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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 494/Mum/2021

(Assessment Year 2006-07)

ITA No. 493/Mum/2021

(Assessment Year 2007-08)

The DCIT Circle 3(3)(2) Room No.1607, 16th Floor, Air India Building Nariman Point Mumbai-400 021	Vs.	Manish Vijay Mehta Flat No.E-26, 7th Floor, E-48, Venus Apartments Dr. R.G. Thadani Marg, Sea Face (South), Worli, Mumbai-400 018
(Appellant)		**(Respondent)**

PAN No. AADPM7278D

CO No. 155/Mum/2021

(Arising in ITA No. 494/Mum/2021 A.Y.2006-07)

CO No. 156/Mum/2021

(Arising in ITA No. 493/Mum/2021 A.Y.2007-08)

Manish Vijay Mehta Flat No. E-26, 7th Floor, E-48, Venus Apartments Dr. R.G. Thadani Marg, Sea Face (South), Worli, Mumbai-400 018	Vs.	The DCIT Circle 3(3)(2) Room No.1607, 16th Floor, Air India Building Nariman Point Mumbai-400 021
(Cross Objector)		**(Respondent)**

ITA No. 491/Mum/2021

(Assessment Year 2006-07)

ITA No. 492/Mum/2021

(Assessment Year 2007-08)

The DCIT Circle 3(3)(2) Room No.1607, 16th Floor, Air India Building Nariman Point Mumbai-400 021	Vs.	Urvi Manish Mehta Flat No. E-26, 7th Floor, E-48, Venus Apartments Dr. R.G. Thadani Marg, Sea Face (South), Worli, Mumbai-400 018
(Appellant)		**(Respondent)**

PAN No. AAIPS0073M

CO No. 153/Mum/2021
(Arising in ITA No. 491/Mum/2021 A.Y.2006-07)

CO No. 154/Mum/2021
(Arising in ITA No. 492/Mum/2021 A.Y.2007-08)

Urvi Manish Mehta Flat No. E-26, 7th Floor, E-48, Venus Apartments Dr. R.G. Thadani Marg, Sea Face (South), Worli, Mumbai-400 018 **(Cross Objector)**	Vs.	The DCIT Circle 3(3)(2) Room No.1607, 16th Floor, Air India Building Nariman Point Mumbai-400 021 **(Respondent)**

Assessee by : Shri Ajay Singh, AR
Revenue by : Shri Soumendu Kumar Dash, DR

Date of hearing: 13.09.2022
Date of pronouncement: 31.10.2022

O R D E R

PER BENCH:

01. These are the bunch of four appeals filed by the Dy. Commissioner of Income Tax, Circle 3(3)(2), Mumbai (the learned Assessing Officer) in case of two assessee, husband and wife, namely Mr. Manish Vijay Mehta and Mrs. Urvi Manish Mehta for A.Y. 2006-07 and 2007-08. Both the assessee have also filed Cross Objections in these appeals.

In case of
Manish Vijay Mehta

02. The grounds of appeal raised by the ld. AO against the appellate order passed by the Commissioner of Income-tax (Appeals)-57, Mumbai

[the learned CIT (A)] for A.Y. 2006-07 in ITA No.494/Mum/2021 are as under:-

"1. Whether on the facts and circumstances of the case and in Law, the Ld. CIT(A) has erred in holding that the onus was on the Department in this case to prove that credits in HSBC Bank account were within the taxing provisions of the Indian Income Tax Act. without appreciating that the onus lies on the assessee to prove the contents of the Base note incorrect in view of his refusal to sign the Consent-Waiver Form to bring back the complete bank statements as mentioned in the Base-Note received from the French Government which the AO has relied during the Scrutiny Proceedings?

2. Whether on the facts and circumstances of the case and in Law, the Ld. CIT(A) has: erred in relying on the decision of DCIT(IT), Mumbai vs Hemant Mansukhial Pandya (100 taxmann.com 280) without appreciating that the decision of Hemant Pandya (supra) was distinguished from the decision of Mumbai ITAT in the case of DCIT(IT) vs Rahul Rajnikant Parikh (ITA NO. 5889/Mum/2016) on certain grounds which are absent in this case and hence, the observations of Hon'ble ITAT Mumbai in the case of Rahul Rajnikant Parikh (supra) would apply squarely in this case?

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

03. The facts of the case show that assessee is a non-resident. The information was received by the Government of India from the French Government that some Indian nationals are having foreign bank accounts in HSBC Private Bank SA, Geneva, which were not disclosed to Indian Tax Department. The information was received in the form of document stated to be 'Base note' wherein the various details of account holder i.e. name, date of birth, place of birth, sex, residential address, date of opening of the bank account etc. are mentioned. In the case of Mr. Manish Vijay Mehta such 'base note' was received wherein assessee was found to be having bank account in that bank. The date of opening of the bank account was 19th April, 2002 and the balance shown for A.Y. 2006-07 was USD 67,421/-. The information regarding the assessee of the balance of USD 67,421/- in that bank account was not disclosed to the Income Tax Department and therefore, the case of the assessee was reopened for A.Y. 2006-07. The requisite notice under Section 148 of the Income-tax Act, 1961 (the Act) was issued to the assessee. On 17th March, 2005, assessee filed an objection thereafter, assessee was asked to give the details with respect to the above bank account.

04. The assessee submitted that

a. he is a non-resident since last several years i.e., from A.Y. 2001-02.

b. he is working as an employee in Belgium and has no business communication in India or outside India and source of his income are only those which are disclosed to tax authorities.

05. Assessee also challenged the reopening of the assessment.

06. The learned Assessing Officer found that assessee has not produced any evidence or proof of the source of the money deposited in the bank account. The learned Assessing Officer held that as per 'base note' assessee is having an address in 501, Vijay Apartment, Bhulabhai Desai Road, Mumbai-400 026, which is his address and assessee is a director in a company engaged in diamond business. Further, assessee and his family members are still based in India and are in the diamond business. Therefore, assessee has business interest in India. The learned Assessing Officer further held that assessee has become a non-resident since 1979, which is a year after he retired from a partnership firm in India. After that assessee continues to be in the diamond business, therefore, it is reasonable and prudent to assume that the deposits in HSBC bank account are form his operation of diamond business in India. Accordingly, the deposit represents income from source from India. As assessee has settled in Singapore, where there is no income tax and as per the base note the HSBC account in Geneva was opened on 19th April, 2002. Further, the assessee did not produce bank account statement and the source of deposit therein despite several opportunities, therefore, Income is

presumably of the assessee, therefore, assessee has not produced any evidence that the deposits in the said HSBC account are income earned outside India same is required to be taxed in the hands of the assessee. Therefore, the learned Assessing Officer held that the amount as appearing in the 'base note' of the assessee's HSBC account in A.Y. 2006-07 being USD 67,421/- translated to ₹30,33,945/- added to the total income of the assessee as income deemed to accrue or arise in India for which assessee has not offered any explanation about the source and nature thereof. Consequently, assessment order was passed on 31st March, 2015 under Section 143 read with section 147 of the Act.

07. Assessee aggrieved with the order of the learned Assessing Officer, preferred the appeal before the learned CIT (A).

08. Assessee reiterated the submission made before the learned Assessing Officer and further challenged that Assessing Officer has not disclosed the base information containing in 'base note' stating that same is confidential information and further that the learned Assessing Officer has fallen into grave error in reopening the assessment on the basis of the 'base note'. It was further argued that the 'base note' does not mention any amount deposited during the relevant assessment year and thus, no addition can be made. It was further challenged that the addition has been made on the basis of base note only without any corroborative evidence that assessee has any connection with India. It was further stated that the false allegation

are also made with respect to the assessee being a Partner or Director in some firm. The assessee also challenged that the same income is also taxed in the hands of his wife Mrs. Urvi Manish Mehta and therefore, the learned Assessing Officer has doubly taxed the income even otherwise.

09. The learned CIT (A) asked the learned Assessing Officer to submit the remand report which was submitted on 4th November, 2016, reiterating the assessment order paragraph no.6.2. It was further stated that as per 'base note' names of other persons are mentioned in the bank of namely Shah Kerul Shashikant and Shah Anjali (anjalio) Kerul. Both these parties are directors of a company namely 'Genevieve Orsine Jewels Pvt. Ltd' which is in the business of gold and diamond. Both these persons are closely connected and related to the assessee and further they are in diamond jewellery business. It establishes the link between the business in India and impugned bank account. The Assessing Officer justified the addition made in absence of any information provided by the assessee.

010. The learned CIT (A) asked the assessee to furnish reply to the remand report which was submitted on 30th January, 2017. Later on, assessee submitted the written arguments before the learned CIT (A). The learned CIT (A) held that similar issue has been decided by his predecessor in case of Venu Raman Kumar in A.Y. 2007-08 and the facts are similar. In that case the issue was decided in favour of the assessee by deleting the addition of ₹4,78,39,775/-. He further held that assessee is a non-resident since A.Y.

2001-02 and became a citizen of Belgium in 2007, he does not have any business communication. He further followed the decision of the co-ordinate Bench in case of Hemant Mansukhlal Pandya in ITA Nos. 4679 & 4680/Mum/2016 dated 18.10.2018. Therefore, he deleted the addition by the appellate order dated 24th September, 2020. The learned Assessing Officer is aggrieved with the above order.

011. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer. At the time of hearing on 18th August, 2022, the learned Departmental Representative was asked to show the 'base note'. On 13th September, 2022, the 'base note' was produced by the learned Authorized Representative which was verified and returned back.

012. The base note also contained the noting that same was shown to the authorized representative of the assessee. This was pointed out to ld. AR. This was fairly agreed that assessee is aware of the contents of the based note.

013. The learned Authorized Representative reiterated the written submission made as under:-

> *""ISSUES: DEPT. APPEAL*
>
> *1. Addition of Rs. 30,33,945/- made on basis of base note in hands of non-resident.*
>
> *CROSS OBJECTION ASSESSEE:*
>
> *1. Reopening is bad in law. Non application of independent mind*

2. Factual inaccuracy in the order thereby coming to wrong conclusion.

3. Assessee being nonresident not liable to be taxed in India.

BACKGROUND OF ASSESSEE:

A Assessee has been a Non Resident right from the assessment year 2001 02 till the year under appeal (and even today) which means for a continuous period of last 20 years;

b) He has been working as an employee in Belgium;

c) He has no business connections in India or outside India; and

d) Sources of his income in India are only interest income on FD being duly declared by him year after year to the tax authorities in India. Copies of the returns of income filed for AYS 2003-04 to 2013-14 were filed with AO wherein the residential status was clearly mentioned as NON RESIDENT. AO accept the assessee is nonresident

FACTS OF THE CASE:

1. In response to Notice u/s 148 dt 12/3/2014 for AY: 2006-07 & AY: 2007-08 the appellant filed copy of the return of income and sought the reasons for reopening of the assessment. Pgs 57-58 & 59-61

2. Copies of the returns of income filed by the appellant in India for assessment years 2003-04 to 2013-14 were filed with AO wherein the residential

status was clearly mentioned as NON RESIDENT. Pgs 8 & 32-61

3. The assessee also submitted Proof of nonresident status along with copy of Belgium Citizenship passport. pgs 8-30

Date of departure from India & arrival in India. pgs 9-10

4. Since the appellant is a non resident, he was under no obligation to file any details about his accounts or assets situated abroad.

