

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 3**

**SERVICE TAX APPEAL NO. 51488 OF 2019
WITH
SERVICE TAX MISC. APPLICATION NO. 50592 OF 2025**

[Arising out of Order in Original No. 26/COMMR/ST.JBP/2019 dated 20.03.2019 passed by the Principal Commissioner of CGST & Central Excise, Jabalpur]

SOUTH EASTERN COALFIELDS LTD

.....APPELLANT

Jamuna Kotma, Jamuna Colliery
Office of the General Manager,
Anuppur, Madhya Pradesh,

Vs.

**PRINCIPAL COMMISSIONER OF CGST &
CENTRAL EXCISE-JABALPUR**

.....RESPONDENT

Office of the Principal Commissioner of CGST,
Customs & Central Excise and Customs
GST Bhawan, Mission Chowk, Napier Town, Jabalpur,
Madhya Pradesh-482001

With

**SERVICE TAX APPEAL NO. 51704 OF 2019
WITH
SERVICE TAX MISC. APPLICATION NO. 50554 OF 2025**

[Arising out of Order in Original No. 25/COMMR/ST/JBP/2019 dated 19.03.2019 passed by the Principal Commissioner of CGST & Central Excise, Jabalpur]

SOUTH EASTERN COALFIELDS LTD

.....APPELLANT

Johilla Colliery Area,
Office of the General Manager,
G.M. Complex Nowrozabad,
Umaria, MP-484555

Vs.

**PRINCIPAL COMMISSIONER OF CGST &
CENTRAL EXCISE-JABALPUR**

.....RESPONDENT

Office of the Principal Commissioner of CGST,
Customs & Central Excise and Customs
GST Bhawan, Mission Chowk, Napier Town, Jabalpur,
Madhya Pradesh-482001

And

**SERVICE TAX APPEAL NO. 50187 OF 2020
WITH
SERVICE TAX MISC. APPLICATION NO. 51293 OF 2025**

[Arising out of Order in Original No. 04/COMMR/ST/JBP/2019 dated 18.10.2019 passed by the Principal Commissioner of CGST & Central Excise, Jabalpur]

SOUTH EASTERN COALFIELDS LTD

.....APPELLANT

Sohagpur Area, Office of the General Manager
Sohagpur, Dhanpuri Post,
Shahdol, MP. 484114

Vs.

**PRINCIPAL COMMISSIONER OF CGST &
CENTRAL EXCISE-JABALPUR**

.....RESPONDENT

Office of the Principal Commissioner of CGST,
Customs & Central Excise and Customs
GST Bhawan, Mission Chowk, Napier Town, Jabalpur,
Madhya Pradesh-482001

Appearance

Shri Rajeev Agarwal and Shri R. Murlidharan, Advocates for the appellants
Shri ShashankYadav, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO'S. 50853-50855/2026

DATE OF HEARING/ DECISION : 04/05/2026

ASHOK JINDAL

1. All these three appeals are having a common issue, therefore, all are disposed of by a common order. The appellant is a public sector undertaking and 100% subsidiary of Coal India Limited engaged in the business of mining and selling of coal. During the course of audit, it was alleged that:

- (i) The appellant is not paying service tax on liquidated damages during the impugned period i.e. April 2016 to June, 2017;
- (ii) The nonpayment of service tax on royalty amount deposited from June 2017;
- (iii) Nonpayment of service tax on dead rent for the period April 2016 to June 2017;

- (iv) Short payment of service tax on renting of immovable property service for commercial purpose for the period 2014-15 to 2017-18;
- (v) Short payment of service tax on security and detective agency services for the period April to September 2015-16;
- (vi) Demand of interest of Rs. 32,713/- was also made for alleged delayed payment of tax for 2016-17;

1.1 various show cause notices were issued to the appellant and after considering the submissions made by the appellant, the following demands have been confirmed:

Particulars	Amount (in Rs.)
Demand of service tax liquidated damages/penalty (April 2016-June 2017)	1,07,17,794/-
Demand of service tax on dead rent (April 2016- June, 2017)	2,05,085/-
Demand of service tax on Renting of immovable property (2014-15 to 2017-18)	1,19,574/-
Demand of service tax on security and detective agency service (April, 2015)	1,45,438/-
Interest liability for late payment of service tax(May 2016-July 2016)	32, 713/-
Total	1,12,20,604/-

- 2. Aggrieved from the said demands the appellant is before us.
- 3. The learned counsel for the appellant submits that the demand for liquidated damages on royalty is not sustainable as same has been settled in their own case for the earlier period reported as **2021 (55) GSTL 549 (Tri.-Del)**.
- 4. With regard to demand of service tax on dead rent he relied on the decision of this Tribunal on **Madhya Pradesh State Mining**

**Corporation vs. Principal Commissioner 2023 (10) CENTAX 253
(Tri.-Del.)**

5. For the demand of service tax on renting of immovable property service, he submits that for the earlier period the adjudicating authority himself dropped the demand as the rent has been charged by the appellant for residential purpose on which no service tax is payable, therefore, same analogy is to be followed to demand the service tax on renting of immovable property service in question.

6. For the demand of service tax on security detective agency services, it is the submission of the appellant that the service provider has already paid 100% tax on the said services, therefore, nothing is required to be paid by the appellant. In view of this, it is prayed that four of the demands mentioned above are not sustainable.

7. With regard to the demand of interest for late payment of service tax of Rs. 32,713/-, the learned counsel for the appellant has conceded the same as being a small amount for which they don't want to contest.

8. On the other hand learned authorized representative supported the impugned order and submitted that with regard to the 'dead rent' appellant has not produced any agreement for payment of dead rent to ascertain the fact that the same is prior to 1.04.2016 or not. Therefore, the said demand is required to be confirmed.

8.1. With regard to service tax on renting of immovable property service it is his submission that the property has been used by the

10. We have to deal with each and every issue separately.

penalty: We find that the said issue has arisen in appellant's case
own for the earlier period and the same has been decided in favour of
the appellant observing as under:

11. Section 65B(44) of the Finance Act defines “service” to mean any activity carried out by a person for another for consideration, and includes a declared service, but does not include what is mentioned in “(a), (b) and (c)”. The relevant portion of the definition of “service” is reproduced below :

“service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -

- 12.** "Declared services" has been defined in Section 66E and sub-section(e) of Section 66E, which is involved in this appeal, is as follows :

The following shall constitute declared 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;”

13. The show cause notice and the impugned order indicate that the appellant was charging and collecting an amount under the following three heads :

- (i) Compensation/Penalty from the buyers of coal on the short-lifted/unlifted quantity of coal and non-compliance of the terms and conditions of the Coal Supply Agreement, including forfeiture of earnest money deposit/security deposit;
- (ii) Compensation/Penalty from the contractors engaged by the appellant for providing various types of services for breach of the terms and conditions of the contract; and
- (iii) Liquidated damages from the suppliers of materials for breach of the terms and conditions of the contract.

14. Liability has been fastened upon the appellant under Section 65B read with Section 66E(e) of the Finance Act for the period from July, 2012 till March, 2016 for the reason that by collecting the said amount the appellant had agreed to the obligation to refrain from an act or to tolerate the non-performance of the terms of the contract by the other party.

15. Section 65B(44) defines ‘service’ to mean any activity carried out by a person for another person for consideration, and includes a declared service. Under Section 66E(e), a declared service shall constitute agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act. Section 66B provides that service tax shall be levied at the rate of 12 per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed. Section 66D contains a negative list of services, while Section 66E contains a list of declared services.

16. Section 67 of the Finance Act deals with valuation of taxable service for charging service tax. It is reproduced below :-

67.(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

- (i) in a case *where the provision of service is for a consideration* in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
- (ii) in a case *where the provision of service is for a consideration* not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;
- (iii) in a case *where the provision of service is for a consideration* which is not ascertainable, be the amount as may be determined in the prescribed manner.

xx xx xx

Explanation. - For the purposes of this section, -

(a) "consideration" includes -

xx xx xx

(b) xx xx xx

(c) xx xx xx"

(Emphasis supplied)

17. Section 68 provides that every person providing taxable service to any person shall pay service tax at the rate specified in Section 66B in such manner and within such period as may be prescribed.

18. It is, thus, clear that where service tax is chargeable on any taxable service

with reference to its value, then such value shall be determined in the manner provided for in (i), (ii) or (iii) of sub-section (1) of Section 67. What needs to be noted is that each of these refer to “where the provision of service is for a consideration”, whether it be in the form of money, or not wholly or partly consisting of money, or where it is not ascertainable. In either of the cases, there has to be a “consideration” for the provision of such service. Explanation to sub-section (1) of Section 67 clearly provides that only an amount that is payable for the taxable service will be considered as “consideration”. This apart, what is important to note is that the term “consideration” is couched in an “inclusive” definition.

19. A Larger Bench of the Tribunal in *Bhayana Builders (P) Ltd. v. Commissioner of Service Tax* [2013 (32) S.T.R. 49 (Tri. - LB)] observed that implicit in the legal architecture is the concept that any consideration, whether monetary or otherwise, should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the latter. In the said decision, the Larger Bench made reference to the concept of “consideration”, as was expounded in the decision pertaining to Australian GST Rules, wherein a categorical distinction was made between “conditions” to a contract and “consideration for the contract”. It has been prescribed under the said GST Rules that certain “conditions” contained in the contract cannot be seen in the light of “consideration” for the contract and merely because the service recipient has to fulfil such conditions would not mean that this value would form part of the value of the taxable services that are provided.

20. The Supreme Court in *Commissioner of Service Tax v. M/s. Bhayana Builders* [2018 (2) TMI 1325 = 2018 (10) G.S.T.L. 118 (S.C.)], while deciding the appeal filed by the Department against the aforesaid decision of the Tribunal, also explained the scope of Section 67 of the Act. The Supreme Court observed that 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 under Section 67. The observations are :

“The amount charged should be for “for such service provided” : Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words “for such service provided” the Act has provided for a nexus between the amount charged and the service provided. *Therefore, 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 under Section 67.* The cost of free supply of goods provided by the service recipient to the service provider is neither an amount “charged” by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined.”

(Emphasis supplied)

“2.2 Consideration

Since this definition is inclusive it will not be out of place to refer to the definition of “consideration” as given in section 2(d) of the Indian Contract Act, 1872 as follows -

(Emphasis supplied)

2(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or agrees to do or to abstain from doing, something, such act or abstinence or agreement by the promisee is called a consideration for the promise.”

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.

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.

31. In this connection, it will be useful to refer to a decision of the Supreme Court in *Food Corporation of India v. Surana Commercial Co. and Others* [(2003) 8 SCC 636]. The Supreme Court pointed out that if a party promises to abstain from doing something, it can be regarded as a consideration, but such abstinence has to be specifically mentioned in the agreement. The relevant portion of the judgment is reproduced below :

“Under the main agreement, a party had contracted for the conversion of whole arhar grain into dal. Subsequently, by another supplemental agreement, the party agreed to upgrade the dal. It was held that as soon as the first agreement was complied with and dal was delivered, the contract came to an end and the supplemental agreement, which was made subsequently, was a separate and independent agreement. In this agreement, there was no consideration to be given to the promisor and thus that agreement could not be enforced in law. *It was claimed that in the supplemental agreement consideration was that the bank guarantees were not to be encashed, but it was found that there was no mention of such a consideration in the supplemental agreement. Although if a party promised to abstain from doing something, it could be regarded as consideration for the contract, but in the present case there was no such case of abstinence and there was no consideration for supplemental contract.*”

(Emphasis supplied)

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'.

33. It would be apt to refer to a judgment of the European Court of Justice (First Chamber) in Case C-277/2005, in *Societe Thermale d'Eugenic-les-Bains v. Ministere de l'Economie, des Finances et de l'Industrie* as it deals with the issue whether an obligation to refrain from an act or to tolerate an act or situation would result in supply of services when a sum paid as a deposit by a client to a hotelier, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, can be regarded as consideration for the supply of a reservation service. Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subjected to VAT. Article 6(1) of the Sixth Directive

provides that “supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5 and that such transactions may include *inter alia* an obligation to refrain from an act or to tolerate an act or situation. Under Article 11(A)(1)(a) of the Sixth Directive, the taxable amount in respect of supplies of services is to be ‘everything which constituted the consideration which has been or is to be obtained by the supplier from the customer or a third party for such supplies’.

34. The question referred for preliminary hearing, in essence, in the aforesaid decision was whether a sum paid as a deposit by a client to a hotelier, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, can be regarded as consideration for the supply of a reservation service, which is subject to VAT, or as a fixed compensation for cancellation, which is not subject to VAT. The Court found that there has to be a direct link between the service rendered and the consideration received. The sum paid must constitute a genuine consideration for an identifiable service supplied in the context of a legal relationship for which performance is reciprocal. It is in this context that Court observed :

“26. Since the obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit, there is no direct connection between the service rendered and the consideration received (Apple and Pear Development Council, paragraphs 11 and 12; Tolsma, paragraph 13; and Kennemer Golf, paragraph 39). The fact that the amount of the deposit is applied towards the price of the reserved room, if the client takes up occupancy, confirms that the deposit cannot constitute the consideration for the supply of an independent and identifiable service.

27. Since the deposit does not constitute the consideration for the supply of an independent and identifiable service, it must be examined, in order to reply to the referring Court, whether the deposit constitutes a cancellation charge paid as compensation for the loss suffered as a result of the client’s cancellation.

28. In that regard, it should be noted that the contracting parties are at liberty - subject to the mandatory rules of public policy - to define the terms of their legal relationship, including the consequences of a cancellation or breach of their obligations. Instead of defining their obligations in detail, they may nevertheless refer to the various instruments of civil law.

29. Thus the parties may make contractual provision - applicable in the event of non-performance - for compensation or a penalty for delay, for the lodging of security or a deposit. Although such mechanisms are all intended to strengthen the contractual obligations of the parties and although some of their functions are identical, they each have their own particular characteristics.

xx xx xx

32. *Whereas, in situations where performance of the contract*

follows its normal course, the deposit is applied towards the price of the services supplied by the hotelier and is therefore subject to VAT, the retention of the deposit at issue in the main proceedings is, by contrast, triggered by the client's exercise of the cancellation option made available to him and serves to compensate the hotelier following the cancellation. Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes (see, to that effect, as regards interest applied on account of late payment, Case 222/81 BAZ Bausystem [1982] ECR 2527, paragraphs 8 to 11)."

(Emphasis supplied)

35. Reference can also be made to a decision of the Tribunal in *Lemon Tree Hotel*. The issue that arose for consideration was whether forfeiture of the amount received by a hotel from a customer on cancellation of the booking would be leviable to service tax under Section 66E(e). The Tribunal held that the retention of the amount on cancellation would not attract service tax under Section 66E(e) and the relevant portion of the decision is reproduced below :

"3. So far as the first issue is concerned, the appellant, in the course of their business of running a hotel, offers advance booking to its customers, on payment of rent or deposit. Sometimes in the event of cancellation or of no show i.e. if the guest does not come for stay, the appellants retain the full or part of the amount towards cancellation charges. It is admitted that the appellant have paid service tax under Accommodation Services as and when they receive advance, availing the permissible abated value. It is the case of the Revenue that upon cancellation by the customers, the gross amount received by the appellant qualifies the receipt under Section 66E(e).

4. Ld. Commissioner (Appeals) in confirming the demand under this head has observed that retention of such cancellation charges is not against the provisions of intended services but for not availing the said services by the customers, which the appellant has tolerated.

5. Having considered the rival contentions, I find that the aforementioned observation of the Commissioner (Appeals) are erroneous and have no legs to stand. *Admittedly, the customers pay an amount to the appellant in order to avail the hotel accommodation services, and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value.* The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus, under the terms of the contract, they are entitled to retain the whole amount or part of it. *Accordingly, I hold that the retention amount (on cancellation*

made) by the appellant does not undergo a change after receipt. Accordingly, I hold that no service tax is attracted under the provisions of Section 66E(e) of the Finance Act. Accordingly, this ground is allowed in favour of the appellant.”

(Emphasis supplied)

36. A Division Bench of the Tribunal in *K.N. Food Industries* examined the provisions of Section 66E(e) in the context of an assessee manufacturing for and on behalf of M/s. Parley and clearing the same upon payment of central excise duty. In a situation when the capacity of the assessee was not fully utilized by M/s. Parley, *ex gratia* charges were claimed so as to compensate the assessee from financial damage or injury. The Department invoked the provisions of Section 66E(e) to levy tax on the amount so received. The Tribunal held that the *ex gratia* charges were for making good the damages due to the breach of the terms of the contract and did not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be towards payment for any services. The relevant portion of the decision is reproduced below :

“4. xxx xxx xxx

We find that appellant is admittedly manufacturing confectioneries for and on behalf of the M/s. Parle and is clearing the same upon payment of Central Excise duty on the basis of MRP declared by M/s. Parle. It is only in situation when the appellant’s capacity, as a manufacturer, is not being fully utilized by M/s. Parle, their claim of *ex gratia* charges arises so as to compensate them from the financial damage/injury. *As such, ex gratia amount is not fixed and is mutually decided between the two, based upon the terms and conditions of the agreement and is in the nature of compensation in case of low/less utilization of the production capacity of the assessee.*

xxx xxx xxx

In the present case apart from manufacturing and receiving the cost of the same, the appellants were also receiving the compensation charges under the head *ex gratia* job charges. The same are not covered by any of the Acts as described under Section 66E(e) of the Finance Act, 1994. The said Sub-clause proceeds to state various active and passive actions or reactions which are declared to be a service namely; to refrain from an act, or to tolerate an act or a situation, or to do an act. *As such for invocation of the said clause, there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act etc. which are clearly absent in the present case. In the instant case, if the delivery of project gets delayed, or any other terms of the contract gets breached, which were expected to cause some damage or loss to the appellant, the contract itself provides for compensation to make good the possible damages owing to delay, or breach, as the case may be, by way of payment of liquidated damages by the contractor to the appellant.* As such, the contracts provide for an eventuality which was uncertain and also corresponding consequence or remedy if that eventuality occurs. *As such the present ex gratia charges made by the M/s. Parle to the appellant were towards making good the damages, losses or injuries arising*

from “unintended” events and does not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be the payments for any services.”

(Emphasis supplied)

37. Much reliance has been placed by the Learned Authorized Representative of the Department on the decision of the Supreme Court in *Fateh Chand*. The submission is that the word “suffering” is synonymous to “tolerating” and the Supreme Court in *Fateh Chand* held that a reasonable compensation for breach of contract has to be proportionate to the actual injury suffered. Thus, according to the Learned Authorized Representative of the Department it has been acknowledged by the Supreme Court that in a case of breach of contract, one party tolerates an act or situation.

38. The decision of the Supreme Court in *Fateh Chand* does not help the Department. The facts indicate that the Delhi Improvement Trust had granted lease hold rights for ninety years to Dr. M.M. Joshi in respect of a property. The relevant clauses of the agreement are :-

- (i) The plaintiff has agreed to sell the building to the defendant for Rs. 1,12,500/-.
- (ii) Rs. 1000, being earnest money deposit, was to be paid to the plaintiff at the time of the execution of the agreement.
- (iii) The plaintiff had to deliver actual possession to the defendant on March 30, 1949 and the defendant had to give Rs. 24,000/- out of the sale price.
- (iv) The defendant had to get the sale deed registered by July 1, 1949. If, for any reason, the defendant failed to get the sale deed registered by the stipulated date, then the sum of Rs. 25,000/- (Rs. 1000 received as earnest money deposit and the subsequent Rs. 24,000/- out of the sale price) would be forfeited and the agreement cancelled.

39. The plaintiff received the agreed sum on March 25, 1949 and possession was delivered, but the sale of the property was not completed before the expiry of the stipulated period. The plaintiff, therefore, sought a decree for possession of land and building and a decree of Rs. 6500/- as compensation for use and occupation of the building. It was alleged that the agreement stood cancelled because the defendant committed a default in performing the agreement and the sum of Rs. 25,000/- paid by the defendant stood forfeited.

40. It is in this context and in the context of Section 74 of the Contract Act, that the Supreme Court observed :

“20. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract for predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty

stipulated.”

41. The Supreme Court also noticed that Section 74 of the Contract Act merely dispenses with the proof of “actual loss or damages”. It does not justify the award of compensation, when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good the loss or damage which actually arose or which the parties knew when they made the contract ‘to be likely to result from the breach’. The Supreme Court also found that there was no evidence that any loss was suffered by the plaintiff in consequences of the default by the defendant, save as to the loss suffered by being kept out of possession of the property. The Supreme Court, therefore, held that plaintiff would be entitled to retain only an amount of Rs. 1000/- that was received as earnest, out of amount of Rs. 25,000/-.

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*.”

As the issue is already settled in favour of the appellant, therefore, we hold that demand of service tax on liquidated damages/ penalty is not sustainable against the appellant, therefore, all the demand under this head is set aside.

(b) With regard to the service tax on dead rent:

We find that the demand of service tax has been sought to be confirmed against the appellant on the ground that the appellant has not produced any agreement which shows that the same are executed prior to 01.04.2016. But, from the records it is seen that the appellant is paying the said rent way back since 2005 onwards and as per the decision in the case of Madhya Pradesh State Mining (*supra*) no service tax is payable if the agreements have been

executed between the parties prior to 01.04.2016. From the records, it is seen that there is no agreement entered between the parties post 01.04.2016. The whole of the rent were deposited on the basis of earlier agreements. In that circumstances, we hold that no demand is sustainable on account of 'dead rent'.

(c) With regard to the demand of service tax on renting of immovable property:

We find that the said property has been given by the appellant by the contractor for residential use by the employees who are working at site. It is also seen that by adjudication order for the earlier period OIO No.AC/ST/DIVISION/JBL-57-16-17 dated March 29, 2017, the said demand has already been dropped and no appeal has been filed by the appellant against the said adjudication order. In these circumstances, the department cannot take a contrary view for the subsequent period. Therefore, we hold that the appellant is not liable to pay the service tax under the category of "renting of immovable property service" for the properties given to the contractor for residential use. Therefore, the demand of service tax on renting of immovable property service is also set aside.

(d) With regard to the demand on security and detective agency services:

We find that the service provider has paid 100% of the tax to the Government treasury and the appellant has reimbursed the said tax to the service provider. In that circumstances, no service tax liability can arise against the appellant. In view of this, we hold that on the said service no tax is payable by the appellant.

(e) As the appellant has conceded the demand of Rs. 32,713/- on account of interest liability for late payment of service tax, therefore, the said demand is confirmed.

11. In view of this the following order is passed:

(i) Except the demand of Rs. 32,713/- for late payment of service tax rest, of the demand are set aside

(ii) demand of Rs.32,713/- for interest of late payment of service tax is confirmed.

(iii) No penalty is imposable in the facts and circumstances of the case.

12. In view of this all the appeals are disposed of in the above manner.

(Operative part of the order pronounced in open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K.ANPAZHAKAN)
MEMBER (TECHNICAL)

Tejo