

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

WRIT PETITION NO.1627 of 2022

IN THE MATTER OF:

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

And

IN THE MATTER OF:

M/s. Anika Traders

- Petitioner

-vs-

Government of Bangladesh and others.

..... Respondents.

And

Mr. Fahima Barrin, 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: 06.02.2024 and
Judgment on: 28.02.2024

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 inaction of the respondents in returning the bank guarantee bearing No. BASIC/JUBI/BG001/2021 dated 22.04.2021 in connection with Bill of Entry No. C- 647467 dated

17.04.2021 for an amount of Tk. 26,07,372.80 (Taka twenty six lac seven thousand three hundred and seventy two point eight zero) only issued by BASIC Bank Ltd., Jubilee Road Branch, Chattogram, furnished by the petitioner for releasing the goods on the basis of provisional assessment under Section 81(1) of the Customs Act, 1969, due to failure of the respondents to make final assessment within the stipulated period prescribed under Section 81(2) of the said Act, 1969 should not be declared to have been done without lawful authority and hence, of no legal effect.

Subsequently, vide order dated 16.03.2022 the respondent concerned was directed not to encash the bank guarantee bearing No. BASIC/JUBI/ BG001/2021 dated 22.04.2021 for a prescribed period.

Facts, in brief, are that the petitioner is a businessmen who is engaged in the business of importing and supplying PE Sheet in Roll (Unprinted) in the local market. In course of business, it opened a Letter of Credit being No. 0000127921010028, dated 03.02.2021 for an amount of USD 52,120.40 for importing 928 PE Sheet Roll from Korea covered under H.S. Code 3920.10.90. After arrival of the said goods at Chattogram port the petitioner submitted Bill of Entry No. C-647467, dated 17.04.2021 for releasing the same under H.S. Code-3920.10.90; however, the Customs authority assessed the said goods under H.S. Code-3921.90.99.

Accordingly, the petitioner filed an application dated 19.04.2021 to the respondent No.3 for releasing the said goods on payment of duties assessed provisionally by furnishing adequate bank guarantee in order to avoid loss and demurrage charges. Later, the goods were released on the

basis of provisional assessment dated 25.04.2021 upon furnishing bank guarantee, issued by BASIC Bank Ltd., Jubilee Road Branch, Chottogram, being No.BASIC/JUBI/BG001/2021 dated 22.04.2021 against Bill of Entry No. C-647467 dated 17.04.2021 for Tk.26,07,372.80/-(Taka twenty Six lac seven thousand three hundred and seventy two point eight zero) only.

In the given context, the Customs authority was under statutory obligation to assess the goods within 120 working days as per provision of Section 81(2) of the Customs Act, 1969, but they did not do so. Accordingly, the petitioner preferred an application dated 04.01.2022 before the respondent No.3 with request to return the aforesaid bank guarantee, but with no response. Hence, the application.

Respondent No.3 entered appearance by filing affidavit-in-opposition stating, *inter alia*, that the consignment in question was released subject to provisional assessment upon accepting unconditional and continued bank guarantee covering the differential amount between the H.S. Code as determined by the Customs authority and the declared H.S. Code of the petitioner. However, at the time of making provisional assessment a condition was imposed that the Bill of Entry of the petitioner's consignment would be disposed of subject to the report of the reference bill of entry of similar goods, which was sent for chemical examination. The reference bill of entry of similar goods i.e. Polymer Ethylene Sheet in Roll (Tarpaulin) corresponding to Nothi No.3452/AP/Section-7B/20-21, Bill of Entry No.C-220545 dated 04.02.2021 was examined and through chemical test the H.S. Code of the said goods was determined as 3921.90.99. Subsequently, vide Nothi

No.8.01.0000.054.01.001.2021/134 dated 25.11.2021 the National Board of Revenue (in short, the NBR) took decision that the goods in question namely Polymer Ethylene Sheet in Roll (Tarpaulin) was to be classified under H.S. Code 3921.90.99. Accordingly, the H.S. Code of petitioner's imported goods was determined and after making the final assessment the Customs authority had decided to encash the bank guarantee being No. BASIC/JUBI/BG001/2021 dated 22.04.2021 in favour of the government in due compliance of law.

Mrs. Fahima Barrin, the learned Advocate appearing for the petitioner submits that as per Section 81(2) of the Customs Act, 1969, when any goods are cleared on the basis of provisional assessment, the amount of duty actually payable on those goods shall, within a period of 120 working days from the date of provisional assessment, be finally assessed. However, the NBR under exceptional circumstances recorded in writing, may extend the said period. In the instant case, the Customs authority has failed to comply with the aforesaid provision of the Act, 1969.

She further submits that it has been settled by the apex court that failure to comply with the provision of Section 81(2) of the Customs Act, 1969 makes the Customs authority liable to return the bank guarantee or refund the excess amount of duty paid by the importer to release the goods on provisional assessment.

Accordingly, she submits that upon making the Rule absolute a direction be given upon the respondent concerned to return the bank guarantee bearing No. BASIC/JUBI/BG001/2021 dated 22.04.2021 in favour of the petitioner.

Mr. Md. Modersher Ali Khan, the learned Assistant Attorney General appearing for the respondents-government submits that the prayer so made by the petitioner- importer for refund of the bank guarantee in question for non-completion of final assessment within 120 working days under Section 81(2) of the Act, 1969 in a misconceived one, for, the Commissioner of Customs, Chattagram vide Nothi No.S-28/miscellaneous/Section-7(B)/94 (Part-3)/54549(Cus) dated 21.12.2021 had requested NBR to extend 03(three) months time to make final assessment. Pursuant thereto the Board vide Nothi No.08.01. 0000.53.03.012.21/22 dated 04.01.2022 had extended the said period till 31.03.2022 to make final assessment. Accordingly, on 18.01.2022 the Customs authority made final assessment of the imported goods in question and on the same date i.e. on 18.01.2022 sent a letter to the bank concerned for encashment of the respective bank guarantee, in due compliance of law. Hence, he submits that this Rule being devoid of any substance is liable to be discharged.

The main contention of the petitioner is that the goods in question have been released on the basis of provisional assessment upon furnishing bank guarantee for the differential amount. The Customs authority having failed to make final assessment within 120 working days from the date of making provisional assessment, as is required under Section 81(2) as such, they are liable to return the said bank guarantee in favour of the petitioner or to refund the excess amount of duty paid by the petitioner for release of the goods on provisional assessment.

Section 81(1) of the Customs Act, 1969 provides scope for release of the goods on provisional assessment subject to furnishing bank guarantee. However, vide Section 81(2) where the goods are allowed to

be released on provisional assessment, the amount of duty actually payable on those goods shall be finally assessed within 120 working days from the date of provisional assessment. However, vide the proviso to Section 81(2) the National Board of Revenue may extend the said period under exceptional circumstances.

Section 81 of the Act, 1969 is quoted below:

*“81. **Provisional assessment of duty.**- (1) Where it is not possible immediately to assess the customs-duty that may be payable on any imported goods entered for home-consumption or for warehousing or for clearance from a warehouse for home-consumption or on any goods entered for exportation, for the reason that the goods require chemical or other test or a further enquiry for purposes of assessment, or that all the documents or complete documents or full information pertaining to those goods have not been furnished, an officer not below the rank of Assistant Commissioner of Customs may order that the duty payable on such goods be assessed provisionally:*

Provided that the importer (save in the case of goods entered for warehousing) or the exporter pays such additional amount as security or furnishes such guarantee of a scheduled bank for the payment thereof as the said officer deems sufficient to meet the excess of the final assessment of duty over the provisional assessment.

¹[(2) Where any goods are allowed to be cleared or delivered on the basis of such provisional assessment, the amount of duty actually payable on those goods shall, within a period of one hundred and twenty working days from the date of the provisional assessment, where there is a case pending at any court, tribunal or appellate authority, from the date of receipt of the final disposal order of that case, be finally assessed and on completion of such assessment the appropriate officer shall order that the amount already guaranteed be adjusted against the amount payable on the

basis of final assessment, and the difference between them shall be paid forthwith to or by the importer or exporter as the case may be: Provided that the Board may, under exceptional circumstances recorded in writing, extend the period of final assessment specified under this sub-section.]

From office Note No.5 of Nothi No.88২২/এপি/সেকশন-৭(বি)/২০২০-২০২১

it appears that in the representation dated 19.04.2021 filed by the petitioner a prayer was made for release of the goods on provisional assessment subject to the context as stated therein.

Note No.5 is quoted below: “আমদানিকারক কমিশনার মহোদয় বরাবর একখানা আবেদনপত্র দাখিল করেন। (দাখিলকৃত আবেদনপত্র নং-নাই, তারিখ: ১৯/০৪/২০২১ খ্রিঃ যা নথির যোগাযোগ অংশে রক্ষিত আছে, দয়া করে দেখা যেতে পারে। উক্ত আবেদন পত্রে উল্লেখ করেন যে, ইতোপূর্বে শুল্কায়িত নথি নং-৩৪৫২/এপি/সেকশন-৭(বি)/২০-২১ এর সিদ্ধান্ত মোতাবেক তাদের ঘোষিত এইচ.এস.কোড ৩৯২০.১০.৯০-তে প্রযোজ্য শুল্ককরাদি নগদে পরিশোধ করে এবং এ দস্তুর কর্তৃক প্রস্তাবিত এইচ.এস.কোড ৩৯২১.৯০.৯৯ ও ঘোষিত এইচ.এস.কোড ৩৯২০.১০.৯০ এর পার্থক্যজনিত শুল্ককরাদির সমপরিমাণ অর্থের ব্যাংক গ্যারান্টি গ্রহণ করে পণ্যচালান সাময়িক শুল্কায়নপূর্বক খালাসের অনুমতি প্রার্থনা করেছেন। আবেদনে আরও উল্লেখ করেন যে, পণ্যচালান খালাসের পরবর্তীতে নথি নং-৩৪৫২/এপি/সেকশন-৭(বি)/২০২০-২০২১ যে সিদ্ধান্ত গৃহীত হবে, উক্ত সিদ্ধান্ত তারা মেনে নিতে বাধ্য থাকবেন। জাতীয় রাজস্ব বোর্ডের সিদ্ধান্তের প্রেক্ষিতে ব্যাংক গ্যারান্টি নিষ্পত্তি বিষয়ে সিদ্ধান্ত গ্রহণের জন্যও অনুরোধ জানিয়েছেন।”

Pursuant thereto the Customs authority took decision on 20.04.2021 (Note No. 6) to release the goods on provisional assessment and to make final assessment on receipt of the decision of NBR.

Note No.6 is quoted below:

“০৬। প্রস্তাব: আমদানিকারকের আবেদন বিবেচনায় নিয়ে জাতীয় রাজস্ব বোর্ডের সিদ্ধান্ত না হওয়া পর্যন্ত এইচ.এস.কোড ৩৯২১.৯০.৯৯ এবং ৩৯২০.১০.৯০ এর পার্থক্যজনিত শুল্ক-করাদির সমপরিমাণ অর্থের (৬২,৬১, ৩১৪.৩১ - ৩৬,৫৩,৯৪১.৫১) = ২৬,০৭,৩৭২,৩৭২.৮০ (ছাব্বিশ লক্ষ সাত হাজার তিনশত বায়াত্তর দশমিক আট শূন্য) টাকার ব্যাংক গ্যারান্টি গ্রহণ করে সাময়িক

শুল্কায়নের অনুমতি প্রদান করা যেতে পারে। পরবর্তীতে জাতীয় রাজস্ব বোর্ডের সিদ্ধান্ত প্রাপ্তি সাপেক্ষে চূড়ান্ত শুল্কায়নপূর্বক ব্যাংক গ্যারান্টি নিষ্পত্তি করা যেতে পারে।

Ultimately, on furnishing bank guarantee dated 22.04.2021 by the petitioner on the differential amount the goods were released on provisional assessment on 25.04.2021.

Meanwhile, the National Board of Revenue gave decision on the goods in question on 25.11.2021 under Nothi No.08.01.0000.054.01.001.2021.134. At the same time, pursuant to the prayer of the Customs Authority so made on 22.12.2021 under Nothi No.S-28/miscellaneous/Section-7(B)/94 (Part-3)/54549(Cus) for extension of period in connection with 104 Bill of Entries the Board vide order dated 04.01.2022 passed under Nothi No.08.01.0000.53.03.012. 21/12 extended the period under the proviso to Section 81(2) till 31.03.2022.

Note No.20 is quoted below: “আমদানিকারক প্রতিষ্ঠান আলোচ্য পণ্যচালানটি The Customs Act, 1969 এর section 81 মোতাবেক ১২০ কার্যদিবসের মধ্যে চূড়ান্ত শুল্কায়ন না করায় ব্যাংক গ্যারান্টি ফেরত প্রদানের আবেদন করেছেন। যা নথির যোগাযোগ অংশে রক্ষিত রয়েছে, সদয় দেখা যেতে পারে। তবে নথি নং-এস-২৮/বিবিধ/সেকশন-৭(বি)/৯৪(অংশ-৩)/৫৪৫৪৯ (কাস), তারিখ: ২২/১২/২০২১ খ্রিঃ তারিখের পত্রের মাধ্যমে জাতীয় রাজস্ব বোর্ডে ১০৪ টি বিল অব এন্ট্রি চূড়ান্ত শুল্কায়নের সময়সীমা তিন মাস মাস বৃদ্ধি করার আবেদন করা হয়। সে প্রেক্ষিতে জাতীয় রাজস্ব বোর্ডের পত্র নং-০৮.০১.০০০০.৫৩.০৩.০১২. ২১/১২, তারিখ: ০৪/০১/২০২২ খ্রিঃ অনুযায়ী আলোচ্য বি/ই এর ক্ষেত্রে The Customs Act, 1969 এর Section-81 (2) মোতাবেক চূড়ান্ত শুল্কায়নের সময়সীমা আগামী ৩১/০৩/২০২২ খ্রিঃ তারিখ পর্যন্ত বৃদ্ধিতে জাতীয় রাজস্ব বোর্ড অনাপত্তি প্রদান করেছেন বিধায় আমদানিকারকের আবেদন বিবেচনায় না নিয়ে পণ্যচালানটি চূড়ান্ত শুল্কায়ন করা যেতে পারে।” Meanwhile, the Customs Authority made final assessment on 18.01.2022 (Note No.22).

Thus, it is apparent on the face of record that the Customs Authority made final assessment on 18.01.2022 i.e., within 120 working

days from the date of receipt of the decision of the NBR. Since decision of the NBR was made on reference Nothi No. ৩৪৫২/ এপি/ সেকশন-৭(বি)/২০-২১ pursuant to the prayer of the petitioner so made on 19.04.2021 for provisional assessment as such, it is now estopped from making assertion otherwise with a view to have the bank guarantee return for alleged violation of Section 81(2) of the Act.

At this juncture, Ms. Fahima Barrin, the learned Advocate for the petitioner submits that since final assessment has already been made an opportunity be given to the petitioner to prefer an appeal before the Tribunal concerned under the Customs Act, 1969

In view of the prayer of the learned Advocate, the petitioner is at liberty to prefer an appeal before the respective forum under the Customs Act, 1969 within 90(ninety) days from the date of receipt of the copy of this order. Till filing of appeal, the operation of the bank guarantee in question be kept in abeyance. In default, the Customs authority will be at liberty to take necessary steps with regard to bank guarantee in question in due compliance of law.

Accordingly, the Rule is discharged without any order as to costs. Communicate the judgment and order to the respondents concerned at once.

Muhammad Mahbub Ul Islam, J:

I agree.