CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO. 2

SERVICE TAX APPEAL NO: 87269 OF 2016

[Arising out of Order-in-Original No: 05 to 07/ST-VII/RK/2016 dated 31st May 2016 passed by Commissioner of Service Tax, Mumbai-VII.]

Meghraj Cinema ... **Appellant**
Plot No.22, Near Abbot Hotel, Sector 2
Vashi, Navi Mumbai-400703

versus

Commissioner of Service Tax ...**Respondent**
Mumbai – VII
13th Floor, Satra Plaza, Palm Beach Road,
Sector – 19D, Vashi, Navi Mumbai – 400 705

APPEARANCE:

None for the appellant

Shri S B P Sinha, Superintendent (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A/85785/2024

DATE OF HEARING: 22/02/2024
DATE OF DECISION: 19/08/2024

PER: C J MATHEW

Back in the days when 'talkies' was the only avenue (other than an occasional travelling circus) for mass entertainment, a theatre-owner, or 'exhibitor' as now known, made money from fans thronging the cinema to find diversion in the latest releases, whose successes were benchmarked by collections at the 'box

office’ and, most often, from the ‘jubilee’ runs, for which they would procure ‘copyright’, temporarily for the duration of the screening by paying a pre-arranged share of the weekly takings, from ‘distributors’ who had longstanding relationships with producers or studios for new offerings. Undoubtedly, a service was rendered to the patrons and the consideration subjected to levy of indirect impost, as entertainment tax, charged to the exhibitor on ticket sale to be borne by the patron. This was not a levy of contemporary times but one that has a hoary past and, interestingly enough in India, much to do with struggle for freedom from the colonial yoke. A tax that was permitted, as resource measure, to the ‘subsidiary states’ by the ‘Paramount dispensation’ under treaty, the Government of India Act, 1919 devolved it initially to the provincial governments of Bengal and Bombay before extending the privilege to other provinces by the Government of India Act, 1935. The framers of the Constitution considered it fit to be excluded from the taxing power of the Union by emplacing it in List II of the Seventh Schedule and there it remained with constituent states according exemptions in keeping their respective policies concerning the product of an industry which, by the last quarter of the previous century, had grown to be the biggest in the world.

2. There is a purpose behind this prefacing narrative for it is moot if a tax, enacted by the Union to subject ‘services’ to levy under residuary empowerment during the relevant time, can alter

the contours of a transaction already being taxed for over a century by substituting one of the parties to it for ‘tax access’ to the consideration. For that is the core of the dispute in this appeal against a demand erected on a circular of the Central Board of Excise & Customs (CBEC) which featured grafting an ‘association of persons (AOP)’ as custodian of ‘box office’, in lieu of the ‘exhibitor’, to tax share of the theatre takings not retained by the latter as consideration for rendering ‘support service of business or commerce’ in pursuit of common cause with ‘distributor’ for screening of films. It is not about a fresh tax under Finance Act, 1994 on the same transaction taxed under the relevant statute of a state government which has been packaged as constitutionally justifiable. It is not about taxing a service provided by the ‘exhibitor’ to the ‘distributor’ which may well be within ambit of Finance Act, 1994. Before we find ourselves stepping into that which it is and that which it is not, we would do well to advert to the claims and counter-claims. But first to the facts as set out in order[1] of Commissioner of Service Tax, Mumbai-VII which is impugned before us even as we are cognizant that, non-representation for the appellant notwithstanding but the circumstances permitting, the appeal can be disposed off with the assistance of Learned Authorised Representative.

3. The appellant, M/s Meghraj Cinema, is a theatre owner and, in keeping with industry practice, screened films for which

[1] [order-in-original No. 05 to 07/ST-VII/RK/2016 dated 31st May 2016]

copyright was temporarily transferred by distributors in accordance with agreements, setting out the period and the declining share of 'net' from the box office collections for each week as consideration thereof, for each of such. Sub-distributors, such as M/s Balaji Motion Pictures Ltd and M/s Yash Raj Film Distributor who had entered into agreement with the appellant for screening of 'Shootout at Wadala' and 'Gunday' respectively which were considered to be representative of similar transactions with others, not only negotiated the deal involving prior payment against which the earnings were transferred to the distributor beyond such advance while the appellant undertook to handle promotion of the film locally. Based on the weekly box office collection details, the sub-distributor raised invoices, representing the cost of assignment of rights, on the exhibitor at the agreed rate and the amount remaining after all payouts retained with them and it is this amount that the service tax authorities brought the levy to bear upon besides some minor amounts which the exhibitor had segregated in their annual financials towards advertisement and transport.

4. The demand straddles the 'negative list' era as well as the preceding regime and, thereby, the first of the notices for ₹ 70,19,786, issued on 29th September 2014, for 2009-10 to 2012-13, charges the levy for having provided 'support service of business or commerce', 'selling of space or time slots for advertisement service' and 'goods transport by road service'

followed by periodical demands of ₹ 13,13,554 and of ₹ 5,43,896 on 22nd April 2015 and 12th February 2016. The confirmation of all three, along with imposition of penalty of ₹ 70,19,786 under section 78 of Finance Act, 1994 and of ₹ 1,85,745 under section 76 of Finance Act, 1994, is cause of cavil in this appeal. The impugned order placed overwhelming reliance on circular[2] of Central Board of Excise & Customs (CBEC) clarifying that

> *'9. Thus, where the distributor or sub-distributor or area distributor enters into an arrangement with the exhibitor or theatre owner, with the understanding to share revenue/profits and not provide the service on principal-to-principal basis, a new entity emerges, distinct from its constituents. As the new entity acquires the character of a "person", the transactions between it and the other independent entities namely the distributor / sub-distributor / area distributor and the exhibitor etc will be a taxable service. Whereas, in cases the character of a "person" is not acquired in the business transaction and the transaction is as on principal-to-principal basis, the tax is leviable on either of the constituent members based on the nature of the transaction and as per rules of classification of service as embodied under Sec 65A of Finance Act, 1994.'*

and, in a sense, is foundation of the proceedings initiated against the appellant inasmuch as the provocation appears to have stemmed from some portion of their 'taxable income' – so designated in the impugned order instead of 'value of taxable service' as it should have been – not having been subjected to

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[2] [circular no. 148/17/2011-ST dated 13th December 2011]

‘service tax’ and, owing to the proposition in the circular, merely awaiting avulsion of a transactional entity distinct from either, and both, of the parties to the agreement.

5. The specifics therein, in stark contrast with circular[3] issued two years earlier, were held to authorise charging of tax upon identification of ‘joint venture’ entity which, by its very nature, was premised as the recipient of service provided by the constituents. Impliedly, in rendering of service – not to each other or jointly to patrons but independently by the two – conformity with ‘principal-to-principal transaction’ stood obliterated. The logic in the distinguishment is not immediately apparent because every commercial transaction cannot but be ‘principal to principal’ if it not be on agency basis; this offers reason to speculate that ‘principal-to-principal’, in the context of the clarification in the impugned circular, was intended to mean direct procurement/rendering by one person from/to another and liable to tax even as the circular also suggests, and amply evident in paragraph 10 therein, that the other transactional engagements prevalent in the industry were not immune from tax either. The apparent *volte face* is attributed in the impugned circular to misinterpretation of the earlier stance offering sufficient justification to re-visit the controversy.

6. The principal contention of the appellant is that the

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[3] [circular no. 109/03/2009 dated 23rd February 2009]

agreements have been misconstrued for contriving a new entity birthed therefrom and that the circular of 2011 has been inappropriately relied upon by disregard of the clear instructions in that of 2009 inasmuch as the former has not disowned the exhortation that each arrangement must be scrutinized for ascertaining the elements of service, as set out in Finance Act, 1994, as prelude to tax. Contending that the earlier circular was not superseded by the later, it was posited that its binding nature should not have been lost on the adjudicating authority. Denying that there was any intent of collaboration for sharing of risk and return as to insinuate a 'joint venture', it was further contended that there was no service rendered by the appellant except to cinema patrons as to warrant conformity with description of service in section 65(104c), or section 65B (44) in the 'negative list' regime, of Finance Act, 1944 for which the grounds of appeal refers to explanatory communication[4] issued by Central Board of Excise & Customs (CBEC) immediately after the impugned service was incorporated in Finance Act, 1994.

7. Learned Authorised Representative took us through the case of service tax authorities and, in particular, to the agreement intended for mitigation of risk, through revenue-sharing arrangements, as well as the scope for determining it as 'joint venture' from conformity with the structure explained by the Hon'ble Supreme Court in **Faqir Chand Gulati vs. Uppal**

[4] [letter no. 334/4/2006-TRU dated 28th February 2006]

Agencies P Ltd[5]. According to him, the costs incurred in exhibiting any film in the collaboration between owner of the theatre and owner of the right to screen the film and met from the 'box office collection' represents the consideration for service rendered to the collaborative venture by each with the 'box office' as the corporeal manifestation of 'association of persons' birthed in the arrangement.

8. 'Parallel' is an expression deployed in context of the film industry but here we find two parallel lines - of constitutional restriction disbarring levy on screening of films and fictional conception of an entity excoriating the flesh and blood of the charging provision - sought to be converged for bringing the 'box office', or part thereof, within the tax net of Finance Act, 1994. The implication is that the 'box office' manifests the joint venture between the exhibitor and distributor and, though not liable to tax of itself, had incurred costs of procuring 'service' from the two collaborators of which provision of 'support service of business or commerce', enabling the venture to screen films, was sought to be fastened on the exhibitor. That such collaboration can exist only with the distributor too contributing in some way to the venture and would be still-born in absence thereof is not an aspect that the adjudicating authority considered necessary to dilate upon as necessary qualification for such a collaboration. Instead, the impugned order has read the circular pertaining to taxability

[5] [2008 (12) STR 401 (SC)]

of service rendered to joint ventures as conclusion that all such screening arrangements are to deemed as fitting the tax model.

9. An identical dispute had come up before the Tribunal for decision in **Inox Leisure Ltd v. Commissioner of Service Tax, Hyderabad**[6] with challenge to finding in adjudication therein that exhibitor was provider of the same service, and by citing support of precedent decisions, thus

> *'3.(i) The issue involved in the appeal has been decided in favour of the appellant in the following decisions of the Tribunal:*
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> *(a) M/s. PVS Multiplex India Pvt. Ltd. vs. Commissioner of Central Excise, Meerut-l 2017 (11) TMI-156-CESTAT Allahabad = 2017-TIOL-4130-CESTAT-ALL ;*
>
> *(b) M/s. Moti Talkies vs. Commissioner of Service Tax, Delhi-l 2020 (6) TMI 87- CESTAT New Delhi = 2020-TIOL-922-CESTAT-DEL*
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> *(c) M/s. The Asian Art Printers (Sheila Theatre) vs. Principal Commissioner of Service Tax, Delhi-l 2020 (12) TMI 1012- CESTAT New Delhi;'*
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> *(d) Shri Vinay Kumar, Proprietor of M/s. Regal Theatre vs. Principal Commissioner of Service Tax, Delhi-l 2020 (11) TMI 436- CESTAT New Delhi;*
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> *(e) M/s. Golcha Properties Pvt. Ltd. vs. Principal Commissioner of Service Tax, Delhi-l 2020 (11) TMI 137- CESTAT New Delhi = 2020-TIOL-1619-CESTAT-DEL ; and*
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> *(f) Satyam Cineplexes Ltd. vs. Principal Commissioner*

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[6] [2021 (10) TMI-893 CESTAT HYDERABAD]

of Service Tax, Delhi-l 2020 (8) TMI 1222- CESTAT New Delhi;

and that the decisions in

'(a) Mormugao Port Trust vs. Commissioner of Customs, Central Excise & Service Tax, Goa-(Vice-Versa) 2016 (11) TMI 520- CESTAT Mumbai = 2016-TIOL-2843-CESTAT-MUM

(b) M/s. Old World Hospitality Limited vs. CST, New Delhi 2017 (2) TMI 1176- CESTAT New Delhi; and

(c) Delhi International Airport P. Ltd. vs. Union of India & Ors. WP(C) 2516/2008 & CM No. 15832/2011 dated 14.02.2017 = 2017-TIOL-394-HC-DEL-ST'

precluded construing of service having been rendered merely by existence of revenue-sharing agreement.

10. The said order drew upon the earlier decisions holding that

'12. Such an arrangement between a distributor/producer and an exhibitor of films was examined by a Division Bench of the Tribunal in Moti Talkies. The Department alleged that the agreement was for 'renting of immovable property' as defined under section 65(90a) of the Finance Act. This contention was not accepted by the Tribunal and it was observed that the appellant did not provide any service to the distributors nor the distributors made any payments to the appellant as consideration for the alleged service. In fact, it was the appellant who had paid money to the distributors for the screening the rights conferred upon the appellant. The observations of the Bench are as follows:

"11. It is more than apparent from a bare perusal of the aforesaid agreements that they have been entered into between the appellant as an exhibitor and the distributors for screening of the films on the terms and conditions mentioned therein. The payments contemplated under the

terms and conditions either require the exhibitor to pay a fixed amount or a certain percentage, subject to minimum exhibitor share or theatre share of effective shows in a week.

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16. It is very difficult to even visualise that the appellant is providing any service to the distributor by renting of immovable property or even any other service in relation to such renting. The agreements that have been executed between the appellant and the distributors confer rights upon the appellant to screen the film for which the appellant is making payment to the distributors. The distributors are not making any payment to the appellant. Thus, no consideration flows from the distributors to the appellant for the alleged service.

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18. ***It is not possible to accept the reasonings given by the Commissioner (Appeals) for confirming the demand of service tax under "renting of immovable property" for the simple reason that the appellant has not provided any service to the distributors nor the distributors have made any payment to the appellant as consideration for the alleged service. In fact, the appellant who has paid money to the distributors for the screening rights conferred upon the appellant.*** *The Commissioner (Appeals) completely misread the agreements entered into between the appellant as an exhibitor of the films and the distributors to arrive at a conclusion that the appellant was providing the service of "renting of immovable property."*

(emphasis supplied)

13. Similar views were expressed by Division Benches of the Tribunal in The Asian Art Printers, Shri Vinay Kumar, M/s. Golcha Properties and Satyam Cineplexes Ltd.

14. What also needs to be noticed is that if the appellant was providing such a service, it would be the producers/ distributors who would be making payments to the appellant, but what comes out from a perusal of clause 5.1 of the Agreement is that in consideration for the distributor agreeing to grant to the appellant the license to exploit the theatrical rights of a motion picture, the appellant would have to pay such revenue share to the distributor as provided for in the said clause. In fact, clause 3.1 of the Agreement provides that distributor agreed to grant to the Appellant the non exclusive license to exploit the theatrical rights of a motion picture during the term.

15. This issue had come up for consideration before a Division Bench of the Tribunal in PVS Multiplex India. The Bench observed that as the appellant was screening films on revenue sharing basis, the appellant was not liable to pay service tax on the payments made to the distributors for screening the films.

> *"**7. Having considered contentions and on perusal of the facts on record, we are satisfied that there is no dispute of fact that the appellant have been screening films in their multiplex on Revenue Sharing basis, which is undisputed finding recorded by the ld. Commissioner in the impugned order.** Accordingly, we hold that the appellant is not liable to pay Service Tax for Screening of Films and payments to distributors in their theatre."*
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> ***(emphasis supplied)'***

11. On the issue of tax leviability on revenue-sharing arrangements, it was held that

'16. This apart, a revenue sharing arrangement does not necessarily imply provision of services, unless the service provider and service recipient relationship is established. This is what was observed by the Tribunal in Mormugao Port Trust, Old World Hospitality and Delhi International Airport.

17. In Mormugao Port Trust, the Tribunal explained that public private partnerships between the Government/ Public Enterprises and Private parties are in the nature of joint venture, where two or more parties come together to carry out a specific economic venture, and share the profits arising from such venture. Such public private partnerships are at times described as collaboration, joint venture, consortium or joint undertaking. Regardless of the name or the legal form in which the same are conducted, they are essentially in the nature of partnership with each co-venturer contributing some of the resources for the furtherance of the joint business activity. The Tribunal held that such public private partnerships meet the test laid down by the Supreme Court in Faqir Chand Gulati vs. Uppal

Agencies Pvt Ltd 2008 (12) STR 401 = 2008-TIOL-147-SC-MISC , for ascertaining whether or not the arrangement is one of joint venture. The relevant observations of the Tribunal in Mormugao Port Trust are reproduced below:

> *"12 …………………….. In our view this arrangement in the nature of the joint venture where two parties have got together to carry out a specific economic venture on a revenue sharing model. Such PPP arrangement are common nowadays not only in the port sector but also in various other sectors such as road construction, airport construction, oil and gas exploration where the Government has exclusive privilege of conducting businesses. In all such models, the public entity brings in the resource over which it has the exclusive right, whether land, water front or the right to exploit the said land and water front, and the private entities brings in the required resources either capital, or technical expertise necessary for commercial exploitation of the resource belonging to the Government. These PPP arrangements are described sometimes as collaboration, joint venture, consortium, joint undertaking, but regardless of their name or the legal form in which these are conducted. These are arrangements in the nature of partnership with each co-venturer contributing in some resource for the furtherance of the joint business activity.*
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> *……………….*
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> *15. An analysis of this judgment shows that in order to constitute a joint venture, the arrangement amongst the parties should be a contractual one, the objective should be to undertake a common enterprise for profit. Joint control over strategic financial and operative decisions was held to be the key feature of a joint venture. The other obvious feature of a joint venture would be that the parties participate in such a venture not as independent contractors but as entrepreneurs desirous to earn profits, the extent whereof may be contingent upon the success of the venture, rather than any fixed fees or consideration for any specific services.*
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> *17 The question that arises for consideration is whether the activity undertaken by a co- venture (partner) for the furtherance of the joint venture (partnership) can be said to be a service rendered by such co-venturer (partner) to the Joint Venture (Partnership). In our view, the answer to this question has to be in the negative inasmuch as whatever the partner does for the furtherance of the business of the partnership, he does so only for advancing his own interest as he has a stake in the success of the venture. There is neither an intention to render a service to the other partners nor is there any consideration fixed as a quid pro quo for any particular service of a partner. All the resources and contribution of a partner enter into a common pool of resource required for running the joint enterprise and if such an enterprise is successful the partners become entitled to profits as a reward for the risks taken by them for investing their resources in the venture.*

A contractor-contractee or the principal-client relationship which is an essential element of any taxable service is absent in the relationship amongst the partners/co-venturers or between the co-venturers and joint venture. In such an arrangement of joint venture/partnership, the element of consideration i.e. the quid pro quo for services, which is a necessary ingredient of any taxable service is absent.

18. The Civil Appeal filed by the Department (Commissioner vs. Mormugao Port Trust) against the aforesaid decision of the Tribunal was dismissed by the Supreme Court both on the ground of delay as well as on merits and the judgment is reported in 2018 (19) GSTL J 118 (SC).'

12. Perusal of the circular led the Tribunal to conclude therein that

'19. The Circular dated 23.02.2009 issued by the Central Board of Excise and Customs, infact supports the case of the appellant. The relevant portion of the Circular, which is in connection with service tax on movie theatres, is reproduced below:

2.4. ***The arrangement most commonly entered into between a theater owner and a distributor is that the theater owner screens the movie for fixed number of days under a contract. The proceeds earned through sale of tickets go to the distributor but the theatre owner receives a fixed sum depending upon the number of days of screening.*** *In this arrangement, the advertisement and display of posters etc. is done by the distributor.* ***Under this arrangement, the fixed amount contracted is given to the theater owner by the distributor irrespective of the fact whether the movie runs well or not.*** *However, there is no rental arrangement between the theater owner and the distributor as in the arrangement at paragraph 2.1 above.* ***A view has been expressed that in this arrangement, the theater owner provides 'Business Support Service' to the distributor and hence is liable to pay service tax on the fixed amount received by the theater owner.***

2.5. The matter has been examined. By definition 'Business Support Service' is a generic service of providing 'support to the business or commerce of the service receiver'. ***In other words the principal activity is to be undertaken by the client while assistance or support is provided by the taxable service provider. In the instant case***

> ***the theatre owner screens/exhibits a movie that has been provided by the distributor. Such an exhibition is not a support or assistance activity but is an activity on its own accord. That being the case such an activity cannot fall under 'Business Support Service'.***
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> *3. In the light of above, it is clarified that screening of a movie is not a taxable service except where the distributor leases out the theater and the theater owner get a fixed rent. In such case, the service provided by the theater owner would be categorized as 'Renting of immovable property for furtherance of business or commerce' and the theater owner would be liable to pay tax on the rent received from the distributor. The facts of each case and the terms of contract must be examined before a view is taken.*
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> *4. All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned."*
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> ***(emphasis supplied)***

20. The subsequent Circular dated 13.12.2011 issued by the Central Board of Excise and Customs, apart from the fact that it would not be applicable for confirming a demand for any period prior to 13.12.2011, would also not come to the aid of the Department. The relevant portion of the Circular is reproduced below:

> *9.* **Thus, where the distributor or sub-distributor or area distributor enters into an arrangement with the exhibitor or theatre owner, with the understanding to share revenue/profits and not provide the service on principal-to-principal basis, a new entity emerges, distinct from its constituents. As the new entity acquires the character of a "person", the transactions between it and the other independent entities namely the distributor/sub-distributor/area distributor and the exhibitor etc will be a taxable service.** *Whereas, in cases the character of a "person" is not acquired in the business transaction and the transaction is as on principal-to-principal basis, the tax is leviable on either of the constituent members based on the nature of the transaction and as per rules of classification of service as embodied under Sec 65A of Finance Act, 1994.*
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> ***(emphasis supplied)'***

13. Once again, and with the additional benefit of subsequent developments in the above dispute, the Tribunal had cause to look at another controversy, and with substitution of the distributor by 'association of persons' as recipient, identical to the one now

before us in **Inox Leisure Ltd v. Commissioner of Service Tax, Mumbai-V**[7]. It was noted therein that the earlier decision was applicable even in the changed circumstances of 'negative list' and that with

> *'23. The Department filed Civil Appeal No. 1335 of 2020 (The Commissioner of Service Tax vs. Inox Leisure Ltd) before the Supreme Court and by order dated 28.02.2022, the Supreme Court dismissed the Civil Appeal holding that the Tribunal had taken an absolutely correct view, to which the Supreme Court agreed. The order passed by the Supreme Court is reproduced below:*
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> > *"No case is made out to interfere with the impugned order passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT'). The CESTAT has taken an absolutely correct view, to which we agree. Hence, the Civil Appeal stands dismissed."'*

any contrary stand on taxability was doubtlessly unacceptable.

14. In the light of the facts and circumstances of dispute and the judicial pronouncements *supra*, the demand and penalty in the impugned order have no basis in law and must be set aside. We do so to allow the appeal.

(Order pronounced in the open court on 19/08/2024)

(JUSTICE DILIP GUPTA)
President

(C J MATHEW)
Member (Technical)

**/as*

[7] [final order no. A/85216/2022 dated 14th March 2022 in service tax appeal no. 87533 of 2016]