

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI**

BEFORE SHRI SANDEEP GOSAIN (JUDICIAL MEMBER)

AND

SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

**ITA No. 2774/MUM/2025
Assessment Year: 2021-22**

The Executor of Sobhagmal M
Patni Deceased
42A, Jolly Maker Apartment-I,
Cuffe Parade, Colaba, S.O.
Mumbai-400005
PAN NO. AAAAE 6964 C
Appellant

Income-tax Officer, Ward 30(1)(1),
Kautilya Bhavan,
Mumbai-400051.
Vs.

Respondent

Assessee by : Mr. Vinit Shah
Revenue by : Mr. Hemanshu Joshi, Sr. DR

Date of Hearing : 25/06/2025
Date of pronouncement : 30/06/2025

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 25.03.2025 passed by the Ld. Commissioner of Income-tax(Appeals)-National Faceless Appeal Centre, Delhi [in short 'the Ld. CIT(A)'] for assessment year 2021-22, raising following grounds:

In the fact and the circumstances of the case, and in law, the learned Addi/Joint Commissioner of Income-tax (Appeals) -(A)1 Kolkata, erred in



confirming the variation in the intimation u/s 143(1) made by CPC in respect of the rate of surcharge and erred:

1. In confirming that the since the appellant is liable to pay tax at maximum marginal rate, the applicable rate of surcharge is 37% viz. the maximum rate of surcharge and hence the maximum marginal rate in this case is 42.74%.

2. In not appreciating that since the total income of the appellant is Rs. 54,99,430/- viz. more than Rs. fifty lakhs but less than Rs. one crore, the applicable rate of surcharge ought to be 10 per cent

as per clause (a) in Paragraph A of Part I to the First Schedule of the relevant Finance Act.

3. In concluding that

a) The MMR always constitutes highest slab tax rates & highest slab surcharge, if any, prescribed in Finance Act

b) Part applicability of MMR is not permissible

c) Once the appellant is subject to MMR, surcharge applicable will be surcharge for highest slab only

2. Briefly stated the facts of the case are that the appellant is an Estate of the deceased Mr. Sobhagmal Patni and is the legal representative of the deceased assessee. The appellant filed the return of income for A.Y. 2021-22 declaring total income of Rs. 54,99,430/- and calculated tax (including surcharge) of Rs. 12,19,419/- on such total income at the normal rate of tax. However, the CPC while processing the return u/s. 143(1) of the Act has calculated the tax and surcharge on such total income at Maximum Marginal Rate (MMR) whereby the tax payable (including surcharge) was worked out to Rs. 15,18,733/-.

3. Aggrieved by this adjustment made by the CPC, the assessee challenged it before the CIT(A) who held that once the appellant is



subject to MMR, the levy of surcharge is to be at the highest slab @37% for which the assessee is in appeal before us. The relevant extract of the CIT(A)'s order is as under:-

"F 7] The submission of the appellant that MMR is for Tax only and not surcharge, is not correct. The MMR for this A.Y. 2021-22 is 42.74%. The rates of taxation provided in the first schedule-part-I of Finance Act, 2020 are applicable to the appellant only to the extent of rates of highest slab of tax and surcharge. It is clear the MMR is applicable to the appellant. There is no dispute on it. Here it is necessary to refer the Finance Act, 2020, chapter-II, which determines/specifies the rates of income tax to be applicable. The section 2 starts with non-obstante words such as subject to provision of sub-section 2 & 3 for A.Y. 2021-22. Therefore, where sub-section 2 & 3 are applicable, the rates specified in Part-I of first schedule required to be adopted for MMR purpose. The relevant part of sub-section 3 of section 2 of Finance Act is as under:

"In cases to which the provisions of Chapter XII or Chapter XII-A or section 115JB or section 115JC or Chapter XII-FA or Chapter XII-FB or sub-section (1A) of section 161 or section 164 or section 164A or section 167B of the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) apply, the tax chargeable shall be determined as provided in that Chapter or that section, and with reference to the rates imposed by sub-section (1) or the rates as specified in that Chapter or section, as the case may be." (Emphasis supplied)

Hence it is clear that, where MMR is applicable the rates specified in part-I of schedule are only relevant to the extent of calculating MMR and MMR will be charged in the applicable cases by virtue of sub-section 3 of section 2 of Finance Act, 2020. The rate of MMR has to be calculated as per the provisions of section 2(29C) of IT Act r.w.s. 164 of the

IT Act. The Finance Act of every year is only relevant to know the highest slab of rate of tax & surcharge. After considering both the rates of tax of highest slab as well as surcharge of highest slab mentioned in the Finance Act MMR is to be calculated & charged. The word "if any" in the section 2(29C) is relevant if the surcharge to the highest slab of income is mentioned in the relevant Finance Act and it will be applicable for a particular A.Y. For Ex. no surcharge was applicable for A.Y. 2010-11 & 2011-12 to slab of income of individual and AOP. Therefore, the word "if



any" is relevant. Here the word surcharge "if any" has relevance to levy of surcharge if mentioned in the Finance Act. The word "if any" is related to the specification/mandate of surcharge mention in the schedule of Finance Act. If surcharge of highest slab is mentioned in the Finance Act then this surcharge will be included in the tax and MMR will be calculated accordingly. If no surcharge for highest slab is mentioned in the schedule of Finance Act then no surcharge will be included in the tax quantum for calculating the MMR. This word does not remotely suggest to include surcharge in MMR as per different slab rates of income/different income like dividend income. Rates mentioned in para -A, part-I, 1st schedule for dividend income are not applicable to the appellant. Provisions of section 164 of IT Act charging the tax at MMR are applicable to the appellant. Nature of income is not relevant as appellant is liable for taxation at MMR calculated as per provisions of section 2(29C) of IT Act. The provision claimed is applicable for Fils only and not in the case of this Appellant.

Therefore, it is crystal clear that MMR is required to be computed as under on the basis of provisions of section 2(29C) of IT Act:

Tax rates for highest slab - 30% - 30

Surcharge for highest slab -37% - 11.11

Education Cess -4% -1.63

Therefore MMR for this A.Y.2023-24 will be 42.74%.

The MMR is also calculated by this method only in the commentary of Sampath lyengar. The year wise details mentioned are as under: (Here Surcharge is not on Tax but on Income - hence 20% of tax => 12% of Income)

<i>Assessment year</i>	<i>Maximum rate of tax</i>	<i>Surcharge</i>
<i>1980-81</i>	<i>60%</i>	<i>12%</i>
<i>1981-82</i>	<i>60%</i>	<i>6%</i>
<i>1982-83</i>	<i>60%</i>	<i>6%</i>
<i>1983-84</i>	<i>60%</i>	<i>6%</i>
<i>1984-85</i>	<i>60%</i>	<i>7%</i>
<i>1985-86</i>	<i>55%</i>	<i>6.88%</i>
<i>1986-87</i>	<i>50%</i>	<i>nil</i>
<i>1987-88</i>	<i>50%</i>	<i>nil</i>
<i>1988-89</i>	<i>50%</i>	<i>5%</i>



Assessment year	Maximum rate of tax	Surcharge
1989-90	50%	5%
1990-91	50%	8%
1991-92	50%	12%
1992-93	50%	12%
1993-94	40%	12%
1994-95	40%	12.00%
1995-96	40%	nil
1996-97	40%	nil
1997-98	40%	nil
1998-99	30%	--
1999-2000	30%	--
2000-2001	30%	10%
2001-2002	30%	17%
2002-2003	30%	2%
2003-2004	30%	5%
2004-2005	30%	10%
2005-2006	30%	10%
2006-2007	30%	10%
2007-2008	30%	10%
2008-2009	30%	10%
2009-2010	30%	10%
2010-2011	30%	--
2011-2012	30%	--

Extracts of commentary on Income-tax by Sampath Iyengar:

30.3 It was felt that the provisions of section 164, even after amendment in 1970, had not been fully effective in curbing the use of private trusts for avoiding proper tax liability. The Finance (No. 2) Act, 1980, has, therefore, made the following amendments to section 164 with a view to curbing tax avoidance through the medium of such trusts:

(i) A discretionary trust will be liable to tax at the maximum marginal rate of income-tax on their entire income. As a result, the entire income of a discretionary trust will be liable to tax at the maximum marginal rate of income-tax including surcharge) applicable to the Finance Act of the relevant year to the highest slab of income in the case of an association of persons. Thus, for the assessment year 1980-81, the entire income of a



discretionary trust will be charged to tax at the rate of 72 per cent (income-tax 60 per cent plus surcharge 12 per cent) and for the assessment year 1981-82, at the rate of 66 per cent (income-tax 60 per cent plus surcharge 6 per cent).

For example surcharge for highest slab is 20% for A.Y. 1980-81 and highest slab tax rate of IT was 60%, then the MMR will be calculated as under:

Tax rates for highest slab 60% - 60

Surcharge for highest slab - 20% - 12

Therefore MMR for this A.Y. 1980-81 will be 72%.

Similarly the MMR for 1981-82 will be as under:

Tax rates for highest slab - 60% - 60

Surcharge for highest slab - 10% - 6

PARTMEN Y

Therefore MMR for this A.Y. 1981-82 will be 66%.

In the book of Vinod Singhania also calculation the MMR is given which also supports the AO CPC's reason that surcharge @ 37% will have to be charged.

351-P1 Determine the tax liability of XY Trust (individual share of beneficiaries is not known) for the assessment year 2023-24, if its income during the previous year is (a) Rs. 2,60,000 and (b) Rs. 11,10,000.

Make the following assumptions :

1. If none of the beneficiaries is a beneficiary under any other trust and has income exceeding Rs. 2,50,000.
2. If one of the beneficiaries is also a beneficiary under another trust or has income exceeding Rs. 2,50,000.

SOLUTION :

	If income of the trust is	
	Rs. 2,60,000	Rs. 11,10,000
	Rs.	Rs.
IF NONE OF THE BENEFICIARIES IS A BENEFICIARY UNDER ANY OTHER TRUST AND HAS INCOME EXCEEDING Rs. 2,50,000		
Tax as per rate applicable to an association of persons [see Annex 1]	520**	1,51,320**
IF ONE OF THE BENEFICIARIES IS A BENEFICIARY IN ANOTHER TRUST OR HAS TAXABLE INCOME EXCEEDING Rs. 2,50,000		
Tax at the maximum marginal rate of tax (i.e., 42.744%)	1,11,134	4,74,458

Here, there is no mention of any head or sources of Income. Moreover, the MMR will not be applicable in parts like in one part of highest slab rate for basic tax i.e. 30% is levied & in one part surcharge is levied at a particular rate of 15% of LTCG. This is not correct. The MMR always constitutes highest slab tax rates & highest slab surcharge if any prescribed in Finance Act. There is no doubt in it. Part applicability of MMR is not permissible i.e. the tax 30% & surcharge @15% as per schedules of relevant Finance



Act on it is not permissible. Once the appellant is subject to MMR, surcharge applicable will be surcharge for highest slab only. Surcharge @37% is integral part of MMR and therefore MMR will be 42.74% for A.Y. 2021-22. Hence, there is no ground to allow this ground of Appeal.

The Appellant has informed that by an Order u/s 154, the CPC has reduced the S C on STCG & LTCG from 37% to 15% and the Surcharge charged u/s 143(1)(a) of Rs 1,62,265/-has been reduced to Rs 1,06,593/-. The Disputed Demand has been reduced from Rs 3,72,430/- u/s 143(1)(a) to Rs 73,908/- u/s 154 dated 09/06/2023, without any Reason.

Hence, the Ground No.2 is DISMISSED. However, this order will have no effect on the Rectification Order passed by the CPC on 09/06/2023 after filing of this Appeal on 13/12/2022.”

4. We have carefully perused the orders passed by the lower authorities, material on record and the arguments made by appellant and revenue. The total income of Rs. 54,99,340/- offered by the assessee comprises of STCG, LTCG and other income and there is no dispute on the applicability of Maximum Marginal Rate on the tax payable. The only issue is whether surcharge on such tax payable should be @37% and therefore the MMR should be 42.74% or not. The appellant argues that since the total income of the appellant is Rs. 54,99,430/- viz. more than Rs. 50 lakhs but less than Rs. 1 crore, the applicable surcharge ought to be 10% as per clause (a) in Paragraph A of Part I to the First Schedule of the relevant Finance Act. This issue has been recently addressed by the Hon'ble Special Bench of this Tribunal in the case of **Araadhya Jain Trust v. ITO (ITA no. 4272/Mum/2024)** wherein it is held that in the ultimate analysis, in case of Private Discretionary Trusts, whose income is chargeable to tax at MMR, surcharge has to be computed



on the income tax having reference to the slab rates prescribed in the Finance Act under the heading 'surcharge on income tax' appearing in Paragraph A, Part 1, First Schedule, applicable to the relevant assessment year. The relevant portion of this decision is reproduced as under:-

“26. On going through Paragraph A, Part (I) of First Schedule to the Finance Act-2023, it becomes very much clear that under Item (1), the rates of income tax applicable to individuals, Hindu undivided family or association of persons or body of individuals have been provided. As could be seen from the rates of income-tax for different income brackets, if the total income does not exceed Rs.2,50,000/-, the rate of income tax is Nil. If the total income exceeds Rs.2,50,000/-, but does not exceed Rs.5,00,000/-, the rate of income tax is 5% of the amount by which the total income exceeds Rs.2,50,000/-. Where the total income exceeds Rs.5,00,000/- but does not exceed Rs.10,00,000/-, the rate of income tax is Rs.12,500 plus 20% of the amount by which the total income exceeds Rs.5,00,000/- and lastly, where the total income exceeds Rs.10,00,000/-, then the rate of tax is Rs.1,12,500/-plus 30% of the amount by which the total income exceeds Rs.10,00,000/-. Thus, as per the rates of income tax prescribed in Item (1), the highest slab of income is Rs.10 lacs and above and the applicable rate of income tax is 30%. Thus, in terms with section 2(29C) of the Act, the maximum marginal rate of tax will be 30% as applicable to the highest slab of income.

27. The expression 'slab' is not mentioned either in sub-section (1) of section 2 or even under Paragraph A, Part (I) of First Schedule to the Finance Act-2023. However, as per the materials placed before us, it is observed that in Press Note dated 01.12.1965 issued by Government of India, copy of which is placed at pg. no. 45 of the Paper Book, submitted in case of NIK Family Trust, the expression 'slab' refers to 'income' and not the tax. In fact, even section 2(29C) of the Act refers to highest slab of income. Even Circular No. 2/2018 (F.No. 370142/15/2017-TPL) containing Explanatory Notes to Provisions of Finance Act, 2017, a copy of which is placed at pg. no. 47 of the Paper Book filed by the NIK Family Trust, refers the expression 'slab' to the various categories of income. Thus, in terms with sections 164/167B r.w.s. 2(29C) of the Act, tax as per maximum marginal rate would mean 'the rate of tax applicable to the highest slab of income' under Item (1) of Paragraph A, Part (I) of First Schedule to the Finance Act-2023.

28. Under the head 'Surcharge on income-tax' appearing in Paragraph A, Part (1), First Schedule it has been provided that the amount of income-tax computed as per the rate of income-tax under



Item (1), (2) and (3) or under the provisions of section 111A or section 112 or section 112A or the provision of section 115BAC of the Income Tax Act, shall be increased by a surcharge, for the purposes of the Union, calculated in the case of particular class of assessee in the manner provided therein. As could be seen from items (a) to (e), provided under the head 'Surcharge on income-tax', there are different rates of surcharge on income tax, depending upon the categories of income. The rate of surcharge starts from minimum of 10% to the maximum of 37% on income-tax. The maximum rate of surcharge at 37% on income-tax is applicable in case of assessee having total income, exceeding Rs.5 crores. It further emanates that the minimum rate of surcharge @ 10% on the incometax is applicable only when the income of the assessee is above Rs.50 lacs, but less than Rs.1 crore. Thus, as per Paragraph A, Part (I) of First Schedule to the Finance Act-2023, the threshold limit for applicability of surcharge is when total income is Rs.50 lacs and above. In other words, if the total income is below the threshold limit of Rs.50 lacs, there would be no surcharge. Even the first proviso under the heading 'Surcharge on incometax' carves out an exception regarding the rate of surcharge by stating that in case where assessee's total income includes dividend income or income under the provisions of section 111A, 112A and section 112A of the Act, the rate of surcharge on the amount of incometax computed on that part of income shall not exceed 15%. In other words, if the total income of an assessee includes any income by way of dividend or income under certain provisions of the Act, the rate of surcharge on tax computed on such part of income under no circumstances would exceed 15%.

29. If we accept the contention of the Revenue that, irrespective of the nature or quantum of income, as per the definition of maximum marginal rate u/s.2(29C) of the Act, surcharge has to be computed at the highest rate of 37% applicable to the highest income bracket of Rs.5 crores and above, then the exception provided under the first proviso under the heading 'Surcharge on income-tax' would become otiose. Even, the different rates of surcharge on income-tax provided under clause (a) to (e) applicable to the different slabs of income would become meaningless so far as discretionary trusts are concerned. In our view, such an interpretation would lead to absurdity, hence, is unworkable. In our view, once the definition of 'maximum marginal rate' refers to the rate of income-tax and surcharge provided under the Finance Act of the relevant year, then the rates of incometax and applicable rate of surcharge as provided under Paragraph A, Part (I) of First Schedule to the Finance Act-2023, would apply. Any other interpretation, in our view, would lead to undesirable consequences and would be discriminatory. In our view, the expression 'including Surcharge on income-tax, if any', within the bracketed portion of section 2(29C) of the Act, would mean the surcharge as provided in the computation mechanism under the heading 'surcharge on income tax' finding place in Paragraph A, Part (I) of First Schedule to the Finance Act-2023.



30. The Revenue has taken a line of argument that the words 'if any' succeeding the words 'including surcharge on income tax' appearing in the definition of maximum marginal rate u/s. 2(29C) of the Act are only for the purpose that when levy of surcharge is specifically provided under the Finance Act of the relevant year, it would be included in income-tax computed at the highest rate, otherwise, not. Though, at first blush this argument of the department sounds attractive, however, on deeper analysis it is found to be superfluous, for the following reasons. As discussed earlier, Article 271 of the Constitution of India, empowers the Union to impose surcharge for the purposes of Union. Whereas, Article 265 of the Constitution of India mandates that no tax can be collected without authority of law. Therefore, levy of surcharge has to be preceded by a law enacted by the parliament authorizing such levy. Thus, in absence of any law authorising levy of surcharge, it cannot be collected. This legal position is as clear as daylight, hence, does not require further clarification with the use of words 'if any' to mean whether the Finance Act of a particular year, if at all, provides for levy of surcharge or not. Though, in our view, there is no conflict between provisions contained u/s. 164/167B, 2(29C) of the Income Tax Act and section 2 of the Finance Act, however, even assuming that there are some conflicts, a harmonious construction has to be made to avoid absurdity and make the provisions workable. Thus, in our view, the expression 'if any' used in section 2(29C) has to be read not de hors but in conjunction with the computation mechanism provided under the heading 'surcharge on income tax' provided in section 2 of Finance Act. This view of ours is further fortified by the object for which levy of surcharge was introduced to the Finance Act - to augment the Revenue of the Union for developmental work by asking persons in the highest income bracket to contribute little more than the other citizens, for nation building.

31. As we find, the Revenue has placed strong reliance upon the decision of the coordinate bench in case of Araadhya Jain Trust (supra) and couple of other decisions, which are on similar line. Pertinently, the decision rendered in case of Anant Bajaj Trust (supra) was subsequently recalled. Whereas, the bench has followed the decision of Anant Bajaj Trust (supra) while deciding the appeal of Kapur Family Trust (supra). Therefore, the decision rendered in case of Kapur Family Trust (supra) has lost its relevance. Insofar as the decision of the co-ordinate bench in the case of Araadhya Jain Trust (supra) is concerned, in our view, the bench has drawing its conclusion, primarily relying upon certain decisions of Hon'ble Kerala High Court and Hon'ble High Court of Bombay. As discussed elsewhere in the order.

32. However, upon carefully going through these decisions, we are of the considered view that the issue arising in the present case never fell for consideration before the Hon'ble Courts. The issue in dispute in those cases was primarily concerning what should be the maximum marginal rate and its applicability. The issue 'whether the rate of surcharge would also be at the highest rate while computing



tax at maximum marginal rate' was never the issue before the Hon'ble Courts. Thus, in our view, the view expressed by the coordinate benches in decisions referred to in Paragraph 10(supra) lay down the correct proposition of law. Thus, in the ultimate analysis, we hold, in case of Private Discretionary Trusts, whose income is chargeable to tax at maximum marginal rate, surcharge has to be computed on the income tax having reference to the slab rates prescribed in the Finance Act under the heading 'surcharge on income tax' appearing in Paragraph A, Part 1, First Schedule, applicable to the relevant assessment year. Hence, reference is decided in favour of the assessee. The records may be returned back to the respective benches for deciding the appeals accordingly."

4.1 Respectfully following the decision of the Hon'ble Special Bench, we are inclined to hold that the surcharge in the present case ought to have been levied based on the slab rates and not on the MMR. The ground of appeal of the assessee are accordingly allowed.

5. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 30/06/2025.

**Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;

Dated: 30/06/2025

Dragon Legal/Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai