

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

**BEFORE SHRI B R BASKARAN, AM &
SHRI N. K. CHOUDHRY, JM**

B.M.A. No. 22/Mum/2023
Assessment Year: 2016-17)
&
B.M.A. No. 20/Mum/2023
Assessment Year: 2017-18)
&
B.M.A. No. 23/Mum/2023
Assessment Year: 2018-19)
&
B.M.A. No. 21/Mum/2023
Assessment Year: 2019-20)

M/s Ocean Diving Centre Ltd.
A-206, Krishna Smruti,
Parleshwar Road, Vile Parle(E),
Mumbai-400057.

PAN No. **AAACO3937F**

Appellant)

Vs.

The Commissioner of Income
Tax(Appeals)-51, Room No. 631,
6th Floor, Aayakar Bhavan,
M.K. Road, Mumbai-400020.

Respondent)

B.M.A. No. 24/Mum/2023
Assessment Year: 2016-17)
&
B.M.A. No. 27/Mum/2023
Assessment Year: 2017-18)
&
B.M.A. No. 25/Mum/2023
Assessment Year: 2018-19)
&
B.M.A. No. 26/Mum/2023
Assessment Year: 2019-20)

M/s Naik Business Services Pvt.
Ltd. B-10, Krishna Kunj,
Parleshwar Road, Vile Parle(E),
Mumbai-400057.

PAN No. **AACCN5114D**

Appellant)

Vs.

The Commissioner of Income
Tax(Appeals)-51, Room No. 631,
6th Floor, Aayakar Bhavan,
M.K. Road, Mumbai-400020.

Respondent)

Appellant by : Shri Vipul Shah, Adv.
Respondent by : Shri Prakash Kishinchandani, Sr. DR
Date of Hearing : 10.08.2023
Date of Pronouncement : 30.08.2023

ORDER

PER BENCH:

The Assessee/Appellants herein have preferred these appeals against the order even dated 19.04.2022 impugned herein, passed by Ld. Commissioner of Income Tax (Appeals)-51 Mumbai {in short 'Ld. Commissioner'} } u/s 17 of the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015 (in short 'B.M.I. Act').

2. The issues involved in the instant appeals are similar, therefore, for the sake of brevity; these appeals were heard together and are being disposed of by this Composite order and BMA No. 22/Mum/2023 (AY 2016-17) as a lead case.

3. BMA No. 22/Mum/2023 (AY 2016-17)- The Assessee being a domestic company resident in India, having the nature of business as "services", declared its total income as "NIL" by filing its return of income on 30.11.2016. Subsequently during the course of investigation in the case of Mr. Vikram Nayak, Director of the Assessee-company it was observed that the Assessee had investment in foreign entities i.e. Helen Incorporated S.A., Panama, however has not reflected said investment in Schedule of "Foreign Assets" in its return of income filed, therefore, a notice dated 12.02.2021 under section 43 of the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015

(in short 'B.M. Act') was issued and served upon the Assessee by the Addl. CIT, Range-2(3), Mumbai. Thereafter due to change of jurisdiction, another notice dated 27.12.2021 was issued to the Assessee by the DCIT, Central Circle-3(1), Mumbai (in short 'AO').

4. In response to the said notice dated 18.03.2021, the Assessee vide letter dated 27.01.2022 filed its submissions/details and claimed as under:

"We would like to submit that we have appropriately disclosed the investment in Halen incorporated SA under Note 12: Non current Investment of the Annual Report for FY 2015-16 Also your good self would appreciate the fact that under the said note 12 of the balance sheet, the company had accurately disclosed the name of the company in which it has invested, i.e. Halen Incorporated SA....The said details were appropriately reported under 'Non-current Investments' in schedule Part A-BS in the return of income for AY 2016-17 on page 5 of the ITR Form.. Along with the tax audit report, the company has also uploaded the balance sheet and profit and loss of the company on the portal... We would like to submit that the financial interest held by the company by way of investment in overseas entity has been duly disclosed and reported with RBI through authorized dealer bank. However, inadvertently missed reporting the same under the Schedule FA in the Income-tax Returns of the relevant assessment years. It becomes the case of partial disclosure made by the company, it will not come under purview of fully undisclosed. Thus we submit that we have been disclosing the said investment with various authorities complying with various statutory requirements. However, we erroneously have missed reporting the said investment in the Schedule FA of ITR but please note that the same was missed on account of typographical error/ bona-fide omission. So we submit that since the said investment was missed to be disclosed only in Schedule FA of ITR due to typographical error/bona-fide omission...no liability of penalty under Section 43 of the Black Money Act should be levied on the company..."

5. Before the AO, the Assessee mainly claimed that though it has not disclosed the information qua foreign Investment in the schedule FA of the Income Tax return but duly disclosed the same in the balance-sheet.

The Assessee further claimed that it has inadvertently missed reporting the same in the schedule 'FA'.

6. The AO being not impressed by the claim of the Assessee, rejected the same and ultimately levied the penalty of Rs. 10,00,000/- under section 43 of B.M. Act, by concluding as under:

"5. Decision:

The submission of the assessee is carefully perused and considered. The assessee admitted that they have not disclosed the information on foreign entity in the schedule FA of the Income-tax Return but argued they have duly disclosed it in the Balance sheet for AY 2016-17. The assessee further stated that they have inadvertently missed reporting the same in the schedule FA. It may be noted that the section 43 of the Black Money Act clearly mandates the levy of penalty for failure to furnish the information about the foreign entity in the prescribed Income-tax Return. The prescribed Income-tax Return specifically contains a schedule FA for disclosing such information. The assessee's argument that it has furnished such information under "Non- current Investments" in schedule 'Part A-BS in the return of income for AY 2016-17 is not in line with the intent of legislation. The legislation clearly mandates the disclosure of information in the prescribed format. It may be noted that in the automated environment, the Income-tax Department, inter alia, relies on voluntary compliance of the assessee and the computer system for analyzing the risk parameters for the assessee. If the assessee has not disclosed the relevant information in the prescribed format, analysis of such information using artificial intelligence is not possible. Hence disclosure, other than the prescribed format is not acceptable and does not serve the intended purpose. Further, the assessee has not only missed the disclosure of foreign asset in schedule FA in the Income tax return for one Assessment year but missed for four subsequent Assessment Years i.e. From AY 2016-17 to AY 2019-20. Further, as evident from the Income-tax Return, the assessee is a company having revenue receipts of more than Rs. 20 Cr and also tax

audit u/s 44AB was carried out. Hence the assessee's argument of inadvertent/typographical mistake is not acceptable.

In view of the above facts and circumstances of the case, I levy a sum of Rs.10,00,000/- (Rupees Ten lakhs Only) as penalty payable by the assessee under section 43 of the Black Money (Undisclosed Foreign Income and Asset) & Imposition of Tax Act, 2015, Notice of demand is issued accordingly."

7. The Assessee being aggrieved challenged the levy of penalty before the Ld. Commissioner and reiterated its claim as raised before the AO. The Ld. Commissioner vide impugned order affirmed the imposition of penalty by concluding as under:

"7.9 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. While the assessee has claimed that the investment in the foreign asset had been disclosed in the ITR in Schedule 'Part A - BS under 'Non-current Investments, the perusal of the ITR does not show any such disclosure in the name of Halen Incorporated SA, Panama'. Thus, this claim of the assessee that disclosure had been made in the ITR is grossly incorrect. Moreover, no where in section 139(1) of the IT 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 the owner of investments in Halen Incorporated SA, Panama.

7.10 The disclosure of a foreign asset 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 its obligation to discharge the onus cast on it to truly disclose the ownership of the foreign asset while filing its return of income. Also, the residential status of the assessee for the AY 2016-17 was that of 'resident' and so the disclosure obligation was very much applicable to it. Further, the facts in the case of the assessee are different from those in the case of Leena Gandhi Tewari (supra) and so the case law cannot be applied to the case of the assessee.

*7.11 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 nos. **1 to 4 raised by the assessee are decided against it and stand dismissed.**"*

8. The Assessee being aggrieved is in appeal before us. The Assessee mainly claimed that according to the provisions of section 43 of the B.M. Act, the Assessee is required to furnish the particulars qua any asset located outside India in the return of income filed under section 139(1) or (4) or (5) and if the Assessee fails to furnish any such information or furnish inaccurate particulars of such income any asset located outside India of which the person is held a beneficial owner or otherwise or in respect to which is a beneficiary or relating to any income from a source located outside India at any time during such previous year then the such person can be held liable to pay a sum of Rs. 10,00,000/- by way of penalty, but not otherwise. The Assessee also claimed that as per question and answer No.17 in Circular No. 13 of 2015 dated 06.07.2015 issued by CBDT, qua clarifications on tax compliance for undisclosed foreign income and assets, it is answered by the CBDT that mere reporting of a foreign asset in Schedule FA of the return, does not mean that the source of investment in the asset has been explained. Further, declaration should be made under Chapter-VI of the Act in respect to all those foreign assets which are unaccounted to/source of investment in

such asset is not fully explainable, which is not the case here. From the answer to question No. 17, it clear that mere reporting of foreign asset in the Schedule FA of the return does not absolve the Assessee from explaining the source of investment in the asset, which goes to show that disclosing of foreign asset in Schedule FA of the return itself is not paramount until and unless the same is explained, therefore, inference can be drawn that disclosing or non-disclosing in Schedule FA do not have much impact.

9. On the contrary, the Ld. Departmental Representative (DR) claimed that Schedule FA has been introduced and enacted in order to unearth the undisclosed investment in foreign. Schedule FA is a mechanism by which the unreported investment in foreign can be detected. The Id. DR also submitted that the Assessee is a habitual defaulter as he has continuously not disclosed its foreign investment in four AYs i.e. 2016-17, 2017-18, 2018-19 & 2019-20, therefore, cannot be absolved from the liability.

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 hereinbelow:

"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.

11. In view of our judgment in B.M.A No. 22/Mum/2023, all the appeals under consideration stands allowed.

Order pronounced in the open court on 30-08-2023.

Sd/-
(B R BASKARAN)
Accountant Member
SK, Sr.PS.

Sd/-
(N. K. CHOUDHRY)
Judicial Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. CIT
5. Guard File

BY ORDER,
(Dy./Asstt.Registrar)
ITAT, Mumbai