IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI

BEFORE SHRI M BALAGANESH, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 963/Mum/2020

(A.Y: 2004-05)

The DCIT, Central Circle – 6(4) Room No. 1925, 19th Floor, Air India Bldg, Nariman Point, Mumbai – 400021.	Vs.	Shri Dilip J Thakkar 12/22B, Acropolis, Malabar Hills, Mumbai – 400006.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACPT9000H		
Appellant	..	Respondent

ITA No. 970/Mum/2020

(A.Y: 2004-05)

The DCIT, Central Circle – 6(4) Room No. 1925, 19th Floor, Air India Bldg, Nariman Point, Mumbai – 400021.	Vs.	Smt Indira D. Thakkar 12/22B, Acropolis, Malabar Hills, Mumbai – 400006.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPT3389E		
Appellant	..	Respondent

Revenue by :	Shri S.G.Mehta.DR
Assessee by :	Shri Dilip Takkar.AR

Date of Hearing	31.05.2022
Date of Pronouncement	06.06.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

These are the appeals filed the revenue against the separate orders of the Commissioner of Income Tax (Appeals)- 34, Mumbai order passed u/s 143(3) r.w.s 147 and 250 of the Income Tax Act, 1961.

Since the issues in these appeals are common and identical, hence are clubbed, heard and consolidated order is passed.

For the sake of convenience, we shall take the ITA No. 963/Mum/2020 A.Y.2004-05 as a lead case and the facts narrated.The revenue has raised the following grounds of appeal.

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing assessee's appeal by ignoring the intention of the Legislature behind amendment of sub-section (1) of Section 149, thereby inserting clause (c) under Section 149(1) of the Income-tax Act, 1961 by the Finance Act, 2012 and Explanation below Section 149, which clarifies that the provisions of sub-sections (1) & (3) as amended by the Finance Act, 2012 shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012".

ii. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the relevant facts of the case in respect of income arising from the foreign assets / investments".

The appellant craves leave to amend or alter any of the grounds or add new ground(s), which may be necessary. Last date for filing of second appeal is 07.02.2020.

2. The brief facts of the case are that, the assessee is an individual and has income from other sources. The assessee has filed the return of income for A.Y 2004-05 on 29.03.2005 disclosing a total income of Rs. 22,29,678/- and the return of income was processed u/s 143(1) of the Act. Subsequently, the assessment was reopened u/s 147 of the Act and the reasons for reopening of the assessment was provided to the assessee on 30.07.2015. Further notice u/s 143(2) and 142(1) are issued. There was a search operation carried out in the case on Shri Dilip Thakkar on 10.08.2011. The findings of the Assessing Officer (A.O.) at page 16 Para 9.9 are read as under:

"9.9 Therefore from the above discussion the following conclusion emerges which clearly rebuts the contentions of the assessee Sh.Dilip Thakkar.

i. That the assessee Sh.Dilip J Thakkar and his family members have derived financial benefits from the maturity proceeds of RIB.

ii. That the submission of assessee Sh.Dilip J Thakkar that investment in RIB was made by Sh. Chagganlal Mulji Suchak through Chagganlal Family Suchak Family Trust (CSFT) settled by Smt. Kantaben Chagganlal Suchak is

incorrect. Rather the investment was made by Sh. Suryakant Chagganlal Suchak with c/o Dilip j.Thakkar.

iii. That the submission of the assessee that maturity proceeds of RIB constitutes the corpus of Chhaganlal Suchak Family Trust (CSFT) is incorrect. Rather the maturity proceeds of Resurgent India Bonds (RIB) went to Suryakant Chhaganlal Suchak in Union Bank of India and State Bank of India and thus the maturity proceeds of the Resurgent India Bonds (RIB) do not constitute the corpus of the Chhaganlal Suchak Family Trust (CSFT). Therefore, the amount mentioned in the base documents of Chhaganlal Suchak Family Trust (CSFT) maintained with HSBC Bank Geneva received under exchange of information from French Authorities through GIT (Inv) Mumbai is independent of the maturity proceeds of Resurgent India Bonds (RIB) contrary to the claim made by the assessee Smt Indira D Thakkar. And in fact the two have no correlation and are therefore separate amounts. And therefore are to be treated separately and independently for the purpose of taxation.

iv. That the Chhaganlal Suchak Family Trust (CSFT) is created by the assessee Smt Indira D Thakkar in collusion with his family member and in laws as special purpose vehicle to channelize the unaccounted income and park it outside India in the HSBC Bank Geneva.

9.10. Therefore, the Chhaganlal Suchak Family Trust is merely a colourable device only to route unaccounted money through RIB channel. Apparent is not real is to be proved by the assessee. In this case the assessee has failed to adduce any corroborative evidence in support of the contention that the maturity proceeds of the RIB not linked with the Chhaganlal Suchak Family Trust created

and the assessee herself was the trustee thereof not only that but the reliance is also placed in judgment of Hon"ble Supreme Court Sumati Dayal Vs. Commissioner of Income tax (1995) 214 ITR 801(SC), in the case of CIT v Durga Prasad more [1971) 82 ITR 540 (SC), in which it is categorically held that preponderance of probability is against the assessee in such cases where necessary evidence is received but not rebutted by the assessee in spite of adequate opportunities granted. It is therefore clear that the assessee along with her family members have parked their undisclosed income in overseas assets and used special purpose vehicle to bring it back in India via RIB and through BC account held abroad.

9.11. Therefore, from the above it is clear that investment of 15 million GBP was made in the name of Shri Suryakant C. Suchak. Hence the investment made in RIB of GBP 15,00,000 in the year 1998 relevant to A.Y. 1999-2000 is taxed in the hands of Shri Suryakant C Suchak on substantive basis and protective addition of GBP 11,69,600 (GBP 1500000-330600) is made in the hands of Shri Dilip J. Thakkar. Considering the conversion rate of GBP to INR at Rs. 76.68, the total deposit works out in INR at Rs. 8,96,84,928/-, which is taxed as concealed income for the A.Y 1999-00 relevant to the F.Y 1998-99 as mentioned above on protective basis. Penalty u/s 271(1)(c) is initiated separately.

9.12 Further addition of GBP 14,400 is made in the hands of Assessee Smt Indira D Thakkar. Unon maturity the assessee received interest which is proportionately worked out to GPB 7038 (Total interst on 15,00,000 is GBP 733194) Considering the conversion rate of GBP to INR at Rs. 76.68, the total deposit works out in INr at Rs, 5,39,674/-, which is taxed as concealed income for the

assessment year in the AY. 2004-05 relevant to the F.Y, 2003-04. Penalty u/s 271 (1) (c) is initiated separately."

3. Finally the A.O. has assessed the total income of Rs.27,69,350/-and passed the order u/sec143(3) r.w.s147 of the Act dated 30-03-2016.

4. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). Whereas the CIT(A) has considered the grounds of appeal, submissions of the assessee and findings of the A.O. and observed at page 18 Para 6.6 of the order and quashed the reopening proceedings are read as under:

"6.6 Section 149(1)(c) which extends the period to 16 years where income in relation to any asset located outside India, chargeable to tax has escaped assessment came into effect from 01.07.2012. By the time section 149(1)(c) was introduced i.e. 01.07.2012, the time limit for issue of notice u/s.148 as per the law prevailing on that day has expired. Following the ratio of the judgement of the Hon'ble Delhi High Court in the case of Brahmdatt(supra), the assessment cannot be reopened in 2015 and the period of 16 years does not apply to this case. In the light of the judgments of the Hon'ble Delhi High Court and the Hon'ble Supreme Court (supra), reopening proceedings which are beyond the relevant period are quashed."

5. Aggrieved by the CIT(A) order, the revenue has filed an appeal before the Hon'ble Tribunal.At the time of hearing

the Ld. DR submitted that the CIT(A) has erred in quashing the reassessment proceedings distinguishing the judicial decisions and supported the Order of the Assessing officer. Contra, the Ld. AR relied on the order of the CIT(A) and the assessee wife case of the Honble ITAT and prayed for dismissal of revenue appeal.

6. We heard the rival submissions and perused the material available on record. The sole crux of the disputed issue as envisaged by the Ld. DR that the assessment for A.Y2004-05 can be reopened beyond six years invoking provisions of Ses. 149(1)(c) of the Act. We find the Hon'bleTribunal in ITA 969/Mum/2020 DCIT vs Smt Indra D Thakkar vide order dated 14-02-2022 has observed and up held the decision of the CIT(A) dealt at page 5 Para 6 of the order, which is read as under:

> *6. We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. The only dispute is whether in the case of the assessee, the assessment for AY 1999-2000 can be reopened beyond six years invoking provisions of section*

149(1)(c) of the Act. Under the provision of section 149(1)(c), in the case of detection of foreign assets, assessment can be reopened upto a period of 16 years from the end of the assessment years. The relevant provision is reproduced as under :

"149. Time limit for notice. (I) No notice under section 148 shall be issued" for the relevant assessment year,-

a. if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c); 2 OSUs

b. if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which Smt. Indira D. Thakkar ITA No. 969/M/2020 6 has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

c. if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.

Explanation.- In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section."

6.1 The Ld. CIT(A) has quashed the reassessment following the findings of the Hon'ble Delhi High Court in the case of Brahm Datta (supra) wherein Hon'ble High Court has held that section 149(1)(c) has to be applied prospectively and reassessment could not be reopened beyond the period of 6 years in terms of provisions of section 149 of the Act as applicable at relevant time. According to Hon'ble High Court any change in law

upsetting the position and imposing tax liability after that date, even if made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year.

6.2 Thus the Ld. CIT(A) has not made any error in following the binding precedent on the issue in dispute. In the case of New Delhi Television Ltd. (supra) relied upon by the Ld. DR, the Hon'ble Supreme Court has discussed the issue of denial of natural justice to the assessee and invoking section 149(1)(c) by the AO while dealing with the objection of the assessee to the reopening proceedings. The relevant findings of the Hon'ble Supreme Court as under : Smt. Indira D. Thakkar ITA No. 969/M/2020 7

"40. On behalf of the revenue it is urged that mere non-naming of the second proviso in the notice does not help the assessee. It has been urged that even if the source of power to issue notice has been wrongly mentioned, but all relevant facts were mentioned, then the notice can be said to be a notice under the provision which empowers the revenue to issue such notice. There can be no quarrel with this proposition of law. However, the notice or the assessee should not be prejudiced or be taken by surprise. The uncontroverted fact is that in the notice dated 31.03.2015 there is no mention of any foreign entity. There is only mention of the Section 148. Even after the assessee 6 (1978) 2 SCR 272 specifically asked for reasons, the revenue only relied upon facts to show that there was reason to believe that income has escaped assessment and this escapement was due to the nondisclosure of material facts. There is nothing in the reasons to indicate that the revenue was intending to apply the extended period of 16 years. It is only after the assessee filed its reply to the reasons given, that in the

order of rejection for the first time reference was made to the second proviso by the revenue.

41. In our view this is not a fair or proper procedure. If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the revenue relied upon the second proviso. The assessee must be put to notice of all the provisions on which the revenue relies upon. At the risk of repetition, we reiterate that we are not going into the merits of the case but in case the revenue had issued a notice to the assessee stating that it relies upon the second proviso, the assessee would have had a chance to show that it was not deriving any income from any foreign asset or financial interest in any foreign entity, or that the asset did not belong to it or any other ground which may be available. The assessee cannot be deprived of this chance while replying to the notice.

42. Therefore, even if we do not fall back on the reason given by the High Court that the revenue cannot take a fresh ground, we are clearly of the view Smt. Indira D. Thakkar ITA No. 969/M/2020 8 that the notice and reasons given thereafter do not conform to the principles of natural justice and the assessee did not get a proper and adequate opportunity to reply to the allegations which are now being relied upon by the revenue.

43. If the revenue is to rely upon the second proviso and wanted to urge that the limitation of 16 years would apply, then in our opinion in the notice or at least in the reasons in support of the notice, the assessee should have been put to notice that the revenue relies upon the second proviso. The assessee could not be taken by surprise at the stage of rejection of its objections or at the stage of proceedings before the High Court that the notice is to be treated as a notice invoking provisions of the

second proviso of Section 147 of the Act. Accordingly, we answer the third question by holding that the notice issued to the assessee and the supporting reasons did not invoke provisions of the second proviso of Section 147 of the Act and therefore at this stage the revenue cannot be permitted to take benefit of the second proviso."

6.3 It is evident from the above that ratio of the above decision does not apply over the facts of the case of the assessee.

6.4 Further, in the case of Soignee R. Kothari (supra) also the writ filed by the assessee against the reassessment proceedings was dismissed by the Hon'ble High Court on the ground that the assessee did not co-operate in giving consent waivers for obtaining copy of the accounts. Therefore, the ratio of the said decision also does not apply in the case of the assessee. The relevant para of the decision of the Hon'ble Bombay High Court in the case of Soignee R. Kothari (supra) is reproduced for ready reference :

"11. However, on enquiry by the Revenue from HSBC, Geneva, it was learnt that a modified Consent Waiver Form would not enable the bank to give copies of the bank statement of A/c. No. 5091404580 since the Waiver would have to be Smt. Indira D. Thakkar ITA No. 969/M/2020 9 provided without modifications. We notice that the principal contention of the Petitioner before us has been that she is nonresident and it is only her income which is received or accrued or arising in India which can be brought to tax under the Act. Thus, it is submitted that it is for the Revenue to establish that the income had accrued or arisen in India which was lying on 26th March, 2006 in A/c. No. 5091404580 in HSBC, Geneva. We find that the Petitioner and/or her uncle – Dilip Mehta i.e. Executor of the Estate of late Ramniklal N. Mehta who

could probably amongst others be able to produce copies of the bank statement either by giving a Consent Waiver Form to the Income Tax Department or in the alternative Mr. Dilip Mehta could instruct the Director of M/s. White Cedar to apply for and furnish to him copies of the bank statement in A/c. No. 5091404580 of HSBC, Geneva. The fact that it is within the authority/power of Mr. Dilip Mehta to instruct M/s. White Cedar is evident from the letter dated 14th. August 2014 addressed by HSBC Bank, Geneva to M/s. Red Oak Operation Ltd. which has been taken on record and marked X for identification. This bank statement if obtained from HSBC, Geneva, would reveal and/or possibly give clues as to the source of amounts deposited in the Account No. 5091404580 of HSBC Bank, Geneva. Neither the Petitioner nor her uncle i.e. Executor of the Estate of late Ramniklal. Mehta is ready to obtain the necessary statement either directly or through M/s. White Cedar from HSBC, Geneva in respect of A/c. No. 5091404580 by exercising or causing to be exercised the limited authority to instruct White Cedar to apply for and obtain the requisite information. In the normal course of human conduct if a person has nothing to hide and serious allegations /questions are being raised about the funds a person would make available the documents which would put to rest all questions which seem to arise in the mind of the Authorities. The conduct on the part of the Petitioner and her uncle, in not being forthcoming, to our mind leads us to the conclusion that this is not a fit case where we should exercise our extra ordinary writ jurisdiction and/or interfere with the orders passed by the authorities Smt. Indira D. Thakkar ITA No. 969/M/2020 10 under the Act. If a person has nothing to hide, we believe the person would have cooperated in obtaining the Bank Statements."

6.5 In view of the above discussion, we do not find any error in the order of Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The grounds raised by the Revenue are dismissed.
7. In the result, the appeal filed by the Revenue is dismissed.

7. We find the CIT(A) has considered the facts, circumstances, provisions of law, and judicial decisions and passed a reasoned order. The Ld.DR could not controvert the observations of the CIT(A) with any new cogent material or information to take a different view. Accordingly, we follow the judicial precedence of Honble Tribunal decision and we do not find any infirmity in the order of the CIT(A) on the disputed issue of granting relief to assessee and uphold the same and dismiss the grounds of appeal of the revenue.

ITAno.970/Mum/2020 (A.Y.2004-05)

8. As the facts and circumstances in this revenue appeal is identical to ITA No 963/Mum/2020 on the disputed issue (except variance in figures) and the decision rendered in above paragraphs will apply

mutatis mutandis to this appeal also. Accordingly, the grounds of appeal of the revenue are dismissed.

9. In the result, the two appeals filed by the revenue are dismissed.

Order pronounced in the open court on 06.06.2022.

Sd/-	Sd/-
(M BALAGANESH)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 06.06.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Mumbai / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai