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Tariff Authority for Major Ports

G No.23

New Delhi,

24 February 2009

NOTIFICATION

In exercise of the powers conferred by Section 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes the proposal received from the Visakhapatnam Port Trust for levy of penal berth hire on vessels not vacating the berth even after considerable time as in the Order appended hereto.

(Brahm Dutt)
Chairman

Tariff Authority for Major Ports

Case No. TAMP/31/2008-VPT

Visakhapatnam Port Trust

Applicant

O R D E R

(Passed on this 12th day of February 2009)

This case relates to the proposal from Visakhapatnam Port Trust (VPT) for levy of penal berth hire on vessels not vacating the berth even after considerable time.

2. Note 2 under Schedule 2.3.3. in the existing Scale of Rates of VPT provides for levy of penal berth hire equivalent to normal applicable berth hire for overstayal of the vessels beyond the stipulated period prescribed in the Scale of Rates, provided there is demand for the berth and a notice is served by the VPT 10 hours in advance of completion of discharge / shipment operators.

3.1. The VPT in its proposal has submitted that the existing penal berth hire is not acting as deterrent to discourage the overstayal of vessels at the berths, despite serving notices to vacate the berths. It causes pre-berthing detention to the waiting vessels besides causing loss of revenue to the port in terms of wharfage, handling charges etc., and thus affecting the efficiency parameters of the port. It is, therefore, felt essential to fix a suitable penal berth hire to discourage the vessels from overstaying at the berths.

3.2. In order to avoid unnecessary occupation of berth by idle vessels, the port has issued a circular on 12 January 2008 for levy of penal berth hire, on an adhoc basis quoting clause 2.17. of TAMP Guidelines of March 2005. The penal berth hire introduced by the VPT on adhoc basis is as under:

"If the overstayal of the vessel exceeds beyond 15 days even after levying Penal Berth Hire under 2.3.3 (2) (i), then Penal Berth Hire equivalent to 5 times of the normal Berth Hire for such excess period shall be levied in addition to the normal Berth Hire Charges."

3.3. The VPT has requested to approve and notify the aforesaid provision.

4. It was pointed out to the VPT, that introduction of the proposed penal berth hire for over stayal of vessel on adhoc basis by the port is not in line with clause 2.17.1 to 2.17.3 of the tariff guidelines of March 2005. As per the tariff guidelines whenever a specific tariff for services / cargo is not available in the notified Scale of Rates, the port can submit the proposal and levy the rate on an adhoc basis till the rate is finally notified. For this purpose, the adhoc rate must be derived based on the existing notified tariffs for comparable services / cargo and it must be mutually agreed upon by the port and the concerned users. In the instant case, the proposed penal berth hire is neither based on the existing notified tariff nor does it have concurrence of the concerned users. The VPT was, therefore, advised to clarify the tariff setting arrangement under which the adhoc rate is collected by the port.

5.1. In the meanwhile, there was a representation from one of the users about the port insisting on payment of proposed penal berth hire charge though the proposed rate is not approved by the TAMP. In this regard, the VPT has submitted that it is constrained to fix and levy adhoc penal berth hire charge since the trade would never agree for the same. It has submitted that if the proposals are sent to TAMP without fixing adhoc rate there may be delay in approving such tariff and the extent of loss in such situations would be very substantial compared to the penal charges levied by the port.

5.2. This Authority vide letter dated 25 August 2008 advised the VPT to refrain from levying the proposed charge till its proposal is formally approved by this Authority.

6. In accordance with the consultative procedure prescribed, the VPT proposal was forwarded to the concerned users / user organisations seeking their comments. The comments received from users / user organisations were forwarded to VPT as feedback information. The VPT has furnished its comments on the comments of users/user organisations.

7.1. It may also be relevant to mention that M/s.SKS Logistics Ltd. has filed a Writ Petition no.14468 of 2008 against Visakhapatnam Port Trust and TAMP in the Andhra Pradesh High Court challenging the circular no.8 dated 12 January 2008 issued by the Visakhapatnam Port Trust (VPT) for levy of penal berth hire equivalent to five times the normal berth hire incase the vessel overstays beyond 15 days.

7.2. The Petitioner has mainly challenged the circular issued by the port for levy of penal berth hire at five times the normal berth hire and consequent actions taken by the port.

7.3. It is understood from an e-mail sent by M/s.SKS Logistics Ltd. to VPT that based on the discussion with the port, the M/s.SKS Logistics Ltd. has decided to withdraw the writ petition and has initiated the process for withdrawal on the case.

8.1. A joint hearing in this case was held on 19 December 2008 at the VPT premises. At the joint hearing, the VPT and the concerned users / user associations have made their submissions.

8.2. At the joint hearing, the VPT was advised to furnish the following information within a week's time:

- (i). The number of instances in the past three years when vessels overstayed at the berth for a period more than 15 days after completion of cargo operation along with reasons for such overstayal.
- (ii). A comprehensive revenue analysis showing revenue foregone by the port due to overstayal of vessels.

8.3. The VPT has in response furnished the following information:

- (i). The port has reported four instances (three vessels and one barge) in the past three years when vessels overstayed at berth for a period more than 15 days. The purpose of call of vessel was for repairs / survey and the reasons for overstayal is stated to be for carrying out repairs.

The port has submitted that two of the vessels had occupied the berth for more than 116/136 days even after serving notices to vacate the berth to accommodate other waiting vessels. This has resulted in heavy pre-berthing detention to other vessels causing losses to exporters / importers. In respect of tug N.P. Anuja and Barge Sushila II, the port has submitted that this tug / barge were berthed in VPT in May 2005 for repairs and are still lying at the port berth despite several notices to vacate the berth.

- (ii). The revenue foregone by the port due to overstayal of these vessels is estimated to be Rs.859.94 lakhs. The proposed penal berth hire at five times the berth hire charge is estimated to be Rs.238.77 lakhs which means still the port will incur loss to the extent of Rs.621.17 lakhs. It has furnished detailed calculation in this regard.

9. 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>.

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

- (i). The proposal of the Visakhapatnam Port Trust (VPT) for levy of penal berth hire is mooted reportedly to discourage overstayal of vessels beyond considerable time at the berths after completion of discharge / loading operations.

- (ii). The existing Scale of Rates prescribes levy of penal berth hire equivalent to berth hire charge in case of overstay of the vessels beyond the stipulated period provided there is demand for the berth and a notice is served by the VPT 10 hours in advance of completion of discharge / shipment operators. The port is of the view that the existing provision of levying penal berth hire is not adequate to act as a deterrent for overstay of vessel. The proposed penal berth hire at five times the normal berth hire is applicable only when the vessels overstay at the berth beyond 15 days even after levy of normal penal berth hire already prescribed in Schedule 2.3.3 (2) (i).
- (iii). The port has reported that there are instances where vessels overstay at berth for considerable time even after levy of the prescribed penal berth hire in the existing Scale of Rates on account of some deficiency on their part. The port has also pointed out that vessel repair facilities available elsewhere in the vicinity of the port are not preferred as the berth hire charges levied by the port are cheaper. Such idling of a vessel at berth causes not only loss of revenue to the port but also inconvenience and losses to the others vessels which are waiting for the berth.

The Visakhapatnam Steamship Agents Association and Visakhapatnam Stevedores Association have in general endorsed the proposal of the port. The Indian National Shipowners Association (INSA) has suggested slab-wise increase in the penal berth hire. It has to be recognised that berth is a scarce resource of the port and hence it is essential that it should be utilized optimally. In a situation of capacity limitation, long occupation of a cargo berth, which is primarily for enabling ship-shore of cargo, will essentially deprive the other waiting vessels from carrying on with their trade even if the revenue loss to the port trust is ignored. Viewed from this perspective, and also recognising that proposed levy is more of a deterrent in nature than a regular source of income for the port, the proposal of the port is accepted.

- (iv). Quoting clause 2.17. of the tariff guidelines of March 2005, the VPT has levied the proposed penal berth hire for over stayal of vessel on adhoc basis based on a circular issued by it on 12 January 2008.

It has already been brought to the attention of the VPT while acknowledging its proposal that the introduction of the proposed penal berth hire for over stayal of vessel on adhoc basis based on a circular issued by it on 12 January 2008 is not in line with clause 2.17.1 to 2.17.3 of the tariff guidelines of March 2005. As per the tariff guidelines whenever a specific tariff for services / cargo is not available in the notified Scale of Rates, the port can submit the proposal and levy the rate on an adhoc basis till the rate is finally notified. For this purpose, the adhoc rate must be derived based on the existing notified tariffs for comparable services / cargo and it must be mutually agreed upon by the port and the concerned users. In the instant case, the proposed penal berth hire is neither based on the existing notified tariff nor does it have concurrence of the concerned users.

As per clause 2.17.4 of the tariff guidelines, final rate fixed by this Authority will ordinarily have only prospective effect. The interim rate adopted in an ad hoc manner will be recognised by this Authority as such unless it is found to be excessive requiring some moderation retrospectively. In the instant case as already mentioned earlier the implementation of the proposed rate on adhoc basis by the VPT is not in line with the tariff guidelines. This Authority has already directed the VPT to refrain from collecting the proposed levy till the rate is finally approved by this Authority. The rate approved by this Authority will have prospective effect and this Authority does not ratify the adhoc tariff arrangement followed by the port during the interim period.

The VPT is, therefore, directed to refund the charges, if any, collected by VPT on this account on adhoc basis during the interim period and is also advised to refrain from such action in future.

- (v). The Visakhapatnam Stevedore's Association while endorsing the proposal has suggested that there should be a provision available for the port to hear genuine reasons for overstays of vessels before imposing the proposed penal berth hire. This Authority has already held in earlier cases that it is not in favour of prescribing conditions in the Scale of Rates which give unfettered discretionary powers to Major Port Trusts/ Private Terminal Operators. The circumstances or exceptions, if any, need to be explicitly prescribed in the Scale of Rates to maintain transparency. No such provision is proposed either by the port or the users. In any case as per the 2005 tariff guidelines the rates prescribed by this Authority are only ceiling levels; and, the VPT has a discretion to levy charges at a level lower than the prescribed rates. Further, Section 53 of the Major Port Trusts Act, 1963 also gives powers to the Board of the Trustees of Major Port Trusts to exempt / remit either wholly or partially any goods or vessels from payment of any rate or charge in special cases.

11.1. In the result, and for the reasons given above, and based on a collective application of mind, this Authority approves insertion of following provision as note (3) under Schedule 2.3.3 of the existing Scale of Rates of the VPT:

- "(3). If the overstay of the vessel exceeds beyond 15 days even after levying Penal Berth Hire under 2.3.3 (2) (i), then Penal Berth Hire equivalent to 5 times of the normal Berth Hire for such excess period shall be levied in addition to the normal Berth Hire Charges."*

11.2. The approved rate will come into effect after expiry of 30 days from the date of notification of this Order in the Gazette of India.

(Brahm Dutt)
Chairman

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/31/2008 - VPT - Proposal from the Visakhapatnam Port Trust for levy of penal berth hire on vessels not vacating the berth even after considerable time.

1. The summary of comments received from the user / user organisations and comments of the Visakhapatnam Port Trust (VPT) thereon are tabulated below:

Sl. No.	Comments of users / user organizations	Comments of VPT
1.	Indian National Shipowners' Association	
(i).	No vessel would stay at berth indefinitely unless it is beyond the requirements of the vessel for surveys and repairs.	No comments furnished.
(ii).	The proposed penal berth hire at 5 times normal berth hire is exorbitant and not acceptable.	No comments furnished.
(iii).	It is understood that at Mumbai Port Trust no such penal berth hire charges is levied even if vessel stays for more than 30 days at berth.	No comments furnished.
(iv).	It is proposed that a "Slab Rate" for penal berth hire may be charged as follows: (a). Upto 15 days – Normal berth hire (b). 15 days – 30 days 20% berth hire (c). 30 days – 60 days 40% berth hire (d). 60 days – 90 days 50% berth hire (e). 90 days and over 100% berth hire	No comments furnished.
2.	Visakhapatnam Container Lines Association	
(i).	The VPT have issued a circular dated 12 January 2008 wherein it was stated in order to avoid recurrence of such incidents in future and to avoid unnecessary occupation of berth by idle vessels, the proposed penal berth at 5 times the normal berth hire is levied.	The Steamer Agents request the port authorities to allot berth for few days for carrying out repairs / change of ownership / annual survey etc. At times the vessels are also detained in the port after completion of loading and unloading of cargoes to comply with the deficiencies pointed out by MMD surveyor. In those circumstances, VPT is forced to allot the berths to such vessels. But the survey / repairs are not being done in time and some of the agents are intentionally immobilising their vessels without permission of VPT authorities and staying at berth for months together causing huge loss to the port as well as to other port users. These types of incidents are on increase and VPT has become helpless in shifting such vessels due to non co-operation of master of the vessels and much difficulty is being experienced by all concerned.
(ii).	No working vessel will overstay at berth longer than necessary as high cost of charter as well as bunkers make overstay unviable. Also, vessels which overstay will have some unforeseen problem and hence	The existing provisions in the VPT Scale of Rates for levying penal berth hire charge equivalent to normal berth hire is only when the vessel overstays at the berth beyond the permissible stay of the vessel for

	they overstay. For this purpose, section 2.3.3(ii) of Scale of Rates of the VPT already contains provisions for penal berth hire for overstay of vessel.	carrying out cargo handling operations / repairs / surveys etc. The proposal to levy penal berth hire equivalent to 5 times of normal berth beyond 15 days i.e. hire is only when the vessel overstays at the berth even after levying normal penal berth hire for 15 days.
(iii).	As regards vessels which are idle and are overstay, the VPT has the powers to remove the vessel even by cold move if required.	
(iv).	Moreover, the Gangavaram port is about to go full steam which will divert, atleast in the short term, vessels from VPT. Hence, the pressure on the berths will be less.	Whenever any vessel overstays at the berth after completion of loading / unloading operations for the time allowed for carrying out repairs / surveys etc., such overstay of the vessel causes substantial loss to the port as well as port users. Incidentally it is submitted that the average berth day income of VPT was Rs.8.37 lakhs and Rs.7.56 lakhs for the years 2006-07 and 2007-08 respectively. The average berth hire per day is only Rs.60,000/-. Even after levying 5 times penal berth hire, the revenue will be only Rs.3 lakhs per day, whereas the port is losing about Rs.5 lakhs per day in terms of other vessel and cargo related charges. From the above, it is amply clear that port is substantially losing its revenue even after levying 5 times penal berth hire. Hence, it is felt appropriate even to enhance the penal berth hire to 10 times to minimize its loss of revenue due to overstay of a vessel at a berth beyond 15 days. When a vessel overstays at a berth, the port users are incurring huge losses due to non-availability of berths and are paying substantial demurrages to the ship owners. Therefore, it is evident that the port users as well as port are losing substantial revenue, when the vessel is not vacating the berth within a reasonable time. In view of the reasons explained above, it is once again submitted that the penal berth hire charges proposed is only to discourage the unnecessary overstay of vessels in the over all interest of the port and port users and it is, therefore, requested to approve and notify the penal berth hire charges as proposed by port.
(v).	The VCLA is not in favour of any increase in the tariff for overstay. It is especially not in agreement for vessels which are arriving for cargo work and overstay due to unforeseen circumstances. It is requested to maintain status quo.	

2. A joint hearing in this case was held on 19 December 2008 at the VPT premises. At the joint hearing, VPT and the concerned users / user associations have made the following submissions:

Visakhapatnam Port Trust

- (i). The existing penal berth hire equivalent to normal berth hire is not acting as a deterrent.
- (ii). If the overstayal vessel exceeds 15 days, we propose to levy 5 times the berth hire as penalty.
- (iii). The proposed rate is not a revenue source. It is only to counter the revenue loss to us and to ensure better availability of berths to trade.
- (iv). We will furnish financial analysis and the statistics of vessel overstayal for the past years.
- (v). Overstayal of vessels has serious implications for cargo handling operations and revenue of the port.
- (vi). There is a shipyard available. Since port trust rates are lower, port's berths are preferred by vessel.

Visakhapatnam Stevedores' Association

- (i). We support the proposal in principle. But, there should be a provision for the port to hear genuine reasons for overstayal of vessels before imposing penalty.

Visakhapatnam Steamship Agents' Association

- (i). Port does not have separate facility for repair / vessel in distress. Therefore, vessels are compelled to stay at cargo berth to carry out necessary repairs.
- (ii). The incidents of overstayal beyond 15 days is very few in the last 75 years of history of the port. This overstayal has not affected cargo handling operation.
- (iii). When a vessel is in distress or not seaworthy or when statutory authorities detain, we cannot push the vessel out.
- (iv). We endorse port's proposal, provided it is confined only to those vessels which deliberately overstay.

Vizag Seaport Private Limited

- (i). Vessel in distress is to be accommodated. But, vessel repairs cannot be arranged at the cargo berth.
