

**16 SCOB [2022] AD 1****APPELLATE DIVISION****PRESENT:**

**Mr. Justice Hasan Foez Siddique**  
**Chief Justice**  
**Mr. Justice Md. Nuruzzaman**  
**Mr. Justice Obaidul Hassan**

**CIVIL PETITION FOR LEAVE TO APPEAL NO.2365 of 2020**

(From the judgment and order dated 10.03.2016 passed by the High Court Division in Writ Petition No.5151 of 2015)

**Government of Bangladesh,**  
**represented by the Secretary, Internal**  
**Resources Division, Ministry of**  
**Finance, Secretariat Building, Ramna,**  
**Dhaka and others**

**...Petitioners.**

**=Versus=**

**Radiant Pharmaceuticals Ltd.,**  
**represented by its Managing Director,**  
**Masrur Ahmed, son of Late Mahbub**  
**Uddin Ahmed, House No.22, Road**  
**No.2, Dhanmondi, Dhaka.**

**...Respondent.**

For the Petitioners : Mr. Sk. Md. Morshed, Additional Attorney General,  
instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Respondent : Mr. Yousuf Hossain Humayun, Senior Advocate,  
instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

Date of judgment: The 4<sup>th</sup> January, 2022

**Editors' Note**

The respondent, a pharmaceuticals company, filed its Income Tax return upon which the concerned Local Office of the CAG conducted an audit after assessment by the DCT and found some irregularities in respect of assessment of the respondent's income. Accordingly, the audit team submitted report to the Commissioner of Taxes claiming that the government suffered a revenue loss of Tk.1,39,750/- for such irregularities. On the basis of such report, the concerned Inspecting Additional Commissioner issued a notice under section 120 of the Income Tax Ordinance, 1984 upon the respondent. Being aggrieved, the respondent filed a writ petition before the High Court Division and obtained Rule Nisi. The High Court Division made the Rule absolute holding that though it is the power of the CAG or local

office of the CAG to audit on the files in the tax department in order to check the receipts/refunds of public funds, it has got no authority to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. If the auditor is allowed to do so, the entire purpose for incorporating the provisions under Section 120 and/or 121A of the Ordinance will be frustrated. Appellate Division, on the contrary, analyzing article 128 of the Constitution of Bangladesh and section 120 and 163(3)(g) of the Income Tax Ordinance, 1984 set aside the judgment and order of the High Court Division holding that the audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is correct or not and therefore the opinion of the High Court Division is erroneous.

### **Key Words**

**Constitution of Bangladesh, article 128; Income Tax Ordinance 1984, sections 120, 121A, 163; Audit Report; Comptroller and Auditor General; Revenue**

### **Constitution of Bangladesh, article 128 and Income Tax Ordinance, 1984 section 120 and 163 (3)**

#### **Whether audit report has any bearing upon the subjective opinion of assessing officer:**

**The Audit Department has been invested with the authority to inspect the accounts of Revenue Department. The Comptroller and Auditor General is authorized to direct any of his officers to conduct audit of tax receipts or refunds under section 163 (3)(g) of the Income Tax Ordinance. The High Court Division has opined that the CAG has got no jurisdiction to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. This view of the High Court Division is erroneous inasmuch as if the audit report does not have any bearing in the subjective opinion of the assessing officer, the very purpose of auditing pursuant to article 128 of the constitution is to be frustrated. If no action can be taken against any irregularities detected through auditing of accounts, auditing itself becomes unnecessary. In the instant case, for example, concerned DCT has allowed financial expenses of an amount of Tk. 575,49,249/- as demanded by the assessee which was not supported by annual report etc. and the audit report has detected this irregularity. If this irregularity as detected by the audit report does not trigger any proceeding under section 120 of the Income Tax Ordinance, 1984, the power conferred to the CAG under section 163(3)(g) of the same Ordinance becomes fruitless.**

...(Para 14)

### **Income Tax Ordinance, 1984 section 120 and 163 (3)**

#### **Audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is erroneous or not:**

**Going through the provision of section 120 of the Income Tax Ordinance, 1984 we find that the Inspecting Joint Commissioner may call for and examine the record of any proceeding under this Ordinance if he considers that any order passed therein by the Deputy Commissioner of Taxes is erroneous in so far as it is prejudicial to the interests of revenue. Provisions of section 120 of the Income Tax Ordinance, 1984 read with section 163(3)(f) and(g) of the same Ordinance lead us to irresistible conclusion that**

**audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is erroneous or not. The audit report better equips the Inspecting Joint Commissioner to apply his discretion to detect errors committed by Deputy Commissioner of Taxes. Therefore, the allegation that the auditors of the CAG have acted like supervisory officers of concerned assessing officer is devoid of any substance.** ... (Para 15)

## JUDGMENT

### **Hasan Foez Siddique, CJ:**

1. Delay in filing this civil petition for leave to appeal is condoned.

2. This civil petition for leave to appeal is directed against the judgment and order dated 10.03.2016 passed by the High Court Division in Writ Petition No.5151 of 2015 making the Rule Nisi absolute.

3. Facts, necessary for the purpose of disposal of this civil petition for leave to appeal, in a nutshell, are:

The petitioner, being a private Limited Company and engaged in the business of pharmaceuticals, filed its Income Tax return for the assessment year 2011-2012 along with computation of income fully supported by books of accounts audited by an independent and reputed firm of chartered accountants. That, thereupon, after completion of the assessment by the DCT, the concerned Local Office of the Controller and Accountant General (CAG) ( writ-respondent No.6) conducted an audit on the concerned files of the petitioner lying with the tax department, and, in the said audit, some irregularities in respect of assessment of the petitioner's income were detected. Accordingly, the audit team submitted report to the concerned Commissioner of Taxes. It is stated that, on the basis of such report of the local office of the CAG, the concerned Inspecting Additional Commissioner (writ-respondent No.3) issued the impugned notice dated 08.03.2015 purportedly under Section 120 of the Income Tax Ordinance, 1984 asking the petitioner to remain present in a hearing on 24.03.2015 along with the concerned papers and documents contending, *inter alia*, that the proceedings under section 120 were to be initiated pursuant to said audit report on the basis of some allegations, namely that (i) the financial expenses for an amount of Tk.5,75,69,249/- as demanded by the assessee and allowed by the concerned DCT was not supported by annual report etc; (ii) interest expenses for an amount of Tk.58,75,072/- should have been added as income proportionately; (iii) that the amount claimed and shown by the assessee being Tk.10,20,45,202/- on account of marketing and promotional expenses should have been treated as commission and, accordingly, advance income tax was deductible therefrom in view of the provisions under Section 53E of the said Ordinance for an amount of Tk.9,20,45,202/- and (iv) the unsecured loan obtained by the assessee for an amount of Tk.3,72,50,000/- in the income year 2007-2008 having not been returned or refunded within a period of 03(three) years, the same should have been treated as taxable income for the

assessment year 2011-2012, and, on this account, the revenue suffered a loss of Tk. 1,39,750/- Pursuant to such notice, the petitioner, vide its letter dated 24.03.2015, sought an adjournment, and, thereafter, vide another letter dated 31.03.2015, sought the copy of the said audit report as referred to in the impugned notice. However, it is stated that, the petitioner did not get any positive response.

4. Being aggrieved by such actions of the writ-respondents, the writ-petitioner filed a writ petition before the High Court Division and obtained Rule Nisi.

5. The Rule was opposed by the concerned Commissioner of Taxes by filing an affidavit-in-opposition.

6. The learned Judges of the High Court Division upon hearing the Rule by the judgment and order dated 10.03.2016 made the Rule absolute.

7. Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the writ-respondents as the leave-petitioners filed this civil petition for leave to appeal before this Division.

8. Mr. Sk. Md. Morshed, learned Additional Attorney General, appearing on behalf of the leave-petitioners, submits that the High Court Division has committed an error of law in holding that Comptroller and Auditor-General of Bangladesh (CAG) has no power and no jurisdiction to make any direction for holding audit though the provisions of section 163(3)(f) and (g) of the Income Tax Ordinance, 1984 have authorized the Comptroller and Auditor-General of Bangladesh (CAG) to audit the tax receipts. He further submits that this Division in the case of National Board of Revenue, represented by its Chairman, Segunagicha, Ramna, Dhaka and others vs. Singer Bangladesh Limited and others in Civil Petitions for Leave to Appeal Nos. 3726, 3728-3729, 3732, 3734, 3736-3745 and 3747 of 2015, observed that the Comptroller and Auditor-General of Bangladesh (CAG) has jurisdiction to direct its officers to audit tax receipts or refunds.

9. Mr. Yousuf Hossain Humayun, learned Senior Advocate, appearing on behalf of the respondents, supporting the impugned judgment and order delivered by the High Court Division submitted that auditors of the CAG had clearly exceeded their jurisdiction by acting like supervisory officers of the concerned assessing officer. When concerned assessing officer allowed some expenses and did not treat some expenses as commissions, the local office of the CAG had expressed the opinion that the DCT should have treated those expenses as commission which indicates that they were in fact not conducting an audit but were performing the functions of either the Commissioner of Tax or Inspecting Joint Commissioner of Taxes under sections 121A and 120 respectively of the Income Tax Ordinance, 1984. Therefore, the proceedings initiated vide impugned notice under section 120 of the Income Tax Ordinance, 1984 suffer from lack of jurisdiction and cannot stand in

the eye of law.

10. We have heard the learned Additional Attorney General appearing for the petitioners and the learned Senior Advocate appearing for the respondent.

11. The moot question in this case as to whether notice issued under section 120 of the Income Tax Ordinance, 1984 pursuant to the audit report of the concerned Local Office of the Comptroller and Auditor-General of Bangladesh (CAG) is lawful or not and whether the Comptroller and Auditor General has any jurisdiction to direct any of his officers to audit tax receipts or refunds.

12. We have gone through the provisions of section 163(3)(f) and (g) of the Income Tax Ordinance, 1984. Contents of the said provisions are as follows:

“163. Statement, returns, etc., to be confidential.-

(1)...

(2)...

(3) The prohibition under sub-section (1) shall not apply to the disclosure of-

(a)...

.....

.....

(f) any particulars to the Comptroller and Auditor-General of Bangladesh for the purpose of enabling him to discharge his functions under the Constitution;

(g) any particulars to any officer appointed by the Comptroller and Auditor-General of Bangladesh or the Board for the purpose of auditing tax receipts or refunds.”

13. The above provisions of law self-explanatory and they provide that the Comptroller and Auditor-General of Bangladesh (CAG) has jurisdiction of auditing tax receipts and / or refunds. The High Court Division has held that though it is the power of the CAG or local office of the CAG to audit on the files in the tax department in order to check the receipts/refunds of public funds in view of Clause (g) of sub-section (3) of Section 163 of the said Ordinance and express its opinion in their reports to be submitted before the President for laying down the same before the Parliament in view of the provisions under Article 128 of the Constitution, it has got no authority to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. If the auditor is allowed to do so, the entire purpose for incorporating the provisions under Section 120 and/or 121A of the Ordinance will be frustrated.

14. In NBR vs. Singer Bangladesh and others referred to above, this Division observed that “the audit department has power to inspect the accounts of the Revenue Department since the Auditor General has been invested with such power under article 128 of the

constitution”. The Audit Department has been invested with the authority to inspect the accounts of Revenue Department. The Comptroller and Auditor General is authorized to direct any of his officers to conduct audit of tax receipts or refunds under section 163 (3)(g) of the Income Tax Ordinance. The High Court Division has opined that the CAG has got no jurisdiction to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. This view of the High Court Division is erroneous inasmuch as if the audit report does not have any bearing in the subjective opinion of the assessing officer, the very purpose of auditing pursuant to article 128 of the constitution is to be frustrated. If no action can be taken against any irregularities detected through auditing of accounts, auditing itself becomes unnecessary. In the instant case, for example, concerned DCT has allowed financial expenses of an amount of Tk. 575,49,249/- as demanded by the assessee which was not supported by annual report etc. and the audit report has detected this irregularity. If this irregularity as detected by the audit report does not trigger any proceeding under section 120 of the Income Tax Ordinance, 1984, the power conferred to the CAG under section 163(3)(g) of the same Ordinance becomes fruitless.

15. Going through the provision of section 120 of the Income Tax Ordinance, 1984 we find that the Inspecting Joint Commissioner may call for and examine the record of any proceeding under this Ordinance if he considers that any order passed therein by the Deputy Commissioner of Taxes is erroneous in so far as it is prejudicial to the interests of revenue. Provisions of section 120 of the Income Tax Ordinance, 1984 read with section 163(3)(f) and(g) of the same Ordinance lead us to irresistible conclusion that audit report prepared by the Local Audit Office of the CAG is one of the factors that enables the Inspecting Joint Commissioner to determine whether any order of Deputy Commissioner of Taxes is erroneous or not. The audit report better equips the Inspecting Joint Commissioner to apply his discretion to detect errors committed by Deputy Commissioner of Taxes. Therefore, the allegation that the auditors of the CAG have acted like supervisory officers of concerned assessing officer is devoid of any substance.

16. It has been further held in *National Board of Revenue vs. Singer Bangladesh and others* (supra) that-

“If the Audit Department finds any irregularity in the process of collection of revenue through cheques, chalans on comparison with other documents and relevant laws, it may ask the Revenue Department to furnish the documents for satisfying itself as to whether the realisation of VAT, Tax etc. is in accordance with law. Therefore, VAT authority has power to issue notice upon any person or organization in any form if it finds that there is evasion of VAT under section 55(1) of the Ain of 1991.”

17. The above decision of this Division squarely applies to the case in hand also.

18. In *S. Subramaniam Balaji vs. State of Tamil Nadu and Ors*, (2013) 9 SCC 659, the Supreme Court of India held that the CAG is the constitutional functionary appointed under Article 148 of the Constitution and its main role is to audit the income and expenditure of the Government, government bodies and State run corporations. But in *Association of Unified Tele Services Providers and Ors vs. Union of India*, (2014) 6 SCC 110, question arose as to whether CAG has power and authority to audit the accounts of private telecom licensees because of the fact that licence fee payable under the licence agreement has to be credited into the Consolidated Fund of India in the form of receipts. The Supreme Court of India analysing pertinent constitutional and legislative provisions and case laws ((2013) 9 SCC 659, (2013) 1 SCC 393 and (2013) 7 SCC 1) came to the conclusion that unless the underlying records which are in the exclusive custody of the service providers are examined by CAG it would not be possible to ascertain whether the Union of India, as per the agreement, has received its full and complete share of Revenue, by way of license fee and spectrum charges. The Supreme Court further opined that CAG in that process, is not actually auditing the accounts of the UAS service providers as such, but examining all the receipts to ascertain whether the Union is getting its due share by way of license fee and spectrum charges, which it is legitimately entitled to, by way of Revenue Sharing.

19. The above decision implies that wherever income and expenditure of public money is involved, the CAG has power and authority to conduct audit to ascertain the propriety, legality and validity of it.

20. In view of our decision as referred to above and the provisions of section 163(3)(f) and (g) of the Income Tax Ordinance, 1984, we are of the view that the High Court Division was not correct to hold that the proceedings as initiated vide impugned notice under section 120 of the Income Tax Ordinance, 1984 and actions taken pursuant to that notice suffer from lack of jurisdiction.

21. Since both the parties are present in this civil petition and have argued at length before us, we are not inclined to grant leave which will cause delay in disposal of the matter.

22. Accordingly, this civil petition for leave to appeal is disposed of and the impugned judgment and order dated 10.03.2016 passed by the High Court Division in Writ Petition No.5151 of 2015 is hereby set aside.