Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Sections 48 and 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby rejects the petition filed by the New Mangalore Port Trust (NMPT) to review the Order passed by the Authority on 19 July 2000 on an issue relating to credit back of interest on Escrow Account as in the Order appended hereto.

(S. Sathyam)

Chairman

ORDER

(Passed on this 21st day of March 2002)

This Authority had passed an Order on 19 July 2000 setting out the guidelines to be followed for calculation of wharfage charges on cargo handled at the dedicated MRPL Jetty (Jetty No.10). In the said Order, inter alia, it was decided that since the Escrow Account was for a specific purpose, the interest earned on the balance of this account had also to be considered while determining the wharfage rate for Jetty No.10.

2.1. With reference to the said Orders the NMPT has submitted a petition to review the decision about crediting the interest on Escrow Account balance for computation of wharfage rate for Jetty No.10.

2.2. The NMPT has made the following points in its petition:

(i). The TAMP in its Order dated 19 July 2000 has allowed the interest earned on the Escrow Account balance for determination of wharfage charges for the Jetty No.10.

(ii). The determinant that prompted the Authority to prescribe this guidelines is perhaps the ‘Guarantee’ provided by the MRPL for repayment of loan.

(iii). Clause 3 of the Memorandum of Understanding (MOU) stipulates that –

“Both the rupee loan and the foreign currency loan will (a) be secured by a charge on properties acquired by NMPT from out of the Funds and (b) if so required by the Lenders; be guaranteed by MRPL.”

(iv). It is true that the MRPL had earlier provided corporate guarantee and second pari passu mortgage on the assets of the MRPL at the instance of the lenders in the Rupee
Loan Agreements. The type of guarantee offered by the MRPL in the Rupee Loan Agreement are as follows:

(a). The MRPL stands as a confirming party in case of the rupee loan advanced by the SCICI (now ICICI) to the NMPT.

(b). In case of loans advanced by various Banks viz. Canara Bank, Syndicate Bank, Corporation Bank, and the HUDCO, the SCICI acts through the letters of authority given by the respective Banks and the MRPL is a confirming party of the third part.

(v). As per the Rupee Loan agreements, the loan from financial institutions and banks are secured by (a) an irrevocable and unconditional corporate guarantee from the MRPL; (b) a first mortgage / hypothecation or other charge on all the assets created out of the borrowed funds; and, (c) a second pari passu mortgage / hypothecation or other charge on the MRPL assets. The second mortgage on the assets of the MRPL was, however, released subsequently at the request of the MRPL on production of NOC from the Lenders; and, only corporate guarantee is now subsisting.

(vi). Clause 4 of the MOU provides the following:

“In the event of MRPL being unable to utilise the said infrastructural facilities for any reason during the aforesaid period, they will make good the shortfall to NMPT to meet its commitments to its lenders. Any amount so paid shall be treated as advance with interest to NMPT and shown as advance in the books and included in the calculation of MRPL’s future wharfage charges to the NMPT on the said infrastructural facilities.”

The provision of this clause ensures a guarantee of short term loan with interest adjustable in the future wharfage in case of under or non-utilisation of the said facility and nothing more. It is, therefore, clear that the Escrow account is the creation of Rupee Loan Agreement.

(vii). The ‘Escrow Account’ has been defined as the designated account opened by the Borrower with any of the Nationalised Bank in consultation with the MRPL and the SCICI (now ICICI).

(viii). (a). The MOU provides that the NMPT shall ensure that all payments from the MRPL for the use of the proposed facilities will be deposited in an Escrow Account; and, lender will have the first right to utilise the amount so deposited towards repayment and prepayment of the loan and payment of interest due to them.

(b). The Rupee Loan agreement entered into between the NMPT and the MRPL provides that the SCICI and other lenders, other than the MRPL, will have the first right to utilise the amount deposited in the Escrow Account towards the repayment of loan and payment of interest due to them. After that the proceeds of the Escrow account shall be utilised for repayment of the MRPL loan.

(c). The Rupee Loan Agreement with SCICI and the Banks states that the respective Banks will have the first right to utilise the amount deposited in the Escrow Account towards the repayments of loan and payments of interest due to them.

(ix). In view of the above it is crystal clear that the MRPL is in no way entitled to net of the interest on Escrow Account balance in calculation of wharfage charges. At the most, the
MRPL can invoke the provisions of the MOU for prepayment of loan. The Authority's decision in its Order dated 19 July 2000 about crediting the interest on Escrow Account balance in computation of wharfage is, therefore, erroneous; and, hence needs to be reviewed.

3. A copy of the NMPT proposal was forwarded to the KCCI and the MRPL for their comments. The comments received from them are summarised below:

Mangalore Refinery and Petrochemical Limited (MRPL)

(i). The TAMP has no jurisdiction to review its own order. In any event, an application for review at best can be filed only on the basis of new facts or changes not in existence at the time of passing the order under review.

(ii). The contention of the NMPT that the TAMP has allowed credit back of interest on Escrow Account balance in wharfage calculation primarily due to a guarantee provided by it for repayment of loan is incorrect.

(iii). The NMPT has totally ignored the fact that the accumulated balance in Escrow Account is the amount collected from its cargo. Interest accrued on the Escrow Account balance because the amount was collected before the expenditure was incurred.

(iv). It has reiterated its earlier claim that the NMPT has earned huge amount of interest on balance accumulated in the Escrow Account. The amount to be collected as wharfage charges must be net of all the income earned under this project.

(v). The TAMP in its Order dated 30 November 1998 had suggested the NMPT to open a specific cost centre for this project for the purpose of determining the net expenditure relating to this cost centre and only that was to be considered for the purpose of calculation of wharfage. Based on this direction only it has claimed that the interest earned by the NMPT on the Escrow Account should be considered for wharfage calculation. The interest obligation is also met by it, therefore, the expenditure relating to interest cost should be net of interest income earned by the NMPT out of the specific funds available from the project cost centre.

(vi). The corporate guarantee given by it is reflected in the balance sheet as contingent liability which implies that at any point of time if there is default in payment of loan, it is equally responsible for repayment of loan due to its commitment under corporate guarantee. Thus, by relieving the second charge on its assets, it has not gone out of its commitment to the project.

(vii). The reference given by the NMPT about the clause prescribed in the MOU that in case the NMPT is short of funds for repayment of loan then, the MPRL shall pay the amount and treat the same as loan granted to the NMPT is irrelevant in the instant case.

(viii). The Escrow Account has been opened as per the terms of the MOU which further provides that all income from the use of the berth has to be credited to the Escrow Account; and, when this is done interest will naturally accrue on the unspent balance. The NMPT has nowhere claimed that interest earned on the Escrow Account does not belong to the cost-centre of this project. That being so, this income naturally belongs to the project cost-centre; and, accordingly it has to be dealt with while calculating the wharfage charges.
(ix). In any event an ‘ESCROW’ amount will remain in ‘ESCROW’ till appropriation. Interest earned on that is also part of ‘ESCROW’ and has to be disbursed along with the ‘ESCROW’ amount.

(x). The NMPT has suggested that the Escrow Account balance including interest can at the most be utilised for repayment of loan. Thereby, the NMPT has recognised the fact that the interest earned and credited to Escrow Account belongs to this project. If this amount is used to repay the loan, the interest on the loan which is charged in the wharfage calculation, will obviously decrease. The ultimate impact of this will result in crediting the interest amount to wharfage calculation.

(xi). The NMPT itself in its review petition has suggested that it is willing to credit the interest earned on the Escrow Account balances to wharfage calculation. It is contradicting its own stand. There is no need, therefore, to review the Authority’s Order in this regard.

(xii). In the wharfage calculation sent by the NMPT on 28 November 2000, the NMPT has implemented the TAMP Order in this regard without demur. It is too late for them to seek review of the matter after having acted and complied with the Order.

(xiii). In this backdrop, the direction of the TAMP about crediting the interest on the Escrow Account balances in the wharfage calculation appears to be in order and it needs no review.

Kanara Chamber of Commerce and Industry (KCCI)

(i). It is unable to comment on the technical aspects as it involves the MOU between the NMPT and the MRPL.

(ii). At the last joint hearing held on 3 October 2001, the MRPL had explained the reasons for shortfall in achieving their target of movement of crude and products. There has been an overall worldwide fall in the demand for products affecting the refining capacity of the MRPL; and, consequently the import of crude oil.

(iii). The dedicated berths and the dedicated Jetty for the MRPL contributes over 70% of the NMPT’s revenue.

(iv). Due to circumstances beyond its control the MRPL was unable to meet its target. The NMPT should follow the guidelines given by the TAMP about “what traffic can bear” while calculating the wharfage rate for Jetty No.10.

A joint hearing in this case was held on 2 January 2002 at the NMPT. At the joint hearing, the following submissions were made:

New Mangalore Port Trust (NMPT)

(i). In the MRPL letter number 295 dated 30 November 2001, they are also asking for reconsideration of some issues. How then can they question jurisdiction?

(ii). The MOU does not say interest should go to Escrow account. We assumed it would come to us. We never anticipated the Order of TAMP about interest. Otherwise, we would have taken the amount into our reserves and invested elsewhere.
(iii). The 3% Renewal Fund should have been in a separate fund and also the interest thereon. Unfortunately these have gone into the Escrow account. It must now be separated; it cannot go into wharfage.

(iv). The MOU says that 'surplus' moneys (Any other moneys due to advance or excess collection of wharfage) should be utilised as mutually agreed upon. This 'utilisation' can only be for pre-payment of loan. We have no objection to this.

(v). In the MOU there is nothing about crediting interest back into the Escrow Account.

(vi). The MRPL has undertaken to abide by our regulations, MPT Act, etc. How can they now question our system of keeping the 3% fund separately? We have all along been showing it separately.

(vii). Pre-payment may have implications for calculation in later years; but, not in the same year. It is, therefore, not the same as crediting the interest back into the Escrow Account.

(viii). We will reconcile our accounts. We will give details of operating expenses. If by mistake they have not been debited at the appropriate time to the Escrow Account, please allow us to do so retrospectively now and correct the mistake.

Mangalore Refinery and Petrochemical Limited (MRPL)

(i). We reiterate our objection on jurisdiction of the Authority to undertake a review of its Order.

(ii). There is no error apparent. There is no case for a review.

(iii). All transactions relating to the special accounts have to go into Escrow Account. It must be taken into account for computation of wharfage.

(iv). According to our understanding the 3% Renewal Fund is only an accounting entry. It cannot override the MOU. The 3% Fund has to be a part of the Escrow Account. The credit must go into the Escrow Fund.

(v). The accounts they have given is only net of operating expenses. The Escrow Account has not been shown to carry any part that could have been transferred out. (The NMPT denied this aspect).

(vi). Pre-payment of loan will itself cause reduction of interest. In effect, therefore, it amounts to giving credit of interest earned for computation of wharfage. In other words, the NMPT has conceded the principle.

(vii). We are not asking for change of any statutory system. We do not want any 'book entry'. We are only talking of an accounting entry. There should be no problem at all for the NMPT.

Kanara Chamber of Commerce and Industry (KCCI)

We totally endorse the MRPL's views.
5. With reference to the totality of information collected during the processing of this case, the following position emerges:

(i). The MRPL has questioned the competence of this Authority to entertain ‘reviews’ of its Orders. It is relevant in this context to recognise that, admittedly, the Statute does not empower this Authority to ‘review’ its Orders. The legal issue has been dealt with by this Authority in many earlier cases. In the absence of any provision for an ‘appeal’ against its Orders, with the intention of providing an opportunity to redress genuine grievances without having to take recourse to costly and time-consuming litigations in courts of law, this Authority has deliberately decided to entertain such requests for ‘reviews’ even in the absence of such a specific provision therefor in the Statute. In this backdrop, this initiative can be seen not as an arrogation to itself of an unintended power but as an extension of application of the principles of natural justice. This is something that is being done in the interests of the parties to the proceedings.

Significantly, in the earlier joint hearing in Mumbai on 9 November 2001 about fixation of ad hoc wharfage rate for Jetty No.10, again, this issue came to be discussed. Interestingly, the Senior Counsel for the MRPL had then observed that, bearing in mind the laudable objective behind the said initiative of this Authority, it cannot be allowed to be lightly questioned by any party on mere technical grounds; the spirit behind the action shall be allowed to prevail! In this backdrop, the preliminary objection about jurisdiction cannot be said to hold force. Interestingly, as rightly observed by the NMPT, the MRPL itself has also been requesting for reconsideration by this Authority of some issues. This vacillating conduct on the part of the MRPL also erodes the credibility of its objection.

When this objection was raised at the joint hearing on 3 January 2002, for the reasons given above, the Chairman had rejected it on-the-spot and allowed the hearing to proceed on merits of the case. This Authority reiterates the stand taken by the Chairman; and, accordingly, dismisses the objection of the MRPL.

(ii). The issue agitated against by the NMPT in this case is the principle enunciated by this Authority in the impugned Order that the interest earned by the Escrow Account shall form an integral part of the Account. According to the NMPT, such interest accruals shall not be bound only for project-payments; they shall flow into the port’s general reserves to be spent at its discretion. It is an elementary principle of accounting that interests earned by special funds shall flow into the credit of the respective funds (for example, interest earned by the Provident Fund or the Pension Fund are credit to the respective funds.). It is incomprehensible that a port trust having access to expert financial and accounting advice should be questioning such a well known and commonly accepted basic principle of accounting! That the MOU does not explicitly mention about credit of interest to Escrow Account cannot be a reason for not abiding by accepted principles.

At the joint hearing a suggestion was made on behalf of the NMPT that such interest accruals can, if at all, be retained in the Escrow Account only for advance repayment of loan-instalments; there can be no implication of the interest accruals for purposes of tariff computation. In making this suggestion, the NMPT has incidentally conceded the fact that the interest earned by and credited to the Escrow Account belongs to the project. This reveals the confusion in the thinking of the NMPT clouding its reasoning. As has rightly been pointed out by the MRPL, whether the interest amount is directly reckoned with for the wharfage computation or whether it is utilised for advance repayments thereby reducing the expenditure liability on ‘interest payable’, the end result will still more or less be the same of reducing the wharfage.
Notwithstanding the general statement made above, the fact remains that the MRPL, the prime promoter of the project, will have a relatively greater advantage in case the wharfage rate is allowed to be computed in accordance with the MOU terms. That being so, and in the absence of any extraordinary circumstances warranting advance repayment of the loan, it may be unnatural for the NMPT to resort to such action.

(iii). As earlier stated, it is a normal practice of accounting for the interest earned to be given to the credit of the account concerned. The NMPT has not been able to come up with any convincing argument to the contrary. It has, therefore, to be concluded that there is no error in the principle enunciated about credit back to the Escrow Account of interest accruals for the purpose of computation of wharfage.

(iv). In the joint hearing, a point was made on behalf of the NMPT that the accumulation of balance in the Escrow Account could be because of delayed transfer of funds from the account to the general reserves for recoupment of admissible expenditure or return. This observation, again, projects the port trust in poor light. What this statement means in effect is that the port trust has not been able to manage its funds competently. And, instead of setting its house in order, the port trust has resorted to making ill-advised petitions wasting everybody's time in the process. What the NMPT can do even now is to do its groundwork in a detailed manner, work out the recoupments necessary and make adjustments accordingly along with the interest due thereon. This issue was specifically discussed in the joint hearing when the MRPL agreed with the proposition and offered to accept the adjustments to be made provided the details were reconciled in consultation with it.

6. In the result, and for the reasons given above, and based on a collective application of mind, it is to be concluded that the NMPT has totally failed to establish any error apparent on the face of the record warranting a 'review' by this Authority of the impugned order. This Authority, therefore, rejects the NMPT's petition seeking a 'review'.

(S. Sathyam)
Chairman