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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

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**W.P.(C) 924/2014 & CM 1873/2014 (for stay)**

DR. AJIT GUPTA

..... Petitioner

Through: Mr. Salil Kapoor with Mr. Sanat Kapoor,  
Ms.Ananya Kapoor, Mr.Sumit Lal Chandani and  
Mr. Arun Vir Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing  
Counsel with Mr. Raghvendra Singh and  
Mr.Sharad Agarwal, Advocates.

**WITH**

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**W.P.(C) 1045/2014 & CM 2151/2014 (for stay)**

DR. AJIT GUPTA

..... Petitioner

Through: Mr. Salil Kapoor with Mr. Sanat Kapoor,  
Ms.Ananya Kapoor, Mr.Sumit Lal Chandani and  
Mr. Arun Vir Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing  
Counsel with Mr. Raghvendra Singh and  
Mr.Sharad Agarwal, Advocates.

**WITH**

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**W.P.(C) 3077/2015 & CM 5498/2015 (for stay)**

DR. AJIT GUPTA

..... Petitioner

Through: Mr. Salil Kapoor with Mr. Sanat Kapoor,  
Ms.Ananya Kapoor, Mr.Sumit Lal Chandani and  
Mr. Arun Vir Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent  
Through: Mr. Rahul Chaudhary, Senior Standing  
Counsel with Mr. Raghvendra Singh and  
Mr.Sharad Agarwal, Advocates.

**AND**

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**W.P.(C) 3078/2015 & CM 5500/2015 (for stay)**

DR. AJIT GUPTA

..... Petitioner

Through: Mr. Salil Kapoor with Mr. Sanat Kapoor,  
Ms.Ananya Kapoor, Mr.Sumit Lal Chandani and  
Mr. Arun Vir Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent  
Through: Mr. Rahul Chaudhary, Senior Standing  
Counsel with Mr. Raghvendra Singh and  
Mr.Sharad Agarwal, Advocates.

**CORAM:**

**JUSTICE S. MURALIDHAR**

**JUSTICE VIBHU BAKHRU**

**ORDER**

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**03.03.2016**

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

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

1. Exemptions allowed subject to all just exceptions.
2. The applications are disposed of.

**W.P.(C) No. 924/2014 & CM No. 1873/2014 (for stay)**  
**W.P.(C) No. 1045/2014 & CM No. 2151/2014 (for stay)**  
**W.P.(C) No. 3077/2015 & CM No. 5498/2015 (for stay)**  
**W.P.(C) No. 3078/2015 & CM No. 5500/2015 (for stay)**

3. These four writ petitions by Dr. Ajit Gupta, a medical practitioner who is an Assessee, challenge the notices issued to the Assessee by the Deputy Commissioner of Income Tax ('DCIT'), Circle 37(1), New Delhi under Section 148 of the Income Tax Act, 1961 ('Act') seeking to reopen the assessment for Assessment Years ('AYs') 2006-07 to 2009-10.

4. The Assessee filed a return of income on 31<sup>st</sup> October 2006 for AY 2006-07 which was picked up for scrutiny by the Assessing Officer ('AO'). An assessment order was passed by the AO under Section 143(3) of the Act on 22<sup>nd</sup> December 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 AY 2007-08 on 31<sup>st</sup> October 2007 which again was picked up for scrutiny. An assessment order was passed on 29<sup>th</sup> December 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 30<sup>th</sup> September 2008 for AY 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 29<sup>th</sup> September 2009 for AY 2009-10. This was picked up for scrutiny and an assessment order was passed by the AO

on 26<sup>th</sup> April 2011. As against the declared income of Rs.2,10,82,780, the income was assessed at Rs.2,19,53,505.

8. On 25<sup>th</sup> March 2013, the DCIT issued a notice to the Assessee under Section 148 of the Act seeking to reopen the assessment order for AY 2006-07. The Petitioner replied by a letter dated 29<sup>th</sup> April 2013 stating that the original return filed on 31<sup>st</sup> October 2006 should be treated as return pursuant to the said notice.

9. By a letter dated 17<sup>th</sup> September 2013, the AO reproduced the reasons for reopening of the assessment, the relevant portion of which read 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 & Nursing. The assessee filed its return of income on 31.10.2006 declaring the income of Rs.12,35,268/-. On the basis of information gathered while scrutiny proceedings u/s. 143(3) for A. Y. 2010-11 and as per para 11(a) of Tax Audit Report u/s. 44AB dated 28.10.2006 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 I.T.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.

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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 F.Y 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 F.Y 2005-06 has escaped from the assessment.

The case has been completed u/s. 143(3) on 22.12.2008 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 u/s 148 of the I.T Act, 1961.”

10. Within three days of the earlier notice, i.e., on 28<sup>th</sup> March 2013, another notice under Section 148 of the Act was issued by the DCIT seeking to reopen the assessment for AY 2008-09. The same reasons, as extracted hereinbefore, were given to the Assessee for the reopening of the said assessment for AY 2008-09.

11. As far as AY 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 5<sup>th</sup> March 2014. The reasons conveyed to the Assessee by the letter dated 9<sup>th</sup> October 2014 were more or less similar to the above reasons. It was stated further as under:

“During the assessment proceedings for A.Y. 2010-11, the assessee submitted in his reply on 14.03.2013 that he has been following cash system of accounting until F.Y 2008-09 and shifted over to mercantile system of accounting for F. Y. 2009-

10. Assessee during the assessment proceedings of the A.Y. 2007-08 never submitted that he had been following cash system of accounting. It was only during the assessment proceedings of A.Y. 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                      31.03.2007                      Amount

Sundry Creditors	6,95,940/-
Expenses Payable	18,86,956/-

2. Sunil Nursing Home                      31.03.2007                      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 AY 2009-10, the notice was issued two days later, i.e., on 7<sup>th</sup> March 2014, again by the ACIT where the reasons were identical for the reasons for AY 2007-08.

13. The Assessee’s objection to the reopening of the above assessment were negatived by orders passed by the AO on 13<sup>th</sup> December 2013 as far as AYs 2006-07 and 2008-09 were concerned and by orders dated 11<sup>th</sup> March 2015

as far as AYs 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 AYs 2006-07 and 2008-09) on 7<sup>th</sup> February 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 AYs 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 AY 2010-11 was under scrutiny. It is stated that in the reply dated 14<sup>th</sup> March 2013 addressed to the DCIT in reply to the notice dated 8<sup>th</sup> March 2013, the Assessee volunteered that “we have followed the cash system of accounting until FY 2008-09 and shifted over to mercantile system of accounting for FY 2009-10 (AY 2010-11). The same has been confirmed by our Chartered Accountant in the tax audit report as well as the confirmation letter dated 01.10.2012”.

17. The reasons furnished to the Assessee for the reopening of the assessment further show that consequent upon the said disclosure, the AO came to the conclusion that the balances in sundry creditors were not allowable expenditure. For AY 2006-07, it was 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 and material facts necessary for assessment”.

18. As far as AY 2006-07 is concerned, it is significant that the assessment order dated 22<sup>nd</sup> December 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 AY 2006-07 were duly furnished before the AO; 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 AO during the original assessment proceedings and the books of accounts were also produced. It was pointed out that the mercantile system of accounting was being followed by the Assessee not only during AY 2006-07 but the earlier and subsequent years as well. Counsel for the Assessee has produced before the Court the assessment order dated 17<sup>th</sup> November 2006 for AY 2004-05 which shows that the method of accounting in the said AY 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 21<sup>st</sup> October 2013. This letter dated 1<sup>st</sup> December 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 AYs. As regards AYs 2007-08 and 2009-10, in its objections the Assessee in the letter dated 9<sup>th</sup> December 2014 pointed out that the letter dated 14<sup>th</sup> March 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 9<sup>th</sup> March 2015, the Assessee pointed out that if the cash system was to be followed for AYs 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 AYs was the same, i.e., 30%. It

was further pointed out that for AY 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 AO 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 AY 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 supplied for the reopening of the assessment for AYs 2008-09 and 2009-10 although for AY 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 AYs in question but for the earlier and later AYs 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 AYs is not sustainable in law. The Court is also satisfied that the requirement of the law, as explained by the Court in *Commissioner of Income Tax. v. Kelvinator of India Limited (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 25th March 2013 (for AY 2006-07), 28th March 2013 (for AY 2008-09), 5th March 2014 (for AY 2007-08) and 7th March 2014 (for AY 2009-10) and the corresponding orders dated 13th December 2013 and 11th March 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.

**S. MURALIDHAR, J**

**VIBHU BAKHRU, J**

**MARCH 03, 2016**

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