

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

**Present**

**Mr. Justice Muhammad Khurshid Alam Sarkar**

**And**

**Mr. Justice Sardar Md. Rashed Jahangir**

**Income Tax Reference Application No. 596 of 2019**

**with**

**Income Tax Reference Application No. 597 of 2019**

**with**

**Income Tax Reference Application No. 598 of 2019**

**with**

**Income Tax Reference Application No. 599 of 2019**

**In the matter of:**

Commissioner of Taxes, Taxes Zone- 01, Chattogram

... Applicant (In all the Income Tax Reference Applications)

-Versus-

Delwar Hossain Dulal

... Respondent (In all the Income Tax Reference Applications)

Mr. Pratikar Chakma, D.A.G

... For the applicant

Mr. Mahbub Shafique with

Mr. Sifat Mahmud, Advocates

... For the respondent

**Judgment on : 16.11.2023**

**Sardar Md. Rashed Jahangir, J:**

All the reference applications have been filed by the Commissioner of Taxes, Taxes Zone-1, Chattogram under section 160 of the Income-tax Ordinance, 1984 arising out of Income Tax Appeal Nos. 682, 683, 684 and 685 of 2018-2019 (assessment years 2012-2013, 2013-2014, 2015-2016 and 2016-2017) (filed by the DCT concerned) heard analogous with

Income Tax Appeal Nos. 1364, 1365, 1366 and 1367 of 2018-2019, formulating identical questions of law and in Reference Application No. 596 of 2019 the same are as follows:

**“Questions of Law:**

Question (i):

Whether, on the facts and circumstances of the case, the learned Taxes Appellate Tribunal, Chattogram Bench, Chattogram was legally justified in reducing the sales from Tk.15,00,00,000/- to Tk.12,00,00,000/- while the assessee failed to submit corroborative evidence or documents against notice under section 79 of Income-tax Ordinance, 1984? Does it violate the section 79 and 35 of Income-tax Ordinance, 1984?

Question (ii):

Whether, on the facts and circumstances of the case, the learned Taxes Appellate Tribunal, Chattogram Bench, Chattogram was legally justified in directing to the Deputy Commissioner of Taxes to accept Gross Profit @13% instead of 18% by considering the parallel case of Hexagon Chemical Complex Ltd., eTIN: 429774396301/ Cir-52(companies), Taxes Zone-3, Chattogram submitted by the assessee where GP was 12% in assessment year, 2012-2013 but the declared GP by the assessee in 2016-2017 assessment year was 25% and when direct expenses claimed in the trading account were not vouched by corroborative evidences violating the section 79 and 35 of the Income-tax Ordinance, 1984?”

Assessee-respondent submitted his returns for the assessment years 2012-2013, 2013-2014, 2015-2016 and 2016-2017 under sections 82BB(1)/93/83(2), 83(2), 83(2) and 83(2) respectively declaring deferent

amounts of yearly income for the aforesaid 4(four) assessment years. At the time of working out with the assessment, Deputy Commissioner of Taxes concerned (hereinafter referred to as 'the DCT') rejected the declared version of sale and thereafter computed the sale at his own at Tk.15,00,00,000.00 (Taka fifteen crore), Tk.15,50,00,000.00 (Taka fifteen crore fifty lac), Tk.18,00,00,000.00 (Taka eighteen crore) and Tk.19,00,00,000.00 (Taka ninety crore) respectively and adopting deferent rates of G.P. on the said estimated sale.

Having aggrieved by the estimation of sales and adopted G.P. rates, the assessee preferred as well as 4(four) appeals before the Appellate Joint Commissioner of Taxes, Appellate Range-2, Taxes Appeal Zone, Chattogram (hereinafter referred to as 'the AJCT') in “আয়কর আপীল পত্র নং- ০৫, ০৬, ০৭/সা-কর্ল-১১/২০১৭-২০১৮” and “আয়কর আপীল পত্র নং ১৩/সার্কেল-১১/২০১৭-২০১৮”. The AJCT by his separate orders dated 28.03.2018 and 26.08.2018 directed to reduce the estimated sales of DCT, finding in the following manner (for the assessment year, 2012-2013)- “নথির রেকর্ড ও প্রাসংগিক তথ্য বিবেচনায় উপ কর কমিশনার কর্তৃক অনুমানভিত্তিক বিক্রয় প্রাক্কলন অত্যধিক প্রতীয়মান হওয়ায় প্রাক্কলিত বিক্রয় হ্রাস করিয়া ১৫,০০,০০,০০০/- টাকার স্থ-ল ১২,০০,০০,০০০/- টাকা করা হইল” and for rest of the assessment years employed almost the identical language in reducing the estimation of sales.

On being aggrieved by the orders of AJCT dated 28.03.2018 and 26.08.2018 the DCT concerned preferred 4(four) appeals before the Tribunal, being Income Tax Appeal Nos. 682, 683, 684 and 685 of 2018-

2019; assessee also filed Income Tax Appeal Nos. 1364, 1365, 1366 and 1367 of 2018-2019. The Tribunal after hearing both the parties by its common order dated 22.01.2019 rejected all the appeals of both the contending parties so far it relates to the estimation of sales and on being further pleased to modify the applicable GP rate for all the assessment years concerned.

On being aggrieved by the order of Tribunal, the Commissioner of concerned zone filed these reference applications formulating the aforementioned questions of law.

Mr. Pratikar Chakma, learned Deputy Attorney General appearing for the Commissioner-applicant brought us through all the reference applications together with annexures and made his elaborate submissions in support of the applications.

On the other hand, Mr. Mahbub Shafique along with Mr. Sifat Mahmud, learned Advocates appearing for assessee-respondent tried to defend the order of Tribunal by filing affidavits-in-reply.

On examination the question No. 1 of all the reference applications, it appears that in formulating the question against reducing of estimated sales by the appellate authorities below unnecessarily mentioned some irrelevant issues, which was at all not referred or argued before the Tribunal. The said irrelevant portion of question No. 1 is quoted in below:

“While the assessee failed to submit corroborative evidence or documents against notice under section 79 of

the Income-tax Ordinance, 1984? Does it violate the sections 79 and 35 of the Income-tax Ordinance, 1984?”

Upon meticulous examination of the order of Tribunal as well as the order of AJCT, we do not find any relevance of above quoted portion of the question of law. Thus, it appears to us this portion is being added/mentioned only to camouflaging upon the real controversy in issue and to divert the attention of this Court elsewhere.

The estimation of sale in a matter of fact based upon relevant materials and information. And so far the question of reducing the sale is concerned, the first appellate authority i.e. the AJCT in his order found as below:

“নথির রেকর্ড ও প্রাসংগিক তথ্য বি-বচনায় উপ কর কমিশনার কর্তৃক অনুমানভিত্তিক বিক্রয় প্রাক্কলন অত্যধিক প্রতিয়মান হওয়ায় প্রাক্কলিত বিক্রয় হ্রাস করিয়া ১৫,০০,০০,০০০/- টাকার স্থ-ল ১২,০০,০০,০০০/- টাকা করা হইল।”

Meaning thereby, the DCT made his estimation of sale on the basis of guess and presumption, which cannot be sustainable in the eye of law. Accordingly, the AJCT as well as the Tribunal interfered with the said presumptive estimation. We do not find any illegality in the order of the Tribunal in respect of reducing the sales. Accordingly, the question No. 1 is decided against the Commissioner-department and in favour of assessee-respondent.

So far the question No. 2 is concerned, it is against Tribunal's decision regarding fixation of GP rates. We have gone through the question at length, earlier it has been decided by our Apex Court in the

case of Commissioner of Income Tax, A-Range, Chittagong Vs. Harendra Kumar Shil reported in 34 DLR(AD)298 that the determination or fixation of rate of gross profit for any particular year in respect of any particular business or trade is purely a question of fact, and on that count only no reference application is entertainable.

In view of the judgment of our Apex Court, the question No. 2 appears to be an incompetent one. Accordingly, the reference application is decided against the Commissioner-applicant and in favour of assessee-respondent.

No order as to cost.

In the result, all the reference applications are decided against the Commissioner-applicant answering the question in affirmative.

The Registrar of the Supreme Court of Bangladesh is directed to take steps in view of the provisions under section 161(2) of the Income-tax Ordinance, 1984.

**Muhammad Khurshid Alam Sarkar, J.**

I agree.