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**(2021) 08 CESTAT CK 0034**

**In the Customs, Excise And Service Tax Appellate Tribunal**

**Case No :** Customs Appeal No. 50232, 50233, 50234 Of 2020

M/s.Bestech Hospitalities Pvt. Ltd. APPELLANT

Vs

Commissioner Of Customs (Import), New Delhi RESPONDENT

**Date of Decision :** 25-08-2021

**Acts Referred:**
Customs Act, 1962 — Section 111, 112

**Citation :** (2021) 08 CESTAT CK 0034

**Hon'ble Judges :** Rachna Gupta, J

**Bench :** Single Bench

**Advocate :** Jyoti Pal, Ashwani Bhatia, Yashvir Singh

**Final Decision :** Allowed

## Judgement

1. The present order disposes of 3 appeals, the appellants and the issue involved being common to 3 of the appeals. The details of three of appeals are tabled as below:-

Appeal No.

C/50232/2020-Cus (SM)

C/50233/2020-Cus (SM)

C/50235/2020-Cus (SM)

EPCG licence No. and date

0530143820 dated 05.062007

0530145100 dated 30.11.2007

0530144681 dated 28/08/2007

EODC issuance date

30.03.2017

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30.03.2017

30.03.2017

Period

2007-08

2007-08

2007-08

Order-in-Appeal

CC-A-CUSTOMS - D1-EXP-NCH-439-2019- 20 dated 15.11.2019

CC-A-CUSTOMS - D-1-EXP-NCH-440- 2019-20 dated 14.11.2019

CC-A-CUSTOMS - D-1EXP-NCH-441- 2019-20 dated 14.11.2019

Order-in-Original

HKP/ADC/ACE/31/201 7 dated 16.3.2017

HKP/ADC/ACE/32/ 2017 dated 16.3.2017

HKP/ADC/ACE/30/ 2017 dated 16.3.2017

Show Cause Notice

HKP/ADC/SCN/ACE/ Gr.VII/9/2016 dated 22.06.2016

HKP/ADC/SCN/ACE / Gr.VII/24/2016 dated 22.06.2016

HKP/ADC/SCN/ACE / Gr.VII/08/2016 dated 22.06.2016

Amounts (Duty, Redemption fine, Penalty confirmed in OIO and OIA)

? Duty: Rs.5,86,609/- alongwith interest

? Confiscation: 111 (o) of Customs Act, 1962

? Redemption fine - Rs.3,00,000/-

? Penalty Rs.2,00,000/- under section 112 of Customs Act, 1962

? Duty: Rs.40,14,496/- alongwith interest

? Confiscation: 111 (o) of Customs Act, 1962

? Redemption fine -Rs.10,00,000

? Penalty Rs.5,00,000/- under section 112 of Customs Act, 1962

? Duty: Rs.5,66,732/- alongwith interest

? Confiscation: 111(o) of Customs Act, 1962

? Redemption fine Rs.3,00,000/-

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? Penalty  Rs.2,00,000/- under section 112 of Customs Act, 1962

2. The factual matrix relevant for the adjudication in brief as follows:-

The appellant had imported and cleared capital goods under EPCG Authorization No.0530143820 dated 05.06.2007 at concessional rate of 5% under Notification No.097/2004 dated 17.09.2004 subject to the condition that the importer fulfills export obligation as prescribed in the said Notification. Department observed that the appellant failed to fulfill the conditions stipulated in the license and failed to submit the export obligation discharge certificate EODC issued by the licensing authority and export verification sheet duly audited by Customs Authority as a proof of completion of export obligations. The EODCs were to be submitted within the specified period of 30 days from the expiry of the period and thus, the appellants have violated the condition of the license and notification. With this observation respective Show cause notices dated 22.06.2016 were served upon the appellants proposing the recovery of respective total custom duty foregone (as shown in the table above) on the imported goods along with the interest and the proportionate penalty. The said proposal was confirmed initially vide the Oder-in-Original No. 31/2017 dated 16.03.2017. The appeal thereof has been rejected. The requisite details of each of the appeals are tabulated hereunder:-

3. I have heard Ms. Jyoti Pal and Mr. Ashwani Bhatia learned Counsels for the appellant and Mr. Yashvir Singh, learned Departmental Representative.

4. It is submitted on behalf of the appellant, that the appellant has imported certain capital goods under EPCG & EODC License in the year 2007. The export obligation, as per those licenses, was to be fulfilled within 8 years thereof i.e. by 2015. It is submitted that admittedly appellant has fulfilled the said obligation in the year 2011 itself. However, the EODC i.e. export obligation discharge certificate evidencing fulfillment of export obligation in relation to the imports made against three of the aforementioned EPCG licenses could not be submitted immediately thereafter as the department had not given the same to the appellants till 30th March, 2017. At the time of issuance of Show Cause Notice in June, 2016, the appellant had duly brought to the notice of the Department about pendency of its request before the Department for obtaining the EODC but still the original adjudicating authority, instead of keeping the matter in abeyance till the decision of the said application, had confirmed the demand against the appellant for want of EODC.

5. Learned Counsel has impressed upon their letter dated 24.01.2017 as was given to Dy. Commissioner of Customs, Air Cargo Export, New Custom House, New Delhi requesting for some time for submitting EODC as the export obligation had otherwise been achieved. The confirmation of the demand by the authorities below despite the said request is alleged to be highly unjustified and unreasonable. It is submitted that though EODC was not received before the Order-in-Original was passed but it was received before the impugned order of Commissioner (Appeals) and was duly produced before him. However, he has

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been miserably silent about the same and has mechanically rejected the appeal. Order, accordingly is prayed to be set aside and appeal is prayed to be allowed.

6. While rebutting these submissions, learned D.R. has impressed upon that in terms of Notification No.97 of 2004, the appellant was required to fulfill the export obligation within a period of 8 years from the date of issue of license. In the proportion such that 50% of the obligation was to be fulfilled in the block of first to 6th Year and remaining 50% was to be fulfilled within a block of 7th to 8th year. Admittedly, the said condition has not been fulfilled by the appellant. In fact the appellant failed to appear before the original adjudicating authority. It is submitted that the appellant was given sufficient time and opportunity to produce the EODC as is also apparent from, the DGFT Quotionary letter dated 05.11.2015 which has never been responded by the appellant. In the light of the said conduct of the appellant and that no EODC was produced before original adjudicating authority the demand has rightly been confirmed. Since the violation of the terms of license and Notification has been committed by the appellant by 2015 itself. EODC issued to him in 2017 has rightly been ignored. Impressing upon no infirmity or illegality, as alleged, in the order under challenge, same is prayed to be upheld. Appeal is prayed to be allowed.

7. After hearing the parties and perusing the record I observe and hold as follows:-

The moot question to be adjudicated is:

"Whether the appellant has failed to fulfill the export obligation in the requisite time and failed to submit EODC before the concerned authority so as to entitle the Department to demand the duty foregone by the appellant at the time of his imports in the year 2007."

" The apparent and admitted facts are as follows:-

1. The EPCG License were given to appellants in three of the appeals in the year 2007 itself.

2. The imports in three of the appeals were made in the year 2007-2008 itself.

3. Export obligation got fulfilled in the year 2011 itself (31.03.2011)

4. The time period for the export obligation otherwise expires on 04.06.2015, 29.11.2016, 27.09.2016 respectively.

5. There occurred an error in average EO figure that the appellants case, for its modification, was pending consideration before EPCG, in DGFT Headquarters that too since much prior the expiry of the aforesaid period, for fulfilling export obligation.

6. EODC stands finally issued on 30th march, 2017 i.e. - prior passing of Order-in-Appeal and 15 days later than Order-in-Original.

8. The above admitted facts are clear to hold that once EODC had been issued

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undisputedly appellants have fulfilled the export obligation arising out of the license issued under Notification No.97/2004 well before the stipulated time (in year 2011 itself). Undisputedly the discharge certificate thereof was duly applied with however, could not be issued within 30 days of fulfilling the export obligation accordingly could not be produced within the limit prescribed in the Notification. Delay in issuance of said certificate is also not on account of appellant's fault. Fact still remains is that since, the only ground on which the demand was confirmed is non-submission of EODC despite that the same was submitted by the appellant prior the order under challenge was passed showing that he has fulfilled the export obligation within the time. This fact was very much mentioned in the appeal also as was filed before Commissioner (Appeals) as is apparent from para 10 of the appeal which was filed before him. The ignorance of the said Certificate by Commissioner (Appeals) while confirming the demand for want of it is held to be highly unjustified. The Hon'ble High Court of Madras in the case of M/s. India Pistons Ltd. vs. Jt. Commissioner of Customs 2021 (4) TMI 829 (Madras) has held that when EODCs was omitted to be taken into account by the Adjudicating Authority, the order raising demand has to be reversed. Hon'ble High Court of Bombay in the case of GKN Sinter Metals Pvt. Ltd. vs. Union of India reported in 2010 (249) ELT 481 (Bom.) approved by Hon'ble Supreme Court in 2010 (257) ELT A18 (SC) has held that where recovery has been ordered by the Department during the pendency of application for regularization and issuance of EODC before DGFT, the same is highly unjustified. It was held that:

'The fact that the matter is pending before DGFT is not disputed by the respondent (Department). If there is delay in regularization and issuance of EODC by the DGFT, thus, the customs authorities cannot penalize the petitioner by resorting to coercive action."

9. In the present case, it is also not in dispute that the petitioner has fulfilled the export obligation substantially and wherever there is little short fall, the petitioner has sought regularization and issuance of EODC by offering to pay customs duty proportionately to that extent. The fact that there is delay in regularization and issuance of EODC by the DGFT, is very much apparent and also it has not been disputed by the department, the customs authorities cannot penalize the petitioner by resorting to coercive action.

10. It is not the case of the Department that the appellants have intentionally defeated the interest of the revenue. Ordering collection of customs duty by the original adjudicating authority despite that the proceedings of obtaining EODC were pending before DGFT and by Commissioner (Appeals) despite that the Export Obligation Discharge Certificate was issued by then and was duly brought to his notice is held to be highly improper and contrary to the decisions of the superior Courts. I draw my support from the decision in the case of India Pistons Limited vs. Joint Commissioner of Customs (EODC- EPCG) and Ors., 2021 (4) TMI 829 - Madras HC. Relevant portion is extracted below:-

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"Taken note of the petitioner's contention that the impugned order has been passed omitting to take note of the Export Obligation Discharge Certificate (EODC), that the petitioner stated, was available on record.

The EODC was indeed omitted to be taken into account and thus the demand raised under the impugned order would have to be reversed".

11. I find that the appellant has fulfilled the export obligation much prior the expiry of the time under the license issued to him. He also has produced the EODC before Commissioner (Appeals) proving that he has fulfilled the export obligation. The order ignoring the said EOC with an intent to confirm the recovery of duty waiver sought by the appellant at the time of imports is nothing but a forcible recovery. The law has been settled that once EODC is issued, the Department cannot recover the amount of duty waiver. This has been held by this Tribunal also in the case of Eicher Tractor vs. CC, New Delhi reported 2018 (10) TMI 413 (Trib.-Delhi). Similar has been the observations of Bangalore Bench of this Tribunal in the case of Pointec Writing Instruments Pvt. Ltd. vs. Commissioner of Customs, Cochin reported as 2019 (8) TMI 1496 (CESTAT-Bangalore). Relevant portion is extracted below:

"7. ............. Since, the only ground on which the demand was confirmed is non-submission of EODC despite that the same was submitted by the appellant prior the order under challenge was passed showing that he has fulfilled the export obligation within the time.

12. Further, Circular No.16/2017-Cus dated 02.05.2017 (Refer page No.27 of compilation) issued by Central Board of Indirect Taxes and Customs ('CBIC') clarifies that in case where the licence/authorization holder submits proof of their application having been submitted to DGFT, the matter may be kept in abeyance till the same is decided by DGFT. Thus, the adjudicating officer must keep the matter in abeyance till issuance of EODC which was not done in the instant case. In fact, the ld. Commissioner (Appeals) after having perused the EODC, during the hearing ignored the same conveniently as can be seen from the impugned orders. Thus, the impugned orders are bad in law and are liable to be set aside.

13. In view of entire above discussion, it stands clear that the appellant otherwise has duly fulfilled the Export Obligations, that too, well in time. The delay in issuance of EODC was also not on account of appellant's fault and the same was duly communicated in writing to the Department, even to the original adjudicating authority. The certificate as such was produced before Commissioner (Appeals). The order under challenge is held to be highly unsustainable. Accordingly, is hereby set aside. In view of the noticed intentional silence on part of the Commissioner (Appeals) while ignoring the EODC submitted before him by the appellant, I deem it to be a fit case where the concerned Commissioner be summoned so to explain the ignorance of the relevant document while confirming the demand against the appellant. Registry, accordingly, is, directed to issue a notice to Commissioner (Appeals) requiring

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him to appear in person before this Bench on 29.09.2021.

14. Consequent to above findings thereof, the appeals are hereby ordered to be allowed.

[Order pronounced in the open Court on 25/08/2021]

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