# 7TH THE DASTUR NATIONAL DIRECT TAX MOOT COURT COMPETITION, 2024

**15th and 29th June, 2024**

## MOOT PROPOSITION

## Tax Appeal before Hon'ble High Court

1. Mrs. X (hereinafter referred to as **"the Appellant"**) is challenging the Order dated 9th August, 2023 for A.Y. 2016-2017 (hereinafter referred to as the **"impugned order"**) passed by the Hon'ble Income Tax Appellate Tribunal, Mumbai Bench "H" (hereinafter referred to as **"the Tribunal"**) whereby the Tribunal confirmed the penalty u/s 43 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter referred to as **"the BMA"**). The Appellant is an individual and resident of India. The Respondent is the Assessing Officer who has levied penalty u/s 43 of the BMA.

2. The brief facts of the case leading to the filing of the Appeal for A.Y. 2016-2017 are as under:

   2.1 In April 2013, the Appellant jointly with her husband Mr. Y made investment of $ 200,000 in Local Stale Misfortune Fund Ltd., Bermuda (hereinafter referred to as **"the fund"**). The share of the Appellant in the fund was 40%. The Source of investment was from IBC Bank Account, Jersey ($ 1,60,000) and from NCLT Bank, Singapore (40,000$). The IBC Bank Account, Jersey was jointly held by the Appellant with her husband who was the first holder. The Appellant was also joint holder of Account at NCLT Bank, Singapore along with her husband who was the first holder. Interest income received from the Fund as well as the IBC Bank Account, Jersey and NCLT Bank Account, Singapore was duly offered to tax from A.Y. 2014-2015 to A.Y. 2016-2017. Though the income from these foreign

investments as bank accounts was offered to tax, details of said investment and bank accounts were not disclosed in Schedule FA of the Return of Income. The Income tax assessment for A.Y. 2014-2015 to A.Y. 2016-2017 was completed u/s 143(3) wherein income offered on foreign investment and foreign bank accounts was duly accepted. Further, the investment in funds was duly disclosed in the Return of Income for A.Y. 2017-2018.

2.2 That Additional Director General of Income Tax (Investigation), 3(3) [hereinafter referred to as the **"ADIT (Inv) 3(3)"**] issued a summons to the Appellant on 27th November, 2018 asking the Appellant to confirm her foreign investments and Bank accounts. The summons was duly replied by the Appellant through her Chartered Accountant giving all the details of the foreign investment and foreign bank accounts vide letter dated 13th December, 2018 and 14th December, 2018. Summons dated 6th December, 2018 u/s 131 of the Income Tax Act was also issued by the Office of the Dy. DIT(Inv) Unit-2, Mumbai to the husband of the Appellant to confirm the said foreign investments and foreign bank accounts. The summons was duly replied by the husband of the Appellant through her Chartered Accountant vide reply dated 14th December, 2018 giving all the details of the foreign investment and foreign bank accounts.

2.3 The Respondent- Assessing Officer issued show cause notice dated 23rd October, 2019 to levy penalty u/s 43 of the BMA for failure to furnish information related to offshore assets/ investments/ bank accounts in schedule FA of Return of Income for A.Y. 2016-2017. In response to the Show cause notice, the Appellant filed reply dated 4th November, 2019 explaining its investment in the fund as well as gave details of the bank accounts held abroad.

2.4 The Respondent No. 1 passed penalty order dated 31st March, 2021 u/s 43 of the BMA. It was stated that information was received from O/o DDIT(Inv), Unit – 2(2) that Appellant was beneficiary of foreign assets, etc., being investment in the fund. It is also stated that information was received that enquiries were conducted by issue of summons dated 6th December, 2018 to the husband of the Appellant from where it was gathered that the Appellant is holding investment in the foreign fund and foreign bank account. It was held that the Appellant violated the provisions of Section 43 of the BMA by not disclosing the investment in the fund and the IBC

Jersey and NCLT Singapore Bank Accounts. Accordingly, penalty of Rs. 10,00,000/- was levied u/s 43 of the BMA.

2.5 Aggrieved by the penalty order, the Appellant filed an appeal before the Commissioner of Income Tax (Appeals) [for short **"CIT(A)"**]. The Appellant submitted the written submissions before the CIT(A) dated 16th January, 2023. It was submitted that penalty u/s 43 of the BMA was not leviable as there was no tax imposed for undisclosed foreign income and foreign asset. Further, there was no undisclosed foreign asset as source of investment in the fund was duly explained. It was submitted that income from foreign investment and foreign bank accounts was duly offered to tax and thus, non-disclosure was not intentional or deliberate.

2.6 The Ld. CIT(A) passed order dated 25th January, 2023 u/s 17 of the BMA and confirmed the order of penalty passed by the Respondent No 1.

2.7 Aggrieved by the order of Ld. CIT(A)-51, the Appellant filed an appeal before the Tribunal. The Appellant pointed out that penalty proceedings in the case of the Appellant's husband which involved identical facts was dropped. Moreover, the Appellant made following arguments:

*(i)* That the preamble of the BMA states that it is an "*An Act to make provisions to deal with the problem of the black money that is undisclosed foreign income and assets, the procedure for dealing with such income and assets and to provide for imposition of tax on any undisclosed foreign income and asset held outside India and for matters connected therewith or incidental thereto."*

(ii) That Section 2(*12*) defines undisclosed foreign income and assets as *"undisclosed foreign income and asset" means the total amount of undisclosed income of an assessee from a source located outside India and the value of an undisclosed asset located outside India, referred to in section 4, and computed in the manner laid down in section 5."*

(iii) That Section 2(11) defines undisclosed asset located outside India as *"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*"

(iv) That in the present case the charging section u/s 4 is not invoked as there is no undisclosed foreign income and assets. Income from foreign investments and foreign bank accounts is duly offered to tax. Hence, mere non-disclosure of such foreign asset, income from which is duly offered to tax and also where the source of acquiring such foreign asset is duly explained, cannot entail penalty u/s 43 of the BMA.

(v) That the alleged undisclosed asset was acquired or made prior to the commencement of the BMA. When it was created, the BMA would not have applied. Hence, if the penalty could not have been levied in the year of creation of Asset then it cannot be applied in subsequent assessment years.

(vi) That existence of undisclosed foreign income and assets is implicit and mandatory before invoking a penalty u/s 43 of the BMA.

(vii) That penalty u/s 43 of the BMA is not automatic. In the absence of any undisclosed foreign income and asset the provisions of penalty u/s 43 cannot be invoked.

(viii) That non-disclosure of income or asset under the Income Tax Act, 1961 cannot ipso facto result in a penalty under the BMA unless that charging section of the BMA is also attracted.

(ix) That the lapse of non-disclosure, even if that be so, is only an inadvertent mistake, and that conscious non-disclosure or any mens rea in the non-disclosure is completely contrary to human probabilities in the present case.

(x) The tribunal decision of the co-ordinate bench in ***ACIT v Leena Gandhi Tiwari [2022] (Mumbai - Trib)*** supports the case of the Appellant.

(xi) That the Tribunal erred in not appreciating that no penalty u/s 43 of the BMA is levied on the husband of the Appellant who has greater share in the foreign investment and is the first holder of the Bank Accounts.

(xii) That the erroneous understanding of the Revenue that penalty u/s 271(1)(c) is automatic in light of the decision in *Union of India v. Dharamendra Textile Processors* [(2008) 306 ITR 277(SC)] was set at naught by the Apex Court in *Union of India vs Rajasthan Spinning & Weaving Mill* [(2009) 180 Taxman 609(SC)] wherein it was held that penalty is not automatic. In *CIT vs. M/s*

*Sidhartha Enterprises* [(2009) 184 Taxman 460 (P & H) (HC)] it was held that *"the judgment in Dharmendra Textile cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. Even so, the concept of penalty has not undergone change by virtue of the said judgment. Penalty is imposed only when there is some element of deliberate default "*

(xiii) The Appellant had a reasonable cause as the Act was recently been enacted and the Appellant is not well versed with the said Act.

2.8 The Tribunal passed the impugned Order dated 9th August, 2023 whereby the order imposing penalty u/s 43 of the BMA passed by the Respondent was confirmed by giving following findings:

(i) Though there may be merit in the submission of the Assessee that the asset cannot be classified as undisclosed since the source for the acquisition is established, we need to look at the requirement u/s 43 of BMA. Therefore, before proceeding further, we will look at the relevant provisions of the BMA.

(ii) The BMA is enacted on 26th May, 2015 by Act number 22 of 2015 and came into force with effect from 1st 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.*

*Explanation. —The value equivalent in rupees shall be determined in the manner provided in the Explanation to section 42*."

(iii) 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 u/s 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 u/s 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.

(iv) Given this the argument that the penalty u/s 43 can be levied only with respect to undisclosed asset is not tenable.

(v) 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.

(vi) The alternate plea of the assessee is that the non-disclosure of the foreign asset in schedule FA of the return is an inadvertent bona fide error and therefore, does not warrant levy of penalty. In this regard, it is noticed that though the assessee claims that non-reporting is a bona fide mistake, there is nothing on record in support of the said claim.

(vii) The contention that the assets are not undisclosed assets may be factually true, but penalty u/s 43 is levied for non-reporting of overseas investments and not for making investments from unaccounted money.

(viii) The provision 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.

(ix) 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 u/s 43 of BMA in an arbitrary and unjustified manner.

(x) Reasonable cause is only mentioned and is applicable to other defaults as per section 45 of BMA. The said concept cannot be imported in section 43, without any specific reference by the Legislature.

(xi) As per Section 72(c), the provisions of BMA will apply even if the undisclosed Asset is created prior to commencement of the BMA.

3. Aggrieved by the decision of the Tribunal, the Appellant filed Appeal u/s 19 of the Black Money (Undisclosed Foreign Income and Assets) & Imposition of Tax Act, 2015 before the Hon'ble Bombay High Court. Along-with the Appeal, Mrs. X also filed an Affidavit of the Chartered Accountant stating that non-disclosure was on account of his mistake.

4. The Hon'ble Bombay High Court has admitted following Substantial Questions of Law:

(i) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming the levy of penalty of Rs.10,00,000/- u/s 43 of the Black Money (Undisclosed Foreign Income and Assets) & Imposition of Tax Act, 2015, without appreciating that the Asset was created before the commencement of the BMA, and thus, the provisions of BMA do not apply and consequently, the Penalty requires to be deleted?

(ii) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble High Court can consider the Affidavit of the Chartered Accountant filed, which was not filed before the lower authorities and was filed for the first time before it and further the Appellant not being conversant with the provisions of BMA and thereby relying on the expertise of a Chartered Accountant had a reasonable cause to vitiate the levy of penalty?

(iii) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming the levy of penalty of Rs. 10,00,000/- u/s 43 of the BMA for non-disclosure of foreign investment and bank account in

schedule FA of the Return of Income filed u/s 139 of the Income Tax Act, 1961 for A.Y. 2016-2017?

(iv) Whether, on the facts and in the circumstances of the case and in law, the impugned order passed by the Tribunal levying penalty of Rs.10,00,000/- u/s 43 of the BMA is perverse, as it did not follow the decision of co-ordinate bench in ***ACIT v. Leena Gandhi Tiwari*** **[2022] (Mumbai - Trib.)** and also failed to appreciate that, on same facts, no penalty was imposed on the husband of the Appellant?

5. The above Appeal is fixed for final hearing.

## NOTE

1. The relevant laws and statutes mentioned in the Moot Proposition are *pari materia* to the laws and statutes of India.

2. The Moot Proposition is purely a work of fiction and created solely for the purpose of the Moot Court Competition. The characters, institutions, organizations and events depicted in this Moot Proposition are purely fictional. Any similarity or resemblance to actual persons or actual events is purely coincidental and unintentional. The Moot Proposition does not intend to defame/denigrate/hurt the sentiments of any person(s), institution, communities, groups or class of persons.