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No. 264

New Delhi, the 28 September, 2001

Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Sections 48 and 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation of M/s. A C T India relating to licensing of JD V berth at the Chennai Port Trust as in the Order appended hereto.

(S. Sathyam)

Chairman

Case No.TAMP/20/2001-CHPT

M/s. A C T India

- - -

Applicant

Vs

The Chennai Port Trust (CHPT)

- - -

Respondent

ORDER

(Passed on this 30th day of August 2001)

This case relates to a representation made by M/s. A C T India about certain issues relating to an agreement entered into between them and the Chennai Port Trust (CHPT) for licensing of JD V berth along with transit shed and its back up area for a period of 20 years from 4 June 1998.

2. In their representation, M/s. A C T India have given the following points:

- (i). As per the agreement, in addition to the berth hire charges, the licensee shall pay berth reservation charges equivalent to one day average berth hire charges or 25% of the berth hire charges of the vessel's stay in berth, whichever is higher.
- (ii). This fee is payable in advance before commencement of each year.
- (iii). During the first year of operation, the CHPT advised them to remit 25% of the berth hire charges as Berth Reservation Scheme charges. However, during the second and third year of operation, the CHPT, citing a communication from the Ministry of Surface Transport

(MOST), advised them to remit 50% of the berth hire charges as Berth Reservation charges contrary to the agreement conditions.

- (iv). The TAMP vide its order dated 22 March 2000 stated that berth reservation charges will be levied only at 25% of berth hire charges notwithstanding the communication from the MOST.
- (v). The TAMP is requested to pass necessary intermediate order to the CHPT for retaining the berth reservation charges at 25% of the berth hire charges.
- (vi). The TAMP may also take up the issue whether such berth reservation charges are applicable for berths licensed through a tendering process. The tender document does not envisage payment of berth reservation charges. It sought only a throughput commitment and payment of licence fee. The TAMP Order is required on the larger question of paying the berth reservation charges itself.
- (vii). As per the terms of the agreement, the entire transit shed excluding the first floor on both sides of JD V sheds and its back up area attached to JD V shed berth as detailed in schedule-I of the contract shall be provided to the licensee for storage and handling of their cargo at the licence fee chargeable as per Scale of Rates.
- (viii). For the area adjoining JD V berth with AC sheet roofing rental more than the rates specified in the Scale of Rates is levied as given below:

S. No.	Location	Area in sq. mtr.	Rental charges	
			As per the agreement	As per the Scale of Rates
1.	Shed area with AC sheet roofing	3941	Rs.60/-	Rs.30/-
2.	Platform with AC sheet roof	701	Rs.30/-	Rs.20/-

- (ix). Despite our various requests, this overcharging has not been rectified so far. We have been advised by the CHPT to remit the storage charges for the second and third year of operation on the above basis.
- (x). The agreements provide that (Article III, Clause I, page 12 of the agreement dated 26 February 1998) as and when Scale of Rates is revised once in three years the same will apply for the area licensed to us.
- (xi). While we agree for a 100% increase in the lease rental over the (then) existing rates as per the TAMP Order dated 22 March 2000 notified in the Gazette of India on 10 April 2000, we request the TAMP to pass necessary order to the CHPT and revise the base for lease

rental as per the Scale of Rates and refund the excess money collected from us.

3. A copy of the representation of M/s. A C T India was sent to the CHPT and all concerned representative bodies of port users for comments. The comments received are summarised below:

Madras Chamber of Commerce and Industry (MCCI)

- (i). The berth reservation charges being levied by the CHPT are in consonance of the agreement between the parties and so long as the terms of this agreement are fulfilled, the Applicant is committed to pay what is being contracted.
- (ii). The Applicant has in fact been passing on the cost of the additional charges incurred towards berth reservations to his customers.
- (iii). With the imminent operation of the Ennore Port, a very substantial amount of the cargo presently being handled in the JD of Chennai Port comprising of thermal coal destined for the TNEB will get shifted to the new port. While the concerns of the Applicant as a result of this development are understandable, it is our view that he can market for replacement cargoes to offset this loss and thereby maintain the revenue levels at the licensed berth.
- (iv). With regard to the storage areas, our position is that the rates being charges by the CHPT are in fact in accordance with the agreement signed between the two parties. Hence should be viewed accordingly.

Tamil Chamber of Commerce (TCC)

- (i). After commissioning of Ennore Port, the CHPT will lose major bulk cargo like coal etc. Eventhough at the time of calling for tender for Licensing of JD V berth, it has been specifically mentioned that coal will be diverted to Ennore Port. Considering the present circumstances, various concessions in rates for attracting cargo other than coal from the neighbouring port need to be offered.
- (ii). At this juncture, it is not advisable to increase the berth reservation charges to 50%. We fully endorse the rates fixed by the TAMP to levy berth reservation charges only at 25% and it is very reasonable.
- (iii). As regarding storage charges, the ACT India has agreed for 100% increase in the lease rental from the existing Scale of Rates as per the TAMP Order notified on 10 April 2000.
- (v). Similar agreement has been entered with another party for JD I berth and the decision taken by TAMP is to be implemented for them also.

The Chennai Custom House Agents' Association (CCHAA)

- (i). On the day of entering of the agreement – the 26th day of February 1998, - the Scale of Rates prescribing the rental charges was Rs.30/- per sq. mtr.
- (ii). Aware of the fact that the rental charges per sq. mtr. was Rs.30/- the Licensee has entered into an agreement for a rental of Rs.60/- per sq. mtr. M/s. A C T India should have at the time of entering the agreement pointed out discrepancy between the Scale of Rates and the rate applied to them.
- (iii). Instead after entering the agreement, and after the lapse of more than a year the Licensee has written to the Port on 24 February 1999 referring to the Scale of Rates of the CHPT.
- (iv). The present request is to waive the charges on a retrospective basis. Assuming the charges are waived and on a retrospective basis, such benefit must be passed on to the end User. As otherwise, it will become an unjust enrichment to the Licensee.
- (v). If the TAMP decides to waive the charges on a retrospective basis, suitable provision must be incorporated to ensure that the benefit is passed on to the end User.

Hindustan Chamber of Commerce (HCC)

- (i). The agreement is not drafted in a systematic manner. There are many repetitive Clauses.
 - (ii). The notice inviting tenders does not talk about any berth reservation charges. It mentioned only about the licence fee, which is covered under the agreement.
 - (iii). It is not understood how the berth reservation fee find a place in the agreement while the same was not a part of the tender conditions.
 - (iv). It is seen from the agreement that the licensee has agreed to pay additional berth reservation charges of 25%. When the agreement is in force how the same can be increased to anything beyond 25%.
 - (v). Article-III (H) of the licence agreement very clearly indicates that the licence agreement applicable as per the Scale of Rates shall be collected for the storage area. If the port is collecting more than the rates prescribed and as stated in the agreement, it is to be amended and the charges to be collected can only be as per the agreement.
4. The CHPT has intimated that the CHPT will not attend the joint hearing on licensing of JD I and JD V berth at the CHPT scheduled to be held on 9 May 2001 for the following reasons:

- (i). The berth reservation charges has been increased from 25% to 50% as per Government directions conveyed vide its letter No.PT-11033/7/95-PT dated 1 April 1999.

The Government vide its letter dated 15 February 2001 have clarified that the berth reservation charges required to be collected at the rate of 50% only with effect from 8 March 95 and the instruction were issued with the approval of the competent authority and at that time the TAMP was not even constituted. The TAMP has no authority to quash the order of the Government.

- (ii). The licence fee for storage area has been fixed as per the Government guidelines and also in terms of Section 49(3) of Major Port Trusts Act, 1963.
- (iii). The licensing of JD I and JD V berth of the CHPT was done by an Agreement and the licensees – M/s. A C T India, and M/s. T. Arumaidurai & Co., had signed the agreement after going through it thoroughly. The parties to the Agreement should have raised the objection before signing of the Agreement. The Agreement holds good in all respects both for berth reservation charges and storage charges according to various clauses, articles and interpretations in the Agreement.

5. A copy each of the comments received from the above representative bodies of the port users was sent to the CHPT and M/s. A C T India as feed back information.

6. In view of the fact that the issues involve are exactly the same, this case and the case relating to the representation submitted by M/s. T. Arumai Durai & Co., are bracketed and taken up together and a joint hearing was held at the CHPT premises on 9 May 2001. The CHPT has also participated in the joint hearing. At the joint hearing, the following submissions were made:

M/s. A C T India

- (i). As regards Berth Reservation Charge (BRC) is concerned, the CHPT should go by the Agreement. They can not charge 50% in place of 25% and, retrospectively at that.
- (ii). If the BRC is revised, we can then be required to pay.
- (iii). A larger issue involved is that the notice inviting tender did not refer to BRC. The Agreement can not go against the Tender Notice.
- (iv). The TAMP can fix BRC. Earlier Government orders can not restrict TAMP's authority.

- (v). There is an error in classifying the land allotted to us. We use it for storage and not for office accommodation. The CHPT must revise the rate with reference to the notified rates.
- (vi). There is no scope for retrospective revision. The increase from 25% to 50% casts a huge financial burden. Had we known about 50% of increase, we might not have come.
- (vii). There is a specific provision about BRC in the Agreement. There is no clause about revision of BRC other than through TAMP Order.
- (viii). Tender Notice says, everything is to be according to Scale of Rates. How the CHPT say today that some special rate was applied?_

M/s. Arumai Durai & Company

- (i). We agree totally with the A C T India.
- (ii). We do not come under any particular Berth Reservation Scheme. Any Steamer Agents can pay 25% to get a berth reserved. We are a 20 year licensee. We can not be equated with any Steamer Agents.
- (iii). There is a clause in the Agreement which says, if commercial interests are crucially affected, both parties can jointly discuss to readjust the terms. We want this facility.
- (iv). We also have the same problem about classification of the lands. Please clarify and resolve the dispute.

The Chennai Port Trust (CHPT)

- (i). There is specific provision in the BRC Agreement. That issue cannot be reopened.
- (ii). There is also a provision in the Agreement about increasing the 25% BRC. We have already sent a proposal to the TAMP.
- (iii). Government order issued in the year 1995 about raising BRC to 50% was not received by us. We acted in 1999 when we received a reminder. We have now retrospectively applied it with reference to the Government directive although TAMP had come into being by then.
- (iv). Rate for land allotment varies with each Agreement. There is no application of any notified rate commonly for all cases.
- (v). This is a deliberate separate arrangement. They signed the Agreement. One year later, they are objecting. It shall not be allowed.

- (vi). There is a BR Scheme for short periods for any Shipping Agents. M/s. A CT India / M/s. T. Arumai Durai have been given the BR facility for much longer periods. The two can not be equated.

Tamil Chamber of Commerce (TCC)

- (i). These are more of legal issues. TAMP may decide.
- (ii). These Agreements are meant for fuller, proper utilisation of berths. Sudden increases like this do not promote such an arrangement. Otherwise, there will be arbitration leading to further complication.

7. Earlier today, this Authority has passed an Order in the matter relating to the petition filed by the CHPT for a review of this Authority's Order dated 22 March 2000 with respect to the observations made therein about Berth Reservation Charge. In that case, it has already been decided for stated reasons to modify the earlier observation (made in the Order dated 22 March 2000) about berth reservation charge remaining static at 25% of the applicable berth hire and allow it to be increased to 50% as ordered by the (then) Ministry of Surface Transport. That being so, the CHPT's arguments about this Authority's competence to decide on Berth Reservation Charges, etc., are not considered again as a part of this case.

8. With reference to the totality of information collected during the processing of this case, and taking into account the arguments advanced at the joint hearing, the following position emerges:

- (i). M/s. ACT India have been given a 20-year Agreement (with effect from 4 June 1998) under the Berth Reservation Scheme.
- (ii). The specific Agreement has incorporated a provision for payment only of a 25% premium. That the CHPT erred in not incorporating a provision of a 50% premium because of being unaware of the Government Order dated 8 March 1995 cannot be of much consequence in this context. The CHPT argument that it has to apply enhancements retrospectively (with effect from June/July 1998) because it has been approved by the Government is not acceptable for the reason that conditions of contract (in this case, the Agreements) cannot be revoked or altered (and, retrospectively at that) by any one party to the contract. Notwithstanding the existence of a valid Government Order on the subject, it cannot supersede a specific condition stipulated in the contract (i.e., the Agreement) in accordance with the prevailing Scale of Rates. In other words, in this case, the CHPT cannot justifiably enforce (either retrospectively, or, even, prospectively) enhancement of the premium rate contrary to the arrangement specifically stipulated in the Agreement.
- (iii). M/s. ACT India argued at the joint hearing that the Berth Reservation Scheme would not be relevant since the tender documents relating to

their cases did not refer to the Berth Reservation Scheme at all. This argument would have been acceptable had they not executed subsequently Agreements that cite the Berth Reservation Scheme in particular. Having done that, they will now be estopped from avoiding the Berth Reservation Scheme. They will have to be found to be bound by it. If at all, it is only the others who failed to win the contracts that can complain about (alleged) deviations from arrangements envisaged in the tender documents. Since the subsequent references to the Berth Reservation Scheme amount only to introduction of a steady long-term arrangement based on considerations not only of payments but equally of sustained performance and not of any dilution of the terms and conditions notified earlier, this Authority will not also like to take *suo motu* cognizance of this issue.

- (iv). M/s. ACT India have represented that the enhanced rate has already been enforced by adjustment from the 'advance payments' deposited by them with the CHPT. If this has indeed happened, in the light of the legal position discussed above, the CHPT will have to refund the adjustments so made by it. And, in fairness to the shippers, the petitioner (M/s. A C T India) shall pass on this benefit to them if the incidence of this (additional) burden had earlier been shifted to them as claimed at the joint hearing by the MCCI.
- (v). The petitioner had also represented about the License Fee for the transit sheds and their back-up areas being far in excess of the rates notified in the Scale of Rates. While this claim is factually correct, the CHPT has explained it away by saying that it is only strictly following the rates specified in the Agreement. The confusion has arisen, as suggested by the HCC at the joint hearing, due to inherent contradictions in the Agreement, in this case by a statement in Clause (h) of Article-III ('License and Authority') which stipulates that the transit shed and its back-up area "shall be provided to Licensee for Storage and handling of their cargo mix, **at the License Fee applicable as per the Scale of Rates**". This general clause (h) is contradicted by Clause (I) which is a specific clause for 'license fee for transit shed and its back-up area' which states that "the license fee ... is enclosed in Schedule-I which shall be paid by the Licensee and such fee is payable in advance before commencement of each year for Berth". The legal position will be that both the Licensor and the Licensee in this case will be bound by the conditions of contract contained in the specific Agreement. The affected party cannot choose to follow this dictum only in respect of the Berth Reservation Scheme where it suits them to do so and choose to go under the Scale of Rates where it does not suit them. Application of the provisions of the Agreements will have to be consistent in respect of both the issues. While it is true that the general Clause (h) in Article-III of the Agreement has caused (avoidable) confusion, the specific Clause (I) relating to 'license fee for transit shed and its back-up area' will have to be found to have an over-riding impact. That being so, there is no substance in the representation in this regard.

- (vi). At the joint hearing, a reference was made to an error in the classification of the land allotted; the land allotted for cargo storage has been treated as land for office accommodation. This is a plain factual matter not involving any issue for adjudication. This Authority accordingly advises the CHPT to get the area inspected for a (final) settlement of facts.
- (vii). The petitioner has sought to invoke the clause that provides for re-adjustment of terms based on a joint discussion where commercial interests are crucially affected. In the light of the analysis given above, it will not be necessary to pursue this proposition at all.
- (viii). Although the case of the Bengal Tiger Lines is not one of the contentious components of these proceedings, reference has also been made to their Agreement under the Berth Reservation Scheme; and, in their context, a suggestion has been made that the Port must give 'volume discounts' for better performance just as it imposed 'penalties' for under-performance. Since the Berth Reservation Scheme in all its details is not under scrutiny in these proceedings, this Authority does not go into these details. That can happen as and when this Authority decided to take up the Berth Reservation Scheme / berth reservation charge for substantive consideration. But, significantly, at the joint hearing in this case on 18 June 2001, the CHPT responded positively to this suggestion to say that there can be a review of the Berth Reservation Scheme to introduce this incentive. For the time being, therefore, it is decided that this issue may be left for the Lines to take up this thread towards further negotiations with the CHPT.

9. In the result, and for the reasons given above, and based on a collective application of mind, this Authority decides the following:

- (i). The representation of M/s. ACT India against enhancement of the berth reservation charge was accepted; and, the CHPT is required to make appropriate refunds to the petitioner.
- (ii). The representation of M/s. A C T India about excessive charge of 'licence fee for transit shed and its back-up area' is rejected.
- (iii). The CHPT is advised to get the storage area inspected for a (final) settlement of the dispute about classification of the land allotted.
- (iv). The CHPT is also advised to make appropriate amendments to Clause (h) under Article-III of the Agreement form so as to eliminate the apparent antithesis to Clause (l) *ibid* so that such cases in future do not encounter this anomalous situation.

(S. Sathyam)

Chairman

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