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TARIFF AUTHORITY FOR MAJOR PORTS

G No. 231 **New Delhi,** **31 July 2014**

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 off the proposal of the Jawaharlal Nehru Port Trust seeking approval for levy of cess on the containers handled by the Gateway Terminals India Private Limited (GTIPL), for recovery of the expenditure incurred for the development of infrastructure outside the licensed premises of JNPT as in the Order appended hereto.

(T.S. Balasubramanian)
Member (Finance)

Tariff Authority for Major Ports

Case No. TAMP/60/2013-JNPT

The Jawaharlal Nehru Port Trust - - - Applicant

QUORUM

(i). Shri. T.S. Balasubramanian, Member (Finance)
(ii). Shri. Chandra Bhan Singh, Member (Economic)

O R D E R

(Passed on this 4th day of July 2014)

This case relates to a proposal received from Jawaharlal Nehru Port Trust (JNPT) seeking approval for levy of cess on the containers handled by the Gateway Terminals India Private Limited (GTIPL), for recovery of the expenditure incurred for the development of infrastructure outside the licensed premises of JNPT.

2.1. The JNPT under cover of its letter dated 03 December 2013 filed the subject proposal. After exchange of correspondences between JNPT and us with regard to the cost statements, the rate of the cess that it proposes to levy, requirement of workings to arrive at the rate of the cess, based on the cost position reflected in the cost statement and the details for incorporation in its Scale of Rates, the JNPT vide its letter dated 4 January 2014 has furnished the workings to arrive the rate of ₹94.42 per TEU, as given below:

Sr. No.	Particulars	Amount (₹)
1.	Repairs and resurfacing expenditure of the asset for the period 2008-09 to 2016-17.	918.30 lakhs
2.	Total depreciation for the period 2008-09 to 2016-17.	568.94 lakhs
3.	Total operating expenditure for the period 2008-09 to 2016-17.	1487.24 lakhs
4.	16% ROCE for the period 2008-09 to 2016-17.	2464.29 lakhs
5.	Total operating expenditure plus 16% ROCE for the period 2008-09 to 2016-17.	3951.53 lakhs
6.	Total cost to be recovered in the period 2014-15 to 2016-17.	3951.53 lakhs
7.	Projected GTI traffic for the period 2014-15 to 2016-17.	41,85,000 TEUs
8.	Cess proposed to be recovered in the period 2014-15 to 2016-17.	₹94.42 / TEU

2.2. Subsequently, the JNPT vide its letter dated 23 January 2014 has furnished the draft proposed Scale of Rates by stating that the following conditionality be included as an additional Clause 3.3.8, in the JNPT Scale of Rates:

> **Clause No.3.3.8:**
> **"**For all the containers handled by the licensee M/s. Gateway Terminal of India Private Ltd (GTIPL)/ M/s. APM Terminal Pvt. Ltd. or its assignee, shall collect ₹94.42 per TEU for 20' container and ₹188.84 per TEU for 40' container as cess and remit the proceeds to JNPT the licensor. For all the other container types like ODC, Hazardous etc., the cess will be collected extra as per percentages mentioned in the Scale of Rates.**"**

3. In accordance with the consultative procedure prescribed, a copy each of the JNPT proposals dated 3 December 2013, 4 January 2014 and 23 January 2014 was forwarded to the GTIPL as well as to the concerned users/ user organisations seeking their comments. The GTIPL as well as some of the users/ user organisations have furnished their comments. These comments were forwarded to JNPT as feedback information. The JNPT has furnished its comments on the comments of GTIPL as well as of the users.

4.1. A joint hearing in this case was held on 27 May 2014 at the Office of this Authority. The JNPT made a power point presentation of its proposal. The GTIPL also made a power point presentation on its objections to the proposal of the JNPT. At the joint hearing, the JNPT, GTIPL and the concerned users and user organisation bodies have made their submissions.

4.2. As agreed by the JNPT during the joint hearing, the JNPT was requested vide our letter dated 28 May 2014 to furnish some information/ clarification. The JNPT vide its letter dated 3 June 2014 has responded. The information sought by us and the response of JNPT thereon are tabulated below:

<table>
<tr><th>Sl. No.</th><th>Information sought by us</th><th>Response of JNPT</th></tr>
<tr><td>(i).</td><td>As per the power point presentation made by the Jawaharlal Nehru Port Trust (JNPT) during the joint hearing, the workings shown by JNPT to arrive at the per TEU cess takes into account the Repairs and resurfacing expenditure of the road and depreciation thereon relating to the years 2008-09 to 2016-17. The working also takes into account the return on the investment. The general tariff fixed for the previous tariff cycles covering the years 2008-09 to 2009-10 and 2010-1 to 2012-13 would have captured the repairs and resurfacing expenditure of the said road and depreciation thereon. Therefore, consideration of the said items of expenditure relating to the previous tariff cycles for determination of the proposed cess again may amount to double counting of the expenditure. The JNPT to clarify the position. Further, JNPT may note that the investment made on the road from the proceeds of the Escrow account would not be eligible for Return, as stipulated in Clause 2.8.3 of the 2005 Guidelines.</td><td>In the general tariff fixed by TAMP covering the tariff cycles 2008-09 to 2012-13 the expenditure on repairs and maintenance of the subject infrastructure has been considered. This fact has already been communicated to TAMP vide our letter No. JNP/Fin./2013/726 dated 17 July 2013

Port is aware that investment made in the subject Infrastructure is out of infrastructure reserve and shall not be eligible for return. Hence, Port has excluded this infrastructure from the Capital Employed calculations which have been furnished along with our proposals for general revision of tariff in October, 2012 and September 2013. This fact has also been communicated to TAMP vide above referred letter.</td></tr>
<tr><td>(ii).</td><td>Further, in the general revision proposal covering the period 2013-14 to 2015-16, recently disposed by this Authority, maintenance as well as depreciation on the entire asset base of JNPT has been allowed as an item of cost. Therefore, considering the maintenance as well as depreciation on the road now, to arrive at the levy of cess may be double counting. The JNPT to clarify whether the maintenance as well as depreciation on the road has been included in the expenditure estimates for the years 2013-14 to 2015-16 in the general revision proposal of the JNPT recently disposed by this Authority in the estimates for the years 2013-14 to 2015-16. The JNPT is also requested to separately quantify the repairs and resurfacing expenditure of the said road and depreciation thereon for the years 2013-14 to 2015-16.</td><td>Port would like to clarify that the maintenance as well as depreciation expenditure on the subject infrastructure has been included in the expenditure estimate for the year 2013-14 to 2015-16. The amounts of such expenditure considered are furnished in the following table:
(₹ in Lakhs)<table><tr><th>Particulars</th><th>2013-14</th><th>2014-15</th><th>2015-16</th></tr><tr><td>Repairs & Maintenance</td><td>112.29</td><td>120.15</td><td>128.56</td></tr><tr><td>Depreciation</td><td>66.93</td><td>66.93</td><td>66.93</td></tr><tr><td>Total</td><td>179.22</td><td>187.08</td><td>195.49</td></tr></table></td></tr>
<tr><td>(iii).</td><td>Since the GTIPL has submitted that not only GTIPL but also BPCL traffic and traffic pertaining to the bulk cargo berth of JNPT make use of the said road, the JNPT is</td><td>The estimated cargo traffic of cement and break bulk considered in the Port's proposal furnished in October, 2012 and September, 2013 and equivalent traffic of TEUs by</td></tr>
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<td></td>
<td>requested to quantify the estimated total cargo traffic that would have used/ using the facility during the years 2013-14 to 2015-16, by converting into the unit of TEUs by applying the applicable conversion factor.</td>
<td>converting the same by using Tonnes/TEU ratio for actual container traffic handled by the Port in the financial year 2013-14 is furnished below:
<table>
<tr><td>Particulars</td><td>2013-14</td><td>2014-15</td><td>2015-16</td></tr>
<tr><td>Cement & break bulk in tonnes</td><td>800000</td><td>800000</td><td>800000</td></tr>
<tr><td>Equivalent No. of TEUs</td><td>64000</td><td>64000</td><td>64000</td></tr>
</table>
Port would like to clarify that the liquid cargo handled at BPCL is moved by using pipelines laid by various tank farms and not by the road tankers. Hence, traffic handled by BPCL is not relevant for the proposal under consideration.</td>
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5. The proceedings relating to consultation in this case are available on records at the office of this Authority. An excerpt of the comments received and arguments made by the concerned parties will be sent separately to the relevant parties. These details will also be made available at our website http://tariffauthority.gov.in

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

(i). The JNPT has reported to have utilized the funds available in its Escrow account to meet the initial cost, interest on initial cost and maintenance expenditure towards widening of the port road from Central Gate Complex to the junction near PUB. In order to enable it recover the said cost and since the road in question has been specifically identified by the JNPT with the traffic of GTIPL, the JNPT has proposed to levy a cess on the containers handled by the GTIPL and has submitted the proposal in reference.

(ii). The recovery of the cost of road by JNPT through a levy of cess on GTIPL is based on Article 8.58 of the Licence Agreement (LA) dated 10 August 2004 entered between JNPT and GTIPL.

(iii). The GTIPL as well as the users have strongly opposed to the levy of cess by the JNPT, for the reasons as brought out in the factual position relating to the case. It is the case of GTIPL, MANSA and IMC that the expenditure on the facility in reference should be met by JNPT from the royalty/ revenue share receipts from the BOT operators and not by way of levy of cess. Actually, the JNPT has met the capital expenditure for creation of facility from the Escrow Account maintained by the port for accounting the royalty / revenue share receipts from the BOT operators; but, wants to collect the operating expenditure and return on the capital cost of the facility by levy of cess since the facility is reportedly created for meeting the specific requirement of a specific BOT operator. The License Agreement provision provides for levy of such a cess. That the road is laid to meet the requirement of the container traffic handled by GTIPL is not denied by the BOT operator. Its contention is that the said road is also used by the traffic pertaining to the bulk cargo berth of JNPT. The JNPT, at our request, has furnished the traffic details of its bulk cargo berth which can be made use for adjustment in determination of a cess. Seen in this perspective, prima facie, the proposal of JNPT under reference merits consideration. Challenge by GTIPL to the LA provision is beyond the scope of the subject proposal and its adjudication is not within the regulatory purview of this Authority.

(iv). During the proceedings relating to the case, the GTIPL has made a mention that the tariff order passed by this Authority for the current cycle in respect of GTIPL is subjudice before the Hon'ble Bombay High Court and that approval to the proposed levy may lead to problem. In this connection, it is clarified as on abundant measure of precaution that the order passed in the current proposal of JNPT is not to tinker with the tariff Order dated 19 January 2012 in Case No.TAMP/48/2011-GTIPL relating to GTIPL which is under challenge before the Hon'ble High Court of Bombay. It is also not the intention of this Authority to interfere in any way in the order dated 2 July 2012 passed by the Hon'ble High Court staying the operation of the tariff Order dated 19 January 2012 passed in the case of GTIPL. If levy of cess is approved, it will be independent of the impugned tariff Order dated 19 January 2012.

(v). As per the Cost plus approach stipulated by the 2005 guidelines, fixation of tariff for an asset/ facility involves consideration of the income estimated to be generated by the asset/ facility, all the admissible costs relating to the operation of the asset as well as allowing of permissible return on the cost of the asset/ facility.

(vi). In the case in reference, the JNPT proposal to collect the cess is to enable it recover the cost relating to road for which it has utilized the funds available in the Escrow account; an account which is maintained by the port in line with the stipulation contained in Clause 2.8.3 of the tariff guidelines of 2005 to record transactions relating to royalty/ revenue share receipts from the BOT operators and expenditures incurred for creation/ modernisation of infrastructure.

(vii). From a reading of Clause 2.8.3 of the 2005 guidelines, it can be seen that the accruals in the Escrow Account are not treated as revenue of the Port Trust for tariff fixing exercise and hence the asset acquired/ created from the funds available in the Escrow Account does not qualify for return.

However, the cost towards maintenance as well as depreciation on the asset created from the Escrow account is allowed as an item of cost in the tariff computation, as per the practice followed in all cases relating to other major port trusts, while dealing with the investments made from the Escrow account.

(viii). (a). Therefore, in the current exercise of fixation of cess in respect of JNPT also, the cess can be only to the extent of recovery of repairs and maintenance cost as well as depreciation cost relating to the road in question. From the workings furnished by the JNPT, it is seen that the JNPT has arrived at the per TEU cess of ₹94.42 by taking into account two cost components viz., Repairs and resurfacing expenditure and Depreciation for the period 2008-09 to 2016-17 and 16% ROCE for the period 2008-09 to 2016-17.

(b). With regard to ROCE component, for the reasons stated earlier, it cannot be considered as an admissible component to arrive at the quantum of cess.

(c). When sought to clarify with regard to the Repairs and Depreciation components considered by the JNPT for the period 2008-09 to 2016-17, the JNPT has confirmed that the Repairs and Depreciation on the road in question had been included as an expenditure in the general tariff fixed by this Authority covering the tariff cycles 2008-09 to 2012-13 in the past. The JNPT has also confirmed that the Repairs and Depreciation with regard to the said road has been included in the expenditure estimates for the years 2013-14 to 2015-16, in the general revision proposal of JNPT recently disposed by this Authority.

(d). Given the position that the expenditure relating to Repairs and Depreciation on the road in question has already been taken into account in the general revision proposal of JNPT disposed in the year 2011 and 2014, consideration of the said cost components again to arrive at the quantum of cess would amount to double counting of the said items of expenditure. Therefore, consideration of the said cost components again would lead to JNPT recovering an amount in excess of the amount spent by it towards repairs and maintenance and depreciation of the road and also lead to (additional) burden to the users.

(e). Since none of the cost components considered by the JNPT can be taken into account to determine the quantum of cess, for the reasons stated above, this Authority is not in a position to prescribe a separate levy of cess for JNPT. Since the cost components have itself not been taken into account, the reasonableness of each of the cost elements considered by JNPT to arrive at the levy of cess have not been examined.

(ix). Given that the cost of repairs and depreciation relating to the road has already been captured while disposing the general revision proposals of JNPT, non-prescription of the separate levy of cess does not put JNPT in a disadvantageous position, as the JNPT is recovering the said costs albeit in the form of a different tariff item(s), though the cost has been recovered/ is being recovered from a different set of port users.

(x). Nevertheless, if the JNPT still desires to have a separate arrangement for levy of cess, then the JNPT is advised to exclude the cost elements relating to the road in question from its overall expenditure while formulating its proposal for general review of its tariff for the tariff cycle from 2016-17 to 2018-19 and come up with a separate proposal for levy of cess beyond 01 April 2016.

7. In the end, and for the reasons given above, and based on a collective application of mind, the proposal of JNPT is rejected.

(T.S. Balasubramanian)
Member (Finance)

SUMMARY OF THE COMMENTS RECEIVED FROM THE PORT USERS / DIFFERENT USER ORGANISATIONS AND ARGUMENTS MADE IN THIS CASE DURING THE JOINT HEARING BEFORE THE AUTHORITY.

F.No.TAMP/60/2013-JNPT	**:**	**Proposal from the Jawaharlal Nehru Port Trust (JNPT) for Levy of cess on the containers handled by GTIPL for infrastructure development outside the license premises of JNPT.**

1.1. A summary of the comments received from the users/ user organisations and the response of the JNPT thereon are tabulated below:

Sr. No	Comments of the users/ user organisations	Comments of JNPT
1.	**Mumbai and Nhava Sheva Ship Agents Association (MANSA)**	
(i).	The proposal of JNPT says that for all Containers handled, the Licensee or its Assignee shall collect ₹94.42 for 20' Container and ₹188.84 for 40' Container as Cess and remit the proceeds to JNPT the Licensor. For all other types of Containers like ODC, Hazardous etc. the Cess will be collected extra as per percentages mentioned in the Scale of Rates. It is surprising that the Port is targeting the Terminal which is rendering highly efficient services for extracting more revenue. The reason for totally opposing the proposal are given in the following paragraphs.	No specific comments furnished by JNPT.
(ii).	Appended to the Proposal is regarding accumulation/ withdrawals from Escrow Account (created from the share in Revenue / Royalty received.) However, this Form No.9 does not indicate any statistics. It is simply shown as "Not Applicable". MANSA is well aware that the performance levels of this Terminal are very high and accumulation of these funds is also very high.	The Form 9 disclosing accumulation/ withdrawals from Escrow Accounts is not applicable in the present case as the same has been considered in the proposal of general revision of scale of Rates of JNPT.
(iii).	The Revenue share and the Royalties earned by JNPT from both the Private Terminals jointly are adequate and there is absolutely no necessity of overburdening the trade presently which is already facing severe setbacks due to international recession, dwindling traffic and acute international competition. As per Govt. Guidelines the entire royalty/ revenue share received by the Major Port Trusts has to be utilized by the port for creation and modernization of infrastructure facility within a specific period. In view of the above, it is not acceptable and advisable for JNPT's own sake to introduce any additional levies on the container traffic at GTIPL for the infrastructure development. This proposal from the Port results only in increase of additional burden to the EXIM trade.	The port is spending the royalty/ revenue share accumulated in the infrastructure reserve for creation and modernization of infrastructure reserves for creations and modernization of infrastructure facilities. The present proposal is based on the article 8.58 of the license agreement which mandates the licensor to levy cess on handling cargo, for development of approach channel and dredging alongside the berths beyond the levels indicated in the article 8.39 of the license agreement and other infrastructure facilities like roads connecting the Port of express way, standard/ elevated highway for facilitating faster movement of Cargo or development/ improvement/ expansion of any other infrastructure facility.

2.	**Gateway Terminals India Private Limited (GTIPL)**	
(i).	When the JNPT had directed the GTIPL to collect and pay cess of ₹4 Crores per annum plus service tax in addition to the tariff approved by the Scale of Rates (SOR) effective January 2012, we had requested for clarification and had raised several concerns over the JNPT's directive to collect the said cess. The GTIPL was then 'under protest' willing to implement the levy of cess, the quantum and modalities of which were unjustified.	No specific comments furnished by JNPT.
(ii).	**Model Concession Agreement:** Clause 8.58 of the License Agreement entered into between the Company and JNPT in August 2004 bestows a unilateral, discretionary and unreasonable authority on JNPT to levy a cess on the company (the licensee) for development/ improvement/ expansion of any infrastructure. This provision gives abundant freedom to JNPT to arbitrarily levy any cess on the licensee, as sought in the proposal. Abuse of such provisions does not only cause unnecessary hardships to the licensee but also defeats the principles of justice. The clause 8.58 is reproduced below: *"8.58 The Licensor or any Competent Authority may levy a cess, as they deem appropriate, on handling cargo for the development of deep-drafted Approach Channel beyond the levels indicated in Article* **Error! Reference source not found.** *dredging alongside the berths beyond the levels indicated in Article* **Error! Reference source not found.** *roads connecting the Port to an expressway, standard/elevated highway for facilitating faster movement of cargo, or the development / improvement / expansion of any other infrastructure. The Licensee shall be liable to collect cess on the cargo handled by him and remit the proceeds to the Licensor, from time to time, in accordance with the prescribed payment procedures as set forth in* **Error! Reference source not found.**. *In such a situation the Scale of Rates prescribed in Article* **Error! Reference source not found.** *shall be automatically get enhanced by an amount equal to the amount of cess levied. The Licensee will however not be allowed to increase the tariff at his terminal on the pretext of investment of the time and revenue to be shared with the Licensor nor seek any compensation from the Licensor for any reduction in traffic or revenues."* A simple reading of the clause 8.58 read with 8.9(iv) would clarify that it is the obligation of JNPT as a licensor to provide general port infrastructure to the Company subject to levy of cess.	As per Article 8.9(iv) of the License Agreement it is general obligation of the licensor to provide and maintain all general port infrastructure other than those covered under the license required for the project. The same clause further mentions that this will be subject to payment by licensee of an infrastructure cess per TEU as detailed in Article 8.58 of License Agreement. The present proposal is based on the article 8.58 of the license agreement which mandates on the licensor to levy cess on handling cargo, for development of approach channel and dredging alongside the berths beyond the levels indicated in the article 8.39 of the license agreement and other infrastructure facilities like roads connecting the Port to express way, standard / elevated highway for facilitating faster movement of cargo or development /improvement of any other infrastructure facility. Hence, from above discussions it may be seen that it is not that the Port is trying to obtain undue advantage and gain by levy of cess on the Licensee but it is strictly as per the License Agreement as the development of subject road was outside the licensed premises and has directly benefited GTIPL. The License Agreement has earlier been approved by the Board as well as Ministry and is still in force and has not been amended till date.

	Without prejudice to the company's rights, it is submitted that levy of a reasonable cess may not be denied. However, in the case of this proposal, the provision is used for obtaining undue advantage and gains by levy of cess on the licensee for an aggregate amount which is much higher than the amount actually incurred.	
(iii)	**The levy of cess is unusual and abnormal in nature:** The levying of additional cess is an unusual practice which is abnormal in nature and understandably not followed in the past. This arbitrary practice, if implemented without a proper consideration of facts and circumstances would be a precedent and create a bad example for the trade at large. In a regulated tariff environment, levy of such arbitrary cess on the company and thereby on the customers disturbs the business forecasts of the entire trade creating confusion and uncertain environment among the trade & final consumers. In addition to this, the cess adds extra cost for the customers. It would not be out of place to mention that such confusion and uncertain environment also weakens the reliability of the trade on the company's business and further affecting the goodwill.	Levying of additional cess is not an unusual practice and abnormal in nature and is in line with the License Agreement, which is agreed and signed by both the parties. In the regulated tariff environment, levy of such cess shall be administered only after approval of the regulatory body i.e. TAMP which always functions transparently and considers the views of trade and Port Users before implementation. There would not be any confusion and uncertainty which shall weaken the reliability of trade, as the regulating authority shall grant approval only after examining all the views and facts.
(iv).	**Utilization of the infrastructure and discrimination against competition** It is very important to note that the subject infrastructure under consideration is not only being used by cargo handlers accessing the Company but is also being used by many other users who belong to BPCL, NSICT, JNPT itself and by general port users. JNPT also uses this infrastructure for cargo transport from it's own shallow berth located adjacent to GTI. It may be noted that JNPT 4th terminal project phase which has already awarded to another port operator is about to start and the said infrastructure will be used by that terminal as well. Some of the expense as claimed by JNPT pertains till period 2016-17. An increase in cost of handling of containers would deter customers from using the company's facility. This has the potential to render the company's business highly uncompetitive. The neighbouring terminals NSICT and JNPT itself would stand to gain an undue advantage of the increased cost of handling containers while they would, among others, continue using the facility which the company is	The percentage of traffic which is used by JNPT, BPCL or passenger traffic partially used in such corridor is miniscule as compared to overall volume of traffic handled by GTIPL. The development of the said facility has directly benefited the cargo movement of GTIPL. The proposal shall be reexamined when the 4^{th} Container Terminal project commences operation and the operator starts commonly using the said facility. Increase in cost of handling shall be offset as the repairs and maintenance expenditure on this facility shall continue to be borne by the Port.

	being made to pay for. In the given circumstances, over - recovery of the cost of infrastructure development that has been made outside the Company's premises would only be unfair and unjustified. This would mean all the other users of the facility, including JNPT itself, would gain an undue benefit from the expenditure incurred by the users of the Company's facilities. Such a levy would be discriminatory, unjustified and arbitrary.	
(v).	Existing Revenue sharing with JNPT by the terminal operators It is pertinent that JNPT assumes the primary role and responsibility for providing network of necessary infrastructure for the port users. There exists a provision in every concession agreement for the minimum share for the Port Authority in the tariff that the terminal operator bills to the cargo handlers. As a matter of general understanding, some part of these royalties is required to be spent for the infrastructure development under which the subject infrastructure also falls. Therefore in our views, the infrastructure development carried out by the JNPT outside the premises is only fulfilment of an obligation by JNPT as a licensor to provide conducive business environment to the terminal operators Further, the current level of cargo handled at JNPT has been well over the minimum traffic which was envisaged at the time of concession agreement. As a result, the revenue earnings of Port Authority have already surpassed their expectation quite considerably. We say that port has derived an unexpected revenue share from the company's efficiency of operations. Given the amount of contribution the company has made to the licensor's revenues, the company is of the opinion that the levy of such a cess from the Company is unwarranted. Therefore, in our opinion a separate charge of the old expenses is not warranted separately putting the port users into more hardship.	The point has been already clarified earlier. The licensee has been awarded the BOT contract in order to create infrastructure facility for the country as per the public/ private participation policy of the government. The Licensee passes on 35% of the revenue share to the Port but 65% of the proceeds are retained by the Licensee himself. No terminal can be viable operating at the minimum traffic level. The MGT traffic mentioned in the agreement is only benchmark for minimum level of efficiency. Any increase in efficiency on the part of licensee shall benefit almost twice the quantum of revenue share passed on to the Port. The revenue share/ royalty is accumulated under Escrow Account and is fully utilized for creation of infrastructure facilities within the port limits.
(vi).	**Delayed levy** It is pertinent to note that the entire claim which is now being put up by JNPT pertains to the period as old as 2007-09. The recovery of cess from 2014 onwards on an expenditure incurred in 2007-09 is beyond reasonability for the following reasons: (a). It is not justifiable to recover the entire sum from the current set of consumers of the company, some	The recovery of expenditure has been made from the year 2008-09 and has been proposed to be recovered as per the directives of CAG and Ministry of

<table>
<tr><td></td><td>of whom who did not use the facility during 2007-09.

(b). It will not be possible to recover the sum from those consumers who were present during that period but who are not currently with us. There has been an unreasonable delay from JNPT to provide any proper justification for the recovery of the cess from the customers. The recovery is now time barred and should therefore be dropped.</td><td>Shipping. Assurance has been given by JNPT Management regarding recovery of the expenditure to CAG audit who had earlier pointed out on non-compliance of article 8.58 of License Agreement.</td></tr>
<tr><td>(vii).</td><td>Verification of expense details claimed by JNPT
JNPT has asked the Company to collect an amount of ₹3951.53 Lakhs in the period 2014-15 to 2016-17. It is submitted that the company would consider the amount only after due verification of expenses as claimed by JNPT.

The company has not been provided with any detailed account of the expenses as claimed by JNPT for the subject levy. It is, therefore, requested that the Authority may ask for a proper audited set of accounts, certifying the expenses incurred.</td><td>All the expenditure of port is audited by CAG of India who are the statutory auditors of the Port and the accounts of the Port are placed before both the houses of Parliament. Copies of the same are furnished to TAMP from time to time. The expenditure claimed as part of this proposal is also forming part of these audited accounts.</td></tr>
<tr><td>(viii).</td><td>Proposal considers GTI volume much lower than TAMP projections
Without prejudice to the rights of the company in any other legal dispute, the company has objections in the volume projections considered while calculating the cess.

The proposal considers GTI throughout at 1.39 million TEUs per year based on its normative capacity. Assuming that the expenses and calculations submitted by JNPT are true and fair, per TEU cess works out to ₹94.42.

It is established that the company's actual throughput (about 2 Mn TEUs per annum) is much higher than the normative capacity of the company. Should the company's actual throughput be considered for the calculation of cess, the per TEU cess to be recovered comes down to about ₹65.86.

Further, assuming that a rational approach be taken to levy the cess uniformly to all container handling terminals (who would be using the facility) over their actual throughput for the period 2014-15 to 2016-17, the company will have to recover only about ₹30.85 per TEU.

This can be substantiated by the following calculations:
<table><tr><th>If cess is levied on…</th><th>Yearly through put</th><th>Total Throughput in 3 yrs</th><th>Cost incurred as claimed by JNPT (₹ Lakhs)</th><th>Levy to GTI (₹ / TEU)</th></tr><tr><td>Normative capacity</td><td>1,395,000</td><td>4,185,000</td><td>3,951.53</td><td>94.42</td></tr></table></td><td>Proposal considers GTI volume much lower than TAMP projections;

Volume projections may be examined by TAMP before granting final approval to the proposal.</td></tr>
</table>

Actual throughput (GTI only)	2,000,000	6,000,000	3,951.53	65.86
Actual capacity, of all users of the facility	4,269,000	12,807,000	3,951.53	30.85

Scenario if only GTI volumes are considered
The levy of cess at the rate of ₹94.42 per TEU would result into an over-recovery of about ₹1713.74 lakhs at actual throughput.

The recovery of ₹94.42 instead of ₹65.86 would mean that customers of the company will have to pay 43.37% more in terms of cess, than what they may actually be subject to, as an effect of frivolous and incorrect assumptions made to calculate the cess.

This would mean approval of an undue gain to JNPT of about ₹1713.74 lakhs over a period of 3 years which is not intended to be provided by Clause 8.58 of the License Agreement.

This can be substantiated by the following calculations:

If cess is levied on…	Yearly throughput	Total Throughput in 3 yrs	Levy to GTI (₹ / TEU)	Total Recovery (₹ Lakhs)	Excess Recovery (%)
Normative capacity	1,395,000	4,185,000	94.42	3,951.53	
Actual throughput (GTI only)	2,000,000	6,000,000	94.42	5,665.28	43.37%
Excess Recovery				**1,713.75**	

Scenario if full volumes handled by all 3 terminals are considered

The recovery of ₹94.42 from GTI customers instead of ₹30.85 per TEU from every user would mean that customers specifically of the company will have to pay 206% over a period of 3 years more in terms of cess, than what they may actually be subject to.

If cess is levied on…	Yearly throughput	Total Throughput in 3 yrs	Levy to GTI (₹ / TEU)	Total Recovery (₹ Lakhs)	Excess Recovery (%)
Actual throughput (GTI only)	2,000,000	6,000,000	94.42	5,665.28	
Actual throughput (GTI only)	2,000,000	6,000,000	30.85	1,851.27	206.02%
Excess Recovery				**3,814.01**	

The Authority may please note that the calculations still do not include the contributions which ideally should be made by other users of the facility developed like BPCL, etc.

(ix).	**Provision for levy of cess under Concession Agreement** In the Concession Agreement entered by GTI with JNPT, Clause 8.58 provides for the levy of cess which also says 'The Licensee will however not be allowed to increase the tariff at his terminal on the pretext of investment of the time and revenue to be shared with the Licensor nor seek any compensation from the Licensor for any reduction in traffic or revenues'. This clause is restrictive as the Licensee will have to spend resources to modify the existing system of billing, collection and payment to JNPT. Also, to the best of our knowledge, such clause is understandably not present in the previous concession agreements entered. Such clauses clearly act against the principles of equity.	It is accepted fact that regular billing section available with the Licensee may be capable of undertaking this additional levy of charge and shall not involve any additional administrative expenditure. From the above clarifications, it is clear that proposal is not unreasonable, unjustified and opposed to public policy. Port has undertaken to propose this levy only after CAG has insisted about non-compliance article 8.58 of the License Agreement. There is no intention of the Port to put a Licensee and Port Users into any hardship.
(x).	**<u>Summary</u>** (a). The proposal submitted by the JNPT disregards the provisions of the License Agreement in spirit. (b). Approval of such a proposal would set an incorrect precedent for the trade and customs of trade. (c). The proposal puts the company in hardship and in a disadvantageous position since it will be the only terminal charging the customers with an additional levy. This will affect the company's competitiveness, efficiency and ultimately, the throughput. (d). The levy of additional cess is not warranted since it will create confusion in addition to extra burden for the trade in specific and consumers in general. (e). Other Terminals and facilities using the infrastructure will benefit at the cost of the company's hardship. (f). The levy of cess relates to a development which has aged. Applying principles of reasonable limitation to recovery of expenses, the proposal should not be considered. (g). The expenses claimed by JNPT are unreasonable. No justification has been provided to the company.	No specific comments have been furnished by the JNPT.

	(h). The calculations submitted above demonstrate heavy over-recovery of cess. (i). Even if it is decided to levy the charge the levy per TEU will work out to ₹13 per TEU if total volume of 4 million TEUs is considered for all the users as given below.	

(INR Millions))

			08-09						14-15		16-17	same pattern for the rest of the period							Total
			1	2	3	4	5	6	7	8	9	10	11	26	27	28	29	30	
A	Gross Capital cost		200																
B	Less: Depreciation		6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	
C	Net Block		193	187	180	173	167	160	153	147	140	133	127	26	20	13	6.3	-0	
D	ROCE	16%	30.9	30	29	28	27	26	25	23	22	21	20	4.2	3.1	2.1	1	-0	
	Add : Repairs & Maint		11.5	11	11	11	11	11	11	11	12	13	13	28	29	30	32	34	
	Add : Depreciaiton		6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	6.7	
E	Total amount recoverable		49.1	48	47	46	45	44	43	42	41	41	40	39	39	39	40	40	1219
F	total cost If spreaded over remaining 24 years from 14-15								51	51	51	51	51	51	51	51	51	51	
G	Levy Rs. per TEU	GTI alone 2M							25	25	25	25	25	25	25	25	25	25	
		Including all users (4M TEUs)							13	13	13	13	13	13	13	13	13	13	

(xi).	Thus, the proposal submitted by JNPT should be rejected on grounds mentioned hereinabove. We submit our comments craving to retain the right to amend / revise any of the submissions made above and/ or add new additional ground against the proposal. The above submission is made without prejudice to any rights of the company in any other matter which may be subjudice.	No specific comments have been furnished by the JNPT.
3.	**Indian Merchants Chamber (IMC)**	
(i).	IMC is shocked to know that JNPT now desires to levy Cess on the Containers handled by GTPL for infrastructure development outside the license premises of JNPT.	(i). The present proposal is based on the article 8.58 of the license agreement which mandates on the licensor to levy cess on handling cargo, for development of approach channel and dredging alongside the berths beyond the levels indicated in the article 8.39 of the license agreement and other infrastructure facilities like roads connecting the Port to express way, standard/elevated highway for facilities faster movement of cargo or development /improvement /expansion of any other infrastructure facility. The license agreement has been approved by the Board as well as Ministry. Port has undertaken to propose this levy only after CAG has insisted about non-compliances article 8.58 of the License Agreement. (ii). The port is spending the royalty/ revenue share accumulated in the infrastructure reserve for creation and modernization of infrastructure facilities. The development of the said infrastructure has directly benefited the cargo movement of GTIPL.
(ii).	All the levies imposed by the Port are passed on to the EXIM Industry.	
(iii).	The JNPT is recovering a huge percentage on the Gross Revenue Receipt received by GTPL and hence there is no reason as to why an additional levy should be imposed.	
(iv).	It has also been repeatedly voiced that JNPT has huge surplus of more than ₹900 Cr. This also confirms that imposition of a levy for development of Infrastructure outside the license premises cannot be burdened on the container handled at GTPL. Then why it should not also be levied on Container handled at D.P.World Container Terminal	
(v).	IMC also likes to know as to what development has JNPT done over the past decade, since its 2 Terminal were leased to P & O Ports (now known as DP World), and GTI, that compels levy to be imposed, which will have to be borne by EXIM Industry.	
(vi).	The EXIM pays a huge Transactions Cost at JNPT due to the failure of developing infrastructure at the Port and the roads leading to the ports.	
(vii).	Further, containers are jammed and truck lines are	

	formed as long 5 to 7 Kms from the Port, solely due to the failures on the JNPT administration to develop the infrastructure other than amassing huge cash reserves in their bank.	(iii). Hence, it is felt that levy of such cess is compliance of the License Agreement in force. There is no intention of the Port to put a Licensee and Port Users into any hardship.
(viii).	JNPT must develop the Infrastructure and whatever infrastructure is developed, a toll may be imposed for a limited time frame, under no circumstances, should a fresh levy be imposed on containers handled at either of the Terminals of the Port.	

2. A joint hearing in this case was held on 27 May 2014 at the Office of the Authority. The JNPT made a power point presentation of its proposal. The GTIPL also made a power point presentation on its objections to the proposal of the JNPT. At the joint hearing, the JNPT, GTIPL and the concerned users and user organisation bodies have made submissions, which are given below:

Gateway Terminals India Private Limited

(i). The Clause of the LA, based on which the JNPT has proposed levy of cess is only a general enabling clause. The clause is to be invoked only as a last resort, when it is unable to raise funds for creation/ development of infrastructure. There is no obligation on the part of JNPT to invoke the clause.

(ii). GTIPL has so far paid revenue share to the tune of ₹1556 crores to JNPT. When the port has sufficient funds, it is not clear why it wants to levy cess on the GTIPL containers. CAG need not take the decision to levy the cess. It is the Management of the port to decide.

(iii). The road is a common user facility. Proposing collection of cess only on the GTIPL traffic is unjustified and discriminatory, as not only GTIPL but also BPCL traffic, traffic pertaining to the bulk cargo berth of JNPT make use of the said road. Thus, even if the cess is to be levied, it should be recovered from all users making use of the road and not on GTIPL alone.

(iv). Levy of cess on GTIPL traffic would make its business highly uncompetitive and would create negative sentiments in the EXIM trade.

(v). Also, levy of cess to recover the past costs is unreasonable. It would be unlawful to collect the cess pertaining to the past period from the current users.

(vi). The rate of cess has been arrived by JNPT by considering the traffic of GTIPL at about 1.39 million TEUs, whereas, GTIPL has handled more than 1.9 million TEUs.

(vii). Under the present scenario itself, GTIPL has witnessed reduction in its traffic by 5%, despite all the efforts. The traffic has moved to Gujarat. Levy of cess on the GTIPL traffic would lead to further diversion of traffic to Gujarat.

(viii). Tariff Order passed by TAMP for the current tariff cycle is subjudice before the Hon'ble Bombay High Court. Approval to the proposed levy may lead to problem.

(ix). TAMP is requested to not consider the proposal of the JNPT and to drop the proposal.

Mumbai and Nhava-Sheva Ship Agents' Association

(i). The rate of JNPT is already high. The trade is already overburdened. We do not want a further levy of cess.

(ii). Levy of cess would divert cargo to the minor ports.

(iii). Providing of road for smooth evacuation of cargo is a basic requirement to be given to the trade. Levy of cess to provide road is unheard of. The cess should be levied neither on GTIPL traffic nor on any other operator.

(iv). 30% of our Lines have shifted their business from JNPT.

(v). The rates of JNPT has been increased recently. Under the scenario, levy of cess would be too much.

Container Shipping Lines Association

Generally endorse the views of the GTIPL.

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