

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)
BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 6202/Del/2019
Assessment Year: 2009-10

M/s. C.M.Buildcon Pvt. Ltd. 42, South Basti Harohol Singh, Delhi-110006 PAN :AADCC0413B	Vs.	Pr. CIT-2 Room No. 394, C.R.Building, I.P.Estate, New Delhi
Appellant		Respondent

Assessee by	Dr. Rakesh Gupta, Sh. Deepesh Garg and Sh. Shrey Jain, Adv's
Revenue by	Sh. Javed Akhtar, CIT-DR

Date of hearing:	23.05.2023
Date of Pronouncement:	14.06.2023

ORDER

Per Anubhav Sharma, JM :

The appeal is preferred by the Assessee against the order dated 19.03.2019 of CIT(A)-2, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in F. No. Pr. CIT/Order u/s 263/2018-19/2586 New Delhi arising out of an appeal u/s 250 of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), before it against the assessment order dated 15.11.2016 passed u/s 147/143(3) of the Act by the ITO, Ward-5(4), New Delhi (hereinafter referred as the Ld. AO).

2. Brief fact of the case are that assessee is a closely held company engaged in the business of real estate and deriving its business income from the same and filed its return on 16.09.2009. Thereafter, Ld. AO issued the notice u/s 148 dated 31.03.2016 on the basis of some document seized during the survey proceeding on M/s Cardio Technovention that assessee-company paid cash amounting to Rs. 5,73,183/- to M/s Cardio Technovention for the purpose of taking reversal of entry as commission received through proper banking channel. The reassessment was concluded at the returned income. However, Ld. PCIT issued notice u/s 263 on 25.02.2017 on the ground that Ld. AO has not thoroughly examined above-mentioned issue and passed the Revision order dated 19.03.2019 setting aside the impugned re-assessment order. Hence, the present appeal is filed by the assessee raising following grounds;

- “1. That Ld. PCIT erred in holding that the Ld. AO did not apply his mind in terms of ignoring the impounded material found during survey of third party in as much as the facts relating to the solitary issue forming the reason to believe while assuming jurisdiction by the Ld. AO u/s 147 had not only been raised and confronted to assessee right from the stage of initiation of proceedings u/s 147 and upto in each and every hearing during assessment proceedings but the same also forms the main part in the body of assessment order.*
- 2. That the Id. PCIT has given direction u/s 263 of the Act without making any inquiry and without showing any cause so as to hold the order unsustainable*
- 3. Without prejudice to other grounds. If for a while, it is assumed that the cash was paid for obtaining cheques for reversal of commission as alleged, even then, there is no loss to revenue as the amount has already been brought in the books of the assessee by crediting it to profit and loss account.*
- 4. That the appellant carves leave to add, alter, modify or delete any of the ground of appeal.”*

3. Heard and perused the record.

3.1 The only effective issue in the present appeal is against the action of Ld. PCIT in assuming jurisdiction u/s 263 and holding that assessment order passed u/s 147/143(3) was erroneous and prejudicial to the interest of revenue by alleging that assessee-company paid cash amounting to Rs. 5,73,183/- to M/s Cardio Technovention for the purpose of taking reversal of entry as commission received through proper banking channel for Rs. 6,39,000/- and this issue was not thoroughly examined while completing the assessment. The Ld. Counsel for the Appellant submitted that the issue of alleged cash paid to M/s Cardio Technovention was thoroughly examined during the assessment proceedings and nothing adverse was found in this regard to prove such allegation against the assessee and thus the re-assessment was completed at returned income. He referred to following matter on record for aforesaid assertion.

- i. At **Page 16 of PB** is the copy of reason recorded which mention that case was reopened to verify this very allegation that assessee-company has allegedly paid cash amounting to Rs. 5,73,183/- to M/s Cardio Technovention allegedly for the purpose of taking reversal of entry as commission received through proper banking channel and thus notice u/s 148 was issued on 31.03.2016 as made available at **Page 13 of PB**.
- ii. At **Page 14 of PB** is the copy of questionnaire u/s 142(1) dated 24.05.2016 issued by Ld. AO where a specify query has been asked regarding M/s Cardio Techovention and at **Page 18 of PB** is the copy of reply dated 13.06.2016 filed by assessee in response to above questionnaire submitting ledger account of M/s Cardio Techovention in their books and further stating the assessee has not paid any cash to M/s Cardio Techovention.
- iii. At **Page 20 of PB** is the copy of invoice raised by assessee to 'M/s Cardio.Techovention for commission towards sales amounting to Rs. 6,39,000/-

and at **Page 19 of PB**, the copy of ledger of account M/s Cardio Techovention is provided from there their books showing that the only transaction undertaken by assessee with M/s Cardio Techovention is for the commission on which TDS has been duly deducted, same has been duly accounted for as at **Page 8 of PB** is the P/L account of assessee showing that the amount received from M/s Cardio Technovention has been duly shown as revenue and thus offered for taxation purposes.

- iv. At **Page 22 of PB** is the copy of questionnaire dated 15.06.2016 issued by Ld. AO duly asking to furnish information regarding the allegation that assessee paid cash to M/s Cardio Technovention. **Page 25-26 of PB** is another questionnaire dated 14.07.2016 wherein Ld. AO asked assessee to furnish an affidavit from M/s Cardio Technovention. **Page 37-38 of PB** is the affidavit of Sh. Lalit Mundra, partner of M/s Cardio Techovention duly submitting that only the commission has been paid to assessee during the concerned year and no cash has been received from assessee by them. **Page 27-30 of PB** is the copy of objections of assessee filed on 20.07.2016 submitting that the case was reopened only on the basis of a dumb documents which has not even confronted to the assessee and further submitting that assessee neither paid any cash to M/s Cardio Techovention nor department has produced any documentary evidence to support this allegation and requested the Ld. AO to provide the said document to assessee. **Page 35-36 of PB** is the copy of reply dated 03.11.2016 filed by assessee before Ld. AO denying the said allegation.
- v. Then at **Page 40-42 of PB** is the copy of reply dated 01/03/2109 filed by assessee before Ld. PCIT in response to show cause notice issued u/s 263 submitting that Ld. AO has conducted adequate enquiry regarding this issue and detailed replies and explanations were filed before Ld. AO, thereafter the adequate application of mind Ld. AO was satisfied with the explanation of

assessee and thus said re-assessment order was passed at returned income.

3.2. Accordingly it is submitted that Ld. AO has duly verified the same and applied his mind before making the impugned re-assessment. Further reliance was placed on the following judicial decisions:

- *Jamna Auto Industries Ltd. vs. CIT, ITA 495/Chd/2015, Date of order 05-01-2016. ITAT Chandigarh Bench.*
- *Maya Gupta vs. CIT in ITA NO. 5701/DEL/2014, ITAT Delhi Bench.*
- *Ram Kishan Dass vs. ITO 149 Taxman 55, ITAT Delhi Bench.*
- *Crown Frozen Foods vs. Addl.CIT 93 TTJ 485 ITAT Mumbai Bench.*
- *Pawan Kumar vs AO, 106 TTJ 494 ITAT Jodhpur Bench.*
- *CIT vs. Bharat Aluminium Co. Ltd., (2008) 303 ITR 256 (Del).*
- *CIT vs. Hindustan Marketing and Advertising Co. Ltd. 341 ITR 180 (Del.).*
- *CIT vs. Design & Automation Engineers (Bombay) (P) Ltd., 323 ITR 632 (Bom).*

4. Ld DR however supported the findings of Ld. Tax authorities.

5. It can be appreciated from the impugned order that the primarily the Ld Revisional authority was not convinced as to how only on the basis of affidavit by the partner of M/s Cardio Technovention Ld. AO has given benefit to assessee and ignored the document impounded in the survey on M/s Cardio Technovention. The Bench is of considered opinion that certainly affidavit is not included in the definition of 'Evidence' under the Indian Evidence Act 1872, but where a quasi judicial authority wants any fact to be proved by way of an affidavit then the same cannot be ignored without rebutting the deposition on facts by some sort of evidence. As Section 30(c) of Code of Civil Procedure, provides that the Court can ask any fact to be proved by way of an

affidavit similarly Section 131 of the Act vests powers with Tax authorities, amongst other, to enforce an individual's attendance and to examine on oath.

6. Here in the case in hand the affidavit was filed on the directions of Ld. AO for which he had powers to call for filing an affidavit to prove the fact that cash was not received by M/s Cardio Technovention. The same could not have been left aside and inferences drawn on the basis of documents which otherwise did not have anything explicit and patent to hold different opinion. It is not self serving affidavit of the assessee but of concerned party from whom allegedly the assessee had benefited. There is no finding of Ld. PCIT as to which matter from the survey was contradicting the affidavit. The aforesaid narration of relevant queries made during re-assessment and replies of the assessee are sufficient to show that Ld. AO has asked for the affidavit, only to reaffirm that replies are supported with on oath deposition too. Ld. Pr.CIT has thus fallen in error to exercise powers u/s 263 to hold Ld. AO wrongly relied the affidavit from M/s Cardio Technovention. Grounds raised are sustained and the **appeal of assessee is allowed**. The impugned order u/s 263 of the Act is quashed.

Order pronounced in the open court on 14th June, 2023.

Sd/-

**(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

Sd/-

**(ANUBHAV SHARMA)
JUDICIAL MEMBER**

Date:- 14.06.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI