IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'BMA*' BENCH, MUMBAI
[*THE BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) & IMPOSITION OF TAX ACT, 2015]

[Coram: Pramod Kumar (Vice President), and Rahul Chaudhury (Judicial Member)]

BMA No. 1/Mum/2022
Assessment year 2017-18

Additional Commissioner of Income Tax
Central Range 1, Mumbai **……..……Appellant**

Vs.

Leena Gandhi Tiwari **……Respondent**
41, Ritu Apartments, 208 B J Road,
Bandra West, Mumbai 400 050 [PAN: AAFPG5709D]

Appearances by
Yogesh Kamat, Commissioner (DR) *for the appellant*
None *for the respondent*

Dates of the hearing : 10/03/2022 and 25/03/2022
Date of pronouncement : 29/03/2022

O R D E R

Per Pramod Kumar, VP:

1. This appeal, filed by the Assessing Officer, challenges the correctness of the order dated 17th December 2021 passed by the learned Commissioner (Appeals) in the matter of penalty under section 43 of the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act 2015 *(hereinafter referred to as '***the BMA'***)* for the assessment year 2017-18.

2. Grievance of the Assessing Officer, in substance and as a whole, is that the learned Commissioner (Appeals) erred in deleting the impugned penalty which was imposed on the taxpayer for not disclosing, in the income tax returns filed by the assessee under section 139, a foreign bank account in which she was a signatory for her late mother and held it in the fiduciary capacity as much, even though the money held therein did not belong to, and were not beneficially owned by, the taxpayer and that position is accepted by the authorities and has attained finality as such. The short case of the Assessing Officer is that *dehors* the non-taxability of the amount in the hands of the assessee and *dehors* the *bonafide* conduct of the assessee, as long as the assessee is a signatory of the undisclosed foreign bank account, and the legal owner as such, the penalty under section 43 of the BMA must be imposed. There is no dispute that the money held in the said account was eventually donated to a charity of global repute i.e. namely Médecins Sans Frontières UK, in deference to the wishes of the assessee's late mother, that it was brought to tax in the hands of the late mother's legal representative, and that, at no stage, assessee used the said money in any manner whatsoever.

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is one of the prominent businesspersons in India, chairperson of a well known pharmaceutical company, and she was one of the signatories to a foreign bank account, which she had not undisclosed to the Indian tax authorities until she filed her income tax returns under section 153A on 21st April 2018. This bank contained a balance of UK £ 2,34,710 which was eventually donated, much before the Indian tax authorities even came to know about it, to a Noble Peace Prize awarded to charity by the name of Médecins Sans Frontières (MSF) on 9th February 2017- in deference to the wishes of her late mother Dr Pramila Gandhi. On 6th July 2017, an intelligence input was received by the income tax investigation wing at Mumbai, which indicated that the assessee is a signatory to a foreign bank account which may not have been disclosed to the Indian tax authorities. It is in this backdrop a search and seizure operation was carried out from 15th September 2017 to 21st September which covered the assessee as also the other connected persons. During the course of these proceedings, the matter regarding this bank account was also probed further. Prashant Kumar Tiwari, assessee's husband and who was handling this account, accepted that there was a bank account with Kleinwort Benson, Guernsey. It was also accepted that he, along with the assessee, were signatories to this account but this account actually belonged to Dr Pramila Gandhi, assessee's mother who passed away on 13th August 2016. It was further submitted that in due deference to the wishes of Mrs Pramila Gandhi, the entire amount lying in the said account was donated, on 9th February 2017, to a French charity by the name of Médecins Sans Frontières. As regards the origin of funds, the explanation was as follows. On 14th January 1986, Shri Arvind V Gandhi (AVG, in short), father of the assessee before us, had an untimely death at a rather young age of 55. The assessee and her husband were, at the point of time when AVG passed away, green card holder residents of the United States, and were non-residents under Indian tax laws. On 3rd July 1986, they returned to India, as a support to the family and to Dr Pramila Gandhi, and to look after the business interests of the late AVG- importantly USV Pvt Ltd. Upon AVG's death, it was also discovered, with inputs from one of his confidantes and a close friend- namely Vasant Thakkar, that he 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. It was in this backdrop that the assessee and her husband, alongwith Vasant Thakkar, travelled to Zurich and completed formalities about the transfer of this bank account to their names, but the understanding was said to be that the assessee and her husband were holding the bank account purely as trustees and the monies were to be used for the benefit of Dr Pramila Gandhi, as was apparently wished by late AVG. The interpersonal relationship between the assessee and her husband vis-à-vis Dr Pramila Gandhi hit a tough patch and normalcy could resume only in 1999. This account, in the meantime, was lying dormant and inactive. In 1999, upon resumption of normalcy in this relationship, and at the instructions of Dr Pramila Gandhi, the bank account was transferred to Kleinwort Benson, London branch and then to Kleinwort Benson, Guernsey. There is a mention about the account being maintained with Societe Generale Bank, St James Square, London branch, but the account is the same and the difference in names of the bank is apparently on account of change of ownership by way of acquisition. This bank account remained by and large unattended though there were accretions in the account of yields from the investments When Dr Pramila Gandhi enquired about this account in January 2016, it was found, in July 2016, that this bank account had no transactions by the assessee and her husband, that this bank account had become inoperative and dormant, and that the KYC formalities in respect of the same were required to be done afresh. The account was then revived again. It appears that when the assessee and her husband discussed the matter again with Dr Gandhi, she expressed

a desire to donate the entire credit balance in that account to a charity in the field of medicine. Accordingly, upon her death, the entire credit balance of this account, i.e. £ 2,34,710, to Médecins Sans Frontières, UK. The explanation so given by the assessee and her husband was accepted, and, accordingly, the entire amount of £ 2,34,710, was brought to tax, under section 10(3) of the BMA, in the hands of Prashant Kumar Tiwari, in a purely representative capacity as legal representative of the late Dr Pramila Gandhi. All consequential legal action followed as such, in the hands of late Dr Pramila Gandhi, and 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. In fact, after taking note of the above position, the assessment order in the assessee's case concluded that "**the undisclosed income and asset of the foreign bank account no. 20115101 in the case of Leena Gandhi Tewari is assessed at NIL**". The matter, however, did not rest there. Notwithstanding the above finding in the assessment proceedings and notwithstanding the acceptance of the explanations given by the assessee, the Assessing Officer proceeded to impose the penalty under section 43 on the ground that, *dehors* any other factor about the non-taxability of the *bonafides* of the assessee's conduct or belief, the mere fact of being a signatory of a foreign bank account not disclosed in the return of income is to be visited with penal consequences under section 43 of the BMA. The elaborate submissions made by the assessee were reproduced in the Assessing Officer's order but without even specifically dealing with the same. It was explained that as per the undertaking given by her husband, even though she is technically a second signatory to the said bank account, the account is operated by the first signatory, i.e. the husband. It was also explained that the assessee's being the second signatory was entirely in a fiduciary capacity and for the benefit of her ailing mother. It was submitted that looking to the financial status of the assessee, and the fact that her personal tax liability is Rs 159.20 crores for the year and the aggregate annual tax liability, including that of her husband and the private company of which she is chairperson, is of Rs 516.30 crores for the year, such an omission is nothing more than a *bonafide* mistake. It was also explained that the money has come from a legitimate source and the bank account, right from the time she became a signatory of the same, was not at all touched, and eventually, everything in the said account was donated as per the wishes of the actual owner of the account in whose hands it is assessed to tax under the BMA anyway. It was then submitted that everything was duly disclosed under section 132(4) of the Income Tax Act, 1961, and, therefore, the provisions of the BMA have no application in the matter. It was then submitted that the BMA does not have any retrospective application, as it would be violative of the provisions of Article 20(1) of the Constitution of India. A reference was then made as to what could constitute 'furnishing inaccurate particulars in the return' and how the present non-disclosure would not fit into the same. It was once again reiterated that non-disclosure in question, which is in respect of being a signatory to a bank account held in the capacity as a trustee and of which the assessee was not the beneficial owner, cannot be said to be a lapse to be visited by the penal consequences under section 43 of the BMA. A lot of emphasis was placed on the use of the word 'may' in Section 43 of the BMA which signifies that this penalty is to be imposed only if the Assessing Officer is satisfied that the case so warrants, and contrast of expression 'may' in Section 43 was made with the expression 'shall' appearing in Section 60 of the BMA. It was explained that this penalty cannot be said to be mandatory in nature, and a reference was also made to Hon'be Surpeme Court's judgment in the case of **Hindustan Steel Ltd Vs The State of Orissa [(1972) 83 ITR 26 (SC)]**. A large number of judicial precedents were then referred in support of the proposition that no penalty is leviable when two views are possible on the same, and that no penalty can be levied when the conduct of the assessee is *bonafide*. None of these submissions, however, impressed the Assessing Officer. The Assessing Officer noted that "**the existence of this bank account was never disclosed in any of the**

returns filed prior to search action under section 132 of the Act on 15th September 2017". As regards the beneficial ownership of the bank account being with Dr Pramila Gandhi, the Assessing Officer held that whether or not the assessee has beneficial ownership of the account, the assessee is under an obligation to disclose the same in the income tax return, and "**thus, the assessee has failed to disclose the details of foreign bank account held with Kleinwort Benson Bank in Schedule FA of the Indian Income Tax Returns for the respective years**". As regards the application of the BMA being prospective only, the Assessing Officer noted that the BMA "**came into effect as on 1.4.2016, the assessee had closed the bank account….on 9.2.2017 which is very well after the introduction**" of the BMA. It was then noted that the plea of a voluntary disclosure under section 132(4) was not acceptable as the declaration was made after the existence of the unaccounted foreign bank account was detected. It was again reiterated that non-disclosure of a foreign bank account for all these years, till the search and seizure operation was carried out, cannot be said to be 'bonafide'. A reference was then made to Hon'ble Delhi High Court's decision in the case of **CIT Vs Zoom Communications Pvt Ltd [(2010) 327 ITR 510 (Del)]**, as also to the wordings of Section 43. On the basis of these reasons, as also the detailed discussions in his order, the Assessing Officer concluded that it was a fit case for imposition of penalty. The Assessing Officer thus proceeded with the imposition of penalty under section 43. Aggrieved, assessee carried the matter in appeal before the CIT(A) who deleted the penalty, after noting that "**the appellant is not found to be engaged in managing the account under dispute**" as it is owned up by her husband, on the short ground that since "**her** *(the assessee's)* **husband has been imposed the penalty for non-disclosure of this account which has been confirmed by the CIT(A)**", "**it is held that no penalty is leviable under section 43 of the BMIT Act in the hands of the assessee**". The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

4. We have heard the learned Departmental Representative, perused the material on record, as also the case records, and duly considered facts of the case in the light of the applicable legal position. We have noted that the notice of hearing was duly served upon the assessee but rather than appearing before us, she has forwarded the said notice, vide her letter dated 3rd March 2022, to the Assessing Officer with a request to withdraw the appeal before us. Be that as it may, we are satisfied that the adjudication on this appeal requires us to primarily deal with a couple of short points of law and an objective perception about what constitutes bonafide conduct of the assessee, within a narrow compass of the undisputed facts, and that it is a fit case for disposal on the basis of material on record and *ex-parte qua* the assessee.

5. As we look at the scheme of the BMA and the ITA, in conjunction with the binding judicial precedents from Hon'ble jurisdictional High Court, one of the possible analysis could possibly be as follows, and while we undertake this analysis of the legal position, we must also bear in mind the fact right now we are dealing with the validity of penalty under section 43 of the BMA, and this section comes into play only when a resident, other than not ordinarily resident in India under section 6(6), filing an income tax return under section 139(1), (4) or (5) of the Income Tax Act, 1961 [hereinafter referred to as the 'ITA'], "**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**". It is also important to note that section 4 r.w.s. 2 (11) of the BMA, dealing

with chargeability of undisclosed foreign asset, defines an undisclosed foreign asset as "**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 beneficial owner, and he has no explanation about the source of such investment in such asset or the explanation given by him is, in the opinion of the Assessing Office, not satisfactory**". The definition of an undisclosed foreign asset, under the BMA, is thus not dependent on 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. The position so far as undisclosed foreign income is concerned, the position is quite different inasmuch the definition of undisclosed foreign income is concerned, it is materially different- as provided under section 4(1)(a) and (b) of the BMA, but then right now we are not concerned with that aspect of the matter. The observations that we make in this order here, therefore, may not have any bearings, in view of the peculiarities of that definition of the 'undisclosed foreign income, particularly with reference to 'filing' of the return within the statutory time frame provided under the ITA and for a variety of reasons that we need not elaborate at this stage. Suffice to say that, in the present case, we are concerned with the non-disclosure of an undisclosed foreign asset, i.e. a foreign bank account, in the income tax return filed under section 139(1), and our observations, even with respect to discussions on possibility of one possible approach to the issue before us, hereinabove must essentially be viewed in that limited context. Coming to the provisions of Section 43 of the BMA, quite clearly trigger for penalty under section 43 thus is the non-disclosure of a foreign asset, held as a beneficial owner or otherwise, or non-disclosure of a foreign income in the income tax return filed under section 139(1),(4) or (5), and this penalty is an additional consequence, in addition to the consequences set out in the ITA in respect of such a lapse. The BMA has come into force on 1st April 2016. As far as the question of non-disclosure after the commencement of the BMA is concerned, thus, the first assessment year in question is the assessment year 2017-18, i.e. the assessment year before us. It is also important to bear in mind the fact that the assessee was subjected to a search and seizure operation on 15th September 2017 and consequently the assessee had to file the income tax returns under section 153A for the assessment year 2017-18 on 21st April 2018. As to what happens as a result of such an exercise, we may gainfully refer to Hon'ble jurisdictional High Court's judgment in the case of **Principal Commissioner of Income Tax Vs JSW Steel Limited [(2020) 422 ITR 71 (Bom)]** wherein Their Lordships noted, *inter alia,* that **"section 153-A(1) provides that where a person is subjected to a search under section 132 or his books of accounts, etc. are requisitioned under section 132-A after 31-5-2003, the assessing officer is mandated to issue notice to such person to furnish return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made. Such returns of income shall be treated to be returns of income furnished under section 139. Once returns are furnished, income is to be assessed or re-assessed for the six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, once section 153-A(1) is invoked, assessment for 6 assessment years immediately preceding the assessment year in which search is conducted or requisition is made becomes open to assessment or re-assessment. Two aspects are crucial here. One is use of the expression "notwithstanding" in sub-section (1); and secondly that returns of income filed pursuant to notice under section 153-A (1)(*a*) would be construed to be returns under section 139. The use of *non obstante* clause in sub-section (1) of section 153-A *i.e.*, use of the expression "notwithstanding" is indicative of the legislative intent that provisions of section 153-A(1) would have**

overriding effect over the provisions contained in sections 139, 147, 148, 149, 151 and 153". It was in this backdrop that Their Lordships of Hon'ble jurisdictional High Court held that "…**the original return which had been filed loses its originality and the subsequent return filed under section 153A of the said Act (which is in consequence to the search action under section 132) takes the place of the original return. In such a case, the return of income filed under section 153A(1) of the said Act, would be construed to be one filed under section 139(1) of the Act and the provisions of the said Act shall apply to the same accordingly**". Viewed thus, 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). In the present case also, it is the income tax return filed under section 153A on 21st April 2018 which is the income tax return acted upon by the Assessing Officer, and the assessment thereon has been finalized under section 153A r.w.s. 143(3) vide assessment order dated 29th March 2019. It is an admitted position that in the income tax return filed by the assessee under section 153A, the disclosure about the said foreign bank account was duly made- as noted by the Assessing Officer in the impugned order itself, and this income tax return alone has only been acted upon. Viewed thus, when it comes to examining any failure on the part of the assessee in not disclosing a foreign bank account for the assessment year 2017-18, i.e. the assessment year before us, it can indeed be said that what is to be seen is the return filed under section 153A and it is that return which, to borrow the words of Hon'ble jurisdictional High Court, is to be "**construed as one filed under section 139(1) of the Act and the provisions of the said Act** *(Income Tax Act, 1961)* **will apply to the same accordingly**". Essentially, 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 a corollary to the above position, the non-disclosure of the foreign bank account in the original return filed under section 139, for the assessment year 2017-18, may not be viewed as reason enough for the imposition of a penalty under section 43 of the BMA, because that original return filed under section 139(1) stands substituted by the subsequent income tax return filed under section 153A for the same year. It cannot thus be said that even after making necessary disclosure in the income tax return filed under section 153A for the assessment year 2017-18, the assessee can be visited with penal consequences for not making that disclosure in the income tax return filed under section 139(1) because, in the considered view of the Hon'ble jurisdictional High Court, the return subsequently filed for the same assessment year under section 153A is to be "**construed as one filed under section 139(1) of the Act and the provisions of the said Act** *(Income Tax Act, 1961)* **will apply to the same accordingly**". On a conceptual note, there can be situations in which the opportunity to file the return under section 153A can indeed work to the advantage of the assessee, as apparently in this case, and even fresh claims may be made which have, as in the case of JSW Ltd *(supra)*, meeting the judicial approval. Whatever be the consequence of this legal position, such conceptual notions, cannot negate the binding effect of the law laid down by the Hon'ble jurisdictional High Court. We may, however, add that the present discussion hereinbefore is in the light of the applicability of Section 43 of the BMA, and the observations made by us must be construed only in this limited context. 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. We have also taken note of the fact that the learned Assessing Officer' has defended the imposition of penalty under section 43 of

the BMA, on the ground that the bank account in question was in existence till 9th February 2017, i.e. well after the BMA coming into play. However, what the Assessing Officer overlooks is that the impugned penalty is not for income representing the undisclosed foreign asset but simply and only for the non-disclosure of the foreign asset in question. In view of these discussions, we are of the considered view that for the short technical reason set out above, the impugned penalty imposed on the assessee under section 43 of the BMA does not stand the test of judicial scrutiny. We, therefore, support the conclusions arrived at by the learned CIT(A). His reaching this conclusion may have been fortuitous, and for altogether different reasons-, what really matters is that he reached the right conclusion, and we, therefore, must uphold the conclusions arrived at by the learned CIT(A).

6. There are, however, many other reasons as well for holding that it was not a fit case for the imposition of penalty under section 43, and, for the sake of completeness, we must set out these reasons as well.

7. 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. While disclosure of all foreign assets is mandatorily required to be made in an income tax return, the penalty under section 43 of BMA comes into play only when the aggregate value of these assets exceeds Rs 5,00,000. Clearly, therefore, even statutorily, it is not a simple cause and effect relationship between non-disclosure of an undisclosed foreign asset in the income tax return, and penalty under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. The unambiguous intent of the legislature thus is to exclude trivial cases of lases 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. As to what should be the considerations for the exercise of this inherent discretion by the Assessing Officer, we find some guidance from Hon'ble Supreme Court's judgment in the case of **Hindustan Steel** *(supra)*, which, inter alia, observes that "**……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. The penalty will not also be imposed merely because it is lawful to do so. Whether a 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 a 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**". Essentially, therefore, the overall conduct of the assessee, and materiality of the lapse as also its being in the nature of a technical or venial breach of law, is the most critical factor so far as taking a call on the question of whether or not a penalty should be imposed for the assessee's failure to discharge a statutory obligation. The 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.

8. Let us, in the light of the above legal position, examine the facts of this case. As we proceed to examine the case of the Assessing Officer, we must also bear in mind the fact that

the assessee is a high net worth individual (HNI), with aggregate payment of taxes around Rs 2,350.66 crores in the last seven years by her, her husband and the private limited company she chairs- as noted by the Assessing Officer himself at page 8 of the impugned penalty order, and, when seen in the light of this financial position, the amount held in the alleged undisclosed foreign bank account is a small, if not trivial, amount of UK £ 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. It is also important to bear in mind the fact that there is a categorical finding by the first appellate authority that even though the assessed may have been technically a signatory of the undisclosed foreign bank account, her and her husband's conduct all along has unequivocally established complete detachment with the said asset so far as any personal interest is concerned- a typical hallmark of someone holding an asset in a fiduciary capacity and in trust. When the beneficial owner of the said bank account, i.e. her late mother, passed away, she and her husband simply donated money to a well-known charity of global repute, as was the wish of the departed soul. All the thirty years that she was the technical owner of this legacy left behind by her father, which was for the benefit of her mother, she simply did not touch the money- did not take a penny or add a penny. It is a somewhat rare situation with touching reverence, almost to a fault, to the wish of the assessee's late father that the money was kept intact for the benefit of the assessee's mother, which mother never used, and then donated it, within weeks of her mother's death, to a charity of her late mothers choice, and a charity which has earned the prestigious Noble Peace Prize in 1999 for its humanitarian work. The degree of reverence for the feelings of the parents, as unambiguously shown by the mother, is undisputed. With this kind of detachment, and truly dealing with this as trust money in letter and in spirit, her belief that she was not required to disclose it as 'her' bank account, cannot be said to be lacking bonafides. While the amount held in the said account is donated to the charity, the entire tax liabilities in respect of the same have been paid by the legal representative of Dr Pramila Gandhi, and the matter has attained finality as such. It is also important to bear in mind the fact that the uncontroverted stand of the assessee is that the assessee, as also 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. Whether this belief was correct or incorrect, for the present purpose of adjudicating on the penalty, is wholly irrelevant, as we are only concerned with bonafides of the plea of the assessed at this stage. The reason is simple. The scheme of penalty is of such a that essentially it does not cover the cases in which the lapses have occurred on account of good and sufficient reasons. A lapse *per se* cannot be reason enough to punish anyone, and the controversy, if at all, is about as to who has the onus of demonstrating the bonafides of such cases- the assessee or the revenue authorities, but once there is a clear finding of bonafides in conduct, irrespective of whether such conduct is lawful or not, the penalty is not impossible- unless, of course, the penalty is statutorily simply an automatic consequence, in cause and effect relationship. That's certainly not the case here. The very fact that the Assessing Officer has the discretion to impose a penalty puts him under a corresponding obligation to exercise the said discretion with proper regard to the facts and circumstances of the case in a holistic manner and in totality. The total amount involved in the undisclosed foreign account is UK £ 2,34,710 (equivalent to Rs 2,16,58,946 at the relevant point of time of assessing the said amount), which is relatively small considering the tax exposure of the assessee, as discussed earlier. The money in the said account did not belong to the assessee, was never used by the assessee and is part of the legacy left behind by her father in 1986- and this position is duly accepted by the revenue authorities. Not a rupee out of that bank account is held to be belonging to the

assessee, and the entire money has been brought to tax in the hands of the assessee's late mother. Even before the bank account was detected by the revenue authorities, the entire balance in the said account, as per instruction of the assessee's late mother, has been donated to a *bonafide* charity of the global repute. In these circumstances, the plea that such a 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, does merit acceptance. No reasonable person would consciously or deliberately withhold disclosure about this foreign bank account, for an ulterior motive, from the tax authorities, and, in any case, admittedly the money does not belong to the assessee- as is the position accepted by the Assessing Officer himself. Viewed thus, on merits of assessee's conduct, it was not a fit case for the imposition of impugned penalty. It is also not a case of siphoning of unaccounted Indian wealth to the undisclosed foreign bank accounts, prevention of which was the noble cause for which the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 was enacted immediately upon the present Government coming to the power. Such well-intended stringent legislation as the BMA, enacted for the larger causes of public good and to check tax evaders, cannot be so interpreted as to cause undue hardship to the citizenry for such harmless technical or venial breaches of the law. Francis Bacon, in his classic essay 'Of Judicature' (The Works of Francis Bacon, Volume 1 (1984), has said that "**Judges must beware of hard constructions, and strained inferences, for there is no worse torture than the torture of laws: especially in case of laws penal, they ought to have care that that which was meant for terror be not turned into rigour"**. Viewed in the light of these discussions, in our considered view, it was not a fit case for invoking the penal provisions under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, even if it was lawful for the Assessing Officer to do so. In view of these twin reasons also, the conclusions arrived at by the learned CIT(A) cannot be faulted. As we hold so, we may add that there are consequences for the lack of appropriate disclosure in the income tax return, and these consequences are provided under the Income Tax Act, 1961, and our observations hereinabove must not come in the way of those proceedings under the Income Tax Act, 1961.

9. The need to implement BMA in a strict manner, as learned Commissioner (DR) pleads for, can hardly be overemphasised. What it essentially means is that whenever any unaccounted income or undisclosed asset abroad is found, stern action, in accordance with the law, must be taken. Just as much as we must ensure that a guilty person does not go unpunished, we must also ensure that such tough laws, as the BMA is, do not inconvenience genuine people not falling in the category which is sought to be checked by the BMA. In the 2015 Union Budget speech, the then Hon'ble Finance Minister had 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**". That is the background in which the BMA was introduced, and that is the backdrop in which harsh penalties and prosecutions are contemplated under the BMA. To put a question to ourselves, can these provisions be invoked in the cases which more of bonafide mistakes, or, at worse, harmless carelessness. The answer is emphatically in the negative. The case before us is of, at best, inheritance of a bank account which the assessee's father opened forty years ago, and the assessee's father, as records indicate, was from a well-placed business family, with business interests abroad. The amount in the bank account, considering the status of the persons involved, is a very small amount of money. The person who inherited the said money

or the persons who were signatories to the bank account, did not put that money to any use so much so that ultimately that money was donated to a charity of global repute. The assessee and her husband were signatories to the said bank account because, as is the uncontroverted stand of the assessee, the actual owner, late Dr Pramila Gandhi had health issues and she was not in a position to travel to Zurich when formalities in respect pf the account inherited by her were to be completed. The subsequent developments spanning over several decades unambiguously corroborate this stand of the assessee. When we objectively see all these factors in totality, the inescapable impression is that the assessee is certainly not from the category of persons who were sought to be checked by this piece of legislation. To use it in a case in which a person has not reported a bank account, which is a lawful inheritance from her father and which contains a small amount that is eventually donated by her to a medical charity of global repute, will surely be inappropriate- more so when the assessee has an explanation which the Assessing Officer himself has accepted. The path of idol worshipping the law, even at the cost of sacrificing the unambiguous intent of the law, cannot take us to the goal of protecting the majesty of law in letter and in spirit- something that every judicial officer must strive for. 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. Undoubtedly, the Assessing Officer has discretion in the matter, and that is what, as we have noted earlier as well, the use of the expression 'may' in Section 43 suggests. When the exercise of a statutory power is not warranted or justified on a well-considered appreciation of the facts of the case on which a reasonable conclusion would be that the lapse is *bonafide* and devoid of any ulterior motives, a public authority must not exercise that power just because it would be lawful for the said authority to exercise the same. That's why human discretion is involved in the exercise of such powers, and this discretion is to be exercised having regard to the facts of each case in a fair, objective and judicious manner and without losing sight of the bigger picture about the related state of affairs and the scheme of relevant legislation. Unless there are sufficient *prima facie* reasons to at least doubt *bonafides* well demonstrated by the assessee, an assessee cannot be visited with penal consequences. The *bonafides* actions of the taxpayers must, therefore, be excluded from the application of provisions of such stringent legislation as the BMA. In this light, and keeping in mind the object of the BMA, we do not subscribe to the learned Departmental Representative's perception that in the name of strict implementation of the BMA, a penalty for non-disclosure of the bank account in question will be justified under the stringent provisions of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. This is, of course, 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.

10. In view of the detailed reasons set out above, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter. As we have reached the same conclusions on the basis of different reasons, we see no need to deal with the correctness of the path traversed by the learned CIT(A). As we part with the matter, we may take note of the useful flow of intelligence inputs, under the automatic exchange of information framework, about undisclosed assets abroad, and express satisfaction with the fact that the good work being done by the Government in this regard is yielding tangible results. Whereas the information obtained in this case clearly did not pertain to the kind of cases the tax administration is focussing to unearth, the fact remains that there is considerable progress in that direction- something which certainly seemed too optimistic a goal in not too distant a past.

11. In the result, the appeal is dismissed. Pronounced in the open court today on the 29th day of March 2022.

Sd/-	***Sd/-***
Rahul Chaudhary	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 29th day of March, 2022

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai