

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.280/Coch/2018 : Asst.Year 2006-2007

ITA No.281/Coch/2018 : Asst.Year 2007-2008

ITA No.282/Coch/2018 : Asst.Year 2010-2011

Dy.Commissioner of Income-tax (International Taxation) Kochi.	Vs.	Sri.Benjamin P.Varkey Padinjattil Veedu Pothanikkad, Muvattpuzha Ernakulam – 689 595 PAN : BSZPB7823G.
(Appellant)		(Respondent)

ITA No.277/Coch/2018 : Asst.Year 2006-2007

ITA No.278/Coch/2018 : Asst.Year 2007-2008

ITA No.279/Coch/2018 : Asst.Year 2010-2011

Dy.Commissioner of Income-tax (International Taxation) Kochi.	Vs.	Smt.Aleyamma Benjamin Padinjattil Veedu Pothanikkad, Muvattpuzha Ernakulam – 689 595 PAN : BZVPB1819B.
(Appellant)		(Respondent)

Appellant by : Smt.A.S.Bindhu, Sr.DR
Respondents by : Sri.Thomson Thomas, CA

Date of Hearing : 12.03.2019	Date of Pronouncement : 19.03.2019
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ORDER

Per George George K., JM

These six appeals at the instance of the Revenue is directed against consolidated order of the CIT(A) dated 28.03.2018. The relevant assessment years are 2007-2008, 2008-2009 and 2010-2011.

2. Two assessees are involved in these appeals. They are husband and wife. Common issue is raised in the appeals. Hence, they were heard together and are being disposed off by this consolidated order.

3. The solitary issue that is raised in these appeals is whether the CIT(A) is justified in deleting the addition made by the Assessing Officer u/s 69 of the I.T.Act on account of deposit with HSBC Bank account. The relevant finding of the Assessing Officer in making the addition in the case of Sri.Benjamin P.Varkey for the assessment year 2006-2007, reads as follows:-

"It was found that Shri Benjamin P.Varkey, the Assessee did not file the Return of Income for A.Y. 2006-07. As per the information available with this office, during the previous year relevant to A.Y. 2006-07, Shri Benjamin P.Varkey, the assessee had Deposits / Liquid Assets in Banks located outside India. But the Assessee has not filed Return of Income for the A. Y. 2006-07 and has not explained the source of the above assets located outside India, the income from which is chargeable to tax in India. Thus the Assessing Officer had reasons to believe that Income chargeable to tax had escaped assessment. Therefore, as per Explanation 2 to Section 147 of the Income Tax Act 1961, Notice u/s.148 of the Act was issued on 28.11.2014. The Assessee filed Return in response to the same on 23.12.2014 declaring NIL income. Notice u/s.143(2) r.w.s. 147 was issued on 05.02.2015 and notice u/s. 142(1) for specific details was issued on 18.02.2015. Shri Thomson Thomas, Chartered Accountant, appeared on behalf of the Assessee and discussed the case.

2. The facts of the case are that during the year, the assessee was maintaining an account with HSBC (Suiss). The assessee himself had admitted the fact of having maintained the account in his various letters. The assessee was asked to submit the account statements and to explain the source for the deposits and investments appearing in the HSBC account and also the taxability of the interest earned on these deposits. The account statements were not furnished by the assessee. The assessee submitted that the account statements of the account for the period were not available with him and filed a notarized affidavit authorizing the department to collect the necessary information from the HSBC (Suisse).

3. Regarding the source of the deposits and investments, the assessee submitted that the HSBC account (held jointly with this wife; was opened out of their savings from previous employment in Abudhabi and that the said account was closed in the year 2000. Other than this the assessee could not produce any concrete proof to link the source of the deposits and investments with his earlier employment income Hence a show cause notice was issued to the assessee on 15.03.2001 requesting to satisfactorily explain the source of the investments in HSBC account with full supporting proofs and clear one to one linking. In the absence of satisfactory explanation substantiated with evidence it was proposed to treat the same as unexplained investment u/s. 69 of the I.T.Act. In response, the Authorized Representative of the assessee appeared on 24.03.2016 and reiterated the earlier submissions. No new fact was brought on record by the assessee and the one to one linking as required was not furnished. In the assessee's own case for A. Y. 2010-11, reference for exchange of information was also made On 03.03.2015 under India-Switzerland Treaty for obtaining the information from the Swiss tax authorities. A revised request was also

made on 06.07.2015. However no information has been received till date. Hence assessment is being completed as per the information available with this office.

Investment in HSBC Swiss account:

4. During the F.Y. 2005-06, the assessee had made various investments with HSBC Bank Pvt. Ltd. (Suiss), Switzerland in the form of liquid assets and fiduciary deposits. The total investments during the year is 5,28,359 \$ as follows:-

Sr. No.	Amount invested (in \$)	Period	Remarks
1.	1,04,482	November 2005	Fiduciary deposits
2.	708	November 2005	Liquid Assets
3.	1,05,079	December 2005	Fiduciary deposits
4.	340	December 2005	Liquid Assets
5.	1,05,676	January 2006	Fiduciary deposits
6.	340	January 2006	Liquid Assets
7.	1,06,215	February 2006	Fiduciary deposits
8.	340	February 2006	Liquid Assets
9.	1,04,433	Marcy 2006	Fiduciary deposits
10	746	March 2006	Liquid Assets
	Total	\$ 5,28,359	

Converted into India Rs. (@44.48 Rs./\$), this amounts to Rs.2,35,01,408/-. Deposit being given several opportunities, the assessee has not properly linked the source for the above mentioned investments with any income earned abroad. The assessee has merely claimed all along that the investments were sourced from his and his spouse's employment savings from abroad and claims

to have deposited those amounts into the HSBC account. However, this claim of the assessee is not acceptable, in the absence of sufficient supporting documents.

5. The only details furnished by the assessee during the course of the assessment proceedings are the certificates of employment issued by the previous employers (for the period upto 1987) indicating that he had worked abroad in Abu Dhabi till then and communications regarding the closing of the HSBC account. There is nothing on record to show that the assessee's employment abroad generated enough savings and that the said savings indeed had been routed to the HSBC account. Merely because the assessee was having some employment abroad during earlier periods, it does not lead to the conclusion that this could sufficiently source investments to the HSBC or count Further the veal' under investigation is A. Y.2006-2007 and there is nothing to link that the so claimed employment savings from the year 1987 has resulted in the fiduciary deposits and investments to the tune of \$ 5,28,350 made in A.Y. 2006-07. The flow of funds from the assessee's salary account to the HSBC account and to the investments for A. Y. 2006-07, tax return and assessment details of the assessee abroad with foreign tax jurisdiction, etc. have not been furnished. In view of this, the assessee's claim has no leg to stand on.

6. In the HSBC Swiss account, the details of the assessee are given as follows:

*Nom (Name): Varki Benjamin Padinjattil
Code profile client: 5094028042
Nationalite (Nationality): Indian
Adresses postales de: Mr PV Benjamin
La personne physique: Pothanicad 686671
(Postal address of the individual): Ernakulam, Distt.,
Kerala
(Domicile)*

It is relevant to note that the assessee had declared his nationality as Indian in the HSBC swiss accounts. The domicile address provided by the assessee is also an Indian domicile address located in Kerala. In fact, there is

nothing in the bank account details to suggest that the investments made by the assessee in the account are sourced from outside India.

7. The assessee had been consistently making investments in his HSBC bank account in Switzerland throughout the year in the form of liquid assets and fiduciary deposits. It is pertinent to note that HSBC Swiss Bank accounts are essentially secret accounts. It has to be inferred that the assessee chose to maintain an account with HSBC Switzerland for the primary purpose of faking out those investment outside the radar of regular tax administration. The assessee had no linked his so called employment savings from abroad with the investments made in HSBC account in A. Y. 2006-07. Unless a clear one to one linking is established to trace the HSBC investments to and foreign earned income, assessee's arguments are merely hypothetical and unsubstantiated. In view of the above facts, the investments made by the assessee in the secret account with HSBC Bank Pvt. Ltd (Suisse), Switzerland are deemed to be sourced from India and accordingly, in the absence of any satisfactory explanation from the assessee regarding the source thereof, these are added as unexplained investments u/s. 69 of the Income Tax Act, 1961. Hence, an addition of Rs.2,35,01,408/- is made to the assessee's total income u/s.69. Though the HSBC account is a joint one with the assessee's spouse, in the absence of sufficient evidence to prove the share of the assessee (who is the primary account holder) in the investments made, the entire amount is being added in the assessee's hand"

Based on the above, the Assessment for A.Y. 2006-2007 is finalized as under as per the provisions of the Act.

<i>Returned Income :</i>	<i>Nil</i>
<i>Additions :</i>	
<i>Unexplained investments u/s 69 as discussed above.</i>	<i>Rs.2,35,01,408</i>
<i>Assessed Income</i>	<i>Rs.2,35,01,408</i>

4. Similar additions were made by the Assessing Officer in assessment years 2007-2008 and 2011-2012 and also in the hands of his wife Smt.Aleyamma Benjamin, since the accounts in HSBC Bank was a joint account.

5. Aggrieved by the assessments completed for assessment years 2006-2007, 2007-2008 and 2010-2011, both the assessee filed appeals before the first appellate authority. The assessee had filed a written submission before the CIT(A). The CIT(A) called for the remand report from the Assessing Officer. The Assessing Officer, in the remand report, admitted that the assessee and his wife are NRI and are US citizens. However, the A.O. was of the view that since the assessee was not able to prove that the deposits in HSBC Bank account are on account of foreign earned income, the same needs to be assessed u/s 69 of the I.T.Act. The remand report submitted by the A.O. was furnished by the CIT(A) to the assessee and objections were called for. After the receipts of the objections of the assessee to the remand report, the CIT(A) decided the appeals in favour of the assessee and deleted the additions made u/s 69 of the I.T.Act. The relevant finding of the CIT(A) reads as follows:-

"11. I have gone through the assessment order, submission of the appellant and relevant details and documents available on record. In this case, the Department received information that the appellant and his wife jointly held an account in HSBC Bank (Switzerland) and that there were deposits in it. On the basis of this information, since the appellant had not filed any Return of Income in India, a notice u/s. 148 was issued and the assessment was finalized

treating the entire deposit as undisclosed income of the appellant.

The appellant contended that he is not at all assessable in India, irrespective of the fact whether he had an account in Switzerland or not for the following reasons:

i) The appellant left India in the year 1973 for UAE and took an employment there.

ii) From 1973 to 1987 he worked in UAE.

iii) In the year 1987 he migrated to USA and since then he is a resident of USA.

(iv) He has given details of his stay in India from 1993 to 2015 and it is seen that his maximum stay in a calendar year has been 40 days i.e. 17.05.1996 to 26.06.1996. In many of the years, he has not come to India at all.

v) Since 1993, he is not a resident of India and not even a citizen of India. He is a USA passport holder.

vi) In the year 1987, the appellant and his wife Aleyamma left UAE and migrated to USA. He closed his bank accounts in UAE and opened an account with his wife in HSBC Bank, Switzerland.

vii) The said account was closed on 16.09.2009 and the amount of US\$. 1,11,812.37 was deposited in NRE Account at Union Bank of India, Muvattupuzha on 03.10.2009 (copy of DO issued by HSBC Bank has been enclosed).

I have gone through the submission and details filed by the appellant, and find them to be correct. Two kinds of persons can be assessed in India, One - a Resident, whose global income is taxable in India, and Second - if the source of any persons income is from India.

In this case, there is no dispute about the residential status of the Appellant as he is clearly a Non-Resident. He has contended that he has no source of Income from India. The AO has taxed his deposits in HSBC Bank (Switzerland: in spite of the fact that he was a non-resident and has explained as to where he earned this income and why he deposited this amount in HSBC Bank. If the AO wants to tax this deposit, the onus is on the AO to prove that this income has been earned in India, which the AO has failed to do. Therefore, the appellant cannot be taxed either on the basis of i) Rule of Residence, or ii) Rule of source.

The appellant, in his submission has contended that the amount in this account is being carried forward from year to year and figures have also not been taken correctly. The AO has taken carried forward deposit in the account as income of the year and the same amount has been added in the hands of the assessee's wife also, which is clearly, nor correct. However, I am not getting into the veracity of finding the correct amount, as in my opinion, the appellant and his wife Mrs.Aleyamma Benjamin are not at all assessable in India.

In view of facts of this case, assessee's submission, details and documents available on record and the discussion above, all the 6 appeals are allowed and all the additions made are deleted. The AO is directed accordingly."

6. Aggrieved by the order of the CIT(A), the Revenue has filed the present appeals before the Tribunal. Identical grounds have been raised in these appeals and they read as follows:-

"1. The learned CIT(A) erred in law and facts of the case in allowing the appeal of the assessee regarding the source of the deposits made into the assessee's secret bank account with HSBC Geneva.

2. *The learned CIT(A) failed to consider the fact that there was nothing in the bank account details to suggest that the investments made by the assessee in the HSBC, Geneva, Switzerland account are sourced from any other place outside India.*

3. *The learned CIT(A) failed to appreciate the fact that there was nothing on record to show that the assessee's employment in Abu Dhabi generated enough savings and that the said savings indeed have been routed to HSBC, Geneva, Switzerland account. The learned CIT(A) ought to have obtained supporting material from the assessee and verified the same before allowing the assessee's claim.*

4. *The learned CIT(A) ought to have considered the fact that except furnishing the certificate of employment issued by the previous employers for the period upto 1987 indicating that the assessee had worked in Abu Dhabi till 1987, the assessee was not able to substantiate as to how he could save from 1987 to previous year 2005-06 in which he had made deposits and investments in HSBC, Geneva, Switzerland account.*

5. *The learned CIT(A) out to have held that unless a clear one-to-one linking is established to trace the deposits and investments in the HSBC account to any foreign earned income, the argument of the assessee is hypothetical and therefore ought to have dismissed the assessee's appeal.*

6. *The learned CIT(A) failed to consider the fact that the assessee had declared his nationality as Indian and his Indian domicile address located in Kerala in the HSBC Geneva, Switzerland account, indicating thereby that the source of the deposits therein was in India.*

7. *The learned CIT(A) failed to consider the fact that the HSBC, Geneva, Switzerland account are essentially secret account in which the assessee has been consistently making investments throughout the relevant assessment year.*

8. For these and such other grounds that may be urged at the hearing, it is prayed that the order of the Assessing Officer be upheld and that of the order of the learned CIT(A) be cancelled."

7. The learned Departmental Representative strongly relied on the assessment order and the grounds raised before the Tribunal. The learned AR, on the other hand, strongly supported the order of the CIT(A). The assessee has filed a paper book consisting of 27 pages inter alia enclosing statement of account, American Passport of the assessee, certificate of employment from the year 1973, etc.

8. We have heard the rival submissions and perused the material on record. Admittedly the assessee is NRI and citizen of USA. Copy of US Passport is enclosed at page 6 of the paper book filed by the assessee. The assessee left India for UAE in the year 1973 to take up employment there. From 1973 to 1987 he worked in UAE and in the year 1987 he migrated to USA and since then he is resident of USA. From 1973 to this date, he has never been a resident in India. Certificates regarding his employment in UAE and USA are enclosed at pages 7 to 10 of the paper book. From the year 1993 to 2015, the assessee's stay in India, are as follows:-

Arrival Date	Departure Date	No.of days
20.05.1993	24.06.1993	35
17.05.1996	26.06.1996	40
12.01.1999	23.01.1999	11
16.07.2001	14.08.2001	29

17.07.2003	21.08.2003	34
16.07.2005	16.08.2005	30
21.07.2008	03.08.2008	13
19.12.2009	03.01.2010	15
18.10.2010	02.01.2011	75
20.10.2012	18.11.2012	28
09.11.2013	24.11.2013	15
08.02.2015	01.03.2015	23

8.1 While calling for remand from the Assessing Officer, the CIT(A) had directed the Assessing Officer to verify the veracity of the above claim made by the assessee. The Assessing Officer has accepted the above assessee's claim in his remand report. Hence, it is an undisputable fact that the assessee is a non-resident from 1993 to 2015. It is also admitted by the Assessing Officer in the remand report that the assessee is a US citizen from 1993 to 2015 and hence this fact is also undisputable.

8.2 The assessee closed his bank accounts in UAE and converted the proceeds to HSBC PrivateBank (Suissee) SA, Switzerland as a joint account with his wife Smt.Aleyamma Benjamin, when he left UAE and migrated to USA in 1987. According to the AR, the said account with HSBC was closed on 16.09.2009 and the proceeds of US\$ 1,11,812.33 was deposited with NRE Account at Union Bank of India, Muvattupuzha on 03.10.2009. Copy of DD issued by HSBC is enclosed at page 14 of the paper book. Copies of HSBC Bank statements from 01.04.1999 are also enclosed at pages 15 to 20 of the paper book filed by the assessee. The assessee was

also stated that from the HSBC bank statement, it is evident that the balances in the account are carried forward from the year 1999. While completing the assessment year A.Y. 2006-2007, the monthly balances from November 2005 to March 2006 are added presuming that each month's balances are fresh deposits and the same is assessed as income. In the case of A.Y. 2007-2008, the monthly balances from April 2006 to February 2007 are added together again presuming that each month's balances are fresh deposits and the same is assessed as income. In making the addition, the Assessing Officer has relied on a statement in Excel Sheet. Copy of this statement is enclosed at page 27 of the paper book. It was submitted that each month the balances are carried over to the next month and such balances carried over are not fresh deposits. Alleging that the assessee had opened deposits with HSBC, Switzerland during the financial year 2005-2006 amounting to Rs.2,35,01,408, the Assessing Officer assessed this amount of Rs.2,35,01,408 as the total income. The same amount is again assessed as the income of the assessee's wife Smt.Aleyamma Benjamin in the ground that it as a joint account, which is not correct.

8.3 As per section 5(2) of the I.T.Act, the following income of a non-resident can be assessed in India:-

- (a) income received or deemed to be received in India.
- (b) income accrues or arises or is deemed to accrue or arise in India.

8.4 As mentioned earlier, the assessee is NRI and a citizen of USA for many years prior to concerned assessment year is not in dispute. In the said circumstances, the Assessing Officer has no jurisdiction to tax the deposits held by the assessee abroad unless it is proved that the source of deposits are from India. On identical facts, the Mumbai Bench of the Tribunal in the case of *Hemant Mansukhlal Pandya v. DCIT [ITA No.4679 & 4680/Mum/2016 etc. – order dated 16th November, 2018]*, decided the issue in favour of the assessee.

8.5 In our opinion :

(i) The Assessing Officer has no jurisdiction to tax the deposits made by the assessee in HSBC unless the source of deposits are from India, as the assessee is a citizen of USA and is a Non-resident in India within the meaning of the Income-tax Act, 1961 from 1993 onwards and even for the earlier years.

(ii) The assessee has to prove that the source of deposit in the HSBC account was out of India and not from India.

(iii) If the deposits were not made out of foreign source during the years for which assessments are made, but are carried over balances from NRI Bank account in 1999, then the assessee has to prove by producing relevant bank account to confirm that it was deposited

into Indian bank account out of transfer of funds from foreign NRI Bank account.

8.6 For the aforesaid reasons, we remit the issue in dispute to the file of the Assessing Officer with a direction to pass fresh order in the light of our above directions. It is ordered accordingly.

9. In the result, the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced on this 19th day of March, 2019.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 19th March, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (A)-II, Kochi.
4. The Pr.CIT), Kochi.
5. The DR, ITAT, Cochin.
6. Guard file.

BY ORDER,

AR-ITAT- Cochin