

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

VALUE ADDED TAX APPEAL NO. 73 OF 2011

IN THE MATTER OF:

An appeal under section 42(1)(Ga) of the Value Added Tax Act, 1991.

And

IN THE MATTER OF:

Md. Rashidunnabi, son of Al-haj Ramzan Ali Sharkar, Proprietor of Trade Engineering, 193, Kabi Jashimuddin Road, Pagar, Tangi, Gazipur.
.... Appellant.

-Vs-

Customs, Excise and VAT Appellate Tribunal, Dhaka and others.

....Respondents.

Mr. Md. Sadullah, Advocate

..... For the Appellant

Mr. Akhtar Farhad Zaman with Mrs. Shadia Afrin Shapla with Mr. Arif Khan, Deputy Attorney Generals with Mr. Sovan Mahmud, Mr. Md. Faridul Islam, Mr. Md. Nazmul Haque and Mr. Md. Sarwar Alam Chowdhury, Assistant Attorney Generals

..... For the Respondent-government.

Heard on: 29.04.2026 & 06.05.2026

Judgment on: 12.05.2026

Present:

Mr. Justice S.M. Maniruzzaman

and

Mr. Justice Dihider Masum Kabir

S.M. Maniruzzaman, J:

In the instant Appeal, under Section 42 (1)(Ga) of the Value Added Tax Act, 1991 (in short, the Act, 1991) is directed against the order No.

CEVT Case (VAT) 164/2010 dated 02.05.2011 passed by the Customs, Excise and VAT Appellate Tribunal (Respondent No. 1) affirming the adjudicating order dated 05.05.2010 No. 43(Mushak)2010 passed by the Commissioner, Customs, Excise & VAT Commissionerate, Dhaka (North), respondent No. 2.

Facts, relevant for disposal of the appeal, in brief, are that the appellant is a businessman engaged in the business of supplying all kinds of transformers, LT/HT switchgear, and PFI plants. The appellant is also engaged in installation, maintenance, and servicing of all the such goods under the name and style of "Trade Engineering." In course of his business, the appellant obtained a VAT Registration Certificate from the concerned VAT authority under the Act, 1991 and he has been paying VAT regularly.

During the course of his business, suddenly on 14.09.2009, the concerned VAT officials visited the petitioner's shop and audited the business documents. After conducting the audit, they submitted a report to the Commissioner, Customs, Excise and VAT, Dhaka (North), respondent No. 2 for taking necessary steps.

Pursuant to the audit report, respondent No. 2 issued a notice upon the appellant demanding Tk. 8,31,633.00 as evaded VAT. Simultaneously, by the said notice, the appellant was also asked to show cause as to why a penalty should not be imposed under section 37(2) of the Act, 1991.

On receipt of the said notice, the appellant replied to the same on 13.04.2010 stating, *inter alia*, that the VAT authority apart from VAT-11

challan collected few delivery challans from the office of the appellant and calculated supply of product being an amount of Tk. 55,44,226/- and calculated at the rate of 15% payable VAT. In fact, the invoices collected by the VAT officials were not related to the supply of taxable manufactured product of the appellant. Most of the challans used by the appellant were for supply of goods purchased from open market but not for supply of appellant's own manufactured products. Other invoices were used by the appellant for shifting goods after completion of repairing and servicing works. However, the VAT officials failed to take such facts and circumstances into consideration. In view of above the appellant prayed for exonerating him from the alleged liability of evaded VAT.

After receiving of the said reply, respondent No. 2 passed an adjudication order being No. 43/Musak/2010 dated 05.05.2016 directing the appellant to pay Tk. 8,31,633.90 as evaded VAT and simultaneously imposed a penalty of the same amount.

Challenging the said adjudication order, the appellant preferred VAT Appeal before the Customs, Excise and VAT, Appellate Tribunal (in short, the Tribunal) being VAT Appeal No. CEVT/Case(VAT)-164/2010. After hearing the contending parties, the Tribunal dismissed the appeal and thereby affirmed the adjudication order by its order dated 02.05.2011.

Being aggrieved by and dissatisfied with the order of the Tribunal, the appellant preferred the instant appeal before this Court under section 42 (1)(Ga) of the Act, 1991.

Mr. Md. Sadullah, the learned Senior Advocate appearing for the appellant submits that the issuance of the notice under section 37(2) of the VAT Act, 1991 without first determining the unpaid VAT/tax, if any, under section 55 of the said Act, 1991 amounts to non application of mind and is therefore illegal. As such the proceeding of the case and the subsequent imposition of penalty by the impugned adjudication order is not sustainable in law. The Tribunal committed an error of law in dismissing the appeal and as such the instant appeal should be allowed.

Mr. Sadullah further submits that the appellant by using delivery challans conducted business as after order under section 2 (৯) and supplied goods purchased from the market. However, against such business VAT at the rate of 15% was not payable on such business transaction. Accordingly, the calculation of tax by the VAT authority was erroneous and not sustainable in the eye of law. As such, both the authorities below erred in law in directing the appellant to pay VAT and penalty.

Mr. Md. Sadullah also submits that the adjudicating authority and, lastly the Appellate Tribunal miserably failed to discuss the facts, submissions and grounds raised by the appellant at the stage of adjudication and appeal, as such the impugned orders are not tenable in the eye of law and liable to be set aside.

Mr. Md. Sadullah goes to argue that the claim of evaded VAT and penalty was not based on VAT-11 Chalan and VAT-17 register maintained by the appellant in accordance with law. Rather the claim and imposition of

penalty were based on imagination and are therefore not maintainable in law and liable to be declared illegal and void.

Mr. Md. Sadullah lastly submits that it is well settled by several judgments of this Division that the VAT authority is not entitled to proceed simultaneously for realization of VAT and imposition of penalty under sections 55(1) and 37(2) of the Act, 1991 respectively. In the instant case, the proceedings were initiated by the VAT authority both for realization of unpaid VAT and imposition of penalty under section 55 and section 37(2) of the Act, 1991. However, the adjudicating authority as well as the Tribunal, without considering the said legal aspect of the matter, passed the impugned order which is liable to be set aside.

On the other hand, Mr. Akhtar Farhad Zaman, the learned Deputy Attorney General appearing for the respondent-Government, submits that the appellant should have issued two VAT invoices: one in favour of the consumer and another for the VAT office. The audit team detected the said irregularity during the audit and found that the appellant had evaded VAT amounting to Tk. 8,31,633.90. Considering the said findings, the adjudicating authority as well as the Tribunal, by the impugned order, directed the appellant to pay the evaded VAT along with penalty. Therefore, there is no illegality in the impugned order.

We have heard the learned Senior Advocate for the appellant, the learned Deputy Attorney General for the respondent-government, perused the memo of appeal, relevant materials on record so appended thereto and consulted of the relevant provisions of law.

The moot issue that requires to be addressed in the instant appeal is whether the proceeding initiated by the VAT authority through the show-cause notice dated 16.02.2010, whereby respondent No. 2 directed the petitioner to pay evaded VAT amounting to Tk. 8,31,633.90 and simultaneously called upon the appellant to show cause as to why a penalty should not be imposed under section 37(2) of the Act, 1991. The relevant part of the said notice is quoted below for ready reference:

“.....এমতাবস্থায় মেসার্স ট্রেড ইঞ্জিনিয়ারিং, ১৯৩ কাজী জসিম উদ্দিন রোড, পাগার, টংগী, গাজীপুর কর্তৃক উপরোল্লিখিত অপরাধ সংঘটন তথা মূসক ফাঁকির দায়ে প্রতিষ্ঠান কর্তৃপক্ষকে এই মর্মে কারণ দর্শাতে লা যাচ্ছে যে, ফাঁকিকৃত মূসক ৮,৩১,৬৩৩/৯০ (আটলক্ষ একত্রিশ হাজার ছয়শত তেত্রিশ টাকা নব্বই পয়সা) টাকা আদায়সহ মূল্য সংযোজন কর আইন, ১৯৯১ এর ধারা ৩৭(২) অনুযায়ী সংশ্লিষ্ট প্রতিষ্ঠান কর্তৃপক্ষের উপর কেন শাস্তিমূলক ব্যবস্থা গ্রহন করা হও না তার লিখিত জ্ঞাপন আগামী ২৮/০২/২০১০ খ্রিঃ তারিখের মধ্যে এ দপ্তরে দাখিল করার জন্য লা হলো।.....”

After receiving of the said show cause notice the appellant replied thereon on 13.04.2010 stating *inter alia* that:

“৩। কিছু কিছু ক্রেতা/ভোক্তা প্রকৃত মূল্যের অতিরিক্ত ঠিকিত মূল্য প্রদর্শনের জন্য চালান ইস্যু করতে অনুরোধ করেন। সেক্ষেত্রে প্রতিষ্ঠান কর্তৃপক্ষ প্রতিযোগিতামূলক প্রজ্ঞারে, ক্রেতার স্বার্থে ব্যবসায়িক সুসম্পর্ক রাখার স্বার্থে, যেহেতু অনুমোদিত মূল্যের অতিরিক্ত চালান কর্তন করার সুযোগ নাই, সে কারণে পরিমানগত তারতম্য সাজিয়ে মূসক-১১ চালানের পাশাপাশি একটি ব্যবস্থাগত চালান কাটেন। যা মূসক আইন অনুযায়ী এ ধরনের ব্যবস্থাগত চালান মূল্যহীন ঠাটে। প্রকৃতপক্ষে মূসক-১১ চালানে প্রদর্শিত প্রক্রয়ই প্রতিষ্ঠানের প্রকৃত প্রক্রয় ঠাটে। কারণ উক্ত ঠাটের সত্যতা হিসাবে প্রমাণ করলে যে, যে সকল ক্রেতা প্রতিষ্ঠানের ক্ষেত্রে অতিরিক্ত মূল্য প্রদর্শনের প্রয়োজন হয় না সে সকল প্রতিষ্ঠানের ক্ষেত্রে মূসক -১১ চালান এং ব্যবস্থাগত চালানে অভিন্ন পরিমান উল্লেখ রয়েছে এং কিছু কিছু ক্ষেত্রে পণ্য মেরামত / Repair করে একইসাথে

একই গাড়িতে প্রেরণ করার সময় একটি অতিরিক্ত প্রকৃতিগত চালান ইস্যু করা হয়েছে। কারণে মেরামত/ Repair যেহেতু প্রক্রিয় নয় অর্থাৎ মূসক আইনের ধারা-৩ ও ৬ মূলে মূসক আরোপযোগ্য নয়। ফলে মেরামত/Repair এর প্রিপরীতে প্রক্রিয় চালান, মূসক-১১ ধারা-৩১, প্রিধি-২২ অনুযায়ী কর্তৃনের সুযোগ নাই।”

On perusal of the said reply, it, however appears, that the present appellant admitted the practice of issuing one challan to the consumer showing the actual price and another challan, for the purpose of payment VAT, showing a lower price. Considering the same, respondent No. 2 passed the adjudication order dated 05.05.2010 holding, inter alia, that:

“প্রিাদীর নিকট থেকে জব্দকৃত মূসক-১৭, মূসক-১১ এং প্রিগিজিক দলিলাদি পরীক্ষায় দেখা যায় প্রতিষ্ঠান প্রি-আইনী ভাং ৫৫,৪৪,২২৬/- (পঞ্চান্ন হাজার চুয়াল্লিশ হাজার দুইশত ছাব্বিশ) টাকার পণ্য সরপ্রাহ করে। উহার প্রিপরীতে প্রদেয় মূসক ৮,৩১,৬৩৩/৯০ (আট লক্ষ একত্রিশ হাজার ছয়শত তেত্রিশ দশমিক নয় শূন্য) টাকা পরিশোধ না করে অর্থাৎ ঐ পরিমান মূসক ফাঁকি প্রদান করে পণ্য খালাস করে প্রতিষ্ঠান কর্তৃপক্ষকে উক্ত মূসক ৮,৩১,৬৩৩/৯০ (আট লক্ষ একত্রিশ হাজার ছয়শত তেত্রিশ দশমিক নয় শূন্য) টাকা পরিশোধের জন্য নির্দেশ দেওয়া হয়। কর্তৃপক্ষ অপরাধের জন্য প্রতিষ্ঠান কর্তৃপক্ষকে ৮,৩১,৬৩৩.৯০ টাকা অর্থদন্ড আরোপ করা হলো।”

Challenging the said adjudication order dated 05.05.2010, the appellant preferred a VAT Appeal before the Tribunal and the Tribunal upon hearing the parties dismissed the appeal and thereby affirmed the adjudication order by its order dated 02.05.2011.

On perusal of the demand cum show cause notice dated 16.02.2010 and subsequent adjudication order dated 05.05.2010, it, however appears that respondent No. 2 had initiated proceedings against the petitioner under section 55(1) of the Act, 1991 for realization of evaded VAT and also for

imposing penalty under section 37(2) thereof. Thereafter, respondent No. 2 finally adjudicated the demand under section 55(3) of the VAT Act demanding evaded VAT and imposing penalty under section 37(2) of the said Act by the adjudication order dated 05.05.2010.

The moot question that requires to be addressed in the instant appeal is 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. This issue has been resolved in various decisions passed by this Court categorically observing, *inter-alia*, that the provision of section 37 of the VAT Act, 1991 is a penal provision that can be exercised only after a determination of VAT evaded by any person under a given scenario. Whereas, section 55 of the said Act provides for realization of unpaid or less paid VAT and other taxes. Section 55(1) empowers the VAT authority among others to issue a notice of show cause for payment of unpaid or less paid VAT. Section 55(3) provides for hearing upon receipt of a reply, if any, submitted to such notice and after such hearing to make the demand final.

In the instant case, respondent No. 2 issued the demand-cum-show cause notice upon the petitioner dated 16.02.2010 under sections 55 and 37 of the VAT Act, 1991 calling upon the petitioner as to why realization of evaded VAT should not be made and penalty should not be imposed. Subsequently, said demand was finalized by respondent No. 2 by order dated 05.05.2010, directing the appellant to pay evaded VAT amounting to Tk. 8,31,633.90 and simultaneously imposed penalty of Tk. 8,31,633.90

and which was affirmed by the Tribunal by the impugned order dated 02.05.2010.

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 (HCD) 734, where it has been observed:

“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 date a final demand in respect of any VAT or tax unpaid evaded or less paid.”

“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, 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 (HCD) 450, the following view has been taken by this Division:

“In the 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 (HCD) 100, where this division observed:

“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:

“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.”

In the instant case, after scrutiny of the show cause notice dated 16.02.2010, an adjudication order dated 05.05.2010 was passed. The proceedings were initiated by the VAT authority under Sections 55(1) and 37(2) of the VAT Act, 1991 by issuing single show cause notice upon the petitioner. In response, the petitioner submitted a reply thereto and upon hearing, the demand was finalized under Section 55(3) of the said Act directing the petitioner to pay unpaid/evaded VAT amounting to Tk. 8,31,633.90 and a penalty of the same amount was also imposed upon the petitioner under Section 37(2) of the VAT Act without initiating any separate proceeding as required under the provision of Section 37 of the Act.

In view of the stated circumstances and position of law, we do not find any illegality in the proceeding initiated against the petitioner so far it relates to the realization of evaded VAT under section 55(1) of the VAT Act, 1991 and subsequently finalizing of the demand under Section 55(3) of the Act by respondent No. 2.

In this regard, we also find in the case of *Grand Azad Hotel -Vs- Customs Excise and VAT and others* reported in 24 BLC (HCD) 899 (where one of us was party, to the said judgment), where 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.”

From the attending facts and circumstances of the case and the decisions cited hereinabove, we are of the view that the impugned order dated 02.05.2011 passed by respondent No. 1 affirming the order so far as it relates to the penalty of Tk. 8,31,633.90 imposed under Section 37(2) of the Act, 1991 by respondent No. 2 against the appellant without initiating any proceeding under the provision of law is liable to be struck down. But, we do not find any illegality in demand so far as it relates to section 55 of the VAT Act, 1991 directing the petitioner to pay evaded/unpaid VAT to the tune of Tk. 8,31,633.90.

Considering the facts and circumstances of the cases, we find substance in the submissions advanced by the learned Senior Advocate for the appellant and thus merit in the appeal in part.

Accordingly, the appeal is allowed-in-part.

The impugned Judgment and Order No. CEVT Case(VAT) 164/2010 dated 02.05.2011, passed by respondent No. 1, the Customs, Excise and VAT Appellate Tribunal so far as it relates to the imposition of the penalty of Tk. 8,31,633.90, is hereby set aside, while the demand for evaded VAT is affirmed.

The appellant is further directed to pay the demanded VAT of Tk. 8,31,633.96 within 60(sixty) days from the date of receipt of this judgment

and order failing which the VAT authority shall be at liberty to initiate proceedings for realization of said VAT and also to initiate fresh proceedings for imposition of penalty in accordance with law.

There will be no order as to costs.

Send down the lower Court's record at once.

Dihider Masum Kabir, J:

I agree.

M.A. Hossain-B.O.