NEUTRAL CITATION
2023:GUJHC:49374-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11182 of 2019

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BHAILAL BABUBHAI PATEL

Versus

THE PRINCIPAL COMMISSIONER OF INCOME TAX 1

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Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
MR.VARUN K.PATEL(3802) for the Respondent(s) No. 1,2

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CORAM: **HONOURABLE MR. JUSTICE BIREN VAISHNAV**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 12/09/2023

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. Rule. Mr. Varun Patel, learned advocate appearing for respondent revenue waives service of notice of rule. With the consent of learned advocates for the parties, matter is taken up for final hearing today.

2. This petition under Article 226 of the Constitution of India challenges the order dated 27.03.2019 under Section 179 of the Income Tax Act, 1961 against the petitioner holding him in his capacity as a Director responsible for the outstanding demand against the

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company – Banyan & Berry Alloys Limited.

3. Facts in brief would indicate that the petitioner a resident of New Delhi, was a Director of the company – Banyan & Berry Alloys Limited till 15.01.2009 on which date he resigned from the directorship due to ill-health. It is the case of the petitioner an intimation was sent to the company and since the company did not inform the Registrar of Companies he also took up the matter with the Registrar of Companies.

3.1 More than nine years after his resignation, it is the case of the petitioner that the respondent no. 2 passed an order under Section 179 of the Act on 13.02.2018 holding the petitioner responsible and liable for payment of outstanding demand of income tax, interest and penalties pertaining to the assessment years 2006-07, 2007-08, 2008-09, 2009-10 and 2011-12 in respect of the company concerned.

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3.2 It is the case of the petitioner that a show-cause notice was issued to the petitioner to show cause as to why he should not be treated jointly and severally liable for payment of tax and in a reply filed on 14.07.2017, the petitioner had raised objections. By the impugned order, the petitioner has been held liable.

4. Mr. B.S. Soparkar, learned advocate appearing for the petitioner would submit that the petitioner had resigned from the directorship on and from 15.01.2009. In accordance with the provisions governing the resignation of a Director under the Companies Act, Section 302(2) casts a legal obligation on the company to inform the Registrar of Companies by filling Form No. 32 giving particulars of changes, if any, in the office of the Director. He would further submit that the company had become a public company from 25.05.2006.

4.1 Mr. Soparkar would further submit that under Section 179 of the Act, the show-cause notice must give

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details of the measures taken by the Assessing Officer to recover dues from the company. In absence of such reasons put forth by the Assessing Officer, in light of the decision in the case of **Ashita Nilesh Patel vs. Assistant Commissioner of Income Tax [[2020] 115 taxmann.com 37]**, a show-cause notice itself was bad. He would further submit that no element of gross neglect, misfeasance or breach of duty of the petitioner was made out in the said impugned order.

5. Mr. Varun Patel, learned Senior Standing Counsel appearing with Mr. Dev Patel, learned advocate for the revenue would submit that it is apparent from the reasons recorded in the order that the only reason given by the petitioner for not being liable under the provisions of the Act was that he was aged 76 years and not able to personally attend Ahmedabad office and therefore had tendered his resignation. Regarding provisions of Section 179 of the Act, he would submit that a recent decision had been taken indicating that despite concrete efforts

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being made by the department for recovery of demand from Assessing Officer, such recovery could not be made and since the company was a private company, the provisions of Section 179 were clearly applicable. He would submit that the authority recorded that the primary reason for failure to collect the demand was on account of total closure of business operations and therefore the petitioner was unable to prove in any manner whatsoever why the non recovery cannot be attributed to gross negligence, misfeasance or breach of duty in conducting the affairs of the company.

6. Considering the submissions made by the learned advocates appearing for the respective parties, it is borne out from the record that multiple submissions have been made by learned advocate Mr. Soparkar for the petitioner challenging the legality and validity of the order under Section 179 of the Act. However, only in light of the decision in the case of **Ashita Nilesh Patel** (supra), a case is made out for interference and quashing of the

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order and for remanding the matter for a fresh consideration.

6.1 In the case of **Ashita Nilesh Patel** (supra), challenge was made to the order passed by the authorities under section 179 of the Income Tax Act. A contention therein was raised by the learned counsel for the petitioner that the show-cause notice therein was bereft of material particulars as regards the steps said to have been taken by the department for the purpose of recovering tax from the company. According to Mr. Soparkar, it was obligatory on the part of the department to demonstrate by some material on record that it had taken necessary steps to recover dues from the company but such steps have failed.

7. Paras 18 to 23 of the decision of this court in the case of Ashita Nilesh Patel (supra) reads as under:

> "18. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only

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question that falls for our consideration is, whether the respondent has committed any error in passing the impugned order.

19. Section 179 of the Act, 1961 reads thus: "Liability of directors of private company in liquidation.

> 179. (1) Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the nonrecovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.
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> (2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company

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assessable for any assessment year commencing before the 1st day of April, 1962.

Explanation.--For the purposes of this section, the expression "tax due" includes penalty, interest or any other sum payable under the Act."

20. In the case of Maganbhai Hanrajbhai Patel vs. Assistant CIT [(2013) 353 ITR 57], this Court had the occasion to examine Section 179 of the Act, 1961 in detail. It has been held therein that subsection (1) of Section 179 of the Act, 1961 provides for the joint and several liability of the directors of a private company, wherein the tax dues from such company in respect of any income of any previous year cannot be recovered. The first requirement, therefore, to attract such liability of the director of a private limited company is that the tax cannot be recovered from the company itself. Such requirement is held to be a pre-requisite and necessary condition to be fulfilled before action under Section 179 of the Act can be taken. In the context of Section 179 of the Act, 1961, this Court held that before recovery in respect of the dues from a private company can be initiated against the directors, 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 alone it can reach to the directors who were responsible for the conduct of the business during the previous year in relation to which liability exists.

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21. There is no escape from the fact that the perusal of the Notice under Section 179 of the Act, 1961, reveals that the same is totally silent as regards the satisfaction of the condition precedent for taking action under Section 179 of the Act, 1961, viz. that the tax dues cannot be recovered from the Company. In the showcause notice, there is no whisper of any steps having been taken against the Company for recovery of the outstanding amount. Even in the impugned order, no such details or information has been stated.

22. In such circumstances, referred to above, the question is, whether such an order could be said to be sustainable in law. The answer has to be in the negative. At the same time, in the peculiar facts and circumstances of the case and more particularly, when it has been indicated before us by way of an additional affidavitinreply as regards the steps taken against the company for the recovery of the dues, we would like to give one chance to the department to undertake a fresh exercise so far as Section 179 of the Act, 1961, is concerned. If the showcause notice is silent including the impugned order, the void left behind in the two documents cannot be filled by way of an affidavitinreply. Ultimately, it is the subjective satisfaction of the authority concerned that is important and it should be reflected from the order itself based on some cogent materials. However, with a view to protect the interest of both, the writ applicant as well as Revenue, we are inclined to quash the impugned order and

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give one opportunity to the Revenue to initiate the proceedings afresh by issuance of fresh show cause notice with all necessary details so that the writapplicant can meet with the case of the Revenue. We are inclined to adopt such measure keeping in mind the statement made by the learned counsel Mr.Soparkar that till the fresh proceedings are not completed, his client will not operate the bank account.

23. In view of the above, this writapplication is partly allowed. The impugned notice as well as the order is hereby quashed and set aside. It shall be open for the respondent to issue fresh showcause notice for the purpose of proceeding against the writapplicant under Section 179 of the Act, 1961. We would like to give a time bound program so that the proceedings may not go on for an indefinite period. We are also issuing such direction because of the statement being made that the writapplicant will not operate the bank account till the fresh proceedings are initiated and completed. In such circumstances, we grant two months' time from the date of receipt of the writ of this order to the Department to initiate fresh proceedings and pass appropriate orders in accordance with law. Till the final order is passed, the writ-applicant shall not operate the bank account concerned."

8. Perusal of the impugned order in the present petition would indicate that nothing had come on record and it is undisputed that the show-cause notice issued to

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the petitioner was bereft of material particulars as regards the steps said to have been taken by the department for the purpose of recovering the tax from the company.

9. Only on the ground of the show-cause notice being defective as the same is totally silent as regards the satisfaction of the condition precedent for taking action under Section 179 of the Act, the order dated 27.03.2019 passed by the respondent no. 1 is quashed and set aside. It shall be open for the respondent to issue fresh show-cause notice for the purpose of proceeding against the petitioner under Section 179 of the Act, if thought fit. All the contentions of the respective parties, as raised in this petition are kept open. Petition is accordingly allowed. Rule is made absolute accordingly.

(BIREN VAISHNAV, J)

(BHARGAV D. KARIA, J)

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