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 of the New Mangalore Port Trust (NMPT) for a review of the Order passed by the Authority on 27 October 1998 on an issue about inclusion of vessel-related income in the calculation of 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 proposal received from the New Mangalore Port Trust (NMPT) for a review of this Authority's Order dated 27 October 1998 relating to inclusion of vessel-related income in the calculation of wharfage rate for Jetty No. 10.

2. This Authority had passed an Order on 27 October 1998 on the proposal made by the NMPT for fixation of wharfage rate of Jetty No. 10 for the year 1996-97. In the said Order, this Authority decided on some of the contentious issues and advised both the NMPT and the Mangalore Refinery Petrochemicals Limited (MRPL) to jointly rework the calculations along the lines indicated in the Order. It was prescribed that the relevant vessel-related charges should be taken into account while computing special wharfage charge of the new oil jetty.

3.1. With reference to the said Order, the NMPT has submitted a petition requesting this Authority to review its decision regarding inclusion of vessel-related income in computation of wharfage rate.

3.2. The NMPT has explained the following background for submitting this review petition:

(i). It gave effect to the Authority's Order dated 27 October 1998 without any review or appeal petitions. The wharfage rate calculation was revised taking into account the cost and income related to the vessel-related activity for the period 1996-97 to 1999-2000. The MRPL, however, had raised many objections on the wharfage rate calculation. Since the matter remained unresolved amicably it was remitted back to the Authority for a final decision. In this regard the Authority passed another Order on 19 July 2000 setting out the guidelines to be followed for computation of the wharfage rate. Accordingly, a detailed working of the wharfage rate was sent to the MRPL for verification at their end.

(ii). In the meantime, the MRPL filed a writ petition against the Authority's Order dated 19 July 2000 with a prayer to quash it. Even though the NMPT had certain reservations as regard the Orders of the Authority, it did not raise any review or appeal petitions so
as to resolve the contentious issues without prolonging them. It being a statutory body, the present circumstances emphasise the need to exhaust all cannons of opportunity especially for a review or appeal.

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

(i). In the first instance when the proposal was submitted after approval of the Port Trust Board, vessel-related income was considered outside the scope of wharfage calculations as per the terms of the MOU.

(ii). The makers of the MOU had in depth and detailed discussions in the Ministry of Shipping over the modus operandi of the funding arrangement and also the modalities of signing MOU with specific clauses touching each party to the MOU.

(iii). The provision in Clause 5 of the MOU is independent of Clause 4 which prescribes the component of the wharfage and the methodology of arriving it. Clause 5 of the MOU pre-supposes that the vessel-related income will be paid in addition to the wharfage charges, as it has nothing to do with wharfage.

(iv). The infrastructural facilities for handling of vessels upto 65,000 / 80,000 DWT with a draft of 12.5 MCD already existed. The breakwater walls were extended from 510 mtrs. to 770 mtrs. to accommodate the requirement of the MRPL to handle vessels upto 80,000 DWT with a drawing draft of 15.4 MCD. It is therefore, apparent, that these facilities were only incremental and inseparable in nature and not exclusive for the MRPL. The MOU, therefore, envisages entitlement of vessel-related income in addition to wharfage income.

(v). The MOU sets down a separate methodology for arriving at the wharfage rate for the dedicated Jetty No. 10. It further provides that the wharfage charges will be mutually agreed to between the parties and shall be subject to approval of the Government. In case of any lack of agreement between both the parties, the decision of the Government in the Ministry of Shipping shall be final and binding both on the NMPT and the MRPL. The Authority should, therefore, have obtained the concurrence of the Ministry of Shipping before taking into consideration the vessel-related income in the wharfage calculation which contravenes the provisions in Clause 5 of the MOU.

(vi). This was considered more inevitable and imminent with reference to Clause 20 of the MOU and also that the MOU between the MRPL and the NMPT was a corollary to the MOU entered into between the President of India, the HPCL and the Indian Rayon Limited on the MRPL.

(vii). The NMPT is a body corporate; and, all its assets and properties are vested in the Government of India. Hence, there is no question of unjust enrichment as alleged by the MRPL, if the MOU provisions are given effect strictly on just, fair and equitable manner.

(viii). The NMPT seeks the legality of interpretation of the terms provided in Clause 5 of the MOU either from the Ministry of Shipping or from the Ministry of law; and, requests for a review thereof.

4. A comparative statement of income realisable at the rates notified in the Scale of Rates vis-à-vis the rate arrived at based on the guidelines prescribed in the Authority’s Order indicates a loss of revenue to the tune of Rs. 14.85 crores and Rs. 19.39 crores for the years 1999-2000 and 2000-01 if the guidelines prescribed by the Authority are followed to arrive at the wharfage rate.

A copy of the NMPT proposal was forwarded to the MRPL and the KCCI for their comments. The comments received from them are summarised below:
(i). The Authority 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 change not in existence at the time of passing the order under review.

(ii). The NMPT while giving effect to the directions of the Authority’s Order dated 27 October 1998 has considered expenditure and return, etc., almost to the extent of 70% of the credit given in the form of vessel-related income.

(iii). The NMPT on each occasion changed the method of calculation of wharfage in spite of the MRPL’s repeated claim that when the expenditure related to dedicated Jetty No.10 are considered, the revenue related to this jetty should also be considered; and, that no return on investment is to be included in computation of the wharfage rate since the principal amount is paid by it. The NMPT’s contention that it raised further issues is, therefore, not correct.

(iv). The NMPT gave effect to the directions of the Authority and sent the revised calculations to the Authority for approval. It is, therefore, too late for them to seek a review after having complied with the Authority’s Order.

(v). It is out of place for the NMPT to mention that though it had reservations, it accepted the Order of the Authority to save time and with a desire to finalise the rate. In fact, the NMPT by adding new element each time delayed the whole settlement.

(vi). The NMPT’s reference to provisions in Clause 5 of the MOU is not of much relevance. The MRPL has reiterated its earlier clarification in this regard; and, it totally disagrees that the MOU does not envisage credit of vessel-related income in calculation of the wharfage rate.

(vii). Clause 4 of the MOU specifically indicates the various cost elements to be included in calculation of wharfage charges. One of the cost elements prescribed to be included in computation of wharfage rate is the actual operation and maintenance cost. Actual operation and maintenance cost clearly means the Actual Outflow minus Inflow; and, therefore, if the NMPT has considered all expenses including share of administrative expenses it is appropriate to consider the income also while computing the wharfage rate for Jetty No.10.

(viii). The NMPT has claimed that since the vessel-related charges are fixed with reference to already existing port facilities, it cannot be shared with the MRPL. This fact was known when the MOU terms were envisaged. The credit of vessel-related income is claimed by it as per the MOU terms.

(ix). Taking into consideration the fact that a share of maintenance dredging cost and running and maintenance of port crafts is included in the wharfage charges which represents the cost, the income generated cannot be simply claimed to be incremental. In real sense this incremental revenue itself is out of additional facility created, but for which the income will not be there at all.

(x). The capital cost for the additional facility is fully funded under the project cost and the full project cost is being repaid by it. The NMPT’s claim that MOU envisages entitlement of vessel-related charges in addition to wharfage income is not found in the MOU. The MOU envisages the calculation of wharfage in such a way that the NMPT will be able to realise the amount required for repayment of loan with interest. The provision itself is not wharfage; but only a definition of the manner of determination of the amount required to meet the obligation of the loan.

(xi). It appears that the NMPT has lost sight of the amendment made to the Major Port Trusts Act, whereby the power of the Government for fixation of rates has been vested with the Tariff Authority. The NMPT’s reference to the take concurrence of the
Government, on a decision of the Authority is ridiculous. In fact the NMPT referred the issue to the Authority for a direction and approval. The Authority has given direction as per powers vested with it under the Major Ports Act.

(xii) The reference made by the NMPT to Clause 20 of the MOU has no relevance to the instant review application.

(xiii) The Authority has considered the facts given by both the parties while passing the Order dated 27 October 1998. In the said Order, it is mentioned that the NMPT cannot have a legitimate grievance because all monies will be utilised only for redemption of its own title to the assets created.

(xiv) It could have opted for the BOT model wherein the terms would have been softer and it would have taken very much longer for the NMPT to acquire the assets created.

(xv) The NMPT’s claim about not crediting the vessel-related income to the wharfage calculation and a further claim that the port will not be unduly rich since it is constituted by the Government of India do not hold good.

(xvi) There is no need to review the Order passed by the Authority earlier in this regard.

Kanara Chamber of Commerce and Industry (KCCI)

(i) The wharfage calculation depends entirely on the MOU, hence it is unable to give its comments on this subject.

(ii) The present trend indicates that the cargo handled in the year 2001-02 at Jetty No.10 will fall far below the projections of the MRPL. This will lead to an increase in the wharfage rate.

(iii) Though the decrease in tonnage handled at Jetty No.10 is due to circumstances beyond the control of MRPL, they have to bear at least a part of the consequential loss.

(iv) The fall in the traffic at the NMPT and the Port’s dependency mainly on the revenue generated from the dedicated berths does not reflect a position for any concessions.

(v) The MRPL is one of the important customers of the NMPT; and, hence its survival is crucial for the port. It is upto the NMPT whether to consider this issue sympathetically.

(vi) The provisions prescribed in Clause Nos. 3, 4 and 5 of the MOU are of no relevance for review of the wharfage rate.

(vi) The Authority is fully aware of the economic condition of the NMPT and the MRPL. As a representative of the trade and industry of Dakshina Kannada it is, however, its duty to draw attention to the present economic scenario at Mangalore.

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

New Mangalore Port Trust (NMPT)

(i) For the period 1996-98 we calculated wharfage based on the KIOCL method. We took into account only cargo related charges. Expenditure on vessel-related items were not considered.

(ii) The Authority gave an order about creating a separate cost centre. We revised accordingly by taking into account vessel-related expenditure. Vessel-related income
was more. That was based on tariffs notified on other considerations. The rates so notified cannot be applied to the MRPL case.

(iii). Clause 5 of the MOU is very important. Calculation of vessel-related charges (VRCs) are different. By giving credit of income to the Escrow Account, we give an undue advantage to 'wharfage'.

(iv). The provisions in Clause 6 of MOU suggested by Bankers is to give more security for repayment of loan. This clause cannot be taken to mean a separate method of wharfage calculation. Calculate wharfage only as per clause (5) of the MOU.

(v). We have been liberal and accommodative. We cannot be called unreasonable at all.

(vi). In the MRPL letter dated 11 December 2001 they clearly admit that they have to pay VRCs 'separately'. How can they blow hot and cold simultaneously?

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

(i). All these issues were stated earlier in the two cases. The Authority has adequately dealt with them already. Our views are stated therein too. We have nothing more to say.

(ii). The NMPT accepted the Authority Order and complied with it. 5 years later they ask for a 'review'. Should this be allowed?

**Kanara Chamber of Commerce and Industry (KCCI)**

We endorse the MRPL's views.

6. 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 request of the NMPT is for a ‘review’ of this Authority's Order dated 27 October 1998. As has repeatedly been stated by this Authority in different Orders, a review can be made only with reference to any ‘error(s) apparent on the face of the record’. The petition of the NMPT in this case cannot be said to identify any such error in this case. The reasons for inclusion of vessel-related income in this computation of the wharfage rate have been set out explicitly in this Authority’s Order in reference. The Petitioner-Port has not been able to challenge precisely any particular point of fact in this regard.

(iii). The basis of the NMPT contention is about questionable interpretation of Clause 5 of the MOU between the port and the MRPL. Without specifically dealing with the logic given in paragraph 7 of the impugned Order, the NMPT has only requested for a reference to the Ministry of Shipping and the Ministry of Law for advice on a correct interpretation of the Clause 5 in the MOU. To say the least, this is a very strange stance for a petitioner to take. The NMPT must either challenge this Authority’s Order in the High Court or itself seek the advice of the Ministry of Shipping and/or the Ministry of Law to decide its further course of action. It is untenable for a petitioner to require this Authority to consult the Ministry of Law to establish the legality/ validity of its interpretation of the said Clause 5. As earlier stated, for initiating a ‘review’ the petitioner has to show the error of fact apparent on the face of the record; besides failing to do so, the NMPT has gone about raising legal issues which cannot be said to be relevant for purposes of a review. The NMPT cannot use the ‘review route’ to require this Authority to establish that there indeed was no error.

(iv). The NMPT has suggested that this Authority shall consult with and seek the concurrence of the Ministry of Shipping in reckoning with the provisions of Clause 5 of the MOU while dealing with this case. To say the least, again, this is a most extraordinary observation made by the petitioner. The jurisdiction conferred on this Authority by the Statute does not envisage such consultations. The amendment made to the Statute providing for constitution of the Tariff Authority for Major Ports basically envisaged an arrangement in which “the Authority” will replace “the Government” for all purposes in respect of all tariff matters. That being so, any reference to ‘approval of the Ministry of Surface Transport’ in Clause 4 of the MOU will have to be deemed to have been amended to refer to ‘approval by the Authority’. The request of the NMPT is, therefore, misconceived and untenable.

(v). The NMPT has requested this Authority to review an Order passed 3½ years ago and an Order which it had itself complied with earlier. In this backdrop, the MRPL has demanded that the NMPT shall be estopped for agitating at this stage against the impugned Order. While the settled legal position is that questions of law can be raised at any stage of the proceedings, it will amount to an extraordinary stretching of the principle to allow such objections to be raised after the proceedings are over and after final orders have been passed therein, especially when the Petitioner-Port has not been able to establish any ground for initiating a ‘review’ at that. Seen in this perspective, the argument of the MRPL can be said to hold force; and, it is accordingly upheld.

(vi). Notwithstanding the fact that the NMPT has not established any ground for entertaining its request for a review, it may be relevant here to refer to a couple of points in support of the basis soundness of the decision taken:

(a). At the time of the general revision of the NMPT Scale of Rates apprehensions were voiced that the general users would be burdened by the dredging and other expenditure relating to jetties dedicated for the MRPL and the KIOCL.

Accordingly, the Port had excluded the income relating to the MRPL and the KIOCL in the cost statements. Also, the direct expenditure allocated in the cost statements
for the MRPL and the KIOCL were deducted by this Authority while fixing the tariff for activities other than the MRPL and the KIOCL Schemes. Thus, if the vessel-related charges are not considered while computing the wharfage rate for the MRPL jetty as suggested by the NMPT now, the apprehensions earlier expressed by the user-groups about the residual cargo and vessels bearing the expenditure on the dedicated MRPL schemes may come out to be true.

(b). Reckoning with commodity-wise cost-centres for determination of tariff will be an ideal position. Such an arrangement will enable retention within the cost-centre of a surplus either in cargo-related activity or in vessel-related activity so that cross-subsidisation can first be accommodated within a commodity-group before transferring the benefit to other commodities/activities. It is relevant here to point out that this Authority had adopted this approach while deciding the general revision of tariffs for the Visakhapatnam Port Trust.

7. In the result, and for the reasons given above and based on a collective application of mind, this Authority rejects the review petition of the NMPT and reconfirms the arrangement ordered by it of introducing a 'common cost-centre' for the MRPL Jetty (i.e., Jetty No.10) at the NMPT.

( S. Sathyam )
Chairman

[ List of Ports  | List of Orders]