

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

Before Shri Pawan Singh (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.4679/Mum/2016
(Assessment year: 2006-07)

&

I.T.A No.4680/Mum/2016
(Assessment year: 2007-08)

DCIT (IT)-3(3)(2), Mumbai	vs	Shri Hemant Mansukhlal Pandya B 201/202, Dheeraj Kunj Bajaj Road, Vile Parle (W) Mumbai 400 056 PAN : AGPPP6132P
APPELLANT		RESPONDEDNT

C.O.58/Mum/2018
(Arising out of I.T.A No.4679/Mum/2016)
(Assessment year: 2006-07)

&

C.O.59/Mum/2018
(Arising out of I.T.A No.4680/Mum/2016)
(Assessment year: 2007-08)

Shri Hemant Mansukhlal Pandya B 201/202, Dheeraj Kunj Bajaj Road, Vile Parle (W) Mumbai 400 056	vs	DCIT (IT)-3(3)(2), Mumbai
CROSS OBJECTOR		RESPONDEDNT

Assessee by	Dr K Shivram / Shri Rahul Sarda
Respondent by	Shri HM Singh / Shri Abi Rama Kartikeyan

Date of hearing	18-10-2018
Date of pronouncement	16-11-2018

ORDER

Per G Manjunatha, AM :

These two appeals filed by the revenue and cross objections filed by the assessee are directed against separate, but identical orders of CIT(A)-56, Mumbai dated 21-03-2016 for the assessment years 2006-07 & 2007-08. Since facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed of by this common order.

2. The revenue, more or less taken up common grounds of appeal for both the assessment years. For the sake of brevity, grounds of appeal taken for AY 2006-07 are extracted below:-

“1. Whether CIT(Appeal) was correct in holding the contention of the Assessee that it is fabricated/manufactured data with some malafide intention, and has ignored the fact that the assessee did not give any evidence/proof in this regard.

2. Ld. CIT(A) erred in ignoring the fact that the Assessee did not sign consent waiver form for carrying out any further enquiry from Swiss HSBC Branch which could have provided all relevant information. CIT(A) has ignored this vital issue in his order and stated that AO should have proved reliable and authentic evidence, whereas the assessee himself thwarted such attempt. More so when assessee has not denied before any authority that such account does not belong to him.”

3. The brief facts of the case are that the assessee is a non resident since financial year 1995-96. The assessee is a director in a company in Japan and living in Japan on business visa since 1990. The assessee has got permanent residency certificate from Japan in 2001. The assessee has filed his return of

income for AY 2006-07 on 29-03-2007 declaring total income of Rs.5,51,667. The return of income was processed u/s 143(1) of the Income-tax Act, 1961 on 12-06-2007.

4. The assessment has been reopened u/s 147 of the Income-tax Act, 1961 for the reasons recorded as per which information was received by Government of India from the French Government under DTAA in exercise of its sovereign powers that some Indian nationals and residents have foreign bank accounts in HSBC Private Bank (Swisse SA, Geneva) which were undisclosed to the Indian Income-tax department. This information was received in the form of a document (hereinafter referred to as 'base note') wherein details of account holders such as name, date of birth, place of birth, sex, residential address, profession, nationality alongwith date of opening of the said bank account and also balance in certain years, etc. are mentioned. The information received from the French government has been processed with that of the assessee's Indian income-tax return and found that the details contained in base note is matching with the information provided by the assessee in his income-tax return. Accordingly, the DDIT(Inv), Unit VII(4), Mumbai has sent information to the concerned AO for further action. The AO issued notice u/s 148 of the Act on 20-11-2014 with the following reasons recorded for reopening of the assessment:-

"The case of HEMANT MANSUKHLAL PANDYA was centralized with the undersigned vide order No. DIT(IT)-II/Juris.127(2)/2014-15, dated 12.11.2014. Information has been received in respect of him from the office of DDJT(Inv.)Unit-VII(4), Mumbai. The information pertains to his having a bank account with HSBC Bank, Geneva bearing a number BUP_\$IFIC_PER_ID - 5090145003. From the said bank statement, it is seen that he is having a peak balance of USD 6237932.15 in the said account during the period 2005 to 2007. It is further seen from the said bank account that an amount of USD 444171 is reflected in his credit in December 2005. The records of this office show that there is no return of income filed by him for the relevant assessment year and this income therefore has escaped assessment. This evidence has come into the possession of the undersigned; I have reason to believe that the income to the extent of atleast USD 444171 has escaped assessment within the meaning of para (d) to the Explanation 2 below section 147 of the Act"

5. In response to notice, the assessee, through his A.R. Shri V.A.Parikh, CA, has filed his objection for reopening of the assessment, vide his letter dated 25-11-2014. The objection filed by the assessee has been duly disposed of by the AO vide his order dated 28-11-2014. Thereafter, the assessee has filed a letter and stated that the return filed u/s 139(1) shall be treated as the return of income filed in response to notice u/s 148 of the Income-tax Act, 1961. The case has been taken up for scrutiny and accordingly, a notice u/s 142(1) of the Act dated 28-11-2014 was issued calling for various details including details of bank accounts maintained in HSBC, Geneva in original CD and other details. In response to notice, the assessee, vide his submission dated 19-12-2014 stated that he is a non resident for more than 25 years and being a non resident, he is not under obligation to declare his foreign assets and foreign income to the Indian Income-tax Authorities; hence, the question of submitting the CD of the HSBC Bank account or the consent waiver form does not arise. Further, the

AO, issued notices u/s 143(2) and 142(1) of the Act on 22-02-2014 and asked the assessee to file necessary details in support of HSBC Bank account maintained in Geneva and also show cause as to why assessment shall not be framed u/s 144 of the Income-tax Act, 1961 based on material available on record.

6. In response to the notices, the assessee, vide his submissions dated 31-12-2014 and 05-01-2015, filed an affidavit dated 29-12-2014 and stated that his foreign bank accounts and foreign assets have no connection with India or any Indian business. No amounts from India have been transferred to any of his foreign accounts directly or indirectly. Further, the assessee challenged the authenticity and correctness of the base note and contended that no addition can be made merely on assumptions or presumptions. The assessee further submitted that he is a non resident Indian since 1990, i.e. for more than 15 years. He went to Japan on business visa in 1990 and worked there till 2001 and after 2001, he become permanent resident of Japan, therefore, the bank account maintained in HSBC, Geneva is having no connection with India and accordingly question of furnishing details of bank accounts and foreign assets does not arise. He further stated that he has filed his income-tax return regularly in India in the status of Non resident declaring whatever income accrued or deemed to accrue in India and such returns have been accepted by

the department. In the absence of any provisions to declare foreign bank accounts and assets by non residents to Indian Income-tax department, the question of disclosing those accounts to Indian Income-tax department does not arise and consequently, the amount lying in HSBC Geneva account cannot be taxed in India.

7. The AO, after considering the submissions of the assessee held that when the information received from two sovereign countries shows that the assessee is having bank accounts in HSBC, Geneva, it is for the assessee to prove that the said bank account had no connection with Indian income or the said deposits are not sourced out of income received or accrued in India. As the assessee has chosen not to produce the details of his HSBC bank account and the source of deposits thereto, even though he could have obtained all the details / evidences for the same, the only corollary that could be drawn is that the assessee has decided to withhold the information as it would have gone against him. Thus, as per the provisions of section 114 of the Indian Evidence Act also it needs to be held that at this stage that the information / details not furnished were unfavourable to the assessee and that the source of money deposited in HSBC account is undisclosed and sourced from India. The AO further observed that the assessee instead of furnishing relevant details to explain the source of deposits found in HSBC Bank, Geneva, questioned the

genuineness and the authenticity of the base note, but fact remains that the genuineness and the authenticity of the base note has already been explained and the same has been provided to the assessee. Despite various opportunities given, the assessee chose not to offer any explanation to the source of deposits made in those accounts on the contention that as a non resident, he has under no obligation to provide such explanation. Although, the assessee claims to have no business connection in India, he had properties in India and also a demat account in which the portfolio valuation as on 16-02-2015 is Rs.1,04,82,026 from 55 shares. During assessment proceedings, the assessee has produced permanent residency card of Japan which is valid from 27-11-2001. When he was asked to produce proof to show that he was permitted to have business / profession or work permit in Japan or any other country in which was earning his income prior to 2001, the assessee chose not to provide any details. Therefore, the only conclusion that can be drawn is that prior to this date, the assessee cannot be engaged in any business, profession or employment in Japan. Therefore, he opined that credits found in HSBC Bank, Geneva is undisclosed to Indian Income-tax department and accordingly made addition of Rs.4,28,95,304 to the returned income. The relevant observations of the AO are extracted below:-

11. The submissions of the assessee are considered. In this case, the source of money deposited in the HSBC, Geneva Account has not been explained, then in absence of anything contrary shown by assessee the only logical conclusion that can be inferred is

that that the amounts deposited are unaccounted deposits sourced from India and therefore taxable in India. This presumption is as per the provisions of Section 114 of The Indian Evidence Act, 1872 which reads as follows:

“Section 114. Court may presume existence of certain facts-

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The Court may presume -

.... (g) That evidence which could be and is not produced would, if produced be unfavorable to the person who withholds it.....”

Section 114(g) of The Indian Evidence Act, 1872, thus clearly says that the Courts can presume existence of certain facts if the person liable to produce evidence which could be and is not produced, which if produced would have been unfavorable to the person who withholds it.

11.1 As the assessee has chosen not to produce the details of his HSBC bank accounts and the source of deposits thereof, even though he could have been obtained all the details/evidences for the same, the only corollary that could be drawn is that the assessee has decided to withhold the information as if producing it would have gone against him. Thus, as per the provisions of Section 114 of The Indian Evidence Act, 1872 also, it needs to be held at this stage that the information/details not furnished were unfavorable to the assessee and that the source of the money deposited in the HSBC account is undisclosed and sourced from India. In *Nova Promoters and Finlease (P)Ltd.* 342 ITR 169(Del), highlighting the legal effect of section 68 of the Act, the Division Bench has observed in para 32 that *"The tribunal also erred in law in holding Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no explanation regarding the nature and source of the creditor the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee."*

11.2 The Hon'ble Supreme Court in the case of *Sumati Dayal Vs. Commissioner of Income Tax* (1995) 214 ITR 801 (SC) held that income tax proceedings are civil proceedings and the degree of proof required is to be judged by preponderance of probabilities. The Hon'ble Supreme Court, in the case of *CIT v Durga Prasad More* [1971] 82 ITR 540 (SC), has held that "the taxing authorities

were not required to put on blinkers while looking at the documents produced before them they were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents....The apparent must be considered as real only it is shown that there are that the apparent is not the real and that too taxing authorities are entitled to founding circumstances to find out the reality and the matter has to be considered by applying the test of human probability.... Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and tribunals have to judge the evidence before them by applying the test of human probabilities. The Hon'ble Punjab and Haryana High Court, in the case of *SomNath Maini v CIT* [2008] 306 ITR 414 (Punj. &Har.), has held that "the assessing officer is to apply the test of human probabilities for deciding genuineness or otherwise of a particular transaction. Mere leading of the evidence that the transaction was genuine, cannot be conclusive. Any such evidence is required to be assessed by the assessing officer in a reasonable way. Genuineness of the transaction can be rejected in case the assessee needs evidence, which is not trustworthy, and the Department does not need any evidence on such an issue. In case of *Smt. Vasantibai Shah* 213 ITR 805 (Bom) the court observed that The Income tax Officer is entitled to take into consideration the totality of the facts and circumstances of the case and to draw his own inference on the basis thereof. Circumstantial evidence in such cases is not impermissible. In

cases like this it is only the circumstantial evidence which will be available. No direct evidence can be expected....." In case of J S Parker 94 ITR 616

(Bom) it was held that "the tax liability under the Income tax Act is of civil nature. To fasten a tax payer with such a liability it is not necessary that the evidence should be in the nature of "beyond doubt" as is required to fix a criminal liability. Tax liability can be fastened on the basis of preponderance of probabilities".

12. The assessee in this case has not produced any evidence to proof that the money deposited in his foreign bank accounts (HSBC Private Bank, Suisse (SA), Geneva) does not have any source from India. The genuineness and the authenticity of the Base note is already explained in para 2 of this order. The same has been provided to the assessee. Despite the various opportunities given, the assessee chose not to offer any explanation to the sources of deposits made in these accounts on the contention that as a non-resident he is under no obligation to provide such explanations.

12.1 On the other hand the assessee has properties in India. He has a flat at Vile Parle (W), Mumbai for many years and also Demat Account No: 120117000006304 in which the Portfolio valuation as on 16.2.2015 is Rs. 1,04,82,0267- from 55 shares held. During the assessment proceedings, the assessee has produced the permanent resident card of Japan which is valid from 27.11.2001. When asked to provide the proof to show that he was permitted to have business / profession or work permit in Japan or any other country in which he was earning his income prior to 2001; vide notice u/s 142(1) of the Act dt. 4.2.15, the assessee chose not to provide any details. Therefore, the only conclusion

that can be drawn is that prior to this date, the assessee cannot be engaged in any business, profession or employment in Japan. The peak balance in his HSBC, Geneva account during the period 2005 to 2007 is USD 6237932.15 as on September, 2006 which translates to Rs. 28,75,68,6727- (@ Rs. 46.10 per USD). As per the Base Note the account was opened in 10.7.1998. What this shows is that the assessee could not have generated any income from Japan or any other country other than India prior to 2001 that could result into a bank balance of Rs. 28,75,68,672/- by 2006.

12.2 The assessee chose not to disclose sources of income returned by him in Japan nor the bank statement of his HSBC, Geneva accounts. Further, it is in the public domain that HSBC, Geneva has been inquired regarding its role in facilitating its clients to evade taxes. Also, the names of various individuals including the assessee himself have been mentioned in the list of account holders in HSBC, Geneva who has been suspected of tax evasion. Hence there is a prima-facie presumption of amounts in the said account being undisclosed and sourced from India. The assessment proceedings offer an opportunity to the assessee to rebut these presumptions but he has chosen not to disclose his HSBC bank accounts and the sources of deposit despite various opportunities given. The circumstances of the case in view of the jurisprudence as mentioned above points only to one thing with regard to the source of deposits in the HSBC, Geneva accounts; that the deposits were made by the assessee in his HSBC, Geneva accounts from sources in India which has not been disclosed in his return of income.

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13. In view of the above, the peak amount as appearing in the Base Note of the assessee's HSBC account in AY 2006-07 being USD USD 942339.71 which translates to Rs. 4J8,95,304/- (@ Rs. 45.52 per USD) is hereby added to the total income of the assessee as income deemed to accrue or arise in India for which the assessee offers no explanation about the source and nature thereof."

8. Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has challenged the validity of reopening of assessment and also addition made by the AO on merits. The assessee has

filed elaborate written submissions on the issue of reopening of assessment which has been reproduced at para 4 on pages 4 to 8 of his order. The sum and substance of the arguments of the assessee before the Ld.CIT(A) are that the alleged base note is fabricated, unauthorised, unauthenticated and hence, not admissible as evidence. Therefore, the recording of reasons and consequent re-assessment proceedings based on such unrelatable evidence are vague in law. The base note is motivated by malafide intentions which is false and fabricated and has been illegally attributed to the assessee. The reopening of assessment on the basis of incorrect evidence has no legal sanctity. There is no live nexus between the reasons recorded for reopening of the assessment and escapement of income. The very basic reason for reopening of the assessment is on the premises that the assessee had not filed his return of income for the relevant assessment year, but fact remains that the assessee was regularly filing his return of income and he has filed his return of income for the relevant assessment year and therefore, reopening of assessment on incorrect reasons cannot survive under the law. The assessee has relied upon various judicial decisions, including the decision of Hon'ble Gujarat High Court in the case of Sagar Enterprises vs ACIT (2002) 257 ITR 335 (Guj).

9. The assessee also filed detailed submissions on additions made by the AO

towards credits found in HSBC Bank, Geneva. The sum and substance of arguments of the assessee before the Ld.CIT(A) are that the information received from French Government is related to residents as mentioned by the AO, but the assessee is a non resident and his status as a non resident is not in dispute. The non residents are not under obligation to disclose foreign bank accounts to the Indian Income-tax department. The assessee also questioned the authenticity of base note by stating that the base note is neither authorized nor is it verified from the original. It is just astray sheet of paper mentioning some information. On the basis of unauthenticated, unverified document, no addition can be made. The assessee has reiterated his arguments made before the AO to argue that he is a non resident since 1990 and he is having no business connection, whatsoever, in India and also whatever income deemed to accrue or arise in India has already been declared in his return of income; filed for the relevant assessment year, therefore, merely some information has been received from some source, the same cannot be considered to make an assessment on non resident in India in respect of bank accounts and assets held outside India. The assessee has filed an affidavit stating that he does not have any business connection in India. The assessee also has given copy of his bank account held with Dena Bank from 1998 onwards. It is clear from the bank account that the assessee has not

remitted any amount abroad from India. It is very much clear from the details furnished before the AO that there is no connection between HSBC Bank account maintained in Geneva and income accrued or deemed to accrue in India. The AO made additions only on the basis of unauthenticated information received from outside source without bringing on record any evidence to show that the assessee has diverted income from India and remitted abroad to the bank account maintained in HSBC Bank, Geneva. In the absence of anything contrary, the AO was erred in making the assessee to prove negative when the assessee is not under obligation to file his foreign bank account and asset details and the law also does not mandate to file those details, which is highly incorrect on the part of the AO to make addition merely on the basis of a base note which is a piece of stray paper having no legal authenticity.

10. The Ld.CIT(A), after considering the submissions of the assessee and also by relying upon various judicial precedents rejected legal ground taken by the assessee challenging reopening of the assessment on the ground that the AO had recorded a reason on the basis of information received from Investigation Wing, which, prima facie establishes escapement of income within the meaning of section 147 of the Income-tax Act, 1961. The case law cited by the assessee are distinguishable from the facts and there is no merit in the legal

ground taken by the assessee and accordingly, the same has been dismissed.

11. Insofar as addition made by the AO towards credits found in HSBC Bank, Geneva, the Ld.CIT(A) held that the AO could not have made the addition without he himself applied his own independent mind to the facts and material gathered by the Investigation Wing. The AO should have made his own enquiries on the basis of information received from the Investigation Wing to establish the fact that there is a nexus between income derived in India and bank deposits found in HSBC Bank account. In the assessment order, the AO; however, did not in any manner discussed the source of information or evidences gathered on the basis of which it was held that the assessee held the HSBC Bank, Geneva account and balance in the same represents escaped income. On the other hands, the assessee has filed enough materials to prove that he is a non resident Indian since 1990 and he is working in Japan on business visa till 2001 and thereafter got permanent residency certificate. The assessee also filed his passports to prove he is in India for all those years only for a limited period, i.e. less than 60 days. It is also an admitted fact that the assessee has filed his income-tax return in the status of non resident disclosing income accrued or deemed to accrue in India and such return has been accepted by the department in the status of non resident. Once, the AO having accepted the status of non resident of the assessee, should not have

questioned the source of amounts deposited in foreign bank accounts without establishing the fact that the said deposit is sourced out of income derived in India. The Ld.CIT(A) further observed that the assessee has filed an affidavit and declared that none of his foreign assets had any connection with India or any Indian business. It is also categorically stated in the affidavit that the assessee does not have any source of income in India except interest and dividend income which he had already declared in his income-tax return for the relevant years. With these observations and also by following certain judicial precedents, the CIT(A) deleted addition made by the AO towards credits found in HSBC Bank account. The relevant observations of the Ld.CIT(A) are extracted below:-

“8.11 During the course of appellate proceedings, AR submitted the decision in the case of Anil Kumar Jain Appeal No.: 145/14-15/CIT(A)-4, wherein it was held by the Hon. COMMISSIONER OF INCOME TAX [APPEALS]-4, NEW DELHI that:

"It is dear that for making an addition u/s 69 the onus is laid on the revenue to bring on record material from which it could be concluded that the deposits in such accounts pertained to assessee himself. In the present case the AO has not brought on record any material which could conclusively prove that the deposits in various accounts were made by the appellant himself or for that matter it belonged to the assessee himself. It is also relevant to note that even the, AO did not have any material to verify such transactions and therefore in absence of any such material, addition could not be made merely based on some information which has not been put to test.

Considering the propositions of cases cited above it is clear that unless the AO brings on record material which substantively prove that amount of deposits in such account were income of the appellant, no addition could be made."

8.12

- i. In the case before me also the AO has failed to substantiate its claim that the amount in question belonged to the appellant.
- ii. It is a proven fact that the assessee is a 'Non Resident' in terms of Section 6 of the Act since long and is filing its tax returns in India reflecting its status as Non Resident. It is also apt to note that the resident status of the assessee is not in dispute

and the same was duly accepted by the Assessing Officer during the course of reassessment proceedings under Section 147/148 of the Act.

iii. Also, the charging section for the purposes of the Act is section 5(2) in case of non-residents. In other words/ for a sum to be taxed in India in the hands of the Appellant, it must be received or deemed to be received in India or it accrues or arises or is deemed to accrue or arise to him in India. The residential status of the appellant i.e. Non-resident is duly accepted by the AO and is not in dispute.

iv. Reliance is placed on the judgement in the case of *DCIT v Finlay Corp, ltd(2003) 86ITD 626(Delhi)*, wherein it was held that:

"The income of the non-resident is chargeable only under Section 5(2) and the provisions of Section 68 cannot override the provisions of Section 5(2). Taxability of non-resident can be seen only under Section 5(2) and the provisions of Section 69 could not be pressed into service since such provisions do not override the provisions of Section 5(2). It is settled legal position that burden is on the Revenue to prove that income of an assessee falls within the net of taxation. Section 5(2) being the Charging section, the burden is on the Revenue to prove that the income of the non-resident falls within the ambit of such section."

v. Reliance is placed on the judgement in the case of *Saraswati Holding Corporation vs. Deputy Director of Income Tax[20/07/2007] (111 TTJ Delhi 334)*, wherein the Tribunal upheld the decision of Dy. CIT v. *Finlay Corporation Ltd. (2004) 84 TTJ (Del) 788 : (2003) 86 LTD 626 (Del)*, quoted at point no. vi in which it was held that:

"The provisions of Section 68 or Section 69 cannot enlarge the scope of Section 5(2). Under Section 5(2), the income accruing or arising outside India is not taxable unless it is received in India."

vi. Reliance is also placed on the judgement in case of *Vodafone International holding B.V v Union of India in 2012(Supreme Court)*, wherein it was held that:

"Under Section 5(2) of the Income Tax Act, in case of NRIs the income accrued and received outside India cannot be subject to tax in India. What is not taxable under Section 5(2), cannot be taxed under the provisions of Sections 68 and 69 as undisclosed income"

vii. Thus, respectfully following the decision in the case of *DCIT v Finlay Corp. Ltd, Saraswati Holding Corporation vs. Deputy Director of Income Tax and Vodafone International holding B.V v Union of India in 2012(Supreme Court)*, it is held that what is not taxable under Section 5(2) cannot be taxed under the provisions of Section 68 or Section 69. Provisions of Section 68 or 69 would be applicable in the case of nonresident only with reference to those amounts whose origin of source can be located in India.

viii. Therefore, provisions of Section 68 or 69 have limited application in case of non-resident and since the appellant has disclosed all his income earned in India or accruing or arising to him in India by regularly filing his Return of Income as a non-resident, the appellant cannot be taxed for income earned outside India unless the Revenue proves that the income falls , within the ambit of Section 5(2). No such evidence has been brought upon by the AO to support his contentions and hence the AO's contentions stand no ground. In the present case, it is also observed that in the appellant's case the addition is made without referring to any Section. Such an act on part of the AO is not justified.

ix. The Appellant had also filed an Affidavit declaring that any of Assessee's foreign account or foreign assets had no connection with India or with any Indian business. It is also categorically stated in the affidavit that the appellant does not have any proprietary or partnership business in India nor he is an employee or director of any

company in India. He does not have any source of income in India except interest and dividend income which he has already declared in the Return filed.

x. In this regard, the AO has acted mechanically in making addition to this effect without rebutting the appellant's clear and categorical stand. It is well settled law that affidavit is an important piece of evidence and if the same is not found faulty, any adverse view taken by the authorities concerned would lead to substantial question of law. Reliance is placed on the judgment of apex court in case of Mehta Parikh & Co. [1956 AIR554] where their lordship has held as under,

"Facts proved or admitted may provide to support further conclusions to be deduced from them, which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law. The court would be entitled to intervene if it appears that the fact finding authority has acted without any evidence or upon a view of the facts, which could not reasonably be entertained or the facts found are such that no person acting judicially and properly instructed as to the relevant law would have come to the determination in question."

xi. Thus, in view of the above and considering the facts and circumstances of the case and respectfully following the decisions in the case of DCIT v Finlay Corp. Ltd(2003) 86 ITD 626(Delhi), Saraswati Holding Corporation vs. Deputy Director of Income Tax[20/07/2007] (111 TTJ Delhi 334) and Vodafone International holding B.V v Union of India in 2012(Supreme Court) cited supra, I am unable to subscribe to the view taken by the AO. Considering the facts I am inclined to accept the arguments of the appellant and accordingly the addition of Rs. 4,28,95,304/- made in this case is hereby deleted and the Ground Nos. II (Sub-Grounds 3 to 5), III (Sub-Grounds 6 to 11) are allowed in favour of the appellant."

12. The Ld.DR submitted that the Ld.CIT(A) was erred in holding that the AO has made addition on the basis of fabricated / manufactured data with some mala fide intention without appreciating the fact that the information has been exchanged between two sovereign countries as per which some Indian nationals and residents have maintained bank account in HSBC Bank, Geneva and said bank accounts are not disclosed to Indian income-tax authorities. The Ld.DR further submitted that the Ld.CIT(A) was erred in ignoring the fact that the assessee did not sign consent waiver form for carrying out any further enquiry from HSHC Bank, Geneva which could have provided all relevant information. The Ld.CIT(A) has ignored this vital fact and deleted addition on

the premises that the AO should have proved reliable and authentic evidences whereas the assessee himself blocked / thwarted such attempt. The assessee neither denied of having maintained account in HSHC Bank, Geneva nor filed any details to prove that the said bank account does not have any link to income derived or sourced from India. In absence of any evidences filed by the assessee, the AO has taken the information received from the French Government to hold that the said deposit is sourced from income generated in India and accordingly made addition. The Ld.DR further submitted that although the assessee is maintaining the bank account, the details of such bank account were never before the Indian Income-tax authorities and also when specifically asked to prove the nature and source of credit, the assessee chose not to file any evidence. The Ld.CIT(A), without appreciating these facts deleted addition made by the AO by shifting the onus to the department ignoring the fact that when a credit is found, it is for the assessee to prove the said credit to the satisfaction of the AO.

13. The Ld.AR for the assessee, on the other hand, strongly supported the order of the Ld.CIT(A) and submitted that when the lower authorities never disputed fact that the assessee is a non resident since 1990, ignored the law, which clearly states that non residents are not required to declare their foreign bank accounts and assets to the Indian Income-tax authorities. The Ld.AR

further submitted that the assessee has explained the position before the AO but the AO, ignored all evidences filed on the basis of unauthenticated base note received from French Government to make addition towards credits found in HSBC Bank, Geneva without establishing the fact that such credit is sourced from income derived in India. The assessee has filed an affidavit and stated that he does not have any business connection in India or employed in any Indian company. He has filed his income-tax return in India in the status of 'non-resident' disclosing income received and deemed to accrue or arise in India and such returns have been accepted by the department. The assessee also filed bank statements of his Indian bank account maintained in Dena Bank from 1998 onwards to prove that there is no significant debits which can be linked to deposits found in HSBC Bank, Geneva. The bank account maintained in India is credited with income derived from India from his portfolio investment and the said income has already been offered to tax in India. The AO, without carrying out any independent enquiry to ascertain the fact that the deposits in HSBC Bank, Geneva is having nexus to Indian income, made addition only on the basis of base note which is unverified and unauthenticated. The assessee being a non resident is under no obligation to disclose his foreign accounts and assets and accordingly he never disclosed his bank account maintained in HSBC Bank, Geneva to the Indian Income-tax

authorities.

14. The Ld.AR, further referring to ITR form prescribed for filing of return of income by the individuals, submitted that the moment a person chooses his status as 'non resident', the columns provided for filling foreign bank accounts and assets details do not appear in the return of non residents and hence, the question of disclosing said information to the Indian Income-tax authorities does not arise. The Ld.AR further referring to the statement of the Minister of State for Finance, has clarified on the floor of the Lok Sabha on 02-12-2011 that mere holding of an account outside India does not lead to the conclusion that the amount is not taxed in India. He also referred to white paper on black money introduced by Government to clarify that there may be cases where the account holders may be NRIs, is not assessed to tax in India with respect to those sums or the sums deposited may already have been disclosed to the Income-tax department. He also referred the statement of Minister of Finance published by Press Information Bureau on 04-04-2016 to clarify the position of non residents in respect of bank accounts found in HSBC Bank, Geneva, as per which, the Government itself does not wish to take any action in respect of non residents holding foreign bank accounts. Even the provisions of black money (undisclosed foreign income and assets) and imposition of tax Act, 2015 applicable only to residents. Even the FAQs to the black money undisclosed

foreign income and assets) and imposition of tax ACT, 2015, questions 22 & 32 clarified that non residents are not required to disclose foreign bank accounts and assets to Indian income-tax authorities. The Ld.AR further submitted that to determine whether a particular deposit in foreign bank account is sourced in India what needs to be considered is the withdrawals from the bank account of the assessee maintained in India. If one considers the withdrawals of the assessee from his bank account maintained in Dena Bank which is approximately Rs.9.25 lakhs, which could not have funded an amount of Rs.4.28 crores in the foreign bank account. The AO, without bringing on record any evidence to support the base note to prove that the credits found in HSBC Bank, Geneva is sourced from income generated in India, asked the assessee to prove negative without any basis. On the other hand, assessee has filed complete details to prove that the said deposits is having no connection, whatsoever to Indian income. The Ld.CIT(A), after apprising all these facts, has rightly deleted addition made by the AO. In this regard he relied upon the decision of ITAT, Delhi in the case of DCIT vs Finlay Corporation Ltd (2003) 86 ITD 626 (Del); Delhi High Court in the case of CIT vs Suresh Nanda (2013) 352 ITR 611 (Del); and ITAT, Chennai in the case of Smt. Susila Ramaswamy vs ACIT (2010) 37 SOT 146 (Chen).

15. We have heard both the parties, considered the material available on

record and gone through the orders of authorities below. We have also considered the case laws cited by either parties. The AO made addition towards amount found credited in HSBC Bank account, Geneva on the ground that the assessee has failed to explain and prove that deposit is not having any connection to income derived in India and not sourced from India. The AO has made additions on the basis of a document called 'base note' received from French Government, as per which the assessee is maintaining a bank account in HSBC Bank, Geneva. The AO has analysed the contents of base note to the details filed by the assessee in his income-tax return to come to the conclusion that the information contained in the base note is matching with the details of the assessee and accordingly opined that the said bank account is belonging to the assessee. Except this, the AO has not conducted any independent enquiry or applied his mind before coming to the conclusion that whether the information contained in base note is verified or authenticated. The AO never disputed the fact that the assessee is a non resident. The lower authorities have accepted the fact that the assessee is a non resident since 2001. The AO also accepted the fact that the non residents are not required to disclose their foreign bank accounts and assets to the Indian Income-tax authorities. But, the AO has made addition on the ground that before 2001 it was not clear as to whether the assessee, is a resident or non resident and the assessee also

not filed any documentary evidence to prove that he is having business visa in Japan and earned income therefrom. The AO has shifted the burden on the assessee to prove negative. According to the AO, it is for the assessee to prove that the credits found in HSBC Bank is not sourced out of income derived from India.

16. The provisions of section 5 of the Act has defined the scope of 'total income' in the Indian Income-tax Act. As per provisions of section 5(2), the total income of any previous year of the person, who is a non resident includes all income from whatever source derived which received or is deemed to received in India in such year by or on behalf of such person or accrues or arises or is deemed to accrue or arises to him in India during such year. Explanation 1 provided to section 5 clarifies that income accruing or arising outside India shall not be deemed to receive in India within the meaning of this section by reason only of the fact that it is taken into account in a balance-sheet prepared in India. Therefore, as per the provisions of section 5(2) of the Income-tax Act, 1961, only income that accrues / arises in India or is deemed to accrue or arise in India is taxable in India in case of non residents. Under this legal background, when we examine the fact of the case of the assessee, whether credits found in bank account maintained by the assessee in HSBC Bank Geneva is accrued / arisen in India or is deemed to accrue or arisen in

India and is taxable in India in the hands of non residents has to be examined. Insofar as the residential status of the assessee, there is no dispute. The AO has accepted the fact that the assessee is a non resident. In fact, the assessee has filed his passport details right from AYs 1995-96 to 2011-12 as per which, the assessee was in India for less than 60 days in all these years. The assessee also filed an affidavit stating that he does not have any business connection in India either through a proprietary / partnership concern or holding directorship in any of Indian companies. The assessee further stated that he is neither in employment in India nor in business activity in India. The assessee also filed details to prove that he is regularly filing his income-tax return in India in the status of non resident disclosing income accrued or arose in India during the relevant financial years. The return filed by the assessee has been accepted by the department for all these years. All these facts have not been disputed by the lower authorities.

17. Having said, let us examine, non residents are required to furnish details of his foreign bank accounts and assets in India or not. The assessee has maintained only one bank account in India in Dena Bank which is an NRO account. The said bank account has been reflected in AIR information. In order to prove that the amount in foreign bank account is not sourced from India, the assessee filed the bank statement of his only bank account in India

from the financial years 1998 to 2008. On perusal of the bank account filed by the assessee, it was noticed that there are no debits in the bank account which could have gone to the foreign bank account. Thus, it can be seen that no amounts have been transferred from his Dena Bank account in India to any of the bank accounts maintained including HSBC, Geneva. In fact, the balance in the account maintained in Dena Bank is so less that it cannot fund an amount of Rs.4.28 crores which has been added by the AO as assessee's income. Despite this, the AO sought to put the onus of proving a negative that the deposits in foreign bank account are not sourced from India, on the assessee. In our considered view, the AO is not justified in placing the onus of proving a negative on the assessee. In fact, only a positive assertion can be proved, but not a negative. Furthermore, the onus of proving that an amount falls within the taxing ambit is on the department and it is incorrect to place the onus of proving negative on the assessee. This legal proposition is supported by the decision of Hon'ble Supreme Court in the case of Parimisetty Seetharaman vs CIT (1965) 57 ITR 532 (SC) where it was categorically held that the burden lies upon the department to prove that a particular asset is within the taxing provisions. Therefore, we are of the considered view that when the AO found that the assessee is a non resident Indian, was incorrect in making addition towards deposits found in foreign bank account maintained with HSBC Bank,

Geneva without establishing the fact that the said deposit is sourced out of income derived in India, when the assessee has filed necessary evidences to prove that he is a non resident since 25 years and his foreign bank account and assets did not have any connection with India and that the same have been acquired / sourced out of foreign income which has not accrued / arisen in India.

18. Having said so, let us examine whether the government / legislature intended to tax foreign accounts of non residents. The Minister of State for Finance has clarified on the floor of the Loksabha on 02-12-2011 that mere holding of an account outside India does not have led to the conclusion that the amount is tax evaded. Further, the white paper on black money introduced by the Government states that if information is received about 100 Indians having bank accounts abroad, it does not automatically prove that all those 100 accounts represent black money of Indian citizens stashed abroad. There may be cases where the account holder may be an NRI who is not assessed to tax in India or the sum deposited may already have been disclosed to the Income-tax department. It is only after enquiry and completion of assessment one can know whether the amount deposited in the foreign account represents black money of an Indian citizen. Similarly, in the statement dated 04-04-2016 issued by the Minister of Finance published by

Press Information Bureau, it was clarified that non residents found having foreign bank accounts were non actionable. Thus, it is very clear from the clarifications issued by the Government itself that the legislature does not wish to take any action in respect of non residents holding foreign bank accounts. Further, even in the excel utility of return of income in the income-tax department website, the moment a person fills his residential status as non resident, the excel utility prevents filling of columns pertaining to foreign assets. Even, the Hon'ble Finance Minister has clarified that all accounts in foreign bank may not be illegal as they may belong to NRI. Thus, even the government has acknowledged the fact that an NRI foreign bank account is not illegal. We further notice that provisions of black money (undisclosed foreign income and assets) and imposition of tax Act, 2015 is applicable only to residence. As per section 2((2) of the said Act, an assessee means a person being a resident other than not ordinarily resident in India within the meaning of sub section (6) of section 6 of the Income-tax Act ,by whom tax in respect of undisclosed foreign income and assets or any other sum of money is payable under this Act and includes, every person who is deemed to be an assessee in default under this Act. Even, the FAQs to the black money (undisclosed foreign income and assets) and imposition of tax Act, 2015 reiterates the above position in questions No.24 & 32 where it was clarified that if a person, while

he was a non-resident acquired or made a foreign asset out of income which is not chargeable to tax in India, such asset shall not be an undisclosed asset under the Act. The AO, without understanding these facts and also without answering the jurisdictional issue of whether the non resident assessee was liable to pay tax in India in respect of deposits in his foreign bank account, when he had proved that the source of deposit was not from India, went on to make addition on wrong footing only on the basis of information in the form of base note which is unverified and unauthenticated. On the other hand, the assessee has filed complete details in respect of his residential status which undoubtedly proves that he is a non resident in India since 1990 and the said bank account had been opened when he was a non resident in India. The assessee went abroad on business visa and started business in 1990 and was earning income in Japan since then. He got permanent residency certificate in the year 2001. The AO, without appreciating these facts, made addition on wrong presumption that before 2001 it was unknown that the assessee was a non resident Indian and he has earned any income outside India which is not taxable in India. Further, the AO has taken the information of foreign bank accounts of Indians to come to the conclusion that the said information is even applicable to non residents without appreciating the fact that even the government's intention is not to tax NRIs in respect of foreign bank account

and assets. No material was brought on record to show that the funds were diverted by the assessee from India to source the deposits found in foreign bank account. The suspicion, howsoever strong, cannot take place of proof and no addition could be made on presumption and assumption. The AO has not proved that impugned addition could be made within the ambit of section 5(2) r.w.s. 68 / 69 of the Income-tax Act, 1961.

19. Coming to the case laws relied upon by the assessee. The assessee has relied upon the decision of ITAT, Mumbai Bench in the case of DCIT vs Dipendu Bapalal Shah in ITA No.4751-4752/Mum/2016. We find that the co-ordinate bench of ITAT has decided an identical issue in respect of foreign bank accounts of non residents and held that when the AO failed to prove nexus between deposits found in foreign bank account and source of income derived from India, erred in making addition towards deposit u/s 68 / 69 of the I.T. Act, 1961. In the said case, the assessee is a non resident in India since 1990 and have no business connection in India during that period. Under those facts, the Tribunal came to the conclusion that in the absence of any nexus between deposits found in foreign bank account and source of income derived in India, no addition could be made towards cash deposits u/s 68 / 69 of the I.T. Act, 1961. The relevant portion of the order is extracted below:-

“8. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as

well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. From the record we found that assessee is a non-resident since 1979, as per Section 6 of the IT Act. Assessment of the assessee was reopened on the basis of information (called as 'Base Note') which was received in respect of the assessee from the office of DIT(Inv.)-II, Mumbai pertaining to a bank account with HSBC Bank, Geneva, Switzerland. It was submitted by assessee before AO that he is a Non-resident as per section 6 of the Act since 1979. Copies of his passport were also submitted to the AO in order to substantiate his claim of being a non-resident under the Act. Since, he is a nonresident, he submitted that his non-Indian bank account does not fall within the purview of the Act. In support of his claim, he also submitted a duly notarized affidavit stating that

- He is a Non-resident as per section 6 of the Income-tax Act, 1961 since 1979.
- He holds a Belgian passport and his current passport number is EI 721068.
- His PAN is BNBPS0099E.
- No income has either been received or accrued to him in India which was liable to tax under the provisions of the Income-tax Act, 1961 during the Assessment Year 2006-07 and 2007-08.
- The Indian funds are not the source of amounts deposited in bank accounts held by him outside India.

9. Further, it was submitted that the scope of income in case of a nonresident is defined under the provisions of sub-section (2) of section 5 of the Act. As per this section, a person who is a 'non-resident' has to pay tax only on that income which is either received or is deemed to be received by him in India, or accrues or arises or deemed to accrue or arise to him in India, during the year. Thus, he will be liable to tax only in respect of income received or accrued to him in India.

10. The assessee also submitted that he was not having any of his business operations in India during AY 2006-07 hence, there is no income which has either deemed to accrue or arise in India under section 9 of the Act. Thus, the initial contribution or even other amounts in the foreign bank account does not fall under the purview - of section 9 of the Act. Thus, the peak balance appearing in the bank statement of the foreign bank account should not be added to the total income of the assessee. 11. Without prejudice to the above, he submitted that the peak balance appearing in the bank statement of this foreign bank account has already been added to the computation of income and subjected to tax in the hands of Deepak Shah and Kunal Shah in their respective assessments for AY 2006-07 and AY 2007-08. A copy of the order passed by Assistant Commissioner of Income-tax -16(2) and by Commissioner of Income-tax (Appeals)-27 ('CIT(A)-27') in their respective cases was submitted to the AO for his consideration. 12. Further, both these assesseees - Deepak Shah and Kunal Shah have paid taxes on the amount of addition to their respective computation of income. A summary of the taxes paid by them was also

submitted to the AO for his consideration. However, AO did not agree with the assessee's contention and added peak credit in the account of HSBC Geneva in assessee's income. The AO has made additions in the case of assessee.

11. Without prejudice to the above, he submitted that the peak balance appearing in the bank statement of this foreign bank account has already been added to the computation of income and subjected to tax in the hands of Deepak Shah and Kunal Shah in their respective assessments for AY 2006-07 and AY 2007-08. A copy of the order passed by Assistant Commissioner of Income-tax -16(2) and by Commissioner of Income-tax (Appeals)-27 ('CIT(A)-27') in their respective cases was submitted to the AO for his consideration. 12. Further, both these assesseees - Deepak Shah and Kunal Shah have paid taxes on the amount of addition to their respective computation of income. A summary of the taxes paid by them was also submitted to the AO for his consideration. However, AO did not agree with the assessee's contention and added peak credit in the account of HSBC Geneva in assessee's income. The AO has made additions in the case of assessee.

12. Further, both these assesseees - Deepak Shah and Kunal Shah have paid taxes on the amount of addition to their respective computation of income. A summary of the taxes paid by them was also submitted to the AO for his consideration. However, AO did not agree with the assessee's contention and added peak credit in the account of HSBC Geneva in assessee's income. The AO has made additions in the case of assessee after taking cognizance of the fact that an addition of the same amount was made in the cases of Mr. Deepak Shah and Mr. Kunal Shah in their respective assessments by the Addl. Commissioner of Income Tax-16(2), Mumbai.

13. By the impugned order, CIT(A) deleted the addition by observing that assessee is indeed a non-resident u/s.6 of the Act and this fact has not been disputed by the AO. As per our considered view under the provisions of the Act, taxability of a non-resident is determined with reference to the provisions of section 5(2) read with section 9 of the Act. In the instant case undisputedly the assessee is a non-resident since 1979, as per the provisions of Section 6 of the IT Act. The scope of income in case of a non-resident is defined under the provisions of subsection (2) of section 5 of the Act. As per this section, a person who is a 'non-resident' has to pay tax only on that income which is either received or is deemed to be received by him in India, or accrues or arises or deemed to accrue or arise to him in India, during the year, therefore assessee will be liable to tax only in respect of income received or accrued to him in India. Further, section 9 of the Act, lays down the provisions relating to income which is deemed to accrue or arise in India. As the assessee Mr. Dipendu Shah was not having any of his business operations in India during AY 2006-07 and AY 2007-08, there is no income which has either deemed to accrue or arise in India under section 9 of the Act, Thus, the initial contribution or even other amounts in the foreign bank account mentioned by AO in the notice does not fall under the purview of section 5(2) read with section 9 of the Act'. Accordingly, assessee is required to be pass through aforesaid test of taxability of nonresident. It is a well settled position in law that a 'non-

resident', having money in a foreign country cannot be taxed in India if such money has neither been received or deemed to be received, nor has it accrued or arisen to him or deemed to accrue or arise to him in India.

14. Under section 5(2) the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. We also found that the assessee in his affidavit dated 13 October 2011 has clearly stated that he was a settlor of a trust outside India which he had created for the benefit of his family members with his initial contribution. Further, he has also stated that none of the discretionary beneficiaries have contributed any funds to the said trust. However, the content of this affidavit was nowhere declined by the AO nor was held to be not true. In view of the above, the assessee being a non-resident, having money in a foreign country cannot be called upon to pay income tax on that money in India unless it satisfies the tests of taxability of non-resident under the provisions of the Act, which in the instant case is not getting satisfied in the case of the assessee. Thus, the bank account of HSBC Bank, Geneva is outside the preview of this Act.

15. We found that CIT(A) as dealt with the issue threadbare and after applying judicial pronouncements laid down by High Court and Supreme Court reached to the conclusion that assessee being non-resident is not liable to tax in respect of money lying in the foreign country unless AO bring something on record to show that assessee has not fulfilled the test of taxability of non-resident under the provisions of the Act. The detailed finding so recorded by CIT(A) are as per material on record and do not require any interference on our part. 16. The CIT(A) also observe that a circumstantial evidence whenever used has to be conclusive in nature. Thus, the circumstantial evidences relied on by the learned AO nowhere lead to the conclusion that the amounts in the alleged foreign bank account are sourced from India. The CIT(A) also recorded a finding to the effect that the source of deposits is nowhere proved by the four instances relied on by the AO being termed as circumstantial evidence. The learned AO has himself observed based on the survey report dated 18 November 2011 that the assessee had retired from partnership of M/s Kanubhai B. Shah & Co. since October 1978. Also, the learned AO observed in the next para that the assessee became a non-resident as per section 6 of the Act since 1979 which is the year after which he retired from being the partner in the firm. Thus, the addition of undisclosed income of the firm M/s Kanubhai B. Shah & Co. during the FY 2011-12 has no connection with the assessee, as he was not a partner during this period. In the instant case, even it is seen that the bank account with HSBC Bank, Geneva was opened during the year 1997. Hence, the circumstantial evidences discussed above including the report of Indian express of 10 February 2015, relied by the learned AO nowhere conclusively establishes that the source of the deposits, since the inception, in the bank account was from India. In view of the above discussion, we do not find any infirmity in the order of CIT(A) for deleting the addition made in respect of deposits in HSBC Account, Geneva in the hands of non-resident assessee. Facts and circumstances in both the years are same.

16. The CIT(A) also observe that a circumstantial evidence whenever used has to be conclusive in nature. Thus, the circumstantial evidences relied on by the learned AO nowhere lead to the conclusion that the amounts in the alleged foreign bank account are sourced from India. The CIT(A) also recorded a finding to the effect that the source of deposits is no where proved by the four instances relied on by the AO being termed as circumstantial evidence. The learned AO has himself observed based on the survey report dated 18 November 2011 that the assessee had retired from partnership of M/s Kanubhai B. Shah & Co. since October 1978. Also, the learned AO observed in the next para that the assessee became a non-resident as per section 6 of the Act since 1979 which is the year after which he retired from being the partner in the firm. Thus, the addition of undisclosed income of the firm M/s Kanubhai B. Shah & Co. during the FY 2011-12 has no connection with the assessee, as he was not a partner during this period. In the instant case, even it is seen that 16. The CIT(A) also observe that a circumstantial evidence whenever used has to be conclusive in nature. Thus, the circumstantial evidences relied on by the learned AO nowhere lead to the conclusion that the amounts in the alleged foreign bank account are sourced from India. The CIT(A) also recorded a finding to the effect that the source of deposits is no where proved by the four instances relied on by the AO being termed as circumstantial evidence. The learned AO has himself observed based on the survey report dated 18 November 2011 that the assessee had retired from partnership of M/s Kanubhai B. Shah & Co. since October 1978. Also, the learned AO observed in the next para that the assessee became a non-resident as per section 6 of the Act since 1979 which is the year after which he retired from being the partner in the firm. Thus, the addition of undisclosed income of the firm M/s Kanubhai B. Shah & Co. during the FY 2011-12 has no connection with the assessee, as he was not a partner during this period. In the instant case, even it is seen that the bank account with HSBC Bank, Geneva was opened during the year 1997. Hence, the circumstantial evidences discussed above including the report of Indian express of 10 February 2015, relied by the learned AO nowhere conclusively establishes that the source of the deposits, since the inception, in the bank account was from India. In view of the above discussion, we do not find any infirmity in the order of CIT(A) for deleting the addition made in respect of deposits in HSBC Account, Geneva in the hands of non-resident assessee. Facts and circumstances in both the years are same.”

20. Coming to the case laws relied upon by the revenue. The Ld.DR has relied upon the decision of ITAT, Mumbai Bench in the case of Rahul Rajnikant Parikh in ITA No.5889/Mum/2016. We find that the case law relied upon by the revenue has no application to the facts of the assessee’s case, as in the said

case, the Tribunal has not laid down any ratio. The matter was set aside to the file of the AO by consent of both the parties. It is a settled law that a judgement / order delivered by consent has no precedential value. Even otherwise, the taxpayer in the said case had business connections in India by way of being a partner in partnership firms. Under those facts, the Tribunal has set aside the issue to the file of the AO for further examinations on the request of both the parties. Admittedly, in this case, the assessee is a non resident and he does not have any business connection / interest in India. Therefore, the case law relied upon by the Ld.DR cannot be applied to the facts of the present case.

21. In this view of the matter and considering the ratios of the case laws discussed above, we are of the considered view that the AO was erred in making addition towards deposits found in HSBC Bank account, Geneva u/s 69 of the Act. The Ld.CIT(A), after considering relevant facts, has rightly deleted addition made by the AO. We do not find any error or infirmity in the order of Ld.CIT(A). Hence, we are inclined to uphold the findings of Ld.CIT(A) and dismiss the appeal filed by the revenue.

22. In the result, the appeal filed by the revenue is dismissed.

ITA No.4680/Mum/2016 – 2007-08

23. The facts and issues involved in this appeal are identical to the facts and

issues which we have already considered in ITA No.4679/Mum/2016. The reasons given by us in preceding paragraphs shall mutatis mutandis apply to this appeal also. Therefore, for the details reasons given therein in ITA No.4679/Mum/2016, we decide the issue in favour of the assessee and against the revenue.

24. In the result, appeal filed by the revenue is dismissed.

Cos No.58 & 59/Mum/2018

25. The assessee has taken a legal ground in its cross objections on the issue of validity of reopening of assessments for both the assessment years. Since we have already decided the issue on merits in favour of the assessee and against the revenue, the cross objections filed by the assessee challenging validity of reopening of assessments becomes academic in nature. Therefore, the same are dismissed, as infructuous.

26. As a result, both the appeals filed by the revenue and the cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 16th November, 2018.

Sd/-

sd/-

(Pawan Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 16th November, 2018

Pk/-

Copy to :

1. Appellant
 2. Respondent
 3. CIT(A)
 4. CIT
 5. DR
- /True copy/

By order

Asstt. Registrar, ITAT, Mumbai