IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" NEW DELHI
BEFORE SHRI R.P. TOLANI AND SHRI SHAMIM YAHYA

ITA Nos: 1428, 1429, & 1430/+Del/2012
Asstt. Yrs: 2001-02,2002-03 &2004-05

Shri Suresh Nanda	**Vs.**	**ACIT, Central Circle-13,**
4, Casurina Avenue, Westend Greens, 30-D, Rajokri, New Delhi. PAN No. AAPPN 9895 H		New Delhi.
(Assessee)		**(Respondent)**

Assessees by : Sh. Ajay Wadhwa Adv.
Respondent by : Sh. V.K. Saksena CIT(DR)

ORDER

PER R.P. TOLANI. J.M.:

These are three appeals by the assessee against separate orders of CIT(A)-I, New Delhi dated, 8-2-2012 for A.Y. 2001-02 & 2002-03; dated 10-2-2012 for A.Y. 2003-04. Since common grounds are involved for adjudication in these appeals, the same are heard together and being disposed of by a consolidated order, for the sake of convenience.

2. Assessee has raised various grounds. Common grounds Nos. 1 to 4 in all these appeals are not pressed, hence dismissed.

2.1. Ground nos. 9 & 10 in A.Y. 2001-02 ground nos. 14 & 15 in A.Y. 2002-03; & ground nos. 10 & 11 in A.Y. 2003-04 are general in nature, requiring no adjudication.

3. Coming to other grounds, common ground nos. 5, 6, 6.1, 6.2 & 6.3, raised in all the appeals, are as under-

> "5. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in not admitting the additional evidence filed on 11-02-2011 under rule 46A of the Income-tax Rules, 1962 in spite of calling for remand report from the AO, without giving any valid reason.
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> 6. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in upholding the action of the Assessing Officer taking the status of the assessee as "resident' as against status of 'non' resident' claimed in the return and accepted in the original assessment made u/s 143(3) for A.Y. 2001-02 and in appeal by the CIT(A) which became final as no appeal was preferred in ITAT by the Department.
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> 6.1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in holding that assessee's residential status is governed by clause (c) and not by clause (b) of section 6 of the Income-tax Act, 1961 by saying that assessee is actually involved in managing his business in India directly or indirectly through his son, Mr. Sanjeev Nanda.
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> 6.2. The Ld. CIT(A) has further erred in saying that clause (b) cannot override clause (c) of section 6 of the Income-tax Act, 1961.
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> 6.3 The ld. CIT(A) has erred in law in holding the assessee as a resident of India.

3.1. Common ground nos. 8 & 8.1 in A.Y. 2001-02 & 2002-03 and ground no. 9 & 9.1 in A.Y. 2003-04 (excepting quantum), are as under:

> "That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the Assessing Officer in adding a sum of Rs. 9,34,15,000/-and Rs. 65,85,000/-

in A.Ys. 2001-02 and 2002-03 respectively representing share capital and Rs. 9,53,00,000/- as loan in A.Y. 2003-04 subscribed in M/s Ol India Pvt. Ltd. The amounts were actually subscribed by its holding company M/s Y2K Systems International Ltd. Mauritius and not by the assessee.

That the above addition made by the Assessing Officer and sustained by the Ld. CIT(A) is illegal as substantive addition has also been made in the case of M/s Ol India Pvt. Ltd. which tantamount to double addition not permissible under law.

3.2. Common issue raised in ground no. 9 for A.Y. 2002-03 & ground no. 8 for A.Y. 2003-04 is as under:

"That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the AO in adding a sum of Rs.2,17,57,724/- (A.Y. 2002-03) & Rs. 27,94,40,988/- (A.Y. 2003-04), on the basis of certain documents purportedly recovered by the Delhi Police on 20-02-2007 from the possession of Mr. M.V. Rao.

3.3. Common issue raised in ground no. 10 for A.Y. 2002-03 & ground no. 7 for A.Y. 2003-04 is as under:

That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the Assessing Officer in adding a sum of Rs. 24,40,000/-(A.Y. 2002-03) & Rs. 23,20,000/- (A.Y. 2003-04), on the presumption that the same was paid by the assessee to his wife Smt. Renu Nanda out of undisclosed sources towards her maintenance expenses.

3.4. That leaves the individual grounds which are raised in following years:

A.Y. 2001-02:

"7. That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the AO in adding a sum of Rs. 10,51,20,000/- made on the basis of

handwritten page allegedly containing debit and credit entries in assessee's account with Deutsch Bank, Singapore on the ground that no explanation was given with regard to the source of the funds.

7.1. That on the facts and in the circumstances of the case the above addition made by the AO and confirmed by the CIT(A) is not correct as deposits in foreign bank account of the non-resident are not exigible to tax in India as already held by the CIT(A)in his order dated 19-11-2004 in assessee's own case."

A.Y. 2002-03

7. That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the AO in adding a sum of Rs. 45,95,000/- towards unexplained expenditure incurred on the wedding ceremony of daughter Sonali Nanda.

11. That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the Assessing Officer in adding a sum of Rs. 18,76,165/- on the basis of certain documents purportedly recovered from the possession of Mr. Mohan Sambha Ji Jagtap.

11.1. That the above addition made by the AO and confirmed by the CIT(A) is illegal as the same was on a false presumption that assessee has a proprietary concern by the name M/s Globtech International Corporation and the amount was received by the said proprietary concern.

12. That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the AO in adding a sum of 1,20,000/- on the ground that during the search proceedings in the case of Shri Mohan Sambha Ji Jagtap, an imprest account was noticed which represented an unaccounted amount spent on import of Chocolates during the wedding ceremony of assessee's daughter Sonali Nanda.

13. That on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in upholding the action of the AO in adding a sum of in adding a sum of Rs. 1,78,850/- on the basis of certain documents purportedly recovered by the Delhi Police on 22-02-207 from the possession of Shri Mohan Sambha Ji Jagtap saying that the same represented unaccounted expenditure on Bijwasan Farm belonging to the assessee.

4 Brief facts are- Assessee has been regularly assessed to tax in India since past so many years in the status of 'Non-resident' by way of assessments u/s 143(3). On the same lines, original assessment under regular provision of Sec. 143(3) for A.Y. 2001-02 was also framed on 26-3-2004, treating the assessee as Non Resident. Some additions to the tune of Rs. 1,21,93,650/- were made by the AO in the assessment.

4.1. Aggrieved assessee challenged the same in first appeal, wherein they were deleted. On second appeal, by the Revenue, the ITAT dismissed the same by upholding the order of CIT(A),

4.2. In the meanwhile, on 22nd February, 2007, Delhi Police searched the premises of one Dr. M.V. Rao who was found to be impersonating himself as Scientific Advisor to the Prime Minister of India. Delhi police accordingly informed the Directorate of Income tax (lnv.) that during the course of search action on one Dr. M.V. Rao they have found cash amounting to Rs. two Crores lying at his Green Park house along with some incriminating papers. Consequent thereto, the Director of Income Tax (Inv.)-II, Delhi issued Warrant of Authorization under section 132 of the Income tax Act, 1961 for search & seizure action at the premise of said Dr. M. V. Rao.

4.3. Subsequently, DIT (lnv) requested the Delhi Police to hand over photocopies of the documents seized by them. Search and seizure operations were also carried out at assessee's premises by income tax department on 28-2-2007 along with one Shri Mohan Sambhaji Jagtap. Consequent to search, all these cases were centralized u/s 127(2). Notices were issued for proceedings u/s 153A and these assessments are accordingly framed u/s 153A read with Sec. 143(3).

4.4. Assessee filed his returns of income u/s 153A claiming the same status i.e. 'Non Resident' as claimed consistently. During the course of assessment proceedings AO found that some papers seized from Dr. D V Rao were confidential order sheet entries of the Ministry of Defence. Some of these papers are related to M/s Tadiran Communication Israel. M/s Transcom Services Ltd. was representing Tadiran in India for the servicing of communication equipment used by Indian armed force.

4.5. Among the papers received from the Delhi Police were page nos. 58 & 59 of Annexure A-10 which allegedly detail the working of commission on arms contracts and the corresponding payments. Other papers include a note on Page wirh page nos. 60 & 61 as its attachments. The contents of page no. 58 & 59 and other pages are reproduced in the assessment order :-

4.6. AO was of the view that these documents were details of the commission payments related to contracts for Radio Sets of the Indian Defence establishment. According to Delhi Police. Dr. M.V. Rao did not furnish any explanation contending that he was not in a position to comment upon the documents due to his critical health condition. The contents and

purported meaning of the page documented is reproduced by AO in his order.

4.7. Assessee denied any role or connection with these deals however Assessing Officer held him to be closely involved with the business of Tadiran in the Indian Defence establishment, as reflected by page no. 79 of Annexure A-10, found and seized on 22.02.2007 from residence of Dr. M.V. Rao.

4.8. Based on the above mentioned documents, Assessing Officer derived the following conclusions:

(i) Sh. Suresh Nanda is actively involved in facilitating defence deals for foreign companies in India. Tadiran is one such client.
(ii) The four contracts mentioned in the page Nos. 58 & 59 of Annexure A10 are contracts with Indian Defence establishment given to Tadiran of Israel. Commission ranging from 5 to 10 percent of the total value of the contract has been paid.
(iii) The foot note on page 59 mentions that pages 58 & 59 are reconciliation statement. Pages 60 & 61 confirm the receipt of the amount mentioned in page 58 & 59. Thus, the commission income has been actually received in the hands of Sh. Suresh Nanda & his Group.

4.9. On the basis of information received from Dr. M.V. Rao, similar search & seizure operations were carried out in the premises of one Shri Mohan Jagtap and assessee. It resulted in seizure of some other papers and statement on oath of Shri Jagtap.

4.10. During the course of search proceedings a document in Russian Language was found & seized as page no. 4, Annexure no. 2 from the residence of Sh. Mohan Sambhaji Jagtap on 28-2-2007. The Russian to English translation to this document was arranged during the course of assessment proceedings.

4.11. This document has been signed by Sh. Mohan Sambhaji Jacthap as the agent. The remittance has been made to the bank account of Globtech International Inc. According to the AO, a perusal of the above document it is amply clear that parts 53-65K worth US$384460 have been sold in India and on this sale the commission due of USD 38446 has to be paid to the account of Globtech International Inc. This is in accordance with an agreement dated 30.03.1998. The document bears a date stamp of 07.05.2001.

4.12. During the course of search proceedings, one profile of Sh. Suresh Nanda was found & seized marked as page nos. l to 4, Annexure A15. As per this document assessee was alleged to have formed Globtech International Corporation as partnership concern dealing in consultancy and shipping activities of a technical nature. Another profile of Sh. Suresh Nanda was found and seized at page no. 22 Annexure A7, Party R-I, mentioning assessee as owner of Globtech International Corporation. AO rejecting assessee's explanations held that these papers represented that he had been receiving commission on supply of these goods to India, which was deposited in bank accounts situated in tax haven countries like Jersey Islands etc. as stated in the documents.

4.13. On the basis of these observations and material found during the course of search from the premises of the assessee, said M/s Dr. M.V. Rao & Mohan Jagtap, the Assessing Officer drew following inferences:-

> 3.1 Before year 2003 assessee had small set up in India in the form of small companies namely M/s. Crown Corporation Pvt. Ltd., M/s. Dynatron Services Pvt. Ltd., M/s C-l India Pvt. Ltd. and M/s. Transcom Services India Pvt. Ltd. etc. These companies were mostly engaged in services and spares of defence armaments. Mr. Nanda being a former Navy Man specializes in contracts for services and spares for equipment used by the Indian Navy.
>
> 3.2 In year 2003 he started investing heavily in hotel properties and lands in Delhi NCR and Mumbai. His first acquisition in India was the prestigious Hotel Claridges situated in Lutyens Delhi. After acquiring the Claridges he went on to extensively renovate the property and converted it into a boutique five star hotel. Along with this deal he also took management control of Claridges Nabha Palace, Mussorie. In year 2005 M/s Claridges Hotel Pvt. Ltd. acquired a company by name of M/s Godawari Shilpkala Ltd., which has hotel property in Surajkund, Faridabad (Haryana) by name of Hotel Hill View. In year 2005 Claridges Hotel Pvt. Ltd. also acquired the holding companies of another company by name of M/s" Elel Hotels & Investment Pvt. Ltd., which was the owner of very prime hotel property in Mumbai by name of Hotel Sea Rock.
>
> 3.3 Apart from this, in 2006 assessee went on a land buying spree on Mumbai Pune Express Highway and consolidated to big land holdings-one admeasuring about 1100 acres in Karjat, Mumbai-Pune Expressway & other about 280 acres of land in Panvel, Maharashtra. The first patch of land is owned by a company named as Claridges SEZ Pvt. Ltd. (formerly Tsunami Tech Pvt. Ltd.) and the second patch is owned by M/s Crown College & Education Institutions Pvt. Ltd. M/s Claridges SEZ Pvt. Ltd. has obtained an in principle approval from Ministry of Commerce for establishing a multi product SEZ and M/s Crown College & Education Institutions

Pvt. Ltd., which is planning a multi disciplinary college or a Golf Course in the Pan vel land .

4.14. Assessing Officer inferred that on paper these companies were controlled by entities situated out side India or by the entities which were ultimately controlled by entities situated out side India. For example M/s Claridges Hotel Pvt. Ltd. is ultimately controlled by an entity situated in Mauritius by name of Universal Business Solutions, Port Louis, Mauritius, M/s Claridges Hotel Pvt. Ltd. in turn owns various subsidiary companies which own different properties.

4.15. On papers, though there appeared to be no connection between assessee and concerned Indian companies but their Board of Directors went on appointing assessee as Chairman and his son Sh. Sanjeev Nanda as Managing Director of these companies. Thus, it was presumed that these companies were owned by assessee.

4.16. According to Assessing Officer the assesse has failed to disclose his exact and true relationship and interest in the foreign entities controlling the Indian companies on the pretext of assessee being a non resident and these companies being foreign entities.

4.17. Assessing Officer was of the view that the assessee had been working as middlemen for looking after various defense deals involving tedious procedure, documentation, persuasions and liaisoning in clandestine manner. These services were rendered in India by the assessee. The resultant commission income arising from these were received abroad. AO alleged that this income has been brought into India in form of F.D.I, and external commercial borrowings and by floating various entities abroad. Thus, all

these incorporated foreign entities and their Indian investments were held to be assessee's front organizations.

4.18. It was held that Dr. M.V. Rao is a close associate of assessee, who operated from the office building of the companies of Nanda group at D-5. Defence Colony, New Delhi. Dr. M.V. Rao was a Director in C1 India Pvt. Ltd. and M/s Transcom Services Pvt. Ltd. Therefore, these companies were held to be benami entities including C 1 India Pvt. Ltd. It was thus held that assessee holds large stake through Mauritius based entity Y2K Systems International Ltd. The main investor in Transcom India Pvt. Ltd. was one Inet Communications Pvt. Ltd., which is controlled by one Sh. Bipin B.Shah. He was also a close associate of Sh. Suresh Nanda and was a Director in almost all the major companies of the group. In fine it was held that assessee owned and controlled these Benami concerns, though on papers they were shown to be controlled by other persons. Thus the funds for investments came from clandestine arms deals, which were routed by assessee.

4.19. On the basis of the above, Assessing Officer drew various conclusions including that assessee was earning income from brokerage of clandestine arms deals and Dr. M. V. Rao and Mohan Jagtap were working together.

4.20. Assessee's statement recorded on 8.03.2007 before the DDIT, was construed by AO as implied admission of having various business interests in India. The relevant portion of the statement is reproduced the below for ready reference"

•Q.10. Please disclose your all movable assets including Bank accounts. FDRs, investment in banking, investment in capital market, investment in (P) Ltd. Company/ firm/ AOP etc.

Ans. Jly bank accounts are as follows-

Deutsche Bank, New Delhi NRO & NRE ale

Some FDRs in the State Bank of India, branch I don't remember

Demat a/c with the ICICI Bank

I have interest in following companies as a share holder:

Crown Corporation (P) Ltd.

Dynatron Services (P) Ltd.

Cl India (P) Lt-Investment through Y2K Ltd., Mauritius

Claridges Hotels (P) Lt-Investment made through Mauritius based company UBS.

4.21. Apropos C 1 India Pvt. Ltd, it was inferred that assessee controls the day to day functioning of the company. An e-mail from one Shri Vivek Aggarwal, President and CEO of C-l India Pvt. Ltd. was found and seized addressing his resignation to Sh. Suresh Nanda citing his inadequate compensation. This was construed to be indicting that assessee controlled the affairs of Cl India Pvt. Ltd.

4.22. Apropos the balance sheet and the Profit and Loss accounts of M/s. Y2K Systems International Limited, AO inferred that the company does not have any significant income. It has been used as mere conduit to channelize assessee's unaccounted money in the guise of loans and other borrowings.

4.23. Based on the above facts, it is was observed that the assessee has been bringing in unaccounted money through Mauritius based entity Y2K Systems International Limited due to weak exchange control norms there.

4.24. The e-mail of Shri Vivek Agrawal established that assessee was controlling C-l India and was the ultimate source of investment in C-l India Pvt. Ltd. through YK2 Systems and controlled its affairs. Hence, the capital received by Cl India Pvt. Ltd. was treated as unexplained investment of the assessee and added to his taxable income. Thus Assessing Officer held that-

i) Assessee was engaged in the business of arms dealings along with Dr. M.V. Rao & Mohan Jagtap.

ii) Y2K was benami company of the assessee.

iii) Capital introduced by Y2K in C-l India was assessee's money.

4.25. Assessing Officer also proposed to assessee to show cause, as to why he should not be treated as 'Resident' assessee instead of 'Non-Resident' as held earlier and taxed accordingly in India. The passport entries about assessee's stay over a period in India were found to be as under-

A.Y.	No. of days in India as computed by the assessee	Actual No. of days
2001-02	154	172
2002-03	138	150
2003-04	158	176
2004-05	159	177
2005-06	155	171
2006-07	158	176

4.26. AO has not disputed the days of stay given in above chart. However according to him for determining the status of residence, clause (c) of Sec. 6 was applicable to assessee and not clause (b) of the I. T. Act, by which he was to be treated as Resident in India for these years.

4.27. Assessee objected to this proposition and filed a detailed reply which is placed on the paper book. The reply emphasized the following issue:-

4.28. Under Section 2(30), an assessee who fails to qualify as a resident under Section 6 (l) of the Act will be regarded as a non-resident for all the purposes of the Income Tax Act 1961. Section 6 (1) of the Income Tax Act 1961 provides as under: -

> An individual is said to be resident in India in any previous year, if he:
> (a) is in India in that year for a period or periods amounting in .all to one hundred and eighty two days or more; or
> (b) …….
> (c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.
>
> Explanation - In the case of an individual,
> (a) being a citizen of India, who leaves India in any previous year [as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or] for the purpose of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year.

(b) being a citizen of India or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provision of Sub-clause (c) shall apply in relation to that year as if for the words "sixty days" occurring therein, the words “one hundred and eighty two days” had been substituted"

4.29. Thus under the legislative scheme as contained in section 6 (1) of the Income Tax Act 1961. an individual is considered to be a resident in India in any previous year

(a) If he is in India in that year for a period or periods amounting in all to one hundred and eighty two days or more or;

(b) If-

i. he has been in India within the four years preceding that year for a period or periods amounting in all to three hundred and sixty five days or more, and

ii. is in India for a period or periods amounting in all to sixty days or more in that year.

4.30. It was observed by the Govt. that the application of clause (c) was harsh on the first category of individuals as an Indian citizen who has become a non-resident for the first time by departure for employment outside would have necessarily stayed for more than one hundred and eighty two days in India in the year previous to the year when he became a non-resident. Thus, in calculating the four years previous to the assessment year within the meaning of clause (c) in the case of an Indian citizen going abroad would include the year or years when he was a resident during which he might have stayed all three hundred and sixty five days in one year in India. In order to set off this disadvantage and mitigate the hardships the

legislature has provided in clause (a) the Explanation to section 6(1) that where an Indian citizen goes for employment in any previous year the rigor of clause (c) of sub-section (1) of section 6 is diluted to some extent by providing a relaxation for the year the assessee left for employment outside India, namely he will be treated as 'Non-Resident" if he is in India for less than 182 days in that year.

4.31. Similarly, a citizen of India/person of Indian origin who visits India in the assessment year succeeding the year in which he became a non-resident in calculating the four years previous to the year of departure from India within the meaning of clause (c) of sub-section (1) of section 6 would include the year or years when he was a resident during which he might have stayed all the three hundred and sixty five days in one year itself in India. In order to set off this disadvantage the legislature has provided in clause (b) of the Explanation that where an Indian citizen/person of Indian origin visits India in the previous year succeeding the year in which he became a non-resident, the rigor of clause (c) of section 6(1)is diluted to some extent by providing a relaxation for the assessment year succeeding the year in which he became a non-resident, namely, he will be treated as Non-Resident if he is in India for less than 182 days in that year. Thus, these amendments were brought to mitigate the hardship being faced by the non-resident assesses and was introduced to do away with the mischief which was inadvertently caused by earlier provisions.

4.32. Consequent to budgetary amendment in Finance Act, by way of explanatory notes a Circular of CBDT No 684 dated 10.06.1994 in this behalf was issued to clarify the meaning and purpose of amendment as under--

> "19.2 Suggestions had been received to the effect that the aforesaid period of one hundred and fifty days should be increased to one hundred and eighty-two days. This is because the non-resident Indians, who have made investments in India, find it necessary to visit India frequently and stay here for the proper supervision and control of their investments. The Finance Act, therefore, has amended clause (b) of the Explanation to section 6(l) (c) of the Income tax Act, in order to extend the period of stay in India in the case of the aforesaid individuals from one hundred and fifty days to one hundred and eighty two days, for being treated as resident in India, in the previous year in which they visit, India. Thus, such non-resident Indians would not lose their "non-resident" status if their stay in India, during their visits, is up to one hundred and eighty one days in a previous year."

4.33. The Assessing Officer was of the view that if Clause (b) of Explanation to Section 6 (1) is interpreted in the above manner it will render clause (c) of section 6 (1) nugatory in its application to citizens of India or persons of Indian origin. It was held that assessee's interpretation of Explanation (b) of Section 6(l)(c) would render Section 6(l)(c) itself redundant as far as its application to citizens of India/persons of Indian origin are concerned, which was not permissible in law. Reliance was placed on the judgment in the case of Hardev Motor Transport v. State of M.P., (2006) 8 see 613(626):

> "31. The role of an Explanation of a statute is well known. By inserting an Explanation in the Schedule of the Act, the main provisions of the Act cannot be defeated By reason of an Explanation, even otherwise, the scope and effect of a provision cannot be enlarged It was so held in S. Sundaram Pillai v. VR. Pattabiraman in the following terms:

4.34. The AO, however, held that assessee was to be treated as Resident and not as Non-resident in these years on following observations:

(a) The Explanation (b) to section 6(l)(c) relaxes the 60 days stay in India to 182 days if the individual is an Indian citizen or a person of Indian origin and if he being outside India visits India during that year. According to the AO, the assessee, though not citizen, for all practical purposes was resident i.e. living within India who goes abroad on visits. In other words he was not outside India and came on visit to India. Therefore, he was not eligible for relaxation provided by Explanation (b) as he was not a person who being outside India comes on a visit to India-

(b) According to the Assessing Officer 'being outside India' connotes some permanence abroad. It is for the benefit of the person who stays abroad and comes on a visit to India.

The Assessee has been staying in India for approximately half of the year during the last ten - fifteen years.

(c) The A.O referred to assesses profound social ties maintained in India with his son, wife and other relations and to keep control over Indian companies which were sufficient to hold that the assessee was inside India and a resident in India for all practical purposes.

(d) The AO made reference to the renovation carried by the Assessee at his farm house in India to show that assessee was to be treated as "inside India".

4.35. Consequently, AO made the additions in this behalf in all these years. Further assessee's residential status was changed from Non-Resident to Resident and thus the entire global income of the assessee was brought to tax in India.

4.36. Aggrieved assessee preferred first appeal. CIT(A) however confirmed the additions. Aggrieved, assessee is before us.

5. Ld counsel for the assessee Shri Ajay Wadhwa first adverted to the common ground about the status of Non Resident and contends that-'

5.1. The assessee has been a Non-Resident since more than 25 years. Status of Non Resident has been accepted by the respective Assessing Officers year after year.

5.2. During his entire history of assessments, they have been framed under the status of non-resident, u/s 143(3), in appeals before CIT(A) and ITAT, which is not disputed. Thus the issue of Non resident status has attained finality. AO accepts the number of days of stay as per passport. No incriminating document is found during the search to suggest any increase in the number of days of stay in India. Only on the basis of second thought, about the interpretation of same law, AO has arbitrarily held the assessee to be Resident. Thus department has done a somersault on the issue of Non Resident status, which is settled and constantly followed over a number of years in the assessments of the assessee. When facts & circumstances and legal proceedings are same and no incriminating material is found, about days of stay, the rule of consistency as laid down by Hon'ble Supreme court in Radhasoamy Satsang and Delhi High court in Lovely Bal Shiksha Parishad and other cases has to be followed. Though the principle of resjudicata is technically not applicable to the income tax proceedings, the rule of consistency is fully applicable.

5.3. Ld counsel contends that a plain reading of section 6 of Income-tax Act, along with Explanation, makes it clear that-

> a. Clause (c) above and part (b) of the Explanation to the sub section, make it abundantly clear that for an individual covered by part (b) of the Explanation, the period of stay in India is to

be counted at 182 days and not at 60 days provided in clause (c) of sub section (1) of section 6. In other words, if the individual is citizen of India or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, he can stay in India upto 181 days and he will not be treated as a resident of India. Such a person can come to India for any purposes including businesses, medical treatment, visit relatives - Thus for the status, days of stay in India is the sole criteria and purpose of visit to India not relevant.

b. It is trite law that in income tax law words and terms used shall be given only their ordinary and plain meaning. Words "being outside India" or "on a visit to India" are to be meant in plain and simple way. They do not need any interpretation and in that guise, AO has attempted to convey beyond what these words actually and plainly state. It is thus pleaded that:

5.4. AOs interpretation is based on words which are already omitted and no longer remain on statute book:

a. Clause (b) of section 6(1) which was omitted from the statue by the Finance Act 1982 w.e.f. 1st April, 1983. It had provided that an individual would be resident in India if he maintained for himself a dwelling place in India and has been in India for 30 days or more in that year.

b. The AO's order shows that he has applied conditions of the omitted provisions and the theory of dwelling place in India underlying such provision. That is why he has referred to the improvement of the farm house, family ties, business interest of the assessee in different concerns and the like, which indicated to dwelling place;

5.5. Reliance is placed on General Finance Co. v ACIT (2002) 257 ITR 338 (S.C) where the Supreme Court found that the Constitutional Bench had already decided in Rayala Corporation Pvt Ltd v Director of Enforcement AIR 1970 SC 494 and Kohlapur Cane Sugar Works Ltd v Union of India AIR 2000 SC 811 that where a provision is omitted, it should be deemed to

have never been part of the statue at any part of time. The Assessing Officer in order to wily nily change the status to Resident has traveled into the ambit of an omitted provision. It is vehemently argued that :

a. An Explanation by its language, may supply or take away something from contents of the provision. They are introduced as a matter of abundant caution without adding or subtracting anything to the main section; this has been observed by the Supreme Court in the case of Keshavji Ravji & Co. v CIT (1990) 183 ITR 1 (SC). Explanation to be read so as to harmonize with and clear up any ambiguity in main section and should not be construed as to widen the ambit of the section. Rules of interpretation are applied only when words used in statute are ambivalent and don't manifest legislative intention. When language is clear, supposed intention of legislation cannot be applied to defeat the plain statutory language which otherwise is unambiguous.

b. Sampath Iyengar in his commentary "Law of Income Tax", 10th edition at page 1127, has noted the decision of English court in the case of Mackenzie, Re (1941) Ch 69. and has observed "It is thus not necessary that the stay must have been in connection with the purpose of earning income which is sought to be taxed; the intention and the purpose of the stay is not relevant".

c. Amendment has been brought into effect for benefit of the citizen of India who 'stay abroad but have investments in India. The basic purpose appears to be that citizen of India who are non-resident should not get attracted into tax reach in respect of their income earned outside India. It is also seen that in terms of plain reading of section 6 of the IT Act the "Residential Status" is determined on the basis of the number of days "spent in India" or "outside India". The concept of grants of economic or legal presence as mentioned by the AO is not indicated in the Act. The mere requirement is with regard to number of days a person is in India or outside India.

d. Circular of the Board is binding on the AO. This has been accepted in the case of Varghese (K.P) v. ITO (1981) 131

> 597 (SC) which decision has again been approved and followed by the Supreme Court in the case of Pradip J. Mehta v. CIT (SC) 300 ITR 231 (SC) on a question relating to status of an individual as a resident.

5.6. Ld counsel for the assessee contends that CIT(A) also erred in upholding the order of AO. It is pleaded that it is settled law that the only test for determining the residential status of a person of Indian origin in India is number of days of stay in India. This is held by the Authority of Advance Ruling in ABC 223 ITR 4621 Dr Virindra Kumar 308 ITR 28; Canoro Resources 313 ITR 2:

> "The Explanation to section 6(l)(c) of the Income-tax Act, 1961 relaxes the provision requiring less than 60 days stay in India during the relevant year for Indian citizen and persons of Indian origin. Lower authorities failed to appreciate that this relaxation does not apply to foreign citizen."

5.7. The Assessing Officer at para 7.14 has himself referred to the Finance Minister's speech to hold that the relaxation extended to self employed and other occupations irrespective of their vocation and nature of visits to India. Self employed means and includes who have their own business abroad This clearly shows that the relaxation is applicable to the assessee.

5.8. In the case of CIT v. Abdul Razzaq 337 ITR 350 (Ker), the word 'employment' outside India appearing in Explanation - (a) to section 6(1) means going abroad to take up employment or any vocation referred to in circular which includes self employment like business or profession. Visit and stay abroad should not be only for other purposes such as tourist or for medical treatment. Thus, in Abdul Razzaq's case dispels the complicated

interpretation applied by AO and CIT(A) to the interpretation of Explanation (b).

5.9. Without prejudice to the aforesaid it is argued that 'being outside India' means that the assessee came from abroad to India. Admittedly, the assessee has been outside India for larger number of days as compared to his stay in India in each of the 6 years. Hence, from this angle alone, he could said to have visited India from abroad, purpose being immaterial as held by Abdul Razzaq's status of Non Resident has been properly given earlier.

5.10. Assessee is having a bank account in Singapore. Large deposits are appearing therein. Remittances being made to India from this account for expenses in India suggest that assessee's active income and business enterprise remained abroad. Thus assessee has passive income from India.

5.11 Ld counsel for the assessee vehemently relied on Rule of consistency. It is submitted that, the assessee has been a non-resident since more than 20 years in the status of Non Resident. It is based on the test of no of days of stay in India, which have not be doubted to be below 182 days in these years. There is no change in law, facts and circumstances. The issue of Non resident status has attained finality in earlier years in view of the fact that assessment proceedings have become conclusive by ITAT and other orders. Hon'ble Supreme court in Radhasoamy Satsang v. CIT (1992) 193 ITR 321 has laid down that law. Facts and circumstances being same, department can not be allowed to change it's stand which has been consciously adopted in earlier years. This proposition has become an established principle of law. Radha Swamy judgment has been followed in number of cases including by Hon'ble Delhi High Court in the case of Lovely Bal Siksha Parishad (2004)

266 ITR 349 (Del); DIT v. Escorts Cardiac Diseases Hospital Society (2008) 308 ITR 75 (Del); DIT v. Apparel Export Promotion Council (2000) 244 ITR 735 (Del). Similarly ITAT Benches have applied it in various cases including Tahreem Electrical (P) Ltd 112 TTJ (Lucknow) 586. Jindal Photo Films Ltd 116 TTJ 483,

5.12. Assessing Officer has erroneously held that the assessee is managing companies in India and therefore is a resident going abroad for business on following mistaken inferences as:

(a) Assessee is resident of Dubai, which has issued residence & health cards; driving license. Business is owned there and business activities
are carried therefrom.

(b) The assessee has been considered a non-resident in last 20 years and comes to India only to meet his family members and look after his
investments.

(c) He has not drawn any salary/remuneration from any company in India and has never been a working director or working employee ever since he became non-resident 2o years ago.

(d) Infotech Services Ltd of Jersy had invested by way of loan into Y2K Systems (P) Ltd of Mauritius which is the Holding Company for M/s
C-l India (P) Ltd. The assessee is a major shareholder in Infotech Ltd. In order to protect his interest in Infotech Ltd,, through his company the assessee may have involved himself sometimes in the affairs of the M/s C-l India (P) Ltd. The running of M/s C-l India (P) Ltd and its management is operated by professional CEO, CFO and directors and not by assessee.

(e) Claridges Hotels Pvt. Ltd, Claridges SEZ etc came into existence only in A.Y. 2004-05 and are therefore, this fact is not relevant for these years.

(f) He has maintained non-resident accounts in the Indian banks as per the provisions of FEMA and importantly has been considered as a non-resident Indian as per the provisions of FEMA.

(g) The assessee has been a resident of UAE since 2000 having residential address in UAE which is 312, Wafi Residence, Wafi City, Dubai. This is also an unrebutted fact. . He holds a UAE resident card, UAE driver's license and UAE health card. This fact has not been rebutted by the assessing officer and the evidence of the same is part of the seized record. Thus the seized record also supports the claim of the assessee.

(h) AO at para 3 of his has mentioned that Mr Nanda has houses in London, Dubai and other parts of the world. Consequently on one hand he admits that the assessee has permanent residences abroad on other hand it is being held that he is resident in India because of visits and farm house repairs done by assessee. This is an apparent contradiction in AOs conclusion and militates against the proposition that assessee is to be treated as Resident in India.

(i) It is accepted by AO that assessee is Director in various Companies abroad and income and has earned income abroad from Infotec Services Ltd, UBS FZC etc. which is a matter of seized record itself.

(j) The assessee has no steady income in India and has been making remittances into India from his own bank accounts from abroad for meeting
expenses and use by his family in India.

(k) Some investments in properties and shares of companies in India, are routinely made by Non Residents of all hues in India. Assessee has carried out similar activities. They have been misconstrued by AO to do a somersault on settled residential status as Non-resident since last 20 years.

(l) The assessee on visits to India stays in a rented property.

(m) If AO's interpretation is accepted then all persons working in the Middle East will become residents of India because they have some investments in India and their families also reside in India

(n) The assessee has two children, both of whom are British citizens. Unfortunately, his son is facing criminal charges for a road accident in India because of which he had to stay in India. The assessee therefore comes to India to help him in legal matters and for moral support and to keep in touch with family. The assessee's wife does not live with him as they have estranged relationship for which monthly maintenance is provided to her as per the order of the court. These facts in any way have no adverse reflection on Non resident status and have been arbitrary used by AO against assessee.

(o) The assessee was a full time Chairman-cum-Managing Director in a company UBS Trading FZC situate at Sharjah (UBS) for the years 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07. This is evidenced by audited Balance Sheets of UBS which are found in the searched premises. The assessee is 99% share holder in UBS, which has not been disputed, as per the seized Annexure 6E, Balance Sheet and Profit & Loss Account this company.

(p) From these facts it shall be properly appreciated that the assessee for all practical purposes was fully involved in the business activities of UBS Trading FZC, Sharjah and apart from huge remuneration, he also received dividend from the said company.

5.13. Lower authorities failed to consider that:

(a) Claridges Chairmanship came about much later i.e AY 2004-05 and not in relevant assessment these years. Therefore, the adverse inference drawn is baseless.

(b) Ownership structure of Claridges has not been considered which reveals that it is not owned by the assessee. One Mr. Hugh Hamilton confirms
owing 80% through companies i.e. Mideast Online and Infotech Services Ltd and he owns remaining 20%. Thus assessee has no stakes in Hotel Claridges.

(c) Details about shareholding of C-l India's ownership have been fully explained which reveals that assessee hold no stakes. It belongs to Mauritius based Y2K Systems (P) Ltd. Assessee is only a minor share holder in Y2K Systems. By figment of

imagination and pure surmises, AO held that these are assesses's benami concerns.

(d) Datasheet of Infotech Services Ltd reveals that it is an independent company, not owned by the assessee.

(e) Details about loan received by Y2K Systems from another foreign company one Palm Technologies in 2007 was explained to be source of share capital money and loan given to C-I India. Thus assessee furnished a proper explanation supported by documents in this behalf.

5.14 Thus, for investment in M/s C1 India P Ltd., Ld. AR contended that complete details of ownership of C-1 India were given during assessment proceedings. About assessee's interest in foreign concerns, following submissions are made:

a. Some investment by way of advance was made in Y2K Systems International Ltd. by another company called Infotec Services Ltd. of Jersey and assessee was a shareholder in the said Infotec Services Ltd. International Ltd. to Infotec Services Ltd. Thus, the assessee was not a shareholder in Y2K Systems International Ltd. in his individual capacity.

b. The assessee was a non Executive Chairman in C-1 India Pvt. Ltd. for a short period and owned 100 shares in it. Request was madeto Assessing Officer to make an independent enquiry from abroad about C-1 India. Mauritius authorities confirmed ownership of C-1 India by Y2K Systems of Mauritius and existence of Y2K Systems. However the information has not been provided.

f. There is not an iota of evidence with department to even suggest that the assessee remitted any money personally through Y2K Systems International Ltd. to C-1 India Pvt. Ltd.

g. The assessees association with C-1 India Pvt. Ltd. is merely because of Infotec Services Ltd. of Jersey which had a stake in Y2K Systems International Ltd. by way of loan. To look after the investment it was desirable to involve himself in some matters of the Company. C1 India is completely independent and is professionally managed by a Chief Operating Officer and assessee has no role to play in day to day affairs. The Company interacts with its parent Company for its financial needs and is controlled by Y2K Systems International Ltd.

h. The burden of proof is on the person who alleges. The allegation that the assessee has remitted money into C-1 India Pvt. Ltd. from undisclosed sources is squarely on the Department. The assessee has discharged the onus that lay upon even by filing the balance sheets of Y2K Systems International Ltd., the list of shareholders of Y2K System International Ltd. and a positive submission that he has not made any investment whatsoever into Y2K Systems International Ltd. or C-1 India Pvt. Ltd.

i. The amount of share application money and loan amount has been held to be the unexplained income of the assessee at the same time these amounts have been taxed in the hands of C-1 India (P) Ltd as unexplained income by using the same language in the assessment order of C1 India.

The following case laws were cited to emphasize that double addition is not permissible

(1) CIT v. Smt. Saraswati Devi (1995) 212 ITR 0445 (Raj)
(2) CIT v. Smt. Tara Devi (2007) 292 ITR 539 (Raj)
(3) Lalji Haridas v. ITO (1961) 43 ITR 0387 (SC)
(4) ACIT v. Precision Metal Works and ors (1985) 156 ITR 0693 (Del)
(5) Smt. Dayabai v. CIT (1985) 154 ITR 0248 (MP)
(6) ITO v. Ch. Atchaiah (1996) 218 ITR 0239 (SC)
(7) CIT v. Smt Durgawato Singh ((1998) 234 ITR 0249 (All)
(8) CIT v. Taj Oil Traders (2003) 262 ITR 0500 (Raj)
(9) CIT v. Cochin Company Pvt. Ltd. (1976) 104 ITR 0655 (Ker)
(10) Jaggannath Hanumanbux v. ITO (1957) 31 ITR 603 (Cal)

5.15. As regards addition on the basis of documents recovered by Delhi Police on 20.02.2007 from the possession of Dr. M.V. Rao, the Ld counsel for the assessee contends that:

i. During the course of assessment proceedings, copies of document Nos. 58 and 59 seized from Mr. Rao were not given and were only shown. Despite this handicap, assessee, to best of his ability, on 21-12-2009 responded to them. No further questions were asked by the Department and huge addition was made. .

ii The AO has relied on various documents and other papers found from the premises of Dr. M.V. Rao, without giving copies of documents and statement and a proper opportunity to cross examination. Thus, there is no basis for additions. These infirmities were pointed out to ld. CIT(A), but for no avail.

iii. It is trite law that no addition can be made on the basis of evidence found from a third party unless evidence is confronted to the assessee and the sine qua non of principle of natural justice "audi altem partem" is not complied with. .

v. Presumption of ownership u/s 132(4A) of the Act and under section 292C of the Act about papers found from his premises extends only to Dr. Rao. It has been arbitrarily applied to the assessee. Reliance is placed on SMS Investment 207 ITR 364 (Raj); Surender M. Khander 321 ITR 254 (Bom), Dr. Bansal 327 ITR 44 (Chattisgarh)

vi Dr. M.V. Rao, a former director of BHEL, may be employed with M/s C-I India Pvt Ltd and M/s Transcom Services Pvt. Ltd. M/s

Transcom Services Pvt. Ltd has no connection with the assessee and M/s C-I India Pvt Ltd. as is evident from the assessment order is connected through Y2K system.

vii The Department has gathered information from Mauritius about M/s C-I India Pvt Ltd. However, this information is not provided to the assessee despite repeated requests.

viii. Without supply of copies of Mr Rao's statement and all documents are proposed to be used against assessee. They cannot be relied up against assessee. It is trite law that, no addition can be made on the basis of documents found from a third party without examining the third party and linking the contents of the documents with him. Reliance is placed on following judgments:

(i) Bangodaya Cotton Mills Ltd. vs CIT 224 CTR62
(ii) DCIT vs Mahendra Ambalal Patel 40 DTR 243
(iii) Prakash Chand Nahta vs CIT 301ITR 134
(iv) CIT vs. Salek Chand 300 ITR 426 (All)
(v) SMC Share Broker Ltd 288 ITR 345 (Del)
(vi) JMD Computers 20 DTR 317
(vii) S.M. Aggarwal (2007) 293 ITR 43
(viiii) Amarjit Singh Bakshi 263 ITR 75
(ix) Krishna Textiles 11 DTR 217
(x) M.A. Chidambaram 63 ITR 203 (Mad)
(xi) Kishan Chand Chela Ram 125 ITR 713
(xii) A.N. Dyaneswaran (2008) 214 CTR (Mad) 482

5.16 Apropos the allegations that about the arms dealings with Dr. M V Rao and Mohan Jagtap Y2K and Cl- India all being Benami transactions Ld. Counsel vehemently argues that the entire burden to prove that assessee is a Benami beneficiary of these transaction lies on the department. The

allegation is devoid of any cogent material and is based on suspicions, surmises and conjecture.

5.17. Various Courts have held that the burden of proving that a particular sale is Benami and apparent purchasers are not the real owners always rests on the person asserting it to be so. This burden is discharged by strictly adducing legal evidence of a definite character which would either directly prove the fact of the Benami or establish circumstances unerringly and unreasonably raising an inference of that fact.

5.18. Further reliance is placed on judgment of Hon'ble Allahabad High Court in the case of Prakash Narain 134 ITR 364 wherein the following four propositions have been propounded:-

a) The burden of proof regarding Benami is upon the person who alleges Benami.

b) To prove Benami the most important point is to examine the source of consideration.

c) The mere rejection of an explanation would not entitle the department to claim that the consideration for the purchase of property is in the name of assessee and was provided by the assessee.

d) A finding regarding Benami is a finding of fact. The said finding cannot be questioned unless it is without evidence in support of it

5.19 Further reliance is placed on the judgment of the Hon'ble Supreme Court in the case of Daulat Ram Rawatmull 87 ITR 349 wherein it has been held that:

"A person can still be held to be the owner of a sum of money even though the explanation furnished by him regarding the source of that

> money is found to be not correct. From the simple fact that the explanation regarding the source of money furnished by A, in whose name the money is lying in deposit, has been found to be false, it would be a remote and far-fetched conclusion to hold that the money belongs to B. There would be in such a case no direct nexus between the facts found and the conclusion drawn therefrom."

5.20. In the case of Subramaniam 55 ITR 610 (Madras), it was held that just because of certain deposits in a bank in the name of wife were not fully explained, it cannot be held that they were the assessee husband's undisclosed income.

5.21. In the case of Man Singh 1 ITD 741 (Delhi), it was held that mere rejection of assessee's explanation that the house was made partly out of her savings and partly out of loans advanced from her husband does not establish that the house belongs to the husband.

5.22. Apropos the addition on account of alleged payments to estranged wife Smt Renu Nanda, Id counsel vehemently argues that the edifice of this addition is based on pure surmises and conjectures. Facts in this behalf are-

(i) The assessee has an estranged relationship with his wife Mrs. Renu Nanda. Vide Deed of Settlement dated 04.04.1998, expiring in 2000, the assessee was required to support her financially during the currency of legal separation. The assessee for the F.Y. 2001-02 paid Mrs. Renu Nanda a sum of Rs. 7,60,000/- towards the maintenance i.e. day to day expenses. The expenses on account of guards, servants, driver and other capital expenditure were met by the assessee from his account by way of account payee cheques.

(ii) The Assessing Officer has assumed that the expenditure should have been a total sum of Rs. 32 lacs for the year under consideration on following guess work-

(a) That the assessee paid Rs. 30 lacs as annual maintenance to his wife in the year 1997-98 and therefore, why would he not pay more at least the

same amount 5 years later.

(b) The estimation of the payment that would have been made to his wife is to be based on the agreement dated 11.09.2004 wherein Mrs. Nanda was to be paid Rs. 1 lacs per month and Rs. 2 lacs for diwali.

5.23. The addition is contested as untenable and deserves to be deleted for the following reasons--

(a) That during the course of search on 28.02.2007, no evidence, whatsoever, was found to even remotely suggest that any payment other than Rs. 7,60,000/- by cheque was made to Mrs. Renu Nanda by the assessee.

(b) The assessee has paid Rs. 7,60,000/- by cheque for her day to day expenses which is more than enough considering that Mrs. Renu Nanda is alone in the house provided by the assessee and all the other fixed expenses are paid by the assessee.

(c) No corroboration from the end of Mrs. Renu Nanda was made to arrive at the estimation.

(d) The estimation is based on the agreement dated 11.09.2004 which is three years after F.Y. 2001-02. the agreement which is valid after 11.09.2004 cannot be applied to the period 2001-02?

(e) The addition has purported to be made u/s 69C of the Act, is not based on some evidence therefore, the estimate is arbitrary and untenable. In case, the assessee had paid the estranged wife less than she would have raised an issue in this behalf, instead AO has raised objection. Thus there is neither any evidence nor circumstance to suggest that any amount outside the books/bank was made to Mrs. Renu Nanda for her support.

(f) In any case, Renu Nanda had sufficient bank balance retained out of the moneys given by the assessee and even otherwise, Rs. 7,60,000/- given to her during F.Y. 2001-02 was sufficient to support her.

(g) Mrs. Renu Nanda had sufficient cash available for the defraying her house hold expenses, more so when expenses on electricity, water, driver, guard etc of her residence are being met by the assessee directly.

(vii) Reliance is placed on ; David Dhawan vs ACIT 71 ITD 1 Mumbai & PRABHU DAYAL LALLU RAM. vs. INCOME TAX OFFICER - 63 TTJ (Del) 557

5.24. Apropos additions on account of daughter's wedding it is pleaded that the addition has been made on the basis of some loose papers in respect of

(i) Mr. Paul Nanda Rs. 13,00,000/-

(ii) Abujani & Sandeep Khosla Rs. 14,50,000/-

Rs. 5,70,000/-

Rs. 12,75,000/-

5.25. According to the assessee proper explanation about the expenditure was furnished. However, AO still made the addition without appreciating that:

(i) The addition of Rs. 12,75,000/- has been made twice.

(ii) No rebate for cash in hand of Rs. 44,66,000/-available with the assessee has been given by AO. It has been held on presumption that assessee could not keep such a huge cash in hand.

(iii) The expenditure was incurred by the assessee and her wife jointly and their withdrawals in the year amounted to Rs. 53.66 lacs which has also not been considered.

(iv) Reliance is placed on Hon'ble Delhi High Court’s judgment in the case of Kulwant Rai 291 ITR 36 (Del.), for the proposition that the burden is on the department to disprove the assessee's contention that amount of cash in hand was available with the assessee.

6. Ld. DR apropos the residential status, vehemently argues that the AO was justified in changing the status of the Assessee from Non Resident to

Resident on just and proper reasons. Looking at the information, bank accounts, business affairs, number of visits to foreign countries and India it is apparent that the assessee was not visiting India but he was an Indian resident for all practical purposes and was visiting abroad in relation to his business affairs. The Explanation (b) to sec. 6(1) provides stay of less than 182 days in the case of PIO who live outside and visit India to look after their investments. In this case, assessee is living in India carrying out various business activities and visits outside India. Therefore, the benefit of Explanation (b) to sec. 6 (1) has been rightly denied.

6.1. Principles of res judicata are not applicable to Income Tax assessments. If the AO comes in possession of such information which suggests that the assessee has been claiming the status of Non Resident without disclosing the proper facts! AO is justified to change the status to Resident. The principle of consistency will not apply in a case where there is a change in facts due to unearthing of some new information during the course of search. Therefore, the assessee's plea to apply rule of consistency based on Hon'ble Supreme Court judgment in the case of Radha Swami Satsang (supra), in this behalf is not tenable.

6.2. Assessee's reliance on Dubai Resident Card, driving license, owning a house in Dubai and London and other documents are irrelevant. The word "Non Resident" is not specifically defined under I.T. Act, Section 2(30) defines, 'non-resident' means a person who is not a 'resident'. Thus, first of all, it is to be ascertained whether assessee is a resident or not, section 6(l)(b) is applicable only for non-resident '. Therefore, if the assessee is a resident, then no other provisions will apply. The word used in explanation (a)talks about employment outside India and explanation (b) talks about 'visit to

India'. Thus, an Indian citizen living abroad in order to claim the status of 'non-resident' has to come on a visit to India and not for the purposes of carrying on business in India.

6.3. The material obtained during the search indicates that the assessee was carrying on business activities by way of investments in hospitality sector i.e hotel Claridges at Delhi, Faridabad and Mussorie,' investment in Ol India acquiring various business properties! commission in arms dealings. Thus, looking at the frequency of business activities it cannot be said to be a person who being outside India comes on a visit to India in previous year in terms of explanation (b) to section 6(l). Assessee is rather inside India who goes abroad for business.

6.4. Thus, the assessee's case is not covered by clause (b) but the same.falls under clause (c) of section 6(l). The status of the assessee, therefore, has been rightly held as 'Resident' which should be upheld. Order of AO and CIT(A) are relied on for this purpose.

6.5. Apropos other additions ld. DR relies on the orders of lower authorities.

7. Ld. Counsel for the assessee in reply contends that apropos the assessee's status, no new information or fact has been unearthed during the search. The fact about the assessee's being share holder in Y-2K Systems Mauritius is already in the record by way of bank a/cs of the company Infotech Services of Jersey in which assessee is a major share holder. The assessee became Chairman of Claridges Hotel in 2004 ', SEZ land for Claridges SEZ Pvt. Ltd. was also purchased in Maharastra in 2005 loan by YK2 was given to Palm Technology during the year 31-3-2007. Therefore, there is no discovery of new facts for these years. As such, no adverse inference thereof can be taken

in these years which are prior happenings in time. The lower authorities have tried to clutter the facts to create confusion and have relied on the facts which may have some effect in 2004. Thus, there being no change in facts and law, the rule of consistency has to apply.

7.1. AO applied section 6(l)(b) on the terms of provisions of which were omitted by Finance Act 1982 w.e.f. 1-4-1983 which provided that an individual would be resident in India if he maintained for himself a dwelling place in India. The provisions have undergone amendments and maintenance of dwelling place has been omitted. Since the Legislature has consciously omitted the provision about dwelling place in India, it is a clear indicator that dwelling place, no. of residence places in one or other country are no more relevant for deciding the issue of residential status. Govt. desired to keep the parameter of no. of days of stay simpliciter as the conclusive test.

7.2. It is trite law that the literal meaning to the words and terms used in Income-tax has to be accorded. The lower authorities have tried to apply the rules of interpretations where the meaning of terms is plain and simple supported by circulars of the Board. When the meaning of the provisions is unambiguous and clear, rule of interpretation do not apply. Merely being influenced by the media publicity, it has been held that assessee is an arms dealer and by twisting the provisions that assessee is a resident.

7.3. CBDT vide Circular no. 684 (supra) has clearly explained that it is the number of days of stay in India which will be decisive in determining the status and not the other factors. The binding nature of

Board circular has been upheld by Hon'ble Supreme Court in the case of K.P. Varghese (supra). The determination of status as 'non-resident ' on the basis of days only has been upheld in the case of O Abdul Razzak (supra) and by the AAR in the case of Dr. Virendra Kumar and Canoro Resources (supra). Thus, the only factor for determination of the status of non-resident is the number of days of stay in India. The distortion of provisions of sec. 6(l)(b) & (c) is without any basis and contrary to the express provisions and binding CBDT clarifications.

7.4 Ld. Counsel for the assessee Shri Ajay Wadhwa further relied on Hon'ble Supreme court judgment in the case of Vodafone 341 ITR 43 which lays down a clear proposition that the companies being incorporated entities under respective law possess independent and distinct status than their share holder or contributories. In case of structured investment transactions should not be disturbed on suspicions or casual considerations. In assesses case all the companies concerned are duly incorporated in respective legal jurisdictions. Necessary papers about their incorporation, existence, bank accounts have been produced. The investments in properties, assets and shares etc. have been made by structured deals. All of these legal transactions are being disturbed on surmises and conjectures, assessee having furnished proper explanation supported with documents has discharged his burden. In the interest of justice all these additions be deleted.

8. We have heard rival contentions and perused the material available on record. The first question which requires determination is whether the assessee is to be treated as Non Resident as has been held since past 25 years or to hold him as Resident as being interpreted by the AO. Whether the days of stay in India is the only test for determining the status as Non Resident and the provisions and Board Circular are clear and this being so require no

further interpretation. In our considered opinion the controversy in question stands answered by Hon'ble Kerala High court in the case of 0. Abdul Razaq 337 ITR 350 (Ker.), in similar facts and circumstances by following observations:

> "There is no controversy on facts inasmuch as the assessee was in India for only 177 days in the previous year relevant for the assessment year 1989-90, and unless it is established that Explanation (a) to sub-clause (c) of section 6(l) of the Act is not available to the assessee, he cannot be treated as a resident in India for the purpose of assessing his global income including the business income earned abroad during the previous year. Obviously Explanation (a) is an exception to section 6(l)(c) of the Act, under which 60 days residence referred to in clause (c) is substituted to 182 days if the assessee went abroad in the previous year for the purpose of employment Admittedly, the assessee went abroad on 24-9-1988 only to take up business there. If the business undertaken and carried on by the assessee in the previous year abroad amounts to employment within the meaning of Explanation (a) to section 6(1)(c) of the Act, then the assessee is entitled to the status of non-resident declared by the CIT (Appeals), which is confirmed by the Tribunal.
>
> *5. The contention of the learned senior counsel appearing for the revenue is that employment necessarily involves employer-employee relationship with terms of employment and only under an employer a person can be employed. Learned senior counsel appearing for the assessee, on the other hand, contended that employment in the context of Explanation (a) includes seh°-employment, and taking up and continue business is also employment for the purpose of the above Explanation.*
>
> *6. During hearing, learned senior counsel for the revenue has relied on the decision of the Supreme Court in Lakshminarayan Ram Gopal & Son Ltd. v Government of Hyderabad [1954] 25 ITR 449. We do not think the*

decision is applicable to the facts of this case. Learned senior counsel for the assessee has relied on the Memorandum explaining the provisions of the Finance Bill introducing the Explanation, contained in 134 ITR 137 (St.) [Para 35 of the Finance Bill], which reads as follow:'—

"(iii)lt is proposed to provide that where an individual who is a citizen of India leaves India in any year for the purposes of employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for 182 days or more. The effect of this amendment will be that the 'test' of residence in (c) above will stand modified to this extent in such cases."

Similarly the Central Board of Direct Taxes issued Circular No. 346, dated 30-6-1982, which reads as follows-'

"7.3 With a view to avoiding hardship in the case of Indian citizens, who are employed or engaged in other avocations outside India, the Finance Act has made the following modifications in the tests of residence in India:'—
*(i)& (ii) *******
(Hi) Where an individual who is a citizen of India leaves India in any year for the purposes of employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for 182 days or more. The effect of this amendment will be that the test of residence in (c) above will stand modified to that extent in such cases."
7. What is clear from the above is that no technical meaning is intended for the word "employment" used in the Explanation. In our view, going abroad for the purpose of employment only means that the visit and stay abroad should not be for other purposes such as a tourist, or for medical treatment or for studies or the like. Going abroad for the purpose of employment therefore means going abroad to take up employment or any

> *avocation as referred to in the Circular, which takes in self-employment like business or profession.*
> *So much so, in our view, taking up own business by the assessee abroad satisfies the condition of going abroad for the purpose of employment covered by Explanation (a) to section 6(l)(c) of the Act. Therefore, we hold that the Tribunal has rightly held that for the purpose of the Explanation, employment includes seh°-employment like business or profession taken up by the assessee abroad.*
>
> *We ther*efore dismiss the appeal filed by the revenue."

8.1. Hon'ble High Court has considered the plain meaning of section 6(l)(c), the Board Circulars and held that the purpose of going abroad includes the purpose of seeking business in foreign countries also. The going abroad for business purposes will include self employment, business or profession taken up by the assessee. In our considered view, these facts cannot be construed in a manner to project that it implies carrying business activities from India.

In view of facts, circumstances, case laws and CBDT circular we reach to following conclusions:

a. Residential status is always determined for the Previous Year because the assessee has to determine the total income of the Previous Year only. In other words, as the tax is on the income of a particular Previous Year, the enquiry and determination of the residence qualification must confine to the facts obtaining in that Previous Year.
b. If a person is resident in India in a Previous Year in respect of any source of income, he shall be deemed to be resident in India in the Previous Year relevant to the Assessment Year in respect of each of his other sources of Income.
c. Relevant Previous Year means, the Previous Year for which residential status is to be determined
d. It is not necessary that the stay should be for a continuous period.
e. It is not necessary that the stay should be at one place in India.
f. A person may be resident of more than one country for any Previous Year.

g. Citizenship of a country and residential status of that country are two separate concepts. A person may be an Indian national/Citizen but may not be a resident in India and vice versa.
h. No. of days of stay in India determines the status.
i. Assessee can take any vocation in any of the countries.
j. During these years assessee had for more greater business engagements abroad as compared to India. Therefore it cannot be assumed that he did not come from outside of India.
k. The explanation (b) to sec. 6, the explanatory notes for this amendment as clarified by CBDT in this behalf also make the no. of days provision very clear and unambiguous and leaves no room for interpretation.
l. Even for the sake of arguments we accept the AOs interpretation it leads to absurd result by making practically every nonresident as a resident in India. This does not seem to be the legislative intent behind this amendment as the mischief sought to be redressed by this amendment to reduce the hardship and not to increase the hardship by unsettling what is settled.

When the law mandates that an Indian Citizen can go abroad for the purpose of seeking employment or business, there is no room to misconstruction to assume that assessees larger presence/business investment/family ties are in India than abroad. This amounts to a guess work contrary to settled propositions. Therefore, we are unable to agree with department that assessee was not visiting India from outside India. There is no restriction for number of days spent abroad. What the law mandates is to look at the number of days stayed in India.

8.2. Similar view has been adopted by the Authority of Advance Rulings in the case of Dr. Virendra Kumar (supra) and Canoro Resources (supra). Departmental authorities, except for interpreting the words in theor own manner, have not relied on any case law on the issue of section 6(l)(c) and expln. (b) specifically. Thus no judgment contrary to Hon'ble Kerala High Court has been cited by the Revenue. It is a trite law that in Income tax

proceedings the words shall be given plain and ordinary meaning and interpretation should be resorted only when the meaning is ambiguous. We are unable to see any ambiguity in these provisions. Hon'ble Kerala High Court has held that for determining the status as Non Resident is to be decided in terms of no. of days of stay in India. This being the only judgment available on this issue, is binding and is to be respectfully followed by us. The AAR judgment have a persuasive value and the decisions in the case of Dr. Virendra Kumar and Canoro Resources also AAR has adopted the ratio of Hon'ble Kerala High Court judgment. Thus, the test of residence will be determined on the basis of number of days of stay in India and not by the interpretation adopted by the lower authorities in this case. It has not been disputed by the revenue that the number of days of the stay of assessee in India are less than 182 days. In these facts and circumstances the assessee's arguments on this issue deserve to be upheld.

8.3. In view of the facts, circumstances and case laws cited and referred above on behalf of the assessee we hold that the determinative test for the status of Non Resident being number of days of stay in India and in assessee's case in these three years, the days of stay being less than 182 days; the status to be applied in this case is to be held as Non Resident as claimed by assessee. Thus, the assessee will be liable to tax on income accrued in India only. The assessee's grounds in this behalf are allowed.

9. Apropos the addition of Rs. 10,51,20,000/- made on the basis of a hand written page allegedly containing debit and credit entries in assessee's account with Deutsch Bank, Singapore on the ground that no explanation was given with regard to the source of the funds, is to be deleted as the same does not represents income accrued in India. Assessee has demonstrated

that paper contains details of transfer of his own funds from foreign bank accounts maintained for the investment and business activities carried out in those countries. The AO has not lead any evidence to show that assesses explanation is incorrect or the credits in the bank account are as a result of any income which accrued in India. Admittedly the assessee being a non-resident claims to have activities and bank accounts in these countries. In these circumstances the burden to prove that assessee's explanation if false or the receipts outside India were as a result of any income which accrued in India was on the Department. AO has failed to discharge the burden and no adverse material has been brought on record. Besides the ITAT in the case of the assessee has held that these are remittances from the assessee's own account outside India to Indian bank accounts cannot be taxed u/s 68 of the Act. The decision of the Tribunal has been accepted by the Department and no appeal has been preferred to the High Court. Hence, we delete this addition, this ground of the assessee is allowed and the addition of Rs. 10,51,20,000/- is deleted.

10. Apropos the addition on account of share capital and loans of M/s C-l India Pvt. Ltd. by its holding company M/s Y2K Systems; Id. Counsel for the assessee that C-1 India is a private limited company incorporated on 11-08.2000 with the main object of pursuing E-Commerce and software business. It was contended on behalf of C-1 India that no addition ought to be made as cash credits under section 68 of the Act on account of share capital and also the loans received from Y2K Systems Ltd as the onus that lay upon it had been discharged during the assessment proceedings. It was explained that:-

(i) the share capital and loans had been received by C-I India from its holding company Y2K Systems Ltd Mauritius through banking channels;

(ii) the audited Balance Sheets of the holding company had been filed and had also been obtained independently by the Department;

(iii) these Balance Sheets clearly reflect the said amounts having been received by C-1 India;

(iv) the tax residency certificate of Y2K Systems Ltd had been filed;

(v) the particulars about incorporation of the company in Mauritius have been filed which have not been disputed.

Thus in respect of share application money and loan to C-I India no addition under 68 of the Act can be made.

The assessee contends that there is no evidence whatsoever in the form of bank account, document, paper etc to show that the amount received by C-1 India belongs to him.

It was further contended that the same amount with the same explanation was held to be belonging to C-1 India and was also added substantively in his hands. As such, the same amount had been taxed substantively in two hands with the same explanation and findings. The nature of the amount is also the same being money allegedly belonging to Mr Suresh Nanda and purportedly brought in by him as share capital in C-1 India.

It is trite that the same amount cannot be taxed doubly unless the nature of the amount changes or it is so provided in the Act. various judgments have been cited by both parties but this issue is well settled and does not need any judicial examination.

Same additions were made in both the cases on substantive basis. Both the parties agreed that the facts & circumstances are similar in both the cases and the issues may be decided keeping in mind the view taken in the case of the assessee.

In our considered view C1 India has been held as a separate entity held by department by way of assessments. It has not been held to be a Benami concern of the assessee. The addition have been made on account of Share application moneys and loan in both the cases i.e. assessee and C1 India without examining the relevant aspects like identity, creditworthiness, issues about genuineness of transaction and the issue of separate status of the entities in view of Hon'ble supreme court judgment in the case of Vodafone (supra). Lower authorities also seems to be ambivalent as to in which case the addition should be made.

Considering all the facts, circumstances and the law on the issue, ends of justice will meet if the issue is set aside and sent back to the file of

AO accordingly to decide afresh to consider, whether any addition on this account is called for in any case and if so in which case the addition is to be made.

11. Apropos common ground raised in A.Ys. 2002-03 & 2003-04 in respect of alleged income from arms deals made on account of searches in the case of M.V. Rao and Mohan Sambha Ji Jagtap, the relevant statements have neither been provided nor these persons have been allowed to be cross examined by assessee. In the presence of these infirmities in the proceedings, these additions cannot be made. The AO may be directed to do the needful in this behalf; consider the outcome of assessment proceedings in their cases provide the opportunity for the cross examination and decide the issue afresh in accordance with law. We are of the view that the addition based on documents found from third parties cannot be made without confronting the material and allowing the opportunity of cross examination to the assessee. This proposition has been repeatedly laid down by all the Courts. Besides, there is a presumption in law that the person from whom the document is found is the owner of the document. The Department should discharge their burden before seeking to tax the assessee on the basis of documents found from Dr. M.V. Rao or shri Mohan sambhaji Jagtap. Since the assessee has not been provided necessary material including their statements, opportunity of cross examination and hearing based thereon, interest of justice will be served if the issues about income from commission/ business of dealings in arms are decided afresh by AO in the light of these observations. These grounds raised by the assessee in A.Yrs. 2002-03 & 2003-04 are allowed for statistical purposes.

12. Apropos the addition in respect of the estranged wife Smt. Renu Nanda, we are unable to uphold this addition inasmuch as both were

separated by way of deed of settlement dated 4-4-1998 and the payments based thereon on were already made. The addition has been made not based on any evidence or incriminating material, indicating that any payment was made out of books. The sole basis of addition is an assumption that there was some unwritten understanding between the assessee and his estranged wife Smt. Renu Nanda. Therefore, it has been assumed that lesser amount for support was paid by the assessee as compared to earlier years. In our considered view the basis of addition being only on presumptions, there being no material what so ever, the addition is deleted. We find merit in the argument of ld. Counsel that with estranged relations on record such presumption is baseless. This ground of assessee raised in A.Y. 2003-04 is deleted.

13. The only ground left is in respect of unexplained expenditure of Rs. 45,95,000/- on the wedding ceremony of assessee's daughter, the Ld. Counsel for the assessee contends that there are mistakes in the amounts alleged to be paid to one Mr. Pal Nanda as mentioned in paper book page 278 which has not been considered. Similarly, the amount of Rs. 12.75 lacs appearing at page 282 has been wrongly included. The assessee and his wife are assessed to tax and are persons of means. The reconciliation of availability of cash in hand of Rs. 53.66 lacs with the assessee and his wife has been ignored by AO without giving any reasons and Hon'ble Delhi High Court judgment in the case of Kulwant Rai 291 ITR 36 has not been considered, holding that the assessee can keep the cash in hand. Looking at the facts and circumstances of the case, it emerges that proper factual verification has not been done by AO. Besides the issue of availability of cash with assessee and his wife needs to be considered in the light of Hon'ble Delhi High Court judgment. In view thereof we set aside this issue

about unexplained expenditure on the daughter's wedding back to the file of AO to decide the same afresh in view of above observations and after giving the assessee opportunity of being heard.

14. In the result, assessee's appeals are partly allowed for statistical purposes.

Order pronounced in open court on 24-07-2012.

Sd/-	Sd/-
(SHAMIM YAHYA)	(R.P. TOLANI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 24-07-2012.
MP
Copy to '
1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR