

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Service Tax Appeal No. 75066 of 2022

(Arising out of Order-in-Appeal No. 03/RAN/2022 dated 14.01.2022 passed by Commissioner of CGST & Central Excise, Ranchi North.)

M/s Maina Oraon,

B, Block, 302, Siddhi Vinayak Apartment, Bariatu Road, Ranchi-834009

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Ranchi,

2nd & 3rd Floor Grand Emerland Building,
Between Road, 1&2, Ashok Nagar, Ranchi-834002.

..Respondent(s)

APPEARANCE :

Shri Akshat Agarwal & Shri Anand Kr. Pasari, both Advocates for the Appellant
Shri P. K. Ghosh, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...76663/2023

DATE OF HEARING : 12.09.2023

DATE OF PRONOUNCEMENT: 15.09.2023

PER K. ANPAZHAKAN :

The Appellant is a Direct Selling Agent of M/s Safe & Secure Online Marketing Private Ltd. (M/s SSOMPL), facilitating their sales to down the line agents as well as actual consumers, on commission basis. On 13.08.2018, officers of DGSTI, Ghaziabad searched the premises of M/s SSOMPL on the basis of an intelligence that they have evaded payment of service tax. During the course of search, the officers resumed a file containing DSA details having commission more than 10 lakhs.

2. On the basis of the data recovered from M/s SSOMPL, a Show Cause Notice dated 23.10.2019 was issued to the Appellant demanding service tax of Rs.13,68,147/- for the period April 2014 to June 2017. In the Notice, it was alleged that the Appellant has provided taxable service as provided under Clause (44) of Section 65B of the Finance Act, 1994, but not paid service tax. It was alleged that the activity of promoting and marketing the products of M/s SSOMPL by the DSA for which they were getting commission from M/s

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SSOMPL, was a 'taxable service' as defined under Section 65B(44). As the service provided by the Appellant to M/s SSOMPL is neither figuring in the services specified in the Negative List as specified under section 66D of the Finance Act, 1994 nor there is any exemption to the same under any Notification, the Appellant was liable to pay service tax on the commission received by them from M/s SSOMPL. The Notice was adjudicated vide Order-in-Original dated 20.01.2021, wherein the demand made in the Notice was confirmed along with interest and penalty. On appeal, the Commissioner (Appeals) upheld the demands vide impugned order dated 18.01.2022. Aggrieved against the impugned order, the appellant has filed the present appeal.

3. In their grounds of appeal, the Appellant stated that the entire demand has been confirmed in the impugned order on the basis of data recovered from M/s SSOMPL, without corroborating the same from the Appellant. When M/s SSOMPL itself was under investigation the data recovered from them and the statement given by them alone cannot be relied upon to demand service tax from the Appellant.

4. The Appellant submits that they were under the bonafide belief that service tax, if any, payable would be payable by M/s SSOMPL only as they have not rendered any service related to promotion or marketing the products of M/s.SSOMPL.

5. The Appellant relied upon the decision of the Tribunal New Delhi in the case of Charanjeet Singh Khanuja Vs C.S.T. Indore/Lucknow/Jaipur/Ludhiana, reported in 2016(41)S.T.R.213(Tri-Del), wherein it has been held that the incentive or commission earned for buying certain quantum of goods during a month cannot be considered as 'consideration' received for promoting or marketing the or sale of goods belonging to the client. They submitted that the facts and circumstances of the present case on appeal is similar to the facts of the case cited above and hence the ratio of this decision is squarely applicable in the present case.

6. The Appellant stated that the Notice demanding service tax in this case was issued on 23.10.2019, for the period April 2014 to June 2017. The entire demand has been raised by invoking extended period. They submitted that there was no intention to evade payment of service tax on their part. In the case of Charanjeet Singh Khanuja Vs C.S.T.

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Indore/Lucknow/Jaipur/Ludhiana, reported in 2016(41)S.T.R.213(Tri-Del), cited above, on similar facts and circumstances, the Tribunal, New Delhi has held that extended period not invocable to demand service tax. They relied upon the following decisions in support of their contention that extended period not invocable in this case.

(i) Tamil Nadu Housing Board Vs CCE reported in 1994(74)ELT.9(S.C)

(ii) CCE Vs Bajaj Auto Ltd. reported in 2010(260)ELT17(SC)

(iii) Padmini Products Vs CCE reported in 1989(43)ELT195(SC)

(iv) Pushpam Pharmaceuticals Company Vs CCE reported in 1995(78)ELT401(SC)

7. In view of the decisions cited above, they prayed for setting aside the impugned order.

8. The Ld.A.R submitted that the Appellant has received commission for promoting the sales of the goods manufactured by M/s.SSOMPL and hence the activity undertaken by them falls within the ambit of 'Service' as defined under Section 65B(44) of the Finance Act, 1994 and hence liable to service tax for the period under dispute. They stated that the Appellant has not taken registration and not disclosed any information to the department and hence extended period has been rightly invoked to demand service tax. They relied on the following decisions to support their case.

(i) Anshita Chawla and Ramesh Chawla Vs Commr. Of S.T. New Delhi , 2016(44)STR300(Tri-Del)

(ii) Surendra Singh Rathore Vs CCE, Jaipur-I, 2014(34)STR147(Tri-Del)

On the basis of the above decisions, he prayed for upholding the impugned order.

9. Heard both sides and perused the appeal records.

10. We observe that the Appellant, a Direct Selling Agent of M/s.SSOMPL, has received an amount of Rs.1,10,51,180/- as commission, during the period April 2014 to June 2017. The department considered this amount as 'taxable vale' received for rendering the service of promoting and marketing the products of M/s SSOMPL. Accordingly, Notice was issued demanding service tax of Rs.13,68,147/. In the impugned order, the demand of service tax was confirmed along with interest and equal amount of tax was also imposed as

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penalty. Thus, we observe that the issues to be decided in the present appeal are as under:

(i) Whether the activities undertaken by the Appellant would fall within the ambit of 'Service' as defined under Clause (44) of Section 65B of the Finance Act, 1994 ?

(ii) Whether the demand issued based on the data recovered from M/s.SSOMPL is sustainable, without adducing any corroborative evidence?

(iii) Whether in the facts and circumstances of the case, extended period invocable or not? Consequently, penalty under Section 78 of the Finance Act, 1994 is imposable or not?

11. (i)Whether the activities undertaken by the Appellant would fall within the ambit of 'Service as defined under Clause (44) of Section 65B of the Finance Act, 1994 ?

(ii) Whether the demand issued based on the data recovered from M/S SSOMPL is sustainable, without adducing any corroborative evidence?

11.1 We observe that Clause (44) of Section 65B of the Finance Act, 1994 defines "service" as

"any activity carried out by a person for another for consideration, and includes a declared service.....".

11.2. In terms of clause (51) of the Section 65B of the Finance Act, 1994, "taxable service" means any service on which service tax is leviable under Section 66B of the Act. Section 66B of the Finance Act, 1994 deals with charge of Service Tax w.e.f. 01.07.2012 and it states that there shall be levied a tax at the rate of twelve per-cent (fourteen per-cent w.e.f. 01.06.2015) on the value of all "services", other than those service specified in the Negative list as defined under Section 66D of the Finance Act, 1994, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

11.3. In the impugned order it has been alleged that as per the definition of "service" and "taxable service" mentioned as above, the activity i.e. promoting & marketing of the products of M/s SSOMPL by DSA for which they are getting commission/incentive from M/s SSOMPL, are covered under the ambit and scope of "service" as defined under clause (44) of Section 65 B of the Act and "taxable service" as defined under clause (51) of the Section 65B. In the impugned order, it has also been concluded that under the Negative List based comprehensive approach to taxation of services with effect from 01.07.2012, the nature of the services as rendered by the Appellant are liable

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to service tax as they neither figure in services specified in the Negative list as per Section 66D of the Finance Act, 1994 nor there is any exemption to the same under any notification issued by the Government.

11.4. In their submission, the Appellant cited the decision in the case of Charanjeet Singh Khanuja Vs C.S.T./ Indore/Lucknow/Jaipur/Ludhiana, reported in 2016(41)S.T.R.213(Tri-Del), wherein it has been held that the incentive or commission earned for buying certain quantum of goods during a month cannot be considered as 'consideration' received for promoting or marketing the or sale of goods belonging to the client. They submitted that the facts and circumstances of the present case on appeal is similar to the facts of the case cited above. For the sake of ready reference the relevant Paras of the decision are reproduced below:

“9. The appellants in the appeals ST/138 and 139/2009, ST/406/2010, ST/522 to 525, 257, 259, 433, 473, 502, 580, 1123, 1383, 1781 & 1802/2011, ST/56, 86, 126, 645/2012 and ST/1723-1724, 2337 and 2810/2012 and the respondents in the Appeals Nos. ST/851 to 854, 863, 864, 865, 866, 867, 868, 869, 870 and 878/2012 filed by the Revenue are distributors of Amway India Enterprises Pvt. Ltd. Amway operate their business of selling of their products under a Business Plan called Multi Level Marketing. As per the “Business Starter Guide of Amway India Enterprises Pvt. Ltd.” placed on record, they appoint Distributors, who purchase their products and sell the same at the price not exceeding the MRP fixed by the Amway. The Distributors, in turn, can sponsor a second level of distributor who are also appointed as distributors by Amway and besides selling the Amway products purchased Amway, they also promote the marketing of the Amway products. As per the Amway Business Plan, a distributor has three streams of income - (a) a distributor of Amway products purchases the products from Amway at the Distributions' Acquisition Price (DAP) and sells them in retail at the price not exceeding the MRP as fixed by the Amway. The difference between the retail sale price and the DAP is the Distributor's profit margin. (b) Besides above, the Distributor also gets a commission from Amway from 6% to 21% depending upon the purchases of Amway products during the month for sale or for personal consumption. Thus, depending upon the purchases made by the

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distributor during a month from Amway, he gets a commission/bonus varying from 6% to 21%. This is the second stream of income of the distributor; (c) A Distributor also gets monthly commission on the basis of the success and productivity as defined by the products' sales of the distributors appointed through him which constitute his sales group.

10. In these cases, the Service tax has been demanded on the gross amount of commission received by each of the Distributors (assesseees) of Amway during the period of dispute, as mentioned in the Chart in para 2 above. The department's contention is that these commission received by the assesseees from Amway are in respect of the Business Auxiliary Service provided by them to Amway. On the other hand, the contention of the assesseees is that their activity is not covered by the definition of Business Auxiliary Service as given under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994.

11. In terms of Section 65(105)(zzb), the service provided to a client by Commercial concern in relation to the Business Auxiliary Service is taxable. The term "Business Auxiliary Service" is defined under Section 65(19) of the Finance Act, 1994 as under:-

"Section 65(19) : "Business auxiliary service" means any service in relation to,-

(i) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) Promotion or marketing of service provided by the client; or

Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

(iii) Any customer care service provided on behalf of the client; or

(iv) Procurement of goods or services, which are inputs for the client; or

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12. According to the Department, the activity of the assessee is “promotion or marketing or sale of the goods produced or provided by or belonging to the client.” In our view, the activity which is covered under Section 19(i) is in relation to the promotion or marketing or sale of the goods produced by the client or provided by the client or belonging to the client. This expression, in our view, would not cover the sale of the goods by a person, which belong to him, as the activity of the promotion or marketing or sale of the goods by a person belonging to him would not constitute service. The assessee in these cases are distributors, who purchase the goods from Amway at the Distributors’ Acquisition Price (DAP)) and sell the same in retail at price not exceeding MRP fixed by the Amway. This activity of the Distributors, in our view, cannot be treated as promotion, marketing or sale of the goods produced or provided by or belonging to the client (Amway), as the sale of the goods purchased by the Distributors from Amway is not the sale of the goods belonging to their client - Amway. Once the Amway products have been purchased by a Distributor from Amway, those products cease to belong to Amway, but belong to the Distributor and sale of these goods by the Distributor would not constitute service to Amway. For the same reason, any incentive or commission received by a Distributor from Amway for buying certain quantum of goods from Amway during a month cannot be treated as the consideration received for promotion or marketing or sale of the goods produced by or provided by or belonging to the client, more so, as this commission is not linked to the goods sold by the Distributor, but is linked to the goods purchased by the Distributor from Amway during a month and is in the nature of volume discount. Therefore, no service tax is chargeable on the profit earned by the distributors from sale of the goods in retail which had been purchased by them from Amway and on the commission earned by them every month on purchase of certain quantum of goods from Amway.

13. However, activity of a Distributor of identifying other persons, who can be roped in for sale of the Amway products/marketing of the Amway products and who on being sponsored by that Distributor are appointed by Amway as second level of distributors is, in our view, the activity of marketing or sale of the goods belonging to Amway and the commission

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received by the Distributor from Amway, which is linked to the performance of his sales group (group of the second level of distributors appointed on being sponsored by the Distributor) would have to be treated as consideration for Business Auxiliary Service of sales promotion provided to Amway. Therefore, service tax would be chargeable on the commission received by a Distributor from Amway on the products purchased by his sales group. However, in the impugned orders Service tax has been demanded on the gross amount of commission and no distinction has been made between the commission earned by a Distributor from Amway based on his own volume of purchase from Amway and the commission earned by him on the basis of the volume of purchases of Amway products made by his sales group i.e. group of second level of Distributors appointed by Amway on being sponsored by the Distributor. For quantifying the Service tax demand on the commission received from Amway on the volume of purchase made by the distributors sponsored /enrolled by a particular distributor i.e. the Distributor's sales group, these matters would have to be remanded to the Original Adjudicating Authority."

11.5. From the decision cited above, we observe that the facts and circumstances of the case referred above and the present appeal are same except that the definition of 'Service' has undergone a change during the period involved in the present appeal. In the case cited above, the activities were proposed to be classified as 'Business Auxiliary Service' as defined under Section 65(19) of the Finance Act, 1994, whereas the same activities rendered by the appellant are proposed to be classified as 'Service' as defined under Clause (44) of Section 65B of the Finance Act, 1994, in the present case on hand. However, we observe that many observations made by the Tribunal in the decision cited above are relevant to take a decision in the present appeal, as the facts and circumstances and the terms and conditions of the Agreement are the same in both the cases.

11.6. We observe that under the Direct Selling Agent Agreement with M/s.SSOMPL, a distributor has three streams of income:

(a) a distributor of SSOMPL, purchases the products from them at the Distributions' Acquisition Price (DAP) and sells them in retail at the price not exceeding the MRP as fixed by the SSOMPL. The difference between the retail sale price and the DAP is the Distributor's profit margin.

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(b) The Distributor also gets a commission from SSOMPL depending upon the purchases of products during the month for sale or for personal consumption. Thus, depending upon the purchases made by the distributor during a month from SSOMPL, he/she gets a commission/bonus. This is the second stream of income of the distributor.

(c) A Distributor also gets monthly commission on the basis of the success and productivity as defined by the products' sales of the distributors appointed through him which constitute his sales group.

11.7. It is observed from the records that the Notice was issued to the Appellant based on the data recovered from the premises of M/s SSOMPL, during the course of investigation at their end. The impugned order has confirmed the demand based on this data and the statements recorded from Shri. Rajat Verma, Director of M/s.SSOMPL. We observe that there is no information available on record to indicate that what type of commission mentioned above was received by the Appellant in this case. No investigation was carried out with the Appellant to ascertain the nature of service rendered by them to M/s.SSOMPL and whether the amount received was towards rendering of any taxable service or not. In the absence of any such corroborative evidence to substantiate the allegations made in the Notice, the impugned order merely confirmed the demands based on the presumption that the entire amount was received towards rendering of taxable service and confirmed the demands made in the Notice. In the decision of the Tribunal cited above, it has been concluded that out of the three categories of income received by a DSA, the income mentioned at (a) and (b) are not liable to service tax and the income mentioned at (c) only liable to service tax. On this count, we observe that the ratio of the decision cited above is applicable for the period after 01.07.2012 also. However, in the impugned order Service tax has been demanded on the gross amount of commission received by the Appellant and no distinction has been made between the commission earned by a Distributor from M/s SSOMPL based on his/her own volume of purchase and the commission earned by him/her on the basis of the volume of purchases of M/s SSOMPL products made by his/her sales group. As no investigation was conducted with the Appellant to ascertain whether the Appellant has rendered any taxable

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service as defined under, section 65B(44) of the Finance ACT, 1994, we hold that the demand confirmed in the impugned order merely on the basis of the data received from M/s.SSOMPL alone is not sustainable. Accordingly, we answer to the question (i) and (ii) above in the negative.

12. (iii) Whether in the facts and circumstances of the case, extended period invocable or not? Consequently, penalty under Section 78 of the Finance Act, 1994 is imposable or not?

12.1. The Appellant contended that the entire demand was hit by the bar of limitation. We find that the Notice demanding service tax for the period April 2014 to June 2017, was issued on 23.10.2019. The breakup of the demand for various years is furnished below:

Financial Year	Turnover Amount as per chart provided by Safe & Secure Online Marketing Pvt. Ltd.	Taxable amount	Service Tax payable on Col.(3)	Taxable Value as per ST-3 Returns	Service Tax Short-Paid Column (4)-5
1	2	3	4	5	6
2014-15	2052255	1826500	225755	0	225755
2015-16	3610705	3168124	442581	0	442581
2016-17	4113685	3580118	533567	0	533567
2017-18 Upto June	1274535	1108291	166244	0	166244
Total	11051180	9683033	1368147	0	1368147

12.2. From the above table, we observe that the entire demand has been raised by invoking extended period. The Appellant submitted that there was no intention to evade payment of service tax on their part. They cited the decision in the case of Charanjeet Singh Khanuja Vs C.S.T./ Indore/Lucknow/Jaipur/Ludhiana, reported in 2016(41)S.T.R.213(Tri-Del), where on similar facts and circumstances, the Tribunal, New Delhi has held that extended period not invocable to demand service tax. The relevant part of the decision is reproduced below:

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“16. Another plea raised in these appeals is regarding limitation. It is the contention of the assesseees that there was absolutely no suppression or mis-statement of facts or deliberate contravention of the provisions of the Finance Act, 1994 or of the Rules made thereunder with intent to evade payment of Service tax. The Department’s contention, on the other hand, is that the assesseees neither obtained service tax registration nor did they declare their activities to the jurisdictional Service tax authorities nor did they file ST-3 Return and, therefore, they are guilty of suppression of relevant facts and deliberate violation of the provisions of Finance Act, 1994 and of the Rules made thereunder with intent to evade payment of tax. On considering the rival submissions on this point, we are of the view merely because the assesseees did not apply for Service Tax Registration or did not file ST-3 Returns or did not declare their activities to the jurisdictional central excise authorities, it cannot be inferred that this was a wilful act with intent to evade payment of service tax. We also take notice of the fact that in respect of appeals filed by the Revenue, the Commissioner (Appeals) after analyzing the activities of the assesseees had taken the view that the same is not covered by the definition of “Business Auxiliary Service” under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994. When on the issue involved in this group of cases, there were two views in the Department itself, it cannot be said that on the question as to whether the activity of the assesseees was taxable under Section 65(105)(zzb) read with Section 65(19) of the Finance Act, 1994, there was no scope for doubt. As held by the Apex Court in the case of Continental Foundation Joint Venture v. CCE, Chandigarh reported in [2007 \(216\) E.L.T. 177](#) (S.C.) when there is scope for doubt in the mind of an assessee on a particular issue, the longer limitation period, under proviso to Section 11A(1) cannot be invoked and in our view, the ratio of this judgement of the Apex Court is applicable to the facts of these cases. Therefore, the longer limitation period of 5 years under proviso to Section 73(1) of the Finance Act, 1994 would not be invocable and duty can be demanded only for normal limitation period of one year from the relevant date. “

12.3. In the present appeal also the Appellant did not apply for Service Tax Registration, did not file ST-3 Returns and did not declare their activities to the jurisdictional central excise authorities. The contention

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of the Appellant is that on these ground alone it cannot be inferred that there was a wilful act with an intent to evade payment of service tax. We observe that extended period cannot be invoked to demand service tax for mere inaction or failure or negligence on the part of the Appellant. There must be deliberate defiance of law to invoke extended period, which is not there in this case. The Notice has also not brought in any evidence of deliberate defiance of law warranting invocation of extended period of limitation.

12.4. In the case of Rajasthan Spinning & Weaving Mills Vs UOI, Hon'ble Supreme Court held that if there is no element of deception or malpractice, neither extended period of limitation invocable nor penalty under Section 11AC would be imposable. In the case of Mahadev Logistics Vs CCE reported in 2017(3)GSTL 56(CHH), the Hon'ble Chhatisgarh High Court held that the presence of mensrea is absolutely necessary for imposition of penalty under Section 78 of the Finance Act, 1994. The relevant para of the said decision is reproduced below:

12. It is settled law that an order imposing a penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. A penalty will not also be imposed merely because it is lawful to do so. In spite of a minimum penalty prescribed, the authority competent to impose the penalty may refuse to impose the penalty if the breach complained of was a technical or venial breach, flew from a bona fide though mistaken belief. [See Karnataka Rare Earth & anr. v. Senior Geologist, Department of Mines & Geology - (2004) 2 SCC 783 and Bharjatya Steel Industries v. Commissioner, Sales Tax, UP - (2008) 11 SCC 617.]

16. Thus, it is quite vivid that presence of mens rea is absolutely necessary ingredient for imposing penalty under Section 78 of the Finance Act, 1994, as held by Their Lordships of the Supreme Court in aforecited cases, as provisions under Section 11AC of the Act of 1944 and Section 78 of the Finance Act, 1994, are pari materia.

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12.5. We observe that the ratio of the decisions cited above is squarely applicable in this case. There is no mensrea or intention to evade payment of duty established in this case. In fact, there was no verification done at the Appellant's end to ascertain their liability of service tax. Accordingly, we hold that the demand confirmed in the impugned order by invoking extended period is not sustainable. For the same reason, penalty under Section 78 is also not imposable. Accordingly, we answer the question raised at (iii) above in negative.

13. In view of the above findings, we hold that the demand confirmed in the impugned order only on the basis of the data received from M/s.SSOMPL and the statement recorded from the Director of SSOMPL, is not sustainable. AS there is no evidence brought on record to establish intention to evade payment of tax, extended period cannot be invoked and the penalty imposed under Section 78 of the Finance Act, 1994 is liable to be set aside. Accordingly, the impugned order is set aside on merit as well as on limitation.

14. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Pronounced in the open court on...15.09.2023....)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar