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TARIFF AUTHORITY FOR MAJOR PORTS

G.No.247

New Delhi,

14 July 2015

NOTIFICATION

In exercise of the powers conferred under Section 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 Kolkata Port Trust (KOPT) for amendment to its Schedule of Rent for Land and Buildings at Kolkata and Haldia, as in the Order appended hereto.

(T.S. Balasubramanian)
Member (Finance)

Tariff Authority for Major Ports
Case No. TAMP/7/2010 – KOPT

The Kolkata Port Trust

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Applicant

QUORUM

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

ORDER

(Passed on this 24th day of June 2015)

This case relates to a Reference received from the Kolkata Port Trust (KOPT) for amendment to its Schedule of Rent for Land and Buildings at Kolkata and Haldia.

1.2. This Authority has passed an Order dated 19 January 2011 on the proposal received from Kolkata Port Trust (KOPT) for revision of the Schedule of Rent for Land and Buildings at Kolkata and at Haldia. This Order has been notified in the Gazette of India on 8 March 2011 vide Gazette no.47. As per the said Order, the revised Rent Schedule as approved, was to become effective after expiry of 30 days from the date of notification of the Order in the Gazette of India and was to be in force for five years thereafter. The Order of KOPT has been notified in the Gazette of India on 8 March 2011. Thus, counting 30 days thereafter, the revised Rent Schedule would have come into effect from 7 April 2011 and would be valid till 6 April 2016.

2. In this backdrop, we are in receipt of a communication dated 08 June 2015 from KOPT with regard to the Rent Schedule approved in January 2011. The submissions made by KOPT are summarized below:

- (i). Prior to introduction of existing Rent Schedule of KOPT on and from 07.04.2011 in terms of Order dated 19.01.2011 of TAMP duly notified in Gazette of India Extraordinary on 08.03.2011, long term leases of 15 years, without any option of renewal were granted by KDS, KOPT in respect of land parcels, on realization of 4 years' rent as Non-refundable and Non-adjustable (NRNA) premium over and above the monthly/ annual rent. The said long term leases contained a rent of revision clause which reads as follows:-

“...and the said rent will stand enhanced @ 5.1% every year during the tenure of lease. However, if the escalated rent after 5 years is found to be lower than the rent computed at the rate of rent of the prevailing rent schedule for the appropriate rental zone, then the rent payable at the end of 5 years will be raised to the level of rent as per prevailing schedule rent during the period of lease.”

- (ii). After introduction of Land Policy Guidelines, 2004, KOPT could no longer realise NRNA premium through the proposed SOR. In order to arrest the drop in KOPT revenue for non-realisation of NRNA premium of 4 years' rent, it was the proposal of KOPT before the TAMP to jack up the proposed rate of SOR by a factor of 32%. This principle and methodology enunciated by KOPT was accepted by TAMP and it was accordingly reflected in schedule rent (SOR) fixed by TAMP for KDS, KOPT and notified in the Authority's Order dated 19 January 2011.
- (iii). The long term lessees, who had to pay NRNA premium of 4 years' rent in addition to monthly/ annual rent, would have their lease rent compared with SOR after every 5 years for the purpose of rent re-fixation which would fall after introduction of KOPT's 2011 SOR. Since the SOR already factored in the element of premium, if the long term lessees, who already paid NRNA premium while taking the lease, would have to pay rent at SOR rate, with premium factor already

subsumed, at the time of 5 yearly rent review and re-fixation, it would be a harsh, injudicious and double blow to them.

- (iv). Therefore, in a bid to mitigate the impact and to avoid such double-taxation, KOPT suggested to TAMP in the footnote of proposed SOR to allow a discount factor of 24% (if 32% is hiked on the base rate 100, then 24% of 132 is to be reduced to arrive at 100) on the SOR and then to compare the said discounted SOR with the escalated rent payable by the long term lessees, who forked out NRNA premium while taking the lease during 5 yearly rent review and re-fixation.
- (v). TAMP sought clarification of KOPT on this point, vide its letter No. TAMP/7/2010-KOPT dated 2.8.2010. But, TAMP did not ultimately approve/ disapprove the same in spite of acknowledging the aforesaid clarification duly furnished by KOPT. The said footnote was omitted by TAMP in their order dated 19.01.2011, though TAMP took into account factor of 32% to offset loss of income due to non-levy of NRNA premium in the proposed SOR. It led KOPT to assume that suggestion of KOPT to reduce SOR by 24% while comparing lease rent and schedule rent at the time of 5 yearly rent re-fixation of those long term leases involving NRNA premium, was turned down by TAMP.
- (vi). Accordingly, KOPT has been considering SOR - without reducing the same by 24% - at the time 5 yearly review and re-fixation of rent of long term leases for comparing with lease rent payable and re-fixing the lease rent at the SOR, if the same is found to be higher than original lease rent duly escalated @ 5.1% per annum.
- (vii). One such long term lessee, Premier Tea Limited (PTL), on being applied 5 yearly rent re-fixation at SOR sans any discounting factor in the same principle recently, strongly objected to the decision of KOPT. They not only represented before KOPT but have also approached TAMP and the Ministry of Shipping with their grievance. They have contended that since they had paid NRNA premium equivalent to 4 years' rent at the time of commencement of lease in 2004 over and above the payment of monthly rent, they should be exempted from paying rent w.e.f. 15.04.2014 at the prevailing SOR of KOPT (effective from 07.04.2011) which had inherent in it an element of 32% to offset the parameter of NRNA premium. According to them, KOPT's decision is harsh and double-blow on them. PTL have, therefore, requested to review the decision of KOPT and compare rent payable by them w.e.f. 15.4.2014 at SOR after reducing it by 24% and not with SOR as such.
- (viii). There are 107 leases involving NRNA premium. However, out of the aforesaid leases, 5 yearly review of rent of some of them fell prior to 07.04.2011 and those cases would remain unaffected. The 5 yearly rent review and re-fixation of those leases, which would be due after 07.04.2011, consists of two categories, viz:-
 - (a). Duly escalated lease rent of some of the leases during first review after 5 years or second review after 10 years may be higher than the prevailing SOR and in those cases, the lessees would continue to pay the lease rent along with annual escalation mentioned in the lease deed.
 - (b). In other case, duly escalated lease rent is found to be lower than the SOR and the rent payable is brought up to the level of SOR.
- (ix). In view of the foregoing, it is proposed that the following footnote, in the line suggested by KOPT in the proposed SOR vide the letter No. Fin/389/B dated 2.9.2010, may be introduced w.e.f. 07.04.2011:-

“Note:

Escalated rates of rent of the existing 15 years long term leases, which have been granted on recovery of premium equivalent to 4 years rent, would be compared

with the updated SOR after reducing the same by 24%, at the time of 5 yearly rent revision and refixation, and if the reduced rate of SOR is higher than the escalated rate, such reduced rate of SOR would be applied and if the reduced rate of SOR is lower than the escalated rate, such escalated rate of rent would continue to be applied.”

- (x). The aforesaid proposed note, if approved by TAMP, will be applicable for PTL and all other similarly placed cases.

3. With regard to PTL referring the matter to this Authority, as brought out by KOPT above, it is to state that the PTL vide its letters dated 18 May 2015 and 25 May 2015 has written to us in the matter in reference. The submissions made by PTL are summarized below:

- (i). The PTL have set up its 100% EOU unit in a piece of land taken on lease from KOPT in the year 2004. The lease is for a period of 15 years.
- (ii). While taking such lease, PTL had paid 4 years rent as premium (upfront money-non-refundable) and also the cost of standing structure in 2004 including post-dated cheques for 15 years i.e., complete rent for 15 years as per procedure prevailing then.
- (iii). As per the lease condition, KOPT is entitled to re-view the lease rent after every 5 years up to the schedule rent (SOR) then in force, if such SOR is more than the lease rent payable then.
- (iv). In tariff order for revision of rent for Kolkata Port Trust land dated 19/01/2011, it is seen that while computing the SOR for different area of KOPT, TAMP has allowed an increase of rent by 32% over and above the tendered rent (please refer para 11(vii) (b) & (c)) in order to compensate the loss that the KOPT will suffer by not allowing to take a premium equivalent to 4 years rent for 15 years lease, which KOPT is taking since 1996.
- (v). It has also been observed that the KOPT, while forwarding its proposal to TAMP for rent revision, has proposed that those existing lessees who had already obtained 15 years lease by paying 4 years rent as premium (Upfront money), will be allowed a reduction of 32% over the new SOR while their rent revision takes place after every 5 years.
- (vi). However, Tariff order for revision of rent for KOPT land issued on 19/1/2011 is silent on such proposal of KOPT.
- (vii). The KOPT sought to revise the lease rent and impose new SOR without allowing 32% rebate, though they have proposed same conditions to TAMP while seeking revision of SOR. This has resulted in an increase of lease rent by about 106% in 2014 over the rent payable in PTL's case.
- (viii). The point was duly highlighted to KOPT by PTL vide letter 14 November 2014, but KOPT turned down their appeal, though accepting that their contentions are correct and that they are eligible to such rebate of 32% in new SOR. The reason sighted by KOPT is that since TAMP's order dated 19/1/2011 does not indicate such reduction of 32%, they are handicapped.
- (ix). The PTL, on seeing such contention of KOPT accepting PTL's contention about their genuine claim of 32% reduction in SOR, had further highlighted to KOPT about TAMP's earlier order no. TAMP/53/2003- Gen dated 28 August 2003, which has already empowered all major ports to consider the SOR rates as ceiling rates and ports are free to allow any rebates on SOR if they so like in eligible and genuine cases.

- (x). The KOPT did not reply to the letter of PTL and during a meeting advised PTL to pay demand notices totaling to ₹ 24,32,448/- for the period December 2014 to May 2015, as non-payment is incurring heavy interest.
- (xi). In view of the above, the Authority is requested to ascertain whether such order no. TAMP/53/2003-Gen dated 28 August 2003 allowing all SOR as ceiling rates and ports are free to allow rebates on SOR, is valid or not, if they so desire, is eligible.

4.1. With regard to the submissions made by PTL, it is stated that during the review of the Schedule of Rent for Land and Buildings of KOPT at Kolkata and Haldia in the year 2011, the KOPT as a foot note at the bottom of the proposed Rent Schedule for KDS had proposed a note stating that rates for the existing leases which had been granted 15 years long term lease on recovery of premium equivalent to four years rent would be compared with the new schedule, after five years for their date of allotment, reducing the scheduled rent by 32% and then the comparison to be carried out.

4.2. Since the proposed note appeared to have certain bearing on the covenants of the existing lease agreements entered into between the KOPT and the concerned lessees, the KOPT was requested to clarify the position. As recorded in the table given under para 7 of the Order dated 19 January 2011, the KOPT had responded that in case of existing lease which has already been granted for a period of 15 years after obtaining 4 years' rent as premium, there is a clause that after every 5 years, Port Trust reserves the right to review and re-fix the lease rent upto the Schedule of Rent (SoR) then in force, if the same is more. As in the proposed Rent Schedule submitted to TAMP, there is one of the methodologies followed to arrive at the rentals from the highest tender rate of port land. In those cases, highest tender rate that has been obtained have been further enhanced by a factor of 1.32 (i.e. 32% rise) to distribute equally over the 15 years period. The lessees already paid such premium will be doubly-taxed if their rent is revised as per proposed rent schedule wherein 32% enhancement has already been incorporated. To avoid such doubly-taxed cases, such a note has been proposed. However there is a typographical error – the said deduction will be @ 24% i.e. to say that at the time of review and re-fixation of existing lease rent for existing lessees after 5 years, the comparison will be made with the proposed schedule rent by applying a discount of 24%. The KOPT had given the calculation for arriving at 24% deduction.

4.3. With regard to the submission made by KOPT as brought out above, it is to state that as per note 2(a) of the then existing Rent Schedule for land and buildings at KDS approved by the Government in the year 1996, the KOPT was required to collect, incase of long term leases for the period of 15 years, a non-refundable non-adjustable upfront premium equivalent to 4 years' rent. The Land Policy Guidelines of 2010 did not stipulate collection of upfront premium incase of annual lease. Therefore, in the proposed Rent Schedule, the KOPT had proposed to dispense with the collection of upfront premium. Thus, as against the then existing practice of collecting upfront premium along with the monthly rentals, the KOPT as per the revised practice was to earn only the monthly rentals. Hence, in order to facilitate a like to like comparison between the existing and proposed arrangement, the KOPT had then envisaged to factor the upfront premium. In this connection, it was seen that KOPT, based on workings (as discussed in the January 2011 Order of KOPT), had arrived at a factor of 1.32 and enhanced the updated tender value and thus, arrived at the rentals based on the tender value.

4.4. Based on the view taken by this Authority then, that it would be appropriate for a Port Trust to assess the market value under all options given in the Government guidelines and derive lease rentals based on the one which is most beneficial to it, the highest lease rentals out of the lease rentals determined which will be in the best financial interest of the port, was approved. Accordingly, it was seen that in majority of the cases, lease rentals derived based on the tender approach was highest and the same was approved.

4.5. Since the rentals based on the tender approach (which had factored a premium factor of 32% to make good for the loss of upfront premium by KOPT) was approved, the note proposed by the KOPT enabling it to compare the rentals being paid by the existing leases which

had been granted 15 years long term lease on recovery of premium equivalent to four years rent with the rentals derived by reducing the scheduled rent by 24%, after five years for their date of allotment, thereby giving relief to such lessees, ought to have been inserted.

4.6. However, inspite of seeking a clarification from the KOPT with regard to the said note, the matter had not been dealt in the Order relating to the review of the Schedule of Rent for Land and Buildings of KOPT at Kolkata and Haldia passed in January 2011. It is with reference to non-insertion of the said note that the KOPT and PTL have now approached us.

4.7. From the submissions made by the KOPT then, it is seen that the KOPT had then proposed the note with the intention of giving relief to its 15 years long term lessees from whom it had already collected the upfront premium at the time of allotment, so as to avoid double levy from them. The proposed note would give respite to such lessees, as intended by the KOPT.

4.8. Since the matter had already formed part of the proposal of the port and was already in the knowledge of the users/ user organisations in the proceedings relating to the review of Rent Schedule in January 2011, no separate consultation proceedings is found necessary at this juncture on the matter.

4.9. In view of the above position, the note proposed by KOPT is approved.

5.1. In the result and for the reasons given above, and based on a collective application of mind, this Authority approves insertion of the following foot note below the Rent Schedule of KDS:

“Note:

Escalated rates of rent of the existing 15 years long term leases, which have been granted on recovery of premium equivalent to 4 years rent, would be compared with the updated SOR after reducing the same by 24%, at the time of 5 yearly rent revision and re-fixation, and if the reduced rate of SOR is higher than the escalated rate, such reduced rate of SOR would be applied and if the reduced rate of SOR is lower than the escalated rate, such escalated rate of rent would continue to be applied.”

5.2. Since the note proposed by KOPT is only to restore the note which appears to be only an omission by oversight in the January 2011 Order of KOPT, the note is deemed to have come into effect from the effective date of implementation of the January 2011 Order i.e. 7 April 2011, as proposed by KOPT.

(T.S. Balasubramanian)
Member (Finance)