

Court No. - 3

Case :- WRIT TAX No. - 966 of 2022

Petitioner :- Nidhi Agarhari

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Avanish Mishra, Anurag Sharma

Counsel for Respondent :- C.S.C.

Hon'ble Surya Prakash Kesarwani, J.

Hon'ble Chandra Kumar Rai, J.

Heard Sri Avanish Mishra, learned counsel for the petitioner and the learned standing counsel for the respondents.

The petitioner had applied for license for model shop within the limits of Civil Lines, Fatehpur for the Excise Year 2020-21 and the allotment letter dated 16.03.2020 was issued to the petitioner by the competent authority. Pursuant thereto, the petitioner deposited the license fees for the whole year of Rs.30,55,000/- and Rs.2,00,000/- towards catering of liquor in canteen. Thus, total amount of Rs.32,55,000/- was deposited by the petitioner on 18.03.2020 through RTGS. The petitioner also submitted security of Rs.3,05,500/- in the form of FDR No.378136 dated 07.04.2020 prepared in favour of District Excise Officer, Fatehpur. Thereafter, for issuance of license of model shop, the petitioner submitted the boundaries of proposed shop and seller's name. On inspection of the proposed place for model shop, it was found to be located within the limits of Ward No.2 and not within the limits of Civil Lines. Therefore, vide letter dated 06.06.2020, the District Excise Officer asked the petitioner to submit boundaries of a new place for running the model shop, for approval. According to the respondents, instead of submitting the boundaries of a new place, the petitioner filed Writ Tax No.330 of 2020, which was disposed of by order dated 15.07.2021. The aforesaid Writ Tax No.330 of 2020 was filed by the petitioner in the month of June, 2020 and after exchange of affidavits, it was disposed of by order dated 15.07.2021 observing/ directing in paragraphs-9, 10, 11 and 12; as under:

*"9. The only dispute of fact that exists between the parties is the reason why the petitioner's shop could not be settled. We have heard the rival contentions in that regard. The claim of the petitioner that the shop offered to her was actually situated in the Civil Lines area of District-Fatehpur, need not be examined, at this stage, as the petitioner filed the present petition in the month of June 2020 and on the first date itself claimed refund. **In light of the fact that there was a complete lockdown from 01.04.2020 to 03.05.2020, we find that the petitioner had, at the earliest stage itself, offered to surrender her license though that application had not been formally made before the Excise Commissioner. At the same time, there is no material on record to doubt that the petitioner did not intend to surrender her license, inasmuch as, no quantity of liquor has been dealt with or sold by the petitioner.***

10. It may be relevant to note that, with respect to service of notice regarding the non-acceptance of the shop offered to the petitioner, other than the alleged service of notice through affixation at the shop of the petitioner's husband, there is no direct evidence that such notice was attempted to be served on the petitioner at the address disclosed in the allotment order.

11. In view of the above facts and circumstances that are undisputed and keeping in mind the extreme circumstances arising from the spread of pandemic Covid-19, we consider it appropriate that the requirement of one month notice as contemplated under Section 36 of the Act may not act as a hurdle in the petitioner's claim for refund.

*12. Also, the petitioner appears to have made an **application for refund**, before the Excise Commissioner on 03.10.2020 which has remained pending perhaps on account of lockdown.*

*12. In view of the above, we dispose of the writ petition with the following directions:
(i) the petitioner shall make a fresh application for refund in terms of Section 36 of the Act, not later than two weeks from today, alongwith a copy of this order, before the Excise Commissioner,*

Uttar Pradesh;

(ii) subject to the petitioner making such application, the said Commissioner may call for a report from the licensing authority as to whether the petitioner had deposited the entire license fee and whether she had operated the model shop for a single day;
(iii) subject to a report being furnished in favour of the petitioner, by the licensing authority, the Excise Commissioner may proceed to **decide the petitioner's application for surrender and refund within a period of three months** from the date of submission of the application by the petitioner;

(iv) **it is expected that while exercising discretion under the proviso to Section 36 of the Act, the Excise Commissioner shall remain mindful of the observations made in this order and allow for refund**, if the petitioner is found entitled thereto for the amount of license fee and additional fee of Rs.2,00,000/-. However, the petitioner shall not be entitled to refund of any amount of processing fee of Rs.30,000/- which has been deposited."

It is admitted by the learned standing counsel that the aforesaid judgment and order dated 15.07.2021 passed by this Court, has attained finality inasmuch as it was not challenged by the respondents before the Supreme Court. Thus, the findings given in paragraph-9 of the aforesaid judgment has also attained finality in which it has been observed that the petitioner had, at the earliest, stage offered for surrender of her license and there is no material to doubt that the petitioner did not intend to surrender the license. Despite the afore-quoted judgment of this court, the respondent No.2 has passed the impugned order dated 30.03.2022 rejecting the application of the petitioner on the ground that the petitioner has failed to arrange appropriate place for running the model shop and, therefore, her application for refund/remittance has no merit and not legally maintainable and consequently, the representations dated 26.07.2021 and 08.02.2022 are rejected.

Prima facie, we find that the conclusions reached by the respondent No.2 while passing the impugned order are in breach of the findings recorded and the directions issued by this Court by the afore-quoted order dated 15.07.2021. The respondents also completely and deliberately ignored the period of complete lock-down and also the fact that in model shops, the consumption on the premises is allowed along with facility of taking snacks and the government has completely prohibited the activity of running restaurants etc. for a major period of the financial year 2020-21 on account of Pandemic COVID-19. Prima facie, the impugned order appears to be arbitrary and illegal. However, following the principles of natural justice, one more opportunity needs to be afforded to the respondents to file a counter affidavit.

Learned standing counsel prays for and is granted a week's time to file counter affidavit. Petitioner shall have three days thereafter to file rejoinder affidavit.

List/ put up in the additional cause list before the appropriate bench on 03.08.2022 at 02:00 P.M.

Order Date :- 21.7.2022

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