

(Published in Part – III Section 4 of the Gazette of India, Extraordinary)

Tariff Authority for Major Ports

G.No. 53

New Delhi, 12 April, 2003

NOTIFICATION

In exercise of the powers conferred by Sections 48 and 50 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the proposal from the Mumbai Port Trust (MBPT) for review of levy of a charge on cargo lighterage operation as in the Order appended hereto.

(A.L. Bongirwar)
Chairman

Tariff Authority for Major Ports
Case No. TAMP/2/97-MBPT

The Mumbai Port Trust

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Applicant

ORDER

(Passed on this 17th day of March 2003)

This Authority had passed an Order on 2 June 1999 disposing of the proposal from the Mumbai Port Trust (MBPT) about levy of a charge for lighterage operation in respect of cargo carried in transit to other ports whether discharged at the Bombay Floating Lights (BFL) or outside. In the said Order, this Authority held as follows:

- (i). The levy of cargo related charges of Rs.15/- PMT for operations at the BFL (outside the port limit) is beyond the competence of the MBPT.
- (ii). The rate of Rs.15/- PMT can be said to justifiable.

1.2. In relation to its decision about the competence of the MBPT to levy a charge for operations at the BFL, this Authority had made the following analysis :

“The MBPT has not been able to produce any documentary evidence that the BFL area forms part of a navigable river or channel leading to the MBPT to support their contention that the BFL area falls within the ‘port approaches’. For extending the tariff jurisdiction beyond its limits, the onus was on the MBPT to show that the area was in the ‘port approaches’. This onus has not been discharged. This point assumes further significance when viewed in the backdrop of the fact that the IIL has shown the BFL area to be ‘the coordinates’ of the Dharamtar (minor) port. That being so, it cannot be said that, in terms of Sections 48 and 49 of the Major Port Trusts Act, the MBPT has any right to levy rates for operations as described in their proposal. Applying the principle of opportunity cost, it may be reasonable for the MBPT to contend that it cannot forego its revenue earnings from potential traffic; but, it cannot seek to apply the principle to operations in areas not within its (legal) reach.”

2. The aforesaid Order was challenged by the MBPT in the Hon'ble High Court of Bombay. The MBPT filed a Writ Petition no. 1516 of 2000 in the High Court of Bombay requesting to quash and set aside the Order under reference pending disposal of its petition.

3.1. The MBPT vide its letter dated 7 June 2002 has informed that the High Court of Bombay through its order dated 8 January 2002 had disposed of the said Writ Petition and set aside the Order of this Authority so far as it rejects the proposal for lighterage charges for BFL and port approaches. The High Court of Mumbai has directed the Tariff Authority for Major Ports to re-consider the proposal of the MBPT and pass suitable orders in accordance with law after giving opportunity of personal hearing to the Petitioner (MBPT). The Hon'ble High Court, in its Order, has observed that this Authority had rejected the MBPT proposal solely on the ground that the Petitioner had failed to establish its claim that BFL was in the port approaches; this Authority had not considered the effect of notification dated 28 May 1982 as well as various maps relied by the port.

3.2. The MBPT has also conveyed that the High Court has subsequently clarified that the Authority should give hearing in accordance with the Regulations framed by the TAMP.

4. In pursuance of the Orders of the High Court of Mumbai, it has been decided to re-open the case and a confirmation was sought from the MBPT whether it wished to pursue the original proposal without modification or not. The MBPT was also advised to submit all the necessary evidences to prove that the BFL falls within the port approaches. After a reminder, the MBPT has responded vide letter dated 24 July 2002 conveying its intention to pursue its original proposal without any modification; and, has also forwarded a copy of notification dated

28 May 1982 passed by the Government of India and a map in support of its claim that the BFL area is within the port approaches.

5.1. In accordance with the consultative procedure prescribed, copies of the relevant portion of the proposal of the MBPT and the earlier Order passed by this Authority on 2 June 1999 disposing of the proposal of the MBPT were forwarded to the concerned user organisations and representative bodies of port users for their comments. The comments received from them are summarised below:

The Container Shipping Lines Association (CSLA)

- (i). While processing the earlier proposal it had stated that it was not in favour of the MBPT's proposal of levying a charge of Rs.15/- PMT as this was another example of fictional charges where the port does not render any service.
- (ii). It has no further comments to add now apart from supporting the conclusion made by the TAMP in its Order dated 2 June 1999.

Bombay Custom House Agents' Association (BCHAA)

- (i). No charges must be levied by the MBPT if any operation of loading, unloading, discharge of cargo, etc., is done outside the limits/ territory of the MBPT.
- (ii). If BFL and anchorages at which the vessels berth and where the operation of lighterage are done, fall within the MBPT territory, the port has the right to levy a tariff for permitting certain operations to be carried out, even if no direct service is rendered by the port.
- (iii). In this backdrop, the tariff of Rs.15/- PMT proposed by the MBPT on cargoes discharged at the anchorages near BFL, which do not pass through Mumbai Port, seems to be justifiable and fair. It is, however, suggested that the tariff should not be more than Rs.10/- PMT.

Mumbai and Nhava-Sheva Ship Agents' Association (MANSA)

- (i). The contention of the MBPT that the mother vessel anchored at the BFL or outside will be within the port approaches is very vague, since the chart for approaches to Mumbai Port covers a vast area which includes the Mumbai High Oil Fields and the Lighterage point offshore (LPO).
- (ii). If the instant request of the MBPT is conceded, all the cargo transiting from the Mumbai High Oil Field to the JNPT will fall within the scope of this charge. It will also cover lighterage operations of VLCCs at LPO discharging cargo into daughter vessels, which could at a later date go to the JNPT for discharge of its cargo.
- (iii). The MBPT does not provide any services for any of these lighterage operations except for the barges transiting through the Mumbai Port Limits for which Port Dues are paid.
- (iv). As already pointed by the TAMP, the MBPT could not extend any explanation justifying the charges proposed except taking the extreme view of reading certain convenient sections of the MPT Act and interpreting same to their advantage.

Indian National Shipowners' Association (INSA)

- (i). The proposed levy of Rs.15/- PMT is very high and works out to nearly ten times the (earlier) proposed rate of 25% of wharfage for the cargo lightered within the port limits.
- (ii). Levy of the proposed charge for lightering cargoes meant for minor ports and outside port limit is not justified at all.
- (iii). The vessels carry out the cargo operations outside the port with a view to save port costs which are highest at the MBPT in this region.
- (iv). The MBPT must quantify in detail the services proposed to be rendered, however, small it may be; and, then evaluate the levy to meet the cost of service.
- (v). The MBPT is not incurring any additional cost for permitting a ship to a safe passage except offering of some additional monitoring. This could be quantified and a toll may be prescribed in addition to normal port dues.

5.2. The comments received from the above users were forwarded to the MBPT as feedback information.

6.1. M/s. Lilani Shah & Company, advocates of M/s. Ispat Industries Ltd. (IIL) have sent a communication on 29 November 2002 to adjourn the joint hearing fixed on 2 December 2002 in this case by at least eight weeks since the Writ Petition filed by it and also by the MBPT in the Hon'ble High Court of Mumbai are pending for hearing and final disposal. It has also been pointed out that comments on the MBPT's proposal cannot be offered unless the copies of the Writ Petition filed by the MBPT and also the High Court Order dated 8 January 2002 are forwarded to the IIL.

6.2. Since the IIL was not a party to the proceeding in W.P. 1516 of 2000, a copy of the W.P. filed by the MBPT was not forwarded; the High Court Order dated 8 January 2002 was, however, forwarded to them. Since this case was reopened by another order passed by the same High Court of Mumbai, the request of the IIL to adjourn the joint hearing fixed in 2 December 2002 was not accepted.

7.1. A joint hearing in this case was held as scheduled on 2 December 2002 at the MBPT premises. At the joint hearing, the following arguments were made:

M/s. Ispat Industries Limited. (IIL)

- (i). IIL had already moved the High Court in a Writ Petition and the same is pending. Similarly, the MBPT petition in the High Court on the same matter is pending. Therefore, the matter is subjudiced and the TAMP should postpone this hearing.
- (ii). Since, we were not a party in the present Writ in which Hon'ble High Court passed order on 8 January 2002, we would like to see that order before we can make detailed comments.

Mumbai Port Trust

- (i). The High Court order dated 8 January 02 was read out in detail and following conclusions were derived:
 - (a). The TAMP has already settled the issue of the reasonableness of the rate of Rs.15/- per metric ton in its 2 June 1999 order. Para 4 of the order speaks clearly on this and, therefore, this issue should not be debated.

- (b). The issue to be decided now is whether BFL is part of the port approach or not and what is the support of law to prove this.
- (ii). The notification dated 28 May 1982 which demarcates the geographical boundaries of the port may kindly be seen. It is abundantly clear from this notification that the port limits abut the BFL and, therefore, port approach would be in an area adjoining the western boundary of the port limits.
- (iii). Admiralty map no.1487 which shows total approach to the port may kindly be seen in which the port limit is defined. We are of the view that the port approach is an area which abutts the port limits.
- (iv). If shipping guide is seen, the definition of anchorages (A) & (B), which are given therein, clearly shows the area of port approach in which they are located.
- (v). The IIL itself is aware of the fact that the area in which they carry out their operations is a part of the port approach. In the writ petition before the Hon'ble High Court, Mumbai, they have admitted this fact.
- (vi). Port approaches as contemplated in the MPT Act need not be defined separately by another notification. In fact any order which defines the geographical boundary of the port approach is issued by the Govt. of India.

The Container Shipping Lines Association (CSLA)

It has reiterated its earlier stand that MBPT should not claim any fee or charges since they absolutely do not provide any service at BFL.

The Shipping Corporation of India (SCI)

It has fully agreed with the CSLA and have nothing more to add.

7.2. As agreed at joint hearing, the MBPT has filed its written submission along with a copy of the notification dated 28 May 1982 and admiralty chart No. 1487. The MBPT has made the following main points in its written submission:

- (i). It has referred to the definition of "port approach" and "port" as found in Section 2 (r) and Section 2 (q) of the Major Port Trusts Act, 1963 which are reproduced below:
 - "2(r). *"port approaches", in relation to a port, means those parts of the navigable rivers and channels leading to the port, in which the Indian Ports Act is in force;"*
 - "2(q). *"port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act."*
- (ii). The port limits of the Mumbai Port have been defined by a Notification dated 28 May 1982 issued by the Government of India. A copy of this notification has also been forwarded to us.
- (iii). It is relevant to note that unlike in the case of a Port or Port limit, in the case of a Port approach, the said Major Port Trusts Act, 1963 does not contemplate issuance of any notification by Government of India for defining or ascertaining any particular area of sea as a Port approach.

- (iv). The detailed plan of Mumbai Port, which inter-alia, shows the limit of Mumbai Port, anchorages and the area abutting the Mumbai Port, highlights the following:
 - (a). The area near BFL abuts the Mumbai Port limits.
 - (b). The anchorages at the BFL area are under the control of MBPT.
 - (c). The said area near BFL is a Port approach leading to Mumbai Port.
- (v). The two definitions are juxtaposed with each other and seen in the light of the detailed plan, it is proved beyond doubt that the area near BFL is a port approach as defined under section 2(r) of the Major Port Trusts Act, 1963.
- (vi). The BFL and adjacent area on the part of navigable rivers and channels leading to the Mumbai Port and all vessels entering the Port of Mumbai enter through this Port approach / route alone. Besides, all outer anchorages of Mumbai Port shown in the Admiralty Chart No. 1487 "Approaches to Bombay" are in the BFL and adjacent area.
- (vii). The port approach is to be seen and determined in the facts and circumstances of each case. In the present case, from the available facts it is clear that the area near BFL is a Port approach. That being so, the MBPT is entitled to fix the rate for the lighterage operations carried out at the area near BFL (which has been proposed at Rs.15/- PMT) subject to the approval of the TAMP.
- (viii). In this backdrop, it has requested this Authority to approve the proposed rate of Rs.15/- PMT for lighterage operation carried out at the area near BFL and issue the necessary notification in this regard.

7.3. As decided at the joint hearing, the IIL was requested to make its written submission on the High Court order dated 8 January 2002. At its request, the date of filing of its written submission was also extended till 20 January 2003. No response is, however, received from the IIL.

8. Based on the records available and with reference to the totality of information collected during the processing of this case, the following position emerges:

- (i). The earlier order dated 2 June 1999 of this Authority holds that levy of the rate of Rs.15 PMT on cargo-in-transit is justified; but, in the absence of any documentary evidence produced by the MBPT, levying such a charge for operations outside the BFL area, stated to have been in the port approaches, is beyond the competence of the MBPT. The Hon'ble High Court of Bombay has directed to reconsider the proposal of the MBPT. While passing this order, the Hon'ble High Court has also observed that this Authority has not considered the effects of the notification dated 28 May 1982 passed by the Government of India as well as various maps relied upon by the MBPT. When asked to produce documentary evidence in support of its proposal, the MBPT has now submitted a copy of the notification dated 28 May 1982 and a copy of Admiralty Chart No.1487 titled "Approaches to Bombay".
- (ii). Some of the users have raised a point about the reasonableness of charging a fee for lighterage operations. The issue about the reasonableness of the rate has already been analysed by this Authority in its earlier Order and found that the rate of Rs.15 PMT can be justifiable. There is no error pointed out from the users' side warranting a review of the earlier decision of this Authority about

the reasonableness of the rate. That being so, this Authority likes to reiterate its earlier observation on the reasonableness of the rate and limit this proceeding to examining the jurisdiction of the MBPT to extend the rate fixed for lighterage operations for operations outside the BFL area.

- (iii). Citing an interim order passed by the Hon'ble High Court of Bombay in a different case relating to the IIL and MBPT, the IIL has objected to this proceeding arguing that the matter is sub-judice. It is noteworthy that this proceeding has been initiated in deference to an order given by the Hon'ble High Court to reconsider the proposal of the MBPT. If the IIL is aggrieved, they may agitate this issue before the High Court. This Authority is not the appropriate forum to consider such requests in view of the clear directions given to it by the High Court.
- (iv). As has been mentioned above, the Hon'ble High Court has directed this Authority 'to reconsider the petitioners' proposal and pass appropriate orders in accordance with law'. Section 48 of the applicable law, i.e. the MPT Act, empowers this Authority to frame Scale of Rates and statement of conditions for the specified services performed by a major port trust at or in relation to the port or port approaches. It is needless to mention that the power of this Authority to fix tariff is confined to the services provided by a major port trust within its legally defined territorial jurisdiction. That being so, it is essential for the MBPT to produce legally acceptable evidence to prove their claim about the territorial jurisdiction outside the BFL area so that this Authority in exercise of its power given in the Statute can authorise levy of fees for services provided thereat. It is also relevant in this context that the High Court Order directs this Authority to reconsider the proposal 'in accordance with law' which implies that the territorial jurisdiction aspect, as emerges from the relevant Law, should be borne in mind while deciding this case.
- (v). Section 2(q) of the MPT Act defines a port as "any major port to which the Act applies within such limit as may be defined by the Central Government by notification in the official gazette". Section 2 (r) of the Act defines 'port approaches' as those parts of the navigable rivers and channels leading to the port in which the Indian Ports Act is in force. The MBPT has argued that the MPT Act does not contemplate issuance of any notification by the Government for defining any particular area of sea as a port approach. It may be relevant here to note that while there is no explicit mention in the MPT Act about notification of the port approach, it does refer to applicability of the Indian Ports Act.

Section 1(2) of the Indian Ports Act, 1908 stipulates its applicability to –

- (a). the ports mentioned in the First Schedule, and to such parts of the navigable rivers and channels leading to such ports respectively as have been declared to be subject to Act XXII of 1855 (for the regulation of Ports and Port-dues) or to the Indian Ports Act, 1875 (12 of 1875) or to the Indian Ports Act, 1889 (10 of 1889);
- (b). the other ports or parts of navigable rivers or channels to which the Government in exercise of the power hereinafter conferred, extends this Act.

Section 4(1)(a) of the Indian Ports Act stipulates that the Government, by notification in the official gazette, can extend the Act to any port in which it is not in force or to any part of any navigable river or channel which leads to a port and in which the Act is not in force. Section 4(2) of the Indian Ports Act requires that a notification issued under Section 4(1)(a) should define the limits of the area to which it refers. A careful reading of these provisions of the Indian Ports Act clearly indicates that the navigable rivers and channels

leading to a port should have been declared to be subject to the relevant Acts existed prior to the enactment of the Indian Ports Act 1908 or should have been notified under the Indian Ports Act. In either case, there is no doubt that the port approaches should be defined by the Government.

- (vi). Apart from the statutory provisions discussed above, it is necessary for the competent authority to define the limits of port approaches from the practical point of view also. Unless such a definition of the limits of the area is made, there cannot be any clarity on the extent to which the approaches of a port spread. If such a definition of limits is not made, as has been brought out by MANSA, then the Bombay High oil fields can also be taken to be falling in the port approaches of the MBPT. In fact, the Admiralty Chart submitted by MBPT shows the Mukta, Panna and Bassein oil field area, Neelam, Hera and Ratna oil field area and Bombay High oil field area in the map titled "Approaches to Bombay". It also includes the JNPT. Obviously, a mention in the Admiralty Chart does not extend the jurisdiction of the Mumbai Port Trust over these oil field areas and the JNPT.
- (vii). As has been mentioned earlier, the limits of port approaches cannot be open ended and it appears from the requirements of the Indian Ports Act that they should be defined by a notification of the Government. The MBPT has not produced any such acceptable documentary evidence to support its claim that the area just outside the BFL lies within the defined port approaches. The Admiralty Chart produced by the MBPT cannot be taken as a substitute for an appropriate notification by the competent authority. In fact, the Admiralty Chart submitted by the MBPT, as it appears, is more of a navigational aid showing the depths at different places near the Bombay coast and the positioning of the navigational marks.

The notification dated 28 May 1982 issued by the Government of India defines the port limits of the MBPT. There is no mention in this notification about the 'port approaches'. Since the issue at consideration is about the MBPT levying a charge for operations outside its port limits which is claimed to be falling in the port approaches, the notification dated 28 May 1982 is not relevant to this case. In any case, there is no dispute about the port limits of the MBPT. This Authority has also held that the charges fixed for lighterage operation can be levied for such operations taking place within the port limits.

9. In the result, and for the reasons given above, and based on a collective application of the mind, this Authority finds that the MBPT has (again) not been able to produce any documentary evidence required under the law to show that the area just outside the BFL forms part of a navigable river or channel leading to the MBPT to support their contention that the BFL area falls within the port approaches where it has a territorial jurisdiction to levy a fee. That being so, this Authority reiterates its earlier decision that MBPT could not produce appropriate notification to justify levying of cargo related charges for operations at the BFL (outside the port limits).

(A.L. Bongirwar)
Chairman