CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

EXCISE APPEAL NO. 52393 OF 2019

[Arising out of Order-in-Appeal No. 613 & 614 (CRM) CE/JDR/2019 dated 24.06.2019 passed by the Commissioner (Appeals) Central Excise and CGST Jodhpur]

The Commissioner,
Central Excise and CGST, Udaipur **Appellant**

Versus

M/s Multimetal Limited **Respondent**
Heavy Industrial Area,
Kansua Road, Kota

Appearance:
Present for the Appellant : Shri O P Bisht, Authorised Representative
Present for the Respondent: Shri Rahul Lakhwani, Advocate

COARM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50830/2022

DATE OF HEARING: 01.09.2022
DATE OF DECISION: 12.09.2022

P V SUBBA RAO:

1. This appeal has been filed by the Revenue assailing the Order-in-Appeal[1] dated 24.06.2019 passed by the Commissioner (Appeals), Jodhpur whereby he set aside the order dated 13.07.2018 passed by the Joint Commissioner, Udaipur and allowed the appeal of the assessee.

2. We have heard learned Authorised Representative for the Revenue and learned counsel for the respondent. The facts of

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[1] **Impugned order**

the case in brief are that the respondent manufactures copper and copper alloy tubes and rods from copper alloy ingots and is registered with the Central Excise Department and had availed the CENVAT credit amounting to Rs. 62,00,595/- on the strength of the invoices for copper alloy ingots issued by M/s Maruti Metals Industries Limited, Kota[2] during the period September , 2012 to December, 2012.

3. As a follow up to a wider investigation of the Directorate General of Central Excise Intelligence[3], the Joint Commissioner of Central Excise, Udaipur issued to the respondent a show cause notice[4] dated 06.10.2017 alleging that the invoices issued by the Maruti Metals were based on the inputs which it had procured from M/s Sypher Impex Alloys Pvt Ltd., Bhiwadi[5] and that SIPL had issued invoices to Maruti Metals without supplying the materials mentioned therein and, therefore, the invoices issued by the Maruti Metals to the respondent do not qualify for CENVAT credit. Accordingly, it was proposed to recover CENVAT credit of Rs. 60,00,595/- availed by the respondent. It was also proposed to impose an equal amount as penalty on the Respondent and on some other co-noticees.

4. The Joint Commissioner had, in his order, dated 13.07.2018 disallowed the CENVAT credit and ordered its recovery from the respondent and imposed penalties. On appeal, the Commissioner (Appeals) has, by the impugned order set aside the order of the Joint Commissioner.

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[2] **Maruti Metals**
[3] **DGCEI**
[4] **SCN**
[5] **SIPL**

5. Hence, this appeal by the Revenue on the following grounds;

(i) As per CENVAT Credit Rules, 2004[6] CENVAT Credit is available only on the goods used in the factory of manufacture of the final products. In other words the invoices should also result in supply of goods.

(ii) The Commissioner (Appeals) has decided the matter following the CESTAT's Final Order No. 51800-51808/2018 dated 11.05.2018 in the case of the same respondent but the Tribunal's order has been challenged before the High Court and hence has not attained finality.

(iii) The finding of the Commissioner (Appeals) was that the respondent was not a party to any fraud. However, it appears that respondent as well as Maruti Metals are both masterminds in the case and are also habitual offenders. Similar cases were also booked against them in the past.

(iv) The Commissioner (Appeals) has erred in recording his findings that the assessee has availed CENVAT credit on the basis of duty paying documents and cleared the goods which are the manufactured on payment of duty.

(v) The Commissioner (Appeals) has observed that cross examination was not provided to the assessee but

[6] **CCR**

there were proper reasons for denial of cross-examination by the adjudicating authority.

(vi) The Commissioner (Appeals) has observed that regular audit of the assessee was being conducted by the Department and no such allegations were ever made but the audit was on the basis of records and physical verification of stock was not conducted. The Commissioner (Appeals) has held that the assessee received the goods in factory and have duly accounted for them in the books of account but has not taken into accoun documentary and circumstantial evidence as well as of the statements of the persons connected with the supply of the goods that the goods were never transported.

(vii) The assessee was not entitled to the disputed CENVAT credit.

6. Learned Authorised Representative strongly reiterated the above submissions.

7. Learned counsel for the respondent supports the impugned order and submits that it calls for no interference.

8. We have considered the submissions on both the sides.

9. We find that Revenue's case is that the trader Maruti Metals had issued invoices on the strength of which the respondent had availed the CENVAT credit but Maruti Metals could not have supplied the goods because it had recorded that

it had received from SIPL who, in turn, had not supplied any goods to Maruti Metals.

10. The basis for coming to this conclusion are the relied upon documents 1 to 18 annexed to the show cause notice. Of these 18 documents, five are statements made by various persons before the Central Excise Officers, three are copies of the summons issued to the various persons, one is the panchnama drawn at the premises of Maruti Metals and two are orders passed by the adjudicating authorities and High Courts and the rest are a few letters and emails.

11. We find from the records of the case that the statements made before the officers of Central Excise which were relied upon in the SCN were not put through the process under section 9D of the Central Excise Act,1944 which reads as follows:

> **Section 9D in the Central Excise Act, 1944**
>
> **"9D. Relevancy of statements under certain circumstances.—**
> (1) **A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant**, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—
>
> > (a) **when the person who made the statement is dead or cannot be found, or is incapable of giving evidence**, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
> > (b) **when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice**.

> (2) The provisions of sub-section (1) shall, so far as may be, **apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court**."

12. The scope of Section 9D was discussed at length by High Court of Punjab and Haryana in **Jindal Drugs Pvt. Ltd. vs UOI[7],** relevant extracts of which are as follows:

> "**8 .** In view of the fact that the case of the petitioners is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, *in extenso*, thus :
>
> **xxxxxx**
>
> **9.** A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.
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> **10.** Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in *J.K. Cigarettes Ltd.* v. *CCE*, 2009 (242) E.L.T. 189 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.
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> There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.
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> **11.** As already noticed hereinabove, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/ investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).
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> **12.** The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.
>
> **13.** Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.

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[7] **2016 (340)ELT 67 (P&H)**

14. Clause (a) of Section 9D(1) refers to the following circumstances :

> **(i) when the person who made the statement is dead,**
> **(ii) when the person who made the statement cannot be found,**
> **(iii) when the person who made the statement is incapable of giving evidence,**
> **(iv) when the person who made the statement is kept out of the way by the adverse party, and**
> **(v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense**.

15. Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioners have also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GTC India and Others in SLP (C) No. 2183/1994, dated 3-1-1995 wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.

16. If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.

> **(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and**
>
> **(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice**.

17. There is no justification for jettisoning this procedure, statutorily prescribed by plenary Parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

18. The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

20. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

21. **It is only, therefore**, -

(i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

22. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof."

13. During hearing, we specifically asked the learned authorised representative for the Revenue, if the statements before the Central Excise Officers had been put through the process prescribed under section 9D of the Central Excise Act, 1944 and he replied in negative. As per Section 9D, any statement made before any central excise officer is relevant only if it has gone through the process prescribed therein. In

this appeal, revenue has asserted that the cross-examination of the persons who made the statements were not allowed by the authority due to some reasons. However, cross-examination will be necessary only if the statements made before the Central Excise Officers are, in the first place, relevant and they will be relevant only if the procedure prescribed under section 9D is followed. Since this procedure has not been followed, the statements are not relevant to prove anything in this case and consequently are also not admissible. Cross-examination, therefore, becomes unnecessary because the statements are not relevant or admissible in the first place.

14. We also asked learned authorised representative if all the statements are ignored being rendered not relevant by not following the process prescribed under section 9D, the case of the Revenue can still be proved and if so, how? He fairly submitted that if all the statements are ignored the case may not sustain as the remaining relied upon documents do not establish the case of revenue by themselves. For this reason alone, we find that the entire proceedings in pursuance of the show cause notice is not sustainable and has been correctly in set aside by the Commissioner (Appeals) in the impugned order.

15. We also find it strange that one of the grounds on which Revenue has come before us is that the Commissioner (Appeals) has wrongly followed this Tribunal's order dated 11.05.2018. As lower authority, the Commissioner (Appeals)

was bound to follow this order. It is immaterial if Revenue has appealed against the order. Unless the order is set aside, all lower authorities are bound to follow it. Had the Commissioner (Appeals) not followed the order of the Tribunal, that would have been serious lapse of judicial discipline on his part. The orders of this Tribunal are not subject to pleasure or acceptance of either of the two disputants - Revenue or the assessee. The order is binding on both and is binding as a judicial precedent on the lower authorities unless it is set aside by any superior judicial forum. The Committee of Commissioners who passed the Review order in this case seems to be under a mistaken notion that the Revenue has the power to decide whether the Tribunal's order must be followed by the Commissioner (Appeals) or not.

16. The law in this regards has been laid down by the Supreme Court in **Union of India vs Kamlakshi Finance Corporation Ltd.**[8] Relevant paragraphs of this judgment are as follows:

> "**5.** The learned Additional Solicitor General, however, submits that the learned Judges have erred in passing severe strictures against the two Assistant Collectors who had dealt with the matter. He submitted that these officers had given reasons for classifying the goods under Heading 39.19 and not 85.46 and could do no more. He submitted that they acted *bona fide* in the interests of Revenue in not accepting a claim which, they felt, was not tenable.
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> **6.** Sri Reddy is perhaps right in saying that the officers were not actuated by any *mala fides* in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual *mala fides* but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect

[8] **1991(55) ELT 433**

to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. **The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws**.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, **there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness**. **He has to follow the order of the higher appellate authority.** This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assessee-public without any benefit to the Revenue. **We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the**

> **appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them."**

17. **Kamlakshi Finance** has been followed in several subsequent decisions by various courts and this Tribunal. We are surprised that despite the well settled legal position, Revenue has filed this appeal with one of the grounds being that the Commissioner (Appeals) has wrongly followed the precedent decision of this Tribunal because the decision has not been accepted by the Revenue. As held by the Supreme Court, the very statement that the order of the Tribunal is 'not acceptable' to the Revenue is in itself an objectionable phrase. Finding fault with the Commissioner (Appeals) for following the judicial discipline as required by him as per the law laid down in **Kamlakshi Finance** and further, filing an appeal to this Tribunal on this ground, as is done in this case, is clearly unthinkable.

18. Even on merits, it is not disputed that Maruti Metals had issued the invoices and the respondents had availed the CENVAT credit on them. It is not in dispute that Maruti Metals is a dealer registered to issue such invoices. It has also been recorded in the impugned order that the appellants had purchased the goods after paying duty thereafter availed the CENVAT credit on such invoices. Even if Maruti Metals had committed some fraud in CENVAT credit which it had taken, that cannot be held against the respondent. The respondent assessee is responsible for receiving goods and accounting for them. It is for the Revenue and the officer who is scrutinising the returns of trader Maruti Metals, to find out if some

irregularities have been committed by it. Revenue seems to be under a mistaken notion that an assessee is required to not only take due care to receive goods under the cover of invoices and account for them and pay duty against those invoices but also has an obligation to see that the trader who supplies the goods has correctly availed the CENVAT credit at his end and if such supply is from a factory, the factory which has so supplied the goods has all the requisite machinery to manufacture the goods. There is nothing in the CCR which requires any assessee to conduct such an investigation through its entire supply chain. The assessee is not an inspector and has no powers to examine the records of all the operators in its supply chain. It is for the officers who registered various entities and who receive regular returns, who audit their records and who have power to summon, seek information, search, seize etc., to ensure that no fraud is committed at their end.

19. Further, in this case, the submissions of the respondent as well as that of the functionaries of Maruti Metals were recorded, extracts of which were reproduced in the order-in-original. None of these suggest, let alone prove, that Maruti Metals only supplied invoices to the Respondent without supplying goods. Therefore, even on merits, revenue has no case.

20. To sum up revenue's appeal is based:

a) On a mistaken notion that the precedential value of the Tribunal's orders is subject to their acceptance by the revenue;

b) On a mistaken notion that all statements recorded by a central excise officer are admissible as evidence even if the statutory requirement under section 9D of the Excise Act has not been followed and that cross-examination can be denied by the officers even when requested for by the assessee;

c) On a mistaken notion that the assessee has the responsibility to investigate complete chain of supply of the goods which it had purchased and to ensure that every operator in the supply chain has been following all the requisite procedures and has not committed any fraud.; and

d) Without any evidence that Maruti Metals has supplied only invoices to the respondent without supplying the goods.

21. For all the above reasons the appeal filed by the revenue deserves to be dismissed and is, accordingly, dismissed with consequential relief, if any, to the respondent.

[Order pronounced on **12.09.2022**.]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

EXCISE APPEAL NO. 52393 OF 2019

The Commissioner, Central Excise and CGST, Udaipur **...Appellant**

Versus

M/s Multimetal Limited **...Respondent**

APPEARANCE:

Present for the Appellant: Shri O P Bisht, Authorised Representative
Present for the Respondent: Shri Rahul Lakhwani, Advocate

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 24.08.2022

ORDER

Order Pronounced on **12.09.2022**.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

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