



## Levy of penalty for non-filing of Form 3CEB for share investment transaction, upheld

### Background

The Mumbai Bench of Income-tax Appellate Tribunal (the Tribunal) in case of BNT Global Pvt. Ltd.<sup>1</sup> upheld the levy of penalty under Section 271BA of the Income-tax Act, 1961 (the Act) for taxpayer's failure to file the audit report in Form 3CEB in respect of its international transaction of receiving foreign remittance from its Non-Resident Indian (NRI) Director who was also a beneficial shareholder, on account of share capital and share premium in its own company.

### Facts of the case

- The taxpayer had filed return of income for Assessment Year (AY) 2011-12, declaring NIL income. The case was subsequently selected for scrutiny proceedings.
- During the assessment proceedings, the Assessing Officer (AO) observed that taxpayer had entered into the international transaction of receiving foreign remittance towards share capital and share premium from one of its NRI Directors who was also a beneficial shareholder, however, Form 3CEB was not filed by the taxpayer.
- Accordingly, without making any adjustment to the returned income, AO levied penalty under Section 271BA on account of taxpayer's failure to file Form 3CEB.

- Aggrieved, the taxpayer filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Before the CIT(A), the taxpayer contended that it had only allotted shares to an individual NRI and did not carry out any other transaction and hence filing of audit report u/s 92E i.e. Form 3CEB was not required.
- The CIT(A) however did not find the taxpayer's reasons to be acceptable, stating that share investment transactions are expressly covered within the ambit of Section 92E.
- Thus, noting that the failure to file Form 3CEB was due to taxpayer's gross negligence, the CIT(A) upheld the levy of penalty under Section 271BA. Reliance was placed on the ruling in case of IL & FS Maritime Infrastructure Company<sup>2</sup>.
- Aggrieved, the taxpayer filed an appeal before the Tribunal.

### Taxpayer's contentions

- The taxpayer primarily contended that it had only allotted shares to its NRI director and did not have any other transaction whatsoever and hence the provisions of Section 92E were not applicable.

<sup>1</sup> BNT Global Pvt. Ltd. [ITA No. 4111/Mum/2016]

<sup>2</sup> IL & FS Maritime Infrastructure Company Ltd. [TS-204-ITAT-2013(Mum)-TP]

- The taxpayer placed reliance on the judgement of Hon. Bombay High Court in the case of Vodafone India Services Pvt Ltd.<sup>3</sup> wherein it was held that provisions of Chapter X are not applicable to international transaction of issuance of equity shares by resident company, since capital receipt cannot be considered as income
- Further, the taxpayer contended that 'an individual, NRI' is not covered within the definition of an 'Enterprise'. It was also contended by the taxpayer that transaction of allotment of shares is not covered as an international transaction defined in explanation to Section 92B.

### Tax department's contention

- The tax department contended that, since the taxpayer has not filed the Audit Report in the prescribed Form 3CEB within the prescribed due-date as was mandatorily warranted under Section 92E of the Act, levy of penalty under Section 271BA of the Act was attracted.

### Tribunal's ruling

- The Tribunal dismissed the taxpayer's contention that, it is not required to file Form 3CEB, since the provisions of Section 92E of the Act were not applicable as it had only received payments for share capital and share premium from its NRI Director and there was no other international transaction.
- Reliance was placed on the co-ordinate bench ruling in the case of IL&FS Maritime Infrastructure Company (supra) wherein it was held that share investment transactions fall within the purview of Section 92E of the Act.
- The Tribunal negated the taxpayer's reliance on the ruling in case of Vodafone India (supra), explaining that, in the said case, Form 3CEB was filed by the assessee and the issue under consideration was tenability of the adjustment made by the Transfer Pricing Officer (TPO) to the arm's length price (ALP) of issue of equity shares at a premium, which was held as untenable by Hon'ble High Court.
- However, the present case was entirely different as the AO had neither attempted to nor made any adjustment to ALP for issue of equity shares at a premium to its NRI Director, but was simply concerned whether penalty under Section 271BA was attracted or not, on account of failure to file Form 3CEB.

- The Tribunal observed that there was no plausible reason put forth by taxpayer to establish how it was prevented from preparing and filing the audit report in Form 3CEB. Thus, the Tribunal noted that the failure on the part of the taxpayer to furnish the Audit Report in Form 3CEB within the prescribed period, without reasonable cause, is a clear violation of the provisions of Section 92E of the Act. Consequently the levy of penalty under Section 271BA was upheld.

### Our comments

It is pertinent to note that the Tribunal has not adjudicated on the taxpayer's contention that, an individual NRI Director is not covered in the definition of 'enterprise'. If one were to look at the legal aspects here the term 'Enterprise' is defined in Section 92F (iii) of the Act to state that 'enterprise' means a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in..... the enterprise is located or at a different place or places.

Now, referring to Section 2(31) of the Act, a 'person' is defined to include 'an individual'. Thus, it would be noteworthy that a transaction between a company and its individual NRI director would also be subject to transfer pricing provisions, subject to fulfilment of associated enterprise relationship conditions.

This ruling reinstates the fact that reporting of transactions in Form 3CEB and determination of ALP of the said transaction are governed by different sections of the Act posing separate requirements on the taxpayer. However, it would be important to know whether only filing of Form 3CEB without any consequent implication on income or ALP determination (say, issue of shares), will add any value to the tax department's risk assessment parameters or only add to the compliance burden for the taxpayer.

<sup>3</sup> Vodafone India Services Pvt Ltd. [TS-308-HC-2014(BOM)-TP]

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