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TARIFF AUTHORITY FOR MAJOR PORTS

G.No. : 140

New Delhi, 4 September, 2005

NOTIFICATION

In exercise of the powers conferred under Section 48 of the Major Port Trust Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the proposal received from the Cochin Port Trust (COPT) for amendment in the Order passed by this Authority on 19 July 2000 relating to fixation of time limit for levy of storage charge on abandoned containers as in the Order appended hereto.

(A.L. Bongirwar)

Chairman

Tariff Authority for Major Ports
Case No. TAMP/70/2003-COPT

The Cochin Port Trust (COPT)

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Applicant

ORDER

(Passed on this 13th day of September 2005)

This case relates to a proposal received from the Cochin Port Trust (COPT) for an amendment to the Order No. TAMP/86/MISC passed by this Authority on 19 July 2000 prescribing a time limit for levy of storage charge on abandoned containers.

2.1. This Authority had initially passed an Order on 10 November 1999 prescribing a time limit of two months for levy of storage charge on abandoned FCL containers / Shipper owned containers.

2.2. Based on the requests received from some of the major ports to review this Order, this Authority had passed another Order on 19 July 2000 clarifying the various points raised by some of the major ports. By the said Order, this Authority had extended the time limit for levy of storage charge on abandoned containers to 75 days.

2.3. The relevant provisions applicable uniformly at all major ports/ private terminals for levy of storage charge on abandoned container are as follows:

“The storage charges on abandoned FCL containers/shipper owned containers shall be levied upto the date of receipt of intimation of abandonment in writing or 75 days from the date of landing of container, whichever is earlier subject to the following conditions:

- (i). *The consignee can issue a letter of abandonment at any time.*
- (ii). *If the consignee chooses not to issue such letter of abandonment, the container Agent/MLO can also issue abandonment letter subject to the condition that,*
 - (a). *the Line shall resume custody of container along with cargo and either take back it or remove it from the port premises; and*
 - (b). *the Line shall pay all port charges accrued on the cargo and container before resuming custody of the container.*
- (iii). *The container Agent/MLO shall observe the necessary formalities and bear the cost of transportation and destuffing. In case of their failure to take such action within the stipulated period, the storage charge on container shall be continued to be levied till such time all necessary actions are taken by the shipping lines for destuffing the cargo.*
- (iv). *Where the container is seized/confiscated by the Custom Authorities and the same cannot be destuffed within the prescribed time limit of 75 days, the storage charges will cease to apply from the date the Customs order release of the cargo subject to lines observing the necessary formalities and bearing the cost of transportation and destuffing. Otherwise, seized/confiscated containers should be removed by the Lines/consignee from the port premises to the Customs bonded area and in that case the storage charge shall cease to apply from the date of such removal.”*

2.4. The provisions mentioned above also appear in clause 5.8.3. of the tariff guidelines announced by the Government which were notified in the Gazette of India on 31 March 2005.

3.1. A reference was initially received from the Cochin Steamer Agents Association (CSAA) stating that the Cochin Port Trust did not comply with the said Order and continued to levy ground rent even beyond 75 days. The reference received from the CSAA was forwarded to the COPT for its comments.

3.2. In response, the COPT has clarified that if the abandoned cargo is not free for disposal for reasons stated, the port must not be insisted to de-stuff the cargo within the stipulated time period and to store it indefinitely. The port must be allowed to collect ground rent on such container beyond 75 days.

4.1. In this backdrop, the COPT has submitted a proposal requesting this Authority to make certain amendments to the Order dated 19 July 2000.

4.2. The COPT in support of its proposal has cited few cases where it could not destuff the containers within 75 days due to practical problems.

4.3. In view of the practical difficulty faced in implementing the TAMP Order as cited above, the COPT has proposed that the existing provision to destuff an abandoned container within 75 days from the date of landing of container should be made applicable only for the containers carrying cargo which is free from all angles like Customs investigation, DRI, Environmental clearance, PHO Clearance, Plant and Quarantine Clearance, litigation, SIIB, etc.

4.4. The COPT has also pointed out that the cargo which cannot be destuffed owing to litigation, statutory clearance, perishable or hazardous in nature and which warrants storage in containers only till such time they are disposed off due to the nature of the cargo, must not come under the purview of the TAMP's Order dated 19 July 2000.

5.1. A copy of the COPT proposal was forwarded to the concerned port users / representative bodies of port users for their comments. The comments received from the various users/representative bodies of port users were forwarded to the COPT as feed-back information.

5.2. The COPT has responded on the comments furnished by the SCI.

6. A joint hearing in this case was held on 9 September 2004 at the COPT premises. At the joint hearing, the COPT and the concerned users made their submissions.

7.1 As decided at the joint hearing, the COPT was advised to study the legal position relating to the responsibilities of carriers and 'bailee' as envisaged in the Carriage of Goods Act, the MPT Act and Customs Act and to furnish a detailed note including case laws on the subject. The CSLA and SCI was also advised to independently undertake such an analysis and furnish their comments.

7.2. In response, Shipping Corporation of India and representatives of the Container Shipping Lines Association i.e. Greenways Shipping Agencies Pvt. Limited and APL India Private Limited have furnished further written submissions on the COPT proposal.

7.3. The COPT has made further written submissions with reference to the point made at the joint hearing. Some of the main points are summarised below:

- (i). Neither the Major Port Trust MPT Act, 1963 nor the Customs Act, 1962 or the Indian Carriage of Goods by Sea Act, 1925 or the Carriers Act, 1865 cast any responsibility on any agency to de-stuff the cargo from unclaimed / abandoned or uncleared containers. The provisions are available in the MPT Act to sell the cargo which is abandoned or uncleared.

In the absence of any express provisions in the relevant Acts, the practice followed in the port sector should prevail.

- (ii). As per the contract for Carriage of Goods in containers by the lines in FCL containers transported on FCL / FCL basis, the line is obliged to deliver the

cargo with containers to the consignee for house destuffing in the importers premises. Accordingly, 95% of the loaded import boxes in Cochin Port on FCL / FCL basis are delivered by the lines to the consignee's agents at container yard. Only FCL/LCL or LCL/LCL boxes are destuffed at the port CFS on request of the lines and at such times containers are taken to the private CFS also for destuffing and delivery.

- (iii). In the terminals managed by private operators in Tuticorin Port, Jawaharlal Nehru Port and Chennai port, the lines move the containers from the terminal to the private CFS irrespective of whether there is a claimant for the cargo or not and the terminal do not take the responsibility for destuffing the containers in their premises. Similarly in this case and other major ports the lines should also take the responsibility of moving the container out of the terminal to the port's CFS or the private CFS, and arrange for de-stuffing or delivery of the cargo with container if required.
- (iv). None of the ports or private terminals make arrangements for destuffing and safe keeping of the perishable and reefer cargo items which are required to be retained in the container itself till such time they are delivered or disposed.
- (v). If a conventional vessel brings any cargo which has triggered a dispute, before discharge of the cargo or found to be hazardous in nature or the cargo on discharge cannot be stored in the port premises, such cargo will not be permitted to discharge from the vessel and the consignee will be asked to take direct delivery of the cargo from the vessel. If there is any dispute between the consignee and the carrier, the vessel will be asked to wait at outer roads till the dispute is resolved. If the vessel wants to stay at berth during this period it will be subject to availability of berth and on payment of berth hire charges. If the cargo is likely to be abandoned in the port premises, the vessel will not be permitted to discharge such cargo and will have to find a suitable alternative.
- (vi). The delivery orders of synthetic rags were not issued by the lines to the consignees on account certain payments demanded from the consignees. In this case the line is holding the cargo and also holding the lien on the cargo and hence are to be considered as the owners of the cargo till such time the delivery order is issued; and, the owner of the cargo is liable to pay the port charges for the storage of container in the port container yard. If the line issues the delivery order and the cargo is not cleared by the consignee and abandoned subsequently, the port will be free to auction such cargo and on such instances port will not charge the ground rent beyond 75 days nor would it refuse to destuff the container at the port premises.
- (vii). In case of seizer or confiscation of cargo, the respective Customs authority has to remove the cargo with container to their premises and get the cargo destuffed and release the container to the lines. The lines are insisting the port trust to destuff such containers and also release the container on the strength of TAMP's notification, which is not fair.
- (viii). With reference to many court cases filed by the Steamer Agents against the Port Trust on such instances of non-destuffing of containers by the port trust due to the very nature of cargo the court orders have been in favour of the port. (In support of its claim, the COPT has also forwarded copies of the Orders passed by the respective Hon'ble Courts with reference to some of the Writ Petitions filed by different Shipping agents). In one of the cases relating non-destuffing of furnace oil barriers since the cargo was not found to be in conformity to the standards laid down by the Pollution Control Board, the Court had ordered the line to re-ship the cargo to the port of origin considering the cargo as a hazardous waste.

- (ix). The Authority's Order on abandoned FCL container does not categorically deal about its application in respect of perishable and hazardous cargo requiring environmental clearance, PHO clearance and PQ clearance.

In view of the above submissions, it has requested this Authority to amend its Order by incorporating the following provisions:

- (a). The cargo items such as hazardous waste, perishable food items, etc., which cannot be destuffed in the port premises due to the very nature of cargo, especially being FCL, the port trust shall not be insisted upon to destuff the containers till such time they are disposed of or removed by the shipping line or the consignee from the port premises.
- (b). The cargo items brought into the country in contravention of the law of the land subjected to investigation by DRI, Customs, Environmental Agencies and restricted by PHO, and Plant Quarantine officials, shall also be not be insisted upon to be destuffed till such time they are cleared or disposed of from the port's premises.

7.4. The COPT on our request has also furnished the details of abandoned containers lying in the port premises since 1998 which could not be disposed off. The COPT has also furnished copies of the Orders passed by the Hon'ble High Court of Kerala in some of the writ petitions filed by different shipping agents.

8. In the meanwhile, a reference was received from Federation of Port Users (FPU), Kandla pointing out that the Customs will not permit either lines or agents to take custody of cargo unless Customs documents under Sections 17, 18, 46 and 47 are filed. Hence, it has contended that even if the lines desire they cannot remove cargo from the port premises. A copy of this letter was forwarded to the KPT requesting to furnish factual position of all such abandoned containers lying in the port premises which could not be cleared by the port along with reasons for not disposing them of so far. We have, however, not received any response from the KPT in this regard.

9. In view of some legal issues raised by the Port Trust and users, a legal opinion from a Sr. Counsel on the matter in reference was obtained. The salient points of the legal opinion received are given below:

- (i). The TAMP has the authority to lay down, in addition to the tariff, "the conditions under which the services will be provided by the Port" and "the Statement of Conditions" can include limitations to levy or recover the laid down charges.
- (ii). The powers available under Sec. 42 to a port trust to undertake the landing and shipping of cargo should be interpreted as an obligation on it to undertake cargo operations.
- (iii). In view of Sec. 42 (6), when a vessel comes and requests the Port Authority to take charge of the goods, the Port will have to take charge of them as a bailee.
- (iv). There is no justification for a different treatment to the cargo that is coming in containers. Unless the MPT Act is amended and appropriate provisions are made for containers, the Ports are bound to take charge of the goods.
- (v). Once a container is discharged in a port, there is no provision in the Major Port Trusts Act, or any other law, for the ship-owners on their own to destuff the containers or to sell, auction or appropriate the cargo, in any manner whatsoever, and the Port Trusts alone is authorised to deal with the cargo under Sections 61 and 62 of the said Act.
- (vi). There is no legal provisions for the line to take back the container with the cargo, and take it away. The cargo can be taken away only if the Customs grant exports permissions.

- (vii). It is the obligation of the port to destuff the containers, when requested so by the steamer agent or the consignee, as the case may be, and take delivery of the cargo and perform services under Section 42 of the Major Port Trusts Act, and deal with it under Sections 61 and 62 of the Act.
- (viii). In the circumstances, the port can levy ground rent only from the date of landing and, after the free period, until such time the ship-owner or his agent applies to the Port to take charge of the goods under Section 42(2) of the Major Port Trusts Act.
- (ix). There are legal provisions for the vessel to file an Import General Manifest (IGM) within 24 hours after the arrival of the vessel, disclosing the cargo under the Customs Act. The vessel cannot proceed until 'Entry Inwards' is granted by an appropriate officer and this document is valid authority for the destuffing of the containers. No other permission is required to be obtained under the Customs Act to destuff the containers.
- (x). The port cannot make an excuse that it has no space or that containers occupy less space and, hence may be used as storing vessels rather than destuffing the same. This is contrary to the mandatory provisions of Section 42 of the MPT Act. The port has to provide the service to the ship by accepting the cargo, which is unloaded there.
- (xi).
 - (a) If the containers are dumped on the port by a steamer agent and he does not take any further action on it but, keeps quiet, the port is entitled to continue to charge ground rent till such time the steamer agent/consignee approaches for destuffing the containers, or any further instructions are given by the steamer agent. Until such time that the ship-owner gives a delivery order in discharge of the original Bills of Lading, the right to deal with the cargo is on the ship-owner.
 - (b). Once the steamer agent confirms to the port that either the importer has abandoned the cargo or the importer, by his conduct of not taking delivery order, has abandoned the cargo, the containers should be destuffed and released to the line; and the ground-rent charges may be levied only up to the date of notice and a reasonable period of 7 days thereafter.
 - (c). If the consignee has obtained the delivery order and approaches the port for any services, the relationship of a bailor and bailee between the port and the ship-owner terminates and, after that, it is entirely for the consignee, or whoever has dealt with the port, to make all payments of Port charges.
 - (d). The question of seizure of the containers by the Customs would not arise at all unless the Customs had a case against the shipping line, that they have committed any act or omission which would make the containers liable for confiscation. In the absence of that, the confiscation can only be that of the cargo, and not of the containers. Once the port accepts that it has an obligation to destuff and take delivery of the cargo, there is no question about levy of ground rent charges unless of course the ship owners desire to park their empty containers in port premises.
 - (e). Once the goods are destuffed and taken charge by the port, the port has an obligation to dispose of the cargo, if not cleared within a period of 6 months, and normal consequences under Section 61 and 62 will follow. If delivery order is issued by the steamer agents or if the consignees approached the port to render services to the cargo,

nothing would be payable by the vessel. In cases where delivery order is not issued and the umbilical cord between the cargo and the ship-owner is not disconnected, the ship-owner would continue to be liable for payment of demurrage. This was held in the case of *the Trustees of the Port of Madras vs. K.P.V. Sheikh Mohd. Rowther & Co. Pvt. Ltd.*, and was also confirmed by the Supreme Court.

10. The proceedings relating to consultation in this case are available on record at the office of this Authority. An excerpt of the comments received and arguments made by the concerned parties will be sent separately to the relevant parties. These details are also available at our website <http://tariffauthority.gov.in>

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

- (i). The Order dated 19 July 2000 passed by this Authority is for common adoption by all the major port trusts and private terminals. The prescriptions made therein have been suitably included as statement of conditions in the respective Scale of Rates of those major port trusts and private terminal operators in whose cases general review was done and revised Scale of Rates was notified subsequent to July 2000. As a matter of fact, these provisions are included in the existing Scale of Rates of the Cochin Port Trust. In terms of the tariff setting arrangement envisaged in the Major Port Trusts Act, a port trust is bound by the Scale of Rates and the statement of conditions prescribed by this Authority. One of the complaints made in this proceeding by the users is that the COPT has not followed the Order issued by this Authority. The Statute does not provide any explicit power to this Authority to enforce its Order. The remedy for the alleged action of the COPT should, therefore, be sought in a different appropriate forum.
- (ii). As mentioned earlier, the principles set in this Authority's Order of 2000 are included in the Scale of Rates of many of the major port trusts and private terminal operators. Further, the issue of imposition of time limit of 75 days for levy of storage charges on abandoned containers was one of the issues taken up in consultation process initiated in the year 2003 for the purpose of review of the (then) prevailing tariff guidelines. This exercise has culminated in the Government issuing a set of revised tariff guidelines in March 2005 as policy direction under section 111 of the MPT Act. The relevant provisions of the Order of July 2000 have been included in the revised tariff guidelines under clause No 5.8.3. Since the revised guidelines constitute the Government policy, the limited exercise now is to see whether there is any case for suggesting to the Government to modify the relevant tariff guidelines in view of the proposal made by the COPT.
- (iii). Both the COPT and the users have pointed out many on-going litigations on the issue of levy of storage charges on long standing containers at COPT. By way of abundant caution, it is clarified that the proceeding before this Authority should not be seen as an action to decide such matters in litigation. Those cases are to be governed by the decisions of the Hon'ble Courts. As mentioned earlier, this proceeding is only to see whether any modification is necessary in the revised tariff guidelines relating to storage charges of abandoned containers.
- (iv). The Order of July 2000 and the relevant revised tariff guidelines of 2005 concern with limiting the levy of storage charges. This aspect is not fully appreciated by the COPT which is evident from its proposal which requests that the existing provision to de-stuff an abandoned container within 75 days from the date of landing should not be made applicable in the specified cases. The Order of this Authority is not concerned with the physical activity of de-stuffing and returning the empty container; it only imposes a restriction on the

length of period for which storage charges of containers can be levied by a port operator.

- (v). The Order of July 2000 prescribes a time limit for levy of storage charges on container. It does not put any restriction on levy of such charges on containerised cargo. It has to be recognised that the container generally remains the property of the carrier and the containerised cargo belongs to the consignee. The intention of prescribing the time limit of storage cargo is to induce the port trust to take action to dispose of the goods according to law after the stipulated period so that the lines can get back containers which may have been held up due to the problems attributable to containerised cargo.
- (vi). Ideally, the container should be returned to the lines within the stipulated period after de-stuffing. The various peculiarities associated with international trade do not always permit practising of such ideal course. It needs no explanation to understand that the abandoned containers cause loss to the ports as well as the shipping lines which brought them. By prescribing a time limit, the intention of this Authority was to minimise the loss on the shipping lines after allowing a reasonable time to the port trusts to act on the containerised cargo in accordance with Law. It is noteworthy that there is no restriction on levy of storage charges on the containerised cargo. If storage charges are continued to be levied for a very long period on the ground that the containerised cargo could not be disposed of, the ports may be saddled with containers abandoned by the shipping lines in addition to the abandoned cargo. This point has been brought out clearly by the Shipping Corporation of India highlighting the cost of procurement of new containers.
- (vii). The COPT has argued about lack of space and pointed out that neither the MPT Act nor the Carriage of Goods by Sea Act cast any responsibility on the port to de-stuff cargo from containers. In this connection, the users have made very valid argument. Having admitted a container, the port trust cannot plead lack of space as a reason for indefinitely holding the container and require it to pay at that. The legal opinion obtained also supports this position. In any case, the Order of 2000 does not require a port to mandatorily de-stuff the container. The Order, as explained earlier, puts a restriction on levy of storage charges only upto the stipulated time limit.
- (viii). The COPT has brought out problems faced by it in de-stuffing and storing hazardous wastes, perishable goods, etc. After accepting such containers for discharge, the port trust cannot perhaps reasonably raise this issue. It is always open for the port trust to intimate the Trade and Lines in advance about the cargo it will not admit.
- (ix). The cases suggested by the COPT to be excluded from the time limit prescribed by this Authority are those which generally pose problems for the ports to de-stuff the containers. As pointed out by many of the users, in majority of such cases the problem arises because of the deficiency on part of the consignees. As pointed out by the Cochin Steamers Agents Association, abandonment of container by the consignee usually takes place for any of the reasons involving litigations, customs confiscation, DRI exemption, etc., which are now sought to be excluded from July 2000 Order. As pointed out by MANSA, the concerned Shipping Lines would not have been asked to bear the storage cost of cargo, if a break bulk cargo brought in by them had deficiency and subjected to litigation, investigation etc. That being so, there is no reason for requiring the Shipping Lines to bear such cost because the cargo was carried in containers owned by Lines.

The CSLA has pointed out the procedure followed by JNPT for disposal of abandoned cargo. It has been pointed out that the collection of ground rent of container is restricted to 75 days even if the containerised cargo is disposed of

after six months in some cases. This is precisely the objective of the Order of this Authority. There is no reason why the COPT cannot follow such a method for disposal of cargo.

- (x). Since the port and the users appear to be interpreting the July 2000 Order as a direction to de-stuff a container within 75 days of landing, it is necessary to explain the correct position in this regard. The Tariff Authority is empowered to prescribe the rates for the services rendered/facilities provided and conditions under which such services are to be provided by the port. Whether a port should allow de-stuffing of particular type of container is an operational matter to be decided in line with the legal provisions dealing with the functions of a port trust. This Authority is not inclined to analyse and interpret the provisions of the Major Port Trust Act in this regard. Nevertheless, this Authority is competent to prescribe that the storage charges should be limited to the prescribed time limit even if relevant container is not de-stuffed.
- (xi). Some of the users have raised certain issues on the charges leviable for transportation and de-stuffing. There is no ambiguity in the Order of this Authority; nor any valid reason is cited for modifying the prescription made by this Authority. The Federation of Port Users of Kandla have made a point about the lines taking back custody of container. In the circumstance explained in the Order, it is an option for the Lines to take back the containers from the Port by resuming its custody. This is of course subject to the rules and regulations of other enforcing agencies.
- (xii). Even though the COPT has raised this proposal, it no longer operates the container terminal at Cochin. The Order of July 2000 is applicable at all the major port trusts and private terminals. No other port has reported any problems in implementing the Order of July 2000. Besides, for the reasons explained earlier, there is no merit in accepting the proposal of COPT. That being so, there is no valid reasons for this Authority to suggest any amendment in the relevant provisions of the revised tariff guidelines issued by the Government.

12. In the result, and for the reasons given above, and based on the collective application of mind, this Authority finds no justification to accept the modifications proposed by the COPT to the Order dated 19 July 2000. Consequently, there will be no change in the corresponding conditionalities prescribed in the existing Scale of Rates of COPT. However, the discussions in the Order and legal opinion obtained and quoted in this Order may give useful guidelines to COPT.

(A.L. Bongirwar)
Chairman

Summary of the comments received from the port users / different user organisations and arguments made in this case during the joint hearing before the Authority

F.No. TAMP/70/2003 – COPT - Proposal received from the Cochin Port Trust for amendment to the Order passed by the Authority relating to fixation of time limit for levy of storage charge on abandoned containers.

1. The comments received from the port users / representative bodies of port users are summarised below:

Cochin Custom House Agents' Association (CCHAA)

- (i). It agreed with the proposal of COPT for an amendment in the TAMP Order in view of various practical difficulties faced in its implementation.
- (ii). It has suggested that as and when the Customs is issuing detention certificate, the same has to be accepted by the port and no ground rent / demurrage should be charged in such cases. In other cases ground rent should not be charged beyond 75 days.

The Shipping Corporation of India Limited (SCI)

- (i). The Tuticorin and Cochin ports are not following the TAMP's order and are continuing to charge ground rents beyond 75 days till the time the cargo is auctioned.
- (ii). Once the cargo is discharged in the port, the port as a custodian is obliged to store it at a suitable place till it is auctioned or destroyed or cleared. The excuse that it does not have sufficient storage space does not give a right to the port to use the lines' containers as storage space for as long as it wants.
- (iii). Apart from using the Lines containers as warehouse, the port continues to charge ground rent for storage of the container. In fact, the port should pay the shipping lines rental for the containers so used and not charge the ground rent to the line.
- (iv). It is not the fault of shipping lines that if the cargo is not cleared by the Customs or other authorities. The port must abide by the TAMP's Order. The port must make all arrangements and release the empty containers to the lines within 75 days.
- (v). If the restriction of 75 days is removed, the ports will cease to put in efforts for releasing containers to the lines as the accruing ground rent will become a source of revenue for them.
- (vi). The request of COPT for amendment in the existing provision should not be considered. The TAMP is also requested to issue strict instructions to the ports to comply with the guidelines already issued on this matter.

Cochin Steamer Agents' Association (CSAA)

- (i). The TAMP Order dated 19 July 2000 intends the port to return containers to the lines after the stipulated time limits, as they need not suffer for the deficiencies on the part of the consignees. The proposal of COPT is against the very spirit of this Order.

- (ii). Any cargo which is abandoned will inevitably involve litigation, Customs confiscation, SIIB investigation, DRI, Environmental clearance, PHO clearance, Plant Quarantine clearance etc., precisely being the reasons for cargoes not being cleared.
- (iii). As per the instant proposal, the port would be virtually entitled to continue to levy ground rent from the lines for utilisation of the containers for indefinite storage of cargoes which cannot be cleared for the stated reasons none of which is arising due to fault of shipping lines. This is totally unacceptable and against basic natural justice.
- (iv). It has offered the following comments with reference to the examples quoted by the COPT for non-clearance of cargo within the stipulated time:
 - (a). The import shipment of dates was abandoned by the consignee due to a dispute with the Shipper. There was no violation of Customs Rules involved. As per Section 48 of the Customs Act 1962, for all goods imported for home consumption and not cleared within 30 days, the port which is appointed as bailee by the Cochin Customs Station, is supposed to give due notice to the importer and, thereafter, proceed with auction under direction of the Customs. The port never adheres to this statutory requirement. If the port is not in position to maintain a suitable storage facility for the cargo and the same being perishable is required to remain in the container itself as reported by the port it is not understood how can the port penalize the Shipping Line by continuing to debit container ground rent charges.
 - (b). In the second case, where after the containers were duly brought back and discharged in the port premises, the port has forcibly debited ground rent charges to the shipping line, thus forcing the shipping lines to seek legal means and obtain stay.
 - (c). In one another case relating to 55 X 40' containers lying un-stuffed and uncleared in the port area for more than 5 years, the version provided by the port seeks to camouflage some of the facts. The statement made by the port that the Hon'ble High Court disposed off the case by ordering disposal of cargo by auction and that Steamer Agents should pay the port charges if they want their containers back, is not true. The judgement of the Single Bench was rather contrary wherein for some shipping lines it was ordered that no further ground rent need to be paid, whereas in others, it was not. As a result all parties to the dispute, including port and Customs, filed a revision petition before a Divisional Bench. The hearings are yet to be concluded, though the Divisional Bench had passed an interim order on the Port and Customs to proceed with destuffing and auctioning of containers. The port has till date only de-stuffed three containers blaming the Customs for non co-operation.
- (v). It would be pertinent to note that in case of similar instances of uncleared goods at other ports, the cargo have been de-stuffed / disposed of by port/ Customs. The reasons, therefore, for not adopting the same procedure in Cochin Port is not clear.
- (vi). If the COPT do not have space to de-stuff abandon / uncleared import cargoes, which have arisen due to no fault whatsoever of shipping lines, they have no moral or legal right to insist the shipping lines to forcibly bear container ground rent charges.
- (vii). TAMP may outright reject the COPT proposal and direct the COPT to implement the TAMP Order in toto without any exceptions.

- (i). The TAMP Order to de-stuff all abandoned cargo in containers within 75 days from the date of landing and to release the empty containers to the Shipping Lines within this time limit will put the COPT to practical difficulties unless the container containing the cargo are free from all angles like Customs investigation, DRI, Environmental Clearance, Litigation, etc.
- (ii). In cases where the Customs issues a Detention Certificate, the port must accept it and hence forth in such case no ground rent/ demurrage must be levied.

Mumbai And Nhava-Sheva Ship-Agents' Association (MANSA)

The MANSA has obtained this proposal from its sister organisation Cochin Steamer Agent's Association and has requested to consider its following comments since the matter relating to levy of storage charges on abandoned containers is applicable for all major ports.

- (i). Container is a standardised unit specifically drafted by shipping Lines for carrying cargo on a continuous basis. Under no circumstances these containers should be detained. It amounts to a part of ship itself being held back for meeting narrow interest of persons/s who is not bearing the cost of the container and also not concerned about the larger purpose for which the unit is inducted.
- (ii). While COPT is quoting reasons such as SIIB investigation, Customs confiscation, DRI etc., it is interesting to note that the port has no problem in handling hazardous cargo. Each port has got an area of warehouse earmarked for storage of hazardous cargo. If hazardous cargo can be stored separately by incorporating the prescribed safety measures only because they are a segment of the cargo which arrive at the Port, there is no reason why similar arrangements cannot be made for storage of such detained cargo since detention / abandonment of a segment of cargo, normally unspecified, is also the order of the day.
- (iii). In case of break-bulk cargo detained by Customs or by other Authorities, all ports offer facility for storage of cargo in a segregated/secured area. The reasons, therefore, for not providing storage space for abandoned cargoes arriving in containers are not explained. The port considers containers as an easy moveable storage space for it does not have to pay, instead, can earn revenue.
- (iv). The port states that it can dispose cargo only after 60 days. There is a general perception that while Customs Act permits disposal after 30 days in case of non-delivery, the Major Port Trust permit same only after 60 days.

It is relevant to mention that as per the MPT Act, the port is duty bound to notify consignee and commence disposal immediately after expiry of 30 days. Only, in case where someone has made the payment of cargo, the port cannot proceed on disposal of cargo before 60 days. In view of the specific provision in the MPT Act, the port can commence disposal of the cargo after expiry of 30 days and can complete disposal in the next 30 days or within 60 days of landing of same. There is no reason, therefore, to keep cargo in container indefinitely.

- (v). Any delay beyond 30 days for disposal of cargo is a reflection of inefficiency of port's administration and the port should be made to pay the lines for converting the containers as a warehouse for storing such cargo.
- (vi). It is surprising that major port such as Cochin Port even after nearly a century of its existence has not found it necessary to make arrangements for storage of

such abandoned cargoes. The Authority may first question the functioning of the port itself without such basic pre-requisites.

- (vii). In this backdrop it has submitted not to accept the COPT proposal. It has also requested that in case of any detention of container beyond 75 days without de-vanning cargo, the port should pay the shipping lines for using its containers as defacto warehouse at the rate collected from the lines.

2. Federation of Freight Forwarders Association of India (FFAI) has informed that it has requested its member (CCHAA) to furnish the comments on the proposal. The same has been received.

3. Comments received from the users were forwarded to the COPT as feed back information / comments. The COPT has responded only on the comments furnished by the SCI. The main point are summarised below:

On comments made by Shipping Corporation of India Limited

(i). The SCI appears to have presumed that its proposal to amend the TAMP Order extends to all long standing containers which is not correct. It has no objection in complying with the TAMP Order. Abandoned cargo in containers are de-stuffed in normal course in order to arrange for auction of cargo as per the Section 61 and 62 of the Major Port Trusts Act.

4. A joint hearing in this case was held on 9 September 2004 at the COPT premises. At the joint hearing, the following submissions were made:

The Cochin Port Trust

- (i). Our proposal is to exempt containers which could not be de-stuffed for want of clearance from Customs, PHO, SIIB, DRI, etc.,
- (ii). The provision approved in the revised Scale of Rates in 2004 largely covers our proposal with reference to detention by Customs.
- (iii). Containers lie in the terminal at the risk and responsibility of Lines. Stuffing / de-stuffing can taken place only at CFSs.
- (iv). We have created container handling facilities on assumption that containers would be cleared within certain dwell time. We cannot have indefinite storage space.
- (v). We will examine the legal position and revert to TAMP.
- (vi). We are taking sufficient action to comply with Court direction in one of the case (referred by the CSAA)
- (vii). It is not for maximizing our revenue. Our storage space is limited. If we keep the boxes, it will be at the cost of normal import-export containers.
- (viii). Even though Customs Act stipulates 30 days, beyond which the port as a bailee can proceed with auction, the relevant Gazette Notification for sale takes at least 3 months. Please recognise the practical difficulties.

Cochin Steamer Agents' Association

- (i). The intention of TAMP Order is to return the containers to the lines who do not need to suffer for the deficiencies of cargo. The proposal of COPT is against the spirit of the TAMP Order.
- (ii). If we bring in any banned cargo we are responsible. Not in any other cases.

- (iii). Section 48 of Customs Act says unclear cargo can be auctioned after 30 days. Port should act accordingly.
- (iv). Customs do not seize containers. They seize only cargo. Our containers need not be held up for this.
- (v). Our containers are used as storage space by port. Paradoxically, we are asked to pay for that.
- (vi). Even after a court verdict to port in one case, the port and Customs have not taken any action to comply with the order for de-stuffing. They face contempt of Court proceedings.

Container Shipping Lines Association

- (i). We will send the relevant literature / legislation / Govt. Orders in this regard.
- (ii). If the port does not de-stuff they earn revenue. The port, therefore, does not like to de-stuff.
- (iii). The Customs Act casts a responsibility on port as custodian. They should discharge their legal responsibility.

Shipping Corporation of India Limited

- (i). The TAMP Order authorises the lines to resume custody or wait till stipulated time limit.
- (ii). If the same cargo comes in break bulk, the port holds cargo owners responsible. The same position applies in containers also.

Indian Chamber of Commerce & Industry

- (i). If cargo is not cleared from all angles, the port cannot clear the container.

Cochin Custom House Agents' Association

- (i). Collection of storage charges should be restricted to 35 days.

5. As decided at the joint hearing, the COPT was advised to study the legal position relating to the responsibilities of carriers and 'bailee' as envisaged in the Carriage of Goods Act, the MPT Act and Customs Act and to furnish a detailed note including case laws on the subject. The CSLA and SCI was also advised to independently undertake such an analysis and furnish their comments.

6. In response, Shipping Corporation of India and representatives of the Container Shipping Lines Association i.e. Greenways Shipping Agencies Pvt. Limited and APL India Private Limited have furnished further written submissions on the COPT proposal. Some of the main points made by them are summarised below:

Container Shipping Line Association

- (i). Section 48 of the Customs Act expressly makes it clear and mandatory for the custodian to dispose off or warehouse the goods after the expiry of 30 days from the date of unloading. Hence it is for the port to dispose off or warehouse the cargo immediately upon the expiry of 30 days and recover it's dues after complying with the procedural requirements prescribed in the act.
- (ii). The port cannot debit the liner or its agent for ground rent for its own errors, omissions, commissions or lack of efficiency.

- (iii). The port is conveniently using the carrier's container as a moveable warehouse and yet penalizing the latter with punitive ground rent charges. In short, the port should be made to pay for using the lines containers as warehouse. If this system is evolved accumulation of uncleared cargo will come down drastically and the valuable and useful space at ports and terminals could be effectively used for transit of cargo.
- (iv). It has quoted the example of Jawaharlal Nehru Port Trust (JNPT), where it does not have enough space and lot of uncleared / abandoned cargo are sold directly from the containers. Collection of ground rent is restricted to 75 days only even if cargo is disposed off after six months in some cases.
- (v). If Cochin port is unable to de-stuff abandoned / uncleared cargo due to its own problems like space shortage, delay in taking Customs permissions, etc. but due to no fault whatsoever of the carriers, the port has no moral or legal right to insist levy of ground rent charges from the carriers.

The Shipping Corporation of India

- (i). The TAMP Order was issued in the right spirit recognising the importance of early release of containers to the lines.
- (ii). The Order is clear in limiting levy of storage charge maximum upto 75 days on abandoned containers whether letter of abandonment is received or not. It does not qualify that this Order will not apply to Customs / DRI seized containers, etc. Some of the major ports are not implementing the Order specifically when they are not able to auction the goods or cannot find space for storage of cargo. This is total violation of TAMP Order.
- (iii). The ports are not exercising the powers vested under Section 61 and 62 of the MPT Act. Instead, the port holds the containers and charge ground rent so that they can increase the revenue by way of ground rent charges. Exception may be given only in case the consignee gives an undertaking in writing that cargo should not be destuffed and auctioned and undertakes the responsibility of all the charges applicable to the port. In such cases, the port may take deposit from consignee for all likely dues and delivery should be given only against lines delivery order.
- (iv). The Order gives an option to the line to issue letter of abandonment subject to line taking custody of container along with cargo after paying all port charges. It may be noted that while the MPT Act empowers the port to treat the cargo as abandoned, a line can issue letter of abandonment only after it is sure that the consignee is not going to come forward later to claim delivery. This is a very difficult proposition. The TAMP has also recognised this position in its Order.

The instances where consignees issue letter of abandonment are rare. Even if the line issues letter of abandonment, it will be only to help the port to expedite the procedure of auction and decogestion. It is, therefore, not clear why the lines should be charged ground rent till the date of issue of the letter of abandonment and removal of container from port premises.

- (v). The cost of new container is around USD 1600 approximately. If the ground rent payable by the line exceeds this amount, line will have no benefit if the container is released only after payment of an amount exceeding USD 1600.
- (vi). The TAMP Order further says that in absence of abandonment letter either from consignee or the line, subject to conditions above, a line has no other option to wait till expiry of 75 days for the port to act under Section 61 of MPT Act. This makes it very clear that the issue of letter of abandonment has

relevance only when it is issued within 75 days of landing of goods. After 75 days, the ports have to act and release the containers. This position may be clarified to the port.

- (vii). The Order states that transportation of containers will be done by the port at the cost and responsibility of lines and port can arrange for destuffing against a specific application of line at lines cost. In this regard, it is clarified that the issue of transportation of laden containers is applicable only if the lines take custody of containers. In case the lines do not take custody, the costs of intra port transport and destuffing should be borne by the port and they can recover the amount from the consignee or from auction proceeds.
- (viii). It is for the port to allocate space/ godown for destuffing the containers and storage of cargo. The lines cannot destuff the containers if no space is allotted or made available by the port. The port is responsible for destuffing and auction of abandoned containers. If the line is made responsible for destuffing then the TAMP may issue a clarification that lines can be held liable for ground rent if they do not arrange destuffing of abandoned containers only in cases when the port provides storage space within 75 days of landing of container.
- (ix). The Order authorizes lines to look for ways and means to take back their containers without waiting for expiry of stipulated time. This means that lines can take action only before expiry of 75 days and after 75 days the ports are obliged to release the containers to the lines after destuffing. If the lines are not able to re-export the containers and have to shift them to off dock CFS, they will be liable for all ground rent and other Customs procedures as well as auction of the cargo to get release of the containers. More over, any CFS who knows that cargo has been abandoned will not be willing to store such containers. Hence this is very expensive and not a viable option. The ground rent on destuffed containers may recover from the auction proceeds. The container should be treated only as a packaging unit and like in case of break bulk, all charges may be applied on the cargo and not on the box.
- (x). The Order states that storage charges will cease to apply from the date of the Customs authorities order release of cargo. This may re-worded to state that storage charges will cease to apply on the lines, from the date the Customs authorities order seizure or detention of cargo. The lines are not at fault if the Customs seize the cargo. The liability is of consignee or the Authority who has ordered the seizure. Since the order is not clear, many ports like Cochin, continue to apply the ground rent on seized containers.
- (xi). In the light of the various observations made herein, the TAMP may modify its order and clarify explicitly that lines should not be charged ground rent beyond 75 days under all circumstances in case of both seized / abandoned containers.

7. The COPT on our request has also furnished the details of abandoned containers lying in the port premises since 1998 which could not be disposed off. The COPT has also furnished copies of the Orders passed by the Hon'ble High Court with reference to the writ petitions filed by the various shipping agents. The salient findings of the judgment in some of these cases are as follows:

- (i). Judgment by the Single bench of Hon'ble High Court of Kerala on 16 September 2002 filed by M/s. Contfreight Shipping Agency India Pvt. Ltd., in the case relating to 55 containers of woolen / synthetic rags not destuffed by the port
 - The Cochin Port Trust is entitled to recover from the steamer agent the demurrage and other dues for the period until the delivery order is issued by the steamer agent to the consignee.

- Where the delivery Order is given to the consignee, but is withheld or withdrawn thereafter disabling the consignee from getting delivery of the goods, the position is the same as though the delivery order is not issued at all and the liability to the port will be that of the steamer agent.
- The steamer agent/ consignee cannot get any mandamus against steps taken to realize dues even by sale of cargo as long as there is failure to pay the entire amounts due to COPT by way of demurrage, port charges etc. The COPT can dispose the cargo after Customs appraisal in a phased manner.

Aggrieved by the decision the Petitioner approached the division bench of the Hon'ble high Court of Kerala. The Court has passed interim order dated 3 December 2002 stating that it was not inclined to stay the operation of the impugned judgment. The COPT was directed to expedite the sale of the goods by auction as directed in the judgment and to keep the sale proceeds in a separate account for being adjusted in accordance with the decision in the appeal and also directed not to take any steps for recovery of ground rent from the appellant on account of the containers, pending disposal of the appeal.

In the subsequent judgment of 16 December 2003 the Hon'ble High Court has directed that the applicants will not be entitled to sell the empty containers belonging to the COPT and that it will have to release the empty containers to the COPT in compliance with the directions contained in the order dated 3 December 2002. The applicants may engage a surveyor for assessing the value of the empty containers in the presence of the representative of the COPT before releasing the containers and before taking delivery of the empty containers, the COPT shall execute a bond undertaking to pay the value of the containers as assessed by the surveyor, if ultimately it is found necessary to do so.

- (ii). In one another case relating to import of furnace oil, the sample of furnace oil was drawn and was sent to Delhi for analytical test. During transit, the bottle of furnace oil got broken. The Cochin Customs further did not allow drawal of sample for analytical test. Finally the party could not take delivery of the cargo. Here also the cargo was not abandoned initially. The Shipping line M/s. APL approached the Hon'ble Court to stop the collection of container detention charges by the Port. In this case also the port is in no way responsible for the detention of containers. Since the cargo was furnace oil, the port could not de-stuff the container, as the Customs will not allow the port to dispose off the cargo. The Court didn't stay the collection of ground rent charges by the port and the case is still pending.

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