

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

REGIONAL BENCH - COURT NO. 3

**SERVICE TAX Appeal No. 00341 of 2012-DB**

[Arising out of Order-in-Original/Appeal No 12-13-COMMR-2012 dated 29.02.2012 passed by Commissioner of Central Excise-RAJKOT]

**Kandla Port Trust**

A O Building, Jamnagar  
Jamnagar, Gujarat

.... Appellant

*VERSUS*

**Commissioner of Central Excise & ST, Rajkot**

Central Excise Bhavan, Race Course Ring Road,  
Income Tax Office, Rajkot, Gujarat-360001

.... Respondent

**AND**

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.... Respondent

**APPEARANCE :**

Shri Shailesh P. Sheth, Advocate for the Appellant  
Shri Ghanasyam Soni, Addl. Commissioner (AR) for the Respondent

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

DATE OF HEARING : 26.04.2023

DATE OF DECISION: 03.08.2023

**FINAL ORDER NO. 11663-11664/2023**

**C.L. MAHAR :**

The appellant is engaged in providing various Port related services classifiable under the category of Port Service and also engaged in providing service under the category of renting of immovable property.

2. The department has issued two show cause notices to the appellant:-

(i) No. V.ST/AR-JMR/Commr/021/2011 dated 04.02.2011

(ii) No. V.ST/AR-JMR/Commr/236/2011 dated 18.10.2011

The first show cause notice as mentioned above was issued to the appellant demanding service tax amounting to Rs. 4,04,73,658/- on the ground that appellant has entered into agreement with M/s. Essar Oil Limited wherein the M/s. Essar Oil Limited shall install/ create various new port related facilities in Kandla Port Trust water limits and also in land/ road/ area of Kandla Port Trust. The agreement will remain in force for a period of 30 years and M/s. Essar Oil Limited after creating all the Port related infrastructure, will hand over the same to M/s. Kandla Port Trust free of cost after a period of 60 months. As per the agreement M/s. Essar Oil Limited shall pay to Kandla Port Trust wharfage charges at the rate of Rs. 18 per ton against the notified charges of Rs. 35 per ton and in the same proportion for berth charges and berth was also provided to M/s. Essar Oil Limited at the discounted rate. The charges thus levied by Kandla Port Trust on the service provided to M/s. Essar Oil Limited were given a discount of 51.43% of applicable rate of charges for berthing and for wharfage.

2.1 On the basis of above facts the department issued the first show cause notice alleging that appellant has provided service under the category of Port service to M/s. Essar Oil Limited under a contract and undervalued the services to the extent of 48.57% of the actual standard rates notified by the appellant and therefore, the appellant have violated the provisions of Section 67 of Finance Act, 1994 and undervalued the taxable value of the service provided by them to Kandla Port Trust.

2.2 The second show cause notice was issued to the appellant on the ground that the appellant had failed to pay service tax on the rental charges recovered by them from M/s. Essar Oil Limited by providing jetty and leave-way facility on lease rent basis. As per the allegation in the show cause notice, the appellant were liable to pay service tax on less ret received by them during the period of construction under service category of Renting of Immovable Property. Both the show cause notice got adjudicated by a

single order wherein the charges leveled were confirmed. The appellant is before us against the impugned order-in-original dated 07.03.2012.

3. We have heard both the sides.

4. We find that both the issues as mentioned above are no longer *res-integra* as the coordinate benches of this Tribunal have already decided the issue in favour of the appellant. Relevant extract of the orders are reproduced hereunder:-

(a) With regard to the issue of renting of immovable property of vacant land for the purpose of providing jetty and leave-way facility, the matter has been decided by this Tribunal in the case of *CCE & ST, Goa vs. Mormugao Port Trust - 2016 (41) STR 127 (Tri. Mumbai)* as under:-

"5.1 It transpires that the appellant assessee is port trust and renders the services classified under Port services and discharges service tax liability. During the material period in question, the appellant assessee has leased out vacant land for commercial use by private parties. This activity according to the Revenue is covered under the service tax net as renting of property services while it is the claim of the appellant that they had given only vacant land which is excluded from taxable services. It is also undisputed that the appellant assessee has entered into long term lease agreement with the private parties. The private parties on execution of lease agreements, utilised the vacant land for commercial purposes by constructing various temporary as well as permanent structures. We have perused the lease agreement entered by the appellant-assessee. The said lease agreement is annexed at Annexure D in the appeal of assessee-appellant. We find that the terms and conditions of the lease agreement which is entered by the appellant assessee, as State Government undertaking, contains standard clauses. We find that the appellant assessee had leased out land area and water area for the use of the lessee and granted permission to him for construction of dry dock, jetty for commercial exploitation. We find from the records that appellant assessee had given vacant land to the lessee.

5.2 On the above reproduced factual matrix we now have to consider whether such an activity of leasing of vacant land would fall under service tax net as claimed by the revenue. We need to consider the definition of the taxable service during the material period which reads as under:-

Taxable Service Defined under Section 65(105)(zzzz)

Taxable Service means any service provided or to be provided (to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or, for furtherance of, business or commerce).

Explanation 1. - For the purposes of this sub-clause, "immovable property" includes -

(i) building and part of a building, and the land appurtenant thereto;

- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto;
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate, and
- (v) vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;

but does not include -

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports, circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

*Explanation. 2* - For the purpose of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce.

It can be seen from the above reproduced definition that renting of property is taxable service from 1-6-2007. We are concerned with the exclusion clause in the definition under explanation I. Exclusion clause (b) will directly apply in the case in hand. It is undisputed that the land which has been leased out by the appellant is vacant. The said exclusion does not envisage any restriction as to it is to be put for non-commercial use. In our considered view the appellant assessee having leased out the vacant land and the water front, is covered under the exclusion provided in the definition. We find strong force in the contentions raised by the learned Counsel that in the case of *Mundra Port & Special Economic Zone Ltd.* (supra) in paragraph numbers 17 and 19 the Tribunal has on similar issue held such leases or not taxable. We reproduce the relevant paragraphs.

"17. As against above, the Commissioner has observed that in case, only vacant land is provided by the noticee under such agreement along with facilities like electricity, road, etc. the same may not amount to providing of infrastructure support for commerce or business. However, if more facilities which either individually or collectively be said to be supportive to the commerce or business of the second party are involved, the same would fall under business support services. As such, by examining each and every agreement, he has confirmed the demand in respect of six agreements.

It is seen that the various activities held by the Commissioner having been provided under the business support services are in relation to Dredged channel, Marine and port facilities, access to main road, usage of Railway, use of existing basic telecom infrastructure, drainage and sewerage lines, tapping point for electrification and providing of other already available facilities. Nevertheless, we note that the agreements are basically and primarily for allowing the use of the vacant plots so as to

have access to their area of work. Admittedly, the basic facilities for use of said vacant plots are required to be provided by the appellants. The same cannot be held to be covered by the business support services. We find that no justifiable reasons for the Commissioner to drop the demand in respect of nine parties and to confirm in respect of six agreements where the agreements were basically for providing vacant land for use of the same. The threadbare examination of the agreements, whereas in some cases along with identical facilities, some more might have been provided was not called for.

19. Inasmuch as admittedly in the present case, it is use of the vacant land, which stands provided by the appellants to various lessees along with the facilities, the same would not fall even within the taxable services of rent of immovable property. The demand on this count is accordingly not sustainable. The same is accordingly set aside along with setting aside of consequent interest and penalty."

5.3 We find that the judgment of the Tribunal in the case of *Gujarat Maritime Board* (supra) in paragraph number 9 the Bench held as under."

"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 service 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."

5.4 It can be seen from the factual matrix of the case in hand as also the ratio of the judgments, the activity of leasing out vacant land will not be covered under the category of renting of immovable property.

5.4 The appeal filed by the Revenue is also of no consequence as on merits we find that the issue is covered in favour of the appellant assessee as recorded by us hereinabove.

5.5 In view of the foregoing, in the facts and circumstances of this case we hold that the impugned order to the extent it is contested by the appellant assessee is liable to be set aside and we do so. To the extent it is contested by the Revenue is to be upheld and we do so.

6. In sum, we allow the appeal filed by the assessee and reject the appeal filed by the revenue.

In this case, also since the lease agreement is much prior to 2010, the above decision is squarely applicable and thus, we hold that demand of service tax is not sustainable on this count.

