IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA

Before Shri P.K. Bansal, Accountant Member
and Shri Mahavir Singh, Judicial Member

I.T.A. No. 1278/KOL/ 2011
Assessment year : 2008-2009

Ballabh Das Agarwal,…………………………………………….Appellant
Prop. of M/s. Shakambari Road Carriers,
85, Metcalf Street, Room No. 303,
Kolkata-700 013
[PAN : ADAPA 5003 G]

-Vs.-

Income Tax Officer,………………………………………….Respondent
Ward-56(3), Kolkata,
3, Government Place West,
Kolkata-700 001

Appearances by:
Shri Miraj D. Shah, FCA, for the assessee
Shri Kanhiya Lal Kanak, JCIT, Sr. D.R., for the Department

Date of concluding the hearing : May 20, 2015
Date of pronouncing the order : May 22, 2015

O R D E R

Per P.K. Bansal:

This appeal has been filed by the assessee against the order of ld. Commissioner of Income Tax (Appeals)-XXXVI, Kolkata dated 02.08.2011 for the assessment year 2008-09 by taking the following revised grounds of appeal:-

(I) *For that ld. AO and CIT(A) failed to appreciate that payment to the truck owners, by the appellant was not made under any sub-contract requiring deduction of tax at source under section 194C of I.T. Act, 1961 resulting in disallowance under section 40(a)(ia) of the said Act and thus the addition of Rs.1,28,20,814/- is not legal and valid.*

(II) *For that CIT(A) failed to consider that payments made to the individual truck drivers were less than Rs.50,000/- for which the individual truck owners issued Form 15-I as prescribed, hence no disallowance under section 40(a)(ia) of the Income Tax Act, 1961 was called for.*

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(III) For that section 40(a)(ia) of I.T. Act, 1961, applies to hire charges which are payable and not applicable to the sum already paid and thus disallowance of the sum of Rs.96,57,939/- inclusive of a sum of Rs.2,83,186/- allowed by AO was not legal and valid.

(IV) For that ld. CIT(A) was not justified in upholding the charging of interest of Rs.13,86,714/- under section 234B of I.T. Act, 1961.

2. We have heard the rival submissions and carefully considered the same along with the order of tax authorities below. We noted that the assessee is engaged in the business of transport of goods belonging to business houses. The assessee during the previous year incurred an expenditure of Rs.1,31,04,000/- towards hiring of lorries. The Assessing Officer was of the view that the assessee was required to deduct TDS, but the assessee has not deducted the TDS where single payment was in excess of Rs.20,000/- at a time and aggregate payment to a single truck owner exceeds Rs.50,000/- during the impugned year. The Assessing Officer, therefore, took the view that a sum of Rs.1,28,20,814/- falls under the provision of section 194C(2) and, therefore, he invoked the provisions of section 40(a)(ia) and disallowed the same.

3. The provisions of section 40(a)(ia) are very clear if the assessee fails to deduct the tax at source or after deduction has not paid before the due date specified in sub-section (1) of section 139, the same will not be allowed in computing the income under the head "profit and gains of business or profession". The contention of the assessee, however, is that the provisions of section 194C are not applicable on the facts as there is no agreement or contract between the assessee and the persons from whom the trucks have been hired. The provision of section 194C lays down as under:-

"194C - Payments to contractors.

(1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work

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(including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—

> *(i)one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;*
>
> *(ii)two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,*

of such sum as income-tax on income comprised therein.

(2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

(3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (e) of clause (iv) of the Explanation, tax shall be deducted at source—

> *(i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or*
>
> *(ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.*

(4) No individual or Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

(5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if such sum does not exceed [17][thirty] thousand rupees :

***Provided** that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds [18][seventy-five] thousand rupees, the person responsible for paying such sums referred to in sub-section (1) shall be liable to deduct income-tax under this section.*

(6) No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

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(7) The person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed income-tax authority or the person authorised by it, such particulars, in such form and within such time as may be prescribed.

Explanation.—For the purposes of this section,—

(i)"specified person" shall mean,—

(a) the Central Government or any State Government; or

(b) any local authority; or

(c) any corporation established by or under a Central, State or Provincial Act; or

(d) any company; or

(e) any co-operative society; or

(f) any authority, constituted in India by or under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both; or

(g) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India; or

(h) any trust; or

(i) any university established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a university under section 3 of the University Grants Commission Act, 1956 (3 of 1956); or

(j) any Government of a foreign State or a foreign enterprise or any association or body established outside India; or

(k) any firm; or

(l) any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, if such person,—

(A) does not fall under any of the preceding sub-clauses; and

(B) is liable to audit of accounts under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor;

(ii)"goods carriage" shall have the meaning assigned to it in the Explanation to sub-section (7) of section 44AE;

(iii)"contract" shall include sub-contract;

(iv)"work" shall include—

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods or passengers by any mode of transport other than by railways;

(d) catering;

(e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer,

but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer."]

4. A plain reading of this Section makes it clear that "**any person responsible for paying any sum to any resident** (hereafter in this section referred to as the contractor) **for carrying out any work** **(including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person**" is required to deduct tax at source under section from the amounts so paid or payable. There is no doubt that the assessee in this case has made the payments as transportation charges in the nature of hiring charges for goods carried vehicles. The main contention of the assessee is, however, that the payments have not been made in pursuance of a contract between the assessee and the transporters. Now the question arises before us, whether there is contractual relationship between the assessee and the persons to whom the assessee had made the payments in the nature of hiring charges for goods carried vehicles. In our opinion, a contract need not be in writing; even an oral contract is good enough to invoke the provisions of Section 194 C. As Hon'ble Karnataka High Court has observed in the case of Smt J Rama Vs CIT (236 CTR 105), "**Law does not stipulate the existence of a written contract as a condition precedent for** *(invoking the provisions of Section 194 C with respect to)* **payment of TDS**". The transporters have received the payments from the assessee towards the transportation charges, therefore, the presumption

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normally be that one would proceed on the basis that there was a contract for hiring of goods carried vehicles. Therefore, if the assessee has made the payment for hiring the goods carried vehicles, the provisions of section 194C are clearly applicable. In our opinion, the ld. CIT(Appeals) was not correct in law that the assessee will be liable to deduct the TDS if the amount of a single contract exceeds Rs.20,000/-. The contract has to be looked into party-wise not on the basis of the individual GR. In our opinion, all the payments made to a truck owner throughout the year are to be aggregated to ascertain the applicability of the TDS provision as all the payments pertain to a contract. Contract need not be in writing. It may infer from the conduct of the parties. It may be oral also. Our aforesaid view is duly supported by the decision of ITAT, 'A' Bench, Kolkata in the case of DCIT –vs.- Kamal Kr. Mukherjee & Co. in ITA No. 199/Kol/2010. We also noted that under section 194C, sub-section (5) proviso thereto, the aggregate amount of all the payments or credited should exceed only Rs.50,000/-, then the assessee shall be liable to deduct income-tax at source.

5. But before us, the ld. A.R. has taken a submission that the 2nd proviso to section 40(a)(ia) as inserted by Finance Act, 2012 would apply in the case of the assessee. According to him, 2nd proviso is curative in nature intended to supply an obvious omission, take care of an unintended consequence and make the section workable. Section 40(a)(ia) without the second proviso resulted in the unintended consequence of disallowance of legitimate business expenditure even in a case where the payee in receipt of the income had paid tax, and, therefore, he took the plea that the second proviso although inserted w.e.f. 1st April, 2013 but being curative in nature has retrospective effect and accordingly contended that the issue be restored to the file of the Assessing Officer so that the assessee can provide all the details in terms of the second proviso to section 40(a)(ia).

6. We find force in the said submission of the ld. A.R. We noted that the submissions of the ld. A.R. are duly covered by the decision of this Tribunal ('SMC' Bench) in ITA No. 1905/Kol/2014 for the assessment year 2007-08, in which this Tribunal vide order dated 04.03.2015 has held as under:-

> *"5. I have heard rival contentions and gone through the facts and circumstances of the case. I find from first argument made by Ld. counsel for the assessee that the second proviso to section 40(a)(ia) of the Act inserted by the Finance Act, 2012 would apply in the instant case. According to him, the second proviso is curative in nature intended to supply an obvious omission, take care of an unintended consequence and make the section workable. Section 40(a)(ia) without the second proviso resulted in the unintended consequence of disallowance of legitimate business expenditure even in a case where the payee in receipt of the income had paid tax. According to him, it has for long been the legal position that if the payee has paid tax on his income, no recovery of any tax can be made from the person who had failed to deduct the income tax at source from such amount. In Grindlays Bank v CIT, (1992) 193 ITR 457 (Cal) decided on September 5, 1989, it was held by the Hon'ble Calcutta High Court as follows at pages 469-470 of the reports:*
>
> *"A point has been made by the assessee that as a result of this deduction the department is realizing the tax twice on the same income. It does not appear that this point was agitated before the Tribunal. We, however, make it clear that if the amount of tax has already been realised from the employees concerned directly, there cannot be any question of further realisation of tax as the same income cannot be taxed twice. If the tax has been realised once, it cannot be realised once again, but that does not mean that the assessee will not be liable for payment of interest or any other legal consequence for their failure to deduct or to pay tax in accordance with law to the revenue." (emphasis supplied)*
>
> *That such was the legal position was accepted by the Central Board of Direct Taxes in its Circular No.275/201/95-IT(B) dated January 29, 1997. Reference in this behalf may also be made to the judgment of the Hon'ble Supreme Court in Hindustan Coca Cola Beverage P. Ltd. v CIT, (2007) 293 ITR 226 (SC) where the same view was taken. I find that the aforesaid settled position in law has also been legislatively recognized by insertion of a proviso in sub-section (1) of section 201 of the Act by the Finance Act, 2012. Thus, the settled position in law is that if the deductee/payee has paid the tax, no recovery can be made from the person responsible for paying of income from which he failed to deduct tax at source. In a case where the deductee/payee has paid the tax on such income, the person responsible for paying the income is no longer required to deduct or deposit any tax at source. In the similar circumstances, I find that the first proviso to section 40(a)(ia) inserted by the Finance Act, 2010, which has been held to be curative and therefore, retrospective in its operation by the Hon'ble Calcutta High Court in ITAT No. 302 of 2011, **GA 3200/2011**, CIT v Virgin Creations decided on November 23, 2011 provides for allowance of the expenditure in any subsequent year in which tax has been deducted and deposited. The intention of the legislature clearly is not to disallow legitimate business expenditure. The allowance of such expenditure is sought to be made subject to deduction and payment of tax at source. However, in a case where the deductee/payee has paid tax and as such the person responsible*

for paying is no longer required to deduct or pay any tax, legitimate business expenditure would stand disallowed since the situation contemplated by the first proviso viz. deduction and payment of tax in a subsequent year would never come about. Such unintended consequence has been sought to be taken care of by the second proviso inserted in section 40(a)(ia) by the Finance Act, 2012. There can be no doubt that the second proviso was inserted to supply an obvious omission and make the section workable. The insertion of second proviso was explained by Memorandum Explaining The provision in Finance Bill, 2012, reported in 342 ITR (Statutes)234 at 260 & 261, which reads as under:-

"E.RATIONALIZATION OF TAX DEDUCTION AT SOURCE (TDS) AND TAX COLLECTION AT SOURCE (TCS) PROVISIONS
*I. **Deemed date of payment of tax by the resident payee**.*
Under the existing provisions of Chapter XVII-B of the Income-tax Act, a person is required to deduct tax on certain specified payments at the specified rates if the payment exceeds specified threshold. In case of non-deduction of tax in accordance with the provisions of this Chapter, he is deemed to be an assessee in default under section 201(1) in respect of the amount of such non-deduction. However, section 191 of the Act provides that a person shall be deemed to be assessee in default in respect of non/short deduction of tax only in cases where the payee has also failed to pay the tax directly. Therefore, the deductor cannot be treated as assessee in default in respect of non/short deduction of tax if the payee has discharged his tax liability.

The payer is liable to pay interest under section 201(1A) on the amount of non/short deduction of tax from the date on which such tax was deductible to the date on which the payee has discharged his tax liability directly.

As there is no one-to-one correlation between the tax to be deducted by the payer and the tax paid by the payee, there is lack of clarity as to when it can be said that payer has paid the taxes directly. Also, there is no clarity on the issue of the cut-off date, i.e., the date on which it can be said that the payee has discharged his tax liability.

In order to provide clarity regarding discharge of tax liability by the resident payee on payment of any sum received by him without deduction of tax, it proposed to amend section 201 to provide that the payer who fails to deduct the whole or any part of the tax on the payment made to a resident payee shall not be deemed to be an assessee in dealt in respect of such tax if such resident payee-

(i) Has furnished his return of income under section 139 ;

(ii) Has taken into account such sum for computing income in such return of income ; and

(iii) Has paid the tax due on the income declared by him in such return of income, and the payer furnishes a certificate to this effect from an accountant in such form as may e prescribed.

The date of payment of taxes by the resident payee shall be deemed to be the date on which return has been furnished by the payer.

It is also proposed to provide that where the payer fails to deduct the whole or any part of the tax on the payment made to a resident and is not deemed to be an assessee in default under section 201(1) on account of payment of taxes by the such resident, the interest under section 201(1A)(i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident payee.

Amendments on similar lines are also proposed to be made in the provisions of section 206C relating to TCS for clarifying the deemed date of discharge of tax liability by the buyer or licensee or lessee.

These amendments will take effect from 1st July, 2012.
II. Disallowance of business expenditure on account of non-deduction of tax on payment to resident payee.

A related issue to the above is the disallowance under section 40(a)(ia) of certain business expenditure like interest, commission, brokerage, professional fee, etc. due to non-deduction of tax. It has been provided that in case the tax is deducted in subsequent previous year, the expenditure shall be allowed in that subsequent previous year of deduction

In order to rationalize the provisions of disallowance on account of non-deduction of tax from the payments made to a resident payee, it is proposed to amend section 40(a)(ia) to provide that where an assessee makes payment of the nature specified in the said section to a resident payee without deduction of tax and is not deemed to be an assessee in default under section 201(1) on account of payment of taxes by the payee, the, for the purpose of allowing deduction of such sum, it shall be deemed that the assessee had deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee.

These beneficial provisions are proposed to be applicable only in the case of resident payee.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years."

7. No contrary decision was brought to our knowledge by the ld. D.R. By respectfully following the said decision, we restore this issue to the file of the Assessing officer with the direction that the assessee shall provide all the details to the Assessing Officer with regard to the recipients of the income and taxes paid by them. The Assessing Officer shall carry out necessary verification in respect of the payments and taxes of such income and also filing the return by the recipient. In case, the Assessing Officer finds that the recipient has duly paid the taxes on the income, the addition made by the Assessing Officer shall stand deleted.

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8. We have also gone through the plea of the ld. A.R. that the assessee has duly received the Form No. 15-I from the truck owners but could not deposit the same before the ld. CIT(Appeals). Although these forms were duly filed before the ld. CIT(Appeals). We noted that Hon'ble ITAT, 'F' Bench, Mumbai in the case of Shri Vipin P. Mehta –vs.- ITO in ITA No. 3317/Mum/2010 vide order dated 20.05.2011 on the similar issue has held as under:-

> *"6. We have carefully considered the facts and the rival contentions. Section 194A provides for deduction of tax from the interest paid by the assessee at the appropriate rate. Section 197A(1A) provides that notwithstanding anything contained in section 194A no deduction of tax shall be made under the section if the payee of the interest furnished to the person responsible for paying the interest, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the tax on his estimated total Income of the previous year in which the interest is to be included will be nil. Sub-section 2 provides that the person responsible for paying interest shall deliver or cause to be delivered to the CCIT or CIT one-copy of the declaration submitted by the payee of the interest to the assessee on or before the seventh day of the month next following the month in which the declaration was furnished to him. If the person responsible for paying the interest (i.e. the assessee) does not comply with sub-section 2 of section 197A, he is liable to pay penalty of Rs. 100/- for every day during which the failure continues. Such penalty can be imposed only by the Commissioner or Chief Commissioner of Income Tax as stated in clause (b) of sub-section 3 of section 272A and sub-section 4 requires that an opportunity shall be given to the assessee before any penalty order is passed.*
>
> *7. In the present case the claim of the assessee is that at the time of paying the interest to the 34 persons mentioned in the assessment order, he had before him the appropriate declarations in the prescribed form from the payees stating that no tax was payable by them in respect of their total income and therefore tax need not be deducted from interest under section 194A, and in the light of these declarations he had no option but to make the payment of interest without any tax deduction. If the claim is true then the contention must be accepted because under sub-section (lA) of section 197A, if such a declaration is filed by the payee of interest no deduction of tax shall be made by the assessee. The revenue authorities have doubted the assessee's version because according to them it is only when the Assessing Officer proposed the disallowance of the interest invoking the section 40(a) (ia) in the course of the assessment proceedings that the assessee filed the declarations claimed 10 have been submitted to him by the payees of the interest in the office of the CIT(TDS) as required by sub-*

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section 2 of section 197A. Apart from this inference, there is no other evidence in their possession to hold that the declarations were not submitted by the payees of the interest to the assessee at the time when the payments were made. Without disproving the assessee's claim on the basis of other evidence except by way of inference, it would not be fair or proper to discard the claim. The Assessing Officer has not recorded any statements from the payees of the interest to the effect that they did not file any declarations' with the assessee at the appropriate time or to the effect that they filed the declarations only at the request of the assessee in September/October, 2008. In the absence of any such direct evidence, we are unable to reject the assessee's claim. The Assessing Officer has stated in para 4.4 of the assessment order that he found that some of the loan creditors were having taxable income but still the assessee had submitted declarations from them in form no. 15G. Unless it is proved that these forms were not infact submitted by the loan creditors, the assessee cannot be blamed because at the time of paying the interest to the loan creditors, he has to perforce rely upon the declarations filed by the loan creditors and he was not expected to embark upon an enquiry as to whether the loan creditors really and in truth have no taxable income on which tax is payable. That would be putting an impossible burden on the assessee. Thai apart sub-section IA of Section 197A merely requires a declaration to be filed by the payee of the interest and once it is filed the payer of the interest has no choice except to desist from deducting tax from the interest. The sub-section uses the word "shall" which leaves no choice to the assessee in the matter. In the case of payment of leave travel concession and conveyance allowance to employees who are liable to deduct tax from the salary paid to the employees under section 192, the Supreme obligation under the Act or Rules to collect evidence to show that the employee had actually utilized the money paid towards leave travel concession/conveyance allowance. The position is stronger under section 197A which does not apply to section 192, but which provides in sub-section (1A) that if the payee of the interest has filed the prescribed form to the effect that he is not liable to pay any tax in computing his total income, the payee shall not deduct any tax. The subsection does not impose any obligation on the payer to find out the truth of the declarations filed by the payee. Even if the assessee has delayed the filing of the declarations with the office of the CIT/CCIT (TDS) within the time limit specified in subsection (2) of section 197 A, that is a distinct omission or default for which a penalty is prescribed. Section 273B provides that no penalty shall be imposed under any of the clauses of sub-section (2) of section 272A for the delay. if the assessee proves that there was reasonable cause for the same. We have already seen that under sub-section (4) of section 27 2A. no penalty can be imposed unless the assessee is given an opportunity of being heard. All these provisions indicate that the failure on the part of the assessee, who is the payer of the interest, to file the declarations given to him by the payees of the interest, within the time limit specified in sub-section (2) to section 197 A is distinct and separate and merely because there is a failure on the part of the assessee to submit the

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> *declarations to the income-tax department within the time limit, it cannot be said that the assessee did not have declarations with him at the time when he paid the interest to the payees. That would be a separate matter and separate proof and evidence is required to show that even when the assessee paid the interest, he did not have the declarations from the payees with him and therefore he ought to have deducted the tax from the payment. No such evidence or proof has been brought by the department.*
>
> *8. For the aforesaid reasons, we accept the assessee 's claim that since he had the declarations of the payees in the prescribed form before him at the time when the interest was paid, he was not liable to deduct tax therefrom under section 194A. If he was not liable to deduct tax, section 40(a)(ia) is not attracted. There is no other ground taken by the income tax authorities to disallow the interest. We therefore accept the assessee's appeal and delete the disallowance of interest of Rs. 7,87,291/-".*

In view of the decision dated 20.05.2011 of the Hon'ble ITAT, 'F' Bench, Mumbai in the case of Shri Vipin P. Mehta (supra), we set aside the order of the ld. CIT(Appeals) on this issue and restore the issue to the file of the Assessing Officer with the direction that the assesese shall file all these forms 15-I which has been received by him. The Assessing Officer will duly examine these forms and in case he finds that these forms are in order, to that extent the assessee should not be treated to be in default. Thus this ground is allowed for statistical purposes.

9. In the result, the appeal filed by the asessee is allowed for statistical purposes.

Order pronounced in the open Court on May 22, 2015.

Sd/-	**Sd/-**
Mahavir Singh	**P.K. Bansal**
(Judicial Member)	**(Accountant Member)**

Kolkata, the 22nd day of May, 2015

Copies to : (1) ***Ballabh Das Agarwal,***
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(2) Income Tax Officer,
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(3) Commissioner of Income-tax (Appeals)
(4) Commissioner of Income Tax
(5) The Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata Benches, Kolkata

Laha/Sr. P.S.

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