

4 SCOB [2015] HCD 171**HIGH COURT DIVISION****(SPECIAL ORIGINAL JURISDICTION)**

Mr. Munsshi Moniruzzaman, Advocate

..... for the petitioner.

WRIT PETITION NO. 5083 of 2004

Mr. Shams-ud-Doha Talukder, A.A.G

.....for Respondents.

Shuvash Chandra Das

.... Petitioner.

Heard on: 22.11.2015 and

Judgment on: 29.11.2015

Vs.

**Customs, Excise & VAT Appellant
Tribunal and others**

.... .. Respondents.

Present:**Mr. Justice Sheikh Hassan Arif****And****Mr. Justice J.N. Deb Choudhury.****VAT Act, 1991****Section 37 & 55:**

A notice under section 37 of the VAT Act cannot be issued without first determining the amount of evaded VAT if any. In doing so the authority have to issue notice under section 55(1) of the VAT Act 1991, claiming the evaded VAT and after giving an opportunity of hearing to the party concern, determine the amount of evaded VAT, under section 55(3) of the VAT Act 1991. After such determination of evaded VAT if the defaulter fails to repay the evaded VAT, only then, can proceed under section 37 along with other provisions of the VAT Act.(Para 16)

Judgment**J.N. Deb Choudhury, J :**

1. Rule Nisi was issued upon the respondents to show cause as to why the Order dated 20.07.2004 passed by the respondent No. 1 in Nothi No. CEVT/CASE (VAT) -12/2003 (Annexure-“T”) dismissing appeal filed by the petitioner and thereby affirming the order No. 22/Musak/2002 dated 30.11.2002 (Annexure-“F”) passed by the respondent No. 2, should not declared to have been passed without lawful authority and is of no legal effect and /or such other or further order or orders passed as to this Court may seem fit and proper.

2. Relevant facts necessary for disposal of this Rule, in brief, are that, the petitioner has been manufacturing Coconut Oil and marketing the same in the local market and supplying the same on payment of VAT under VAT Registration No. 3052001944, area code No. 301.05. Respondent No. 4 seized goods on 29.06.2002 on the plea that there was no Musak - 11 chalan showing payment of VAT. On the basis of the said seizure, respondent No. 2 issued a show cause notice dated 06.07.2002 upon the petitioner to deposit Tk. 65,688/- as evaded VAT. The respondent No. 2 issued another show cause notice dated 09.07.2002 upon petitioner to deposit Tk. 10,85,263.50 and asking the petitioner to deposit the same within 14 days. After receiving the aforesaid show cause notices the petitioner replied to the respondent

No. 2 on 07.08.2002 denying all the allegations. Respondent No. 2, passed the adjudication order No. 22/Musak/ 2002 dated 30.11.2002 and demanded Tk. 10,19,575.50 as evaded VAT and imposed a penalty of Tk. 10,25,000/- and also Tk. 2,00,000/- as fine in lieu of confiscation. Petitioner being aggrieved preferred an appeal before the Customs, excise and VAT appellate Tribunal, Dhaka the respondent No. 1 on depositing 10% of the demanded amount vide treasury challan who dismissed the same by the order dated 20.07.2004.

3. The Respondent No. 5 filed affidavit in opposition on stating that, the adjudication order No. 22/j§pL/2002 dated 30.11.2002 has been passed by the Respondent No. 2 in accordance with the provision of section 37(2) of the Value Added Tax Act, 1991 as this section provides the strength of imposition of penalty up to 2.5 times of the evaded tax. An amount of Tk. 2,00,000/- was imposed as redemption fine in lieu of confiscation of the consignment and also passed release order in addition of payment of taxes, penalty and fine as per provision of section 41 of the said Act but the petitioner has failed to take this opportunity the petitioner by suppressing the related fact of seizure of the consignment, evasion of tax by himself, has obtained a rule and an ad-interim order by misleading the Honourable Court. So, the writ petition is not maintainable and bears no merit.

4. Mr. A.M. Amin Uddin the learned Advocate along with Mr. Munshi Moniruzzaman, Advocate, appearing for the petitioner submits that in both the show cause notices dated 06.07.2002 (annexure C) and dated 09.07.2002 (annexure D) respectively, the claim was for both evaded VAT and also for taking penal action, which not tenable in the eye of law. Mr. Uddin further submits that the respondent No. 2 while passing the adjudication order also claimed the evaded VAT and imposed penalty and the Tribunal respondent No. 1 also most illegally affirmed the same, and those are as such passed without lawful authorities and are of no legal effect and accordingly prays for making the Rule absolute.

5. On the other hand the learned Assistant Attorney General submits that there were no illegalities in the adjudication order and the Tribunal rightly affirmed the same. He further submits that under section 37 of the VAT Act, the authority have the power to settle the amount of evaded VAT and so also impose penalty and accordingly prays for discharging the Rule.

6. We have gone through the writ petition, affidavit in opposition and annexures thereto.

7. For appreciating the arguments of both the parties we like to quote some relevant lines from the show cause notice dated 06.07.2002 (annexure C).

“EfCl-উক্ত বেআইনী কার্য সংঘটনের মাধ্যমে আপনি/আপনারা ৪,৩৭,৯২০/- টাকা মূল্যমানের নারিকেল তেলের উপর প্রযোজ্য ৬৫,৬৮৮.০০ টাকা সরকারের মুসক ফাঁকি দিয়েছেন। ফলে আপনি/আপনারা মূল্য সংযোজন কর আইন, ১৯৯১ ধারা ৬, ৩২ ও ৩৭ এবং মূল্য সংযোজন কর বিধিমালা, ১৯৯১ এর বিধি ৪(১৬), ১৬ ও ২৩ লংঘন করেছেন। EccōMa d;lj J thcd mwOe LIjl অপরাধে কেন ফাঁকি প্রদত্ত মুসক Ajclupq আপনার/ আপনাদের বিরুদ্ধে n;Ūj jnL hfhŪj গ্রহণ করা হবে না তার লিখিত জবাব এ নোটিশ জারীর ১৪ (চৌদ্দ) দিনের মধ্যে এ দপ্তরে দাখিল করার জন্য আপনাকে বলা হলো।”

(Underlines given for emphasis)

8. And also like to quote some line from the second show cause notice dated 09.07.2002 (annexure D)

“উপরোক্ত বেআইনী কার্য সংঘটনের মাধ্যমে আপনি/আপনারা 4,37,920/- টাকা মূল্যমানের নারিকেল তেলের উপর প্রযোজ্য মুসক বাবদ ৬৫,৬৮৮.০০ টাকা সরকারের প্রাপ্য রাজস্ব ফাঁকি দিয়েছেন। এছাড়া আপনি ২০০১-2002 Abll বছরে এ কমিশনারেটের শুধুমাত্র বিনাইদহ ও চুয়াডাঙ্গা এলাকায় ৬৭,৯৭,১৭০/- টাকা মূল্যমানের নারিকেল তেল

সরবরাহ করেন; যার উপর প্রযোজ্য মুসক এর পরিমাণ হয় ১০,১৯,৫৭৫.৫০ টাকা। পক্ষান্তরে আপনি ট্রেজারী চালানোর মাধ্যমে ৪৪,০০০/- টাকা টার্নওভার কর সরকারী কোষাগারে জমা দিয়েছেন। অর্থাৎ আপনি টার্নওভার করার ছত্রছায়ায় টাকা ১০,১৯,৫৭৫.৫০ সরকারের প্রাপ্য মুসক ফাঁকি দিয়েছেন। উপরোক্ত বিশ্লেষণ হতে প্রমানিত হয় আপনি সংশ্লিষ্ট আটক মামলার ক্ষেত্রে ৬৫,৬৮৮/- টাকা ও এ দণ্ডের থেকে তদন্তে প্রাপ্ত তথ্যের ক্ষেত্রে ১০,১৯,৫৭৫.৫০ টাকা অর্থাৎ সর্বমোট ১০,৮৫,২৬৩.৫০ টাকা মুসক ফাঁকি দিয়েছেন। বর্ণিত কার্যকলাপের মাধ্যমে আপনি মূল্য সংযোজন কর আইন, ১৯৯১ এর ধারা ৩, ৬, ১৫, ৩২ ও ৩৭ এবং মূল্য সংযোজন কর বিধিমালা, ১৯৯১ HI (Hd) 49, 16 J 23 এর লংঘন করেছেন। উল্লিখিত ধারা ও বিধি সমূহের বিধান লংঘন করার অপরাধে কেন ফাঁকি প্রদত্ত রাজস্ব AjCjupq আপনার বিরুদ্ধে njUj jnL hfhUj গ্রহণ করা হবে না তার লিখিত জবাব এ নোটিশ জারীর ১৪ (চৌদ্দ) দিনের মধ্যে এ দণ্ডের দাখিল করার জন্য আপনাকে বলা হলো।”

(Underlines given for emphasis)

9. From a plain reading of the said two notices it appears that though section 55 of the VAT Act has not been mentioned ; but the words “AjCjupq” and “njUj jnL hfhUj”, clearly shows that the notices were infact, issued, under sections 55 and 37 of the VAT Act 1991.

10. It also appears from the adjudication order dated 30.11.2002 (annexure F) passed by respondent No. 2, it appears that respondent No. 2 determined the unpaid VAT as Tk. 10,19,575.00 and directed to deposit the same along with a fine of Tk. 10,25,000.00 and a penalty of Tk. 2,00,000.00 in place of confiscation. The relevant part of the order is quoted below;

“কাজেই প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর কর্তৃপক্ষ টার্নওভার করার ছত্রছায়ায় টার্নওভার করার আওতায় তালিকাভুক্তির যোগ্যতা না থাকা সত্ত্বেও ৬৭,৯৭,১৭০/- টাকা মূল্যমানের নারিকেল তেল সরবরাহ কর্পে সরকারের ১০,১৯,৫৭৫/৫০ টাকা মুসক ফাঁকি দিয়েছে। ফলে প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর কর্তৃপক্ষ মূল্য সংযোজন কর আইন, ১৯৯১ এর ধারা ৩, ১৫ ৩২ ও ৩৭ Hhw jnf সংযোজন কর বিধিমালা, ১৯৯১, এর বিধি ৪, ৯, ১৬ ও ২৩ লংঘন করেছেন। উল্লিখিত আইন ও বিধি লংঘন করার অপরাধে প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর কর্তৃপক্ষের উপর মূল্য সংযোজন কর আইন, ১৯৯১ এর ৩৭ ধারার প্রদত্ত ক্ষমতাবলে ১০,২৫,০০০/- (cn mr fju n qjSj r) টাকা অর্থদণ্ড আরোপ করা হলো এবং ফাঁকিকৃত ১০,১৯,৫৭৫/৫০ টাকা মুসক অনতিবিলম্বে সরকারী কোষাগারে জমা প্রদান করার জন্য বলা হলো। তবে প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর প্রতি নমনীয় মনোভাব পোষণ করে মূল্য সংযোজন কর আইন, ১৯৯১ এর ৪১ ধারার প্রদত্ত ক্ষমতাবলে ২,০০,০০০/- (দুই লক্ষ) টাকা বিমোচন জরিমানা আরোপ করা হলো। উল্লিখিত ফাঁকিকৃত রাজস্ব, অর্থদণ্ড এবং বিমোচন জরিমানা পরিশোধ সাপেক্ষে আটককৃত সমুদয় নারিকেল তেলসহ পিক আপ ভ্যান গাড়িটি ছাড় প্রদানের আদেশ দেয়া হলো। উল্লিখিত সমুদয় টাকা পরিশোধের পর প্রগতি অটো কোকোনাট অয়েল মিলস, নাগেরবাজার, বাগেরহাট এর কর্তৃপক্ষ পিকআপ ভ্যান গাড়িটি অন্তর্বর্তীকালীন ছাড় প্রদানের মূচলেকা থেকে অব্যাহতি বলে গণ্য হবে।”

11. From a plain reading of the adjudication order, it also appears that the respondent No. 2 not only passed order determining the evaded VAT, but also imposed penalty for evasion of VAT.

12. The respondent No. 1, Tribunal by order dated 20.07.2004 (annexure I) affirmed the said order of adjudication.

13. It appears from a plain reading of section 37 of the VAT Act that, it not only deals with offences concerning evasion of VAT, rather it also deals with othr offences committed under the VAT Act, which are not at all related to evasion of VAT and for which there is no necessity to avail the provisions under section 55(1) of the VAT Act or to determine anything before proceeding under section 37 of the VAT Act; but while the question, evasion of VAT, the authority have to first follow the procedure as laid down in section 55 of the VAT Act for determining the evaded VAT.

14. Section 55 of the VAT Act deals with evasion of VAT and in order to proceed with, under that section, service of prior notice is mandatory and after hearing, if the notice receivers desire so, determine the amount of evaded VAT under section 55(3) of the VAT Act.

15. Now comes the question as to how the evaded VAT could be realised. It is section 56 of the VAT Act which deals with realisation of evaded VAT. There are some primary steps to compel the defaulter to pay the evaded VAT and on failure, the authority will issue a certificate under section 56(2) of the VAT Act and send it to District Collector for proceeding with in accordance with Public Demand Recovery Act.

16. It is the consistent view of this Division that a notice under section 37 of the VAT Act cannot be issued without first determining the amount of evaded VAT if any. In doing so the authority have to issue notice under section 55(1) of the VAT Act 1991, claiming the evaded VAT and after giving an opportunity of hearing to the party concerned, determine the amount of evaded VAT, under section 55(3) of the VAT Act 1991. After such determination of evaded VAT if the defaulter fails to repay the evaded VAT, only then, can proceed under section 37 along with other provisions of the VAT Act.

17. It has been decided in the case of United Mineral Water and PET Industries–vs-Commission, Customs Excise and VAT Commissionerate and others, reported in, 61 DLR 734, that:-

“On the other hand, section 37 of the said Act defines various offences and punishments for such offence. Before any final demand could be made under section 55(3), none of the provisions of section 37 could be resorted to. It is needless to say as the fiscal law demands strict interpretation so equally demands for strict application by an authority authorized to apply. The VAT Act is a comprehensive tax law. It has defined the tax to be paid as VAT on the specified sales and/or services. Similarly, it has laid down elaborate procedure for realization of the tax and punishment for any violation or omission. The concerned authority is therefore, duty bound to follow the procedure as laid down in the Act for each and every action. The Act does not empower any of the authorities created to become zealot to overpower and/or overawe any tax payer. Invoking and/or resorting to section 37 while issuing notice under section 55(1) of the VAT Act therefore could not be said to have been issued bonafide for the simple reason that at the time of issue of the notice, the authority concerned had not yet arrived at as to any evasion of VAT by the petitioner”.

18. It has also been held in a case of Abdul Motaleb and others –vs-Customs, Excise and VAT Appellate Tribunal reported in 64 DLR 100, that;

“On the conspectus, we hold that nothing short of prior compliance of section 55 of the VAT Act, the VAT authority by any stretch of imagination cannot go for an action under section 37 of the VAT Act, which is a penal provision. Liability has to be fixed first under section 55 of the Act nothing more nothing less”.

19. And in an unreported case of M/s. Doctor’s Chemical Works Limited -vs- National Board of Revenue, Customs passed in writ petition No. 6215 of 2004 held that;

“The argument of the learned assistant Attorney General that the failure to issue separate show cause notice under section 55 and subsequently invoke penal provision under section 37(1) may be technicalities for which the customs authorities should not be liable is misconceived. “There is no dearth of authority to say when an authority is created to exercise certain authority and a procedure laid down to follow in the exercise of such authority by a statute , the authority concerned shall exercise the

authority in accordance with the procedure otherwise its action shall become unauthorized. Thus the Respondents claim in Annexure-A notice demanding VAT under section 55(1) of the VAT Act as well as 55(3) served upon the petitioner along with invoking the penal provisions under section 37(2) the VAT Act, is hereby struck down”.

20. Similarly in another unreported case of Sonear Laboratories Ltd. -vs- The Commissioner, Customs, Excise & VAT, Dhaka, passed in writ petition No. 5768 of 2008. Their Lordships held that:-

“Upon going through all the decisions referred by Ms. Mobina Asaf, it is found that this Court categorically held that the demand under section 37 of the Act without complying with the provision of section 55 is not tenable in law. So the demand of VAT authority being not under section 55 of the Act the issuance of the impugned notice under section (37) (2) is not sustainable because the same cannot be determined under section 37 of the VAT Act. The allegation of evasion of VAT or evaded VAT cannot be determined under any other provision other than section 55 but when the question of imposition of penalty for determined evasion of VAT arises section 37, to the extent of its conditions quoted above, can be invoked.”

21. On going through the aforesaid decisions of this Division, we also do not find any reason to disagree with the view taken therein.

22. The learned Assistant Attorney General also fails to show any authority or decision, which taken any contrary view.

23. In view of the discussions made above we find substance in the arguments of the learned advocate for the petitioner and find no substance in the arguments of the learned Assistant Attorney General for the respondent No.2.

24. Accordingly Rule is made absolute, the order dated 20.07.2004 passed by the respondent No. 1 in Nothi No. CEVT/CASE (VAT) -12/2003 (Annexure-“I”) dismissing appeal filed by the petitioner and thereby affirming the order No. 22/Musak/2002 dated 30.11.2002 (Annexure-“F”) passed by the respondent No. 2 are hereby declared to have been passed without lawful authority and are of no legal effect.

25. The respondent No. 2 are at liberty to proceed with, in accordance with law for realization of evaded VAT, if any.

26. Communicate the judgment to respondent No. 2 at once.