5. With regard to the second issue whether the appellant have undervalued the services provided by them to M/s. Essar Oil Limited, this issue is also no longer *res-integra* as it has also been decided in the Gujarat

Maritime Board vs. Commissioner of Central Excise reported under – 2015  
(38) STR 776 (Tri. Ahmd.) as follows:-

**“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."

The above mentioned decision of this Tribunal has also been affirmed by the Hon'ble Supreme Court by their order reported as 2015 (39) STR 529 (SC) holding that :-

**"11.** The question which arises on a reading of the said agreement is, therefore, whether any service is rendered by GMB or by any person authorized by GMB in relation to a vessel or goods. The agreement makes it clear that it is the duty of the licensee, i.e., UCL to maintain the jetty in good order and condition during the tenure of the agreement. (See : clauses 15 and 16 set out above). Further, it is UCL that is to provide all services at or around the jetty including dredging, navigation, water supply, etc. (See : clause 28 of the agreement). This makes it clear that during the currency of the agreement it is not the Board but the licensee who keeps the said jetty in such condition that it is capable of enabling vessels to berth alongside it to load and unload goods. This being the position, we agree with Shri Tripathi, learned Senior Counsel on behalf of GMB that no service is rendered by GMB to UCL under the agreement. The agreement makes it clear that it is an agreement entered into under Section 35 of the GMB Act allowing the licensee - UCL to construct a jetty and thereafter maintain it at its own cost. We may add that the rebate in wharfage charges of 80% is a condition imposed statutorily under Section 35 of the said Act. To say that it is in the nature of lease rent or licence fee, would not be correct inasmuch as a separate licence fee is payable under the agreement. (See : clause 3 of the agreement). To that extent we agree with Shri Adhyaru, learned senior advocate appearing on behalf of revenue that the CESTAT does not seem to be correct in this behalf. But this would make no difference to the result of

this case inasmuch as the very first condition that must be met under the definition of "port service" is not met on the facts of the present case.

12. Shri Adhyaru argued relying upon the definition of "wharf" and "wharfage" in Black's Law Dictionary, Seventh Edition that all that is necessary is that a wharf be provided by the Board. The very provision of such wharf would entitle the Board to levy a fee which is nothing other than wharfage charges collected under the Schedule of rates mentioned hereinabove. To appreciate this argument we set out the definition of 'wharf and 'wharfage' from Black's Law Dictionary as under :

*Wharf.* A structure on the shores of navigable waters, to which a vessel can be brought for loading or unloading.

*Private wharf.* One that can be used only by its owner or lessee.

*Public wharf.* One that can be used by the public.

*Wharfage 1.* The fee paid for landing, loading, or unloading goods on a wharf. 2. The accommodation for loading or unloading goods on a wharf.

We are afraid that we are unable to agree with Shri Adhyaru for the reason that though GMB is the owner of the jetty under the said agreement, yet for providing the service of allowing a vessel to berth at the said jetty, it is necessary for GMB itself to keep the said jetty in good order. Wharfage charges are collectible because they are in the nature of fees for services rendered. The expenses that are defrayed by the Board for the maintenance of the jetty is sought to be collected as wharfage charges. This amount would necessarily include all amounts that are spent for keeping the said jetty in good condition including dredging so that vessels can berth alongside the jetty. It is clear that so far as jetties operated by the Board are concerned, the Board itself defrays such expenses. It is only in cases like the present where the jetty is primarily meant for loading and unloading goods belonging to a particular private party that repair and maintenance expenses are to be borne by the private party and not by the Board. It is in this circumstance that we find that there is no service, therefore, rendered by GMB to UCL.

13. The other limb of Shri Adhyaru's argument is that in any case UCL is a person authorized by GMB within the definition of "port service" and that, therefore, in any case the Section would be attracted as there is no doubt that wharfage charges are a payment for services rendered in relation to a vessel or goods.

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."

6. Since the issues involved in the present matter are identical to the one decided by this Tribunal in above mentioned cases, we follow the same and hold that impugned orders-in-original are without any merits and therefore, we set-aside the same. Accordingly, both the appeals are allowed.

*(Pronounced in the open court on 03.08.2023)*

**(Ramesh Nair)**  
**Member (Judicial)**

**(C L Mahar)**  
**Member (Technical)**