
(2008) 11 RAJ CK 0034
In the Rajasthan High Court

Union of India (UOI)

APPELLANT

Vs

Inani Carriers

RESPONDENT

Date of Decision : 21-11-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35
Constitution of India, 1950 — Article 136
Finance Act, 1994 — Section 76, 84
Income Tax Act, 1961 — Section 147, 263, 84

Citation : (2009) 222 CTR 264 : (2009) 1 RLW 772 : (2009) 13 STR 230 :
(2009) 22 VST 44

Hon'ble Judges : N.P. Gupta, J;Kishan Swaroop Chaudhari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.P. Gupta, J.—This appeal has been filed by the Revenue, against the judgment of the Tribunal dated 27-6-2006, accepting the appeal of the assessee, against the Order in review dt. 7-10-2005.

2. The appeal was admitted vide order dt. 25-1-2007, by framing following substantial question of law:

Whether in the facts and circumstances the Commissioner of Central Excise could exercise his power of revision u/s 84 of the Finance Act, 1994 to the extent the order of Adjudicating Authority was found to be erroneous by him and about which no appeal lay at the instance of Revenue notwithstanding that to the extent the assessee was aggrieved, he had preferred the appeal and the order in appeal has been passed.

3. The necessary facts are, that the, assessee was issued show, cause notice for short/delayed payment of service tax for the quarter ending September, December, 2000, March, June, September and December, 2001 and quarter ending March, 2002. The necessary adjudication was made vide order-in-original dt. 16-10-2003, whereby the demand of service tax was confirmed, and penalty

u/s 76 was imposed. Aggrieved by the said order the assessee preferred appeal before the Commissioner (Appeals), who vide order in appeal dt. 13-10-2004, upheld the order-in-original. Accordingly the assessee discharged the liability, and deposited the amount of penalty.

4. The Commissioner of Central Excise, thereafter, in purported exercise of powers vested in him u/s 84 issued show cause notice to the assessee on 12-8-2005, informing that he would like to review the imposition of penalty. The notice was opposed, on the sole ground, that the order-in-original has already merged with the order dt. 13-10-2004, hence on the date of issuance of show cause notice there was no order-in-original, which could be reviewed by the Commissioner. This contention was negatived, and the Commissioner enhanced the penalty.

5. Aggrieved of that order dt. 7-10-2005 the assessee carried the matter to the Tribunal, and the learned Tribunal vide order dt. 27-6-2006 found, that the Commissioner had issued show cause notice to the appellant on 12-8-2005, informing his intention to review the, order-in-original dt. 16-10-2003. It is clear on record that the said notice was issued after the order-in-appeal was passed, which was passed on 13-10-2004. Thus, the show cause notice dt. 12-8-2005, is not in accordance with law, as settled by the Division Bench of the Tribunal in identical case, being CCE, Madurai v. Chellapandi Match Works reported in 2006 (197) E.L.T. 272, wherein it had been held, that long before the Collector reviewed the Assistant Collector's order-in-original, the Assistant Collector's order had merged with the order in appeal dt. 4-11-1993. The review order was passed on 24-1-1994, and that, on account of the merger there was no order of the Assistant Collector to be reviewed on 24-1-1994, and consequently the review was held to be not maintainable. Accordingly it was found, that the order-in-appeal was passed on 13-10-2004, and the copy was marked to the Commissioner, Central Excise. The reviewing authority could have preferred an appeal against the order-in-appeal, instead of resorting to review an order, which was non est on the date of issuance of show cause notice. Accordingly, the appeal was allowed and the order of the Commissioner was set aside, with consequential reliefs.

6. Thus, the factual aspect of the matter is not in dispute, and the precise question is, as to whether after decision of the appeal against the order of the Assistant Collector, the Commissioner could exercise power of review against the order of the Assistant Collector, in view of the merger of the order.

7. Arguing the appeal it was contended by the learned Counsel for the Revenue, that the power was exercised u/s 84, and a look at Sub-section (4) thereof shows, that according to that provision, no order u/s 84 can be passed by the Commissioner in respect of any issue, if an appeal against such issue is pending before the Commissioner of Central Excise (Appeals), and by reading this provision he means to convey, that the merger shall be only with respect to issue which is raised in the appeal, and regarding other aspects the power u/s 84 can

very well be exercised, as in that regard there is no merger. Then, learned Counsel for the Revenue read to us the judgment of the Hon''ble Supreme Court in Kunhayammed and Others Vs. State of Kerala and Another, where the Hon''ble Supreme Court has considered the aspect of merger, as to when it would be attracted, and when it will not be attracted, and after discussing the matter threadbare, and considering various previous judgments, in para-44 had drawn conclusions, which we may gainfully quote. Since conclusions No. (iv), (v), and (vi) are not relevant for the present purpose, only conclusions No. (i), (ii), (iii) and (vii) are being quoted, which read as under:

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 put 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) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted, and the SLP is converted into an appeal.

(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.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted, into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by Sub-rule (1) of Rule 1 of Order 47 CPC.

8. The strongest reliance was placed on conclusion No. (iii), that 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. Then, learned Counsel also read to us the judgment in Mauria Udyog Ltd. Vs. Commissioner of Central Excise, , wherein the Hon''ble Supreme Court did consider the doctrine of merger. In that case the facts were, that there were cross appeals; one by the

assessee, and the other by the Revenue. The assessee challenged the entire order, and the Revenue challenged only reduction of penalty. The assessee's appeal was ordered to be struck off the register for non-compliance of the Tribunal's pre-deposit order. Then, later on the Revenue's appeal was also dismissed. Thereafter the assessee filed an application for restoration, and submission was made, that after dismissal of the Revenue's appeal, the assessee's appeal was not maintainable, as consequent upon dismissal of the Revenue's appeal the impugned order of Commissioner got merged. This submission was negated, by holding that the Revenue's appeal was restricted to the reduction of the penalty amount by the Commissioner, whereas the assessee's appeal challenged the entire order of the Commissioner. Learned Counsel then relied upon a judgment of Calcutta High Court in Hindustan Aluminium Corporation Ltd. Vs. Commissioner of Income Tax (Central) and Others, , wherein the Division Bench of the Calcutta High Court held, 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 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. It was also held, that the scheme of the Income Tax Act has also to be seen, and if the doctrine of merger is rigorously applied, then the Income Tax Officer will not be able to reopen a case u/s 147 of the Income Tax Act, 1961 after the assessment order has been affirmed or modified by the appellate authority, and that the power of reopening an assessment will have to be confined only to such orders against which no appeals is preferred.

9. On the other hand, learned Counsel for the assessee referred to a judgment of the Hon'ble Supreme Court in COMMISSIONER OF Income Tax Vs. SHRI ARBUDA MILLS LTD., In that case the Hon'ble Supreme Court, considering the fact of amendment made in Section 263, with retrospective effect, extending the powers of the Commissioner, and to have always been deemed to have been extended, to matters not considered and decided in appeal filed by assessee, and on that language it was held, that in respect of the three items which were decided by, the assessing officer in favour of the assessee, which was not required to be, and could not be challenged by the assessee in appeal, the assessment order did not merge with the appellate order, so as to exclude jurisdiction of the Commissioner. Learned Counsel also relied upon the judgment in Commissioner of Income Tax, Kohlapur Vs. Jaykumar B. Patil, but then that judgment is not of much relevance, as the question therein only was, as to whether the CIT has power to initiate revision proceedings in respect of such issue which had not been dealt with in appeal, requires a reference to be made, or not, and by that judgment the Hon'ble Supreme Court proceeded to treat the petition as reference to itself, and decided the issue, relying upon Shri Arbuda Mills Ltd.'s case. Learned Counsel for the assessee also relied upon the judgment

of the Tribunal in CCE v. Chellapandi Match Works" case which was relied upon by the learned Tribunal, and also relied upon yet another judgment of the Tribunal, in 2002 (84) ECC 187 wherein it was held, that in appeal the final order had already been passed by the Tribunal prior to the order passed in review by the Commissioner, and in view of the earlier order having already merged in the final order of the Tribunal, the appeal filed by the Revenue was held to be not maintainable. Learned Counsel then relied upon Larger Bench judgment of the Tribunal, Delhi in 2002 (82) ECC 734 wherein again the assessee filed appeal before the Tribunal against the order of the Commissioner imposing penalty while not confirming the demand of duty, which appeal was allowed, holding that when there is no duty demand, there could be no penalty. However, the Revenue pursuant to order in review passed, by the Commissioner, in exercise of its power u/s 35(2) of the Central Excise Act, 1944 filed appeal, before the Tribunal, against the same order, and much after the decision of the Tribunal, the Board itself sought to review on the appeal filed by the assessee, and in those facts it was held, that the order impugned has already been merged with final order passed by the Tribunal, much before any order was passed by the Board of Revenue. It was also held, that even if the appeal filed by assessee challenges a portion of the impugned order, the doctrine of merger will apply. This is the whole case law cited before us.

10. Arguing the appeal it was contended by the learned Counsel for the Revenue, that the assessee had filed appeal only against the levy of excise duty, and of course he had challenged consequential levy imposition of penalty, but then the quantum of penalty was not in issue before the appellate authority, and therefore, on the question of quantum of penalty, there cannot be any merger, and therefore, powers u/s 84 were very much available, so far as the question of quantum of penalty is concerned. While according to the learned Counsel for the assessee, the assessee had of course challenged the levy of excise duty, but at the same time it also challenged the imposition of penalty as well, which included obviously the challenge to quantum as well, and when the penalty also was challenged, and the order-in-original was affirmed in appeal, the order-in-original merged with the order-in-appeal whole hog, with the result, that learned Commissioner did not retrain any power to review the order-in-original, as it ceased to exist by doctrine of merger.

11. In our view, even on the principles of Kunhayammed"s case, the conclusion No. (iii) covers the controversy at the nearest, inasmuch as it does lay down, that the doctrine of merger is not a doctrine of universal or unlimited application, and it will depend on the nature of jurisdiction exercised by the superior forum. But then, it also holds, that it will also depend on the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger, and that, the superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. In our view, the penalty whole hog was a subject matter of challenge before the Commissioner (Appeals), and was also capable of being challenged before the Commissioner

(Appeals). Likewise, the Commissioner (Appeals) had jurisdiction to, and was capable of reversing, modifying, or affirming the order of penalty also, which was in issue before it. It may be noticed here, that the order-in-original imposed a penalty lesser than the one which according to the Department was required to be imposed, and the penalty as imposed was challenged. It is well nigh possible, that in appeal the commissioner (Appeals) could have set aside the order altogether, or could have reduced it as well, while maintaining imposition of penalty, may be rightly, or wrongly. Therefore, on the parameters laid down in conclusion No. (iii), by Hon"ble the Supreme Court, the superior jurisdiction was capable of reversing, modifying, or affirming the order which was in issue before it, and in the present case the learned Commissioner (Appeals) declined to modify, and simply affirmed.

12. We are not inclined to subscribe to the view as propounded before us, that since this was not precisely prayed in the appeal, even by way of alternative prayer, that the penalty be further reduced there could be no merger. This would be too far fetched a proposition to be accepted by us. The judgments in CCE, Madurai v. Chellapandi Match Works reported in 2006 (197) E.L.T. 272 , 2002 (84) ECC 187 and 2002 (82) ECC 734 in our view, do clearly cover the controversy appropriately, and in favour of the assessee.

13. At this place we may gainfully read the judgment in Hindustan

Aluminium"s case, and that in Arbuda Mills" case, in juxtaposition with each other. In Hindustan Aluminium"s case the High Court had gone to the extent of holding, that if the doctrine of merger is accepted powers u/s 147 would not be capable of being ever invoked, where assessment order has been appealed against. In our view, with all respect to the learned Members of the Bench, the judgment clearly proceeds on misreading of Section 147 of the Income Tax Act, if it does not proceed on non-reading thereof, as the power u/s 147 does not relate to reopening of the assessment order, but is applicable where income has escaped assessment, and so on. As against this, in Arbuda Mills" case view was taken by the Hon"ble Supreme Court, on the basis of amendment, expressly made in Section 263, whereby statutory powers of review were extended, in limited category of cases, where the assessment order has been appealed against. In our view, the analogy in Arbuda Mills" case, is, that in absence of identical provision under the Act, the power of review, or revision cannot be exercised, if the order-in-original has been subject matter of appeal, and that appeal having been decided, on the doctrine of merger.

14. Thus, in our view, the question as framed is required to be, and is, answered against the Revenue, and in favour of the assessee.

The appeal thus has no force, and is dismissed.