

(2008) 12 BOM CK 0099

In the Bombay High Court

Case No : Central Excise Appeal No. 175 of 2006

The Commissioner of Central Excise

APPELLANT

Vs

Godrej and Boyce Mfg. Co. Ltd.

RESPONDENT

Date of Decision : 17-12-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 173, 173Q, 178(4), 209A
Central Excises and Salt Act, 1944 — Section 11AB, 11AC, 2, 35, 35A
Constitution of India, 1950 — Article 136
Customs Act, 1962 — Section 127
Customs and Excise Revenue Appellate Tribunal Act, 1986 — Section 3
Income Tax Act, 1961 — Section 143(3), 257, 263, 263(1), 264(4)

Citation : (2009) 111 BOMLR 408 : (2009) 161 ECR 92 : (2009) 233 ELT 446 :
(2010) 18 STR 682 : (2009) 19 STT 492

Hon'ble Judges : J.P. Devadhar, J;F.I. Rebello, J

Bench : Division Bench

Advocate : R.B. Raghuvanshi, Additional Solicitor General, P.S. Jetly, A.M. Sethna, Anamica Malhotra and H.P. Chaturvedi, in Central Excise Appeal No. 175 of 2006 and R.B. Raghuvanshi, Additional Solicitor General, P.S. Jetly, Heena P. Shah and H.P. Chaturvedi, in Central Excise Appeal Nos. 262 and 269 of 2006, for the Appellant; Arshad Hidayatullah, M. Baxi and Ricabchand K., in Central Excise Appeal No. 175 of 2006, Anupam Dighe, Raji Radhakrishnan Nair and Pratik Pawar, instructed by India Law Alliance in Central Excise Appeal No. 262 of 2006 and Prakash Shah and Jitu Motwani, instructed by P.D.S. Legal in Central Excise Appeal No. 269 of 2006, for the Respondent

Final Decision : Allowed

Judgement

F.I. Rebello, J.—Before we frame the question of law for consideration, a few relevant facts in each of the cases need to be set out.

2. Central Excise Appeal No. 175 of 2006 is by the Revenue against the order dated 26th October, 2005 passed by the CESTAT dismissing the Appeal preferred by the Revenue. In this case seven show cause notices were issued by the Department claiming differential duty, penalty and interest u/s 11AB between

2nd November, 1090 to 11th April, 2000. By order of 9th March, 2001 the Deputy Commissioner confirmed the duty and penalty as claimed by the Department. No finding was given on interest as claimed in the show cause notice. The Company preferred an Appeal before the Commissioner (Appeals) against the demand for duty and penalty. That Appeal came to be allowed on 16th July, 2001. The issue of interest was not in issue before the Commissioner (Appeals). An order then came to be passed on 7th August, 2001 in exercise of the powers conferred u/s 35E(2) directing that an appeal be preferred against the non-granting of interest as demanded in the show cause notice by the Deputy Commissioner by his order dated 9th March, 2001. Accordingly, an appeal was preferred by the Revenue before the Commissioner (Appeals) on 23rd August, 2001. By order of 31st December, 2001 the Commissioner passed an order allowing the Departmental Appeal for interest. The Company preferred an Appeal before the CESTAT which appeal is allowed based on the doctrine of merger considering the orders of 9th March, 2001 and 16th July, 2001 and placing reliance on the judgment of the larger Bench of the Tribunal in the case of 2002 (82) ECC 734 .

3. Central Excise Appeal No. 262 of 2006 has been preferred by the Revenue against the order dated 2nd March, 2006 whereby the Tribunal applied the doctrine of merger placing reliance on the judgment in L.M.L. Ltd. (supra) and accordingly dismissed the appeal preferred by the Revenue against the portion of the impugned order in original dated 31st December, 2003 whereby the Commissioner dropped the penalties u/s 11AC and confirmation of interest u/s 11AB. Show cause notice was issued to the Company. The Commissioner by order dated 31st December, 2003 set aside the duty demanded in the SCN with direction that duty for the year 2001 shall be considered by the Assistant Commissioner, but dropped the penalty u/s 11AC and demand for interest u/s 11AB. Penalty was imposed under Rule 173 of the Central Excise Rules. Penalty was also imposed on an employee. In an Appeal preferred by the Company, the appeal was allowed by order dated 11th June, 2004 as the Tribunal found, that the Commissioner had dropped the demand for duty on the ground that the same was raised before finalisation of the provisional assessment and as such there was no justification for imposing penalty upon the appellants. By order dated 2nd November, 2004, an order was passed by C.B.E.C. directing the Commissioner to apply to CESTAT for correct determination of the points as set out in the order.

4. Central Excise Appeal No. 269 of 2006 is preferred by the Revenue against the order of the CESTAT dated 28th October, 2005, where CESTAT held that the doctrine of merger will apply and in the light of that allowed the appeal filed by the company and set aside the order passed in Review dated 20th March, 2003. The learned Tribunal referred to the decision of the larger Bench in L.M.L. Ltd. (supra). Five show cause notices were served on the company. By order dated 29th September, 2000 the Additional Commissioner held that the show cause notice dated 30th April, 1996 was time barred. The additional Commissioner,

however, confirmed the demands in respect of the other show cause notices demanding duty, but did not impose any penalty. The company preferred an appeal. The Commissioner (Appeals) allowed the appeal and remanded the matter to the original authority for verifying the facts and to decide and to conduct an enquiry whether the disputed product "capping cement" is actually marketable and as such excludable by order dated 20th February, 2001. On 24th August, 2001 the Commissioner of Central Excise under powers conferred by Section 35E(2) directed that an appeal be filed against the order in original dated 29th September, 2000 whereby the show cause notice dated 30th April, 1996 had been held to be time barred. Accordingly an appeal was preferred which was allowed by order dated 1st April, 2002. Against that the Company went in Appeal before CESTAT.

5. The question of law as raised in Central Excise Appeal No. 175 of 2006 is as under:

Whether the CESTAT was right in law in applying the doctrine of merger, when the issue involved in the appeal filed by the assessee was whether duty and penalty were rightly imposed whereas in the appeal filed by the Revenue the issue involved was whether interest could be levied u/s 11AB of the Central Excise Act, 1944.

6. In Central Excise Appeal No. 262 of 2006 the question of law as framed is as under:

Whether the Customs, Excise & Service Tax Appellate Tribunal is right in law in holding that the appeal filed by the revenue, pursuant to the Review Order passed by the Central Board of Excise & Customs, on the issues of duty, levy of penalty u/s 11AC and interest u/s 11AB is not maintainable on the principle of merger as it had set aside the Order-in-Original passed by the Commissioner, on appeal filed by the assessee in respect of the issue of levy of penalty under Rules 173Q and 209A.

7. In Central Excise Appeal No. 269 of 2006 the question of law involved is as under:

Whether the CESTAT was right in relying on the judgment in LML Limited by invoking the doctrine of merger when admittedly the matter was at large before the Additional Commissioner pursuant to the order of Commissioner (Appeals) dated 20th February, 2001.

8. The Scheme of the Act may be firstly considered. Against any decision or order in original by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, an Appeal lies u/s 35 to the Commissioner of Appeals. u/s 35B any person aggrieved by any order from authorities as set out therein can prefer an appeal to the Appellate Tribunal. Appellate Tribunal as defined u/s 2(aa) to mean, the Customs, excise and Service Tax Appellate Tribunal constituted u/s 127 of the Customs Act. u/s 35A, the Commissioner (Appeals) at the hearing of

the Appeal allow the Appellant to go into any ground of appeal even if not raised if the Commissioner is satisfied that the omission was not wilful or unreasonable.

Under Section 35B(4) on the respondent receiving a notice that an appeal has been preferred under that Section before the Appellate Tribunal, a party against whom the appeal has been preferred (respondent) may notwithstanding that he may not have appealed against such order or any part thereof can file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal. The relevant provision of Section 35B(4) reads as under:

35B(4). On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in Sub-section (3).

9. Section 35E confers suo mottu power on the Board to examine an order passed by Commissioner of Central Excise as an adjudicating authority and to apply to the Appellate Tribunal or as the case may be the Customs and Excise Revenue Tribunal for determination of such points as may be ordered by the Committees of Chief Commissioner of Central Excise u/s 35E(1) or the Commissioner of Central Excise u/s 35E(2) against order of adjudicating authority subordinate to him to direct filing of appeals for determination of such points as may be specified. . The power conferred on the Board and the Commissioner of Central Excise is u/s 35E and which reads as under:

35E.(1) Powers of Board or Commissioner of Central Excise to pass certain orders.- (1) The Board may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Central Excise as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other commissioner to apply to the Appellate Tribunal or, as the case may be, the Customs and Excise Revenues Appellate Tribunal established u/s 3 of the Customs and Excise Revenues Appellate Tribunal Act, 1986 (62 of 1986) for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Central Excise in its order:

Provided that where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board which, after considering the facts of

the decision or order, if is of opinion that the decision or order passed by the Commissioner of Central Excise is not legal or proper, may, by order direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order, as may be specified in its order.

35E(2).The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise, in his order.

10. From these provisions some distinctions can be noted in respect of the procedure for appeals before the Appellate Forums. In so far as the Commissioner (Appeals) is concerned, there is no provision u/s 35A for filing cross objections from decisions or orders passed by an Officer of Central Excise lower in rank than a Commissioner of Central Excise Officer in an Appeal provided u/s 35. On the other hand if an appeal is preferred u/s 35B(1) on receiving notice of the appeal, a party against whom an appeal has been preferred may notwithstanding that he may not have appealed against such order or any part thereof file within time prescribed cross objections. These cross objections shall be disposed off by the Appellate Tribunal as if it were an appeal.

11. Apart from this jurisdiction u/s 35EA there is a suo motto power of revision conferred on the Board or the Commissioner as the case may be. Similarly Section 35EE confers a power on the Central Government to exercise revisional powers at the instance of an aggrieved party against an order passed u/s 35A. This power of revision can also be exercised on behalf of the Revenue if proceedings are taken u/s 35EE(2).

12. On behalf of the Revenue, learned Counsel, submits that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders one by an inferior authority and the other by superior authority, passed in appeal or revision there is a fusion or merger of the two orders, irrespective of the subject matter of the appellate or revisional order and the scope of the Appeal or Revision contemplated by the particular statute. The application of the doctrine depends on the nature of the Appellate or Revisional jurisdiction in each case and the scope of the statutory provisions conferring the Appellate or Revisional jurisdiction. The Court, therefore, while considering the doctrine of merger will have to consider the issues which were in Appeal before the Appellate or Revisional Authority and also the reliefs sought in Appeal or Revision. The learned Counsel has relied on several judgments.

On the other hand on behalf of the Private Respondents more specifically in

Appeal No. 175 of 2006 the learned Counsel submits that the principle of merger has been accepted by the Supreme Court and this Court and the issue is no longer res integra. Reliance is also placed on several judgments in support of the said contention.

Counsel submits that the orders passed in the appeals preferred the Appellate Tribunal has correctly applied the doctrine of merger and the Appellate Tribunal was within its jurisdiction to dismiss the Appeals.

13. The doctrine of merger is neither a doctrine of Constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on the principles of propriety in the hierarchy of justice delivery system. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum, then though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view. See *Kunhayammed and Others Vs. State of Kerala and Another*, .

14. Revenue has placed reliance on the judgment in *Mauria Udyog Ltd. Vs. Commissioner of Central Excise*, . The ratio of that judgment can now be considered. Pursuant to a show cause notice, the demand was confirmed and penalty was imposed. Interest was also held to be liable. In Appeal before the Commissioner (Appeals) the order of adjudication was maintained but the amount of penalty was reduced. Two Appeals were preferred to CESTAT, one by the Company and the other by the Revenue. Revenue challenged in its appeal the order of Commissioner (Appeals) to the extent of reduction of the penalty amount. In the Appeal preferred by the Company a conditional order of predeposit was made by the Tribunal for entertaining the Appeal. The High Court in the Writ Petition declined to interfere with the order of predeposit, however, extended time to deposit. As the Company failed to deposit the amount the appeal was dismissed. The Company filed an application for restoration which was opposed on behalf of the Revenue. It was submitted that in the meanwhile the Appeal filed by the Revenue against the order of Commissioner (Appeals) had been dismissed by the Tribunal and consequently the impugned order of the Commissioner got merged in the order of the Tribunal and, therefore, the Company's appeal cannot be entertained. The Supreme Court answered the

issue in the following words:

4. It is evident from the facts noticed above that the principle of merger has no applicability. The appeal of the Revenue was restricted to the reduction of the penalty amount by the Commissioner (Appeals). In the appeal of the appellant, the challenge was not only to the penalty but to the entire order including the order of the Commissioner confirming the demand and holding that the freight expenses of the appellant's factory to the buyer's factory are includeable in the assessable value. The restricted question which was the subject matter of the appeal of the Revenue, under these circumstances, cannot result in the dismissal of the appellant's appeal by application of the principle of merger. The said principle on the factual situation herein has no applicability whatsoever. Mr. Raval, the learned Additional Solicitor-General very rightly did not support the order on the ground of the applicability of the principle of merger.

From this judgment, the *ratione decendi*, would be that even if an Appeal preferred by one of the parties against an order of Commissioner (Appeals) before the CESTAT is dismissed, the doctrine of merger would not apply in respect of the appeal preferred by the other party as what has to be considered is the scope of the two appeals, the reliefs claimed and the jurisdiction to grant relief by the Appellate Forum. It may be noted that though the company's Appeal had been dismissed it was on the ground of non-deposit, but an application for restoration was pending. In other words if the two appeals filed are in respect of different parts of the same order merely because an appeal preferred by one of the parties is dismissed on the ground of non-deposit, the doctrine of merger would not apply and the other appeal will have to be decided on its own merits. The Supreme Court in *Smt. S. Kalawati Vs. Durga Prasad and Another*, observed that:

The principle behind the majority of the decisions is thus to the effect that where an appeal is dismissed on the preliminary ground that it was not competent or for non-prosecution or for any other reason the appeal is not entertained, the decision cannot be said to be a decision on appeal nor of affirmance. It is only where the appeal is heard and the judgment delivered thereafter the judgment can be said to be a judgment of affirmance.

This was reiterated in *Chandi Prasad and Others Vs. Jagdish Prasad and Others*, , as under:

When an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply.

The applicability of the doctrine of merger would depend on the scope of the proceedings already disposed of. The ratio of the judgment in *Mauria Udyog Ltd.* (supra) would have to be considered in that context.

15. In that context we may now consider the judgment of the larger Bench of the Tribunal in *L.M.L. Ltd.* (supra) to find out whether it has laid down any new proposition on the doctrine of merger. An Appeal was filed by the Revenue

challenging the order in original dated 27th April, 2000 passed by the Commissioner of Central Excise (Adjudication), New Delhi. By that order the Commissioner had dropped the demand raised under the show cause notice. While dropping the demand the Commissioner had imposed penalty on the assessee under Rule 178(4). The assessee filed an appeal before the Tribunal challenging the imposition of penalty. The Appeal was allowed by the Tribunal by order dated 29th June, 2000, holding that it is settled law that when there is no duty demand there could be no penalty. After this appeal was dismissed the Central Board of & Customs in exercise of its power under Sub-section (1) of Section 35E of the Central Excise Act, 1944 passed an order dated 24th April, 2001 directing the Commissioner to apply to the Tribunal for determination of the question, whether order passed by the Commissioner not confirming to the demand of duty was erroneous in law. Pursuant to that, an Appeal was filed before the Tribunal on 13th July, 2001. When the Appeal came up for hearing the assessee filed Memorandum of cross objections and raised an objection that the appeal against the order of the Commissioner dated 27th April, 2000 is not maintainable since the order had already merged with the order of the Tribunal dated 29th June, 2000 much before the Board of Revenue passed the proceedings u/s 35E(1) on 24th April, 2001. The issue for consideration was whether after the Tribunal had disposed of the Appeal, could the appeal filed on the direction of the Board under Sub-section (1) of Section 35E before the Tribunal be maintainable. The larger Bench after considering the controversy held that the Appeal filed by the Revenue is not maintainable as the order impugned had already merged with the final order passed by the Tribunal dated 29th June, 2000 much before any order was passed by the Board of Revenue u/s 35E(1) and any application filed pursuant thereto before the Tribunal. The SLP preferred was dismissed on the ground of delay.

From the above facts, what follows is that the Tribunal there held that after the Tribunal had disposed of an Appeal though that Appeal was restricted to the relief of penalty under Rule 173Q, the Appeal preferred pursuant to the directions of the Board u/s 35E would not be maintainable, even though it was in respect of a challenge to a different part of the order as in the meantime the appeal preferred by the Company (Assessee) had been disposed of considering the doctrine of merger.

16. The Tribunal in deciding the appeal in L.M.L. (supra) relied upon judgments of the Supreme Court. In Kunhayammed v. State of Kerala 2001 (supra). The issue before the Supreme Court in Kunhayammed (supra) related to application of doctrine of merger in relation to orders passed in petition for special leave under Article 136 of the Constitution. The Tribunal relied on the following three conclusions:

44. To sum up our conclusions are:

(i) Where an appeal or revision is provided against an order passed by a court, Tribunal or any other authority before superior forum and such superior forum

modifies, reverses or affirms the decision in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii)....

(iii) 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.

(iv)....

(v)....

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger, the order may be of reversal, modification or merely affirmation.

The learned Tribunal then noted as has been held in the case of Kunhayammed (supra) that the doctrine of merger will depend upon the nature of the jurisdiction exercised by the superior forum and the content or the subject matter of challenge laid or capable of being laid before that forum. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. It was the very same principle that was applied by the Supreme Court in State of T.N. Vs. Tvl. Jeevanlal Ltd., . The Supreme Court there affirmed the view taken by the High Court that where the appeal had been preferred only in respect of part of the order by which the Appellant was aggrieved, Revenue could invoke the revisional jurisdiction to consider the legality of the other part of the order which was not in issue before the Tribunal. The Supreme Court considering the relevant provisions held that no exception could be taken to the view expressed by the High Court. The issue discussed there was in the context to whether two authorities could exercise jurisdiction in respect of the very same order. The Supreme Court held that where the challenge in appeal was distinct from what was being considered by the revisional authority, the exercise of revisional power by the revisional authority even if an appeal had been filed could not be faulted. The learned Tribunal also referred to the judgment of the Supreme Court in State of Madras Vs. Madurai Mills Co., Ltd., where the Supreme Court held that there will be no merger when the challenge is only against part of the order.

17. From a consideration of the judgment of the Special Bench what emerges is that if an appeal had been preferred before the Appellate Tribunal against part of the order and that appeal had been dismissed, it was not open to the Commissioner or the Board to exercise their revisional powers to direct filing of an appeal if Revenue could have filed cross objections against that part of the order from which no appeal had been preferred.

The matter was taken to the Supreme Court. The Special Leave Petitions was dismissed on the ground of delay. The subsequent observations considering the principles of *ratio decendi*, cannot be said to be laying down any law. They appear to be observations on the findings recorded by the Special Bench. The settled law is, dismissal of a SLP does not result in the Supreme Court affirming the order on merits. See *V.M. Salgacar Bros Pvt. Ltd. v. Commissioner of Income Tax 2000 (1) Scale 240*, which has been affirmed in *Kunhayammed (supra)*.

18. The expression "to merge" means to sink or disappear in something else, to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; and absorption or swallowing up so as to involve a loss of identity and individuality. See *Corpus Juris Secundum*, Vol. LVII, pp.1067-1068.

19. Appellants apart from relying on the judgment in *Mauria Udyog Ltd. (supra)* have also relied on the judgment in *COMMISSIONER OF Income Tax Vs. SHRI ARBUDA MILLS LTD., .* The I.T.O. on completing the assessment proceedings made while computing the loss of income and accepted three claims. An appeal was preferred by the assessee before the Commissioner (Appeals). The Commissioner of Income Tax exercised his power u/s 263 of the Act. The contention by the assessee before the Tribunal was that the three items in respect of which assessee had no occasion to prefer an appeal had merged in the order of the Commissioner (Appeals). The matter was referred by the Appellate Tribunal u/s 257 of the Income Tax Act, 1961 to the Supreme Court on the question whether or not the order of the Income Tax Officer regarding the three items had merged in that of the Commissioner (Appeals). The Supreme Court considered the explanation to Section 263(1) which was substituted by the Finance Act, 1988, with effect from June 1, 1988, which was again amended by the Finance Act, 1989, with retrospective effect from June 1, 1988. The effect of the amendment was that, where any order referred to in the Sub-section and passed by the Assessing Officer had been the subject matter of any appeal (filed on or before or after the 1st day of June, 1988), the powers of the Commissioner under Sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal. Considering this the learned Supreme Court observed that:

The consequence of the amendment made with retrospective effect is that the powers u/s 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an

appeal. Accordingly, in respect of the aforesaid three items, the powers of the Commissioner u/s 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee. Therefore, the order of assessment passed by the Income Tax Officer on march 31, 1978, had not merged with that of the Commissioner (Appeals), dated December 15, 1979, in respect of the three items in dispute so as to exclude the jurisdiction of the Commissioner of Income Tax u/s 263.

20. We may now refer to some of the judgments relied upon on behalf of the Respondents. A Full Bench of the Punjab and Haryana High Court in Punjab State Civil Supplies Corporation Ltd. v. Commissioner of Income Tax 2000 ITR 536 was considering the issue of merger. The Full Bench firstly relied upon the Supreme Court judgment in State of Madras v. Madurai Mills Co. Ltd. (1967) 19 STC 144 where the supreme observed as under:

The doctrine of merger is not a doctrine of rigid and universal application, and it cannot be said that wherever there are two orders, one by an inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute.

The Full Bench which considering the issue under the provisions of the Income Tax Act, was pleased to hold that once an appeal against an order of the Income Tax Officer u/s 143(3) of the Act has been heard and decided by the Appellate Assistant Commissioner, the Commissioner u/s 263 has no jurisdiction with regard to the issues considered and decided in appeal. In other words the jurisdiction would be restricted only to that part of the order of assessment that was not the subject matter of the appeal. From this judgment what will appear is that the doctrine of merger would apply to the extent of the issues considered and decided in Appeal.

21. In Commissioner of Income Tax, Bombay North Vs. Tejaji Farasram, , a learned Division Bench considering the provisions of the I.T. Act held that:

It is well established principle of law that when an appeal is provided from a decision of a Tribunal and the appeal Court after hearing the appeal passes an order, the order of the original Court ceases to exist and is merged in the order of the appeal Court, and although the appeal Court may merely confirm the order of the trial Court, the order that stands and is operative is not the order of the trial Court but the order of the appeal Court.

22. In Commissioner of Income Tax Vs. P. Muncherji and Company, the learned Division Bench referred to the following observations in Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., :

As a result of the confirmation or affirmance of the decision of the tribunal by the

appellate authority, the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement;...

The learned Division Bench then held that the judgment in *C.I.T. v. Tajaji Farasram Kharawala* (supra) continues to hold the field.

23. In *J.K. Synthetics Ltd. Vs. Additional Commissioner of Income Tax and Another*, the learned Bench there observed that on a finding given by the I.T.O. if such finding could have been canvassed before the Appellate Assistant Commissioner in the appeal filed by the assessee on other points, if the department chose to do so. In view of the scope and nature of the appellate power, the entire subject-matter of the assessment order was within the jurisdiction of the Appellate Assistant Commissioner. That being so, the entire assessment order merged in the appellate order, irrespective of the points urged by the parties or decided by the appellate authorities.

24. *Sheodan Singh Vs. Smt. Daryao Kunwar*, is really not an authority on the doctrine of merger, but on the principles of *res judicata*.

25. We may next refer to the Judgment of the Full Bench of the Karnataka High Court in *Commissioner of Income Tax, Karnataka-I Vs. Hindustan Aeronautics Ltd.*, . The assessee there filed an appeal against part of the order of A.A.C. by which the assessee was aggrieved, however, withdrew the appeal and filed Revision before the Commissioner. The Department preferred an appeal to Tribunal against that part of the order of A.A.C. by which relief was given to the assessee. That appeal came to be disposed of. The question was whether the Commissioner could exercise revisional jurisdiction. The learned Full Bench held that the Appellate Assistant Commissioner can look into and adjudicate upon the findings recorded by the Income Tax Officer which may expressly be the subject matter of an appeal but also upon a matter which has been considered and determined by the Income Tax Officer in the course of the assessment. In other words, the entire subject matter of the assessment would be within the jurisdiction of the Appellate Assistant Commissioner and the revisional authority would not entertain the revision considering the express bar u/s 264(4) of the I.T. Act.

26. In *Khandelwal Ferro Alloys Ltd. v. State of Maharashtra* 1991 80 STC 42 a learned Division Bench considered the doctrine of merger and held that it depends on the subject matter of decision and scope of appellate jurisdiction.

27. Reference was made to the judgment of this Court in *Commissioner of Income Tax Vs. Smt. A.S. Narendrakumari Basaheba*, . The learned Division Bench there had held that the order of the Income Tax Officer merges with the order of the Appellate Assistant Commissioner on all points irrespective of which an Appeal could have been filed before him or in respect of which the Appellate Assistant Commissioner could have modified the order. The Commissioner of Income Tax cannot, therefore, revise the order of the Income Tax Officer.

28. In COMMISSIONER OF Income Tax Vs. INTERNATIONAL COMPUTERS INDIAN MANUFACTURE LTD., the learned Division Bench held that the Tribunal was right in law in holding that the passing of an order by the Commissioner of Income Tax (Appeals) resulted in the merger of the order of Commissioner (Appeals) thereby ousting the jurisdiction of the Commissioner of Income Tax from exercising his powers u/s 263 of the Income Tax Act, 1961 in respect of the order appealed against.

29. We have also considered the judgment in State of Kerala and Anr. v. Kondotty Paramban Moosa and Ors. 2008 AIR SCW 5677. The case law on the doctrine of merger was considered including the ratio of the judgment in Kunhayammed when the principles laid down in Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, were approved. The ratio of the judgment in Kunhayammed (supra) is in applying the doctrine of merger, what the Court must consider is the nature of the jurisdiction exercised by the superior forum and the contract or subject matter of challenge laid or which could have been laid. In that case the earlier revision petition was not rejected on merits but only on the ground of delay and as such could not be said to be an order of affirmance and as such the doctrine of merger would not apply.

30. Section 35B(4) enables the respondents to file cross objections against that part of the order from which no appeal has been preferred. Can the Tribunal in the absence of cross objections have jurisdiction to confirm, modify or reverse that part of the order from which no appeal has been preferred? The language of the Section makes it clear that on filing of cross objections against any part of the order, the cross objections be treated as an Appeal against that part of the order only. The Respondent may file cross objection and not "shall". It is, therefore, the choice of the Appellants. u/s 35C, the Appellate Tribunal has powers to confirm, modify or annul the decree or order appealed against. In other words the jurisdiction is limited to examine the legality of that part of the order in respect of which the Appeal or cross objection have been preferred. Thus it cannot exercise jurisdiction in respect of that part of the order in respect of which no appeal has been preferred. Under these circumstances will the doctrine of merger apply in respect of an appeal preferred only against part of the order.

31. Section 35E is an independent power conferred on the Board or Commissioner, as the case may be, to direct filing of an Appeal in respect of the entire order or part of the order where the appeal has not been preferred. Considering the nature of jurisdiction exercised by the Tribunal u/s 35B if the appeal filed before the Tribunal is dismissed, is the Board precluded from directing filing an appeal or if an appeal is filed the same be dismissed on the ground of merger. For the principle of merger to apply the order must result in the challenge to the entire order becoming final. As observed by Supreme Court in State of Madras Vs. Madurai Mills Co., Ltd., there can be no fusion or merger of two orders irrespective of the subject matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute.

Thus merely because u/s 35B(4) the respondent on notice may file cross objections, if cross objection is not filed cannot result in holding that the doctrine of merger would apply and the appeal preferred against the directions of the CBDT has to be dismissed on the principle of merger. The law as settled and explained by the Supreme Court in the various judgments referred to would not support such proposition. The Appellate Tribunal in the absence of that part of the order not being challenged, cannot examine the legality or otherwise considering the statutory power conferred on the Tribunal u/s 35C.

32. Even if Revenue is respondent in the proceedings before the Tribunal, that would not exclude the jurisdiction u/s 35E merely because Revenue could have filed cross objections. Section 35C(4) enables a Respondent to prefer cross objection. The Section does not prohibit a Respondent if it has not filed cross objection from preferring an appeal. The scheme of the Section does not expressly or impliedly bar filing of an Appeal. The power u/s 35B is to the person aggrieved to prefer an appeal. The power u/s 35E is conferred on the Board on its own motion to call for and examine the record and proceedings. If it forms an opinion that the appeal has to be preferred then it can direct filing of such an appeal. Clearly considering the provisions of the Central Excise Act, 1944 in terms of what we have discussed, the doctrine of merger would not apply in the absence of the entire order being the subject matter of the Appeal and the Appeal being heard and finally decided on merits.

33. It may be further clarified that in so far as an appeal filed u/s 35, the procedure is governed by Section 35A. There is no provision for filing cross objections against the order in original. The doctrine of merger in such case would not apply. The final order considering the "principle or doctrine of merger" must result in a challenge to the entire order becoming final.

34. The applicability of the doctrine thus depends on the nature of the Appellate or revisional jurisdiction. The scope of the statutory provisions conferring the appellate or revisional jurisdiction must be first considered. As rightly argued by the Appellants the doctrine of merger is not a doctrine of rigid and universal application. Merely because there are two orders, one by the inferior authority and the other by a superior authority passed in an appeal or revision, it cannot be said that there is a merger of the two orders irrespective of the subject matter of the appellate or revisional order and this scope of the appeal or revision contemplated by the particular statute. A Court or Tribunal while applying the doctrine must consider the nature of the order and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

35. The following principles will have to be considered while applying the doctrine of merger in the context of the provisions of "The Central Excise Act, 1944".

1. In the proceedings from which the matter arises, the Court or Tribunal hearing the appeal or revision, should have jurisdiction to decide all issues arising from the said order of the inferior Court or Tribunal from whose order the proceedings

arise.

2. The Appeal should not have been dismissed on the ground of limitation or failure to deposit as ordered. The Appeal should have been heard and decided on merits on the issues raised and or could have been raised including by the Respondent. In such an event the doctrine of merger would apply.

3. If the proceedings are pending before the same Appellate Tribunal the power u/s 35E can still be exercised by the Competent Authority. The doctrine of merger will not apply even if one of the Appeals is dismissed, provided the other appeal is pending.

4. Even if the Appeal preferred u/s 35B has been disposed off, an appeal can still be preferred pursuant to direction issued u/s 35E, if in the appeal disposed off, the entire order was not the subject matter of the Appeal.

36. In the light of the above the question raised in each of the Appeals can be disposed off as under:

(i) In Central Excise Appeal No. 175 of 2006 the Revenue had no occasion to raise the issue against the order impugned before the Commissioner (Appeals) in respect of that part of the order which they were aggrieved. There is also no provision for filing cross objections. Disposal of the Appeal, therefore, by the Commissioner (Appeals) would not preclude the Commissioner from directing that an Appeal be filed on points not in issue in the Appeal filed by company and in respect of that part of the order by which revenue was aggrieved. Accordingly, the question of law raised in the Appeal will have to be answered in the negative and in favour of the Appellants. The impugned order is set aside and the matter is remanded to the Appellate Tribunal for redetermination of the questions on merits according to law.

(ii) In so far as Central Excise Appeal No. 262 of 2006 is concerned, the appeal had been preferred by the Company only in respect of that part of the order by which they were aggrieved. The entire order there was not the subject matter of Appeal. In these circumstances the doctrine of merger would not apply. In the light of that the question of law will have to be answered in the negative and in favour of the Revenue. Order is accordingly set aside and the matter is remanded to the Tribunal for deciding the appeal on merits.

(iii) In so far as Central Excise Appeal No. 269 of 2006 is concerned, the Company preferred an Appeal before the Commissioner (Appeals) which was remanded to the original Authority. An Appeal thereafter was preferred before the Commissioner (Appeals) pursuant to the directions issued u/s 35E(2) against that part of the order which was not an Appeal before Commissioner (Appeals). In the light of that the doctrine of merger would not apply. The question of law is answered in the negative and in favour of Revenue. The Appeal is allowed and consequently the order of CESTAT is set aside and the matter is remanded back to CESTAT for deciding the appeal on merits.

(iv) All the Appeals stand disposed off accordingly.