

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

WRIT PETITION NO. 3993 of 2020
with
WRIT PETITION NO. 3994 of 2020

IN THE MATTER OF:

Applications under Article 102 of the Constitution
of the People's Republic of Bangladesh

And

IN THE MATTER OF:

Morshed Arif Chowdhury
..... Petitioner in writ petition No.3993 of 2020
Nur Afzal Begum
..... Petitioner in writ petition No.3994 of 2020

-vs-

***Commissioner of Taxes, Taxes Zone-2,
Chattogram and others***
.....Respondent in both the writ petitions.

And

Mr. M. A. Hannan, Advocate with
Mr. Abdus Samad Azad, Advocate
..... For the Petitioner.
Mr. Samarendra Nath Biswas, D.A.G. with
Mr. Md. Abul Kalam Khan (Daud), A.A.G. and
Mr. Md. Modersher Ali Khan (Dipu), A.A.G.
....For the Respondents-government.

Heard on: 29.05.2024, 30.05.2024
And judgment on:06.06.2024

Present:

Mrs. Justice Farah Mahbub.

And

Mr. Justice Muhammad Mahbub Ul Islam

Farah Mahbub, J:

Since common question of law and facts are involved in these 2(two)
writ petitions as such, those have been heard together and are being disposed
of by this single judgment.

In writ petition No.3993 of 2020 filed under Article 102 of the Constitution of the People's Republic of Bangladesh a Rule Nisi was issued calling upon the respondents to show cause as to why the initiation of the impugned proceeding under Section 93 of the Income Tax Ordinance, 1984 by the respondent No.3 vide Nothi No.Circle-28/Taxes Zone-2, Chattogram/653969166902/2018/70 dated 26.06.2018 (Annexure-B), No.653969166902 dated 12.07.2020 (Annexure-C) and No. Circle-28/Taxes Zone-2, Chattogram/653969166902/2018 (Annexure-D) dated 03.08.2020 respectively issued by the respondent No.2 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 impugned proceeding initiated under Section 93 of the Income Tax Ordinance, 1984 by the respondent No.3 vide Nothi No.Circle-28/Taxes Zone-2, Chattogram/653969166902/2018/70 dated 26.06.2018 (Annexure-B), No.653969166902 dated 12.07.2020 (Annexure-C) and No. Circle-28/Taxes Zone-2, Chattogram/653969166902/2018 dated 03.08.2020 (Annexure-D) respectively issued by the respondent No.2, were stayed by this Court for a prescribed period.

In writ petition No.3994 of 2020 filed under Article 102 of the Constitution of the People's Republic of Bangladesh a Rule Nisi was issued calling upon the respondents to show cause as to why the initiation of the impugned proceeding under Section 93 of the Income Tax Ordinance, 1984 by the respondent No.3 vide Nothi No.Circle-28/Taxes Zone-2, Chattogram/175555 640026/2018/70 dated 26.06.2018 (Annexure-B), No.175555640026 dated 12.07.2020 (Annexure-C) and No. Circle-28/Taxes Zone-2, Chattogram/175555 640026/2020 dated 03.08.2020 (Annexure-D)

issued by the respondent No.2, should not be declared to have been issued without lawful authority and hence, of no legal effect.

With the issuance of the said Rule Nisi vide interim order the operation of the impugned proceeding under Section 93 of the Income Tax Ordinance, 1984 by the respondent No.3 vide Nothi No.Circle-28/Taxes Zone-2, Chattogram/175555 640026/2018/70 dated 26.06.2018 (Annexure-B), No.175555640026 dated 12.07.2020 (Annexure-C) and No. Circle-28/Taxes Zone-2, Chattogram/ 175555 640026/2020 dated 03.08.2020 (Annexure-D) issued by the respondent No.2, were stayed by this Court for a prescribed period.

Common facts, in brief, are that both petitioners as being individual assesseees filed respective return of income for the assessment year 2011-2012 under Section 82BB(1) of the Income Tax Ordinance, 1984 (in short, the Ordinance, 1984) showing total income of Tk.26,06,356.00 on 07.09.2011 in writ petition No.3993 of 2020 and Tk.2,48,950.00 on 18.09.2011 in writ petition No.3993 of 2020 under universal self assessment scheme and paid tax to the tune of Tk.5,06,589.00 and Tk.4,895.00 respectively. Both the returns were duly accepted by the tax authority and were disposed of with the issuance of acknowledgment receipts (Annexure-AI of both the writ petitions) and certificates (Annexure-A-2 of both the writ petitions) respectively.

The cause of action arose when respective proceedings had been initiated by the Deputy Commissioner of Taxes concerned in respect of the assessment year 2011-2012 after expiry of 05 (five) years of the end of the assessment year i.e. 30.06.2012 by issuing a notice vide Nothi No. 653969166902/2018/70 dated 26.06.2018 (Annexure-B) under Section 93 of

the Ordinance, 1984 on the ground of escaped payment of tax (i) by showing less bank deposit and not showing interest income, and (ii) tax deducted at source on undisclosed interest earning which was not shown in the family expenses.

However, long after expiry of 2 (two) years from the date of issuance of the said notice under Section 93 of the Ordinance the respondent No. 3 vide Nothi No. 653969166902 dated 12.07.2020 (Annexure-C) issued notice under Section 79 of the said Ordinance directing the petitioner to submit respective documents as mentioned therein within a prescribed period. On the same date i.e. on 12.07.2020 another notice under Section, 130 of the Ordinance had been issued by the respondent concerned for failure of the petitioner to submit return under Section 93(1) for the assessment year 2011-2012 within the prescribed period. Later, vide Memo No. Sa-28/KaO-2/Chatta /653969166902.2018 dated 03.08.2020 (Annexure-D) the respondent No.2 issued a notice fixing 17.08.2020 for hearing of the petitioners at his office, otherwise the case would be decided *ex-parte* under Section 84 of the Ordinance, 1984.

Being aggrieved by and dissatisfied with the petitioners have preferred the instant applications under Article 102 of the Constitution and obtained the Rules Nisi along with respective orders of stay.

Mr. M.A. Hannan, the learned Advocate appearing with Mr. Abdus Samad Azad, the learned Advocate for the petitioners in both the writ petitions submits that it is apparent from record that both the petitioners submitted respective returns of income for the assessment year 2011-2012 on 07.09.2011 showing total income of Tk.26,06,356.00 in writ petition No.3993 of 2020 and Tk. 2,48,950.00 in writ petition No.3994 of 2020

respectively under Section 82BB of the Ordinance, 1984 under universal self-assessment scheme. The concern tax authority having been satisfied gave acknowledgement receipt with issuance of respective income tax certificates and accordingly, said taxes have been disposed of in due compliance of law. As such, he submits that said returns having not been selected for audit under Section 82BB(3) of the said Ordinance, 1984 hence, initiating proceeding by the respondent concerned under Section 93 of the Ordinance is not maintainable in the eye of law. In support he has referred the decision of the case of *Abu Hena Mostafa Kamal and another Vs. Bangladesh and others* reported in *63DLR (HCD) 334*.

He further submits drawing attention to Annexure-4 of the affidavit-in opposition filed by the respondent No.1 that admittedly, for initiation of proceeding under Section 93 approval of the Commissioner of Taxes was taken on 24.06.2008. Referring to Section 93(2) of the Ordinance, 1984 he submits that before issuance of notice under Section 93(1) approval of the Inspecting Joint Commissioner is mandatory. In this regard, he goes to argue that neither the definition of Inspecting Joint Commissioner, as contained in Section 2(36) of the said Ordinance includes Commissioner of Taxes nor the definition of Commissioner of Taxes as contained in Section 2(19) includes Inspecting Joint Commissioner. On the score as well, he submits that the proceeding under Section 93(1) of the Ordinance fails.

He again goes to argue that the impugned proceedings under Section 93 (Annexure-B) further fails as being barred by limitation for having not been issued within the prescribed period of 5(five) years as stipulated under Section 93(4)(c) of the Ordinance, 1984. In this connection, he goes to submit that though said provision was amended subsequently by enhancing

the period to 6(six) years vide Finance Act, 2019 but the amended provision of 6 years has no manner of application in the present case in view of the decision of the case of *The Commissioner of Income-Tax, Chittagong Zone, Chittagong -Vs- M/s. Everent Orient Line Corporation and others* reported in *28 DLR (AD 30, paragraph-13*. Moreover, he submits, said amended period of 6(six) years is not applicable for the petitioner, for, the proceeding under Section 93 has been initiated on 26.06.2018 (Annexure-B) i.e., prior to amendment of Section 93 (4)(c) vide Finance Act, 2019.

He also submits that from the correspondences so made by the Central Intelligence Cell (CIC) vide office letter dated 11.06.2018 (Annexure-3 to the affidavit in opposition) with the Deputy Commissioner of Taxes concerned it appears that proposal was sent to the Deputy Commissioner of Taxes to take necessary steps with regard to the petitioner under Section 93(1) of the Ordinance for the assessment year 2011-2012. Moreover, he submits that proviso to sub-section (4) of Section 93 comes into play where proceeding under Section 93 has started within 5 (five) years from the end of the relevant assessment year. In view of Section 93(3) since approval was given by the Commissioner of Taxes on 24.06.2018 (Annexure-4 of the affidavit in opposition) i.e. after the expiry of 5 (five) years from the end of the respective assessment year, 2011-2012; hence, it is not sustainable in the eye of law.

He also goes to contend that vide Section 94(2) the assessment under Section 93 is to be made within 2 (two) years from the end of the year in which the notice under Section 93(1) was issued. In the instant case, he submits, notice under Section 93(1) was issued on 24.06.2018; hence, the period of 2(two) years expired on 30.06.2020. Accordingly, he submits that

since proceedings under Section 93(1) falls down as being barred by law vide Section 82BB(7) as well as Section 93(3) and (4) of the Ordinance; hence, issuance of notice dated 12.07.2020 under Section 79 with direction to submit respective documents on 03.08.2020 after the expiry of 2 (two) years as provided under Section 94(2) is also liable to be knocked down. Consequently, notice under Section 130 of the Ordinance, 1984 dated 12.07.2020 for imposition of penalty also, falls through.

Mr. Md. Abul Kalam Khan (Daud), the learned Assistant Attorney General appearing for the respondent No.1 by filing affidavit-in-opposition categorically submits that the petitioners submitted his income tax return for the assessment year 2011-2012 concealing significant amount of income and thereby evading huge amount of tax. The Central Intelligence Cell, National Board of Revenue on gathering definite information about said concealment vide office letter dated 11.06.2018 asked the respondent No.1 to take necessary steps against the petitioners for the assessment year 2011-2012. On receipt thereof the respondent No.1 accordingly gave approval on 24.06.2018 to re-open the Income Tax return of the petitioners for the assessment year 2011-2012. Pursuant thereto the Deputy Commissioner of Taxes issued notice upon the petitioners on 26.06.2018 under Section 93 of the Ordinance, 1984, within time.

He lastly submits that the petitioners have totally misconceived the provision of Section 94(2) of the Ordinance, 1984 which provides that an assessment under Section 93 may be made within two years from the end of the year in which the notice under sub-section (1) of Section 93 was issued. Thus, it is apparent that said provision is not mandatory, rather it is directory.

Accordingly, he submits that both these Rules being devoid of any substance are liable to be discharged.

In *The Commission of Income-Tax, Chittagong Zone, Chittagong Vs. M/S. Everett Orient Line Corporation and others* reported in **28DLR (AD) 30 Para-13**, it has been categorically observed, *inter-alia*, by our apex court, that “*The law in operation on the first date of assessment year will clinch and govern the income of the previous year which in terms of the Act is the date of immediately ending on the first day of the assessment year.*”

In view of the said findings of our apex court since the respective issues in question are in connection with the assessment year 2011-2012 as such, the respective provisions of law as were in force in 2011 shall be relied on for disposal of both the present Rules Nisi.

Admittedly, the petitioners filed return of income tax for the assessment year 2011-2012 under Section 82BB(1) of the Ordinance, 1984 under the universal self assessment scheme on 07.09.2011 (Annexure-A). Both the returns were duly accepted by the tax authority concerned with the issuance of acknowledgement receipts (Annexure-A1) and certificates (Annexure-A2) respectively.

Section 82BB(3), however, empowers the National Board of Revenue or any authority subordinate to Board, if so authorised by Board, to select any return filed under Section 82BB(1) and refer the same to the Deputy Commissioner of Taxes for the purpose of audit subject to conditions as prescribed under clause (a)-(c) of the proviso to Section 82BB(3).

In the case of Abu Hena Mostafa Kamal and another Vs. Bangladesh and others reported in **63DLR (HCD 334, para-19** it has been empathically observed by one of the Benches of this Division that,

“Since the legislature intended to give a special privilege to an assessee founded upon trust that cannot be curtailed by applying Section 93 of the Ordinance when the legislature has categorically made provision for reopening the return filed under 82BB(1) by bringing sub-section (3) of section 82BB of the Ordinance which says that only for the purpose of audit the Deputy Commissioner Taxes can reopen the same at the behest of the National Board of Revenue.”

Said findings of this Court is still in operation.

In agreement with the said findings we have no manner of doubt to find that since the petitioners have submitted return of income under Section 82BB(1) of the Ordinance for the assessment year 2011-2012 and pursuant thereto acknowledgement receipts along with certificates were issued by the tax authority as such, except being selected for audit under Section 82BB(3) said return cannot be the subject of re-opening under Section 93 of the Ordinance.

In both the writ petitions, the respective impugned notices both dated 26.06.2018 (Annexure-B of both the writ petitions) issued under Section 93(1) were not approved by the respective Inspecting Joint Commissioner, as required under Section 93(2). It is further fortified from Annexure-4 of the affidavit in opposition wherefrom it appears that approval to initiate proceedings under Section 93(1) has been given by the Commissioner of Taxes on 24.06.2018. However, the definition of Inspecting Joint Commissioner as provided under Section 2(36) does not include Commissioner of Taxes, nor the definition of Commissioner of Taxes as provided under Section 2(19) includes Inspecting Joint Commissioner. On that count as well as the impugned proceeding are tainted in the eye of law.

Both the impugned notices dated 26.06.2018 again fails as being time barred, for, proceedings under Section 93 has been initiated prior to amendment of Section 93(4) (c) so made vide Finance Act, 2019 vide which the period of 05 (five) years has been replaced with 6 (six) years. Hence, the plea of the respondent as to initiation of the proceedings within 6 (six) years, has no leg stand. In addition, the shelter as provided under the proviso to Section 93(4)(c) vide Finance Act, 2019 giving power to the Commission to extend the time upto 6 (six) years is also of no assistance to the respondent, for, approval to initiate proceeding under Section 93 for the assessment year 2011-2012 has been given on 24.06.2018 (Annexure-4) i.e. after expiry of 5 (five) years from the end of the respective assessment year.

In addition, the proceedings under Section 93(1) having been initiated with the issuance of notice on 26.06.2018 hence, in view of Section 94(2)(a), as it then was in 2011, since the tax authority failed to complete the assessment within 2(two) years, it has no legal mandate in the eye of law.

Consequently, issuing notice under Section 79 of the Ordinance along with notice under Section 130 of the Ordinance both dated 12.07.2020 after expiry of the said period also, fall through.

In view of the facts and circumstances, observations and findings, we find substance in both the Rules. Accordingly, the Rules Nisi in connection with writ petition Nos.3993 of and 3994 both of 2020 are hereby made absolute.

Both the impugned proceedings under initiated Section 93 of the Income Tax Ordinance, 1984 by the respondent No.3 vide Nothi No.Circle-28/Taxes Zone-2, Chattogram/653969166902/2018/70 dated 26.06.2018 (Annexure-B), No.653969166902 dated 12.07.2020 (Annexure-C) and No.

Circle-28/Taxes Zone-2, Chattogram/ 653969166902/2018 dated 03.08.2020 issued by the respondent No.2 (Annexure-D) in writ petition No.3993 of 2020 and the impugned proceeding under Section 93 of the Income Tax Ordinance, 1984 by the respondent No.3 vide Nothi No.Circle-28/Taxes Zone-2, Chattogram/175555 640026/2018/70 dated 26.06.2018 (Annexure-B), No.175555640026 dated 12.07.2020 (Annexure-C) and No. Circle-28/Taxes Zone-2, Chattogram/ 175555 640026/2020 dated 03.08.2020 issued by the respondent No.2 (Annexure-D) in writ petition No.3994 of 2020 are hereby declared to have been issued without lawful authority and hence, of no legal effect.

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.