LEX/BDHC/0127/2008

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IN THE SUPREME COURT OF BANGLADESH
(HIGH COURT DIVISION)

Writ Petition No. 5614 of 2000

Decided On: 16.01.2008

Appellants: CHITTAGONG CEMENT CLINKER GRINDING CO LTD. **Vs.** Respondent: THE CHAIRMAN, NATIONAL BOARD OF REVENUE AND OTHERS

Hon'ble Judges/Coram:
Md. Abdur Rashid and Md. Miftah Uddin Choudhury, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: M.R. Hasan

For Respondents/Defendant: Nahid Mahtab, DAG with Kazi Zinat Hoque, AAG

Case Note:
Decision of the Appellate Tribunal in maintaining the order of the Deputy Commissioner rejecting the revised declaration of the petitioner for change of the price of its cement on the basis of minimum value as per recommendation of so-called Base-value Review Committee was not justified either in law or on facts.

Under Sub-rule (3) of rule 3 every proposal for declaring such base-value was required to be investigated or verified by departmental officer, circle superintendent or any other officer empowered by the Commissioner. Upon such investigation or verification of the market if the declared base-value was found to be (1) inconsistent with section 5, or (b) less than the base-value of the goods of similar nature and quality in the same jurisdiction and any other jurisdiction or (c) the amount of VAT as disclosed in form "Musak"-1 was less or (d) such base-value was made substantially less in order to get some financial advantage for any existing relation in between the supplier of goods or buyer or for their any mutual or individual benefit, such Departmental officer upon giving an opportunity of hearing to the registered person shall be empowered to fix reasonable base-value on the information collected or received, and the tax payable thereon shall be assessable and payable during the tax period concerned on such base-value from the date of declaration.

In such view of rule 3, no departmental officer is empowered to reject any

proposal made within a month of approval of the base-value for change of the declared value or on the basis of the recommendation of so-called Base-value Review Committee or without giving any opportunity of hearing. Moreover, subsection (2) of section 5 entitles a producer or manufacturer to sell its goods at a price/consideration which he declares, and neither the National Board of Revenue nor the Government is empowered by any provision of the VAT Act in any way to fix any flat or minimum value for any goods. The provision for determination by such departmental officers of the base-value of such goods, which a manufacturer is entitled to supply at his consideration appears to have been made under rule 3 in derogation of subsection (2) of section 5 of the VAT. Act. When the law does not put any embargo in fixation of the price by a manufacturer of its goods no rules or decision of the VAT authority can impose any such flat or minimum value for such goods in the country, adversely affecting the interest of such manufacturer

JUDGMENT

Md. Abdur Rashid, J.

1 . Above Rule NISI was obtained against an order passed on 17.08.2000 and communicated on 28.08.2000 by the Customs, Excise and VAT Appellate Tribunal, in short, the Appellate Tribunal dismissing an appeal of the petitioner, Annexure-F presented against the decision of the respondent no. 3, the Commissioner dated 04.05.2000, Annexure-D1, which affirmed the decision of the respondent no. 4, Deputy Commissioner rejecting the base-value of cement declared by the petitioner for supply and maintained the previous approved base-value at taka 191.30 per 50 KG-bag. The petitioner is stated to be a public limited company incorporated under the Companies Act, 1913 in Bangladesh. It carries on the business of grinding clinker and manufacturing cement under the brand name, 'Ruby Cement'. It has got its factory on the bank of Karnafuly. It is also registered under the Value Added Tax Act, 1991, in short, the VAT Act as a VAT payer.

2. The petitioner got the price of cement approved time to time by the VAT authorities in accordance with the provisions of section 5(2) of the VAT Act read with rule 3 of the Value Added Tax Rules, 1991, in short, the VAT Rules and supplied upon regular payment of VAT on the value thus declared and approved.

3 . Necessitated by various factors in the market, the petitioner vide its letter dated 12.01.2000 submitted a revised declaration of the base-value in 'Musak'-1 before respondent no. 4, Deputy Commissioner for reducing the price of its cement with effect from 19.01.2000, Annexure-B. In such declaration, the base value of cement for government/dealers was fixed at taka 3739.93 per metric ton in place of the then base-value of taka 3826.09 and taka 3,826.09 as fair price in place of taka 3913.04 without

VAT. Such value corresponds nearly to 186.96 per 50 KG-bag. Along with such declaration, all necessary papers including chemical analysis, cost analysis and copy of relevant bills of entry were submitted.

4 . Upon such declaration, said respondent no. 4 vide his letter dated 01.02.2000 informed the petitioner amongst other that there was no scope for acceptance of such declared value as such value was less than the recommended value of the Base-Value Review Committee appointed by the National Board of Revenue and that the earlier approved value at 191.30 was maintained, Annexure-C. He also requested the petitioner to deposit by 'Chalan' the VAT realized less and adjust the credit account if the cement was supplied upon such declared reduced value. The petitioner vide its letter dated 08.02.2000 wrote to said respondent that the cost of raw materials was reduced by taka 0.09 per metric ton and not taka 17.26, and profit margin by taka 86.74 not taka 194.34, which was wrongly calculated. But the petitioner received no response from respondent no. 4, Deputy Commissioner.

5 . Then, on 23.04.2000 the petitioner appealed to the respondent no. 3. the Commissioner for approval of the declared base value under rule 3(7) of the VAT Rules, Said Commissioner by a letter dated 04.05.2000 communicated to the petitioner that the appeal of the petitioner could not be considered since there were no reasons for interference with the decision of the departmental officer and he accordingly maintained the decision of respondent no. 4, Deputy Commissioner. He also asked the petitioner to supply cement by payment of VAT accordingly.

6. The petitioner then took an appeal before the aforesaid Appellate Tribunal. By the impugned order said Appellate Tribunal dismissed the appeal and affirmed the aforesaid decision of the VAT authority practically at the same vein of reasoning.

7. Mr. M.R. Hasan, learned advocate for the petitioner took us through the writ petition and read the relevant provisions of the VAT Act and submitted that the petitioner was entitled to supply its cement at the price it declared and received as consideration from the buyer under section 5 of the VAT Act, which did not require approval of the Deputy Commissioner or any VAT authority and as such, impugned decisions of the VAT authorities in rejecting the declared price Was arbitrary, illegal and of legal effect.

8. He submitted that rejection of the declared price on the recommendation dated 12 August, 1999 of the Review Committee prescribing minimum taxable price at taka 190 for locally produced cement, Annexure-G for the entire country was unreasonable, illegal and without any lawful authority in that such recommendation was not consistent with section 5 of the VAT Act and as such, had no force of law. In support, he cited the State of Kerala v. Hajji K. Kuti and others: MANU/SC/0392/1968 : AIR 1969 SC 378.

9 . He submitted that the minimum price was recommended without taking into

consideration of the factory, location, size, production capacity, management, efficiency etc and rejection of the declared value without hearing the petitioner must be held to be arbitrary, illegal and as such, of no legal effect.

10. He submitted that respondent no. 3, the Commissioner acted beyond his jurisdiction in acting under sub-rule (7) of rule 3 of the VAT Rules to approve the decision of respondent no. 3 Deputy Commissioner in the absence of any request either from him or acting suo moto.

11. He submitted that there was no limitation for amendment and/or modification of the base-value once fixed and/or approved under the VAT Act and/or the Rules made there under but the VAT authority rejected the revised base value mainly for submission of the declaration within a month of approval of earlier declared value at taka 191.30.

12. He also submitted that the Deputy Commissioner acted illegally in rejecting the declared price on the basis of a decision of the aforesaid Review Committee in that there was no provision either in the VAT Act or rule 3 of the VAT Rules, which authorized the Deputy Commissioner to act upon such recommendation of said committee.

13. On behalf of the respondent no. 3, the Commissioner an affidavit-in-opposition sworn on 12.05.02 was submitted annexing photocopy of two letters, one dated 05.09.01 issued by the Deputy Commissioner and the other dated 25.02.01 issued by the Commissioner in respect of 'Aramit Cement Limited' and 'Diamond Cement Limited'. The Deputy Commissioner by his letter approved the price declared by M/s. Aramit Cement Limited considering in bulk per metric ton cement (1000 KG) 'Camel Brand Cement' and the approval was made effective from 19.08.01. The Commissioner by his letter approved the price declared by Diamond Cement Limited at the rate of taka. 190 per 50 KG-bag. The Commissioner also mentioned in his letter that his order was based under sub-rule (7) of rule 3 of the VAT Rules.

14. It was mainly submitted on behalf of the revenue department that whatever decision was given by the Deputy Commissioner, which was ultimately approved by the Commissioner must be deemed to have been given under section 5 of the VAT Act read with sub-rule (7) of rule 3 of the VAT Rules and therefore, binding in law.

15. The facts which are not disputed are that on 20.12.99 the petitioner got its declared price of cement lastly approved at taka 191.30 per 50 KG bag. Then, on 20.01.2000 it submitted the declaration of revised price in 'Mushak'-1 making effective from 19.01.2000. The Deputy Commissioner by his letter dated 31.01.2000 and communicated on 01.02.2000 rejected such price for first, the cost of price of raw materials increased by taka 17.26 and second, profit margin was shown to have reduced by taka 194.34 and thereby, the price for levy of VAT would stand at taka 186.96, which

was less than the minimum price recommended by the aforesaid Review Committee. The petitioner however claimed that the above calculation of the Deputy Commissioner was not correct. On 08.02.2000 he wrote to the Deputy Commissioner that by such revision of the price the cost of raw materials would reduce by taka 0.09 per metric ton and profit margin by 86.74 only and requested for approval for the interest of its business.

16. Further, it appears that so-called Review Committee by its letter dated 12.08.99 recommended the minimum taxable price of cement at taka 190 per 50-KG bag for locally produced cement. Lastly approved such price of cement of the petitioner, was taka 191.30. Declared revised price of the petitioner for its cement submitted in 'Mushak'-1 on 20.01.2000 was nearly taka 186.96. The price of "Camel Brand" cement of "Aramit" was approved at taka 171.45 by the Deputy Commissioner by letter dated 05.09.01, Annexure-1 and that of Diamond was approved by the Commissioner at taka 190, Annexure-2 to the affidavit-in-opposition.

17. In the circumstances, submissions of the learned advocates have raised certain pertinent questions, which are definitely of great public importance not only for a registered VAT payer but also for the revenue. What is the right of a producer or manufacturer to the price of any goods it declares for levy of VAT and what is the authority of the revenue in controlling and/or fixing such price recognized under the VAT Act are the real issues that demand decision in this writ petition.

18. Section 3 provides for levy and collection of VAT on the importation and supply of all goods except those mentioned in schedule-1 and services except those mentioned in schedule-2 to the VAT Act at the rate of 15 per cent While section 5 provides three modes for determination of the value of goods for levy of VAT. In case of import of goods, under subsection (1), the value on which VAT to be payable shall be determined by adding the value assessable to duty under section 25 or 25A of the Customs Act, 1969 to all other duty and tax, if any, including import duty and supplementary duty but excluding the advance income tax. In case of supply of goods, under subsection (2) the value on which VAT to be payable shall be the consideration the manufacturer or producer or dealer of such goods receives from the buyer, in which would be included, at the relevant time, the cost of raw materials of such manufacturer or producer or dealer, all other expenses and all duty and tax along with commission, charge, fee and supplementary duty but excluding the VAT paid and/or incurred by such manufacturer, producer or dealer however subject to subsection (3). It may be mentioned at the time profit was not required to be added to such consideration. Subsection (3) on the other hand empowers the government, in case of goods on which VAT to be levied on the retail price, by notification in the official gazette, to determine such goods and the retail price of such goods for levy of VAT would be the price, which would be approved by concerned authority and include all costs including commission, charge, duty and tax,

and at which would be sold to the consumers with the brand name or special mark etc. printed with indelible ink thereon.

19. First proviso to subsection (2) however provides that in case of manufacture of goods by use of imported raw materials, or in case of sale or exchange or transfer of imported goods, the value of supplied goods leviable to pay VAT shall have to be determined on the basis of the value as per section 25 or 25A of the Customs Act and upon which rebate of input tax is received under section 9 of the VAT Act. And, at the relevant time, second proviso to said subsection empowered the National Board of Revenue, in case of supply of any specified goods or class of goods by any dealer, to levy VAT at the rate of value addition fixed by it by gazette notification.

20. In subsection 5, the word, "মূল্য" appears to have been used both in the sense of value and price of goods. Value is required to be determined for the purpose of levy of VAT while the price at which goods are sold and buyer buys. In case of supply of goods, a manufacturer or producer or dealer is required to pay VAT on the consideration he receives from a buyer. In such consideration would be included the entire cost plus all duty and tax plus commission, charge and supplementary duty paid minus VAT. Such manufacturer or producer or dealer in case of supply of goods under subsection (2) of section 5 shall pay VAT on the consideration he receives from the buyer and not on the basis of value of goods as in other cases.

21. In order to carry out purpose of section 5, rule 3 provides detailed procedure for fixation of the value for levy of VAT. Sub-rule (2) of rule 3 laid down the procedure for any change of the declared base-value. But in nowhere in rule 3 was prescribed any limitation of time for change of the approved/declared base-value.

22. Under Sub-rule (3) of rule 3 every proposal for declaring such base-value was required to be investigated or verified by departmental officer, circle superintendent or any other officer empowered by the Commissioner. Upon such investigation or verification of the market if the declared base-value was found to be (1) inconsistent with section 5, or, (b) less than the base-value of the goods of similar nature and quality in the same jurisdiction and any other jurisdiction or (c) the amount of VAT as disclosed in form "Musak"-1 was less or (d) such base-value was made substantially less in order to get some financial advantage for any existing relation in between the supplier of goods or buyer or for their any mutual or individual benefit. Such Departmental officer upon giving an opportunity of hearing to the registered person shall be empowered to fix reasonable base-value on the information collected or received, and the tax payable thereon shall be assessable and payable during the tax period concerned on such base-value from the date of declaration. The proviso to sub-rule (3) however provided, at the time, that if such departmental officer failed to

conclude the proceeding within ten working days of receipt of such declaration it would be deemed that he had no objection to such declared value.

23. Sub-rule (7) of rule 3 notwithstanding anything in sub-rule (1) on the other hand empowers the commissioner either on the application of a registered person or on his own or on the request of the departmental officer to fix the base-value of any goods or class of goods for reason of fluctuation of the market price or any other special reason in his consideration. Proviso to such sub-rule (7) however provides that if the commissioner failed to give any decision upon the application within ten working days then such application would be deemed to have been allowed. Second proviso to such sub-rule(7) however empowers the commissioner to request the Base-value Review Committee appointed by the National Board of Revenue either on his own or on the request of the departmental officer for recommendation of the base-value in case of any goods or class of goods.

24. Perusal of the aforesaid sub-rule (3) and (7) of rule 3 makes its clear that,

(i) no time limit is prescribed for seeking any change of the declared/approved value;

(ii) the officers mentioned under sub-rule (3) are empowered to fix the base-value upon investigation or verification of various data;

(iii) they could fix such base-value only after giving an opportunity of hearing to the registered person;

(iv) in fixing such value, such departmental officer is however not authorized to act on the recommendation of said Base-value Committee;

(v) jurisdiction of such departmental officer to fix the base-value rests on a finding that the declared value was less as per clause 'ka', 'kha' 'ga' or 'Gha' of sub-rule (3);

(vi) jurisdiction of the Commissioner under sub-rule (7) appears to be simultaneous and separate either on his own motion or on the request of the departmental officer to fix the base-value for fluctuation of the price in the market or any other special reason; and

(vii) the Commissioner only is empowered to seek recommendation of said Base-value Committee.

25. In such view of rule 3, no departmental officer is empowered to reject any proposal made within a month of approval of the base-value for change of the declared value or on the basis of the recommendation of so-called Base-value Review Committee or without giving any opportunity of hearing. Moreover, subsection (2) of section 5 entitles

a producer or manufacturer to sell its goods at a price/consideration which he declares, and neither the National Board of Revenue nor the Government is empowered by any provision of the VAT Act in any way to fix any flat or minimum value for any goods, say, cement for the entire country. Reasons for not giving such power to the Board or the Government are based on the reality in the ground and/or market especially for such goods. The provision for determination by such departmental officers of the base-value of such goods, which a manufacturer is entitled to supply at his consideration appears to have been made under rule 3 in derogation of subsection (2) of section 5 of the VAT Act. When the law does not put any embargo in fixation of the price by a manufacturer of its goods no rules or decision of the VAT authority can impose am such flat or minimum value for such goods in the country, adversely affecting the interest of such manufacturer.

26. In the appeal before the Appellate Tribunal, the petitioner stated various facts and circumstances to justify reduction of its price and quantum of profit in order to make the price of its cement competitive in the market and in the interest of business. It is stated that the factory of the petitioner is situated on the bank of river, Karnafully. Imported raw materials are carried to the factory by conveyers and in such carrying of the raw materials and loading and unloading and transportation, the cost that is incurred is low than other factories, say, which are situated in Khulna, Narayanganj and Sylhet in the country.

27. It is also asserted that if the cement was allowed to supply at the reduced price that would have no adverse impact on the revenue rather would boost up revenue. By statistics supplied thereto, the petitioner claimed that the revenue increased a lot at the reduced price during the period July, 1999 to March 2000. Such assertion could not be denied in the affidavit-in-opposition of the revenue. Such assertion therefore could not be brushed aside and said to be unjustified for reduction of the price on behalf of the petitioner in the interest of the business. The revenue also failed to prove that the minimum price of cement throughout the country was achievable and in fact, achieved.

28. The Appellate Tribunal as a final authority on facts and law did not at all consider the case of the petitioner on its need for making the change of the declared price. It just accepted the case of the revenue on the view that the demand made on the basis of the recommendation of the Base-value Review Committee was just and proper.

29. In support of the case, Mr. M.R. Hasan, learned advocate for the petitioner cited State of Kerala v Haji K Kuttu: MANU/SC/0392/1968 : AIR 1969 SC 378. In the case, the Kerala Building Tax Act was considered. In the bunch appeals that came for consideration before the Supreme Court of India, the order of High Court of Kerala, which held that the charging section of the Kerala Building Act, 1961 was violative of the equality clause of the Constitution, was challenged. By said Building Act tax was levied on the basis of floor area of a building irrespective of all other considerations.

Upholding such decision of the High Court, the Supreme Court of India reasoned,

> Where objects, persons or transactions essentially dissimilar are treated by the imposition of a uniform tax, discrimination may result, for, in our view, refusal to make a rational classification may itself in some cases operate as denial of equality. This Court in a recent judgment has decided that the levy of tax in exercise of the power under Entry 49, List II of the Seventh Schedule in respect of factory buildings in a municipal area based on floor area was illegal.

30. For the reasons stated, we do not have any hesitation to say that impugned decision of the Appellate Tribunal in maintaining the order of the Deputy Commissioner rejecting the revised declaration of the petitioner for change of the price of its cement on the basis of minimum value as per recommendation of so-called Base-value Review Committee was not justified either in law or on facts.

31. In the result, the Rule is made absolute without however any order as to cost. Impugned decision dated 17.08.2000 and communicated on 28.08.2000 of the Appellate Tribunal, (Annexure-F) maintaining that of respondent no. 4, Deputy Commissioner dated 01.02.2000, (Annexure-C) to the writ petition fixing the price of cement is hereby declared to have been made without lawful authority and as such, of no legal effect. Communicate at once.