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TARIFF AUTHORITY FOR MAJOR PORTS

G. No.298

New Delhi, 11 November 2010

NOTIFICATION

In exercise of the powers conferred under Sections 48 and 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the reference received from the Chennai International Terminals Private Ltd. (CITPL) and Chennai Port Trust (CHPT) seeking clarifications on the license fee prescribed in the Scale of Rates of the CHPT as in the Order appended hereto.

(Rani Jadhav)
Chairperson

Tariff Authority for Major Ports
Case No. TAMP/28A/2010-CITPL

ORDER

(Passed on this 3rd day of September 2010)

The Chennai International Terminals Private Ltd. (CITPL), a container terminal operators at the Chennai Port, vide its letter dated 2 January 2010 has sought clarifications on the license fee prescribed in the Scale of Rates (SoR) of ChPT.

2. The main points made by the CITPL are summarised below:

(i) License Agreement

The CITPL has entered into a Licence Agreement (LA) with the ChPT on 7 March 2007 for development and operation of second container terminal at the ChPT. In terms of the LA, CITPL has to pay license fee to the ChPT on land licensed to CITPL.

(ii) Base year

The base year for the application of rates as fixed by the TAMP can only be the year in which the date of award of license falls. The Date of Award of License is defined in Art. 1 of the LA as the date of signing of the Agreement or handing over of Licensor's assets, whichever is later. There is no dispute over the fact that the land was handed over only in the year 2007-08. Thus, the base year for application of the rates fixed by TAMP can only be 2007-08.

The base year for application of rates, the rates themselves and the annual escalation of rates ought to be as per Article 12.10 of the Licence Agreement and Chapter VI Scale 1 of SoR of ChPT, as contained in TAMP's order dated 7 March 2006.

However, the ChPT claims 2003-04 as the base year since the Land Policy Guidelines of the Government of India were announced then.

(iii) Rates to be applied

(a). The land has been licensed and not leased to CITPL. This has led to erroneous claims by the ChPT. In the instant case, the land has been licensed to CITPL and the right conferred on CITPL is to build and operate the terminal.

(b) (i). The license fees charged on a given type of land should be consistent with the right conferred on CITPL on that type of land. If the right conferred on CITPL on one type of land is more valuable than on another, it stands to reason that the former type of land should attract a higher license fee than the latter. This is clearly envisaged in the TAMP Order / Land Policy Guidelines.

(ii). TAMP order states as under the General Note under Chapter VI, Scale 1 of the SoR of ChPT.

"General Note:

All the conditions/ notes stated hereinunder to govern the rates prescribed in Scale 1 and Scale 2 (Miscellaneous Charges) of Chapter VI shall apply to the extent they are not inconsistent with the conditions prescribed in the Land Policy guidelines announced by the Government in February/ March

2004. In case of disagreement, the conditions prescribed by the government in the Land Policy guidelines shall prevail.”

- (iii). Para 5.3 (I) (e) of the Land Policy Guidelines states as under:

“5.3 (I) Market Value of land and Schedule of Rates (SoR)

(e) SoR should vary in accordance with the purpose of land use. The Committee should recommend to the competent authority, varying SoR in accordance with the end uses reflected in the Land Use Plan.”

- (iv). TAMP order has fixed a rate of Rs.2,000/- per calendar month or part thereof per 100 sq. m. or part thereof for open space and Rs.3,800/- per calendar month or part thereof per 100 sq. m. or part thereof for open space hardened with water bound macadam surface and so on. A more valuable right is potentially conferred on a licensee on a surfaced land than on unsurfaced land. TAMP has rightly fixed a higher rate for surfaced land.

However, if in a given case, the right conferred on a licensee on two different types of land are identical, then license fees should not be different. In CITPL case, all land licensed to CITPL, whether surfaced or not, had to necessarily be concreted over to build the terminal, the end use to which the land was to be put. The end use of both kinds of land is the same and the right that has been conferred on CITPL on open space that is surfaced is no more valuable than the right conferred on CITPL on open space that is not surfaced. If anything, CITPL incurred additional expense on land that had been surfaced without deriving any additional benefit.

- (v). The LA (Table 2 of Appendix 3) classified the land licensed to CITPL into ‘Developed Assets’, ‘Undeveloped Assets’ and ‘Waterfront Assets’ and stated that the rate chargeable on ‘Developed Assets’ would be the same as that applicable to surfaced open space and that the rate chargeable on ‘Undeveloped Assets’ would be the rate applicable to open space. On this basis, the ChPT has claimed a higher rate on surfaced land than on unsurfaced land. Though the right conferred on CITPL on surfaced land is no more valuable than an open land, the license fee claimed for the former is nearly double that for the latter. Worse, this would be for the 30 year life of the project and the actual quantum of the difference will widen with every passing year as the rates are escalated.
- (vi). This would tantamount to a circumvention of the letter and spirit of the rates fixed by TAMP, which have the force of law. It would also be contrary to the government’s Land Policy guidelines which clearly state that the SoR should vary in accordance with the purpose of land use.
- (vii). CITPL readily admit that it is signatory to the LA which contains the provisions of Appendix 3 as stated above. However, LA is a contract and a contract cannot override the rates fixed by TAMP, which have the force of law, nor can a Port Trust circumvent the rates fixed by TAMP through such means.
- (viii). Thus, the fees applicable to both open space and surfaced open space licensed to CITPL should be Rs.2,000/- per calendar month or part thereof per 100 sq. m. or part thereof, base year being 2007-08.

(iv) Escalation of rates of licence fee

- (a). The rate of escalation of license fees per year is clearly fixed as 2% in the TAMP order. However, ChPT has applied a rate of 5% (compoundable) per annum. This is perhaps because of Art.13.14 of the LA, which is reproduced below:

“Lease rent means charges payable by the Licensee to the Licensor for the Licensed premises as per applicable license fee contained in the Licensor’s Scale of Rates. The Lease Rent shall bear an escalation at a rate of 5% (compoundable) per annum as per the Licensor’s Scale of Rates. The Licensor shall have the option to refix the base of Lease Rent every five years. The Licensor’s Assets shall be classified (as provided in Table 2 of Appendix 3) for the purpose of determining the Annual Land Lease Charges including the premium and security deposit and shall be charged at the rate indicated alongside.”

- (b). It would be immediately evident that Article 13.14 is inherently self contradictory. On the one hand, the Article states the escalation shall be at a rate of 5% (compoundable). On the other hand, it states that the escalation shall be as per the Licensor’s Scale of Rates, though the Scale of Rates limits the escalation to 2% per annum. In fact, nowhere in the Scale of Rates does 5% (compoundable) figure.
- (c). In the face of the inherent self contradiction in Art. 13.14, the 2% escalation provided for by the Scale of Rates, which derives its authority from the TAMP order which has the force of law, should prevail since otherwise it would amount to saying that the licensor and licensee can contract out the rates fixed by TAMP and the Port Trust can circumvent the rates fixed by TAMP.
- (v) CITPL paid the excess amount claimed by the ChPT under protest since it was threatened with revocation of its Bank Guarantee if it had failed to pay. CITPL had approached the High Court of Madras for an injunction against the revocation of the Guarantee. The Court declined its prayer for such injunction. However, the Court did not go into the merits of CITPL’s contentions and ordered as under:

“10. However, Clause 26.1 of the license agreement dated 7.3.2007 stipulates that in the event of a dispute between the licensor and licensee, the parties meet and make an earnest attempt to resolve such a dispute. Therefore, I am of the view that by mutual consultation the dispute between the parties should be first attempted to be resolved before arbitration. Hence, the application is disposed of directing the respondent to make an earnest attempt to resolve the disputes by mutual consultation in terms of Clause 26.1 of the license agreement dated 7.3.2007.”

- (vi) CITPL is about to embark upon the formal attempt at resolving the disputes by mutual consultation under Article 26.1 of the LA as ordered by the Court. This attempt would be more meaningful if CITPL has suitable clarification from / orders by TAMP on the points raised and requested TAMP to provide the same.

3. The licence fee prescribed in the SoR of ChPT from the year 2000 onwards are as given below:

- (i) After constitution of this Authority, the first revision of the Scale of Rates of ChPT took place in March 2000 vide order dated 22 March 2000 passed by this Authority. The Scale

of Rates along with conditionalities was subsequently notified vide order dated 28 March 2001.

The rates of licence fee for open space and open space hardened with water bound macadam surface prescribed in the order dated 28 March 2001 are as follows:

Open space	Rs.2,000/- per 100 sq. m. or part thereof per calendar month or part thereof
Open space hardened with water bound macadam surface	Rs.3,800/- per 100 sq. m. or part thereof per calendar month or part thereof

- (ii) Thereafter, the SoR of ChPT was reviewed in the year 2002. In the tariff order dated 5 October 2002, the estate rentals were not revised for the reasons stated therein and same rates prescribed in the 28 March 2001 order were notified. The escalation condition was also prescribed in the October 2002 order to the effect that the rates shall bear an escalation @ 5% p.a. in two places, viz. under 'conditions for licence of space by the ChPT for periods of one year and above but below 3 years' and under 'general conditions for long term lease'.
- (iii) During the review of the SoR of ChPT in March 2006 vide order dated 7 March 2006, since the estate activity showed a revenue surplus, no increase was allowed in estate rentals. However, taking into consideration that some of the conditions for allotment of land might require modifications in the light of the Land Policy Guidelines announced by the Government in February / March 2004, the following general note was prescribed in the SoR of ChPT under Chapter-VI, Scale-1.

"All the conditions/ notes stated hereinunder to govern the rates prescribed in Scale 1 and Scale 2 (Miscellaneous Charges) of Chapter VI shall apply to the extent they are not inconsistent with the conditions prescribed in the Land Policy guidelines announced by the Government in February/ March 2004. In case of disagreement, the conditions prescribed by the government in the Land Policy guidelines shall prevail."

The existing SoR of ChPT stipulates that the lease rent / licence fee shall bear an escalation @ 2% p.a.

4. The representation of CITPL was forwarded to CHPT vide our letter dated 8 January 2010 for its comments. After a reminder, the CHPT vide its letter dated 20 March 2010 has furnished its comments on the points made by the CITPL. While furnishing its comments, the CHPT by way of general comment has stated that the License Agreement has been entered and signed by CHPT and CITPL. CITPL is very much aware of the Article 13.14 of the Agreement (Article 13.14 governs the payment of lease rent by the CITPL to the CHPT). Hence, raising any issue covered and agreed by both parties is not proper on the part of CITPL. The CHPT has, however, requested this Authority to decide on the applicability of the escalation factor (5% or 2%) and issue guideline / direction keeping in view the practical problems explained in its letter. The comments of CHPT was again forwarded to the CITPL vide our letter dated 19 April 2010 for its views on the comments made by the ChPT. The CITPL vide its letter dated 5 May 2010 furnished its comments on the comments of ChPT.

5. The points made by the CITPL in its representation, comments of CHPT on the points made by CITPL and comments of CITPL thereon are summarized and tabulated as given below:

Sl. No.	Points raised by CITPL in its letter dated 2 January 2010	Comments of ChPT dated 20 March 2010 on the representation of CITPL	Comments of CITPL dated 5 May 2010 on the comments of ChPT
1	Base year for application of Licence Fee:		
	The base year for application of rates as fixed by the TAMP order can only be the year in which the	The base year for the application of rates is taken as 2000 SOR. No revision has been approved by	The ChPT says the base year for the application of rates is taken as 2000 SOR. However, for all other

	date of award of license falls. The Date of Award of License is defined in Art. 1 of the LA as the date of signing of the Agreement or handing over of licensor's assets, whichever is later. As the land was handed over only in the year 2007-08, the base year for application of the rates fixed by TAMP can only be 2007-08. However, the ChPT claims 2003-04 as the base year since the Land Policy Guidelines of the Government of India were announced then. This is wrong.	TAMP for Rental activity during the 2002 & 2006 general revision of SOR and TAMP has advised to follow the new Land Policy 2004. Accordingly, the rate has been arrived by taking 5% escalation as per license agreement. The base year for computation has been taken as per New Land Policy (NLP). The license fee of CHPT has not been revised from 2000 onwards. Hence, the escalation factor is being applied on allotments based on the NLP / license agreement. Accordingly, the escalation @ 5% as per license agreement has been applied to CITPL. The contention of CITPL that the base year 2007-08 cannot be accepted since the license fee is charged as per NLP. For eg. for an allotment during the year 2007 the charge will be Rs.2,431/- per 100 sq. mtr. per calander month for undeveloped area and Rs.4620/- per 100 sq. mtr. per calander month for developed area. If the contention of the CITPL is accepted then the rates would be Rs.2000/- & Rs.3800/- respectively. That is a person who has been allotted the land at the later date will be paying less than the one who has been allotted earlier. Hence, the contention of CITPL cannot be accepted.	items of tariff ChPT is using the 2006 SOR which is the version included in the License agreement. Using the 2000 SOR which has been superceded by the 2006 SOR released by TAMP is tantamount to obeying TAMP's order selectively. The contention of ChPT that no revision has been approved by TAMP for rental activity during the 2002 and 2006 general revision of Scale of Rates is incorrect. TAMP has issued a detailed tariff order in 2006, fixing the license fee / lease rent. It is not necessary for the rates to be increased every time TAMP fixes tariff. TAMP has the liberty to fix the same as before or even to decrease the rates. TAMP has chosen to retain the same rate as in its earlier order of 2002. Yet the ChPT has arbitrarily chosen 2000-01 as a base year, escalated rates from then and ended up with rates vastly higher than what has been allowed by TAMP. The CHPT had initially applied the base year as 2007-08, the year in which the license agreement was signed and raised invoices accordingly. This was abruptly changed to 2003-04 in 2008 and arrears claimed retrospectively. Now 2000-01 is claimed as the base year. The 2006 SOR was used to determine the due demanded from the successful bidder at the time of issuing LOI (prior signing license agreement), then changed to 2003-04 SOR in 2008 and now to 2000-01 in 2010. The clause 5.3(1) (c) of the land policy clearly states that escalation in rates may be applied only until such time as the SOR is revised. Thus all licensee / lessees will pay at the same rates at any given time, no matter when their allotment was made. It is clear that the CHPT should apply only the rate as pr SOR to all licensees/ lessees. The example given by the CHPT is hence inappropriate.
2	Quantum of Licence Fee for open space and open space hardened with water bound macadam		
	The land has been licensed to us and not leased to us and this has led to erroneous claims by the ChPT. The land has been licensed out to CITPL and right conferred on CITPL is to build and operate the terminal.	The development of Second Container Terminal was approved under BOT basis. The land policy guidelines are not applicable to BOT projects in view of separate license agreement approved by Ministry. As the land has been licensed out to CITPL as per license agreement, the	Having argued in their earlier paragraphs that they have adopted the Land Policy guidelines, the ChPT suddenly says that land policy guidelines are not applicable to BOT projects.

The license fees charged on a given type of land should be consistent with the right conferred on us on that type of land. If the right conferred on us on one type of land is more valuable than on another, it stands to reason that the former type of land should attract a higher license fee than the latter. This is clearly envisaged in the TAMP Order (General Note under Ch.VI, Scale 1 of SOR) and Land Policy Guidelines [clause 5.3 (I) (e)]. In CITPL case, all land licensed to CITPL, whether surfaced or not, had to necessarily be concreted over to build the terminal, the end use to which the land was to be put. The end use of both kinds of land is the same and the right that has been conferred on CITPL on open space that is surfaced is no more valuable than the right conferred on CITPL on open space that is not surfaced. CITPL incurred additional expense on land that had been surfaced without deriving any additional benefit. The LA (Table 2 of Appendix 3) classified the land licensed to CITPL into 'Developed Assets', 'Undeveloped Assets' and 'Waterfront Assets' and stated that the rate chargeable on 'Developed Assets' would be the same as that applicable to surfaced open space and that the rate chargeable on 'Undeveloped Assets' would be the rate applicable to open space. On this basis, the ChPT has claimed a higher rate on surfaced land than on unsurfaced land. Though the right conferred on CITPL on surfaced land is no more valuable than an open land, the license fee claimed for the former is nearly double that for the latter. Worse, this would be for the 30 year life of the project and the actual quantum of the difference will widen with every passing year as the rates are escalated. This would tantamount to a circumvention of the letter and spirit of the rates fixed by TAMP, which have the force of law. It would also be contrary to the government's Land Policy guidelines which clearly state that the SOR should vary in accordance with the purpose of land use. CITPL readily admits that it is signatories to the LA which contains	escalation factor of 5% has been considered as per Article 13.14 whereas for the land which is not covered under the license agreement and leased out to CITPL an escalation factor of 2% only is applied. The rates applied are in order and they vary in accordance with the purpose of land use. That is, the rate applied to Developed area and Undeveloped area is different. The allotment of land in custom bound area should be considered only for activities directly related to the port operations and in accordance with the guidelines issued by the competent authority. The lease rents for developed and undeveloped has not been revised in 2002 and 2006 tariff revision and the same rate continues to exist till date. The CITPL, citing the LA provisions, has stated that the License fee claimed at 5% escalation would have an adverse effect over the period of 30 years. The land has been given on an agreement basis for the development of the terminal and the escalation charged is as per the license agreement. The license fee payable by the licensee will be negligible when compared to the income that will accrue to CITPL during the license period of 30 years.	CITPL do not wish to comment on this except for saying that TAMP's Order of 2006 is the determining factor as to what the port trusts should charge. The ChPT says that the rates applied are in order and they vary in accordance with the purpose of land use. But they don't. The land in this case is open space or hardened open space. However, the use of both is the same as per the license agreement. Both have to be concreted over to build the terminal. The licensee has had to incur extra expense to remove the surfacing on the surfaced land to comply with the license agreement and to build the container terminal. Thus all land should be charged only at the rate of open land. No additional right is conferred on the licensee on surfaced land to warrant applying a higher rate.
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	the provisions of Appendix 3 as stated above. However, LA is a contract and a contract cannot override the rates fixed by TAMP, which have the force of law, nor can a Port Trust circumvent the rates fixed by TAMP through such means. Thus, the fees applicable to both open space and surfaced open space licensed to CITPL should be Rs.2,000/- per calendar month or part thereof per 100 sq. m. or part thereof, base year being 2007-08.		
3	Escalation of Rates of License Fee:		
	The rate of escalation of license fees per year is clearly fixed as 2% in the TAMP order. However, ChPT has applied a rate of 5 (compoundable) per annum. This is perhaps because of Art.13.14 of the LA, which states that Lease rent means charges payable by the Licensee to the Licensor for the Licensed premises as per applicable License fee contained in the Licensor's Scale of Rates and the Lease Rent shall bear an escalation at a rate of 5% (compoundable) per annum as per this Licensor's Scale of Rates. It would be immediately evident that Article 13.14 is inherently self contradictory. On the one hand, the Article states the escalation shall be at a rate of 5% (compoundable). On the other hand, it states that the escalation shall be as per the Licensor's Scale of Rates, though the Scale of Rates limits the escalation to 2% per annum. In fact, nowhere in the Scale of Rates does 5% (compoundable) figure. In the face of the inherent self contradiction in Art. 13.14, the 2% escalation provided for by the Scale of Rates, which derives its authority from the TAMP order which has the force of law, should prevail since otherwise it would amount to saying that the licensor and licensee can contract out the rates fixed by TAMP and the Port Trust can circumvent the rates fixed by TAMP.	The land has been licensed out to CITPL as per license agreement and the escalation factor of 5% has been considered as per Article 13.14 of the License Agreement. The lease agreement has been entered and signed between CHPT and CITPL. CITPL is very much aware of the Article 13.14 of agreement. Hence, raising any issue covered and agreed both parties is not proper on the part of CITPL. TAMP may kindly decide on applicability of the escalation factor i.e. 5% or 2% and issue guidelines / directions in this regard.	The CITPL has stated that their prayer is also the same.

6. The ChPT vide its letter dated 28 April 2010 has also pointed out that the CITPL had filed an appeal (O.A. 1186/2009) disputing the lease charges wherein a judgement has been made on 13 November 2009 to resolve such dispute by mutual consultation and requested this Authority to issue a clarification/order on the subject matter.

7.1 A hearing in this case was held on 29 June 2010 at the premises of the CHPT in which CITPL and CHPT were present. The CITPL made a presentation at the Joint hearing reiterating the points made by it in its letter dated 2 January 2010

7.2. As decided at the joint hearing, the CHPT is required to furnish a detailed list of all allotment of land made by it from the year 2000 onwards clearly bringing out the date of such allotment, the base rate at which the land was allotted and the annual escalation in rate made applicable in such cases by 5 July 2010. Despite a reminder dated 5 July 2010, we have not received the response of CHPT till finalization of this case.

8. The proceedings relating to consultation in this case are available on records at the office of this Authority. Extract of the arguments made by the concerned parties will be sent separately to them. These details will also be made available at our website <http://tariffauthority.gov.in>

9. With reference to the totality of information collected during the processing of this case, the following position emerges:

- (i). The CITPL has entered into a License Agreement (LA) with the Chennai Port Trust (CHPT) on 7 March 2007 for development of a second container terminal at the CHPT on Build, Operate, Transfer Basis (BOT).
- (ii). As brought out in the factual position narrated earlier, the CITPL had reportedly moved the Hon'ble High Court of Madras in connection with some disputes arising from the License Agreement dated 7 March 2007. The copy of the Hon'ble High Court Order dated 13 November 2009 produced by CHPT shows that the CHPT has been directed to make an attempt to resolve the disputes by mutual consultation as per the relevant provisions of the Licence Agreement. It is further reported by CITPL and CHPT that both the parties are in the process of referring the matter to arbitration. In the meanwhile, the CITPL has referred the matter to this Authority for clarification.
- (iii). The matter presented before this Authority is with regard to the disputes that have arisen between the CITPL and CHPT in respect of some of the provisions of the License Agreement and applicability of license fee for the land allotted by CHPT to the CITPL prescribed in the Scale of Rates of CHPT which was notified on 30 March 2006. As an abundant measure of caution, it is stated that the Ministry of Shipping vide its letter No. PR-14019/36/2001-PG, dated 9 September 2002 issued a policy direction under Section 111 of the Major Port Trusts Act, 1963 refraining this Authority from entertaining representations made by individual parties. The Ministry of Shipping in its subsequent letter No. PR-14019/36/2001-PG, dated 26 March 2003 has clarified that its direction dated 9 September 2002 does not relate to or prohibit this Authority in the matter of entertaining requests for interpretation / clarification in respect of Orders passed by this Authority relating to Scale of Rates. In any case, this Authority is not the appropriate forum for interpreting a License Agreement and settle the disputes between a Landlord Port and a BOT operator. The matter presented before this Authority though some issues arising out of the License Agreement entered between the CITPL and CHPT are raised, mainly revolves around the estate rentals prescribed in the Scale of Rates of CHPT. It is noteworthy that the CHPT during the proceedings relating to the case has also made a request to clarify the Scale of Rates fixed for CHPT. The representation received from the CITPL does not appear to be hit by the direction dated 9 September 2002 issued by the Ministry. The exercise on hand is not an attempt by this Authority to adjudicate the disputes between the CITPL and CHPT with reference to the Licence Agreement signed between them. The exercise should not also be construed as interfering with the order passed by the Hon'ble High Court of Madras, as it is not for this Authority to furnish interpretation of different provisions of the Licence Agreement. The matter is taken up only for the purpose of issuing clarifications, as may be necessary, on the rates of estate rentals prescribed in the Scale of Rates of CHPT notified by this Authority in March 2006.
- (iv). It is to be borne in mind that the Scale of Rates notified by this Authority has common application and is not oriented towards any individual cases unless a special mention to this effect is made therein.

After its constitution, this Authority revised the Scale of Rates of CHPT in March 2000. As recorded in Paragraph No. 10 (x) (a) of the tariff Order dated 22 March 2000, an increase of 100% was approved over the then existing rates of Estate Rentals including license fee for allotment of space. The tariff Order dated 22 March 2000 does not specify any automatic annual escalation to be applied on the prescribed Lease Rentals. There was also no proposal from the CHPT in this regard.

Thereafter, in the subsequent general revision of the Scale of Rates, the Estate Rentals including license fee for allotment of space were not revised upwards for the reasons recorded in the tariff Order of October 2002. Neither were the rates of the Estate Rentals were revised downwards. A conditionality for escalation of License Fee at 5% per annum was, however, introduced in the Scale of Rates.

The Government of India in the Ministry of Shipping announced Land Policy Guidelines for Major Port Trusts in March 2004. The Land Policy Guidelines announced by the Government are to be followed by this Authority in fixation of Lease Rentals at the Major Port Trusts in line with the stipulation made in Clause 8 of the tariff policy guidelines of the Government notified in March 2005. The Land Policy Guidelines stipulate that the Estate Rentals shall be escalated by 2% per annum.

While disposing of the general revision proposal filed by the CHPT vide Order dated 7 March 2006, the Estate Rentals including License Fee were left unchanged for the reasons stated in the said tariff Order. However, the annual escalation factor was scaled down to 2% per annum in the Order of March 2006.

- (v). (a). One of the issues raised by the CITPL is with regard to the base year to derive the rate of license fee for calculation of charges towards levy of license fee on the land allotted to CITPL.
- (b). The position narrated above shows that the Estate Rentals fixed in March 2000 were not reset in the subsequent tariff Orders of either October 2002 or March 2006. A Scale of Rates is not merely a table of rates but also contains a set of conditionalities governing the prescribed rates. Therefore, in order to determine the applicable rate in respect of a service or facility, the specified rate is to be seen with the associated conditionalities. A plain reading of the Order of 2002 and 2006 will show that the decision of not allowing any upward revision in the Estate Rentals on both the occasions can only have the consequence of the (then) existing rates to continue and not otherwise, as this Authority had not ordered any reduction in those rates either. As explained earlier, the decision of continuing with the existing rates needs to be seen with the associated conditionalities permitting automatic annual escalation. Any interpretation made to exclude the accrued escalation on the date of the general revision Order of 2006, will mean reduction in the (then) existing rate, which was not ordered by this Authority in the said tariff Order. The rates of estate rentals notified in the tariff Order of October 2002 and March 2006 should be seen to have been updated with the applicable escalation factor for charging purposes. Otherwise, an allottee who has been allotted land at a later date will be paying rental charges that are lower than the charges paid by another allottee who was allotted the same type of land earlier with applicable year on year escalation, as rightly observed by the CHPT.

The element of escalation for the Estate Rentals at the CHPT has been introduced by the tariff Order of October 2002. That being so, the estate rentals notified consequent to the tariff Order of October 2002 bear escalation factor on year on year basis. Therefore, the base year of the estate rental rates prescribed in the Scale of Rates of CHPT is the effective date of implementation of the tariff Order dated 5 October 2002, after which the said base rate will undergo annual escalation at the applicable rate every year. In view of this position, the contention that base year for estate rental will be the year of allotment of land cannot be admitted.

- (vi). (a). The next issue brought before this Authority is with regard to the question of rate of escalation in lease rentals to be considered for charging purpose. The CHPT is reported to have applied the escalation factor of 5% on the basis of provision contained in the License Agreement for the allotted land covered by the said Agreement. The CITPL has argued for application of the annual escalation factor of 2% as prescribed in the Scale of Rates of CHPT.
- (b). The Land Policy Guidelines issued by the Ministry of Shipping in February/March 2004 was made applicable for all Major Port Trusts except Kolkata Port Trust (KOPT) and Mumbai Port Trust (MBPT). The guidelines stipulate that the Scale of Rates shall be escalated by 2% per annum till such time the Scale of Rates is revised with the approval of Competent Authority. As such, the lease rentals of CHPT need to be levied with an annual escalation at the rate of 2% per annum from the due date of such annual escalation which fell after February / March 2004. For the period prior to this, annual escalation at the rate of 5% will apply as approved in the tariff Order of 5 October 2002.
- (c). As stated earlier the Scale of Rates of CHPT notified in March 2006 specifies the escalation factor at 2% per annum. At the cost of repetition, it is to be kept in view that the Scale of Rates notified by this Authority has common application and is not oriented towards any individual cases unless a special mention to this effect is made therein. Since the provisions in the Scale of Rates are clear, there is nothing for this Authority to clarify. Allegation of escalation factor incorporated in an individual License Agreement is at variance with the prescribed Scale of Rates may have to be enquired into by some other appropriate forum as this Authority will not adjudicate an individual dispute.

It is also to be noted that para 4 of the Government guidelines of March 2004 mentions that 'this policy for land allotment would not be applicable to BOT projects for which separate guidelines already exists'.

The factual position presented before this Authority clearly shows that the License Agreement between CHPT and CITPL with a provision for annual escalation @5% was signed on 7 March 2007. This means, both the parties were aware at the time of executing the agreement about the stipulation of 2% annual escalation in the Scale of Rates notified in October 2006 and the Government policy guidelines issued in February 2004, but chose to agree upon a different rate of escalation of which the Government was aware.

- (vii). (a). The third issue raised by the CITPL relates to the rates of licence fee to be charged for the land allotted to the CITPL. Differential rates of license fee for "open space" and "open space hardened with water bound macadam surface" have been prescribed in the existing Scale of Rates of CITPL. Drawing a distinction between the term "licence" and "lease", the CITPL has contended that the land has been licensed to it to build and operate the terminal.
- (b). The Land Policy guidelines stipulate, inter alia, that the rate should vary with the purpose of use of land. Citing this provision and contending that all land licensed to CITPL, whether surfaced or not had to be concreted to build the terminal and the end use of both kinds of land remaining the same, the CITPL has sought to plead that the rate prescribed for "open space" should be levied for the "open space with water bound macadam surface". On the other hand, the CHPT maintains that the development of second container terminal has been approved under BoT basis and the Land Policy guidelines do not apply for BoT Projects. The Scale of Rates notified by this Authority prescribing rates of license fee for different kinds of land is already in the hands of CHPT. The plea of the CITPL calling for levy of uniform rate for both kinds of land is a matter to be decided between the CITPL and CHPT based on facts. There does not appear to be any

ambiguity in the existing Scale of Rates which may necessitates a clarification to be offered by this Authority.

10. In the result, and for the reasons given above, and based on a collective application of mind, this Authority clarifies that:

- (i). The base date of license fee for calculation of charges leviable for licencing the CHPT lands is the effective date of implementation of the tariff Order dated 5 October 2002.
- (ii). The base rates prescribed in the Scale of Rates of CHPT vide Order dated 5 October 2002 for allotment of space should be escalated by 2% per annum from the due date of such annual escalation which fell after February / March 2004 on announcement of the Land Policy Guidelines by the Government. For the period prior to this, escalation factor of 5% per annum as stipulated in the tariff Order dated 5 October 2002 should be applied.
- (iii). The category of land in which an individual lease / licence would fall is a matter of fact to be administered by the port. There is nothing for this Authority to clarify the Scale of Rates, as no ambiguity is found therein.

(Rani Jadhav)
Chairperson

ARGUMENTS MADE IN THIS CASE DURING THE JOINT HEARING BEFORE THE AUTHORITY.

No.TAMP/28A/2010-CITPL - Clarification sought by the Chennai International Terminals Private Limited and Chennai Port Trust on the license fee prescribed in the Scale of Rates of CHPT.

The CITPL and CHPT made the following submissions at the joint hearing:

CITPL

1. CITPL is granted only a licence to build and operate a container terminal.
2. Our Licence Agreement (LA) says annual land lease charges are payable as per CHPT Scale of Rates. LA also classified lands allotted into 'Developed' and 'Undeveloped'.
3. For developed land rates applicable to open space with water bound macadam is applicable.
4. CITPL has to rip off water bound macadam surface to construct container terminal. Application of rates for developed open space is wrong.
5. After our terminal has commenced operations, the land allotted should be charged at 'open space' instead of 'open space with water bound macadam'.
6. Scale of Rates of CHPT prescribes 2% only. They can't demand escalation at 5%.
7. LA was signed in March 2007. Land given in 2007-08.
8. CHPT considers base year for lease rent as 2003-04 and applies escalation. Nowhere in Scale of Rates or LA, the base year 2003-04 was mentioned. The lease year should be 2007-08.
9. We don't dispute our License Agreement. We seek interpretation of LA with reference to the provisions of Scale of Rates.
10. Security Deposit – The provision contemplates review of the rates.
11. We referred to TAMP for opinion which will help both the parties in arbitration.

CHPT

12. Agreement clearly mentions the category of land based on which CITPL will be charged. CITPL has never questioned the categorisation before signing the agreement. The action of CITPL now is an after thought and totally beyond the contract.
13. Escalation at 5% is mentioned in the LA. We cannot charge more than Scale of Rates.
14. We feel many issues arising from LA are beyond the scope of TAMP to clarify. TAMP may clarify the Scale of Rates.
15. LA is clear that CITPL accepts land on 'as is where is' basis.
16. Our Scale of Rates on lease was not revised since 2000. Therefore, the base rate should be from 2000.
17. We can't charge two parties differently based on date of allotment.
18. The Scale of Rates is the rate at which allotment to be made. It is to be seen with reference to the escalation.
19. The LA contains a provision for mutual discussions and arbitration. We will refer to arbitration.

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