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) for a review of the Order passed by the Authority on 9 August 2001 on an issue about considering repayment of loan in excess of depreciation while computing the wharfage rate for Jetty No.10 as in the Order appended hereto.

(S. Sathyam)
Chairman

ORDER
(Passed on this 21st day of March 2002)

This case relates to a petition filed by the New Mangalore Port Trust (NMPT) for a review the Order passed by the Authority on 9 August 2001 on a specific issue about considering repayment of loan in excess of depreciation while computing the wharfage rate for Jetty No.10.

2.1. The Authority had earlier passed an Order on 19 July 2000 setting out the guidelines to be followed for calculation of wharfage rate on cargo handled at the dedicated MRPL Jetty. In the said Order, the NMPT was directed to compute wharfage charges for the years 1996-97, 1997-98, 1998-99 and 1999-2000 in line with the guidelines prescribed by the Authority. It was also advised to get the figures verified by the MRPL before forwarding the proposal for fixation of wharfage rate to the Authority.

2.2. Subsequently, the NMPT had submitted a proposal for a comprehensive revision of its Scale of Rates wherein the income related to the MRPL and the KIOCL scheme were excluded on the ground that these dedicated jetties were governed by separate MOUs. The Authority had passed an Order on 9 August 2001 disposing of the NMPT proposal for revision of its Scale of Rates.

2.3. In the said general revision Order, the Authority affirmed that it had allowed a return on investment to the extent of 3% towards renewal, replacement and modernisation reserve and the actual amount of repayment of loan during the year apart from the interest payable on loan for calculation of wharfage on cargo handled at the MRPL jetty. The amount equivalent to repayment of loan was allowed in the calculation of wharfage rate to take care of the cash flow problems. Since the amount of depreciation of assets which was included in the computation of wharfage rate, was also available for repayment of loan, the NMPT was directed to consider only the excess of instalment of repayment of loan over the amount of depreciation already accounted under operating expenditure while arriving at the wharfage rate.

3. With reference to this decision of the Authority, the NMPT has now filed a petition for a review the Authority's Order dated 9 August 2001 as regards exclusion of depreciation from the instalment of loan repayment. In its petition, the NMPT has made the following main points:
(i). The cargo-related charges in respect of the captive facilities enjoyed by the KIOCL and the MRPL were kept out of the purview of its proposal for comprehensive revision of the Scale of Rates.

(ii). While examining the general revision proposal, the Authority had sought for supplementary information from it as regards the dedicated jetties; but, at no point of time the Authority had indicated examination of the issues concerning the MRPL and the KIOCL in the general revision case. In the general revision Order, however, the Authority had directed the NMPT to exclude the depreciation from the instalment of loan repayment while computing wharfage rate for the Jetty No.10.

(iii). It is to be noted that the guidelines issued by the Authority in its Order dated 19 July 2000 for calculation of wharfage rate for Jetty No.10 had been litigated by the MRPL in the High Court of Karnataka. The MRPL had reiterated that the guidelines prescribed under the said Order is sub judice. The cause of action which prompted the Authority to give such a conclusion on the Order which is sub judice is not understood.

(iv). The depreciation is provided on straight-line method based on historic cost of assets. The amount of funds so retained will be equal to historic cost of asset and not its replacement cost. The amount of depreciation, therefore, has to be retained to recover the fixed cost and sunken cost. Any plough back of this depreciation to the MRPL shall lead to a revenue loss of over Rs.50/- crores during the loan period.

(v). The Authority in one of its earlier letter dated 10 June 1997 to the NMPT as regards fixation of wharfage rate for Jetty No.10, had stated that though the Government allows 18% return on investment (i.e. 12% towards interest plus 3% each towards renewal fund and development fund), the NMPT had considered only 6% rate of return. There is, therefore, a scope for claiming another 12% return on investment.

(vi). As against the Government’s prescription of 18% rate of return, the Authority has allowed only 3% return towards renewal replacement and modernisation reserve in addition to depreciation. In addition to the above, the MRPL has to pay loan repayment instalment as per the terms of the MOU.

(vii). The Authority did not accept the following contention/submission of the MRPL while disposing of the Order dated 27 October 1998 as regards fixation of wharfage rate for Jetty No. 10:

(a). The realisation of depreciation and reserve will enrich the NMPT unduly during the period when charges are realised as per the MOU.

(b). The depreciation is a charge towards realisation cost of the asset over its useful life. It may, therefore, be considered in computation of wharfage rate only after repayment of loan was completed.

(viii). In view of the above contentions of the Authority, depreciation was included as a cost in addition to repayment of loan and interest while computing the ad hoc wharfage rates for the subsequent years. The depreciation and return as allowed by the Authority has been considered in the annual accounts (audited) and submitted to the Government / Parliament. Any change in the methodology now will amount to writing off loss to a great extent which will not be in the interest of the Port / Government.

(ix). The MRPL had not claimed credit back of the depreciation when the Authority passed an Order dated 19 July 2000 prescribing the guidelines to be followed while computing the wharfage rate. It is surprising to note that this matter has been brought up by the MRPL just before the Authority passed the general revision Order of the NMPT.
The Authority has neither provided an opportunity nor heard it personally before passing the aforesaid Order. The matter relating to captive Jetty which was purportedly kept out from the purview of general revision, has been included in the general revision Order to the advantage of the MRPL; and, also an issue which was already deliberated and disposed of had been revived again.

The repeated claim of the MRPL that the port is enriching its resources through Jetty No.10 is a myth. The fact is that the funds collected to meet the operating expenditure, overheads and reserve funds were not withdrawn from the Escrow account in time due to uncertainties of final outcome.

A detailed working sheet has been furnished which indicates that the NMPT will suffer of revenue loss in the region of Rs. 14.85 crores and Rs. 19.39 crores for the years 1999-2000 and 2000-01 if the wharfage rates are computed as per the guidelines prescribed in the Authority’s Order.

Approximately Rs. 50/- crores has been spent for the project out of depreciation and reserve fund balance. Thus, the loan amount has been reduced from Rs. 232/- crores to Rs. 182/- crores.

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

**Mangalore Refinery and Petrochemical Limited (MRPL)**

(i). It has reiterated that as per clause 4 of the MOU the wharfage charge is primarily collected to enable the NMPT to repay the loan with interest. The depreciation being a notional charge is included in calculation of wharfage rate only for the purpose of generating funds, therefore, must be set off from the amount required for repayment of loan. This was pointed out by it even on earlier occasion; and, therefore, the NMPT's claim that the Authority has considered this matter unilaterally is incorrect.

(ii). The Authority, at paragraph 13 of its Order in the general revision case, has given an elaborate explanation for exclusion of depreciation from the instalment of repayment of loan for computation of wharfage rate. There is no need, therefore, to review the Order of the Authority in this regard.

(iii). It has not filed a writ against the Authority's Order in the High Court as alleged by the NMPT. It has only filed a writ on a limited principle mainly because the NMPT has not followed the MOU terms while calculating the wharfage rate. No stay has been granted by the High Court. The Authority is, therefore, certainly entitled to complete the reference and give directions.

(iv). The Escrow Account also mentions that all funds collected as wharfage from Jetty No. 10 shall be credited to Escrow account and shall be utilised for repayment of loan. The depreciation is a notional charge and that portion of amount collected, as wharfage is the cash available with the NMPT. Hence, it should be utilised for repayment of loan.

(v). The accounting treatment is different from the actual cash collection. Merely because credit back of the depreciation amount in wharfage calculation shall result into a revenue loss of Rs. 50 crores cannot be a consideration for making a review application to the Authority.

(vi). The reference of the NMPT that they are entitled for 18% return on investments as per the Government's instruction though the Authority has allowed only 3% is primarily not relevant at this point of time.
As per provisions in Clause 4 of the MOU, the NMPT shall collect wharfage charge that is required for operating the berth and for repayment of loan taken for this Jetty. The NMPT’s claim to earn more profit is, therefore, not the true intentions of the MOU.

(vii). It has repeatedly claimed that the depreciation cannot be considered in computation of the wharfage rate and this issue was reiterated during the joint hearing. The Authority has, perhaps, considered this issue while reviewing the general revision of the NMPT Scale of Rates. It is, therefore, inappropriate for the NMPT to claim that they were not aware of the stand of the Authority in this regard.

(viii). The purport and intent of the MOU overrides the form of accounts to be maintained by the Port. If the transactions as per the MOU does not meet the Port’s requirement of accounting, the method of accounting is required to be changed and not the MOU. The terms of the MOU cannot be manipulated to suit the accounting method, especially if that results in collecting unintended revenue from the users of the Port facility.

(ix). It has pointed out the following discrepancies in the NMPT working depicting a revenue loss of Rs.50 crores if the wharfage rate is computed based on the guidelines issued by the Authority:

(a). The actual depreciation as per the working sheet furnished by the NMPT is only Rs.21.68 crores for the last five years i.e., from 1996-97 upto 2000-01. The NMPT has unnecessarily inflated the figure to mislead the Authority.

(b). The notified rate of Rs.80/- PMT covers all expenditure and also profits. The NMPT has, however, worked out the rates that are higher than the notified rate. This implies that they intend to collect more revenue from it than from the other users. The revenue over and above the notified rate is to the extent of Rs.14.61 crores.

(c). As per the Authority’s Order the depreciation has to be adjusted only from the amount required for repayment of loan. In 1996-97 and 1997-98 there was no loan repayment as such the adjustment shown by the NMPT in this regard is erroneous.

(x). Generally, at all the major ports of India, wharfage rate on oil products cross-subsides the wharfage rate of other cargo. The NMPT is no exception to this practice. The Authority in its Order has mentioned that incidence of cross-subsidisation has to be reduced. Hence, it has not approved any increase in the tariff rates for oil products. That being so the NMPT’s claim that they are incurring huge loss in this activity is baseless.

(xi). If it had opted for BOOT model its cash out flow would have been far lesser than this.

(xii). Although it has given commitment to fund the entire loan, guaranteed the traffic and had under taken to pay the entire interest over a period of 10 years, the NMPT does not appear to be satisfied with the collection of wharfage rate which at present is higher than the notified rate.

(xiii). Return on investment may not be allowed in computation of wharfage rate.

5. A joint hearing in this case was held on 3 January 2002 at the NMPT. At the joint hearing, the following submissions were made:

New Mangalore Port Trust (NMPT)
(i). The MOU stipulates that wharfage calculation will take into account five components which are commonly understood.

(ii). Depreciation is not enough to replace the equipment. We do not calculate depreciation on replacement value but on original cost. That is why a 3% Renewal fund is also given. In this system, if we use depreciation for repayment of loan we will have no funds or funds will be inadequate for replacement of assets. Also, it will amount to ‘diversion’ of funds.

(iii). As regards the confusion about Rs.50 crores, there is no fudging of accounts. They have counted only for 5 years. Whereas we have done for the whole project period.

(iv). They have used our existing facilities to set up Jetty No.10. In a green field situation, they would have to spent a lot more. We must get some credit for that in our accounts.

(v). By the MRPL’s entry we have lost IOC traffic. We have not taken that into account.

(vi). The ‘depreciation’ money has not been used for any other purpose. It has been used only on the MRPL project otherwise we would have borrowed more.

**The Mangalore Refinery and Petrochemical Limited (MRPL)**

(i). The MOU details everything. The intention of the MOU is to enable repayment of loan by the NMPT. We are only asking for that method of calculation to be adopted exactly as it has been spelt out in the MOU.

(ii). Depreciation is a ‘notional’ entry in the books of accounts. We are not asking for "actual" return of amounts to MRPL.

(iii). As regards loss of Rs.50 crores their own letter shows it only pertains to a limited period and not the entire project period. (In this regard the NMPT has clarified that it is not so. The letter does clearly refer to the loan period).

(iv). The MOU is one thing and life of an asset is another thing. How can depreciation be dealt with differently? The Authority Order is clear. There is no ambiguity.

(v). The argument about green field condition was adequately dealt with in the 1998 Order of the Authority. Why raise it again now?

6. With reference to the totality of the information collected during the processing of the 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 the 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 NMPT has raised two basic objections:

(a). The matter has been *sub judice* in the context of a writ petition filed by the MRPL against this Authority’s Order in reference. In the circumstance, it is not appropriate for this Authority to pass fresh orders introducing further prescriptions.

(b). Before passing the fresh order, this Authority did not give any opportunity for the NMPT to represent its views in the matter. That being so, it cannot be said that the principles of natural justice have been followed.

As regards the first objection, it has to be recognised that there is no appeal against this Authority’s Order as claimed by the NMPT. As is well known, there is no provision for an appeal against the Authority’s orders. Parties aggrieved by this Authority’s orders can only approach the High Court and through a writ petition at that. In this case also, as has been stressed by the MRPL, only a writ petition has been filed and on the limited point at that of the NMPT not following the MOU terms for computing the wharfage rate. Furthermore, and significantly, no ‘stay’ has been granted in the case by the High Court; and, this Authority has not been restrained in any manner for taking further action in the case. That being so, there can be no question about the freedom of this Authority to process the case further towards final settlement.

As regards the second objection, it has to be conceded that there has been an infirmity in the action taken in the sense that neither the NMPT nor the MRPL was given an opportunity of being heard before the decision was taken. But, it has to be clarified that the said decision was not taken arbitrarily or in an *ad hoc* manner. In the context of the proceedings relating to a general revision of the NMPT tariffs, various details came to light which exposed an omission in the arrangement ordered by this Authority for computation of the wharfage rate necessitating some corrective action. Notwithstanding this *bona fide* sequence of events, in recognition of the procedural infirmity involved, it was decided to entertain the request for a review and provide a complete opportunity for the NMPT to plead its case. This can be said to have adequately met the objection concerned.

(iii). One of the substantive issues agitated by the NMPT is about violation of established accounting principles/practices in the arrangement prescribed by this Authority in the impugned Order. In this connection, it is relevant to clarify that the arrangement prescribed in the impugned Order is only in respect of computation of tariffs; it does not require the NMPT to alter its financial accounting system. Seen in this light, there can be no question of any violation of accounting principles/system or of having to write off huge financial losses retrospectively. The Petitioner-Port has not obviously understood the precise import of the said prescription and has agitated misconceived objections.
The NMPT has argued that the Government [in the (then) Ministry of Surface Transport] has prescribed a return of 18% on capital employed which has arbitrarily and unauthorisedly been reduced to 3% by this Authority in the impugned Order. It has to be pointed out here that there is no order of the Government prescribing an 18% return on capital employed. Going by the recommendations of the Major Ports Commission, this Authority had adopted the approach of allowing a return equal to the rate at which Government lends money to the ports + a 3% contribution to a Development / Repayment Fund + a 3% contribution to a Renewal / Replacement Fund. Flowing from this formula, the rate of return varies with reference to the Government lending rate as announced annually. In other words, there is no sanctity about the figure of 18%.

The formula described above does not apply to the assets created for the MRPL Project in the NMPT for the following reasons:

(a). The NMPT has not to invest any of its resources in the project; resource requirements are met by loans arranged by the MRPL. Although the loans are taken in the name of the NMPT, the entire debt service liability is met out of an Escrow Account arrangement supported by a guarantee from the MRPL to cover cash flow deficits, if any. Incidentally, it is noteworthy that the NMPT itself had proposed a ‘return’ of only 6% (representing the contribution of 3% each to a Renewal Fund and a Development Fund) ignoring the return ‘component’ with reference to the Government lending rate. In the face of this position, it is indeed surprising for the NMPT to have agitated the point about return on capital employed with reference to the formula adopted by this Authority because that will amount to double realisation of ‘return on capital employed’.

(b). During the pendency of the project, there will be no developmental liability on the NMPT outside of the project mechanism. That being so, there will be no need of funds exclusively for developmental purposes. The 3% contribution to a Development Fund has, therefore, not been allowed in this case.

Repayment of instalment of loans, which is normally expected to be covered from out of the Development / Repayment Fund, is in this case to be met out of resources available in the Escrow Account. There need, therefore, be no apprehension about a gap in the arrangement for enabling regular repayment of loans.

(c). Since, even during the pendency of the project, there will be a need to incur expenditure on replacement / renewal / modernisation, a 3% contribution to a Replacement Fund as been admitted.

(iv). In the light of the details set out above, it will be clear that there has neither been violation of any established prescriptions nor of leaving any gap in the arrangement for an orderly management of the escrow arrangement by the NMPT.

(v). The NMPT has sought to press its claim by citing huge financial losses resulting from the arrangement now ordered by this Authority. It has, in this case, to be recognised that the said ‘losses’ have been estimated by the NMPT with reference to a wharfage rate computed by it. In other words, it is nothing more than a ‘notional’ loss computed with reference to an unauthorised wharfage rate. It will be ludicrous to entertain a request for a review on the basis of such a contention.

In the result, and for the reasons given above, and based on a collective application of mind, it has 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. Accordingly, this Authority rejects the NMPT’s petition seeking a ‘review’.

(S. Sathyam)
Chairman

[ List of Ports | List of Orders ]