CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85644 of 2020

(Arising out of Order-in-Original No. 100/MVSC/Pr. COMMR/ME/2019-20 dated 30.01.2020 passed by the Pr. Commissioner of GST & Central Excise, Mumbai East.)

L&T Finance Ltd. **.... Appellants**
Plot No. 177, Brindavan, 2nd Floor,
CST Road, Kalina, Santacruz East
Mumbai – 400 098.

Versus

Principal Commissioner of CGST & Central Excise **.... Respondent**
Mumbai East Commissionerate
9th Floor, Lotus Info Center, J.B. Marg,
Near Parel Station, Mumbai – 400 012.

APPEARANCE:

Shri Prasad Paranjape along with Shri Aditya Joglekar, Advocates for the Appellant
Shri Adeeb Pathan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87599/2024

Date of Hearing: 25.09.2024
Date of Decision: 25.09.2024

Per: M.M. PARTHIBAN

This appeal has been filed by M/s L&T Finance Limited, Mumbai (herein after referred to as 'appellants' for short) assailing the Order-in-Original No. 100/ MVSC/Pr. COMMR/ME/2019-20 dated 30.01.2020 (referred to as 'impugned order') passed by the Pr. Commissioner of GST & Central Excise, Mumbai East.

2.1. Briefly stated, the facts of the case are that the appellants herein are registered with jurisdictional Commissionerate under service tax centralized registration No. AACCA1963BST003 for providing various taxable services including services falling under the category 'Banking and Other Financial Services' under Chapter V of the Finance Act, 1994.

2.2. The appellants herein are a Non-Banking Financial Company (NBFC) duly incorporated under the Companies Act, 1956 and registered with and licensed by the Reserve Bank of India. The appellant *inter alia,* is engaged in the business of providing various types of finance such as corporate financing, infrastructure financing, automobile financing, farm finance, micro loan, housing finance etc. to various customers/ borrowers. The appellants have entered into agreements with their customers/borrowers for providing loans to them and collect various charges from customers/borrowers such as processing fees, documentation fees, logging fees, loans statement issuance charges, pre-payment charges, etc. as per terms and conditions of the loan agreement. The appellants are duly paying service tax on such charges collected from the customers/ borrowers. The loan agreements, *inter-alia*, provide for repayment of the outstanding dues/Equated Monthly Instalments (EMI) through Cheques/Electronic Clearing System (ECS) or any other electronic or clearing mandate on the due dates stipulated in the agreement. In case of delay in payment of dues by the customers/borrowers, the appellants collect 'penal interest' as an additional interest for the number of days of delay in terms of the agreement executed by the customers/ borrowers. This penal interest is calculated at a fixed percentage on the overdue loan amounts, and it normally varies from customer to customer, and generally ranges between 2% to 4% per month. The Department had interpreted that the additional interest/penal interest/default interest are not part of EMI of the loan amount or principal loan amount, and these are extra amounts imposed by the appellants as penal interest, which are accounted in the profit and loss accounts. Hence, the Department treated the same as compensation received by the appellants on account of delay in payment of EMI by the customer/borrower, and these are part of consideration for declared services provided by the appellants i.e., service of agreeing to the obligation to tolerate the act of delay/situation of default by customers/ borrowers. Accordingly show cause proceedings were initiated for recovery of service tax during the disputed period April, 2013 to June, 2017 for an amount of Rs.1,97,29,32,082/- by issue of SCN No. DGGI/MZU/I&IS "C"/12(4)279/ 2018/6095 dated 17.10.2018. The said show cause notice was adjudicated by the learned Principal Commissioner in concluding that the activity of appellants in tolerating the act of 'delay/default; and non-payment and late payment in payment of EMI by the borrowers & customers towards repayment of loan installments' as 'Declared Service' of 'agreeing to tolerate an act or situation' in terms of Section 66(E)(e) of the Finance Act, 1994 read with Section 65B(22), and thereby treating it as 'service' in terms of Section 65B(44) and 'taxable service' under Section 65B(51) of the said Finance Act. Accordingly, the learned Principal Commissioner passed the impugned order for recovery of adjudged demands besides imposition of penalty under section 77, 78 of the Finance Act, 1994. The appellants having been aggrieved by the impugned order passed by the learned Principal Commissioner, GST & Central Excise, Mumbai East Commissionerate, have filed this appeal before the Tribunal.

3.1. Learned Advocate appearing for appellants submits that they were under *bona fide* belief that the penal interest collected by them was in the nature of additional interest on the loans/advances provided by them and the same was exempt from payment of service tax. Further, the appellants were also under *bona fide* belief that charges collected from their customers/borrowers on bouncing of negotiable instruments of payment of EMI, was merely in the nature of penalty or liquidated damages or compensation for the breach of the terms and conditions of the loan agreement, and accordingly, the same was not leviable to service tax.

3.2 Learned Advocate appearing for the appellants also submitted that the appellants and borrowers enter into a contract wherein the appellants agree to grant loan in consideration for payment of interest and return of the principal amount on the due date. Thus, he claimed that the borrower is under an obligation to pay back the loan amount on the due date. In case, the borrower fails to pay the said amount at the time specified, it amounts to breach of the contract. This compensation/damages for breach of contract are not a consideration for any service.

3.3 He further stated that in the present case, there is only one contract between the appellant and the borrower, which is the agreement for loan, for which consideration is payable by the borrower in the form of interest. Upon breach of contract, the liquidated damages become payable not as a consideration for the contract but as a compensation for damage suffered due to breach of the contract. Their agreement is for performance of the contract and not for its breach. Thus, he claimed that the provisions of Section 66E(e) *ibid* is not applicable in the present case.

3.4. Learned Advocate also stated it is a settled position of law that damages/penalty/compensation for breach of contract is not consideration for any service and thus not leviable to service tax. In this regard, he placed reliance on the following judicial decisions, wherein the Tribunal have held that amounts paid in the nature of damages, would not be susceptible to service tax:

> (i) *Bajaj Finance Limited Vs. Commissioner of Central Excise & GST, Pune - I* – 2023 (8) TMI 473- Tri. Mumbai
>
> (ii) *South Eastern Coalfields Ltd. v. CCE, Raipur* - 2021 (55) G.S.T.L. 549 (Tri. - Del.)
>
> (iii) *Neyveli Lignite Corporation Ltd. v. Commissioner of Customs, Central Excise and Service Tax* - 2021 (53) G.S.T.L. 401 (Tri. – Chennai)

Hence, they pleaded that their appeal be allowed by setting aside the impugned order.

4.1. Learned Authorised Representative for Revenue submits that the activity of the appellants is covered under Section 66E(e) of the Finance Act, 1994 as "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act". The consideration is paid by the customer in form of separate payment of Penal Interest. As per agreement entered between the appellants and borrowers, it is clear that the default in payment of EMIs is hereby deemed to be default under the provisions of agreement entered between appellant and customers. The activity of tolerance of situation of delay in payment of EMI is adequately covered in the second expression 'to tolerate an act' provided in clause 5(e) of Schedule II to the CGST Act, 2017 enumerating activities or transactions to be treated as supply of goods/ services. Such a tolerance of an activity of delay in payment is against the agreed consideration and it is in the form of penal charges/penalty. It is agreed between appellant and borrower/customer that in case any delay has occurred, the appellants are entitled to recover the penal charges/penalty from such defaulting borrowers.

4.2. In view of the above submissions made by him, the Learned AR by reiterating the findings made in the impugned order, had stated that the appellants are liable to pay service tax on the penal interest received from their customers/borrowers during the relevant period as part of taxable services.

5. The submissions advanced by the learned Advocate appearing for the appellants and the learned Authorized Representative of the Department have been considered. We have also perused the records of the case.

6.1 We find that the issue for consideration before us is to determine whether service tax is liable to be paid in respect of penal interest and charges, more fully described below,

(i) penal interest or delayed payment charges in case of late payment of EMI or delay in payment of periodical installments of loan/advance repayments, and

(ii) charges recovered for bouncing of repayment instruments such as dishonour of cheque/ECS or any other electronic or clearing mandate given by the customers/borrowers.

and which were collected by the appellants during the disputed period i.e., from April, 2013 to June, 2017, and whether the appellants are providing a declared service in terms of Section 66E(e) of the Finance Act, 1994 read with Section 174 (2) CGST Act, 2017.

6.2 On perusal of the records of the case, it transpires that the Department has interpreted that, as per Section 66B which was introduced with effect from 01.07.2012, read with Section 65B(44) of the Finance Act, 1994, '*any activity carried on*' by '*a person for another for consideration',* will be levied to service tax, unless otherwise excluded or covered by the negative list of services. On the basis of various clauses in the agreement entered into by the appellants with their customers/borrowers, the Department alleged that recovery/earning of an extra/surplus (i.e., penal interest/penalty) being other than the loan amount and the principal interest is nothing but a compensation received by the appellants on account of delay in payment of EMI by the customer. As these charges are not in the nature of principal interest and are to be appropriately treated as consideration for a declared service of 'tolerating an act' of non-payment/delay in payment of EMI by the customers/borrowers, as per clauses made in the loan agreement entered into by the appellants in providing loans and advances. Accordingly, learned Principal Commissioner had concluded that these penal charges paid by the borrower for default in payment of EMI/ dishonour of payment instrument is a consideration and such a default/ delay/ non-payment/dishonour of payment instrument is tolerated by the appellants on payment of an amount as agreed upon in the agreement and it is a declared service of 'agreeing to tolerate an act or a situation' under section 66 E(e) of the Finance Act, 1994. Accordingly, he ordered that penal Charges paid by borrowers is a consideration for service rendered by the appellants and service tax is thus payable on such consideration by confirming the adjudged demands.

7. We find that the issue of demand of service tax on penal interest or delayed payment charges in case of late payment of EMI or default/ delay/ non-payment/dishonour of payment instrument by treating as a declared service of 'agreeing to tolerate an act or a situation' under section 66 E(e) ibid, has been examined under identical set of facts by this Bench of the Tribunal in the case of *Bajaj Finance Limited* (supra). In the Final Order dated 07.08.2023, it was held by the Tribunal that such charges of penal interest or delayed payment charges are not subject to levy of service tax. Further, we find that the issue is no more open for debate, in view of the judgements relied upon by the appellants in the cases of *South Eastern Coalfields Ltd.* (supra) and *Neyveli Lignite Corporation Ltd.* (supra). The relevant extract of the Final Order dated 07.08.2023 decided by the Tribunal in the case of *Bajaj Finance Ltd.,* (supra) is extracted and given below:

> *"10.1. In the context of the above issues under dispute, we note that the banking and monetary policy framework are being designed by the Reserve Bank of India (RBI) in exercise of the powers vested with it under the Reserve Bank of India Act, 1934 and various policy circulars in this regard are being issued from time to time by RBI. Accordingly, all banks/ banking company dealing with banking business are required to charge interest on loans/advances/cash credits/overdrafts or any other financial accommodation granted/provided/renewed by them or discount usance bills in accordance with the directives on interest rates on advances issued by Reserve Bank of India from time to time. The Master Circular issued by RBI in this regard vide RBI/2010-11/72 DBOD.No.Dir.BC.9/13.03.00/ 2010-11 dated 01.07.2010 deals, inter-alia, with the issue of penal interest, as follows:*
>
> > *"**2. Guidelines***
> >
> > ***2.1. General***
> >
> > *2.1.1. Banks should charge interest on loans / advances / cash credits / overdrafts or any other financial accommodation granted / provided / renewed by them or discount usance bills in accordance with the directives on interest rates on advances issued by Reserve Bank of India from time to time.*
> >
> > *xx xx xx xx xx*
> >
> > ***2.5. Levying of penal rates of interest***
> >
> > *Banks are permitted to formulate a transparent policy for charging penal interest with the approval of their Board of Directors. However, in the case of loans to borrowers under priority sector, no penal interest should be charged for loans up to Rs.25,000. Penal interest can be levied for reasons such as default in repayment, non submission of financial statements, etc. However, the policy on penal interest should be governed by well-accepted principles of transparency, fairness, incentive to service the debt and due regard to genuine difficulties of customers."*
>
> *Thus, we find that the guidelines of RBI which provide for charging interest on loans and advances also provide for levy of penal interest for default in repayment or non-submission of instruments of repayment of loan in time. The appellants being a Non-Banking Financial Institution governed by the regulatory frame work of RBI had followed the guidelines and hence there is no extra consideration that flows in such payments made on account of penal interest/delayed payment charges.*

10.2. We further find that clause (iv) to sub-rule 2 to Rule 6 of the Service Tax (Determination of Value) Rules, 2006, notified vide Notification No.24/ 2012 - S.T. dated 06.06.2012, inter alia, provide that the value of any taxable service does not include, '(iv) interest on delayed payment of any consideration for the provision of services or sale of property, whether movable or immovable'. Thus, in our considered opinion the above entry clearly provide the Government had excluded the interest on delayed payment from the scope of payment of service tax.

11.1. In the impugned order, the learned Commissioner had held that penal charges and bounce charges are in the nature of consideration for having agreed to tolerate an act or a situation and thus it is a declared service of 'agreeing to tolerate an act or a situation' under section 66 E(e) of the Finance Act, 1994.

11.2 We find that the issue regarding charging of penal interest in respect of delay in payment of EMI, had been examined by the Ministry of Finance in the context of applicability of GST and it was clarified vide CBIC Circular No. 102/21/2019-GST dated 28.06.2019, that the transaction of levy of additional/penal interest does not fall within the ambit of entry 5(e) of Schedule II of the CGST Act i.e. "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act", as this levy of additional/penal interest satisfies the definition of 'interest' as contained in Notification No.12/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, it was clarified that 'penal interest' charged on a transaction would not be subject to GST. The said circular is extracted below:

"Circular No. 102/21/2019-GST

F. No. CBEC- 20/16/04/2018 – GST
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs
GST Policy Wing
****

New Delhi, Dated the 28th June, 2019

To,
The Principal Chief Commissioners / Chief Commissioners / Principal Commissioners / Commissioners of Central Tax (All)
The Principal Director Generals / Director Generals (All)

Madam/Sir,

Subject: Clarification regarding applicability of GST on additional / penal interest – reg.

Various representations have been received from the trade and industry regarding applicability of GST on delayed payment charges in case of late payment of Equated Monthly Instalments (EMI). An EMI is a fixed amount paid by a borrower to a lender at a specified date every calendar month. EMIs are used to pay off both interest and principal every month, so that over a specified period, the loan is fully paid off along with interest. In cases where the EMI is not paid at the scheduled time, there is a levy of additional / penal interest on account of delay in payment of EMI.

2. Doubts have been raised regarding the applicability of GST on additional / penal interest on the overdue loan i.e. whether it would be exempt from GST in terms of Sl. No. 27 of notification No. 12/2017-Central Tax (Rate) dated 28th June 2017 or such penal interest would be treated as consideration for liquidated damages [amounting to a separate taxable supply of services under GST covered under entry 5(e) of Schedule II of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the CGST Act) i.e. "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act"]. In order to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168 (1) of the CGST Act, hereby issues the following clarification.

3. Generally, following two transaction options involving EMI are prevalent in the trade:-

> *Case – 1: X sells a mobile phone to Y. The cost of mobile phone is Rs 40,000/-.• However, X gives Y an option to pay in installments, Rs 11,000/- every month before 10th day of the following month, over next four months (Rs 11,000/- *4 = Rs. 44,000/-). Further, as per the contract, if there is any delay in payment by Y beyond the scheduled date, Y would be liable to pay additional / penal interest amounting to Rs. 500/- per month for the delay. In some instances, X is charging Y Rs. 40,000/- for the mobile and is separately issuing another invoice for providing the services of extending loans to Y, the consideration for which is the interest of 2.5% per month and an additional / penal interest amounting to Rs. 500/- per month for each delay in payment.*

> *Case – 2: X sells a mobile phone to Y. The cost of mobile phone is Rs 40,000/-. Y has the option to avail a loan at interest of 2.5% per month for purchasing the mobile from M/s ABC Ltd. The terms of the loan from M/s ABC Ltd. allows Y a period of four months to repay the loan and an additional / penal interest @ 1.25% per month for any delay in payment.*

4. As per the provisions of sub-clause (d) of sub-section (2) of section 15 of the CGST Act, the value of supply shall include "interest or late fee or penalty for delayed payment of any consideration for any supply". Further in terms of Sl. No. 27 of notification No. 12/2017- Central Tax (Rate) dated the 28.06.2017 "services by way of (a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services)"is exempted. Further, as per clause 2 (zk) of the notification No. 12/2017-Central Tax (Rate) dated the 28th June, 2017, "'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;".

5. Accordingly, based on the above provisions, the applicability of GST in both cases listed in para 3 above would be as follows:

> *Case 1: As per the provisions of sub-clause (d) of sub-section (2) of section 15 of the CGST Act, the amount of penal interest is to be included in the value of supply. The transaction between X and Y is for supply of taxable goods i.e. mobile phone. Accordingly, the penal interest would be taxable as it would be included in the value of the mobile, irrespective of the manner of invoicing.*

> *Case 2: The additional / penal interest is charged for a transaction between Y and M/s ABC Ltd., and the same is getting covered under Sl. No. 27 of notification No. 12/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, in this case the 'penal interest' charged thereon on a transaction between Y*

and M/s ABC Ltd. would not be subject to GST, as the same would not be covered under notification No. 12/2017-Central Tax (Rate) dated 28.06.2017. The value of supply of mobile by X to Y would be Rs. 40,000/- for the purpose of levy of GST.

6. It is further clarified that the transaction of levy of additional / penal interest does not fall within the ambit of entry 5(e) of Schedule II of the CGST Act i.e. "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act", as this levy of additional / penal interest satisfies the definition of "interest" as contained in notification No. 12/2017- Central Tax (Rate) dated 28.06.2017. It is further clarified that any service fee/charge or any other charges that are levied by M/s ABC Ltd. in respect of the transaction related to extending deposits, loans or advances does not qualify to be interest as defined in notification No. 12/2017- Central Tax (Rate) dated 28.06.2017, and accordingly will not be exempt.

7. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

8. Difficulty, if any, in the implementation of this circular may be brought to the notice of the Board immediately. Hindi version follows."

12. We also find that the issue of penal charges in respect of delay in payment amounting to declared service as contemplated by the department under section 66E(e) of the Finance Act, on which service became taxable w.e.f. July 1, 2012, has already been decided by Principal Bench of this Tribunal in the case of M/s. South Eastern Coalfields Ltd. Vs. Commissioner of Central Excise and Service Tax in Final Order No. 51651/2020 dated 22.12.2020. In this case, the Tribunal had held that 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. Hence, it was held by the Tribunal that it is not possible to sustain the view that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the appellant towards consideration for tolerating an act leviable to service tax under section 66E(e) of the Finance Act. The relevant paragraphs in the above order of the Tribunal are extracted below:

*"24. What follows from the aforesaid decisions of the Supreme Court in **Bhayana Builders** and **Intercontinental Consultants**, and the decision of the Larger Bench of the Tribunal in **Bhayana Builders** is that "consideration" must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has necessarily to be a consideration for the taxable service provided under the Finance Act. Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable. It should also be remembered that there is marked distinction between "conditions to a contract" and "considerations for the contract". A service recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided.*

*25. It is in the light of what has been stated above that the provisions of section 66E(e) have to be analyzed. 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:*

(i) consideration for agreeing to the obligation to refrain from an act; or
(ii) consideration for agreeing to tolerate an act or a situation; or
(iii) consideration to do an act.

26. 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).

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.

xx xx xx xx xx

42. The conclusion drawn by the learned authorized representatives of the Department from the aforesaid decision of the Supreme Court that compensation received is 'synonymous' with 'tolerating' or that the Supreme Court acknowledged that in a breach of contract, one party tolerates an act or situation is not correct.

43. It is, therefore, not possible to sustain the view taken by the Principal Commissioner that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the appellant towards

> *"consideration" for "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act.*
>
> *44. The impugned order dated December 18, 2018 passed by the Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed."*

The aforesaid order of the Principal Bench of the Tribunal was appealed by the department before the Hon'ble Supreme Court in Civil Appeal No.2372/2021 and the Hon'ble Apex Court dismissed the same as withdrawn. The said Order dated 11.9.2023 is extracted below:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2372 OF 2021

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX — **APPELLANT(S)**

VERSUS

SOUTH EASTERN COALFIELDS LTD. — **RESPONDENT(S)**

WITH

Diary No. 24419/2022

AND

CIVIL APPEAL NOS.51-53 OF 2022

O R D E R

Learned Additional Solicitor General appearing for the appellant(s) submitted that he has instructions to withdraw these appeals. His submission is placed on record.

The Civil Appeals are dismissed as withdrawn.

..J.
[B.V. NAGARATHNA]

..
[PRASHANT KUMAR MISHRA]

NEW DELHI
JULY 11, 2023

13. We also find that the question regarding taxability of an activity or transaction as the supply of service of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act was examined by the CBEC and they had issued certain guidelines to the field formations clarifying the legal position for determining whether tax on an activity can be imposed, in its Circular No.178/10/2022-Service Tax dated 03.08.2022. The relevant portion of the above circular dealing with 'cheque dishonor fine/penalty' is extracted below:

> ***"Cheque dishonor fine/ penalty***
>
> *7.3 No supplier wants a cheque given to him to be dishonoured. It entails extra administrative cost to him and disruption of his routine activities and cash flow. The promise made by any supplier of goods or services is to make supply against payment within an agreed time (including the agreed permissible time with late payment) through a valid instrument. There is never an implied or express offer or willingness on part of the supplier that he would tolerate deposit of an invalid, fake or unworthy instrument of payment against consideration in the form of cheque dishonour fine or penalty. The fine or penalty that the supplier or a banker imposes, for dishonour of a cheque, is a penalty imposed not for tolerating the act or situation but a fine, or penalty imposed for not tolerating, penalizing and thereby deterring and discouraging such an act or situation. Therefore, cheque dishonor fine or penalty is not a consideration for any service and not taxable."*

14. We further find that the issue of liability of service tax on the declared service of "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 was clarified by the CBEC in its Circular No.214/1/2023-Service Tax dated 28.02.2023, in the context of the orders passed by this Tribunal in various cases. Accordingly, it was clarified that there should be a flow of consideration for this activity of tolerating an act or a situation. It was also decided by the Board not to pursue the Civil Appeals filed before the Apex Court in those cases, where the Tribunal had ordered for setting aside the orders of lower authorities for confirming the service tax demands under Section 66E(e). The relevant paragraph of the said circular is extracted below:

> *"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 judgement of divisional bench in case of M/s South Eastern Coal Fields Ltd Vs. 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 20.09.2022 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 (CA No. 2372/2021), M/s Paradip Port Trust (Dy. No. 24419/2022 dated 08-08-*

2022), and M/s Neyveli Lignite Corporation Ltd (CA No. 0051-0053/2022) 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.

7. Difficulty experienced, if any, in implementing the circular should be brought to the notice of the Board. Hindi version will follow."

16. In view of the above discussions and findings recorded in the preceding paragraphs, as well as on the basis of decisions of the Tribunal and higher judicial forum, we are of the considered view that the impugned order holding that penal interest and bouncing charges received by the appellants as "consideration" for "tolerating an act", and are leviable to service tax under section 66E(e) of the Finance Act, 1994, cannot be sustained."

8. We also find that in the Miscellaneous Order dated 07.06.2023 passed by the Co-ordinate Bench of the Tribunal, mention has been made about Circular No. 214/1/2023-Service Tax dated 28.02.2023 issued by Central Board of Indirect Taxes & Customs (CBIC) which the appellants had relied upon for seeking early hearing and the Revenue had contended that its applicability needs to be examined. We find that the clarification issued in that circular amplify the settled position of law, that in respect of activities contemplated under Section 66E ibid, there shall be specific agreement to the effect of tolerating or refraining from an act and there should be consideration flowing for such activity between the service provider and service receiver. The relevant paragraph of the said circular is extracted and given below:

***"6.** In view of above, it is clarified that the activities contemplated under section 66E 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."*

In the absence of such ingredients in the present case, even by the CBIC Circular dated 28.02.2023, it has been clarified that the disputed penal interest amount is not liable to service tax.

9. In view of the aforesaid discussions and the settled position of law as discussed in the above paragraphs as well as in the referred cases, we find that the issue arising out of the present dispute is no more *res integra* and as such, the impugned order passed by the learned Principal Commissioner is liable to be set aside.

10. Therefore, the impugned order dated 30.01.2020 passed by the learned Principal Commissioner is set aside and the appeal filed by the appellants is allowed in their favour.

(Operative portion of the Order pronounced in the open court)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M. M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha