

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA Nos.987 & 988/Kol/2023
Assessment Years: 2013-14 & 2014-15**

Apeejay Surrendra Management Services Pvt. Ltd. Apeejay House, 15, Park Street, Kolkata-700016. (PAN: AADCA5000A)	Vs.	DCIT, Circle-8(1), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Manish Tiwari, FCA
Respondent by : Shri Abhijit Kundu, CIT, DR

Hearing concluded on : 13.12.2023
Date of Pronouncement : 19.02.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Both these captioned appeals filed by the assessee are against the separate orders of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide order nos. ITBA/NFAC/S/250/2023-24/1054509881(1) and ITBA/NFAC/S/250/2023-24/1054510712(1) both dated 21.07.2023 passed against the assessment order by DCIT, Circle-8(1), Kolkata, dated 15.03.2016 and 26.12.2016 u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") for AYs 2013-14 and 2014-15.

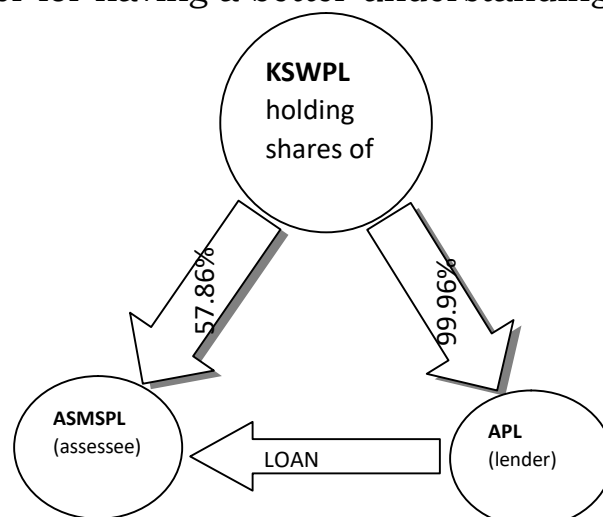
2. Common issue is involved in both the appeals except for difference in the quantum of addition, therefore, we heard both of them together and are being disposed of by this common order.

3. The common issue involved in the two appeals is in respect of addition made by the Ld. AO and confirmed by the Ld. CIT(A) towards deemed dividend u/s. 2(22)(e) of the Act for the sum received by the assessee from another group company. We take ITA No. 987/Kol/2023 to draw the facts of the case. Our observations and findings in this respect will apply *mutatis mutandis* to the other appeal in ITA No. 988/Kol/2023.

4. Brief facts of the case are that assessee filed its return of income on 30.09.2013, reporting total loss of Rs.2,16,59,610/-. Assessee is engaged in the business of Brand Owning and Consultancy. During the year under consideration, assessee Apeejay Surrendra Management Services Pvt. Ltd. (in short "ASMSPL") received a sum of Rs.5,50,11,501/- as loans/advances from another group company called as Apeejay Private Ltd. (in short "APL"). Assessee is not a registered shareholder of APL who is a lender company. However, there is a common shareholder namely, Kathua Steel Works Pvt. Ltd. (in short "KSWPL") who holds substantial interest in both the assessee and the lender company. Details of common shareholding by KSWPL in the two companies is as under:

- (i) KSWPL holds 99.96% shares in APL (lender),
- (ii) KSWPL holds 57.86% shares in ASMSPL (assessee)

4.1. The above stated fact can be pictorially presented in the following manner for having a better understanding:



4.2. Accumulated profits available for distribution in the books of APL, the lender was Rs.3691 lakhs. Ld. AO thus, in view of these facts treated the amount of loans/advances received by the assessee from APL as deemed dividend u/s. 2(22)(e) of the Act since there was a common shareholding by KSWPL having substantial interest in both APL and ASMSPL. Assessee had made detailed and elaborate written submission in the course of assessment proceeding by placing reliance on various judicial precedents which could not convince the Ld. AO. Assessment was completed by making the addition.

4.3. Aggrieved, assessee went in appeal before the Ld. CIT(A), who also confirmed the addition so made. Aggrieved, assessee is in appeal before the Tribunal.

5. Assessee has placed a paper book on record containing 74 pages along with a case law compilation containing 16 citations. Ld. CIT, DR has also placed on record a written submission containing ten pages along with certain judicial precedents. Before us, Ld. Counsel for the assessee assertively submitted that assessee is not a shareholder in APL and, therefore, no addition can be made in the hands of the assessee by applying the provisions of section 2(22)(e) of the Act. According to him, deemed dividend can be assessed only in the hands of the person who is a shareholder of the lender company and not in the hands of any other person. According to him, the basis adopted by Ld. AO for making the addition is owing to a fact that there is a common shareholder i.e. KSWPL having substantial interest in both APL and ASMSPL which does not meet the test u/s. 2(22)(e) of the Act. He further stated that the sums received by the assessee are not gratuitous loan enjoyed by the assessee.

5.1. According to him, these amounts were received at various point of time to meet the company's working capital requirement and some part of which has been repaid during the year. Ld. Counsel asserted that assessee is not a shareholder having substantial interest in the lending company i.e. APL and, therefore, no addition can be made in the hands of the assessee. It was further contended by the Ld. Counsel that provisions contained in section 2(22)(e) of the Act are deeming fiction which should receive strict construction. According to him, in construing a legal fiction, it will be proper and necessary to assume all those facts on which alone the fiction can operate. While construing the fiction, it cannot be extended beyond the purpose for which it is created. The legal fiction has to be carried to its logical conclusion and must be within the framework for the purpose for which it is created.

5.2. Ld. Counsel placed reliance on the decision of Special Bench, Mumbai ITAT in the case of ACIT Vs. Bhaumick Colour Pvt. Ltd. (2009) 118 ITD 1 (Mum)(SB) wherein it was held that deemed dividend can be assessed only in the hands of a person who is a shareholder of the lender company and not in the hands of the person, other than a shareholder. Ld. Counsel also referred to the decision of Hon'ble High Court of Delhi in the case of CIT Vs. Ankitech Pvt. Ltd. (2011) 340 ITR 14 (Del.) wherein Hon'ble Court held that the assessee who is not a shareholder of the company from which he received a loan or an advance cannot be treated as being covered by the definition of the word dividend u/s. 2(22)(e) of the Act. He further made an attempt to distinguish the decision of Hon'ble Supreme Court in the case of CIT Vs. National Travel Services (2018) 89 taxmann.com 332 (SC) by submitting that this case related to a partnership firm who had received loans from a company in which the partners of the firm were actually holding more than the prescribed percentage of shares in

their individual names. According to him, the said decision is not applicable and distinguishable on facts.

5.3. Per contra, Ld. CIT, DR strongly supported the orders of the authorities below. He submitted that KSWPL is a common shareholder in both, the lender and the assessee company, having substantial interest therein and thus, the case squarely falls within the second limb of section 2(22)(e) of the Act. According to him, payments made by a company to a concern in which the shareholder entity has a substantial interest, falls within the definition of deemed dividend. He reiterated the facts as to –

(a) APL makes payment of Rs.5.50 Cr. by way of loan to the assessee company i.e. ASMSPL,

(b) KSWPL is the shareholder/member of the lender company i.e. APL in which it holds 99.96% voting power,

(c) KSWPL also has beneficial interest by way of 57.86% shareholding in the assessee company i.e. ASMSPL.

(d) The payment of loan was not directly made by APL to its shareholder i.e. KSWPL but to a concern i.e. the assessee company ASMSPL in which KSWPL is having substantial interest.

5.4. On these facts, Ld. CIT, DR submitted that the mischief of section 2(22)(e) is attracted and the loan amount by APL to ASMSPL is taxable in the hands of ASMSPL as deemed dividend. He strongly placed reliance on the decision of Hon'ble Supreme Court in the case of National Travel Services (supra).

5.5. According to him, there are three limbs to section 2(22)(e) and case of the assessee falls in the second limb according to which deemed dividend includes any payment made by company by way of advance or loan to any concern in which such shareholder is a

member or partner and in which he has substantial interest. He thus, reiterated that “the concern” in the present appeal is the assessee i.e. ASMSPL. According to him, even though payment of loan was made to the assessee by APL and not directly to KSWPL which is “the shareholder” of APL, it would still be taxable in the hands of the assessee as deemed dividend because “such shareholder” KSWPL is also a shareholder/member of the assessee company and having substantial interest.

6. We have heard the rival contentions and perused the material available on record and have also given our thoughtful consideration to the written submission and case law compilations placed before us. The sole issue under consideration before us is whether Ld. CIT(A) erred in confirming the action of ld. AO who considered the loan of Rs.5,50,11,501/- received from APL as deemed dividend u/s. 2(22)(e) of the Act. Before delving on the moot point referred above, we apprise ourselves with the relevant provisions contained in the Act u/s. 2(22)(e) which is extracted below.

“2(22)(e) - any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;

Explanation 3 -

(a) “concern” means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company;

(b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern ;”

6.1. The term substantial interest referred in clause (b) of Explanation (3) to section 2(22)(e) is of vital importance. The same is defined u/s. 2(32) which is extracted below:

“2(32) “person who has a substantial interest in the company”, in relation to a company, means a person who is the beneficial owner of shares, not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits, carrying not less than twenty per cent. of the voting power;

6.2. From the above referred section of 2(22)(e), we note that there are three limbs to it which are listed as under:

Dividend includes – any payment by a company, not being a company in which the public are substantially interested, of any sum, by of advance or loan

- (a) to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power or
- (b) to any concern in which such shareholder is a member or a partner and in which he is a substantial interest (hereafter in this clause referred to as the said concern) or
- (c) any payment by any such company on behalf, or for the individual benefit, of any such shareholder.

7. Before we further elucidate on the issue, it is worthwhile to understand the intention behind enacting the provisions of section 2(22)(e). Closely held companies (i.e. companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profits as dividend because if so distributed, the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, such companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any

payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the company is treated as dividend. The intention behind the provisions of section 2(22)(e) of the Act is to tax such payments as dividend. To meet this objective, the definition of 'dividend' was expanded to include such transactions of payment of loans/advances which otherwise are not in the nature of 'income' under the Act.

7.1. The basis of bringing amendment to section 2 (22)(e) by the Finance Act, 1987 w.e.f. 01.04.1988 was to ensure that persons who controls the affairs of the company as well as that of a concern and for the payment made to a concern from the company and the person who can control the affairs of the concern and draw the same from the concern instead of the company directly making payment to the shareholder as dividend. Thus, the source of power to control the affairs of the company and the concern is the basis on which this amendment to the provision has been made. The scope of expansion of the definition of 'dividend' is to include certain transactions within the purview of 'income' under the Act by creating a fiction.

7.2. We note that so far as the first limb is concerned, the same is applicable to a shareholder of the company who gives such loan or advance and the shareholder is the beneficial owner of the shares as mentioned in the provisions of Section 2(22)(e) of the Act. Third limb applies in a case where payments are made by such company for individual benefit any such shareholder. So far as the second limb is concerned, where a concern in which such shareholder as referred in the first limb is a member or a partner having substantial interest, receives loan/advance from a company in which also such shareholder is a beneficial owner as referred in section 2(22)(e) of the Act, then Section 2(22)(e) of the Act can be invoked. The deeming provisions as it applies

to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance.

7.3. One thing common in all the three limbs reading it in consonance with the provisions of section 2(22)(e) of the Act, in our humble understanding, only indicates that the addition can be made in the hands of the shareholder, if any of the three conditions are fulfilled. Therefore, so far as the first limb is concerned, the payment is directly received by such shareholder but in the remaining two limbs, if any such transaction takes place, then the deemed dividend needs to be added in the hands of the beneficial shareholder.

8. When kept this understanding in juxtaposition with the facts of the present case, KSWPL is in a position to control the affairs of both the lender i.e. APL and the receiver ASMSPL i.e. the concern, assessee. The benefit of transaction between APL and ASMSPL accrues to KSWPL who is in a controlling position having more than 20% of shareholding in both of them. Under these facts of the case, provision as contained in section 2(22)(e) and the definition of substantial interest contained in section 2(32) of the Act, the beneficial ownership of shares is with KSWPL.

8.1. Keeping the intention in mind while enactment of section 2(22)(e), the present transaction of loan/advance given by APL to the assessee, both having a common shareholder KSWPL *per se* falls within the mischief of second limb of section 2(22)(e) whereby the assessee is the 'concern'(ASMSPL) to whom a loan has been granted by the 'company'(APL) in which 'such shareholder'(KSWPL) has a beneficial interest. The question before us in the present appeal is as to in whose

hands the taxability arises, once caught within the mischief of section 2(22)(e) of the Act.

9. To arrive at a conclusion to bring legal fiction to a logical conclusion as contained in section 2(22)(e), we need to look into the relevant provisions contained in the Companies Act, 2013 to have a proper perspective and understanding of the terms dividend, member, voting right so as to understand the concept of beneficial ownership, creating a charge of income-tax, in accordance with section 5 of the Act.

9.1. When we look at the provisions of the Companies Act, 2013, relevant provisions are extracted as under:

(a) 2. *Definitions.- In this Act, unless the context otherwise requires,-*

(20) "company" means a company incorporated under this Act or under any previous company law;

(22) "Company limited by shares" means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them;

(35) "dividend" includes any interim dividend;

(55) "member", in relation to a company, means- (i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members; (ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company; (iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

(93) "voting right" means the right of a member of a company to vote in any meeting of the company or by means of postal ballot;

b) 43. *Kinds of share capital.- The share capital of a company limited by shares shall be of two kinds, namely:-*

(a) equity share capital-

(i) with voting rights; or

(ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed; and

(b) preference share capital:

Provided that nothing contained in this Act shall affect the rights of the preference shareholders who are entitled to participate in the proceeds of winding up before the commencement of this Act.

Explanation.-For the purposes of this section,- (i) "equity share capital", with reference to any company limited by shares, means all share capital which is not preference share capital;

c) 47. *Voting rights.-*

(l) Subject to the provisions of section 43 and sub-section (2) of section 50,-

(a) every member of a company limited by shares and holding equity share capital therein, shall have a right to vote on every resolution placed before the company; and

(b) his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

(2) Every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company:

(d) 51. *Payment of dividend in proportion to amount paid-up.-*

A company may, if so authorised by its articles, pay dividends in proportion to the amount paid-up on each share.

10. From the above stated provisions of the Companies Act, 2013, the controlling position is achieved by having certain threshold percentage of voting power which in turn accrues to a member of a company as a right on account of being member of a company. For being a member of a company, a person has to hold shares whose name is entered in the register of members of the company or whose name is entered as a beneficial owner in the records of the depository.

10.1. In the case of a company limited by shares, the liability of its members is limited to the extent of amount paid on the shares held by the member. Share capital of a company limited by shares being equi-

ty share capital carries voting right or have differential rights as to dividend and voting, depending upon such rules as may be prescribed. In order to control the affairs of the company, a member of a company limited by shares and holding equity share capital thereunder has a right to vote on every resolution placed before the company to voting. Right of a member to vote is proportionate to its share in the paid-up equity share capital of the company. Also, payment of dividend is only to a member and in case of a company limited by shares, dividend is in proportion to the amount paid up on each share held by the member.

10.2. From the above understanding of the provisions of the Companies Act, 2013 and the legislative intent of bringing amendment to section 2(22)(e) by the Finance Act, 1987, the beneficial ownership is with KSWPL under whose substantial control, loan from APL is granted to the concern i.e. ASMSPL, assessee. ASMSPL i.e. the assessee cannot influence the decision making of company KSWPL. Similarly, APL cannot influence the decision making process of KSWPL. In both the companies, the controlling interest (substantial interest) is held by KSWPL. It is in fact KSWPL who is in a position to influence the decision making process of the two companies. Therefore, the deeming fiction of section 2(22)(e) can be applied only in the hands of KSWPL who is the beneficial owner of shares in both, the lender and the receiving companies.

10.3. Further, a loan or advance received by assessee (a concern) is not *per se* in the nature of income. It is in fact deemed accrual of income u/s. 5(1)(b) of the Act in the hands of the beneficial shareholder and not in the hands of the receiver (concern) who is a non-shareholder. Also, the definition of dividend under the Act is an inclusive definition which was expanded to include even a loan or advance

though in the natural and ordinary course, it is not an income. The basic character of dividend is a share in profits of the company, given to its shareholder.

11. Ld. CIT, DR and the authorities below have heavily relied on the decision of Hon'ble Supreme Court in the case of National Travel Services (supra) to canvas the proposition that it is not necessary that one has to be a registered shareholder in order to attract section 2(22)(e). The relevant observations and findings arrived at by the Hon'ble Apex Court is extracted as under:

"15. This then brings us to the Division Bench judgment in the present case. In para 17, after referring to various judgments referred to by us hereinabove, the Division Bench posed two questions to be answered by it as follows:

"(1) To attract the first limb of Section 2 (22) (e) of the Act, is it necessary that the person who has received the advance or loan is a shareholder and also beneficial owner. To put it otherwise, whether both the conditions are required to be satisfied will depend upon the interpretation to be given to the words "being a person who is a beneficial owner of shares" which was inserted by amendment in the aforesaid provision carried out by the Finance Act, 1987 w.e.f 1st April, 1988.

(2) Whether the assessee who is a partnership firm can be treated as 'shareholder' because of the reason that it has purchased the shares in the name of the two partners."

16. It answered the first question by stating that the expression "being a person who is a beneficial owner of shares" would be in addition to the shareholder first being a registered shareholder of the Company. The Division Bench of Hon'ble Delhi High Court then states that, therefore, in order to attract section 2(22)(e) both conditions have to be satisfied. So far as the second question is concerned, the Division Bench went on to state that a partnership firm can be treated as a shareholder but that it is not necessary that it has to be a registered shareholder.

17. We are of the view that it is very difficult to accept the reasoning of the Division Bench. It is not enough to say that Ankitech's case refers to the second limb of the amended definition, whereas the present case refers to the first limb, for the simple reason that the word "shareholder" in both limbs would mean exactly the same thing. This is for the reason that the 'expression "such shareholder" in the second limb would show that it refers to a person who is a "shareholder" in the first limb.

18. *This being the case, we are of the view that the whole object of the amended provision would be stultified if the Division Bench judgment were to be followed. Ankitech's case (supra), in stating that no change was made by introducing the deeming fiction insofar as the expression "shareholder" is concerned is, according to us, wrongly decided. The whole object of the provision is clear from the Explanatory memorandum and the literal language of the newly inserted definition clause which is to get over the two judgments of this Court referred to hereinabove. This is why "shareholder" now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear therefore that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is the addition, by way of amendment, of such beneficial owner holding not less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way, as has been held in a catena of decisions starting from Mathalone v. Bombay Life Assurance Co. Ltd. [1954] SCR 117.*

19. *This being the case, we are prima facie of the view that the Ankitech (P.) Ltd. case (supra) itself requires to be reconsidered, and this being so, without going into other questions that may arise, including whether the facts of the present case would fit the second limb of the amended definition clause, we place these appeals before the Hon'ble chief Justice of India in order to constitute an appropriate Bench of three learned judges in order to have a relook at the entire question."*

11.1. At the outset, we note that in this decision, the Hon'ble Court has placed the appeals before the Hon'ble Chief Justice of India to constitute appropriate bench of (3) Ld. Judges to have a relook at the entire question. Further, we note that in para 18, Hon'ble Court observed that shareholder now, post amendment, has only to be a person who is the beneficial owner of shares. According to the Hon'ble Court, the moment there is a shareholder, who need not necessarily be a member of the company on its register, who is the beneficial owner of share, the section gets attracted without more. We also take note of the vital observation made by the Hon'ble Court in respect of the amendment brought in respect of beneficial owner holding voting power not less than 10%. The said amendment, according to the Hon'ble

Court, speaks only of a beneficial owner who can compel the registered owner to vote in a particular way.

11.2. Keeping these observations and findings of the Hon'ble Apex Court in perspective, we find that both, the assessee and APL are in no way in a position to compel KSWPL in any way for exercising its voting rights in a particular manner. In fact, in the present case, it is the other way that KSWPL, because of its shareholding, is in a position to compel, both the assessee and APL, by exercising its voting power, to conduct in a particular way. Thus, even by going with the observations and findings of Hon'ble Apex Court in the case of National Travel Services (supra), the beneficial shareholder in the present case is KSWPL under whose controlling interest and influence, APL has given loan/advance to the assessee. Accordingly, the deeming provisions of section 2(22)(e) under the second limb are attracted on KSWPL. Also, taking into consideration the provisions contained in section 5(1)(b), the income accrues or arises or is deemed to accrue or arise in the hands of KSWPL and not in the hands of the assessee, in the present case. This leads us to bringing legal fiction to a logical conclusion that by invoking second limb of section 2(22)(e) of the Act, accrual of income and its taxability cannot be held to be in the hands of the assessee i.e. ASMSPL (the concern) before us. We thus, set aside the findings of Ld. CIT(A) and delete the addition of Rs.5,50,11,501/- added in the hands of the assessee (ASMSPL) by treating the amount of loan and advance as deemed dividend u/s. 2(22)(e) of the Act. Accordingly, ground taken by the assessee is allowed.

12. Since identical facts and issue is involved in ITA No. 988/Kol/2023, except for variation in amount, the above stated observations and findings applies *mutatis mutandis* this appeal also.

13 In the result both the appeals of the assessee are allowed.

Order is pronounced in the open court on 19th February, 2024

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 19th February, 2024

JD, Sr. P.S

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), NFAC, Delhi
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata