Tax dues couldn't be recovered from director if AO didn't make any efforts to recover it from company

Summary – The High Court of Gujarat in a recent case of Income Tax Officer, (the Assessee) held that provisions of section 179 can be invoked when any tax due from private company cannot be recovered from such company and, therefore, where Assessing Officer did not make any efforts for recovery of tax dues from company, question of inquiring with petitioner as a director of company to pay up said amount would not arise.

Facts

- The petitioner was a director of 'S' Ltd.. For the assessment year 2000-01, the Assessing Officer passed order of assessment, raising tax demand. Five more separate orders of assessment were also passed in case of the same company for the assessment years 1996-1997 to 1999-2000 and 2001-2002 raising different tax demands.
- On 22.3.2004, the Income Tax officer issued a notice to the assessee indicating that a tax demand of the said company for the assessment year 2000-2001 was still outstanding. He was the director of the company during the relevant period. He was asked to show cause why he should not be held personally liable for such recovery under section 179.
- The petitioner submitted his replies contending that he was merely a technical director of the company having no involvement in day to day affairs of the company and, thus, provisions of section 179 would not apply to him. He further submitted that he had already resigned from 'S' Ltd. in year 1996 itself.
- Another major objection raised by petitioner was that by virtue of section 43A of the Companies Act, 1956, since the company's turnover had crossed the threshold limit, the company would be a deemed public company.
- The Assessing Officer rejected the objections raised by the assessee and held him liable to pay tax demand in terms of section 179.
- On writ:

Held

- From a perusal of documents on record, following facts emerge :
  1. Notice under section 179(1) was issued only for recovery of tax due pertaining to assessment year 2000-2001.
  2. Without any further notice, the final order under section 179 was passed for recovery of dues of the company for all the years from 1996-1997 to 2001-2002.

- The recovery demand therefore, for the assessment years1996-1997 to 1999-2000 and 2001-2002 must fail on two counts. Firstly, there was no notice for recovery of such amounts. More

importantly, the only notice of show cause which was issued was dated 22.3.2004. The assessment orders of the said assessment years were passed on 27.2.2004. Thus within less than a month of passing of the assessment orders, the notice came to be issued.

- The first requirement of application of section 179 is that any tax due from a private company cannot be recovered from such company. When the Assessing Officer had and could not have made any efforts for recovery of such tax dues, question of inquiring with the petitioner as a director of the company to pay up the same amount or else be held liable under section 179, would not arise.
- The inquiry therefore, regarding the impugned order of the Assessing Officer would be confined to the demand for the assessment year 2000-2001.In this context one is unable to hold that the petitioner having already resigned from the position of a director in the year 1996, could no longer be held responsible under section 179. The undisputed facts which have come on record are that in the year 2003, the petitioner signed the return of the company as its director. In the year 2004, the petitioner filed appeals against the orders of assessment passed by the Assessing Officer for the assessment year 1995-1996 and onwards. Thus, even if one believes that the petitioner had tendered his resignation as a director, he continued to act as one. Neither the company nor the petitioner acted on such resignation.
- The crucial question however, is of the status of the company. As noted, the petitioner time and again contended before the Assessing Officer that the company had ceased to be a private company by virtue of provisions of section 43A of the Companies Act, 1956 the company having crossed the maximum threshold turnover limit and also by virtue of 25 per cent of its share capital being held by another company.
- It was open for the Assessing Officer to inquire into these aspects. The question raised by the petitioner was a mixed question of fact and law. If the facts as asserted by the petitioner were established, the legal implications flowing thereof must follow. The Assessing Officer however, brushed aside this contention and held that whatever be the status of the company for the purpose of the Companies Act, section179 would continue to apply.
- It was not a case of the Assessing Officer that the facts asserted by the petitioner were not correct or that for any other reason, the company had not become a deemed public company under section 46A of the Companies Act.
- Under the circumstances on this count, the petition is required to be allowed. However, it may be clarified that the petitioner's contention that merely being a technical director, section 179 would not apply to him cannot be accepted. Further, the view of the Assessing Officer is acceptable that duty is cast on the directors to establish that non-recovery was not due to any gross neglect, misfeasance or breach of duty on his part and in the present case, he produced no material to establish such facts. Nevertheless, when section 179 itself does not apply, question of seeking any recovery personally from the director would not arise.
- In the result, impugned order is quashed.