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New Delhi, the 26 September, 2001

Tariff Authority for Major Ports

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 proposal of the Chennai Port Trust for a review of its Order dated 22 March 2000 with reference to berth reservation charges as in the Order appended hereto.

(S. Sathyam)

Chairman

Case No.TAMP/35/2001-CHPT

Chennai Port Trust (CHPT)

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Applicant

ORDER

(Passed on this 30th day of August 2001)

The Chennai Port Trust (CHPT) has sent a proposal for a review of this Authority's Order dated 22 March 2000 with reference to the Berth Reservation Charges.

2.1. The facts of the case are as follows:

(i). This Authority had passed an Order on 22 March 2000 approving revision of the Scale of Rates of the CHPT.

(ii). In paragraph 11(vi) of the said Order, this Authority had made the following points:

(a). Levy of berth reservation charge @ 25% of applicable berth hire was introduced by the CHPT in line with an advice given by the Government sometime ago.

(b). Levy of berth reservation charge came to the knowledge of the Authority for the first time in the case relating to general revision of tariffs of the CHPT. That being so, the Authority found that it was not possible to go into the details of the concept of berth reservation charge as a part of the proceedings of that case. Accordingly, the Authority reserved this item for separate scrutiny.

(c). Keeping in mind the financial interests of the CHPT, the Authority allowed the levy of berth reservation charge to stay for the time being. But, the Authority did not allow any change in the rate of berth reservation charge and ordered continuance of this levy @ 25% of the applicable berth hire.

2.2. In pursuance of the position described above, the CHPT has now requested this Authority to review its Order on berth reservation charge. The points stated by the port in its letter dated 29 June 2000 addressed to the (then) Ministry of Surface Transport seeking directions in terms of Section 54 and Section 111 of the Major Port Trusts Act 1963 in the matter are summarised below:

- (i). A long term licence agreement was entered into by the Port with M/s. ACT India Limited and M/s. T. Arumai Durai & Co. on the basis of the Guidelines on Berth Reservation Scheme approved by the (then) Ministry of Surface Transport (MOST).
- (ii). One of the guidelines at Point 1(ii) of the MOST letter dated 1 June 1992 pertaining to the berth reservation charge reads as follows:

“A fee will have to be charged for berth Reservation Scheme and this should be equal atleast to the berth hire for a day or to 25% of the berth hire for the expected stay of the ship at berth whichever is higher. The shipping lines should intimate the expected stay of the ship at the time of asking for berth reservation”.

- (iii). The berth reservation charge was enhanced to 50% by the MOST vide its letter dated 1 April 99 (addressed to the Chairman of the JNPT in response to its proposal to the Ministry requesting for certain amendments to the General Guidelines on the Berth Reservation Scheme issued by the MOST in its letter dated 8 March 1995.) Paragraph 3 of the said Guidelines was amended to read as follows:

“The vessels which stay at berth for more than 24 hours shall pay a fee equivalent to berth hire charges for single day or 50% of the hire charges calculated on the actual stay of the vessel at berth whichever is higher; and a fee equivalent to berth hire charges for half a day only shall be charged from the vessels which stay at berth for less than 24 hours”.

The letter also stated that the amendment to the paragraph 3 of the Guidelines of the MOST, dated 8 March 1995 would come into effect from 1 April 1999.

- (iv). In view of the position described above, the berth reservation charge was enhanced with effect from 1 April 99 by the CHPT.
- (v). Since the berth reservation charge is governed by the terms of the agreement (and not covered by the Scale of Rates), the licensees refused to pay the charge at a higher rate. The amount due on that account was adjusted from the advance paid by the licensees as per the Government directions. In view of the Authority's Order dated 22 March 2000, the licensees have approached the Port to refund the increased amount of the berth reservation charge adjusted earlier by it from the advance paid by them.

2.3. In its reply to the CHPT, the Ministry of Shipping (vide its letter dated 15 February 2001) has stated as follows:

- (i). The Tariff Authority for Major Ports (TAMP) was not constituted at the time of issue of the Ministry's instructions on 8 March 1995, hence the TAMP has no right to quash the Order passed by the MOST in this case.
- (ii). A proposal stating the order of the Government on berth reservation charge be forwarded to the TAMP by the port explaining the matter with complete justification for withdrawal of its Order.
- (iii). To indicate the total loss on account of not enhancing the berth reservation charge (from 25% to 50%) with effect from 8 March 95 in respect of the licensees viz., M/s. ACT India Limited and M/s. T. Arumai Durai & Co. which was specifically

approved prior to finalisation of the long term licence agreement with the said parties.

- (iv). The CHPT may send a proposal with full justification to the TAMP for withdrawal of its Order. (The proposal under process is the one so sent by the CHPT.)

3. A copy of the proposal was circulated to all concerned representative bodies of port users. The comments received are summarised as below:

Indian National Shipowners Association (INSA)

If the CHPT had implemented the order passed by the MOST before the constitution of the TAMP, the approval of the TAMP was not required; however, presently no increase in port tariff can take place without the approval of the TAMP. The TAMP has rightly questioned the Port in its Order about the unilateral increase and may have reservation in amending its Order.

Tamil Chamber of Commerce (TCC)

We have already given our view in the cases relating to M/s. ACT India Limited and M/s. T. Arumai Durai & Co.

Container Shipping Lines Association (CSLA)

- (i). The general guidelines for the Berth Reservation Scheme was first introduced by the MOST vide its letter No.PT-11023/2/89-PT dated 1 June 92. The guidelines were issued at the time when the TAMP was not in existence and in response to a requirement of the JNPT. The Guidelines became applicable to all the ports in India and applied at the Chennai Port also for the bulk (coal) as well as general cargo vessels. The Guidelines fixed the berth reservation charge equal to one day berth hire cost or 25% of the total berth hire cost whichever is higher.
- (ii). The MOST vide its letter No.PT-11033/7/95-PT dated 1 April 99 (in response to the JNPT's letter dated 27 January 99 seeking certain amendment in the general Guidelines on Berth Reservation Scheme issued by the MOST on 8 March 95) amended the guidelines on the berth reservation charge by increasing it from 25% to 50%. The letter appears to have been copied and delivered to all the Ports and the Order became effective from 1 April 99.
- (iii). The CHPT has increased the charges from 25% to 50% only from 1 April 99 and it is not clear as to why the revised rate was not applied between the period from 8 March 95 to 1 April 99.
- (iv). The following users have entered into a Berth Reservation Scheme agreement during this period at the old (pre-revised) rate:

Vessel Operator	Berth Reserved	Cargo Type	Effective date	Expiry date
XCL	West Quay 1	Containers	25.9.95	24.9.97 extended upto 31.3.98
M/s. ACT India Ltd.	JD-I	Coal	4.6.98	20 year Agreement
M/s. T. Arumai Durai & Co	JD-V	Coal/General Cargo	13.7.98	20 year Agreement

- (v). In its letter to the MOST, the CHPT (vide its letter dated 29 June 2000) stated that the TAMP stayed the revised order of the MOST for application of a rate of 50% on

the basis of justifications put forth during the hearing against the charge; and now, the amount adjusted from the advance towards the enhanced berth reservation charge for the period between 1 April 99 to 17 April 2000 becomes refundable to M/s. ACT India Limited and M/s. T. Arumai Durai & Co., as per the TAMP Order.

- (vi). The details of the Berth Reservation Scheme in existence as per the current agreement with Bengal Tiger Lines (BTL) are given below:
 - (a). The duration of the agreement is between 1 October 99 to 30 September 2001 for container Berth No.1.
 - (b). The priority berth hire charges @ 50% of the total berth hire cost are paid.
 - (c). The stacking and feeding operation of the vessel are managed by the BTL by using port labour and equipment.
 - (d). In spite of the guaranteed throughput of 1.25 lakhs TEU for the first year and 1.30 lakhs TEU for the second year, no incentive is given to BTL for over performing, rather, the BTL has to pay CHPT Rs.1500/TEU for any shortfall. This can be considered a very high premium under the Berth Reservation Scheme.
- (vii). The priority berth hire charge upto 50% of the total berth hire cost is arbitrary and is not supported with factual workings of cost. The TAMP was correct in retaining the old rate.
- (viii). The CHPT is raising this issue only because it has been asked to explain by the Ministry for omission in the past and the MOST's advice to rectify it by sending justification to the TAMP for withdrawal of its Order. There are no cost justification for the revision.
- (ix). The Port may be advised to discontinue charging a premium over the normal berth hire charges to such users who guarantee a fixed quantity of throughput and hence the revenue. This guaranteed revenue shall be an incentive enough for the Ports to offer berth reservation or fixed window to such users.

The Chennai Custom House Agents' Association (CCHAA)

- (i). It is noticed that the guidelines for the Berth Reservation Scheme have been framed as early as 1 June 1992. On 8 March 1995, berth reservation charge has been enhanced from 25% to 50% by the MOST as per their instructions in letter No.PT-11033/7/95-PT. Subsequently on 1 April 1999 an amendment to one of the clauses of the guideline has been introduced by the MOST.
- (ii). The CHPT entered into a long-term license agreement with M/s. A C T India and M/s.T. Arumai Durai & Co., under the Berth Reservation Scheme, presumably after 1 June 1992 and 8 March 1995. If the CHPT has entered into an agreement after 8 March 1995 and have not consider the enhancement of 25% to 50% berth reservation charge during the time of entering into the agreement, in all fairness, the terms of the agreement shall prevail.
- (iii). There cannot be two authorities (i.e., the TAMP and the MOST) giving two different directions on a singular issue.
- (iv). If the berth reservation charge is not covered by the Scale of Rates then the terms of agreement shall only be considered.

- (v). Even assuming that as per the terms of the agreement, the licensee is liable to pay the charges levied by the Government / TAMP, any change can only be prospective.
- (vi). If there is no specific provision in the agreement for revising charges with retrospective effect, it will be incorrect for the Port to enforce the charges on a retrospective basis.
- (vii). If a regulatory body has been constituted by the Government with full authority and power to look into the tariff matters of the Port and interests of the Trade, the decision of the regulatory body must be final; otherwise, the very purpose of creation of such a regulatory authority gets defeated.

4. In response to the comments of the INSA and CSLA, the CHPT has made the following points:

- (i). The Government letter No. PT-11033/7/95-PT dated 8 March 1995 enhancing the berth reservation charge from 25% to 50% was not received by it and it came in light only on receipt of the Government's letter No. PT-11033/7/95-PT dated 1 April 1999. Hence the increase of berth reservation charge from 25% to 50% has been effected from 1 April 1999. The claims for balance 25% have also been made from 1998 onwards from the licensees.
- (ii). The berth reservation charge was enhanced before the constitution of the Authority and hence the Authority cannot override the Order passed by the Government. The berth reservation charge is governed by the terms of the licencing agreement and not by the Scale of Rates. The Authority's approval is required only for incorporating the rates and conditionalities in the Scale of Rates.
- (iii). The Authority had passed the Order without giving an opportunity to the CHPT to explain its position. The Authority and the Board of Trustees of a major port are bound by the directions of the Central Government in terms of Section 111 of the MPT Act.
- (iv). Since the berth reservation charge is governed by the terms of agreement, the licensee and the CHPT are the only concerned parties and the INSA and the CSLA has no role to interfere in this subject.
- (v). The priority berth hire and berth reservation charge under licensing of two different issues. Under priority berth hire the CHPT shall collect a fee in addition to berth hire charges. Whereas, berth reservation charge are collected at 50% of the berth hire in addition to normal berth hire. The increase in berth reservation charge was made by the Government after careful consideration. The Authority cannot interfere in Government instructions and retain the old rate.
- (vi). The Government have now taken a stand that the Authority has no right to quash the orders of the Government. As the revision of berth reservation charge from 25% to 50% was made by the Government after careful consideration, the cost justification does not arise.

6. A joint hearing in this case was held at the CHPT premises on 18 June 2001. At the joint hearing, the following submissions were made: _

The Chennai Port Trust (CHPT)

- (i). This is an existing scheme approved by the Government. We do not, therefore, want another hearing to prepare for a regular tariff case.

- (ii). Government letter of 1995 was not received. We were aware only of 25%; not of the 50%. In the Agreements, therefore, we incorporated only 25% (when in fact we could have incorporated 50% on strength of the Government Order.)
- (iii). This was started before the TAMP was constituted. The TAMP's Order dated 10 April 2000 was an embargo on us in charging the rate from 25% to 50%. We only want the TAMP to remove the embargo. The rate of 50% has already been approved by the Government.
- (iv). Clause (m) of the Agreement provides unambiguously for such revisions.
- (v). In the general revision hearing the TAMP refused to discuss the specific cases. That is why we say 'there was no opportunity given to us'.
- (vi). This is not a tariff proposal. Ours is an application for a review of TAMP's April 2000 Order and remove the embargo.
- (vii). Berth is a common user facility. That's why a special rate is charged when preferential access is given. This right cannot be taken for granted.
- (viii). Cost details are commercially sensitive and, therefore, confidential. These cannot be revealed to the Trade.
- (ix). Tendering process for Berth Reservation Scheme takes into account all productivity and efficiency factors.
- (x). Penalty is fully justified. Of course, we do not give volume discounts. There can be a review of the Berth Reservation Scheme to introduce this incentive.
- (xi). If the provisions for 'ousting priority' are applied every time, the lines will have to pay more. That is why the special Berth Reservation Scheme where they pay less.
- (xii). The benefits under Berth Reservation Scheme are enormous. Vessels do not wait at all. 'Ship standing time' is zero. This benefit far out weighs the special charge they have to pay.
- (xiii). Gantry cranes are also kept ready. Their cargo handling operation starts at once. Turn around time is considerably reduced.
- (xiv). If their vessel does not arrive, we utilise the berth by giving it to others. The berth hire so collected is adjusted to their credit.

The Chennai Steamer Agents' Association (CSAA)

We have no observations to make now._

The Container Shipping Lines Association (CSLA)

- (i). Two issues are there:
 - the way Berth Reservation Scheme has been implemented.
 - the proposal to increase the rate.

- (ii). The situation in the Jawaharlal Nehru Port Trust (JNPT) was different. MLOs were calling at the port. There was low port productivity. MLOs were, therefore, demanding special attention. Hence the Berth Reservation Scheme.
- (iii). Government Order in 1995 was for the JNPT, which was copied to others, which was not received by the CHPT. How can it be acted upon today?
- (iv). If the Lines performed better, other ports like JNPT or NSICT give volume discounts. The CHPT has imposed penalties on Bengal Tiger Lines for not achieving guaranteed traffic.
- (v). Even if there has to be a revision, costing details are not given. Increase to 50% is, therefore, arbitrary.
- (vi). We do not agree that this can be done with reference to any Government Order. There has to be good justification.
- (vii). Guarantee of traffic by lines should be incentive enough for the CHPT to give Berth Reservation Scheme. The lines pay 'extra' for the Berth Reservation Scheme. There can be 'penalty' if the traffic does not materialise. But, do not charge any 'premium' on berth hire which is high and arbitrary. So instead of increasing 25% to 50%, abolish the 25% altogether. The NSICT follows this approach.
- (viii). Berth Reservation Scheme shall be emphasising the efficiency aspects; but, not 'penalties'. Even the JNPT does not charge the premium.
- (ix). Ousting priority is a spasmodic arrangement. Berth Reservation Scheme is a longer-term arrangement. Details of one cannot be compared to the other.

Madras Chamber of Commerce and Industry (MCCI)

- (i). There is a specific Agreement on Berth Reservation Scheme. Can a Government letter supersede a clause in a specific Agreement?
- (ii). TAMP Order of the April 2000 is the latest and that must prevail.
- (iii). Increase from 25% to 50% is too steep.

7. 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, and based on a collective application of mind, the following position emerges:

- (i). This case relates to a reservation charge levied by the CHPT under a Berth Reservation Scheme operated by it in accordance with Guidelines issued by the (then) Ministry of Surface Transport.
- (ii). This Authority came to know about the charge for the first time only during the processing of the case relating to general revision of the Scale of Rates of the CHPT in 2000. As it was not possible for this Authority at that stage to go into the details of the Berth Reservation Scheme in the absence of requisite information and scrutiny, it was decided to deal with the matter separately. In the circumstance, this Authority neither approved nor disapproved the reservation charge. Bearing in mind the financial interests of the CHPT, the charge was allowed to be continued as it existed at that time.
- (iii). All major ports operate a priority berthing scheme. This Authority has been of the view that, in a situation where demand for exceeds supply of port capacities, such a

priority berthing scheme will lend scope for manipulations; and, it has, therefore, not been favourably inclined towards such arrangements. Nevertheless, until it has had time to go into details of the *pros* and *cons* of such arrangements and develop any alternative, it has decided to let the *status quo* prevail without either approving or disapproving the system of priority berthing.

In this backdrop, and in the same way, in the case of the Berth Reservation Scheme also this Authority has let the *status quo* prevail without either approving or disapproving the Scheme in operation.

- (iv). Strictly speaking, it is not really necessary for this Authority to veer away from these issues until development of any alternatives. Nothing will be lost by taking a stand even at a preliminary stage of consideration; this Authority can always alter its stand based on subsequent information, deliberations, analysis. The principle of estoppel cannot be said to apply to adjudicators or arbiters of justice. This Authority took the stand it did only by way of abundant caution; apparently, it did not wish to expose itself to the vulnerability of a charge of vacillation (especially in cases where the decisions tend to border on swings of oscillation).
- (v). Be that as it may, the matter relating to the Berth Reservation Scheme can be seen to be different from that relating to priority berthing. Whereas the latter involves spasmodic arrangements based on considerations of payments, the former is predicated on a steady long-term arrangement based on considerations not only of payments but equally of sustained performance. That being so, there need not be any hesitation in recognising such arrangements.

In this case, such a berth reservation arrangement has existed since 1992; and, has been governed by comprehensive Guidelines issued by the (then) Ministry of Surface Transport.

- (vi). The CHPT has complained that this Authority's observations about this Scheme have been passed in the Order relating to the general revision of its Scale of Rates without giving any opportunity to it to express its views. This complaint is not factually correct. There was an elaborate discussion on various issues at the time of the joint hearing in the 'general revision case'. The CHPT could have raised this matter as a general issue concerning all vessels. It did not do so. Instead, this matter was raised as a dispute between the Port Trust and two parties - M/s. ACT India Limited and M/s. T. Arumai Durai & Co. Since, in joint hearings relating to general proposals, specific cases are not ordinarily discussed, no discussion on the two specific cases was allowed. And, as earlier stated, since this Authority came to know about the Berth Reservation Scheme / berth reservation charge for the first time only at that stage, it could not also see behind the specific cases to sight the general issues involved. As a result, this matter remained unresolved. Hence, this separate proposal from the CHPT in this matter.
- (vii). In the Order relating to the general revision of tariffs, this Authority was informed by the CHPT only about a '25% charge'; there was no indication about the Government Order enhancing it to 50%. To avoid any confusion, therefore, this Authority had stated that the enhancement approved by it in the berth hire charge will apply only to the berth hire charge notified in the Scale of Rates and not to the 25% berth reservation charge. This has been wrongly interpreted by the CHPT as amounting to an Order by this Authority to quash the Government Order about enhancement of the berth reservation charge from 25% to 50%.

As it now transpires, the Scheme was introduced on 1 June 1992 with a 25% charge; it was amended on 8 March 1995 to enhance the charge from 25% to 50%; and, it was further amended on 1 April 1999 to introduce some minor changes. The CHPT was unaware of the Government Order dated 8 March 95 which it came to know about only when the letter dated 1 April 99 was received. Hence, the

confusion in this matter. As a matter of fact, therefore, there has been a valid Government Order enhancing the berth reservation charge from 25% to 50% with effect from 8 March 95; that the CHPT did not enforce the Order because of being unaware of it cannot be said to detract from this factual position. In the circumstance, this Authority likes to modify its earlier observation about the berth reservation charge remaining static at 25% and allow it to be increased to 50% as ordered by the (then) Ministry of Surface Transport on 8 March 95.

- (viii). It is necessary here to clear certain misconceptions:
- (a). With reference to a wrong advice given by the CHPT, the Government has stated that this Authority has no right to quash the Order of the Government.
 - (b). The CHPT has taken the stand that this Authority cannot override the Government Order about the Berth Reservation Scheme / berth reservation charge as the Order was passed before this Authority was constituted.
 - (c). The CHPT has stated that this Authority, like the Board of Trustees of a major port, is bound by the directions of the Central Government in terms of Section 111 of the Major Port Trusts Act.

With reference to the three objections cited above, the following position is worthy of recognition:

- (a). While in this case, as earlier stated in Para 7.(vii). above, this Authority can recognise the fact that a valid Government Order has been in position since 8 March 95 and can be recognised as such, it is difficult to accept the Government contention that this Authority cannot overturn any (earlier) order of the Government relating to tariffs. As is known, the earlier statutory provision required Government sanction for notification of all tariffs. If the Government's contention in reference were to be accepted, then, this Authority cannot alter any tariffs (and/ or the attached conditionalities) since they had all been notified as approved and ordered by the Government. Clearly this will not be a tenable proposition at all. The amended Statute of February 1997 has vested in this Authority the power of the Government to approve and notify tariffs. Inherent in this power is the power to call into question any of the existing tariffs (and all related issues).
 - (b). The CHPT's contention about the competence of this Authority to alter arrangements ordered by the Government prior to its constitution is totally misconceived. If this were to be so, then, as described in (a) above, there can be no change at all. Surely, the Statute would not have been amended to constitute this Authority only for the purpose of witnessing a static tariff situation!
 - (c). The CHPT's observation about directions of the Central Government being binding on this Authority is unexceptionable. Only, in this case, there has been no such 'direction'. An executive communication cannot be equated with a 'direction' under Section 111 of the Major Port Trusts Act. And, significantly, the said executive communication is also addressed to the CHPT and not to this Authority.
- (ix). The CHPT has made a most extraordinary observation that what is really required is this Authority's approval only for incorporating the rates and conditionalities in its Scale of Rates and not for ratifying the arrangements already ordered by the Government. The correct legal position governing such situations and the powers of this Authority to deal with the Scale of Rates and all tariff-related matters have already been analysed above. In the backdrop of the analysis given, the contention

of the CHPT cannot but be seen to amount to a mockery of the tariff setting system envisaged in the Statute.

Likewise, the CHPT's objection to involvement of the INSA and the CSLA in these proceedings is devoid of any substance. As has already been pointed out in 7.(vi). above, the confusion in this case has arisen because of the CHPT's approach of dealing with the Berth Reservation System / berth reservation charge only with reference to the two specific parties in reference. It may be that the CHPT has concluded Agreements only with two parties as of now. But, the Berth Reservation Scheme as a Scheme has to be seen as a general proposition open to all vessel operators. That being so, the INSA and the CSLA who are recognised representative-bodies of vessel operators cannot be denied a role to represent their views in these proceedings.

8. In the result, and for the reasons given above, and based on a collective application of mind, this Authority decides to modify its observation (made in its earlier 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.

(**S. Sathyam**)

Chairman

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