



\$~

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

+ W.P. (C) 5590/2020 & CM APPL.20200/2020

SANJIV KUMAR MITTAL Petitioner
Through: Ms. Pritha Srikumar Iyer, Advocate
with Ms. Nikita Garg, Advocate.

versus

DEPUTY COMMISSIONER (TRC), CGST COMMISSIONERATE
DELHI SOUTH & ORS. Respondents
Through: Mr. Harpreet Singh, senior standing
counsel with Ms. Suhani Mathur,
Advocate for R-1 to 4.
Ms.Rashmi, Advocate for R-5.

Reserved on : 21st October, 2020

%

Date of Decision: 06th November, 2020

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

MANMOHAN, J:

1. Petitioner, who is a former Director of respondent no.6-company (hereinafter referred to as 'assessee-company'), is aggrieved by the attachment of his personal bank account by respondent-Service Tax Authorities towards recovery of dues from the assessee-company under the Finance Act, 1994 (hereinafter referred to as the 'Finance Act').



2. In the writ petition, it has been averred that the petitioner was appointed as an Additional Director of the assessee-company on 22nd August, 2014 and resigned in less than a year i.e. on 08th July, 2015.

3. It has further been averred that petitioner had agreed to his appointment as a Director in good faith and that too at the behest of his cousin, Mr. Ram Mohan Gupta, who was the founder Director of the assessee-company.

4. It is also stated in the writ petition that even prior to petitioner's appointment as an Additional Director the assessee-company was under investigation by the anti-Evasion branch of Service Tax, Delhi-I, Commissionerate. Subsequent to petitioner's resignation as a Director, a show cause notice dated 24th April, 2017 was issued to the assessee-company and the same was decided vide Order dated 08th August, 2018 whereby the Commissioner, CGST, Delhi South Commissionerate, confirmed the demand and recovery of service tax along with interest and penalties against the assessee-company.

5. It is averred that the attested copy of the aforesaid order in original dated 08th August, 2018 was returned undelivered with the remark "refused" by the assessee-company and subsequently two demand notices dated 21st May, 2019 and 08th November, 2019 were issued to the assessee-company through the petitioner in his capacity as its Director.

ARGUMENTS ON BEHALF OF PETITIONER

6. Ms. Pritha Srikumar Iyer, learned counsel for petitioner stated that, Mr. Ram Mohan Gupta, the founder Director of the assessee-company had



signed an affidavit dated 22nd November, 2019 wherein he had admitted that it was at his request that the petitioner was inducted as an Additional Director and that the petitioner was not responsible for the dues of the assessee-company.

7. She further stated that even though the petitioner had clarified that he was not involved with the assessee-company since 08th July, 2015 vide his letter dated 26th December, 2019, yet the respondent no.1 had issued the impugned letter/attachment order dated 08th June, 2020 under Section 87(b)(i) of the Finance Act read with Section 174(1) of the Central Goods and Services Tax, 2017 (hereinafter referred to as the 'CGST Act') for recovery of service tax determined against the assessee-company.

8. Learned counsel for the petitioner submitted that the impugned attachment order was beyond the purview of Section 87(b)(i) of the Finance Act as the said provision provides for a garnishee order i.e. attachment of funds of an assessee lying with third parties. According to her, the impugned attachment order was without jurisdiction inasmuch as there was no basis for proceeding against the petitioner personally while acting under Section 87(b)(i) of the Finance Act as there was no material to indicate that the funds in the petitioner's personal bank account were due and payable to, or held on behalf of, the assessee-company.

9. She also submitted that there was no provision in the Finance Act making Directors personally liable for the tax liabilities of a company or empowering the respondent-authorities to recover such liabilities of the company from the personal assets of its Directors.

10. She emphasised that under the statutory scheme relating to Service Tax as provided under the Finance Act, no proceeding was ever initiated



against the petitioner by issuing a show cause notice or otherwise and he was not even granted an opportunity to be heard before the impugned demand notices dated 21st May, 2019 and 08th November, 2019 or attachment order dated 08th June, 2020 were issued. She pointed out that even the show cause notice issued to the assessee-company had no reference to the petitioner in his personal capacity.

ARGUMENTS ON BEHALF OF RESPONDENT

11. Mr. Harpreet Singh, learned senior standing counsel for the respondent stated that the petitioner was a Director in the assessee-company i.e. M/s Unickon Real Estate Pvt. Ltd. between 22nd August, 2014 and 08th July, 2015, during which period, service tax investigations were continuing (having begun on 27th February, 2014) and the statements were recorded.

12. He submitted that being a Director in a Company, a person is deemed to have knowledge of the affairs of the same and a bald assertion that he took up Directorship “in good faith and was not actively involved” cannot be accepted.

13. He stated that it is not a matter of dispute that there is evasion of Service Tax by the assessee-company as confirmed by the Order-in-Original dated 08th August, 2018. He pointed out that the adjudication proceedings were conducted and held against the assessee-company, which would essentially mean recovery of dues from not only the assessee-company but also from the then Directors and Additional Directors – who are deemed to have played an active role in such evasion of Service Tax.



14. Mr. Harpreet Singh submitted that a vicarious liability is cast upon the Directors of the company to pay/deposit service tax with the Government exchequer. He stated that Section 87(b)(i) of Chapter V of the Finance Act as amended provides for a mode of recovery of any amount due to the Central Government.

15. He clarified that as the dues to the Government of India vide the Order-in-Original had attained finality, the recovery provisions of Section 87 of the Finance Act were applicable and they did not envisage any further or separate notice to the petitioner as being claimed.

16. Learned counsel for respondents stated that the impugned notice had been issued under Section 87(b)(i) of the Finance Act read with Section 174 of the CGST Act. He submitted that Section 174(2)(e) saves recovery proceedings of tax/fine/penalty allowing it to be initiated under the CGST Act and imposition thereof under the repealed Acts. Since Section 87(b)(i) was heavily relied upon by learned counsel for respondent, the relevant portion of the same is reproduced hereinbelow:-

“Section 87

Where any amount payable by a person to the credit of the Central Government under any of the provisions of this Chapter or of the rules made there under is not paid, the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned below:-

(a)

(b)(i) the Central Excise Officer may, by notice in writing, require any other person from whom money is due or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit



of the Central Government either forthwith upon the money becoming due or being held or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

17. Mr. Harpreet Singh repeatedly and vehemently emphasised that the Directors of a company and other persons in management are vicariously liable to pay/deposit service tax. In support of his submission, he relied upon Section 9AA of the Central Excise Act, 1944 [as made applicable to like matters of service tax under Section 83 of Finance Act], Section 89 of the current CGST Act and Section 168(2) of the Companies Act, 2013 which stipulate that a Director who has resigned shall be liable, even after his resignation, for the offences committed by the company during his tenure. Thus, according to him, the penal / statutory liability is deemed to have been imposed by a statute upon the petitioner in this case under Section 87 of Finance Act in line with Section 9AA of Central Excise Act, 1944 and proviso to sub-section (2) of Section 168 of the Companies Act, 2013.

COURT'S REASONING

A COMPANY AND ITS DIRECTORS ARE SEPARATE AND DISTINCT JURISTIC ENTITIES AND THIS DISTINCTION CANNOT BE JETTISONED UNLESS THERE IS A SPECIFIC STATUTORY PROVISION TO THE CONTRARY OR TILL A CASE FOR LIFTING OF THE CORPORATE VEIL IS MADE OUT

18. Having perused the paper book and having heard learned counsel for the parties, this Court finds that after completion of investigation, a notice was issued to the assessee-company, a separate legal entity, on 24th April,



2017 i.e. subsequent to the petitioner's resignation as its Director on 08th July, 2015.

19. Further, the assessment proceedings culminated by way of the Order-in-Original (for short 'OIO') dated 08th August, 2018 against the assessee-company alone.

20. It is well-settled that a company is a distinct juristic entity, separate from its Directors. In ***Bacha F. Guzdar, Bombay vs. Commissioner of Income Tax, Bombay, AIR 1955 SC 74***, the Supreme Court has held as under:-

"9. It was argued that the position of shareholders in a company is analogous to that of partners inter se. This analogy is wholly inaccurate. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders. In Halsbury's Laws of England, Vol. 6 (3rd Edn.), p. 234, the law regarding the attributes of shares is thus stated:

"A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate."

(emphasis supplied)

21. From the above extract, it is apparent that the distinction between a company and its Director cannot be jettisoned unless there is a specific statutory provision to the contrary or till a case for lifting of the corporate veil is made out.



SECTION 87(b)(i) OF THE FINANCE ACT PROVIDES FOR A GARNISHEE ORDER ONLY – i.e. PROVIDES FOR ATTACHMENT OF FUNDS OF AN ASSESSEE LYING WITH THIRD PARTIES. THERE IS NO PROVISION IN THE FINANCE ACT MAKING AN EX-DIRECTOR, EVEN IF HAVING KNOWLEDGE OF AFFAIRS OF THE COMPANY, VICARIOUSLY OR JOINTLY LIABLE FOR THE DUES OF THE COMPANY

22. Though Section 174(2) of CGST Act saves any duty or tax that is due or may become due under the repealed Act including Chapter V of the Finance Act, yet there is no provision in the Finance Act making the Directors personally liable for service tax liabilities of a company.

23. It is clarified that Section 89 of the current CGST Act is confined only to liabilities assessed under the CGST Act and cannot be used to fasten personal liability on Directors for company dues determined under the Finance Act. After all, no new liability can be fastened under the CGST Act for a period prior to its enactment as it does not have retrospective operation.

24. This Court is in agreement with the submission of learned counsel for petitioner that the impugned attachment order is beyond the purview of Section 87(b)(i) of the Finance Act as the said provision provides for a garnishee order only – i.e. provides for attachment of funds of an assessee lying with third parties. Accordingly, Section 87(b)(i) of the Finance Act does not entitle the revenue to attach personal bank accounts of a director like the petitioner, for recovery of dues of the assessee company, on the assumption that money is due or may become due from the Petitioner to the assessee company. This perspective is wholly misconceived, contrary to the basic tenets of liability of the Company law, discussed in the preceding paras.



25. We have also contrasted the provisions of the Finance Act and the Central Excise Act, to the extent the same are applicable to Service Tax with Section 179 of the Income Tax Act, 1961 and Section 18 of the Central Sales Tax Act, 1956, which for quick reference are reproduced hereinbelow:

A) Section 179 of the Income Tax Act, 1961:

“179. Liability of directors of private company in liquidation.

(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.”

B) Section 18 of the Central Sales Tax Act, 1956:

“18. Liability of directors of private company in liquidation.—
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 under this Act for any period, whether before or in the course of or after its liquidation, cannot be recovered, then, every person who was a director of the private company at any time during the period for which the tax is due 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.”

The aforementioned provisions firstly pertain to companies in liquidation and pertinently begin with a *non-obstante* clause. The said provisions specifically render a Director jointly and severally liable for tax dues assessed against private companies 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. However, there is no such provision *viz-a-viz* Service Tax and the absence thereof is determinative. Levy and collection of tax must be with the authority of law by virtue of Article 265 of the Constitution. Consequently, the impugned action against the petitioner is without jurisdiction.

26. In ***Sunil Parmeshwar Mittal vs. Deputy Commissioner (Recovery Cell), Central Excise, Mumbai & Ors., 2005 (4) Mah. LJ 837***, the Bombay High Court has held as under:-

“28. Thus, notices issued to the petitioners were not only in breach of principles of natural justice but the same were in violation of section 11-A of the Excise Act. At this juncture, it will not be out of place to mention that even under the provisions of the Companies Act the petitioners are not liable to discharge the liability of the company, if any, of which they were directors in the past. As soon as a company is incorporated, it constitutes an independent juristic person in the eyes of law as distinct from its members constituting it. Even private limited company consisting



of only two members has, nonetheless, a separate legal entity. It is entirely different from its members. From the date of its incorporation a company is endowed with certain special rights and privileges and, unlike the partnership firm or a Hindu undivided family, is not a mere aggregate of members. It can carry on business and can acquire and hold property in its corporate name and has other special advantages e.g. to contract with all its members and others. In short, it becomes a body corporate capable of exercising all functions of an incorporated company having a perpetual succession. It remains in existence, irrespective of the changes in its members, until it is wound up and dissolved under the provisions of the Companies Act. The characteristic of company limited by shares is that it enjoys the privilege of limited liability i.e. liability of its member is limited to the extent of the face value of the shares subscribed by each member and the amount remaining unpaid on them for the time being. Thus, considering effect of incorporation of a company and its independent juristic existence, a former director of the company cannot be held responsible for payment of the liabilities of the company in absence of any specific provision. No contrary provision to persuade us, not to take a view taken hereunder, was brought to our notice. In this view of the matter, we have no hesitation to hold and declare that petitioners herein cannot be held liable to pay outstanding dues of the central excise duty sought to be demanded from them. We, therefore, quash and set aside the impugned last demand notice dated 1st October, 2003 holding it to be without jurisdiction and without authority of law and make the rule absolutely in terms prayer clause (a) and (b) with no order as to costs.

Order accordingly.”

(emphasis supplied)

27. Consequently, in the absence of a specific provision and given a company's separate legal personality, the petitioner/ex-Director, even if having knowledge of affairs of the company, is not vicariously or jointly liable for the dues of the company. The onus of proof shall remain on the



department/respondents to show that a Director is personally liable for the dues of the company at the stage of issuing show-cause notice under Section 73 of the Finance Act.

SECTION 9AA OF THE CENTRAL EXCISE ACT, 1944 AND SECTION 168(2) OF THE COMPANIES ACT, 2013 DEAL WITH OFFENCES COMMITTED BY A COMPANY, WHICH IS DISTINCT FROM CIVIL LIABILITY TO PAY TAX

28. The reliance upon Section 9AA of the Central Excise Act, 1944 and Section 168(2) of the Companies Act, 2013 is untenable in law as these provisions deal with offences committed by a company, which is distinct from civil liability to pay tax.

THE IMPUGNED ORDER IS IN VIOLATION OF PRINCIPLES OF NATURAL JUSTICE

29. This Court is also of the view that any show cause notices issued to the assessee-company during the adjudication proceedings does not amount to notice to the petitioner in his personal capacity. Admittedly no notice was ever issued to the petitioner personally prior to the passing of the impugned demand notices dated 21st May, 2019 and 09th November, 2019 and/or the attachment order dated 08th June, 2020.

30. In fact, during the course of final hearing, this Court had put a pointed question to the Principal Commissioner, CGST, as to whether the respondents would like to give a fresh notice to the petitioner clearly mentioning as to how the petitioner was liable for tax dues of the assessee-company. However, the Principal Commissioner informed this Court that the department has no material against the petitioner other than the fact that he was a Director of the assessee-company.



31. Consequently, the impugned order is in violation of principles of natural justice.

32. This Court is further of the view that recovery cannot be selectively initiated against one of the Directors only i.e. the petitioner.

RELIEF

33. For the aforesaid reasons, the present writ petition is allowed without costs and the Demand notices dated 21st May, 2019 (Annexure P-5) as well as 08th November, 2019 (Annexure P-6) and attachment order dated 08th June, 2020 (Annexure P-11) are quashed. Any action taken by the respondents in pursuance to the impugned notices/order and OIO dated 08th August, 2018 against the petitioner are also set aside.

MANMOHAN, J

SANJEEV NARULA, J

NOVEMBER 06, 2020

rn/js

सत्यमेव जयते