

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

WRIT PETITION NO.2580 of 2023
with
WRIT PETITION NO.2581 of 2023
And
WRIT PETITION NO.1761 of 2023

IN THE MATTER OF:

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

And

IN THE MATTER OF:

Sonali Biri Factory (Pvt.) Limited
..... *Petitioner in all writ petitions.*

-vs-

Commissioner of Customs, Excise and VAT
Commissionerate, Jashore, Bhola Tank Road,
Jashore and others.

..... *Respondents in all writ petitions*

And

Mr. A.R.M. Qayyum Khan, Advocate with
Mr. Bhuiya Alamgir Hossain, Advocate
.... For the Petitioner in all writ petitions.

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 all writ petitions.

Heard on: 27.05.2024 and
Judgment on:29.05.2024

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 all these 3(three) writ petitions as such, those have been heard together and are being disposed of by this single judgment.

In these Rules 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 order dated 23.11.2022 passed under Nothi No.৪র্থ/এ (১০) ০৮/অনিয়ম ও মুসক ফাঁকি/সোনালী বিড়ি/আঃ ও বিঃ/ ২০২২/ ২৬১ (১) in writ petition No.2580 of 2023, order dated 23.11.2022 passed under Nothi No.৪র্থ/এ (৮) ০৮/অনিয়ম ও মুসক ফাঁকি/সোনালী বিড়ি/আঃ ও বিঃ/ ২০২২/ ২৬০ (১) in writ petition No.2581 of 2023 and order dated 06.11.2022 passed under Nothi No.৪র্থ/এ (৮) ৩০/অনিয়ম ও কর ফাঁকি/সোনালী বিড়ি/ বিচার/ ২০২০/ ২২০ (১) in writ petition No.1761 of 2023 all issued by the respondent No.1 imposing penalty simultaneously while determining the evaded amount of VAT, in violation of Rule 65(2)(ka) of the Value Added Tax and Supplementary Duty Rules, 2016 (Annexure-C), should not be declared to have been issued without lawful authority and hence, of no legal effect.

At the time of issuance of the Rules the operation of the impugned order dated 23.11.2022 passed under Nothi No.৪র্থ/এ (১০) ০৮/অনিয়ম ও মুসক ফাঁকি/সোনালী বিড়ি/আঃ ও বিঃ/ ২০২২/ ২৬১ (১) in writ petition No.2580 of 2023, order dated 23.11.2022 passed under Nothi No.৪র্থ/এ (৮) ০৮/অনিয়ম ও মুসক ফাঁকি/সোনালী বিড়ি/আঃ ও বিঃ/ ২০২২/ ২৬০ (১) in writ petition No.2581 of 2023 and order dated 06.11.2022 passed under Nothi No.৪র্থ/এ (৮) ৩০/অনিয়ম ও কর ফাঁকি/সোনালী বিড়ি/ বিচার/ ২০২০/ ২২০ (১) in writ petition No.1761 of 2023 all issued by the respondent No.1 (Annexure-C), so far it relates to imposition of penalty were stayed by this Court for a prescribed period.

In support of the statements so made in the respective writ petitions, we have heard Mr. A.R.M. Qayyum Khan, the learned Advocate appearing for the petitioners in connection with all 3(three) writ petitions, In this connection, he also informs the Court that in compliance of the direction given by this Court at the time of issuance of the Rules the petitioner has already preferred respective appeals before the forum created under the

statute so far determining evaded amount of VAT, which is pending for hearing and disposal.

Mr. Mr. Samarendra Nath Biswas, the learned Deputy Attorney General appearing for the respondents-government is present before this Court.

The issue in question has earlier been resolved by this Bench in connection with writ petition No.14643 of 2022 in *The Cox Today Limited - Vs- The Secretary, Internal Resources Division, Ministry of Finance, Bangladesh and others*, vide judgment and order dated 10.03.2024 categorically observing, *inter-alia*:

“Section 73 of the VAT and Supplementary Duty Act, 2012 (in short, the Act, 2012) empowers the Commissioner concerned to make demand of VAT on the contexts as provided under Clause (ka) – (gha) of Section 73(1), but subject to issuance of show cause notice and upon hearing the person concerned if objection thereto is raised by him.

Section 85, however, fixes the parameter for imposition of penalty by the respective VAT officers concerned as mentioned in Section 86.

Rule 65 of the VAT and Supplementary Duty Rules, 2016 on the other hand prescribes the procedure for imposition of penalty.

Rule 65(1) deals with the contexts as prescribed under clause (ছ), (জ), (ঝ) and (ড) of Section 85(1). Rule 65(2) provides for “ধারা ৮৫ এর উপধারা (১) এ বর্ণিত কর ফাঁকি সংক্রান্ত ব্যর্থতা বা অনিয়ম ব্যতীত অন্য যে কোন ধরনের ব্যর্থতা বা অনিয়মের জন্য”. However, in both the cases question of imposition of penalty arises only

after final determination of unpaid or less paid or evaded amount of VAT “ধারা ৭৩ এ উল্লিখিত কর নির্ধারণ কার্যক্রম সম্পন্ন করিয়া” but subject to issuance of show cause notice in Form Mushok 12.12. with particulars as prescribed in Rule 65(3). In addition, on receipt of reply thereto the officer concerned has to give/provide opportunity of personal hearing under Rule 65(6). Subsequent thereto, the VAT officer will be empowered/entitled to pass adjudicating order in Mushok Form 12.13.

In view of the above, it can clearly be discerned that question of imposition of penalty arises only after final determination of unpaid/less paid/evaded amount of VAT and that is also, subject to issuance of show cause notice and personal hearing of the person concerned.”

*“..... As has been observed earlier, Act, 2012 empowers the VAT officer concerned to impose penalty but only after final determination of the evaded amount of VAT or less paid VAT and subject to the procedures as have been prescribed under Rule 65 i.e. with the issuance of show cause notice in prescribed form along with personal hearing. Said requirement of law has not been complied with by the officer concerned in the instant case prior to imposition of penalty. In the light of the observations so made by one of the Benches of this Division in **PET Industries Ltd. Vs. Commissioner, Customs, Excise and VAT, 61DLR734** “the concerned authority is therefore, duty bound to follow the procedure as laid down in the Act, for each and every action.*

In that view of matter, we have no manner of doubt to find that imposing penalty by the respondent concerned under Rule 65(6) while making final demand under Section 73(2) without first issuing a notice in Form Mushok 12.12. asking to show cause to that effect with personal hearing of the petitioner concern, is an order passed without lawful authority.”

Said observations and findings are still in operation.

In the present case, claiming evaded amount of VAT to the tune of Tk.34,81,869/-, the officer concerned issued a demand-cum-show cause notice in exercise of power as provided under Section 73(1) of the Value Added Tax and Supplementary Duty Act, 2012 (in short, the Act, 2012). In response thereof the petitioner duly replied on 23.10.2022 (Annexure-B). Ultimately, the respondent concerned made a final demand of VAT on 21.11.2022 under Section 73(2) of the said Act (Annexure-C); at the same time had imposed penalty of Tk.34,81,869/- in connection with writ petition No. 2580 of 2023.

In writ petition No.2581 of 2023, claiming evaded amount of VAT to the tune of Tk.25,22,790/-, the officer concerned issued a demand-cum-show cause notice in exercise of power as provided under Section 73(1) of the Act, 2012. In response thereof the petitioner duly replied on 23.10.2022 (Annexure-B). Ultimately, the respondent concerned made a final demand of VAT on 21.11.2022 under Section 73(2) of the said Act (Annexure-C) and at the same time had imposed penalty of Tk.25,22,790/-.

In the writ petition No.1761 of 2023, claiming evaded amount of VAT to the tune of Tk.15,47,914.48/-, the officer concerned issued a demand-cum-show cause notice in exercise of power as provided under Section 73(1)

of the Act, 2012. In response thereof the petitioner duly replied on 25.11.2020 (Annexure-B). Ultimately, the respondent concerned made a final demand of VAT on 06.11.2022 under Section 73(2) of the said Act (Annexure-C) and at the same time had imposed penalty of Tk.30,95,828.96/-.

In view of the above observations and finding given by this Bench in connection with writ petition No.14643 of 2022 as well as considering the facts and the position of law, we have no manner of doubt to find that imposing penalty of Tk.34,81,869/- by the respondent concerned under Rule 65(6) of the VAT and Supplementary Duty Rules, 2016 (in short, the Rules, 2016) while making final demand of Tk.34,81,869/- under Section 73(2) of the Act, 2012 in writ petition No. 2580 of 2023; imposing penalty of Tk.25,22,790/- by the respondent concerned under Rule 65(6) of the Rules, 2016 while making final demand of Tk.25,22,790/- under Section 73(2) of the Act, 2012 in writ petition No. 2581 of 2023 and imposing penalty of Tk.30,95,828.96/- by the respondent concerned under Rule 65(6) of the Rules, 2016 while making final demand of Tk.15,47,914.48/- under Section 73(2) of the Act, 2012 in writ petition No. 2581 of 2023 without first issuing a notice in Form Mushok 12.12 asking to show cause to that effect with personal hearing of the petitioner concern so far it relates to imposition of penalty, are liable to be struck down for having been issued issuing without lawful authority and hence, of no legal effect.

In the result, all the Rules in writ petition Nos. 2580, 2581 and 1761 all of 2023 are made absolute.

The impugned order dated 23.11.2022 passed under Nothi No.৪৩/এ (১০) ০৮/অনিয়ম ও মূসক ফাঁকি/সোনালী বিড়ি/আঃ ও বিঃ/ ২০২২/ ২৬১ (১) in writ petition No.2580 of 2023,

order dated 23.11.2022 passed under Nothi No.৪র্থ/এ (৮) ০৮/অনিয়ম ও মুসক ফাঁকি/সোনালী বিড়ি/আঃ ও বিঃ/ ২০২২/ ২৬০ (১) in writ petition No.2581 of 2023 and order dated 06.11.2022 passed under Nothi No.৪র্থ/এ (৮) ৩০/অনিয়ম ও কর ফাঁকি/সোনালী বিড়ি/ বিচার/ ২০২০/ ২২০ (১) in writ petition No.1761 of 2023, all by the respondent No.1 imposing penalty simultaneously while determining the evaded amount of VAT, in violation of Rule 65(2)(ka) of the Value Added Tax and Supplementary Duty Rules, 2016 (Annexure-C), are hereby declared to have been passed 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.

Montu (B.O)