

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

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 543 of 2012 - DB

(Arising out of OIA-167-168-2012-STC-AK-COMMR-A--AHD dated 26/07/2012 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD)

C.S.T.-Service Tax - Ahmedabad

.....Appellant

7 TH Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat- 380015

VERSUS

Ramky Infrastructure Ltd

.....Respondent

2, Anand Vihar Bungalows,
Tragad Ioc Road, Tragad, Chankheda,
Ahmedabad, Gujarat

APPEARANCE:

Shri Rajesh K Agarwal, Superintendent (AR) for the Appellant
Shri Rahul Patel Chartered Accountant for the Respondent

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

Final Order No. 12606/2023

DATE OF HEARING: 17.07.2023
DATE OF DECISION: 10.11.2023

RAMESH NAIR

This appeal is filed by the Revenue challenging the order-in-appeal passed by Commissioner(Appeal). Whereby the Learned Commissioner (Appeal) held that laying of pipeline for the project of Gujarat Water Supply & Sewerage Board (GWSSB) is not taxable under Industrial or Commercial Construction Service and consequently, the Service Tax paid by the respondent was allowed as refund.

2. Shri Rajesh K Agarwal, Superintendent (AR) appearing on behalf of the Revenue /Appellant reiterates the grounds of appeal.

3. Shri Rahul Patel, Learned Chartered Accountant appearing on behalf of the respondent submits that the issue is no longer res-Integra as in catena of the judgments, it has been held that service of laying of pipeline and installation of pumping station provided to Gujarat Water Supply &

Sewerage Board (GWSSB) is not Industrial or Commercial Construction Service. Accordingly, the same is not taxable under the said head. In support, he placed reliance on the following judgments:

- Commissioner of CGST & C.Ex. Surat Vs. BMS Projects Pvt. Ltd.- 2018 (8) GSTL 13 (Guj.)
- Dinesh Chandra Agarwal Infracon P. Ltd. Vs. CCE, Ahmedabad 2011 (21) STR 41 (Tri.- Ahmd.)
- Larsen & Toubro Ltd. Vs. Commissioner of Service Tax, Ahmedabad- 2011 (22) STR 459 (Tri.- Ahmd.)
- Nagarjuna Construction Co. Ltd. Vs. Commr. Of C. Ex., Hyderabad- 2010 (19) STR 259 (Tri.-Bang.)

4. On the careful consideration of the submission made by both the sides and perusal of record, we find that as per the fact the appellant have provided the service of laying of pipeline for the project of Gujarat Water Supply & Sewerage Board (GWSSB). The laying of pipeline for the government cannot be considered as Industrial or Commercial Construction Service. This issue has been considered in the following judgments:

- In the case of BMS Project Private Limited the Hon,ble Gujarat High Court has passed following decision:

“[Order per : Akil Kureshi, J. (Oral)]. - Department has filed this appeal to challenge the judgment of CESTAT dated 30-1-2017. Following questions are presented for our consideration :

“(i) Whether the activities of M/s. GWSSB i.e. purchasing and selling water falls within the meaning of ‘commerce’ or a ‘commercial activity’ as defined under ‘Commercial or Industrial Construction Service’ in Sec. 65(25b) of Chapter V of the Finance Act, 1994?

“(ii) Whether the activities of M/s. GWSSB and its status as an ‘industry’ under Industrial Disputes Act, 1947 falls within the meaning of ‘industry’ or ‘industrial activity’ as defined under ‘Commercial or Industrial Construction Service’ in Sec. 65(25b) of Chapter V of the Finance Act, 1994?

(iii) Whether the usage of pipelines laid/constructed by M/s. BMS Projects Pvt. Ltd. for M/s. GWSSB for transporting the treated water, falls within the scope of the expressions 'used, occupied, or engaged, primarily in, commerce of industry or work intended for commerce or industry as specified in the above mentioned definition of Commercial or Industrial Construction Service?

(iv) Whether CESTAT was justified in treating the activities of M/s. GWSSB as not being commercial or industrial activities or that the usage of Pipelines laid by M/s. BMS Projects Pvt. Ltd., were not for use in commerce or industry?"

(v) Whether CESTAT was justified in holding that all activities which are concerned with welfare of citizens are excluded from liability of Service tax?

and

(vi) Whether in the facts and circumstances of the case, CESTAT was justified in setting aside the Order-in-Original passed by the Commissioner and in allowing the appeal filed by M/s. BMS Projects Pvt. Ltd.?

2. Respondent is engaged in providing construction services, for which purpose, it is registered in the category of commercial or industrial construction service with the Central Excise Authorities. Issue pertains to levy of service tax on the service provided by the respondent in laying down long distance pipelines for transfer of drinking water in the State of Gujarat pursuant to a contract awarded by Gujarat Water Supply and Sewerage Board ('GWSSB' for short). The stand of the department is that such service is taxable service under the category of commercial and industrial construction service as defined under Section 65(25b) of the Finance Act, 1994 (hereinafter to be referred to as 'the Act' for short). When such demand was confirmed by the Commissioner, the assessee approached the Tribunal. The Tribunal by the impugned judgment reversed the decision of the Commissioner by relying on two decisions of the Tribunal involving similar issues in case of *Dinesh Chandra Agarwal Infracon P. Ltd. v. C.C.E., Ahmedabad* reported in [2011 \(21\) S.T.R. 41](#) (Tri.-Ahmd.) and in case of *Larsen & Toubro Ltd. v. Commissioner of Service Tax, Ahmedabad*, reported in [2011 \(22\) S.T.R. 459](#) (Tri.-Ahmd.). The Tribunal has not recorded its independent detailed reasons but primarily relied on the earlier decisions on the issue. Learned counsel for the department has made available a judgment of Bangalore bench of the Tribunal in case of *Nagarjuna Construction Co. Ltd. v. Commr. of C.Ex., Hyderabad* reported in [2010 \(19\) S.T.R. 259](#) (Tri.-Bang.), in which similar issue came up for consideration and was discussed at length. We have perused such judgment in which, the Tribunal has analyzed the constitution of GWSSB, its status and its activities. The Tribunal noted that GWSSB was created by the Government of Gujarat to plan and implement the drinking water supply and sanitation policy and to operate and maintain the water supply schemes to develop human resources for the effective implementation of programmes among others. It was noted that GWSSB was created under statute. It was not enacted under a trade or commerce and was engaged solely in supplying potable water to supply different parts of the State. It was noted that only a small portion of the water is supplied to the industries at a higher cost. Such sale was merely incidental and ancillary to their main objective. The Tribunal noted that 90% of the water supplied by the Board was to the Gram Panchayats, Nagar Palikas and Nagar Panchayats at a non-commercial rate. The Board did not have any profit motive in carrying out such activities. In this context, the Tribunal noted the definition of commercial or industrial construction service provided under Section 65(25b) of the Act, which reads as under :

'Commercial or Industrial Construction Service' means -

- “(a) construction of a new building or a civil structure or a part thereof; or*
- (b) construction of pipeline or conduit; or*
- (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or*
- (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is -*
 - (i) used, or to be used, primary for; or*
 - (ii) occupied, or to be occupied, primarily with; or*
 - (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.”*

3. In the context of our case, as per this definition therefore, a service to be included within the meaning of commercial or industrial construction services, different activities specified in clauses (a) to (d) thereof are such which are used or to be used primarily for commercial or industry. In this context, the Tribunal noted that GWSSB was constituted under an Act for carrying out following duties and functions :

- “(a) To prepare, execute, promote and finance the schemes for supply of water and for sewerage and sewage disposal;*
- (b) To render all necessary services in regard to water supply and sewerage to the State Government and local bodies and on request to private institutions or individuals also;*
- (c) To prepare draft State Plans for water supply, sewerage and drainage on the directions of the State Government.*
- (d) To assess the requirements of materials and arrange for their procurement and utilization;*
- (e) To assess the requirements of materials and arrange for their procurement and utilization;*
- (f) To establish State standards for water supply and sewerage services;*
- (g) To review annually the technical, financial, economic and other aspects of water supply and sewerage system of every scheme of the Board of the local-bodies which have entered into an agreement with the Board;*

(h) *To establish and maintain a facility to review and apprise the technical, financial, economic and other pertinent aspects of every water supply and sewerage scheme in the State;*

(i) *To operate, run and maintain any water works and sewerage system, if and when directed by the State Government, on such terms and conditions and for such period as may be specified by the State Government;*

(j) *To assess the requirements for manpower and training in relation to water supply and sewerage services in the State;*

(k) *To carry out applied research for efficient discharge of the duties and functions of the Board;*

(l) *To perform such of the duties and functions, which are being performed by the Gujarat Public Health Engineering Services, as may be entrusted to it by the State Government.”*

4. *In that context, the Tribunal was of the view that GWSSB discharged an important duty and responsibility of providing drinking water to the people, industries, etc. The Board was constituted mainly to supply drinking water and maintenance of sewerage system. The usage charges recovered by the Board from Gram Panchayats, Nagar Palikas and Nagar Panchayats are at highly subsidized rates and therefore, cannot be considered as an industry in the sense that the said word is used in the definition of taxable entry. The Board was sustaining on the grants released by the State Government. It was therefore concluded that the pipelines were not laid to facilitate any commercial or industrial activity.*

5. *We are broadly in agreement with the view of the Tribunal. The Tribunal noted the purpose for which the Board was constituted and its nature of activities. The pipelines constructed were for providing drinking water facilities to the people of the State through different Gram and Taluka Panchayats. Only a small portion of the water was provided to the industries at commercial rates.*

6. *In the result, no question of law arises. Tax Appeal is dismissed.”*

- In the case of Dinesh Chandra Aggarwal Infracon P. Ltd this Tribunal has passed the following decisions:

“11. After carefully appreciating the submissions made by both the sides, we find that there is no dispute about the legal position that the category of service of “Commercial or Industrial Construction” creates liability to pay service tax on the construction activities if the pipelines or conduits are used or to be used primarily for Commerce or Industry. The Board Circular No. 116/10/2009-S.T., dated 15-9-2009 has clarified that canals constructed by the Government or under Government projects are not liable to service tax under Commercial or Industrial Construction service. For better appreciation, we reproduce Para 2 of the said circular :-

“2. Thus the essence of the definition is that the “Commercial or Industrial construction service” is chargeable to service tax if it is used, occupied or

engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax."

In fact the above legal position stands accepted by the Commissioner in his impugned order. However, he has held that GWSSB is engaged in the Commercial activities.

12. Examining the above issue, we refer to Gujarat Act No. 18 of 1979, under which the GWSSB has been constituted. The preamble of the said Act provides that - "An Act to provide for the establishment of a Water Supply and Sewerage Board for the rapid development and proper regulation of water supply and sewerage services in the State of Gujarat."

13. We further take note of the provisions of Section 14 of the said Act which provides Duties and Functions of the Board. The same is extracted below for the sake of easy reference :-

"14. The duties and functions of the Board shall be as follows, namely :-

(a) to prepare, execute, promote and finance the schemes for supply of water and for sewerage and sewage disposal;

(b) to render all necessary services in regard to water supply and sewerage to the State Government and local bodies and on request to private institutions or individuals also;

(c) to prepare draft State Plans for water supply, sewerage and drainage on the directions of the State Government;

(d) to review and advise on the tariff, taxes, fees and charges of water supply and sewerage systems, in the areas comprised within the sphere of operation of the water supply and sewerage services of the Board and in the areas of the local bodies which have entered into an agreement with the Board;

(e) to assess the requirements of materials and arrange for their procurement and utilization;

(f) to establish State standards for water supply and sewerage services;

(g) to review annually the technically financial, economic and other aspects of water supply and sewerage system every scheme of the Board or the local bodies which have entered into an agreement with the Board;

(h) to establish and maintain a facility to review and apprise the technical, financial, economic and other pertinent aspects of every water supply and sewerage scheme in the state;

(i) to operate, run and maintain any water works and sewerage system, if and when directed by the State Government, on such terms and conditions and for such period as may be specified by the State Government.

(j) to assess the requirements for man-power and training in relation to water supply and sewerage services in the State;

(k) to carry out applied research for efficient discharge of the duties and functions of the Board;

(l) to perform such of the duties and functions, which are being performed by the Gujarat Public Health Engineering Service, as may be specified, from time to time;

(m) to perform and discharge such other duties and functions as are allotted to the Board under other provisions of this Act or as may be entrusted to it by the State Government.”

The perusal of the above duties and functions of the Board clearly show that sale of water is not the primary function of the Board. It is also clear that the water purchased by the Board is being distributed to rural and urban areas for the purpose of irrigation and drinking at different rates which are subsidized and even the operating cost also does not stand recovered by them. To setup an establishment for water supply is a part of the duties and functions of the State to provide its citizens with a better living. In these circumstances, it cannot be held that laying of pipelines for the Board is for the purpose of undertaking any commercial activities by the Board, and the appellant would be covered by said services by making him liable to payment of service tax.

14. At this stage, we also taken note of the Tribunal’s decision in the case of M/s. Nagarjuna Construction v. CCE, Hyderabad - 2009-TIOL-1156-CESTAT-BANG = [2010 \(17\) S.T.R. 44](#) (T). Though the same is stay order, but we propose to lift the contents of letter from the Member Secretary of GWSSB, mentioned in the said stay order, to support the conclusion arrived at by us :-

“It is to state that the Gujarat Water Supply & Sewerage Board (GWSSB) have been established under the Gujarat Act. No. 18 of 1979 for rapid development and proper regulation of drinking water supply and sewerage services in the state of Gujarat. The GWSSB primarily executes water supply and sewerage works for the benefit of both the rural and urban communities, excluding the municipal corporations.

The Government of Gujarat has presently formulated a Water Tariff Policy by virtue of which drinking water is to be supplied to the communities on quantum basis. The cost of supplying drinking water from its sources to the delivery point at the village boundary incorporates different components like intake wells, raw water pipes, filtration plants, pumping stations, underground sumps, overhead tanks, distribution networks and village level sumps, etc.

The cost of supplying drinking water thus incorporates raw water cost, filtration cost, pumping cost and all service charges related to this activity. The actual service cost has been, even if capital cost of infrastructure is not accounted, is high enough that the beneficiary people may not afford. However, with a view to create a sense of responsibility and awareness towards the services amongst the people for its economic use, the State Government has imposed a nominal charge to the beneficiary panchayat. However, it is not sufficient enough to recover even the operating cost. Thus the Gujarat Water Supply & Sewerage Board cannot be treated as a commercial organization, selling drinking water to the community. This is a service sector establishment for fulfilling the needs of the people for this basic requirement.”

15. Inasmuch as the second limb of definition of Commercial or Industrial Construction service do not stand satisfied, we hold that the services provided by the appellants are not covered under the said services and no service tax is required to be levied. Accordingly, we allow the appeal with consequential relief to the appellants.

16. As we have held in favour of the assessee on merits, we do not intend to pass any separate order on the plea of limitation. Appeal is disposed off accordingly.”

- In the case of Larsen & Toubro Ltd. this Tribunal has passed the following order:

14. *Before we proceed to decide whether the pipeline laid in this case can be said to have been used or used primarily for commerce or not, it is necessary to deal with the submissions that GWSSB is a commercial organization and therefore the pipeline laid for them and used for carrying the water meant for sale to Panchayat, local body etc. can be said for "commerce".*

15. *The submissions made to support the view that GWSSB is a commercial organization in the impugned order and the submissions made before us are :*

(i) *Water was purchased @ Re. 1/- per ltr. and sold from the price @ Rs. 2/- per ltr. to Panchayats to price @ Rs. 15/- per ltr to industrial units. Thus, water was being sold at a much higher rate and therefore just because the charges levied were fixed by Government, it does not take away the essential character of the activity, which is "commerce". The examples of the oil companies, power utility companies were cited to show that just because Government fixes the rate and there is a cross-subsidy, the charges cannot be said to be non-commercial.*

(ii) *It was also said that GWSSB was covered under Industrial Dispute Act, 1947 and therefore is industry.*

(iii) *GWSSB was authorized to raise money and also to give loans to Government or local bodies. Therefore, it can be seen that GWSSB is functioning like any commercial entity by raising money from banks and financial institutions, advancing loans and recovering interest for the same. The very fact that advancing loans is one of the objective behind setting up of GWSSB, GWSSB is meant for generating services and earning profit on its activities.*

16. *Whether GWSSB can be categorized as a industry or not, is not relevant at all. In fact, the learned SDR himself has submitted that the definition of the services does not talk about the status or the definition of the service receiver. Any service receiver irrespective of its status or definition or composition, if utilizing the pipeline for commerce or industry, will render the provider liable to Service Tax. Therefore, strictly speaking, by Revenue's own submissions, the status of GWSSB is not relevant. Nevertheless, this issue as to whether the GWSSB can be considered as a commercial organization, was discussed in detail in M/s. Nagarjuna Construction Co. Ltd. case and we agree with the views taken in that case. The Gujarat Act No. 18 of 1979, under which GWSSB was set up has a preamble which reads as "An Act to provide for the establishment of a Water Supply & Sewerage Board for the rapid development and proper regulation of water supply and sewerage services in the State of Gujarat." The responsibility of the Board is rapid development and proper regulation of water supply and sewerage services and not commercial or industrial activity. The provision in the act enabling the Board to borrow money or lending money or receiving grant for entering into contract, have been incorporated to serve the purpose for which the Board has been set up. The objective is to execute water supply and sewerage work for the benefit of both rural and urban communities as mentioned by Member Secretary in his letter dt. 14-6-07. A perusal of the Annual Report of the company would show that there is no*

profit and loss account at all which would be found in any organization, which is classifiable as commercial or industrial establishment. Further, the auditors have clearly observed that the balance sheet and Income-Expenditure account dealt with by this report comply with the accounting standards applicable to non-commercial and non-business entities. Enactment passed by peoples of representatives of Gujarat treats the purpose of the Board as Water Supply and Sewerage; Member Secretary considers the definition of Board as non-commercial one and facilitating supply of water; Annual Report has no profit and loss account; auditors clearly observe that annual report complies with the accounting standards applicable to non-commercial, non-business entities and have raised no objection to the procedure adopted by the Board. The annual report would have been placed before Government of Gujarat. Under these circumstances, we fail to understand how we can consider GWSSB as a commercial organization or the purpose of pipeline laid for them by various contractors as one for commerce i.e. to say to buy and sell water. The name of the scheme for which pipeline was laid was also Mehsana District Water Supply Scheme.

17. The next question that is to be answered is whether the pipeline can be said to have been used or used primarily for commerce or industry. The only point that has been stressed by the Revenue is that the GWSSB is buying water @ Re. 1/- per ltr. and selling at Rs. 2/- per ltr. to Rs. 15/- per ltr. The definition uses words "used for commerce" or "primarily used for commerce". This would mean that Revenue is required to show that the purpose of construction of pipelines is for "commerce" or "primarily for commerce". "Commerce" would mean buying and selling not necessarily for profit according to Revenue. But, the question here is the purpose of buying water by GWSSB was for selling or not. Obviously, the purpose of buying water and bringing it from Narmada Dam was not for selling it, but for supplying it to needy people. In this case, buying and selling is incidental. The purpose is supply of water to the needy citizens of the State. The term used "for commerce" would mean that only purpose would be buying and selling, which is definitely not the case here. The term used "primarily for commerce" would mean that primary purpose should be buying and selling and the other purposes also may be served incidentally. In this case, purchase and sale of water are incidental and the main purpose is supply of water to needy citizens of the State.

18. In view of the above discussion, we do not find any reason for us to disagree with the views already taken by the Coordinate Bench of this Tribunal in case of M/s. Nagarjuna Construction Co. Ltd. Accordingly, the impugned order cannot be sustained and is set aside.

19. In view of the fact that the appeal is allowed on merit, there is no need to discuss the applicability of extended period and the question of imposition of penalty also does not arise. For the same reason, other grounds canvassed viz. the service is Works Contract and therefore was not liable to Service Tax earlier, is also not required to be considered. In view of the above discussion, we do not consider it necessary to consider other issues raised or decisions cited before us.

20. In the result, appeal is allowed with consequential relief."

4.1 In view of the above judgments, particularly the Hon'ble jurisdictional High Court of Gujarat in the case of BMS project Pvt. Ltd. (Supra) as of now it is settled that service of laying of pipeline for Gujarat Water Supply & Sewerage Board (GWSSB) is not falling under the service of industrial or commercial construction service. In the grounds of revenue's appeal with reference of these judgments, it is submitted that these judgments have been appealed against. However, since no adverse judgments has been delivered against the aforesaid judgment and no stay has been granted the judgment cited (Supra) have binding effect.

5. Accordingly, following the above judgments, we are of the view that in the present case also since the appellant is not liable to pay the service tax they are legally entitled for the refund of service tax already paid. Therefore, we do not find any infirmity in the order of the Commissioner (Appeal). Hence, the same is upheld, Revenue's appeal is dismissed.

(Pronounced in the open court on 10.11.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)