

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, HON'BLE JUDICIAL MEMBER**

ITA NO. 4097/MUM/2018 (A.Y: 2007-08)

DCIT – Central Circle - 8(3) 6 th Floor, Room No. 659 Aayakar Bhavan, M.K. Road Mumbai - 400020	v.	Shri Rihen Harsahad Mehta 1608/1609, Prasad Chambers Opera House, Mumbai - 400004 PAN: AFFPM9223F
(Appellant)		(Respondent)

Department by	:	Shri Ajay Chandra
Assessee by	:	Shri Nitesh S. Joshi
Date of Hearing	:	02.02.2022
Date of Pronouncement	:	07.04.2022

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the revenue against the order of the Learned Commissioner of Income Tax (Appeals) –50, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 26.03.2018 A.Y. 2007-08.

2. Brief facts of the case are, the Assessing Officer completed the impugned assessment order following his order for the assessment year 2006-07 under section 153A r.w.s 143(3) of the Income Tax Act 1963 (in

short "Act"). The Assessing Officer recorded in the assessment order that after verification of the information unearthed during the course of Search action on the assessee as also the material available on record and in light of independent corroborative information, and for the assessee failure to discharge his onus, it is proved that the assessee is a beneficial owner of an undisclosed foreign bank account in HSBC Bank Geneva. He further recorded that as per the base note the peak credit as appearing in the bank account as on March, 2006. When the assessee preferred an appeal before CIT(A)-50, Ld.CIT(A) by relying on the decision taken by his predecessor in the AY 2006-07 gave relief to the assessee and now revenue is in appeal raising following grounds of appeal: -

"1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 79,68,819/- u/s. 69A of the I-T Act pertaining to Bank A/c with HSBC Bank, Geneva in the name of White Cedar Investments Ltd, in which assessee is a beneficiary without appreciating the fact the addition was based on information received to Government of India from the Government of France under the provisions of Double Taxation Avoidance Agreement (DTAA) and the decision of the Bombay High Court in the case of All Cargo Logistics Ltd (ITA No.523 of 2013) has not been accepted by the Department and SLP has been filed in the Supreme Court and the same is pending?"

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 25,95,89,172/- u/s. 69A of the I-T Act pertaining to Bank A/c with HSBC Bank, Geneva in the name of Rosy Blue FZE, in which assessee is a beneficiary, without appreciating the fact the addition was based on information received to Government of India from the Government of France under the provisions of Double Taxation Avoidance Agreement (DTAA) and the decision of the Bombay High Court in the case of All Cargo Logistics Ltd (ITA No.523 of 2013) has not been

accepted by the Department and SLP has been filed in the Supreme Court and the same is pending?"

The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary."

3. At the time of hearing, Ld.DR submitted his elaborate submissions and also filed the written submissions, it is reproduced below: -

"1. The original return of income was filed by the assessee declaring total income of Rs. 5,65,309/-. Return of income of the assessee was processed u/s 143(1) of the Act by accepting the returned income. The AO did not have an occasion to examine the books of accounts and state of affair, of the assessee prior to the search.

2. Information was received by Government of India from the French Government under DTAA in exercise of its sovereign powers that some Indian nationals and residents have Foreign Bank Accounts in HSBC Bank, Geneva, Switzerland which were undisclosed to the Indian Tax Department.

3. This information is received in the form of a document (herein after referred to as Base Note) wherein various details of account holders such as Name, Date of Birth, Place of Birth, Sex, Residential Address, Profession, Nationality along with the date of opening the bank account in HSBC Bank, Geneva and balance in certain years were mentioned.

4. In the case of assessee also, a base note was received. Base Note contained all personal details of the assessee including his Name — MEHTA RIHEN HARSHAD, Date of Birth — 02.10.1981, Place of birth — Mumbai, Sex — Male, Residential Address — 91, Vijay Deep 31, Ridge Road, Mumbai 6, India, Nationality — Indian. The information in the base note matches with the personal particulars of the assessee & his family members. Also the base note contained the date of opening of Bank Account in HSBC Bank, Geneva — 01.04.2004 and details of two bank accounts in the name of White Cedar Investment Ltd. and Rosy Blue FZE. The assessee and his family members are beneficiaries of the trust / company.

5. Subsequently, during post search enquiry, Shri Dilip Ramnikle/ Mehta, relative of the assessee has admitted that his father Late Shri

Ramniklal Rajmal Mehta was having some assets in the form of precious pearls and ruby which were kept with the sultan of UAE. After the death of his father (Shri Ramniklal Mehta) in 2002, as per his wishes the said assets were sold and the sale proceeds were invested in White Cedar Investments Limited in 2004. In the said company, White Cedar Investments Limited, the assessee Shri Rihen Harshad Mehta, his family members and two family trusts namely "The Oak Trust" and "The Pine Trust" were beneficiaries.

6. *It is pertinent to note that the name of the Late Ramniklal Mehta or his estate is not mentioned anywhere in the base note in the name of the assessee. Hence, it is clear that the statement and submissions of Shri Dilip Ramniklal Mehta and his offer of disclosure of undisclosed investments in the hands of Estate of Late Shri Ramniklal Mehta has no relevance to the assessment in the case of the assessee. It is also clear that Dilip Ramniklal Mehta has nothing to do with undisclosed bank account of the assessee, as claimed by him. As per the base note, the assessee is beneficial owner of bank account under consideration and his undisclosed income must be taxed in his hands only. The assessee cannot escape tax liability by citing that certain income was offered in the name of Estate of Late Ramniklal Mehta.*

7. *During the assessment proceedings, a notice u/s 142(1) of the IT Act dated 06.05.2013 and 16.03.2015 was issued and served to the assessee to submit the complete copy of the statement of bank account in HSBC, Geneva right from the inception till date. If he is not in possession of statement of his bank account then he was requested to fill up Consent Waiver Form. Consent waiver form is a form whereby the assessee gives consent to the HSBC Bank, Geneva that his account details should be forwarded to himself. However, the assessee did not give the consent waiver form*

8. *In view of the above and that original document is in the possession of a bank outside the jurisdiction of Government of India, Swiss Banks have not parted with the information of the complete bank account statements of the assessee and the assessee has not given consent waiver form, the contents of this base note are considered to be correct.*

9. *White Cedar Investments Limited was having bank account in HSBC Bank, Geneva. As on 31st March, 2006 the available peak balance in HSBC Bank was of US \$4,48,61,171 (Rs. 200,12,56,826/-) which was taxed for AY 2006-07 in the hands of the assessee, Shri Rihen Harshad Mehta and his family members, since they are beneficiaries in White Cedar Investment Limited. 1/7th of the Peak balance was added on substantive basis and 6/7th on protective basis to income of each of the beneficiaries. For AY 2007-08, the net profit*

on foreign exchange was USD 181,817.96 which was taxed in AY 2007-08 in the hands of the assessee Shri. Rihen Harshad Mehta and his family members. 1/7th of the net profit on foreign exchange equivalent to Rs. 11,38,403/was added on substantive basis and 6/7th of the net profit equivalent to Rs. 68,30,416/was added on protective basis to income of each of the beneficiaries u/s 69A of the Act. In the case of Shri Rihen Mehta, another foreign bank account was also found. This bank a/c was with HSBC bank, Geneva was in the name of Rosy Blue FZE which was also reflected in Base note in the case of Shri Dilip Vadilal Mehta. Since, the assessee has failed to explain his exact share in the holding of bank account. 50% of the peak balance of USD 59,22,636.83 as on July, 2006 equivalent to Rs. 12,97,94,586/was also added back to the total income fo the assessee on protective basis and balance 50% of the peak balance amounting / equivalent to Rs. 12,97,94,586/as substantive basis treating it as undisclosed income of the assessee u/s 69A of the Act.

10. Reliance was placed on the case of E.N. Gopakumar v/s CIT (Central) 2016. 75 Taxmann.com 215 (Kerala). In this, the Kerala High Court has held that Section 153A(1)(a) authorizes the issuance of notice Calling for filing of returns. Once that is done, it is well within the jurisdiction of the assessing authority to proceed with any of the lawful modes of assessment as prescribed in the Act. The statute nowhere makes it conditional that the department has to unearth incriminating material where assessment is triggered by issuance of notice u/s 153(1)(a). When such notice is triggered following the search, the assessment proceedings can be concluded in any manner known to law including u/s 143(3) or even Sec. 144 of the Act, if need be. Assessment proceedings can be concluded even without any incriminating material being available against the assessee in the search u/s 132 of the Act on the basis of which notice was issued u/s 153A(1)(a) of the Act.

11 Reliance is also placed on the decision of the Bombay High Court in the case of Murali Agro Products wherein it has been held that -

"In such a case, the AO while passing an independent assessment order u/s 153A r.w.s. 143(3) could not have disturbed the assessment/reassessment order which has attained finality unless, the material gathered in the course of proceedings u/s 153A of the IT Act establish that the relief granted under the finalized assessment / reassessment were contrary to the facts unearthed during the course of 153A proceedings."

12. In this case, material has been gathered in course of proceedings u/s153A in so far as enquiries have been conducted on the base note. Statement u/s 132(4), were recorded on base note

which is being relied upon by the assessee. Furthermore it is to be stated that no assessment u/s 143(3) has been made prior to search. Paperbook prepared by AO was submitted on 31.01.2022. Department has preferred SLP in the case of All Cargo Logistics which is pending. Therefore grounds of appeal may be allowed."

4. On the other hand, Ld AR also submitted a detailed written submissions, it is also reproduced below: -

"2. The only issue involved in the present appeal is whether the assessing officer was justified in making an addition under section 69A of the Act in respect of the bank accounts held by White Cedar Investments Ltd. and Rosy Blue FZE with the HSBC Bank in Geneva (where the Assessee's name appeared as a beneficiary), in the assessment order dated 11.12.2012 passed under section 153A of the Income-tax Act (the Act). Therefore, the Hon'ble Bench has to consider whether the aforesaid addition which is admittedly not based on any incriminating material found in the course of search could be made in the assessment order passed under section 153A.

3. The brief undisputed facts, as may be relevant for deciding the aforesaid issue in the appeal, are as stated hereinafter:

a. The assessee has been a non-resident in India for the year under consideration (see 7th row in the Table on Page - 1 of the assessment order);

b. The assessee had filed his original return of income on 31.07.2017. The limitation for selection of the said return of income for scrutiny by issue of notice under section 143(2) of the Act expired on 30.09.2008. Since, the assessee's return of income was not selected for scrutiny, no assessment proceeding was pending in its case.

c. A search action was carried out on 25.08.2011 on the assessee along with the Rosy Blue Group. The said search action was carried out on the assessee based on information received by way of base note by the Government of India from the Government of France in accordance with Article 28 for Exchange of information as per the Double Taxation Avoidance Agreement. At the time of the search, since no assessment proceeding was pending for the year under consideration there was no abatement of such proceedings. Hence, the assessment order under section 153A of the Act can be framed based only on the incriminating material found in the course of search.

d. The AO issued a notice dated 11.12.2012 under section 153A of the Act and consequently passed an assessment order dated 31.03.2015 making addition of amount lying in the account of White Cedar Investments Ltd. and Rosy Blue F2E with HSBC Bank, Geneva by invoking the provisions of section 69A of the Act. A bare perusal of the assessment order shows that the only reason given for the addition is the information contained in the Base note. That the said addition is also based on a similar addition made for assessment year 2006-07 as the addition for the year under consideration was in respect of incremental peak balance in the said bank accounts. (See paragraphs 14 to 20 at pages 22 to 25 of the assessment order).

e. On further appeal to the CIT(A), he allowed the assessee's appeal by his order dated 26.03.2018 following his appellate order dated 15.03.2017 for assessment year 2006-07 (see paragraphs 8.4 to 8.6 where in paragraph 8.4 i.e. from pages 9 to 17 of the appellate order the corresponding order for assessment year 2006-07 has been reproduced). In paragraph 5.4.4 of the extract at pages 9 and 10 of the appellate Order for AY 2006-07 it is clearly noted that the AO has accepted that the addition is only based on the Base Note.

4. *Along with the assessee there were six other beneficiaries in whose hands the aforesaid amount had been assessed, insofar as the amount lying in the bank account of White Cedar Investments Ltd. is concerned. Their cases including assessment year 2006-07 and 2007-08 had come up for hearing before the Tribunal, wherein, the addition under section 69A of the Act, has been deleted both as without jurisdiction as well as on merits. Even the assessee's case for the assessment year 2006-07 formed part of the said group which came to be disposed of by order dated 05.09.2019. The said order is at Pages 3 to 58 of the Paper-book. Reference to the Assessee's case for assessment year 2006-07 being ITA No.4676/M/2017 is at page 3. Ground Nos.2 and 4 to 6, as reproduced at pages 7 and 8 of the said Order are similar to the ground as raised for the year under consideration. The relevant facts have been referred to by the Tribunal in paragraph 3 at pages 8 to 10. In its findings, which starts from paragraph 14 at page 37, the Tribunal has relied upon an earlier order in the case of Mr. Arunkumar Mehta who also formed a part of the said group. After a detailed discussion, the finding of the Tribunal is in paragraph 24 at pages 49 and 50 in the reproduction thereof. Based thereon, in paragraph 15 at pages 54 and 55 the said additions stands deleted as beyond jurisdiction of the AO in proceeding under section 153A of the Act. Consequently, the CIT(A) has not adjudicated the merits of the matter. Since the issue stands fully*

covered by the Tribunal's Order in the Assessee's own case, it is submitted that the Tribunal may dismiss the grounds raised in the Revenue's appeal.

5. In the course of hearing before the Tribunal, the Ld. DR relied upon judgment of the Hon'ble Kerala High Court in the case of E. N. Gopakumar (2016) 75 taxmann.com 215. It is submitted that, the view taken by the Kerala High Court is contrary to that of the Bombay High Court in Murlu Agro Products Ltd. (49 taxmann.com 172), All Cargo Logistics Ltd (58 taxmann.com 78) (Bom) and various other cases where this view has been followed. It is respectfully urged that the jurisdictional High Court is binding on this Bench.

6. Further, with respect to the observation from the judgment in the case of Murlu Agro Products Ltd. (supra) as relied upon by the Ld. DR, it is urged that, the information that comes to the knowledge of the AO during the assessment proceedings under section 153A of the Act for which an adjustment is sought to be made should be related to the incriminating material and not de hors it. If the Revenue's submission is accepted, then the AO can also assess any income in the assessment order under section 153A by only making certain enquiry with respect to the same in the said proceedings. In that scenario, the limitation of existence of incriminating material would become irrelevant which it is submitted is contrary to law."

5. Considered the rival submissions and material placed on record by both the parties. We observe from the record that the Assessing Officer completed the assessment for this year fully relying on the findings and order passed for the AY 2006-07. The Assessing Officer completed the assessment u/s 153A r.w.s 143(3) of the Act, which is unabated based on the fact on record that the time for issue of notice u/s 143(2) was expired on 30.09.2008 and search action was carried out on 25.08.2011. It is well settled law that the Assessing Officer can make additions only based on the incriminating material found during the search, not on the information already available at the time of search. It is fact on record that the search

was initiated only based on the "base note" and no other information was found during the search. We observed from the record that similar additions were made by the Assessing Officer in the AY 2006-07 and the CIT(A) and ITAT, both decided the issue in favor of the assessee, it held that the additions made to the total income of the assessee on account of transactions reflected in the foreign bank account under consideration are beyond the scope of section 153A as the assessment for the year had become final prior to the date of search and there was no incriminating material found during the course of search to support and substantiate the additions made by the Assessing Officer. The relevant decision of the co-ordinate bench is reproduced below:-

"15. In the present case, on perusal of facts available on record, we find that the AO has made similar additions in the hands of assessee and other beneficiaries at the rate of 1/7th each towards peak balance lying in HSBC Bank account, Geneva in the name of White Cedar Investments Ltd. and Ruby Enterprises inc. without there being any reference to incriminating material found as a result of search. We further noted that in relation to amounts sought to be taxed in the hands of assessee in the present appeal the tax liability has already been recovered from another assessee the estate of Mr. Ramniklal Mehta. In case this is allowed to happen it amounts to double taxation which is not permissible under the law. Therefore, we are of the considered view that that the AO was erred in making additions towards peak balance lying in HSBC Bank account, Geneva in the name of White Cedar Investments Ltd. and Ruby Enterprises Inc in the hands of the assessee; Accordingly, we direct the AO to delete addition made towards peak balance lying in HSBC Bank account, Geneva in the hands of the assessee."

6. Respectfully following the above decision, we are inclined to accept the findings of the Ld.CIT(A) in deleting the additions made by the

Assessing Officer. Therefore, we are also inclined to set aside the order passed u/s 153A r.w.s 143(3) of the Act. Accordingly, appeal filed by the revenue is dismissed.

7. In the result the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 07.04.2022.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER
Mumbai / Dated 07/04/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum