Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Section 48 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation made by M/s. JRK International Private Limited challenging the interpretation made by the Kandla Port Trust’s on Scale ‘E’ - Schedule of Demurrage charges in its Scale of Rates relating to a 50% rebate on demurrage charges for export cargo, as in the Order appended hereto.

(S. Sathyam)
Chairman

Tariff Authority for Major Ports

Case No. TAMP/77/2000-KPT

M/s. JRK International Private Ltd. ... Applicant

Vs.

The Kandla Port Trust ... Non Applicant

ORDER

(Passed on this 26th day of September 2000)

This case relates to a representation from M/s. JRK International Private Limited (JRK) submitting that the Kandla Port Trust (KPT) has made its own interpretation of Scale ‘E’ - Schedule of Demurrage charges prescribing a rebate of 50% demurrage for export cargo.

2. The salient points made in the representation from the JRK are given below.

(i). The KPT vide its Board Resolution No. 71 dated 9 January 1997 had amended the provision of rebate on demurrage for export cargo as given below:
“Rebate of 50% demurrage shall be allowed only on cargoes physically exported but not otherwise.”

(ii). By adding the words ‘physically exported’ the KPT has brought in a distinction between the exporter who physically exported the cargo and an exporter who could not physically export the cargo (possibly due to circumstances beyond his control).

(iii). No other major port except KPT has imposed any qualification for extending approved rebate of demurrage to an exporter.

(iv). In view of the amendment made by the KPT as given above, the KPT demanded Rs.367.13 lakhs from JRK as demurrage charges without granting 50% rebate and without allowing 15 days free period.

3. The comments of the KPT on the representation are summarised below:

(i). Earlier, all cargoes brought for export were allowed 50% rebate on demurrage charges.

(ii). The conditionalities relating to demurrage charges on export cargo were not explicitly clear in the Scale of Rates, leading to difficulties in interpretation and implementation.

(iii). It was felt that 50% rebate in demurrage charges on shut-out cargoes, damaged cargoes, etc., should not be allowed as they are not physically shipped. Accordingly, the KPT Board passed the resolution to provide a lucid interpretation of the said provision.

(iv). The term shut-out cargo has been defined as given below:

   “Shut-out cargo means part cargo, out of the cargo meant for shipment as per shipping documents, not taken by Master of a vessel for want of space or draft restrictions and taken back without being exported.”

   Under the above definition, the damaged cargoes and cargoes rejected by surveyors are not to be treated as ‘shut-out’ cargo and no free period is to be allowed on such cargo.

(v). Free days are allowed on goods brought in and removed when there is a definite attempt made for shipment as per provisions of the Scale of Rates.
A joint hearing in this case was held at the KPT on 16 September 2000. At the time of the joint hearing, the following submissions were made:

**JRK International Private Limited**

(i). Rates and conditions relating to levy of demurrage were notified in 1993 Scale of Rates.

(ii). Provisions relating to rebate of 50% on demurrage charges for export cargo was amended in the KPT Scale of Rates in 1997 by introducing a new condition that the cargo has to be physically exported.

(iii). Government approval was not obtained towards this amendment. This amendment was not notified and hence it is not valid.

(iv). On 9 January 1997, there may not have been any Authority to sanction, but subsequently the KPT could have gone to the TAMP to get its decision ratified.

(v). This amendment was brought with respect to three specific situations. It cannot be applied to other situations.

(vi). The relevant Board Resolution does not spell out the situations. But the concerned Board note provides the background.

(vii). Paragraph 26.4 and paragraph 26.6 of the Minutes of the KPT Board meeting held on 9 January 1997 indicate the decision was not unanimous.

(viii). Paragraph 26.7 of the Minutes of Board meeting states that shut-out cargo will continue to get the benefit of shut-out cargo, if the Master of vessel refuses to load the cargo for want of space in the vessel or on account of draft restrictions. Only, damaged cargo and the cargo rejected by the surveyor will not be allowed the benefit of export cargo.

(ix). Only three categories are hit and not others. They could not export because no ship would go to Bangladesh because of congestion there.

**The Gandhidham Chamber of Commerce and Industries (GCCCI)**

(i). What is in reference is not a clarification of the Scale of Rates. It is a basic change affecting fundamental financial interests.
(ii). The KPT should have obtained ratification by the TAMP subsequently.
(i). This was not a case of amendment. There was ambiguity. It was clarified to introduce uniformity of interpretation of the Scale of Rates. After January 1997 they have consistently followed this interpretation.

(ii). Paragraphs 26.4 and 26.5 of the Minutes of the Board meeting clearly indicate that the Board was not exercising its power to approve rates.

(iii). The Board Resolution dated 9 January 1997 itself also specifically confirms interpretation of the Scale of Rates.

(iv). The amendment Ordinance to set up TAMP was dated 9 January 1997. There was no Authority to sanction tariffs on that date.

(v). Shut-out cargo has been defined in paragraph (ii) of the Board Resolution.

4.2. The KPT furnished, at the time of the joint hearing, a comparative statement showing treatment given to cargo brought for export but not physically shipped at the other Major Ports.

5. With reference to the totality of information collected during the processing of this case, and based on a collective application of mind, the following position emerges for consideration:

(i). The entry in reference of the KPT’s Scale of Rates was notified in 1993 with the sanction of the Government. It has not so far been revised.

(ii). In 1997, the Board of Trustees of the KPT approved a proposal to amend Note-1 of Scale ‘E’ – Schedule of Demurrage Charges. The said Note which read earlier as -

   “A rebate of 50% shall be allowed on the rates for export cargo”

   was changed to read as –

   “Rebate of 50% in demurrage rates shall be allowed only on cargoes physically exported but not otherwise”

The KPT has contended that this was not a case of ‘amendment’; this was only a case of introduction of a clarification to remove ambiguity and promote
uniformity of interpretation. That being so, it is argued, there can be no objection about not obtaining the sanction of the Government or the approval of this Authority.

In support of its contention, the KPT has cited paragraph 26.4 and 26.5 of the minutes of the meeting of the Board of Trustees held on 9 January 1997 to show that the Board was not exercising its power to approve rates and was only entertaining a clarification. In this connection, the Resolution (No.71) itself is cited to contend that the text of the Resolution also specifically confirms that what was envisaged was only an ‘interpretation’.

(iii). The Applicant has contended that what is in reference was not just a clarification; it was a basic change affecting fundamental financial interests. That being so, the change in reference must be seen to be an amendment requiring sanction by the Government or approval by the Tariff Authority.

While it is factually correct that, as pointed out by the KPT, the documents do refer to ‘interpretations’, the substance of the change does not seem to lend scope for such a conclusion. As a result of the change introduced, the expression ‘export cargo’ has been split into two categories – ‘cargo physically exported’ and ‘cargo not physically exported’. This substantive change, as has been contended by the Applicant, entails substantial financial implications for the latter category.

While the various passages of the agenda note and the Resolution cited by the KPT will establish the genuineness of its intent, they cannot be said to establish the validity of its action.

The pith and substance of the change introduced is of such substantive significance that it has to be held to amount to an ‘amendment’; it cannot justifiably be seen to be just a ‘clarification’. And, undeniably, such an amendment will call for sanction/approval.

(iv). The change in reference was made on 9 January 1997. Significantly, the Major Port Trusts Act was amended on that very date through an Ordinance. One of the provisions amended was about the procedure for approval of tariffs: Approval by the Board and sanction by the Government was replaced by (approval and) Notification of rates by the Tariff Authority for Major Ports.

In this situation, it can be contended that there was no scope for the KPT to obtain sanction of the Government; and, there was no Tariff Authority also to approve and notify the change. In fact, in the light of the amendments made by the Ordinance, the very authority of the Board to approve tariff-related issues may be questioned. While the legal position in this respect cannot be said to be unequivocally clear, it has to be recognised that there can be no vacuum in respect
of the powers to fix tariffs for Public Utilities; an important power like tariff fixation cannot be extinguished without any alternative arrangement; tariff fixation cannot come to a halt; it has to go on. Accordingly, in this case, the Board of Trustees had to continue with this responsibility until the Tariff Authority came to be constituted. In the meanwhile, the Board of Trustees can be said to have derived interim validity for its action by virtue of its “right to levy rates” as contained in Section 29-1(a) of the Major Port Trusts Act.

(v). Irrespective of the ‘interim validity’ cited above, the fact remains that the KPT did not seek subsequent ratification of its action by the Tariff Authority. The genuineness of its intent, forcefully pleaded by the KPT, cannot correct this legal infirmity.

It is also to be recognised in this context that, no dire circumstances existed on 9 January 1997 to warrant such action by the KPT to amend its Scale of Rates. On this count, again, the validity of its action must be seen to fail.

(vi). Just as the KPT has cited various passages of the agenda note to bolster its contention about the real intent, the Applicant also has cited various passages in the same agenda note to show that the real intent was to exclude only three categories of cases – shut-out cargo; damaged cargo; and, rejected cargo. Since the present case is not one of any of these three, the Applicant has contended that his case cannot be hit by the change in the Scale of Rates even if the change is seen to be legally acceptable.

It is a fact that the Applicant’s case does not fall into any of the three categories described above. This was a case of cargo not being shipping because of vessels refusing to go to Bangladesh on account of acute congestion in the ports there.

While the position relating to the legal acceptability of the change made in the Scale of Rates is unambiguously clear as has been described in (iii), (v), and (vi) above, even this contingent argument of the Applicant can be said to hold force and give him a fall-back position.

(vii). At the time of the joint hearing, the KPT submitted a tabular statement showing the treatment given at the other major ports to cargo brought for export but not actually exported. The information contained therein is found to be interesting and indicative of the fact that there can indeed be distinction of export cargo as those physically exported and not physically exported. But, a mere citation of these examples cannot be expected to correct the legal infirmity in the action taken by the KPT to change the entries in its Scale of Rates.

6. In the result, and for the reasons given above, the grievance of the Applicant is found to be substantiated. The petition of M/s. JRK International
Private Limited, therefore, is allowed; and, the prayer for requiring the KPT to strictly follow the unamended provision in the Scale of Rates is granted.

7. Since the amendment indicated by the KPT is seen to be warranted by circumstances, this Authority advises it to come up with a formal proposal for consideration if it wishes to pursue the proposition. If and when it does so, the KPT must also take into account other related issues like the ‘free days’ to be allowed, the desirability of the port subsidising export cargo and specific listing of the categories of cases (e.g., shut-out, damaged, etc.).

( S. Sathyam )

Chairman

[ List of Ports  | List of Orders]