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New Delhi, the 27 August 2002

Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Section 48 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation made by M/s. Redeagle Maritime Services (I) Pvt. Limited for waiver of demurrage charges claimed by the Kolkata Port Trust on the container detained by the Kolkata Custom Authority as in the Order appended hereto.

( S. Sathyam )
Chairman

M/s. Redeagle Maritime Services (I) Pvt. Ltd. - - - - Applicant

V/s.

The Kolkata Port Trust - - - - Respondent

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

This case relates to a representation received from M/s. Redeagle Maritime Services (I) Private Limited (RMSPL) about waiver of demurrage charges raised by the Kolkata Port Trust (KOPT) in respect of a container
detained by the Kolkata Customs Authority (KCA).

2.1. The RMSPL has made the following points in its representation:

(i). Two containers with numbers TRIU-2757418 and ITLU 8347228 stuffed with cargo Gum Damar and Betelnuts were planned for shipment from Bangkok to Bombay and Bangkok to Calcutta respectively. Both the consignments were on account of same shipper in Thailand and were carried on-board the vessel ‘Jaya Moon’ from Bangkok.

(ii). On reaching at the respective port trusts, the customs duty was paid. However, during the examination of the cargo by the Customs Authorities at Mumbai on destuffing of the container, it was found to contain 200 bags of Betelnuts instead of Gum Damar and hence, the delivery of the cargo was not allowed by the Mumbai Customs Authorities (MCA).

(iii). On being enquired it was revealed that there was a cross shipment at the port of loading i.e. Bangkok, as the shipper was the same person. It was a case of bonafied human mistake and this inadvertence required regularisation of the transactions through amendments.

Accordingly written submissions were made to the Custom Authorities in Mumbai & Kolkata with a request to amend the records and allow transhipment of the container from Mumbai to Kolkata and Kolkata to Mumbai respectively.

(iv). The MCA responded favourably and being satisfied with the documentary evidences produced, shortly resolve the matter and allowed transhipment of the container so that it could be delivered to the importers at the Kolkata.

(v). The KCA, on the other hand, detained the container and the cargo and after the lengthy proceedings consisting of issuing of a show cause notice by the Assistant Commissioner of Customs, Kolkata, reply to the show cause notice, personal hearing before the Additional Commissioner of Customs, appeal to the commissioner (Appeals) under Section 128 of the Custom Act 1962, etc., the KCA allowed
transhipment of the container only on 13 December 2001. Thus the container ITLU 8347228 remained detained at the KOPT for the period from 29 February 2000 to 13 December 2001 by the order of the Custom Authorities, which was arbitrary and unwarranted.

(vi). At the time of release of container, the KOPT claimed payment of full demurrage charges from the date of landing upto the date of shipment (barring free period) and refused the removal of the container otherwise. Despite the representation made to the KOPT for waiver of the demurrage charges for the detention period, no favourable response was received from them.

2.2. In this backdrop, the RMSPL has requested this Authority to instruct the KOPT to waive the demurrage charges for the period from 29 February 2000 to 13 December 2001; and, treat the matter as urgent as the demurrage charges are accruing daily.

3.1. In accordance with the consultative procedure prescribed, a copy of the proposal was forwarded to various port users/representative bodies of port users and the KOPT for comments. The comments received from them are summarised below:

**Association of Shipping Interests In Calcutta (ASIC)**

(i). This is a bonafide case of cross stuffing of containers meant for two different destinations. Both the Mumbai and the Kolkata Customs Authorities allowed transhipment, but delay at the KOPT occurred because of detention of the container by the KCA.

(ii). Conventionally, the KOPT does not charge demurrages on the cargo for the period the cargo is detained by the Customs Authorities as the fault causing the detention is not attributable to the consignee. Hence the demurrages shall not be charged for the period of detention of the laden container by the KCA.

**The Shipping Corporation of India (SCI)**
(i). This is basically an issue between the Steamer Agent and the Customs and the port is not concerned with the issue.

(ii). The Customs Authorities seized the consignment on 3 June 2000 and release the same in 2001 on payment of a fine by the agent. There are various angles to the issue and there were errors also on the part of the Shipping Company/its Agent, as brought out in the papers. For example, not having highlighted to the Dock Intelligence Unit (Preventive) of Customs even at the time of the first hearing on 27 June 2000 about the Agents’ letter of 29 February 2000 addressed to the A.C. Customs, Import Noting department regarding wrong stuffing. Rather, as per the show-cause notice of A.C. Customs dated 18 September 2000, “a statement from the container Agent u/s 108 of the Customs Act, 1962 was recorded on 27 June 2000, wherein the representatives clearly stated that they had no knowledge that the container contained anything other than 200 bags of betelnuts”.

(iii). The demurrage for the period upto the seizure of the consignment on 3 June 2000 may be on account of the agent and the Kolkata Port Authorities may consider waiver of the same for the period thereafter till 13 December 2001. This is on the grounds that the agent had sufficient time till then to organise reshipment of the container, after satisfying the Customs Authorities suitably, as their Mumbai counterparts had done. From the papers forwarded, it is observed that the first enquiry ordered by Dock Intelligence Unit (Preventive) of the Customs was intimated for the first time on 20 May 2000 and the seizure of the consignment took place only thereafter.

The Bengal Chamber of Commerce and Industry (BCCI)

(i). In a similar case in respect of Orient Lines, a single judge bench of the Kolkata High Court had directed the port trust to refund the money. The port trust has preferred an appeal and the matter is, at present, pending before the Division Bench of the Kolkata High Court.

(ii). The KOPT is withholding the money since there is no specific provision for refund of money charged on the containers under the MPT Act 1963.
There are many other cases on this subject and all are pending before the Kolkata High Court. In one of the occasion, even the Customs Authorities were directed to pay rent to the port trust. It is, therefore, a fit case for the TAMP to deliberate on the subject and arrive at a conclusion.

(iii). The RMSPL is entitled for waiver of demurrage charges in respect of the container detained by the KCA.

**Container Shipping Lines Association (CSLA)**

(i). The problem arose by a mistake of the shipper; however, the apparent delay by the KCA is unpardonable. The KOPT must receive some recompense for use of their land. The Scale of charge being sought in this respect is, however, beyond what is sensible.

(ii). The short-term issue may be resolved by a commercial settlement between the interested parties. As regards the long-term issue, as long as the KOPT and the KCA will cling to their Rule Books, the India’s International Trade will not flourish and the Kolkata Port will die.

**Eastern India Shippers Association (EISA)**

(i). The Association agrees with the RMSPL that long detention by the KCA was unwarranted since transhipment was allowed by the MCA without any delay, on the basis of same documentary evidence.

(ii). The demurrage charges shall be waived for the period from 29 February 2000 to 13 December 2001 as the detention was entirely due to the isolated stand taken by the KCA and they too eventually allowed the transhipment of the container after 22 months of detention.

The shipper and the carrier shall not be made liable to pay the demurrages as the reasons for long detention was not directly attributable to them.
Kolkata Port Trust (KOPT)

(i). The KCA has detained the container for reasons best known to them. The container agent did not apply for removal of the container load from the port premises to a bonded warehouse outside the docks, as is the general practice to avoid payment of demurrages.

(ii). The Government guidelines stipulate waiver of demurrages only in cases where goods are confiscated and confiscation order is held invalid by the court/tribunal; and, the importer is allowed to clear the cargo on withdrawal of the confiscation order. In this case, the cargo was allowed to be re-exported to Singapore on payment of redemption fine of Rs. 1 lakh in lieu of confiscation; and hence, this guideline is not applicable here.

(iii). It has been held by the Supreme Court in the case of IAAI vs. Grand Slam International, [3 SCC 151 (1995)] that the custodian of the imported goods is entitled to realise the demurrage charges for the period during which the said party was unable to clear the cargo from the Customs area due to fault on the part of the Customs Authority or all other parties who might have issued detention certificates owning such fault. In view of the foregoing, the demurrage charges cannot be waived.

(iv). Since the KOPT receives several such representations, and if holding of joint hearing is allowed in one case, the others will also demand the same for disposal of their representations, which may become a cumbersome and time consuming procedure. A joint hearing may be conducted only when the policy decision involving the trade in general is to be taken. In the present case, this Authority may pass the Order considering the comments of the KOPT and the representation of the RMSPL.

3.2. A copy of the comments received from the above users was forwarded to the RMSPL and the KOPT as feedback information.

3.3. The Calcutta Chamber of Commerce and Industry and the Indian National Shipowners Association did not furnish comments.
4.1. The RMSPL has forwarded its views on the comments furnished by the port users and the KOPT.

4.2. The points made by the RMSPL are summarised below:

(i). Two months have already been lost in correspondence and still it has not been favoured with a decision.

(ii). Both the ASIC and the BCCI have supported its case and are apparently in favour of waiver of rent. The comments from the CSLA indicate its position and recommend due consideration deserves by it in this regard.

(iii). On the comments of the KOPT

(a). The prescribed government guidelines for waiver of demurrage charges in case of confiscated goods indicated by the KOPT makes its case a fit one for waiver of demurrage charges. The redemption fine did not suggest that there was no confiscation at all. The Customs Act is very clear that unless there is confiscation, the question of redemption fine does not arise. However, even after payment of the redemption fine, the goods were not released and further compliances were suggested.

(b). The appeal filed before Commissioner of Customs (Appeal) was too rejected and goods continued to remain confiscated.

This cannot be categorised as a stray case as indicated by the KOPT since in this case a heinous crime has been committed. It has been treated shabbily and gross injustice has been done by the KCA in a simple case of bonafide human error.

(iv). The SCI seems to have missed the real string; and, did not seem to be perturbed by attitude of the KCA when they are at Bombay.
(v). The Custom Act does not distinguish between the Mumbai or the Kolkata Custom Authority. Whereas the MCA allowed transhipment, the KCA instead confiscated the goods.

5. The KOPT has responded on the comments furnished by the port users. The points made by it are summarised below:

(i). The CSLA has admitted that the problem has arisen due to the mistake of the shipper; and that, the KCA is at fault for the apparent delay.

(ii). Neither the BCCI nor the CSLA has indicated that the delay was due to any fault on the part of the KOPT.

(iii). The EISA has stated to consider the request of the RMSPL favourably but did not indicate that delay in taking the delivery was due to any fault on the part of the KOPT.

(iv). Incidentally, the TAMP did not allow refund of ground rent levied by the KOPT for the period the containers were detained by the Customs Authority in the Order dated 11 March 2002 in connection with the request of M/s. Seahorse Ship Agencies (P) Limited.

6.1. A joint hearing in this case was held on 24 May 2002 at the KOPT premises in Kolkata. At the joint hearing, the following submissions were made:

**Red Eagle Maritime Services (I) Pvt. Ltd. (RMSPL)**

(i). ‘Detention’ is different from ‘Demurrage’.

(ii). (a). We are not focusing on the CDC now.

(b). The KOPT is claiming demurrage on the cargo.
(iii). Neither the Line nor the Shipping Agent is “owner” of the cargo. It is, therefore, illegal to charge demurrage on cargo. CRCs cannot be held against the Lines or their agents. (Cases- AIR 1999 SC 2947 and AIR 1977 SC 142)

(iv). The Bombay Customs have recognised the simple error in shipments. But, Calcutta Customs have been extraordinarily fussy. The action of the Customs is unheard of and ridiculous.

(v). It was held in the case AIR 2001 Madras 413 that unless there is a specific provision in the MPT Act, the Lines/Agents cannot be held responsible for payment of demurrage. There is no charging section in the MPT Act.

(vi). We should be allowed to de-stuff the cargo and take the container back.

(vii). Demurrage is payable only by the consignee. Please stop the KOPT from debiting this charge to our deposit account.

Kolkata Port Trust (KOPT)

(i). Charge on container and charge on cargo - both are duly notified by the TAMP. There is nothing illegal about it.

(ii). As regards detention, the delay is caused by the Customs; not the Port.

(iii). (a). The Customs have levied a penalty. They have paid it. They have thus admitted liability.

(b). Their appeals have been rejected.

(iv). (a). They never approached us for release of container for movement to a bonded area.
(b). They have not even applied for destuffing.

(c). They have only applied for reshipment.

(v). As per Section 59 of the MPT Act, the port is required to collect advance charges. They cannot refuse to pay or pay only selectively.

(vi). After payment of penalty, they have filed a Challan for (re) export of the container. This means they are acting as consignee and also exporter.

**Association of Shipping Interests in Calcutta (ASIC)**

(i). The SOR clearly says that the CRCs are recoverable from the consignees (and, not the Steamer Agents).

**Container Shipping Lines Association (CSLA)**

(i). (a). We agree with the RMSPL regarding the CRCs.

(b). As regards the storage charges, the KOPT has a legitimate revenue interest and right. The TAMP may give authority to the KOPT to commercially settle this matter.

(ii). IDTR is only for container; not for cargo. The KOPT contention is wrong.

(The KOPT says, this statement of the CSLA applies only to normal containers. Such abnormal cases have extraordinary connotations).

6.2. At the joint hearing, the counsel for the RMSPL submitted copies of the two judgments, one of the Supreme Court and other of the Madras High Court for reference. The rulings made in the said judgments in brief are
stated below:

AIR 1999 Supreme Court 2947
A Port Trust as per S 171 of Contract Act has a general lien on goods imported as bailee thereof. Port Trust can, therefore, retain a consignment for wharfage, demurrage charges due in respect of earlier consignment.

AIR 2001 Madras 413
In case the delivery of the consignment (landed from the ship) is not taken by the consignee, the liability for payment of demurrage charges payable to the port trust, is solely of the consignee and not of the shipping agent.

6.3. The KOPT was given time to furnish written submissions with reference to the rulings cited.

7.1. The KOPT has responded with reference to the court cases cited by the RMSPL. The KOPT has given comments on two out of the total of three cases cited by the RMSPL as it was given copies of only 2 cases.

7.2. In addition to reiterating its earlier arguments about the confiscation not being held ultimately invalid, the container load continuing to physically occupy the space, etc., the further points made by the KOPT are summarised below:

(i). In the matter of AIR 2001 Madras 413

(a). It was held that the owner of the goods (consignee) is liable to pay demurrages for the consignment landed from the ship, delivery of which is not taken by the consignee.

(b). The case of the RMSPL is totally different and not similar because the consignment has not reached its destination port and that is why the container agent is taking steps for transhipment/re-export of the container and the goods and has paid redemption fine to the Customs in lieu of confiscation of goods.
(c). Since the container has carried misdeclared / unmanifested cargo of the other port, the question of taking delivery of the same by the consignee from the KOPT does not arise.

(d). It is the responsibility of the container agent to arrange for the transhipment / re-export of the goods so that the goods can reach the destination port and the consignee can take delivery and bear whatever expenses arise consequently and are incurred in the process of complying with all the formalities.

The container agent has, in fact by way of accepting his responsibility, paid a fine of Rs. One lac as redemption fine in lieu of confiscation of goods (as ordered by the Appellate authority), followed up with the Customs to obtain permission to transship/re-export the goods to Singapore and filed necessary challan for the re-export through the clearing and forwarding agents engaged by him.

(e). As per section 58 of the MPT Act, the port charges are payable before the removal / shipment / transhipment of the goods.

(f). Demurrages on the loaded container includes demurrages on the box u/s 12 and demurrages on the container u/s 6 of the KOPT SOR.

(ii). In the matter of AIR 1999 Supreme Court 2947

(a). It was held that a port trust as a wharfinger has a general lien u/s 171 of the Contract Act and retain the goods bailed to them as security for realization of the amount of wharfage, demurrage and other charges which were due to them on earlier consignments for which payment has not been made. Therefore, this case is not relevant here.

(iii). As per the MPT Act, the Board is empowered to sell the goods after two months in respect of which rates or rent due to the port has not been fully paid.
(iv). In terms of section 48 of the Customs Act, permission from the proper (Customs) officer is required for sale. Hence, in respect of the goods detained by the Customs u/s 110 of the Customs Act and/or confiscated by the Customs, a port cannot initiate action for sale as mentioned by the RMSPL in the joint hearing.

(v). Also, in terms of section 45 of the Customs Act, a port cannot permit goods to be removed from the Customs area except under and in accordance with the permission in writing of the proper officer.

(vi). Since the cargo in the container is unmanifested and is also another port's cargo, the container agent is liable to comply with the required formalities and pay all the expenses and port charges including demurrages till the container and the cargo is transhipped or re-exported or removed from the port premises by him or otherwise dispose off with the permission of the Customs.

(vii). The container agent has not yet issued abandonment letter to the KOPT subject to the condition stipulated at Serial. No. 5 under note for section 12.1 and 12.2 of the SOR of the KOPT.

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

(i). This case is about waiver of demurrage charges, both on the container and the containerised cargo, levied by the KOPT in respect of the container (wrongly) brought in by the Applicant. It is noteworthy that the Customs had seized the container as well as the cargo contained therein. The confiscation was held valid by the Appellate Authority and the confiscation order was not withdrawn but a redemption fine was imposed in case the goods were to be redeemed.

(ii). At the outset, it may be relevant here to mention that waiver of demurrage charges accrued is a power conferred on the Board of Trustees of a Port Trust. This case has been taken up by this Authority for adjudication on the issues of wrong application of Scale of Rates, if any, and on the requirement of
modification of the Scale of Rates, if necessary.

(iii). The Applicant and many of the user organisations have pleaded that the KOPT must not levy demurrage for the period of detention by the Customs.

The fact of the case furnished by the Applicant clearly shows that the Kolkata Customs have detained the container under the relevant provisions of the Customs Act. This Authority is not the right forum to go into the merits of such detention and to analyse why Customs in Mumbai and Kolkata have taken different actions. It is an undisputed fact that the container with the containerised cargo continued to be in the KOPT premises during the entire period of detention. As pointed out by the KOPT, the Applicant has not either arranged for destuffing the cargo and take back his container or shifted the container to some other bonded warehouse.

The KOPT Scale of Rates prescribes levy of demurrage charges on container and cargo separately on expiry of the stipulated free period. The SOR does not specify any exemption from these charges on account of detention by the Customs. That being so, the action of the KOPT in demanding demurrage charges on the container as well as the containerised cargo for the period of the laden container occupied the Port Trust’s yard is not outside the scope of the existing Scale of Rates; and, therefore, it cannot be called as a wrong application of the Scale of Rates.

(iv). As has been pointed out by the SCI, the issue involved is between the Applicant and the Customs. The BCCI has mentioned that the Kolkatta High Court has in one case ordered that the Customs should pay demurrage to the Port. It has also referred to a case where the High Court has ordered the KOPT to refund the charges realised. We do not have details of these cases. Nevertheless, the latter case is said to be pending before the Division Bench in appeal.

It is noteworthy that, in the case in hand, there has not been any order on the Port either not to claim demurrage or to realise it from the Customs. Since the Applicant has brought in the container in question, the KOPT has demanded payment of its dues from him.
(v). The Applicant has cited rulings of the Supreme Court and the Madras High Court to argue that demurrage on cargo cannot be levied on ship owner/agent. The judgement of the Supreme Court cited settles the position relating to general lien of a port trust as wharfingers if there is any amount which is due and payable to it. This ruling is not directly relevant to the issues arising in this case.

The Madras High Court has held that the Port Trust can recover charges in respect of goods only from the owner of the goods and the vessel agent is not liable for the same. One of the considerations leading to this decision of the High Court is that the contract is between the Port Trust and the holder of the bill of lading viz., the consignee. Irrespective of the fact whether an order passed by the Madras High Court in a case relating to the Chennai Port Trust will bind the KOPT or not, as has been pointed out by the KOPT, in the case in reference the consignment has not reached its destination port. The shipping line has wrongly brought the consignment to and landed it at the KOPT; and, therefore, it will remain responsible for the payment due to the Port.

In a matter relating to storage charges on abandoned containers, this Authority has held that the Lines/Agents can resume custody of container along with cargo and either take back it or remove it from the port trust premises; or else, they must observe all formalities and bear cost of transportation and destuffing failing which storage charges will continue to be levied by a Port Trust till such time when necessary actions are taken by the Shipping Lines. There is nothing on record in this case to show that the Applicant had attempted to shift the container to some other bonded warehouse or, as pointed out by the KOPT, issued a letter of abandonment and complied with the consequential formalities. As again pointed out by the KOPT, the Applicant was trying to re-export/tranship the container, in which case the responsibility of bearing port charges on container and containerised cargo squarely rests on the Lines/Agents.

(vi). Another issue posed for consideration relates to the practice of levying demurrage on container and containerised cargo. Admittedly, this issue does not confine to the case in hand and the KOPT alone but is to be settled for many of the major ports where this practice exists. This practice of levying all container related charges is in vogue for a long time and has perhaps come into being for billing
It may also be seen in the light of the legal fiction evolved treating a container as an extension of a ship’s hatch. The case of the Applicant’s container may be an aberration; but, the general position is that Lines/Agents do not bear all port charges on containers, demurrage charges included, just because they are billed by the Port Trusts. They recover the costs from the shippers/consignees by way of claiming Terminal Handling Charge (THC). It may be a different matter, extraneous to this case, that there is a general allegation from Indian shippers that the THC levied by the Lines/Agents are more than the actual port cost incurred by them in handling a container.

If demurrage charges on cargo and containers are not specified separately, then there can be a separate demurrage charge on loaded containers and empty containers. It is unreasonable to expect a Port Trust to ignore the contents of a container, while levying storage charges.

(vii). One of the guidelines adopted at the Chennai Workshop (February 1998) is about users not being made responsible for delays caused by the ports. This principle has been followed in prescribing/amending many of the conditionalities in the Scale of Rates of the ports. In this case the detention was ordered by the Customs; but, a relief has been sought from the KOPT.

Even if the KOPT and the Customs are seen to be instrumentalities of the same Government, there is no justification for ignoring the fact that they are separate legal and financial entities. It is noteworthy that a port trust is a self-financing organisation and it cannot stand responsible for acts of commission/omission of other arms of the Govt. As has been argued by the KOPT, the container in reference continues to occupy revenue earning space inside the port premises during the period of its detention. That being so, the KOPT is justified in demanding storage charges for that period.

The KOPT has cited an order passed by the Supreme Court in a case relating to the International Airports Authority of India to justify its action to levy storage charges even during the period of detention of container/cargo by other statutory agencies. Irrespective of the Supreme Court decision, as has already been pointed out, the principle followed by this Authority is that users are not to be made responsible for delays caused by the port. In this case, it has only been argued that the delay was caused not due to the fault of the Applicant; but, it is not established that it was due to the fault of the
That being so, there is no merit in the request of the Applicant for refund of the storage charges collected by the KOPT for the period of detention of his container by the Customs.

(viii). In the light of the analysis given in the preceding paragraphs, it is not necessary at this juncture to make any amendments to the existing Scale of Rates with reference to demurrage on container and cargo detained by the Customs.

(ix). The prayer is for waiver of demurrage charges for the period from 29 February 2000 to 13 December 2001. The Applicant has, however, made repeated requests that his case is to be decided on a priority basis since demurrage charges are accruing even now. This appears to be a request made to sensationalise the issue since the Customs have allowed on 13 December 2001 transhipment of the container. The Applicant cannot take a reasonable stand that he will clear the container only if the demurrage accrued is waived or ordered to be waived. In the absence of any interim order, it should have been for the Applicant to shift the container from the port premises even if it would have required remittance of payment to the KOPT under protest or subject to final outcome of this case. It is noteworthy that this Authority has not rendered any advice to the Applicant to keep the container in the KOPT premises beyond 13 December 2001 till settlement of this case.

9. In the result, and for the reasons given above, and based on a collective application of mind, this Authority reject the representation of M/s. Red Eagle Maritime Services (I) Pvt. Limited for waiver of demurrage charges raised by the KOPT for the period of detention of their container by the Customs.

( S. Sathyam )
Chairman