Bench:
Mr. Justice Md. Ruhul Quddus
and
Mr. Justice S.M. Maniruzzaman

Writ Petition Number 2697 of 2014

Seagull Hotels Ltd., Hotel Motel Zone, Cox's Bazar Beach, District- Cox's Bazar
..... Petitioner

-Versus-

The Commissioner of Customs, Excise and VAT Commissionerate, Chittgong and others
....Respondents

Mr. Mustafizur Raham Khan with Ms. Sumaiya Ifait Binte Ahmed with Mr. Shafayet Ahmed, Advocates
.....for the petitioner

Mr. Amit Talukder, Deputy Attorney General with Mr. Ali Akbor Khan, Mrs. Afroza Nazneen Akhter and Mr. Md. Rayhan Kabir, Assistant Attorney Generals
.....for respondent number 1

Judgment on 16.03.2023

S.M. Maniruzzaman, J:

In this rule, the respondents have been called upon to show cause as to why the Memo Number 4th/A(12)05/Mushak/Seagull Hotels/56-Dhara/14/63 dated 23.02.2014 (Annexure-A) issued by the Assistant Commissioner, Customs, Excise and VAT, Cox's Bazar Division (respondent number 2) under rule 43 of the Value Added Tax Rules, 1991 demanding Taka 22,89,874/- from the petitioner should not be declared to have been issued without lawful authority and is of no legal effect and or such other or further order or orders should not be passed as to this Court may seem fit and proper. At the

time of issuance of the rule the operation of the impugned Memo was stayed by this court for a limited period which was subsequently extended from time to time.

Facts, relevant for disposal of the rule, are that the petitioner is a private limited company incorporated under the Companies Act, 1994 and is engaged in the business of a deluxe hotel in Cox's Bazar. It has been operating four restaurants, namely, Rangdhanu, Parijat, Niharika and Abashar and a bar namely Mahua in the hotel premises. The restaurants and the bar are situated in separate and distinct places of the hotel. Alcoholic beverages are served only in the bar. It recovered and paid Value Added Tax (in short, VAT) at the rate of 15% from its customers rendering service from the restaurants at the time in question. Moreover, as per service rendered through the bar, the petitioner also received and paid Supplementary Duty (in short, SD) at the rate of 10% and paid to the government through treasury challan. Suddenly, Revenue Officer (respondent number 3) issued a demand letter dated 07.11.2010 upon the petitioner directing to pay an amount of Taka 3,27,973/- as SD for the period of July, 2010 to August, 2010. He issued a similar demand on 24.03.2011 directing to pay SD and VAT of an amount of Taka 6,05,650.37/- for the period of September, 2010 to December, 2010 and issued further demand on 26.07.2011 directing to pay an amount of Taka 13,28,468.36/- as SD and VAT for the period of January, 2011 to June, 2011 (Annexure- B, B-1 and B-2 respectively).

In response to the demand dated 26.07.2011, the petitioner made a reply dated 22.08.2011 to the Commissioner, Customs, Excise and VAT

Commissionerate, Chittagong (respondent number 1) contending that the VAT and SD were received only in relation to the services rendered by the bar, which was the only place in the hotel where alcoholic beverage were served. The petitioner realized VAT only against the service rendered in its restaurants and paid it accordingly.

Respondent number 2 without considering the said reply issued a demand notice on 08.10.2012 (Annexure-D) upon the petitioner referring to the earlier 3(three) demands (Annexure- B, B-1 and B-2) and directed to pay total unpaid VAT and SD of Taka 22,89,874.34 for the period of July, 2010 to June, 2011 within 7 (seven) days from receipt.

In response thereto, the petitioner made another reply dated 26.12.2012 (Annexure-E) contending that it had received VAT and SD from its customers only in relation to the services rendered through the bar, which was the only place in the hotel where alcoholic beverages were served. The petitioner recovered VAT only against the service rendered through its restaurant. It was further contended that the another 3(three) hotels filed Writ Petitions Number 8051 of 2011, 3910 of 2009 and 271 of 2012 and those were pending before this Court for hearing and till disposal of the said writ petitions, the present petitioner requested to recall the demand. Respondent number 2 without taking any positive step in response to the reply issued the impugned notice dated 23.02.2014 under rule 43 of the Value Added Tax Rules, 1991 (in short, the Rules) directing for payment of unpaid VAT and SD to the tune of Taka 22,89,874.34/- within 7(seven) days, failing which it was intimated that the respondent would

take steps under Section 56 of the Value Added Tax Act, 1991 (in short, the Act).

Mr. Mustafizur Rahman Khan, learned Advocate for the petitioner submits that the impugned memo dated 2302.2014 (Annexure-A) is *ultra vires* of the Act, 1991 and issued without lawful authority inasmuch as the VAT authority cannot issue a notice under rule 43 of the VAT Rules without initiating any proceedings under Section 55 of the Act upon issuance of a show cause notice and determination of facts as to what extent the VAT or SD was unpaid.

Mr. Khan further submits that the VAT authorities have failed to appreciate that the SD is recoverable and payable only at the time of rendering service of alcoholic beverages in hotel and restaurant. The petitioner has recovered huge amount of so from the consumers by rendering its services through the bar, which is the only place in the hotel where alcoholic beverages were served. Now it cannot be responsible for payment of SD in respect of their services. The impugned memo issued is therefore, without lawful authority mala fide, unreasonable and an abuse of powers for collateral purpose. In support of his submission, Mr. Khan refers to the case of *Zakir Ahmed (Md.)-Vs-National Board of Revenue and others, 20 BLC(2015)37.*

Per contra, Mr. Ali Akbor Khan, learned Assistant Attorney General appearing for respondent number 1 opposes the rule by filing an affidavit-in-opposition and submits that the writ petition is not maintainable, since the petitioner had an alternative and efficacious remedy of appeal under Section 42 of the Act, 1991. The petitioner without exhusting the

alternative forum filed the instant writ petition which is not maintainable. By referring the judgment passed by the Appellate Division in Civil Petition for Leave to Appeal Number 3726 of 2015 with branch of Appeals (*National Board of Revenue-Vs- Singer Bangladesh Limited and others)* submits that the VAT Authority has power to issue notice upon any person in any form pursuant to the audit conducted by Local and Revenue Audit Directorate. The demand notices in questioned have been issued by the VAT Authority pursuant to the audit conducted by the Local and Revenue Audit Directorate and as such there is no wrong in the impugned orders.

We have considered the submissions of the learned Advocate and the learned Assistant Attorney General, gone through the writ petition, affidavit-in-opposition, relevant materials on record appended thereto and consulted of the relevant provisions of law.

In the instant case the moot contention of the petitioner is that the VAT Authority without completing proceeding under Section 55 of the Act, 1991 directly issued the demand notices in violation of the said provision of the Act, 1991. Opposing the said assertion, learned Assistant Attorney General contends that the demands have been made pursuant to the audit conducted by the Local Revenue Audit Directorate and as such the VAT authority is legally authorized to issue demand in any form and as such there is no illegality in the impugned order.

It is therefore, admitted by both the parties that no proceedings have been initiated against the petitioner under Section 55 of the Act, 1991 before issuance of the demands in question.

It appears that respondent number 3 issued first demand notice on 07.11.2010 upon the petitioner directing to pay an amount of Taka 3,27,973/- as unpaid VAT and SD for the period of July, 2010 to October, 2010. The respondent issued another demand notice on 24.03.2011 upon the petitioner directing to pay an amount of Taka 6,05,650.37/- as unpaid VAT and SD for the period of September, 2010 to December, 2010 (Annexure-B-1) and further issued demand notice dated 26.07.2011 upon the petitioner requesting to pay an amount of Taka 13,28,468.36/- as unpaid VAT and SD. On perusal of the aforesaid 3 (three) demand notices dated 07.11.2010, 24.03.2011 and 26.07.2011 respectively it appears that respondent number 1 in his own motion issued the said demand notices stating that after examining the returns (দাখিলপত্র), it was found that the hotel, restaurant and bar were registered under Service Codes Number S-001.10 and S-001.20. Such kind of service provider was liable to pay VAT and SD at the rate of 10% but those demands were issued pursuant to the audit report conducted by the Local and Revenue Audit Directorate.

We have noticed from the affidavit-in-opposition filed by respondent number 1 that the Local and Revenue Audit Directorate issued letter to the Secretary, IRD, Ministry of Finance and a copy of the said letter was forwarded to respondent number 3 (Revenue Officer) stating that the said Directorate audited the concerned VAT office on 23.04.2012 but the demands in question were issued before the conducting audit by the said directorate.

In view of the above stated facts and circumstances, we think that the argument advanced by the learned Assistant Attorney General relating to

the demand issued pursuant to the audit report has no leg to stand. However, it also appears that by referring the above 3(three) demands dated 07.11.2010, 24.03.2011 and 26.07.2011 (B, B1 and B2 respectively), respondent number 1 issued a demand notice on 08.10.2012 (Annexure-D) asking the petitioner to pay demanded amount to the tune of Taka 22,89,874.34/- as unpaid VAT and SD and a copy of the said notice was also forwarded to the respondents number 1 and 2.

In response thereto the petitioner replied to the said notice on 26.12.2012 (Annexure-E), but without giving any decision against the reply to the demand or without giving any opportunity to the petitioner for hearing the matter, directly issued the impugned notice dated 23.02.2014 under rule 43 of the VAT Rules, 1991.

Section 55 of the Act, 1991 provides:

> "……
> (৩) উপ-ধারা (১) এর অধীন শুল্ক ও কর প্রদানের জন্য যেই ব্যক্তির নিকট হইতে দাবী করা হয় সেই ব্যক্তি লিখিতভাবে উক্ত দাবীর বিরুদ্ধে আপত্তি উত্থাপন করিলে তাহাকে শুনানির সুযোগ দান করিতে হইবে। অতঃপর উক্ত ব্যক্তির উত্থাপিত আপত্তি বিবেচনা করিয়া সংশ্লিষ্ট মূল্য সংযোজন কর কর্মকর্তা নোটিশে দাবীকৃত শুল্ক ও করের পরিমান প্রয়োজনবোধে পুনঃনির্ধারণ করিতে পারিবেন, এবং উক্ত ব্যক্তি নোটিশে দাবীকৃত বা ক্ষেত্রমতে পুনঃনির্ধারিত শুল্ক ও কর পরিশোধ করিতে বাধ্য থাকিবেন।"

In the instant case, the VAT Authority did not follow the aforesaid quoted provision of law before issuance of the demand notices dated 08.10.2012 and 23.02.2014.

In the case of *Sekandar Spinnning Mills Ltd.-Vs- Commissioner, Customs Excise and VAT and others, 63 DLR 272,* the High Court Division observed;

> *"The law provides that the VAT authority ought to have issued notice under section 55(1) of the Act on account of any discrepancy for paying VAT by any company or person who is registered under VAT authority. Without complying with the procedure as laid down under section 55 of the VAT Act issued the demand notice is not sustainable in law. The law does not provide that the respondent VAT authority can issue any demand notice on the request of the audit team but it is their absolute power in case of any discrepancy found, it may initiate proceeding under section 55 of the Act."*

Similar view has been expressed in the case of *Zakir Ahmed (Md.)-vs-National Board of Revenue and others 20 BLC(HCD) 37* where I speaking for the Court observed;

> *"Sales Tax/VAT Section 53, 55, 56 of Value Added Tax Act, 1991; Rule 43 01 VAT Rules - Appeal against order under nothi and notice under nothi issued by respondent No. 7 imposing Section 56 of Value Added Tax Act, 1991 and Section 202 of Customs Act, 1969 upon petitioner and requesting other respondents not to release petitioner's imported goods on ground that his Business Identification Number (BIN) has been locked - Whether impugned notice by Respondent treated as legal and authorised? Held, court finds no provision for locking Business Identification Number (BIN) in Custom Act, 1969 Business identification number can only be locked under Section 56 of VAT Act for recovery of Government dues - As per Rule 43 of VAT Rules more than one notice demanding payment of Government dues required to be issued Locking BIN and stopping petitioner from running business is stringent action taken on part of Customs authority without assigning any reason - Action or step could only be enforced after service of sufficient notice upon petitioner under VAT Act Service of notice must by Officer not below*

rank of Assistant Commissioner Court finds before imposition of Section 56 of VAT Act, no notice under Section 55(1) of VAT Act issued - No decision was given under Section 55(3) of VAT Act No notice as required under Rule 43 of VAT Rules was served upon petitioner - Locking of BIN of petitioner by impugned memos respectively are without legal sanction - Action absolutely unauthorized and uncalled for Rule made absolute. Impugned memos issued by Assistant Commissioner, Customs, Excise and VAT, was done without any lawful authority and of no legal effect."

In the stated circumstances, the demand dated 08.10.2012 having been made by respondent number 3 (Annexure-D) upon the petitioner without issuing any show cause notice as well as without giving any opportunity to the petitioner for hearing as required under Section 55(3) of the Act, 1969, respondent number 2 issued the impugned notice dated 23.02.2014 which is not permissible under the Act, 1991. We thus find substance in the rule.

At the same time we also find that the demand has been issued by respondent number 3 (Revenue officer) on 08.10.2012 (Anexxure-D to the writ petition) requesting the petitioner to pay an amount of Taka 22,89,874.34 as unpaid VAT and SD. In response thereto the petitioner replied thereof on 26.12.2012 (Annexure-E to the writ petition) and which is still pending before the VAT authority for final disposal. It is well settled by our apex Court that only for technical ground any person cannot avoid payment of the government revenue. At this juncture respondent number 1 (Commissioner, Customs, Excise and VAT, Commissionerate, Chattogram) is directed to treat the demand dated 08.10.2012 as a notice

under Section 55(1) of the VAT Act, 1991 and the reply to the said notice made by the petitioner on 26.12.2012 be treated as written objection against the demand.

The said respondent is further directed to make demand final under Section 55(3) of the VAT Act, 1991 giving an opportunity to the petitioner of being heard within 120 days from the date of receipt of this judgment and order. In the meantime, the petitioner is at liberty to produce necessary documents and to submit additional written statement in support of its case, if necessary. Similarly the VAT authority is also permitted to ask the petitioner any question by giving any additional notice.

Accordingly, in light of the above observation and direction, the rule is made absolute, however, without any order as to costs. The impugned order being number 4th/A(12)05/Mushak/Sea Gull Hotels/56-Dhara/14/63 dated 23.02.2014 (Annexure-A) issued by respondent number 2 is hereby declared to have been passed without lawful authority and is of no legal effect.

Communicate a copy of the judgment and order to the respondent number 1.

Md. Ruhul Quddus, J:

I agree.