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

VALUE ADDED TAX APPEAL NO. 66 OF 2013

IN THE MATTER OF:

An appeal under section 42(2)(Ga) of the Value Added Tax Act, 1991.

And

IN THE MATTER OF:

M/S. Fahim Sanitary Wares Ltd.

.... Appellant.

-Vs-

Customs, Excise and VAT Appellate Tribunal, Jibon Bima Bhabon (3rd Foor), 10, Dilkusha Commercial Area, Dhaka 1000 and others.

....Respondents.

Mr. Munshi Moniruzzaman with Ms. Shuchira Hossain, Mr. Yousuf Khan Rajib, Ms. Nahid Sultana Jenny, Mr. Shakib Rejowan Rejowan Kabir, Mr. S.M Shamsur Rahman and Ms. Mosammat Suraiya Khatun, Advocates

..... For the Appellant.

Ms. Nasima K. Hakim, Deputy Attorney General with Mr. Md. Hafizur Rahman, Mr. Md. Ali Akbor Khan, Mr. Elin Imon Saha, and Mr. Ziaul Hakim, Assistant Attorney Generals

..... For the Appellant-government.

Heard on: 17.08.2023, 12.10.2023, 18.10.2023 & 01.02.2024
Judgment on: 07.02.2024.

Present:

Mr. Justice Md. Iqbal Kabir
and
Mr. Justice S.M. Maniruzzaman

S.M. Maniruzzaman, J:

The instant appeal filed under Section 42 (1)(Ga) of the Value Added Tax Act, 1991 (in short, the Act, 1991) is directed against the

order dated 16.06.2013 passed by the respondent No. 1 Customs, Excise and VAT Appellate Tribunal (in short, the Tribunal) under Nothi No. CEVT/Case(VAT)-149/2012/2488 dated 20.06.2013 allowing the appeal in part and modifying the order dated 04.06.2012 under আপীল আদেশ নং-১০/মূসক/২০১২ passed by the respondent No. 2, Commissioner, Customs, Excise and VAT, Dhaka (East), Dhaka.

Facts, relevant for disposal of the appeal, in short, are that the appellant is a private limited company incorporated under the Companies Act, 1994 and is engaged in the business of manufacturing sanitary product by importing raw materials from the local market on payment of customs duty and taxes. In course of business, the appellant copy obtained VAT registration certificate from the concerned VAT office under the Act, 1991 and since then it has been paying VAT regularly.

During continuation of its business, the respondent No. 2 issued a show cause notice upon the appellant on 02.02.2012 alleging *inter alia* that a preventive team led by the Assistant Commissioner and other officials at the office of the Customs, Excise and VAT Commissionerate, Dhaka (East), Dhaka went to the appellant's factory on 14.09.2011 for making a search under Section 26 of the Act, 1991. At the time of searching they asked the employees of the petitioner to produce commercial documents as well as Mushak Challans-19, 16 and 18. Accordingly the employees of the appellant company supplied the said documents before the audit team and the said team seized the documents by issuing Mushak-05 Challan.

After auditing the seized documents, the audit team detected that the appellant supplied its products amounting to Tk. 8,65,11,510/- in the different places but upon examination of Mushak-11 Challans, it was also found that there were 3 discrepancies in the names and addresses of the purchasers mentioned in the Mushak-11 Challans as well as in the delivery challan. In view of the above the appellant company evaded VAT amounting to Tk. 2,78,99,962/-. The audit team after examination of the gate pass book being No. 0042 (issued between 21.08.2011 to 11.09.2011) found that the appellant supplied goods amounting to Tk. 74,11,200/- where the appellant used different names and addresses in the gate pass as per Mushak- Challan 11. As such the appellant company without issuing Mushak- Challan 11 also evaded VAT amounting to Tk. 12,78,432/- and Supplementary Duty (SD) to the tune of Tk. 11,11,680/- in total amount of Tk. 3,02,90,074/- which is liable to pay by the appellant. By the said notice, the appellant was asked as to why the said amount should not be realized and also penalty should not be imposed under Section 37(2) of the Act, 1991, further the appellant was further asked to reply the said notice within the stipulated time stated therein.

On receipt thereto, the appellant replied to the show cause notice on 04.03.2012 denying all the material allegations so made in the notice contending *inter alia* that at the time of investigation of the appellant's factory, the employees who were conversant of the VAT matter were not present in the factory premises and as such the appellant did not produce relevant documents before the audit team i.e. Mushak-11, 16 and 17 Challans in support of its payment of the alleged VAT and S.D.

In view of the above, the appellant prayed for exonerating the allegations so made in the show cause notice against the appellant company. The respondent No. 2, Commissioner, Customs, Excise and VAT, Dhaka (East), Dhaka after hearing the appellant and considering the relevant materials on record made the demand final by his order dated 04.06.2012 directing the appellant to pay Tk. 3,02,90,074/- as evaded VAT and S.D. and thereby imposed penalty of said amount and further directed the appellant to pay total amount of Tk. 6,05,80,148/- as evaded VAT and SD with penalty.

Challenging the said order the appellant preferred appeal before the respondent No. 1, Tribunal being Appeal No. CEVT/Case(VAT)-149/2012 and the Tribunal after hearing the contending parties allowed the appeal in part and thereby directed the appellant to pay penalty to the tune of Tk. 1,64,64,969.38/- instead of penalty 3,02,90,074/-.

Feeling aggrieved by and dissatisfied with the order of the Tribunal, the appellant preferred the instant appeal under Section 42(1) (Ga) of the Act, 1991.

Ms. Nahid Sultana Jenny, learned Advocate appearing for the appellant mainly submits that before making any final demand under Section 55(3) of the Act, 1991 the provision of Section 37 of the said Act cannot be resorted. But in the present case since action under both the sections having been initiated by the impugned order as such which is illegal and it is liable to be set aside. Ms. Jenney next submits that for imposing penalty under Section 37(2) of the Act, 1991 it is required under Section 37(2) (Ka Ka) of the Act, 1991 to issue two notices and

after receiving those notices, if the person concerned fails to pay the amount demanded in the notice only in that case action may be taken under Section 37(2) of the Act, 1991 but in the present case the VAT Authority without making any demand notice for payment unpaid tax initiated proceeding under Section 37(2) and imposed penalty and as such the same is liable to be set aside. Ms. Jenny further submits that the respondent VAT Authority having not issued any notice upon the appellant under Section 55(1) of the Act, 1991 and no determination was made as to the allegation of alleged evasion of VAT and SD before issuance of the impugned demand which is the mandatory provision under the Act, 1991 and as such the impugned demand was issued without jurisdiction and which is liable to be set aside. Lastly Ms. Jenny goes to submit that the impugned order having been passed by ignoring the fact and evidence and avoiding proper inquiry and as such the demand order has been passed in violating of the provisions of Section 26, 35, 36 and 55(1) of the Act, 1991 thus the same is issued without jurisdiction and liable to be set aside.

In support of the said submission, learned Advocate relies on the judgment, in the case of ***United Mineral Water and PET Industries Ltd.***-Vs- ***Commissioner of Customs Excise and VAT*** reported in **61 DLR (HC) 734**, in the case of ***Private Insurance Company Ltd.***-Vs- ***Commissioner of Customs Excise and VAT*** reported in **17 BLC (HC) 450**.

On the other hand, Md. Hafizur Rahman, learned Assistant Attorney General appearing for the respondent VAT Authority mainly

submits that the proceeding so had been initiated by the respondent No. 2 by issuing show cause notice wherein the authority categorically stated that evaded VAT and SD to the tune of Tk. 3,02,90,074/- should not be realized along with the imposition of the penalty should not be imposed for evaded of such amount of VAT and SD under Section 37(2) of the Act, 1991. Considering the said proceeding, the Adjudication Authority as well as the Tribunal by concurrent findings of facts categorically stated that the appellant evaded VAT to the tune of Tk. 1,64,64,969.38/- and the Tribunal also imposed penalty upon the appellant for evading VAT to the tune of Tk. 1,64,64,969.38/-. In view of the above there is no illegality in the impugned order and considering the provision of law the Tribunal allowed the appeal in part.

We have heard learned Advocate for the appellant and learned Assistant Attorney General for the respondent VAT Authority and gone through the memo of appeal and relevant materials on record so appended thereto.

It, however, appears from record that, the respondent No. 2, Commissioner, Customs, Excise and VAT Commissionerate, Dhaka (East), Dhaka had initiated a proceeding against the appellant by issuing show cause notice on 02.02.2012 wherein the said respondent categorically stated;

"এমতাবস্থায়, দায়েরকৃত অনিয়ম মামলার ভিত্তিতে উপর্যুক্ত ধারা ও বিধি লংঘন করে ৩,০২,৯০,০৭৪/- টাকা মূসক ফাকির দায়ে মূল্য সংযোজন কর আইন, ১৯৯১ এর ধারা ৩৭ এর উপ-ধারা (২) অনুযায়ী আপনার প্রতিষ্ঠানের বিরুদ্ধে কেন শাস্তিমুলক ব্যবস্থা গ্রহনসহ ফাকিকৃত মূসক

বাবদ ৩,০২,৯০,০৭৪/- টাকা আদায় হবে না তার সন্তোষজনক জবাব এ পত্র প্রাপ্তির ১৫(পনের) দিনের মধ্যে লিখিত ভাবে নিম্নস্বাক্ষরকারী বরাবরে দাখিলের জন্য অনুরোধ করা হলো''

Emphasis by us

Pursuant to the said proceeding the concerned respondent made the demand final by the adjudication order dated 04.06.2012 directing the appellant to pay an amount of Tk. 3,02,90,074/- as evaded VAT and SD and thereby imposed penalty of said amount upon the appellant under Section 37(2) of the Act, 1991 and further directed the appellant to pay total amount of Tk. 6,05,80,148/- as evaded VAT, SD and penalty holding *inter alia*;

> ''এ মামলার সাথে কর ফাকি প্রতিবেদন, কারণ দর্শানো নোটিশ, উক্ত নোটিশের জবাব এবং শুনানীতে উপস্থিত প্রতিনিধির বক্তব্য পর্যালোচনা করা হলো। পর্যালোচনান্তে দেখা যায় যে, মূসক ও সম্পূরক শুল্ক বাবদ (১,৪০,৮৮,৪০৭/- + ১,৬২,০১,৬৬৭/-) = ৩,০২,৯০,০৭৪/- (তিন কোটি দুই লক্ষ নব্বই হাজার চুয়াত্তর) টাকার অভিযোগ প্রতিষ্ঠিত ও প্রমানিত হয়েছে। আনীত অভিযোগ প্রতিষ্ঠিত হওয়ার মূল্য সংযোজন কর আইন, ১৯৯১ এর ধারা ৩৭(২) এর আওতায় ফাকিকৃত রাজস্বের সমপরিমান ৩,০২,৯০,০৭৪/- টাকা অর্থদন্ড আরোপ করা হলো। উক্ত ফাকিকৃত মূসক ও সম্পুরক শুল্ক বাবদ ৩,০২,৯০,০৭৪/- টাকাসহ সর্বমোট ৬,০৫,৮০,১৪৮/- (ছয় কোটি পাঁচ লক্ষ আশি হাজার একশত আট চল্লিশ) টাকা অবিলম্বে ট্রেজারী চালানের মাধ্যমে সরকারী কোষাগারে জমা প্রদানের জন্য নির্দেশ দেয়া হলো।''

Challenging the said adjudication order the appellant preferred appeal before the Tribunal and the Tribunal after hearing the contending parties and examination of the materials on record allowed the appeal in part directing the appellant to pay Tk, 1,64,64,969.38/- as penalty instead of Tk. 3,02,90,074/- holding that;

> ''……..সার্বিক পর্যালোচনায় দেখা যায় রেসপনডেন্ট পক্ষ কর্তৃক আপীলকারী পক্ষের বিরুদ্ধে প্রতিষ্ঠান থেকে আটককৃত ডেলিভারী রেজিষ্টার অনুযায়ী মূসক চালান ব্যতীত পণ্য সরবরাহ করায় রাজস্ব ফাকির বিষয়ে আনীত অভিযোগ যথাযথ ও সঠিক। কেননা আপীলকারী পক্ষ উপযুক্ত তথা ও উপাত্ত দ্বারা রাজস্ব ফাকির

বিরুদ্ধে কোন প্রমাণ উপস্থাপন করতে পারেন নাই ফলে এক্ষেত্রে উক্ত আইনের ৫৫(৩) দ্বারা অনুযায়ী মূসক ফাকির বিষয়টি প্রতিষ্ঠিত মর্মে গণ্য করা যায়।……..”

In view of the above stated contexts it, however, appears that the Tribunal by its order modified for payment of the evaded VAT and SD Tk. 1,64,64,969.38/- instead of Tk. 3,02,90,074/- fixed by the respondent VAT Authority.

The respondent VAT Authority did not prefer any appeal against the said order. It also however appears that the amount of evaded VAT and SD so fixed by the Tribunal the present appellant could not produce any material before this Court showing that the amount of evaded VAT of Tk. 1,64,64,969.38/- was paid by the appellant after passing the order by the Tribunal. In view of the stated circumstances, we have no manner of doubt to fine that evaded VAT and SD to the tune of Tk. 1,64,64,969.38/- so fixed by the Tribunal following the provision of the Act and the appellant is liable to pay such amount of VAT and SD.

Now the issue requires to be addressed by this Court is that whether penalty can be imposed by the VAT Authority under Section 37(2) of the Act, 1991 without finalization of liability under Section 55 of the Act, 1991.

In this regard, learned Advocate for the appellant main contention is that the adjudication authority before finalization of the liability under Section 55 of the Act, 1991 cannot impose penalty under the provision of Section 37 of the Act, 1991.

The said issue has been resolved in various decisions passed by this Court categorically observing, *inter alia***,** the provision of Section 37

of the Act, 1991 is a penal provision which can be exercised only after determination of VAT evaded by any person under a given scenario; whereas, Section 55 of the Act, 1991 provides for realization of unpaid or less paid VAT and other taxes. Section 55(1) clearly empowers among others to the concerned VAT authority to issue notice of show cause for payment of unpaid or less paid VAT. Section 55(3) provides for hearing on the basis of reply, if any, submitted to such notice and after such hearing to make the demand final.

In the instant case, the respondent No. 3 issued the demand-cum-show cause notice on 16.06.2013 asking the appellant to show cause as to why realization of evaded VAT and SD and imposition of penalty should not be taken under Section 37(2) of the Act, 1991. Subsequently, said demand was made final by the respondent by order dated 12.06.2007 passed under Sections 55(3) and 37(2) of the Act, 1991 and which was affirmed by the respondent No. 1, Tribunal.

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 (HC) 734**, it has been observed, *inter alia:*

> *"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."*

Further, it has been observed:

> *"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 the 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 (HC) 450**, where following view has been taken by this Division *inter alia:*

> *"In 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 (HC)100**, observing *inter alia*:

> *"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 *inter alia:*

> *"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(ক) and 2(খ).*
>
> *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."*

However, in the present case, after scrutiny of the show cause notice dated 02.02.2012, adjudication order dated 04.06.2012 and the order of the Tribunal dated 16.06.2013, it, however, appears that the proceedings had been initiated by the VAT Authority for realization of VAT and imposition of penalty under the Act, 1991 by issuing show cause notice upon the petitioner. In response thereto, the appellant replied thereof on 04.03.2012 and upon hearing the appellant, the said demand was made final under Section 55(3) of the Act, 1991 directing the petitioner to pay unpaid/evaded VAT amounting to Tk. 3,02,90,074/- and simultaneously imposed penalty of Tk. 1,64,64,969.38 under Section

37(2) of Act, 1991 without taking any separate proceeding as required under the provision of Sections 55 and 37 of the Act, 1991.

In view of the stated position of the law and considering the fact of the case we have no manner of doubt to hold that no illegality has been committed by the respondent No. 3 in the proceeding so initiated against the appellant so far it relates to realization of unpaid VAT to the tune of Tk. 3,02,90,074/-. Subsequently said demand was made final under Section 55(3) of the Act, 1991 and which was modified by the Tribunal fixing liability of Tk. 1,64,64,969.89 instead of Tk. 3,02,90,074/- by the impugned order dated 16.06.2013.

In this regard, in the case of ***Grand Azad Hotel***-Vs-***Customs Excise and VAT and others*** reported in **24 BLC (HCD) 899** (one of us was party of the said judgment) wherein 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 order dated 16.06.2013 so far it relates to penalty of Tk. 1,64,64,969.38 imposed by the respondent No. 3 under Section 37(2) of the Act, 1991 upon the petitioner before finalization of demand under Section 55 of the Act, 1991 and affirmed the said order by the Tribunal on 16.06.2013 has not been passed in accordance with the Act, 1991, but we do not find any legal infirmity in the demand so far it relates to unpaid VAT to the tune of Tk. 1,64,64,969.38 made under Section 55 of the Act, 1991.

Having considered the facts and circumstances of the appeal, we find merit in the appeal so far it relates to imposition of penalty to the tune of Tk. 1,64,64,969.38/- but the findings so made by the Tribunal in respect of evaded VAT and SD of Tk. 1,64,64,969.38/- which was passed in accordance with law.

Accordingly, the appeal is allowed in part, however, without any order as to costs.

The impugned order dated 16.06.2013 passed by the respondent No.1 (Customs, Excise and VAT Appellate Tribunal) in under Nothi No. CEVT/Case(VAT)-149/2012/2488 dated 20.06.2013 allowing the appeal in part and modifying the order dated 04.06.2012 under আপীল আদেশ নং-১০/মূসক/২০১২ passed by the respondent No. 2, so far it relates to the penalty hereby set aside but demand for payment of VAT and SD is hereby upheld

Last but not the least learned Advocate for the appellant submits before this Court that her client is ready to pay the amount so fixed by

this Court, if the Court is given an accommodation to pay the unpaid VAT and SD to the tune of Tk. 1,64,64,969.38/- by installments. Considering the said submission and following the provision of Section 55(4) of the Act, 1991 we are inclained to allow the appellant to pay the said amount of VAT and SD within 6 (six) months by 6(six) equal installments commencing from the date of receipt of a copy of this judgment and order.

Send down the lower Court's record at once.

Communicate the judgment and order to the Appellate Tribunal forthwith.

Md. Iqbal Kabir, J:

I agree.

M.A. Hossain-B.O.