

LEX/BDHC/0285/2014

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Writ Petition Nos. 9129, 8694 of 2010, 4702, 10272 of 2011, 34 and 1061 of 2012

Decided On: 13.03.2014

United Airways (BD) Ltd.

Vs.

Government of Bangladesh and Ors.

Hon'ble Judges:

Md. Ashfaqul Islam and Md. Ashraful Kamal, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Raghiv Rauf Chowdhury, Advocate

Subject: Indirect Taxation

Catch Words

Mentioned IN

Case Note:

Sales Tax/VAT - Assessment - Waiver - Entitlement to - Sections 2 and 14(2) of Value Added Tax Act 1991 - Writ Petitions filed against denial to allow application of Petitioner for waiver and against imposition of advance trade VAT at rate of 3% on imported goods - Whether orders impugned have been passed without lawful authority and therefore having no legal effect - Held, there was no any definition of service renderer in Section 2 of Act in order to justify orders impugned - Orders impugned was ex-facie illegal and not sustainable - Respondents by exercising power under Section 14(2) of Act have already considered and did not impose any advance trade tax on imported goods - Respondents were directed to return Bank Guarantees to Petitioner - Rules made absolute. [15], [17]

JUDGMENT

Md. Ashfaqul Islam, J.

1. All these writ petitions are taken up and disposed of by a single judgment as there involved common question of fact and law. At the instance of the petitioner, United Airways (BD) Ltd., in Writ Petition No. 9129 of 2010 Rule was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why Memo No.

নথি নং ৭(১) মুসক-নীতি ও বাজেট/২০১০/ ৩৬৬(১) dated 5-10-2010 (Annexure-F) issued by the respondent No. 4 Second Secretary (VAT Policy and Budget) showing its inability to allow the application of the petitioner for waiver of ATV misinterpreting the relevant provision of law and treating the petitioner as 'বাণিজ্যিক আমদানীকারক' and also to show cause as to why the impugned action of the respondent by treating the petitioner as 'বাণিজ্যিক আমদানীকারক' misinterpreting section 2 (tha tha) of the VAT Act, 1991 while assessing the impugned goods (ATR 72-200 Aircraft- MSN: 385) under IP No. 486090 corresponding to Bill of Entry No. C-285221 dated 8-11-2010 resulting imposition of Advance Trade VAT @ 3% on the imported Aircraft ATR 72-200 Aircraft-MSN: 385 should not be declared to have been done without any lawful authority and are of no legal effect."

2. At the time of issuing Rule ad-interim order was passed directing the respondents to release the imported goods under IP No. 486090 corresponding to Bill of Entry No. C-285221 dated 8-11-2010 accepting all sorts of customs duty and other taxes, if any, in cash and upon accepting a continuing Bank Guarantee for the amount imposed as ATV.

3. In similar terms Rules were issued in other writ petitions. Facts are also similar in all the petitions.

4. The facts leading to the Rule issued in Writ Petition No. 9129 of 2010 in short, are that the petitioner is conducting its business under the name and style of United Airways (BD) Ltd. Authority and Import Permission from the Chief Controller of Export and Import. In compliance with the Rules and Regulations of the land it has imported passenger aircraft ATR" Aircraft MSN: 385 from Phonix Aircraft Leasing PTE Limited, Singapore under lease-cum-purchase agreement for earning passenger of the "United Airways (BD) Ltd." from and to Bangladesh for which passenger service was supposed to be started from 10-11-2010. It has been further stated that for importing the said aircraft, the petitioner obtained Import Permission being No. 486090 corresponding to Bill of Entry No. C-285221 dated 8-11-2010 at a declared value of the aircraft at \$ 90,03,000.00 USD.

5. The said Aircraft being No. ATR 72-200 Aircraft MSN: 385 itself has flown its way from Singapore to Dhaka for which the petitioner submitted the Bill of Entry No. C- 285221 dated 8-11-2010 ATV (Advance Trade VAT) was assessed as Taka 2,33,06,602.22 by treating the petitioner as commercial importer as per section 2 (থথ) of the VAT Act 1991 after imposing AVT @ 3% on the imported goods.

6. It has been stated in the petition that respondents imposed Advance Trade VAT (ATV) at the rate of 3% on the imported Aircraft which was reflected in the computerized Bill of Entry. The petitioner being aggrieved applied to the respondent No. 3 Member, (Value Added Tax) National Board of Revenue and No. 4 issued a letter dated 5-10-2010 treated the petitioner as service Tenderer and held that the petitioner was not entitled to get waiver from ATV as per SRO No. 207-Ain/2010/556-Mushak dated 10-6-2010 Annexures-F & F-1).

7. It is at this stage mainly contending that under SRO No. 207-Ain/2010/556-Mushak there cannot be any imposition of Advance Trade VAT (ATV) the petitioner moved this Division and obtained the present Rules and directions.

8. Mr. Raghbir Rauf Chowdhury, the learned counsel appearing on behalf of the petitioner in all the petitions after placing the petitions and the relevant papers thereto mainly submits that as per the Customs Act, 1969, the imported Aircraft falls under the HS Code 8802.40.00 and as per the SRO being No. 245/Ain/2010/565-Mushak dated 30-6-2010 issued by the respondent No. 1, all goods bearing the HS Code under the HS Head 8802 have been declared as free from VAT and Custom Duty at import stage but the Custom Authority, without considering the same has assessed the goods of the petitioner by imposing ATV @ 3% by treating the, petitioner as 'বাণিজ্যিক আমদানীকারক' and, as such, the same has been done without lawful authority and is of no legal effect.

9. Substantiating his argument the learned counsel further submits that the SRO being No. 245/Ain/2010/565-Mushak dated 30-6-2010 has not contained any provision for the "Service Renderer" rather stipulates the provisions for imposition of ATV for the goods imported by 'বাণিজ্যিক আমদানীকারক' but without considering the above, the action of the respondents by imposition of ATV disallowing the application of the petitioner is malice in law. The respondents have treated the petitioner as 'বাণিজ্যিক আমদানীকারক' while assessing the imported goods of the petitioner but they have not shown any valid or lawful reason either in the Nothi No. 5 KASH-12(3187) GROUP- 03/10 dated 6-9-2010 or in the reply to the application of the petitioner dated 5-10-2011 which clearly shows the malafide actions of the respondents as such, the same may be declared to have been done without any lawful authority.

10. The learned counsel further by filing supplementary affidavit annexing the office order dated 3-12-2012 (Annexure-H) further submits that the present respondent No. 1 by special order dated 3-12-2012 had allowed another Air Lines Company namely Novo Air Limited an waiver on paying ATV upon two imported Aircrafts under section 14(2) of the VAT Act 1991. Therefore, he submits that the petitioner having been standing on the same footing should not be discriminated by imposing ATV by the respondents.

11. The Rules are not opposed by the respondents by filing any affidavit in opposition.

12. Heard the learned counsel for the petitioner and considered his submissions at length.

13. The only question that calls for consideration in all the petitions is whether Advance Trade VAT (ATV) can be imposed as per SRO 207 (annexed in the petitions) when in the said SRO there is no definition or mentioning of service renderer.

14. Be that as it may to appreciate the point it would be profitable to quote the order impugned

against which is as under:-

“সূত্রীয় পত্রে উল্লিখিত প্রতিষ্ঠানের অগ্রিম মূসক অব্যাহতি আবেদন জাতীয় রাজস্ব বোর্ডের মূসক অনুবিভাগে পর্যালোচনা করা হয়েছে। বর্ণিত প্রতিষ্ঠানগুলি Service Renderer হিসাবে নিবন্ধিত এবং তৎকর্তৃক আমদানিকৃত এয়ারক্রাফটের উপর আমদানি পরবর্তী পর্যায়ের অগ্রিম মূসক (ATV) অব্যাহতি প্রদানের আবেদন জানিয়েছে। এস, আর, ও নং ২০৭ আইন/২০১০/৫৫৬-মূসক তারিখ ১০-৬-২০১০ অনুযায়ী Service Renderer কর্তৃক আমদানিকৃত পণ্য বা কাঁচামাল আমদানি পরবর্তী পর্যায়ের অগ্রিম মূসক হতে অব্যাহতি প্রাপ্ত নয়। এমতাবস্থায়, এইচ জি এভিয়েশন লিঃ এবং ইউনাইটেড এয়ারওয়েজ (বিডি) লিঃ এর অগ্রিম মূসক অব্যাহতির আবেদন বিবেচনায় বোর্ড অপরাগতা প্রকাশ করেছে।”

15. If we now glean the SRO No. 207 (Annexure-F) nowhere it could be found that there is any definition of service renderer in order to justify the order impugned against. However, in the SRO in section 2 which is the definition of ‘বাণিজ্যিক আমদানীকারক’ It has been stat-ed ‘বাণিজ্যিক আমদানীকারক’ অর্থ VAT Act এর ধারা ২ এর দফা (থথ) এ বর্ণিত ‘বাণিজ্যিক আমদানীকারক’।

16. Section 2 (থথ) of the VAT Act runs thus:-

‘বাণিজ্যিক আমদানীকারক’ বলিতে এমন ব্যক্তিকে বুঝাইবে যিনি তৎকর্তৃক প্রথম তপসিলে উল্লিখিত পণ্য ব্যতিত অন্য যে কোন পণ্য আমদানি পূর্বক পণ্যের কোনরূপ আকৃতি, প্রকৃতি, বৈশিষ্ট বা গুরগত পরিবর্তন না করিয়া পণ্যের বিনিময়ের অন্য কোন ব্যক্তির নিকট বিক্রয় বা অন্যবিধভাবে হস্তান্তর করেন।”

17. So, on a combined reading of both the SRO and the definition of ‘বাণিজ্যিক আমদানীকারক’ as envisaged in the VAT Act itself and thereafter in juxtaposition if we compare the order impugned against (Annexure-F) we can safely hold that the same is ex-facie illegal and not sustainable under the facts and circumstances of the case. We cannot read

the words "Service renderer" in the impugned order as **বাণিজ্যিক আমদানাকারক** under the SRO 207 in terms of definition of **বাণিজ্যিক আমদানীকারক** in section 2 (থথ) of the VAT Act. We find substance in the submissions of the petitioner based on supplementary affidavit (Annexure-G) that by exercising the power under section 14(2) of the Act the respondents have already considered and did not impose any ATV on the imported Aircraft of Novo Aircraft Limited. So there is no earthly reason why the petitioner standing on the same footing should be discriminated on the same issue. That being the position, we are of the view that these Rules merit substance which should be made absolute.

In the result, all the Rules are made absolute. The orders impugned against are declared to have been passed without lawful authority having no legal effect and set-aside. The respondents are directed to return the Bank Guarantees to the petitioner forthwith.

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