Hon'ble Apex Court in UOI v. Intercontinental Consultants and Technocrats Pvt Ltd, the adjudicating authority goes on to hold that " *The above case law strengthens my opinion that telephone charges are the consideration for telecommunication service and **delayed payment charges being penal charges collected for the default in payment of telephone charges, it need not be included in the assessable value.**"* (emphasis supplied).

11. However, the adjudicating authority then states that he is proceeding to examine whether the late payment charges otherwise constitute a service namely a declared service under Section 66E(e) of Finance Act, 1994. The adjudicating authority goes on to hold that by not disconnecting the telephone lines, the appellant tolerates the customer's act of non-payment/delayed payment of telephone bills and that this act is squarely covered by the declared service under Section 66E(e) of Finance Act 1994 and the appellant is liable to pay service tax on the amount collected as late payment charges on the delayed payment of telephone charges. In para 4.3.9, while holding that the appellant's contention that it is to be treated as interest and not includable in the assessable value is not acceptable, the adjudicating authority once again reiterates that LPC is collected

as penal charges on delayed payment of telephone bills. The adjudicating authority then goes on to confirm the demand on LPC as declared service under Section 66E(e) after allowing cum tax benefit along with applicable interest and imposing penalty as indicated in the tabulation above. We are unable to comprehend as to what prompted the adjudicating authority, after rendering a categorical finding as to the character and nature of LPC as penal charges on delayed payment of telephone bill, and finding that it ought not to be treated as consideration and does not form part of the value of taxable service under Section 67 of the Finance Act, a finding in consonance with the CBEC Circular as well as in sync with the service that is actually being rendered by the appellant, then to turn around and state the very same amounts for the very same transactions are otherwise leviable to service tax as consideration for declared service, as if completely oblivious to the already determined character of LPC as a penal charge for the very same transactions of the appellant!. This idiomatic “running with the hare and hunting with the hound” undertaken by the adjudicating authority leaves us nonplussed. Such contradictory findings render the impugned order suspect, and reveals a non-application of mind. We say no more.

12. Be that as it may, it is seen from the corrigendum to the SCN that Sl.No.5 of the terms and conditions in the Customer Application Form is as under:

"5. PENAL CHARGES FOR DELAYED PAYMENT:

5.1. The payment against monthly bills beyond the stipulated date shall entail an interest charges @ 2% p.m or such other rate/fixed amount as may be decided by BSNL from time to time, over the payment from the date it became due. This however is without prejudice to the right of BSNL to suspend the services partially or fully due to non-payment."

Apart from the said condition, Sl.No.6 deals with different scenarios wherein BSNL has the right to suspend and disconnect the services to the customer.

13. From a plain reading of the aforesaid condition No.5, it is clearly discernible that the appellant has in fact reserved its rights to suspend the services partially or fully due to non-payment, without prejudice to the payment of penal charges. This only means that even if the subscriber makes the payment of penal charges, still the appellant has the right to suspend the services partially or fully. In other words, the right of the appellant to suspend the services, either partially or fully, does not in any way depend on whether or not the penal charges are paid by the customer. Even if the customer pays the penal charges, the appellant is well within its right to suspend the services, partially or fully. Therefore, the said clause, in our view, cannot be read as a promise or assurance to refrain from disconnecting the services if the penal charges are made. In fact, there is no express or implied agreement, to abstain from

disconnection against payment of LPC in order to treat LPC as a consideration for abstaining from such act of disconnection so as to bring it within the ambit of Section 66E(e) as a declared service. That the appellant also has reserved the right to suspend or disconnect the services fully or partially in the circumstances narrated in condition 6, also goes to indicate that such payment of LPC does not guarantee to a customer a non-disconnection if the appellant finds other reasonable reasons to do so. We are therefore of the view that the finding of the adjudicating authority that the appellant is rendering a declared service under Section 66E(e) of the Finance Act, 1994 and that the LPC so collected is exigible to service tax, is wholly unsustainable and is liable to be set aside.

14. Even otherwise, we notice further that in the SCN itself the proposal while demanding service tax on the LPC is to treat it as “Liquidated damages”. This is seen from the relevant paragraphs of the corrigendum to the SCN reproduced below: -

S.No.	Para No.	Appearing in SCN as	To be added/substituted and read as
(1)	(2)	(3)	(4)
1	1	-	-
-	-	-	-
-	-	-	-
42	8(I)	-	----- ----- ----- 8(I)(iii) Thus it is crystal clear that there is an agreement, in the form of Customer Application Form (CAF), between Telecom Company and their Customers, binding them into contractual obligations and as per the agreed terms and conditions. The said customers have to mandatorily make payment towards the receipt of the telecommunication services within the due date

		prescribed on the invoice issued to him in this regard. Thus the customers had the obligation to follow and comply with the terms and conditions of the said agreement between him and the telecom company. Further the contractual obligation mandates/authorizes the telecom company, as per the agreement [CAF] to terminate the service if the customers commit breach of the terms and conditions contained therein. However, in cases where in the Customer willfully defaulted in terms of their monthly bill payment, the telecom company is authorized to charge an extra amount which they labeled as 'Surcharge / Late Payment Charges' which they collected at the applicable predetermined rates from time to time in terms of the contractual enablement in the agreement [CAF] unconditionally agreed upon by the Customers. Thus, if any Customer defaulted in making the said payment by the prescribed due date, late payment charges is levied on him by the telecom company at applicable rates for the breach of the terms and conditions governing the payment of the amounts towards the receipt of the telecommunication services. The Customers were fully aware that in case of default they would be charged an extra amount by way of 'Surcharge/Late Payment Charges' for the said default. Further, it appears that the telecom companies did not resort to Suspension /Termination of the defaulting member's services, if they paid the 'Surcharge/Late Payment Charges' imposed upon them. Therefore, in all such cases, it appears that the telecom companies tolerated the act of willful default of such clients and received compensation by way of 'Surcharge/Late Payment Charges' towards their act of tolerance or forbearance vis-à-vis the said default in payment. Therefore the 'late payment charges' appear to be 'liquidated damages' which appear to be actually pre-quantified damages pursuant to contractual obligation in respect of the parties to the contract. Therefore, in wake of above facts and circumstances, the quantum of damages, though named as Surcharge/Late Payment Charges, has been pre-quantified vide the contractual undertaking entered by the telecom company with its customer, the nature of the same appears to be nothing else but 'liquidated damages which are collected by them specifically for tolerance of the act of default in paying the monthly bill amounts before the prescribed due dates. 8 (1) (iv) 'Service' under Section 658 (44) of the Finance Act, 1994, includes 'Declared services as specified in Section 66E of the Finance Act, 1994 As per Section 65B(44) of the Finance Act, 1994 "service" means any activity carried out by a
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		person for another for consideration, and includes a declared service. The definition of Service as laid down under above mentioned Sub-clause 44 of Section 658 of the erstwhile Finance Act, 1994 (as it existed up to 30.06.2017) infers the term 'service' with a very wide amplitude to mean <u>'any activity carried out by a person for another for consideration, and includes a declared service,'</u> subject to certain exclusions like transactions in goods or immoveable property or transactions in money and actionable claims. Para 2 1.1 of the CBEC's Taxation of Services Education Guide states that though the term 'activity' has not been defined under the provisions of the Finance Act, 1994, as per the CBEC Education Guide so issued by the Tax Research Unit, Central Board of Excise and Customs, Ministry of Finance, an 'activity' could be both active as well as passive thereby meaning that it would not only include "acts or deeds done" but would also include "forbearance to act". Therefore there are "services" liable to Service Tax, which do not contain state of being active. For example, as per Section 66E (e) of the Finance Act, 1994, 'agreeing to the obligation to refrain from an act or to tolerate an act or a situation or to do an act', is 'declared service' and liable to Service Tax, though there is no state of being active. Thus it can be seen that the term "activity" has very wide connotation. It could be active or passive. Therefore, it appears that the monetary value recovered by the telecom companies for tolerating the said defaults of their customers have automatically acquired the status and nature of 'consideration' to such passive activity of tolerance by the telecom companies 8 (I) (v) An analysis of the above provisions reveal that breach of contract is a legal concept in which there is a binding agreement respected by one or more of the parties to the contract is breached by non-performance or interference with the other party's performance Liquidated damages are damages whose amount the parties designate during the formation of a contract, for the injured party to collect as compensation upon a specific breach of the contract. The clause will be enforceable if it involves a genuine attempt to quantify a loss in advance. The purpose of payment of Liquidated damages is to make good the damages, losses or injuries arising from the "obligation" on the part of any of the parties to tolerate an act or a situation. When the terms of a contract are broken and if a sum is named in the contract as the amount to be paid in case of breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive
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		compensation not exceeding the amount so named. 8 (I) (vi) Whereas, in addition to certain other activities, an activity of 'agreeing to the obligation to refrain from an act or to tolerate an act or a situation', have also been declared to be a 'service' in terms of clause (e) Section 66E of the Finance Act, 1994 (as it existed up to 30.06.2017), the damages received or paid for breach of any obligation as specified in the Contract would fall within the ambit of the above clause This is because these amounts are paid to the injured party for tolerating the situation/ act of contractual breach. Further in order for this clause to be invoked there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act or a situation etc. The Contract entered into by both the parties provides for an eventuality which is uncertain and also the corresponding consequence or remedy if that eventuality occurs. Accordingly, suffering a damage or incurring a loss tantamount to making a supply of taxable service falling within the ambit of the clause (e) of Section 66E which could possibly be invoked only when there is an 'obligation' or 'consensus' amongst the parties 'to tolerate an act or a situation'. Section 66B of the Finance Act, 1994 which is the charging section provides for levy of service tax on the value of all services provided or agreed to be provided in the taxable territory, except those service activities which are specified in the negative list. A joint and collective reading of the above mentioned two critical provisions of the Finance Act, 1994 makes it amply clear that an activity or a service (including a declared service) provided with a consideration will have service tax implications. 8 (I) (vii) Under Rule 6 of the Service Tax (Valuation Rules), only "accidental damages not relatable to the provisions of service" are excluded, thereby meaning that the legislature does not intend to tax compensatory amounts/damages where there is no service involved. Further, legislative intent is not to exempt compensatory damages from the levy of service tax and this can be seen that as per the amendment to the Mega Exemption Notification list vide Notification No. 22/2016-ST dated 13.04.2015, only damages payable to the government are exempted from payment of service tax and damages payable to other non-government entities are not exempt from payment of service tax. The said view strengthens the contention that LPC paid to telecom companies are liable to service tax as liquidated damages' being paid as consideration for the said non-performance
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			/delayed performance which appear to fall under clause (e) of Section 66E (e) of Finance Act, 1994 as a declared service as, "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" which is leviable to service tax. 8 (l) (viii) Further, either in 'Negative List' of services listed in Section 66D of Chapter V of the Finance Act, 1994, or in Mega exemption issued vide Notification No.25/2012-Service Tax dated 20th June, 2012 effective from 01/07/2012 as amended, there is no express provision for exemption of the 'Surcharge/Late Payment Charges' from the payment of Service Tax service. 8 (l) (ix) Thus it is a confirmed fact that BSNL and their Clients consented to follow the voluntary and mandatory terms and conditions contained in the Individual Customer Application Form for subscribing to the Mobile/Landline Telephone Services. From the concurrent reading and interpretation of the contents of Paras 8 [I] herein above, it appears that there is an agreement between BSNL and their customers have duly contracted by both of them, binding them into a contractual obligation on either of them. As per the agreed terms and conditions, customer has the obligation to settle/pay all the pending amounts dues, on account of the mobile/landline telephone services received by him from BSNL within the prescribed due date and on the other hand, the contractual obligation mandates/authorizes BSNL to suspend/deactivate the services to the customers for non-payment of the above stated dues and such other amounts as may be due from them from time to time without giving any further notice or intimation. However in lieu of suspension/deactivation of the services to the customer in case of default in payment of amounts due by their customers, BSNL were authorized to charge Surcharge/Late Payment Charges over and above the bill amount from their customers. Further, the customers of BSNL were fully aware that in case of default they would be Surcharge/Late Payment Charges which BSNL had inter-changeably termed it as 'Surcharge /Surcharge on Late Payment". It is a matter of fact that all such customers of BSNL who could not make payments on due dates had wilfully defaulted against the payments due and were aware of the consequences that Surcharge / Late Payment Charges would be charged by BSNL.
43	8(m)	-	-
44	8(n)	-	-
45	8(o)	-	-

46	9.1	-	-
47	10	-	-
48	10(i)	-	-
49	10(ii)	-	-
50	10(iii)	telecommunication services	'service' as defined under Section 65B (44) which includes a declared service
51	11	telecommunication services	'service' as defined under Section 65B (44) which includes a declared service
52	12	-	-
53	13	-	-
54	14	telecommunication services as defined under Section 65B (51) of the Finance Act, 1994	'service' as defined under Section 65B (44) which includes a declared service under Finance Act, 1994.
55	14(a)	telecommunication services	'service' as defined under Section 65B (44) which includes a declared service
56	14(b)	-	-
57	14(c)	-	-
58	14(d)	-	-
59	14(e)	-	-
60	14(f)	-	-
61	15	-	-
62	15(a)	the LPC amount collected should not form part of the value of taxable	the LPC amount collected should not should not be classified as declared service as defined in Section 66 E (e) read with Section 65B (44) of the Finance Act, 1994 for payment of Service Tax as discussed in para 8 above, for the period from 01.07.2012 to 30.6.2017.

(Emphasis supplied)

15. Thus, the proposal in the notice asking the appellant to show cause, itself was, why the LPC amount collected should not be classified as declared service as defined in Section 66E(e) read with Section 65 B (44) of the Finance Act, 1944 for payment of Service Tax **as discussed in para 8 above**, for the period 01.07.2012 to 30.06.2017; the said para 8 clearly stating that the LPC paid to telecom companies are liable to service tax as 'liquidated damages'. This proposal in the show cause notice itself to categorise the LPC as liquidated damages, puts paid to the Ld Authorised Representative's contention that LPC is to be seen different from liquidated charges, relying on the circular of

the Commissioner of State Tax, issued under the GST regime. While the Ld. AR can advance contentions to justify or substantiate the findings, Ld. AR is precluded from contending or urging anything contrary to what has been proposed in the SCN or to put forth a new case that was not made in the SCN. Further, the circular appears to be only a reflection of the understanding of the said authority and such circulars, that are issued contrary to judicial decisions as reproduced infra which are binding precedents, are not valid. Apex Court decision in ***Assistant Commissioner of Income Tax (Exemptions) v. Ahmedabad Urban Development , 2022 SCC OnLine SC 1461 = (2022) 144 taxmann.com 78*** refers. Likewise, the reliance placed by Ld AR Sanjay Kakkar on para 16.1 of the OIO 113/2018 dated 03.12.2018 is also not of any moment. Even if a clause pertaining to enforcement of liquidated damages exists, that in itself does not validate the character of the liquidated damages as consideration for refraining from doing an act. In any event, save for such an averment, the adjudicating authority too does not rely on any agreement or at least reproduce such clause, if any, of the agreement, in the impugned OIO. The submission that the matter be remanded for the adjudicating authority to examine this aspect afresh doesn't have any merit as it would tantamount to protracting the litigation for no fault of the appellant, more so, when the very issue of taxability of liquidated damages have been decided in a number of Tribunal decisions as further elaborated infra.

16. The issues in these appeals therefore boil down to whether liquidated damages received by the appellant would come within the ambit of the declared services stipulated under Section 66E(e) of the Finance Act, 1994 as amended and consequently, whether the demand of service tax along with interest and penalties imposed under the impugned orders in original are tenable in law.

17. We find that we do not have to reinvent the wheel as the said issue is no more res-integra in the light of a host of judicial pronouncements. It is seen that in the case of ***Northern Coalfields Ltd v. Commr of CGST, CE & Cus, Jabalpur, 2023 (71) GSTL 63 (Tri-Del): (2023) 3 Centax 211 (Tri-Del)***, the department's proposal to levy service tax on liquidated damages as declared service under Section 66E(e) was examined and negated. The relevant portions are as under:

"16. Section 65B(44) defines service to mean any activity carried out by a person for another for consideration and includes a declared service. One of the declared services contemplated under Section 66E is a service contemplated under clause (e) which service is agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. There has, therefore, to be a flow of consideration from one person to another when one person agrees to the obligation to refrain from an act, or to tolerate an act, or a situation, or to do an act. In other words, the agreement should not only specify the activity to be carried out by a person for another person but should specify the:

*(a) consideration for agreeing to the obligation to refrain from an act;
or*

(b) consideration for agreeing to tolerate an act or a situation; or

(c) consideration to do an act.

17. *Thus, a service conceived in an agreement where one person, for a consideration, agrees to an obligation to refrain from an act, would be a 'declared service' under Section 66E(e) read with Section 65B(44) and would be taxable under Section 68 at the rate specified in Section 66B. Likewise, there can be services conceived in agreements in relation to the other two activities referred to in Section 66E(e).*

18. *In South Eastern Coalfields, the Tribunal examined at length the provisions of Section 66E(e) of the Finance Act and made the following observations:*

"27. It is trite that an agreement has to be read as a whole so as to gather the intention of the parties. The intention of the appellant and the parties was for supply of coal; for supply of goods; and for availing various types of services. The consideration contemplated under the agreements was for such supply of coal, materials or for availing various types of services. The intention of the parties certainly was not for flouting the terms of the agreement so that the penal clauses get attracted. The penal clauses are in the nature of providing a safeguard to the commercial interest of the appellant and it cannot, by any stretch of imagination, be said that recovering any sum by invoking the penalty clauses is the reason behind the execution of the contract for an agreed consideration. It is not the intention of the appellant to impose any penalty upon the other party nor is it the intention of the other party to get penalized.

28. It also needs to be noted that Section 65B(44) defines "service" to mean any activity carried out by a person for another for consideration. Explanation (a) to Section 67 provides that "consideration" includes any amount that is payable for the taxable services provided or to be provided. The recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se, since neither the appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.

29. The situation would have been different if the party purchasing coal had an option to purchase coal from 'A' or from 'B' and if in such a situation 'A' and 'B' enter into an agreement that 'A' would not supply coal to the appellant provided 'B' paid some amount to it, then in such a case, it can be said that the activity may result in a deemed service contemplated under Section 66E(e).

30. The activities, therefore, that are contemplated under Section 66E(e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.

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32. *In the present case, the agreements do not specify what precise obligation has been cast upon the appellant to refrain from an act or tolerate an act or a situation. It is no doubt true that the contracts may provide for penal clauses for breach of the terms of the contract but, as noted above, there is a marked distinction between 'conditions to a contract' and 'considerations for a contract'.*"

19. *The issue in the present case is covered by the aforesaid decision rendered by the Tribunal and, therefore, it has to be held that service tax could not have been demanded from the appellant.*

20. *In this connection it would also be pertinent to refer to the Circular dated 3-8-2022 issued by the Department of Revenue regarding applicability of goods and service tax on liquidated damages, compensation and penalty arising out of breach of contract in the context of 'agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act'. This Circular emphasizes that there has to be an express or implied agreement to do or abstain from doing something against payment of consideration for a taxable supply to exist and such an act or a situation cannot be imagined or presumed to exist merely because there is a flow of money from one party to another. It also mentions that unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity or tolerating an act, such payment will not constitute 'consideration' and such activities will not constitute 'supply'. The relevant portion of the Circular is reproduced below:*

"Agreement to do or refrain from an act should not be presumed to exist

There has to be an express or implied agreement: oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act, for a taxable supply to exist. An agreement to do an act or abstain from doing an act or to tolerate an act or a situation cannot be imagined or presumed to exist just because there is a flow of money from one party to another. Unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money paid to him, it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or situation. Payments such as liquidated damages for breach of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of salary or payment of amount as per the employment bond for leaving the employment before the minimum agreed period, penalty for cheque dishonour etc. are not a consideration for tolerating an act or situation. They are rather amounts recovered for not tolerating an act or situation and to deter such acts; such amounts are for preventing breach of contract or non- performance and are thus mere "events" in a contract. Further, such amounts do not constitute payment (or consideration) for tolerating an act, because there cannot be any contract : (a) for breach thereof, or (b) for holding more stock than permitted under the mining contract, or (c) for leaving the employment before the agreed minimum period or (d) for doing something leading to the dishonour of a cheque. As has already been stated, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act,

such payments will not constitute 'consideration' and hence such activities will not constitute "supply" within the meaning of the Act."

21. Thus, for all the reasons stated above, it is not possible to sustain the order dated 27-4-2018 passed by the Commissioner. It is accordingly, set aside and the appeal is allowed."
(Emphasis supplied)

18. For the sake of brevity, we refraining from burdening this order by reproducing from the wealth of jurisprudence available in this regard. The decisions in ***Neyveli Lignite Corporation Ltd v CCE & ST, Chennai, 2021 (53) GSTL 401 (Tri-Chennai)***, ***Steel Authority of India Ltd v Commr of GST & Central Excise, Salem, 2021 (55) GSTL 34 (Tri-Chennai)***, ***Rajcomp Info Services Ltd v. Principal Commisssoner of CGST & C.E., Jaipur-I, 2023(73) GSTL 237 (Tri-Del)*** and ***Krishnapatanam Port Co Ltd v CCE & ST, Guntur, 2023 (72) GSTL 239 (Tri-Hyd)*** to cite a few, clearly lay down the ratio that liquidated damages are not exigible to service tax as declared service under Section 66E(e) of the Finance Act, 1994 as amended.

19. We also find it apposite to reproduce the clarification given by the Central Board of Indirect Taxes and Customs, New Delhi vide its Circular, C.B.I. & C. Circular No. 214/1/2023-S.T., dated 28-2-2023 on the subject of "*Leviability of Service Tax on the*

declared service "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" under clause (e) of section 66E of the Finance Act, 1994". The relevant portions are as under:

"2. It may be seen that "Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act" is a Declared Service as per clause (e) of section 66E of the Finance Act, 1994. A service conceived in an agreement where one person agrees to an obligation to refrain from an act or to tolerate an act or to do an act, would be a 'declared service' under section 66E(e) read with section 65B(44) and would be leviable to service tax.

3. The description of the declared service in question, namely, agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is similar in GST. "Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act" has been specifically declared to be a supply of service in para 5(e) of Schedule II of the CGST Act, 2017.

4. As can be seen, the said expression has three limbs : - (i) Agreeing to the obligation to refrain from an act, (ii) Agreeing to the obligation to tolerate an act or a situation, (iii) Agreeing to the obligation to do an act. Service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is nothing but a contractual agreement. A contract to do something or to abstain from doing something cannot be said to have taken place unless there are two parties, one of which expressly or impliedly agrees to do or abstain from doing something and the other agrees to pay consideration to the first party for doing or abstaining from such

an act. Such contractual arrangement must be an independent arrangement in its own right. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.

5. The issue also came up in the CESTAT in Appeal No. ST/50080 of 2019 in the case of M/s. Dy. GM (Finance) Bharat Heavy Electricals Ltd. in which the hon'ble Tribunal relied on the judgment of divisional bench in case of M/s. South Eastern Coal Fields Ltd. v. CCE, Raipur {2021(55) G.S.T.L. 549(Tri. - Del.)}. Board has decided not to file appeal against the CESTAT order ST/A/50879/2022-CU[DB], dated 20-9-2022 in this case and also against Order A/85713/2022, dated 12-8-2022 in case of M/s. Western Coalfields Ltd. Further, Board has decided not to pursue the Civil Appeals filed before the Apex Court in M/s. South Eastern Coalfields Ltd. supra (C.A. No. 2372/2021), M/s. Paradip Port Trust (Dy. No. 24419/2022, dated 8-8-2022), and M/s. Neyveli Lignite Corporation Ltd. (CA No. 0051-0053/2022) [2022 (59) G.S.T.L. J55 (S.C.)] on this ground.

6. In view of above, it is clarified that the activities contemplated under section 66E(e), i.e. when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are the activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity. Field formations are advised that while taxability in each case shall depend on facts of the case, the guidelines discussed above and jurisprudence that has evolved over time, may be followed in determining whether service tax on an activity or transaction

needs to be levied treating it as service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act. Contents of Circular No. 178/10/2022-GST, dated 3rd August, 2022, may also be referred to in this regard.”
(emphasis supplied)

20. We also find substance in the contentions of the appellant that being a public sector undertaking, there cannot be an intent to evade payment of duty attributable to it, especially in the absence of any finding stating a positive act of collusion or wilful misstatement, or suppression of facts, with intent to evade payment of duty that has been done by the appellant. Reliance placed in this regard, on the decision in ***Collector of Central Excise v Chemphar Drugs & Linments, 1989 (40) ELT 276 (SC)***, is appropriate. We also find that the chronologically later two show cause notices could not have invoked the extended period of limitation and visited the appellant with equivalent penalty, because when the first show cause notice was issued after conducting a detailed special audit of the appellant’s books of account, all relevant facts have become known to the authorities. Therefore, while issuing the second and third show cause notices, same/similar facts could not be taken as suppression of facts as these facts were already in the knowledge of the authorities. The decision in ***Nizam Sugar Factory v CCE, AP, 2006 (197) ELT 465 (SC)*** applies in this regard. Thus, in these matters we find that invoking the

extended period of limitation and imposing equivalent penalty is, even otherwise, decidedly untenable.

21. In view of our discussions above and following the ratio of the decisions cited supra, we hold that the demands of service tax made along with applicable interest and imposition of penalties in the impugned orders in original cannot sustain and the impugned orders in original are liable to be set aside. Ordered accordingly.

The appeals are allowed with consequential relief in law, if any.

(Order pronounced in the open court on 28.03.2025)

Sd/-

(AJAYAN T.V.)
Member (Judicial)

Sd/-

(VASA SESHAGIRI RAO)
Member (Technical)