

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
SOUTH SONAL BENCH AT BANGALORE**

**Date of hearing : 04.02.2010**

**Date of decision : 17.05.2010**

**Appeal No. ST/731/2008**

**(Arising out of Order in Original No. 19/2008 Dated 31.10.2008, passed  
by the Commissioner of Customs, Central Excise and Service Tax,  
Hyderabad)**

**Coram:**

**Hon'ble Mr. M.V. Ravindran, Member (Judicial)**

**Hon'ble Mr. P. Karthikeyan, Member (Technical)**

**M/s Nagarjuna Construction Company Limited**

**Vs**

**Commissioner of Central Excise, Hyderabad**

**- Appellant**

**- Respondent**

**Appearance:**

**Mr. G. Natarajan, Advocate for the appellant**

**Ms. Joy Kumari Chander, JCDR for the revenue.**

**Final Order No. 81/2009**

**Per P. Karthikeyan.**

M/s Nagarjuna Construction Company Limited, Hyderabad (NCCL) is an assessee registered with the department as provider of taxable service falling under the category 'Commercial or Industrial Construction Services', 'Consulting Engineering Services, 'Erection, Commissioning or Installation Services', etc. During the period 16.06.2005 to 31.03.2007, NCCL were found to have incurred liability under 'Commercial or Industrial Construction Services' as it had executed laying of long distance pipelines in the state of Gujarat Water Supply and Sewerage Board (GWSSB or the Board). After due process of law, the Commissioner found that NCCL had engaged in providing "Commercial or Industrial Construction Service" during the material period. He demanded service tax of Rs.7,15,36,082 (Rupees Seven Crores fifteen lakhs thirty six thousand and eighty two only) along with applicable interest. He imposed penalty @ 2 % on the demand confirmed against NCCL subject to maximum of the tax demanded and another penalty of Rs.8,00,00,000 (Rs. Eight Crores only) under section 78 of the Finance Act, 1994 (the Act). In the appeal filed before us, NCCL has relied on CBEC Circular No. 80/10/2004 ST Dated 17.09.2004, the pertinent portion of which reads as follows.

"The leviability of service tax would depend primarily upon whether the building or civil structure is 'used, or to be used' for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax."

2. It is submitted that GWSSB is 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. They relied on the certificate issued by the Member Secretary of GWSSB to the effect that GWSSB is not Commercial Organisation as it supplies drinking water to the community recovering nominal charges to inculcate a sense of responsibility in usage of water among the beneficiaries. It is submitted that GWSSB is not a commercial concern. They cited the definition of "Industrial Concern" in the Collection of Statistics Act which meant a public limited company or a cooperative society or a firm or any other person engaged in the manufacture, assembling, packing, preservation, or processing of goods or in mining or in the generation or distribution of electricity or any other form of power. The GWSSB was not engaged in trade or commerce. It was created under a statute and was solely engaged in supplying potable water to the villages, Nagar Palikas, etc. They sold water to others at a higher price; such activity or sale was incidental or ancillary to their main objective. GWSSB cannot therefore be held to be a commercial concern engaged in trade or commerce for profit. The statutory auditors of GWSSB have certified that their accounts had been prepared on the basis of the Accounting Standards applicable to non commercial / non business entities. In order to attract levy under "Commercial or Industrial Construction services" the impugned pipelines must be used in commerce or industry, or work intended for commerce or industry. They submitted Balance Sheet for the year ending 31.03.2006 of GWSSB which does not show either profit or loss since GWSSB is a

Government Organisation carrying out sovereign responsibilities of the state Government without profit motive. The following table has been prepared to show that revenue generated by GWSSB was mostly (above 90 %) on sale of water to Gram Panchayats and Nagar Palikas.

Category of User	Gross amount collected during 2005-2006 in Rs. Lakhs	% of total amount collected	Remarks
Nagar Palikas / Nagar Panchayats	1508.71	49.57%	Supply of water to local bodies.
Gram Panchayats	1248.29	41.02. %	Supply of water to rural areas
Private Institutions / Industries	286.31	9.41 %	Commercial use of water
Total	3043.31	100 %	

2.1 The income from sale of water in fiscal 2005-2006 was Rs.4101.89 lakhs, whereas the expenses towards operation and maintenance of water supply schemes was Rs.13471.22 lakhs. GWSSB got a grant of RS.7481 lakhs. These financial records showed that the operations of GWSSB were not commercially viable, but for the grants from the Government.

3. The appellant argued relying on caselaw in MSCO Pvt. Limited Vs UOI that since GWSSB was not engaged in manufacture of any goods, it was not a industry. The primary objective of laying the pipelines was to provide proper drinking water to the citizens. The Member Secretary of GWSSB had clarified this object of GWSSB and that user charges were collected to curb the people wasting water.

4. The impugned activity was executed under 'works contract'. 'Works Contract service' was brought in tax net w.e.d. 01.06.2007. Therefore, the same activity could not be taxed under 'commercial or industrial construction services' for a previous period. They relied on the decision of the Tribunal in Diebold Systems (P) Limited VS CCE [2008(2) STR 546]. The Tribunal had also held in this decision that the indivisible works contract could not be vivisected and part of the same subjected to tax. They also relied on Glaxo Smithkine Pharmaceuticals Limited Vs CC [2005 (188) ELT 171] wherein it was held that certain services specifically covered by 'Business Auxiliary Service' (BAS) could not be taxed under 'Management Consultancy Service' for an earlier period when BAS was not

on the statute book. Same ratio was laid down in Wedia GMBH case [2006(4)STR309]. The Commissioner had not specifically concluded that the subject activity was not covered by 'works contract service'.

5. Revenue has reiterated the reasoning adopted by the Commissioner to confirm the demand and to impose penalty on the appellants. It is argued that GWSSB was in the business of purchase and sale of water and the same did not constitute a social service. It was submitted that the subject activity may be covered under 'works contract service' w.e.f. 01.06.2007. However, during the material period, the same as covered under 'commercial or industrial construction service' under section 65 (25b).

6. We have heard both sides. We have carefully perused the case records and the rival submissions. The appellants had undertaken the activity of laying pipeline system for GWSSB during the material period for supply of mainly drinking water to Gram Panchayats and Nagar Panchayats. As per Section 65 (25b) of the Act '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, primarily 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;

6.1 As per the definition, a pipeline unless deployed primarily in commerce or industry or work intended for commerce or industry will not be considered to be the outcome of the activity taxable under the entry 65 (25b) viz., 'Commercial or Industrial Construction Service'. The thrust of the appellant's argument is that GWSSB is mainly engaged in providing drinking water to rural and urban communities without profit motive. We find from the Gujarat Act No. 18 of 1979, that the duties and functions of GWSSC are as follows.

- (a) to prepare, execute, promote and finance the schemes for supply of water arid 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 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 specified, from time to time, by the State Government;

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

7. We also find that vide letter No. MS/PA/GEN/84/07 Dated 13.06.2007, the Member Secretary of GWSSB certified the above facts. The material portion of the letter is extracted below:

“The cost of supplying drinking water thus incorporates raw mater 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 and Sewerage Board cannot be treated as a commercial organisation selling drinking water to the community. This is a service sector establishment for fulfilling the needs of the people for this basic requirement”.

8. The impugned order has proceeded to confirm the demand against the appellants on the ground that the pipeline laid by it was

- (i) used, or to be used, primarily for; or
- (ii) occupies, or to be occupies, primarily with; or
- (iii) engaged, or to be engaged, primarily in ,

Commerce or industry or work intended for commerce or industry.

8.1 The GWSSB was found to be engaged in trading water which was a commercial activity. GWSSB was registered under the Industrial Disputes Act, 1947 and was engaged in an activity which came within the definition of ‘industry’ as per the Act. The relevant definition reads as follows:

"industry" means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not

being wants or wishes which are merely spiritual or religious in nature), whether or not, - (i) any capital has been invested for the purpose of carrying on such activity; or

(ii) such activity is carried on with a motive to make any gain or profit, and includes - (a) any activity of the Dock Labour Board established under section 5A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1949);

(b) any activity relating to the promotion of sales or business or both carried on by an establishment, but does not include - (1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation : For the purposes of this sub-clause, "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951); or

(2) hospitals or dispensaries; or

(3) educational, scientific, research or training institutions; or

(4) institutions owned or managed by organizations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) khadi or village industries; or

(6) any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or

(7) any domestic service; or

(8) any activity, being a profession practised by an individual or body of individuals, if the number of persons employed by the individuals or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals in relation to such activity is less than ten;

9. We find that GWSSB discharges an important duty and responsibility of the Government to provide drinking water to the people residing in its jurisdiction. As per the Gujarat Act, GWSSB is constituted mainly to ensure supply of drinking water and maintenance of sewerage system in the jurisdiction of the said Board. In the coming days water could be a precious commodity traded for profit and supply of water entailing that business would constitute

'industry'. However, production of drinking water to the community in Gram Panchayats and Nagar Panchayats in the State on recovery of user charges at a highly subsidized rate, we find, does not come within the expression 'industry' used in the definition of the taxable entry in question. From the figures of revenue of the Board for the year 2005-2006, we find that above 90 % of its revenue came from sale of water to local bodies and rural population. The revenue was less than 1/3<sup>rd</sup> of the cost incurred to maintain water supply by the Board. The Board is run by substantial amounts released by the State Government as grants every year. These facts show that the pipelines in question were not laid to facilitate any commercial or industrial activity. We find that in the decision of the Tribunal in Indian Hume Pipes Co Ltd. Vs CCE, Trichy reported at 2008 (12) STR 363, which dealt with taxability of long distance pipeline laid by the appellant therein under the entry 'erection, commissioning or installation' of the Act held as follows.

We also find that a water supply project is an infrastructure facility and a civic amenity the State provides in public interest and not an activity of commerce or industry. The impugned order also did not hold it to come under a service of commercial or industrial nature as submitted by the Id. Consultant for the Revenue. Therefore, the impugned order demanding duty on the activity of laying of pipeline interpreting it to be erection, commissioning and installation of a plant is totally misconceived and unacceptable.

9.1 The Tribunal also held more or less to the same effect in M/s Lanco Infratech Limited Vs CST, Hyderabad reported at 2009-TIOL-2139 CESTAT, Bang. When it held while perusing the CBEC Circular No. 116/10/2009 ST Dated 15.09.2009, that "the activities which are concerned with welfare of the citizens of this country has been excluded from the liability of service tax".

10. The appellants had argued before the Adjudicating Authority that the impugned activity was 'works contract service' which was brought under the tax net after the material period. The Commissioner found that the work was undertaken on "Build and Operate contract" which included design, procurement and supply, construction, commissioning and operation and maintenance and therefore, fell outside the scope of 'works contract on turnkey basis'. We find that the Commissioner accepted that the contract involved was a composite contract. While demanding tax on construction service being part of the composite contract

the adjudicating authority had vivisected the composite contract and found part of it liable to service tax. We find that the impugned demand on 'construction service' is contrary to the ratio of the Tribunal's decision in Diebold Systems (P) Limited Vs CCE case (supra).

11. In view of the above discussion, we set aside the impugned order and allow the appeal filed by M/s Nagarjuna Construction Co. Ltd.

(Pronounced in open Court on 17.05.2010)