

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.128 OF 2009

The Commissioner of Income tax-I. ..Appellant.

Vs.

Shri. Inder V. Nankani. ..Respondent.

Mr. S.K. Bhatnagar with Mr. N.R. Prajapati for the Appellant.
Mr.Danial with Mr. V.S. Hadade for the Respondent.

CORAM : F.I.REBELLO & R.S.MOHITE, JJ.

DATE : 24TH FEBRUARY,2009.

PC: 1. We have heard the learned counsel for the parties.

2. Revenue is in appeal on the following questions.

i) Whether the Honourable ITAT was correct in relying on the decision of the ITAT in the case of M/s. Uttamchand P. Jain Vs. ITO (ITAT "B" Branch, Mumbai's order vide ITA No.7599/Mum/2003 dated 5.5.2006 which are distinguishable on the facts of the present case?

ii) Whether the Honourable ITAT was correct in relying on retraction of statements by witness, ignoring the fact that the same was against the evidence available?

iii) Whether the Honourable ITAT was correct in shifting the onus on the Department to prove the genuineness of the purchasers involved in transaction?

iv) Whether on the facts and in the circumstances of the case Honourable ITAT was justified in confirming the order of CIT(A) which has put burden on Department to prove genuineness of source of income and genuineness of transactions which is against the Income Tax Act, 1961 and against the judgment of Honourable Supreme Court in Rohan Di Hatti Vs. Commissioner of Income tax, Delhi (1977) 2 SCC 378?

v) Whether on the facts and in the circumstances of the case and in law the ITAT was justified in dismissing the appeal without going into the facts of the matter?

3. The admitted facts are that the assessee under VDIS made a declaration which included assets in the form of diamonds. The assessee sold the diamonds and received consideration for the same by cheque which was duly encashed and shown in the books

of accounts. The Assessing Officer sought to add the said amount in his income on the ground that the assessee was unable to prove that he was actually in possession and ownership of the diamonds and as such, income received was undisclosed income. The learned counsel submits that these were hawala transactions which were unearthed on the raid being conducted on the two Chartered Accountants.

4. On behalf of the assessee, the learned counsel submits that there was no material before the Assessing Officer to show that the consideration received was not part of the sale transaction. Our attention was in fact invited to Para-4.5 to 4.19 of the order of the CIT(A). The CIT(A) wrote to the Assessing Officer to submit a report of the material which was in his possession to arrive at a conclusion and also directed to submit a report whether an opportunity had been given to the assessee to cross examine the witness based on whose statement addition was sought to be done..

It is also pointed out that, the reliance placed by the revenue upon the judgment of the Supreme Court in *Roshan Di Hatti Vs. Commissioner of Income Tax, Delhi* reported in (1977) 2 SCC 378 is totally misconceived.

5. Admittedly, the assessee had made a VDIS declaration in which diamonds were disclosed. There is no dispute that the assessee had received the consideration from the purchaser by cheque. The entire submission on behalf of the revenue is that the first purchaser has in fact sold the diamonds to the second purchaser whose whereabouts could not be traced and as such, the sale was fictitious. The question is whether the order of CIT(A) and ITAT suffers from any error of law. In the instant case, admittedly the diamonds were declared. The declaration was accepted by the revenue and thereafter, assessee had paid the tax. The assessee thereafter had sold the said diamonds and received consideration which is also disclosed in the books of accounts. In these circumstances, the finding recorded by the tribunal cannot be faulted namely that the assessee had proved the possession of the jewellery or diamonds at the time of declaration. In the instant case, the Assessing Officer was given an opportunity to produce any material in his possession to hold to the contrary. The Assessing Officer failed to comply with the said direction. In these circumstances, CIT(A) proceeded to pass the order which order came to be subsequently affirmed by the ITAT. The tribunal in the instant case has held that the assessee had disclosed the diamonds in his possession at the time of VDIS declaration which was accepted. Once that be the case and the consideration received from the purchaser which has not been doubted, The fact that there is doubt about the second sale, cannot result in making addition, in the hands of the assessee.

6. In our opinion, considering the findings of facts in the case, this is not a fit case where questions of law as framed would arise. There is no merit in the appeal.

Consequently, appeal dismissed.

(R.S. MOHITE, J.) (F.I.REBELLO, J.)