CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.ST/CO/023/2011, ST.434/2011

[Arising out of Order-in-Original No.15/2010 (ST) dt.29.10.2010 passed by the Commissioner of Central Excise, Madurai]

The Executive Engineer, Urban Division,
Tamil Nadu Water Supply and Drainage Board,
Madurai Petitioner

Versus

The Additional Commissioner,
O/O.Commissioner of Central Excise, Madurai Respondent

Appearance:

Shri A.Cletus, ADC (AR)
For the Appellant

Shri. Raghavan Ramabhadran, Advocate
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 1.5.2018

Per Bench

FINAL ORDER No.

The department is aggrieved by order of Commissioner (Appeals) who set aside the demand, interest and penalties.

1. Brief facts are that respondent is a statutory body set up by Government of Tamil Nadu as per the Tamil Nadu Water Supply & Drainage Board Act, 1970 (TWAD Act) created to carryout works related to water and drainage schemes in Tamil Nadu. TWAD awards contracts of laying pipelines or drainages on turnkey basis to

independent contractors. The materials are procured by contractors themselves. As per Clause 7.9.1 of the Contract, TWAD, is empowered to subject the samples of materials procured by the contractors to various quality tests at its Quality Control Laboratories. As condition of the contract, the testing charges are to be borne by the contractor. Department was of the view that in doing such tests, TWAD, respondent herein, was rendering 'Technical Testing and Analysis' Services and is liable to pay service tax on the charges collected for testing for the period from 1/4/2004 to 30/6/2009. SCN was issued which after due process of law, culminated in confirming demand, interest and penalties. In appeal, Commissioner (Appeals) set aside the same. Hence the department is before the Tribunal.

2. The Ld.AR, Sh.A.Cletus appearing for the Revenue reiterated the grounds of appeal. The activity of testing rendered by respondent is not a statutory duty and therefore the testing charges collected are not statutory fees. Though the pipelines are tested for the ultimate benefit of the public, there is a service provider – service recipient relationship between respondent and contractors. Only after testing, the contractor can use the pipes for execution of work order and therefore the testing is a service provided to the contractor. That Commissioner (Appeals) has erroneously placed reliance on Circular No.89/7/2006 dt.18/12/2006, and has set aside the demand without proper appreciation of facts and evidence.

3. The Ld.Counsel, Sh.Raghavan Ramabhadran appeared on behalf of respondent and argued the matter. His submissions are summarized as under :

3.1 The Respondent submits that the activity of testing is undertaken by it is a self-service, for it is not an activity performed at the behest of the contractor. It is a requirement under the contract that the materials intended to be used are tested by the Respondent. The same condition stipulates that contractors will bear the costs incurred for testing. The Respondent executes contracts with independent contractors for the laying of pipes/drainage systems and in the process of ensuring that such pipes are laid properly, it conducts quality assessment tests on the materials to satisfy itself as to the quality of the materials used in laying out these systems. In the instant case, testing of water, designing of plant for purification of water, conducting research relating to water supply, etc. for establishing and maintaining schemes incidental to water supply and drainage is a statutory obligation accorded to Respondent under Section 16 of the TWAD Act. However, to properly fulfil such function, the Respondent must ensure that the materials used are of satisfactory quality, or must regularly verify that plant designed for water purifying is functional. The quality check undergone by the materials prior to their implementation in a water pipeline cannot be separated from the use of materials and made separately made liable to service tax.

3.2 in ***Executive Engineer (Mechanical) vs. C.C.E., CUSTOMS & S.T., NASHIK, 2015 (40) S.T.R.306 (Tri. – Mumbai)*** the Hon'ble Tribunal was considering the activity of erection of sluice gates in the agricultural dams constructed by the various corporations, on which service tax had been demanded under the head 'erection, commissioning and installation service'. It was noted that the Chief

Engineer, Water Resources Department of the Government of Maharashtra is not a commissioning and installation agency as they do not undertake these activities for anybody else except themselves. There is n*o* Quid Pro Quo : it is not a case where the contractor requests or requires such testing to be done, which the Respondent acquiesces to. Therefore, costs recovered for testing is not consideration.

3.3 Respondent submitted that the quality assessment testing is done on materials for the purpose of furthering its own objective of ensuring that its functions as provided for under section Section 16 of the TWAD Act are fulfilled. The obligation to test materials used to lay such pipes cannot be isolated from its responsibility of executing/maintaining proper pipelines/drainage access systems. Commissioner (Appeals) has discussed this in para 7,9 in Order-in-Appeal.

3.4 Though the period under dispute is prior to 01.07.2012, the education guide lends clarify on the concept of activity for consideration, which alone is liable to service tax.

3.5 The fact that there is no quid pro quo between the Respondent and the contractor so as to make the transaction liable to service tax has been recognised in paragraph 8 of the OIA impugned by the Appellant Department.

3.6 The testing activity is rendered to effectuate its own objectives of instituting a water supply scheme. Therefore, where the present testing activity is performed by the Respondent for the purpose of fulfilling its own objectives under the statute, it cannot constitute a service on which tax would be leviable. Furthermore, the charges collected are not in return for such activity. The charges incurred for testing activity do not constitute consideration so as to attract levy of service tax. The demand for tax merits to be set aside on this ground itself.

3.7 As per Section 34 of TWAD Act, it is entitled to collect any moneys for the furtherance of its objectives. And such money would be deposited in the Board funds. Therefore, the testing charges are statutory in nature. Further, Section 23 of the TWAD Act stipulates that all costs incurred by the Board shall be reimbursed by the local authority on whose behalf the scheme is implemented. Thus, the testing charges paid to the Respondent are statutorily provided for and these charges paid by contractor to TWAD are reimbursed to the contractor by the local authority.

4. Heard both sides.

5. The Commissioner (Appeals) has set aside the demand mainly on two grounds. Firstly, that the testing done by TWAD is a statutory duty and the fees collected is a statutory fees. Secondly, that there is no service provider – service recipient relationship between TWAD and the contractors and as such there is no taxable event. For the first issue, the Commissioner (Appeals) has relied upon the Board Circular 89/7/2006-ST dt.18/12/2006. Let us address the second issue.

5.1 Clause 7.9 in the TWAD Act deals with the testing of pipes. It reads as under :

"7.9 Testing of pipes

7.9.1. The Manufacturer test certificate third-party inspection certificate should be produced by the contractor for the pipes used in the work. The Engineer shall have the right to test the *pipes, wherever felt necessary for its quality. All testing charges should be borne by the contractor."*

5.2 The above clause makes it necessary to test the pipes. Such testing is done not at the behest of the contractor. In fact, the contractor would be happy to use all materials procured without any testing. The TWAD in order to ensure standard of quality of the pipes for the works done by TWAD has made it obligatory on the part of contractor to get the pipes tested. The contractor would not get any benefit by such testing and there is no desire on the part of contractor to test the pipes. In CBEC Education Guide (TRU-Circular 20/6/2012) the Board has clarified the necessity to look into the 'quid pro quo' in a transaction. It is explained therein that the concept of 'activity for consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange of consideration. An activity done without such a relationship i.e., without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity. It is beautifully illustrated by the following example :

"There can be many activities without consideration. An artist performing on a street does an activity without consideration even though passers by may drop some coins in his bowl kept after feeling either rejoiced or merely out of compassion. They are, however, under no obligation to pay any amount for listening to him nor have they engaged him for his services. On the other hand if the same

person is called to perform on payment of an amount of money then the performance becomes an activity for a consideration."

5.3 Thus, consideration presupposes a certain level of reciprocity. In the instant case it is TWAD who wants to ensure the quality of the pipes used in the Water Supply and Drainage Schemes floated by them. Therefore it cannot be said that the testing is done for the contractor and that a service is rendered to him. The testing fee therefore does not take the colour or character of 'consideration'.

5.4 In Cricket Club of India Ltd Vs CST, Mumbai 2015 (40) STR 973 (Tri. – Mum.) the Tribunal has discussed a similar aspect in para 11 as under :

> **"11.** Owing to its inherent intangibility, a service transaction becomes recognizable only if a benefit accrues to a recipient and that explains the use of the phrase "provided or agreed to be provided" to determine taxability. It is taxable only if and when any, or a particular, service is rendered to a recipient. Consideration is, undoubtedly, an essential ingredient of all economic transactions and it is certainly consideration that forms the basis for computation of service tax. However, existence of consideration cannot be presumed in every money flow. Without an identified recipient who compensates the identified provider with appropriate consideration, a service cannot be held to have been provided. In a taxation scheme that specifies the particular targets of taxation, tax liability will arise when a provider conforming to the relevant description in the charging section performs an activity that conforms to the relevant description in the charging section on the request, and for the benefit, of a recipient conforming to the relevant description in the charging section. Service, its taxability and the provision of the taxable service to a recipient, in that order, are necessary pre-requisites to ascertaining the quantum of consideration on which *ad valorem* tax will be levied. This fundamental will not alter in the scheme of the negative list too; a service that is clearly identifiable has to be provided or agreed to be provided before it can be taxed. The factual matrix of the existence of a monetary flow combined with convergence of two entities for such flow cannot be moulded by tax authorities into a taxable event without identifying the specific activity that links the provider to the recipient."

5.5 From the above discussions, we agree with the view taken by the Commissioner (Appeals) that there is no 'service' rendered by

TWAD to the contractor and the fees collected is not a consideration that can be subject to levy of service tax under the Finance Act, 1994. In the result, we find that the impugned order calls for no interference. The appeal filed by department is dismissed. The cross objection filed by respondent also gets disposed accordingly.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

vsr