

ITAT deleted additions as amount deposited in assessee's Foreign Bank a/c didn't belong to him

Summary – The Mumbai ITAT in a recent case of Deepak B Shah., (the Assessee) held that where addition was made to income of assessee on account of amount deposited in foreign bank account through a trust owned by an NRI, since it was found that said amount in foreign bank account was actually owned by said NRI and he had also admitted some, impugned addition was unjustified

Facts

- The assessee had filed income-tax returns which were processed under section 143(1). Subsequently, an information was received by Government of India from French Government under DTAA that some Indian nationals and residents had foreign bank accounts in HSBC Bank, Geneva, Switzerland which were not disclosed to the Indian Taxation department. The said information was received in the form of a document known as 'base note' wherein various personal details of account holders such as name, date of birth, place of birth, sex/gender, residential address, profession, nationality, date of opening of bank account in HSBC bank, Geneva and balances in certain years etc. were mentioned. After receiving 'base note' as a part of Swiss leaks, the Investigation Wing of Income-tax Department conducted a survey under section 133A at the premises of one, KBSC. During the course of survey proceedings, the 'base note' was shown to the assesseees DBN and KNS and it was indicated that the revenue was of the view that both the assesseees had foreign bank account. As a matter of fact the said foreign bank account was opened in 1997 by an overseas discretionary Trust known as 'B' Trust set up by MDDBS, an NRI since 1979 and a non-resident under section 6. Both the assesseees with Indian residency were named as discretionary beneficiaries of the said trust.
- Accordingly, the Assessing Officer after initiating the proceedings under section 147 added peak balance *i.e.* in the hands of both the assessee's by framing assessments under section 143(3) read with section 147. The same addition was also made in hands of the DBS. So, the addition was made in the hands of three assesseees. On appeal, the Commissioner (Appeals) also affirmed the addition to the tune of half of the peak balance in the hands of both the assesseees as well as MDDBS to avoid double taxation.
- On second appeal:

Held

- The undisputed facts are that the after receiving 'Base Note' in 2011 as apart of 'Swiss leaks', the investigation wing of the Income-tax department conducted a survey under section 133A at the premises of KBSC. During the course of survey, the Base Note was shown to the appellants namely DBS and KNS and told the assesseees that the Income Tax Department has reasonable belief on the basis of information received in the Base Note that foreign bank account is held by the appellants. The appellants denied the knowledge of any such bank account in HSBC, Geneva during the course

of survey proceedings itself and it is also fact that no incriminating material was found during the course of survey. The facts as are culling out from the record show that a person named MDBS created and constituted an overseas Discretionary Trust known as 'Balsun Trust' by making contribution to the said trust from his own fund/sources with discretionary beneficiary of the said trust DBS and KNS. It is pertinent to state that during the year under consideration both the appellants did not receive any distribution of income from the said trust as no such distribution done by the trust during these years. MDBS is a foreign resident since 1979 and is a non-resident under section 6. During the course of the assessment proceedings MDBS and both the appellants in their respective assessment proceedings filed their sworn in affidavits. The affidavit of MDBS was sworn in before the UAE authority stating on oath that he had settled an offshore discretionary trust with his initial contribution, none of the discretionary beneficiaries have contributed any funds to the trust none of the beneficiaries have received any distribution from the trust.

- The appellants also filed sworn affidavit stating that they were not aware of the existence of any of the accounts in HSBC, Geneva. They further stated that they never carried out any transactions in relation to the said account with HSBC Bank, Geneva nor received any benefit from the said account. It is also found that they have not signed any documents nor operated the said bank account. It is also true that both the appellants also filed a clarificatory letter from HSBC Bank, Geneva stating that both the appellants have neither visited nor opened or operated the bank accounts and that no payments have been received from them or made to them in relation to the said account. The peaks during two years in the said account with HSBC, Geneva were added in the hands of all three persons the MDBS and two appellants presently before us in assessment years 2006-07 and 2007-08. In the case of MDBS, Commissioner (Appeals) *vide* order deleted the addition by holding that MDBS is an NRI, and none of his monies outside India could be brought to tax in India unless they would shown to have arisen or accrued in India. The said order of the Commissioner (Appeals) was also upheld by the coordinate bench of the Tribunal *vide* by holding that contents of the affidavit of the MDBS were not declined or held to be not true by the Assessing officer.
- Further, the bank account of HSBC Bank, Geneva is out of the purview of the IT Act, as MDBS is a non-resident Indian since 1979. In the case of the two appellants, the same amount was added in assessment years 2006-07 and 2007-08 which was reduced by Commissioner (Appeals) to one half of the total additions to avoid any double taxation affirming the additions to that extent. Looking to the decision of the co-ordinate bench holding that the money belonged to the MDBS who is non-resident and the income of the non-resident held abroad is not assessable in India unless it is shown to have arisen or accrued in India. Since it is held by the Tribunal that the amount in HSBC Account in Geneva is owned by MDBS who is non-resident there is no any justification or reasons to sustain the order of Commissioner (Appeals) when the revenue had completely failed to show any linkage with foreign bank account with Indian money. Addition has been made by the Assessing officer under section 69A to justify the addition on account of peak balance. It is *sine qua non* for invoking section 69A the assessee must be found to be the owner of money, bullion, jewellery or other

valuable articles and whereas in the present case the money is owned and held by MDBS a foreign resident in an account HSBC, Geneva and also admitted that he is the owner of the money in the HSBC account, Geneva.

- In the present case the money is held in the name of MDBS who vehemently claimed to be owner of the said deposits from his own fund/sources and the revenue has failed to bring any cogent and convincing materials on record which proved that the two appellants are owners of the money in HSBC Account.
- In the present case, undisputedly MDBS is owner of HSBC Bank account, Geneva and the appellants are discretionary beneficiaries which leads to positive inference that the appellants are not the owners of the said bank account and hence the additions under section 69A cannot be sustained. In the present case admittedly both the appellants namely DBS and KNS are discretionary beneficiaries of the 'B' trust created by MDBS and the two appellants have not made any contribution nor done any transaction with said trust at all. In the case of discretionary trust, the income of the trust could not only be added in the hand of beneficiary but the trustees are the representative assesseees who are liable to be taxed for the income of the trust. If the discretionary trust has made some distribution of income during the year in favour of the discretionary beneficiaries only then the distributed income is taxable in the hands of the beneficiaries but nothing of the sort has happened nor two appellants have received any money as distribution of income by the discretionary trust. So long as the money is not distributed by the discretionary trust, the same cannot be taxed in the hands of the beneficiaries. Similarly, the present case the deposits held in HSBC, Geneva account cannot be taxed in the hand of beneficiaries/appellants at all.
- The additions cannot be made and sustained in the hands of the appellants as the 'B' trust is a discretionary trust created by the MDBS and said trust has neither made any distribution of income nor did the two beneficiaries/appellants receive any money by way of distribution. While the department has failed to bring any conclusive evidence to establish nexus between these two appellants and bank account in HSBC, Geneva and more so when the MDBS has owned the balance in the HSBC, Geneva bank account, one is not in agreement with the conclusions of the Commissioner (Appeals) in sustaining the additions equal to fifty per cent of the peak balance in the hands of both the appellants. Considering the facts of the two appellants in view of various decisions as discussed hereinabove we hold that order of Commissioner (Appeals) is wrong in assuming that the said money may belongs these two appellants and such conclusion is against the facts on record and based on surmises and presumptions. Accordingly we set aside the order of Commissioner (Appeals) and direct the Assessing officer to delete the additions made under section 69A in respect of HSBC Bank account for assessment years 2006-07 and 2007-08 in the case of both the appellants.