TARIFF AUTHORITY FOR MAJOR PORTS

NOTIFICATION

No. MF/NMPT/56/97-TAMP - 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 proposal of the New Manglore Port Trust for fixation of final wharfage charges for its new oil jetty, as in the Order appended hereto.

Case No. MF/NMPT/56/97-TAMP

The New Mangalore Port Trust ... Applicant

Vs.

M/s. Mangalore Refinery & Petrochemicals Ltd. ... Non-applicant

ORDER

(Passed on this 19th day of July 2000)

This case relates to a proposal from the NMPT for fixation of final wharfage charges for the new oil jetty for the year 1996-97. The new oil jetty has been constructed as a dedicated facility for the Mangalore Refinery and Petrochemicals Ltd. (MRPL); and, the MRPL will have exclusive access to it. The project cost was Rs. 231.39 crores, which was funded by the MRPL by investing Rs. 30 crores out of its funds and arranging the balance of amount from a consortium of financial institutions. The title to the assets will vest in the NMPT. To ensure proper repayment of loans, all payments from the MRPL for the use of the project facilities will be deposited in an escrow account; and, the lender has been given the first right to utilise the deposit amount towards repayment of loan and interest due. The MOU signed between the MRPL and the NMPT makes a special reference to the method of computation of wharfage charge payable by the MRPL. The wharfage charge so determined is subject to yearly review and consequent adjustment depending on the tonnage involved.

2. There were points of disagreement between the NMPT and the MRPL in regard to calculation of wharfage charge for the year 1996-97. The following three contentious issues needed to be resolved before the wharfage could be determined:

(i). Whether vessel related charges should be taken into accounting while computing the special wharfage charge for the new oil jetty.

(ii). Whether revenue earned through the use of the new oil jetty by others should be adjusted against operating cost.

(iii). Whether the traffic figure, to be reckoned with for computation of the special wharfage charge, should include also the traffic generated by parties other than the MRPL.

3.1. In this backdrop, the Authority considered the proposal received from the NMPT for fixation of wharfage charges for the new oil jetty for the year 1996-97 and passed an order on 27 Oct. 1998.
3.2. In the Order, the Authority settled the contentious issues raised by both the parties as follows:

(i). Vessel related charges should be taken into account while computing the special wharfage charge for the new oil jetty.

(ii). The revenue earned through use of the new oil jetty by others should be adjusted against operating costs.

(iii). The traffic figure to be reckoned with for computation of the special wharfage charge should include also the traffic generated by parties other than the MRPL.

3.3. The following decisions were given in the Order dated 27 Oct. 1998:

(i). There should be one common ‘cost centre’ for the project of the New Oil Jetty; and, the NMPT should maintain its accounts accordingly.

(ii). All the revenue earned through the project of the New Oil Jetty should be credited to the escrow account; and, all such income should be taken into account for computation of the special wharfage.

(iii). All parties using the New Oil Jetty should be subjected to the same terms and conditions.

(iv). The revenue earned through the use of the New Oil Jetty by ‘others’ should (also) be adjusted against operating costs.

(v). The traffic figure, to be reckoned with for computation of special wharfage charge, should include also the traffic generated by parties other than the MRPL.

3.4. Accordingly, the Authority did not find it possible to approve the wharfage charge proposed by the NMPT. The Authority remitted the case to the NMPT with an advice that both the NMPT and the MRPL would jointly re-work the calculations along the lines indicated by the Authority.

4.1. The NMPT submitted a revised proposal in which it has mentioned that both the NMPT and the MRPL have been unable to arrive at a mutually acceptable basis for fixation of wharfage. It has, therefore, submitted the details of the NMPT’s and MRPL’s calculations and the points of difference for the consideration of the Authority.

4.2. The NMPT has worked out a revised wharfage rate of Rs. 106.89 PMT for the year 1996-97. It has reportedly proceeded on the following basis while re-calculating the wharfage:

(i). The agreed formula for sharing of expenses like revenue dredging, insurance and interest cost on loan has been retained.

(ii). Return on investment at 6% of assets created for jetty No. 10 has been retained.

(iii). Return on investment at 18% for the port’s own assets, which are directly or indirectly contributing to handling of cargo/service of vessels at jetty No. 10, has been considered.

(iv). Expenditure directly related to the jetty No. 10 has been allocated directly. Those items of expenditure for which allocation is not possible, have been treated as indirect expenses and apportioned either on the basis of wharf length or on the basis of cargo ratio, whichever is found more reasonable in the circumstances.

5. The MRPL has submitted a separate proposal showing the re-calculated wharfage as Rs. 65.93 PMT. The MRPL has advanced the following points in support of its proposal:
The original proposal of NMPT for a wharfage rate of Rs. 111.78 PMT itself was wrong which was revised by the MRPL to Rs. 100.39 PMT based on the NMPT’s assumption that return on investment is to be taken into account. Based on the TAMP decision, the MRPL has incorporated the vessel related credits and removed return on investment. The rate thus calculated comes to Rs. 65.93 PMT.

The NMPT has considered 18% return on assets, which has no relevance to the MRPL jetty.

Even the return on investment on MRPL jetty cannot be considered in the wharfage calculation since the NMPT has not invested any amount.

If the entire expenses of the other facilities are taken, the NMPT should also consider the entire income of the port as a whole in the calculation.

The NMPT’s argument that the wharfage rate calculated by the MRPL is less than the present notified rate for handling POL at other jetties has no basis as the wharfage for MRPL jetty is governed by a special agreement and the same cannot be disputed by the NMPT by linking it to a notified rate.

A joint hearing in this case was held on 13 July 99 in Mangalore. The following arguments were made by the parties:

Mangalore Refinery and Petrochemicals Ltd. (MRPL)

(i). Issues like cross subsidisation, ability of the NMPT to sustain, etc. are irrelevant. What is relevant is only the legal interpretation of the MOU. It is to be recognised that we are not in a green field situation.

(ii). Clause 4 of the MOU specifically mentions about the period during which funds are outstanding. ROI is forever; not just during the period when funds are outstanding.

(iii). (a). Clause 4(e) is important. It talks about some percentage on capital employed to be fixed by the Govt. Total investment minus loan is the capital. Mere capitalisation of assets does not make it capital

(b). If it is treated as a capital, it will be a case of unjust enrichment.

(c). Investment / capital represents the margin money contributed by an investor. In this case, the MRPL has given Rs. 30 crores to NMPT and thus even the margin money has been paid by the MRPL.

(d). In this case, wharfage is not an income to the port. It is governed by the MOU for ensuring repayment of loan.

(e). The interpretation of Clause 4(a) of the MOU made by the port to cover all expenditure of the port is wrong. The whole MOU is about the jetty only. The clause C of preamble to the MOU refers only the infrastructure facility.

(f). The wharf will become a property of the NMPT only after the loan is repaid; till such time they cannot show it as a capital employed.

(g). Investments not related to MRPL jetty are not relevant. Other assets already in existence cannot be considered.

(h). In our written submissions, we have given sufficient reasons exposing the fallacy in the NMPT logic.
(i). The NMPT is following ‘cargo handled’ basis for apportionment of expenditure. Let them apply the same basis that they applied to everybody for the launches in reference. In the absence of anything else, let them go by the number of ships.

(j). Escrow means it belongs to neither party. Substantial interest earned on the balance of the Escrow account is not given credit on the Escrow side, which is an unjust enrichment for NMPT. The NMPT argument that there is nothing in the MOU about the accrual of interest is not correct.

(k). In terms of clause 6 & 7 of the MOU, interest accrual cannot be diverted by the NMPT.

(l). We agree to allocation of administrative and management cost. Only under the financial and miscellaneous expenditure, they have taken all port items. If they conform to those items that are covered under administrative and management overheads, we have no objection.

New Mangalore Port Trust (NMPT)

(i). Wharfage is a cargo related charge; VRC have been brought in, in the light of TAMP Order.

(ii). General cargo handling expenditure like cargo handling workers salary have been excluded.

(iii). The expenditure on Dy. Conservator’s office is apportioned at the same rate as administrative facility.

(iv). 1995 letter clearly stipulates that ROI will apply.

(v). Clause 5 of the MOU covers VRCs. They have agreed to pay the VRCs also. Now the vessels may be paying such charges. But, we are deducting the income from VRC from the expenditure. So the MRPL must pay VRC also. Their refusal to pay is objectionable.

(vi). Clause 4 of the MOU covers all operation and maintenance cost. Dredging cost is substantial and the extra dredging was done only for the benefit of the MRPL jetty. They must agree to bear the cost of dredging.

(vii). For determining the capital employed, sources of fund are not relevant.

(viii). Now as directed by the TAMP, we are reckoning both with CRC and VRC. Even though we do not agree with the TAMP logic, we abide by it.

(ix). It is not correct to say that the port has made no investment. Breakwater, dredging, etc. are our investment.

(x). (a). NMPT pays interest on the margin money.

(b). Exclusive use of jetty is given to the MRPL.

(c). We have spent from the project since they did not.

(xi). Going by apportionment of expenditure based on GRT is acceptable to us if they so wish; but, it will work out to their disadvantage.

(xii). (a). Interest accrual in the Escrow account is shown as from that account. But, it is taken into our balance sheet.
(b) We want to prepay the loans. However, HUDCO and banks are not keen on prepayment. We can prepay MRPL only after prepaying the others.

(c) Interest accrual cannot be reckoned with for computation of wharfage.

(xiii). Fund is defined in the preamble of the MOU read with clause 6 as the total of loans. Interest is not included. We have taken only the relevant items of financial and miscellaneous expenditure and charged 14% thereof.

7. During the joint hearing, the MRPL submitted another written submission listing out the following issues on which difference of opinion persists.

(i). Return on investment when NMPT funds are not invested.

(ii). Claim of NMPT for return on investment on assets not related to the new oil jetty.

(iii). Allocation of expenses unrelated to MRPL oil jetty.

(iv). Adoption of tonnage handled as basis for allocation of certain expenditure.

(v). Non consideration of interest earned on the funds available in the escrow account.

(vi). Allocation of Finance & Miscellaneous expense without allocating Finance & Miscellaneous income.

The MRPL has also worked out a wharfage rate of Rs. 64.22 per ton.

8. During the joint hearing, the Chairman, NMPT and the Senior Counsel for the MRPL proposed another round of discussion between the officers to resolve the differences. The discussions were agreed to be concluded by the end of July 99. Thereafter, the Chairman, NMPT and the Senior Counsel for MRPL agreed to discuss and try to present an agreed proposal by 7 August 1999.

9. Despite several rounds of discussions, both the parties could not arrive at an agreed proposal. The NMPT vide its letter dated 22 April 2000 requested the Authority to fix the rate after considering the viewpoints of both the parties. It has also requested to reconsider the guideline issued by the Authority vide its Order dated 27 Oct, 98 in view of taking considerable profit element under the vessel related charges contemplated by the MRPL. The NMPT has worked out a revised wharfage rate of Rs. 102.76 per ton. Likewise, the MRPL vide its letter dated 18 April 2000 has also informed that both the parties are interested to leave the matter for a final decision of the TAMP, as they could not arrive at a conclusion mutually. Subsequently, the MRPL vide its letter dated 26 May 2000 has furnished its comments on the NMPT letter dated 22 April 2000 detailing its claim for fixing the wharfage charge.

10. Based on the records available and with reference to the totality of information collected during the processing of the case, the following position emerges for consideration:

(i). This Authority has already given the guidelines based on which the wharfage charge is to be jointly re-worked by both the parties. Even though more than 1½ years have elapsed since notification of the Order of this Authority in this regard and despite several rounds of discussions between both the parties, an agreed proposal has not emerged. Both the parties have now left the matter for a final decision by this Authority.

(ii). This Authority has already given clear guidelines and both the parties have the benefit of having a definite MOU which governs the method of calculations of wharfage charge. The issues on which difference of opinion persists are more relating to apportionment of various costs and different cost elements to be considered for wharfage calculations.

(iii). The areas of difference of opinion can be broadly classified as follows:
(a). Return on investment.

(b). Allocation of interest earned on the funds of the escrow account.

(c). Allocation of overhead expenses.

(iv). Position with respect to iii (a) above.

The NMPT has claimed return on investment as follows:

(a). Return on investment at 6% of assets created for jetty No. 10.

(b). Return on investment at 18% for the port’s own assets, which are directly or indirectly contributing to handling of cargo / service of vessels at jetty No. 10.

(c). 18% return on investment on a sum of Rs. 642.10 lakhs stated to have been invested by the NMPT in the project.

The MRPL has contended that since the assets are not created with the own funds of the NMPT, there is no room for separately considering return on investment. Similarly, return on investment on other assets unrelated to MRPL shall not be included. Return on investment on the amount of Rs. 642.10 lakhs, as claimed by the NMPT is not admissible, as such investment has been made out of the escrow account.

The argument of the MRPL that the wharf will become a property of the NMPT only after the loan is repaid and till such time, the NMPT cannot show that as capital employed is not correct. If this argument is accepted, the NMPT cannot even charge wharfage because the wharf is not its property. As pointed out by the NMPT, for determining the capital employed, sources of funds are not relevant. In any case, the title of the assets rests with the NMPT.

Even though the terminology return on investment is used, the 6% claimed by the NMPT is for a 3% contribution each towards reserve for renewal, replacement and modernisation of capital assets and reserve for development, repayment of loan and contingency. Since the repayment of loan will be made at actuals from the escrow account, only 3% of capital employed needs to be transferred to the reserve for renewal, replacement, etc. of capital assets. It is logical for the port to provide for renewal, replacement and modernisation. So, instead of calculating ROI at 6% of the assets created for jetty No. 10, the NMPT should consider the actual amount of repayment of principal during the year and 3% of the related capital employed as a contribution towards renewal, replacement and modernisation of assets.

The MOU specifically provides for calculation of wharfage considering some percentage on capital employed to be fixed by the Government. This means it has already been recognised that return on capital employed on the new oil jetty will be reckoned with in the calculation of wharfage. For reasons given above, a 3% return on capital employed is admissible. However, the return on capital employed should not be diverted to the funds of the NMPT and should be retained in the escrow account.

The argument of MRPL negating the claim of NMPT for a return on investment on assets not related to MRPL jetty is also not tenable. It is a well accepted practice that all revenue earning activities contribute towards common assets created which are not directly earning revenue. Thus, apportionment of return on investment on assets not directly related to the oil jetty, is logical. However, while doing so, the NMPT should not include any other asset which are directly relevant to some other revenue earning activities.
The NMPT is also claiming 18% return on Rs. 642.10 lakhs on the ground that this amount has been funded by it, as certain project cost was incurred after commissioning of the main facility. The port has claimed this as its investment. However, this investment has been made out of unutilised balance of funds available in the escrow account. Funds utilised from the escrow account cannot be treated as an investment made by the NMPT out of its own internal resources.

As mentioned earlier, a 3% contribution towards renewal, replacement, etc. of capital assets is admissible which will be calculated on the value of assets created for jetty No. 10 irrespective of the source of funds. Since the investment of Rs. 642.10 lakhs has also been applied (as a part of the total investment) to create the assets of jetty No. 10, allowing a separate return of 3% on this investment towards renewal, replacement of loan etc. will result in double counting of return. Likewise, a 3% contribution towards development, repayment of loan, etc. is not admissible since actual repayment of principal will be reckoned for the purpose of calculation of wharfage. Since Rs. 642.10 lakhs is invested from the escrow account, the question of repayment of it does not arise.

The next component of return on capital employed is 12% interest. If the interest on Rs. 642.10 lakhs is allowed, it will be an income for the escrow account; and, the interest to be payable is a cost for the purpose of computation of wharfage. For reasons given in sub para (v) below, the interest earned by the escrow account is to be considered for determination of wharfage. That being so, this element will add to cost as interest payable to the escrow account and also gets deducted from the cost as a part of interest earned by the escrow account. In other words, interest payable and interest earned will neutralise each other with no net effect on the wharfage. Therefore, it will not be necessary to consider interest on Rs. 642.10 lakhs invested out of escrow account.

In working out the capital employed, the NMPT has considered working capital equal to one month expenditure allocable to MRPL jetty excluding depreciation. This method may be suitable for arriving at an estimate of working capital for a project, when actual figures are not available. In this case, the wharfage is to be calculated retrospectively with reference to actual figures of income and expenditure. That being so, the working capital is to be considered in the conventional manner i.e., Current Assets minus Current Liabilities. While computing current assets, cash balances of specific funds are to be excluded. Likewise, interest accrued on specific funds (like the one on MRPL loan) shall also be excluded from current liabilities. The Working Capital thus arrived at shall be apportioned to the new oil jetty. Since length of wharf is considered for allocation of indirect assets, the same apportionment basis is considered appropriate for allocation of working capital also.

(v). Position with respect to iii (b) above.

Interest earned on the balance of escrow account has not been considered by the NMPT while working out the wharfage and the MRPL is demanding inclusion of this item. The NMPT has mentioned that interest accrual in the escrow account is credited to the same account and not diverted elsewhere. The argument of NMPT is that why such credit should be given to the advantage of the MRPL while working out the wharfage charged. The port has also pointed out the absence of any provision in the MOU to credit back the interest on escrow account to wharfage calculation. Since the interest is earned due to port’s prudent financial management, the NMPT has contended that the benefit should be available in the escrow account only. The Port Trust has also pointed out that it incurs expenditure on dredging, interest payment, etc., at the first instance from its general fund and subsequently at a later date it transfers such expenditure to the escrow account; and because of such delayed transfer the escrow account balance earns interest. It is to be recognised that like the expenditure items transferred at a later stage to the escrow account, the income earned may also be transferred subsequently to the escrow account. Hence, the delay in transfer to the
escrow account is irrelevant as the notional interest earned due to delayed transfer of expenditure and the notional interest foregone on account of delayed transfer of income may neutralise each other. Since the escrow account is for a specific purpose, the interest earned under this account has also to be considered while determining the wharfage rate. The argument of using the interest accrual for prepayment of loan, to meet contingencies, etc., is irrelevant. Since the MRPL has provided guarantee for the loans, it is equally responsible for timely repayment of the principal.

(vi). Position with respect to iii (c) above.

(a). The NMPT has apportioned the vessel related expenditure on the basis of GRT. The MRPL wants ‘number of ships handled’ as the basis, as the expenditure on operation and maintenance will be more related to usage which is closer to number of movement of vessels rather than traffic handled at the Port. Since the income for all the vessel related activities is calculated on GRT basis, it is justified in allocating the corresponding expenditure on GRT basis.

(b). NMPT has apportioned the indirect expenses to the New Oil Jetty number 10 on the ground that these items provide indirect services to the New Oil Jetty. According to MRPL these expenses are not directly related to the New Oil Jetty and hence shall not be considered for calculation of wharfage.

The New Oil Jetty is an integral part of the Port. Every user of the port has to share the common expenses and hence apportionment of these expenses is found to be correctly done by the NMPT.

(c). As clarified by the NMPT, the Traffic Manager’s office expenses do not include expenditure pertaining to cargo handling workers. The new oil jetty is getting services indirectly from the department and hence apportionment of indirect expenditure of the Traffic Department and motor vehicle running expenditure are found to be in order.

(d). Port is providing general facilities like break water, capital dredging, buoys, moorings, navigational structures, common services like road, lighting, electricity, etc., for MRPL. Further, it is logical to apportion the depreciation on assets not related to any of the revenue earning activities to all the activities of the port. The apportionment of depreciation of these assets is found to be correctly done by the NMPT.

(e). The Port provides fire fighting facility as a common user facility. Even if a dedicated fire fighting facility is provided at the Oil Jetty, the MRPL is using the other facilities of the port and not confining only to the jetty. It is, therefore, logical to apportion the expenditure on general fire fighting facilities on the basis of traffic handled. Similarly, apportionment of net expenditure on pump house is found to be in order, as it is a common user facility.

(f). The MRPL objects to apportionment of electricity expenses. The NMPT has clarified that the MRPL makes direct payment only in respect of electricity supplied to the loading / unloading arms. The electricity is also required for general lighting, fire fighting and other equipment installed at the new oil jetty, and also for offices, colony, etc. The Port has explained that total income realised is deducted from total expenditure and the net expenditure is apportioned to various revenue earning activities. The approach adopted by the NMPT can be said to be reasonable.

(g). The MRPL has objected to allocation of cost of operation of some floating craft and insisted that operating cost of the floating craft acquired under this project only can be considered. Since these floating craft are also used elsewhere, the MRPL has
demanded that income earned out of such utilisation should also be adjusted against the expenditure. The argument of MRPL is not correct.

The port’s arguments about cross usage of floating craft and the off setting effect of usage of other port craft at this jetty for which no separate cost is included in the calculation carry force. The method followed by the NMPT in this regard is in order.

(h). MRPL’s objection is that expenses on pension & gratuity allocated are post retirement benefit and hence shall not be considered. This view of MRPL does not appear to be reasonable. These are administrative overheads and have to be shared by all facilities.

(i). The Port has allocated Finance and Miscellaneous (F&M) Expenditure but has not considered F & M Income. The MRPL’s view is to include F & M Income on the ground that all administrative expenses though not related directly to MRPL activity have been allocated. In absence of non-allocation of income it will be a lopsided allocation of cost resulting in enrichment to the port.

Interest on loan has been considered separately as it is the actual amount of interest paid for the New Oil Jetty 10. Other expenditure like gratuity, pension, ex gratia, etc., are general administrative overhead expenditure hence apportioned on New Oil Jetty. All such overhead expenses of the port have been apportioned to the New Oil Jetty. This is on the ground that the New Oil Jetty being an integral part of the Port must share such common expenditure.

The NMPT has not apportioned the whole of Finance & Miscellaneous expenditure. Interest payable on loans other than the loans specific to MRPL jetty project, Bank Charges, items relating to previous years, etc., are not considered for apportionment. Pension, gratuity and ex gratia payment, which are grouped under the head Finance and Miscellaneous expenditure, are in fact administrative overheads, and hence apportioned to all revenue earning activities.

The MRPL demand for giving credit to Finance and Miscellaneous Income (FMI) does not appear to be reasonable. The FMI consists of interest earned on general and specific funds, charges recovered for some miscellaneous services, sale proceeds of unclaimed goods, etc. The main contributor to FMI is interest earned. This interest is earned on the Reserves of the Port, which are primarily past accumulation. The MRPL, therefore, can not justifiably demand credit for the interest earned on the accumulated reserve funds of the Port. However, as already mentioned, the MRPL is justified in its claim on the interest accrual on the escrow account, the balance of which is not a part of Port’s general or specific funds.

In the result, and for the reasons given above, the Authority approves the method followed by the NMPT for calculation of wharfage for the New Oil Jetty subject to the following modifications:

(i). Instead of charging 6% ROI on assets created under this project, the NMPT should charge actual amount of repayment of loan during the year and 3% of the capital employed towards renewal, replacement and modernisation reserve.

(ii). Return on investment on Rs. 642.10 lakhs invested out of the escrow account is not admissible.

(iii). Working capital shall be calculated as the difference between Current Assets (excluding cash balances of specific funds) and Current Liabilities; and, the basis of its apportionment will be ‘wharf length’.

(iv). Interest earned on the balance of escrow account shall be considered for determination of wharfage charged.
12. The New Oil Jetty has been commissioned in the year 1996 and no final wharfage has been fixed for handling of cargo through this jetty. In view of the clear guidelines available now for calculation of wharfage, the NMPT is directed to work out wharfage charges, in line with the guidelines given, for the years 1996-97, 97-98, 98-99 and 1999-2000. Before forwarding the calculations and the proposed wharfage charges (to this Authority), the NMPT is advised to have the figures verified by the MRPL.

( S. Sathyam, Chairman )