

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI**

Principal Bench

Customs Appeal No. 51012 of 2019

[Arising out of common Order-in-Original No. 16/NKU (16-18) ADJ (Adj),
/DRI/ N. DELHI/ 2018-19 dated February 4, 2019 passed by Additional
Directorate General (Adj) New Delhi]

EMD Locomotive Technologies

Appellant

D-149 to 153, Hosiery Complex, Noida
Phase II Extension Noida
UP

Versus

Additional Director General, DRI

Respondent

Office of the Additional Director General (Adj)
Directorate of Revenue Intelligence Room No. 214,
New Custom House, Near IGI Airport, New Delhi

With

Customs Appeal No. 51013 of 2019

EMD Locomotive Technologies

Appellant

D-149 to 153, Hosiery Complex, Noida
Phase II Extension Noida
UP

Versus

Additional Director General, DRI

Respondent

Office of the Additional Director General (Adj)
Directorate of Revenue Intelligence Room No. 214,
New Custom House, Near IGI Airport, New Delhi

And

Customs Appeal No. 51014 of 2019

EMD Locomotive Technologies

Appellant

D-149 to 153, Hosiery Complex, Noida
Phase II Extension Noida
UP

Versus

Additional Director General, DRI

Respondent

Office of the Additional Director General (Adj)
Directorate of Revenue Intelligence Room No. 214,
New Custom House, Near IGI Airport, New Delhi

Appearance

Shri Sanjeev Sachdeva, Learned Consultant and Ms. Neha Gulati, Advocate
for the appellant

Shri Sunil Kumar, AR for the Respondent

And

Customs Appeal No. 51051 of 2019**Additional Director General, DRI****Appellant**

Office of the Additional Director General (Adj)
 Directorate of Revenue Intelligence Room No. 214,
 New Custom House, Near IGI Airport, New Delhi

Versus

EMD Locomotive Technologies**Respondent**

D-149 to 153, Hosiery Complex, Noida
 Phase II Extension Noida
 UP

Appearance

Shri Sunil Kumar, AR for the appellant
 Shri Sanjeev Sachdeva, Learned Consultant and Ms. Neha Gulati, Advocate
 for the respondent

CORAM:

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**Hon'ble Ms. Rachna Gupta, Member (Judicial)****Date of Hearing/ Decision: 09.08.2019****Final Order Nos: 51063-51066/2019****Per Anil G. Shakkarwar:**

1. The above stated four appeals are arising out of common impugned Order-In-Original, and therefore, they are taken together for decision. Out of above stated four appeals Appeal No. C/51051/2019 is filed by Revenue and the remaining three appeals are filed by importer.
2. Brief facts of the case are that the importers imported "PHASE CAB EQ SHPG ASM (200V) " hereinafter referred to as 'impugned goods' and they were in the activity of import of said impugned goods from 2012 onwards. In 2012 the importers claimed classification under heading 8537 of

Customs Tariff for the impugned goods and cleared the same on payment of appropriate customs duty. On 26/07/2013 importers filed Bills of Entry for impugned goods claiming classification under heading 8537. The Departmental officer ordered "first check" and the goods were examined before assessment and after following the required procedure the goods were ordered to be classifiable under heading 8504 through Order-in-Original dated 12/09/2013. The matter was agitated before learned Commissioner (Appeal) who decided that appeal through Order-in-Appeal dated 26/08/2014, wherein he did not interfere with the order passed by the Original Authority holding the classification of impugned goods under heading 8504. Subsequently, in view of India Japan Comprehensive Economic Agreement the goods imported from Japan were eligible for reduced rate of duty in terms of Notification No. 69/2011-CUs dated 29/07/2011, and the importers started availing the benefit of the same. In 2016, DRI initiated investigations in respect of all the importers who were availing said exemption on the basis of certificate of origin and as a result since the importers were availing the said benefit since the impugned goods were manufactured in Japan the importers also got covered by the said investigation. On investigation DRI has found that importer was genuinely importing the goods from Japan. However, the importer was issued with three Show Cause Notices. The contention of DRI in the said Show Cause Notices were that impugned goods were properly classifiable under

heading 8537 and said goods were not eligible for reduced rate of duty under Notification No. 69/2011 to the same extent to which the goods falling under heading 8504 were eligible. Therefore, by making allegations of suppression of information by importer the DRI issued three Show Cause Notices to the importer. The first Show Cause Notice dated 15/12/2016 covered the period from December, 2014 to October, 2016 where the customs duty demand was to the tune around Rs. 5.52 Crores. Another Show Cause Notice was issued on 21/02/2017 covering the imports during the month of March 2015 and the customs duty demanded was around Rs. 36 Lakhs. The third Show Cause Notice was issued on 3/11/2017 and the period covered was from July, 2013 to September, 2017 which was already covered by the above stated two show cause notices dated 15/12/2016 and 21/2/2017 and the customs duty demand was around Rs. 6 Crores. The allegation in the show cause notices was that that importer suppressed vital information from the Department and mislead the Department to classify the impugned goods under heading 8504. Therefore, in the third show cause notice extended period was invoked. The Show Cause Notice also made a mention that through Commissioner (Appeal) order dated 26/08/2014 the impugned goods have been held to be classifiable under heading 8504 and appeal against the said Order-in-Appeal is contemplated. On contest of all the three show Cause Notices were adjudicated through the impugned Order-in-Original where learned Original authority has confirmed the

demand of customs duty of around Rs. 5.51 crores raised through the Show Cause Notices dated 15/12/2016 and also confirmed the demand of Customs duty of around Rs. 36 lakhs raised through show cause notice dated 21/2/2017. In respect of Show Cause Notice dated 3/11/2017 the learned adjudicating authority dropped the demand of around Rs. 2.12 Crores on account of limitation and confirmed the demand customs duty of around Rs. 3.96 crores. Penalty of Rs. 11 Lakhs under Section 112 of Customs Act, 1962 was imposed. Further, he has directed to finally assessed the goods by holding the goods to be classifiable under heading 8537 in respect of provisionally assessed goods in respect of 32 Bills of Entry filed during the period from 29th November, 2016 to 13th September, 2017. Aggrieved by the order of change in the classification the importer is before this Tribunal. Further importer have also challenged the order of original authority in respect of direction to finalise the provisional assessment holding impugned goods to be classifiable under heading 8537. The Revenue is in appeal before this Tribunal on that part of the Order-in-Original through which the duty was dropped on account of limitation and for not confiscating the goods and not imposing the penalty under Sections 112 and 114 A of Customs Act, 1962.

3. Heard Shri Sanjeev Sachdeva, learned Counsel on behalf of the importer. He has submitted that the Order-in-Appeal dated 26/08/2014 through which it was held that the impugned goods were classifiable under heading 8504 was

challenged before this Tribunal with application of condonation of delay of 749 days. This Tribunal did not condone the delay and dismissed the said appeal through Order dated 27/03/2017 vide Final Order No. 52569/2017-CUS(DB). He has further submitted that the said Final Order was challenged before Hon'ble High Court of Delhi. The Hon'ble High Court of Delhi has passed the order in the matter on 1st November, 2017 in CUS AA 60/2017. He has submitted that in para 12 of the said order Hon'ble High Court of Delhi has clarified that the issue of classification in respect of the Bills of Entry for which the appeal was filed was held to be classifiable under heading 8504 and that for any other Bill of Entry the Hon'ble High Court of Delhi had left the issue open to both the parties to take stand that the impugned goods are classifiable under 8537 if permissible under law. He has further submitted that in all the Show Cause Notices put together there is no change in the description of the goods in respect of Bill of Entries for which the said Show Cause Notices have been issued and for the impugned goods classification has been finalised under heading 8504 up to the level of Hon'ble High Court and the classification was decided by Revenue after conducting the "first check", and therefore, there was no suppression at any stage on account of the importer and importer did not withheld any information and after carrying out required procedure through appealable Order-In-Original dated 12/09/2013 was passed and classification was held to be under heading 8504. Therefore, after four

years Revenue cannot make an allegation that importer had suppressed any information. He has further submitted that all the Show Cause Notices are only based on allegations that the importer has suppressed information from the Department. He has further submitted that he is ready to argue on the technicalities of the classification but since the issue of classification is already settled in respect of the same description of the goods, therefore, in the other Bills of Entry when the goods are having same description there cannot be different classification of the goods.

4. Heard the learned AR who has submitted that on the basis of detailed technical examination of the goods which are technical in nature Revenue has correctly claimed classification to be under heading 8537, and therefore, the appeal filed by importer may be rejected and appeal filed by Revenue may be allowed. He has also submitted that all the information required for arriving at correct classification was not provided by the importer, and therefore, there was suppression.
5. Having considered the submissions from both the sides and on perusal of the record, we note that Hon'ble High Court has held that in respect of impugned goods for which the Bill of Entry dated 26/07/2013 was filed by importer the Department has finally classified the goods under heading 85044010 and was affirmed by Commission (Appeal) and not interfere by the Tribunal. We note that Hon'ble High Court have clarified through para 12 of their said order dated 01/11/2017 as follows;

12. However, we will only clarify that impugned order and the present order would not be construed as an order would constrain or bind the Revenue from taking a stand that TCC i.e. "Traction Control Cabinets" are classifiable under heading 8537 in any other case relating to a separate Bill of Entry, if permissible in law. We also clarify that in case the appellant/Revenue takes this stand, it will be open to the assessee/importer to contest the said position"

6. We also note that contention of Revenue is that the importer has not provided all the information required to arrive at the correct classification, and therefore, there is suppression. We do not accept the contention of the Revenue because for passing the order dated 12.09.2013 the goods were subjected to first check and after filing of the Bill of Entry by importer the goods were first examined by Revenue and then they have proposed to be classified under heading 8504 and through the order dated 12/09/2013 the classification was decided under heading 8504. The Revenue had all resources and opportunities in 2013 to either know from the importer all the technical information that they required. Since Revenue have not done so, in 2016 they cannot make allegation that importer did not provide them all the information. Learned AR could not produce any such document through which Revenue had sought information from the importer which was either not provided or was refused to be provided. Further, Revenue could have sought technical guidance from National Institutes to get correct information which was not done by Revenue, and therefore, Revenue lost opportunity in 2013

and they cannot make allegation that importer has suppressed the information. Since in all the three Show Cause Notices the basis for issue of Show Cause Notice is suppression, we hold that suppression on behalf of the importer is not established in this case. We, therefore, set aside the impugned order in so far as it is in relation to confirmation of the duties and imposition of penalties. Accordingly, we allow all the three appeals filed by the importer.

7. Since the allegations levelled in the Show Cause Notices are not sustained we dismiss appeal filed by the Revenue.
8. The importer shall be entitled for consequential relief as per law.

(Dictated and pronounced in open court)

(Anil G. Shakkarwar)
Member(Technical)

(Rachna Gupta)
Member(Judicial)