

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29/6/2018
Pronounced on : 26/10/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.No.986 of 2018

The Commissioner of Customs (Air)
Meenambakkam
Chennai 600 027. ...Appellant/Respondent

Vs

Hindustan Petroleum Corporation Ltd
Visakapattinam ...Respondent/Appellant

Civil Miscellaneous Appeal filed under Section 130 of Customs Act 1962 against the final order No.41693 of 2016 ordered against dated 30.09.2016 of the CESTAT, Chennai

For Appellant : Mr.V.Sundareswaran

For Respondent : Mr.Akhil Suresh

J U D G M E N T

(Judgment of the Court was delivered by SUBRAMONIUM PRASAD,J)

The instant appeal is directed against the order dated 30.09.2016 of the CESTAT, Chennai, in final order No.41693 of 2016.

2. The Respondent M/s.Hindustan Petroleum Corporation Limited imports systems hardwares and software vide Bill of Entry No.216574, on 02/05/2000. The goods so imported were assessed at Rs.1,24,21,701/-. It is pertinent to mention that, it is stated by the respondent that the amount was paid under protest vide, letter No. VSPL:RLN:VVVP-01. Copy of the letter is not on record.

3. Admittedly, no appeal was filed challenging the said assessment. Contending that Excise duty has been wrongly paid under Bill of Entry No.216574, stating that there was mis classification of goods, a refund claim for Rs.84,11,937/-, was presented on 06.11.2000. On 30.12.2000, the Assistant Commissioner of Customs, rejected the refund application.

4. An appeal was taken to the Commissioner (Appeals). The Commissioner (Appeals), vide, order, dated 27.09.2001, rejected the appeal. The Commissioner (Appeals) took the view that, since the order of assessment had attained finality, refund application on the ground that the amount was paid wrongly due to misclassification of goods could not have been entertained. The Commissioner (Appeals) relied on the judgement of the Hon'ble Supreme Court of India in the case of Commissioner of Central Excise, Kanpur Vs Flock India Pvt. Ltd [2000 (120) ELT 285(SC)]. The order of the Commissioner (Appeals) was further challenged before the Customs, Excise and Gold (Control) Appellate Tribunal, South Zone. The Tribunal by its order, dated 24.04.2003, held that, when a refund claim is filed by the assessee by not accepting the classification and the rate of duty, etc., mentioned in the Bill of Entry, such refund claim is entertainable because the assessment also gets challenged by filing such refund claim. The Tribunal therefore, remanded the matter to the Adjudicating Authority for processing the refund claim.

5. The original authority once again looked into the matter and by an order dated 29.10.2003 relied on judgement of the Hon'ble Supreme Court of India in Flock India Pvt. Ltd [2000 (120) ELT 285(SC)] cited (Supra), to hold that, once the assessment has not challenged, it could not be challenged in a refund application. The order was once again taken up for appeal to the Commissioner Customs (Appeal), who by an order dated 31.03.2004 set aside the order dated 29.10.2003 with a direction to process the refund claim on merit. The Appellate Authority, relied on the judgment of the Hon'ble Supreme Court in Karnataka Power Corporation reported in 143 ELT 482. This order was not further challenged.

6. When the matter stood thus the order, dated 24/04/2003, passed by the CEGAT in final order No.291/2003, was challenged by the Revenue, by filing Referred Petition No.02/2012, in the High Court of Madras. The same was dismissed by the order dated 04.07.2013 on the ground that no question of law arose for consideration. The revenue thereafter, filed a Special Leave Petition before the Hon'ble Supreme Court of India against the order dated 04.07.2013, passed by this Court. The Special Leave Petition was withdrawn by the appellant on 7/2/2014 with liberty to file a review against the order dated 04.07.2013. The order of the Hon'ble Supreme Court reads as under:-

"Learned A.S.G appearing for the petitioner-revenue, on instructions, seeks permission of this Court to withdraw the Special Leave Petition with liberty to file an appropriate Review Petition before the High Court.

Permission sought for is granted.

The Special Leave Petition is disposed of as withdrawn.

If, for any reason, the petitioner does not succeed before the High Court, he is at liberty to question the main order as well as on the review order.

Ordered accordingly."

7. Review Petition No.167 of 2012 was filed in view of the liberty obtained from the Hon'ble Supreme Court.

8. For the third time, the adjudicating authority by an order, dated 21.12.2005, rejected the refund application, which was upheld by the appellate authority by order, dated 18/7/2006. The further appeal by the respondent before the CESTAT stands allowed by the impugned order dated 10.10.2016. The CESTAT has passed a very short order as under:-

"Right of refund arises out of the order dated 31.03.2004 appearing at page 69 to 72 of the appeal record. Once that right accrues and not reversed by a higher court, that is to be undeniable.

a. Revenue says that the assessment was not challenged.

b. Above proposition of Revenue is not acceptable to law for the reason that after the appellate order, no assessment order survives. Doctrine of merger applies and the order of the adjudicating authority has already merged with the order of the appellate order. Accordingly, refund to the appellant is admissible and authority shall act accordingly.

c. In the result, appeal is allowed."

9. When the matter came up for hearing it was decided to first consider the review petition No.167/2018 which had been numbered after the delay was condoned, by this Court. The review petition was allowed by an order dated 28.06.2008 and a Reference case Petition No.02/2012 was restored to file. Both C.M.A.No.986 of 2018 and Reference case Petition No.02/2012 are being taken up for consideration with the consent of both the parties.

10. The learned counsel for the appellant would submit as under:-

1.The Bill of Entry is an assessment order and if there is any disagreement with the classification list, the same had to be challenged. Unless the classification is set aside in an appeal, it attains finality and cannot be challenged in a collateral proceeding.

2. The issue as to whether the respondent had filed any protest was found to be incorrect as per the findings recorded by the authorities below.

3. The Apex Court and various Courts have held that the Bill of Entry is challenged only when the classification is disputed by the importer at the time of adjudication. It cannot be granted since the filing of protest alone would not amount to challenge of the order of assessment.

4. The decision of the Apex Court in Karnataka Power Corporation reported in 143 ELT 482 is not applicable to the facts of the case, since in Karnataka power corporation, the appeal was filed contesting the classification. In the present case the respondent had failed to file an appeal challenging the assessment of imported goods under the Bill of Entry dated 02.05.2000.

5. Unless the assessment order is set-aside in a manner known to law, the adjudicating authorities are not empowered under the Taxing enactment to refund the amount of tax paid.

6. The judgment of the Apex Court in Collector of Central Excise, Kanpur Vs. Flock India Pvt Ltd {2000 (12) ELT 285 (SC)} and Priya Blue Industries Ltd Vs. Commissioner of Customs (Preventive) {2004 (172) ELT 145 (SC)}, would apply to the present case.

11. The learned counsel for the respondent would submit that, their case is clearly distinguishable from the facts of Flock India cited supra for the following reasons:-

a. There exist no law at the relevant point of time which directed the respondents to separately challenge the assessment order. To the contrary, the common practice followed in the trade then was to file a refund claim which would also decide if the appellants have rightly classified the goods or not. The scope of a refund sanctioning authority is not confined to simply processing the documents filed by them but also includes deciding the classification on merits.

b. There are decisions to hold that a bill of entry is an appealable order and also to the contrary and therefore the respondents were under a Bonafide belief that on filing a refund application, their classification would automatically be decided by the adjudicating authority.

c. Flock India deals with a refund claim filed under Section 11B off the Central Excise Act and not under Section 27 of the Customs Act where in the language off the provision is distinguishable.

d. The respondents were not given the benefit of a speaking order as in the case of Flock India at the time of assessment (Supra). In Flock India (Supra), the Assistant Collector had passed a speaking order clearly giving clear reasons, as to why, the goods are classifiable under 22-B. The Assistant collector even went ahead to expressly state in the speaking order that the Assessee may prefer an appeal against his order before the Collector (appeals) which was not done in this instant case.

e. The respondent in the case of Flock India did not pay the duty under protest but in the instant case, the respondent herein had lodged their protest.

f. Assuming but not admitting the fact that a Bill of Entry is an appealable order, it is the case of the respondents that their protest was not vacated by way of a speaking order. It was contended that if a speaking order is not passed, it would be contrary to the principles of Natural Justice.

g. It was contended that the assessing authority did not give any reasons, in its order, dated 02.05.2000, learned counsel for the assessee therefore submitted argued that in the absence of the speaking order, by the assessing authority, classification under it, cannot be accepted and could be challenged in the remand proceedings.

h. Learned counsel for the respondent also submit that once the appellants have participated in further proceedings after the order of the CESTAT in final order No.291/2003 dated 24.04.2003, the reference petition is not maintainable. The department has submitted itself, to the remand proceedings and suffered various orders. The respondent therefore cannot turn around and challenge the order of the Tribunal.

12. The questions which arise for consideration are:-

a. Whether the appellant could question the classification of the case in a refund application, without challenging the assessment order. In other words, can the refund application go behind an assessment, which has attained finality.

b. Whether the revenue could pursue the R.C.P. after participating in the proceedings consequent to the remand order, dated 24/4/2003, passed by the CESTAT.

c. Whether the Tribunal could apply the Doctrine of Merger for dismissing the appeal of the revenue.

13. The Hon'ble Supreme Court, in COLLECTOR OF CENTRAL EXCISE, KANPUR Vs. FLOCK (INDIA) PVT. LTD {2000 (120) ELT 285 (SC), has held that when an order which is appealable, under

the Central Excise Act, is not challenged, then, the order is not liable to be questioned and the matter is not to be reopened in a proceeding, for refund. Paragraph Nos.8 to 10 of the said judgment reads as under:-

"8. From the aforementioned provisions of the Act the position is clear that any order passed by an authority under the Act is appealable to the Collector (Appeals) and a further appeal to the appellants tribunal against the order of the Collector (Appeals) is also provided in section 35. The hierarchy of authorities for adjudication and determination of matter relevant for charging the excise duty is for a purpose. It is not an empty formality. Classification of the goods manufactured by an assessee is important for the purpose of levy and collection of excise duty. Under Rule 173B every assessee is required to file with the proper officer a list of goods manufactured by him for approval and the proper officer shall after such inquiry as he deems fit approve the list with such modifications as are considered necessary and all clearances are to be made only thereafter.

9. A right of appeal is a creature of the statute. It is a substantive right. An order of the appellate authority is binding on the lower authority who is duty bound to implement the order of the superior authority. Refusal to carry out the direction will amount to denial of justice and destructive of one of the basic principles in the administration of justice based on hierarchy of authorities.

10. Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by us also gain

support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act, therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand, it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

(emphasis supplied).

14. The Hon'ble Supreme Court in Priya Blue Industries Ltd Vs. Commissioner of Customs (Preventive) {2004 (172) ELT 145 (SC)}, followed the judgment of the COLLECTOR OF CENTRAL EXCISE, KANPUR Vs. FLOCK (INDIA) PVT. LTD {2000 (120) ELT 285 (SC)}. Paragraph 6 of the judgment in Priya Blue Industries Ltd's case, reads as under:-

"We are unable to accept this submission. Just such a contention has been negated by this Court in Flock (India)'s case (supra). Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent officer. The Officer considering the refund claim cannot also review an assessment order."

(emphasis supplied)

15. Learned counsel for the respondent would contend that the view of the Hon'ble Supreme Court in Priya Blue Industries Ltd's case, is not correct, in view of the judgment rendered by a Bench of three Judges in KARNATAKA POWER CORPORATION LTD Vs. COMMISSIONER OF CUS (APPEALS), CHENNAI {2002 (143) ELT 482 (SC)}. Order being a short one is being extracted in its entirety.

"The order under challenge was passed by the Customs, Excise and Gold (Control) Appellate Tribunal in the following circumstances:

The appellants imported epoxy coils to use in two generators of a hydro-electric power station belonging to them. The respondents classified the epoxy coils under Tariff Entry 8544.11. The customs duty so determined was paid. Therefore, the appellants made a formal application for re-assessment of the duty and for refund of a part of the duty paid on the ground that the epoxy coils ought properly to have been classified and assessed under Entry 8501.64. This application remained pending until, on 27th August, 1994/25th August, 1994, the appellants addressed letters to the Assistant Collector of Customs in regard to that application. In the letter dated 27th August, 1994, They stated:

"Vide our claim letter dt.17-9-90 we had requested to re-classify the epoxy coils and accessories under heading 8501.64/9801. The case has not come for hearing till to date. Further, we wish to state that after detailed review of the custom tariff and classification, it is found that the epoxy coils are parts which are used solely/principally with the generator/machine. Therefore we request you to classify epoxy coils and accessories under heading 8503 of customs tariff for the payment of custom duty at the rate of 35% (basic duty)+45%(aux.duty)+20%CVD & 5% SED on CVD instead of classification under heading 8501.64/9801 as already claimed."

There was no reply to that letter but, on 3rd January, 1995, the Assistant Collector of Customs declined their application. The appellants filed an appeal before the Collector (Appeals). He dismissed the appeal; he found that at the appellate stage the appellants had changed their stand regarding the classification of the epoxy coils. The order of the Collector (Appeals) was challenged by the appellants before the Tribunal. In their memo of appeal, they impugned the aforesaid finding of the Collector (Appeals) and added that he had failed to notice that the appellants had amended their stand on classification as early as on 27th August, 1994/25th August, 1994 and copies of those letters were annexed to the memos of appeal. Even so, the Tribunal stated : "This raises a question of law as to whether, when a new classification is suggested before an appellate authority, the consequential relief flowing out of it can become time-barred, if the original issue pertained to a refund claim on other grounds?" The Tribunal considered this question and concluded against the appellants.

2. It is plain from what has been stated above that the Tribunal has misdirected itself. There is no question but that the appellants had sought amendment before the Assistant Collector of Customs himself and it was in that light that the issue had to be decided. We are of the view, therefore, that the orders of the Assistant Collector of Customs, the Collector (Appeals) and the Tribunal must be set aside and the matter restored to the file of the Assistant Collector of Customs to be decided afresh on the basis of the claim of the appellants contained in the letters dated 27th August, 1994/25th August, 1994.

3. Orders on the appeals accordingly."

16. A perusal of the said order in KARNATAKA POWER CORPORATION LTD's case, would show that the Hon'ble Supreme Court has not over ruled the judgment rendered in Flock's case, referred to supra. Further, there was a separate challenge to the classification in that case, unlike the present case, where there is no separate challenge. This judgment also cannot be an authority for the proposition that, when the order which is an appealable order is not challenged at all, even then, the same order can be questioned, in a refund application. The fact that the appellant herein had paid the duty under protest, does not mean that they could raise the same question, in a refund application. The Central Excise Act, 1944, provides for an appeal against the order of the Adjudicating Authority. Once an assessee choses not to file an appeal, then, he cannot challenge the same, in a collateral proceedings. In this view, order, dated 4/7/2013, dismissing the Referred Case Petition No.2 of 2012, needs to be reviewed.

17. Revenue had challenged the order, dated 24/4/2003, passed by the Tribunal in F.O.No.291/2003, on the ground that the Tribunal was not correct in relying on the judgment of Karnataka Power Corporation Ltd., Vs. Commissioner of Cus (Appeals), Chennai, stated supra, and that the judgment of the Hon'ble Supreme Court in Collector of Central Excise, Kanpur Vs. Flock (India) Pvt Ltd, would hold the field. Substantial question of law did arise for consideration, as to whether the issue of classification could have been raised by the assessee, in a refund application, without filing an appeal against the order of assessment. The issue, as stated earlier is squarely covered against the assessee in the judgment of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt Ltd and Priya Blue Industries Ltd Vs. Commissioner of Customs (Preventive) {2004 (172) ELT 145 (SC). The reference petition No.2/12 therefore has to be allowed and the order dated 24/4/2003, passed by the Customs Excise and Gold (Control) Appellate

Tribunal, South Zonal Bench, Chennai, in FlO.No.291/2003, has to be set aside.

18. Tribunal by the impugned order, has set aside the order dated 18/7/2006 of the Commissioner (Appeals). The order of the Commissioner (Appeals) reads as under:-

"The facts of this case is squarely applicable to the law set out by the Apex Court on the issue of the refund claim. The order of assessment made in the Bill of Entry No.216574 dated 2/5/2000 stands operative even to this day as it has not been set aside by an authority under the Act. It follows from the above that the question of refund of duty based on the existing order of assessment of the said Bill of Entry, as per the law in force, does not arise.

Accordingly, I pass the following order:

O R D E R

The refund claim of Rs.84,06,409/- made by HPCL through their claim dated 1/11/2000 is rejected under Section 27 of Customs Act, 1962."

19. As stated earlier, the appellate authority in its order, dated 18/7/2006, upheld the order of the original authority, by following the judgment of the Hon'ble Supreme Court, in COLLECTOR OF CENTRAL EXCISE, KANPUR Vs. FLOCK (INDIA) PVT. LTD {2000 (120) ELT 285 (SC) (extracted supra). This order has been set aside by the Tribunal by a very short order, which has been extracted earlier. Order of the Tribunal, (extracted supra) does not contain any reason.

20. While setting aside the orders of the assessment authority and the appellate authority, the Tribunal has applied the Doctrine of Merger, which is not applicable to the facts of this case. Tribunal has not stated precisely, as to how, the Doctrine of Merger, is applicable in this case. The Tribunal has not stated, as to which order has merged into which order and as to why the appeal before it was allowed by applying the Doctrine of Merger. No doubt, order dated 24/3/2004 had not been challenged, at the first instance and was challenged only much later by filing a Reference Petition No.2 of 2012. It is also not clear, as to whether the Tribunal, applied Doctrine of Merger, since the order dated 31/3/2004, passed by the Commissioner (Appeals) in order in Appeal No.269 of 2004 was not challenged. The Doctrine of Merger would not apply, even if the order dated 31/3/2004, passed by the Commissioner (Appeals), in order in Appeal No.269 of 2004 was not challenged. Order, dated 31/3/2004 only remanded the matter once again and directed the refund claim to be processed as per law, on merit. The operative portion of the order reads as under:-

"7. In view of the above I allow the appeal

by setting aside the Order-in-Original with the end result that the refund claim should be processed, as per law, on merit and if found refundable the payability to the appellant should be decided after ruling out unjust enrichment."

21. Order dated 31/3/2004 only directed the refund claim should be processed, as per law, on merit and if it was found refundable, then it should be refunded. In any event, the order, dated 31/3/2004, is not correct in law, and the Tribunal ought to have seen as to whether the judgment of the Hon'ble Supreme Court in COLLECTOR OF CENTRAL EXCISE, KANPUR Vs. FLOCK (INDIA) PVT. LTD {2000 (120) ELT 285 (SC)}, would apply to the facts of this case.

22. The fact that the order, dated 24/4/2003, was not challenged initially, does not also lead to the conclusion that the orders of the appellate authority, dated 30/12/2000 and 27/9/2001, had merged with the order of Tribunal. The Tribunal, in its order dated 24.04.2003, has remanded the matter for fresh adjudication and after remand, the authorities once again applied the judgment of the Apex Court in FLOCK (INDIA) PVT. LTD reported in {2000 (120) ELT 285 (SC)}.

23. Doctrine of Merger has been explained by the Hon'ble Supreme Court in Kunhayammed v. State of Kerala, (2000) 6 SCC 359, wherein it has been observed as under:

"7. The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.

8. In CIT v. AmritlalBhogilal and Co.AIR 1958 SC 868, this Court held:

"There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. 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;”

9. In *State of Madras v. Madurai Mills Co. Ltd.* AIR 1967 SC 681, this 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 the inferior authority and the other by a superior authority, passed in an appeal or revision there is a 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. The application or the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

11. In *S.S. Rathore v. State of M.P.* AIR 1990- SC 10, a larger Bench of this Court (seven Judges) having reviewed the available decisions of the Supreme Court on the doctrine of merger, held that the distinction made between courts and tribunals as regards the applicability of doctrine of merger is without any legal justification; where a statutory remedy was provided against an adverse order in a service dispute and that remedy was availed, the limitation for filing a suit challenging the adverse order would commence not from the date of the original adverse order but on the date when the order of the higher authority disposing of the statutory remedy was passed. Support was taken from doctrine of merger by referring to *Commissioner of Income-tax, Bombay Vs. M/s Amritlal Bhogilal and Co.* AIR 1958 SC 868 and several other decisions of this Court.

12. 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 an 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. Stage of SLP and post-leave stage.

24. Similarly in *Amba Bai v. Gopal*, (2001) 5 SCC 570, the Hon'ble Supreme Court observed as under:

"10. The learned Single Judge of the High Court in the impugned order held that the order passed in the first appellate decree merged into the order passed in the second appeal and hence there is no executable decree. "The doctrine of merger arises only when there are two independent things and the greater one would swallow up or may extinct the lesser one by the process of absorption." (Law Lexicon by P. Ramanatha Aiyar – p. 1224, 2nd Edn.)

11. If the judgment or order of an inferior court is subjected to an appeal or revision by the superior court and in such proceedings the order or judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court. The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject-matter and the judgment of the inferior court is deemed to lose its identity and merges with the judgment of the superior court. In the course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is continuation of the suit, came to be gradually extended to other proceedings like revisions and even the proceedings before quasi-judicial and executive authorities.

12. This Court in *State of Madras v. Madurai Mills Co. Ltd.* AIR (1967) SC 681 observed as under: (AIR Headnote)

"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 the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a 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. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction."

25. In *S. Shanmugavel Nadar v. State of T.N.*, (2002) 8 SCC 361, the Hon'ble Supreme Court has observed as under:-

7. When the Full Bench took up the hearing of the case, the order of the Supreme Court dated 10-9-1986, referred to hereinabove, was brought to its notice. The Full Bench formed an opinion that in view of the appeals against the Division Bench decision in *M. Varadaraja Pillai* case having been dismissed by the Supreme Court, though on technical ground, nevertheless the Division Bench decision of the Madras High Court stood merged in the decision of the Supreme Court according to the doctrine of merger and, therefore, it was no more open for the Full Bench to examine and consider the correctness of the law laid down by the Division Bench in *M. Varadaraja Pillai* case which, the Full Bench thought, would be deemed to have been affirmed by the Supreme Court in view of dismissal of the appeals thereagainst.

10. Firstly, the doctrine of merger. Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part i.e. the mandate or decree issued by the court which may have been expressed in a positive or negative form. For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum, what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction. However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum.

11. Secondly, the doctrine of merger has a limited application. In *State of U.P. v. Mohd. Nooh*, AIR (1958) SC 86, the Constitution Bench by its majority speaking through S.R. Das, C.J. so expressed itself, "while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation

for execution of the decree" (AIR p. 95, para 13). A three-Judge Bench in State of Madras v. Madurai Mills Co. Ltd, AIR (1967) SC 681, held: (AIR pp. 683-84, para 6)

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 the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a 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. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

Recently a three-Judge Bench of this Court had occasion to deal with the doctrine of merger in Kunhayammed v. State of Kerala, (2000) 6 SCC 359, and this Court reiterated that the doctrine of merger 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. (emphasis supplied) In this view of the law, it cannot be said that the decision of this Court dated 10-9-1986 had the effect of resulting in merger into the order of this Court as regards the statement of law or the reasons recorded by the Division Bench of the High Court in its impugned order. The contents of the order of this Court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor could they have been gone into.

12. Thirdly, as we have already indicated, in the present round of litigation, the decision in M. Varadaraja Pillai case was cited only as a precedent and not as res judicata. The issue ought to have been examined by the Full Bench in the light of Article 141 of the Constitution and not by applying the doctrine of merger. Article 141 speaks of declaration of law by the Supreme Court. For a declaration of law there should be a speech i.e. a speaking order. In Krishena Kumar v. Union of India, [1990] 4 SCC 207, this Court has held that the doctrine of precedents, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. In State of U.P. v. Synthetics and Chemicals Ltd, [1991] 4 SCC 139, R.M. Sahai, J. (vide para 41) dealt with the issue in the light of the rule of sub silentio. The question posed was: can the decision of an appellate court be

treated as a binding decision of the appellate court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule of sub silentio is an exception to the rule of precedents. "A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." A court is not bound by an earlier decision if it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". A decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues, cannot be deemed to be a law declared, to have a binding effect as is contemplated by Article 141. His Lordship quoted the observation from *B. Shama Rao v. Union Territory of Pondicherry*, [1967] 2 SCR 650, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". His Lordship tendered an advice of wisdom – "Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law." (SCC p. 163, para 41)."

26. The conclusion of CESTAT, Madras, is that the order of the Appellate Authority had merged with the order of the Tribunal passed earlier, is not correct. The order, dated 24/4/2003, has been set aside by us. In any event, the Tribunal did not lay down the correct position of law. An erroneous judgment, cannot definitely bind the superior Courts, from correcting them. It cannot be said that there was a fusion of the order dated 29/10/2003 passed by the Adjudicating Authority with the order dated 31/3/2004 passed by the Appellate Authority, and the Doctrine of Merger is applicable. In fact, it was only a remand order. No finality can be said to have been reached for applying the Doctrine of Merger. Similarly, it cannot be said that the order dated 30/12/2000 and the order dated 27/9/2001, passed by the original authority, and the appellate authority have merged into the order dated 24/4/2003 passed by the Tribunal, which was again, only an order of remand. The authorities below were bound to apply the law before allowing the refund application. The authorities below were also duty bound to consider, as to whether the refund application could go behind the assessment order. They were duty bound to follow the judgment of the Hon'ble Apex Court in *FLOCK (INDIA) PVT. LTD* {2000 (120) ELT 285 (SC),

27. The contention of the respondent that the revenue after participating in a proceeding, pursuant to a remand order, dated 24/4/2003 cannot be permitted to turn around and challenge the matter, cannot be sustained. It is a well accepted principle that there is no estoppel against law. The judgment in COLLECTOR OF CENTRAL EXCISE, KANPUR Vs. FLOCK (INDIA) PVT. LTD {2000 (120) ELT 285 (SC)}, followed by Priya Blue Industries Ltd., case, would bind the parties. A pure question of law which arises for consideration is, as to whether the question of classification could be gone into at the stage of refund, has been answered against the assessee by the Supreme Court. The fact that revenue has participated, in further proceeding, cannot bind the revenue from raising this contention, at any stage. In any event, order dated 24/3/2003 has been challenged, though belatedly, in a reference application. This Court while deciding the reference petition, dated 4/7/2013, did not consider the question of law which arose, in this case, and this is a error apparent on the face of record. The Tribunal did not comes in COLLECTOR OF CENTRAL EXCISE, KANPUR Vs. FLOCK (INDIA) PVT. LTD {2000 (120) ELT 285 (SC)} and PRIYA BLUE INDUSTRIES LTD., Vs. COMMISSIONER OF CUSTOMS (PREVENTIVE) which would squarely apply to the facts of the present case.

28. In the light of the above discussion, reliance of the respondent on the judgment of the Hon'ble Supreme Court in STATE OF MAHARASHTRA Vs. HARISH CHANDRA & ORS {(1986) 3 SCC 349}, STATE OF PUNJAB & OTHERS Vs. KRISHAN NIWAS {(1997) 9 SCC 31}, MUNICIPAL COMMISSIONER, CALCUTTA & OTHERS Vs. SALIL KUMAR BANERJEE AND OTHERS {(2000) 4 SCC 108}, ANNADATA DISTRIBUTOR & ANR Vs. RANJIT KUMAR MAITY & ORS {(2011) SC Cal.2751}, are of no assistance and are distinguishable.

29. Reliance placed by the appellant on the judgment of the Delhi High Court and Madras High Court in MICROMAX INFORMATICS Ltd Vs. PRINCIPAL COMM. OF CUSTOMS, ACC, CHENNAI {2017 (358) ELT 38 (Mad.)}, on the proposition, that even while deciding the question of refund, the question of classification can be gone into has to be rejected, in view of the law, laid down by the Hon'ble Supreme Court.

30. In the result, Civil Miscellaneous Appeal is allowed. No costs.

-s/d-

Assistant Registrar (CS-IX)

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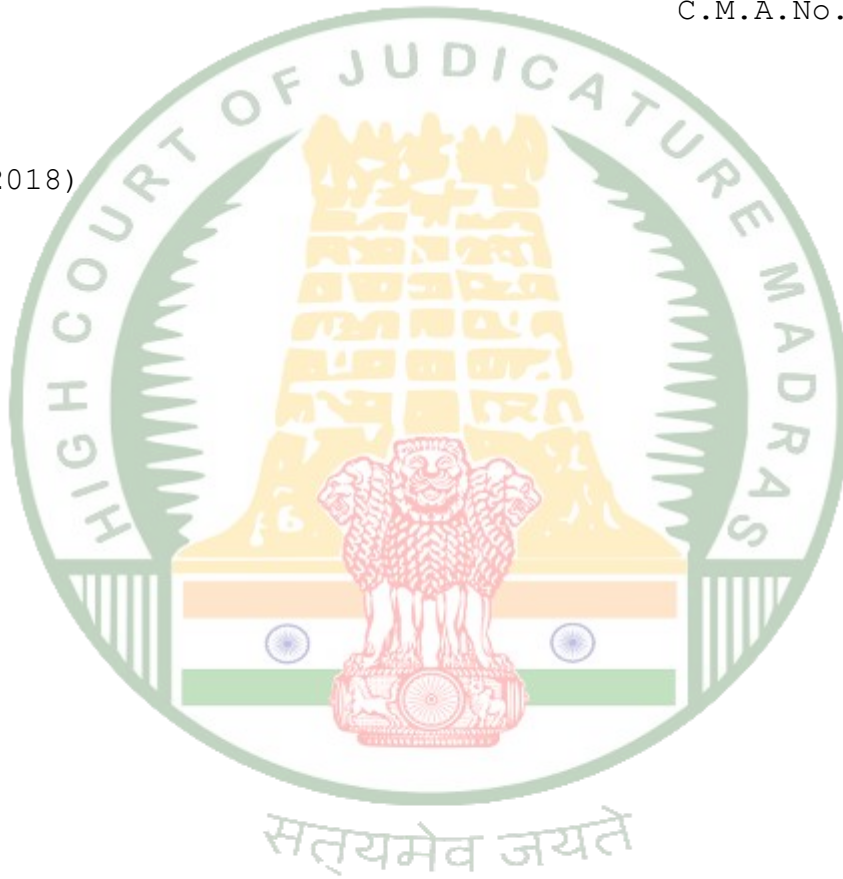
1. The Customs Excise and Service Tax
Appellate Tribunal, Chennai.

+1 CC to Mr.V. Sundareswaran, Advocate sr 73646.

+1 CC to Mr.S. Muthuvenkatesan, Advocate sr 73390.

C.M.A.No.986 of 2018

EV(CO)
SP(28/11/2018)



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