IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
ITA Nos:676 & 677/SRT/2018 (AY-2006-07 & 07-08) With
C.O. No's.06 & 07/SRT/2021 (AY 2006-07 & 07-08)
(Hearing in Virtual Court)

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| The Income Tax Officer,<br>International Taxation,<br>Surat. | Vs | Alkesh Pratapchandra Bhansali,<br>107, Anavil Business Centre,<br>Adajan, Hazira Road,<br>Surat.<br>PAN: ABBPB 7892 F |
| Assessee / appellant | | Revenue /respondent |

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| Assessee by | Shri K.Gopal - Advocate |
| Revenue by | Shri H.P.Meena - CIT-DR &<br>Ms.Anupama Singla - SrDR |
| Date of hearing | 22.10.2021 |
| Date of pronouncement | 22.11.2021 |

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This set of four appeals consisting two appeals by Revenue and Cross Objections therein by assessee are directed against the order of ld. Commissioner of Income Tax(Appeals)-13[Ld.CIT(A)], Ahmedabad for the Assessment Year 2006-07 and 2007-08. In both the appeals, the Revenue as well as in CO's both the parties have raised certain common grounds of appeal, facts in both the years are similar, except variation of addition on account credit appearing in HSBC, Switzerland, therefore, all cases were clubbed, heard and are decided by common order.

2. At the time of hearing, the ld. Authorised Representative (ld.AR) for the assessee submits that tax effect involved in ITA No.677/SRT/2018 is less than the monetary limit of Rs.50 lakhs as determined by Central Board of Direct Taxes (CBDT) for filing the appeal by the Revenue before the Tribunal, thus, the appeal filed by revenue is not maintainable and may be dismissed. After hearing, the submission of the ld.AR of the assessee and going through the grounds of appeal and the order of ld. CIT(A), the ld Sr DR for the revenue is agreed that the tax effect in the appeal is less than the monetary limit, however, the revenue may be given liberty to move appropriate application if on later stage it is discovered that the appeal is covered by any exception clause of Circulars of CBDT, or the tax effect is much more than the monetary limit of Rs. 50 lakhs. The ld AR for the assessee submitted that since appeal of the revenue in ITA No. 677/SRT/2018 is not maintainable as tax effect is less than the monetary limit fixed by CBDT for filing appeal by the Revenue before the Tribunal, therefore he is not pressing the grounds of appeal raised in his Cross Objections. Considering the submission of both the learned representative of the parties, the appeal for the A.Y. 2007-08 by Revenue as well as Cross Objections therein by assessee are dismissed as not pressed. In the result, ITA No. 677/SRT/2018 and CO No. 07/SRT/2018 are dismissed.

3. Now adverting to the facts for the A.Y. 2006-07. Facts of the case are that assessee is a Non Resident Indian(NRI), filed his return of income for the A.Y. 2006-07 on 23.08.2007 declaring income of Rs.60,243/-. The case was not selected for scrutiny and no scrutiny assessment order was passed. The Assessing Officer(AO)received information that assessee is maintaining foreign bank account with HSBC Bank, Geneva, Switzerland, with data sheet containing monthly balance in his account, received by Indian Government from French Authority. The said information was passed on by the Investigation Wing, Surat. As per the report of ADIT(Inv.), Unit-2, assessee refused to provide the details of his bank account on the ground that being Non-Resident, he is not obliged to provide details of his foreign income, bank account or transaction to Indian Tax Authority. As per the information available with the AO, the assessee was having peak balance in the impugned account with HSBC of US$ 562739.52, in the month of March, 2007. The data sheet and the account extract contained personal information of the account holder. The AO recorded that assessee did not furnish the account details maintained by him outside India. The assessee is a Non-Resident since 2002 onwards he has not provided details of income earned by him outside India. The AO recorded that as per the basic information, the assessee has been either in Belgium or in Ahmedabad. In the information

received from French Authority disclosed that assessee is a diamond trader and having business address at Ahmedabad. On the basis of such information, the AO took his view that assessee has business location in at Ahmedabad in India and Swiss Bank Account received income from this business. On the basis of such information, the AO has a reason to believe for reopening assessment under section 147 of the Act. The AO recorded following reasons:

> "In this case, the assessee has filed his return of income for A.Y.2006-07 on 23.08.2007 declaring total income of Rs.60,243/-.
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> 2. The information regarding the foreign bank account was received from the ADIT(Inv.), Unit-2, Surat. As per this information, the assessee is having bank account No. 5091289250 in HSBC Pvt. Bank (Suisse) S.A., Geneva, Switzerland with code BUP 5090149787 and PerNo. 149787. The said account is stated to have been opened on 17.02.2000. The peak balance in this bank account in March-2006 was $562,739.52. The rate of exchange as on 31.03.2006 was Rs.44.48 per dollar. Considering this, the total amount comes to Rs.2,50,30,653/-. As such, the nature of above deposits are not clear from the return itself submitted by the assessee.
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> The above deposits require deep investigation. In view of this, I have reason to believe and am satisfied that the income chargeable to tax of Rs.2,50,30,653/- has escaped assessment within the provisions of section 147 of the Act."

4. After recording reasons, the AO issued notice under section 148 of the Act dated 11.11.2014. The AO recorded that in response to the notice under section 148 the assessee filed his reply/ letter dated 22.12.2014 and stated that return of income filed on 23.03.2007 may be treated as return in response to the said notice and filed copy of return, along with return

of income, the assessee enclosed various documents and evidence of his being Non-Resident during the period and furnished the copy of passport. The AO after serving notice under section 143(2) of the Act on 24.12.2014 proceeded for assessment. The assessee was served with notice under section 142(1) of the Act, dated 11.12.2015 and was asked to provide information with regard to nature and business activities during this year and source of his Income earned during this period, the copy of passbook, extract of all bank accounts including NRO/NRE, foreign bank account either in his name or jointly with any other person in India as well as abroad including HSBC Bank, Geneva and extract of all bank account with HSBC, Geneva with date of opening of account, tax returned and tax payment challan in respect of income earned in the tax jurisdiction wherein the assessee resided in last three years. The Profit and Loss account, Return of Income, Commission, brokerage income declared by assessee, the capital account, source of income which resulted in transfer of amount with necessary evidence and other details. The AO recorded that assessee in its written submissions has not denied the existence of bank account in HSBC, Geneva. The assessee pleaded that he was a non-resident, only income accrued or arising in India was taxable in India, has not substantiate the plea, that he had not earned in income in India, it was necessary for assessee to demonstrate that source

of income earned by him outside India in the lying fact that credit balance of US$ 562739 was appearing in HSBC Account, without any tangible source of income outside India. The AO recorded that no such attempt was made by assessee nor the details as furnished.

5. The AO further recorded that assessee objected against the reasons recorded vide objection filed on 02.01.2015. The gist of which is recorded by AO in para 4 of the assessment order. In the objection, the assessee stated that he is a Non-Resident. In case of Non-Resident, as per the section 9 of the Income Tax Act, unless the place of accrual for arises of income is within India, he cannot be subjected to tax, only to that extent which any income accruing arising within India or deemed to accrue or arise in India, the income of Non-Resident, will be made liable to be taxed by the reasons of section 5(2)(b) of the Income Tax Act. The assessee is Non-Resident, and liable to Income Tax to India only in respect of income which accrues or arise in India, the Non-Resident are not needed to fill up the new schedule it was added to the Income Tax Return for the first time in Financial Year 2011-12, which requires reporting of foreign asset in the Income Tax Return. As per the provision of the Act, existence of foreign account is not relevant for Indian Income Tax Return. As such, the existence of bank account in HSBC, Geneva is not relevant in case of Non-Resident. On the basis of such information,

the reassessment under section 147 of the Act cannot be initiated being beyond the jurisdiction of AO. The AO recorded that objection of assessee was rejected by speaking order. The AO after rejecting the objection proceeded for assessment. The AO recorded that on verification of Capital account of assessee it was noted that he assessee has credited a sum of Rs.57,37,619/- by way of remittance, which is credited to his NRE account. The A.O. issued show cause notice to the assessee to explain the as to why the amount of remittance and peak credit in HSBC of Rs. 2,50,30,653/- should not be added to the income of the assessee. The assessee filed its detail reply on 18.03.2015, the contents of the reply filed by the assessee is recorded by A.O. in para-9 of assessment order. The assessee in his reply further stated that the remittance of Rs. 57,37,619/- was sent through banking channel and there is no evidence regarding the transfer of money. The money is transferred with the RBI norms. On the alleged credit in the HSBC, the assessee reiterated that he is an NRI from so many years and under no obligation to disclose foreign income or assets. The assessee further stated that in case of non-resident, the onus is on the department to prove that income is remitted from India. The assessee also rely on the decision of Hon'ble Supreme Court in the case of Parimisetti Seetharamamma vs. CIT (1965) 57 ITR 532 (SC). The assessee also stated that no income is accrued or arose in India and is not

taxable in India as per section 9(1)(i) of the Act as there is no business connection, any property or asset or source of income in India or capital asset generating income in India. Mere alleged reference in the address in HSBC account does not represent accrual of income from India. The nexus between income and India is either business connection in India or the property in India or source or asset in India. As per section 5 in case of non-resident or resident but not ordinary residence, the income accrued and received outside India is not taxable in India. In case of non-resident, the income accrued and received outside India cannot be subject to tax India. If income is not taxable under section 5 cannot be taxed under the provision of section 69 of the Act. Thus, the proposed additions are uncalled for. The reply of assessee was not accepted by Assessing Officer, the Assessing Officer took his view that assessee has not furnished any evidence to establish that assessee having any source of income outside India and that the depositing in this account is of such source of income. In absence of information, the Assessing Officer took his view that income deemed to accrue or arise in India and is liable to tax under section 5 (2)(b) r.w.s section 69. Further the assessee has not denied the bank account is not of assessee or there was no fund in the said account. The Assessing Officer recorded that there was deposit of Rs.2,50,30,653/- in the month of March, 2006 and the same was added as

undisclosed income under section 69A of the Act. The Assessing officer further held that the assessee failed to substantiate the credit at the remittance of Rs.57,37,619/-,from where the amount was remitted to NRI account. Mere through banking channel would not mean that funds from NRI to NRO account. The remittance made by assessee. The relevant documents are in possession of assessee. The onus on the assessee to demonstrate that source of credit was explainable.

6. Aggrieved by the addition as well as reopening under section 147 the assessee filed appeal before the CIT(A). Before CIT(A) the assessee filed detailed written submission, challenging the validity of reopening as well as addition of Rs.57,37,619/- and addition of Rs.2.50 crores under section 69A of the Act. The detailed written submission are duly recorded by Ld. CIT(A) in para-3 and 4 (pages 32 to 38) against the addition. On validity of reopening the submission of assessee are recorded in para-5 and 6 (pages 39 to 46) of order of ld. CIT(A). The Ld. CIT(A) after considering the submission of assessee upheld the re-opening by referring the decision of Hon'ble jurisdictional High Court in Ankit Financial Co. Ltd. vs. DCIT (2017) 78 taxman.com 58 and in Pushpak Buildcoin Pvt Ltd. Vs DCIT 85 taxman.com. However, the Ld. CIT(A) deleted both the additions on merit. While deleting the addition of Rs.57,37,619/-, the Ld. CIT(A) held that the decision with regard to this addition would depend

on whether the assessee is a resident or non-resident. The Ld. CIT(A) recorded that during A.Y. 2006-07the assessee's period of stay in India was 45 days. Further there is no dispute that status of assessee is a non-resident in terms of section 6 of the Act. Further, the assessee is filing his return in India by reflecting is status as non-resident. This status of assessee is accepted by Assessing Officer. The Ld. CIT(A) further recorded that perusal of Circular No.5 of 1969 issued by CBDT states that if the inward remittance has come through proper banking channel, no question at all asked by Income Tax Officer so as to origin of money brought in. The Assessing officer has accepted that impugned amount of Rs.57,37,619/- has come through banking channel in his NRE account. Any credit entry in terms of inward remittance in India cannot be income deemed to accrue or arrive in India. The assessee earned the income outside India and remitted it to India. In such cases, the assessee is not under obligation to state the nature of transaction in abroad. In case of remittance by banking channel, the onus on the assessee is stranded discharged. Therefore the section 5(2)(b) does not apply. The Ld. CIT(A) also relied on the decision of Delhi High Court in the case of CIT vs. Suresh Nanda (2013) 35 taxman.com 199 (Del). The Ld. CIT(A) also relied on the decision of Hon'ble Delhi High Court in case of Saraswati Holding Corporation vs. DCIT (111 TTJ Delhi 334) and held that

provision of section 68 / 69 is applicable in case of non-resident only with reference to those amounts, whose origin of source can be located in India. Therefore, the provisions of section 69 or 69 have limited application in case of non-resident. The Ld. CIT(A) also held that A.O. has not been able to provide any documentary evidence to support that income accrues or have been received by assessee in India and further that any funds to his Overseas Bank account were from India and deleted the addition of Rs.57,37,619/-. On the issue of addition of Rs.2.50 crores, the Ld. CIT(A) by referring section 5 & 9 held that only income is directly or indirectly deemed to accrues or arising in India or received or deemed to receive in India is chargeable to tax. Further, there should be any business connection in India or through any property, or from any asset or source of income or through transfer of capital asset situated in India, is taxable in India. There is no evidence available before the Assessing Officer on the basis of which he could have deduced that the assessee was allegedly maintaining bank account with HSBC Geneva, Switzerland that peak balance appearing in the said account was transferred by the assessee from India to abroad and therefore the peak balance in the said amount represent his income escaping assessment. The only information available with the Assessing Officer was the Base Note. In absence of any tangible material there is no material before the

Assessing Officer who believe that a sum of Rs.2.50 course appearing as peak balance in the said account represent assessee's income for A.Y. 2006-07 which escaped assessment as per section 5 of the Act. The Ld. CIT(A) also held that once the assessee made his submission that he a non-resident, he can have foreign asset and foreign accounts which is not required declared before the Income Tax Authority. The assessee is cannot be asked to prove negative. The A.O. has not brought any evidence on record to go through that income in India has been diverted and remitted in abroad. From the bank account furnished by assessee it is clear that assessee has not diverted any income of remittance abroad from India. Therefore the assessee has discharged his primary onus. Moreover, the non-resident the assessee is working abroad. The assessee is not a partner, a proprietor, director of any company doing business in India and he does not have any business in India. As he is non-resident, he is under obligation to declare his Indian asset and Indian accounts and he is not required to explain his foreign income or asset. The assessee already declared income arising or accruing in India by filing return of income in India. The Assessing Officer merely assumption and surmises that assessee has concealed particulars of income on the basis of sheet of papers from French Government highlighting that assessee holds a bank account in Switzerland. On the basis of above observation, the Ld.

CIT(A) deleted the addition of Rs.2,50,30,653/-. Aggrieved by the order of ld CIT(A), the revenue has filed present appeal before this Tribunal. The revenue has raised following grounds of appeal.

a. That the Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in holding that sec. 68 or Section. 69 of the Act have limited application in the case of a non-resident without appreciating the fact that the provisions u/s 68 and 69 of the Act do not distinguish between the residential status of an assessee.
b. That the Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in extending the benefit of section 5(2) of the Act to the assessee without verifying the residential status of the assessee in the FY 1999-2000 and 2000-01 when the impugned bank account was opened by the assessee and its consequent impact on the residential status of the assessee for the year under consideration.
c. That the Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in allowing the claim of the assessee of not explaining the source of the credits appearing in his bank account of HSBC Switzerland of Rs.2,50,30,653/- completely ignoring the provisions of Section 5(2) of the Act which makes the receipts taxable in India even if the same is received or deemed to be received in India even though the same is accruing or arising outside India.
d. That the Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in allowing the claim of the assessee of not explaining the source of the credits appearing in his bank account on the ground of assessee being non-resident even though the assessee could prove that he was a non-resident only in the A.Y 2005-06 onwards and therefore deposit of huge sums in such a short span required deeper investigation by the CIT(A) and proper explanation by the assessee.
e. That the order of the Ld. CIT(A)-13, Ahmedabad suffers from perversity since the Ld. CIT(A) failed to apply the provisions of Section 6(1)(c) of the Act to the facts of the assessee's case upto AY 2004-05 as the assessee would become resident in India if his stay in India is more than 365 days in the previous four years and more than 60 days in the A.Y 2004-05.

f. That the order of the Ld. CIT(A)-13, Ahmedabad suffers from perversity since the Ld. CIT(A) failed to collate / collect the details of number of days presence of the assessee in India to determine his residential status before F.Y 2001-02 which were very vital for deciding the residency of the assessee. Therefore, the order passed by the Ld. CIT(A) is perverse to this extent.

g. That the Ld.cita-13, Ahmedabad has erred in facts and in law in holding that in the case of remittance of Rs.57,37,619/- by way of banking channel, the onus on the Non-Resident u/s 69 of the Act stands discharged and therefore Section. 5(2)(b) of the Act does not apply, completely ignoring the fact that the onus was not discharged by the assessee that the said amount did not accrue or arise in India or could not be held to have accrued order arisen in India without verifying the residential status of the assessee upto AY 2004-05 wherein the assessee could have been a resident as per provision 6(11)(c) of the Act and therefore such a huge remittance within such a short span warranted deeper investigation and enquiry.

h. That the order of the Ld. CIT(A)-13, Ahmedabad suffers from perversity since the Ld. CIT(A) failed to enquiry the source of remittance which was received by the assessee or call for a remand report directing the assessee which were received in such a short span of time of assessee becoming non-resident.

i. That the Ld.cita-13, Ahmedabad has erred in facts and in law in holding that it is incumbent upon the AO to establish that the balance in the bank account reflect the income, source of which is in India, in absence of which the additions cannot be sustained completely ignoring the fact that as per the provision s of the statute the responsibility lay on the assessee to explain to the satisfaction of the assessing officer the nature of a transaction or entries appearing in its bank account of the assessee in the absence of assessee being a non-resident for a fairly long period of time.

j. That the Ld. CIT(A)-13,Ahmedabad has erred in facts and in law in relying on the order of the Hon'ble ITAT in the case of Shri Dipendu Bapalal Shaha ITA No.4751/Mum/2016 & 4752/Mum/2016 in which there was no dispute

that the assessee was a non-resident since 1979 whereas in the present case the assessee became non-resident only in the AY 2005-06.

7. The assessee in its Cross Objection (CO) has raised following grounds of appeal;

1. The Commissioner of Income Tax, Appeals-13, Ahmedabad [hereinafter referred to as "CIT(A)-13" erred in upholding the action of the Assessing Officer [hereinafter referred to as "the Assessing Officer"] in reopening the case of the assessee , a non-resident, beyond a period of six years from the end of relevant assessment year i.e. A.Y 2006-07 that too without forming a valid reason to believe as to how income chargeable to tax has escaped assessment. The reasons for doing so are wrong, contrary to facts and position in law.

2. The CIT(A)/AO failed to appreciate that reopening merely for verification purpose and being based upon information received from the investigation wing in the form of a data sheets which were loose, unverified and unauthenticated without any independent application of mind is invalid and the same may be quashed as bad in law.

3. On the facts and circumstances of the case and position in law, the AO failed to appreciate that the notice under section 148 of the Income-tax Act, 1961 [hereinafter referred to as "the Act"] seeking to reopen the case of the appellant under section 147 of the Act, who is a non-resident, beyond a period of four years from end of the relevant assessment year without a valid sanction as mandated under section 151 of the Act is bad in law and consequentially the reassessment order is liable to be quashed.

8. We have heard the submission of learned Commissioner of income tax - departmental representative (CIT-DR) for the revenue and the learned authorised representative (AR) for assessee and have gone through the orders of lower authorities carefully. The learned CIT-DR for the revenue

submits that the learned CIT(A) erred in holding that assessing officer made addition without any basis and not considering the status of assessee being non-resident Indian. The assessing officer made addition on the basis of information received from sovereign country that is French Authorities, wherein it was communicated that certain Indian nationals and residents were maintaining bank account in HSBC Geneva. The said bank accounts are not disclosed to Income tax authorities. The learned CIT(A) not appreciated the relevant information received from sovereign countries. The assessee has not denied of having bank account with HSBC Geneva, nor filed in the detail to prove that the said bank does not have any link or there is no income derived or sourced from India. The assessing officer during the assessment proceeding granted full opportunity to the assessee to prove that the credit shown in the HSBC bank, it source and nature, despite the fact the assessee failed to prove the nature and source of credit. The learned CIT(A) appeals without appreciating these facts deleted the addition on account of remittance as well as the addition on the basis of peak credit in HSBC Geneva. The learned CIT-DR for the revenue prayed for reversal of the order of CIT(A) and to restore the additions made by assessing officer.

9. On the other hand the learned AR of the assessee supported the order of learned CIT(A). The learned AR of the assessee submits that the

assessing officer never disputed the fact that assessee is non-resident since 2000-01. The status of assessee is accepted throughout the proceedings. The assessing officer ignored the law, which clearly and without any ambiguity states that non-residents are not required to declare their foreign bank account and assets to the Indian Income tax authorities. The assessee before the assessing officer clearly explained that he is not entitled to make addition solely on the basis of alleged information received from French authorities about maintaining of bank account in HSBC bank and without establishing the fact that such credits are sourced from income derived in India. During the assessment the assessee categorically stated and filed his affidavit that the assessee have no business connection in India or no income accrued or arise in India. The assessee furnish the details of bank account /and NRO account with Andhra Bank Opera House Navsari and NRE bank account with Bank of India Navsari branch. The assessee remitted the sum of  57,37,619/- with the permission of reserve Bank of India (RBI).

10. The assessing officer has not made any investigation to ascertain the fact that deposit in HSBC bank is having any nexus with any income accrues or arise in India and solely made addition only on the basis of alleged base note which is just a photocopy, unverified and unauthenticated document. The learned AR further retreated that assessee being non-

resident is under no obligation to disclose his foreign account and asset and accordingly he never disclosed his bank account maintained anywhere in overseas countries. The learned AR further invited our attention by referring the income tax return form, prescribed for filing return of individual, and would submit that the moment a person choose his status as of "non-resident" the column provided for filing foreign bank accounts and asset details do not appears in the return of non-residents and accordingly there is no occasion for disclosing such information to the income tax authorities. The learned AR of the assessee further invited our attention on section 5, 6 and 9 of Income-tax Act and would submit that the assessee is non-resident and his status is not disputed. The assessee is having no business connection, whatsoever no income accrues or arise in Indie or received or deemed to receive on behalf of assessee, therefore, merely some information had been received from some sources the same cannot be considered to make the assessment on non-resident in India in respect of bank account and assets held outside in India. The assessee has already filed his affidavit that he has no business connection in India. Only his passport was issued from Ahmedabad. The Ld. AR for the assessee submits that in fact the issues raised by the revenue are squarely covered by the decision of Mumbai Tribunal in DCIT Vs Venu Raman Kumar (ITA No. 2977/Mum/2018)

and in DCIT Vs Hemant Mansukhlal Pandya (ITA No. 4697& 680/Mum/2016). To buttress his other submissions the ld AR for the assessee relied on the following decisions;

- DCIT Vs Venu Raman Kumar (ITA No. 2977/Mum/2018),
- PCIT Vs Binod Kumar Singh (2019) (4) TMI 1533,
- DCIT Vs Binod Kumar Singh (2019) (4) TMI 295,
- DCIT Vs Hemant Mansukhlal Pandya (ITA No. 4697 & 680/Mum/2016),
- DCIT Vs Dipendu Bapalal ( ITA 4751-52/Mum/2016,
- CIT Vs Suresh Nanda ( 2013) 352 ITR 611 and
- Perimesetti Seetharamamma Vs CIT (1965) 57 ITR 532

11. The ld AR for the assessee finally submits that in case the grounds of appeal raised by the revenue are dismissed, he will not pressed the grounds of appeal raised in his Cross Objections. On the Cross objections, he has already filed written submission, which may be considered.

12. We have considered the rival submissions of the parties and have gone through the order of the lower authority. We have also deliberated on various case laws relied by ld AR of the assessee and on the decisions referred by ld. CIT(A) in his order. The A.O. made additions of Rs. 57,37,619/- by taking his view that assessee has not furnished any evidence to establish that assessee having any source of income outside India and that the depositing in this account is of such source of income. that assessee has not furnished any evidence to establish that assessee

having any source of income outside India and that the depositing in this account is of such source of income. In absence of information, the Assessing Officer took his view that income deemed to accrue or arise in India and is liable to tax under section 5 (2)(b) r.w.s section 69. The AO further held that the assessee has not denied the HSBC bank or there was no fund in the said account. The AO held that there was deposit of Rs.2,50,30,653/- in the month of March, 2006 and in absence of information, the AO held that income deemed to accrue or arise in India and is liable to tax under section 5 (2)(b) r.w.s section 69.

13. The ld CIT(A) deleted both the additions by holding that once the assessee took his stand that he a non-resident, he can have foreign asset and foreign accounts which is not required declared before the Income Tax Authority. The status of non-resident is not disputed by the AO. The assessee is cannot be asked to prove negative. The A.O. has not brought any evidence on record to go through that income in India has been diverted and remitted in abroad. From the bank account furnished by assessee it is clear that assessee has not diverted any income of remittance abroad from India. Therefore the assessee has discharged his primary onus. Moreover, the non-resident, the assessee is working abroad. The assessee is not a partner, a proprietor, director of any company doing business in India and he does not have any business in India. As he is

non-resident, he is under obligation to declare his Indian asset and Indian accounts and he is not required to explain his foreign income or asset. The assessee already declared income arising or accruing in India by filing return of income in India. The Assessing Officer merely assumption and surmises that assessee has concealed particulars of income on the basis of sheet of papers from French Government highlighting that assessee holds a bank account in Switzerland.

14. We find that the coordinate bench of Mumbai Tribunal in DCIT Vs Venu Raman Kumar (supra) while relying on earlier decision in DCIT Vs Hemant Mansukhlal Pandya (supra) almost on similar grounds of appeal, in case of assessee who was also non-resident from decade, passed the following order;

> "12. We have carefully considered the rival submissions. So far as the factual aspect of the matter are concerned, the same has been noted in the earlier paragraphs and are not been repeated for the sake of brevity. So however, in order to briefly recapitulate, it is to be noticed that the assessee is a non-resident individual, an aspect which is not disputed. Further, it is also not disputed that three accounts in question are not in the name of the assessee. Further two of the bank accounts have been opened in the name of entities viz. Zetec Ventures Ltd and Zeke Limited based in British Virgin Islands and assessee is a Director in one of the two entities and so far as the second entity is concerned, assessee founded the same. The claim of the assessee was that none of the bank accounts in question have any relation or connection to India or to any of assessee's transactions in India. We find that the case set

up by the AO is on a presumption that the assessee has routed money sourced from India through three entities to the bank accounts in question.

13. In this background, the first and the foremost issue which arises for consideration is the question of onus on the respective parties (i.e. assessee and Revenue) and whether the same has been discharged? Aligned to this question, is the scope and ambit of the income assessable in India in the hands of a non resident which is governed by the provisions of section 5(2) of the Act. In fact, such a situation has been examined by our co-ordinate Bench in the case of Shri Hemant Mansukhlal Pandya (supra). The bare provisions of section 5(2) of the Act bring out that in case of a non-resident assessee, the total income that is liable to be taxed shall comprise of income, which is received or deemed to be received by or on behalf of such person or the same accrues or arises or is deemed to accrue or arise in India to such person. Therefore, the moot question is whether it can be said that the credits appearing the three bank accounts in question lead to the situation where the amount is includible in the income of the assessee, a non resident Indian, within the provisions of section 5(2) of the Act. For this purpose, what is relevant to decide is the burden on the assessee to disclose the details of the three bank accounts in question. This aspect was also gone into by our coordinate Bench in the case of Shri Hemant Mansukhlal Pandya (supra), and the following discussion is relevant:-

> "17. Having said, let us examine, non residents are required to furnish details of his foreign bank accounts and assets in India or not. The assessee has maintained only one bank account in India in Dena Bank which is an NRO account. The said bank account has been reflected in AIR information. In order to prove that the amount in foreign bank account is not sourced from India, the assessee filed the bank statement of his only bank account in India Hemant Mansukhalal Pandya from the financial years 1998 to 2008. On perusal of the bank account filed by the assessee, it was noticed that there are no debits in the bank account which could have gone to the foreign bank account. Thus, it can be seen that no amounts have been transferred from his Dena Bank account in India to any of the bank accounts maintained including HSBC, Geneva. In fact, the balance in the account maintained in Dena Bank is so less that it cannot fund an amount of Rs.4.28 crores which has been added by the AO as assessee's income. Despite this, the AO sought to put the onus of proving a negative that the deposits in foreign bank account are not sourced

> from India, on the assessee. In our considered view, the AO is not justified in placing the onus of proving a negative on the assessee. In fact, only a positive assertion can be proved, but not a negative. Furthermore, the onus of proving that an amount falls within the taxing ambit is on the department and it is incorrect to place the onus of proving negative on the assessee. This legal proposition is supported by the decision of Hon'ble Supreme Court in the case of Parimisetty Seetharaman vs CIT (1965) 57 ITR 532 (SC) where it was categorically held that the burden lies upon the department to prove that a particular asset is within the taxing provisions. Therefore, we are of the considered view that when the AO found that the assessee is a non resident Indian, was incorrect in making addition towards deposits found in foreign bank account maintained with HSBC Bank, Hemant Mansukhalal Pandya Geneva without establishing the fact that the said deposit is sourced out of income derived in India, when the assessee has filed necessary evidences to prove that he is a non resident since 25 years and his foreign bank account and assets did not have any connection with India and that the same have been acquired / sourced out of foreign income which has not accrued / arisen in India."

The aforesaid discussion by our co-ordinate Bench reveals that the onus was on the Department to prove that the particular asset in question was within the taxing provisions of the Indian Income Tax Act, 1961. The proposition has been arrived at, relying on the judgment of the Hon'ble Supreme Court in the case of Parimisetty Seetharaman vs. CIT [57 ITR 532]. Therefore, we proceed further on the premise that the onus was on the AO to establish that qua the three bank accounts in question assessee had the ownership and also the fact that the transactions therein have Indian connection.

14. In this background, we have examined the factual findings which have been arrived at by the CIT(A). In the earlier part of this order, a portion of the said finding has also been extracted by us. As per the CIT(A) there is no material or evidence to say that the assessee was connected with the bank accounts in question so as to justify an inference that any income thereof was received or deemed to have been received or accrued or deemed to have accrued in India. A perusal of the Grounds of appeal raised by the Revenue before us reveal that none of the findings recorded by the CIT(A) have been assailed on the basis of any material or evidence. In fact, the entire case of the Revenue, which had been adverted to at the time of hearing before us, is based on the presumption that the assessee has routed the money sourced

from India through the three entities into the bank accounts in question. It is a well-settled proposition that a presumption, howsoever, strong cannot substitute an evidence and, therefore, in our view, the CIT(A) made no mistake in deleting the addition. At this stage, we may also refer to the reliance placed by the AO as well as the CIT-DR on the judgment of Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT [214 ITR 801] to defend the addition made on the test of human probability. No doubt, the test of human probabilities is an acceptable test to decide the genuineness or otherwise of a particular transaction. So, however, what is required is to weigh and consider all evidences and material which are available on record. Considering the facts of the instant case and noting that there was complete absence of material, as noted by the CIT(A) too, we find that the application of test of human probabilities to sustain the addition would be unjustified. Therefore, the reliance placed on the judgment of Hon'ble Supreme Court in the case of Sumati Dayal (supra), is not applicable to the facts of the instant case.

15. Before parting, we may also refer to the fact that there is no negation to the fact recorded by the CIT(A) that the circumstances of the case are similar to those in the case of Shri Hemant Mansukhlal Pandya (supra). Even in the Grounds of appeal filed before us, the Revenue has not canvassed to the contrary. In fact, at the time of hearing, the learned representative referred to the Grounds of appeal raised in the case of Shri Hemant Mansukhlal Pandya (supra) and stated that two of the Grounds in the present appeal are identically worded. Considering that our coordinate Bench in the case of Shri Hemant Mansukhlal Pandya (supra) has also considered an identical issue in similar circumstances, we find no reasons to depart from the aforesaid decision and, accordingly, on this ground also we affirm the ultimate decision of the CIT(A) in deleting the addition.

16. In the result, the appeal of the Revenue is dismissed."

15. In view of the aforesaid factual and legal discussions, and keeping in view of legal proposition declared by the decision of Hon'ble Supreme

Court in the case of Parimisetty Seetharaman vs CIT (supra), where it was categorically held that the burden lies upon the department to prove that a particular asset is within the taxing provisions. As noted above that the assessee is non-resident, and that status of the assessee is not in dispute. A bare reading of provisions of section 5(2) of the Act makes it clear that that in case of a non-resident assessee, the total income that is liable to be taxed shall comprise of income, which is received or deemed to be received by or on behalf of such person or the same accrues or arises or is deemed to accrue or arise in India to such person. No such evidence to prove the fact that the remittance made by the assessee in his NRE Account or the credit allegedly appearing in HSBC has any source from income in India or routed from any business connection in India. The moot question is whether it can be said that the credits appearing the HSBC bank accounts in question lead to the situation where the amount is includible in the income of the assessee, a non resident Indian, within the provisions of section 5(2) of the Act. We find that the CIT(A) clearly held that there is no material or evidence to say that the assessee was having any business connection in India so as to justify an inference that any income thereof was received or deemed to have been received or accrued or deemed to have accrued in India. Further on perusal of the Grounds of appeal raised by the revenue before us, we find that none of

the findings recorded by the CIT(A) have been assailed on the basis of any material or evidence rather based on assumption. Therefore, we do not find any merit in the grounds of appeal raised by the revenue. Hence, we do not find any infirmity, illegality or perversity in the order passed by ld CIT(A), which we affirm.

16. In the result, we do not find any merit in all the grounds of appeal raised by the revenue, resultantly all the grounds of appeal raised by the revenue are dismissed. As we have dismissed all the grounds of appeal raised by the revenue, thus, the grounds of Cross Objections raised by the assessee have become infructuous. Even otherwise the ld AR for the assessee at the time of his submissions asserted that in case, the grounds of appeal raised by the revenue is dismissed, the assessee will not press his grounds of appeal raised in Cross objections.

17. In the result, the appeal of the revenue for AY 2006-7 is dismissed and the Cross Objection, filed by the assessee therein is also dismissed.

Order announced on 22nd November, 2021 in open Court and by placing the result on the notice board.

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| Sd/- | Sd/- |
| (Dr ARJUN LAL SAINI) | (PAWAN SINGH) |
| ACCOUNTANT MEMBER | JUDICIAL MEMBER |

Surat, Dated: 22/11/2021 / SGR*

Copy to:
1. Appellant
2. Respondent

3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

// TRUE COPY //

Sr.Pvt. Secretary, ITAT, Surat