IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 808 of 2013

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NAYAN M SHAH....Petitioner(s)

Versus

INCOME TAX OFFICER....Respondent(s)

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Appearance:

MR TEJ SHAH, ADVOCATE for the Petitioner(s) No. 1

MR MANAV A MEHTA, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 04/03/2013

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Heard learned counsel for the parties for final disposal of the petition.

2. Petitioner has made following substantive prayers in this petition:

"a. A Writ of Certiorari or any other Writ, order or direction in the nature of Certiorari quashing the impugned order dated 24.10.2011 passed under Section 179 of the Act for the assessment year 1995-96 recovering the amount of tax and interest from the petitioner;

b. A Writ of Mandamus or any other writ, order or direction in the nature of mandamus directing the Respondent to refund the amount of tax and interest recovered from the petitioner pursuant to the order

dated 24.10.2011;

c. A Writ of Certiorari or any other writ, order or direction in the nature of Certiorari quashing the order dt. 08.10.2012 passed by the respondent u/s. 179 of the axt recovering the penalty imposed u/s. 271 (i)(c) in the name of the company;

c. A writ of Mandamus or any other writ, order or direction in the nature of mandamus directing the Respondent to not recover the penalty over and above what is recovered pursuant to the order dated 08.10.2012 and to refund the penalty already recovered."

3. The petition arises in following factual background:

3.1 Petitioner is a Director of one M/s. Ronak Oil Mills Pvt. Ltd. (hereinafter to be referred to as "the company"). In case of the company, assessment was made for the assessment year 1995-96 raising a demand of Rs. 29,93,644/-. This included unpaid tax of Rs. 10,25,749/- and interest under Section 234A and 234B of the Income Tax Act, 1961 ('the Act' for the short). Against such order of assessment, company had preferred appeal before the CIT(A). Such appeal was dismissed. It is stated that company's further appeal before the Tribunal is pending.

3.2 Since the company did not pay the tax and the interest due arising out of the said order of assessment dated 30.12.2009, the respondent issued a notice dated 12.10.2011 and the petitioner was asked to prove that such non-recovery was not due to any gross neglect, misfeasance or breach of duty on his part in relation to affairs of the company.

4. It appears that the petitioner did not reply to the show-cause notice. Respondent, therefore, passed an order on 24.10.2011 under Section 179 of the Act and held the petitioner jointly and severally liable for the payment of the outstanding dues of the company of Rs. 29,93,644/-. In the said order he observed as under:

"2. The assessee has not attended on 21.10.2011 nor has furnished any submission which proves that the addition which has been made was not due to his neglect or breach of duty. The silence on part of director is treated as acceptance of the proposal of order u/s. 179 of the Act. Shri Nayan M. Shah has failed to prove that on his part there was no breach of duty in relation to the affairs of the company or any negligence which has led to these circumstances. In the circumstances I treat Shri Nayan M. Shah, who was a director of the company during accounting period relevant to A.Y. 1995-96, as jointly and severally liable for payment of the above outstanding dues of the aforesaid assessee company."

5. It is an undisputed position the respondent did make actual recovery of total amount of Rs. 29,93,644/- from the petitioner. Such recovery was made in two modes. Partial recovery was affected by directly withdrawing the Keyman Insurance Policy amount of the petitioner and the rest of the recovery was through the petitioner's bank account, which happened on or around 17.02.2012.

6. Independent of the assessment proceedings, penalty proceedings under Section 271(1)(c) of the Act were also initiated against the company. The Assessing Officer ordered levy of penalty of Rs. 11,25,746/- under the said

provision. Company has preferred appeal before the Commissioner (Appeals) against penalty order dated 16.03.2012. It is stated that such appeal is pending before the Appellate Commissioner.

7. At that stage, the respondent issued notice under Section 226(3) of the Act attaching the account of the petitioner for recovery of the said outstanding penalty amount of Rs. 11,25,746/-. The petitioner, thereupon, replied to the respondent and contended that no recovery of the penalty can be made from the petitioner. He stated that the demand of Rs. 29,93,644/- was already satisfied by the petitioner.

8. We may record that in addition to the tax and interest due, the respondents also recovered a further sum of Rs. 72,673/- on 27.09.2012 from the bank account of the petitioner. Before us, though the prayers of the petitioner are wider, the counsel for the petitioner, during his submissions on 29.01.2013, had made it clear that he is confining this petition to the action of the respondents in seeking to recover the interest and penalty from the petitioner arising out of the assessment of the company in question for the assessment year 1995-96.

9. We have accordingly heard learned counsel for the parties on these issues. Short question is whether in exercise of powers under Section 179 of the Act any recovery can be made from the petitioner towards interest and penalty with respect to the private limited company, in which, the petitioner was a Director. It is clarified that the petitioner is not questioning the

recovery of the principal tax due from such company.

10. A Division Bench of this Court in case of ***Maganbhai Hansrajbhai Patel Vs. Assistant Commissioner of Income Tax & 1 reported in [2012] 26 taxman.com 226 (Guj)*** had an occasion to consider this issues along with several other issues pertaining to Section 179(1) of the Act. It was held and observed as under:

"16. In section 179 of the Act, term used is "tax due". Section 2(43) of the Act defines tax and reads as under :

"(43) 'tax' in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year incometax and super-tax chargeable under the provisions of this Act prior tot he aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA."

17. Term 'penalty' has not been defined. Term 'interest' is defined in section 2(28A) of the Act but is in context of interest payable in any manner in respect of any moneys borrowed or debt incurred and has no relation to interest chargeable under various provisions of the Act on tax arrears. We may however, notice that as observed by the Apex Court in case of Harshad Mehta (supra), the Act uses the term 'tax', interest and penalties at various places having different connotations. Section 156 which pertains to notice of demand provides that where any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under the Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable. Section 156 reads as under :

“156. Where any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under the Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable :

(Provided that where any sum is determined to be payable by the assessee under sub-section(1) of section 143, the intimation under the sub-section shall be deemed to be a notice of demand for the purposes of this section.)”

18.When we compare the language used in section 179(1) of the Act with that of section 156, it emerges that in section 179, the term used is 'tax due' where as in section 156 which is a recovery provision refers to a notice of demand which would specify the sum payable. The sum payable may as provided in the section itself include tax, interest, penalty fine or any other sum which is payable in consequence of any order under the Act. Section 220 of the Act pertains to “when tax payable and when assessee deemed to be in default”. Section 220(1) provides for time limit for payment of amount otherwise than advance tax specified in notice demand under section 156. Section 220(2) provides that if the amount so specified is not paid within such time, the assessee shall be liable to pay interest. Such interest thus would be on the entire sum payable which may include the tax, interest and penalty or any other source found payable. It would therefore, not be possible to stretch the language of section 179(1) of the Act to include interest and penalty also in the expression 'tax due'.

19. In case of Ratanlall Murarka and others (supra), as already noted, Kerala High Court did hold that under section 179 of the Act not only the tax dues but also interest can be recovered from the director of a public company. This was on the basis that according to the Court, the company was liable for interest under section 220(2) of the Act.

The liability of the Director would be co-extensive with that of the company and that would make the director an assessee within section 2(7) of the Act. To our mind, the liability of the director to pay the dues of the company arises in terms of section 179(1) of the Act and such liability would be co-extensive as provided in the said provision which as we notice refers to tax dues. The director may be considered an assessee under section 2(7) of the Act which provides that assessee means a person by whom any tax or any other sum of money is payable under the Act. However, the same must be qua the tax of the company which was due and remained unpaid. By virtue of section 179(1) of the Act, the director cannot be held liable for interest and penalty and thereupon be treated as an assessee under section 2(7) of the Act as a person by whom any tax or any other sum of money is payable under the Act."

11. It can thus be seen that both the issues are covered by the aforesaid decision of this Court in case of Maganbhai Hansrajbhai Patel vs. Assistant Commissioner of Income Tax (supra). We do not have therefore to discuss the same issue again in this petition. We hold and declare that it was not legally permissible for the respondent to recover from the petitioner, interest and penalty arising out of the assessment order passed against the company, in which the petitioner was a Director.

12. Action taken by the respondent for effecting such recovery is therefore, set aside. Respondent shall not seek any recovery of the penalty and shall refund the interest and a portion of the penalty, which is already recovered so far. Since the petitioner had approached this Court after a considerable delay after the interest was recovered, we provide that such refund shall not carry interest, if made within a period of three months from today. Failing which, from the end of such period, the amount to be refunded shall carry simple interest @ 9% per annum till

actual payment. Petition stands disposed of accordingly.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

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