

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.634 OF 2009

The Commissioner of Income Tax – 21

6<sup>th</sup> Floor, Pratakshya Kar Bhavan,

Bandra Kurla Complex, Mumbai

..Appellant.

Versus

Uttamchand Jain,

C/o.Kailash Chand Jain & Co.,

`Edna', Ist Floor, Near Income Tax Office,

M.K. Road, Mumbai – 400 020

..Respondent.

Mr. S.K. Bhatnagar with Ms.Suchitra Kamble i/by Mr.N.R. Prajapati for the appellant.

Mr.S.G. Lakhani for the respondent.

**CORAM : V.C. DAGA &  
J.P. DEVADHAR, JJ.**

**DATE : 2ND JULY, 2009**

**ORAL JUDGMENT (Per J.P. Devadhar, J.) :**

1. This appeal filed by the revenue under Section 260 A of the Income Tax Act, 1961 (`Act' for short) was admitted on 29-04-2009 on the following substantial questions of law :

- a) Whether on the facts and circumstances of the case and in law, the ITAT was justified in deleting the addition of Rs.10,35,562/- made on account of alleged

unaccounted income from sale of jewellery which are declared under VDIS 1997 ?

b) Whether on the facts and circumstances of the case and in law, the ITAT was justified in not appreciating the fact that the statement of confession of Vishnudatta Trivedi is backed by the irrefutable evidence in respect of pay-in-slips of the banks, cash deposits and non existence of any stock during the course of survey ?

2. The assessment year involved herein is A.Y. 1998-1999.
3. The respondent ('assessee' for short) is a Dealer in Diamonds. The assessee had declared diamond jewellery weighing 65.75 carats under the Voluntary Disclosure of Income Scheme, 1997 ('VDIS, 1997' for short). The said declaration was accepted by the department and a certificate was issued to the assessee under VDIS, 1997.
4. In the return of income filed for A.Y. 1998-1999, the assessee claimed to have sold the said jewellery declared under VDIS, 1997 to M/s.Dhananjay Diamonds, a proprietary concern of Vishnudatt Trivedi on 20-01-1999 for Rs.10,35,562/-, thereby earning long term capital gains amounting to Rs.1,75,520/-. The said return was processed under Section 143(1)(a) of the Act on 23-7-1999.
5. On 30-3-2000, the Income Tax authorities conducted a survey at the business premises of Mr.Trivedi, Proprietor of M/s.Dhananjay Diamonds. During the course of survey proceedings statement was recorded on 30/3/2000 wherein Mr.Trivedi stated that he was in the business of trading and manufacturing of diamonds. However, in this statement recorded

under section 133A of the Act on 31-3-2000, Mr.Trivedi confessed that he was not doing actual business of trading and manufacture of diamonds and that the transactions reflected in his books of accounts were merely accommodation entries given to various VDIS declarants. As per the statement, Mr.Sanjay Saxena, a resident of Kalyan used to visit Mr.Trivedi with cash and only description of the diamonds and not the actual diamonds . The cash given by Sanjay Saxena was deposited in one of the bank accounts of Mr.Trivedi and thereafter purchase bills as well as cheques were issued in the names of the parties furnished by Mr.Sanjay Saxena towards the sale price of the diamond jewellery declared under VDIS 1997 allegedly sold by those parties.

6. Based on the above statement, of Mr.Trivedi, the assessment of the assessee for A.Y. 1998-1999 was re-opened on 16-5-2001 by issuing a notice under Section 148 of the I.T. Act. During the course of assessment proceedings, Mr.Trivedi appeared before the assessing officer ('A.O.' for short) and made a statement on oath confirming the purchase of diamonds from the assessee and that the assessee was not introduced to him by Mr. Sanjay Saxena. However, by the reassessment order dated 27-2-2003, the A.O. made addition of the entire amount of Rs.10,35,562/- as undisclosed income of the assessee, which was originally claimed and accepted as sale proceeds of the diamond jewelery declared under VDIS, 1997.

7. The appeal filed by the assessee against the addition of Rs. 10,35,562/- was dismissed by CIT (A) mainly on the basis of the statement of Mr. Trivedi recorded on 31/3/2000 to the effect that the transactions

recorded in his books were hawala transactions. The CIT(A) further held that the statement of Mr.Trivedi was backed by the evidence of non-existence of diamond jewellery allegedly purchased by Mr.Trivedi and the cash deposits made in the bank accounts of Mr.Trivedi before issuing cheques to various parties.

8. On further appeal filed by the assessee, two members of the ITAT differed in their view and the matter was referred to a third member. In the light of the decision of the third member, the appeal filed by the assessee was allowed and the addition was deleted. Challenging the aforesaid order of the tribunal, the present appeal is filed by the revenue.

9. On behalf of the revenue, it is contended that the tribunal has committed an error in relying upon the retracted statement of Mr.Trivedi instead of relying on his statement recorded on 31-3-2000 under Section 133A of the Act. It is contended that the retraction letter of Mr.Trivedi though dated 4-4-2000 was in fact posted on 11-4-2000 and was received by the A.O. on 17-4-2000. These facts clearly show that the retraction was only an after-thought and ought to have been discarded. It is contended that Mr.Trivedi had failed to explain as to how the admission made by him on 31-3-2000 was under undue pressure exerted by the department and if the said statement was under undue influence, then why he took 11 days to retract his statement recorded on 31-3-2000. It is contended that there is inconsistency in the retraction of Mr.Trivedi because, in the re-assessment proceedings, although Mr.Trivedi claimed that the transaction with the assessee took place through his family members, he could not even state

the names of the family members through whom he allegedly entered into the transaction with the assessee. In these circumstances, it is contended that the A.O. was justified in making the additions.

10. Relying upon two decisions of the Calcutta High Court in the case of CIT Vs. Precision Finance Pvt. Limited 208 ITR 465 (Cal.) and CIT V/s. United Commercial Bank Limited, 187 ITR 596 (Cal.), it is contended on behalf of the revenue that where cash credits are introduced in the accounts, the primary onus lies on the assessee to prove the identity of the creditors, their credit worthiness and genuineness of the transaction. Similarly, where the assessee has credits in the names of various persons, the assessee must prove the identity of the creditors and their credit worthiness. As Mr.Trivedi failed to explain huge deposits in his bank accounts and the diamond jewellery allegedly purchased from the VDIS 1997 declarants were not traceable, the transactions in his books of account could not be relied upon and taken as genuine business transaction and, therefore, it is contended that the amounts received by the assessee from Mr.Trivedi of Dhananjay Diamonds was nothing but the undisclosed income of the assessee.

11. It is further contended by the revenue that the third member of the ITAT committed an error in holding that the department has accepted the return filed by Mr.Trivedi, when in fact the return has not been accepted and addition in the income of Mr.Trivedi has been made by estimating the commission in the hawala transaction and Mr.Trivedi has accepted such addition. It is contended that the statement of Mr.Trivedi recorded on

30-3-2000 being a preliminary statement, there were no admissions and therefore, the tribunal ought to have relied upon the statement of Mr.Trivedi recorded on 31-3-2000, wherein he had categorically admitted that the payments made to various parties as recorded in his books were only hawala transactions. It is further contended that the tribunal has wrongly put the onus on the department to prove the credit in the assessee's books of account when in law the onus was on the assessee to prove the source of credit in the books of account including the genuineness of the transactions. Accordingly, it is submitted that the decision of the tribunal be quashed and set aside by answering the questions raised in favour of the revenue.

12. We see no merit in the above contentions. At the outset, we may note that the certificate issued by the revenue under VDIS 1997 to the effect that the assessee had diamond jewellery weighing 65.75 carats continues to be valid and subsisting. In fact, no proceedings have been initiated so far to cancel the certificate issued to the assessee under VDIS, 1997.

13. When the assessee claimed that the above diamond jewellery declared under VDIS 1997 has been sold to Dhananjay Diamonds on 20-1-1999 for Rs.10,35,562/-, the same was accepted in the original assessment, however, in the reassessment order, the claim is disbelieved mainly by relying on the statement of Mr.Trivedi recorded on 31/3/2000, wherein he had stated that the transactions recorded in his books are hawala transactions. It is further held that the above statement is corroborated by the non-availability of the diamond jewellery allegedly sold

by the assessee to Dhananjay Diamonds and the bank accounts of Mr. Trivedi show that he had received cash before issuing cheques to various parties including the assessee.

14. In the present case, the statement of Mr.Trivedi recorded on 31-3-2000 has been retracted by him vide letter dated 4-4-2000 (received by the A.O. on 17-4-2000). In the light of the decision of the Apex Court in the case of Vinod Solanki V/s. Union of India reported in 2008 (16) Scale 31, the retracted confession of Mr.Trivedi can be relied upon only if there is independent and cogent evidence to corroborate the statement of Mr.Trivedi made on 31-3-2000.

15. In the present case, the finding of fact recorded by the Tribunal is that Mr.Trivedi has not only retracted his statement recorded on 31-3-2000 vide letter dated 4-4-2000, but has also participated in the re-assessment proceedings and stated on oath that the purchase of diamond jewellery from the assessee was a genuine transaction (see page 31 & 97 of the paper book). The Tribunal has recorded a finding that the statement of Mr.Trivedi recorded on 31-3-2000 was a general statement and nowhere in the said statement it is recorded that the transaction with the assessee was not a genuine transaction. The Tribunal noted that in the reassessment proceedings, Mr.Trivedi has categorically denied that the assessee was introduced to him by Mr.Sanjay Saxena. On evaluation of the evidence on record, the Tribunal has arrived at a finding that the assessee has successfully shown the existence of diamond jewellery prior to the sale, the person to whom it is sold and also the consideration received and, therefore,

the A.O. was not justified in making the addition. Thus, the decision of the Tribunal is based on appreciation of evidence.

16. As the VDIS 1997 certificate issued by the department is valid and subsisting, it is not open to the revenue to contend that there was no jewellery which could be sold by the assessee on 20/1/1999. It is not the case of the revenue that the assessee continues to be in possession of the said diamond jewellery even after the alleged sale effected on 20-1-1999 or that the said jewellery has been sold to third parties. In these circumstances, the decision of the Tribunal in accepting the claim of the assessee that the amount of Rs.10,35,562/- represented the sale proceeds of the diamond jewellery declared under VDIS 1997 cannot be faulted.

17. The fact that the diamond jewellery claimed to have been sold by the assessee was not found with the purchaser (Dhananjay Diamonds) or his associates cannot be held against the assessee, because, admittedly, the said diamond jewellery declared under VDIS 1997 is also not found with the assessee after the sale is effected. If existence of the diamond jewellery with the assessee prior to the sale is evidenced by the VDIS, 1997 certificate and on sale of the said jewellery the assessee has received the consideration which is duly accounted for, then the mere fact that the jewellery sold by the assessee is not found with the purchaser cannot be a ground to hold that the transaction was bogus and the consideration received by the assessee was the undisclosed income of the assessee.

18. Assuming the revenue is right in its contention that the sale did



not involve actual delivery of diamond jewellery, then, unless it is established that the assessee had passed on his undisclosed income to Mr. Trivedi, it cannot be said that the amount received by the assessee from Mr. Trivedi represented the undisclosed income of the assessee. In the present case neither Mr.Trivedi in his statement recorded on 31-3-2000 had stated that the assessee had given the cash amount of Rs.10,35,562/- nor in the re-assessment proceedings the A.O. has gathered any evidence to that effect. In fact, in the statement recorded on 31-3-2000, Mr.Trivedi had stated that he used to received cash through Mr.Sanjay Saxena. There is nothing on record to suggest that the assessee had given cash to Mr.Sanjay Saxena. The A.O. has not chosen to examine Mr.Sanjay Saxena to establish that cash was given by the assessee to Mr.Trivedi through Mr.Sanjay Saxena. Perusal of the re-assessment order shows that the A.O. has not made any efforts to link the cash received and deposited by Mr.Trivedi in his bank account was in fact paid by the assessee. In other words, the decision of the A.O. in discarding the sale and holding that the amount received by the assessee from Mr.Trivedi represented the undisclosed income of the assessee is based on conjectures and surmises and is not based on any independent evidence gathered prior to or during the course of reassessment proceedings. In these circumstances, in the absence of any cogent evidence brought on record, the decision of the Tribunal in holding that the A.O. has failed to establish the nexus between the cash amount deposited in the bank account of Mr. Trivedi is attributable to the cheque issued by Mr.Trivedi in favour of the assessee cannot be faulted. Consequently, the decision of the Tribunal in deleting the addition of Rs. 10,35,562/- cannot be faulted.

19. The decisions of the Calcutta High Court in the case of Precision Finance Private Limited (supra) and UCO Bank Limited (supra) do not support the case of the revenue, because, in the present case, cash credits are not introduced in the accounts of the assessee. The fact that the cash credits are introduced in the accounts of Mr.Trivedi, it cannot be inferred that the said cash belonged to the assessee. The assessee was not under any obligation to prove the cash credits in the accounts of Mr.Trivedi. In the present case, the assessee has proved that he was in possession of the diamond jewellery which was duly declared and certified under VDIS 1997. The assessee has proved the identity of the person to whom the said diamond jewellery was sold, his credit worthiness and has accounted for the sale proceeds received from the sale of the diamond jewellery. Therefore, reliance placed on the aforesaid two decisions is misplaced.

20. It is pertinent to note that the sale transaction of diamond jewellery declared under VDIS 1997 between the assessee and Mr.Trivedi of Dhananjay Diamonds has been accepted by the Sales Tax Authorities and the assessments made thereunder have attained finality. In any event, in the facts of the present case, the view taken by the Tribunal to reject the contention of the revenue that the retracted statement of Mr.Trivedi is corroborated by the pay-in-slips / cash deposits in the bank account of Mr.Trivedi and the non-availability of the jewellery claimed to have been sold by the assessee to Mr.Trivedi, is a reasonable and possible view. As the decision of the Tribunal does not give rise to any question of law, we see no reason to interfere with the order of the Tribunal.

21. For all the aforesaid reasons, we see no merit in the appeal and the same is hereby dismissed by answering both the questions in the affirmative, that is, in favour of the Assessee and against the Revenue.

22. The Appeal is disposed of accordingly with no order as to costs.

(J.P. Devadhar, J.)

(V.C. Daga, J.)