
(2002) 04 CAL CK 0010

In the Calcutta High Court

Case No : Writ Petition No"s. 574 and 575 of 2002 23 April 2002

Dipak Dutta

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-04-2002

Acts Referred:

Income Tax Act, 1961 — Section 179

Citation : (2003) 1 CALLT 12 : (2004) 134 TAXMAN 533

Hon'ble Judges : Amitava Lala, J

Bench : Division Bench

Advocate : P.K. Mullick, P. Chatterjee, R. Deb, J.P. Khaitanand A. Bose, for the Petitioner D.K. Shomeand S.K. Chokroborty, for the Appellant;

Judgement

Both the matters were analogously placed. In both the matters notices u/s 179 of the Income Tax Act, 1961 have been challenged. The aforesaid notices dated 6-3-2002 were made requiring reason as to why the taxes should not be realised personally from them giving a date of hearing. Therefore, in effect, the petitioners challenged the show-cause notice under writ jurisdiction of the Court. Under normal circumstances writ court does not interfere with the show cause. But element of interference is available hereunder.

2. The petitioner (in each writ petition) contended that he was a non-executive Director of the respondent No. 4 company inducted in the capacity of a Chartered Accountant. They were never involved in administering the day-to-day business of the respondent- company. In early 1993 the Board of Directors was reconstituted in view of the change of management of the company. The petitioners resigned from the directorship. At the time of resignation, the fiscal position of the respondent company was quite strong and healthy. Prior to the resignation Income Tax return was duly filed by the company and tax dues were paid. The return was duly processed u/s 143(1)(a) of the Income Tax Act. After the resignation the petitioners had no contact or communication with the new management of the company. On 9th March, 1998 the petitioners were surprised

to receive a letter from the office of the Asstt. Commissioner of Income Tax, Company Circle, u/s 272A of the Act requiring attendance of the petitioners. The petitioners intimated that they had left the company. Thereafter, the impugned notice was received by them u/s 179 of the Act. The petitioners contended that in such short period of time they are not in a position to give reply. However, various statements are made as against the show- cause notice by way of averments in the writ petitions which are likely to be the reply to the show cause of the authority.

3. Mr. Mallick, learned senior counsel appearing for the petitioners, has drawn my attention to section 179 of the Act. It appears to me that it is made in respect of liability of the directors of the private company in liquidation. He cited a judgment in K.V. Reddy and Another Vs. Assistant Commissioner of Income Tax, Hyd. and Another, to establish in that the liability of the Director is not a liability co-extensive with the liability of the company unlike a principal debtor and surety.

4. On the other hand, Mr. Shome, learned senior counsel appearing for the authority cited a judgment in Darshan Kumar Vs. Commissioner of Income Tax and Others, and contended that bare reading of the provision u/s 179 of the Act shows that every person who was Director of the private company at any time during the relevant previous year of assessment shall be jointly and severally liable for the payment of tax found due against the company for the previous year.

5. He further cited a decision in M.R. Sudararaman v. CIT (1995) 215 ITR 91 whereunder a Single Bench of Madras High Court also held that Director/s shall be jointly and severally liable for payment of tax.

6. He also cited a judgment in Roop Chandra Sharma Vs. Deputy Commissioner of Income Tax (Assessment), to reiterate his submission by showing the relevant portion of such judgment where even it has been held that liability is co-extensive with the company and a Director is liable only in respect of the arrears of tax of the assessment year when he was functioning as a Director.

7. According to me, for the purpose of invocation of writ jurisdiction there should be some materials for which it will appear that a judicial review is necessary being the action is bad from the face of it. In the instant case, a notice has been issued to the petitioners u/s 179(1) of the Act only to meet the show cause. Therefore, the court will have to come to a definite finding whether there is any illegality or material irregularity in respect of service of such notice. From the plain reading of section 179 it appears that when a tax due from a private company in respect of income of any previous year cannot be recovered, then, every person who was a Director of a private company at the time during the relevant previous year shall be jointly and severally liable for payment of such tax. Therefore, the joint or several liability will arise provided tax cannot be recovered from the company. The petitioners argued that in the first instance the authority should have proceeded against the company and if all attempts to

make recovery from the company failed then only the respondents can proceed against the petitioners. It appears that the assets of the company had been disposed of u/s 29 of the State Financial Corporation Act and the possession has been handed over to the purchaser. However in the judgment of the Andhra Pradesh High Court K.Y. Reddy's case (supra) the court held that notice to initiate the proceeding u/s 179 of the Act is without jurisdiction and without authority of law because there is no finding by the assessing officer of the Income Tax that the amount cannot be recovered from the company. Even in the judgment of the Punjab and Haryana High Court Darshan Kumar's case (supra) it has been held by Division Bench that a Director cannot escape his liability to pay the arrears after the competent authority found that it is impossible to recover the amount from the company. I have made a conjoint reading of the Division Bench judgments of different High Courts. One aspect is very categorical in all the judgments irrespective of any result that a proceeding can be initiated as against the Directors of the company provided that there is a finding that the tax for the relevant period cannot be recovered from the company. In the impugned notice I do not find any averment about due compliance of the show-cause notice u/s 179 of the Act to the extent that the tax cannot be recovered from the company.

8. Therefore, such notice cannot be sustained. Hence, the notice stands quashed. Writ petition stands allowed accordingly. No order is passed as to costs. However, no factual allegation is deemed to be admitted since no affidavit has been filed by the respondent authorities. This order will have binding effect on both the writ petitions.

9. However, this order does not preclude the appropriate authority/s to initiate proceeding afresh in the event such authority found the amount of tax for such period cannot be recovered from the company.

Petition allowed.