

Non-recovery of tax due of company couldn't be recovered from director without issuing SCN

Summary – The High Court of Gujarat in a recent case of Susan Chacko Perumal, (the Assessee) held that where a private company had unpaid outstanding tax dues, such dues could not be recovered from director of said company without giving her opportunity to prove that non-recovery of tax due against company could not be attributed to any gross negligence, misfeasance or breach of duty on her part in relation to affairs of company

Facts

- The assessee was a director of one MTLPL, a private company.
- The company had filed the return of income declaring total income of certain amount. Assessment under section 143(3) was framed.
- The assessment was set aside by Commissioner as time-barred. Notice of reopening was issued and order of reassessment was passed. The income of company was determined at higher amount and, the income-tax authorities held that the assessee company had to pay unpaid tax of certain amount. Penalty proceedings resulted into imposition of penalty under section 271(1)(c). On the premise that the company had not discharged such tax and penalty liabilities, the department chose to make recovery from the director of the company, for which it passed on order under section 179(1) seeking recovery of a sum by way of unpaid tax of the said company.
- In instant appeal, the assessee contended that before passing the impugned order, no show cause notice was issued. No other form of opportunity was granted to the assessee petitioner that why such recovery should not be made nor the order contains any ground why such recovery was necessitated from the director of the company. Thus, the said order was unjustified.

Held

- In the instant case, not even a single notice on record was found to be issued to any of the directors why order under sub-section (1) of section 179 should not be passed for whatever reasons that may be available at the command of the income-tax authority. The notices, which are referred to, are all issued to the company. These notices are in the form of recoveries or reminders of unpaid tax or penalty. None of these notices contain even a reference to any recoveries being made personally from the directors for the failure of the company to discharge its tax dues.
- This apart even the order under section 179(1) is completely silent on the requirements of the statute being satisfied.
- Perusal of the order would demonstrate total disregard of the authority towards the requirement of section 179(1) . He merely proceeds on the basis that the tax and penalty had not been paid so far and therefore, whole directors of the company shall be jointly and severally liable to pay the outstanding demands. He accordingly, ordered such directors to pay the said sum within ten days of

the receipt of the order. This order betrays certain misconception about the requirement of section 179(1). If one reads the order, it seems to be suggesting that the sole requirement of applicability of section 179(1) is that the tax dues of a private company have remained unpaid. To the later requirement of the same not attributable to any gross negligent, misfeasance or breach of duty on part of director in relation to the affairs of the company is totally lost sight of. The language used in sub-section (1) of section 179 may be in the negative covenant casting primary duty on the director to establish such facts, nevertheless, it is one of the essential requirements. The statute, at best, may be seen as giving rise to rebuttable presumption which is required to be rebutted by the concerned director. It does not, in any manner, provide for a deeming fiction, a natural and inevitable consequence or an irrebutable presumption. A director of a company would discharge his responsibility of establishing necessary facts only when he is put to notice that the authority proposes to pass order under section 179(1).

- In the result, the impugned orders under section 179(1) is set aside.