No. 159 New Delhi, the 19 August, 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 M/s. J. M. Baxi & Co. about levy of 50% port dues and Roadstead charges in respect of vessel M.V. ‘Perelik’ which was denied entry to the port by the Visakhapatnam Port Trust as in the Order appended hereto.

( S. Sathyam )
Chairman

M/s. J. M. Baxi & Co. - - - - Applicant

V/s.

The Visakhapatnam Port Trust - - - - Respondent

ORDER
(Passed on this 12th day of August 2002)

This case relates to a representation received from M/s. J. M. Baxi & Co. (JMBC) about levy of 50% Port Dues and Roadstead charges in respect of vessel M.V. ‘Perelik’ which was denied entry to the port by the Visakhapatnam Port Trust (VPT).

2.1. The details mentioned in the representation of the JMBC and those revealed by the documents submitted along with the representation are summarised below:
(i). The vessel ‘M.V. Perelik’ arrived at the Visakhapatnam anchorage on 27 October 2001 laden with 12087 MT of Ammonium Nitrate in bulk consigned to M/s. Indian Detonators Ltd., Hyderabad (IDL).

(ii). The VPT granted permission on 28 October 2001 to the vessel to enter and handle the cargo in reference subject to the conditions prescribed regarding maximum time of transit through the port area, taking direct delivery of the cargo from the jetty, and following of the fire precautions and the Govt. guidelines.

In the meanwhile, documents were filed with the Customs authorities and duty as assessed was paid.

(iii). Despite submission of all the requisite permissions from various concerned authorities/copies of all the relevant documents along with an undertaking to comply with all the safety requirements/directives issued by the VPT, the vessel was not granted permission to berth and discharge the said cargo.

(iv). The VPT informed the JMBC on 29 October 2001 that the vessel was denied permission to berth as there was no clearance from the State Pollution Control Board for the said cargo.

(v). The IDL (consignees) made an application to the Andhra Pradesh Pollution Control Board (APPCB) on 31 October 2001 informing about the import of the said Cargo; observance of all the safety norms and stipulated GOI guidelines; and, submitted a copy of the application duly acknowledged by the APPCB to the VPT which was again not considered by the VPT.

(vi). The vessel finally sailed out on 7 November 2001 from the Visakhapatnam Port to the nearby private port at Kakinada for discharge.

The non-acceptance of the vessel for berthing at the VPT resulted in payment of a huge amount of demurrages.

(vii). The VPT has handled two vessels M.V. “VAST BANGALORE” and M.V. “IRENE” on 21 October 2001 and 24 January 2001 to discharge 12690/10846 MT of Ammonium Nitrate in bulk respectively without any difficulty. The VPT has been handling much more inflammable and hazardous liquid
cargoes at the port berths duly following the safety precautions and regulations. The VPT has also not issued any circular to the trade regarding handling/non-handling of Ammonium Nitrate cargo.

(viii). The Ministry of Commerce & Industry (Department of Explosives) has vide letter dated 30 October 2001 intimated to the IDL that since Ammonium Nitrate is not an explosive and does not come under the purview of Explosive Rules 1983, no approval or licence is required to be obtained from this department for manufacture, transport, handling, storage, import-export of such cargo.

(ix). As per Rule 18 of the Manufacture, Storage and Import of Hazardous Chemical Rules 1989, and the notification issued by the Ministry of Environment & Forests, there is no need to obtain permission/clearance from the Pollution Control Board; the party has only to inform them as per the statutory requirement. This formality has already been complied with.

(x). The VSAA has also requested the VPT to not to charge the dues as the vessel was not allowed to enter the port and discharge the cargo by the VPT for their own reasons.

(xi). The VPT has charged 50% port dues leviable on a vessel entering the port but not handling cargo or passengers, and Roadstead charges as per the Scale of Rates in force. This is not correct, as the vessel was not accepted for entry. The VPT has unilaterally denied the requests made for not charging these amounts.

2.2. In this backdrop, the JMBC has requested this Authority to intervene in the matter and issue necessary Orders to the VPT not to levy any charges since the vessel was not granted permission to handle the said cargo for their own reasons.

3.1. In accordance with the procedure prescribed, a copy of the representation was sent to the Vizagapatnam Chamber of Commerce and Industry (VCCI), the Visakhapatnam Steamship Agents’ Association (VSAA), the Visakhapatnam Port Users Association (VPUA), the Shipping Corporation of India (SCI), the Indian National Shipowners Association (INSA) and the VPT for comments.

3.2. Comments have not been received from any of the user organisations. The VPT has also not responded with its comments on the representation.
4. A joint hearing in this case was held on 5 February 2002 at the VPT premises. At the joint hearing, the following submissions were made:

M/s. J. M. Baxi & Co. (JMBC)

(i). We had entered the port limits based on a specific authorisation; we had actually been cleared also for berthing. Subsequently, the port changed its mind and refused to handle our cargo. In the circumstance, it will be unfair to require us to pay any charges at all.

Visakhapatnam Port Trust (VPT)

(i). It is a fact that we had handled this cargo in the past. It is also a fact that we had given clearance for berthing of this vessel. But, we had to cancel the permission because the case had come to attract a lot of local controversy. Unexpectedly, the APPCB intervened in the matter to create hurdles and stopped the operations. Although the port is required in such cases only to give intimation to them about handling of such cargo, in this case, the APPCB went beyond that requirement to ask for many more details. Because of the aggressive attitude adopted by the APPCB, the VPT decided to err on the cautious side by refusing permission to handle the cargo in this case.

(ii). It is relevant here to note that, in a PIL case, the Supreme Court had directed the APPCB to keep a special watch on the VPT in respect of pollution control measures.

5. After the joint hearing, the JMBC has informed that the VPT has debited its deposit account by an amount of Rs.2,38,526/- towards port dues and roadstead charges. The JMBC has requested this Authority to require the VPT to refund the amount with interest thereon.

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

(i). The representation relates to refund of port dues and Anchorage charges levied by the VPT on the vessel brought in by the Applicant. The vessel occupied an anchorage of the VPT; and, anchorage fees as per notified SOR have been claimed by the Port. Since the vessel entered the Port, but did not carry out any cargo/passenger operation, 50% of the port dues, again, as per the notified SOR, has been demanded. Prima facie, it appears that there is no wrong application of the Scale of Rates. But, it is necessary to apply the rules to complete facts of the case. In the face of the allegation made by the Applicant about the Port denying permission to berth the vessel, it is necessary to analyse whether the charges have accrued due to any fault of the Port.
(ii). It is admitted that a Port Trust can decide on the services to be provided by it or the cargo to be allowed to be handled within in its geographical limits. But, it is inevitable for this Authority to intervene in such matters, if the action of denying services by the Port Trust gives rise to tariff implications.

(iii). The documents produced by the Applicant show that the VPT has initially on 28 October 2001 granted permission to the vessel to enter subject to fulfillment of some conditions. The conditions stipulated generally relate to method of evacuation of cargo and observance of fire precautions. There was no mention about obtaining any clearance from the Pollution Control Board. The VPT has, however, subsequently denied berthing on the ground that the Pollution Control Board has not given clearance to the cargo. By the time this decision was taken, the Applicant’s vessel had entered the Port and was waiting at the anchorage.

(iv). The Applicant has argued that the relevant law does not require any clearance from the Pollution Control Board for handling the cargo carried by his vessel. That being so, he has only informed the concerned Authorities about the nature of the cargo to be handled. These statutory and procedural aspects are not relevant for the issues at consideration. There is nothing on record to show that the PCB has restrained the VPT from allowing Ammonium Nitrate to be handled within its premises. The action of the VPT was based only on a presumption of facing action from the PCB based on a questionnaire received by it. If the port has decided to err on the cautious side, then, the cost of such decision cannot reasonably be sought to be recovered from the user concerned.

(v). The Applicant has pointed out that the VPT has allowed berthing in the past to vessels carrying Ammonium Nitrate. The VPT has also admitted this position. As has been contended by the Applicant, the VPT has not intimated the Trade that it will not allow Ammonium Nitrate vessels without obtaining clearance from the PCB. That being so, the past precedence coupled with the absence of any decision conveyed to disregard the past precedence, gives rise to a reasonable expectation on the part of the Applicant towards admission (into the port) for cargo operations. It is noteworthy that even in this case, the vessel entered into the Port only after the VPT accorded permission initially; and, significantly, it was even assigned a berth.

(vi). The charges demanded by the VPT arise in the context of the vessel’s entry into and stay at the Port. Since the VPT has denied berthing after the entry of the vessel in response to the port’s clearance for berthing, the desired objective of the vessel’s call at the VPT has not been achieved (i.e.) unloading of cargo could not happen. This is a result of the decisions taken by the Port. It is not reasonable to make the Applicant pay for the vasccillations of the Port. That being so, the VPT is liable to refund the port dues and Anchorage charges levied by it on the vessel in reference.
The Applicant has also prayed for allowing interest on the refunds to be made by the VPT. It is recognised that there was no interlocutory order restraining the VPT from claiming payment of the disputed charges. In fact, there was no prayer made for such an interim order also. In the absence of any restraint imposed, the VPT has debited the deposit account of the Applicant by an amount equivalent to its claim. Even though this charge can be seen in retrospect as irregular, the VPT had levied it with a bonafide belief about its legitimacy. In such cases, therefore, this Authority does not order refunds with interest unless there is an open and flagrant violation of the SOR. That being so, it is not considered necessary to order payment of any interest on the refund to be made by the VPT in this case. Provisions of penal interest will, however, apply if the VPT does not effect the refund within the time limit prescribed in its Scale of Rates. The time limit for this purpose will count from the date of communication of this Order to the VPT after its notification in the Gazette of India.

In the result, and for the reasons given above, and based on a collective application of mind, this Authority allows the representation of M/s J.M. Baxi to the extent of directing the VPT to refund the port dues and Anchorage fees levied on the vessel M.V. Perelik which was denied berthing at the Port.

( S. Sathyam )

Chairman

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