DOCTRINE OF MERGER AND I.T.PROCEEDINGS

1.The decision of hon'ble S.C. in **V. SENTHUR AND ANOTHER vs M. VIJAYAKUMAR, IAS, AND ANOTHER in contempt petition no 638 delivered on 1.10.2021[in CIVIL APPEAL NO. 4954 OF 2016**]has brought back the issue of merger in sharp focus again.The decision is a clarion call ,in my view,specially to the learned officers in income tax department,who,I have seen ,in my experience in IRS, are quite unmindful of judicial consequences of their ignorance/arrogance of precedents which become binding due to operation of doctrine of merger, and go their own merry way in deciding issues.

2.The doctrine is a statement of judicial propriety and discipline of subordinate authorities,whether judicial,quasi judicial or administrative.
It is not a doctrine statutorily recognized. It is a common law doctrine founded on principles of propriety in the hierarchy of the justice delivery system.

2.1 **Juristic justification of the doctrine of merger** can be found in the dictum laid down in ***Gojer Bros. (P) Ltd*. v. *Ratan Lal Singh*, (1974) 2 SCC 453 that** *''there cannot be, at the same time, more than one operative order governing the same subject matter".*

When a decree or order passed by an inferior court, Tribunal or authority is 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, its finality is put in jeopardy.

2.2 When an appeal or revision or any other remedy is provided in a statute against an order passed by any authority, **it is an established principle in law that the decision of the appellate, revisional or other higher authority is the subsisting decision which alone is operative, whether the challenged order is confirmed, modified or reversed. The decisions of all lower authorities merge in it** ; the order under challenge ceases to have an independent existence and the order of the highest authority alone subsists. This, in essence, is the doctrine of merger.

3.Merger is not omnibus -

Such a merger happens only in respect of matters that are under contest and covered by the higher forum and not in respect of every matter contained in the impugned order. Thus the subject-matter of the order OF INFERIOR AUTHORITY, should be fully considered. If the subject-matter differs at the various stages, there can be no merger and if some matters are ADJUDICATED *de novo* by the appellate or revisional authority there is no merger.

3.1 Justice Ramaswamy, speaking for the court in ***State of Madras* v. *Madurai Mills Co.* [1967] 19 STC 144 (SC)** sounded a note of caution against the indiscriminate application of this doctrine:

> *"But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that whenever there are two orders, one by the inferior tribunal and the other by a superior tribunal 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. In our opinion,*

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."

3.1.1 Similar note of caution occurred in **CST v. Vijai Int. Udyog [1985] 152 ITR 111(SC).** It was held that the theory of merger of the decree of the lower court in the decree of the appellate court applies only if the appellate court reverses, modifies or confirms the original decree on the merits in its own judgment. But if the appellate court dismisses the appeal as withdrawn,the principle does not apply, the right of the plaintiff or the appellant to withdraw a suit, appeal or a lis being unquestionable.

3.2The doctrine of merger does not apply where an appeal is dismissed (a) for default ; (b) as having abated by reason of the omission of the appellant to implead the legal representatives of a deceased respondent ; (c) as barred by limitation.

3.3Whether there is fusion or merger of the order of the inferior Tribunal shall have to be determined by finding out the subject-matter of appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute.

3.4 A debatable issue arises in that whether a merger of an order with an appellate order can arise only when there has been an effective appeal and not when the appeal was dismissed summarily. *Srinivasalu Naidu* v. *CIT* [1948] 16 ITR 341(Mad) says yes. This decision was followed by the Bombay High Court in *Jagmohandas Gokaldas* v. *CWT* [1963] 50 ITR 578 and by the Karnataka High Court in *Krishna Flour Mills* v. *CIT* [1965] 55 ITR 259. This view was also prima facie supported by an obiter in *CIT* v. *MTT. AR. S.AR. Arunachalam Chettiar* [1953] 23 ITR 180 (SC) to the effect

that dismissal of an appeal on preliminary grounds was not in exercise of the appellate powers.

Contrary views exist in in *Mela Ram & Sons* v. *CIT* [1956] 29 ITR 607 (SC)& *Sheodan Singh* v. *Daryao Kuer* AIR 1966 SC 1332.Per this view,and one which prima facie holds field currently, is that a summary dismissal of an appeal or revision, for any reason whatsoever, amounts to a confirmation of the order of the lower authority and hence that order merges with the order of the higher authority.

3.5 It can be said thus that whenever there are two orders, one by a lower authority and the other by the higher authority, the lower authority order fuse or merge into the higher authority order subject to i) their subject-matter and ii) scope and jurisdiction of the higher authority. The application of the doctrine, hence depends on

a.the nature of the orders,

b.the field or area actually or impliedly traversed in them, and

c.the statutory provisions conferring the jurisdiction of appeal or revision.

4. **The scope of doctrine of merger**:

a.**Applies to revisional proceedings**- this doctrine was **originally restricted to appellate decrees** because an appeal in effect is only a continuation of the suit, but in course of time this was extended to other proceedings like revisions and also to quasi-judicial and administrative proceedings. In **Shankar R. Abhyankar v. K.D. Bapat AIR 1970 SC 1,** it was held that a revisional jurisdiction is a part and parcel of the appellate jurisdiction and the doctrine of merger shall apply also to orders passed in revision.

b.**Applies to administrative orders**- In **Somnath Sahu v. State of Orissa [1969] 3 SCC 384,** the doctrine was extended to an administrative order in which the order passed by a subordinate authority was held to merge with that passed by its higher authority.

Also , in this case it was held that when an incorrect or illegal order was affirmed on appeal, no relief could be granted by the court unless it could be established that the order of the appellate authority ws defective. Thus, **an appellate order can validate an incorrect or illegal assessment order**, if the former does not suffer from any similar or other infirmity.

c.In income tax the order of assessment merges with the order of the CIT(A), [or by CIT u/s 264,]which in turn merges with the order passed by ITAT and so on.

5.Partial merger: a point of debate

View is that the entire order of assessment comes up for review before the appellate authority and that authority is quite competent to deal with and revise all the matters therein whether or not contested by either party and it can, if need be, rewrite the order. The *Explanation* below section 251 of the Income-tax Act specifically empowers the appellate authority to decide any matter arising in the proceedings for assessment though it may not be raised in the appeal. Even if there is no such a provision in the statute, the decision in *Shapoorji Pallonji Mistry* v. *CIT* [1958] 34 ITR 342 (Bom.) affirmed in *CIT* v. *Shapoorji Pallonji Mistry* [1962] 44 ITR 891 (SC) is authority for the proposition that an appellate authority can deal with any matter covered by the order appealed against, irrespective of the fact whether that matter is raised in appeal or not. **If it does not deal or revise**

any of the points within its jurisdiction, it should be assumed that the appellate authority has affirmed the findings on those points and has not thought it necessary to interfere with them. Hence, the entire order of assessment should be deemed to merge in the appellate order subject only to any other enabling statutory provision, as in the *Explanation* below section 251 of the Income-tax Act mentioned above.

J.K. Synthetics v. *Addl. CIT* [1976] 105 ITR 344,(Alld) upholds this view. The ratio of the decision in *Tel Utpadak Kendra's* case [*Tel Utpadak Kendra* v. *Dy. CST* [1981] 48 STC 248.]is also that when an appeal is filed, the appellate authority is seized of the entire order and not only that part of it which is challenged before it.

Contrary view is that if the appellate authority has not been called upon or has not interfered with any part of the assessment orders there is no question of that part of the assessment order merging with, the appellate order and hence that part continues to have an independent existence. *Karsandas Bhagwandas Patel* v. *G.V. Shah, ITO* [1975] 98 ITR 255,Calcutta High Court in *Singho Mica Mining Co. Ltd.* v. *CIT* [1978] 111 ITR 231, the Madras High Court in *CIT* v. *City Palayacot Co.* [1980] 122 ITR 430 ; *CIT* v. *Indian Auto Stores* [1981] 129 ITR 554 and the Bombay High Court in *CIT* v. *Sakseria Cotton Mills Ltd.* [1980] 124 ITR 570 sold the same view.

6. Operative Conditions:

In ***Ramchandra Abhyankar*** **v.** ***Krishnaji Dattatreya Bapat*****[(1969) 2 SCC 74** the hon'ble Court laid down **operative conditions of applicability** of the doctrine:

a.the jurisdiction exercised should be appellate or revisional jurisdiction,

b.such jurisdiction is exercised after issuance of notice, and that

c.it should be result of a full hearing in presence of both parties.

7.Situation of simultaneous remedies:

An assessee may prefer a 154 petition and at the same time ,to avoid limitation also file a 246A appeal.This raises a peculiar situation.If subject matter of both is the same then appeal will become infructuous if 154 order is passed prior and merger will apply if appellate order is passed before, ousting the jurisdiction of the subordinate authority.

I am afraid I am unable to subscribe to the view that the appellate authority can consider the modified order.That order is passed under a different provision which is separately appealable and the present appellate jurisdiction is circumscribed by the issues raised and points adjudicated in the original assessment order.The 154 should be separately appealed and the present one has to be dismissed as infructuous as the subject matter of the appeal does not subsist.In fact the original assessment order stands merged in the 154 order which alone now holds.This is a debatable issue,one for legal eagles to ponder upon. *CST* v. *Agrimal Raja Ram* [1974] 33 STC 416(Alld) provides an illustration of this issue.An apparently contrary view to this is expressed in *Sheodan Singh* v. *Daryao Kuer* AIR 1966 SC 1332.

8.Merger of orders of remand

When an order of a lower authority is set aside in appeal or revision and the proceedings are remanded to that authority for a retrial of the issues involved or a reassessment of the tax, does the order of remand stand by itself or does it cease to be in force after being merged with the order in dispute which has been set aside ?

In civil law, section 105(2) of the Code of Civil Procedure, 1908 provides that when a party, aggrieved by an order of remand does not appeal then and there against it, it is precluded from disputing its correctness at a later stage. **In tax laws,** though there generally is no such provision, it is open to the party aggrieved by an order of remand to go in for remedies like second appeal or revision against that order to the next higher authority, if available under the statute.

In ***Satyadhyan Ghosal* v. *Deorajin Debi* AIR 1960 SC 941,** the Court made a distinction between interlocutory orders which terminated the proceedings and those which did not.The same can be fruitfully referred.

***CAIT* v. *Lucy Kochuvareed* [1976] 103 ITR 799 (SC), *U.P. Electric Supply Co.* v. *Chatterjee* AIR 1972 SC 1201 & *Lalji Haridas* v. *CIT* [1968] 67 ITR 213 (Guj.)**provide further food for thought.

9.Merger and 147

An order of assessment merges completely with the order of reassessment, the latter alone being the operative order. Even if 147 order merely makes certain additions or modifications to the original order of assessment, the position will be the same, the two orders fusing together forming a single order. *Dy. CCT* v. *H.R. Sri Ramulu* [1977] 39 STC 177 (SC) validates this view.

CST v. *H.M. Esufali H.M. Abdul Ali* [1973] 32 STC 77 (SC) & *V. Jaganmohan Rao* v. *CIT* [1970] 75 ITR 373 (SC), reiterate.

10.Six landmark decisions:

a.CIT v. *Amritlal Bhogilal & Co.* [1958] 34 ITR 130 (SC)

b. *Collector of Customs* v. *East India Commercial Co.* AIR 1963 SC 1124

c.*State of Madras* v. *Madurai Mills Co.* [1967] 19 STC 144 (SC)

d. *Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359.

e. *V. M. Salgaocar and Bros. Pvt. Ltd.* v. *CIT* [2000] 243 ITR 383(SC)

f. *Shanmugavel Nadar* v. *State of Tamil Nadu* [2003] 263 ITR 658(SC)

a. Amritlal Bhogilal case

i.ITO passed a composite order granting renewal of registration as a firm to the assessee and also assessing the firm for the assessment years 1947-48 to 1949-50

ii.The assessee went in appeal to the AAC

iii. The appeal was disposed of by that authority giving some relief to the assessee but without in any way interfering with the registration granted by the ITO to the firm.

iv.Thereafter, the Commissioner invoked his power under section 33B of the 1922 Act and revoked the order in regard to the part granting registration.

v.The assessee contended that the entire order of the ITO having merged with the appellate order, the Commissioner had no jurisdiction to interfere with any part of it. The High Court, upheld the contention of assessee.

vi.On appeal by the department, the hon'ble Supreme Court considered the following question as arising in the case :

> *"Does the order passed by the Income-tax Officer granting registration to the assessee-firm continue to be an order passed by the Income-tax Officer even after the assessee's appeal against the assessment made by the Income-tax Officer on the basis that the assessee was a registered firm,*

has been disposed of by the Appellate Assistant Commissioner ? In other words, where the appeal preferred by an assessee against his assessment has been considered and decided by the Appellate Assistant Commissioner, does the order of registration along with the subsequent order of assessment merge in the appellate order ?"

The Court held that an **order granting registration to a firm was not amenable to the appellate jurisdiction of the AAC.** Consequently, such an order stood outside his jurisdiction and did not strictly form part of the proceedings before him such an order did not therefore merge in the appellate order. **The Commissioner was, therefore, held to have the competence to revise the order granting registration. It was thus held that the merger could not take place in a matter over which the higher appellate authority had no jurisdiction.**

b. *East India Commercial Co.* case:

i Collector of Customs, Calcutta confiscated certain goods imported by the company and levied also a penalty under the Customs Act.

ii.The company went in appeal before the Central Board of Revenue, New Delhi (as it then was)

iii. the appeal was dismissed by the Board.

iv.The company went to Calcutta High Court for a writ . The question that arose in this case was whether the Calcutta High Court had jurisdiction under article 226 of the Constitution to entertain an application for a writ against authorities beyond its territorial jurisdiction .

[At that point of time, **article 226 had not undergone the amendment made to it in 1963 by the Fifteenth Amendment** and a High Court's

jurisdiction to issue writs was confined to the orders of authorities located within its territorial jurisdiction.]

v.The Calcutta High Court held that as the Board had dismissed the appeal against the Collector's order, it was the latter which was effective and hence the High Court had jurisdiction .

vi.On appeal by the Collector of Customs, the Supreme Court held the order of the Collector had, merged with the order of the Board and hence the Calcutta High Court had no jurisdiction (then) to entertain the application for a writ against that order.

On same issue of jurisdiction:

a.Swadeshi Cotton Mills Co. Ltd. v. *CIT* [1975] 101 ITR 621 (All.).

b.*Kshitish Chandra Bose* v. *Commissioner of Ranchi* AIR 1981 SC 707

c. State of Madras *v.* Madurai Mills Co.case-

i. order of assessment was passed determining the taxable turnover for the year 1950-51 at Rs. 15.44 lakhs, **which excluded a turnover of Rs. 7.75 lakhs** on purchases claimed by the assessee to have been made outside the State not taxable under the State sales tax.

ii.The assessee went in appeal against the inclusion of a sum of Rs. 1.44 lakhs towards commission paid to its agents which was omitted to be excluded from the said sum of Rs. 15.44 lakhs. The appellate authority allowed this deduction ; **the assessing authority passed a revised order of assessment in November 1952.**

iii.The assessee went in revision against this revised order before the Deputy Commissioner claiming a further deduction of Rs. 6.58 lakhs,

towards sales tax collected along with sale prices, which was claimed to have been wrongly included in the taxable turnover both in the returns filed by the assessee and in the order of assessment. **This application for revision was dismissed in August 1954.**

iv. On August 4, 1958, the Board of Revenue initiated proceedings for a *suo motu* revision of the November 1952 order of assessment and passed an order on August 25, 1958, including in the taxable turnover ,the sum of Rs. 7.75 lakhs on purchases .

v.The order of the Board was successfully challenged by the assessee in the High Court as barred by limitation counted from November 1952 Revenue contended that limitation counted from the date of the revisional order, August 1954, as the order of assessment had merged with it.

vi.The hon'ble Supreme Court held that there was merger of the revisional order of August 1954 with the order of the assessing authority passed in November 1952 **only to the extent of the claim for Rs. 6.58 lakhs dealt with in the former and rejected in the latter** and as **there was no merger insofar as the sum of Rs. 7.75 lakhs is concerned** which did not at all form the subject of the revisional order of August 1954, the limitation for revision in respect of that amount should be counted from November 52 and not August 1954. There was no merger of its order insofar as the claim for the deduction of Rs. 7.75 lakhs was concerned which did not form part of the revised order of assessment passed in November 52.

d. ***Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359/245 ITR 360(SC)**

Probably the definitive word on the doctrine.Nothing better than citing the exact words of the hon'ble Court." *23. A petition for leave to appeal to this*

Court may be dismissed by a non-speaking order or by a speaking order. 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 place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under article 141 of the Constitution*** *for there is no law which has been declared.* ***If the order of dismissal be supported by reasons, then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction*** *refusing to grant leave to appeal. We have already dealt with the aspect earlier. Still* ***the reasons*** *stated by the Court would attract applicability of article 141. If there is a law declared by the Supreme Court which obviously would be binding on all the Courts and Tribunals in India and certainly the parties thereto, the statement contained in the order other than on points of law would be binding on the parties and the Court or Tribunal, whose order was under challenge on the principle of judicial discipline this Court being the Apex Court of the country, no Court or Tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of the Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave.* ***The declaration of law will be governed by article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply.*** *The Court*

sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of article 141. ***This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.***"

e. *V. M. Salgaocar and Bros. Pvt. Ltd.* v. *CIT* [2000] 243 ITR 383(SC)

Here also I cannot do any better than to reproduce the words of the decision

."*5. Different considerations apply when a special leave petition under Art. 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under Art. 133 is dismissed also with the words 'the appeal is dismissed'. In the former case it has been laid by this Court that when special leave petition is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. But what the Court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Art. 136 of the Constitution. That certainly could not be so* ***when appeal is dismissed*** *though by a non-speaking order.* ***Here the doctrine of merger applies****. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under cl. (3) of Art. 133.* ***This doctrine of merger does not apply in the case of dismissal of special leave petition*** *under Art.*

136. When appeal is dismissed order of the High Court is merged with that of the Supreme Court."

f. *Shanmugavel Nadar* v. *State of Tamil Nadu* [2003] 263 ITR 658(SC)

Here it was held that 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 positive or negative form.** The application of the doctrine depends on the nature of the appellate or revisional order , the scope of the statutory provisions conferring jurisdiction and the subject-matter of challenge. It was also held that article 141 of the Constitution of India speaks of declaration of law by the Supreme Court : **for a declaration of law there should be a speech, i.e., a speaking order. A decision which is not express and is not founded on reasons nor on consideration of the issues, cannot be deemed to be a law declared, to have binding effect as is contemplated by article 141**. A summary dismissal by the Supreme Court, without laying down any law, is not a declaration of law envisaged by article 141. When reasons are given the decision of the Supreme Court would be binding on all courts within the territory of India : when no reasons are given, dismissal simpliciter is not a declaration of law by the Supreme Court. **The doctrine of precedents, that is, being bound by a previous decision, is limited to the decision itself and not as to what is necessarily involved in it.** 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 construed as the imprimatur of the superior forum on the correctness of the decision sought to be appealed against.

8.Suggested Readings:Other Landmark cases in income tax:

A.CIT v. Alagendran Finance Ltd [2007] 293 ITR 1 (SC) on 263

B.Ashoka Buildcon Ltd. v.ACIT [2010] 325 ITR 574 (Bombay) on 263 and 147

C.PCIT v. Oil India [2019] 103 taxmann.com 339 (Gauhati) on 263 and 250

D.CIT v. Hindustan Aeronautics Ltd. [1986] 157 ITR 315(KAR.) ON 264

E. KOTHARI INDUSTRIAL CORPORATION LTD.*v.*AGRICULTURAL INCOME-TAX OFFICER[1998] 230 ITR 306 (Kar) on rectification and doctrine of merger.