(1984) 02 BOM CK 0072

Bombay High Court

Case No: Writ Petition No. 982 of 1980

Praveen D. Desai		APPELLANT
	Vs	
Income Tax Officer, Companies Circle-V(6), Bombay and others.		RESPONDENT

Date of Decision: Feb. 1, 1984

Acts Referred:

- Income Tax Act, 1961 - Section 179, 220(2)
- Taxation Laws (Amendment) Act, 1975 - Section 179

Citation: (1984) 41 CTR 368 : (1984) 149 ITR 187 : (1984) 17 TAXMAN 273

Hon'ble Judges: Bharucha, J

Bench: Single Bench

Judgement

Bharucha J.

1. The petitioner is a director of a private limited company called advent Corporation Pvt. Ltd. The company carries on the business of construction of buildings and the sale of flats therein

2. For the assessment year 1961-62 to 1968-69 the company contended that no profit arose upon the construction by if of buildings until the entire construction work was completed. This argument was rejected by the ITO and a percentage of the cost of work done during the relevant year was added on to the company''s income. The company thereafter went up to the Income Tax Appellate Tribunal. The Tribunal also rejected the appeals but made reference to this court, which are pending.

3. In the meantime, the petitioner was served with a notice to show cause why the arrears of Income Tax of the company should not be recovered from the petitioner under s. 179 of the I.T. Act, 1961. On April 10, 1979, the petitioner''s chartered accountants replied and submitted that the demand which had been raised had

been disputed and was pending before this court. The contention of the company that in the case of a builder, profits could not be arrived at and taxed on the basis of work-in-progress was reiterated. It was also submitted that the provisions of s. 179 could not be invoked because it was not proved that the non-recovery of tax was attributable to gross negligence, misfeasance or breach of duty on the part of the petitioner in relation to the affairs of the company.

4. On April 12, 1979, the ITO held the petitioner was personally liable for payment of the company''s taxes in the sum of Rs. 2,74,508. He held that a valid demand had been raised upon the company and was pending for a number of years. The company''s appeals up to the Tribunal had gone against the assessee. There was no provision in the I.T. Act, 1961, which stated that recovery of a valid demand should be postponed in the case of a disputed demand. Though it was felt not to be necessary, it was pointed out that the company had during the many years not cared to clear at least a major part of the disputed amount offering to pay be instalments. The plea of a personal hearing had to be rejected because it had been pointed out in the show-case notice under s. 179 that this would be the final opportunity. There was reason to believe that the plea for a personal hearing was only for gaining unwarranted time.

5. Pursuant to the order under s. 179, the Tax Recovery Officer attached certain properties of the petitioner. This petition filed on August 22, 1980, impugns the order under s. 179 and the attachments made pursuant thereto.

6. The first submission made on behalf of the petitioner must be upheld because it is covered in his favour by my judgment dated January 11, 1983, in Miscellaneous Petition No. 1432 of 1978 - M.D. Lotlikar Vs. R.C. De Desouza, Commissioner of Income Tax, Bombay City-V, . In that case the petitioner was a director of a private limited company. The tax liability determined in respect of the company for the assessment years 1964-65 and 1965-66 was not paid by the company. On September 17, 1976, the ITO passed an order under s. 179, as amended with effect from October 1, 1975, holding that the petitioner was liable for the arrears. The contention that was upheld was that there was nothing in s. 179, as amended by the Taxation Laws (Amendment) Act, 1975, with effect from October 1, 1975, which made its operation retrospective. The tax sought to be collected pertained to a period much prior to the coming into force of the Amendment Act. The petitioner could not be saddled with such tax liability under s. 179. The judgment in M.D. Lotlikar Vs. R.C. De Desouza, Commissioner of Income Tax, Bombay City-V, , squarely applies to the facts of this petition and as a ground for striking down the order under s. 179 and the attachments consequential thereon.

7. It was then contended on behalf of the petitioner that the ITO had not determined the precondition for the application of s. 179; the ITO had not even considered whether the petitioner had proved that the non recovery could not be attributed to any gross neglect, misfeasance or breach of duty on the petitioner''s

part in relation to the affairs of the company. It is the case of the company and of the petitioner that the profits in the case of a builder cannot be arrived at and taxed on the basis of work-in-progress. This is a contention which was agitated up to the tribunal and is now pending before this court in references under the I.T. Act, 1961. This was made clear to the ITO in reply to the show-cause notice. One would have thought that this was enough proof that the non-recovery could not be attributed to neglect or misfeasance or breach of duty on the part of the petitioner. The ITO in passing the order under s. 179 of the I.T. Act, 1961, has, however, not chosen to consider this aspect of the matter at all. It must, therefore, be held that the order is bad on this count also.

8. The petition is made absolute in terms of prayers (a) and (b), with costs.

9. Rule accordingly.