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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRIRAHUL CHAUDHARY, JM

BMA No. 15/MUM/2024
BMA No. 16/MUM/2024
BMA No. 17/MUM/2024
BMA No. 18/MUM/2024
BMA No. 19/MUM/2024

(Assessment Years (2017-18 to 2021-22)

Arnab Mitra, G-506, Oberoi Splendor, Jogeshwari Vikhroli, Link Road, Mumbai- 400060 (Maharashtra)	Vs.	DDIT/ADIT(INV)-3(1), FAIU, Mumbai
(Appellant)		(Respondent)
PAN		AKTPM 2329K
Assessee by		Shri Anand Kumar Pasari, Advocate a/w Shri Ananad Kumar Pandey, Advocate
Revenue by		Shri P.D. Chougule (Addl. CIT) Sr. DR

Date of hearing	20th August, 2024
Date of pronouncement	26th August 2024

O R D E R

PER BENCH:

1. These are five appeals filed by the assessee Arnab Mitra (the assessee/appellant) for Assessment Years (A.Y.) 2017-18 to 2021-22 challenged by the assessee to the appellate order passed by the learned CIT(A)-51 Mumbai (the learned CIT(A)) under Section 17 of Black Money (UFIA) & Imposition of Tax Act, 2015 wherein the appeal filed by the assessee against the penalty order dated 18.03.2023 for A.Y. 2017-18 under Section 43 of the Black Money ('undisclosed foreign income and assets') and Imposition of Tax Act 2015 passed by the Deputy Director of Income Tax (Inv.)-3(1), FAIU, Mumbai (the AO) was dismissed and penalty of Rs 10 lakhs were confirmed.

2. For A.Y. 2017-18, the assessee has raised the following grounds of appeal:

   A. "FOR THAT, perusal of the penalty order as also the appellate order would transpire that both these orders have been passed without application of mind judiciously.

   B. FOR THAT, the Learned Appellate Authority failed to appreciate the fact that the Appellant was not given resemble opportunity of hearing in as much as apart from the service of one notice dated 15.02.2023, no other opportunity or hearing was provided to the appellant nor any further clarification was called for and straightaway, without going through the documentary evidence furnished by the Appellant, the Penalty order was passed.

C. FOR THAT, the Appellant most humbly states that it is settled position of law that before passing of any adverse order against the taxpayer, an opportunity of personal hearing must be green. In the instant car the same has not been provided. In terms of Paragraph 6 (1) of the CBTD Instruction No. 3 of 2018 bearing reference No 225/249/2018-ITA.II. dated 20.08.2019, where the show cause notice contemplates any adverse issue by Assessing Officer the Assesses should mandatorily be given personal hearing in absence of grant of personal hearing to the Appellant, the Assessment order is bad in law and is liable to be set aside on this ground alone.

D. FOR THAT, the Learned Appellate Authority did not take note of the fact that in infer to impose penalty under Section 43 of the Black Money (UFTA) & Imposition of Tax Act, 2015, the Assessing Officer ought to have considered the following factors.

a) Whether there was any Foreign Asset outstanding of the end of the financial year?

b) If there was any Foreign Asset outstanding at the end of the Financial Year, did the said asset escape assessment amounting evasion of tax

c) Whether there is any element ofMens rea in the event where the Assessee unintentionally and bonafidely failed to disclose such Foreign Asset in the FA Schedule of the Income Tax Return?

d) Whether the penalty under Section 4 of the Black Money [UFIA) & Imposition of Tax Act, 2015, is mandatory to be imposed in the event of unintentional and bona fide mistake, if any

E. FOR THAT, the Appellant farther states that the Learned Appellate Authority failed to take note of the fact that the Learned Adjudicating Authority has passed the order of penalty and has carried out the entire proceeding with a preconceived notion without appreciating the materials on record and without considering the factors as enlisted in the preceding ground.

F. FOR THAT, it is submitted that rules of interpretations in case of penalties are now a settled law.

Suppose two constructions can be put upon a penal provision. In that case, the court must lean towards that Construction which exempts the subject from the penalty rather than the one which imposes penalty Tola ram Relumal v. State of Bombay AIR 1954 SC 496 1954(1) SCR 158 (SC Constitution

Bench) quoted with approval in Virtual Soft Systems v. CIT(2007) 9 SCC 665-159 Taxman 155-289 ITR 83 (SC) Aturan Singh v. C. D comunachen (2017)2 SCC 029 (SC 7 member bench - majority decision) Excel Crop Care Ltd v. CCl (2017) 8 SCC 47-141= SCL 480=81 taxmann.com 173 (SC)

G. FOR THAT, the Learned Appellate Authority failed to take note that from the language of Rection 43 of Black Money (UPIAI &Imposition of Tax Act, 2015, a can be inferred that the Adjudicating Authority has the discretion in the matter of imposing penalty and be may or may not impose penalty, if he is satisfied with the explanation given by the Assesses

H. FOR THAT, the Learned Appellate Authority ought to have taken a liberal view while imposing penalty upon the Appellant inasmuch as the Appellant having admitted that such non-disclosure was a bonafide mistake at the instance of the Appellant however there remained no Foreign Asset at the end of the year and even if it has been left un-disclosed, such Foreign Asset being given under ESOP Scheme by the Employer of the Appellant has suffered tax and the entire amount of tax has already been deposited by the Employer himself in form of TDS.

I. FOR THAT, imposition of penalty under Section 43 of the Act the discretion of the Adjudicating

Authority/Assessing Officer, but the manner in which discretion is to be exercised, has to meet the well settled tests of judicious conduct even by quasi-judicial authorities, assigning reasons for non-acceptance of reply.

J. FUR THAT, it is only elementary that mere non-disclosure of foreign asset in the ITR, by itself, is not a valid reason for penalty under Section 43 of Black Money (FIA) & Imposition of

K. FOR THAT, if an individual can prove to the tax department that the mistake was unintentional and not with the intent to evade any taxes, the penalty may not be levied. But if the tax department upon further investigation finds that the individual is not only at fault for non-disclosure of foreign assets in schedule FA but also at fault for tax evasion, black money routing outside India, others rigorous imprisonment will also be imposed along with penalty This only happens in extreme cases and not merely for nondisclosure failures. The unambiguous intent of the legislature is to exclude trivial cases of lapses which can be attributed to a reasonable cause.

L. FOR THAT, an order imposing penalty for failure to carry out a statutory obligation is a result of a quasi-criminal proceeding and penalty will not ordinarily be imposed, unless the party obliged

acted deliberately in defiance of the law. Presence of mens rea is essential and bringing forth the same is obligatory by the authority Imposing penalty in order to impose penalty.

M. FOR THAT, the Hon'ble Finance Minister's Budget Speech wherein the FM said Hiat "Tracking down and bringing back the wealth which legitimately belongs to the country is our abiding commitment to the country. Recognizing the limitations under the existing legislation, we have taken considered decision to enact comprehensive new law on black money to specifically deal with such money stashed away abroad",

N. FOR THAT, a perusal of the speech would transpire that the intent of the legislature is to track and bring back the wealth which belongs to the country and for which the instant law has been laid down. However, in the instant case, the Foreign Asset which has unintentionally not been disclosed in the return of income is not black money other, entire tax liability which was to be paid on the same has been paid.

FOR THAT, other and further ground of appeal, if any, shall be urged at the time of hearing of this Appeal."

3. The facts of all these assessments are identical.

4. The facts show.

i. Assessee is an employee with M/s. Credit Suisse Securities India Pvt. Ltd. and assessee received foreign shares of credit Suisse (Switzerland), Ltd. under ESOP/stock option grant as perquisites from A.Ys. 2016-17 to 2022-23.

ii. As the parent company shares were listed outside India were administered through separate account for assessee during the period, which was included in his salary and taxes were deducted by is an employer or allotment of shares.

iii. Assessee filed the return of income for all these years. The Assessing Officer observed that the foreign assets [FA] schedule was introduced in the return of income since A.Y. 2012-13 in order to track the foreign assets and income generated thereon in the foreign jurisdiction of Indian resident. Same become mandatory for reporting in 'FA,' schedule A.Y. 2012-13. Section 43 of the Black Money Act provides a penalty for nondisclosure of foreign assets since A.Y. 2016-17.

iv. The Assessing Officer found that assessee has not disclosed these foreign assets in the form of sharesof credit Suisse (Switzerland), Ltd. The Assessing Officer held that nondisclosure of foreign assets received under ESOP for A.Y. 2017-18 attracted penalty u/s.43 of the Black Money Act. Therefore, penalty proceedings were initiated u/s.43 of that Act for nondisclosure of foreign assets.

v. Notice u/s. 46 read with section 43 of the B.M.A. dated 15.02.2023 was issued by the Assessing Officer asking

why penalty of Rs. 10.00 lacks should not be levied in his case.

vi. In response to the above notice, the assessee filed a written submission dated 22.02.2023, the assessee submitted that assessee has disclosed the dividend income generated from the same shares and same was offered to tax and disclosed in Form No.16 and Form No.12BA provided by the employer.

vii. However, the assessee did not disclose the same in Schedule-FA due to inadvertence. The assessee further stated that he held entire shares were sold on 04.12.2016 incurring losses and, therefore, there were no foreign assets outstanding at the end of the year which were to be disclosed.

viii. The learned Assessing Officer rejected the explanation of the assessee that the error in reporting Schedule- FA in the return of income was due to oversight and not intentional. The Assessing Officer was satisfied that it is a fit case for levy of penalty for nondisclosure of foreign assets for A.Y. 2017-18 and penalty order was passed levying a penalty of Rs.10.00 lacs u/s.43 of the BMA vide order dated 18.03.2023.

5. The assessee preferred an appeal before the learned CIT(A). The Grounds of appeal raised are tabulated in Paragraph-4 of the order of the learned CIT(A). The assessee further made a submission on 16.04.2024 raising several contentions.

i. As per Paragraph-8 of the appellate order, where assessee raised issue of violation of principles of natural justice, the learned CIT(A) held that there is proper show cause notice to the assessee by the Assessing Officer and the submissions of the assessee has been considered.

ii. In Paragraph-9, the learned CIT(A) disposed of the merits of the case against the assessee.

iii. The assessee relied on the decision of the Coordinate Bench in the case of Leena Gandhi Tiwari 136 taxmann.com and the decision of the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. 83 ITR 26 stating that the above default is mere technical and venial. The learned CIT(A) held that Section 43 of that Act, the investment has been made in the name of the assessee and assessee is the owner of the foreign assets and has the obligation of reporting it under the law and, therefore, the penalty is leviable as such default is neither technical nor venial.

iv. He further held that there is no onus on the Assessing Officer to demonstrate that the funds or assets in these accounts were owned by theassessee orbeneficially owned by him. Merely failure to furnish such information is sufficient to include in its ambit nondisclosure of foreign assets. He held that in the present case, it was mandatory for the assessee to disclose the foreign assets accurately in return.

v. He also rejected the explanation of the assessee that the foreign assets are out of explain the sources already asset under the Provision of the Income Tax Act and, therefore, it should be excluded for the levy of the penalty is not acceptable. He held that the penalty u/s.43 of the Income Tax Act is not with respect to ownership of or taxability of income from such assets but with respect to nondisclosure. The learned CIT(A) further distinguished the facts of the case of Leena Gandhi Tiwari (Supra).

vi. The learned CIT(A) further relied upon the decision of the Coordinate Bench in the case of Shobha Harish Thawani vs. JCIT (BMA 1/Mum/2023 dated 09.08.2023) and Nirmal Bhawar LalJain (BMA 13/Mum/2023) dated 31.07.2023. Accordingly, the penalty was confirmed.

6. Similar penalty orders and appellate orders were passed for all these years.

7. The learned Authorized Representative referred to Ground-B of the appeal raising that assessee did not get proper opportunity of hearing before the ld. AO and Ld. CIT (A).

i. He submitted that the learned CIT (A) issued only one notice dated 15.02.2023 and no further opportunity was granted to the assessee. No further clarification was called for and did not discuss the documentary evidence furnished by the assessee. He further submitted that the learned CIT(A) has further relied upon the decision of Shobha Harish Thawaniand Nirmal Bhawar LalJain

without putting to the notice of the assessee. He submitted that if those decisions are relied upon and followed by the learned CIT(A), the assessee should have been granted opportunity of hearing. He further stated that the assessee has relied upon the decision of Leena Gandhi Tiwari (Supra) which covers all the aspects of the case and also followed the decision of the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. He further submitted that in the case of Shoba Harish Thawanithe decision of the earlier Bench in the case of Leena Gandhi Tiwari was referred to, but the Coordinate Bench did not discuss how that decision does not apply. Further in the case of Nirmal Bhawar Lal Jain the facts were quite different as the investment was made in the name of the children which was not disclosed. Here the assessee has disclosed the assets and consequent income in Form-16 as well as in the return of income and Form No.12BA of prerequisites valuation.

ii. He Referred to the decision in case of Leena Gandhi Tiwari [Supra] and submitted that in that case 'It was submitted that looking to the financial status of the assessee, and the fact that her personal tax liability is Rs. 159.20 crores for the year and the aggregate annual tax liability, including that of her husband and the private company of which she is chairperson, is of Rs. 516.30 crores for the year,

such an omission is nothing more than a *bona fide* mistake." He also referred to his ROI and states that nondisclosure of ESOP why ld. CIT (A) failed to believe as Bonafide mistake.

iii. He submitted that despite though there are divergent views , more decisions in favour of the assessee then against the assessee, at least an opportunity of hearing should have been granted to the assessee if favorable decisions are put ignore and adverse decisions are to be applied by the appellate authority.

iv. He further submits that even before the Assessing Officer penalty notices were issued and reply of the assessee was considered but no opportunity of hearing more precisely personal hearing was granted. He specifically referred to his letter dated February 21, 2023, filed before the Assessing Officer wherein in the last line the assessee requested to provide opportunity of being heard in the matter to explain his case in entirety. No such opportunity was granted to the assessee.

v. He submits that the provisions of Section 139(9) of the Act also talk about the defective return. If a particular column is not duly filled in such notice, assessee should have been issued a notice u/s 139 (9) of The Act to correct the defect to the assessee. Prior to that penalty cannot be levied.

vi. He, therefore, submitted that both the learned lower authorities did not provide the adequate opportunity to the assessee. He submitted that if the assessee is granted such an opportunity, the principles of Natural justice would serve the purposes.

8. The learned Departmental Representative (DR) vehemently submitted that.

i. Assessee was granted opportunities before the lower authorities. The assessee has also made the written submission and, therefore, there is no question of now further opportunity to be granted to the assessee.

ii. He further referred to the Provisions of Section 43 of the Act and submits that the decision of Shoba Thawani and Nirmal Bhawarlal Jain correctly considered the provisions of the law.

iii. He submits that the learned CIT(A) has correctly distinguished that decision in the case of Leena Gandhi Tiwari does not apply in the facts of case.

iv. He referred to the provision of section 43 of The BMA and submits that merely nondisclosure is enough to levy the penalty. It nowhere provides that (1) rich and famous cannot be penalized, (2) it is not venial breach, (3)it has been enacted based on the DTAA provisions and cannot be ignored holding it to be technical breach as it hampers exchange of information between two

countries, (4) It does not make any distinction about bona fide error and mala fide attempts of non-disclosures, (5) Good and sufficient cause is not at all to be read therein as the law is clear and unambiguous. (6) harshness of the law cannot be looked in to for determining this penalty (7)inadvertent mistake, and that conscious non-disclosure or any *mens rea* in the non-disclosure is not at all contrary to human probabilities, does not merit any acceptance in case of this penalty. (8) attempt to siphoning of unaccounted Indian wealth to the undisclosed foreign bank accounts, is irrelevant in deciding penalty. (9) Law how so ever strict, renders whatever inequity, is to be applied as it provides for. Nothing is to be added and nothing is to be subtracted.

v. He further submits that irrespective of income offered by the assessee out of the foreign assets the penalty u/s. 43 of the Act is leviable.

vi. He further submitted that the provisions of Section 139(9) of the Act do not apply for the above as the column for FA was not at all filled in.

9. In the rejoinder, the learned Authorized Representative referred to the provisions of Section 43 of the Act and submitted that it nowhere says that penalty u/s.43 of the Act can be levied without giving an assessee opportunity of hearing. He specially referred to once again his letter dated 21.02.2023 before the Deputy Director of Investigation where opportunity of being heard was asked for. He submits that no

such opportunity was granted. He further referred to his grounds of appeal before the learned CIT (A) wherein this ground of appeal was dismissed by the learned CIT (A) in Para-8.1. He submits that it is not the claim of the assessee that show cause notice was not given and submission of the assessee was not recorded but assessee asked for personal hearing which was not adjudicated. He further submitted that the claim of the assessee is that decisions against the assessee were used behind the back of the assessee without confronting the assessee. He further submitted that if one more opportunity was given to the assessee before the lower authorities showing inadvertent omission, bona fide belief, disclosure in the return of income itself at other places.

10. We have carefully considered the rival contentions and have perused the orders of the learned lower authorities. The assessee resident individual earning income from salary filed his return of income declaring income from salary of Rs.174,00,61,928/-. The ROI was filed on 01.08.2017 at a total income of Rs.171,00,55,70/-. The Schedule –FA where the details of foreign assets and income from any source of outside India was required to be disclosed assessee has disclosed his Switzerland Bank Account with M/s. Credits Swiss Bank as its owner. The learned Assessing Officer issued show cause notice dated 05.02.2023 u/s. 8 of the Act stating that information has been received that assessee has foreign assets in Credit Suisse (Switzerland), Ltd. It was noted that during the course of employment with Credit Suisse (Switzerland), India Ltd. assessee received foreign shares of credit Suisse (Switzerland),

Ltd. under ESOP/ grant as prerequisite for A.Y. 2017-18. He further noted that the assessee has not furnished the details of foreign assets in Schedule-FA of the Income Tax return filed in A.Y. 2017-18. Therefore, show cause notice was issued to the assessee 115/2/2023. The assessee replied to that show was notice wide letter dated 21/2/2023 and asked the learned assessing officer to grant him the opportunity of hearing. This is evident as per that letter where in the last paragraph assessee has specifically requested that the above proceedings either may be dropped and if a further clarification or information as required the assessee shall submit on hearing from the AO. The assessee further asked to provide an opportunity of being heard in the matter to explain the case in its entirety. This letter is placed at page number 79 – 81 of the paper book. The learned assessing officer reproduced the submission at paragraph number 6 of his penalty order but did not reproduce the last paragraph where such request was made. According to the provisions of section 46 which prescribes the procedure provides that tax authority shall, for the purpose of imposing any penalty under this chapter, issues notice to an assessee requiring him to show cause why the penalty should not be imposed on him. Further, subsection 3 of section 46 provides that no order imposing a penalty under this chapter shall be made unless the assessee has been given an opportunity of being heard. Therefore, if the assessee asked for an opportunity of being heard, it is mandatory required to be given by the assessing officer. In the present case, the assessee specifically asked for that where the law provides that even without asking, assessee should be provided such an

opportunity. When the assessee agitated the same before the learned CIT – A, he dismissed these grounds of appeal holding that the AO issued proper show cause notice to the assessee, submissions of the assessee have been duly incorporated and discussed in the appellate order and the AO has passed the speaking order after following due process. He did not discuss that when the assessing officer was requested with an opportunity of personal hearing why same was not granted.Similarly, the assessee raised before us ground number 2 of the appeal wherein it was specifically stated that assessee was not given a reasonable opportunity of hearing apart from the service of one notice dated 15/2/2023 no further opportunity was provided. We do not agree with the contention of the assessee that the learned CIT – A must issue several notices to the assessee. However, we are concerned with the argument of the learned authorized representative that there are certain decisions used by the learned CIT – A against the assessee without putting it to the notice of the assessee. We find that when a material/precedent which in appellate authority thinks that same are against the assessee and are required to be used in the appellate order, the principle of natural justice demands that assessee must be put to notice of those judicial precedents, thereafter, the learned appellate authority is fully entitled to use them. But not giving an opportunity to the assessee and not putting to his notice the various judicial precedents which are required to be used against him, it violates the principles of natural justice. In view of this, as the assessee has been denied opportunity of hearing before the assessing officer and learned appellate authority has

used decisions against the assessee without putting it to the notice of the assessee, we are of the view that assessee deserves an opportunity of hearing before the lower authorities as the principles of natural justice are violated in this case. As this is merely any regularity, we restore all these appeals back to the file of the learned director of investigation – 3 (1),FAIU , Mumbai to grant an opportunity of hearing to the assessee and then decide the issue afresh. Assessee is also free to raise all the issues before him, which are required to be decided by the adjudicating authority in accordance with law.

11. In view of this all these appeals are restored back to the file of the learned assessing officer and allowed for statistical purposes.

(Order pronounced in the open court on26/08/2024)

Sd/- Sd/-

(RAHUL CHAUDHARY)
(JUDICIAL MEMBER)

(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 26.08.2024.
Aks/-
Copy of the Order forwarded to :

The Appellant, The Respondent, The CIT, The DR ITAT & Guard File

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai