

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH  
MUMBAI**

**BEFORE: SHRI MAHAVIR SINGH, VICE PRESIDENT  
&  
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

<b>Sr. No.</b>	<b>ITA No.</b>	<b>A.Y.</b>	<b>Appellant</b>	<b>Respondent</b>
1.	7179/Mum/2017	2006-07	Shri Sunil Chimanlal	Dy. Commissioner of Income Tax,
2.	7180/Mum/2017	2007-08	Gandhi	Central Circle-8(3), Mumbai
3.	7181/Mum/2017	2006-07	C-62,Om Dariya Mahal	(Erstwhile ACIT, CC-46, Mumbai
4.	7182/Mum/2017	2007-08	80, Nepean Sea Road	
5.	7183/Mum/2017	2012-13	Mumbai – 400 006	R.No.659, 6 <sup>th</sup> Floor
6.	7222/Mum/2017	2006-07		Aayakar Bhavan, M.K.Road
7.	7223/Mum/2017	2007-08		Mumbai – 400 020
8.	7224/Mum/2017	2008-09		
9.	7225/Mum/2017	2009-10		
10.	7226/Mum/2017	2010-11		
11.	7227/Mum/2017	2011-12		
12.	7228/Mum/2017	2012-13		

**PAN/GIR No.AACPG5765A**

<b>Sr. No.</b>	<b>ITA No.</b>	<b>A.Y.</b>	<b>Appellant</b>	<b>Respondent</b>
1.	7272/Mum/2017	2006-07	Dy. Commissioner of	Shri Nirav Sunil Gandhi
2.	7273/Mum/2017	2007-08	Income Tax,	C-62,Om Dariya Mahal
			Central Circle-8(3),	80, Nepean Sea Road
			Mumbai	Mumbai – 400 006
			R.No.659, 6 <sup>th</sup> Floor	
			Aayakar Bhavan,	
			M.K.Road	
			Mumbai – 400 020	
3.	7236/Mum/2017	2006-07	Shri Nirav Sunil Gandhi	Dy. Commissioner of
4.	7237/Mum/2017	2007-08	C-62,Om Dariya Mahal	Income Tax,
5.	7238/Mum/2017	2008-09	80, Nepean Sea Road	Central Circle-8(3),
6.	7239/Mum/2017	2009-10	Mumbai – 400 006	Mumbai
7.	7240/Mum/2017	2010-11		R.No.659, 6 <sup>th</sup> Floor
8.	7241/Mum/2017	2011-12		Aayakar Bhavan,
9.	7242/Mum/2017	2012-13		M.K.Road
				Mumbai – 400 020

**PAN/GIR No.AACPG5764B**

Sr. No.	ITA No.	A.Y.	Appellant	Respondent
1. 2.	7274/Mum/2017 7275/Mum/2017	2006-07 2007-08	Dy. Commissioner of Income Tax, Central Circle-8(3), Mumbai R.No.659, 6 <sup>th</sup> Floor Aayakar Bhavan, M.K.Road Mumbai – 400 020	Shri Pranav Sunil Gandhi C-62,Om Dariya Mahal 80, Nepean Sea Road Mumbai – 400 006
3. 4. 5. 6. 7. 8. 9.	7229/Mum/2017 7230/Mum/2017 7231/Mum/2017 7232/Mum/2017 7233/Mum/2017 7234/Mum/2017 7235/Mum/2017	2006-07 2007-08 2008-09 2009-10 2010-11 2011-12 2012-13	Shri Pranav Sunil Gandhi C-62,Om Dariya Mahal 80, Nepean Sea Road Mumbai – 400 006	Asst. Commissioner of Income Tax, Central Circle-8(3), Mumbai R.No.659, 6 <sup>th</sup> Floor Aayakar Bhavan, M.K.Road Mumbai – 400 020

**PAN/GIR No.AACPG5763G**

Assessee by	Shri Rajesh Simhan & Shri Ashish Sodhani
Revenue by	Shri Vijaykumar G. Subramanian
<b>Date of Hearing</b>	<b>08/04/2021</b>
<b>Date of Pronouncement</b>	<b>21/06/2021</b>

**आदेश / ORDER**

**PER M. BALAGANESH (A.M):**

**ITA No.7180/Mum/2017 (A.Y.2007-08) and 7179/Mum/2017 (A.Y.2006-07) in the case of Shri Sunil Chimanlal Gandhi; 7272/Mum/2017 (A.Y.2006-07) and ITA No.7273/Mum/2017 (A.Y.2007-08) in the case of Shri Nirav Sunil Gandhi ; and ITA No. 7274/Mum/2017 (A.Y.2006-07) and 7275/Mum/2017 (A.Y.2007-08) in the case of Shri Pranav Sunil Gandhi**

These appeals arise out of the order by the Id. Commissioner of Income Tax (Appeals)-50, Mumbai in appeal dated 22/09/2017 (Id. CIT(A) in short) against the order of assessment passed **u/s. 153A r.w.s. 143(3)** of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31/03/2015 by the Id. Dy. Commissioner of Income Tax, Circle-8(3) (hereinafter referred to as Id. AO).

Let us take up the appeals first in the case of Shri Sunil Chimanlal Gandhi.

**ITA No.7179/Mum/2017 (A.Y.2006-07)- Quantum Appeal in the case of Shri Sunil Chimanlal Gandhi**

2. We find that assessee has contested the addition made u/s.69A of the Act in respect of monies lying in foreign bank account as undisclosed income of the assessee in the assessment framed u/s.153A r.w.s. 143(3) of the Act for the A.Y.2006-07. We also find that assessee has raised a preliminary ground that no addition could be made for the A.Y.2006-07 being a concluded assessment on the date of search in the absence of any incriminating material relatable to that assessment year. Hence, we would like to address this preliminary issue as to whether any addition could be made in a concluded assessment in the absence of incriminating material and whether there is any incriminating material in the facts and circumstances of the case.

3. We have heard rival submissions and perused the materials available on record. The assessee, Shri Sunil C Gandhi, is a citizen of India, aged 71 years, S/o Shri Chimanlal Gandhi, residing at, C-62, Om Darya Mahal, 80, Nepean Sea Road, Mumbai-400006. He is an individual and partner in M/s Nehal Diamonds, a partnership firm engaged in business of export of

diamonds. The original return of income for the A.Y.2006-07 was filed by the assessee on 12/07/2006 declaring total income of Rs.58,889/- which was duly processed u/s.143(1) of the Act. On 16.09.2011, a search and seizure action u/s 132(1) of the Act was carried out at the residence and business premises of the assessee. Statement of the assessee u/s 132(4) of the Act was recorded wherein the authorized officers showed a document which had details of a bank account in HSBC Bank Geneva in the form of Base Note received from the French Government. Admittedly, this Base Note was not seized at the time of search by the search team. The assessee categorically stated in his statement recorded on 16.09.2011 and 14.11.2011, that his son, Shri. Nirav S. Gandhi, who is a resident of Belgium, had opened the said bank account in the name of the assessee for the sake of his (i.e Shri Nirav Gandh) business and future safety in Belgium. He further stated that the account was owned and operated by son, Shri Nirav S. Gandhi. However, to buy peace and avoid litigation, the assessee accepted for including Rs. 1,35,66,701/- as additional income on account of peak balance in the said bank account as his income. However, he subsequently received legal advice that there was no liability to pay tax on the income that was never received or accrued to him and that the said funds belonged to Shri. Nirav Gandhi who is a resident of Belgium and have accrued and received by him. Accordingly, the assessee herein chose not to offer the same in the return filed in response to notice u/s 153A of the Act, which tantamount to retraction made by him.

3.1. Pursuant to the above, the Id.AO referred the matter to the Foreign Tax and Tax Research ("FT&TR") division of CBDT on 04.01.2012 vide letter no. ADIT/Unit-IX(2)/Mumbai/HSBC\_Sunil Gandhi/2011-12.

3.2. The case was selected for scrutiny and Id.AO issued a notice u/s 153A of the Act on 21.01.2013, which was served on the assessee. In response to the said notice, the assessee filed the return of income on 23.07.2013 declaring the income of Rs. 58,889/-. Subsequently, the Id.AO issued a notice u/s 143(2) of the Act on 12.09.2013. Vide Notice u/s.142(1) of the Act issued on 28.10.2013, the assessee was asked to furnish the details about the foreign bank account in HSBC at Geneva. In full cooperation with the department and in good faith, the assessee through different submissions filed the details as required by the Id.AO. The assessee reiterated in all his statements that he was neither the owner of the said bank account, nor did he have any beneficial interest in the said account. He consistently held that the account belonged to, and was operated by his son, Shri, Nirav S. Gandhi. Hence, he was unable to furnish details of the said bank account to the authorities.

3.3. In all his replies to the income tax department, the assessee continued to deny any possession, ownership or beneficial interest in this bank account. Further, on 27.03.2014, the assessee had submitted a notarized copy of the official certificate confirming that his son, Shri Nirav Gandhi was the possessor, ultimate authority holder and economic owner of the said bank account. Shri. Nirav S. Gandhi had also disclosed the said income pertaining to the account as his taxable income in Belgium and a certificate from the Belgium Tax Authorities confirming compliance with Belgium Tax Laws was also given to the Id. AO.

3.4. Further, when the statement of the assessee was being recorded on 20.01.2015 u/s 131 of the Act, the Id.AO again confronted the assessee with the Base Note received from the French Government and sought an explanation. The assessee continued to deny ownership of the bank

account and requested the Id. AO to provide him a copy of the Base Note. However, the assessee was not provided with a copy of the Base Note.

3.5. The Id. AO while making the addition had also observed in his assessment order that the Base note received from French Government contained all the personal details of the assessee including his name, date of birth, place of birth, residential address, gender, nationality along with date of opening of bank account in HSBC Bank, Geneva i.e. 16/10/2000 and amount balance lying in the said bank account in the particular year. Accordingly, the Id. AO concluded that this bank account belongs to the assessee and since assessee had not explained the source of the deposits made in the said bank account, addition u/s.69A of the Act was made in the hands of the assessee by giving a finding that the money belongs to the assessee.

3.6. It is pertinent to note that the Base note received from the French Government was very much available with the Income Tax department prior to conduct of search u/s.132 of the Act on 16/09/2011. During the course of search, we find absolutely there was no incriminating material relating to this addition of deposits made in HSBC Bank accounts , or any other document relating to same, in any manner whatsoever, was found. Admittedly, the assessment for the A.Y.2006-07 was a concluded assessment as on 16/09/2011 (being the date of search) in as much as the original return of income was filed by the assessee on 12/07/2006 which was duly processed u/s.143(1) of the Act and that the time limit for issuance of notice u/s.143(2) of the Act had already expired as on the date of search. Hence, there is absolutely no quarrel that as on the date of search, the assessment for the A.Y.2006-07 had already been concluded and becomes unabated assessment. Admittedly the residential

status of assessee is resident and ordinarily resident wherein the global income of the assessee is taxable in India. We find that assessee had always stated that the HSBC Bank account in assessee's name was opened by his son Shri Nirav Gandhi for the purpose of securing his future (i.e. Shri Nirav Gandhi) and for sentimental reasons only. Hence, the assessee though gave a statement u/s.132(4) of the Act on the date of search and subsequently, had later retracted the same by not offering the disclosed sum in the return of income filed pursuant to notice issued u/s.153A of the Act. The very fact that income was not offered in the return u/s.153A of the Act despite giving a statement u/s.132(4) of the Act making same disclosures, tantamount to retraction made by the assessee.

3.7. During the course of assessment proceedings, the Id. AO issued notice u/s.142(1) of the Act dated 28/10/2013 asking the assessee to submit the complete copy of bank statement in HSBC, Geneva, right from inception till date. The said notice also gave an option to the assessee that if the assessee is not in possession of statement of his bank account, then he was requested to fill up consent waiver form to be submitted to HSBC Bank, Geneva for obtaining the bank statement thereon. In response to the said notice, the assessee vide letter dated 13/03/2014 reiterated his earlier stand and denied having any ownership or interest in the said bank account and further stated that he was not in possession of any information or documents in relation to the said bank account. With respect to the consent waiver form, he explained that the said form is irrelevant since he does not have any ownership or interest in relation to the said bank account and that he is not under any legal obligation under the Income Tax Act to sign the said consent waiver form, more so, when

he is not the beneficial owner of the funds lying in the overseas bank account.

3.8. Based on the above, the Id. AO came to conclusion that assessee could not discharge his onus by either submitting the complete bank statements or the consent waiver form to ascertain the entire bank account transactions from HSBC bank. During the course of assessment proceedings, a statement was recorded on oath on 29/07/2013 from the assessee by the Id. AO wherein the assessee initially denied having any overseas bank account with beneficial ownership and in response to question No.15 raised by the Id.AO thereon confronting the assessee showing him the statement recorded u/s.132(4) of the Act dated 14/11/2011, the assessee responded that his son Shri Nirav Gandhi is a resident of Belgium having independent business in Belgium for more than 20 years and that he has visited Belgium in the year 2000 and during the course of search visit, his son had opened a bank account in HSBC Bank in assessee's name for securing the future of Shri Nirav Gandhi. The assessee also stated that he has not visited Belgium after the year 2004, in support of which he has submitted the passport for verification of the Id. AO. It was categorically submitted by the assessee by way of statement on oath that the said bank in HSBC Bank, Geneva was opened only by Shri Nirav Gandhi (son of the assessee) in the name of the assessee for the business and personal purposes of Shri Nirav Gandhi. It was categorically stated that the said bank account was operated fully by Shri Nirav Gandhi. In other words, it could be safely inferred that assessee always maintained that he was never beneficial owner of the transactions in the bank account maintained with HSBC Bank, Geneva. We find in response to Question Nos. 15 to 24 while recording a statement on oath by the Id. AO during the assessment

proceedings on 29/07/2013, the assessee had categorically denied having any transactions in the said bank account with HSBC Bank, Geneva and submitted that the said account does not belong to him and it was all maintained and operated by only his son Shri Nirav Gandhi who is a resident of Belgium doing business there for the past 20 years. Again, the assessee filed yet another letter dated 19/09/2013 reiterating his earlier stand. We find that the Id. AO also records in para 8 of his assessment order that vide letter dated 27/03/2014, the assessee had stated that the said HSBC Bank was owned and operated by his son Shri Nirav Gandhi who is a non-resident since 1993 and presently is a resident of Belgium; that the assessee had submitted a translated statement of approval issued by the Belgium tax authorities stating that the full compliance of the same is done as per Belgium tax laws; and since the entire transactions in HSBC Bank account, Geneva has been disclosed to the Geneva tax authorities and the same should not be brought to tax as undisclosed investment in the hands of the assessee herein.

3.9. The Id. AO however disregarded all the contentions of the assessee and observed that the Base note received from French Government is in relation to the bank account in the name of the assessee and not his son. Since assessee had originally given a statement u/s.132(4) of the Act at the time of search and later on, he ought to have offered undisclosed income by owning up the funds lying in the bank account in the return filed u/s.153A of the Act. The Id. AO also observed that assessee did not co-operate with either furnishing the entire bank statements or by signing the consent waiver form in order to obtain the bank statements from the Swiss authorities. Accordingly, in the assessment framed u/s.153A r.w.s.143(3) of the Act for the A.Y. 2006-07, the Id. AO proceeded to make an addition of Rs.1,26,18,254/- u/s.69A of the Act as unexplained

money of the assessee. This addition was made based on the peak amount of USD 2,82,857.07 as on November 2006 (which is not relevant to A.Y. 2006-07) equivalent to Rs.1,26,18,254/- calculated at the exchange rate of Rs. 44.61 per USD as on 31/03/2006 and accordingly, this sum of Rs.1,26,18,254/- was brought to tax as undisclosed income for the A.Y.2006-07 u/s.69A of the Act. We find that the Id. CIT(A) upheld the action of the Id. AO.

3.10. It is absolutely not in dispute that there was no incriminating material found during the course of search in the case of the assessee relating to this HSBC Bank account maintained with Geneva. The entire addition has been made in the hands of the assessee only based on the Base note received from the French Government independently which has got nothing to do with the search proceedings u/s.132 of the Act and statement recorded u/s 132(4) of the Act at the time of search. The law is now very well settled that in respect of concluded assessment / unabated assessment, on the date of search, no addition could be made thereon unless there is any incriminating material relatable to that year during the course of search. Reliance in this regard has been rightly placed by the Id. AR on the decision of the *Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla reported in 380 ITR 573* and the decision of the *Hon'ble Jurisdictional High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) reported in 374 ITR 645*. The Id. AR also placed reliance on the decision of the *Hon'ble Delhi High Court in the case of PCIT vs. Best Infrastructure (India) Pvt. Ltd reported in 397 ITR 82* to drive home the point that statement recorded u/s.132(4) of the Act does not by themselves constitute incriminating material. Hence, the argument advanced by the Id. DR in this regard is dismissed. We find that the Id. DR vehemently relied on the decision of the *Hon'ble Kerala High Court in*

*the case of E N Gopakumar vs CIT reported in 390 ITR 131* wherein it was held that there is no requirement for recovery of any incriminating material during the course of search so as to make the assessment u/s.153A of the Act to make any addition thereon. We find that the Hon'ble Jurisdictional High Court in 374 ITR 645 stated above had decided the issue on this legal principle which would bind this Tribunal more than the decision of the Hon'ble Kerala High Court. Hence, respectfully following the decision of the Hon'ble Jurisdictional High Court stated supra and in view of the undisputed fact that there is no incriminating material found during the course of search and in view of the fact that the statement made u/s.132(4) of the Act does not constitute incriminating material, we have no hesitation in quashing the assessment made u/s.153A of the Act r.w.s.143(3) of the Act on 31/03/2015 for the A.Y.2006-07. We also find that on similar facts and circumstances in respect of Base note received from French Government and in respect of assessment completed u/s.153A of the Act, the *Co-ordinate Bench of Kolkata Tribunal in the case of Bishwanath Garodia vs. DCIT reported in 76 Taxmann.com 81 dated 21/09/2016* had also held that the Id. AO cannot make any assessment u/s.153A of the Act making addition to assessee's income in respect of amount deposited in foreign bank since assessment for relevant assessment year have already been completed u/s.143(3) of the Act and no incriminating material was found in the course of search relating to said addition. Respectfully following the aforesaid decision of Hon'ble Jurisdictional High Court and also Co-ordinate Bench decision of Kolkata Tribunal, the revised ground No.2 raised by the assessee is allowed.

3.11. Since the relief is granted to the assessee on the preliminary ground of absence of incriminating material in respect of concluded

assessments, all other grounds raised by the assessee including the ground raised on merits need not be gone into and they are left open as adjudication of the same would only be academic in nature. We would like to specifically make it clear that no opinion is hereby given by us on the merits of the addition made.

**4. In the result, appeal of the assessee for the A.Y.2006-07 in the case of Shri Sunil C Gandhi in ITA No.7179/Mum/2017 is allowed.**

**ITA No.7180/Mum/2017 (A.Y.2007-08) – Quantum Appeal in the case of Shri Sunil Chimanlal Gandhi**

5. As the facts and circumstances for this assessment year are identical with facts and circumstances of A.Y.2006-07 deliberated hereinabove, the decision rendered for A.Y.2006-07 in ITA No.7179/Mum/2017 shall apply with equal force for this assessment year also except with variance in figures.

**6. In the result, appeal of the assessee for the A.Y.2007-08 in the case of Shri Sunil C Gandhi in ITA No.7180/Mum/2017 is allowed.**

**ITA No.7181/Mum/2017 & 7182/Mum/2017 (A.Y.2006-07 & A.Y. 2007-08) – Penalty appeals u/s.271(1)(c) of the Act for A.Yrs. 2006-07 & 2007-08 respectively in the case of Shri Sunil C Gandhi**

7. These appeals arise out of order of the Id. Commissioner of Income Tax (Appeals)-50, Mumbai (Id. CIT(A) in short) in appeal dated

22/09/2017 & 25/09/2017 respectively in the matter of imposition of penalty u/s.271 (1)(c) of the Income Tax Act, 1961 (hereinafter referred to as Act).

7.1. Since the quantum assessments have been cancelled for the A.Yrs. 2006-07 and 2007-08 in ITA Nos. 7179 & 7180/Mum/2017 respectively hereinabove, the concealment penalty u/s.271(1)(c) of the Act levied for both the years would have no legs to stand. Accordingly, the grounds raised by the assessee for these two years are allowed.

**8. In the result, penalty appeals of the assessee for A.Yrs 2006-07 and 2007-08 in ITA Nos. 7181/Mum/2017 & 7182/Mum/2017 respectively are allowed.**

**ITA Nos.7222/Mum/2017 to 7228/Mum/2017 (A.Y.2006-07 to 2012-13) - penalty appeals u/s.271(1)(b) of the Act**

9. These appeals arise out of the independent orders of the Id. Commissioner of Income Tax (Appeals)-50, Mumbai (Id. CIT(A) in short) in appeal in the matter of imposition of penalty u/s. 271 (1)(b) of the Income Tax Act, 1961 (hereinafter referred to as Act) for the A.Ys. 2006-07 to 2012-13 in the case of Shri Sunil C Gandhi.

9.1. We find that all these appeals are in respect of penalties levied u/s.271(1)(b) of the Act by the Id. AO due to non-cooperation by the assessee with the Id. AO by not signing the consent waiver form. We find that the basic purpose of signing the consent waiver form is only to enable the Income Tax department to obtain the bank statements from the Swiss authorities in respect of foreign bank accounts held by the

assessee. In the instant case, the assessee has always taken a stand that though the foreign bank account in HSBC Geneva was in his name, the same was opened by his son Shri Nirav Gandhi in the year 2000 when the assessee had visited Belgium. It was always stated by the assessee that the said bank account was opened by his son for securing his future (i.e. Shri Nirav Gandhi) and the said bank account was always used for business and personal purposes of Shri Nirav Gandhi. Hence, the assessee had categorically denied the ownership of the funds lying in the said bank account. While that is so, the assessee always felt that there was no need for him to give any consent waiver form to the Income Tax department. This action of the assessee was found to be of non-cooperative attitude by the Id. AO for which penalty u/s.271(1)(b) of the Act was levied. In our considered opinion, the assessee has given a plausible explanation on the subject mentioned issue and the said explanation was not accepted by the Id. AO. However, we find that ultimately the assessments were framed by the Id. AO for all these assessment years only u/s.143(3) of the Act which goes to prove that assessee had indeed cooperated with the Id. AO for smooth completion of assessment proceedings by making some addition. Reliance in this regard is placed on the following decisions:-

- a) Decision of Co-ordinate Bench of Delhi Tribunal in the case of Shiv Kumar Nayyar vs ACIT in ITA Nos. 6203 & 6204/Del/2019 dated 31/03/2021*
- b) Decision of Delhi Tribunal in the case of Globus Infocom Ltd vs. DCIT in ITA No.738/Del/2014*
- c) Decision of Delhi Tribunal in the case of Akhil Bhartiya Prathmik Shikshak Singh vs ADIT in ITA No.2900/Del/2005.*

9.2. Hence, we do not deem this as fit case for sustaining the levy of penalty u/s.271(1)(b) of the Act. Accordingly, the penalty levied u/s.271(1)(b) of the Act are hereby directed to deleted for A.Y.2006-07 to 2012-13.

**10. In the result, all these penalty appeals u/s.271(1)(b) of the Act in ITA Nos.7222/Mum/2017 to 7228/Mum/2017 (A.Y.2006-07 to 2012-13)of the assessee i.e. Shri Sunil C Gandhi are allowed.**

**ITA No.7183/Mum/2017 (A.Y.2012-13) – Shri Sunil C Gandhi -  
Penalty u/s.271AAA of the Act**

11. This appeal arises out of order of the Id. Commissioner of Income Tax (Appeals)-50, Mumbai (Id. CIT(A) in short) in appeal dated 25/09/2017 in the matter of imposition of penalty u/s.271AAA of the Income Tax Act, 1961 (hereinafter referred to as Act) for the A.Y. 2012-13 in the case of Shri Sunil C Gandhi.

12. We have heard rival submissions and perused the materials available on record. We find that during the course of search on 16/09/2011, the assessee had admitted disclosure of Rs.96,15,428/- in his statement recorded u/s.132(4) of the Act on account of unexplained cash and jewellery found during the course of search and the same was duly disclosed in the return of income filed by the assessee for A.Y.2012-13 on 30/09/2012 offering the said income. We find that assessment for the A.Y.2012-13 was completed by the Id. AO u/s.143(3) of the Act on 31/03/2015 accepting returned income of Rs.1,01,81,170/- which admittedly included the amount disclosed by the assessee in the

statement u/s.132(4) of the Act in the sum of Rs.96,15,428/-. We find that the Id. AO proceeded to levy penalty u/s.271AAA of the Act in respect of amount disclosed by the assessee at the time of search to the extent of Rs.96,15,428/-. We find that the Id. AO had observed that assessee is not entitled for immunity for levy of penalty in terms of Section 271AAA(2) of the Act in as much as according to the Id. AO, the assessee had not specified the manner and substantiated the manner in which the undisclosed income was derived by him, hence assessee has not satisfied one of the cumulative conditions stipulated in 271AAA(2) of the Act. We find that this action of the Id. AO was upheld by the Id. CIT(A).

12.1. We find that the assessee would be eligible for immunity from levy of penalty in terms of 271AAA(2) of the Act if he cumulatively satisfies the following conditions:-

- a) He has made disclosure of undisclosed income in the statement recorded u/s.132(4) of the Act at the time of search.
- b) He has substantiated the manner in which that undisclosed income has been derived by him.
- c) He has paid the taxes due thereon with interest in respect of that undisclosed income disclosed.

12.2. In the instant case there is absolutely no quarrel that assessee has satisfied the conditions stipulated in point a & c. In respect of yet another condition with regard to substantiating the manner in which undisclosed income has been derived by the assessee, we find that assessee had indeed replied on the date of search itself in his statement recorded u/s.132(4) of the Act vide reply to question No.4 that he is a partner of

Nehal Diamonds and had earned income thereon along with his family members. It was also specifically submitted that in the said statement that he is associated with M/s. Nehal Diamonds since 1979 and the modus operandi of business carried on by him was duly specified. Since the disclosure was made only in respect of jewellery predominantly and that unexplained cash of Rs.3.5 lakhs, it could be safely concluded that the assessee had earned undisclosed income only from his diamond business which he has been carrying on from 1979 onwards and this is further strengthened by the stand that assessee does not have any other source of income other than this. We further find that assessee had duly filed the reconciliation of jewellery belonging to him as well as to various family members vide his letter dated 08/11/2011 before the Revenue. The said reconciliation statement further provides details of wealth tax returns that were filed and valuation reports that were obtained for the jewellery which was found in the course of search and seizure. The said details also provide that details about the jewellery that was purchased, details from whom it was purchased along with copies of relevant bills thereon. When the only source of income is from diamond business, it could be safely concluded and inferred that assessee could have earned undisclosed income only from such businesses, hence, the second condition prescribed in 271AAA(2) i.e. substantiating the manner in which undisclosed income has been derived has been duly complied with by the assessee in the instant case. Hence, we hold that assessee is duly entitled for immunity from levy of penalty in respect of undisclosed income disclosed during the course of search in terms of Section 271AAA(2) of the Act. Accordingly, the penalty levied for A.Y.2012-13 in the case of Shri Sunil C Gandhi is hereby directed to be deleted.

**13. In the result, appeal of the assessee i.e. Sunil C Gandhi in ITA No.7183/Mum/2017 for A.Y.2012-13 is allowed.**

**Quantum Appeal filed by the revenue in the case of Shri Nirav Sunil Gandhi - ITA No.7272/Mum/2017 (A.Y.2006-07)**

14. The Revenue has raised the following ground:-

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 1,26,18,254/- u/s.69A of the IT Act made on protective basis in the case of the assessee, merely on the basis of confirming the same addition on substantive basis In the case of his father Shri Sunil C Gandhi without appreciating the fact that assessee’s name had also appeared in the information received by the Government of India from the Government of France under the provisions of Double Taxation Avoidance Agreement (DTAA) and the very basis of the protective addition in assessee’s case is to protect the interest of Revenue in the event of the substantive demand being non-recoverable?”*

*The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.*

*The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary.”*

15. We have heard rival submissions and perused the materials available on record. We find that a search and seizure action was carried out u/s.132 of the Act at the residence and business premises of Shri Sunil C Gandhi and his group on 16/09/2011 by the Income Tax department. The present assessee i.d. Shri Nirav S Gandhi is the son of Shri Sunil C Gandhi, who is also covered in the search action. There is absolutely no dispute that Shri Nirav S Gandhi is a non-resident as far as Indian Tax laws are concerned and he is a tax resident of Belgium. It is not in dispute that Shri Nirav S Gandhi is carrying on business in Belgium from 1993 onwards. As per Indian Tax laws, for a non-resident, only income earned in India would be liable to tax. The assessee (i.e. Shri Nirav Gandhi) had duly filed his original return of income for A.Y.2006-07 on

30/06/2006 declaring total income of Rs.99,548/- comprising of interest income under the head 'income from other sources'. As pointed out hereinabove in the quantum appeal for A.Y.2006-07 in the case of Shri Sunil C Gandhi in ITA No.7179/Mum/2017, the Id. AO obtained the Base note from the French Government which stated that there is a foreign bank account maintained in the name of Shri Sunil C Gandhi with HSBC Bank, Geneva. As stated supra, Shri Sunil C Gandhi had always maintained and stated that the said bank account in his name was opened by his son Shri Nirav Gandhi for the purpose of business purposes of Shri Nirav Gandhi and for securing the future of Shri Nirav Gandhi; that the said bank account was opened in the year 2000 when Shri Sunil Gandhi visited Belgium to meet his son and that the said bank account transactions are fully owned up and belonging only to Shri Nirav Gandhi, who is a non-resident. Since, the Id. AO had made addition in respect of peak balance of the amounts lying in the said bank account as on November 2006 amounting to Rs.1,26,18,254 (USD 2,82,857.07) on substantive basis in the hands of Shri Sunil C Gandhi, we find that the Id. AO had proceeded to make the very same addition in the hands of Shri Nirav S Gandhi on protective basis. The fact that the said transaction by at any stretch of imagination cannot be brought to tax in the hands of Shri Nirav Gandhi in view of the fact that he is a non-resident, has not been considered by the Id AO. We find that the Id. CIT(A) had observed that since the substantive addition made in the hands of Shri Sunil C Gandhi has already been confirmed for A.Y.2006-07 vide his order dated 22/09/2017, the protective addition made in the hands of Shri Nirav Gandhi (assessee herein) was deleted.

16. Aggrieved by this, the Revenue is in appeal before us.

17. We find that assessee in respect of notice issued u/s.153A of the Act had filed the return of income on 23/07/2013 for the A.Y.2006-07. We find that assessee in response to the queries raised by the Id. AO confirmed that he was the beneficial owner of the foreign bank account of HSBC Bank at Geneva and that he has been operating the same since 2000. We find that assessee has also confirmed before the Id. AO that all the funds in the said bank account are in relation to his (i.e. Shri Nirav Gandhi) business activities outside India and do not represent any income from any sources in India. It was also pointed out that the said funds have duly been disclosed by Shri Nirav Gandhi while filing his tax returns in Belgium, which fact was also later confirmed by the Belgium revenue authorities.

17.1. At the outset, we do not deem it fit to go into merits of the addition made in the hands of Shri Nirav Gandhi. We hold that Shri Nirav Gandhi, being a non-resident, is not liable to offer any explanation in respect of the transactions in the HSBC Bank, Geneva to Indian tax authorities. Hence, there cannot be any addition that could be made in the hands of a non-resident in respect of a foreign bank account either on substantive or on protective basis. On this preliminary ground, we are inclined to grant relief to the assessee (i.e. Shri Nirav Gandhi). We find that assessee has not preferred any appeal against the order passed by the Id. CIT(A). We find that Revenue has challenged the deletion of protective addition made by the Id. CIT(A). Since assessee is a non-resident, at the cost of repetition, there cannot be any addition in respect of a foreign bank account in HSBC Bank, Geneva in India either on substantive or on protective basis. Accordingly, the ground raised by the Revenue is dismissed.

18. In the result appeal of the Revenue in ITA No.7272/Mum/2017 for A.Y. 2006-07 in the case of Shri Nirav S Gandhi is dismissed.

**Quantum Appeal filed by the revenue in the case of Shri Nirav Sunil Gandhi - ITA No.7273/Mum/2018 (A.Y.2007-08)**

19. As the facts and circumstances for this assessment year are identical with facts and circumstances of A.Y.2006-07 deliberated hereinabove, the decision rendered for A.Y.2006-07 in ITA No.7272/Mum/2017 shall apply with equal force for this assessment year also except with variance in figures.

**20. In the result, both the quantum appeals of the Revenue in ITA No.7272/Mum/2017 & 7273/Mum/2017 for A.Y.2006-07 & 2007-08 respectively are dismissed.**

**ITA No. 7236/Mum/2017 to 7242/Mum/2017 for A.Y.2006-07 to 2012-13 in the case of Shri Nirav Sunil Gandhi – Penalty appeals u/s.271(1)(b) of the Act**

21. These appeals arise out of the independent orders of the Id. Commissioner of Income Tax (Appeals)-50, Mumbai (Id. CIT(A) in short) in appeal in the matter of imposition of penalty u/s. 271 (1)(b) of the Income Tax Act, 1961 (hereinafter referred to as Act) for the A.Ys. 2006-07 to 2012-13 in the case of Shri Nirav Sunil Gandhi.

21.1. We find that these penalties are levied for various assessment years by the Id. AO on the ground that assessee has not cooperated with the assessment proceedings. But while narrating the facts of the case in the case of the assessee (i.e. Shri Nirav Gandhi) in ITA No.7272/Mum/2017 supra, we find that the assessee, being a non-resident, had duly responded to all the queries raised by the Id. AO by giving written replies. The replies given by the assessee was not found acceptable to the Id. AO. That does not mean that assessee has failed to comply with the statutory notice issued by the Id. AO. In any case, the assessee being a non-resident, there cannot be any addition towards foreign bank transactions in HSBC, Geneva in his hands in India either on substantive or protective basis. Hence, there is no need for the assessee to sign in consent waiver form or any other document in order to obtain the bank statements from the Swiss authorities. However, we find that ultimately the assessments were framed by the Id. AO for all these assessment years only u/s.143(3) of the Act which goes to prove that assessee had indeed cooperated with the Id. AO for smooth completion of assessment proceedings. Reliance in this regard is placed on the following decisions:-

*a) Decision of Co-ordinate Bench of Delhi Tribunal in the case of Shiv Kumar Nayyar vs ACIT in ITA Nos. 6203 & 6204/Del/2019 dated 31/03/2021*

*b) Decision of Delhi Tribunal in the case of Globus Infocom Ltd vs. DCIT in ITA No.738/Del/2014*

*c) Decision of Delhi Tribunal in the case of Akhil Bhartiya Prathmik Shikshak Singh vs ADIT in ITA No.2900/Del/2005.*

21.2. Accordingly, the penalties levied u/s.271(1)(b) for the A.Y.2006-07 to 2012-13 in the case of Shri Nirav Sunil Gandhi are hereby directed to be deleted.

**22. In the result, all the penalty appeals of the assessee (Shri Nirav Sunil Gandhi) u/s.271(1)(b) of the Act in ITA Nos. 7236 to 7242/Mum/2017 for A.Y.2006-07 to 2012-13 respectively are allowed.**

**ITA No.7274/Mum/2015 (A.Y.2006-07)- Quantum Appeal filed by the revenue in the case of Shri Pranav Sunil Gandhi**

23. The Revenue has raised the following ground:-

*“ On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.1,26,18,254/- u/s.69A of the I.T. Act made on protective basis in the case of the assessee, merely on the basis of confirming the same addition on substantive basis in the case of his father Shri Sunil C Gandhi without appreciating the fact that assessee’s name had also appeared in the information received by the Government of India from the Government of France under the provisions of Double Taxation Avoidance Agreement (DTAA) and the very basis of the protective addition in assessee’s case is to protect the interest of Revenue in the event of the substantive demand being non-recoverable?”*

*The appellant prays that the order of the CIT(A) on the above grounds be set aside and that the Assessing officer be restored.*

*The appellant craves leave to amend or alter any ground and / or add new grounds which be necessary.*

24. We have heard rival submissions and perused the materials available on record. We find that a search and seizure action was carried out u/s.132 of the Act at the residence and business premises of Shri Sunil C Gandhi and his group on 16/09/2011 by the Income Tax department. The present assessee i.e. Shri Pranav Sunil Gandhi is the son of Shri Sunil C Gandhi, who is also covered in the search action. The assessee Shri Pranav Sunil Gandhi is resident of India and is also partner in Nehal

Diamonds, a partnership firm engaged in the diamond business. The original return of income for the A.Y.2006-07 was filed by Shri Pranav Sunil Gandhi on 12/07/2006 declared total income of Rs.98,408/-. Pursuant to the search, the notice u/s.153A of the Act was issued on him and he filed the return in response thereto on 23/07/2013 declaring total income of Rs.98,408/-.

24.1 As pointed out hereinabove in the quantum appeal for A.Y.2006-07 in the case of Shri Sunil C Gandhi in ITA No.7179/Mum/2017, the Id. AO obtained the Base note from the French Government which stated that there is a foreign bank account maintained in the name of Shri Sunil C Gandhi with HSBC Bank, Geneva stated supra. Shri Sunil C Gandhi had always maintained and stated that the said bank account in his name was opened by his son Shri Nirav Gandhi for the purpose of business purposes of Shri Nirav Gandhi and for securing the future of Shri Nirav Gandhi; that the said bank account was opened in the year 2000 when Shri Sunil Gandhi visited Belgium to meet his son and that the said bank account transactions are fully owned up and belonging only to Shri Nirav Gandhi who is a non-resident. Since, the Id. AO had made addition in respect of peak balance of the amounts lying in the said bank account as on November 2006 (Which is not relevant for A.Y. 2006-07) amounting to Rs.1,26,18,254 (USD 2,82,857.07) on substantive basis in the hands of Shri Sunil C Gandhi, the Id. AO had proceeded to make the very same addition in the hands of Shri Pranav Sunil Gandhi on protective basis.

24.2. We find that the Id. CIT(A) had observed that since the substantive addition made in the hands of Shri Sunil C Gandhi has already been confirmed for A.Y.2006-07 vide his order dated 22/09/2017, the

protective addition made in the hands of Shri Pranav S Gandhi (assessee herein) was deleted.

25. Aggrieved by this, the Revenue is in appeal before us.

26. The assessee in response to queries of the Id. AO confirmed that his brother Shri Nirav Gandhi was the beneficial owner of the foreign bank account with HSBC at Geneva and that the said account was operated by his brother since 2000 and that all the funds in the said bank account are in relation to his brother's business (i.e. Shri Nirav S Gandhi) outside India and do not represent any income from sources in India. It was specifically confirmed that the said funds have been disclosed by his brother (Shri Nirav S Gandhi) while filing the tax returns in Belgium which fact is also confirmed by Belgium revenue authorities.

27. We find that the said bank account is not in the name of Shri Pranav Gandhi and hence, Shri Pranav Gandhi is not obliged to give any explanation in respect of funds lying in the said bank account in HSBC, Geneva and hence, no addition could be made in his hands either on substantive basis or protective basis. Accordingly, the ground raised by the Revenue is dismissed.

28. In the result, appeal of Revenue in ITA No.7274/Mum/2017 for A.Y.2006-07 in the case of Shri Pranav Sunil Gandhi is dismissed.

**ITA No.7275/Mum/2017 (A.Y.2007-08) – Quantum Appeal filed by the revenue in the case of Shri Pranav Sunil Gandhi**

29. As the facts and circumstances for this assessment year are identical with facts and circumstances of A.Y.2006-07 deliberated hereinabove, the decision rendered for A.Y.2006-07 in ITA No.7274/Mum/2017 shall apply with equal force for this assessment year also except with variance in figures.

**30. In the result, the quantum appeals of the Revenue in ITA No.7274/Mum/2017 & 7275/Mum/2017 for A.Y.2006-07 & 2007-08 respectively in the case of Shri Pranav Sunil Gandhi are dismissed.**

**ITA No.7229/Mum/2017 to 7235/Mum/2017 (A.Ys.2006-07 to 2012-13 respectively) – Shri Pranav S. Gandhi – Penalty Appeals u/s 271(1)(b) of the Act**

31. These appeals arise out of the independent orders of the Id. Commissioner of Income Tax (Appeals)-50, Mumbai (Id. CIT(A) in short) in appeal in the matter of imposition of penalty u/s. 271 (1)(b) of the Income Tax Act, 1961 (hereinafter referred to as Act) for the A.Ys. 2006-07 to 2012-13 in the case of Shri Pranav Sunil Gandhi.

31.1. We find that these penalties are levied for various assessment years by the Id. AO on the ground that assessee has not co-operated with the assessment proceedings by not signing the consent waiver form for seeking the bank statements from the Swiss authorities. When it has been consistently stated by the assessee (Shri Pranav S Gandhi) that he is no way connected with the foreign bank account in HSBC Bank, Geneva as it

is not at all in his name, there is no question of signing any consent waiver form from his side. Hence, it could be safely concluded that assessee was asked to give the unwanted and irrelevant information which is not at all concerned in his case. This cannot be construed as non-cooperation by the assessee. Hence, we hold that no penalty u/s.271(1)(b) of the Act could be levied in the hands of the assessee. However, we find that ultimately the assessments were framed by the Id. AO for all these assessment years only u/s.143(3) of the Act which goes to prove that assessee had indeed cooperated with the Id. AO for smooth completion of assessment proceedings by making some addition thereon. Reliance in this regard is placed on the following decisions:-

*a) Decision of Co-ordinate Bench of Delhi Tribunal in the case of Shiv Kumar Nayyar vs ACIT in ITA Nos. 6203 & 6204/Del/2019 dated 31/03/2021*

*b) Decision of Delhi Tribunal in the case of Globus Infocom Ltd vs. DCIT in ITA No.738/Del/2014*

*c) Decision of Delhi Tribunal in the case of Akhil Bhartiya Prathmik Shikshak Singh vs ADIT in ITA No.2900/Del/2005.*

31.2. Hence, we do not deem this as fit case for sustaining the levy of penalty u/s.271(1)(b) of the Act. Accordingly, the penalty levied u/s.271(1)(b) of the Act are hereby directed to be deleted for A.Y.2006-07 to 2012-13 in the case of Shri Pranav Sunil Gandhi.

**32. In the result, all these penalty appeals u/s.271(1)(b) of the Act of the assessee i.e. Shri Pranav S Gandhi in ITA Nos. 7229 to 7235/Mum/2017 for the A.Ys. 2006-07 to 2013-13 respectively, are allowed.**

**33. TO SUM UP:**

<b>Sr. No.</b>	<b>ITA No.</b>	<b>A.Y.</b>	<b>Name of the Assessee</b>	<b>Result</b>
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.	7179/Mum/2017 7180/Mum/2017 7181/Mum/2017 7182/Mum/2017 7183/Mum/2017 7222/Mum/2017 7223/Mum/2017 7224/Mum/2017 7225/Mum/2017 7226/Mum/2017 7227/Mum/2017 7228/Mum/2017	2006-07 2007-08 2006-07 2007-08 2012-13 2006-07 2007-08 2008-09 2009-10 2010-11 2011-12 2012-13	Shri Sunil Chimanlal Gandhi	Assessee Appeals are Allowed
13. 14.	7272/Mum/2017 7273/Mum/2017	2006-07 2007-08	Shri Nirav Sunil Gandhi	Revenue Appeals are Dismissed
15 16 17 18 19 20 21	7236/Mum/2017 7237/Mum/2017 7238/Mum/2017 7239/Mum/2017 7240/Mum/2017 7241/Mum/2017 7242/Mum/2017	2006-07 2007-08 2008-09 2009-10 2010-11 2011-12 2012-13	Shri Nirav Sunil Gandhi	Assessee Appeals are Allowed
22 23	7274/Mum/2017 7275/Mum/2017	2006-07 2007-08	Shri Pranav Sunil Gandhi	Revenue Appeals are Dismissed

24.	7229/Mum/2017	2006-07	Shri Pranav Sunil Gandhi	Assessee Appeals are Allowed
25.	7230/Mum/2017	2007-08		
26.	7231/Mum/2017	2008-09		
27.	7232/Mum/2017	2009-10		
28.	7233/Mum/2017	2010-11		
29.	7234/Mum/2017	2011-12		
30.	7235/Mum/2017	2012-13		

Order pronounced on 21/06/2021 by way of proper mentioning in the notice board.

**Sd/-**  
**(MAHAVIR SINGH)**  
VICE PRESIDENT

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 21/ 06 /2021  
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai