Tenet Tax & Legal Private Limited

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## AO couldn't make additions due to deposit of money in Swiss Bank if assessee became NR decades ago

**Summary – The Mumbai ITAT in a recent case of Dipendu Bapalal Shah., (the Assessee) held that where additions were made to income of assessee, who became a non-resident decades ago, in respect of cash deposits in his bank account outside India, since there was no income accrued or arised to assessee in India since long, impugned additions were unjustified**

**Facts**

- The assessee was an individual who was a non-resident as per section 6. The assessee was partner in a partnership firm, KSBC in India till 1978 and became non-resident in 1979. The case of the assessee was opened by the Assessing Officer on the basis of a information (called as 'Base Note') which was received from the office of DIT(Inv.) pertaining to a bank account of the assessee with HSBC Bank, Geneva, Switzerland. In the assessment order, the Assessing Officer, had made a strong presumption of the amounts in the HSBC Bank account being undisclosed lying therein being sourced from India. The Assessing Officer held that the amounts deposited were unaccounted deposits sourced from India and therefore taxable in India. The Assessing Officer had made additions in the case of assessee after taking cognizance of the fact that an addition of the same amount was made in the cases of DS and KS who were other partners of a partnership firm, KSBC in which the assessee was partners in their respective assessments by the Addl. Commissioner.
- On appeal, the Commissioner (Appeals) deleted the addition made by the Assessing Officer.
- On revenue's appeal to the Tribunal:

**Held**

- It was submitted by assessee before Assessing Officer that he is a non-resident as per section 6 since 1979. Copies of his passport were also submitted to the Assessing Officer in order to substantiate his claim of being a non-resident under the Act. Since, he is a non-resident, assessee submitted that his non-Indian bank account does not fall within the purview of the Act. In support of his claim, he also submitted a duly notarized affidavit stating that he is a non-resident as per section 6 since 1979. He holds a Belgian passport. No income has either been received or accrued to him in India which was liable to tax under the provisions of the Income-tax Act, 1961 during the assessment years 2006-07 and 2007-08. The Indian funds are not the source of amounts deposited in bank accounts held by him outside India.
- Further, it was submitted that the scope of income in case of a non-resident is defined under the provisions of sub-section 2 of section 5. As per this section, a person who is a 'non-resident' has to pay tax only on that income which is either received or is deemed to be received by him in India, or accrues or arises or deemed to accrue or arise to him in India, during the year. Thus, he will be liable to tax only in respect of income received or accrued to him in India.

- The assessee also submitted that he was not having any of his business operations in India during assessment year 2006-07 hence, there is no income which has either deemed to accrue or arise in India under section 9. Thus, the initial contribution or even other amounts in the foreign bank account does not fall under the purview of section 9. Thus, the peak balance appearing in the bank statement of the foreign bank account should not be added to the total income of the assessee.
- Without prejudice to the above, he submitted that the peak balance appearing in the bank statement of this foreign bank account has already been added to the computation of income and subjected to tax in the hands of DS and KS in their respective assessments for assessment year 2006-07 and Assessment year 2007-08. A copy of the order passed by Assistant Commissioner and by Commissioner (Appeals) in their respective cases was submitted to the Assessing Officer for his consideration.
- Further, both these assessees DS and KS have paid taxes on the amount of addition to their respective computation of income. A summary of the taxes paid by them was also submitted to the Assessing Officer for his consideration. However, Assessing Officer did not agree with the assessee's contention and added peak credit in the account of HSBC Geneva in assessee's income. The Assessing Officer has made additions in the case of assessee after taking cognizance of the fact that an addition of the same amount was made in the cases of DS and KS in their respective assessments by the Addl. Commissioner.
- By the impugned order, the Commissioner (Appeals) deleted the addition by observing that assessee is indeed a non-resident under section 6 and this fact has not been disputed by the Assessing Officer. Under the provisions of the Act, taxability of a non-resident is determined with reference to the provisions of section 5(2) read with section 9. In the instant case undisputedly the assessee is a non-resident since 1979, as per the provisions of section 6. The scope of income in case of a non-resident is defined under the provisions of sub-section (2) of section 5. As per this section, a person who is a 'non-resident' has to pay tax only on that income which is either received or is deemed to be received by him in India, or accrues or arises or deemed to accrue or arise to him in India, during the year, therefore assessee will be liable to tax only in respect of income received or accrued to him in India. Further, section 9 lays down the provisions relating to income which is deemed to accrue or arise in India. As the assessee was not having any of his business operations in India during Assessment year 2006-07 and Assessment year 2007-08, there is no income which has either deemed to accrue or arise in India under section 9. Thus, the initial contribution or even other amounts in the foreign bank account mentioned by Assessing Officer in the notice does not fall under the purview of section 5(2) read with section 9. Accordingly, the assessee is required to be pass through aforesaid test of taxability of non-resident. It is a well settled position in law that a 'non-resident', having money in a foreign country cannot be taxed in India if such money has neither been received or deemed to be received, nor has it accrued or arisen to him or deemed to accrue or arise to him in India.

- Under section 5(2) the income accruing or arising outside India is not taxable unless it is received in India. Similarly, if any income is already received outside India, the same cannot be taxed in India merely on the ground that it is brought in India by way of remittances. It is also found that the assessee in his affidavit has clearly stated that he was a settlor of a trust outside India which he had created for the benefit of his family members with his initial contribution. Further, he has also stated that none of the discretionary beneficiaries have contributed any funds to the said trust. However, the content of this affidavit was nowhere declined by the Assessing Officer nor was held to be not true. In view of the above, the assessee being a non-resident, having money in a foreign country cannot be called upon to pay income tax on that money in India unless it satisfies the tests of taxability of non-resident under the provisions of the Act, which in the instant case is not getting satisfied in the case of the assessee, thus, the bank account of HSBC Bank, Geneva is outside the preview of this Act.
- The Commissioner (Appeals) as dealt with the issue threadbare and after applying judicial pronouncements laid down by High Court and Supreme Court reached to the conclusion that assessee being non-resident is not liable to tax in respect of money lying in the foreign country unless Assessing Officer bring something on record to show that assessee has not fulfilled the test of taxability of non-resident under the provisions of the Act. The detailed finding so recorded by Commissioner (Appeals) are as per material on record and do not require any interference.
- The Commissioner (Appeals) also observe that a circumstantial evidence whenever used has to be conclusive in nature. Thus, the circumstantial evidences relied on by the Assessing Officer nowhere lead to the conclusion that the amounts in the alleged foreign bank account are sourced from India. The Commissioner (Appeals) also recorded a finding to the effect that the source of deposits is no where proved by the four instances relied on by the Assessing Officer being termed as circumstantial evidence. The Assessing Officer has himself observed based on the survey report that the assessee had retired from partnership firm since October 1978. Also, the Assessing Officer observed in the next para that the assessee became a non-resident as per section 6 since 1979 which is the year after which he retired from being the partner in the firm. Thus, the addition of undisclosed income of the firm KBSC during the financial year 2011-12 has no connection with the assessee, as he was not a partner during this period. In the instant case, even it is seen that the bank account with HSBC Bank, Geneva was opened during the year 1997. Hence, the circumstantial evidences discussed above including the report of Indian Express of 10 February 2015, relied by the Assessing Officer nowhere conclusively establishes that the source of the deposits, since the inception, in the bank account was from India. In view of the above discussion, there is no any infirmity in the order of Commissioner (Appeals) for deleting the addition made in respect of deposits in HSBC account, Geneva in the hands of non-resident assessee.