

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत  
IN THE INCOME TAX APPELLATE TRIBUNAL  
SURAT BENCH, SURAT

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष  
BEFORE SHRI C.M.GARG, JUDICIAL MEMBER  
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER  
आ.अ.सं./I.T.A Nos.1503 & 2576/AHD/2016

निर्धारण वर्ष/Assessment Year : 2011-12

M/s. Schoeller Allibert Time Materials Handling Solutions Ltd. Survey No. 213, Sabri, Kachhig Nani, Daman – 396 210. PAN: AADCT1752G	Vs .	Income Tax Officer, Daman Ward, Daman.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Rishabh Shah, CA
राजस्व की ओर से /Revenue by	Shri B. P. K. Panda, Sr. D.R.

सुनवाई की तारीख/ Date of hearing:	11.01.2018
उद्घोषणा की तारीख/Pronouncement on	25-01-2018

**आदेश / ORDER**

**PER O. P. MEENA, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is directed against the order of Learned Commissioner of Income-tax (Appeals) - Valsad [in short "the CIT (A)"] dated 26.04.2016 & 02.08.2016 pertaining to Assessment Year 2011-12, which in turn has arisen from the two separate orders dated 17.08.2015 passed by the Income Tax Officer, Daman Ward, Daman (in

short "the AO") under section 271AA and 271BA of the Income Tax Act, 1961 (in short 'the Act').

**ITA No.1503/AHD/2016 for A.Y. 2011-12:**

2. The assessee raised the following grounds of appeal:

"1.The Id. CIT (A) erred in upholding a penalty of Rs. 18, 04, 254/- u/s. 271AA r.w.s. 274 of the Income Tax Act, 1961 without appreciating the facts and circumstances of the case.

2. The Id. CIT (A) erred in ignoring the fact that the transaction is not covered within the ambit of Transfer Pricing provisions.

3. The Id. CIT (A) erred in ignoring the fact that since no TP adjustment has been made, no penalty is leviable.

4. The Id. CIT (A) erred in ignoring the fact that the non-disclosure of transaction is a bona fide mistake and no penalty is leviable.

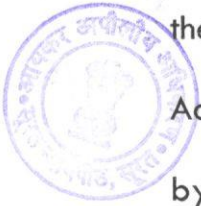
5. The Id. CIT (A) erred in ignoring the fact that no penalty can be levied on a debatable issue."

3. Succinctly, facts as culled out from the orders of Lower Authorities are that the assessee company filed its return of income (ROI) on 30. 09. 2011 by declaring total income at Rs. Nil. The assessment was finalised under section 143(3) after determining total income at Rs. Nil. During the course of assessment proceedings, it was noticed that the assessee company has issued shares 22,55,318 of the face value of Rs.10 per share at a premium of Rs.30 per share to its AE in foreign i.e. M/s. Schoeller Area Time Holding Pvt. Ltd. Singapore. However, no Audit Report in Form No. 3CEB was filed by the assessee, which is required to be filed under section 92D (3) of the



Act. Thus, the assessee violated the provisions of section 92B, wherein such transaction has been defined and needs to be quantified in the audit report in form 3 CEB. That DCIT, Transfer Pricing Officer-1, Ahmedabad, passed an order u/s. 92CA(3) of the Act on 31.12.2014 which was forwarded to the AO with following observation: " the case was referred by the Assessing Officer on the basis of transaction of share application money receipt reflected in the financials of the assessee. The assessee did not file statutory form 3 CEB for its International Transactions, did not maintain information, and comments as per Rule 10 D of the I.T. Rules, 1962.

4. Therefore, the Assessing Officer has requested to initiate and impose the penalty under section 271 BA and 271AA of the Act in this case.' Accordingly, the AO issued penalty, the reply of the has been reproduced by the AO in the penalty order at page 3 to 7. However, the said explanation was not found acceptable to the AO on the ground that the immunity from penalty cannot be granted because of the reasons that Explanation (i) (c) to Section 92B of the Act pertains to furtherance of its arm of defining the term "International Transaction" which inter-alia would include the Act of "Capital Financing" by an Enterprise. Capital Financing means any type of financing taken by the company, whether it be in the nature of issue of any type of securities or even financing by the way of taking loan by the enterprise. The said explanation (i) (c) to section 92B of



the Act is an inclusive term, which extends itself to the financing by way of loans, lending or guarantee, purchase or sale of marketable securities, any type of advances payments or deferred payments or receivable, or any other debt arising during the course of business. It was in the said inclusive definition of the term "Capital financing" the transaction in the nature of any type of advances is also made covered explicitly. Accordingly, the said transaction of receipt of share application money by the enterprise is purely covered in the term "International Transaction" and consequently, the transaction of receipt of share application money was required to be determined in accordance with the Arm's Length Pricing Principle. However, the assessee has failed to keep and maintain information and documentary evidence as required by subsection (1) of section 92D and failed to obtain and this report as required by section 92E of the Act. Hence, the penalty provisions under the I.T. Act is clearly protected in the case of the assessee. Accordingly, in view of the provisions of section 271AA of the Act, the AO imposed a penalty of sum equal to percent of the value of each International Transaction of the specified previous year.

5. Being aggrieved, the assessee has filed an appeal before CIT (A). It was claimed before the CIT (A) that receipt of share application money is pending allotment is merely a capital transaction and it does not have any impact on the income, losses or assets of the assessee. Premium received on



issue of share capital is not covered under the Chapter X as decided by the Hon`ble Bombay High Court in the case of Vodafone India Services (P) Ltd. vs. Union of India [2014] 50 taxmann.com 300/ [2015] 228 Taxman 25 [2014]368 ITR 1/ 271 CTR 488 (Bom). Therefore, it was contended that when its transaction is not covered under the provisions of chapter X, mentioning it in the Form No. 3CEB is not required. Besides, no shares were allotted to the AE during the year. The allotment of shares was made in the following year. Hence, the same does not come under the definition of an International Transaction as provided in section 92B. In support of his view, the assessee has placed reliance on the following decisions, namely Bharti Airtel Ltd. vs. ACIT [TS-76-ITAT-2014(DEL), Amiantit International Holding Ltd. In re [2010] 189 Taxman 149 (AAR) wherein it was held that where income is not chargeable to tax at all, the provisions of Section 92B of the Act would not be applicable.

6. It was further submitted that the assessee did not mention the transaction in Form No. 3CEB. Since the assessee was of a bonafide belief that the transaction was not covered under the provisions of Transfer Pricing. Thus, non-disclosure by the assessee was bonafide mistake within the meaning of section 273B of the Act. It was further submitted that no addition was made to income in the order passed under section 143(3) of the Act.

Hence, there was no loss of revenue due to non-reporting of transaction in Form No. 3CEB.

7. However, CIT (A) held that the appellant violated the provision of Section 92B wherein such transaction of share premium has been defined needs to be quantified in Audit report in Form No. 3CEB. The appellant has not filed statutory Form No. 3CEB for its International Transaction, did not maintain information, and documents as per Rule 10 D of Income-Tax Rules, 1962. It is an admitted fact that the appellant has issued Rs.22,55,318/- of shares of face value of Rs.10/- at a premium of Rs. 30/- per share to its i.e. AE M/s. Schoeller Arca Time Holding Pvt. Ltd., Singapore without submitting any audit report in Form No. 3CEB as required to be filed/mentioned under section 92D(3) of the Act. Thus, there is a clear violation of the provisions of Income Tax Act and Income-tax Rules. By doing so, the appellant has invited the panel provision as contained under section 271AA of the Act. Accordingly, the CIT (A) has confirmed the levy of penalty of Rs.18,04,254 under section 271AA of the Act.

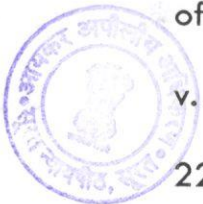
8. Being aggrieved with the CIT (A), the assessee filed this appeal before the Tribunal. The Id. Counsel for the assessee submitted that the issue is covered by the decision of Hon`ble Bombay High Court in the case of Vodafone India Services (P) Ltd. v. Union of India [2014] 50 taxmann.com 300/ [2015] 228 Taxman 25 [2014]368 ITR 1/ 271 CTR 488 (Bom)



wherein it was held that issue of shares at a premium by assessee to its non-resident holding company does not give rise to any income from an admitted International transaction and , thus, there is no occasion to apply Chapter X. This decision has also been accepted by the Govt. of India as per its Press release Dated 28<sup>th</sup> January 2015 (Copy filed ) and Instruction No. 2/2105 [ F. No.500/15/2014-APA-i] dated 29.01.2015. (Copy filed).

9. Therefore, it was argued that when the transaction is not covered by provisions of Chapter-X, then mentioning the same in Form No. 3CEB is not required; hence, penalty under section 271AA is not required to be levied.

The Id. Counsel for the assessee, further, placed reliance on the judgement of Hon`ble Bombay High Court in the case of Shell India Markets (P) Ltd. v. ACIT- LTU [2014] 51 taxmann.com 519 /369 ITR 516 /(Bombay) [2015] 228 Taxman 99 / 273 CTR 161 (Bom) wherein it was laid down that on issuance of shares by an Indian entity to its non-resident AEs , no income arises; hence, transfer pricing provisions under Chapter X would not be applicable. Therefore, it was contended that once the transaction are not International Transaction, then reporting of the same in Form No. 3CEB does not arise. Hence, there was a reasonable cause for the assessee for non-reporting or non-filing in Audit Report in Form No. 3CEB. Thus, the Counsel submitted that the assessee had a bonafide belief that its transaction of



issue of shares at premium to its AE does not fall under International Transaction as provided under section 92B(2) of the Act, hence, same were not required to be reported in Form No. 3CEB. Thus, there was a reasonable cause as provided under section 273B of the Act. Therefore, it was submitted that the CIT (A) was not justified in confirming the penalty under section 271AA of the Act.

10. *Au contraire*, the Id. Sr. DR submitted that the assessee company has issued shares at premium and received foreign remittance for its non-resident AE's as share capital and share premium, therefore, such transaction would fall under International Transaction as per provision of Section 92B whether taxable or not. Therefore, the assessee company was required to furnish an Audit Report in Form No. 3CEB and report the said transaction therein. By not filing audit report, the assessee has failed to comply with requirement of provisions of section 92E of the Act. The Id. Sr. DR relied in the case of BNT Global (P) Ltd. v. Income Tax Officer 9(1) (2) Mumbai [2017] 82 taxmann.com 459 (Mumbai-Tribunal) wherein it was held that where the assessee company received foreign inward remittance from its NON-RESIDENT director on account of share capital and share premium, it would fall within parameters of international transaction within meaning of Section 92B of the Act and section 92E mandates that every person who has entered into an international transaction / transaction s



during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed duly signed and verified in the prescribed manner by such an accountant and setting forth such particulars as may be prescribed.

11. The Id. Sr. Dr., further, relied in the case of First Blue Home Finance Ltd. v. ACIT Circle-10(1) [2015] 62 taxmann.com 80 (Delhi-Tribunal) which laid down that the definition of International Transaction encompasses a transaction between two associated enterprises which inter-alia has a bearing on assets of such enterprise. As the issue of shares by a company has direct bearing, inter-alia, on its assets in terms of receipt of consideration, such transaction cannot be held to be non-international transaction. The Id. Sr. Dr., further, submitted that chargeability of income is not relevant to file audit report in Form No. 3CEB. When there is an International Transaction, then the assessee is required to report such transaction in its Audit Report as prescribed under rules setting forth such particular as may be prescribed within the time stipulated in statute. Non reporting of such transaction entails levy of penalty, which is a consequence, which has to be followed. Therefore, it was vehemently argued that the Id. CIT (A) was correctly upheld the levy of penalty in the instant case.

12. We have heard the rival submissions and perused the relevant material on record. We observe that the assessee company has issued



shares 22,55,318 of the face value of Rs.10 per share at a premium of Rs.30 per share to its AE in foreign i.e. M/s. Schoeller Area Time Holding Pvt. Ltd. Singapore. However, no Audit Report in Form No. 3CEB was filed by the assessee, which is required to be filed under section 92D (3) of the Act. Thus, the assessee violated the provisions of section 92B, wherein such transaction has been defined and needs to be quantified in the audit report in form 3 CEB. We find that the assessee did not file statutory form 3 CEB for its International Transactions and did not maintain information and comments as per Rule 10D of the I.T. Rules, 1962. Therefore, the Assessing Officer has imposed the penalty under section 271 BA and 271AA of the Act in this case. The Explanation (i) (c) to Section 92B of the Act pertains to furtherance of its arm of defining the term "International Transaction" which inter-alia would include the Act of "Capital Financing" by an Enterprise. Capital Financing means any type of financing taken by the company, whether it be in the nature of issue of any type of securities or even financing by the way of taking loan by the enterprise. The said explanation (i) (c) to section 92B of the Act is an inclusive term, which extends itself to the financing by way of loans, lending or guarantee, purchase or sale of marketable securities, any type of advances payments or deferred payments or receivable, or any other debt arising during the course of business. It was in the said inclusive definition of the term "Capital financing"



the transaction in the nature of any type of advances is also made covered explicitly. Accordingly, the said transaction of receipt of share application money by the enterprise is purely covered in the term "International Transaction" and consequently, the transaction of receipt of share application money was required to be determined in accordance with the Arm's Length Pricing Principle. Since the assessee has failed to keep and maintain information and documentary evidence as required by subsection (1) of section 92D and failed to obtain and this report as required by section 92E of the Act. Hence, the penalty provisions us 271AA and 271BA are clearly attracted. We observe that the assessee company has issued shares at premium and received foreign remittance for its non-resident AE's as share capital and share premium, therefore, such transaction would fall under International Transaction as per provision of Section 92B whether taxable or not. Therefore, the assessee company was required to furnish an Audit Report in Form No. 3CEB and report the said transaction therein. By not filing audit report, the assessee has failed to comply with requirement of provisions of section 92E of the Act. This view is further supported with the decision of Co-ordinate Bench of Mumbai Tribunal in the case of BNT Global (P) Ltd. v. Income Tax Officer 9(1) (2) Mumbai [2017] 82 taxmann.com 459 (Mumbai-Tribunal) wherein it was held we also find support from the decision of Co-ordinate Bench Tribunal in the case of BNT



Global (P) Ltd. v. Income Tax Officer 9(1) (2) Mumbai [2017] 82 taxmann.com 459 (Mumbai-Tribunal) wherein the Co-ordinate Bench has observed as under:

**“ 3.2.2** As per the facts on record, and the relevant sections of the Act (*supra*), by not filing the Audit Report in Form 3CEB, the assessee has failed to comply with the requirement of the provisions of section 92E of the Act. In the light of the requirements in the provisions of section 92B and 92E of the Act (*supra*), the assessee's contentions that it was not required to file Audit Report in Form 3CEB, since the provisions of section 92E of the Act were not applicable as it had only received payments from aboard for share capital and share premium from its NRI Director for allotment of shares and no other international transaction; would not hold good. In our view, since the assessee entered into international transactions in the year under consideration, failure on its part to file the Audit Report from an accountant in Form 3CEB, as required under section 92E of the Act within the time prescribed, renders it liable to the levy of penalty of Rs. 1,00,000/- under section 271BA of the Act as levied and sustained by the authorities below. In coming to this view, we draw support from the finding of the Coordinate Bench of this Tribunal in the case of *IL&FS Maritime Infrastructure Co. Ltd. v. Asstt. CIT [2013] 37 taxmann.com 297/144 ITD 559*; wherein the Coordinate Bench held that share investment transactions fall within the purview of section 92E of the Act and the assessee is required to file audit report in Form 3CEB for such transactions, by the prescribed date, before the authorities concerned and that failure to do so would attract levy of penalty under section 271BA of the Act.

**3.2.3** In ground No. 2.b. (*supra*), the assessee contends that the learned CIT(A) erred in ignoring the judgement of the Hon'ble Bombay High Court in the case of *Vodafone India Services (P.) Ltd. v. Union of India [2014] 368 ITR 1/50 taxmann.com 300/[2015] 228 Taxman 25* wherein it has been held that the provisions of Chapter X are not applicable to international transactions of issuance of equity shares by resident company since the capital receipts cannot be considered income. We have carefully perused the aforesaid judicial pronouncement and with great respect find that the decision therein would not come to the rescue of the assessee in the case on hand as it is factually different and does not deal with penalty under section 271BA of the Act. In the cited case Form 3CEB report was filed by the assessee and on reference by the AO the TPO made an adjustment to



the ALP of issue of equity shares at a premium, which was held as untenable by the Hon'ble Court in that case. However, the facts in the case on hand are entirely different as the AO has not attempted to or made any adjustment to the ALP for issue of equity shares at a premium to its NRI Director. The issue raised by the authorities below before us is simply that since the assessee has not filed the Audit Report prepared by an accountant in the prescribed Form 3CEB within the period specified as was mandatorily warranted under section 92E of the Act, levy of penalty under section 271BA of the Act was attracted in its case.

**3.2.4** From the factual and legal matrix of the details on record before us, as discussed above, we do not find any plausible reason put forth by the assessee to establish how it was prevented by reasonable and sufficient cause from getting the Audit Report in Form 3CEB prepared by a Accountant in the prescribed proforma and filing the same before the concerned authority within the time specified, as stipulated under section 92E of the Act. Transactions of share investment, as entered into by the assessee in the case on hand, clearly fall within the ambit of the provisions of section 92E of the Act since the international transaction of investment in share capital of the assessee by the NRI Director of the assessee company falls within the ambit of section 92E of the Act. As laid out therein, it is mandatory for the person entering into an international transaction to file the Audit Report in Form 3CEB, duly prepared by an Accountant, setting out the particulars of such international transactions before the concerned authority within the time prescribed. In our considered view, the failure on the part of the assessee to furnish the Audit Report in Form 3CEB from an Accountant in the prescribed proforma within the prescribed period, without reasonable cause, is a clear violation of the provisions of section 92E of the Act and we therefore uphold the levy of penalty under section 271BA of the Act as it is clearly warranted in the factual and legal matrix of the case on hand. We hold and direct accordingly. In coming to this view, we draw support from the findings rendered by the Coordinate Bench in the case of IL&FS Maritime Infrastructure Co. Ltd. (*supra*). Consequently, finding no merits in the grounds raised by the assessee, the same are dismissed.

13. Thus, where the assessee company received foreign inward remittance from its non-resident Director on account of share capital and share premium, it would fall within the parameters of International



Transaction within the meaning of Section 92B of the Act and section 92E mandates that every person who has entered into an International Transaction /Transactions during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed duly signed and verified in the prescribed manner by such an accountant and setting forth such particulars as may be prescribed. We also relied in the case of First Blue Home Finance Ltd. v. ACIT Circle-10(1) [2015] 62 taxmann.com 80 (Delhi-Tribunal) which has laid down that the definition of International Transaction encompasses a transaction between two associated enterprises which inter-alia has a bearing on assets of such enterprise. As the issue of shares by a company has direct bearing, inter-alia, on its assets in terms of receipt of consideration, such transaction cannot be held to be non-international transaction. We are of the considered view that the chargeability of income is not relevant to furnish the audit report in Form No. 3CEB. When there is an International Transaction, then the assessee is required to report such transaction in its Audit Report as prescribed under rules setting forth such particular as may be prescribed within the time stipulated in statute. Non-reporting of such transaction in Form No. 3 ECB entails levy of penalty, which is a consequence, which has to be followed. The case laws relied by the learned counsel for the assessee are relevant for quantification international transaction on merit whether



taxable or not, which is nothing to do with non furnishing of audit report in Form No. 3 CEB and non maintenance of documents as required under section 92D and section 92E of the Act. In view of these facts and circumstances, we do not find any infirmity in the order of Id. CIT (A), accordingly, same is upheld. Accordingly, all five grounds of appeal of the assessee for A.Y. 2011-12 in I.T.A. No. 1503/AHD/2016 against penalty under section 271AA is dismissed.

**ITA No.2576/AHD/2016 for A.Y. 2011-12: The grounds of appeal are as**

**under:**

- “1. The Id. CIT (A) erred in upholding a penalty of Rs. 1,00,000/- u/s. 271BA r.w.s. 274 of the Income Tax Act, 1961 without appreciating the facts and circumstances of the case.*
- 2. The Id. CIT (A) erred in ignoring the fact that the transaction is not covered within the ambit of Transfer Pricing provisions.*
- 3. The Id. CIT (A) erred in ignoring the fact that since no TP adjustment has been made, no penalty is leviable.*
- 4. The Id. CIT (A) erred in ignoring the fact that the non-disclosure of transaction is a bona-fide mistake and no penalty is leviable.*
- 5. The Id. CIT (A) erred in ignoring the fact that no penalty can be levied on a debatable issue.”*

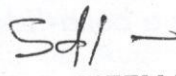
14. Since the facts of penalty levied under section 271BA are same as in the case of penalty levied under section 271AA of the Act as discussed above. We find that the assessee has failed to keep and maintain information and documents as required under section 92D(1) and also

failed to obtain and furnish the report as required under section 92E of the Act. The decision relied by the learned counsel for the assessee are not applicable in view of clear provisions of section 92D and 92E of the Act. The assessee did not file statutory form 3 CEB for its International Transactions and did not maintain information and documents as per Rule 10D of the I.T. Rules, 1962. Moreover, the facts are same as discussed while dealing with penalty appeal under section 271AA of the Act as above. Therefore, for the reasons discussed in respect of penalty under section 271AA of the Act as above, the penalty levied under section 271BA of the Act is also upheld as confirmed by the CIT (A). Accordingly, all five grounds of appeal of the assessee for A.Y. 2011-12 in I.T.A. No. 2576/AHD/2016 against penalty under section 271BA is dismissed.

15. In the result, the appeal of the assessee in respect of penalty under section 271AA and under section 271BA is dismissed.

16. The order pronounced in the open Court on 25-01-2018

  
(C.M. GARG)  
JUDICIAL MEMBER

  
(O.P. MEENA)  
ACCOUNTANT MEMBER

सुरत/ Surat, दिनांक Dated: 25-01-2018

Copy of order forwarded to- Assessee/AO/Pr. CIT/ CIT (A)/ITAT  
(DR)/Guard file of ITAT.

By order

Assistant Registrar, Surat  
सहायक पंजीकार  
आयकर अधीन अधिकारी  
सुरत न्यायपीठ, सुरत.