IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A(SMC)' BENCH, KOLKATA
[Virtual Court Hearing]

Before Shri P.M. Jagtap, Vice-President (KZ)

I.T.A. No. 291/KOL/2021
Assessment Year: 2019-2020

Bhawarlal Alok Kumar,.....Appellant
4th Floor, Room No. 407, Baiju Chowk,
P-12, New Howrah Bridge Approach Road,
Kolkata-700001
[PAN:AADFB0620N]

-Vs.-
Deputy Commissioner of Income Tax,.....Respondent
Circle-34, Kolkata,
Aayakar Bhawan (Poorva),
110, Shanti Pally,
Kolkata-700107

Appearances by:
Shri P.R. Kothari, FCA, appeared on behalf of the assessee
Shri Biswanath Das, Addl. CIT, appeared on behalf of the Revenue

Date of concluding the hearing : December 09, 2021
Date of pronouncing the order : December 09, 2021

O R D E R

This appeal filed by the assessee is directed against the order of the ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as CIT(A)] dated 23.07.2021 and the solitary issue involved therein relates to the disallowance of Rs.8,01,212/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of delayed payment of employees contribution to PF and ESI paid after the due dates prescribed in the relevant Statutes but before the due date of filing of return under section 139(1) of the Income Tax Act, 1961.

2. I have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that a similar issue

relating to the disallowance on account of delayed payment of employees contribution towards PF and ESI was involved in the case of Lumino Industries Limited and after considering the relevant provisions of the Income Tax Act as amended from time to time as well as the relevant judicial pronouncements on the issue, this Tribunal vide common order dated 17th November, 2021 passed in ITA No. 365/KOL/2021 in the case of Lumino Industries Limited –vs.- Assistant Commissioner of Income Tax, Circle-5(1), Kolkata has decided the same by passing a well discussed and well reasoned order as under:

> *"8. We have heard both the parties and perused the records. We find that the assessee had remitted the payment which are in the nature of contribution of employees' share towards PF to the fund set up for the welfare of the employees within the due date of filing of return of income u/s 139(1) of the Act. In the present case the AO have disallowed the payment made towards these funds by relying on CBDT Circular No. 22/2015 dated 17.12.2015 and by taking note of the decision of Hon'ble Gujrat High Court in the case of M/s Gujrat State Road Transport (supra) and ITAT (Mumbai) decision in the case of M/s LKP Securities(supra) that the employees contribution to PF/ESI can be allowed only if the same has been deposited within the due date prescribed under the respective Act (PF and ESI Act) and not before the due date of filing of return of income. On appeal, the Ld. CIT(A) has taken note of the amendment brought in by Finance Act, 2021, by virtue of it has been clarified that Section 43B does not apply to Section 36(1)(va) of the Act and it is deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of Section 2(24)(x) applies. And thus according to Ld. CIT(A), it is a clarificatory amendment and so is retrospective in operation and therefore he upheld the action of AO which action of Ld. CIT(A) has been challenged before us.*
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> *9. Assailing the action of Ld. CIT(A) the Ld. A.R. Shri Miraj D Shah submitted that the amendment brought in by the Finance Act 2021 is prospective in nature and for buttressing this submission he drew our attention to the decision of Hon'ble Supreme Court in the case of M/s M.M. Aqua Technologies Ltd. vs. CIT, Delhi and drew our attention to Para 22 wherein the Hon'ble Supreme Court has held that if the retrospectivity of a taxing statute is urged due to the expression used in the Statute is "for the removal of doubts" cannot be presumed to be retrospective, if it alters or changes the law as it earlier stood and has relied on several decisions of the Hon'ble Supreme Court which reads as under:*
>
> > *"22. Second a retrospective provision in a tax act which is 'for the removal of doubts' cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill. Inc. vs. CIT (2005) 12 SCC 717 as follows:*
> >
> > > *17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the*

law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale [(1980) 124ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.

23. This being the case, Explanation 3C is clarificatory - it explains Section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court.

24. Third, any ambiguity in the language of Explanation 3C shall be resolved in favour of the assessee as per Cape Brandy Syndicate v. Inland Revenue Commissioner (supra) as followed by judgments of this Court - See Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 at paras 60 to 70 per Kapadia, C.J. and para 333, 334 per Radhakrishnan, J."

10. And according to Ld. A.R. the Ld. CIT(A) erred in holding the later amendment brought in by Finance Act, 2021 to be retrospective and for that proposition he cited the Constitution Bench decision of the Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd. 2015 (1) SCC 1 which decision has been taken note of by the Hon'ble Supreme Court in the case of M/s Snowtex Investment Ltd. vs. PCIT dated 30.04.2019 [Civil Appeal No(s). 4483 of 2019, Special Leave to

appeal (c) No. 20017/2017] wherein the Hon'ble Supreme Court has explained the test to be applied to find out whether the intent of the legislature/Parliament is to give retrospective operation of law by taking note of the decision in the case of Vatika Township (supra) and held as under:

The Test to be applied is essentially one of the intent of the legislature.

28. In a more recent decision in Commissioner of Income Tax vs. Vatika Township Pvt. Ltd. (2015) 1 SCC 1, a Constitution Bench of this Court held thus:

42.1. "Notes on Clauses" appended to the Finance Bill, 2002 while proposing insertion of proviso categorically states that 'this amendment will take effect from 1.6.2002.' These become epigraphic 1 words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that a few other amendments in the Income tax Act made by the same Finance Act specifically making those amendments retrospective. For example, clause 40 seeks to amend S. 92-F. Clause (iii-a) of S. 92-F is amended "so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract". (emphasis supplied). This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of three concepts:

i) prospective amendment with effect from a fixed date;

ii) retrospective amendment with effect from a fixed anterior date; and

iii) clarificatory amendments which are retrospective in nature."

29. In M/s. Vijay Industries (supra), decided on 1 March 2019, a three judge Bench of this Court held that the provisions of Section 80AB which were introduced by the Finance (No. 2) Act, 1980 with effect from 1 April 1981 could not be regarded as clarificatory in nature. The Court held that the provision was made with prospective effect and the amendment would not apply to assessment year 1979-1980 and 1980-1981 because the amended provision was brought on the statute book after the assessment years in question.

30. In conclusion, we therefore, hold that the amendment which was brought by Parliament to the Explanation to Section 73 by the Finance (No 2) Act 2014 was with effect from 1 April 2015. In its legislative wisdom, the Parliament amended Section 43(5) with effect from 1 April 2006 in relation to the business of trading in derivatives, Parliament brought about a specific amendment in the Explanation to Section 73, insofar as trading in shares is concerned, with effect from 1 April 2015. The latter amendment was intended to take effect from the date stipulated by Parliament and we see no reason to hold either that it was clarificatory or that the intent of Parliament was to give it retrospective effect.

31. The consequence is that in A.Y. 2008-2009, the loss which occurred to the assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the profits which it had earned against the business of futures and options since the latter did not constitute profits and gains of a speculative business.(Emhasis given by us)

11.Citing the aforesaid case law, Shri Miraj D Shah contended that in order to find out the legislative intent as to whether the Parliament/legislature intended the amendment/explanation brought in later to be retrospective in operation or not, then one may take the assistance of "Notes on Clauses" which are appended to the Finance Bill concerned. Shri Miraj Shah drawing our attention to the Constitution Bench decision of Hon'be Supreme Court in Vatika Township Ltd. (supra) pointed out that Parliament/Legislature is aware of the three concepts before an amendment is brought in, which can be discerned from reading of the "Notes on Clauses" to the Bill which are (i) prospective amendment with effect from a fixed date; (ii) retrospective amendment with effect from a fixed anterior date; and (iii) clarificatory amendments which are retrospective in nature.

12.So according to the Ld. A.R. in order to understand whether the amendment brought in by Finance Act, 2021, is retrospective or prospective in operation in respect of the present case, he drew our attention to the memorandum explaining the Notes on Clauses of Finance Act, 2021. According to him, the clause 8 & 9 of the memorandum is relevant which are reproduced hereunder:

> *"Rationalisation of various Provisions*
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> *Payment by employer of employee contribution to a fund on or before due date*
>
> *Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees. "*
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> *Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head "Profits and gains of business or profession.*
>
> *Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, "due date" to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.*
>
> *Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under subsection (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act..*

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions.

Accordingly, in order to provide certainty, it is proposed to –

(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the "due date" under this clause; and

(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

<u>These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. [Clauses 8 and 9]</u>"[Emphasis given by us]

13. Therefore, taking us through the relevant clauses of Notes of Clauses of Finance Act, 2021, he pointed out to us that it is explicitly made clear that amendment will take effect from 1st April, 2021 and therefore will accordingly apply to the assessment year 2021-11and subsequent years. Therefore according to Shri Miraj Shah the amended provision of Section 43B as well as Section 36(1)(va) are not applicable in the assessment year under consideration for the present case as it is for AY 2017-18 and therefore according to him, the decision of the Hon'ble Jurisdictional Calcutta High Court is binding on this issue as held in the case of CIT vs. M/s Vijayshree Ltd. in ITAT No.243 of 2011 & GA No. 26607 of 2011, CIT vs. Philips Carbon Black Ltd. in GA No. 1382 of 2014 & ITAT 31 of 2014, CIT vs. M/s Coal India Ltd. in ITA 12 of 2015, M/s Akzo Nobel India Ltd. vs. CIT in ITA No. 110 of 2011 and therefore the claim of the assessee should be allowed. According to him, the jurisdictional High Court's decision on this issue is therefore binding on this Tribunal ; and since the employees' contribution was remitted by the assessee before the due date of filing of return of income u/s 139(1) of the Act it is an allowable deduction. Therefore he wants us to overturn the decisions of the lower authorities and uphold the claim of deduction on this issue.

14. Per contra, the Ld. D.R. Shri Jayanta Khanra supporting the decision of authorities below has contended that the Hon'ble Delhi High Court in the case of CIT vs. Bharat Hotel Ltd. in 410 ITR 417 has decided this issue in favour of the revenue and the Delhi Tribunal

has followed the order of the Hon'ble Delhi High Court in Bharat Hotel (supra) and upheld the action of the Department disallowing the amount deposited by the assessee company in respect of the employees' contribution since it was not deposited within the due date as prescribed by PF Fund and ESI Act. So therefore the Ld. D.R. does not want us to interfere in the impugned order passed by the authorities below.

15. In his rejoinder, the Ld. A.R. Shri Miraj D Shah contended that even though the Delhi High Court in the case of Bharat Hotels Ltd. (supra) had held in favor of the revenue, however the Hon'ble High Court in that case (Bharat Hotels Ltd.) had not considered the earlier Division Bench judgment of the Delhi High Court which was binding on a Division Bench in the case of CIT vs. Aimil Ltd. & Ors. Reported in 321 ITR 508 (Delhi) wherein the head notes reads as under:

> *"Late deposit of PF and ESI - During the assessment proceedings, the Assessing Officer (AO) found that the assessee had deposited employers' contribution as well as employees' contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules. Accordingly, he made addition of Rs. 42,58,574/- being employees' contribution under Section 36(1)(va) of the Act and Rs. 30,68,583/- being employers' contribution under Section 43B of the Act. CIT(A) deleted the addition by holding that the assessee had made the payment before the due date" of filing of the return, which was a fact apparent from the record - that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. <u>Insofar as the Income Tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement - Decided in favor of assessee.</u>"[Emphasis given by us]*

16. Thus it has pointed out by the Ld. A.R. that the Hon'ble High Court Division Bench had earlier held in M/s Aimil Ltd. (supra) that the PF/ESI Act permits the employer to make deposit with some delays, subject to the consequents as per the respective PF/ESI Acts, however insofar as the Income Tax Act is concerned, the assessee can get the benefit of deduction if the actual payment is made before the return is filed as per the principle laid down by the Hon'ble Supreme Court in Vinay Cements reported in 213 CTR 268 (SC). Therefore, according to Ld. A.R., since the later judgment of the Division Bench of Hon'ble Delhi High Court in Bharat Hotels Ltd.(supra) did not consider the Co-ordinate Bench decision as the case of CIT vs. Aimil Ltd. (supra) it cannot be a stare-decise. And moreover it is settled position of law that when there is conflict between two decisions of the High Court of equal strength [(DB) in this case], it cannot be said that later judgment need to be followed, unless a Full Bench of the High Court settled the issue either wise. However, when it comes to fiscal statutes, according to Shri Miraj D Shah, in such circumstance [i.e, conflict of decisions/views of Benches of same strength and when there is no decision on the issue of jurisdictional High Court] then, the decision in favour of assessee should be followed as held by the Hon'ble Supreme Court in the Vegetable Products Ltd. 82 ITR 192 (SC) wherein it is settled when two views/interpretations are possible on an issue, then the view which is in favour of the assessee need to be followed. Taking note of this aspect, it was brought to our notice that the latest Delhi Tribunal order and Hyderabad Tribunal Orders have held in favour of the assessee in NCC Ltd. vs. ACIT dated 27.09.2021 and also Hyderabad Bench

decision in ACIT vs. Nava Bharat Ventures Ltd. (2021) 10 TMI 403 wherein Tribunal was pleased to direct deletion of the disallowance made by the AO in respect of the payment of employees contribution to ESI/PF. Therefore he prayed that the disallowance made by authorities below be deleted on this score.

17. Have heard both the parties. We note that the Finance Bill, 2021 has brought in an amendment which disallows the employees' contribution made in PF and ESI if not made within the due date as prescribed by the respective statutes (PF and ESI Act). So after the amendment has been inserted according to Shri Miraj D Shah takes effect from 1st April, 2021 i.e AY 2021-22 and subsequent assessment year and if the remittance of PF/ESI Employees' Contribution is not made within the time prescribed by the PF/ESI Act then the remittance cannot be allowed as a deduction which is prospective in operation. Whereas according to Ld. CIT(A), the amendment brought in is clarificatory in nature so, retrospective in operation. So we have to adjudicate this issue whether the amendment brought in by Finance Act, 2021 is prospective or retrospective in operation. We note that before this amendment has been inserted by Finance Bill, 2021, the Hon'ble Jurisdictional Calcutta High Court in the case of Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra) has held that the payment of employees' contribution if made by an assessee before the due date of filing of return of income u/s 139(1) of the Act, is allowable as a deduction. We note that by Finance Act, 2021, the provision of Section 36(1)(va) as well as Section 43B has been amended to this extend by inserting the Explanation 2 whereby it is clarified that the provision of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause. For ready reference, we reproduce the Explanation-2 to Section 36(1)(va) as under:

> *"Section 36(1)(va)*
>
> *Explanation-2 – For the removal of doubts, it is hereby clarified that the provisions of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the 'due date' under this clause'*

18. We find that this amendment has been brought in the Act to provide certainty about the applicability of Section 43B in respect of belated payment of employees' contribution. In order to test whether the amendment brought in later is retrospective or not one has to apply the test as laid by the Hon'ble Supreme Court in the case of M/s Snowtex Investment Ltd. (supra) wherein the Hon'ble Supreme court took note of the law laid down on this issue by the Constitution Bench in M/s Vatika Township Ltd. and held that the intent of the Parliament/legislature need to be looked into for ascertaining whether the amendment should be retrospective or not. In Vatika Township Ltd. (supra) the Hon'ble Supreme Court held that the notes on clauses appended to the Finance Bill will throw light as to the legislative intent; because it has to be borne in mind that Parliament/legislature is aware of three concepts before an amendment is brought in, which can be discerned from reading of the "Notes on Clauses" to the Bill which are (i) prospective amendment with effect from a fixed date; (ii) retrospective amendment with effect from a fixed anterior date; and (iii) clarificatory amendments which are retrospective in nature. So when we adjudicate whether the view of Ld CIT(A) that the explanation 2 brought in by Finance Act, 2021 is retrospective, let us look at the "Notes on Clauses and the relevant clauses 8 & 9 of the Finance Bill, 2021 (supra) pertaining to the issue in hand which in clear and unambiguous terms spells out the intention of Parliament that the amendment shall take effect from 1st April, 2021 and therefore will

accordingly apply to Assessment Year 2021-22 and subsequent years. So since the legislative intent is clear, the amendment brought in by Finance Act, 2021 on this issue as discussed is prospective and Ld. CIT(A) erred in holding otherwise. So till AY 2021-22, the Jurisdictional High Court's view in favor of assessee will hold good and is binding on us. As discussed the decision of the Hon'ble Delhi High Court in Bharat Hotels Ltd. (supra) which was in favor of revenue has not considered the decision of the Co-ordinate Division Bench decision in M/s Aimil Ltd.(supra) which is in favour of assessee. So we note that later decision of the Delhi/Hyderabad Tribunal have followed the decision favouring assessee in the light of the Hon'ble Supreme Court decision in M/s Vegetable Products (supra). In the light of the aforesaid decision and relying on the ratio of the Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra) and M/s Snowtex Investment Ltd. (supra) and also taking note of the binding decision of the Hon'ble Jurisdictional Calcutta High Court on this issue before us in Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra), we set aside the impugned order of Ld CIT(A) and direct the AO to allow the claim of deduction in respect of employees contribution shares towards ESI, PF, by the assessee before the due date of filing of return u/s 139(1) of the Act. Therefore the appeal of assessee succeeds and so, it is allowed in favour of assessee".

3. As the issue involved in the present appeal as well as the material facts relevant thereto are similar to the case of Lumino Industries Limited (supra), I respectfully follow the decision rendered by the Tribunal in the said case and delete the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of delayed payment of employees contribution towards PF and ESI.

4. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on December 09, 2021.

Sd/-

(P.M. Jagtap)
Vice-President (KZ)

Kolkata, the 9th day of December, 2021

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(3) Commissioner of Income Tax (Appeals), National Faceless Appeal Centre,
(4) Commissioner of Income Tax ,
(5) The Departmental Representative
(6) Guard File

By order

Senior Private Secretary/DDO,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.