<u>आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

MA No. 397/Mum/2017
Arising out of ITA No. 2735/Mum/2016
(**निर्धारण वर्ष /** Assessment Year : 1996-97)

Sh. Bimal V. Pala(legal heir of late Smt. Ranjana Vrajlal Pala) C/o H H Parmer & Co. 512, Maker Chambers V 221, Nariman Point, Mumbai 400021.	**<u>बनाम</u>**/ v.	Principal CIT, 26 BKC, Bandra East Mumbai.
स्थायी लेखा सं./ PAN :APMPP6636G		
(अपीलार्थी **/Applicant**)	..	(प्रत्यर्थी / **Respondent**)

Applicant by :	Shri. Rajesh P Shah
Respondent by:	Shri Rajat Mittal (DR)

सुनवाई की तारीख **/Date of Hearing : 19-01-2018**
घोषणा की तारीख **/Date of Pronouncement : 12-02-2018**

<u>आदेश / O R D E R</u>

PER RAMIT KOCHAR, Accountant Member

The assessee has filed this Miscellaneous Application(MA) seeking recall of the Income-Tax Appellate Tribunal, Mumbai (hereinafter called " the tribunal") order dated 17-03-2017 passed by Division Bench in ITA no. 2735/Mum/2016 for the assessment year 1996-97.

2. The brief background of the case is that the Assessing Officer(AO) received information from Investigation wing that the assessee has an account during the relevant year with HSBC Bank at Geneva, Switzerland. The assessee had not filed any return of income with Indian Income Tax Department for the said assessment year 1996-97. The Provisions of Section 147/148 were invoked by the AO and the assessee was confronted with the said information. She filed Nil Return in reassessment proceedings and claimed that since she was Non Resident during the relevant assessment year, she did not file any return of income for the relevant period with the Revenue.

The assessee claimed that she is Non-Resident during the said period but did not file any passport with the AO for the relevant period on the ground that the same was lost . She also claimed that bank statement and other documents are also lost and she could not recollect any bank transactions during the said period . She also claimed that she did not had any income during the relevant period which could be brought to tax in India. The AO accepted the contentions of the assessee and accepted her to be Non Resident based on her contentions and the assessment was framed at Nil Income. The Pr. CIT invoked provisions of Section 263 as there was no enquiry conducted by the AO with respect to her stay in India and without any cogent material and verifications , her Non Resident status was accepted by the AO. The Division Bench of the Tribunal confirmed the invocation of provisions of Section 263 by Pr. CIT by holding as under:

> "*8. We have considered rival contentions and perused the material on record including case laws cited before us. The AO received information from Investigation wing that assessee has an account during the relevant previous year in Switzerland with HSBC Bank at Geneva. The AO based on such information reopened the assessment u/s 147 of the Act for assessment year 1996-97 by issuing notice dated 26-03-2013 u/s 148 of the Act The assessee was confronted with the said information during re-assessment proceedings u/s 147 r.w.s. 143(3) of the Act. The assessee in re-assessment proceedings submitted that she is an old lady of 74 years suffering from arthritics. It was submitted that she resided in Bahrain for more than 40 years and accordingly was Non-Resident during the previous year relevant to the impugned assessment year 1996-97. It was submitted that since she was Non-resident at tha time she was under no obligation to file return of income with Revenue during the impugned assessment and hence no return of income was originally filed by her for the impugned assessment year with Revenue . In re-assessment proceeding , she filed return of income declaring 'Nil' Income, under protest. It was submitted that she is not able to recollect transaction for assessment year 1996-97 nor she had any bank statement or any other documents of those times to help her recollect the transactions. It was submitted that from the assessment year 2009-10, she was filing return of income in India as 'resident'. It was submitted that in 2007, in Bahrain , the assessee lost her passport which bore the number Z003983 issued on 26- 12-2006, which is reflected in the present passport issued at Bahrain on 09-01-2012 which referred to old passport dated 11.12.2007 and 26.12.2006. . It was submitted that the assessee did not have copy of old passport. It was submitted that assessee did not had any taxable income in India during the relevant previous year . It was submitted that the assessee had investment income in Bahrain but since there was no tax in Bahrain, she did not preserve any documentary proof of investment.*
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> *The AO accepted contentions of the assessee and accepted Non Resident status of the assessee for the relevant previous year , without any enquiry and verifications based on submissions and claims made by the assessee in her submissions before the AO, for which re-assessment order dated 19.03.2014 was passed by the AO u/s*

143(3) r.ws. 147 of the Act. We have gone through the assessment order dated 19.03.2014 passed by the AO u/s 143(3) r.w.s. 147 of the Act as well submissions made by the assessee before the AO. The assessment was re-opened as information was received that assessee was holding an bank account in Switzerland with HSBC Bank at Geneva. The assessee during re-assessment proceedings did not commented whether she is holding the said bank account with HSBC, Geneva or not as no comments were offered towards the existence of said bank account. The assessee merely stated that she does not have any bank statement with her for relevant period. The assessee had contended that the assessee is Non Resident during the relevant period but no evidence was provided to that effect. It is merely stated that the assessee resided in Bahrain for last more than 40 years and being Non Resident, the assessee does not have taxable income in India and hence no returns were filed till assessment year 2009-10. No details of actual period of stay out of India and specifically during the previous year relevant to the impugned assessment year as also no details as to fulfilling of the requirements as provided under Section 6 of the Act was furnished by the assessee before the AO. It was merely stated that passport was lost and no details are available. Even , if the assessee is held to be Non Resident , then also by virtue of income received in India or deemed to be received in India or income accrued in India or income deemed to accrue or arise in India , the said income shall be taxable in India , by virtue of provisions of Section 5(2) of the Act. These aspects were not gone into by the AO and he merely accepted the contentions of the assessee without verifications and enquiry. Thus, it is a case which is not suffering from inadequate enquiry but rather the re-assessment is vitiated by complete lack of enquiry wherein the AO chose not to make any enquiry or verifications whatsoever . The AO while passing re-assessment order dated 19-03-2014 did not made any enquiry and merely accepted the contentions of the assessee without any verification and enquiry. The re-assessment order dated 19-03- 2014 passed by the AO thus cannot be upheld as it is not based on any cogent material on record to substantiate that assessee was infact non resident in the relevant year as per provisions of Sect on 6 of the Act and also even if she is held to Non Resident , there was no income falling within purview of Section 5(2) of the Act to take her out of clutches of taxability as provided under provisions of the Act. Thus, the assessment order of he AO cannot be sustained as it is erroneous so far as prejudicial to the interest of Revenue and was rightly set aside by Ld. Pr. CIT u/s 263 of the Act. The AO even did not brought on record whether the assessee was in-fact holding bank account with HSBC , Geneva or not during the relevant previous year or no such bank account was held by her . The assessee has merely stated that she does not have bank statement. Even the passport was stated to be lost and status of the assessee being Non Resident for previous year relevant to assessment year was accepted by the AO on self declaration by the assessee.

Attention is drawn to provisions of Section 263 of the Act which stipulates as under:

"E.—Revision by the [Principal Commissioner or] Commissioner

Revision of orders prejudicial to revenue.

263. (1) The [Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneousin so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation 1.]—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—
(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—
(i) an order of assessment made by the Assistant Commissioner 2[or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;
(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;
(b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;
(c) where any order referred to in this sub-section and pas ed by the Assessing Officer had been the subject matter of any appeal [filed on o before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]
[Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—
(a) the order is passed without making inquiries or verification which should have been made;
(b) the order is passed allowing any relief without inquiring into the claim;
(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or
(d) the order has no been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the asses ee or any other person.]
[(2) No orde shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]
(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.
Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."
We have observed that w.e.f. 1st June, 2015 by Finance Bill 2015, Explanation 2 to section 263 was inserted to declare the law which reads as under:-
" [Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;
(b) the order is passed allowing any relief without inquiring into the claim;
(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or
(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]"
Thus, explanation 2 to Section 263(1) of the Act has introduced deeming provisions where, inter-alia, if the AO did not made the enquiries which it was required to made , the order shall be deemed to be erroneous so far as it is prejudicial to the interest of Revenue. In the instant case , the AO did not made any enquiry or verification whatsoever and accepted the contentions of the assessee. Even as to incriminating information received by AO that the assessee had an account in Switzerland with HSBC Bank at Geneva during the impugned assessment year was not enquired / verified into . The Hon'ble Supreme Court in the case of Malabar Industrial Company Limited v. CIT (2000)109 Taxman 66 (SC) held that if the AO has accepted the entry in the statement of account filed by the taxpayer without making enquiry and application of mind , the said order of the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of the Revenue In our considered opinion, the facts of the case of the instant case are similar to the facts in the case of Malabar Industrial Co. Limited(supra) whereby no enquiry/verification is made by AO whatsoever with respect to residential status of the assessee as well as his holding of the bank account in Switzerland with HSBC at Geneva during relevant previous year and the same was accepted based on submissions of the assessee without application of mind as well without any verification/enquiry being made by the AO. Thus, in our considered view learned Pr. CIT rightly invoked provisions of Section 263 of the Act for setting aside re-assessment order dated 19-03-2014 passed by AO being erroneous so far as prejudicial to the interest of Revenue, as no enquiry was made by AO as well there was no application of mind while all the submissions of the assessee were accepted without any enquiry/verification. Thus the view of the AO is not a sustainable view as it was not supported by evidence on records and hence was a perverse view which could not be held to be one of the possible view taken by the AO to take the same out of the purview of mandate of Section 263 of the Act.
In proceedings u/s 263 of the Act , the assessee reiterated its submissions as also filed an affidavit dated 31.01.2015 (pb/page 17-18), wherein she admitted to have opened a bank account in Switzerland with HSBC Bank at Geneva on 15-12-1989. It is the averment of the assessee in the said affidavit that she is staying with her husband in Bahrain since 1957(pb/17) , while certificate (pb/19) dated 12-11-2014 issued by Head of the Human and Resources Directorate had stated that her first entry to the kingdom of Bahrain was recorded on 21-07-1994 , and the impugned assessment year is 1996-97. The assessee in her affidavit has averred that the assessee has filed an RTI application with FRRO on 05-11-2015 to obtain her entry into and out of India to confirm her residential staus. The assessee has also averred that she has lost her passport no Z003983 dated 26/12/2006 issued at Bahrain by Indian Consulate which was duly reported to Ministry of Interior at Kingdom of Bahrain , their certificate is placed in page 20-21, but in our considered view, this is irrelevant as her residential status is to be determined u/s 6 of the Act w.r.t. previous year relevant to assessment year 1996-97 which is a relevant assessment year and any passport which is issued post this period i.e. in this case passport no Z003983

issued on 26-12-2006 is totally irrelevant to determine residential status of the assessee for assessment year 1996-97 under consideration .
Thus, keeping in view of our above detailed discussions , we uphold the order of the learned Pr. CIT passed u/s 263 of the Act setting aside the order of the AO being erroneous and prejudicial to the interest of Revenue on the above mentioned issue and to be set aside the same to the file of the AO for deciding the issue afresh , after due verifications. We order accordingly.
9. In the result, appeal filed by the assessee in ITA No. 2735/Mum/2016 for assessment year 1996-97 is dismissed."

3. The assessee has now filed this MA to rectify mistakes apparent from records u/s 254(2) of the 1961 Act by recalling the orders passed by Division Bench of the tribunal on 17-03-2017 and for fresh hearing of the appeal. It is the say of the assessee that tribunal has not considered Unit Trust of India (which is claimed to be government documents by the assessee) application forms/ receipts filed by the assessee w.r. subscription of US 64 securities issued by UTI in July 1995 which were subscribed by the assessee wherein the assessee declared herself to be Non Resident in the application form filed by the assessee with UTI for allotment of US 64 securities in July 1995 and the said Non Resident status was accepted by UTI, which were placed by the assessee in the paper book page no. 8 to 11 filed with the tribunal during appellate proceedings. It is the claim of the assessee that these documents being government documents are sufficient to classify the assessee to be Non-Resident under the provisions of the Income-tax Act, 1961 . It is subm tted by the assessee that these documents were not considered by the tribunal while passing the aforesaid order dated 17-03-2017 , which constituted mistake apparent from records amenable to correction u/s 254(2) of the Income-tax Act,1961. The above contentions of the assessee are misconceived as the definition of Non-Resident was substantially different under Foreign Exchange Regulation Act, 1973 (as it was applicable at relevant time being FY 1996-97) and in the Income-tax Act,1961. We are concerned with the proceedings under Income Tax Act, 1961 for which the definition of Non-Resident has been stipulated under the provisions of the 1961 Act namely Section 2(30) r.w.s. Section 6 of the 1961 Act which requires stipulated period of stay outside India for individuals to come within the ambit of being classified as Non-Residents , while in the case of FERA, 1973 it is the intention of the assessee to take up employment, business etc outside India with the intention of settling abroad which was relevant. Thus , to determine the residential status of the

assessee from the point of view of the 1961 Act, it is essential to know the period of stay outside India of an individual as is required under the provisions of Section 6 of the 1961 Act r.w.s. 2(30) , which we are afraid that this document does not throw any light to conclude that the assessee was non-resident during the relevant period and had satisfied the conditions of being out of India for stipulated period(s). These documents are merely in the nature of self declaration and are not conclusive to determine residential status of the assessee as required under the provisions of 1961 Act. These are the documents for making investments in UTI in the US 64 securities offered by UTI for which self declaration by the assessee could be sufficient but to establish the residential status in India of the assessee from the view point of the 1961 Act , the assessee has to prove through cogent evidences such as passport to prove her stay outside India for stipulated period as per conditions stipulated u/s 6 of the 1961 Act. Thus the contention of the assessee lacks merit and her contentions are rejected because the DB of the Tribunal has passed a detailed order after due application of mind wherein all the relevant contentions of the assessee were duly considered by the tribunal and these documents were no relevant to come to conclusion as to residential status of the ass ssee from the point of view of the 1961 Act. Scope of provisions of Section 254(2) is restricted to correction of the mistakes apparent from record and wherein in the instant case a conscious decision was taken by the DB of Tribunal which is not shown by the assesee to be a perverse view not sustainable in the eyes of law , and hence the same is not amenable to corrections within limited mandate of provisions of Section 254(2). Thus this contention of the assessee lacks merit and is hereby rejected.

The assessee has also claimed in this MA that she lost her passport in 2006, but on the perusal of the records it was observed that the passport no.Z003983 which was issued on 26th December, 2006 was lost which has no relevance for determination of the residential status of the assessee for period under consideration in this appeal as the assessment year before us is AY 1996-97 and infact wrong contentions were raised before the tribunal. The tribunal while passing orders dated 17-03-2017 has dwelt upon this issue in details in its orders and rejected the contention of the assessee. This ground raised by the assessee in MA is also rejected.

The perusal of the assessment order passed by the AO clearly reveals that no enquiry/verification whatsoever was conducted by the AO and contentions of the assessee were accepted by the AO without and enquiry/verification and without any application of mind. The assessee did not submit passport for relevant period nor any bank statements were submitted and it was claimed that bank statement and passport was lost. The tribunal has duly deliberated on these issues in its order in details and came to conclusions after due application of mind and the said view of the tribunal is not shown to be a perverse view dehors material on records and hence in our considered view there is no mistake apparent from records in tribunal order dated 17-03-2017 which is amenable to correction within limited mandate of provisions of Section 254(2) of the 1961 Act. Thus, this contention lacks merit and is hereby rejected.

It is the claim of the assessee that provisions of Section 5(2) was discussed by tribunal while the same was not the subject matter of order passed u/s 263. It is only the discussion by the tribunal on the scope of taxability of the income of Non-Residents which was covered by provisions of Section 5(2) and in any case all Non-Residents are covered by said provision which is already placed in statute by legislature which in our considered view did not made tribunal order amenable to corrections within limited mandate u/s 254(2) as in our considered view no prejudice is caused to the assessee with the said discussion on the relevant and applicable provision of the 1961 Act, thus in our considered view, there is no mistake apparent from records in the said order of the tribunal which can be corrected within limited mandate of Section 254(2). This ground raised by the assessee also lacks merits and is also rejected.

4. The Division Bench of the tribunal while passing order in ITA no. 2735/Mum/2016 has taken a conscious decision after due application of mind by upholding the decision of Principal CIT in invoking provisions of Section 263 as the AO had accepted the assessee to be Non-Resident during the relevant period merely on the basis of submissions of the assessee without making any enquiry/verification and without any cogent material on record. The assessee did not place passport, bank statements before the AO while on the other hand the assessee had admitted to having bank

accounts abroad. Thus , the scope of Section 254(2) to rectify mistake apparent from record is very limited and tribunal cannot review its own decisions within limited scope of Section 254(2) unless there is a mistake apparent from records neither it is shown that tribunal order is perverse not sustainable in the eyes of law. Hence in view of our above detailed findings we do not find any merit in this MA which stood dismissed. The assessee fails in this MA. We order accordingly.

5. In the result the MA filed by the assessee stood dismissed.

Order pronounced in the open court on 12.02.2018

आदेश की घोषणा खुले न्यायालय में दिनांकः 12.02.2018 को की गई ।

Sd/-	Sd/-
(JOGINDER SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 12.02.2018

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI