IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 107 OF 2017
WITH
INCOME TAX APPEAL NO. 108 OF 2017
INCOME TAX APPEAL NO. 110 OF 2017
INCOME TAX APPEAL NO. 121 OF 2017
INCOME TAX APPEAL NO. 122 OF 2017
INCOME TAX APPEAL NO. 150 OF 2017
INCOME TAX APPEAL NO. 218 OF 2017

Pr. Commissioner of Income Tax -15 .. Appellant

Versus

Binod Kumar Singh .. Respondent

.....

- Mr. Suresh Kumar for the Appellant
- Mr. R. Murlidhar a/w Mr. B.G. Yewale i/by Rajesh Shah & Co for the Respondent

.....

CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.

DATE : APRIL 22, 2019.

P.C.:

1. These appeals involve the same assessee and involve identical issues. For convenience, we may refer facts from Income Tax Appeal No. 107 of 2017.

2. This appeal is filed by the Revenue to challenge the judgment of the Income Tax Appellate Tribunal, Mumbai ("the

Tribunal" for short) dated 18.12.2015. Following questions are presented for our consideration:-

(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that the assessee was not an ordinary resident without appreciating that the amendment brought in Section 6(6) by the Finance Act, 2003 w.e.f. 1.4.2004 was clarificatory in nature and had to be given retrospective effect as communicated by the Circular No. 7 of 2003 issued by the CBDT?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in deleting the addition of Rs. 41,71,89,166/- made u/S. 68 on the ground that the assessee is a not an ordinary resident and the amount found deposited in the foreign bank is not taxable in India without appreciating that the provisions of Section 68 of the Income Tax Act, 1961 required the assessee to establish the source & nature of the funds transferred from the foreign bank accounts to the Indian Bank Accounts?

(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in upholding the order of the CIT(A) deleting the addition of Rs. 5,60,00,000/- made u/S. 69 on the ground that the assessee is not an ordinary resident and all money earned overseas are not taxable in India and the source of the investment is established?

3. It is undisputed position that only if the Revenue succeeds in Question No. (a), Question Nos. (b) and (c) shall become relevant. We have, therefore, concentrated our

attention to the first question. The question arose in relation to the respondent - assessee who is an individual for the assessment year 2006-07. The question was whether the assessee, for the purpose of said assessment year a resident of India?. This question would have to be answered in the context of provisions contained in Section 6 of the Income Tax Act, 1961 ("the Act" for short) pertaining to residence in India. Sub-section (1) of Section 6 reads as under:-

> "(1) An individual is said to be resident in India in any previous year, if he—
>
> (a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or
>
> (b) [***]
>
> (c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.
>
> [Explanation. 1—In the case of an individual,—
>
> (a) being a citizen of India, who leaves India in any previous year [as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or] for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;
>
> (b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of Section 115C, who, being outside India, comes on a

visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted.]

[Explanation 2.—For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.]"

4. The Assessing Officer having held that the assessee was the resident of India, the CIT(A) and the Tribunal reversed the order of the Assessing Officer. The Commissioner in the appellate order carried out detail examination of the facts on record. He also discussed the concept of the visit of a person to India. The Tribunal, while confirming such view of the CIT(A), further examined the relevant facts. Before referring the said facts, we may take note of the provisions contained in Section 6(1) of the Act. As per this provision, an individual would be stated to be a resident in India in any previous years, if [by virtue of clause (a)], he is in India in that year for a period or periods amounting in all to one hundred and eighty two days or more ; or [by virtue of clause (c)], he having within the four years preceding that year been in India for a period or periods, amounting in all to three hundred sixty five days or more and

is in India for a period or periods amounting in all to sixty days or more in that year. Clause (b) of Explanation 1 below Section 6(1) of the Act, however, clarifies that in case of an individual being a citizen of India, or a person of Indian origin, who being outside India, comes on a visit to India in any previous year, the reference towards sixty days in sub-clause (c) would be substituted by one hundred eighty two days.

5. In plain terms, by virtue of Section 6(1) of the Act, an individual would be said to be a resident in India if he satisfies the requirement contained in clause (a) or clause (c). Requirement of clause (a) is that the person should have been in India during the relevant previous year for a period not less than 182 days. Clause (c) would require that he was within the country for not less than 365 days in four preceding years and has been in India for 60 days or more in the current year. This requirement of 60 days would be substituted by 182 days if he is an Indian citizen or a person of Indian origin and has come on a visit to India.

6. In the background of such provision, the Tribunal on material on record came to factual finding that the assessee was in India during the previous year relevant to the assessment year in question for 173 days. This factual finding is unassailable. In that view of the matter, clause (a) of Section 6(1) would not apply. It is true that in absence of clause (b) of Explanation 1 below Section 6(1) of the Act, the assessee would have fulfilled the requirements of clause (c) of Section 6(1). However, as per the explanation, if the assessee comes to a visit in India, the requirement of stay in India in the previous year would be 182 days and not 60 days as contained in clause (c). It is, in this respect, the Tribunal had taken a note of relevant facts more minutely. Such facts were that the assessee who was born in India in the year 1960, after completing his higher education went to Soviet Union for further education in engineering. From 1978 to 1984, he persuaded his Masters in Engineering in Radio Technology. He also did post graduation in Russian language. From 1984 to 1986, he had worked in trading pharma company in USSR. From the year 1986-1987, he did his business management from Sweden. He again worked in a

trading pharma company. Between 1989 to 1995, he had worked in Ukraine after which he set up his own business in pharmaceutical sector primarily in Russia, Ukraine and CIS countries for which purpose he had set up a trading house at Ukraine. He had acquired immovable property in Ukraine in 1995 and 1997. The assessee had permanent resident status in Ukraine till 2002. After that along with his family, he shifted to England but continued his business interest in Ukraine, Russia and CSI Countries. The assessee had acquired properties in Ukraine but continued his business interest as earlier.

7. These facts would demonstrate that the assessee had migrated to a foreign country where he had set up his business interest. He pursued his higher education abroad, engaged himself in various business activities and continued to live there with his family. His whatever travels to India, would be in the nature of visits, unless contrary brought on record. We do not find that the Tribunal, therefore, committed any error.

8. Learned counsel for the Revenue submitted that Section 6(6) of the Act has been amended by virtue of Finance Act of 2003 and this amendment is declaratory in nature. We need not go into this issue because in our opinion, Section 6(6) of the Act has no relevance. The question in the present case is not whether the assessee is "not ordinary resident" of India. The question is during the previous year relevant to the present assessment year, whether he was a resident in India which question must be answered with reference to sub-section (1) of Section 6 of the Act.

9. Before concluding, we may notice that in some of the appeals, Revenue has raised additional question as to the date of the travel outside India should be included as a day of resident in India or not. This question would be academic since even after inclusion of the said day, the assessee would not cross the minimum 182 days required for his residence in India.

10. In view of above, the appeals are dismissed.

[SARANG V. KOTWAL, J.] **[AKIL KURESHI, J]**

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,बी,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री राजेश कुमार, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Rajesh Kumar, Accountant Member

ITA NOs.4596 to 4598/Mum/2012
Assessment Years- 2007-08 to 2009-10

DCIT, CC-40, Room NO.653, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	**बनाम**/ Vs.	Mr. Binod Kumar Singh, 9th Floor, Opp. Asian Paints, LBS Marg, Bhandup, Mumbai-400078
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		PAN. No.AMXPS1998L

Cross Objections Nos.148 to 150/Mum/2013
(Arising out of ITA NOs.4596 to 4598/Mum/2012)
Assessment Years- 2007-08 to 2009-10

Mr. Binod Kumar Singh, 9th Floor, Opp. Asian Paints, LBS Marg, Bhandup, Mumbai-400078	**बनाम**/ Vs.	DCIT, CC-40, Room NO.653, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AMXPS1998L		

ITA NOs.5530 to 5532/Mum/2012
Assessment Years- 2003-04 to 2005-06

DCIT, CC-40, Room NO.653, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	**बनाम**/ Vs.	Mr. Binod Kumar Singh, 9th Floor, Opp. Asian Paints, LBS Marg, Bhandup, Mumbai-400078
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		PAN. No.AMXPS1998L

Cross Objections Nos.212 to 214/Mum/2013
(Arising out of ITA NOs.5530 to 5532/Mum/2012)
Assessment Years- 2003-04 to 2005-06

Mr. Binod Kumar Singh, 9th Floor, Opp. Asian Paints, LBS Marg, Bhandup, Mumbai-400078	**बनाम**/ Vs.	DCIT, CC-40, Room NO.653, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AMXPS1998L		

ITA NO.6143/Mum/2012
Assessment Year- 2006-07

DCIT, CC-40, Room NO.653, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	**बनाम**/ Vs.	Mr. Binod Kumar Singh, 9th Floor, Opp. Asian Paints, LBS Marg, Bhandup, Mumbai-400078
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		PAN. No.AMXPS1998L

Cross Objections No.267/Mum/2013
(Arising out of ITA NO. 6143/Mum/2012)
Assessment Years- 2006-07

Mr. Binod Kumar Singh, 9th Floor, Opp. Asian Paints, LBS Marg, Bhandup, Mumbai-400078	**बनाम**/ Vs.	DCIT, CC-40, Room NO.653, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AMXPS1998L		

राजस्व **की ओर स**े / Revenue by	Shri N.P.Singh CIT-DR
निर्धारिती **की ओर स**े / Assessee by	Shri Jitendra Sanghvi & Shri Amit Khatiwala

सुनवाई की तारीख / **Date of Hearing :**	**29/10/2015**
आदेश की तारीख /**Date of Order:**	**18/12/2015**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

This bunch of fourteen appeals are by the Revenue including cross objections by the assessee against separate orders of different dates by the ld. First Appellate Authority, Mumbai. First we shall take up appeal for A.Y. 2008-09 (ITA No.4597/Mum/2012), wherein, first ground raised by the Revenue pertains to deleting the addition of Rs.57,40,09,054/- by the ld. First Appellate Authority by holding the status of the assessee as "non-resident" without appreciating that clause-(b) of Explanation to section 6(1)(c) is not applicable to the case of the assessee and further even if the assessee is treated as NRI, then also, there is need to analyze the taxability of income as an NRI in the light of section 5 and section 9 of the Income Tax Act, 1961, (hereinafter the Act). The issues involved in all the appeals were argued to be identical.

2. During hearing, of this appeal, the ld. CIT-DR, Shri N.P. Singh, advanced arguments, which is identical to the ground raised by contending that search action u/s 132 of the Act was carried out on 15/05/2008. The ld. CIT-DR also contended that the issue involved in all the assessment years is identical. It was pointed out that assessee is a resident and original passport was never produced by the assessee before the Assessing Officer. It was fairly agreed by the ld. CIT-DR that assessee was frequently going abroad and original passport was claimed to be lost. It was pleaded that

there is contravention of Rule 46-A of the Rules by the ld. Commissioner of Income Tax (Appeals) but when questioned by the Bench and also objected by the assessee, it was again agreed that remand report was sought from the Assessing Officer by the ld. Commissioner of Income Tax (Appeals). Our attention was invited to section 6 of the Act by placing reliance upon the decision in 300 ITR 231 (SC). However, necessary enquiries were made by the Assessing Officer. Reliance was further placed upon the decision in 259 ITR 486 (SC). The crux of argument advanced by ld. CIT-DR is that the passport was not produced. At this stage, Shri Jitendra Sanghavi along with Shri Amit Khatiwala, the ld. counsel for the assessee, intervened and explained that passport was duly produced by the assessee by inviting our attention to page-18 of the paper book. It was fairly agreed by the ld. CIT-DR that in A.Y. 2005-06, the assessee was assessed as non-resident by the Assessing Officer. It was further claimed by the ld. CIT-DR that the evidence produced by the assessee are not relevant to the facts of the case and even the banks, while opening the NRE account may or may not see the passport and other documents.

2.1. On the other hand, the ld. counsel for the assessee, Shri Jitendra Sanghavi along with Shri Amit Khatiwala, defended the conclusion arrived at in the impugned order, firstly, inviting our attention to letter dated 09/02/2011, modifying the grounds and statement of facts. Assessee also filed additional evidence before the ld. Commissioner of

Income Tax (Appeals) on which remand report was sought twice from the Assessing Officer as such additional evidence was filed from time to time by the assessee. It was pointed out that the Addl. CIT as well as the Assessing Officer, both were present before the ld. First Appellate Authority for which our attention was invited to page -1 of the impugned order evidencing the presence of both the officers. It was explained that for getting the status, the period of stay should be 182 days. It was pleaded that the assessee remained out of India for 187 days. The ld. counsel pointed out that the assessee is Managing Director of a Company, a non-resident so the global income cannot be assessed in India and the addition was deleted by the ld. Commissioner of Income Tax (Appeals) by confronting the factual position to the Assessing Officer and based upon evidence. It was explained that the amount was sent through banking channel and no addition can be made when the assessee is a non-resident Indian. The ld. counsel further asserted that when a bank account is opened by the bank, every document is examined including FEMA conditions, status and the accounts are not opened in a casual manner. Our attention was invited to page-18 of the impugned order by asserting that the addition was deleted based upon the evidence and not in a slip short manner as has been alleged by the ld. CIT-DR. It was explained that the date of arrival and departure are to be excluded while counting the period of stay for which reliance was placed upon the decision in DIT vs Manoj Kumar Reddy Nare (2011) 245 CTR 350 (Karn.); (2011) 12 taxman.com 326 (Karn.)

order dated 20/06/2011 and ITO vs Fausta C. Cordeiro (2012) 24 taxman.com 193 (Mumbai) order dated 29th June, 2012. The ld. counsel for the assessee also consented that the issue involved in all the appeals are identical.

2.2. We have considered the rival submissions and perused the material available on record. These appeals contains identical issues, were heard together, therefore, being disposed of by this common and consolidated order for the sake of brevity and convenience. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsels, if kept in juxtaposition and analyzed, the facts, in brief, are that the assessee is a non-resident Indian (as per statement of facts filed by the assessee). Undisputedly, his non-resident status was accepted by the Department all along in past as is evident from A.Y. 2005-06. The assessee was regularly filed its return of income in his individual capacity in the status of the non-resident and was accepted as such while framing the assessment u/s 143(3) of the Act. The Assessing Officer after due examination of period of stay, accepted the status of the assessee as "non-resident" (A.Y. 2005-06). A search action u/s 132 of the Act was carried out in the case of the assessee by the DDIT(Investigation) on 15/05/2008, while the assessee was abroad, at the premises of the company and also of the Directors (Shri CMP Singh, Amit Kumar, Rajesh Soni, Dilip Kumar Bhagat), the assessee.

Consequent to the search, M/s Ganom Biotech Pvt. Ltd. (hereinafter in short GBPL) was also put to search. The cases of the present assessee (Mr. Binod Kumar Singh), his wife Ms. Sheila Singh, his daughter Ms. Trisha Singh were centralized and thus notice u/s 153A was issued on 24/07/2008 to the present assessee. The assessee, before the search, was assessed to tax in ward no.21(3)(1) Mumbai. He filed his return on 17/08/2008 for A.Y. 2008-09 in the said ward declaring income of Rs.93,41,381/-. In response to notice u/s 153A, he filed the return on 30/10/2008 declaring income of Rs.85,66,442/- for A.Y. 2008-09. It is noteworthy that, as per the Revenue, certain incriminating documents were found and seized. On examining of the documents, it was found that the company GBPL was operating in Ukraine, wherein, the company claimed huge amount of advertising and marketing expenses for marketing its products in that country. It was also found that payment towards these expenses were made to the companies based in Cyprus and UK. As per the Revenue, all these companies are controlled by Shri Binod Kumar, founder and CMD of GBPL and several rubber stamps of various companies/entities were also found in the companies premises during search. Shri Binod Kumar along with one of the Directors of GBPL, Mr. CMP Singh was examined on oath with respect to activities of the company. As per the Revenue, evasive replies were given by these persons and in the mid of investigation, Mr. Binod Kumar went abroad.

2.3. Before coming to any conclusion, we are reproducing hereunder the relevant finding of the ld. Commissioner of Income Tax (Appeals), contained in the impugned order. The written submissions, though are part of the impugned order, but still we are reproducing the same for ready reference for reaching to a proper conclusion:-

> *"3.The facts as mentioned in the statement of facts and reiterated in the written submissions are as under:-*
>
> *Shri Binod Kumar Singh Slo Late Shri M P. Singh an Indian Citizen was born in India on 14.11.1960. After having completed his Higher Secondary Education at St. Xavier's College, Ranchi, Jharkhand, in 1978, was selected by the public sector undertaking MIs Heavy Engineering Corporation Ltd. Ranchi and sent to Soviet Union for further education. After completing the Russian language course at Lomonosova Institute at Kiev in 1978-79, the appellant secured admission at the "Odessa Polytechnic Institute" Ukraine in 1979, wherein he pursued his studies in Master of Engineering in Radio Technical Engineering. After having passed out from the aforesaid institute in 1984, the appellant did a short stint of working in a trading Pharma Company in Soviet Union. From 1989 to 1995 he worked in a trading company in Ukraine.*
>
> *He, thereafter, he set up his business of a trading House in the Pharmaceutical Sector in Russia, Ukraine and CIS Countries under the name of "Trigram International" The business venture was successful and consequently the appellant acquired residential properties in Ukraine in 1995 and 1997 The appellant continued to maintain permanent residence in Ukraine conducting business therein and then in Cyprus etc till he shifted to UK in late 20021 early 2003, even though his business interests continued in Ukraine! CIS countries.*
>
> *The appellant along with his family shifted residence to England, though his business interest continued in Ukraine, Russia, CIS Countries. Initially he was residing at 3 Civic Way, ilford, Essex, UK which was purchased in FY 2002-2003. Thereafter he shifted to other residential premises which were acquired in A Y 2005-06 at Rusden Gardens, Ilford, Essex, UK and ultimately at 9, Hadrian Way, Chillworth, Southampton, UK purchased in A Y2008-09.*
>
> *That despite having shifted the place of residence to UK, the appellant continued to retain his investments in Ukraine as no substantive business*

was being conducted in UK and the primary source of income abroad was through the business venture / investments made in Russia, Ukraine, CIS Countries and Cyprus.

Sr. No.	Passport No.	Place of Issue	Validity	Remarks
1.	R-691005	UKRAINE/KIEV	30/06-94-31/08/98	Filed as additional evident
2.	U-925810	UKRAINE/KIEV	Additional Booklet to Passport NO.R-691005 issued on 04/08/1997	Filed as additional evident
3.	U-925873	UKRAINE/KYIV	Additional Booklet issued on 22/01/1998-18/06/2001	Original Passport misplaced
4.	A-1280977	UKRAINE/KYIV	19/06/2001-21/01/2008	Additional Booklet to Passport NO.R-691005 issued on 04/08/1997 as additional evidence
5.	Z-1023527	UKRAINE/KYIV	14/05/2003-21/01/2008	Produced before AO
6.	Z-1023527	UKRAINE/KYIV	23/08/2006-10/08/2006	Produced before AO

The appellant produced the original passports bearing nos. Z-1023527, Z-1023582, during the course of assessment proceedings. The original passport bearing No U 925873 for the period 22.1.1998 to 18.6.2001 was not traceable could not locate the same.

The appellant with a desire to set up and make investments in India started a Pharmaceutical Company under the name and style of "Brahma Drugs Pvt. Ltd which was incorporated in AY 1999- 00. Thereafter "Genom Biotech Pvt. Ltd." was incorporated in 2001-02 having its manufacturing plant at MIDC Sinnar, Nasik (India) and its Registered Office at A- 601 / 602, Delphi, Orchard Avenue, Hiranandani Business Park, Powai, Mumbai.

The aforesaid investment as also the investments made in acquiring various real estate properties in India were through remittances from Overseas. The investments in India in the Stock Exchange through Demat Accounts were all classified as non-resident.

The Period of stay of the assessee in India as computed and verifiable from the original passports, as presently available, detailed ac under:-

A.Y.	*F.Y.*	*Days outside India*	*Days in India*	*Residential Status*	*Remarks*
1995-96	*1994-95*	*337*	*28*	*Non Resident*	
1996-97	*1995-96*	*306*	*59*	*Non Resident*	
1997-98	*1996-97*	*337*	*28*	*Non Resident*	
1998-99	*1997-98*	*346*	*19*	*Non Resident*	*Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present. No. of days computed for the period 1st April 1998 to 31st August 1998.*
1999-00	*1998-99*	*N.A.*	*N.A.*		*Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present*
2000-01	*1999-00*	*N.A.*	*N.A.*		*Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present*
2001-02	*2000-01*	*N.A.*	*N.A.*		*Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present*
2002-03	*2001-02*	*215*	*150*		*Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present*
2003-04	*2002-03*	*206*	*159*	*Non Resident (As per section 6(1)(c) read with explanation (b)*	*Period computed from original passport*
2004-05	*2003-*	*261*	*104*		*Period computed*

	04			*Non Resident (As per section 6(1)(c) read with explanation 'b'*	*from original passport. Stayed in India for less than 182 days for each previous year and continuously resident abroad.*
2005-06	*2004-05*	*187*	*178*		
2006-07	*2005-06*	*223*	*142*		
2007-08	*2006-07*	*265*	*100*		
2008-09	*2007-08*	*188*	*177*		
2009-10	*2008-09*	*288*	*77*		

The Banking Accounts in the name of the appellant and all family were all classified as non-resident detailed as under:-

1	*013-055678-006/0074/008 (NRE/NRO/PI)*	*HSBC BANK Plot No.3/1, Eden Square NS Road, No-10, JVPD, Scheme Juhu Vile Parle(W), Mumbai-400049*	*29, Rushden Gardens, Ilfor City, Essex, UK, IG50BP*
2	*246010100129879/ 246010100125772 (NRO/NRE)*	*AXIS BANK LTD Shop No.17 & 18, Gr. Flr. Ventura Bldgs, Hiranandani, Business Park, Powai, Mumbai-400076*	*9 Hadrian way, Chilworth, Southampton, SO 16 7HZ*
3	*NJSB000052146 (NRE)*	*Canara Bank New Marine Lines, Mumbai-400020*	*STR STARONAVODNITSKAY A 6A, FLAT NO.44, KYIV, UKRAINE*
4	*10000019132/10000017974 (NRE/NRO)*	*State Bank of India PBB*	*STR STARONAVODNITSKAY*

		Hiranandani, Hiranandani Complex, Powai, Mumbai	*A 6A, FLAT NO.44, KYIV, UKRAINE*
5	*01191083075 (SB)*	*State Bank of India Satpur Industrial Area h Nashik*	*C/o TRIGRAM UKRAINE*
6.	*009013100016996 (SB)*	*Bank of India S.S. I-Andheri (E) Branch, Mathuria Apts., 49, .M.V. Road, Andheri (E), Mumbai-400069*	*VOROBIEVY GORY PLOT NO.02, FLOOR 38, STREET, MOSFILNOVSKAYA, MOSKOW, RUSSIA,*
7.	*010613100001157 (NRE)*	*Bank of India Mumbai Corporate Banking Branch Fort-Mumbai*	*STAR-STARONAVODNITSKAYA 6-A, FLAT NO.44, KYIV, UKRAINE.*

The particulars of all immovable properties purchased and owned by him in India and abroad are detailed as under:-

Sr. No.	*Particulars of Property*	*Date of Acquisition*	*Cost*	*Source of Investment*
1	*50% share in House Jamuna Apartment, Flat No.92, Boring Road, P.S. S.K. Puri, Patna-13*	*14/09/1992*	*2,00,000/- (share of A-Rs 1,00,000/-)*	*Remittance from abroad*
2	*Flat No.44, House No. N-6A, Staronavodnytskaya Street apt. 44 KYIV Ukraine)*	*09/06/1995*	*7500000/- (Seven hundred fifty million karbovantes)*	
3	*50% share in House-Flat No.118, Building No.102, Silver Oaks Apartments,D.L.F Qutub Enclage-1, Gurgaon*	*18/11/1996*	*Rs.15,03,260/-*	*Direct Remittance from abroad*
4	*Flat no.43, House No.N-6A Staronavodnytskaya Street apt. 44 KYIV*	*25/04/1997*	*200/two hundred grivnyas*	

	Ukraine)			
5	*B-603/A, & B-603/B Valencia, Hiranandani Gardens, Powai, Mumbai*	*19/03/1998*	*B-603/A Rs.36,76,160, B-603/B Rs.22,76,040/-*	*Loan from HDFC Bank Ltd. Rs.50,00,000/- balance Direct Remittance from abroad*
6	*Residential house in U K at 3 Civic Way, Ilford, IG6 1HF in joint name of Binod Singh & Mrs. Sheila Singh*	*02/09/2007 (correct dated is 31/03/2003*	*1,44,995/- GBP (Rs.1.25 crores approx)*	*Partly thru loan by mortgage (Addition made in 2008-09 is incorrect*
7	*Tivoli, Flat No. A-2702, B-2702, C-2702, D 2702 (amalgamated) Hiranandani Gardens Near Hiranandani Business Park, Powai, Mumbai*	*02/03/2004*	*A-2702, B-2702, C-2702, D-2702 Total- 2,61,60,966/-*	*HSBC Loan Rs.1,91,00,000 & Balance SBI NRO & HSBC Rs.21,00,000/-*
8	*Office premises-Delphi, 601 & 602 (amalgamated), Hiranandani Business Park, Hiranandani Gardens, Powai, Mumbai*	*25/05/2004*	*601- 1,36,99871/- 602/- 1,37,24,917/- (Joint with Company)*	*HDFC Loan Rs.3.50 cr. And Direct Remittance from abroad*
9	*Residential house at Rusden Gardens, Ilfort Essex IGS OBP*	*20/07/2004*	*GBP 2,84,000/- (Rs.2.50 crore approx)*	*Partly thru loan by mortgage*
10	*Residential house in USA at 32, Sand Stone Road, East Windsor, NJ08520*	*Sept,2005*	*USD 419,800/- (Rs.2 crores approx)*	
11	*Office Premises No.604 & 605 (amalgamated) Powai Plaza-2, Hiranandani Business Park, Hiranandani Gardens, Powai, Mumbai*	*20/02/2006*	*Office Premises given on lease basis 605 & 604- Rs.3,03,14,999/-*	*Centurian Bank Loan Rs.2,10,00,000/- & Rs.66,97,424/- from GBPL Rs.26,17,575/- from HSBC NRO and NRE A/c*
12	*Residential house in UK-at Hadrian Way, Chilworth, Southampton, SO 16 7HZ in joint name of Binod Singh & Mrs. Sheila Singh*	*30/08/2007*	*GBP7,75,000/- (Rs. 7 crores approx)*	*Partly thru loan by mortgage*

13	*Flat No.1905/2C, 1906/2C;1806/4A, 1906/4A;1906/4B, Station Road, LBS Marg, Bhandup, Mumbai*	*29/11/2007*	*Total cost of Five flats Rs.2,33,77,745/-*	*Rs.2,00,00,000/- was financed by DHFL & Balance from HSBC NRO & NRE A/X*

The appellant was regularly filing return of income in his individual capacity in the status of a non-resident and was duly assessed u/s 143(3) of the Act vide Order dated Novem ber 30, 2007 in respect of A Y 2005-06 The AO, after due examination of the period of stay, accepted the status of non-resident as declared by the assessee and no incriminating documents found during search which would warrant a change of opinion.

The Income Tax Authorities conducted a search operation u/s 132(1) of the Income Tax Act, 1961 on May 15, 2008 while the appellant was abroad. The search was conducted in the names and on the premises detailed under:-

(a) *Shri Binod Singh, Shri CMP* ***Singh,*** *2702, Tivoli, Hiranandani Gardens, Powai, Mumbai.*

(b) *Genom Biotech Pvt. Ltd. A-504, 601, 602 & 604 Delphi, Orchard Avenue, Hirandani Gardens, Powai, Mumbai.*

(c) *Genom Biotech Pvt. Ltd. MIDC, Malegaon, Sinnar, Nasik.*

(d) *S/Sh. CMI' Singh, Amit Kumar, Rajesh Soni, Diip Kumar Bhagat, (all Directors of the Company) 4A / 1806, Dreams Co-op. Housing Society, Bhandup (West) near Railway Station, LBS Marg, Mumbai.*

2.1 During the course of the search, there was no seizure of assets.

However, certain documents were seized though none of them were incriminating and have not been used for making any addition.

Notice u/s 153A & 143(2) of the Income Tax Act were issued by the AO and duly served

Sr. No.	***A.Y.***	***Date of issue/Service of Notice u/s 153A***	***Date of Issue/Service of Notice u/s 143(2)***
1	***2003-04***	***24/07/2008***	***17/11/2008 / 18/11/2008***
2	***2004-05***	***24/07/2008***	***17/11/2008 / 18/11/2008***
3	***2005-06***	***24/07/2008***	***17/11/2008 / 18/11/2008***
4	***2006-07***	***24/07/2008***	***17/11/2008 / 18/11/2008***
5	***2007-08***	***24/07/2008***	***17/11/2008 / 18/11/2008***
6	***2008-09***	***24/07/2008***	***17/11/2008 /18/11/2008***
7	***2009-10***	***NIL***	***27/04/2010 / 12/05/2010***

The period of stay of appellant in India as computed and verified from original passports for A.Y.'2007-08 to 2009-10 as accepted by the AO in the Original assessment order is as under:-

Date of arrival –Dt. of departure as per immigration seal	*Previous Year*	*No. of days in India*	*Page no. in the Original passport*
01/04/06-13/04/06	*2006-07*	*13*	*Pg.52*
22/10/06-06/11/06		16	Pg.04 & Pg.04
05/12/06-09/01/07		36	Pg.03 & Pg.07
25/02/07(arr)-31/03/07		35	Pg.07
		100	
01/04/07-18-04-07(dep)	*2007-08*	18	Pg.03
27/04/07-13/05/07		17	*Pg. 08 & Pg.08*
08/07/07-11/08/07		35	*Pg.09 & Pg.09*
19/08/07-16/09/07		29	*Pg.03 & Pg.09*
13.0108(arr)-31/03/08		79	*Pg.13*
		178	
01/04/08-08/04/08(dep.)	*2008-09*	08	*Pg.31*
23/05/08-16/06/08		25	*Pg.31 & Pg.32*
02/011/08-13/11/08		12	*Pg.32 &14*
13/12/08-04/01/09		23	*Pg.03 & Pg. 04*
20/03/09(arr) 31/03/2009		12	*Pg.04*
		80	

Pursuant to notice u/s 153A of the Act, the appellant filed its return of income in the status of a Non- Resident Indian, declaring the income of Rs. 1,98,911/- as against the income of Rs. 15,8001- declared in the return filed u/s 139 of the Income Tax Act, 1961,

The AO has framed an assessment u/s 153A read with Section 143(3) dated December 16, 2010 for the A Y 2007-08 in the status of resident determining the taxable income of Rs.

19,82,67,9141- as against the status of non-resident with a declared income of Rs. 1,98,911/- resulting in an addition of Rs. 19,80,69,0031-. While framing the order, the A 0 has recorded findings as under;-

A. Status:

Held that clause (b) of explanation to Section 6(1)(c) is not applicable to the appellant.

Held that nothing was brought on record to indicate that the appellant is permanently domiciled in UK despite documentary evidence having been filed.

Held that the appellant is a resident and ordinarily resident in India liable to pay tax on global income.

B. Additions u/s 68 of the Income Tax Act,1961

1	Alleged unexplained deposits in India Bank A/C's through Remittances from abroad.	Rs.17,06,95,475 /-
2	Alleged unexplained Remittances from Overseas to Genom Biotech Pvt. Ltd.	Rs.93,47,871/-
3	Alleged unexplained deposits in Bank A/c's maintained abroad	-Rs.1,72,24,053/-
4	Alleged unsubstantiated liabilities	Rs.7,91,604/-
	Total	**Rs.19,08,69,003/-**

The appellant filed combined written submissions for the AY's 2003-04 to 2009-10 along with paper book thereof, copy of which was forwarded to the AO for his comments.

The AO furnished his comments by way of Remand Report dated October 17, 2011 and in respect of residential status stated "During assessment proceeding regarding residential status the assessee furnished copies of the passport along with the details of no. of days of stay in India. The Assessing Officer have already discussed residential status of the assessee in details in the Assessment Order which reveals that the status of the assessee is "resident and ordinarily resident' and not as 'non-resident' as claimed by the assessee. No further verification is required in the above ground".

That during the course of appellate proceedings the appellant

filed the petition for additional evidence on November 11,2011 in terms of Rule 46A of the Income Tax Rules, 1962, along with a paper book containing *75* pages, constituting the additional evidence. The said additional evidence, inter alia contained evidence in respect of:-

Stay in UK comprising of telephone/utility/credit card statement of UK, children, undergoing education abroad

Copy of tax return filed in UK relating to rental income Sources of investment in India including FIRC,

Certificates to establish deposits in banks in India, Genome Biotech Pvt. Ltd.

Confirmation *from* Lakeview Developers, Abhishek Kumar, Rajesh Jha and confirmation of regarding transfer of shares.

The copy of petition along with the aforesaid paper book containing the evidence was forwarded to the AO for his examination, verification and submitting report thereon. The AO has submitted his interim report dated March 22, 2012 and final report dated April 3, 2012 confirming that the interim report be treated as Final. The AO in brief has in his report stated as under:-

(a) The appellant has not filed the copies of passport *no.U-925873* and has also not produced the original passport bearing nos.U-925873, A-1280977, Z-1023527 and Z-1023582 during the remand proceedings, despite, being asked to produce the same.

(b) The AO in term of section 133(6) of the Act, sought information from FRRO, Mumbai, FRRO Delhi and Central Foreigners Bureau Delhi. While, FRRO Delhi and Central Foreigners Bureau Delhi have sent the details for the whole period, FRRO Mumbai has given details of arrival/ departure only after November 20, 2005. The AO on the basis of the information received from the said agencies and as per the passport has re-computed the period of the stay of the appellant in India. The relevant excerpts from the information in the table submitted in the report for the AY 2007-08 to 2009-10 is as under:

Dt. Of arrival	Date of departure	No. of days in India	(Passport No) and Remarks	No. of days as per assessee
F.Y.2006-07				
01/04/06	13/04/06	13	Z-1023527	12
22/10/06	06/11/06	16	Z-1023582	15
05/12/06	09/11/07	36	Z-1023582	35
25/02/07	31/03/07	35	Z-1023582	34
120 DAYS TOTAL TO READ 100 DAYS				**96**
F.Y.2007-08				
01/04/07	18/04/07	18	Z-1023582	17
27/04/07	13/05/07	17	Z-1023582	16
08/07/07	11/08/07	35	Z-1023582	34
19/08/07	16/09/07	29	Z-1023582	28
31/01/08	31/03/08	79	(Z-1023582) As per assessee the no. of days of stay in India is 78. However, on calculation it is arrived at 79	
178 Days				**173**
F.Y.2008-09				
01/04/08	08/04/08	8	(Z-1023582) assessee arrived in India on 13/01/2008 and left on 08/04/08	7
23.05.08	16.06.08	25	(Z-1023582) As per assessee the no. of days of stay in India is 24. However, on calculation it is arrived at 25 days	24
02/11/08	13/11/08	12	(Z-1023582) As per assessee the no.of days stay in India is 11. However, on Calculation, it is arrived at 12 days	11
13/12/08	04/01/09	23	(Z-1023582) As per assessee the no.of days stay in India is 22. However, on Calculation, it is	22

			arrived at 23 days	
20/03/09	31/03/09	12	Z-1023582	11
Total				75

The appellant filed his written reply to the Remand Report submitting what he had stated during course of hearing on March 26, 2012, in which Shri U.N. Marwah, FCA counsel of the appellant and the AO were present.

Shri Marwah pointed out that the statement of the AO that the appellant had not produced the original passport nos. Z-1023527, A-1280977 was incorrect and in presence of the AO the original passports were again produced. The AO accepted this fact as he stated that he was referring to non-production of the original passports bearing nos.Z-1023582 and U925873. The pointed out that the passport no. Z-1023582 was produced in the assessment proceedings and was not produced during proceedings of additional evidence. The passport no.U-925873 relating to the period .....to 18.06.200 1 was misplaced and neither a copy nor the original could be produced.

The Counsel pleaded that the AO, pursuant to the petition for additional evidence was required to examine and submit his Remand Report with respect to the additional evidence sought to be admitted by the assessee under rule 46A. However, after receipt of the petition for additional evidence, instead of restricting the inquiry / investigation with respect to the additional evidence has unlawfully started re-examination of the status by making enquiries from FRRO Mumbai FRRO Delhi and Central Foreigners Bureau Delhi. The assumption of powers and jurisdiction under section 133(6) was not in accordance with law.

He submitted that the AO furnished a Remand Report dated 17th October, 2011 and in respect of residential status state "No further verification is required in the above ground".

The Counsel pleaded that the dates of arrival/ departure in /from India are correct, as per assessment order and accepted by the appellant, but period of stay in India, determined by the AO is incorrect as the AO has calculated the period of each visit by including both the date of arrival and departure which is not in accordance with law.

The first issue to be decided is whether the additional evidence filed by the appellant under Rule 46A should be admitted or not. The petition filed by the appellant containing 316 pages was furnished to the AO granting opportunity to examine the same and

the AO has submitted his report dated March 22, 2012.

The appellant has submitted that due to circumstances beyond his control, the old passports not being readily available with him, the same could not be filed. The appellant being resident abroad could not furnish the requisite information pertaining to the sources of investment in India, as the same was to be obtained from the banker and old information was not easily accessible.

The Counsel pleaded that the documents filed by the appellant go to the root of the assessment and are necessary for arriving at a judicious decision. He has cited the following judgments:-

CIT Vs Suretech Hospital And Research Centre Ltd (2007) 293 ITR 53 (Born)

The rule 46A of the 1962 rules allows the appellant authority to permit production of documents which enable him to dispose of the appeal Tribunal found that the documents produced were necessary for disposal of the appeal on the merits. However, before admitting the additional evidence, the CIT(A) has to give opportunity to the Assessing Officer to consider or cross examine or rebut the additional supporting evidence furnished by the assessee. In the following cases, the Courts had occasion to consider under what circumstances, the additional evidence can be entertained by the Appellate Authorities.

Electra (Jaipur)(P) Ltd Vs Inspecting Assistant Commissioner (Delhi) 26 lTD 236

Whether if evidence produced by assessee is genuine ,reliable and proves assessee's case ,then assessee should not be denied opportunity of it being produced even if he first time produces before appellant authority-held yes.

Smt .Prabhavati S.Shah Vs CIT (Born) 2311TR 1

Production of additional evidence -Assessee taking loans from 2 creditors -ITO treating loans as Income from undisclosed sources as summons could not be served on creditors - ITO treating loans as income from undisclosed sources as summons couldn't be served on creditors -Assessee wanting to genuineness of loan by relying on fact that amount borrowed and repaid be cheques-Assessee producing additional evidences but AAC refused to admit-AAC should have considered it -Matter Remanded.

ITO Vs Bajoria Foundation (Cal) 2541TR 65

Appeal CIT (A) -Powers of CIT (A)-Powers of CIT (A)-Power to admit additional evidence -Effect of sec *250* and rule 46A-No opportunity for trust to present evidence-CIT(A) justified in admitting the additional evidence.

3.20 Thus, having regard the submissions of the Counsel and the AO, and considering the report of the AO, I admit the additional evidence as submitted by the appellant as same goes to the root of the matter and is necessary for reaching a decision on the case.

4. Additional Ground:-

"That the Lid. A 0 has erred in computing the period of stay in India by including therein both the day of arrival and departure, as representing stay in India ".

The Counsel submitted that the day of arrival has to be excluded for calculating the number of days. For instance, if a person arrives on *10th* and leaves on F" the period would be one day and not two. The appellant drew support for this proposition from the case of *Manoj Kumar Reddy v ITO ITA T Bangalaore (2009) 34 SOT180, (2010) 132TTJ 328.* The Hon'ble members have relied upon the decision of the Hon'ble Delhi High Court in the case of *Praveen Kumar v Sunder Singh Makkar.* The Hon'ble High Court referred to Section 9 *of the General Clauses Act and held "if the word from is used then the first day in the series of days will stand excluded and if the word to is used then it will include the last day in a series of days or any other period of time".*

The Hon'ble Members observed that the period is to be counted from the date of arrival of the assessee in India to the date he leaves India. Thus, the word "from" and "to" are to be inevitably used for ascertaining the period though, these words are not mentioned in the statute. Accordingly, we hold that first day of each visit shall be excluded"

I have considered the submissions of the appellant and the order of the AO. The facts as mentioned in the case of the appellant are filly covered by the judgment as mentioned above which states that while the computing the period of stay of a person in India, the date of arrival is to be excluded. Accordingly, I hold that the period of stay in India of the assessee for the assessment years 2007-08 to 2009-10 shall be 96, 173 and *75* days respectively as against 100 days, 178 days & 80 days determined by the AG.

5. Ground No. l:

"1.1 That on facts and in law the Learned AO erred in framing an assessment u/s 143(3)1153.4 determining the status of the appellant as "resident" as against "non-resident" declared by the appellant and accepted as such in earlier years.

1.2 While determining the status of the appellant as "resident", the Learned A 0 has erred in..-

(i) Holding that clause (b) of explanation to Section 6(1)(c) is not applicable to the appellant.

(ii) Holding that the appellant has failed to discharge its onus of establishing that his stay in India during the year was less than 182 days.

(iii) Holding that the appellant was in fact permanently residing in India and undertook visits abroad.

(iv) Holding that nothing was brought on record to indicate that the appellant was permanently settled abroad.

1 7 *That while determining the status of the appellant as "resident and ordinarily resident' the Learned A. 0. has failed to consider the period of stay of the appellant in India in the preceding nine / seven years, nor appreciate the provisions of Section 6(6)."*

The AO has dealt with the issue relating to residential status at para 19 of order. TheAO has on the basis of the passport prepared a tabular chart stating the period of stay in India commencing from October 1, 2003 as the tort for the earlier period was not available.

The AO has mentioned that records at para D, Page 20 of the order states as under:-

"In this case under consideration for F.Y.'s 2002-03, 2001-02, 2000-01, 1999-00, no information has been submitted by the asses see, therefore in the absence of information his claim of NRI cannot be entertained."

Records at Para 1, Page 23 of the order states that "assessee can claim the benefit of relaxation provided in Explanation (b) only when it is established that the assessee is permanently domiciled abroad or due to certain reason he is being outside India comes to India only on visit. The word *"visitor"* as understood in common parlance is .....'meet a person'. When a person having his residence and place of work at a place comes and stays that place, he shall not be treated as a visitor. This

aspect is most strengthened by the fact that the assessee has his home and part of his family (Parents) in India. The business empire run by him is totally based in India. The Company's major activity of manufacturing and export activity is fully controlled by the Indian Territory. The assessee has no other source of Income except the business activity carried out by him from India. Therefore, the interpretation of the term "being outside India, comes on a visit to India" is relevant 'in the light of the facts. The assessee has not submitted any evidence to prove why he is being outside India and comes on a visit in India."

In Para E at Page 24 of the order mentions as under

"The assessee has furnished copies of certain documents .....school certificates of Ms. Trisha Singh (Daughter), Master Vyom Singh (Son), electricity bills, club cards, property documents . ..... how these documents are relevant for his claim of NRI status. The assessee has furnished a resident permit by UK in March 2009 .....assessee has not furnished any detail to prove that he was domiciled in UK from FY 2002-03 to 2008-09. It is also noticed that for the previous year 2004-05, the information furnished by the assessee regarding the no. of days of stay in India is incomplete as pointed out in the above said letter. (See at point no.3 of para no. 20(c) of this order). The assessee has only furnished the date of departure from India but has not furnished the date of arrival in India."In view of this, it is concluded that the assessee has failed to substantiate his claim of Non-Resident status. Therefore, the assessee claim is rejected and he is treated as Resident and Ordinarily Resident for the purpose of this AY.

Thus in brief (i) AO analysed the provisions of section 6(1)(c) and held that if a person stayed in India for more than 182 days or in preceding years the person is in India for more than *365* days and in that year for 60 days or more the individual will be treated as resident.

The AO did not have complete details in respect of the period of stay for financial year 2002-03, 2001-02, 2000-2001 and 1999-2000 and hence NRI status cannot be granted.

The AO also invited intention of the appellant to explanation B of section 6(l)(c).

The AO also held that the word Visitor means who comes and goes or meets a person but a person who has a residence and place of work in India cannot be treated as a visitor. The appellant has

residence, place of work, parents stay in India and have not submitted any evidence to prove that why he is being outside in India and comes on a visit to India. However, AO held that the relaxation is available to a person who is outside India and is not available to person who has permanent residence in India and also place of work. The visa of the appellant has captioned a 'Residence Permit' and is an investor visa read as "Tier I (Investor) Migrant. The date of issue of the visa is March 18, 2009.

The assessee has furnished copies of certain documents to support his claim that he was domiciled in UK during the financial year 2002-03 to 2008-09. The documents relate to school certificate of his daughter, son, electricity bills, club card and property documents. These do not establish the claim of NRI status.

That the facts as aforesaid were re-affirmed.

It was stated that only because information is not available in respect to AY 2000-2001 to 2002-03 (Information for 2003 - 04 has been furnished), it cannot be held that appellant is a resident. The appellant had filed its returns of income for AY 2000-01, 2001-02 & 2002-03 u/s 139 in status of NON-RESIDENT which have been accepted and stand assessed as such.

The attention was drawn to the fact that section 6 (1)(c) has cumulative condition with respect to presence in India in *365* days in four preceding years AND 60 days or more in that year. In the case of an Indian Citizen / PIO the period of 60 days is substituted by 182 days.

Thus, in case the period of stay is less than the stipulated no. of days, the other condition becomes irrelevant as both the conditions have to be satisfied.

The AO has while interpreting the provisions of section 6(1)(a)/6(1)(c) read with explanation b has admitted that the relaxation of extended time of 182 days is available to a citizen of India / person of Indian origin provided the said person is residing abroad and comes on a visit to India. He has despite furnishing evidence of residing abroad since over 20 years including evidence that every travel after 2002 commenced and ended in UK, foreign bank accounts specifying the address on which KYC was done, borrowing abroad, earning abroad, concluded that in the absence of satisfactory proof / evidence of the domicile of the appellant being abroad having been

established, the explanation b is not applicable.

Now, having given a finding that the period of stay of the appellant during AY 2007-08 to 2009-10 is less than 182 days in each of the years , the issue for adjudication on the basis of the aforesaid are:-

Whether the provisions of Explanation (b) of Section 6(1)(c) applicable in the case of the assessee for the A.Y.'s 2007-08 to 2009-10 and can it be said that the assessee is entitled, on merits, for the benefit of 182 days as stipulated in the said explanation.

Whether determination of Status can be considered in re-assessment u/s 153A, in absence of any incriminating material found during course of search which would warrant a change thereof?

Section 6(1) is reproduced as under:

An individual is said to be resident in India in any previous year, if he:-

Is in India in that year for a period or periods amounting in all to one hundred and eighty two days or more; or

Having within the four years preceding that year been in India for a period of periods amounting in all to three hundred and sixty five days or more, is in India for a period or periods amounting in all sixty days or more in that year.

Explanation-In the case of an individual:-

Being a citizen of India, who leaves India in any previous year [as a member of the crew of India ship .....I for the purpose of employment outside India, the provisions of sub- e (c) shall apply in relation to that year as if for the words sixty days the words one red eighty two days had been substituted

Being a citizen of India or a person of Indian Origin within the meaning of Explanation to e (e) of Section 115C, who, being outside India, comes on a visit to India in any previous year, the provision of Sub-Clause (c) shall apply in relation to that year as if for the words "sixty days" occurring therein, the words one hundred and eighty two days had been substituted".

In accordance with the provision aforesaid the residential status based on the physical presence in India is divided into two

categories:-

The first year when an India citizen goes abroad to take up employment.

Thereafter having taken up employment abroad / settled therein comes to India from time to time.

In the case of persons falling under category (a) above the residential status is governed by Section 6(l)(c) read with Explanation (a) i.e. if an assessee in the first year of departure from India leaves India with the purpose of employment, then the status is to be determined under clause (c) by computing the following:-

Been in India for *365* days or more in four years preceding the year of departure OR In India for a period of 182 days or more

In case of persons falling under category (b), the Explanation (b) to Section 6(l)(c) is applicable after an assessee having become non-resident in an earlier year resides / settled abroad.

Thus, the determination of residential status of an individual under section 6(1) may be summarized as follows:-

If individual has stayed in India for a period of 182 days or more in any previous year he is a resident in India in that previous year OR

If he has stayed in India for a period of 60 days or more during any Previous year and *365* days or more during the four preceding previous years, he is a Resident in India in that previous year.

If both the above two conditions are not satisfied, he is a Non-Resident in India in that previous year.

Exceptions to Section 6(1)

An individual, who is an Indian citizen, leaves India for the purposes of employment outside India; or

An individual who is an Indian Citizen leaves India as a crew member on an Indian ship; or

An individual, who is an Indian citizen or person of Indian origin, comes on a visit to India.

In other words, if any of the above three categories of individuals

stay in India for less than 182 days in the relevant previous year he shall be regarded as a non-resident in India in that previous year and the test of stay in India for *365* days or more in the four preceding previous year as laid down in Section 6(l)(c)shall not apply to him.

The special benefit of extended stay upto 182 days is given for all Indian Citizens/PIO, whereas all Non-Indian Citizens are governed by the restricted number of days as specified in 6(1)(a)-182 days or *6(l)(c)-365* days in four preceding years and 60 days in that year.

The legislative amendments to Section 6 have been made by The Direct Tax Laws (Second Amendment) Act, 1989 -

New Explanation has been substituted in Section 6(1)(c) for the then existing Explanation, with effect from 1st April, 1990, i.e. for and from Assessment Year 1990-91. On a comparison of the two Explanations, it may be seen that clause (a) of the new Explanation is, in substance, the same as clause (a) of the then existing Explanation. Clause (b) of the new Explanation also takes within its ambit a person of Indian origin within the meaning of Explanation to Section 115C(e).

The scope and effect of these amendments have also been elaborated in the following portion of the departmental Circular No. *554* dated 13.02.1990, as under:-

'Liberalization of the criterion for determining the residential status in the case of non-resident Indians -

Under the provisions of the Income-tax Act, 1961, an individual who is resident in India is taxable on his global income, i.e. in respect of income accruing or arising in India as well as outside India. Prior to the amendment by the Second Amending Act, 1989, a citizen. of India who was outside India and came to India on a visit in any previous year was held to be resident if he had been in India for a period or periods amounting in all to *365* days or more in the four years preceding that year and was in India for a period of 90 days or more in that year.

In the case of individuals who are not citizens of India, the period of 90 days or more is restricted to 60 days or more.

The non-resident Indians had been representing that the period of 90 days or 60 days was too short, especially for those who had to supervise their investments in India.

In order to enable the non-resident Indians to stay in India for a longer period for looking after their investments without losing their 'non-resident' status, clause (b) of the Explanation to clause (c) of sub-section (1) of section 6 has been amended.

The period of 90 days provided there under has been increased to 150 days. The amended provision will apply not only to a citizen of India but also to a person of Indian origin within the meaning of Explanation to clause (e) of section 115C of the Income-tax Act. The effect of the amended provision is that, subject to the other conditions prescribed in Section 6 of the Income-tax Act, such person can stay in India on a visit for 149 days as against 89 days earlier in the case of citizens of India and 59 days earlier in the case of those who were not citizens of India during a previous year without losing their 'non-resident' status.

Thereafter, amendment was again made by the Finance Act, 1994 and were clarified in Circular No. 684 dated 10.06.1994

Relevant extract is reproduced hereunder:-

"Suggestions had been received to the effect that the aforesaid period of one hundred and fifty days should be increased to one hundred and eighty-two days. This is because the non-resident Indians, who have made investments in India, find it necessary to visit India frequently and stay here for the proper supervision and control of their investments. The Finance Act, therefore, has amended clause (b) of the Explanation to Section 6(1)(c) of the Income Tax Act, in order to extend the period of stay in India in the case of the aforesaid individuals from one hundred and fifty days to one hundred and eighty-two days, for being treated as resident in India, in the previous year in which they visit India Thus, such non-resident Indians would not lose their 'non-resident' status if they stay in India, during their visits, upto one hundred and eighty-one days in a previous year."

The judicial authorities have had occasion to consider the implications of Section 6 of the Income Tax Act read with various Explanations which are as under:

CIT Vs Avtar Singh Wadhwan, 247 ITR 260 (Born.)

"Section 6 indicates the meaning of residence in India. Section 6 lays down that for the purpose of the Income Tax Act an individual is said to be resident in India if he is in India for a

prescribed period. Therefore section 6 emphasis physical presence of the person in India".

ITO V/s. Dr. M.P. Konan Halli *55* lTD 266

Clause (a) of Explanation to Section 6(1) is intended to cover cases of Indians who go out of India for securing employment or being employed outside India during the relevant previous year only. If somebody is already settled abroad, his case is not covered by Clause (a) but falls within purview of Clause (b).

ShriAnurag Chaudhary V/s. CIT(AAR) 839 / 2009 dated 11.02.2010

Section 6 sub-section (1), which determines the residential status of an individual, requires that either the applicant should have been in India for 182 days or more in four preceding years [vide clause (c)]. The Explanation to this sub-section provides that a citizen of India who leaves India for the purpose of employment outside India can be considered as resident of India, if he has been in India for 182 days or more even though he may have been in India for than 365 days in 4 preceding years.

The net effect of section 6(1) read with the Explanation is that for an individual who has left India for employment outside India he should be treated as resident of India only if he was in India during the relevant period / year for 182 days or more.

In other words, if an individual has spent less than 182 days in India during a previous year and was outside India for the purposes of employment, then regardless of his being in India for 365 days or more during 4 preceding previous years, he cannot be treated as a resident of India.

Vijay Mallya V/s, ACIT 263 ITR 41 (Cal.)

The Lordships while analyzing the provisions of Section 6(1')(c) read with both the Explanation (a) & (b) have held "clause (a) of Explanation covers cases where a citizen of India leaves India for the purpose of employment outside India, then he would be a nonresident, if he is a India for less than 182 days. Now having been employed outside India, he comes to India for a visit, the Explanation (b) would be attracted.

V. K. Ratti Vs. CIT 299 1TR295 (P&H)

The lordship has held that physical presence in India has been indicated to be the basis for determination of residence.

CIT vs Ramaswamy (K.S.)(1980) 122 ITR 217(SC)

Section 6(1) applies to all individuals: Section 6(1) lays down a technical test of territorial connection amounting to residence to all individuals - foreigners as well as Indians including Hindus, Christians, Muslims, Parsis and other irrespective of the personal law governing them.

CIT v Dhote (B.K.) (1967) 66 ITR *457* (SC) Also see Moosa S. Madht & Azam S. Madha v. CIT 89 ITR *65 (SC).*

Onus to prove stay in India with department: The onus of proving that the assessee was in India during the four years preceding the previous year for a period or periods in the aggregate of not less than *365* days, and was in India for at least 60 days during the previous year, lies on the department.

Pradip J Mehta Vs CIT (2008) 300 ITR 231(SC)

Interpretation of taxing statutes - Where 2 interpretations possible- Court will adopt that in favour of taxpayer.

Dhruv Choudhrie, Appeal No. 90/0809. A. Y. 2005-06

The Commissioner of Income Tax (Appeals) —XXIX, New Delhi vide Order dated 03.07.2009 on facts which are similar to that of the appellant has after due analysis of the provisions of Section 6 of the Income Tax Act recorded a finding that residential status is determined on the basis of physical presence of an assessee in India.

Sudhir Sareen Appeal No. 490/09-10 CIT (A)-1, New Delhi. Order dated 31.03.2011

Held, on identical facts "Para 1.9" The Legislature has been granting the benefit of extended stay to Indian Citizen / PlO's .....period has been extended from 60 days to……181 days with the principal objective of granting more time to stay during each of the frequent visits to India to Indian Citizens / PIO residing abroad to manage their affairs in India. This has been clearly brought out by the various Circulars by the Central Board of Direct Taxes at each relevant time. It is also settled law that the Circulars of the CBDT are binding on the Revenue Officers. Similarly, in case a provision of law is possible of two opinions, the interpretation beneficial to the assessee is to be followed.

Para 1.9.1 "Held that appellant is not a resident of India in accordance with section 6 (1) (c) read with explanation B even

though his period of stay for each of the four preceding years exceeds *365* days yet in that previous year his period of stay in India is less than 181 days and as such the appellant is a Non-Resident."

The AO has misinterpreted the provisions of Section 6(1) of the Income Tax Act, by recording a finding that the assessee is not domiciled in U.K. and no evidence thereof has been adduced. It has been brought on record that the appellant is (a) residing in U. K. in residential house owned by him (b) the children are undergoing education in U.K. (c) the period of stay in U.K. can be confirmed from the Passports, which would indicate he is domiciled in U.K. (d) the resident permit granted by U.K. is only issued after a person is domiciled in U.K. beyond a certain period of time (e) the Banking Accounts in the name of the assessee were opened after due verification, compliance with KYC norms and all classified as non-resident, bearing the permanent address of UK (f) assessee has filed tax returns in UK for 2007-08 to 2009-10.

Further the provisions of Section 6 for determining the residential status are based on phʸsical presence in India for determining the period of stay in India. In case an assessee satisfies the same or otherwise the status is determined accordingly.

The appellant states that, Circular No.684 of 1994 issued by the Central Board, being binding on the AO, the AO ought not to have ignored the same to conclude on alleged ground that the appellant having failed to adduce evidence, which was already submitted to the AO in the course of assessment proceedings, for her claim as Non Resident.

The Supreme Court in the case of Keshavji Ravji & Co. reported in 183 ITR Pg. 1 at Page 17 has observed as under;

"However, circulars beneficial to the assessees and which tone down the rigour of the law issued in exercise of the statutory power under Section 119 of the Act or under corresponding provisions of the predecessor Act are binding on the authorities in the administration of the Act." Navnit Lal C. Javeri 56 ITR 198 (SC), Navnit Lal Amba Lal vs. CIT *105* ITR *735* (Born.), Dattatraya Gopal Shette vs. CIT 150 ITR 460 (Born.), CIT V. T.V. RAMANAIAB & SONS (1986) 157 ITR 300, 307 (A.P)

Circulars are binding on all Officers and persons employed in the execution of the Income Tax Act. Even if the Circular may

amount to a deviation of a point to law conferring benefit to a assessee the same is binding on the department.

Relying on the aforesaid judgments, the appellant submits that the Assessing Officer erred in rejecting the appellant's claim based on the Circular No. 684 of 1994 explaining section 6(1)(c) r.w. Explanation to Clause (e) to section 115C of the Income Tax Act, 1961. The status of the appellant, therefore, should have been considered as Non Resident. The decision of the Assessing Officer in this respect may be annulled.

I have considered the submissions of the appellant and the order of the AO. The gist of the finding of the AO is as under:

Clause (b) of explanation to section 6(1) (c) is not applicable to the appellant.

The Complete details of his stay in India for 4 years prior to assessment year 2003-04 were not furnished. No evidence that the appellant is domiciled in UK. Therefore, the appellant is Resident and ordinarily resident in India and liable to tax the Global Income of the appellant. The period of stay of the applicant in India for the A.Y.2007-08 to 2009-10 are admittedly less than 182 days in each of the years.

That the appellant is the holder of Indian Passports detailed as under:

Sl. No.	Passport No.	Place of Issue	Validity
1	R-691005	UKRAINE/KIEV	30/06/94 -31/08/98
2	U-925810	UKRAINE/KIEV	Additional Booklet to PassportNo.R-691005 issued on 04.08.1997
3	A-1280977	UKRAINE/KYIV	19/06/2001-21/01/08
4	Z-1023527	UKRAINE/KYIV	14/05/2003-21/01/08
5	Z-1023582	UKRAINE/KYIV	23/08/2006-10/08/16

An embassy is a diplomatic office established in one country by another country with which diplomatic relations have been established. A consulate is the regional branch of a country's main embassy. Technically the embassy building and its property are part of the embassy's country.

The following services are provided by the Indian Embassy abroad relating to the passport.

Issue emergency passport in case you lose your passport

Renewal of passport, issuing a new/ duplicate passport

Validity extension of current passport, additional booklet, getting a passport for a minor.

Hence, the issue of Indian Passport by the Ukraine and London Embassy to the appellant is not wrong and in fact shows that the appellant at that point of time was in that country.

The Consulate General of India, Birmingham located at 20 Augusta Street, Jewellery Quarter, Hockley Birmingham B18 61L has the following guidelines for the issue of new passports:

Indian passports are now normally issued with a validity of 10 years (except iii the case of children up to the age of 15 years (please see relevant paragraph below). Their renewal thereafter involves the issue of a new passport. This section also applies to persons requiring additional booklets where their passport has run out of available pages for visas, etc.

A new passport can be issued on final expiry or up to one year before final expiry of any passport issued for 10 years.

Following are required:-

Application form duly filled in (click here to download form)

Original passport (current/ expired) including any additional booklets issued

Latest identical coloured passport size photographs (four). There is a coin-operated Photo Me machine installed in the Public Hall of the Consulate building (1st floor) which gives photographs of the required size at a charge of £3.50. This facility is open to public on all working days of the Consulate during the public hours.

Self-addressed special delivery envelope (in case return of passport is desired by post) Fees

The above clearly shows that passport could be issued to an Indian National by Indian Embassy in any country. Accordingly, the appellant was issued such passport by Indian Embassy 'in Kyiv, Ukraine and from London. This shows that the appellant

was not in India at that point of time and was in Ukraine and United Kingdom.

The learned counsel in order to establish that the appellant was settled abroad has filed and pleaded:-

That the appellant was initially residing in Ukraine in a property purchased by him in *1975,* evidence of purchase of property Flat No. 44, House No. N-6A, Staronavodnytskaya Street, apt. 44, Kyiv till shifting to UK in 2002-2003.

The minor daughter was undergoing education at British International School Kyiv who has confirmed that Trisha Singh D/O of assessee was in their school from September, 1996 to July 2002 (Departure from Ukraine)

Thereafter the family shifted to UK and the daughter was admitted in Brentwood School, Brentwood Essex, U.K. on 1st September, 2002 and completed her school in 2007. Copies of bills of Gas, credit cards, telephone etc in respect of UK

Evidence of purchasing property at Civic Bay, UK in 2003 which was the residential premises and thereafter shifted to a new house purchased by him

All overseas travel commenced from UK and terminated in UK in evidence that he was residing in UK and always returned to his hometown.

The assessee is subjected to tax in UK for the years 2007-08 to 2009-10. Copies of returns filed.

The assessee was assessed to tax in India for the A.Y. 2005-06 in a scrutiny assessment in of non-resident and no evidence has been found which would suggest that the -'said status was determined fraudulently.

The banking accounts in India are all Non Resident External accounts bearing addresses abroad. The said accounts were opened after due diligence of "Know Your Customer (K)" norms laid down by Reserve Bank of India.

Thus the learned counsel argued that in view of the aforesaid the Findings of the AO that assessee is not settled abroad are opposed to facts and need to be reversed.

Now, it is pertinent to analyze the section 6 of the Income Tax Act,

1961.

The residential status is crucial in determining the taxes an assessee is required to pay. Section 6 of the Income Tax Act defines the following categories liable to pay tax in India: Non-Resident Indian (NRI)

Resident

Resident, but not ordinarily resident (RNOR)

NRIs and RNORs are liable to pay tax only on their "Indian income" while tax payers who are resident in India as per Income Tax Act are taxed on their "world income".

Chapter XI of the Act defines a non-resident Indian as an individual, being a citizen of India or a person of Indian origin, who is not a resident. A person is of Indian origin if he or either of his Indian parents or any of his grandparents was born in undivided India. To avail of tax sops extended to NRIs, an individual must satisfy the following criteria

A person who has been in India for 60 days or more during a financial year and *365* days or more during the preceding four financial years qualifies as a 'Resident' of India. This has been relaxed and can be extended to 182 days. Not meeting this criterion qualifies the individual for a "non-resident" status.

NRIs based outside India can continue to enjoy non-resident status in India if their presence in India is more than 60 days but less than 182 days, even if their stay in India during the past four financial years is *365* days or more

Having been deputed overseas for over 6 months also qualifies an individual for NRI status.

The relaxation to 182 days applies to:

Indian crew members sailing overseas on Indian ships - their stay abroad is treated as employment outside India

In the case of Indian citizens as well as in the case of "Persons of Indian Origin" who are settled abroad but visit India for personal reasons.

The concession of extended stay is available only to Indian citizens or to "persons of Indian origin" A "Person of Indian origin" is a person who is not an Indian citizen, but was born, or

either of his parents or grandparents was born in India.

In the case of *C.N. Townsend vs. CIT [1974] 97* ITR 185 (Pat) is was held that if any of the conditions mentioned in clause (a), *(b)* or *(c)* of section 6(1) is fulfilled, the assessee will be 'resident' within the meaning of the Act.

In the case of *Vijay Mallya* vs. *ACIT* [2003] 131 Taxman *477* (Cal.) it was held that while deciding the residential status of an assessee, the Assessing Officer should consider the provisions of both section 6(1)(a) and 6(1)(c) and this is a mandatory requirement of law. An assessee may not be a 'resident' of India under section 6(1)(a) but may be a resident of India under section 6(1)(c). The authorities functioning under the Act who have been empowered to see that proper revenues are collected can *suo motu* call for the records to see whether question of residential status has been properly determined by the Assessing Officer or not. Under the circumstances, even when the Assessing Officer accepts the claim of assessee and decides that the assessee is a 'non-resident' under section *2(30),* then also he is duty-bound to record the reasons as to why he is not holding the assessee as a 'resident' in India either under the provisions of section 6(1)(a) or under section 6(l)(c).

Recently, the Hon'ble High Court of Karnataka decided the question whether the period of visit by NRI preceding his return to India should be excluded from the total stay of NPJ. The Hon'ble Karnataka High Court in Manoj Kumar Reddy Nare (2011) 12 taxmann.com 326 (Kar) has held that the period of visit by a Non Resident shall be excluded for counting the number of days of stay in a year for the purpose of determination whether he/she is resident in India in that year. In this case, the issue before the Karnataka High Court was to determine the residential status of an individual assessee for assessment year 2005-06 (previous year 2004-05). The assessee who was an employee of an Indian company was deputed to Chicago, USA with effect from 1st February 2004. He stayed in India for 365 days during each of the years from previous year 2000-01 to 2006-07, except for the previous years 2003 -04 and 2004-05, wherein he stayed in India for 306 days and 78 days respectively. The stay of 78 days during previous year 2004-05 ("the relevant previous year") included the days of his visit to India from 19th August 2004 to 6th September 2004.The assessee came back permanently to India on 31st January 2005. The assessee was held to be resident as his stay during the relevant previous year exceeded 60 days and stay during the four years immediately preceding the relevant

previous year was more than 365 days. During the course of proceedings before the ITAT, an alternative contention was raised on behalf of the assessee. It was contended that period of 60 days referred to in section 6(1)(c) of the Act should exclude the period of stay in India while on a visit and that non-acceptance of this contention would lead to an absurd result Two examples were given in this regard:

Example A: A person (citizen of India / PIO) who comes on a visit to India and stays in India for 120 days would be treated as non-resident, as the threshold in his case for being treated as resident in India would get extended to 182 days instead of 60 days by virtue of clause (b) of the Explanation.

Example B: If a person (citizen of India /P10) comes on visit and stays in India for 90 days and returns abroad and later on comes back to India permanently and he stays in India for a period of 30 days, he will become a resident according to A 0. In this case, the threshold would not get extended to 182 days as the assessee has come back to India permanently.

Thus, it was put forth on behalf of the assessee that an individual coming to India during a previous year on a visit and later coming back to India permanently during the same year would face hardship vis-a-vis a person coming to India only on visits during a previous year and staying in India for the same period as the former. While considering this contention, the ITAT referred to the corresponding provisions of the Indian Income-tax Act, 1922 and after considering the legislative history and the intention of the legislature, agreed with the contention of the assessee that period of stay on a casual or occasional visit to India is not to be reckoned while computing the period of stay in India. Thus, the period of the assessee's visit (from 18th August 2004 to 6th September 2004) was held to be excludible from his stay in India during the relevant previous year. The Hon'ble Karnataka High Court held as under

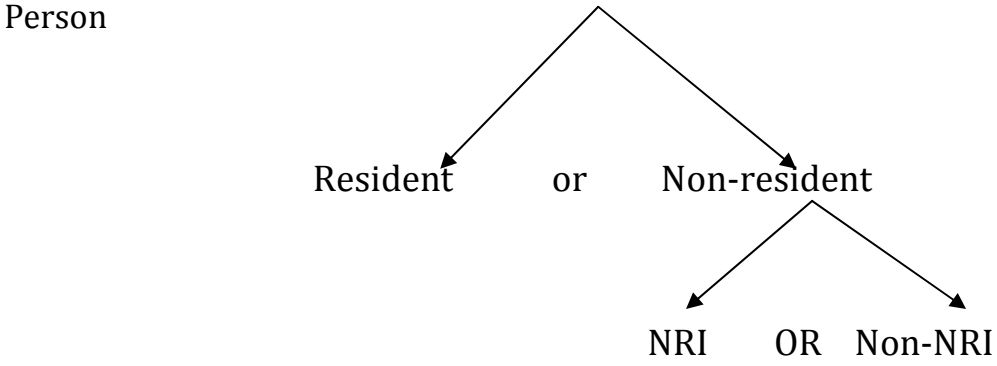
"The material on record would clearly show the fact that the assessee was to work in U S.A., though be an employee of the company in India, on the basis of the letter of Deputation. However, a concurrent finding by the Assessing Officer, the Appellate Authority and the Tribunal that excluding the time during which he was visiting India, the requisite number of days, that is 60 days during the current year, the assessee was not in India and therefore, he is to

be treated as non-resident and cannot be taxed as a resident under section 6(1)(c). The said finding of fact is arrived at on the basis of the material on record. The Tribunal and the Appellate Authority have relied upon a certificate issued by Warton Residential, the employer, which is dated 18-1-2008. In the certificate it is stated that the assessee was resident of River North Park Apartments from 20th March, 2004 until 9th April, 2005 and that during the said period, he resided at 320 W, Illinois St. #801, Chicago. It is held by the Tribunal that it is a fact that the assessee was on deputation from April 2004 to January 2005 and his stay in India from 1 August to 6' September was in respect of a visit to India and this period is to be excluded while considering the applicability of section 6 (1) (c). By holding so, the Tribunal accepted the alternative contention of the assessee and held that for the purpose of computing the period of 60 days as mentioned in section 6 (1) (c), the period of visit to India would be excluded and assessment shall be done considering his status as 'non-resident'.

The above said finding of fact, cannot at all said to be perverse and arbitrary as it is well-founded and all the material available have been taken into consideration by the Appellate Authority and the Tribunal. Therefore, no substantial question of law arises for consideration in this appeal. Accordingly, appeal is dismissed.

It is now relevant to understand the meaning of the word **'visit'** and the context in which the same has been used in the explanation (b) to section 6(1)(c).

As per Income Tax Act, first **it** should be determined whether a person is a resident or a non-resident. If a person is a non-resident, then one has to see whether a person is an NRI or not. Graphically, the position can be explained as under



As per the income tax act - section 6(1), it is the number of days which determine the residential status. A person is considered as a non-resident for the previous year (hereinafter

referred to as relevant previous year), if he is in India for a period of less than 181 days in **the year.**

However there is another condition. If the person has been in India in the four preceding years (preceding the relevant previous year for which residential status has to be determined) for *365* days or more, then he should in India for less than 60 days. For NRIs however, the number of days for which he be in India and still be a non-resident, is less than 182 days (instead of less than 60 days). Thus they can be for almost six months in a year and continue to be non-residents. Thus the condition of 60 days is redundant in case of NRIs. There is however one condition to be fulfilled. The relief of allowing to be in India for upto 181 days and still continuing to be a non-resident is available if the NIRI comes to India for a visit. What is a visit is not explained. Generally if he comes to India (for any purpose), and goes back, it should be considered as a visit to India. This can have an impact in the year in which a person returns to India.

The Word 'visit' has not been defined in the Income Tax Act. However, the definition of the word 'visit' is as under

Vis.it

Verb\vi-zet\

Vis.it.ed:vis.it.ing

Definition of Visit

Transit verb

1 *a archaic:* comfort —used of the Deity <*visit* us with Thy salvation - Charles Wesley> *b (1)* afflict <*visited* his people with distempers - Tobias Smollett> (2): inflict, impose <*visited* his wrath upon them> C: avenge <*visited* the sins of the fathers upon the children> *d:* to present itself to or come over momentarily <was *visited* by a strange notion>

2 to go to see in order to comfort or help

3 ***a :*** to pay a call on as an act of friendship or courtesy *b :* to reside with temporarily as a guest C: to go to see or stay at (a place) for a particular purpose (as business or sightseeing) *d* to go or come officially to inspect or oversee <a bishop *visiting* his parishes> intransitive verb

1 to make a visit; *also:* to make frequent or regular visits

2 chat, converse <enjoys *visiting* with the neighbors>

Examples of *VISIT*

She is *visiting* her aunt in New York.

When are you coming to *visit?*

He is *visiting* a client in Phoenix.

She *visits* her doctor regularly.

I would like to *visit* Rome someday.

City officials *visited* the building site.

Our town was once *visited* by the President.

Be sure to *visit* our Web site.

Origin of *VISIT*

Middle English, from Anglo-French *visiter,* from Latin *visitare,* frequentative of *visere* to go to see, frequentative of *vidëre* to see

First Known Use: 13th century

Related to *VISIT*

Synonyms: call (on *or* upon), drop in (on), see

Antonyms: avoid, shun

In the instant case, the AG has held that the visit to India cannot be for the purpose of looking after his business and stay at his own home/residence in India. However, in the absence of the definition being provided of the word 'visit' in the Indian Income Tax Act, 1961, the above definition can be adopted. The above definition covers the business, social, inspection, temporary visits. Therefore, it can safely be said that the purpose of visit is immaterial as far as the Income Tax Act is concerned.

In the case of Pradip J. Mehta vs CIT (2002) *175* CTR 394 (Guj) it was held on 3 May, 2002, as under:

"From the condition of not being resident in India in nine out often preceding years laid down in sub-section (6) of section 6, it does not automatically follow that for being ordinarily resident in India, one should be resident in India for eight years. A resident in India will be an ordinarily resident in India unless he qualifies to be a 'not ordinarily resident in India' under section 6(6)(a). Ordinary residence is the country where a person normally lives or makes habitual visits, as in case of an individual who visits three hundred and sixty-five days or more in the preceding four years as contemplated in clause of section 6(1)Ordinarily resident for the purposes of income-tax connotes residence in a place with some degree of continuity and apart from accidental or temporary absences (see Levene v IRC (1928) A. C. 217, Union Corporation Ltd. v. IRC (1953) 2 WLR 615). Thus, in Levene v. IRC (supra), a British subject, who had been ordinarily resident here, returned to this country for periods of between four and five months every year for domestic and other reasons, living in hotels without a permanent place of abode. It was held on the facts that he was resident in this country. A similar decision was given in IRC v. Lysaghat (1928) AC 234, where the facts were not so strongly in favour of the crown; in that case a citizen of the Irish Free State came to English company, and stayed in hotels for a week on the occasion of each visit. The Special Commissioners found as a fact that he was resident in the United Kingdom, and the House of Lords (Viscount Cave L. C. dissenting) refused to interfere with their finding. This case shows that the motive of presence here is immaterial; it is a question of quality which the presence assumes.

The foreign income of every resident even when it is not brought into the country is chargeable to tax except when the resident is 'not ordinarily resident' in India. For an individual including a resident in order to be 'not ordinarily resident' so as to escape tax on his foreign income, it must be shown that the position is covered by clause (a) of sub-section (6) of section 6 of Act. When an individual has been a resident in India for nine out often preceding years, then in order to escape tax on his foreign income, he must not have been in India for seven hundred thirty days or more in the aggregate during the preceding seven years. The test is one of presence and not absence from India and the length of

presence will determine when an individual is 'not ordinarily resident' in India. In order than an individual is not an ordinarily resident, he should satisfy one of the two conditions laid down in section 6(6)(a) of the Act, the first condition is that he should not be resident in India in all the nine out often years preceding the accounting year and the second condition is that he should not have during the seven years preceding that-year, been in India for a total period of seven hundred thirty or more days.

The Tribunal has found as a fact that the assessee was a resident in India for eight years out often preceding years and his case, therefore, cannot fall under the first part of clause (a) of sub-section (6) of section 6 of the Act. His case will also not fall in the second part of that clause, because, in the seven years preceding the relevant previous year, the assessee had been in India for o ze thousand four hundred and two days, i.e., much more than seven hundred thirty days being the upper limit referred to in that clause.

For the above reasons, we are of the opinion that the Tribunal was justified in holding that the status of the assessee for the year in question was not that of "not ordinarily resident" as claimed by him, and that it has not committed any error in interpreting the provisions of section 6(6) of the Act. The question No. I referred to us is therefore answered in the affirmative in favour of the revenue and against the assessee and the question No. 2 is answered in the negative in favour of the revenue and against the assessee. The reference stands disposed of accordingly with no order as to costs. "(emphasis supplied).

Further, in the case of CIT v The Hindu 18 ITR 237, 250; CIT v Srinivasan & Gopalan 23 ITR 87 (SC) it was held that a definition or interpretation clause, which extends the meaning of a word, should not be construed as taking away its ordinary meaning. Further, such a clause should be so interpreted as not to destroy the basic concept or essential meaning of the expression defined, unless there are compelling words to the contrary.

Words, which are not specifically defined, must be taken in their legal sense or their dictionary meaning or their popular

> or commercial sense as distinct from their scientific or technical meaning unless a contrary intention appears.
>
> The Supreme Court of India in the case of Tarlochan Dev Sharma vs State of Punjab has held on July 25, 2001 that even the meaning of the words not defined in the Statutes should be assigned after reading the same into the context."

2.4. Before coming to any conclusion, we are analyzing the background of the assessee (as is evident from statement of facts filed before the ld. Commissioner of Income Tax (Appeals) by the assessee through letter dated 09/02/2011- available on record). The assessee was born in India on 14/11/1960 and after completing his higher secondary education at St. Xavier College Ranchi, Jharkhand, he was selected by Heavy Engineering Corporation Ltd. and in 1978 he went to Soviet Union for further education. During the period from 1978 to 1984 he did his masters in Engineering in Radio Technology in systems and also did post graduation in Russian language. From 1984 to 1986, he worked in trading pharma company in USSR and from 1986 and 87, he did his business management from Sweden and from 1987 to 1989 again worked in a trading pharma company. Thereafter, from 1989 to 1995, he worked in a trading company in Ukraine. Thereafter he set-up his own business in pharmaceutical sector primarily in Russia, Ukraine and CIS countries by setting up a trading house under the name of "Trigram International" in Ukraine. As per the assessee, the business venture was successful and he acquired residential properties in Ukraine in 1995 and 1997. The assessee

continued to maintain his permanent resident in Ukraine conducting business in Ukraine, till 2002. Thereafter, along with his family, he shifted to England but his business interest continued in Ukraine, Russia and CSI countries. Thereafter, the assessee acquired further properties in UK, the addresses of which are provided in para 1.3 of the said letter. Thereafter, the assessee continued his business in Ukraine and his primary source of income was business ventures/investment made in Ukraine, USSR and CSI countries and Cyprus.

2.5. Now, we shall deal with the allegation of the Department that original passport was never produced by the assessee. As is evident from the record and the remand report sought by the ld. Commissioner of Income Tax (Appeals) from the Assessing Officer, it is evident that in fact, the assessee produced the original passport before the Assessing Officer and also before the ld. Commissioner of Income Tax (Appeals), the details of which are summarized hereunder along with their validity:-

Sr. No.	Passport No.	Place of issue	Validity
1.	R-691005	KIEV /UKRAINE	30/06/1994 to 31/08/1998
2.	A-1280977	KYIV/UKRAINE	19/06/2001 to 21/01/2008
3.	Z-1023527	KYIV/UKRAINE	14/05/2003 to 21/01/2008
4.	Z-1023582	KYIV/UKRAINE	23/08/2006 to 10/08/2016
5.	H-3291213	LONDON/UK	23/11/2009 to 22/11/2019

2.6. So far as, the allegation of the ld. CIT-DR that the assessee did not submit the original passport is concerned, we find, as is evident from written submissions of the assessee, which have been reproduced in para -3 (page-3) onwards of the impugned order at page 4, there is a categorical finding that the assessee produced the original passports, bearing Nos.Z1023527 and Z1023582, during the course of assessment proceedings as is borne out from the letter dated 11/10/2010 and from the assessment order. This factual matrix was not controverted by the Revenue. In view of this factual finding, we are not agreeing with the argument of the ld. CIT-DR, that original passport was not produced by the assessee. From the facts, it is clearly oozing out that the assessee in fact produced the passport along with their validity so, the allegation of the Assessing Officer which were identically argued by ld. CIT-DR are not substantiated, therefore, on the basis of finding recorded by the ld. Commissioner of Income Tax (Appeals) and examined by us clearly indicates that the passport were in fact produced by the assessee.

2.7. Now, so far as, status of the assessee is concerned which is to be identified by his stay in India, is concerned, it is summarized as under:-

Previous year	A.Y.	Days outside India	Days in India	Consequent Residential status	Remarks
1994-95	1995-96	337	28	Non-Resident	
1995-96	1996-97	306	59	Non-	

				Resident	
1996-97	1997-98	337	28	Non-Resident	
1997-98	1998-99	346	19	Non-Resident	Passport for period 1st Sept. 1998 to 18th June 2001 not traceable at present. No. of days computed for the period 1st April 1998 to 31st August 98.
1998-99	1999-00	N.A.	N.A.		Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present
1999-00	2000-01	N.A.	N.A.		Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present
2000-01	2001-02	N.A.	N.A.		Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present
2001-02	2002-03	215	150		Passport for period 1st Sep. 1998 to 18th June, 2001 not traceable at present
2002-03	2003-04	206	159	Non-Resident (As per Section 6(1)(c) read	Period computed from Original Passport

				with explanation 'b)	
2003-04	2004-05	261	104	Non-Resident (As per Section 6(1)(c) read with explanation 'b)	Period computed from Original Passport. Stayed in India for less than 182 days for each previous Year & Continuously resident abroad
2004-05	2005-06	187	178		
2005-06	2006-07	223	142		
2006-07	2007-08	265	100		
2007-08	2008-09	188	177		
2008-09	2009-10	288	77		

It is noteworthy that during the search operation and thereafter also, the assessee was never confronted by the Assessing Officer with the help of any relevant material, seized during search, justifying the change of status of the assessee from non-resident to resident. The details of period of stay, in India, by the assessee is tabulated hereunder (as is evident from record) for ready reference:-

Date of Arrival & Departure	No. of days in India	Grand Total no. of days	Relevant A.Y.	Reference
26/12/1994 to 23/01/1995	28	28	1995-96	Commissioner of Income Tax (Appeals) order for A.Y. 2003-04 Page-10
31/03/1995 to 04/04/1995	5	59	1996-97	
07/04/1995 to 14/04/1995	7			
24/10/1995 to 02/11/1995	9			
21/12/1995 to 18/01/1996	28			
09/02/1996 to 12/02/1996	3			
08/03/1996 to 15/03/1996	7			
20/15/1996 to 17/01/1997	28	28	1997-98	

01/05/1997 to 08/05/1997	7	19	1998-99	
24/07/1997 to 31/07/1997	7			
22/09/1997 to 27/09/1997	5			
17/04/1998 to 24/04/1998	8	39	1999-00	CIT(A) order of A.Y. 2003-04 Pages 12 & 13
10/071998 to 17/07/1998	8			
29/12/1998 to 20/01/1999	23			
8/4/1999 to 19/4/1999	11	123	2000-01	CIT(A) order of A.Y.2006-07 Pages 7 & 8
28/6/1999 to 1/9/1999	65			
18/10/1999 to 25/10/1999	7			
16/12/1999 to 10/1/2000	25			
13/3/2000 to 28/3/2000	15			
5/10/2000 to 24/10/2000	19	57	2001-02	
27/12/2000 to 23/1/2001	27			
5/3/2001 to 16/3/2001	11			
03/07/2001 to 19/09/2001	68	150	2002-03	CIT(A) order of A.Y. 2003-04 Pages 10 & 11
19/10/2001 to 24/10/2001	5			
18/11/2001 to 13/01/2002	56			
03/03/2002 to 24/03/2002	21			
03/05/2002 to 22/05/2002	20	179	2003-04	
01/07/2002 to 28/08/2002	58			
09/09/2002 to 02/11/2002	53			
17/11/2002 to 30/11/2002	13			
17/12/2002 to 21/01/2003	35			
02/04/2003 to 04/04/2003	2	162	2004-05	CIT(A) order of A.Y.2004-05 Pages 13 & 17
05/07/2003 to 02/09/2003	59			
01/10/2003 to 29/12/2003	89			
02/02/2004 to 11/02/2004	9			
28/03/2004 to 31/03/2004	3			
01/04/2004 to 22/05/2004	51	174	2005-06	CIT(A) order of A.Y.2005-06 Pages 11 & 16
16/07/2004 to 18/07/2004	2			
30/07/2004 to 07/09/2004	39			
29/10/2004 to 21/11/2004	23			
20/12/2004 to 17/02/2005	59			
31/03/2005 to 31/03/2005	**Nil**			
01/04/2005 to 09/06/2005	69	209	2006-07	CIT(A) order of A.Y.2006-07 Pages 7 & 13
31/07/2005 to 05/09/2005	36			
25/11/2005 to 28/11/2005	3			
07/12/2005 to 08/01/2006	32			
10/01/2006 to 03/02/2006	23			
12/02/2006 to 28/03/2006	44			
29/03/2006 to 31/03/2006	2			
01/04/2006 to 13/04/2006	12	96	2007-08	
22/10/206 to 06/11/2006	15			
05/12/2006 to 09/11/2007	35			
25/02/2007 to 31/03/2007	34			
01/04/2007 to 18/04/2007	17	173	2008-09	CIT(A) order of A.Y.2008-09 Pages 9, 10 & 11
27/04/2007 to 13/05/2007	16			
08/07/2007 to 11/08/2007	34			
19/08/2007 to 16/09/2007	28			
13/01/2008 to 31/03/2008	78			

01/04/2008 to 08/04/2008	7	75	2009-10	CIT(A) order of A.Y.2009-10 Pages 11 & 15
23/05/2008 to 16/06/2008	24			
02/11/2008 to 13/11/2008	11			
13/12/2008 to 04/01/2009	22			
20/03/2009 to 31/03/2009	11			

Based upon the above details, relevant to provisions of the Act, the year wise residential status/position of the assessee is summarized hereunder:-

A.Y.	F.Y.	No. of days in India during the year	Status in terms of section 6(1)(a) and 6(1)(c)	If resident whether covered by section 6(6)(a)(Yes/No) "Not ordinarily Resident
1995-96	1994-95	28	Non-Resident	Not applicable
1996-97	1995-96	59	Non-Resident	Not applicable
1997-98	1996-97	28	Non-Resident	Not applicable
1998-99	1997-98	19	Non-Resident	Not applicable
1999-2000	1998-99	39	Non-Resident	Not applicable
2000-01	1999-00	123	Non-Resident	Not applicable
2001-02	2000-01	57	Non-Resident	Not applicable
2002-03	2001-02	150	Non-Resident	Not applicable
2003-04	2002-03	159	Non-Resident	Not applicable
2004-05	2003-04	162	Non-Resident	Not applicable
2005-06	2004-05	174	Non-Resident	Not applicable
2006-07	2005-06	209	Resident	Yes resident but not ordinary resident (refer note (ii)
2007-08	2006-07	96	Non-Resident	Not applicable
2008-09	2007-08	173	Non-Resident	Not applicable
2009-10	2008-09	75	Non-Resident	Not applicable

The assessee before the authorities put the following notes:-

i. The assessee is an individual, citizen of India/person of Indian Origin, who comes on a "visit to India", the

provision of sub-clause (c) shall apply in relation to any year as if for the words "sixty days" the word "one hundred and eighty two days" has been substituted, therefore, in terms section 6 (1)(c), even if assessee is within India for a total of 365 days in four years preceding the relevant year, then also the person is to be considered as "Resident" for a particular year as he has to be in India for 182 days are more in that year.

ii. During A.Y. 2006-07, the assessee was in India for more than one eighty two days, therefore, he is a resident in India for that year. However, keeping in view, the aforesaid history of the assessee, he is "not ordinarily resident" as in all the ten previous year preceding F.Y. 2005-06, the assessee is a "non-resident".

2.8. If the totality of facts are analyzed for A.Y. 2008-09, the total stay of the assessee in India comes to 173 days, which is further fortified by the finding contained in pages 9,10 and 11 of the impugned order. Now, we shall analyze the section 6 of the Act, which reads as under:-

6. *For the purposes of this Act,—*

(1) An individual is said to be resident in India in any previous year, if he—

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more; or

(b) [* *]*

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

[28][Explanation 1].—In the case of an individual,—

(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;

(b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted.

[29][Explanation 2.—For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.]

If the factual position and the aforesaid provision of the Act are kept in juxtaposition, the incidents of tax depend upon the residential status of the assessee in India. In case of "Non-resident" only "income arose in India" i.e. income received or deemed to be received in India are taxable in India. "Foreign income" is not taxable in India.

Business income in case of business, which is controlled wholly or partly from India

(a) Income from profession/business set up in India.

In case of a "resident assessee", the income arising in India and "foreign income" are taxable in India.

2.9 So far as, the contention of the ld. CIT-DR that there is violation of Rule-46A of the Rules and further no opportunity was provided to the Assessing Officer is concerned, we note that the details, filed by the assessee, were examined by ld. Commissioner of Income Tax (Appeals) along with the contention of the Assessing Officer, who was very much present before the ld. Commissioner of Income Tax (Appeals) during first appellate stage proceedings as is evident from the impugned order (page-1) that Shri Vijendra Ojha Addl. CIT and Shri Amit Singh ACIT both were present, therefore, the contention of the ld. DR that opportunity was not provided to the assessee is not substantiated. It is also noted from the impugned order (page-13) that the contention of the Assessing Officer has been duly incorporated in the impugned order, wherein, the assessee furnished certain copies of documents, evidencing that during F.Y. 2002-03 to 2008-09, he was domiciled in U.K. The documents relates to school certificate of his daughter, son, electricity bills, club cards, property documents, etc. It is also noted that for A.Y. 2007-08, the contention of the assessee as well as other details, contention of the Assessing Officer were considered holding that the period of stay of the assessee in India was 173 days as against 178 days determined by the Assessing Officer, meaning thereby, the period of stay was less than 182 days, therefore, in view of the terms of section 6(1)(c) of the Act read with Explanation (b) his status was non-resident, therefore, the global income cannot be taxed in India. We,

therefore, on this issue, affirm the conclusion of the ld. Commissioner of Income Tax (Appeals).

3. The next ground raised by the Revenue pertains to deleting the addition of Rs.33,67,59,738/- u/s 68 of the Act on account of unexplained cash deposits in Indian Bank Accounts, merely on the evidence of transfer of funds and confirmation without investigating the source of funds transferred from foreign bank accounts.

3.1. The crux of argument advanced on behalf of the Revenue is in support of the assessment order, wherein, the addition of Rs.18,08,83,727/- (Axis Bank) and Rs.15,58,76,011/- (HSBC Bank) (Total Rs.33,67,59,738/-) being remittance received from abroad from the funds of the assessee (owned funds/accumulated) earnings over the period of years was made by the Assessing Officer. On the other hand, the ld. counsel for the assessee, explained that these are own funds/accumulated earning over a period of many years were remitted from these banks by the assessee. The conclusion drawn in the impugned order was defended.

3.2. We have considered the rival submissions and perused the material available on record. we find that the issue of foreign remittance has been discussed in para 24 (page 29) of the assessment order by holding that the assessee refused to explain the source and the nature of the remittances, therefore, the ld. Assessing Officer treated the remittance as unexplained credit u/s 68 of the Act and added to the total

income of the assessee. The stand of the assessee is that necessary details were filed by the assessee before the Assessing Officer and if he was not satisfied with the explanation of the assessee, he should have asked for further details. We note that before the ld. Commissioner of Income Tax (Appeals), the assessee filed additional evidence in support of the remittances, which are as under:-

(a) copy of HSBS Bank India FIRC in support of remittance of Rs.13,57,72,439/-, received in India, in NRE Account of the assessee from a foreign bank account

(b) copy of confirmation of Rs.2,01,03,572/-, received from M/s Selesta Hoing Ltd. against the amounts owed by M/s Biogenetica ltd. (subsidiary of M/s Selesta Hoing Ltd.) to the assessee along with funds transfer advice from bank of Cyprus and FRIC issued by HSBC Bank, India.

(C) copy of FRIC, issued by Axis Bank, India, in support of remittance of Rs.18,08,83,727/-, received in India from foreign bank account of the assessee (Shri Vinod Singh).

3.3. It is noteworthy that aforesaid evidence was forwarded for examination by the Assessing Officer and report, no comments were offered except saying that evidence should not be admitted. So far as, admission of additional evidence is concerned, we are of the view, that the ld. Commissioner of Income Tax (Appeals) is empowered to admit the additional evidence and sought remand report from the Assessing

Officer. The amount of Rs.31,66,56,166/- was received in bank accounts of the assessee through regular banking channel from his bank account maintained in overseas branch/abroad. So far as, the balance amount of Rs.2,01,03,572/-, is concerned, it represents the amounts remitted by M/s Selesta Holding Ltd. against the amount owed by M/s Biogenetica Ltd. (subsidiary of M/s Selesta Hoing Ltd.) to the assessee along with funds transfer advice from the bank of Cyprus and FIRC issued by HSBC bank in which the assessee had an interest. The impugned amounts were remitted from respective bank accounts of the assessee in India. These were personal foreign bank accounts of the assessee and remitted to NRE Indian bank accounts in India. This factual finding was neither controverted by the Revenue nor any adverse material was brought on record. Therefore, so far as, application of Section 68 of the Act is concerned, we find that the assessee has proved all the three ingredients i.e. source, creditworthiness and genuineness of the transaction, as contained in section 68 of the Act, therefore, if the Assessing Officer was still not satisfied with the explanation of the assessee then burden shifts upon the Revenue to prove otherwise. It is also noted from page 15 (last para) that the ld. Commissioner of Income Tax (Appeals) himself examined the evidence with respect to remittance which were supported by FIRC, issued by bank in India, remittance advice of a foreign bank, confirmation of each companies, confirming that remittance were made at the instance of the assessee to whom substantial amounts were owed by them, certificate of

incorporation of the said companies, confirmation that the amounts are not loans but were own funds, due from the said companies, thus, in the absence of any adverse material, we affirm the finding of the ld. Commissioner of Income Tax (Appeals). Even otherwise, addition u/s 68 can be made only when the three ingredients, contained in the section, are not satisfied by the assessee. The Revenue has not produced any material that the assessee violated the provision of the Act. Even otherwise, we are satisfied that the assessee has fulfilled the conditions enshrined in section 68 of the Act as identity, capacity and genuineness of the transaction has been satisfactorily explained by the assessee. The assessee has proved the source of receipt of the impugned amounts. We are aware that initial burden is upon the assessee to prove the source of such receipts but once it is discharged, no addition can be made u/s 68 of the Act. Even otherwise, if the Assessing Officer was still not satisfied with the explanation of the assessee, then the onus shifts to the Revenue to prove otherwise, consequently, we find no merit in the argument of the Department with respect to the impugned ground. The stand of the ld. Commissioner of Income Tax (Appeals), on this issue, is affirmed.

4. The next ground raised by the Revenue pertains to deleting the addition of Rs.15,44,72,906/- made u/s 68 of the Act. The crux of argument advanced on behalf of the Revenue is in support to the addition made by the ld. Assessing Officer,

whereas, the ld. counsel for the assessee defended the conclusion arrived at in the impugned order.

4.1. We have considered the rival submissions and perused the material available on record. The ld. Assessing Officer made the addition u/s 68 of the Income Tax Act, for the amount of Rs.15,44,72,906/- ($ 32,86,657 at the rate of Rs.47 per dollar at the relevant time) which was found deposited in the account maintained by the assessee with HSBC Bank USA. The addition was made by the ld. Assessing Officer on the ground that the assessee refused to furnish the nature and source of these deposits. We find from the assessment order itself (para-18, page-17) that vide letter dated 13/09/2010, the assessee claimed that since he is non-resident, the income earned abroad (outside India) is not chargeable to tax in India. However, the ld. Assessing Officer made addition of the impugned amount u/s 68 of the Act.

4.2. On appeal, before the ld. First Appellate Authority, the factual matrix was examined and finally, as is evident from para no.10 (page-16 onwards), by following various decisions, the addition was deleted, against which, the Revenue is in appeal before this Tribunal.

4.3. We find that there is a categorical finding in the impugned order (page-16) that the I.T. Department conducted independent enquiries abroad with respect to bank account of the assessee and the amount was treated unexplained. This enquiry, if any, was made behind the back of the assessee and

the department was dutifully bound to confront the assessee, if any, adverse material is found. Admittedly, the assessee was residing abroad for the last many years. The necessary information/details with respect to income earned in India, properties in India, Directorship, share holding in Indian Companies, etc. were furnished by the assessee. In view of this factual position, we are in agreement, with the finding of the ld. Commissioner of Income Tax (Appeals) that no person should be condemned unheard and right to confront/cross examination is the inherent right of a person against whom allegations are made. The ratio laid down in following decisions supports the case of the assessee and also our view.

i. Rajesh Kumar vs DCIT (2006) 287 ITR 91 (SC)
ii. CIT vs Dhrampal Premchand Ltd. 295 ITR 105 (Del.)
iii. PrakashChand Nahata vs CIT (2008) 301 ITR 134 (MP)
iv. CIT vs SMC Share Brokers Ltd. (2007) 288 ITR 345 (Del.)

4.4. The crux of the ratio laid down by Hon'ble High Courts and also by Hon'ble Apex Court are that the assessment proceedings are part of judicial process, thus, attract principle of natural justice and any evidence which is put forth against the assessee has to be confronted to the assessee subject to right of cross examination. The relevant portion of facts and decision in the case of Prakashchand Nahata (supra) is reproduced hereunder:-

> ***"On a bare reading of the said provision it is manifest that the same empowers the Income-tax Officer to enforce the attendance of any person and examine him on oath. That power has been exercised by the Assessing Officer in the assessment proceeding. It is contended by Mr. Shrivastava that when a witness has been examined by the Assessing Officer and his statement has been pressed into service, the assessee should have been allowed to cross-examine, more so, when, he had filed an affidavit retracting from his earlier statements."***

4.5. In P.S. Abdul Majeed v. Agricultural ITO and STO , the High Court of Kerala took note of the order of reassessment which was made without any reference to inspection records and made on the basis of the strength of the entries in the auctioneers' records. In that context, it was held that reliance on the auctioneer's records and treating them as if they were conclusive did violence to the principles of natural justice when the petitioner had prayed for an opportunity to cross-examine the auctioneers. It was ruled therein that when such a request was made it was incumbent on the officer to afford an opportunity to the assessee to cross-examine the authors of those books.

4.6. In this context, we may refer to a three-judge Bench judgment of the apex court rendered in State of Kerala v. K.T. Shaduli Yusuff , wherein their Lordships expressed the view that where the entries in third party's accounts were used to reject the assessee's accounts to pass best judgment assessment, denial of the assessee's request to cross-examine the third party vitiates the order of assessment.

4.7. In Rajesh Kumar, the apex court has expressed the opinion that assessment proceeding is a part of judicial process and when a statutory process is exercised by the assessing authority in exercise of its judicial functions which is detrimental to the assessee, it is not and cannot be administrative in nature. Their Lordships expressed the opinion that when civil consequences ensue, there is hardly any distinction between an administrative order and a quasi-judicial order and it attracts the principles of natural justice. Mr. Rohit Arya, learned senior Counsel for the Revenue, submitted that the said decision is distinguishable as that deals with giving of reasons. We have referred to the same only to show that the principles of natural justice are applicable when adverse civil consequences are visited to an assessee.

4.8. In Dharam Pal Prem Chand Ltd. [2007] 295 ITR 105, the Delhi High Court took note of the fact situation where the Assessing Officer had passed an assessment order on the basis of a report obtained from the research institute, namely, Shri Ram Institute for Industrial Research, New Delhi. The assessee had filed objections thereto and requested to cross-examine the analyst. The Assessing Officer did not pay any heed to the same and proceeded to pass order of assessment. The order of assessment was assailed by the assessee before the Commissioner of Income-tax (Appeals) and a contention was raised that request to cross-examine the analyst had not been allowed. The Commissioner of Income-tax (Appeals) accepted the contention of the assessee and concluded that the Assessing Officer had wrongly avoided granting permission

to the assessee to cross-examine the analyst and held that the order of assessment is vitiated in law.

4.9. In the case of Prakashchand Nahata (supra) the Revenue preferred an appeal before the Tribunal and the Tribunal dismissed the appeal on the ground that in the absence of grant of permission to cross-examine the analyst who had prepared the test report the order of assessment was vulnerable. Against the order of the Tribunal the Revenue approached Hon'ble High Court, wherein, while dismissing the appeal, filed by the Revenue, has held as under (page 108):

> ***"There is no doubt that even if the strict rules of evidence may not apply, the basic principles of natural justice would apply to the facts of the case. The Assessing Officer placed reliance upon the report of the Shri Ram Institute for Industrial Research for deciding against the assessee. The report cannot be automatically accepted particularly since there is a challenge to it and the assessee had sought permission to cross-examine the analyst making the report. Since the Assessing Officer did not permit the correctness or otherwise of the report to be tested, there is a clear violation of the principles of natural justice committed by him in relying upon it to the detriment of the assessee. As observed by the Constitution Bench in C.B. Gautam v. Union of India , that, 'The observance of the principles natural justice is the pragmatic requirement of fair play in action'."***

4.10. In the case at hand Mohd. Rashid was summoned and his statement was recorded. A request was made by the assessee to cross-examine him. The same was not allowed. On a perusal of the assessment order it is perceivable that the Assessing Officer has heavily relied upon the statement of

Mohd. Rashid. The Assessing Officer has expressed the opinion that there could not have been any transaction between M/s. Rashid and Co., as it was a small firm and not assessed to income-tax.

4.11. In the obtaining factual matrix, the seminal question is whether the said statement of Mohd. Rashid could have been utilised against the assessee without calling him for cross-examination. It is of immense significance that Mohd. Rashid has filed an affidavit in variance of his original statement. That apart, the Assessing Officer has ignored the affidavit and ascribed reasons how the transaction with the said Mohd. Rashid was not worth giving credence. The genuineness of bills produced by the assessee has not been accepted exclusively on the basis that the said Mohd. Rashid was a small businessman and was not assessed to income-tax. The aforesaid circumstances eloquently speak that the addition in the order of assessment has been made on the basis of the statement made by Mohd. Rashid. There is no cavil that a prayer was made under Section 131 of the Act to summon the said Mohd. Rashid for cross-examination. That has not been done. The language employed under Section 131 of the Act empowers the Assessing Officer to ensure the attendance of any person. When the statement of Mohd. Rashid was used against the assessee and an affidavit was filed controverting the same, we think, it was obligatory on the part of the Assessing Officer to allow the prayer for cross-examination. That would have been in the fitness of things and in compliance with the principles of natural justice.

The Hon'ble High Court of Madhya Pradesh concluded as under:-

> "**In view of the aforesaid we answer the reference holding that as the Assessing Officer had not summoned Mohd. Rashid, the proprietor of M/s. Rashid and Co., Jabalpur, in spite of the request made under Section 131 of the Act, the evidence of the said Mohd. Rashid could not have been used against the assessee and in the absence of affording a reasonable opportunity of being heard by summoning the said witness the assessment order is vitiated and cannot be saved as the addition has been made on the foundation of his deposition. In the result, we answer the reference in the affirmative in favour of the assessee and against the Revenue. There shall be no order as to costs.**"

Since, the assessee is a non-resident during the year, the amount found deposited in the foreign bank cannot be held to be taxable in India, hence, in view of the foregoing decisions and the uncontroverted factual matrix, we find no infirmity in the conclusion drawn by the ld. Commissioner of Income Tax (Appeals), on this issue, and affirmed the same.

5. The next ground raised by the assessee pertains to deleting the addition of Rs.2,76,410/- on account of unsubstantiated liability by considering the additional evidence in contravention of Rule-46A of the Rules. The crux of argument advanced on behalf of the Revenue is identical to the ground whereas, the ld. counsel for the assessee defended the conclusion arrived at in the impugned order.

5.1. If the observation made in the assessment order, leading to addition made to the total income, conclusion

drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, we note that the ld. Assessing Officer has discussed the issue in para 27 (page 33) of the assessment order by holding that the assessee did not furnish any explanation/evidence/confirmation with respect to these liabilities, representing the amount due to Shri CMP Singh (Rs.1,70,000/-), Abhay Jha (Rs.95,000/-) and Shri Rajesh Jha (Rs.20,000/-) and made addition u/s 68 of the Act. The ld. Commissioner of Income Tax (Appeals) examined the additional evidence filed by the assessee such as ledger account of Shri CMP Singh for the period from 01/04/2007 to 31/03/2008, copy of bank statement of Shri Binod Singh (assessee), in support of repayment of liability, copy of confirmation along with ledger account of Shri Abhay Jha for the period 01/04/2007 to 31/03/2008, copy of confirmation along with ledger account of Shri Rajesh Jha for the same period and upon examination of evidence found the same in order. In view of this uncontroverted factual finding, we affirm the stand of the ld. Commissioner of Income Tax (Appeals) as no contrary evidence was brought to our notice by the Revenue, consequently, this ground of the Revenue is devoid of any merit.

6. The next ground pertains to deleting the addition of Rs.8,25,00,000/- made u/s 69 of the Act in contravention of Rule 46A of the Rules by accepting additional evidence. The ld. DR, during hearing, supported the conclusion arrived at

in the assessment order and consequent addition, whereas, the ld. counsel for the assessee defended the conclusion arrived at in the impugned order.

6.1. We have considered the rival submissions and perused the material available on record. Before coming to any conclusion, we are reproducing hereunder the documents/proof filed before the ld. Commissioner of Income Tax (Appeals), which was claimed to be additional evidence by the Department:-

> *"property at 9HZ, Hadrian Way, Chilworth, Southampton, U.K. (GBP 7,75,000)-Rs. 7,00,00,000/-.*
>
> *Copy of Loan Sanction Letter (4,80,000 GBP) for purchase and against hypothecation of the property at 9HZ, Hadrian Way, Chilworth, Southampton, U.K. being part of the source for the purchase.*
>
> *Copy of Loan Sanction Letter (2,11,200 GBP) for purchase of the aforesaid property and against hypothecation of property at 29, Rushden Gardens Ilford, Essex, U.K. being part of the source for the purchase.*
>
> *The appellant in respect of addition u/s 69 of the Act relating to Residential House at 3 Civic Way, Ilford. (GBP 284000)-Rs.1,25,00,000/- has submitted that the Assessing Officer has without verification on facts, framed the assessment without application of mind, in a hazard manner, made the impugned addition ignoring the critical fact that the property was purchases in A.Y. 2003-04 as evidenced by copy of sale Deed placed on record, which has also available with the Assessing Officer. Thus, this addition is wholly opposed to facts and law. In any case the assessee has also placed on*

record the source of investment made out of earning and saving thereof abroad and being Non Resident the same is not taxable in India.

The appellant in respect of Property at 9 HZ, Hadrian Way, Chilworth, Southampton, U.K (GBP 7,75,000) - Rs. 7,00,00,0001- purchased on 30.8.2007 has submitted that the same was purchased out of

(i) Loan of GBP 4,80,0001 from banks against hypothecation of the Property at 9 HZ, Hadrian Way, Chilworth, Southampton, U.K.

(ii) Loan of GBP 2,11,200 from banks against hypothecation of Property at 29, Rushden pardens Ilford, Essex, U.K-

(iii)Ba1ance of GBP 83,800 was paid by appellant out of own resources.

The Appellant in support of the aforesaid has filed (a) Copy of Loan Sanction Letter (4,80,000 GBP) for purchase against hypothecation of the Property at 9 HZ, Hadrian Way, Chilworth, Southampton, U.K.(b) Copy of Loan Sanction Letter (2,11,200 GBP) for purchase of the aforesaid property against hypothecation of Property at 29, Rushden Gardens Ilford, Essex, U.K.

The appellant has furnished complete details and evidence regarding source of investments representing his accumulated savings abroad out of incomes earned overseas as Non Resident."

6.2. On the basis of the above evidence, the ld. Commissioner of Income Tax (Appeals) concluded as under:-

"**Since I have held that the appellant to be a Non-Resident, all moneys earned overseas are not taxable**

> **in India in terms of and in accordance with Section 5 of the 1. T. Act. Accordingly for the reason that the source of investment is established and the appellant has been he to be a Non Resident, the addition of Rs 8,25,00,000/- representing investments in acquiring immovable properties made by the AO is deleted. Accordingly the Appellant succeeds in this Ground of Appeal No 3.5 and gets a re1ief of Rs 8,25,00,000/-. AO is directed to give effect accordingly**."

6.3. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, there is categorical finding in the impugned order that the source of investment made by the assessee was established/proved and the assessee during the relevant period was non-resident. It is also noted that the accounts of the assessee were opened and operated in the status of "non-resident". This factual matrix was also consented to be correct by the Department. It is also noted when any accounts in the status of non-resident are opened at that stage even the bank authorities analyze the passport and other documents of the assessee. We further note that for initial years, the status of the assessee as non-resident was accepted by the Department itself. During hearing, the ld. CIT-DR, fairly admitted that for A.Y. 2005-06, the assessee was assessed as non-resident, therefore, without bringing any contrary material, on the principle of consistency also, the assessee is having a case in its favour as consistency has to be maintained. So far as, the date of

arrival and departure are concerned, both these dates are to be excluded while counting the stay in India, for which we are fortified by the decision from Hon'ble Karnataka High Court in 245 CTR 350 (Karnataka) DIT(IT) vs Manoj Kumar Reddy (2011) 201 taxman 30(Kar)-(2011) 12 taxman.com326 (Kar) and ITO vs Fausta C. Cordeiro (2012) 24 taxman.com 193 (Mum.). So far as, the issue of consistency is concerned, it has to be followed, for which, we have fortified by the following decisions.

i. Parshuram Pottery Works Ltd. vs ITO 106 ITR 1 (SC)
ii. Security Printers 264 ITR 276(Del.)
iii. CIT vs Neo Polypack Pvt. Ltd. 245 ITR 492 (Del.)
iv. CWT vs Allied Finance Pvt. Ltd. 289 ITR 318 (Del.)
v. Berger Paints India Ltd. vs CIT 266 ITR 99 (SC)
vi. DCIT vs United Vanaspati (275 ITR 124) (AT)(Chandigarh ITAT)
vii. Union of India vs Kumudini N. Dalal 249 ITR 219 (SC)
viii. Union of India vs Satish Pannalal Shah 249 ITR 221
ix. B.F.Varghese vs State of Kerala 72 ITR 726 (Ker.)
x. CIT vs Narendra Doshi 254 ITR 606 (SC)
xi. CIT vs Shivsagar Estate 257 ITR 59 (SC)
xii. Pradip Ramanlal Seth vs UOI 204 ITR 866 (Guj.)
xiii. Radhaswamy Satsang vs CIT 193 ITR 321 (SC)
xiv. Aggarwal warehousing & Leasing Ltd. 257 ITR 235 (MP)

6.4. The sum and substance of the aforesaid decisions is that on the basis of principle of judicial discipline,

consistency has to be followed and once in a particular year, if any view is taken, in the absence of any contrary material, no contrary view is to be taken as finality to the litigation is also a principle which has to be followed. Before us, no contrary facts or any adverse material was brought on record by the Revenue, therefore, we find no infirmity in the finding/conclusion of the ld. First Appellate Authority. We affirm his view being uncontroverted on fact.

Finally, this appeal of the Revenue is having no merit, therefore, dismissed.

7. So far as, cross objection No.149/Mum/2013 (against the ITA No.4597/Mum/2012) filed by the assessee, is concerned, the same was not pressed by the ld. counsel, therefore, the cross objection of the assessee is dismissed as not pressed.

8. So far as the appeal of the Revenue for A.Y. 2007-08 (ITA No.4596/Mum/2012) is concerned, the issues involved are identical to ITA No.4597/Mum/2012) (A.Y. 2008-09), therefore, on the same reasoning, we find no merit in the appeal of the Revenue for this assessment year also, therefore, the appeal of the Revenue is dismissed.

8.1. The Cross objection No.148/Mum/2013 (against the ITA No.4596/Mum/2012) was not pressed by the ld. counsel for the assessee, therefore, it is dismissed as not pressed.

9. Now, we shall take up ITA No.4598/Mum/2012 (A.Y. 2009-10), the appeal of the Revenue, wherein, identical grounds have been raised. We have made elaborate discussions on facts on the issues in hand in preceding paras of this order, therefore, on the same reasoning, we find no merit in this appeal also, therefore, dismissed.

9.1. The Cross Objection no.150/Mum/2013 (against the ITA No.4598/Mum/2012) was not pressed by the ld. counsel for the assessee, therefore, it is dismissed as not pressed.

10. So far as, the appeal of the Revenue for A.Y. 2003-04 (ITA No.5530/Mum/2012) is concerned, identical ground have been raised, therefore, on the same reasoning as discussed in preceding paras of this order, on identical facts/grounds, this appeal of the Revenue is dismissed. It is also noted that for A.Y. 2003-04, the status of the assessee was non-resident and was accepted by the Department.

10.1 So far as C.O. No.212/Mum/2013 (against the ITA No.5530/Mum/2012) is concerned, it was not pressed by the ld. counsel for the assessee, therefore dismissed as not pressed.

11. Identical is the situation for the appeal of the Revenue in ITA No.5531/Mum/2012 (A.Y. 2004-05), therefore, on the same reasoning, we find no merit in this appeal also, therefore, dismissed.

11.1 Identically, C.O. No.213/Mum/2013 (A.Y. 2004-05) was not pressed by the ld. counsel for the assessee, therefore, it is dismissed as not pressed.

12. The appeal for A.Y. 2005-06 (ITA No.5532/Mum/2012), being on identical ground, is also deserves to be dismissed on the same reasoning.

13. C.O. No.214/Mum/2013 (A.Y. 2005-06) was not pressed by the ld. counsel for the assessee, therefore, dismissed as not pressed.

14. Now, we shall take up ITA No.6143/Mum/2012 (A.Y. 2006-07), wherein, the grounds are identical. However, in this case, the first issue pertains to resident but not ordinarily resident as defined u/s 6(6)(a) of the Act ignoring the report of the Assessing Officer as the assessee was not resident in nine out of ten previous years and further the appeal of the Department on the point of status is pending for A.Y. 2003-04 to 2005-06 and 2007-08 to 2009-10. Identical argument was raised by the ld. CIT-DR. On the other hand, the ld. counsel for the assessee, defended the conclusion in the impugned order.

15. We have considered the rival submissions and perused the material available on record. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective

counsel, if kept in juxtaposition and analyzed, the only distinguished feature in this ground is that the assessee is a resident but not ordinarily resident. The stay of the assessee, during the relevant financial year is 209 days (as summarized above (table). To express our opinion, the status of the assessee for earlier and later year needs to be examined with the help of various case laws. The issue of not ordinarily resident has been defined in section 6(6) of the Act. Before coming to any conclusion, we should understand the legislative history. The Law Commission recommended the total abolition of the provisions of section 4B of the 1922 Act defining "ordinary residence" of the taxable entities. The Income-tax Bill, 1961 (Bill No. 27 of 1961), therefore, did not contain any such provision. On the legislative anvil, it was felt necessary to keep the provisions of section 4B of the 1922 Act in fact and, therefore, section 6(6) had to be enacted in the 1961 Act.

16. Section 6(6) consists of two limbs. It does not define "ordinarily resident" but defines, in negative, "not ordinarily resident".

On reading the corresponding provisions in the two Acts, it seems that there is little substantial change in the provisions. Clause (a) makes an individual "not ordinarily resident" if he has not been resident in India in nine out of the ten preceding previous years or has not, during the seven preceding previous years, been in India for a total period of at

least 730 days or more. Clause (b) makes a Hindu undivided family "not ordinarily resident" if its manager* has not been resident in India in nine out of the ten preceding previous years or has not, during the seven preceding previous years, been in India for a total period of at least 730 days or more. Although the change is there in the phraseology, there is no change in the prescriptions. Section 4B(c) of the 1922 Act, which did not make any distinction between a "resident" and "resident but not ordinarily resident", in the case of a company, firm or other association of persons, finds no place in the 1961 Act.

In the facts of Dr. Surmukh Singh Uppaz v. CIT [(1983) 144 ITR 191 (Punj)], a case under the 1922 Act provisions it was held that the status of the assessee was correctly taken as 'resident but not ordinarily resident' negativing assessee's contention that his status should be taken as 'non-resident'.

Enquiry is necessary only if the assessee has been found to be a resident. The enquiry whether or not an individual or a Hindu undivided family is "ordinarily resident" or "not ordinarily resident" is needed only after it is found that he or it is "resident" within the meaning of section 6(1) or 6(2), as the case may be. If it is ascertained, on facts, that the assessee is non-resident, no such enquiry is needed at all.

The only difference in the incidence of income-tax on a "resident and ordinarily resident" assessee on the one hand a "resident and not ordinarily resident" assessee on the other hand is in respect of foreign income. In the former case it is

liable to be included in the total income assessable; in the latter case it is not so includible unless it is derived from a business controlled in, or a profession set up, in India [see section 5(1)].

Reversing the provisions contained in section 6(6), it may be seen that a person is "resident and ordinarily resident" in India in a previous year, only-
(i) if he is an individual, (a) he has been resident in India in nine out of the ten previous years preceding that year and (not or) (b) during the seven previous years preceding that year he has been in India for a total period of seven hundred and thirty days or more;

(ii) if it is a Hindu undivided family, (a) its manager has been resident in India in nine out of ten previous years preceding that year and (not or) (b) during the seven years preceding that year he has been in India for a total period of seven hundred and thirty days or more (CN. Townsend v. CIT, (1974) 97 ITR 185 (Pat); K.M.N.N. Swaminathan Chettiar v. ClT, (1947) 15 ITR 418 (Mad); P.B.I. Bava v. CIT, (1955) 27 ITR 463 (Tra-Co).

The following departmental circular is relevant on the point:-
C.I.T., W.B.'s Circular letter No. JI2832014A11015158-59, dated Calcutta, the 5th December, 1962, addressed to the Secretary, Indian Chamber of Commerce, Calcutta-
1.-I am directed to refer to the correspondence resting with the Ministry of Finance (Department of Revenue) letter No.

4122/61-IT(AT), dated 25th November, 1961, and to state that the Department's view has all along been that an individual is "not ordinarily resident" unless he satisfies both the conditions in section 4B(a), i.e.,-

(i) he must have been a resident in nine out of ten preceding years; and

(ii) he must have been in India for more than two years in the preceding seven years.

Thus, a person will be "resident and ordinarily resident" if both these conditions are satisfied but he will be "resident but not ordinarily resident" if either of those conditions is not satisfied.'

Thus, a person will become resident and ordinarily resident only if

(a) he has been 'resident' in nine out of ten preceding previous years, and

(b) has been in India for at least 730 days in the seven preceding previous years; and he will be treated as resident but not ordinarily resident if either of these conditions is not fulfilled [Advance Ruling Application No. P-5 of 1995, In re, (1997) 223 ITR 379, 385 (AAR)]. In the facts of that case, it has been held that the applicant will have the status of a resident but not ordinarily resident for assessment years 1996-97 to 2004-05. Also see, Advance Ruling Application No. P-12 of 1995, In re, (1997) 228 ITR 61,66 (AAR).

In Morgenstern Werner v. CIT [(1998) 233 ITR 751, 755 (All), affirmed in CIT v. Morgenstern Werner, (2003) 259 ITR

486 (SC)], the petitioner, a foreign technician has been held to be 'not ordinarily resident'.

It is pertinent to note that the proposed abolition (w.e.f. 1-4-1999) of the special category of 'not ordinarily resident' by the Finance (No. 2) Bill, 1998, has been withdrawn by the Finance Minister on 17-7-1998 while introducing in Lok Sabha Notice of Amendments to the Finance (No. 2) Bill, 1998. Thus, such special category has been retained.

In Pradip J. Mehta v. CIT [(2002) 256 ITR 647, 654, 656-57 (Guj), special leave petition granted by the Supreme Court: (2002) 257 ITR (St.) 35 (SC)], it has been held that section 6(6) does not define 'ordinarily resident in India' but describes 'not ordinarily resident' in India. It resorts to the concept 'resident in India' for which the criteria are laid down in section 6(1). 'Ordinarily resident' for the purposes of income-tax connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. When an individual has been a resident in India for nine out of ten preceding years, then in order to escape tax on his foreign income, he must not have been in India for 730 days or more in the aggregate during the preceding seven years. The test is one of presence and not absence from India and the length of presence will determine when an individual is 'not ordinarily resident' in India. In order that an individual is not an ordinarily resident, he should satisfy one of the two conditions laid down in section 6(6)(a), the first condition is that he

should not be resident in India in all the nine out of ten years preceding the previous year and the second condition is that he should not have during the seven years preceding that year, been in India for a total period of 730 or more days.

In the facts of that case, the Tribunal has found (pp. 656-57) as a fact that the assessee was a resident in India for 8 years out of 10 preceding years and his case, therefore, cannot fall under the first part of section 6(6)(a). His case will also not fall in the second part of that section, because, in the 7 years preceding the relevant previous year, the assessee had been in India for 1402, i.e., much more than 730 days being the upper limit referred to in that behalf. Therefore, the High Court was of the opinion (p. 657) that the Tribunal was justified in holding that the status of the assessee for the year in question was not that of 'not ordinarily resident' as claimed by him and that the Tribunal has not committed any error in interpreting the provisions of section 6(6).

Reversing the decision of Gujarat High Court [256 ITR 647 (Guj)], in Pradip J. Mehta v. CIT [(2008) 300 ITR 231 (SC)], it has been held that the assessee was 'not ordinarily resident' in India within the meaning of section 6(6)(a) as he was not resident for 9 out of 10 years. A person would become an ordinary resident only (1) if he had been residing in India in 9 out of 10 preceding years, and (2) he had been in India for at least 730 days in the previous seven years.

Effect of the substitution (w.e.f. 1-4-2004) of section 6(6) by the Finance Act, 2003.-Section 6(6) has newly been substituted (w.e.f. 1-4-2004) by the Finance Act, 2003 (32 of 2003) [for the text of so-substituted section 6(6), see, ante]. On a comparison of the phraseology employed in the then existing section 6(6), and the newly substituted section 6(6), the following points of difference emerge:

Sl. No.	Section	Existing Provision	Substituted
(1)	6(6)(a)	Has not resident	Has been a non-resident
(2)	6(6)(a)	Has not during	Has during
(3)	6(6)(a)	Seven hundred and thirty days or more	Seven hundred and twenty nine days or less
(4)	6(6)(b)	Has not been resident	Has been a non-resident
(5)	6(6)(b)	Has not during	Has during
(6)	6(6)(b)	Seven hundred and thirty days or more	Seven hundred and twenty nine days or less

To put it differently, according of section 6(6)(a), an individual is said to be 'not ordinarily resident' in India in any previous year if he-

-(upto assessment year 2003-04) has not been resident

-(for and from assessment year 2004-05) has been a non-resident in India in 9 out of the 10 previous years preceding that year, or

-(upto assessment year 2003-04) has not

-(for and from assessment year 2004-05) has during the 7 previous years preceding that year been in India for a period of, or periods amounting in all to,-

-(upto assessment year 2003-04) 730 days or more

-(for and from assessment year 2004-05) 729 days or less.

According to section 6(6)(b), a Hindu undivided family is said to be 'not ordinarily resident' in India in any previous year if its manager-

-(upto assessment year 2003-04) has not been resident

-(for and from assessment year 2004-05) has been a non-resident in India in 9 out of the 10 previous years preceding that year, or

-(upto assessment year 2003-04) has not

-(for and from assessment year 2004-05) has

during the 7 previous years preceding that year been in India for a period of, or periods amounting in all to,-

-(upto assessment year 2003-04) 730 days or more

-(for and from assessment year 2004-05) 729 days or less.

It is evident from the word 'or', occurring for the first time in sub-clause (a) or (b) of clause (6) of section 6, that the two conditions contemplated in those sub-clauses are alternate and these are not cumulative. The fulfillment of either of the conditions would be sufficient to treat an individual or a Hindu undivided family as 'not ordinarily resident' in India.

Section 6(6) was amended by the Finance Act 2003, with effect from 1-4-2004. As a result of the said amendment, an individual though resident, is not ordinarily resident in any previous year:

(1) either where he has not been resident, i.e., has been a non-resident in 9 out of 10 previous years preceding that previous year;

(2) or where he has not been in India (i.e., has been absent from India) for 730 days or more during the seven previous years preceding that year. Even though the Departmental Circular No. 7 of 2003 states that the amendment was made in order to remove doubts about the interpretation of the section and it is clarificatory in nature, nevertheless, it has been made applicable only from 1-4-2004. The said amendment cannot be held to be clarificatory, as the residential status of an assessee determines the tax burden of the assessee. Thus, the said amendment can be held only as substantive in nature and cannot be given retrospective effect [CIT v. Karan Bihari Thapar, (2011) 335 ITR 541 (Del)]. If the totality of facts, and the judicial pronouncements, discussed hereinabove and more specifically, during the earlier and later years, the assessee was practically residing abroad, therefore, it can be concluded that the controlling management of the assessee during the aforesaid period remained abroad and further the factual finding recorded by the ld. First Appellate Authority was neither controverted by the Department nor any adverse material was produced before us, in support of the

assertion made by the Revenue, consequently, the assessee is not an ordinary resident, thus, we affirm the stand of the ld. Commissioner of Income Tax (Appeals).

Finally, the appeals of the Revenue and the cross objections of the assessee, are dismissed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 18/12/2015.

Sd/-	Sd/-
(Rajesh Kumar)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated :18/12/2015

Shekhar, P.S./नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**