INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI SUDHIR PAREEK, JUDICIAL MEMBER

ITA Nos.6743 & 6744/Del/2017 & 3623 to 3627/DEL/2016
(Assessment Years: 2006-07 to 2012-13)
And
ITA Nos. 6767 ,6769,7756 to 7760/Del/2017
(Assessment Years: 2006-07 to 2012-13)

Rajinder Kumar, B-5/116, Safdarjung Enclave, New Delhi (Appellant) **PAN:AAAPK9260E**	Vs.	ACIT, Central Circle-30, New Delhi (Respondent)

ITA No.3368/Del/2016
(Assessment Years: 2010-11)

ACIT, Central Circle-30, New Delhi (Appellant) **PAN:AAAPK9260E**	Vs.	Rajinder Kumar, B-5/116, Safdarjung Enclave, New Delhi (Respondent)

Assessee by :	Shri V. Sridharan, Sr. Adv Shri Karanjot Singh, Adv Shri Snehal Ranjan Shukla, Adv Shri Romit Hotwani, Adv Shri dinesh Kukreja, Adv
Revenue by:	Shri P. N. Barnwal, CIT DR Shri Vivek Vardhan, SR. DR
Date of Hearing	13/05/2024
Date of pronouncement	12/06/2024

O R D E R

PER SHRI S. RIFAUR RAHMAN :

1. These are the appeals filed by the assessee against the order of the Ld. CIT(A) of different dates against the order passed u/s 153A and 271(1)(c) as under:-

ITA No.	CIT(A) order dated	AO order dated	Assessment Year
QUANTUM APPEALS			
6743/Del/2017	05.09.2017	27.02.2015	2006-07
6744/Del/2017	05.09.2017	27.02.2015	2007-08
3623/Del/2016	11.03.2016	27.02.2015	2008-09
3624/Del/2016	11.03.2016	27.02.2015	2009-10
3625/Del/2016	11.03.2016	27.02.2015	2010-11
3626/Del/2016	25.04.2016	27.02.2015	2011-12
3627/Del/2016	25.04.2016	27.02.2015	2012-13
PENALTY APPEALS			
6767/Del/2017	17.10.2017	30.04.2015	2006-07
6769/Del/2017	17.10.2017	30.04.2015	2007-08
7756/Del/2017	20.10.2017	30.04.2015	2008-09
7757/Del/2017	20.10.2017	30.04.2015	2009-10
7758/Del/2017	20.10.2017	30.04.2015	2010-11
7759/Del/2017	20.10.2017	30.04.2015	2011-12
7760/Del/2017	20.10.2017	30.04.2015	2012-13

2. The revenue has also filed appeal in ITA 3368/Del/2016 for AY 2010-11 against the order of the Ld. CIT(A)-30, dated 11.03.2016 for AY 2010-11.

3. Since the identical issues are involved in all the above appeals, therefore, all these appeals are taken up together and disposed off by this consolidated order for the sake of convenience and brevity. We take ITA No. 6743/Del/2017 for AY 2006-07 as lead case.

4. Brief facts of the case are, assessee filed its return of income on 31.10.2006, declaring an income of ₹6,47,19,409/-. Subsequently, a search and seizure operation u/s 132 of the Income Tax Act, 1961, (for short "the Act) was conducted at various business premises of Rajinder Kumar Group (in assessee group), in the residential premises of the B-5/116, Safdarjung Enclave, New Delhi- 29 on 23.08.2011. The case was centralised at Central Circle-14, New Delhi. Subsequently, the search notices u/s 153A of the Act was issued and served on the assessee. In response, the assessee filed his return of income declaring an income of ₹6,47,19,409/- on 16.05.2012. Subsequently, notices u/s 143(2) and 142(1) along with questionnaire were issued and served

on the assessee. In the return of income, the assessee has declared profit from business and profession on architecture and income from other sources. In response to the notices, the Ld. AR of the assessee attended and submitted the relevant information as called for.

5. Subsequently, during the assessment proceedings, the assessee filed a revised return of income on 16.02.2015 for the current assessment year and in this revised return of income the assessee has declared maximum balance in the bank account maintained at HSBC Bank, London for financial year 2005–06 at US$ 5705010 (equivalent to Indian Rupee 2,53,00,440/-) was declared as additional income under the head "income from other sources". Accordingly, the assessee has declared revised return of income in the above said revised return of income at Rs. ₹9,00,19,849/-. The AO proceeded to complete the assessment based on the revised return of income declared by the assessee on 16.02.2015. The AO observed in his order that the assessee along with his family members, wife and son had maintained a bank account with HSBC Bank London with the client profile name of the assessee and his family members and the same was created on 28.08.1991. The AO has discussed various issues relating to this account in his order and also reproduced the monthly transaction of this bank account from November 2005 to October 2006 in his order at page 2 to 8. Further, he observed that the above said account maintained by the assessee along with his family members were remained undisclosed to the Income Tax Department till the date of search conducted at the premises of the assessee. He also observed that during the search action, the assessee stated that he was not having an undisclosed account with HSBC Bank London jointly with his family members however, he has accepted the maintenance of the above said bank account during the subsequent post search proceedings as there was no options available with the assessee. Further, he observed that till the date of completion of assessment, none of the account holders have furnished the complete statements of this bank account. The AO discussed the statement recorded u/s 132(4) of the Act with the assessee on 23.08.2011, which was discussed elaborately and reproduced

the same in his order at page 8 to 11. The AO observed from the statement of Smt. Shobha Kumar(wife), Shri Rahul Kumar (son) that initially they denied the opening of any bank account abroad and later accepted that they have foreign bank account. The AO also discussed in his order about the reference made to the concerned authorities through FT&TR Division of the CBDT, New Delhi, calling for certain information relating to HSBC Account, London operated by the assessee. Due to non-receipt of requisite information from the concerned authorities, the time limitation of completion of assessment in this case was extended in accordance with the provision of section 153B(1)(viii) of the Act.

6. The AO observed at para 10 of the order that the assessee during search u/s 132 of the Act voluntarily stated on 24.08.2011 of having an account with HSBC, London and offered the same as undisclosed income with respect to the HSBC bank for taxation. Based on the above statement, the assessee has disclosed the maximum balance of the said bank account in US$ converted into the Indian rupee as income from other sources in his revised return of income for AY 2006–7 and 2007–08. The AO has reproduced the client copy of the same in its order at page 16 to 17. The AO observed that the assessee is maintaining the bank account with HSBC Bank and assessee has deliberately and willfully avoided the production of complete statement of this bank account and preferred not to obey the help extended by the department to obtain bank account statement from HSBC through FT&TR by not furnishing the concerned waiver form. The AO acknowledged that the assessee has declared maximum balance of US$ 575010 in AY 2006-07, adopting exchange rate at the ₹44 per dollar and he has adopted average exchange rate of January 2006 was at the rate of 44.398 per dollar. Since the assessee has considered the exchange rate at the rate of 44/- instead of 44.398, AO had proceeded to make the of addition of exchange difference to the extent of ₹2,28,854/-.

7. Aggrieved with the above order, the assessee preferred an appeal before the Ld. CIT(A) vide grounds of appeal and filed a detailed submissions and objections as under:-

a) Extension of period of assessment by 1 year u/s 153B of the Act.

b) the addition made by the AO was not based on any incriminating material found during the search and the information available with the department about the bank account was available with them even before the date of search.

c) The assessee has declared maximum credit in bank account in his revised return to buy peace of mind and to avoid litigation. The amount declared by the assessee is out of income that has already been taxed year after year.

d) The AO has not declared the source of the evidence and opportunity to cross examine. Such source was never provided to the assessee. He disputed the fact that the above account is not belongs to the assessee.

8. After considering the detailed submissions of the assessee, the Ld. CIT(A) rejected the submissions of the assessee. The Ld. CIT(A) observed in his order that the assessee has initially not accepted the existence of HSBC bank account however, the other details which was with the department made the assessee to accept existence of the bank account opened by the assessee and accepted the same by filing revised return of income. Further he observed that the conduct of the assessee in not providing the concerned waiver form is amounts to non-cooperation on the part of the assessee. Only after search and subsequent proceedings, assessee accepted the same and disclosed the above said bank deposits as income. With the above observations, the ld. CIT(A) has dismissed the appeal filed by the assessee for the current assessment year.

9. Aggrieved with the above order, the assessee is in appeal before us, raising following grounds of appeal:-

"1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in not holding that the assessment order dated 27.02.2015, passed under section 143(3) r.w.s. 153A of the Income-tax Act, 1961 ('the Act') is beyond jurisdiction, bad in law and void-ab-initio.

1.1. That Commissioner of Income Tax (Appeals) erred in not appreciating that the impugned assessment under section 153A having been completed de-hors any incriminating material/ document being found/ seized during the course of search conducted under section 132 of the Act in the case of the appellant, is illegal and bad in law.

Without prejudice

2. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in assessing an amount of Rs 2,55,29,294 (US$ 5,75,010 @ Rs.44.398) as undisclosed income of the appellant from an alleged undisclosed foreign bank account.

2.1 That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the aforesaid addition de-hors any material found/ seized during the course of search in the premises of the appellant.

2.2 That the Commissioner of Income Tax (Appeals) failed to appreciate that no addition could be made in the hands of the appellant, considering that: (a) the addition was made without any material/ evidence, i.e., on the basis of unauthenticated piece of paper, source whereof is also not known; (b) the alleged foreign bank account, in any case, did not belong to the appellant; (b) none of the deposits, as alleged, related to the appellant; and (c) no transaction was made by the appellant

2.3 That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the addition made, without making available copies of bank statements and other ex-parte material(s) on the basis of which addition was made in the hands of the appellant, in gross violation of principles of natural justice.

2.4 That the Commissioner of Income Tax (Appeals) failed to appreciate that merely because an amount, not taxable in law, is under threat and coercion offered for tax by the appellant in the return of income, cannot confer jurisdiction to tax the said amount

2.5 That the Commissioner of Income Tax (Appeals) erred in alleging that the appellant had intentionally concealed vital information by not signing the consent/declaration form, without appreciating that the appellant was not at all competent to sign such form.

2.6 That the Commissioner of Income Tax (Appeals) failed to appreciate that there was no evidence on record to corroborate that deposit(s) in the alleged foreign bank account represented income earned/ received by the appellant in India.

2.7 Further, without prejudice, that the Commissioner of Income Tax (Appeals) erred in not appreciating that the exchange rate adopted by the assessing officer was without any basis.

3. That the Commissioner of Income Tax (Appeals) erred in not directing deletion of interest charged under section 234B of the Act."

10. Subsequently, the assessee has filed additional grounds of appeal in accordance with Rule 11 of the ITAT Rules with the prayer and the same is reproduced below:-

"4. "That on the facts and circumstances of the case, the Ld. CIT(A) erred on facts and in law in holding that the assessment under section 153A of the Act has been completed within the statutory time limit as mentioned in section 153B of the Act.

5. "That on true construction of Article 23(3) of the India-UK Double Taxation Avoidance Agreement, the credits in alleged bank account in London can't be taxed in the hands of the Appellant."

6. "That in view of Article 23(3) of the India-UK Double Taxation Avoidance Agreement, the Notification No. 91 dated 28.08.2008 issued under section 90(3) of the Act is inapplicable."

7. "Without prejudice to above, Notification No. 91 dated 28.08.2008 issued under section 90(3) of the Act will not be applicable retrospectively and accordingly will not apply to the assessment year under consideration."

11. Subsequently, the assessee has filed amended grounds of appeal as under:-

"1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in not holding that the assessment order dated 27.02.2015, passes under section 143(3) r.w.s. 153A of the Income Tax Act, 1961 ('the Act') is beyond jurisdiction, bad in law and void-ab-initio.

1.1. That commissioner of Income Tax (Appeals) erred in not appreciating that the impugned assessment order under section 153A having been completed de-hors any incriminating material/document being found/seized during the course of search conducted under section 132 of the Act in the case of Appellant, is illegal and bad in law.

Without prejudice

2. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the action of the assessing officer in assessing an amount of Rs.

2,55,29,294 (US$ 5,75,010 @ Rs. 44,398) as undisclosed income of the appellant from an alleged undisclosed foreign bank account.

2.1. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the aforesaid addition de-hors any material found/seized during the course of search in the premises of the Appellant.

2.2. That the Commissioner of Income Tax (Appeals) failed to appreciate that no addition could be made in the hands of the Appellant, considering that: - (a) the addition was made without any material/evidence, i.e., on the basis of unauthenticated piece of paper, source whereof is also not known; (b) the alleged foreign bank account, in any case, did not belong to the Appellant; (b) none of the deposits, as alleged, related to the Appellant; and (c) no transaction was made by the Appellant.

2.3. That the Commissioner of Income Tax (Appeals) erred on facts and in law in confirming the addition made, without making available copies of bank statements and other ex-parte material(s) on the basis of which addition was made in the hands of the Appellant, in gross violation of principles of natural justice.

2.4. That the Commissioner of Income Tax (Appeals) failed to appreciate that merely because an amount, not taxable in law, is under threat and coercion offered to tax by the Appellant in the return of income, cannot confer jurisdiction to tax the said amount.

2.5. That the Commissioner of Income Tax (Appeals) erred in alleging that the Appellant had intentionally concealed vital information by not signing the consent/declaration form, without appreciating that the Appellant was not at all competent to sign such form.

2.6. That the Commissioner of Income Tax (Appeals) failed to appreciate that there was no evidence on record to corroborate that deposit(s) in the alleged foreign bank account represented income earned/received by the Appellant in India.
2.7. Further, without prejudice, that the Commissioner of Income Tax (Appeals) erred in not appreciating that the exchange rate adopted by the assessing officer was without any basis.

3. That the Commissioner of Income Tax (Appeals) erred in not directing deletion of interest charged under section 234B of the Act.

Additional Grounds of Appeal

4. That on the facts and circumstances of the case, the Ld. CIT(A) erred on facts and in law in holding that the assessment under section 153A of the Act has been completed within the statutory time limit as mentioned in section 153B of the Act.

5. That on true construction of Article 23(3) of the India-UK Double Taxation Avoidance Agreement, the credits in alleged bank account in London can't be taxed in the hands of the Appellant.

6. That in view of Article 23(3) of the India-UK Double Taxation Avoidance Agreement, the Notification No. 91 dated 28.08.2008 issued under section 90(3) of the Act is inapplicable.

7. Without prejudice to above, Notification No. 91 dated 28.08.2008 issued under section 90(3) of the Act will not be applicable retrospectively and accordingly will not apply to the assessment year under consideration."

12. Further, the assessee also filed additional evidence in accordance with the Rule 29 of the ITAT Rules, 1963 with the application for admission of the same. However, at the time of hearing the Ld. AR has not referred to any of the additional evidences in his submissions, therefore we do not see any reason to entertain the same.

13. At the time of hearing, Ld AR submitted that the assessee filed the additional ground and prayed that the same may be considered for the adjudication since the issue raised by the assessee are issues involving legal issues, which goes to the root of the matter and all the relevant informations are already available on record, he relied on the decision of Hon'ble Supreme Court decision in the case of NTPC. On the other hand, Ld DR has no serious objection for admission of the above additional grounds. Therefore, we proceeded to adjudicate the additional grounds raised by the assessee considering the fact that the issues now raised by the assessee are legal issues which goes to root of the matter.

14. At the time of hearing Ld AR made a detailed submissions and also made following written submissions as under:-

"1. Addition cannot be made based on data given in a pen drive by France authorities to government of India.

[AY 2006-07 and AY 2007-08: Ground number 2]

1.1. On 14.01.2016, the Respondent filed complaint under section 276-C (1)/276-D & 277 of the Act for AY 2006-07 before the Hon'ble Court of Ld.

ACMM (Special Acts), Tis Hazari Courts, Delhi (Kindly refer page 4-7 of the Paper Book, Volume 2] praying the Hon'ble Court to initiate prosecution against the Appellant-Assessee.

1.2. Paragraph 2 of the said complaint states that certain information was received from the Government of France in 2011 under the Double Tax Avoidance Convention/ Agreement ("DTAC/DTAA") entered between India and France, which revealed that the Appellant- Assessee was beneficial owner of a bank account with HSBC Bank, London.

1.3. Further, in "Annexure E" to the said complaint, the Respondent has enclosed a letter dated 26.10.2015 issued by JCIT, Central Range-8, New Delhi to the Respondent, which provided clarification regarding source of information relating to the alleged undisclosed foreign bank account. [Kindly refer page 10 of the Paper Book, Volume 2].

1.4. The said letter dated 26.10.2015 also contains a certified copy of the letter dated 28.06.2011 through which the said information was handed over by the Government of France to the Government of India in a pen drive.

1.5. Data provided in a pen drive to the Government of India by the authorities of French Government is based the documents stolen in 2006 by a person working for HSBC in Geneva. The documents purportedly contained details of more than 1,00,000 clients of HSBC from around the world.

1.6. The document alleged to be statement of a bank account with HSBC London does not bear any signature of any authority competent to generate/issue such bank statement. Further, no confirmation has been brought on record by the Income Tax Department either from HSBC Bank, London or from Swiss Government Authorities with respect to the authenticity, genuineness and correctness of the alleged bank statement.

1.7. The said information in form of a loose paper purportedly to be a bank statement cannot be considered to be evidence. Assuming that the information is from valid source and correct, it is still required to be converted into evidence for a valid inference to be drawn for completing any assessment. No provision under the Act or any law or even DTAA attaches any presumption of truth to the contents of such an information provided in a pen drive by the Govt. of France.

1.8. Since, in the present case, the alleged bank statement has not come from the HSBC Bank itself, there must be certification/stamp to prove its authenticity. Even in case of banks operating in India, a bank statement is admissible as evidence only when it is a certified as per the conditions prescribed under Bankers' Books Evidence Act, 1891. In the absence of any such proof, the alleged document cannot be admitted as evidence.

1.9. Reliance in this regard, can be placed on the following judgements:

a) Bishwanath Garodia v. DCIT, [2016] 76 taxmann.com 81, 21.09.2016, ITAT Kolkata (Relevant paras: 10 & 11, Page 7-12 of case law compendium, Volume 3.1): The Hon'ble ITAT has considered similar

HSBC Bank foreign account and deleted the additions made by the AO as no seized materials was found during the search operation.

b) Anurag Dalmia v. DCIT, ITA No. 5395 & 5396/Delhi/2017, 15.02.2018, ITAT Delhi (Relevant paras: 18 & 19, Page 22-35 of case law compendium, Volume 31): In this case, search was conducted under section 132(1). Assessment entailing additions was conducted as per section 153A of the Act in light of some information received by the Government of India in a USB allegedly containing details of bank accounts of Indian persons with HSBC, Switzerland as part of tax information exchange treaty. In this case, the Hon'ble ITAT noted that

i. no documents or any incriminating material relating to HSBC accounts in Switzerland was found from the possession and premises of the assessee during the course of search and seizure.

ii. the entire information and material was in possession of the Department prior to the date of search.

The Hon'ble ITAT, Delhi has held that once any document which though is in the nature of incriminating material but if it has not been found in the course of search, then such an addition cannot be roped in the assessment u/s. 153A. The Hon'ble ITAT further held that if the Revenue has any information in its possession prior to the date of search i.e., the USB received from a foreign government and no corroborative evidence was found during the course of search so as to link the information already in hand with the material found during the course of search, then such an information for making any kind of addition ostensibly is outside the purview of Section 153A of the Act. Accordingly, the reliance place by the Revenue solely on the USB was held to be invalid and additions made by the revenue was deleted.

c) ACIT v. Shri Rajeshkumar Govindlal Patel, ITA Nos. 25 & 26/ITAT Rajkot/2021, 12.04.2023, ITAT Rajkot (Relevant para 8.2, 8.3, 9.1 & 9.4, Page 36-80 of case law compendium, Volume 3.1): In this case, the AO attempted to draw an inference that the assessee owns and maintains foreign bank account, based on some unverified sheet of paper which was indicative of a bank statement. The court held that mere appearance of some personal details of the assessee on the three pages photostat copy does not validate the information as true and correct as personal details are easily available from known sources and therefore such details do not validate the case of the AO in any manner and it is upon the AO to prove the truthfulness of the same. Further, the court held that since the Revenue failed to prove the same with necessary materials and proper evidences therefore no additions can be made on the basis of that material.

d) ACIT v. Sh. Parminder Singh Kalra (ITA No. 5330/Del/2016, 15.06.2021), ITAT Delhi (Relevant para 135, Page 81-170 of case law compendium, Volume 3.1): The Hon'ble ITAT while taking similar set of facts into consideration, has held that the pen drive so received was just

like an anonymous letter forwarded by the French Competent Authority to the Indian Competent Authority. The Hon'ble ITAT further held that although the fact that the documents basis which assessment is made has been obtained from the French Government is established but the source, author and authenticity of the information contained in the said pen drive is not established. Accordingly, the Hon'ble ITAT has held that in the absence of any corroborative evidence, the information contained in the said pen drive can't be relied upon.

e) Late Shri Bhushan Lal Sawhney vs. The DCIT, ITA Nos. 427-439/Delhi/2017, 01.06.2021, ITAT Delhi (Relevant para 8., 8.1, & 8.2, Page 171-184 of case law compendium, Volume 3.1): The Hon'ble ITAT has considered a similar HSBC foreign account case and in the absense of any corroborative evidene and in the absence of any incriminating material found during search, the Hon'ble ITAT held that the information/documents provided by the French Authorities in a pen drive cannot be relied and deleted the additions.

f) Vikram Dhirani v. ACIT, ITA No. 4647 to 4652/Del/2016, 17.04.2023, ITAT Delhi (Relevant para 185, Page 185-202 of case law compendium, Volume 3.1): In this case, the assessee was found to have not disclosed an HSBC Bank account at Dubai.

The Assessing Officer ("AO") treated this as an undisclosed income of the assessee, Upon appeal, the ITAT held that an information, regardless of its validity and accuracy from a reliable source, must still be converted into evidence in order to draw an inference and establish the proven fact. The court observed that the French authorities had provided the information stored on a USB drive but the Act does not include any provision that assumes the truth of the information received from the Competent Authority under the DTAA between India and France. Therefore, the court held that it is the responsibility of the AO to prove that the material obtained or printed from the Pen Drive contains exactly the contents of the 'Bank Account' as recorded by the bank and only then can it be deemed to possess evidentiary significance of categorical value. Since, there was no incriminating material found during the course of search to support and substantiate the said addition hence the court held that the income relating for relevant AY under consideration was beyond the scope of section 153A of the Act.

1.10. Per contra, in Renu Tharani v. DCIT, ITA No.2333/Mum/2018, 16.07.2020 (Relevant paras 45, 46 & 50, Page 203-255 of case law compendium, Volume 3.1): The Hon'ble ITAT Mumbai has upheld the additions made in the case of the assessee based of the documents received from the French Authority.

1.11. In Ambrish Manoj Dhupelia v. DCIT, ITA No 5720 to 5729, 5751 & 5752 (MUM.) 2016, 23.10.2017, ITAT Mumbai (Relevant paras 16 & 18, Page 256-285 of case law compendium, Volume 3.1): ITAT upheld the assessment on the basis of that documents was received officially by the Government pursuant to an investigation made by permanent sub- committee on investigation of United States Senate.

1.12. In the case of Parag Dalmia v. DCIT, ITA No.5499/Del/2017, 26.02.2018, ITAT Delhi (Relevant para 34, Page 286-300 of case law compendium, Volume 3.1) It was held that 7 pages received by the Government of India from a sovereign country containing information regarding the undisclosed foreign accounts, were received prior to the search and were confronted to the assessee during the course of search, and hence the same constitutes incriminating material, which was rightly used by the AO in the proceedings u/s 153A/143(3)

The document alleged to be statement of a bank account with HSBC London allegedly belonging to the Appellant is not admissible as electronic evidence.

1.13. The CBDT has issued an Investigation Manual for the purpose of collecting Digital Evidence (the "Manual") in the cases of search and seizure, In para 2.6.3 of the Manual, the CBDT has directed that while handling any digital evidence, the procedure has to be in consonance with the provisions of section 65B of the Indian Evidence Act.

1.14. Further the Manual also states that merely gathering electronic evidence is not sufficient and efforts will have to be made to corroborate the contents therein vis-à-vis other evidence such as material and oral. Therefore, without prejudice to the aforesaid submissions, since in the present case, no corroborative evidence is supplied by the Ld. AO in support of the alleged bank statements, the same can't be relied on.

1.15. Section 65B of the erstwhile Indian Evidence Act, 1872 states that any information contained in an electronic record which is, inter alia, printed on a paper shall be admissible as evidence in all proceedings, if the following conditions are satisfied:

> *a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;*
>
> *b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;*
>
> *c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and*
>
> *d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.*

1.16. Accordingly, as per section 65B of the Indian Evidence Act, 1872, the Revenue Authorities have to mandatorily and scrupulously follow the conditions laid down under section 65B(2) and (4) of the Indian Evidence Act, 1872 to render any documents to be valid in the eyes of law.

1.17. In the instant case, a certificate under section 65B of the Indian Evidence Act, 1872 (the "Certificate") issued by Under Secretary to the Government of India, FT&TR Division, CBDT [Kindly refer page 82-83 of the Paper Book, Volume.2] only states that a pen drive was received by Joint Secretary, FT&TR-1, CBDT as per the India-France DTAA and thereafter printout of the documents was taken from the data stored in the pen drive through the computer installed in the office of the Indian Competent Authority at C Wing, Hudco Vishala Building, Bhikaji Cama Plance, New Delhi. Except these details nothing else was stated in the Certificate.

1.18. The bank statement cited as evidence was purportedly provided to the Income-tax Department in the form of a pen drive by the French tax Authorities in terms of India-France DTAA. However, no certificate under section 65B(4) of the Indian Evidence Act, 1872 has been brought on record in relation to the contents of the said pen drive. Thus, the primary records basis which the evidence is sought to be adduced is not certified in terms of section 65B of the Indian Evidence Act, 1872.

1.19. Further, the condition stated in section 65B(2)(d) of the Indian Evidence Act, 1872 postulates that information contained in electronic record is derived from information fed into the computer. Thus, the certificate issued under section 65B(4) should have certified the information in question i.e. the alleged bank statement and not the contents of the pen drive. Thus, there is a complete failure to comply with elementary principles of section 65B of the Indian Evidence Act, 1872.

1.20. Accordingly, the conditions mentioned under section 65B(2) of the Indian Evidence Act, 1872 have not been followed and therefore, the Certificate produced under section 65B of the Indian Evidence Act, 1872 is not valid/relevant.

1.21. Further, the Certificate was issued on 20.11.2015 which is years after the day on which the alleged pen drive was received by the Indian tax authorities i.e., 28.06.2011 and even beyond the date of passing of assessment order for AY 2006-07 i.e., 27.02.2015. It is also signed by an Under Secretary functioning as such on that date. This is way short of the requirements of Section 65B. Hence, the alleged bank statement can't be relied on to complete the assessment.

1.22. Reliance in this regard is placed on the following judgements:

> *a) Hon'ble Supreme Court in the case of Anvar P.V. v. P.K. Basheer, [2014] 10 SCC 473(SC) dated 18.09.2014 (Relevant para: 22, Page 301-314 of case law compendium, Volume 3.1) has stated that that non-compliance of section 65(B) of the Indian Evidence Act renders the document inadmissible in the eye of law.*

b) Further, the Hon'ble Supreme Court in the case of Arju Arjun Pandit Rao Khotkar v. Kailash Kushanrao Gorantyal, Civil Appeal Nos. 20825-20826 of 2017 dated 14.07.2020 (Relevant para: 22, Page 301-314 of case law compendium, Volume 3.1) held that the non obstante clause in section 65B(1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of section 65B. The Hon'ble Court further observes that the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced i.e., the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. Further, it holds that in cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with section 65B(1), together with the requisite certificate under section 65B(4) of the Indian Evidence Act.

c) The Madras High Court in Vetrivel Mines v. ACIT, [2021] 129 taxmann.com 126 (Madras) dated 03.08.2021 (Relevant para: 21, 22, 25 & 26, Page 371-383 of case law compendium, Volume 3.1) allowed the writ petition of assessee and quashed the assessment order passed by the AO.

d) The Hon'ble ITAT, Vishakhapatnam in Polisetty Somasundaram v. DCIT, [2023]153 taxmann.com 591 (Visakhapatnam Trib.) dated 18.08.2023, ITAT Visakhapatnam (Relevant para: 45, 46, 47 & 48, Page 384-415 of case law compendium, Volume 3.1) has held as follows:

"45. On careful perusal of the case laws cited above, we are of the considered view that the Revenue Authorities should mandatorily and scrupulously follow the conditions laid down under section 65B(2) and (4) of the Indian Evidence Act to render any documents to be valid in the eyes of law. In the instant case, the investigation agency obtained a Certificate about the details of the pen drive and the person in whose custody it was seized. Except these details nothing was there in the Certificate and also the said Certificate was not completely filled up by the Ld. Revenue Authorities. Further, from the Certificate obtained under Indian Evidence Act which is placed in Page-11 of Paper Book-2, we find force in the arguments of the Ld. AR that it is not as per the conditions laid down u/s. 65B of the Indian Evidence Act.

46. After considering the decisions of the Hon'ble Supreme Court in the case of Anvar P.V (supra); Arjun Pandit Rao Khotkar (supra) and the judgment of the Hon'ble Madras High Court in the case of Vetrivel Mineral (supra) as well as on perusal of the facts and circumstances of the case, we are of the considered we that the four conditions stipulated in section 65B(2) i.e., (a) to (d) along with section 65B(4) were not followed while obtaining the Certificate u/s. 65B of the Indian Evidence Act 1872 in the case of the assessee which are to be followed mandatorily. Therefore, we

have no hesitation to hold that this Certificate is not a valid Certificate as prescribed under the Indian Evidence Act 1872 and hence cannot be enforced. Therefore, the Certificate obtained in the case of the assessee cannot be regarded as a legally valid certificate u/s. 65B of the Indian Evidence Act and the same has no recognition in the eyes of law. The information contained in the seized pen drive is could not be considered as admissible evidence as per the provisions of section 65B of Indian Evidence Act. Therefore, we are of the considered view that such inadmissible seized material is not sustainable in the eyes of law. Thus, the assessment order passed in the case of the assessee on 31-3-2022 is not a valid assessment order in the eyes of law and it deserves to be set aside.

47. So far as Grounds No. 2 and 3 (AY 2012-13) are concerned, since we have set- aside the assessment order by allowing the Grounds No. 4 & 5 raised by the assessee, the Ground Nos 2 and 3 needs no separate adjudication. It is ordered accordingly.

48. In the result, appeal of the assessee for the AY 2012-13 is allowed."

2. Assessment under section 153A of the Act is bad in the absence of any incriminating material found during search operation.

[AY 2006-07 and AY 2007-08: Ground number 1 and 1.1]

[AY 2008-09 to AY 2012-13: Ground number 3 and 3.1]

2.1. The alleged undisclosed bank statement of the bank account with HSBC Bank, London was brought by the investigating officer when they came for search of appellant's premises on 23.08.2011 & 24.08.2011. The original or copy of the alleged bank account statement was never recovered from the Appellant-Assessee during the search operation. Hence no incriminating material was found during the said search operation. Hence, Section 153A is inapplicable.

2.2. Accordingly, ratio laid down in PCIT v. Abhisar Buildwell (P.) Ltd. [2023] 454 ITR 212 (SC), 24.04.2023, Supreme Court of India (Relevant para: 8, 12, 13 & 14, Page 416-436 of case law compendium, Volume 3.2) applies.

2.3. The statement of the Appellant-Assessee recorded during the search operation on or around 23.8.2011 and 24.8.2011 under section 132(4) of the Act themselves cannot constitute incriminating material attracting Section 153A.

2.4. In CIT v. Harjeev Aggarwal, [2016] 290 CTR 263, 10.03.2016, Delhi High Court (Relevant para: 19-25, Page 437-450 of case law compendium, Volume 3.2): the Hon'ble Delhi High Court has held that a statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself trigger a block assessment. The undisclosed income of an assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4)

of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search.

2.5. The Hon'ble Delhi Bench of ITAT in ACIT v. Sh. Parminder Singh Kalra (supra) (Relevant para: 151, Page 81-170 of case law compendium, Volume 3.1):held that the statement recorded u/s 132(4) does not constitute incriminating material and that the assessment cannot be made on the basis of statement alone without any reference to material gathered during the course of search operations.

2.6. The judgement of Hon'ble ITAT, Rajkot in ACIT v. Shri Rajeshkumar Govindlal Patel, ITA Nos. 25 & 26/ITAT Rajkot/2021, 12.04.2023 (Relevant para: 9.3, Page 36-80 of case law compendium, Volume 3.1): held that a statement recorded under section 132(4) of the Act is not a document seized during the continuation of a search.

2.7. The Ld. AO has also made additions amounting to Rs. 2,28,00,000/- alleging the sum as fictitious expenditure for AY 2010-11. The Ld. AO has based his conclusion on an accountant' note which was found during search. The addition in relation to the alleged fictious expenditure has been deleted by Ld. CIT(A) holding that the Appellant Assessee has explained the contents of the note. Thus, the accountant' note cannot be an incriminating material for the purpose of section 153A of the Act

2.8. The revenue has preferred an appeal against the aforesaid order of Ld. CIT(A). Even if that appeal of revenue is allowed by this Hon'ble Bench, the incriminating material bears nexus to AY 2010-11. It will not confer jurisdiction to the department in relating to other completed assessments (vide para 11 of Abhisar Buildwell (P.) Ltd (supra), Page 416-436 of case law compendium, Volume 3.2)

3. The sum in question is not taxable under the Act in view of Article 23(3) under the India-UK DTAA and true meaning of the expression "may be" taxed employed therein.

[AY 2006-07 and AY 2007-08: Ground Number 5, 6,7 (Additional Ground)
AY 2008-09: Ground Number 6, 7, 8 (Additional Ground)
AY 2009-10: Ground Number 6, 7 (Additional Ground)
AY 2010-11: Ground Number 4, 5 (Additional Ground)
AY 2011-12 and AY 2012-13: Ground Number 5, 6 (Additional Ground)]

3.1. Broadly speaking, section 90(2) of the Act is to this effect: where the Central Government has entered into an agreement with the Government of any country outside India, then the provisions of the Act shall apply to the extent they are more beneficial to an assessee.

3.2. The Appellant- Assessee has been assessed based on purported bank account în HSBC London. The Appellant-Assessee was and is undoubtedly a resident in India only for the relevant AYs. Therefore, Appellant-Assessee can invoke and rely on India-UK DTAA to the extent it will be more beneficial to the

Appellant Assessee. That the information pertaining to the above-mentioned alleged bank account was supplied by the authorities from the French Government has no bearing on applicability of benefit of Indo-UK DTAA.

3.3. The benefit of treaty was duly claimed before A.O. in the assessment proceedings is evident from the reply dated 16.02.2015 filed before DCIT, Central Circle 30 (Page 57 of Paper Book Volume 1). This has not been dealt with by him. The CIT (A) has summarily rejected the treaty benefit vide para 10(iii) of his order dated 05.09.2017 for AY 2006-07 and AY 2007-08. This ground in the appeal has been duly raised as an additional ground in the appeals filed before this Hon'ble ITAT also. Hence, Appellant-Assessee can urge this additional ground before this Hon'ble ITAT particularly since penalty has been levied and prosecution has been launched on appellant-assessee.

2.4. Indo-UK DTAA has been duly notified vide Notification No. GSR 91(E) dated 11.12.1994 as amended by Notification No. 10/2014 [F. No. 505/1986 FTD-1] dated 10.02.2014. Article 23 of the India-UK DTAA is reproduced as under:

> *Subject to the provisions of paragraph (2) of this Article, items of income beneficially owned by a resident of a Contracting State, wherever arising, other than income paid out of trusts or the estates of deceased persons in the course of administration, which are not dealt with in the foregoing Articles of this Convention, shall be taxable only in that State.*
>
> *2. The provisions of paragraph (1) shall not apply to income, other than income from immovable property as defined in paragraph (2) of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15 of this Convention, as the case may be, shall apply.*
>
> *3. Notwithstanding the provisions of paragraphs (1) and (2) of this Article, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention, and arising in the other Contracting State may be taxed in that other State*

3.5. Thus, vide, Article 23(3) of the India-UK DTAA, items of income not dealt with forgoing articles of the convention and being any income of resident of India arising in UK "may be taxed" in UK. In the light of decisions referred infra, when an article of a DTAA, suggest that income "may be taxed" in other contracting State tax, it cannot be charged to tax on that income by the resident State. Accordingly, the type of income falling under Article 23(3), if it arises in U.K., it is not liable to tax in India, even if the assessee is a resident of India.

3.6. The word "may be taxed" appearing DTAA entered by Government of India has been interpreted by courts in a catena of judgments explained infra.

8.7. P.V. A.L. Kulandayan Chettiar v. Income Tax Officer, [1983] 3 ITD 426 (MAD.) (SB), 27.12.1982, ITAT Madras (Special Bench) (Relevant para: 8, Page 451-454 of case law compendium, Volume 3.2): In this case, it was held that the word 'maybe' in Article 6(1) of the India- Malaysia DTAA agreement empowered only the Malaysian Government to tax income from properties situated in Malaysia and if India could also levy tax on the same income then it will only frustrate the object of avoidance of double taxation with which the agreement was made.

3.8. CIT v. R.M. Muthalah, [1993] 202 ITR 508 (Karnataka), 11.12.1992, Karnataka High Court (Relevant para: 7, Page 455-457 of case law compendium, Volume 3.2): In this case, the word 'may be' used in Article 6(1) of India-Malaysia DTAA was interpreted to mean that the revenue generated from immovable property in Malaysia may be taxed by the Malaysian government and if the Malaysian Government is recognised to have this power, then it would take away such power from the Indian Government.

3.9. CIT v. S.R.M Firm, [1994] 208 ITR 400 (MAD.), 15.03.1994. Madras High Court (Page 458-468 of case law compendium, Volume 3.2): In this case, the court interpreted the word 'may be taxed' as a prohibition or embargo upon the authorities' exercising powers under the Act and it can't be read as an enabling form of language.

3.10. CIT v. P.V.A.L Kulandagan Chettiar, (2004) 267 ITR 654, (Supreme Court), 26.05.2004, Supreme Court of India, (Relevant para: Para 5, 11, 12, 13, 14, 15 & 16, Page 469-481 of case law compendium, Volume 3.2): dismissed the appeal of the revenue against the above decisions of Madras High Court & Karnataka high Court.

3.11. In Union of India v. Azadi Bachao Andolan, [2003] 263 ITR 706 (SC), [2003] 263 ITR 706 (SC), 07.10.2003, Supreme Court of India (Relevant para: Para 23-26, Page 482-531 of case law compendium, Volume 3.2 after inter alia, referring to CIT v. R.M. Muthaiah (supra) the Hon'ble Supreme Court observed that:

> *"... We approve of the reasoning of the decisions which we have noticed. If it was not an intention of the Legislature to make a departure from the general principles of chargeability under section 4, and the general principles of ascertainment of total income under section 5 of the Income-tax Act, then there was no purpose of making those sections 'subject to the provisions of the Act'. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAA which would automatically override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to income-tax and ascertainment of total income, to the extent of the inconsistency with the terms of DTAC."*

The court held that the prevailing legal position is that once an income is held to be taxable in a tax jurisdiction under a double taxation avoidance agreement, unless there is a specific mention that it can also be taxed in the other tax

jurisdiction, the other tax jurisdiction is denuded of its powers to tax the same (to check this extract) (fill up (5))

3.12. DCIT v. Patni Computer Systems Ltd, [114 ITD 159 (Pune)], 29.06.2007, ITAT Pune, (Relevant para: Paras 7 & 8, Page 532-537 of case law compendium, Volume 3.2): In this case, inter alia, the court relied upon the interpretation of 'maybe' in aforesaid judgments. The aforesaid judgements deal with income from immovable property located in other contracting state. Patni Computers however related to business income. Principle of above judgement were applied to business income. The Tribunal expressly referred to relied on the judgments in the case of R.M. Muthaiah (supra), VR. S.R.M. Firm (supra) and also the ruling of Hon'ble Supreme Court in Azadi Bacho Andolan.

3.13. Hon'ble High Court of Madhya Pradesh in Dy. CIT v. Torqouise Investment & Finance Ltd. [2006] 154 Taxman 80 (Madhya Pradesh) (Relevant para: 14, Page 538-543 of case law compendium, Volume 3.2) upheld the decision of the Hon'ble ITAT wherein it was observed that dividend income derived by the assessee being Indian resident from a company in Malaysia was not liable to be taxed in its hands in India under any of the provisions of the Act in view of Indo-Malaysian DTAA.

3.14. In DCIT v. Turquoise Investments & Finance Ltd, [2008] 300 ITR 1 (SC), 20.02.2008, Supreme Court of India (Relevant para: 9, Page 544-546 of case law compendium Volume 3.2) the Hon'ble Supreme Court upheld the decision of Madhya Pradesh High Court following decision in Kulandayan Chettiar case.

3.15. In CIT v. Essar Oil Ltd, [2012] 345 ITR 443 (Bombay), 16.10.2008, Bombay High Court (Relevant para: 3 & 4, Page 547-548 of case law compendium, Volume 3.2) the assessee was an Indian company & tax resident of India. It had a permanent establishment at Oman. The assessee was sought to be taxed under Indian Income Tax Act, 1961 in respect of the income earned from the said establishment in Oman. In light of article 7(1) of the India- Oman DTAA which employed the expression "may be taxed" and in the light of the judgment of the apex court in the case CIT v. P. V. A. L. Kulandagan (supra), the ITAT excluded the profit earned from the permanent establishment at Oman. Upon appeal by revenue, the Hon'ble High Court upheld the order of the Tribunal and dismissed the appeal of Revenue.

Effect of Section 90(3) and notification 91/2008 dated 28.8.2008 on the meaning of term "may be taxed" particularly for AY 2006-07 and AY 2007-08 in question.

3.16. Sub-section (3) to section 90 was inserted vide Finance Act 2003 with effect from 01st April 2004 and provides as under:

> *"(3) Any term used but not defined in this Act or in the agreement referred to in sub- section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf."*

3.17. Pursuant to 90(3) of the Act, notification number 91/2008 dated 28.08.2008 was issued by CBDT, which stated as follows:

> *"In exercise of the powers conferred by sub-section (3) of section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that where an agreement entered into by the Central Government with the Government of any country outside India for granting relief of tax or as the case may be, avoidance of double taxation, provides that any income of a resident of India "may be taxed" in the other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement."*

3.18. In DCIT v. Bank of India [ITA No. 3082/2015/ITAT Mumbai 08.11.2017] (Relevant para: 5 & 12, Page 551-561 of case law compendium, Volume 3.2) relate to the appeal filed by the revenue for AY 2009-10 regarding taxability of business income earned in another state. It related to India-Kenya treaty for income from house property. ITAT relied upon its own rulings for AY 2004-05 and AY 2003-04, Therein it was held (relying on text the Article 7 of DTAA states that if the enterprise of one State carries on business in another State through permanent establishment) that the State where the business is carried out alone would levy tax on the profits attributable to the permanent establishment. Similarly, for AY 2009-10 with regards to DTAA between India and Kenya, the ITAT took note of Notification No. 91/2008 and held that any notification or circular cannot alter the nature of income that has been specifically included in DTAAs. Even amendment in a section of the Act would not affect the provisions of tax treaties unless same are not ratified by both the signatories of the treaty. Therefore, for AY 2009-10 it was held that house property income had to taxed as per Article 6 of the DTAA and as per that article income from Kenyan house property could not be taxed in India.

3.19. However, the notification number 91/2008 dated 28.08.2008 was held to retrospective and applicable to AY 2006-07, AY 2007-08 and AY 2008-09 by the decision of Mumbai bench of ITAT in Essar Oil Ltd. v. ACIT, (2014) 42 taxmann.com 21 (Mumbai ITAT) (Relevant para: Para 54, 60 & 61, Page 562-637 of case law compendium, Volume 3.2).

3.20. The above order of the ITAT in Essar Oil case is contrary to the principles flowing from the judgement of Hon'ble Bombay High Court in Godrej & Boyce Mfg. Co. Ltd. v. DCIT, [2010] 328 ITR 81, dated 12.08.2010 (Relevant para 65, 66 & 67, Page 638-676 of case law compendium, Volume 3.2) and the ruling of Hon'ble Supreme Court in CIT v. Essar Teleholdings Ltd., [2018] 300 CTR 561 dated 31.01.2018 (Relevant para: 23 & 48, Page 677-692 of case law compendium, Volume 3.2. These judgements were no doubt in the context of Rule 8D and Section 14A of the Act and not in the context of Notification 91/2008 dated 28.8.2008. However, these judgements have held that the Rules/notifications issued under the fiscal statutes will be, unless otherwise expressly provided, prospective in nature.

3.21. Notification dated 28.8.2008 cannot be retrospective and applicable to AY 2006-07 & 2007- 08, particularly where civil and penal consequence are attracted.

Income in the form of alleged credits in a bank account in London would fall Article 23 of Indo-UK DTAA. Also, it would be income arising in UK and hence governed by Article 23(3).

3.22. The income in question has been assessed by the Ld. AO as "income from the sources".

3.23. Therefore, self-evidently and even otherwise, the income represented by alleged credits in the bank account would be not covered by the relevant articles 6 to 22 of the India-UK DTA. Hence, it will be governed by Article 23 of the India-UK DTAA.

3.24. Since the bank account is in U.K., income purportedly represented by credit it would be income arising in U.K.

Principles laid down by ITAT Patna in ITO v. Branch Manager 225 ITR AT 126 in the contest of Indo-Nepal treaty qua Nepalese resident suports the assesse in the present case qua India-UK treaty.

3.25. The decision of the Patna Bench of the ITAT in case of ITO v Branch Manager, State Bank of India [255 ITR (AT) 126] (Page 549-550 of case law compendium, Volume 3.2) is relevant as deals with applicability of Article 21 – Other Income of the Indo-Nepal DTAA. Although the said reported decision concerns appeal against the penalty levied u/s 271(1)(c) of the Act, order of ITAT quantum appeal is not reported or available it also set out the material facts and decision arrived in quantum proceedings for which penalty was levied,

3.26. Article 21 of the DTAA between India-Nepal is on the lines of OECD Model Convention.

Article 21 of the Indo-Nepal DTAA reads as follows:

Items of income of a resident of a Contracting State, wherever arising, not dealt within the foregoing Articles of this Agreement shall be taxable only in that State.

3.27. The facts in the said decision were as follows: Two Nepali Citizens opened account in SBI in India and deposited a sum of INR 1,25,000 in year 1992-93. The AO treated the deposits as earned out of income arising in India and taxed the same under Section 163 of the Act in the hands of the Branch Manager, SBI as agent of the Nepali citizens. AO treated it as unexplained investment attracting Section 69 of the Act.

3.28. Broadly speaking, the Tribunal deleted the addition on the following basis:

i. The unexplained sums deposited in SBI bank account in India were chargeable to tax in India under Section 69 of the Act.

ii. The Article 21 of the Indo-Nepal DTAA was attracted in the present case.

iii. In view of Article 21 of the Indo-Nepal DTAA, such income taxable only in Nepal which was the state of residence of both the Nepali Citizens.

3.29. In that case, the AO had invoked Section 163 of the Act. It is implicit that both the Nepali citizens were not residents for the purpose of Indian Income Tax Act, 1961.

3.30. The sums deposited by non-residents in the bank account located in India were held taxable under Section 69 of the Act. Non-residents are liable to tax under the Act only on income which has arisen in India. It is also implicit that clear basis of the aforesaid decision is that income being sums deposited in bank account arise in the country in which the bank account is located,

3.31. ITAT has clearly in view that Section 69 is otherwise attracted. It is therefore self-evident that ITAT has effectively concluded that income accrues or units in India as otherwise non- resident will not be taxable in India.

3.32. Therefore, it is clear ratio of the above decision type of income being sums deposited in bank account is not an item of income dealt with by specific articles of the DTAA and consequently fall only within the ambit of Article 21 - Other Income of the DTAA. Article 21 of the Indo-Nepal DTAA granted taxing right only to the country of residence, thus such sums were held as not taxable in India.

3.33. In the present case, is concerned with Article 23 of the India-UK DTAA. This is based on the UN Model Convention. A superficial comparison of Article 21 of the Indo-Nepal DTAA with Article 23 of the India-UK DTAA should not be made arrive at a conclusion that sums deposited in the bank account in UK will be taxable in India which was the state of residence of the appellant in the present case. There is a material difference between Article 23 of the India-UK DTAA which is based on UN Model Convention and Article 21 of the Indo-Nepal DTAA which is based on OECD Model Convention. The difference is as follows:

3.34. Article 23 of the India-UK DTAA provides that:

1. Subject to the provisions of paragraph 2 of this Article, items of income beneficially owned by a resident of a Contracting State, wherever arising, other than income paid out of trusts or the estates of deceased persons in the course of administration, which are not dealt with tin the foregoing Articles of this Convention, shall be taxable only in that State.
……..

3. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention, and arising in the other Contracting State may be taxed in that other State.

(Emphasis Supplied)

3.35. Indo-Nepal treaty based on OEID has not clause corresponding to Article 23(3) based on UN Model. Also, Article 23(3) is notwithstanding Article 23(1).

3.36. The phrase "may be taxed" in that contracting state has been judicially interpreted to mean that it will be taxed only in that contracting state. Thus, in view of Article 23(3) of the India- UK DTAA, the income being sums deposited in bank account in UK are taxable only in UK due to following reasons;

> *i. The income being sums deposited in UK Bank is not dealt with in the specific income article of the India-UK DTAA hence amenable to Article 23 - Other Income of the*
>
> *ii. The income being sums deposited in UK Bank account can be said to have arisen only in UK;*
>
> *iii. Sub-clause (3) of Article 23, in view of judicial interpretation of the term "may be taxed" it will be liable to tax only in UK since it has arisen in UK and not in India.*

3.37. Therefore, in view of decision of above decision of ITAT in ITO v. Branch Manager, sums in question are not taxable in India, in view of Article 23(3)/

4. The impugned assessment order passed under section 153A of the Act for all the AYs is barred by limitation prescribed under section 153B of the Act. Reasoning of the Ld. AO to extend it, based on reference made to Swiss tax authority is invalid.

[AY 2006-07 and AY 2007-08: Ground Number 4 (Additional Ground)
AY 2008-09, AY 2009-10: Ground Number 2
AY 2010-11: Ground Number 1
AY 2011-12 and AY 2012-13: Ground Number 2]

4.1. In the impugned assessment order, it has been averred that a reference has been made to the concerned Swiss tax authorities through the FT & TR Division of CBDT calling for certain information vide letter dated 16.11.2012 and 11.02.2015. Accordingly, it is the contention of the Ld. Assessing Officer that because of the said reference the time period for concluding the assessment u/s 153A of the Act is extended.

4.2. The Notification No. S.O. 2903(E) dated 27.12.2011 amending the DTAA between India and Switzerland clearly states that that Exchange of Information provided for in the said Protocol will be applicable for information that relates to any fiscal year beginning on or after the 01.04. 2011. In the present case, the period for which the reference has been made calling for information for period prior to 01.04.2011 (FY 2004-05 and FY 2005-06). Accordingly, the reference made by the Department in the present case is invalid in law, Consequently, the period of limitation can't be extended as claimed by the Ld. Assessing Officer in the impugned assessment order. Therefore, the assessment orders pertaining to AY 2006-07 to AY 2011-12 is bad in law.

4.3. This aspect is covered in favour of assessee by the following judgments:

a) Late Shri Bhushan Lal Sawhney vs. DCIT (supra) (Relevant para: 8, 8.1, 8,2, Page 171-184 of case law compendium, Volume 3.1) No addition could be made of any unexplained bank deposits or interest earned thereon in the case of assessee for the relevant AYs i.c., 2006-2007 to 2011-2012 as by virtue of Notification No. 2903 (E) dated 27.12.2011 no information was provided by Swiss Authorities for the period prior to 01.04.2011.

b) Shri Praveen Sawhney vs. ACIT, [2023] 152 taxmann.com 134, 18.05.2023, ITAT Delhi: (Relevant paras: 19, 20 & 21, Page 693-716 of case law compendium, Volume 3.2)

In this instant case, the assessee had challenged the assessment order passed on him on 04.03.2015 on the ground that it was barred by limitation, and it should have been passed on or before 31.03.2014. The revenue however contended that since a reference was made to the Swiss Authorities under section 90 of the Act and no information was received till the time of the passing of the assessment order, therefore the time limit was extended by one year as per the Explanation IX to section 153B of the Act. The assessee however contended that the reference made to Swiss Authorities itself was invalid and therefore an invalid reference can't extend the period of limitation as provided under section 153B read with explanation IX. After hearing both the parties, the court held that the Notification No. 2903 (E) is loud and clear and has specifically mentioned that Exchange of Information provided for in the said Protocol will be applicable for information that relates to any fiscal year beginning on or after the 1st day of April 2011. However, in this case the reference was made by the Revenue calling for information for the period prior to 01.04. 2011. Therefore, the information for period prior to 01.04.2011 can't be received and it would be futile to wait for such information by making an invalid reference. Thus, the period of limitation could not be extended by the Revenue and the impugned assessments are clearly barred by limitation and deserve to be quashed.

15. On the other hand, the Ld. DR submitted that the assessee has agreed to disclose the above said undisclosed credit in the bank account in the revised return of income and he submitted that can the assessee raise the issues in the appellate proceedings on which no addition was made in the assessment order by the AO. The AO has accepted the revised return of income and proceeded to complete the assessment based on the revised return of income. Therefore, he submitted that all the issues raised by the assessee on such already declared income are not to be entertained by the Hon'ble Bench. Accordingly, he prayed that several issues raised by the Ld. AR on the issue of additional income declared by the assessee is only afterthought. Further, he

brought to our notice Question No. 45 from the statement recorded u/s 131 in which the question raised by the revenue is that the assessee has spent a period of one month and five days in UK only to attend meetings, office seminars and study architecture project in UK ?. In answer to the Question No. 45, the assessee has corrected his Stand to admit that he had deposited accumulated income over a period of many years. He submitted that the conduct of the assessee is not to come clean. Further, he submitted that the assessee was asked to file the bank statement and the assessee has not filed any bank statement before the authorities even during the appellate proceedings. No details were filed before the AO. Further, he submitted that even the assessee has not given consent form to obtain the bank statement through FT&TR Division of CBDT. It clearly shows that the assessee has not disclosed the above said bank account and bank balance voluntarily and without the action of search and seizure, the said disclosure would not have been possible.

16. With regard to incriminating material, he submitted that no doubt the Investigation Wing had the information about the bank account maintained by the assessee before initiation of search and on the basis of search the same was confronted before the assessee, the assessee had no option but to accept the same. Therefore, it is clearly an incriminating material for the simple reason that the information relating to bank account was not disclosed to the Income Tax Department, only upon the search operation, the assessee had accepted the same. This is clearly an incriminating material. In this regard, he relied on the following decisions:-

a. ITA No. 5499/Del/2017 for AY 2006-07 in the case of Parag Dalimia Vs. DCIT;
b. Soignee R. Kothari Vs. DCIT 386 ITR 466 (Bombay)

17. Considered the rival submissions and materials available on record, we observe that the Ld AR now raised several issues relating to the income offered

by the assessee in revised return of income, the basis of offering the income is based on the bank statement acquired by the revenue thru the French Authorities, which is nothing but the stolen documents from the HSBC Bank data belongs to several clients of the HSBC bank across the globe. Ld AR argued that these are not valid documents for the purpose of treating them as evidence for making any addition. Further this loose paper containing bank statement are not authenticated by any authorities and also this is not coming directly from the HSBC bank, has no evidentiary value. In this regard, he relied on following cases:

a. Bishwanath Garodia (supra), in this case, the assessment was completed by the AO on the basis of information of assessee having bank account with the HSBC bank and having conducted the search and seizure operation, the department could not find any incriminating material. The case of the assessee was decided on the basis of jurisdictional issue and not on the basis of merits. Therefore, this case is distinguishable to the present case.

b. Anurag Dalmia (supra), In this case, the search was conducted on the basis of alleged information contained in the USB that Indian persons maintaining bank account with HSBC Switzerland. In search, no documents or any incriminating material was found from the possession of the assessee, the coordinate bench held that no incriminating material found during the search and the information of having bank account was already with the department therefore, it was held that though there is material in the nature of incriminating but it has not been found in the possession in course of search, then such an addition cannot be roped in the assessment u/s 153A. From the facts on record, we observe that the revenue has proceeded to conduct the search solely on the basis of information of assessee having a bank account with the HSBC and not found any corresponding

incriminating material in the possession of the searched person, it was held that the revenue cannot make addition purely on the basis of information which was already with the revenue prior to search. Whereas in the given case, the information with the revenue, no doubt prior to search, a bank statement with the complete details of bank transactions datewise/monthwise and details of assessee along with the family members of the assessee was received and the same was confronted with the assessee search assessment proceedings, the assessee has initially denied and subsequently agreed to having the bank account. The fact in the case is distinguishable to the above case. Normally, the department conducts the search proceedings in the case of several persons without having any information relating to the bank financial transaction but only based on the incomplete information about the clients code found in the USB from the Swiss authorities, without proper details, the information in the form of foreign language etc., The initiation of proceedings with the insufficient data and then tries to find the incriminating material in the search, this led to the findings that the revenue was only making rowing enquiries without there being any material with them. Whereas in the given case, the revenue had complete details of the assessee and relevant bank transactions. When the same was confronted with the assessee, the assessee had accepted of having the bank account with the HSBC and came forward to disclose the same in the revised return of income and paid the relevant tax. Therefore, it is quite distinguishable to the facts in the above case.

c. Shri RajeshKumar Govindlal Patel case, in this case also, the proceedings were initiated on the basis that the assessee owns and maintains foreign bank account, based on some unverified sheet of paper which was indicative of a bank statement. It was

held that mere appearance of some personal details of the assessee on the three pages photostat copy does not validate the information as true and correct as personal details are easily available from known sources and therefore such details do not validate the case of the AO in any manner and it is upon the AO to prove the truthfulness of the same. In our view, this case also distinguishable to the facts in the present case, as discussed in the case of Anurag Dalmia (supra) case.

d. Similarly in the cases of Parminder Singh Karla, Late Shri Bhushan Lal Sawhney, Vikram Dhirani (supra), in the above cases, it was held that an information, regardless of its validity and accuracy from a reliable source, must still be converted into evidence in order to draw an inference and establish the proven fact. It was held that the French authorities had provided the information stored on a USB drive but the Act does not include any provision that assumes the truth of the information received from the Competent Authority under the DTAA between India and France. Therefore, it was held that it is the responsibility of the AO to prove that the material obtained or printed from the Pen Drive contains exactly the contents of the 'Bank Account' as recorded by the bank and only then it can be deemed to possess evidentiary significance of categorical value. Since, there was no incriminating material found during the course of search to support and substantiate the said addition hence it was held that the income relating for relevant AY under consideration was beyond the scope of section 153A of the Act. However, in the given case, as discussed in the above paragraph, the content of information with the revenue was not unverified but had details of the assessee with the relevant financial transactions, the assessee was cornered and finally accepted to have maintained the bank account.

Therefore, these cases are distinguishable to the facts in the present case.

e. In the cases of Renu Tharani, Ambrish Manoj Dhupelia, Parag Dalmia (supra), the issues were decided against the assessee, therefore, there is no need to discuss any further.

18. Ld AR submitted that the alleged documents of bank account with HSBC London belongs to the assessee is not admissible as electronic evidence considering the fact that the revenue has not made efforts to corroborate the contents of the documents under section 65B of the Indian Evidence Act, 1872. Therefore, it cannot be admitted as electronic evidence. It is mandatory on the part of the revenue authorities to follow the conditions laid down u/s 65B(2) and (4) of the IE Act. After careful consideration of facts on record, we are of the view that the relevant documents were confronted before the assessee and the assessee after considering the various contents in the bank account received from the foreign bank, it does not matter how it was acquired, the assessee has accepted the same and proceeded to revise the return of income shows that the documents collected by the revenue from the foreign authorities are genuine and no need to follow the procedure laid down in the section 65B of IE Act considering the fact that the assessee has not retracted the acceptance on the contents of the statement of bank account produced before him neither before revenue authorities in the revision proceedings or appellate proceedings. Therefore, we do not see any reason to consider the above submissions of the Ld AR. Coming to the case law relied by the Ld AR are:

a. Anvar P.V Versus P. K. Basheer and others (supra), we observed that the Hon'ble Supreme Court held that the evidence collected thru Police and Election commission are used as primary evidence, these evidences cannot be admitted since the mandatory requirements of section 65B of the Evidence Act are not satisfied. In the given case, the facts are different considering the fact that

the information are received thru the FT&TR Division and these evidences are forwarded to the respective officers to make the investigations, normally the informations may not contain basic informations or may contain certain information relating to the alleged assessees, upon investigations, the informations used to corroborate with the information collected from the respective assessees. In the given case, the contents of the information are complete and the assessee has accepted the same upon investigation and not preferred to retract the same before any authorities. At this stage, contesting the same is not appropriate. In our view, the Evidence Act is applicable based on the evidential value of the same and it is known fact that it is not applicable in the income tax proceedings. Therefore, in our view the facts in the above case are distinguishable to the facts in the present case.

b. Arjun Pandit Rao Khotkar Vs. Kailash Kushanrao Gorantyal (supra), in this case also, the findings in the Anvar P.V supra was relied and held that admissibility of electronic evidence is based on the drill of section 65B of the Evidence Act. Since we have already held that the above case is distinguishable to the present case, therefore, there is no need to rely on the above case.

c. The other case law relied by the assessee's counsel are on the same line and therefore all these are distinguishable to the facts in the present case and we already discussed the issue in the above paragraphs. Therefore, we dismiss the submissions of the Ld AR.

19. The next submissions of the Ld AR is, the assessment u/s 153A of the Act is bad in the absence of any incriminating material found during the search operation. We observe that the authorities received the documents relating to the foreign bank account maintained by the assessee, with complete details relating to the details of the assessee and family along with the transactions, in

order to verify the same, the search operation was initiated against the assessee, during the search assessment proceedings, the assessee has accepted to have maintained above foreign bank for a specific period. To the extent of the information contained in the bank statement, the assessee has declared the same as his income under the head income from other sources. Before us the assessee now challenges the proceedings initiated under section 153A as bad in law since no incriminating material found during the search. In our considered view, the search was initiated on the basis of some information available with the revenue and the same was confronted with the assessee, no doubt the Investigation Wing had the information about the bank account maintained by the assessee before initiation of search and fact on record that the revenue had not find any material relevant to the above material with the possession of the assessee during the search however when the bank statement was shown to the assessee, he has accepted the same. Based on the fact on record, we are of the view that when the material available with the revenue and same was shown to the assessee with the proper data along with the clear identity of the assessee and his family members with the monthly transactions in the bank statement, the assessee had accepted the same in order to buy peace. In our view, the material with the revenue which was existed prior to search cannot be considered as incriminating material per se, however, after accepting the existence of the bank account and owning up the above transaction, the assessee cannot rake up the issue of incriminating material not found in the search proceedings, in our view, after thought and irrelevant at this stage. Further even the assessee has not retracted the statement till now, proceeded to revise the return of income and paid the relevant tax. Therefore, the search was initiated to verify the information available with the revenue thru the FT&TR division of the CBDT and the same was found to be proper when confronted with the assessee. Therefore, the information collected was confirmed in the search assessment proceedings is nothing but acceptance and confirmation of the existence of such bank account. The important thing is that the assessee not only revised the return of

income and chose not to retract the statement. Therefore, now invoking the jurisdictional issue relying on the several case law is not acceptable at this stage. The findings in the Abhishar Buildwell is as under:

> *"It held that in a case of search under section 132 or requisition under section 132A, the Assessing Officer assumes jurisdiction for assessment under section 153A ; all pending assessments or reassessments shall stand abated. In case any incriminating material is found or unearthed, even in case of unabated or completed assessments, the Assessing Officer would assume the jurisdiction to assess or reassess the "total income" taking into consideration the incriminating material unearthed during the search and the other material available with the Assessing Officer including the income declared in the returns; and in case no incriminating material is unearthed during the search, the Assessing Officer cannot assess or reassess taking into consideration the other material in respect of completed assessments or unabated assessments, meaning thereby, in respect of completed or unabated assessments, no addition can be made by the Assessing Officer in the absence of any incriminating material having been found during the course of search under section 132 or requisition under section 132A of the Act. Court also held that the High Court was right in affirming the order of the Tribunal upholding the addition made on the basis of the incriminating material found during the search. However, completed or unabated assessments can be reopened by the Assessing Officer in exercise of powers under section 147 or 148 of the Act, subject to fulfillment of the conditions as envisaged or mentioned under section 147 or 148 of the Act and those powers are saved."*

20. Therefore, the above decision is factually different to the facts in the present appeal, mere fact that the material gathered by the revenue are confirmed by the assessee in the post search proceedings considering the fact that the search was initiated only on the basis of the fact that the assessee operated a foreign bank account. Therefore, the facts in the Abhishar Builders (supra), Harjeev Aggarwal (supra), Sh. Parminder Singh Kalra (supra), Shri Rajesh Kumar Govindlal Patel (supra) where it was held that the statement recorded u/s 132(4) is not construed to be as incriminating material. In those cases, the search action was initiated and the revenue had not found any incriminating material during the search, they proceeded to collect information post search proceedings and proceeded to make the addition u/s 153A of the Act. However, the facts are totally different in the present case, the search was initiated on the basis of information which was confirmed by the assessee in the search assessment proceedings, further, the assessee has not retracted

means he has accepted, it goes to prove that the information with the revenue is substantially correct. Hence the material with the revenue has to be considered proper and the action of the AO to accept the revised return of income and proceeded to complete the assessment goes to prove that the material with the revenue can be assessable u/s 153A of the Act. Therefore, we have no choice but to reject the contentions of the assessee.

21. The next contention of the assessee is, the sum in question is not taxable in view of Article 23(3) of Indo-UK DTAA on the expression "may be" taxed employed therein. We perused the detailed submissions made by the Ld AR that in case of income declared under the head Income from other sources, the relevant article 23(3) of Indo-Uk is applicable and as per the concept of "may be taxed", the various courts have held that it should be taxed only in the other country of source. We are not in dispute with the above submissions and he has relied on several case law. By acknowledging the various case law on this subject, the facts in this case is quite different to the facts of other cases relied by the assessee. Therefore, the facts in this case is that the assessee has disclosed the deposits in the HSBC London account as income from other sources, since the assessee was not in a position to disclose the sources of such cash deposits. It is the assessee who has disclosed the income voluntarily in its revised return of income and the same was accepted by the AO. It does not mean that the income actually falls in the category of income from other sources. Therefore, we are of the view that the assessee has not actually established or disclosed the sources of the deposits in the above said bank account.

22. Ld AR heavily relied on the decision in the case of Branch Manager, State Bank of India(supra) wherein two residents of Nepal made bank deposits in the SBI, Patna Branch and AO treated the above deposits as income is arising in India. Taxed the same u/s 163 of the Act in the hands of SBI, treated the SBI as agent of above said Nepali citizens. The ITAT deleted the addition by invoking the Art.21 of the Indo-Nepali DTAA and held that such income is

taxable only in the Nepal which was the state of residence of both the Nepali citizens. The above said income was charged to tax as other sources by invoking sec.69 of the Act, the non residents are liable to tax under the Act only on income which has arisen in India. It was submitted that it is implicit and clear that income being sums deposited in bank account arise in the country in which the bank account is located. It is clear from the finding that as per Art.21, the income is chargeable to tax only in the country in which the person in resident. It was submitted that as per the Indo-UK treaty the relevant article is 23 and there is material difference between the article 21 of UN convention and OECD convention. The article 23(3) is applicable in this case and income is chargeable to tax only in the country where the deposits was made by drawing parallel with the concept of "may be taxed" mentioned in the above article. After careful consideration, we are of the view that the case of SBI, Patna branch is clearly held that the Nepali citizens made the deposits in the Indian bank and it is taxable in the country of residence by invoking the Art. 21 of the DTAA. In the given case, the assessee is a resident of India and global income is chargeable to tax in India and any tax suffered by the assessee can be claimed as tax credit. The important issue is, whether the assessee has declared the income in source country ie., UK and whether the assessee has declared the relevant income in the source country. There is nothing coming out of the submissions made by the assessee. Merely because the income was declared by the assessee as income from other sources and the same was accepted by the AO, the article 23 will not be invoked automatically. The assessee first has to establish the source of income declared in the UK relevant to the bank deposits or establish that the bank deposits are not generated in India and earned outside India, further the income is falling under the category of other income without considering the fact that global income is chargeable to tax in the case of Indian resident. Therefore, the case of SBI, Patna branch is not applicable in the present case and distinguishable.

23. As discussed above, the assessee itself declared the income under the head income from other sources without clearly disclosing the nature of

income earned by the assessee in the source country in this case, UK. Merely because the AO accepted the same as such, it does not mean that the article 23(3) will automatically apply. Therefore, this contention of the assessee also dismissed.

24. With regard to another contention raised in additional ground that the impugned assessment was completed with extended period due to reference to FT & TR division of CBDT calling for certain information, he submitted that the exchange of information between India and Switzerland applicable on or after 01.04.2011, therefore, the AO sent the request for calling information in the case of assessee for the period 2004-05 and 2005-06. The reference itself is invalid in law. After considering the above submission, we are of the view that the AO made the reference to FT&TR division for collecting information from the UK counterpart for the simple the reason that the information relevant for the case under consideration is from UK and not from Swiss even though the original information from Swiss authorities however, in this case the relevant information required from UK. There is no bar on the part of the AO to seek information from FT&TR division. This contention also cannot be accepted at this stage.

25. Accordingly, the various grounds including additional grounds raised by the assessee are dismissed for the impugned AY 2006-07.

26. With regard to other appeals filed by the assessee relating to AY 2007-08 which emanates from the additions proposed by the AO on the deposits made by the assessee during the current AY which are similar to the additions proposed in the AY 2006-07. Since the issue raised by the assessee are similar to the issues raised in the AY 2006-07, the decision taken in the AY 2006-07 are applicable mutatis mutandis for this year also. Accordingly, the appeal preferred by the assessee is dismissed.

27. With regard to the appeals filed by the assessee for other assessment years 2008-09 to 2012-13, which are relating to the additions proposed by the AO on the basis of accrued interest on the outstanding amount in the bank account maintained by the assessee in the HSBC bank, UK. In this regard, Ld AR submitted that the additions proposed by the AO based on the bank statement available with the revenue and in the same statement, it is clearly shows that the assessee had closed the account and the statement also clearly shows that the period for which the statement was generated and description in the body of the statement clearly shows that the assessee has closed the account. Therefore, the AO cannot apply the presumption to tax the income, he can only tax on the actual income accrued to the assessee. On the other hand, Ld DR objected to the above submissions and the assessee has not submitted any bank statement and also failed to sign the waiver form to obtain the above said bank statement through the FT& TR division.

28. In this regard, Ld AR has filed the below detailed submissions:

5. Notional interest could not have been added to income of AY 2008-09 to AY 2012-13 [AY 2008-09 to AY 2012-13: Ground Number 4]

5.1. The Ld. AO added notional interest to the incomes for AY 2008-09 to AY 2012-13 alleging that the Appellant-Assessee ought to have earned interest at the rate of 4% from the alleged bank account. This is incorrect.

5.2. Even as per the bank statement relied upon by the department, the bank account is indicated to be closed in October 2006. Further, the Assessee in his statement dated 23.08.2011 (Page 7 to 39 of Paper Book Volume 1) had also stated that the bank account stood closed in 2006. The relevant extract of the statement (Page 36 of Paper Book Volume 1) is reproduced below:

"Q No. 52-Pls furnish date wise deposits and withdrawals from the foreign bank account including amount.

Ans:- This was an old a/c which was closed in 2006 and at present I am not having any statement with me. Regarding Doha and Cyprus a/c I have already given my reply vide question no. 25."

5.3. The department had identified peak balance of USD 608,200 in the bank statement in relation to period of August 2006. However, no interest was added for AY 2007-08 for the period between September 2006 to March 2007. The

statement in the possession of the department does not indicate that any interest was being credited to the bank account,

5.4. The Hon'ble ITAT Delhi in Vikram Dhirani (Relevant para: 22) (supra) and Late Shri Bhushan Lal Sawhney (Relevant para: 12) (supra) has also held that the AO could not have added any notional interest to the income of the Assessee on a mere suspicion.

5.5. Also, no additions on account of notional bank interest has been made for AY 2013-14 and subsequent AYS.

29. On the other hand, the ld DR relied on the order of lower authorities.

30. Considered the rival submissions and material placed on record. We observed from the record that the AO proceeded to make the addition in AY 2006-07 and 2007-08 only on the basis of bank statement obtained from the data contained in pen drive forwarded by the French Authorities relating to the various account maintained in the HSBC. The information contained in the above sourced information which contained the details of account held by the assessee and his family members for the period Nov'2005 to Oct'2006. Further the relevant information contained in the above statement itself shows that the account was in closed status. Therefore, in our considered view, the AO cannot presume that the account was in existence beyond the period mentioned in the above statement. The information with the department was only the above said statement, beyond that they do not have any information nor they recovered any information during the search or subsequent proceedings. Therefore, the AO cannot apply the concept of presumption to tax the notional income. Hence, we are inclined to allow the grounds raised by the assessee in the AYs 2008-09 to 2012-13.

31. With regard to penalty appeals filed by the assessee, the Ld. AR submitted that the penalty was levied based on the bank account maintained by the assessee in HSBC bank account, London. He submitted that the assessee has accepted the maintenance of bank account during the

assessment proceedings and filed the revised return of income voluntarily to buy peace of mind and to avoid protracted litigation. Therefore, the Ld. AO has completed the assessment based on the revised return of income. AO again proceeded to levy the penalty and further he submitted that there is no material with the department about the maintenance of bank account by the assessee only because of old age and to buy peace of mind the assessee has proceeded to disclose the undisclosed bank account in its return of income. In this regard, he has submitted a detailed submissions as under:

"6. For AY 2006-07 and 2007-08 penalty under section 271(1)(c) of the Act is not leviable since the assessment under Section 153A is based income disclosed in the return of income filed pursuant to notice under section 153A of the Act.

[AY 2006-07 to AY 2012-13: Ground Number 1 and 2]

6.1. The Appellant-Assessee had filed returns of income under section 153A of the Act on 21.11.2011 disclosing the amount alleged peak credits of USD 6,08,200 as income of AY 2007-08. Letter dated 24.11.2022 was also written reserving a right to revise the returns in respective years. Show Cause Notice dated 06.01.2014 was issued proposing to add part of the amount in AY 2006-07 and balance in AY 2007-08. A further revised return for AY 2006-07 and AY 2007-08 was filed on 16.02.2015, splitting the income already returned entirely for AY 2007-08 into partly for AY 2006-07 & Balance for AY 2007-08. Impugned assessment is based on these returns filed under Section 153A of the Act.

6.2. Penalty proceedings have been initiated under section 271(1)(c) of the Act and imposed on the ground of concealment of income/ furnishing inaccurate particulars of income in the original returns filed under Section 139(1). No concealment is alleged in the revised returns filed under Section 153A.

6.3. In Shri Prem Arora v. DCIT, ITA No.4702 (Del) of 2010, ITAT Delhi dated 09.03.2012 (Relevant para: 30-33, Page 717-735 of case law compendium, Volume 3.2) a search and seizure action under section 132(1) of the Act was carried out in the case of assessee pursuant to which assessee filed returns of income for the relevant AY under section 153A of the Act admitting income from undisclosed business activities. The assessing officer completed assessment accepting the returned income filed under section 153A and invoked penalty under section 271(1)(c) read with section 274 of the Act. On appeal, the court held that once returned income under section 153A is accepted by the AO, it can neither be a case of concealment of income nor furnishing of inaccurate particulars of such income. The court also held that penalty under section 271(1)(c) cannot be imposed by invoking Explanation 5 in AY 2004-05 in respect of cash found in previous year relevant to AY 2007- 08, merely on presumption that assessee might have been in possession of cash throughout period covered by search assessments.

6.4. In ITO v. Shri Neeraj Jindal, ITA Nos.4398 & 4399/Del./2012, 19.08.2015, ITAT Delhi (Relevant para: 26 & 27, Page 736-747 of case law compendium, Volume 3.2) dated 19.08.2015, a search and seizure operation under section 132(4) of the Act was carried out in the premises of the assessee's group companies and directors of the company. A notice under section 153A of the Act was issued. In response to it the assessee filed his return of income declaring additional income. The AO completed the assessment under section 153A of the Act, read with section 143(3) of the Act after accepting the declared income. He also imposed penalty proceedings under section 271(1)(c) of the Act. Aggrieved, the assessee made an appeal before the CIT(A) where it was held that for the purpose of imposition of penalty, the original return of income filed under section 139 of the Act could not be considered and penalty under section 271(1)(c) of the Act was imposable only when there was a variation in assessed and returned income. If there was no variation, there will be no concealment and thus the question of levy of penalty would not arise. Upon appeal by the revenue against the CIT(A) order, the ITAT held that the concealment of income is to be determined with reference to the return of income to be filed in response to notice u/s 153A of the Act. Once returned income filed u/s 153A of the Act is accepted by the assessing officer it can neither be a case of concealment of income nor furnishing of inaccurate of particulars of such income. Hence, penalty u/s 271(1)(c) of the Act is not exigible.

6.5. The above order of ITAT Delhi was further confirmed by the Hon'ble Delhi High Court in PCIT v. Neeraj Jindal, [2017] 393 ITR 1 (Delhi) dated 09.02.2017 (Relevant para: 28 & 29, Page 748-759 of case law compendium, Volume 3.2) wherein it was held that the when an assessee has filed revised returns after search had been conducted and such revised return was accepted by the AO then merely by virtue of the fact that such return showed a higher income, penalty under section 271(1)(c) cannot be automatically imposed.

6.6. Similarly, ratio was also laid down by the Hon'ble Punjab & Haryana High Court in CIT v. Suraj Bhan, [2007] 294 ITR 481(Punjab & Haryana) dated 19.04.2006 (Relevant para: 6, Page 760-761 of case law compendium, Volume 3.2) and Hon'ble Supreme Court in the case of PCIT v. Prabhjot Kaur Chhabra, [2020] 269 Taxman 34 (SC) decided on 02.07.2019 (Relevant para: Para 7, 8, 9 & 10, Page 762-764 of case law compendium, Volume 3.2)

6.7. Explanation 5A is inapplicable for a simple reason. Undisputedly, the alleged bank statement was already with the department when they came for search. It was not found in original or no copy during the search of the Appellant-Assessee premises. For this short explanation 5A is not attracted. In addition, the judgment of Hon'ble ITAT Delhi in Prem Arora (supra) and the ruling of ITAT Delhi in Neeraj Jindal (supra) and ruling of Hon'ble Delhi High Court in Neeraj Jindal (supra) rules out applicability of Explanation 5A.

6.8. In CIT vs. SAS Pharmaceuticals, [2011] 11 taxmann.com 207 (Delhi)), (Relevant para: Para 12, 13, 14, 15, 16 & 17, Page 765-771 of case law compendium, Volume 3.2) certain discrepancies were found during a survey which resulted in surrendering of certain amount as income by the assessee. The question before the Hon'ble High Court of Delhi was whether this would attract penalty upon the assessee under the provisions of section 271(1)(c) of the Act.

The Hon'ble high Court held that there cannot be any penalty only on surmises, conjectures and possibilities and that section 271(1)(c) of the Act has to be construed strictly and therefore unless it is found that there is actually a concealment or non- disclosure of the particulars of income, penalty cannot be imposed. Noting the fact that may be the assessee would have not disclosed the income but for the said survey, the Hon'ble High Court held that in the facts of the said case, no such concealment or non-disclosure of income was made as the assessee had made a complete disclosure in the income-tax return and offered the surrendered amount for the purposes of tax.

6.9. Further, in CIT vs. Suresh Chandra Mittal [(2001) 251 ITR 9] (Page 772-773 of case law compendium, Volume 3.2) the Hon'ble Supreme Court upheld the view taken by the Hon'ble Madhya Pradesh High Court. The Hon'ble High Court of Madhya Pradesh in Commissioner of Income Tax v. Suresh Chandra Mittal [(2000) 241 ITR 124] (Page 774- 776 of case law compendium, Volume 3.2) has held that once the revised assessment was filed by the Assessee and regularised by the Revenue and once the Assessing Authority had failed to take any objection in the matter, the declaration of income made by the assessee in his revised returns and his explanation that he had done so to buy peace with the Department and to come out of vexed litigation could be treated as bona fide in the facts and circumstances of the case. Accordingly, the Hon'ble High Court held that the Tribunal was justified in cancelling the penalty levied by Assessing Officer and affirmed by CIT(A) in the facts and circumstances of the case.

6.10. Similar view has been taken in the following judgements:

a) The Hon'ble Madhya Pradesh High Court in CIT v. Shyamlal M. Soni ([2005] 276 ITR 156). (Relevant para: Para 7 & 8, Page 777-778 of case law compendium, Volume 3.2)

b) The Hon'ble ITAT Mumbai in the case of DCIT v. Gopichand Roopchand Rajani (ITA No. 2158/Mum/2010 dated 27.05.2011. (Relevant para: 13, 14 & 15, Page 779-792 of case law compendium, Volume 3.2)

c) The Hon'ble ITAT Hyderabad in the case of Shri P.V. Ramana Reddy v. ITO, ITA Nos. 1852-1857/Hyd/2011 dated 06.01.2012 (Relevant para: 8, Page 793-812 of case law compendium, Volume 3.2)

7. There are conflicting decisions on applicability of Notification No.91/2008 dt.28.8.2008 and that too retrospectively. Hence, no penalty is imposable under Section 271(1) (c) for AY 2006-07 & 2007-08.

[AY 2006-07, AY 2007-08: Ground Number 5 to 8 (Additional Ground)
AY 2008-09: Ground Number 7 to 10 (Additional Ground)
AY 2009-10, AY 2010-11, AY 2011-12 and AY 2012-13: Ground Number 7 to 9 (Additional Ground)]

7.1. The Appellant-Assessee submits that the interpretation of the phrase "may be taxed" in Article 23(3) of the India-UK DTAA and non-taxability of income of Indian resident arising in foreign country under Income Tax Act, 1961 has been

settled in assessee favour by way of judicial precedents. Notification 91/2008 was issued only on 29.8.2008 modifying this legal position.

7.2. Even after that date, in view of DCIT Vs. Bank of India (supra) (Relevant paras: Para 5 & 12, Page 551-561 of case law compendium, Volume 3.2) it was held that notification cannot override the treaty. In such a scenario, penalty u/s.271(1)(c) of the Act cannot be levied.

7.3. The decision în Essar Oil, dated 28.08.2013 (supra) (Relevant paras: Para 54, 60 &61, Page 562-637of case law compendium, Volume 3.2) views that Notification dated 29.8.2008 will be effective from date of coming in to force of Section 90(3) under which it is issued namely 1.4.2004. Surely, penalty cannot be levied under Section 271(1)(c) of the Act in such circumstances.

7.4. In DCIT v. Shri Shah Rukh Khan, [2018] 93 taxmann.com 320 (ITAT Mumbai) dated 21.05.2018 and DCIT v. Shahrukh Khan [(2019) 103 taxmann.com 252] dated 08.03.2019 the issue before the Tribunal was with regards to taxability of income of assessee from immovable property as per Article 6 of DTAA between India and UAE read along with the Notification No 91, dated 28.08.2008 issued by the CBDT. The court observed that the issue in this case is whether Notification No 91, dated 28.08.2008 will have a superseding effect over the DTAA entered between Government of India along with the Government of any other country. The court observed that the above issue was debatable and had come before this tribunal in the case of Essar Oil Ltd. v. Addl. CIT (supra) from where it has been appealed and pending before the Hon'ble Bombay High Court. There was another ruling of Bank of India v. DCIT (supra) where in a similar issue emerging in context of India-Kenya DTAA. It held by the co-ordinate bench that any notification or circular cannot alter the nature of income that had been specifically included in the DTAA's. Therefore, on the basis of conflicting views of two benches of the Tribunal on the issue under consideration, ITAT held that it could be concluded that the issue under consideration was not free from doubts and debates, thus the assessee could not be subjected to levy of penalty under section 271(1)(c) of the Act.

7.5. In DCIT v. Johnson & Johnson Ltd., ITA No. 3781/Mum/2016, 20.12.2019, ITAT Mumbai (Relevant paras: Para 13 & 14, Page 838-842 of case law compendium, Volume 3.2) the issue was whether the profits of foreign branch in the case of assessee are liable to be taxed in India. Matter relates to AY 2008-09. The court observed that it is a debatable issue as there are divergent views by two different benches of the ITAT on the above issue. The court held that it is a trait law that where the issue is debatable, no penalty under section 271(1)(c) of the Act is leviable.

8. Penalty under section 271(1)(c) for exchange rate difference in AY 2006-07 is not sustainable

8.1. Pursuant to the search, the Appellant Assessee had, to buy peace of mind, in November 2011 suo-motto paid requisite taxes considering the income entirely to be of AY 2007-08. The Appellant Assessee had also reserved the right to offer the income to tax in respective years. Returns were filed under section 153A on this

basis assessing the entire income to tax in AY 2007-08 (Kindly refer Page 40-42 of the Paper Book, Volume 1)

8.2. On 06.01.2014, the Appellant-Assessee was show-caused that a part of the peak balance of USD 575,010 stated in alleged bank statement was in relation to AY 2006-07 and as to why the sums should not be taxed in AY 2006-07, balance number of USD 5,75,010.88 being taxable in AY 2007-08.

8.3. In reply to the aforesaid notice, the Appellant-Assesse provided his consent to pay taxes on peak balance in AY 2006-07 provided the said balance was reduced from the peak balance for AY 2007-08. (Kindly refer Page 44-63 of Paper Book, Volume 1)

*8.4. Thereafter, on 16.02.2015 the Assessee proceeded to file revised return of income for AY 2006-07 and 2007-08. The Assessee converted USD 575,010 representing peak balance on January 2006 as per RBI exchange rate as on 31.01.2006 of 1 USD = INR 44 and added income of Rs. 2.53 * 0 * 0.44 /- to AY 2006-07. The Assessee adopted the exchange rate on 31.01.2006 as the bank statement stated the peak balance in January 2006 without reference to any particular date of the month. For the AY 2007-08, assessee adopted exchange rate of 1USD = Rs . 46.41 and offered USD 33, 189 = Rs * 0.15 ,40,318 as income for A Y 2007-08.*

8.5. Exchange rate adopted by assessee for A Y2007-08 was acceptable by assessing officer for this year A Y2007-08 .

8.6. However, the Ld. AO in his assessment order for A Y 2006-07 stated that the Assessee ought to have adopted the exchange rate based on the average rate for the month and made addition amounting to Rs. 2,28,854/- by adopting the rate as 1USD= INR 44.398/-

8.7. The conversion of income from USD to INR was based on the bona fide belief that the rate of exchange for the last day of the month should be adopted. Further, the Assessee had made complete disclosures regarding exchange rate adopted in the revised ITR.

8.8. Consequently, penalty under section 271(1)(c) in relation to exchange difference is not sustainable.

9. Ld. CIT(A) should not have arbitrarily increased quantum of penalty from 100% to 200%.

[AY 2006-07, AY 2007-08: Ground number 3]

9.1. At the time of passing the assessment orders, the Ld. AO had levied penalty under section 271(1)(c) of the IT Act at the rate of 100% of the tax sought to be evaded by the Appellant Assessee. During the proceedings before the first appellate authority, the Ld. CIT(A) increased the penalty from 100% to 200% of the tax sought to be evaded by the Appellant Assessee. The Ld. CIT(A) cited the non-cooperation of the Appellant-Assessee in submitting the requisite details before the Ld. AO as the basis of increase of penalty.

9.2. The provisions of section 271(1)(c) cast a discretion on the Assessing Officer to levy penalty between 100% to 300% of the tax sought to be evaded by an assessee. The legislature in its discretion has reserved this discretion for the Assessing Officer.

9.3. CIT(A) may have the power to increase the addition or penalty, but such powers must be exercised only where the lower authority has not acted in accordance with law. The powers cannot be exercised merely to disturb the discretion of AO.

9.4. The penalty levied by Ld. AO was acted in accordance with law by levying the penalty at the rate of 100% of tax sought to be evaded. Having done so, the power of CIT(A) of increasing the penalty cannot be read to usurp the powers of AO and interfere with discretion that is otherwise reserved for AO.

9.5. The Ld. CIT(A) has cited that the Appellant-Assesse's alleged non-cooperation in submitting a consent letter to enable department to obtain copy of bank statement during the assessment proceedings as the basis for increasing the penalty from 100% to 200%. In doing 50, the Ld. CIT(A) has erred in law. The legislature has prescribed penalty under section 271(1)(b) for not submitting details during the assessment, In fact the Appellant-Assessee was penalised in terms of the said provision separately. Further, prosecution proceedings under section 276D for AY 2006-07 is also initiated against the Appellant-Assessee for not replying to a notice u/s 142(1) of the Act. Hence, enhancement of penalty from 100% to 200% under Section 271(1)(c) for this reason is invalid."

32. On the other hand, Ld. DR supported the findings of the lower authorities.

33. Considered the rival submissions and perused the material placed on record and various case law relied by the Ld AR. After considering the same, we are of the view that the revenue had information relating to the bank account maintained by the assessee way back in AY 2005-06 and 2006-07 in the search proceedings initiated on 23/08/2011. The above said bank account information was obtained from the French Authorities and in order to confirm the same, the assessee was searched and post search proceedings, the assessee had accepted the same as his account and could not confirm the sources for the same. The assessee had accepted the same in order to buy peace with the department and revised the return of income. The AO has accepted the revised return of income and proceeded to complete the assessment.

34. The AO initiated the penalty proceedings considering the fact that the assessee has not declared the same in the original return of income filed u/s 139(1) of the Act. Strictly speaking, we have already held in the quantum proceeding that the information collected by the revenue from foreign authorities and based on the above information, the search was initiated and during the search no incriminating material was found and only because the assessee had accepted the existence of bank account in the search assessment proceedings, we held that the income accepted by the assessee is chargeable to tax and assessable u/s 153A of the Act. We came to the conclusion based on the fact that the search was initiated only to substantiate the existence of such bank account in the HSBC Bank. Since the assessee accepted the same, we have concluded that the material with the revenue as proper and true. However, for the purpose of penalty, we have to analyze the circumstances and situation to levy the penalty. In this case, no doubt the material for initiating search was already with the department and in the search proceedings, there was no material found relating to any of the alleged transactions. Only during the search assessment proceedings, the assessee had to accept the same to buy peace with the revenue and accordingly, the AO had accepted the revised return of income to complete the quantum assessment. The information submitted by the assessee in the revised return of income was accepted by the AO.

35. We have analyzed whether the penalty can be imposed under explanation 5A of section 271(1)(c) of the Act, for the sake of clarity, the same is reproduced below:

> *"Explanation 5A.— Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—*
>
> *(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or*
>
> *(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other*

documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of search and,—

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income."

36. From the above, it is clear that any material found during the search which consist of money, bullion, jewellery or other valuable article/thing and the assessee discloses the same in the return of income filed subsequent to the search is considered deemed to have concealed the particulars of income for the purpose of section 271(1)(c) of the Act. In the given case, we already discussed this issue while dealing with the issue of incriminating material, the revenue has not found any material during the search which was the main reason for the additional income declared by the assessee rather, the assessee had accepted the contents of the bank account only in the post search assessment. Therefore, the explanation 5A cannot be invoked in the present case due to the fact that there was no incriminating material found during the search and such material was not applied to revise the return of income. The explanation 5A of section 271(1)(c) can be invoked only in the situation wherein the department finds incriminating material found during the search and in the given case, the department had the material prior to initiation of search. We have to interpret the provision literally in order to invoke the provisions of penalty whereas in the quantum appeal, certain information can be interpreted in order to confirm the quantum owing to the situation. In the given case, the assessee had accepted the existence of bank account in order to buy peace and the situation was such that the search was initiated based on the information already existed with department. In the search they could not

find any material to substantiate the same. Only because the assessee had accepted the bank account only in the search assessment proceedings. In our view the penalty can be imposed only on the basis of material found during the search in order to invoke the explanation 5A of section 271(1)© of the Act. Therefore, in our view the AO had accepted the revised return of income and had not found any misreporting or concealment of income or even inaccurate particulars of income. Therefore, we are inclined to dismiss the penalty levied by the AO in the present case for the AY 2006-07 and AY 2007-08. Further, Ld CIT(A) has increased the quantum of penalty from 100% to 200% of Tax sought to be evaded. Since we have already deleted the penalty levied by the AO, the enhancement of above said penalty by the Ld CIT(A) also deserves to be deleted. Accordingly, the grounds raised by the assessee in AYs 2006-07 to 2007-08 are allowed.

37. With regard to other penalties levied by the AO, in the quantum appeals filed by the assessee in AY 2008-09 to 2012-13, we already held that the AO had applied the presumptions to make the addition of interest income with the belief that the assessee had maintained the funds in the HSBC Account in the subsequent years also. Since, we have deleted the above additions, imposing the penalty on the above interest income is not proper. Accordingly, we direct the AO to delete the penalty levied for the AY 2008-09 to AY 2012-13. Accordingly, the appeals filed by the assessee for AY 2008-09 to AY 2012-13 are allowed.

38. With regard to departmental appeal in ITA No. 3368/Del/2016, the AR brought to our notice at page 19 to 22 of the assessment order and he also prayed our notice at page 46 to 48 of the appellate order and submitted that the Ld. CIT(A) has not looked into the aspect of the expenditure and he objected to the findings of the Ld. CIT(A). On the other hand, Ld. AR submitted as under:

> *10. The Ld. CIT(A) has rightly deleted addition relating to alleged fictitious expenditure in relation to AY 2010-11.*

[Department Appeal ITA No. 3368/DEL/2016, AY 2010-11]

10.1. The Ld. AO had made additions amounting to Rs. 2,28,00,000/- citing an accountant' note as the basis of concluding that the Appellant-Assessee had booked fictitious expenditure.

10.2. In doing so, the Ld. AO erred on law and in facts considering the following position:

a. That the note was merely a lose sheet and did not have evidentiary value in isolation.

b. Without prejudice, on perusal of the note it is evident that the note was prepared on 16.02.2010 i.e., before the closure of financial year 2009-10 relevant to AY 2010-11 and that the alleged amount represented the amount that the Appellant-Assessee was expecting to incur before the closure of financial year.

c. That the Appellant-Assessee follows cash system of accounting, and that the Appellant has actually paid for the expenses claimed by him before the closure of financial year and deducted taxes in accordance with the provisions of IT Act. Therefore, the accountant note could not have been an after through prepared after the closure of financial year to book fictitious expense as alleged by Ld. AO.

d. That the Appellant-Assessee had produced the details of all the expenses and the Ld. AO could not even identify any expense which was not genuine.

e. That the Appellant-Assessee explained the content of the note in detail and the Ld. AO has not been able to counter the facts put across by the Appellant-Assessee.

f. That majority of the expenses incurred by the Appellant-Assessee (i.e., about 88% of the total expenses) were in the form of salaries and that the details of these individuals was made available to Ld. AO in relation to which no adverse inference has been drawn."

39. Considered the rival submissions and material placed on record. On careful consideration of facts, we observed that the officers found a loose sheet having certain details of expenses, which may or may not have any relevance to the accounts. The loose sheet never have a evidentiary value unless it is brought on record that these were having direct link with the financials or to the activities of the assessee. In this case, it is only certain probable expenses were recorded by the accountant, which is only a projected expenses and the assessee has already recorded the actual expenses on cash basis in its books of account, therefore, this loose sheet cannot be the basis of

any addition. Hence, we do not see any reason to interfere with the findings of the Ld CIT(A). Accordingly, the grounds raised by the revenue are dismissed.

40. In the result, the appeals filed by the assessee on quantum for AY 2006-07 and AY 2007-08 are dismissed and for AY 2008-09 to AY 2012-13 are allowed. With regard to penalty appeals filed by the assessee for AY 2006-07 to AY 2012-13 are allowed and appeal preferred by the revenue in ITA 3368/Del/2016 for AY 2010-11 is dismissed.

Order pronounced in the open court on 12/06/2024.

-Sd/-	-Sd/-
(SUDHIR PAREEK)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated:12/06/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi