आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE

SHRI LALIET KUMAR, JUDICIAL MEMBER
AND
SHRI MADHUSUDAN SAWDIA, ACCOUNTANT MEMBER

BMA: 2/Hyd/2024		
Assessment Year: 2019-20		
Prasad Nimmagadda, Hyderabad. PAN No. ABKPN3078N	Vs.	Director of Income Tax, Investigation, DDIT / ADIT (Inv.)-2(1), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Shri K.A. Sai Prasad, AR	
Revenue by:	Mrs. M. Narmada, CIT-DR	
Date of hearing:	02/01/2025	
Date of pronouncement:	16/01/2025	

O R D E R

PER LALIET KUMAR, J.M:

This appeal is filed by the assessee feeling aggrieved by the order passed by the Ld. Commissioner of Income Tax (Appeals)-11, Hyderabad dated 31/10/2024 for the AY 2019-20.

2. At the outset, it is noticed from the record that there is a delay of 01 days in filing the appeal before the Tribunal. With respect to the belated filing of the appeal, the Learned Authorized Representative of the assessee has e-filed an affidavit, dated 22/10/2024 wherein it was stated that since their office had not

received the Digital Signature Certificate from the assessee on time, they could not proceed with the filing of the appeal within the prescribed time limit. On a perusal of the reasons advanced by the assessee for belated filing of the appeal which are not attributable to the assessee, we hereby condone the delay of 01 days and proceed to adjudicate the appeal on merits.

3. The grounds raised by the assessee read as under:

> *"1. The order U/s. 17 of the Black Money (UFIA) and imposition of Tax Act dated 26/03/2022 passed by the Ld. CIT(A), Hyderabad confirming the order U/s. 43 is incorrect and wrong both in law and on facts.*
>
> *2. The Ld. CIT(A) ought to have noted that the appellant has explained the sources for the investment fully and no undisclosed income was determined in the assessment U/s. 10 and hence no penalty U/s. 43 ought to have been levied taking a lenient view.*
>
> *3. The Ld. CIT(A) ought to have noted that the omissions in the FA schedule are clerical in nature and committed due to inadvertence and were rectified in subsequent years voluntarily by the appellant and hence no penalty U/s. 43 ought to have been levied.*
>
> *4. The Ld. CIT(A) failed to observe that the appellant is mere subject of insurance and had no legal or beneficial interest therein, and hence no disclosure in FA schedule of the insurance policies was required.*
>
> *5. The appellant craves to add, amend, modify, rescind, supplement or alter any or more grounds of appeal stated herein above either before or at the time of hearing of this appeal."*

4. Further, the assessee has also raised an additional ground of appeal which reads as under:

> *"The Ld. First Appellate Authority is not justified in confirming the penalty for AY 2019-20 levied U/s 43 of BMA Act in respect of non-disclosure of investment in the ITR for AY 2017-18 especially when there is complete disclosure in ITR for AY 2019-20."*

5. Brief facts are that in the present case, the Ld. AO for the AY 2019-20 has noticed that the assessee failed to disclose the following investments in foreign assets in the return of income:

> *"1. Failed to disclose the investment in Best Skyline Inc, for AY 2012-13 to 2015-16 and AY 2017-18 and also holding of insurance policies bearing no.94428125 and 6015871 for 40 million USD in the company M/s. Best Skyline Inc, Bahama for AY 2012-13 to 2015-16 and AY 2017-18 (These policies have been closed in the month of September, 2016).*
> *2. Failed to disclose the investment in Lemon Stone Holding Pte Ltd, Mauritius in the AY 2017-18. He had made disclosure in this regard in his ITR for AY 212-13 to 2016-17 and again in AY 2018-19 to 2019-20.*
> *3. Failed to disclose the investment amounting to Rs. 7,22,07,540/- in residential flats in Singapore made during FY 2016-17 in his ITR for AY 2017-18 also not shown the investment amounting to Rs. 12,72,798/- in property situated at Malaysia made during the FY 2016-17.*
> *4. Failed to disclose the possession of shares received from Mylan Inc, USA received as ESOPs and RSUs in his return of income for AY 2012-13 to 2015-16."*

As the assessee failed to disclose the foreign assets in the return of income, the Ld AO has issued a notice to the assessee and as the assessee failed to comply with the notice, the Ld. AO accordingly

imposed the penalty of Rs. 10,00,000/- U/s. 43 of the Black Money (UFIA) and Imposition of Tax Act, 2015 [in short "the BMA Act, 2015"].

6. Feeling aggrieved by the order of the Ld. AO, the assessee preferred an appeal before the Ld. CIT(A). The Ld. CIT(A), after dealing with the contention of the assessee, have decided the issue against the assessee for the year under consideration. Feeling aggrieved the assessee in further appeal before us by raising the grounds as extracted herein above.

7. The submissions of the assessee are that on account of inadvertent mistake, the assessee failed to disclose the investments in the AY 2017-18. However, as the assessee continued to show these investments in the prior & subsequent Assessment Years, the impugned order is required to be set-aside. Further, it was submitted that the breach, if any, occurred in the AY 2017-18 and not in the AY 2019-20, therefore, the penalty, if any, U/s. 43 of the BMA Act, 2015 cannot be imposed in the AY under consideration. The Ld. AR further submitted that the Ld. AO, during the course of the assessment held that the assessee was able to furnish the details of the investments made and no assessment was made U/s. 10 of the BMA Act, 2015. The Ld.AR also drawn our attention to the order passed by the

Mumbai Bench of the Tribunal in the case of M/s. Ocean Diving Centre Ltd vs. CIT, in BMA No.22/Mum/2023, dated 30/08/2023, wherein under the identical facts, the Tribunal had decided the issue as under:

> *"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 here inbelow:*
>
> > *"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."

Therefore, the Ld. AR prayed for deletion of the penalty.

8. Per contra, the Ld. DR relied upon the orders passed by the lower Authorities and she had drawn our attention to the various provisions of the BMA Act, 2015 and more particularly, our attention was drawn to section 43 of the BMA Act, 2015 which reads as under:

> ***"Penalty for failure to furnish in return of income, an information or furnish inaccurate particulars about an asset (including financial interest in any entity) located outside India.***
>
> ***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:"*

9. It was submitted that from a plain reading of the above said provisions of section 43 of the BMA Act, 2015, it is clear that when the assessee failed to disclose the assets in the return of income as contemplated in law, then the Revenue Authorities are right in imposing the penalty on the assessee.

10. The Ld. DR relied upon the decision of the Mumbai Tribunal in the case of Ms. Shobha Harish Thawani vs. JCIT [2023] 154 taxmann.com 564 (Mumbai – Trib.) wherein it was held as under:

"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 nondisclosure 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.

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 nondisclosure 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."

11. The Ld. DR had submitted that the decision of the Bombay Tribunal in the case of Ocean Diving Centre (supra) was *per incurium* as the binding decision of the coordinate bench in the case of M/s. Shobha Harish Thawani had not been referred and distinguished by the Tribunal while granting the relief to the assessee.

12. We have heard the rival contentions and perused the material available on record. It is an undisputed fact that the assessee, in the return of income for the AY 2017-18, had failed to disclose the foreign assets held by him outside India, which were required to be disclosed in the return of income. The Ld. CIT(A), in para 6.8 of his order, have captured various investments which were required to be disclosed by the assessee and yet not disclosed in the return of income for the AY 2017-18 which are as under:

> *"i. Investment in Best Skyline Inc., for AY 2017-18.*
> *ii. Insurance policies bearing no. 94428125 and 60158671 for 40 million USD in the company Best Skyline Inc, for AY 2017-18.*
> *iii. Investment in Lemon Stone Holding Ptd Ltd, Mauritius in the AY 2017-18.*
> *iv. Investment amounting to Rs. 7,22,07,540/- in residential flats in Singapore made during FY 2016-17 relevant to AY 2017-18 and investment amounting to Rs. 12,72,798/- in property situated at Malaysia made during FY 2016-17 relevant to AY 2017-18."*

13. The above said non-disclosure of the assets by the assessee in the return of income for the AY 2017-18 had not been disputed. However, the assessee has contended that the failure on the part of the assessee to disclose the same was on account of omission due to inadvertent mistake and it should have been considered as a curable mistake. It was further submitted that the assessee has all along been showing the assets in the return of income for the assessment years prior to AY 2017-18 and thereafter also. Further, the assessee

has already furnished the information with regard to the source of the investment during the assessment proceedings for the AY 2019-20. It was submitted that the assessee will not gain by not disclosing the information more particularly, when the assessee has been disclosing the same information in the previous and subsequent assessment years.

14. Section 43 of BMA, Act, 2015 requires the Assessing Officer to impose a penalty of Rs. 10 lakhs in case there is a failure on the part of the assessee to furnish inaccurate particulars of investment outside India. In the present case, admittedly the assessee has failed to disclose the said assets outside India and when this fact came to the notice of the Assessing Officer in the assessment proceedigns for the AY 2019-20 then as per the procedure provided U/s. 46 of the BMA Act, 2015, the Assessing Officer had issued the show cause to the assessee for imposing the penalty.

15. The assessee, though had pleaded ignorance or omission or technical glitch to justify non-disclosure in the return of income, the same has been rejected by the Assessing Officer /CIT(A). We are of the opinion that though Section 43 has been couched in the mandatory manner which commands the Assessing Officer to impose the penalty

unless some reasonable cause has been demonstrated by the assessee for not disclosing the assets in the return of income. There is sacrosanct purpose for providing this imposition of penalty i.e., to curb the menace of Black Money and the assets possessed outside India with the help of Black Money in foreign countries. But the question arises whether the imposition of penalty is automatic in case there was a venial or technical breach also. In our considered opinion, that cannot be the inference and conclusion. The law has contemplated to issue show cause notice to the assessee as per Section 46 of B.M.A Act and if the penalty is necessarily being required to be imposed then there was no purpose of issuing the show cause notice to the assessee. The Legislature has deliberately provided and mandated for issuance of the show cause notice so that the assessee can explain the reasonable cause for not disclosing the investment in Foreign countries in the return of income. In the present case, the Assessing Officer after examining the case of the assessee had not made any addition under Section 10 of the B.M.A Act as the Assessing Officer was satisfied that the assessee had explained the source of investment which was containing for the earlier years starting from A.Y. 2012-13 onwards. In the present assessment year, no fresh investment was made by the assessee and

the previous investments made by the assessee were required to be disclosed during the year under consideration. Undoubtedly, the explanation of source of investment as per Sections 3 and 10 of B.M.A Act and failure to disclose as per Section 43 of B.M.A Act per se may be independent but both are required to be read together and find out the intention of the Legislation. In the present case, since the explanation relating to the source of investment has been accepted and therefore, the failure on the part of the assessee to disclose the assets for the year under consideration cannot be vitiated on account of malafide or an attempt to evade the rigours of the Act. No fresh investment has been made and all the investments made in the earlier years, simply have been continued in the year under consideration. All these aspects clearly show that there was bonafide mistake on the part of the assessee to mention and disclose the same in the return of income. In view of the above, the penalty imposed by the lower authority is required to be deleted. Furthermore, we may follow the reasoning given by the co-ordinate Bench of the Tribunal in the case of Ocean Diving Centre (supra) wherein on identical facts, the Tribunal had deleted the penalty imposed upon the assessee.

16. The reliance of the Revenue on the decision of the coordinate Bench in the case of Ms. Shobha Harish Thawani (supra), is not applicable to the present facts of the case as the assessee in the present case, has all along disclosed the investment in the prior and subsequent assessment years and furthermore, the assessee was able to disclosed and explained the source of investment in foreign countries for the assessment year 2017-18 and therefore, the said decision is not applicable to the facts of the present case. Furthermore, we may fruitfully rely upon the decision of the jurisdictional High Court in the case of Mylan Laboratory reported in [2022] 137 taxmann.com 178 (TELANGANA) wherein it was held as under:-

> *"35. In Union of India v. Kamlakshi Finance Corporation Ltd. 1992 taxmann.com 16, Supreme Court held and reiterated that the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the department, which in itself is an objectionable phrase, and is the subject matter of an appeal can be no ground for not following the appellate order unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to the assessee and chaos in administration of the tax laws.*
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> *36. Following the above decision, Supreme Court again in Collector of Customs v. Krishna Sales (P.) Ltd. 1994 Supp. (3) SCC 73, reiterated the proposition that mere filing of an appeal does not operate as a stay or suspension of the order appealed against. It was pointed out that if the authorities were of the opinion that the goods ought not to be released pending the appeal, the straight-forward course for them is to obtain an order of stay or other appropriate direction from the Tribunal*

or the Supreme Court, as the case may be. Without obtaining such an order they cannot refuse to implement the order under appeal.

37. Following the above decisions of the Supreme Court, a Division Bench of the Bombay High Court in Ganesh Benzoplast Ltd. v. Union of India 2020 (374) ELT 552 held that non-compliance of orders of the appellate authority by the subordinate original authority is disturbing to say the least as it strikes at the very root of administrative discipline and may have the effect of severely undermining the efficacy of the appellate remedy provided to a litigant under the statute. Principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.

38. This principle has been reiterated by the Bombay High Court in Himgiri Buildcon & Industries Ltd. v. Union of India 2021 (376) ELT 257.

39. Therefore, the stand taken by the Assessing Officer that since the decision of the Income Tax Appellate Tribunal in the case of the petitioner itself for the assessment year 2014-15 has been appealed against the issue in question has not attained finality, is not only wrong but is required to be deprecated in strong terms being highly objectionable."

17. Respectfully, following the decision of the coordinate Bench in the case of Ocean Diving (supra) and the judgment of the Hon'ble Telangana High Court in the case of Mylan Laboratories (supra), we hereby allow the appeal of the assessee.

18. Since we have allowed the appeal of assessee on merits, therefore, we have left open the grounds raised by the assessee for the limitation of issuing the show cause notice by the Assessing Officer in the proceedings for A.Y. 2019-20 for the breach happened in the assessment year 2017-18 to be decided in appropriate case.

19. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 16th January, 2025.

Sd/-	Sd/-
(MADHUSUDAN SAWDIA) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 16/01/2025
OKK/sps

Copy to:

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3	Pr.CIT, Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order