R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 1083 OF 2019

Vanraj V. Shah .. Petitioner

Versus

Dy. Commissioner of Income Tax - 10(1)(1) & Anr. .. Respondents

……………….
- Mr. Devendra H. Jain for the Petitioner
- Mr. Akhileshkumar Sharma for Respondent No. 1

……………….

CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.

DATE : JUNE 24, 2019.

P.C.:

1. The petitioner has challenged an order dated 18.9.2018 passed by respondent No. 1 - Dy. Commissioner of Income Tax under Section 179 of the Income Tax Act, 1961 ("the Act" for short).

2. Brief facts are as under:-

2.1. The petitioner is an individual. He is a director of one M/s. Hridaynath Consultancy Pvt Ltd, a Private Limited Company (hereinafter referred to as the "said Company"). For the assessment year 2015-16, the said company had filed its return of income. The Assessing Officer passed the order of assessment on said return on 30.12.2017 which gave rise to a tax demand of Rs. 36.99 Crores (rounded off). The company filed an appeal before the Appellate Commissioner. When such appeal was pending, respondent No. 1 issued a notice dated 26.6.2018 calling upon the petitioner why an order under Section 179 of the Act should not be passed treating the petitioner jointly and severally liable for payment of tax dues of the said Company. The petitioner replied to the show cause notice under a communication dated 14.7.2018 and raised several contentions. The principal contentions of the petitioner were that there is nothing on record to suggest that the tax dues could not be recovered from the said company and the same can be attributed to any gross neglect, misfeasance or breach of duty on the part of the petitioner in relation to the affairs of the company.

2.2 Ignoring such pleas of the petitioner, the Assessing Officer passed the impugned order under Section 179 of the Act holding the petitioner liable to pay the outstanding dues of the said Company.

2.3 It appears that the said order was passed without taking into consideration the detailed representation of the petitioner under the communication dated 14.7.2018. When this was pointed out to the Assessing Officer, he passed another order dated 8.3.2019 titled it as 'Corrigendum' and reiterated his stand that the petitioner is liable to pay dues of the Company after dealing with the petitioner's contentions in the original representation.

3. Having heard the learned counsel for the parties and having perused the documents on record, we find that the action of respondent No. 1 cannot be sustained. Section 179 of the Act undoubtedly authorizes the Department to recover unpaid tax dues of a private company from its directors, however, this is subject to certain legal requirements contained in the said provision. Section 179 reads as under:-

> "**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 non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

(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 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.]

4. In terms of sub-section (1) of Section 179, from every person who was a director of a private company during the time when the tax dues arose, such tax could be recovered from such director holding him jointly and severally liable for payment of such tax. However, the same cannot be recovered from him unless he proves that non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on his part in relation to the affairs of the Company. First requirement for application of sub-section (1) of Section 176, therefore, is that the tax dues in question could not be recovered from private company. Even if this requirement is satisfied, it is open for the concerned director to prove that such non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on his part in relation to the affairs of the company. On all these counts, therefore, the petitioner had a right to oppose and resist the proposal of the Assessing Officer.

5. In the show-case notice, it is not even averred that the dues of the company should not be recovered form the said Company and that therefore, the onus would be on the director to prove that the same could not be attributed to his gross neglect, misfeasance or breach of duty. The action of the Assessing Officer to order recovery of the unpaid tax dues of the company from the petitioner, thus, was without the foundation of the necessary facts in show-cause notice.

6. Further, in the context of establishing that such recovery cannot be attributed to his gross neglect, misfeasance or breach of duty, the petitioner had made a detailed representation. The Assessing Officer passed the order without considering such representation. When this was pointed out to him, he passed a further order describing it as one of the 'Corrigendum'. This was also impermissible. Without recalling the earlier order, his action to dispose of the petitioner's objections would amount to nothing more than post-decisional consideration.

7. Under these circumstances, both the orders dated 18.9.2018 and Corrigendum dated 8.3.2019 are set aside. The order of attaching the petitioner's bank accounts for such recoveries is also set aside.

8. We have not entered into the merits of the case and therefore, nothing stated in this order would prevent the Department from passing fresh order in accordance with law after issuing fresh show-cause notice to the petitioner. The Writ Petition is disposed of accordingly.

[S.J. KATHAWALLA, J.] **[AKIL KURESHI, J]**