IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 2678/Ahd/2014 (Assessment Year: 2005-06)
(Physical hearing)

A.C.I.T., Circle-1, Surat.	Vs.	M/s Micro Polyster Pvt. Ltd., 2025, Jash Textile Market, Ring Road, Surat-395002. **PAN No. AABCM 6127 E**
Appellant/ Revenue		Respondent/ Assessee

Department represented by	Shri Vinod Kumar, Sr. DR
Assessee represented by	Shri Rasesh Shah, CA
Date of hearing	12/04/2023
Date of pronouncement	12/04/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-I, Surat (in short, the ld. CIT(A) dated 09/07/2014 for the Assessment year 2005-06.
2. Initially, this appeal was adjudicated/dismissed vide order dated 24/04/2017 as the tax effect involved in this appeal was less than Rs. 10.00 lacs, which was below the threshold limit of tax effect for filing appeal before the Tribunal, as determined by the Central Board of Direct Taxes (CBDT) in its Circular No. 21/2015 dated 10/12/2015. Thereafter, the Revenue filed Misc. application(MA), vide M.A. No. 10/Srt/2018 for recalling of order dated 24/04/2017, inter alia stating therein that the appeal was covered by exception clause of para 8(c) of CBDT Circular

No. 5/2014 dated 10/07/2014, as the assessment was reopened on the basis of audit objection. The Misc. application of revenue was dismissed vide order dated 01/12/2020. Order dated 01/12/2020 was challenged by the Revenue before the Hon'ble Jurisdictional High Court vide S.C.A. No. 12735/2021. The Hon'ble High Court in a consolidated order dated 08/07/2022 in a similar set of appeals, set aside the order of Tribunal dated 01/12/2020, thereby allowing MA of revenue, resultantly the order dated 24/04/2017 was recalled/set aside with the direction to hear the appeal of revenue expeditiously on merit (as per grounds of appeal raised by revenue).

3. The order of Hon'ble High Court was received on 23/03/2023. In view of the aforesaid background, the appeal of the revenue was fixed for hearing on 29/03/2023.

4. The revenue in its appeal has raised only following grounds of appeal:

> *"(1) On the facts and circumstances of case whether the ld. CIT(A) was justified in quashing the reopening of assessment proceedings made by the A.O., even though there was nothing on record to suggest that any opinion was formed by the AO in the original assessment.*
> *(2) On the facts and in the circumstances of case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*
> *(3) It is, therefore, prayed that the order of the CIT(A) may be set aside and that of Assessing Officer may be restored to the above extent."*

5. Brief facts of the case are that the assessee is a company engaged in manufacturing and selling of yarn and grey cloths, filed its return of income for A.Y. 2005-06 on 31/10/2005 declaring NIL income. The case of assessee was selected for scrutiny and assessment was completed

under Section 143(3) of the Income Tax Act, 1961 (in short, the Act) on 31/12/2007 by making addition on account of low gross profit and disallowance under Section 43B of the Act. Subsequently, the case of assessee was reopened under Section 147 on the ground that at later stage, it was noticed that the provisions of Section 145A of the Act, with regard to unutilised CENVAT Credit were violated which resulted into under assessment of income of Rs. 26,75,167/-. The Assessing Officer on making belief and after recording reasons, issued notice under Section 148 on 13/02/2012. In response to notice under Section 148 of the Act, the assessee filed reply dated 19/03/2012 and submitted that original return filed on 31/10/2005 may be treated as return in response to notice under Section 148 of the Act. The assessee requested for copy of reasons recorded. The Assessing Officer noted that the reasons recorded were provided to the assessee vide his letter dated 10/04/2012. The assessee filed its objection dated 29/01/2013 and objected against the reopening on various legal grounds. The assessee in its objection specifically contended that the reopening under section 147 is not valid and even on merit, the impugned addition of Rs. 26,75,167/- on account of unutilized CENVAT credit proposed by the Assessing Officer is not correct. The assessee explained that under the scheduled loan and advances of the balance sheet and Clause (22)(a) of the report in Form 3CD, the assessee has utilized CENVAT credit of Rs.

26,75,167/- which has not been included in the closing stock, is the amount of excise duty paid by assessee in advance in respect of purchase of raw material as an expenditure and as such it cannot be added to the income and provisions of Section 145A of the Act. The assessee further clarified that amount of CENVAT credit as pointed out is the amount of excise duty paid in advance by assessee in respect of purchase of raw material i.e. yarn. Hence, as per the provisions of Section 145A, the duty paid on purchase is allowable as an expenditure and cannot be added to the income as has been questioned by the Assessing Officer. The assessee also explained as to which adjustment are required to be made in respect of excise duty, as per the provisions of Section 145A of the Act. The assessee also submitted that their Auditor has certified that net impact of the adjustment under Section 145A on the profit of assessee would be NIL. The assessee relied on the decision of Ahmedabad Tribunal in DCIT Vs M/s Jay Laxmi Mart P. ltd. in ITA No. 264/Ahd/2007 wherein it was held that cost of raw material and capital goods to the extent of MODVAST claim was reduced was a fact which is not disputed by the Assessing Officer and the difference after adjustment of current year utilization remains as a debit balance in the balance sheet. The debit balance is in fact prepaid expenditure and cannot constitute income. The assessee, thus stated that even on merit, there is no escapement of income. The reply of assessee was not

accepted by the Assessing Officer. The Assessing Officer has simply concluded that unutilized CENVAT credit as on 31/03/2005 ought to be considered for necessary adjustment under Section 145A of the Act. The assessee violated the provisions of Section 145A and closing stock of unutilized CENVAT credit left out while making adjustment under Section 145A of the Act which deserves to be disallowed. The Assessing Officer accordingly disallowed the unutilized CENVAT credit of Rs. 26,75,167/- in assessment order dated 19/02/2013 passed under Section 143(3) r.w.s 147 of the Act.

6. Aggrieved by the reopening as well as disallowance of CENVAT credit, the assessee filed appeal before the ld. CIT(A). Before the ld. CIT(A), the assesse filed detailed statement of fact relied on various case laws on the validity of reopening as well as addition on merit. The assessee submitted that the case of assessee was reopened only on account of change of opinion as of the relevant materials and details in respect of CENVAT credit were available in the balance sheet and audit report in Form No. 3CD. No new facts have been brought out by the Assessing Officer to justify the reopening of the assessment. There was no failure on the part of assessee to disclose fully and truly all material facts necessary for the relevant assessment. The assessment was completed under Section 143(3) which cannot be reopened beyond the period of four years unless there was a failure on the part of assessee in not

disclosing fully and truly all material facts necessary for assessment. The assessee further contended that on perusal of reasons recorded, it is clearly emerges that the assessment was reopened on perusal of breakup of loans and advances of the balance sheet and clause (22)(a) of From 3CD, which amounts to mere change of opinion, there was no question of there being any failure on the part of assessee to disclose fully and truly all material facts necessary during the course of relevant assessment. To support such submission, the assessee relied upon various case laws of Hon'ble Gujarat High Court, Delhi High Court, Bombay High Court and various Benches of the Tribunals. The assessee also submitted that reopening on the basis of audit objection is invalid being a change of opinion. To support such submission, the assessee also relied on various case laws of Hon'ble Jurisdictional High Court including of Cadila Healthcare Ltd. Vs ACIT & Anr. (2012) 65 DTR 385 (Guj).

7. The ld. CIT(A) after considering assessment order and submissions of assessee held that on perusal of reasons recorded by the Assessing Officer, the basis of reopening of assessment was that the Assessing Officer was not able to make addition on account of non-inclusion of unutilized CENVAT credit during the original assessment proceedings, therefore, he took remotely action by issuing notice under Section 148 of the Act. Such action of Assessing Officer is not justified. The

Assessing Officer must have reasons to believe and his believe should be based on reasons which are relevant and material. Change of opinion of forming an opinion on any issue cannot be termed as reason to form believe for reopening of assessment. The Assessing Officer has no new material for form the opinion that income has escaped assessment. The details related to unutilized CENVAT credit were on record in the return of income itself. All the details in respect of income disclosed in the original return were examined and books of account were verified by the Assessing Officer during reassessment proceedings and certain additions were made. The Assessing Officer not being able to tax the additional income on account of CENVAT credit has taken the recourse of reassessment. By issuing notice under Section 148 on the facts which was already available during the regular assessment. The ld. CIT(A) while referring the decision of Hon'ble Supreme Court in CIT Vs Bhanji Lavji 79 ITR 582 (SC) held that when primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer will not be entitled on change of opinion to commence the proceedings for reassessment. Similarly, in case of ITO Vs Nawab Mir Barkat Ali Khan Bahadur 97 ITR 239 (SC), the Hon'ble Supreme Court held that having second thoughts on the same material and omission to draw correct legal presumption during original assessment do not warrant the initiation of proceedings under Section 147 of the Act. The ld. CIT(A)

further held that he has noted that the Assessing Officer was not having any new factual information in his possession to form the opinion that there is any escapement of income. The Assessing Officer merely formed his opinion on the basis of facts available on record in the return of income. The facts of the case that the assessee for a long time remained accepted by Assessing Officer and suddenly after almost five years, he changed his opinion that unutilized CENVAT credit is not allowable. Such change of opinion cannot be held valid in view of decision of Hon'ble Supreme Court relied by the ld. CIT(A). The ld. CIT(A) specifically noted that the Assessing Officer ought to have fulfilled the condition as per proviso to Section 147 by establishing the fact that the assessee has not made true and full disclosure of material facts necessary for their assessment. On the contrary, the Assessing Officer himself while recording reasons mentioned that "*on perusal of break up loans and advances and the balance sheet and Clause (22) of audit report, it was observed that unutilized CENVAT credit was not included in the closing stock which has escapement assessment*". On such finding, the ld. CIT(A) held that reopening of assessment cannot be held legal, therefore, the assessment proceedings were annulled (quashed). Since the ld. CIT(A) quashed the assessment order, thus the discussion on merit became academic thereby grounds of appeal on merit were not adjudicated. Aggrieved by the order of ld. CIT(A), the

revenue has filed present appeal before this Tribunal. The revenue has challenged the order of ld CIT(A) only on the legal issue and no grounds of appeal on merit was raised by revenue either at the time of filing the appeal nor till now, i.e. at the time of hearing of submissions.

8. We have heard the submissions of learned Senior Departmental Representative (ld. Sr. DR) for the revenue and the learned Authorised Representative (ld. AR) of the assessee and have gone through the orders of the lower authorities carefully. The ld. Sr. DR for the revenue supported the order of Assessing Officer. The ld. Sr. DR for the revenue submits that merely the assessee has furnished information which were not examined during the original assessment and came to the notice of Assessing Officer on the basis of which the case of assessee was reopened, cannot be termed as change of opinion.

9. On the other hand, the ld. AR of the assessee supported the order of ld. CIT(A). The ld. AR of the assessee submits that the case of assessee was reopened after four years from the end of relevant assessment year and there was no new material came to the notice of Assessing Officer. Even otherwise, the Assessing Officer has not recorded in the reasons recorded or in the assessment order that he has some information of tangible material that the income of assessee has escaped assessment. The assessee has disclosed fully and truly all material facts necessary for assessment either at the time of filing of return of income or during the

original assessment proceedings. The reasons recorded clearly shows that the assessment was reopened on perusal of details available on record which is nothing but mere change of opinion. Thus, there is no question of there being any failure on the part of assessee to disclose fully and truly all material facts necessary for assessment. The ld. AR of the assessee submits that it is settled position under law that in absence of new tangible material, the case of assessee cannot be reopened after expiry of four years for the end of relevant assessment year. To support such submission, the ld. AR of the assessee relied upon the decision of Hon'ble Supreme Court in CIT Vs Kelvinator of India Ltd. 187 Taxman 312 (SC) and Delhi High Court decision in CIT Vs Kelvinator of India Ltd 123 Taxman 433 (Delhi). The ld. AR of the assessee further submits that even on audit objection, there cannot be any audit objection on law and the objection of audit party on the point of law cannot be regarded as information for the purpose of initiating reassessment proceedings under Section 147 of the Act. To support such view, the ld. AR of the assessee relied upon the decision of Hon'ble Supreme Court in Indian & Eastern Newspaper Society Vs CIT 119 ITR 996 (SC). The ld AR for the assessee prayed to uphold the order of ld CIT(A) and to dismiss the appeal.

10. We have considered the rival submissions of both the parties and have gone through the orders of the lower authorities. We have also

deliberated on various case laws followed by the ld. CIT(A) as well as the case laws relied upon by the ld. AR of the assessee. We find that initially the assessment under section 143(3) was completed on 31.12.2007 by making certain additions therein. The case of the assessee was again reopened under section 147. Notice under section 148 was issued upon the assesse on 13.02.2012, which is admittedly beyond four years from the end relevant financial year when the assessment was completed. Thus, first proviso of section 147 is clearly applicable on the facts of present case. From the material available in the form of orders of lower authority, it is clear that the assessing officer reopened the case of assessee on the basis of material available on record. The assessing officer clearly recorded that "*on perusal of break up loans and advances and the balance sheet and Clause (22) of audit report, it was observed that unutilized CENVAT credit was not included in the closing stock which has escapement assessment*".

11. Before ld CIT(A) as well as before us, the assessee vehemently argued firstly that case of assessee was reopened only on account of change of opinion as of the relevant materials and details in respect of CENVAT credit were available in the balance sheet and audit report in Form No. 3CD or that no new facts have been brought out by the Assessing Officer to justify the reopening of the assessment. Secondly, there was no failure on the part of assessee to disclose fully and truly all material

facts necessary for the relevant assessment. Thirdly, the assessment was completed under Section 143(3) which cannot be reopened beyond the period of four years unless there was a failure on the part of assessee in not disclosing fully and truly all material facts necessary for assessment. We find merit in the submissions of the ld AR for the assessee that there is no reference in the reasons recorded that there was failure on the part of the assessee in not disclosing fully and truly all the facts necessary for assessment. We find that the assessing officer while making reopening merely relied on the material which was already on record.

12. We find that the ld CIT(A) on consideration of such fact held that the basis of reopening of assessment was on account of non-inclusion of unutilized CENVAT credit during the original assessment proceedings, therefore, the assessing officer took remote action by issuing notice under Section 148 of the Act. The action of Assessing Officer is not justified. The Assessing Officer must have reasons to believe and his believe should be based on reasons which are relevant and material. The change of opinion of forming an opinion on any issue cannot be termed as reason to form believe for reopening of assessment as the Assessing Officer has no new material for form the opinion that income has escaped assessment. The details related to unutilized CENVAT credit were on record in the return of income itself. All the details in respect of

income disclosed in the original return were examined and books of account were verified by the Assessing Officer during reassessment proceedings and certain additions were made. It was held that the Assessing Officer not being able to tax the additional income on account of CENVAT credit has taken the recourse of reassessment. The notice under Section 148 was issued on the facts which was already available during the regular assessment. The ld. CIT(A) relied on the decision of Hon'ble Supreme Court in CIT Vs Bhanji Lavji (supra) wherein it was held that when primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer will not be entitled on change of opinion to commence the proceedings for reassessment. Ld CIT(A) also relied in case of ITO Vs Nawab Mir Barkat Ali Khan Bahadur (supra) wherein it was held that having second thoughts on the same material and omission to draw correct legal presumption during original assessment do not warrant the initiation of proceedings under Section 147 of the Act. We also find that ld. CIT(A) clearly held that assessing officer was not having any new factual information in his possession to form the opinion that there is any escapement of income. The Assessing Officer merely formed his opinion on the basis of facts available on record in the return of income. The facts of the case that the assessee for a long time remained accepted by Assessing Officer and suddenly after almost five years, he changed his opinion that unutilized CENVAT

credit is not allowable. Such change of opinion cannot be held valid. In our view the ld CIT(A) granted relief to the assessee after complete scrutiny of reasons recorded and material available on record. The revenue failed to bring any material on record to discard the facts that the action of the assessing officer was based on new material which came to the notice of assessing officer.

13. We are conscious of the facts that at the time of making submissions on MA, the revenue tried to impressed that the action of assessing officer was based on audit objection. Such facts are totally missing in the order of assessment. No material is still placed on record, despite the fact that the matter travelled up to Hon'ble High Court. Yet, even if we accepted such facts that the reopening was based on the audit objection, the revenue/ the assessing officer is under obligation to disclose such facts either in the reasons recorded or somewhere in the body of assessment. Still we feel appropriate to consider such fact for complete adjudication of legal issue. We find that Hon'ble Supreme Court in Indian & Eastern News Paper Agency Vs CIT (supra) held that view expressed by internal audit party "on the point of law cannot not be regarded as "information" for the purpose of initiating action under section 147. Thus, in view of afforesaid factual and legal discussions, we do not find any infirmity in the order passed by ld CIT(A), which we affirm, with our additional

observations. In the result, the grounds of appeal raised by the revenue are dismissed.

14. In the result, this appeal of the revenue is dismissed.

Order pronounced in the open court on 12th April, 2023 in open court soon after hearing.

Sd/-	Sd/-
(Dr. ARJUN LAL SAINI)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Surat, Dated: 12/04/2023
**Ranjan*

Copy to:
1. Assessee
2. Revenue
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

Sr. Private Secretary, ITAT, Surat