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Tariff Authority for Major Ports

G No. 220

New Delhi, 11 November 2011

NOTIFICATION

In exercise of the powers conferred by Section 48 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the proposal received from the New Mangalore Port Trust for fixation of final wharfage on cargo handled at Jetty No.10 for the years from 2000-01 and 2001-02 as in the Order appended hereto.

(Rani Jadhav)
Chairperson

Tariff Authority for Major Ports
Case No. TAMP/19/2010 - NMPT

New Mangalore Port Trust

Applicant

O R D E R

(Passed on this 11th day of October 2011)

This case relates to a proposal dated 19 April 2010 received from the New Mangalore Port Trust for fixation of final wharfage on cargo handled at Jetty No.10 for the years from 2000-01 and 2001-02.

2. The New Mangalore Port Trust (NMPT) and Mangalore Refinery and Petrochemicals Limited (MRPL) had signed a Memorandum of Understanding (MOU) on 20 January 1995 for construction of a dedicated jetty to handle MRPL cargo.

3. The NMPT and the MRPL both had disagreements on various issues concerning computation of wharfage rate for Jetty No.10. This Authority vide its earlier Orders has set the guiding principles to be followed for fixation of wharfage rate for Jetty No.10.

4. The NMPT had earlier vide its letter dated 16 July 2007 filed a proposal for fixation of final wharfage rate for the years 2000-01 and 2001-02 for Jetty No.10. The main points made by NMPT in the said proposal are as follows:

- (i). The calculations and the proposed wharfage charges have been verified by MRPL with reference to vouchers, records, etc. The MRPL has communicated its confirmation vide letter No.MRPL/F&A/NMPT/2006 dated 27.1.2007.
- (ii). The NMPT has clarified that the observation of MRPL on "adjustment of Insurance Claim" does not affect the calculations. The other two observations made by the MRPL and the NMPT remarks thereon are tabulated below:

Sl. No.	Observations of MRPL	Remarks of NMPT
1.	Non-maintenance of sufficient balance in the Escrow A/c. to take care of Return on Investment and Depreciation.	Withdrawal from Escrow Account for operating and maintenance expenses, etc., is made after retaining the Return on Investment (ROI) as ordered by TAMP. Depreciation in respect of assets created out of loan funds is not retained since the same is set off against loan repayment.
2.	Non-reduction of depreciation on NMPT common assets.	TAMP order is clear that depreciation on common Assets of NMPT is not to be deducted.

- (iii). It has submitted that the final wharfage rates proposed for the years 2000-01 and 2001-02 are in accordance with TAMP guidelines. The wharfage rate proposed by the NMPT (in its July 2007 proposal) for Jetty No.10 for the years 2000-01 and 2001-02 are as follows:

Year	Proposed wharfage rate (in ₹ per tonne)
2000-01	73.32
2001-02	87.24

5.1. When the said proposal was forwarded to the MRPL seeking their comments, the MRPL had raised objection on two points (a). on consideration of that portion of the pension contribution which pertained to years prior to 1996-97, and (b). the port's method of withdrawal of the amount from the Escrow Account.

As part of consultative process, a joint hearing in this case was held on 17 December 2009 where the MRPL reiterated its objections. The NMPT submitted that it had revised the proposal vide its letter dated 9 December 2009 to accommodate some of the demands of the MRPL and also forwarded copy of the same to the MRPL. As the MRPL had requested further time to verify the

figures and submit its response vide letter dated 17 December 2009, it was felt that no useful purpose would be served by continuing with the proceedings initiated based on its old proposal. This Authority, therefore, vide its Order dated 23 February 2010 (notified on 9 March 2010) closed the case as withdrawn and advised the port to file its proposal for the years 2000-01 and 2001-02 along with the comments of the MRPL within one month from the date of Notification of the Order.

5.2. In the meantime the MRPL, vide its letter dated 15 March 2010, has furnished its comments on the revised calculations forwarded to them by the NMPT in its above mentioned vide letter dated 9 December 2009. The points made by the NMPT in its letter dated 9 December 2009 and the comments of the MRPL thereon are tabulated below:

Sr. No.	Views of the NMPT in its earlier revised proposal dated 9 December 2009	Comments of the MRPL vide letter dated 15 March 2010
(i).	Actuarial valuation:	
(a).	As per actuarial valuation done by the LIC, the pensionary and gratuity liability for the years 1996 to 2002 is ₹77 crores and ₹11.8 crores respectively.	It has gone through the calculation of pension and gratuity for the years 1995-96 to 2001-02 and agree for giving effect to the adjustment in wharfage of ₹243.57 lakhs in the year 2001-02 computation.
(b).	Logic requires that the liability has to be shared equally from the date of its formation i.e. 1 April 1980. Accordingly, the liability for the 1st year works out to ₹4.37 crores (₹69.9/16). Considering that and the variances for further period, the allowable pension and gratuity liability for the year 1996 to 2002 works out to ₹23.27 crores. The NMPT has, however, considered ₹39.39 crores for pension and ₹1.31 crores i.e. ₹40.70 crores on these two counts in its calculation.	
(c).	The proportionate chargeable amount for this jetty of 0.1462 on the actuarial valuation of ₹23.27 crores comes to ₹3.40 crores whereas the actual amount taken by it is ₹5.84 crores. The over charge arises due to above calculation.	
(ii).	ESCROW ACCOUNT	
(a).	As per the TAMP order, only the ROI is supposed to be retained in the Escrow Account and all the other balances remain to the credit of the port, whether they are withdrawn or otherwise. In this connection it has furnished a statement to show that the escrow account is maintained equal to the annual accrual of ROI.	TAMP has never stated in this manner in any of its orders. On the contrary in its Order, TAMP has confirmed that all the revenue earned through the project of the new Oil jetty shall be credited to the Escrow Account and all such income shall be taken into account for computation of the special wharfage. Even clause 6 & 7 of the MOU clearly mention as to which amounts can be withdrawn by NMPT from Escrow Account. Hence, NMPT has erred in the method of calculation of interest on escrow account.
(b).	It would have earned interest of ₹378.23 lakhs at the average rate of 7%. Alternatively, the interest on the monthly minimum balance lying in the account would have accrued not more than ₹626.25 lakhs @ 4%. As against that it considered actual interest earned of ₹1221.86 lakhs for calculation of the proposed wharfage charges based on the bank intimation. Thus, the MRPL has derived extra benefit of ₹843.63 lakhs which is required to be	(i). The TAMP vide its order dated 30.11.1998 have categorically stated that "All the revenue earned through the project of the new oil jetty shall be credited to the Escrow Account and all such income shall be taken into account for the computation of special wharfage". (ii). Accordingly, all incomes were being credited to escrow account. The amount after meeting the expenditure was to be retained in the same account. Therefore, the entire balance has to be considered while calculating interest on escrow account.

	adjusted in the present proposal or in the proposal for subsequent years.	(iii). Reasons for recalculating the interest by NMPT on escrow account by considering retention of only the ROI on Jetty Assets is not clear. The return on common assets, the depreciation which was charged initially by NMPT has not been considered for the calculation of interest on escrow account. The computation, therefore, is incorrect and contrary to provisions of MOU and order of TAMP already passed in this regard. Therefore, amendment of the calculation at this stage would be against the notified Order of TAMP. (iv). NMPT has ignored the amount of wharfage provisionally collected and credited to the escrow account for calculating the interest on escrow account balance. (v). NMPT has arbitrarily considered interest at 7% while re-calculating the interest on escrow account balance, which is also incorrect, as notional interest rate cannot be considered. (vi). They have furnished calculation of interest on escrow account consequent to the TAMP order. Accordingly, an amount of ₹7.05 crores is required to be credited to wharfage computation on account of non maintenance of required escrow account balance, for these period. In view of this wharfage rate will be ₹72.05 and ₹79.48 as against ₹73.32 and ₹87.24 originally submitted by NMPT for the year 2000-01 and 2001-02 respectively.
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5.3. Thus, from the above it is clear that the earlier objection raised by the MRPL regarding consideration of pension contribution based on actuarial valuation for the period prior to 1996 is settled.

6. In compliance with our Order of March 2010, the NMPT vide its letter dated 19 April 2010 has filed the proposal for fixation of the wharfage rate for jetty no.10 for the years 2000-01 and 2001-02. The main points made by the NMPT therein are as below:

- (i). The MRPL had earlier disputed two issues namely, pension charges as per the actuarial valuation and interest on escrow account. The issue was examined and the revised calculation was sent to the MRPL vide NMPT letter dated 9 December 2009.
- (ii). Based on the revised calculation, the wharfage rate as compared to the rate proposed in July 2007 stood revised. The rate then proposed and the rate now proposed is tabulated below:

	2000-01	2001-02
Wharfage rate proposed in July 2007	₹73.32 per ton	₹87.24 per ton
Wharfage rate proposed as per revised proposal dated 19 April 2010	₹84.02 per ton	₹82.25 per ton

- (iii). The changes in the rate arrived now and as per its earlier proposal of July 2007 is due to the following reasons:
- (a). Actuarial valuation earlier considered was less by ₹2,43,57,487/-; and
 - (b). Interest on escrow account considered was more by ₹8,43,63,120/-
- (iv). The MRPL in its comments furnished vide letter dated 15 March 2010 to TAMP with a copy to NMPT has agreed to the calculation of the actuarial valuation of pension and gratuity liability. The only point disputed by the MRPL is the amount of interest on escrow account to be taken into account for calculation of the wharfage charges.
- (v). The MRPL has furnished a working wherein it has arrived at the rate of ₹72.05 per tonne for the year 2000-01 and ₹79.48 per tonne for the year 2001-02.
- (vi). (a). MRPL appears to have claimed excess interest to the extent of ₹12.92 crores than the computation of NMPT to bring down the per tonne rate.
- (b). The observation of MRPL that it had only sought NMPT to furnish the basis on which the withdrawals are made from the Escrow Account is not true. As a matter of fact, MRPL vide their letter dated 14 December 2009 claimed necessary workings to match and substantiate the closing balance so as to ascertain the exact interest income which will also have an impact on the wharfage for these two years.
- (c). This demand of MRPL involved considerable working for NMPT as the escrow account had to be recast for six years. While recasting the balance working, we have considered what should be the ultimate balance to be retained in escrow account. TAMP has stipulated that ROI shall remain in escrow account. This is considered the base for closing balance of each year.
- (d). The orders of TAMP quoted by MRPL does emphasize the need to accumulate funds for discharge of borrowers liability towards repayment or prepayment of loan and interest on borrowed funds. The very nature of escrow account is to ensure timely and prompt payment of loan, interest and other liabilities arising from or out of it. Hence, NMPT also phased out the withdrawals towards operating and maintenance charges too without recourse to any specific periodicity like monthly or quarterly basis.
- (vii). The revised calculations of the NMPT, therefore, are found to be just, fair and reasonable in terms of existing TAMP orders and demand put forth by MRPL.

7. The proposal of NMPT dated 19 April 2010 was circulated to the MRPL seeking their comments. The MRPL vide its letter dated 6 July 2010 has furnished its comments. A copy of the comments received from the MRPL was forwarded to the NMPT. We have not received any response from the NMPT. A summary of the points made by the MRPL are tabulated below:

Sl. No.	Comments of MRPL
(i).	NMPT has claimed that the interest credited to the wharfage calculation on account of Escrow Account balance has to be recomputed considering what should be the ultimate balances. In this regard, they have indicated that the TAMP has stipulated that ROI alone shall remain the Escrow Account. The NMPT has erred in understanding the order of the TAMP. All these years they have given effect to TAMP order and reason for changing the method is not clarified.
(ii).	NMPT has ignored the relevant clauses 6 and 7 of the MOU while coming to the conclusion.
(iii).	TAMP vide its Order dated 30 November 1998 has categorically stated that "All revenues earned through the project shall be credited to the Escrow Account and all such income shall be taken into account for computation of special wharfage.

	The interest on Escrow Account to be credited in the cost calculation, is the one what is earned by NMPT on Escrow Account and not a notional income as estimated/computed by them. Therefore, pursuant to MOU clause and also as per the TAMP Order, the entire interest earned on the Escrow Account has to be considered for the wharfage calculation as against what is computed by them on notional basis.
(iv).	In view of the provisions of the MOU, the claim made by the NMPT that only ROI has to be retained in the Escrow Account is unfounded and is incorrect interpretation of the MOU.
(v).	NMPT has arbitrarily considered interest at 7% while recalculating the interest on Escrow Account balance, which also, in our view, is incorrect, as notional interest rate cannot be considered since at different point of time the interest rates were different.
(vi).	Further, it is submitted that NMPT generally collects wharfage on provisional basis at a slightly higher side and refund is given at later stage. As provisional rates are higher than the finalized rates, these amounts remain in Escrow Account and are to be considered for arriving at the Escrow Account balance, and consequently the interest income. However, NMPT has ignored this while calculating the interest on Escrow Account balance.
(vii).	The NMPT, all these years were crediting the interest earned to the Escrow Account. Therefore, it is incorrect for NMPT to recalculate the interest on Escrow Account by considering return on investment only in these two years. This computation, therefore, is incorrect and is also contrary to provisions of MOU and the TAMP Order.
(viii).	We are also not in agreement with NMPT considering 3% return on assets (ROI) created specifically for MRPL and 18% return on the NMPT assets in view of the fact that this facility is user funded.
(ix).	The MRPL has calculated the interest on escrow account. As per its calculation an amount of ₹7.05 crores is to be credited to wharfage computation on account of non-maintenance of escrow account balance for the period 1996-97 to 2001-02. By considering this, the wharfage rate for the years 2000-01 and 2001-02 will be ₹72.05 and ₹79.48 per tonne as against ₹84.02 and ₹82.85 proposed by the port for the years 2000-01 and 2001-02 respectively. It has requested TAMP to direct NMPT to recast the interest calculation as per its calculation and fix the final wharfage rate for berth no.10 for the year 2000-01 and 2001-02 accordingly.

8.1. A joint hearing in this case was held on 21 June 2011 at the New Mangalore Port Trust (NMPT) premises. The NMPT made a power point presentation of its proposal. At the joint hearing, NMPT and MRPL have made the following submissions:

New Mangalore Port Trust

- (i). The points of disagreement between MRPL and NMPT are limited to
 - Pension / Gratuity liability based on actuarial valuation
 - computation of interest on escrow account
- (ii). Since we have revised the calculations of pension / gratuity liability based on the suggestions of MRPL, the issue on this point is settled.
- (iii). The only issue pending for resolution is levy of interest on escrow account fund. We request TAMP to take considered decision.
- (iv). Except return, all other components relate to the expenses incurred by NMPT. Therefore, escrow account interest will only be on return element.
- (v). Even the return on common assets of NMPT is not a fund to be retained in escrow account. It has to be transferred to NMPT.

Mangalore Refinery and Petrochemicals Limited

- (i). The MOU between MRPL – NMPT requires all funds to be credited to Escrow account. Withdrawal is only towards operational and maintenance purposes and only with the consent of MRPL.
- (ii). The interpretation of NMPT that ROI is the only amount to be retained in escrow account is wrong.

- (iii). We don't dispute interest element but the balances on which the interest is calculated. Our contention is that the whole interest earned by escrow account should be credited and retained in the said account.

8.2. At the joint hearing, the MRPL has filed their written submissions mainly reiterating its earlier objection/ submissions on the interest on escrow account computed by the NMPT in the wharfage calculation. It has further stated that in revised computation furnished by its earlier vide letters dated 15 March 2010 and 6 July 2010, it has inadvertently missed to consider the interest actually credited on escrow account balance.

Considering this, the wharfage calculation is recomputed for both the aforesaid years at ₹70.25 and ₹78.15 per tonne for the years 2000-01 and 2001-02 respectively. It has requested that necessary directives may be given to NMPT to re-calculate the interest on escrow account, in line with TAMP guidelines and give necessary effect to wharfage computation and re-submit their proposal, so that special reduced wharfage rate is considered.

8.3. At the joint hearing, both the New Mangalore Port Trust (NMPT) and Mangalore Refinery and Petrochemicals Limited (MRPL) agreed on all elements of costing considered to arrive at the proposed wharfage rates for Jetty No.10 for the years 2000-01 and 2001-02 except on the quantum of interest earned from the escrow account which is to be reckoned in the said calculation. The NMPT and MRPL were given one more opportunity to sit together and attempt to resolve among themselves the points of disagreement in a week's time. The NMPT was also advised to furnish point-wise response to the observation made by MRPL vide its letter dated 6 July 2010. The NMPT was also advised to file its proposal for fixation of the wharfage rate for the subsequent years beyond 2000-01 before 31 July 2011.

9.1. With reference to the points discussed at the joint hearing, the NMPT vide letter dated 20 July 2011 has informed that a joint meeting of MRPL and NMPT was held on 22 June 2011 wherein the pending issues related to the proposal were discussed. The NMPT has stated that the MRPL on reviewing the matter has vide their letter No.MRPL/F&A/Whge/2000-02/2011-12 dated 18 July 2011 considered to withdraw the two pending issues agitated by them earlier. The NMPT has forwarded a copy of the said letter of the MRPL dated 18 July 2011.

9.2. The NMPT vide its letter dated 20 July 2011 has also conveyed that it has clarified the wharfage rate applicable, as per calculation submitted on 16 July 2007 is ₹73.32 per tonne and ₹87.24 per tonne for the years 2000-01 and 2001-02 respectively. NMPT has once again resubmitted the calculations of the said wharfage rates.

10.1. Before proceeding to analyse this case, it may be brought out here that the current exercise is for fixation of wharfage rate for jetty no.10 for the period 2000-01 and 2001-02. Proposal from the NMPT for fixation of wharfage rate for the subsequent period till the subsidence of the MOU i.e. (15 October 2009) is pending. This Authority has on several occasions by way of Orders/letters advised / directed the NMPT to file its proposal for fixation of the wharfage rate for the period subsequent to 2000-01. Despite advice rendered to NMPT to file the proposal for the remaining period on several occasions including during proceeding of this case, the NMPT has not filed the proposal for fixation of wharfage rate for Jetty No.10 for the period from 2002-03 onwards till subsidence of Memorandum of Understanding (i.e. 15 October 2009).

10.2. The NMPT has been once again advised vide our letter dated 8 June 2011, to immediately file its proposal for fixation of wharfage rate for Jetty No.10 for the remaining years since 2002-03 onwards till it is governed by the MOU. The proposal from the NMPT for determining wharfage rate for the period after 2002-03 onwards is not received.

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

- (i). The Writ Petitions filed by both New Mangalore Port Trust (NMPT) and Mangalore Refinery and Petrochemicals Limited (MRPL) challenging some of the guidelines issued by this Authority and also on the wharfage rate fixed for the years 1996-97 to 1999-2000 have been dismissed by the Order passed by the Single Judge of the High Court of Karnataka dated 27 October 2005. The Writ Appeal filed by the MRPL challenging the Order of Single Judge has also been dismissed by the

Division Bench of High Court of Karnataka in its Order dated 20 April 2010. Hence, there is no order as such restraining this Authority to take up the matter for fixing wharfage rate for Jetty No.10 for the years 2000-01 to 2001-02.

- (ii). As brought out in the earlier part of the Order, the NMPT in the earlier proposal dated 16 July 2007 had proposed the wharfage rate for Jetty No.10 at ₹73.32 per tonne for the year 2000-01 and ₹87.24 per tonne for the year 2001-02. The MRPL had contested two items in the wharfage calculation furnished by the NMPT in the said proposal. The first item pertained to the pension contribution based on the actuarial valuation for the period prior to 1996-97 considered by the NMPT in the wharfage calculation and second was relating to interest on escrow account balance considered by the NMPT.

This Authority vide its Order dated 23 February 2010 closed the July 2007 proposal of the NMPT as withdrawn and advised the port to file its proposal for the years 2000-01 and 2001-02 along with the comments of the MRPL within one month from the date of Notification.

- (iii). In the revised proposal filed by NMPT dated 19 April 2010 for fixation of wharfage rate for Jetty No.10 for the years 2000-01 and 2001-02, the port has reported that dispute relating to the pension contribution in the wharfage calculation is settled between both the parties i.e. NMPT and MRPL. The only item remaining to be resolved was the point made by the MRPL on the interest computed by the NMPT on the escrow account balance. The MRPL has contended that the actual interest earned on Escrow Account needs to be credited in the cost calculation and not the notional interest income estimated/ computed by the port. It has stated that the claim made by the NMPT that only ROI has to be retained in the Escrow Account is unfounded and is incorrect interpretation of the MOU. The NMPT has, however, reiterated its calculations. On our advice, the NMPT held a joint meeting with the MRPL to resolve the dispute on this item. The NMPT has stated that after the joint meeting with the MRPL, the MRPL has reviewed the matter vide letter dated 18 July 2011 and withdrawn the two points agitated by them earlier and further stated that the earlier proposal of 16 July 2007 communicated by NMPT to them may be forwarded to TAMP. Based on the above position reported by the MRPL, the NMPT vide its letter dated 20 July 2011 has sought approval of the wharfage rate proposed by it in its original proposal dated 16 July 2007.

The two other points made by the MRPL in a general way in its letter dated 18 July 2011 are mere reiteration of its earlier objections. The first point made by the MRPL regarding non-maintenance of sufficient balance in the Escrow account to take care of return on investment on assets is already withdrawn by the MRPL in the current proceedings. The another point made by the MRPL about credit of depreciation on common assets of the NMPT against repayment of loan is already settled by this Authority in the Order No.TAMP/31/2004-NMPT passed on 18 November 2004. It is notable that subsequent W.P. filed by the MRPL on the latter point has been dismissed by the Single Judge of the Hon'ble High Court of Karnataka vide its Order dated 27 October 2005.

With reference to the NMPT proposal dated 16 July 2007 which is finally sought for approval, the NMPT had reported earlier that the calculations and the proposed wharfage charges have been verified by MRPL with reference to vouchers, records, etc. That being so, the figures furnished by NMPT in its proposal are relied upon assuming that the NMPT has followed the guiding principles set by this Authority for arriving at the wharfage rate. Relying that the approval sought by the NMPT on the rates proposed in its earlier proposal of 16 July 2007 is reportedly based on the position agreed by the MRPL, this Authority approves the wharfage rate of ₹73.32 per tonne for the year 2000-01 and ₹87.24 per tonne for the year 2001-02 as proposed by the port in its final revised proposal.

- (iv). The proposal of the NMPT to fix the wharfage for Jetty No.10 for the years 2000-01 and 2001-02 is a case of retrospective approval of rates. It is relevant here to mention that as per the tariff guidelines, the tariff approved by this Authority generally has prospective effect except under special circumstances. In the instant case, the final wharfage rate fixed is based on sharing of certain elements of income/ expenditure and the traffic handled at the actuals for the years 2000-01 and 2001-02 hence the rate has been approved with retrospective effect.

12.1. In the result, and for the reasons given above, and based on a collective application of mind, this Authority approves the final wharfage rate leviable on cargo handled by MRPL at Jetty No.10 for the years 2000-01 and 2001-02 as follows:

Year	Rate (₹ per tonne)
2000-01	73.32
2001-02	87.24

12.2. NMPT and MRPL is advised to sit together and finalise the wharfage rate for the year 2002-03 onwards and submit a proposal to this Authority within one month's time from the date of notification of the Order in the Gazette.

(Rani Jadhav)
Chairperson