CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.70348 of 2017

(Arising out of Order-in-Original No.LKO/EXCUS/000/COM/CX/037/2016-17 dated 24.01.2017 passed by Commissioner of Central Excise & Service Tax, Lucknow)

Commissioner of Central Excise & Service Tax, Lucknow **.....Appellant**
(7-A, Ashok Marg, Lucknow)

VERSUS

M/s K. P. Pan Products Pvt. Ltd, **....Respondent**
(C-524, Transport Nagar, Lucknow)

APPEARANCE:

Shri Santosh Kumar, Authorized Representative for the Revenue
Shri Rupesh Kumar, Senior Advocate & Shri Aditya Kumar, Advocate for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70599/2024

DATE OF HEARING : 20.09.2024
DATE OF DECISION : 20.09.2024

SANJIV SRIVASTAVA:

This appeal is filed by the Revenue – Appellant against Order-in-Original No.LKO/EXCUS/000/COM/CX/037/2016-17 dated 24.01.2017 passed by Commissioner of Central Excise & Service Tax, Lucknow.

2. By the impugned order Commissioner has dropped the proceedings initiated by show cause notice No.16/Commr./LKO/2009-10 dated 10.08.2009 against Respondent.

3. Aggrieved by the order Revenue has filed this appeal stating as follows:-

> *"2. The main issue raised by the then Adjudicating Authority while passing the Order-In-Original*

No.30/Commr/LKO/CX/2013-14 dated 07.03.2014 is following:-

> *"This Order No.01/2008 dated 17.07.2008 has been issued under statuary provision of Rule 6(2) of Pan Masala Rules, 2008. The Deputy Commissioner was the proper statutory authority to issue such order. The party had the statutory right to file appeal against the said order under Section 35 of Central Excise Act, 1944 but the party not preferred an appeal. Due to non filing of an appeal against Order No.01/2008 dated 17.07.2008 issued by Deputy Commissioner, Central Excise Division-I, Lucknow in terms of Rule 6(2) of Pan Masala Rules, 2008, the same has been attained finality and the concerned party is bound to comply and pay Central Excise Duty in accordance with said order. The department is also bound to follow Order No.01/2008 dated 17.07.2008 passed under statuary provision of law. To my mind, this proposition of the party at this stage that the said order was not correct cannot carry the case of the party any further as the right of the party to prefer an appeal against an order by which he is aggrieved, has not been availed by it which resulted in the finality of the said order. Now this order is not open to review by me at this stage."*

3. While passing the order in remand proceedings, the Adjudicating Authority has erred by not deciding or offering any comment on this basic issue.

4. In view of the above, it appears that the observations of the adjudicating authority are not proper as the demand of Rs.7,82,00,000/- should have been confirmed and penalty should have been imposed in Order-In-Original dated 24.01.2017."

4. We have heard Shri Santosh Kumar learned Authorized Representative appearing for the Revenue-Appellant and Shri Rupesh Kumar learned Advocate appearing for the Respondent.

5. We have considered the impugned order along with submissions as made in the appeal and during the course of arguments.

6. The basic ground for filing the appeal is that the Commissioner has not offered any comments on certain observations made in the earlier order made by his predecessor in respect of the same show cause notice. This order was set aside by this Tribunal and remanded the matter back for *de novo* consideration without any direction to consider the matter again in the light of the said observation.

7. Revenue has filed this appeal relying on the observation which was therein the earlier order which has already been set aside by the Appellate Authority. That order does not exist in law. In case of Kunhayammed [2000 (6) SCC 359] Hon'ble Supreme Court has observed as follows:

> *"The doctrine of merger :*
>
> *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.*
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> *In Commissioner of Income-tax, Bombay Vs. M/s Amritlal Bhogilal and Co. AIR 1958 SC 868 this Court held :*
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> *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.

.....

In M/s Gojer Brothers Pvt.Ltd. Vs. Shri Ratanlal AIR 1974 SC 1380 this Court made it clear that so far as merger is concerned on principle there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority; in all the three cases the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision whether of reversal or modification or only confirmation. Their Lordships referred to an earlier decision of this court in U.J.S. Chopra Vs. State of Bombay AIR 1955 SC 633 wherein it was held.

A judgment pronounced by a High Court in exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would replace the judgment of the lower court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the courts below.

....

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. ….”*

8. The observations made in the order set aside in appeal cannot be a ground for preferring the appeal.

9. Appeal dismissed.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS