

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

**WRIT PETITION NO. 6440 OF 2007**

IN THE MATTER OF:

Application under Article 102 (2)(a)(i) of the  
Constitution of the People's Republic of  
Bangladesh.

And

IN THE MATTER OF:

***Elixir Pharmaceuticals Ltd.***

.... Petitioner

-Vs-

***Commissioner, Customs, Excise and VAT, Dhaka  
(North)***

.... Respondents.

Mr. Md. Sadullah, Advocate with

Ms. Arefa Parvin Taposhe, Advocate

..... For the petitioner

Ms. Nasima K. Hakim, Deputy Attorney General  
with Ms. Tahmina Polly, Mr. Elin Imon Saha and  
Mr. Ziaul Hakim, Assistant Attorney General

..... For the respondents-government

**Heard on: 10.01.2024**

**Judgment on: 11.01.2024**

**Present:**

Mr. Justice Md. Iqbal Kabir

and

Mr. Justice S.M. Maniruzzaman

**S.M. Maniruzzaman, 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 demand order under Nothi No. 4-

MUSUK/8(282)Ilixir/dabinama/05/3514 dated 28.12.2005(Annexure-A) issued by the respondent No. 2 and subsequent letter(s) pursuant to the same should not be declared to have been issued without any lawful authority and is of no legal effect and/or pass such other or further order or orders passed as to this court may seem fit and proper.

At the time of issuance of the Rule, the operation of the impugned notice dated 28.12.2005 (Annexure-A) was stayed by this Court for a prescribed period.

Facts, in brief, for disposal of the Rule, are that the petitioner is a private limited company incorporated under the Company Act, 1994 and is engaged in the business of manufacturing “Human Medicine” for selling the same in the local market. In course of business, the petitioner obtained VAT registration certificate from the concerned VAT office under the Value Added Tax Act, 1991 (in short, the Act, 1991) for the purpose of payment VAT and since then it has been paying VAT regularly.

During course of business, the respondent No.2 the Deputy Commissioner and Divisional Officer, Customs, Excise and VAT Tejgaon Division issued a show cause notice upon the petitioner on 28.12.2005 asking it as to why the tune of Tk. 38,21,521/- as evaded VAT should not be realized under Section 55 of the Act, 199. By the said notice the petitioner was also asked as to why penalty should be imposed under Section 37(2) of the Act, 1991 for evasion of such amount of VAT.

Being aggrieved thereby the petitioner moved this application before this Court and obtained the *Rule* with *interim* order of stay.

Mr. Md. Sadullah, learned Advocate for the petitioner mainly submits that the respondent No. 2 without following the mandatory provision as provided under Sections 55 of the Act, 1991 and the statutory requirement as prescribed in Section 37 of the said Act issued the impugned notice directing the petitioner to pay an amount of Taka 38,21,521/-) as evaded VAT along with showing cause as to why penalty under Section 37(2) of the Act should not be imposed for evasion of such amount of VAT and finalized the said notice by the impugned order dated 28.12.2005 which is absolutely illegal and without jurisdiction. Mr. Md. Sadullah next submits that the VAT Authority without fixation of liability under Section 55 of the Act has initiated proceeding under Section 37(2) of the said Act, 1991 by the self same single notice and directed the petitioner to pay evaded VAT and simultaneously imposed penalty by the impugned demand notice which is illegal.

On the other hand, Ms. Tahmina Polly, learned Assistant Attorney General for respondent No. 2 submits that the petitioner filed the instant writ petition challenging the demand/adjudication order dated 28.12.2005 passed by the said respondent as an adjudication authority under Sections 55(3) and 37(2) of the Act, 1991 which is appealable order under the provision of Section 42 of the Act, 1991 and the petitioner without exhausting forum of appeal filed the instant writ petition and as such the writ petition is not maintainable. The learned Assistant Attorney General further submits that there is no illegality in the impugned order since the proceeding has been initiated under Sections 55 and 37 of the Act, 1991

following the provision of the said Act and as such the Rule is liable to be discharged with cost.

We have considered the submissions of the learned Advocate and the learned Assistant Attorney General, gone through the writ petition, affidavit-in-opposition and relevant materials on record so appended thereto.

On perusal of the aforesaid demand cum show cause notice dated 28.12.2005, however, it appears that the respondent No. 2 has initiated proceeding against the petitioner under Section 55(1) of the Act, 1991 for realization of evaded VAT amounting to Taka 38,21,521/- and simultaneously for imposing penalty under Section 37(2) of the said Act for evading VAT.

In view of the above, the moot question requires to be adjudicated in the instant Rule is that whether the proceeding for recovery of unpaid or less paid or evaded VAT and imposition of penalty can be initiated simultaneously by the VAT authority under Sections 55 and 37 of the Act, 1991.

The said issue has been resolved in various decisions passed by this Court categorically observing *inter-alia* that the provision of Section 37 of the Act, 1991 is a penal provision which can be exercised only after determination of VAT evaded by any person under a given scenario; whereas, Section 55 of the Act, 1991 provides for realization of unpaid or less paid VAT and other taxes. Section 55(1) clearly empowers among others to the concerned VAT authority to issue notice of show cause for

payment of unpaid or less paid VAT. Section 55(3) provides for hearing on the basis of reply, if any, submitted to such notice and after such hearing to make the demand final.

In the instant case, the respondent No. 2 issued the demand-cum-show cause notice upon the petitioner under Sections 55 and 37 of the Act, 1991, simultaneously asking the petitioner to show cause as to why the evaded VAT and penalty should not be realized/imposed under Section 55(1) and 37(2) of the Act, 1991.

In this regard, in the case of *United Mineral Water and PET Industries Ltd.-Vs- Commissioner of Customs Excise and VAT* reported in 61 DLR (HC) 734, it has been observed, *inter alia*:

*“If the entire provision of section 55 is considered then it would be clear that section 55 empowers the concerned VAT authority to take steps for realization of unpaid or less paid VAT or tax, upon first issue of a notice asking to show cause and then, upon hearing, within 90 days to make a final demand in respect of any VAT or tax unpaid evaded or less paid.”*

Further, it has been observed:

*“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 n overawe any tax payer. 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 *Private Insurance Company Ltd. -Vs- Commissioner of Customs Excise and VAT* reported in 17 BLC (HC) 450, where following view has been taken by this Division *inter alia*:

*“In absence of compliance with the requirements of section 55(1) of the Act, thereafter of demands made twice as required under section 37(2)(Kaka), the penalties under section 37(2) and 37(3) have been illegally imposed.”*

Similar view has been expressed in the case of *Abdul Motaleb -Vs- Commissioner of Customs Excise and VAT Appellate Tribunal* reported in 64 DLR (HC)100, observing *inter alia*:

*“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 Act, which is a penal provision. Liability has to be fixed first under section 55 of the Act nothing more nothing less.”*

In the case of *TK Chemical Complex Limited- vs-National Board of Revenue* reported in 63 DLR (HCD) 687, it has been held *inter alia*:

*“8. if we glean at all these provisions, we find that the law enjoins a procedure to be fulfilled in a case where a rebate*

*has been taken in violation of section 9(1) of the said Act. Even the audit report by which the excess rebate in question has been found against the petitioner itself suggests the steps should be taken against the petitioner under section 9(2), 2(⌘) and 2(⌘).*

*9. That being the position we are of the view that the respondent No. 2 the Commissioner of Customs Excise and VAT Commissionerate, Chattogram misdirected itself by exceeding his limit in issuing the notice under section 37(2) of the VAT Act upon the petitioner. Thus, this Rule succeeds.”*

However, as regard to the submission of the learned Assistant Attorney General for the respondent No. 2 that the petitioner without preferring appeal under the VAT Act having invoked writ jurisdiction and hence, the rule is not maintainable. The said argument of the learned Assistant Attorney General is misconceived one. There are many decisions of this Court that when an illegality is apparent on face of the record and the respondent performing the function of the Republic have acted totally without jurisdiction, invoking forum as provided under Article 102 of the Constitution is not a bar. In this regard, it is pertinent to mention here that the same question had been raised in the case of *United mineral water and PET Industries Ltd.-Vs- The Commissioner of Customs (supra)*, where it has been observed:

*“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. Any demand therefore made by an*

*authority concerned for VAT or other tax, which was not made in accordance with the procedure laid down in the VAT Act, such demand must be held to be not a demand in the eye of law and this Division cannot deny or refuse to exercise its jurisdiction under article 102 of the Constitution to strike down such unauthorized exercise of statutory power.”*

However, in the instance case, after scrutiny of the show cause notice dated 28.12.2005 (Annexure-A) it is apparent that the proceeding has been initiated by the VAT Authority under Sections 55(1) and 37(2) of the Act, 1991 by issuing show cause notice upon the petitioner simultaneously, without initiation any separate proceeding as required under the provision of Section 37 of the said Act as well as before finalization/fixation of demand/liability under Section 55 of the Act, 1991.

In the stated circumstances and position of the law we do not find any illegality in the proceeding so have been initiated against the petitioner so far it relates to realization of VAT under Section 55(1) of the Act, 1991 by the respondent No. 2.

In this regard, in the case of *Grand Azad Hotel -Vs- Customs Excise and VAT and others* reported in 24 BLC (HCD) 899 (one of us was party of the said judgment) wherein this Court categorically observed:

*“.....In view of the above, we find that imposition of penalty and claiming additional tax under Sections 37(2) and (3) of the Act, 1991 in the proceeding so initiated for realization of unpaid/ less paid VAT under section 55 of the Act, 1991 is not sustainable in the eye of law and hence, the order so far imposition of penalty and additional tax passed by the concerned respondents are without jurisdiction. However, we*



*find no legal infirmity in the impugned orders so far it relates to realization of unpaid VAT.*

*From the attending facts and circumstances of the case and the decisions so have been cited herein above we are of the view that the impugned orders so far it relates to imposition of penalty and additional tax under sections 37(2) and (3) is liable to be struck down.”*

It view of the above it appears that by the impugned notice dated 28.12.2024 the respondent No. 2 has initiated proceeding against the petitioner for realization of VAT to the tune of Tk. 38,21,521/- under Section 55(1) of the 1991 and simultaneously has been initiated proceeding under Section 37(2) of the Act, 1991 for imposition of the penalty by the impugned notice which is not permissible under the Act, 1991.

In view of the facts and circumstances of the case, we find substance in the submission made by the learned Advocate for the petitioner and thus merit in the Rule so far it relates to the proceeding under Section 37(2) of the Act, 1991. Accordingly, the Rule is made absolute in part, however, without any order as to costs.

The impugned demand order under Nothi No. 4-MUSUK/8(282) Ilixir/dabinama/05/3514 dated 28.12.2005 (Annexure-A) issued by the respondent No. 2 so far it relates to the proceeding under Section 37(2) is hereby declared to have been done without lawful authority and is of no legal effect. The concerned respondent No 2 is hereby directed to dispose of the proceeding so initiated by the impugned notice dated 28.12.2005 under Section 55(1) of the Act, 1991 within 60 (sixty) days from the date of receipt of the copy of this judgment and order. However, the petitioner is at

liberty to submit written objection against the demand notice within the said period.

Communicate a copy of this judgment and order to the respondents.

*Md. Iqbal Kabir, J:*

I agree.

**Md. Mashud sikder, ABO**