IN THE INCOME TAX APPELLATE TRIBUNAL
"B''BENCH: BANGALORE

BEFORE SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No.1333/Bang/2024
Assessment Year: 2011-12

M/s. Toyota Kirloskar Motor Pvt. Ltd. Plot No.1, Bidadi Industrial Area SO Bidadi Ramanagar Bengaluru 562 109 **PAN NO : AAACT5415B**	**Vs.**	ACIT LTU, Circle-1 Banalore
APPELLANT		**RESPONDENT**

Appellant by	:	Sri Padam Chand Kincha, A.R.
Respondent by	:	Smt. Kumutha D., D.R.

Date of Hearing	:	24.09.2024
Date of Pronouncement	:	20.12.2024

O R D E R

PER KESHAV DUBEY, JUDICIAL MEMBER:

This appeal at the instance of the assessee is directed against the order of the ld. CIT(A), Bengaluru-12 dated 15.5.2024 vide DIN & Order No.ITBA/APL/S/250/2024-25/1064890877(1) for the AY 2011-12 passed u/s 250 of the Income Tax Act, 1961 (in short "The Act").

2. The assessee has raised the following grounds of appeal:

General Ground:

1. *The Order of the learned Commissioner of Income Tax (Appeals)-12 (hereinafter referred to as CIT-(A)) to the extent prejudicial to the Appellant is bad in law.*

Grounds relating to reassessment:

2. The learned CIT(A) has erred in confirming the action of the AO in issuing notice under section 148 and making reassessment

a. *On mere 'change of opinion' and without any 'tangible material'. The reassessment made and the reassessment order on a mere 'change of opinion' and without any 'tangible material' is bad in law and liable to be quashed.*

b. *Without any 'reason to believe' as to how the said information has resulted in income escaping assessment, the impugned order passed by the learned AO is thus bad in law and liable to be quashed.*

3. The learned CIT(A) has erred in confirming the action of the AO in passing reassessment order after the expiry of 4 years from the end of the assessment year 2011-12, though there is no failure on the part of the assessee to disclose all material facts necessary for the assessment, which is contrary to first proviso to section 147 of the Act.

Ground relating to Corporate Tax

4. The learned CIT(A) has erred in confirming the action of the AO in:

a. *Disallowing a sum of Rs. 52,00,057/-, as excess depreciation claimed on the asset capitalized on the basis of year end provision without appreciating that excess provision was reversed in subsequent years on gross basis including depreciation;*

b. *Disregarding accounting methodology adopted by the Appellant and not appreciating that amount capitalized was based on fair estimates made for work already completed but for which final bills were pending; and*

c. *Not appreciating that the assets were acquired and put to use during the year under consideration.*

Other grounds:

5. *The learned AO has erred in levying interest under section 234B and 234D. On the facts and in the circumstances of the case, interest under section 234B and 234D is not applicable. Even otherwise, the interest u/s 234B and 234D is excessive.*

6. *The learned AO has erred in levying interest under section 234B without appreciating the provisions of section 234B(3).*

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

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 Income-tax Appellate Tribunal to decide the appeal according to law.

3. The brief facts of the case are that the Assessee Company is in the business of manufacturing and selling multi-utility vehicles and passenger cars. The assessee company filed its original return of income for the Assessment Year 2011-12 on 29.11.2011 declaring total income of Rs. 253,23,16,463/- and revised return of income on 04.01.2013 declaring total income of Rs.248,57,41,829/-The return was processed U/s 143(1) of the Act. Thereafter the Assessment was completed u/s 143(3) r.w.s. 144C of the Act on 11.01.2016 on a total income of Rs.361,52,16,490/-.Thereafter within 10 days of passing the Assessment Order, the AO issued Notice under section 148 of the Act on 21.01.2016 for re-opening the Assessment on the ground that during the course of assessment proceedings for AY 2012-13 it was noticed from the balance sheet & notes thereto that the assessee company, has made excess claim of depreciation on assets which are capitalized on provision basis. Thereafter considering the submissions of the assessee, the AO passed the Assessment Order U/s 143(3) r.w.s. 144C and 147 of the Act on 19. 12 2016 disallowing the alleged excess depreciation claims on building of Rs. 23,80,603/- and Plant & Machinery of Rs. 28,19,454/- and added to the total income of the assessee.

4. Aggrieved by the disallowance made by the AO , the assessee preferred an appeal before the ld. CIT(A)/NFAC questioning the legal validity of reassessment order dated 19.12.2016. However The ld. CIT(A)/NFAC agreed with the finding of his predecessor on this issue and accordingly directed the AO to allow, after verification of the

reversal of the entry, such depreciation in next AY as the same has been disallowed in this AY, meaning thereby the disallowance of depreciation in this AY was confirmed by the ld. CIT(A)/NFAC.

5. Aggrieved by the order of ld. CIT(A)/NFAC, the assessee has filed the present appeal before this Tribunal. Assessee has filed a paper book comprising 206 pages along with the compilation of case laws relied upon by the assessee comprising 245 pages. The assessee further submitted a written synopsis of arguments stating as follows:

5.1 The issue in appeal relates to disallowance of a sum of Rs. 52,00,057/-, as excess depreciation claimed on the asset capitalized on the basis of year end provision. The appellant disclosed the details about capitalization of assets on provision basis in the financial statements. The return was selected for scrutiny by issue of notice under section 143(2) on 06.08.2012. Notice u/s 142(l) was issued calling for various details wherein details of additional depreciation was also called for. The Appellant provided requisite information/details including financial statement, Form 3CD, etc. Further enquiry was made by AO vide Notice dated 8.12.2014. The Appellant filed requisite information/details. The final assessment order for the impugned AY was passed on 11.01.2016. Thereafter within 10 days of passing the assessment order, the AO issued Notice under section 148 on 21.01.2016 for re-opening the Assessment. At the request of the Appellant, the AO provided the reasons for re-opening assessment vide letter dated 25 02.2016. Vide this letter the AO has stated that assessment was re-opened because, during the course of assessment proceedings for AY 2012-13 it was noticed from the balance sheet & notes thereto that the Appellant, has made excess claim of depreciation on assets which are capitalized on provision basis.The AO passed Assessment Order on 19. 12 2016 disallowing depreciation ofRs.52,00,057/-.

5.2 With respect to reopening of assessment, the Appellant submits as follows:

- The reopening of the assessment is with an intention to review the assessment order. The AO has not demonstrated what new tangible material came before the AO within 10 days of passing the final assessment order. Reliance is place on the decision of SC in Kelvinator of India Ltd 187 Taxman 312.
- The AO has relied on the assessment for AY 12-13 to justify the reopening. However, the Draft asst order for AY 12-13 was passed on 21.03.2016 and the final asst order for AY 12-13 was passed on 22.11.2016, which is much after the issue of notice u/s 148.
- In the original assessment proceedings, the appellant filed all the details, including details of depreciation. Based on the details filed by the Appellant, the learned AO did not make any disallowance with respect to depreciation. Thus, forming an opinion on the depreciation claim. Subsequently, reopening the assessment on the same issue constitutes a review and hence a 'change of opinion', which is not permitted.
- It has been held that non-rejection of explanation in the assessment order would amount to assessing officer accepting the view of the assessee, thus taking a view/forming an opinion (SC in Marico Ltd 1 17 taxman.com 244, page 222 and JCIT v Cognizant Technology Solutions Ltd [2023] 146 taxmann.com 197 (SC) — page 223).
- The AO has passed the reassessment order after the expiry of 4 years from the end of the AY 2011-12, which is contrary to first proviso to section 147 of the Act. The Appellant has made full and true disclosures. The AO has not alleged that there is non-disclosure by the Appellant of any material facts. The reasons recorded do not make any such claim.

- The Appellant submits that if the reasons recorded do not demonstrate that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, then reopening is bad in law. Reliance is placed on the decision of Karnataka High Court in the case of Hewlett Packard Digital Global Soft Limited (ITA 406 of 2007, Para7, page 219 of PB-II).

6. The ld. D.R. also submitted a written synopsis wherein he stated that the Income Tax Assessment record relating to the above-mentioned Assessee, M/S Toyota Kriloskar Motor Pvt. Ltd. relating to the A.Y.s 2011-12 and 2012-13 were obtained from the Assessing Officer and upon perusal of the same the following facts are being submitted:

6.1 As per the facts on record, the return of income filed by the Assessee for the A.Y.s 2011-12 was taken up for scrutiny by issue of Notice u/s 143(2) of the Act on 06.08.2012. In this regard, the following sequences of events are being tabulated:

Sl.No	Date	Description
1	20.02.2015	The AO has passed Draft Assessment Order u/s 143(3) r.w.s 144C of the Income Tax Act, 1961 (Enclosed as

		Annexure- Pages 1 to5)
2	27.02.2015	As noted from the Proceedings of the DRP Panel-2, Bengaluru in the Assessee's Case for the A.Y. 2011-12, the Draft Assessment Order dated 20.02.2015 has been served on the Assessee on the said date.
3	27.03.2015	As noted from the Proceedings of the DRP Panel-2, Bengaluru in the Assessee's Case for the A.Y. 2011-12, the Assessee has filed objections before the DRP on this date.
4	23.11.2015	The directions u/s 144C(5) of the Income Tax Act, 1961 issued by the DRP Panel-2, Bengaluru.
5	11.01.2016	The AO has passed the Final Assessment Order u/s 143(3) r.w.s 144C of the Income Tax Act, 1961 in conformity with the directions of the DRP.
6	07.12.2015	During the course of the Assessment proceedings in the Assessee's case for the A.Y. 2012-13, the AO received a letter from the Assessee in which the Assessee has in fact admitted that the excess claim was made i.r.o depreciation and additional depreciation.

6.2 The ld. D.R. submitted that the above sequence of the facts clearly shows that the AO was not able to take cognizance of this submission of the Assessee preferred in their letter dated 07.12.2015 for the A.Y. 2012-13, while passing the Final Assessment Order for the A. Y. 2011-12 on 11.12.2016 as the Draft Assessment Order was already passed in the Assessee's case for the AY 2011-12 on 20.02.2015. In this regard, the provisions of Section 144C(8) restricts the AO to make further enquiry and pass the Assessment Order the provisions of Section 144C(8) is reproduced herein below for kind immediate reference.

"....(8)The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set asideany proposed variation or issue any direction under sub-section (5) forfurther enquiry andpassing ofthe assessment order.... "

6.3 Further, the ld. DR submitted that the provisions of Section 144C(13) mandates that upon receipt of the directions issued u/s 144C(5) by the DRP, the AO has to pass the Order in conformity with the directions without providing any further opportunity of being heard to the Assessee within one month from the end of the month in which such direction is received.

6.4 In the light of the above stated facts as noted from the file of the Assessee, Notice u/s 148 issued on 21.01.2016 cannot be termed as there being a change of opinion on the part of the AO. In the circumstances, requested that the written submission may kindly be taken on record and that it is for kind consideration to sustain the Assessment that has been reopened as the same has been carried out in due conformity with the mandated provisions of Section 148 of the Act.

7. On the contrary, the AR of the assessee also submitted the written rejoinder to revenue's submissions which are reproduced below-

1. The Appellant refers to the Note filed by the Revenue on 8.10.2024. In this regard, the Appellant submits as follows:
2. The Appellant submits that the Note filed by the Revenue is just recounting of the sequence of events, and no new submissions on points of law are put forth in the Note filed by the Revenue.
3. During the hearing or in the Note, the DR could not demonstrate that any new material was available from the date of passing the final assessment order i.e 11.01.2016 and reopening of the assessment vide Notice dated 21.01.2016.

4. The learned DR in the Note has referred to DRP proceedings. The DRP proceedings are continuation of the assessment proceeding and partake the nature of a corrective mechanism. The material on depreciation claim mentioned in the revenue submissions was available with the AO during the assessment proceedings. DRP proceedings being a continuation of the assessment proceedings, such material should be held to be available with the department during the course of the assessment proceedings. Such material, therefore, ought to, if at all, have been used in such proceedings. This could have been achieved by the AO giving such material to the DRP for an appropriate consideration. Having failed to do so, it is not permissible to use the same material in the reassessment proceedings. Having asked a question during the assessment proceedings and having secured the relevant information, it is to be presumed that the AO had applied his mind to the said information.

5. The material was available at the time of assessment proceedings and its use after the completion of assessment proceedings is categorical case of 'change of opinion'. Thus, the notice issued u/s 148 is bad in law and assessment order is to be quashed.

8. We have heard the rival submissions and perused the materials available on record. The issue in appeal relates to disallowance of sum of Rs. 52,00,057/- as excess depreciation & additional depreciation claimed on the asset capitalized on the basis of year end provision. The assessee had also disclosed the details on the capitalization of assets on provisional basis in the financial statement.

We take a note of the fact that during the course of the Assessment proceedings the assessee company had submitted the details of depreciation as well as additional depreciation along with the audited financial statements containing the Notes to the Accounts.

9. Further the assessee had filed requisite information/details Complete Audit Report in Form 3CA & 3CD. The AO after careful consideration of the information/record and detailed scrutiny of the papers/documents submitted by the assessee along with the Audited financial statements had passed an Assessment order U/s 143(3) of the Act dated 11/01/2016.

10. We also find that within 10 days of passing the assessment order, the AO issued notice u/s. 148 on 21/01/2016 for reopening the assessment for the reason that during the course of assessment proceeding, it was noticed from the balance sheet and notes thereto that the assessee has made excess claim of depreciation on assets which are capitalized on provision basis.

11. On going through the reasons for the reopening, we find that the AO had not disclose while furnishing the reasons for reopening of the assessment U/s 148 of the Act that on what new/additional information/ tangible material in possession of the AO to believe that income has escaped assessment. We are of the opinion that that there is no new/fresh tangible material in the possession of the AO on the basis of which AO could have reason to believe that the income chargeable to tax had escaped assessment or had been under assessed.

12. In our opinion, the AO has not demonstrated what new tangible material came before him within 10 days of passing the final assessment order. In our considered view this is nothing but the attempt to review of his own order passed u/s. 143(3) of the Act based on change of opinion.

The AO further has relied on the assessment for A.Y. 2012-13 to justify the reopening however we find that the draft assessment order for A.Y. 2012-13 was passed on 21/03/2016 and the final assessment order for A.Y. 2012-13 was passed on 22/11/2016 which is much after the issue of notice u/s. 148.

Before us the ld. DR fervently submitted that the AO was not able to take cognizance of the submission made by the assessee. We are of the considered Opinion that if the AO should have but did not do so then, he cannot avail of section 147 to correct that mistake.

13. Reliance is placed on the judgment of the Hon'ble supreme Court in the case of " ITO Vs Nawab Mir Barkat Ali Khan Bahadur [1974] 97 ITR 239(SC) in which it is held that having second thoughts on the same material, and omission to draw the correct legal presumption during original assessment do not warrant the initiation of a proceeding under section 147 of the I. Tax Act,1961.

Further Hon'ble supreme court in the case of " CIT Vs Bhanji Lavji [1971] 79 ITR 582 (SC) held that when the primary facts necessary for the assessment are fully and truly disclosed, the AO will not be entitled on change of opinion to commence proceedings for reassessment. Similarly if he has raised a wrong legal inference from the facts disclosed, he will not, on that account, be competent to commence reassessment proceedings. In the original assessment proceedings, the assessee filed all the details including details of depreciation, copy of the audit reports and based on the details filed by the assessee, the AO took the judicious view not to disallow with respect to depreciation. Thus the AO formed an opinion on the claim of depreciation based on material available before him. Subsequently, reopening the assessment on the same issue constitutes a review of his own order which is not permitted under the law. It is well settled law that non-rejection of explanation in the assessment order would amount to AO accepting the view of the

assessee. The AO has not alleged that there is non-disclosure of any material facts on the part of the assessee, then reopening of the same again is bad in law. We are of the view that there was no failure on the part of the assessee to disclose fully and truly all material facts and there seems to be mere **change of opinion** on the part of the AO and, therefore the notice U/s 148 is unwarranted as the same may be held to be unconstitutional.

14. If the reason recorded do not demonstrate that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, then reopening is illegal and bad in law by placing reliance on the decision of Hon'ble Karnataka High Court in the case of CIT vs. Hewlett Packard Digital Global Soft Ltd. in ITA No. 406 of 2007. We also place reliance on the decision of Hon'ble Apex Court in case of CIT vs. Kelvinator of India Ltd. reported in (2010) 187 Taxman 312 (SC), the relevant paragraph of which is given below for ease of reference and on record.

> *"2. A short question which arises for determination in this batch of civil appeals is, whether the concept of "change of opinion" stands obliterated with effect from 1st April, 1989, i.e., after substitution of Section 147 of the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1987?*
> *3. To answer the above question, we need to note the changes undergone by Section 147 of the Income Tax Act, 1961 [for short, "the Act"]. Prior to Direct Tax Laws (Amendment) Act, 1987, Section 147 reads as under:*
> *"Income escaping assessment.*
> *147. If--*
> *[a] the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or*
> *[b] notwithstanding that there has been no omission or failure as mentioned in clause*
> *(a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession*

reason to believe that income chargeable to tax has escaped assessment for any assessment year,
he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year)."
3.1 After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to 1st April, 1989, Section 147 of the Act, reads as under:
"147. Income escaping assessment.-- If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year)."
3.2 After the Amending Act, 1989, Section 147 reads as under:
"Income escaping assessment.
147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."
4. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done

under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment 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 re-opening 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 Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, 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 Section 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 Section 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 Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were*

received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. 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 section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 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 section 147, however, remain the same."

5. For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

15. Further, we also rely on the decision of Hon'ble Apex Court in the case of ACIT vs. Marico Ltd. reported in (2020) 117 taxmann.com 244 (SC), the relevant paragraph of which is given below for ease of reference and on record.

"In the present matter, the assessment order was passed on 30.01.2018 as regards the Assessment Year 2014-15.

According to the record, certain queries were raised by the Assessing Officer on 25.09.2017 during the assessment proceedings which were responded to by the Assessee vide letters dated 10.10.2017 and 21.12.2017.

After considering said responses, the assessment order was passed on 30.01.2018.

Subsequently, by notice dated 27.03.2019 issued under Section 148 of the Income-Tax Act, the matter was sought to be re-opened. While accepting the challenge to the issuance of notice, the High Court in para 12 of its judgment observed as under:

"12. Thus we find that the reasons in support of the impugned notice is the very issue in respect of which the Assessing Officer has raised the query dated 25 September 2017 during the assessment proceedings and the Petitioner had responded to the same by its letters dated 10 December 2017 and 21 December 2017 justifying its stand. The non-

rejection of the explanation in the Assessment Order would amount to the Assessing Officer accepting the view of the assessee, thus taking a view/ forming an opinion. Therefore, in these circumstances, the reasons in support of the impugned notice proceed on a mere change of opinion and therefore would be completely without jurisdiction in the present facts. Accordingly, the impugned notice dated 27 March 2019 is quashed and set-aside."

In the circumstances, we see no reason to interfere in the matter. This special leave petition is, accordingly, dismissed. Pending application(s), if any, also stand disposed of."

Accordingly, respectfully following the above judgments of the Hon'ble Apex Court, We are of the firm opinion that the AO has no jurisdiction to review his own order either based on his change of opinion or to rectify his mistake by giving second thought on the same material available with him being illegal and bad in law & without jurisdiction. Accordingly, we annulled the entire reassessment proceedings as based on change of opinion that to without any new tangible material on record.

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

Order pronounced in the open court on 20th Dec, 2024

Sd/-	**Sd/-**
(Laxmi Prasad Sahu)	**(Keshav Dubey)**
Accountant Member	**Judicial Member**

Bangalore,
Dated 20th Dec, 2024.
/MS/

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.