

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

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER**

**BMA No.11/M/2024
Assessment Year: 2016-17**

Mr. Rohit Krishna, Flat 4401, Tower 2, Island City Centre, G.D Ambekar Marg, Dadar (East) Mumbai - 400014 PAN: AKTPK2049Q	Vs.	CIT(A)-51 and DDIT(Inv.)-4(1) FAIU, Aayakar Bhavan Maharishi Karve Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Jaiprakash Bairagra, A.R. a/w
Ms. Rupa Nanda, A.R. &
Shri Ashishkumar Bairagra, A.R.

Revenue by : Shri P.D. Chougule, (Addl.CIT) Sr. D.R.

Date of Hearing : 08 . 08 . 2024

Date of Pronouncement : 26 . 08 . 2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 17.05.2024, impugned herein, passed by the Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 17 of the Black Money (undisclosed foreign income and assets and imposition of tax) Act 2015 (in short 'BMA') for the A.Y. 2016-17.

2. Facts relevant for adjudication of the instant appeal, as appears from the Assessment order are that the Assessee during the year under consideration was resident of India and had foreign asset being investment with Equatex UK Ltd. (United Kingdom of Great Britain and Northern Ireland) having account No.1660701, however, has not disclosed this investment in schedule FA of ITR filed for A.Y. 2016-17 as revealed in the enquiries conducted by the investigation wing. The foreign asset schedule (FA schedule) was introduced in the return of income since A.Y. 2012-13 in the Finance Bill, 2012 in order to track the foreign assets and income generated thereon in foreign jurisdiction of Indian residents, therefore the same became mandatory reporting in "FA Schedule" since 2012-13. Further with the introduction of BMA, the disclosure of foreign assets is mandatory under the BMA and section 43 of the BMA attracts penalty of Rs.10,00,000/- for each such non disclosure of foreign assets from A.Y. 2016-17. Accordingly, the Assessee was show caused "*as to why a penalty of Rs.10,00,000/- should not be levied in his case in accordance with the section 43 of the BMA for A.Y. 2016-17 for not disclosing the investment made with Equatex UK Ltd*".

3. The Assessee in response to the showcase, by filing his reply dated 25.03.2023 has mainly claimed as under:

That the Assessee was an employee of Vodafone M-Pesa Limited (part of the Vodafone group) and was granted stock options i.e. ESOPs by the company as a part of his employment. The shares were valued at Rs.16,89,381/- by the employer and the same were held in an online broking account bearing user ID: 1528635 with Equatex UK Ltd. which was opened by the employer itself to facilitate the allotment by the ESOP. The excess to the ESOP was assessed to the ESOP provided by the employer through an in house company portal. Thus, this ESOP is the nature of perquisite, has been disclosed in the perquisite as per the provisions of the IT Act. The extract of the relevant portion of the form 12BA issued by the employer clearly depicts item No.16 as "stock options" (non-qualified options)-Rs.16,89,381/-. Further, the employer under its obligation has deducted the appropriate and full amount of TDS on the entire value of perquisite of Rs.16,89,381/-. Hence, the amount of ESOP is fully taxed and has been deducted at source by the employer and therefore should be considered as paid. Further, the Assessee in the income tax return

for A.Y. 2016-17 has disclosed and offered the entire value of ESOP of Rs.16,89,381/- under the head "income from salary" and these ESOPs are clearly disclosed in annexure to Form 16 and Form 12BA issued by the employer for the year under consideration. Since the Assessee in the schedule AL has adequately disclosed his assets and liabilities against the items in the schedule based on his estimates, hence the Assessee is not required to maintain books of accounts. Further, as per the provisions of section 43 of BMA, it appears that when the Assessee fails to furnish any information or furnished inaccurate particulars of such return, then only the penalty of Rs.10,00,000/- is attracted. The provisions do not specify that the details of foreign assets must be disclosed in a particular schedule i.e. (Schedule FA as alleged) of the income tax return. The Assessee in support of his claim also relied on various judgments on this aspect and at the last claimed that the case of the Assessee is not a case intended to be covered by the legislation of the stringent BMA, let alone section 43 of the BMA under which the penalty is proposed as the Assessee was under bonafide belief that he is not supposed to disclose his foreign assets in any separate schedule such as "FA Schedule".

4. The Assessing Officer (AO) though considered the above submission of the Assessee but not found the same as tenable, because of the following reasons and ultimately imposed the penalty of Rs.10,00,000/- under section 43 of the BMA by observing and holding as under:

"6. The submission of the assessee is carefully considered but not found tenable because of the following reasons-

6.1. The Black Money Act, 2015 requires that every resident of India shall disclose all the foreign assets in the Schedule FA of ITR. For the purpose of disclosure, the Act does not distinguish the foreign assets based on the source of investment or explanation for the sources. The Act is very clear with respect to disclosure of foreign assets. All the foreign assets must be disclosed. As per the title of Section 43, an asset located outside India must be disclosed. There is no mention of unexplained foreign asset or unexplained foreign income.

6.2. Thus, the penalty under section 43 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is on account of non-disclosure of foreign assets held by a resident at any point of time during the previous year. In the instant case, the assessee failed to disclose the foreign assets in

the return of income filed prior to issuance of summons. No exceptions have been provided under the Act for not levying penalty in the event of non-reporting of foreign assets in Schedule-FA to the return of income. Thus, the plea of the assessee cannot be accepted.

6.3. Furthermore, the facts of the case of Assistant commissioner of Income Tax Vs. Leena Gandhi Tewari, Mumbai are entirely different from that of the assessee. Thus, the rationale adopted by ITAT, Mumbai is not applicable to the current case of the assessee.

6.4. The CBDT has issued a circular for clarifications on compliance under the Black Money Act. Question No 18 of the Circular No. 13 of 2015 dated 06/07/2015, is reproduced below:

Question No.18: A person holds certain foreign assets which are fully explained and acquired out of tax paid income. However, he has not reported these assets in Schedule FA of the Income-tax Return in the past. Should he declare such assets under Chapter VI of the Act?

Answer: Since, these assets are fully explained they are not treated as undisclosed foreign assets and should not be declared under Chapter VI of the Act. However, if these assets are not reported in Schedule FA of the Income-tax Return for assessment year 2016-17 (relating to previous year 2015-16) or any subsequent assessment year by a person, being a resident (other than not ordinarily resident), then he shall be liable for penalty of Rs. 10 lakhs under section 43 of the Act. The penalty is, however, not applicable in respect of an asset being one or more foreign bank accounts having an aggregate balance not exceeding an amount equivalent to Rs. 5 lakhs at any time during the previous year.

As per the above circular, the Board has clarified that if the foreign assets are not reported in Schedule -FA of the return of income for assessment year 2016-17 or in any subsequent assessment years by a person being the resident, then he shall be liable for penalty of Rs.10.00 lakhs u/s. 43 of the Act.

7. Therefore, in view of the section 43 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 and facts & circumstances of the case as discussed in para 8, this is a fit case for levy of penalty of Rs. 10 lakhs for

Assessment Year 2016-17 for non-disclosure of foreign assets in schedule FA of Rol filed for AY 2016-17.

8. Accordingly, I direct the assessee to pay by way of penalty a sum not less than Rs. 10,00,000/- (Rupees Ten Lakhs only) under section 43 of the Black Money (Undisclosed foreign Income and Assets) and Imposition of Tax Act, 2015 for A.Y. 2016-17. Demand Notice issued accordingly.

This order is passed after prior approval of Addl. DIT(Inv.), FAIU-4, Mumbai vide order sheet noting dated 26.05.2023.”

5. The Assessee, being aggrieved, challenged the levy of penalty before the Ld. Commissioner who affirmed the levy of penalty, almost on the same reasoning as given by the AO for levying the penalty.

6. The Assessee, being aggrieved, is in appeal before us. The Ld. Counsel Shri Jaiprakash Bairagra, at the outset, by drawing our attention to the income tax return Form-2A tried to demonstrate that in such Form there is no such column for disclosing the foreign assets. Further, the objective of BMA and the definition reflects that BMA applies solely for “undisclosed foreign income and assets” but does not apply to “disclosed foreign income and assets”. As the Assessee has declared the foreign assets qua ESOP valued at Rs.16,89,381/- in “Schedule AL” of the income tax return as well as the employer of the Assessee has also declared the foreign asset/value of ESOP in Form no. 16 as well as Form no. 12BA and therefore cannot be treated as undisclosed foreign income and assets, as mandated under the BMA and/or the Assessee cannot be held the Assessee in default.

7. On the contrary, the Ld. D.R. refuted the claim of the Assessee and vehemently submitted that the provisions of BMA are strictly applicable and cannot be interpreted in favour of the

Assessee, as the Assessee is mandatorily required to disclose the foreign assets in appropriate Schedule/Form i.e. "FA Schedule "and therefore the penalty levied may be upheld.

8. We have heard the parties and perused the material available on record and given thoughtful considerations to the rival claims of the parties. Admittedly, the Assessee has not disclosed the foreign assets in particular schedule i.e. FA Schedule, however, it is a fact that the Assessee has duly disclosed the foreign assets i.e. ESOP and its value in "Schedule AL" of the income tax return and the employer of the Assessee has also deducted the TDS on the value of the foreign asset/ESOP and shown the details/value of the same in Form No.16 Part-B as well as in Form No.12BA. Hence, it cannot be said that the Assessee has not disclosed the foreign assets in any manner. The Hon'ble Co-ordinate Bench of the Tribunal in the case of M/s. Ocean Diving Centre Ltd. vs. CIT BMA No.22/M/2023 & ors. decided on 30.08.2023 has also considered almost the similar circumstances, wherein though the Assessee has not disclosed the foreign assets in Schedule FA but in fact disclosed the same in its balance sheet and schedule part-A-BS under "non-current investments" attached with the return of income and therefore the Co-ordinate Bench considering the fact that the Assessee has disclosed the foreign assets may not be in form FA but otherwise in its return of income ultimately held that the penalty is not warranted. For brevity and ready reference, the conclusion drawn by the Hon'ble Co-ordinate Bench of the Tribunal is reproduced herein below:

"10. We have heard the parties and perused the material available on record and also given thoughtful consideration to the orders passed by the authorities below and rival submissions of the parties. It is not in controversy that the Assessee has not disclosed the information qua investment in foreign entity in Schedule FA of the Income Tax return but disclosed the same in its balance-

sheet and Schedule part-A-BS under "Non Current Investments" attached with the return of income filed for the AY under consideration. Let us peruse the provisions of section 43 of the Act, which for ready reference and clarity reproduced herein below:

"If any person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who has furnished the return of income for any previous year under sub-section (1) or sub-section (4) or sub-section (5) of section 139 of the said Act, fails to furnish any information or furnishes inaccurate particulars in such return relating to any asset (including financial interest in any entity) located outside India, held by him as a beneficial owner or otherwise, or in respect of which he was a beneficiary, or relating to any income from a source located outside India, at any time during such previous year, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum often lakh rupees:

Provided that this section shall not apply in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed a value equivalent to five hundred thousand rupees at any time during the previous year.

3. Enactment of BMA for Technical, Venial or Bonafide breaches 3.1) The said harsh law named Black Money (Undisclosed Foreign Income & Assets) and imposition of Tax Act, 2015 has been enacted for checking the economic offenders, tax evaders and for the larger causes of public good and cannot be so interpreted as to cause undue hardship to bonafide/ innocent breachers and therefore the said law must not be invoked for punishing a technical/venial/bonafide breach by a bonafide breacher of any statutory obligation and therefore, the bonafide actions of the taxpayers must be excluded from the application of provisions of stringent legislations like, BMA, 2015."

10.1 By reading bare provisions of section 43 of the Act, it clearly reflects that a person shall pay by way of penalty of sum of Rs. 10,00,000/- who fails to furnish any such information or furnishes inaccurate particulars qua any asset/located outside India / sourced from outside India in the return of income filed under sub-section (1) or (5) of section 139 of the Act. Further, the AO may direct that such person shall pay by way of penalty of Rs. 10,00,000/-. No doubt the AO is empowered to impose the penalty as discretion is vested with him by using word „May" in the provisions. The discretion is always at wisdom of an authority, however, discretion is required to be exercised judicially and under the Judicial canons of law and in reasonable and justified manner to impart the Justice, by considering all the relevant circumstances and in case the Assessee is able to discharge its burden for reasonable cause,

then the discretion against the Assessee has to be used cautiously and consciously.

The Hon"ble Apex Court in M/s Hindustan Steel Ltd. vs State of Orissa (1972) 83 ITR 26(SC) also reminded that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

10.2 In the instant case, the Assessee admittedly duly recorded and disclosed the investment in foreign entity in its audited balance-sheet and also furnished such information under "Non Current Investments" in Schedule para-A-BS in its return of income, hence we are in concurrence with the claim of the Assessee that the Assessee has directly or indirectly complied with the statutory provisions and therefore, the case of the Assessee does not fall under the rigorous provisions of section 43 of the B.M. Act. No doubt the Schedule "FA" and BMI Act, have been introduced and enacted for checking the economic offenders, tax evaders and for analyses of information qua foreign investment/income by using artificial intelligence and Schedule "FA" applicable specifically to the Assessee(s) whose accounts are not required to be audited or if audited but books of account not filed along with the return of income. However, in each and every case, the penalty as prescribed in section 43 of the Act, cannot be imposed.

10.3 With regard to the contention raised by Ld. DR to the effect that the Assessee is a habitual defaulter. In our view as the Black Money Act was introduced and enacted in 2015 and therefore, that could be a reason for technical / venial breach starting from AY 2016-17 onwards which is under consideration before us, however, in the instant case, it is not the case of total defiance or malafide or dishonest breach/non- disclosure of information of foreign investment in schedule FA, therefore, on the aforesaid analyzations and considerations, in our view the penalty is not warranted, hence, the same is deleted. Consequently, the appeal filed by the Assessee is allowed."

8.1 Hence, considering the aforesaid facts and circumstances of the case, as it is not the case of the Revenue Department that the foreign asset/ESOP remained undisclosed entirely and there was malafide intention or ulterior motive for hiding the foreign assets from disclosing ; and as the Hon'ble Apex Court in the case of Hindustan Steel Ltd. has laid down the dictum that simply on the technical or venial breach of the law the penalty is not automatically leviable; the judgment of the Hon'ble Co-ordinate Bench of the Tribunal in the case referred to above, wherein the Co-ordinate Bench dealt with the identical situation and ultimately deleted the penalty ; hence we are inclined to delete the penalty under consideration. Thus, the same is deleted.

9. In the result, the appeal filed by the Assessee stands allowed.

Order pronounced in the open court on 26.08.2024.

Sd/-
(RATNESH NANDAN SAHAY)
ACCOUNTANT MEMBER

Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.