CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

SERVICE TAX Appeal No. 11110 of 2013-DB

[Arising out of Order-in-Original/Appeal No 03-BVR-COMMISSIONER-2013 dated 30.01.2013 passed by Commissioner of Central Excise and Service Tax-BHAVNAGAR]

State Charges Gog Jafrabad Port **...Appellant**

Gujarat Maritime Board,
Pipavan Group Of Ports, Bandar Chowk,
Jafrabad
Gujarat-365540

VERSUS

C.C.E. & S.T.-Bhavnagar **...Respondent**

Plot No.6776/B-1...Siddhi Sadan, Narayan Upadhyay Marg,
Beside Gandhi Clinic, Near Parimial Chowk,
Bhavnagar,
Gujarat-364001

APPEARANCE:
Shri V.H.P Singh, CA, Shri Jigar Shah & Shri Ambar Kumrawat, Advocates for the Appellant
Shri. P K Singh, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L MAHAR

FINAL ORDER NO.A / 12550 /2023

DATE OF HEARING: 25.07.2023
DATE OF DECISION:06.11.2023

C.L MAHAR

The brief facts of the matter are that the appellant is registered with the Service Tax department under the category of port services and have been paying Service Tax regularly under the port service rendered by them to various clients.

2. The department during the course of audit came to know that appellant have been regularly paying Service tax on the taxable amount received by them from M/s. GPPL, Pipavav towards water front royalty/ wharfage charges.

The audit party of the department notice that the appellant had started payment of Service Tax on amount of water front royalty, considering as "port service" since April 2010, but the appellant have not paid the Service Tax on the taxable amount received by them during the period from 2006-07 to 2009-10. The amount on the water front royalty charges/wharfages received by them from M/s. GPPL. Accordingly, a SCN dated 21 October, 2011 came to be issued demanding Service Tax of Rs. 1,52,52,812/-, under Section 73 of the Finance Act 1994, invoking the extended time *proviso* for demand of the duty. Interest and penal provisions have also be invoked as per the provisions of Finance Act, 1994 in the SCN. The matter was adjudicated vide order-in-original dated 30 January, 2013, whereunder the learned Adjudicating Authority has confirmed all the charges as invoked in the SCN. The appellants have before us avail the above mentioned order-in-original.

3. Learned Advocate appearing for the appellant have contended that the water front royalty charged by the appellant M/s. GPPL, is statutory levy charged by the Government of Gujarat in respect of sovereign/staturory function, and therefore, in view of the CBIC's clarification vide Circular No. 89/7/2006-ST dated 18.12.2006, same are not taxable service. The learned Advocate has also added that as per Section 22A (2) of the Gujarat Maritime Board Act, 1981. The water front royalty is to be credited to the consolidated fund of state. Thus, the WFR are in the nature of tax levied by the State Government in exercise of sovereign function, and therefore, same cannot be subjected to Service Tax by treating the said sovereign function as a performance of taxable service.

3.1 Learned Advocate has also pointed out that the appellant start paying the Service Tax on this charges from 01.07.2010, as the definition of the port services provided in the Finance Act, 1994, underwent amendment from

01.07.2010, the legal provisions with regard to the port service definition prior to 01.07.2010, and thereafter has been as follows:

> *"They claimed that before the amendment of definition of "port service" they were not falling in the category of "port service". Before the amendment, the "port service" was defined as "any service rendered by a port or any person authorized by the port, in any manner, in relation to a vessel or goods". After the amendments, "port service" has been defined as "any service rendered within a port or other port, in any manner". From the above definition of "port service", it can be seen that words "vessel or goods". After the amendments, "port service" has been defined as "any service rendered within a port or other port, in any manner". From the above defined of "port service", it can be seen that words "vessel or goods" have been deleted in the amended definition of "port service".*

3.2 Thus, since they have not provided any service in relation to vessel and goods therefore the charges received by them does not fall under the definition of port service during the period of demand. The learned Advocate has also contended that the SCN dated 21 October, 2011 was issued for the period covering 2006-07 to 2009-10. Thus, the entire SCN is bared by period of limitation as provided under Section 73 (1) of the Finance Act, 1994. It has been the contention of the learned Advocate that the appellant have regularly been audited by the department. The learned Advocate has drawn our attention to the audit report dated 05.01.2009 & 03.05.2010. It has also been contended that during the course of the audit entire record including the financial accounts are presented before audit party and therefore the charges of any suppression, mis-representation, fraud with an intent to evade Service Tax cannot be invoked in their case. The learned Advocate has drawn our attention to audit report dated 05.01.2009, which covers the audit period covered under this report is from October, 2005 to March 2008, and the audit report dated 03.05.2010, covers the period from March 2008 to September 2009. Thus, the learned Advocate is emphasis that it was wrong on the part of the department to invoke larger period of demand while all the facts have

been before the department and the appellant have never tried to suppress or mis-representation any facts with regard to amount received by them from M/s. GPPL-Pipavav.

3.3 Learned Advocate has drawn our attention to the Board Circular No. 89/7/2006-ST dated 18.12.2006, and emphasis that it has been clarified by the CBIC that any mandatory statutory levies which are deposited into the Government and which are in the nature of statutory fee/levy, same cannot be subjected to Service Tax. Since the wharfage charges is being charged as per Section 22A (2) of the Gujarat Maritime Board Act, 1981 and the same are in the nature of the statutory levy and therefore, in view of the above mentioned Board Circular same cannot be subjected to Service Tax. The learned Advocate has also relied upon various case laws which are as mentioned below:

- CCE Vs Cochin Port Trust 2019 (22) GSTL 345 (Kar.)
- Cochin Port Trust Vs.CCE 2011 (21) STR 400 (T)
- CCE Vs Cochin Port Trust 2018 (10) GSTL 87 (T)
- Gujarat Maritime Board Vs CCE-2015 (39) STR 529 (SC)
- CGST Vs Delhi International Airport Ltd 2023 (6) Centax 199 (SC)
- Mormogao Port Trust Vs CE 2017 (48) STR 69 (T)

  Affirmed by the Supreme Court of India- 2018 (19) GSTL J118 (SC)
- CCE Vs. Pragathi concrete Products (P) Ltd- 2017 (50) STR 92 (SC)

3.4 The learned Advocate has drawn our attention to decision of this Tribunal in case of M/s. Gujarat Maritime Board Vs. CCE- Bhavnagar reported in 2015 (38) STR 776 (Tri.-Ahmd), wherein the issue has been decided by this Tribunal in favour of the party holding that water front royalty charge recovered from licensee are in the nature of statutory levy and proceeds such levy are credited to the consolidated fund of State of Gujarat and same cannot be subjected to

Service Tax liability. It has further been mentioned that the decision of the Tribunal in above matter was appealed before Supreme Court by the department and the Hon'ble Supreme Court has held that charges for use of water front royalty charge does not include any service in relation to vessel or goods and therefore same cannot be described as a port service.

4. Learned AR reiterated the findings as given in the order-in-original.

5. We have heard the rival submission. We notice that period of demand in this case pertains to 2006-07 to Feb 2009 and the show cause notice in this case has been issued on 21/10/2011 invoking the intended period of limitation as per the provisions of Section 73 of the Finance Act, 1994.

5.1 The relevant definition, as it existed at the relevant time, reads as follows:

> *"Section 65(82) "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".*

5.2 This definition underwent certain changes vide Finance Act 2010 with effect 01.07.2010, and the port service definition after 01.07.2010 reads as follows:

> *"Port services means any service rendered within a port or other port, in any manner."*

The relevant definition in this case is the definition & port services as it exists prior to 01.07.2010.

5.3 The relevant facts in the matter are that M/s. Gujarat Maritime Board (the appellant) is a statutory body appointed under Gujarat Maritime Board

Act, 1981. As per the Maritime Board Act, 1981, the state of the Gujarat has authorized Gujarat Maritime Board to administer and operates the minor ports. The appellant as per the authority granted to them by the Maritime Board Act, 1981, collects shipping and landing fees for cargo handled at water front/minor ports and captive jetty in the State of Gujarat. The appellants have prescribed the rate of shipping, landing fees and other charges for use of the port of the appellant. For the purpose of development of the minor ports and for creation of the better infrastructure for the State of Gujarat. The Government of Gujarat has allowed the appellants to enter into agreement with the various private operators for developments of minor ports. In view of the policy of State Government of Gujarat, the appellant have granted license to Gujarat Pipavav Prt Ltd, Pipavav for development of port of Jafarabad and others sub ports. The relevant parts of the written reply submitted by the appellant to the Adjudicating Authority dated 21.01.2023, wherein the relevant parts of the agreement between the appellant and GPPL have been reproduced below:

> *"14.2 PORT OFFICE JAFARABAD operates under administration, control and management of the GUJARAT MARITIME BOARD- a state government entity-local authority-constituted under the Gujarat Maritime Board Act, 1981. The said control is granted to State Governement by virtue of CONSTITUTION OF INDIA.(Item 31, List III Seventh Schedule)*
>
> *14.3 FURTHER, FOUR SUB PORTS VICTOR, MAHUVA, RAJPARA AND KOVAYA operate under administration, control and management of PORT OFFICER JAFARABAD. All, Five, i.e. Port 1 Jafarabad and its Four Sub-ports are individually / separately registered with Service Tax Department since 01.07.2003.*
>
> *14.4 The State Government of Gujarat has and exercises sovereign right over the water front in Gujarat. In view of such sovereign right of the State Government, inter alia certain private ports have been allowed to be developed in its jurisdiction.*
>
> *14.5 GUJARAT PIPAVAV PORT LIMITED, PIPAVAV [GPPL] is one such private port which has been allowed to operate as such and is authorised to operate independently and provide Port Services etc. within its jurisdiction as per the*

relevant agreement(s) with Government of Gujarat in compliance of the BOOT Policy Government of Gujarat Resolution dated 29.07.1997 (ANNEXURE 1: 10 PAGES];

14.6 On perusal of BOOT Policy, your goodself will be able to confirm that the operation of the concerned port was envisaged to be responsibility of concerned Port Developer Le. GPPL in this case.

14.7 Thereafter, on 30.09.1998 a Concession Agreement was executed between GMB and GPPL with State Government as confirming party. (ANNEXURE 2 35 PAGES] Please note that the said agreement supposedly forms part of SCN in question as ANNEXURE C as a relied upon Document but in view of the fact that the same was not annexed to SCN provided to GMB, the same has been submitted herewith for ready reference.

14.8 SCN in its para 3.2 refers to TWO clauses of the above agreement. Viz. 2.1(49) and 11.3. Both are reproduced below for immediate recapitulation:

> *"2.1(49) "Waterfront Royalty" means the amount payable by the Licensee to the Licensor per ton of cargo handled at the Port based on the actual cargo throughputs achieved and to be paid in accordance with Clause 11.3 for the various options given therein."*

11.3 Waterfront Royalty Payments

> *(a) From the effective Date, the Licensee shall pay the Licensor a monthlyWaterfront Royalty per ton of cargo handled at the Leased Premises. Such Waterfront Royalty payment shall be based on the actual cargo throughputs achieved, which shall be determined on the basis of customs and other statutory declarations.*
>
> *(b) The Licensee shall submit for verification to the Licensor every month, the cargo wise throughput achieved in that month.*
>
> *(c) The total royalty payable by the Licensee shall be the aggregate sum in respect of all types of cargo, of the applicable per ton royalty for each particular type of cargo multiplied by the actual throughput of that particular cargo in the month*

(d) The Licensee shall pay Waterfront Royalty payments by cash and/or negotiable instrument on the last day of each month."

14.9 In terms of the aforesaid agreement, as laid down in Clause 10 on its pages 13 to 15, the total aspects encompassing Pilotage, Operations & Services, Priority Services, Sub-Contracting, Leasing, Personnel, Security and Maintenance were responsibilities of Port Developer i.e. GPPL and GMB/State Government had no role, whatsoever, in any of the said aspects.

14.10 Further, Licensee ie. GPPL, in terms of clause 11.2.1(a) and (b) is "entitled to fix and collect fees for all the services rendered or performed at the Port and authorised under the above Agreement in accordance with applicable law, duly complying with the provisions of the Indian Ports Act relating to tariff."

14.11 Further, in terms of clause 11.2.1(c) of the same agreement "GPPL is also permitted by law to structure the tariff at its discretion and the currency of denomination of tariff."

14.12 Further, in terms of clause 11.2.2(b), "notification of comprehensive tariff schedule to public was to be responsibility of GPPL along with power to customise separate service and tariff package for specific users form time to time."

14.13 In view of above factual / legal reality, it can be observed that the total port operations including complete responsibility of GPPL. port operations were total

14.14 Please note that State Government and/ or GMB had/has no role to play in the administration, finances and/or operations of GPPL and all operations/logistics/ provisions of services etc. are entirely at risk, cost control of GPPL.

14.15 In terms of its agreement with State Government / GMB, GPPL had/has to pay WATER FRONT ROYALTY [WFR] to GMB till 28.02.2009 and thereafter w.e.f. 01.03.2009 DIRECTLY to STATE GOVERNMENT at a prespecified and agreed rate(s) in terms of above facts/stipulations.

14.16 Prior to 1 April 2008, such WATER FRONT ROYALTY was collected/levied by GMB in exercise of powers under the Gujarat Maritime Board Act 1981 and with effect from 1 April 2008, the same is levied by the State Government

itself under Section 22A of the said Act. [ANNEXURE 3:48 PAGES)

14.17 Having clarified the facts about the port operations in the port premises handled by GPPL, We, now seek to describe the accounting / financial procedure adopted for collection of Waterfront Royalty by GMB.

14.18 With a view to comply the provisions of Indian Ports Act, 1908 and the Gujarat Maritime Board Act, 1981, the total proceeds collected by GPPL were supposed to be deposited by GPPL first in a separately opened PLD (personal ledger deposit) bank account (similar to escrow account maintained in similar transactions) and then, on computation of Waterfront Royalty payable to GMB State Government, residual amount would be transferred to GPPL and the amount of Waterfront Royalty arrived at would transferred to GMB /State Government account.

14.19 For arriving at the amount of Waterfront Royalty receivable by GMB State Government and residual amount belonging to GPPL, a periodical bill would be prepared by GMB under the nomenclature Waterfront Royalty Bill" which would have a statement annexed to it duly enumerating vessel wise account of financial transaction (similar to the one attached as Annexure-D to SCN). Thereafter, on crystallisation of specific amount of WFR, a cheque of residual amount would be issued in favour of GPPL with simultaneous issue of WFR amount to GMB / State Government. For your kind perusal, records and complete view of all transactions, a 2006-2007, are being complete set of relevant documents, for financial year submitted hereinafter:

> *ANNEXURE 4:52 PAGES: PLD Ledger account maintained at GMB level in vernacular.*
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> *ANNEXURE 5: 20 PAGES: Relevant Bank Statement.*
>
> *ANNEXURE 6: 90 PAGES: WFR Bill and statement*
>
> *ANNEXURE 7:01 PAGE: Annual Reconciliation Statement*

14.20 Thus in the revenue (income) accounts of GMB / State Government, the actual amount of WFR and TDS thereon would be credited and at no point of time the total income (Port Dues and Wharfage) earned by GPPL on

provision of services would pass through in GMB's / State Government's revenue accounts.

14.21 Further, right from creation of port infrastructure for port user(s) to actual provision of various port services in the port premises of PIPAVAV PORT of GPPL, GMB/State Government has had no role to play and only collection of proceeds thereof would be routed through PLD account which was/is basically to ensure foolproof computation of WFR to ensure that no loss occurred to Government exchequer.

14.22 All the relevant facts as narrated above are/were on record and apparent on prima facie perusal and in vogue since October,1998.

14.23 Apart from the fact that Port Office Jafarabad of GMB and its four subports had got itself registered under Service Tax w.e.f. 01.07.2003, GPPL was also registered as such in view of the fact that they were providing port services [AAACG6975BST001).

14.24 Since 01.07.2003, various audits / inspections, of the records of GMB and GPPL, have been conducted by Service Tax Division of Excise department and nowhere in past, any objection / para was ever raised in this context about non levy/collection of Service Tax on the WFR received by GMB/State Government.

14.25 In para 2 of SCN it is stated that "During the course of Audit conducted by the HQ Audit, Bhavnagar, it has come to the notice of the Audit Party.... that the noticee had started the payment of service tax on the amount of water front royalty charges considering it as "port services" since April-2010 but have not paid the service tax on the taxable amount received by them during the period from 2006-07 to 2009-10 "whereas the fact is that all along since 01.07.2003 during various departmental audits of GMB PO JAFARABAD and other subports under its jurisdiction and/or GPPL the fact was known to Department. Further, DGCEI of AZU had initiated inquiry vide its communication no. DGCEI/AZU/12(4)5/2008-09/1939 dated 03.09.2009 for the period 01.04.2004 to 2008-2009 and concluded with final submission of PO JAFARABAD on 19.02.2010 during which PO was called personally and statement taken on all pertinent aspects. A copy of his statement may please be called from the file of DGCEI-AZU and also given to us. All this goes on to substantiate that it was not that the fact came to notice of

HQ Audit first without being known to Department earlier but that HQ Audit NOW chose to interpret it differently and against the stance/interpretation of GMB. At this juncture, We are submitting herewith synopsis of all audits/litigations and proceedings of DGCEI etc. as (ANNEXURE 8 02 PAGES) to substantiate our stance about Department, all along, having knowledge of all the relevant facts and how HQ Audit ignored ground realities to arrive at a predetermined conclusion. 14.26

14.26 Even, the issue raised in present SCN dated 21.10.2011 (received at GMB on 15.11.2011) seemingly has its origin in Final Audit Report No. 20/ST/11-12 dated 31.10.2011 ANNEXURE 9 02 PAGES

14.27 As given to understand by our Port Officer, We have been informed that after commencing collection of service tax on WFR since April, 2011, service tax was collected and paid along with applicable interest for the perid April, 2010 to March, 2011. This fact is confirmed in present SCN para 2 and is not in dispute at all.

14.28 The commencement of levy/collection of service tax by GMB was initiated by way of letter no. PO/JFD/AC/44 dated 20.04.2011 (ANNEXURE 10: 01 PAGE] addressing it to Chief Operating Officer and Accounts Officer of GPPL.

14.29 We presume that at that time or some time thereafter, Audit Staff of Service Tax Division while conducting audit of GPPL came across the said letter of PO Jafarabad dated 20.04.2011 and wrote a letter dated 29.06.2011 [ANNEXURE 11:01 PAGE] addressing it to PO Jafarabad with a copy to GPPL. The said letter in its para 2 stated that

> *"2 .....the Service Tax on warfage charges is from April*
>
> *2010 is incorrect. In this connection, your attention is invited to the fact that Water front Royalty Charges are nothing but Wharfage Charges and M/s. GPPL, Pipavav collect the Service tax right from the beginning. The applicability of Service Tax on said warfage charges is very well in the knowledge of M/s. GPPL.*
>
> *3. It is therefore informed that the Service Tax is applicable on the said charges collected by you from M/s. GPPL The Service Tax on it is not paid prior to*

April, 2010. It is required to be paid for the prior period to April 2010.....”

14.30 The natural question arising at this juncture would be that; If, as per statement in para 2 of Supdt.'s letter dated 29.06.2011, GPPL had been collecting Service Tax right from the beginning, then WHERE IS/WAS THE QUESTION OF LEVYING SERVICE TAX AGAIN ON SAME AMOUNT, WHEN ONLY A PART OF IT WAS BEING PAID BY GPPL TO GMB/STATE GOVERNMENT AS "WATER FRONT ROYALTY" as one of the items of its expenditure?

14.31 WATER FRONT ROYALTY" It is interesting to note that, in the same breath, the para 2 of the communication stated that "It is therefore informed that the Service same Tax is applicable on the said charges collected by you from M/s. GPPL. The Service Tax on it is not paid prior to April, 2010. It is required to be paid for the prior period to April 2010....." without clarifying or specifying HOW AND WHY?

14.32 Thereafter, pursuing the issue again, a communication dated 01.08.2011 was received (ANNEXURE 12 01 PAGE] from Supdt., Bhavnagar.

14.33 At this juncture, PO Jafarabad replied vide letter dated 06.09.2011 [ANNEXURE 13: 02 PAGES] clarifying the entire issue inter alia that

Please refer to item I sent by your goodself subsequent to our letter no. PO/JFD/AC/44 dated 20.04.2011 questioning our interpretation of "taxable port services" GMB since 01.07.2003, has always collected and paid applicable Service Tax on "Wharfage Charge(s)" collected by it on its own ports. Liberally interpreting and mainly for buying peace, GMB has also collected and paid Service Tax on jetties etc. wherein it was not providing any service whatsoever, in context and/or for vessel and/or cargo and legally speaking, service tax was neither leviable nor payable to your department for cargo handled by respective party wherein GMB was not providing any port service in terms of Finance Act, 1994.

In present case raised by you. "Waterfront Royalty" is being received from Gujarat Pipavav Port Limited [GPPL] on cargo discharged/handled by it. Please note that GPPL is a private port and separately registered with your department and must be collecting/paying applicable service tax on its "taxable port services"

and out of its revenue thus raised, it is also paying service tax on "Water Front Royalty" as above.

Further, as per our understanding the service tax being paid to GMB must have been claimed by GPPL as service tax/cenvat credit against the amount arrived at as payable by it. Thus the same, even if hypothetically considered as taxable would give rise to a revenue neutral situation

Even subsequent to Finance Act, 2010, in our humble interpretation. the same is neither collectible from GPPL nor payable to your department as being done by GMB BUT as submitted above GMB has been liberally interpreting the stipulation as also for buying peace by avoiding litigation, GMB started collecting and paying the same since April, 2010.

At this juncture, We also wish to draw your kind attention to the fact that unlike the contention taken by you in para 2 of your above letter that "Water Front Royalty Charges are nothing but Wharfage Charge" factually and legally both cannot be and are not synonymous, as sought to be conveyed by you.

As regards, your query raised in para 4 in your letter dated 29.06.2011. We seek to inform that GMB has neither collected nor paid Service Tax on "Water Front Royalty" prior to 01.04.2010 for reasons stated above.

14.34 On 27.09.2011, Supt., (Audit) visited PO Jafarabad and issued letter F.No. VI/8(a)-196/EA-2000/10-11/AP-VI (ANNEXURE 14: 01 PAGE) based on the records produced for audit and asked for confirmation of the data contained therein (ANNEXURE 15: 01 PAGE) which now forms part of present SCN as Annexure A."

5.4 It can be seen from the perusal of the above agreement that lumpsum royalty per matric tones on monthly basis a water front royalty is to be paid. We find that the Water Front Royalty payment which is been charged by the appellant from M/s. Gujarat Pipavav Port Ltd., is a license fee for the appellants allowing the GPPL to operate port facilities on the minor ports. If we take look at the definition as given in the proceedings paras,

We find that port service has been defined as the service rendered by port or any person authorized by such port in relation to a vessel or goods. It can be seen that the appellants are not providing any service to M/s. Gujarat Pipavav Port Ltd with regard to a vessel or goods rather it is a fee which is being charged to allowing him to operate port facilities of the minor port. Therefore we are of view that actual service with regard to a vessel or goods are being provided by M/s. Gujarat Pipavav Port Ltd at the minor port not by the appellant. It has also been contended by the leaned Advocate that State Government of Gujarat exercises sovereign right over the water front of minor ports in Gujarat and in view of such sovereign right of the State Government, the Gujarat Maritime Board Act, 1981 *inter alia* provides for levy of water front and royalty in respect of goods landed at the private ports for in behalf of the other parties. From 01 April 2008, the water front Royalty was levied by the appellant in exercise of powers under the Gujarat Maritime Board Act, 1981. The royalty is levied by the state Government itself under Section 22A of the Maritime Board Act, 1981. Thus, it has been contended that Water Front Royalty in respect of goods landed by the private port authority for other persons in Gujarat is statutory levy in respect of sovereign activity /function of a sovereign/ public authority. We take note of the Board Circular No. 89/7/2006-ST dated 18.12.2006, in this regard, the relevant extracted of the same is reproduced below:

> *"2. The issue has been examined. The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute*

provision of taxable service to a person and, therefore, no Service Tax is leviable on such activities."

Similarly the CBEC has further clarified this matter vide Circular dated 23.08.2007, The relevant portion of the same is reproduced below:

999.01/ 23-8-2007	*Sovereign/public authorities perform functions assigned to them under the law in force, known as "statutory functions". For example,* • *Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments;* • *Regional Transport Officers (RTO) issue fitness certificate to motor vehicles;* • *Directorate of Boilers inspects and issues certificates for boiler; or* • *Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws.* *Authorities providing such functions, required to be performed as per law, may collect specific amount or fee and the amount so collected is deposited into government account.* *Whether such activities of a sovereign/public authority, performed under a statue, can be considered as provision of service for the purpose of levy of Service Tax and the amount or fee collected, if any, for such purpose can be treated as consideration for the services provided?*	*Activities assigned to and performed by the sovereign/public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provisions of the relevant statue for performing such functions is in the nature of a compulsory levy and are deposited into the Government account.* *Such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not to be treated as services provided for a consideration. Therefore such activities assigned to and performed by a sovereign / public authority under the provisions of any law, do not constitute taxable services. Any amount/fee collected in such cases are not to be treated as consideration for the purpose of levy of Service Tax.* *However, if a sovereign/public authority provides a service, which is not in the nature of statutory activity and the same is undertaken for a consideration (not a*

		statutory fee), then in such cases, Service Tax would be leviable as long as the activity undertaken falls within the scope of a taxable service as defined.

5.5 In view of above circulars, the fact that water front royalty is being charged from 1 April 2008 as per the provisions of the Maritime Board Act, 1981 per Section 22A, and therefore in our view the maritime board is collecting the water front royalty as a statutory levy provided by Maritime Board Act, 1981, on behalf of State of Gujarat.

5.6 We also find that similar matter has already been decided by this Tribunal in the appellant's own case of Gujarat Maritime Board Vs.Commr. C.E reported under 2015 (38) STR 776 (Tri.-Ahmd) as follows:

> ***"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.*

8.11 *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.*

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."*

5.6 The Hon'ble Apex Court also in the same matter as held as follows:

- Commr. Of C.Ex., Bhavnagar Vs. Gujarat Maritime Board, Jafrabad:

"14. *As can be seen from Section 32 sub-sections (3) and (4), the Board may authorize any person to perform any of the services mentioned in sub-section (1) of the said section which includes landing of goods at wharves. We asked Shri Adhyaru to show us where such authority is given and his reply was only that it was given under the self-same agreement referred to hereinabove. We are afraid that we are unable to agree with Shri Adhyaru. The authority given to perform any of the services must first and foremost be under terms and conditions as may be agreed upon by the Board and the private person. Further, under sub-Section (4) of Section 32, it is the private person who is then authorized to charge or recover any sum in respect of such service rendered. This is conspicuously absent in the aforesaid agreement. There is no doubt on a reading of the agreement that it is the Board itself that charges or recovers wharfage charges from the licensee*

> *- UCL and does not authorize UCL to recover such charges from other persons. This being the position, it is clear that no service is rendered by a port or by any person authorized by such port and, therefore, the very first condition for levy of Service Tax is absent on the facts of the present case. So far as the direct berthing facilities provided for captive cargo is concerned, the lease rent charged for use of the waterfront also does not include any service in relation to a vessel or goods and cannot be described as "port service". This being so, it is unnecessary to go into any of the other contentions raised by both parties. To the extent that the impugned judgment is in conformity with our judgment, it is upheld. The appeals of the revenue are, therefore, dismissed accordingly."*

5.7 We also take note of the argument advanced by the learned Advocate that SCN in the present case has been issued invoking the extended time *proviso* under Section 73 of the Finance Act, 1994. However, it has been pointed out that the appellant have regular been audited by the department. We take note of the fact that a final audit order report No. 10/ST/2008-09, for covering the audit period October 2005 to March 2008, wherein all the financial records have been there report the auditing officers. Similarly another audit final order report No. 75/ST-2009-10 dated 03.05.2010, covering period from 2008 to September 2009 has also been placed on record. The above audited report indicate that all the financial statements of the appellants were before the auditing officers much before the issuing of the SCN. In these circumstances, we feel that element of the suppression of facts or mis-representation etc., within intent to evade Service Tax are not present in this case. As the SCN has been issued on 21 October 2011 much beyond the normal period of demand, we therefore feel that the SCN is barred by period of limitation.

5.8 In view of above facts, we hold that the impugned order-in-original is without any merit and therefore we set aside the same. Appeal is accordingly allowed.

6. In view of above facts and following the above mentioned decisions, we hold that impugned order-in-original is without any merit and therefore we set aside the same. Accordingly the appeal is allowed.

(Pronounced in the open Court on 06.11.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C.L MAHAR)
MEMBER (TECHNICAL)

PALAK