

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Custom Appeal No. 85263 of 2023

(Arising out of Order-in-Appeal No.250(GrV)/2023/JNCH/Appeals dated 01.03.2023 passed by Commissioner of Customs (Appeals), Mumbai-II)

M/s. OSM Ecocar Pvt. Ltd.

Appellant

6D, 6th Floor, M6, Uppal Plaza, Jasola Dist Centre,
New Delhi-110 025.

Vs.

Commissioner of Customs

Respondent

Group V, NS-V Commissionerate,
JNCH, Nhava Sheva.

Appearance:

Shri Chirag Shetty, Advocate for the Appellant

Shri Ram Kumar, Assistant Commissioner, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 19.04.2023

Date of Decision: 19.04.2023

FINAL ORDER NO. A/85556/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No.250(GrV)/2023/JNCH/Appeals dated 01.03.2023 passed by Commissioner of Customs (Appeals), Mumbai-II

2.1 Appellant had filed a bill of entry no. 2103996 dated 22.08.2022 for clearance of old used machinery (capital goods) and declared assessable value of Rs. 4,28,86,373/-. As per the Board circular 7/2020-Cus dated 05.02.2020 such goods were required to be cleared only after examination and determination of the value by the Chartered Engineer empanelled with the custom authority. Accordingly, the goods were examined by the Chartered Engineer Shri. S. M. Khanche of M/s. Ace-Global Tech. Based on his reports the assessable value of imported goods was determined and duty paid by the appellant on 31.08.2022.

2.2 After out of charge 01.09.2022, appellants were informed that the imported goods have been put on hold by the DRI for investigations. The goods were subsequently seized vide the seizure memo No 107/2022 dated 04.11.2022, under Section 110 of the Customs Act, 1962. The appellant vide their letter dated 25.11.2022 requested for the provisional release of seized goods.

2.3 Original authority vide its order dated 07.01.2023 directed for provisional release of seized goods except for 131 nos of tyres, subject to fulfillment of following conditions:

- a) Execution of bond an amount equal to full assessable value of seized goods i.e. Rs. 15,46,86,224/-.
- b) Furnishing of Bank Guarantee/ Security Deposit to the tune of Rs. 8,24,26,019/- to cover the differential duty of Rs 3,24,26,019/-, the requisite fine and penalty under various sections of Customs Act, 1962.

2.2 This order of provisional release was challenged by the appellant before Commissioner (Appeal) to vide impugned order modified the conditions in provisional release order as follows:

'In view of the above, I direct that the provisional release of the seized goods section 110A of the Customs Act, 1962 be allowed in favor of the appellant subject to the appellant fulfilling all the conditions prescribed by the CA in its order dated 24.01.2023, except the condition of bank guarantee/ security deposit, which should stand amended to Rs. 4,21,53,825/- (Rupees Four Crores Twenty One Lakhs Fifty Three Thousand Eight Hundred and Twenty Five Only) which covers the differential duty, redemption fine and penalty.'

3.1 We have heard Shri. Chirag Shetty, advocate for the appellant and Shri. Ram Kumar, Assistant Commissioner (AR) for the revenue.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Undisputedly in the present case the goods sought to be cleared are used machinery items/ capital goods. Board has vide Circular dated

05.02.2020 clarified that such goods have to be assessed in following manner:

“6. To sum up, the following guidelines shall be followed:

(a) All imports of second hand machinery/used capital goods shall be ordinarily accompanied by an inspection/appraisal report issued by an overseas Chartered Engineer or equivalent, prepared upon examination of the goods at the place of sale.

(b) The report of the overseas chartered engineer or equivalent should be as per the Form A annexed to this circular.

(c) In the event of the importer failing to procure an overseas report of inspection/appraisal of the goods, he may have the goods inspected by any one of the Chartered Engineers empanelled locally by the respective Custom Houses.

(d) In cases where the report is to be prepared by the Chartered Engineers empanelled by Custom Houses, the same shall be in the Form B annexed to this circular.

(e) The value declared by the importer shall be examined with respect to the report of the Chartered Engineer. Similarly, the declared value shall be examined with respect to the depreciated value of the goods determined in terms of the circular No. 493/124/86-Cus VI dated 19/11/1987 and dated 4/1/1988. If such comparison does not create any doubt regarding the declared value of the goods, the same may be appraised under rule 3 of the CVR, 2007. If there are significant differences arising from such comparison, Rule 12 of the CVR, 2007 requires that the proper officer shall seek an explanation from the importer justifying the declared value. The proper officer may then evaluate the evidence put forth by the importer and after giving due consideration to factors such as depreciation, refurbishment or reconditioning (if any), and condition of the goods, determine whether the declared transaction value conforms to Rule 3 of CVR, 2007. Otherwise, the proper officer may proceed to determine the value of the goods, sequentially, in terms of rule 4 to 9.”

The goods have been assessed by the group following the procedure laid down as per the above circular and the duty paid accordingly.

4.3 Section 110A of Customs Act, 1962 provides as follows:

"Section 110A. Provisional release of goods, documents and things seized or bank account provisionally attached] pending adjudication. -

Any goods, documents or things seized or bank account provisionally attached under section 110, may, pending the order of the adjudicating authority, be released to the owner or the bank account holder on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require."

4.4 In the present case the goods seized were assessed by the appraising group on the basis of the procedure prescribed as per the circular dated 05.02.2020. The charge of under valuation cannot be established without challenging the assessment made by the assessing group as per the procedure prescribed. It is not the case where the goods were being cleared on the basis of the declared value but were being cleared on the basis of the assessed value on the payment of assessed duty. However, these questions of undervaluation need to be investigated and we are not concerned with those in the present proceedings.

4.4 Central board has issued circular dated 16.08.2017 which provides as under:

"Subject: Guidelines for provisional release of seized imported goods pending adjudication under Section 110A of the Customs Act, 1962- reg.

The following guidelines are being issued for guidance of the adjudicating authorities in order to ensure uniformity and to streamline the divergent procedures being followed for grant of provisional release of imported goods which are seized under Section 110 of the Customs Act, 1962 Section 110A of the Customs Act, 1962 states that "Any goods, documents or things seized under section 110, may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require".

2. *While provisional release of seized imported goods under Section 110A of the Customs Act, 1962 may normally be considered by the competent adjudicating*

authority upon a request made by the owner of the seized goods, provisional release shall not be allowed in the following cases-

- i) Goods that do not fulfill the statutory compliance requirements/ obligations in terms of any Act, Rule, Regulation or any other law for the time being in force;*
- ii) Goods that do not fulfill the statutory compliance requirements/obligations in terms of any Act, Rule, Regulation or any other law for the time being in force;*
- iii) Goods specified in or notified under Section 123 of the Customs Act, 1692;*
- iv) Where the competent authority, for reasons to be recorded in writing believes that the provisional release may not be in the public interest.*

2.1 Seized imported goods shall be released provisionally by the competent authority upon request of the owner of he seized goods, subject to executing a Bond for the full value/estimated value of the seized goods.

2.2 Further, in addition to the Bond mentioned at Para 2.1. above, the competent authority shall take a Bank Guarantee or Security Deposit to cover the following:

- i) the entire amount of duty/differential duty leviable on the seized goods being provisionally released;*
- ii) amount of fine that may be levied in lieu of confiscation under Section 125 of the Customs Act, 1962 at the time of adjudication of the case. While securing the same, the competent authority shall take into account the nature of the seized goods, the duty and charges payable on the said goods, their market price and the estimated margin of profit;*
- iii) amount of penalties that may be levied under the Customs Act, 1962, as applicable, at the time of adjudication of the case.*

2.3 Depending on the specific nature of a case, the competent authority may, for reasons to be recorded in writing, increase or decrease the amount of security deposit as indicated above.

3. xxxxxxxxx

4. Xxxxxxxx

4.1 The above mentioned observation of the Hon'ble Madras High Court and Hon'ble Delhi High Court may be kept in mind while allowing provisional release of goods."

4.5 As no reasons are forthcoming for enhancing the value of the imported goods over and above the value belonging by the Chartered Engineer. We are of the view that the order prescribing conditions of provisional release is too harsh, taking note of the fact that on the assessed value appellant has already paid duty amounting to Rs. 1,18,94,536/- . Taking into account, the fact that issue is in respect of the redetermination of assessed value, the bond should not be more than the deferential value. Commissioner (Appeal) has in fact modified the order in respect of the security deposit to be made without amending the value of the bond. In our view taking into account of the fact of the case the value of the bond and security needs to be re-determined in interest of justice protecting interest of both revenue and the appellant..

4.6 Accordingly we modify the conditions in the order of provisional release stating that used equipment (Capital goods) imported by the appellant and seized under the seizure memo no. 107/2022 dated 4/11/2022 can be released on execution of indemnity bond of Rs. 4,00,00,000/- (Rupees Four Crores) along with it bank guarantee of Rs. 50,00,000/- (Rupees Fifty Lakhs.).

4.7 With the above modifications we are also of the considered view that the matter needs to be finalized expeditiously say within 6 months of the receipt of this order.

5.1 Thus appeal is allowed modifying the Impugned order to the effect of stating that seized goods except the tyres be allowed provisional release against Indemnity bond of Rs. 4,00,00,000/- (Rupees Four Crores) along with it bank guarantee of Rs. 50,00,000/- (Rupees Fifty Lakhs.).

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)