आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,जी,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**
श्री रमित कोचर, लेखा सदस्य, के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Ramit Kochar, Accountant Member

ITA NOs.2348 & 2350/Mum/2017
Assessment Year: 2008-09

SI Group India Pvt. Ltd. Plot No.2/1, T.T.C. Industrial Area, Thane Belapur Road, Navi Mumbai-400705	vs	DCIT (Large Taxpayer Unit), 29th Floor, World Trade Centre, Cuffe Parade, Mumbai-400005
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.**AACH7323L**		

निर्धारिती **की ओर से /** Assessee by	Shri Ajit Jain
राजस्व **की ओर से** / Revenue by	Chaudhary Arun Kumar Singh-DR

सुनवाई की तारीख / **Date of Hearing :**	**11/10/2018**
आदेश की तारीख /**Date of Order:**	**11/10/2018**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

These two appeals are by the assessee against the impugned orders dated 20/01/2017 and 25/01/2017 of the Ld. First Appellate Authority, Mumbai, confirming the action of the Ld. ACIT in restricting the MAT credit of the Assessment Year 2006-07 to the extent of Rs.44,29,848/- instead of Rs.49,70,291/-, claimed by the assessee and further the fact that the said MAT credit under section 115JAA of the Act consist of sur-charge of Rs.4,42,985/- and education cess of Rs.97,457/-, which would be part of MAT payable under section 115JB of the Act for Assessment Year 2006-07.

2. During hearing, the ld. counsel for the assessee, Shri Ajit Jain, advanced arguments, which are identical to the ground raised by contending that the assessee moved application under section 154 of the Act, which was not considered in proper perspective. Plea was also raised that tax includes surcharge, cess so far as section 115JB and 115JAA is concerned and placed reliance upon the decision in the case of M/s Eastern Jewels Pvt. Ltd. vs ACIT (ITA

No.163/Jp/2017) and CIT vs K. Srinivasan 83 ITR 346 (Supreme Court). On other hand, the ld. DR, Chaudhary Arun Kumar Singh, contended that assessee filed two applications under section 154 of the Act and defended the impugned orders.

2.1. We have considered the rival submissions and perused the material available on record. In view of the above arguments from both sides, we are reproducing hereunder the relevant portion from the order of the Jaipur Bench of the Tribunal in the case of M/s Eastern Jewels Pvt Ltd. vs ACIT for ready reference and analysis:-

> *"This is an appeal filed by the assessee against the order of ld. CIT(A)- 01, Jaipur dated 14.12.2016 pertaining to assessment year 2011-12 wherein the assessee has challenged the action of ld. CIT(A) in confirming the action of the Assessing Officer in restricting the MAT credit of AY 2010-11 to Rs. 6,59,098/- as against Rs. 10,41,894/- claimed by the assessee company.*
>
> *2. Briefly stated, the facts of case are that in its return of income, the assessee has claimed MAT credit of Rs. 10,41,894/- u/s 115JAA pertaining to AY 2010-11. The AO however restricted the MAT credit to Rs. 6,59,098/- as claim by the assessee in its return of income for A.Y 2010-11 and secondly, the AO held that the MAT credit so worked out by the assessee, it has included surcharge and education cess which is not to be included for calculating the MAT credit as only tax is to be allowed to be carried forward as MAT credit and not surcharge and education cess as contemplated u/s 115JAA of the Act.*

3. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A). The ld. CIT(A) has returned a finding that as regards the quantum of carried forward MAT credit is concerned, where there was some mistake in carrying forward the MAT credit pertaining to AY 2010- 11, the proper course of action for the appellant would have been to revise its return of income for the AY 2010-11 and carry forward the correct amount of MAT Credit. Secondly, the ld. CIT(A) relied on the decision of Hon'ble Allahabad High Court in case of CIT vs. Vacment India [2015] 55 taxmann.com 314 and confirmed the action of the AO in restricting the MAT credit to Rs. 6,59,731/-. Now, the assessee is in appeal before us.

4. Firstly, it was submitted by the ld. AR that the assessee has moved an application u/s 154 for AY 2010-11 for rectifying the quantum of MAT credit and the AO has since accepted that the assessee company is eligible to carry forward MAT credit of Rs. 10,41,894/- pertaining to AY 2010-11 vide its order dated 12.02.2018. It was further submitted that the Hon'ble Supreme Court in case of CIT vs. K. Srinivasan [1972] 83 ITR 346 has held that the words "income-tax" would include surcharge and additional surcharge. Therefore, the tax paid and tax payable as per section 115JAA(2A) would include both surcharge and education cess and the MAT credit claimed by the assessee company is correct. Further, reference was drawn to the Coordinate Bench decision in case of ACIT vs. Smt. Zahida Bano (ITA No. 579/JP/2013 dated 15.05.2017) where the aforesaid decision of the Hon'ble Supreme Court has been followed. Further, the ld. AR referred to the decision of Hon'ble Calcutta High Court in the case of Srei Infrastructure Finance Ltd. vs. DCIT [2016] 395 ITR 291 (Cal) wherein the earlier decision of the Hon'ble Allahabad High Court in case of CIT v. Vacment India [2014] 369 ITR 304 (All) has been distinguished and it has been held that both the surcharge and education cess are part of income tax.

5. The question of law which came up for consideration before the Hon'ble Calcutta High Court (supra) was whether on the facts and in the circumstances of the case and in law, the Tribunal was right in confirming the set-off of MAT Credit under section 115JAA brought forward from earlier years against tax on total income including surcharge and education cess instead of adjusting the same from tax on total income

before charging such surcharge education cess" and the relevant findings are contained as under:-

> *"…7. We have not been impressed by the submissions advanced by Mr. Khaitan for the following reasons:-*
>
> *(b) We are inclined to think that both surcharge and cess are part of the income tax though payable in addition to the Income Tax calculated at the rate provided in Section 115JB.*
>
> *8. We are supported in our view by Sub-section (1), the second proviso to Sub-section (3); Sub-section (11) and Sub-section (12) of Section (2) of the Finance Act, 2008, which provides as follows:-*
>
> *……..*
>
> *Second proviso to Sub-section (3):-*
>
> *……..*
>
> *All the provisions quoted above speak about income tax being increased by the amount of surcharge and cess. Can it in that case be contended that surcharge is anything other than Income Tax? We think the answer is 'no'.*
>
> *9. It is true that sub-section (1) of section 4 of the Income Tax Act provides for rate or rates of Income Tax to be stipulated by the Central Act. If the legislature chooses to realise part of the amount by way of tax and part of it by way of surcharge and cess thereon rather than providing for a higher rate to realise the intended amount of tax, can it be said that the rate of income tax is what appears to have been provided without taking into account the surcharge and the cess? The answere we think again is an emphatic 'no'. The reason behind increase of income tax by the amount of surcharge and cess has been spelt out on the basis whereof it can be said that the intention is that part of the amount realized by way of income tax is earmarked for being spent in education and higher education. 10 We are, so such, of the opinion that the view taken by the learned Tribunal is a correct view.*
>
> *……*
>
> *No elaborate reasoning is, as such required to show why are we unable to follow the judgment of the Allahabad High Court in the case of Vacment India (supra)?*
>
> *………*
>
> *12. There can be no quarrel with the aforesaid view. But the same has no application to this case because the form for the relevant year, which provided inspiration to the assessee to take this point, did in fact seek to control or derogate from*

> *the sections quoted above. That form, as a matter of fact, was erroneous. That form has subsequently been corrected. Had it not been a case of a wrong form, the corrected form would in that case be contrary to law. Our attention was not drawn nor was it contended that the corrected form is contrary to law. Both the forms, viz. the one which was prevalent at the relevant period of time and which was corrected for the assessment year 2012-13, could not be the correct forms. If the form of 2012-13 was correct, then the form of 2008-09 was wrong, and naturally contrary to law.*
>
> *13. We, as such, answer the question in the affirmative and against the assessee….."*

6. Further, the reliance was placed on the decisions of Coordinate Bench in the case of Virtusa (India) (P) Ltd. vs. DCIT (2016) 157 ITD 1160 (Hyd) and in the case of Bhagwati Oxegen Ltd. vs. ACIT (2017) 51 CCH 0368 Kol Trib. It was accordingly submitted that the assessee has rightly claimed the MAT credit well within the four corners of provisions of section 115JAA. The relief may kindly be granted by allowing the MAT credit to the extent of Rs. 10,41,894/- as against Rs. 6,59,098/- allowed by the Assessing Officer.

7. The ld. DR is heard who has relied on the order of the lower authorities.

8. We have heard the rival contentions and perused the material available on record. The limited issue under consideration is whether for the purposes of computing the MAT credit u/s 115JAA of the Act, whether tax include surcharge and education cess or not.

9. In this regard, we refer to the provisions of section 115JB of the Act and in particular Explanation - 2 wherein the amount of income tax has been defined to include surcharge and education cess and the same is reproduced as under:-

> *"[Explanation 2.— For the purposes of clause (a) of Explanation 1, the amount of income-tax shall include—*
>
> *(i) any tax on distributed profits under section 115-O or on distributed income under section 115R;*
>
> *(ii) any interest charged under this Act;*
>
> *(iii) surcharge, if any, as levied by the Central Acts from time to time;*

> *(iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and (v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time."*

10. In the instance case, as per the order of the AO passed under section 154 of the Act dated 31.3.2010 for AY 2010-11, it has been stated that the assessee company has paid MAT u/s 115JB amounting to Rs 40,15,518 and given that tax under normal provisions comes to Rs 29,70,947, the MAT credit of Rs 10,44,571 is allowed to be carried forward u/s 115JAA of the Act. Further, in view of explanation 2 to section 115JB, there is no dispute that the tax includes surcharge and education cess. In any case, the decision of the Hon'ble Calcutta High Court in case of Srei Infrastructure Finance Ltd (supra) supports the case of the assessee company.

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

2.2. It is noted that as explained by the Ld. counsel for the assessee, two applications were moved under section 154 of the Act rectifying the mistakes of quantum of MAT credit and since the earlier application was not disposed of by the Ld. Assessing Officer, the assessee moved another application, therefore, two appeals has been moved for Assessment Year 2008-09 but the issues involved are same. The issue before us is with respect to whether MAT credit will include income tax, sur-charge and education cess. The facts, in brief, are that the assessee vide application dated 02/04/2014 applied for rectification of order dated 07/01/2004, under section 154 of the Act as per which, it

was claimed that there was short grant of MAT credit. The contention of the assessee was not found acceptable. Before adverting further, it is our bounded duty to examine section 115JB of the Act, which is reproduced hereunder:-

> **115JB.** (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012, is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent.
>
> (2) Every assessee,—
>
> (*a*) being a company, other than a company referred to in clause (*b*), shall, for the purposes of this section, prepare its [76][statement of profit and loss] for the relevant previous year in accordance with the provisions of [76][Schedule III] to the [76b][Companies Act, 2013 (18 of 2013)]; or
>
> (*b*) being a company, to which the [76c][second proviso to sub-section (1) of section 129] of the [76d][Companies Act, 2013 (18 of 2013)] is applicable, shall, for the purposes of this section, prepare its [76e][statement of profit and loss] for the relevant previous year in accordance with the provisions of the Act governing such company:
>
> **Provided** that while preparing the annual accounts including [76e][statement of profit and loss],—
>
> (*i*) the accounting policies;
>
> (*ii*) the accounting standards adopted for preparing such accounts including [76e][statement of profit and loss];
>
> (*iii*) the method and rates adopted for calculating the depreciation,
>
> shall be the same as have been adopted for the purpose of preparing such accounts including [76e][statement of profit and loss] and laid before the company at its annual general meeting in accordance with the provisions of [76f][section 129] of the [76d][Companies Act, 2013 (18 of 2013)] :
>
> **Provided further** that where the company has adopted or adopts the financial year under the [76d][Companies Act, 2013 (18 of 2013)], which is different from the previous year under this Act,—
>
> (*i*) the accounting policies;
>
> (*ii*) the accounting standards adopted for preparing such accounts including [76e][statement of profit and loss];

(*iii*) the method and rates adopted for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including [76e][statement of profit and loss] for such financial year or part of such financial year falling within the relevant previous year.

Explanation 1.—For the purposes of this section, "book profit" means the [77][profit] as shown in the [76e][statement of profit and loss] for the relevant previous year prepared under sub-section (2), as increased by—

(*a*) the amount of income-tax paid or payable, and the provision therefor; or

(*b*) the amounts carried to any reserves, by whatever name called, other than a reserve specified under section 33AC; or

(*c*) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

(*d*) the amount by way of provision for losses of subsidiary companies; or

(*e*) the amount or amounts of dividends paid or proposed ; or

(*f*) the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (*38*) thereof) or section 11 or section 12 apply; or

(*fa*) the amount or amounts of expenditure relatable to income, being share of the assessee in the income of an association of persons or body of individuals, on which no income-tax is payable in accordance with the provisions of section 86; or

(*fb*) the amount or amounts of expenditure relatable to income accruing or arising to an assessee, being a foreign company, from,—

(*A*) the capital gains arising on transactions in securities; or

(*B*) the interest, royalty or fees for technical services chargeable to tax at the rate or rates specified in Chapter XII,

if the income-tax payable thereon in accordance with the provisions of this Act, other than the provisions of this Chapter, is at a rate less than the rate specified in sub-section (1); or

(*fc*) the amount representing notional loss on transfer of a capital asset, being share of a special purpose vehicle, to a business trust in exchange of units allotted by the trust referred to in clause (*xvii*) of section 47 or the amount representing notional loss resulting from any change in carrying amount of said units or the amount of loss on transfer of units referred to in clause (*xvii*) ofsection 47; or

[78][(*fd*) the amount or amounts of expenditure relatable to income by way of royalty in respect of patent chargeable to tax under section 115BBF; or]

(*g*) the amount of depreciation,

(*h*) the amount of deferred tax and the provision therefor,

(*i*) the amount or amounts set aside as provision for diminution in the value of any asset,

(*j*) the amount standing in revaluation reserve relating to revalued asset on the retirement or disposal of such asset,

(*k*) the amount of gain on transfer of units referred to in clause (*xvii*) of section 47 computed by taking into account the cost of the shares exchanged with units referred to in the said clause or the carrying amount of the shares at the time of exchange where such shares are carried at a value other than the cost through [79][statement of profit and loss], as the case may be;

if any amount referred to in clauses (*a*) to (*i*) is debited to the [79a][statement of profit and loss] or if any amount referred to in clause (*j*) is not credited to the [79a][statement of profit and loss], and as reduced by,—

(*i*) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the [80][statement of profit and loss]), if any such amount is credited to the [80][statement of profit and loss]:

Provided that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this *Explanation* or *Explanation* below the second proviso to section 115JA, as the case may be; or

(*ii*) the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (*38*) thereof) or section 11 or section 12 apply, if any such amount is credited to the [80][statement of profit and loss]; or

(*iia*) the amount of depreciation debited to the [80][statement of profit and loss] (excluding the depreciation on account of revaluation of assets); or

(*iib*) the amount withdrawn from revaluation reserve and credited to the [80][statement of profit and loss], to the extent it does not exceed the amount of depreciation on account of revaluation of assets referred to in clause (*iia*); or

(*iic*) the amount of income, being the share of the assessee in the income of an association of persons or body of individuals, on which no income-tax is payable in accordance with the provisions of section 86, if any, such amount is credited to the [80][statement of profit and loss]; or

(*iid*) the amount of income accruing or arising to an assessee, being a foreign company, from,—

(*A*) the capital gains arising on transactions in securities; or

(*B*) the interest, royalty or fees for technical services chargeable to tax at the rate or rates specified in Chapter XII,

if such income is credited to the [80][statement of profit and loss] and the income-tax payable thereon in accordance with the provisions of this Act, other than the provisions of this Chapter, is at a rate less than the rate specified in sub-section (1); or

(*iie*) the amount representing,—

(*A*) notional gain on transfer of a capital asset, being share of a special purpose vehicle to a business trust in exchange of units allotted by that trust referred to in clause (*xvii*) of section 47; or

(*B*) notional gain resulting from any change in carrying amount of said units; or

(*C*) gain on transfer of units referred to in clause (*xvii*) of section 47,

if any, credited to the [80a][statement of profit and loss]; or

(*iif*) the amount of loss on transfer of units referred to in clause (*xvii*) of section 47 computed by taking into account the cost of the shares exchanged with units referred to in the said clause or the carrying amount of the shares at the time of exchange where such shares are carried at a value other than the cost through [81][statement of profit and loss], as the case may be; [82][or]

[82][(*iig*) the amount of income by way of royalty in respect of patent chargeable to tax under section 115BBF; [83][or]]

[84]**[**(iih*) the aggregate amount of unabsorbed depreciation and loss brought forward in case of a company against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).*

Explanation.*—For the purposes of this clause, the expression "Adjudicating Authority" shall have the meaning assigned to it in clause (*1*) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and the loss shall not include depreciation; or***]**

(*iii*) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account [84]**[***in case of a company other than the company referred to in clause (*iih*)***]**.

Explanation.—For the purposes of this clause,—

(*a*) the loss shall not include depreciation;

(*b*) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is *nil;* or

(*iv*) to (*vi*) [***]

(*vii*) the amount of profits of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.—For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (*ga*) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986); or

[85][(*viii*) the amount of deferred tax, if any such amount is credited to the [85][statement of profit and loss].

Explanation 2.—For the purposes of clause (*a*) of *Explanation 1*, the amount of income-tax shall include—

(*i*) any tax on distributed profits under section 115-O or on distributed income under section 115R;

(*ii*) any interest charged under this Act;

(*iii*) surcharge, if any, as levied by the Central Acts from time to time;

(*iv*) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and

(*v*) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.

Explanation 3.—For the removal of doubts, it is hereby clarified that for the purposes of this section, the assessee, being a company to which the [86][second proviso to sub-section (1) of section 129 of the Companies Act, 2013 (18 of 2013)] is applicable, has, for an assessment year commencing on or before the 1st day of April, 2012, an option to prepare its [87][statement of profit and loss] for the relevant previous year either in accordance with the provisions of [88][Schedule III to the Companies Act, 2013 (18 of 2013)] or in accordance with the provisions of the Act governing such company.]

[89][*Explanation 4.*—For the removal of doubts, it is hereby clarified that the provisions of this section shall not be applicable and shall be deemed never to have been applicable to an assessee, being a foreign company, if—

(*i*) the assessee is a resident of a country or a specified territory with which India has an agreement referred to in sub-section (1) of section 90 or the Central Government has adopted any agreement under sub-section (1) of section 90A and the assessee does not have a permanent establishment in India in accordance with the provisions of such agreement; or

(*ii*) the assessee is a resident of a country with which India does not have an agreement of the nature referred to in clause (*i*) and the assessee is not required to seek registration under any law for the time being in force relating to companies.]

[90]**[**Explanation 4A.—*For the removal of doubts, it is hereby clarified that the provisions of this section shall not be applicable and shall be deemed never to have been applicable to an assessee, being a foreign company, where its total income comprises solely of profits and gains from business referred to in section 44B or section 44BB or section 44BBA or section 44BBB and such income has been offered to tax at the rates specified in those sections.***]**

[91][*Explanation 5*].—For the purposes of sub-section (2), the expression "securities" shall have the same meaning as assigned to it in clause (*h*) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).

[92][(2A) For a company whose financial statements are drawn up in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015, the book profit as computed in accordance with *Explanation 1* to sub-section (2) shall be further—

(*a*) increased by all amounts credited to other comprehensive income in the statement of profit and loss under the head "Items that will not be re-classified to profit or loss";

(*b*) decreased by all amounts debited to other comprehensive income in the statement of profit and loss under the head "Items that will not be re-classified to profit or loss";

(*c*) increased by amounts or aggregate of the amounts debited to the statement of profit and loss on distribution of non-cash assets to shareholders in a demerger in accordance with Appendix A of the Indian Accounting Standards 10;

(*d*) decreased by all amounts or aggregate of the amounts credited to the statement of profit and loss on distribution of non-cash assets to shareholders in a demerger in accordance with Appendix A of the Indian Accounting Standards 10:

Provided that nothing contained in clause (*a*) or clause (*b*) shall apply to the amount credited or debited to other comprehensive income under the head "Items that will not be re-classified to profit or loss" in respect of—

(*i*) revaluation surplus for assets in accordance with the Indian Accounting Standards 16 and Indian Accounting Standards 38; or

(*ii*) gains or losses from investments in equity instruments designated at fair value through other comprehensive income in accordance with the Indian Accounting Standards 109:

Provided further that the book profit of the previous year in which the asset or investment referred to in the first proviso is retired, disposed, realised or otherwise transferred shall be increased or decreased, as the case may be, by the amount or the aggregate of the amounts referred to in the first proviso for the previous year or any of the preceding previous years and relatable to such asset or investment.

(2B) In the case of a resulting company, where the property and the liabilities of the undertaking or undertakings being received by it are recorded at values different from values appearing in the books of account of the demerged company immediately before the demerger, any change in such value shall be ignored for the purpose of computation of book profit of the resulting company under this section.

(2C) For a company referred to in sub-section (2A), the book profit of the year of convergence and each of the following four previous years,

shall be further increased or decreased, as the case may be, by one-fifth of the transition amount:

Provided that the book profit of the previous year in which the asset or investment referred to in sub-clauses (*B*) to (*E*) of clause (*iii*) of the *Explanation* is retired, disposed, realised or otherwise transferred, shall be increased or decreased, as the case may be, by the amount or the aggregate of the amounts referred to in the said sub-clauses relatable to such asset or investment:

Provided further that the book profit of the previous year in which the foreign operation referred to in sub-clause (*F*) of clause (*iii*) of the *Explanation* is disposed or otherwise transferred, shall be increased or decreased, as the case may be, by the amount or the aggregate of the amounts referred to in the said sub-clause relatable to such foreign operations.

Explanation.—For the purposes of this sub-section, the expression—

(*i*) "year of convergence" means the previous year within which the convergence date falls;

(*ii*) "convergence date" means the first day of the first Indian Accounting Standards reporting period as defined in the Indian Accounting Standards 101;

(*iii*) "transition amount" means the amount or the aggregate of the amounts adjusted in the other equity (excluding capital reserve and securities premium reserve) on the convergence date but not including the following:—

(*A*) amount or aggregate of the amounts adjusted in the other comprehensive income on the convergence date which shall be subsequently re-classified to the profit or loss;

(*B*) revaluation surplus for assets in accordance with the Indian Accounting Standards 16 and Indian Accounting Standards 38 adjusted on the convergence date;

(*C*) gains or losses from investments in equity instruments designated at fair value through other comprehensive income in accordance with the Indian Accounting Standards 109 adjusted on the convergence date;

(*D*) adjustments relating to items of property, plant and equipment and intangible assets recorded at fair value as deemed cost in accordance with paragraphs D5 and D7 of the Indian Accounting Standards 101 on the convergence date;

(*E*) adjustments relating to investments in subsidiaries, joint ventures and associates recorded at fair value as deemed cost in accordance with paragraph D15 of the Indian Accounting Standards 101 on the convergence date; and

(*F*) adjustments relating to cumulative translation differences of a foreign operation in accordance with paragraph D13 of the Indian Accounting Standards 101 on the convergence date.]

(3) Nothing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried

forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause (*ii*) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A.

(4) Every company to which this section applies, shall furnish a report in the prescribed form[93] from an accountant as defined in the *Explanation* below sub-section (2) of section 288, certifying that the book profit has been computed in accordance with the provisions of this section along with the return of income filed under sub-section (1) of section 139 or along with the return of income furnished in response to a notice under clause (*i*) of sub-section (1) of section 142.

(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.

(5A) The provisions of this section shall not apply to any income accruing or arising to a company from life insurance business referred to in section 115B.

(6) The provisions of this section shall not apply to the income accrued or arising on or after the 1st day of April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone, as the case may be:

Provided that the provisions of this sub-section shall cease to have effect in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012.

[94][(7) Notwithstanding anything contained in sub-section (1), where the assessee referred to therein, is a unit located in an International Financial Services Centre and derives its income solely in convertible foreign exchange, the provisions of sub-section (1) shall have the effect as if for the words "eighteen and one-half per cent" wherever occurring in that sub-section, the words "nine per cent" had been substituted.

Explanation.—For the purposes of this sub-section,—

(*a*) "International Financial Services Centre" shall have the same meaning as assigned to it in clause (*q*) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005);

(*b*) "unit" means a unit established in an International Financial Services Centre;

(*c*) "convertible foreign exchange" means a foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 (42 of 1999) and the rules made thereunder.]

2.3. If the aforesaid section is analyzed, explanation-2 inserted by the Finance Act, 2008, w.r.e.f. 01/04/2001

clarifies that for the purposes of clause (a) of explanation-1, the amount of income tax shall include

> *(i) any tax on distributed profits under section 115-O or on distributed income under section 115R;*
>
> *(ii) any interest charged under this Act;*
>
> *(iii) surcharge, if any, as levied by the Central Acts from time to time;*
>
> *(iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and*
>
> *(v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.*

2.4. The Ld. DCIT in his order under section 154 says that section 115JAA stipulates that such book profit shall be deemed to be the total income of the assessee and tax payable by the assessee on such total income shall be the amount of income tax at specified rate of tax, which was 7.5% for Assessment Year 2006-07. Thus, section 115JAA does not talk about the income tax as increased by surcharge or education cess and it talks about only income tax. This issue has been clarified by Hon'ble Apex Court in CIT vs K. Srinivasan (1972) 83 ITR 346 (Supreme Court) whether income tax include sur-charge, which is reproduced hereunder:-

> "This is an appeal by special leave from a judgment of the Kerala High Court in an income-tax reference. Originally C. A. No. 1111 of 1969 had been brought by certificate but the same has been found to

be defective for want of reasons and has, therefore, to be revoked. Special leave was sought and has been granted.

The facts may be succinctly stated. The assessee's main source of income was salary from a limited company (A. V. Thomas & Co. Ltd.). In the previous year ending on 30th March, 1964, his total income from salary amounted to Rs. 42,900. In making the assessment the Income-tax Officer levied surcharge and additional surcharge in accordance with the rates prescribed by the Finance Act, 1963. The assessee preferred an appeal to the Appellate Assistant Commissioner. It was contended before him on behalf of the assessee that the provisions of the Finance Act, 1964, did not permit the Income-tax Officer to levy surcharge and additional surcharge in accordance with the provisions of the Finance Act of 1963. In other words, it was contended that under sub-section (2) of section 2 of the Finance Act of 1964 only income-tax was payable in the proportion in which the salary stood to the total income, the income-tax being worked out at the rates applicable under the Finance Act, 1963. There being no mention of any surcharge in the sub-section income-tax alone was leviable which did not include surcharge. The Appellate Assistant Commissioner did not accede to these contentions. He was of the view that surcharge was only another form of income-tax. The matter was taken to the Appellate Tribunal which upheld the levy of the surcharge and the additional surcharge. On a reference being sought, the following question of law was referred to the High Court:

"Whether the words 'income-tax' in the Finance Act of 1964 in sub-section (2)(*a*) and sub-section (2)(*b*) of section 2 would include surcharge and additional surcharge ?"

The High Court answered the question in the negative and in favour of the assessee.

Section 2 of the Finance Act, 1964, which is headed as "Income-tax and super-tax" provides in sub-section (1) that income-tax and super-tax shall be charged at the rates specified in Parts I and II of the First Schedule respectively and that in cases to which certain paragraphs of those Parts apply these taxes shall be increased for surcharge for the purpose of the Union. According to sub-section (2) where the total income of an assessee not being a company includes any income chargeable under the head "Salaries" income-tax and super-tax payable by the assessee on the salary portion of the total income shall be the proportionate amount payable according to the rates provided in the Finance Act, 1963. Under section 2 of the Finance Act, 1963, income-tax was to be charged at the rates specified in Part I of the First Schedule and super-tax at the rates specified in Part II of that Schedule. The income-tax was to be increased in the cases mentioned by a surcharge and additional surcharge for the purpose of the Union and a special surcharge. The super-tax was, however, to be increased by a surcharge for the purpose of the Union and a special surcharge. It will be noticed that section 2(2) of the Finance

Act, 1964, did not contain mention of any of the surcharges. This led to the controversy which resulted in the reference.

Before the High Court the assessee relied on sections 4 and 95 of the Income-tax Act, 1961, hereinafter called "the Act". These sections provide for charge of income-tax and super-tax. It was pointed out that surcharge was treated in the Finance Acts as a tax different from the income-tax and super-tax and that surcharge was levied by the Finance Act while the income and super-taxes were levied by the Act. Reference was made in this connection to the First Schedule to the Finance Act, 1963. Part I of that Schedule dealt with "income-tax and surcharge on income-tax". Under that heading were given the rates of income-tax as also the rates of surcharge. Similarly, Part II of the Schedule dealt with super-tax and surcharge on super-tax and under that heading the rates of super-tax and the rates of surcharge on super-tax were given. Among the surcharges in the case of income-tax were mentioned: (*a*) a surcharge for the purpose of the Union, (*b*) a special surcharge and (*c*) an additional surcharge. As regards the surcharge on super-tax there was mention of (*a*) a surcharge for the purpose of the Union and (*b*) a special surcharge. The High Court examined the aforesaid provisions of the Finance Acts of 1963 and 1964 and articles 270 and 271 of the Constitution apart from the legislative entry 82 in List I of the Seventh Schedule. It came to the conclusion that income-tax and super-tax did not include surcharge and that these were called by different nomenclature in all the statutory provisions.

In order to determine the point before us, which is of considerable complexity, it is necessary to trace the concept of surcharge in taxation laws in our country. The power to increase federal tax by surcharge by the federal legislature was recommended for the first time in the report of the committee on *Indian Constitutional Reforms,* volume I, part I. From paragraph 141 of the proposals it appears that the word "surcharge" was used compendiously for the special addition to taxes on income imposed in September, 1931. The Government of India Act, 1935, Part VII, contained provisions relating to finance, property, contracts and suits. Sections 137 and 138 in Chapter I headed "finance" provided for levy and collection of certain succession duties, stamp duties, terminal tax, taxes on fares and freights, and taxes on income, respectively. In the proviso to section 137 the federal legislature was empowered to increase at any time any of the duties or taxes leviable under that section by a surcharge for federal purposes and the whole proceeds of any such surcharge were to form part of the revenues of the federation. Sub-section (3) of section 138 which dealt with taxes on income related to imposition of a surcharge. Under the Government of India Act, 1935, the surcharge was levied for the first time by the Indian Finance No. 2 Act, 1940. Section 3(1) of that Act read :

"Subject to the provisions of this section, the rates of income-tax and rates of super-tax . . . imposed by sub-section (1) of section 7 of the Indian Finance Act, 1940, shall, in respect of the year beginning on

the first day of April, 1940, be increased by a surcharge for the purposes of the Central Government ..."

Similar phraseology was employed in respect of surcharge on super-tax. The provisions relating to surcharge were omitted in the Finance Acts of 1946 to 1950. It was reintroduced in the Finance Act of 1951 and the same has been continued in the Finance Acts of subsequent years. Special surcharge came to be levied in the Finance Acts of 1958 to 1964 and 1966 to 1971 and the additional surcharge was levied only by the Finance Act of 1963.

In the Finance Act of 1951, section 2 relating to income-tax and super-tax provided that these taxes would be levied at the rates specified in Parts I and II of the First Schedule increased in each case by a surcharge for the purpose of the Union. The Finance Act of 1952 was a short document and section 2 thereof simply provided :

"The provisions of section 2 of, and the First Schedule to, the Finance Act, 1951, shall apply in relation to income-tax and super-tax for the financial year 1952-53 as they apply in relation to income-tax and super-tax for the financial year 1951-52.........."

There was no specific mention whatsoever of surcharge in section 2 nor was there any modification of the First Schedule to the Finance Act of 1951 which contained the rates, etc., relating to the surcharge. Similar state of affairs existed with regard to the Finance Acts of 1953, 1954 and 1957. Section 2 of the Finance Act, 1971, is to the effect that the provisions of section 2 and of the First Schedule to the Finance Act, 1970, shall apply in relation to income-tax for the assessment year or, as the case may be, the financial year commencing on the first day of April, 1971, as they apply in relation to income-tax for the assessment year commencing on the first day of April, 1970, with certain modifications set out in the section. The First Schedule to the Finance Act of 1970 was modified and the Schedule so modified contains provisions for a surcharge on income-tax. It is significant that section 2 of the Finance Act of 1971 speaks only of income-tax and not of any surcharge. It is only in the modifications made in the Schedule to the Finance Act of 1970 that there is provision for a surcharge.

The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "income-tax" as employed in section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income-tax and super-tax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958, the language used showed that income-tax which was to be charged was to be increased by a surcharge for the purposes of the Union. The word "surcharge" has thus been used to either increase the rates of income-tax and super-tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave

no room for doubt that the term "income-tax" as used in section 2 includes surcharge.

According to article 271, notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for the purposes of the Union and the whole proceeds of any such surcharge shall form part of the consolidated fund of India. Article 270 provides for taxes levied and collected by the Union and distributed between the Union and the States. Clause (1) says that taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2). Article 269 deals with taxes levied and collected by the Union but assigned to the States. The provisions of article 268 which is the first one under the heading "Distribution of revenue between the Union and the States" relate to duties levied by the Union but collected and appropriated by the States. Thus, these articles deal with the levy, collection and distribution of the proceeds of the taxes and duties mentioned therein between the Union and the States. The legislative power of Parliament to levy taxes and duties is contained in articles 245 and 246(1) read with the relevant entries in List I of the Seventh Schedule.

As mentioned before, the legislative entry 82 in List I relates to taxes on income other than agricultural income; income-tax, super-tax and surcharge would all fall under this entry. It is in exercise of the legislative power conferred by that entry that the Union Parliament enacts the provision in the Finance Act each year relating to them. It is that Act which authorises these taxes to be charged and prescribes the rates at which they can be charged. Section 4 of the Act simply provides that where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates income-tax at that rate or those rates shall be charged in accordance thereto and subject to the provisions of the Act. Section 95, which was omitted by the Finance Act of 1965, contained similar provision with regard to super-tax. Although under the Act section 4 is the charging section yet income-tax can be charged only where the Central Act which, in the present case, will be the Finance Act, enacts that income-tax shall be charged for any assessment year at the rate or rates specified therein. The distinction made by the High Court that the surcharge are levied only under the Finance Act and income-tax under the Act may not hold good if the above view which has been pressed on behalf of the revenue were to be accepted. In our judgment it is unnecessary to express any opinion in the matter because the essential point for determination is whether surcharge is an additional mode or rate for charging income-tax.

The meaning of the word "surcharge" as given in the *Webster's New International Dictionary* includes, among others, "to charge (one) too much or in addition................"; also "additional tax". Thus, the meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is

> **applied to section 2 of the Finance Act, 1963, it would lead to the result that income-tax and super-tax were to be charged in four different ways or at four different rates which may be described as : (*i*) the basic charge or rate (In Part I of the First Schedule); (*ii*) surcharge ; (*iii*) special surcharge ; and (*iv*) additional surcharge calculated in the manner provided in the Schedule. Read in this way, the additional charges form a part of the income-tax and super-tax.** It is possible to argue, and that argument has been commended on behalf of the revenue, that the word "surcharge" has been used in article 271 for the purpose of separating it from the basic charge of a tax or duty for the purpose of distributing the proceeds of the same between the Union and the States. The proceeds of the surcharge are exclusively assigned to the Union. Even in the Finance Act itself it is expressly stated that the surcharge is meant for the purpose of the Union.
>
> It would appear that, since the Finance Act, 1943, up to the Finance Act, 1967, a provision was made for taxing the income under the head "Salaries" according to the provisions of the Finance Act of the preceding year rather than of the current year if the assessee had any income in addition to his income by way of salary. According to the Tribunal this was done because if the income under the head "Salaries" was to be assessed at the rates fixed by the Finance Act enacted for the current year it would entail considerable administrative work in the form of a refund or collection in the final assessment. Since by the Finance Act of 1967, this method or procedure was dropped we do not consider that much significance can be attached to this aspect.
>
> In the result we are unable to sustain the view of the High Court. The question that was referred must be answered in the affirmative and in favour of the revenue. In view of the nature of the point involved the parties are left to bear their own costs in this court. The appeal by certificate is dismissed.
>
> We wish to acknowledge with thankfulness the valuable assistance rendered as *amicus curiae* at our request by Mr. S.T. Desai, Senior Advocate, and Mr. Balakrishnan, Advocate, as the respondent was unrepresented.

2.5. In the aforesaid case, the Hon'ble Apex Court held that the surcharge is part of income tax. This issue has been dealt with by the coordinate bench/Jaipur Bench of the Tribunal in the aforesaid order dated 14/06/2018 and explanation-2 to section 115JB of the Act clearly states that

tax includes surcharge and education cess. Thus, following the ration of the decision of the Co-ordinate Bench in the case of M/s Eastern Jewels Pvt. Ltd. vs ACIT in ITA No.163/JP/2017. Ground no.1.1 to 1.4 raised by the assessee as to whether income tax will include sur-charge and education cess so far as section 115JB and 115JAA are concerned, are allowed as indicated above.

3. The assessee has not pressed ground no.2.1 to 2.3 which were raised without prejudice to ground no.1.1 to 1.4 with respect to stage at which MAT credit is to be allowed while computing income and hence, the same is dismissed as not pressed.

Finally, the appeals of the assessee are partly allowed.

This order was pronounced in the open court in the presence of the ld. representatives from both sides at the conclusion of the hearing on 11/10/2018.

Sd/-	**Sd/-**
(Ramit Kochar)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** /JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : **11/10/2018**

Shekhar, P.S./नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**