CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 301 OF 2012

[Arising out of Order-in-Appeal No: 38 & 39/MCH/ADC/Gr.VB/BN/2012dated 8th February 2012 passed by the Commissioner of Customs(Appeals), Mumbai–I.]

Marina Jawahar Mahi
Director, Joy Home Creation Pvt Ltd
10/601 Juhu Sai Darshan, JVPD Scheme Ext
Road No. 5, Juhu, Mumbai - 400049 …***Appellant***

versus

Commissioner of Customs (Import)
New Custom House, Ballard Estate
Mumbai - 400001 ***…Respondent***

<u>APPEARANCE</u>:

Shri J C Patel with Ms Shamita Patel, Advocates for the appellant

Ms Trupti Chavan, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

<u>FINAL ORDER NO: A/ 86424 /2021</u>

DATE OF HEARING:	24/03/2021
DATE OF DECISION:	18/06/2021

<u>PER: C J MATHEW</u>

This dispute originated with allegation of the value of 'Toyota Landcruiser', imported against the bill of entry no. 418324/16.12.2003 by one Valvatkar Mujaffar Mohammed Salhe on which duty liability of ₹ 11,99,329 was discharged on ascertainment of assessable value of ₹ 7,19,166 applicable to manufacture in 1999 as declared in bill of entry and in possession of the appellant, Ms Marina J Mahi, from whom seizure was effected by officers of Directorate of Revenue Intelligence (DRI) on 11th July 2008, having been misdeclared by concealing evidence of manufacture in 2003. Further proceedings culminated in order of the original authority demanding differential duty of ₹ 18,64,198, along with offer enabling redemption of the confiscated vehicle on payment of fine of ₹ 10,00,000, and imposing penalty of ₹ 10,00,000 on the appellant; besides, it was also stipulated that all the liabilities enumerated therein would be recovered from either of importer, or of appellant, seeking redemption of the vehicle. Commissioner of Customs (Appeals), Mumbai-I, *vide* order-in-appeal no. 38&39/MCH/ADC/Gr.VB/BN/2012 dated 8th February 2012 dismissed the challenge of the appellant herein leading to the dispute now before us.

2. Drawing our attention to the lengthy investigation based on intelligence that loans had been obtained from M/s ICICI Bank through their agent, M/s JMD Marketing Pvt Ltd, on the security of such vehicles and transferred, in contravention of restriction imposing

ban on sale for two years after import, to such borrowers, the appellant came up for scrutiny. The details of the transactions obtained from the bank assisted in connecting the impugned vehicle to the appellant and, upon physical examination evincing erroneous placement of the plate bearing chassis number that suggested tampering with this critical information to mislead the year of manufacture was opined to be 2003. Thus it was that the adjudicating authority revised the value of the vehicle for demand of differential duty and held that sale in breach of restriction, along with deliberate misdeclaration of value, rendered the vehicle liable for confiscation. In the light of the specific submissions made on behalf of the appellant, much of the minutiae recorded by the original authority is not germane to the proceedings before us and we have above taken note of that which are.

3. It has been admitted by the appellant that the vehicle had been leased from the original importer under agreement dated 30th January 2004 committing to payment of ₹ 69,000 for 36 months with option to acquire the vehicle thereafter. It is also on record that the importer had availed loan of ₹ 30,00,000 from M/s ICICI Bank in January 2004 against vehicle as security in which the appellant, as possessor of the vehicle, was incorporated as co-applicant. Further, it is on record that, M/s Lakozy Pvt Ltd, with expert knowledge of such vehicles, had reported certain peculiarities in the placement of the plate bearing

chassis number while advising that year of manufacture and, other details, could be obtained through M/s Toyota Kirloskar Motor Pvt Ltd, the Indian affiliate of the overseas manufacturer.

4. Learned Counsel contends that the appellant was not concerned with the import and, hence, could not be made responsible for any liability under Customs Act, 1962 as held in the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs (Import), Bombay v. VXL India Ltd [2006 (193) ELT 396 (Bom)]* that was affirmed by dismissal of appeal of Revenue before the Hon'ble Supreme Court, in that of the Hon'ble High Court of Karnataka in *Commissioner of Customs, Bangalore v. Five Star Shipping Co Ltd [2012 (278) ELT 196 (Kar)]* and of the Tribunal in *Rajeshwari Sanjay Patel v. Commissioner of Customs (Import), Nhava Sheva [order no. A/815/15 dated 31st March 2015 disposing of appeal no. C /614/2008 against order-in-original no. 179/07 CC(I) JNCH dated 31st January 2008 of Commissioner of Customs (Import), Nhava Sheva]*. It was further contended that the appellant had not violated the condition pertaining to restriction on sale in as much as the vehicle had not been purchased but merely in use under lease agreement that did not involve sale until expiry of the agreement and that such lease was not barred by public notice no. 3 (RE 2000)/1997-2000 dated 31st March 2000. The decision of the Hon'ble Supreme Court in *KL Johar & Co v. Deputy Commercial Tax Officer [AIR 1965 SC 1082]* was cited in

support of this distinction.

5. According to Learned Authorised Representative, the entire scheme of loan agreements against security of vehicles with back-to-back lease agreements was a form of transfer in contravention of the restriction on sale of vehicles imported by persons returning from abroad. She points out that the conditions stipulated for such imports were required to be strictly enforced. The findings of the original authority on the role of the appellant was reiterated during the course of the hearing.

6. The appellant has not contested the findings of the original authority, as upheld by the first appellate authority, that the plate bearing chassis number had been tampered with intent to evade duties of customs by misrepresenting the age of the vehicle. We, therefore, forbear from examining the evidences in support of the misdeclaration and restrict the scope of this proceeding to the claim of the appellant that she has not been involved in breach of condition of ‘no sale’ subject to which such imported vehicles are permitted to be cleared.

7. In *re VXL India Ltd*, the Hon’ble High Court of Bombay has, approvingly, referred to the distinguishment of the provisions of section 28 of Customs Act, 1962 and section 125 of Customs Act, 1962 by the Tribunal to conclude that two cannot be invoked simultaneously and that liability under the former can be fastened only

on the importer. In *re Five Star Shipping Co Ltd*, the Hon'ble High Court of Karnataka has held that the purchaser, in due course, of imported vehicles cannot be held liable for payment of fine imposed in *lieu* of confiscation in proceedings initiated for demand of differential duty.

8. It is clear from the conditions specified in public notice no. 3 (RE-2000)/1997-2002 dated 31st March-2000 of Director General of Foreign Trade that endorsement of 'no sale' for two years was to be recorded by the competent authority in the registration certificate of the vehicle. The appellant, having entered into lease agreement with the importer, cannot be said to be ignorant of such condition. Nonetheless, we are unable to concur with the findings of the lower authorities that 'no sale' restriction has been breached by taking possession of the vehicle on lease. The distinction between 'sale' and 'lease' is not only substantive but also legally unassailable in view of the judgement of the Hon'ble Supreme Court in *re KL Johar& Company* and the deeming of such transaction as 'sale' by amendment of Constitution of India for coverage under sales tax law. The expression employed in the restriction is specific to 'sale' which lease transactions cannot be equated with. Hence, the appellant cannot be held liable as a willful participant in breaching conditions of import. Consequently, the penalty on the appellant does not sustain.

9. There is also no doubt that the differential duty confirmed by the lower authorities under section 28 of Customs Act, 1962 cannot, in the light of decisions of the Hon'ble High Court of Bombay and of the Hon'ble High Court of Karnataka, be fastened on the appellant as a substitute for the importer.

10. The vehicle was held to be liable to confiscation for misdeclaration of value as well as for alleged breach of condition of 'no sale'; though the relative gravity of each has not been mathematically determined, the lack of challenge to the former in the present proceedings precludes erasure of confiscation under section 111 of Customs Act, 1962 and, thereby, retains fine, even in the lack of segregation, for redemption. In this peculiar circumstance of challenge restricted to one of the grounds of confiscation coupled with the absence of appeal by the person affected by the other, it would be inappropriate for us to contemplate alteration of the fine. We are, however, clear that such fine is recoverable only upon exercise of option to redeem the confiscated goods. Such request not having been tendered before us on behalf of the appellant, this proceeding may well ignore that element in the impugned order.

11. In view of our findings *supra*, the appeal is allowed to the extent of setting aside the penalty imposed on the appellant with the clarification that the appellant may not be subjected to recovery

proceedings for differential duty, redemption fine or penalty that devolves on the importer.

(Pronounced in Open Court on 18/06/2021)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*