(2013) 08 GUJ CK 0046

In the Gujarat High Court

Case No : Tax Appeal No''s. 227 to 230, 294, 328 to 331 and 360 of 2013

J.R. Steel Industries APPELLANT

Vs

Customs Excise and Service Tax Appellate Tribunal RESPONDENT

Date of Decision : 21-08-2013

Acts Referred:

Citation : (2014) 43 GST 119 : (2014) 24 GSTR 600

Hon'ble Judges : Sonia Gokani, J;M.R. Shah, J

Bench : Division Bench

Advocate : Anand Nainawati, for the Appellant; Hriday Buch, for the Respondent

Judgement

M.R. Shah, J.—As common question of law and facts arise in this group of appeals, all these appeals are disposed of by this common judgment and order.

The following short but an interesting questions of law are posed for consideration of this Court in present group of appeals

(i) Whether once the Appellate Tribunal rejects the assessee''s challenge to the penalty imposed by the adjudicating authority, revenue can file appeal before the Commissioner seeking enhancement of the penalty?

(ii) Whether once the Commissioner rejects assessee''s appeal against penalty, the revenue''s appeal for enhancement would be barred since the order of adjudicating authority would have merged in the order of the Commissioner rejecting appeal of the assessee?

As common question of facts arise in all these appeals, facts of Tax Appeal No. 227/2013 would be considered for the sake of convenience. Facts in Tax Appeal No. 227/2013 in a nutshell are as under:

1.1 That the appellant herein - assessee was manufacturing Non-Alloy Hot-Re-rolled Products falling under Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. That the said products were notified goods under erstwhile Section 3A of the Central Excise Act, 1944 [hereinafter referred to as

"Act"] and the levy and payment of duty in respect of the goods were governed by erstwhile Rule 96ZP of the Central Excise Rules, 1944 [hereinafter referred to as "Rules"]. That the assessee was availing the scheme described under Rule 96ZP(3) of the Rules for the purpose of the payment of duty leviable on the goods. The assessee was required to pay amount equally to one-twelfth of their full and final duty liability for the year, every month by 10th of such month. It appears that assessee failed to discharge its duty liability within the stipulated time under Rule 96ZP(3) and therefore, was liable for penal action u/s 96ZP(3) of the Rules. That a show-cause notice was issued by the adjudicating authority and the assessee was required to show-cause to the Deputy Commissioner, Central Excise, Bhavnagar to show-cause as to why the penalty should not be imposed upon them under Rule 96ZP(3) and Rule 173Q(1) of the Rules for the contravention of Rule 96ZP(3) of the Rules. That the assessee submitted its written reply. That the Deputy Commissioner, Central Excise Division, Bhavnagar passed the Order in Original [OIO] dated 28.07.2004 imposing the penalty of Rs. 6,000/- only. At this stage it is required to be noted that the amount outstanding at the end of the respective month was of Rs. 6,96,418/- and as per proviso (iv) to Rule 96ZP(3) of the Rules, imposition of penalty is mandatory once there is delay in payment of duty and the maximum penalty under the said proviso shall be an amount equal to the duty outstanding at the end of such month and minimum shall be Rs. 5,000/-. However, by observing that considering discretion conferred on the adjudicating authority, by the aforesaid OIO, the Deputy Commissioner imposed the penalty of Rs. 6,000/- only.

At this stage it is required to be noted that there were in all number of show-cause notices came to be adjudicated by the said Deputy Commissioner with respect to the different amount of duty outstanding at the end of the concerned month, by common Order in Original Nos. 207 to 236 of 2004, the Deputy Commissioner imposed the penalty of Rs. 6,000/- only for each of the notices upon the concerned assessee.

1.2 Feeling aggrieved and dissatisfied with the Order in Original passed by the Deputy Commissioner imposing the penalty of Rs. 6,000/-, the assessee preferred appeal before the Appellate Commissioner and the only question which was raised by the assessee before the Appellate Commissioner was that the assessee is not liable for penal action and was not liable to pay the penalty at all. That the Commissioner (Appeals) by common order dated 17.02.2005 dismissed the said appeals holding that the assessee is liable to pay the penalty provided under the erstwhile Rule 96ZP(3) of the Rules and consequently the Commissioner (Appeals) dismissed the appeal preferred by the assessee.

1.3 That thereafter feeling aggrieved and dissatisfied with the order passed by the Deputy Commissioner imposing the penalty of Rs. 6,000/- only, the revenue preferred appeal before the Commissioner (Appeals) for enhancement of the penalty. However, the Commissioner (Appeals) dismissed the said appeal solely on the ground that as against the Order-in-Original passed by the Deputy

Commissioner the appeal preferred by the assessee came to be dismissed by it and the order of penalty came to be confirmed, thereafter the appeal preferred by the revenue against the very order would not be maintainable on the ground of merger.

1.4 Feeling aggrieved and dissatisfied with the order passed by the Commissioner (Appeals) dismissing the said appeal, the revenue preferred appeal before the Customs, Excise and Service Tax Appellate Tribunal [hereinafter referred to as "CESTAT"]. That at the time of hearing of the appeal, there was a difference of opinion between the Members of the Bench. One Member took the view that on the ground of merger the appeal preferred by the revenue would not be maintainable and another Member held that appeal preferred by the revenue would be maintainable therefore, the matter was referred to the Third Member of the Bench who concurred with the view taken by another Member of the Bench that despite the fact that the appeal preferred by the assessee against the penalty is dismissed, the revenue is not debarred from preferring the appeal for enhancement of the penalty and therefore, the appeal at the instance of the revenue in enhancement of the penalty would be maintainable. Consequently, by majority the order passed by the Commissioner (Appeals) came to be set aside and by impugned judgment and order the CESTAT has remanded the matter to the Commissioner (Appeals) for fresh decision after following the principles of natural justice.

1.5 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the CESTAT holding that despite the fact that the appeal preferred by the assessee against the penalty is dismissed by the Commissioner (Appeals), it would not debar the revenue preferring the appeal before the Commissioner (Appeals) for enhancement of the penalty, the assessee has preferred the present Tax Appeal raising the aforesaid substantial question of law.

2. Shri Nainawati, learned advocate appearing on behalf of the appellants - assessee has vehemently submitted that the learned Tribunal has materially erred in holding that despite the fact that Commissioner (Appeals) rejected the assessee''s appeal against the order of penalty imposed by the adjudicating authority and consequently confirming the order of penalty imposed by the adjudicating authority, still the appeal preferred by the revenue against the very order of penalty imposed by the adjudicating authority, but for enhancement of penalty is not barred and would be maintainable. It is vehemently submitted by Shri Nainawati, learned advocate appearing on behalf of the appellants that as the order of penalty imposed by the adjudicating authority came to be confirmed by the Appellate Commissioner while rejecting the assessee''s appeal challenging the penalty imposed by the adjudicating authority, the revenue''s appeal for enhancement of penalty would be barred since the order of adjudicating authority would merge in the order of the Commissioner (Appeals) rejecting the appeal of the assessee.

2.1 It is further submitted by Shri Nainawati, learned advocate appearing on behalf of the assessee that even in an appeal preferred by the assessee before the Appellate Commissioner u/s 35A of the Act, challenging the penalty imposed by the adjudicating authority, it was open for the Appellate Commissioner even to consider the enhancement of the penalty. It is further submitted that even in the present case while rejecting the appeal preferred by the assessee against the penalty imposed by the adjudicating authority, the Appellate Commissioner had specifically observed that the lower adjudicating authority while adjudicating the OIO has already taken the lenient view by imposing nominal penalty and therefore, the OIO does not warrant interference. It is submitted that under the circumstances thereafter it was not open for the revenue to prefer appeal against the OIO before the Appellate Commissioner and in such a situation the only remedy which would be available to the revenue would be either to prefer the appeal against the order passed by the Appellate Commissioner passed in an appeal preferred by the assessee or to take the order passed by the Appellate Commissioner under revision in exercise of powers u/s 35E of the Act. It is submitted, therefore, while passing the impugned order, the Tribunal has not properly appreciated the scope and ambit of section 35A of the Act.

2.2 It is further submitted by Shri Nainawati, learned advocate appearing on behalf of the appellants that the learned Tribunal has materially erred in heavily relying upon the decision of the Bombay High Court in the case of The Commissioner of Central Excise Vs. Godrej and Boyce Mfg. Co. Ltd., . It is submitted that even in the said decision the Bombay High Court has specifically held that "the principle of doctrine of merger must result in a challenge to the entire order becoming final". It is submitted that even otherwise on facts the said decision would not be applicable, as in the case before the Bombay High Court two appeals were filed i.e. one by the assessee and another by the revenue with respect to the different parts of the same order and the appeal preferred by the assessee came to be dismissed on the ground of non-deposit and to that the Bombay High Court held that doctrine of merger would not apply and the other appeal will have to be decided on its own merits. It is submitted that therefore, the learned Tribunal has materially erred in relying upon the decision of the Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra).

2.3 Shri Nainawati, learned advocate appearing on behalf of the appellants has heavily and mainly relied upon the following decisions of the Hon''ble Supreme Court

(i) Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.,

(ii) Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat,

(iii) Somnath Sahu Vs. The State of Orissa and Others,

(iv) Chandi Prasad and Others Vs. Jagdish Prasad and Others,

Relying upon aforesaid decisions it is submitted that once the Appellate Commissioner rejected the appeal preferred by the assessee challenging the penalty imposed by the adjudicating authority and consequently confirming the order of penalty imposed by the adjudicating authority, thereafter the revenue''s appeal for enhancement would be barred on the ground of merger. No other submissions have been made.

Making above submissions and relying upon above decisions, it is requested to answer the aforesaid questions raised, in favour of the assessee and allow the present appeals by quashing and setting aside the impugned judgment and order passed by the learned Tribunal by holding that once the Appellate Commissioner rejects assessee''s appeal against the penalty, the revenue''s appeal for enhancement would be barred on the ground of merger.

3. All these appeals are opposed by Shri Hriday Buch, learned Central Government Standing Counsel appearing on behalf of the revenue.

It is submitted that in the facts and circumstances of the case, the learned Tribunal has not committed any error and/or illegality in holding that the appeals preferred by the revenue for enhancement of penalty would be maintainable before the Appellate Commissioner, despite the fact that the appeal preferred by the assessee against the order of penalty imposed by the adjudicating authority has been dismissed and the appeal for enhancement of penalty by Revenue would not be barred on the ground of merger.

3.1 It is further submitted by Shri Buch, learned counsel appearing on behalf of the revenue that as such the issue before the Appellate Commissioner in the appeal preferred by the assessee was a limited issue and the limited issue raised by the assessee was whether the assessee is liable for penal action on account of delay on their part in discharging their duty liability within time stipulated under erstwhile Rule 96ZP(3) of the Rules under the compounded levy of scheme or not. It is submitted that as such in the appeal preferred by the assessee which came to be dismissed, there was no issue raised with respect to the quantum of appeal. It is submitted therefore as such there was no lis between the parties in appeal preferred by the assessee with respect to the quantum of the penalty. It is submitted that in the appeal preferred by the assessee which came to be dismissed, the Appellate Commissioner considered the aforesaid limited issue only and held that the assessee is liable for penal action. It is submitted that no other question/issue was before the Appellate Commissioner. It is submitted that therefore so far as the issue with respect to the quantum of penalty is concerned, it cannot be said that while dismissing the appeal preferred by the assessee in which the only issue was with respect to the liability of the assessee to pay the penalty, it cannot be said that the issue with respect to the adequacy and/or the quantum of penalty is merged and thereafter it is not open for the revenue to prefer appeal for enhancement of penalty. It is submitted that if the contention on behalf of the assessee is accepted, in that case, any assessee would prefer appeal, get it dismissed without any further adjudication of the appeal on merits and thereafter would contend that thereafter it is not open for the revenue to prefer appeal. It is submitted that unless and until there is a lis between the parties on particular issue and there is a decision by the Appellate Commissioner on merits on a particular issue then and then only the question with respect to merger will arise.

3.2 It is further submitted by Shri Buch, learned counsel appearing on behalf of the revenue that in the present case as such there is no question of taking the order passed by the Commissioner (Appeals) in revision u/s 35E of the Act as contended on behalf of the appellant - assessee as, as such the order passed by the Commissioner (Appeals) holding that the assessee liable to pay penalty is in favour of the revenue.

