REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.3347-3348 OF 2014

COMMISSIONER OF CENTRAL

EXCISE, BHAVNAGAR …APPELLANT

VERSUS

M/S GUJARAT MARITIME BOARD,

JAFRABAD ...RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. The issue raised in the present civil appeals is with

regard to service tax payable on wharfage charges. The

respondent - M/s Gujarat Maritime Board (hereinafter referred to

as “GMB”) is a statutory body constituted under the Gujarat

Maritime Board Act, 1981 (hereinafter referred to as “GMB Act”).

This authority administers and operates minor ports in the

State of Gujarat. GMB entered into an agreement dated 28.2.2000

with Larsen & Toubro which ultimately became M/s Ultratech

Cement Limited (hereinafter referred to as “UCL”) whereby a

licence was granted to UCL to construct and use a jetty for

landing of goods and raw materials manufactured by UCL in their

cement factory which was situate close to the said jetty at

Pipavav port. As the true construction of this agreement is the

bone of contention between the parties, we will refer to it in a

little detail hereafter.

2. It is alleged that service tax was payable on wharfage

charges by GMB collected by them from their licensee UCL under

the taxable category of “port services”. The revenue

authorities initiated investigation against GMB for under-

valuation and short payment of service tax. Ultimately, a show

cause notice dated 6.3.2009 was issued to collect 80% of service

tax payable on wharfage charges which was not paid by the

assessee. This was for the period 1.10.2003 to 31.3.2006, the

differential amount being a sum of Rs.1,67,45,620/-. A further

amount of Rs.12,53,076/- was also demanded for the period 2003

October upto 2007-2008 on account of the provision of direct

berthing facilities provided for captive cargo of a ship size of

10,000 DWT and above on account of lease rent for use of the

waterfront. By the order in original dated 16.7.2009, the

Commissioner, Central Excise held that it is clear that the

nature of service provided, which is wharfage, is squarely

covered under the head “port services” as defined in the Finance

Act, 1994. The amount of rebate/concession granted in wharfage

charges amounting to 80% allowed to the licensee should,

therefore, be included for purposes of calculation of service

tax. Equally, the amount that was demanded on account of lease

rent for waterfront usage was also confirmed, together with

interest and penalty, which was imposed on the assessee.

3. In appeal from this order, CESTAT by its judgment dated

1.8.2013 reversed the Commissioner’s order holding that no

service at all was rendered by the Gujarat Maritime Board in

relation to any vessel and, therefore, no amount was payable by

way of service tax. Equally, on an analysis of the agreement

between GMB and UCL, it was held that 20% of wharfage charges

which was payable under the agreement was really payable as

licence fee/rental and, therefore, the balance 80% being of the

nature of licence fee/rental and not being of the nature of

payment for services rendered would equally render the payment

bad in law.

4. Shri Yashank Adhyaru, learned senior advocate appearing on

behalf of the revenue has taken us through the Gujarat Maritime

Board Act and the Finance Act, 1994. It is his contention that

on a conjoint reading of the two Acts and in particular Section

37 of the Gujarat Maritime Board Act and Section 65(82) of the

Finance Act, 1994, it is clear on a correct reading of the

agreement between GMB and UCL that service was rendered by GMB

as owner of the jetty, the service being the provision of a

space for landing of goods from vessels which are allowed to

berth there. As an alternative argument, on a correct reading

of the agreement, it was also argued that GMB had authorized UCL

to render the service of wharfage and since what was collected

was actual wharfage charges in accordance with the schedule of

rates prescribed under the Gujarat Maritime Board Act, it was in

relation to goods that were loaded or off-loaded from vessels on

the said jetty. It was further argued by learned counsel that

the reason why only 20% of the wharfage charges was collected

and not the entire amount was a pure internal arrangement

between GMB and UCL with which revenue is not concerned. He

further assailed the findings of the Tribunal stating that the

finding that the ownership of the jetty vests in UCL is contrary

to the agreement between the parties and that 20% of wharfage

levied and collected cannot be said to be rental or licence fee

but is wharfage charges collected under the GMB Act for the

service of allowing goods to be landed at the said jetty.

According to learned counsel, the Gujarat Maritime Board was the

owner and in control of the said jetty throughout the term of

the agreement and all findings to the contrary by the Tribunal

were incorrect.

5. Shri P.P. Tripathi, learned senior advocate appearing for

the respondent countered all the aforesaid submissions and

supported the Tribunal judgment. According to learned counsel,

the very basis for service tax was absent in the present case as

there is no service rendered of any kind by his client the

respondent on the facts of the present case to UCL nor has UCL

been authorized by GMB to render any service mentioned in

Section 37 of the Act and that, therefore, the authority to levy

service tax was absent. He also argued that the 20% of wharfage

charges that was paid under the agreement was really only a

measure to calculate what is in fact payable as licence fee and

that, therefore, the agreement read as a whole would lead to the

conclusion that no service was in fact rendered by the

respondent and, therefore, no service tax could be collected.

6. It is important first to advert to the Finance Act, 1994

under which the charge is laid for service tax. Section 65(82)

defines “port service” as under:-

“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;”

7. Such service tax is leviable under Section 65(105)(zn)

which reads as follows:-

“Taxable service” means any service provided or to be

provided-

“(zn) to any person, by a port or any person authorized by

the port, in relation to port services, in any manner;”

Further, under Section 67 of the said Act, the value of any

taxable service shall be the gross amount charged by the service

provider for such service provided or to be provided by him.

8. The relevant provisions of the Gujarat Maritime Board Act

are as follows:-

“35. Power to permit erection of private wharves, etc.

within a port subject to conditions:

(1) No person shall make, erect or fix within the limits

of a port or port approaches any wharf, dock, quay, stage,

jetty, pier, place of anchorage, erection or mooring or

undertake any reclamation of foreshore within the said

limits except with the previous permission in writing of

the Board and subject to such conditions, if any, as the

Board may specify.

(2) If any person makes, erects or fixes and wharf, dock,

quay, stage jetty, pier place of anchorage, erection or

mooring or undertakes reclamation of foreshore in

contravention of sub-section (1) the Board may, by notice

require such person to remove it within such time as may be

specified in the notice and if the person fails so to

remove it the Board may cause it to be removed at the

expense of that person.

37. Scales of rates for services performed by Board or

other person:-

(1) The Board shall from time to time frame a scale of

rates at which and a statement of the conditions under

which any of the services specified hereunder (except the

State charges) shall be performed by itself or any person

authorized under Section 32 at or in relation to the port

or port approaches-

(a) transshipping of passengers or goods between vessels

in the port or port approaches;

(b) stevedoring, landing and shipping of passengers or

goods from or to such vessels, to or from any wharf, quay

jetty, pier, dock, berth mooring stage, or erection, land

or building in the possession or occupation of the Board or

at any place within the limits of the port or port

approaches;

(c) cranage or porterage of goods on any such place;

(d) wharfage, storage or demurrage of goods on any such

place;

(e) any other service in respect of vessels, passengers

or goods excepting the services in respect of vessels for

which fees are chargeable under the Indian Port Act, 1908

(15 of 1908).

(2) Different scales of rates and conditions may be

framed for different classes of goods and vessels and for

different ports.

32. Performance of services by Board or other person:-

1) The Board shall have power to undertake the following

services:-

(a) stevedoring, landing, shipping or transshipping

passengers and goods between vessels in port and the

wharves, piers, quays, or docks belonging to or in the

possession of the Board;

(b) receiving, removing, shifting, transporting, storing

or delivering goods brought within the Board’s premises;

(c) carrying passengers within the limits of the port

approaches, by such means and subject to such restrictions

and conditions as the State Government may think fit to

impose; and

(d) piloting, hauling, mooring, re-mooring, hooking or

measuring of vessels or any other service in respect of

vessels.

(2) The Board may, if so requested by the owner, take

charge of the goods for the purpose of performing the

service or services and shall give a receipt in such form

as the Board may specify.

(3) Notwithstanding anything contained in this section,

the Board may authorize any person to perform any of the

services mentioned in sub-section (1) on such terms and

conditions as may be agreed upon.

(4) No person authorized under sub-section (3) shall

charge or recover for such service any sum in excess of the

amount leviable according to the scale framed under Section

37, 38 or 40.

(5) Any such person shall, if so required by the owner

perform in respect of the goods any of the services and for

that purpose take charge of the goods and give a receipt in

such form as the Board may specify.

(6) The responsibility of any such person for the loss,

destruction or deterioration of goods of which he has taken

charge shall, subject to the other provisions of this Act,

be that of a bailee under Section 151, 152 and 161 of the

Indian Contract Act, 1872 (IX of 1872).

(7) After any goods have been taken charge of and a

receipt given for them under this section, no liability for

any loss or damage which may occur to them shall attach to

any person to whom a receipt has been given or to the

matter or owner of the vessel from which the goods have

been landed or transshipped.

9. Since a large part of the arguments on both sides revolved

around the agreement dated 28.2.2000, between GMB and UCL, it

would be important to advert to the various provisions of the

agreement. The agreement begins as follows:

“THE ARTICLES OF AGREEMENT made at Gandhinagar on this day

28th February, two thousand between the GUJARAT MARITIME

BOARD, a Board constituted under the Gujarat Maritime Board

Act, 1981 – (Gujarat Act No.XXX of 1981) having its office

at Opp. Air force station, ‘Chh’ Road, Sector No.10-A,

Gandhinagar, hereinafter referred to as the “BOARD” (which

expression shall unless it be repugnant to the context or

meaning thereof mean and include its successors and

assigns) of the one part and Larsen & Toubro Limited having

its Registered Office at L&T House, Ballard Estate, Mumbai

– 21, hereinafter referred to as the “LICENSEE’ (which

expression shall unless it be repugnant to the context or

meaning thereof mean and include its successors and

assigns) of the other part;

WHEREAS the Licensee approached the Board for permission

for construction and use of a Captive Jetty at Port Pipavav

in the State of Gujarat on a license basis for the purpose

of handling, storage and transportation of raw-materials

for manufacturing and finished products that are

manufactured by the Licensee and for the purpose of the

Board as well;

AND WHEREAS the Board and the Licensee have already entered

into License agreement which is modified and this license

Agreement in modification of previous Agreement is entered

into by and between the Board and the Licensee as appearing

hereinafter;

AND WHEREAS in consideration of the Licensee constructing a

Captive jetty as aforesaid at its cost initially to be

adjusted against the Rebate, that may be granted by the

Board, the Board as empowered under Section 35 of the

Gujarat Maritime Board Act, 1981 granted to the Licensee a

license or permission for construction/use of the captive

Jetty on the said port at the place aligned, demarcated,

provided and approved by the Board upon the terms and

conditions specified herein on Build, transfer, Operate and

Maintain basis;

NOW IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS

FOLLOWS:

(c) ‘PORT CHARGES’ would mean port charges specified in

schedule of port charges, notified by government/Board

under the Indian Ports Act, 1908/Gujarat Maritime Board

Act, 1981 and allied legislations/regulations from time to

time.

(e) ‘CAPTIVE JETTY’ would mean a Jetty constructed for

landing and shipping by a port based industry, located in

Gujarat for landing and shipping of their Captive Industry

Raw Materials for manufacturing or their finished products

that are manufactured by the Licensee, from the constructed

Jetty for that specific industry.

2. The Board has granted permission to the licensee for

continuing with construction and use of the Captive Jetty

at the site demarcated on the plan, a layout of which has

been annexed to this agreement.

3. The Licensee shall pay and continue to pay for the

license granted under this Agreement a license fee of

Rs.10,000/- (Rupees Ten Thousand only) per annum to the

Board regularly on or before the 30th day of April every

year during the currency of this agreement.

12. The ownership of the structure so constructed vests in

the Board and the Licensee shall have no right, title,

interest or other proprietary right in respect of such

structure or in respect of the land on which the structure

is constructed, it being specifically understood that water-

front is the sovereign right of the Government.

13. The Licensee may however obtain a loan at its own risk

and cost, on the basis of rights granted to him under this

agreement and is entitled to create a charge or lien on its

rights or property only on the basis of investment made by

it for construction i.e. to say taking into consideration

the extent of investment made by it in the construction;

PROVIDED that and it is agreed that the cost can be divided

for the purpose of obtaining finance for the Jetty

construction, it being, however, clearly understood that

the water-front is a sovereign right of Government and the

right of the Licensee is limited only for the purpose of

mortgage or hypothecation to the extent of investment made

by it and its right to concur in the event of transfer or

take over of the entire project to which the Jetty is

attached, subject, however, to the prior approval of the

Board for transfer of license. The Licensee shall not be

allowed to transfer the jetty separately as the same is

directly connected to the project to which the Captive

Jetty is allowed to be constructed.

PROVIDED further that whatever rebate and concession is

granted by the Board against the cost of construction, the

equivalent amount at the relevant time shall be utilized by

the Licensee in repayment of loan so that at the end of the

period of this agreement when the Licensee may not have

right of rebate under this agreement, then the construction

is free of any liability in respect of such loan.

PROVIDED further that the Bank or financial institution

granting loan to the licensee shall not have any right

against the Board.

PROVIDED further that in the event of a declaration of War

in the Country or any Emergency or on account of national

security or any other circumstances, the Board is entitled

to exercise all rights in such kinds of situation and

emergency. The Bank or financial institutions shall not be

entitled in such event to exercise any right under loan

documents even in respect of such construction. The

Licensee shall obtain "No Objection Certificate" of the

Board for the loan and for the terms and conditions on

which the loan is sanctioned, and shall be bound to see

that the relevant Clauses in pursuance of this Agreement

are incorporated in loan documents.

15. The Board may, in order to decide the safety of the

structure or for any other purpose, carry out inspection

every six months from the date of issue of the Completion

Certificate. The Licensee shall carry out maintenance and

repairs to the structure at its own cost, whenever so

directed by the Board upon inspection. No alteration or

extension of the Jetty shall be done without prior

permission of the Board in writing PROVIDED that this

clause shall not preclude the Board from carrying out

inspection at any time, instead of every six months.

16. The Licensee shall at its own cost repair and maintain

the jetty in good order and condition to the satisfaction

of the Board during the tenure of this agreement and on the

failure of the Licensee to do so, the Board shall be

entitled, but not bound, to do so at the cost of licensee.

This condition however, does not entitle the Licensee to

refrain from carrying out repair or maintain the Jetty in

good order and condition and it is further agreed that non-

performance by Licensee shall be considered as a breach of

condition of this agreement.

17. In consideration of the Board permitting the Licensee

to construct the Captive Jetty at its own cost initially,

the Board hereby agree that the Jetty to be so constructed

by the Licensee shall mainly and initially as per the terms

of this agreement, allowed to be used for the vessels

belonging to the Licensee or chartered by the Licensee, on

preferential basis, without any ousting priority and

subject to Steamer Working (Priority) Rules as may be

amended from time to time and subject to all other rules

and regulations and the legislations prevailing at the

relevant time and subject also to the further conditions of

this agreement.

18. It is agreed that subject to the priority right of the

Licensee for user of Jetty under the preceding clause, it

is further agreed that the Jetty shall when the same is not

in use by the Licensee, be open to use by the Board for

itself or for the traffic being regulated by the Board for

the purpose of embarking or disembarking their ships,

boats, tugs, etc. and for loading and discharging cargo.

The Licensee or its Agents shall not by any act of

commission or omission, restrict the use of the Jetty and

back up area by the Board except when it is actually used

by the Licensee for the purpose provided for in this

agreement.

PROVIDED that this clause shall not be construed to mean

that Licensee has any ownership or transferable right in

the property and the Licensee is not entitled to levy any

charges or compensation from the Board.

21. It is agreed that subject to what has been stated

herein, the Licensee shall be liable to pay all the port

charges and all other dues payable by the Licensee to the

Board, and the Licensee shall not be eligible to get any

other rebate or concession except that which is mentioned

in Clause 22 and 24.

22. It is agreed that in consideration of the Licensee

constructing the Jetty at its own cost initially, the Board

has agreed to grant rebate, to be adjusted against the cost

of construction, as under:

A. The Licensee shall have to pay landing/shipping fees

(popularly known as wharfage charges) @ 20% of the actual

landing and shipping fees specified in the Schedule of Port

Charges prescribed for Captive Jetty. The landing and

shipping fees shall be calculated for this purpose as per

the schedule of landing and shipping fees, as may be

revised or amended from time to time. This concession shall

be called 'REBATE' and it will be set off as aforesaid

against the Capital Investment (cost of construction as

mentioned in Clause 24) made by the Captive Jetty holder,

and the same shall be calculated in a prescribed format.

Once the Capital Investment is recovered through the

Rebate, the Captive Jetty holder shall have to pay

thereafter, landing and shipping fees at the normal rate as

per the Schedule of Port Charges in force from time to time

prescribed for captive jetty.

B. The Licensee shall also be entitled, as in the normal

case to a concession in payment of landing/shipping fees

for coastal transportation of the cargo from one port under

the Board to another port under the Board @ 25% and from

one port under the Board to another Indian Port or vice-

versa @ 15% or at the rate as may be applicable from time

to time.

C. No Rebate will be given in respect of any other charges

to be levied under Indian Ports Act and under Gujarat

Maritime Board Act. The parties shall have to pay all the

port charges at the rates specified in Schedule of Port

Charges in force from time to time.

?25. In case the direct berthing facilities provided for

captive cargo (ship size calling at jetty of 10,000 DWT and

above) an amount of Rs.25.00 Lakhs (Rupees Twenty Five

Lakhs only) per annum will be charged as lease rent for

waterfront and way leave facility compensation.

28. The Licensee shall provide all the services at or

around the Jetty including dredging, navigation, water

supply, fire fighting equipments, electricity, telephone,

Very High Frequency (VHF) sets of HF sets and such other

services and facilities which may be required at or around

the Jetty and also such other services and facilities which

the Board may require the Licensee to keep available at or

around the Jetty. If the Licensee does not provide all or

any of the aforesaid facilities, the Board may at its own

discretion provide such facilities at the cost and risk of

the Licensee and shall recover such costs from the

Licensee. The decision of the Board regarding the amount of

cost incurred for such services shall be treated as final.

34. If the Licensee commits breach of any of the terms and

conditions of this agreement or of any Rules, Regulations

or Notifications as may be in force from time to time, the

Board shall be entitled to give notice the Licensee to

remove such breach within a period of 15 days from the date

of notice and Port Authorities can temporarily suspend

operation of captive port facility. If the said notice is

not complied with, the Board shall give another Notice to

terminate this agreement if the said breach is not complied

with within a period of further 15 days and that on the

expiry of such period of 15 days, the agreement shall

automatically be deemed to have been terminated without

further notice. Upon such termination of the agreement, the

Board shall be entitled to take control or otherwise

dispose off all or any part of the Jetty that may have been

constructed, as well as the site thereof in such manner and

may give the same to such person or party as may be decided

by the Board and the Licensee shall not be entitled to any

compensation, nor shall the Licensee have then a right in

respect of the superstructure or the land/sea on which the

Jetty was constructed, provided that even if the cost of

construction of the Jetty is not adjusted against the

aggregate of the amount of rebate availed off by the

Licensee, the Licensee shall not be entitled to any refund.

In case of any dispute or difference by and between the

Licensee and the Board, the same shall be referred to the

Arbitration of Secretary of the Government in Ports and

Fisheries Department and it shall be held in accordance

with the provisions of the Indian Arbitration and

Reconciliation Act, 1996 or any statutory modification or

re-enactment thereof for the time being in force.

36. The agreement shall remain in force for a period of

twenty five years or till such time as the aggregate of

‘REBATE’ availed off by the party equals the amount of the

construction of the Jetty whichever is earlier from the

date of commissioning of Jetty.

PROVIDED further that even after aggregate of rebate

availed of by the Licensee equals the amount of

construction of Jetty, the Licensee will be allowed to use

the Jetty for captive purpose subject to full payment of

full wharfage charges so long as the project of the

Licensee for which the permission is granted exists or

continues to exist, i.e., continues to function.

It is agreed and understood by the Licensee that out of the

terms ‘Jetty’ the terms applicable for the purpose of this

Agreement may be retained in this Agreement and other

words/terms not applicable may be deleted.”

10. A reading of the agreement as a whole would lead to the

following conclusions:

A. The agreement is a licence agreement entered into under

Section 35 of the Gujarat Maritime Board Act under which a

licence or permission for construction and use of a captive

jetty in Pipavav Port is entered into on a Build, Transfer,

Operate and Maintain basis on certain conditions.

B. A licence fee of Rs.10,000/- per annum is payable by the

licensee to the Board for the currency of the agreement

unless terminated earlier.

C. The ownership of what is constructed vests in the Board

together with the landing on which it is constructed and

the waterfront.

D. The jetty is constructed for the project to which it is

attached, namely, the cement factory of UCL. The licence

granted to UCL is, therefore, a non-transferable one.

E. The Board is entitled to carry out inspection every six

months so that it can direct the licensee to maintain and

repair the structure at its own cost, maintenance of the

said jetty in good order and condition being that of the

licensee alone, a breach of which is considered as a breach

of the agreement.

F. The jetty is to be used mainly for the goods of the

licensee and when not in use by the licensee can be used by

the Board itself.

G. That in consideration of the licensee constructing the

jetty at its own cost, the Board has agreed to grant rebate

to be adjusted against the cost of construction of the

jetty by paying 20% of wharfage charges specified in the

schedule of charges prescribed for captive jetties. This

concession is to be called a rebate and to be set off

against the cost of construction of the said jetty. Once

the entire cost of construction is recovered through the

rebate, the licensee will have to pay thereafter wharfage

charges at the full rate prescribed in the schedule of port

charges for captive jetties.

H. For direct berthing facilities provided for captive cargo

in ships which call at the jetty of 10,000 DWT and above,

an amount of Rs.25,00,000/- will be charged as lease rent

for waterfront use.

I. It is the licensee UCL that will provide all services at or

around the jetty including dredging, navigation, etc. and

if this is not done then the Board may on its own provide

such facilities at the risk and cost of the licensee UCL.

J. The licence is terminable on breach of the terms and

conditions of the agreement or of any infraction of law.

Upon such termination, the Board shall be entitled to take

control or otherwise dispose of all or any part of the

jetty that may have been constructed.

K. The period of the agreement is to be 25 years from the date

of commissioning of the jetty or such time as the rebate

availed of by the party equals the construction cost of the

jetty whichever date is earlier. However, even after the

rebate and the construction cost square off, the licensee

will be allowed to use the jetty for captive purposes

subject to full payment of wharfage charges so long as the

project of the licensee – i.e. the cement plant of the

licensee continues to function.

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.

……………………J.

(A.K. Sikri)

……………………J.

(R.F. Nariman)

New Delhi;

July 22, 2015