IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT NO. – III

Customs Appeal No. 40486 and 40487 of 2013

(Arising out of Order-in-Original No. 20015/2012 (Denova) dated 31.12.2012 passed by the Commissioner of Customs, Seaport Export, Chennai)

M/s. Joy's The Beach Resort Pvt. Ltd. **Appellant**
Chowara P.O. South
Kovaiam, Trivandrum – 695 501.

Vs.

Commissioner of Customs **Respondent**
Seaport – Export
Custom House, No. 60, Rajaji Salai
Chennai – 600 001.

And

Shri T.C. Paul, Managing Director
M/s. Joy's The Beach Resort Pvt. Ltd. **Appellant**
Chowara P.O. South
Kovaiam, Trivandrum – 695 501.

Vs.

Commissioner of Customs **Respondent**
Seaport – Export
Custom House, No. 60, Rajaji Salai
Chennai – 600 001.

No. 1, Goubert Avenue
Beach Road
Puducherry

<u>APPEARANCE:</u>

Shri Hari Radhakrishnan, Advocate for the Appellant
Ms. T. Usha Devi, DC (AR) for the Respondent

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri C.J. Mathew, Member (Technical)

Final Order Nos. **40106-40107 / 2020**

Date of Hearing: 06.02.2020
Date of Decision: 06.02.2020

Per Ms. Sulekha Beevi C.S.

Brief facts are that the appellants M/s. Joy's The Beach Resort Pvt. Ltd. imported one Mercedez Benz car vide Bill of Entry dated 10.2.2006 availing concessional rate of duty under Notification No. 97/2004 dated 17.9.2004 using EPCG license dated 23.12.2005 issued by Jt. DGFT, Trivandrum. On specific intelligence that the vehicle is used in violation of the conditions stipulated in the license, investigations were initiated. It was noticed that the vehicle was not registered as a tourist taxi and was registered only as a private vehicle in the name of the Managing Director of the appellant-company. The vehicle was initially seized and thereafter provisionally released on furnishing bank guarantee. Show Cause Notice was issued alleging violation of the conditions in the EPCG license and for recovery of duty forgone along with interest and also for imposing penalty. After due process of law, the adjudicating authority confirmed the demand, interest and also imposed penalty. Aggrieved by such order, appellant is now before the Tribunal.

2. On behalf of the appellant, ld. counsel Shri Hari Radhakrishnan appeared and argued the matter. He submitted that the three allegations raised in the Show Cause Notice as violation of condition of EPCG license is as under:-

(i) That the vehicle was not registered as a tourist vehicle

(ii) That the foreign exchange has not been earned exclusively by use of the vehicle

(iii) That no proper accounts were maintained by the appellant.

3. With regard to the first issue, ld. counsel submitted that there is no such condition stipulated in the EPCG license that the vehicle

has to be registered as a tourist taxi. Further, it is submitted by him that though the vehicle was initially registered as a private vehicle in the name of the Managing Director of the company, subsequently, the registration was changed to that of a tourist vehicle. He adverted to the circular No. 7/(RE-08)/2004-09 dated 7.5.2008 issued by DGFT. It was clarified in the circular issued in 2008 that it is necessary to endorse on the Bill of Entry that the vehicle has to be registered for tourist purpose. The said circular is issued only on 7.5.2008 whereas the import in the present case is in the year 2006. The circular also clarified that in past cases where EODC has not been obtained till 30.6.2008 and where vehicles were not registered as tourist vehicle, the EPCG license holders will get the vehicles registered as tourist vehicle before 31.8.2008. In the present case, the appellant was issued the EODC only on 12.6.2018. Thus, the appellant has converted the registration from private vehicle to tourist vehicle much before obtaining EODC and before 31.8.2008. Thus, this condition has been sufficiently complied.

4. He relied upon the decision in the cases of Narang International Hotels P. Ltd. Vs. Commissioner of Customs, Nhava Sheva – 2017 (347) ELT 680 (Tri. Mum.), Commissioner of Customs Vs. air Travel Bureau Ltd. – 2010 (260) ELT 78 (Del.) and Hotel Excelsior Ltd. Vs. Commissioner of Customs, New Delhi – 2016 (336) ELT 116 (Tri. Del.) to argue that when the EODC has been issued by the concerned authority the proceedings alleging that conditions have been violated cannot sustain.

5. The ld. AR Ms. T. Usha Devi appeared and argued the matter on behalf of the department.

6. Heard both sides.

7. The first and foremost issue is the violation of the condition that the vehicle has not been registered as tourist vehicle. It is brought out from the facts that the appellant has obtained registration under tourist category after the proceedings have been initiated. The DGFT vide Circular dated 7.5.2008 has clarified as under:-

> *"Attention is invited to para 5.1 of Foreign Trade Policy wherein Import of Motor Cars, Sports Utility Vehicles / all purpose vehicles are allowed only to Hotels, Travel Agents, Tour Operators or Tour Transport Operators and Companies owning / operating Golf Resorts.*
>
> *2. In order to ensure proper and intended use of above vehicles under EPCG Scheme, following course of action would be taken by EPCG authorization holder, Regional Authorities of DGFT and Custom Authorities in addition to existing conditions:*
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> *(a) Customs authorities will endorse in "Bill of Entry" while clearing such vehicles that such vehicles have to be registered as a vehicle "for tourist purpose only". This would make purpose of import of vehicles absolutely clear and would also facilitate registration.*
>
> *(b) In all past cases where Export Obligation Discharge Certificate (EODC) has not been obtained by 30-06-2008 and where vehicles were not registered as Tourist Vehicles, EPCG authorization holders will get them registered as Tourist Vehicles, by 31-08-2008. Regional Authorities of DGFT will monitor and ensure compliance.*
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> *3. This issues with the approval of DGFT."*

8. From the above clarification, it can be seen that an importer / assessee could get the vehicles registered as tourist vehicle on or before 31.8.2008 and also if the EODC has not been issued within 30.6.2008. In the present case, the appellants have converted the registration to tourist vehicle much before issuance of EODC.

9. The second allegation is that the appellants have not earned foreign exchange exclusively by the use of the imported vehicle. In the case of Commissioner of Customs Vs. Hotel Excelsior Ltd. – 2016 (336) ELT 595 (Del.), the Hon'ble High Court of Delhi held that as

long as foreign exchange is earned by the hotel and the imported cars are used for hotel purpose, there would be no violation of any statutory requirement and it is not necessary that the foreign exchange has to be exclusively earned by using the vehicle. The EPCG license does not envisage that the amount collected by use of the imported car only has to be accounted towards fulfillment of export obligation. Similar view was taken in Air Travel Bureau Ltd. (supra).

10. The Tribunal in the case of Narang International Hotels Pvt. Ltd. (supra) had occasion to analyse a very same issue with regard to import of luxury cars. Relevant paragraph of the said decision is reproduced as under:-

> "11. We are not in doubt that the facts unearthed by the investigators do evidence use of the imported cars for personal use and for purposes other than earning of foreign exchange but that, to the extent that such use is not violation of the conditions of import in the scheme or in the corresponding exemption notification, does not suffice to conclude that the vehicles were not used for the purposes for which import at concessional rate of duty was permitted by the authorization.
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> 12. Appellant-company has applied to the licencing authority for issue of Export Obligation Discharge Certificate (EODC). Such application does not terminate the validity of the authorization or to accrue credit of further earning of foreign exchange in the manner envisaged in the scheme to meet any shortfall in achievement of obligation that may yet be determined by the licensing authority. It is not in doubt that the licensing authority is competent to determine that export obligation has been discharged. That such authority is vested as the final authority to do so is amply clear in the decision of the Hon'ble High Court of Bombay in *Bhilwara Spinners* v. *Union of India* [2011 (267) E.L.T. 49 (Bom.)] holding thus :
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> '22. … … Once the licencing authority has found that the licencing conditions have been fulfilled, it would not be open to the customs authorities too contend that the imports under the licence are contrary to law and take action against the licence holder.'
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> Consequently, while the 'proper officer' under the Customs Act, 1962 can initiate action for breach of conditions of notification, a certification of compliance with conditions of licence cannot be

> ignored or substituted by separate findings to the contrary. The adjudicating authority, in rendering the finding that export obligation has not been fulfilled, has erred in pre-empting a decision by the statutory authority vested with that responsibility. The exemption notification itself in Paragraph 2(2) allows a period of six years from date of licence, *i.e.* up to August, 2013, as the first reporting block, to fulfill the export obligation; and we notice that seizure was effected and importers directed to justify the imports well before that deadline. For the reason of not having awaited the completion of the deadline prescribed in the exemption notification for compliance with first report of prescribed proportion of achievement of obligation and of deciding on the extent of achievement of export obligation without proper authority, we find that the proceedings are not legally sustainable."

In the present case, the appellant having been issued EODC on 12.6.2018 by the Jt. DGFT, Trivandrum, the department cannot proceed to recover the duty forgone at the time of import, alleging non-fulfillment of conditions of EPCG license.

11. From the foregoing discussions and also following the decisions cited supra, we are of the considered opinion that the demand cannot sustain. The impugned order is set aside and the appeals are allowed with consequential relief, if any.

(Operative part of the order was pronounced in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**C.J. MATHEW**)
Member (Technical)

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