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

BEFORE SHRI AMIT SHUKLA, JM &
SHRI S. RIFAUR RAHMAN, AM

1. आयकरअपीलसं./ I.T.A. No. 6949/Mum/2019
(ननधारणवर्ष / Assessment Years: 2010-11)
2. आयकरअपीलसं./ I.T.A. No. 6950/Mum/2019
(ननधारणवर्ष / Assessment Years: 2011-12)
3. आयकरअपीलसं./ I.T.A. No. 576/Mum/2021
(ननधारणवर्ष / Assessment Years: 2012-13)

Ananya Ajay Mittal 62-A, 3rd Floor, Mittal Bhavan-2, Peddar Road, Mumbai-400 026	**बनाम**/ Vs.	**DCIT Cen. Cir-6(4),** 1925, Air India Building, Nariman Point, Churchgate Mumbai-400 021
स्थयीलेखसं./जीआइआरसं./PAN No. AZTPM4759N		
(अपीलधथी/**Appellant**)	:	(प्रत्यथी / **Respondent**)
अपीलधथीकीओरसे/ **Appellant by**	:	Shri Piyush Chhajed, Ld. AR
प्रत्यथीकीओरसे/**Respondent by**	:	Smt. Shailja Rai, Ld. DR
सुनवईकीतधरीख/ **Date of Hearing**	:	26.12.2022
घोर्णधकीतधरीख / **Date of Pronouncement**	:	29.12.2022

आदेश / O R D E R

Per AMIT SHUKLA, Judicial Member:

The aforesaid appeals have been filed by the assessee against the separate impugned order of even date 13.09.2019, passed by Ld. CIT(A), Mumbai for the quantum of assessment passed u/s

153A/143(3) for the AYs 2010-11, 2011-12 & 2012-13 respectively.

2. Here in this case, the Tribunal has already passed the order for AY 2010-11 and 2011-12 vide order dated 23.03.2022, wherein additions made on certain credit in the foreign bank account of the assessee in USA was confirmed. However, the assessee had filed Misc. Application and pointed out that one very important fact raised vide ground no. 1 & 3 that assessee being an NRI was not resident in India during the relevant assessment year, therefore addition could not have been made. After considering this vital fact on record which was omitted to be considered, Tribunal has then recalled the order after observing as under:-

4. Considered the rival submissions and material placed on record. It is submitted before us that the assessee has not argued the issues raised in the Ground Nos. 1 and 3. Further, even on Ground No. 2, the Ld.AR has submitted that the assessment was completed treating the assessee as a NRI and the ITAT has adjudicated taking que from the original assessment and ROI, which was filed by the assessee herself as a resident. Since the Assessing Officer himself accepted the assessee as a NRI in the revised proceedings u/s 153A. Further he submitted that the

Hon'ble bench while considering the applicability of section 6(1)(c) and failed to consider the Explanation 1 to section 6(1)(b) and decision of Hon'ble Delhi High Court in the case of Suresh Nanda (supra), non consideration of High Court decision is mistake apparent on record and prayed that the above said mistake be rectified.

5. After considering the submissions, we observe that the decision relied by the Ld AR in which the Hon'ble High Court has analyzed the status of the assessee based on the duration of stay in India. Further, there is no such discussion in the assessment order or in first appellate order. The issue raised by the assessee goes to root of the matter and we have also not dealt with the issue in the matter of search except dealt with the merit on upholding the addition. Therefore, in our considered view, to meet the ends of justice, we are inclined to give opportunities to both parties and rehear the matter to uphold the legal convention, we are recalling this order so that both parties can have proper opportunities to put forth their submissions and arguments. Hence, we direct the registry to fix the case for hearing in due course and inform the parties accordingly.

3. Thus, though the addition was sustained on the credit balance in the foreign bank account, the important fact which was missed to decide that, whether the assessee was resident or non-resident, during the relevant assessment years or not was not adjudicated

which issue was raised vide ground no. 2, in the original memo of appeal, which reads as under:-

2. On the facts and circumstance of the case, the Ld. CIT (Appeals) has erred in law and on facts in upholding the additions without appreciating that the Ld. assessing officer made addition after considering the appellant as "Resident" even though it is admitted fact that he was non-resident and the assessment order also is passed assessing him as "Non-Resident".

4. The brief facts qua the limited issue is that, assessee is an individual and in the AY 2008-09, he had gone to USA for his studies. A search and seizure actions was carried out in the case of assessee's father, Shri Ajay Mittal and during the course of search action, certain documents were found which contained detail of foreign bank account of Shri Ananya Mittal, USA. The relevant facts as noted by the AO reads as under:-

7.1 During the course of search, pages 12 to 15 marked as Annexure A-2 were found and seized from Mittjal Bhawan II 62A Peddar Road, Mumbai, which contained details of foreign bank account of Shri Ananya Mittal in United States of America. It was also seen that the foreign bank account was not declared in the Income Tax Return filed by the assessee for the said assessment year.

7.2 During the post search proceedings it was stated by the Authorized Representative of the assessee, that the assessee for his post graduation for four years was required to stay in USA. It was also submitted that it was mandatory for a student pursuing studies in USA to open an account in USA. Further it was submitted that all the expenses of Shri Ananya Mittal in USA were exclusively borne by a family friend of Mittal family, Dr. Prakash Sampath based in USA.

7.5 Further it was also stated by the AR of the assessee, that the assessee was an ordinary resident Indian throughout his stay in USA for his post graduation and that the records of the foreign bank account were not maintained by him.

7.9 The submission of the assessee has been carefully perused but the same is not acceptable on account of the following :

- *The contention of the assessee that he is Non resident for the relevant A.Y, is an afterthought because in the original return of income the assessee has claimed the status of a resident and it is only after the search proceedings when the undisclosed foreign bank account of Sh. Ananya Mittal came to notice (that the assessee while filing of the revised return in response to notice u/s 153A filed his status as a non resident.*

- *Further the assessee in his submission dated 20.12.2016 has stated that any credit to his bank account along with the expenses were borne by Sh. Prakash Sampath on his behalf and they do not*

form part of the income which is taxable in India as he was a non resident for the said period. This contention of the! assessee is not acceptable as the assessee Sh. Ananya Mittal has no independent source of income in U.S.A and had gone there to pursue higher studies. The source of his credits have arisen in India as employment is prohibited in U.S.A for students coming on student visas. Therefore the contention of the assessee cannot be accepted that the credits and its source are beyond the taxability of his income in India

5. Further, the AO has also noted that during the year, the assessee was outside India for 290 days and this fact is noted in the assessment order which is as under:-

Mr. Ananya Mittal F.Y. 2009-2010 A.Y. 2010-2011 Statement showing Stay outside India				
NO.	DATE (FROM)	DATE (TO)	COUNTRY	DAYS
1	1- Apr-09	13-May-09	USA	43
2	24-May-09	7-Jun-09	London	15
3	17-Jun-09	20-Jun-09	USA	4
4	4-Sep-09	17-Dec-09	USA	105
5	26- Jan- 10	14-Feb-10	USA	20
6	23-Feb-10	26-Mar-10	USA	32
TOTAL				**219**

6. However, the AO has taxed the entire credit in the foreign bank account of Rs. 3,02,133/- u/s 68 by holding that the so called explanation given that it was gift from a family friend resident of USA Shri Prakash Sampath did not fall within the section of 56(2)(v).

7. In the order of Ld. CIT(A), this issue was specifically raised that assessee was not a resident in India in terms of section 6 of the Act, has not rebutted this fact and dismissed the appeal of the assessee in the following manner:-

5.8 The facts of the case, the assessment order and the submissions of the Learned Counsel have been carefully considered. The assessee had filed the return of income in the status of an ordinary resident but subsequently, during the assessment proceedings, filed revised return as a non resident. He had given evidence of his stay and stated that he was out of India for 212 days In the relevant FY. As he is a non resident, according to him, the Learned Counsel argued that the records of foreign bank accounts were not required to be maintained by him. He rebutted the AO's statement regarding non-reporting of foreign assets In the return of income stating that requirement to report the foreign assets in the Income Tax return was introduced from AY 2012-13 and that too, the reporting requirement is applicable to

individuals qualifying as Resident and Ordinary Resident and not to non-resident. According to him, the entire expenses of the appellant in USA was met by a family friend Dr. Prakash Sampath. However, in spite of questioning by the AO about the relationship between the appellant and Dr. Sampath, it was only mentioned that he was a family friend. As he is not covered in the term 'Relative' u/s. 56 of the Income Tax Act, the AO had made an addition of the credits in the foreign bank accounts to the tune of Rs.3,02,133/- u/s. 56(2)(v) of the Income Tax Act. It is seen that the appellant was a student during that period and had no independent source of income in the USA. Even though the appellant claims that all the expenditure was met by Dr. Sampath, this remains only a claim with no substantiation. There is no confirmation issued by Dr. Sampath of having borne all the expenses of the appellant. When the appellant had no known source of income in the US, it has to be assumed that the credits in the foreign bank account were from his income arising out of India and he was under obligation to declare such income in his return of income. Even though it was not required by an assessee to disclose the foreign assets In the return of income prior to AY 2012-13, once the details of foreign account have come to the notice of the department during the search and seizure operation, it is for the assessee to explain the source of credits in such bank account. In this case, the foreign account details were unearthed during the search and the details of the credits for the said account were obtained by the AO through FTTR, It is also noteworthy to mention

that in spite of the AO's request, the assessee had not provided the details of the bank account. Once the AO had, in his possession, the details of the foreign bank account and the credits into it, the assessee had simply stated that all the expenditure were borne by Dr. Prakash Sampath. As already stated this remains a claim with no evidence. Therefore, the credits in the foreign bank account of the appellant to the tune of Rs.3,02.133/- have to be treated as his Income and brought to tax. The addition made by the AO is upheld. This Ground of appeal is ***DISMISSED.***

8. We have heard the rival submissions and perused the relevant findings given in the impugned order as well as material placed on record. We find that section 6 provides that an individual is said to be resident in India in the previous year, if he

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

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

9. Thus, if the person who has stayed 182 days or more shall be treated as non-resident and admittedly in the case of assessee it was more than 182 days as noted in the assessment order itself.

10. Before us, Ld. CIT-DR submitted that assessee is an Indian origin and is a citizen of India, therefore Clause (c) of sub-section 1 of section 6 will apply, i.e., if the individual having within 4 years preceding that year been in India for a period or periods amounting in all to 365 days or more, is in India for a period or periods amount in all 60 days or more in that year, shall be treated as resident in India. Thus, assessee who has been outside India since AY 2008-09 had stayed more than 60 days in this year shall be treated as resident. Moreover, assessee in the original return of income filed u/s 139(1) has declared his status as resident and even in the AY 2008-09 also shown has as Resident. Thus, assessee cannot say that he was non-resident simply in the return filed notice u/s 153A he has made this claim.

11. On the other hand, Ld. Counsel for the assessee submitted that by mistake in the original return of income, assessee might have given his status as resident. However, in the notice u/s 153A, the assessee has filed the return of income showing that the status as non-resident and even in the assessment order is passed in the status of non-resident and once that is to so, then no income of the assessee of a foreign bank account can be taxed here in India. He

further submitted that Clause-(c) is to be read with Clause-(b) of Explanation 1 to section 6 as the assessee was staying outside India since 1st April 2008 and was non-resident from 2008-09.

12. Here the controversy is that whether assessee was resident or non-resident in terms of section 6 of the Act, the relevant portion of section 6 is read as under:-

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

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

(b)(**]

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

[Explanation. In the case of an individual.

(a) xxx

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

13. Here it is not a dispute that assessee was staying outside from 01.04.2008 and for the relevant previous year i.e. for AY 2009-10, he was outside India for more than 182 days (in fact 290 days), then in terms of Clause-(a), assessee was not a resident in India. The Clause-(c) is applicable on citizen of India, if he has been outside India for more than 4 years and visited in India in all 365 days and in the relevant previous year, he had stayed for more than 60 days, this is applicable to citizen of India who has been outside in India. This Clause is not applicable in the case of the assessee if it is read with Clause (b) of Explanation-1.

14. Thus, clearly the assessee was a non-resident which fact has not been disputed by the AO and Ld. CIT (A) and the only contention of the AO was that assessee has mentioned his status as resident in the original return of income. The assessee is resident or non-resident has to been from the records whether he was outside India for more than 182 days or not and this fact has not been controverted and is also borne out from the records. Thus, merely mentioning the status as resident in the original return of income does not make the assessee as resident in India. Here in this case, assessment has been made u/s 153A and the assessee has

declared the status as non-resident in return of income filed in response to the notice u/s 153A and the assessment has been completed in the status of non-resident. Therefore, this cannot be the ground for treating the assessee as resident. Once the assessee is non-resident, then income or deposit in the foreign bank account of the assessee who is not resident in India cannot be taxed in India. Therefore, on this ground the entire additions cannot be sustained.

15. Similar situation is permeating in AY 2012-13 and 2013-14 wherein the assessee was admittedly outside India for more than 182 days which is evident from the respective orders. Therefore, for the AY 2012-13 and 2013-14 also, no additions can be made on account of any deposit in the foreign bank account. Accordingly, the addition has been deleted.

16. In the net result, all the appeals filed by the assessee are **allowed.**

Orders pronounced in the open court on 29th December, 2022.

Sd/-	*Sd/-*
(S. Rifaur Rahman)	(Amit Shukla)
Accountant Member	Judicial Member

मुंबई Mumbai;नदनधंक Dated : 29/12/2022
Sr.PS. Dhananjay

आदेशकीप्रतितिअग्रेतिि/Copy of the Order forwarded to :

1. अपीलधथी/ The Appellant
2. प्रत्यथी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. नवभधगीयप्रनतननधध, आयकरअपीलीयअनधकरण, मुंबई/ DR, ITAT, Mumbai
6. गधर्फधईल / Guard File

आदेशानुसार/ BY ORDER,

उि/सहायकिंजीकार (Dy./Asstt.Registrar)
आयकरअीिीयअतिकरण, मुंबई/ **ITAT, Mumbai**