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

Before: **Shri S.S.Viswanethra Ravi, Judicial Member, and**
Shri Dr. Arjun Lal Saini, Accountant Member

ITA No. 737/Kol/2014
A.Y 2009-10

M/s. Shelter Projects Limited	**Vs.**	**C.I.T (A)-XII Kolkata**
PAN: AABCS 5229C		
(Appellant)		(Respondent)

Appearances by**:**
Shri A.K Tibrewal, FCA &
Shri Amit Agarwal, Advocate,
Shri Goulen Hangshing, CIT,DR

Date of hearing : 24-07-2018
Date of pronouncement : 17-10-2018

O R D E R

Shri S.S. Viswanethra Ravi, JM :-

This appeal by the Assessee is against the order dt. 21-02-2014 of the Learned Commissioner of Income Tax (Appeals), XII, Kolkata for the A.Y 2009-10.

2. Ground nos. 1 & 2 are relating to confirmation of addition of Rs.49,92,73,606/- made by the AO as income of assessee representing consideration said to have been received by the assessee under development agreement.

3. Heard both and perused the evidence on record. The AO by placing reliance on the letter dt: 23-12-2011 filed by the assessee in the assessment proceedings, the AO held that possession of land was given

to developer, thereby, the AO treated the total consideration of Rs. 50.17 crore under the agreement as income of the assessee for AY consideration. This Tribunal upon hearing both the parties on 31-08-2017 directed the ld. DR to produce relevant assessment record to verify the letter dt. 23-12-2011. On the other hand, the ld.AR filed said letter in the paper book at pages 13 to16 and argued that there was no admission in the said letter that the assessee handed over the possession of land to the developer. Relevant portion of assessee's letter dt. 23-12-2011 is reproduced herein below:-

> *"Clause no. 1. Development right agreement with Bengal Shelter Housing Development Ltd Rs. 50.17 crores.*
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> *Already we have filed with the copy of the development right and a supplementary agreement where the terms and conditions are stated clearly. Our Authorised Representative filed with you on 21.12.2011 when he received the above memo the explanations why the amount received in part amounting to Rs.21.66 crores are not considered as the income of the year and it is very much clear that we disclosed in our books of Rs.21.66 core as our liability which will be treated as income along with the balance amount in the coming year/s only when both the parties complied with the terms stated therein. The amount received against development in Gouripur Mouza, 24 Pgs (North).*
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> *As such, your proposal to add Rs. 21.66 cores as income to your assesse does not hold good. And is justified from the point of justice and equity."*

4. On perusal of said letter, we find that no permission to have been made by the assessee the possession was handed over to the said developer.

5. Further, the ld.AR referred to an agreement dt. 31-03-2009, placed at page-3 of the paper book and pointed out clause (c) and argued that there was no covenant that the assesse handed over the possession of land to its developer. It only stated that on receipt of consideration of Rs. 50.17 crores the assesse will hand over the land in question to the developer. The ld.AR further submits that the said

agreement was cancelled by a deed of cancellation dt. 28-12-2011, pages 8-11 of the paper book and as such no transfer of land under the provisions prescribed u/s. 47(v) of the I.T Act is attracted. Relevant clause (c) of the said agreement is reproduced herein below:-

> *"c) And on payment of the consideration of Rs. 50.17 Crores, the First Party will hand over the possession of the land and deliver all the deeds and documents as stated herein before to the Second Party allowing them to develop the project as per the scheme/plan as may be sanctioned by the concerned authority or authorities at their cost or at cost of their nominee/nominees. "*

6. Referring to the said agreement dt. 31-03-2009, the ld. AR argued that the said agreement dt. 31-03-2009 was entered into between the assessee (1st party) and M/s. Bengal Shelter Housing Development Limited (BSHDL) (2nd Party) and was not registered, the assesse cancelled the said agreement by way of Deed of Cancellation dt. 28-12-2011 and returned the amounts received by the assessee by way of accumulative redeemable preference shares valuing at Rs.19,60,00,000/- and Rs.2,06,02,680/- through bank. The AR referred to ledger of assessee showing the accounts advance against development rights (40-46 of the paper book) and referred to page-45 of the paper book and submitted that opening balance as on 1-4-2013 was of Rs. 42,36,55,680/- and debited the same by repaying to the account of M/s.BSHDL from 1-4-2013 to 9-10-2013. All the payments were made by cheque to M/s. BSHDL.

7. The ld.AR referred to page-10 of the paper book and submitted that due to lot of disputes and differences between the assessee and M/s. BSHDL the agreement dt. 31-03-2009 was cancelled and as such no possession of land was given to developer i.e M/s. BSHDL and no income was accrued to the accounts of assessee. The amounts in question were repaid to the developer by cheques.

8. The ld. AR placed reliance in the case of Shri Harder Singh of ITAT Chandigarh and referred to para 4 at page-3 of the said order and submitted, the amendment of section 53A of Transfer of Property Act came into force w.e.f 24-09-2001 and the registration of an agreement is mandatory from 24-09-2001. The Tribunal held the said agreement does not fall u/s. 53A of Transfer of Property Act r.w.s 2(47)(v) of the IT Act 1961 in the absence of registration of JDA having been executed after amendment came into force. Relevant portion is reproduced herein below:-

> *Considering these facts, the appeal of the assessee was allowed by the ld. CIT(A) on the following reasoning;*
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> *"7.2 During appeal proceedings, the Ld. A/R submitted that there are 95 members of the said society who filed appeal on identical facts and the appeal has been decided by Hon'ble Punjab and Haryana High Court in the case of Sh. C.S. Atwal. [ITA No. 200 of 2013J. On perusal of the order it is seen that the additions on account of capital gain were made relying upon the decision of Hon'ble ITAT, Chandigarlt in the case of Sh. Charanjeet Atwal (ITA No. 4481Chd/2011). The assessing officer in this case computed the capital gains at Rs. 1,82,85.429/- by taking into consideration receivable in cash at Rs. 82,50,000/- and the value of one flat of 2250 sq. feet @ 4500/- sq. feet for Rs. 1,01,25,000/-. The appellant had disclosed capital gains of Rs. 15.59.230/-, in his return of income as the appellant had received Rs. 33,00,000/- only in pursuance of the said agreement. A submission was filed during the present proceedings. It is submitted that the case of Sh: C.S. Atwal has been decided by Hon 'ble Punjab & Haryana Caur in ITA No. 200 of 2013 (O&M) vide its order dated July 22, 2015 in favour of the assessee. The Hon'ble Court has summarized the conclusion at para 46 of the said order as under:*
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> *46. We summarize our conclusions as under:*
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> *1. Perusal of the JDA dated 25.02.2007 read with sale deeds dated 02.03.2007 and 25.04.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties has agreed for pro-rata transfer of land.*
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> *2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.02.2007 so as to fall within the domain of section 53A of 1882 Act.*
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> *3. The possession delivered. if at all. was as a licensee for the development of the property and not in the capacity of a transferee.*

4 Further Section 53A of 1882 Act. by incorporation. stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A if 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.02.2007 having been executed after 24.09.2001, the agreement does not fall u/s 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply.

5. It was submitted by Learned counsel for the assessee appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JDA dated 25.02.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals., we observe that the assesse appellants shall remain bound by their said stand.

6. The issue of exigibility to capital gains tax having been decided in favour of the assesse, the question of exemption u/s. 54F of the Act would not survive any longer and has been rendered academic.

7. The Tribunal and the authorities below were not right in holding the assesse-appellant to be liable to capital gains tax in respect of remaining land measuring 13-5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed. "

9. In the present case as discussed above, an agreement dt. 31-03-2009 was entered into between the assessee (1st party) and M/s. Bengal Shelter Housing Development Limited (BSHDL) (2nd Party) and it is clear that was executed after the amendment came into force w.e.f 24-09-2001. The fact remains admitted that it was not registered. Therefore, in our opinion, the order in the case of Shri Harder Singh of ITAT Chandigarh is applicable and we hold that in the absence of registration of agreement dated 31-03-2009 having been executed after 24.09.2001, the agreement does not fall u/s 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply.

10. Further the ld. AR drew our attention to the decision of the Hon'ble Punjab & Haryana High Court in the case of C.S Atwal and referred to

para-43 and argued that the Hon'ble High Court held that when the mandatory requirements of section 53A of Transfer of Property Act were not complied, the assessee therein was not liable to pay tax on capital gain. Relevant portion of which is reproduced herein below:-

> *"43. In view of preceding analysis, it is reiterated that from the cumulative effect of covenants contained in JDA dated 25.2. 2007 read with registered power of attorney dated 26.2. 2007, it cannot be held tht the mandatory requirements of Section 53 of 1882 Act were complied with which stood incorporated in Section 2(47)(v) of the Act. Once that was so, it could not be said that the assesse-appellants were liable to capital gains tax in respect of remaining land which was not transferred by them to the developer/builder because of supervening event not on account of any volition on their part.*
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> *44. Viewed from another angle, it cannot be said that any income chargeable to capital gains tax in respect of remaining land had accrued or arisen to the appellant-assessee in the facts of the case. Considering the issue of taxability of income with regard to its accrual or receipt as the basis for charging income tax, the Apex Court in Commissioner of Income Tax, Bombay City v. Messrs Shoorji Vallabhdas & Co (1962) 46 ITR 144 (SC) observed that income tax is a levy on income and where no income results either under accrual system or on the basis of receipt, no income tax is exigible. The relevant observations read thus:-*
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> *"Income tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income, if income does not result at all, there cannot be a tax, even tough in book-keeping, an entry is made about a "hypothetical income" which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor/ receipt of income, even though an entry to that effect might, incineration circumstances, have been made in the books of account." -*
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> *This pronouncement was applied by the Supreme Court in Godhra Electricity Co. Limited v. CIT, (1997) 225 ITR 746 (SC) and followed by the Calcutta High Court in CIT v. Balarampur Commercial Enterprises Limited,(2003) 262 ITR 439 (CaL).*
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> *45. Relying upon decision in Messrs Shoorji Vallabhdas & Co. 's case (supra), the Supreme Court in CIT v. Excel Industries Limited (2013) 358 ITR 295 (SC) held that income tax cannot be levied on hypothetical income. Income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability, the income is not hypothetical and it has really accrued to the assessee. It was observed as under:-*
>
> > *"17. First of all, it is now well settled that income tax cannot be levied on hypothetical income. In Commissioner of Income Tax v. Shoorji Vallabhdas and Co., [1962] 46 ITR 144 (SC) it was held as follows:-*
> >
> > *"Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that*

effect might, in certain circumstances, have been made in the books of account."

18. The above passage was cited with approval in Morvi Industries Ltd. v Commissioner of lncome-Tax (Central), [1971] 82 ITR 835 (SC) in which this Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due. It was then observed that:

".....the date of payment does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

19. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount."

20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee."

46. We summarize our conclusions as under:-

1. Perusal of the lDA dated 25.2.2007 read with sale deeds dated 2.3.007 and 25.4.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land.

2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.2.2007 so as to fall within the domain of Section 53A of 1882 Act.

3. The possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of a transfree.

4. Further Section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JOA dated 25.2.2007 having been executed after 24.9.2001, the agreement does not fall under Section 53A of I 1882 Act and consequently Section 2(47)(v) of the Act does not apply.

5. It was submitted by learned counsel for the assessee-appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JOA dated 25.2.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee appellants shall remain bound by their said stand.

6. The issue of exigibility to capital gains tax having been decided in favour of the assessee, the question of exemption under Section 54F of the Act would not survive any longer and has been rendered academic.

7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed.

47. Consequently, the substantial question of law as reproduced in the beginning of the judgment are answered in the manner indicated herein before and the appeals of the assesse are disposed of accordingly. "

11. The Hon'ble Punjab & Haryana High Court in the case of C.S Atwal in the aforementioned decision placed reliance on the decision of Messrs Shoorji Vallabhdas & Co (1962) 46 ITR 144 (SC) observed that income tax is a levy on income and where no income results either under accrual system or on the basis of receipt, no income tax is exigible. In the present case, the agreement was entered into on 31-03-2009 and was cancelled owing to some disputes and differences between the parties and whatever consideration alleged by the AO to have been received by the assessee was repaid to the account of M/s.BSHDL from 1-4-2013 to 9-10-2013 by cheque. In our opinion, there was no income accrued or received by the assessee so as to bring the same to tax. The Hon'ble Supreme Court in the case of CIT v. Excel Industries Limited (2013) 358 ITR 295 (SC) by placing relience upon decision in Messrs Shoorji Vallabhdas & Co. 's case (supra), held that income tax cannot be levied on hypothetical income and it has really accrued to the assessee. Therefore, the addition made by the AO which was confirmed by the CIT-A is not maintainable and liable to be deleted.

12. The ld.AR further placed reliance on the order of Chennai Bench, ITAT in the case Coromondal Cables P.Ltd reported in (2016) 75 taxmann.com 346 (Chennai Trib) and referred to para 12.3 and 12.4 of the said order and argued that unless the condition(s) prescribed in section 53A of the Act were satisfied, section 2(47)(v) of the Act cannot be acted upon. Relevant paras of the said order are reproduced herein below:-

"*12.3 It is important to bear in mind that Section 2(47)(v) refers to possession to be taken or retained in part performance of the contract of the nature referred to in Section 53A of the Transfer of Property Act and in the case before Hon'ble Bombay High Court, there was no dispute that the conditions of Section 53A were satisfied. In other words, the*

proposition laid down by their Lordships can at best be inferred as that when conditions under Section 53A are satisfied, and when the assessee enters into a contract which is a development agreement, in the garb of agreement of sale, it is the date of this development agreement which is material date to decide the date of transfer. However, by no stretch of logic, this legal precedent can support the proposition that all development agreements, in all situations, satisfy the conditions of Section 53A which is a sine qua non for invoking Section 2(47)(v).

12.4 In order to invoke the principles laid down by the Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia of Bombay (supra), it is, therefore, necessary to demonstrate that the conditions under Section 53A of the Transfer of Property Act are satisfied. This section is reproduced below for ready reference:-

"Section 53A : Part performance-Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession. continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed thereof by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the, transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than the right specifically provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof." (Emphasis, italicized in print, supplied by us now).”

13. As discussed above relevant to the facts and circumstances of the present case, that no possession of land given to the developer i.e M/s. Bengal Shelter Housing Development Limited and no income accrued or received by the assessee under the agreement dt: 31-03-2009, as such, therefore, the said agreement can not be said to be in the nature of a contract referred to in Section 53A of the Transfer of Property Act and thus, the provisions of Section 2(47)(v) of the Act is not applicable.

14. The ld.AR referred to page 118 and argued that the Hon’ble Supreme Court held if there is no possession of land given by transferor to the transferee, the conditions laid down in section 53A of the Act does not apply. The ld.AR referred to substantial question of raised by the revenue Civil Appeal No. 15619 of 2017 arising out of SLP (Civil) No.

35248 of 2015) in the case of Balmir Singh Maini which is reproduced here under:

Whether the transactions in hand envisage a "transfer" exigible to tax by reference to Section 2(47)9v) of the Income Tax Act, 1961 read with Section 53-A of the Transfer of Property Act, 1882?

i) Whether the Income Tax Appellate Tribunal, has ignored rights emanating from the JDA, legal effect of non-registration of JDA, its alleged repudiation etc?

ii) Whether "possession"as envisaged by Section 2(47)(v) and Section 53-A of the Transfer of Property Act, 1982 was delivered, and if so, its nature and legal effect.

iii) Whether there was any default on the part of the developers, and if so, its effect on the transactions and on exigibility to tax ?

iv) *Whether amount yet to be received can be taxed on a hypothetical assumption arising from the amount to be received? "*

15. The Hon'ble Supreme Court held when there is no income on a transaction which never materialized is at best a hypothetical income which cannot be brought to tax. Therefore, respectably following the decisions above referred to and discussed in the aforementioned paragraphs, the addition made by the AO as confirmed by the CIT-A is deleted. Ground no's 1 and 2 raised by the assessee are allowed.

16. Ground No. 3 is relating to confirmation of addition made u/s 40A(3) of the Act in the facts and circumstances of the case.

17. During the course of assessment proceedings the AO found that assessee paid registration fee in cash above ₹ 20,000/-. The assessee explained the said payments made for registration of land and flats and such cost includes stamp duty and registration cost. The assessee also filed evidences in support of its contentions and submitted the said payments does not attract the provision Sec. 40A(3) of the Act. But it is noted from the record that the AO disallowed such amount by observing the assessee did not furnish any valid or tenable explanation. The CIT(A) held the payment has to be directly paid to the government's account and rejected the contention of assessee and confirmed the

addition made by the AO. Before us the Ld. AR pointed to page No.48 of the paper book and referring to the transactions at Sl. No. 12 and submitted that the major portion of said addition was made towards stamp duty cost and only minor portion is belonging to other expenditures. The Ld. AR further referred to page No.s 58 & 59 of the paper book to show the said amount has reflected at Sl. No.12 at page No.48 of the paper book was being paid towards stamp duty under TR Form No.7 which is a challen for depositing of money in the account of Govt. of West Bengal. Likewise, it is seen from the pages 48 to 91 of the paper book which supports the contentions of the Ld AR. The Ld. DR did not controvert the same. It is noted from the record particularly at page No.48 of the paper book that the assessee carried on transactions with two parties showing the reimbursements of expenses in connection with registration of flats / properties at Beharampur. Considering the submissions of Ld AR, facts and circumstances of the case and evidence available on record from pages 48 to 91 of the paper book we find force in the contentions of Ld AR, therefore, the addition made by the AO has confirmed by CIT(A) is deleted. Thus, ground No. 3 raised by the assessee is allowed.

18. Ground No.4 is relating to confirmation of addition being paid to Beharmpur Municipalities on account of business proficiency. The AO during the course of assessment proceedings for not offering valid and tenable explanation disallowed ₹1,75,000/- paid in cash to the Beharampur Municipality. The CIT(A) confirmed the addition made by the AO for not disputing the fact the said payment was made in cash. Before us the Ld. AR drew our attention to page No.47 of the paper book and submitted that the said payment made to Beharampur Municipality on account of donation. Ld AR further submitted that the assessee is

engaged in the business of property developer and the payment made in the nature of business expediency to Municipality. The Ld AR did not dispute the said payment was made in cash as rightly pointed out by the CIT(A) in his impugned order. But however it is seen on the page No.47 of the paper book that the said payment was authenticated by the Chairman Behrampur Municipality by affixing revenue stamp. But however, no submissions were made before us as well as before authorities below in terms of Rule 6DD of the Income Tax Rule 1962 and in the absence of such evidence covering the exception provided under Rule 6DD of the IT Rules, we find no infirmity in the order of CIT(A) and it justified. Thus, ground No.4 raised by the assessee is dismissed.

19. Ground No. 5 & 6 are general in nature requires no adjudication hence, they are dismissed.

20. In the result, the appeal of assessee is partly allowed.

Order Pronounced in the Open Court on 17-10-2018

Sd/-	Sd/-
Dr. A.L. Saini	**S.S.Viswanethra Ravi**
Accountant Member	**Judicial Member**

Dated: 17-10-2018

Copy of the order forwarded to:-

1. The Appellant/Assessee: M/s. Shelter Projects Limited BA-2, Sector-I, Salt Lake City, Kolkata-64.
2. The Respondent/Revenue : The Commissioner of Income Tax (A)-XII, Kolkata, Aaykar Bhawan, P-7 Chowringhee Square, Kolkata-69.
3. CIT
4. CIT(A), Kolkata
5. The Departmental Representative
6. Guard File

True Copy By order

Sr.PS/H.O.O
ITAT Kolkata

* PRADIP SPS