

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 3172 OF 2015

Soignee R. Kothari

.. Petitioner

v/s.

Dy. Commissioner of Income Tax,
Central Circle-8(3), Mumbai & Ors.

.. Respondents

Mr. P.J. Pardiwalla, Senior Counsel a/w Nitesh Joshi i/b Atul Jasani for
the petitioner

Mr. Anil Singh, Addl. Solicitor General a/w Suresh Kumar for
respondent nos. 1 to 3.

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 5th APRIL, 2016.

PC.

1. This petition under Article 226 of the Constitution of India assails a notice dated 31st March, 2015 issued under Section 148 of the Income Tax Act, 1961 (the Act) by the Assessing Officer. The impugned notice seeks to reopen assessment for Assessment Year 2006-07.

2. This petition was on board for admission on 12th February, 2016. At that time, the Court was inclined to admit the petition and expedite its hearing as it involved interpretation of Explanation-2 to Section 147 and Section 149(1)(c) of the Act, in the context of the jurisdiction of the Assessing Officer to issue the impugned notice. At that time, the learned Additional Solicitor General submitted that instead of

admitting the petition, the same could be kept for final disposal at the stage of admission. This request was made as the decision on the interpretation of the law would have a bearing on a large number of re-opening notices issued by the Revenue in respect of foreign assets/accounts. In these circumstances, the petition was adjourned to be disposed of finally at the stage of admission and it has now been taken up for hearing.

3. Brief facts :-

(a) The petitioner though born in India has migrated to United States of America on her marriage in 1996 (and since then has her permanent place of residence therein). From the assessment year 2000-01 onwards, the petitioner has been for the purposes of the Act a Non Resident. It has been so declared in her Return of Income and her status as Non-Resident is also accepted by the Revenue.

(b) For the Assessment Year 2006-07, the petitioner filed her Return of Income on 29th March, 2007 declaring a total income of Rs.37.96lakhs. This income was the aggregate of interest received by her on her bank balance in accounts in India, on delay in income tax refund being issued and on loans advanced by her in India. The Return was processed under Section 143(1) of the Act.

(c) On 25th June, 2011 the Assessing Officer received information from the Central Board of Direct Taxes in the form of a copy of a "Base Note" received by it from the French Government. This Base Note was received under the Double Taxation Avoidance Agreements (DTAA) between France and India. It indicated existence of A/c. No.5091404580 in HSBC, Geneva, Switzerland ("the Account") held by M/s. White Cedar Investments Ltd. (M/s. White Cedar) with a

balance of US\$ 44,861,171 as on 26th March, 2006. Seven individuals, including the petitioner and two Trusts i.e. nine in the aggregate, are shown as beneficiaries of the Account. The seven individuals in turn are beneficial owners of the two Trusts. All the seven individuals including the petitioner in the records of the HSBC, Geneva have, as indicated in the Base Note, have their addresses in Mumbai.

(d) Thereafter, during the course of a search on the business premises of our M/s. Rosy Blue (India) Group of companies, one Mr. Russell Mehta was asked to explain the source of investments in the Account on the basis of the Base Note. This was so as Mr. Russell Mehta was one of the seven individuals shown as beneficiaries of the Account in terms of the Base Note. At this, Mr. Russell Mehta informed the search team that he was unaware of the Account but his uncle one Mr. Dilip Mehta, who is the executor of the Estate of late Mr. Ramniklal Mehta may be aware of it.

(e) Consequently, there to and making enquiries an Assessment Order dated 30th May, 2014 under Section 153A r/w Section 143(3) of the Act was passed on the Estate of late Ramniklal R. Mehta. By the above order dated 30th May, 2014, the entire amount of US\$ 44,861,171 i.e. Rs.200.12crores was treated as the income of the Estate of Ramniklal Mehta. This in spite of the fact that the assessee therein was offering only 5.73% of the above amount to tax being his investment in the Account. The Additional (difference) amount was taxed under Section 69A of the Act.

(f) Thereafter, on the basis of the Base Note, on 31st March, 2015, the Revenue passed order on the individual beneficiaries (except the petitioner) bringing to tax their 1/7th share in the Account on a substantial basis and the other 6/7th share on protective basis. This was

so in respect of all beneficiaries (except the Petitioner). Five out of the six beneficiaries in respect of whom order dated 31st March, 2015 was passed were resident under the Act and only one of them like the petitioner is a non-resident under the Act.

(g) On 31st March, 2015, the Assessing Officer issued the impugned notice seeking to reopen the petitioner's assessment for the Assessment Year 2006-07. The reasons recorded in support of the impugned notice dated 31st March, 2015 was also issued to the petitioner.

(h) The petitioner by her letter dated 1st September, 2015 filed her objections to the reasons as recorded by the Assessing Officer in support of the impugned notice. By an order dated 18th September, 2015, the Assessing Officer rejected the petitioner's objections leading to filing of this petition.

4. Mr. Pardiwalla, learned Senior Counsel in support of the petition submits as under :-

(I) The impugned notice dated 31st March, 2015 seeking to reopen the assessment for A.Y. 2006-07 under Section 148 of the Act is barred by limitation in view of Section 149(1)(b) of the Act.

(II) In any case, the *sine qua non* to issue a notice under Section 147 / 148 of the Act is that the income chargeable to tax should have escaped assessment. In this case, the same Assessing Officer has brought to tax the entire amount of deposit i.e. US\$ 44,861,171 to tax in the hands of Estate of Ramniklal Mehta by order dated 30th May, 2014. Further, by order dated 31st March, 2015 all other six individual beneficiaries have been brought to tax to the extent of 1/7th of the amount in their hands and balance 6/7th as protective

assessments also in its hands.

(III) The Assessing Officer did not have any reason to believe that the income chargeable to tax has escaped assessment in the case of the petitioner assessee.

(IV) The Explanation -2 to Section 147 of the Act which is being relied upon by the Revenue before this Court for the first time to invoke jurisdiction by contending that where a person is found to have any assets located out side India it shall be deemed to be a case where income chargeable to tax has escaped assessment is without any basis.

(V) In any case, the proper reading of Explanation 2 to Section 147 of the Act would mean that the fiction therein would apply only to the income listed therein being deemed to be income, escaping assessment. It would not cover reasons to believe and chargeability to tax.

(VI) The reopening notice is without jurisdiction as the sanction for the impugned notice dated 31st March, 2015 which was obtained from the Additional Commissioner of Income Tax on 31st March, 2015 on the basis of reasons recorded on 31st March, 2015 itself evidences non application of mind.

5. As against the above, the Additional Solicitor General in support of the impugned notice and in response submits as under :-

- (a) This Court should not exercise its writ jurisdiction in favour of the petitioner as she has failed to sign the Consent Waiver Form.
- (b) This Court should not entertain this petition as there is an alternative remedy available under the Act, in case the Assessing Officer decides against the petitioner.
- (c) This Court should not interfere with the notice for reopening of an assessment. If the reasons recorded, when read as a whole

indicate reason to believe that income chargeable to tax has escaped assessment, the test is satisfied.

- (d) The impugned order is not barred by limitation as it stands covered by Section 149(1)(c) and the mere finding of an asset in a foreign land would be sufficient to issue a reopening notice within sixteen years from the end of the relevant Assessment Year.
- (e) The mere fact that the tax has been assessed in the hands of the wrong person in this case i.e. the Estate of Mr. Ramniklal Mehta by order dated 30th May, 2014 would not make the notice without jurisdiction. In support he relies upon the decision of the Apex Court in *Income Tax Officer Vs. Ch. Atchaiah* 218 ITR 239.
- (f) The mere fact that the petitioner is a non- resident, does not absolve her from paying taxes on the amount in the Account in view of Section 9(1) of the Act especially in view of the Indian connection.
- (g) De hors the fact that the Assessing Officer records reason to believe that income chargeable to tax has escaped assessment without application of Explanation 2 to Section 147 of the Act, would not by itself exclude the Explanation 2 to Section 147 of the Act where a person is found to have an asset outside India, the reopening of reason to believe that income chargeable to tax has escaped assessment is deemed to be satisfied.
- (h) There is no reason in a fiscal statute to interpret the Act by examining the possible consequences resulting in absurdity. A fiscal statute is to be literally interpreted. It is not for the Courts to rewrite a fiscal legislation.

6. We invested considerable time on this Petition. During the course of the hearing of the Reply of the Revenue it was pointed out to us that despite the Revenue's request, the Petitioner had failed to sign a Consent Waiver Form ("the Waiver") which would have enabled HSBC to provide information about the Account. According to the petitioner the Waiver was sought only on 30th October, 2015 i.e. much after the issue of the impugned notice on 31st March, 2015 and also after filing of this Petition in Court on 30th October, 2015. In any case, we asked the Petitioner whether she is now ready to sign the Waiver. Mr. Pardiwalla took time to take instructions from the Petitioner. At the time of the rejoinder we were informed that the Petitioner is willing to sign the Consent Waiver Form with a modification – namely as alleged beneficiary rather than holder or beneficiary of the account in HSBC, Geneva.

7. Furthermore, during the arguments in rejoinder when the Petitioner placed reliance upon the order dated 30th May, 2014 we noticed that in the case of the Estate of late Ramniklal N. Mehta, a statement of Mr. Dilip Mehta recorded on 10th January, 2012 is reproduced. The relevant Question No.4 and answer thereto is extracted herein:-

"Q.4. Vide your submission dated 6th January 2012 you have filed a letter from the HSBC Bank dated 22nd December, 2011 which states that the following have neither visited nor opened nor operated the account bearing the name of White Cedar Investments Limited (a/c no. 5091404580)

Sr. No.	Name
1	Arun Ramniklal Mehta
2	Russell Mehta
3	Viraj Russell Mehta
4	Rihen Harshad Mehta
5	Naina Harshad Mehta
6	Soigne Rajeev Kothari
7	Priti Harshad Mehta

Moreover, the letter from HSBC dated 22nd December 2011 also states that you have the limited authority to operate the account of White Cedar Investments Limited (a/c no. 5091404580). Do you stand by whatever you have stated in your letter dated 6th January 2012?

Ans : Yes, I stand by whatever I had stated vide my letter dated 6th January 2012."

8. Further, para 5.11 of the Order dated 30th May, 2014 records that the Executor of estate of late Mr. Ramniklal N. Mehta i.e. uncle of the Petitioner was asked by letter dated 15th July, 2013 to submit a complete copy of the Account from its inception till date. The Executor i.e. uncle of the Petitioner stated that he is not in a position to give statement of the HSBC Geneva bank account. Further, when he was requested to fill up the Consent Waiver Form, the authorized representative of the uncle of the Petitioner by letter dated 23rd July, 2013 stated that the executor of the Estate of late R.N. Mehta i.e Mr. Dilip Mehta is unable to attend the office as he is non-resident and not present in India. We, therefore, asked Mr. Pardiwalla whether the petitioner could obtain the Consent Waiver Form from her uncle Mr. Dilip Mehta in respect of A/c. No. 5091404580 in HSBC Bank, Geneva.

9. At this Mr. Pardiwalla, learned Sr. Counsel appearing for the Petitioner drew our attention to the letter dated 6th January, 2012 i.e. letter by which the Executor of the Estate of late Ramniklal N. Mehta i.e. Mr. Dilip Mehta states that the authority to operate the A/c. No. 5091494580 is with the Directors of M/s. White Cedar. However, in the letter, there is no denial to his limited authority to operate account of M/s. White Cedar, being A/c. No. 5091404580 in HSBC, Geneva. Mr. Pardiwalla, learned Sr. Counsel seeks to rely upon para 11.C thereof to contend that the account is operated by the Directors of M/s. White Cedar and his role is limited to advise M/s. White Cedar on behalf of the Estate as an investor. On instructions of the Petitioner, the Learned Senior Counsel Mr. Pardiwalla informed us that her Uncle Mr. Dilip Mehta i.e. the Executor of the Estate of late Mr. Ramniklal N Mehta was also willing to sign a modified consent waiver form. Thus both the Petitioner and her uncle agreed to give a modified Consent Waiver Form in effect disputing being either the beneficiary or being the person who has authority to operate the account.

10. Mr. Pardiwalla also produced a copy of the letter dated 14th August, 2014 addressed by HSBC Bank, Geneva to M/s. Red Oak Operation Ltd. (earlier known as M/s. White Cedar) pointing out that Mr. Dilip Mehta is not authorized to instruct the Bank but only authorized to instruct M/s. White Cedar. This would show that if the Petitioner and/or her uncle so deems it fit they could ask M/s. White Cedar to obtain Bank Statement of A/c. No. 5091404580 from HSBC Bank. We cannot turn a blind eye to the fact that family relationship amongst Indians is strong and the money in A/c No. 5091404580 in HSBC, Geneva apparently for the benefit of the family would

presumably further bind them together. This itself would raise a presumption that they are very close to each other. The letter dated 14th August, 2014 addressed by HSBC Bank Geneva to M/s. Red Oak Operation Ltd. is taken on record and marked 'X' for identification.

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 provided without modifications. We notice that the principal contention of the Petitioner before us has been that she is non-resident 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 N. 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 under the Act. If a person has nothing to hide, we believe the person would have co-operated in obtaining the Bank Statements.

12. Before concluding, we cannot help but comment on the manner in which the Revenue has conducted these proceedings. The Revenue filed an affidavit in reply dated 16th December, 2015 – wherein it has been stated as under :-

“9.2 With reference to para 2(c), it is submitted that it is pertinent to note that the name of the Late Ramniklal Mehta (who was father of Shri Arun R. Mehta and grandfather of the assessee) or his estate is not mentioned anywhere in the base note. On the contrary, as per the base note, the assessee is a beneficial owner of bank account under consideration and therefore, her disclosed income therein is liable to be assessed in her hands only. The assessee cannot escape tax liability by citing

that certain income was offered in the name of Estate of Late Ramniklal Mehta. The plea of the assessee is without any basis. Undisclosed income must be assessed in the hands of the person, to whom that undisclosed income belongs. Income of other beneficial owners viz. Shri. Arun R. Mehta, Shri Russel A. Mehta, Shri Viraj R. Mehta, Ms. Naina H. Mehta, Ms. Priti H. Mehta and Shri Rihen H. Mehta on account of their beneficial ownership interest in HSBC Bank account in the name of White Cedar Investments Ltd. is already brought to tax in their respective hands and income of the assessee on account of her beneficial ownership interest in HSBC Bank account in the name of White Cedar Investments Ltd. is required to be brought to tax. In a separate proceeding, return of income was filed in the name of Estate of Late Shri Ramniklal Mehta in which 5.73% of the peak balance in HSBC Bank A/c. in the name of White Cedar Investments Ltd. was offered to tax. No evidence regarding basis for this 5.73% share was given and hence to protect the interest of the revenue, the AO added the whole amount. The matter is contested before the CIT(A) including legality of the proceedings. However, the fact remains that name of Late Shri Ramniklal Mehta or his Estate appears nowhere in the base note and bank account in the name of White Cedar Investment Ltd. was opened much later on 23.03.2004 after death of Shri Ramniklal Mehta who died on 07.04.2002. The actual beneficial owners of the said bank account are the assessee and six other persons and income should be brought to tax in the hands of correct persons. As discussed above, income of six beneficial owners is already brought to tax in their respective hands and income of the assessee is required to be brought to tax in her hand."

13. From the above, it is clear that the stand of the Revenue is that the names of the late Ramniklal N. Mehta or his executor – does not appear in the Base-Note received from the French Government. Further, the bank account in the name of M/s. White Cedar was opened only on 23rd March, 2004 i.e. almost two years after the death of Shri Ramniklal N. Mehta. During the course of arguments, we understood the learned Additional Solicitor General to contend that the tax in the hands of the

Estate of late Ramniklal N. Mehta is not correct and the Revenue is obliged to tax the income in the hands of the correct person i.e. Petitioner herein. By virtue of the aforesaid affidavit read in the context of the submission made on behalf of the Revenue it is likely that the the Executor of the Estate may contend that the order dated 30th May, 2014 passed on the Estate of late Ramniklal N. Mehta which is in appeal before the CIT(A), is not sustainable. This could / may result in the appeal being allowed. When we queried the learned Additional Solicitor General with our above understanding at the stage of rejoinder, he clarified that the Revenue is not contending that the Estate of late Ramniklal Mehta has been wrongly taxed but it was his submission in the alternative that even if the said Estate of late Ramniklal N. Mehta has been wrongly taxed, it is the obligation of the Revenue to tax the right person (s) including the Petitioner. We accept this as an alternative submission made by the Revenue and we concede that it is likely that we may have not correctly understood the same when voiced by the Revenue at the first instance. This submission of Additional Solicitor General was an alternative submission made even though the Executor of the Estate of late Ramniklal N. Mehta, one Mr. Dilip Mehta – uncle of the Petitioner clearly admits in his statement made to the Income Tax Authority on 10th January, 2012 that he has limited authority to operate the A/c. No. 5091404580 in the name of M/s. White Cedar. The Revenue ought to have in fact proceeded further and held the uncle of the Petitioner – Mr. Dilip Mehta who is Executor of the Estate of late Ramniklal N. Mehta bound by his admission that he has limited authority to operate the Account No. 5091404580 in HSBC Geneva of M/s. White Cedar. As we understood the Revenue to contend that the Estate of late Ramniklal Mehta is not

the correct person to be taxed there was no occasion to to examine the statement of Dilip Mehta dated 10th January, 2012 as extracted in the order dated 30 May 2014 passed in the case of the Estate before our attention was invited by the petitioner to the order dated 30 May 2014 in support of its case during its rejoinder. We would expect the Revenue in matters such as these to take decisions with due consideration and some thought before taking a stand as taken in the affidavit in reply 16 December 2015 with regard to the order dated 30 May 2014 passed on the Estate of late Mr. Ramnikal Mehta.

14. It may be pointed out that just before giving our reasoned order, Mr. Nitesh Joshi, the learned Counsel appearing for the Petitioner sought permission to withdraw this Petition. We declined. This is particularly, so as after having taken up substantial time of the Court and only after we expressed our final view that we are dismissing the Petition, an attempt is made to withdraw the petition. This cannot be permitted.

15. Therefore, for the reasons indicated herein above in para 11, we see no reasons to exercise our extra ordinary writ jurisdiction in the case of present Petitioner. We are not expressing any opinion on merits of the Petition. The parties are entitled to raise all contention available to it in law before the authorities under the Act.

Petition dismissed. No order as to costs.

(A.K.MENON, J.)

(M.S.SANKLECHA,J.)