l\204ITEM NO.1B COURT NO.6 SECTION III
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 2059-2060 OF 2003

COMMNR. OF CENTRAL EXCISE, DELHI Appellant (s)

VERSUS

M/S. PEARL DRINKS LTD. Respondent(s)

(Heard by Hon'ble Mr. Justice D.K. Jain and Hon'ble Mr. Justice T.S. Thakur)

Date: 06/07/2010 These Appeals were called on for judgment today.

For Appellant(s)
Mrs Anil Katiyar,Adv.

For Respondent(s)
Ms. Radha Rangaswamy,Adv.

Hon'ble Mr. Justice T.S. Thakur pronounced the judgment of Bench comprising Hon'ble Mr. Justice D.K. Jain and His Lordship.

The appeals are allowed in terms of the reportable judgment.

(Rajesh Dham)
Court Master

(Indu Satija)
Court Master

(signed reportable judgment is placed on the file)

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICITION

CIVIL APPEAL NOS.2059-2060 OF 2003

Commissioner of Central Excise,
Delhi ...Appellant

Versus

M/s Pearl Drinks Ltd. ...Respondent

JUDGMENT

T.S. THAKUR, J.

1. These appeals have been filed under Section 35(L)(b) of the Central Excise Act, 1944. They are directed against an order dated 22nd July, 2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, whereby an appeal preferred by the Revenue against an order passed by the Commissioner of Central Excise has been dismissed on the principle of merger. The Tribunal has held that the order passed by the Excise Commissioner had merged in that passed by the former in an earlier appeal filed by the assessee against the very same order. The fact that the said appeal was limited to only two of the eight deductions that formed the subject matter of controversy between the parties, according to the Tribunal made no difference.

2. The respondent-company is engaged in the manufacture and sale of aerated water falling under heading 22.01 and 22.02 of Chapter 22 of the Schedule to the Central Excise Tariff Act, 1985. In the course of scrutiny of records the excise authorities noticed that the respondent-company had not affected any sale of aerated water to any wholesale buyer at its factory gate. It had instead been clearing the manufactured product in glass bottles after making payment of the duty and removing them to a duty paid godown situated at B-42, Lawrence Road Industrial Area, Delhi, adjacent to the factory. The duty paid stocks so removed were then sent to the customers in lorries owned by the respondent or taken on hire by them on long term basis from other parties. The driver-cum-salesman employed for that purpose would deliver the goods to the customers/dealers at a higher price and issue cash memos to them, while unsold stocks and empties were brought back to the company’s duty paid godown.

3. In the declarations filed by the respondent-company from time to time it had while disclosing the wholesale price/assessable value for various sizes and flavours claimed deductions towards excise duty, sales tax, transportation charges, container service charges and other service charges including trade discounts etc. before arriving at the

assessable value under Section 4 of the Central Excise & Salt Act, 1944. Being of the view that such deductions were not legally admissible, the adjudicating authority issued a notice dated 3rd November, 1995 calling upon the respondents to show cause why the deductions claimed under the following eight heads be not denied to them:

"1. Mazdoor and cartage expenses on account of bringing of breakdown vehicles.

2. Service charges including handling.

3. Establishment cost of sale and Shipping Department.

4. Shell Repair Cost.

5. Interest on Containers.

6. Deduction claimed on account of loss of beverages in duty paid godown and transporting the goods from the duty paid godown to the customers.

7. Trade discount given to the privileged customers.

8. Other trade discount by way of one or more bottles free of cost to customers."

4. The respondent filed a reply to the notice aforementioned upon consideration whereof the Principal Commissioner of Central Excise, Delhi passed an order in original dated 14th March, 2001 disallowing deductions to the extent of Rs.13,42,924/- on account of loss of beverages in the duty paid godown and a sum of Rs.27,50,072/- on account of loss in transit from the said godown to the customers and discount made on account of free supply of bottles of aerated water. Insofar as the remaining six heads under which deductions were claimed by the company the order in original accepted the said claim.

5. Aggrieved by the order aforementioned the respondent-company filed an appeal under Section 35(E)(1) of the Central Excise before the CEGAT who by a reasoned order dismissed the same, holding that the disallowance of deductions under the two heads referred to above was perfectly in order. A further appeal filed by the assessee before this

Court was also dismissed on 23rd September, 2002 thereby finally settling in favour of the Revenue the controversy as regards the admissibility of deductions under the two heads referred to above are concerned.

6. As regards the admissibility of deductions under the remaining six heads which the adjudicating authority allowed to the company, the Central Board of Excise and Customs (for short 'CBEC') appears to have reviewed the order of the Commissioner Excise under Section 35(E)(1) of the Central Excise Act and come to the conclusion that the grant of deductions under the said six heads was unjustified. The Board accordingly directed the Commissioner of Central Excise to approach the CEGAT for a correct determination of the following points:

> "(i) Whether the Commissioner was right in allowing the deductions claimed by the party without first verifying whether these were included in the wholesale price and if so, whether the same were included as a part of transportation cost only as claimed by the party and allowed by them.
>
> (ii) Whether the Commissioner was right in allowing the deduction of Rs.6975/-, Rs.24,00,000/-, Rs.62,12,578/-, Rs.7,66,662, Rs.2,27,329/- and Rs.91,000/- from the wholesale price, which do not appear to be admissible.
>
> (iii) Whether the Commissioner was right in not imposing the penalty as proposed in the SCN."

7. It is noteworthy that the Board while passing the above order referred to the disallowance of similar deductions claimed by the respondent for the period immediately preceding the period relevant to the show cause notice in question. The Board noted that the CEGAT had by its order dated 2nd March, 2001 (reported in (2002) 150 ELT 661) affirmed the said disallowance except for two items. The effect of the said disallowance had not according to the Board been taken into consideration by the adjudicating authority while granting the deductions claimed by the respondent-company.

8. In compliance with the order passed by the CBEC the Commissioner of Central Excise preferred an appeal under Section 35E(4) of the Act which was dismissed by the CEGAT by its order dated 22nd of July, 2002 holding that the order under challenge had merged in

the earlier order dated 24th January, 2002 passed by the Tribunal in the company's appeal whereby disallowance of two of the eight deductions in dispute had been upheld. The present appeal questions the correctness of the said order as noticed earlier.

9. Appearing for the appellant Mr. Gourab Banerjee, learned Additional Solicitor General argued that the Tribunal had fallen in a palpable error in applying the doctrine of merger and dismissing the appeal filed by the Revenue. It was submitted that the doctrine of merger had no application to a case like the one at hand where the content and the subject matter of challenge in the two proceedings, namely, the appeal filed by the assessee and that filed by the Revenue were totally different. Reliance in support was placed by the learned counsel upon the decision of this Court in Kunhayammed & Ors. v. State of Kerala & Anr. (2000) 6 SCC 359. Reliance was also placed upon the decision of this Court in Mauria Udyog Ltd. v. Commissioner of Central Excise, Delhi II (2003) 9 SCC 139 to contend that the doctrine of merger is not a doctrine of universal application and that the difference in the subject matter or the content of the proceedings could take a decision inter se parties out of the purview of the said doctrine.

10. On behalf of the respondent-company it was per contra argued that the order passed by the adjudicating authority could not be split into two and that the doctrine of merger applied no matter the issue which arose for determination in the two appeals were distinctly different.

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

doctrine has been examined by this Court in a long line of decisions. One of the earliest of the said decisions was rendered in Commissioner of Income Tax, Bombay v. Amritlal Bhogilal & Co. (AIR 1958 SC 868). The Court in that case declared that as a result of the confirmation or affirmation of the decision of the Tribunal by the Appellate Authority, the original decision merges in appellate decision whereupon it is only the appellate decision which subsists and is operative and capable of enforcement.

12. In State of Madras v. Madurai Mills Co. Ltd. (AIR 1967 SC 681) this Court had another occasion to examine the true scope and purport of the doctrine of merger. The court declared that the doctrine of merger was not a doctrine of rigid and universal application nor could it be said that where there are two orders one by the inferior authority and the other by a superior authority they must necessarily merge irrespective of the subject matter of the appeal or the revision or the scope of the proceedings in which such orders are passed. Subsequent decisions of this Court in Gojer Bros. (Pvt.) Ltd. v. Ratan Lal Singh (1974) 2 SCC 453 and S.S. Rathore v. State of Madhya Pradesh (1989) 4 SCC 582 have reiterated and explained that position. No reference to the pronouncements of this Court on the subject can be complete without a reference to the decision of this Court in Kunhayammed's case (supra) and Mauria's case (supra). In Kunhayammed's case (supra) a three-Judge Bench of this Court reviewed the decisions rendered on the subject and summed up its conclusions in para 44 of this decision. One of the said conclusions apposite to the case at hand is in the following words:

> "44. To sum up, our conclusions are:
> ....
> (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.
..."

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

14. Applying the above test to the case at hand the doctrine would have no application for the plain and simple reason that the subject matter of the appeal filed by the assessee against the adjudicating authority's order in original was limited to disallowance of two out of eight deductions claimed by the assessee. The Tribunal was in that appeal concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of the deductions under the remaining six heads obviously because the assessee's appeal did not question the grant of such deductions. Admissibility of the said deductions could have been raised only by the Revenue who had lost its case qua those deductions before the adjudicating authority. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the Tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads which were not the subject matter of scrutiny before the Tribunal. That being so, the proceedings instituted by the Commissioner, Central Excise pursuant to the order passed by the Central Board of Excise and Customs brought up a subject matter which was distinctively different from that which had been examined and determined in the assessee's appeal no matter against the same order, especially when the decision was not rendered on a principle of law that could foreclose the Revenue's case. The Tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may be partly in favour and partly against a party in

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

15. We have in the light of the above no hesitation in holding that the order passed by the Tribunal dismissing the appeal by the Revenue on the doctrine of merger is erroneous and unsustainable. We accordingly allow these appeals, set aside the impugned order and remand the matter back to the Tribunal for a fresh disposal in accordance with law. The parties to appear before the Tribunal on 6th September, 2010.

.....J.
(D.K. JAIN)

.....J.
(T.S. THAKUR)

New Delhi
July 6, 2010