5. AO himself has acknowledged the status of the appellant as that of a Non resident and there is no dispute on the said facts. (Asst order pg 1).

6. Reasons recorded for reopening of assessment pg 123-124.

7. The AO had mentioned in the first paragraph of the assessment order itself that "Information was received by Government of India from the French Government under DTAA in exercise of its sovereign powers that SOME INDIAN NATIONALS AND RESIDENTS (emphasis supplied) have Foreign Bank Accounts in HSBC Private Bank (Suisse) SA, Geneva which were undisclosed to the Indian Taxation Department. This information was received in the form of a document (hereinafter referred to as "Base Note") wherein various details.....

8. The authenticity of the Base Note is being challenged because copy of the reasons which were handed over on 15.07.2015 lacked the authenticity

inasmuch as the rubber stamp and official seal of the Income tax authority signing the same were missing in the recorded reasons. The appellant had also further asked for supplying the tangible material which was never given to the appellant. (pgs 125-144)

Circular No. 3/2012 date: 12/06/2012 (Suppl. Memorandum explaining the amendments Finance Act 2012) Pg. No. 130-131

9. Written application for supply of " recorded reasons" and/or "substantial documentary evidence" was made on 18.05.2016, pg 179 for which the reply from the AO was received on 27/5/2016 pg 180 stating that the same appears in the order rejecting the objections to reopen the assessment in his order dated 17.03.2015. pg 146. This does not have either recorded reasons" and/or "substantial documentary evidence "and hence another written application was made on 08.06.2016 pg 181-182 which has not been responded by the AO.

10. The case papers were transferred to AO vide CIT 19, Mumbai vide his order dated 11.03.2015.(Refer page 145 of the paper book). The AO completed the assessment on 31.03.2015, It means, the AO must have either received the files from the earlier jurisdiction with the Report of Inquiries made at their end or the AO must have made his independent inquiry within just a period of 19 days.

11. The first time Notice u/s 142(1) and 143(2) of the Act were issued by AO on 17.03.2015 and therefore in fact the assessment was completed within 13 days from the date of the issue of the Notice viz. on 31 March 2015. It means his inquiry must have been completed in 13 days. It is submitted that the time available to the AO to conduct enquiries was such short and there was not even an iota of evidence which was made available to the appellant in this regard.

12. Further the assessee's raised its objection against reopening vide letter dt 4/8/2014 pg 125-134 which was disposed off on 17/3/2015 pg 146.

13. Submission of assessee before AO vide letter dt 24/3/2015 pg 166-171.

14. Submission of assessee before AO vide letter dt 27/3/2015 pg 172-178

15. Thereafter the AO passed the assessment order on 31/3/2015 making an addition of Rs. 30,33,945 (US$ 67421 x Rs. 45).

16. Written submission before CIT(A) dt 17/6/2016. pg 184-210

17. The Id CIT(A) had called for remand report from the assessing officer (AO) mainly on the observations and conclusions arrived at by him in paragraph 6.2 of the assessment order.

18. Remand report dt 4/11/2016 was forwarded vide letter dt 13/1/2017. pg 211 22

19. Assessee's Reply dt: 30/1/2017 to remand report. pg 222-236

20. Brief note and summary of submissions filed before CIT(A). pg 237-261

BRIEF PROPOSITION:

1. Notice under Section 148 cannot be issued on mere suspicion. Reopening is bad in Law as there exist no reason to believe that income has escaped Assessment and there is no independent application of mind on the part of the Assessing Officer. Reopening is not permitted to make roving enquiries merely on basis of unauthenticated documents.

2. The information obtained was about a Bank Account in HSBC, Geneva. Having a Bank Account in Geneva by a non-resident cannot be a reason to reopen. AO could have reopened only if he had any evidence to link the amounts in said account with source in India. Thus, there are a factual error.

3. Reliance is placed on the decision of the jurisdictional High Court in the case of PCIT v. Rajesh D. Nandu (HUF) (2019) 261 Taxman 110 (Bom.) (HC)wherein it was held that since reasons as recorded in support of impugned notice to doubt genuineness of gift was not based on any material so as to form belief that assessee's income had escaped assessment on account of gift not being genuine and it was only a suspicion subject to enquiry, impugned reopening notice issued by Ld. Assessing Officer was unjustified.

4. The appellant was never provided with the source and details of information AO was relying on apart from the Base Note under the guise of confidential information which he has referred in his order/Remand report.

-Durgo Prashad Goyal 98 ITD 227 (Asr) (SB) that "any general information contained in letter is not relevant material".

-Secondly if any document or material is relied by the AO for reopening the assessment the same should be provided to the assessee so as to enable the assessee to meet its case. Kishinchand Chellaram v CIT (1980) 125 ITR 713 (SC).

-Tata Capital Financial Services Limited v. ACIT (Bombay High Court) (WP NO. 546 OF 2022 dated February 15, 2022)

5. Recording the reasons for re-opening the assessment merely on the basis of the Base Note without application of independent mind by the AO is void. Base Note did not show that any amount was deposited during the relevant year.

-CIT vs. Insecticides (India) Ltd (2013) 357 ITR 330 (Del).

-CIT vs. Fair Invest Ltd. (2013) 357 ITR 146 (Del).

-Sarthak Securities Co, Pvt Ltd. 329 ITR 110 (Delhi)

-Recently in case of Sharvah Multitrade Company Private Limited. v/s. Income Tax Officer Ward 4(3)(1) & Anr : [Writ Petition No. 3581 OF 2021; AY 2015-

16; dt: 20/12/2021 (Bombay High Court)]. Held that Non application of mind by AO while recording the reasons - Non application of mind by PCIT while granting approval u/s. 151 of the Act rendered the reopening bad in law.

6. The AO didn't had any cogent and credible information or evidence in possession of the either at the time of recording of reasons or at the time of completion of assessment or even if he had, the same was never shared with assessee even at appellate stage.

7. A bare reading of the recorded reasons shows that there is not even a whisper or suggestion therein that information gathered or received by the AO in any manner would enable him to form satisfaction that appellant's income (nonresident) had escaped assessment. Thus there is no proper reasons recorded for reopening the assessment. PCIT v/s. Shodiman Investment Pvt Ltd. (2020) 422 ITR 337 (Bom) Ankita A Choksey v/s. ITO (2019) 411 ITR 207 (Bom) (HC)

8. The AO himself never conducted any direct enquiries of investigation from any person or any source to establish that the appellant had maintained any accounts.

9. The AO did not analyze the facts and circumstances before issuing notice u/s 148 but simply acted on the advice/report of DDIT (Inv) and the approval was also given by JCIT, Range- 16 in the same mechanical manner.

10. Also, in the objections the assessee pointed out that he is a non-resident and but the AO failed to consider that as a non-resident, the Assessee could have foreign bank accounts and erred in recording reasons that due to holding of foreign bank account, income had escaped assessment. If the logic of the AD is upheld, the AO would be able to issue notice u/s 148 to each and every non-resident who has a bank account outside India and who does not file return of income in India without even considering whether they are supposed to file return of income in India or not.

11. The AO has merely acted upon the directions of Investigation Wing of Mumbai and not based upon an enquiry/examination/verification of his own findings. Phool Chand Bajrang Lal (1993) 203 ITR 456 (SC)

12. The AO has violated the mandate of jurisdictional High Court in case of Asian Paints Ltd v/s. DCIT (2008) 296 ITR 96 (Bom) as assessment was completed within 4 weeks after disposal of the objections. Similar view has been taken by Hon. Bombay High Court in Bharat Jayantilal Patel v. UOI (2015) 378 ITR 596 (Bom.)(HC). 13. The Hon'ble Delhi High Court (Full Bench) in the case of Kelvinator of India Ltd, upheld by Hon'ble Supreme Court of India, 320 ITR 561 (SC) wherein Supreme Court interalia held the AO has power to re-open the assessment provided there is tangible material" to come to conclusion that there was escapement of income from assessment. Reason to believe' has to be construed in logical term'.

14. The AO had no such tangible material for the reopening except the photocopy of Base Note which is not justifiable legal evidence. Assessee has demanded time and again put no such material was brought on record. Nor such material was providing during appellate proceeding.

15. The assessment made on the basis of materials not brought to the notice of the taxpayer are violating the principles of natural justice (East Coast Commercial Co. Ltd, 63 ITR 449 (SC)). Even if he collects information from private sources, he is duty-bound to disclose the substance of the enquiry to the assessee before making the assessment.

16. It is submitted that this is against the rule of natural justice and therefore the entire reassessment proceedings require to be held as null and void. Page 179 182 of paper book.

17. It was also incumbent upon AO to independently apply his mind before reopening the Assessment in the facts of the present case for following reasons:

(a) The Minister of State in the Ministry of Finance, Shri S. S. Palanimanickam, clarified on the floor of the Lok Sabha on 2/12/2011 that "mere holding of an account outside India does not lead to the conclusion that the amount is tax evaded."

(b) The White Paper on Black Money introduced by the Government, the following example was given

"For example, if we receive information about 100 Indians having bank accounts abroad from a country, it does not prove automatically that all these 100 accounts represent black money of Indian citizens stashed aboard. There may be cases where the account holder may be an NRI who is not assessed to tax in India with respect to those sums"

(c) Extract of sample ITR 2 for AY 2012-13 along with instructions stating that only residents are liable to fill in columns pertaining to foreign assets.

18. Therefore, the AO could not have reopened the assessment merely because he had information that the Assessee had a foreign bank account. Thus, there is nonexus between the AO's belief and the material on record. The reply of the Minister of State in the Ministry of Finance is also material on record, after considering which it cannot be said that mere possessing a foreign bank account could have led the AO to reopen the Assessee's assessment. No rational person could have entertained a belief that merely by holding a foreign bank account, non-resident Assessee's taxable income has escaped escapement within the meaning of section 147 of the Act. Thus, assessment has been reopened without application of mind.

19. The recorded reasons clearly shows that the reopening of assessment has been done in the instant case to undertake a fishing enquiry so as to cast an onerous burden on the Assessee of proving a negative i.e. foreign assets have not been sourced from income arising/ accruing in India. The

reassessment proceedings cannot be initiated to undertake a fishing enquiry, especially when there is absolutely no material on record to even suggest that income chargeable to tax had escaped assessment.

20. Reopening is bad in law if there exist no "Reason to Believe" even if there was no original scrutiny assessment.

-Ankita A Choksey v ITO [2019] 411 ITR 207 (Bom.) (para 5)

-Khubchandani Health Parks Pvt Ltd v ITO (2016) 384 ITR 322 (Bom)(HC) (Para 5)

-Sarthak Securities Co. (P) Ltd v ITO (2010) 329 ITR 110 (Del) (HC)

21. The reasons to believe must have rational connection with or relevant bearing on the formation of belief i.e. there must be a live link between material coming the notice of the Assessing Officer and the formation of belief regarding escapement of income.

-ITO v. Lakhmani Merwal Das [1976] 103 ITR 437(SC) [Pg 436-437]

- Nivi Trading Limited v. UOI[2015] 375 ITR 308 (Bom.) (HC) (para 22)

If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on the facts and law could reasonably entertain the belief, then, the exercise

undertaken by the AO in reopening of assessment can be interfered with.

22. Where reopening is done only on the basis of information received from the investigation wing without application of independent mind by Ld AO, reopening is bad in law and same tantamount to roving/fishing enquiry. PCIT v Shodiman Investments Pvt Ltd. (2020) 422 ITR 337 (Bom)(HC) [Original Assessment u/s 143(1)]

23. Base Note relied upon by Ld AO is not admissible in evidence.

A. There can be no Reason to believe as the alleged Base Note is unauthorized and unauthenticated and hence it is not admissible evidence. Therefore, the recording of the reasons and consequent section 148 proceedings based on such unreliable evidence are vague in law. The Id Assessing Officer has erred in holding that the alleged Base Note has evidentiary value in as much as the same was unauthenticated and hence consequent re-assessment proceedings are invalid, void and without jurisdictions. Also, the data revealed from Base Note is not corroborated by any other evidence. Thus, reopening on the basis of such unreliable evidence is bad in law.

'As per The Foreign Exchange (Authentication Of Documents) Rules, 2000, any document received from place outside India purporting to have affixed, impressed or submitted thereon or thereto the seal and signature of any person who is authorized by

Section 3 of the Diplomatic and Consular Officer (Oaths and Fees) Act, 1948 to do any notarial acts shall be deemed duly authenticated for the purpose of Section 39 of the Act.

'Even Section 39 of The Foreign Exchange Management Act, 1999 also mentions that for the document received outside India to be utilized as evidence should be duly authenticated. The same is applicable even for Income Tax Act as per section 39(1)

'As per Section 39 of The Foreign Exchange Management Act, 1999, where any document

is produced or furnished by any person or has been seized from the custody of any person in either case under this Act or under any other law; or

ii) has been received from place outside India which is duly authenticated by such authority or person and in such manner as may be prescribed in the course of Investigation of any contravention under this Act alleged to have been committed by any person, and such a document is tendered in any proceeding under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court or the Adjudicating Authority, as the case may be shall-

a. Presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in

handwriting of, any particular person, is in that person's handwriting and in case of document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

b. Admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

c. In a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document.'

Thus unauthenticated base note is not an admissible evidence and re opening on the basis of such unauthenticated and inadmissible base note is bad in law.

24. Explanation 2 to Section 147 has created deeming fiction for income chargeable to tax that has escaped assessment and the fiction doesn't extend to "Reason to believe" and "chargeability to tax". Hence, just because person is found to have any asset outside India would not justify reopening of Assessment.

Ingram Micro (India) Exports (P.) Ltd. v DCIT [2017] 78 taxmann.com 140 (Bom)(HC)

"7. However, it appears that for Explanation 2(a) of the Act (sic.) to apply, the income chargeable to tax which is deemed to have escaped assessment does not arise simplicitor on not filing of return of income but must also be coupled with the prima facie

satisfaction of the Assessing Officer that the income of a person concerned is chargeable to income tax even if it exceeds the maximum amount not exigible to tax. Therefore, prima facie for Explanation 2(a) of Section 147 of the Act to be invoked, the reasons must indicate that the Assessing Officer has applied his mind to the fact that the income is chargeable to tax under the Act and it has exceeded maximum amount not chargeable to income tax. The above satisfaction is not found in the reasons.

25. Reopening is bad in law as there is no sanction u/s 151 and assuming there is sanction then same is mechanical in nature without looking at basic facts.

In view of the same the assessment order is bad in law liable to be quashed

ON MERITS:

1. Appellant being a non resident which is undisputed fact and accepted by AO, he was not obliged to disclose assets situated abroad in the returns of income filed in India.

2. The burden of proof always lies with the person who lays charges The one who alleges has to establish the charge. The burden of proof does not lie with the person who denies the allegation.

When the appellant had categorically denied that he has no foreign bank account, the onus shifts towards the AO to prove that the photocopy of the document shown relates to him. This burden has not been

discharged by the AO. It is well settled that mere suspicion cannot be the basis of addition.

Moosa S Madha and Azam CIT, 89 ITR 65 (SC)

3. Also Refer: But if a foreign document is otherwise relevant and proved according to law, its photocopy can be admitted in evidence provided such copy is duly authenticated in the manner prescribed by the Diplomatic an Consular Officers (Oaths and Fees) Act, 1948 [Vimal Chandra Gulecha 134 ITR 119 (Raj) at 130].

4. Factual inaccuracy in asst order: PERVERSE ORDER

I. It is held by the AO in paragraph 6.2 of the assessment order that;

A. "The appellant has his interest in India since his address as per the Base Note is in India".

The address mentioned by the AO is the residential address of the appellant in India at which he is assessed to tax in India. (Parents Address). Liability to pay tax in India does not depend on residential address nor on Nationality or domicile of the taxpayer but depend on his residential status under IT Act.

B. The AO further mentions that the appellant "is a Director in a company engaged in the Diamond business". The appellant was never in the past and not even till today a Director in any company engaged in the diamond business. The family of the appellant consists of his parents, self and his wife and minor children.

C. The AO further also mentions that "family members who are still based in India are in the diamond business".

The appellant's father who is based in India is not in the diamond business.

II. It is held by the AO in paragraph 6.3 of the assessment order that;

A. "It can be seen that the assessee became a non-resident as per Sec. 6 of the Act since 1979 which is a year after he retired from being the partner in the firm".

The appellant was born in 1975 and he became a Non Resident during the assessment year 2002-03 when he was 25 years of age and not 4 years of age, as stated by the AO.

Secondly the appellant was never a partner in any firm (let apart a partner in any firm in diamond business). The appellant was not a partner in any diamond trading firm operating in India before he became Non Resident.

On the basis of this incorrect data and information AO held

B. "Thus it is reasonable and prudent to assume that the deposits in his HSBC bank account were from the operations from his diamond business, i.e. representing income source from India. He has settled in Singapore where there is no income tax".

AO goes on TO ASSUME that "the deposits in his HSBC bank account were from the operations from his diamond business i.e. representing income sourced from India".

He, thereafter, takes his assumption to the peak by saying that "he has settled down in Singapore, where there is no income tax."

As stated earlier the appellant is employed in Belgium ever since he became a Non resident in the assessment year 2001-02.

The AO further came to a wrong conclusion that "there is no tax in Singapore." The appellant submits that AO has without any knowledge assumed that there is no tax in Singapore (though this is irrelevant for the present appeals).

C. In para 6.4 the AO's mind has adopted theory of presumptions when he states in the third reason that "there is a prima facie presumption of amounts in the said account being undisclosed and sourced from India".

Income tax is a tax on income and not on "presumed income" without any evidence being provided by the AO in this regard.

D. The AO in his conclusion arrived at in paragraph 7 of the assessment order once again repeat the same factual incorrect information/findings and goes on to make presumption

E. Even the conclusion in para 7.3 has been arrived at on wrong facts as under The appellant

submits he was NEVER EVER a beneficiary of any discretionary trust and therefore the entire conclusion arrived at by the AO is factually and legally incorrect.

5. The AO held that "in view of the factual position regarding his earnings in India at mentioned at Para (1) and (ii) above, it is presumed that the deposits are from his Indian income".

The AO has opted to blow hot and cold simultaneously viz. he mentions that "in view of the factual position" it is "presumed that the deposits are from his Indian income".

6. The conclusions arrived at by the AO are WHOLLY AND TOTALLY factually and legally incorrect which goes to prove that his finding is vitiated by the reason of his indulging in conjectures, suspicions, surmises, assumptions and presumptions and without any authenticate material to support the same and that, in any case, it was perverse, and therefore it is submitted that the entire reassessment proceedings require to be held as null and void.

7. Even assuming without admitting, the scope of total income in case of a Non resident is enumerated in Section 5 (2).

8. The burden is on the revenue to prove that the income of the non-resident falls within the ambit of such section

9. It is submitted that the AO intended to reassess the appellant only on account of an asset located outside India but there is no information about the

income in relation to such an asset earned in India. It is reason to believe that may give jurisdiction to reassess the income and not reason to suspect which is the case in the present case.

10. Even assuming without admitting, the extended period of sixteen years for issue of Notice u/s. 148 is available u/s. 149(1)(c) only in case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year. Thus, essential requirements are that –

b. there should be income.

c. the income should be in relation to any asset located outside India.

d. the income should be chargeable to tax; and

e. such income would have escaped income.

11. The appellant who is a Non resident since last about 15 years to have a bank account outside India is not vital or important information.

12. Under Section 149(1)(c), and for the purpose of reassessment asset located outside is relevant if and only if there is income in relation to such asset located outside India and that such income must have been chargeable to tax in India.

13. If there is no income chargeable to tax in India in relation to asset located outside India there can be no reassessment since reassessment proceedings

could be of income in relation to asset located in India and not of asset located outside India. The distinction between income and asset (capital balance) has been explained by the Hon'ble Bombay High court in Vodafone Services India P Ltd vs Union of India 368 ITR 1 (Bom).

14. Provisions of Section 149(1)(c) and proviso 2 to Sec 147 make it clear that what is intended to be reassessed is only income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax that has escaped assessment for any assessment year.

15. The AO has not disclosed nor referred to any credible information in support of his finding that the said account had peak balances on any particular day during the Financial Year 2005-06. The AO, based only on hearsay and unverifiable information and adopted imaginary amounts as peak balance and proceeded to make additions.

16. The AO has wrongly taxed the alleged income by taking count of all the possible assumptions and probabilities only on suspicion It is submitted that judicially it has been held that suspicion however strong cannot take place of the evidence.

17 Conclusion should be on clear findings and not on presumptions and decision cannot be on the basis of assumption or presumption. Without prejudice to all the earlier grounds of the present appeal, even otherwise it would be incorrect to include the balance

at the end of the accounting year as the alleged income.

18. The revenue is not justified in placing the onus of proving a negative on the Assessee.

Parimisetti Seetharamamma v. CIT [1965] 57 ITR 532 (SC) [Pg 131-138]

The Act does not provide that whatever is received by a person must be regarded as income liable to tax. In all cases in which a receipt is sought to be taxed as income, the burden lies upon the department to prove that it is within the taxing provision. The case of the assessee was that the receipts did not fall within the taxing provision: it was not her case that being income the receipts were exempt from taxation because of a statutory provision. It was therefore for the department to establish that these receipts were chargeable to tax.

DCIT(IT)-3(3)(2) vs. Shri Hemant Mansukhlal Pandya [ITA No. 4679 & 680/Mum/ 2016 dtd: 16/11/2018] (Mum) (Trib), [pg 1- 25]: wherein it was held that since the assessee is a non-resident in India since 1990 and has no business connection in India during that period, mere holding of an account outside India does not lead to the conclusion that the amount is tax evaded. It was also held that it is the responsibility of the assessing officer to prove the source of income being connected to India and the assessing officer has failed to do so, as no evidence has been provided by the assessing officer to date.

DCIT v Venu Raman Kumar ITA No 2977/M/2018 dtd 19/6/19 (Mum)(Trib)[Pg 54-64]

DCIT vs. Shri Dipendu Bapalal shah, ITA No. 4751-52/M/2016, (Mum)(Trib) - [Pg 41-53]: the Mumbai Bench of the ITAT has decided an identical issue in favour of the taxpayer and against the Revenue. The facts in that case are identical to that of the Assessee.

Mr Kamal Galani v ACIT ITA Nos 138,142,266,267,286,289/M/2019 dtd 10/9/2020 (Mum)(Trib) [P.Book III Pg 1-43]

Addition of deposit in foreign bank account was deleted as AO could not prove that initial deposit was earned from a source in India.

DCIT v. Finlay Corporation Limited [2003] 86 ITD 626 (Delhi) (Trib.)

Income of non-resident is taxable or not has to be decided with reference to the provisions of s. 5(2) and what is not taxable under s. 5(2) cannot be taxed under s. 68 or 69.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.

PCIT v/s. Binod kumar Singh (2019) 264 Taxman 335 (Bom)(HC) - wherein ITAT Mumbai held that if one has proved his status of being a non resident then his global income cannot be taxed in India. When it was noted that the assessee was a non resident, appeal

was disposed off as global income of a non-resident cannot be taxed in India.

The decision of Mumbai Tribunal in Renu T Tharani v DCIT [2020] 184 ITD 565 (Mumbai - Trib.) is not applicable in the facts of the present case.

On the aspect of reopening, reopening was upheld as Assessee had filed ROI in India as a resident. It was not a case of nonresident. Also the above decision do not rely upon Bombay High decision in Pr.CIT-15 v Binod Kumar Singh (2019) 178 DTR 49 / 264 Taxman 335/ 310 CTR 243 (Bom.)(HC) which specifically deal with taxability in the hands of Non residents.

Similarly decision in Rahul R Parikh AYS 2003-04 to 2008-09 & anr.

Dated: 01/06/2018 (Mumbai ITAT) is not applicable in the facts of the present case. Assessee did not challenge the reopening before ITAT. There was a finding of fact that the assessee and Kalpesh Jhaveri were partners inKR Gems, and Navinchand Navalchand & Co. Opera House Mumbai. The Assessment Order is set aside

19. Even the Hon'ble Finance Minister, has clarified that all accounts in foreign banks may not be illegal as they may belong to NRIs. Thus, even the Government has acknowledged the fact that an NRI's foreign bank account is not illegal. In the instant case, since the Assessee is an NRI, the Government does not seek to tax him in India in respect of his foreign bank account. Also, as per the official statement released to the media on 9/2/2015, the

Government acknowledged that only residents' holding foreign bank accounts may be actionable.

-Even the provisions of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is applicable only to residents. As per section 2(2) of the said Act, assessee means "a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, by whom tax in respect of undisclosed foreign income and assets, or any other sum of money, is payable under this Act and includes every person who is deemed to be an assessee in default under this Act." Since the Assessee in the present case is a non-resident, even this law does not apply to him.

20. The AO has taxed the SAME INCOME in the hands of his wife Smt. Urvi Manish Mehta (PAN: AAIPS0073M) independently and making a substantive assessment which amounts to double assessments and double addition resulting into double taxation of the alleged income.

21. In Subsequent year A.Y.: 2007-08 same balance amount carried forward is added back in hands of both assessees."

014. Cross Objections filed by the assessee are on the issue of reopening and on merits. They are merely supportive in the nature.

015. We have carefully considered the rival contentions and perused the orders of the lower authorities. Undisputedly,

in this case, the assessee is a nonresident from A.Y. 2001-02 and has been working as an employee in Belgium. He is having the income of interest on fixed deposits in India and is filing the return of income since A.Y. 2003-04 showing residential status as non-resident. Assessee has also submitted the proof of his non-residential status by submitting the copy of the passport showing Belgium citizenship. Thus the assessee is a non-resident and it is accepted by both the parties.

016. A Nonresident is chargeable to tax in India only income falls under Section 5(2) of the Act. Accordingly, he is chargeable to tax only if the income is received or accrues or arises in India or deemed to be received or deemed to accrue or arise to him in India. Therefore, the assessee can be asked to file the details only with respect to the income falling under Section 5(2) of the Act. Therefore, it is an undisputed fact that assessee is a non resident is not obliged to disclose his assets situated outside India in the return of income filed in India.

017. The facts also shows that the appellant was born in India in 1975 and became non-resident in A.Y. 2002-03 when he was 25 years old and not four years as held by the learned Assessing Officer. It is also stated by the assessee that he was never a partner in any firm in India. This data and statement of facts was not rebutted by the learned Assessing Officer. Further, these facts are also not doubted that assessee is employed in Belgium after he became a non-resident. Assessee also denied that he was ever a beneficiary of any discretionary trust. Therefore, it

is apparent that all the allegation made in the assessment order are without any basis or evidence available with the learned Assessing Officer. If an income is to be taxed in the hands of non-resident assessee under Section 5(2) of the Act, then the burden is on the ld. AO to show that income of the non-resident assessee is falling within the definition of income chargeable to tax in his hands. No doubt, 'base note' before us shows the name of the assessee, however, such 'base note' could have been used for income tax in the hands of this assessee only if he would have been resident in India. That is not the case, because assessee is a non-resident accepted by the learned Assessing Officer for last several years i.e. almost 2 decades. The assessee has also produced his Passport which also do not show that he was resident in India in any of these years. It is also clear that foreign bank accounts belong to non-resident Indians cannot be illegal for the reason that non-resident Indians are bound to have their bank accounts outside India. It is not the intention to tax foreign bank accounts of non-resident but to tax the foreign bank accounts of resident Indians. It is further not clear that how the learned Assessing Officer has also taxed the same income in the hands of his wife. Further, in A.Y. 2007-08, identical amount once again taxed in the hands of the assessee as well as in the hands of his wife. Apparently, in this case, there is no evidence available with the learned Assessing Officer that there is an amount deposited in the HSBC bank by the assessee during the year. In fact, there is no deposit during the year. There is no evidence that such deposit is income of a

non-resident under Section 5(2) of the Act. Assessee is assessed to tax year to year basis as non-resident on his Indian income. In view of this, we do not find any infirmity in the order of the learned CIT (A) in deleting the addition of ₹30,33,945/- in the hands of the assessee for A.Y. 2006-07. Accordingly, the order of the learned CIT (A) is confirmed.

018. In the result, ITA No. 494/Mum/2021 filed by the learned Assessing Officer for A.Y. 2006-07 is dismissed.

019. ITA No. 493/Mum/2021 is also filed by the learned Assessing Officer for A.Y. 2007-08, wherein the same addition of ₹30,84,468/- is made in the hands of the assessee on account of balance in HSBC bank account as per 'base note' having balance of USD 69,737/-. The learned CIT (A) deleted the addition considering the facts in Assessee's own case for A.Y. 2006-07. We do not find any reason to sustain the order of the learned CIT (A) for A.Y. 2007-08. For the reason that, we have already upheld the order of the learned CIT (A) for A.Y. 2006-07, deleted the above addition.

020. Accordingly, the appeal of the learned Assessing Officer for A.Y. 2007-08 in ITA No.493/Mum/2021 is dismissed.

021. Assessee has filed cross objections in CO Nos. 155/Mum/2021 and 156/Mum/2021, both are supported in nature. As we have already upheld the order of the learned CIT (A) for both the years, deleted the impugned addition, these cross objections are infractuous and hence dismissed.

022. Accordingly, both the appeals of the learned Assessing Officer in case of Mr. Manish Vijay Mehta and both the CO of the assessee are dismissed.

In case of
Urvi Manish Mehta

023. Identical additions were made by the learned Assessing Officer in the hands of Mrs. Urvi Manish Mehta of the identical sum for A.Y. 2006-07 and 2007-08 by passing an order under Section 143(3) read with section 147 of the Act for A.Y. 2006-07 and 2007-08 on 31st March 2015. Both the years of appeals were preferred before the learned CIT (A)-57, Mumbai and by separate orders dated 24th September, 2020, deleted the addition. The main reason for deletion of the addition was deletion of addition by the learned CIT (A) for both the years in the hands of the husband of the assessee namely Mr. Manish Vijay Mehta. Therefore, the learned Assessing Officer has preferred the ITA No. 491 and 492/Mum/2021 for A.Y. 2006-07 and 2007-08 respectively. Assessee has preferred the Cross Objections in Co Nos. 153 & 154/Mum/2021 for both the years respectively. As we have already upheld the orders of the learned CIT (A) in the hands of Mr. Manish Vijay Mehta deleting the above addition and the orders under challenge in the hands of his wife are also identical, for the reason given in appeals related to Mr. Manish Vijay Mehta, we also dismissed the appeals of the assessee in case of M/s Urvi Manish Vijay Mehta. Similarly, both the cross objections are also supportive in nature and therefore, become infractuous and hence, dismissed.

024. In the result, appeals of the learned Assessing Officer and CO of the assessee for both the years are dismissed.

025. In the result, all the appeals of the learned AO and CO of both the assessee are dismissed.

Order pronounced in the open court on 31.10.2022.

Sd/-	Sd/-
(SANDEEP SINGH KARHAIL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 31.10.2022
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai