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

Before Shri C N Prasad, Judicial Member
& Shri Rajesh Kumar, Accountant Member

ITA Nos.6065 & 6066/Mum/2014
Assessment Years : 2006 – 2007 & 2007-08

Deepak B Shah 61-A, 6th Floor, Laxmi Vilas, 87 Nepean Sea Road, Mumbai 400 006. PAN AACPS0199L	Vs.	ACIT 16(2) Mumbai
(Appellant)		Respondent)

ITA Nos.6067 & 6068/Mum/2014
Assessment Years : 2006 – 2007 & 2007-08

Kunal N Shah, 501, Gitanjali Garden, 68E, Nepean Sea road, Rungata Lane, Mumbai 400 006	Vs.	ACIT 16(2) Mumbai
(Appellant)		Respondent)

Appellants By : Shri Roshan Shah
Respondent By : Ms Neha Thakur

Date of Hearing :09.10.2018		Date of Pronouncement : 30.10.2018

O R D E R

Per Rajesh Kumar, Accountant Member

These four appeals by two different assessees are directed against the two different orders of Commissioner of Income Tax(appeals)- 27 Mumbai {(hereinafter called CIT(A)} even dated 01.08.2014 which are in turn arose out of the assessment orders of Assistant commissioner of Income Tax , Circle-16(2) (hereinafter called

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the AO) passed u/s 143(3) 147 of the Act dated 18.03.2014 .

2. Both the appellants have challenged the orders of the ld. Commissioner of Income tax(Appeals) (hereinafter CIT(A)) basically on two common issues in various Grounds of appeal. The first issue is against upholding of re-assessment proceedings u/s. 147 of the Act and second issue challenged by the assessees in upholding the addition to the tune of Rs.3,06,54,922/- in AY 2006-07 and Rs. 2,74,007/- in AY 2007-08 u/s. 69A of Income tax Act each on account of deposit in HSBC Bank, Geneva.

3. At the time of hearing the assessee did not press for the ground on re-opening of assessment u/s 147 of the Act. Thus this ground is dismissed as not pressed.

4. With regard to second issue challenging the order of ld. CIT(A) confirming the addition to the tune of Rs.3,06,54,922/- and Rs. 2,74,007/- in AY 2006-07 and 2007-08 u/s. 69A of the Act in both the cases of these appellants, the brief facts are that both assessees have filed their respective income tax returns for both the assessment years i.e. 2006-07 and 2007-08 which were processed under section 143(1) of the Act. Subsequently notices u/s 148 was issued for reopening the assessment stating that income had escaped assessments. The assessees in response to the said notice filed letters requesting to treat the returns filed originally treated as returns filed in response to notices u/s. 148 of the Act. The case of both the assessees were re-opened when information was received by Govt. of India from French Government under DTAA in exercise of its sovereign

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powers that some Indian nationals and residents have Foreign Bank Accounts in HSBC Bank, Geneva, Switzerland which were not disclosed to the Indian Taxation department. The said information was received in the form of a document known as "base note" wherein various personal details of account holders such as name, date of birth, place of birth, sex/gender, residential address, profession, nationality, date of opening of bank account in HSBC bank, Geneva and balances in certain years etc. were mentioned. In 2011 after receiving "base note" with the details as mentioned above as a part of Swiss leaks, the Investigation Wing of Income tax Department conducted a survey u/s. 133A of the Act on 30.09.2011 at the premises of M/s. Kanubhai B. Shah and Co. During the course of survey proceedings the "base note" was shown to the assessees and it was indicated that the revenue was of the view that both the assessees have foreign bank account. Both the assessees denied having any knowledge of any foreign bank account with HSBC, Geneva during the course of survey proceeding itself. Besides no incriminating material was found during the course of survey. As a matter of fact the said account with HSBC Bank, Geneva was opened in 1997 by an overseas discretionary Trust known as Balsun Trust set up by Shri Dipendu Bapalal Shah an NRI since 1979 and a non-resident u/s. 6 of the Incone tax Act. Shri Deepak Shah and Shri Kunal Shah the two appellants before us with Indian residency were named as discretionary beneficiaries of the said trust. Shri Dipendu Bapalal Shah furnished an affidavit dated 13/10/2011 duly sworn in before UAE authority in which he stated on oath :-

(i) He had settled on an offshore discretionary trust with his initial contribution;

(ii) None of the discretionary beneficiaries have contributed any funds to the trust;

(iii) None of the beneficiaries have received any distribution from the trust.

Thereafter Shri Deepak Shah and Shri Kunal Shah, the appellants also furnished sworn in affidavits dated 05/11/2011 stating that they were not aware of the existence of any the accounts in HSBC, Geneva, Switzerland nor known about the mention of their names in the said accounts. They further stated that they had not carried out any transactions in relation to the said account nor received any benefit from the said account or discretionary trust, besides affirming that they have not signed any document in relation to opening or operating of the said bank account. In addition the assessees submitted a clarificatory letter from HSBC Bank, Geneva stating that both the assessees have neither visited nor opened or operated the said bank account and that no payments have been received or made in relation to the said account. However not convinced with the submissions of the assessee, the Assessing Officer after initiating the proceedings u/s. 147 of the Act and added peak balance i.e. in the hands of both the appellants at Rs. 6,13,09,845/- and Rs. 5,99,75,370/- for assessment year 2006-07 and 2007-08 respectively by framing assessments u/s 143(3) r.w.s. 147 of the Act. Thus the same additions were made in the hands of two assessees. It is also pertinent to note that same additions were also made in the hands of Shri Dipendu Bapalal Shah who created the private discretionary Trust known as Balsun Trust. So the same additions were made in the hands of three assessee.

5. In the appellate proceedings the ld. Commissioner of Income tax(Appeals) [CIT(A)] affirmed the addition to the tune of half of the peak balance in the hands of both the assessees/appellants to avoid double taxation and now the appellants

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have challenged the impugned order of the ld. CIT(A) qua the addition sustained equal to 50% of peak balance. It is pertinent to mention that in the hands of Shri Dipendu Bapalal Shah the revenue added the same peak balance vide assessment order dated 03/03/2015 for assessment years 2006-07 and 2007-08. As a result, the peak balances were added thrice by revenue in the hands of both the appellants in two successive assessment years and also in the case of Shri Dipendu Bapalal Shah in the same years. In the appellate proceedings of Shri Dipendu Bapalal Shah, the ld. CIT(A) vide order dated 28/3/2016 set aside the addition on the basis that as an NRI, none of his business monies earned outside India could be brought to tax in India unless they are shown to have arisen or accrued in India. He also held that there was no linkage of the amounts to India and the revenue has not discharged its duty on this issue . The said order of CIT(A) in the case of Shri Dipendu Bapalal Shah was also upheld by Tribunal in ITA No. 4751 & 4752/Mum/2016 AY 2006-07 & 2007-08 dated 19.06.2018. The Hon'ble Tribunal upheld the order of the ld. CIT(A) in the case of Shri Dipendu Bapalal Shah, on the ground that contents of the affidavit dated 13.10.2011 were not denied or proved to be not true by the Assessing Officer. Further, it was held that the bank account of HSBC Bank, Geneva is outside the purview of the IT Act, as Shri Dipendu Bapalal Shah is a Non Resident Indian.

6. At present the appeals of two assessees before us viz. Shri Deepak B Shah & Shri Kunal N Shah, are being dealt by us for A.Ys 2006-07 and 2007-08, whereas the appeals of Shri Dipendu Bapalal Shah has been decided by the Tribunal, as stated above. As stated earlier, there was a peak credit of Rs. 6,13,09,845/- in A.Y.

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2006-07 and Rs. 5,99,75,370/- in A.Y. 2007-08, which were in the case each of three different assessees viz. Shri Dipendu Bapalal Shah, Shri Deepak B Shah & Shri Kunal N Shah. In the case of Shri Dipendu Bapalal Shah, the issue has been decided in favour of the assessee by the CIT(A) and such decision has also been upheld by the Tribunal. However, in the case of present appellants, the amounts have been reduced to Rs. 3,06,54,923/- and Rs. 2,74,007/- for A.Ys 2006-07 and 2007-08 respectively in the case of these assessees by the ld CIT(A).

7. The learned AR vehemently submitted before us that the order of the CIT(A) is factually incorrect and against the settled position of law in as much as in sustaining part of the peak balance in the account of Balsun Trust, an overseas Discretionary Trust, with HSBC, Geneva, which was created by Shri Dipendu Bapalal Shah, who is an NRI since 1979, and a non-resident under section 6 of the Income tax Act, 1961. The learned counsel argued that Shri Deepak B Shah and Shri Kunal N Shah are Indian residents and have been named as discretionary beneficiaries of the said Trust. This fact has been corroborated by sworn in affidavit dated 13.10.2011 before the UAE authority of Shri Dipendu Bapalal Shah, asserting that (i) he had settled an offshore discretionary trust with his initial contribution; (ii) none of the discretionary beneficiaries have contributed any funds to the trust and (iii) none of the beneficiaries have received any distribution from the trust. The learned counsel further submitted that peak balances in two years in the HSBC account of Balsun Trust, created by Shri Dipendu Bapalal Shah of Rs. 6,13,09,8745/- and Rs. 5,99,75,370/- were added in the assessment years 2006-07 and 2007-08 of the said NRI but were deleted by the CIT(A) on the ground that he

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is a non-resident under section 6 of the Income tax Act, 1961 and such decision of CIT(A) has also been upheld by the Tribunal vide order dated 19.06.2018. The learned counsel argued that the peak balances in two years in the HSBC account have already been held to be in the ownership of Shri Dipendu Bapalal Shah and was not taxable in his hands on account of his NRI status. He further contented that, in any case, in the absence of any proven linkage of the amounts to India the amounts cannot be added and taxed in the hands of present appellants. Further, the learned AR argued that there is a clear assertion by Shri Dipendu Bapalal Shah that the money lying in HSBC account belonged to him and the department has failed to prove the said assertion to the contrary by brining any cogent evidence on record. Therefore, he contended that there is no reason as to why and how the said amounts can be taxed in the hands of the present appellants. He further submitted that it is a well settled position of law that decision of co-ordinate Benches of the Tribunal are binding on other co-ordinate Benches by relying on the decision in the case of S. I. Rooplal and Ors. Vs. Ltd. Governor through Chief Secretary, Delhi and Ors (2000) (1 SCC 644) and Hatkesh Co-op. Hsg. Society Ltd Vs Asstt. Commissioner of Income Tax Circle21(2), Mumbai ITA No. 328 of 2014. The learned AR submitted that in the present case, the Co-ordinate Bench has held that Shri Dipendu Bapalal Shah is the owner of the funds in question and he being a non-resident, the said amounts cannot be bought to tax in India under Sections 5 and 9 of the Income tax Act. He, therefore, contended that the said funds in the HSBC account are beyond the purview of Income Tax Act. On the same analogy, the learned AR submitted that in view of these findings rendered by the Co-ordinate

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Bench of the Tribunal in the case of Shri Dipendu Bapalal Shah, the amount in question cannot be brought to tax in the hands of present appellants.

8. Further, the AR submitted that the provisions of section 69A of the IT Act have wrongly been invoked by the AO and confirmed by the learned CIT(A). It is submitted that it is sine qua non for the invocation of section 69A of the IT Act that the assessee must be found to be the owner of the money, bullion, jewellery or other valuable articles but in the present case there is nothing of the sort. The learned AR further relied on the following decisions in defence of his arguments :

CIT vs. K Chinnathamban [2007] 162 Taxman 459 (SC)
Durga Kamal Rice Mills v. CIT [2003] 130 Taxman 553 (Cal)
CIT vs. KTMS Mohamood [1997] 92 Taxman 169 (Madras)

It is undisputed that the money lying in the foreign bank account with HSBC, Geneva, belongs to Shri Dipendu Bapalal Shah, who has agreed that the appellants are discretionary beneficiaries and it was he who created the Trust with his initial contribution. He also confirmed that the two beneficiaries viz. the appellants before us, have not contributed anything to the said trust nor did they receive any money by way of distribution during the year. The said undisputed fact that Shri Dipendu Bapalal Shah is owner of money lying in the HSBC Account, Geneva, leads to the positive inference that the appellants are not owners of the bank account and, therefore, addition made u/s. 69A is not sustainable. The learned counsel submitted that even the ITAT vide order dated 19.06.2018 held that the money lying in the HSBC account, Geneva, is outside the purview of the I.T Act, and,

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therefore, the said money held by a non-resident in a foreign bank account cannot be taxed in the hands of the two appellants, as the appellants in their respective affidavits denied the ownership of the said money.

9. The learned AR further submitted that no tax can be levied in the hands of the present appellants, who are discretionary beneficiaries of the said trust and have not received any distribution from the said trust. The learned AR further stated that it is settled principle of the taxation of trusts that the beneficiary of a discretionary trust is not liable to tax in respect of income of the trust unless it is distributed to such beneficiary. He, therefore, placed reliance on the following:

CIT vs. Smt. Kamalini Khatau 74 Taxman 392 (SC)

CWT Rajkot vs. Estate of HMM Vikramsinhji of Gondal 45 taxmann.com 552 (SC)

He further submitted that in view of the ratio laid down in both these decisions, it is the trustee who is the representative assessee of a trust and in whose hands the income of the trust is to be assessed. A discretionary beneficiary can never be taxed until and unless he has received a distribution from the trust, and even then, such beneficiary can only be taxed to the extent of such actual distribution. The learned AR further submitted that it is well settled that a charging provision under a taxing statute must be strictly interpreted and there can be no imposition of tax by implication. The learned AR in support of his contentions relied on the following decisions :

CWT vs. Ellis Bridge Gymkhana [1998] (1 SCC 384)

A.V Fernandez vs. State of Kerala [AIR 1957 SC 657]

CIT vs. Kasturi & Sons LTd. [3 SCC 346]

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He further contended that as per the provisions of section 5 and 9 read with Sections 160-166 of the I T Act, qua a trust, the statute clearly prescribes a liability of tax in the hands of the trustee, and stipulates that a discretionary beneficiary having received no distribution will not be liable to tax. As such the provisions require to be read strictly and no tax liability can be imputed to the appellants as discretionary beneficiaries when the statute specifically provides otherwise. Therefore, in view of the fact that amounts lying in the HSBC Account, Geneva belonged to Shri Dipendu Bapalal Shah, the addition of peak balances in the hands of the appellants in A.Y. 2006-07 and 2007-08 should be deleted.

10. The learned counsel also contended that it is well settled proposition of law that the onus to prove the taxability of particular income is heavily on the department. The ld Counsel contended that the Revenue ought to have discharged its burden of proof to prove the ownership qua the appellants and could not have shifted the onus of proof on the assessees under the I T Act. He further stated where the legislature specifically intended to shift the burden of proof under the IT Act to the assessee, specific provisions u/s 278D, 278E and 292C of the Act have been enacted. In view of the said provisions, the learned counsel submitted that shifting of the onus of proof under the IT Act is only envisaged only in respect of specific provisions and cannot be pressed into play in any other situation. In the present case, the Revenue is placing an impossible burden on the appellants to prove a negative that the account has not been opened by the appellants and that they have not received any distribution from the said account, which is contrary to various precedents which have clearly held that no such burden of proof can be

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placed on an assessee under a taxing statute. The assessee relied heavily on two decisions viz., K P Varghese vs. ITO 4 SCC 137 and Advani Oerlikon Ltd. and Anr. Vs. UOI and Ors [1981 ELT 432]. In the present cases, the appellants have clearly stated that they are not the owners of the bank account and also time and again confirmed by way of sworn in affidavits that bank account does not belong to them nor did they enter into any transaction in relation to the said account nor received any benefit from the said account. Additionally, it was also submitted that appellants have not executed or signed any documents in relation to opening or operating the account. It is noteworthy that the survey u/s. 133A of the Act at the KBS premises did not yield any incriminating evidence qua the appellants. The learned counsel finally submitted that the presumption sought to be raised by the Revenue stands rebutted by the consistent, clear and unequivocal statements of the appellants affirming that the funds in the bank account belong to the non-resident Shri Dipendu Bapalal Shah and no distribution has been made to the appellants. The learned AR finally submitted that in view of the totality of facts and ratio laid down by various Courts, the addition as sustained by the CIT(A) deserves to be deleted.

11. The learned DR, on the other hand, relied heavily on the order of CIT(A) by submitting that the claim of the AR that the same amount has been assessed thrice in the hands of three individuals is wrong as the learned CIT(A) has very fairly reduced the additions of the peak balances to half of the peak. The ld Dr further stated that the affidavits filed by both the appellants are self serving documents without any corroborative or evidentiary value. He submitted that in the

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affidavit of Shri Dipendu Bapalal Shah there was no details of family members of the deponent and, therefore, said document is self serving without any evidentiary value. The learned DR referring to page 11 of the paper-book, which is a confirmation submitted by the bank submitted that HSBC Bank has confirmed the name of Deepak B Shah and Kunal N Shah (the assessees). He also submitted that the name of the assessees have been mentioned in the information received by Government of India as a part of Swiss Leaks in relation to HSBC Bank, Geneva, by way of base note by referring to page 1 of the paper-book. He further submitted that the assessee has refused to sign any consent paper, which clearly showed that the said transactions are proved beyond doubt that these two assesses have connection with the said bank account. Further, both the assessee's did not co-operate at any stage of the proceedings. He further submitted that the first appellate authority has very clearly held that in such clandestine operations and transactions, it is impossible to have direct evidences or demonstrative proofs of every move of the assessee. The income tax liability is to be assessed on the basis of parameters, which are gathered from the inquiries during the course of assessment. Therefore, he confirmed that the AO has no choice but to take recourse on the material available on record. Finally, the ld DR prayed before the bench that the order of CIT(A) should be upheld.

12. We have heard rival submissions and carefully considered the relevant records as placed before us including various decisions cited by the Ld. AR during the course of hearing. The undisputed facts are that the after receiving "Base Note" in 2011 as apart of "Swiss leaks", the investigation wing of the Income-tax

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Department conducted a survey u/s 133A of the IT Act the premises of Kanubhai B. Shah & Co. on 30/09/2011. During the course of survey, the Base Note was shown to the Appellants namely Deepak B Shah & Kunal N. Shah and told the assessees that the Income Tax Department has reasonable belief on the basis of information received in the Base Note that foreign bank account is held by the appellants. The appellants denied the knowledge of any such bank account in HSBC, Geneva during the course of survey proceedings itself and it is also fact that no incriminating material was found during the course of Survey. The facts as are culling out from the record show that a person named Mr. Dipendu Bapalal Shah created and constituted an overseas Discretionary Trust known as "Balsun Trust" by making contribution to the said trust from his own fund/ sources with discretionary beneficiary of the said trust Shri Deepak B. Shah and Shri Kunal N. Shah. It is pertinent to state that during the year under consideration both the appellants did not receive any distribution of income from the said trust as no such distribution done by the trust during these years. Mr. Dipendu Bapalal Shah is a foreign resident since 1979 and is a non- resident under Section 6 of the IT Act, 1961. During the course of the assessment proceedings Mr. Dipendu Bapalal Shah and both the appellants in their respective assessment proceedings filed their sworn in affidavits. The affidavit of Mr. Dipendu Bapalal Shah was sworn in before the UAE authority stating on oath as under:

i) He had settled an offshore discretionary trust with his initial contribution
ii) None of the discretionary beneficiaries have contributed any funds to the trust
iii) None of the beneficiaries have received any distribution from the trust.

13. The appellants also filed sworn affidavit dated 5/11/2011 stating that they were not aware of the existence of any of the accounts in HSBC, Geneva. They further stated that they never carried out any transactions in relation to the said account with HSBC Bank, Geneva nor received any benefit from the said account. It is also found that they have not signed any documents nor operated the said bank account. It is also true that both the appellants also filed a clarificatory letter from HSBC Bank, Geneva stating that both the appellants have neither visited nor opened or operated the bank accounts and that no payments have been received from them or made to them in relation to the said account. The peaks during two years in the said account with HSBC, Geneva were added in the hands of all three persons the Mr. Dipendu Bapalal Shah and two appellants presently before us in AY 2006-07 and 2007-08. In the case of Mr. Dipendu Bapalal Shah, the Ld. CIT(A) vide order dated 28/03/2016 deleted the addition by holding that Mr. Dipendu Bapalal Shah is an NRI, and none of his monies outside India could be brought to tax in India unless they would shown to have arisen or accrued in India. The said order of the Ld. CIT(A) was also upheld by the coordinate bench of the Tribunal vide order dated 19/06/2018 by holding that contents of the affidavit dated 13/10/2011 of the Mr. Dipendu Bapalal Shah were not declined or held to be not true by the AO. The relevant operative extracts are as under:-

> *14. Under section 5(2) the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. We also found that the assessee in his affidavit dated 13 October 2011 has clearly stated that the he was a settlor of a trust outside India which he had created for the benefit of his family members with his initial contribution. Further, he has also stated that none of the discretionary beneficiaries have contributed any funds*

to the said trust. However, the content of this affidavit was nowhere declined by the AO nor was held to be not true.In view of the above, the assessee being a non-resident, having money in a foreign country cannot be called upon to pay income tax on that money in India unless it satisfies the tests of taxability of non-resident under the provisions of the Act, which in the instant case is not getting satisfied in the case of the assessee. Thus, the bank account of HSBC Bank, Geneva is outside the preview of this Act.

15. We found that CIT(A) as dealt with the issue threadbare and after applying judicial pronouncement laid down by High Court and Supreme Court reached to the conclusion that assessee being non-resident is not liable in respect of money lying in the foreign country unless AO bring something on record to show that assessee has not fulfilled the test of taxability of non-resident under the provisions of the Act. The detailed finding so recorded by CIT(A) are as per material on record and do not require any interference on our part.

14. Further, the bank account of HSBC Bank, Geneva is out of the purview of the I T Act, as Mr.Dipendu Bapalal Shah is a non-resident Indian since 1979. In the case of the two appellants before us, the same amount was added in AY 2006-07 and 2007-08 which was reduced by Ld. CIT(A) to one half of the total additions to avoid any double taxation affirming the additions to that extent. Looking to the decision of the co-ordinate bench holding that the money belonged to the Mr. Dipendu B Shah who is non-resident and the income of the non-resident held abroad is not assessable in India unless it is shown to have arisen or accrued in India. Since it is held by the ITAT that the amount in HSBC Account in Geneva is owned by Mr. Dipendu Bapalal Shah who is non-resident we do not find any justification or reasons to sustain the order of ld. CIT(A) when the revenue has completely failed to show any linkage with foreign bank account with Indian money. We find that addition has been made by the AO U/s 69A of the Act to justify the addition on account of peak balance. We agree with the contentions of the Ld. AR that it is *sine qua non* for invoking section 69A of the IT Act., the assessee must be found to be the owner of money, bullion, jewellery or other valuable articles and

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whereas in the present case the money is owned and held by Mr. Dipendu Bapalal Shah a foreign resident in an account HSBC, Geneva and also admitted that he is the owner of the money in the HSBC Account Geneva.

15. In the case of *CIT Vs K. Chinnathamban (supra)* the Hon'ble Apex Court has held that when a deposit stands in the name of third person and that person is related to the assessee in a such case the proper course would be to call upon the person in whose books the deposit appears or the person in whose name the deposit stands to explain such deposit. In the present case the money is held in the name of Mr. Dipendu Bapalal Shah who vehemently claimed to be owner of the said deposits from his own fund /sources and the revenue has failed to bring any cogent and convincing materials on record which proved that the two appellants are owners of the money in HSBC Account.

16. In the case of *Durga Kamal Rice Mills vs. CIT (supra)* it was observed by the Hon'ble Kolkata High Court that ownership is one of the considerations when the matter comes u/s 69A. Similarly in the case of *CIT Vs. K.T.M.S. Mohamood* supra in order to make an assessment under section 69A for undisclosed income, the assessee must not only be the person who is in possession of the undisclosed income but he should also be the owner of the same.

17. In the present case, undisputedly Mr. Dipendu Bapalal Shah is owner of HSBC Bank account, Geneva and the appellants are discretionary beneficiaries which leads to positive inference that the appellants are not the owners of the said bank account and hence the additions under Section 69A cannot be sustained. In the present case before us, admittedly both the appellants namely Deepak B. Shah and

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Kunal N. Shah are discretionary beneficiaries of the "Balsun trust" created by Mr. Dipendu Bapalal Shah and the two appellants have not made any contribution nor done any transaction with said trust at all. In our opinion in the case of discretionary trust, the income of the trust could not only be added in the hand of beneficiary but the trustees are the representative assessees who are liable to be taxed for the income of the trust. If the discretionary trust has made some distribution of income during the year in favour of the discretionary beneficiaries only then the distributed income is taxable in the hands of the beneficiaries but nothing of the sort has happened nor two appellants have received any money as distribution of income by the discretionary trust. So long as the money is not distributed by the discretionary trust, the same cannot taxed be in the hands of the beneficiaries. Similarly, the present case for us, the deposits held in HSBC, Geneva account cannot be taxed in the hand of beneficiaries/ appellants at all.

18. The case of the assessee find supports from decision of the Apex court in the case of *CIT Vs Smt. Kamilini Khatau supra* and *Commissioner of Wealth Tax, Rajkot vs. Estate of HMM Virasinhji of Gondal supra*. In the first case, the Hon'ble Apex Court has held as under: -

- ***Commissioner of Income-tax vs. Smt. Kamalini Khatau [1994] 74 TAXMAN 392 (SC)***

25. [] Section 166 is clearly clarificatory. It does not empower any assessment or recovery by itself. It only makes it clear that sections 160 to 165 to not bar the direct assessment of the person on whose behalf or for whose benefit the income is receivable or the recovery from such person of the tax payable thereof, provided that is permissible under any other provisions of the Act. Even so, since the word used in section 166 is 'receivable' it cannot apply to a discretionary trust for it cannot be said that the income thereon is 'receivable' for one or more beneficiaries, it being left to the discretion of the trustees whether or not the income should be distributed

to one or more of the beneficiaries or not at all. But that is not to say that the beneficiary of a discretionary trust, because he does not fall within the ambit of section 166, may not be assessed upon income received by him and tax recovered from him thereon if that is permissible under any other provisions of the Act.

Section 5 defines the total income of any person to include income received by him or received on his behalf or which accrues or arises to him. A person may be directly assessed in respect of such income. The income of a discretionary trust which is within the accounting year distributed to and received by the beneficiary would, therefore, be subject to assessment in his hands and tax thereon would be recoverable from him. Such income would squarely fall within the broad sweep of total income under section 5 and the beneficiary would be liable to assessment and recovery of tax thereof under section 4

In the second case the Hon'ble Apex Court has held as under: -

- ***Commissioner of Wealth Tax, Rajkot vs. Estate of HMM Vikramsinhji of Gondal [2014] 45 taxmann.com 552 (SC)***

  18. A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished to so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour. [Snell's Principles of Equity, 28the Edition, Page 138]

So applying the ratio laid down by the Hon'ble Apex Curt in the above said two decisions, we are of the considered view that the additions cannot be made and sustained in the hands of the appellants as the Balsun trust is a discretionary trust created by the Mr. Dipendu Bapalal Shah and said trust has neither made any distribution of income nor did the two beneficiaries/appellants receive any money by way of distribution. While the department has failed to bring any conclusive evidence to establish nexus between these two appellants and bank account in HSBC, Geneva and more so when the Mr. Dipendu Bapalal Shah has owned the

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balance in the HSBC, Geneva bank account , we are not in agreement with the conclusions of the CIT(A) in sustaining the additions equal to fifty percent of the peak balance in the hands of both the appellants. Considering the facts of the two appellants in view of various decisions as discussed hereinabove we hold that order of CIT(A) is wrong in assuming that the said money may belongs these two appellants and such conclusion is against the facts on record and based on surmises and presumptions. Accordingly we set aside the order of ld. CIT(A) and direct the AO to delete the additions made u/s 69A in respect of HSBC Bank account for assessment years 2006-07 and 2007-08 in the case of both the appellants before us.

19. In the result the appeals of the assessee are allowed.

Order pronounced in the open court on this day of 30th October, 2018.

Sd/-	**Sd/-**
(C N Prasad)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated : 30th October, 2018

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Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'B' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai

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