No. 56  

New Delhi, the 10th May, 2000

TARIFF AUTHORITY FOR MAJOR PORTS

NOTIFICATION

New Delhi, the 10th May, 2000

No.TAMP/65/99-JNPT

The Tariff Authority for Major Ports hereby disposes of the application submitted by the Nhava Sheva International Container Terminal Limited (NSICT) for review of its order dated 5 December 1998 passed in the case No.TAMP/1/98-JNPT relating to notification of their Scale of Rates, as in the order appended hereto.

SCHEDULE

Case No.TAMP/65/99-JNPT

The Nhava Sheva International Container Terminal Limited ... Applicant

ORDER

(Passed on this 10th day of April 2000.)

1.1. This case relates to a request made by the Nhava Sheva International Container Terminal Limited (NSICT) for a review of this Authority's order dated 5 December 98 about notification of their Scale of Rates. The request in particular is about denomination in dollar terms of tariffs of certain items that have been denominated in rupee terms.

1.2. Notwithstanding the fact that a similar request had earlier been rejected on 13 April 99, this request
was considered in the Authority's meeting on 2 August 99. Noting the NSICT assurance to cooperate in the matter of provision of data/details, and recognising the position that the technicality of absence of a specific provision for a 'review' shall not come in the way of removal of injustice, if any, this Authority decided to register a formal 'review' case.

2. In their request, the NSICT have made the following pleadings:

(i). They have not achieved the financial closure of their project.

(ii). Investors and potential lenders to the project are concerned with the foreign currency exposure that the project has because of the state of the art equipment that is required to be imported by the terms of license agreement.

(iii). Since the meltdown of SE Asian currency of 1997, lenders and investors are less comfortable with the Asian debt that is not hedged.

(iv). US denominated tariff gives the project a natural hedge against any unnaturally high depreciation of Rupee.

(v). The situation on the border with regard to Kargil has also had an adverse effect on the lender's perspective on Indian country risk.

(vi). A large quantum of their capital expenses is USD based. The type of the equipment that is permitted to be installed at NSICT is not being manufactured in India at present and have to be imported.

(vii). USD denominated tariff is required to service the debt.

(viii). In terms of their present tariff structure, only 2-4% of their revenues are USD denominated. With this miniscule proportion of revenue NSICT needs to support USD purchases of about Rs. 396 crores (54% of project cost) and 97% of overseas equity.
(ix). NSICT is not proposing any increase in the tariff already approved. They merely wish to denominate in USD the tariff that has already been approved by the TAMP using the rate of exchange that was prevalent on 17 December 98.

The substance of the NSICT’s proposal is for dollar denomination of its tariffs.

3. This Authority passed an order on 5 December 98 on a proposal from the NSICT for fixation of tariffs for the three berths they were constructing on a BOT basis at the Jawaharlal Nehru Port Trust (JNPT). In the said order, the Authority did not approve the proposal to denominate cargo related charges in dollar terms and observed that the question of denominating cargo related charges in dollar terms would be examined afresh in detailed consultation with all concerned. Some of the relevant observations of the Authority while passing the said Order are:

(i). The NSICT had chosen to adopt the JNPT tariff as ‘ceilings’ for their own purpose in operating the new International Container Terminal. Under law, the NSICT would have been entitled to propose a tariff of its own. But, since the NSICT had chosen to bind itself to the JNPT rates because of a stipulation to that effect in their Agreement with the JNPT, the Authority need not question their discretion.

(ii). Although the proposal was modelled on the JNPT tariffs, the NSICT had made a significant departure in proposing denomination of all cargo-related charges in dollar terms.

In the case of JNPT, only ‘dwell time charges’ were denominated in dollar terms.

Although charges for ‘hatch cover handling’ and for ‘shifting containers within the vessel’ could have also been denominated in dollar terms, for some reason, the JNPT had not chosen to do so.

(iii). The denomination in dollar terms had been proposed on the ground that the substantial foreign equity and foreign loan component of the project-funding would require debt-servicing in dollars.

The denomination in dollar terms, according to the NSICT, would safeguard the interest of the foreign financiers against wild exchange rate fluctuations. The NSICT had also cited for support of its proposal the case of the Mumbai Port Trust (MBPT) where a ‘container’ has been recognised as an extension of
the vessel-hold, and consequently, container-handling charges had been treated as ‘vessel-related charges’ thereby qualifying for denomination in dollar terms.

(iv). The proposal to denominate the tariffs in dollar terms had been objected to by the users on the ground that cargo-related charges could be denominated only in rupee terms; and, the ‘legal fiction’ applied in the case of MBPT was wrong.

In this connection, it was pointed out that the JNPT itself had not denominated cargo-related charges in dollar terms; even after the MBPT example was available, the JNPT still did not choose to change from rupee to dollar denomination.

(v). The demand for denomination in dollar terms was rejected at the time of bids. And, the Agreement also did not give any assurance to do so.

(vi). The NSICT had bound itself to abide by the JNPT tariff. The proposal for denomination in dollar terms would not be in the consonance with this assurance.

(vii). The ‘royalty’ payments had all been denominated in rupee terms. Significantly, the bid document specified that the ‘royalty’ denomination and ‘tariff’ denomination would be in the same currency. Although the Agreement did not incorporate a specific provision to this effect, a harmonious construction with reference to both the documents would establish the point conclusively.

(viii). The Authority had, for stated reasons, not been in favour of denominating cargo-related charges in dollar terms.

(ix). It would not be correct to contend that business risks could not be assessed without denomination of tariffs in dollar terms. Getting foreign equity or loan would be a normal business decision. And, reckoning with exchange rate fluctuations would be a normal business risk.

Significantly, there would be no difficulty in purchase of foreign exchange for the purpose of repatriation of earnings in accordance with the Ministry of Finance / Reserve Bank of India Guidelines.
(x). Currency denomination was a basic aspect of the tender in this case. Any decision to alter at this stage a categorically stated earlier decision might give rise to avoidable legal complications.

(xi). Incidentally, a scrutiny of some of the data available would highlight the dimensions involved.

The project cost had been estimated at Rs.700 crores. The Debt-Equity ratio was stated to be 65:35. On the Debt side, the dollar-debt – Rupee-debt ratio was stated to be 55:45. Likewise, on the Equity side, the foreign equity - Indian equity ratio was stated to be 95:5.

A scrutiny of the data contained in the ‘Projected Financial Statements (unescalated cash flow)’ could give a reasonable indication of the debt-servicing liability. The relevant data for 2002 and 2003, for example, show ‘earnings after payment of royalty’ in the region of Rs.220-230 crores; and, the debt-servicing liability for the same period had been shown in the region of Rs.70 crores. It should be recognised here that only 55% of this liability would be in foreign currency. In other words, the foreign currency requirement would be of the order of less than Rs.40 crores.

In this context, it should also be recognised that ‘dwell time’ tariff (it would be denominated in dollar terms) would account for at least 15-20% of the tariff and would, accordingly, net in about Rs.40 crores. Viewed in this perspective, the investment could be seen to have an adequate cover of return. Even if there was still an ‘uncovered’ balance, it could be deemed to fall under ‘normal business risk’. But, it has further to be recognised in this context that two more activities – ‘hatch cover operations’ and ‘shifting of containers within the vessel’ – would, as earlier stated, also qualify for denomination of tariff in dollar terms. If these were to be so, then, together with the earnings from ‘dwell time charges’ the ‘cover’ available would receive a further boost.

4. This Authority had passed an Order on 13 April 99 rejecting the earlier request for a review. In this Order, this Authority had made the following observations:

(i). India has never defaulted in respect of a foreign liability.
(ii). It is an established economic principle of denoting charges for non-tradable services only in the local currency so as to retain whatever competitive advantages are available in pricing.

(iii). The Authority has approved the tariff only for a two-year period with a further stipulation that, for good reasons, the Authority will entertain a proposal for revision (even) ahead of the schedule. In other words, there need be no apprehension about irreparable loss to be caused by any rigid prescriptions.

(iv). The exchange rate fluctuation in respect of the Indian Rupee has not also been so volatile as to warrant apprehensions about frequent adjustments in tariff.

5. While disposing of this case, therefore, this Authority had to bear in mind these observations also.

6. Even as this review case was in progress, referring to the Authority's order on fixing tariffs for the PSA SICAL Tuticorin Container Terminal, the NSICT represented about discrimination between them and the PSA SICAL in the matter of identification of items for denomination of tariffs in dollar terms. They referred in particular three items – Reefer Monitoring and Connection Charges, Shut Out Charges and Consolidated Charge for Transhipment Containers. We passed an order dated 15 March 2000 approving denomination of Shut Out Charges and Reefer Monitoring and Connection Charges in US dollar terms in the Scale of Rates of the NSICT. However, the item about Consolidated Charges for Transhipment Containers was decided to be taken up along with the ‘review’ case. This item has to be examined to find out the inclusion of wharfage and haulage elements with reference to relevant components of costing.

7. While considering tariff proposal(s) of any Private Terminal Operator to whom concession has been granted to construct / equip and maintain / operate a Terminal on BOT basis, it is necessary to see what is the IRR on the project cost as a whole and in particular on the Equity Capital. The Regulatory Authority needs to be satisfied that the traffic projections and income estimates are not on the lower side, the estimates of costs are not abnormally on the higher side, and the tariffs proposed are not excessive giving an unreasonably high IRR. Since the concession period is 30 years, it is necessary to consider the IRR likely to be achieved over the concession period. The NSICT was, therefore, required to furnish Financial Statements showing the IRR on the project cost as also on the equity capital on the basis of the tariff proposed. Since the NSICT was representing that rupee-tariff does not give them adequate
return to service the equity capital and debt capital, it was necessary to have the Financial Statements based on rupee-tariff and dollar-tariff as well. Detailed information was called for as we did not want to prejudge the issue of denomination on other grounds.

8. During the scrutiny, the NSICT gave different figures on many items. When we referred to these discrepancies in detail and called for explanations, the NSICT’s reply has been that the revised figures are based on experience gained subsequent to the original application. It will not be possible for us to take into account such subsequent experiences / developments. This is a ‘review’ case; and a review is supposed to be based on the conditions available at the time of the original order.

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

(i). It is difficult to persuade one to accept that, in such a major international bid, any internationally reputed company will submit a bid without making a financial analysis based on rupee-tariff model especially when no assurance was given at the pre-bid stage that dollar denomination of tariffs would be allowed. In such an analysis, any prudent investor would have reckoned with factors like country risk and currency risk.

(ii). Currency denomination was a basic aspect of the tender in this case as stressed in paragraph 5.(xvii) of this Authority’s Order dated 5 December 98. Any decision to alter at this stage a categorically stated earlier decision may give rise to avoidable legal complications and vitiate the sanctity of the tender procedure. In spite of a specific reference to this issue, the NSICT have not addressed it other than to make a bland statement to the effect that, in their opinion, there will be no legal hurdle. Their reference to Clause 7-3 of the Concession Agreement cannot be seen to be supportive of their cause. All that the said clause says is that the tariff shall be fixed by the TAMP and notified as per the policy of the Government; there is no mention about currency denomination. It has been the policy of the Government to denominate cargo-related charges only in rupee terms. Furthermore, at the pre-bid stage, no assurance was given that dollar-denomination of such-tariffs would be allowed.
(iii). The main emphasis of the NSICT is about serving (heavy) foreign debt as well as equity and about other expatriate expenses. Their financial analysis shows that foreign debt servicing is only for the first ten years. Expenses on expatriates will come down considerably after the initial phase of the project is over. Expenses on Terminal Service Management and EDP assistance fees will continue throughout the concession period. Servicing of foreign equity will also continue throughout if equity stays. However, all these do not justify dollar denomination of the entire tariff for the whole of the concession period of 30 years.

(iv). Since the NSICT have adopted the JNPT tariff ‘values’ which include the cargo-related elements, the NSICT tariff also has to be deemed to include these elements. A mere disclaimer that “Our tariffs do not include wharfage” is not sufficient. So also the argument that ‘a container is unloaded on a trailer and not on the wharf and, therefore, composite tariff does not include wharfage’ is not convincing as the trailer is on the wharf. Its proposal to exclude ‘transportation costs’ can only be seen to have a nominal implication. The elements of ‘railway haulage’ and ‘wharfage’ constitute the bulk of the cargo-related components in the JNPT tariff. Unless these are identified and eliminated or until it can be conclusively established by the NSICT that its tariff involves elements other than those relevant to the JNPT context, its argument cannot be accepted. There will be very little point in its repeated assertion that this Authority is discriminating between the MBPT and the NSICT. Likewise, it is not open to the NSICT to require this Authority to gather the relevant details from the JNPT for examining the components of its tariff. It will be expected of the NSICT to do this groundwork and establish satisfactorily that the components of its tariff are variant from those of the JNPT.

(v). The NSICT have stated that charges recovered for ‘on-board stevedoring’ have always been classified as part of sea freight under ‘Liner Terms’ and therefore, be denominated in dollar terms. Vide their letter dated 1 December 99, they have proposed, as a compromise, a revised tariff schedule by prescribing truck shifting charges in rupee terms and the rest in dollar terms, though they do not favour such splitting of the box-rate. The element denominated in rupee terms is only a small fraction and does not adequately cover all the cargo-related elements mentioned earlier. In fact, since the NSICT has no railway system of their own, this element should get totally eliminated from their tariff; wharfage and transportation elements should get segregated and denominated in rupee terms as the Authority has not revised its earlier decision not to denominate cargo-related charges in dollar terms. The exercise has to be done by the NSICT and they cannot expect the Authority to do the same.
(vi). The main asset created, viz. berths has a life longer than the concession period of 30 years and the container handling equipment is required to be replaced after 18 years. In both cases, depreciation considered by the NSICT will be higher based on the total concession period or residual concession period instead of on the basis of life of asset. The NSICT has adopted JNPT tariff, which normally allows for \((12 + 3 + 3 = 18\%)\) return on capital employed. The NSICT is expected to hand over the assets created back to JNPT free of cost. There is no need to allow the element of 3\% contribution for Development, etc. The element of 3\% contribution for Replacement, Rehabilitation etc. should at least partly cover the investment of intermediate renewal of equipment.

(vii). It is also relevant here to recognise the specific stipulation in the bid documents that ‘royalty’ and ‘tariff’ will be denominated in the same currency. During the discussions, the NSICT categorically stated that it cannot have the ‘royalty’ quoted by it in rupee terms converted into dollar terms. Besides the other issues cited above, this discrepancy will add another dimension of probable legal hurdles if the request of the NSICT is to be conceded.

10. In the result, and for reasons given above, and based on a collective application of mind, this Authority decides that the request of the NSICT for a review of our earlier order dated 5 December 1998 does not merit consideration. The NSICT application is accordingly rejected.

11. With reference to Transhipment Containers, the MBPT, in a different case, has proposed to convert rupee-denominated wharfage into dollar-denominated tariff on the grounds that Shipping Agents / Owners recover these charges from consignees in dollar terms as a part of the sea freight. There appears to be some force in this argument. If the wharfage on Transhipment Containers is decided to be denominated in dollar terms as proposed by the MBPT, the same arrangement will have to be extended to the NSICT and the PSA SICAL Terminals also. But, before such an arrangement can be effected, the elements of transportation and contribution towards railway infrastructure will have to be segregated / excluded from its composite rate by the NSICT. In the case of the PSA-SICAL charges for Handling of Transhipment Containers are denominated in dollar terms while wharfage has been denominated only in rupee terms. The handling charge at the PSA SICAL Terminal is, however, much less as compared to (even) the split rate for handling in dollar terms as indicated by the NSICT.

12. In the case of empty containers, wharfage is denominated in dollar terms at the MBPT and also at the PSA SICAL Terminal. In the case of JNPT (and, therefore, in the case of the NSICT too), the composite rate includes,
inter alia, elements of stevedoring, wharfage on containerised cargo, transportation, and contribution towards railway infrastructure. If the NSICT wishes to rely on the MBPT model, then, the element of contribution towards railway infrastructure will have to be excluded and transportation element segregated. The split charge in dollar terms indicated by the NSICT segregating only the transportation element is much higher.

13. In the totality of circumstances of the case, and the declared stand of the Authority in regard to the denomination of cargo-related charges in dollar terms, it is further decided that the Consolidated Charge for Transhipment Containers at the NSICT cannot be denominated in dollar terms since the elements of transportation and contribution towards railway infrastructure have not been segregated from the composite rate by the NSICT.

S. SATHYAM, Chairman