* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 30.08.2012
DECIDED ON: 11.10.2012

W.P.(C) 5175/2012 & C.M. APPL. 10572/2012
W.P.(C) 2303/2012 & C.M. APPL. 4936/2012

SANJAY GHAI ……Petitioner
Through: Sh. Ashwani Taneja and Ms. Rani Kiyala, Advocates.

Versus

ASSTT. COMMISSIONER OF INCOME TAX & ORS.
…..Respondents
` Through: Ms. Rashmi Chopra, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

1. These writ petitions challenge the orders dated 3.11.2011 and 2.7.2012 passed by the first respondent under Sections 179/154/ of the Income Tax Act (the "Act") respectively.

2. The facts, to the extent necessary for the deciding the petitions, are that the petitioner is an individual and was a director of M/s Sarvodaya Realtors Pvt. Ltd (the "Company"), which has its registered office at New Delhi. The only other director of the company was late Shri D.K. Ghai, the petitioner's father. While the petitioner was assessed by DCIT Circle-1,

Dehradun, the company was assessed with the first Respondent. By letter dated 15.3.2010, the petitioner was informed by DCIT Circle-1, Dehradun that he was entitled to tax refund of Rs. 38,92,957/- and Rs. 15,00,276/- in respect of A.Y. 1999-2000 and 2003-2004. However, at the same time, he was intimated that the first Respondent had computed the outstanding tax liability of the company at Rs. 28,71,84,883/-, and proposed that the refund payable to the petitioner, be set off with the tax liability of the company. The writ Petitioner wrote a letter to the ACIT, Dehradun, on 23rd March, 2010, and inspected the record in Delhi; he claims that at this stage, he became aware of the Income tax liabilities of the company, and the order made against him on 14th November, 2007, under Section 179 of the Act. The petitioner felt aggrieved by the order and the move to recover the arrears of the company's taxes and related liabilities, from him. He preferred a writ petition before this Court. That petition was disposed of in the following terms:

> *"5. We have examined the said contentions. We have also looked at the quantum of demand and the legal issues raised by the petitioner. Keeping in view the aspects and questions raised, we feel that it will be appropriate and proper if the petitioner is given a hearing, and a fresh order under Section 179 of the Act is passed. There is a dispute regarding service of notice dated 27th September, 2007. The respondent in the counter affidavit has stated that Abhay Singh had informed that the petitioner was out of station and intimation may be sent to him by writing to him another letter. However, the respondent did not communicate or correspond with the petitioner thereafter. It may be noted that the notice was received by Abhay Singh on 11th October, 2007 at 12.30 pm and hearing was fixed on 15th October, 2007, i.e. just four days later. Therefore, no communication was made by the respondent to the petitioner fixing the hearing or calling for reply. On 14th*

November, 2007 order under Section 179 was passed. It is not clear and there is no material/evidence whether the order under Section 179 of the Act dated 14th November, 2007 was ever served on the petitioner. No steps for recovery were undertaken even after passing of the order. Keeping in view the aspects and questions raised, we feel that it will be appropriate and proper if the petitioner is given a hearing and a fresh order under Section 179 of the Act is passed.

6. Accordingly, the impugned order dated 14th November, 2007 is set aside with a direction that the petitioner or his authorized representative will appear before the Deputy Commissioner of Income Tax, Circle 7(1), New Delhi on 29th August, 2011 at 2 p.m. He shall also file his reply to the notice under Section 179 of the Act on the said date. If required and necessary, the Assessing Officer can grant further opportunity of hearing to the petitioner. However, the proceedings under Section 179 of the Act will be disposed of within three months from the first date of hearing..''

3. After the conclusion of the proceedings before the first Respondent, he made the impugned order dated 3.11.2011 holding the petitioner liable for the outstanding dues of Rs. 27,93,05,184/- of the company. It was held that the petitioner had not proved how he, the lone surviving director of the company, should not be treated as the assessee in default, and the whole amount should not be recovered from him in accordance with the provisions of Section 179(1) of the Act; furthermore, it was held that he was unable to show that the non-recovery of taxes cannot be attributed to gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

4. The Petitioner filed an application for rectification/amendment under section 154/155 of the Act. In these proceedings, the first Respondent, by the second impugned order dated 2.7.2012, enhanced the outstanding dues

of the company, and consequently, of the petitioner to Rs. 35,13,35,804/-. The increase was on account of interest due under section 234A and section 234B, and penalty leviable under section 271(1)(b)/(c) of the Act.

5. The petitioner contends that the outstanding dues of the company were in the form of interest and penalties. He contended that "*tax due*" under Section 179 does not include within its ambit interest and penalty. It is submitted that the language of the provision is clear, and has to be construed in its terms; the Act makes a clear distinction between taxes, penalties and interest, which are distinct liabilities. Learned counsel relied on the definition of "*tax*" under Section 2(43) of the Act. Further, reliance was placed on the decision of the Bombay High Court in *Dinesh T. Tailor v. Tax Recovery Officer* (2010) 326 ITR 85 (Bom*), H. Ebrahim & Ors. v. Dy. CIT & Anr.* (2011) 332 ITR 122 (Karn), *Harshad Shantilal Mehta v. Custodian* (1998) 231 ITR 871 (SC) and *Pratibha Processors v. Union of India*, (1996) 11 SC 101.

6. Ms. Rashmi Chopra, counsel for the revenue, on the other hand, urged that a purposive interpretation of Section 179 has to be adopted. It was urged that Section 179 is intended to shift the tax liability, in cases of such dues which are of a private company and have not been recovered, upon the directors of such private company, and that whatever is recoverable from the private company, inclusive of interest and penalties due, becomes recoverable at the hands of the directors. Every director, she pointed out, is jointly and severally liable, to pay all the dues, including penalties, and interest, unless it is proved that the non-recovery was not due to gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. It was emphasized that in the present case, the company had

only two directors, the petitioner, and his late father, and thus, there is no scope for the petitioner to escape the liability under Section 179 of the Act.

7. Counsel for the revenue relied on *Union of India and others v. Manik Dattatreya Lotlikar* 1988 172 ITR 1 (Bom) and the Kerala High Court in *Ratanlall Murarka and Ors. v. Income-tax Officer, "A" Ward and Ors.*, [1981]130ITR797(Ker) in support of the proposition that all tax arrears would be payable by a director, under Section 179 (1). It was also argued that a question of fact cannot be agitated in a writ petition and that whether the director, against whom proceedings for recovery of arrears of tax are initiated, has discharged the burden of proving that the non-recovery of the arrears of tax cannot be attributed to neglect, misfeasance or breach of duty on his part is a question of fact which should not be gone into in writ proceedings. The revenue relied on *Union of India v. Praveen D. Desai* (1988) 173 ITR 303 (Bom), *Sunderaraman (M.R.) v. CIT* (1995) 215 ITR 9 (Mad), and *Roop Chandra Sharma v. DCIT (Assessment)* (1998) 229 ITR 570 (All). It was, lastly, contended that Section 179 enacts a statutory presumption and places the burden on the director to prove that the non-recovery was not due to his gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. For this, reliance is placed on *Sunderaraman (M.R.) v. CIT* (1995) 215 ITR 9 (Mad) and the Gujarat High Court view in *Indubhat T. Vasa (HUF) v. ITO* (2006) 282 ITR 120 (Guj).

8. The principal question which has to be resolved by the Court in this case is the true ambit and scope of the provisions of Section 179. Section 179(1), as it exists at present, reads as:

> *"(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."

This provision, prior to its amendment, read as under:

"179. Notwithstanding anything contained in the companies Act, 1956 (1 of 1956), when any private company is wound up after the commencement of this Act, and ***any tax assessed on the company***, ***whether before or in the course of or after its liquidation, in respect of any income of any previous year 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."*

9. Section 2 (43) defines "tax":

"2. In this Act, unless the context otherwise requires, -

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(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 income-tax and super-tax chargeable under the provisions of this Act prior to the 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;"

10. There are, apart from Section 179 (1), several other provisions of the Act which cast liability upon specified individuals or entities, in the event the assessee, (either an individual, partnership firm or other entity or concern, etc) defaults in payment of its dues. Section 170 provides for succession to a business *"otherwise than on death"* and enacts that where an assessee, carrying on any business or profession is succeeded to by another, who continues the business or profession, the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession. The successor is to be assessed for the income of the previous year after the date of succession. Section 170 (3) says that when *"any sum payable"* under that Section in respect of the income of such business or profession for the previous year (in which the succession took place) up to the date of succession or for a previous year preceding that year, assessed on the predecessor, cannot be recovered from him, the Assessing Officer shall record a finding to that effect and *"the sum payable"* by the predecessor shall be payable by and recoverable from the successor. Thus, *"any sum payable"* necessarily carries a wider connotation than *"tax payable"*. Section 177 provides that where a business or profession is carried on has been discontinued or where an association is dissolved, the Assessing Officer has to make an assessment of the total income, as if no such discontinuance or dissolution had taken place, and all the provisions of this Act, including the provisions with respect to levy of a penalty or *"any other sum"* chargeable under the Act are to apply. Section 177 (3) mandates that every person who was, at the time of such

discontinuance or dissolution, a member of an association of persons and a legal representative of any such person who is deceased *"shall be jointly and severally liable for the amount of tax, penalty or other sum payable"*. This again is wider than what is provided for under Section 179 (1). Section 188A, prescribes that every person who was, during the previous year, a partner of a firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable along with the firm *for the amount of tax, penalty or other sum payable by the firm* for the assessment year. Section 189 too uses the same terms, i.e "amount" of tax, penalty or other sum payable in respect of a firm (while creating liability of every partner at the time of discontinuance or dissolution of a firm). Section 221(1) deals with an assessee who, in addition to the amount of arrears and the amount of interest payable under Section 220 (2) is made liable by way of penalty, to pay such amount as the Assessing Officer may direct. Hence, in the case of an assessee in default, Parliament has made a specific provision making such a person liable to pay tax and in addition thereto the amount of interest payable under sub-section (2) of Section 220 and penalty.

11. It is a sound canon of construction that when Parliament or the legislature creates duties or liabilities, the task of the Court is to carefully interpret the provisions as they are. As held in *Jumma Masjid v Kodimaniandra* AIR 1962 SC 847 (quoting *Vickers Sons and Maxim Ltd v Evans* 1910 AC 444):

> *"We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself"*

Thus, it has been sometimes held that the intention of the Legislature is to, primarily, be gathered from the language used in the statute, which in turn means that attention should be paid to what has been said as also to what has not been said. (See *Mohammed Alikhan v Commissioner of Wealth Tax* 1997 (3) SCC 511; *Institute of Chartered Accountants v Price Waterhouse* AIR 1998 SC 74). Another rule of interpretation which the Court has to keep in mind, in cases like the present is that when, in relation to the same subject matter, different expressions are used, in the same statute, there exists a presumption that the legislature intended such different use, and that the words are not to be used in the same sense. This was stated in *Commissioner of Income Tax v East West Import & Export (P) Ltd* AIR 1989 SC 836, in the following observations:

> *"..there has been no dispute before us that the requirement "if any such shares have been in the course of such previous year" would also apply to the last requirement "are in fact freely transferable by the holders to other members of the public". The only contentious aspect is as to whether "in the course of such previous year" would mean throughout the year or any part of it. There is no direct authority indicating the true meaning of this requirement in the Explanation one way or the other. The purpose of enacting s. 23A, as pointed out in Afro's case, was to control evasion of tax.*
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> *The Explanation has reference to the point of time at two places: the first one has been stated as "at the end of the previous year" and the second, which is in issue, is "in the course of such previous year". Counsel for the Revenue has emphasised upon the feature that in the same Explanation reference to time has been expressed differently and if the legislative intention was not to distinguish and while stating "in the course of such previous year" it was intended to convey the idea of the last day of the previous year, there would have been*

no necessity of expressing the position differently. There is abundant authority to support the stand of the counsel for the Revenue that when the situation has been differently expressed the legislature must be taken to have intended to express a different intention. 'Course' ordinarily conveys the meaning of a continuous progress from one point to the next in time or space and conveys the idea of a period of time; duration and not a fixed point of time. "In the course of such previous year" would, therefore, refer to the period commencing with the beginning of the previous year and terminating with the end of the previous year. If that be the meaning of the phrase "in the course of such previous year", it would necessarily mean that free transferability of the shares by the holders to other members of the public should be present throughout the previous year. Admittedly that was not the position in this case as transferability was acquired only on 26th of March, 1951." (emphasis added)

12. In *H. Ebrahim v. The DCIT and The Tax Recovery Officer*, [2011] 332 ITR 122 (KAR) relied on by the Petitioner, the Karnataka High Court, which dealt with the same issue that has arisen in the present petitions, held that:

"12. Whether the Nomenclature 'tax' would include the other two components namely the penalty as well as interest, fell for consideration before this Court in the case of ***Soma Sundarams (Private) Ltd. v. Commissioner of Income Tax Karnataka*** *reported in (1979) 116 ITR 620. Indeed in the said case Section 2(43) of the Income Tax Act fell for consideration before a Division Bench of this Court. It had an occasion to examine whether interest, penalty and fine, which are payable under the provisions of the Act can be termed as income tax, this Court decidedly stated that the component 'income tax' does not include payment of penalty as well as interest. Indeed Section 179 of the Act indicates that the Directors would be liable to pay the tax due in the case, where the company is unable to*

satisfy the demands and gross negligence, misfeasance and breach of duty are attracted. Thus, what is contemplated under Section 179 of the Act is the Tax component and not the penalty and interest Indeed Section 126 of the Act would relate to notice of demand, which clearly indicates that the entire sum due to the Revenue is classified into three different components i.e., tax, interest, penalty or any other sum, which would not necessarily come under Section 179 of the Act. Indeed this reference would be only to the Directors of the Company. With reference to Section 222 of the Act the assessee undoubtedly is liable to pay the tax, interest and penalty. But however, the same cannot be said about the Directors of the Company. Indeed whether tax would include penalty and interest fell for consideration before the Apex Court in the case of ***Prathibha Processors and Ors. v. Union of India and Ors.*** *reported in (1996)11 SCC 101. Indeed the said decision was rendered under the Customs Act but however, the words and phrases "interest", "tax" and "penalty" fell for consideration and the Apex Court has observed thus:*

> *"In fiscal statutes, the import of the words 'tax', Interest', penalty', etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty - which is penal in character."*

Having regard to the decisions referred to above in relation to the import of words 'tax' interest and 'penalty' which would

operate in different concepts, I am of the view that the said contention of Mr. Shankar is required to be accepted, inasmuch as, the phrase tax' as contemplated under Section 179 of the Act does not include penalty and interest insofar as the Directors of the Company are concerned. It is made clear that this interpretation of phrase 'tax' would not be' is under Section 179 of the Act and does not encompass the assessee. Indeed the Assessee as contemplated under Section 222 of the Act is liable to pay all the three components i.e., 'tax' 'interest' and 'penalty' and any other sum due or recoverable from him."

13. Earlier, the Bombay High Court, in *Dinesh T. Tailor* (supra) made a detailed analysis of the provisions of the Act, the effect of which has been discussed in the earlier part of this judgment, and after noticing the differing nature of the expressions, used by the Act, creating constructive liability, held that:

"7. ... Section 179(1) refers to "any tax due from a private company" and every director of the company is jointly and severally liable for the payment of "such tax", which cannot be recovered from the company. The expression "tax due" and, for that matter the expression "such tax" must mean tax as defined for the purposes of the Act by Section 2(43). "Tax due" will not comprehend within its ambit a penalty.

8. The provisions of the Act make a clear distinction between the imposition of a tax on the one hand and a penalty on the other. Section 2(43) defines the expression "tax" in relation to an assessment year commencing on 1 April 1965 and any subsequent assessment year to mean inter alia Income Tax chargeable under the provisions of the Act.

10. [W]here Parliament has intended to make a specific provision imposing a liability to pay penalty apart from the tax which is due and payable, a specific provision to that effect has been made. Section 179, which falls for interpretation in the present case imposes a joint and several liability upon a director of a private company where tax due from the company cannot be recovered. The expression "tax due" cannot

comprehend within the meaning of that expression a liability to pay a penalty that may have been imposed on the company."

14. In *Harshad Shantilal Mehta* (supra) The Supreme Court considered the provisions of Section 11(2)(a) of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, under which inter alia all revenues taxes, cesses and rates due from persons notified by the Custodian under Sub-section (2) of Section 3 to the Central Government or to any State Government or Local Authority have to be paid or discharged in full. The Supreme Court considered as to whether the expression "tax" under Section 11(2)(a) would include interest or penalty under the Income Tax Act, 1961. This question was answered in the negative:

"38. One other connected question remains: whether "taxes" Under Section 11(2)(a) would include interest or penalty as well? We are concerned in the present case with penalty and interest under the Income Tax Act. Tax, penalty and interest are different concepts under the Income Tax Act. The definition of "tax" Under Section 2(43) *does not include penalty or interest. Similarly, Under Section* 157, *it is provided that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. Provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. Learned Special Court judge, after examining various authorities in paragraphs 51 to 70 of his judgment, has come to the conclusion mat neither penalty nor interest can be considered as tax Under Section 11(2)(a). We agree with the reasoning and conclusion drawn by the Special Court in this connection."*

15. As far as the decisions cited by the revenue are concerned, the Court notices that none of them discussed, or analyzed the different expressions used, and varying liability cast on different classes of assesses, in event of

the principal or main assessee/defaulter, if one can use that expression. *Manik Dattatreya Lotlikar* held that the liability created is joint and several with that of the company; the High Court looked at the expression "assessee" under Section 2 (7) which includes an assessee in default. Therefore, held the High Court, a director would be an assessee deemed under Section 179; he has to satisfy all demands. *Ratanlal Murarka* too went by Section 2 (7) and was concerned with interest liability under Section 220 (2); the Court held that such non tax liability would have to be borne by the director of the company *"despite the distinction between tax and interest emphasised by counsel for the petitioner."* This court is of the opinion that the absence of any discussion about the different treatment given by Parliament to the same nature of liability, i.e. tax default of an assessee, in one instance only providing for recovery of tax, and in other cases all "amounts" or "sums" points to different nature and content of the same class of liability, which cannot be ignored. The said two decisions do not, therefore help the revenue.

16. As regards the second contention, there is no doubt about the principle that the High Court would not decide questions of fact, in proceedings under Article 226, and that whether the presumption of liability can be rebutted under Section 179 has to be gone into before the tax authorities. Nonetheless, the Court here has to deal with the assessee's fundamental argument that he is not liable to pay anything more than the tax (i.e. not liable to pay penalty or interest). A decision on that question falls within the legitimate scope of this Court's jurisdiction, as it implicates the authority of the revenue to collect such amounts from the petitioner. The objection of the revenue, is therefore, rejected as meritless.

17. In view of the above discussion, the Court is of the opinion that the structure and construct of the Act has consciously used different words to create constructive liability on third parties, in the case of default in payment of taxes by an assessee. The treatment of the same subject matter by using different terms – in some instances expansive and in others, restrictive, mean that the Court has to adopt a circumspect approach and limit itself to the words used in the given case (in the present case, "tax due" under Section 179) and not *"travel outside them on a voyage of discovery"* (*Magor & St. Mellons RDC v Newport Corporation* 1951 (2) All ER 839). Therefore, it is held that the petitioner cannot be made liable for anything more than the tax (defined under Section 2 (43)). The first respondent is consequently directed to determine the liability of the Petitioner, in the light of the finding; the impugned orders are therefore quashed. The writ petitions are allowed in the above terms, without any order on costs.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

OCTOBER 11, 2012