3.3 It is further submitted by Shri Buch, learned counsel appearing on behalf of the revenue that assuming that the Commissioner (Appeals) has jurisdiction to enhance the penalty suo motu while deciding the appeal u/s 35A of the Act, in that case also, it would not debar the revenue in preferring an independent appeal against the order passed by the adjudicating authority for enhancement of the penalty. It is submitted that as such the learned advocate appearing on behalf of the appellant is not disputing that against the order of adjudicating authority imposing the penalty, the revenue cannot prefer appeal before the Appellate Commissioner for enhancement of the penalty.

3.4 It is further submitted by Shri Buch, learned counsel appearing on behalf of the revenue that as such the Commissioner (Appeals) while dismissing the appeal preferred by the assessee against the order of penalty imposed by the adjudicating authority, did not consider the adequacy and/or quantum of the penalty at all as the said issue was not at all before it. It is submitted that while dismissing the appeal preferred by the assessee dealing with the issue with respect to the liability of the assessee to pay the penalty in breach of Rule 96ZP(3) of the Rules, passing observation is made that the lower adjudicating authority while adjudicating the OIO has already taken a lenient view by imposing nominal penalty. It is submitted that any passing observation without any lis between the parties with respect to quantum of penalty, would not debar the revenue in preferring the appeal against OIO, for enhancement of the penalty. It is submitted therefore no error and/or illegality has been committed by the learned Tribunal while holding that the appeal preferred by the revenue before the Appellate Commissioner for enhancement would be maintainable and is not barred on the ground of merger as alleged.

3.5 It is further submitted by Shri Buch, learned counsel appearing on behalf of the revenue that as such the issue raised in the present appeals is squarely covered by the decision of the Hon''ble Supreme Court in the case of Commissioner of Central Excise, Delhi Vs. Pearl Drinks Ltd., . It is submitted that in the said decision the Hon''ble Supreme Court has considered all the decisions which are relied upon by the learned counsel appearing on behalf of the assessee. It is submitted that in the aforesaid decision the Hon''ble Supreme Court has considered in detail the doctrine of merger in extenso and in detail.

3.6 It is further submitted that the learned Tribunal has rightly relied upon the decision of the Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra). It is further submitted by Shri Buch, learned counsel appearing on behalf of the revenue that on facts the decisions relied upon by the learned counsel for the assessee in the case of Amritlal Bhogilal & Co. (supra); Shankar Ramchandra Abhyankar (supra) and Somnath Sahu (supra) and even in the case of Chandi Prasad (supra) would not be applicable to the facts of the present case. It is submitted that all the aforesaid decisions are distinguishable on facts.

Making above submissions and relying upon above decision of the Hon''ble Supreme Court in the case of Pearl Drinks Ltd. (supra) and the decision of the Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd (supra), it is requested to dismiss all these appeals and answer the question in favour of the revenue.

4. Heard learned advocates appearing on behalf of the respective parties at length. In this group of appeals the question posed for consideration is whether once the Appellate Tribunal rejects the assessee''s challenge to the penalty imposed by the adjudicating authority, revenue can file appeal before the Appellate Commissioner seeking enhancement of the penalty? Whether once the Commissioner rejects assessee''s appeal against penalty, the revenue''s appeal for enhancement would be barred on the ground of merger i.e. on the ground that the order of adjudicating authority would merge in the order of the Appellate Commissioner rejecting appeal of the assessee?

4.1 In the present case as stated hereinabove, against the order passed by the adjudicating authority imposing the penalty u/s 96ZP(3) of the Rules, the assessee preferred appeal before the Commissioner (Appeals). Before the Appellate Commissioner the limited issue raised by the assessee was whether the assessee is liable for penal action on account of delay on their part in discharging their duty liability within the time stipulated under the erstwhile Rule 96ZP(3) of the Central Excise Rules, 1944 under the compounded levy of scheme or not. No other issue was at large before the Appellate Commissioner. The Appellate Commissioner decided the aforesaid issue against the assessee and consequently dismissed the appeal. Therefore, at the relevant time when the Appellate Commissioner decided the appeal preferred by the assessee against the penalty imposed by the adjudicating authority, the Appellate Commissioner had no occasion to consider the quantum of penalty, as the said issue was not raised at all. Thus, at the relevant time, when the Appellate Commissioner decided and dismissed the appeal preferred by the assessee, there was no lis between the parties with respect to quantum of the penalty. In backdrop of the above facts, aforesaid questions raised in the present appeals are required to be considered.

4.2 It is the case on behalf of the assessee that as once the appeal preferred by the assessee against the order of penalty imposed by the adjudicating authority came to be dismissed by the Appellate Commissioner and consequently, the order passed by the adjudicating authority imposing the penalty came to be confirmed by the Appellate Commissioner, thereafter, the appeal preferred by the revenue for enhancement of the penalty would be barred on the ground of merger of the OIO into the order passed by the Appellate Commissioner and the only remedy available would be to take the order passed by the Appellate Commissioner into revision u/s 35E of the Act. The aforesaid has no substance and cannot be accepted. As stated hereinabove, the only issue before the Appellate Commissioner in the appeal preferred by the assessee was whether the assessee was liable for penal action or not i.e. with respect to the liability of the assessee to pay the penalty. The question with respect to quantum of penalty was neither raised by the assessee nor the same was the issue before the Appellate Commissioner. Thus, neither there was any lis between the parties with respect to the quantum of penalty nor the Appellate Commissioner had any occasion to consider the issue with respect to quantum of penalty. Under the circumstances, the revenue cannot be precluded from preferring the appeal before the Appellate Commissioner for enhancement of the penalty. As stated hereinabove, as the issue with respect to quantum of appeal was not at large before the Commissioner (Appeals) and the appeal preferred by the assessee came to be dismissed with respect to another issue raised, by dismissing the appeal preferred by the assessee answering the issue raised in the appeal i.e. with respect to the liability of the assessee to pay the penalty, it cannot be said that with respect to the quantum of penalty also the order passed by the adjudicating authority is merged into the order of Appellate Commissioner. Question of merger would be applicable only when the issue raised subsequently is already answered directly by the higher appellate authority/revisional authority and/or there was a lis between the parties with respect to the said issue which is sought to be raised subsequently.

5. Identical question came to be considered by the Hon''ble Supreme Court in the case of Pearl Drinks Ltd. (supra). In the said decision the Hon''ble Supreme Court has considered the doctrine of merger in detail and in extenso. In the said decision the Hon''ble Supreme Court has also considered its earlier decision in the case of Amritlal Bhogilal & Co. (supra), which has been relied upon by the learned counsel appearing on behalf of the assessee.

In the case before the Hon''ble Supreme Court, the Principal Commissioner of Central Excise, Delhi passed an OIO disallowing deductions under two heads i.e. on account of loss in transit from the said godown to the customers and discount on account of free supply of bottles of aerated water and insofar as the remaining six heads under which deductions were claimed by the Company, the OIO accepted the said Scheme. Aggrieved by the order of the Commissioner, the assessee filed an appeal u/s 35E(1) of the Central Excise Act before the CEGAT who by reasoned order dismissed the same, holding that disallowance deductions under the two heads referred to above were perfectly in order. A further appeal filed by the assessee before the Hon''ble Supreme Court was also dismissed. As regards the admissibility of deductions under the remaining six heads which the adjudicating authority allowed to the company, the Central Board of Excise and

Customs appears to have reviewed the order of the Commissioner Excise u/s 35E(1) of the Central Excise Act and come to the conclusion that the grant of deductions under the said six heads was unjustified. Therefore, the Board directed the Commissioner of Central Excise to approach the CEGAT against the order passed by the adjudicating authority granting deductions under the remaining six heads. That the Commissioner of Central Excise preferred an appeal before the CEGAT u/s 35E(4) of the Act which came to be dismissed by the CEGAT holding that the order under challenge had merged in the earlier order passed by the Tribunal in the assessee''s appeal whereby disallowance of the two of the eight deductions in dispute had been upheld. Feeling aggrieved and dissatisfied with the order passed by the CEGAT dismissing the appeal, the revenue approached the Hon''ble Supreme Court and considering various decisions of the Hon''ble Supreme Court, it is held that as the appeal preferred by the assessee was only against disallowance of the deduction under the two heads and the said appeal being dismissed on merit with respect to the aforesaid two heads only, the subsequent appeal filed by the revenue against the order of adjudicating authority in respect of remaining six heads, is maintainable. It is held that the order of adjudicating authority did not merge with the order-in-appeal preferred by the assessee as there was finality only with regard to the issues adjudicated in appeal. While holding so, in paras 13 to 21, the Hon''ble Supreme Court has observed and held as under:

13. The doctrine of merger has its origin in common law. It has its application not only in the realm of judicial orders but also in the realm of estates. In its application two orders passed by judicial & quasi-judicial courts and authorities it implies that the order passed by a lower authority would lose its finality and efficacy in favour of an order passed by a higher authority before whom correctness of such an order may have been assailed in appeal or revision. The doctrine applies regardless whether the higher court or authority affirms or modifies the order passed by the lower court or authority.

14. The juristic basis of the doctrine has been examined by this Court in a long line of decisions. One of the earliest of the said decisions was rendered in Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., . The Court in that case declared that as a result of the confirmation or affirmation of the decision of the Tribunal by the Appellate Authority, the original decision merges in appellate decision whereupon it is only the appellate decision which subsists and is operative and capable of enforcement.

15. In State of Madras Vs. Madurai Mills Co., Ltd., this Court had another occasion to examine the true scope and purport of the doctrine of merger. The court declared that the doctrine of merger was not a doctrine of rigid and universal application nor could it be said that where there are two orders one by the inferior authority and the other by a superior authority they must necessarily merge irrespective of the subject matter of the appeal or the revision or the scope of the proceedings in which such orders are passed. Subsequent decisions

of this Court in Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, and S.S. Rathore Vs. State of Madhya Pradesh, have reiterated and explained that position.

16. No reference to the pronouncements of this Court on the subject can be complete without a reference to the decision of this Court in Kunhayammed and Others Vs. State of Kerala and Another, and State of Madras Vs. Madurai Mills Co., Ltd., . In Kunhayammed (supra) a three-Judge Bench of this Court reviewed the decisions rendered on the subject and summed up its conclusions in para 44 of this decision. One of the said conclusions apposite to the case at hand is in the following words: (SCC p. 384)

44. To sum up, our conclusions are:

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(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

17. There is in the light of the above pronouncements no gainsaying that the doctrine of merger will depend largely on the nature of the jurisdiction exercised by the superior court and the content or the subject-matter of challenge laid or capable of being laid before it.

18. Applying the above test to the case at hand the doctrine would have no application for the plain and simple reason that the subject-matter of the appeal filed by the assessee against the adjudicating authority''s order-in-original was limited to disallowance of two out of eight deductions claimed by the assessee. The Tribunal was in that appeal concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of the deductions under the remaining six heads obviously because the assessee''s appeal did not question the grant of such deductions. Admissibility of the said deductions could have been raised only by the Revenue who had lost its case qua those deductions before the adjudicating authority.

19. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the Tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads which were not the subject matter of scrutiny

before the Tribunal.

20. That being so, the proceedings instituted by the Commissioner, Central Excise pursuant to the order passed by the Central Board of Excise and Customs brought up a subject-matter which was distinctively different from that which had been examined and determined in the assessee''s appeal no matter against the same order, especially when the decision was not rendered on a principle of law that could foreclose the Revenue''s case.

21. The Tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may be partly in favour and partly against a party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the appellate Court or authority but dismissal on merits or otherwise of any such appeal against a part only of the order will not foreclose the right of the party who is aggrieved of the other part of this order. If the doctrine of merger were to be applied in a pedantic or wooden manner it would lead to anomalous results inasmuch as a party who has lost in part can by getting his appeal dismissed claim that the opposite party who may be aggrieved of another part of the very same order cannot assail its correctness no matter the appeal earlier disposed of by the Court or authority had not examined the correctness of that part of the order.

Considering the aforesaid decision of the Hon''ble Supreme Court, it can be said that the doctrine of merger would come into play in a case where in an earlier appeal, the Appellate Authority has considered the issue on merits and/or there was a lis between the parties with respect to a particular issue. Where an OIO may be partly in favour and partly against the party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the Appellate Court or authority, but dismissal on merits or otherwise of any such appeal against a part only of the order cannot foreclose the right of the party who is aggrieved by the other part of the order.

5.1 Considering the facts of the case on hand and as stated herein above the only issue before the Appellate Commissioner in an appeal preferred by the assessee which came to be dismissed by the Appellate Commissioner was, whether the assessee was liable for penal action under erstwhile Rule 96ZP(3) of the Rules or not. Therefore, neither any other issue was at large before the Appellate Commissioner more particularly with respect to the quantum of penalty nor there was any lis between the parties with respect to quantum of penalty nor in the appeal preferred by the assessee with respect to the aforesaid issue only, the Appellate Commissioner had any occasion to consider the issue with respect to quantum of appeal. Under the circumstances and considering the aforesaid direct decision of the Hon''ble Supreme Court in the case of Pearl Drinks Ltd. (supra), the question posed for consideration in these appeals is required to be held in favour of the revenue and against the assessee by holding that in aforesaid situation, the subsequent appeal and/or the appeal preferred by the

Revenue for enhancement of the penalty cannot be said to be barred on the ground of merger. The revenue cannot be precluded from preferring the appeal for enhancement of penalty on the ground that the appeal preferred by the assessee with respect to altogether another issue i.e. with respect to the liability of the assessee for penal action being dismissed.

5.2 At this stage even the decision of the Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra) which has been relied upon by the Tribunal while passing the impugned judgment and order is required to be referred to. In the case before the Bombay High Court the assessee preferred the appeal before the CESTAT with respect to the penalty under Rule 173Q of the erstwhile Central Excise Rules, 1944 which came to be dismissed by the CESTAT. The revenue preferred the appeal before the CESTAT challenging the very order against which the assessee preferred appeal before the CESTAT but with respect to the different part of the order impugned. The CESTAT dismissed the appeal preferred by the revenue on the ground of merger by holding that original order merged with the Tribunal''s order already passed on assessee''s appeal. The order passed by the CESTAT dismissing the appeal of the revenue came to be challenged before the Bombay High Court and considering the various decisions of the Hon''ble Supreme Court as well as High Courts, it is held by the Bombay High Court that as the appeal by the assessee was restricted to penalty under Rule 173Q of the Central Excise Rules, 1944 while revenue''s appeal challenged different part of the impugned order and the entire order was not subject-matter of the assessee''s appeal, doctrine of merger not applicable and consequently the Bombay High Court set aside the order passed by the CESTAT dismissing the appeal and remanded the matter back to the CESTAT for fresh decision.

5.3 Now, so far as the decision of the Hon''ble Supreme Court in the case of Amritlal Bhogilal & Co. (supra) relied upon by the learned counsel appearing on behalf of the assessee is concerned, at the outset it is required to be noted that the said decision came to be considered by the Hon''ble Supreme Court in the subsequent decision in the case of Pearl Drinks Ltd. (supra). Even otherwise on facts also the said decision would not be applicable to the facts of the present case. In the case before the Hon''ble Supreme Court the question was whether the income tax Officer''s order granting registration of a firm can be challenged by the department during the hearing of the firm''s appeal against the final order of assessment made by the income tax Officer. Under the circumstances, the said decision would not be applicable to the facts of the case on hand.

5.4 Similarly, even the decision of the Hon''ble Supreme Court in the case of Shankar Ramchandra Abhyankar (supra) also would not be applicable to the facts of the case on hand. In the case before the Hon''ble Supreme Court against the very order first a revision application was preferred which came to be dismissed by the learned single Judge and thereafter against the very order which came to be confirmed by the learned single Judge in revision, the writ petition was preferred and to that the Hon''ble Supreme Court held that the subsequent writ petition ought not to have been entertained by the High Court more particularly when the respondent has already chosen a remedy u/s 115 of the Code of Civil Procedure, 1908. In the case before the Hon''ble Supreme Court, it is held that if there are two modes of invoking jurisdiction of the High Court and one of the modes has been chosen and exhausted, it would not be a proper and sound exercise of discretion to grant relief in other set of proceedings in respect of the same order of the subordinate court. Thus, the said decision also would not be applicable to the facts of the case on hand.

5.5 Similarly, another decision of the Hon''ble Supreme Court in the case of Somnath Sahu (supra), which has been relied upon by the learned advocate appearing on behalf of the assessee would not be applicable to the facts of the present case. Learned counsel appearing on behalf of the assessee has sought to rely upon last six lines of the para 6 of the said decision and has sought to submit that as held by the Hon''ble Supreme Court, even if the appellate decision nearly confirms the decision of the Tribunal, the original decision merges in the appellate decision and it is the appellate decision alone which is subsisting and is operative and capable of enforcement. However, it is required to be noted that any observations in the decision are required to be considered in light of the controversy raised. In the case before the Hon''ble Supreme Court, appellant before the Hon''ble Supreme Court preferred an appeal to the State Government against the order of the original respondent No. 4 and the State Government dismissed the appeal. Thereafter, challenging the very order which was confirmed by the State Government and without challenging the order passed by the State Government in appeal, the appellant preferred writ petition before the High Court and to that the Hon''ble Supreme Court has observed that the original decision of the respondent No. 4 no longer subsists as it has merged in the appellate decision of the State Government and unless the appellant is able to establish that the order of the State Government is defective in law, the appellant would not be entitled to the grant of any relief. Thus, on facts the said decision would not be applicable to the facts of the case on hand.

6. Now, so far as the contention on behalf of the assessee that it was open for the CIT(A) to suo motu enhance the amount of penalty while exercising the power u/s 35A of the Act and therefore, when such power is not exercised by the Appellate Commissioner and the appeal preferred by the assessee against the order passed by the adjudicating authority imposing the penalty is dismissed, the appeal preferred by the revenue on enhancement of the penalty would be barred on the ground of merger is concerned, the same cannot be accepted. Merely because such powers are vested with the Appellate Commissioner, the appeal by the revenue for enhancement of the penalty cannot be said to be barred. As stated hereinabove and as it is not disputed by the learned Counsel for the assessee that the appeal by the revenue for enhancement of penalty against the order passed by the adjudicating authority as such and/or even otherwise, would not be maintainable. The issue in the present appeal is whether on dismissing the appeal preferred by the assessee against the order of adjudicating authority

in not specifically dealing with the issue with respect to the quantum of penalty, the appeal by the revenue for enhancement of penalty would be barred on the ground of merger or not.

6.1 Similarly, the contention on behalf of the assessee that in the facts and circumstances of the case when the appeal by the assessee against the order of adjudicating authority imposing the penalty is dismissed, the only remedy available to the revenue would be to exercise powers u/s 35E and to take the order passed by the Appellate Commissioner in revision is concerned, it is required to be noted that as such in an appeal preferred by the assessee before the Appellate Commissioner, the only issue raised was with respect to the liability of the assessee to pay the penalty and not with respect to quantum of penalty and while dismissing the appeal preferred by the assessee, the Appellate Commissioner has held that the assessee is liable to pay the penalty and therefore, as such the said order is in favour of the revenue. Therefore, there is no question taking the said order in revision u/s 35E of the Act.

In view of the above and for the reasons stated above, the questions raised in the present appeals are answered in favour of the revenue and against the assessee and it is held that in the facts and circumstances of the case narrated hereinabove that on dismissal of the appeal preferred by the assessee raising the issue with respect to the liability of the assessee for penal action, the appeal preferred by the revenue for enhancement of the penalty against the order passed by the adjudicating authority would not be barred on the ground of merger and consequently would be maintainable, meaning thereby the revenue cannot be said to be debarred from challenging the order passed by the adjudicating authority with respect to the quantum of penalty which was neither the subject-matter of appeal before the Appellate Commissioner nor there was any lis between the parties in the said appeal preferred by the assessee nor the Appellate Commissioner had any occasion to consider the issue with respect to quantum of appeal. Under the circumstances, no error has been committed by the learned Tribunal in quashing and setting aside the orders passed by the Commissioner (Appeals) dismissing the appeals preferred by the revenue solely on the ground of merger and directing the Appellate Commissioner to decide the appeals of the revenue afresh. Under the circumstances, all the appeals deserve to be dismissed and are, accordingly, dismissed. In the facts and circumstances of the case, no order as to costs.