IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 1548 OF 2014

M/s Hariom Sarees Depot .. Petitioner

Vs.

The Commissioner Ulhasnagar Municipal Corporation & Ors. .. Respondents

...

Mr. Shrishailya S. Deshmukh for petitioner.
Mr. Vijay D. Patil for Respondent Nos. 1 and 2.

CORAM : A. K. MENON, J.
DATE : SEPTEMBER 22, 2015.

Judgment.:

1] Rule.

2] Returnable forthwith. By consent the petition is taken up for final hearing at the stage of admission.

3] The present petition is filed challenging the impugned order dated 15th July 2013 passed by respondent no. 1 confirming an order dated 6th June 2013 passed by respondent no. 2 pursuant to which respondent no. 2 issued a demand notice seeking payment of Rs. 41,90,774/- towards Local Body Tax payable to the Ulhasnagar Municipal Corporation. The petitioner had challenged the said order of the Deputy Commissioner, Ulhasnagar Municipal

Corporation, as well as the demand notice dated 6th June 2013 by filing appeal No. 1/2013 under Section 106 (6) (ii) of the MMC Act, 1949. At hearing of the appeal the petitioner made a grievance of the fact that under Section 33 (7) when a notice is issued in form "H" it would necessarily be issued after an assessment order is made.

4] The impugned order holds that the appeal is filed on technical grounds. According to the respondent no. 1 a notice under section 33 (7) was issued by the opponent in the prescribed form "H" for the purpose of Sub rule 3 (i) of Section 33 and in such case an assessment order in the prescribed form 1 under Rule 33(9) is not necessary.

The impugned order further observes that the appellant filed his returns in form E-1 and E-2 after receipt of the impugned notice and in the meantime the petitioner had sought certain refund under Rule 32 for the period of 01.07.2012 to 31.03.2013.

5] The petitioner had also filed an application dated 10th April 2013 seeking permission to pay only 10% of the Local Body Tax for the Financial Year 2013-14. It is the grievance of the

petitioner that apart from the rejection of the claim for refund, permission to pay 10% is also denied, pursuant to which the notice of demand came to be issued. The learned counsel for the petitioner states that as required by the rules, the appeal would not be entertained unless the entire amount of the demand was deposited. The learned counsel for the petitioner submitted that as required by the rules prior to filing the appeal the petitioner has deposited the entire amount demanded which demand is under challenge, a fact that is observed in the impugned order dated 15th July 2013 as well.

6] In these circumstances, the interest of the corporation being secure it is submitted that there is no justification in holding that the petitioner's expectation that an assessment order would be furnished to him is a “technical” issue. For that matter learned counsel for the petitioner invited my attention to the provisions of Rule 33 (i) under the Chapter 12 providing for the assessment procedures. Rule 33 (3) reads thus ;

33. Assessment of local body tax.-

(1)

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(2)

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(3) The Commissioner may assess a registered dealer who,-

(i) has failed to furnish returns for any period, or

(ii) has furnished all the returns in respect of all the periods on or before the date prescribed for furnishing the last return pertaining to that period, if he is not satisfied that the returns furnished by the registered dealer in respect of that period, are correct and complete, and if he thinks it necessary to require the presence of the dealer or the production of further evidence in respect thereof, or

(iii) has furnished returns in respect of any period and has claimed refund in the returns furnished by him, or

(iv) has applied for cancellation of his certificate of registration.

7] The other relevant provision that the learned counsel for the petitioner pointed out is Rule 33 (7) under which the Commissioner may proceed to assess the dealer within a period of 5 years to end of the year to which the assessment relates after serving a show cause notice to a dealer in form of “H”. These are the very notices that has been issued on the 23.11.2012 & 14.12.2012 under Rule 33(7) and copies of which appear at Exhibits E & G to the petition. In the normal course if the dealer such as the petitioner fails to file returns for any period as contemplated by the Rule 33 (3) (i), the Commissioner is

empowered to assess the duty and make an assessment order.

8] The learned counsel for the petitioner also drew the attention of the Court to Rule 33 (9) which provides that the order of assessment will be in Form (I) and submitted that in the present case such order of assessment has not been issued. In the circumstances he is unable to meet the case against him. It is on this basis that the petitioner has come to this Court praying that the impugned order be quashed and set aside.

9] On behalf of the respondent an affidavit of Mr. Yogesh Godse, Assistant Commissioner Local Body Tax Ulhasnagar Municipal Corporation, has been filed. The learned counsel for the respondent has pointed out that in the said affidavit the deponent has reiterated that the petitioner is not entitled to any refund as the benefit had already been passed on to the ultimate buyer and any refund would result in unjust enrichment to the petitioner and that there is no merit in the contention of the petitioner that an assessment order is required to be passed before a notice of demand is issued.

10] Having perused the provisions of the Rules 32, 33 and the assessment procedures provided under the Act it is clear that the Commissioner is empowered to assess a register dealer if he ;

1) has failed to file any return for any period or,

2) the dealer having furnished the return for the relevant period or last return pertaining to that period, if he is not satisfied that the returns are complete and correct and in such situation the Commissioner is entitled to require the presence of the dealer or the production of further evidence.

11] Under Rule 33 (7) the Commissioner is entitled to proceed to assess the dealer after issuance of notice in Form “H” which is seen to have been issued in the present case on 23rd November 2012 (Exh. E). After receipt of the show cause notice it appears that the petitioner has submitted an explanation on 5th December 2012, enclosing certain documents. However, the Commissioner issued one more notice on 14th December 2014 to which the petitioner responded by filing the Local Body Tax Return for the period of July to December 2012 in Form E-1 and E-2. It is the petitioner's case that the said returns have been accepted and

having filed returns it was entitled to an order of assessment before issuance of demand notice.

12] In my view the contention deserves to be accepted in view of the scheme of the act and it was not proper for the respondent no. 2 to dismiss the appeal merely observing that the appeal was on a “technical” ground. The order of assessment is a decision which is a very vital to the petitioner's case and for that matter of any assessee and it was incumbent upon the respondent to issue an assessment order before making a demand. In the instant case the demand notice is issued on 6th June 2013 after the filing of the returns, albeit belatedly. It is not in dispute that returns in Form E and E1 were filed on 11th March 2013. Almost 3 months thereafter a notice of demand came to be issued without an assessment order being furnished to the assessee.

13] In the circumstances I am of the view that the dismissal of the appeal without providing an assessment order would not only be in breaching the scheme of the Act but would also amount to failure to observe principles of natural justice in having required the petitioner to deal with a notice of demand without providing

him with the order of assessment on the basis of which such demand could be sustained. The learned counsel for the respondent points out and rightly so, that although returns have been filed the same do not appear to be covering the entire period in dispute since the period for which returns have been filed in Form "E" reveals that it is period of 01.07.2012 to 31.12.2012, whereas the period in dispute and which formed subject matter of the notice of demand is 01.07.2012 to 30.04.2013. The appellate authority does not appear to have taken this aspect into consideration in the impugned order, but has merely observed the appellant had filed return in Form E and E-2 after receipt of notice. It seems that the period in respect of which the return is filed has been overlooked. In the circumstances, the petitioner will be required to file its returns for the entire period of dispute before a final order of assessment can be issued.

14] As far as the other aspect of refund is concerned the learned counsel for the petitioners submitted that in the present petition he is only pressing the challenge to the demand notice dated 6th June 2013 and in respect of the rejection of the demand

for refund he would be required to file appropriate proceeding and he seeks liberty to do so. Having considered the facts as above and for reasons recorded above the impugned orders of 15th July 2013 and 6th June 2013 to the extent it issued a demand notice for Rs. 41,90,774/- cannot be sustained. In the circumstances I pass following order.

ORDER

(i). The impugned order dated 6th June 2013 passed by Respondent no. 2 is set aside to the extent of the demand notice issued for the amount specified under paragraph 6 of the order.

(ii). The impugned order dated 15th July 2013 passed by respondent no. 2 is hereby set aside.

(iii). The impugned demand notice dated 6th June 2013 bearing No. Umc/LBT/2/65 dated 6th June 2013 is hereby set aside.

(iv). As far as the aspect of refund of Rs. 53,72,380/- which is claimed in the application as well as the application for concession by payment of only 10% of

Local Body Tax chargeable are concerned, the same is left open for consideration in appropriate proceedings that the petitioner may chose to adopt if so advised.

(v). The petitioner is directed to file the additional returns for the period of 01.01.2013 to 31.03.2013 within a period of 4 weeks from today. Upon such returns being filed, the respondents or such of them who are responsible shall issue an assessment order for the entire period of 01.07.2012 to 31.03.2013 within a period of 3 weeks.

(vi). If the petitioner omits to file the returns for the relevant period mentioned above it will be open for the respondent to proceed in accordance with law.

(vii). The petition is disposed of in the above terms. There will be no order as to costs.

(**A. K. MENON, J.**)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/Order.