Sudhir Sareen, New Delhi vs Department Of Income Tax on 15 September, 2014

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH: 'G' NEW DELHI BEFORE SMT DIVA SINGH, JUDICIAL MEMBER AND SH. B.C.MEENA, ACCOUNTANT MEMBER I.T.A .No.-3120-3126/Del/2011 (ASSESSMENT YEARs- 2003-04 to 2008-09) ACIT, vs Sudhir Sareen, Central Circle-7, Room No-363, B-101, Greater Kailash-I, E-2, ARA Centre, Jhandewalan Extn., New Delhi.

New Delhi	PAN-AAACR0344K
(APPELLANT)	(RESPONDENT)

CO No.207 to 210/Del/2013
(In I.T.A .No.-3120-3126/Del/2011)
(ASSESSMENT YEARs- 2003-04 to 2005-06)

Sudhir Sareen,	vs ACIT,
B-101, Greater Kailash-I,	Central Circle-7, Room No-363,
New Delhi.	E-2, ARA Centre, Jhandewalan Extn.,
Pan-AAAPS5842A	New Delhi
(APPELLANT)	(RESPONDENT)

Appellant by Sh. Ramesh Chandra, CIT DR
Respondent by Sh. D.N.Marwaha, CA &
Sh. K.Sundar, CA

Per Bench

These seven appeals filed by the Revenue against the separate orders dated 31.03.2011 of CIT(A)-I pertaining to 2003-04 to 2008-09 assessment year alongwith four Cross objections filed by the assessee in ITA No.-3120/Del/2010 to ITA No.3124/Del/2013 for 2003-04 to 2005-06 assessment years are being decided by a common order for the sake of convenience.

(In I.T.A .No.-3120-3126/Del/2011)

2. It was a common stand of the parties before the Bench that the grounds raised by the Revenue and by the assessee in the Cos filed are more or less identical in all the years. Accordingly the arguments advanced in ITA No- 3126/Del/2011 for 2008-09 Assessment year by the Revenue subject to the differences in the other years which Ld. CIT DR stated he would point out in the respective appeals would cover the departmental stand in all these years. This stand was fully agreed to by the Ld. AR. Similarly qua the assessee's COs in 2002-03 to 2005-06 assessment years the common stand of the parties was that the arguments advanced for CO-207/Del/2013 in 2002-03 assessment year would address the remaining COs.

3. The hearing in the present appeals took place on various dates from 29.05.2014 to 01.09.2014 and the parties have been heard at length wherein in order to sum up the issues, written submissions sought to be placed on record by the parties were permitted which were repeatedly

revised/modified and supplemented right till the last date.

4. The relevant facts of the case as are emerging from the assessment orders common to all the years are that Search & Seizure operations u/s 132 of the Income Tax Act was carried out in the case of the assessee on 12.09.2007. Referring to the facts as discussed for 2008-09 assessment year as the lead order as per the common stand of the parties has been passed by the CIT(A) in the said year and taking note of the fact that in the arguments advanced by the parties focus has been maintained on the said order we deem it appropriate to first address the facts as recorded by the AO in the said year. While doing so we have gone through the assessment order passed in 2003-04 including others and have seen that except for the difference in foreign remittance amounts there is no other difference noted by the AO. A reading of assessment order in 2008-09 assessment year shows that the (In I.T.A .No.-3120-3126/Del/2011) AO records that after the transfer of the case to the DIT(E), Delhi to International Taxation by an order u/s 127 dated 27.12.2007 notice u/s 142(1) dated 17.10.2008 was issued to the assessee requiring him to file the return for the assessment year 2008-09. The return in response thereto was filed on 19.02.2009 declaring an income of Rs.44,34,854/-. The AO notes that the return filed in response to the notice u/s 142(1) is the same as had been filed by the assessee u/s 139 on 12.08.2008. The returned income it was noticed consisted of income from house property, income from other sources and income from capital gains. The AO was of the view that the claim of Non-Resident Indian was only to take advantage of the benefit u/s 5(2) of the Act available only to a person who is a non-resident Indian within the meaning of section 6 r.w.s 2(30) of the Act which mandates that the income which arises to a NRI outside India shall not be included in his total income. Accordingly the AO issued notice u/s 143(2) and 142(1) alongwith questionnaires. The assessee however did not produce original passport for verification which led the AO to hold that the onus had not been discharged by the assessee.

4.1. The specific reasons set out in the assessment order are extracted hereunder for ready-reference:-

> "Firstly, the assessee has claimed that he left India for the purpose of employment and permanently settling abroad in the FY 1998-99 and therefore his residential status in the A Y 1999-2000 is governed by Explanation 'a' of section 6(6)(c) of the Act. In the absence of the original passport, the above fact could not be verified.
>
> Secondly, the assessee contended that the original passport for FYs 1998-99 to 2004-05 was lost by him in his visit to London on 4th February, 2009. In support of the same he has produced a letter dated 24.2.2009 from the Lost Office London, intimating the assessee that the document could not be traced. The letter was examined and it was found that it was a mere acknowledgement from the Lost Office, London of the assessee's report that he has lost certain belongings on 4.2.2009. The report is not indicative of what all belongings the assessee lost in his visit. Moreover, it is a common practice everywhere , particularly in common law countries to give the (In I.T.A .No.-3120-3126/Del/2011) details of the passport lost, in the complaint, including the name of the issuing authority, date of issue, expiry date etc. Nothing of that sort was found from the so called report of the Lost Office, London. Thirdly, the

assessee contended that the original passport was verified by the Intelligence Wing during the post search enquiry. However, no such finding has been recorded by the intelligence wing in their finding on the residential status of the assessee. "

4.2. In view of the above the AO held as under:-

"Hence it is held that the assessee has failed to discharge the onus of establishing that he has stayed in India for less than 182 days in assessment years from 1999-2000 to 2008-09. Therefore, he is a 'resident' as per the provision of the Income Tax Act, 1961.

4.3. Against the said conclusion the assessee advanced detailed submissions before the AO which have been reproduced in para 6 to para 6.2 at pages 4-14 of the assessment order. The relevant extract therefrom is reproduced hereunder for ready-reference:-

6. "In support of his contention the assessee has brought on record certain facts which could throw light on the issue of his residential status.

The arguments of the assessee are as under:-

"The assessee being a law abiding NRI, has always filed his income tax returns regularly in India as per Indian Income Tax Laws under the Permanent Account No.AAAPS5852A. He was a resident individual till FY 1997-98 and was staying at B-101, Greater Kailash, Part-I, New Delhi. Thereafter, he went outside India for the purpose of employment and with an intention to settle permanently abroad in the FY 1998-99. As his stay in India during the FY 1998-99 was less than 182 days, he became "Non Resident" as per applicable provisions (section 6(1) (a & c) read with explanation 'a') of the Indian Income tax Act.

The number of day's stay of the assessee during the above referred two financial years is stated here under:-

AY	Previous Year	Days Outside India	In India	Resident Status	at	Remarks
1998-99	1997-98	150	215	Resident (As per sec6 (1)(a))	Doing Consultancy and other Business in In and staying for mor 182 days in India.	
1999-2000	1998-1999	189	176	Non-Resident(As		Left India on 14/08 for the purpose of

(In I.T.A .No.-3120-3126/Del/2011

per Section employment outside Indi

6(1)(c) read and with an intention to
with settle permanently ab
explanation
on 'b'

As per provisions of section 6 of the Indian Income Tax Act, for the purpose of determining the residential status, the physical presence or stay in India and outside India can be broadly divided into two different periods:-

a} The first year when an Indian citizen is going abroad to take up employment abroad.

b) Subsequent visits to India after becoming NRI First Year of Leaving India: If a person leaves India for the purpose of taking up employment abroad, he becomes an NRI in the year of departure, if his total stay in India is less than 182 days.

c)Subsequent Year: To maintain the status of NRI, in all the subsequent financial years, he has to ensure that:-

(i) He stays abroad and do not visit India at all during the financial year, or

(ii) His aggregate number of day's stay in India during such financial year should be less than 182 days.

In other words, he can come to India in every financial year after his departure in the initial year and can stay in India for a maximum period of 181 days without losing his status of being considered as Non Resident.

(v) Thus, in view of above provisions, the residential status of the assessee stands determined here as under:

Residential Status for the Assessment Year 1998-99 The assessee was in India for a period or periods aggregating in all for more than 182 days. Thus, he became 'Resident' as per provisions of section 6 (1)(a) of the Income Tax, 1 961. The said fact was clearly highlighted in the returns of income filed for the said assessment year.

Residential Status for the Assessment Year 1 999-2000 when he permanently left India for employment outside India:

Clause 6 (l)(a) It is on record that the stay of the assessee during the financial year 1 998-99 in India was less than 1 82 days. Since the assessee was in India during the relevant years for a period or periods amounting in all to less than 1 82 days, he would be considered as ' non - resident' as per clause 'a' of section 6 (1) of the Income Tax Act,1961.

Clause 6 (1) (c) The assessee had stayed for more than 365 days during the preceding four years relevant to financial year 1 998-99 as he was doing business in India. He was also present in India for a period or periods amounting in all to 60 days or more (but less than 182 days) during the previous year 1998-99. Therefore, on a conjoint reading of both the limbs of clause (c), (without reference to Explanation as being discussed infra) it infers that the assessee (In I.T.A .No.-3120-3126/Del/2011) becomes resident due to his total stay exceeding 60 days in the financial year 1998-99.

Now let us refer to the Explanation below the above said section which governs the applicability as well as operation of the sub clause (c). The Explanation 'a' was inserted under section 6 (1) (c) by the Finance Act 1978 w.e.f. 01/04/1979 and later amended by the Finance Act, 1982. w.e.f. 01/04/1983. The intent of such insertion was explained in the Explanatory Notes to the provisions of Finance Act, 1982 vide Circular No 346 dated 3010611982. It was clarified that in order to avoid hardship in the case of Indian citizens, who are employed and leaves India in any previous year/or the purpose of employment, or are engaged in other avocations outside India, the period of sixty days as stipulated in sub clause 'c ' of section 6 (1) was extended to 182 days for being treated as resident in India. (Kindly Refer Annexure 13 for Clause 7. 3 of Circular No. 346 dated 3010611982 - Explanatory Notes on provisions of Finance Act 1982). Such relaxation of extended stay for Indian Citizens leaving for the purpose of employment in the first year was therefore duly allowed by the Finance Act, 1982. It is on record that the assessee left India on 14/08/1998 for the purpose of employment and with an intention to settle permanently in UAE. His stay in India during the Previous Year 1998-99 was less than 1 82 days. Thus, he had duly fulfilled the twin conditions of

- Having left India permanently for the purpose of employment outside India during the financial year 1998-99 and

- Staying in India for less than 182 days in the said financial year Therefore, it stands established beyond doubt that the assessee was a 'Non - resident' in terms of section 6 (1)(c) read with Explanation 'a' of the Income Tax Act, 1961 during the financial year 1998-99 relevant to the assessment year 1999- 2000.

Residential Status [or the Assessment Year 2000-2001 onwards The number of day's stay of the assessee during the Assessment Year 2000-01 to Assessment year 2008-09 is as under :-

Assessment Year	Previous Year	Days Outside India	Days in India	Residential Status	Remarks
2000-2001	1999-2000	191	175	Non-Resident (As per section	Stayed in India for less than 1 days for each
2001-2002	2000-	188	177	6(1)(c) read	Previous year
2002-2003	2001-2002	202	163	with explanation 'a')	and continuousl having UAE Residency Visa Since 1998.

2003-2004	2002-	193	172

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2004-2005	2003-	198	168
2005-02006	2004-2005	190	175
2006-2007	2005-	193	172
2007-2008	2006-	188	177
2008-2009	2007-	188	177

It is hereby clarified that the assessee has included both i. e. the day of arrival in India as well as the day of departure from India while computing his total stay in India as highlighted in chart above.

As mentioned supra, Clause 'a' of Explanation to section 6(1)(c) is applicable for, the year of departure i.e. FY 1998-99 only, whereas Clause 'b ' is intended for the assessee, who being outside Indian comes to India for a visit, so as to manage and supervise their investments and assets in India. The following judicial pronouncements and clarifications are dictatorial in this regards:"

> 4.4. Apart from the above arguments on facts and law reliance was also placed upon ITO vs Dr. M.P.Konanhalli, 55 ITD 266 and extract of the Budget speech of the Finance Minister (1982-83), part B wherein the discussion on the purpose and intention for bringing about certain amendments to the relevant provisions of law by the Finance Act of 1982 have been addressed. The same is reported at (1982) 27 CTR (TLT) 2,3: (1982) 134 ITR (St) 25, 26. The assessee also relied upon Circular No-684 dated 10.06.1994 extracted at para 10 & 11 of the assessment order. Based on the position of law as emerging therefrom following submissions on facts were advanced:-
>
> "It is also pertinent to mention that the Residency Visa of Dubai was granted and renewed by the Government of UAE continuously without any break since 1998 till date as per the details mentioned hereunder: Details of U.A.E Residency Visa of the assessee:-

Valid From	Valid To	Validity Period	Visa No.	Enclosure

(In I.T.A .No.-3120-3126/De

28-07-1998	27-07-2001	Three Years	2470845	Kindly Refer
23-07-2001	22-07-2004	Three Years	2000545	Annexure-18
21-07-2004	20-07-2007	Three Years	600545	
14-02-2007	13-02-2010	Three Years		

From the above details, it is evident that since 1998, when the assessee went outside India for the purpose of gainful employment and with an intention to settle permanently abroad, he visited India only for short durations i.e. for less than 182 days just to manage his assets in India and he had been continuously staying abroad for more than 182 days in all previous years after 1998. The said fact also stands corroborated from the Income Tax Returns filed by the assessee, which clearly reflect that he was Non Resident in the entire period after the year 1998 till date and was deriving income from his assets or investments held in India."

4.5. Reliance was also placed on the legal opinion of Sh. S.D.Kapila, Advocate and two retired Chief Commissioner of Income Tax namely Sh. Ashwani Kumar Garg and Sh. V.K.Aggarwal in support of the submissions of the assessee as advanced before the AO these are extracted hereunder:-

"....

All the above opinions are in sync with the view of the assessee and all of them are of the opinion that the assessee being a non-resident, would be liable to pay tax in India on his Indian income only and not on the foreign income for all the assessment years beginning from 1999-2000 till 2008-09. They also opined that since India is having Double Taxation Avoidance Agreement with UAE, the provisions of the I.T. Act, 1961 shall apply to the extent they are more beneficial to the assessee as provided in section 90(2) of the I.T. Act. Otherwise he will be governed for his tax liability by the provisions of DTAA. Therefore, the global income of the assessee cannot be taxed India except the Indian income. The opinions are considered and placed on record.

6.2. The assessee has also taken the help of the provisions of DTAA between India and UAE to canvass his case that his income earned outside India is not taxable in India. The entire arguments in this respect have been dealt in the ensuing paragraphs wherein discussions on provisions of DTAA have been made."

(In I.T.A .No.-3120-3126/Del/2011) 4.6. However not convinced with the arguments of the assessee status was determined by the AO as Resident for the following reasons:-

10.1. "The above submission of the assessee was examined and found to be non-sustainable for the reasons mentioned below:-

a) the assessee has allegedly entered into an agreement with M/s Westmead Holdings Limited which is a company registered in Canada. The nomenclature of the agreement is of "employment contract". The contract was signed in London on the 1st day of June. 1998. Neither of the parties of the contract is based in Dubai or locals of UAE.

c) two parties from two different countries have signed an agreement in a third country and subjected themselves to the jurisdiction of fourth country before any activities are done in the fourth country.

d) The word remuneration conveys a relationship of employer and employee between the parties. In the case of the assessee it is very difficult to say that there was ever a relationship of employer and employee except the nomenclature in the agreement. Few of the bank advices of the remittance bank of the employer were furnished. During the assessment proceedings, the assessee refused to furnish the copies of the bank account where the so called remuneration was received.

These advices also indicate that payments to the assessee are being remitted/sent from the bank of the company situated in Canada. If few of the bank remittance advice sent by the banker of M/s Westmead Holdings Limited to assessee's bank is examined closely then regularity of remuneration, which is the most crucial ingredient of employer and employee relationship, is missing.

e) Nothing has been brought on record to the effect that the assessee was in employment in UAE and has rendered services at that place. What all activities the assessee undertook for the so called employer is best known to the assessee.

In the absence of any record it cannot he said that the assessee was getting remuneration in UAE."

4.7. As a result of the above conclusion the following additions were made by him:-

10.1. "The above submission of the assessee was examined and found to be non-sustainable for the reasons mentioned below:-

a) the assessee has allegedly entered into an agreement with M/s (In I.T.A .No.-3120-3126/Del/2011) Westmead Holdings Limited which is a company registered in Canada. The nomenclature of the agreement is of "employment contract". The contract was signed in London on the 1st day of June. 1998. Neither of the parties of the contract is based in Dubai or locals of UAE.

c) two parties from two different countries have signed an agreement in a third country and subjected themselves to the jurisdiction of fourth country before any activities are done in the fourth country.

d) The word remuneration conveys a relationship of employer and employee between the parties. In the case of the assessee it is very difficult to say that there was ever a relationship of employer and employee except the nomenclature in the agreement. Few of the bank advices of the remittance bank of the employer were furnished. During the assessment proceedings, the assessee refused to furnish the copies of the bank account where the so called remuneration was received.

These advices also indicate that payments to the assessee are being remitted/sent from the bank of the company situated in Canada. If few of the bank remittance advice sent by the banker of M/s Westmead Holdings Limited to assessee's bank is examined closely then regularity of remuneration, which is the most crucial ingredient of employer and employee relationship, is missing.

e) Nothing has been brought on record to the effect that the assessee was in employment in UAE and has rendered services at that place. What all activities the assessee undertook for the so called employer is best known to the assessee.

In the absence of any record it cannot he said that the assessee was getting remuneration in UAE.

10.2. Once the assessee is treated as resident as per the domestic Act, i.e. Income Tax Act, 1961 the onus is shifted on him to establish that his source of the income during the relevant year is exempted from taxation in India in view of the provision of DT AA. The assessee refused to furnish the copies of statements of bank accounts maintained by him outside India. In the absence of any documentary details it is very difficult to say whether the income is in the nature of remuneration or business income or income arising from permanent establishment in India. The only fact which is writ large in his capital account is that he has remitted huge amount of approximately Rs. 150 crores in the last eight years from abroad for which no plausible explanation exists with him except saying that he is not obliged under the law to give the details. Hence it can be safely concluded that he (In I.T.A .No.-3120-3126/Del/2011) wants to take shelter behind some tax clauses to keep the income tax authorities of India at bay to avoid taxation of his income. Hence, it is held that the provisions of DTAA do not give any immunity to the assessee from his global income being taxed in India.

10.3. During the year the assessee has shown an amount of Rs.77,071,972/-

in his capital account as NRE income and claimed it as exempt from being taxed in India because he is an NRI. In the event of his residential status being determined as resident his entire income becomes taxable in India as per section 5 of the Income Tax Act, 1961. Hence an amount of Rs.77,071,972/- is added to the income of the assessee for the relevant year.

(Addition of Rs.77,071,972/-) 10.4. During the year the assessee has given a gift of Rs.2 lac to Saeisha Gupta. The above gift has been given by the assessee from his bank accounts maintained outside India and the same has not been remitted through the NRE account of the assessee. The assessee refused to give the source of the above amount stating that he not obligated as per law to give the details. Hence the above amount is treated as the income of the assessee for the relevant year."

(Addition of Rs.2,00,000/-)

5. Aggrieved by this the assessee went in appeal before the CIT(A). The CIT(A) as per the lead order in 2008-09 assessment year summarized the facts as under:-

1.3. "The facts in brief are as under:-

1.3.1. A search was conducted u/s 132(1) of the Income Tax Act, 1961, on 12.09.2007 on the Emaar MGF Group, New Delhi of which the appellant is a promoter and at appellant's local residential premises at B -101, Greater Kailash -I, New Delhi-110048.

That post search, a statement of the appellant was recorded, which is also on record. As per the copy of the Panchnama, placed on record, certain documents were seized which do not form the basis of making the addition by the A O. while completing the assessment.

1.3.2. The appellant is an Indian citizen holding an Indian Passport, regularly assessed to tax in India, till A Y. 1998-99 in the status of resident and ordinary resident in India and thereafter filed his returns of income regularly in the status of non-resident. The returns for the A Y. 1999-2000 till date have been filed regularly in status of Non-Resident. The assessments for the AY. 1999-2000 to 2001-02 were completed u/s 143(1) of the Act in the status of Non-Resident and by virtue of limitation have become (In I.T.A .No.-3120-3126/Del/2011) conclusive and final. Accordingly, the appellant was a Non-Resident in each of the years commencing from A Y. 1999-2000 to 2001-02.

1.3.3. The appellant, while he was resident in India, was deriving income as a consultant to various foreign entities. He was offered an employment in terms of Agreement dated 01st June, 1998 with M/s. West Mead Holdings Ltd, a foreign company, offering him Salary including share of Profits, for establishing, developing and administering its business in UAE and other Gulf Countries effective from 15th August 1998. The said Contract was executed in London on 1st June, 1998 and for this purpose the appellant has placed on record evidence in the form of stamp of the immigration authorities in the passport to the effect that he was in London on the 1st of June, 1998.

1.3.4 It has also been brought on record that the UAE granted a residence visa to the appellant effective from 28th July 1998 valid for a period of three years up to July 27th 2001. The said visa continued to be renewed from time to time and is presently valid upto June, 2013.

1.3.5. Further, in compliance to Foreign Exchange Regulation Act, the appellant approached the Reserve Bank of India on 14th August, 1998 in terms of application dated 10th August 1998 seeking their permission to hold assets in India u/s 29 of the Foreign Exchange Regulation Act, detailing out all his movable and immovable properties, directorship in Indian companies, bank accounts etc. in India and surrendering his repatriation rights in respect of the aforesaid assets or income accruing there from. The appellant even during the period he was resident in India had substantial immovable I movable assets in India being (a) residential house at B-1 01, Greater Kailash -1, New Delhi (b) farm houses in Delhi (c) investment in shares of Companies controlled by him, which also owned substantial movable I immovable assets. RBI in terms of its letter dated 08.09.1998 accorded its permission and directed the appellant to duly inform his bankers in India and companies in which he is a director for the change of the status from Resident to Non-Resident.

1.3.6 The appellant, as noted from record, has placed on record evidence to the effect that he had taken on lease an Apartment No. 230, Golden Sand II, Dubai on March 3rd 1999 for purposes of his residence in Dubai.

1.3.7 The appellant in the returns of income for each of the A. Y.'s 1999-2000 onwards, filed before the date of search, disclosed and stated detailed particulars of his stay in India while claiming his status as Non-Resident. The stay in India as stated by the A.O. in his Assessment Order is summarized as under:

Asstt. Year Previous	Days	Days	Residential	Remarks
				(In I.T.A .No.-3120-3126/De
Year	Outside India	in India	Status	
1999-2000	1998-1999	189	176	Non-	Left India on
2000-2001	1999-2000	191	175	Residential	14/08/1998 for
2001-2002	2000-2001	188	177	(As per	purpose of empl
2002-2003	2001-2002	202	163	Section	outside India a
				6(1)(c) read	an intention to
				with	permanently abr
				Explanation	Stayed in India
2005-2006	2004-2005	190	175	'a')	than 182 days f
2006-2007	2005-2006	193	172		Previous year
2007-2008	2006-2007	188	177		continuously ha
2008-2009	2007-2008	188	177		UAE Residency V
					Since 1998.

5.1. Before the CIT(A the arguments advanced and the documents

evidences relied upon before the AO were again addressed and the CIT(A) sought a Remand Report from the AO thereon. These facts, evidences, arguments and Remand Report etc. are found addressed in para 1.4 to 1.4.6 at pages 5-7 of the CIT(A) and are reproduced hereunder for ready-reference:-

> 1.4. "The appellant had filed before the A.O. and before me copies of his Indian/foreign bank accounts, bank advices for the amount credited to his bank accounts abroad, Copy of Employment Contracts, Salary Certificates, copy of passport and all other necessary documents.
>
> 1.4.1. That while framing the assessment order for A. Y. 2008-09, the A. O. has determined and held the status of "Resident" as against "Non-Resident", declared by the appellant, on the following grounds:-
>
> (i) Failure to produce the passport in original in support of the period of stay in India as claimed by the appellant and as such failed to discharge the onus of establishing the stay in India. The notarized certified copy of the Passport cannot be relied upon. Para-5, page 4 of order.

(ii) The A.O. has stated and Recorded at Para 9 - that appellant satisfies the first limb of explanation (b) to Section 6 (1) (c) but does not satisfy the other two sub-clauses namely "being outside India" for the reason that the appellant is actively involved in business in India; has relatives settled in India including his wife; is a Director in various Companies in India; has large investment in immovable properties in India including a farm house.

(iii) The A.O. has further stated and held at Para 9.4/9.5 - contention / interpretation of the appellant that Explanation (b) to Section 6 (1)(c) is applicable to a non-resident Indian for all subsequent years after the year he (In I.T.A .No.-3120-3126/Del/2011) has become non-resident does not hold good and has been rejected. The A.O. has held that circular of the CBDT does not and cannot extend the scope of the Section by granting the benefits of clause (b) to all the subsequent years when the non-resident Indian visits India. Accordingly, the A.O. held that the appellant is a resident for each of the A. Y.'s from 2002-03 to 2008-09.

(iv). In Para 10, the AO. has contended and held that the genuineness of the Employment Agreement is suspect and it cannot be concluded that the appellant is getting remuneration in UAE.

1.4.2. The appellant had during the course of assessment proceedings filed various letters dealing with each of the aforesaid items and the contentions of the appellant before the AO. were re-iterated before me, namely:-

The original Passports detailed as under were duly produced before the Intelligence Authorities and copies notarized on 19.12.2007 were filed during course of proceedings:-

The leaflets / pages in the passport issued on 26.02.2003 valid till 25.02.2013 had been exhausted and accordingly a new booklet was issued by the Authorities on 07.11.2006.

- Passport No Z-028671 issued on 7.11.2006 at Dubai.
- Passport No Z-1384925 for the period 26.02.2003 to 6.11.2006 issued on 26.02.2003 at Dubai.
- Passport No Z-042469 for the period 09.04.1999 to 25.02.2003 issued on 09.04.1999 at Delhi

It was submitted that the old passport issued on 09.04.1999 and the renewed passport issued on 26.02.2003, which were marked as cancelled by the Authorities and not useable, were unfortunately lost during the course of appellant's visit to London on 04.02.2009. The appellant filed a report, which is confirmed by the Lost Property Office London, the official designated government authority for this purpose, in terms of letter dated 24.02.2009. It is under these circumstances that the old expired passports in original (except the passport issued on 07.11.2006) could not

be produced before the AO. at the time of assessment.

It was further submitted, in this context, by the appellant that in law he is not required to maintain old expired and cancelled passports. However, due to a search u/s 132 of the Act, conducted on 12.09.2007, and subsequent letter dated 11.12.2007 addressed to the ADI, photocopies of the passport were duly filed and original produced therewith. The appellant as a matter of abundant caution had a photocopy of the original passport duly notarized by the Notary Public, Delhi on 19.12.2007 under entry no. 101149. The said 222 notarized copies were also duly filed before the A.O. 1.4.5. The appellant had specified the period of stay in India in each year in the returns of income filed, which were duly verified by the Intelligence Department and were also verifiable from the notarized copies of the (In I.T.A .No.-3120-3126/Del/2011) passports of earlier years and in respect of period commencing 07.11.2006 to 31.03.2007 relating to A Y. 2007-08 and for the complete year relating to AY. 2008-09 from the original passport.

During the course of hearing before me the appellant produced the original passport issued at Dubai on 07.11.2006 which was examined. The appellant was directed vide my letter to produce the same before the A.O. for his verification. The A.O. verified the original passport and has confirmed that the period of stay in India of the appellant during the period 07.11.2006 to 31.03.2008 as stated by him in the return of income and filed during the course of proceedings is correct. Consequently, the onus of establishing the period of stay in India being less than 182 days has been discharged by the appellant.

1.4.6. Further, the Remand Report and submissions of A.O. were forwarded to the appellant who has filed rejoinder on record."

5.2. The submissions of the assessee addressing the objections posed by the AO in the Remand Report of the AO are found discussed in para 1.5 at page 7 & 8 of the CIT(A)'s order. Considering the same, the CIT(A) vide para 1.6 to para 1.9.2 accepted the assessee's claim in respect to status as non-resident Indian. Consequently the reliance placed upon Double Taxation Agreement between India and UAE was left undecided. The ground addressing the remittances made to India in view of the non-resident status was also decided in assessee's favour vide paras 2 to 2.2 as on account of the status being determined as non-resident Indian the remittances made to India from the overseas bank accounts by the assessee to his Indian bank accounts were held to be not taxable.

6. Aggrieved by this the Revenue is in appeal before the Tribunal.

7. On the first date of hearing, it was submitted by the CIT DR, Mr. Ramesh Chandra that let the Ld. AR first argue the COs filed and thereafter he would address the same alongwith the issues arising in the departmental appeals. It was pointed out by the Ld. CIT DR that the Cos filed by the assessee are late and (In I.T.A .No.-3120-3126/Del/2011) barred by limitation on account of the fact the Registry has pointed to a delay of 855 days in each of them.

8. Ld. AR in the circumstances submitted that the defect of limitation pointed out by the Registry in each of the COs filed pointing a delay of 855 days has been addressed and a condonation of delay

petition has been filed alongwith an affidavit of Sh. Siddharth Sareen, the legal heir of the assessee. 8.1. Referring to the same it was submitted that Sh. Sudhir Sareen the late father of Sh. Siddharth Sareen was the permanent resident of Dubai and had always been assessed as Non-Resident Indian since 1998-99 assessment year and even by the order u/s 143(3) dated 08.03.2013 for 2010-11 assessment years his status had been determined by the Assessing Officer as non-resident. Sh. Sudhir Sareen it was submitted passed away after a prolonged illness on 21.02.2013 at Singapore and the COs have been filed by his son who has also filed the return for 2010-11 Assessment Year.

8.2. Referring to para 3 of the affidavit filed, Ld. AR submitted that the legal heir Sh. Siddharth Sareen in the affidavit submits that on becoming aware of the departmental appeals pending before the ITAT he had filed letter dated 20.05.2013 stating that he be impleaded as a legal heir of the Late Sh. Sudhir Sareen in ITA No-3120 to 3126/Del/2011 for 2002-03 to 2008-09 assessment years. No objection in response to the said letter also filed in the DR's office has been made by the Revenue thereon till date.

8.3. It was submitted that on his visit to India Sh. Siddharth Sareen on receiving his counsels advice apprising him of recent judgements of Delhi ITAT in the case of MGF Automobiles Ltd. dated 28.06.2013 and Kusum Gupta dated 28.03.2013 wherein it had been held that in the absence of incriminating material/documents (In I.T.A .No.-3120-3126/Del/2011) found during the search, no additions or adverse view can be made/taken in respect of completed assessment the Cos had been filed.

8.4. Addressing the delay in filing the Cos, it was submitted that initially the tax matters were being handled by the late assessee personally who was the father of the legal heir. The late assessee it was submitted expired on 21.02.2013 after a prolonged illness. It was submitted that the late father on account of his illness could not devote time to the legal matters and as soon as the son became aware of the legal position the COs have been filed. In the circumstances it was his prayer that the delay caused may be condoned as the late assessee represented through the legal heir was prevented by sufficient cause from filing the cross-objection within time.

8.5. Apart from placing reliance on the affidavit dated 13.11.2013, reliance was also placed upon the order of the Tribunal passed by Co-ordinate Bench dated 07.04.2014 in the case of Siddharth Sareen vs ACIT in ITA No-3010 & 3011/Del/2011 and CO-205 & 206/Del/2013 rendered by the "G" Bench wherein the delay caused on account of identical reasons in the case of the legal heir himself in his personal appeals of 855 days on identical reasoning had been condoned. Accordingly relying upon the facts, circumstances and precedent it was submitted that the delay may be condoned.

9. The Ld. DR objecting to the submissions advanced on behalf of the assessee submitted that there is nothing on record to show that Sh. Siddharth Sareen was the only legal heir as evidently the Late Mr. Sudhir Sareen was survived by his wife and two daughters apart from Sh. Siddharth Sareen. Further referring to the affidavit filed it was argued that the only claim of the assessee is that the Late Sudhir Sareen was medically not well. It was argued that there is nothing on record to show that he was mentally capacitated. It was vehemently contended that law (In I.T.A .No.-3120-3126/Del/2011) should not assist a person who is not alert about his legal rights and

accordingly the delay should not be condoned.

9.1. Referring to the order of the Co-ordinate Bench, it was his submission that the decision of the Apex Court in Living Media cited before the Bench has not been referred to by the Bench which was relied upon by him and in terms of the clear mandate of the Apex Court the delay should not be condoned.

10. In the circumstances, Ld. CIT DR submitted that let the Ld. AR conclude his arguments on CO on merits also alongwith his reply and he would then proceed to argue the departmental appeal as the facts can be brought out by the Ld. AR in the CO would be addressed by him in his arguments. Accordingly Ld. AR apart from addressing the maintainability of the CO filed by Sh. Siddharth Sareen and addressing the delay also advanced arguments on merits in the CO filed.

11. Addressing the objection posed by the Ld. CIT DR to the filing of the Cos by Sh. Siddharth Sareen as legal heir of the assessee, attention was invited to page 1 and 2 of the Paper Book page No-2 filed in the C.O.-207 to 210/Del/2011 running from pages 1 to 101. The said pages contain a copy of the letter dated 20.05.2013 filed before the Registry by Sh. Siddharth Sareen requesting that he be impleaded as legal heir of Late Sh. Sudhir Sareen. In support of the said request reliance was placed on the copy of the Will dated 14.07.2010 filed alongwith copy of the death certificate of the Late Sh. Sudhir Sareen. Attention was invited to the seal of the DR's office dated 21.05.2013 affixed therein acknowledging the fact of receipt of the said letter in the DRs office. In response to the request for impleadment in ITA No-3120 to 3126/Del/2011 it was submitted no objections have been filed by the department till date.

11.1. Attention was also invited to the copy of the death certificate filed in the said paper book and copy of the Will at pages 3-10 of the Paper Book. Referring to the (In I.T.A .No.-3120-3126/Del/2011) same it was submitted that the deceased's family consisted of his wife and two daughters alongwith his son, Sh. Siddharth Sareen. Sh. Sudhir Sareen, the late assessee it was submitted had bequeathed the ownership of shares in various companies specifically mentioned by him in India and abroad giving details of assets movable and immovable in India including details of his various bank accounts to his only son, Sh. Siddharth Sareen. The late assessee it was submitted has recorded at page 8 that he is not bequeathing anything to his daughters and to his wife only utensils, paintings, decorations, jewellery and some specific shares in his portfolio mentioned alongwith user rights of residential property at London and rental receipts from property at Delhi to his spouse that too only for her lifetime and everything else to his only son thereafter. For ready-reference the relevant extract is reproduced hereunder :-

> "Both my daughters are married and are well placed in life. I have already given sufficient to both my daughters. My son-in-laws Mr. Shravan Gupta and Mr. Siddharth Gupta are very wealthy in their own right. I have gifted my daughter Mrs. Parul Gupta, 2499 Shares in the Private Limited Company Oriole Exports Pvt. Ltd. Therefore I am not bequeathing anything to my said two daughters Mrs. Parul Gupta W/o Siddharth Gupta and Mrs. Shipla Gupta W/o Mr. Shravan Gupta.

"To my wife Smt. Sunita Sareen I bequeath absolutely and forever all the Carpets, painting, pictures, drawings and other household goods, effects and things and all other article of personal, domestic or household use or decoration consumption lying in the premises 101 Greater Kailash, New Delhi including all jewellery / silver utensils / cash and amounts laying in my individual bank accounts and/or as nominee in any of my account. I also bequeath to her absolutely and forever all my quoted shares in listed companies and all my investment in mutual funds in NRO Account with HSBC Securities and Capital Markets (India) Pvt. Ltd. with Client Code No. 053- 179438 and also NRE Account with client code no. 053-195780 with HSBC Securities and Capital Markets (India) Pvt. as detailed in clause C (I) (IV) (V) and clause (VI). As already stated, she shall have the respective rights conferred on her of residence during her lifetime in the said two properties i.e. Westmed Holding Ltd., 8 Claridge House, London WIK 4 ND and B-101, Greater Kailash-I, New Delhi with the right to receive rents of the property No. B-101, Greater Kailash-I, New Delhi and to let the same during her lifetime. My wife Mrs. SUnita Sareen shall also have the absolute right (In I.T.A .No.-3120-3126/Del/2011) during her life time to rent Claridge House, London, which is in the name of the company Westmed Holding Ltd."

11.2. Accordingly it was his submission that there is no doubt that the sole legal heir of the assessee was the only son of Late Sh. Sudhir Sareen. It was also his submission that the said Will has been acted upon and has been accepted by the department which would be evident from the fact that the appeal in 2010-11 assessment year has been decided by the CIT(A) accepting the capacity of Sh. Siddharth Sareen as a legal heir.

11.3. For ready-reference, attention was invited to Paper Book Page-11-18 which contains the copy of the order of CIT(A)-I, New Delhi pertaining to 2010-11 assessment year dated 22.07.2013:-

IN THE OFFICE OF THE COMMISSIONER OF INCOME TAX (APPEALS-1), NEW DELHI Date of Order 22.07.2013 Appeal No. 22/12-13 Instituted on 13.06.2012 from the order of the Assistant Commissioner of Income Tax, Central Circle - 7, New Delhi.

1) Assessment Year / Block Period	2010-11
2) Name of the Appellant	Late Sudhir Sareen Through L/R Siddharth Sareen

(emphasis in the present proceedings)

11.4. It was pointed out that against this order the Revenue is in appeal before the Tribunal and the capacity of Sh. Siddharth Sareen as a legal heir for impleadment has not been challenged and only for obstructing the CO the challenge is being posed.

11.5. Referring to page 19 of the Paper Book in the CO filed it was submitted that the return for 2013-14 was filed at 30.07.2013 by Siddharth Sareen as legal heir of Late Sh. Sudhir Sareen as would be evident from paper book page 20 to 23.

Which would show that in 2011-12 assessment year the AO records in his order (In I.T.A .No.-3120-3126/Del/2011) dated 31.03.2014 passed u/s 143(3) that in the return filed for Late Sh. Sudhir Sareen the status of 'non-resident' has been accepted by him. 11.6. Referring further to page 21 which is a copy of letter dated 25.06.2013 addressed to the AO by the Ld. AR pointing the facts that Sh. Sudhir Sareen had expired on 21.02.2013 and as per the deceased's Will executed on 20.07.2010, it was requested that notice may instead be addressed to Sh. Siddharth Sareen who was the legal heir in terms of the Will executed by the late Sh. Sudhir Sareen. The said request it was submitted was acted upon resulting in the order for 2011-12 being passed u/s 143(3).

11.7. Attention was invited to Paper Book page no-24 dated 01.06.2014 addressed by Ms. Sunita Sareen, the surviving wife declaring that her son be considered as legal heir for her late husband Sh. Sudhir Sareen, son of Late Sh. Agyapal Sareen, who expired on 21.02.2013 in Singapore. The contents of the last Will executed by her husband are confirmed by her in the following words, stating that she has given her verbal consent to her son to act, represent, make statement and sign the documents, appoint consultants / legal representatives before any authority, courts, including Income Tax Department, Appellate Tribunals and any other court of law as authorized legal heir of my deceased husband. The Will it had been stated is registered in the following words:-

> "That my husband Late Sh. Sudhir Sareen, executed his last WILL duly registered as Document No. 118, in Additional Book No. III, Volume No. 530, on pages 44 to 49, dated : 14.07.2010, in the office of the Sub-Registrar, New Delhi, in accordance with which my son Shri Siddharth Sareen & myself are the Joint Executors."

11.8. Referring to the said Paper Book, it was his submission that there can be no doubt that Sh. Siddharth Sareen is the legal heir of Sh. Sudhir Sareen.

(In I.T.A .No.-3120-3126/Del/2011)

12. The Ld. AR submitted that the judicial precedent laid down by the Co- ordinate Bench vide its order dated 11.04.2014 in the case of the son of the late assessee who in the present proceedings is the legal heir of the late assessee deserves to be followed. In the facts of that case it was submitted there was a delay of 865 days which has been condoned on similar facts. Reliance was also placed upon Collector Land Acquisition vs MST Katzi & others 167 ITR 471(SC) canvassing that justice oriented approach is required to be maintained by a Court while deciding the issues raised on merit as opposed to treating the proceedings in a hyper technical manner. It was his contention that the facts and circumstances with the son's case remained identical.

13. Advancing his arguments on merit as the Ld. CIT DR had suggested that let the CO be argued on merits also, the Ld. AR again placed reliance upon the order of the Co-ordinate Bench in Siddharth Sareen (copy placed at page 12 to 16 in paper book-1 in the COs filed). Apart from that reliance was also placed on the orders of the Co-ordinate Bench in the case of MGF Automobiles Ltd. vs ACIT in ITA No-4212 & 4213/Del/2011 dated 28.06.2013 amongst others. On facts it was submitted that in view of the stated legal position in the case of Siddharth Sareen itself which would constitute a binding precedent on facts and law apart from the precedent in law laid down by MGF Automobiles

Ltd. and Kusum Gupta and various other decisions cited in the written submissions it was submitted that the proceedings deserve to be quashed as nothing incriminating was found in the course of the search as the assessments which stood finalized could not be disturbed u/s 153A of the Act. For the said purpose, attention was invited to the grounds raised in the COs filed by the assessee in each of these four years which are identical except for the difference in the amounts of the remittance from his bank accounts abroad to his Indian bank accounts which is a common fact in each (In I.T.A .No.-3120-3126/Del/2011) of the years. Apart from this common ground in all the years in 2004-05 and 2005-06 assessment years the distinguishing feature is that the assessee had gifted an amount of Rs. 25 lac and Rs.6,17,770/- respectively in these two years to his son-in-law/daughter from his Overseas Bank account. It was submitted that if the main plea of the assessee is accepted than this issue becomes academic.

14. Before we proceed to address the specific arguments it would be appropriate to reproduce the grounds raised in CO-207/Del/2013 keeping in mind the common stand of the parties that the grounds in the remaining 3 Cos are identical except for the difference pointed out in 2004-05 and 2005-06 pertaining to gifts to the assessee's son in law:-

> 1. That on facts and in the circumstances of the case, in the absence of any incriminating evidence or material found during the course of search u/s 132 in respect of the year under consideration, assessment of which was originally completed u/s 143(1), the actions of the AO in:-
>
> (i) Recording a finding that the assessee is "Resident & Ordinarily Resident" as against declared & assessed status of "Non Resident".
>
> (ii) Making addition of Rs.4,35,89,983/- in respect of remittances from his bank accounts abroad to his India Bank Accounts.

Are unwarranted, contrary to law, not constituting undisclosed income and as such the assessment order passed u/s 153A of the Act is bad in law and liable to be quashed.

2. That the respondent, craves, leave to add, alter, amend, substitute, forgo, any or all the grounds of cross objections before or at the time of hearing."

14.1. The Ld. AR requested that the word "AO" referred to in the grounds may be substituted by "CIT(A)" as it is a typographical error. The Ld. CIT DR stated that he had no objection to the said substitution as he has objections on the grounds of delay and the filing of CO by Sh. Siddharth Sareen as legal heir of the assessee. Accordingly substitution of "AO" for "CIT(A)" in the grounds raised in the Cross Objections filed is allowed to be carried out.

(In I.T.A .No.-3120-3126/Del/2011)

15. Referring to the material available on record it was argued by the Ld. AR that the sole issue in the present appeal revolves around the status of the assessee in the background where assessment for

2005-06 assessment year stood completed much before the search which took place on 12.09.2007. Accordingly it was submitted that the present proceedings pertaining to 2002-03 to 2005-06 assessment years cannot be sustained.

15.1. Addressing the background of the case and carrying us through the assessment order and the CIT(A)'s order, it was his submission, that the entire arguments and the case of the Revenue is based on the changed status which the Revenue wants to pin upon the assessee and there is no reference to any documents found in the search as a result of which the additions are made. The additions it was argued are based on recorded entries and since addition is not as a result of any documents found in the search, it cannot be sustained in law. For the said purpose attention was invited to para 10.3 of the assessment order which specifically brings out this fact. For ready-reference the same is reproduced:-

> 10.3. "During the year the assessee has shown an amount of Rs.43,589,983/- in his capital account as NRE income and claimed it as exempt from being taxed in India because he is an NRI. In the event of his residential status determined as resident his entire income becomes taxable in India as per section 5 of the Income Tax Act, 1961. Hence an amount of Rs.43,589,983/- is added to the income of the assessee for the relevant year."

16. The Ld. CIT DR at the outset submitted that the delay may not be condoned following the precedent as in Siddharth Sareen's case the decision of the Apex Court in Living Media cited before the Bench has not been considered. 16.1. On merit it was his argument that the decisions relied upon by the assessee namely MGF Automobiles and Kusum Gupta were fact specific and not relevant and since there are decisions of High Courts available the same can be discarded. Reliance instead has placed upon (i) SSP Aviation vs DCIT 346 ITR 177; and (ii) (In I.T.A .No.-3120-3126/Del/2011) Chetan Das Laxman Das 25 Taxmann.com 227(Delhi). Reliance was also placed upon the judgement dated 10.10.2013 K.L.Manhas rendered by the Delhi High Court under RTI Act, 2005 for the proposition that mere prima facie observations of the Court not dealing with the issue on merits does not constitute a binding precedent. Ashok Kumar vs Union of India (2008) 4 SCR at page 284 para 94 was also relied upon for the proposition that in order to interpret the language used intention of the legislature is to be gathered it was submitted that it is the words and symbols that stimulates the mind.

16.2. Addressing the departmental appeal it was submitted that since the leading order has been passed by the CIT(A) in 2008-09 assessment year i.e in ITA No- 3126/Del/2011 accordingly the arguments would be addressed referring to the said order as they would be more or less identical in the other years except for the difference which he would point out as and when he takes up those issues in the other years. Apart from that it was submitted that the in each of these years the CIT(A) has not addressed the assessee's ground relying upon the Double Taxation Avoidance Agreement which issue though has been challenged by the assessee in its COs also has not been argued. Notwithstanding that the Ld. CIT DR stated that he would rely on the assessment order.

16.3. In the facts of the present case it was his submission that it would be his endeavor to establish that the assessee through some gentleman by the name of Mr.John Ronald Macinnes has created a façade and relying upon "solicited" documents has attempted to hoodwink the department. It was his submission that in the facts of the present case it needs to be borne in mind that the original passport was never produced before the AO except for 2007-08 & 2008-09 assessment years. Accordingly the finding of the CIT(A) it was stated is bad in law as how can the finding based on the facts where primary evidence is produced (In I.T.A .No.-3120-3126/Del/2011) before the CIT(A) be relied upon for the years where primary evidence was never produced by the assessee.

16.4. It was his submission that the said argument is notwithstanding the fact that the consistent claim of the department in each of the years where primary evidence is produced or not produced remained the same that the relevant provision of the Act have been incorrectly appreciated by the CIT(A). Infact it was his arguments that the Ld. CIT(A) has not given a categoric finding whether the assessee's case is covered in Explanation (a) or (b) of section 6(1)(c) of the Income Tax Act 1961. 16.5. It was also his submission that the conclusion drawn by the CIT(A) in para 1.4.5 that the original documents were seen by the Investigation Wing is not borne out from the record and infact in the course of the hearings he offered that the Ld. AR may go through the Appraisal Report and point out where such a finding is given.

16.6. Referring to pages 112 to 118 of the paper book it was stated which is the "purported" salary certificate from Westmead Holdings Ltd. Emphasis was laid by the Ld. DR that the last sentence appearing in the copies filed would show that it is stated that the certificate is issued on the request of Mr. Sareen. Emphasis was laid on the fact that the first certificate refers to the period August 1998 to December 1998 has been signed on 08.12.2009 by the designated person for Westmead Holdings Ltd. at London and similarly in each of the years, the certificate is signed on the very same date i.e. on 08.12.2009 for the periods January 1999 to December 1999, going on January 2004 to December 2004. 16.7. It was his submission that similarly Paper Book page 342 would show that in regard to loss of original passport, the letter/reply of lost property office situated at 200, Baker Street, London, NWI 5RZ again brings out the fact that it too is a (In I.T.A .No.-3120-3126/Del/2011) "solicited" document. This fact is borne out form the reply itself as the last sentence there also reads as under:-

> "the details of inquiries as provided to us have been confirmed below which I address well meet your insurance requirements."

16.8. Referring to the same it was pointed out it refers to two expired passports, brief case, some unstated business, general papers, deeds and documents etc. Accordingly it was his contention that in the facts of the present case the secondary evidence relied upon may be discarded as in all the years where original passport was never produced and it was curiously stated to be lost the conclusion should be drawn against the assessee.

16.9. The secondary evidence relied upon in the absence of primary evidence it was submitted consists of "solicited documents" as such deserves to be rejected and the assessment order to be upheld.

16.10. Carrying us through Section 6 of the Income Tax Act, reliance was placed upon the decision of the Apex Court in Rao Sher Bahadur Singh vs Union of India for the proposition that the interpretation of the statute should not be in such a manner that the provisions are nullified. Similarly CIT vs Kharwar 72 ITR 603 (SC) was also relied upon for the proposition that if the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and determine the true character of the relationship. Reliance was also placed upon Mc Dowell 154 ITR 152 (SC) for the proposition that the art of dodging without breaking the law should be strongly discouraging. 16.11. Carrying us through the facts as recorded in the assessment order it was his submission that if the facts for 2001-02 assessment year are seen than for almost equal number of days, the assessee has stayed in India and visited abroad. It was his argument that in the FYs 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006- (In I.T.A .No.-3120-3126/Del/2011) 07, the record would show that the assessee has gone abroad approximately 16 times; 14 times; 18 times; 22 times; 22 times and 18 times respectively and accordingly the facts would show that the assessee's normal place of residence was in India and he only visited abroad from India. Accordingly it was his submission that his status has rightly been considered as resident in India. It was his argument that in the facts of the present case, the CIT(A) has curiously relied upon both the clauses of the Explanation to section 6(1)(c) without addressing under which clause of the explanation he has considered that the assessee's case falls under. It was his vehement plea that the burden for establishing its claim that he is a non- resident is on the assessee which has not been discharged. Reliance was placed on the judgement of the Apex Court in the case of Moosa A Mada of 89 ITR 65(SC). 16.12. It was his argument that section 6 is a deeming provision and has to be read literally. Reliance for the said proposition was placed upon the decision of the Apex Court in Bank of Bihar AIR 1976 (SC) 389.

16.13. Addressing the conduct of the assessee it was his submission that all the documents relied upon stated to be contemporaneous documents are "solicited" documents and being self-serving documents, it was requested they should be outrightly rejected.

16.14. It was his submission that the record would show that Mr. Jon Ronald Macinnes a Canadian citizen supposedly having no reasons whatsoever chooses to employ the assessee as his agent in Dubai curiously signs the agreements of employment in London. This fact it was submitted is suspicious as why should the document not be signed in India or Canada why London. Apart from this as per the terms of the agreement clause 10 of the same it was submitted the assessee is required to devote his time to the interests of Westmead Holdings and consequently how and for what purpose as per the photocopy of the passport (In I.T.A .No.-3120-3126/Del/2011) available was the assessee travelling to different countries including India. It was submitted that the Paper Book page 345-352 would show that the declaration of Trust between NorthQuay Ltd. and Mr.Jon Ronald Macinnes is registered at Isle of Man which is a tax haven.

16.15. Referring to Paper Book page 617 & 618 which is a copy of the panchnama recorded at the time of search it was submitted that the inventory recorded of the passports found from the residence of the assessee at the time of the search which is annexed at Paper Book page 625 would show that passport of the assessee was not found and only passports of Ms. Bhavna Sareen, Ms.Sumaya Sareen, Ms.Sumiti Sareen & Ms.Alice Scaria were found.

16.16. Inviting attention to the statement recorded of Sh. Sudhir Sareen u/s 131 on 31.10.2007 on oath available in the paper book at pages 609-616 it was submitted that in response to the first question where the assessee was required to identify himself, he states that he is Sudhir Sareen, Son of Sh. Agyapal Sareen, Resident of B-101, G.K. Part-I, New Delhi and also of Emirates Hill, Dubai, UAE. The Ld. CIT DR referring to the same contended that the first address which the assessee mentions is his residence of India and the arguments that he was a non-resident is disproved by this spontaneous reply of the assessee itself. It was his stand that when a question is asked to a person to introduce himself the spontaneous answer is normally the correct answer consequently the assessee identifies his normal place as resident of India.

17. Ld. AR intervened that when the statement is recorded during the search at the residence of the assessee the said address where the statement is recorded has to be mentioned. It was contended that it does not mean that for the tax purposes the assessee has given up its claim of being a non-resident. A reading of the complete answer it was submitted would show that he has also given L-20, (In I.T.A .No.-3120-3126/Del/2011) Emirates Hills, Dubai address as his address. It was his submission that infact Question no-2 would show that he has stated that he is a non-resident Indian since 1998 which claim is supported by his income tax returns and copies of passport. The selective reading of documents it was submitted in order to mislead the Bench will not bring out the full and correct facts. Similarly the reading of the panchnama to submit that the passport was not found by the search party from his residence, as it was not recorded in the inventory of the passport it was submitted does not mean that it was not available with the assessee what documents the search party wants to take note of and inventorise cannot be dictated to by the assessee and it was his submission that he would be able to address these points when his turns comes.

18. The Ld. CIT DR contended that in the facts of the present case neither the assessee can be treated to be "outside India' and nor can the word "visit" in explanation (b) to section 6(1)(c) be understood as multiple visits and reliance placed on Sudhir Sareen and Suresh Nanda by the Ld. AR was misplaced; distinguishable on facts and was not applicable.

18.1. Accordingly it was his submission that the CIT(A) has come to a finding based on various shortcomings as such the same should not be upheld. It was also his submission that he would also like to make written submissions addressing these points.

19. The Ld. AR submitted that unnecessary doubts, conjectures and suspicions have been sought to be aroused by the Ld. CIT DR. It was his submission that in the facts of the present case, the Ld. CIT DR has raised a lot of arguments based on unfounded suspicions. Addressing the agreement signed in London with a citizen stated to be of Canada on 01.06.1998 and the assessee having travelled on 31st May it was submitted the Ld. DR has questioned how this could be possible. It was (In I.T.A .No.-3120-3126/Del/2011) submitted that India is ahead in time by 5.30 hours and the international flights leave in the early hours. A person travelling on a flight for business the next day would leave in the early hours of 31st May thus gaining 5.30 hours of the very same day on landing at London. Consequently signing of the document on the next date is hardly surprising. The arguments advanced merely to create suspicioun it was submitted cannot help the Revenue when the facts are clear and admitted.

19.1. Before specifically addressing the departmental objections the Ld. AR sought to first address the background of the case so as to have a correct appreciation of facts by contending that the assessee who was an Indian citizen expired on 21.02.2013 and was regularly filing his return in India till 1998-99 Assessment Year in the status of resident.

19.1.1.The assessee it was submitted left India on 14.08.1998 for settlement abroad in Dubai, UAE after having executed Employment Agreement dated 1.06.1998 with West Mead Holdings Ltd. UK which required him to be working from Dubai UAE.

19.1.2.It was submitted the assessee obtained Resident Visa from UAE No.2470845 dt. 28.07.1998 & entered UAE on 14.8.1998 as would be evidenced from the Stamp on the copy of the Passport filed. The Resident Visa it was contended continued to be valid till 2013.

19.1.3. It was submitted that only as a result of permanently setting as a result of employment and obtaining Visa etc that the assessee from AY 1999-2000 onwards filed Returns of income in the status of "Non Resident" which have been accepted over the years.

19.1.4.Inviting attention to the paper book filed it was submitted that acting on the employment after the assessee moved a petition dated 10.08.1996 u/s 29 of FERA (In I.T.A .No.-3120-3126/Del/2011) seeking permission from RBI to retain assets in India. On receipt of the permission the Resident Bank Accounts in India were converted to Non-resident accounts as per instructions of RBI and the Companies in which the assessee was a shareholder were also duly intimated this fact.

19.1.5.The Ld. AR submitted that the assessee continued to be in Employment till 31.12.2004 and thereafter conducted the business activities independently. 19.1.6.The period of stay of the assessee in India in each of the years since AY 1999-2000 to AY 2009-10 was less than 182 days as per chart enclosed which was the statutory requirement.

19.1.7.It was submitted that Search u/s 132(1) was conducted upon the assessee in India on 12.09.2007 and no incriminating material was found which is an admitted position not contested by the department.

19.1.8.It was submitted that prior to the date of the search, returns from AY 1999- 2000 till 2006-07 were duly filed in the status of "Non-Resident" which were accepted by the department. The returns for AY 1999-2000 to 2005-06 were accepted u/s 143(1). Notice u/s 153A were issued for AY 2002-03 to 2007-08 and assessee filed returns again in the status of "Non-Resident" disclosing the same income as declared in the Returns filed originally u/s 139(1) in each of the years. The assessments it was submitted have been framed for each of the Asstt. Years 2002-03 to 2009-10 in the status of "Resident" and additions have been made in each of the years as per chart enclosed solely on account of the change of status. It was submitted that the AO held the assessee to be a Resident; and thus treated the sums remitted from assessee's foreign bank accounts to bank accounts in India as Taxable Income; and also in two years treated the Gifts made out of Foreign bank accounts to his relatives in India also as taxable.

(In I.T.A .No.-3120-3126/Del/2011) 19.1.9.It was submitted that the AO on similar facts in AY 2011-12, considering the stay in India being less than 182 days has accepted the declared status of the assessee as "Non-Resident".

19.2. In the above background based on facts and evidences it was his submission that irrelevant facts have been referred to in an incorrect manner so as to create unnecessary suspicions and doubts about the facts of the case. It was submitted that the identity of Mr.John Ronald Macinnes has been questioned ignoring the material on record and the so-called façade of why the Agreement was entered into with the assessee and other such related doubts, it was submitted would stand addressed if the facts and record of past history of the assessee is considered. The identity of Mr.John Ronald Macinnes it was submitted would be established from a perusal of the photocopy of the passport of the said person available at page 343 of the paper book. The said document it was submitted is a photocopy of the passport of Mr. John Ronald Maccines and would show that he is a Canadian citizen. It was submitted that the assessee prior to moving permanently to Dubai, UAE had worked as a consultant in India as a representative of Rintra Cont in the field of oil, commodities fertilizers etc. in India, Far East and South East Asian countries, UAE it was submitted is a rice consumer country which sources its requirements from India and Thailand and the assessee as a result of his employment travelled to various countries in the course of the business for which he was employed and apart from rice various other commodities like fertilizers and other petroleum products etc. were also dealt with. Pages 296 to 330 of the paper book it was submitted contained the copy of the Income Tax returns for the assessment year 1999-2000 to 2008-09 assessment year and in the computation of income for assessment year 2002-03 as in the other years, the following note had been written addressing the status of the assessee. These returns it was submitted (In I.T.A .No.-3120-3126/Del/2011) have been filed in due course over the years much before the date of search. As an illustration, attention was invited to paper Book page 307 which is an acknowledgement of the return filed for 2002-03 assessment year dated 07.08.2002. The search it was emphasized took place on 12.09.2007. For ready- reference extract from page 309 addressing the status note given in the returns filed is reproduced hereunder:-

> 3. "Status of the Assessee The assessee during the Assessment Year 1999-2000 became a Non-Resident in term and in accordance with Section 6 (i) (a) read with explanation (a). The Assessee left India on 14th August 1998 with the intention of permanent settlement in U.A.E. and took up employment there in. The assessee duly complied with the Rules and Regulation under the Foreign exchange Regulation Act and intimated to the Reserve Bank of India of this fact. The details of his period of stay outside India for the year 1998-99, 1999-2000, 2000-2001 and 2001-2002 are as under.
>
> Year A.Y. Days 19.3. The information it was submitted in regard to the number of days outside India was given in the normal course of functioning alongwith the returns over the years based on the passports and much before the date of search. The statement recorded at pages 615 referred to by the Ld. CIT DR it was stated when fully read establishes the fact that the assessee was doing business abroad and had accepted the ownership of the various assets in India and abroad. The stay outside

India was bonafide on account of the employment initially and thereafter due to having his own business abroad. Attention was invited to Annexure 6 which contains details of income from various sources earned abroad remitted to India alongwith available bank advise contained at Paper Book page 570-572. Specific reference was made to page 507-509 which was referred to by the AO himself. Page 510 it (In I.T.A .No.-3120-3126/Del/2011) was his submission as an illustration was pointed out is an advise by Standard Chartered (UAE) making a reference to the remitting bank which is Standard Chartered Bank, USA recording the specific bank reference and the remitter as Westmead Holdings in favour of the customer i.e Sh. Sudhir Sareen. It was submitted that before remitting funds the banks internationally follow strict know year customer (KYC) norms so as to ensure that funds are not moved for any terrorist activity. Similarly at pages 513-514 onwards it was submitted would show that after mentioning the specific account No. of the assessee customer the date on which remittance is made and the balance in the accounts are found duly recorded therein. The source of funds it was submitted would be evident on perusal and would show that they have come from Canada, New York, Dubai & London where the officers of Westmead Holdings were inexistence and from various business dealings etc. At pages 603 -608 it was submitted is the year-wise details of the statement showing salary income/balance due to bank/loan taken or realization on sale of investment during the FY 2001-02 to 2007-08 and amount remitted to India. Attention was invited to Paper Book No-95 which is letter dated 10.08.1998 u/s 29 of the FERA Act addressed to Reserve Bank of India seeking permission to hold in India the assets, accounts and Directorship etc. as Non-

Resident mentioning the specific passport held in the capacity of India citizen. Referring to grant of resident Visa on the basis of which the assessee expressed his intention to permanently settle in Dubai for which purposes the assesses expressed he intended to leave India on 14.08.1998 brought to the notice of the said authority that he was a director of 14 companies mentioned therein all give evidence to the intention expressed which was acted upon. Ownership of agricultural lands, stocks and shares and bank accounts, residential houses and residential plots in Delhi etc. was also conveyed and as per law request was made that communication in respect (In I.T.A .No.-3120-3126/Del/2011) of or in relation to the petition may be addressed to his wife at his G.K. New Delhi address. The said letter it was stated had been acted upon and the assessee left India which is not disputed by the Revenue who have merely argued that the assessee thereafter only visited the countries and did not leave permanently so as to be considered that "he was outside India". Copy of the visa referred to it was submitted has been filed at Paper Book 94.

19.4. Addressing the doubts of the department as to why the assessee was chosen for employment abroad by Mr.Jon Ronald Macinnes it was submitted the material on record would show that the assessee had been appointed as a consultant for various companies in India over the years as would be evident from Paper Book Page 42-53 which is consultant agreement dated 08.01.1991 with Northrop Corporation for which he received retainer fee; Consultant Agreement with D &M International at page 55 to 59; Paper Book page 60 it was submitted would show that the assessee had entered into a Consultation Agreement dated 20.11.1993 with Rintra Cont SA owned by

Mr.John Ronald Macinnes the said contract it was submitted was renewed as would be evident at page 62-65 which is a renewal consultant agreement dated 25.03.1995 and again on 08.03.1996 it was renewed. Paper book Page 86-90, it was submitted is the employment contract entered at 01.06.1998 at London by the assessee with Westmead Holding Ltd which was represented by Mr.John Ronald Macinnes, a Canadian citizen who was also a director of the said company. The following 5 clauses from the said agreement it was submitted would address the reason as to why the assessee was chosen by Mr. John Ronald Maccines as it brings out the reasons when read alongwith all the other evidences on record including pages 28 to 41 which is a letter dated 17.12.2009 addressed to the AO. On a perusal of the same the expertise and the knowledge of the assessee and why the said consultant for the multinationals in (In I.T.A .No.-3120-3126/Del/2011) India was chosen stands addressed. It is due to the trust reposed in him that he was employed for which the late assessee permanently moved to the UAE and needed to travel there from to various places in the business interest of the said concern in pursuance to clause 10 of the Agreement referred to by the Ld. CIT DR. The genuineness of the transactions it was submitted would stand addressed by the experience and knowledge of the assessee. For ready-reference we reproduce the first five clauses of the Employment Agreement entered into with Mr.John Ronald Macinnes relied upon by the Ld. AR:-

> 1. " The First Party is engaged in the business of trading of commodities such as rice, wheat, sugar, soyabean and all other agricultural, floriculture, Oil, petroleum, Fertilizer and Chemical related products all over the world.
>
> 2. The First Party duly recognizes the vast expertise and experience of the Second Party to establish, develop and administer such business. The First Party also accolades the work performed by the Second Party related to its business interest in India in past.
>
> 3. The First Party has decided to expand its area of operation and multiply their presence by recognizing UAE and its thrust area and therefore, appreciated the Second Party to act in the capacity of Chief Executive Officer in their business venture at UAE.
>
> 4. The Second Party undertakes to work for establishing developing and administering the business interest of the First Party in UAE and Middle East.
>
> 5. The Second Party shall establish an office and residence in Dubai (UAE).' (emphasis provided) 19.5. The copy of the UAE Residency Visa and related evidence of withdrawals for buying the ticket; immigration; salary certificates etc. it was submitted all cumulatively demonstrates these facts. The arguments of the Ld. CIT DR that the salary certificates filed for each of the years are "solicited documents" hence having no evidentiary value it was submitted is without any basis. It was his submission that acting on the Employment Agreement the assessee arranged its affairs in India so as to permanently settle in Dubai and took charge as C.E.O. For which he received salary etc for the services. Merely because despite the periodic

transfers through the bank accounts of the Westmead Holdings to the assessee's (In I.T.A .No.-3120-3126/Del/2011) bank accounts in Dubai etc. the assessee also considered it necessary according to his understanding to have a salary certificate for each of the years. The request so considered by Westmead Holdings designated person who on considering the record of the period and amounts paid to the assessee signed these Certificates on the same date on the request of the assessee does not lead to the conclusion that these are false and incorrect. It was submitted that they only demonstrate that the assessee requested that these may be issued on assessee's request. These certificates it was submitted are fully supported for each of the years by the bank receipts in terms of the agreement and do not impinge the authenticity of the document in any manner. Attention was invited to page 29-41 which is a note on the residential status of the assessee. Addressing the background it was submitted that the assessee on graduating from a Delhi College joined his family business of manufacture and formulation of pharmaceuticals in 1972. On account of his desire to start his own business in 1979 he went on an expansion and diversification spree and started his own business of exporting garments primarily to Europe and North America. The said business it was submitted was incorporated as M/s Oriole Exports Pvt. Ltd. and Niryat Pvt. Ltd. Thereafter the assessee went into various consultancy agreements with different concerns and thus when he had built up a reputation, expertise and knowledge he was finally offered an employment as C.E.O. in the middle East. It was submitted that the assessee already had a sufficient experience in working with and dealing with various multi national companies for almost 20 years. It was emphasized that no fresh material and incriminating material has been found in the search and despite the arguments of the Revenue attempting to arouse suspicions by selective reading of the evidences no argument has been advanced stating that any incriminating material was found in the detailed arguments advanced. Reliance was placed on the case of Suresh (In I.T.A .No.-3120-3126/Del/2011) Nanda stated to be identical on facts and the decisions in Abdul Razzack, Avatar Singh and various other decisions cited.

19.6. Addressing the arguments of the Ld. CIT DR that primary evidence is not available, it was his submission that as per the departmental stand a fire broke out in the Investigation Wing or wherever the documents records are kept by the department and if the departmental record is not available no motives have been ascribed on behalf of the assessee in regard to the loss thereof as to why relevant record which may have been favourbale to the assessee was lost. The loss of documents in fire by the department is not claimed to be not bonafide. In the facts of the present case it was argued ascribing of motives based on no material does not help the Revenue in the loss of expired passports. It was contended that the record shows that a search took place in September 2007. The loss of the passport is after 14 months. The assessment proceedings as per notice issued u/s 143(2) started in June 2009. The assessee lost the expired original passports in February 2009. Accordingly no linkage from the above sequence of events can be formed to show that the loss is not bonafide. Inviting attention to paper book page no-342 it was his submission that

> it is issued by the Lost Property Office in reference to Enquiry 1111427116 dated 24.02.2009 addressed to the assessee recording the fact that in regard to the following property lost on 04.02.2009 there was no record in the Lost Property Office of the said property being handed either to an official of Transport of London; Metropolitan Police or in the said office:-
>
> "Books/Passport: Organization: Indian High Commission, Name: Sareen, Blue×2 expired passports Books/Document-General: Type: Business Papers, Trust deeds & documents from HSBC Bank"

19.7. It was submitted by the Ld. AR that the Metropolitan Police function under the Mayor of London has made the Lost Property Office as the designated (In I.T.A .No.-3120-3126/Del/2011) authority and the following foot note given on the said letter under "data protection" would address this fact:-

> "Data protection :the data we hold now or in the future will be processed by Transport for London for the purpose of Lost Property administration. It may be passed to law enforcement authorities if it is considered necessary for the prevention and detection of crime and when otherwise legally required."

19.8.It was his submission that in regard to the loss of an expired passport, no report to the Police is required to be filed as firstly it was lost and not stolen as only then it would have been considered to be a crime and since the expired passport already stood renewed by the Dubai, Indian High Commission on 07.11.2006 on which passport the assessee was travelling in London on that date during his stay in London, the occasion accordingly to correspond with the Indian High Commission in London did not arise. In the circumstances it was submitted the onus caste upon the assessee in regard to stay outside India for the requisite number of days arising due to employment abroad accordingly stood discharged in terms of the judgement of the Supreme Court in the case of D.K.Dhote which has been relied upon before the CIT(A) and considered by him. 19.9. Inviting attention to the compilation consisting of Annexure A-1 to Annexure J-15 the Ld. AR submitted that the A-1 & A-2 makes a reference to the chronological date-wise events linking these with the relevant pages of the paper books filed which are necessary to be taken into consideration for deciding the issues. The same is reproduced hereunder:-

> Late Sudhir Sareen.
>
> (Through Legal Heir Siddharth Sareen) ITA Nos. 3120-3126/2011 & 6411/ 2012 ...G. Bench CHRONOLOGICAL DATE WISE EVENTS Sl. Date Particulars Paper Book page No. No.
>
> 1. 01.06.1998 Executed employment contract in London 86-90(Volume-1) (In I.T.A .No.-3120-3126/Del/2011) with West Mead Holdings Ltd. to join on 15.08.1998 at their office in UAE

2. 01.06.1998 Entry in passport for entering UK to execute 93 (Volume-1) the aforesaid agreement at London.

3. 28.07.1998 First UAE resident visa granted and affixed 94 (Vol.-1) in passport

4. 10.08.1998 Letter to RBI seeking permission u/s 29 of 95(Vol.-1) FERA, informing them of intended departure under employment and to hold assets in India.

5. 14.08.1998 Left India and entered UAE as evidenced by 94(Vol.-1) entry stamp in passport and air ticket

6. 08.09.1998 Letter from RBI re change of status and 111(Vol.-1) directing assessee to inform bankers and companies in which shareholder

7. 25.09.1998 Intimation to bankers regarding change in 108-110 (Vol.-1) status of bank accounts as non resident

8. Salary certificates from West Mead Holdings 112-117(Vol.-1) Ltd.

9. 03.03.1999 Copy of lease deed of Appt. No. 230, Golden 149-150(Vol.-1) Sands, Dubai in evidence of residence/accommodation in Dubai

10. Residence Visas valid upto 2013 292-205[Vol.2]

11. 26.07.1999 Return of AY 1999-00 in status of NR which 296[Vol.2] [Period became final stated that assessee left on of stay of each year 14.08.1998 on pgs 300,309 312,314,318,322]

12. Returns of AY 2000-01 to 2001-02 in status of 301-306 [Vol 2] NR filed which stated period of stay in each year and became final

13. Returns for AY 2002-03 to 2005-06 in status 307-319 [Vol.2] of NR filed stating period of stay in each year and asstt. Stood completed on 12.9.2007 [Dt of search]

14. Returns for AY 2006-07 & 2007-08 filed u/s 320-326[Vol2] 139 (1) in status of NR before dt. Of search

15. List of Companies owned & managed abroad Statement of A 615 by assessee incl. ownership of Residential houses in Dubai, London.

16. Attested copy of (i) passport nos Z-1384925 218-281 [Vol2) for the period 26.02.03 to 6.11.06 and (ii) passport nos Z-042469 for the period 9.4.99 to 25.02.03 were filed before AO.

17. Original produced before intelligence unit 333-334 [Vol2] (In I.T.A .No.-3120-3126/Del/2011) and attested copies filed.

18. Aforesaid two passports lost in London as 342-343[Vol2] confirmed by lost office

19. Copy of affidavit dt. 21.04.2010 651[Vol.2]

20. Remand report dt. 25.06.2010 accepting 637-644[Vol.4] examination of original passport issued on 7.11.06 and accepting period of stay in India

21. Gr. No.3 Statement of Foreign sources/ Remittances 603-608 [Vol.3] into India

22. Detail of income earned abroad and remitted 507-509 [Vol.3] to India with bank advice 510-572

23. 19.10. The summary of admitted facts relied upon by the Ld. AR attached as Annexure B-1 brought to our notice by the Ld. AR is reproduced hereunder:-

FACTS In the matter of :- ACIT Vs. late Sudhir Sareen Appeal Nos :- ITA Nos 3120 to 3126 For AY's 2002-03 To 2009 - 10- Departmental Appeal Before :- ITAT- Bench "G" New Delhi Summary of admitted Facts of all years :-

1. Assessee an Indian citizen, who expired on 21.02.2013, was regularly filing his returns in India, till AY 1998-99 in Status of Resident. He left India on 14-

0801998 for settlement abroad in Dubai UAE having executed Employment agreement dated 1.06.1998 with West Mead Holdings Ltd UK to be posted in Dubai UAE. He obtained Resident Visa from UAE no. 2470845 dt. 28-07-1998 & entered UAE on 14.8.1998 as evidenced by Stamp on Passport. The Resident Visa continues to be valid till 2013. Thereafter from AY 1999-2000 onwards Returns of Income were filed in status of "Non Resident". Assessee (A) complied with Section 29 of FERA by seeking permission from RBI to retain assets in India vide letters dated 10-08-1998 and as per instructions of RBI Resident Bank Accounts in India were converted to Non-resident accounts, Companies in which he was shareholder were duly intimated. He continued in Employment till 31.12.2004 and thereafter conducted independent business activities.

2. That the period of stay of assessee in India in each of the years since AY 1999- 2000 to AY 2009-10 was less than 182 days as per chart enclosed.

3. That a search u/s 132(1) was conducted upon assessee in India on 12.09.2007 and no incriminating material was found. Prior to the date of search, returns from AY 1999-2000 till 2006-07 were duly filed in status of "Non Resident"

out of which returns for AY 1999-2000 to 2005-06 were accepted u/s 143(1).

(In I.T.A .No.-3120-3126/Del/2011)

4. Notices u/s 153A were issued for AY 2002-03 to 2007-08 and assessee filed returns in status of "Non Resident" disclosing the same income as declared in Returns u/s 139(1).

5. Assessments have been framed for each of the Asstt. Years 2002-03 to 2009-10 in status on "Resident" and additions have been made in each of the years as per chart enclosed. The AO acted as under :-

(i) Held assessee to be a Resident;
(ii) Treating the sums remitted from assessee's foreign bank accounts to bank accounts in India as Taxable Income;
(iii) Treated the Gifts made out of Foreign bank accounts to his relatives in India.

6. The AO on similar facts, stay in India being less than 182 days has accepted the declared status of Appellant as "NON-RESIDENT" in AY 2011-12. [Copy of order attached] 19.11. Annexure B-2 & C-1 it was submitted addresses the remittance made to India. Since no arguments controverting these facts have been advanced by the Revenue the relevant facts are not reproduced. The year-wise details from 2009-10 assessment year to 1999-2000 showing the no. of days in India and the status disclosed and accepted by the department in 143(1) since 2001-02 assessment year to 1999-2000 assessment years has been addressed in Annexure D-1, the same is reproduced hereunder for ready-reference:-

Details of Stay in India of Late Mr. Sudhir Sareen since AY 1999-2000 to 2009-10 ITA Nos 3120-3126 / 2011 & 6411/2012 A.Y. Previous Year No. of days in Residential Remarks India Status 2009-10 2008-09 168 Non-Resident (As Stayed in India per Section 6(1) for less than 182 © read with days for each explanation 'b' Previous Year and continuously having UAE Residency Visa since 1998.

2008-09	2007-08	177	Non-Resident	
2007-08	2006-07	177	-do-	-d
2006-07	2005-06	172	-do-	-d
2005-06	2004-05	175	-do-	-d

(In I.T.A .No.-3120-3126/Del/2011)

2004-05	2003-04	168	-do-	-do-
2003-04	2002-03	172	-do-	-do-
2002-03	2001-02	163	-do-	-do-
2001-02	2000-01	177	-do-	Asstt. u/s 143(1)
2000-01	1999-00	175	-do-	Asstt. u/s 143(1)
1999-00	1998-99	176	-do-	Asstt. u/s 143(1)

> 19.12. The Ld. AR carrying us through the assessment order emphasized the fact that the CIT(A) in para 1.4.5 has accepted the arguments of the assessee that the original passport issued at Dubai on 07.11.2006 was produced before him and the AO has verified the original passport and confirmed the stay during the 07.11.2006 to 31.03.2008 having been correctly disclosed in the income tax return.

Consequently the onus in regard thereto for the period being less than 182 days stands discharged. Referring to the said para it was submitted that the Remand Report was made available to the assessee who has filed re-joinder. It was submitted that the Remand Report also states that notarized copies of old passport were refilled before the AO. Accordingly the arguments of the Ld. CIT DR that in the absence of the original passport which was lost in London on 04.02.2009 which fact is supported by the letter of London Lost Office dated 24.02.2009 in the face of the Remand Report which accepts that the notarized copies of the old passport were filed becomes an unnecessary doubt. It was submitted that the original passport was produced before the Intelligence Wing and the mere fact that it is not recorded in their finding in the facts of the case does not unsettle the settled position in regard to the residential status as contemporaneous evidence by way of returns filed over the years accompanied by necessary evidence recording the period of stay in India in each year from Assessment year 1999-2000 onwards have been filed in due course definitely much before the date of the search which (In I.T.A .No.-3120-3126/Del/2011) orders had become final cannot be ignored. For the said purpose, attention was invited to paper book page no-300, 309, 312, 314, 318 & 322. 19.13.Attention was also invited to Paper Book page No-333 which is correspondence with the Intelligence Unit dated 11.12.2007. Referring to the same it was pointed out that a reading of the letter addressed to the Investing Wing copy at page 334 would show that the assessee had carried out corrections pointed out by the ADI. For the said purpose first part of the letter dated 11.12.2007 page 333 and the last paras of the said letter at page 334 are reproduced for ready-reference:-

> "This is with reference to our hearing at your good self's office, we would like to submit the details of stay in abroad along with copies of Passport of the assessee as required by your good self as evidence that the assessee is a non - resident Indian during all the financial years 2000-01 to 2006-07 as he did not stayed 182 days or more in India during any of the financial year. Hence, the assessee is not a resident in India as per the provisions of section 6 of the Income Tax Act, 1961. Relevant portion of section 6 is reproduced as under :
>
> .... It is further submitted that the assessee has already furnished the details of stay in India and abroad from financial year 1998-99 to 2005-06 in his computation of income filed along with return of income for the assessment year 2006-07. The minor difference in number of days as furnished earlier was due to the fact that there were some clerical and calculation error, which now rectified. Details of stay in abroad for the financial year 2000- 01 to 2006-07 along with coloured copies of passports held by the assessee are enclosed herewith as Annexure -

1-----

Keeping in view of the provisions of section 6 of the Income Tax Act, 1961 & its explanation and the fact that the assessee did not stay in India more than 181 days in any financial from 2000-01 to 2006-07, the assessee is not a resident of India and hence only liable to pay tax on income accrued or arise in India as per section 9 of the Income Tax Act, 1961."

(emphasis on the present proceedings) 19.14. The year-wise details alongwith specifying the specific page of the passport addressing the date of arrival and the date of departure and the no. of days stay it was submitted has all been addressed at page 335 to 341 which remain unassailed (In I.T.A .No.-3120-3126/Del/2011) on record. It was his submission that the conclusion drawn by the CIT(A) at para 1.6 and the doubts addressed by the CIT DR stands adequately addressed by the same. It was re-emphasized that the AO has accepted the correctness of the period of stay in 2008-09 assessment year on the basis of original passport. The assessment year 1999-2000 to 2001-02 it was emphasized stand concluded in the status of NRI. The affidavit filed with the CIT(A) forwarded to the AO is a part of the remand proceedings. In these circumstances the arguments that the assessee has failed to discharge the onus of having stayed in India for less than 182 days in assessment year 1999-2000 to 2008-09 assessment years is not made out. It was also his submission that the arguments of the Ld. CIT DR that the CIT(A) has not addressed as to which clause of Explanation to section 6(1)(c) is applicable to the assessee is incorrect on facts as, it was emphasized that the CIT(A) has given a categoric finding, considering the material available on record in para 1.6 that the assessee is a non-resident in the year under consideration within the meaning of section 6(1)(c) r.w explanation (b) of the Income Tax Act, 1961. 19.15.Ld. AR carried us through section 6 of the Income Tax Act, 1961 and on the basis of the same submitted that on a co-joint reading of explanation (b) of section 6(1)(c) it would be evident that it has three limbs (a) it is applicable to a citizen of India or a person of Indian origin within the meaning of explanation 2(e) or section 115(c); (b) who being outside India; and (c) comes to visit to India. 19.15.1. In the facts of the present case it was submitted there is no debate that the assessee satisfies the first limb as he is a citizen of India and is also a person of India origin. The assessee and the AO are at loggerheads it was submitted on the second limb i.e. "being outside India" as the provision encompasses that the benefit is available to a person settled abroad who comes to visit India.

(In I.T.A .No.-3120-3126/Del/2011) 19.15.2. It was submitted that the mere arguments that the assessee has been staying in India and visits UK, UAE etc; and the assessee has investments in India and has relatives including wife, son and daughter and has movable and immovable assets in India; is a director in various companies all these facts and arguments are of no relevance in the facts of the case as the criteria to be considered has been laid down by the Statute as only number of days. The law is very clear which holds that for considering the same it is only the duration of the stay in India which is the relevant criteria after being outside India is established. In the facts of the present case it was submitted that there is a plethora of documentary evidence in the nature of resident visa issued by UAE in favour of the assessee pursuant to the employment agreement acting on which due permission under FERA u/s 29 from RBI have been sought and acted upon; the evidence of having stayed abroad evidenced by lease agreement initially for one year which was renewed periodically and ultimately the assessee residing in a house owned by his company etc. sufficiently demonstrates

that the assessee has been settled abroad permanently. For the said purpose attention was invited to Annexure E-2, E-3 & E-4. These are reproduced for ready-reference:-

> (a) "Copy of Employment Contract dated 01.06.1998 with West Mead Holdings Ltd. effective.
>
> (b) Copy of Passport No. A-2470845 for the period 26.02.1997 to 08.04.1999 issued at Delhi bearing 1st Residence Visa of UAE No. 2470845 dt. 28.07.1998 and entry stamp of immigration at UAE on 14.08.1998.

(c) Copy of application dated 10.08.1998 to Reserve Bank of India seeking their permission u/s 29 of FERA 1973 to retain assets in India after he leaves India for permanent settlement wherein the appellant informed the Reserve Bank of India of being granted a UAE resident visa bearing no. 2470845 dated 28.07.1998 and as also informing them of the intended date of departure from India with the intention of permanent settlement abroad being 14.08.1998.

(d) Copy of letter of Reserve Bank of India dated 08.09.1998 confirming receipt of aforesaid letter dated 10.08.1998 and directing the appellant to (In I.T.A .No.-3120-3126/Del/2011) inform the change of status to the Bankers, Companies in which appellant was a Director.

(e) Copy of letter to Banks in confirmation that the present resident banking accounts in India were converted to non-resident accounts. All his foreign bank accounts specify his address as Dubai.

(f) Cost of Air Ticket to Dubai on 14.8.1998 was duly borne by the appellant and withdrawals reflected in the accounts.

(g) Initially appellant stayed at hotels till an accommodation was taken on lease at Apartment No. 230, Golden Sand -II, Dubai in term of lease Agreement placed on record.

(h) Copy of certificate or salary dated 08.12.2009 issued by West Mead Holding Ltd. ....., 2004, which are supported by Bank advices ....Royal Bank of Canada confirming remittance and corresponding receipts in the accounts.

(i) Copy of Resident visa issued by UAE from time to time and currently being valid up to 2013.

(j) The appellant has been managing/ conducting business in the names of various Companies abroad namely Fair Bridge Holdings Ltd., Cyprus; Kallister Trading Ltd., Cyprus; Kerswell Consultants Ltd. and Fair Bridge Estate Ltd. (Offshore) and he inter-alia owns a residential house in Dubai wherein the appellant resides. The particulars of these Companies were available publically in the share issue offering of Emaar MGF Ltd..... the residential status of the appellant in terms of Section 6 of the Income Tax Act, i.e. his physical presence in India. I have examined the documents placed on record, ..., I have no hesitation in holding that the appellant is settled and residing abroad and visits India for the purposes of monitoring/managing his investments and being with his family members from time."

19.15.3.It was submitted that as a result of this and taking note of more or less identical facts into consideration the Co-ordinate Bench in the case of Sh. Suresh Nanda vs ACIT, ITA No-1428 to 1430/Del/2012 alongwith the Cross Objections has held that the assessee residing abroad on visits to India the duration of which was less than 182 days continues to enjoy the status of NRI. In the said decision reliance has been placed upon the judgement of the Kerala High Court in the case of O. Abdul Razack reported in 337 ITR 350 which had held at para 8 that "going abroad for the purposes of employment only" means that the visit and stay abroad should not be for other purposes such as tourists; medical treatment; studies or (In I.T.A .No.-3120-3126/Del/2011) vacation and is only for employment as has been considered by circular No-684 of CBDT. Referring to para 8.1 it was pointed out that it lays down that the basis for determination of residential status can be only number of days which are to be considered when an Indian citizen goes abroad for employment. Accordingly it was his submission that there can be no room to assume that the criteria is business investment and/or family ties in India.

19.16. The specific additions in the respective years for making the addition it was submitted is only on account of change of residential status as is found discussed in each of the assessment orders and is addressed in Annexure E-5 & E-6. It was emphasized that the only reason in para 10.3 of the assessment order for making the additions is that the accepted status of the assessee has been changed contrary to facts and law. Attention was invited to para 2.1 of the CIT(A) wherein reference is made to analysis of source of application of foreign funds since 2002-03 assessment year to 2008-09 assessment year wherein it was brought out that moneys remitted were not wholly out of foreign earning but also included borrowings abroad. The following contentions in regard thereto addressed in Annexure E-5 & E-6 was relied upon:-

> "Assessee has remitted funds from his accounts abroad to his accounts in India out of accumulated past earning from salary, loans taken abroad. Summary statement showing sources of foreign income/ Borrowings / sale of Investments and corresponding remittances Refer Page Nos. 603-608 (Volume-3). Reliance placed on case of (i) Russian Technology Pvt Ltd ITA Nos 4932, 4933, 5390, 5391 Dt. 12.4.2013 ITAT Del "H" Bench (ii) Finlay Corporation Ltd. [2004] 84 TTJ (Del) 788 ; Smt. Sushila Ramaswamy v. ACI(T [2010] 37 SOT 146 ; held that Moneys remitted by Non-Residents whose identity is not in question thru their bank accounts outside India held to be Capital receipts [Para 11.6 pg 22 of Russian Tech.] In view of the assessee being a Non-resident, the CIT(A) has correctly held the amount remitted of Rs. 7,70,71, 792/- from abroad has been correctly excluded as wrongly taxed by the AO. "

(In I.T.A .No.-3120-3126/Del/2011) 19.17. Inviting attention the CIT vs Suresh Nanda (2013) 350 ITR 611 of the Delhi High Court which has upheld the order of the ITAT and the judgement of the Kerala High Court in the case of CIT vs Abdul Razzack alongwith the circular 684 of the CBDT it was emphasized that the following conclusions have been arrived at by the ITAT in its order in the case of Suresh Nanda (Copy filed at Annexure H1 to H 9 of the same paper book) which case it was re-emphasized has been upheld by the Jurisdictional High Court. The relevant portion extracted in Annexure F2 & F3 is reproduced hereunder for ready-reference:-

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 the 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 section 6, the explanatory notes for this amendment as clarified by CBDT in this behalf also make the No. of days provisions very clear and unambiguous and leaves no room for interpretation. l. Even for the sake of arguments we accept the AO interpretation it leads to absurd result by making practically every non-resident 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.

(In I.T.A .No.-3120-3126/Del/2011) 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 assesses larger presence/business investment/family ties are in India than abroad. This amounts to a guess work contrary to the 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 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. Virindra Kumar Raina (supra). Departmental authorities, except for interpreting the words in their own manner, have not relied on any case law on the issue of

> section 6(1) (c) and Explanation (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.

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 argument 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 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.

19.18. Summing up this argument it was contended that notwithstanding the fact that the assessee has established its status over the years wherein complete disclosures for year to year has been made and para 3 of the Remand Report accepts that for 2007-08 and 2008-09 assessment years original passport was produced. It was contended that it is not the case of the Revenue that the secondary evidence relied upon for the years for which original passport was not available consisting of notarized copies was fraudulently obtained. It was (In I.T.A .No.-3120-3126/Del/2011) emphasized that Notary is a public officer under the Notary Act, 1952 and in the performance of his duty the Notary certifies and authenticate the documents; maintains a record in its Register of the certificates and the documents certified as a true copy of original. Section 63 of the Indian Evidence Act 1872 it was submitted makes a reference to what is admissible evidence. Relying on Banarsi Das Alias Banarsi Lal vs Maman Chand [1991] 0785 (Punjab & Haryana); Jugraj Singh vs Jaswant Singh (Punjab & Haryana) 1967 AIR Punjab 345:1967(2) ILR (Punjab) 402; and K.A.Pradeep vs Branch Manager, Nedungadi Bank Ltd., Manjeri & Others (2007) AIR (Kerala) 269: 2009 (1) CivCC 48 :2007 (4) KLT 57, it was contended that the secondary evidence which is duly notarized is a reliable evidence in the absence of primary evidence and the Courts have had an occasion to consider the said proposition in a plethora of decisions. 19.19. Reliance was also placed upon P.K.Pandiyan vs Komal Judgement rendered by the Madras High Court on 10.07.2008 copy of which is placed at pages 16-20 in Vol.-6 for the proposition that in terms of section 77 of the Indian Evidence Act permits production of certified copies as proof of contents of public documents or part of the public documents of which they purport to be copies of and section 79 of the Indian Evidence Act gives a statutory presumption with respect to the genuineness of the certified copies. Referring to the same it was submitted that the objection posed to reliance placed upon certified copy of the Power of Attorney objected to was not sustained by the Hon'ble High Court following the principle laid down by the Apex Court in the case of Kalyan Singh Choti reported in AIR 1990 SC 396.

19.20. Reliance was also placed upon the opinion of Jaswal Johnston LLP London solicitor regarding validity of the procedure followed in the report filed with Lost Property Office of London wherein the said solicitor has opined that based on (In I.T.A .No.-3120-3126/Del/2011) prevailing law the correct procedure was followed and filing a police report was not required as a black taxi cab comes under the jurisdiction of TFL (Transport for London). The crimes which fall before the London Metropolitan Police it was submitted as per the website are specifically listed and loss has not been defined as a crime.

19.21.The reliance placed upon the decision of the Apex Court in the case of Bank of Bihar relied upon by the Ld. CIT DR in the facts of the present case it was submitted is of no help to the Revenue as the statute is very clear and judicial precedent thereon is available. The circular of the CBDT copy of which is placed at page 289-291 dated 10.06.1994 it was submitted is binding on the AO. 19.22. Addressing the reason as to why the passport was notarized on 19.02.2007, the Ld. AR submitted that the assessee had appeared before the ADI on 11.12.2007 alongwith the original passport and photocopy thereof and the ADI required the assessee to file notarized copies of the original passport instead of merely filing photocopies of the original passport which was shown. The request it was stated on query was an oral request of the ADI but the fact remains that in pursuant thereto notarized copies were filed and the fact that passports were scrutinized by ADI is evident from the letter addressed to the said officer who pointed out some mistakes and which correction were carried out and again relied upon before the ADI who on scrutinizing was satisfied, as no infirmity has been pointed out by him. It was submitted that after scrutiny, discussions and consideration since nothing negative has been mentioned in the Appraisal Report it means that the ADI was satisfied with the claim of the assessee. The secondary evidence in the facts of the present case by way of notarized photocopy it was submitted cannot be discarded for which purpose reliance was placed on J.Yasoda vs K.Sobha Rani copy filed at pages 21-24 of Volume No-6 in appeal Civil 2060 of 2007 dated (In I.T.A .No.-3120-3126/Del/2011) 19.04.2007 (section 65, 74 & 76). Reliance was also placed upon Pratap Mal Dharewa vs Ganpat Das & Others rendered by the Rajasthan High Court, copy placed at pages 25-31 order dated 04.04.2013 in SBCWP No-1404/2012; Chandra vs M.Thangmathu & Anr.

20. Addressing Ground No-3 of the department's appeal, attention was also invited to ITO vs Dr. M.P.Konanhalli 55 ITD 266 (Ban.) and Russian Technology Pvt. Ltd. in ITA No-4932, 4933, 5390, 5391/Del/2011 for the proposition that if income is already received outside India, the same cannot be taxed in India merely on account that it is brought in India by way of remittances. Reliance was also placed on the judgement of the Apex Court in the case of Keshav Mills for the said proposition. Apart from that reliance was placed upon DCIT vs Finlay Corporation Ltd. (2004) 84 TTJ 788 (Del.) and Smt. Sushila Ramaswamy vs ACIT [2010] 37 SOT 146.

21. Accordingly it was his prayer that the Cos filed may be allowed and the department's appeals be dismissed.

22. In reply the LD. CIT DR submitted that the facts in the case of Suresh Nanda are entirely different. Referring to the same it was submitted that the said decision would not apply as non-production of the passport was not an issue there and secondly Suresh Nanda was outside India

and involved in business abroad. Even otherwise it was contended the decision of the Delhi High Court would not apply as the Hon'ble High Court has simply dismissed the Revenue's appeal holding that no question of law arose from the order of the Tribunal. 22.1. It was also his submission that reliance placed on letter dated 10.08.1998 under FERA filed u/s 29 (Assessee's Paper Book page 95) is of no relevance as the residential status for FERA purposes is different from the provisions of the section 6 of the Income Tax Act.

(In I.T.A .No.-3120-3126/Del/2011) 22.2. In regard to the hiring of the apartment it was submission that firstly copy made available is signed by the lessor and at best would throw light only for 2000-01 assessment year. Ld. AR intervened on behalf of the assessee stating that the same was renewed and copies of renewal are available on record and infact thereafter the assessee has lived in the house owned by his company evidenced from the address in the passport.

22.3. Similarly the claim that right from 1999-2000 assessment year , the assessee has been filing its return as a non-resident India it was submitted is of no relevance as the returns were finalized u/s 143(1) and not under scrutiny. Moreover the same were not accompanied by the copy of the passport. For similar reasons the arguments that disclosure of stay over the period of time has been made in the normal course much before the date of search it was submitted are not relevant evidences.

22.4. It was his stand that the claim of the assessee that he left India in terms of employment contract with Westmead Holdings Ltd. cannot be accepted as the assessee has had a long association with Mr.John Ronald Macinnes since 1998 and reliance by the assessee has been placed upon contract with Rintra Cont which lasted 1993-98 accordingly Mr.John Ronald Macinnes with the aid of his company accommodated the assessee and the contract it was submitted was not genuine. 22.5. The arguments that in 2011-12 assessment year, the AO has accepted the status as NRI it was argued is also of no consequence secondly judicial propriety may have persuaded the AO to hold so.

22.6. Referring to section 6 of the Income Tax Act, 1961, it was emphasized that it refers only to visit and not multiple visits and the expansion of the term by the Circular No-684 of the CBDT is contrary to the legislative intent.

(In I.T.A .No.-3120-3126/Del/2011) 22.7. The claim that the notarized document was filed on the direction of the ADI, it was stated is not borne out from record. The claim that the expired passport was lost in a black cab (taxi) it was argued has come out for the first time in the opinion of the solicitor Jaswal Johnston LLP 20.08.2014. The burden accordingly to prove that the assessee was NRI was not discharged and reliance placed upon B.K.Dhote 66 ITR 547(SC) is misplaced and instead the principle laid down by the Apex Court in the case of Moosa A Mada 89 ITR 65 (SC) which is a judgement of 3 judges Bench would fully apply.

22.8. The evidence by way of a notarized document it was submitted is not the primary evidence and contemporaneous evidence like air tickets correspondence with Indian High Commission for being issued a fresh passport and other such contemporaneous date as opposed to notarized photocopy of the passport would have been more relevant evidence.

22.9. It was submitted that section 6 apart from being a deeming provision is also a charging section and hence interpretation has to be such whereby charge is not defeated.

23. Accordingly it was submitted that the COs be dismissed and the departmental appeals may be allowed. In the alternative it was his request the issue may be restored in the interests of justice.

24. We have heard the rival submissions and perused the material available on record. It is seen that the oral arguments in the present appeals were spread over on various dates. The oral arguments were further supplemented by written submissions/synopsis etc. which were frequently sought to be modified. In view of the multiplicity of the arguments advanced by the parties before the Bench it would be appropriate to first determine the issues which arise for our consideration in the present appeals and the Cross Objections filed.

(In I.T.A .No.-3120-3126/Del/2011) 24.1. Considering the arguments and the material available on record in the context of the grounds raised by the respective parties, we find that in order to address the same, finding on the following issues on facts and law framed by us is warranted in the present proceedings:-

> Issue (1) Whether departmental objections in the present proceedings to Sh. Siddharth Sareen filing Cross-objections as legal heir of Late Sh. Sudhir Sareen are maintainable?
>
> Issue (2) Whether the delay of 855 days in filing of the Cross-objections can be condoned in each of the years on the facts of the case? Issue(3) Whether the Cross-objections have to be allowed in the respective years where admittedly no incriminating material was found during the search conducted upon the assessee or for considering the entire factual material the conclusion there on should be deferred for the time being? Issue(4) Whether the status of the assessee can be varied for 2002-03 to 2008-09 assessment years where admittedly no incriminating material was found?
>
> Issue(5) In case the Cross Objection of the assessee is not allowed, then whether the department appeals are to be allowed on facts where for 2002- 03 to 2006-07 assessment years admittedly original passport was not produced by the assessee, whereas the finding in the impugned order is based on the lead order passed by the CIT(A) in 2008-09 assessment years where original passport was available?

Issue(6) whether the departmental appeals in 2007-08 and 2008-09 assessment years can be allowed in the facts of the case?

(In I.T.A .No.-3120-3126/Del/2011) Issue(7) If the answer to issue in issues in Serial No-5 and 6 are in the negative then can the additions made in the years under consideration be sustained?

25. Having framed, the above questions, we now set out to consider the first of these, namely whether the departmental objections are sustainable in regard to filing of the cross-objections by Sh. Siddharth Sareen. On a consideration of the detailed arguments and evidences relied upon by the parties which we have brought out in great detail in the earlier part of this order, we hold that the objections of the Ld. CIT DR on facts are not maintainable. Not only the fact that no effort has been made by the Ld. CIT DR to bring the so called correct legal heirs on record by way of providing the Registry with the correct names of the legal heirs of Sh. Sudhir Sareen acceptable to the Revenue. It is also seen that no attempt in response to letter dated 20.05.2013 of Sh. Siddharth Sareen resulting that he be impleaded as legal heir in the departmental appeal has been attempted to bring the correct legal heirs. The copy of the said letter as per record has been filed in the DRs office as per stamp of the Departmental Representatives Officer affixed thereon dt. 21.05.2013. On the contrary the record shows that the return filed for Late. Sh. Sudhir Sareen by Sh. Siddharth Sareen as legal heir in 2013-14 (copy available at page 19 of CO paper book-2) has been accepted by the AO as would be evident from copy of the assessment order passed u/s 143(3) for 2011-12 after bringing Sh. Siddharth Sareen on record. The said fact supports the conclusion that Sh. Siddharth Sareen has already been taken as the legal heir of the Late Sh. Sudhir Sareen by the AO himself. No effort has been made by the Ld. CIT DR in the pro-longed hearing spread over for almost three months to controvert the claims of the Ld. AR. No efforts have been made as per record to obtain comments from the AO to show that Sh. Siddharth Sareen is not the sole (In I.T.A .No.-3120-3126/Del/2011) legal heir. Raising of arguments dehors the facts is of no avail. No argument on fact has been advanced to contend that the will dated 14.07.2010 copy of which had been filed alongwith the letter dated 20.05.2013 addressed to the Registry has been contested by the daughters or the wife of Late Sh. Sudhir Sareen. Infact certificate dated 01.06.2014 of Smt. Sunita Sareen, wife of the deceased authorizing Sh. Siddharth Sareen to act, represent, in Courts etc. has been placed the record. The said document was filed in the course of the hearing and the Ld. AR by way of abundant caution was also required to file proof of the properties devolving on Sh.Siddharth Sareen in pursuance to the Will which were also filed. It is further seen as per paper book 2 appears in page 21 the CO filed that letter dated 25.06.2013 addressed by Ld. AR informing the DCIT/DCWT of the demise of Sh. Sudhir Sareen with the request to bring Sh. Siddharth Sareen as his legal heir on record. The said request was acted upon and assessment was concluded after bringing Sh. Siddharth Sareen as legal heir on record by the AO. In view of these facts and evidences the arguments of the Ld. CIT DR dehors facts cannot be accepted. Sh. Siddharth Sareen is accordingly taken as the sole legal heir of the Late Sh. Sudhir Sareen in the absence of any fact or evidence to the contrary placed on record by the Ld. CIT DR.

25.1. Accordingly the first issue is answered in the negative the departmental objections on facts are found to be not sustainable.

26. Addressing the next question posed by us whether on facts the delay of 855 days in filing the cross-objections can be condoned or not, we find on considering the explanation offered, judicial precedent and the arguments of the respective parties on facts that the assessee was prevented by sufficient cause on account of which the delay has occurred. The delay accordingly of 855 days in filing the CO, we hold deserves to be condoned. The arguments of the (In I.T.A .No.-3120-3126/Del/2011) respective parties and the judicial precedent relied upon have all been

taken into consideration. Not only the judicial precedent in the case of Siddharth Sareen as considered by the Co-ordinate Bench in its order dated 11.04.2014 (copy available at para 12-16 in paper book No-1 in CO filed) supports such a conclusion, but even, on consideration of the peculiar facts and circumstances of the case, we find no good reason why the same should not be condoned. The argument of the Ld. CIT DR that the Co-ordinate Bench did not consider the judgement referred to by the Ld. CIT DR rendered by the Apex Court in the case of Chief Post Master General vs Living Media India Ltd. reported in 348 ITR 7 (SC) in the facts of the present case is of no help. The said decision it is seen has been passed on a consideration of the peculiar facts and circumstances as were available before the Hon'ble Apex Court. On considering the said judgement, we are of the view that it does not support the department's objections on facts. In the facts of that case, the appellant was the Government department and for the delay there was no proper explanation offered before the Apex Court. In these peculiar facts the Hon'ble Apex Court dismissed the appeal. The argument of the Ld. CIT DR that the decisions by the Co-ordinate Bench in the case of MGF Automobiles Ltd. and Kusum Gupta pronounced on June 2013 and March 2013 respectively have been available in the public domain for quite some time and merely because the assessee was physically ill and was not mentally incapacitated so as to file the COs in time is an argument which we decline to address. Suffice it to say the objections could have been worded more happily and are not in good taste. Without commenting on the same, we are inclined to accept the arguments of the Ld. AR that an assessee suffering from a prolonged illness who finally does expire would necessarily be more concerned with doctor's appointments then legal appointments. The pre- occupation with health as opposed to legal affairs is not an unreasonable (In I.T.A .No.-3120-3126/Del/2011) explanation in the peculiar facts of the case. The explanation on behalf of the son who comes on record as the legal heir in the peculiar facts of the present case after the demise of his father where tax matters were looked after by the father in his life time cannot be faulted for the delay in filing the COs as the death of a father after a prolonged illness would normally come as a shock to a son and the attention of Late Sh. Sudhir Sareen remaining engaged with doctors on his visit to India and other countries who finally expired in Singapore is a scenario where a family can legitimately argue that it was left in a state of loss, confusion and flux and there is no reason to disbelieve the legal heir that as soon as he became aware after sorting out the formalities that Cross Objections are required to be filed. We find that the arguments of the Ld. CIT DR that Sh. Sudhir Sareen was only physically unwell which did not make him mentally incapacitated as a little out of sync with how families are normally bound by emotions of love, care and consideration. The scenario of a family battling with natural tragedies on account of illness and subsequent demise resulting in a period of grieving, confusion and loss cannot be expected to exhibit a level of alertness towards its financial affairs. To presume to the contrary atleast in the Indian context is a little far-fetched. Accordingly for the reasons given herein above we find ourselves unable to accept the arguments of the Ld. CIT DR. Notwithstanding the fact that the issue is stated to be covered in favour of the assessee by the decision of the Co-ordinate Bench in the case of Sh. Siddharth Sareen himself. The conclusion accordingly to condone the delay is based not only on the peculiar facts and circumstances of the case but also following the judicial precedent relied upon. The decision relied upon by the Revenue (Living Media) on facts we hold to be inapplicable and fact specific as there no proper explanation was offered by a Government Department.

(In I.T.A .No.-3120-3126/Del/2011) 26.1. The answer to Issue No-2 accordingly is in the affirmative and the delay of 855 days in filing the Cross objection is condoned.

27. The third issue which falls for our consideration is whether where admittedly no incriminating material was found in the search conducted upon the assessee can the Cross objections of the assessee be allowed. The arguments of the respective parties on facts alongwith reliance placed on the decisions cited in support of their respective claims have been addressed in the earlier part of this order in great detail. Accordingly repetition of the same is refrained from suffice it to say that all the decisions cited have been taken into consideration even if reference specifically in the following paras is not being made to them. In the COs filed the stand of the assessee not disputed by the Revenue has been that the assessment order in each of the years in 2002-03 assessment year to 2005-06 assessment year brings out the common fact in para 10.2 and 10.3 (and para 10.4 in 2004-05 and 2005-06 assessment year) that the additions are made solely on account of the change of status from NRI to resident. It is an admitted fact that no document was found in the course of the search conducted.

27.1. Apart from this as per record which is also not disputed the assessments for 2002-03 to 2005-06 assessment years stood concluded as in some years intimation u/s 143(1) is available on record and in all the cases the last date for issuance of notice u/s 143(2) has since long passed. These facts are available on record and have not been disputed by the department. The only argument raised is that these were not scrutiny assessments. The judicial precedent in the case of Siddharth Sareen by way of the order dated 11.04.2014 by the Co-ordinate Bench is available on record which has considered the decision of the Co-ordinate Benches in the case of MGF Automobile Ltd (cited supra); ACIT vs Pradeep Kumar (cited supra); Kusum Gupta vs DCIT (Third Member) (cited supra). Apart from that before us (In I.T.A .No.-3120-3126/Del/2011) reliance has been placed amongst others on the following decisions Gunvardhan Vyapar Pvt. Ltd. (copy in the CO Paper Book 2 page 25-35) order dated 16.01.2014 in Sanjay Aggarwal vs DCIT 47 taxmann.com 2010 (Del.); Manoj Narain Aggarwal and V.K.Fiscal Services Pvt. Ltd. at pages 36-61 and 62-89 respectively alongwith decisions of the Hon'ble Rajasthan High Court in the case of Jai Steels (India) vs ACIT (cited supra) and Mumbai High Court in Murli Agro Products Ltd. all these decisions have been taken into consideration. The Ld. CIT DR on the other hand has relied upon SSP Aviation (cited supra); CIT vs Chetan Dass Lachman Dass (cited supra); and Filatex (Delhi High Court) (cited supra) and CIT vs Raj Kumar Arora (Allahabad High Court) (cited supra) amongst others which also have been taken into consideration.

27.2. The decision rendered by the Delhi High Court dated 14.07.2014 in the case of Filatex India Ltd. vs CIT it is stated to be distinguishable by the Ld. AR on facts as it is based on peculiar facts of that case. The facts it is argued are entirely distinguishable as would be evident from para 2 of the said judgement wherein the additions are stated to be based on incriminating material found in the course of the search which was an admitted fact in that case and in the facts of the present case it was submitted the admitted fact is that nothing incriminating was found in the search conducted on 12.09.2007. Apart from this it was submitted that there was also a statement of one Mr.Sanjay Aggarwal, G.M. (Marketing) of Filatex in the facts of that case on the basis of which the additions were made. All these material facts it was submitted are found to be missing in the present

proceedings. 27.3. Similarly the decision of the Allahabad High Court in the case of Raj Kumar Arora, it was submitted is on facts which are entirely distinguishable and on the contrary it has been submitted that not only Sh. Siddharth Sareen's own case on facts is available on record but there is also the decision of the Rajasthan High (In I.T.A .No.-3120-3126/Del/2011) Court in the case of Jai Steel and of the Nagpur Bench of the Mumbai High Court in ACIT vs Murli Agro Products. The following paras in the decision of Murli Agro Products was relied upon:-

> 10. "Thus on a plain reading of Section 153A of the Income-Tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalized for those assessment years covered under Section 153A of the Act. By a circular No.8 of 2003 dated 18.09.2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalized assessment/reassessment shall not abate. It is only because, the finalized assessment/reassessments do not abate, the appeal, revision or rectification pending against finalized assessments/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalized for the assessment years covered under Section 153A of the Income Tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stand revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).
>
> 11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalized on 29.12.2000 and search was conducted thereafter on 3.12.2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalized on 29.12.2000.
>
> 12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80HHC of the Income Tax Act as well as the loss computed under the assessment dated 29.12.2000 would attain finality. In such a case, the AO while passing the independent assessment order under section 153A read with section 143(3) of the I.T.Act could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income Tax Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

27.4. It has been argued that the decision in SSP Aviation relied upon by the Revenue is in the context of section 153C and is not relevant to section 153A as (In I.T.A .No.-3120-3126/Del/2011) has been considered by various Benches namely Sanjay

Aggarwal and decision of the Delhi High Court in the case of Chetan Dass Lachman Dass has also been considered in Atul Barot's case (Mumbai Bench) and Sanjay Aggarwal (Delhi Bench) and infact is relied upon by the assessee also specifically para 11 of Chetan Das Lachman Das which has been also considered in Sanjay Aggarwal and Atul Barot's case. In the decision rendered by the Allahabad High Court it has been argued the decisions of the Rajasthan High Court and Mumbai High Court in Jai Steel and Murli Agro respectively have not been taken into consideration.

Reliance accordingly was placed upon the decision of the Apex Court in the case of Vegetable Products for the proposition that where two views are possible if the views considered in Chetan Das Lachman Das of the Hon'ble Delhi High Court as considered in Sanjay Aggarwal's case and Atul Barota amongst others on one side and the decision in Filatex if it is considered to be contrary to the earlier decision notwithstanding the fact that the said decision is fact specific and distinguishiable even then the decisions in favour of the assessee rendered by the Nagpur Bench of the Mumbai High Court in Murli Agro Products and Rajasthan High Court in Jai Steels would mandate that the decision in favour of the assessee be taken. 27.5. The above proposition propounded appears to be acceptable however we by way of abundant caution would deem it appropriate to defer our decision on the issue and instead also consider the other issues framed by us in the present proceedings so as to address the departmental grievance and accordingly address this issue subsequently, if need be.

28. In view of the fact that the answer to the issue framed in issue number-3 has been left unanswered for the time being the answer to the issue framed in issue number-4 is postponed for the time being.

(In I.T.A .No.-3120-3126/Del/2011)

29. Proceeding to the issue framed in issue No-6 requiring us to consider whether in the facts and circumstances of the present case the departmental appeals in 2002-03 to 2006-07 assessment years are to be allowed keeping in mind the arguments of the Ld. CIT DR in urging that the Employment Agreement is sham and other related arguments including the major distinction of non availability of original passport from the lead order passed by the CIT(A) in 2008-09 assessment year where the original passport was available.

29.1. In order to address the same it is seen that the assessee has relied upon the following evidences addressed by way of chronological date wise events:-

Late Sudhir Sareen.

(Through Legal Heir Siddharth Sareen)
ITA Nos. 3120-3126/2011 & 6411/ 2012 ...G. Bench

CHRONOLOGICAL DATE WISE EVENTS

Sl. No.	Date	Particulars	Paper Book page No.
1.	01.06.1998	Executed employment contract in London with West Mead Holdings Ltd. to join on	86-90(Volume-1)

		15.08.1998 at their office in UAE	
2.	01.06.1998	Entry in passport for entering UK to execute the aforesaid agreement at London.	93 (Volume-1)
3.	28.07.1998	First UAE resident visa granted and affixed in passport	94 (Vol.-1)
4.	10.08.1998	Letter to RBI seeking permission u/s 29 of FERA, informing them of intended departure under employment and to hold assets in India.	95(Vol.-1)
5.	14.08.1998	Left India and entered UAE as evidenced by entry stamp in passport and air ticket	94(Vol.-1)
6.	08.09.1998	Letter from RBI re change of status and directing assessee to inform bankers and companies in which shareholder	111(Vol.-1)
7.	25.09.1998	Intimation to bankers regarding change in status of bank accounts as non resident	108-110 (Vol.-1)

8. Salary certificates from West Mead Holdings 112-117(Vol.-1) Ltd.

(In I.T.A .No.-3120-3126/Del/2011)

9. 03.03.1999 Copy of lease deed of Appt. No. 230, Golden 149-150(Vol.-1) Sands, Dubai in evidence of residence/accommodation in Dubai

10. Residence Visas valid upto 2013 292-205[Vol.2]

11. 26.07.1999 Return of AY 1999-00 in status of NR which 296[Vol.2] [Period became final stated that assessee left on of stay of each year 14.08.1998 on pgs 300,309 312,314,318,322]

12. Returns of AY 2000-01 to 2001-02 in status of 301-306 [Vol 2] NR filed which stated period of stay in each year and became final

13. Returns for AY 2002-03 to 2005-06 in status 307-319 [Vol.2] of NR filed stating period of stay in each year and asstt. Stood completed on 12.9.2007 [Dt of search]

14. Returns for AY 2006-07 & 2007-08 filed u/s 320-326[Vol2] 139 (1) in status of NR before dt. Of search

15. List of Companies owned & managed abroad Statement of A 615 by assessee incl. ownership of Residential houses in Dubai, London.

16. Attested copy of (i) passport nos Z-1384925 218-281 [Vol2) for the period 26.02.03 to 6.11.06 and (ii) passport nos Z-042469 for the period 9.4.99 to 25.02.03 were filed before AO.

17. Original produced before intelligence unit 333-334 [Vol2] and attested copies filed.

18. Aforesaid two passports lost in London as 342-343[Vol2] confirmed by lost office

19. Copy of affidavit dt. 21.04.2010 651[Vol.2]

20. Remand report dt. 25.06.2010 accepting 637-644[Vol.4] examination of original passport issued on 7.11.06 and accepting period of stay in India

21. Gr. No.3 Statement of Foreign sources/ Remittances 603-608 [Vol.3] into India

22. Detail of income earned abroad and remitted 507-509 [Vol.3] to India with bank advice 510-572

23. 29.2. The Ld. CIT DR's case on the other hand it is seen has been that firstly the original passport has not been produced in these years; secondly the notarized photocopy of the original passport is self-serving document as it has not as per (In I.T.A .No.-3120-3126/Del/2011) record been sought by the ADI; thirdly even if it is sought by the ADI it has no evidentiary value; fourthly the CIT(A)'s conclusion in para 1.4.5 in the lead order that the period of stay was verified by the Intelligence Wing of Department is incorrect on facts; fifthly the claim of loss of passport was not genuine and also in support of the claim no evidence of correspondence with the High Commission of India/London has been filed for issuance of fresh passport which would have been necessary had the claim been bonafide; sixthly the salary certificates are "solicited" documents; seventhly the Lost Passport Office letter is also for insurance purposes and as such solicited; further the identity of Sh. John Ronald Macinnes was initially questioned and thereafter when the Ld. AR referring to photocopy of his Canadian passport and related documents established that he is the beneficial owner of M/s Westmead Holdings the Ld. CIT DR stated that Mr. John Ronald Maccines because of his long association with the assesssee had created a façade by aiding and accommodating the assessee by offering him employment in order to hoodwink the department; and lastly the clinching contemporaneous evidence was stated to be missing.

29.3. In the light of the above departmental objections to the evidence relied upon in support of the impugned order considering first the initial departmental objection which was subsequently modified we on considering the unassailed material available on record dismiss the initial departmental objection and hold that the identity of Mr. John Ronald Maccines as a Canadian citizen as beneficial owner of Westmead Holding stands proved.

29.4. Considering the departmental objections as to why the employment was offered to the assessee and the assertions that the assessee had created a façade with the help of Mr. John Ronald Maccines who had aided and accommodated the assessee for nefarious reasons we find looking at the evidences, arguments and (In I.T.A .No.-3120-3126/Del/2011) undisputed facts on record that the departmental objections and reasoning cannot be sustained. The long past history of the asessee not only with Mr. John Ronald Maccines related companies but even other unrelated multi-national companies addressing the experience, knowledge, exposure and understanding stands unassailed on record. The facts and submissions advanced before the AO vide letter dated 17.12.2009 at pages 28 to 41 stands unrebutted on record. The argument that due to the past over 20 years of experience in dealing with commodities, petroleum products, fertilizers etc. as consultant in India for business in India, Far East, South East etc. and the consequent decision of Mr. John Ronald Maccines to offer employment to the assessee as its C.E.O at Dubai and thus entering into an Agreement at London in

the absence of any material to the contrary can not be doubted.

29.4.1.The related arguments that the agreement signed in London by an Indian and Canadian citizen per se by itself raises no doubts as the place of signing of documents settled either at mutual convenience or at the convenience of only one party does not negatively reflect on the contents of the agreements. 29.4.2.Similarly the departure of the assessee immediately one day before the signing of the agreement keeping the rationale of the explanation in mind offered by the Ld. AR which is also an accepted fact that Indian time is 5.30 hours ahead of London time also does not lead to any doubt about the authenticity of the agreement.

29.4.3. As observed the subsequent arguments of the Ld. CIT DR when confronted with the documents establishing past history with Mr. John Ronald Maccines and the assessee wherein the Ld. CIT DR changed his stance from objecting to the agreement entered into with an unknown person to an agreement entered into with a known person having past established history of business (In I.T.A .No.-3120-3126/Del/2011) relations urging that it is an accommodation on the part of Mr. John Ronald Maccines, it is seen is without any basis or evidence. In view of the demonstrated knowledge and experience with the working of the assessee as a consultant with concerns where Mr. John Ronald Maccines was also a director the prudence of business decision to engage such a consultant appears to be a very logical act and decision. Infact we donot see how in the presence of the documentary evidence available on record why Mr. John Ronald Maccines should have denied himself the opportunity to utilize the India specific knowledge of the assessee. Nothing has been placed on record by the Revenue that the late assessee's performance as a consultant in India did not inspire any confidence in the claim of being offered a genuine employment. The decision to trust such a person by someone who has seen the late assessee's performance so as to appoint him as a C.E.O at Dubai on a salary in the facts f the present case demonstrates the genuineness of the claim and does not show that the arrangement was a sham. Nothing has been placed in order to assail the expertise, acumen and past performance of the late assessee. On the contrary the Revenue has argued cluelessly on all possible angles based on suspicions without referring to material on record to justify the action of the AO. 29.4.4. The arguments that the salary certificate for different years carry the same dates and are signed in London and being "solicited" documents should be discarded has been answered by the Ld. AR adequately. It has been submitted that the salary certificates were requested for by the assessee stating that considering the period and the amounts as per record these may be issued for record. As such merely because it is issued on assessee's request it has been submitted it does not by itself show that the contents thereof are not correct. The assessee has placed on record all along the details of the remittances made to the salary account from the Westmead Holding and the same have not been controverted by the department.

(In I.T.A .No.-3120-3126/Del/2011) Accordingly we hold that in the absence of any material to the contrary the authenticity of the salary certificates stands unchallenged. 29.4.5.On considering the entire gamut of arguments, facts on record and the evidence on record we do not find any merit in the arguments of the Ld. CIT DR that the contract of employment was not genuine.

29.5. The next issue which we are required to consider expressing the grievance of the Revenue is whether on facts the claim of loss of original expired passport at London on 04.02.2009 is bonafide or is the claim of loss of passport on facts has to be rejected.

29.5.1. The department it is seen has objected to the claim being bonafide on the grounds that the letter dated 24 Feb. 2009 of the Lost Property Officer is a "solicited" document for the purposes of insurance and more importantly no police complaint in regard to its loss has been lodged; apart from it contemporaneous evidence of correspondence addressed to the Indian High Commission for issuance of a fresh passport has also not been filed by the assessee.

29.5.2. Giving our consideration to the said objections we find on considering the arguments and the material available on record including the opinion of the Solicitor Mr Jaswal Johnston LLP that the claim of loss of passport in London appears to be bonafide. The opinion of the London Solicitor supports the assessee's claim that the procedure followed in regard to the loss of the passport was the correct prevalent procedure. The argument that the Lost Property Officer is the designated authority for loss of belonging in London traffic, trains or black taxi and the website of the Metropolitan Police who functions under the Mayor of London as per the copy of the website available elaborates what is a crime and for (In I.T.A .No.-3120-3126/Del/2011) loss of an expired passport the argument that police claim was not required to be lodged supports our conclusion.

29.5.3. The objection that the assessee has not brought on record any correspondence with the Indian High Commission in regard to issuance of a fresh passport stands addressed from the record itself as the assessee was admittedly already in possession of a fresh passport since earlier passports had expired and the fresh passport accordingly already stood issued from Dubai Consulate of the Indian High Commission dated 07.11.2006 on the basis of which as an Indian Non- resident the late assessee was staying at London. In these circumstances, the occasion to enter into correspondence with India High Commission at London for issuance of a fresh passport we find does not arise. Nothing in rebuttal to the stated position has been placed on record.

29.5.4. The arguments of the Ld. CIT DR that "black taxi cab" is being mentioned for the first time in the opinion sought from the London Solicitor is incorrect as in the reply addressed to the department in writing copy available on record the assessee specifically makes a mention of the loss of the briefcase containing expired passport etc. in a taxi in London in Feb. 2009. 29.5.5.Considering also the sequence of events and the cumulative evidences, facts and arguments on record which we shall address specifically considering the objections posed we hold that the claim of loss of the passport on facts is genuine and bonafide.

29.6. Addressing the availability of notarized photocopy of the original passport on record, it is seen as per the reply of the assessee dated 11.12.2007 addressed to the ADI post search (copy available at pages 333 to 334 at specific page 334) that response is made to some calculation mistakes of the number of days as per the dates mentioned in the passport which corrections were carried out and placed (In I.T.A .No.-3120-3126/Del/2011) again before the ADI. The argument that it was necessitated as mistakes were noticed/pointed out by the ADI appears to be plausible. The argument that the original was shown in the post search inquiries supported by photocopies which were

required to be notarized by the ADI orally in the presence of the various other material on record which we shall address subsequently also appears to be plausible. The arguments of the Ld. CIT DR that the documents were not legible for which purposes scanned copies were filed and the arguments that in the remand proceedings the copies may not have been legible have been adequately addressed by the Ld. AR who has submitted that if these were not eligible than how the arguments have been advanced by the Revenue that the number of days spent in India are almost half in a year and how the arguments have been advanced addressing the specific number of visits made to India in the respective years. Considering the stand of the parties before the Bench we are of the view that the photocopy of the original expired passport was notarized in response to the oral request of ADI cannot be doubted. The argument of the Ld. CIT DR that the CIT(A) at para 1.4.5 has given a finding that ADI has verified is also an incorrect argument as there is no such finding of the CIT(A) and it merely is a reproduction of the assessee's claim which on facts appears to be correct. On consideration we find that the objections of the Ld. AR that the arguments and the evidences are being advanced and read selectively by the department is taken note of and does to an extent appear to be correct.

29.7. Addressing the next objection of the Ld. CIT DR that the secondary evidence by way of notarized photocopy of the original passport inasmuch as it having no evidentiary value when considered in the light of Section 8 of the Notaries Act, 1952 which does not empower the notary to authenticate/certify a passport and the notary's powers are limited to the said Section r.w.section 2(a) of (In I.T.A .No.-3120-3126/Del/2011) the Notary Act. These objections of the Ld. CIT DR have been responded to by the Ld. AR who has placed on the last date of hearing copy of the Notaries Rules 1956 made by the Central government in exercise of the powers conferred by section 15 of the Notaries Act 1952 highlighting that Rule 10 of the same which lays down the fees payable to a Notary for doing any notarial act under sub rule (l) thereof prescribes the fee for certifying copies of documents as true copies of the original etc. The Rules made under the Act it is seen addresses the departmental doubts. Our attention has also been invited to section 63 of the Indian Evidence Act which defines and illustrates secondary evidence as under:-

> Secondary evidence:-
>
> 63. "Secondary evidence means and includes:-
>
> (1) certified copies given under the provisions hereinafter contained; (2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
>
> (3) copies made from or compared with the original;
> (4) counterparts of documents as against the parties who did not execute them;
> (5) oral accounts of the contents of a document given by some person who has himself seen it.
>
> Illustrations
>
> (a) A photograph of an original is secondary evidence of its contents, though

the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.'' 29.7.1. It is further seen that section 64 of the Indian Evidence Act mandates that documents must be proved by primary evidence except in cases mentioned (In I.T.A .No.-3120-3126/Del/2011) hereinafter. Reference has been made to for purposes of the present proceedings to clause (c), (e) & (f) of section 65 of the Indian Evidence Act. These are reproduced hereunder for ready-reference:-

"Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition, or con- tents of a document in the following cases:-

(a).....

(b).....

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d).....

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in e evidence;

(g)....."

29.7.2. Our attention has also been invited to section 74 of the Indian Evidence Act which makes a reference to "public documents". Section 79 of the said Act raises a presumption that certified

documents are genuine. On considering the relevant provisions we hold that as per section 17 of the Indian Passport Act, 1967 r.w.s 74 of the Indian Evidence Act "passport" is a public document. Section 17 of the Indian Passports Act mandates that the passport at all times is the property of the Central Government. In the light of the above reasoning considering the arguments of the assessee and the fact that although Indian Evidence Act is not strictly applicable to the Income Tax proceedings, but, where the notarized copy of the passport is relied upon in a situation where the original passport admittedly is lost and is stated to have been produced before the ADI; in these circumstances, where the very same information; in regard to period and duration of stay in India; over the years is disclosed by way of filing of returns in due course in the status of NRI; which have been accepted in 143(1) (In I.T.A .No.-3120-3126/Del/2011) proceedings; and no 143(2) notice have been issued right from 1999-2000 to 2008- 09 assessment years we donot see how the secondary evidence so placed on record and relied upon can be discarded.

29.7.3. The said issue is answered in favour of the assessee not only on the above reasoning but also on the reasoning that in the relevant information duly filed by the assessee over the years, no fault is pointed out by the Revenue when collated with the record of the Revenue. On the contrary relying on the very same facts and figures it has been sought to be argued that these visits were from India to outside India and not by a person who was "outside India" to India. The frequency of the travel or the dates mentioned or the duration claimed by the assessee stands unrebutted on record. The arguments advanced by the Revenue in the context of the wordings "being outside India" and "visit" to India does not mean multiple visits as per the mandate of explanation (b) to section 6(1)(c) of the Income Tax Act shall be addressed separately and subsequently in the later portion of this order.

29.7.4. While coming to the said conclusion we have also seen and taken note of the contemporaneous evidences of Employment Agreement dated 01.06.1998 which we have held to be as genuine; the UAE resident Visa granted to the assessee on 28.07.1998; the letter dated 10.08.1998 addressed to the RBI seeking permission u/s 29 of the FERA Act informing of the assessee's intention to permanently depart to the UAE and the consequent arrangement of the financial affairs in India; arrival at Dubai on 14.08.1998; letter dated 08.09.1998 from RBI regarding change of status and directing the assessee to inform the bankers and the companies in which the assessee was a shareholder; letter dated 25.09.1998 intimating the banks of changed status of the assessee to NRI; salary certificates even though solicited whose authenticity has not been impinged by referring to the (In I.T.A .No.-3120-3126/Del/2011) remittances in the bank accounts available on record; copy of the lease deed dated 03.03.1999 with M/s Arenco Real Estate which was stated to be relevant by the Ld. CIT DR for only one year and responded to by the Ld. AR that the lease has continually been renewed and the copy of the renewal of lease is available on record and subsequently staying in a house owned by a company in which the late assessee was a Director in Dubai; the returns filed in due course over the years right from 1999-2000 to 2005-06 assessment years which stood completed before the day of the search thus on a cumulative consideration of the entire factual material available on record, we find that the arguments of the Ld. CIT DR that in the absence of primary evidence reliance placed by the CIT(A) on secondary evidence is not justified on facts cannot be agreed with. 29.8. We have taken ourselves through the lead order pertaining to 2008-09 assessment years along with the facts available on record and given our serious consideration to the arguments advanced to the respective parties and come to the

conclusion that the finding arrived at cannot be faulted with. However we shall address this issue in detail later on as before we address the lead order and its applicability to the assessment years wherein the original passport was not available, we are also required to address another overarching objection to the impugned order in all the years namely that on facts Explanation (b) to section 6(1)(c) has incorrectly been held applicable by the CIT(A). 29.9. The incorrect application has been canvassed by the Ld. CIT DR on the ground that in the facts of the present case according to the departmental stand the assessee cannot be said to fall in the category of "being outside India" as considered in explanation (b) to section 6(1)(c). The said assertion on facts by the Ld. CIT DR is not agreed to by us. The reason for so holding is found addressed from the earlier part of this order where we have addressed elaborately our reasons (In I.T.A .No.-3120-3126/Del/2011) in holding that the assessee on account of a genuine business entered into Agreement with Mr. John Ronald Maccines and assessee shifted to Dubai in August 1998. The assessment years under consideration being 2002-03 to 2006-07 during which the stay in India as per record admittedly has been less than 182 days in each of the years as observed earlier the number of dates are not rebutted by the Revenue by any contrary evidence. All these facts and evidences have been taken into consideration and addressed at length in the earlier part of this order. Considering the judicial precedent relied upon the departmental objections that the assessee did not fall in the category of "being outside India" is held to be not sustainable.

29.10. The other overarching departmental objection to the incorrect application of Explanation (b) to section 6(1)(c) has been that the legislative intent is "visit" which means a singular visit and not multiple visits as has been canvassed by the Ld. AR. On considering the relevant provisions and the judicial precedent by way of the order of the Co-ordinate Bench in Suresh Nanda's case which has been upheld by the Hon'ble High Court and others we find no merit in the departmental stand. The Hon'ble High Court it is seen was pleased to hold that no question of law arises and consequently dismissed the departmental appeal. The said decision it is seen adequately addresses the grievance posed by the Revenue. The distinguishing facts pointed out by the Ld. CIT DR that in the facts of that case the assessee was outside India due to business we hold is not a material fact as in the facts of the present case the late assessee was outside India on account of employment subsequently due to his own business. The said distinction would not detract from the applicability of the ratio decidendi that "visit" includes multiple visits as addressed by circular no-684 of the CBDT which is binding on the AO and the decision of Suresh Nanda which has considered the same. Similarly the (In I.T.A .No.-3120-3126/Del/2011) distinction therein that original passport was available in the facts of that case is also not a relevant criteria to decide whether visit shall include multiple visits which issue has been addressed by the Co-ordinate Bench in their detailed finding which has been extracted in the earlier part of this order. Accordingly considering the facts of the present case and the principle laid down by the judgement of Three Judge Bench of the Hon'ble Apex Court in the case of Moosa A Mada (cited supra) which lays down the proposition that the initial burden is placed on the assessee to prove its case we hold that the initial burden placed on the assessee stands discharged and reliance placed on the judgement of the two Judges Bench in B.K.Dhote's case on facts is correctly made out.

29.11. The issue framed in Serial Number-5 accordingly is decided in assessee's favour.

30. Considering the facts, circumstances, reasoning and discussion in the earlier part of this order where admittedly the stay in India is less then 182 days in each of these two years, the issue framed in serial number (6) also has to be decided in favour of the assessee. It is seen that the only distinguishing fact in 2007-08 and 2008-09 assessment year was that the original passport issued at Dubai on 07.11.2006 by the Indian Consullate at Dubai was produced before the CIT(A) who had remanded the same to the AO. Since facts qua the duration are not rebutted and all other arguments remained the same as in the earlier years, accordingly for similar reasons the departmental appeals are dismissed. 30.1. The detailed reasons for coming to the conclusion that the impugned order for each of the years before us is upheld have been discussed in the earlier part of this order. The arguments that on facts the impugned orders in the remaining years have largely relied upon the finding in 2008-09 assessment years, where the presence in India each of the years is less than 182 days as per the chart (In I.T.A .No.-3120-3126/Del/2011) reproduced in the assessment orders and also the lead order, which calculation remains unassailed on record on the basis of which addressing the specific grievance of the Revenue, we have held that the orders of the CIT(A) in the respective years deserve to be upheld. We have found no fault in the reasoning and the conclusion arrived at either in the lead order or in the specific impugned orders in the years under consideration.

31. The following reasoning, discussion and finding of the CIT(A) in 2008-09 assessment years which has been followed in the other years has been extracted from the lead order hereunder and followed by the CIT(A) in the earlier years is upheld by us:-

> 1.4.6. Further, the Remand Report and submissions of A.O. were forwarded to the appellant who has filed rejoinder on record."
>
> 1.5. "The Ld. Counsel, Sh. U.N. Marwah, of the Appellant was emphatic in his assertion that, notwithstanding in this year where the original passport is available and has been verified by the A.O. who has accepted the statement of the appellant with respect to stay in India, there is overwhelming circumstantial evidence in the nature of returns filed prior to search, notarized copies of passports in respect of each of the earlier years upto 7.11.2006, evidence of permanent residence abroad substantiated by Visa Issued by UAE, sanction of RBI, address in the banking accounts, etc. in regard to the status of the Appellant being that of a non resident in each of the years commencing from A.Y. 2002-03 to 2007-08. Besides, the Ld. Counsel contended that the onus is upon the department to establish that the period(s) of stay in India exceed the permissible limits and for this proposition, the Ld. Counsel has relied on the decisions of the Hon'ble Supreme Court in the case of CIT V/s.

B.K.Dhote 66 ITR 457 and Moosa S. Madha & Azam S. Madha V. CIT 89 ITR 65 (SC).], where in the lordships have held that "in order that the appellant may be treated as resident in India, the onus of proving that the appellant was in India during the four preceding previous years in an aggregate of not less than 365 days and in the relevant previous year at any time, lies upon the department".

31.1. The following finding arrived at by the CIT(A) in para 1.6, is reproduced hereunder for ready-reference:-

> (In I.T.A .No.-3120-3126/Del/2011) 1.6 " I have considered the facts of the case i.e., the assessment order of the A.O., submissions made by the Ld. Counsel of the Appellant, examined the copies of the returns filed, notarized copy of the Passport, the original Passport from the period 7.11.2006 onwards till date which has also been examined by the A.O. and period of stay as stated by the appellant during such period, which has been found to be correct.

I have personally perused the Appraisal Report, wherein it is clearly mentioned that the stay of the appellant in each of the years under appeal is loess than 180 days. It is apparent that the Investigation Unit in post search enquiry examined the original Passport with a view to determine the period of stay of the appellant in India for purposes of determining his residential status and have after critical examination recorded the said finding. In view of the facts available on record, the overwhelming evidence, circumstantial and factual, the findings recorded by the Investigation Unit and deriving support from the judicial decision, supra, I hold that the period of stay of the appellant during the previous year is 177 days as declared by the appellant and specified in the chart forming a part of the order of the A.O. Thus, the period of stay in the previous year being less than 182 days the status of the Appellant in the year in terms of Section 6(1)(c) read with Explanation (b) of the Income Tax Act is that of non-resident."

31.2. The arguments considered for the applicability of section 6 of the Income Tax Act alongwith the facts on record are found discussed in para 1.6.1 to para 1.7.2 in the lead order. The same are reproduced hereunder:-

> 1.6.1 " The A.O. has next recorded a finding to the effect that the appellant does not satisfy the conditions of "being outside India" specified in Explanation (b) for the reason that "Being outside India" indicate that the normal and ordinary place where the appellant stays is outside India. It is for the benefit of person settled abroad coming for a visit to India. His basis of forming the view that appellant is "not outside India" is for the following reasons :-
>
> (a) Appellant has been staying in India for the approximately half of the year during every previous year for the last 10-15 years and the balance period he has stayed at different places such as U.K., UAE etc.
>
> (b) Appellant is actively involved in business in India and his economic ties are visible that he has invested an amount of nearly Rs. 150 Crores in India.
>
> (c) Has relatives settled in India including his wife, son and daughters.
>
> (d) Has large investments movable / immovable in India including a residence.

(e) Is a Director in various Companies in India.

(f) Is trying to take shelter behind the tax provision in order to evade taxes, which is not permissible in law.

(In I.T.A .No.-3120-3126/Del/2011) 1.7 Shri U.N. Marwah, C.A., the learned Counsel of the appellant, has vehemently contended that the A.O. has without any basis or substance alleged that the appellant, despite all the documentary evidence in the nature of Resident Visa issued by UAE, permissions under FEMA, undertaking employment overseas, Managing businesses abroad, having facility of residential house earlier on lease and subsequently owned by one of the companies owned by him, is permanently settled in India and as such is not to be categorized as "being outside India". The ld. Counsel in support of his contention that the appellant is permanently settled / residing abroad has relied upon the following :-

(a) Copy of Employment Contract dated 01.06.1998 with West Mead Holdings Ltd. effective from 15.08.1998.

(b) Copy of Passport No. A - 2470845 for the period 26.02.1997 to 08.04.1999 issued at Delhi bearing the 1st Residence Visa of UAE No 2470845 dt. 28.07.1998 & entry stamp of Immigration at UAE on 14.08.1998.

(c) Copy of application dated 10.08.1998 addressed to Exchange Control Department, Reserve Bank of India seeking their permission u/s 29 of FERA 1973 to retain assets in India after he leaves India for permanent settlement, wherein the appellant informed the Reserve Bank of India of being granted a UAE resident visa bearing no. 2470845 dated 28.07.1998 and as also informing them of the intended date of departure from India with the intention of permanent settlement abroad being 14.08.1998.

(d) Copy of letter of Reserve Bank of India dated 08.09.1998 confirming receipt of aforesaid letter dated 10.08.1998 and directing the appellant to inform the change of status to the Bankers, Companies in which appellant was a Director.

(e) Copy of letter addressed to Banks in confirmation that the present resident banking accounts in India were converted to non-resident accounts. Further, all his foreign bank accounts specify his residence address as Dubai.

(f) Cost of Air Ticket to Dubai on 14.08.1998 was duly borne by the appellant and withdrawals reflected in the Accounts.

(g) Initially appellant stayed at hotels till an accommodation was taken on lease at Apartment No. 230, Golden Sand - II Dubai in term of lease Agreement placed on record.

(h) Copy of certificate of salary dated 08.12.2009 issued by West Mead Holding Ltd. confirming that they had paid salary including commission to the appellant for the period August, 1998 to December

2004, which are supported by Bank Advices of West Mead Holdings Ltd., through Royal Bank of Canada confirming remittance to the appellant and corresponding receipts in the accounts of appellant.

(i) Copy of Resident visa issued by UAE from time to time and currently being valid upto 2013.

(j) The appellant has been managing / conducting business in the names of various Companies abroad namely Fair Bridge Holdings Ltd., Cyprus; Kallister Trading Ltd., Cyprus; Kerswell Consultants Ltd. and Fair Bridge (In I.T.A .No.-3120-3126/Del/2011) Estate Ltd. (Offshore) and he inter-alia owns a residential house in Dubai wherein the appellant resides. The particulars of these Companies were available publically in the share issue offering of Emaar MGF Ltd. The Ld. Counsel argued that merely because the relatives are living in India and the appellant has substantial investments in India, including some of the immovable properties and the Companies were already owned at the time he was a resident of India. Directorships in Indian Companies does not and cannot form a basis of determining the residential status of the appellant, Shri Sudhir Sareen or for recording a finding that the appellant is settled abroad or not.

1.7.1. He impressed that the period of stay in India is the basis for determining the residential status of the appellant in terms of Section 6 of the Income Tax Act, i.e., his physical presence in India.

1.7.2.The A.O. after verification of the passport relating to the period 7/11/2006 to 31/3/2008 has himself admitted that the stay of the appellant in the said period (years) as stated by the appellant is correct, i.e. the period of stay during this year is 177 days which is less than 182 days. However, the A.O. has observed in the impugned assessment order that the appellant is primarily settled / residing in India and visits abroad with a limited purpose or intent of recording a finding that the appellant is "resident" in India and to tax moneys earned abroad and remitted / invested in India."

31.3. It is seen that considering this the CIT(A) came to the following finding that the assessee was settled abroad :-

> 1.8 "I have examined the documents placed on record, contentions of the A.O. in the assessment order and the submissions of the Ld. Counsel supported by the documents submitted. After considering all the facts, I have no hesitation in holding that the appellant is settled and residing abroad and visits India for the purposes of monitoring / managing his investments and being with his family members from time to time.
>
> 1.8.1 The A.O. during the course of hearing, before me has reiterated his arguments as stated in the Assessment Order to the effect that the benefit of Explanation (b) is available only for one year, meaning of the word being outside India and has also submitted that by reading Explanation (b) to Section 6 of the Income Tax Act in so far as an Indian citizen and Persons of Indian Origin (PLO) are concerned the provision of Section 6 (1) (a) are redundant.

He has submitted that if the language of Explanation (b0 was transposed into the Section it would read as under :-

> (In I.T.A .No.-3120-3126/Del/2011) Section 6(1) (a) "An individual is said to be resident in India, if he is (a) is in India in that year for a period / period(s) amounting 182 days or more (c) having within four year preceding that year being an India for 365 days or more and 60 days or more in that year (a case of Indian Citizen / PIO 60 days to be read as 182 days.
>
> The A.O. thus argued that upon a reading of the aforesaid, the 182 days appearing in clause (a) is redundant and of no consequence, which could never have been the intention of the legislature. Thus, he submitted that his order holding that the appellant is a resident of India be upheld."
>
> 31.4. However the arguments of the Ld. AO were distinguished on facts and the applicability of the relevant provisions of the Act was submitted should be considered in the following manner :-
>
> "In accordance with the provision aforesaid, the Ld. Counsel urged that the residential status based on the physical presence in India is divided into two categories :-
>
> (a) The first year when an India citizen goes abroad to take up employment.
>
> (b) Thereafter having taken up employment abroad / settled therein comes to India from time to time.

In the case of persons falling under category (a) above the residential status is governed by Section 6(1)(c) read with Explanation (a) i.e. if an individual in the first year of departure from India leaves India with the purpose of employment, then the status is to be determined under clause (c) by computing the following :-

> (a) Been in India for 365 days or more in four years preceding the year of departure
> OR
>
> (b) In India for a period of 182 days or more In case of Individual falling under category (b), the Explanation (b) to Section 6(1)(c) is applicable after an individual having become non-

resident in an earlier year resides / settled abroad.

Thus, the determination of residence status of an individual under section 6(1) may be summarized as follows:-

(i) If individual has stayed in India for a period of 182 days or more in any previous year he is a resident in India in that previous year OR

(ii) If he has stayed in India for a period of 60 days or more during any Previous year and 365 days or more during the four preceding previous years, he is a Resident in India in that previous year.

(iii) If both the above two conditions are not satisfied, he is a Non-

Resident in India in that previous year."

(In I.T.A .No.-3120-3126/Del/2011) 31.5. The CIT(A considering the facts and the following judicial precedent decided the issue in assessee's favour:-

(i)	ITO vs Dr. M.P.Konan Halli 55 ITD 266
(ii)	Sh. Anurag Chaudhary vs CIT (AAR) 839/2009 dated 11.02.2010
(iii)	Circular No.684 dated 10.06.1994
(iv)	Vijay Mallya vs ACIT 263 ITR 41 (Cal.)
(v)	V.K.Ratti vs CIT 299 ITR 295 (P&H)
(vi)	Dhruv Choudhrie-Appeal No.90/08-09-CIT(Appeals)-XXIX, New Delhi

31.5.1. Cognizance was taken of the following decisions for the proposition that the circular of CBDT was binding on the AO:-

1. Navnit Lal C. Javeri V/s. K.K.Sen 56 ITR 198 (SC.)

2. Shivakant Jha V/s. UOI (2002) 256 ITR 563 (Del.)

3. Pradip J.Mehta V/s. CIT (2008)300 ITR 231 (SC.)]

4. UCO Bank V/s. CIT 104 Taxman 547 (SC.) 31.5.2. Reliance was placed on the following decisions for the proposition that in the absence of ambiguity in the section there is no scope for resorting to interpretation:-

(a) CIT vs T.V.Sundaram Iyyengar [1975] 101 ITR 764 (SC);

(b) CIT vs Elphinstone Spg & Wvg Mills Co. Ltd. 40 ITR 142 (SC) & CIT vs Motors & General Stores Ltd. 66 ITR 692, 699-700 (SC)

(c) CIT vs Ajax Products Ltd. (1965) 55 ITR 741(SC)

(d) Smt. Tarulata Shyam vs CIT [1971] 108 ITR 345 (SC)

(e) Keshavji Ravji & Co. vs CIT [1990] 49 Taxman 87 (SC)

(f) UOI vs Azadi Bachao Andolan [2003] 263 ITR 707 (SC)

(g) CIT vs Poddar Cement (P.) Ltd. [1997] 226 ITR 625 (SC)

(h) CIT vs Shyam Finance Pvt. Ltd. 230 ITR 308 (SC).

31.6. Considering the arguments judicial precedent and the legal opinions of Mr. S.D.Kapilla, Adv. And two retired Chief Commissioner of Income Tax the CIT(A) on facts and the duration of the stay for the specific years in India as per chart extracted in para 1.3.7 in the impugned order which it is seen is identical to the assessee's claim as put forth before the AO in the respective years the issue was (In I.T.A .No.-3120-3126/Del/2011) decided on fact and considering the judicial precedent he came to the following conclusion:-

> 1.9. "I have considered the arguments, submissions of both the A.O. and the Ld. Counsel. It is true that the legislature has been granting the benefit of extended stay to Indian Citizen / PIO's from time to time as a result that the period has been extended from 60 days to 90 days to 150 days and, thereafter, to 181 days with the principal objective of granting more time to stay during each of the frequent visits to India to Indian Citizens / PIO residing abroad to manage their affairs in India. This has been clearly brought out by the various Circulars by the Central Board of Direct Taxes at each relevant time. It is also settled law that the Circulars of the CBDT are binding on the Revenue Officers. Similarly, in case a provision of law is possible of two opinions / interpretation, the interpretations beneficial to the assessee is to be followed.

I have also considered the various case laws directly on the subject cited by the Ld. Counsel particularly the case of Anurag Chaudhary, decided by the AAR, which clearly supports the case of the appellant.

1.9.1 I accordingly hold that the appellant is not a Resident of India in accordance with Section 6(1)(c) read with Explanation (b) even though his period of stay for each of the four preceding years exceeds 365 days yet in that previous year his period of stay in India is less than 181 days and as such the appellant is a Non-Resident. This finding is applicable and relevant for each of the Assessment Years from 2002-03 to 2008-09.

(iv) The appellant during the course of hearing before the A.O. had also contended that in view of the Double Taxation Agreement between India and the UAE, the income from salary is not taxable in India. He had also argue that the moneys is remitted to India were not out of income earned but of borrowings abroad. However, in view of my specific finding regarding Residential status of the appellant, this issue is not relevant for this year and as such is not being adjudicated.

1.9.2 Thus, in conclusion the appellant succeeds on the first ground of appeal as the status of the appellant is that of a non resident and not resident as the determined by A.O. Accordi9ngly, the finding of the A.O. holding the appellant to be a resident and not a non resident of claimed is deleted. The status of the appellant be taken as Non Resident, as claimed, and the assessment order be modified/amended accordingly.

2.0. The second ground of appeal related to inclusion of the sum of Rs. 7,72,71,972/- comprising of Rs. 7,70,71,792/- being amounts remitted from abroad and a gift of Rs. 2,00,000/- to the maternal grand daughter Sesha Gupta out of his overseas bank account.

(In I.T.A .No.-3120-3126/Del/2011) 2.1. The appellant during the course of hearing filed an analysis of the source and application of foreign funds, since A.Y. 2002-03 to 2008-09 attaching therewith summary of the foreign bank account, to establish that the moneys remitted to India were not wholly out of foreign earnings but were also out of borrowings effected overseas. Complete copies of written submissions along with Paper Books as filed before me were also handed over to the A.O. to enable him to verify the Paper Book, and make his submissions in rebuttal to the arguments of the Counsel. However, since I have held that the appellant to be a Non-Resident, all moneys earned overseas are not taxable in India in terms of an in accordance with Section 5 of the I.T.Act. Accordingly, the addition made Rs. 7,72,71,972/- is deleted and the impugned assessment order may be amended accordingly."

32. In view of the detailed finding given herein above as a result of which the issues framed in the serial number (5) and (6) have been decided in assessee's favour and the departmental appeals stand dismissed. In view of the same, we find that the issue framed in serial numbers (3) becomes academic.

33. The status on facts of the present case determined by the CIT(A) as NRI has been upheld as departmental appeals have been dismissed as admittedly nothing has been found in the search. The status change accordingly on facts was not correctly made by the AO. The said action has not been upheld the issue framed in Serial Number (4) accordingly is decided in assessee's favour.

34. Since the additions deleted by the CIT(A) which stood made only on account of the status change made in the assessment order dehors facts and the Cross Objections filed are partly supportive of the impugned orders and the impugned orders in each of the years stands upheld in toto the Cross Objections filed are partly allowed and the issue framed in Serial Number (7) is answered in assessee's favour.

(In I.T.A .No.-3120-3126/Del/2011)

35. In the result the departmental appeals are dismissed and the COs are partly allowed.

The order is pronounced in the open court on 15th of September 2014.

Sd/-	Sd/-
(B.C.MEENA)	(DIVA SINGH)

ACCOUNTANT MEMBER JUDICIAL MEMBER

Dated: 15 /09/2014
Amit Kumar & Binita Rukhaiyar

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI