(1987) 12 BOM CK 0033

In the Bombay High Court

Case No : Appeal No. 420 of 1985 from Writ Petition No. 982 of 1980

Union of India APPELLANT

Vs

Praveen D. Desai RESPONDENT

Date of Decision : 02-12-1987

Acts Referred:

Income Tax Act, 1961 — Section 179, 179(1)

Citation : (1988) 72 CTR 212 : (1988) 173 ITR 303

Hon'ble Judges : M.L. Pendse, J;Kotwal, J

Bench : Division Bench

Judgement

Pendse J.

1. The principal point involved in this appeal preferred against the judgment dated February 1, 1984, delivered by the learned single judge in Writ Petition No. 982 of 1980 Praveen D. Desai Vs. Income Tax Officer, Companies Circle-V(6), Bombay and others., stands concluded in view of our decision dated November 11, 1987, in Appeal No. 909 of 1983 Union of India and others Vs. Manik Dattatreya Lotlikar, . In view of that decision, Mr. Jetly, learned counsel appearing on behalf of the appellants, the Income Tax Department, submitted that this appeal also must succeed.

2. Mr. Dwarkadas, learned counsel appearing for the respondent-assessee, submitted that though the principal question about the liability of the director of a private company for discharging liabilities of the company u/s 179(1) of the Income Tax Act, 1961 (hereinafter "the Act"), is not open for agitation in view of our earlier decision, the order passed u/s 179 by the Income Tax Officer on April 12, 1979, cannot be sustained. Learned counsel urged that the Income Tax Officer has held the respondent personally responsible for payment of the arrears of tax amounting to Rs. 2,74,508. The break-up of this amount is set out in the order itself and includes the tax arrears of Rs. 54,434 in respect of the assessment year 1961-62. Mr. Dwarkadas is right in saying that this amount of tax due for the assessment year 1961-62 cannot be included while determining

the liability of the respondent-director. Mr. Dwarkadas also pointed out that the tax of Rs. 1,41,471 found to be in arrears by the Income Tax Officer for the assessment year 1962-63 is not correct, because the assessment order was set aside by the Tribunal and the matter is remitted for fresh assessment. Mr. Dwarkadas submitted that in respect of the assessment year 1967-68, the company had suffered losses and there was no liability for payment of tax and, therefore, the Income Tax Officer was in error in holding that there was a liability of an amount of Rs. 7,495. In our judgment, it is not possible to investigate the accuracy of the claim of arrears of tax subsequent to the assessment year 1962-63 in the present proceedings and, therefore, it is necessary to direct the Income Tax Officer to reascertain the amount of arrears of tax of the company from the assessment year 1962-63 onwards after hearing the objections of the respondent-assessee. Mr. Dwarkadas assures that the respondent would file objections before the concerned Income Tax Officer within a period of four weeks from today. In case such objections are filed, then the Income Tax Officer will consider and examine the same and then reascertain the arrears of tax due from the company. In case the respondent fails to file any objections, then it is open to the Income Tax Officer to refix the amount in the light of the judgment delivered by us in Appeal No. 909 of 1983 Union of India and others Vs. Manik Dattatreya Lotlikar, .

3. Mr. Dwarkadas then submitted that the liability of the director of a private limited company u/s 179(1) arises provided the non-recovery can be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. Learned counsel submitted that the non-recovery cannot be attributed to any of the reasons set out in the section. We are unable to accept the submission because the non-recovery can very well be attributed to the breach of duty on the part of the respondent in relation to the affairs of the company. As a director of the company, it was the bounden duty of the respondent to pay tax due from the company and as the respondent has failed to discharge that duty, the provisions of section 179(1) are clearly attracted.

4. Shri Dwarkadas then submitted that the liability of the director arises provided the Department is unable to recover the arrears of tax from the assets of the company. Learned counsel invited our attention to the sale proclamation issued by the Tax Recovery Officer on November 20, 1987, for sale of immovable property attached on February 2, 1972. Mr. Dwarkadas submitted that the respondent should be made liable to personally pay the arrears of tax provided the Department is unable to realise the arrears by the proposed auction sale. The submission is correct and deserves acceptance.

5. Accordingly, the appeal is allowed and the judgment dated February 1, 1984, delivered by the learned single judge in Writ Petition No. 982 of 1980 Praveen D. Desai Vs. Income Tax Officer, Companies Circle-V(6), Bombay and others., is set aside and the order dated April 12, 1979, passed by the Income Tax Officer u/s 179 of the Income Tax Act, 1961, is upheld, but subject to the direction that the

Income Tax Officer would redetermine the amount of arrears of tax due from the company after hearing objections to be filed by the respondent within four weeks from today and bearing in mind that the respondent would not be liable for arrears of tax due for the assessment year 1961-62. The Department is also directed to enforce the order personally against the respondent only in case the amount of arrears of tax cannot be realised in the proposed auction to be held on December 21, 1987, or on any adjourned date thereafter.

6. In the circumstances of the case, there will be no order as to costs.

