

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

Writ Petition No. 7637 of 2023

In the matter of:

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

-And-

In the matter of:

Md. Ismail

...Petitioner

-Versus-

Chairman, Chattogram Port Authority and others
...Respondents

Mr. Abul Kalam, Advocate

...For the petitioner

Mr. Sayed Misbahul Anwar, Advocate

...For the respondent No. 1

Mr. Nawroz Md. Rasel Chowdhury, DAG with
Ms. Tahmina Polly and

Mr. Prince-Al-Masud, AAGs

... For the respondents

Heard on: 23.05.2024

Judgment on: 06.06.2024

Present

Mr. Justice Zafar Ahmed

And

Mr. Justice Sardar Md. Rashed Jahangir

Sardar Md. Rashed Jahangir, J:

The Rule was issued on an application under article 102 of
the Constitution of the People's Republic of Bangladesh calling
upon the respondents to show cause as to why the action of

respondent Nos. 1 to 3 in deducting 15% VAT instead of 7.5% from the bills of the petitioner (Annexure-‘E’, ‘E-1’ and ‘E-2’) for the works under (Form PW3A-9) Tender No.18.13.0000.132.14.002.23 dated 23.01.2023 and contract agreement dated 01.05.2023 (Annexure-‘A’) should not be declared to have been done without lawful authority and is of no legal effect and why the respondents should not be directed not to deduct 15% VAT instead of 7.5% VAT from the petitioner’s bill for the works under contract No. 18.13.0000.132.14.002.23/594 dated 01.05.2023 (Annexure-‘A’) and/or pass such other or further order or orders as to this Court may seem fit and proper.

The petitioner is a Bangladeshi National, having proprietary concern in the name and style ‘Ifaz Traders’ and engaged in various kinds of works under different contracts. Respondent No.1 floated a tender being No.18.13.0000.132.14.002.23 dated 23.01.2023 inviting eligible contractors/persons to participate in the tender for the works ‘appointment of a contractor for Jetty Handling (cleaning and garbage removing) for Chittagong Port Authority’ for a period of 2(two) years. The petitioner on being successful in getting the work, a contract was signed between the respondent No.1 and petitioner on 01.05.2023 for execution of the works as per specification of the Notification of Award and Tender documents.

It is to be mentioned here that the Notification of Award was issued in favour of the petitioner on 27.04.2023.

As per the contract dated 01.05.2023, the documents forming the contract shall be interpreted in the following order of priority:

- a. the signed Contract Agreement;
- b. the letter of Notification of Award;
- c. the completed Tender and the Appendix to the Tender;
- d. the Particular Conditions of Contract;
- e. the General Conditions of Contract;
- f. the Technical specifications;
- g. the General Specification;
- h. the Drawing;
- i. the priced BOQ and the Schedules; and
- j. any other Documents listed in the PCC forming Part of the Contract;

It is stated that the respondent Nos. 1-3 collect VAT on behalf of respondent Nos. 4 and 5 from the monthly bills payable/paid to the petitioner. It is further stated that under ‘সাধারণ আ-দশ নং-১৪/মূসক/২০১৭, তারিখঃ০১/০৭/২০১৭ইং’ the petitioner’s work having been defined under Service Code 037.00 as ‘Procurement Provider (যোগানদার)’ and deductible VAT from the bills of said service as per stipulation of the aforementioned General Order of 2017 is 5%; thereafter, SRO No.149-Law/2020/110-Mushak has been promulgated by the respondent No.5 on being authorized by the Value Added Tax and Supplementary Duties Act, 2012 (shortly

‘the VAT Act’) under which 7.5% VAT is to be deducted from the bills of ‘Procurement Provider’. It is further stated that the petitioner submitted his first bill to the Chattogram Port Authority for the works completed in the month of May, 2023 and surprisingly found that the authority made payment after deducting VAT at the rate of 15% from the aforesaid monthly bills, violating the provisions of the VAT Act and the Order and Rules made thereunder. Challenging the deduction of 15% VAT from the monthly bills, the petitioner filed this writ petition and obtained the Rule.

Mr. Abul Kalam, learned Advocate appearing for the petitioner submits that the petitioner after participating in open tender obtained the work order from respondent, Chattogram Port Authority for rendering some services as specified in the Notification of Award dated 27.04.2023 as well as in Tender documents. Under ‘সাধারণ আ-দশ নং-১৪/মূসক/২০১৭, তারিখঃ ০১/০৭/২০১৭ইং’ read with ‘এস,আর,ও নং ১৪৯-আইন/২০২০/১১০-মূসক’ dated 11.06.2020, the petitioner should be treated as ‘Procurement Provider (-যাগানদার)’ Service Code of which is S037.00 and under ‘এস.আর,ও নং ১৪৯-আইন/২০২০/১১০-মূসক’ the deductible VAT from the bills of petitioner’s service is 7.5%, but the respondent Nos.1-3 most arbitrarily and illegally deducted VAT at the rate 15% from the monthly bills of petitioner and thereby acted beyond the jurisdiction

stipulated in law and as such, the action of the respondent Nos.1-3 is required to be declared to have been taken without lawful authority and is of no legal effect.

On the other hand, Mr. Sayed Misbahul Anwar, learned Advocate appearing for respondent No. 1 submits that under the VAT Act the respondent No. 1 is the withholding tax authority and is under an obligation to deduct VAT from any payment made to any person under any contract or agreement for rendering services and as such, the respondent Nos.1-3 are deducting VAT at source from the monthly bills of the petitioner's proprietary concern as per the provision of the VAT Act as well as the contract and tender documents. He next submits that the Commissioner of Customs, Excise and VAT of zone concerned asked the respondent No. 1 to deduct 15% VAT from the monthly bills of petitioner and accordingly, the respondent Nos. 1-3 are deducting VAT as per direction of the Commissioner concerned and in view of above, he prays for discharging the Rule.

Mr. Nawroz Md. Rasel Chowdhury, learned Deputy Attorney General appearing with Ms. Tahmina Polly, learned Assistant Attorney General and made his submission adopting the submissions of learned Advocate for the respondent No. 1 claiming that 15% VAT has been deducted justly and legally from the

monthly bills of the petitioner's proprietary concern and therefore he also prays for discharging the Rule.

Heard learned Advocates for the petitioner, respondent No.1 and the learned Deputy Attorney General; perused the writ petition and affidavit-in-opposition filed on behalf of respondent No.1 together with their annexures.

We have also examined the provisions of the VAT Act alongwith the 'এস,আর,ও নং ১৮৬-আইন/২০১৯/৪৩-মুসক' dated 13.06.2019 and 'এস,আর,ও নং ১৪৯-আইন/২০২০/১১০-মুসক' dated 11.06.2020.

It appears that the petitioner through its proprietary concern entered into an agreement with respondent No.1 on 01.05.2023 after successfully participating in an open tender for appointment of a contractor for Jetty Handling (Cleaning & Garbage Removing) for Chattogram Port Authority for a period of 2(two) years. Clause-5 of the Contract dated 01.05.2023 states as under:

“The Procuring Entity hereby covenants to pay the Contractor in consideration of the execution and completion of the works and the remedying of defects therein, the contract price or such and other sum as may become payable under the provisions of the Contract at the times and in the manner prescribed by the Contract.”

Under section 3 of the Tender Documents captioned 'General Condition of Contract' (in short 'GCC') in clause-4, it is stipulated

that the contract shall be governed by and interpreted in accordance with the laws of the People's Republic of Bangladesh and under clause-18 of GCC, it is also stipulated that the contractor shall be entirely responsible for all applicable taxes, custom duties, VAT and other levies imposed or incurred inside and outside Bangladesh. It is to be noted here that the contractor (petitioner) is to submit his bill on monthly basis. Under section 4 of the Tender documents, captioned 'Particular Condition of Contract' (PCC) in clause GCC 65.1 the method and conditions of payment has been specified and it is also stated that (from page 60 of the writ petition) the payment shall be made in Bangladeshi taka on monthly basis. Under sub-clause (6) of clause-GCC 65.1, it is further stipulated that Income-tax, VAT and any other taxes imposed by the Government shall be borne by the contractor and those shall be deducted from the monthly bills of the contractor.

It further appears that the work has been specified in Contract Agreement, Notification of Award, Tender documents, etc. as "Appointment of a Contractor for Jetty Handling (Cleaning and Garbage removing) for Chattogram Port Authority.....' and under 'এস,আর,ও নং ১৮৬-আইন/২০১৯/৪৩-মূসক' dated 13.06.2019 read with 'এস,আর,ও নং ১৪৯-আইন/২০২০/১১০-মূসক' dated 11.06.2020 such services of the petitioner has been defined/explained under Service Code

S065.00 captioned “ভবন, মে-ঝা ও অংগন পরিস্কার বা রক্ষণা-বক্ষণকারী সংস্থা” and are as below:

ব্যখ্যা।-‘ভবন, মে-ঝা ও অংগন পরিস্কার বা রক্ষণা-বক্ষণকারী সংস্থা’ অর্থ প-গর বিনিম-য় সরকারি, আধা-সরকারি, স্বায়ত্তশাসিত প্রতিষ্ঠান, বেসরকারি সংস্হা (এনজিও), ব্যাংক, বীমা বা অন্য কো-না আর্থিক প্রতিষ্ঠান, লিমি-টড কোম্পানী, শিক্ষা প্রতিষ্ঠান বা আন্তর্জাতিক সংস্থার ভবন, মেঝে ও অংগন পরিস্কারের কার্যে নিয়োজিত কোনো ব্যক্তি, প্রতিষ্ঠান বা সংস্থা।”

Learned Advocate for respondent No. 1 is claiming that the service of the petitioner shall fall under the Service Code S005.10 under caption ‘পণ্যাগার’. On meticulous examination of the explanation, definition given under Service Code S005.10 (under SRO No. 186 of 2019), it appears that in no manner the said Code shall be applicable for the services rendered by the petitioner. Now, regarding the submissions made by learned Advocate for the petitioner, it was contended that their service should fall under Service Code S037.00 under caption ‘-যাগানদার’ (Procurement Provider) claiming himself as ‘-যাগানদার’, because he is rendering the services to the ‘চট্টগ্রাম বন্দর কর্তৃপক্ষ’ after participating in a tender and that is why his rendered service should be treated/fallen under Service Code S037.00.

We have also examined the provisions of এস,আর,ও নং ১৪৯-আইন/২০২০/১১০-মূসক, ‘উৎস মূল্য সং-যাজন কর কর্তন ও আদায় বিধিমালা, ২০২০; in Rule 4 under the caption ‘যোগানদারের ক্ষেত্রে উৎসে মূসক কর্তন’, it is

provided that ‘যে সকল সেবার সুনির্দিষ্ট সংজ্ঞা রহিয়া-ছ, সে সকল সেবা যোগানদার হিসা-ব গণ্য হই-ব না’। Under Service Code S065.00, the services of the petitioner have been defined and explained as ‘ভবন, মে-বা ও অংগন পরিষ্কার বা রক্ষণা-বক্ষণকারী সংস্থা’; thus, by operation of Rule 4 of the ‘উৎস মূল্য সং-যাজন করকর্তন ও আদায় বিধিমালা, ২০২০ the services of the petitioner cannot be treated as ‘Procurement Provider’. Under sub-rule (2) of Rule 3 of the said Rules, 2020 it is also stated that ‘টেডার, চুক্তি, কার্যাদেশ বা অন্যবিধভাবে সরবরাহের ক্ষেত্রে নি-ম্নর ছ-ক বর্ণিত কলাম (২) এ বর্ণিত সেবার কো-ডর বিপরী-ত কলাম (৩) এ বর্ণিত সেবার বিপরী-ত কলাম (৪) এ বর্ণিত হা-র আবশ্যিকভাবে উৎসে কর্তনকারী সত্তা কর্তৃক উৎসে কর্তন করিতে হইবে; যথাঃ’ and at serial No. 35 under Service Code S065.00 the deductible VAT has been specified at the rate of 10%.

In the premise above, we are of the view that neither the petitioner’s service can be treated as ‘পণ্যাগার’ nor as ‘-যোগানদার’, rather its services are to be treated under Service Code S065.00 as ‘ভবন, মে-বা ও অংগন পরিষ্কার বা রক্ষণা-বক্ষণকারী সংস্থা’ and the deductible VAT from the payment of its monthly bills is 10% under the provisions of SRO No. 149-Law/2020/110-Mushak dated 11.06.2020 read with SRO. No. 186-Law/2019/43/Mushak dated 13.06.2019.

Accordingly, we find merit in the Rule.

Therefore, the Rule is made absolute-in-part. No order as to cost.

The respondents are directed to refund the excess collected amount as VAT at the rate of 15%, in-stead of 10% (under Service Code S065.00).

Communicate the judgment and order at once.

Zafar Ahmed, J:

I agree.