



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

+ **I.T.A. No.1092/2009**

% **Date of Decision: 23.03.2011**

Commissioner of Income Tax ..... Appellant  
Through: Mr.Sanjeev Sabharwal, Sr. Standing Counsel

Versus

Oswal Chemical & Fertilisers Ltd. .... Respondent  
Through: Mr.C.S. Aggarwal, Sr. Advocate with Mr.Prakash Kumar, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE A.K. SIKRI**  
**HON'BLE MR. JUSTICE M.L. MEHTA**

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| 1. | Whether 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 |

**A.K. SIKRI, J. (ORAL)**

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- For the assessment year 1996-97, the respondent/assessee filed its return of income declaring loss of Rs.2,39,12,90,363/-. The assessee is engaged in the manufacturing of fertilisers at a plant installed at Shahjahanpur, Uttar Pradesh. In this assessment year, the assessee had, in the return, shown the plant and machinery worth Rs.6.97 crores purchased from M/s.Bermaco



Industries Ltd. (hereinafter referred to as “the supplier”). The assessment was framed under Section 143(3) of the Income Tax Act (hereinafter referred to as “the Act”) at a total of Rs.2,34,79,94,444/-. However, thereafter a notice under Section 148 of the Act was served upon the assessee seeking to reassess the proceedings on the ground that the assessee had never purchased aforesaid machinery worth Rs.6.97 crores from the supplier and it was a bogus purchase and, therefore, the assessee was not entitled to any depreciation thereupon which the assessee had claimed and was allowed in the assessment proceedings. Thereafter, the re-assessment order was passed by the Assessing Officer on 31<sup>st</sup> March, 2004 deleting the depreciation allowed on the aforesaid machinery. The Assessing Officer while taking the aforesaid course of action based its decision on the statement of Mr.Viren Ahuja of the supplier, who had allegedly stated that the machinery was not supplied by the supplier to the assessee. The Assessing Officer had also taken note of the fact that the supplier had itself approached the Settlement Commission and there also it had accepted non supply of the machinery.

2. The assessee preferred appeal there against before the CIT(A). The CIT(A) allowed the appeal and set aside the order of the



reassessment order passed by the Assessing Officer. We may note, at this stage, that in the course of this appeal, the Assessee had filed written submissions on 6<sup>th</sup> December, 2004 objecting to the re-assessment. In his submission, the assessee had requested to institute following inquiries/providing the following documents:

- “1. An opportunity of corss-examination of Mr.Viren Ahuja.
  2. Report of Settlement Commission of investigations made by it in this regard.
  3. Copy of application of Bermaco Indus. Ltd. filed before Settlement Commission.
  4. Evidence available with the department that the transactions with Bermaco Indus. Ltd. were accommodation entries.
  5. An on the sport verification of the assets.”
3. The grievance of the assessee was that the copy of the statement of Mr.Viren Ahuja, on the basis of which addition was made, was not supplied to the assessee by the Assessing Officer. It was also argued that no opportunity to cross-examine Mr.Viren Ahuja was provided; so much so even the report of the Settlement Commission on investigations made in this regard or the application preferred by the supplier before the Settlement Commission was not provided to the assessee. The assessee took a positive stand that the machinery was in fact purchased



and installed, which was brought/transported from Mumbai to U.P. through ST 31. It is for this reason, the assessee even offered spot verification of the said machinery. On this request of the assessee contained in the aforesaid statement dated 6<sup>th</sup> December, 2004, the CIT(A) called for the remand report from the Assessing Officer under Section 250(4) of the Act. The Assessing Officer submitted his report dated 24<sup>th</sup> March, 2006. As per this report, the factory premises of the assessee at Shahjahanpur were inspected by the Inspector, who personally visited there and found that the machinery was in fact installed. This was stated in the following manner:-

“In your first query you have asked to verify that whether valves and other machinery match the description given by the assessee. To check this issue photograph provided by the assessee were matched with actual plant site on test check basis. And plants as well as valves were found to be physically present on plant site which shows that valves are existing part of machinery.”

4. The Assessing Officer, at the same time, in his report, stated that it was physically impossible to verify each and every piece of machinery as valves had been placed from ground level to top of urea tower, which was about 100 meters in height. It was also stated that the physical appearance of valves gave the impression that these were quite old. To cross-check the



quantitative description, the bigger valves of size 20", 18" and 16" were checked and found to be correct. In another exercise, it was also found that valves of different sizes as detailed in assessee's submission in respect of said offsite section in some part were checked and the same were found to be tallying with the actual valves. The report also mentioned that as per the physical verification made on test-check basis, it could not be said that there was any discrepancy. He even found merit in the submissions of the assessee that the valves, the photographs of which were submitted, were physically lying installed in the factory and without these valves there could be no production. After receiving this report, the CIT(A) had deleted the addition made by the Assessing Officer and took the view that their machinery was in fact purchased by the assessee and, therefore, assessee was entitled to depreciation thereupon. The Income Tax Appellate Tribunal (for short "ITAT") has upheld this order of the CIT(A) after re-examining the entire issue and accepting the finding of fact recorded by CIT(A) that machinery was in fact purchased by the assessee and it was not a case of bogus purchase.

5. It is clear from the aforesaid that the matter is in the realm of facts only as to whether it was a case of bogus purchase shown



by the assessee or the assessee had in fact purchased the machinery on which it had claimed depreciation. It is clear from the above that the CIT(A) as well as ITAT have arrived at a finding of fact, that too, on the basis of remand report submitted by the Assessing Officer himself that machinery was in fact purchased by the assessee.

6. Detailed discussion in this order also confirmed transportation of the machinery from the factory of the supplier to the factory of the assessee where the machinery was installed.
7. The ITAT has given an additional ground to set aside the order, namely, that Mr.Viren Ahuja was not even produced for cross-examination. We may record that the actual statement of Mr.Viren Ahuja has not been produced on record. It appears from the orders of the authorities below that Mr.Viren Ahuja had not disputed the supply of the machinery to the assessee. In fact he had stated that the machinery supplied to the assessee was not manufactured by the supplier itself and the benefit under Section 80IA was wrongly claimed by the said supplier and it is only on that account that the supplier had approached the Settlement Commission. Therefore, merely the fact that the supplier had gone to the Settlement Commission would not be of



any relevance inasmuch the issue before the Settlement Commission was entirely different which pertain to the benefit wrongly availed by the supplier under Section 80IA of the Act.

8. We are, thus, of the opinion that no question of law arises. This appeal is accordingly dismissed.

**A.K. SIKRI, J.**

**M.L.MEHTA, J.**

**MARCH 23, 2011**

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