IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.596 OF 2012

1. **Sahara Hospitality Ltd.**)
A Company incorporated under)
The Companies Act, 1956,)
having its registered office at,)
Hotel Sahara Star, Opp. Domestic)
Airport, Vile Parle (E),)
Mumbai – 400 099.)

2. **Mrs. Ashu C. Sood**, an Indian,)
Inhabitant, CFO and Company)
Secretary of Sahara Hospitality)
Limited having her address at)
Hotel Sahara Star, Opp. Domestic)
Airport, Vile Parle (E),)
Mumbai – 400 099.)

..Petitioners

versus

1. **Commissioner of Income Tax-8**)
Room No. 259 Aayakar Bhavan,)
M.K. Road, Mumbai – 400 020.)

2. **Assistant Commissioner of**)
Income Tax 8(3),)
Aayakar Bhavan, M.K.Road,)
Mumbai – 400 020.)

3. **Deputy Commissioner of Income Tax,**)
Central Circle-6, Room No.334,)
E-2, ARA Centre, Jhandewalan Extn,)
New Delhi.)

4. **Union of India**, through the)
Secretary, Minister of Finance,)
Government of India,)
New Delhi – 110 101.)

..Respondents

Mr. Percy Pardiwalla, Senior Counsel alongwith Mr. Parag Kandar i/b DSK Legal for the Petitioners.
Mr. Arvind Pinto for the Respondents.

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CORAM : S.J.VAZIFDAR & M.S.SANKLECHA, JJ.

DATE : 12th September, 2012

JUDGMENT (PER S.J.VAZIFDAR,J) :

1 Petitioner no.2 is the Chief Finance Officer and Company Secretary of petitioner no.1. The reference to the Petitioner in this judgment is to petitioner no.1.

Respondent nos. 2,3 & 4 are the Assistant Commissioner of Income Tax, Mumbai, Deputy Commissioner of Income Tax, New Delhi and the Union of India respectively.

2 The petitioners seek *inter alia* a writ to quash an order dated 05.01.2012 passed by respondent no.1. The question that falls for consideration in this Writ Petition is whether the requirement under Section 127(1) and (2) of the Income Tax Act, 1961 of granting an assessee a

reasonable opportunity of being heard, wherever it is possible to do so is mandatory.

We have answered the question in the affirmative both, on principle and on authority. In this case, petitioner no.1, the assessee was admittedly not heard although it was possible to do so. The impugned order has therefore been set aside on this ground alone. In view thereof we did not permit Mr. Pardiwalla to advance any further submissions.

3 The petitioner's registered office which was originally in Delhi, was shifted to the State of Maharashtra in the year 2003. By an order dated 22.09.2003 under Section 127(2) of the Income Tax Act, 1961 ('the Act') the petitioner's case was transferred from the ITO, New Delhi to respondent no.2 for administrative convenience and coordinated investigation. Accordingly, the petitioner's tax returns were filed in and taken up for assessment for the assessment years 2003-2004 to 2009-2010 in Mumbai.

4(A) The petitioner filed its return for the assessment years 2010-2011 and 2011-2012 in Mumbai. However, by a letter dated 12.09.2011, respondent no.1 informed the petitioner that he was directed to propose to transfer the petitioner's case from ACIT, Mumbai to DCIT, New Delhi. Respondent no.1 requested the petitioner for its no objection certificate for the proposed centralization of the case and stated that in the event of the petitioner not complying with the same, it would be presumed that it had no objection thereto and a order under Section 127(2) of the Act would be passed accordingly.

(B) The petitioner by its reply dated 22.09.2011 stated that the first respondent's said letter was without reasons and requested him to furnish the reasons for the proposed transfer and thereafter, to offer it reasonable time to object to the same. It is important to note that the Petitioner expressly stated that the first respondent ought to grant it a personal hearing

after receiving its objections. Accordingly, the petitioner requested the first respondent to keep the proposed transfer in abeyance till the personal hearing was granted.

(C) Respondent No.1 by a letter dated 23.11.2011 stated that the transfer was proposed in view of the large scale finance transactions and investments of the petitioner with the Sahara Group of Companies to which it belonged and that the other entities of the Sahara Group were already centralized in New Delhi. The letter offered the petitioner an opportunity to file its written submissions on or before 05.12.2011. The letter did not mention anything about a personal hearing.

(D) The petitioner by a letter dated 05.12.2011 stated that it would submit its detailed reply by 20.12.2011 and requested an adjournment accordingly. The letter refers to "the hearing fixed today (05.12.2011) vide notice dated 23.11.2011," but, as noted earlier that letter did

not mention anything about a personal hearing.

(E) By a further letter dated 19.12.2011, the petitioner set out various objections to the transfer of its assessment proceedings. For the purpose of this judgment, it is not necessary to refer to the petitioner's objections on merits. The letter concludes by stating that in case respondent no.1 did not accept its submissions, a further opportunity be granted to the petitioner to make further submissions.

5 The impugned order is dated 05.01.2012. It was however served on the petitioner only on 27.01.2012. We will therefore refer to what transpired during this period before dealing with the impugned order.

6(A) Respondent No.2, Assistant Commissioner of Income Tax, Mumbai issued a notice dated 28.12.2011 under Section 142(1) which *inter alia* raised various queries and granted the petitioner time

till 16.01.2012 to respond to the same.

(B) Subsequently, the petitioner received a notice dated 18.01.2012 under Section 142(1) issued by respondent no.3, Deputy Commissioner of Income Tax, New Delhi stating that the jurisdiction over the case had been centralized with Central Circle -6, New Delhi. The petitioner was called upon to attend the office of respondent no.3 in connection with the assessment including the said notice under section 142(1) dated 28.12.11 issued by respondent no.2, Asst. Commissioner of Income Tax, Mumbai.

(C) The Petitioner by a letter dated 27.01.2012 addressed to respondent no.3 stated that nothing had been heard by it, nor had any order been passed for centralizing the case by the Commissioner of Income Tax, Mumbai and that the notice issued by Respondent no.3 was therefore beyond jurisdiction.

On the same day, the petitioner's representative, who attended the office of

respondent no.3 was furnished a copy of impugned order passed under section 127(2) purporting to transfer the petitioner's case from respondent no.2 in Mumbai to respondent no.3 in New Delhi.

7 This bring us back to the impugned order dated 05.01.2012 passed by respondent no.1. The order *inter alia* records the previous correspondence between the parties and states as under :

> "8. I have considered the relevant facts, perused the relevant records and considered the objections of the assessee, it is seen that all the cases belonging to the Sahara Group are centralized with DCIT Central Circle – 6, New Delhi. It is also a fact that the assessee has substantial loan / financial transactions with the other group entities. Therefore, since the assessee's group cases are centralized with DCIT Central Circle-6, New Delhi, for the purpose of co-ordinated investigation and assessment, in exercise of the powers conferred by sub-section (2) of Section 127 of Income Tax Act, 1961 and all other powers enabling me in this behalf, I, the Commissioner of Income Tax-8, Mumbai, hereby transfer the case, the particulars of which are

mentioned in column (2) of the schedule hereunder, from the officer mentioned column (3) to the officer mentioned in column (4) thereof."

The order was directed to take effect from 06.01.2012.

8 Mr. Pinto, the learned Counsel appearing on behalf of the respondents submitted that Section 127 merely requires an assessee to be granted an opportunity of placing its submission in writing before the concerned officer. According to him, Section 127 does not require the concerned officer to grant an assessee a personal hearing in respect of proceedings under section 127(1) and 127(2) even where it is possible to do so.

9 This submission is ill-founded on principle and on precedent. It is contrary to the judgments of the Supreme Court, various High Courts and to the provisions of sections 127(1) and (2) which require the concerned officer to grant the assessee "a reasonable opportunity of being heard

in the matter wherever it is possible to do so." It is not the respondent's case that it was not possible to offer the petitioner an opportunity of being heard. In our opinion, the section 127(1) and (2) mandate an assessee being granted a reasonable opportunity of being heard wherever it is possible to do so. Section 127 reads as under:-

> "**127. Power to transfer cases.**—(1) The Director-General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.
> (2) Where the Assessing Officer or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to whom the case is to be transferred are not subordinate to the same Director-General or Chief Commissioner or Commissioner,—
>
> (*a*) where the Director Generals or Chief Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Director-General or Chief Commissioner

or Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;

(*b*) where the Director Generals or Chief Commissioners or Commissioners aforesaid are not in agreement, the order transferring the case may, similarly, be passed by the Board or any such Director-General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, authorise in this behalf.

(3) Nothing in sub-section (1) or sub-section (2) shall be deemed to require any such opportunity to be given where the transfer is from any Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) and the offices of all such officers are situated in the same city, locality or place."

10 The Section read as above indicates that the word 'may' in sub sections (1) and (2) of Section 127 ought to be read as 'shall'. It is obvious that upon the transfer of a case from one jurisdiction to another in a different city as opposed to cases where the transfer is from one

officer to another in the same city, locality or place, would adversely affect the rights of an assessee for reasons too obvious to state. This becomes clear when sub sections (1) & (2) on the one hand are compared to sub-section (3) on the other. In cases falling under sub Section (3), there is no requirement of giving the assessee a reasonable opportunity of being heard in the matter.

11 The Madhya Pradesh High Court in Sagarmal Spinning & Weaving Mills Ltd. v. C.B.D.T., (1972)83 ITR 130 held as under:

> " As already indicated by us, on a plain reading of Section 127 of the Income Tax Act, 1961, two things are absolutely necessary, namely, a reasonable opportunity of being heard in the matter wherever it is possible to do so and, secondly, the recording of reasons for transferring a case. In the absence of these two requirements being fulfilled, it is not possible to support an order of transfer and especially with such a vague observation that the transfer is proposed for facility of investigation."

12 The Andhra Pradesh High Court in Vijayasanthi Investments Pvt. Ltd. v. Chief Commr. of I.T., (1991)187 ITR 405 held that under Section 127 the giving of a reasonable opportunity of being heard wherever it is possible to do so is essential. The Division Bench held as under :

> "From the aforesaid decisions, it is clear that, in the matter of the transfer of a case under Section 127 of the Act, it is necessary that the authority which proposes to transfer the case must, wherever it is possible to do so, give the assessee a reasonable opportunity of being heard with a view to enable him to effectively show cause against the proposed transfer. The notice must also propose to give a personal hearing."

13 A Single Judge of the Calcutta High Court in Chhota Nagpur Industrial Gases (P) Ltd. v. CIT (1998) 233 ITR 377 held that the provision of a reasonable opportunity of hearing the assesee was mandatory when it was possible to give such a hearing. It was held that the entire proceeding was vitiated because of the denial of a reasonable opportunity of hearing to the assessee.

14 A Division Bench of the Delhi High Court in Melco (P) Ltd. v. CIT, (2003) 260 ITR 450 followed the Judgment of the Andhra Pradesh High Court in Vijayasanthi Investments Pvt. Ltd. (Supra)

15(A) Section 127 fell for the consideration of a Constitution Bench of the Supreme Court in Kashiram Aggarwalla v. Union of India, (1965)1 SCR 671 = (1965) 56 ITR 14. The Supreme Court considered Section 127 prior to its amendment. However, for the present purpose, the position remained the same. Section 127(1) prior to its amendment, insofar as it was relevant, read as under:

> "127. The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so and after recording his reasons for doing so, transfer any case from one Income Tax Officer subordinate to him, to another also subordinate to him. and the Board may similarly transfer any case from one Income Tax Officer to another:
> Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from one Income Tax

> Officer to another whose offices are situate in the same city, locality or place."

(B) It is useful to note that the Supreme Court dealt with a case which fell within the proviso i.e. the transfer was from one ITO to another where offices were situate in the same city. Such a case falls under sub-section (3) of section 127 as it now stands. In the case before us the transfer is from one officer in Mumbai to another in New Delhi which falls within sub-section (2) of section 127 as it now stands and would have fallen under the main section 127 prior to its amendment. The Supreme Court has noted and dealt with the two types of cases. The Supreme Court held as under:

> **"3.** ..... It will be noticed that Section 127(1) requires that where the power conferred by it is intended to be exercised, an opportunity should be given to the assessee wherever it is possible to do so, and reasons have to be recorded for making the order of transfer. The requirement that opportunity should be given, cannot be said to be obligatory, because it has been left to the discretion of the

authority to consider whether it is possible to give such an opportunity to the assessee. It is, of course, true that in coming to the conclusion that it is not possible to give the required opportunity to the assessee, the authority must act reasonably and bona fide; but if the authority comes to the conclusion that it is not possible to give a reasonable opportunity to the assessee, that can be dispensed with. That, however, is not so with regard to the requirement that reasons must be recorded for making the transfer. So far as Section 127(1) is concerned, there is no dispute about this position.

4. The question which calls for our decision in the present appeals is: what is the effect of the proviso to Section 127(1)? The proviso lays down that nothing in sub-section (1) shall be deemed to require any such opportunity to be given in a case like the present. It is plain that the transfer in the present case is from one Income Tax Officer to another whose offices are situate in the same locality; and so, the point to consider is, what is the effect of this proviso? It is urged by Mr Jain that the effect of the proviso is that the requirement as to the giving of a reasonable opportunity alone is dispensed with in respect of cases falling under the proviso, but not the requirement as to the recording of reasons. If the words used in the proviso are literally construed, it may have to be conceded that there is some force in this contention.

5. But, on the other hand, the provision that nothing in sub-section

(1) shall be deemed to require any opportunity to be given, is worded in an emphatic form; and that fact has to be borne in mind in considering the effect of the proviso. Besides, it would not be unreasonable to assume that the recording of reasons prescribed by Section 127(1) would be appropriate where a transfer is being made otherwise than in the manner prescribed by the proviso. In such a case, normally, the assessee has to be given a reasonable opportunity to be heard; and the natural corollary of this requirement is that his objections to the transfer should be considered and reasons given why the transfer is made despite the objection of the assessee. In other words, the requirement as to the recording of reason flows as a natural consequence and corollary of the requirement that a reasonable opportunity should be given to the assessee. If, however, a reasonable opportunity is not given to the assessee on the ground that it is not possible to do so, Section 127(1) requires that the transfer being of a category where a reasonable opportunity should be given to the assessee, the authority should record its reasons for making the transfer, even though no opportunity was in fact given to the assessee. If that be the true position, it is not easy to understand why the proviso should be so construed as to require reason to be given for the transfer, even though no opportunity to the assessee is required to be given. That is one aspect of the matter which has to be borne in mind in determining the true scope and effect of the proviso." (emphasis supplied)

16 The Supreme Court has therefore clearly held that a reasonable opportunity should be given to the assessee wherever it is possible to do so. The opportunity referred to is a reasonable opportunity of being heard. There is no other opportunity referred to in the section. The observation in paragraph 3 that the opportunity cannot be said to be obligatory, refers to those cases where it is not possible to give such an opportunity to the assessee. The discretion of the authority is only to consider whether it is possible to give such an opportunity to the assessee or not. This is clear from the fact that the Supreme Court went on to hold that if the authority comes to the conclusion that it is not possible to give a reasonable opportunity, the same can be dispensed with. It is also important to note that the Supreme Court dealt with a case where the transfer was from one ITO to another, whose office was situate in the same locality. The proviso to section 127(1) prior to its amendment was similar to sub-section (3) which was introduced by the

amendment.

The doubt if any, if set at rest by the observations in paragraph 5 that where a transfer is being made otherwise than in the manner described by the proviso, (i.e. not from one ITO to another whose offices are situate in the same city, locality or place) normally the assessee has to be given a reasonable opportunity to be heard. In other words, it is only where it is not possible to offer the assessee an opportunity of being beard that the requirement of giving him a reasonable opportunity of being heard is dispensed with.

17 It is important to note that under Section 5(7-A) of the Indian Income-tax Act, 1922, there was no requirement of the assessee being given a reasonable opportunity of being heard. Section 5(7-A) of the 1922 Act read as under:

> "Section 5(7-A) The Commissioner of Income-tax may transfer any case from one Income-tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case from any one Income-tax Officer to another. Such transfer may be made at any stage

> of the proceedings, and shall not render necessary the reissue of any notice already issued by the Income-tax Officer from whom the case is transferred."

The introduction in Section 127(1) and (2) of the 1961 Act indicates the legislative intent of providing an assessee a reasonable opportunity of being heard in cases falling under sub-sections (1) & (2) thereof.

18 In conclusion therefore we hold that the word "may" in Section 127 should be read as "shall". The requirement of giving an assessee a reasonable opportunity of being heard wherever it is possible to do so, is mandatory. The discretion of the authorities is only as to what is a reasonable opportunity in a given case and on the question, whether it is possible in a given case to provide the opportunity.

19 Mr. Pinto then submitted that on several occasions the assessee had appeared before respondent no.1. He relied upon an affidavit in

sur-rejoinder filed by respondent no.1 who had passed the impugned order. In paragraph 1 it is stated that sufficient opportunity of being heard was given to the Counsel appearing for the petitioner before the impugned order was passed. He was however, unable to indicate anything in support of this averment. The affidavit does not even furnish the approximate date on which the petitioner's Counsel were heard. As stated earlier, the petitioners' objections were filed on 19.12.2011 and the impugned order was passed on 05.01.2012 i.e. within 16 days. Paragraphs 6 & 7 of the affidavit in sur-rejoinder refer to the petitioner's letter dated 19.12.2011 and the impugned order dated 05.01.2012 respectively. All that is stated in paragraph 7 is that "these submissions (i.e. the submissions contained in the petitioner's letter dated 19.12.2011) were taken into consideration." No details have been furnished as to when the petitioner's Counsel were heard. Paragraph 8 merely states that the sequence of facts and correspondence indicate that sufficient

opportunities of being heard were given to the petitioner without furnishing details in respect of the alleged hearing.

Paragraph 8 of the sur-rejoinder further states that the petitioner had indicated in its letter that it preferred to submit its objection in writing and that the same were therefore considered before passing the impugned order. This is incorrect. In the correspondence which we have already referred to the petitioner had expressly requested for a personal hearing.

20 In the circumstances, the impugned order is liable to be set aside on the ground that the petitioner had not been heard.

21 Mr. Pardiwalla, the learned Senior Counsel appearing for the Petitioners agreed that the order being set aside does not affect the respondent's case in any manner whatsoever on merits or otherwise including on the question of limitation.

22 Rule is therefore made absolute in terms of prayer (a). Respondent no.1 shall after hearing the petitioner pass a fresh order.

The Writ Petition is accordingly disposed of. No order as to costs.

(M.S. SANKLECHA, J.) **(S.J.VAZIFDAR, J.)**