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

BEFORE VIKAS AWASTHY (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

BMA 01/Mum/2023	-	A.Y. 2016-17
BMA 02/Mum/2023	-	A.Y. 2017-18
BMA 03/Mum/2023	-	A.Y. 2018-19

Ms. Shobha Harish Thawani 701, Rendezvous, 120, Perry Road Bandra (West), Mumbai-400 050 **PAN : AAFPT7625P**	vs	Joint Commissioner of Income-tax, Central Circle-8, Mumbai Room No.631,6th Floor, Aayakar Bhavan, Maharishi Karve Road, Mumbai-400 020
APPELLANT		**RESPONDENT**

Assessee represented by	Shri B.N. Rao
Department represented by	Smt.Prakash Kishinchandani, Sr AR

Date of hearing	02-08-2023
Date of pronouncement	09-08-2023

O R D E R

PER : MS PADMAVATHY S. (AM)

These three appeals are against separate orders of Commissioner of Income-tax (Appeals), all dated 25/01/2023 passed under section 17 of the Black Money (UFIA) Act, 2015 (in short, 'the BMA') for A.Ys. 2016-17 to 2018-19, respectively. The issue in all these appeals is identical, and therefore, the appeals are heard together and are disposed of through this common order.

2. The common issue contended by the assessee in all these assessment years is levy of penalty under section 43 of the BMA for non disclosure of all their assets / bank accounts / investments in Schedule FA of the Income-tax return filed for the assessment years under consideration. The assessee has invested in foreign financial assets from her Indian bank account in the financial year 2014-15 through liberalized remittance scheme under the Foreign Exchange Management Act (FEMA). The said foreign asset is a general investment along with her husband in "Global Dynamic Opportunity Fund Ltd" where the assessee holds 40% of the share.

3. The Assessing Officer issued a show cause notice to the assessee requiring to show cause why penalty under section 43 of BMA Act should not be levied. The assessee, in the reply stated that it is an inadvertent error on the part of the assessee not to have disclosed the foreign asset in Schedule FA of the Income-tax return. The assessee further submitted that the amount invested in the fund was sourced out of assessee's account i.e. HSBC Bank at Jersey to which funds were transferred from her Indian account under the liberalized scheme permitted by Reserve Bank of India. The assessee also submitted that in the return filed for A.Y. 2019-20, the foreign assets have been duly disclosed. The assessee accordingly, prayed that the penalty proceedings may be dropped as the error committed by the assessee is not intentional. The Assessing Officer did not accept the submissions of the assessee and proceeded to levy penalty of Rs.10 lakhs for each of the assessment years under consideration under section 43 of the BMA. The Assessing Officer placed reliance on the decision of the Hon'ble Supreme Court in the case of Union of India vs Dharmendra Textile Processors & Ors (306 ITR 275) and also in the case of CIT, Ahmedbad vs Reliance Petroproducts Pvt

Ltd 189Taxmann 322 (SC). Aggrieved, the assessee filed appeal before the CIT(A).

4. Before the CIT(A), the assessee reiterated its submissions made before the Assessing Officer. The assessee further submitted that the impugned assets are not undisclosed assets located outside India and the income arising there from being already offered to tax does not fall within the purview of undisclosed foreign income. The assessee also submitted that the intention of the law behind enacting the BMA was to tax citizens of India on non disclosure of foreign assets held by the residents and that the spirit of letter should be appreciated. The CIT(A), after considering the submissions of the assessee, upheld the penalty by holding that –

> *6.6 The basic and paramount claim of the assessee is that since the source of the investment in the relevant foreign assets was explained, being the income earned over the years and also the income from the said foreign assets been regularly included in the returns of income, there was no case for levy of penalty u/s 43 of BMA.*
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> *6.7 The assessing officer, while levying the penalty, has demonstrated conclusively that the assessee was the owner of the foreign assets being the investment in Global Dynamic Opportunities Fund Ltd, Account No. 65-0-934970-5 with Standard Chartered Bank, Singapore and Account No. 40616212318229 with HSBC Bank, Jersey.*
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> *6.8 In my view, for the purpose of section 43 of the BMA, there is no onus on the AO to demonstrate that the funds or assets in these accounts were owned by the v assessee or beneficially owned by him. Section 43 of the Act has two limbs with respect to non-disclosure - the first being failure to furnish any information sought in the return filed under section 139(1) and second being furnishing of inaccurate particulars in such return relating to any asset located outside India, held by him as a beneficial owner or otherwise or in*

respect of which he was a beneficiary, or in relation to any income from a source located outside India. The term ***"fails to furnish any information"*** *is sufficient to include in its ambit non-disclosure of a foreign asset. In the present case, it was mandatory for the assessee to disclose the foreign assets in the return. The mandate to file such information was introduced in the Income Tax Act from AY 2012-13 onwards and it is noted that the appellant has failed to file the information in the return filed by her for the relevant assessment year.*

6.9 The assessee has contended that once the foreign assets are already assessed under the provisions of the Income Tax Act, such assets shall be excluded from the purview of undisclosed foreign assets under BMA. It has already been clarified earlier that the penalty u/s 43 of the Act is not related to the quantum of assets determined as undisclosed under BMA. The default has to be determined with respect to the assessee's failure to disclose the assets / bank accounts outside India in the return filed under section 139(1) of the Income Tax Act 1961.

6.10 The penalty under section 43 of the Act is not with respect to ownership of such assets but with respect to non-disclosure of the account in which the assets were held. The lapse could have been treated as technical lapse if the assessee was not aware of the said asset/account or if some one else was operating the said account. However, no where, in section 139(1) of the ft Act or in the return of income, there is any confusion with:' respect to nature of disclosure required to be made. Admittedly, the assessee was' a joint holder in the Global Dynamics Opportunities Fund Ltd to the extent of 40% and was also a joint holder in the foreign bank account with Standard Chartered Bank ,Singapore and also HSBC Bank, Jersey (till its closure ***on 27.06.2017)***

6.11 The disclosure of a foreign account in the return is not merely a technical requirement without any 'purpose. It enables the department to ensure proper investigation and hence, a non-disclosure of an item in the return is required to be viewed with disfavour even if the assessee did not display a contumacious conduct. The penalty under section 43 of the Act is to ensure compliance with disclosure requirements of the return else the column in the return will itself become otiose or redundant. The appellant has clearly

defaulted on her obligation to discharge the onus cast on her to truly disclose the ownership of the account while filing his return of income.

6.12 In light of the above discussion, I am convinced that the AO is correct in proceeding to levy the penalty under section 43 of the BMA, The action of the AO is upheld. ***Ground no. 1 raised by the assessee is decided against her and stands dismissed."***

5. The Ld.AR submitted that the source for the foreign investments in which assessee holds 40% share has been clearly explained and that the income arising from the foreign asset is also offered to tax. The Ld.AR submitted that the non disclosure of the foreign asset is an inadvertent mistake on the part of the assessee and, therefore, the penalties may be deleted. The Ld.AR also submitted that the power to levy penalty under section 43 of BMA is the discretionary power since the section uses the words "may levy penalty". The Ld.AR submitted that all the relevant details pertaining to the investment were submitted before the Assessing Officer who failed to take cognizance of the same and erred in levying penalty. The Ld.AR further brought to our attention that the investments which the assessee jointly holds with her husband was not disclosed in the hands of the husband in the return of income and that no penalty was levied in his case after examining the evidences submitted. Therefore the Ld.AR argued that for the assessee in the given case has filed the same set of evidences before the Assessing Officer and the Assessing Officer is not correct in taking a different stand in assessee's case with regard to the same foreign assets. The Ld.AR further placed reliance on the decision of the co-ordinate bench in the case of Leena Gandhi Tiwari vs ACIT (BMA 01/Mum/2022 dated 29/03/2022) where the Tribunal has deleted the penalty levied by the Assessing Officer.

7. The Ld.DR, on the other hand, submitted that the levy of penalty under section 43 of BMA is with respect to non disclosure of foreign assets held by the residents. The Ld.DR further submitted that the source being explained and the income arising out of the foreign asset being offered to tax does not discharge the onus of the assessee to disclose the asset in Schedule FA as per the provisions of section 43of the BMA. Accordingly, the ld.DR submitted that the penalty has been rightly levied.

8. We heard the parties and perused the material on record. The assessee along with her husband has made a joint investment in Global Dynamic Opportunity Fund Ltd and the assessee's share in the said investment is 40%. The assessee has made the investment out of funds transferred from India to HSBC Bank at Jersey. On perusal of records it is noticed that the assessee has declared interest income from the foreign investment in AY 2016-17 and the said asset has been sold and capital gain is offered to tax in AY 2019-20. The assessee however did not disclose the foreign asset while filing the return of income for AY 2016-17 to A.Y. 2018-19 under schedule FA and the Assessing Officer levied penalty towards the non-disclosure under section 43 of BMA for each of the assessment years. Though there is merit in the submission of the ld AR that the asset cannot be classified as undisclosed since the source for the acquisition is established, we need to look at the requirement under section 43 of BMA. Therefore before proceeding further we will look at the relevant provisions of the BMA.

9. The BMA is enacted on 26th of May, 2015 by Act number 22 of 2015 and came into force with effect from First day of April, 2016. Section 43 of the BMA contains provisions for levy of penalty for failure to furnish in return of income,

information or furnish inaccurate particulars about an asset (including financial interest in any entity) located outside India. The section reads as under –

> ***43.*** *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 of ten 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.*
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> *Explanation.—The value equivalent in rupees shall be determined in the manner provided in the Explanation to section 42.*

10. From the plain reading of the above it is clear that a person who is resident and ordinarily resident while filing the return of income under section 139(1), or 139(4) or 139(5) fails to furnish or files inaccurate particulars of investment outside India, then the person is liable for penalty under section 43. The disclosure of foreign investments / assets is to be made in return of income-Schedule FA. Thus, it is apparent from the language of section 43 that the disclosure requirement is not only for the undisclosed asset but any asset held by the assessee as a beneficial owner or otherwise. Given this the argument that the penalty under section can be levied only with respect to undisclosed asset is not tenable. Undisputedly, the assessee in the instant case has not disclosed the foreign asset in

the return of income – Schedule FA, therefore, we are inclined to agree with the findings of the CIT(A) in this regard.

11. The alternate plea of the assessee is that the non-disclosure of the foreign asset in schedule FA of the return is an inadvertent bonafide error and therefore does not warrant levy of penalty. In this regard it is noticed that, though the assessee claims that the non-reporting is a bonafide mistake, there is nothing on record in support of the said claim. It is also contended that the levy of penalty under section 43 is not mandatory but is at the discretion of the Assessing Officer since the word used in the section is that the Assessing Officer "may" levy penalty. In the given case it is an undisputed fact that the impugned foreign asset has not been disclosed in the return of income filed for all the three assessment years 2016-17 to 2018-19 in schedule FA. Even if it is assumed that in the light of expression “may” used in section 43 of BMA, the Assessing Officer has the discretion to levy penalty, the assessee failed to substantiate that the Assessing Officer has exercised his discretion extravagantly. The Assessing Officer after examining the facts of the case, formed his opinion to levy penalty. The Assessing Officer exercised his discretion judiciously. No material is brought before us to show that Assessing Officer levied penalty under section 43 of BMA in an arbitrary and unjustified manner. The contention that the assets are not undisclosed assets may be factually true, but penalty under section 43 is levied for non-reporting of overseas investments and not for making investments from unaccounted money. The provisions of section 43 does not provide any room not to levy penalty even if the foreign asset is disclosed in books since the penalty is levied only towards non-disclosure of foreign assets in schedule FA. In the light of these discussions we see no infirmity in the order of CIT(A) confirming levy of penalty under section 43 of the BMA for non disclosure of foreign assets in the return of income filed by the

assessee. Accordingly, appeals of the assessee for all assessment years i.e. 2016-17 to 2018-19 are dismissed.

12. In result the appeals of the assessee are dismissed

Order pronounced in the open court on 09/08/2023.

Sd/- sd/-

(VIKAS AWASTHY)	**(PADMAVATHY S)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt : 9th August, 2023
Pavanan

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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Asstt. Registrar / Senior Private Secretary,
ITAT, Mumbai