



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

+ **Writ Petition (Civil) No. 6531/1998**

% **Reserved on: 3rd October, 2013**
Date of Decision: 20th November, 2013

MOONGIPA SECURITIES LIMITEDPetitioner
Through Mr. Salil Aggarwal, Advocate.

Versus
ASSISTANT COMMISSIONER OF INCOME TAX &
WEALTH TAX ...Respondent
Through Mr. Anmol Sinha, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

Impugned notices/ communications/penalty orders passed by Assistant Income Tax Commissioner, Circle 7(4), New Delhi, direct Moongipa Securities Ltd, the petitioner to pay liabilities and dues of S.C. Mangal, (respondent No. 3, herein) under the Income Tax Act, 1961 (IT Act, for short) and Wealth Tax Act, 1957 (WT Act, for short). The petitioner disputes their liability to pay dues of the third respondent. The said respondent has not entered appearance and as per the facts pleaded, has migrated to United States of America.

2. The details of the dues claimed from the petitioner relating to and due and payable by S.C. Mangal are as under:-

Assessment Year	Statute	Order dated	On Account of	Amount (Rs)
1995-96	Income Tax Act	30 th March, 1998 30 th September, 1998	Tax Demand and penalty	7,99,430 Plus penalty



1991-92	Wealth Tax Act – Section 18(1)(c)	25 th March, 1998	Penalty	1,12,875
1992-93	Wealth Tax Act – Section 18(1)(c)	25 th March, 1998	Penalty	1,79,950

3. Revenue claim that they are entitled to recover said dues under I.T. Act and W.T. Act, payable by S.C. Mangal from the petitioner as the successor who has taken over the assets and liabilities of S.C. Mangal.

4. Contention of the petitioner is to the contrary and it is submitted that the petitioner had only taken over and acquired rights as a stock broker of Delhi Stock Exchange Association Limited pursuant to transfer of share certificates by S.C. Mangal in favour of the petitioner.

5. In order to decide the said contentions, necessary facts in brief may be noticed. One Sanjay Jain had filed civil suit No. 1950/1992 against S.C. Mangal and his wife. In the said civil suit, an application under Section 151 read with Order XXIII, Rule 3 of the Code of Civil Procedure, 1908, was filed. The compromise application records that without prejudice to the contentions, the defendants therein S.C. Mangal and his wife had agreed to transfer the brokerage business and attached business as member broker of the Delhi Stock Exchange Association Limited carried on in the name and style of M/s S.C. Mangal & Co. together with all assets and liabilities of the said business for a consideration of Rs.40 lakhs. S.C. Mangal Co. was sole proprietorship of S.C. Mangal. The application further provided



that defendants therein would sign share transfer forms, and any other applications to be given to Delhi Stock Exchange Association Ltd. for the transfer of said share and brokerage business of S.C. Mangal & Co. together with its assets and liabilities. As and from the date thereof, Sanjay Jain shall be exclusively entitled to all benefits and rights whatsoever attached to the said shares and the said brokerage business. Defendants therein would put Sanjay Jain in possession of all books of accounts, documents, and other assets of S.C. Mangal & Co. in his possession to assist Sanjay Jain in determining the correct and proper liabilities of the said business and also to enable him and his nominees with immediate effect to reopen, start and conduct business. Paragraph (e) of the said compromise and the said application reads as under:-

“e. The plaintiff shall be exclusively responsible to pay and discharge all proper liabilities of the said brokerage business conducted under the name and style of S.C. Mangal & Company.”

6. Pursuant to the application, statements of parties were recorded in the Court and a compromise decree dated 12th May, 1994 was passed. Delhi Stock Exchange Association Limited was also a party to the suit as defendant No. 4. The compromise decree clarified that Delhi Stock Exchange Association Limited was not a party to the compromise decree and that the question of membership interest would not be binding on the said defendant; the parties to the compromise shall move appropriately in the matter for transfer of membership. Subject to the aforesaid, the application was allowed and clause (e) became part of the binding decree, to which Sanjay Jain was a party.



7. The petitioner company was incorporated on 18th March, 19 for carrying on stock brokerage business on the Delhi Stock Exchange Association Ltd with Sanjay Jain as one of the Directors. On 8th August, 1994, petitioner company filed an application for admission as a corporate member of the said Stock Exchange in the prescribed proforma. Upon completion of formalities, on 6th February, 1995, the application was allowed and the shares originally belonging to S.C. Mangal and his wife were transferred in the name of the petitioner.

8. Contentions raised on behalf of the petitioner are required to be stated in seriatim:

(1) The Assessing Officer had not passed any order under Section 170(3) of the IT Act and without first adjudicating and passing an order under the said section, no recoveries could be made. An order under Section 170(3) of the IT Act was a pre-requisite and was also an appealable order under Section 246 of the IT Act before the Commissioner of Income Tax (Appeals). The Assessing Officer had, therefore, erred in initiating or pressing for recoveries of the dues of S.C. Mangal from the petitioner and even rejecting the objections, without first passing an order under Section 170(3) of the IT Act.

(2) The petitioner was not a successor and the tax liabilities payable by S.C. Mangal cannot be recovered from them for the following reasons:

(a) The petitioner had taken over and bought the trade and had agreed to pay the liabilities relating to trade and not personal liabilities of S.C. Mangal. Tax liabilities were personal liabilities. In



alternative, the liabilities of S.C. Mangal were quantified at Rs. lakhs and the petitioner was not liable to pay any tax beyond the said sum.

(b) There was time gap or difference between the date of decree and when the petitioner had taken over the business of S.C. Mangal & Co. The share in the Delhi Stock Exchange Association Limited was transferred in the name of the petitioner on 6th February, 1995 and thereafter Security and Exchange Control Board of India granted certificate of registration to the petitioner under Section 12 of the Securities and Exchange Board of India Act, 1992 and Regulation 6 of SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992 on 16th May, 1995. Subsequently, Delhi Stock Exchange Association Limited granted corporate permission to the petitioner on 25th May, 1995 under a different code. Thus, there was no succession of business.

(c) Liabilities created by the penalty orders under Section 271(1)(b) and (c) of the IT Act cannot be recovered from the petitioner as the penalty orders were passed against S.C. Mangal in his personal capacity and for personal lapses, after the compromise decree dated 12th May, 1995 and even after the petitioner was granted corporate membership on 25th May, 1995. The penalty orders under the IT Act were received on 5th October, 1998.

(d) There was no provision in the WT Act for recovery of dues from a successor. There was/is no equivalent provision or Section like Section 170(3) of the IT Act, in the WT Act.



(e) Penalty under Section 18(1)(c) of the WT Act was person Lapses or defaults were on the part of S.C. Mangal. Said penalty orders were received on 5th October, 1998 i.e. after the compromise decree dated 12th May, 1994 and 25th May, 1995, when the petitioner was granted corporate permission by Delhi Stock Exchange Association Ltd. Even if the penalty pertains to assessment years 1991-92 and 1992-93, the said liability cannot be recovered from the petitioner, assuming that the petitioner was/is a successor.

9. Simultaneously, we note and rejected the supplementary contention raised by the petitioner that the assessment/penalty order and order under Section 170(3) should be a singular or one order. It was submitted that the assessment order itself should determine and decide the question of succession. Reliance was placed on sub-section (1) and (2) to Section 170. For convenience, we reproduce sub-section (3) to Section 170 along with explanation to the said Section which is applicable and the same reads:-

“Succession to business otherwise than on death.

170.

(3) When any sum payable under this 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 the 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 thereafter be payable by and recoverable from the successor, and the successor shall be entitled to recover from the predecessor any sum so paid.

.....



Explanation.—For the purposes of this section, "income" includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession.”

The contention has to be noted and rejected, as it is clearly self-contradictory to contention No. 1 raised by the petitioner above. Sub-section (3) to Section 170 mandates and stipulates a specific order before an Assessing Officer proceeds under the said provision. This clearly indicates and stipulates contrary to the contention of the petitioner that the issue of succession must be dealt with and examined in the assessment or penalty order or the assessment or penalty order itself must decide whether Section 170(3) of the IT Act is applicable. An order under Section 170(3) was/is made appealable under Section 246 of the IT Act before the Commissioner of Income Tax (Appeals). It is not correct to propound and hold that no separate order under Section 170(3) could be passed by an Assessing Officer. Of course the Act does not bar/prohibit a common order.

10. The petitioner himself has contended and in our opinion rightly that in case an Assessing Officer feels that any sum payable in respect of income from business or profession which cannot be recovered from the predecessor for the year in which succession took place upto the date of succession or the year preceding it, then the Assessing Officer shall record a finding to that effect and the sum payable by the predecessor shall thereafter be payable and recoverable from the successor. Successor is, however, entitled to recover from the predecessor any sum so paid. Explanation to section 170(3) was introduced to get over the difficulty and the position in law expounded by the Supreme Court in *CIT vs. K.H. Chambers* (1965)



55 ITR 674. Scope of the Section by a deeming fiction now include any income or gain arising from the transaction in which succession of business or profession took place. Under the Income Tax Act, 1922, income or gain as a result of transaction resulting in succession was personal liability of the predecessor alone and could not be recovered from the successor. The explanation by deeming fiction now stipulates to the contrary.

11. In the present case, it was accepted by the counsel for the Revenue that no order under Section 170(3) has been passed by the Assessing Officer. It was however, submitted that the petitioner had filed objections and they have been dismissed by a speaking order of the Assessing Officer after notice for recoveries were served. Our attention was drawn to letter dated 31st August, 1998 written by the Asstt Commissioner of Income Tax and Wealth Tax to the petitioner rejecting the contention that the petitioner was not liable to pay the liabilities as untenable and holding that the liability was on account of business of S.C. Mangal. The said letter is not in the form of an order and on reading the said letter no one can assume that this was an order under Section 170(3) of the IT Act.

12. We would not like comment in detail on the contention of the petitioner that they are not successor of S.C. Mangal. Prima facie on reading of the documents of transfer i.e. the compromise application, agreement etc., the said contention does not appear to be correct. But we leave this issue open to be decided by the authorities i.e. the assessing officer when he passes an order under Section 170(3) of the Act.



13. In view of the aforesaid position, it is clear that recovery proceedings cannot be initiated against the petitioner for recovery of the dues under the IT Act without the Assessing Officer first passing an order under Section 170(3) of the IT Act. If and when any adverse order is passed by the Assessing Officer, the petitioner herein would be entitled to file an appeal as provided under Section 246 of the IT Act. We refrain from delving into the legal issues and contentions of the petitioner on the question of applicability of Section 170(3) of the IT Act or succession as these will have to be debated, considered and examined by the Assessing Officer at the first instance itself and then debated in the appellate proceedings. However, our observations above, or below on the question of nature and character of penalty for concealment under the WT Act, are relevant and to this extent will be binding on the Assessing Officer. In other words, the assessing officer will examine scope and ambit of Section 170(3) of the IT Act and decide whether penalty amount can be recovered from the successor under the said section, though the penalty order is subsequent to the date of succession. This brings us to the second issue regarding recovery proceedings on penalties initiated under the WT Act.

14. The penalty order under Section 18(1)(c) of the WT Act, was passed as noticed above sometime in the end of September/October 1999 (penalty order is undated but the petitioner claim that they received the penalty order on 5th October, 1998). The penalty order, it appears, refers to assessment proceedings under Section 16(5) of the WT Act which concluded on 20th March, 1998. It appears that wealth tax liability pursuant to the said order is not subject matter of



challenge in the writ petition and possibly the department does not seek to recover the dues from the petitioner herein. At this instance, we notice that the WT Act does not have any para materia or equivalent section as under the IT Act i.e. section 170(3) of the IT Act for recovery of dues of the predecessor from the successor. The contention of the Revenue, however, is that the petitioner had taken over the liabilities payable by S.C. Mangal and, therefore, under the common law recoveries can be made from the petitioner. No decision or ruling, however, has been relied upon to support the said proposition. The aforesaid proposition propounded by the revenue is not acceptable in terms of the ratio expounded by the Supreme Court in *State of Punjab v. Jullunder Vegetables Syndicate*, AIR 1966 SC 1295 and our ratio expounded in decision in Central Excise Act Reference No. 1/2011, Freezair India (P) Ltd. v. Commissioner of Central Excise, Commissionerate, Delhi-1. Moreover and importantly, issue has to be decided against the Revenue as the recoveries sought to be made in the present case are on account of penalty imposed under Section 18(1)(c) of the WT Act, which were passed after/post 12th May, 1995 thus the liability was created after the date of transfer. Similar is the position in respect of penalty order under Section 271(1)(c) of the IT Act, but the question of recovery has to be decided in terms of Section 170(3) of the IT Act.

15. It has been observed that penalty under Section 271(1)(c) or 18(1)(c) is additional tax and partake character of tax but the said principle cannot be expanded beyond reasonable limits and has its limitations. Liability to penalty does not arise merely upon proof of default. Penalty is imposed on failure to carry out the statutory



obligation and is normally considered to be quasi criminal in nature though mens rea or contumacious conduct may not be required. There is always an element of discretion as the authorities concerned have to act judiciously and on consideration of all relevant circumstances, decide whether or not to impose penalty. Penalty under the two provisions is not imposed automatically and is not mandatory. To this extent penalty proceedings are distinct from statutory liability of payment of tax which arises or accrues under the charging section and the adjudication proceedings only quantify the liability. Liability to tax is therefore different from the liability to pay penalty under section 18(1)(c) and 271(1)(c) of the WT Act and the IT Act respectively. Obligation and liability to penalty arises, when the penalty order is passed, and not before.

16. In *Jain Brothers vs. UOI* (1970) 77 ITR 107, the Supreme Court dealt with legality of levy of penalty under the (1961) IT Act with reference to a return filed under the earlier (1922) IT Act and observed that although penalty was regarded as an additional tax in certain facts and for certain purposes, it was not possible to hold that penalty proceedings were essentially continuation or proceedings relating to assessment where return was filed. Madras High Court in *Commissioner of Wealth Tax vs. V. Vardharajan* (1980) 122 ITR 1014 has observed that IT Act carries within it a dichotomy of treating the tax and penalty separately. In the said case, the question raised was whether penalty imposed under Section 18(1)(a) of the WT Act could be recovered from the legal heirs. Referring to the then applicable Section including Section 19 of the WT Act, it was observed that legal heirs were not liable as there was no relevant



corresponding provision in the WT Act as in Section 159(2)(b) of the IT Act. Reference was made to decision of Andhra Pradesh High Court in *Smt. Yawarunnissa Begum Vs. Wealth Tax Officer, A Ward* (1975) 100 ITR 645, wherein writ petition under Article 226 of the Constitution was allowed and notice for penalty issued to the legal heirs after the death of the assessee, was set aside. It was observed that the penalty could not be levied on the legal representatives of the deceased assessee for belatedly filing of return by the deceased assessee (There have been statutory amendments w.e.f. 1st April, 1989 but the effect of the said amendments need not be examined in the present decision as we are concerned with the proposition of law).

17. A Division Bench of Delhi High Court in *Commissioner of Wealth Tax vs. H.S. Chauhan* (2000) 245 ITR 704 again referred to provisions of Sections 14, 15, 17 and 19 of the WT Act as they existed and were applicable for the assessment years 1960-61 to 1971-72. It was held that these provisions have no applicability to proceedings relating to imposition of penalty against the legal representatives. The provisions as existed, penalty under Section 18 did not come under the ambit of Section 19 of the WT Act. It was further held that Section 159 of the IT Act had a clear prescription for continuation of proceedings for imposing penalty against the legal heirs but Section 19 of the WT Act was contextually different from sub-section (2) to Section 159 of the IT Act.

18. Jurisprudentially, the person is actionable and responsible for himself, for what he does and not for what others do or for events or acts of others. Family per se or a spouse is not actionable or responsible for other family members and for the spouse. Doctrine of



vicarious liability is not of general application and is applied in case of statutory crimes. (For detailed elucidation refer Central Excise Act. Reference 1/2011 Freezeair India (P) Ltd v. Commissioner of Central Excise Delhi-1). Normally, there are specific provisions in the statute which imposes an obligation which are invoked to fasten vicarious liability [see *P. N. P. Thulkarunai & Co. Vs. Director, Enforcement Directorate, Finance Ministry* (1969) 71 ITR 149 (Mad.)].

19. Bombay High court in *Controller of Estate Duty (Central), Bombay vs. N.H. Kotak* (1982) 134 ITR 256, had the occasion to consider the question whether penalty levied under the IT Act on a firm of which the deceased was a partner should be deducted in determining the value of the property passing on the death of the deceased. The debt, it was opined, means a sum of money which was now payable or would become payable in future by reason of a present obligation; *debitum in praesenti, solvendum in futuro*. Thus, the fact that the amount was to be ascertained does not make it any less a debt if the liability was certain. However, liability qua penalty arises only when an order imposing penalty stands/was passed by the appropriate authority. Until then, there was no liability whatsoever. Thus, liability to pay an amount by way of penalty cannot be equated or compared with tax liability which remains certain, though may be quantified at a later date. Whether or not penalty was to be imposed and the amount of penalty could be only ascertained and accrued for the first time when the penalty order was passed by the appropriate authority. Thus, liability on account of penalty was not a case of liability in *praesenti*. Such being the nature of liability of penalty, it



was not a debt which could be deducted. The aforesaid reason would equally be applicable to the liability of penalty under Section 18(i)(c) of the WT Act. The said liability was not in existence on the date of the compromise i.e. 12th May, 1994 and, therefore, it is not recoverable and cannot be fastened and forced upon the petitioner.

20. During the course of hearing, learned counsel for the petitioner has produced before us copies of two orders dated 27th August, 2013 passed by the Commissioner (Appeals) deleting penalties imposed under Section 18(1)(c) and 271(1)(c) in respect of assessment years 1991-92 and 1992-93 for penalty proceedings under the WT Act and assessment years 1995-96 for penalty proceedings under the IT Act. We express no opinion in that regard, as in the said decisions penalty has been quashed for technical reasons and the Revenue may have preferred appeals. Moreover, in the present writ petition, we are not concerned with the order of penalty but with the recovery of the penalty amount.

21. At this stage, we would like to deal with one contention of the petitioner that respondents should be prohibited and barred from passing any order under Section 170(3) of the IT Act as the demands in question relate to the assessment year 1995-96. We are not inclined to accept the said submission as the petitioner has filed this writ petition which has been pending since 1998. By order dated 11th November, 1999, the respondents 1 and 2 were restrained from making recovery from the petitioner of the demand raised against S.C. Mangal in respect of assessment years 1991-92, 1992-93 and 1995-96, subject to the petitioner furnishing security for the amounts in question to the satisfaction of the Assessing Officer. It was also



directed that the order will not preclude the appellate authorities from proceedings with the appeal stated to be pending.

22. The writ petition is accordingly partly allowed. It is directed that the penalty amounts under Section 18(1)(c) of the WT Act relating to assessment years 1991-92 and 1992-93 cannot be recovered from the petitioner. With regard to the income tax demand including penalty for the assessment year 1995-96, relating to S.C. Mangal, it is open to the respondents to initiate recovery proceedings after deciding the dispute by passing an order under Section 170(3) of the Act. While passing an order under Section 170(3), the assessing officer will decide whether penalty amount under Section 271(1)(c) of the IT Act can be recovered from the petitioner, even when the liability was determined subsequent to the date of succession. Petitioner, if aggrieved, by the said order will be entitled to file an appeal and question the same. The writ petition is disposed of. No costs.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

NOVEMBER 20th, 2013
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