

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI
BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No. 1575/MUM/2020
(Assessment Year: 2008-09)**

M/s Mahindra CIE Automotive Ltd (as a successor of Hinoday Industries Ltd.) Mahindra Towers, 1 st Floor, P.K. Kurne Chowk, Worli Mumbai - 400 018	Vs.	The Deputy Commissioner of Income Tax, Circle 6(3) Room No. 515, Aayakar Bhavan, M.K. Road, Mumbai – 400 020
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PAN No. AABCM6632J

(Assessee)

(Revenue)

Assessee by	:	Shri H.P. Mahajani, A.R
Revenue by	:	Shri Mahendra Ahuja, D.R
Date of Hearing	:	22/11/2021
Date of pronouncement	:	23/11/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-13, Mumbai, dated 21.01.2020, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act'), dated 23.09.2012 for A.Y. 2008-09. The assessee has assailed the impugned order on the following grounds of appeal before us:

"Based on the facts and circumstances of the case and in law, Mahindra CIE Automotive Ltd (as a Successor of Mahindra Hinoday Industries Limited) ('hereinafter referred to as 'the Appellant') respectfully craves to prefer an appeal against the order dated 21 January 2020 (received on 21 January 2020) passed by the learned Commissioner of Income Tax (Appeals) - 13 (hereinafter referred to as 'CIT(A)') under section 250 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') on the following grounds which are separate and without prejudice to each other.

On the facts and in the circumstances of the case and in law, the learned CIT(A)/AO have:

1. Erred in re-opening and validating the assessment under section 147 of the Act an passing the impugned order.

2. Without prejudice to the above, erred in disallowing the depreciation of Rs.28,00,768/- by classifying certain items of electrical installation without which machinery would be unable to function as electrical installation instead of plant and machinery thereby applying depreciation rate of 10% instead of 15%.
3. Failed to appreciate that the electrical installation which forms the integral part of plant and machinery is entitled to depreciation by applying the rate of 15%.
4. Erred in rejecting consequential additional depreciation of Rs.1,12,03,075/- on the electrical installation forming part of plant and machinery.
5. Without prejudice to the above, the disallowed depreciation and additional depreciation should be allowed to be included/ added to the written down value of subsequent years block of asset.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Honourable Income-tax Appellate Tribunal to decide this appeal according to law.”

2. Controversy involved in the present appeal lies in a narrow compass i.e as to whether or not the assessee company is entitled for depreciation on its “Electrical installation – casting” @ 15%, as claimed, or @ 10% as allowed by the A.O. Shorn of unnecessary details, the assessee had filed its return of income for A.Y 2008-09 on 27.09.2008, declaring a loss of Rs.17,27,18,820/-. Original assessment was framed by the A.O vide his order passed u/s 143(3), dated 30.12.2010, determining the loss of the assessee company at Rs.17,74,11,015/-.

3. Observing that the assessee had claimed depreciation on electrical fittings @ 15%, as against its entitlement for the same @10%, the A.O holding a conviction that excessive depreciation of Rs.28,00,768/- was allowed to the assessee, reopened its case u/s 147 of the Act.

4. During the course of the assessment proceedings, it was observed by the A.O that the assessee had claimed excessive depreciation of RS. 28,00,768/- on its electrical fittings, as under:

	(in Rs.)	Depreciation allowable @ 10%/5%	Depreciation allowed @ 15%/7.5%	Excess Depreciation
Cost of Installation put to use for more than 180 days	4974993	497499	746249	248749
Cost of installation put to use for less than 180 days	102080762	5104038	7656057	2552019
Excess claim of depreciation				2800768

After necessary deliberations, the A.O not finding favour with the contention of the assessee that its claim for depreciation on electrical installation @ 15% was in order, vide his order passed u/s 143(3) r.w.s 147 of the Act, dated 23.09.2013 disallowed the amount of excessive depreciation of Rs.28,00,768/- and revised its total loss at Rs.16,34,07,172/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The assessee assailed the assessment order before the first appellate authority on two fold grounds, viz. (i) that the A.O had invalidly assumed jurisdiction and reopened its case u/s 147 of the Act; and (ii) that the A.O had erroneously disallowed the assessee's claim for depreciation on electrical installation. Insofar the assessee's challenge to the jurisdiction assumed by the A.O for reopening its case u/s 147 of the Act was concerned, the CIT(A) not finding favour with the same upheld the reassessment order passed by the A.O. Also, the CIT(A) holding a conviction that the assessee's entitlement for claim of depreciation on electrical fittings, as per the mandate of law, was restricted to 10%, thus, finding no infirmity in the view taken by the AO upheld, the same.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Id. A.R to drive home his aforesaid claim. As the

assessee has assailed the validity of the jurisdiction assumed by the A.O for reopening its concluded assessment, therefore, we shall first deal with the same. As observed by us hereinabove, the case of the assessee was reopened, for the reason, that as against its entitlement for depreciation on electrical fittings @ 10%, the same was allowed while framing the regular assessment u/s 143(3), dated 30.12.2010 @ 15%, as a result whereof an excess depreciation of Rs.28,00,768/- was allowed to the assessee. The copy of the 'reasons to believe' on the basis of which the case of the assessee was reopened, read as under:

"The assessment in this case was completed u/s 143(3) of the Income-tax Act, 1961 on 30/12/2010 at a loss of Rs.17,74,11,015/-. Perusal of assessment records reveal that:

"Rule 5 of the Income-tax Rules provides allowance of depreciation on electrical fittings at the rate of 10%. The term electrical fittings include wiring, switches, sockets, other fittings and fans etc. as elaborated in Note 5 of Append I to rule 5. The electric installation, as defined in Indian Electricity Rules, 1956, is a composite electrical unit meant for transforming, transmitting, converting, distributing or utilizing energy. Thus, the term electric fittings also include electrical installation and attract depreciation allowance @ 10%.

In this case, the income of the assessee was determined at a loss of Rs. 17.74 crore after scrutiny assessment completed in December, 2010. Verification of depreciation table indicates that the assessee had put into use electrical installation total valuing Rs.107055755/- during the previous year. The depreciation was taken at the rate of 15% on such electric installation at par with plant and machinery instead of allowable depreciation at rate of 10%. This resulted in excess allowance of depreciation of Rs.28,00,768/- as detailed below. It is further observed that major expenses involved are towards expenses incurred towards obtaining high tension or low tension electric connection, which rightly fall under the definition of electrical fittings."

	(in Rs.)	Depreciation allowable @ 10%/5%	Depreciation allowed @ 15%/7.5%	Excess allowance
Cost of installation put to use for more than 180 days	4974993	497499	746249	248749
Cost of installation put to use for less than 180 days	102080762	5104038	7656057	2552019
				2800768

In view of the above, I have reason to believe that income chargeable to tax as enumerated herein above, has escaped assessment within the meaning of section 147

read with proviso thereto, by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment Notice u/s 148 of the Income-tax Act, 1961 is therefore, issued to the assessee.”

On a bare perusal of the aforesaid reasons, we find, that the original assessment framed in the case of the assessee u/s 143(3), dated 30.12.2010 had been dislodged by the A.O, for the reason that a perusal of the assessment records revealed that the assessee was allowed an excessive depreciation of 5% on its electric installations i.e @ 15%, as claimed by it, instead of its entitlement for the same @ 10%. As is discernible from the ‘reasons to believe’, the A.O, admittedly, had taken recourse to the reassessment proceedings not on the basis of any fresh tangible material coming to his notice after the culmination of the regular assessment that was framed by him u/s 143(3), dated 30.12.2010, but on account of a discrepancy which as per him was discernible from a perusal of the assessment record. In our considered view, the A.O had clearly assumed jurisdiction for reopening the case of the assessee u/s 147 of the Act on the basis of a ‘change of opinion’ as against that as was held by his predecessor while framing the regular assessment vide order passed u/s 143(3), dated 30.12.2010. Backed by our aforesaid observations, we are of the considered view that de hors any tangible material and/or information which could have formed a basis for the A.O to form a bonafide belief that the income of the assessee chargeable to tax had escaped assessment, the concluded assessment of the assessee could not have been validly reopened by him u/s 147 of the Act. Our aforesaid view is fortified by the judgment of the **Hon’ble Supreme Court** in the case of **CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC)**, wherein the Hon’ble Apex Court had observed that merely on the basis of a ‘change of opinion’ the case of an assessee cannot be reopened and had held as under:-

“On going through the changes, quoted above, made to s. 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the AO to make a back assessment, but in s. 147 of the Act (w.e.f. 1st April, 1989), they are given a go by and only one condition has remained, viz.,

that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1], which reads as follows :

"7.2 Amendment made by the Amending Act, 1989, to re-introduce the expression 'reason to believe' in s. 147.—A number of representations were received against the omission of the words 'reason to believe' from s. 147 and their substitution by the 'opinion' of the AO. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of Court rulings in the past and was well settled and its omission from s. 147 would give arbitrary powers to the AO to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended s. 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new s. 147, however, remain the same."

Further, following the judgment of the 'Full bench' of the Hon'ble High Court of Delhi in the case of Kelvinator of India (supra), which had been upheld by the Hon'ble Apex Court, the **Hon'ble High Court of Bombay** in the case of **Asteroids Trading & Investment P. Ltd. Vs. DCIT (2009) 308 ITR 190 (Bom)**, had held, that an A.O is precluded from assuming jurisdiction to initiate reassessment proceedings on the basis of a 'Change of opinion', observing as under:

“8. Perusal of the record shows that the petitioner had made full disclosure necessary for claiming deduction under s. 80M. The AO after applying his mind to the relevant records had made a specific order allowing the deduction. A perusal of the record shows that now respondent No. 1 proposes to reopen the assessment because according to him deduction under s. 80M was wrongly allowed, and, therefore, he was of the opinion that the income has escaped assessment. Though, in the notice respondent No. 1 has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of forming of opinion by respondent No. 1, nothing new has happened and there is no change of law, no new material has come on record, no information has been received. It is merely a fresh application of mind by the same officer to the same set of facts. Thus, it is a case of mere change of opinion, which, in our opinion, does not provide jurisdiction to respondent No. 1 to initiate proceedings under s. 148 of the Act. It can now be taken as a settled law, because of a series of judgments of various High Courts and the Supreme Court, which have been referred to in the judgment of the Full Bench of the Delhi High Court in the case of Kelvinator of India Ltd. (supra) referred to above, that under s. 147 assessment cannot be reopened on a mere change of opinion.”

We further find that the **Hon'ble High Court of Bombay** in the case of **Asian Paints Ltd. Vs. DCIT (2008) 308 ITR 195 (Bom)**, had observed, that as no new information/material was received by the A.O, therefore, the fresh application of mind by him to the same set of facts and material which were available on record at the time of framing of the assessment but had inadvertently remained omitted to be considered would tantamount to review of order, which is not permissible as per law. The Hon'ble High Court while concluding as hereinabove had held as under:-

“10. It is further to be seen that the legislature has not conferred power on the AO to review its own order. Therefore, the power under s. 147 cannot be used to review the order. In the present case, though the AO has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the AO, nothing new has happened, therefore, no new material has come on record, no new information has been received; it is merely a fresh application of mind by the same AO to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator (supra) referred to above, has taken a clear view that reopening of assessment under s. 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under s. 148”.

Further, the **Hon'ble High Court of Bombay** in the case of **ICICI Prudential Life Insurance Co. Ltd. Vs. ACIT (2010) 325 ITR 471 (Bom)**, relying on the judgment of the Hon'ble Supreme Court in the case of *Kelvinator of India (supra)*, had held as under:

23. *Though the power to reopen an assessment within a period of four years of the expiry of the relevant assessment year is wide, it is still structured by the existence of a reason to believe that income chargeable to tax has escaped assessment. The Supreme Court, in a recent judgment in Kelvinator of India Ltd. (supra) while drawing upon the legislative history of s. 147 held that the expression 'reason to believe' needs to be given a schematic interpretation in order to ensure against an arbitrary exercise of power by the AO. The judgment of the Supreme Court emphasises that the power to reopen an assessment is not akin to a power to review the order of assessment and a mere change of opinion would not justify a recourse to the power under s. 147. Unless the AO has tangible material to reopen an assessment, the power cannot be held to be validly exercised. The Supreme Court has held thus :*

"...Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which we are afraid s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an inbuilt test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief."

24. *In the present case, for all the assessment years in question, and a fortiori for asst. yr. 2004-05, what the AO has purported to do is to reopen the assessment on the basis of a mere change of opinion. That the AO had no tangible material is evident from the circumstance that the reasons which have been disclosed contain a reference to the same basis, namely the existence of a nil surplus/deficit in Form 1 which was drawn to the attention of and was present to the mind of the AO during the assessment proceedings under s. 143(3). Consequently, it is evident that there is an absence of tangible material before the AO".*

Also, the Hon'ble High Court of jurisdiction in the case of **Aventis Pharma Ltd. Vs. Asst. CIT (2010) 323 ITR 570 (Bom)**, reiterating its aforesaid view that

reassessment proceedings cannot be permitted on the basis of a 'Change of opinion' had held as under:-

“There is merit in the submission which has been urged on behalf of the assessee that there was no tangible material before the AO on the basis of which the assessment could have been reopened and what is sought to be done is to propose a reassessment on the basis of a mere change of opinion. This, in view of the settled position of law is impermissible. No tangible material is shown on the basis of which the assessment is sought to be reopened. In the absence of tangible material, what the AO has done while reopening the assessment is only to change the opinion which was formed earlier on the allowability of the deduction. The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. There is no tangible material in the present case.

7. At this stage, we may herein observe, that as per the mandate of law even where a concluded assessment is sought to be reopened by the A.O within a period of 4 years from the end of the relevant assessment year, it is must that the A.O has fresh material or information with him that had led to the formation of belief on his part that the income of the assessee chargeable to tax has escaped assessment. Our aforesaid view is fortified by the judgments of the **Hon'ble High Court of Bombay** in the case of **NYK Lime (India) Ltd. Vs. DCIT (No.2) [2012] 346 ITR 361 (Bom)** and **Purity Tech Textile Pvt. Ltd. Vs. ACIT & Anr. [2010] 325 ITR 459 (Bom)**. As regards the view taken by the CIT(A) that as the issue in question i.e entitlement of the assessee company for claim of depreciation on electrical installations was not looked into by the A.O in the course of the original assessment proceedings, therefore, in the absence of any formation of a view by the A.O the concept of 'change of opinion' could not be brought into play, the same we are afraid does not find favour with us. We find that the Hon'ble High Court of Karnataka in the case of **Dell India (P) Ltd. Vs. JCIT, LTU, Bangalore (2012) 123 taxmann.com 468 (Kar)**, relying on the three judge bench judgment of the Hon'ble Supreme Court in the case of the **Indian & Eastern Newspaper Society (1979) 119 ITR 996 (SC)**, had held, that an oversight, inadvertence or

mistake of assessing officer or error discovered by him on reconsideration of the same material tantamounts to a mere change of opinion and, the same does not give him power to reopen a concluded assessment. Backed by the aforesaid settled position of law, we are of the considered view that as the A.O for the reasons discussed at length hereinabove had wrongly assumed jurisdiction and reopened the concluded assessment of the assessee company i.e without satisfying the mandate of law as required u/s 147 of the Act, therefore, the reassessment order passed by him u/s 143(3) r.w.s 147, dated 23.09.2013 cannot be sustained and is liable to be struck down. Resultantly, the **Ground of appeal No. 1** is allowed in terms of our aforesaid observations.

8. That as we have quashed the assessment for want of jurisdiction, therefore, we refrain from adverting to and therein adjudicating upon the merits of the case which are left open. The **Grounds of appeal Nos. 2 and 3** are disposed off in terms of our aforesaid observations.

9. Resultantly, the appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 23.11.2021

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;
Dated: 23.11.2021
PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai