Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench At Chennai

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.40497 of 2020

(Arising out of Order-in-Appeal No. 05-06/2020 (CTA-I) dated 10.01.2020 passed by the Commissioner of GST and Central Excise (Appeals-I, 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai-600 034)

M/s.Kingmakers IAS Academy **........Appellant**
S-48, 20th Street, 6th Avenue, Anna Nagar,
Chennai- 600 040

VERSUS

The Commissioner of G.S.T. and Central Excise **.......Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai- 600 034

With

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Smt. Sathyashree Boominathan, Proprietrix, **........Appellant**
M/s.Kingmakers IAS Academy
S-48, 20th Street, 6th Avenue, Anna Nagar,
Chennai- 600 040

VERSUS

The Commissioner of G.S.T. and Central Excise **.......Respondent**
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APPEARANCE:
Shri Krishna Pratap Singh, Advocate for the Appellants
Shri S. Balakumar, Assistant Commissioner (AR) for the Respondent

CORAM: **HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
HON'BLE MEMBER (TECHNICAL), MR. P.ANJANI KUMAR

Final Order No.40023-40024 / 2022

DATE OF HEARING: 22.10.2021
DATE OF DECISION: 31.01.2022

RAMESH NAIR

The present appeals are directed against the Order-in-Appeal No. 05-06/2020 (CTA-I) dated 10.01.2020 passed by the Commissioner of GST and Central Excise (Appeals-I), Chennai upholding the Order-in-Original No. 06/2019-2020-Audit-1 dated 21.08.2019 passed by the Joint Commissioner, Office of the Commissioner of GST & Central Excise, Audit-I Commissionerate, Chennai. Vide impugned order, the Demand of Rs. 95,57,355/- was upheld with interest. Further, the Learned Commissioner (Appeals) vide the said order also upheld a penalty upon M/s. Kingmakers IAS Academy amounting to Rs. 95,57,355/-, and has also upheld the appropriation of Rs 3,01,994/-. Further, the learned Commissioner (Appeals) also upheld a penalty of Rs. 1,00,000/- on Smt. Sathyashree Boominathan (the Proprietor) of the Appellant firm. Against the impugned order, the Appellant firm and it's Proprietor has filed Early Hearing Applications and Appeals.

1.1 Briefly stated facts of the case are that the Appellant firm is registered with the Service Tax Department vide Service Tax Registration No. BJKPS9105GSD001 under the category of 'Commercial Coaching Service'. The officers of Director General of Goods & Services Tax Intelligence (DGGI) Chennai Zonal Unit, Chennai visited the premises of the Appellant firm and made scrutiny of records and various documents recovered from the Appellant firm and also recorded the statement of the Proprietor. Consequent to investigation, a Show Cause-cum- Demand Notice dated 17.10.2018 was issued by the Joint Director, DGGI, Chennai Zonal Unit, Chennai covering the period from 01.06.2013 to 30.06.2017, directing the Appellant firm to show cause as to 'Why'-

(i) *"the Commercial Coaching or Training to the aspirants of UPSC/TNPSC/BANK Exams provided by the appellant should not be considered as 'Taxable Service' as per Section 65 B (51) and Section 65 B (44) of the Finance Act, 1994;*

(ii) Service Tax including Cess amounting to Rs 95, 57, 355 (Rupees Ninety Five Lac fifty Seven Thousand Three Hundred & Fifty Five Only)' towards Service Tax (Rs 91,05,042), Education Cess (Rs 39,107/-), Secondary & Higher Education Cess (Rs 19,555/-), Swatch Bharat Cess (Rs 2,16,686/-) & Krishi Kalyan Cess (Rs 1,76,965/-), should not be demanded for rendering Commercial Training or Coaching services for the period from

01.06.2013 to 30.06.2017 under proviso to Section 73(1) of The Finance Act, 1994;

(iii) an amount of Rs 3,01,994/- (Rupees Three Lac One Thousand Nine Hundred and Ninety Four) paid voluntarily by the appellant; towards past service tax liability, should not be appropriated towards the demand as made at (ii) , subject to verification;

(iv) appropriate interest, on the service tax demanded at point (ii) above, should not be demanded and recovered from them under Section 75 of The Finance Act;

(v) penalty should not be imposed on them in the manner prescribed under sections 76 of The Finance Act, 1994 for their failure to pay service tax in accordance with the provisions of Section 68 of the Finance Act, 1994 or the rules made there under;

(vi) penalty should not be imposed on them under Section 77 (2) of The Finance Act, 1994 read with Rule 7 of The Service Tax Rules, 1994 for contraventions of Rules and provisions and;

(vii) penalty should not be imposed on them under Section 78(1) of the Act for mis-stating and suppressing the facts, value of the taxable service and contravention of the provisions of the Act with intent to evade payment of service tax.

Further the Proprietor of the Appellant firm was also called upon to show cause as to why penalty should not be imposed on her in terms of Section 78A of the Finance Act, 1994.

1.2 The matter under the said Show Cause Notice was adjudicated by the Adjudicating Authority vide aforementioned Order-In-Original. The appeals against the said Order-In-Original filed by the Appellant firm and Proprietor have been rejected vide the impugned order. In the present appeal the Appellant firm has taken the grounds that right to cross examination was denied, principles of natural justice were not followed, computation of demand was incorrect and arbitrary, the SCN has been issued beyond the period of limitation, there is no willful suppression of facts thus provisions of Section 78 of the Finance Act, 1994 are not attracted and retractions filed by the Proprietor were neither made a part of the SCN nor has been discussed in any part of the impugned order. The Proprietor in its appeal repeated the above grounds and contended that the penalty cannot be imposed on the

Proprietor as the Proprietor and the firm are one and the same in the eyes of law.

1.3 Both the Early Hearing applications were heard on 22.10.2021. After hearing, the Early Hearing applications were allowed. On 22.10.2021 this bench heard both sides on the main appeals also with the consent of Authorized Representative of revenue.

02. The Appellant firm filed the Appeal and submission which are summarized as under:-

(a) that the Appellant is 'Commercial Coaching and Training Service' center and operating since the year 2013 vide STC No. BJKPS9105GSD001 under the category "*Commercial Coaching Service*" to train UPSC aspirants and other competitive exams including TNPSC examination and others. Fee collected is divided into 3 components *i.e.* TUITION FEE, HOSTEL & MESS FEE and BOOKS. Each student, who is admitted in the institute is required to deposit only the Tuition Fee. Other components i.e Hostel and Mess Fee and Books are optional. The Appellant has received the amount from students by way of cheques, bank transfer and also cash. The cash received has been deposited in the bank account. From the total amount deposited in bank account, the expenses towards Books and Hostel & mess had been incurred on behalf of the students and on balance amount (the tuition fees) the Service Tax has been duly paid.

(b) that the Appellant acts as a facilitator to students who come from various parts of India, particularly rural areas of Southern India for UPSC/TNPSC preparation. On request of the parents of Students, the Appellant helps them by arranging Hostel, Mess and Books which are required for study and preparation of the examinations. The same are arranged and facilitated without any additional cost or payment from the students for the sake of focused preparation for the examination. The Appellant does it on the request of the parents and guardians of the students so that their wards exclusively focus on the studies. The Appellant only collects the Coaching Fee (Tuition Fee) and is paying Service Tax on such consideration. Other collected amounts are incurred on behalf of students on actual basis towards Hostel & Mess charges and Books.

(c) that to serve the students better, Appellant maintains a student-wise account for boarding, lodging and other expenses that are incurred on behalf of the students. The details were already submitted with the Appeal Memo with names of each student and their Mobile Numbers under bracket. The wallet amount of each student is maintained in separate accounts wherein every student has his account and the payment for Hostel and Mess are paid by the Appellant on behalf of the student. The amount is also utilized by the student for buying Books and the same are without fail paid by the Appellant on behalf of the students. The Appellant acts as a Local guardian and there is no additional consideration that is being charged by the Appellant for this purpose.

(d) that the Appellant received a Show Cause Notice (SCN) No. 112/2018 dated 17.10.2018 for the period from 01.06.2013 to 30.06.2017 taking gross value received by the Appellant as 'Taxable value' for the purpose of computation of service tax liability under Section 67 of the Finance Act, 1994. The computation made in the SCN was miserably whimsical, arbitrary and factually incorrect. The Gross Value is taken based upon the comparison of highest figure as per IT Returns, invoices, Bank Statement and the account statement maintained in the CPU which was seized by the department. This is an arbitrary way of computation of demand and lacks uniformity and legal basis. That it was observed that the data obtained from the CPU is the highest among all the financial documents available except 2013-14 wherein the value of the bank statement was the highest. This arbitrary selection of documents based on the highest figure is principally wrong and legally unsustainable.

(e) that the Appellant had informed through submissions in the form of replies and in appeal proceedings that the account statement in CPU was being fraudulently maintained by Appellant's previous Accountant against whom Appellant had also filed FIR much prior to the Case made out by the department (DGGSTI).

(f) that while computing the tax liability, the department has made calculation on Cum-Tax-Value basis and had determined the amount of Rs. 95,57,355/- as Service Tax liability on Rs. 7,71,27,668/- the value taken from account statement maintained in the CPU. The department has not considered the amount of Service Tax of Rs. 3,01,994/- which has already been paid as per ST-3 Returns filed. Therefore, the computation is wholly incorrect which has been done without appreciating all the facts available. In fact, the figures mentioned in respect with IT Returns, Bank Statements and Invoices are at variance when compared with the actual Returns which can easily be seen at the Para 8 of the SCN (Quantification). The basis of their Computation is beyond comprehension. The Department whimsically adopted the highest value while calculating the Demand. Further the Appellant has deposited Rs. 3,01,994/- voluntarily during the course of investigation, Rs. 4,14,808/- while filing the Appeal before the Commissioner (Appeals) and Rs 2,38,934 /-for filing the present appeal. Therefore, an amount of Rs. 9,55,736/- (Rs. 3,01,994/- +Rs. 4,14,808 /- + Rs 2,38,934 /-) has been deposited in the form of mandatory pre-deposit requirement of 10% of the Duty or Penalty. The duty amount involved in the instant matter as per SCN is Rs. 95,57,355/- and against this an amount of Rs. 9,01,789/- has been shown as paid in ST-3 Returns and Rs. 9,55,736/- has been paid during proceedings as mentioned above.

(g) that the Appellant enclosed the Reconciliation Statement reconciling ST Returns, IT Returns and the Bank Statements along with year-wise Service Tax working**.** This Statement shows head-wise receipt of amount from students (during the period covered in SCN). The gist is given as under-

(I) Income as per IT Returns - Rs. 84,46,161/-
(II) Amount collected on account of Books - Rs. 1,59,55,292/-
(III) Amount collected for Hostel and Mess - Rs. 60,91,726/-
(IV) Amount refunded to the students - Rs. 26,32,601/-
(V) Total amount collected - (I+II+III+IV) - Rs. 3,31,25,780/-
(VI) Amount as per Bank Statement - Rs. 3,31,25,780/-
(VII) Amount on which Service Tax has been paid - Rs. 69,09,934/-
From the above it is clear that the amount as per Bank statement is matching with the total amount collected.

(h) that against net income of Rs. 84,46,161/- (shown in IT Returns), the Appellant firm has made payment of Service Tax on amount of Rs. 69,09,934/- as per ST-3 Returns. The difference remains of Rs. 15,36,227/- on which Service Tax of Rs. 1,89,878/- (@12.36%)was payable. Against this, the Appellant has already made payment of Rs. 9,55,736/-. Therefore an amount of Rs. 7,65,858/- has been paid in excess and the Appellant may be refunded this amount with applicable rate of interest.

(i) that regarding non-payment of Service Tax on amount of Rs. 1,59,55,292/- (collected towards Books), the Appellant submitted that the said amount is outside the purview of Service Tax in view of the benefit extended under Notification No. 12/2003-ST dated 20.06.2003. The said amount has been shown in Financial records as expenses made towards Books purchased which were further provided to the students.

(j) that the fact that the books are purchased by the Appellant from a third-party supplier for students is not in dispute. The exemption provided under Notification No. 12/2003-ST dated 20.06.2003 would be available to the Appellant since expenses for the text books were incurred on behalf of the students. Each student's name along with their mobile numbers in bracket were provided to the Investigating Officers. The DGGI was at liberty to verify the factual details and genuineness of the transactions. The DGGI has adopted a short-cut method of relying on only CPU Data which have been prepared by the erstwhile Accountant against which the Applicant has filed the FIR with the Chennai Police. It is settled position of law that in cases where such books are procured by coaching centers from third-party suppliers, the same will be eligible for exclusion from value of taxable service being covered under above-mentioned exemption notification.

(k) that it is undisputed fact that the Appellant purchased books from suppliers of books which are chargeable to VAT but exempted in terms of Tamil Nadu VAT Department's Clarification dated 25.05.2007. The relevant part of Clarification has been reproduced as under-

> *"text books are exempted from VAT Tax under entry 11 of Part B of IVth Schedule to the TNVAT Act 2006".*

In view of above, the consideration paid towards these books cannot be subjected to Service Tax in the hands of Appellant.

(l) that it is trite law that Service Tax and VAT are mutually exclusive, and both cannot be levied simultaneously on the same transaction. In this regard reliance is placed on the case of *IMAGIC CREATIVE PRIVATE LIMITED VS. COMMISSIONER OF COMMERCIAL TAXES* [*2008 (1) TMI 2- Supreme Court*] where it has been held that in case Service Tax is payable, no VAT can be levied on the same transaction.

(m) that the fact that Hostel and Mess facility for the students was facilitated by the Appellant with the help from the third-party supplier is not in dispute. Regarding non-payment of Service Tax on amount of Rs. 60,91,726/- (collected towards Hostel and Mess), the Appellant submits that the said amount has been paid to the vendors (Hostel & Mess service providers) on actual basis on behalf of the students. Such expenses on behalf of the students are reflected in the financial records.

(n) The reliance is placed on the judgement of CESTAT Bangalore in the case of *ADITYA COLLEGE OF COMPETITIVE EXAMINATIONS VS. COMMISSIONER OF CENTRAL EXCISE, VISAKHAPATNAM* [*2009(4) TMI 134-CESTAT Bangalore*], wherein Hon'ble CESTAT held as follows:

> *"…Further a part of the demand relates to inclusion of Mess charges. By no stretch of imagination, the Mess charges collected can be considered as receipt for rendering the service of 'Commercial Training and Coaching'. The Commissioner has stated that there is no provision for excluding the said charges. We would like to emphasis that there is no provision for inclusion of any amount whatsoever collected by the appellants. There should always be a nexus between the amount collected and services rendered. The Mess charges have been collected for availing the facility of the mess. The mess is meant for providing food to the trainees. It cannot be brought under the category of receipt for 'Commercial Training or Coaching' and subject to service tax. Further we find that the show-cause notice was issued based on some Audit objection. There is no justification for invoking the longer period. Therefore, the demand is also hit by time bar. In view of the above findings, we do not find any merit in the impugned order. The demand is not sustainable. Once the demand is not sustainable, the imposition of penalty/demand of interest also cannot be upheld. Hence, the impugned order is set aside and the appeal is allowed with consequential relief if any."*

(o) that the impugned order in appeal fails to appreciate settled position of law governing valuation of taxable service during the period of dispute and proposes to levy service tax on sale of goods i.e., books. This proposal of the department also leads to the Double Taxation with associated Cascading Effects which has never been the intention of the Legislature.

(p) that with total disregard to the Principles of Natural Justice, the investigation and the Respondent has accepted and blindly relied the statements of Smt. S. Sathyashree, the Proprietor of the Appellant herein, dated 09.01.2018 and 03.10.2018 recorded under duress, coercion and threats considering them as gospel truth. All these have been done without adverting to the fact that these statements were immediately retracted vide retraction letters dt. 09.01.2018 & 06.10.2018, which were sent to the Investigating Officers. The Proprietor was forcefully made to sign the pre-typed statements without even letting her read its contents. In this regard, the Respondent *vide* Para 8 of the impugned order has set out the reason for the imposition of penalty on the Proprietor to be the admission by the Proprietor of secreting the details of actual income in the CPU seized from the premises of Appellant and her confirmation as to the correctness of the said details. While doing so, the Respondent chose to remain blind to the fact that Proprietor has already retracted her statements dt. 09.01.2018 and 03.10.2018 vide letter dt. 9.01.2018 and letter dt 06.10.2018. This erroneous act of the order, runs parallel to the errors committed by the Appellate Authority regarding, *inter-alia,* placing of reliance on retracted statements of the Proprietor.

(q) that it is clear that there is no short payment of Service Tax and there is no will full suppression of any fact by the Appellant. In this situation the Appellant is not liable for any penalty under Section 78 of the Finance Act, 1994. It has been settled by various judicial and quasi-judicial pronouncements that such allegation is not a ground for imposition of penalty under Section 78. Further no penalty should be imposed for non-payment of Service Tax if there is no wilful suppression of facts to evade tax.

2.1 Further the Proprietor has also filed appeal and submission separately in the matter which is summarized as under: -

(a) that the Appellant is a Proprietor of the Appellant firm. Hence two different penalties under section 78 on the Appellant firm and 78A on the Proprietor cannot be imposed when both entities essentially remain the same being Proprietary Concern. The Imposition of personal penalty on the Appellant is without any authority of law and is liable to be set aside. The Appellant also placed reliance on number of case laws cited in Appeal Memo and subsequent Submission.

03. The Learned Authorized Representative appearing on behalf of the revenue supports the Order-in-Appeal and reiterates the findings given in the impugned order.

04. We have carefully considered the submissions made by both the sides through video conferencing and perused the appeal records and subsequent submissions made by the Appellant and the Learned Departmental Representative. The issue involved in the instant case for decision is determination of correct assessable value for the purpose of Service Tax and whether the deductions claimed by the Appellant firm towards reimbursement of expenses on account of Hostel & Mess Fee and books are admissible deductions or not. Essentially there is challenge to the value adopted for making the Service Tax Payment.

4.1 We find that the Appellant is 'Commercial Coaching and Training Service' center having Service Tax Registration under the category "Commercial Coaching Service" to train UPSC aspirants and other competitive exams including TNPSC examination and others. Fee collected is divided into 3 components i.e. TUITION FEE, HOSTEL & MESS FEE and BOOKS. Each student, who is admitted in the institute is required to deposit only the Tuition Fee. Other components i.e. Hostel and Mess Fee and Books are optional. The Appellant has received the amount from students by way of cheques, bank transfer and also cash. The cash received has been deposited in the bank account. From the total amount deposited in bank account, the expenses towards Books and Hostel & mess had been incurred on behalf of the students and on balance amount (the tuition fees) the Service Tax has been duly paid. The Appellant maintains a Student-wise wallet account for boarding, lodging and other expenses that are incurred on behalf of the students. The wallet amount of each student is maintained separately and the payment for Hostel and Mess are paid by the Appellant on behalf of the student. The amount is also utilized by the student for buying Books and the same are without fail paid by the Appellant on behalf of the students.

4.2 We find that the DGGI has taken the Gross Value based upon the comparison of highest figure as per IT Returns, invoices, Bank Statement and the account statement maintained in the CPU which was seized by the department. This is an arbitrary way of computation of demand and lacks uniformity and legal basis. Thus, it was observed that the data obtained from the CPU is the highest among all the financial documents available except 2013-14 wherein the value of the bank statement was the highest. This arbitrary selection of documents based on the highest figure is principally wrong and legally unsustainable. Appellant had informed through submissions in the form of replies and in appeal proceedings that the account statement in CPU was being fraudulently maintained by Appellant's previous Accountant against whom Appellant had also filed FIR much prior to the Case made out by the department (DGGI). This fact was under the knowledge of the Department all along. However, the Department never checked the veracity of the FIR and never analysed the impact on the valuation. It merely and blindly accepted the values mentioned in the CPU documents and concluded the demand without any investigation to this effect.

4.3 We find that while computing the tax liability, the department has made calculation on Cum-Tax-Value basis and had determined the amount of Rs. 95,57,355/- as Service Tax liability on Rs. 7,71,27,668/- the value taken from account statement maintained in the CPU. The department has not considered in its demand calculation the amount of Service Tax of Rs. 3,01,994/- which has already been paid as per ST-3 Returns filed. This arbitrary and incorrect calculation done shows the carelessness, biasness and pre determination on the part of Department which is not sustainable.

4.4 The Appellant firm in their submission has given the reconciliation statement prepared by taking into consideration of statutory documents viz. IT Returns, Bank Statements and ST-3 Returns. In the nutshell it emerges that against net income of Rs. 84,46,161/- (shown in IT Returns), the Appellant has made payment of Service Tax on amount of Rs. 69,09,934/- as per ST-3 Returns. The difference of taxable value remains of Rs. 15,36,227/- on which Service Tax along-with due interest is payable by the Appellant firm. It is seen from the Reconciliation Statement that after considering the payment of Service Tax of Rs 3,01,994/- during the investigation along with the appropriate interest the appellant would be entitled for refund.

4.5 We find that the amount received on account of Hostel & mess and books is not directly related to provision of taxable service. It was purely optional for the students looking into the business model adopted by the Appellant firm. Regarding non-payment of Service Tax on amount collected towards Books we find force in Appellant firm's contention that the said amount is outside the purview of Service Tax in view of the benefit extended under Notification No. 12/2003-ST dated.20.06.2003. The said amount has been shown in Financial records as expenses made towards Books purchased (Tamil Nādu VAT is exempted) which were further provided to the students. The Appellant firm produced the sample copies of invoices / vouchers evidencing purchase of Books on behalf of the students. Therefore, the demand on this point is not sustainable. Reliance is placed on Final Order No. 71643/2018 dated 26.07.2018 (Appeal No. ST/70817/2018-CU(DB**)** pronounced by CESTAT Regional Bench Allahabad in case of M/s. Smart Value Products & Services Ltd. Vs Commissioner of Central Goods & Service Tax, Noida. Reliance is also placed on Final Order 71180/2018 dated 20.06.2018 (Appeal No. ST/2406/2012-CU(DB) pronounced by CESTAT Regional Bench Allahabad in case of M/s. FITTJEE Ltd. Vs Commissioner of Central Excise & Service Tax, Lucknow.

4.6 Further regarding non-payment of Service Tax on amount collected towards Hostel and Mess, the Appellant's contention is that the said amount has been paid to the vendors (Hostel & Mess service providers) on actual basis on behalf of the students. Such expenses on behalf of the students are reflected in the financial records. The Appellant firm produced the sample copies of invoices raised by the vendors. We find force in the said contention hence the demand on this point is also not sustainable in view of the fact that Hostel and Mess was optional for students. Reliance is placed on Final Order No 158/2011 dated 24.02.2011 (Appeal No. ST/610/2009) pronounced by CESTAT Bangalore in case of M/s. Vikas Coaching Centre Vs Commissioner of Cus, C.Ex. & S.T. Guntur. It is also noticed that the Department has sent the Scrutiny Notice to the Appellant and the Appellant had provided the documents and data in response to it. It also clearly establishes the *bona fides* of the Appellant in terms of their compliance. So, on the ground of Limitation also demand based on excel sheet obtained from the CPU does not sustain.

4.7 The Respondent in impugned order has not distinguished the case laws cited by the Appellant firm. The DGGI without making thorough investigation and has adopted a short-cut method of relying on only CPU Data which was alleged to have prepared by the erstwhile Accountant against which the Applicant firm had filed the FIR with the Chennai Police. DGGI did not record any statement of the accountant hence the reliance placed on some unauthenticated and unreliable data is patently wrong.

4.8 We further find that with total disregard to the Principles of Natural Justice, the investigation and the Respondent has accepted and blindly relied the statements of the Proprietor of the Appellant which were immediately retracted vide retraction letters sent to the Investigating Officers. Consequently, no *mala fide* is established against the Proprietor hence no penalty is sustainable on the Proprietor.

05. In view of the above discussions, the demand upheld vide impugned order against the Appellant firm is modified to the extent as mentioned at Para 4.4 above. The major portion of demand arising out of calculations on the basis of the excel sheet obtained through CPU is not sustainable. Consequently, the Appellant firm and the Proprietor are not liable to any penalty.

06. In the result, the appeal filed by the Appellant firm is partially allowed with consequential relief, if any. Further the appeal filed by the Proprietor is allowed.

(Pronounced in the open court on 31.01.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Mehul