

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

Writ Petition No. 11803 of 2017

In the matter of :

An application under Article 102(2) of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of :

Gopal Biri Factory Ltd.

..... Petitioner

-Versus-

Commissioner, Customs, Excise & VAT
Commissionerate, Khulna and others.

..... Respondents

Mr. A.R.M. Qayyum Khan, Advocate with
Mr. Bhuiyan Alamgir Hossain, Advocate
.... For the Petitioner

Mr. ABM Abdullah Al Mahmud, DAG with
Mr. Mohammad Abul Hasan, AAG,
Mr. A.K.M. Alamgir Parvez Bhuiyan, AAG and
Ms. Rawsan Ara Rahman, AAG
..... For respondent no. 1

Ms. Israt Jahan, Advocate
.... For respondent no. 3

Present:

Mr. Justice Zubayer Rahman Chowdhury

And

Mr. Justice Kazi Ebadoth Hossain

Date of Hearing : 03.01.2023, 12.01.2023
& 02.08.2023

Date of Judgment : 09.08.2023

Zubayer Rahman Chowdhury, J :

The notice dated 22.06.2017, issued by respondent no. 1, combining section 55(1) together with section 37(3) of the VAT Act, 1991, claiming unpaid VAT from the petitioner is being challenged by the petitioner by filing the instant application under Article 102(2) of the Constitution. At the time of issuance of the Rule, the operation of the impugned notice dated 22.06.2017 was stayed for a period of 6 (six) months.

Mr. A.R.M. Qayyum Khan, the learned Advocate appears with Mr. Bhuiyan Alamgir Hossain, the learned Advocate on behalf of the petitioner, while the Rule is being opposed by respondent no. 1 by filing an affidavit-in-opposition, on whose behalf Mr. ABM Abdullah Al Mahmud, the learned DAG appears.

The issue that is to be decided by this Court has already been settled well and truly through several pronouncements of this Division, which was subsequently upheld by the apex Court. In that view of the matter, it is absolutely unnecessary to enter into a detailed discourse as to the factual aspect of the case. Suffice to say that in view of the categorical pronouncement by the apex Court that a notice cannot be issued combining in section 55(1) with section 37(3) of the VAT Act, 1991, we are obliged to follow suit.

Nevertheless, we deem it necessary to refer to some of the decisions governing the issue in this field, beginning with the case of United Mineral Water and PET Industries Ltd. vs Commissioner,

Customs, Excise and VAT Commissionerate and others, reported in 61 DLR (2009) 734, where the Court held as under :

“Invoking and/or resorting to section 37 while issuing a 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.”

In the case of Abdul Motaleb and other –vs- the Customs, Excise and VAT Appellate Tribunal, reported in 64 DLR (2012), 100, while deciding a similar issue, as in the present case before us, a Division Bench of this Court held as under:

“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 under section 55 of the Act nothing more nothing less.”

In the case of Eastern Cement Industries Ltd. –vs- Customs, Excise and VAT, Appellate Tribunal, Dhaka and another, reported in 22 BLC (2017) 445, a Division Bench of this Court, while endorsing the view expressed in the case of PET Industries as well as in the case Abdul Motaleb, referred to above, held as under:

“Significantly, the interpretation above makes it absolutely necessary for the invocation first of a section 55 process entailing the act of final determination through a participatory exercise under section 55(3) on the basis of reply or objection submitted further to section 55(1) notice. This ratio in the PET Industries Case is found by this Court to be pervasive of the ratio decidendi in a series of other decisions, most notably, *Abdul Motaleb vs Customs* reported in 64 DLR (2012), 100 as well as in *Hotel Zakaria International (Pvt) Ltd. Vs National Board of Revenue (NBR)* reported in 30

BLD (2010), 388. This Court has repeatedly emphasized on such exhaustion of the section 55 process in its entirety culminating in a final determination before the VAT Authority can proceed under section 37. Such insistence is premised on the legal impossibility of any attempt at even raising the spectre of punishment under section 37 of the Act before any decision could be arrived at finally and conclusively under section 55(3) as to the true extent, if at all, of the shortfall of the payment of any tax or arrears in taxes and the extent and nature of the concomitant liability stemming from such circumstances.”

Apart from the fact that issuance of such a notice is evidently contemptuous in view of the pronouncement of the apex Court on this issue, it results in the harassment of a citizen in that pursuant to issuance of such a notice combining section 55(1) read with section 37(3) of the VAT Act, the aggrieved person has to move this Court to redress his grievance. Such conduct of the concerned Authority is not only unacceptable, it is strongly deprecated in no uncertain terms.

During the course of hearing, we directed the concerned respondent (Commissioner, Customs, Excise and VAT Commissionerate, Khulna), who had issued in impugned notice in June 2017, to appear before this Court. An adjournment was granted and subsequently the Court was informed by the learned DAG that the said official, one Mr. K.M. Ohidul Alam, had already gone into retirement. Nevertheless, we felt that such contemptuous conduct, and that too by an official holding the post of Commissioner of VAT, should not be allowed to go unquestioned. Accordingly, we issued an order on 23.01.2023 directing the said Mr. K.M. Ohidul Alam to appear before this Court in person.

In compliance thereof, Mr. Alam duly appeared before this Court. Ms. Israt Jahan, the learned Advocate who appeared on behalf of Mr. Alam, submitted that the concerned person, who was serving as the Commissioner of Customs, Excise and VAT Commissionerate at the relevant time, had passed the order upon misreading of the earlier orders passed by this Court for which he tenders his unconditional apology and prays for mercy from the Court. Ms. Israt Jahan further submitted that she would make no submission in defense of Mr. Alam. Considering his age, we decided to accept the apology and exonerate Mr. Alam from further appearance before this Court.

The reason which prompted us to direct the concerned official to appear before this Court, despite having retired from service, was to address a situation which is repeatedly occurring nowadays. It appears that some officials, in gross violation of the law or, in some cases, in utter violation of the order passed by the highest Court of the country, issues an order, which not only entangles the person concerned with the legal process, but also adds to the ever mounting number of cases pending before this Court. In our view, such a situation can easily be avoided if the concerned official(s) are more cautious and apply their mind before issuing any order. It has to be borne in mind that each and every Government official, serving in their respective posts, has a duty to “strive at all times to serve the people”, as mandated by Article 21(3) of the Constitution. Therefore, it is imperative that the concerned officials be well aware of their constitutional obligation and discharge their duties accordingly.

Be that as it may, having regard to the settled legal position, we are inclined to hold that the instant Rule merits positive consideration.

In the result, the Rule is made absolute.

The impugned order dated 22.06.2017, as evidenced by Annexure G, is hereby declared to have been issued without lawful authority and to be of no legal effect.

The respondents shall be at liberty to issue notice afresh upon the petitioner for realisation of the arrear VAT, if any, if so advised, in accordance with law.

There will be no order as to cost.

Kazi Ebadoth Hossain, J :

I agree.