IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,

Chief Justice

Mr. Justice Md. Nuruzzaman

Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NOS.11-15 OF 2008.

(From the judgment and order dated 29.03.2006 passed by the High Court Division in W.P. Nos.3942 of 2005, 3943, 3944, 3945 and 5217 of 2005)

The Commissioner of Customs, Customs Excise and VAT Commissionerate Dhaka (South) Dhaka and others.	Appellants. (In all the appeals)
=Versus=	
Syed Nurul Arefeen :	Respondent. (In C.A.No. 11-14/2008)
Md. Nasiruddin	Respondent (In C.A. No.15/2008)

For the appellants (In all the appeals)	:	Mr. A.M. Aminuddin, Attorney General (with Ms. Abanti Nurul A.A.G), instructed by Mr. Haridas Paul, Advocate-on-Record.
For the Respondent (In all the appeals)	:	Mr. A.F. Hassan Ariff, Senior Advocate (with Mr. Zakir Hossain Munshi, Advocate) instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

Date of hearing : 18.10.2022.

Date of judgment : 19-10-2022

J U D G M E N T

Hasan Foez Siddique,C.J: These five appeals are directed against the judgment and order dated 29.03.2006 passed by the High Court Division in Writ Petition Nos.3942,3943, 3944, 3945 and 5217 of 2005 making all the Rules

absolute. Points for determination of all matters are identical.

The relevant facts of writ petition No.3942 of 2005,in short, are that the writ petitioner has been running his business concern in the name and style of M/S. Solar Trading Corporation. His business is for importing automobile, tyres, tubes and flaps etc. He is a VAT assesse and has been paying VAT duly. In course of business, the writ-petitioner imported his commodities in 2003 by different letters of credit and after arrival of the goods he got release of the same on paying the customs duties, VAT and other charges leviable under the law and sold the imported goods in the market on the basis of retail price. The writ-petitioner received the notice under the signature of writ respondent No.1, Assistant Commissioner, Customs, Excise and VAT, Sutrapur Division, Dhaka dated 08.05.2004 being No.4/VAT/Aum/Dabi/585 claiming tk.54,82,648.00 as unpaid VAT which was allegedly liable to be paid by the writ petitioner at the sale/supply of his imported goods in the market while selling the same on the basis of retail price. The writ petitioner

denied to pay the alleged liability submitting reply to the writ-respondent No.2 on 20.05.2004. Thereafter, writ respondent No.2 blocked the BIN number of the writ petitioner so the writ petitioner could not release imported goods. In such compelling circumstances, the writ-petitioner paid tk.2,00,000.00 on 02.08.2004 through challan as part payment against the said demand dated 12.05.2004 to avoid loss, demurrage and bank interest. Consequently, his BIN number was restored. The writ-respondent No.2 on 21.08.2004, issued another demand notice demanding tk.57,56,069.57 which includes the demand earlier dated 08.05.2004 followed by reminder letter dated 27.06.2004. Writ-respondent No.2, on 28.12.2004, issued another demand notice claiming an amount of tk.44,68,631.00 showing the same as due VAT from financial year 2001 to 2004 which covered the period from 2001, which was included in the earlier demand notice dated 08.05.2004, upto the 30th June, 2004. The writ petitioner's BIN was again locked. Thereafter, the writ-petitioner again compelled to deposit tk.13,00,000/- as part payment against the said

demand to avoid loss, demurrage and bank interest. After so payment his BIN number was again restored. The writ-petitioner claiming the demand as false filed an application to the writ-respondent No.2 praying for refund of the said amounts at tk.2,00,000.00 and tk.13,00,000.00 but did not get any result. Thereafter, writ-respondent No.2 on 30.03.2005 again issued another demand notice claiming tk.69,62,012.00 as unpaid VAT for the period from July, 2000 to June, 2004 which also includes the earlier demand excluding the paid amount of tk.15,00,000.00 as aforesaid. The writ-respondent No.2 on 26.05.2005 again issued another demand amount to tk.3,66,721.95 as unpaid VAT for the period from July, 2000 to August, 2000. Thus, the writ-petitioner challenged the said demands.

In Writ Petition No.5217 of 2005 the writ petitioner, Md. Nasiruddin, alleged that he is a regular importer of Sugar classified under H.S. Code No.170.11.00; Sodium Carbonate classified under H.S. Code No.2836.20.00; Milk Powder classified under H.S. Code No.04022.21.20; Wood classified under H.S. Code No.4403.49.00; Rice classified under H.S. Code

No.1006.20.00; Resin classified under H.S. Code No.3907.60.00; Dal Dunpeas etc. He is a whole seller of the aforesaid goods in the local market. The writ-petitioner imported the said goods lastly in the month of September, 2002 to October, 2005 and got release of those goods after paying Customs duties, Excise and VAT and paid other charges as applicable in law and sold the goods in the market on the basis of retail price. The writ-petitioner received a demand notice No.01 of 2005 dated 14.05.2005 issued by writ-respondent No.5 claiming an alleged unpaid VAT amounting to tk.3,42,653.50. The writ-petitioner, protesting the said demand, submitted written representation on 11.06.2005 to the writ-respondent No.5 and prayed for withdrawal of the notice. The writ-respondent No.5 heard the writ-petitioner but issued final demand notice being No.01 of 2005 dated 05.07.2005 modifying the earlier demanded amount from tk.3,42,633.50 to tk.3,29,12,147.00 under section 5(2) and 5(4) of the VAT Act, read with the provision of SRO No.143 and 144 dated 07.06.2001 without considering the objection raised by the writ-petitioner. Thus, the writ petitioner, challenging the said

demand notice, filed this writ petition. Facts of all the writ petitions are almost identical.

The High Court Division made all the Rules absolute. Against which, the appellants have preferred these five different appeals in this Division upon getting leave.

Mr. A.M. Amin Uddin, learned Attorney General, appearing for the appellants, submits that the instant writ petitions were not at all maintainable in view of the statutory provision of preferring appeal against the impugned order made by the Assistant Commissioner of Customs, Excise and VAT Commissionerate, the High Court Division erred in law in entertaining the instant writ petitions which has a caused total failure of justice. In support of his submissions, learned Attorney General cited a recent decision of this Division dated 04.04.2022 passed in Civil Petition for Leave to Appeal No.140 of 2019.

Mr.A.F. Hassan Ariff, learned Senior Advocate appearing for the writ petitioner-respondents in all the appeals in his submissions contended that since the Assistant Commissioner of Customs, Excise and VAT while issuing the impugned demand the committed gross

illegality, the High Court Division rightly entertain the writ petitions.

Recently, this Division in Civil Petition for Leave to Appeal No.140 of 2019 has made the following observations:

"Our apex court in the case of TaeHung Packaging (BD) Limited and others Vs. Bangladesh and others, reported in 18 BLC (AD) (2013) 144, held:

> *"When the question of maintainability of a writ petition is raised by the contesting respondents, it is the first and foremost duty of the learned judges to decide the said question first. If the writ petitions are found not maintainable, then it will be sheer wastage of court's valuable time to consider and discuss the merit of the case."*

Section 42 of the VAT Act provides forum for statutory appeal which runs as follows:

> ৪২। আপীল-(১) ''যে কোন মূল্য সংযোজন কর কর্মকর্তা বা যে কোন ব্যক্তি মূল্য সংযোজন কর কর্মকর্তার এই আইন বা কোন বিধির অধীন প্রদত্ত কোন সিদ্ধান্ত বা আদেশ দ্বারা সংক্ষুব্ধ হইলে তিনি উক্ত সিদ্ধান্ত বা আদেশের বিরুদ্ধে, পণ্যের সরবরাহ বা প্রদত্ত সেবার ক্ষেত্রে ধারা ৫৬ এর অধীন প্রদত্ত কোন আটক বা বিক্রয় আদেশ অথবা পণ্য আমদানির ক্ষেত্রে Customs Act এর section 82 বা section 98 এর অধীন কোন আদেশ ব্যতীত, উক্ত সিদ্ধান্ত বা [আদেশ প্রদানের বা, ক্ষেত্রমত, আদেশ জারির] [নব্বই দিনের] মধ্যে,
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> (ক) উক্ত সিদ্ধান্ত বা আদেশ অতিরিক্ত কমিশনার বা তন্নিম্নের কোন মূল্য সংযোজন কর কর্মকর্তা কর্তৃক প্রদত্ত হইয়া থাকিলে, কমিশনার (আপিল) এর নিকট;

(খ) উক্ত সিদ্ধান্ত বা আদেশ কমিশনার, কমিশনার (আপিল) বা তাঁহার সমমর্যাদার কোন মূল্য সংযোজন কর কর্মকর্তা কর্তৃক প্রদত্ত হইয়া থাকিলে, Customs Act এর section 196 এর অধীন গঠিত [Customs, Excise and মূল্য সংযোজন কর Appellate Tribunal, অত:পর Appellate Tribunal বলিয়া উল্লিখিত, এর নিকট; এবং

(গ) উক্ত সিদ্ধান্ত বা আদেশ Appellate Tribunal কর্তৃক প্রদত্ত হইয়া থাকিলে, বাংলাদেশ সুপ্রীম কোর্টের হাইকোর্ট বিভাগের নিকট;]

আপিল করিতে পারিবেন।

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(২) যদি কোন ব্যক্তি কোন পণ্য বা সেবার উপর প্রদেয় মূল্য সংযোজন করের দাবী সম্পর্কিত অথবা এই আইনের অধীন আরোপিত কোন অর্থদন্ড সম্পর্কিত কোন সিদ্ধান্ত বা আদেশের বিরুদ্ধে উপ-ধারা (১) এর অধীন আপিল করার ইচ্ছা করেন, তাহা হইলে তাহাকে, তাহার আপিল দায়ের করার কালে [আপিলটি-

[(ক) কমিশনার (আপিল) এর নিকট দায়ের করা হইলে, দাবীকৃত কর এর দশ শতাংশ বা দাবীকৃত কর না থাকিলে আরোপিত অর্থদন্ডের দশ শতাংশ]; [এবং]

(খ) কমিশনার বা তাঁহার সমমর্যাদার কোনো মূল্য সংযোজন কর কর্মকর্তার আদেশের বিরুদ্ধে Appellate Tribunal এ দায়ের করা হইলে, [দাবীকৃত কর এর দশ শতাংশ বা দাবীকৃত কর না থাকিলে আরোপিত অর্থদন্ডের দশ শতাংশ] ;"

From the above provision of law it is clear that any person aggrieved by the decision or order passed by the Commissioner, Additional Commissioner or any VAT Official lower in the rank of the Commissioner or Additional Commissioner can prefer appeal to the forum prescribed.

In the instant case the writ-petitioner impugned adjudication order dated 15.08.2007 passed by the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division

and other impugned orders passed by other officials are appealable order under section 42(1)(Ka) of the VAT Act and section 42(2)(Ka) mandates that 10% of the demanded VAT is to be deposited at the time of filing of the appeal.

When there is a statutory provision to avail the forum of appeal against an adjudication order passed by the concern VAT Official then the judicial review under Article 102(2) of the constitution bypassing the appellate forum provided under the law is not maintainable.

In view of the time frame prescribed by section 42(4) of the VAT Act it cannot be said that the remedy under section 42 of the Act is not efficacious.

The respondent had an adequate remedy under the VAT Act which he could avail of. The respondent did not avail the appellate forum under the statute which was competent to decide all questions of fact and law.

It is pertinent to mention here that Clause (2) of Article 102 of our Constitution empowers the High Court Division to interfere with any proceeding if satisfied that there is 'no other equally efficacious remedy is provided by law.'

Though Article 226 of the Constitution of India provides no such restrictions for the High Courts in India to invoke writ jurisdiction even in presence of equally efficacious remedy in any case of violation of fundamental rights and the Supreme Court of India has also been given similar power with the exception that under Article 32 the sole object is the enforcement of the fundamental rights guaranteed by the Constitution whereas, under Article 226 of the High Courts have been invested with a wider

power relating to the enforcement of fundamental rights as well as ordinary legal rights, still Indian Supreme Court is very cautious in exercising the right where there is an alternative remedy.

In the case of Champalal Binani Vs. the Commissioner of Income Tax, West Bengal & others, reported in AIR 1970(SC)645, the Indian Supreme Court observed that:

> *"Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority which is ex-facie with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of jurisdiction or of infringement of fundamental rights of the petition."*

From the reasons stated above, we are of the view that the writ petitions were not entertainable without exhausting the statutory forum of appeal provides under section 42 of the VAT Act.

It is true that there is no absolute Rule of law barring to file writ petition challenging the impugned orders but this Division consistently deprecate the practice of filing writ petition in the High Court Division where an alternative remedy has been provided under the relevant statute. In the case of Harbanslal

Sahnia V. Indian Oil Corp. Ltd., (2003) 2 SCC 107 it was observed by the Supreme Court of India that High Court may exercise its writ jurisdiction in at least three contingencies: (1) Where writ petition seeks enforcement of any fundamental rights; (II) Where there is failure of principles of natural justice; or (III) Where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In the instant cases, since the statute provided efficacious alternative remedy to the aggrieved persons and Statute itself contains a mechanism for redressal of grievance and in the writ petitioners the writ petitions did not raise any point stated above, we are of the view that writ petitioners should avail the statutory remedy provided in the statute.

In view of the aforesaid recent decision of this Division and discussions made above and since we have already decided the issued raised by the learned Attorney General, it would be unjust to reopen the same again. The writ petitioners may prefer appeal before the appropriate authority and they may consider the prayer for condonation of delay if the same is so filed.

With the observations made above, all the appeals are allowed. The judgment and order dated 29.03.2006 passed by the High Court Division in Writ Petition Nos.3942 of 2005, heard analogously with Writ Petition Nos.3943, 3944, 3945 and 5217 of 2005 are hereby set aside.

C.J.

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The 19th October, 2022
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