

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.1637/Del/2014
Assessment Year : 2007-08**

Asahi India Glass Limited, 38, Okhla Industrial Area, Phase- III, New Delhi.	Vs.	DCIT, Circle- 2(1), New Delhi.
PAN : AADCA7706R		
(Appellant)		(Respondent)

**ITA No.2183/Del/2014
Assessment Year : 2007-08**

DCIT, Circle- 2(1), New Delhi.	Vs.	Asahi India Glass Limited, 12, Basant Lok, Vasant Vihar, New Delhi.
		PAN : AADCA7706R
(Appellant)		(Respondent)

Assessee by : Shri Sandip Sapra, Adv.
Department by : Shri Kumar Parnav, Sr.DR
Date of hearing : 06-12-2017
Date of pronouncement : 26-02-2018

ORDER

PER R. K. PANDA, AM :

These are cross appeals. The first one is filed by the assessee and the second one filed by the Revenue and are directed against the order dated 27.01.2014 of the CIT(A)- XX, New Delhi relating to assessment year 2007-08.

For the sake of convenience, these were heard together and are being disposed of by this common order.

ITA No.1637/Del/2014 (By Assessee) :

2. Ground of appeal no.1 reads as under :-

“1. That the learned CIT(A) erred on facts and under the law in upholding the action of the assessing officer and restricting the disallowance to Rs.1275500/- u/s 14A under the normal provisions of the IT Act and under the MAT Provisions u/s 115JB. The authorities below erred in involving Rule 8D of the IT Rules even though the same was made operative from 24th March, 2008 and was not applicable for A.Y. 2007-08. No nexus between the interest paid on borrowed funds and tax free income was established by the authorities below. At any rate without prejudice the additions as made are excessive.

3. Facts of the case, in brief, are that the assessee company is manufacturing toughened glass, laminated glass and float glass. The assessee has a financial and technical collaboration with Asahi Glass Company Limited Japan (AGC). Asahi India Glass Limited is India's largest manufacturer of world-glass automotive safety glass. It performs all the functions, starting from purchase of raw materials, processing it into final product till the stage of carrying out the marketing functions and after sales service. It filed its return of income on 30.10.2007 declaring loss of Rs.65,37,51,392/- under the normal provisions and book profit of Rs.42,25,48,996/- u/s 115JB of the I.T. Act. During the course of assessment proceedings, the Assessing Officer observed that the assessee company has shown dividend income of Rs.8,27,937/- and long term capital

gain at Rs.60,12,597/- which have been claimed exempt u/s 10(34) and 10(38) respectively. He, therefore, asked the assessee to explain as to why the disallowance u/s 14A should not be made for the expenditure incurred in relation to incomes which do not form part of total income and also to explain as to why the same should also not be added to the book profit within the meaning of Clause (f) of Explanation (1) to section 115JB of the I.T. Act. It was explained by the assessee that the dividends are automatically received and no expenditure for earning the same has been incurred. However, the Assessing Officer was not satisfied with the explanation given by the assessee. Relying on various decisions, he computed the disallowance u/s 14A at Rs.14,72,158/- and made addition of the same to the total income of the assessee.

4. Before the Id. CIT(A), the assessee reiterated the same arguments as made before the Assessing Officer. Various decisions were also brought to his notice to the proposition that no disallowance is called for.

5. However, the Id. CIT(A) was not fully satisfied with the explanation given by the assessee. Observing that the top management of the assessee company is involved in making decisions for investments in shares and securities, he held that the estimation of 0.5% of the average value of investment should be considered as administrative cost for earning exempt income during the year. He accordingly estimated such disallowance at

Rs.3,07,500/-. However, proportionate disallowance of interest was computed by him of Rs.9.68 lakhs. He accordingly directed the Assessing Officer to restrict the disallowance u/s 14A at Rs.12,75,500/- as against Rs.14,72,158/- made by the Assessing Officer. He directed the Assessing Officer to add the amount of Rs.12,75,500/- instead of Rs.14,72,158/- as expenditure in relation to exempt income.

6. Aggrieved with such order of Id. CIT(A), the assessee is in appeal before the Tribunal.

7. Ld. counsel for the assessee strongly objected to the order of the Id. CIT(A). He submitted that the provisions of Rule 8D are not applicable to the assessee company since the assessment year involved is assessment year 2007-08. Relying on various decisions, he submitted that the said Rules are prospective in nature and are applicable from assessment year 2008-09 onwards. Further, no expenditure has been incurred either for earning the dividend income or the long term capital gain. Referring to various decisions, he submitted that no disallowance u/s 14A is called for when the Assessing Officer has not pointed out any expenditure which according to him has been incurred by the assessee. He, however, fairly conceded that under identical facts and circumstances, the Tribunal in assessee's own case for assessment year 2006-07

vide ITA No.4242/Del/2010 order dated 06.04.2016 has restored the issue to the file of the Assessing Officer.

8. Ld. DR on the other hand submitted that since the Tribunal in preceding assessment year has restored the issue to the file of the Assessing Officer, therefore, for this year also, this issue should be restored to the file of the Assessing Officer for adjudication afresh in the light of the decision of the Tribunal in assessee's own case in the preceding year.

9. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the ld. CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer made disallowance of Rs.14,72,158/- u/s 14A and also added the same to the book profit u/s 115JB. We find the ld. CIT(A) restricted such disallowance to Rs.12,75,500/- and also directed the Assessing Officer to add the amount of Rs.12,75,500/- to the book profit instead of Rs.14,72,158/- as expenditure incurred in relation to the exempt income. We find under identical circumstances, the Tribunal in assessee's own case for assessment year 2006-07 vide order dated 06.04.2016 has restored the issue to the file of the Assessing Officer by observing as under :-

"12.3. We have heard the rival submissions and perused the relevant material on record. The assessment year under consideration is 2006-07. The Hon'ble jurisdictional High Court in Maxopp Investments Ltd. Vs. CIT (2012) 347 ITR 272

(Del), has held that the provisions of Rule 8D are applicable only from the assessment year 2008-09. It has further been held that in the period anterior to that, the disallowance is required to be made on some reasonable basis. In view of the judgment of the Hon'ble jurisdictional High Court on the point, we cannot approve the view taken by the AO in computing the disallowance u/s 14A as per the mandate of Rule 8D of the Income-tax Rules. Accordingly, the impugned order is set aside on this issue and the matter is restored to the file of the AO for making disallowance u/s 14A on some reasonable basis as has been held by the Hon'ble jurisdictional High Court in the afore noted case."

10. Respectfully following the decision of the Tribunal in assessee's own case in assessment year 2006-07, we deem it proper to restore the issue to the file of the Assessing Officer for adjudication of the issue afresh in the light of the decision of the Tribunal and in accordance with law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The ground no.1 by the assessee is accordingly allowed for statistical purposes.

11. Original ground no.2 by the assessee reads as under :-

2. That the learned CIT(A) erred on facts and under the law in not allowing interest charged u/s 234B in respect of disallowances on account of 'Provision for bad and doubtful debts' and 'Deferred tax liability' made under MAT provision of the IT Act which were inserted with retrospective effect after filing the income tax return."

12. Subsequently, at the time of hearing, the assessee filed the amended ground of appeal no.2 which reads as under :-

"That the learned CIT(A) erred on facts and under the law in not deleting interest charged u/s 234B and 234C of I.T. Act in respect of disallowance on account of 'provision for bad and doubtful debts' and 'deferred tax liability' made under MAT provision of the I.T. Act which were inserted with retrospective effect after filing the income tax return."

13. Facts of the case, in brief, are that the Assessing Officer in the assessment order has not discussed the issue relating to charging of interest u/s 234B and 234C of the I.T. Act. However, before the Id. CIT(A), the assessee took the ground challenging the charging of interest u/s 234B in respect of disallowance on account of 'provision for bad and doubtful debts' and disallowance on account of 'deferred tax liability' on the ground that such disallowances made under the provisions of the I.T. Act have been inserted after the filing of the income-tax return for the year under consideration from retrospective effect. The Id. CIT(A), however, did not adjudicate the issue raised by the assessee.

14. Ld counsel for the assessee referring to the decision of the Hon'ble Orissa High Court in the case of Siksha "O" Anusandhan vs. CIT reported in 336 ITR 112 submitted that the Hon'ble High Court in the said decision has held that once the materials are available on record, the Appellate Court should have disposed of the same on the merits by taking these materials into consideration and there is no need to direct remand.

15. Referring to the decision of the Hon'ble Allahabad High Court in the case of Mohd. Ayyub and Sons Agency's case reported in 197 ITR 637, he submitted that when the new issue is raised before the Tribunal and no further investigation is required into the facts of the case, the Tribunal is under a statutory obligation not only to entertain the plea but is also to decide the same

after providing sufficient opportunity of being heard to either sides. Relying on various other decisions, he submitted that since this ground was specifically argued before the Id. CIT(A), the relevant details of which are placed at page 26 to 41 of the Paper Book and since the same has not been adjudicated by the Id. CIT(A), therefore, this ground needs to be adjudicated here itself instead of restoring it to the file of the Id. CIT(A).

16. So far as merit of the case is concerned, he submitted that the assessee filed its return of income on 30.10.2007 and paid tax u/s 115JB as per computation of income, the details of the same are placed at pages 45 - 46 of the Paper Book. He submitted that as per such computation of income, the assessee did not offer deferred tax liability amounting to Rs.19,96,77,375/- and provision for bad and doubtful debts amounting to Rs.75,00,000/- under the MAT provision i.e. u/s 115JB of the I.T. Act. He submitted that the explanation (1)(h) to section 115JB was inserted by the Finance Act, 2008 with retrospective effect from 01.04.2001 whereby deferred tax liability was to be added to the book profit under the MAT provision. Referring to 300 ITR (Statutes) page 17, he submitted that the Finance Act, 2008 received the assent of the President on 10.05.2008. Accordingly, the Assessing Officer vide order dated 28.01.2011 added Rs.19,96,77,375/- on account of deferred tax liability to the taxable book profit u/s 115JB and levied interest u/s 234B and 234C thereon.

17. Similarly, Explanation 1(i) to section 115JB was inserted by the Finance (No.2) Act, 2009 with retrospective effect from 01.04.2001 whereby provision for bad and doubtful debts was to be added to the book profit under the MAT provision. Accordingly, the Assessing Officer vide assessment order dated 28.01.2011 added Rs.75,00,000/- on account of bad and doubtful debts to the taxable book profit u/s 115JB and levied interest u/s 234B and 234C thereon. He submitted that since the aforesaid Explanations were introduced or brought in with retrospective effect by the Finance Act, 2008 and 2009 respectively, therefore, the assessee could not be termed as defaulter in payment of advance tax and hence was not liable to pay interest in terms of section 234B and 234C of the I.T. Act.

18. Referring to the decision of the Hon'ble Bombay High Court in the case of CIT vs. JSW Energy Ltd., he submitted that the Hon'ble High Court in the said decision has held that where the assessee computed book profit of assessment year 2006-07 as per prevailing law, no interest under section 234B could be levied consequent to inclusion of various items while computing book profit as per Explanation to section 115JB which has been brought on statute by Finance Act, 2008 with retrospective effect from 01.04.2001.

19. Referring to the decision of the Hon'ble Calcutta High Court in the case of CIT vs. Emami Ltd. reported in 337 ITR 470, he submitted that the Hon'ble

High Court in the said decision has held that where the assessee had no liability to pay any advance tax u/s 208 on any of due dates for payment of advance tax installments and it became liable to pay tax by virtue of a retrospective amendment made long after close of financial year, assessee could not be branded as a defaulter in payment of advance tax and no interest could be imposed upon it u/s 234B and 234C of the I.T. Act. He accordingly submitted that the grounds raised by the assessee should be allowed and levy of interest u/s 234B and 234C in respect of disallowance on account of provision for bad and doubtful debts and deferred tax liability made under MAT provision should be deleted.

20. The ld. DR on the other hand strongly objected to the arguments advanced by the ld. counsel for the assessee. Referring to the decision of the Hon'ble Supreme Court in the case of JCIT vs. M/s Rolta India Ltd. vide Civil Appeal No.135 of 2011 order dated 07.01.2011, he submitted that the Hon'ble Supreme Court in the said decision has held that interest u/s 234B and 234C shall be payable on failure to pay advance tax in respect of tax payable u/s 115JA and 115JB. He submitted that the provisions of section 115J, 115JA and 115JB are special provision. For purpose of advance tax the evaluation of current income and determination of the tax thereon had to be made in terms of the statutory scheme comprising section 115J and 115JA. Hence, levy of

interest was inescapable. The assessee was bound to pay advance tax under the scheme of the Act. Referring to the provisions of section 234B, he submitted that it is clear that it applies to all companies and there is no exclusion of section 115J and 115JA in levying of interest u/s 234B. He accordingly submitted that the grounds raised by the assessee should be dismissed.

21. We have heard the rival contentions made by both the sides, perused the materials available on record and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the body of assessment order has merely mentioned that as the tax liability worked out u/s 115JB on the book profit of Rs.16,35,315/- is higher than the tax payable as per normal provisions of the Act, the total tax payable is determined u/s 115JB of the I.T. Act and the interest is charged u/s 234B, 234C and 234D. We find the assessee before the Id. CIT(A) has raised the ground challenging the levy of interest u/s 234B in respect of disallowance on account of provision for bad and doubtful debts and disallowance on account of deferred tax liability under MAT provisions which has been reproduced by the Id. CIT(A) at page 2 of the order which reads as under :-

- “6. *That the Ld. AO erred in charging interest under section 234B of the Act.*
6.1 *That the Ld. AO erred in charging interest under section 234B of the Act in respect of the following disallowances made under the MAT provisions of the Act which have been inserted after filing the tax return for the year under consideration from retrospective effect.*

- *Disallowance on account of “provision for bad and doubtful debts”; and*
- *Disallowance on account of “deferred tax liability”.*

22. We find although a specific ground was raised by the assessee before the Id. CIT(A), however, he has not adjudicated the same. Now, the assessee before the Tribunal has raised a ground challenging the levy of interest u/s 234B in respect of disallowance on account of the various additions made under MAT provisions which has been amended to include also the levy of interest u/s 234C. Since this amended ground is purely a legal ground, therefore, following the decision of the Hon’ble Supreme Court in the case of NTPC Ltd. vs. CIT reported in 229 ITR 383, the request of the assessee to amend ground no.2 taken originally is accepted and the amended ground is admitted for adjudication.

23. It is an admitted position that the facts are available on record and no fresh investigation is required to ascertain the facts of the case. The Hon’ble Orissa High Court in the case of Siksha “O” Anusandhan (supra) has disapproved the remand of the matter to the file of the Id. CIT(A) for fresh hearing when full facts were available. The relevant observations of the High Court reads as under :-

“21. Admittedly, the Tribunal after being satisfied that the additional ground taken by the appellant before it to be a question of law and goes to the root of the matter vide order dated 05.05.2009 (Annexure-8) directed the learned D.R. to produce the records of search to examine as to whether search warrant was issued in the name of the assessee or not and adjourned the case to 06.05.2009. At this stage, there is no reason as to why the Tribunal being the final fact finding authority could not have

recorded its finding on aforesaid vital jurisdictional issue when consciously the Tribunal called for the record of search. This action of the learned Tribunal, in our view, seems to be unjust.

22. *The specific stand of the appellant is that pursuant to order dated 05.05.2009 (Annexure-8) passed by the learned I.T.A.T. directing learned D.R. to produce the records of the search to examine whether search warrant was issued in the name of the assessee, the Revenue produced the search records and the I.T.A.T. after examining the relevant records was satisfied that no such search warrant was issued against the appellant-Society under Section 132(1) of the I.T. Act, 1961. In spite of the same, the I.T.A.T. vide its order dated 27.07.2009 remitted the matter to the C.I.T.(A) for fresh hearing which is not permissible under the law.*

23. *Law is well settled that once the materials are available on record, the appellate Court should have disposed of the case on merit taking those materials into consideration and there is no need to direct remand.*

24. *The apex Court in Indian Bank Vs. K.S.Govindan Nair & Ors., (2004) 13 SCC 697, held that once the materials are available on record, it was for the High Court to have decided the matter on the basis of that materials after appreciation of evidence, and there was no need for directing remand.*

25. *The apex Court in Gowrammani & Ors. Vs. V.V.Patil (D) by L.Rs. & Ors., (2009) (II) OLR SC 465, held that the appellate court should have itself disposed of the case on merits taking into consideration the evidence adduced before the trial Court as on the question of identity of disputed land the parties have adduced evidence, the Court Commissioner was appointed and submitted a report, and he was examined as a witness and duly cross-examined and thereupon the suit was disposed of by the trial Court.*

26. *The Allahabad High Court in Mohd. Ayyub and Sons Agency's case (supra), held that the power of the Tribunal to permit any party to the appeal to raise the question of jurisdiction, which goes to the root of the matter and does not involve further investigation into facts, cannot be disputed on the plain reading of rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963. Indeed, on such a plea being taken, the Tribunal is under a statutory obligation not only to entertain the plea but also to decide the same after providing sufficient opportunity of being heard to the other side.*

27. *The Allahabad High Court in A.D.Sons Vs. Commissioner of Sales Tax (1989) 29 STL 37 Allahabad, held that on the facts of the case and in view of the finding recorded in the said impugned order, the Tribunal was in error in remanding the case to the assessing authority for giving second innings to the Department, and it was not open to the Tribunal under the law to do so.*

28. *However, we find that neither the order of the learned Tribunal nor Annexure-8 reveals whether the Revenue had produced the relevant search records pursuant to direction of the Tribunal vide order dated 05.05.2009. If the records were produced as contended by the appellant, the learned I.T.A.T. should have recorded its findings vis-à-vis the stand taken by the appellant. If the relevant records were not produced by the Revenue pursuant to order of the Tribunal dated 05.05.2009, the Tribunal should have insisted upon production of the search records in view of the specific stand of the appellant that there was no search warrant in the name of the appellant-*

assessee, which was the foundation of jurisdictional issue. After verifying the relevant search records, learned Tribunal should have taken a decision on the additional ground and should not have remitted the matter to the C.I.T.(A) for adjudication on the additional ground that goes to the root of the case.”

24. In view of the decision cited (supra) the amended ground raised by the assessee is not only admitted but we proceed to adjudicate the same on merit as well since the relevant facts are available on record and no further investigation of the facts are required.

25. Now coming to the merits of the case, it is the submission of the Id. counsel for the assessee that since Explanation (1)(h) to section 115JB was inserted by the Finance Act, 2008 with retrospective effect from 01.04.2001 whereby differed tax liability was to be added to the book profit under the MAT provisions and since the Finance Act, 2008 received the assent of the President on 10.05.2008, therefore, levy of interest u/s 234B and 234C on account of addition of the same to the book profit u/s 115JB is improper.

26. Similarly, it is also his submission that Explanation (1)(i) to section 115JB was inserted by the Finance (No.2) Act, 2009 with retrospective effect from 01.04.2001 whereby provision for bad and doubtful debts was to be added to the book profit of the assessee under the MAT provision and, therefore, the Assessing Officer, who made addition of Rs.75,00,000/- on account of bad and

doubtful debts to the taxable book profit could not have levied interest u/s 234B and 234C thereon.

27. We find the provisions of section 208 as it stood at the relevant time read as under :-

“Conditions of liability to pay advance tax.

208. Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter, is ten thousand rupees or more.

28. Now, the question that arises is as to whether there is any statutory obligation on the part of the assessee to pay advance tax during the said previous year when the Explanation 1(h) to provisions of section 115JB was inserted by the Finance Act, 2008 with retrospective effect from 01.04.2001 whereby the deferred tax liability was added to the book profit under the MAT provision and when the Finance Act, 2008 received assent of the President on 10.05.2008 and the assessee is liable for interest u/s 234B and 234C on account of such addition to the book profit. Similar is the question in respect of the addition of provision for bad and doubtful debts to the book profit under the MAT provision as per Explanation (1)(i) to section 115JB which was inserted by the Finance (No.2) Act, 2009 with retrospective effect from 01.04.2001. We find the issue has been settled by the Hon’ble Bombay High Court (supra) and the Hon’ble Calcutta High Court (supra).

29. We find the Hon'ble Calcutta High Court in the case of Emami Ltd.

(supra) while deciding an identical issue has observed as under :-

"9. However, in order to attract the provisions contained in Sections 234B and 234C of the Act, it must be established that the assessee had the liability to pay advance tax as provided in Sections 207 and 208 of the Act within the time prescribed under Section 211 of the Act. Those provisions are quoted below:

"207. Liability for payment of advance tax.—Tax shall be payable in advance during any financial year, in accordance with the provisions of Sections 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as "current income".

"208. Conditions of liability to pay advance tax.—Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter, is [five thousand rupees] or more.

"211. Instalments of advance tax and due dates.—¹[(1) Advance tax on the current income calculated in the manner laid down in Section 209 shall be payable by—

(a) all the companies, who are liable to pay the same, in four instalments during each financial year and the due date of each instalment and the amount of such instalment shall be as specified in Table I below:

TABLE I

Due date of installment	–	Amount payable
On or before the 15th June	–	Not less than fifteen per cent of such advance tax.
On or before the 15th September	–	Not less than forty-five per cent of such advance tax, as reduced by the amount, if any, paid in the earlier instalment.
On or before the 15th December	–	Not less than seventy-five per cent of such advance tax, as reduced by the amount or amounts, if any, paid in the earlier instalment or instalments.
On or before the 15th March	–	The whole amount of such advance tax as reduced by the amount or amounts, if any, paid in the earlier instalment or instalments.

(b) all the assesseees (other than companies), who are liable to pay the same, in three instalments during each financial year and the due date of each instalment and the amount of such instalment shall be as specified in Table II below:

TABLE II

Due date of instalment	–	Amount payable
On or before the 15th September	–	Not less than thirty per cent of such advance tax.

On or before the 15th December

Not less than sixty per cent of such advance tax, as reduced by the amount, if any, paid in the earlier instalment.

On or before the 15th March

The whole amount of such advance tax as reduced by the amount or amounts, if any, paid in the earlier instalment or instalments:

Provided that any amount paid by way of advance tax on or before the 31st day of March shall also be treated as advance tax paid during the financial year ending on that day for all the purposes of this Act.]

(2) If the notice of demand issued under Section 156 in pursuance of an order of the Assessing Officer under sub-section (3) or sub-section (4) of Section 210 is served after any of the due dates specified in subsection (1), the appropriate part or, as the case may be, the whole of the amount of the advance tax specified in such notice shall be payable on or before each of such of those dates as fall after the date of service of the notice of demand.”(Emphasis supplied by us).

A mere reading of those provisions leaves no doubt that the advance tax is an amount payable in advance during any Financial Year in accordance with the provisions of the Act in respect of the total income of the assessee which would be chargeable to tax for the Assessment Year immediately following that Financial Year. Thus, in order to hold an assessee liable for payment of advance tax, the liability to pay such tax must exist on the last date of payment of advance tax as provided under the Act or at least on the last date of the Financial Year preceding the Assessment Year in question. If such liability arises subsequently when the last date of payment of advance tax or even the last date of the Financial Year preceding the assessment year is over, it is inappropriate suggest that still the assessee had the liability to pay “advance tax” within the meaning of the Act.

10. In the case before us, the last date of the relevant Financial Year was March 31, 2001 and on that day, admittedly, the appellant had no liability to pay any amount of advance tax in accordance with the then law prevailing in the country. Consequently, the appellant paid no advance tax and submitted its regular return on October 31, 2001 within the time fixed by law wherein it declared its total income and the book profit both as nil. However, consequent to the amendment of the provisions contained in Section 11 5JB of the Act by virtue of Finance Act, 2002 which was published in the official gazette on May 11, 2002 giving retrospective effect to the amendment from April 1, 2001, the appellant first voluntarily paid a sum of Rs. 1,55,62,511/- on account of the tax payable on book profit as provided in amended provision of Section 115 JB and then filed its revised return of March 31, 2003 declaring its business income as nil but the book profit under Section 1 15JB as Rs.20,63,65,71 1/-. The Assessing Officer accepted such return of income but imposed interest under Section 234B and 234C of the Act amounting to Rs.44,00,937/- and Rs. 11,78,960/- respectively.

11. In our opinion, the amended provision of Section 11 5JB having come into force with effect from April 1, 2001, the appellant cannot be held defaulter of payment of advance tax. As pointed out earlier, on the last date of the Financial Year

preceding the relevant Assessment Year, as the book profit of the appellant in accordance with the then provision of law was nil, we cannot conceive of any “advance tax” which in essence is payable within the last day of the financial year preceding the relevant Assessment Year as provided in Sections 207 and 208 or within the dates indicated in Section 211 of the Act which inevitably falls within the last date of Financial Year preceding the relevant Assessment Year. Consequently, the assessee cannot be branded as a defaulter in payment of advance tax as mentioned above.

12. *At this stage, we may profitably rely upon the observations of the Supreme Court in the case of Star India P. Ltd Vs. Commissioner of Central Excise, reported in (2006) 280 ITR 321, strongly relied upon by Mr. Bajoria, where the Apex Court in the context of imposition of Service Tax by the Finance Act, 2002 with retrospective effect held that that the liability to pay interest would arise only on default and is really in the nature of quasi-punishment and thus, although the liability to pay tax arose due to retrospective effect of law, same should not entail the punishment of payment of interest.*

13. *Although Mr. Nizamuddin, the learned Counsel appearing on behalf of the Revenue, in this connection, strongly relied upon the decision of the Supreme Court in the case of Joint Commissioner of Income Tax vs. Rolta India Ltd., reported in (2011) 330 ITR 470, we find that in that case the question was whether interest under Section 234B of the Act could be charged on the tax calculated on the book profit under Section 115JA and in other words, whether advance tax was at all payable on book profits under Section 115JA of the Act. The Supreme Court answered the said question in the affirmative and further held that the provisions of interest on default as provided in Sections 234B and 234C would also apply. We have already pointed out that Mr. Bajoria, at the very outset, conceded that the said decision should be applied for answering the first question formulated in this appeal against his client. In our opinion, the said decision is not relevant for considering the second and the third questions as to whether an assessee can be said to be a defaulter in payment of advance tax if he had no liability to make payment of such tax on the last date of a Financial Year preceding the relevant Assessment Year as such question did not arise in the said case before the Supreme Court.*

14. *It appears that the learned Tribunal has not at all considered the aforesaid aspect as to the liability of the assessee to make payment of the advance tax on the last day of the Financial Year i.e. March 31, 2001 when its book profit was nil according to the then law of the land. The various decisions of the other High Courts and the Tribunals relied upon by the Tribunal did not effectively consider the question whether even in a case like the present one where on the last date of the Financial Year preceding the relevant Assessment Year, the assessee had no liability to pay advance tax, he would be nevertheless asked to pay interest in terms of Section 234B and Section 234C of the Act for default in making payment of tax in advance which was physically impossible.”*

30. We find the Hon'ble Bombay High Court in the case of JSW Energy Ltd. (supra) following the decision of the Hon'ble Calcutta High Court in the case of Emami Ltd. (supra) and various other decisions has upheld the decision of the Tribunal in deleting the levy of interest u/s 234B on account of the addition made by the Assessing Officer while making MAT calculation u/s 115JB on the basis of amendments made to such provisions with retrospective effect from 01.04.2001. The relevant observations of the Hon'ble High Court read as under :-

"11. Then, Mr. Tejveer Singh vehemently contended that in relation to question no. 2, the findings require detailed probe by this Court. He submits that the Tribunal was not right in law when it held that no interest under section 234B of the I.T. Act can be levied. Though several items have to be calculated while computing book profit and in terms of explanation to section 115JB of the I.T. Act, that explanation has been brought on the statute book and with retrospective effect from 1st April, 2001, therefore, this calculation of the tribunal is erroneous in law.

12. However, Mr. Kaka, learned senior counsel invited our attention to section 234B of the I.T. Act to submit that this is provision to recover interest for default in payment of advance tax. It directs payment of simple interest and in terms of this provision provided any assessee who is liable to pay advance tax under section 208 has failed to pay such tax or where the advance tax paid is less than 90% of the assessed tax. Thus, this is a provision whereunder interest could be recovered wherein advance tax for the assessment year fails to take note of the amendment to the Income Tax Act which is brought in subsequently. When the Parliament stepped into to amend the Act though with retrospective effect but in 2008, then, there is no default in payment of advance tax for the assessment year 2006-07. The computation of income based on which the advance tax was paid was in tune with the law prevailing on the date on which tax was due and payable. Any further addition in the income by way of amended provisions and which were incorporated subsequently, therefore, does not attract payment of interest as there is no default.

13. Mr. Kaka also invited our attention to section 115JB and particularly, insertion of clause (h) in Explanation (1). That clause reads as under :

"(h) The amount of deferred tax and the provision therefor."

14. This clause has been substituted by Finance Act, 2008 with restrospective effect from 1st April, 2001. Prior to the same it read as under :

'4. Substituted for the portion beginning with the words "if any amount referred" and ending with the words "as reduced by " by the Finance Act, 2008, w.r.e.f. 1.4.2001."

Prior to its substitution, read as under :

"If any amount referred to in clauses (a) to (g), is debited to the Profit and Loss account, and as reduced by...."

15. *The Tribunal in this regard noted rival contentions and the admitted facts. It also relied upon and followed the judgment of Hon'ble Calcutta High Court in Emami Ltd. v. CIT[2011] 337 ITR 470/200 Taxman 326/12 taxmann.com 64.*

16. *In paragraph 13 of the Tribunal's impugned order the relevant portion from Calcutta High Court's judgment has been extracted. The Calcutta High Court, therefore, found that the provisions would indicate that they are mandatory. There is no scope for waiving of the provision. However, in order to attract the provisions contained in section 234B and 234C of the Act, it must be established that the assessee had the liability to pay advance tax as provided under sections 207 and 208 of the I.T. Act within the time prescribed under section 211 of that Act. Noting the rival contentions, the Calcutta High Court proceeded to hold that the last date of relevant financial year was 31st March, 2001 and on that date, admittedly, the appellant before it had no liability to pay any amount of advance tax in accordance with the then law prevailing in the country. Consequently, the appellant paid no advance tax and submitted its regular returns on 31st October 2001, within the time fixed by law wherein it declared its total income and the book profit both as Nil. The amendment to section 115JB by virtue of Finance Act, 2002 and which was referred to in the Calcutta High Court judgment has retrospective effect from 1st April, 2001.*

17. *In the present case, what the assessee has pointed out is that some of the amounts included in the book profits as per Explanation (h) to section 115JB were brought in by the Finance Act, 2008 with retrospective effect from 1st April, 2001. The assessee cannot be held to be liable for failing to make a provision for payment of advance tax which was not possible on the last date as per the law then prevailing. Thus, clause (h) which is reproduced above having been brought in with retrospective effect but by Finance Act 2008, the advance tax computation by the assessee for the year 2006-07 cannot be faulted and it cannot be said that the assessee is in default and therefore, there is any liability to pay interest in terms of section 234B of the Income Tax Act, 1961.*

18. *In the case of Star India (P.) Ltd. v. CCE[2006] 280 ITR 321/150 Taxman 128 the Hon'ble Supreme Court held that the service of "broadcasting" was made a taxable service with effect from July 16, 2001, by the Finance Act, 2001. The appellant disputed its liability to make any payment for service tax on the ground that it did not broadcast. The Commissioner, however, held against the appellant. The matter was carried before the Commissioner of Income Tax (Appeals) and during pendency of appeal the Finance Act, 2001 was amended by the Finance Act, 2002. The effect of amendment, inter alia, was to make an agent, such as the appellant, before the Supreme Court, liable to pay service tax as broadcaster.*

19. *The Supreme Court noted that the Appellants' appeal pending before the Commissioner was rejected by him on the basis of this amendment. The tribunal also*

maintained this order and that part of the order passed by the Commissioner was not challenged in appeal. However, the appellant was aggrieved by the fact that the tribunal held it liable to pay interest on the amount which it was required to pay by reason of the 2002 amendment. The assessee contended that once the amendment was brought in, pending the appeal, there was no question of applying section 234B or any analogous provision and payment of interest. It is in that regard that the Hon'ble Supreme Court held as under :

"7. In any event, it is clear from the language of the validation clause, as quoted by us earlier, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective effect. It is well established that while it is permissible for the Legislature to retrospectively legislate, such, retrospectivity is normally not permissible to create an offence retrospectively. There were clearly judgments, decrees or orders of courts and Tribunals or other authorities, which required to be neutralised by the validation clause. We can only assume that the judgments, decree or orders, etc., had, in fact, held that persons situate like the appellants were not liable as service providers. This is also clear from the Explanation to the valuation section which says that no act or acts on the part of any person shall be punishable as an offence which would not have been so punishable if the section had not come into force.

8. The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect."

20. The Supreme Court held that the liability to pay interest would only arise on default and is really in the nature of a quasi punishment. The liability to tax although credited retrospectively could not entail the punishment of payment of interest with retrospective effect. It is this principle which has been laid down which is followed by the Calcutta High Court. It is that principle relied upon by the Calcutta High Court which has been applied by the Tribunal to the facts and circumstances of the present case. We do not think that the assessee before us can be called upon to pay interest in terms of section 234B, once the explanation was introduced or brought in with retrospective effect but by Finance Act, 2008. Then, there was no liability to pay interest in terms of this provision. That was because the assessee cannot be termed as defaulter in payment of advance tax. The advance tax computation on the basis of the unamended (sic) provision therefore could not have been entertained.

21. We do not see any broader or wider question arising for our determination as the view taken even on this question is neither perverse or neither vitiated by any error of law apparent on the face of the record."

31. In view of the decisions of the Hon'ble Calcutta High Court and the Hon'ble Bombay High Court cited (supra), we are of the considered opinion

that no interest u/s 234B and 243C could have been levied consequent to inclusion of the above two items while computing book profit as per Explanation (1) to section 115JB which were brought on the statute book with retrospective effect from 01.04.2001 by the Finance Act, 2008 and 2009 respectively and that after filing of the return of income. The assessee cannot be held as a defaulter of payment of advance tax on account of a subsequent amendment which came into force retrospectively after filing of the return.

32. So far as the decision relied on by the Id. DR in the case of Rolta India Ltd. (supra) is concerned, the same relates to the levy of interest u/s 234B on the tax calculated on book profit u/s 115JA. There is no dispute to the fact that the assessee is liable to interest u/s 234B on the tax calculated on book profit u/s 115J/115JA. The question before the Hon'ble Supreme Court was as to whether the assessee which is a MAT company was not in a position to estimate its profit for the current year prior to the end of the financial year on 31st March. However, in the instant case the amendments which got the assent of the President were brought into the statute book after the end of the financial year. Therefore, the assessee was not in a position to estimate its liability under the MAT provisions. Therefore, the decision relied on by the Id. DR is not applicable to the present case. In view of the above discussion, the amended ground raised by the assessee is allowed.

ITA No.2183/Del/2014 (By Revenue) :

33. The ground no.1 by the Revenue reads as under :-

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in deleting the addition of Rs.4,09,00,000/- made on account of adjustment following TPO’s order on ALP and holding that the action of the TPO in determining the ALP of Royalty paid for the Taloja Plant of the assessee at NIL was incorrect and unsustainable.”

34. Facts of the case, in brief, are that the assessee during the year under consideration has entered into the following international transactions with its AE in both its automotive and float glass divisions :-

<i>International Transactions</i>	<i>Automotive</i>	<i>Float</i>	<i>Method</i>
<i>Purchase of raw material</i>	<i>24.65</i>		<i>TNMM</i>
<i>Import of stores & machinery spares</i>	<i>5.77</i>	<i>0.2</i>	<i>TNMM</i>
<i>Import of clear float and reflective glass</i>	<i>6.38</i>		<i>TNMM</i>
<i>Purchase of capital goods</i>	<i>8.57</i>	<i>124.82</i>	<i>TNMM</i>
<i>Import of Tin bath blocks & machinery spares</i>	<i>-</i>	<i>1.08</i>	<i>TNMM</i>
<i>Fee for Technical consultancy services</i>	<i>0.44</i>	<i>16.50</i>	<i>TNMM</i>
<i>Royalty for use of technical know-how</i>	<i>3.30</i>	<i>1.83</i>	<i>CUP</i>
<i>TOTAL</i>	<i>58.97</i>	<i>44.87</i>	<i>10.3.84</i>

35. The Assessing Officer referred the matter to the TPO for determination of the arm’s length price of the international transactions entered into by the assessee. The TPO observed that the assessee has adopted the TNMM on an entity level basis to determine the arm’s length price of all its international transactions except for the payment of royalty for use of technical know-how. He observed that the assessee has applied CUP method to benchmark the

payment of Royalty to its AEs. While doing so, the assessee has relied on the rates charged in case of Sona Koyo Steering Systems Limited as an effective CUP for royalty payments made to its AEs. The TPO disregarded the analysis carried out by the assessee and analyzed the margins of the automotive glass division and float glass division separately. Based on the segmentation, the TPO concluded the Automotive Glass division to be at arm's length.

36. So far as the Float Glass division is concerned, the TPO accepted the various corroborative analysis of the assessee to demonstrate the arm's length price of all the international transactions except for the payment of royalty.

37. With regards to the payment of royalty, the TPO selected following comparables to determine the benefits received by the assessee under the royalty agreement :-

<i>Company Name</i>	<i>March 2007 OP/Sales</i>	<i>Product Profile</i>
<i>Gujarat Guardian Ltd.</i>	<i>28.63%</i>	<i>Manufactures Float and mirror glass.</i>
<i>Saint-Gobain Glass India Ltd.</i>	<i>8.33%</i>	<i>Manufactures Float glass.</i>
<i>Sejal Architectural Glass Ltd.</i>	<i>11.01%</i>	<i>Manufactures toughened, laminated and other glass.</i>
<i>AVERAGE</i>	<i>15.99%</i>	

38. While doing so, the TPO disregarded the following companies as potential comparables to the assessee's float glass division:-

<i>Company Name</i>	<i>March 2007 OP/Sales</i>	<i>Product Profile</i>

<i>Bharat Glass Tube Ltd.</i>	<i>1.35%</i>	<i>Manufacture Figured and Wired glass.</i>
<i>Hindusthan National Glass & Inds. Ltd.</i>	<i>10.92%</i>	<i>Manufactures glass containers.</i>
<i>Triveni Glass Ltd.</i>	<i>-5.50%</i>	<i>Manufactures float, sheet, figured and wired glass.</i>

39. Thereafter, the TPO compared the operating margins of the Float Glass division of the assessee with the mean of the operating margins of these comparables. Upon comparison, the TPO concluded that the higher mean operating margin of these comparables vis-à-vis that of the assessee indicated that the assessee has not derived commensurate benefit from the payments made by it on account of royalty. On the basis of the above, the TPO determined the arm's length price for the payment of royalty as NIL under CUP and, accordingly, proceeded with an upward adjustment of Rs.4.09 crores to the income of the assessee on account of the international transactions in the Float Glass division. The Assessing Officer, thereafter, in the assessment order made addition of Rs.4.09 crores to the total income of the assessee.

40. Before the Id. CIT(A), the assessee submitted that it has paid an amount of Rs.3.62 crores as royalty for technical know-how in the Automotive Glass division and Rs.4.09 crores in the Float Glass division. Thus, the total royalty of Rs.7.71 crores paid by the assessee to its AEs amounted to 0.98% of its net sales. It was submitted that the royalty paid by Sona Steering Systems Limited

was considered as an appropriate CUP for benchmarking the royalty payments of the assessee since in either case, the technology was ultimately used to cater to OEMs. Accordingly, the Sona Steering agreement was submitted before the TPO during the course of assessment proceedings. It was submitted that as per agreement, Sona Steering paid royalty to its foreign collaborator at 3% of the turnover. Since the total payment of royalty made by the assessee amounted to only 1.91% of its turnover, which is lower than the royalty paid by Sona Steering, it substantiates the arm's length nature of its royalty transaction. It was submitted that the TPO rejected the CUP data on the ground that Sona Steering has significant RPT. Referring to the decision of the Mumbai Bench of the Tribunal in the case of Bayer Material Science P. Ltd. (ITA No.7977/Mum/2010), it was argued that the Tribunal in the said decision has held that in absence of any uncontrolled transactions, it was perfectly in order to consider a genuine controlled transaction. It was further submitted that AGC Japan has only 22.21% shareholding in the assessee company. So far as other shareholders are concerned, Indian promoters constitutes 33.03% and the remaining shares i.e. 44.76% are held by general public. Thus, the AEs are not in a position to wield significant influence over the assessee's business. It was argued that as a listed company, the assessee is in compliance with the corporate governance conditions stipulated in clause 49 of the listing agreement with

stock exchange. Under the said clause, the assessee has to file quarterly compliance reports before stock exchanges. Therefore, its performance and commercial expediency of its business decision are subject to intense scrutiny by its shareholders. It was argued that the assessee is receiving continuous technical know-how, information, inputs, training and support for the manufacturing of float glass and its variants from its AEs. the assessee argued that the direct benefit to the assessee from the licensed technology has been the increase in the sales over the years with its ability to cater to the changing needs of its customers. The following details were furnished before the Id. CIT(A) :-

Turnover of Asahi India over the years

<i>Company Name</i>	<i>Sales (in Rs. Lakhs)</i>			
	<i>Mar-05</i>	<i>Mar-06</i>	<i>Mar-07</i>	<i>Mar-08</i>
<i>Asahi India Glass Ltd.</i>	<i>67,606</i>	<i>68,283</i>	<i>87,830</i>	<i>111,382</i>
<i>Y.o.Y. growth in sales</i>		<i>1%</i>	<i>29%</i>	<i>27%</i>

41. Various submissions were made to challenge the action of the TPO. The assessee further submitted fresh comparable uncontrolled price for the payment of royalty and connected agreements which were forwarded to the TPO for a remand report. The TPO in his report objected to the admission of the additional evidences filed before the Id. CIT(A) and justified its earlier action. The Id. CIT(A) confronted to the assessee to the remand report made by the Assessing Officer. After considering the contents of the remand report and the

rejoinder of the assessee to such remand report, the Id. CIT(A) directed the TPO to delete the addition of Rs.4.09 crores on account of TP adjustment in respect of royalty by observing as under :-

“10.4 I have carefully considered the submissions of the appellant and also the remand report dated 01/01/2013. In the TP study the royalty paid by Sona Steering Systems Limited was considered by the appellant as an appropriate Comparable Uncontrolled Price ('CUP') for benchmarking the royalty payments of the appellant. During the appellate proceedings the appellant had undertaken a search of independent agreements over global royalty database namely, RoyaltyStat database, to identify comparable uncontrolled agreements to compare royalty rates paid by appellant to its AEs with the rates charged between independent third parties for use of similar intangibles. As per the search, the arithmetic mean of the royalty rates on sales/ revenue of 5 agreements between independent third parties worked out to 4.36%. The appellant has claimed that as the royalty rates of 0.98% paid by appellant were lower than the rates charged between independent third parties for use of similar intangibles, the transaction of payment of royalty by the appellant to its AEs should be considered to be at arm's length. However, CUP data furnished by the appellant was not accepted by the TPO.

10.5 The appellant has submitted that AGC Japan has only 22.21% shareholding in the appellant. Of the other shareholders, Indian promoters constitute 33.03% and the remaining i.e. 44.76% are publicly held. Thus, the appellant has argued that the AEs are not in a position to wield significant influence over the appellant's business and as a listed company, the appellant is in compliance with the corporate governance conditions stipulated in Clause 49 of the listing agreement with stock exchange. Under the said clause, the appellant has to file quarterly compliance reports before stock exchanges. Thus, its performance and commercial expediency of its business decision are subject to intense scrutiny by its shareholders. The TPO concluded that all transactions relating to Automotive division were at arm's length. However, in the Float Glass division, the TPO concluded the appellant has not derived any benefit from payment of royalty to its AEs. In this regard, the appellant has argued that it has been receiving continuous technical know-how, information, inputs, training and support for the manufacturing of float glass and its variants from its AEs. The appellant has also informed that the availed technology has enabled it to avoid common quality defects in float glass including bubble formation and ripples. These defects curb the use of end use of float glass results in

bulk rejection of orders and loss of customer base. The licensed technology ensures lower defects, increased aesthetics and enhanced product perception. Furthermore, float glass is often treated with colorants and chemical coatings for specialty applications. The appellant has argued that the direct benefit to the appellant from the licensed technology has been the increase in the sales over the years with its ability to cater to the changing needs of its customer which can be seen from the table below:

Turnover of Asahi India over the years

<i>Company Name</i>	<i>Sales (in Rs. Lakhs)</i>			
	<i>Mar-05</i>	<i>Mar-06</i>	<i>Mar-07</i>	<i>Mar-08</i>
<i>Asahi India Glass Ltd.</i>	<i>67,606</i>	<i>68,283</i>	<i>87,830</i>	<i>111,382</i>
<i>Y.o.Y growth in sales</i>		<i>1%</i>	<i>29%</i>	<i>27%</i>

10.6 The appellant has further submitted that approximately 80% of the sales revenue of the appellant represents sales made to global customers of the Asahi Group and these sales would not have been possible in absence of the technical and brand affiliation with the Asahi Group. The appellant has also argued that the majority of the benefit derived by the appellant includes retention of its customer base who may be lured by competitors unless the appellant constantly evolves its product portfolio. The royalty payments were made by the appellant for availing patented technology. The appellant has highlighted that the Asahi brand and associated technology is quintessential for its continued existence and sustenance in the float glass industry.

10.7 Since float glass constitute the base raw material for manufacture of auto-glass, the float glass technology would be crucial for the performance of its automotive division as well. Generally, the Float Glass division provides about 30% of the total raw material requirement of the automotive division. The appellant has explained that in the absence of the requisite know-how, the appellant would be compelled to rely on external suppliers which would result in a dip in its overall profits. In this connection, the appellant has submitted that the technology and know-how of float glass is only restricted to Asahi Glass, Saint Gobain and Guardian. The appellant has also explained that all the players in the float glass industry would be licensing the technology and know-how of their respective group companies for the production and sale of float glass in its region.

10.8 Based on the discussion hereinabove, it is fair to conclude that there is no meaningful analysis / evidence provided by the TPO to hold that the entire royalty payment should be reduced to zero. The appellant has been able to demonstrate that the appellant has received technical know-how, information, inputs, training and support for the manufacturing of float glass and its variants from its AEs in lieu of royalty payment and no independent company will provide such services free of charge. The royalty payments were made by the appellant for availing patented technology. The above benefits derived by the appellant are critical to the smooth functioning of its business. Considering facts of the case, I am of the view that the action of the TPO in determining the ALP of "Royalty" paid by the appellant at Nil is incorrect and unsustainable. Accordingly the AO/TPO is directed to delete the addition of Rs.4.09 Crores on account of Transfer Pricing Adjustment in respect to Royalty."

42. Aggrieved with such order of the Id. CIT(A), the Revenue is in appeal before the Tribunal.

43. Ld. DR strongly opposed the order of the Id. CIT(A) in granting relief to the assessee. Referring to para 10.4 of the order of the Id. CIT(A), he submitted that he has not properly adjudicated issue and, therefore, the order of the Id. CIT(A) should be reversed and that of the Assessing Officer be restored.

44. Ld. counsel of the assessee on the other hand heavily relied on the order of the Id. CIT(A). He submitted that the Id. CIT(A) has given justifiable reasons while deleting the addition made by the Assessing Officer. He submitted that the assessee company in the instant case has paid royalty of Rs.4.09 crores on net sales of float glass of Rs.238.61 crores to its AEs which works out to only 1.71% of sales. Therefore, the same deserves to be allowed because due to the licensed technology made available by the AEs, the assessee company was able

to cater to the changing needs of its customers, maintain quality and was also able to increase its sales over the years and smooth functioning of its business. He submitted that since the assessee company does not undertake any research and development activity on its own and totally depends upon its AEs for technology, therefore, without such technology the assessee would not have achieved such higher turnover. He submitted that no independent third party will let any other entity to use its licensed technology without charging a fee/royalty. Since the float glass constitutes about 30% of raw material for manufacture of auto glass, the float glass technology becomes crucial for the performance of its automotive division as well. He further submitted that since the assessee is a public limited company which is listed on BSE and NSE in which Asahi Glass Co. Ltd., Japan (AE) holds only 22.21% shareholding while Indian promoters held 33.03% and the remaining 44.76% shareholding was held by the public, therefore, the AEs were not in a position to wield significant influence over assessee's business as its performance and commercial expediency were subject to intense scrutiny by its shareholders. He submitted that in earlier years royalty paid by the AEs for float glass technology has been accepted by the Department. Similarly, royalty paid at 3% by Sona Steering Systems Ltd. to its AE has been accepted by the Department which is more than 1.71% paid by the assessee company. Referring to the decision of the Hon'ble

Delhi High Court in the case of CIT vs. EKL Appliances Ltd. reported in 345 ITR 241, he submitted that the Hon'ble High Court in the said decision has held that financial health of the assessee could never be a criterion to judge the allowability of an expense. There was no authority for that. So long as the expenditure or payment had been demonstrated to have incurred or laid out for the purpose of business, it was no concern of the TPO to disallow it on any extraneous reasoning. As provided in the OECD guidelines, he was excepted to examine the international transaction as he actually found them and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which has been given by the TPO was not contemplated or authorized. Even on the merits, the disallowance of the entire brand fee/royalty payment was not warranted.

45. Referring to the order of the immediately preceding assessment year 2006-07, he submitted that TPO had accepted the royalty payment under the Float Glass Division at ALP. However, for the remaining international transactions namely purchase of capital goods, import of machinery spares and clear float glass etc, adjustment was made as per the provisions of section 92CA of the I.T. Act by comparing the operating margin of the Float Glass Division of the assessee company with the mean/average operating margin of three comparable companies namely Gujarat Guardian Ltd., Hindustan National

Glass and Industries and Saint Gobain Glass India Ltd.. However, the TPO excluded two companies namely Bharat Glass Tube Ltd. and Triveni Glass Ltd. as comparables. On appeal by the assessee, the Tribunal vide order 06.04.2016 directed the TPO to include Bharat Glass Tube Ltd. and Triveni Glass Ltd. as comparables. Consequently, pursuant to the order of the Tribunal, the TPO worked out the average/mean operating margin by including Bharat Glass Tube Ltd. and Triveni Glass Ltd. as comparables. Therefore, Bharat Glass Tube Ltd. and Triveni Glass Ltd. ought to be considered as comparables for the year under consideration for working out the average/mean operating margin of Float Glass Division. He submitted that Gujarat Guardian Ltd. and Sejal Architectural Glass Ltd. could not be considered as comparable because Gujarat Guardian Ltd. was engaged in the manufacture of float glass and mirror glass and Sejal Architectural Glass Ltd. was engaged in the manufacture of toughened glass and laminated glass. Before the TPO the said companies were given as comparables because the assessee company is engaged in the manufacture of both toughened glass and float glass for which royalty had been paid. However, the TPO accepted the royalty payment towards technical fee of toughened glass and determined the arm's length price of royalty at Nil as against royalty of Rs.4.09 crores paid towards float glass. Therefore, Gujarat Guardian Ltd. and Sejal Architectural Glass Ltd. could not be considered as comparables for working

out the average/mean operating margin of Float Glass Division. He submitted that the average/mean operating margin of the three comparables namely (i) Saint Gobain Glass India Ltd. (8.33%), (ii) Bharat Glass Tube Ltd. (1.35%) and (iii) Triveni Glass Ltd. (-5.50%) gives the margin of average of 1.39%. In other words, the average/mean operating margin of these comparable companies works out to 1.39% which is even less than 6.02% operating margin of the assessee company. In view of the above, the order of Id. CIT(A) being in consonance with facts and law should be upheld and the grounds raised by the Revenue should be dismissed.

46. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the Id. CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the TPO made an addition Rs.4.09 crores to the total income of the assessee by disallowing payment of royalty by the assessee to its AE being at arm's length price. We find the Id. CIT(A) deleted the addition made by the AO/TPO, the reasons of which have already been reproduced in the preceding paragraphs. We do not find any infirmity in the order of the Id. CIT(A) on this issue. We find the assessee before the TPO had given analysis of the comparables with an average/mean margin of 8.66%. The details of which are as under :-

<i>Company Name</i>	<i>Sales (Cr.)</i>	<i>Total cost (TC) (Cr.)</i>	<i>Operating Profit (OP) (Cr.)</i>	<i>OP/Sales %age</i>
<i>1) Bharat Glass Tube Ltd.</i>	<i>41.36</i>	<i>40.08</i>	<i>0.56</i>	<i>1.35%</i>
<i>2) Gujarat Guardian Ltd.</i>	<i>484.63</i>	<i>359.3</i>	<i>125.33</i>	<i>25.86%</i>
<i>3) Hindustan National Glass & Inds. Ltd.</i>	<i>596.17</i>	<i>531.06</i>	<i>65.11</i>	<i>10.92%</i>
<i>4) Saint Gobain Glass India Ltd.</i>	<i>854.28</i>	<i>783.12</i>	<i>71.16</i>	<i>8.33%</i>
<i>5) Sejal Archtiectural Glass Ltd.</i>	<i>43.87</i>	<i>39.04</i>	<i>4.83</i>	<i>11.01%</i>
<i>6) Triveni Glass Ltd.</i>	<i>106.23</i>	<i>112.07</i>	<i>-5.84</i>	<i>-5.50%</i>
<i>Mean/Average</i>				<i>8.66%</i>

47. The operating margin of the assessee company for float glass division was shown at 6.02% which the TPO has reproduced at page 4 of his order. We find the TPO in the order rejected three comparables namely Bharat Glass Tubes Ltd., Hindustan National Glass & Inds. Ltd. and Triveni Glass Ltd. as comparables and worked out the average/mean operating margin of three comparables at 15.99%. After comparing the operating margin of the float glass division of the assessee company at 6.02%, the TPO made addition of Rs.4.09 crores on the ground that the assessee company had not derived any benefit from payment of royalty and determined the arm's length price of royalty at Nil under CUP. We find Id. CIT(A) deleted the addition which has been already been reproduced in the preceding paragraph. We do not find any infirmity in the order of the Id. CIT(A) on this issue. We find the assessee company has paid royalty of 4.09 crores on net sales of float glass of Rs.238.61 crores to its AEs which works out to only 1.71% of the sales. We find merit in the argument

of the Id. counsel for the assessee that due to the licensed technology made available by the AEs, the assessee company was able to maintain quality and increase its sales. For the year ending March, 2005 the turnover was Rs.67,606/- lakhs which has gone up to Rs.68,283/- lakhs for the year ending March, 2006 and Rs.87,830/- lakhs for the year ending March, 2007 and Rs.111,382/- for the ending March, 2008. This indicates that there is huge jump in the turnover between the year 2006 to 2008 as compared to financial years 2004-05 and 2005-06. Further, the royalty paid by the assessee to AE for float glass technology has been accepted by the Department in the earlier years. We also find merit in the submission of the Id. counsel for the assessee that since the assessee is a public limited company with only 22.21% shareholding by its AE and Indian promoters holding 33.03% and the general public holding 44.76%, therefore, the AEs were not in a position to wield significant influence over assessee's business as its performance and commercial expediency were subject to intense scrutiny by shareholders of the companies which are listed on BSE and NSE. We further find the Revenue has accepted the royalty paid at the rate of 3% by Sona Steering Systems Ltd. to its AE which is much more than 1.71%. Further, in the immediately preceding year 2006-07, the Tribunal had directed the TPO to include Bharat Glass Tube Ltd. and Triveni Glass Ltd. as comparables. If these two companies are included as comparables, the average

margin comes to 1.39% which is much less than the operating margin of 6.02% of the assessee company.

48. We find the Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd. (supra) has held that the financial health of the assessee could never be a criterion to judge the allowability of an expense. There was no authority for that. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purpose of business; it was no concern of the TPO to disallow it on any extraneous reasoning. He was expected to examine the international transaction as he actually found them and then make suitable adjustment but a wholesale disallowance of the expenditure is not warranted. It has further been held that it is not open to the TPO to question the judgment of the assessee as to how it should conduct its business and regarding the necessity or otherwise of incurring the expenditure in the interest of its business. It is entirely the choice of the assessee as to from whom it contemplates to source its technology or technical knowhow and as to what steps should be taken to meet the competition prevalent in the market and to stave off the competitors. This is the domain of the businessman and the TPO has no say in the matter. The Revenue cannot justifiably claim to place itself in the arm chair of businessman or in the position of the Board of Directors and assume the role to decide how much is the reasonable expenditure having regard

to the circumstances of the case. In view of the above discussion and in view of the detailed reasoning given by the Id. CIT(A) while deleting the disallowance made by the Assessing Officer. We find no infirmity in the same. Accordingly, the order of the Id. CIT(A) is upheld and the ground raised by the Revenue is dismissed.

49. Ground no.2 by the Revenue reads as under :-

“2. In deleting the addition amounting to Rs.40,36,786/- made on account of provision for gratuity to book profit as per provision of section 115JB of the Income Tax Act 1961.”

50. Facts of the case, in brief, are that the Assessing Officer during the assessment proceedings observed that the assessee has debited an amount of Rs.40,36,786/- on account of provision for gratuity which has been added to the taxable income of the assessee while computing the income under the normal provisions of the Act. Since the same has not been added to the net profit for the purpose of computing book profit, he asked the assessee explain as to why the same should not be added back to the book profit. It was explained by the assessee that the provision for gratuity is ascertained liability calculated by approved valuer and no addition should be made to the book profit. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He observed that the provision for gratuity is made on the basis of

actuarial valuation but the actual payment of the gratuity is deferred to a later date on the happening of certain event namely death or voluntary retirement of the employee which are uncertain events. He, therefore, held that the provision made by the assessee for the payment of gratuity is unascertained liability. He accordingly added the same to the book profit as per clause (c) of Explanation (1) below sub-section 2 of section 115JB. Before the ld. CIT(A), the assessee relying on various decisions argued that the provision for gratuity being unascertained liability cannot be added to the book profit. Based on the argument advanced by the assessee, ld. CIT(A) deleted the addition by observing as under :-

“The provision for gratuity amounting to Rs.40,36,786/- debited to the profit and loss account has been added to the taxable income while computing the income under normal provisions of the Act. Since the same is not added to the net profit for the purpose of computing the book profit, the assessing officer has added it to the book profit on this account. The assessing officer has also observed that the provision for gratuity has been made on the basis of actuarial valuation. During the course of the appellate proceedings, the Appellant has explained that this provision is not an unascertained liability instead it has been created on the basis of the actuarial valuation. Thus, the clause (c) of the explanation (1) does not apply in the instant case. The appellant has also relied on various case laws. In the case of DCIT Vs. Inox Leisure (supra) the Hon’ble High Court of Gujarat has held “Considering the above judicial pronouncements and the facts on hand, we have no hesitation in upholding the Tribunal’s view that though actual payment of gratuity may be made at a later point of time upon periodical release of the employees from service, it is provision having been made on actuarial basis it cannot be stated to be an unascertained liability so as to add it back in terms of Clause (c) to Explanation 1 to section 115JB.” Respectfully following the decision of the Hon’ble High Court of Gujarat in the case of DCIT Vs. Inox Leisure (supra), the assessing officer is directed to exclude the provision for gratuity amounting to Rs.40,36,786/- while computing book profit u/s 115JB. This ground of appeal is allowed.”

51. Aggrieved with such order of the Id. CIT(A), the Revenue is in appeal before the Tribunal.

52. After hearing both the sides, we do not find any infirmity in the order of the Id. CIT(A). It is an admitted fact that the provision for such gratuity was made on the basis of actuarial valuation which even has been accepted by the Assessing Officer. The only grievance of the Assessing Officer is that since the actual payment of the gratuity is deferred to a later date on the happening of certain events namely death or voluntary retirement of the employee which are uncertain events, therefore, such provision is as an unascertained liability. However, the various Benches of the Tribunal are continuously and consistently holding that when the provision for gratuity is being made on the basis of actuarial valuation, it cannot be said to be an unascertained liability and added in terms of clause (c) to Explanation (1) to section 115JB of the I.T. Act.

53. The Hon'ble Bombay High Court in the case of CIT vs. Echjay Forgings Private Limited reported in 251 ITR 15 has held that since provision for gratuity was made on the basis of actuarial valuation, it was an ascertained liability and the said amount would not be added to the net profits. Similar view has been held by the Indore Bench of the Tribunal in the case of Eicher Motors Ltd. vs. DCIT reported in 82 TTJ 61. The various other decisions relied on by the Id. counsel for the assessee also support its case. In view of the above and in

absence of any contrary material brought to our notice by the ld. DR against the order of the ld. CIT(A), we do not find any infirmity in the same. Accordingly, the order of the ld. CIT(A) on this issue is upheld and the ground raised by the Revenue is dismissed.

54. In the result, the appeal filed by the assessee is partly allowed for statistical purposes and the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on this 26th February, 2018.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 26-02-2018.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi