Reserved On : 02/09/2026
Pronounced On : 11/09/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO.6580 of 2016

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/-

and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI Sd/-

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Approved for Reporting	Yes	No
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AJAY SURENDRA PATEL
Versus
DEPUTY COMMISSIONER OF INCOME TAX

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Appearance:
MR S N SOPARKAR, SENIOR ADVOCATE WITH MR. JAIMIN R DAVE(7022) & MS MANVI A DAMLE for the Petitioner(s) No. 1
MR DEV D PATEL(8264) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. By way of the present petition under Article 226 of the Constitution of India, the petitioner has assailed the order dated 31.03.2016 passed under Section 179 of the Income Tax Act, 1961 (for short, “the IT Act”), whereby, in his capacity as a Director of Hirak Biotech Limited, he has been called upon to discharge the income-tax dues of the Company pertaining to Assessment Year (“A.Y.”) 2006-07.

2. The present writ petition was dismissed vide CAV judgement and order dated 23.02.2017. However, on an application filed for review being Misc. Civil Application No.1 of 2017, the said judgement was

recalled vide CAV IA order dated 28.09.2018, which was assailed by the Respondent authority by filing Special Leave Petition (Civil) No.9107 of 2019, which was dismissed by the Supreme Court vide order dated 05.04.2019 with clarification that any observations made in the judgment and order dated 23.02.2017 shall not be treated as expression of any opinion and this Court shall decide the petition on merits.

BRIEF FACTS OF THE CASE :

3. Hirak Biotech Limited ("the Company") was incorporated as a public limited company on 25.01.2005. At the time of its incorporation, the Company had three Directors, namely, Shri Pranav Amratlal Shah, Shri Pratik P. Shah and Mrs.Niketa B. Dave. The petitioner was subsequently appointed as a director of the Company on 20.03.2005 and continued to hold the said office until 05.09.2005, when he resigned from the directorship.

4. Subsequently, the Company was assessed to income tax for A.Y. 2006-07, pursuant to which additional tax liability of Rs.240.08 lakh was determined and a demand was raised against the Company. As the Company failed to discharge the said tax liability, proceedings under Section 179 of the IT Act were initiated against the petitioner in his capacity as a former director of the Company.

5. In furtherance thereof, a show-cause notice dated 11.10.2013 under Section 179 of the IT Act was issued to the petitioner, to which he submitted his reply vide letter dated 17.10.2013. Thereafter, an order dated 19.11.2013 came to be passed under Section 179 of the IT Act.

6. Thereafter, on 04.09.2014, the petitioner received a further notice under Section 179 of the IT Act calling upon him to discharge the outstanding tax dues of the Company, failing which coercive measures were proposed to be taken against him. The petitioner, through his consultant, submitted a reply dated 10.09.2014 seeking time to file an appropriate response. In response thereto, the petitioner was informed that his reply was required to be filed by 15.09.2014, failing which the respondent authority proposed to take steps for attachment of his bank accounts.

7. Aggrieved by the aforesaid notice, the petitioner approached this Court by filing Special Civil Application No.12861 of 2014, wherein he challenged the notice dated 04.09.2014, *inter alia*, on the ground that he was neither an authorised signatory nor involved in the affairs or business of the Company.

8. During the course of hearing of the said petition, the respondent authority produced a copy of the order dated 19.11.2013 passed under Section 179 of the IT Act. The petitioner thereafter sought amendment of the petition so as to challenge the said order as well, principally on the ground that the same had been passed in breach of the principles of natural justice.

9. The aforesaid petition came to be disposed of by this Court vide order dated 12.02.2015, whereby the order dated 19.11.2013 and the notice dated 04.09.2014 were quashed and set aside. The Court interfered with the said order and notice on the ground that they were issued / passed without affording the petitioner an adequate opportunity of

hearing. The respondent authority was accordingly directed to undertake the proceedings afresh and pass an appropriate order after affording due opportunity of hearing to the petitioner.

10. Pursuant to the aforesaid directions, the respondent authority issued a fresh show-cause notice dated 19.06.2015 under Section 179 of the IT Act. The petitioner submitted a detailed reply thereto vide letter dated 24.07.2015, contending, *inter alia*, that he had never been a shareholder of the Company, that he was neither an authorised signatory nor was he involved in the affairs or management of the Company, and that he had ceased to be a director thereof w.e.f. 05.09.2005.

11. During the course of the proceedings, the respondent authority called for various particulars and documents from the petitioner from time to time. The petitioner duly cooperated with the proceedings and furnished the information and documents sought by the respondent authority.

12. Ultimately, the respondent authority passed the impugned order dated 31.03.2016 under Section 179 of the IT Act, holding the petitioner liable for the outstanding tax dues of the Company. The petitioner has challenged the said order, *inter alia*, on the ground that the respondent authority failed to appreciate that the Company's default in discharging its tax liability could not, in the facts and circumstances of the case, be attributed to any gross neglect, misfeasance or breach of duty on the part of the petitioner.

<u>SUBMISSIONS ON BEHALF OF THE PETITIONER</u>:

13. Learned Senior Advocate Mr.S.N.Soparkar, appearing for the petitioner has submitted that the impugned order is wholly without jurisdiction, inasmuch as the essential conditions precedent for invoking Section 179 of the IT Act are not satisfied in the present case. It is submitted that before fastening liability upon a director under Section 179 of the IT Act, the respondent authority is required to establish, firstly, that the company in default is a private company within the meaning of the statutory provision and, secondly, that the tax due from such company cannot be recovered and that such non-recovery is attributable to the gross neglect, misfeasance or breach of duty on the part of the concerned director.

14. At the outset, learned Senior Advocate has submitted that the impugned order is liable to be quashed and set aside on the fundamental ground that Hirak Biotech Limited was incorporated as a Public Limited Company and, therefore, the very jurisdictional foundation for invoking Section 179 of the IT Act is absent. It was submitted that the power conferred under Section 179 of the IT Act can be exercised only in respect of a private company and cannot be extended to a public limited company by merely attributing to it certain characteristics of a private company.

15. With regard to the status of the Company, learned Senior Advocate submitted that the findings recorded by the respondent authority to the effect that the Company possessed the characteristics of a private limited company are factually incorrect and legally unsustainable. It was submitted that the respondent authority proceeded on the erroneous

premise that there were restrictions on the transfer of shares and that the Company was prohibited from inviting the public to subscribe to its shares or debentures, or from inviting or accepting deposits from persons other than its members, directors or their relatives. According to the learned Senior Advocate, none of the statutory attributes relied upon by the respondent authority were established against the Company.

16. Learned Senior Advocate further submitted that the respondent authority fell into serious error in lifting the corporate veil for the purpose of treating a company incorporated as a public limited company to be a private limited company. It was submitted that the Company and its directors constitute distinct legal entities, and the corporate personality of a company cannot ordinarily be disregarded except in well-recognised and exceptional circumstances. Such circumstances may arise, *inter alia*, where the statute expressly permits the corporate veil to be lifted or where the material on record establishes that the corporate structure has been deliberately employed as a device to perpetrate fraud or defeat the interests of the Revenue.

17. In the facts of the present case, learned Senior Advocate submitted that none of the circumstances warranting lifting of the corporate veil is either pleaded or established on record. It was submitted that the IT Act contains no express provision authorising the respondent authority to disregard the corporate personality of the Company for the purpose of determining whether a public limited company is, in substance, a private company. The respondent authority, therefore, could not have assumed jurisdiction under Section 179 by disregarding the Company's admitted status as a public limited company.

18. Without prejudice to the aforesaid contention, learned Senior Advocate submitted that even on the second jurisdictional requirement under Section 179 of the IT Act, the impugned order cannot be sustained. It was submitted that the respondent authority has failed to establish any nexus between the alleged non-recovery of the Company's tax dues and any gross neglect, misfeasance or breach of duty attributable to the petitioner.

19. First and foremost, it was submitted that the petitioner was a director of the Company only for a very brief period. The petitioner was appointed as a director on 20.03.2005 and resigned from the said office on 05.09.2005. The said fact is borne out from Form No. 32 filed with the Registrar of Companies, a copy whereof was duly produced before the respondent authority during the proceedings. It was, therefore, submitted that the petitioner had ceased to be a director much before the relevant assessment proceedings and could not, merely by reason of his having held the office of director for a limited period, be saddled with liability for the subsequent non-recovery of the Company's tax dues.

20. It was further submitted that the respondent authority has failed to consider the aforesaid Form No.32 in its proper perspective. Despite the document having been produced before the authority, there is no meaningful consideration or discussion thereof in the impugned order. The omission assumes significance, particularly when the petitioner's liability under Section 179 of the IT Act was sought to be founded upon his status as a director.

21. Secondly, learned Senior Advocate submitted that the petitioner had, in fact, never participated in the management or day-to-day affairs of the Company. He was neither a signatory to any contract executed by the Company nor a participant in its business affairs. He did not attend any meeting of the Board of Directors, nor did he sign any board resolution. He was not authorised to operate the Company's bank accounts or to sign cheques on its behalf. It was further submitted that even the return of income of the Company was not signed by the petitioner.

22. Thirdly, learned Senior Advocate submitted that the affairs and management of the Company were, in fact, conducted by Shri Pratik P. Shah, one of its directors and promoters. In support of this submission, the petitioner had produced before the respondent authority an affidavit of Shri Pratik P. Shah, wherein he unequivocally acknowledged that he was responsible for the management and conduct of the Company's affairs and that the petitioner had no involvement therein.

23. It was further submitted that the aforesaid material was not duly considered by the respondent authority. The respondent authority appears to have discarded the affidavit merely on the ground that Shri Pratik P. Shah had not remained present at the time of hearing. Learned Senior Advocate submitted that such an approach was wholly erroneous, particularly when the affidavit constituted relevant material bearing directly upon the question whether the petitioner had any role in the management or conduct of the Company's affairs.

24. As regards the petitioner's alleged shareholding, learned Senior Advocate submitted that the petitioner could not have been held liable

under Section 179 of the IT Act merely because a substantial percentage of shareholding was attributed to him during a brief period. It was submitted that the Company was incorporated on 25.01.2005 with three directors, namely, Shri Pranav Amratlal Shah, Shri Pratik P. Shah and Mrs.Niketa B. Dave. The petitioner was subsequently appointed as a director on 20.03.2005. Thereafter, 29,50,000 shares of the Company were subscribed by Fortune Gilt Private Limited, through the petitioner, and the said investment was duly reflected in the books of account of the Company.

25. Learned Senior Advocate further submitted that the shares in question were not held by the petitioner in his individual capacity. The shareholding was in the name of Fortune Gilt Private Limited, of which the petitioner was a Director. Consequently, the respondent authority's description of the petitioner as personally holding 98% of the shares is factually incorrect and cannot constitute a valid basis for fastening liability upon him under Section 179 of the IT Act.

26. It was also submitted that the Company had several other shareholders who were wholly unconnected with the petitioner. The existence of such independent shareholders itself belies the respondent authority's theory that the Company was a mere "one-man show" of the petitioner or that its corporate structure was, in substance, that of a private company.

27. Furthermore, learned Senior Advocate submitted that the respondent authority has selectively relied upon the shareholding pattern prevailing during the initial period of incorporation while completely

overlooking the shareholding position in the immediately succeeding financial year i.e. F.Y. 2006-07. The petitioner was shown to have held approximately 98% of the shares only for a brief period immediately following the incorporation of the Company, which was merely a consequence of the timing of the subscription of shares. In the immediately succeeding financial year, the shareholding attributed to the petitioner stood at approximately 30%, which by itself demonstrates that the alleged 98% shareholding was neither permanent nor reflective of any continuing control over the Company.

28. Thus, learned Senior Advocate submitted that the respondent authority's conclusion that the Company was effectively a one-man concern controlled by the petitioner is contrary to the material on record and rests upon an erroneous appreciation of the Company's incorporation status, shareholding pattern and the petitioner's actual role in its affairs. Mere status as a Director, or even the holding of a substantial percentage of shares for a limited period, cannot by itself satisfy the statutory requirement of establishing gross neglect, misfeasance or breach of duty so as to attract Section 179 of the IT Act.

29. In support of his submissions, learned Senior Advocate Mr.S.N.Soparkar, has placed reliance on the decision of the Supreme Court in the case of <u>M.Rajamoni Amma and Another vs. Deputy Commissioner of Income-tax (Assessment) and Others</u>, [1992] 195 ITR 873 (SC).

30. While referring to the decision of this Court in the case of <u>Radhey Mohan Sharma vs. Deputy Commissioner of Income Tax (OSD)</u> [passed

in Special Civil Application No.1921 of 2005, dated 12.02.2014]. It is contended that it is not mandatory or compulsory to lift the corporate veil in each and every case involving the directors of a private limited company or a public limited company in order to invoke the provisions of Section 179 of the IT Act.

31. While referring to the decision of this Court in the case of <u>Ram Prakash Singeshwar Rungta vs. Income Tax Officer</u>, [2015] 59 taxmann.com 174 (Gujarat), which has been followed in subsequent decisions, learned Senior Advocate Mr.Soparkar has submitted that this Court, while construing the provisions of Section 179(1) of the IT Act, has held that the provisions of this section can only be invoked against the directors if it is proved that there was gross neglect, misfeasance, or breach of duty on their part in the non-recovery of the dues of the company. He submitted that the respondent authority, while passing the impugned order, have not recorded satisfaction on these three factors.

32. Reference is also made to the decision of this Court in case of <u>Pravinbhai M. Kheni vs. Assistant Commissioner of Income Tax, Central Circle-2&2</u>, (2012) 28 taxmann.com 111 (Gujarat) and has submitted that the reliance placed by the respondent, while passing the impugned order on this decision is misconceived, since the facts of the case disclose that the assessees and the Directors of the public limited company had formed the company for their personal gains in order to utilize the funds, assets of the public limited company for their own benefit, for creation of the huge assets in their own name, and all the directors and shareholders were members of the family and such the public limited company was used as

a conduit for generating unaccounted wealth, which is missing in the present case.

33. While referring to the assessment order of the company, Hirak Biotech Limited, it is submitted that the same does not in any manner reflect that the company was formed for providing accommodation entry. He has submitted that the assessment order refers to the inadmissible expenses under Section 40(a)(ia) of the IT Act, which refers to the deduction of TDS but not depositing in the government and accordingly, such expenses have been disallowed by the Assessing Officer. Further, it is submitted that the claim of depreciation is held to be wrong and excessive and has been disallowed. He has also submitted that the assessment order also deals with unexplained investment in fixed assets and the cash credit which is deposited after the petitioner had resigned as a Director.

34. Thus, it is urged that the receipt of money in cash by the company cannot be held against the petitioner, since the Revenue has failed to examine or give a finding to that extent that such amount has been utilized by the petitioner for his personal gains.

35. It is also submitted that the assets were sold in the year 2009, which cannot be attributed to the petitioner as it was beyond his tenure as a Director, as he resigned on 05.09.2005.

<u>SUBMISSIONS ON BEHALF OF THE RESPONDENT</u>:

36. In response to the petition, an affidavit-in-reply came to be filed on behalf of the respondent authority. It was submitted that, though Hirak Biotech Limited was incorporated and registered as a public limited

company, the factual circumstances surrounding its incorporation, shareholding and management warranted lifting of the corporate veil for the purpose of determining the petitioner's liability under Section 179 of the IT Act.

37. With regard to the shareholding pattern, it was submitted that, upon the petitioner being inducted as a director of the Company on 20.03.2005, he subscribed to 29,50,000 equity shares out of the total 30,00,000 shares of the Company. The remaining 50,000 shares were held by the other promoters/directors, namely, Shri Pratik P. Shah, who held 44,000 shares, and Ms. Niketa B. Dave, who held 1,000 shares, along with the remaining shareholders. Thus, according to the respondent authority, there was a period during the relevant financial year when the petitioner held approximately 98.33% of the total shareholding of the Company.

38. It was further submitted that, upon lifting the corporate veil, the actual nature and functioning of the Company became apparent. According to the respondent authority, as on 31.03.2005, the share capital of the Company in the form of equity shares was only Rs.5,00,000/-. However, upon the induction of the petitioner as a director, the share capital of the Company increased substantially to approximately Rs.7 crore, predominantly by way of equity shares held through the petitioner. Out of the total 30,00,000 equity shares, 29,50,000 shares were attributed to the petitioner, while the remaining shares were held by other persons who were either directors or beneficiaries.

39. On the basis of the aforesaid circumstances, the respondent authority submitted that the Company was, in substance, completely

controlled and managed by the petitioner and was effectively a “one-man show”. It was further contended that the public was not substantively involved in the affairs or ownership of the Company and that, notwithstanding its registration as a public limited company, its actual constitution and functioning bore the characteristics of a private company.

40. As regards the statutory provision, it was submitted that Section 179 of the IT Act fastens joint and several liability upon every person who was a director of a private company at any time during the relevant previous year in respect of the tax due from such company, unless such director establishes that the non-recovery of the tax cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

41. In the aforesaid context, the respondent authority submitted that the petitioner could not absolve himself of liability merely on the ground that he was not aware of the tax demand at the time when it came to be raised. According to the respondent authority, the petitioner, having held approximately 98% of the shareholding during the relevant period, exercised substantial control over the Company and, therefore, could not disclaim responsibility for its tax liability merely by relying upon the Company's status as a public limited company.

42. With regard to the petitioner's contention that he was neither an authorised signatory nor involved in the day-to-day affairs of the Company, learned Senior Standing Counsel appearing for the respondent authority submitted that such a contention was wholly untenable. It was

submitted that a person holding more than 98% of the shareholding of a company could not reasonably contend that he had no involvement in its affairs. According to the respondent authority, the appointment of another person as an authorised signatory, despite the petitioner's alleged substantial control over the Company, was itself indicative of an arrangement intended to conceal the petitioner's actual role and thereby constituted a circumstance warranting lifting of the corporate veil.

43. It was further submitted that the aforesaid arrangement constituted a device adopted by the major stakeholder, namely, the petitioner, to defeat the legitimate interests of the Revenue. On that basis, the respondent authority contended that the petitioner's conduct, as a director during the relevant period, amounted to gross negligence in relation to the discharge of the Company's tax liability.

44. Learned Senior Standing Counsel for the respondent authority also submitted that the petitioner could not seek to avoid liability by contending that Shri Pratik P. Shah was exclusively looking after the affairs of the Company. According to the respondent authority, if the petitioner was in fact holding approximately 98% of the shareholding, he could not have remained completely oblivious to the manner in which the Company was being managed. It was submitted that the petitioner's failure to raise any objection before any forum against the manner in which Shri Pratik P. Shah was conducting the affairs of the Company demonstrated that the petitioner had extended his support to the management of the Company.

45. Turning to the Company's dealings with the general public, learned Senior Standing Counsel for the respondent authority submitted that, although the Company was registered as a public limited company, it had not issued its shares to the general public for subscription. According to the respondent authority, substantially all the shares during F.Y. 2005-06, relevant to A.Y. 2006-07, were held by the petitioner, which demonstrated that the Company did not, in substance, have any meaningful public participation.

46. It was further submitted that the Company had also alienated a substantial portion of its immovable properties, including properties which were subsequently dealt with by the bank and the Department, leaving the Revenue with no effective avenue for recovery by way of attachment of the Company's remaining assets. According to the respondent authority, these circumstances further demonstrated the necessity of proceeding against the petitioner under Section 179 of the IT Act.

47. Finally, learned advocate for the respondent authority submitted that the mere description of the Company as a “public limited company” in its certificate of incorporation could not, in the facts of the present case, be regarded as conclusive of its true character and functioning. It was contended that the petitioner had deliberately caused the Company to be incorporated with the description of a public limited company, whereas, in substance, its affairs and shareholding were structured in a manner characteristic of a private company. The respondent authority, therefore, submitted that the corporate veil was rightly lifted and that the petitioner, being a director during the relevant previous year and

exercising substantial control over the Company, was liable for the outstanding tax dues under Section 179 of the IT Act.

ANALYSIS AND OPINION :

48. We have heard learned advocates appearing for the respective parties.

49. The following facts are established from the record:

(A) The company - Hirak Biotech Limited, was incorporated on 25.01.2005 as a public limited company.

(B) Initially, three directors, namely Shri Pranav Amratlal Shah, Shri Pratik P. Shah and Mrs.Niketa B. Dave, were the Directors.

(C) On 20.03.2005, the petitioner herein was introduced as a Director of Hirak Biotech Limited and he continued to remain as a Director of the said company till 05.09.2005, the day on which he resigned.

(D) For the A.Y. 2006-07, the assessment of the company was undertaken and it appears that under the assessment proceedings, additional income tax of Rs.240.08 lakhs was assessed in the hands of the company and demand was raised.

(E) A show cause notice under Section 179 of the IT Act dated 11.10.2013 was served upon the petitioner, to which he replied vide letter dated 17.10.2013. On 04.09.2014, he was called upon to pay the outstanding tax dues of the company. The petitioner replied to the same.

50. On 15.09.2014, the petitioner preferred a writ petition, being Special Civil Application No.12861 of 2014, challenging the notice dated 04.09.2014.

51. During the pendency of the petition, the respondent passed an order dated 19.11.2013 passed under Section 179 of the IT Act, which was also challenged by amending the writ petition.

52. By the order dated 12.02.2015, this Court quashed and set aside the order dated 19.11.2013 and notice dated 04.09.2014, and remanded the matter to the respondent to pass fresh order.

53. This Court has reserved liberty in favour of the respondent to examine the status of the company, whether it is a private limited or public limited, by lifting of the corporate veil, and thereafter to take steps, if any available, in accordance with law under Section 179 of the IT Act.

54. Thereafter, the petitioner was issued show cause notice on 19.06.2015 under Section 179 of the IT Act, to which the petitioner filed his reply on 24.07.2015. Ultimately, the respondent passed an impugned order dated 31.03.2016 under Section 179 of the IT Act.

55. During the financial year 2005-06 and during the period the petitioner acted, as a Director, he was having 98% shareholding.

56. The petitioner is roped in in the proceedings under Section 179 of the IT Act primarily for the reason that after the petitioner was inducted as an Additional Director of the Company, he subscribed 29,50,000 shares out of this total shares held by the company at 30 lakhs and remaining 50,000 shares were held by the Promoters / Directors of the Company, that is Shri Pratik P. Shah, Mrs.Niketa B. Dave and hence, it is alleged that the petitioner was owning 98.33% shares during the year under consideration and hence, by applying the principles of lifting of

corporate veil, the public limited company Hirak Biotech Ltd., in fact, was a private limited company.

57. It is also alleged that as on 31.03.2005, the share capital of Hirak Biotech Limited in form of equity share was only Rs.5 lakh, but on induction of the petitioner as a Director, the share capital of company increased to Rs.7 crores. Thus, it was alleged that the company was fully controlled and managed by the petitioner, as he had substantial shareholding in the company and it was a one-man show and as per the provisions of Section 3(1)(iii) of the Companies Act, 1956 the public limited company Hirak Biotech Limited is held to be a private limited company.

58. From the impugned order, it is also noticed by us that the respondent has also questioned the disposal of the assets of the company vide transfer deed dated 25.02.2009.

59. It is case of the respondent Revenue that despite making honest and sincere efforts to realize the demand, since none of the Directors co-operated, it was necessary to invoke the provisions of Section 179 of the IT Act against the Directors including the present petitioner, as there has been gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company in payment of taxes.

60. While passing the impugned order, the respondent has relied upon the statement of one of the directors - Shri Pratik P. Shah, which was recorded on 01.05.2013, wherein he has explained the *modus operandi* to provide accommodation entries. The entire reply has been incorporated in

the impugned order, and ultimately, it has been concluded by the respondent authority that the company was formed only to provide accommodation entries in the form of bogus share capital and share premium, which satisfies the directions issued by this Court vide judgment dated 12.02.2015.

61. It is not in dispute that the petitioner was never called upon in the show cause notice to deal with the statement of Shri Pratik P. Shah, on which the reliance is placed by the respondent to conclude that the company was formed only to provide accommodation entries. The assessment order dated 29.12.2008 also does not whisper about the allegations that the unexplained introduction of share capital and cash credit were only made for providing accommodation entries. Hence, on this count, the impugned order suffers from violation of principles of natural justice, and non-application of mind since the petitioner was never called upon to deal with the statement of Shri Pratik P. Shah.

62. Additionally, at this stage, we may refer that, in fact, Shri Pratik P. Shah had filed an affidavit dated 23.07.2015, which was produced by the petitioner, in which he has not whispered about the accommodation entries. The said affidavit has been discarded by the respondent for the reason that Shri Pratik P. Shah did not appear before him. Thus, on one hand, the respondent has placed reliance on the statement of Shri Pratik P. Shah recorded on 01.05.2013 for holding against the petitioner that the company was formed to provide accommodation entries, whereas the affidavit sworn by Shri Pratik P. Shah, which was produced by the petitioner before the respondent clarifying that neither he nor the director of the company has diverted the funds received from the debtors, etc. has been ignored.

63. We may now deal with the primary reason cited by the respondent for invoking the provisions of Section 179 of the IT Act. At this stage, we may notice the statutory provisions contained in section 179 of the IT Act which reads as under:

> *"**Liability of Directors of Private Company** :*
>
> *179. [(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,]"*

64. It is the case of the respondent that the petitioner, when he was a Director and for the year under consideration, was holding a shareholding capacity of 98.33%, and after his induction as a Director in the company, the share capital increased from Rs.5 lakhs to Rs.7 crores. On this count, the status of the company as a public limited company has been doubted, and it has been recorded that in fact, since it was a one-man show by the petitioner, the company can be said to be a private limited company.

65. In our considered opinion, the status of public limited company cannot be doubted and held to be a private limited company by mere holding of substantial numbers of equity shares by a director. Neither can it be held that since the shares were not offered to the public the company

becomes a private limited company. The Company - Hirak Biotech Limited was an unlisted public company, which is statutory recognized under the Companies Act and, was undertaking its business that has issued equity shares not traded on any stock exchange. There are various factors which statutorily differentiate an unlisted public limited company and private limited company. Even if one of the director holds majority or substantial number of shares, such holding of shares cannot be construed that a public limited company can be said to be a private limited company. The Companies Act, 2013 or other regulations such as SEBI rules does not recognize that the status of the company which is registered as a public limited company has to be treated as private limited company in case one of its director holds substantial number of shares. A company's classification as public or private depends on its Memorandum of Association (MoA) and Articles of Association (AoA), not the concentration of its shareholding. The respondent in the impugned order has placed reliance on the provisions of Section 3(1)(iii) of the Companies Act, 1956 for determining the status of the Hirak Biotech Limited. We are of the opinion, that while fixing the liability of directors under the provisions of section 179 of the IT Act, the authority cannot venture into the examine the status of the company on the basis of definition of private company under the Companies Act, without examining or ignoring that the company in question was registered as public limited company.

66. For invoking the provisions of Section 179 of the IT Act, and roping in the Directors of a public limited company by applying the principle of lifting the corporate veil, a stringent exercise is required to be undertaken by the Revenue. The principle envisaged in the decision of

this Court in the case of ***Pravinbhai M. Kheni (supra)*** cannot be blindly applied. The facts of the said case would determine that the factors which had weighed upon the Coordinate Bench of this Court to apply the principle of lifting the corporate veil were egregious. The facts suggest that the Memorandum of Association of the company before the coordinate Bench in the said case and the Directors and shareholders who were seven in number, belonged to and were family members related to one M. Kantilal's family. The main object of the company was to take over the business and undertaking and to deal with the business of manufacturing, dealing, buying, selling, etc., of gems and diamonds and right from the inception of the company, it was run as a family business and huge undisclosed income and the creation of huge assets were done by the Directors of the company, and the unaccounted income of the company was utilized for acquiring such properties by the Directors. A categorical finding was recorded that the company was used as a conduit for generating unaccounted wealth, the shares of the company were not offered to the general public for subscription and all shares were held by the directors only. These combined factors had impressed the Court to apply the principles of lifting the corporate veil. In the present case, the impugned order does not reflect that the income of the company was siphoned and utilized for acquiring properties by the petitioner, and no finding has been recorded by the respondent in the impugned order.

67. Thus, the legal precedent set by this Court in the case of ***Pravinbhai M. Kheni (supra)*** cannot be thoughtlessly applied to each and every case wherein the status of a company has been questioned by applying the principles of lifting the corporate veil in an exercise undertaken under the provisions of Section 179 of the IT Act.

68. Unless three factors, as reiterated in the decision of this Court in the case of Maganbhai Hansrajbhai Patel vs. Assistant Commissioner of Income-tax and Anr., [2013] 353 ITR 567 (Guj.), which are found in the aforesaid provisions of Section 179(1) of the IT Act, such as gross negligence, Misfeasance or breach of duty, are established, due to which the authority was unable to recover the payment of tax dues, the director of a private limited company cannot be fastened with the liability of recovery. It is held thus:

> ***"20*** *To our mind, the authority completely failed to appreciate in proper perspective the requirement of section 179(1) of the Act. We may recall that said provision provides for a vicarious liability of the director of a public company for payment of tax dues which cannot be recovered from the company. However, such liability could be avoided if the director proves that the non recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on his part in relation to the affairs of the company. It is of-course true that the responsibility of establishing such facts is cast upon the director. Therefore, once it is shown that there is a private company whose tax dues have remained outstanding and same cannot be recovered, any person who was a director of such a company at the relevant time would be liable to pay such dues. However, such liability can be avoided if he proves that the non recovery cannot be attributed to the three factors mentioned above. Thus the responsibility to establish such facts are on the director. However, once the director places before the authority his reasons why it should be held that non recovery cannot be attributed to any of the three factors, the authority would have to examine such grounds and come to a conclusion in this respect. Significantly, the question of lack of gross negligence, misfeasance or breach of duty on part of the director is to be viewed in the context of non recovery of the tax dues of the company. In other words, as long as the director establishes that the non recovery of the tax cannot be attributed to his gross neglect, etc., his liability under section 179(1) of the Act would not arise. Here again the legislature advisedly used the word gross neglect and not a mere neglect on his part. The entire focus and discussion of the Assistant Commissioner in the impugned order is with respect to the petitioner's neglect in functioning of the company when the company was functional. Nothing came to be stated by him regarding the gross negligence on part of the petitioner due to which the tax dues from the company could not be recovered. In absence of any such consideration, the Assistant Commissioner could not have ordered recovery of dues of the company from the director. We would clarify that in the present case the petitioner had put forth a strong representation to the proposal of recovery of tax from him under section 179 of the Act. In such representation, he had detailed the steps taken by him and*

the circumstances due to which non recovery of tax cannot be attributed to his gross neglect. It was this representation and the factors which the petitioner had put forth before the Assistant Commissioner which had to be taken into account before the order could be passed. It is not even the case of the department that the petitioner paid the dues of other creditors of the company in preference to the tax dues of the department. It is not the case of the department that the petitioner negligently frittered away the assets of the company due to which the dues of the department could not be recovered. To suggest that the petitioner did not oppose the GSFC's auction sale is begging the question. GSFC had sold the property after several attempts through auction. It is not the case of the department that proper price was not fetched."

69. Thus, it is a settled legal precedent that for invoking the provisions of Section 179(1) of the IT Act against a Director, a finding has to be recorded that the non-recovery of the tax dues from the Company is to be attributed to gross negligence, misfeasance or breach of duty on the part of the Director (petitioner) once the Director places before the authority his reasons why it should be held that non-recovery cannot be attributed to any of the three factors. The petitioner, in his exhaustive reply dated 24.07.2015, while referring to the decision of this Court in the case of ***Maganbhai Hansrajbhai (supra)*** had explained that during the period of 5 months from 20.03.2005 to 05.09.2005, he never operated bank accounts, filed income tax returns, nor did he manage the affairs of the Company, and he has never authorised to sign any financial or tax documents, and was never involved in managing the affairs of the company, and was not a signatory to the contracts of the Company, and never operated the bank accounts of the Company nor signed any cheques. He had also produced his affidavit to strengthen his case. It is also not in dispute that for F.Y. 2006-07, the share holding of the petitioner was 30%. The petitioner had also pointed out that he was not a director of the Company when the assessment was completed under Section 143(3) of the IT Act on 29.12.2008, whereby a demand of

Rs.2.40 crores was raised. It is also established from the record that the properties of the Company were sold after the assessment order passed by the DRT under the SARFAESI Act. The petitioner also contended that the loan and creation of mortgage in favour of Jammu and Kashmir Bank Ltd. and Ahmedabad Peoples Co-operative Bank for securing the loan granted to the Company was done by Shri Pratik P. Shah, which was after the petitioner tendered his resignation, and the properties were sold by the lender bank under the SARFAESI Act. After such explanation tendered by the petitioner, the respondent was supposed to apply his mind to two aspects and record the findings - (1) whether the petitioner has siphoned off the funds and defrauded the revenue; and (2) whether the non-recovery of the tax dues from the Company is to be attributed to gross negligence, misfeasance or breach of duty on the part of the petitioner. The impugned order is bereft of any such findings; and hence, the provisions of Section 179(1) of the IT Act do not get attracted.

70. On an overall analysis of the facts, legal precedent and the provisions of Section 179 of the IT Act, we hereby quash and set aside the impugned order dated 31.03.2016 passed by the respondent authority under Section 179 of the IT Act. Accordingly, the writ petition stands ***allowed***. There shall be no order as to costs.

Sd/- .
(A. S. SUPEHIA, J)

Sd/- .
(VAIBHAVI D. NANAVATI,J)

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BHAVESH-[PPS]* & MAHESH/1