(2008) 10 GUJ CK 0025

In the Gujarat High Court

Case No : Special Civil Application No''s. 11905, 11921 and 11922 of 2008

Amit Suresh Bhatnagar APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 21-10-2008

Acts Referred:
Income Tax Act, 1961 — Section 179

Citation : (2009) 147 CompCas 576 : (2008) 221 CTR 70 : (2009) 308 ITR 113 : (2009) 183 TAXMAN 287

Hon'ble Judges : D.A. Mehta, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : Manish J. Shah, for the Appellant; Manish R. Bhatt and Mauna M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—As the issue involved in all the three petitions is common, all the three petitions have been taken up for hearing together.

2. Rule in each of the petitions. Learned Counsel appearing for the respondent-authority in each of the petitions is directed to waive service of rule. By consent of the learned advocates appearing for the respective parties, petitions are taken up for final hearing and disposal today.

3. Each of the petitioner has challenged order dated 19-8-2008 made by respondent-authority u/s 179 of the Income Tax Act, 1961 (''The Act''). Each of the petitioner is a Director of a Company, named, Diamond Project Ltd. (hereinafter referred to as ''the Company''). For assessment year 2001-02, pursuant to assessment order dated 31-12-2006 demand of Rs. 3,62,01,913/- was raised in hands of the Company. The appeal filed by the Company before Commissioner (Appeals) came to be dismissed vide order dated 31-3-2008. The Company has preferred Second Appeal before the Tribunal and the said Appeal bearing No.ITA-1536/Ahd/2008 is pending as of today. It appears that the

respondent-authority called upon the Company to make payment during pendency of the First Appeal for liquidating a part of the demand and correspondence ensued between the respondent-authority and the Company. Ultimately, on 8-8-2008 the Company wrote to the respondent-authority pointing out that a sum of Rs. 15,09,946/- had been paid and the company was also making payment of Rs. 1 lac every month. The Company,therefore, requested for further stay against recovery of demand till the disposal of the appeal pending before Tribunal. On 1-9-2008 the request for stay was rejected. The impugned order has been made on 19-8-2008. In the impugned order, the demand that has been shown to be outstanding vis-a-vis the Company is at a figure of 3,48,95,985/- considering the interest on the outstanding dues.

4. The learned advocate for the petitioners submitted that in light of the provisions of Section 179 of the Act,before recovery in respect of dues from a private Company can be initiated against the Directors, the Revenue was required to establish that such recovery could not be effected from the Company and only then could the Directors be called upon to discharge the liability of the Company. In support of the submission made, reliance has been placed on judgment of this Court in the case of Indubhai T. Vasa (HUF) Vs. Income Tax Officer,

5. Learned senior advocate appearing for respondent-authority has placed reliance on the affidavit-in-reply dated 13-10-2008 of the respondent-authority. It was submitted that in fact from the correspondence it was apparent that the Company having expressed its inability to discharge the liability, respondent-authority was justified in acting u/s 179 of the Act. That the respondent-authority need not thereafter take any steps to show that recovery was sought to be effected against the Company and such recovery was not possible. The learned Counsel did not dispute that otherwise the ratio of aforesaid decision of this court in case of Indubhai T. Vasa (HUF) v. Income Tax Officer,(Supra) would squarely apply.

6. Having heard the learned advocates for the parties, it is apparent that the controversy raised in the petitions stands concluded by judgment of this Court. The record reveals that except for accepting the amount paid by the Company from time to time, respondent-authority has not taken any steps to effect recovery from the Company. This High Court in the case of Indubhai T. Vasa (HUF) v. Income Tax Officer (Supra) has stated that the phrase ''cannot be recovered'' requires the Revenue to establish that such recovery could not be made against the Company and then and then alone would it be permissible for the Revenue to initiate action against the Director or Directors responsible for conducting the affairs of the Company during the relevant accounting period.

7. Thus in effect, before action u/s 179 of the Act can be initiated against the Director or Directors of a private Company, Revenue has to first of all show that such a Director or Directors were responsible for the conduct of the business during the previous year in relation to which the liability exists. Revenue has also

to establish that it has taken effective steps to recover the outstanding dues from the Company and has not been able to recover the entire outstanding liability. Applying the aforesaid ratio to the facts of the case, it is apparent that except for calling upon the Company and/or the petitioners-Directors to discharge the liability, Revenue has taken no effective steps to effect recovery of outstanding dues from the Company. In the circumstances, the impugned order dated 19-8-2008 made in case of each of the three petitioners, cannot be permitted to operate. Order dated 19-8-2008 made u/s 179 of the Act is, therefore, quashed and set aside.

8. Needless to state that this order shall not preclude the Revenue from taking necessary steps to effect recovery from the Company. Rule is made absolute in the aforesaid terms in each of the petitions. There shall be no order as to costs.