

**SUPREME COURT OF INDIA**

Mauria Udyog Ltd.

Vs.

Commissioner of Central Excise

16.08.2002

**ORDER**

1. Leave granted.

2. A show cause notice that was issued to the appellant resulted in confirmation of the demand of Rs. 12,24,492/- on the ground that freight expenses from appellant's factory to the buyers place were includible in the assessable value. In addition to confirmation of demand, penalty of the like amount was also imposed on the appellant and interest was also held payable. In appeal, the commissioner of central excise (appeals) maintained the order of adjudication but reduced the penalty amount to Rs. 4.5 lacs. Two appeals were filed before customs, excise and gold (control) appellate tribunal; one by the appellant and another by the revenue. The revenue challenged in its appeal the order of the commissioner (appeals) to the extent of reduction of penalty amount. In the appeal of the appellant a conditional order of pre-deposit of Rs. 2.5 lacs was made by the tribunal for entertaining the appeal. The High Court in the writ petition declined to interfere with the said order of pre-deposit. The time for making deposit was, however, extended by the High Court up to 11th December, 2000. The appeal of the appellant was dismissed by the tribunal on 12th December, 2000 noticing, inter alia, that the appellant had not deposited the amount. In view thereof the tribunal directed that the appeal was not properly constituted and directed it to be struck off the register.

3. The appellant filed an application for restoration. When the said application came up, it was represented on behalf of the revenue that in the meanwhile the appeal of the revenue filed against the order of the 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 appellant's appeal cannot be entertained. Accepting that submission, the tribunal by the impugned order held that the appeal filed by the appellant could not be dealt with on merits as the impugned order of the commissioner (appeals) got merged in the order of the tribunal as a result of the dismissal of the appeal by the revenue. Therefore, the application and appeal of the appellant was dismissed.

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 buyers factory

are includible 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 appellant's appeal by application of principle of merger. The said principle on the factual situation herein has no applicability whatsoever. Mr. Rawal, the learned additional solicitor general very rightly did not support the order on the ground of the applicability of the principle of merger.

5. It seems that the appellant had made the deposit of the amount, as stated in this appeal, in the treasury of the central government on 10th November, 2000 and as claimed only a debit entry remained to be made in the account books maintained by the appellant. This fact, it appears, was not brought to the notice of the tribunal when the appeal was directed to be struck off the register in terms of the order dated 12th December, 2000 and later impugned order was passed applying erroneously the principle of merger.

6. Under the aforesaid circumstances, we would set aside the impugned order and restore the appeal filed by the appellant against the order of commissioner (appeal's) dated 8th August, 2000 to the file of the tribunal to be decided on merits in accordance with law. The appeal is allowed on these terms leaving the parties to bear their own costs.