

No. 12

New Delhi, the 22 January 2001

**Tariff Authority For Major Ports**

**No.TAMP/13/2000-TPT**

**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 representation submitted by M/s. Shiva Marketing Limited to treat their barges 'BLUMINGDALE' and 'SHIVA-6' by the Tuticorin Port Trust as dumb barges for the purpose of levy of Berth Hire charge, as in the Order appended hereto.

( S. Sathyam )

**Chairman**

**Case No.TAMP/13/2000-TPT**

**M/s. Shiva Marketing Limited (SML)      ...      Applicant**

**Vs**

**The Tuticorin Port Trust (TPT)      ...      Respondent**

**ORDER**

**(Passed on this 5th day of January 2001)**

This case relates to a representation made by M/s. Shiva Marketing Ltd. (SML) to treat their barges 'BLUMINGDALE' and 'SHIVA-6' (used for off-shore storage of molasses for export) by the Tuticorin Port Trust (TPT) as dumb barges for the purpose of levy of Berth Hire charges.

2.            The SML has made the following points in its application:

- (i).        The SML exported approximately 1,25,000 MT of molasses during the year 1995-96 and 1996-97 through the Tuticorin Port.
- (ii).        It had kept barges 'BLUMINGDALE' and 'SHIVA-6' at the TPT and was using them as off shore storage of molasses.
- (iii).        When it originally placed the barges at the TPT, the SML was given to understand wrongly by its agents that the berth hire charges for dumb barges was calculated on the basis of GRT, as in the case of commercial vessels.
- (iv).        The TPT Scale of Rates contains different rates for a commercial vessel and a dumb barge.

- (v). The TPT, even after pointing out the provisions in the Scale of Rates, continues to levy the commercial vessel rates.

3.1. The representation was sent to the TPT for comments. The important points made by the TPT in its reply are given below:-

- (i). The SML chartered two barges in 1995, which were foreign flag vessels, to be used for storage and transportation of molasses for export to the mother vessel.
- (ii). The DG (Shipping), Mumbai had initially issued a specified period licence to the above barges for the purpose of storage/transfer of Bulk molasses within the Harbour limit of the Indian Ports. Subsequently the said two dumb barges were registered with the Mercantile Marine Department (MMD), Mumbai as Coastal vessels with the name of 'BLUMINGDALE' and 'SHIVA-6' with effect from 10 September 97 and 10 February 98 respectively.
- (iii). The Berth hire charges for the dumb barges were initially calculated on the basis of GRT of a foreign flag vessel, as the two barges had separate official number, port of Registry and possess separate loadline certificates. The charges were revised to be levied as per the Scale of Rates for the Coastal vessels from the date of conversion to coastal run.
- (iv). Pursuant to non payment of the outstanding dues in respect of Berth Hire charges, the port decided to sell the barges to make good the dues after intimating the decision to the SML on 19 November 1999.
- (v). The SML agreed to pay the outstanding berth hire charges as on 30 November 1999 amounting to Rs.43,79,680/- in 12 monthly instalments commencing from January 2000 as well as current monthly berth hire charges vide their letter dated 6 January 2000. But the SML has not paid any amount till date.

3.2. In response to the comments of the TPT, the SML has made the following further comments:

- (i). Charges leviable on lash vessels / barges are applicable to its dumb barges also.
- (ii). It is not clear whether the coastal rates were applied from the time the barges had specific period licence from the DG (Shipping), Mumbai or not.
- (iii). It has requested the Port to shift both the barges to Zone B. However, shifting of only one barge from Zone 'A' to Zone 'B' has taken place.
- (iv). Due to the financial crisis, the SML intends to make the payments from out of the funds generated from the barge working. So, it may be allowed to utilise the barges for storing and export of molasses.
- (v). The TAMP may like to impress upon the TPT not to dispose off the barges (by auction).

3.3. The TPT was requested to examine the points made by the SML; and, it was also advised not to auction the barges as apprehended by the SML until the case was decided by the Authority.

4. The representation was sent to various port users / representative bodies of users for their comments. The comments received are summarised below:

**The Container Shipping Lines Association (CSLA)**

Since the representation does not involve the movement of containers, they did not offer any views.

#### **The Tuticorin Steamer Agents Association (TSAA)**

As the barges are used only for storage of export cargo and there is a rate for berth hire for barges in the Scale of Rates, the berth hire charges are to be collected as specified in the Scale of Rates only and not on GRT basis.

#### **The Indian National Shipowners Association (INSA)**

The Scale of Rates and the statement of conditions of the TPT prescribe only the charges for lash vessels / barges and they may apply to the Dumb barges of the SML.

#### **The Tuticorin Stevedores Association (TSA)**

The TSA has forwarded the following comments of M/s. Aspinwall & Co, who were the agents of the SML:

- (a). The TPT had clearly informed M/s. Shiva Marketing Limited about the schedule of rates and other conditions to which they agreed.
- (b). As per the Scale of Rates there is no separate rate for dumb barges. The charges have to be paid as per the Scale of Rates either a Foreign run or Coastal run.
- (c). The TPT had way back in 1997 itself had informed the SML that its barges could not be treated at par with LASH barges.
- (d). M/s. Shiva Marketing Limited have to pay a huge amount to M/s. Aspinwall & Co., and the matter is pending at the Tuticorin Court.

#### **The Shipping Corporation of India (SCI)**

The Agents of the SCI, M/s. Pereira & Roche, have physically verified the barges 'BLUMINGDALE' and 'SHIVA-6' lying at the TPT and found them as dumb barges.

The Tuticorin Chamber of Commerce and Industry (TCCI)

The TCCI had no comments to offer on the subject.

#### **The Tuticorin Customs Licensed Agents' Association (TCLAA)**

They offered the same views as that of the TSAA.

- 5.1. On being requested, the SML has sent the following information / documents:
  - (i). Statement of the specific period licence issued by the DG (Shipping), Mumbai to the barges to operate with in the Harbour limit of the Indian Ports;
  - (ii). Certificate of registry issued by the MMD, Mumbai, under the Coasting Vessel Act for both the barges.
  - (iii). They also stated that both the barges are dumb barges and cannot move on their own. The barges were double banked most of the times they were berthed.
- 5.2. The SML has further stated as follows:

- (i). It has already paid Rs.2 lakhs in the month of June 2000 and intend paying some more money in the month of August 2000. However, the TPT insists on at least 50% payment (i.e. about 20 lakhs) and a binding agreement relating to the balance payment.
- (ii). The TPT is not allowing the SML to operate the vessels, which is a must for arranging payments out of the earnings.

6.1. The TPT has reiterated the facts earlier furnished and further clarified on the points made by the SML as follows:

- (i). Due to lack of sufficient place, the other barge 'SHIVA-6' could not be shifted to Zone 'B'.
- (ii). There is no provision in the Indian Ports Act 1908 or MPT Act 1963 or the TPT Scale of Rates to pay the dues to the port out of the funds to be generated from the operation of the vessels / barges.

6.2. The TPT has also informed that the SML has not paid the dues, despite several reminders.

7.1. A joint hearing in this case was held on 6 September 2000 at the TPT premises. During the joint hearing, the following submissions were made:

**Shiva Marketing Limited (SML)**

- (i). This is a case of unjust enrichment.
- (ii). The rate of \$ 129 is inequitable and unjustifiable.
- (iii). The rate for dumb barges is low. It should be applicable to our vessels, which are like dumb barges.
- (iv). The TPT treats our dumb barges as foreign going vessels. This is atrocious; and, the arbitrariness needs to be corrected. The TPT shall follow the MOPT model.
- (v). Regarding payment of outstanding dues, we will stick to our commitment of paying in instalments to TPT.

**Tuticorin Port Trust (TPT)**

- (i) There is no need for a specific agreement. The port has a notified Scale of Rates.
- (ii). The reference to the MOPT is not relevant because the rates between the ports will vary.
- (iii). The comparison of a dumb barge with a LASH barge is not correct. The two cannot be equated.
- (iv). The SML started a commercial venture. If it did not become a success, it cannot become a ground for review of our rates.
- (v). 'Principle of estoppel' will surely apply as the SML has started the operation and were paying. Suddenly they have raised objection.
- (vi) Nothing prevented the SML to take their barges away to the MOPT or elsewhere. Who will pay for the cost involved in keeping these barges and looking after them?
- (vii). The SML has agreed to pay Rs.45 lacs in 12 instalments. Now they are going back.
- (viii) The TPT cannot recognise a new concept. A vessel is a vessel, it will go by its registration and not arbitrarily classified as dumb barges.

**The Container Shipping Lines Association (CSLA)**

The SML have introduced an innovative method of adding to the traffic of the port which should be encouraged.

**The Tuticorin Steamer Agent's Association (TSAA)**

- (i). Instead of dragging the issue, the port should adopt a liberal attitude and resolve the issue on arbitration basis.
- (ii). Please fix a separate rate for dumb barge.

### **Tuticorin Chamber of Commerce and Industry (TCCI)**

The operation started by the SML is a first of its kind in the TPT. They need sympathy and encouragement.

### **Indian National Shipowners' Association (INSA)**

- (i). It is a special circumstance in which a dumb barge can be equated with a lash barge.
- (ii). The SML can take advantage of reference to a 3000 tonne limit on GRT in certification of the vessel.

7.2. At the request of the SML, a further of time upto 15 September 2000 for submitting its written arguments was granted.

8.1. Subsequent to the hearing, the SML, through its legal counsel, has sent elaborate written submissions giving the entire sequence of events chronologically for taking the complete view without prejudice and furnished the following additional information:

- (i). The barges were kept in a place where no other vessels were being kept or brought. Only fore and aft of one barge was touching the jetty at any point of time. The second barge was always kept double banked with the first barge.
- (ii). The size of LASH barges is not mentioned anywhere. This means the rate fixed for LASH barge is irrespective of the size of the barge and the same should hold good for a dumb barge also.
- (iii). When delay in obtaining Specific Period Licences (SPL), the TPT charged berth hire on foreign going rates. The barges even when they did not have any SPL, continued to remain in the TPT and as per definition only costal rates should be charged.
- (iv). Since bill of entry relating to import of barges was not filed, the Customs detained the barges from 10 September 98 to 12 May 2000. Hearing a petition filed by the SML, the Customs, Excise and Gold (control) Appellate Tribunal ruled that the detention was not proper and filing of bill of entry was not necessary.
- (v). Due to this illegal detention for a period of nearly 20 months, enormous berth hire charges were imposed by the TPT for no fault of the SML. The berth hire charges for this period should be waived or recovered from the Customs Authority.
- (vi). During the period, the Government had also imposed a ban on movement of molasses out of the country.
- (vii). The SML has prayed for the following:
  - (a). A clear definition of dumb barge should be used; and, specific rates for the dumb barges should be levied as per the Scale of Rates.
  - (b). A distinction is to be made between the vessels coming and berthing for a period of 5 to 10 days and for substantial period of time.
  - (c). LASH barges rate should be logically applied to a dumb barge where no size constraint has been kept. However, the LASH barge rates with proportionate increase on the basis of size of the biggest Lash barge may be applied

(d). During the period of illegal customs detention of the barges, no payment of berth hire charges is to be recovered from the SML.

(e). The vessels have never moved out of the port area at the TPT. Its status remains that of a coastal vessel and coastal rates should be charged for the entire stay of the barges at the TPT.

8.2. A copy of the written submissions from the legal counsel of the SML was sent to the TPT for comments, if any. In its reply the TPT has stated as follows:

(i). The Berth Hire Charges collected from any vessel are not on the basis of any specific berth. Any developed property inside the Tuticorin harbour is considered as a berth and shall be charged without any distinction.

The contentions of the SML that the barges were berthed at an angular fashion and only one barge was touching the jetty at any point of time is not acceptable as there is no provision for waiver of Berth hire charge on the above basis.

(ii). The LASH barges are small with capacity of approximately 300 MT whereas the barges of SML are much bigger with capacity of approximately 3000 MT of cargo.

The LASH barges are plain cargo containers with no equipment of their own, whereas SML barges have got independent pumping arrangements for loading and discharge of cargo.

The LASH barge, even in loaded condition can be picked up by a crane mounted on the mother vessel, where as the barges of SML are too big for this purpose.

(iii). The TPT Scale of Rates specifies the charges on LASH mother vessel and LASH barges and no specifications for any other kind of barges is made. Hence the SML barges are treated like a normal commercial vessels and charged according to the GRT.

(iv). It was made amply clear to the SML in 1996 itself, that these barges would be treated as commercial vessels and charged accordingly. The SML didn't raise any objection and paid dues upto 30 April 97. The SML raised these points about the comparison with dumb barge only after loosing business, to evade legitimate port dues.

(v). The Scale of Rates duly approved by the TAMP does not differentiate between non power-driven vessel and a power driven vessel for calculating Berth Hire fees. Different rates for commercial barges of SML do not appear anywhere. The barges of the SML cannot be considered as non commercial vessels like tugs and barges as they have been employed for commercial purpose.

(vi). The barges are foreign flag vessels with separate registry, official number and loadline certificate. The rates of foreign flag vessels as per TPT Schedule of rates are charged for the period upto April 1997 and later on the conversions of the vessels to coastal, the berth hire charges were revised to be levied as that for coastal vessels.

The Port is in no way connected with the Customs formalities to be observed by importers and the contention of the SML about waiver of Berth hire charges for the period during which the barges were detained by the Customs is not acceptable as there is no such provision in the Scale of Rates of the TPT.

9. With reference to the totality of information collected during the processing of this case, and based on a collective application of mind, the following position emerges:

- (i). The dumb barges in question are exclusively used for storage of molasses for export and berthed inside the TPT. These barges were foreign flag vessels operating with Specified Period (coastal) Licences issued by the DG (Shipping) before their registration as coastal vessels from 10 September 97 and 10 February 98.
- (ii). The TPT Scale of Rates was amended by this Authority through an Order passed on 8 December 99. The pre-revised Scale of Rates contained different berth hire rates for vessels, fishing vessels (Trawlers / Boats) and LASH vessels / barges. During the 1999 amendments, a separate rate for non-commercial vessels like tugs and barges was introduced.
- (iii). The TPT has classified the barges in question as normal commercial vessels and levied berth hire accordingly. The applicant's contention is to group these dumb barges alongwith LASH barges and to apply the berth hire rates given in the Scale of Rates for LASH barges. To bolster its arguments, the SML has pointed out that the Scale of Rates does not prescribe any size restrictions for LASH barges.

The TPT has brought out several differences between the SML barges and LASH barges. It is obvious that the sizes of the SML barges and LASH barges do not compare. Apart from the size factor, a LASH barge is one which is carried on board of the mother vessel and dropped at a Port for cargo operation. The SML barges do not satisfy this condition.

It is relevant here to recall the observations of the INSA made in the case relating to anchorage fee at the MBPT. The INSA apprehended that the concessions given to LASH barges could be exploited when they covert into dumb barges. The MBPT, however, maintained that it would go strictly by the certification of vessels. This amply proves that the vessel registration authorities also recognise the differences between the LASH barges and dumb barges.

Even though no size restrictions for LASH barge is mentioned in the Scale of Rates, the provision is clear that the specified rate is applicable to LASH barges only. And, the SML barges are not LASH barges. That being so, there is no merit in the Applicant's arguments seeking application to the barges in reference of berth hire rates prescribed for LASH barges.

- (iv). The SML barges can not be classified as non-commercial vessels as they were engaged in a commercial operation of molasses export. The SML has also pleaded for a distinction between vessels staying for shorter duration and for substantial period of time for the purpose of levying berth hire. It is to be recognised that berth hire is for occupation of a berth. As long as a vessel continues to occupy a berth she has to pay berth hire charges at the specified rates for entire duration of stay at the berth.

There can not be any concession in the berth hire charges depending on the duration of stay. In any case, the SML did not raise this issue before the TPT prior to commencement of its operation at the Port. The argument made now by the SML appears to be an after thought.

- (v). The SML has also mentioned about detention of its barges by the Customs and prayed for waiver of berth hire accrued during the period of detention or to recover such charges from the Customs.

Even during the period of detention the barges were at the TPT berth; and, the TPT is legitimately entitled to levy berth hire for this period. The TPT can not be made to forego its revenue for a dispute between the SML and the Customs. The question of TPT recovering the berth hire charges from the Customs does not arise. Since its barges were in occupation of the TPT berths, the SML is responsible to pay to the



TPT. It is for the SML to decide whether it should claim reimbursements of such payments from the Customs.

- (vi). The SML contentions about paying the dues to the port out of revenue to be generated in future from the barges working are devoid of any merit. It is to be reiterated that berth hire is for occupation of a port's berth. There can not be any condition that such levy should be linked to generation of revenue by the occupier. The Port has not forced the barges to occupy its berth. The barges have been brought to the Port by the Applicant to exploit a commercial opportunity. If the anticipated commercial success did not happen, the applicant can not reasonably seek relief from the port by asking it not to charge its legitimate dues or to wait indefinitely to recover such dues, till he generates sufficient surplus revenue.
- (vii). Addressing the issue of double banking of barges raised by the SML, the TPT has mentioned that there is no provision in its Scale of Rates for waiver of berth hire charges on this basis.

The TPT Scale of Rates does contain a provision to charge 2/3 of the berth hire charges on the vessel double banked with another vessel occupying a berth. However, this provision is made only in respect of fishing vessels.

The principle accepted in the cases of double banked fishing vessels holds good for any other category of vessels. In fact, the vessel with which the double banked vessel is tied, acts as a mooring for the latter. So, the double banked vessel has to pay only mooring charges and not berth hire. Since no separate mooring charges is available in the TPT, it is reasonable if the provisions applicable to fishing vessels is extended to all vessels.

On the material point of time during which the SML barges were double banked, there was no provision in the Scale of Rates of the TPT for not charging full berth hire on double banked vessels. So, the billing done by the TPT is as per its Scale of Rates in vogue. This Authority will introduce a common practice at all major ports regarding levy of berth hire on double banking vessels. Till such time, the TPT shall extend the existing provision relating to Fishing trawlers to all other vessels in such cases. The Authority can revise the Scale of Rates retrospectively. Such revisions, however, can only be in exceptional circumstances or to make a correct interpretation of the provisions in the Scale of Rates. There are no exceptional circumstances governing this case. That being so, there is no necessity to prescribe retrospectively a separate provision to levy berth hire on double banked vessels.

- (viii). There has been some confusion about the registration-status of the two barges. Alleging that the TPT has not appropriately classified them, the Applicant has requested for the two barges to be treated as 'coastal vessels' throughout.

In this connection, the following facts are significant:

- (a). To start with, the two barges were foreign flag vessels (belonging to a foreign Company); and, *ipso facto*, therefore, foreign-going.
- (b). Subsequently, the two barges were converted into 'coastal vessels' under Specific Period Licences issued by the Director General (Shipping).
- (c). After expiry of the Specific Period Licences, there was a 'gap' in the sense that no fresh registration for coastal operation was obtained.

(d). Ultimately, both the barges were converted into coastal vessels on a long-term basis by securing 'coastal registration' from the Director General (Shipping).

From the statement of facts above, it is clear that the two barges had floated between 'foreign-going' and 'coastal' categorisation intermittently. For purposes of this case, the periods relating to (b) and (c) above require to be dealt with in particular. It is very clear from the registration that the periods covered by (b) above fall clearly under the 'coastal' category. The TPT had obviously erred in levying tariffs applicable to 'foreign-going' vessels for this period. That being so, the contention of the Applicant about misapplication of tariffs is upheld to this extent.

The Applicant's similar claim in respect of the period covered by (c) above cannot, however, be sustained. As is evident from the narration of facts, the two barges had been converted into 'coastal' status for specific periods. No action apparently was taken by the Applicant either to get the specific periods extended or to seek a fresh (coastal) registration. In the event, the vessels were deemed to have reverted to their original status automatically. In other words, for the period between expiry of the Specific Period Licence and commencement of the regular 'coastal registration', the two barges in reference were in the 'foreign-going' category. That being so, there was nothing wrong in the levy of 'foreign-going vessel rates' by the TPT for the period.

- (ix). The TPT contemplated action to auction the barges to realise outstanding berth hire. At the request of the Applicant, the port was advised not to take such action till the case is decided. Now that the case has been decided, the TPT may proceed to raise a revised bill and recover the dues.

10.1. In the result, and for the reasons given above, and based on a collective application of mind, this Authority allows the application to the limited extent of treating the two barges as 'coastal vessels' for the periods covered by the Specific Period Licences and rejects all the other prayers. This part of the Order shall come into effect immediately on notification of this Order in the Gazette of India.

10.2. The TPT is directed to levy, with prospective effect, only 2/3rd of the berth hire charges on a vessel which is double banked with another vessel occupying a berth. The TPT is directed to introduce this prescription in its Scale of Rates appropriately. This part of the Order shall be effective 30 days after publication of this Order in the Gazette of India.

( S. Sathyam )

Chairman

