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TARIFF AUTHORITY FOR MAJOR PORTS

G. No. : 67

New Delhi, 19 April, 2006

NOTIFICATION

In exercise of the powers conferred by Section 48 of the Major Port Trust Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby reviews its earlier Order dated 22 July 2005 relating to the Scale of Rates of Nhava-Sheva International Container Terminal Limited as in the Order appended hereto.

(A.L. Bongirwar)
Chairman

Tariff Authority for Major Ports
Case No. TAMP/15/2005 - NSICT

ORDER

(Passed on this 7th day of March 2006)

This Order is issued fixing a revised tariff, after reviewing the order dated 22nd July 2005 relating to revision of the Scale of Rates of Nhava Sheva International Container Terminal (NSICT) which was, published in the Gazette of India on 3rd August 2005. The Order of 22nd July 2005 became necessary on account of the fact that, for the previous tariff fixation, this Authority had taken into consideration the estimated revenue based on traffic that was projected to this Authority by NSICT, and it was found that the estimate was far less than actual traffic witnessed during the period, and the increased revenue accordingly. However, at the time of the earlier review, despite repeated requests, NSICT did not furnish any data or information and, therefore, the review was done based on the information available with this Authority, the relevant details obtained from JNPT and the details which had been furnished by NSICT earlier, at the time of the fixation of tariff in 2000. Analysis of the cost positions for the years 2005-2006, 2006-2007 and 2007-2008 indicated an average revenue surplus of 30.20%, in addition to recovery of the permissible return on Capital Employed. For the reasons stated in the said Order, this Authority fixed a revised tariff reducing the earlier rates effectively by about 12.85%.

2. When the tariff for NSICT was fixed by this Authority in the year 2000, the entire royalty payable to JNPT, as the landlord Port, under the relevant BOT agreement between JNPT and NSICT, was permitted as allowable expenses. At the review undertaken in 2005, since the object of the review, as stated in the notice by the Authority at that time, was only to review with reference to the estimated traffic projected by NSICT to this Authority – and the actual traffic, this Authority refrained from interfering with the royalty. It is reiterated that the Order of this Authority passed in November 2000 specifically provided that the fixation of tariff was based on the estimates made available and that the tariff could be adjusted on actual data, when available. It is in pursuance of that exception, contained in the original Order, the last review was undertaken; and hence abstention from dealing with the royalty aspect.

3. The Ministry of Shipping, Road Transport & Highways (MSRTH), vide its letter No. PR-14019/38/2003-PG dated 22nd November 2005, had sought clarification from this Authority on allowing full royalty as an item of cost in the case of NSICT. Subsequently, the Ministry pointed out that the decision of TAMP in NSICT case gave an impression of deviation from the revised tariff guidelines and was quoted as a precedent by another private terminal operator.

4. As stated above, it was not the intention of this Authority to deviate from the guidelines and permit only NSICT to treat the royalty as allowable expenditure. In the circumstances, it was decided by this Authority to review the tariff with reference to the new guidelines, after following proper procedure, like a notice, hearing, etc.

5. NSICT was notified vide our letter dated 14th December 2005 to furnish its comments on reviewing the Order dated 22nd July 2005, to the extent of admissibility of the entire royalty amount payable by NSICT, taken as cost for the years 2005-2006, 2006-2007 and 2007-2008, in the *suo motu* review of tariff of NSICT. The reply of NSICT is summarised below:

- (i). The Order cannot be a subject of *suo motu* review. The only feasible purpose of the review of the Order seems to be to reverse a small part of the cost allowed to NSICT in the process of tariff fixation.
- (ii). The Major Port Trusts Act does not explicitly provide any provision for TAMP to review its own order *suo motu*. Only the revised tariff guidelines permit the Government to issue directions on questions of policy. Accordingly, in terms of clause 3.3.2, which provides TAMP to initiate *suo motu* review, is entirely outside the powers vested in the Central Government under Section 111 of the MPT Act. Therefore, *suo motu* review of its own order by TAMP is without authority of law and without jurisdiction.
- (iii). NSICT, vide its letter dated 30th June 2005, before passing the Order of July 2005, set out in detail as to why the tariff should not be increased. TAMP, after consideration of submissions made by NSICT and recording the reasons for the same in paragraph 10

(ix) (c) of the Order of July 2005, allowed the entire royalty amount paid as cost. Obviously, the Order has been passed after carefully considering the submissions made by NSICT and after comprehensive application of mind in conjunction with the guidelines. There is no necessity for a further review. No ground is set out for reviewing the Order of July 2005.

- (iv). Clause 2.8.1 of the revised tariff guidelines (regarding admissibility of royalty revenue share as cost) was already in existence and fully considered by TAMP in July 2005 Order. There is no amendment to the said clause 2.8.1. The July 2005 Order allowed the entire royalty amount as cost on the specific basis and that case was a *suo motu* review of tariff itself. The present proceeding purports to the same thing. If a *suo motu* review is the very ground and reason for allowing the deduction in July, the same reasoning must necessarily apply 5 months later in the absence of any other changes in the position.
- (v). Clause 3.1.8 of the revised tariff guidelines (regarding tariff validity period) specifically provides that tariff once fixed will be in force in 3 years and any review within the said period would be beyond the powers vested by the guidelines on the TAMP.
- (vi). TAMP has no statutory power to enter into this revision of the Order dated 22nd July 2005. What is being sought to be done is to materially amend an existing Order passed barely 5 months ago and not to review it. This is beyond the jurisdiction and the proposed review is without authority of law. Neither the Government nor TAMP is empowered under the Act to amend this tariff Order momentarily before the prescribed period of 3 years, as set out in the guidelines. Even if assuming that TAMP is entitled to review the Order, there has been no change in the situation to entail any good and sufficient reasons under clause 3.3.2 of the revised tariff guidelines.

In view of the above, NSICT has urged this Authority not to take any steps to review its Order of July 2005.

6. After receipt of the above reply, a date for hearing the affected party, viz. NSICT, was fixed on 13th January 2006. NSICT appeared and reiterated its arguments contained in the above letter of 9th January 2006, and the substance of the contention was that this Authority did not have statutory powers to review its own Orders and that the policy direction issued by the Government of India on the revised tariff guidelines was devoid of any legal authority. NSICT, however, did not advance any arguments on merits of the issue. When one more opportunity was offered, NSICT intimated that it had nothing to submit further, than what had already been submitted in the Written Submissions dated 9th January 2006.

7. It is clear from the record that identical arguments in regard to the statutory power of this Authority to review were raised on the last occasion, which was dealt with in the Order dated 22nd July 2005. As already held in the earlier Order, *inter alia*, "power to fix the rate also includes the power to review". It is an accepted position that tariff is based on the data submitted and, if these data are incorrect, a right of review is inherent. The tariff can also be reviewed to comply substantially with the guidelines, if, for any reason, the Authority had made an error. Similarly, it is open for the Ports also to approach the Authority for a review, on the ground of change of circumstances.

8. The misconceived contention of NSICT is that the Order of July 2005 was passed after considering all submissions made by NSICT, that it is only on that basis the Authority allowed the entire royalty paid as cost, that the Order was passed after comprehensive application of mind and that, therefore, there is no necessity for review. As already clarified above, the question of consideration of permitting the royalty was not even an issue while passing the Order of July 2005, for the simple reason that the review was undertaken strictly on the point of the cost estimated and the actuals and, therefore, without a specific notice to NSICT, the Authority did not consider, nor could it have considered, the point of royalty.

9. NSICT further contended that the previous Order had been passed taking into consideration all necessary data and, therefore, the review was unnecessary. As already stated above, the present review is only restricted to "royalty", which was not a subject matter considered in the previous Order. As a matter of fact, in the previous Order, it had been very specifically stated that the

Authority was maintaining *status quo* in the matter of royalty and that full royalty was being allowed as expenses. This was done only since this was not an issue considered at the relevant time.

10. NSICT has made a reference to Section 111 and a directive by the Government. The Authority makes it clear that there is no such directive from the Government and the Authority is *suo motu* reviewing its earlier Order, in order to conform to the new guidelines since it is creating misunderstanding amongst concerned people that TAMP is not following its own guideline. NSICT submits that clause 3.3.2 of the guidelines has been framed and approved without any jurisdiction by the Government of India, inasmuch as an authority to review was not provided in the Act and, therefore, cannot be provided in a guideline. We have already dealt with this point earlier that the authority to fix tariff is also an authority to review, and it is in pursuance of that it is provided in the guidelines; and all that what the Government has directed in the guidelines is that such review also should be through a consultative process. In any event, there cannot be fetter on the policy-making power of the Government under the Act.

11. In regard to the royalty, the Authority has taken note of the facts and circumstances which led to the inclusion of the provision regarding royalty in the guidelines. Chennai Container Terminal Pvt. Ltd. (CCTL) had filed a Writ Petition in the High Court of Delhi against this Authority and the Government of India, inter alia contending the provisions constituting this Authority as *ultra vires* of the Constitution, for lack of guidelines, and that since the bid conditions, when CCTL bid for the Chennai Port, did not contain a provision that "royalty" will not be allowed as expenses for arriving at the tariff, that such a condition was imposed only for later bids and that CCTL should be allowed the entire royalty as allowable expenditure. To settle this matter, at the request of CCT, a meeting was held in the chambers of the (then) Hon'ble Minister for Shipping. Present at the said meeting were the Chairman of this Authority, the Chairman of CCTL – who was then the Chairman of NSICT also, CCT counsel and other officials. Also present at the meeting was PSA-SICAL, who had the contract for Tuticorin Port Trust and who had filed a Writ Petition in the High Court of Madras. At the meeting held on 5th August 2003, it was explained that, as per the Government policy, the Ports awarded contracts for operation and management of berths, under Section 42 of the Major Port Trust Act, to a bidder who offered to pay the highest royalty / revenue share. If the bidder, who succeeds, is subsequently permitted by this Authority to recoup the royalty by way of allowable expenditure in the fixation of tariff, it would, in effect, mean that the bidder is paying out the royalty only out of the revenue earned by him from the trade.

12. After prolonged arguments, all parties present agreed that it would be fair and reasonable that, for those Ports where contracts were entered into before the Government policy was known, the Ports would be permitted to treat that part of the royalty / revenue share up to the limit of the next highest bid, if they incur any loss on this account, and those bidders would have to only forego the extra part of the royalty / revenue share, over and above the second highest bid. According to these terms and conditions, CCTL withdrew the Writ Petition filed in the Delhi High Court and submitted a revised proposal permitting revenue share equivalent to the second highest bidder. Even though CCTL and NSICT are two different entities, they are both substantially owned and controlled by the P&O Ports, with a common Chairman – then as well as now. In the circumstances, it is too late for NSICT to challenge the guidelines or argue about the "royalty" issue. This was the background for the provision regarding royalty in the guidelines.

13. On the above basis, this Authority has decided to allow in its calculations only royalty equivalent to the second highest bidder, as per information received from JNPT vide its letter no.PPD/CM/TAMP/2005/1352 dated 20 December 2005.

14. In order to remove any confusion and to correctly reflect the intention of this Authority, it is necessary to reassess the estimated cost position of NSICT for the years 2005-2006, 2006-2007 and 2007-2008, by considering royalty to the extent permissible under the revised guidelines.

15. As per the revised guidelines for tariff fixation, in case of bids finalised before 29th July 2003, the tariff computation must take into account royalty / revenue share payable by the private operator to the landlord Port as cost for tariff fixation, so as to avoid the likely loss on account of this item not being taken into account, subject to maximum of the amount quoted by the next highest bidder. The Licence Agreement entered into between NSICT and JNPT was signed on 3rd July 1997.

16. In the royalty model, the bid values relate to initial payment and royalty payment. Since the bid values are more than one and the successful bidder was selected based on the NPV

assessment, a similar analysis is to be followed to decide the royalty to be considered in computation to the extent quoted by the second highest bidder. The NPV of the revenue stream quoted by the second highest bidder in this case is reported to be at Rs.163.616 crore, which is found to be 69.50% of the NPV of the bid of NSICT. This means, a maximum 69.50% of the royalty quoted by NSICT can be admitted for tariff computation purpose, as per the revised tariff guidelines, provided NSICT would incur loss if it is not allowed to this extent.

17. In a similar case relating to CCTL, 'loss' for this purpose was taken to mean gap between the revenue and admissible costs and return. In this case, there may not be any apparent loss. But the surplus depicted in the cost statement is not to be retained by the private terminal operator on a permanent basis, because of the stipulation of adjustment of tariff for the next cycle, as recorded under paragraph 10 (xvi) of the Order dated 22nd July 2005.

18. Accordingly, the royalty amount payable by NSICT for the 3 years, viz. 2005-2006, 2006-2007 and 2007-2008, is to be taken at the level of 69.50% for the purpose of tariff computation. In the light of the discussion above, the cost statement considered in the earlier proceeding has been modified. The modified cost statement is attached as an **Annex**. The result disclosed by the statement is summarised as shown in the table given hereunder:

S. No.	Year	Surplus (+) / Deficit (-) (Rs. in Lakhs)	Surplus (+) / Deficit (-) (% of operating income)
(1).	2005-2006	16,808/-	44.3
(2).	2006-2007	14,725/-	38.8
(3).	2007-2008	12,201/-	32.1
(4).	Average surplus as % of operating income for the years 2005-2006 to 2007-2008.		38.4

It can be seen from the above table that the average net surplus for the three years under consideration, as a percentage of operating income, stands revised to 38.4%, as against the earlier average surplus of about 30%.

19. It may be relevant here in this context to note that the surplus position discussed above pertains to the three year period from 2005-06 to 2007-08. Since any tariff adjustment can have prospective effect only and the year 2005-06 is drawing to a close soon, the net surplus position relevant for the next two years is to be set off in the tariff relevant for the two years i.e., 2006-07 and 2007-08.

20. The aggregate surplus position for years 2006-07 and 2007-08 is Rs.26926 lakhs based on the tariff notified in the year 2000. The impact of tariff reduction ordered in July 2005 is estimated to be around Rs.11258 lakhs. It is noteworthy that the Order of July 2005 did not envisage reduction in tariff to the full extent of surplus position since the *suo motu* review was carried out based on approximation and extrapolation of the cost and revenue estimates. For this reason, a surplus of around Rs.19857 lakhs for the three years 2005-06 to 2007-08 was left unadjusted subject to the stipulation contained in para 10 (xvi) of the Order of July 2005. It appears reasonable even now to leave the corresponding amount of surplus for the years 2006-07 and 2007-08 which comes to Rs.8414 lakhs unadjusted subject to the same condition. This means, a net surplus of around Rs.7253 lakhs for the years 2006-07 to 2007-08 is available for adjustment. In order to adjust this net surplus, the tariff approved in July 2005 is required to be reduced prospectively by about 12%.

21.1. In the result, and for the reasons given above, this Authority decides to reduce the Scale of Rates of NSICT notified in the Gazette of India on 3 August 2005 by 12%.

21.2. The NSICT is directed to amend its Scale of Rates accordingly.

21.3. The revised Scale of Rates shall come into effect after expiry of 30 days from the date of notification of this Order in the Gazette of India and will remain valid for the tariff validity period prescribed in the earlier Order of 22nd July 2005.

(**A.L. Bongirwar**)
Chairman

**COST STATEMENT OF NHAVA SHEVA INTERNATIONAL CONTAINER
TERMINAL LIMITED**

		(Rs. in lakhs)							
Sr. No.	Particulars	Financial years							
		2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
	Throughput in TEUs	694899	943928	120119	1230355	1232470	1232470	1232470	1232470
I	OPERATING INCOME								
	Income from Container Handling	18486	26946	34288	35122	35183	35183	35183	35183
	Income from Storage and others	1679	2281	2859	2735	2740	2740	2740	2740
	Other Income	17	19	28	28	28	28	28	28
	Total Operating Income	20182	29246	37175	37885	37951	37951	37951	37951
II	OPERATING COST								
	Equipment Running Costs	1786	2578	3358	3803	4115	4362	4623	4901
	Operating & Direct Labour	748	807	856	907	961	1019	1080	1145
	Maintenance Labour	253	271	287	304	323	342	363	384
	Staff Welfare	88	98	103	110	116	123	131	138
	General Operations	484	532	596	610	617	625	627	633
	Royalty	407	1171	1847	3682	4562	4744	6987	9540
	Property Costs	198	198	210	222	236	250	265	281
	IT/Communications	174	184	201	219	239	260	266	273
	Operations Equip. Depn.	3965	3966	3966	3986	3986	3986	3986	3986
	Equipment Hire	205	220	233	247	262	278	294	312
	Technical Service Fee	0	0	0	0	0	643	641	637
	Sub Total (a)	8309	10025	11657	14090	15416	16632	19264	22231
	Non-operating Depreciation	259	327	328	328	328	328	328	328
	Misc Exp.	310	310	310	310	255	24	24	24
	Management & General Overheads	560	594	634	676	722	770	822	877
	Sub Total (b)	1129	1231	1272	1314	1304	1122	1174	1229
	TOTAL (II) (a+b)	9438	11256	12928	15404	16720	17754	20437	23460
III	SURPLUS (I - II)	10744	17990	24246	22481	21230	20197	17513	14491

IV	Computation of Return								
	(I) For the period 2001-02 to 2004-05								
	Preference Share Capital (found nil in its Annual accounts)	1300 0	13000	13000	1300 0	1300 0			
	Equity and debt considered in the ratio 1:1 of the capital employed after it being funded by the preference share. Equity share holder funds	3045 3	28487	26255	2438 2	2238 9			
	Debt	3045 3	28487	26255	2438 2	2238 9			
	14% dividend on preference shares	1820	1820	1820	1820	1820			
	10.5% as the cost of the debt	3198	2991	2757	2560	2351			
	20% Return on equity share holders funds subject to debt /equity in the ratio of 1:1 of the capital employed allowed for the year 2000-01 to 2004-05	6091	5697	5251	4876	4478			
	Total return for the period 2000-01 to 2004-05	1110 8	10508	9828	9257	8649			
	(ii) 15% Return on capital employed for the period 2005-06 onwards as per the revised guidelines for tariff fixation.						8123	7522	7024
V	NET SURPLUS/DEFICIT after admissible Return and payment of royalty (III-IV)	-364	7481	14418	1322 5	1258 1	12074	9991	7467
VI	NET SURPLUS/DEFICIT AS A PERCENTAGE OF INCOME (after allowing payment of royalty as admissible cost and	- 1.80 %	25.58 %	38.79 %	34.9 1%	33.1 5%	31.81 %	26.33 %	19.68%

	after admissible return)								
VII	Average net surplus/deficit as a percentage of total operating income for the years 2000-01 to 2004-05 and 2005-06 to 2007-08 in addition to the admissible return allowed at VI above	29.14 %						25.94 %	
VIII	50% of net surplus/benefit for spreading it over the subsequent years at the time of tariff review/ revisions (V * 50%)	-182	3741	7209	6612	6291			
		cumulative for 5 years				23671			
IX	Setting off 50% of the benefit / loss accrued during the years 2000-01 to 2004-05 over the next five years						4734	4734	4734
X	Net surplus in addition to admissible Return, payment of royalty as cost item and after adjustment of past benefit/ loss over the subsequent years(V+IX)						16808	14725	12201
XI	Net surplus as a percentage of total operating income for the years 2005-06 to 2007-08 in addition to the the return allowed and after setting off 50% of the benefits/ losses accrued in the past five years						44.3%	38.8%	32.1%
XII	Average net surplus as a percentage of total operating income for the years 2005-06 to 2007-08 in addition to the the return allowed and after setting off 50% of the benefits/ losses accrued in the past five years (X/I)						38.4%		