

Electropack, Connection and Vs. Dcit

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Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Sep-27-2004

Reported in : (2005)94ITD227(Ahd.)

Judge : R Garg, Vice

Appellant : Electropack, Connection and

Respondent : Dcit

Judgement :

1. These Misc. Applications are arising out of orders passed in IT(SS) Nos. 24, 26, 27/AHD/199S dated 20-12-2002. One of the questions involved in the main appeal was regarding, the contentions of different amounts in three cases on account of alleged bogus purchases. The Tribunal vide paragraph-8 of its order, deleted the addition on merits by following the decision of the Tribunal in the case of M/s.

Electrotherm India Ltd., vide order dated 29-12-1998 in ITA No.38/Ahd/1997, quoting paragraph Nos. 13 to 15 of that order. The paragraph-15 being, the concluding portion, reads as under: "15. We have considered the rival submissions, facts and materials on record. It is not disputed that purchases had been recorded in the books of account claiming deduction. Otherwise, the same could not have been disallowed as expenditure for bogus purchases. When the search was conducted in fact excess tok was found than recorded in the books of accounts. Had there been no purchase there should have been shortage in the stock than the books of accounts.

Anonymity of the actual seller would not wake the purchases as no purchases at all in fact, bogus purchases as well as excess stock is contradictory to each other. The order of the AO on the point of bogus purchases is, therefore, fallacious. The facts of the cases cited by the Id. DR are not applicable to the facts of the case before us. We are of the opinion that in these circumstances, addition for bogus purchases could not arise. We delete the addition made by, the AO for alleged bogus purchases." 2. Following the aforesaid reasoning given in the said order, the Tribunal deleted the additions in the present by observing in paragraph-8.1 as under: "Respectfully following the reasoning given by the Tribunal in the aforesaid order, we delete the addition of Rs. 85,08,522/-." "9. Before parting, we may observe that the assessee firm was closed at the time of search. However, it has filed its returns for AYs.

1990-91 to 1995-96 in Ward-3, Ahmedabad and the alleged bogus purchases were shown in the statement of trading account and P&L account filed along with returns. The alleged bogus parties to whom some of the payments were yet to be made were shown as sundry creditors for goods in the balance sheets of the relevant assessment years. In this view of the matter, even if the AO do not believe the genuineness of the purchases, the additions could have been made only in the course of regular assessment proceedings and not in the Stock Assessment proceedings in view of the decision of the Hon'ble Gujarat High in the case of N.R. Paper & Board Ltd (supra)." 4. There was an amendment by Finance Act, 2002 to Section 158B, amending the definition of undisclosed income with retrospective effect from 1-7-1995, which reads as under: 158B(b) "undisclosed income" includes any money, bullion, jewellery or other valuable articles or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable articles, thing, entry in the books of account or other document or transaction represses wholly or partly income or other property which has not been or would not have been disclosed in the purpose of this *[or any expense, deduction or allowance claimed under the Act which is found to be false]." * inserted by finance Act 2002 with retrospective effect from 1-7-1995 5. Based on this amendment, the Revenue made an application for rectification submitting that the order of the Tribunal stating that the order of the Tribunal holding that addition on account of genuine purchases could

have been made in the course of regular proceedings and not in the block proceedings, in view of the decision of Gujarat High Court in the case of N.R. Paper and Board Ltd. suffers from a mistake apparent on the face of the record.

6. In the meantime, the Revenue carried the matter to the High Court under Section 260A of the Act and the High Court rejected the appeal by holding that -"In our opinion no substantial question of law arises in this regard. Moreover, in Tax Appeal No. 217/1999 was filed by the Revenue involving similar issue and the said appeal has been dismissed by the High Court on 5th July, 2000. That is one more reason for which this appeal deserves to be dismissed." The order in IT Tax appeal No.217/1999 dated 5-7-2000 reads as under: "No substantial question of law arises in the matter. The appeal is therefore dismissed. Notice is discharged."

7. The above M.A. came up for hearing before the Division Bench and there struck a difference of opinion between two members - Accountant Member holding that - "Under the circumstances, where the order of the ITAT have been merged with the orders of the High Court, the ITAT has no power to consider the Miscellaneous Application of Revenue, the Hon'ble High Court only empower to entertain such Miscellaneous Applications and the Tribunal can entertain such Miscellaneous Application only on the direction of the High Court..." "... retrospective amendment can be declared to be law existing from the date that it was given retrospectively and is mistake apparent from the record within the meaning of Section 254(2) of the I.T Act, 1961. In my view, there is no merge of Tribunal order because Hon'ble High Court has refused to assume jurisdiction to exercise its powers Under Section 260A of the I.T. Act." 8. On reference to the President, ITAT under Section 255(4) of the I.T.Act, the following points of difference has been referred for my opinion.

"Whether on the facts and circumstances of the case, the order of the Tribunal is merged with the order of the Hon'ble Gujarat High Court dismissing the appeal of the Revenue on the ground that no substantial question of law arises in the appeals of the Revenue ?" 9. The learned DR, Shri P.K. Ambastha submitted that the Tribunal had decided the matter before the amendment brought in by Finance Act, 2002 in Section 158B(b) with retrospective effect from 1-7-1995, and therefore, the order of the Tribunal holding that this issue can be agitated in

regular proceedings alone, suffers from a mistake apparent from the record. As regards the merger of the order of the Tribunal he supported the order of the Judicial Member and submitted his view is in conformity with the order of the Supreme Court in the case of Kunhayammed and Ors. v. State of Kerala and Ors., 245 ITR 360 and later decision in the case of S. Shanmugavel Nadar v. State of Tamil Nadu and Anr., 263 ITR 658. The gist of the submissions of the learned DR is that the High Court having refused to admit the appeal and assume the jurisdiction to exercise its power under Section 260A, cannot mean that it has upheld the order of the Tribunal, whereby it could be said that the order of the Tribunal gets merged in the order of the High Court.

10. The learned counsel for the assessee, Shri S.N. Soparkar, on the other hand, submitted that the Tribunal had decided the appeal on merits in paragraph-8 and alternative findings has been given in paragraph-8 stating that the genuineness of purchases can be agitated only in regular assessment. In paragraphs-9 of the order, according to him, therefore, the decision of the case merits remains and this difference of opinion is of academic exercise and in either of the situations, the Tribunal's order cannot be rectified. As regards merger, he submitted that the issue in the decisions of Kunhayammed and Ors. and S. Shanmugavel Nadar supra, are the cases where the doctrine of merger has been discussed with regard to Special Leave Petition, which is extraordinary jurisdiction of the Supreme Court. It was not in connection with the appeal against the order. The direct decision of the Supreme Court regarding merger in appellate jurisdiction, is in the case of Gojer Bros. (P) Ltd. v. Shri Ratan Lal Singh, 174-(SC2)-GJX-0175-SC wherein according to him, it is held that once the decree passed was taken in appeal to the Court of the Subordinate Judge which confirmed the decree and then to the High Court, which after a contested hearing, dismissed the defendants' appeal and confirmed the decree passed by the Subordinate Judge, the order/decreed passed by the Trial Court can be deemed to have merged in the decree passed by the High Court. The judgment of an inferior court loses its identity by its merger with the judgment of the superior Court.

11. I have heard the parties and considered the rival submission.

Income-tax Act provides for an appeal to High Court under Section 260A of the Act. Under Sub-section (1) an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, only if the High Court is satisfied that the case involves a substantial question of law. Sub-section 2 of the said section authorizes the Chief Commissioner or the Commissioner of the I.T. or the assessee aggrieved by any order passed by the Appellate Tribunal to file an appeal to the High Court within 120 days from the date on which the order appealed against is received and it has to be in the form of Memorandum of appeal precisely stating therein the substantial question of law involved. Sub-section-3 provides that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question and Sub-section 4 provides that the appeal shall thereafter be heard on the question so formulated and at the time of hearing the respondent is also permitted to argue on the appeal that the case does not involve such question. Without taking away or to abridge the power of the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it. Sub-section 5 of this Section further provides that the High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

12. On reading of the aforesaid provisions, it is clear that an appeal lies to the High Court only when there is a substantial question of law is involved. In an appeal filed by the patty, when the High Court dismiss the same by stating that no substantial question of law arises, it cannot, in our opinion, be said that it was a decision of the High Court on merits. What the High Court can be said to have observed is that they declined to entertain/admit the appeal in the absence of any substantial question of law, which is pre-requisite for assuming the jurisdiction of the High. If there is no substantial question of law, in the opinion of the High Court, then by virtue of provision of Sub-section (1) of Section 260A, there lies no appeal.

13. In the case of Kunhayammed and Ors. (supra) the facts are there was a large family consisting of 71 members who raised a dispute before the Forest Tribunal, with regard to the land to the tune of 1,020 acres. By order dated 11-8-1982, the Tribunal held that the land did not vest in the Government. The appeal before the

High Court of Kerala, was dismissed on 17-12-1982 by an elaborate order. There was no statutory remedy of appeal, revision or review against the order of the High Court. The State of Kerala filed a petition for special leave to appeal under article 136 of the Constitution and the petition was dismissed by an order dated 18-8-1983, which reads as under: 14. There was an amendment in Section 8C, amongst other, enacting with retrospective effect from 19-11-1983, a power of the Government to file an appeal or application for review in certain cases and under that section the State of Kerala filed application for review before the High Court seeking review of order dated 17-12-1982. A preliminary objection was raised to the maintainability of the review petition which has been heard and disposed of by order dated 14-12-1995, overrunning the objections as to the maintainability of objections and directed the review petition to be posted for hearing on merits.

Feeling aggrieved, the Petitioner sought leave to appeal to the Supreme Court which was granted on 16-9-1996 and when the matter came up for hearing, the question of merger was raised and dealt with elaborately by the Supreme Court. Discussing various judicial opinion on this issue, in the case of CIT v. Amritlal Bhogilal and Co., 34 ITR 130 and in the case of Rathore (S.) v. state of Madhya Pradesh, AIR 1990 SC 10, the Court held that the logic underlying the doctrine of merger is that there cannot be more than one decree or operative order 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 men, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put to 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.

15. Thereafter, the Supreme Court considered the stage of SLP and post-leave stage and opined the legal position as under: (i) While hearing the petition for special leave to appeal, the court is called upon to see whether the petition should be granted such leave or not. While hearing such petition, the court is not exercising its appellate jurisdiction, it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal.

The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave; (ii) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the court that a case for invoking the appellate jurisdiction of the court was not made out; (iii) If leave to appeal is granted the appellate jurisdiction of the court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the court may dismiss the appeal without noticing the respondent.

(iv) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put to jeopardy though it continues to be binding and effective between the parties, unless it is a nullity or unless the court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

16. Thereafter, the Supreme Court discussed the fate of dismissal at the stage special leave, without reasons and held that an order refusing special leave to appeal may be by a non-speaking order or by a speaking order. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in the place of the order under challenge. All that it means is that the Supreme Court was not inclined to exercise its discretion so as to allow the appeal being filed. Whatever be the phraseology employed in the

order of dismissal, if it is a non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in the place of the order put in issue before it, nor be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared.

17. If the order refusing leave to appeal is a speaking order, i.e., it gives reasons for refusing the grant of leave, that the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of article 141 which will obviously be binding on all courts and Tribunals in India and certainly the parties thereto. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court would be binding on the parties and the court, tribunal or authority whose order was under challenge, in any proceedings subsequent thereto, on the principle of judicial discipline, the Supreme Court being the apex court of the country. The declaration of law will be governed by Article 141, but the case not being one where leave is granted, the doctrine of merger does not apply.

18. The Supreme Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to appeal and having formed an opinion may say "dismissed on the merits." Such an order may be passed even in the absence of the opposite party. The dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the petition for special leave to appeal. Even if the merits have been gone into they are the merits of the special leave petition only. Neither the doctrine of merger or Article 141 is attracted such an order.

19. In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. If at the stage when special leave is granted the respondent/caveator appears and resists the grant of special leave and the ground urged in support of resisting the grant of special leave is rejected on the merits resulting in the grant of special leave, then it

would not be open to the respondent to raise the same point over again at the time of final hearing of the appeal. However, if the respondent/caveator does not appear, or having appeared, does not raise a point, or even if he raised a point the court does not decide it before grant of special leave, the same point can be raised at the time of final hearing. There would be no technical bar of res judicata.

20. Even though, it has dismissed the SLP on merits, the Supreme Court held that the order of the High Court did not merge with the order of dismissal of the petition for special leave to appeal passed by the Supreme Court and the High Court could review its own order under Section 8C(2) of the Kerala Private Forests (Vesting and Assignment) Act, 1971, statutory conferring the right to review by a retrospective amendment, the order of the Supreme Court dismissing the petition under article 136 was a non-speaking and unreasoned order and all that would spelt out of that order was that the Supreme Court was not convinced of the need for exercising its appellate jurisdiction.

21. In the case of S. Shanmugavel Nadar supra, the matter was again examined by the Supreme Court and it was held that Apart altogether from the merits of the grounds for rejection, the mere rejection by a superior forum resulting in refusal to exercise its jurisdiction which is invoked cannot by itself be constructed as the imprimatur of the superior forum on the correctness of the decision sought to be appealed against. In this case, the constitutional validity of the amendment Act of 1960 amending the Madras City Tenants Protection (Amendment) Act, 1954 was challenged and upheld by Madras High Court placing reliance in the case of M. Varadaraja Pillai. The appeal by the special leave was dismissed by the Supreme Court on the technical ground that the State of Madras, a necessary party, had not been impleaded. When the constitutional validity of an Amendment Act, 1956, amending the 1921 Act, was challenged a Division Bench of the High Court entertained some doubt about the correctness of the earlier decision in Varadaraja Pillai, and the matter was referred to a Full Bench for reconsidering that decision. Full Bench held that the appeals from the decision in Varadaraja Pillai having been dismissed, though on a technical ground that decision stood merged in the decision of the Supreme Court and according to the doctrine of merger it was not open to the Full Bench to reconsider that decision. On appeal the Supreme Court

held that reversing the decision of the full Bench of the High Court, that the Supreme Court had dismissed the appeals from the decision of the Madras High court in Varadaraja Pillai's case [1972] 85 Mad LW 760 only on a technical ground without any law being laid down by the Supreme Court.

Neither the merits of the judgment in Varadaraja Pillai's case nor the reasons recorded therein were gone into by the Supreme Court. The Full Bench of the Madras High Court was folly entitled to go into the merits and decide all controversies and was not to feel inhibited by the fact that the appeals against the decision in Varadaraja Pillai case were dismissed by the Supreme Court.

21. The decision in M/s. Gojer Bros (P) Ltd., supra relied upon by the counsel has been considered by the Supreme Court in the case of Kunhayammed and Ors. (supra). The following observations of the Court were brought to our notice by the learned counsel: 11. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subject to an examination by the Supreme Court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court.

12. Stated in this form the principle may appear to be unexceptionable but the problem has many facets. What, if the higher court dismisses the proceeding before it summarily without a speaking order Does the judgment of the lower court still merge in the unspeaking order of the higher court What, if the powers of the higher court are invoked in the exercise of its revisional and not appellate jurisdiction Does a judgment or an order passed in the exercise of severally restricted jurisdiction like that under Section 115 of the Code of Civil Procedure wipe out of existence a decree or order passed in the exercise of a wider jurisdiction as may be exercised by a court possessed of a suit Does it make any difference to the application of the doctrine of merger that the higher court has not modified or reversed the judgment of the lower court but has merely affirmed it These nuisance had once raised issues on which conflicting views were

expressed by the courts. Over the years, the area of conflict was considerably narrowed down and most of the problems touched by us have been resolved by this Court.

16. In case where the decree of the trial court is carried on appeal and the appellate Court disposes of the appeal after a contested hearing, the decree to be executed is the decree of the appellate Court and not of the trial court. In *Jowad Hussain v. Gendan Singh* (53 LA 197 : AIR 1926 PC 63: 51 MLJ 782), the Privy Council while holding that the limitation of three years within which an application for a final decree must be made from the date of the decree of the appellate Court, quoted with approval the statement of law contained in the judgment of a learned Judge of the Allahabad High Court to the following effect: "When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause "(Per Banerji, J. in *Gajadhar Singh v. Kishan Jiwan Lal*, ILR 39 All 641: 42 IC 93: AIR 1917 All 163). The Privy Council also adopted the statement contained in a judgment of Tudball, J. to this effect: "When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties". Thus, when the decree of the Court of first instance is confirmed by the High Court and the latter decree is confirmed by the Privy Council the decree capable of execution is the decree of the Privy Council (*Bhup Indar v. Bijai*, (1900) 27 IA 209; ILR 23 All 152: 5 CWN 52). In that case the decree passed by a District Judge in 1887 awarded "future mesne profits" to the plaintiff. That decree was reversed by the High Court but was confirmed by the Privy Council on May 11, 1905. When the matter came back in executive proceedings the Privy Council held that the decree which the courts had to execute was the one passed by it in 1895 and since by that decree the District Judge's decree was confirmed, the decree of 1905 clearly carried the means profit upto its own date.

19. The fundamental reason of the rule that where there has been an appeal, the decree to be executed is the decree of the appellate Court is that in such the decree the decree of the trial court is merged in the decree of the appellate Court.

In course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is a continuation of the suit, came to be gradually extended to other proceedings like revisions and even to proceedings before quasi-judicial and executive authorities. *Shanker Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat* ((1970) 1 SCR 322 : (1969: 2 SCC 74) where after a single Judge had dismissed a Civil Revision Application filed by the tenant under Section 115 of the Code of Civil Procedure, against a decree passed by the District Court a Division Bench of the Bench of the Bombay High Court entertained the tenant's writ petition under Articles 226 and 227 of the Constitution against the same decree and allowed it. The Bombay High Court had followed its earlier judgment in *Sipahimalani's case* (*K.B. Sipahimalani v. Fidahusseain Vallibhoy*, ILR 1956 Bom 422, 422 : 58 Bom I.R 344) which had taken the view that an order passed by the lower court does not merged in the order passed by the revisional court because whereas a right of appeal is a vested right and appeal is a continuation or rehearing of the suit and it is not obligatory upon the revisional court to interfere with the order even if it is in proper or illegal. This Court disapproved of that view and held following judgment of the Privy Council in *Nagendra Nath Dev. v. Suresh Chandra Day* (59 IA 283, 287 : All 1932 PC 165 : ILR 60 Cal 1) that the revisional jurisdiction is a part and parcel of the appellate jurisdiction of the High Court and therefore the principle of merger would apply to orders passed in the exercise of revisional jurisdiction also.

27. The learned Judge of the High Court has referred to some of these decision in his judgment but he took the view: "I am of opinion that in cases where the appellate court merely dismisses the appeal, the principle of merger have no application in cases of execution of the original decree except as to limitation and will not affect an executable decree passed by an inferior court, in so far as its execution is concerned. The position would be otherwise if the decree is modified or varied by such appellate authority, as in such event, the original decree will be inexecutable." This conclusion is clearly opposed to the view taken by this Court in the decisions referred to above and the learned Judge was in error in making a distinction between an appellate judgment whereby an appeal is dismissed and an appellate judgment modifying or reversing the decree of the lower court. This distinction is unsound and is based on no discernible principle.

33. In the instant case the subject-matter of the suit and the subject matter of the appeal are identical. The entire decree of the trial court was taken in appeal to the first appellate court and then to the High Court. The appellate order also shows that the appellate Court and then to the High court. The appellate order also shows that the appeal after being heard on merits, was dismissed with the modification that the respondents should vacate the premises by the end of January, 1970. The decree of the High Court dated January 8, 1969, reads thus: It is ordered and decree that the decree of the court of appeal below be and same is hereby affirmed and this appeal dismissed subject to this that the defendant appellate, having duly filed the stipulated undertaking, through his learned Advocate, is allowed time till the end of January, 1970, for vacating the disputed premises and delivering up quiet and peaceable possession thereof to the decree-holder respondent on contradiction that the said defendant appellant deposits in the trial court, to the credit of the decree-holder respondent, on condition that the said defendant appellant deposits in the trial court, to the credit of the decree-holder respondent, within two months from this date, the outstanding areas, if any, on account of rents or means profits, as the case may be, and also goes on depositing, in the same court to the same credit, month by month, regularly, according to the English calendar, within the 15th of the next succeeding month according to the same calendar, a sum of Rs. 175 (Rupees one hundred and seventy-five) per month, account of current rents or mesne profits.

And it is further ordered that in the events of the said defendant's failure to make any of the above deposits, this decree shall become executable at once.

22. The aforesaid case, in our opinion is of no help to the assessee, as this was a case decided on merits in appeal after the appeal is admitted and the parties were heard at length. Further, the distinction made by the learned counsel for the assessee between SLP rejection and appeal dismissal is not of any significance in the present case. By virtue of Sub-section (1) of Section 260 (A), an appeal lies to the High Court only when there is a substantial question of law. If the High court says that there is no substantial question of law, the question of invoking the appellate jurisdiction of High Court does not arise. The doors of the High Court are not open for the assessee or the applicants to appeal. It is only when the High

Court is satisfied that substantial question of law is involved, it formulates question and admit appeal for hearing. Until that stage, in our opinion. High Court does not exercise the appellate jurisdiction, and therefore, when an appeal is dismissed, on the ground that no substantial question of law arises, the appellate jurisdiction of the High Court are not invoked and the rejection of the appeal at that stage would not be a appellate order, in which the Tribunal's order can be said to have been merged.

The special jurisdiction is said to be a residuary power vested in the Supreme Court under Article 136, that is to say, it confers an appellate jurisdiction on the Supreme Court subject to special leave being granted in such matters as may not be covered by the preceding articles. Even in the field covered by the preceding articles, jurisdiction conferred by Article 136 is available to be exercised in an appropriate case. It is an untrammelled reservoir of power incapable of being confined to definitional bounds. The discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense or sense of justice of the judges. While hearing the petition for special leave to appeal, the Supreme Court is called upon to see whether the petitioner should be granted such leave or not.

While hearing such petition, the Supreme Court does not exercise its appellate jurisdiction, it merely exercises its discretionary jurisdiction to grant or not to grant leave to appeal and if the petition seeking grant of special leave is dismissed, it is an expression of opinion by the Supreme Court that a case for invoking the appellate jurisdiction of the court was not made out. Similar is the situation in an appeal under Section 260A wherein the High Court before admitting an appeal is to formulate a substantial question of law and prior to that stage if such an appeal is dismissed on account that no substantial question of law is involved in the appeal filed by the assessee and it is rejected on that ground, in our opinion, it is not exercise of appellate jurisdiction. It is an expression of the fact that the High Court was not inclined to exercise its power so as to allow appeal being entertained. To summarise the existence of the substantial question of law is a condition precedent for invoking of the appellate jurisdiction of the High Court. If an appeal is dismissed on the ground that no substantial question of law arise, it is

not dismissal of appeal on merits but dismissal at threshold that no appeal is maintainable. It would be an order of High Court on the maintainability of the appeal and not an order on appeal. We see no difference in an order dismissing SLP by the Supreme Court under Article 136 and an order dismissing an appeal by the High Court under Section 260A on the ground that no substantial question of law arise.

Both are for admission and maintainability of appeal. The former is conditioned by the discretion of the Supreme Court to exercise extra ordinary jurisdiction and the later is conditioned by the existence of substantial question of law. The fact remains that both are for invoking appellate jurisdiction of the Courts. Until the appeal is admitted, it is a petition for appeal and the effect is that same i.e.

the petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court under Article 136 in one case and of the High Court under Section 260A in another, and if it is dismissed it is an expression of opinion given by the court that a case for invoking the appellate jurisdiction was not made out. The dismissal in such a case is not of the appeal but of the petition for appeal, on the ground that there is no substantial question of law involved therein. Therefore, the doctrine of merger will not apply in such cases. In my opinion, therefore, hold that in this case, no merger was there, and consequently, I agree with the view expressed by the Judicial Member.

23. The contentions of the learned counsel of the assessee that the Tribunal has decided the issue on merits also, and therefore, this entire exercise is of an academic nature, has also no force in these proceedings before me. Be that as it may, this subject is beyond my jurisdiction, as the question referred to my opinion is whether the order of the Tribunal merged in the High Court's Order or not, Therefore, the broader question is to whether Tribunal had decided the appeal on merits and impugned dispute was only by way of alternate ground, should not detain me in expressing my opinion on the question referred to me Under Section 255(4) of the Act. I, therefore, need not, and cannot, express any opinion on this issue. The appeal papers be placed before the Division Bench for passing consequential orders.

