
(2009) 10 MAD CK 0093

In the Madras High Court

Case No : Writ Petition No. 1350 of 2009 and M.P. No's. 1, 2 and 3 of 2009 and W.P. No. 1351 of 2009 and M.P. No's. 1, 2, 3, 4, 5 and 6 of 2009

PSA Sical Terminals Limited

APPELLANT

Vs

Tariff Authority for Major Ports, Tuticorin Port Trust and Union of India (UOI)

RESPONDENT

Date of Decision : 15-10-2009

Acts Referred:

Constitution of India, 1950 — Article 14
Major Port Trusts Act, 1963 — Section 42

Citation : (2009) 10 MAD CK 0093

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : L. Nageswara Rao, SC for Uma, in Writ Petition No. 1351 of 2009 and Nalini Chidambaram, SC for Uma, in Writ Petition No. 1350 of 2009, for the Appellant; S. Venkateswaran, SC for C.J. Shyamala, for 1st respondent and S. Yashwanth, for 2nd respondent and J. Ravindran, Asst. Solicitor General of India for 3rd respondent, for the Respondent

Judgement

S. Nagamuthu, J.—This is the third round of litigation relating either to guidelines issued by the Government of India u/s 111 of the Major

Port Trusts Act, 1963 for tariff fixation or tariff fixation order issued by the Tariff Authority for Major Ports, the 1st respondent herein in respect of

the petitioner.

2. W.P. No. 1351 of 2009 has been filed challenging such directions issued by the Government of India in exercise of the powers conferred u/s

111 of the Act in its proceedings No. PR-14019/6/2002-PG (Vol.I), dated 20.02.2008; whereas W.P. No. 1350 of 2009 has been filed

challenging the consequential tariff order dated 17.12.2008 in Case No. TAMP/52/2005-PSA SICAL and notified on 30.12.2008. Before going

into the issues involved in these writ petitions, it would be useful to recapitulate the background of the case. Since common issues are involved,

both the writ petitions were heard together and they are disposed of by means of this common order.

3. The 2nd respondent Tuticorin Port Trust (in short ""TPT"") is a Major Port Trust governed by the Major Port Trusts Act, 1963 (hereinafter

referred to as ""the Act""). The petitioner is a Joint Venture Company incorporated by the Port of Singapore Authority, South India Corporation

(Agencies) Limited and Nur Investment and Trading PTE Limited. For the present, the Joint Venture partners are PSA India Pte. Limited, SICAL

Logistics Limited and S.Chandra Das.

4. During the month of March, 1997, the 2nd respondent issued a global tender inviting bids for the development of 7th Berth as a Container

Terminal at Tuticorin and its operation and maintenance for 30 years on ""Build Operate Transfer"" (BOT) basis. The petitioner emerged as the

successful bidder and in pursuance of the confirmation of its bid, a license agreement dated 15.07.1998 between the petitioner and 2nd respondent

was entered into, according to which, the petitioner agreed for designing, engineering, financing, constructing, equipping, operating, maintaining,

replacing of container handling equipments, and repairing, of Container Terminal. The said agreement was entered into in tune with Section 42 of

the Act.

5. Article 7.3 of the License Agreement deals with the tariff, which the petitioner would be entitled to collect, which reads as follows:

7.3. Tariff

7.3.1. Setting Prices: The Licensee shall be entitled to recover from the owners/ consignees or vessel owners/agents, rates and/or charges due and

payable by them for use of the Container Terminal services including terminal charges, wharfage on cargo containerised, container box and cargo

related charges in respect of cargo and other services provided by the Licensee provided however that the rates and /or charges to be collected by

the Licensee shall not exceed the rates fixed by the Licensor in respect of similar services and duly notified by the GoI in official gazette or to be

fixed by the Tariff Authority for Major Ports constituted under Article 47A of the Major Port Trusts Act, 1963, as applicable, from time to time.

For the purpose of fixing revising existing Tariff, the GoI has set up an independent Tariff Authority for Major Ports constituted under Article 47A

of the Major Port Trusts Act, 1963. The tariff to be fixed by such authority would be the maximum rate of tariff and the Licensee would be free to

fix the tariff at a rate lower than that fixed by such authority. Regarding fixation of tariff and setting prices, the Licensee shall follow the rules and

regulations stipulated by TAMP for fixing/review of tariff.

These charges shall be collected from cargo interests and the owners or agents of the vessels and shall accrue to and be payable to the Licensee.

The rate prevailing at the time of signing of this Agreement are contained in Appendix 15 to this Agreement.

Charges on account of Berth Hire, Port Dues and Pilotage shall be raised and recovered directly by the Licensor from the users.

The Licensee shall be free to give discounts in tariff. However, such discounts shall be given by the Licensee only in respect to the charges due and

payable by the consignees/owners or vessel owners/agents to the Licensee and not in respect of the charges payable by such persons directed to

the Licensor.

6. In terms of the above Article of the Agreement, the petitioner agreed to pay royalty to the 2nd respondent as detailed in Appendix 12 to the

Agreement. For the initial period of 12 months, the petitioner need not pay any royalty. For the second twelve months, after the date of license, the

petitioner guaranteed a Minimum Traffic Guarantee of 148800 Twenty Equivalent Units (TEUS) for which at the rate of Rs. 102 per TEU, the

petitioner has to pay a total sum of Rs. 1,51,77,600/- . Slowly, as per the agreement, Minimum Guaranteed Traffic (in short, ""MGT"") is increased

to 3,00,000 TEUS and the rate of royalty per TEU is also increased and it varies at various levels. Consequentially, the royalty to be paid to the

2nd respondent for each year also varies. For instance, during the last 12 months, for MTG of 3,00,000 TEUS at the rate of 5178 per TEU, the

petitioner has to pay a sum of Rs. 155,34,00,000/- to the 2nd respondent.

7. Article 7.3 deals with Tariff, which the petitioner could collect from the owners/ consignees or vessel owners/agents, rates and/or charges due

and payable by them for use of the Container Terminal services including terminal charges, wharfage on cargo containerised, etc. The proviso to

the said article further provides as follows:

provided however that the rates and /or charges to be collected by the Licensee shall not exceed the rates fixed by the Licensor in respect of

similar services and duly notified by the GoI in official gazette or to be fixed by the Tariff Authority for Major Ports constituted under Article 47A

of the Major Port Trusts Act, 1963, as applicable, from time to time.

8. For the purpose of fixing or revising the existing tariff, Government of India has set up 1st respondent as Tariff Authority u/s 47A of the Act. As

per Article 7.3 of the License Agreement, tariff to be fixed by the 1st respondent would be the maximum rate of tariff and the petitioner would be

free to fix the tariff at a rate lower than that fixed by the 1st respondent. The said Article further states as follows:-

Regarding fixation of tariff and setting prices, the Licensee shall follow the rules and regulations stipulated by TAMP for fixing/review of tariff.

9.The rate of tariff to be collected at the time of entering into the License Agreement were contained in Appendix 15 of the License Agreement .

10.Article 7.3.2 which deals with Regulation and Review of Tariff reads as follows:

The Licensee may at any time, apply for revision of tariff to be charged and recovered by it to the Tariff Authority for Major Ports constituted

under Article 47A of the Major Port Trusts Act, 1963. However, the Licensee shall be bound by any statutory amendments to the existing

procedure for fixing the tariff, as applicable to the Licensee.

11.The petitioner, as per Article 7.3.5.1 shall pay to the 2nd respondent initial amount of Rs. 45 million (Rupees Forty Five Millions only)

simultaneously on the date of Award of License. Under Article 7.3.5.2, the petitioner shall pay to the 2nd respondent royalty calculated on the

basis of minimum guaranteed traffic royalty rates as set out in Appendix 12 of the Agreement irrespective of discounts in tariff, if any, that may be

granted by the petitioner . The royalty shall be paid every month. The said Article further proceeds to say as follows:

Royalty shall be paid every month on the basis of annual minimum guaranteed traffic as set out in Appendix 12. Monthly royalty shall be initially

calculated proportionately to the yearly royalty based on the annual minimum guaranteed traffic as per the Appendix 12 and shall be paid latest by

the 7th day of the subsequent month. At the end of each 3 Month period the

total royalty payable shall be computed and the difference, if any, between the amount of royalty actually payable, calculated on the basis of actual TEUs handled and the corresponding amount as set out in the Appendix 12, and the amount of royalty already remitted, shall be paid by the Licensee to the Licenser within fifteen days of expiry of the relevant 3 Months period.

In case the actual traffic falls below the annual minimum guaranteed traffic as guaranteed by the Licensee and as set out in the Appendix 12, then

the Licensee shall pay the amount of royalty as per its annual minimum guaranteed traffic.

12. In the above back ground , for the first time, the Tariff Order was passed by the 1st respondent on 08.12.1999 valid for a period of 3 years

and the same was notified on 28.12.1999. Regarding this tariff order, there is no dispute between the parties.

13. For the years 2003, 2004 and 2005, on the proposal submitted by the petitioner seeking revision of tariff, on 20.09.2002 a revised tariff order

was passed by the 1st respondent in Case No. TAMP/21/2002-TPT. In the said Order, the 1st respondent rejected the proposal of the petitioner

for an increase in the tariffs and instead, reduced existing rates by 15%. As per the order , the said tariff rate was to take effect after 30 days from

the date of notification of the order in the Gazette of India. It was accordingly notified in the Gazette of India on 04.10.2002. Here started the first

round of litigation.

FIRST ROUND OF LITIGATION

14. Aggrieved over the said tariff order dated 20.09.2002 made in Case No. TAMP/21/2002-TPT (hereinafter referred to as ""the tariff order

2002""), the petitioner filed W.P. No. 40638 of 2002 on several grounds. Mainly it was contended that the royalty was not calculated as a pass

through in the cost of the petitioner. While admitting the writ petition on 08.11.2002, this Court in W.P.M.P. No. 60249 of 2002 granted stay of

operation of the tariff order 2002. This Court further directed that the petitioner would continue to collect tariff as per the tariff order of the year

1999. From the records, it could be seen that the said interim order was made absolute by a learned single Judge on 17.06.2005. As a result, the

petitioner continued to collect the tariff from the users of the terminal at the very

tariff rate of the year 1999.

15. During the pendency of the said writ petition, the Government of India, the 3rd respondent herein, in exercise of its power u/s 111 of the Act,

on 29.07.2003 issued its policy decision that the royalty payment shall not be factored into/taken into account as cost for fixation /revision of tariff

by TAMP for the following reasons:

(i) The benefit of higher efficiency on account of private participation in ports should also be passed on to shippers or the users which will not be so

if royalty is allowed to be factored in the cost of private operators.

(ii) If royalty is allowed as cost, the private bidder can offer high percentage which he will recover from the shippers/users in the shape of royalty

cost factored in fixing higher rates.

16. In the said policy decision it was further directed that it may be clearly indicated in the bid documents while inviting the bids for private sector

participation at Major Ports. It appears that subsequent to the issuance of the said policy decision, a meeting was held under the chairmanship of

the Hon'ble Minister for Shipping, Government of India to resolve the issues relating to tariff fixation and in the said meeting it was decided that in

the case of Chennai Terminal, the offer of the second highest bidder should be accepted as costs of Chennai Container Terminal (hereinafter

referred to as ""CCT"") for the purpose of arriving at tariff. Subsequently, the 1st respondent based on the policy decision issued by the Government

of India as narrated above u/s 111 of the Act notified the revised guidelines for tariff fixation. The said guidelines issued by the 1st respondent has

not been challenged and the same has become final.

17. As per the said guidelines, vide Clause 2.8.1 Royalty/Revenue share payable to the landlord port by the private operator will not be allowed as

an admissible cost for tariff computation as decided by the Government of India in the Ministry of Shipping vide its Order No. Pr-14019/6/2002-

PG, dated 29th July 2003. In those BOT cases where bidding process was finalised before 29th July 2003, the tariff computation will take into

account royalty / revenue sharing as cost for tariff fixation in such a manner as to avoid likely loss to the operator on account of the royalty /

revenue share not being taken into account, subject to maximum of the amount quoted by the next lowest bidder. This would, however, be allowed

for the period up to which such likely loss will occur. This would not be applicable if there is provision in the concession agreement on treatment of Royalty/Revenue share.

18. According to the above policy decision, there are two aspects to be remembered. The first one is that in respect of BOT cases, where bidding process was finalised subsequent to 29.07.2003, private operators will not be allowed to count royalty as cost for tariff computation. Insofar as

BOT cases like , the petitioner, whose bidding process was finalised before 29.07.2003, the tariff computation will take into account royalty as

cost for tariff fixation subject to the following conditions:

(i) This should be to avoid likelihood of loss to the operators on account of royalty not being taken into account;

(ii) In such event, the royalty shall be taken into account subject to maximum of the amount quoted by the next lowest bidder;

(iii) This should be allowed for the period of up to which such a likelihood loss will arise.

19. Coming back to W.P. No. 40638 of 2002, as against interim order the 1st respondent preferred a writ appeal in W.A. No. 1287 of 2005.

When the matter was taken up for hearing by the First Bench of this Court a memo of compromise (MOC) entered into between the petitioner and

the respondents 1 to 3 was filed and the court was requested by the parties to record the said MOC and to dispose of the writ appeal. On

accepting the said request, the First Bench of this Court passed the following order:

Learned senior counsel appearing on either side, by filing a compromise memo, submit that parties reached a settlement among themselves and,

therefore, the writ appeal and the writ petitions may be dismissed as infructuous.

2. Recording the submission made by the learned senior counsel for the parties, the appeal as well as the writ petitions are dismissed as

infructuous. The compromise memo filed in the matter shall form part of record of this appeal.

20. The terms of MOC are very important for deciding the issues involved in these writ petitions. Therefore, it is necessary to extract the relevant

paragraphs of the MOC viz., 4, 6,7,8 and 9 hereunder:

4. The petitioner will make a proposal to the Government of India, Ministry of

Shipping and Transport in the matter of fixation of quantum of

royalty that may be permitted to be allowed as a "pass through" as a revenue expenditure for fixation of the tariff for the period prior to 31st March

2005. It is clarified that for the period thereafter the new guidelines provide the manner and mode in which this has to be done. Respondent No. 3,

Central Government, on receipt of the proposal may consider the same and pass appropriate orders consistent with the policy decision of the

Government of India in the matter of Chennai Container Terminal Limited dated 5th August 2003 and accordingly issue a directive u/s 111 of the

Major Port Trusts Act.

5. ...

6. The petitioners will continue to charge the 1999 tariff till a new tariff is gazetted as stated above.

7. Advantage or gains, if any, that the petitioner has enjoyed by virtue of not implementing the 2002 tariff in view of the stay, will be quantified by

the First Respondent and such advantage/gains will be adjusted/set off in the proposed new tariff and such set off will be spread over a period of

three years.

8. In arriving at the quantum of gains, TAMP will bear in mind that the 2002 tariff did not permit pass through of royalty and adjustment from the

same will be made as per the directive of the Government of India as stated above. To the extent that the 2002 tariff has been arrived at on the

basis of estimates, appropriate adjustments in the quantum of gains will be made if the actual figures, which are now available for the relevant

period are different.

21. A reading of Para 4 of the MOC would show that it deals with two different periods viz., period prior to 31.03.2005 and subsequent period.

Insofar as the period prior to 31.03.2005 (i.e., between November 2002 to March 2005), on considering the proposal to be submitted by the

petitioner, the Government of India, Ministry of Shipping and Transport shall consider the fixation of quantum of royalty that may be permitted to

be allowed as a pass through as revenue expenditure for fixation of tariff. This would make it crystal clear that for the period from November 2002

to March 2005, it was agreed upon between the parties that some amount of royalty shall be permitted as a pass through as revenue expenditure in

the matter of fixation of tariff. What was left open to be decided by the Government of India was only the quantum. In respect of the period on or after 31.03.2005, a new guideline dated 28.03.2005 shall be followed which states as extracted above, that tariff computation will take into account royalty as cost for tariff fixation, if only there is likelihood of loss to the operator on account of royalty not being taken into account that too subject to maximum of the amount quoted by the next lowest bidder. As per Clause 6 of the said MOC, the petitioner continued to charge at the tariff rate of the year 1999 beyond August 2005.

22. In terms of the said MOC, the petitioner submitted a proposal to the 3rd respondent on 06.09.2005 for fixation of quantum of royalty that may be permitted to pass through as revenue expenditure for the period from November 2002 to March 2005.

23. In the said proposal, the petitioner, inter alia, took the stand that the petitioner is not similarly situated to CCTL and as a matter of fact, it is similarly situate to Nava Sheva International Container Terminals (NSICT) for Jawaharlal Nehru Port, Bombay. The petitioner pointed out that insofar as NSICTL is concerned 100% royalty had been permitted as pass through and therefore, the petitioner claimed that for the period from November 2002 to March 2005, the petitioner may also be given the same benefit of exemption of 100% royalty as pass through as revenue expenditure for the purpose of fixation of tariff rate.

24. When the said proposal of the petitioner was under the consideration of the 1st respondent, on a clarification sought for by the 1st respondent, the Government of India (3rd respondent herein) issued a fresh direction dated 17.04.2006 to the 1st respondent in the following terms:

After considering the proposal of PSA SICAL and the submissions made at the meeting held on 27.10.2005 as also further submissions made in their letter dated 10.11.2005 and the comments furnished by furnished by the TPT, it clearly emerges that the pre-condition of incurring loss for claiming at least part of royalty as pass through has not been satisfied in this case. Further, the decision taken in the CCTL case has been given prospective effect. No extraordinary circumstance has been brought out in this case warranting an exceptional treatment. Therefore, it emerges that the request made by PSA SICAL for allowing royalty as pass through for the

period up to 31st March , 2005 is devoid of merit and cannot be accepted. TAMP is directed u/s 111 of MPT Act, 1963 to consider the tariff fixation case of PSA SICAL accordingly. The TAMP will be guided by the provisions of the revised tariff guidelines in the matter.

25. The petitioner is aggrieved by the said direction. According to the petitioner, the proposal submitted by him in pursuance of the MOC was not

duly considered and further there was no sufficient opportunity given to him. It was further contended that the said direction was not issued in tune

with Section 111 of the Act. Here started the second round of litigation.

SECOND ROUND OF LITIGATION:

26. Challenging the said direction of the 3rd respondent, dated 17.04.2006, the petitioner filed W.P. No. 388446 of 2006. Following the above

directives dated 17.04.2006 and based on the proposal of the petitioner dated 08.08.2005, the 1st respondent issued a revised tariff order dated

23.08.2006 for the period 2006, 2007 and 2008. Challenging the same the petitioner filed W.P. No. 38845 of 2006.

27. In both the above writ petitions, inter alia, it was contended that hearing was not done by the TAMP and instead it was held only by the

Chairman before passing the tariff order and that no opportunity was afforded as agreed in the MOC dated 17.08.2005 to the petitioner before

passing the directive by Central Government of India dated 17.04.2006. It could be noticed that while admitting the writ petitions interim orders of

stay were granted against the above two proceedings and as a result, the petitioner continued to collect the tariff on the basis of the tariff order

1999.

28. On 22.08.2007 by common order in W.P. No. 38845 and 38846 of 2006, the learned single Judge of this Court (A.Kulasekaran,J.) allowed

both the writ petitions on the ground that before issuance of policy directives by the Central Government, no opportunity what so ever was given to

the petitioner. While so quashing the tariff orders of the respondents 1 and 3, this Court further directed as follows:

If the petitioners intend to submit a representation, if any, to the 1st and 3rd respondents , they are permitted to do so within a period of two

weeks from today. On receipt of the same, the said respondents are directed to give personal hearing to the petitioner and pass orders on merits in

accordance with law and within a period of two weeks and six weeks respectively thereafter.

29. There was no appeal preferred by the respondents against the said order of the learned single Judge and thus the same has become final.

30. In pursuance of the said directions issued by this Court, the 3rd respondent has given personal hearing to the petitioner on 18.09.2007. After

considering the proposal of the petitioner submitted earlier and on hearing the petitioner's representatives, the 3rd respondent issued a fresh

direction by its proceeding No. PR-14019/6/2002-PG (Vol.I) dated 20.02.2008. In the said order, inter alia, the 3rd respondent directed that the

1st respondent should follow the same method of computation and treatment of royalty as in the case of CCTL for the period prior to 31.03.2005.

To be precise, the tariff computation for the period prior to 31.03.2005 will take into account royalty as cost for tariff fixation in such a manner as

to avoid likelihood of loss to the operator on account of royalty not being taken into account subject to maximum of the amount quoted by the next

lowest bidder. It could be understood that the Government of India directed that royalty will be counted as cost, if only, the petitioner had suffered

loss during the period prior to 31.03.2005. Here started the third round of litigation.

THIRD ROUND OF LITIGATION

31. Challenging the said direction of the Government dated 20.02.2008, the petitioner has come forward with W.P. No. 1351 of 2009. Mr.

L.Nageswara Rao, learned senior counsel has submitted his argument in this writ petition on behalf of the petitioner.

32. Subsequent to the above direction, the 1st respondent issued tariff order in Case No. TAMP/52/2005-PSA SICAL dated 17.12.2008,

notified in the Gazette of India Extraordinary Gazette on 30.12.2008. This was to take effect after 30 days of such notification. The said tariff

order is for the period 2009, 2010 and 2011. Aggrieved over the same, the petitioner has come forward with W.P. No. 1350 of 2009. Mrs.Nalini

Chidambaram, learned senior counsel submitted her arguments on behalf of the petitioner in this writ petition.

33. For the sake of convenience, let me, take up W.P. No. 1351 of 2009, at first.

34. As We have noticed, in this writ petition, the petitioner challenges the

direction issued by the Central Government dated 20.02.2008. Though several grounds have been raised in the writ petition, Mr. L.Nageswara Rao, learned senior counsel appearing for the petitioner would mainly focus his arguments on the following main grounds:

(1) The impugned order is vitiated as it suffers from the vice of irrationality for the following reasons:

(a) all relevant factors were not taken into consideration. The Central Government has correctly held that it is not bound by MOC in view of the subsequent judicial pronouncements in the second round of litigation, wherein, the Court has directed the Central Government to consider the proposal submitted by the petitioner on merits and in accordance with law. But, the 3rd respondent has failed to take into account all the factors including 100 % royalty to be calculated in the case of NSICTL, which is similarly situated like that of the petitioner.

(b) the Central Government has erroneously considered the tariff fixation order in respect of CCTL which is not in accordance with the directions issued by this Court in the second round of litigation.

2. Assuming without conceding that the MOC still holds the field, even then the impugned order is liable to be set aside for the following reasons:

(a) The very fact that a decision has to be taken by the 3rd respondent for the period prior to 31.03.2005 would indicate that the parties were of the clear understanding that a fresh decision has to be taken after considering the case of CCTL as well as the other relevant factors.

(b) If the case of CCTL has to be applied to the petitioner's case without any other factors to be taken into account, then there was no need for review the matter to refer for adjudication by the 3rd respondent.

(c) The impugned order suffers from another infirmity viz., procedural impropriety. Section 111 of the Act contemplates that the TAMP should be consulted before a direction is issued. The impugned order does not disclose that any opportunity as provided u/s 111 of the Act was given to TAMP. Therefore, the impugned order is liable to be set aside on this ground also.

35. The said submission of the learned senior counsel appearing for the petitioner is countered by Mr. J.Ravindran, learned Asst. Solicitor General of India (ASGI) in the following manner:

(i) The MOC dated 17.08.2005 holds good and as per the directions issued by this Court in the second round of litigation , the 3rd respondent

was required to issue a fresh directive based on the said MOC alone. The MOC , inter alia, states that in respect of inclusion of royalty as a pass

through in the matter of fixation of tariff rate, it shall be included, if only, there has been loss to the petitioner due to non implementation of the tariff

order of the year 2002. Since, the petitioner did not substantiate its contention that it suffered loss, for the said period, as per the impugned order,

royalty as cost for the purpose of determination of tariff rate was not allowed.

(ii) The impugned order is one of policy, which cannot be interfered with by this Court as it does not suffer from any irrationality, illegality or

impropriety.

(iii) As per MOC, the 3rd respondent is bound to consider only the case of CCTL to decide whether to allow the royalty as a pass through to

determine the tariff rate strictly in accordance with the same, the impugned order has been issued and therefore, there is no illegality in the same.

(iv) The Government has issued yet another declaration by issuing guidelines dated 31.03.2005, in which the Central Government directed the

royalty payable to the landlord port by the private operator will not be allowed as an admissible cost for tariff computation as decided by the

Government of India in the Ministry of Shipping. But in respect of those BOT cases, where bidding process was finalised before 29th July 2003,

the tariff computation will take into account royalty / revenue sharing as cost for tariff fixation in such a manner as to avoid likely loss to the

operator on account of the royalty / revenue share not being taken into account, subject to maximum of the amount quoted by the next lowest

bidder. This has not been challenged by the petitioner. The impugned order came to be issued based on the above guidelines dated 31.03.2005.

Therefore, there is nothing illegal in the same.

(v) In respect of consultation u/s 111 of the Act, effective consultation was, as a matter of fact, had with the 1st respondent and only after

considering the views of the 1st respondent, the impugned order came to be issued.

36. Mr. S.Venkateswaran, learned senior counsel appearing for the 1st respondent Tariff Authority for Major Ports would make the following

submissions:

(i) the MOC holds good even subsequent to the order passed by this Court in the second round of litigation. The 3rd respondent consulted the 1st

respondent before passing the impugned order.

(ii) The order of this Court in the second round of litigation was strictly complied with by the 1st respondent in as much as the 1st respondent duly

considered the case of CCTL to decide whether royalty should be allowed as cost for the purpose of determining the tariff rate. Thus, there is no

infirmity in the impugned order of the 3rd respondent, which was scrupulously followed by the 1st respondent while passing the subsequent tariff

order, which is impugned in the other writ petition.

37. The respondents 1 & 2 have filed separate counter affidavits running to several pages. The substance of the counters are as extracted above.

38. Now , let me consider the rival submissions.

39. Before going into the facts of the case, let me, analyse the law relating to the scope of judicial review in respect of the issues involved in these

writ petitions, at first.

40. The learned senior counsel appearing for the petitioner would rely on a judgement of House of Lords of England in Padfield and Ors. v.

Minister of Agriculture, Fisheries and Food and Ors. [1968] 1 All ELR 694, wherein Lord Upjohn has held as follows:

Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the

classification of LORD PARKER, C.J., in the division court): (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting

himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into

account a relevant consideration. There is ample authority for these propositions which were not challenged in argument. In practice they merge

into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of

misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings which I have mentioned.

41. The aforesaid judgement was followed with approval by a Full Bench of the Hon"ble Supreme Court in Hochtief Gammon Vs. State of Orissa

and Others, , wherein in para 13, the Hon"ble Supreme Court, after considering the principles stated in the above judgement by LORD UPJOHN

has held as follows:

13. The Executive have to reach their decision by taking into account relevant considerations. They should not refuse to consider relevant mater

nor should they take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such

a decision will be lawful. The courts have power to see that the Executive acts lawfully. It is no answer to the exercise of that power to say that the

Executive acted bona fide nor that they have bestowed painstaking consideration. They cannot avoid scrutiny by courts by failing to give reasons.

If they give reasons and they are not good reasons, the court can direct them to reconsider the matter in the light of relevant matters, though the

propriety, adequacy or satisfactory character of those reasons may not be open to judicial scrutiny. Even if the Executive considers it inexpedient

to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts.

42. Subsequently, in TATA Cellular v. Union of India (1994) 6 SCC 651, while considering the scope of judicial review, in para 77 , the Hon"ble

Supreme Court has held as follows:

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only

concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put,

the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law

that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

43. The learned senior counsel for the petitioner would rely on another judgement in M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and

Others, , wherein, the Hon"ble Supreme Court, in para 18 has held as follows:

18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the courts, in exercise of their

power of judicial review, do not ordinarily interfere with the policy decision of the executive unless the policy can be faulted on grounds of mala

fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy

unconstitutional.

44. He further relied on another judgement in Union of India and Others Vs. Dinesh Engineering Corporation and Another etc., wherein , the

Hon"ble Supreme Court, in para 12 has held as follows:

12. A perusal of the letter dated 23-10-1992 does not show that the Board was either aware of the existence of the writ petitioner or its capacity

or otherwise to supply the spare parts required by the Railways for replacement in the governors used by it, an ignorance which is fatal to its policy

decision. Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be

termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the

Constitution.

45. The learned senior counsel for the petitioner also relied on the following judgements of the Hon"ble Supreme Court:

Indian Railway Construction Co. Ltd. Vs. Ajay Kumar,

Sanjay Singh and Another Vs. U.P. Public Service Commission, Allahabad and Another, ;

Delhi Development Authority, N.D. and Another Vs. Joint Action Committee, Allottee of SFS Flats and Others,

46. In Sanjay Singh and Another Vs. U.P. Public Service Commission, Allahabad and Another, ; the Hon"ble Supreme Court, in para 50 has held

as follows:

50. Learned Counsel for the Commission also referred to several decisions in support of its contention that courts will be slow to interfere with

matters affecting policy requiring technical expertise and leave them for decision of experts. (State of U.P. v. Renusagar Power Co., Tata Iron &

Steel Co. Ltd. v. Union of India, Federation of Rly. Officers Assn. v. Union of India) There can be no doubt about the said principle. But manifest

arbitrariness and irrationality is an exception to the said principle. Therefore, the said decisions are of no avail.

47. A survey of these judgements would make it abundantly clear that even in respect of policy decisions of the Government, if it is found that the

same suffers from irrationality or impropriety, this Court can interfere with the said policy decision. Regarding this legal proposition, the learned

senior counsel appearing for the 1st respondent has no second opinion .

48. Keeping in mind, the scope of judicial review in respect of policy decisions, as deduced in the above decisions, let me now analyse the

arguments advanced on either side to see whether the impugned order of the Central Government suffers from any one of the above.

49. The foremost contention of the learned senior counsel appearing for the petitioner is that the impugned order of the Government suffers from

the vice of irrationality in as much as the Central Government had failed to take into account all the relevant factors into consideration. He would

point out that in the impugned order, the 3rd respondent has taken into account only the case of CCTL and the same has not taken into account

the case of the other similarly placed operators such as NSICT, where 100% royalty is included in the cost for the period between 2001 to 2007

for determining the tariff rate. A perusal of the MOC would go to show that in respect of the period prior to 31.03.2005, quantum of royalty that

may be permitted to be allowed as a pass through as a revenue expenditure for fixation of tariff for the said period should be considered by the

Central Government and order should be passed consistent with the policy decision of the Government of India in the matter of Chennai Container

Terminal Limited (CCTL) dated 05.08.2003. This would make it manifestly clear that as per MOC, the Central Government has to take into

account only the case of CCTL and not any other Container Terminal like, NSICT.

50. Admittedly, in pursuance of the said MOC, directive dated 17.04.2006 u/s 111 of the Act was issued by the 3rd respondent. When the same was challenged before this Court in W.P. No. 38846 of 2006, this Court found that the said order dated 17.04.2006 was not passed after affording sufficient opportunity to the petitioner as agreed upon in para 9 of the MOC. That is the reason why this Court set aside the said order by order dated 22.08.2007. While doing so, this Court directed the petitioner to submit a fresh proposal, if any, to the Government and the Government was directed to consider the same strictly in accordance with law and on merits. The learned senior counsel appearing for the petitioner would submit that in view of the said order dated 22.08.2007, the MOC has become inoperative and therefore, the 3rd respondent ought to have taken into account all the factors such as NSICT, CCTL and other Container Terminals. In my considered opinion, the said argument is highly untenable and the same cannot be accepted at all. It could be seen that the order dated 22.08.2007 in W.P. No. 38846 of 2006 was not passed on the other grounds raised in the writ petition except the ground that the impugned order therein was passed without affording sufficient opportunity to the petitioner. Therefore, the direction issued by the Court in the said order, should be properly understood to mean that the parties are relegated to the original position prior to the directive dated 17.04.2006 which was set aside by the Court. Therefore, the Government is expected only again to go by the MOC.

51. As per para 4 of the MOC, the Central Government is required to take into account only the policy decision of the Government of India in the matter of CCTL dated 05.08.2003.

52. Now, it has to be seen whether the same has been properly done in the impugned order or not. A close scrutiny of the impugned order of the 3rd respondent dated 20.02.2008 would go to show that the 3rd respondent, as a matter of fact, considered the policy decision in matter of CCTL. To that extent, there is no infirmity in the order. But, the order further proceeds to say as though the Government considered the decisions taken in respect of similarly placed cases. When a specific query was made to the Assistant Solicitor General of India appearing for the 3rd respondent to explain to the Court as to what are all the other similarly placed

cases, which had been taken into account, he has no answer to submit to this Court.

53. A perusal of the records would go to show that no such consideration of similarly placed cases was ever made by the Government of India

before passing the impugned order. Had it been done, certainly, the 3rd respondent would not have omitted to consider 100% royalty given as a

pass through in the case of NSICT. Though, the file has been produced, the learned ASGI appearing for the 3rd respondent is not in a position to

point out anywhere in the file that due consideration of other similarly placed cases were ever taken.

54. Even in respect of CCTL, the Government has stated that the TAMP should follow the same method of computation and treatment of royalty

as in the case of CCTL for the period prior to 31.03.2005. This directive is strictly in conformity with the agreement found in para 4 of the MOC

in respect of the period prior to 31.03.2005. In the impugned order, the 3rd respondent has not taken any different view. Therefore, the argument

that the 3rd respondent ought to have taken the other factors such as the case of NSICT, etc., cannot be accepted at all.

55. In respect of the second contention of the learned senior counsel appearing for the petitioner, assuming that MOC still holds the field, even then

the impugned order is liable to be set aside for the reason that the period prior to 31.03.2005, the royalty may be permitted to be allowed as a

pass through" as a revenue expenditure should be decided by the 3rd respondent on the proposal to be submitted by the petitioner consistent with

the policy decision dated 05.08.2003 in the case of CCTL. But, no such fresh consideration was made as agreed upon in the MOC. In this

argument also I find no substance. As I have already elaborated, the MOC relates to two different periods viz., the period prior to 31.03.2005

and to the subsequent period. In so far as the former period is concerned, the scope of decision making has been reduced to a narrow compass in

the MOC. Insofar as the said period is concerned, the MOC clearly stipulates that the order to be passed shall be consistent with the policy

decision in respect of CCTL. But, in the impugned order, there is no indication that the proposal of the petitioner was considered scrupulously to

take a decision regarding royalty to be allowed as "pass through". Instead, the

Government in a mechanical fashion has simply stated that insofar as the period prior to 31.03.2005 is concerned, the TAMP should follow the same method of computation and treatment of royalty as in the case of

CCTL. This would go to show that there was no decision taken afresh on the basis of the proposal submitted by the petitioner and instead, the

Government has simply directed the TAMP to follow the policy decision regarding CCTL. Here only the petitioner has got a case to succeed.

56. The learned ASGI appearing for the 3rd respondent is not in a position to explain to this Court, as to what are all the factors taken into

account to consider the proposal submitted by the petitioner and why they were rejected and how the decision to direct the TAMP to follow the

decision in respect of CCTL prior to 31.03.2005 was taken. This, in my considered opinion, is arbitrary. This would go to show that to this extent,

the impugned order is a non speaking order, which is not based on proper consideration of the proposal submitted by the petitioner and on sound

reasonings. It should be remembered that on the earlier occasion, during the second round of litigation, this Court set aside the earlier directive of

the 3rd respondent solely on the ground that sufficient opportunity was not given to the petitioner before passing the impugned order therein. Here,

sufficient opportunity means, "sufficient opportunity of personal hearing which encompasses proper consideration of the points raised by the

petitioner during such hearing. Points are raised only to be considered. If there is no proper consideration of the points raised in support of the

contention that royalty should be allowed as a pass through as a revenue expenditure, then the decision is undoubtedly arbitrary. Thus the

impugned Government Order suffers from irrationality inasmuch as the same is not only a non speaking order, but, it has failed to deal with the

grounds raised in the fresh proposal of the petitioner in pursuance of the earlier order passed by this Court in the second round of litigation.

57. The learned ASGI appearing for the 3rd respondent, from the files produced before this Court, is not in a position to point out any such

effective consideration of the proposal submitted by the petitioner.

58. It is to be seen that there is procedural impropriety in as much as no opportunity as provided u/s 111 of the Act to TAMP in respect of the

proposal submitted by the petitioner was given. The learned senior counsel

appearing for the petitioner would submit that there is a specific plea taken in the affidavit filed in support of the writ petition that there was no effective opportunity given to the 1st respondent by the 3rd respondent before passing the impugned order. But, in the counter affidavit filed by the 1st respondent, there is an averment that such an opportunity was , as a matter of fact, given to the 1st respondent before the impugned order was passed by the 3rd respondent. However, curiously, in the counter affidavit filed by the 3rd respondent, there is only a vague statement as follows: Ministry of Shipping, after examining the submissions made by the petitioner and the views expressed by the Tuticorin Port Trust and TAMP, issued a policy direction u/s 111 of the Major Port Trusts Act, 1963 stating that the request made by the petitioner is devoid of merit and cannot be accepted.

59. It has not been given in detail in the counter affidavit as to what was the kind of opportunity given to the 1st respondent as required under proviso to Section 111 of the Act. The proviso to Section 111 of the Act states that the authority or the Board, as the case may be, shall be given opportunity to express its views. Since the counter of the 3rd respondent was silent on this aspect, this Court directed the 3rd respondent to produce the entire file which reveals that as a matter of fact , in pursuance of a letter from the 3rd respondent , the 1st respondent did submit his views. To that extent, the argument of the learned senior counsel appearing for the petitioner that the order suffers from procedural impropriety as though there was no effective opportunity given to the 1st respondent by the 3rd respondent cannot be accepted. As I have already stated , the views of the 1st respondent were received by the 3rd respondent.

60. But, curiously, nowhere in the impugned order, it is stated that the views expressed by the 1st respondent were ever considered by the 3rd respondent while passing the impugned order. u/s 111 of the Act, the views of the 1st respondent is absolutely necessary to issue a direction in respect of tariff fixation. Though views were expressed by the 1st respondent regarding the same, the 3rd respondent has failed to consider the same. As I have already stated , as per settled law, the failure to consider the relevant factor is arbitrary which offends the order of the Government. This again takes us to the conclusion which I have arrived at few

paragraphs above that while passing the impugned order, the Central Government has not applied its mind properly and it has simply stated that the earlier decision in respect of CCTL for the period prior to 31.03.2005 should be followed. Thus, the mandate contained in Section 111 of the Act has not been scrupulously complied with by the 3rd respondent before passing the impugned order. For this reason, again I have to hold that the impugned order is bad in law.

61. For the reasons which I have stated above viz., the 3rd respondent has failed to deal with the grounds raised by the petitioner in its proposal thoroughly to arrive at a proper conclusion as agreed upon in the MOC and on the ground that as per legislative mandate that the views of the 1st respondent should be considered, which has not been done in this case, I am inclined to hold that the impugned order is liable to be set aside and the matter needs to be remitted back to the 3rd respondent for fresh orders after duly considering the proposal submitted earlier by the petitioner and the views expressed by the 1st respondent after affording sufficient opportunity of hearing. It is needless to say that while doing so, the 3rd respondent shall pass a deatailed speaking order meeting all the grounds raised in the proposal submitted by the petitioner.

W.P. No. 1350 of 2009:

62. Let me, now, move on to W.P.1350 of 2009 wherein the consequential tariff order passed by the 1st respondent dated 17.12.2008 made in Case No. TAMP/52/2005-PSA SICAL is under challenge by the petitioner. To recapitulate the history of the case, I have to state that similar order passed on the earlier occasion was set aside by this Court in the second round of litigation on the ground that sufficient opportunity was not given to the petitioner. If once, the same was done, the parties as I have already stated, have to be relegated to the position prior to the said tariff order. If that is done, the MOC will occupy the issues. As per the MOC, for the period subsequent to 31.03.2005, 1st respondent has to follow the policy decision of the new guidelines of the year 2005. On issuance of directives as per the MOC by the 3rd respondent, the 1st respondent was required to pass a tariff order for the period between November 2002 to March 2005 based on the policy decision regarding CCTL and for the subsequent period as per the new guidelines. It should be noticed that as per

Para 6 of the MOC advantage or gains, if any, that the petitioner has enjoyed by virtue of non implementing the 2002 tariff order should be set off. In view of the same, tariff will be quantified by the 1st respondent and such advantage/gains will be adjusted/set off in the new tariff and such set off will be spread over for a period of 3 years. It is contended by the learned senior counsel Mrs.Nalini Chidambaram appearing for the petitioner, inter alia , that the tariff order dated 30.12.2008, which is impugned in this writ petition is flawed for the reason that no proposal was called for from the petitioner for the years 2009 , 2010 and 2011 . The impugned tariff order has been passed on the earlier proposal submitted by the petitioner for the year 2006, 2007 and 2008. It is every body's knowledge that for every year, the expenditure differs. It is only based on the cost , the tariff fixation is made. What was the cost involved during the year 2006, 2007 and 2008 cannot be the same for the years 2009, 2010 and 2011. Admittedly, there is no tariff order passed for the years 2006, 2007 and 2008 on the proposal submitted by the petitioner. But, instead, on the said proposal relating to the years 2006, 2007and 2008, the 1st respondent has passed the impugned order for the year 2009, 2010 and 2011. This, in my considered opinion, cannot be countenanced at all.

63. The learned senior counsel appearing for the petitioner would further submit that on account of the order made by this Court in the second round of litigation on 17.08.2005, the 1st respondent ought to have revisited the tariff order of the year 2002. But, the learned senior counsel for the 1st respondent vehemently opposed the same. According to him, the tariff order will only be prospective in nature and will never be given retrospective operation and therefore, the impugned order was passed for the years 2009, 2010 and 2011 prospectively. In my considered opinion, I find it very difficult to accept the said arguments of the learned Counsel for the 1st respondent. Since there is a clause in the MOC to adjust, excess amount, if any, collected based on the tariff order of the year 1999 during the past, unless the tariff orders are issued for the years commencing from 2002 till 2008, it cannot be found out as to whether the petitioner gained by collecting tariff based on the tariff order 1999.

Evidently, the 3rd respondent has once again taken into account the earlier tariff

orders which were quashed by this Court to find out the differential tariff collected by the petitioner for the past , so as to adjust the same for the year 2009 to 2011. Thus, the non fixation of tariff for the previous years has got a direct impact on the rate of tariff prescribed for the years 2009, 2010 and 2011.

64. If there is no adjustment of the excess amount allegedly collected during the past based on the order for the year 1999, then, it can be, certainly, held that though rate of tariff was not fixed for the past, the present tariff order will, however, independently survive. But, that is not the case here. If once it is held that the non fixation of the tariff rate for the past has got an impact, since there is an adjustment of the excess amount allegedly collected by the petitioner during the past in the matter of fixation of tariff rate for the years 2009 to 2011 , I have to necessarily hold that the impugned order is irrational and arbitrary.

65. The learned senior counsel would further submit insofar as the period subsequent to 31.03.2005 as per MOC, it is not only the case of CCTL, but the case of the other similarly placed operators, should also be taken into account while fixing the tariff rate. In answer to the said argument , the learned senior counsel appearing for the 1st respondent would submit that the 1st respondent is bound by the directions of the Central Government u/s 111 of the Act, since as per the guidelines of the year 2005, the Central Government has directed the petitioner not to include the royalty as a pass through in the matter of fixation of tariff, the 1st respondent had to follow the same. But, the learned senior counsel appearing for the petitioner would submit that the 1st respondent is an independent adjudicator , who is not bound by the directions of the 3rd respondent.

Instead, according to her, the 1st respondent is required to adjudicate upon the issues involved in the matter and to pass an order independently.

66. In this regard, a perusal of Section 111 of the Act would go to show that the Central Government has got power to issue directions on policy decisions which bind the 1st respondent. Therefore, the argument that the 1st respondent is not bound by the directions of the 3rd respondent cannot be countenanced. At the same time, as rightly pointed out by the learned senior counsel for the petitioner, there is an element of adjudication involved on the part of the 1st respondent. While adjudicating upon

viz., while arriving at the tariff rate, the 1st respondent is expected to act judiciously and on rationale basis. But, at the same time, it should be done as per the policy decisions of the Central Government. It is not to say that the Central Government can influence the decision making of the 1st respondent. On the other hand, the decision making of the 1st respondent should be in accordance with the policy decision of the Government. Here, in this case, the Government has taken policy decision to allow royalty as a pass through for the purpose of determining the tariff rate only to the extent of likely loss. Therefore, to that extent, the petitioner is bound by the said policy decision.

67. As rightly pointed out by the learned ASGI appearing for the 3rd respondent, the policy decision denying inclusion of 100% royalty as a pass through has not at all been challenged by the petitioner. When the said guidelines of the Central Government is not challenged, the same binds the 1st respondent. The learned senior counsel appearing for the petitioner would submit that Clause 6.2 of the policy decision comes to the rescue of the petitioner. In my considered opinion, it is not so. Therefore, the contention of the petitioner that because royalty as a pass through is allowed 100% in the case of NSICT and as a parity measure, the same should be allowed to the petitioner also by the 1st respondent cannot be accepted. It may be a different case that in the event of any challenge made against the policy decision of the 3rd respondent, all these points raised by Mrs.Nalini Chidambaram, learned senior counsel appearing for the petitioner may require consideration. But, here, without challenging the policy decision, only the consequential tariff order is challenged.

68. It is the contention of the 1st respondent that despite sufficient opportunity given to the petitioner, the petitioner failed to produce any material to show that the petitioner sustained any loss and therefore, no royalty was allowed as a pass through for determining the tariff rate. The learned senior counsel for the petitioner would take me through the voluminous documents produced by the petitioner to substantiate the contention that the petitioner has suffered loss. As a matter of fact, she has filed a tabulation to show the loss, which the petitioner sustained during the past and the loss to be sustained in future. In my considered opinion, this Court cannot go into all these minute details to give a finding as to whether the

petitioner has really sustained any loss during the past and whether it is going to sustain a huge loss in future because of the non inclusion of royalty

as a pass through for the purpose of determination of tariff rate. This Court does not have such an expertise either to agree with the contentions of

the petitioner or with that of the respondents. It needs reconsideration by the 1st respondent.

69. But, one thing is clear that admittedly, the proposals were submitted for the years 2006, 2007 and 2008 by the petitioner and no proposal was

called for from the petitioner for the subsequent years viz., 2009, 2010 and 2011. Thus , there was no occasion for the petitioner to produce the

accounts to substantiate his contention that there is likely loss to be sustained by the petitioner because of non inclusion of royalty as a pass

through. It is needless to say that only on quantifying the likely loss, to that extent alone the royalty is to be treated as a pass through for

determining the tariff rate as per policy decision of the Central Government. Since, in this case, accounts relating to the years 2009 , 2010 and

2011 was not at all produced by the petitioner, as there was no opportunity afforded to the petitioner , in my considered opinion, the impugned

order is not sustainable.

70. Mrs. Nalini Chidambaram, learned senior counsel would give emphasis on the phrase ""If any"" found in para 7 of the MOC to indicate that if any

advantage/gain sustained by the petitioner during the past because of non implementation of the tariff order for the year 2002, then only such

amount gained is to be quantified and adjusted or set off in the future tariff order spreading for three years. As I have already stated, since the same

was not done properly, so as to quantify the correct gain allegedly sustained by the petitioner, the impugned tariff order needs to be interfered with.

Though the arguments are advanced in respect of few other grounds also on either side, I do not propose to go into the same since it is not

necessary, in view of the above conclusions arrived at by me. Therefore, in my considered opinion, while passing the tariff order, the 1st respondent

was right in not taking into account the royalty as a pass through for determining the tariff rate. At the same time, as I have already concluded, the

impugned tariff order should fall to the ground as the same is arbitrary since the same had been influenced by non fixation of tariff rate for the

previous years.

71. In the result, W.P. No. 1351 of 2009 is allowed; the impugned policy direction of the 3rd respondent dated 20.02.2008 having reference No.

PR-14019/6/2002-PG (Vol.I) is set aside; and the matter is remitted back to the 3rd respondent for fresh orders after duly considering the

proposal submitted earlier by the petitioner and the views expressed by the 1st respondent in the manner indicated above and after affording

sufficient opportunity of hearing to the petitioner. The said exercise shall be completed within a period of 3 months from the date of receipt of a

copy of this order. Consequently, connected MPs are closed. No costs.

72. W.P. No. 1350 of 2009 is allowed; the impugned tariff order passed by the 1st respondent dated 17.12.2008 in Case No. TAMP/52/2005-

PSA SICAL and notified in Gazette of India Extraordinary on 30.12.2008 is set aside; and the matter is remitted back to the 1st respondent for

passing fresh orders in respect of the years 2009, 2010 and 2011 after obtaining necessary proposal from the petitioner and after affording

sufficient opportunity including personal hearing to the petitioner. It is further directed that before issuing such tariff order for the years 2009, 2010

and 2011 , the 1st respondent shall pass tariff orders for the past years based on the guidelines as indicated above and after an order is passed by

the 3rd respondent as directed in W.P. No. 1351 of 2009.