No. 54  New Delhi, the 28 March, 2001

TARIFF AUTHORITY FOR MAJOR PORTS

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 the Andhra Petrochemicals Limited about fixation of Lease Rent for the land leased out by the Visakhapatnam Port Trust as in the Order appended hereto.

(S. Sathyam)

Chairman

The Andhra Petrochemicals Limited - - - Applicant

Vs

The Visakhapatnam Port Trust - - - Non- Applicant

ORDER

(Passed on this 21st day of March 2002)

This case relates to a representation from the Andhra Petrochemicals Limited (APL) about fixation of lease rents for the land admeasuring 75 acres in Survey No.-I of the Malkapuram village leased out by the Visakhapatnam Port Trust (VPT).
2. The APL has made the following points in its representation:

(i). The land admeasuring 75 acres at the Malkapuram village at Visakhapatnam was taken on lease from the VPT for a period of 30 years from 27 June 1989 to 26 June 2019 vide lease agreement dated 27 June 1989.

(ii). The land in reference being low lying and swampy was developed by investing huge sums of money to make it suitable for setting up of a manufacturing plant by the side of HPCL refinery as the raw-material used for manufacture of its products is supplied by the HPCL.

(iii). The lease agreement stipulates payment of rent @ Rs. 7260/- per annum at 6% of the cost of land payable in advance; and, revision of the lease rent as per the quinquennial valuation of port trust lands made by the District Revenue Authorities (DRA), which will be paid by the lessee without any contest.

(iv). In accordance with the terms of the lease agreement, the VPT has revised the rent to Rs.8,363.52/- per acre (an increase of 15.2%) during the 5 year period from 1993 to 1998; and again, to Rs.10,872.59/- per acre (30% increase over the 15% escalation considered earlier or 50% hike over the original rate agreed) for the period from 1998 to 2003.

(v). Following a major fire at the Visakha Refinery in September 1997, its plant was deprived of the feed stock initially for a period of 8 months; and later, from May 1998 to October 1999, the supplies from the Refinery remained inconsistent and low leading to operation of the plant below the capacity. More so, the non-operation of the Refinery for a period of 101 days for maintenance caused altogether lack of supply of the raw material, resulting in closure of its plant. This has resulted in adverse cash flows and affected the debt service obligations of the Company.

The losses incurred on account of loss of production due to the above stated fire incident at the Refinery amounts to Rs.60.82 crores during the three years ending 31 March 2000.

The exorbitant increase in land rentals will cause further hardships to it.
(vi). The VPT and Municipal Corporation of Visakhapatnam have considerable lands, which are meant for facilitating the infrastructure for the industries. Considering these lands on commercial basis for the purpose of levy of rent is not reasonable.

(vii). The levy of lease rent at the current rate will affect the industrial development, the employment potential, and the state revenue. The VPT is applying the same high rentals in respect of all other leaseholders and if this is continued, it will retard the industrial development in and around Visakhapatnam.

2.2. In this backdrop, the APL has requested this Authority to take a reasonable approach in fixing of the annual lease rent per acre; and, to freeze it at Rs.8363.52 per acre as was existing in 1998 at least for a period of 10 years by which time the unit will become viable.

3.1. In accordance with the procedure prescribed, a copy of the representation of the APL was forwarded to the VPT and various concerned representative bodies of port users for comments. The comments received are summarised below:

The Visakhapatnam Port Trust (VPT)

(i). In terms of the ‘Rents’ clause of the lease agreement dated 27 June 1989, the lessee has to pay a provisional rent @ Rs.7260/- per acre per annum i.e. @ 6% on the cost of the land payable yearly in advance in one installment on or before the first day of commencement of each year; and, the rent will be revised from 1 April 1988 as per the quinquennial valuation of Port lands made by the DRA for the quinquennium 1988-1993, which shall be paid by the lessee without any contest.

The lease agreement further stipulates that the rent shall be revised as per the rates fixed by the Port Trust Board from time to time, subject however, to the condition that the annual rent shall not at any stage be less than the preceding year’s rent. The lessee shall not question the valuation made by the DRA and the rates fixed by the Port Trust Board, and shall abide by the fixation made by the lessor, which cannot be questioned on any grounds whatsoever.

(ii). The DRA had fixed quinquennial valuation of port lands in Zone-IX-B at Rs.37.44 ps. per sq. yd. for the quinquennium 1998-2003, which is very low when compared with the basic value (Market value) of the Port lands in Zone-IX-B at Rs.800/- per sq. yd. Since the lease rent is being charged as per the terms & conditions of the lease agreement, (i.e. @ 6% of the quinquennial value
of Rs.37.44 ps. per sq. yd. which comes to Rs.10872.59 paise per acre per annum), the APL has no
reason to dispute the increase.

(iii). The occurrence of fire accident at the HPCL Refinery and, the consequent problems faced by
the APL has nothing to do with the conditions of the lease agreement relating to valuation of port
lands by the DRA, which are being applied strictly.

The Vizagapatam Chamber of Commerce & Industry (VCCI)

(i). Out of the 75 acres of land allotted to the APL, only 25% is being put to effective use, the rest
is used for developing ‘Green belt’ as per the environmental regulations. In other words, 75% of the
land allotted to the APL is maintained by it for a social purpose. The APL needs special consideration
as the company has suffered heavy losses for more than two years on account of major fire accident
at the HPCL Refinery, which is the sole supplier of the raw material to the APL.

(ii). Steep increase in rentals besides the advance payment, royalty etc. makes it inconvenient for
the C&F agents to operate storage sheds in an open areas developed; and, construction in the
Western sector since it is situated far away from the landing / shipping place. Many of sheds, hence,
remain vacant for long periods. The transportation cost has also gone up considerately during the
past five years.

(iii). It is requested to review the rental issue in depth and bring in the old rate with marginal
increase.

3.2. A copy each of the comments received from the VPT and the VCCI was sent to the APL
as feed back information.

4.1. A joint hearing in this case was held on 6 November 2001 at the VPT. At the joint
hearing the following submissions were made:

The Andhra Petrochemical Limited (APL)

(i). We have taken undeveloped land; we have spent a lot on development of the land.
(ii). 75% of the land is required to be kept as green belt.

(iii). We are not even paying any dividend to our share-holders.

(iv). Without any change in the physical features of the land, the VPT goes on revising the rentals, which is unreasonable.

(v). The VPT has many proposals for improvement, road construction, etc. but, nothing actually has happened. There has been no development from the side of the VPT.

(vi). We had to improve the marshy land; we had to raise the level by almost one meter, on which a lot of investment was involved.

(vii). Regular and frequent increases of rates by the VPT is unreasonable; raising the rates every 5 years is not justifiable. Straight acquisition would have been cheaper.

(viii). Industries are usually given lands at concessional rates; we are not getting any concession.

The Visakhapatnam Port Trust (VPT)

(i). We are strictly going by the Government guidelines.

(ii). We agree that the lands are marshy; and, the VPT has also not done any thing for development of the land. The original value was fixed taking all this into consideration.

(iii). The norm prescribed by the AP pollution board on ‘Green Belt’ applies to all and not only to the APL.
(iv). The rate for other lands is fixed at Rs.800/- per sq. yd.; whereas, the rate for this land is fixed at Rs.37/- per sq. yd. and, it is also based on the rate suggested by the DRA.

4.2. At the joint hearing, the following written submissions were made:

Andhra Petrochemical Limited (APL)

(i). A background note indicating details of the land, the lease agreement, the DRA valuation, the environmental & other rules and regulations, the lease rentals charged, the position with the other industries etc., has been furnished.

(ii). The points made earlier with respect to the undeveloped land, improper basis of calculation of increases in the lease rentals, investment made in developing of the land, etc., were reiterated supported by facts and details; and a request has been made to charge the lease rentals only on 15 acres of land since 80% of the land i.e. 60 acres has been used as ‘Green belt’. Further it was requested to retain, if not reduced, the original lease rentals.

(iii). One of the points mentions about the land policy to consider the factors such as the location & condition of the land, development cost incurred by the port, infrastructure provided by the port, etc.

The Vizagapatam Chamber of Commerce & Industry (VCCI)

(i). The VPT has always presented a surplus budget for the last 10 years. During the year 2000-01, the VPT has earned highest ever surplus of Rs.111.15 crores.

In view of the above, there in no case for upward revision of land rentals in Western sector which is situated far away from the berths where general cargo is being handled.

(ii). Since the entire area leased out in the western sector is a marshy land, the development and the construction costs are very high because of the soil conditions.
(iii). For arriving at the lease rentals by taking 6% of the land value, the DRA has taken into consideration the market value of land based on private lands available nearby where soil conditions are far better than that of the port land.

(iv). The land has remained un-utilised since the custody by the port administration in 1928 till 1980 because of the nature of the soil; and, the distance involved in transporting of goods.

(v). As per the Government order, rental charges were increased from 6% to 9%, which had already resulted in 50% increase in the rentals.

(vi). During the last revision, the Revenue Authorities have proposed only 20% increase in the market value of land, which was not accepted by the port; and, the Revenue Authorities were asked to revise the rates only with a view to collect high rentals. New system of advance rent, royalty, etc. introduced by the port had also resulted in payment of huge sum as rental.

(vii). The port is not incurring any capital or maintenance expenditure on the area leased to the port users.

(viii). Sizable quantum of general cargo which used to get stored in the private parties warehouse, in the western sector has already been diverted to Kakinada and Paradip Port; and, much more cargo will get diverted unless the port quotes competitive rates. Presently, much of the storage area, covered as well as open, in the western sector is remaining idle for the last 18 months.

(ix). It is, therefore requested to re-examine the issue and pass necessary order to reduce the total land rentals payable by users to the old level.

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

(i). The VPT land in reference was allotted to the APL on a 30-year lease with effect from 27 June 1989. The issue under consideration is not for fixation of a new lease rent for the land; but, about the reasonableness of revision of the lease rent as per the lease agreement. The APL’s prayer is that the revised annual lease rental of Rs.10872.59 per acre prescribed by the VPT for the quinquenni
1998 – 2003 is excessive; it may therefore be allowed to continue at the pre-revised level of Rs.8,363.52 per acre per annum for the next ten years.

(ii). In support of its prayer, the APL has cited losses suffered by it due to fire at the HPCL Refinery, requirement of maintaining a green belt, etc. These reasons are extraneous to the VPT and not relevant to the issue under consideration. The APL is a commercial entity and it is expected to manage its financial viability. It is not reasonable for it to seek a relief from the VPT for the business losses suffered by it or for making its venture commercially viable. Even if such an expectation may have arisen due to the fact that the VPT is a Public Trust controlled by the Government, it cannot be ignored that the Port Trust is a separate legal and financial entity. It is noteworthy that a Port Trust is a self-financing organisation and it cannot be expected to forgo its revenue for making some other business financially viable.

It is the stated position of this Authority (and indeed of the Government also) that Port Trusts must commercially exploit the lands under their disposal so that revenue from the activity can supplement their core functions thereby reducing the burden of tariffs.

(iii). As has been pointed out by the VPT, the lease agreement contains a specific provision for a quinquennial revision of lease rent based on the valuation obtained from the DRA. The VPT has confirmed that it had fixed the revised rent based on such a valuation by applying the formula specified in the lease agreement. That being so, the action of the VPT cannot be held as arbitrary or violative of the lease agreement. Having signed the lease agreement with the rent revision clause, it is not reasonable for the APL to voice any grievance against an action taken according to the pre-agreed arrangement. Viewed in this perspective, the prayer of the APL for allowing the pre-1998 lease rent to continue for the next ten year does not merit admission.

(iv). This Authority has held in may other cases that specific lease agreements executed by a Port Trust with its lessees will prevail over the guidelines / revision of rates decided subsequently so long as they are not contradictory to the overall tariff setting arrangement envisaged in the Statute or to the tariff setting principles adopted by this Authority. Any provision in a specific agreement entered into by a Port Trust cannot have the effect of ousting the statutory jurisdiction of this Authority over prescription of rates for services rendered by port trusts or for use of their properties.

This issue arises in the context of the approach adopted by the VPT to decide on its own revised lease rentals based on the DRA valuation.
It is to be recognised that the valuation given by the DRA is only an input for determination of the current lease rent. The lease rent so arrived at becomes legally enforceable only when it is approved by the competent authority; and, by virtue of amendments made to the MPT Act in 1997, such competent authority is the Tariff Authority for Major Ports in relation to tariffs levied by the Major Port Trusts.

(v). It is admitted that a statement has been made in the Authority’s Order dated 29 October 1999 covering fixation of lease rentals of four specific zones of the VPT lands conveying a meaning that there can be no objection to a system of revision of lease rents with reference to the DRA valuation. This statement is to be modified in view of the position explained in paragraph (iv) above.

In fact, this statement has to be seen to have been superseded by a common adoption Order dated 15 March 2000 passed by this Authority setting out the correct legal position about prescribing Scale of Rates for use of properties of Major Port Trusts. In the said Order, the following position has been confirmed:

(a). For purposes of framing Scale of Rates and Statement of Conditions, this Authority has jurisdiction over all the properties and assets, wherever located, of a Major Port Trust.

(b). Under Section 49 (1) of the Major Port Trusts Act, this Authority will frame the Scale of Rates and the Statement of Conditions for use of the following categories of property:

(ba). Property belonging to the Board.

(bb). Property in possession of the Board.

(bc). Property in occupation of the Board.

(bd). Property in any place within the limits of the port area or port approaches.

(c). For purposes of framing Scale of Rates and Statement of Conditions, all lease cases (irrespective of any time limitation) relating to all the properties of a Major Port Trust shall be seen to fall within the jurisdiction of this Authority.
(vi). Notwithstanding the unambiguous Order already passed, which applies to the VPT also, it is reiterated that the VPT must obtain the approval of this Authority for lease rentals of different zones of its lands before their inclusion in its Scale of Rates; and, only such approved rates can be applied in both new leases and revision of base rates in existing leases, if the lease agreement provides for periodic revisions. It is needless to mention that the Scale of Rates for lands is also subject to periodic review/revision by this Authority.

7.1. In the result, and for the reasons given above, and based on a collective application of mind, this Authority rejects the representation of the APL.

7.2. The VPT is directed to obtain the approval of this Authority to the Scale of Rates for its lands; and, apply only such approved rates in the leases granted by it.

(S. Sathyam)

Chairman

[ List of Ports | List of Orders]