LEX/BDHC/0380/2012

Equivalent Citation: 18BLC(2013)589

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Writ Petition No. 1932 of 2007

Decided On: 25.04.2012

Appellants: Comfort Nursing Home (Pvt.) Ltd. **Vs.** Respondent: Customs Excise and VAT and Ors.

Hon'ble Judges/Coram:
Syed Refaat Ahmed and Md. Akram Hossain Chowdhury, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: M.A. Hannan, Advocate

For Respondents/Defendant: Israt Jahan, Kashefa Hussain and Khairun Nessa, AAGs

Case Note:
VAT - Demand and penalty - Legality of - Sections 37(2) and 37(3) of VAT Act, 1991 - Present rule nisi was issued calling upon respondents to show cause as to why appeal order passed imposing penalty under Section 37(3) and further imposing penalty under Section 37(2) of VAT Act and notice demanding VAT under Section 37(3) of VAT Act should not be declared to have been made without lawful authority - Whether penalty and demand impugned in present case need interference - Held, entire process of initiation and determination of petitioner's liability has been in violation of law - Respondents shall extend to petitioner benefit of reduced liability - Respondents at liberty to issue afresh notice against petitioner - Impugned orders and notice issued without lawful authority - Rule made absolute. [11]

JUDGMENT

Syed Refaat Ahmed, J.

1. In this Application under Article 102 of the Constitution a Rule Nisi was issued on 12-3-2007 calling upon the Respondents to show cause as to why the appeal order passed by the Respondent No. 1 in Nathi No. CEVT/Case (VAT)-237/2005 dated 27-11-2006 communicated vide Nathi No. CEVT/Case (VAT)-237/2005/429(1-6) dated 30-11-2006 (Annexure-'G') and appeal order No. 209, Musak/Appeal/2005/dated 16-8-2005 communicated vide Nathi No. 4-A(9) 2577 Musak/Appeal/2004/1934 dated 17-8-2005 passed by the Respondent No. 2 (Annexure-E) and Order No. 292/Musak/2004 dated 30-6-2004 passed by Respondent No. 4 demanding VAT of Taka 11,80,112 and

imposing penalty in the form of additional tax of Taka 21,81,897 under section 37(3) and further imposing penalty of Taka 11,80,112 under section 37(2) of the VAT Act, 1991 (Annexure-C) and notice vide No. 4/VAT/(125)Auiurn/Clinic/2003/3291 dated 29-6-2003 passed by the Respondent No. 5 demanding VAT of Taka 3,64,332 in the name of the additional tax under section 37(3) of the VAT Act, 1991 (Annexure-A) should not be declared to have been made without lawful authority and are of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper. It is noted that by its ad interim order of the same date this Court was pleased to stay the operation of the impugned appellate order of the Tribunal on the condition, however, that the Petitioner paid 25% of the "evaded" VAT i.e., Taka 11,80,112. The Petitioner by its Affidavit-in-Compliance dated 5-9-2007 duly informed this Court of the deposit of Taka 2,95,028, being 25% of the "evaded" VAT amount of Taka 11,80,112, to the VAT Authority by way of Chalan being No. 157 dated 9-4-2007 of Sonali Bank, Farmgate Branch, Dhaka and of the receipt of the same by the Office of the Customs, Excise and VAT. The petitioner's case stems from the issuance of a show cause notice dated 29-6-2003 under section 37 of the VAT Act, 1991 ("the Act") by the Respondent No. 5 Assistant Commissioner demanding VAT of Taka 11,80,112 for the period of July, 1999 to December, 2001 on the basis of an inspection carried out on 26-1-2002. The said notice is also in evidence of a penalty of Taka 3,64,332 imposed by way of a 2% monthly interest computed up until March, 2002. The notice elicited responses dated 8-7-2003 generally denying the allegation of evasion of VAT. The Petitioner took care to inform the Respondent No. 5 that any meaningful and effective response to the notice dated 29-6-2003 would necessitate a perusal of all relevant documents as had previously been seized by and on behalf of the Respondents presumably during inspection conducted on site. This led the Petitioner to specifically request the Respondent No. 5 to issue certified copies of all relevant seized document before the Petitioner could even contemplate providing a response to the show cause notice. Evident from yet another letter of the Petitioner's dated 31-7-2003 is the fact that ostensibly the above request of the Petitioner went unheeded by the Respondents and that the Respondent No. 5 in particular by a letter dated 23-7-2003 directed the Petitioner to be present at her office on 2-8-2003 with all relevant documents to participate in a hearing of the Petitioner case. The Petitioner in the circumstances highlighted the impracticability of complying with the said direction given that the Respondent No. 5 had until then not effectively or favourably responded to the Petitioner's earlier request of furnishing it with certified copies of all relevant documents that had earlier been seized by an on behalf of the Respondents.

2. It is against this backdrop with no opportunity, therefore, being extended to the Petitioner to be heard by reference to all relevant documents, that the adjudicating order of 30-6-2004 incorporating both the demand and the penalty as initially imposed with an added penalty of Taka 6,37,260 was issued by the Respondent No. 4 Deputy Commissioner. Beside this the Respondent No. 4 also imposed a penalty of Taka

11,80,112 by reference to section 37(2) of the Act. This Court has taken particular note of the observations of the Respondent No. 4 Deputy Commissioner in the order of 30-6-2004 expressing satisfaction in particular as to the sufficiency of the process of determination of the Petitioner's case apparently upon providing all opportunity for the Petitioner's case to be heard and considered. This Court has at the same time not lost sight of the fact that the said Deputy Commissioner, Ms Tasmina Hossain was sitting in determination over the ostensible sufficiency of such process of determination as stemmed from the show cause notice of 29-6-2003, that incidentally was issued by herself but in the capacity of an Assistant Commissioner. Aside from the spectre of potential conflict of interest that, therefore, mars the process of determination up until the issuance of the adjudicating order of 30-6-2004, it is also evident that Ms Hossain was expressing satisfaction over a process that the Petitioner submits she was negligent in overseeing in accordance with law and which, as we shall see later in the form of the order of the Respondent No. 2 Commissioner (Appeal), was seriously wanting in procedural safeguards despite repeated requests made of Ms. Hossain by the Petitioner for conformity to the same. Curiously, Ms. Hossain in her capacity as the Deputy Commissioner in her order dated 30-6-2004 notes that on the date of hearing scheduled on 15-10-2003 a request for photocopies of all seized documents was lodged by the Petitioner's representative and that later upon all such documents being so provided to the Petitioner the latter replied to the show cause notice on 1-3-2004. Ostensibly, thereafter, upon a consideration of the Petitioner's request to be absolved of all liability for short payment of VAT as reflected in such response and a purported "careful" consideration of all documents and facts Ms. Hossain as the Deputy Commissioner declares to have arrived at a finding of liability leading to a determination and imposition of penalties as above stated.

3. Alleging in this Application that contrary to the assertions above in the order dated 30-6-2004 the Petitioner did not indeed benefit from any hearing given to its case by the said Deputy Commissioner, it is shown that aggrieved by such order the Petitioner preferred an appeal before the Respondent No. 2 Commissioner, Customs, Excise and VAT (Appeal) on 27-9-2004 by depositing 10% of the demanded VAT being Taka 1,18,011 through Chalan No. 40 dated 25-9-2004 of Sonali Bank, Farmghate Branch, Dhaka. In the said Memo of appeal, the Petitioner specifically mentioned the fact that no hearing was given before passing of the adjudicating order. The said appeal was heard on 2-8-2005 and the Respondent No. 2 passed the appeal order No. 209/Musak/Appeal/2005 on 17-8-2005.

4. Indeed, in the facts and circumstances of this case, the adjudicating order of the Respondent No. 2 was succeeded by the impugned appellate order of the Respondent No. 1 Customs, Excise and VAT appellate tribunal dated 27-11-2006. It is however, this order of the Respondent No. 2 Commissioner (Appeal), that in this Court's view, sets the tone of the Petitioner's case before this Court and against which the sufficiency or

not of the impugned appellate order of the Tribunal at the end of the day stands to be determined. The Respondent No. 2 Commissioner (Appeal) is found to have under taken a painstaking review of the proofs of determination of the Petitioner's VAT liability initiated through the notice of 29-6-2003 and culminating in the adjudicating order of the Deputy Commissioner dated 30-6-2004.

5. Considering in particular the representation and appeal of the Petitioner dated 8-7-2003 and 31-7-2003 along with all relevant documents on file, the Respondent No. 2 Commissioner (Appeal) repeatedly notes that the determination process did not benefit at all from any meaningful opportunity given to the Petitioner to represent its case on any material date before the concerned authority. This is attributed specifically to the fact that there is no evidence on record to even remotely suggest that the Petitioner's request to be given copies of all relevant documents to prepare its case before the concerned Respondents sitting in determination of its liability under the law was ever met. Failing receipt of these documents as repeatedly requested for, the Petitioner, therefore, was not on any material date in a position to substantively and effectively present its case before the concerned Respondents and, therefore, the determination appealed against was premised upon the Petitioner not having been heard at all. That led the Commissioner (Appeal) to be satisfied of the fact that "প্রতিষ্ঠান কর্তৃপক্ষের নিকট থেকে কারণ দর্শানো বিজ্ঞপ্তির জবাব গ্রহণ ব্যতিরেকে শুনানী পত্র জারী করা হয়েছে, যার ফলে বিচার প্রক্রিয়া আইন অনুযায়ী হয়নি।" Latent in that observation is a preliminary determination based upon the said Commissioner's understanding of the law and in particular the application of the provisions of section 55 of the Act in particular that the Respondent No. 2 Commissioner draws on in due course in his adjudicating order. But, prior to focusing on the pure questions of law, the Commissioner significantly expresses dissatisfaction with the process leading to the hearing of the Petitioner's case on 15-10-2003 by the Deputy Commissioner in that no evidence was found on record to substantiate the fact that up until that date care was taken by the Respondents to equip the Petitioner with all relevant documents, thereby, permitting him, in any meaningful way, to present his case in response to the show cause notice. Predicated on that fact the Commissioner (Appeal) specifically observes that the Deputy Commissioner's observation that the Petitioner was able to have itself heard on the basis of documents provided it by the Respondents is not supported by facts found in the relevant file. That in turn led the Deputy Commissioner's satisfaction of due consideration of all facts and circumstances to be wholly unjustified, leading the Commissioner (Appeal) to arrive at a specific finding "অতএব নিঃসন্দেহে এটাই প্রমাণ করে যে আপীলাধীন আদেশ আইন অনুযায়ী জারী করা হয়নি". Having so categorically found on the illegality of the Deputy Commissioner's Order dated 30-6-2004 primarily on grounds of non-conformity with the principle of natural justice as enshrined in the law, the Respondent No. 2 Commissioner (Appeal) thereafter aptly embarked on an exercise of identifying the specific provisions of law that are attracted to the case and by resort to which the realization process ought legally to have been initiated by the

Respondents in the alternative from the very start. It is hereby ostensibly drawing a distinction between the provisions of section 37 of the Act as operate to determine offences under the Act and identify the sanction and penalties that are attracted to the same from the purely charging or realizing provisions of section 55 that operate distinctly from those of section 37, that the Commissioner (Appeal) resorts to applying section 55(1) of the Act. Predicated on that exercise, and in the facts and circumstances, he further seeks to treat the show cause notice of 29-6-2003 to be one deemed as a section 55(1) notice qualified by the limitation restrictions prescribed in section 55(1) for the issuance of such notice. Accordingly, so confining himself to the boundaries of section 55(1), the Commissioner (Appeal) also finds on the case initiated against the Petitioner to be partially time-barred. He finds that at least on this aspect the Petitioner is entitled to a benefit of deduction of Taka 3,02,805 from the demanded amount of Taka 11,80,112. That notwithstanding, the Commissioner (Appeal) thereafter is found, however, to have upheld the additional tax of Taka 2,08,439 and found on the legality of the imposition of a penalty equivalent to the now primary reduced demand of Taka 8,77,307.

6. It is here that the learned Advocate for the Petitioner Mr. MA Hannan establishes to the satisfaction of this Court the incongruity blatant in the order of the Respondent No. 2 Commissioner (Appeal). While extensive findings are aptly made by the Respondent No. 2 Commissioner (Appeal) on both the inadequacy and the illegality of the initiation of the determination process by the show cause notice dated 29-6-2003 and the findings in the adjudicating order of 30-6-2004, he nevertheless proceeds to quantify the Petitioner's liability based directly on the findings of such inadequate and illegal determination process by reference to section 37 of the Act, thereby, endorsing and upholding the Petitioner's ostensible liability to the extent of Taka 19,63,353.

7. Considering Mr. Hannan's submission and given this Court's understanding of the law, it is found that the Respondent No. 2 pertinently found against the legality and validity of the adjudicating order of the Deputy Commissioner dated 30-6-2004 on the grounds of such determination not being supported either by facts or by law. Additionally, the Respondent No. 2, to a certain extent, properly directed himself in law by observing and finding that this being a case for realization of short payment of VAT required initiation of realizing the same through issuance of a notice under section 55(1) of the Act. Beyond that the Commissioner (Appeal), however, appears to have overlooked the provision of section 55(3), in particular, of the Act as prescribes a culmination of a process of determination through opportunity given to an assessee to be heard pursuant to a show cause notice and for a final determination to be made upon a due and proper consideration of the same. That process found to have been seriously wanting in this case by the very findings of the Commissioner (Appeal) himself, it was, thereafter, incumbent upon the said Commissioner (Appeal) to extend that opportunity to the Petitioner before readily finding on the extent of the Petitioner's liability based on

the determination of the Respondent No. 4 Deputy Commissioner. The fallacy evident here is of a finding on a liability under section 37 by wholly ignoring the provision of section 55(3) even after treating the show cause notice of 29-6-2003 as a section 55(1) notice. The error of law was also committed in wholly ignoring the essential provision of section 55(3) of giving the Petitioner an opportunity to be heard, which admittedly the Petitioner was denied in this case, and readily imposing penalty on him under section 37.

8 . These are the grounds that essentially inform the Petitioner's case against the impugned appellate order if the Customs Excise and VAT Tribunal that not only failed to consider the proper application of the law in the facts but appears to have confined itself wholly on a selective consideration of the findings of the Commissioner (Appeal). The Tribunal, thereby, wholly ignored the findings in the order of 17-8-2005 that had declared the initial adjudicating order finding on the Petitioner's liability under section 37 and imposition of penalty there under to be wholly without the sanction of law. This Court finds that, indeed, as the ultimate forum sitting on an entire process of determination of facts and ascertaining the relevant law applicable to the same, it was incumbent upon the Tribunal to sift very carefully through the whole determination process in general and in particular to dwell on the exhaustive findings of the Respondent No. 2 Commissioner (Appeal) and, thereafter, to arrive at independent and clearly enunciated findings of its own. Had the Tribunal so discharged its statutory duty in application of its judicial mind, the Tribunal inevitably would have concurred with the observations and findings of the Commissioner (Appeal) as to the illegality of the adjudicating order of 30-6-2004 and of the need consequentially under the law for any process against the Petitioner, in the facts and circumstances, to the initiated under section 55(1) of the Act. Premised on this preliminary finding it was, thereafter, incumbent also upon the Tribunal, independently of the findings of the Commissioner (Appeal), to deduce therefrom that the Petitioner, if at all, could be subjected to a section 55 process leading to a final determination under section 55(3) of the Act. In other words, a final determination of liability could only ensue after proper and due opportunity given the Petitioner to be heard as legally prescribed. This would necessarily require the Petitioner to be served with copies of all documents that, up until the date of the Tribunal's impugned decision, appear not to have been given the Petitioner, thereby, depriving the Petitioner of any reasonable opportunity to present its case at any stage of the impugned determination process in any meaningful way. Upon a clear reading of the impugned appellate order it is evident to this Court that the Tribunal failed so to do.

9. The Tribunal instead found no evidence that the Petitioner mistakenly or unavoidably found himself being liable for short payment. Rather, the tribunal found on a willful and fraudulent attempt of the Petitioner to evade tax liability and, resultantly, also against the prescribed limitation period of three years for issuance of a notice. On these facts

and circumstances, the Tribunal determined upon an enhanced liability of Taka 21,81,897 predicated on the validity of initial determination of Taka 11,80,112 and imposed an additional penalty under section 37(2) of the Act.

10. Given the above circumstances, this Court finds on the inadequacy of the Appellate Tribunal's determination process and, thereby, on the illegality and ineffectiveness of the determination of liability as well as the imposition of penalty as above noted. It follows that the Tribunal's order dated 27-11-2006 along with the earlier orders of the Respondent No. 2 Commissioner (Appeal) dated 17-8-2005, the Deputy Commissioner dated 30-6-2004 and the Notice dated 29-6-2003 are deduced to have been issued without any lawful authority and to be of no legal effect.

11. Given these facts and circumstances and this Court's understanding that the entire process of initiation and determination of the Petitioner's liability commencing with the show cause notice of 29-6-2003 and culminating in the impugned appellate order of 27-11-2006 has been in violation or in avoidance of the prescription of the relevant provisions of the law, this Court is, however, also of the view that the Petitioner must, nevertheless, submit to the authority of the law upon a due and proper initiation of a determination process under section 55(1) of the Act. To that end the Respondents shall extend to the Petitioner the benefit of the observations of the Respondent No. 2 Commissioner (Appeal) to the extent that these reduce the Petitioner's liability by reason of the initial demand as made on 29-6-2003 being partially time-barred. Allowing for that latitude, the Respondents shall be at liberty to issue afresh a notice against the Petitioner under section 55(1) of the Act with a view to a final determination and for the sole purpose of realization of any amount upon a due and proper opportunity given for the Petitioner to be heard in strict compliance with the provision of section 55(3) of the Act. To that end, it shall be incumbent upon the concerned Respondents to forward, either in their original or copies duly attested and certified by the concerned Respondents, all documents as may have been seized earlier from the Petitioner and as shall be necessary for the Petitioner to rely upon to submit a meaningful response to any notice under section 55(1). These documents shall be forwarded to the Petitioner by way of enclosures attached to any section 55(1) notice addressed to it. It shall further be incumbent upon the Respondents to finally determine any case so initiated within a period of no more 6(six) months from the date of the issuance of the notice as aforestated. In initiating and pursuing such process of determination and realization as above directed, all parties shall be governed by the provisions of section 55 as were current on the date of the issuance of the first impugned notice that is on 29-6-2003.

12. All impugned orders having being quashed by this Judgment and Order it is also directed that the Petitioner shall be entitled to a refund in entirety of all deposits made as a prerequisite for filing the appeal both before the Respondent Nso. 2 Commissioner

(Appeal) and the Respondent No. 1 Customs, Excise and VAT Appellate Tribunal. Furthermore, this Court having found against the validity and indeed the quantification of the allegedly "evaded" VAT of Taka 11,80,112 as above, it is further directed that Taka 2,95,028, being 25% of such amount and paid to and received by the Office of the Customs, Excise and VAT Authority pursuant to this Court's Order dated 12-3-2007, shall now automatically stand refundable to the Petitioner. The Respondents are directed to refund forthwith, and positively prior to the issuance of any notice under section 55(1) of the Act, to the Petitioner all these amounts in their entirety.

13. In light of the above, this Court finds merit in the Application and substance in the Rule issued and declares all the impugned orders to have been issued without lawful authority and to be of no legal effect. In the result, the Rule is made absolute subject to the observations and specific directions made hereinabove. There is no order as to costs.

Let the Records, as earlier called for, be sent down to the Respondent No. 1, President, Customs Excise and VAT Appellate Tribunal forthwith.