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

BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

ITA No.4751/Mum/2016 & 4752/Mum/2016
(**Assessment Year :2006-07 & 2007-08**)

DCIT (IT) – 4(2)(1), Scindia House Ballard Pier, N.M.Road, Mumbai – 400 038	Vs.	Shri Dipendu Bapalal Shah C/o. Sampat & Mehta Chartered Accountants B-501/502, 11 Sarvoday W.E. Highway, Bandra(E) Mumbai – 400 051
PAN/GIR No.		**BNBPS0099E**
Appellant)	..	**Respondent**)

Revenue by	Shri Rajat Mittal
Assessee by	Shri Rohan Shah, Shri Hardik Choksi, Shri Vijay Riyani & Ms. Divya Jeswant
Date of Hearing	**15/06/2018**
Date of Pronouncement	**19/06/2018**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These are appeals filed by the Revenue against the order of CIT(A) for the A.Y.2006-07 and 2007-08 in the matter of order passed u/s.143(3) r.w.s. 147 of the IT Act.

2. Common grounds have been taken by the Revenue in both the years which pertains to deletion of addition of amount credited in the HSBC Bank account Geneva, Switzerland. The ground taken by the Revenue in the A.Y.2006-07 reads as under:-

1. " Whether on the facts and in the circumstances of the case, the CIT(A) has erred in deleting addition of Rs. 6,13,09,845/-without appreciating the fact that the addition was made to the total income of the assessee as income deemed to accrue or arise in India for which the assessee offered no explanation about the source and nature thereof."

2. " Whether on the facts and in the circumstances of the case, the CIT(A) has erred in holding that AO has not proved that money deposited in HSBC a/c was sourced from India, without appreciating that assessee having admitted the ownership of HSBC A/c, stonewalled the further enquiry by not providing the bank statement or a consent waiver form, which could have enabled the AO to cross verify the claim made by assessee."

3. " Whether on the facts and in the circumstances of the case, the CJT(A) has erred in not appreciating that under similar circumstances, where petitioner had not provided the requisite details of the HSBC a/c, the Hon'ble Bombay High Court dismissed the W.P. No. 3172 of 2015 in the case of Soignee R. Kothari by observing that in the normal course of human conduct, if a person has nothing to hide and serious question are being raised about the funds, a person would put to rest all questions which seem to arise in the minds of the authority."

4. " Whether on the facts and in the circumstances of the case, the CIT(A) has erred in not appreciating that though assessee did not explain the source of amounts credited in HSBC A/c, the AO had brought circumstantial evidence also, suggesting that some income was accruing to assessee in India. The Ld. CIT(A) ought to have accepted the contention of assessee that in absence of assessee providing details, the presumption made by AO was a valid one u/s. 114(g) of the Indian Evidence Act."

5. "Whether on the facts and in the circumstances of the case, the CIT(A) was right in holding that no addition could be made in the present case, as similar additions were made in the cases of Mr. Deepak Shah and Kunal Shah, related entities, without appreciating the fact that these two individuals have filed appeal to ITAT disowning the bank account and transactions comprised therein."

6. "The Appellant prays that the order of the CIT(A) be set aside on the above ground(s) and of the Assessing Officer restored."

7. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. Rival contentions have been heard and record perused.

4. Facts in brief are that the assessee is an individual who is a non-resident as per section 6 of the Act. The case of the assessee was reopened under Section 147 of the Act and a notice under Section 148 of the Act was issued on 31 October 2014 by Addnl. CIT(IT)-1(1), Mumbai along with reasons for reopening the assessment. The case of the assessee was opened by the AO on the basis of information (called as 'Base Note') which was received in respect of the assessee from the office of DIT(Inv.)-II, Mumbai pertaining to a bank account with HSBC Bank, Geneva, Switzerland.

5. The learned AO passed the assessment order, after considering the submissions of the assessee. In the assessment order, the learned AO, has made a strong presumption of the amounts in the HSBC Bank account being undisclosed lying therein being sourced from India. In support of this the AO has relied on the circumstantial evidences to decide the matter at hand. In the absence of anything contrary shown by the assessee, the learned AO had come to the conclusion that the amounts deposited are unaccounted deposits sourced from India and therefore taxable in India. This presumption has been made by him relying on the provisions of section 114(g) of the Indian Evidence Act, 1872. The AO has made additions in the case of assessee after taking cognizance of the fact that an addition of the same amount was made in the cases of Mr. Deepak Shah and Mr. Kunal Shah in their respective assessments by the Addnl. Commissioner of Income Tax-16(2), Mumbai.

6. By the impugned order CIT(A) deleted the addition after observing as under:-

> *13. I have given my careful consideration to the rival submissions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.*
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> *14. In view of the factual and legal analysis, it has been observed that the Appellant is indeed a non-resident under section 6 of the Act. This fact has not been disproved by the AO. The information relied by the learned AO is a Base Note which has various details of account holders along with the balance in certain years. As per the learned AO, these details clearly revealed that the account belonged to the Appellant. Even I have taken a note of the duly sworn in affidavit dated 13 October 2011 of the Appellant.*
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> *15. Thus, the fact that the information received in the form of Base Note regarding existence of an account with HSBC Bank, Geneva, Switzerland, a fact which has not been denied by the Appellant, is sufficient reason for the learned AO to initiate reassessment proceedings. Thus, while the learned AO has followed the due procedure of law laid down by the Supreme Court in the case of in the case of GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC) as far as procedure of re-assessment proceedings are concerned.*
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> *16. Further, the Appellant in this regard had submitted that the assessing officer can assume jurisdiction under the said provision provided there is sufficient material before him which establishes nexus between the material and escapement of income. The Supreme Court in the case of ITO v. Lakhmani Mewal Das [1976] 103 ITR 437, the Hon'ble Supreme Court while interpreting the provisions of section 147 of the Act held as under*
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> *"... the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of*

his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the loords 'definite information' which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence." (Emphasis supplied).

In view of the above, the ground no.l of challenging the reopening of the assessment is dismissed.

17. In fact, in the fiscal statute the burden of proof is heavily upon the income-tax department seeking to recover the revenue or tax. This was discussed elaborately by the co-ordinate bench in the case of DCIT vs. Finlay Corporation Ltd., [86 ITD 626], Delhi, wherein it was observed that

"it is the settled legal position that burden is on the revenue to prove that income of an assessee falls within the net of taxation.Once it is so proved, then the burden is on the assessee to prove that such income is exempt from taxation. Section 5(2) being charging section, the burden is on the revenue to prove that the income of the non-resident falls within the ambit of such section. "(Emphasis supplied)

18. It is observed from the assessment order, that the AO has made addition based on the basis of Base Note of the foreign bank account of HSBC Bank, Geneva as income which has escaped assessment. In the reasons recorded, it is nowhere mentioned as to how such an amount constitutes income of the Appellant who is non-resident under the Act or even has a linkage with India or has escaped assessment. Thus, unless there are enough corroborative evidences to show that these

amounts were actually sourced from India and taxable in the case of this nonresident, an addition cannot be sustained.

19. Even further, having gone through the case records, which were also shown to the learned AO, I record a finding that the Base note indicates that the bank account of HSBC Bank, Geneva was opened in the year 1997. The Appellant was in fact a non-resident since 1979. Thus, during the year 1997, the year in which the account was opened and even before this year, and even thereafter, the Appellant continues to be a non-resident under the Act.

20. Under the provisions of the Act, taxability of a non-resident is determined with reference to the provisions of section 5(2) read with section 9 of the Act. The Appellant submitted that 'Mr. Dipendu Shah is a non-resident under section 6 of the Act. Since 1979. The scope of income in case of a non-resident is defined under the provisions of sub-section (2) of section 5 of the Act. As per this section, a person who is a 'non-resident' has to pay tax only on that income which is either received or is deemed to be received by him in India, or accrues or arises or deemed to accrue or arise to him in India, during the year. It is therefore submitted that Mr. Dipendu Shah will be liable to tax only in respect of income received or accrued to him in India. Further, section 9 of the Act, lays down the provisions relating to income which is deemed to accrue or arise in India. As Mr. Dipendu Shah was not having any of his business operations in India during AY 2006-07 and AY 2007-08, there is no income which has either deemed to accrue or arise in India under section 9 of the Act, Thus, the initial contribution or even other amounts in the foreign bank account mentioned by you in the notice does not fall under the purview of section 5(2) read with section 9 of the Act'

21. In view of the above, Mr. Dipendu Shah needs to be first pass the aforesaid test of taxability of non-resident in India. It is a well settled position in law that a 'non-resident', having money in a foreign country cannot be taxed in India if such money has neither been received or deemed to be received, nor has it accrued or arisen to him or deemed to accrue or arise to him in India.

22. *In view of this, the Appellant has relied on the Chennai Tribunal's ruling in the case of Smt. Sushila Ramasamy v.*

ACIT (2010) 37 SOT 146 (Chennai) where in the Tribunal observed "The question arose as to whether a- (non-resident) person, having money in a foreign country, could be called upon to pay income-tax on that money in India. The answer is 'NO', and the reason is obvious because in respect of that money it will not be possible for the Assessing Officer to say that it was either received by him in India, or it was deemed to be received by him in India, or it accrued to him in India, or it arose to him in India, or it was deemed to accrue to him in India, or it accrued to him in India, or it arose to him in India, or it was deemed to accrue to him in India, or it was deemed to arise to him in India."

23. Even the provisions of Section 5 do not permit taxation of amounts remitted to India from sources outside India which is not income under the provisions of the ***Act*** *This issue was discussed elaborately by the co-ordinate bench in the case of DOT vs. Finlay Corporation Ltd., [supra], wherein it was held as under:*

"The issue whether the income of non-resident is taxable or not is still to be decided with reference to the provisions of section 5(2) and, the provisions of Section 68 or 69 cannot enlarge the scope of section 5(2), What is not taxable under section 5(2) cannot be taxed under the provisions of section 68 or section 69. 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. Reference can be made to the judgment of Supreme Court in the case of Keshav Mills Ltd. V. CIT (1953) 23 ITR 230 (Supreme Court of India) if such income is shown in the books of account then it cannot be taxed in India merely because the assessee is unable to prove the source of such entry. For example, there may be appearing an entry of cash credit in the name of a person of USA by way of loan received through cheque and deposited in the bank account maintained at any city in USA. Such money being received outside India cannot be taxed under section 5(2) unless it is proved that such money is relatable to the income accrued or arising in India. Therefore, the same cannot be taxed under section 68 merely on the ground that the assessee fails to prove the genuineness and source of such cash credit. Therefore, we are of the considered view that the provisions of Section 68 or 69

would be applicable in the case of non-resident only with reference to those amounts whose origin of source can be located in India. Therefore, the provisions of section 68 or 69, in our opinion, have limited application in the case of non-resident."

24. The Appellant 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.

25. The AO observed that the Appellant has created an offshore discretionary
trust out of his own initial contribution and the onus is on him to explain the source of deposit made in the account and show that they were not sourced from India. The
Appellant's representatives submitted that Appellant was not in a position to the source of deposits in the HSBC bank account as being not from India. since the records pertaining to the year 1997, which is the year in which the account was opened, are very old and are not available with the Appellant.

26. Accordingly, even I am of the view that the Appellant 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 test of taxability of a non-resident under the provisions of the Act, which in the instant case is not getting satisfied in the case of Appellant. Thus, the bank account of HSBC Bank, Geneva is outside the purview of this Act.

27. It would, at this stage, be relevant to consider the admissibility and use of circumstantial evidence in income-tax proceedings. Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of principal fact. It is evidence on various facts, other than the fact in issue which are so associated with the facts in issue, that taken together they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact.

28. The learned AO in his order has resorted to the circumstantial evidence since the assesses chose not to explain the source of deposits made in these accounts. Relying on the circumstantial evidences, the learned AO has concluded that the deposits in the HSBC, Geneva account were sourced from India.

29. The Appellant in its submission stated that circumstantial evidence is merely direct evidence indirectly applied. Generally, circumstantial evidence means a combination of facts creating a net work which is used when it is difficult to adduce direct evidence and also in order to lend support to direct evidence. However, a circumstantial evidence whenever used has to be conclusive in nature. Thus, the circumstantial evidences relied on by the learned AO nowhere lead to the conclusion that the amounts in the alleged foreign bank account are sourced from India.

30. I agree with the submissions of the Appellant, that the source of deposits is no where proved by the four instances relied on by the AO being termed as circumstantial evidence. The learned AO has himself observed based on the survey report dated 18 November 2011 that the Appellant had retired from partnership of M/s Kanubhai B. Shah & Co. since October 1978. Also, the learned AO observed in the next para that the Appellant became a non-resident as per section 6 of the Act since 1979 which is the year after which he retired from being the partner in the firm. Thus, the addition of undisclosed income of the firm M/s Kanubhai B. Shah &: Co. during the FY 2011-12 has no connection with the Appellant, as he was not a partner during this period. In the instant case, even it is seen that the bank account with HSBC Bank, Geneva was opened during the year 1997. Hence, the circumstantial evidences discussed above including the report of Indian express of 10 February 2015, relied by the learned AO nowhere conclusively establishes that the source of the deposits, since the inception, in the bank account was from India.

31. Further, in the assessment order, the learned AO has made additions after taking cognizance of the fact that an addition of the same amount was made in the cases of Mr. Deepak Shah and Mr. Kunal Shah in their respective assessments by the ACIT-16(2), Mumbai.

32. The Appellant also submitted that the peak balance appearing in the bank statement of foreign bank account has already been added to the computation of income and subjected to tax in the hands of two other assessee's i.e. Mr. Deepak Shah and Mr. Kunal Shah in their respective assessments for AY 2006-07 and AY 2007-08. Even both these assesses, have paid taxes on the amount of addition made to their respective computation of income. Thus, taxing the amounts from this foreign bank account would tantamount to double taxation of the same amount.

33. I do find substance in the argument advanced that the ***same*** *income which has already been added in the hands of the appellant's relatives Mr. Deepak and Mr. Kunal Shah, who are beneficiaries of the trust, cannot be sustained as an income in the hands of the Appellant, who in facts is the settlor of the trust. Thus, it would be seen that to that extent, there is a case of double taxation of the same income in the hands of more one assessee. It is also evident from the base note that the balance of earlier year was being carried forward from March 2006 to April 2006. Thus it can also be seen that the same income has suffered tax in assessee's hand in two different years.*

34. Regarding the issue of double taxation of income that has already suffered tax in the hands of the same assessee in different years or different assessee in same year, a number of judicial rulings are in place. In one such early ruling that was subsequently followed by other courts including the ***Hon'ble Apex court, is in Joti Prasad Agarwal [11959]*** *37****ITR107 (ALL.),*** *where it was, inter alia, held as under:*

"In the present case, the income, which was earned by the association, was assessed and charged to tax in the hands of the members of the association individually under one of the alternatives provided under section 3 of the Income-tax Act. This assertion of the petitioners is admitted by the opposite party, the Income-tax Officer, in the counter-affidavit filed on his behalf. The income having once been charged to tax, it is urged that it could not be charged to tax again in the hands of the association. Learned counsel for the opposite party contended before us that there was no bar to tax being charged on the income in the hands of the association after it had already been charged to tax in the hands of the individual

members of that association relying on the fact that in the Income-tax Act there is no specific provision barring such action of charging of tax by the Income-tax Officer. ***We do not think that any specific provision in this*** *behalf was* ***required. Section 3 of the Act, which is the main charging section, only*** *talks of* ***charging the income of certain persons and does not talk of income-tax being charged on persons. This implies*** *that* ***the charge is to be levied on an income only once.*** *Whether it is to be charged in the hands of one person or another can certainly be determined under section 3 and other relevant provisions of the Income-tax Act Section 3 is clear enough to indicate that the same income cannot be charged repeatedly in the hands of different persons or in the hands of the same person."*

(Emphasis supplied)

This view may be taken to be approved by their Lordships of the Supreme Court in Commissioner of Income-tax v. Kanpur Coal Syndicate [1964] 53 ITR 225 (SC). The view taken in that case was that tax can levied on either of the said two entities, that is, an association of persons or the individual members of an association, according to the provisions of the Act. Joti Prasad's case (supra) was also referred to by that Supreme Court in Income-tax Officer v. Bachu Lal Kapoor [1966] 60 ITR 74, 79, 80 (SC), in which it was observed that:

"The exercise of the option to do one or other of the two alternatives open to an officer assumes knowledge on his part of the existence of two alternatives."

And it was further observed that:
"... the Act does not envisage taxation of the same income twice over 'on one
passage of money in the form of one sort of income'."

The same view is taken in Commissioner of Income-tax v. MJ. & P. Ginning & Pressing Factory [1966] 60 ITR 95 (SC). Thus, the position that section 4 of the Act (corresponding to section 3 of the 1922 Act) impliedly prohibits double taxation is accepted by the courts. If one of the entities has been taxed, it is not open to the taxation department to tax another entity for the same income. This maxim was confirmed by the

Hon'ble Supreme Court in the case of Laxmipat Singhania 71 ITR 291(SC) by holding;

"It is a fundamental rule of the law of taxation that, unless otherwise expressly provided, income cannot be taxed twice. Again, it is not open to the ITO, if income has accrued to the assessee, and is liable to be include in the total income of the particular year, to ignore that accrual and thereafter to tax it as income of another year on the basis of receipt."

35. In view of the above, I hold that the addition in the case of the Appellant should not sustain. Accordingly, the addition of Rs.5,99,75,370/- in the hands of the Appellant is deleted for A.Y.2007-08. Accordingly, the grounds raised are partly allowed.

7. Against the above order of CIT(A), Revenue is in further appeal before us.

8. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. From the record we found that assessee is a non-resident since 1979, as per Section 6 of the IT Act. Assessment of the assessee was reopened on the basis of information (called as 'Base Note') which was received in respect of the assessee from the office of DIT(Inv.)-II, Mumbai pertaining to a bank account with HSBC Bank, Geneva, Switzerland. It was submitted by assessee before AO that he is a Non-resident as per section 6 of the Act since 1979. Copies of his passport were also submitted to the AO in order to substantiate his claim of being a non-resident under the Act. Since, he

is a nonresident, he submitted that his non-Indian bank account does not fall within the purview of the Act. In support of his claim, he also submitted a duly notarized affidavit stating that

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

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

10. The assessee also submitted that he was not having any of his business operations in India during AY 2006-07 hence, there is no income which has either deemed to accrue or arise in India under section 9 of the Act. Thus, the initial contribution or even other amounts in the foreign bank account does not fall under the purview - of section 9 of the Act. Thus, the peak balance appearing in the bank statement of the foreign bank account should not be added to the total income of the assessee.

11. Without prejudice to the above, he submitted that the peak balance appearing in the bank statement of this foreign bank account has already been added to the computation of income and subjected to tax in the hands of Deepak Shah and Kunal Shah in their respective assessments for AY 2006-07 and AY 2007-08. A copy of the order passed by Assistant Commissioner of Income-tax -16(2) and by Commissioner of Income-tax (Appeals)-27 ('CIT(A)-27') in their respective cases was submitted to the AO for his consideration.

12. Further, both these assessees - Deepak Shah and Kunal Shah have paid taxes on the amount of addition to their respective computation of income. A summary of the taxes paid by them was also submitted to the AO for his consideration. However, AO did not agree with the assessee's contention and added peak credit in the account of HSBC Geneva in assessee's income. The AO has made additions in the case of assessee

after taking cognizance of the fact that an addition of the same amount was made in the cases of Mr. Deepak Shah and Mr. Kunal Shah in their respective assessments by the Addl. Commissioner of Income Tax-16(2), Mumbai.

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

foreign bank account mentioned by AO in the notice does not fall under the purview of section 5(2) read with section 9 of the Act'. Accordingly, assessee is required to be pass through aforesaid test of taxability of non-resident. It is a well settled position in law that a 'non-resident', having money in a foreign country cannot be taxed in India if such money has neither been received or deemed to be received, nor has it accrued or arisen to him or deemed to accrue or arise to him in India.

14. Under section 5(2) the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. We also found that the assessee in his affidavit dated 13 October 2011 has clearly stated that 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 pronouncements laid down by High Court and Supreme Court reached to the conclusion that assessee being non-resident is not liable to tax in respect of money lying in the foreign country unless AO bring something on record to show that assessee has not fulfilled the test of taxability of non-resident under the provisions of the Act. The detailed finding so recorded by CIT(A) are as per material on record and do not require any interference on our part.

16. The CIT(A) also observe that a circumstantial evidence whenever used has to be conclusive in nature. Thus, the circumstantial evidences relied on by the learned AO nowhere lead to the conclusion that the amounts in the alleged foreign bank account are sourced from India. The CIT(A) also recorded a finding to the effect that the source of deposits is no where proved by the four instances relied on by the AO being termed as circumstantial evidence. The learned AO has himself observed based on the survey report dated 18 November 2011 that the assessee had retired from partnership of M/s Kanubhai B. Shah & Co. since October 1978. Also, the learned AO observed in the next para that the assessee became a non-resident as per section 6 of the Act since 1979 which is the year after which he retired from being the partner in the firm. Thus, the addition of undisclosed income of the firm M/s Kanubhai B. Shah &: Co. during the FY 2011-12 has no connection with the assessee, as he was not a partner during this period. In the instant case, even it is seen that

the bank account with HSBC Bank, Geneva was opened during the year 1997. Hence, the circumstantial evidences discussed above including the report of Indian express of 10 February 2015, relied by the learned AO nowhere conclusively establishes that the source of the deposits, since the inception, in the bank account was from India. In view of the above discussion, we do not find any infirmity in the order of CIT(A) for deleting the addition made in respect of deposits in HSBC Account, Geneva in the hands of non-resident assessee. Facts and circumstances in both the years are same.

17. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on this 19/06/2018

Sd/-	**Sd/-**
(RAM LAL NEGI)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 19/06/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai