आयकर अपीलीय अधिकरण
मुंबई पीठ"आई",मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्यके समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRIGAGAN GOYAL, ACCOUNTANT MEMBER
आ.अ.सं.1585/मुं/2017 (नि. व.2006-07)
ITA NO.1585/MUM/2017 (A.Y. 2006-07)

Jaspal Singh Sawhney
As Executor of Late Mr. Devinder Singh Sahney,
38, Sawhney Farm,
Prakriti Marg Sultanpur,
Gadai Pur, South Delhi,
Delhi – 110 030.
PAN: AAIPS-9975-N ..... अपीलार्थी/Appellant

बनाम Vs.

The Income Tax Officer (IT) 4(2)(1),
Air India Building, 17th Floor,
Room No.1728, Nariman Point,
Mumbai – 400 021 .....प्रतिवादी/Respondent

Assessee by : Shri P.J.Pardiwal, Sr. Advocate with
S/Shri Madhur Agrawal, Fenil Bhatt &
Ashwin Damania, Advocates
Revenue by : S/Shri Miland Chavan & Anil Sant, Sr. DRs

सुनवाई की तिथि/ Date of hearing : 08/01/2024
घोषणा की तिथि/ Date of pronouncement : 02/04/2024

**आदेश/ORDER**

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-56, Mumbai [in short 'the CIT(A)'] dated 30/11/2016, for the Assessment Year 2006-07.

2. Shri Percy Pardiwala, Sr.Advocate appearing on behalf of the assessee submitted that the assessee is a Non-Resident Indian (NRI). He has been

residing outside India since June, 1992. The assessee has been filing his return of income for the several years in the status of Non-Resident andthe same have been accepted by the Department. As Non-resident, the assessee has maintained Non-Resident(External) Account and Non-Resident(Ordinary) Account with banks in India. Thus, the assessee has been filing return of income in the status of "Non-Resident" in respect of income chargeable to tax in India. The assessee filed his return of income for Assessment Year 2006-07 on 27/07/2006 in the status of Non-Resident declaring taxable income of Rs.16,36,859/-, which comprises of income from house property Rs.8,98,800/- and income from other sources Rs.7,38,059/-. On 06/02/2014 the assessee received a notice u/s. 148 of the Income Tax Act, 1961[in short 'the Act']. Subsequently, the said notice was withdrawn by the Assessing Officer vide letter dated 06/03/2014. A fresh notice u/s. 148 of the Act dated 12/03/2014 was issued to the assessee by the Commissioner of Income Tax(OSD)[(IC) of the Office of Additional CIT, Range -16(2)]. In response to the said notice the assessee vide letter dated 02/04/2014 and 10/04/2014questioned the validity of notice. The assessee further asked for a copy of reasons recorded for reopening and a copy of sanction for reopening assessment. After a gap of 5 months, the assessee on 12/09/2014 received a copy of reasons recorded for reopening alone. A copy of sanction for issuing said notice was not provided to the assessee. A copy of reasons for reopening u/s. 147 of the Act is at page-34 of the Paper Book. He pointed that a perusal of the reasons would show that the assessment in the case of assessee has been reopened on the basis of information received by the Government of India under Article -28 of India-France Double Taxation Avoidance Agreement (DTAA). On the basis of material received, the CIT(OSD) formed his opinion that the assessee holds a

bank account with HSBC Geneva and his income chargeable to tax in India has escaped assessment.

2.1 The assessee vide letter dated 07/10/2014 requested the Assessing Officer to provide copy of the information received from French Authorities under Article -28 of India -France DTAA. No material was provided to the assessee. The assessee filed preliminary objections before the Assessing Officer on 16/10/2014 against assuming of jurisdiction to reopen the assessment and issuance of notice u/s. 148 of the Act. The objections of the assessee were disposed of by the Assessing Officer vide order dated 11/03/2015. Thereafter, the assessee received a notice u/s.142(1) of the Act dated 12/03/2015. Along with the notice a document was attached, which was referred to as "Base Note". The assessee vide letter dated 25/03/2015 furnished a detailed submissions and objected to the baseless allegation. The assessee categorically denied to have any Bank Account with HSBC Private Bank, Geneva and in so far as the account details given in the "Base Note" it was pointed that the account holders as referred to in the Base Note are "Genor SA" and "First Enterprises Ltd." It was nowhere stated in the Base Note that the assessee is the account holder. The ld. Counsel for the assessee submitted that Fina Trust (registered in Liechtenstein) was major shareholder of Genor SA. The said trust is Discretionary Trust and the assessee was merely one of the beneficiaries of the Trust. He further informed that the Fina Trust was also major shareholder in First Enterprises Ltd., which is no more in existence now. No additions in respect of bank accounts held by foreign companies can be made in the hands of assessee, hence, forming a belief on the basis of said bank account that the income has escaped assessment in assessee's case is without any rational or logic. The ld. Counsel for the

assessee submitted that the assessee is a Non-Resident and hence, is not liable to tax in Indiain respect of any income which may accrue or has arisen to him outside India.

2.3 The Assessing Officer without appreciating the facts of case and without considering the submission of the assessee passed the assessment order dated 31/03/2015 u/s. 143(3) r.w.s. 147 of the Act making addition of the peak balances as in December 2005 in the bank accounts in the name of two foreign companies with HSBC Bank. The Assessing Officer made addition u/s. 69A of the Act as under:

| S.No. | Name of entity | Peak Balance (in $) |
|---|---|---|
| 1. | First Enterprises Ltd. | 198057 |
| 2. | GENOR SA | 449715 |
| | Total | 647772 |

(*The exchange rate of Rs.44.48 per Dollar as on 31-3-2007 was applied. Thus, addition of Rs.2,88,12,898.56 was made.*)

2.4 Aggrieved by the assessment order, the assessee filed appeal before the CIT(A), inter-alia, assailing the validity of reassessment proceedings on the ground of, as well as, addition on merits. The CIT(A) vide impugned order dismissed the appeal of assessee in toto. Hence, the present appeal by the assessee.

2.5 The ld. Counsel for the assessee assailing the findings of the authorities below submitted that the notice issued u/s. 148 of the Act is time barred and hence, subsequent proceedings arising there from are void-ab-initio. Referring to the provisions of section 149(1) of the Act as amended by the Finance Act, 2012 w.e.f. 1/07/2012, he submitted that for invoking jurisdiction u/s. 148 of

the Act, the Revenue has placed reliance on the provisions of section 149(1)(c) of the Act. Clause (c) of section 149(1) provides that where more than four years but not more than 16 years have elapsed from the end of the relevant Assessment Year, no notice u/s. 148 of the Act shall be issued unless the income in relation to any asset (including financial interest in any entity) located outside India chargeable to tax has escaped assessment. In the present case, a perusal of the reasons recorded for reopening indicate that according to the CIT(OSD) what has escaped is the value of the financial asset located outside India i.e. balance standing in the account maintained with HSBC Geneva. If that be so, then the amount in Bank account in Geneva does not fall within the meaning of "income in relation to any asset" the expressions used in clause (c) to section 149(1) of the Act. There is no allegation in reasons for reopening in the present casethat income from foreign assets has escaped assessment. Therefore, the provisions of section 149(1)(c) are not attracted, hence, the notice issued u/s 148 of the Act is time barred.

The ld. Counsel asserted that, what is taxable u/s.149(1)(c) of the Act is the income in relation to the asset outside India and not the asset itself. To support his submissions, he placed reliance on the decision in the case of Amrita Jhaveri vs DCIT in ITA No. 6095/M/2016 for AY 2006-07, decided on 09/5/2023.

2.6 The ld. Counsel for the assessee asserted that the provisions of section 149(1)(c) of the Act would apply to reopen assessment of persons who are Residents in India. The said clause will have no application in respect of Non-Residents. To support his arguments he referred to 4$^{th}$ Proviso to section 149(1) of the Act where details of foreign assets are required to be disclosed in

Schedule FA of the return of income and the said requirement is only for the Resident assessees and does not apply to Non-Residents. He submitted that if the provisions of section 149(1)(c) of the Act are made applicable to Non-Resident assessees, then it will lead to absurd conclusion i.e. the Revenue can ask any person in the world to file a return of income in India under the Act on the ground that the said person has an asset located outside India and has not been disclosed in India. He pointed that since Non-Resident is not required to give details of foreign accounts, the question of failure to disclose the same does not arise. Further, referring to the provisions of section 5(2) of the Act he stated that the conditions set out under sub-section (2) are not satisfied. The income from Bank account in Geneva has neither accrued nor arisen or deemed to have accrued or arisen in India. Further, no part of income from alleged Bank accounts in Geneva has been received or deemed to be received in India.

2.7 The ld.Counsel for the assessee pointed that the reasons for reopening assessment have been recorded by the CIT(OSD) and he has also issued the notice u/s. 148 of the Act. He asserted that section 148 mandates that before making the assessment /reassessment u/s. 147 of the Act, the Assessing Officer shall serve on the assessee a notice. Section 2(7A) of the Act defines the Assessing Officer to mean, Asstt. Commissioner or Dy. Commissioner or Asstt. Director or Dy. Director of Income Tax. The Income Tax Officer has vested with the relevant jurisdiction by virtue of directions or orders issued under sub-section(1) or sub-section (2) of section 120 or under any other provisions of the Act. The CIT is not mentioned in section 2(7A) of the Act, hence, the CIT cannot be an Assessing Officer. He further contended that if the CIT is to be Assessing Officer, the provisions of section 151 of the Act regarding

sanction of notice would be dysfunctional. Thus, notice served u/s. 148 of the Act on the assessee is without jurisdiction.

2.8 The ld.Counsel for the assessee pointed that the assessee had filed its return of income for the impugned assessment year in the status of a Non-Resident. The Assessing Officer initially objects to the status of assessee as 'Non-Resident', but finally completes the assessment holding the assessee as Non-Resident. As has been pointed earlier the provisions of section 149(1)(c) of the Act would apply to the Residents only and would not apply to the Non-Residents. To reinforce his submissions he placed reliance on the following decisions:

(i) ITO vs. LakhmaniMewaldas, 103 ITR 437 (SC); and

(ii) JS & MF Builders vs. AK Chauhan, 117 taxmann.com 228.

2.9 The ld. Counsel for the assessee submitted that document (Base Note) on the basis of which assessment has been reopened in the case of assessee does not appear to be authentic. He pointed that the amount mentioned in Base Note is in lacs,whereas, the amount is always mentioned in thousands in the bank statement of the overseas banks. Further , pointing defect in the Base Note he asserted that the source of Base Note is unknown, the Base Note does not bear the stamp, bank name, letterhead, etc., no reason is given as to why the amount in Bank overseas is chargeable to tax in India. He submitted that no addition can be made on the basis of such 'Base Note'. To support his submissions, he placed reliance on the decision in the case of DCIT (IT) vs. Hemant Mansukhlal Pandya, 197 TTJ 161 (Mum.).

2.10 The ld. Counsel for the assessee submitted that the authorities below have time and again referred to the "Consent Waiver Form" not submitted by the assessee. The assessee is not owner of the Bank account referred to in the Base Note on the basis of which assessment has been reopened. Since, the assessee does not own the Bank account, there was no question of assessee giving any "Consent Waiver Form".

2.11 On merits of the addition, the ld. Counsel submitted that the addition has been made solely based on 'Base Note', the authenticity whereof is under doubt. Nor admitting but assuming Base Note is accepted and relied, the said document clearly records that the bank account is in the names of First Enterprises Ltd. and Genor SA. Nowhere from the Base Note it is established that the assessee is the owner of the Bank account. He asserted that the provisions of section 69A of the Act under which addition has been made are not attracted. The credit balance in the bank account in the name of a company does not represent money bullion jewelry or other valuable article owned by an individual. He contended that the case of the assessee is at par with that of Manish Vijay Mehta and Amrita Jhaveri. The Tribunal in ITA No, 494/Mum/2021 for AY 2006-07 vide order dated 31/10/2022 in the case of Manish Vijay Mehta has deleted the addition.The Tribunal in the case of Amrita Jhaveri (supra) has held reopening of assessment as bad in law.

3. Per contra, Shri Miland Chavan representing the Department vehemently defended the impugned order and prayed for dismissing appeal of the assessee. The ld. Departmental Representative submitted that the assessee had filed objections against reopening of assessment. The objections of the assessee were disposed of by the Assessing Officer by passing a separate

speaking order in accordance with decision of Hon'ble Supreme Court of India in the case of GKN Drive Shaft (India) Ltd. vs. ITO, 259 ITR 19. The assessee accepted the order and choose not to file Writ Petition challenging the order. Therefore, the assessee at this stage cannot raise any objection on validity of reopening of assessment. To support his argument the ld. Departmental Representative placed reliance on the decision in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., 161 Taxman 316(SC).

3.1 The Ld. Departmental Representative submitted that the objection raised by the assessee that notice u/s. 148 has been issued by the CIT and hence, the same is without jurisdiction is not sustainable as the CIT who had issued the notice was also discharging the duties of Additional CIT. He pointed that notice u/s. 148 was issued on 12/03/2014 by Mr. K. K Vyas CIT(OSD), Range -16(2), Mumbai. The CBDT vide order dated 20/02/2014 had promoted Mr. K. K Vyas as CIT (OSD)but was directed to continue to discharge the functions of his present post i.e. Additional CIT, Range -16(2), Mumbai. The ld. Departmental Representative placed on record a copy of the office order dated 10/03/2014 to substantiate his contentions.

3.2 The ld. Departmental Representative asserted that the assessee failed to furnish documentary evidence substantiating that he was Non-Resident. No consent Waiver Form was filed by the assessee. Even if, the assessee is not having bank account, the assessee in order to discharge his onus and to show his bona fide could have furnished Consent Waiver Form, thereafter, it was for the bank to deny that the assessee is not having bank account. The ld. Departmental Representative placed reliance on the following decisions in support of his arguments.

(i) Soignee R. Kothari vs. DCIT, 386 ITR 466(Bom);

(ii) Renu T. Tharani vs. DCIT, 117 taxmann.com, 804 (Mum-Trib); &

(iii) Mohan Manaj Dhupelia vs. DCIT, ITA No.3544/Mum/2011 A.Y.2002-03 decided on 31/10/2014.

4. Controverting the submissions made on behalf of the Department, the ld.Counsel for the assessee submitted that the case laws own which reliance has been placed by the Department are distinguishable on facts. He submitted that admittedly the assessee did not file Writ Petition against the order disposing of the objections filed by the assessee against reopening, nevertheless, the decision rendered in the case of GKN Drive Shaft (India) Ltd.vs. ITO(Supra) does not bar the assessee to raise objection against reopening of assessment in any other proceedings, if any, in case remedy of Writ Petition is not availed by the assessee.

4.1 With regard to Department's reliance on the decision in the case of Rajesh Jhaveri (supra), the ld. Counsel for the assessee referred to the decision of Hon'ble Bombay High Court in the case of Prashan S. Joshi vs. ITO, 324 ITR 154 to contend that the requirement that there must be a 'valid reason to believe' before issuance of notice u/s.147 of the Act must be satisfied. He pointed that in the aforesaid decision the Hon'ble Bombay High Court has considered the decision in the case of Rajesh Jhaveri (supra). Regarding decision in the case of Soignee R. Kothari (supra), the ld. Counsel for the assessee submitted that said decision was rendered in peculiar set of facts and hence, the said decision would not apply in the case of assessee being distinguishable on facts.

4.2 To counter arguments made on behalf of the Department that the assessee hasnot furnished documentary evidence that the assessee was NRI, the ld. Counsel for the assessee pointed that the assessee had furnished copy of the Passport before the authorities below. The fact that the assessee has been filing return of income in the status of Non-Resident from the year 1993 onwards is a matter of record. To buttress his contentions, as a sample the ld. Counsel furnished copy of assessment orders for the AYs 1998-99, 2009-10, 2010-11, 2012-13 and 2017-18 wherein the assessments have been made accepting status of the assessee as Non-Resident.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decisions on which reliance has been placed by respective sides. The assessee has made multi-pronged arguments challenging validity of reopening as well as merits of the addition.

6. Before we proceed to decide the main issue in appeal, it would be imperative to first address the arguments advanced by ld. Departmental Representative with respect to assessee's residential status. The contention of the ld.Departmental Representative is that the assessee is a Resident -Indian. The assessee has filed its return of income in the impugned Assessment Year in the status of a 'Non-Resident'. A perusal of the impugned assessment order dated 31/03/2015 (supra) shows that the Assessing Officer has completed the assessment accepting the residential status of the assessee as 'Non-resident'. The assessee has also placed on record assessment orders for Assessment Years 1999-2000, 2009-10, 2010-11, 2012-13 and 2017-18 to substantiate the residential state of the assessee as 'Non-resident'. The

assessment have been made on assessee in preceding and succeeding Assessment Years accepting status of assessee as Non-Resident. Thus, in view of the above documents on records coupled with the fact that the Assessing Officer while completing the assessment has accepted the status of the assessee as 'Non-resident', we find no merit in the submissions of the ld. Departmental Representative on this issue.

7. The first contention of ld.Counsel for the assessee is that the notice issued u/s. 148 of the Act is time barred. The reasons recorded for reopening reveals that the assessment has been reopened invoking provisions of section 149(1)(c) of the Act. Before proceeding further, it would be relevant to refer to the provisions of section 149(1)(c) of the Act. The same are reproduced herein under:-

> *" 149. Time limit for notice-(1) No notice under section 148 shall be issued for the relevant assessment year:-*
>
> *(a) Xxxxxxxxxxx*
> *(b) Xxxxxxxxxxxx*
> *(c) If four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment."*

A bare reading of clause (c) to section 149(1) would show that the same can be invoked where any income in relation to any asset located outside India chargeable to tax has escaped assessment. In the instant case the addition has been made in respect of peak credit balance in the Bank account at Geneva in the name of company i.e. First Enterprises Ltd. and Genor SA. The assessment has been reopened on the basis of information received from French Authorities under Article 28 of India France DTAA. The document under reference is a 'Base Note'. A perusal of 'Base Note' at page 34(26) of the

paper book shows that the Bank Account is in the name of First Enterprises Ltd. and Genor SA. The name of assessee is mentioned on the top of Base Note, however, it is not emanating from the said document as to how assessee is connected to the account holders. Be that as it may, the Assessing Officer has made addition of the amount credited in the Bank account at Geneva and not the income in relation to any asset (amount credited in the Bank account) located outside India. Thus, the Assessing Officer has taxed the asset itself and not the income in relation to such asset as is the mandate of section 149(1)(c) of the Act. Therefore, in our considered view the condition necessary for invoking provisions of Section 149(1)(c) of the Act are not satisfied. As a corollary the time period available for reopening under clause (c) would not be available to the Assessing Officer for reopening.

8. The ld.Counsel for the assessee has argued that the assessee being a 'Non-Resident' is not required to furnish details of assets located outside India in the return of India. Residents having assets located outside India are required to give information of such assets in Schedule –FA in the return of income. The requirement to furnish such details does not apply to the 'Non-Resident'. This is evident from CBDT Circular No.3 of 2012 dated 12/06/2012 i.e. Supplementary Memorandum explaining amendments in the Finance Bill, 2012 as reflected in the Finance Act, 2012. The relevant extract of the circular explaining the provisions of declaring information in relation to assets located outside India is extracted herein under:

> "*Compulsory filing of income tax returns by residents in relation to asses located outside India*
>
> *Under section 139 of the Income-tax Act, every resident is required to file a return of income if his income exceeds the maximum amount which is not chargeable to tax. The Finance Bill, 2012 had proposed to make it mandatory for every resident, to file a return of income, if he has assets (including any financial interest in any entity)*

*located outside India or signing authority in any account located outside India, irrespective of the fact whether his income exceeds the exemption limit or not. The intention is to have information available regarding global assets of a resident since the income from such assets is taxable in India.*

*As a category of residents are called "not ordinarily resident" and the income of a "not ordinarily resident" individual from assets located outside India is not taxable in India, it has been clarified that the provision for compulsory filing of income-tax return in relation to assets located outside India would not apply to a person, who is "not ordinarily resident".”*

The above circular makes it clear that the requirement to furnish information relating to assets located outside India applies only to Resident and not to ‘Non-resident’ assessees. Thus, the above referred provisions makes it unambiguous that the basis for exercising power of reopening is itself erroneous

9. In the case of Ms. Amrita Jhaveri vs. DCIT (supra) under similar set of facts the assessment was reopened invoking provisions of section 149(1)(c) of the Act. The Co-ordinate Bench after examining the facts and the provisions of the Act held that the extended time limit provided u/s. 149(1)(c) will not be applicable. The relevant extract of the decision by the Tribunal is reproduced herein below:

*“ 14. One very important fact which is relevant here in this case is that, assessee is a non-resident and from last several years she has been staying in London and earning income from various activities carried outside India. Whatever income, which has been accrued in India in the form of capital gain or interest or dividend has always been disclosed in the return of income filed in India. Fourth proviso to Section 139(1) of the Act requires that a person who is resident of India to disclose the details of foreign assets in the return of income and is not applicable to the assessees who are not ordinarily resident or non-resident. Before us, ld. Counsel has filed a copy of return and had drew our attention to Schedule FA forming part of the return of income which requires assessee to give information with respect to assets held outside India, but the same is applicable for residents and not for the non-resident. The notes forming part of Schedule FA of the Return mentions as under:-*

***Schedule FA:-***

> ***This schedule needs to be filled up by a resident assessee. Mention the details of foreign bank accounts, financial interest in any entity, details of immovable property or other assets located outside India. This should also include details of any account located outside India in which the assessee has signing authority.***
>
> *Even the Schedule FA of 2015 explains object behind various amendments made by the Finance Act 2012 in Section 139(1) which only refers to the cases of resident assessees. Thus, the assessee being a non-resident was not required to disclose any asset held outside India in the return of income to be filed in India. This basic tenet has been missed by the Assessing Officer while recording the reasons as well as in the assessment order.*
>
> *15. The department before us seeks to rely upon Section 149(1)(c) to justify the availability of extended time period of 16 years within which the notice can be issued would be available, provided the income in relation to any asset is located outside India which is chargeable to tax has escaped assessment. However, section 149(1)(c) and the period of 16 years is only applicable for reopening the assessment of the persons who are residents and are required to disclose the assets outside India. The asset can be said to be "found" when an assessee who is resident is required to disclose the said asset in the return of income within the provisions of the Income Tax Act. For a non-resident there is no obligation to disclose any foreign asset / account in its return of income in India as per section 139 itself, nor there is any column in the return of income as noted above in the foregoing para. It is reiterated that, even the ld. CIT (A) has not disputed that assessee was non-resident and more so the assessment passed by the ld. AO is in the status of non-resident. The ld. CIT(A) had also not denied this fact that assessee in terms of Section 6 of the Income Tax Act was never a resident of India. Thus, extended time limit provided u/s. 149(1)(c) will not be applicable in the case of the present assessee."*

10. In light of the facts of case and decision cited above, we are of considered view that there is a flaw in the reasons for re-opening the assessment. The provisions of section 149(1)(c) of the Act are not triggered in the instant case, hence the extended time of 16 years is not available to the Assessing Officer for issuing notice u/s.148 of the Act . Thus, the notice issued u/s. 148 of the Act in the instant case is time barred, therefore, liable to be quashed.

11. Further, the ld.Counsel for the assessee has pointed that the income accruing from HSBC Bank account in Geneva or the amount credited in the

Bank account in Geneva is not taxable in India as the said income or the balance in the account do not fall within the ambit of the provisions of Section -5 of the Act. Here it would be relevant to refer to the provisions of section 5(2) of the Act, the relevant extract of the same is reproduced herein below:

> *" (2)Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-*
>
> *(a)is received or is deemed to be received in India in such year by or on behalf of such person; or*
>
> *(b) accrues or arises or is deemed to accrue or arise to him in India during such year."*

A bare reading of sub-section (2) to section 5 would show that in the case of a 'Non-Resident, any income which is received or is deemed to be received in India or accrues or arises or deemed to accrue or arises in India is exigible to tax in India. The reasons for reopening nowhere alleges that any income from Bank account in HSBC Bank in Geneva is received or is deemed to be received in India or accrues or arises or is deemed to accrue or arises in India. Thus, the basic conditions set out in Section -5 for charging tax on balance in HSBC Bank Account in Geneva are not satisfied. The entire emphasis of the Revenue is on the information extracted from "Base Notes". Unless it is shown that the income from HSBC Bank Geneva satisfies the condition set out in Section-5(2) of the Act, the income of a 'Non-resident' assessee is not taxable in India.

We find that similar issue has been considered by the Co-ordinate bench in the case of DCIT vs. Manish Vijay Mehta (supra). The Co-ordinate Bench dismissed the appeal of Revenue by holding as under:

> *"017. The facts also shows that the appellant was born in India in 1975 and became non-resident in A.Y. 2002-03 when he was 25 years old and not four years as held by*

*the learned Assessing Officer. It is also stated by the assessee that he was never a partner in any firm in India. This data and statement of facts was not rebutted by the learned Assessing Officer. Further, these facts are also not doubted that assessee is employed in Belgium after he became a non-resident. Assessee also denied that he was ever a beneficiary of any discretionary trust. Therefore, it is apparent that all the allegation made in the assessment order are without any basis or evidence available with the learned Assessing Officer. If an income is to be taxed in the hands of non-resident assessee under Section 5(2) of the Act, then the burden is on the ld. AO to show that income of the non-resident assessee is falling within the definition of income chargeable to tax in his hands. No doubt, 'base note' before us shows the name of the assessee, however, such 'base note' could have been used for income tax in the hands of this assessee only if he would have been resident in India. That is not the case, because assessee is a non-resident accepted by the learned Assessing Officer for last several years i.e. almost 2 decades. The assessee has also produced his Passport which also do not show that he was resident in India in any of these years. It is also clear that foreign bank accounts belong to non-resident Indians cannot be illegal for the reason that non-resident Indians are bound to have their bank accounts outside India. It is not the intention to tax foreign bank accounts of non-resident but to tax the foreign bank accounts of resident Indians. It is further not clear that how the learned Assessing Officer has also taxed the same income in the hands of his wife. Further, in A.Y. 2007-08, identical amount once again taxed in the hands of the assessee as well as in the hands of his wife. Apparently, in this case, there is no evidence available with the learned Assessing Officer that there is an amount deposited in the HSBC bank by the assessee during the year. In fact, there is no deposit during the year. There is no evidence that such deposit is income of a non-resident under Section 5(2) of the Act. Assessee is assessed to tax year to year basis as non-resident on his Indian income. In view of this, we do not find any infirmity in the order of the learned CIT (A) in deleting the addition of ₹30,33,945/- in the hands of the assessee for A.Y. 2006-07. Accordingly, the order of the learned CIT (A) is confirmed."*

Thus, in light of facts of the case and the decisions cited above, we are of considered view that the addition made u/s. 69A of the Act on the basis of peak balances is unsustainable, hence, liable to be deleted.

12. The ld.Departmental Representative has vehemently placed reliance on the decisions in the case of Renu T. Tharani vs. DCIT(supra) and Soignee R. Kothari vs. DCIT (supra) to contend that the assessee in order to discharge its onus should have furnished Consent Waiver Form. We find that the facts in the aforesaid decisions are distinguishable. Hence, the ratio laid down in the

said decisions does not apply to the present case. In the instant case, the reasons for reopening the assessment are itself held to be invalid, therefore, there is no question of traveling further to adjudicate need/effect of non furnishing of Consent Waiver Form. Thus, in light of our above findings, the impugned order is set aside and appeal of the assessee is allowed.

13. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on Tuesday the 02nd day of April, 2024.

| Sd/- | Sd/- |
|---|---|
| (GAGAN GOYAL) | (VIKAS AWASTHY) |
| लेखाकार सदस्य/ACCOUNTANT MEMBER | न्यायिक सदस्य/JUDICIAL MEMBER |

मुंबई/ Mumbai, दिनांक/Dated 02/04/2024
*Vm*, Sr. PS(O/S)

**<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4.. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar),ITAT, Mumbai