

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 1481 OF 2014

In the matter of:

An application under article 102(2)(a)(ii) of
the Constitution of the People's Republic of
Bangladesh

And

In the matter of:

Kamal Uddin Ahmed
Director
Holy Crescent Hospital Limited
Taher Chamber (1st Floor)
10, Agrabad
Chittagong

... Petitioner

Versus

The Chairman
National Board of Revenue
Segun Bagicha
Dhaka and others

... Respondents

Mr. Sarder Jinnat Ali with
Mr. Md. Umbar Ali,
Mr. Md. Ali Akbar Khan;
Mr. Md. Delwar Hosin

... For the petitioner

Mr. S. Rashed Jahangir, DAG with
Mr. Titus Hillol Rema, AAG
Ms. Salma Rahman

... For the respondents

Heard on the 1st April

And

Judgment on the 5th April, 2015

Present:

Ms. Justice Zinat Ara
 And
 Mr. Justice J. N. Deb Choudhury

Zinat Ara, J:

In this writ petition under article 102 of the Constitution, the petitioner has challenged the legality of the notices under Nathi Nos. পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ধারা/২০১৩-২০১৪/২৭৮ dated 26.11.2013 (Annexure-B to the writ petition) and পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ধারা/২০১৩-২০১৪/২৯৪ dated 12.12.2013 (Annexure-C to the supplementary affidavit) issued by respondent No. 3.

Relevant facts necessary for disposal of the Rule Nisi, in brief, are as follows:-

The petitioner-Kamal Uddin Ahmed, as an individual, submitted his return of income before the Deputy Commissioner of Taxes, Taxes Circle-67(Companies), Taxes Zone-4, Chittagong (briefly stated as the DCT) under section 82BB of the Income Tax Ordinance, 1984 (hereinafter referred to as the Ordinance) showing his income at Tk. 15,88,796/-. He paid taxes of an amount of Tk. 2,67,498/- on his income for the assessment year 2011-2012. The said return was accepted by the DCT under sub-section (1) of section 82BB of the Ordinance. The return has not been selected for audit under

sub-section (3) of section 82BB of the Ordinance by the National Board of Revenue (hereinafter stated as NBR). After about a period of two years, the Inspecting Additional Commissioner of Taxes, Range-2, Taxes Zone-4, Chittagong (shortly stated as the IACT) issued the impugned notice under Nathi No. পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ধারা/২০১৩-২০১৪/২৭৮ dated 26.11.2013 purporting to take action under section 120 of the Ordinance by treating the return as an assessment order passed by the DCT on total misconception of law of universal self-assessment scheme under section 82BB of the Ordinance enacted by the Parliament.

The petitioner also filed a supplementary affidavit stating that the IACT issued another notice under Nathi No. পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ ধারা/২০১৩-২০১৪/২৯৪ dated 12.12.2013 correcting letter dated 12.12.2013; that the petitioner submitted written objection as to the jurisdiction; that respondent No. 3 then issued letter dated 15.01.2014; that respondent No. 3 ignoring his jurisdiction in the matter of universal self-assessment scheme under section 82BB of the Ordinance, passed order dated 02.02.2015 under section 120 of the Ordinance illegally. Eventually, respondent No. 4, the DCT

passed an assessment order under sections 82BB(1)/120 of the Ordinance on 04.02.2014 as per direction of the IACT.

In the backdrop of the aforesaid facts and circumstances, the petitioner filed this writ petition and obtained the Rule with an order of stay of operation of the notice demanding taxes.

Respondent No. 2, the Commissioner of Taxes, contested the writ petition by filing an affidavit-in-opposition supporting the impugned notices issued by the IACT contending, inter-alia, that non-selection of a return for audit does not mean that other provisions of the Ordinance will not be applicable, if necessary; that, in the instant case, the IACT correctly initiated proceedings under section 120 of the Ordinance in the interest of the revenue for which he is empowered and entrusted; that the IACT rightly issued notice under Memo No. পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ধারা/২০১৩-২০১৪/২৭৮ dated 26.11.2013 invoking power as contemplated in section 120 of the Ordinance; that the petitioner filed the return under section 82BB (universal self-assessment scheme) of the Ordinance and the DCT issued a receipt of the said return and the said receipt is deemed to be an order of assessment by the DCT for the assessment year 2011-2012; that the petitioner himself admits it in paragraph 4 of the writ petition; that the IACT examined the record and considered that the order passed by the DCT under section 82BB(1) of the Ordinance is

erroneous in so far as it is prejudicial to the interest of revenue and stating detailed reasons he issued impugned notice No. পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ধারা/২০১৩-২০১৪/২৭৮ dated 26.11.2013 for giving the petitioner an opportunity of being heard; that issuance of the said notice is quite justified and within the purview of the provision of section 120 of the Ordinance; that the receipt of a return submitted under section 82BB of the Ordinance, is an assessment order of the DCT; that the petitioner in response to the notice under section 120 of the Ordinance and corrigendum thereof for an inadvertent mistake with regard to a date submitted a reply along with oral representation through his legal representative on 29.12.2013 seeking the abeyance of the proceedings initiated under section 120 of the Ordinance; that the petitioner deliberately suppressed the relevant facts necessary for deciding the dispute; that the order under section 120 of the Ordinance had already been passed before filing the writ petition; that the petitioner has ample opportunity to go for appeal, if he is dissatisfied with the order. So, the question of irreparable loss does not arise at all; that the instant writ petition is frivolous, vexatious, without merit and with malafide intention to avoid payment of Government revenue and, as such, the Rule is liable to be discharged.

Mr. Sarder Jinnat Ali, the learned Advocate for the assessee-petitioner, takes us through the writ petition, the supplementary affidavit thereto, the connected materials on record as well as the provisions of sections 82BB and 120 of the Ordinance and forwards before us the following arguments:-

- (1) a return submitted under section 82BB of the Ordinance under universal self-assessment scheme and accepted by the DCT under sub-section (1) may only be selected for audit by NBR under sub-section (3) of the said section of the Ordinance. Hence, the issuance of notices under section 120 by treating the self-assessment under section 82BB of the Ordinance to be an order of assessment passed by the DCT is without jurisdiction;
- (2) under section 120 of the Ordinance, the IACT has only jurisdiction to interfere with the assessment order, if there has been any error of law. But, he cannot invoke his jurisdiction under section 120 of the Ordinance in case of any error of facts;
- (3) in the instant case, from the impugned notices, it is evident that the IACT only pointed out some error of facts and not any error of law resulting in loss of

Government revenue. Therefore, the IACT had no jurisdiction to modify the assessment order or direct the DCT to revise the same under section 120 of the Ordinance and impugned notices and subsequent proceeding are illegal and liable to be struck down.

In reply, Mr. S. Rashed Jahangir, the learned Deputy Attorney General, appearing with Mr. Titus Hillol Rema and Ms. Salma Rahman, the learned Assistant Attorney Generals, on behalf of the respondents, takes us through the affidavit-in-opposition, the provisions of sections 82BB and 120 of the Ordinance and contends as follows:-

- (A) there is no provision in the four corners of the Ordinance that a return submitted under section 82BB shall remain outside the ambit of section 120 of the Ordinance. Therefore, the IACT has jurisdiction to pass an order under section 120 of the Ordinance;
- (B) under section 82BB of the Ordinance, the DCT has jurisdiction to receive a return or cause to be received by any other official authorized by him and issue a receipt of such return only where an

assessee furnishes a correct and complete return of income. In case, an assessee furnishes a correct and complete return of income, in such case, the DCT is to issue a receipt of such return and the said receipt shall be deemed to be an assessment for the assessment year for which the return is filed;

- (C) in the instant case, the assessee submitted a return which was incorrect and incomplete and, as such, the acceptance of the return by the DCT under section 82BB of the Ordinance was beyond his jurisdiction and therefore, the IACT legally invoked his jurisdiction under section 120 of the Ordinance, as the DCT committed an error of law in accepting an incorrect and incomplete return erroneously and it was prejudicial to the interest of the Government revenue. Therefore, the impugned notices issued by the IACT under section 120 of the Ordinance are lawful and the Rule is, thus, liable to be discharged.

In view of the submissions as advanced by the learned Advocates/the learned Deputy Attorney General for the contending

parties, the sole question to be decided in the Rule is the legality of the notices issued by the IACT under section 120 of the Ordinance.

We have examined the writ petition, the supplementary affidavit thereto, the affidavit-in-opposition and the connected materials on record. We have also carefully examined the relevant provisions of sections 82BB and 120 of the Ordinance to the best of our ability.

It is an admitted proposition that the assessee-petitioner filed his return of income for the assessment year 2011-2012 under universal self-assessment scheme under section 82BB of the Ordinance. It is also admitted that the DCT accepted the said return and issued acknowledgement receipt accordingly. Admittedly, NBR has not selected the return for audit under section 82BB(3) of the Ordinance. There is no dispute that the IACT, subsequently, issued the impugned notices by invoking his jurisdiction under section 120 of the Ordinance. The initial notice dated 26.11.2013 and the corrigendum dated 12.12.2013 issued by the IACT read as under:-

“বিষয়ঃ আপনার ২০১১-২০১২ কর বছরের আয়কর মামলার ক্ষেত্রে ১২০ ধারায় কার্যক্রম গ্রহন ও শুনানী প্রসঙ্গে।

উপর্যুক্ত বিষয়ের প্রতি আপনার দৃষ্টি আকর্ষণ করছি।

সার্বজনীন স্বনির্ধারণী পদ্ধতির আওতায় আপনার দাখিলকৃত ২০১১-২০১২ কর বছরের আয়কর রিটার্নটি উপ কর কমিশনার কর্তৃক গ্রহণপূর্বক গত ২০/১১/২০১২ খ্রিষ্টাব্দ তারিখে ৮২বিবি ধারায় মামলা নিষ্পত্তির আদেশ প্রদান

করেন। উপ কর কমিশনারের এ আদেশ নিম্নবর্ণিত কারণে ভ্রান্তিপূর্ণ (Erroneous) হয়েছে এবং এতে রাজস্বের ক্ষতি সাধিত হয়েছেঃ

- ১। ২০১১-২০১২ করবর্ষে আপনার সম্পদ ও দায় বিবরণী ১৬ নং কলামে সম্পদের মোট পরিবৃদ্ধি প্রদর্শন করেন ১,৩২,২৪,৩৪১/-টাকা। উক্ত সম্পদের পরিবৃদ্ধির উৎস হিসাবে সর্বমোট তহবিল দাবী করেন ১,৩২,২৪,৩৪১/-টাকা যার মধ্যে অংশীদারী ফার্ম ইউনিয়ন ফিশারীজ থেকে উত্তোলন প্রদর্শন করেন ৯০,০০,০০০/-টাকা আইনসঙ্গত ও যৌক্তিক নয়;
- ২। আইটি-১০বি তে আপনার একক মালিকানাধীন ব্যবসা প্রতিষ্ঠান মেসার্স আলিফ কমোডিটিজ হাউজ, মেসার্স আলিফ গ্রুফ অব কোম্পানীজ এবং মেসার্স সোনালী ট্রেডিং কর্পোরেশন এর মূলধন হিসাবের স্থিতি প্রদর্শন করেন ৬,৭০,৯৬৮/- টাকা, অথচ উক্ত প্রতিষ্ঠান সমূহের সমন্বিত স্থিতিপত্রে মূলধনের স্থিতি প্রদর্শিত আছে ২২,৫৯,৭৬৪/- টাকা। অর্থাৎ আপনি স্থিতিপত্রে মূলধন হিসাবে স্থিতিতে (২২,৫৯,৭৬৪-৬,৭০,৫৮,৯৬৮) বা ১৫,৮৮,৭৯৬/- টাকা কম প্রদর্শন করেন;
- ৩। আইটি-১০ বি তে SIBL এর সর্বমোট শেয়ারের সংখ্যা প্রদর্শন করেন ৯৭,১৭,৫২৩টি যার বিপরীতে শেয়ারের সর্বমোট মূল্য প্রদর্শন করা হয় ৬,২০,৫৮,৯৯০/- টাকা। কিন্তু প্রতি শেয়ারের দাম ১০/-টাকা মূল্যে মোট মূল্য দাঁড়ায় ৯,৭১,৭৫,২৩০/- টাকা, অথচ আপনি শেয়ারের হিসাবে (৯,৭১,৭৫,২৩০-৬,২০,৫৮,৯৯০)

বা ৩,৫১,১৬,২৪০/- টাকা কম প্রদর্শন করেন; এবং

- ৪। আপনি ব্যাংক সুদ আয় ও স্থিতি যথাযথ ভাবে প্রদর্শন করেন নাই।

বর্ণিত কারণে উপ কর কমিশনার কর্তৃক কর মামলা নিষ্পত্তির আদেশটি ভ্রান্তিপূর্ণ (Erroneous) হওয়ায় এবং এত রাজস্বের ক্ষতি হওয়ায় ক্ষতিগ্রস্ত রাজস্ব পুনরুদ্ধারের লক্ষ্যে আপনার ২০১১-২০১২ কর বছরের কর মামলার বিপরীতে আয়কর অধ্যাদেশ ১৯৮৪ এর ১২০ ধারায় কার্যক্রম গ্রহণপূর্বক আগামী ৩০/১২/২০১৩ খ্রিঃ তারিখ পূর্বাহ্ন সকাল ১০.০০ ঘটিকায় শুনানী ধার্য করা হলো। শুনানীতে নিম্নস্বাক্ষরকারীর সম্মুখে হাজির হয়ে প্রযোজ্য

প্রমাণাদিসহ বক্তব্য পেশের জন্য আপনাকে কিংবা আপনার পক্ষে মনোনীত কোন বৈধ প্রতিনিধিকে বিশেষভাবে অনুরোধ করা হলো।”

“বিষয়ঃ ২০১১-২০১২ কর বৎসরের আয়কর মামলার ক্ষেত্রে ১২০ ধারায় কার্যক্রম গ্রহণের বিপরীতে শুনানীর নোটিশের Corrigendum ইস্যু।

সূত্রঃ অত্র রেঞ্জের ২৬/১১/২০১৩ খ্রিঃ তারিখের স্মারক নং পরে- ১(৩২)/কঅ-৪(চট্ট)/১২০ ধারা ২০১৩-২০১৪/২৭৮।

উপর্যুক্ত বিষয় ও সূত্রের প্রতি আপনার দৃষ্টি আকর্ষণ করছি।

আপনার ২০১১-২০১২ কর বছরের আয়কর মামলার বিপরীতে আয়কর অধ্যাদেশ ১৯৮৪ এর ১২০ ধারায় কার্যক্রম গ্রহণ করা হয়েছে-- যা সূত্রস্থ পত্রের মাধ্যমে আপনাকে অবহিত করা হয়েছে। এ প্রসঙ্গে আপনার অবগতি ও প্রয়োজনীয় ব্যবস্থার জন্য জানানো যাচ্ছে যে, ভুলবশতঃ সূত্রস্থ পত্রটিতে শুনানীর দিন মুদ্রণজনিত ভুলের কারণে ৩০/১২/২০১৩ খ্রিঃ এর পরিবর্তে ২০/১২/২০১২ খ্রিঃ উল্লেখ করা হয়েছে। এ অনাকাঙ্ক্ষিত ভুলের জন্য আন্তরিকভাবে দুঃখিত।

এমতাবস্থায় সূত্রস্থ পত্রে শুনানীর দিন “২০/১২/২০১২ খ্রিঃ” এর স্থলে “৩০/১২/২০১৩ খ্রিঃ” প্রতিস্থাপিত হবে। সূত্রস্থ নোটিশের অন্যান্য প্রসঙ্গ অপরিবর্তিত থাকবে।

জাতীয় রাজস্ব আদায়ে আপনার সহযোগিতা কামনা করছি। ”

Section 82BB of the Ordinance as prevalent in the assessment year 2011-2012 reads as under:-

“82BB. Universal self Assessment.—

- (1) Subject to sub-section (3), where an assessee, either manually or electronically, **furnishes a correct and complete return of income, the Deputy Commissioner of Taxes shall receive such return himself or cause to be**

received by any other official authorized by him and issue a receipt of such return normally or electronically and the said receipt shall be deemed to be an order of assessment for the assessment year for which the return is filed.

- (2) A return shall be taken to be complete, if it is filed in accordance with the provisions of sub-section (2) or (3) of section 75 and tax has been paid in accordance with section 74.
- (3) Notwithstanding anything contained in sub-section (1), the Board or any authority subordinate to the Board, if so authorized by the Board in this behalf, may select, in the manner to be determined by the Board, a number of these returns filed under sub-section (1) and refer the returns so selected to the Deputy Commissioner of Taxes for the purpose of audit and the Deputy Commissioner of Taxes shall thereupon proceed, if so required, to make the assessment under section 83 or section 84, as the case may be.

Provided that a return of income filed under this section shall not be selected for audit where such return shows at least twenty percent higher income than the income assessed or shown in the return of the immediate preceding assessment year and—

- (a) does not have any income which is exempted from tax; or
 - (b) does not have receipt of Gift; or
 - (c) does not have loan other than from a bank or financial institution; or
 - (c) sum of ascertain of next wealth and shown expenditure is covered by the income.
- (4) No question as to the source of investment made by a new assessee deriving income from business or profession shall be raised, if he shows income at least not less than twenty five percent of the capital invested in business or profession and pays tax on such income before filing of income.
- (5) The initial capital investment of business or profession or any fraction of such initial capital shall not be transferred from that business or profession within the income year when the investment was made or within five years from the end of that income year.”

(Bold, emphasis given)

Section 120 of the Ordinance reads as under:-

“120. Power of Inspecting Joint Commissioner to revise orders of Deputy Commissioner of Taxes.—

- (1) The Inspecting Joint Commissioner may call for from the Deputy Commissioner of Taxes

and examine the record of any proceeding under this Ordinance, and, **if he considers that any order passed therein by the Deputy Commissioner of Taxes is erroneous in so far as it is prejudicial to the interests of the revenue**, he may, after giving the assessee an opportunity of being heard, and after making or causing to be made, such inquiry as he thinks necessary, pass such order thereon as in his view the circumstances of the case would justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment to be made.

- (2) No order shall be made under sub-section (1) after the expiry of four years from the date of the order sought to be revised.”

(Bold, emphasis supplied)

On careful scrutiny of the aforesaid two sections, it is evident that the DCT, before accepting a return of income, has to **satisfy himself about the correctness and completeness of such return** and if he is satisfied about the correctness and completeness of a return, in such case, only he or his authorized other official has to receive such return and issue a receipt and when such receipt is issued by the DCT, in such case, only it is to be treated as an assessment. Mere filing of an assessment under self-assessment scheme is not an assessment in the eye of law, unless it is accepted by the DCT or his authorized

other official and receipt is issued on such return being satisfied about the correctness and completeness of the return. Therefore, it cannot be said that the acceptance of the return on examination of correctness and completeness is not an order passed by the DCT.

Under section 120 of the Ordinance, the IACT is empowered to call for the record of any proceeding from the DCT and examine the same under section 120 of the Ordinance and if he considers that **any order** passed thereon by the DCT is erroneous in so far as it is prejudicial to the interest of the Government revenue, he may invoke his jurisdiction under section 120 of the Ordinance subject to certain conditions.

In the instant case, where the DCT is accepting a return and issuing a receipt which is being treated as an assessment, no doubt, the DCT is passing an order about the correctness and completeness of the return. Therefore, it cannot be said that the IACT has no jurisdiction to pass any order under section 120 of the Ordinance.

Be that as it may, if the DCT has committed an error of law, the IACT on examination of the record of the DCT, may pass order following the provision of section 120 of the Ordinance. However,

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by now it is a settled principle of law that the IACT may invoke his jurisdiction under section 120 of the Ordinance only where the order passed by the DCT is erroneous in so far as it is prejudicial to the interest of the Government revenue and the error of the DCT must be an error of law and not an error on facts. In the instant case, we have already seen from Annexure-B to the writ petition that the notice issued by the IACT is on factual error. The learned Deputy Attorney General submits that the return was incorrect and incomplete, but the DCT violating the provision of section 82BB(1) of the Ordinance accepted it. But, from the impugned notices issued by the IACT, it transpires that the IACT has not mentioned therein that the DCT committed an error of law in accepting an incorrect and incomplete return.

Thus, we find no substance in the argument of Mr. S. Rashed Jahangir, the learned Deputy Attorney General, that the order passed by the IACT is on legal error committed by the DCT. So, it cannot be said that the DCT committed any error of law so as to invoke jurisdiction under section 120 of the Ordinance by the IACT. Therefore, the impugned notices and subsequent proceedings and order passed/issued by the IACT cannot be said to be lawful.

In view of the above, we find merit and force in the arguments of Mr. Sarder Jinnat Ali and we find no merit in the arguments of Mr. S. Rashed Jahangir.

In view of the discussions made in the foregoing paragraphs, vis-à-vis the law, we find merit in this Rule.

Accordingly, the Rule is made absolute.

The impugned notices under Memo No. পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ধারা/২০১৩-২০১৪/২৭৮ dated 26.11.2013 (Annexure-B to the writ petition) and পরে-১(৩২)/কঅ-৪(চট্ট)/১২০ধারা/২০১৩-২০১৪/২৯৪ dated 12.12.2013 (Annexure-C to the supplementary affidavit) issued by respondent No. 3 and all the subsequent actions under section 120 of the Ordinance are, hereby, declared to have been issued/taken without lawful authority and are of no legal effect.

No costs.

Communicate the judgment to respondents No. 3 and 4 at once.

J. N. Deb Choudhury, J.

I agree.

Hasib/
B.O.