

COMMISSIONER OF CENTRAL EXCISE, BHAVNAGAR A

v.

M/S GUJARAT MARITIME BOARD, JAFRABAD

(Civil Appeal Nos. 3347-3348 of 2014)

JULY 22, 2015 B

[A. K. SIKRI AND R. F. NARIMAN, JJ.]

Gujarat Maritime Board Act, 1981 – s. 37 – Finance Act, 1994 – s. 65(82) – Service tax payable on wharfage charges – Agreement between State Maritime Board and Company UCL, whereby licence granted to UCL to construct and use jetty for landing of goods and raw materials manufactured by UCL – Allegation that service tax payable on wharfage charges by Maritime Board collected by them from their licensee-UCL under the taxable category of ‘port services’ – Tribunal holding that no service was rendered by Maritime Board in relation to any vessel and thus, no amount payable as service tax – Interference with – Held: Not called for – No service was rendered by Maritime Board to UCL under the agreement – Agreement was entered allowing UCL to construct a jetty and thereafter, maintain it at its own cost – Board itself charges or recovers wharfage charges from UCL and does not authorize UCL to recover such charges from other persons – No service is rendered by a port or by any person authorized by such port and, thus, the first condition for levy of service tax is absent – As regards, direct berthing facilities provided for captive cargo, lease rent charged for use of waterfront also does not include any service in relation to a vessel or goods and cannot be described as “port service”. C D E F G

Dismissing the appeals, the Court

HELD: 1.1 The agreement makes it clear that it is H

A an agreement entered into u/s. 35 of the Gujarat Maritime Board Act allowing the licensee-UCL to construct a jetty and thereafter, maintain it at its own cost. It is not the Gujarat Maritime Board but the Licensee-UCL who keeps the said jetty in such condition that it is capable of
B enabling vessels to berth alongside it to load and unload goods. Thus, no service is rendered by Gujarat Maritime Board to UCL under the agreement. The rebate in wharfage charges of 80% is a condition imposed
C statutorily under Section 35 of the said Act. It is not correct to say that it is in the nature of lease rent or licence fee, inasmuch as a separate licence fee is payable under the agreement. [Para 11] [207-B-D]

Black's Law Dictionary, Seventh Edn – referred to.

D
1.2 The submission 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
E the Schedule of rates, cannot be accepted. Though Gujarat Maritime Board 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 Gujarat Maritime Board itself to keep the said jetty in
F 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
G 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 instant
H 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, there is no service, therefore, rendered by Gujarat Maritime Board to UCL. [Para 12] [207-F-G; 208-C-F]

1.3 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. It cannot be said that such authority is given under the self-same agreement. 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 s. 32(4), it is the private person who is then authorized to charge or recover any sum in respect of such service rendered. This was conspicuously absent in the 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 instant case. So far as the direct berthing facilities provided for captive cargo are 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". [Para 14] [209-A-F]

CIVILAPPELLATE JURISDICTION : Civil Appeal Nos. 3347-3348 of 2014.

From the Judgment and Order No. A/10931-10932/

A WZB/AHD/2013 dated 01.08.2013 of the CESTAT, West Zonal Bench, Ahmedabad, O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad-380016 in A No. ST/403/2011 & ST/384/2009.

B Yashank Adhyaru, Rupesh Kumar, B. K. Prasad, for the Appellant.

Paras Tripathy, Gursharan Virk, Hemantika Wahi, Jesal for the Respondent.

C The Judgment of the Court was delivered by

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 undervaluation 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

A 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 B 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 C 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 D 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 E 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.

F 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 G 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 H 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.

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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:-

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"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;"

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7. Such service tax is leviable under Section 65(105)(zn) which reads as follows:-

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"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;"

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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.

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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:

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(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

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A limits except with the previous permission in writing of the Board and subject to such conditions, if any, as the Board may specify.

B (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.

C 37. Scales of rates for services performed by Board or other person:-

D (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-

E (a) transshipping of passengers or goods between vessels in the port or port approaches;

F (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;

G (c) crantage or portorage of goods on any such place;

H (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). A

(2) Different scales of rates and conditions may be framed for different classes of goods and vessels and for different ports. B

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

1) The Board shall have power to undertake the following services:- C

(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; D

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises; E

(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. F

(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. G

(3) Notwithstanding anything contained in this section, the Board may authorize any person to perform any of H

A the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

B (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.

C (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.

D (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).

E (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.

F 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:

G "THE ARTICLES OF AGREEMENT made at
H 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 &
Toubrø 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;

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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;

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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;

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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;

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NOW IT IS AGREED BY AND BETWEEN THE PARTIES
HERETO AS FOLLOWS:

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A (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.

B (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.

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D 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.

E 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.

F 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.

G 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

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consideration the extent of investment made by it in the construction;

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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.

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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.

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PROVIDED further that the Bank or financial institution granting loan to the licensee shall not have any right against the Board.

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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

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- A** 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.
- B**
- C** 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.
- D**
- E** 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.
- F**
- G** 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
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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.

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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.

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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.

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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.

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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:

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

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A (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.

B 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.

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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.

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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.

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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.

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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.

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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

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A 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
 B 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
 C 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
 D '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
 E 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
 F to exist, i.e., continues to function.

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

H 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. A

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. B

C. The ownership of what is constructed vests in the Board together with the landing on which it is constructed and the waterfront. C

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. D

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. E

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. F

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 H

A the full rate prescribed in the schedule of port charges for captive jetties.

B 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.

C 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.

D 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.

E 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.

G 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 H 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.

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

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

B **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.

C We are afraid that we are unable to agree with Shri
D Adhyaru for the reason that though GMB is the owner of the
E jetty under the said agreement, yet for providing the service of
F 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.

G 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
H vessel or goods.

14. As can be seen from Section 32 sub-sections (3) A
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 B
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 C
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 D
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 E
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 F
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.