Penalties under Black Money Act - 'must' or 'may'?

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Introduction

In order to tackle the issues arising from undisclosed foreign income and assets, Central Government has enacted special Act 'Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015' (for brevity 'BMA') with effective from 01.07.2015.

Charge of Tax:

Section 3 of BMA states that a tax of 30 percent shall be levied on every assessee in respect of his total ***undisclosed foreign income and assets***.

Scope of BMA, as stated in section4, is applicable in respect of any income from a source outside India which is not disclosed in the income tax return (ITR) filed under section 139 of Income Ta Act, 1961 (ITA) or any income from a source outside India in respect of which no ITR is filed under section 139 of ITA, or any undisclosed asset located outside India.

In order to attract provisions of section 3 of BMA, it needs to establish that the person is an assessee, and such assessee has undisclosed income or assets.

Undisclosed Foreign Income and Asset vs. Undisclosed Asset:

Section 2(12) of BMA defines the term 'undisclosed foreign income and asset' *to mean total amount of undisclosed income of an assessee* ***from a source located outside India*** and the value of an undisclosed asset located outside India.

> ***"Undisclosed asset located outside India" means an asset (including financial interest in any entity) located outside India, held by the assessee in his name or in respect of which he is a beneficial owner, and he has no explanation about the source of investment in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory.***

On a conjoint reading of both the terms, it is evident that non-disclosure of foreign assets in India may not be construed as undisclosed asset located outside India unless the assessee has no explanation about the source of investment in such asset or explanation given by him is in the opinion of officer unsatisfactory. In simpler words, if the assesse has explanation about source of investment, then the said asset may not fall under the ambit of 'undisclosed foreign asset' and has nothing to do with the disclosure in India qua this obligation. However, the income irrespective of the assessee has explanation or not, if not shown in India, then it amounts to undisclosed foreign income, because of the absence of expression relating to the source of investment in the definition of 'undisclosed Foreign Income and Asset'.

In simple terms, if the assessee has explanation to source of investment, for the purposes of charging section, there would not be any tax implications, even if he fails to disclose the asset in India. For income, the above proposition would not hold good.

> ***Non-disclosure of asset located outside India in ITR may not necessarily be an undisclosed asset.***
>
> ***However, non-disclosure of foreign income may be considered as undisclosed foreign income.***

The intention behind the enacting the BMA is to bring back the Black Money to India. The term 'undisclosed asset' has to be interpreted with the definition provided in section 2(11) of BMA.

Further, the term 'assessee' is defined under section 2(2) to mean a person being a resident under section 6 ITA or being a non-resident or resident but not ordinary resident (RNOR), who was a resident either in the year to which such income relates or year in which the undisclosed asset located outside India was acquired.

Disclosure of foreign income and assets – Charging Section vs. Penal Provisions:

Section 42 and 43 of BMA deals with levy of penalty in respect of non-disclosure foreign income or asset in the ITR filed by the assessee.

Section 42 is applicable in respect of an assessee being a resident who has failed to furnish the return of income when such assessee is having any asset including beneficiary holding or having any income from a source located outside India.

Section 43 is applicable when the assessee being a resident failed to furnish the details of any asset including beneficiary holding or any income from a source located outside India in the return of income filed by him.

However, it is to be noted that penalty under section 42 or 43 is leviable for non-disclosure any foreign income or asset. Nothing in Section 43 speaks about the disclosure of undisclosed foreign asset, it applies to all foreign assets. Hence, it should not be confused that only undisclosed foreign assets are required to be shown in ITR. All the foreign assets have to shown to avoid penalties.

Powers of AO to levy penalty:

Under both the Section 42 and Section 43 of BMA, AO is empowered to levy penalty of INR 10,00,000. The Hon'ble Mumbai Tribunal in the matter of Leela Gandhi Tiwari[1] has held that penalty under Section 43 of BMA is not tenable when there is a bonafide mistake for not disclosing the details. In this article, we intend to discuss the subject case.

Facts:

The proceedings are started in the name of Mrs. Leela Gandhi Tiwari ('assessee') who is one of signatories of the foreign bank account.

Mr. Arvind V Gandhi, father of the assessee is a businessperson in India who has died during the year 1986. Subsequent to the death of the father, assessee and her husband who are non-residents in India have returned to India to support their family and to look after the business.

Subsequently, it was found, with the help of close friend Mr. Vasanth Thakkar, that Mr. Aravind V Gandhi has left behind, amongst other things, a Swiss bank account for the benefit of his wife, Dr Pramila Gandhi.

As Dr Pramila Gandhi was traversing through a tough patch, including on her health front, she approached her eldest daughter for taking care of the business as also, inter alia, this Swiss bank account as well.

[1] Leena Gandhi Tiwari [TS-227-ITAT-2022(Mum)]

Accordingly, the bank account has been transferred to assessee and her husband's name. However, they are holding the bank account as a trustees and monies are to be used for the benefit of Dr Pramila Gandhi. These formalities have been completed during the year 1986.

After a long time, during July 2016, Dr Pramila Gandhi has enquired about the bank account, and it is found that the account has become dormant as no transactions have been undertaken by the assessee and her husband. In order to make the account operative, fresh KYC requirements have been completed.

When the assessee and her husband have discussed the matter again, Dr Pramila Gandhi, before the demise in August 2016, has expressed a desire to donate the entire balance in the account to a charity in UK. Accordingly, the total amount lying in the account has been transferred to charity during February 2017.

Subsequently, with the input from investigation wing, a search and seizure operations have been conducted during September 2017 and an assessment has been completed in the name of her husband in the representative capacity under section 10 (3) of BMA. As there was no amount, as an undisclosed foreign asset, which was brought to tax, under the BMA, in the hands of the assessee or her husband, the assessment order in the assessee's case concluded that the undisclosed income and asset of the foreign bank is assessed at NIL.

However, assessing officer proceeded to impose penalty under section 43 of BMA in the hands of the assessee for non-disclosing the foreign asset in ITR in India.

Tribunal's Ruling:

- ***The definition of 'undisclosed foreign asset' under BMA is not dependent upon the disclosure made, or not made, in the income tax return. So far as disclosure of an undisclosed foreign asset in the income return is concerned, it is relevant only for the purpose of penalty under section 43 and for no other purpose in the BMA and position so far as undisclosed foreign income is concerned is different as undisclosed foreign income in ITR is covered under section 4(1) (a)/(b) of the BMA.***

- In the present case, a search operation was carried on the assessee and assessment was also made under section 153A of the ITA for the AY 2017-18. In the return of income filed by the assessee under section 153A, details of foreign bank account have been duly disclosed.

- It could possibly be said that the income tax return filed on 21st April 2018 under section 153A is the income tax return that obliterates the original income tax return filed under section 139(1), and it is that return that is now required to be treated as income tax return filed under section 139(1).

- Therefore, it can indeed be said that non-disclosure of the foreign asset in the original return filed under section 139, even if that be so, cannot be put against the assessee, particularly when the said disclosure was admittedly made in the return filed under section 153A.

- As regards such a non-disclosure for the earlier assessment years, which is what the learned Assessing Officer has harped upon vehemently in the impugned order, those were the assessment years that pertain to the period prior to the BMA coming into force, and, nothing, therefore, turns on those lapses, even if any, so far as the application of the provisions of Section 43 of the BMA is concerned.

Considering the above analysis, Tribunal has held that penalty under section 43 of BMA is not leviable. Accordingly, the Tribunal has upheld

the order of the CIT (A). Further, Tribunal has held that there are other reasons as well for holding why penalty under section 43 of BMA is not leviable, which are as under:

- It is only elementary that a mere non-disclosure of a foreign asset in the income tax return, by itself, is not a valid reason for a penalty under the BMA.

- The unambiguous intent of the legislature is to exclude trivial cases of lapses which can be attributed to a reasonable cause.

- It is also to be noted that Section 43 provides that the Assessing Officer ***"may"*** impose the penalty, and the use of the expression ***"may"*** signifies that the penalty is not to be imposed in all cases of lapses and that there is no cause-and-effect relationship simpliciter between the lapse and the penalty.

- Imposition of penalty under section 43 is surely at the discretion of the Assessing Officer, but the manner in which this discretion is to be exercised has to meet the well-settled tests of judicious conduct by even quasi-judicial authorities.

- The assessee is an HNI with aggregate payment of taxes around Rs. 2,350 Crores in last several years and the amount held in the alleged undisclosed foreign bank account is a small, if not trivial, amount of £2,34,710, and that it is not, by any stretch of logic or imagination, a case of siphoning unaccounted wealth in India to the undisclosed bank accounts abroad.

- Assessee and her husband were the trustees of the account and total amount is simply donated to a charity.

- Assessee and her husband were signatories because Dr Pramila Gandhi was having health issues and was not in a position to travel. It was more of being a signatory for the operation of the bank account, rather than holding the bank account even in a fiduciary capacity, and, as such, the assessee's belief that she was not required to disclose this bank account cannot be said to be lacking bonafides.

- Once there is a clear finding of bonafides in conduct, irrespective of whether such conduct is lawful or not, the penalty is not imposable unless the penalty is statutorily simply an automatic consequence, in cause and effect relationship.

Accordingly, the Tribunal has held that penalty under section 43 of BMA is not tenable. However, the Tribunal has held that whenever any unaccounted income or undisclosed asset abroad is found, stern action, in accordance with the law, must be taken. The Tribunal has pointed the Hon'ble Finance Minister's Budget Speech wherein the FM said that ***"Tracking down and bringing back the wealth which legitimately belongs to the country is our abiding commitment to the country. Recognising the limitations under the existing legislation, we have taken a considered decision to enact a comprehensive new law on black money to specifically deal with such money stashed away abroad".***

- In the present case, it is the case of inheritance of bank account which is opened by the assessee's father forty years back and amount lying in the bank account is small money.

- The well-intended harsh laws meant for checking the economic offenders, stashing their ill-gotten monies abroad, must not be invoked for punishing a venial breach of the law by a bonafide businessperson. The bonafides actions of the taxpayers must, therefore, be excluded from the application of provisions of such stringent legislation as the BMA.

Considering the above, Tribunal has held that in this backdrop in which harsh penalties and prosecutions are contemplated under the BMA, penalty cannot be levied in the cases which more of bonafide mistakes.

Tribunal has further highlighted that this ruling is without any prejudice to whatever consequence may follow under the provisions of the Income Tax Act, 1961, the legislation under which the lapse of non-disclosure, even if that be so, occurred.

Author's Comments:

The facts of the present case are different from the Shrivardhan Mohta[2] case where in the Calcutta High Court has upheld the proceedings under section 50 and 55 of BMA against the assessee as assessee has failed to disclose the foreign assets despite opportunity is available to the assessee while filing the return of income under section 153A.

Even though the ruling in the present case has been given in assessee's favour, considering the stringent regulations under BMA, every resident in India (ROR) must keep the track of foreign assets and income and have to duly disclose such details in the return of income in order to avoid penalties and other consequences under BMA.

[2] W.P. NO. 568 OF 2018.