(2016) 03 DEL CK 0154

In the Delhi High Court

Case No : W.P.(C) Nos. 924, 1045 of 2014, 3077 and 3078 of 2015 with C.M.Nos. 1873, 2151 of 2014, 5498 and 5500 of 2015.

Dr. Ajit Gupta APPELLANT

Vs

Assistant Commissioner of Income-Tax RESPONDENT

Date of Decision : 03-03-2016

Acts Referred:
Income Tax Act, 1961 — Section 148

Citation : (2016) 383 ITR 361

Hon'ble Judges : Dr. S. Muralidhar;Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Salil Kapoor with Sanat Kapoor, Ananya Kapoor, Sumit Lal Chandani and Arun Vir Singh, Advocates, for the Appellant; Rahul Chaudhary, Senior Standing Councel, With Raghvendra Singh and Sharad Agarwal, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

CM No. 1874 of 2014 (for exemption) in W.P.(C) No. 924 of 2014

CM No. 2152 of 2014 (for exemption) in W.P.(C) No. 1045 of 2014

1. Exemptions allowed subject to all just exceptions.

2. The applications are disposed of.

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W.P.(C) No. 924 of 2014 and CM No. 1873 of 2014 (for stay)

W.P.(C) No. 1045 of 2014 and CM No. 2151 of 2014 (for stay)

W.P.(C) No. 3077 of 2015 and CM No. 5498 of 2015 (for stay)

W.P.(C) No. 3078 of 2015 and CM No. 5500 of 2015 (for stay)

3. These four writ petitions by Dr. Ajit Gupta, a medical practitioner who i an assessee, challenge the notices issued to the assessee by the Deput} Commissioner of Income-tax ("Deputy CIT"), Circle 37(1), New Delh under section 148 of the Income-tax Act, 1961 ("Act") seeking to reopen the assessment for the assessment years ("AYs") 2006-07 to 2009-10.

4. The assessee filed a return of income on October 31, 2006, for the assessment year 2006-07 which was picked up for scrutiny by the Assessing Officer ("AO"). An assessment order was passed by the Assessing Officer under section 143(3) of the Act on December 22, 2008, assessing the taxable income at Rs. 14,40,226 as against the declared income of Rs. 12,35,268.

5. The assessee filed a return for the assessment year 2007-08 on October 31, 2007, which again was picked up for scrutiny. An assessment order was passed on December 29, 2009 assessing the taxable income at Rs. 36,95,120 as against the declared income of Rs. 36,00,313.

6. The assessee filed a return of income on September 30, 2008 for the assessment year 2008-09 which was processed under section 143(1) of the Act. The returned income was Rs. 1,14,96,331.

7. The assessee filed a return on September 29, 2009, for the assessment year 2009-10. This was picked up for scrutiny and an assessment order was passed by the Assessing Officer on April 26, 2011. As against the declared income of Rs. 2,10,82,780, the income was assessed at Rs. 2,19,53,505.

8. On March 25, 2013, the Deputy Commissioner of Income-tax issued a notice to the assessee under section 148 of the Act seeking to reopen the assessment order for the assessment year 2006-07. The Petitioner replied by a letter dated April 29, 2013, stating that the original return filed on October 31, 2006 should be treated as return pursuant to the said notice.

9. By a letter dated September 17, 2013, the Assessing Officer reproduced the reasons for reopening of the assessment, the relevant portion of which as under :

"The assessee is a Doctor by profession and derived income from proprietary business from M/s. Park Hospital and M/s. Sunil Hospital and Nursing Home. The assessee filed its return of income on October 31, 2006 declaring the income of Rs. 12,35,268. On the basis of information gathered while scrutiny proceedings under section 143(3) for the assessment year 2010-11 and as per para. 11(a) of Tax Audit Report under section 44AB dated October 28, 2006 of the assessee (M/s. Park Hospital and Sunil Hospital and Nursing Home), the assessee is regularly following mixed system of accounting. As per section 145 of the Income-tax Act, 1961, income chargeable under the head ''Profits and gains of business or profession'' shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. . . .

Following the cash basis of accounting, unpaid expenses or expenses payable or provision for expenses are not allowed as deductible expenditure. Since, there is an outstanding balance of Rs. 5,97,750 and Rs. 4,12,215 in the sundry creditors and amounts payable respectively in M/s. Park Hospital and M/s. Sunil Nursing Home respectively during the financial year 2005-06, the same are not an allowable expenditure under cash system of accounting. Following the mercantile system of accounting, bills raised and accrued income has to be shown as taxable income. Since, the assessee is not showing any debtors or receivables in the balance-sheet, accrued income during the financial year 2005-06 has escaped from the assessment.

The case has been completed under section 143(3) on December 22, 2008 assessing the total income at Rs. 14,40,230. The assessee neither at the time of assessment nor while filing the income-tax return disclosed the above mentioned facts. Therefore, the income chargeable to tax has escaped assessment by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

In view of above facts, I have reason to believe that the assessee has income which has escaped from assessment and fit case to issue notice under section 148 of the Income-tax Act, 1961."

10. Within three days of the earlier notice, i.e., on March 28, 2013, another notice under section 148 of the Act was issued by the Deputy Commissioner of Income-tax seeking to reopen the assessment for the assessment year 2008-09. The same reasons, as extracted hereinbefore, were given to the assessee for the reopening of the said assessment for the assessment year 2008-09.

11. As far as the assessment year 2007-08 is concerned, the notice under section 148 of the Act was issued by the Assistant Commissioner of Income-tax ("ACIT"), Circle 37(1) on Marcia 5, 2014 The reasons conveyed to the assessee by the letter dated October 9, 2014, were more or less similar to the above reasons. It was stated further as under :

"During the assessment proceedings for the assessment year 2010-11, the assessee submitted in his reply on March 14, 2013 that he has been following cash system of accounting until the financial year 2008-09 and shifted over to mercantile system of accounting for the financial year 2009-10. The assessee during the assessment proceedings of the assessment year 2007-08 never submitted that he had been following cash system of accounting. It was only during the assessment proceedings of the assessment year 2010-11 that the assessee submitted this fact.

Following the cash basis of accounting, sundry creditors and expenses payable are not allowed as deductible expenditure. In the balance-sheet of Park Hospital and Sunil Nursing Home, the following sundry creditors and expenses payable are appearing :

1. Park Hospital 31-3-2007 Amount

Sundry creditors 6,95,940

Expenses payable 18,86,956

2. Sunil Nursing Home 31-3-2007 Amount

Sundry creditors -

Expenses payable 4,33,011

As, sundry creditors and amounts/expenses payable are not allowed to be claimed as expenditure under the cash system of accounting. Accordingly, Rs. 30,15,907 is not allowable as expenditure, thus, Rs. 30,15,907 has escaped from assessment."

12. For the assessment year 2009-10, the notice was issued two days later, i.e., on March 7, 2014, again by the Assistant Commissioner of Income-tax where the reasons were identical for the assessment year 2007-08.

13. The assessee''s objection to the reopening of the above assessment were negatived by orders passed by the Assessing Officer on December 13, 2013, as far as the assessment years 2006-07 and 2008-09 were concerned and by orders dated March 11, 2015 as far as the assessment years 2007-08 and 2009-10 were concerned.

14. While directing notice to be issued in W.P. (C) No. 924 and 1045 of 2014 (for the assessment years 2006-07 and 2008-09) on February 7, 2014, the court restrained further proceedings pursuant to the impugned notices. Similar orders were passed at the time of issuance of notices in the other two petitions W.P. (C) Nos. 3077 and 3078 of 2015 (for the assessment years 2007-08 and 2009-10).

15. The court has heard the submissions of Mr. Salil Kapoor, learned counsel for the petitioner and Mr. Rahul Chaudhary, learned senior standing counsel for the Revenue.

16. The main reason for the reopening of the assessment is admittedly the letter given by the assessee while the assessment for the assessment year 2010-11 was under scrutiny. It is stated that in the reply dated March 14, 2013, addressed to the Deputy Commissioner of Income-tax in reply to the notice dated March 8, 2013, the assessee volunteered that "we have followed the cash system of accounting until financial year 2008-09 and shifted over to the mercantile system of accounting for the financial year 2009-10 (the assessment year 2010-11). The same has been confirmed by our chartered accountant in the tax audit report as well as the confirmation letter dated October 1, 2012".

17. The reasons furnished to the assessee for the reopening of the assessment further show that consequent upon the said disclosure, the Assessing Officer came to the conclusion that the balances in sundry creditors were not allowable expenditure. For the assessment year 2006-07, it v/as concluded that the assessee was not showing any details of receipts and, therefore, the above accrued income, being the outstanding balance shown as sundry creditors has escaped assessment and would require to be added back. It is stated that the

escapement of income was on account of the failure on the part of the assessee to "disclose fully and truly all material facts necessary'' for assessment".

18. As far as the assessment year 2006-07 is concerned, it is significant that the assessment order dated December 22, 2008, itself notes against column 10 as under "method of accounting : mercantile". Further in the objections to the reopening of assessment, the assessee pointed out that all relevant particulars for the assessment year 2006-07 were duly furnished before the Assessing Officer; that there were no sundry creditors outstanding and the only amount due was against expenses payable. It was stated that since the mercantile system of accounting was followed, the liability against the expenses payable was accounted for in the books. Since the hospital was not allowing credit to any patient, there was no debtor appearing in the books. These factors were examined by the Assessing Officer during the original assessment proceedings and the books of account were also produced. It was pointed out that the mercantile system of accounting was being followed by the assessee not only during the assessment year 2006-07 but the earlier and subsequent years as well. Counsel for the assessee has produced before the court the assessment order dated November 17, 2006, for the assessment year 2004-05 which shows that the method of accounting in the said assessment year was "mercantile". It was explained that the word "mixed" was inadvertently mentioned in the audit report under section 44AB of the Act but actually it was only the mercantile system which was followed. The auditor had issued a clarification in this regard. This is specifically mentioned in the objections filed by the assessee in its letter dated October 21, 2013. This letter dated December 1, 2012, of the auditor states "in this audit report by clerical mistake the method of accounting is mentioned as ''mixed'' but it is on mercantile system basis and instead of mixed method it should be treated as mercantile basis".

19. Similar objections were also filed as regards the notices under section 148 of the Act issued for the other three assessment years. As regards the assessment years 2007-08 and 2009-10, in its objections the assessee in the letter dated December 9, 2014, pointed out that the letter dated March 14, 2013 was written by the assessee under some misconception as he "does not understand as what is the mercantile or cash based accounting". It was further stated : "First of all, this letter was written by the assessee in some misconception as he does not understand as to what is the mercantile or cash basis of accounting. He is a layman as regards to accounting systems, records, policies, etc. He is a doctor by profession and does not have accounting knowledge. This letter was written by him without understanding the meaning of it. Therefore, no cognizance should be taken of it as the contents of this letter are contrary to the facts on record".

20. In a further letter dated March 9, 2015, the assessee pointed out that if the cash system was to be followed for the assessment years 2006-07 to 2010-11, the overall impact would be "nil" and there would be no escapement of income. The only controversy was whether income was to be taxed in the first year or the

next year and overall it would be tax neutral. There was also no revenue loss as the maximum slab of tax rate in all the assessment years was the same, i.e., 30 per cent. It was further pointed out that for the assessment year 2009-10 "by changing the method as cash basis, the assessed income would be reduced".

21. The court finds that none of the above objections have been adequately dealt with by the Assessing Officer while rejecting the objections.

22. During the course of today''s hearing, apart from the mistake made in the audit report by mentioning the system of accounting of the assessee as "mixed" and the letter issued by the assessee himself, no other " tangible material" was cited to justify the reopening of assessment for the assessment year 2006-07 and 2007-08, the two years for which the reopening was beyond the period of four years. The reasons provided were the same reasons for the reopening of assessment for the assessment years 2008-09 and 2009-10 although for the assessment year 2008-09 the earlier assessment was completed under section 143(1) of the Act. The fact of the matter was that the reason for the reopening of the assessment was a mistaken factual premise that the assessee had changed the system of accounting from the mercantile to the cash system. It was more than adequately explained by the assessee that this was an inadvertent error. The assessee has convincingly shown that he has consistently been following the mercantile system of accounting not only for assessment years in question but for the earlier and later assessment years as well.

23. Since the action of the Revenue was based on a factually erroneous premise, the court is of the view that the reopening of the assessments for the said assessment years is not sustainable in law. The court is also satisfied that the requirement of the law, as explained by the court in CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC), and reiterated in the later decisions, has not been fulfilled in the present case.

24. Accordingly the impugned notices under section 148 of the Act dated March 25, 2013 (for the assessment year 2006-07), March 28, 2013 (for the assessment year 2008-09), March 5, 2014 (for the assessment year 2007-08) and March 7, 2014 (for the assessment year 2009-10) and the corresponding orders dated December 13, 2013 and March 11, 2015 rejecting the objections of the assessee to the said notices, are hereby quashed.

25. The writ petitions are allowed but in the circumstances with no order as to costs. The pending applications are also disposed of.

