

आयकर अपीलिय अधीकरण, न्यायपीठ –“A” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
[Before Shri A. T. Varkey, Judicial Member and Dr. M. L. Meena, Accountant Member]

**I.T.A. Nos. 285 & 279/Kol/2020**  
**Assessment Years: 2003-04 & 2004-05**

Assistant Commissioner of Income-tax, Circle-2(1), Kolkata.	Vs	M/s. ABCI Infrastructure Pvt. Ltd. (PAN: AACCM3317R)
Appellant		Respondent

Date of Hearing (Virtual)	29.07.2021
Date of Pronouncement	06.08.2021
For the Appellant	Smt. Ranu Biswas, Addl. CIT, Sr. DR
For the Respondent	Shri Miraj D. Shah, AR

### **ORDER**

#### **Per Bench:**

Both these appeals preferred by the revenue are against the separate orders of the Ld. CIT(A)-10, Kolkata dated 30.12.2019 for AYs 2003-04 and 2004-05. Since grounds are common and facts are identical except variance in amount, we dispose of both these appeals by a common order for the sake of convenience by taking the ITA No. 285/Kol/2019 as the lead case and the result of which will be followed in the case of ITA No. 279/Kol/2019.

2. The relevant grounds of appeal raised by the revenue for AY 2003-04 are as under:

*“1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in granting relief to the assessee on account of claim of deduction under section 80IA of the Act of Rs.82,51,545/- disallowed by the AO during assessment.*

*2. That on the facts and circumstances of the case and on law, the Ld. CIT(A) has erred in granting relief to the assessee on account of claim of deduction under section 80IB of the Act of Rs.33,00,170/- disallowed by the AO during assessment.*

*3. The appellant craves leave to make any addition, alteration, modification etc. of the grounds either before the appellate proceedings or in the course of appellate proceedings.”*

3. Relevant facts in respect of ground no. 1 as noted by the AO are as under:

“The assessee filed its return of income on 28th November, 2003 declaring total income of Rs.14,22,150/- after claiming deductions of Rs.82,51,545/- and Rs.33,00,170/- respectively under section 80IA and 80IB of the Income Tax Act, 1961. The return was assessed u/s 143(3) of the Income Tax Act, 1961 on 31.03.2006. Deductions of Rs.82,51,545/- and Rs.33,00,170/- were allowed

respectively u/s 80IA and 80IB of Income Tax Act, 1961. Subsequently, notice u/s 148 of the Income Tax Act, 1961 was issued on 18.03.2009. Notices u/s 143(2) and 142(1) of the Income Tax Act, 1961 were also issued after the assessee stated, vide letter dated 22.04.2009, that the return filed on 28.11.2003 should be treated as return in response to notice u/s 148 of Income Tax Act, 1961.

2. From an examination of the assessment records it is observed that the assessee changed its name to M/s ABCI Infrastructure (P) Ltd. from M/s Maxxcom Vyapar (P) Ltd. w.e.f. 01/02/2002. The assessee-company also took over M/s Anupam Bricks & Concrete Industries (Hot Mix Plant Unit) w.e.f. 01/02/2002 with intent to change the nature of the existing business and to start a business of construction. Simultaneously, there were also changes in the portfolio of the Directors. As per the Clause 8(a) of the Tax Audit Report filed by the assessee along with the return of income, the company was engaged in the business of "Civil Construction and manufacturing of Construction Materials". As per the Profit & Loss account, the total turnover of the company for year ended on 31/03/2003 was Rs.23,12,94,956/- which included Income of the company's Contract Unit as well as the Hot Mix Plant Unit. Deductions under Chapter VIA was claimed as per below-

(a) Deduction of Rs. 82, 51,545/- u/s.80IA of Act for the Contract Unit:

During the year the company had undertaken various civil works for the Railways, State Government and other Local Authorities on contract basis. The assessee claimed profit from this unit as deduction under section 80IA of Act. Clause 6 of FORM No.1 OCCB of this unit show detail as per below:

'6. Name of the enterprise or undertaking eligible For deduction under section 80-IA and 80-IB	CONTRACT UNIT OF ABCI INFRASTRUCTURE PVT. Ltd.
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Thus, it is clear that deduction under section 80IA of Act is claimed in respect of a Unit which is in contract business.

(b) Deduction of Rs. 33,00,170/- u/s.80IB of Act for the Hot Mix Plant Unit:

The assessee has shown an income of Rs.33,00,170/- from the Hot Mix Plant. This plant utilizes Bitumen, Chips, Sands etc. and mixes them: Final mixture is transferred to the other unit for construction activity.

3. The assessee was given a detailed requisition under section 142(1) of Act vide this office letter no. 1237 Gated 17.11.2009 which was not complied with .....

After perusal of the fact of the case, it is held that the assessee is not entitled for its claim of deductions under section 80IA and 80IB of Act for following reasons:

(i) As per the Clause 8(a) of the Tax Audit Report filed by the assessee along with the return of Income, the company was engaged in the business of "Civil Construction and manufacturing of Construction Materials". As per explanation below section 80IA(13) of the Act, which is inserted by Finance Act, 2009 w.e.f. 01.04.2000, a contractor is entitled for the benefit of deduction under section 80IA of Act. The assessee, being a contractor, is not entitled for claim of deduction under section 80IA of Act. Moreover, deduction under section 80IA of Act is available only if the assessee satisfies the requisite conditions laid down in section 80IA of Act. Non-submission of any required details establish that the assessee failed to show that it satisfied with conditions mentioned in section 80IA of Act. For above reasons, no deduction under section 80IA of Act is allowed.

(ii) As per the provisions of the Act, where the gross total income for the year includes profits and gains derived by an undertaking or an enterprise carrying on business of - (i) developing, or (ii) operative & maintaining, or (iii) developing, operative and maintaining any infrastructure facility, the assessee shall

be entitled to claim deduction u/s. 80IA of an amount equal to hundred percent of the profits and gains derived from such business. However, such deduction shall not be allowed if the undertaking was formed by splitting up or reconstruction of a business already in existence or was formed by the transfer to a new business of machinery or plant previously used for any purpose. In the present case, the assessee was not involved in any developing, maintaining and operative of any infrastructure project and had merely executed the contract work. Moreover, it was formed by reconstruction of the existing business. For these reasons deduction u/s 80IA of the Act is not allowable to the assessee.”

4. Aggrieved by the aforesaid action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the claim of the assessee u/s. 80IA of the Act by taking note of the decision of this Tribunal in assessee's own case for AY 2006-07 (*ITA No. 990/Kol/2013, AY 2006-07 dated 10.01.2018*) wherein the assessee had challenged the reopening of assessment order passed u/s. 143(3) of the Act by the AO. In that case (AY 2006-07) in the original assessment framed u/s. 143(3) of the Act dated 31.12.2008, the AO had partially allowed as in the present case the claim of deduction u/s. 80IA of the Act (*without allowing the claim of interest component included in it*). Thereafter, the AO reopened the assessment u/s. 147 of the Act after issuing notice u/s. 148 on 10.09.2010 on the same reasons as stated in the present case that Assessee Company was merely a contractor and, therefore, would not be eligible to claim deduction u/s. 80IA of the Act. However, this Tribunal in that case for AY 2006-07 held that the assessee company was developing the roads and railway lines for the Government and was engaged in development of the infrastructure facility being roads and rail system and therefore deduction u/s 80IA of the Act was allowable. The Tribunal also noted “*Development encompasses within its contract work the agreement between the assessee and the customer being the Government is for the development of the infrastructure facility being roads and rail system by participating through tenders. Under these circumstances and for the reasons given by the coordinate bench in similar facts in the case of DCIT Vs. Simplex Somdatt Builders JV, ITA No. 1684/Kol/2011 for Ay 2007-08 order dated 18.06.2013, the Tribunal was of the view that the assessee's claim for deduction u/s. 80IA of the Act is allowable*” and, therefore, the Tribunal upheld the contention of assessee. Taking note of the decision of this Tribunal in assessee's own case for AY 2006-07, the Ld. CIT(A) allowed the deduction claimed by the assessee u/s. 80IA of the Act. This order of the Ld. CIT(A) is now being challenged before us.

5. We have heard rival submissions and gone through the facts and circumstances of the case. We note that assessee is a corporate body engaged mainly in the business of

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infrastructure development and also having a small scale industry (hot mix plant) in the North Eastern Region of India. However, according to the AO, the assessee company is engaged in the business of constructing roads, highways, bridges and railway tracks etc. on contract with various State Govt., Railways, BRTF etc. According to assessee, since the assessee company was in the business of infrastructural development and having a small scale industry in the North Eastern Region it is eligible to claim deductions u/s. 80IA and 80IB of the Act for its business of infrastructure, development and manufacturing respectively and accordingly while filing the return of income the assessee filed the audited accounts, tax audit report and auditor's certificate certifying the amount eligible for deduction u/s. 80IA and 80IB of the Act. Scrutiny assessment in respect to original assessment was so completed u/s. 143(3) of the Act vide order dated 31.03.2006 and deduction of Rs.82,51,545 and Rs.33,00,170/- were allowed respectively u/s. 80IA and 80IB of the Act. Thereafter the AO has reopened the assessment by issuing notice u/s. 148 on 18.03.2009 and thereafter has disallowed the deduction claimed u/s. 80IA and 80IB of the Act. On appeal, the Ld. CIT(A) has allowed the claim of deduction u/s. 80IA of the Act by following the decision of this Tribunal in assessee's own case for AY 2006-07, wherein the Tribunal has held in respect of this claim as under:

"8. .... Moreover, on merits also, we note that in a similar case the Coordinate Bench of this Tribunal in DCIT Vs. Simplex Somdatt Builders JV, ITA No.1684/Kol/2011 for AY 2007-08 order dated 18.06.2013 in similar facts of the case has held that assessee's claim is allowable u/s. 80IA of the act as under:

*"11. We have considered the rival submissions. Admittedly, a perusal of the agreement entered into between the assessee and the Govt of Andhra Pradesh Irrigation & CAD Department shows that the assessee has taken EPC/Turnkey contract of the flood flow canal project from SRSP. The name of the contract has been extracted earlier in this order. The scope of the work is also extracted above. Admittedly, the assessee has taken a turnkey contract from the Irrigation Department, Govt. of Andhra Pradesh. The turnkey contract is in respect of the irrigation project. Irrigation project is an infrastructure facility within the scope of Explanation to section 80IA(4) of the Act. The provisions of section 80IA(4) is to be controlled by the Explanation to section 80IA, which has been substituted by the Finance (No.2) Act, 2009 with retrospective effect from 1-4-2-2000. This Explanation is found after sub-section (13) of section 80IA. The said Explanation attempts to control the provisions of sub-section 4. More so, it says that nothing contained in section 80IA would apply in relation to the business referred to sub-section (4), which is in the nature of works contract. A works contract is not defined in section 80IA. Now, what would come into consideration is whether the substituted Explanation after sub- clause (13) changed the nature of the meaning of 'infrastructure facility' provided in the Explanation to section 80IA(4). Admittedly, the Explanation to section 80IA(4) gives the meaning the term 'infrastructure facility'. The substituted explanation after sub clause (13) brings in the nature of work as a works contract. The provisions of section 194C, which deals with TDS in respect of payment to contractors for carrying out any work in the Explanation thereto as explained the term 'work' to be an inclusive definition, but has provided an exclusion to be 'does not include manufacturing or supplying of a product. according to requirement or specification of the customer by using materials purchased from a person, other than such customer'. Thus, with this in mind, a perusal of the turnkey contract agreement entered into by the assessee with the Irrigation Department, Govt of A.P clearly shows that the construction of all the structures of the whole canal system is to be as per approved design, drawings, specifications of the department etc. The survey is to be done as per investigation and designing criteria of the Irrigation Department. This is also as per article 11.1 of the agreement. The assessee is to procure the materials independently and those materials are to conform to the specifications provided. The assessee is also to make its arrangements for storage of the materials. This is as per article 107 of the agreement. Thus, admittedly the work done by the assessee falls in the exclusion provided to the meaning of the work given in the Explanation to section 194C of*

*the Act. Once it falls outside the meaning of term 'work' for the purpose of section 194C, the question that arises is can it be said that the assessee is doing the work contract as provided in the substituted Explanation in section 80IA after sub clause (13)?, The answer would be emphatic no.*

*12. This is because the assessee is doing the activity of development of an infrastructure facility as provided under section 80IA(4). The project is a Turnkey project and it cannot form nor have a character of a works contract. Works contract would be applicable to the repairs and maintenance of an existing project. Works contract cannot be in relation to the development of a new project. One of the arguments raised by the learned Sr.DR that the intention of the substitution of the Explanation after sub clause (13) of section 80IA was to deny, the benefit of deduction u/s. 80IA(4) in respect of works contract, but to provide the deduction to such undertakings, which is doing the business of building, operating and Transfer (BOT) and building owning, operating and transfer BOOT as also PPP contracts does not hold water in so far as an irrigation project can never function under BOT or BOT or PPP . In the circumstances, we are of the view that the assessee's claim is not hit by the substituted Explanation as provided after sub clause(13) of section 80IA.. Here, we may mention that this view finds support from the decision of the co-ordinate of the tribunal, [ITAT, Hyderabad Bench, Hyderabad in the case of GVPR Engineers Ltd & Ors (refer to supra). We may mention here that our view also finds support from the decision of the co-ordinate bench of this tribunal, ITAT Cuttack Bench, Cuttack in the case of ARSS Infrastructure Projects Ltd Vs. ACIT, Circle-2 (1), Bhubaneswar in ITA Nos. 142, 143/CTK/2010 & 483,484/CTK/2011 dated 13-06-2013, wherein one of us was a party and in which case it has been held as under :-*

*10. Now coming to the merits of the deduction u/s. 80IA(4) of the Act. A perusal of the provisions of section 80IA(4) of the Act shows that in the explanation 'infrastructure facility' has been specified to mean a road including a toll road, a bridge or a rail system. Admittedly, the assessee is doing the business of development of railway tracks and bridges thereof as also roads. If, we are to accept the contention of the Ld. CIT that the provisions of section 80IA(4) of the Act after the substitution of the explanation to section 80IA of the Act was introduced was only for the purpose of giving the benefit to BOT contracts then, the explanation to section 80IA(4) of the Act becomes otiose. This is as explanation to section 80IA(4) of the Act specifically provides for the road to include a toll road, a bridge or a rail system. BOT contract in respect of the railway system can never exist. Further, a perusal of the provisions of section 80IA of the Act shows that the term 'works contract' is not defined in the said section. However, the terms 'works' and 'contract' is defined in the provisions of section 194C of the Act. If a particular word or term is not defined in the specific section then, one could go to other sections in the said Act where the definition would be available to draw a meaning to the said terms. In the provisions of section 194C of the Act, work has been given an inclusive definition but in the subsequent portion it has excluded the manufacturing or supplying a product according to requirement or specification of a customer by using material purchased from a person other than such customer. As has been specified by the Ld. AR, the assessee is doing contract work but that work is according to the requirement and specification of the customer and the same has been done by using materials purchase from third parties other than the customers. Thus, though the assessee is doing a works contract the same would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. The issue raised by the Ld. CIT that the assessee is not doing the development work but is only doing the contract also does not stand to test as the assessee admittedly is developing the roads and railway lines and the bridges thereof. Development encompasses within itself contract work. The agreement between the assessee and the customer being the government is for the development of the infrastructure facility being roads and rail systems and bridges by participating in the tenders. Under these circumstances, we are of th view that the AO was right in law in granting the assessee the benefit of deduction u/s. 80IA(4) of the Act.*

*13. In the circumstances, the Assessing Officer is directed to grant the assessee the benefit of deduction u/s. 80IA of the Act as claimed."*

*9. From a reading of the aforesaid order which is similar to that of the case of assessee and though in that case, the assessee was executing works contract of the Government, the Tribunal held that it would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. The issue raised by the AO that the assessee is not doing the development work but is only doing the works contract so is not eligible to deduction u/s. 80IA of the Act is not legally sustainable, as the assessee admittedly is developing the roads and railway lines thereof. Development encompasses within its contract work the agreement between the assessee and the customer being the Government is for the development of the infrastructure facility being roads and rail system by participating in the tenders. Under these circumstances and for the reasons given by the coordinate bench in similar facts in Simplex Somdatt Builders (supra), we are of the view that the assessee's claim for deduction u/s. 80IA of the Act is allowable and, therefore, the main reason found by the AO to deny the claim does not exist..."*

6. Thus, it is noted that the Ld. CIT(A) after taking note of the Tribunal's decision in assessee's own case and the ratio laid by the Tribunal in Simplex Somdutt Builders (supra) has allowed the claim of the assessee u/s. 80IA of the Act which we find to be as a plausible view and, therefore, we confirm it and Revenue's ground of appeal is dismissed.

7. Coming to the second ground of appeal of the revenue which is against the action of Ld. CIT(A) in granting relief to the assessee on account of claim of deduction u/s. 80IB of the Act of Rs.33,00,170/- (for AY 2003-04), we note that the facts as noted by the AO are that in the original assessment framed u/s. 143(3) of the Act dated 31.03.2006 he had allowed deduction u/s. 80IB of the Act. However, after reopening the assessment, the AO was of the opinion that the hot mixing plant used for mixing the raw material for construction of road and chips of different sizes and minerals filler are mixed with Bitumen in the hot mix plant as per the required temperature for laying the base course for construction of road is nothing but mixing of basic ingredients for laying at the top layer of the road, therefore, it is not a manufacturing or is production of article or thing, so the assessee did not satisfy the condition of section 80IB of the Act. According to the AO, since the assessee did not satisfy the condition of section 80IB of the Act as per sub-section (1) of section 80IB of the Act and since its business does not come under sub-section (3) to (11), (11A) and (11B) of section 80IB of the Act the assessee's hot mixing plant business is not entitled to deduction u/s. 80IB of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the same by holding as under:

➤ I have carefully considered the observations of the Ld. AO and submissions made by the Ld. AR in appeal and I find that the appellant has satisfied all the criteria's as mentioned in the Act. Further, the appellant has also established that the activity carried on by it falls under the definition of manufacture and since its plant was also located in the remote area of North-East and also that the same was not formed by splitting up of any business. Hence in my carefully considered view of the matter, the appellant-company is eligible for claim of deduction u/s 80IB. I also find useful reference in the judgment of the Hon'ble Rajasthan High Court in the case of **CIT vs. Bes Chem & Limestone Industries (P) Ltd. [1993] 69 Taxman 503 (Raj)** wherein, in an identical set of events, it has been held that crushing of a stone in converting them into dust/chips would amount to manufacturing.

**[1993] 69 TAXMAN 503 (RAJ.)  
HIGH COURT OF RAJASTHAN  
Commissioner of Income-tax**

**Best Chem & Limestone Industries (P.) Ltd.  
K.C. AGRAWAL, C.J. AND V.K. SINGHAL, J.  
DB IT REFERENCE NO. 116 OF 1981  
DECEMBER 8, 1992**

**Assessee was engaged in business of extracting limestone and its sale either as such or after converting it into lime and limedust, etc., by stone crusher - Whether crushing of limestone for converting same into lime and limedust, etc., was a process of manufacture and, therefore, assessee was entitled to investment allowance under section 32A in respect of plant and machinery used for such purpose by it - Held, yes**

8. In view of the foregoing paragraphs, it is evident that the appellant had submitted all relevant documents to justify its eligibility for claim of deduction u/s 80IB during course of original assessment as well as during the course of appellate proceedings. It is worthwhile to mention that the Ld. AO himself has allowed the claim of deduction u/s 80IB/80IC to the appellant from the AYS 2005-06 onwards during the course of reassessment/assessment proceedings. Hence it is evident that the Ld. AO had himself accepted that appellant was eligible to claim deduction u/s 80IB.
9. In view of the above, the disallowance made by the Ld. AO u/s 80IB of the Income Tax Act, 1961 is not sustainable and hence the **Ground No. 4** relating to such disallowance therefore stands **allowed**.

7. Aggrieved, the revenue is in appeals before us.

8. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO disallowed the claim of deduction u/s. 80IB of the Act on the ground that assessee did not satisfy the requisite condition laid down in the provision of section 80IB of the Act. We note that in this case while the original assessment order u/s. 143(3) of the Act was framed dated 31.03.2006 wherein the claim of deduction u/s. 80IB of the Act was duly considered and the AO has observed as under:

*“In course of assessment proceedings, a letter dated 08.03.2006 was issued to the assessee company asking to substantiate the claim of deduction u/s. 80IA and 80IB of the I. T. Act. In reply the AR submitted letter dated 16.03.2016 along with supporting documents including works contract regarding infrastructure activities and certificate from the state Government showing the Hot Mixed Plant registered as a Small Scale Industry in respect of the assessee company.”*

9. Further it was brought to our notice that the claim of deduction u/s. 80B of the Act has been allowed by the AO for AY 2005-06 onwards in the reassessment proceedings, and this fact has been duly taken note by the Ld. CIT(A). We note that the Ld. CIT(A) has made a finding of fact that the assessee has satisfied all the conditions stipulated in the Act and has filed all the statutorily required documents before the AO while claiming the deduction and the AO while framing the original assessment being satisfied has allowed the same. The Ld. CIT(A) has given the following finding of fact that (i) *the assessee has established that the activity relied on by it falls under the definition of manufacture and (ii) its plant was located in the remote area of North East and (iii) the eligible unit was not formed by splitting up of any business.* This factual finding of the Ld. CIT(A) has not been assailed/challenged by the Department in the grounds of appeal as reproduced (supra), therefore, this finding of facts made by the Ld. CIT(A) crystallizes and becomes final. Since the assessee's eligible units satisfies all the conditions as stipulated for claiming deduction u/s. 80IB of the Act as held by the Ld. CIT(A), we are inclined to confirm the order of the Ld. CIT(A) and moreover we note that the main fault pointed out by the AO in denying section 80IB deduction was that the assessee in its Hot Mixed Plant is not engaged neither in manufacturing or production. We note that the assessee uses different raw materials like chips of different sizes and sand along with Bitumen which combination brings out a new material. Therefore, we are of the view that the assessee is engaged in manufacturing or production of a product for that we rely on the

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decision of Hon'ble Supreme Court in Empire Industries Ltd. Vs. Union of India reported in 1985 (3) SCC 314 wherein the Hon'ble Supreme Court held as under:

*“Excise duty is a duty on the manufacture of goods and not on sale. Manufacture is complete as soon as by the application of one or more process, the raw material undergoes some change. If a new substance is brought into existence or if a new or different article having a distinctive name, character or use result from particular processes, such process or processes would amount to manufacture. Therefore, the taxable event under the Excise Law is 'manufacture'. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes 'manufacture' takes place and liability to duty under section 4 is attracted.”*

Therefore, in view of the ratio laid by the Hon'ble Supreme in Court Empire Industries Ltd.(supra), we do not agree with the view of the AO that the assessee's Hot Mixed Plant is not engaged in the activity of manufacturing or production. Since the view of the Ld. CIT(A) is a plausible view, we confirm the same that the assessee is eligible for deduction u/s. 80IB of the Act which does not require any interference from our part. Therefore, ground no. 2 of both the appeals are dismissed.

10. In the result, both the appeals of the revenue are dismissed.

Order is pronounced in the open court on 6th August, 2021.

Sd/-

Sd/-

(Dr. M. L. Meena)  
Accountant Member

(A. T. Varkey)  
Judicial Member

Dated: 6th August, 2021

*Jd, Sr. PS*

Copy of the order forwarded to:

1. Appellant- ACIT, circle-2(1), Kolkata.
2. Respondent – M/s. ABCI Infrastructure Pvt. Ltd., 2/7, Sarat Bose Road, Room No. 4, 6<sup>th</sup> floor, Kolkata-700 020.
3. The CIT(A)-10, Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Senior Private Secretary/DDO