G. No. 45 New Delhi, 15 March 2002

NOTIFICATION

In exercise of the powers conferred by Section 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation of M/s. Bengal Tiger Line (India) Pvt. Limited against levy of additional berth hire charges by the Chennai Port Trust as in the Order appended hereto.

( S. Sathyam )
Chairman
This case relates to a representation made by M/s. Bengal Tiger Line (India) Pvt. Ltd. (BTL) against levy of additional berth hire charges by the Chennai Port Trust (CHPT).

2.1. In its representation, the BTL has made the following points:

(i). The vessel M.V. Tiger Bridge belonging to the BTL was berthed at the Container Terminal Berth (CTB)-II on 13 June 2001. The vessel was seized by the Customs for investigation during the course of discharge of cargo on 14 June 2001.

(ii). Since the vessel M.V. Tiger Bridge was not allowed to sail by the Customs authorities, the cargo of the vessel was loaded onto another vessel M. V. Tiger Sped; and, the CHPT authorities were requested to shift the vessel to any convenient berth pending investigation.

Accordingly, the vessel M.V. Tiger Bridge was shifted to berth WQ-II on completion of discharge of cargo on 15 June 2001, as the Customs authorities did not permit movement of the vessel to outer anchorage. The vessel occupied the berth WQ-II from 15 June 2001 to 19 June 2001. It was, subsequently shifted to mooring as per the requirement of the CHPT. The vessel was allowed to sail by the Customs authorities only on 23 June 2001.

(iii). The CHPT had levied not only normal berth hire but also additional berth hire charges for the period from 15 June 2001 to 19 June 2001 when the vessel was berthed at WQ-II.

(iv). The existing Scale of Rates (SOR) of the CHPT prescribes that the additional berth hire charges are leviable only when a vessel continues to occupy the berth after completion of discharge operations or after expiry of the notice period given by the Deputy Port Conservator (DPC) to vacate the berth @ Rs.3150/- / US$ 150 per hour or part thereof, if the DPC so decides in consultation with the Traffic Manager (TM).

(v). The vessel occupied berth WQ-II as per the requirement of Customs. Otherwise, there was no necessity for the vessel to occupy a berth.
(vi). The additional berth hire charges can be levied only if the vessel occupies the same berth continuously causing hindrance / interruption to any other incoming vessel at the port as per the berthing schedule of the port trust.

(vii). In the Instant case, there was no involvement of the DPC or the TM for deciding this levy as per the provision of the SOR of the CHPT; and also, the vessel did not cause hindrance / interruption to any other incoming vessel.

(viii). In view of the above, there is no justification in collecting the additional berth hire charges.

2.2. In this backdrop, the BTL has requested this Authority to intervene and redress the grievance caused to it due to collection of additional berth hire charges by the CHPT.

3.1. In accordance with the procedure prescribed, a copy of the representation was sent to concerned port users, representative bodies of port users and the CHPT for comments. The comments received from them are summarised below:

**The Tamil Chamber of Commerce (TCC)**

(i). Since the detention of the vessel by the Customs is beyond the control of the BTL, levy of additional berth hire charges is not reasonable.

(ii). Additional berth hire charges are levied only when the vessel continues to occupy the berth after completion of discharge operations which is not so in this case. Hence, the request of the BTL can be considered favourably.

**The Madras Chamber of Commerce and Industry (MCCI)**

(i). The vessel was detained for inspection by the Customs authorities. Though the vessel agents had offered to shift the vessel to outer anchorage, the vessel had to be kept alongside at a hard quay berth as per the Customs requirement. The choice of such berth was left to the CHPT so that the vessel does not hamper other vessels, which may require the berth for cargo operations.

(ii). The CHPT is justified in charging normal berth hire for the period of stay of the vessel at the berth and not the additional berth hire charges, which are imposed as a deterrent so that the vessels do not unnecessarily idle at the berth after completion of the cargo operations. The action of the CHPT to levy of additional berth hire charges is not justified, as there was no other vessel waiting for the berth.

**The Chennai Steamer Agents’ Association (CSAA)**
The legitimate claim of the BTL shall be supported because a ship owner cannot be penalised for no fault of his.

It is requested to examine whether 50% berth hire charges levied by the CHPT on the vessel at the anchorage are being charged at other ports also. It is sometimes impossible for the agent to collect 50% berth hire for the vessel belonging to a Tramp Operator.

**The Southern India Chamber of Commerce and Industry (SICCI)**

(i). The vessel was detained by the Customs with no recourse to shift to the anchorage; and, every effort was made by the BTL to keep the vessel clear of the working berth so that the revenue of the Port was not affected. Since there has been no apparent loss of revenue to the port trust judging from the facts presented, the CHPT need not have charged the additional berth hire charges.

**Indian National Shipowners Association (INSA)**

(i). In all such cases where the Customs or any other authority detains the vessel, it is natural that the port has to recover port dues and berth hire charges as per the applicable tariff; however, the basis thereof cannot apply to additional berth hire charges, since in such situations the owner has no control over the vessel to vacate the berth. The purpose of levying the additional berth hire charges is to pressurise the owner to do his utmost and not stay at the berth idling.

**Chennai Port Trust (CHPT)**

(i). The Customs authorities had seized the vessel for investigation as the vessel was found indulging in the carriage of contraband goods. Since the Customs authorities did not allow this vessel even to be shifted to the outer anchorage / mooring inside the harbour, the port had no option but to shift the vessel to another alongside berth WQ-II, which is a commercial berth, even though no cargo operation was required to be carried out.

(ii). The vessel was shifted from the berth WQ-II to mooring only when the Customs authorities ensured that their further investigation would not be hampered.

(iii). Though there was no other vessel to occupy the berth WQ-II as per the berthing schedule, the vessel was idling at the commercial berth till 19 June 2001 only because of her illegal activities and not as per the requirements of the port trust.

(iv). Clause 7 of Chapter XI relating to berth hire charges of SOR in the CHPT reads as follows:
“Any vessels which continues to occupy any berth other than the berth in the Bharathi Dock for more than 2 hours after completion of discharge or loading or after the expiry of the notice period (4 hours in the case of Centre Berth and 12 hours in the case of others) given by the Deputy Port Conservator to vacate the berth after any of the said period, pay additional berth hire charges at the rate of Rs.3150 / 150 US Dollars per hour or part thereof if the Deputy Port Conservator so decides in consultation with Traffic Manager. The additional berth hire charges leviable shall be in addition to the normal berth hire charges payable under the Schedule supra”.

In the instant case, the additional berth hire charges have been levied by the DPC based on the stipulation that the vessel had continued to occupy the berth other than the berth in the Bharathi Dock for more than 2 hours after completion of discharge or loading.

Under the normal circumstance, the vessel would have sailed on 15 June 2001 after the discharge of cargo. It was detained by the Customs till 23 June 2001 because it had indulged in illegal and nefarious activities. The vessel had stayed at the berth for more than 2 hours after the completion of discharge operations or loading due to its own fault and hence the additional berth hire charges were levied.

(v). It is correct that in this case the TM was not consulted before the levy of additional berth hire charges which is usually done when it concerns cargo operations, cargo lashing, issue of clean mate’s receipt for cargo, etc.

(vi). Waiver of additional berth hire charges may create a bad precedent encouraging other agents/ship owners to ask for allotment of berths every time their ships get detained by various Government agencies like P.O. (M.M.D.), Customs, Courts, etc., irrespective of whether a berth can be spared or not. Such detentions by the Government agencies are done due to non-adherence of various rules or not maintaining the vessels in a seaworthy condition or indulging in unlawful activities by the masters/ship-owners. The additional berth hire charges in such cases have been levied in the past and upheld by the court.

3.2. A copy each of the above comments was sent to the CHPT (excepting its own comments) and the BTL as feed back information.
A joint hearing in this case was held on 18 December 2001 in Chennai. At the joint hearing the following submissions were made:

**Bengal Tiger Lines India (Private) Limited (BTL)**

(i). The facts are detailed in our petition. There is no dispute.

(ii). No other ship was waiting. The CHPT, therefore, would not have lost any revenue.

(iii). The SOR says that the DPC in consultation with the TM will decide. In this case the DPC never consulted the TM, which is a procedural infirmity.

(iv). We did not stay out of volition. We were compelled to stay by the Customs. We were not deliberately blocking the traffic; therefore, Additional Berth Hire (ABH) shall not apply.

In any case, there was no other ship waiting. There was no loss of revenue. In fact, if we were not there, even normal berth hire would not have been there. There was, therefore, only a revenue gain.

(v). The ABH is relevant for a congested situation. There is no congestion now; hence, the ABH has no relevance.

**Chennai Port Trust (CHPT)**

(i). In the SOR, there is no reference to other vessels waiting.

(ii). Consultation with the TM is an internal matter. That is not relevant vis-à-vis the user. That is for the CHPT tm bother about.

(iii). Finally, the Chairman (CHPT) approved. His approval implies approval of TM who is subordinate to him.

(iv). The High Court has upheld levy of ABH. We will send copies of the High Court Orders.

(v). The CHPT is not concerned with detention; that is by the Customs; why should the CHPT lose revenue?

(vi). We did have some consultation with TM about additional time allowed to the vessel, etc.

(vii). The waiting certainly was not an unintentional idling. It was because of smuggling. The Line cannot escape the responsibility.

(viii). There is no double penalty; Customs penalty has nothing to do with the CHPT.

(ix). The CHPT has recommended to the Customs that the vessel may be shifted to the moorings. In that case, there would have been no ABH. But, the Customs refused.

(x). Various statutory bodies (Customs/MMD/courts) order detention of vessels. If we do not collect the charges, port will lose earnings.

(xi). The ABH is used as a deterrent to protect loss of revenue. We do not emphasis loss of revenue too much as it is difficult to estimate precisely; and, will create avoidable complications.
(xii). Too much of relaxation will also remove the deterrence.

Indian National Shipowners’ Association (INSA)

(i). The ABH is seen as a deterrent against idling. In this case, there was no voluntary idling. It was imposed by the Customs. There is, therefore, no case for ABH.

(ii). The CHPT has passed a unilateral order. No reasons are given for over-ruling our objection to levy of ABH.

Tamil Chamber of Commerce and Industry (TCCI)

(i). Normal berth hire is O.K. The objection is only to ABH. The quantum of money is small; but, it is a question of principle.

Container Shipping Lines Association (CSLA)

(i). According to the SOR, this case may attract ABH; but, one must go behind the provision in the SOR to appreciate the principle involved.

Chennai Steamer Agents’ Association (CSAA)

(i). It was not the vessel’s discretion to stay, the Customs ordered.

(ii). There were no vessels waiting; there was, therefore, no scope for loss of revenue.

(iii). The BTL wanted to move out of the berth; Customs did not permit even the shift. Why should they pay ABH for that?

4.2. At the joint hearing, the CHPT informed that the writ matter pending before the Madras High Court about the validity of ‘additional berth hire’ has since been disposed of; and, levy of additional berth hire has been held to be legitimate. The CHPT agreed to forward a copy of the judgment passed in this regard. Subsequently, it had also forwarded a copy of the judgement of the High Court of Madras in WP 3199 of 1995.

4.3. In addition to reiterating the points made at the joint hearing, the CHPT has furnished its comments on the arguments put forth by the BTL and the port users, which are summarised below:
(i). The objective of levying the additional berth hire charges is not connected with the loss of revenue; otherwise, in each case, before levy of additional berth hire charge, the loss of revenue is to be ascertained which will be a very complicated exercise.

(ii). The charge acts as a deterrent to occupy the port infrastructure after completing the cargo operations; and, if the loss of revenue is taken into consideration, the deterrent purpose of the additional berth hire charges will peter out.

(iii). The Customs and the Port Trust are two different authorities. Penalty imposed under the provisions of Major Port Trusts Act cannot be compromised on account of the penalty levied under the Customs Act.

(iv). The responsibility rests with the master of the vessel, when the crew indulges in an unlawful activity such as smuggling and also when this kind of an act is intentional.

4.4. A writ petition (WP 3199 of 1995) filed by M/s. Maritime Agencies Pvt. Ltd. against the claim of additional berth hire charges by the CHPT was partially allowed by the Madras High Court by setting aside the claim of the CHPT in respect of the period during which the vessel could not be moved from the berth due to strike of the marine crew i.e. the circumstances beyond the control of the petitioner. In respect of the period other than the one stated above, the High Court held that the petitioner was made liable to pay the additional berth hire charges.

5. With reference to the totality of information collected during the processing of this case, the following position emerges:

(i). The vessel in reference was seized by the Customs for investigation during the course of discharge of cargo. After transferring the remaining cargo on-board to another vessel, this vessel was shifted to another berth at the West Quay since the Customs did not allow the request of the BTL’s request to move the vessel to outer anchorage. The dispute is about additional berth hire charges levied by the CHPT for the over-stayal of the vessel at a berth after completion of cargo operation.

(ii). While considering the case relating to general revision of tariffs at the CHPT in March 2000, this Authority neither approved nor disapproved the levy of additional berth hire charges in view of a pending litigation brought to its notice at that time. The CHPT was, therefore, advised to implement the court orders on the subject. The CHPT has now
intimated that the High Court of Madras has upheld the levy of additional berth hire charges.

(iii). The Scale of Rates of the CHPT provides for levy of additional berth hire charges if vessels continue to occupy any berth for more than two hours after completion of loading or discharge of cargo. The vessel in reference continued to occupy a berth of the CHPT for more than two hours after completion of cargo operation; and, hence the vessel satisfies the condition prescribed in the Scale of Rates for levy of additional berth hire charges. That being so, the levy of additional berth hire charges from this vessel by the CHPT cannot be said to be a wrong application of its Scale of Rates.

(iv). The CSLA has specifically requested that the admissibility of additional berth hire charges in this case may be determined not just based on the provisions in the Scale of Rates but considering the principle involved in prescription of such charges.

One of the guidelines adopted at the Chennai Workshop (February 1998) is about users not being made responsible for delays caused by the port. This principle has been followed in prescribing / amending many of the conditionalities in the Scale of Rates of the ports. In this case, admittedly, the detention of the vessel was ordered by the Customs. Since a charge levied by the CHPT based on its notified Scale of Rates for the period of detention is questioned, it becomes necessary to examine whether the over-stayal was due to any fault of the CHPT.

(v). The INSA has argued that there was no voluntary idling from the vessel’s side. It may not, perhaps, serve any useful purpose to harp on the pleadings that the user is not responsible for the delay caused. The relevant point is whether such idling was as a result of the Port's action (or, lack of it).

There is nothing on record to prove that the CHPT on its own decided to shift the vessel to another cargo handling berth. In the instant case, the seized vessel was ordered to be berthed inside the docks by the Customs. The CHPT had only provided a berth as requisitioned by the BTL based on the orders of the Customs. At the same time, the vessel cannot be certified to be not responsible for the delay. As a carrier, it cannot disown its responsibility for the cargo carried. As has already been mentioned, the issue whether the vessel is responsible for the delay is, in any case, not relevant. There is nothing on record to prove that the CHPT is responsible for the delay caused to the vessel.
The CHPT has made a valid observation that a penalty imposed under the provisions of the MPT Act cannot be compromised on account of the penalty levied under the Customs Act. Even if the CHPT and the Customs are seen to be instrumentalities of the same Government there is no justification for ignoring the fact that they are separate legal and financial entities. It is noteworthy that a port trust is a self-financing organisation and it cannot be made to forego its revenue for acts of other arms of the Government.

In this connection, it may be relevant here to refer to an Order passed by the Supreme Court in a case relating to the International Airport Authority of India [1995(I); Scale 859 : 1995 AIR SCE 1802; p-1928] which was cited by the Kolkata Port Trust in a case relating to levy of storage charges on containers detained by the Customs. The relevant portion of the Supreme Court Order is reproduced below:

“An Authority created under a statute even if it is the custodian of the imported goods because of the provision of Customs Act 1961, would be entitled to charge demurrages for the imported goods in its custody and make the importer or consignee liable for the same even for period during which he/it was unable to clear the goods from the Customs Area due to fault on the part of the Customs Authorities or of other authorities who might have issued Detention Certificate owing such fault.”

Irrespective of the Supreme Court decision, as has already been pointed out, the principle followed by this Authority is that users are not to be responsible for delays caused by the Port. In this case, it has only been argued that the delay was caused not due to the fault of the user; but, it was not established that it was due to the fault of the port. That being so, there is no merit in the representation of the BTL seeking refund of additional berth hire charges levied by the CHPT.

The BTL and MCCI have argued that levy of additional berth hire charges cannot be justified when no other vessel was waiting for that berth at the material time. Levy of additional berth hire charges is a penal provision and not intended for raising revenue for the port trust. Such penal provisions need to be absolute and cannot be relative. The one who infringes the rule prescribed has to face / pay the penalty. If the argument of the BTL and MCCI are admitted in this case, then there can be a demand to extend it to other port tariffs also. There can be an argument that berth hire charges from a vessel should not be levied if there is no immediate demand for that berth from any other waiting
vessel. Similarly, one can even argue that demurrage from cargo should not be levied if there is not demand for the ground slot occupied by the cargo / package.

(viii). The issue raised by the BTL about consultation between the DC and TM is not material to decide the case as it is only an internal procedural formality. In any case, the CHPT has confirmed that the decision was taken with the approval of its Chairman.

The existing provisions in the Scale of Rates about levy of additional berth hire charge stipulates that imposition of this charge is at the discretion of the Deputy Conservator. It may be rationale to remove such discretions insofar as application of the rates and conditionalities prescribed in the Scale of Rates. The CHPT is advised to list out the circumstances under which the additional berth hire charges will not be applicable and to levy this charge in all other cases. The CHPT may examine this aspect further based on its past experience in applying the discretion available and come up with an appropriate formulation while formulating its proposal for the next general revision / review of its Scale of Rates.

6. In the result, and for the reasons given above, and based on a collective application of mind, this Authority rejects the representation of M/s. Bengal Tiger Line (India) Pvt. Ltd. against the additional berth hire charges levied by the CHPT on account of their vessel M.V. Tiger Bridge.

(S. Sathyam)
Chairman