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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.908 OF 2005

Nandkishor Kagliwal, Director
M/s. Jeevan Investment & Finance Pvt. Ltd. ..Petitioner
Versus
Income Tax Officer, Ward 1(2)(1) & Ors. ..Respondents

....
Mr. K. Gopal a/w Jitendra Singh & Ms. Neha Paranjpe for the petitioner.
Mr. Abhay Ahuja for the Respondents.
....

CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 13th DECEMBER, 2016

P.C.:

1. By this petition under Article 226 of the Constitution of India the petitioner challenges:-

(a) order dated 24th March, 2003 passed by the Assessing Officer under Section 179 of the Income Tax Act, 1961 (the Act);

(b) order dated 31st July, 2003 passed by the Commissioner of Income Tax under Section 264 of the Act.

The genesis of the impugned order is the unpaid tax demand of Rs.69.89 lakhs (income tax and surcharge of Rs.40 lakhs (approximately) and interest of Rs.28 lakhs approximately) for Assessment Year 1997-98 of

M/s. Jeevan Investment & Finance Pvt. Ltd. (defaulting company). The petitioner is a Director of the defaulting company, thus proceedings for recovery under Section 179 of the Act were commenced by show cause notice dated 29th January, 2003 under Section 179 of the Act against the petitioner. This notice was confirmed by the impugned order dated 24th March, 2003 and the Revision Application filed under Section 264 of the Act against the order dated 24th March, 2003 which was rejected by order dated 31st July, 2003 of the Commissioner of Income Tax.

2. The petition was admitted on 12th July, 2005. At that stage interim relief was granted. The respondent-Revenue was restrained from adopting any coercive measures to recover any amounts from the petitioner consequent to the impugned orders dated 24th March, 2003 and 31st July, 2003 of the Assessing Officer and the Commissioner of Income Tax.

3. At the very outset, Mr. Gopal, the learned counsel appearing for the petitioner states that the petitioner is desirous of paying of the tax dues of the defaulting company as now due. It is stated across the bar that after the impugned orders dated 24th March, 2003 and 31st July, 2003 were passed, the tax arrears of the defaulting company had been rectified for

Assessment Year 1997-98 by an order dated 18th December, 2004. This order dated 28th December, 2004 has determined the tax and surcharge payable at Rs.15.55 lakhs and an amount of Rs.10 lakhs has already been paid by the defaulting company to the Revenue. Thus leaving a balance amount of Rs.5.55 lakhs as tax and surcharge payable with interest payable thereon (till 28th December, 2004 interest payable was Rs.25 lakhs approximately). In support a photo copy of Notice of Demand dated 28th December, 2004 along with the computation of tax is shown to us.

4. It is the petitioner's contention that in terms of Section 179 of the Act the petitioner as a Director of the defaulting company is only required to pay the 'tax due' from the defaulting company to the Revenue. The interest payable on the tax and/or any penalty imposed upon the defaulting company is outside the scope of recovery from the Director of a defaulting company in terms of Section 179 of the Act. In support of his contention, the petitioner relies upon the decision of this Court in ***Dinesh T. Tailor v/s. Tax Recovery Officer and others 326 ITR 85*** and the decision of Apex Court in ***Harshad Shantilal Mehta v/s. Custodian and others 231 ITR 871***. It is further submitted by Mr. Gopal that the explanation inserted to Section 179 of the Act by the Finance Act 2013 with effect from 1st June, 2013 would not have retrospective effect but

would only be prospective. In support he placed reliance upon the decision of the Apex Court in ***CIT v/s. Vatika Township P. Ltd. 367 ITR 466.***

5. On the other hand Mr. Ahuja, the learned counsel for the Revenue contests the petition. It is submitted that the petition be dismissed on account of inordinate delay in filing the petition. It is submitted that the impugned orders were passed on 24th March, 2003 and 31st July, 2003 while the petition was filed only on March 2005. Thus the petition be dismissed. Our attention was invited to the Explanation to Section 179 of the Act and it is submitted that it is being clarificatory in nature. Therefore the petitioner is obliged to pay the interest also in respect of the pending tax dues.

6. So far as the objection of Revenue in respect of the petitioner suffering from laches and delay is concerned, we find that the respondent-revenue had not raised this objection when the petition was admitted on 12th July, 2005 nor was it kept open to be raised/urged at the final hearing. Therefore it is not open to the Revenue to urge it now as held by the Division Bench of this Court in ***Dinkar Satpute v/s. Zilla Parishad 2004(3) Mah. L. J. 151.*** In any case we find that the delay in

challenging the orders dated 24th March, 2003 and 31st July, 2003 has been explained in the petition and we are satisfied with the explanation of awaiting the result of the appeal to Income Tax Appellate Tribunal by the defaulting company. The Income Tax Tribunal disposed of the appeal filed by the defaulting company only in September 2004. Consequently, the delay, if any, has been sufficiently explained by the petitioner in moving this Court.

7. We are of the view that before the issue of interpretation of the word 'Tax due' can be decided, the factual aspect of the amount due on account of tax and interest from the defaulting company has to be ascertained. This is more so in view of the fact that the demand under Section 156 of the Act along with computation of tax, which is shown to us is dated 28th December, 2004 i.e. much before the petition was filed. However, no reference was made to it in the petition nor any amendments moved to the petition over the last 10 years when the petition was pending. Therefore it would be appropriate to restore the issue before the Assessing Officer at the stage of the notice dated 29th January, 2003 to determine the factual amount due from the defaulting company and consequently the petitioner. Thereafter the Assessing Officer will rule on the meaning of the words 'tax due' under Section 179 of the Act, keeping

in view the decision of this Court in Dinesh T. Tailor (supra) which was not available at the time when the impugned orders dated 24th March, 2003 and 31st July, 2003 was passed in the context of the merely added Explanation to Section 179 of the Act. The Assessing Officer would consider whether the Explanation is prospective or retrospective. Besides, also consider the impact of the Explanation in respect of pending tax dues. Needless to state the order on the Notice dated 29th January, 2003 will be passed in accordance with principles of natural justice.

8. In the above view, the impugned orders dated 24th March, 2003 passed under Section 179 of the Act by the Assessing Officer and order dated 31st July, 2003 passed by the Commissioner of Income Tax under Section 264 of the Act are set aside. The proceedings are restored to the file of the Assessing Officer to proceed further from the stage of the show cause notice dated 29th January, 2003 issued to the petitioner for the tax dues of the defaulting company. The petitioner is also directed to pay the admitted tax due of Rs.5 lakhs on or before 31st December, 2016 and file evidence of the same with the Assessing Officer on or before 31st December, 2016.

9. Mr. Gopal, the learned counsel for the petitioner states that he will

file his representations/response to the show cause notice dated 29th January, 2003 on or before 31st December, 2016. Mr. Ahuja, the learned counsel appearing for the Revenue states that show cause notice dated 29th January, 2003 would be disposed of by the Assessing Officer on or before 31st January, 2017 after following the principles of natural justice.

10. However, this order is subject to the condition that the petitioner shall pay the admitted tax due of Rs.5 lakhs into the treasury on or before 31st December, 2016 and file evidence of the deposit/payment with the Assessing Officer on or before 31st December, 2016. In fact Mr. Gopal, the learned counsel for the petitioner on instructions states/undertakes to deposit/pay the admitted tax due of Rs.5 lakhs on or before 31st December, 2016 into the Treasury and file the evidence of the same with the Assessing Officer on or before 31st December, 2016. It is therefore made clear that in case the above direction/undertaking is not complied with, the petition will stand dismissed without reference to this Court.

11. Petition disposed of in above terms. No orders as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**

Wadhwa