

# EY Tax Alert

**Special Bench holds levy of penalty under Black Money Act for default in reporting of foreign assets, as discretionary and not automatic**

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## Executive summary

This Tax Alert summarizes a decision of the Special Bench of the Income Tax Appellate Tribunal, Mumbai (SB) dated 14 October 2025 in the case of Vinil Venugopal and Ranjeeta Vinil<sup>1</sup> (Taxpayers), wherein the issue before the SB was whether the imposition of penalty under Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA) for default in disclosure of foreign assets/income in the return of income (ROI), is “mandatory” and “automatic”.

The SB held that the use of the expression “may” under BMA, together with the fact that BMA also requires the tax authority to grant an opportunity of being heard to the taxpayer, indicates that penalty levy is discretionary in nature and not automatic.

<sup>1</sup> Vinil Venugopal (BMA No. 33/Mum/2024) & Ranjeeta Vinil (BMA No. 34/Mum/2024)



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## Background

- ▶ BMA was enacted for taxation of undisclosed foreign assets and income, as also for disclosure of foreign assets held and/or foreign income earned by a taxpayer being a resident<sup>2</sup> in India, in the ROI filed.
- ▶ Under BMA, the power is granted to the tax authority to levy penalty of INR1m on a resident taxpayer who has furnished ROI under the Indian Tax Laws (ITL) but has failed to furnish any information, or has furnished inaccurate particulars relating to any asset (including financial interest in any entity) located outside India held by them as beneficial owners or otherwise, or in respect of which they were beneficiaries, or relating to any income from a source located outside India.

However, no penalty shall be imposed if the value of such foreign asset/s (other than immovable property) is less than INR2m.

## Facts

- ▶ The Taxpayers had made investments in a foreign asset (i.e., with Avestar Global Opportunities SPC (Cayman Islands)) which they failed to disclose in their respective ROI for tax year 2019-20, in respect of which the tax authority initiated penalty proceedings.
- ▶ In response, the Taxpayers explained that disclosure was missed due to an oversight. The investment was from tax paid income and made through banking channels under the Liberalised Remittance Scheme of the Reserve Bank of India and, hence, the same cannot be considered as “undisclosed asset” under BMA. Furthermore, assets were disclosed in ROI of subsequent years before issuance of show cause notice for the present tax year. Hence, no penalty under BMA should be imposed.
- ▶ The tax authority concluded that once the fact of non-disclosure is established, penalty under BMA is automatic and should be mandatorily levied. The tax authority drew support from Question No. 18<sup>3</sup> of Circular No. 13 of 2015 dated 6 July 2015 issued by the Central Board of Direct Taxes<sup>4</sup>.
- ▶ The first appellate authority (FAA) upheld the penalty levy. Being aggrieved, the Taxpayers filed an appeal before the Division Bench (DB) of the Mumbai Tribunal against the FAA’s order.

- ▶ One of the grounds of appeal before the DB of the Mumbai Tribunal was whether penalty under BMA on failure to disclose foreign asset in ROI is mandatory and automatic. Because of conflicting decisions of the DB of the Mumbai Tribunal on this issue, the matter was referred to the SB.

## Issue before the SB

- ▶ The limited issue for consideration of the SB was with regards to the interpretation of the term “may” used in the provision imposing penalty under BMA, that renders the imposition of penalty discretionary and not mandatory/compulsory.

## Taxpayers’ arguments before the SB

- ▶ The use of the term “may” in the penal provision under BMA indicates that the tax authority, in appropriate cases involving bona fide oversight/mistake, waives the imposition of penalty.
- ▶ The mandatory requirement to issue a show cause notice for granting an opportunity of being heard to the taxpayer before levy of penalty also indicates the discretionary nature of the penal provision. Taking any other view will make this provision redundant.
- ▶ The use of the term “may”, along with the term “shall”, in the same penal provision, indicates that while there is discretion for levying penalty, once such discretion is exercised against the taxpayer, the quantum of penalty is fixed at INR1m, thus making it mandatory by the use of “shall”.
- ▶ The Taxpayers placed reliance on various judicial precedents<sup>5</sup>, including of the Supreme Court (SC) in the case of Hindustan Steel v. State of Orissa<sup>6</sup>, wherein it was held that the penalty need not be levied where there is a technical or venial breach of law. Reliance was also placed on certain judicial precedents<sup>7</sup> under BMA, wherein Tribunals have granted relief from levy of penalty to the taxpayer.

## Tax authority’s arguments before the SB

- ▶ BMA mandates imposition of penalty for any failure to disclose reporting of assets in ROI.

<sup>2</sup> As per the provisions of ITL

<sup>3</sup> “**Question No.18:** A person holds certain foreign assets which are fully explained and acquired out of tax paid income. However, he has not reported these assets in Schedule FA of the Income-tax Return in the past. Should he declare such assets under Chapter VI of the Act?”

**Answer:** Since, these assets are fully explained they are not treated as undisclosed foreign assets and should not be declared under Chapter VI of the Act. However, if these assets are not reported in Schedule FA of the Income-tax Return for assessment year 2016-17 (relating to previous year 2015-16) or any subsequent assessment year by a person, being a resident (other than not ordinarily resident), then he shall be liable for penalty of Rs. 10 lakhs under section 43 of the Act. The penalty is, however, not applicable in respect of an asset being one or more foreign bank accounts having an aggregate balance not exceeding an amount equivalent to Rs. 5 lakhs at any time during the previous year.”

<sup>4</sup> Apex body of direct tax administration in India

<sup>5</sup> ACST v. Ankit International [(2011) 46 VST 1 (Bom)], CIT v. Ask Enterprises [230 ITR 48 (Bom)], Vidarbha Industries Power Ltd. v. Axis Bank [(2022) 8 Supreme Court Cases 352]

<sup>6</sup> [83 ITR 36 (SC)]

<sup>7</sup> CIT(OSD) Central v. Shrem Alloys Pvt. Ltd. [BMA No. 8/Mum/2023; Order dated 29 August 2023]; Additional CIT v. Mr. Manoj Mahendrakumar Pandya [BMA No. 6/Mum/2024; Order dated 26 June 2024]; ACIT v. Rohit Krishna [BMA Nos. 36/MUM/2024; Order dated 27 November 2024] and Prasad Nimmagadda v. DIT [BMA No. 2/Hyd/2024; Order dated 16 January 2025]

- ▶ The provision of BMA, besides being mandatory, has a deterrent effect. Accordingly, omission of disclosure results in an automatic imposition of penalty. Bona fide or inadvertence of taxpayers are not relevant considerations.
- ▶ Reliance was placed on the SC decision in the case of Union of India v. Dharamendra Textile Processors<sup>8</sup>, according to which, the provision for imposition of penalty is compensatory and not penal in nature. Therefore, strict interpretation of the term “may” as discretionary, could not be accepted.
- ▶ Contentions that disclosure was missed out by oversight or inadvertence are not well-founded as the Taxpayers availed services of tax advisors.
- ▶ Reliance was also placed on the Mumbai Tribunal decisions in the case of Nirmal Bhanwarlal Jain<sup>9</sup> and Shobha Harish Thawani<sup>10</sup>, wherein the Mumbai Tribunal had confirmed the mandatory nature of penalty under BMA.

## SB's decision

The SB held that the penalty provision under BMA is not automatic or mandatory, and the tax authority has the discretion in the matter of levy of penalty for failure to disclose foreign assets and income in ROI depending upon facts and circumstances of the case, for the following reasons:

- ▶ The penal provisions of a taxing statute have to be construed strictly. Furthermore, the words shall be given their plain and ordinary meaning unless it leads to absurdity not intended by the statute. Hence, the use of the term ‘may’ indicates that it is discretionary in nature.
- ▶ Imposition of penalty, if considered as automatic, would result in the provision of BMA providing an opportunity of being heard to the taxpayer before levy of penalty, as redundant or superfluous. Hence, such interpretation should be avoided.

The SB also considered the Bombay High Court decision<sup>11</sup> relied upon by the Taxpayers in this regard, to conclude that the requirement of grant of an opportunity of being heard is indicative of the power of imposition of penalty being discretionary.

- ▶ The SB also took note of the SC decision in the case of Hindustan Steel Ltd. (*supra*) relied upon by the Taxpayers, wherein it was held that even where the minimum penalty is prescribed, the authority that is competent to impose the penalty will be justified in refusing the imposition of penalty when there is a technical or venial breach of the provisions of the ITL.
- ▶ Furthermore, the SB also distinguished the decision of the Mumbai Tribunal in the case of Nirmal Bhanwarlal Jain (*supra*) and Shobha Harish Thawani (*supra*) relied upon by the tax authority on the basis

that, in both these cases, the Mumbai Tribunal had confirmed the levy of penalty because the taxpayer was not able to substantiate that non-disclosure of foreign asset was bona fide in nature. Additionally, the SB did not approve the DB's decision in the case of Nirmal Bhanwarlal Jain (*supra*) on legal proposition, wherein the DB had held that imposition of penalty is automatic on failure to disclose foreign assets in ROI.

## Comments

This is a welcome decision and provides a sigh of relief to taxpayers who committed bona fide omission in reporting their disclosed foreign assets by sheer oversight, particularly those employees who, in reporting ESOP shares of foreign employer which, though offered as perquisite for taxation, missed out in making disclosure under the relevant schedule of ROI for reporting. The decision reaffirms a long-standing legal principle that no penalty could be imposed for technical or venial breach of law and taxpayers may not be punished if they have acted in a bona fide manner. While such is the principle, onus shall lie on the taxpayer to substantiate their bona fide conduct.

Furthermore, an SB decision is binding on DBs of all Tribunals.

<sup>8</sup> 306 ITR 277 (SC)

<sup>9</sup> Nirmal Bhanwarlal Jain v. CIT [BMA Nos. 13 to 15/Mum/2023; order dated 31 July 2023]

<sup>10</sup> Shobha Harish Thawani v. JCIT [BMA Nos. 1 to 3/Mum/2023; order dated 9 August 2023]

<sup>11</sup> ACST v. Ankit International (46 VST 1) (Bom) relying upon Nitco Paints Ltd (42 VST 71) (Bom)

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