IN THE INCOME TAX APPELLATE TRIBUNAL,'D' BENCH KOLKATA

Before : **Shri M.Balaganesh,Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

I.T.A. No.371/KOL/2015
A.Y: 2006-07

M/s. Barasat Eye Hospital Vs. I.T.O., Ward 55(2), Kolkata & M.R.C
PAN: AAEFB9406D
(Appellant) (Respondent)

Appearances by:
Shri Soumitra Choudhury, Advocate, AR for the assessee
Shri Debasis Banerjee,JCIT, Sr.DR for the revenue

Date of hearing : 07-11-2016
Date of pronouncement : 21-12-2016

O R D E R

Shri S.S. Viswanethra Ravi, JM :-

This appeal by the assessee is directed against the order dated 30-01-2015 passed by the Commissioner of Income Tax(Appeals)-6, Kolkata for the assessment year 2006-07.

2. In this appeal, the Assessee has raised the following grounds of appeal:-

1. For that the learned Income Tax Officer arbitrarily and wrongly added back an amount of Rs.9,99,994/- as undisclosed income of the appellant firm without considering the fact of social voluntary service on behalf of Rotary Club of Dakshin Barasat.

2. For the learned Income Tax Officer added back an amount of Rs.5,30,130/- u/s 40(a) (ia) of the I.T.Act' 1961 ignoring the fact that the attending Doctors are never the employee of the hospital.

3. For that the partial disallowance of expenditures on estimate basis including purchase of medicine and operation lens was whimsical and unjustified.

4. For that the appellant reserves the right to take further Grounds of Appeal on or before the date of hearing.

3. At the time of hearing the Ld.AR submits that ground no-3 needs no adjudication and accordingly, it is dismissed as not pressed.

4. The assessee is a firm, running a nursing home in the name and style as M/s Barasat Eye Hospital and M.R.C and renders its services in eye related treatment and filed return of income on 31-03-2007 showing total income of Rs.1,43,140/- and the same was duly processed u/s 143(1) on 12-09-2007.The case was reopened against which notices u/s 148 and 142(1) of the Act were issued, in response, the ARs representing the assessee appeared before the AO.

5. Ground no-1 relates to the addition of Rs 9,99,994/- as undisclosed income. Before the AO, the assessee stated in response to the notice u/s 133(6) of the Act, that as per agreement that it received Rs 9,99,994/- towards reimbursement of expenses incurred during various eye camps organized jointly by them with Rotary Club. The AO found from the said agreement that Dakshin Barasat Eye Foundation utilised the Assessee's hospital for the treatment of their Eye patients before and post operation and according to him the receipt of Rs 9,99,994/- is an income of the assessee and added the same to the total income of the assessee as undisclosed income.

6. In first appeal, the Assessee challenged said addition and made submissions as under:

That the appellant Firm runs a Eye Hospital with Micro Surgery at the remote rural area where treatment of eyes is very much unavailable. During the year under appeal M/s. Rotary Club of Dakshin Barasat Centre entered into an agreement with the appellant firm hospital to organize various eye camps jointly with club in different parts of South Bengal to render eye treatment including Micro surgery to the rural public and accordingly an amount of Rs.9,99,994/- was paid to the firm. The appellant firm maintained a separate account for this camp service and submitted the same to the Rotary Club and obtained certificate for utilization of money from the CA. appointed by Rotary Club. This eye camp service during this year under appeal has no connection with the regular business of the firm and the Rotary club also did not pay any amount to the firm for its usual business except service charge for Rs.99,999/-.

This voluntary social service of the firm has entirely been ignored by the Learned ITO and added back the entire receipt of the social service fund for Rs.9,99,994/- to the total income ignoring the actual state of affairs. From the copy of agreement and accounts separately prepared for this eye camp service it would be evident that the firm business has no connection with the eye camp except the subsequent treatments required to the eye camp patients after camp This addition is unjust, arbitrary and deviance of actual state of affairs. Hence this addition is liable to be deleted.

7. The CIT-A found the entire sum received from Rotary club was stated to have been spent on camp expenses, primarily consisting of IOL lenses for Cataract patients, publicity, fooding and other expenses for patients etc.. on noticing the vouchers for alleged expenses which were neither called for by A.O nor produced, the Assessee was asked to produce bills and vouchers for such expenses. In response, the assessee filed invoices from on S.S Vision, Baruipur for supply of IOL lenses and a bill from one Sagar Decorators for camp site decorating, mike, publicity was produced, and according to him no other bills and vouchers were produced.

8. The CIT-A in order to verify the veracity of the expenses incurred in the Rotary eye camp, a commission was issued to

jurisdictional ITO, ward 55(2), Kolkata, to conduct an enquiry. The A.O got enquired through his Inspector and filed report. The CIT-A found that Mr. S Mondal, Prop of S.S.Vision stated that, he had no transaction with Barasat Eye Hospital during the given period and the invoices with name of his concern were false. Likewise, one Mr. Pranab Halder of M/s Sagar Decorators stated that the bills and invoices produced in the name of his concern were false and no such items were supplied to the assessee nor he deals in such items and further he never writes in English as appearing in bill.

9. According to the CIT-A, the Assessee did not give any reply to the report as submitted by the AO and confirmed the addition made by the AO and relevant portion of which is reproduced herein below:

> *3.6 The information obtained by ITO through his enquiry were confronted to A/R of the appellant Mr. SK Samanta during the course of hearing. However after seeking adjournment, no compliance has been made to the evidence confronted. In view of the above, it is held that A.O had correctly held that the expenditure against the earning from Rotary Club, was out of the existing expenditure of hospital. The appeal made on this ground is dismissed.*

10. Before us the ld.AR submits that the AO added such amount for not showing the same in the profit and loss account and referring to page-2 of the paper book submits that the assessee incurred such expenses prior to camp, on the day of camp, for surgery and post camp and argued that all the expenses incurred during such events were paid by the assessee to the concerned parties and the same were received towards reimbursement from the Rotary club and the same does not constitute the income of assessee. In support of this, the ld.AR referred to pages 3 & 4 of the paper book. On the other hand, the ld.DR submits that the said details as produced and referred were not before the AO for his

examination and showing income of Rs.99,999 as received towards service charges is entirely a new argument as advanced by the assessee before the CIT-A and also referred to para 3.4 of the impugned order of the CIT-A. He also submits that the CIT-A could have remanded the issue to the AO for conducting enquiry instead of issuing of Commission to the jurisdictional ITO for the same.

11. Heard rival submissions and perused the material available on record. We find that from the submissions of the assessee that an amount of Rs.9,99,994/- is not the income and it was only an expenditure incurred by the assessee during the eye camps in pursuance of the agreement on behalf of Rotary Club. The details of which are placed on record at page-2 of the paper book. In support of the same, the ld.AR also referred to page no-3 etc.. of the paper book, which clearly shows that the assessee received such amount through cheque from Rotary Club of Dakshin Barasat. We find that the ld.AR also placed on record a document relating to matching grant at page-4 of the paper book, which clearly shows that the details of expenses incurred towards cataract micro surgery operation for 350 beneficiaries. Therefore, it clearly establishes that the assessee incurred all the expenditure on its own i.e. prior to camp, on the day of camp, for surgery and post camp and the same were reimbursed by the Rotary Club of Dakshin Barasat. Therefore, in view of the same, we hold that the amount in question does not constitute the income of assessee except the portion of Rs.99,999/- remaining addition thereon is liable to be deleted. Thus, the order of the CIT-A on this issue is not justified and ground no-1 of assessee's appeal is partly allowed.

12. Ground no-2, the Assessee challenged the disallowance of expenditure claimed on account of Doctors remuneration.

13. The AO found the assessee paid Rs.5,41,655/- to twelve (12) attending Doctors and claimed as professional fees of out of which Rs 5,30,130/- has been paid to ten doctors where the such fees in individual exceeded Rs 20,000/- and no TDS was deducted and for violation of section 194J of the Act and disallowed Rs 5,30,130/- u/s 40(a)(ia) of the Act and added to the total income of the assessee.

14. Before the CIT-A, the Assessee submitted as under:

> *5. That the addition made by the learned Income Tax officer u/s.40(a)(ia) is unjust on the grounds that the payments to the attending doctors were genuine and correct and the actual expenditure cannot added back to the total income of the appellant only to meet the statutory obligation when penal provisions of the said act are prevalent to compel the assessee in this regard.*
>
> *Further to my earlier statement on the grounds of appeal in respect of addition made u/s.40(a)(ia) by the Learned ITO I beg to submit that the payments to the attending Doctors were made in course of regular business and there was no amount payable to them. The amounts were paid and not payable. Furthermore the payee doctors have shown those payments in their return of income during this year under appeal and have paid Income Tax as per calculation for the income on payments. The appellant nursing home has not deducted tax from payments but the payments have suffered tax win the hands of the payees._Thus the addition should not be made to the income of the appellant firm. Apart from this the doctors are not the employee of the nursing home and they visited the nursing home on request of the patients. The payments were made by the patients to the visiting doctors through nursing home.*
>
> *I rely upon the case law CIT vs. Deep nursing home and Children hospital (2008) 169 Taxman (Punj) and Har) and ITO vs. Calcutta Medical Research Institution (2000) 75 ITD 484 (Cal). When the liability of deducting tax cases the question of addition to the total income uls.40(a)(ia)does not arise.*

15. The CIT-A confirmed the addition as the Assessee was stated to have been admitted the payments to such Doctors and the relevant portion of which is reproduced herein below:

> *4.3 Appellants submission and facts available on record are carefully considered. Appellant has not disputed the fact that payment to 10 Doctors who were not his employees, was made in amount exceeding Rs. 20,000/- , which attracted TDS u/s 194J of the I.T. Act. As no tax had been deducted*

while making payment the expenditure was required to be disallowed u/s 40a(ia) of the I.T.Act.

16. Before us the ld.AR submits that the all the ten (10) attending doctors were not employed in assessee's nursing home and they were attending as consultants in assessee's nursing home only on the request made by their respective patients and whatever amounts were received from such patients were paid to ten (10) such attending doctors. The ld. AR also submits that the said doctors were shown the amount as received from the assessee as income and suffered from tax. He further referred to the decision of the Hon'ble High Court of Delhi in the case of Ansal Landmark and urged to send the issue to the AO for verification of the same. On the contrary, the ld.DR submits that the statute covering the issue is not applicable to the present case.

17. Heard rival submissions and perused the material on record. We find that the assessee made the same argument before the CIT-A that the said doctors have shown the fees received from respective patients through assessee as their income. But, however, the CIT-A did not consider the same. In this regard, we may refer to the decision of the Kolkata Tribunal in the case of ITO Vs. Calcutta Medical Research Institute reported in 75 ITD 484(Cal) as relied by the Assessee before the CIT-A. Relevant portion of which is reproduced herein below for better understanding:-

10. In the instant case, the assessee had not controlled over the visiting doctors that how to do the treatment of the patients. It also appears that as per the terms and conditions of the order that some patients were brought by the visiting doctors themselves in the institute (assessee). The assessee will have to provide the infrastructure for these visiting doctors to carry out their professional activities in its premises at the commission of 40 per cent deducted from the payment made to these doctors. Nomenclature of the commission is mentioned as administration charges. This is the duty of the assessee to collect the payment from the patients for various charges including the doctors' fee and these visiting doctors might have this

arrangement with several other hospitals, nursing home, .etc., besides having their individual practice. The payment received by the visiting doctors cannot be treated as fee/commission or perquisite or ,profit in lieu of salary, etc., because in some cases the patients are referred by the doctors themselves.

By considering the totality of the facts and circumstances of the case, nowhere it appears that there was any intention of regular employment as these visiting doctors were not entitled for provident fund and other terminal benefits. It appears as a professional arrangement to share the profit in a systematic and regular manner. The arrangement is for a limited period of one year which cannot be considered as permanent or regular in nature. So, we are of the view that the payment made by the 3 assessee to the doctors is not relatable to the employment. It is merely the profit sharing arrangement out of the fee collected between the parties. The Commissioner (Appeals) has already gone through the various aspects of the case in his order which need not to be repeated to which we agree in principle.

11. Moreover, the visiting doctors have shown the income received from the assessee in their individual return as the income from profession and not from the salary. As we were told that the department has accepted the income in question under the head 'professional income'. Now it is not desirable that the department should take two opposite views about the same income, i.e., professional income in the individual return; and as salary income in the instant case. In view of the facts discussed and narrated above we are of the opinion that it is not open to the revenue to take a second view in consistent with a diametrically opposed to the earlier view as per the ratio laid down in 203 ITR 351 (sic.). In the absence of any adverse material/ evidence, we find no merit in the appeal filed by the department which is hereby dismissed.

18. The Co-ordinate bench in the case of *supra* accepted the contentions of the assessee that there was no relationship between the assessee therein and visiting doctors and took cognizance of the said doctors showing such income in their individual returns as income from profession and not from salary. In the present case, the contention of the ld.AR is that the said attending Doctors are not the employees of assessee and the assessee according to CIT-A admitted that such payments were made to such ten (10) doctors, who attended their respective patients in its premises. Taking into consideration the submissions of the ld.AR that the assessee is ready to submit the returns income of such doctors before the AO, we are of the view that the issue shall go back to the AO for verification of the same, whether the said doctors shown such income in their respective returns or not.

19. Keeping in view of the principle enunciated by the Hon'ble High Court of Delhi *supra,* we are of the view that the if the concerned payee(s) has taken into account the relevant sum for computing income in their returns of income furnished u/s. 139 and has paid tax due on the income declared in such return, We, therefore, set aside the impugned

order of CIT(A) to the extent confirming the disallowance made by the AO u/s. 40(a)(ia) and restore the matter to the file of the AO for deciding the same afresh in the light of the submissions of the assessee. The assessee shall be at liberty to file requisite evidences, if any, to substantiate its claim.

20. In the result, the appeal of assessee is allowed for statistical purposes.

ORDER PRONOUNCED IN OPEN COURT ON 21st December,2016

Sd/- Sd/-

M.Balaganesh **S.S. Viswanethra Ravi**
Accountant Member **Judicial Member**

Dated 21/12/ 2016

Copy of the order forwarded to:

1. The Appellant/assessee: M/s. Barasat Eye Hospital & M.R.C
   Dakshin Barasat station Road, Dakshin Barasat,
   South 24 Parganas-743372(WB).
2 The Respondent/department: Income Tax Officer,
   Ward 55(2), 54/1 Rafi Ahmed Kidwai Road,
   Kolkata-700 016.
3 /The CIT(A)
4. The CIT
5. DR, Kolkata Bench
6. Guard file.

**PP/SPSTrue Copy, By order, Asstt Registrar