

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

WRIT PETITION NO.2634 OF 2012

Shikshana Prasarak Mandali,]
Sharda Sabhagraha, S.P.College Campus,]
Pune-411030.] ..Petitioner.

v/s.

- 1 The Commissioner of Income Tax]
(Central) Room No.309, C-Wing,]
PMT Bldg. Swargate, Pune 411037.]
- 2 The Commissioner of Income Tax]
(Central)-1, Mumbai, R.No.1002,]
10th floor, Old C.G.O. (A) Building,]
M.K.Road, Mumbai-400020]
- 3 The Assistant Commissioner of]
Income-Tax, (Central Circle 2(2)]
Pune, 'C' Wing, P.M.T. Bldg.,]
Swargate, Pune 411 037.]
- 4 The Deputy Commissioner of]
Income-Tax (Central Circle-12)]
Mumbai, Old C.G.O.(A) Bldg.,]
M.K. Road, Mumbai 400 020.]
- 5 The Director General of Income-Tax]
(Inv.) Aayakar Bhavan, 12, Sadhu]
Waswani Road, Pune 411 001.]

- 6 The Chief Commissioner of Income]
Tax-1, Aayakar Bhavan, M.K,Road,]
Mumbai 400 020.]
- 7 The Union of India]
through, the Secretary, Ministry of]
Finance, Government of India]
North Block, New Delhi 110 001.]

..Respondents.

Mr. J. D. Mistri, Senior Advocate with Mr. Nitin S. Dhumal for the
Petitioner.

Mr. Vimal Gupta, Sr. Advocate with Ms. Padma Divakar for the
Respondent.

CORAM : J.P. DEVADHAR AND

M.S. SANKLECHA, JJ.

RESERVED ON : 27th February, 2013.

PRONOUNCED ON : 5th March, 2013

JUDGMENT:- (Per M. S. Sanklecha J.)

By this petition, the Petitioner challenges the
validity of the order dated 2/8/2012 passed under Section
127(2) of Income Tax Act, 1961 (the Act) by Commissioner
of Income Tax (Central), Pune. By the impugned order dated

2/8/2012, the Petitioner's case under the Act has been transferred from Assistant/Deputy Commissioner of Income Tax, Central Circle, Pune to Assistant/Deputy Commissioner of Income Tax , Central Circle-12, Mumbai.

2. Brief facts leading to this petition are as under:

a) The Petitioner is a Public Charitable Trust established in the year 1888. It is engaged in establishing and running Educational Institutions.

b) The Petitioner trust as on date manages 63 Educational Institutions and most of these institutions are in and around Pune. However, 6 out of the 63 institutions are situated in Mumbai. The Petitioner consists of 18 Trustees and 17 of whom are based at Pune.

c) On 8/2/2012, the Commissioner of Income Tax, Central, Pune issued a show cause notice to the petitioner. By the above notice the Petitioner was informed that consequent to the search proceedings conducted in respect of one Uday Namdeo Salunke on 20/11/2010 all cases belonging to the Salunke group were centralized with the Dy.

Commissioner of Income Tax, Central Circle-12, Mumbai. It was thereafter suggested by the Assessing Officer (Dy. Commissioner of Income Tax, Central Circle-12, Mumbai) that the cases pertaining to the Petitioner be centralized with him for the purposes of co ordinated investigation. In view of the above, the Petitioner was called upon to show cause to the proposed transfer on or before 15/2/2012.

d) On 8/2/2012 itself, the Petitioner responded to the show cause notice dated 8/2/2012 objecting to the transfer of its case from Pune to Mumbai. The Petitioner pointed out that since its inception its head office is at Pune and the meetings of the Petitioner also takes place at Pune. Further almost all of its 63 educational institutions are situated in and around Pune, save and except 6 institution which are in Mumbai. Returns under varied Acts are filed before the various authorities in Pune. Account of the Petitioner is maintained and audited in Pune. Thus, transfer of their case from Pune to Mumbai would cause them great inconvenience. In any event, the Petitioner undertook to co-operate with the Deputy

Commissioner of Income Tax, Central Circle-12, Mumbai i.e. the Assessing officer of Salunke group. In these circumstances, it was requested that the case be not transferred for purposes of income tax from Pune to Mumbai.

e) Thereafter on 30/8/2012, the Petitioner was served with the impugned order dated 2/8/2012 of the Commissioner of Income Tax, Pune under Section 127(2) of the Act. By the impugned order dated 2/8/2012, the Petitioner's case under the Act was transferred from Pune to Mumbai for the purpose of administrative convenience and co-ordinated investigation.

f) On 11/10/2012, the Petitioner filed the present petition challenging the impugned order dated 2/8/2012. The Petition came up for admission before this Court on 23/10/2012. At that time, the Respondents took time to file its reply Affidavit.

3. The Respondent filed their Affidavit in reply dated 14/12/2012 in Court on 13/2/2013 though served upon the Petitioner earlier. In its affidavit in reply, the Respondents stated that the transfer of the Petitioner's case was proper

and calls for no interference. The affidavit in reply also brought on record events subsequent to filing of the Petition i. e. notice dated 15/10/2012 under Section 153C of the Act for the assessment years 2005-06 to 2010-11 issued on the Petitioner for making a search Assessment. This notice was consequent to a search carried out on 20/11/2010 on one Uday Salunke who is the Principal of one of the Educational Institutions run by the Petitioner. In view of the aforesaid the Petitioner was called upon by the above notice under Section 153 of the Act to file true and correct returns of its total income for assessment year 2005-06 to 2010-11.

4. The Petitioner filed an affidavit in rejoinder dated 21/1/2013 and an additional affidavit dated 13/2/2013 in Court on 15/2/2013. In the affidavit in rejoinder the petitioner pointed out that in an earlier affidavit dated 9/3/2012 filed by the Respondent in Writ Petition No.5866 of 2011 it had stated that cash seized during the search had nothing to do with the petitioner and a contrary stand was being taken in the present proceedings. Further, the Petitioner also brought on record their letter dated 29/10/2012 objecting to the notice under

Section 153C of the Act.

5. Mr. J. D. Mistri, Senior Advocate in support of the Petition submits as under:-

a) The impugned order dated 2/8/2012 is bad in law as no personal hearing was granted to the Petitioner before passing the impugned order under Section 127(2) of the Act. An order under Section 127(2) of the Act has to be preceded by a personal hearing as held by this Court in its order dated 12/9/2012 passed in Writ Petition No.596 of 2012 (Sahara Hospitality Ltd. v. Commissioner of Income Tax-8 and others).

b) The impugned order dated 2/8/2012 is in breach of principles of natural justice inasmuch as the notice dated 8/2/2012 given to the Petitioner proposing the transfer was an inadequate notice in as much as the various circumstances and reasons which would warrant transfer of the Petitioner' case from Pune to Mumbai were not spelt out in the notice though the same are found extensively in the impugned order. Therefore, according to him, if proper and adequate notice was served upon the Petitioner a proper

representation could have been made and it is likely that in that case no order of transfer under Section 127(2) of the Act may have been passed by the Commissioner of Income Tax, Pune. Thus, prejudice was caused to the Petitioner in view of inadequate show cause notice. In view of the above, it is submitted that the impugned order dated 2/8/2012 passed under Section 127(2) of the Act be set aside.

6. As against the above, Mr. Vimal Gupta, Senior Counsel for the respondent in reply submits as under:-

a) The Petition challenging the impugned order dated 2/8/2012 should not be entertained as the Petitioner having participated in the proceeding before the Assistant Commissioner of Income Tax at Mumbai, have waived their rights to a personal hearing or adequate notice.

b) In the facts of the present case, the decision of this Court in the matter of Sahara Hospitality Ltd. (supra) would be inapplicable as in that case a personal hearing was sought for by the Petitioner unlike in this case. This coupled with the participation of the Petitioner before the Assessing

Officer in Mumbai, prohibits them from urging breach of natural justice;

c) In any event, the decision of this court in the matter of Sahara Hospitality Ltd. (supra) should not be applied as the period of limitation to complete the Petitioner's assessment for Assessment Year 2010-11 expires on 31/3/2013. In fact, this Court in almost identical circumstances by an order dated 24/1/2013 in the matter of Aamby Valley Ltd. and anr. v. Commissioner of Income Tax-8 being Writ Petition No.2854 of 2012 refused to quash an order of transfer under Section 127(2) of the Act in so far as it related to Assessment year 2010-2011 on the ground that otherwise the assessment for the year 2010-11 would become time barred.

(d) In the event that the impugned order dated 2/8/2012 passed under Section 127(2) of the Act is set aside, grave prejudice would be caused to the Revenue as the assessment for the Assessment Year 2010-11 may become time barred. This is because then the jurisdiction to pass the Assessment orders in the Petitioner case will be with the

Pune Commissionerate. However, due to Administrative reasons, the Mumbai Commissionerate, would take time to transfer the papers to Pune making it almost impossible for the Commissioner at Pune to complete the assessment for Assessment Year 2010 -2011 before the time barring date i.e. 31/3/2013.

(e) Further in this case, the proceedings under Section 153C of the Act could be commenced by the Assessing Officer at Mumbai even before the assessment of the searched person Salunke was completed. This was possible as the assessing officer is presently the same at Mumbai for Salunke group and the Petitioner. In case the jurisdiction of the Petitioner is restored to Pune jurisdiction then the notice under Section 153 C of the Act can only be issued after Assessment of the searched person i. e. Salunke is completed. This would delay the proceeding and cause prejudice to the revenue.

7. We have considered the submissions. It is a settled position in law as held by this Court in the matter of

Sahara Hospitality Ltd.(supra) that before an order of transfer of case is passed under Section 127(2) of the Act, an opportunity of personal hearing is mandatory, wherever it is possible to do so. In the present matter the show cause notice proposing the transfer of the Petitioner's case from Pune to Mumbai was issued by the office of the Commissioner of Income Tax (Central) Pune on 8/2/2012. The Petitioner responded to the notice stating its objections to the proposed transfer on 8/2/2012 itself. The impugned order of transfer of the Petitioner case from Pune to Mumbai was passed by the Commissioner of Income Tax(Central) Pune on 2/8/2012. Thus there was sufficient time to grant a personal hearing to the Petitioner after the issue of the show case notice and before the passing of the impugned order 2/8/2012. Neither at the hearing nor in the affidavit in reply the respondent-revenue have contended that it was not possible to grant a personal hearing to the Petitioner. At the hearing the Respondent Revenue did not assert that any personal hearing was granted to the petitioner before the passing of the impugned Order dated 2/8/2012. The only submission on

behalf of the Respondents at the hearing with regard to the impugned order being bad is that if the impugned order is set aside, the jurisdiction of the Pune Commissioner is restored then in such an event, the normal assessments for the assessment year 2010-2011 would become time barred. It is submitted on behalf of the Respondents that as the Mumbai Commissionerate of Income Tax is seized of the matter the assessment could be completed here before 31/3/2011. Therefore the impugned order must be sustained and in support thereof reliance is placed upon the decision of this court dated 24/1/2013 in the matter of Aamby Valley Ltd. (supra).

8. This court in the matter of Amby Valley Ltd(supra) reiterated the principle laid down in Sahara Hospitality(supra) that giving of personal hearing, wherever possible, is mandatory before passing an order under Section 127(2) of the said Act. However, this court in the matter of Aamby Valley Ltd. (supra) held in the facts before it that in case the order of transfer for the Assessment year 2010-2011 is not sustained, the assessment for the assessment year 2010-

2011 would become time barred. To properly appreciate the submission of the Respondent it may be relevant to consider the facts in the case of Aamby Valley Ltd.(supra). In the case of Aamby Valley Ltd.(supra) an order under Section 127(2) of the Act was passed on 5/1/2012 transferring the case from Mumbai to Delhi. The Petitioner therein challenged the order dated 5/1/2012 by filing a petition in the registry of this court on 23/10/2012 and moved before this court only on 2/1/2013. The Court took into account the above delay and held that as a consequence of the Petitioner's delay, the assessment for assessment year 2010-2011 would become time barred on 31/3/2013. Thus in the above facts it held that the assessment for assessment year 2010-2011 would alone stand transferred to Delhi. However, so far as the other years are concerned, the order was set aside and the Commissioner of Income Tax was directed to give personal hearing to the petitioner before passing an order of transfer under Section 127(2) of the Act. However, the facts in this petition, particularly the conduct of the Petitioner, is completely distinguishable. The impugned order of transfer was passed

on 2/8/2012 and the same was received by the Petitioner on 30/8/2012. The Petitioner filed the present petition on 11/10/2012 and moved this court for the first time on 23/10/2012. The Respondent thereafter sought time to file their affidavit in reply and the same though dated 14/12/2012 was filed on 13/2/2013. Thereafter this petition was adjourned from time to time and the matter was heard only on 25/2/2013 and 27/2/2013. In these circumstances, no complaint on account of the conduct of the Petitioner can be made as it had moved the Court with reasonable expedition unlike in the case of Aamby Valley(supra). Therefore in the present petition it cannot be said that the normal assessment for the assessment year 2010-11 is getting time barred in view of the delay on the part of the Petitioner in moving this Court as in the case of Aamby Valley(supra). Therefore, the decision in the matter of Aamby Valley(supra) would not apply to the facts of the present case.

9. One more distinguishing feature in this case is that unlike in the matter of Aamby Valley(supra) a notice under Section 153C of the said Act inter alia covering the

Assessment year 2010-2011 has been issued by the Assessing officer in Mumbai to the Petitioner consequent to the search on the Salunke group. Therefore in case the petitioner's petition is allowed, in that event the Assessing Officer assessing the Salunke group would have to send his recorded satisfaction along with any documents, books of accounts etc seized during the course of investigation belonging to the Petitioner to its Assessing officer at Pune. Thereafter the Assessing officer at Pune can assess and/or reassess the Petitioner for a period of six assessment years previous to the year in which the search was conducted. In terms of the first proviso to Section 153C of the Act the date of search would be the date when the documents etc are received by the Assessing officer having jurisdiction over the Petitioner's at Pune. Therefore assuming for some reason the assessments for Assessment year 2010-2011 (though we see no reason why) cannot be completed before 31/3/2013, yet the same would be open to assessment/reassessment by virtue of Section 153C read with Section 153A of the Act. In the circumstances of this case, unlike in the matter of Aamby

Valley(supra) no irretrievable injury is caused to the Revenue. This is one more reason why according to us the decision of this Court in the matter of Aamby Valley Ltd. (supra) is completely distinguishable and cannot be applied to the facts of the present case.

10. In the Affidavit in reply dated 14/12/2012 the Respondent have averred that the impugned order dated 2/8/2012 was passed after giving a personal hearing to the Petitioner. This has been disputed by the Petitioner in its Affidavit in rejoinder dated 4/1/2013. At the hearing the petition was argued before us by the revenue and the assessee on the basis that no personal hearing was granted to the petitioner before passing the impugned order dated 2/8/2012. Moreover the Affidavit in reply filed by the revenue does not give any particulars of the date when the hearing was offered to the Petitioner's. In view of the above circumstances it appears to us that no personal hearing was granted to the Petitioner before passing the impugned Order dated 2/8/2012.

11. We do not find substance in the submission of the Respondent-Revenue that there is no requirement to offer a personal hearing as the same was not asked for by the Petitioner. This court in the matter of Sahara Hospitality (supra) has held that it is mandatory wherever it is possible to do so on the part of the Revenue to grant a personal hearing before passing an order under Section 127(2) of the Act. Thus merely because the Petitioner had not specifically asked for a personal hearing it will not absolve the revenue of its obligation to ordinarily grant such a hearing. Similarly, the participation, if any, by the Petitioner before the Officer at Mumbai was without prejudice to its challenge to his jurisdiction, as the same was pending in this court to the knowledge of the Respondent-Revenue. In these circumstances, the revenue will not be absolved of its obligation of giving a personal hearing to the petitioner before passing an order under Section 127(2) of the said Act.

12. In any view of the matter, the entire proceeding transferring the case from Pune to Mumbai is in breach of principles of natural justice. This is for the reason that the

impugned order dated 2/8/2012 gave various reasons supporting/justifying the conclusion therein. However, while calling upon the Petitioner to show cause on 8/2/2012 to the proposed transfer none of the reasons found in support of the impugned order dated 2/8/2012 were mentioned in the show cause notice. It may be relevant to reproduce the show cause notice issued to the Petitioner calling upon the Petitioner to show cause why the Petitioner's case should not be transferred from Pune to Mumbai as under:

"Sir,

**Sub: Centralization of cases belonging to
Shri. Uday Namdeo Salunkhe
Group-reg.**

Kindly refer to the above

2 I am directed to submit that the search and seizure action u/s. 132(1) of the I.T. Act 1961 was conducted in Shri. Uday Namdeo Salunkhe Group on 20.11.2010. Consequent to the search, the cases belonging to the said group were centralized with the DCIT Central Circle-12, Mumbai. The said A.O. has suggested that your case i.e. Shikshan Prasarak Mandali (S.P.Mandali Trust) having PAN AABTS7821G may be centralized with him.

3 *It is therefore, proposed to transfer your case to the DCIT CC-12, Mumbai for coordinated investigation.*

4 *If you have any objection to the proposed transfer of your case from this charge to the DCIT CC-12, Mumbai you are requested to submit your objections on or before 15/2/2012.*

5 *If no objection is received before 15/2/2012 it will be presumed that you have no objection to the proposed transfer of the case as mentioned in Para 3 above and necessary orders will be passed accordingly. Any objection raised after this date will not be entertained.*

Yours faithfully,

sd/-

(D.R.Pardeshi),

Income Tax officer (Central(HQ),

For Commissioner of Income Tax (Central),Pune.”

13. As against the above show cause notice the impugned order dated 2/8/2012 refers to the following grounds in support of the transfer:

“In the instant case, the following reasons have led to form the decision that the assessee's case be centralized with the

Assistant Commissioner of Income tax, Central Circle-12 Mumbai.

(i) During the course of search in the case of Shri. Uday Namdeo Salunkhe, Director of Willingkar Institute of Mumbai, it was noticed that the entire process of admission under the Institutional quota is in following two stages.

a) Profile of the students are collected and analyzed by the institutes and

b) The list is submitted to the Managing Council of the Shikshan Prasarak Mandali Trust for decision regarding admission. The admission committee comprises of Chairman, Local Managing committee of the Institute and Members of the Managing Council of M/s. SPM Trust, Pune.

(ii) During the course of search in the case of Shri. Uday Namdeo Salunke Director of Welingkar Institute of Mumbai, evidences indicating receipt of donations for admissions under management quota in the institutions being managed by the assessee Trust have been found. Prof. Samir Karkhanis was confronted with the

evidences. He stated that the figures on the paper are donation fees received from the students whose names are also recorded therein.

(iii) Institutions charging donations against the admissions are located in Mumbai and are managed by the assessee Trust.

(iv) The ultimate beneficiary of the donations received is the assessee trust and its trustees.

(v) Shri. Abhay Dadhe, Chairman and Shri. A. N. Mate Vice Chairman of the Managing Council of SPM Trust, Pune in their statements recorded admitted that the Management Council members take decision regarding admissions to students through Management quota.

(vi) During search it has been admitted by Smt. Kalpana Hans a faculty member, that Shri. Bhekhare and Ravi Sumbhe of the Director's office in the institute were instrumental for collecting cash out of admissions and transport to the SPM Trust, Pune.

(vii) During search it is also admitted by Prof. Kanu Doshi that cash received on account of admissions is sent to the Trustees of SPM Trust Shri.Dadhe and Shri. Mate.

(viii) The donors who have got admission against the donations have their base in Mumbai.

(ix) The cases of Shri. Uday Namdeo Salunke and his group concerns are centralized with DCIT/ACIT Central Circle-12, Mumbai.

14. None of the above grounds which find place in the impugned order was ever put to the Petitioner before passing the impugned order. The case of the Respondent in its affidavit in reply dated 14/11/2012 is as under:

“ I submit that there is nothing in the provision of law requiring the Commissioner to give all the reasons in the show cause notice itself before the transfer. The Commissioner is only required to record his reasons in the transfer order.”

In support of the above submission the Respondents-

Revenue in its affidavit placed reliance upon the decision of the Apex Court in the matter of Ajantha Industries v. CBDT reported in 102 ITR Pg. 281. The issue before the Apex Court was whether an order of transfer under Section 127(2) of the Act must contain the reasons for the transfer or the reasons by way of noting in the file are sufficient. On the above facts, the Court held that the order under Section 127(2) of the Act must give reasons as a party must know the reasons, that led the authority to pass an order of transfer of jurisdiction under Section 127(2) of the Act. These reason can then also be considered by the Court to decide its validity, if the same is challenged in Court. The Apex Court was not concerned with the issue whether the show cause notice must contain reasons for the proposed transfer. Therefore the reliance by the revenue upon the decision of the Supreme Court in the matter of Ajantha Industries(supra) is entirely misplaced.

15. The giving of notice containing the reasons for the proposed action is a basic postulate for compliance of the Audi Alteram Partem Rule. It is axiomatic that unless a party is informed of the reasons for the proposed action, it would be

impossible for the noticee to put forth its point of view with regard to the reasons for the proposed action. The views of the noticee are to be considered by the authority before taking any decision to confirm or drop the notice. A show cause notice to be effective must be adequate so to enable a party to effectively object/respond to the same. The authority concerned is obliged to consider the objections, if any, and thereafter reach a finding one way or the other. This alone ensures absence of arbitrary exercise of powers by the authorities. Thus, there has been failure of Audi Alteram Partem Rule and the case of the Petitioner has been transferred in breach of natural justice de hors the non giving of personal hearing to the Petitioner. In that view of the matter also the order dated 2/8/2012 passed by the respondent cannot be sustained.

16. Mr. Vimal Gupta Senior Counsel for the Respondent-Revenue also submitted that the Assessing Officer at Mumbai being the same for the searched person i.e. Salunke group and the Petitioner the proceedings can be commenced under Section 153C of the Act without completing the Assessment

of the searched person i.e. Salunke group. However according to him in case the Assessing officer is different for the other person (petitioner in this case) from that of the searched person then proceeding against such other person can only commence after the assessment of the searched person is completed. This would result in delay and cause prejudice to the Petitioner's case. We are not examining the above issue as according to us for the purposes of this Petition the period of limitation under Section 153C of the Act only commences from the date the documents etc are sent to the Assessing officer of the such other person (petitioner in this case). Therefore, in the facts of this case, we are not called upon to decide when the documents etc., can be transferred by the Commissioner of Income-Tax Mumbai to the Commissioner of Income Tax, Pune. This issue could be decided in some other case, where it appropriately arises.

17.

17. In view of the above, we quash and set aside the order dated 2/8/2012 passed by the Commissioner of Income Tax (Central) Pune, transferring the Petitioner's case under the Act from Assistant/Deputy Commissioner of Income Tax,

Central Circle, Pune to Assistant/Deputy Commissioner of
Income Tax , Central Circle-12, Mumbai.

18. The Petition is allowed in the above terms. No
order as to costs.

(M.S.SANKLECHA, J.)

(J.P. DEVADHAR, J.)

Bombay High Court

Court