

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

Customs Appeal No.40029 of 2024

(Arising out of Order-in-Original No. 103200/2023 dated 29.9.2023 passed by the
Commissioner of Customs (Import), Chennai)

Hyundai Motors India Ltd.
Irungattukottai
Sriperumbudur, Chennai – 602 105.

Appellant

Vs.

Commissioner of Customs
Chennai II Commissionerate
Custom House, No. 60, Rajaji Salai
Chennai – 600001.

Respondent

With
Customs Miscellaneous Application No. 40495/2024
in
Customs Appeal No. 40143/2024

(Arising out of Order-in-Original No. 103953/2023 dated 11.12.2023 passed by the
Commissioner of Customs (Import), Chennai)

Hyundai Motors India Ltd.
Irungattukottai
Sriperumbudur, Chennai – 602 105.

Appellant

Vs.

Commissioner of Customs
Chennai II Commissionerate
Custom House, No. 60, Rajaji Salai
Chennai – 600001.

Respondent

And

Customs Appeal No. 40337/2024

(Arising out of Order-in-Original No. 103200/2023 dated 29.9.2023 passed by the
Commissioner of Customs (Import), Chennai)

Commissioner of Customs
Chennai II Commissionerate
Custom House, No. 60, Rajaji Salai
Chennai – 600001.

Appellant

Vs.

Hyundai Motors India Ltd.
Irungattukottai
Sriperumbudur, Chennai – 602 105.

Respondent

APPEARANCE:

Shri M. Manickam, Advocate for HMIL
Shri P. Narasimha Rao, Commissioner (AR) for Revenue

CORAM

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

Final Order Nos.41308 to 41310/2024

Date of Hearing : 30.07.2024
Date of Decision: 21.10.2024

Per M. Ajit Kumar,

Appeal Nos. C/40029/2024 and C/40143/2014 are filed by Hyundai India Ltd. and Appeal No. C/40337/2024 is filed by the department against the impugned orders.

2. M/s. Hyundai Motor India Limited, Kanchipuram (hereinafter also referred to as "**HMIL**"), are engaged in the manufacture of passenger motor cars, under the brand name of "Hyundai". They import various parts and accessories of passenger motor cars through Chennai ports.

2.1 Intelligence developed by the Directorate of Revenue Intelligence (**DRI**), allegedly indicated that HMIL was resorting to misclassification of various goods imported for manufacture of automobiles, in order to avail undue benefit of BCD exemption vide Notification No. 152/2009-Customs dated 31/12/2009 as amended. They visited HMIL's premises and made enquiries. Thereafter, HMIL vide their letter dated 10/02/2020 informed DRI that they have reviewed the classification adopted in respect of certain Bills of Entry (**BE**), details of which were also given, and had found that the classification assigned by them was not consistent in some of the cases with the nature of the products and as the Country of Origin (**COO**) Certificates with the inconsistent codes

had already been filed, they intend approaching the suppliers to revise the HS codes and issue the COO for the respective Bills of Entry retroactively as provided under the India-Korea CEPA. Further, the importer also informed the voluntary payment of differential duty and interest, in respect of some products and attached a copy of TR-6 challan paid at Chennai Customs.

2.2 Two Show Cause Notices (**SCN**) were issued to HMIL. SCN No. 56/2023 dated 14/06/2023 mainly for ECU's, for a differential duty of Rs 59.93 Crores was confirmed by Order-in-Original (**OIO**) **No. 103953 / 2023** dated 04/12/2023. A second SCN No. Gr.5/05/2022 dated 06/10/2022, was issued for a differential duty of Rs 38.62 Crores, which pertained to 15 items imported and cleared through 195 No.'s of finally assessed Bills of Entry and was confirmed by **OIO No.103200/2023** dated 29/09/2023. Aggrieved by these orders the rival parties are before us on different grounds.

3. Shri M. Manickam, Ld. Counsel appeared for HMIL. and Shri P. Narasimha Rao, Ld. Commissioner (AR) appeared for the respondent-department. The averments made are discussed along with the specific issues raised by the parties.

4. We have heard the rival parties and have carefully gone through the appeals filed by both the parties.

4.1 We find that **OIO 103200/2023** dated 04/10/2023, covers 24 items. However, the demand of Rs 38,62,17,880/- relates to 15 items only, pertaining to 195 finally assessed BE's, of which HMIL had accepted 11 items as classified by the department, before the AA. For 4 items i.e. (a) Camshaft Assembly (b) Oil Control Valve Assembly (c)

PIO AVN Audio and (d) Computer Bracket Assembly/ ECU, covered by 115 finally assessed BE's, they have not accepted the findings in the impugned order, for the following reasons;

(a) Camshaft Assembly. The dispute is between CTH 84831091 (HMIL) and CTH 84831099 (revenue). They have accepted the classification as per the impugned order but hold that the goods are eligible for exemption since the COO Certificate is at 6 digit level and covers the imported goods.

(b) Oil Control Valve Assembly. They have contested the classification of the goods adopted in the OIO.

(c) PIO AVN Audio. They have accepted the classification of the goods as done in the OIO but have claimed eligibility for exemption for the said CTH under another Sl. No. of the exemption notification.

(d) Computer Bracket Assembly/ ECU. They have contested the classification of the goods adopted in the OIO.

The remaining 9 items pertain to provisionally assessed BE's. Though the goods have been classified no demand has been raised on the same as these items are still provisional, HMIL has hence not replied to the classification of these goods.

4.2 OIO **103953/2023** dated 11/12/2023, covers 13 items. However, the demand of Rs 59,93,89,450/- relates to 5 items only covered by 118 BE's which were finally assessed, of which HMIL does not accept the classification of any item as classified by the department. 4 of these 5, are ECU's with different part numbers and 1 is a ECU Coding System. No separate examination and discussion has been made for the ECU Coding System. HMIL paid the duty amount of

Rs.59,56,35,048/- for the period from 04/03/2020 to 11/03/2022 during the investigation vide TR6 challan dated 05/04/2022. The remaining 8 items pertain to provisionally assessed BE's. Though the goods have been classified no demand has been raised on the same as these items are still provisional, HMIL has hence not replied to the classification of these goods.

5. We now take up the issues under dispute jointly for discussion and resolution. The main issues involved are whether,

A) the classification of the goods pertaining to provisionally assessed BE's has been done without the authority of law.

B) it is legal and proper on the part of the AA in not confiscating and imposing a redemption fine in respect of the impugned goods provisionally assessed and cleared under a bond and in not imposing a penalty on the assessee.

C) the impugned goods are eligible for benefit of concessional rate of BCD, based on the COO Certificate as per a Bilateral Free-Trade Agreements (FTA), even after re-classification and hence no demand of duty is sustainable.

D) the redetermination of classification of Oil Control Valve (OCV) Assembly is legal and proper.

E) the re-determination of classification of the other 13 imported items i.e. Vacuum Assembly; Water Pump Assembly; Cap Sealing; Case Assembly Timing Chain; Nut Flange; Nut Washer; Oil Seal; V-Ribbed Belt; Junction Box; Piston and Piston Assembly; Connecting Rod Assembly; Camshaft Assembly; PIO AVN Audio is legal and proper.

F) the imported PIO AVN Audio is appropriately classifiable under CTH 8526 9190 and is eligible for the benefit of concessional rate of BCD @ Nil in terms of Serial No.1389 (I) of Notification No. 46/2011 Customs dated 01.06.2011, instead of claimed Serial No.1390 (I).

G) the re-determination of classification of the imported Computer & Bracket Assembly / Electronic Control Unit (ECU) is legal and proper.

H) the "relevant date" as defined under Section 28 of CA 1962, is the date of clearance of the imported ECU, whereby part of the demand is outside the ambit of two years normal period pertaining to goods covered by Order-in-Original dated 11/12/2023 and is unsustainable.

I) there is no suppression of facts or wilful misstatement of facts hence demand and confirmation of duty liability beyond the normal period of 2 years from the date of import as per Order-in-Original dated 04/10/2023 is unsustainable and no fine on the goods or penalty on the individual can be imposed.

6) **Whether the classification of the goods pertaining to provisionally assessed BE's has been done without the authority of law.**

6.1 HMIL has stated that the impugned orders have decided the classification of goods which were provisionally assessed. The Final Assessment in such cases has to be carried out in terms of Section 18(1A) of the **CA 1962** read along with **Customs (Finalisation of Provisional Assessment) Regulations, 2018**. The impugned order demands differential duty only on finally assessed BE's and the findings and conclusions with respect to the said BE's alone are relevant for the

purpose off appeal. Hence the confirmation of the classification of provisionally assessed goods in the impugned order is bad in law.

6.2 Per Contra revenue has stated that in the subject case some Bills of Entry were assessed provisionally pending SVB decision under section 18 of CA 1962. AA has only changed the wrong classification to proper classification considering the untruthful declarations made by HMIL, under section 46 of the CA 1962 while clearing the said goods under self-assessment procedure. Section 18 of the CA 1962 is without prejudice to the provisions of section 46 *ibid*. Hence no prejudice is caused to the importer in this regard and their plea be dismissed as untenable as assessment under section 2(2) of the CA 1962 includes re-assessment also. The AA has only appropriately classified the said goods without demanding any duty arising out of the changed classification against the provisionally assessed Bills of Entry and leaving the same to finalisation proceedings.

6.3 We find that classification of goods under the Customs Tariff is a part of assessment. Assessment of duty involves the determination of the dutiability of exim goods. It involves determining the import permissibility in terms of the EXIM policy and any other laws regulating imports/exports, determining the classification and duties leviable on the goods on import – (Basic, Additional, Anti-dumping, Safeguards etc.). Permissibility of various benefits of duty-free clearances under different schemes or applicability of any exemption notification benefits, checking the quantity and value of the goods (where the duties are assessable on value basis) etc. The determination of dutiability hence creates special rights and liability and should not be

finalised in a piece meal manner. Neither the Customs Act nor the Customs (Finalisation of Provisional Assessment) Regulations, 2018, support such a procedure. However, the action of piece meal finalizing the classification of provisionally assessed goods has led to the department filing an appeal on the non-confiscation of the goods and non-imposition of fine and penalty, which shall be examined separately. We feel that the finalisation of classification of provisionally assessed BE's without concluding the dutiability of the imported goods is not proper in law and merits to be set aside. The classification of the said goods can be done at the time of finalizing the provisional assessment, without being prejudiced by the findings in the impugned order.

7. Whether it is legal and proper on the part of the AA in not confiscating and imposing a redemption fine in respect of the impugned goods provisionally assessed and cleared under a bond and in not imposing a penalty on the assessee.

7.1 HMIL is of the opinion that goods which are assessed provisionally cannot be confiscated as their assessment has not been completed and their liability determined. Further the Provisional Assessment was resorted only on the grounds of determination of valuation by the department. According to them it is relevant to read Regulation 4 (1) of the **Customs (Finalisation of Provisional Assessment) Regulations, 2018**, in a harmonious manner with Section 18 (1) (c) of the **CA 1962** along with the **Customs (Provisional Duty Assessment) Regulations, 2011**. Regulation 4 (1) of the Customs (Finalisation of Provisional Assessment)

Regulations, 2018 reads that "where the provisional assessment is ordered by the Proper Officer of Customs for the reasons that...". They have emphasised the words "for the reasons that". Bond conditions executed are based on the reasons determined by the proper Officer. No other external matter can be brought to alter the Bond conditions. In the impugned issue, the Bond was executed only with respect to determination of value of the goods supplied by related parties and not for any other purposes, hence, re-determination of classification by the AA is not only contrary to the provisions of CA 1962, but also against the spirit of Article 265 of the Constitution of India.

7.2 Revenue has relied on **CESTAT Larger Bench**, decision in **Collector of Central Excise Vs P.M.T Machine Tools** 1991 (55) ELT 592 (Tribunal) and Hon'ble High Court of Madras in case of **Collector of Central Excise, Madras Vs India Tyre & Rubber Co Ltd [1997 (94) ELT 485 (Mad)]** wherein it is held that when provisional assessment is made it should be treated as provisional for all purposes and not necessarily provisional in respect of particular grounds only. Hence it was open to the AA to finalise the classification. Further being a prominent and established manufacturer of Automobiles they are well aware of the classification of the goods. It is observed that goods which are having specific Tariff Heading/ Item were deliberately misclassified by the importer under different tariff Heading/ Item with intention to evade applicable Customs duty. Although HMIL had cleared the goods they had executed a bond and HMIL had bound themselves to pay the deficiency, if any, between the duty as may be finally assessed and the duty provisionally assessed. In the case of **M/s.**

Weston Components Ltd. v. Commissioner of Customs, New Delhi [2000 (115) E.L.T. 278 (S.C.)], the Hon'ble Apex Court has taken the view that redemption fine can be imposed even in the absence of the goods as the goods were released to HMIL on an application made by them and on their executing a bond. Since the goods were released on a bond the position is as if the goods were available. Hence the goods should have been confiscated under section 111(m) of CA 1962, a redemption fine imposed under section 125 *ibid* along with a penalty under section 112(a) *ibid*.

7.3 We find that before goods can be confiscated, fine and penalty imposed, the procedures laid down in the Act must be complied with. The submission put forward by revenue does not address the core issue. An adjudication order should be the final decision in the dispute resolution process as formulated in the Act/Rules/Instructions which conclusively puts to rest all the rights and liabilities of the parties to the *lis*. The seminal purpose is to avoid piece-meal adjudication. When assessment has not been completed and the classification of the goods has itself been finalised prematurely and irregularly the question of confiscation or imposition of fine on the goods or penalty on persons would not arise.

7.4 In the circumstances of this case, there could be no question of confiscation, penalty or interest till after final assessment, otherwise there could be a situation whereby the goods are later alleged to have been undervalued or later being involved in some other blame worthy act and be subject to further rounds of similar piece-meal penal proceedings. This is untenable. Penal proceedings being invoked

separately / sequentially on the same goods and persons for albeit different reasons, first for classification then for valuation then for violation of EXIM policy etc, is unreasonable and arbitrary. All facts and issues that are so connected together to be part of a same transaction should be decided together. Splitting up of the transaction into separate disputes should not be resorted to as it is, likely to prejudice the assessee. In remarks that are also relevant to the departments appeal, it has been stated by the Hon'ble Supreme Court in the case of **Union Of India Vs Jesus Sales Corporation** [1996 (83) E.L.T. 486 (S.C.) / 2002-TIOL-259-SC-CUS / 1996 (4) SCC 69] as under;

“4. . . Whenever an unfettered discretion has been exercised courts have refused to countenance the same. That is why from time to time courts have ‘woven a network of restrictive principles’ which the statutory authorities have to follow while exercising the discretion vested in them. This principle has been extended even when the authorities have to exercise administrative discretions under certain situations. Another well settled principle which has emerged during the years that where a statute vests discretion in the authority to exercise a particular power, there is an implicit requirement that it shall be exercised in a reasonable and rational manner free from whims, vagaries and arbitrariness.”

7.5 We note that a Coordinate Bench of this Tribunal in the case of **Lan Esenda Ltd. Vs. Commissioner of Customs, Mumbai** [2005 (192) ELT 305 (Tri.- Mumbai)] held that the penalties imposed before finalisation of assessment cannot sustain. A similar view has also been taken by a Coordinate Bench of this Tribunal in **M/s. Shell India Markets Private Limited Vs Commissioner of Customs, Chennai** [2024 (3) TMI 1189 - CESTAT CHENNAI]. The judgment relied upon the case of **AS Syndicate (Warehousing) P. Ltd. Vs Commissioner of Customs (Port)** [2009 (12) TMI 609-CALCUTTA HIGH COURT] wherein the Hon'ble High Court had held that there could be no question of confiscation, penalty or interest till after final assessment.

Hence based on the legal issue as discussed and the precedential value of the above judgments the appeal of revenue in this regard must fail.

8. **Whether the impugned goods are eligible for benefit of concessional rate of BCD, based on the COO Certificate as per a Bilateral Free-Trade Agreements (FTA), even after re-classification and hence no demand of duty is sustainable.**

8.1 HMIL has stated that to avail the preferential tariff benefit based on the Country of Origin, three substantive conditions, such as, minimum regional value addition, substantial manufacturing process and change of nomenclature of the product and change of sub tariff heading of the resultant product other than that of the inputs, have to be met along with various procedural criteria such as, submission of original COO Certificate document issued by the Competent Authority, disclosure of fact in the said certificate, etc. In the impugned case, both substantive criteria and procedural criteria are met by them to the satisfaction the Proper Officer at the Country of Import with respect to the impugned goods and thus the benefit of concessional rate of BCD granted at the time of import was just, proper, legal and correct and cannot be denied.

8.2 Per contra revenue is of the view that once there is a discrepancy between the classification of the goods as in the COO certificate and that assessed, benefit under 46/2011-Cus and under 152/2009-Cus is correctly denied for the goods by rejecting the Country-of-Origin Certificate. They have referred to CESTAT, Principal Bench, New Delhi decision in case of **Holyland Marketing Pvt Ltd Vs Commissioner of Customs (Import), ICD, Tuglakabad** vide Final Order No 51574 /

2023 dated 30/11/2024 wherein a Coordinate Bench of this Tribunal held that imported goods namely "Canned Pineapple Slices" are correctly classifiable under CTH 0804 instead of declared CTH 08119010 and benefit of Notification under Notification no 46/2011-Cus dated 01/06/2011 [Import from ASEAN Countries] was denied because of wrong classification of the impugned goods.

8.3 We find that international treaties are entered into between Sovereign contracting States for providing "preferential tariff treatment" to goods imported by participating countries, from each other, in accordance with a trade agreement. There is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein a specific treaty obligation. This is because the Directive Principles of State Policy as enshrined in Article 51 of the Indian Constitution enjoin the State to endeavor, inter alia, to foster respect for international law and treaty obligations. This is also seen to be diligently followed in CBIC's **Instruction No. 19/2022-Customs**, dated 17/08/2022, wherein Customs officials were instructed to give Free Trade Agreements an overriding treatment over Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 (**CAROTAR** in short) wherever CAROTAR is inconsistent with FTA. Relevant portion is reproduced below.

"3.2 In continuation of the same, field formations are sensitized by drawing attention again to section 28DA [**Customs Act, 1962**]. It is emphasized that its sub-section (3) empowers the proper officer to ask the importer to furnish further information, consistent with the trade agreement, in case the proper officer has reasons to believe that the country-of-origin criteria have not been met. Similarly, its sub-section (4) enables the proper officer, where the importer fails to provide the requisite information for any reason, to cause further verification consistent with the trade agreement. Moreover, in the Rules [**CAROTAR**], the rule 8 (3) states - "In the event of a conflict

between a provision of these rules and a provision of the Rules of Origin, the provision of the Rules of Origin shall prevail to the extent of the conflict." (Sentence underlined to add emphasis. Highlighted words added for clarity)

"Preferential tariff treatment" has also been defined under CAROTAR to mean allowing preferential rate of duty to goods imported into India in accordance with a trade agreement.

8.4 The issue has also been examined by the Hon'ble Andhra High Court in **Mahadev Metaliks Pvt. Ltd. Vs Union of India**. [(2016) 331 ELT 424)], and it was held;

"28. . . . One should not lose sight of the fact that FTA settlement negotiated between two independent Nations and the adherence to respective countries solemn promises is of utmost importance to the bilateral trade between the two Nations."

Section 5(1) of the **Customs Tariff Act, 1975**, empowers the Central Government to issue a Notification so as to make Rules for determining if any article is a produce or manufacture of such foreign country. This benefit is extended through a Notification issued in accordance with the powers conferred by sub-section 1 of **Section 25** of the **CA 1962**, which provides a preferential rate for payment of BCD for the goods concerned. In accordance with the framework of the Notification, COO Certificate issued by the Competent Authority at the country of export, contains the classification of the goods as per the Harmonized System number of the importing Party.

8.5 The COO Certificate is to be submitted to the Proper Officer of the importing country and upon verification and satisfaction of the contents contained therein, the Proper Officer of Customs extends the benefit of preferential rate for payment of BCD. The Rules of Origin are comprehensive in nature which contains the complete operative

mechanism on various substantive and procedural aspects for determination of the origin criteria of the imported product.

8.6 HMIL submits that, for example, in the Impugned Order the validity, or the genuineness of the Certificate submitted by HMIL at the time of import of PIO AVN Audio is not quashed or denied. In the Impugned Order, the only observation is that at the time of import, in the Country-of-Origin Certificate, the CTH was mentioned as 852712/852721, whereas as per the Impugned Order the appropriate classification is 8526 9190 and the said CTH is not mentioned in the certificate, and because of this, the Impugned Order seeks to deny the benefit of exemption. They hold that the substantial conditions required to be satisfied to avail the benefit of Country of Origin has been complied with. Further they submit that Rule 13 of the **Customs Tariff (Determination of Origin of Goods) under the Preferential Trade Agreement between the Governments of Member States of the Association of South East ASEAN Nations (ASEAN) and the Republic of India, Rules, 2009** [Herein after referred to as '**Rules of 2009**'] deals with issuance of AIFTA Certificate of Origin. Para 7(c) of Annexure III to the said Rule states that in cases where an AIFTA Certificate of Origin is not accepted by the Customs Authority of the importing party, such AIFTA Certificate of Origin shall be marked accordingly in box 4 and the original AIFTA Certificate of Origin and shall be returned to the Issuing Authority within a reasonable period but not exceeding two months, duly notifying the grounds for the denial of preferential tariff treatment. No such action has been taken by the

Customs department in this case and hence the benefit cannot be denied.

8.7 We find that the Government of India signed an Agreement on Trade in Goods Under the Framework Agreement of the 'Comprehensive Economic Co-operation between the Republic of India and the Association of Southeast Nations (ASEAN)' in the year 2009. A lot of thought has gone into framing the policy for the benefit of trade and industry in the participating Countries. As per the said international agreement preferential tariff treatment was agreed to be accorded by India in respect of imports of specified goods, provided certain conditions are fulfilled. One such condition was that the goods imported under a Trade Agreement are required to be covered under a Certificate of Origin issued by the Designated Authority of the exporting country. When the Rules of 2009 are comprehensive in nature and contain the complete operative mechanism on various substantive and procedural aspects for facilitating preferential tariff treatment for goods covered by AIFTA, the said Rules would have to be diligently followed before any concession is sought to be denied to goods, coming within the ambit of the Agreement. Otherwise, the whole procedure set out in the 2009 Rules would be rendered redundant and it would upset the certainty of duty that had been notified by the agreement, for the benefit of trade and industry.

8.8 When an importer produces a COO Certificate which covers the imported goods, it has to be considered as substantive and conclusive evidence of being goods as declared and duty concession as eligible should be allowed, in the normal course, as the concession originates

from an international treaty entered between the contracting States of which India is a signatory. In case the concession is felt to be not eligible then the department has to take recourse to the provision of the Rules of 2009 and follow the procedure set out there in. When the Customs Department of the importing Country does not take any action as provided for in Paras 7, 16 and 17 of Annexure III to the Rules of 2009 it cannot then question the concession from payment of duty as eligible as per the COO Certificate. As per Para 7, in case the AIFTA Certificate of Origin is not accepted by the Customs Authority of the importing party it shall be returned to the Issuing Authority within a reasonable period but not exceeding two months, duly notifying the grounds for the denial of preferential tariff treatment. As per para 16 the importing party may request a retroactive check at random and/or when it has reasonable doubt as to the authenticity of the document or as to the accuracy of the information regarding the true origin of the goods in question or of certain parts thereof. In case of reasonable doubt as to the authenticity or accuracy of the document, the Customs Authority of the importing party may suspend provision of preferential tariff treatment while awaiting the result of verification. As per Para 17 if the importing party is not satisfied with the outcome of the retroactive check, it may, under exceptional circumstances, request verification visits to the exporting party.

8.9 In the present case Revenue has not demonstrated that they have taken any steps as required by paras 7, 16 and 17 of Annexure III *ibid* and have thereby wrongfully sought to deny the exemption. In its

judgment in **Noble Import Pvt Ltd. Vs Union of India** [2017 (349)

E.L.T. 44 (A.P.)], the Hon'ble Andhra High Court held as under;

“19. It is only after a retroactive check is conducted, and the concerned authorities are satisfied that the Certificate of Origin cannot be accepted, are they entitled, thereafter, to pass an adjudication order under the Customs Act. Without conducting a retroactive check, in terms of Clause 16(a) of Annexure-III to the 2009 Rules, it was not open to the 3rd respondent to pass an adjudicating order. The impugned orders dated 30-10-2015, passed even before conducting a retroactive check in terms of Clause 16(a), are without jurisdiction.”

8.10 We find that Rule 5 of the **CAROTAR** allows, the Principal Commissioner of Customs or the Commissioner of Customs, to disallow the claim of preferential rate of duty without further verification, for the reasons to be recorded in writing, where the importer relinquishes the claim or the information and documents furnished by the importer and available on record provide sufficient evidence to prove that goods do not meet the origin criteria prescribed in the respective Rules of Origin. However, the present issue does not involve a dispute on the origin criteria, but only on the classification of the goods and is hence not applicable.

8.11 Thus, while the Customs department can after following the due process change the classification of the imported goods as per the domestic laws, it cannot deny “preferential rate of duty” (which has been defined under CAROTAR to mean rate at which customs duty is charged in accordance with a trade agreement), to the goods covered by a valid COO Certificate issued as per an international treaty obligation, that satisfies the conditions of a notification issued under Section 25 of the CA 1962, unless the classification had been challenged successfully as provided for in the Rules of 2009. Hence the action taken by the AA in

denying concessional rate of duty for the goods by rejecting the Country-of-Origin Certificate is untenable and merits to be set aside.

8.12 The decision of the Tribunal in **Holyland Marketing** (supra) is distinguished in as much as the case involved suppressing the non-frozen character of the impugned goods, in order to avail the benefit of the Notification. Fraud vitiates all transactions and the decision in that case has been arrived at accordingly, hence it is distinguished.

9. **Whether the redetermination of classification of Oil Control Valve (OCV) Assembly is legal and proper.**

9.1 HMIL submits that the Oil Control Valve (OCV) is a critical component used in engine that is fitted with "Variable Valve Technology (VVT)". It has its own casing and is placed outside the engine. OCV regulate the supply of engine oil to a designated VVT hub, to advance or retard the timing by altering the Cam shaft angle position and is specifically covered under the category of valves under CTH 8481. The OCV increases the efficiency and performance of internal combustion engines. However, the efficient working of the VVT solenoid is very important for the efficient working of the engine. Although OCV is a valve it is not an inlet valve or exhaust valve to the engine and has specific functions which helps achieve fuel efficiency, reduce exhaust gases and enhance engine performance. Only inlet or exhaust valve to engine is classifiable as parts of engine and all other valves are classifiable under CTH 8481.8090. As per the HSN Explanatory Notes, taps, cocks, valves etc., remain under CTH 8481, even if supplied for use on a particular machine or apparatus or on a vehicle or aircraft. HSN also further states that CTH 8481 covers taps,

cocks, valves and similar appliances to regulate the flow of fluids, liquids, viscous or gaseous. No Country-of-Origin benefit of exemption from payment of BCD was availed and duty under merit @ 7.5% was paid at the time of import for the imported OCV Assembly even though the OCV Assembly were imported from Korea. Therefore, it is submitted that the redetermination of classification of the imported Oil Control Valve Assembly under CTH 84099111 instead of declared CTH 8481, may be quashed and set aside and the classification sought and adopted at the time of import may be held as proper and correct.

9.2 Revenue states that the said goods are specifically made to be used as a part of engine to improve its efficiency. As such, the said goods are not classifiable under CTH 8481 as the said heading is for valve used in pipes, boilers etc. The classification under CTH 8708 is also not correct as the said heading is for other parts and accessories of Motor vehicles. As the goods are specifically used with parts of engines, it is pertinent to refer to CTH 8409 which is for parts suitable for use solely or principally with the engines of heading 8407 or 8408. Under CTH 8409, there are specific tariff entries for valve, inlet and exhaust. From the working / functions of the said goods, the correct classification for the said goods is CTH 84099111 / 840999911 depending upon the type of engine.

9.3 We find that the legal position involved in such a situation has been stated by the Hon'ble Supreme Court in the case of ***O.K.Play (India) Ltd. v. CCE, Delhi [2005 (180) ELT 300 (SC)]*** wherein it was held that apart from the HSN Explanatory Notes, and the Rules of Interpretation, functional utility, design, shape and predominant usage

have also got to be taken into account while determining classification of an item – these are more important than names used in trade or common parlance. Relevant portion is cited below;

“6. Before dealing with the issue of classification, certain points are required to be clarified.

7. In the case of *A. Nagaraju Brothers v. State of Andhra Pradesh* reported in [1994 (72) E.L.T. 801], it has been held by this Court that no one single universal test can be applied for correct classification. There cannot be a static parameter for correct classification.

8. Further, the scheme of the Central Excise Tariff is based on Harmonized System of Nomenclature (for short “HSN”) and the explanatory notes thereto. Therefore, HSN along with the explanatory notes provide a safe guide for interpretation of an Entry.

9. Further, equal importance is required to be given to the Rules of Interpretation of the Excise Tariff. Under Rule 3(a), it is provided that the heading which provides a specific description shall be preferred to a heading having a more general description. For example, in the case of “toys” referred to in the HSN Heading and the Tariff Heading, the description refers to reduced size model of an Article used by adults. This test helps us to understand the difference between “toys” and “furniture”.

10. Lastly, it is important to bear in mind that functional utility, design, shape and predominant usage have also got to be taken into account while determining the classification of an item.

11. The afore stated aids and assistance are more important than the names used in the trade or common parlance in the matter of correct classification.” (emphasis added)

Therefore, HSN along with the explanatory notes provide a safe guide for interpretation of an Entry. As per the HSN Explanatory Notes, taps, cocks, valves, etc., remain under heading 84.81 even if specialized for use on a particular machine or apparatus, or on a vehicle or aircraft. Hence the cryptic conclusion in the impugned order that ‘CTH 8481 as the heading suggests is for valve used in pipes, boilers etc’ is not correct. However, the HSN explanatory notes state that certain

machinery parts which incorporate a complete valve, or which regulate the flow of a fluid inside a machine although not forming a complete valve in themselves, are classified as parts of the relative machines, for example, inlet or exhaust valves for internal combustion engines (heading 84.09), slide valves for steam engines (heading 84.12), suction or pressure valves for air or other gas compressors (heading 84.14), pulsators for milking machines (heading 84.34) and non-automatic greasing nipples (heading 84.87). 11.4 OCV is a device which as described by HMIL, as having its own casing. It is placed outside the engine and works according to the oil pressure to regulate the flow of engine oil and thus alter the rotation of the camshaft. It is not a simple inlet valve or exhaust valve to the engine. As stated in the impugned order, controlled by the ECU, the OCV receives electrical signals, instructing it to adjust the oil flow as required, in accordance with current driving conditions. As per the Explanatory Notes Heading 84.81 includes devices designed to regulate the pressure or the flow velocity of a liquid or a gas. Valves remain in this heading even if specialized for use on a particular machine or apparatus, or on a vehicle or aircraft. This being so the department has not been able to discharge their burden of proof on the merits of classification the impugned goods under CTH 8409.9111 / 8409.99911 (depending upon the type of engine) and thus HMIL's classification of the goods cannot be disturbed.

10. Whether the re-determination of classification of the other 13 imported items i.e. Vacuum Assembly; Water Pump Assembly; Cap Sealing; Case Assembly Timing Chain; Nut Flange; Nut Washer; Oil Seal; V-Ribbed Belt; Junction Box;

**Piston and Piston Assembly; Connecting Rod Assembly;
Camshaft Assembly; PIO AVN Audio is legal and proper.**

10.1 HMIL has stated that they do not accept the classification of the goods mentioned above as done in the impugned order. No detailed arguments are seen made in furtherance of their stand.

10.2 Revenue has stated that the importer vide reply letter dated 27/06/2023 and 12/07/2023 inter alia accepted classification changes as proposed by the department of all the 13 items listed above. In the case of Camshaft Assembly and PIO AVN Audio, HMIL has accepted the classification and only challenged the issue pertaining to the eligibility of the goods to duty exemption. They cannot now resile from their consent given and the appeal for change in classification of the said goods may be rejected.

10.3 We find that HMIL has after admitting to the classification of the above 13 goods vide their letter dated 27/06/2023 and 12/07/2023 before the Original Authority, as pointed out by revenue above, made a feeble attempt to reverse their earlier acquiescence, now before us. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. When allegations of facts are admitted before the Original Authority, there was no need for him to prove what was admitted and orders have come to be passed. The Tribunal has an inherent power to prevent the right of appeal being abused by an appellant who keeps back till the stage of appeal, points of law or fact which he could have raised before the lower authority, without showing any reason and thus places the other side at a disadvantage. Persons with good causes of

action should pursue the remedy with reasonable diligence at every available opportunity. When a person even by tacit or passive acceptance or by implied consent to an act, when he has a duty to speak or oppose / deny a fact or law, does not do so, with full knowledge of its consequences, then he cannot exercise that right at a later stage. The doctrine of non-traversal, as per Order VIII Rule 5 of the Code of Civil Procedure (CPC), in the case of civil litigation asserts that any factual averment in a plaint, if not specifically denied by the defendant, is deemed admitted. The legal issue that non-traverse would constitute an implied admission has been examined with approval by the Hon'ble Apex Court in **Tek Bahadur Bhujil vs Debi Singh Bhujil And Ors.** (AIR 1966 SC 292 / AIR 1966 SUPREME COURT 292) and **Lohia Properties Pvt. Ltd., Tinsukia Vs Atmaram Kumar,** (1993 (3) SCALE 453 / (1993) 4 SCC 6 / AIRONLINE 1993 SC 562). In this case HMIL has in fact given consent in writing to the classification of the above goods as suggested by revenue in the SCN and cannot go back at this stage. Hence except for Oil Control Valve Assembly and Computer & Bracket Assembly (ECU), which has been contested elaborately by HMIL and is dealt with separately, in the case of the goods mentioned above the classification remains as determined in the impugned order and the appeal in this regard is rejected.

11. Whether the imported PIO AVN Audio is appropriately classifiable under CTH 8526 9190 and is eligible for the benefit of concessional rate of BCD @ Nil in terms of Serial No.1389 (I) of Notification No. 46/2011 Customs dated 01.06.2011, instead of claimed Serial No.1390 (I).

11.1 HMIL has stated that the item PIO AVN Audio were imported from Vietnam and they availed the BCD exemption benefit @ Nil in terms of Customs Notification No. 46/2011, whereas, in the SCN, it was alleged that the goods were imported from Republic of Korea and alleged that they had wrongly availed the BCD exemption benefit @ Nil in terms of Customs Notification No. 152/2009 and thus the allegations are contrary to the facts available on record and hence, there is no application of mind, and the Original Authority has exceeded the scope and ambit of the SCN by confirming the duty liability by denying the BCD exemption benefit @ Nil in terms of Customs Notification No. 46/2011, which was not a part of allegations proposed in the SCN. Further it was stated that in their reply to the SCN they had categorically submitted to the Original Authority about their acceptance of the proposed reclassification of the imported PIO AVN Audio under CTH 8526 9190. The said tariff entry also finds a place at Serial No.1389 (I) of the same Customs Notification No. 46/2011 for the benefit of Preferential Basic Customs Duty (BCD) @ Nil and hence the impugned order denying them duty concession is not legal and proper and merits to be set aside.

11.2 Revenue, per contra opines that mere non mention of Notification no 46/2011-Cus in the SCN will not vitiate the demand as the Bills of Entry under Notification no 46/2011-Cus have also been considered for arriving at duty differential and the SCN issuing Authority being the same as AA has correctly denied the benefit of Notification no 46/2011-Cus in his findings at para No. 18,19,21.22,22,23 & 25 refers to the said notification and denies the benefit at para 36 in the O-I-O. The

entire exercise of change of classification and differential duty computation in respect of finally assessed BE's has been done meticulously in the SCN with denial of benefit of Notification No 152/2009 and 46/2011-Cus, the AA has only brought out the implied fact of duty difference arising out of denial of benefit of Notification 46/2011-Cus to the fore by making it explicit at para 36 (b) of O-I-O and confirming the differential duty demand as per SCN. Hence there is no irregularity on the part of Adjudication Order dated 04/10/2023.

11.3 We have examined the matter and agree with revenue that mere non mention of Notification no 46/2011-Cus in Show-Cause Notice will not vitiate the demand, if otherwise correctly imposed. We are fortified in our views by the principle laid down by the Hon'ble Supreme Court in the case of **JK Steel Vs Union of India** [1978 (2) E.L.T. (J355)], and also in the case of **Sanjana Vs Elphinestone Spinning & Weaving Mills** [1978 (2) E.L.T. (J399)], that the mere mentioning of a wrong provision of law would not vitiate the SCN.

11.4 As regards HMIL's plea that PIO AVN Audio are appropriately classifiable under CTH 8526 9190 and are eligible for the benefit of concessional rate of BCD @ Nil in terms of Serial No.1389 (I) of Notification No. 46/2011 Customs dated 01/06/2011, instead of claimed Serial No.1390 (I). We have already stated that once the COO Certificate covers the imported goods which satisfies the requirement of the exemption notification and is not challenged and modified as per the procedure established by the Rules of 2009, the benefit of concessional duty cannot be denied. Further, there is nothing brought out in the SCN to show that the certificate was fraudulently obtained

so as to taint its acceptability. The said goods are hence eligible for BCD concession @ Nil rate as initially claimed at the time of import, i.e. prior to their re-classification.

12. Whether the re-determination of classification of the imported Computer & Bracket Assembly / Electronic Control Unit (ECU) is legal and proper.

12.1 HMIL submits that the impugned order No 103953/2023 dated 11/12/2023, covers 8 different types of ECU's. 7 of these BE's were assessed provisionally when imported and are yet to be finalised and the matter is pre-mature. Hence their reply is restricted to the finally assessed Electronic Control Unit (ECU), mentioned in the bills of entry as Computer Bracket Assembly as described in the consigners invoice. We find that 4 of the ECU's dealt with in order No 103953/2023 have different part numbers and 1 is an ECU Coding System. However, all of them have been examined collectively. Similarly, OIO 103200/2023 dated 04/10/2023, also covers Computer Bracket Assembly / ECU among other goods. We examine the issue accordingly.

12.2 As per HMIL the impugned Computer & Bracket Assembly / ECU is a device that controls all the electronic features in a car. This may range from fuel injection to maintaining perfect cabin temperature to controlling braking and suspension. ECU is a hardware embedded with software. It operates much like the BIOS does in a computer and controls all the electronic features in a car. While the basic working principle of engine operation is still based on combustion, the process is now controlled by the ECU. The ECU acts as a receiver of inputs and compares these inputs with the programmed optimum levels and

accordingly sends the output signal to control/ regulate the respective parameters of the parts. The imported ECU is hence a Programmable Process Controller.

12.3 Basically, various chips and microprocessors are integrated like in a Central Processing Unit (CPU) of a computer along with operative software, having definite program and interactive mechanism. The CPU of the impugned ECU works in conjunction with the various sensors attached and located in different parts of the car, for carrying out the defined specific function of (1) Engine Control Mechanism, (2) Transmission Control Mechanism (3) Body Control Mechanism (BCM) (4) Signal Control mechanism (SCM) and (5) Fuel Control Mechanism (FCM) Safety Air Bag Control Mechanism etc. It is hence a device pre-programmed along with software and interacts with various sensors to enable stability, safety, speed, optimal performance, fuel efficiency, regulating and minimizing the harmful gas emissions, providing notifications and signals in the Audio Video Navigation Telematic (AVNT) of the vehicle. HMIL submits that the Ministry of Road Transport & Highways, Government of India, in accordance with the Central Motor Vehicles Rules, has prescribed Automotive Industry Standards (AIS). Clause 3.5.4 defines Engine Control Unit and it means the on-board computer that controls the engine or engines of the vehicle. On account of the definition given by the Automobile Research Association of India (ARAI), the ECU is declared in the Bills of Entry as Computer Bracket Assembly or Electronic Control Unit. Further for all the cars manufactured in the factory, the Type Approval Certificate has to be issued by the Automobile Research Association of India (ARAI)

which refers to the Marks and Numbers of the Electronic Control Unit. As such, the ECU is a functional apparatus having a definite independent function and standardization by the International Standardization Organization (ISO).

12.4 The Ld Counsel further stated that;

A) The classification of Computer Bracket Assembly/ ECU was dealt with by two SCN's and connected OIO's. As per SCN dated 06/10/2022, Computer Bracket Assembly/ ECU was sought to be classified under the CTH 8537, however the impugned order has travelled beyond the SCN and classified the goods under a completely new CTH i.e. 8708. This is highly irregular and since the change in classification was made vide OIO No 103200/2023 dated 04/10/2023 which was outside the SCN the said order merits to be set aside on this ground itself.

B) The Central Board of Excise and Customs (**CBEC**) vide Central **Excise Order No. 49/3/97-CX dated 09.05.1997**, issued in terms of Section 37B of Central Excise Act, 1944, in consultation with the Department of Electronics, had inter alia clarified that there are 2 types of Programmable controllers, and these are, Programmable Logic Controller (PLC) and Programmable Process Controller (PPC). While the former is classifiable under heading 85.37 the latter is classifiable under heading 90.32. Departmental officers are bound by Boards instructions.

C) The expert opinion dated 05/08/2022 rendered by IIT Madras, confirmed that the imported ECU sample is a specific purpose Algorithm based Electronic Controller and neither a Programmable Logic Controller nor a Programmable Process Controller nor a

Proportional Integral Derivate Controller (PID). Hence it is evident that the impugned goods are a category of automatic Controllers and have a specific function.

D) Both the CBEC order and the expert opinion given by IIT agree that the impugned goods are Controllers. The ECU which are Programmable Process Controllers are classifiable under Chapter 90 and are specifically excluded from Section XVII in terms of Section Note 2 (g) to the said Section of the Customs Tariff. Explanatory Notes to CTH 9032 only excludes Programmable logic Controllers of CTH 8537 however the impugned order itself has ruled out that the classification of the imported ECU under CTH 8537. Hence the impugned ECU which is a Programmable Process Controllers is correctly classifiable under CTH 9032.

E) As per Para 'O' under HSN Explanatory Notes to CTH 8708, Safety Airbags with inflater system are specifically covered under CTH 8708 9500, but the Air bag Control Unit being an Electronic Controller (used for inflating the Airbags) is excluded from CTH 8708 9500 as per the above exclusion clause. Hence the confirmed classification of imported ECU under CTH 8708 based on sole and principal use with Vehicles of 8702 to 8704 is not correct and hence not substantiable.

F) As per part II to Explanatory notes to CTH 9032, Electronic Automatic Controller controls non-Electric quantities such as revolutions per minute, torque, traction force, level, pressure, flow or temperature. Automatic regulators of heading 90.32, consist essentially of the following devices:

(i) A measuring device (sensing device, converter, resistance probe, thermocouple, etc.) which determines the actual value of the variable to be controlled and converts it into a proportional electrical signal.

(ii) An electrical control device which compares the measured value with the desired value and gives a signal (generally in the form of a modulated current).

(iii) A starting, stopping or operating device (generally contacts, switches or circuit breakers, reversing switches or, sometimes, relay switches) which supplies current to an actuator in accordance with the signal received from the control device. Even though, Electronic Automatic Controller has to have all the 3 components (Measuring Device, Control Device, a starting, stopping or operating Device), but even if one of them is not there also i.e., Measuring Device or a starting, stopping or operating Device, then also it is still to be classified in this heading i.e., 9032 89 as incomplete automatically controlling instruments or apparatus.

G) The impugned ECU's are Controllers with a specific function covered by heading CTH 9032 which covers 'Automatic regulating or controlling instruments and apparatus'. Whereas CTH 8708 is a residual entry. It is a settled position of law that the maxim "*generalia specialibus non derogant*" is applicable.

H) The impugned goods satisfy Note 7 under to Chapter 90 which specifically covers CTH 9032. Revenue has disagreed with this view because the 'desired value' is not a constant in the impugned goods and is hence stated to be absent, taking the goods outside the said heading. The Ld. Counsel stated that 'desired value' does not mean a

fixed/static/constant value but a dynamic value. The desired value refers to an output value that is already fed in the preprogrammed software embedded in the microprocessor for a combination of inputs that are received by ECU at that point of time. As long as the ECU ensures that the set or the targeted goals or levels are achieved based upon the input, for obvious reason, the output ensures that the desired value is achieved and maintained for that input conditions, which may not necessarily be maintained at a fixed value but are continuously adjusted based on changing conditions.

I) They had been importing the Computer Bracket Assembly / ECU from 1999 onwards and in two instances, the classification sought under CTH 9032 was disputed by the Department. On both occasions, the Department proposed reclassification of the imported Computer Bracket Assembly (ECU) under CTH 8708. The Commissioner of Customs (Appeals), Custom House, Chennai, vide Orders-in-Appeal No's. 301 & 302/2013 both dated 28.02.2013 had held that the imported item is an automatic regulating or controlling apparatus classifiable under CTH 9032. Similarly, an Order-in- Original No. 755/2018 dated 17.12.2018 passed by Deputy Commissioner of Customs, ACC, Chennai, classified the imported items under CTH 9032 and not under CTH 8708. The matters were reviewed and found just, legal, proper and correct and thus the matter had attained finality. Hence, the imported ECU is appropriately and rightly classifiable under CTH 9032.

12.5 The Ld. Counsel for HMIL referred to the following judgments to supports their stand classifying ECU's under chapter 90;

- a) In the case of **EACOMS Controls India Limited v. Collector of Customs, New Delhi** (1999 (109) ELT 805) the Hon'ble Tribunal had held that the imported Transducers are classifiable under the category of Electronic Control Systems under CTH 9032.
- b) In the case of **IFB Industries Ltd v. Commissioner of Customs, Goa** (2001 (131) ELT 213 (Tri-Kol)), the Tribunal had held that the Imported Programmer for use in the washing machines is to be classified under CTH 903289
- c) In the case of **Commissioner of Customs, ICD, New Delhi v. Keihin Penalfa Ltd** (2002 (154) ELT 680 (Tri-Del)), it was held by the Tribunal that the Electronic Fuel Injection Module imported by the Importer was held to be classified under CTH 8543. However, the same was reversed by the Hon'ble Supreme Court of India (2012 (278) E.L.T. 578 (S.C.) and held that the imported item is covered under the ambit of Electronic Automatic Regulators, and it falls under sub-heading 903289.
- d) HMIL submits that in the case of **Commissioner of Customs, Bangalore v. N.I. Systems India (P) Ltd.** (2010 (256) ELT (173)), the Hon'ble SC of India determined the classification of PXI Controllers and held that the principal function of Controllers is to execute control algorithms, for real time monitoring and for controlling devices, processors or systems.
- e) In the case of **Larsen & Toubro Limited v. Commissioner of Central Excise, Mumbai** (2011 (270) ELT 385 (Tri-Mum)), the Tribunal had held that Programmable Process Controller is classifiable under CTH 9032.

f) In the case of **Crompton Greaves Limited v. Commissioner of Central Excise, Nashik** (2017 (7) GSTL 124), the Tribunal had held that the Advance Variable Speed Drive Controller had to be classified under CTH 9032 under the category of Automatic Regulating or Controlling Equipment.

g) In the case of **Jain Irrigation Systems Ltd v. Commissioner of Customs, ACC, Imports, Mumbai** (2018 (363) ELT 190 (Tri-Mum)), the Imported decoders were held to be classifiable under CTH 9032.

12.6 Per Contra Revenue has stated that ECU's are commercially known as part of motor vehicle manufactured by HMIL. They are electronic goods containing;

I) Core: Microcontroller

II) Memory: RAM/ROM/CPU

III) Communication Links: Controller Area Network (CAN) and

III) Embedded Software: Boot S/W

The input factors/quantities received by Electronic Control Units are different from the factors/quantities controlled by them. ECU does not automatically regulate or control any of the variables of liquids or gases mentioned in the said Note No. 7(a) or electrical non-electrical quantities mentioned in point 7(b) in such manner as mentioned therein.

12.7 The Ld AR has taken us through the impugned order and further stated that;

A) As per note 7 of Chapter 90 Automatic Controllers or Regulators falling under CTH 9032 are intended for use in automatic control

systems which are designed to bring a quantity, electrical or non electrical, to and maintain it at a desired value. It hence appears that the only function of automatic regulating or controlling instruments is to maintain the measured variable at a predetermined 'desired value' stabilised against disturbances. The output of ECU is not on 'desired value' as the same is generated dynamically based on the varying input data received by it.

B) Both Note 2(f) i.e. "Electrical Machinery or Equipment (Chapter 85)" or 2(g) i.e. "Articles of Chapter 90", to Section XVI, which excludes the said goods from the expressions "parts" and "parts and accessories" *ibid*, do not apply to the impugned goods, because they are (i) not electrical machinery or equipment, which convert mechanical energy into electrical energy and vice versa. ECU compares the input signals received from various sensors and the same is analysed with algorithms/programs stored in microprocessor available within it to process and compare the constantly varying input data with the programmed software instructions (numeric or formulae) stored in the memory of ECU and calculate the revised output value in the form of pulse/analog/digital signals (non-desired value not a pre determined value) which is passed on to remotely mounted actuators, valves and other parts for desired functions, and (ii) they are not classifiable under Chapter 90 for reasons stated in para (A) above.

C) ECU are solely and principally used in the motor vehicle manufactured by HMIL and commercially known as part of motor vehicle. They are assigned with specific part numbers. They are not capable of being marketed independently for use otherwise than in

motor vehicles. As per a reading of Note 3 to Section XVII when any part or accessory can fall in Section XVII as well as in another Section, its classification has to be determined by its sole or principal use. This is in line with the judgment of the Hon'ble Supreme Court in **M/s G.S Auto International Ltd Vs Collector of C. EX. Chandigarh** 2003 (152) ELT 3 (S.C) and **M/ s. Cast Metal Industries Pvt. Ltd.**, 2015 (325) E.L.T. 471 (S.C.).

D) ECU is not more specifically included elsewhere in the Nomenclature including under CTH 8537. They are hence correctly classifiable under CTH 8708.9900.

E) He stated that HMIL reliance on O-I-A's 301 & 302 of 2013 of Chennai Custom House for classification of ECU under CTH 903289 is not valid for the reason that the relevant O-I-O numbers 645 and 646 of 2011 pertaining to the O-I-A dated 28-2-2013 relied upon by HMIL as a settled principle of classification for the subject ECU / COMPUTER BRACKET ASSEMBLY under CTH 9032 is not tenable because a perusal of the O-I-O Nos 645 and 646 of 2011 reveals that the duty involved was Rs 3758/- & Rs 45,026/- respectively. By virtue of low monetary value as per litigation policy Circular No. 390/Misc/163/2010-JC (8-2011) dated 17th August, 2011 read with Circular 390-Misc/163/2010-JC (6-2013) dated 03-Jun-2013, the Commissioner (Appeal) Order dated 28-2-2013 appears to be falling under low appeal category on monetary grounds (Rs 5,00,000/- limit for appeal to CESTAT) and hence has got no precedence value and hence HMIL's reliance on the same is untenable. Further, in taxation matters principle of res judicata is not applicable as observed by Coordinate

Bench of this Hon'ble Tribunal in Final Order No 40526 / 2024 dated 6-5-2024 in case of **M/s Sai Balaji Fancy Store Vs Commissioner.**

12.8 We find at the outset that HMIL has responded to the classification of only one group of the 8 type of ECU's i.e the Computer Bracket Assembly / ECU along with ECU Coding system, the classification of all of which was commonly finalised in the impugned orders. As discussed above we agree that piece meal adjudication should not be done of an issue and that the classification of goods that have been provisionally assessed can be finalised by the Proper Officer, along with other issues, if any, while finalizing the assessment and without being influenced by the discussions in the impugned order in this regard. We hence limit ourself to examining the finally classification of Computer Bracket Assembly / Electronic Control Unit (ECU), inclusive of ECU Coding System, the assessment of which is not provisional.

12.9 The dispute pertains to the classification of the impugned goods as per CTH 9032 under the category 'Automatic regulating or controlling instruments and apparatus' (HMIL) or CTH 8708 as 'Parts and accessories of the motor vehicle of heading 8701 to 8705' (revenue). As stated by the Apex Court in **O.K.Play (India) Ltd.** (supra) that apart from the HSN Explanatory Notes, and the Rules of Interpretation, functional utility, design, shape and predominant usage have also got to be taken into account while determining classification of an item – these are more important than names used in trade or common parlance. Further as stated in **Union of India Vs Garware Nylons Ltd.** reported in 1996 (87) E.L.T. 12 (S.C.), the burden of proof

is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them.

12.10 It is seen that the CPU of the impugned ECU works in conjunction with the various sensors attached and located in different parts of the car, for carrying out the defined specific function of (1) Engine Control Mechanism, (2) Transmission Control Mechanism (3) Body Control Mechanism (BCM) (4) Signal Control mechanism (SCM) and (5) Fuel Control Mechanism (FCM) Safety Air Bag Control Mechanism etc. It is hence a device pre-programmed along with software and interacts with various sensors to enable stability, safety, speed, optimal performance, fuel efficiency, regulating and minimizing the harmful gas emissions, providing notifications and signals in the Audio Video Navigation Telematic (AVNT) of the vehicle.

12.11 We find that as per SCN dated 06/10/2022, Computer Bracket Assembly/ ECU was sought to be classified under the CTH 8537, however the impugned order has classified the goods under a completely new CTH i.e. 8708. We find that the Hon'ble Supreme Court in **Commissioner of Central Excise, Nagpur Vs Ballarpur Industries Ltd.** [2007 (215) E.L.T. 489 (S.C.),] had held, it is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest and that all allegations to be met by the respondent have to be clearly spelt out in it, so that the respondent can make a proper defense of his case. Since the classification of ECU under CTH 8708, which is a substantial charge, was not alleged in the SCN dated 06/10/2022 the subsequent confirmation of demand and related action taken against the said

goods in the OIO fails and merits to be set aside on this ground above. However, since the classification of Computer Bracket Assembly/ ECU's as per SCN dated 14/06/2023 incorporates the classification of the said goods under CTH 8708 and is confirmed under the said heading vide OIO 103953/2023 dated 11/12/2023, the said order is examined below.

12.12 It is HMIL's contention that the imported ECU is a Programmable 'Process' Controller falling under Chapter 90 as it automatically controls processes not machines and is not a Programmable Controller which might control an assembly line or a conveyor belt system (8537). The CBEC vide Central Excise Order No. 49/3/97-CX dated 09/05/1997 (supra), issued in terms of Section 37B of Central Excise Act, 1944, in consultation with the Department of Electronics, had inter alia clarified that programmable process controllers are specifically classifiable under CTH 9032 and not under CTH 8537. As per this order, there are 2 types of Programmable controllers and these are, Programmable Logic Controller (PLC) and Programmable Process Controller (PPC). While the former is classifiable under heading 85.37 the latter is classifiable under heading 90.32. Departmental officers are bound by Boards instructions, especially that issued under Section 37B of Central Excise Act, 1944. Hence if the impugned ECU are found to be Programmable Process Controllers rather than Programmable Logic Controller, they are classifiable under Chapter 90 and are specifically excluded from Section XVII in terms of Section Note 2 (g) to the said Section of the Customs Tariff.

12.13 The show cause notice has relied upon an expert opinion dated 05/08/2022 rendered by IIT Madras, which states that the ECU, provides output value generated dynamically based on the varying input data received by it. That the imported ECU sample is a specific purpose Algorithm based Electronic Controller and not Programmable Process Controllers. It is an electronic unit and is essential and integral component of motor vehicle. The opinion hence while accepting the ECU to be a category of controller holds it in the common parlance to be an integral component of motor vehicle. The impugned orders, also while stating that the impugned goods are "Programmable controllers" has ruled out classification of the goods under CTH 8537. The dispute in the impugned orders is also limited to headings 9032 and 8708.

12.14 The impugned ECU has a separate identifiable/ individual function of its own, as an automatic regulating and controlling electronic apparatus that helps the automobile achieve optimal performance in different parameters and is different from the main electrical machine i.e. the engine. The Type Approval Certificate issued by ARAI refers to the Marks and Numbers of the Electronic Control Unit thus acknowledging it as a functional apparatus having a definite independent function. The Hon'ble Supreme Court **Commissioner Of Income-Tax, Bombay Vs. I.B.M. World Trade Corporation - [1981] 130 ITR 739 (BOM)** has cited the dictionary meaning of 'apparatus' as under;

"8. Now, the meaning of the word "apparatus" given in the Random House Dictionary is:

1. a group or aggregate of instruments, machinery, tools, materials etc., having a particular function or intended for a specific use.
2. any complex instrument or machine for a particular purpose."

Further the Apex Court in the case of **Commissioner Of Customs, New Delhi Vs C-Net Communication (I) Pvt. Ltd**, [2007 AIR SCW 6208, 2007 (12) SCC 72], held that the word 'apparatus' would certainly mean the compound instrument or chain of series of instrument designed to carry out specific function or for a particular use. The term "apparatus" has been defined by the Court of International Trade (U.S.) and its predecessor court as a combination of articles and materials which are intended, adapted, and necessary for the accomplishment of some purpose. In **ITT Thompson Industries, Inc. v. United States** [3 CIT 36 (1982)] the Court held;

Webster's Third New International Dictionary (1963 ed.) defines the term "apparatus" as follows (at 102):
apparatus * * *

2 a: a collection or set of materials, instruments, appliances, or machinery designed for a particular use * * *

b: any compound instrument or appliance designed for a specific mechanical or chemical action or operation * * *

The word "apparatus" is defined by the *Century Dictionary* as:

* * * an equipment of things provided and adapted as a means to some end; especially a collection, combination, or set of machinery, tools, instruments, utensils, appliances, or materials, intended, adapted, and necessary for the accomplishment of some purpose, such as mechanical work, experimenting, etc.; as, chemical philosophical, or surgical apparatus.

Funk Wagnalls Standard Dictionary (International Edition, 1963) defines *apparatus*: A complex device or machine for a particular purpose.

The ECU being a combination of equipment and by its specific functions, hence satisfies the definition of being an apparatus. As per Rule 3(a) to the General Rules of Interpretation of the Customs Tariff, it is provided that the heading which provides a specific description

shall be preferred to a heading having a more general description. CTH 8708 is a residual entry covering various 'parts and accessories' when compared to CTH 9032 which covers 'Automatic regulating or controlling instruments and apparatus'. In **Santhosh Maize & Industries Ltd. Vs State of Tamil Nadu** [(2023) 385 ELT 814 / (2023) 7 TMI 191 (Supreme Court)], it was held that the law is well settled that if in any statutory rule or statutory notification two expressions are used one in general words and the other in special terms under the rules of interpretation, it has to be understood that the special terms were not meant to be included in the general expression; alternatively, it can be said that where a statute contains both a general provision as well as a specific provision, the latter must prevail. Hence prima facie ECU's appear to be covered by Chapter 90 rather than Chapter 87 of the Customs Tariff.

12.15 We find that Para 'O' under HSN Explanatory Notes to CTH 8708, reads as under.

(0) Safety Airbags of all types with inflater system (e.g. Driver-side airbags. passenger-side airbags to be installed in door panels for side-impact production or airbags to be installed in the ceiling of the vehicle for extra production for the head) and parts thereof. The inflater systems include the ignitor and propellant in a container that directs the expansion of gas into the airbag. The Heading excludes remote sensors or electronic controllers as they are not considered to be parts of the inflater system.

Thus, even though, Safety Airbags with inflater system are specifically covered under CTH 8708 9500, the Air bag Control Unit being an Electronic Controller (used for inflating the Airbags) is excluded from CTH 8708 9500 as per the above exclusion clause. Hence the confirmed classification of imported ECU under CTH 8708 based on sole and

principal use with Vehicles of 8702 to 8704 is not an absolute principle in classification of goods.

12.16 Revenue has drawn attention to Note 7 to Chapter 90 to state that the said heading covers instruments and apparatus that automatically control certain parameters and maintain it at a desired value. This value according to revenue is a constant value which the impugned machine fails to meet. The said Note reads as under;

“7. Heading 90.32 applies only to:

a. Instruments and apparatus for automatically controlling the flow, level, pressure or other variables of liquids or gases, or for automatically controlling temperature, whether or not their operation depends on an electrical phenomenon which varies according to the factor to be automatically controlled, which are designed to bring this factor to, and maintain it at, a desired value, stabilised against disturbances, by constantly or periodically measuring its actual value; and

b. Automatic regulators of electrical quantities, and instruments or apparatus for automatically controlling non-electrical quantities the operation of which depends on an electrical phenomenon varying according to the factor to be controlled, which are designed to bring this factor to, and maintain it at, a desired value, stabilised against disturbances, by constantly or periodically measuring its actual value.” (emphasis added)

12.17 We find that the impugned order while interpreting ‘desired value’ has held to be a ‘predetermined desired value’. While interpreting a statute there is no place for intendment. One must go by the plain language used. The Hon’ble Supreme Court in **Union of India Vs Hansoli Devi** reported in (2002) 7 SCC 273 held that it is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, the court must give effect to the words used in the statute. Besides, in a taxing Act one has to look merely at what is clearly said and there is no room for any intendment.

In a taxing statute nothing is to be read in, nothing is to be implied, one can only look fairly at the language used.

12.18 Controllers play an important role in modern automobiles. The task of a Controller is to continuously compare and adapt the current value(s) of a system to some possibly changing desired value(s). What has been mentioned in Note 7 to Chapter 90 is 'desired value' and not 'set value' or 'specified value' or 'predetermined desired value'. One of the meanings of 'desired' as per the Oxford English Dictionary is "That is longed for, wished, or wanted". As per the web site dictionary.com 'desired' means, "1. yearned or wished for; coveted. 2. deemed correct or proper; selected; required:". The word has a broad meaning and in the present context covers a functional or technical requirement and cannot be read restrictively. Unlike in the case of an industrial machine doing fixed processes the desired value in an automobile is an optimum operating value and is not constant. It depends on the requirement of a working automobile at a point of time, so as to ensure that it operates within desired parameters. This could depend on the specific requirements of the process being done by the machine at that point of time. For example, when the driver of a car accelerates the automobile, the engine controller computes the appropriate amount of fuel as well as the best point in time for injection and ignition suitable for that velocity and the external environment which the automobile has to negotiate etc. Similarly, while going uphill as contrasted with going downhill, speeds, difficulty angles, conditions etc all vary and the desired values required to keep the vehicle safe and stable will not be a constant and will depend on a host of dynamic

factors. The goal of process control is to maintain consistency, efficiency, and safety among other things. Automatic control is concerned with maintaining process variable i.e. temperature, pressure, flow, acceleration, brake etc. at the desired operating value at a given time, automatically. Processes are dynamic in nature, changes are always occurring and if action is not taken to optimise the process function, the important process variable related to safety, production quality, and production rate may get compromised. In short, the desired value in automobiles is computed dynamically at a specific point of time and not by any static point of reference. The 'desired value' in an automobile is an optimum operational value for a particular set of conditions which may differ from static 'set values' or 'specified value' as they are commonly understood in the industrial machine parlance. Hence, in terms of the classification of controllers made in CBEC order dated 09/05/2007 (supra) the impugned ECU's are programmable process controllers classifiable under heading 90.32.

12.19 As per the impugned order ECU are solely and principally used in the motor vehicle manufactured by HMIL and commercially known as a part of motor vehicle. They are assigned with specific part numbers. They are not capable of being marketed independently for use otherwise than in motor vehicles. The OIO does not discuss as to why the impugned goods are considered as 'Parts and accessories' of the motor vehicle of heading 8701 to 8705' falling under CTH 8708 and not as an "instrument" or "apparatus" under CTH 9032, more so when the goods of Chapter 90 cover "instrument" or "apparatus" and are

excluded from the definition of 'parts' under Section XVII. We have discussed earlier that the goods satisfy the definition of 'apparatus' as has found approval in judgments of the Hon'ble Supreme Court. Just because the goods have been assigned numbers for ease of identification do not make them car parts, in terms of the Customs Tariff. The Hon'ble Supreme Court in **Commissioner Of Customs, New Delhi Vs C-Net Communication (I) Pvt.** [2007 AIR SCW 6208, 2007 (12) SCC 72] extensively quoted from the Canadian Tribunal decision in **York Barbell Company Limited Vs Canada** [(DMNRCE), AP-90-161, [1991] CITT No 43] which listed the following criteria as being relevant in determining whether a product is a part: (1) the product is essential to the operation of another product; (2) the product is a necessary and integral component of the other product; (3) the product is installed in the other product; and (4) common trade usage and practice. In **Deputy Commissioner Vs Union Carbide India Ltd.** [(1976) 38 STC 198 (KER)], the Kerala High Court after referring to some of the leading decisions of the Allahabad High Court held as follows :

“The principle which can be drawn from the above decisions appears to be that a thing is a **part** of the other only if the other is incomplete without it. A thing is an **accessory** of the other only if the thing is not essential for the other but only adds to its convenience or effectiveness.” (emphasis added)

No such test has been examined and satisfied before classifying the goods as parts under CTH 8708 and hence the discussion is incomplete to that extent. Therefore it is difficult to hold that the goods have been comprehensively examined and classified.

12.20 In the case of **Intel Design Systems (India) Pvt. Ltd. Vs Commr. of Cus. & C. Ex.** 2008-TIOL-18-SC-CX the Hon'ble Supreme Court held that parts falling under CTH 87 would should fulfil both the conditions (1) they must be identifiable as being suitable for use solely or principally for vehicles falling under Chapter 87 and (2) they must not be excluded by the provisions of Section Note XVII. Hence if it is found that the impugned goods are a 'part' of the motor vehicle and if also for argument sake, condition (1) is said to be satisfied the impugned goods still do not satisfy condition (2) to remain under Section XVII. Again in **Commissioner of Central Excise Vs Uni Products India Limited** [2020 (372) E.L.T. 465 (S.C.)], the issue before the Hon'ble Supreme Court was whether "Carpets and Other Textile Floor Coverings" of CTH 5703 covers 'car matting' or whether they would be classified as "Parts and accessories of the motor vehicles of headings 8701 to 8705" under CTH 8708. The ratio spelled out by the Hon'ble Supreme Court in its judgment was:

- a. Section Notes and Chapter Notes are of utmost importance to determine classification.
- b. According to HSN Explanatory Note to Section XVII, all following three conditions must be fulfilled to classify any product as parts or accessories namely (a) They must not be excluded by the terms of Note 2 to Section XVII, and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88; and (c) They must not be more specifically included elsewhere in the Nomenclature.
- c. The most specific description shall be preferred to headings providing a more general description as per Rule 3(a) to GI Rules.
- d. Even though HSN Explanatory Notes have persuasive value only, but the level or quality of such persuasive value is very strong, as observed in numerous judgments.

12.21 The decision makes it clear that the articles of CTH 9029 cannot be regarded as "parts and accessories" of motor vehicles

classifiable under CTH 8708, even if they are principally designed for use with motor vehicles. In **Commissioner of Central Excise Vs Carrier Aircon Ltd.** [2006 (199) E.L.T. 577 (S.C.)], the Hon'ble Supreme Court has held that end use to which the product is put to cannot be determinative of the classification of the product.

12.22 The impugned order further holds that as per a reading of Note 3 to Section XVII when any part or accessory can fall in Section XVII as well as in another Section, its classification has to be determined by its sole or principal use. First of all Note 3 to section XVII states that, references in Chapters 86 to 88 to "parts" or "accessories" do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those **Chapters**. A part or accessory which answers to a description in two or more of the headings of those Chapters is to be classified under that heading which corresponds to the principal use of that part of accessory. Hence the note deals with goods which answers to a description in two or more of the headings of the Chapters falling under Section XVII and not between goods which answers to a description in two or more of the headings of the different **Sections** as wrongly stated in the impugned order. The impugned order has referred to the judgment of the Hon'ble Supreme Court in (i) **M/s G.S Auto International Ltd Vs Collector of C. EX. Chandigarh** 2003 (152) ELT 3 (S.C) which pertained to classification of goods falling under Sections XV and XVII. The Hon'ble Court as per a conjoint reading of the Notes of both the Sections stated that the test to be applied is whether the goods are suitable for use solely or primarily with articles

of Chapter Heading Nos. 87.01 to 87.05 or else they would be classifiable as "parts of general use". The classification in this case is with respect to goods falling under Sections XVII and XVIII, which has a separate set of Section / Chapter and HSN Explanatory Notes and the ratio of the said case is not applicable. (ii) **M/ s. Cast Metal Industries Pvt. Ltd.**, [2015 (325) E.L.T. 471 (S.C.)], has drawn on the ratio of the judgment in *G.S Auto International*. Further the judgment dealt with the classification of door handles and hinges for automobiles under competing CTH 8302.00 or 8708.00 and the Hon'ble Court held that to determine the applicability of the item under particular head, the test of commercial identity of the goods would be the relevant test and not the functional test. Further the common meaning of a tariff term is a question of law to be decided by the appropriate authority, while the determination of whether a particular item fits within that meaning is a question of fact. The facts in this case are different from that of the judgments cited above further the classification of the goods is between Chapters 85 and 90 and are governed by Section and Chapter Notes that are not in pari materia. These judgments are hence distinguished both on fact and law.

12.23 In **Hari Khemu Gawali Vs Deputy Commissioner of Police, Bombay and another** [AIR 1956 SC 559], a **Constitution Bench** of the Apex Court stated:

"It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia."

The same would also be applicable for judgments on the classification of goods covered by Section / Chapter Notes which are not *pari materia*.

12.24 Classification of goods are to be done as per the Statute enacted in this behalf. In its judgment in **Hameed Joharan (D) And Ors Vs Abdul Salam (D) By Lrs. And Ors**, [AIR 2001 SUPREME COURT 3404 / 2001 (7) SCC 573] the Hon'ble Court stated as under

"...We consider it proper to say, as we have already said in other cases, that judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton*, [1951 AC 737-761], Lord MacDermott observed : The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Wills. J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."

12.25 We find that the **HSN Explanatory Notes under Section XVII** explains the scope of the terms "parts and accessories" for the purpose of Section XVII as below:

"(III) PARTS AND ACCESSORIES

It should be noted that Chapter 89 makes no provision for parts (other than hulls) or accessories of ships, boats or floating structures. Such parts and accessories, even if identifiable as being for ships etc., are therefore classified in other Chapters in their respective headings. The other Chapters of this Section each provide for the classification of parts and accessories of vehicles, aircraft or equipment concerned. It should, however be noted that these headings apply only to those parts or accessories which comply with all three of the following conditions:

- a. They must not be excluded by the terms of Note 2 to this Section (see Paragraph (A) below),
- b. They must be suitable for use solely or principally with the articles of Chapter 86 to 88 (see paragraph (B) below, and
- c. They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below:

(A) Parts and accessories excluded by Note 2 to Section XVII This Note excludes the following parts and accessories, whether or not they are identifiable for as for the articles of this Section.

...

(8) Instruments and apparatus of Chapter 90, including those used on certain vehicles such as:

... .”

They clearly exclude instruments and apparatus of Chapter 90 from the scope of the terms “parts and accessories”. Further the goods are excluded by the terms of Note 2 to the Section and are more specifically included elsewhere in the Nomenclature. While there are a number of factors which have to be taken into consideration for determining the classification of a product, while dealing with goods which answers to a description in two or more of the headings, the heading having the more specific description will have the ‘first claim’ for examining the Section/ Chapter/ HSN Explanatory Notes for its suitability. Further as stated by the Hon’ble Supreme Court in **Commissioner of Central Excise, Aurangabad Vs M/S Videocon Industries Ltd.** [2023 (384) E.L.T. 628 (S.C.)] that when goods are excluded from a particular chapter, the “pull in” through a note must be narrowly construed as otherwise, the basis of exclusion would be defeated.

12.26 The Ld. AR has drawn attention to the Order of a Coordinate Bench at New Delhi in **M/s Continental Automotive Systems India Private Ltd Vs Commissioner of Customs, Delhi** [2024 (3) TMI-CESTAT New Delhi], wherein it was held that ECU in that case was not a regulator of electrical quantity nor was it an instrument or apparatus for regulating non-electrical quantities which depend on electrical phenomenon. Merely because ECU is a chip which

analyses the data (and through any chip electricity flows), the function of ABS or its part ESCS (manufactured by the HMIL) or its further sub-part ECU (imported by HMIL) do not, qualify as automatic regulator of electrical quantities and instruments or apparatus for automatically controlling non-electrical quantities the operation of which depends on electrical phenomenon. Accordingly, the Principal Bench, dismissed the Appeals and upheld the Order of the Adjudicating Authority wherein the goods were classified under CTI 8708 9900. We find that ECU is a generic name. It is not unique to motor vehicles and is used in domestic machines like refrigerators, washing machine, dish washers etc. and also in industrial machines. Even in motor vehicles there are known to be between 1 to more than 70 ECU's. They include body control modules for the door, seat, power lock, airbag, air condition system etc. and powertrain control modules which includes anti-lock brake system (ABS), engine control unit, transmission control unit etc. Each ECU performs separate functions as per the machine and mechanism it is a part of and is not comparable to another. Hence the classification of each ECU for the purpose of assessment as per the Tariff must be considered separately. The issue in the said judgment was whether the ECU which was a printed circuit board imported by HMIL to be used in the manufacture of Electronic Stability Control Systems which are used by manufacturers of automobiles in Anti-Lock Braking Systems or Electronic Braking Systems, was classifiable under CTI 9032 8910 as claimed by HMIL or under CTI 8708 9900 as per revenue. We find that the dispute in this case is distinguished in as much as HMIL in that case had imported a printed circuit board which is a part of the Anti-Lock

Braking System of cars. It is thus a part of a part of a motor vehicle. Central ECU's are commonly known as the engine's "brain." It is a rugged solid block item which is positioned outside the engine and as per the discussions above has been found to be an apparatus with an independent function which though not essential for the functioning of an IC engine adds to its effectiveness. In **Bhavnagar University Vs Palitana Sugar Mills Pvt. Ltd** [2003(2) SCC 111], the Apex Court observed;

"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision".

A similar view was taken by a Larger Bench of this Tribunal at paras 25, 26 and 27 of its decision in **The Ramco Cements Ltd. Vs. CCE, Puducherry** [2023 (12) TMI 1332 -CESTAT Chennai LB]. As discussed the goods in the impugned case are not comparable, and the judgment in **Continental Automotive** (supra) is hence distinguished.

12.27 Based on the discussion above we find that the department has not discharged the burden of proof to show that the ECU, is taxable in the manner claimed by them under CTH 8708 9090 and hence the classification as adopted by HMIL must prevail.

13. Whether the "relevant date" as defined under Section 28 of CA 1962, is the date of clearance of the imported ECU, whereby part of the demand is outside the ambit of two years normal period pertaining to goods covered by Order-in-Original dated 11/12/2023 and is unsustainable.

13.1 HMIL submits that in the course of investigation, they had paid the differential duty 'under protest'. In the Impugned Order, the duty

liability was confirmed for the period of 2 years' time from the date of payment of duty under protest. For the purpose of determination of period of limitation, the "relevant date" as defined under explanation 1(a) of Section 28 has not been taken into account and on proper application of law, it is evident that either partial or full demand is outside the ambit of two years period. As such, demand and confirmation of duty liability are beyond the normal period of 2 years from the "relevant Date" (Clearance date of the imported goods), hence, part of the demand may be held as unsustainable and unacceptable. It is submitted that the Impugned Order has confirmed duty liability for 118 finally assessed Bills of Entry and out of the 118 finally assessed Bills of Entry, for 53 Bills of Entry, the demand is after the period of 2 years, hence, not protected under Section 28 (1) of the Customs Act, 1962. Therefore, only with respect to remaining 65 Bills of Entry out of 118 finally assessed Bills of Entry, the demand notice was issued within the time limit of two years.

13.2 Revenue has stated that during the course of investigation by DRI, the importer as per section 28(1)(b) of CA 1962 on their own ascertainment has voluntarily paid duty differential duty and intimated the same before the issuance of SCN on 14/06/2023. Hence section 28(3) of Customs Act, 62 will come into play. The CA 1962 does not have a provision to pay duty 'under protest' and no special provision exists under section 28 for such payment. Therefore, the relevant date for issuance of SCN has to be computed from the date of receipt of information of duty payment as stipulated under section 28(3) read with explanation given for relevant date under section 28(11) of the

Customs Act, 1962. Since duty is paid voluntarily under protest by importers on 31/03/2022 during the course of investigation the said date is the relevant date under Explanation-1 (d) to Section 28(11) of the Customs Act 1962 read with section 28(3) as found by the AA at para 84.1 of O-I-O.

13.3 We find that 'any duty' referred to in section 28(1)(a) is wide enough to cover demand of all types of duty under CA 1962 whether the assessments were correctly done or not. Section 28(3) ibid states that when the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, the proper officer shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of two years shall be computed from the date of receipt of information under sub-section (2). Hence the said 'relevant date' has to be understood as per section 28(3) read with Explanation-1 (d) to section 28(11) under of the Customs Act 1962. This being so the "relevant date" cannot begin from the date of clearance of the imported ECU's and must be calculated from the date of receipt of information under sub-section (2) of section 28.

14. **Where there is no suppression of facts or willful misstatement of facts hence demand and confirmation of duty liability beyond the normal period of 2 years from the date of import as per Order-in-Original dated 04/10/2023 is unsustainable and no fine on the goods or penalty on the individual can be imposed.**

14.1 HMIL avers that there is no specific allegation nor have specific details been adduced in the said Show Cause Notice's regarding suppression of facts. The entire issue is mere redetermination of classification of the imported items and there is no mis-declaration of description or value or any other information at the time of filing the Bills of Entry. Hence the question of invoking suppression of facts for demanding duty for the extended period, confiscation of goods or imposition of fine and penalty does not arise and merits to be set aside in the impugned orders.

14.2 We find that OIO 103953/2023 dated 12/12/2023 at para 85.2 and 85.3 states the reason for invoking sections 111 (m) for confiscation of the goods and 112(a) and 114(AA) of CA 1962 for penalising HMIL. The burden of the charge is that HMIL while filing the bills of entry had subscribed to a declaration as to the truthfulness of their contents. Further under the self-assessment procedure onus is on the importer to ensure that they declare the correct description, classification, applicable rate of duty, value and correctly and claim the benefit of notifications if any in respect of the imported goods while presenting the bill of entry. However the importer has failed to comply with the same. A similar discussion is seen at paras 30, 31 and 32 of OIO No 103200/2023 dated 04/10/2023.

14.3 We find that this is a case where the allegation of suppression has been made only because the Ld. Adjudicating Authority does not agree with some of the classification of the imported goods made by HMIL who in respect to some goods have agreed to change the classification made after DRI started its investigation and have paid

the differential duty involved. This has led to the conclusion that HMIL has failed to comply with the procedures as set out in the CA 1962. However, it is settled law that the extended period cannot be invoked when the case involves a genuine interpretative issue, which is not merely an excuse given by HMIL who has short paid duty due to a change in classification of the imported goods. HMIL has referred to the decisions of Commissioner of Customs (Appeals), Custom House, Chennai, which had held that the imported item is an automatic regulating or controlling apparatus classifiable under CTH 9032 as stated at para 12.4 above. They have also referred to a few judgments that supports their stand classifying ECU's under chapter 90, which is listed at para 12.5 above. In such a situation HMIL is not involved in a blame worthy act hence no mis-declaration or suppression of facts can be alleged and the impugned goods cannot be confiscated and subject to a fine nor can a penalty be imposed on him. This view has also been held by the Apex Court in ***Northern Plastic Ltd. v. Collector of Customs & Central Excise [1998 (101) E.L.T. 549 (S.C.)]***. The extended period of demand can be evoked when there is an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section. As stated by the Apex Court in ***Uniworth Textiles Ltd. v. Commissioner of Central Excise***, Raipur [2013 (288) E.L.T. 161 (S.C.)], that the 'Act contemplates a positive action which betrays a negative intention of willful default', which is not the case that has been made out here. The demand if any will hence have to be confined to the normal period with applicable interest. As regards the imposition of redemption fine, the

Hon'ble Supreme Court in **Asstt. Collector v. Bussa Overseas and Properties Pvt. Ltd. [2004 (163) E.L.T. A160 (S.C.)]**, dismissed the SLP against the judgment and order dated 04/08/1992 of the Bombay High Court in **Bussa Overseas and Properties Pvt. Ltd. v. C.L. Mahar, Asstt. Collector [2004 (163) E.L.T. 304 (Bom.)]** The High Court had held that once the imported goods are cleared for home consumption they cease to be 'imported goods' as defined in Section 2 of the Customs Act, 1962 and are consequently not liable to confiscation. The Hon'ble Supreme Court again in **Commissioner Vs Finesse Creation Inc. [2010 (255) E.L.T. A120 (S.C.)]**, dismissed the SLP filed by Commissioner of Customs (Import) against the Judgment of the High Court of Bombay in **Commissioner Vs Finesse Creation Inc [2009 (248) E.L.T. 122 (Bom.)]**. The High Court had distinguished the Apex Court decision in case of Weston Components Ltd. (supra), while holding that concept of redemption fine arises in the event the goods are available and are to be redeemed, and if goods are not available, there is no question of redemption of goods. In any case HMIL has not been found committing a blame worthy act and the demand has been restricted to the normal period. Hence the appeal filed by Revenue is rejected. No question of confiscation, fine and penalty hence arises. We hold accordingly.

15. Having regard to the discussions we modify the impugned orders as below.

(1) SCN No. 56/2023, dated 14/06/2022; OIO 103953/2023, dated 04/12/2023.

A) We hold that the 7 imported ECU items, which were cleared through provisionally assessed Bills of Entry have been decided

prematurely by the impugned order. The finalisation of classification of provisionally assessed BE's by piece-meal penal proceedings without concluding the dutiability of the imported goods is not proper in law and is set aside. The classification of the said goods can be done at the time of finalizing the provisional assessment, without being prejudiced by the findings in the impugned order.

B) The appeal filed by revenue pertaining to the confiscation of goods provisionally assessed under a bond and confiscation / imposition of redemption fine on the goods and a penalty on the assessee, fails.

C) The department has not discharged the burden of proof to show that the ECU, is taxable in the manner claimed by them under CTH 8708 9090 and hence the classification as declared by HMIL must prevail. The goods are hence eligible for benefit of Notification No. 46/2011, dated 01/06/2011 as claimed.

D) As per the facts of this case, the 'relevant date' has to be understood as per section 28(3) read with Explanation-1 (d) to section 28(11) under of the Customs Act 1962. This being so the "relevant date" cannot begin from the date of clearance of the imported ECU's and the two years period must be calculated from the date of receipt of information under sub-section (2) of section 28.

(2) SCN No. Gr.5/05/2022, Dated 06/10/2022; OIO NO. 10320/2023 dated 04/10/2023.

A) We hold that the 9 items, which were cleared through provisionally assessed Bills of Entry have been decided prematurely by the impugned order. The finalisation of classification of provisionally assessed BE's by piece-meal penal proceedings without concluding the

dutiability of the imported goods is not proper in law and merits to be set aside. The classification of the said goods can be done at the time of finalizing the provisional assessment, without being prejudiced by the findings in the impugned order.

B) It is settled law that the extended period cannot be invoked when the case involves a genuine interpretative issue, which is not merely an excuse given by HMIL, who has short paid duty due to a change in classification of a few of the imported goods as above. Some of the disputed classification of goods, covered by the impugned orders, have been found by us to be correctly classified. Demand and confirmation of duty liability, if any, beyond the normal period of 2 years from the relevant date, is not sustainable.

C) The classification proposed for Electronic Control Unit (ECU) as per the SCN was under CTH 8537 whereas the impugned order has finalised the classification under CTH 8708 9090 which is beyond the allegations and proposal made in the SCN and hence merits to be set aside. The goods are hence eligible for benefit of Notification No. 46/2011, dated 01/06/2011 as claimed.

D) PIO AVN Audio were imported from Vietnam and availed the BCD exemption benefit @ Nil in terms of Customs Notification No. 46/2011, whereas, in the SCN, it was alleged that the goods were imported from Republic of Korea and had wrongly availed the BCD exemption benefit @ Nil in terms of Customs Notification No. 152/2009. However, the wrong quoting of a notification benefit in the SCN is a minor error and is not fatal to the OIO. Hence HMIL plea for quashing this part of the impugned order is rejected.

E) HMIL has not disputed that PIO AVN Audio are appropriately classifiable under CTH 8526.9190. They are eligible for the benefit of concessional rate of BCD @ Nil in terms of Serial No.1389 (I) of Notification No. 46/2011 Customs dated 01/06/2011, instead of claimed Serial No.1390 (I) claimed by them and hence merits to be granted. However, even without reference to this legal issue, which is acceptable, we have already stated that once the COO Certificate covers the imported goods and is not challenged and modified as per the procedure established by the Rules of 2009, the benefit of concessional duty as per the cited notification cannot be denied.

F) The department has not been able to discharge their burden of proof on the merits of classification of Oil Control Valves under CTH 8409.9111 / 8409.99911 (depending upon the type of engine) and thus HMIL classification of the goods under CTH 8481.8090 cannot be disturbed.

G) As regards Camshaft Assembly, HMIL have accepted the classification as per the impugned order as discussed we hold that the goods are eligible for exemption since the COO Certificate at 6 digit level covers the imported goods.

H) The re-determination of classification of the 13 items imported i.e. Vacuum Assembly; Water Pump Assembly; Cap Sealing; Case Assembly Timing Chain; Nut Flange; Nut Washer; Oil Seal; V-Ribbed Belt; Junction Box; Piston and Piston Assembly; Connecting Rod Assembly; Camshaft Assembly & PIO AVN Audio, has been consented to before the Original Authority in writing as suggested in the SCN and cannot be resiled at this stage. Hence in the case of the stated goods

the classification remains as determined in the impugned order and the appeal in this regard is rejected.

I) In the absence of any suppression of facts / wilful mis-statement of facts, the impugned goods imported and cleared with or without a bond cannot be subject to confiscation, hence no penalty and redemption fine can be imposed on the ground of wrong classification.

(3) As per the facts and law discussed above, all impugned goods covered by a COO Certificate, as required by the conditions of the relevant notification, under which exemption is claimed, are eligible for preferential rate of duty irrespective of the subsequent change in classification, if any.

(4) The impugned order is partly modified as above. HMIL is eligible for consequential relief, if any, as per law. The appeals filed by HMIL and Revenue are disposed of as above.

(Order pronounced in open court on 21.10.2024)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)