

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

**Before Dr. Manish Borad, Accountant Member
&
Shri Sonjoy Sarma, Judicial Member**

**I.T.A. Nos. 86 & 87/KOL/2023
Assessment Year: 2011-2012**

&

**I.T.A. Nos. 88 & 89/KOL/2023
Assessment Year: 2012-2013**

**Saraswati Gupta,.....Appellant
Radha Kunj, 4D, 181, Dharamtalla Road,
Salkia, Howrah-711106
[PAN: ADAPG1993M]**

-Vs.-

**Income Tax Officer,.....Respondent
Ward-47(1), Kolkata,
3, Government Place (West),
Kolkata-700001**

Appearances by:

Shri Chirag Desai, Office staff on behalf of Shri Miraj D. Shah,A.R., appeared on behalf of the assessee

Shri Prabhakar Prakash Ranjan, JCIT, Sr. D.R., appeared on behalf of the Revenue

Date of concluding the hearing : June 22, 2023

Date of pronouncing the order : August 04, 2023

O R D E R

Per Dr. Manish Borad, Accountant Member:-

These appeals at the instance of assessee for assessment year 2011-12 and 2012-13 are directed against the order of ld. Commissioner of Income Tax

(Appeals), National Faceless Appeal Centre (NFAC), Delhi, all dated 16.12.2022, which are arising out of the order under section 271A of the Act on 28.06.2019 framed by ld. ITO, Ward-47(1), Kolkata.

2. The assessee has raised the following grounds of appeals:-

ITA No. 86/KOL/2023(A.Y. 2011-12)

- (1) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 dated 16/12/2022 confirming the penalty imposed by the Assessing Officer u/s 271A of the I.T. Act, 1961 of Rs.25,000/- without giving your appellant the chance of being heard and thereby ignoring the rules of natural justice on the grounds which are not correct.*
- (2) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 of the I.T. Act, 1961 dated 16/12/2022 confirming the penalty imposed u/s 271A of the I.T. Act, 1961 while Ld. Income Tax Appellate Tribunal, A'-Bench, Kolkata has disposed of the case by deleting the addition made u/s 143(3)/147 of the I.T. Act 1961 in favour of the assessee.*

ITA No. 87/KOL/2023 (A.Y. 2011-12)

- (1) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 dated 16/12/2022 confirming the penalty imposed by the Assessing Officer u/s 271B of the I.T. Act, 1961 of Rs. 1,36,773/- without giving your appellant the chance of being heard and thereby ignoring the rules of natural justice on the grounds which are not correct.*
- (2) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 of the I.T. Act, 1961 dated 16/12/2022 confirming the penalty imposed u/s 271B of the I.T. Act, 1961 while Ld. Income Tax Appellate Tribunal. 'A'-Bench, Kolkata has disposed of the case by deleting the addition made*

u/s 143(3)/147 of the I.T. Act, 1961 in favour of the assessee.

ITA No. 88/KOL/2023 (A.Y. 2012-13)

- (1) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 dated 16/12/2022 confirming the penalty imposed by the Assessing Officer u/s 271A of the I.T. Act, 1961 of Rs.25,000/- without giving your appellant the chance of being heard and thereby ignoring the rules of natural justice on the grounds which are not correct.*
- (2) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 of the I.T. Act, 1961 dated 16/12/2022 confirming the penalty imposed u/s 271A of the I.T. Act, 1961 while Ld. Income Tax Appellate Tribunal, Kolkata C(SMC) Bench, has disposed of the case by partially allowing in favour of the assessee.*

ITA No. 89/KOL/2023 (A.Y. 2012-13)

- (1) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 dated 16/12/2022 confirming the penalty imposed by the Assessing Officer u/s 271B of the I.T. Act, 1961 of Rs. 1,19,650/- without giving your appellant the chance of being heard and thereby ignoring the rules of natural justice on the grounds which are not correct.*
- (2) *For that the Ld. CIT(A), NFAC, Delhi has erred in law as well as on facts of the case by passing order u/s 250 of the I.T. Act, 1961 dated 16/12/2022 confirming the penalty imposed u/s 271B of the I.T. Act, 1961 while Ld. Income Tax Appellate Tribunal. Kolkata 'C(SMC) Bench, has disposed of the case by partially allowing in favour of the assessee.*

3. From perusal of the grounds, we notice that effectively two issues have been raised commonly for assessment years 2011-12

and 2012-13 and the same relates to penalty imposed for not maintaining books of account under section 271A of the Income Tax Act at Rs.25,000/- and penalty imposed under section 271B of the Act for not getting the booking of account audited as provided under section 44AB of the Act.

4. Since the issues raised in the grounds of appeals are common, therefore, we adjudicate the issues based on the facts for A.Y. 2011-12.

5. The facts in brief are that the assessee is an individual. She declared her return of income at Rs.1,96,350/- on 05.03.2012. The assessment proceedings were carried out by issuance of a notice under section 148 of the Act and the assessment was completed under section 143(3) read with section 147 of the Act. So far as the additions made in the assessment order are concerned, the same are not in dispute before us. However, we notice that in the course of assessment proceedings, the ld. Assessing Officer noticed that there was a cash deposit of Rs.2,73,54,650/-, which ld. Assessing Officer considered it as a business turnover and computed the income @ 8%. The ld. Assessing Officer came to a conclusion that the assessee is liable to pay penalty under section 271A of the Act for not maintaining the books of account as provided under section 44AA of the Act and also liable to pay penalty under section 271B of the Act for not getting the books of account audited since the gross turnover for the year exceeded the limits of turnover provided under section 44AB of the Act. Accordingly penalty proceeding was

initiated and after considering the submissions of the assessee, penalty under section 271A levied at Rs.25,000/- and penalty under section 271B of the Act levied at Rs.1,36,773/-.

6. So far as the two appeals for assessment year 2012-13 are concerned, the facts involved therein are same to that for A.Y. 2011-12 and ld. Assessing Officer levied penalty at Rs.25,000/- under section 271A of Act and at Rs.1,19,650/- under section 271B of the Act.

7. The assessee challenged the alleged penalties before the ld. CIT(Appeals), but on the dates of hearing, the assessee neither appeared nor filed any written submission and accordingly ld. CIT(Appeals) confirmed the levy of penalty by way of a speaking order. Being aggrieved, the assessee is now in appeal before this Tribunal for A.Ys. 2011-12 and 2012-13 challenging the levy of penalties under section 271A and 271B of the Act.

8. Ld. Counsel for the assessee on the strength of plethora of judgments placed in the paper book has stated that it is an admitted fact that assessee has not maintained books of account and therefore, penalty under section 271A of the Act is leviable. However, since there were no books of account maintained by the assessee, then, the question of getting the books of account audited does not arise. Therefore, penalty under section 271B of the Act levied for not getting the books of account audited deserves to be deleted. Further, ld. Counsel for the assessee stated that since the reason for not maintaining the books of

account for A.Y. 2011-12 is similar to those to maintain books of account for A.Y. 2012-13, the same should be constituted as reasonable cause under the provision of section 273B of the Act and the assessee should not be visited by penalty under sections 271A and 271B of the Act.

9. On the other hand, ld. D.R. vehemently supported the order of authorities below.

10. We have heard the rival contentions and gone through the record placed before us. We notice that for A.Ys. 2011-12 and 2012-13, there was huge cash deposit in the Bank account of the assessee and the transactions appearing therein were not declared in the income tax return. The cash deposited during the assessment years 2011-12 and 2012-13 exceeded the limits provided under section 44AB of the Act, which specifies the turnover beyond which the books of account of the assessee are required to be maintained. However, ld. Assessing Officer rather than making an addition for the total cash deposits found in the bank account during the year concluded the assessment proceeding by treating it as a business turnover and estimated the net profit thereon. So far as the action of the ld. Assessing Officer is concerned, the same has not been disputed by the assessee at any stage. Thus it remains an admitted fact that since assessee has accepted the finding of ld. Assessing Officer treating the cash deposit during the year as business turnover, and the gross turnover from the business for the year under appeal exceeds the prescribed limits as provided under section

44AB of the Act and the assessee is required to get the accounts audited and failure to do so attracts the penalty under section 271B of the Act. Now for the purpose of getting the books of account audited, the assessee should maintain the books of account, but in this case, the assessee has not maintained books of account also. Based on these observations, the ld. Assessing Officer initiated the penalty proceedings under section 271A of the Act for not maintaining the books of account and under section 271B of the Act for not getting the books of account audited. The contentions of the ld. Counsel for the assessee is that since the assessee has not maintained the books of account, it should be charged only with the penalty under section 271A of the Act and since books of account are not maintained, the assessee should not be penalized for not getting the books of account audited under section 271B of the Act. Further it has been submitted that since the assessee based on some reasons did not maintain the books of account for A.Y. 2011-12 and the same is also applicable for A.Y. 2012-13, the assessee deserves to get relief for being penalties imposed under section 271A and 271B of the Act for A.Y. 2012-13 under the provisions of section 273B of the Act.

11. We observe that penalty under section 271A of the Act is leviable in a case when the assessee does not maintain the books of account as provided under section 44AA of the Act i.e. for non-compliance of section 44AA of the Act. Whereas penalty under section 271B of the Act is leviable for not getting the books of account audited. Now the contention of the assessee is that the

assessee intends to get benefit for its own wrong doing. On one hand, since the turnover of the assessee exceeds the limit prescribed under section 44AB of the Act and to get the books of account needs to be audited but since she has not maintained the books of account, it is pleaded that only penalty for not maintaining the books of account should be leviable and no penalty should be levied for not getting the books of account audited. If such plea is considered, then in case of a person, who is required to maintain the books of account but does not maintain the books of account and even not filed the return of income and thereafter when the ld. Assessing Officer wants to examine credit entries in the bank account, which assessee is unable to explain, then it cannot be pleaded by the assessee that since it has not maintained books of account, therefore, provision under section 68 of the Act cannot be invoked.

12. We notice that recently similar issue came for adjudication before the Coordinate Bench Ranchi in the case of Rakesh Kumar Jha -vs.- ITO (2023) 150 taxmann.com 298 and this Tribunal after considering the judicial precedence on this issue has decided it against the assessee holding that in case of not maintaining books of account by a person, whose gross business turnover exceeds the prescribed limit under section 44AB of the Act, then both the penalties i.e. under section 271A and 271B are leviable. The relevant finding of the Tribunal reads as under:-

“4. We have gone through the order of the ITAT, Ranchi Bench, in the own case of the assessee in respect of quantum appeal for the year under consideration. We find that the assessee has not presented the true and correct facts. A perusal

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of para 5 of the order of ITAT dated 07.06.2019 (supra) would show that the Tribunal has categorically noted, "The A.O considering the submissions of the assessee and material placed on record, rejected the books of accounts of assessee estimating @10% of the total gross receipts". Therefore, the case of the assessee is not of maintenance of books of account, rather, the case of the assessee was that of rejection of books of account. The decision cited by the ld. counsel in the case of CIT vs. Bisauli Tractors (supra), therefore, is not applicable to the facts and circumstances of the present case.

5. Even otherwise, we find that the provisions of section 44AA and 44AB are separate and distinct provisions. Section 44AA and 44AB are reproduced as under:

"44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.

(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,--

(i) if his income from business or profession exceeds one lakh twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds ten lakh rupees in any one of the three years immediately preceding the previous year; or

(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed one lakh twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed ten lakh rupees, during such previous year; or

(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AE or section 44BB or section 44BBB, as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such previous year; or (iv) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his

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income exceeds the maximum amount which is not chargeable to income-tax during such previous year,] keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.

(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe, by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.

(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained.]"

"44AB. Every person,--

*(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds one crore rupees in any previous year 89[***]:*

[Provided that in the case of a person whose--

(a) aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year, in cash, does not exceed five per cent of the said amount; and

(b) aggregate of all payments made including amount incurred for expenditure, in cash, during the previous year does not exceed five per cent of the said payment, this clause shall have effect as if for the words "one crore rupees", the words "five crore rupees" had been substituted; or]

(b) carrying on profession shall, if his gross receipts in profession exceed fifty lakh rupees in any previous year; or

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or section 44BB or section 44BBB, as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year; or

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(d) carrying on the profession shall, if the profits and gains from the profession are deemed to be the profits and gains of such person under section 44ADA and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his profession and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year; or

(e) carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year, get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed : Provided that this section shall not apply to the person, who declares profits and gains for the previous year in accordance with the provisions of sub-section (1) of section 44AD and his total sales, turnover or gross receipts, as the case may be, in business does not exceed two crore rupees in such previous year:

Provided further that this section shall not apply to the person, who derives income of the nature referred to in section 44B or section 44BBA, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later :

Provided also that in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and furnishes by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section. Explanation.--For the purposes of this section,--

(i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;

(ii) "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means date one month prior to the due date for furnishing the return of income under sub-section (1) of section 139."

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6. *As per Section 44AA of the Act, the maintenance of books has been made compulsory in respect of persons carrying out certain profession and as mentioned above and further in cases of persons or business or profession if their turnover crosses the prescribed limit then such persons are required to maintain books of account, whereas, the condition prescribed for compulsory audit of accounts are different as prescribed u/s 44AB of the Act. Under section 44AA(1) the persons carrying on the notified professions irrespective of their annual receipts are required to maintain books of accounts, whereas the condition of carrying on of specified profession as not there u/s 44AB of the Act requiring compulsory auditing of the books of account. Similarly u/s 44AA(2) in case of persons carrying on business or profession other than the specified professions, are required to maintain their books of account if their annual receipt/turnover exceeds the prescribed limit. However u/s 44AB, the auditing of books has been made mandatory only in case of persons carrying on business activity only if their turnover increases the prescribed limit, however the prescribed limit for business is different than that for person carrying on profession. Further the limit prescribed u/s 44AA relating to annual receipts/turnover is very less as compared to that u/s 44AB of the Act. An person covered u/s 44AB is of course also covered u/s 44AA of the Act but not the vice-versa may not be true. The penalty u/s 271A is levied for non-compliance of the provisions of section 44AA of the Act, whereas, the penalty u/s 271B is levied for non-compliance of the provisions of section 44AB of the Act. Neither section 44AA and 44AB are in substitution of each other and nor the penalty levied u/s 271A and 271AB are in alternate or in substitution to each other. The separate and distinct provisions of section 44AA and 44AB of the Act not only apply on different class of persons but also on the different threshold of income/sales turnover. It is to be further noted here that the rate of penalty u/s 271A for non-maintenance of books of account u/s 44AA are lesser than that is prescribed u/s 271B for non-auditing of the books of account. Allowing a person who is required to get his books of audited to escape with lesser penalty or for no penalty for committing his wrongful act of even not maintaining his books of account will amount to allowing a person to take the benefit of his own wrong. The person, who have different class being their turnover very high has been assigned double responsibility i.e. firstly, maintaining their books of account and secondly get their books of account audited. Whereas the persons with lesser receipts or turnover have been given single responsibility of maintaining their books of accounts. Under the circumstances, the persons with lesser responsibility have been subjected to lesser penalty for*

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non-compliance of the statutory requirement. However, the persons having higher turnover have been given the responsibility of also get their books of account audited and are subjected to higher penalty. In our humble view, the persons who have been given double responsibility of maintaining books of account and audit of the accounts are liable to be subjected to penalty on both counts and they cannot be equated with the persons given single/lesser responsibility for their own wrongful act or omission.

This can be explained by an example. Suppose there are two persons namely Ram & Shyam. Both are required to maintain their books of accounts and also get those audited as required u/s 44AA and 44AB. Ram maintains his books of account but did not get those audited, whereas, Shyam did not maintain his book of accounts at all and there was no question of audit of the same as the books did not exist at all. Under these circumstances, if the contention of the ld. Counsel is to be accepted, Ram will be subjected to higher penalty u/s 271B of the Act, whereas, Shyam who has committed double default would escape with lesser penalty. This proposition, in our humble view, is neither legally justified nor it can pass the test of application of principles of justice, equity and good conscience.

7. We may at this stage refer to the decision of the Hon'ble Madhya Pradesh High Court in the case of Bharat Construction Co. v. ITO reported in [1999] 106 Taxman 460 (MP), wherein, the Assessing Officer had earlier levied penalty u/s 271A of the Act for non- maintenance of books, thereafter the Assessing Officer issued another notice for levy of penalty u/s 271B of the Act for not getting the books of accounts audited. The assessee challenged the levy of penalty u/s 271B of the Act on the ground that the same was barred by limitation. The Hon'ble Madhya Pradesh High Court has held that the defaults contemplated by section 271A and section 271B are separate and distinct. Under the latter provision, if the assessee fails to get his accounts audited u/s 44AB, he is liable to penalty. The object is to get a clear picture of the assessee's accounts whose turnover exceeds the prescribed limit. The rates envisaging two types of defaults are also different. The Hon'ble High Court also took notice the fact that earlier penalty levied by the Assessing Officer only for non-maintenance of accounts by the assessee and not for its failure to have its accounts audited u/s 44AB of the Act. Therefore, the Hon'ble High Court held that the earlier penalty levied by the Assessing Officer u/s 271A of the Act was only for non-maintenance of books of account and the same did not cover

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the penalty for not getting the books audited u/s 271B of the Act and that the second notice issued by the Assessing Officer for levy of penalty u/s 271B of the Act was not barred by limitation by reckoning the limitation period from the date of issue of earlier notice for levy of penalty u/s 271A of the Act. The relevant part of the order of the Madhya Pradesh High Court is reproduced as under:

"7. Applying all this to the present case, it emerges that the Assessing Officer had initiated penalty proceedings in his assessment order dated 30-5-1986 only for non-maintenance of account books by the assessee and not for its failure to have its accounts audited under section 44AB. That is why he firstly issued notice dated 11-11-1987 under section 271A and passed the final penalty order on 28-12-1988. He did not record default of non-audit of accounts in his order and, consequently, his direction for initiation of penalty proceedings contained in his assessment order would not cover his second notice dated 11-9-1989 issued under section 271B. The second notice, accordingly, cannot be held time-barred by reckoning the limitation period from 30-3-1987 and expirable on 3-8-1989.

8. It remains to be seen whether proceedings under section 271B were necessarily required to be initiated in the assessment proceedings of the relevant assessment year. But as it is, the defaults contemplated by section 271A and section 271B are separate and distinct. Under the latter provision if the assessee fails to get his accounts audited under section 44AB, he is liable to penalty as laid down in this section. The object is to get a clear picture of the assessee's accounts whose turnover exceeds the prescribed limit. The rates envisaging two types of defaults are also different. Therefore, without dilating on the issue further we find no difficulty in holding that the impugned second notice dated 11-9-1989 cannot be ascribed to the direction of the Assessing Officer for initiation of penalty proceedings in his assessment order dated 30-5-1986. Since it is not covered by that order, it should be treated as initiating penalty proceedings under section 271B from the date it was issued and this was not barred by time under section 275B. This shall not, however, be construed to validate this impugned notice for all purposes, should it be suffering from some other infirmity. But it surely is not barred by time under section 275B."

8. The object of requiring the assessee to get his books of accounts audited u/s 44AB is to get a clear picture of the assessee's accounts so as to enable the Income Tax Authorities to assess true and correct income of the assessee. The penalty u/s 271B is attracted for failure of the assessee to get the books

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of account audited. Since, the case in hand, the assessee did not get his books of account audited, therefore, as per the provisions of section 44AB read with section 271B of the Income Tax Act, the Assessing Officer rightly levied the penalty u/s 271B of the Act. We, therefore, do not find any merit in the appeal of the assessee and the same is accordingly dismissed”.

13. After going through the decision of the Coordinate Bench, Ranchi, we are of the view that the same is squarely applicable on the facts of the present case and respectfully following the same, we confirm the finding of the Id. CIT(Appeals) and accordingly penalties for A.Y. 2011-12 and 2012-13 levied under section 271A for not maintaining books of account and penalty under section 271B of the Act for not getting the books of account audited stand confirmed.

14. In the result, all the appeals of the assessee are dismissed.

Order pronounced in the open Court on 4th August, 2023.

Sd/-

(Sonjoy Sarma)
Judicial Member

Sd/-

(Manish Borad)
Accountant Member

Kolkata, the 04th day of August, 2023

*Copies to :(1) Saraswati Gupta,
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(3) Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre (NFAC),
Delhi;

(4) *Commissioner of Income Tax-* ;

(5) *The Departmental Representative*

(6) *Guard File*

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.