

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

Excise Appeal No.40335 of 2022

(Arising out of Order in Original No. 5/2022-C. Ex. (Commr.) dated 15.3.2022 passed by the Commissioner of GST and Central Excise, Salem)

**M/s. Faiveley Transport Rail
Technologies India Pvt. Ltd.**

Post Box No. 39
Haritha, Hosur
Tamil Nadu – 635 109.

Appellant

Vs.

Commissioner of GST & Central Excise

No. 1, Foulks Compound, Anaimeedu
Salem – 636 001.

Respondent

APPEARANCE:

Shri Raghavan Ramabhadran, Advocate for the Appellant
Shri P. Ayyamperumal, Special Counsel for the Respondent

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Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 41108/2024

Date of Hearing : 20.06.2024
Date of Decision: 22.08.2024

Per M. Ajit Kumar,

This appeal is filed by Faiveley Transport Rail Technologies India Pvt. Ltd. (the appellant) against Order in Original No. 5/2022 dated 15.3.2022 passed by the Commissioner of GST and Central Excise, Salem (impugned order).

2. Brief facts of the case are that the appellant is engaged in the manufacture and supply of parts of rail products and providing services. The major items manufactured are brake systems, HVAC, couplers, doors, pantographs etc. and their major customers are Indian Railways, Delhi Metro, Alstom, Hyundai Rotem, BEML, BHEL etc.

Intelligence developed by the DGGI, Hosur indicated that the appellant was supplying railway component to Indian Railways and were uniformly classifying all such supplies under Chapter 86 and were paying GST @5% and Central Excise duty @6%. It appeared that the said goods should have been classified under the respective Chapter 84 or 85 as per Section Note 2(f) of section XVIII of the Central Excise Tariff, 1985 (CETA 1985) and discharge duty @12.5%. Show Cause Notice dated 18.6.2020 was issued to the appellant for reclassification of goods i.e. railway components etc. for the period March 2016 to June 2017. Duty of Rs.8,52,50,584/- was sought to be demanded along with interest. Penalties were also proposed. After due process of law, the Adjudicating Authority confirmed the proposals in the Show Cause Notice. Hence this appeal.

3. Shri Raghavan Ramabhadran, learned counsel appeared for the appellant and Shri P. Ayyamperumal, learned Special Counsel appeared for the respondent-department.

3.1 The Ld. Counsel for the appellant submitted that prior to 2014, they had been classifying the goods supplied to the Indian Railways under chapter 84/85/86, etc. for which the Excise Duty rate was mostly 12.5%. In February 2014 Excise duty rates for items under other respective tariff headings such as Chapter 84, 85 was reduced to 10% vide Notification No. 4/2014 - Central Excise (Tariff) dated 17/02/2014. However, post 2014, the Appellant re-classified the goods under the bonafide belief that all the goods that are supplied for use to Indian Railways merited classification under CTH 8607 as per the industry practice. The goods were chargeable to Excise Duty at the higher rate of 12.50%, though the duty applicable for Chapter 84/85

goods was reduced to 10%. During the period from 01/03/2016 to 30/06/2017, Notification No. 12/2016–Central Excise was issued to provide concessional rate of duty (Viz. 6%) for goods falling under 8607 and the Appellant claimed this benefit. The appellant had duly and regularly filed all the periodical Excise Returns for the impugned period. The decision to re-classify the goods under tariff heading 8607 in 2014 from Chapter 84 / 85 was taken well before the reduction/concessional rate benefit given in 2016. The same classification was continued even after implementation of GST. On 31 August 2017 a letter was issued to conduct an Excise Audit for the FY 2015-16 and FY 2016-17. Audit was followed by an investigation by DGGI. The appellant undertook an internal exercise to revalidate the classification of its entire product line and identified the products which may require re-classification in Tariff Headings other than CTH 8607 based on the understanding available at that time. On 07/01/2020 Appellant submitted the relevant details to DGGI along with the details of products meriting re-classification much before the issue of SCN dated 18.6.2020. The Appellant had expressed its willingness to pay the differential duty and settle the dispute under the Legacy Dispute Resolution Scheme. However, the department refrained from taking the letter dated 07 January 2020 into consideration whereby the appellant could not avail the benefit of the Scheme. He stated that the Hon'ble Supreme Court in the case of **Westinghouse Saxby Farmer Ltd.** [2021 (376) E.L.T 14 (S.C.)] has pronounced its judgement regarding the classification of railway goods in view of Note 2 and 3 of the Central Excise Tariff Act, 1975 and held that as relays are solely suitable for railway goods, it merits classification under CTH 8608 in

accordance with the principal/ sole use test. The Original Authority has grossly erred in evoking the extended period of limitation as the appellant had classified its products under CTH 8607 under a bonafide belief and not with an intention to evade payment of duty. Further the department had issued a corrigendum to the SCN enhancing the duty demanded by changing the position adopted in the SCN, which is not tenable in law. The Ld. Counsel stated that the SCN has been issued without any pre-consultation and is rendered liable to be quashed, having been passed in violation of established principles of law. The Original Authority has grossly erred in imposing interest and penalty when demand itself is not tenable. The Ld. Counsel prayed that the order may be set aside.

3.2 The Ld. Special Counsel for the respondent submitted that the key issues involved in the proceedings are misclassification of certain goods, wrong availment of CENVAT for certain category of goods procured and removed as such, issuance of corrigendum and invocation of extended period. He stated that the classification should be done taking into account all facts, details of individual items, admitted classification by Appellant, recorded statement having evidentiary value, all the decisions on the subject, to arrive at the appropriate classification. As regards the issue of misclassification and wrong availment of CENVAT in respect of 'Kittings' and 'Platform Doors' i.e. goods procured and cleared as such, he discussed the relevant paras from the impugned order. As regards suppression of facts by the appellant he stated that the awareness about the classification is a matter of fact. It's also a fact that same were not communicated/ disclosed to the department and the appellant had not approached the

department for Advance Ruling or for advice on the said Classification matter. By citing ignorance and suggesting that a Tendering Authority such as Railways should have sought Advanced Ruling, the Assessee cannot get away from the fact that they resorted to suppression of facts, mis-stated facts in their ER returns and failed to pay duty correctly. There is no legal bar in terms of provisions of any rule or any Circular that a Corrigendum should not enhance the duty. Moreover, in the instant case, the same has been issued by the proper officer and was duly served upon the appellant. The same was acknowledged and responded by appellant by attending the personal hearing. No order has been passed ex-parte contravening principles of Natural Justice. He prayed that the appeal may be rejected.

4. We have carefully gone through the appeal and have heard the rival parties. The issue as raised by the parties are discussed in detail below.

5. The impugned order is issued on the premises that the goods cleared to the railways was misclassified under chapter heading 8607 by the appellant, instead of classifying them under the appropriate chapters 84, 85 etc., as the case may be of the CETA, 1985. Thereby the appellant evaded duty by paying Central Excise duty @ 6% w.e.f 01.03.2016 instead of @ 12.5%.

6. It is seen that the appellant, consequent to the visit by the Audit wing of the department and commencement of investigation by DGGI undertook an internal exercise to revalidate the classification of its entire product line and identified the products which may require re-classification in Tariff Headings other than CTH 8607. As a result of this study of the 29 products under dispute, 22 of them (including platform

doors and kitting's) were reclassified under other chapter headings while 7 items were retained under chapter 86. These seven items were;

Sl. No.	Product Name	HSN Code
1.	Brake Actuators	86072900
2.	Brake systems and parts	86072100
3.	Caliper	86072100
4.	Couplers and Parts	86073010
5.	Door and Parts	86079910
6.	Pantographs and Parts	86079990
7.	Parts of TBU (Thread Brake Unit)	86072100

The reclassification of all the 29 goods as per the headings indicated by the appellant was accepted by the Original Authority, except in the case of Pantographs and Parts, for which the department had issued a corrigendum changing its alleged classification from CTH 8607 in the SCN to CTH 8535 as per the corrigendum. We find that there is no dispute regarding the classification of the other goods after the same was re-worked out by the appellant and the dispute in this appeal has narrowed down to classifying 'Pantographs and its parts' only.

7. Since the appellant has raised a preliminary objection on the corrigendum issued for the classification of pantographs and its parts we take up the issue first.

8. The appellant has stated that by issuance of a corrigendum changing the classification of pantographs and its parts from CTH 8607 in the SCN to CTH 8535, the department has sought to impose an additional duty demand of INR 46,70,340. In the instant case, the classification of pantographs and its parts were already alleged in the SCN, to fall under chapter 86 and hence a different position cannot be adopted by issuing a corrigendum. The corrigendum has traversed beyond the SCN and is bad in law.

9. Normally the word "corrigendum" is used when correction is made in a printed matter which has already been disclosed to the public. The Hon'ble Allahabad High Court in its judgment in **Polyplex Corpn. Ltd. Thru' Auth. Signatory Vs Union Of India & Others** [2014(306) ELT / 2014:AHC:62320], while examining the effect of a corrigendum held;

"8. Normally the word "corrigendum" is used when correction is made in a printed matter which has already disclosed to public and, therefore, mere handwritten correction or draft or finalized matter would not be sufficient but correction as such has to be notified separately and that is how it is termed corrigendum.

9. The meaning of "corrigendum" is "an error to be corrected especially an error in print". The word "corrigenda" is used in a list of corrections of errors in a book or other publications. The origin of the word "corrigendum" is said to be from Latin from the phrase, "neuter of corrigendus, gerundive of corrigere to correct".

10. In various dictionaries also the word "corrigendum" has been defined.

11. In "Oxford Advanced Learner's Dictionary" Seventh Edition at page 343 word "corrigendum" is defined "something to be corrected, especially a mistake in a printed book".

12. In "The Concise English Dictionary", 1982 Edition, page 253 meaning of "corrigendum" is "an error needing correction, esp. in a book".

13. In "Black's Law Dictionary" Eighth Edition at page 370, meaning of "corrigendum" is, "an error in a printed work discovered after the work has gone to press".

14. In "Legal Dictionary" along with Foreign Words and Maxims including Latin Maxims by Prafulla C. Pant, Second Edition, Reprint 2007, at page 118, the meaning of "corrigendum" is, "a thing to be corrected, esp. an error in a printed book".

Hence if the corrigendum instead of correcting a mistake, affects any right, privilege, obligation, liability, acquired, accrued or incurred and has materially changed both the content and the grounds of the original SCN, it is then in the nature of an amendment to the SCN and the amended portion amounts to a fresh SCN. In such a situation the time

limit for demanding the newly proposed duty is to be computed from when the 'Corrigendum' to the show cause notice was issued.

10. As per the appellant pantographs and its parts are not capable of generic use since the same have been manufactured to cater to a specific design and configuration. The pantograph is a device used specifically for the collection of electric current, which is mounted on the roof of the car body. It is used to collect and transfer electric energy from the catenary to traction system and is mounted on insulators for electrical insulation of the car body. In an electric locomotive there are two pantographs mounted on the roof. At any given point of time, one pantograph is raised and connects the locomotive with the overhead contact wire carrying electricity in order to ensure constant power supply to the locomotives. These pantographs are solely and principally used with railway locomotives and do not have any other buyers as they are made as per the specification of railways / locomotive manufacturers. They qualify the test of Note 3 to section XVII of the Central Excise Tariff, 1985. They hence merit classification under heading 8607 as parts of railways or tramway locomotives or rolling stock, notwithstanding their mention under any other chapter of the Customs Tariff. The appellant has drawn attention to the decision of a Coordinate Bench of this Tribunal in the case of **Hi-Tech Industries Ltd Vs Commissioner of Customs, Bangalore** [2005 180 ELT 0356], wherein web camera was classified under chapter 84 instead of chapter 90 considering that it was not an ordinary camera and does not function independently. The decision of the Tribunal has been affirmed by the Hon'ble Supreme Court in **Commissioner Vs Hi-Tech Computers** [2015 321 ELT A274 SC].

11. The discussion on pantographs and its parts occurs at para 26 of the impugned order and is very cryptic. It accepts that pantograph and its parts are exclusively used in railways or tramway locomotives, however it states that the classification of any item under the Central Excise Tariff is not guided by usage or application of the goods but guided by the notes prescribed under Section / Chapters of the Schedule to the Central Excise Tariff, 1985. The relevant para is reproduced below: -

“26. The assessee in reply to the corrigendum, submitted that Pantographs are specifically designed for exclusive use in the Indian Railways and merit classification under Heading 8607 as ‘parts of railways or tramway locomotives or rolling stock’ notwithstanding a probable classification under any other chapter of the Customs Tariff and it qualify the test of Note 3 of Section XVII and classification of goods should also be determined having regards to commercial identity / utility. In this connection, I have to state that as discussed in para 20 to 20.02 for classifying any item under Central Excise Tariff, it is not guided by usage or application of goods but guided by the Notes prescribed under Section / chapters of the Schedule to the Central Excise Tariff Act, 1985. Therefore, though Pantograph and its parts are exclusively used in Railways or tramway locomotives, for the reasons as discussed in para 20 to 20.02, it is rightly classifiable under CH 8535 and hence I hold that they are liable to pay differential duty as demanded in the corrigendum to the demand notice.”

12. As held by the Apex Court in a catena of cases when Revenue challenges the classification made by the assessee, the onus is on Revenue to establish that the item in question falls in the taxing category as claimed by them. [See **HPL Chemicals Ltd. v. Commissioner of Central Excise, Chandigarh** [(2006) 5 SCC 208], **Parle Agro Pvt. Ltd. v. Commissioner of Commercial Taxes, Trivandrum** [(2017) 7 SCC 540], **Union of India & Ors. v. Garware Nylons Ltd. & Ors.** [(1996) 10 SCC 413]. We find from the impugned order that Revenue has failed to establish its case for classification of pantographs and its parts under CTH 8535. The order is cryptic and

non-speaking on the issue. A lack of reasoning in an order makes it difficult for Appellate Authorities to discharge their appellate function properly. Hon'ble Chief Justice Y.V. Chandrachud writing for the Constitution Bench of the Apex Court in **Shri Swamiji of Shri Admar Mutt etc. Vs The Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors.**, [AIR 1980 SC 1], referred to Broom's Legal Maxims (1939 Edition, page 97) where the principle in Latin runs as follows, "*Ces-sante Ratione Legis Cessat Ipsa Lex*". The said principle was explained by the Hon'ble Chief Justice to mean, "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." Since the revenue has not been able to discharge their burden of proof through a speaking order on the merits of the issue, the classification of pantographs and its parts as revised and declared by the appellant cannot be disturbed.

13. Having decided the issues regarding the classification of the impugned goods and corrigendum to the SCN we shall now examine the question of time bar.

14. The appellant avers that both the impugned SCN and the impugned Order nowhere states as to how the "mens rea" of the Appellant is proven beyond doubt. No reasons or evidence was provided by revenue to substantiate the claim of intention to evade payment of tax. They had re-classified the goods falling under Chapter 84/85 under the bonafide belief that all the goods that are supplied for use in Indian Railways merits classification under CTH 8607 which were chargeable to Excise Duty at the higher rate of 12.50%, though the duty applicable for Chapter 84/85 goods was reduced to 10%. The said position was changed to align with the industry practice. During the

period from 17/02/2014 to 29/02/2016 the Appellant reclassified goods under Chapter 8607 wherein Excise Duty rate was 12.5%. They have denied any willful misstatement having been made and have been filing their monthly returns giving complete information as required and permitted by the electronic return filing provision.

15. We find that the appellant has traced the history of the classification of goods manufactured and supplied to Railways as followed by them over a period of time, as also stated by the Ld. Counsel in his submissions. These submissions were also made to the Original Authority in reply to the SCN. The same have not been refuted in the impugned order. We hence prima facie accept the claim made by the appellant that it was not the rate of duty that motivated the reclassification of goods. However, it is seen that for the two item 'kitting's' and 'platform doors' they paid duty @ 12.5% charged under respective headings at the time of buying the goods, but while clearing the said item as such, they classified the same goods under CH 8607 and paid duty @ 5 to 6%, leading to an excess buildup of CENVAT Credit. This is not a response expected of a reasonable and prudent person. While they did agree to reverse the excess credit taken, it was only after they were confronted by this contradictions of their actions during the investigation and they were not able to explain their actions rationally.

16. Can a person be said to be acting honestly or in a bona fide manner where he had reason to be suspicious that there is something wrong and does not make further enquiries? Bona fide is a Latin term signifying good faith. Honesty is the core of Good Faith. Its connotation is pure purpose free of taint or deception or dishonest design. Section

52 of the Indian Penal Code defines "good faith" as, "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." Perhaps the appellants action would fail this test. However, the question is whether the lack of bona fide alone would permit for the issue of SCN invoking the extended time limit. While negligence may indicate a lack of bona fide, it does not necessarily mean mala fides. Something more than negligence is necessary.

17. It is revenue's case that Central Excise duty is levied as per the provisions of the Central Excise Act, 1994 and the Rules made thereunder wherein a system of self-assessment and self-disclosure through periodical returns is prescribed. It is the legal responsibility of the appellant to discharge the duty liability as per the provisions of the Act, and also declare the same through the prescribed periodical returns. The appellant has willfully misstated the classification of goods in ER-1 returns filed with the Department and they have also suppressed vital information of nature of goods from Department with an intent to evade duty. In the instant case, it was only after specific intelligence gathered and subsequent investigations carried out by the DGGI Hosur Regional Unit that the fact of short payment of Central Excise duty and contraventions of the provisions of the Act and Rules came to light, thereby enabling invocation of extended period under Section 11A (4) (e) of the Central Excise Act, 1944. Further, they are liable to pay interest, at applicable rates, as prescribed under Section 11AA and penalty under Section 11AC Ibid.

18. Prima facie, we find that the allegations in the SCN do not disclose any willful attempt to evade payment of duty. The appellant had

reclassified the goods under Tariff Heading 8607 during 2014 when the duty rate was @12.5% and well before the concessional rate of duty was introduced in 2016. We have examined the issue of the appellant procuring 'kitting's' and 'platform doors' by paying duty of 12.5%, availed cenvat credit of the duty paid but while clearing the same under chapter heading 8607 and paying lesser duty. While we found that the action may indicate a lack of bona fide, it does not necessarily mean mala fide. Moreover, the complexity in the classification of the goods is seen from the fact that even revenue resiled from the classification of pantographs and its parts as proposed in the SCN and later sought to change it through a corrigendum / amendment to the SCN. In **Pushpam Pharmaceuticals Company Vs Collector of Central Excise Mumbai** [1995 (78) E.L.T. 401 (S.C.)], the Hon'ble Supreme Court examined Section 11A of the Central Excise Act, 1944 and held as follows:

“ 4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.”

(emphasis added)

19. We find that a Coordinate Bench of this Tribunal has discussed this matter in detail in the case of **M/s GD Goenka Private Limited**

VS The Commissioner of Central Goods and Services Tax, Delhi

South [FINAL ORDER NO. 51088 /2023, Dated: 21.08.2023] while examining Section 73 of the Finance Act which was worded similar to Section 11A of the Central Excise Act, 1944. Relevant portion is extracted below;

“16. Another ground for invoking extended period of limitation given in the impugned order is that the appellant was operating under self-assessment and hence had an obligation to assess service tax correctly and take only eligible CENVAT credit and if it does not do so, it amounts to suppression of facts with an intent to evade and violation of Act or Rules with an intent to evade. We do not find any force in this argument because every assessee operates under self-assessment and is required to self-assess and pay service tax and file returns. If some tax escapes assessment, section 73 provides for a SCN to be issued within the normal period of limitation. This provision will be rendered otiose if alleged incorrect self-assessment itself is held to establish wilful suppression with an intent to evade. To invoke extended period of limitation, one of the five necessary elements must be established and their existence cannot be presumed simply because the assessee is operating under self-assessment.

17. The argument that the appellant had not disclosed in its returns that it was availing and using ineligible CENVAT credit also deserves to be rejected. The appellant cannot be faulted for not disclosing anything which it is not required to disclose. Form ST-3 in which the appellant is required to file the returns does not require details of the invoices or inputs or input services on which it availed CENVAT credit and the appellant is not required to and hence did not provide the details of the CENVAT Credit taken. It also needs to be pointed out that the Returns are filed online and therefore, it is also not possible to provide any details which are not part of the returns. If the format of ST-3 Returns is deficient in design and does not seek the details which the assessing officers may require to scrutinise them, the appellant cannot be faulted because as an assessee, the appellant neither makes the Rules nor designs the format of the Returns. So long as the assessee files the returns in the formats honestly as per its self assessment, its obligation is discharged.

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21. This legal position that the primary responsibility for ensuring that correct amount of service tax is paid rests on the officer even in a regime of self-assessment was clarified by the Central Board of Excise and Customs [CBEC] in its **Manual for Scrutiny of Service Tax Returns** the relevant portion of which is as follows:

1.2.1A The importance of scrutiny of returns was also highlighted by Dr. Kelkar in his Report on Indirect Taxation [Report of the Task Force on Indirect Taxation 2002, Central Board of Excise and Service Tax, Government of India.]. The observation made in the context of Central Excise but also found to be relevant to Service Tax is reproduced below:

It is the view that assessment should be the primary function of the Central Excise Officers. Self- assessment on the part of the taxpayer is only a facility and cannot and must not be treated as a dilution of the statutory responsibility of the Central Excise Officers in ensuring correctness of duty payment. No doubt, audit and anti-evasion have their roles to play, but assessment or confirmation of assessment should remain the primary responsibility of the Central Excise Officers.”

(emphasis added)

As per the discussions above it is not merely a blame worthy act that would trigger the evocation of the extended period of limitation, something more is required. The act should have been done with the intention to evade payment of duty. We find that a positive finding of intended duty evasion has not been arrived at in the impugned order. Hence the demand of duty for the extended period must fail.

20. On the payment of interest, the appellant has stated that when duty demand is in itself not sustainable, there can be no question of payment of any interest by the appellant under Section 11AA of the Central Excise Act. We have found that the appellant is liable to pay duty for the normal period. Further whenever the payment of interest is mandated by statute, it automatically comes into play, when the happening or non-happening of an event mentioned in the relevant section of the statute occurs. The liability gets extinguished only when the statutory payments are made as required by the statute. A similar issue relating to payment of interest under the Central Excise Act was examined by the Hon'ble Supreme Court in **Commissioner of Central Excise, Pune Vs M/s SKF India Ltd** [2009-TIOL-82-SC-CX] wherein it was held that interest was payable even in a case of short payment of duty which was indeed completely unintended and without any element of deceit etc. We thus find that the appellant is lawfully bound

to pay interest on the duty demanded, and that interest is leviable on delayed or deferred payment of duty for whatever reasons.

21. As regards penalty, we find that revenue has not made out a case of a blame worthy act with intention to evade payment of duty, hence the question of penalty does not arise and the same is set aside.

22. In the light of the discussions above we partly modify the impugned order as follows;

- A) The classification of pantographs and its parts as revised and declared by the appellant under CTH 86079990 is not disturbed.
- B) Demand for duty may be revised by revenue for the normal period and paid by the appellant accordingly.
- C) Interest is to be paid by the appellant on the duty as reworked out and demanded.
- D) Penalty imposed by the impugned order is set aside.

Appellant is eligible for consequential relief, if any, as per law. The appeal is disposed of accordingly.

(Order pronounced in open court on 22.08.2024)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)