Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.11630 of 2016
Service Tax Cross-Objection No.10711 of 2016

(Arising out of OIO-SUR-EXCUS-002-COM-017-16-17 dated 11/05/2016 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

C.C.E. & S.T.-Surat-ii **.....Appellant**
New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat, Gujarat-395001

VERSUS

Essar Bulk Terminal Limited **.....Respondent**
27th Km, Essar House, Hazira Road, Hazira
SURAT, GUJARAT

APPEARANCE:
Shri S K Mathur, Special Counsel for the Appellant
Shri Vishal Agrawal & Ms. Dimple Gohil (Advocates) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 10005 /2022

DATE OF HEARING: 08.09.2021
DATE OF DECISION: 06.01.2022

RAMESH NAIR

The brief facts of the case are that the respondent M/s. ESSAR BULK TERMINAL PVT. LTD.(EBTL) are registered for providing various taxable services (including Port & Cargo Handling Services) under Section 69 of the Finance Act, 1994 and also availing Cenvat Credit on input services and capital goods under Cenvat Credit Rules, 2004. During the course of verification of records, it was noticed that ESSAR group formed a Special Purpose Vehicle (SPV) Company with equity contribution from the group companies namely M/S. ESSAR STEEL INDIA LTD. (ESTL), M/S. ESSAR PORTS LTD., etc specially to develop terminal facility at Hazira, Port Magdalia which included construction of a 550 meters jetty. The respondent has been granted a license of GUJARAT MARITIME BOARD (GMB) to administer, develop, maintain and operate a captive jetty for the purpose of handling storage and transportation of cargo of M/S. ESSAR STEEL INDIA LTD. The license agreement between M/S. GMB and the respondent appear to reveal that Gujarat Maritime Board had agreed to give rebate of 80% of

notified rates, on landing and shipping fees (known as wharfage charges) notified by the Ports and Transportation Department, Government of Gujarat under Schedule of Ports Charges with respect to such captive jetty of M/S. ESSAR STEEL INDIA LTD. in view of the cost of construction borne by the respondent as per the agreement dated 25.03.2010, it was noticed that the Gujarat Maritime Board is paying service tax on entire amount of wharfage charges as notified by the Government of Gujarat whereas, the respondent was paying service tax only on the 20% of notified wharfage charges.

1.1 On perusal of the invoices issued by the Gujarat Maritime Board, it was noticed that Gujarat Maritime Board is charging service tax on full notified rate as per Schedule of Ports Charges from the respondent and in turn the respondent was availing the Cenvat Credit of service tax paid by Gujarat Maritime Board on full value (calculated on full notified rate). However, the respondent has charged service tax only on 20% of notified rates under Schedule of Ports Charges from M/S. ESSAR STEEL INDIA LTD. and paid service tax thereon, the remaining 80% of the notified rates of wharfage charge attributable to the Ports services provided by the respondent to M/S. ESSAR STEEL INDIA LTD. was not subject to levy of service tax at all. Therefore, the show cause notice F.No. V(a)ST/27/Commr./Audit-II/2015-16 dated 23.06.2015 was issued by the respondent proposing to fix the value of wharfage charge at the normal rate of wharfage charges as notified under Schedule of Ports Charges in terms of Section 67 of the Finance Act, 1994 read with Rule 3(a) & (b) and Rule 4(2) of the Service Tax (Determination of value) Rules, 2006; proposing demand of service tax of Rs.24,61,14,052 for the period from April 2010 to March 2014 under Proviso to Section 73(1) of the Act; to recover interest under Section 75 of the Act and to impose penalty under Section 78 of the Act. The Adjudicating Authority after considering the submission made by the respondent dropped the proceedings initiated vide Show Cause Notice dated 23.06.2015 therefore, the present appeal filed by the revenue. The respondent also filed Cross Objection in Revenue's Appeal No. ST/11630/2016.

02. Shri S.K.Mathur, learned special counsel appearing on behalf of the revenue appellant reiterates the grounds of appeal in brief is as under:

2.1 The value of 20% of notified wharfage charges by the respondent on the services provided to M/s. ESTL appears to be not in accordance with the provision of Section 67 of the Act read with Rule 3(a) & (b) of Valuation Rules in view of the fact that the cost of provision of such taxable service is

at notified rates (without rebate) and that the rebate of 80% of notified rebate is not concession but a set off in view of the capital expenditure incurred for construction of jetty. In the normal course, wharfage charges are recoverable from any person availing taxable service of Ports services in terms of the notifications issued by Gujarat Maritime Board from time to time under the authority of Gujarat Maritime Board Act, 1981 at specified rates mentioned in Schedule annexed thereto. It is only by virtue of clause 22 of the agreement dated 25.03.2010 between Gujarat Maritime Board and M/s. EBTL that in consideration of M/s. EBTL constructing the deep draft captive jetty or handling captive cargo of EBTL at its own cost. Initially, the Gujarat Maritime Board has agreed to grant rebate adjusted against the cost of constructing subject to the conditions stipulated therein. It is clearly mentioned therein that set off as aforesaid against the capital investment for construction of deep water captive jetty only (i.e. Cost of construction) and that whether such captive investment is recovered through such rebate, M/s. EBTL shall have to pay thereafter, such charges at normal rate as per schedule of Ports Charges. It is clearly provided under the said agreement dated 25.03.2010 that whatever rebate in concession is granted by Gujarat Maritime Board against the cost of construction is equivalent amount at the relevant time shall be utilized by M/s. EBTL in repayment of loan so that at the end of the period of the agreement when M/s. EBTL may not have right of rebate then the construction is free of any liability in respect of such loan. It is clearly established the fact that such rebate of 80% of wharfage charges has been extended only to M/s. EBTL towards repayment of cost of constructing the captive jetty that M/s. ESTL has not incurred expenditure for constructing the said jetty therefore, only M/s. EBTL is entitle for such rebate on the wharfage charges and no one else. Other person availing the benefit of taxable services are liable to wharfage charges at 100% Port Charges as notified under the Gujarat Maritime Board Act.

2.2 He referred to certain clause of agreement dated 25.03.2010 between Gujarat Maritime Board and M/s. EBTL wherein, he has pointed out that the extension of existing jetty was transferred to M/s. EBTL from M/s. ESTL and the said jetty was situated on the land/premises belonging to M/s. ESTL and is used exclusively for captive use of M/s. ESTL. He further submits that the assessment of the service tax is based on value of the taxable services arrived in terms of Section 67 of the Finance Act, 1994 according to which, for the purpose of levy of service tax consideration against the service provided has to be taken as value. He submits that the term ‘consideration’

which is explained in Explanation (a) to Section 67 is an exclusive meaning which is not limited to the amount in monetary terms but may expand to other consideration i.e. other than monetary terms as well. He placed reliance on the judgment of the Hon'ble Supreme Court in the case of COMMISSIONER OF CUSTOMS, NEW DELHI V/s. CARYAIRE EQUIPMENT INDIA PVT. LTD.- 2012 (02) LCX 0012 wherein, it was held that the terms 'consideration' provided under Explanation to Section 67 does not restrict its meaning so as to represent only to amount in terms of money but also to other things, it signifies according to its natural import. As regard interpretation on the term 'consideration', he placed reliance on the Hon'ble Supreme Court in the case of SONIA BHATIA Vs. STATE OF UP, in their Order dated 17.03.1981 in Civil Appeal No. 775 of 1981 reported vide AIR 1981 SC 1274/(1981) 2 SCC 585.

2.3 He further submits that M/s. ESTL were only paying to M/s. EBTL the amount as shown in their invoices towards wharfage charges at the rate of 20% of the notified rates and on which service tax discharged by M/s. EBTL to M/s.ESTL have also passed on other value benefits discussed hereinabove to M/s. EBTL. The quantum of which cannot be ascertained hence, the value in this case is to be arrived other than resorting to clause (i) to Section 67(1) of the Act in other words, such gross amount charged in respect of taxable service of port services provided by M/s. EBTL to M/s. ESTL being not wholly consisting of money and the quantum of which is not ascertainable the same has to be arrived at in terms of Section 67(1) read with provision of Rule (3) of Service Tax (Determination of value) Rules, 2006.

2.4 In view of the above, the adjudicating authority has clearly erred in holding that there is no evidence of additional consideration or additional money flow from M/s. ESTL to M/s. EBTL. He submits that it is an admitted position that GMB normally charge charges as notified by the Government of Gujarat at specified rates, only had extended the benefit of rebate to the tune of 80% applicable wharfage charges they would normally charge to other port users only to M/s. EBTL in terms of their agreement with them and in consideration of the fact that M/s. EBTL had invested huge sum in constructing and developing of the said port and that too with the condition that such rebate shall be allowed only for a period of 25 years therefore, this benefit of rebate was specifically intended for M/s.EBTL only and not to others. Therefore, the finding of the adjudicating authority to the effect that

in the instant case provision of service is for a consideration wholly in money only and there is no evidence of additional consideration is totally erroneous and misplaced. He submits that the judgment relied upon by the Commissioner in the case of GUJARAT MARITIME BOARD V/s. CCE, BHAVNAGAR- 2015 (38) STR 776 (Tri.-Ahmd) is totally misplaced and distinguishable of facts in as much as in the relied case, it was in respect of services provided by GMB to the appellant who developed and maintained and operated the port by investing their own capital and considering the limited nature of services rendered by GMB to the appellant. The rebate was correctly held to have been allowed by GMB. In view of his above arguments, he prays to set aside the impugned order and an appropriate order be passed by this tribunal.

03. Shri Vishal Agrawal, learned counsel along with Ms. Dimple Gohil appeared on behalf of the respondent. He reiterates the findings of the impugned order. He also reiterates the submission made in their cross objection. He submits that apart from the grounds on which the adjudicating authority dropped the demand raised in the show cause notice, the adjudicating authority ought to have dropped the demand on other grounds also, which are submitted in the Cross Objection, the same are reproduced below:-

> *11.3 Without prejudice to the above, Applicant further submits that the in terms of the Gujarat Maritime Board Act, 1981 wharfage is to be levied by GMB at a notified rate and is to be regarded as a state/statutory levy. The Applicant has, while providing cargo handling and port related services to ESTL, contracted to recover actual wharfage charges paid to GMB. It is a settled law that reimbursement of a statutory levy is not to be added to the consideration payable for the services rendered. Reliance in this regards is placed on the decision in the case of Surya Transport Co. 2014 (35) STR 115 (Tri-Del). Accordingly, the notified wharfage charges are not includible in the valuation of services provided by the Applicant. The demand raised in the notice ought to have been dropped on this ground also.*
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> *11.4 Without prejudice to the above it is submitted that a plain reading of the various clauses of the agreement dated 25.3.2010 clearly bring out that the Applicant had been granted a license under Section 35 of the GMB Act to construct and use 550 Mtrs of deep water captive jetty for handling of captive cargo at the demarcated site. For this purpose, a license fee of Rs. 10,000/- per annum was payable by it to GMB. As the jetty was constructed at the Applicant's own cost initially, GMB agreed that the jetty so constructed shall be mainly and initially as per terms of the agreement allowed to be used for the vessels belonging to the Applicant or chartered by it on preferential basis without any ousting priority. The agreement very specifically emphasized that the ownership of deep water captive jetty will vest in GMB and the Applicant shall have no right, title, interest or other proprietary right in respect of the*

jetty so built and the land on which it was constructed as it was specifically understood that the water front is the sovereign right of the Government.

11.5 It is submitted that looking into all the clauses of the agreement, it was GMB which was the owner of the captive jetty and the wharfage and other like services were being provided by the Applicant on behalf of GMB. Reference is invited to clause 17 of the agreement which lays down that "in consideration of the Board permitting the Licensee to construct the captive jetty at its own cost initially, the Board hereby agrees that the deep water captive jetty for handling of their captive cargo by the Licensee shall be mainly and initially, as per terms of the agreement, allowed to be used for the vessels belonging to the Licenser or chartered by the Licensee on preferential basis without any ousting priority". The use of the expression "allowed to be used clearly means that as the owner of the jetty, it was GMB which has allowed the landing and shipping of the goods to the Applicant,
and therefore, it was GMB on whose behalf the Applicant was providing the services.

11.6 It is submitted that once the services were being provided on behalf of GMB, the liability to pay service tax on the same was that of GMB and not of the Applicant. This legal liability of payment of service tax by M/s GMB has not been denied in the notice. On the other hand, it has been clearly admitted that GMB was paying, service tax on the full wharfage charges as prescribed in the schedule to port charges even though it was recovering only 20% of the same from the Applicant. In such an eventuality, the question of again paying service tax on the same service which was rendered to ESTL on behalf of M/s GMB simply does not arise. There cannot be double payment of service tax on the same set of services, one by GMB and the other by the Applicant. The Applicant has, however, inadvertently paid service tax on the same which was not payable and the said amount is liable to be refunded to it.

11.7 Without prejudice to above, Applicant submits that port services are provided by GMB in exercise of its sovereign function of development of minor ports. The charges recovered by it are in the nature of state levy as per amendment carried out by the Government of Gujarat w.e.f. 1.4.2008 in Gujarat Maritime Act, 1981, wherein Section 22A has been inserted which specifically states that any amount provided by GMB is a state levy and a statutory levy and proceeds of such levy are credited to the consolidated Treasury Fund of State of Gujarat. In view of this, the amount collected by GMB has to be considered as statutory levy only and cannot therefore be considered as a service liable to service tax. In view of this, the Applicant only assisted GMB in discharging its sovereign function and therefore no service tax was payable on the same. In support thereof, reference invited to the CBEC Circular No. 89/7/2006-ST dated 18.12.2006, Master circular dated 23.8.2007, FAQ dated 4.12.2008 issued by DGST and FAQ 2010 dated 1.9.2010 wherein it has been clarified that if a Government department (sovereign) / public authorities perform any mandatory or statutory function under the provisions of any law and collect any fees, such activity shall be treated as activity purely in public interest and will not be taxable. Applicant submits that on this ground also the demand ought to have been dropped.

11.8 Applicant submits that matter was purely revenue neutral as ESTL, our own group company was entitled to the entire credit of service tax paid by us. In view of this, no demand for service tax could have been raised as held by the Hon'ble Supreme Court in the case of Commissioner Vs. Coca Cola reported in 2007 (213) ELT 490 (SC); Commissioner Vs. Textile Corporation, Marathwada 2008 (231) ELT 195 (SC); Nirlon Ltd. Vs. Commissioner -2015 (320) ELT (SC) besides several other decisions wherein it has been clearly held that when the whole exercise is revenue neutral then the extended period cannot be invoked. These decisions are more applicable in the present case since the goods were cleared to the Applicant's own group company which was entitled to credit of the duty paid. The impugned order has failed to appreciate the binding principle laid down by the Apex Court.

11.9 Without prejudice to above, Applicant submits that it has been regularly filing ST-3 returns wherein payment of service tax on discounted amount was always reflected. The only ground for alleging suppression as reflected in the notice is that the Applicant has not furnished a copy of the agreement dated 25.3.2010 entered into with GMB, allowing discounted rates to us with an intent to evade service tax. Applicant submits that the copies of the agreements entered into with GMB from time to time have always been furnished to the department and to the audit party visiting its unit. The Applicant had, vide our letter dated 22.12.2009, intimated to the Jurisdictional Superintendent regarding approval given by GMB for construction of 550 Mtr water cargo handling terminal facility as well as permission for transfer of approval from ESTL to EBTL It was intimated that port is under construction and GMB will give the approval for commencement of cargo operation after we signed an agreement which was under process. The agreement was ultimately signed on 25.3.2010 after which the operations were commenced.

11.10 The commencement of the operation was in the knowledge of the department as successive EA-2000 audits were conducted in March 2011, June & July 2012 for the period 2010-11 and 2011-12 wherein copies of the agreements dated 25.3.2010 entered into with GMB were duly furnished. In fact, the audit report No. FAR/ST/190/2012-13 dated 7.9.2012 conveyed to the Applicant by Jurisdictional Superintendent vide his letter dated 1.2.2013, had in para 1 specifically referred to clause no.22 of the License Agreement dated 25.3.2010 with GMB and had pointed out similar short payment of service tax on part of GMB on wharfage charges on an identical ground that the service tax was paid on concessional rate granted to us by GMB and not on the full rate. This very clearly establishes that the copy of the agreement dated 25.3.2010 entered into by us with GMB along with all its enclosures was submitted to the department and clause 22 which is subject matter of the present dispute was very much in knowledge of the Department as similar short levy in respect of GMB was pointed out earlier. In view of this, the very basis on which suppression has been alleged on the Applicant does not survive and the extended period cannot therefore be invoked. In view of this, it was submitted that the entire demand is time barred and the proceedings are liable to be dropped. Reliance was also placed on the Supreme Court decision in the case of CCE Vs. Pragati Concrete Products reported in 2015-TIOL-223-SC-CX wherein it has been held that no suppression can be alleged when the unit has been audited several times. The impugned order however does not contain any finding in this respect.

11.11 Applicant submits that even otherwise it could not have any intention to evade service tax as ESTL, to whom the service was rendered, was eligible to avail credit of the entire service tax paid by us, and being a group company the entire exercise was completely revenue neutral. There was therefore no incentive to the Applicant to evade payment of tax. In view of this, the extended period cannot be invoked and the demand is liable to be dropped.

04. We have carefully considered the submissions made by both the sides and perused the records. We find that the issue to be decided in this case is that when GMB charged wharfage charges at the rate of 20% of the notified rate to EBTL and the same was charged on actual by M/s. EBTL to M/s. ESTL, the EBTL on the transaction between EBTL and ESTL required to charge the service tax on 100% of the notified rate including 80% rebate given by GMB to EBTL or on the 20% of the notified rate on which the service tax was discharged is correct or otherwise.

4.1 We find that in the Revenue's appeal, its contention is that since the charge of 20% of the notified rate by the GMB is on the condition that 80% rebate is due to capital expenditure incurred by the respondent therefore, the same should be part and parcel of the gross value for valuation under Service Tax law. The relevant Section 67 is reproduced below:-

"67. Valuation of taxable service for charging service tax-

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its 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 as, 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."

The show cause notice invoked clause (ii) of Section 67(1) with an interpretation that in the present case the provision of services is a consideration not wholly consisting of money but there is other consideration in the form of rebate which attributed to the capital expenditure incurred by the respondent therefore, the said rebate should be added in the gross value. We find that as per the strict interpretation of Section 67(1)(ii) which applies only in a case where if the consideration is not wholly or partly consisting of money but in addition to that some other consideration is flowing from the service recipient to the service provider.

4.2 In the present case, admittedly the respondent raised invoices for services charge for wharfage charges under Port Service at the rate of 20% of the notified rate as per GMB, however, other than this there is no other amount flowing in the form of money or in any form from ESTL to EBTL therefore, the case of the respondent does not fall under clause (II) of Section 67(1) of the Finance Act, 1994. It is pertinent to note that the entire case of the revenue is that there is a capital expenditure incurred by EBTL and on that account 80% rebate was given by GMB. The transaction which is under question in the present case is not between GMB and EBTL but it is between EBTL and ESTL, in this transaction the capital expenditure incurred by the EBTL is not relevant for the purpose of charging wharfage charges by EBTL to ESTL. Therefore, in our view the entire foundation of the case that 80% rebate given by GMB to EBTL on account of the capital expenditure incurred by the EBTL is not relevant for the transaction which is between EBTL and ESTL. The manner of determination of value is provided under Rule 3 of the Service Tax (Determination of Value) Rules, 2006 which is reproduced below:-

> *Subject to the provisions of section 67, the value of taxable service, **where such value is not ascertainable**, shall be determined by the service provider in the following manner :-*
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> *(a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;*
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> *(b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service.*

From the plain reading of the above rule, we find that the above Rule 3 shall be applicable only in case were the value is not ascertainable. In the present case, the value for the service i.e. wharfage charges is clearly ascertained as per the invoice issued by EBTL to ESTL. Therefore, Rule 3 as whole not applicable in the facts of the present case. Without prejudice, even if clause (b) is applied, the cost of service to the respondent was only charged to ESTL therefore, the value of service charged by EBTL to ESTL is not less than the cost for such taxable service. In the present case, there is no dispute that the gross amount charged by EBTL to ESTL is equivalent to 20%

of notified rate of wharfage charges and there is no additional consideration therefore, the amount charged by EBTL to ESTL is the sole consideration therefore, the value determined in the present case is strictly in accordance with Section 67 of the Act. On the plain reading of Section 67 of the Finance Act, 1994, it is clear that only the actual consideration for the services provided by the service provider to the service recipient shall alone be chargeable to service tax unless there is any extra consideration flowing from Service recipient to service provider. In the present case, neither it is a case of any extra consideration flowing from service recipient to the service provider nor there is any proof of such extra consideration therefore, the gross amount charged by EBTL to ESTL being sole consideration will alone be liable to service tax and no any other amount which is otherwise not existing.

4.3 It is also the contention of the revenue that in normal course the GMB charge the wharfage charges at normal notified rate but in the present case, they charged only 20%. In this regard, we find that transaction is an independent transaction between two parties, the one transaction may vary from the other transaction. There is no provision in the service tax law particularly when the gross value in the present case is ascertained to apply a comparable value of a similar service but of a different transaction therefore, even though there is a different charges by GMB to two different parties that cannot be a reason to apply normal notified rate in the present case. For this reasons also revenue's contention to enhance the value from 20% to 100% is not sustainable. We find that the adjudicating authority has relied upon the judgment of Hon'ble CESTAT in the case of GUJARAT MARITIME BOARD V/s. CCE- BHAVNAGAR- 2015 (38) STR 776 (Tri.-Ahmd.) the same is reproduced below:-

> ***6.*** *We have considered the submissions made at length by both sides and also have taken on record the written submissions made by both sides.*
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> *Essentially, the entire issue revolves around whether the appellant herein is required to pay the differential Service Tax liability on the amount of Rs. 80/- which was considered by M/s. GMB and M/s. Unitech Ltd. as rebate and the Revenue authorities considered as additional consideration received by the appellant from M/s. Unitech Ltd.*
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> ***7.*** *The undisputed facts are that the appellant herein being a Maritime Board constituted under the Gujarat Maritime Policy of Government of Gujarat has sovereign rights over the waterfront of the entire coast of Gujarat State. The ownership of the said waterfront vests with Gujarat Maritime Board. In respect of certain waterfronts, the appellant has developed them into ports with proper infrastructure at its own cost and whosoever using the same, the appellants charges Rs. 100/- per ship on*

account of wharfage and discharges Service Tax on the same under category of Port services. In the case hand, even though the waterfront belongs to the appellant, they did not do anything and by an agreement, consequent to Maritime Policy as envisaged by the Govt. of Gujarat, permitted M/s. Unitech Ltd. to construct entire port at their own cost. M/s. Unitech Ltd. has invested money and has developed a port on the said waterfront, for use of the said port for conveyance of raw material for their cement plant situated in the vicinity. M/s. Unitech Ltd. has developed all infrastructure facilities as required in a Port and this has been under the Build, Own, Operate and Transfer scheme. Thus, the said port has been built by M/s. Unitech Ltd. as per the agreement, operated by M/s. Unitech Ltd. and was to transfer the same to the appellant at the end of 10/20 years. The terms of agreement entered into between the appellant and M/s. UTL as envisaged charge of Rs. 20 as wharfage charges per ship anchoring in the port which will be exclusively used by M/s. UCL. Appellant has paid the Service Tax on Rs. 20/- so charged by them under the category of 'Port services'. It is also undisputed that the said port is only utilized by M/s. UCL and has not been used for providing facilities to other assessees; yet another bone of contention is regarding the water lee way charges which have been collected by the appellant and not discharged the Service Tax liability i.e. the appellant has charged a lump sum amount from M/s. UCL for a particular kind of ship approaching the said port as waterway fees.

7.1 *The contention of the Department is that the Service Tax should have been discharged by appellant on Rs. 100/- under wharfage charges and also on the water fees collected by them. The entire issue in this case is upto the year June 2008.*

At the outset, we would like to record that both sides have relied upon the various case laws and we have given due consideration to them.

8.1 *The term Port service is defined during the relevant time as under in terms of Section 65(82) of Finance Act, 1994.*

"Port service" means any service rendered by a port or other port or any person authorized by such port or other port, in any manner, in relation to a vessel or goods."

8.2 *From the perusal of the definition of port service which was in existence prior to 1-7-2010, it can be seen that a service could be considered as a port service if it satisfied following two conditions :-*

(i) Service should have been rendered in relation to a vessel or goods.

(ii) Service should have been provided by port, other port, or person authorized by port.

8.3 *In the present case, neither of the above two conditions is being fulfilled. Except for the ownership of the waterfront, GMB had no role to play. The entire port with infrastructure was built by M/s. UCL Ltd. and would be owned and operated also by M/s. UCL Ltd. under BOOT scheme. Thus, no service of whatsoever nature has been rendered by GMB, which may fall under the category of port service. No service has been rendered by them in relation to a vessel or goods. Just because Rs. 20 has been charged by GMB from M/s. UCL Ltd. under the head wharfage charges and GMB has paid Service Tax on the same under the category of Port service, it cannot be said that the service rendered, if at all, by GMB was a port service. There is no estoppel against the law.*

8.4 *As mentioned above, except for the ownership of waterfront, GMB does not own anything. The port and the infrastructure thereon vests in*

M/s. UCL Ltd. and this is permissible under Indian Law as there can be two owners, one for the waterfront and another for port and infrastructure thereon. The law in India is that land can belong to one and building thereon can be of other person as compared to law in UK wherein building vests in the owner of the land.

8.5 *Thus, in the absence of any port service having been rendered by GMB, question of charging differential Service Tax under the category of Port service does not arise at all. The show cause notice has not invoked any other head for taxing the service, if any.*

8.6 *As mentioned above, GMB has not invested any amount whatsoever on the development of the port and infrastructure thereon and hence, Rs. 20 charged by the GMB, if at all, can be said to be an amount received for renting of immovable property in terms of S. 65(90a) of the Finance Act, 1994 which includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce. In our view, the understanding of C.B.E. & C., in Circular No. B-II/I/2000-TRU, dated 9-7-2001, in Para 2.2 (already reproduced in this order), talks about lease rentals for land, etc.*

8.7 *Now, it remains to be seen whether allowing the user of waterfront for construction of port and infrastructural facility by GMB to M/s. UCL Ltd. amounts to renting of immovable property.*

8.8 *The terms "immovable property" has been defined in S. 3(26) of General Clauses Act, 1897 which reads as under :*

"Immovable property" shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

8.9 *In the present case, GMB has allowed M/s. UCL Ltd. to use their waterfront.*

8.10 *In Anand Behera v. State of Orissa - AIR 1956 SC 17, it was held by the Supreme Court that the right to catch and carry away of fish in specific sections of lake for a specified future period amounted to a licence to enter on the land coupled with the grant to catch and carry away the fish and was regarded as a benefit that arose out of the land as "immovable property". In Lakshman Gowroji Nakhawa v. Ramji Antone Takhwa - AIR 1921 BOM 93, it was held that right of fishing was "immovable property". Several fishery was held to be "immovable property" in Ram Bysack v. Nurumuddin - 1893 ILR 20 CAL 446. In Shibu Haldar v. Gupi Sundari Dasya - ILR 24 CAL 449, it was held that suit for the rent of the fishery was a suit for immovable property. In Sitaram v. Petia - AIR 1917 Nag 37, it was held that right of fishing is recognized as an interest in immovable property.*

8.11 *In the light of the above judgments, it can reasonably be concluded that allowing the user of the water front by M/s. GMB to M/s. UCL Ltd. was allowing the use of immovable property by GMB to M/s. UCL Ltd, and hence, Rs. 20 charged by GMB to M/s. UCL Ltd. at the most was on account of renting of immovable property. Just because the said charges were linked to the number of ships, it will not convert the same into port charges because basis of quantification or measurement is not relevant while deciding on the nature of the charges.*

8.12 *The charges levied by GMB in case of other ports cannot be compared with the present case since in case of other ports entire investment for constructing the port and infrastructural facility was spent by GMB and port was being operated by GMB and hence, the charges*

levied by GMB were in relation to the vessel or goods and were provided by GMB and hence, rightly fell under the category of port service in terms of Section 65(82) of the Finance Act, 1994.

9. *In essence, the service rendered by GMB is one of grant of a licence to use the waterfront at the minor ports over which the State Government has a sovereign right. Such service, without any other attendant service for handling the vessels or goods, cannot be considered to be a port service. Such a service is akin to the service of renting of an immovable property but that has not been the case of the Revenue at any stage. Even if the taxable sentry of renting of immovable property had been invoked, no tax would have been payable at least till 2010 as renting of a vacant land was expressly kept out of tax net till 2010.*

9.1 *Even if it is assumed that the grant of licence to use waterfront is a port service, appropriate tax on the 'gross amount' actually charged by GMB for such service has already been discharged. The question whether there was any additional consideration received by GMB towards such service rendered by it has to be seen in the context of the valuation provisions in the Finance Act, 1994. Section 67 of the Finance Act, 1994 provides that the value for the purposes of levy will be the 'gross amount charged'. The expression 'gross amount charged' is defined in Section 67 in the following manner :*

" 'gross amount charged' includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called 'Suspense account' or by any other name, in the books of account of a person liable to pay Service Tax, where the transaction of taxable service is with any associated enterprise."

The 'gross amount charged' is the value with reference to which tax is payable, provided the provision of service is for a consideration in money. The expression 'money' is defined in Section 67 to read as under :

" 'money' includes any currency, cheque, promissory note, letter of credit, draft, pay order, traveler's cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value."

9.2 *A reading of the above provisions makes it evident that the levy of Service Tax in the Finance Act, 1994 is with reference to the amount actually paid for the services. This is akin to the concept of transaction value which is now the method of valuation followed both in the Central Excise as well as Customs Acts. The definitions extracted above make it clear that tax is required to be paid on the amount that is actually paid by one party to another. Such actual payments can be made by any acceptable modes of payment such as cheque, currency, promissory note, letter of credit, draft, pay order, traveler's cheque, money order, postal remittance or other similar instruments. Also, payments made by way of deduction from accounts or by issue of credit notes, debit notes or book adjustments are also regarded as forms of payment. Applying the definitions of 'gross amount charged' and 'money' to the present case, it is evident that the only amount received by GMB is the amount equivalent to 20% of the usual wharfage charges, as the remainder 80% was rebate or a discount offered by GMB.*

9.3 *It is not in dispute that the remainder amount which was offered as rebate was not paid back to GMB either as 'deduction from account' or 'credit note' or 'debit note' or by book adjustment. The question of such deduction from account or issue of credit note, debit note or book*

adjustment would have arisen, if the capital investments made by the user industry were investments made on behalf of or on account of GMB. If that had been the case, the amounts spent by the user industry would have been shown as amount receivable from GMB not only in the user industry's books but also in GMB's books. The Agreement between GMB and the user industry makes it clear that all and any expenditure incurred by the user industry for development of waterfront will not be the liability of GMB and therefore will not be remissible by GMB under any circumstances. This is the essence of the Agreement between the two parties. This being the case, the question of such capital expenditure being adjusted or deducted would not arise. The reason why GMB was still required to know the extent of capital investment made was to ascertain and/or work out the period for which the rebate would continue to be available to the user industry. Therefore, it can be said that the tracking of the capital expenditure as well as the extent of rebate granted to the user industry was only done for the purpose of determining the period during which the concessional rate would apply. This tracking was not intended to hold that it was squaring off account or adjustment or deduction. The gross amount charged is the assessable value only when the provision of service is for a consideration in money. In the present case, Revenue's contention is that the service rendered by GMB was not entirely covered by a consideration in money and that there was an additional consideration which flowed to it in the form of benefits which it would derive from the capital expenditure incurred by the user industry for developing the seafront, which would become GMB's property. In this context, one needs to examine whether the expenditure incurred by the user industry can at all be considered as 'consideration flowing from the user industry to GMB'.

9.4 *The capital expenditure incurred by M/s. UCL cannot constitute 'consideration' flowing from M/s. UCL to GMB for the reason that such expenditure was not incurred at the desire and request of GMB but was incurred by the end user for own benefit without there being a stipulation for such amount to be incurred. The Privy Council in the case of Raja of Venkatagiri v. Sri Krishnayya, - 1948 PC 150, interpreted the words 'at the desire of the promisor appearing in Section 2(d) of the Contract Act, 1872 held that where the monies were advanced not as a result of the desire of the promisor who executed the promissory note, the same cannot constitute consideration for the promissory note. As such, applying the ratio of this decision, it will flow that since the construction of the jetties by the user industry was not at the request or desire of GMB but by the company's own volition, such expenditure would not constitute consideration. This is clear from the definition of 'consideration' in Section 2(d) of the Contract Act, which reads thus :*

"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 promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

9.6 *Even if the capital expenditure incurred for development of waterfront is regarded as 'construction', the next logical question that will arise is whether the entirety of such construction is liable to be included in the value. As per the understanding between GMB and its user industry, the infrastructure developed by the user industry goes into the possession and exclusive control of GMB even after the expiry of 20 years or thereabout. Significantly, the Agreement between GMB and the user industry does not require or stipulate the user industry to construct the infrastructure of such quality and type which can last beyond the concession period of 20 years or so. The Agreement between GMB and the user industry does not require the user industry to ensure that the facilities and infrastructure so created are of such quality that they outlive*

the concession period so as to become usable for GMB at a later date. Therefore, if the user industry decides to construct a temporary jetty or a ro-ro jetty or an SPM whose shelf life is less than 20 years, the benefit that would accrue to GMB at the end of concession period would be nil as the facilities would have become unusable by that time. This itself shows that the understanding between GMB and the user industry did not contemplate the passing on of any benefit to GMB at the end of concession period. Any such benefit, even if it accrues to GMB, is clearly contingent for industry and in the absence of any mechanism or machinery provision for following the present value of such contingent benefit, no addition can be made to the assessable value on account of such contingent benefit. Since the provisions of the Finance Act, 1994 do not contain any machinery provision to determine the present value of such future or contingent benefit, any addition on this account would be an arbitrary one. The question of adding the value of full capital expenditure as additional consideration is in any case absurd as most of the benefits from such capital expenditure would have accrued to the user industry during the concession period and would not be to the account of GMB. In other words, the capital expenditure incurred by the user industry is an expenditure incurred by the user industry in its own benefit and it is clear on the intention of the two parties that GMB would have been entitled only to a contingent benefit at the end of the concession period and the value of that contingent benefit cannot be quantified particularly in the absence of a machinery provision to that effect in the Finance Act, 1994 or in the rules framed thereunder. In this regard, the judgement of the Supreme court in the case of B.C. Srinivas Shetty is relevant, which provides that where a taxing statute does not provide or prescribe a machinery provision, in the absence of such machinery provision to cover a particular type of transaction, it is the absence of such a machinery provision itself sufficient indication that the legislature did not intend to tax that transaction. Though the judgment was rendered in the context of the Income Tax Act, 1961, the principle arising therefrom is equally applicable in the present situation where there is no method available to determine the present value of a contingent benefit which may or may not accrue to GMB at a future date.

9.7 *The Revenue's case is even otherwise illogical and absurd as it seeks to assess the services rendered by GMB with reference to the normal wharfage charges which it recovers from users at the full-fledged ports developed and operated by GMB, such as the Kandla Port. This is clearly illogical as in the present case the service rendered by GMB was limited and confined to the grant of licence to use the waterfront for which it charged a limited amount (20% of the usual wharfage). Considering the limited nature of the service rendered, GMB could only charge a limited consideration. This amount, which happens to be 20% of the usual wharfage charge, is the amount actually paid and in the absence of any book adjustment or deduction from the account constitutes the 'gross amount' actually charged for the service.*

10. *It is also to be mentioned that w.e.f. 1-4-2008, the Govt. of Gujarat has amended the Gujarat Maritime Board Act, 1981, wherein Section 22A has been inserted. The said Section 22A specifically states that any amount provided by Gujarat Maritime Board, the appellant herein, is a State levy and a statutory levy and proceeds of such levy are credited to the Consolidated Treasury Fund of State of Gujarat. If that be so, any amount collected after 1-4-2008 by Gujarat Maritime Board, can be considered as statutory levy only and Service Tax liability thereon may not arise.*

11. *Since we have disposed of the appeal on merits of the case, we are of the view that detailed discussion on other various points raised by both*

sides would be academic nature and hence, we are not recording any finding.

12. *In view of the foregoing, we find that the impugned order is unsustainable and is liable to be set aside.*

13. *The impugned order is set aside and the appeal is allowed with consequential relief, if any.*

As per the revenue, the above judgment is distinguishable for the reason that it was in respect of services provided by GMB to the appellant who had developed, maintained and operated the Port by investing their own capital and considering the limited nature of service rendered by GMB to the respondent, the rebate was correctly held to have been allowed by GMB. We find that in the present case, the service transaction is between the EBTL & ESTL whereas, the revenue has heavily relied on the agreement between GMB and EBTL. In our view, since there is no such conditions, which exists between GMB and EBTL, exists in the transaction between EBTL & ESTL, the case of the respondent is on a better footing as compared to the judgment given in GUJARAT MARITME BOARD case (supra). In the said judgment the similar issue was involved that whether service tax should be chargeable on 100% of notified rate or on 20% (after giving rebate of 80%) therefore, the judgment of GUJARAT MARITIME BOARD (supra) is squarely applicable in the present case.

4.4 In view of the above and concurring with the findings of the learned Commissioner, we are of the view that the appellant has discharged service tax correctly on the 20% of the wharfage charges charged to the M/s. ESTL.

4.5 Without prejudice to the above, we find that the appellant also raised additional grounds in their cross- objection. As regard the ground that the adjudicating authority has not appreciated and ignored the agreement, as regards consideration receivable for provision of services in terms of agreement dated 21.2.2011, we find that EBTL is also providing facilities for loading unloading and export import of cargo and services incidental thereto referred to as cargo and handling facility for which separate charges are made to ESTL and there is an escalation clause also. The agreement also provides that in the event of EBTL increases the depth of the channel from 10 meters to 12 meters, the cargo handling charges for raw material will increase by Rs.21 per metric ton. The same agreement also provides the wharfage charges shall be recovered at actual, this clearly shows that the agreement provides that the total consideration shall be the sum of cargo

handling charges and port related charges including the recovery of wharfage charges at actual. In this fact, there could have been no undervaluation of any kind. We agree with this submission of the respondent which also reinforce the correct determination of the value arrived at by the respondent for discharging the service tax.

4.6 As regard the demand being barred by limitation, we find that as per the submission made by the respondent which is not under dispute that they have been regularly filing ST-3 returns wherein, payment of service tax on discounted amount was always reflected. The only ground for alleging suppression as reflected in the notice is that the respondent had not furnished the copy of the agreement dated 25.3.20 and entered into agreement with GMB allowing discounted rates to them with an intent to evade service tax.

4.7 We find that the respondent vide their letter dated 22.12.2009 intimated to the jurisdictional Superintendent regarding approval given by GMB for construction of 550 Mtr water cargo handling terminal facility as well as permission for transfer of approval from ESTL to EBTL. It was intimated that port is under construction and GMB will give approval for commencing of cargo operation after the agreement is signed which was under process. The agreement was signed on 25.3.2010 after which the operations were commenced. The commencement of the operation was in the knowledge of the department as successive EA-2000 audits were conducted in March 2011, June & July 2012 for the period 2010-11 and 2011-12 wherein copies of the agreements dated 25.3.2010 entered into with GMB were duly furnished. In fact, the audit report dated 7.9.12 conveyed to the respondent by Jurisdictional Superintendent vide his letter dated 1.2.2013 had in Para 1 specifically referred to clause 22 of the License Agreement dated 25.3.2010 with GMB and had pointed out similar short payment of service tax on part of GMB on wharfage charges on an identical ground that the service tax was paid on concessional rate granted to them by GMB and not on the full rate. These establish that the copy of agreement dated 25.3.10 entered into by the respondent with GMB along with all its enclosures was submitted to the department and clause 22 which is subject matter of the present dispute was very much in the knowledge of the department as similarly short levy in GMB was pointed out earlier. In view on this fact the invocation of the longer period for demand is absolutely incorrect and not sustainable. We hold that the demand for the extended period is not sustainable on time bar also. Since we have decided the matter

on merit as well as on limitation, we are not going into other issues raised by the respondent.

05. As per our above discussion and findings, we hold that the impugned order does not suffer from any infirmity and therefore, is sustained. The appeal of the revenue is dismissed accordingly. CO is also disposed of.

(Pronounced in the open court on 06.01.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul