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TARIFF AUTHORITY FOR MAJOR PORTS

G. No. 153

New Delhi, 27 September 2003

NOTIFICATION

In exercise of the powers conferred by Section 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the reference received from the Visakhapatnam Port Trust (VPT) regarding dispute between the Visakha Container Terminal Private Limited (VCTPL) and the VPT on payment of land rentals for the lands allotted to the VCTPL as in the Order appended hereto.

(A.L. Bongirwar)
Chairman

Tariff Authority for Major Ports
Case No. TAMP/36/2003-VPT

The Visakhapatnam Port Trust

Applicant

ORDER

(Passed on this 10th day of September 2003)

This case relates to a reference received from the Visakhapatnam Port Trust (VPT) regarding dispute between the Visakha Container Terminal Private Limited (VCTPL) and the VPT on payment of land rentals for the lands allotted to the VCTPL.

1.2. A Concession and License Agreement (CLA) was signed by the VPT with the VCTPL on 11 September 2002 for developing the multipurpose berth in the outer harbour of the VPT as a Container Terminal on BOT basis.

2.1. In accordance with the provisions stipulated in Appendix 21A of the CLA, the VPT has demanded lease rentals of Rs.51.54 lakhs (comprising Rs.17.18 lakhs as one year's advance rent, Rs.17.18 lakhs as non-refundable premium, and Rs.17.18 lakhs as refundable security deposit.) for the back up area of 49,800 sq. mtrs. (as against 42,000 sq. mtrs mentioned in the CLA) based on the rates prescribed in its Scale of Rates (i.e. Rs.3450/- per 100 sq. mtrs). On the same basis, Rs.118.71 lakhs was also demanded by the port from the VCTPL for the additional back up area measuring 1,14,700 sq. mts. (as against 35000 sq. mtrs mentioned in the CLA) allotted to the VCTPL.

2.2. The main issues of raised by the VCTPL with reference to lease rental demanded by the VPT are summarised below:

- (i). Lease rental is not applicable to 49,800 sq. mtrs. of back up area.

As per Clause 5.2. of the CLA a lump sum amount of Rs.3.19 crores has already been paid to the VPT towards upfront fees for the Licensor's Assets which include backup space to the berth of 42,000 sq. mtrs. (Appendix 3, Item 2 and Appendix 4, Item III). It is not required to pay any further rent (whether monthly or annually) for the back-up area.

- (ii). As per clause 5.3 of the CLA, terms and conditions for the lease of additional backup land shall be mutually agreed within the framework of the CLA; unilateral application of the Government guidelines for land lease proposed by VPT is, therefore, not applicable in the present case.

- (iii). Apart from payment of upfront fees and royalty per TEU for the guaranteed throughput and lease rent for backup lands (to be read as additional backup lands, covered by Annexure 3 of the CLA – Licensor's Assets), no other charges are applicable or chargeable, unless VCTPL specifically avails of additional services and/or facilities.

- (iv). The effective date for sharing of 50% wharfage collected by VPT when the berths were not used by VCTPL will be the date of signing of the CLA and not the date of commencement of commercial operations by the VCTPL.

2.3. The arguments of the VPT with reference to the points made by the VCTPL are summarised below:

- (i). The licensee (VCTPL) has paid Rs.3.19 crores towards upfront fees and it has to pay royalty from the date of starting the commercial operation at the rates

agreed in the CLA. Apart from these payments, the licensee is liable to pay lease rentals for allotment of backup area of 49,800 sq.mtrs. and for allotment of additional backup area of 1,14,700 sq. mtrs. as per land lease agreement to be separately entered into.

- (ii). The payment of one year advance rent and one year rent as refundable premium are in accordance with the notification published in the Andhra Pradesh Gazette on 19 February 1976. The guidelines dated 1 April 1995 issued by the Government also envisage that one year rent has to be collected as non-refundable premium
- (iii). The effective date of sharing wharfage will be the date of commencement of operation by the VCTPL.

3.1. Subsequently, the VCTPL has made the payment of lease rentals to the port under protest and requested the VPT to refer the matter to the arbitrator. Since the arbitration will take a long course of time and in the light of the fact that the proposal from the VCTPL for fixation of rates is being considered by this Authority, the VPT has requested this Authority to intervene in the matter and to resolve the dispute.

3.2. Since the VCTPL was the only concerned party affected in this case, the reference received from the VPT was forwarded to the VCTPL for their comments. In response to this, the VCTPL has furnished further points to substantiate its earlier argument. Some of the additional points made by the VCTPL are summarised below:

- (i). There is a dichotomy in the CLA as regards payment of rent for additional land made available by the VPT as stated below:
 - (a). Clause 5.3. of CLA provides that the Licensee shall also pay rent or other charges for the additional land or other premises or additional utilities or services, made available by the Licensor to the Licensee in accordance with the terms, conditions and covenants mutually agreed between the Licensor and the Licensee.
 - (b). Page 52 of the CLA states that land rentals as per applicable Scale of rates for backyard area shall be paid by the Licensee to the Licensor.
 - (c). Whereas Appendix 21-A item (iii) page 87 of the CL:A stipulates that land rentals for back-up area, and leased in any other VPT area shall be paid by the Licensee at commercial rates for those areas as per Land Lease Agreement to be separately entered into. (The commercial rates are, however, not specified)
- (ii). Further, the terms of land lease contained in VPT's letter dated 17 January 2003 are not applicable to this Contract on the following grounds:
 - (a). The policy guidelines referred by the VPT have been specifically developed for allotment of land to meet ad-hoc demand of other users.
 - (b). The BOT tender was a stand-alone comprehensive document. The execution and operation is to be governed by the CLA, which incidentally formed a part of the tender document.
 - (c). The guideline on terms like security deposit, advance payment, premium reflects the shorter term nature of the leases to be governed by the said guidelines whereas the BOT is clearly more than just a long-term project, for which adequate security and consideration to VPT is built in the CLA.

- (d). The tender, bid or CLA does not make any reference or demand about premium or security deposit or advance payment of rent. Neither was any reference made about the pro-forma long-term land lease agreement published by VPT in the Andhra Pradesh Gazette on 19.02.1976.
- (e). The provisions of Appendix 21-A, item (iii) cannot be read in isolation. If all provisions relating to back up area as a whole is considered, it will clearly emerge that back-up area of 49,800 sq. mtrs forms part of the Licensor's Asset for which it has paid the upfront fee and shall continue to pay royalty. Rent is payable only for additional back up land (i.e. 1,14, 700 sq. mtrs.) and other services. The VPT letter dated June 17 2002, now forms part of the CLA and the CLA supersedes all previous arrangements.
- (iv). Since lease rentals are payable to the VPT from the date of signing of the CLA, the same yardstick must be applied for sharing wharfage unless specifically mentioned to the contrary in the CLA.

4. It will be relevant here to mention that the jurisdiction of this Authority is restricted to tariff issues involved in case of the major port trusts or private terminal operators. The issues agitated in this case primarily call for interpretation of the CLA signed between the VPT and the VCTPL. There is no case made out to show that either any new tariff are to be fixed or any ambiguity in the existing Scale of Rates is to be removed for want of which this dispute has arisen. If at all any tariff implication arises due to interpretation of the CLA, such an occurrence is only consequential.

5. A joint hearing in this case was held on 19 August 2003 where both the parties VPT and the VCTPL were requested to explain the tariff issues involved in this dispute. Both the parties after some discussion agreed that this Authority is not a proper forum to adjudicate the issues in reference. The VPT and the VCTPL have decided to take recourse to the dispute resolving mechanism envisaged in the CLA.

6. In the result, and for the reasons given above, and based on a collective of mind, this Authority dismisses the reference made by the VPT for want of jurisdiction, without going into the merit of the case.

(A.L. Bongirwar)
Chairman