1. This dispute before us comes by way of a certiorarified mandamus filed by the appellant company against the Income Tax department seeking a quashing of the order of the Authority for Advanced Ruling (AAR) from December 2015, where the AAR held that the appellant company HIL was liable to pay MAT under Section 115JB of the Income Tax Act, 1961.

2. In January 2015, the appellant, HIL (an FPI) sold its major Indian investments. HIL believed that it will only have to pay a Securities Transaction Tax on the transaction, and since the capital gains qualified as long term capital gains (LTCG), HIL was exempt under S. 10(38) of the IT Act. However, HIL filed an application before AAR to ensure that the transaction undertaken by it was exempt from capital gains tax and especially that no further tax was required to be paid by it. HIL filed its return of income (ROI) every year with the Income Tax Department (ITD) at Bengaluru as SAIL was located in Bengaluru. SAIL helped HIL in these aspects too. The IT Department argued that HIL shall be liable to pay Minimum Alternate Tax (MAT) under section 115JB of the Act by holding SAIL, which is the sole and the key investment advisor of HIL as its permanent establishment (PE) in India. HIL disputed these claims of ITD taking the stance that SAIL was an independent agent. Matter was posted for final hearing in June 2015.

3. In the hearing on June 30, 2015, HIL pointed out to AAR that as per the Finance Act, 2015, foreign companies were not liable to pay MAT amendments to section 115JB. ITD argued that the amendment to section 115JB by the Finance Act, 2015 was prospective in nature since a new exemption from taxation was granted to specified category of taxpayers and therefore, taxpayers like HIL were covered prior to the amendment i.e. prior to April 1, 2015 within the ambit of levy of MAT.

4. After hearing the final arguments, the AAR rejected the arguments of HIL and shortly concluded that HIL had an Agency PE in India and therefore, was liable to pay MAT under

section 115JB. Therefore, in light of the above facts, the issues before this court are as follows:

A. Whether the MAT provisions under Section 115 JB will be applicable to the petitioner?

B. Whether the petitioner had a Permanent Establishment/Place of Business/Business Connection in India?

C. Whether the petitioner is required to prepare financials in accordance with the Companies Act, 2013or whether the petitioner is governed by SEBI regulations?

D. Whether the Finance Act, 2015 amendment is prospective or retrospective in nature?

E. Whether the capital gains exemption under the tax treaty is applicable, and whether the imposition of MAT is in violation of the treaty?

F. Whether the petitioner can cherry pick the provisions of both the Income Tax Act and the tax treaty?

G. Whether 115JB is applicable to FIIs and FPIs, and what is the scope, nature and functioning of the same?

5. The appellants, in brief claimed that S. 115JB does not take foreign companies within its ambit, and the definition of 'company' in the IT Act has to be subject to the requirement of S. 115JB, and is thus applicable only when there is an obligation to prepare financial statements in accordance with S. 210 of the Companies Act, 1956. Further, the Companies Act definition is inapplicable due to the proviso under S. 10(38) of the IT Act not being applicable. In addition, there is a clear lack of legislative intent with regards to deeming foreign companies liable to MAT in this regard. It is submitted that HIL is not liable to pay MAT, due to an absence of a *permanent establishment* in India, and of a *business connection* and *place of business.*

6. HIL is not required to prepare financials under the Companies Act but under the SEBI (FPI) Regulations, 2014 because it is not a "foreign company" as per the Companies Act.

Secondly, the FPI Regulations do not mandate the preparing of financials under the Companies Act.

7. The Finance Act, 2015 amendment is retrospective in application because the Government of India Press Release clarifies the retrospective exemption of foreign companies from MAT. Secondly, the amendment was merely clarificatory in nature and hence will apply retrospectively. Thirdly, since the Companies Act does not apply to FIIs/FPIs, Section 115JB is inapplicable to them, and hence the amendment is immaterial to the instant case. It is submitted that HIL is entitled to the capital gains exemption under Article 13(4) of the tax treaty, and the imposition of MAT is violative of the same.

8. Section 90(2) of the Act specifies that the provisions of the Act may apply to the assessee to the extent that they are beneficial to him. However, a non-resident is primarily governed by the DTAA in place between two countries, and is entitled to the exemptions stipulated by the treaty.

While S. 115JB *prima facie* makes no distinction between the types of investment made, the underlying body of regulation has resulted in some critical differences between the treatment of FIIs/FPIs and FDIs, and hence the given Section is not equally applicable.

9. The respondents, in brief, claimed that S. 115JB of the IT Act, 1961 is applicable to HIL, as the definition of 'company' under the Act allows for the inclusion of foreign companies,. Further, the Companies Act definition can be made applicable due to the two being complementary statutes. In addition, the legislative intent behind S. 115JB shall encompass even foreign companies. HIL is required to pay MAT, because it constitutes a *business connection* in India or has a *place of business* in India or, has a *permanent establishment* in India.

10. HIL is required to prepare financials under the Companies Act, 2013 because it is a "foreign company" as per the Companies Act, 2013. Secondly, the requirements of the FPI

Regulations, 2014 are simply in addition to the Companies Act, 2013. The Finance Act, 2015 amendment on imposition of MAT on foreign companies is prospective because retrospective operation is not provided for expressly or by necessary implication. Further, the Finance Act, 2015 amendment created a new exemption from taxation and hence is not retrospective.

11. HIL is not entitled to the capital gains exemption under the DTAA as the *Limitation of Benefits* clause in the treaty applies, and *even if* the exemption is applicable, the imposition of MAT is not violative of the same.

12.HIL cannot be permitted to selectively apply provisions of both the IT Act and the Treaty because as per various judicial interpretations, only one regime of law can be applied, with a party having no discretion over the same. S. 115JB of the IT Act, 1961 *prima facie* makes no distinction between the types of investment that come into the Indian market, and applies uniformly to companies both domestic and foreign, as provided under the definition of 'company' in S. 2(17).

13. On the basis of the detailed argumentation provided to us, the conclusions we have reached are thus.

I. Whether MAT Provisions are Applicable to the Petitioner as a Foreign Company

14. The definition of a 'company' in the IT Act includes companies that have been incorporated outside India, and the applicability of S. 115JB has been stated as being with regards to any assesse that is a company. Provisions with regards to taxation are to be interpreted strictly, with a clear, unvarnished reference to a subject being given due regard.

15. In this case, given the inclusion of foreign companies in this regard, and the clarity of S. 115JB negating the possibility of any ambiguity, it is submitted that the rule should be made applicable to Hassleton.

16. In addition, this should be distinguished from the necessity of an explicit amendment to allow for the calculation of book profits for electricity, insurance and banking companies as under the Finance Act of 2012 as the latter were specifically excluded from the ambit of the relevant provisions in the Companies Act, 1956 via S. 211, unlike the operation of FIIs/FPIs.

17. In addition, it has already been stated that the computation clause and the charging provision shall remain independent in ambit, and even that the liability arising principally under the charging provision will necessitate compliance on part of the company with the computation provision, and that the former shall apply *proprio vigore*. In addition, difficulties with computation should not negate the liability arising, and can be remedied by legislative action.

18. Even assuming that the lack of formulation of accounts was an impediment to implementation, provisions such as S. 591 of the Companies Act, 1956 allow for the mandating of calculation of book profit in scenarios such as the company having a local place of business.

It is a settled principle of interpretation that reference may be made to complementary statutes, so as to allow for the reading of multiple provisions together, particularly when the original statute does not tend towards being exhaustive and comprehensive. In this scenario, with the inclusion of the Companies Act, 1956 within S. 115JB, the two can be read as complementary statutes. In addition, the doctrine of incorporation by reference is applicable here, given the explicit reference to the Companies Act. While the usual position of law would be that reference would not take into account the positions of law that emerge due to subsequent amendment, this can be altered in case it is determined that the two statutes are complementary or *pari material* etc.

19. In the present scenario, the Companies Act and the IT Act are complementary statutes, and thus any subsequent modification must be taken into account unless it voids the

functioning of the law. Hence, the definition of ‘foreign company’ as provided under the 2013 Act can be read in.

20. Looking at the legislative history, speeches made by members of the legislature, circulars and so on, the primary emphasis of the provision for the application of MAT has always been to ensure the collection of a certain portion of money from companies operating in the country, even if they have brought down their taxable income, through a variety of means, to a non-taxable income shown in their accounts. The same is applicable for the growing influx of foreign investors and groups within the country, who are acquiring an ever-increasing amount of capital and economic viability, and it is thus submitted that the purpose for which MAT was originally introduced remains wholly applicable.

II. Whether HIL has a Business Connection/Permanent Establishment/Place of Business in India

21. An entity is deemed to have “business connection” in India, under Section 9(1), explanation 2(a), when a person acting on behalf of the non-resident, habitually has and exercises the authority to conclude contracts, excluding activities carried out through a general commission agent. However, a general commission agent shall not be deemed to be of independent status if he works mainly or wholly on behalf of the non-resident.

22. As per judicial pronouncements, a business connection is requires to be “real and intimate”, as well have an element of continuity. In the instant case, SAIL closely involved in the investment decisions by HIL over several years, and it has been mentioned that HIL investments would not be as successful in the absence of SAIL. A business connection may exist even without any regular agency, branch or definite organization.

23. Additionally, despite having other clients, SAIL primarily carries out the business of HIL in India, and thus, it is humbly submitted that the SAIL constitutes business connection in India under S. 9(1).

24. The phrase "*place of business*" has been defined under the Companies Act as, a share transfer or a share registration office. Section 591 of the Companies Act also provides for requirements to be met by foreign companies that have an established place of business within India.

25. In *Deverall v. Grant Advertising Inc*, it was held that a place of business must be a specified or identifiable place at which business is carried out, having some concrete connection between the locality and the business.

26. In *Tumlare Software Services Ltd. v. Magic Software Services*, it was held that an established place of business means that it has a permanent and specific location in the country, from where it habitually and regularly carries out the business. While in *Linmark International (Hong Kong) Limited v. DDIT*¸ the court recognized that when "*real and substantive*" operations are carried out by an entity in India, the income would be deemed to originate in India and thus be liable to taxation.

27. In the instant case, as investment decisions were habitually taken at the office of SAIL, and this constitutes the majority of the business of HIL in India, it is submitted that the SAIL office constitutes a place of business.

28. Section 90 (2) provides that when there exists an agreement between the Central government and any other nation in order to prevent double taxation, the provisions of the agreement shall prevail over those in the Act, to the extent that the provisions of the Act are more beneficial to the assessee. However, interpretation of permanent establishment as a concept, when defined under a convention or agreement, does not require recourse under domestic law, and it is only when the treaty fails to sufficiently explain the concept, is domestic law resorted to. In the instant case, permanent establishment is sufficiently explained in the DTAA.

29. The Act only defines permanent establishment as a place of business, but is silent with regard to an agent. On the other hand, Article 5(9) of the DTAA between Singapore and India provides that if the general commission agent carries out mainly or wholly, the business of the non-resident, he cannot be considered to be of independent status.

30. The Income Tax Act defines permanent establishment as a "*fixed place of business through which the business of the enterprise is wholly or partly carried on*". The general rule with regard to a "*fixed place of business*" is that it must be more than merely temporarily at the disposition of the foreign enterprise. This *power of* disposition is also not required to be proved by legal ownership of the premises by enterprises. HIL regularly made decisions with regard to investments in India, at the office of SAIL, and thus it can be said that the premises were more than *temporarily* at the disposal of HIL.

31. Additionally, CBDT Circular 333 had clarified that when a specific provision exists in the agreement, the special law will prevail over the general provisions of the Income Tax Act. Thus, in the instant case, the provision of the tax treaty should be preferred over domestic law. This was upheld in *DCM Ltd. v. ITO* , and in *CIT v. ITC Ltd*. In cases of a conflict between the provisions of the two, the treaty thus should prevail.

32. Thus, it is submitted that as the Income Tax Act fails to define an Agency PE, and the provisions under the DTAA prevail over those in the Act, the definition there under should be applied. Since SAIL primarily carries out the work of HIL in India, it can be considered to be a dependent agent, and thus, HIL is said to have Permanent Establishment in India.

III. Whether The Petitioner is Required to Prepare Financials under the Companies Act, 2013.

33. Section 2(42) of the Companies Act, 2013 states that any company incorporated outside India having a place of business by itself or through an agent is a "foreign company". It is submitted that in a case where a foreign company is collaborating with an Indian company,

the place of business of the Indian company must be considered as the foreign company's place of business, for the purposes of Section 2(42). Further, as was held in the *Rabenek* case, the regular visit and stay of the foreign company's employee is sufficient to be construed as a place of business for the purposes of the definition of "foreign company".

34. In the given case, HIL is collaborating with SAIL for the purposes of their investment business. Further, HIL had its own team of advisors in India and HIL's managerial staff continuously visited India, thus making such presence sufficient for HIL to be construed to have a place of business in India as per Section 2(42) of the Companies Act, 2013. Since HIL is a foreign company, Section 384 applies, which mandates foreign to prepare financials as per Section 128 of the Companies Act, 2013.

35. Section 32 of the SEBI Act, 1992 states that the provision of the Act operate only in addition to, and not in derogation of any other existing law. Further, SEBI Regulations, when in contravention with the provisions of the Companies Act, are invalid. Therefore, it is submitted that the existence of SEBI (FPI) Regulations, 2014 do not allow HIL to abrogate its responsibility under the Companies Act, 2013 to prepare financials. The FPI Regulations are only in addition to the Companies Act, 2013. Further, in case of a conflict, the Companies Act, 2013 provisions will prevail and hence HIL cannot evade its obligations to file financials under Section 384, read with Section 128 of the Companies Act, 2013.

36. Since the Companies Act, 2013 mandates HIL to prepare financials, Section 115JB of the Income Tax Act, 1961 is attracted. Section 115JB(2)(a) defines an assessee as someone who is mandated to prepare financials under Schedule VI of the Companies Act, 1956. Schedule VI is *in pari materia* with Schedule III of the Companies Act, 2013. Section 128 refers to Schedule III for the particulars of preparing financials, and Section 384 leads to the application of Section 128 of the Companies Act. Hence, MAT liability is imposed on HIL as per Section 115JB of the Income Tax Act, 1961.

IV. Whether The Finance Act, 2015 Amendment on Imposition of MAT on Foreign Companies is Prospective

37. The Finance Act, 2015 amendment on imposition of MAT on foreign companies is prospective because retrospective operation is not provided for expressly or by necessary implication [A]. Further, it is submitted that the Finance Act, 2015 amendment was not merely explanatory in nature, in fact it created a new exemption from taxation and hence cannot be retrospectively applied [B].

38. It is a well established principle of legislative interpretation that unless retrospective operation is expressly provided for, or if, by necessary implication, retrospective operation is provided, a provision only operates prospectively. Additionally, it is submitted that if a taxation provision is imposing liability, i.e. creating a right or obligation under the law, there is a presumption of prospectivity.

39. Under the Finance Act, 2015, it was clearly mentioned that the said amendment will be effective only from 1/04/2016. Hence, it is submitted that *per* the reading of the Finance Act, 2015 amendment, it was expressly provided that its applicability will only be prospective.

40. *Further*, there is no necessary implication in this regard with respect to the retrospective operation of this amendment. A necessary implication can only arise when no new imposition or extinguishment of liability is created. It is submitted that the amendment to Explanation 1 of Sec. 115JB of the Income Tax Act was one which exempted a set of companies from MAT liability, and is therefore a substantive provision. Explanation 1 envisages the scope of "book-profit" and hence identifies the companies on which MAT liability will be imposed. Therefore, since it clearly affects the rights and liabilities of companies with respect to applicability of taxation, it is submitted that it cannot be held that retrospective operation occurs by necessary implication.

41. An amendment is considered to be explanatory or clarificatory or declaratory if it merely removes doubts with respect to unintended consequences. Additionally, if there was no ambiguity in the existing provision, and if there are no clear words in the amendment to suggest that the intention was merely to clarify, it cannot be assumed to be explanatory, and hence retrospective operation cannot be held.

42. The amendment to Explanation 1 of the Section 115JB creates a new exemption from taxation, as has been established above. *Prima facie*, therefore, it cannot explanatory. Further, this amendment is extremely specific with respect to capital gains for foreign companies from trading in securities being brought within the consideration of "book-profit" and hence, such a specific addition is not for removal of doubts, but a new exemption from the applicability of MAT. Additionally, the existing provision before the amendment had no mention of capital gains for foreign companies from trading in securities. Hence, it cannot be inferred that a mere ambiguity was to be cured. It is also submitted that such specificity of applicability gives no suggestion as to the clarificatory nature of the amendment, and hence it further proves that this was a new exemption created from MAT applicability, thus ruling out retrospective operation of the impugned amendment.

V. Whether HIL is Entitled to Capital gains Exemption

43. HIL has claimed an exemption for capital gains under Article 13(4) of the India-Singapore DTAA, however, this is challenged on the grounds that the benefit of the exemption is limited by Article 24.

44. Article 24 of the treaty is a limitation of relief clause, which has been interpreted in *Alabra Shipping Pte Ltd v. ITO*. The tribunal ruled that benefits would be limited by the provisions of Article 24 when there is i) low or taxability in the source jurisdiction or ii) there is taxability on a receipt basis in the resident jurisdiction.

45. As Singapore imposes no capital gains tax on its residents, the first condition recognized by the court is satisfied, and HIL cannot be allowed to avoid taxation in both jurisdictions by benefitting from the exemption clause.

46. It is submitted that the imposition of MAT on HIL is not violative of the Double Taxation Avoidance Agreement between India and Singapore, due to the following.

47. Capital gains, though exempted from taxation any provision of the Act and a treaty, are still required to be computed in the net profit, under Section 115. In *Castleton Investment Limited v DIT.*, it was held that even though the non-resident could avail of the capital gains exemption, under Article 13 of the Double Taxation Avoidance Agreement between India and Mauritius; it was liable to pay the Minimum Alternate Tax under Section 115JB.

48. In *Dharmayug Investments Ltd. v. Assistant Commissioner of Income-tax*, it was held that Section 115JB was a self contained code and a *non obstante* section. Thus, even though the long term capital gains by HIL were exempt under Section 10(38) of the Income Tax Act and Article 13(4) of the DTAA, they would still be taken into account while computing book profits.

49. As Section 115JB is considered to be an "overriding charging provision", and does not clearly distinguish between a resident and non-resident company, and is thus applicable to all companies under Section 2(17) of the ACT; it is submitted that MAT is not violative of the India- Singapore DTAA.

VI. Whether HIL Can Cherry-Pick Provisions of the Tax Treaty and the Act

50. In the instant case, the assessee has submitted that the definition of PE should be applied as per the Act, however, they would still be entitled to the capital gains exemption under the India-Singapore DTAA. This is challenged as HIL cannot be permitted to selectively apply provisions of both, substantiated as follows.

51. In the case of *Dresdner Bank AG v. ACIT*, it was held that a taxpayer is disallowed from selectively appropriating the benefits of both the tax treaty and the Act. This was upheld in *Patni Computer Systems Ltd.* as well.

52. In *B.M. Kamdar*, the tribunal held that a "pick and choose" policy of provisions is not permissible, and once a non-resident submits to the applicability of the Act, he cannot avail of the benefits of the tax treaty with respect to computation of taxation.

53. Even if two interpretations may exist, in *CIT v. Vegetable Products Ltd.*, the court held that the provision or the interpretation beneficial to the assessee is applicable. This is provided for under Section 90(2) of the Income Tax Act as well. Therefore, it is submitted that HIL is not allowed to selectively apply and benefit from the provisions of the tax treaty and the Act, and that only the provisions of the tax treaty should be applicable, as per *Paradigm Geophysical Pty Ltd*.

VII. Whether Section 115JB is Equally Applicable to Foreign Institutional/Portfolio Investors and Foreign Direct Investors

54. S. 115JB of the IT Act, 1961 *prima facie* makes no distinction between the types of investment that come into the Indian market, and applies uniformly to companies both domestic and foreign, as provided under the definition of 'company' in S. 2(17).

55. Given how the earlier arguments have demonstrated how S. 115JB is applicable with regards to FIIs/FPIs, and how construction of accounts is dealt with in accordance with the Companies Act, there can be no derogation from the applicability of the provisions of the provision itself.

56. FDI tax liability, while determined by sector-based rules and regulations in addition to the Consolidated Policy of the RBI, depends primarily on the *vehicle employed* to undertake the investment concerned. In that scenario, the MAT provision will be applicable to the liability regime of any Foreign Direct Investor employing a company, as 115JB is applicable to all

companies, and there is no *special law* such as the SEBI Regulations which will overcome the responsibility that might otherwise accrue with regards to preparation of documents. However, any regulation dealing with special rights and liabilities enjoyed by a member of an SEZ, for instance, might prevent FDI investors from being subject to MAT.

57. Wherefore in light of the issues raised, arguments advanced and authorities cited, this Court declares that:

1. MAT provisions are applicable to the petitioner as it is a 'foreign company' as per the Companies Act, 2013.

2. SAIL constitutes a permanent establishment/place of business/business connection in India.

3. HIL is required to prepare financials under the Companies Act, 2013 and is not governed by SEBI regulations.

4. The Finance Act, 2015 amendment on imposition of MAT is not retrospective, but prospective in nature.

5. HIL is not entitled to the capital gains exemption under the India-Singapore tax treaty, and *even if* it is, the imposition of MAT on HIL is not in violation of the treaty.

6. HIL cannot be permitted to selectively apply and benefit from the provisions of both the Income Tax Act and tax treaty.

7. 115JB is applicable to FIIs/FPIs as well as FDIs.

Appeal allowed.