#23

$~

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

23.

\+ ITA 924/2010

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Suruchii Aggarwal, Advocate

versus

M/S RICE INDIA EXPORTS PVT. LTD. ..... Respondent
Through: None

AND

24.

\+ ITA 999/2010

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Suruchii Aggarwal, Advocate

versus

M/S RICE INDIA EXPORTS PVT. LTD. ..... Respondent
Through: None

% Date of Decision: 3rd August, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.

2. To be referred to the Reporter or not? No.

3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J

1. The present two appeals have been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act, 1961") challenging the order dated 27th November, 2009 passed by the Income Tax Appellate Tribunal (in short "ITAT") in ITA Nos. 2233/Del/2008 and 2444/Del/2008 by virtue of which appeals filed by the assessee and Revenue were disposed of with regard to the Assessment Year 2005-2006.

2. Ms. Suruchii Aggarwal, learned counsel for Revenue submitted that the respondent-assessee had over-invoiced its purchases with an intent to inflate its purchases and reduce its profits. She submitted that the respondent-assessee could not substantiate with any evidence the purchases from Mr. Sanjay Kumar Garg. She pointed out that the respondent-assessee did not produce Mr. Sanjay Kumar Garg whose affidavit the assessee had filed and relied upon. Consequently, she submitted that the respondent-assessee had failed to discharge the onus.

3. It is settled law that in revenue matters, the onus of proof is not a static one. Though the initial burden of proof lies on the assessee yet when it files purchase bills and affidavits, the onus shifts to the Revenue. One must not forget that it is Revenue which has powers regarding discovery, inspection, production and calling for evidence as well as survey, search, seizure and requisition of books of accounts.

4. The ITAT in its impugned order has also pointed out that excess in purchase price of goods purchased from Mr. Sanjay Kumar Garg is only about 1.5% and further inability of assessee to produce the supplier could not lead to the inference that the supplier was bogus. The relevant observations in the impugned order are reproduced hereinbelow:-

> *"6.2 We have carefully considered the rival submission and perused the records. Admittedly, in this case the addition is being made on the basis that purchase made by the assessee from the impugned parties during certain period is higher than the average purchases made from other suppliers. According to the working of the learned CIT(A) the excess comes 139 per/MT on the basis rate of Rs.9101/MT. This excess in percentage terms comes to 1.5%. Now the basis for coming to the conclusion is that the purchases from these concerns are bogus. The assessee has duly produced the purchase bills. Now the revenue's grievance is that the assessee has not been able to produce those person. It is not the case that the revenue has come across any instance of over invoicing or any material has been seized that purchases by the assessee is bogus. Inability of the assessee to produce those suppliers cannot alone lead to the inference that these purchase are bogus. In this regard reference is made to Hon'ble Apex Court decision in the case of Anis Ahmad & Sons Vs. EIT reported in 297 ITR 441, wherein as per the fact of the case where AO issued summon to 10 traders and in response to the same 5 traders appeared and gave evidences in favour of the assessee. But the remaining 5 traders did not appear because they could not be serve with summons as they were residing outside State. The Hon'ble Apex Court held that AO's action of treating transaction with absentee traders as having been done by the assessee as a trader and not as commission agent was not justified.*
>
> *6.3 The difference in purchase rate has been arrived at by the learned CIT(A) is merely 1.5%. This in our opinion is not significant enough to warrant any addition based on surmises. The learned CIT(A) has himself observed that provision of section 40A(2) are not attracted in this case. It is also an admitted fact that assessee has made the profit on*

those purchase. It is also not the case that there is decline in the gross profit rate as compared the previous year. No case has also been made out that the profit earned on these purchase was not up the mark. Under the circumstances, in our opinion the addition on account of substitution of purchase price by the revenue is not justified.

6.4 In this regard, we draw support from the decision of the Hon'ble Apex Court in the case of CIT, Bombay Vs. Walchand and Co. Private Ltd. In 65 ITR 381, wherein it was held that "in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively for business, the expenditure has to be adjudged from the point of view of the businessman and not of revenue".

5. Keeping in view the aforesaid factual findings by ITAT, which is the final fact finding authority, we are of the opinion that no substantial question of law arises in the present two appeals. Accordingly, the appeals are dismissed *in limine*.

MANMOHAN, J

CHIEF JUSTICE

AUGUST 03, 2010
rn