

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CWP No. 17197 of 2008

Date of Decision 4 .8.2009

Deep Malhotra and others ... Petitioners

Versus

The Chief commissioner of Income Tax and others ... Respondents.

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE JASWANT SINGH

Present: Mr. J.S. Bhatia ,Advocate for the petitioner

Ms. Savita Saxena, Standing counsel for CIT.

1. Whether Reporters of local papers may be allowed to see the judgement?

Yes

2. To be referred to the Reporter or not ? Yes

3. Whether the judgement should be reported in the Digest ? Yes

M.M.KUMAR, J.

The petitioners have approached this Court with a prayer for quashing order dated 13.6.2008 (P.4) passed by the Commissioner of Income Tax, Bhatinda- respondent no. 5. The Commissioner exercising his powers under Section 127(2) of the Income Tax Act, 1961 (for brevity 'the Act') has transferred the jurisdiction of some of the cases to the Assistant

Commissioner/ Deputy Commissioner of Income Tax, Central 7, New Delhi.

Brief facts of the case are that the petitioners are wine contractors and have a joint venture of business. The business of wine/liquor is not static and keeps on changing depending on the wine contracts, which they are able to secure in the open auction in the State of Punjab. The petitioners have following PAN numbers namely:

Deep Malhotra – AIGPM 919/C

Gautam Malhotra – AAACO 1525 A.

The petitioners have residential house at old Cantt. Road, Faridkot and they have also two shops one in Nehru shopping Centre and the other in the Municipal Market, near Jubilee Cinema at Faridkot.

Petitioner no. 3 namely M/s Oasis Resorts Pvt. Ltd. has its head office at Faridkot and branch offices at Ludhiana and New Delhi. It has also income tax PAN No. namely AAACO1524 A. It has been filing its income tax return at Faridkot for the last over 15 years. Their cases have already been centralized at Faridkot and they are being assessed at Ward No. III(3) and Ward No. III(4).

On 3.1.2008, the Commissioner – respondent no.5 issued notice to Gautam Malhotra- respondent no.2 suggesting centralization of assessment records/ jurisdiction in the group cases of Sh. Gautam Malhotra and others. He was asked to show cause on or before 16.1.2008. According to the notice it was alleged that petitioner no.2 is a resident of Delhi and he has business there (P.1). The petitioners filed objection on 1.2.2008 asserting that they are resident of old Cantt. Road, Faridkot and they did not have any kind of business in Delhi. They further averred that they are doing

the business of liquor in the State of Punjab and disclosed their place of residence and properties at Faridkot. They also disclosed that they are maintaining bank accounts in Punjab and Sind Bank, Faridkot and no search and seizure under Section 132 of the Act had ever been taken against the petitioners or petitioners' firm (P.2). The petitioners asserted that according to Section 127 of the Act, the Commissioner- respondent no.5 is under an obligation to record reasons in his order transferring the jurisdiction of the Assessing Officer failing which the order is vitiated.

In the written statement filed by the respondents the stand taken is that Commissioner- respondent no.5 is holding administrative jurisdiction over the functioning of Income Tax Officers of Ward No. III(3) and (4), Faridkot. It is further asserted that while passing an order under Section 127 of the Act, interest of administration has been duly taken into account. It has been alleged that petitioners have been running hotels at Delhi and Mousurie (Uttaranchal). They are residing at Delhi and they occasionally visit their residence at Faridkot. It is also pleaded that reasons have been duly recorded in the order dated 13.8.2008 (R.1) and therefore, the impugned order does not suffer from any legal infirmity.

Mr. J.S. Bhatia, learned counsel for the petitioner has argued that Section 127 of the Act imposes an obligation on the Commissioner of Income Tax to pass an order supported with reasons while exercising power of transfer. According to the learned counsel when administrative order, like the one in hand, does not disclose any reasons then such an order is liable to be set aside. In support of his submission, learned counsel has placed reliance on a judgement of Hon'ble the Supreme Court rendered in the case of **Ajantha Industries and ors v. CBDT and others, (1976) 102 ITR 281.**

He has further submitted that the aforesaid view has been repeatedly followed by various High Courts including this Court which is the jurisdictional High Court. In that regard reliance has been placed on a Division Bench judgement in the case of **Lt. Col. Paramjit Singh v. Commissioner of Income Tax and another, (1996) 220 ITR 446** and a Single Bench judgement in the case of **Rajesh Mahajan and others v. Commissioner of Income Tax, (2002) 257 ITR 577.**

Ms. Savita Saxena, learned counsel for the respondents has however argued that provisions of Section 127 of the Act have been religiously complied with in as much as reasons have been recorded by the Commissioner on 13.8.2008 (R.1).

Having heard learned counsel for the parties and perusing the paper book with their able assistance, we are of the considered view that power of transfer is vested in various authorities including the Commissioner by Section 127 of the Act. It would be necessary to read the aforesaid section which is as under:

“Section 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 Directors General 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 Directors General 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, authorize 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.

(4) The transfer of a case under sub-section (1) or sub-section (2) may be made at any stage of the proceedings, and

shall not render necessary the re-issue of any notice already issued by the Assessing Officer or Assessing Officers from whom the case is transferred. “

A perusal of the aforesaid provision shows that Director General or Chief Commissioner or Commissioner could transfer any case at any stage of the proceedings from one assessing officer subordinate to him to another one subordinate to him. However, under sub-section (2) of Section 127 when the cases are to be transferred to an Assessing Officer, who is not sub-ordinate to the same Director General or Chief Commissioner or Commissioner then both of them have to be in agreement and hearing has to be granted by the Chief Commissioner/Commissioner from whose jurisdiction the cases are proposed to be transferred. The legislature has further provided by Section 127(2) of the Act that before transferring any case from one assessing officer subordinate to him to any other assessing officer, the assessee is required to be given reasonable opportunity of hearing and after record recording reasons for passing such an order.

The matter is no longer *res-integra* because Hon'ble the Supreme Court in **Ajantha Industries case (supra)** has interpreted the provisions of Section 127(1) of the Act and it has been held that the requirement of recording the reasons is mandatory. The view of their Lordship is discernible from following para of the judgement which reads thus:

“ The reason for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under

its writ jurisdiction under Article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations. Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question.

We are clearly of opinion that the requirement of recording reasons under Section 127 (1), is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee.”

Similar view has been taken by a Division Bench of this Court in the case of **Lt. Col. Paramjit Singh (supra)** and a Single Bench in the case of Rajesh Mahajan (supra).

The provision of sub-section (2) of Section 127 of the Act in substance provide for hearing beside requiring agreement between the Chief Commissioner or Commissioner of transferring place and the place where the cases are to be transferred. There is, thus, no reason why the view of Hon’ble the Supreme Court in **Ajantha Industries case (supra)** along with the judgments of this Court would not apply for interpreting Section 127(2) of the Act. We are further of the view that agreement between both Commissioners cannot be withheld from the assessee and a copy thereof also has to be furnished to the assessee.

The argument of the learned counsel that the reasons have been recorded in a separate order dated 13.8.2008 would not satisfy the

requirement of Section 127 of the Act because the reasons have to be part of the order and recording of separate reasons on file without communicating the same to the assessee has been considered to be unfair and unwarranted. In support of the aforesaid proposition reliance may be placed on the observations made by a Constitution Bench of the Hon'ble Supreme Court in the case of **Mohinder Singh Gill v. Chief Election Commissioner**, AIR 1978 SC 851. In para 8 of the judgment it has been observed as under:

“The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.”

In view of the aforesaid principle, the recording of separate reasons which are not part of the impugned order and its non communication to the petitioners would not be sustainable in the eyes of law. Therefore, we find no hesitation to reject the aforesaid argument.

For the reasons afore-mentioned, this petition succeeds and the same is allowed. Order dated 13.8.2008 (Annexure P.4) is set aside. However, we leave it open to the Commissioner- respondent no.5 to pass a fresh order in accordance with the law laid down by Hon'ble the Supreme Court in **Ajantha Industries' case (supra)** and by this Court in the cases of **Lt. Col. Paramjit Singh (supra)** and **Rajesh Mahajan (supra)**.

(M.M.Kumar)
Judge

4.8.2009
Okg/Pkapoor

(Jaswant Singh)
Judge