

(2005) 03 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 1164 of 2005

Indubhai T. Vasa (HUF)

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 22-03-2005

Acts Referred:

Income Tax Act, 1961 — Section 179, 220(2)

Citation : (2005) 196 CTR 15 : (2006) 282 ITR 120

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : J.P. Shah and Manish J. Shah, for the Appellant; K.M. Parikh, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta

1. Heard Mr.J.P.Shah, learned advocate for the petitioner.
2. RULE. Mr.K.M.Parikh, learned Standing Counsel appears and waives service of rule on behalf of the respondent. In light of the fact that the controversy lies in a very narrow compass and stands concluded by a decision of this Court, the matter is taken up for final hearing and disposal with consent of both the learned counsels appearing for respective parties.
3. This petition challenges the order made by the respondent u/s 179 of the Income Tax Act, 1961 (the Act) on 3rd January, 2005. The petitioner, a H.U.F., has filed this petition through its Karta, who was a director of M/s.Sirs Engineering Private Limited (Company) upto 25th February, 1996. According to the respondent, a total sum of Rs.1,31,10,454/-, which comprised of tax plus interest plus penalty, was due and recoverable from the Company and the said demand pertains to Assessment Years 1996-1997 to 2001-2002.The respondent issued notice on 22nd March, 2004 and called upon the petitioner to explain why the petitioner should not be held jointly and severally liable for payment of

outstanding dues of the Company. The petitioner submitted his reply and also attended personally. It was brought to the notice of the respondent vide the said reply that the Karta of the petitioner had resigned as a director from the Company after February 1996 and this fact was intimated to the Registrar of Companies and hence, according to the petitioner, the petitioner was not liable to be proceeded against by invoking provisions of Section 179 of the Act. In reply to the show-cause notice, the petitioner has raised various other issues on merits, but the same are not necessary for the purpose of this petition.

4. The respondent accepted the fact that the petitioner had resigned w.e.f. 25th February, 1996 as per record of the Registrar of Companies. The respondent, however, held that the petitioner was liable jointly and severally with other directors for payment of arrears of tax of Rs.27,686/- outstanding in the case of Company for Assessment Year 1996-1997 along with interest u/s 220(2) of the Act.

5. Mr.J.P.Shah, learned advocate for the petitioner, has submitted that apart from the fact that the petitioner is not liable for the demand relatable to subsequent years, even for Assessment Year 1996-1997, the petitioner having admittedly given up the post of director w.e.f. 25th February, 1996, the petitioner could not be held liable to satisfy the demand in relation to income which would accrue or arise only at the end of the accounting period of the Company and hence, according to him, the petitioner was not liable even for Assessment Year 1996-1997.

6. It was further submitted that the respondent had failed to establish that the outstanding dues could not be recovered from the Company and in absence of fulfillment of the said condition, the respondent cannot be permitted to proceed to effect recovery against the petitioner. In support of the aforesaid proposition reliance has been placed on the decision of this Court in case of Bhagwandas J. Patel Vs. Deputy Commissioner of Income Tax, . In this context Mr.Shah also invited attention to various averments made in the affidavit-in-reply dated 9th March, 2005 filed by the respondent.

7. Mr.K.M.Parikh, learned Standing Counsel appearing on behalf of the respondent, submitted firstly that Section 179 of the Act permitted the revenue authorities to proceed against any director of a Private Company and for this purpose he placed reliance on the phrase "jointly and severally liable" occurring in Section 179 of the Act. According to Mr.Parikh, it was open to the respondent authority to simultaneously proceed both against the Company and its directors. In support of the aforesaid submissions, he placed reliance on the decision rendered by learned Single Judge of Madras High Court in case of M.R. Sundararaman Vs. Commissioner of Income Tax and another, . Mr.Parikh also referred to the affidavit-in-reply filed by the respondent to submit that the tax recovery officer had made various efforts repeatedly to effect recovery of outstanding dues from the Company, including attachment of the properties of the Company more particularly described in the order of attachment dated 8th

March, 2004 (Annexure R-8). He, therefore, submitted that considering the fact situation, the impugned order made u/s 179 of the Act was perfectly justified and no interference was called for.

8. In the case of Bhagwandas J. Patel Vs. Deputy Commissioner of Income Tax (supra) this Court has enunciated the law on reading of provision of Section 179 of the Act in these words : "A bare perusal of the provision shows that before recovery in respect of dues from the private company can be initiated against the director, to make them jointly and severally liable for such dues, it is necessary for the Revenue to establish that such recovery cannot be made against the company and then and then alone it can reach the directors who were responsible for the conduct of business during the previous year in relation to which liability exists." In the said decision this Court has further gone on to observe from the facts on record that "Neither in the order nor in the affidavit any such assertion has been made that in spite of making efforts against the company, it is not possible to recover the amount from the company by reaching its assets."

9. The aforesaid ratio may be applied to the facts of the case. In Paragraph No.2 of the impugned order it is stated that :

"This demand could not be recovered from the said company. Many notices have been given to it for making the payment in spite of various efforts made by this office there was no compliance from the company towards payment of aforesaid demand. The efforts made by the Tax Recovery Officer - 4, Baroda also did not result into recovery of tax. " In light of these averments, the learned counsel for the respondent was called upon to substantiate the aforesaid averments and hence, the affidavit-in-reply. From the affidavit-in-reply it becomes apparent that the respondent has initiated action for recovery of dues by issuance of various notices, more particularly enumerated in detail in the affidavit-in-reply, which are followed up by an attachment order dated 8th March, 2004. It is necessary to take note of the fact that in the attachment order the property attached is specified as under :

"SPECIFICATION OF PROPERTY:

1. Right, title and interest in immovable properties i.e. land, factory shed and building along with machinery, furniture and fixtures, equipments and electrical fittings situated at B/225, GIDC Waghodia, Dist. Baroda."

10. The affidavit-in-reply is silent as to what is the total value of the immovable properties as well as other assets attached under the order of attachment dated 8th March, 2004.

11. In these circumstances, it is not possible to accept the stand of the respondent that despite best efforts the taxes due from the Company cannot be recovered. As laid down by this Court the phrase "cannot be recovered" requires the Revenue to establish that such recovery cannot 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. Hence, the prerequisite condition stipulated by Section 179 of the Act remains unfulfilled in context of the facts available on record by virtue of the impugned order as well as the affidavit-in-reply.

12. It is also necessary to take note of the fact that once the respondent had, in the impugned order, accepted that the petitioner was liable only qua the demand relatable to Assessment Year 1996-1997, it was necessary for the respondent to satisfy himself that even the figure of outstanding dues relatable to the said assessment year cannot be recovered from the Company or its assets. Considering the nature and the description of the property attached as per the order of attachment, prima facie, even this requirement does not seem to be fulfilled. However, in absence of any evidence in this regard, it is not necessary to state anything more on this count.

13. Reliance on the decision of Madras High Court in the case of M.R. Sundararaman (supra) placed by the learned counsel for the respondent cannot carry the case of the Revenue any further. The said decision disposes of the contention of the petitioner in the following words:

"The last contention of learned counsel for the petitioner is that the Department can initiate action against the petitioner only after exhausting its remedies against the company and its assets and before doing so, no proceeding can be taken against the petitioner. There is no merit whatever in this contention as section 179(1) of the Act makes the liability joint and several. "

Thus, it can be seen that Madras High Court is relying upon the phrase used in the latter part of Section 179 of the Act wherein it is held that every person who was a director of the Company shall be "jointly and severally" liable. The aforesaid decision does not deal with the earlier portion of the provision which relates to recovery, or inability to recover, from the Company. In fact the said decision does not record any reasons. Hence, the said decision rendered by a learned Single Judge, which is contrary to the exposition of law made by this Court, cannot be accepted to be laying down a correct proposition of law. This Court is in respectful disagreement with the views expressed in the said decision.

14. In the present case, it is not necessary to decide as to whether the phrase "jointly and severally" is applicable qua the company and its directors or is applicable qua the directors inter se and hence, the said issue is left open. Suffice it to state that Section 179 of the Act, on a plain reading, prima facie indicates the latter interpretation, i.e. qua the directors inter se.

15. In the circumstances, the impugned order dated 3rd January, 2005 (Annexure-N) made u/s 179 of the Act by the respondent is quashed and set aside. The respondent is prohibited from proceeding any further in consequence of the impugned order 3rd January, 2005 (Annexure-N).

16. The petition is allowed accordingly. Rule made absolute. There shall be no order as to costs.