

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 7654 of 2017

IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh

And

IN THE MATTER OF:

Vitalac Dairy and Food Industries Limited
..... *Petitioner*

-vs-

National Board of Revenue and others.
.....*Respondents.*

And

Mr. Meah Mohammad Kausar Alam, Advocate
..... For the Petitioner.

Mr. Samarendra Nath Biswas, D.A.G. with
Mr. Md. Abul Kalam Khan (Daud), A.A.G. with
Mr. Md. Modersher Ali Khan (Dipu), A.A.G.
....For the Respondents-government.

Heard on: 07.11.2023 and
Judgment on:30.11.2023

Present:

Mrs. Justice Farah Mahbub.

And

Mr. Justice Muhammad Mahbub Ul Islam

Farah Mahbub, J:

In this Rule Nisi, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the impugned decision dated 22.01.2017 classifying some goods including Oats under H.S. Code No.19.04.90.00 despite having its original Code being H.S. Code

No.11.04.12.90, issued by the respondent No.1 (Annexure-I) and issuance of Demand letter dated 04.05.2017, demanding Tk.9,72,861.28 vide Nothi No.এস-২/৬৭/বিবিধ/এপি/সেকশন-১/১৬-১৭/১১১৬৪ (কাস) issued by the respondent No.4 (Annexure-H), should not be declared to have been issued without lawful authority and hence, of no legal effect.

At the time of issuance of the Rule operation of the Demand letter dated 04.05.2017, demanding Tk.9,72,861.28 vide Nothi No.এস-২/৬৭/বিবিধ/এপি/সেকশন-১/১৬-১৭/১১১৬৪(কাস) issued by the respondent No.4 (Annexure-H), was stayed by this Court for a prescribed period.

In view of the statements so made in the writ petition, Mr. Meah Mohammad Kausar Alam, the learned Advocate appearing for the petitioner submits that the customs authority issued a demand cum show cause notice under Section 32(3) of the Customs Act, 1969 on 15.11.2016 vide Nothi No.এস-২/৬৭/বিবিধ/এপি/সেকশন-১/১৬-১৭ (Annexure-F) asking the petitioner to give reply as to why a demand for Tk. 9,72,816.28 should not be made as less paid duty. The petitioner, however, duly replied thereof on 04.12.2016. Subsequently, the respondent No.2 issued the impugned demand letter under Section 83A of the Customs Act, 1969 (in short, the Act of 1969) on the self same demanded amount of duty but without disposing of the proceeding initiated under Section 32(3) of the said Act of 1969.

He further submits that prior to issuance of the impugned demand notice under Section 83A of the Act, 1969 demanding an amount of

Tk.9,72,816.28 as short levied duties, the petitioner was not given any opportunity of being heard, which is against the principles of natural justice and also, directing the petitioner to pay the said demanded amount without any adjudication is a denial of justice.

He also submits drawing attention to Annexure-E to the writ petition that the consignment in question was assessed by the Customs authority on 19.05.2016 whereas while passing the impugned demand under Section 83A of the Customs Act, 1969 they had relied upon the decision of the National Board of Revenue passed under Nothi No.০৮.০১.০০০০.০৫৪.০৫.০০৩.১৬/২২ dated 22.01.2017 giving retrospective effect, which they cannot do; hence, said order must fail as being not tenable in the eye of law.

Mr. Md. Abul Kalam Khan (Daud), the learned Assistant Attorney General appearing on behalf of the respondents-government submits that the Customs authority is empowered under Section 83A of the Act, 1969 to make a demand in respect of the customs duties and taxes which could not be realized earlier. In the instant case, he submits that the petitioner declared wrong H.S. Code and for the said reason actual duties and taxes could not be realized. Considering the said context, the Customs authority initially issued the demand cum show cause notice under Section 32(3) of the Act, 1969 which culminated in making final demand under Section 83A of the said Act; as such, the petitioner has not been prejudiced in manner whatsoever.

He also submits that the impugned demand is an appealable order and hence, without exhausting the forum of appeal filing the instant writ petition under Article 102 of the Constitution is not maintainable. On that score as well, he submits that this Rule is liable to be discharged.

In view of the submissions of the learned Advocate for the petitioner and the learned Assistant Attorney General for the respondent concerned, let us first have a look at the relevant provisions of law.

Section 83A of the Act of 1969 provides as under:

“83A. Amendment of assessment. (1) An officer of Customs not below the rank of an Assistant Commissioner of Customs may from time to time make or cause to be made such amendments to an assessment of duty or to the value taken for the purpose of assessment of duty as he thinks necessary in order to ensure the correctness of the assessment even though the goods to which the value or the duty relates have already passed out of Customs control or the duty originally assessed has been paid. [Emphasis given]

(2) If the amendment has the effect of imposing a fresh liability or enhancing an existing liability, a demand notice in writing shall be given by the officer of Customs to the person liable for the duty.

(3) Unless otherwise specified in this Act, the due date for payment against the aforesaid demand notice shall be thirty working days from the date of issue of such a written demand notice by the officer of Customs.”

Vide Section 83A(1) an officer of Customs holding the rank or post of Assistant Commissioner of Customs or above is empowered to make amendment to an assessment of duty or to the value taken for the purpose of assessment of the duty in order to “*ensure correctness of the assessment*”, even though the goods to which value or duty relates have already been passed out or duty originally assessed has been paid. In other words, power under Section 83A is exercised by the authority concerned not on the basis of allegation alleged to have been

committed by the importer or his respective C&F agent, but for the purpose of “*correctness of assessment.*”

However, under Section 83(2) if such amendment of assessment has the effect of imposing (i) fresh liability; or (ii) enhancing an existing liability demand notice to be given to make such payment and vide section 83A(3) due date for payment against demand notice is 30 (thirty) working days.

Section 83B prescribes time frame of 3 (three) years from the date of original assessment, within which the officer concerned is to exercise his power under section 83A of the Act.

Section 32 of the Act on the other hand provides as follows:

“32. Untrue statement, error, etc.-(1) *If any person, in connection with any matter of customs,-*

(a) make or signs or causes to made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or

(b) makes any statement in answer to any question put to him by an officer of Customs which he is required by or under this Act to answer, [or]

[(c) transmits any statement, document, information or record through electronic device or produces soft copy thereof,]

And such document or statement is untrue in any material particular, he shall be guilty of an offence under this section.

(2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within three years of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice.

(3) Where, by reason of any inadvertence, error or misconstruction, any duty or charge [amounting to not less than one thousands taka] has not been levied or has been short-levied or has erroneously refunded the person liable to pay any amount

on that account shall be served with a notice, within [three years] of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice.

(4) The appropriate officer, after considering the representation, if any, of such person as is referred to in sub-section(2) or sub-section (3) shall determine the amount of duty payable by him which shall in no case exceed the amount specified in the notice, and such person shall pay the amount so determined

[Provided that where the amount so determined is less than one thousand taka, the person concerned shall not be required to make the payment.]

*(5) For the purposes of this section, the expression “**relevant date**” means-*

(a) in any case where duty is not levied, the date on which an order for the clearance of goods is made;

(b) in a case where duty is provisionally assessed under section 81, the date of adjustment of duty after its final assessment;

(c) in a case where duty has been erroneously refunded, the date of its refund;

(d) in any other case, the date of payment of duty or charge.”

Under Section 32(1) in matters of customs if any person (a) makes or signs or causes to be made or signed or delivers or causes to be delivered to an officer of customs any declaration, notice certificate or other documents; whatsoever; or b) makes any statement in answer to any question put to him by an officer of customs which he is to answer under the Act; or (c) transmits any statement, document, information or record through electronic device or produces soft copy thereof, and such statements or documents is “**untrue**” it becomes a punishable offence under clause 14 of the Table under Section 156(1) of the Act.

However, at the same time vide Section 32(2) for the reason of such “*untrue*” statement or document or due to collusion if any duty or charge has not been levied or has been short levied or has been erroneously refunded, the person concerned shall be served with a show cause notice as to why he shall not be required to pay the said amount.

Conversely, vide Section 32(3) due to “*inadvertance, error or misconstruction*” any duty or charge, not less than TK. 1000/=, has not been levied, or has been short levied or has been erroneously refunded the person liable to pay the amount shall be served with a show cause notice within 3 (three) years of the relevant date as to why he shall not pay the said amount.

Vide section 32(4) upon considering the representation so has been submitted under sub-section (2) or (3) the officer concerned shall determine the amount of duty or charge payable by the incumbent person concerned.

From a combined reading of Sections 83A and 32 of the Act it transpires that Section 83A empowers the officer concerned to amend assessment in order to “*ensure correctness*” with the issuance of a demand notice with direction to pay the said amount within 30(thirty) working days from the date of issuance. In this regard, it has now been settled by this Division in a number of cases in particular in *Md. Musa Bhuiyan vs- The Commissioner of Customs Dhaka and others* reported in *23 BLC 662* at paragraph 42 and 43 observing, *inter alia*,-

“The respondents Customs authorities in assessing the duties are performing a quasi judicial function. Where the proceedings are judicial the rules of Natural Justice should be applied; where they are quasi judicial they should also be applied. In the instant case the act of assessment of duty is a quasi judicial function.

Their act is bound to affects the assessee importer and also prejudice him if duty is increased. Before such amendment of assessment therefore justice demands that he should be served with a prior show cause notice allowing him to make any statement that he considers important in his defiance, even though section 83A does not speak of any prior show cause notice.....”

Simultaneously, vide Section 32(3) of the Act of 1969 the Legislature has empowered the officer of Customs to ask the person concerned to pay duty or charges on the ground that due to **“inadvertence, error or misconstruction”** the same was not levied or short levied or erroneously refunded. However, prior to determining the said amount compliance of the principles of natural justice has been ensured with the issuance of show cause notice within 3 (three) years of the relevant date as described under Section 32(5) of the Act, 1969.

In other words, without charging any allegation for recovery of duties or charges, the officer of Customs may invoke provisions either under Section 83A or Section 32(3) of the Act, 1969.

In the instant case, the respondent No.3 vide order dated 15.11.2016 (Annexure-F) issued a demand-cum show cause notice upon the petitioner under Section 32(3) of the Act on the count of “পণ্য চালান খালাস পরবর্তীতে Internal Audit পর্যায়ে দেখা যায় যে, QUAKER OATS পণ্যটি বিভিন্ন উপদানে তৈরী। যা Harmonized System Explanatory Notes এবং The Customs Act, 1969 এর First Schedule অনুযায়ী H.S. Code 1904.90.00 তে শ্রেণিবিন্যাস যোগ্য। উক্ত চালানটি প্রকৃত H. S. Code ও নূন্যতম মূল্যে শুল্কায়ন করা হলে প্রকৃত শুল্ক-করাদির পরিমাণ দাঁড়ায় ১৪,৩৭,৬৬৮.০০ টাকা মাত্র। ইতোপূর্বে উক্ত চালানের বিপরীতে ৪,৬৪,৮৫১.৭২ টাকা পরিশোধ করায় অবশিষ্ট ৯,৭২,৮১৬.২৮ টাকা মাত্র কম আদায় করা হয়েছে।” i.e., having released the goods under wrong H.S. Code Tk.9,72,816.28/- had been demanded as short levied duties upon issuing show cause notice to that effect.

The petitioner, however, gave reply thereof on 04.12.2016 (Annexure-G) with personal hearing on 18.04.2017. Ultimately, upon hearing the petitioner the Customs authority made the impugned demand under Section 83A(2) vide the impugned order dated 14.05.2017 (Annexure-H), instead of Section 32(4) of the said Act, 1969.

As has been observed earlier, amendment of assessment can be made invoking Section 83A of the Act, 1969. At the same time vide Section 32(3) the Legislature has empowered the Customs authority to make demand of short levied duties which could not be realised earlier at the time of assessment of goods due to inadvertence, error or misconstruction, but subject to issuance of show cause notice. Thus, it can clearly be discerned that the perspective of both Sections 32(3) and 83A are similar, but consequences are all together different, for, Section 83A has not been identified as a penal provision; whereas, for violation of Section 32 of the said Act Customs authority is empowered to impose penalty three times the

amount claimed to have been less paid under clause (14) of the Table of Section 156(1) of the Act, 1969.

In view of the above observations and findings, we are opinion that no illegality has been committed by the respondent concerned while making demand of short levied duties upon the petitioner under Section 83A of the Act, 1969.

In that view of the matter making demand of Tk.9,72,816.28/- as less paid duties under Section 83A for having released the goods under wrong H.S. Code does not suffer from any illegality requiring interference by the Court. Moreover, the impugned demand is an appealable order as such, without preferring appeal filing the instant writ petition under Article 102 of the Constitution is not maintainable.

In view of the above facts and circumstances, observations and findings this Rule is accordingly disposed of.

The petitioner, however, is at liberty to prefer an appeal invoking the respective forum in due compliance of law.

There will be no order as to costs.

Communicate the judgment and order to the respondents concerned at once.

Muhammad Mahbub Ul Islam, J:

I agree.