

LEX/BDAD/0026/2023

Equivalent Citation: 202328 ALR (AD) 69, 28BLC(AD)(2023)289, 14LM(AD) 2023 539

IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Civil Appeal No. 125 of 2008

Decided On: 06.06.2023

Appellants: The Chairman, National Board of Revenue and Ors. **Vs.** Respondent: Rahim Steels Mills Co. (Pvt.) Ltd. and Ors.

Hon'ble Judges/Coram:

Md. Nuruzzaman, Borhanuddin and Md. Abu Zafor Siddique, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: A.M. Amin Uddin, Attorney General and Tahmina Polly, Assistant Attorney General instructed by Haridas Paul, Advocate-on-Record

For Respondents/Defendant: Probir Neogi, Senior Advocate and Munshi Moniruzzaman instructed by M. Ashrafuzzaman Khan, Advocate-on-Record

JUDGMENT

Borhanuddin, J.

1 . This civil appeal by leave is directed against the judgment and order dated 17.08.2004 passed by the High Court Division in Writ Petition No. 4132 of 2002 making the Rule absolute.

2 . Relevant facts for disposal of the civil appeal are that the respondents herein as petitioners preferred Writ Petition No. 4132 of 2002 before the High Court Division invoking Article 102 of the Constitution impugning Memo No. ৪/এ(২৬)ভাট/আব/৯১/অংশ-৩/৯৯/৯৪২ dated 15.07.2002 issued by the writ-respondent No. 4 The Superintendent, Customs, Excise and VAT, Sonargaon Circle, Narayanganj directing the petitioner No. 1 to pay the unpaid VAT and Memo No. ৪/এ(২৬)ভাট/আব/৯১/অংশ-৪/০২/১০০৩ dated 29.07.2002 issued by the writ-respondent No. 4 directing to cancel the rebate availed by the petitioner No. 1, otherwise threatened to take action under Section 56 of the Value Added Tax Act, 1991 (hereinafter stated as 'the VAT Act, 1991'); Case of the petitioners is that the petitioner No. 1 is a private limited company incorporated under the Companies Law and also registered with the VAT Authority; The petitioner company is engaged in the business of manufacturing alloy steel casting, specialized steel, high strength deform bars; In course of its business, the petitioner company supplied construction materials to local purchasers in foreign currencies as per instructions of the tender schedule floated locally; The petitioners supplied 2,211.50 metric tons of construction materials and

received foreign currencies of US\$ 8,19,013.50 from the purchasers against aforesaid supplies as per tender instructions; Banks situated locally issued encashment certificates infavour of the petitioners and formally informed the Bangladesh Bank regarding encashment of the foreign currencies by the petitioner company.

3. Petitioners' contention is that as per Section 3 of the VAT Act, 1991 read with Rule 31 of the Value Added Tax Rules, 1991 (hereinafter stated as 'the VAT Rules, 1991') the aforesaid supplies in foreign currencies are 'deemed export' on which VAT is not payable and accordingly the petitioners did not pay VAT against aforesaid 'deemed export'. It may be mentioned here that the petitioners in their previous 'deemed export' got drawback of the VAT paid by them on the supplied raw materials but in the instant case as per the direction of the authority concerned the petitioners instead of getting drawback of VAT availed rebate on the VAT paid by the petitioners on the raw materials used for production of the construction materials.

4. After availing the rebate, the petitioners received a letter dated 27.01.2002 from the writ-respondent No. 4 to deposit VAT on the sale price against the aforesaid 'deemed export' and also received another letter dated 20.03.2002 from the writ-respondent No. 5 the Inspector (Sadar), Office of the Superintendent, Customs, Excise and VAT, Sonargaon Circle, Narayanganj to deposit the unpaid VAT of Tk. 47,14,325.00 (Forty Seven Lac Fourteen Thousand Three Hundred and Twenty Five only) against the aforesaid 'deemed export' alleging that the foreign currencies received by the petitioners against the aforesaid 'deemed export' were not repatriated through Bangladesh Bank; The petitioners replied the letters through his lawyer on 02.04.2002 stating that the foreign currencies against the aforesaid supply were received by the petitioners through (i) American Express Bank Limited, (ii) Standard Chartered Bank Limited, (iii) Dhaka Bank Limited, (iv) IFIC Bank Limited and (v) Uttara Bank Limited who are the authorised dealers under the license from Bangladesh Bank to deal with foreign currencies and those Banks issued encashment certificates infavour of the petitioners filing necessary returns to the Bangladesh Bank; As such the foreign currencies received by the petitioners through Authorised Dealers (Schedule Banks) is a remittance/repatriation for the purpose of Rule 31(1) of the VAT Rules, 1991.

5. In response of the said reply, the writ-respondent No. 5 directed the petitioners to furnish the documentary evidence that the foreign currencies against the 'deemed export' in question was repatriated through Bangladesh Bank by letter dated 11.04.2002; Accordingly, the petitioners submitted encashment certificates to the respondent No. 5 vide letter dated 15.04.2002; Thereafter, the writ-respondent No. 4 it's letter dated 22.05.2002 directed the petitioners to cancel the rebate of Tk. 39,96,763.00 (Thirty Nine Lac Ninety Six Thousand Seven Hundred and Sixty Three only) availed on the duties paid by the petitioners on the raw materials used for production of the construction materials regarding said 'deemed export' and to make

necessary adjustment in the current account register; The petitioners in reply dated 05.06.2002 stated that the cancellation is illegal being in violation of the VAT Rules, 1991; Thereafter the impugned letters dated 15.07.2002 and 29.07.2002 were issued by the writ-respondents; Under the situation the petitioners preferred writ petition.

6. Upon hearing the petitioners, a Division Bench of the High Court Division issued a Rule Nisi upon the writ- respondents to show cause.

7. The writ-respondent No. 2 The Commissioner, Customs, Excise and VAT, Dhaka South, Segunbagicha, Dhaka contested the Rule by filing affidavit-in-opposition, contending inter alia, that the writ-petitioners have miserably failed to fulfil the requirements that has laid down in Section 3(2) of the VAT Act, 1991 and Rule 31 of the VAT Rules, 1991. The petitioners failed to submit any export proceed realization certificates which are the most vital documents to show that the payment received by the petitioners in foreign currencies are repatriated through Bangladesh Bank and in absence of any export proceed realization certificate, the petitioners are disentitled to claim any rebate or exemption of VAT on the supply in question on account of 'deemed export'.

8. Upon hearing the parties and perusing the annexures annexed to the writ-petition, a Division Bench of the High Court Division made the Rule absolute declaring that the memo dated 15.07.2002 and 29.07.2002 have been issued illegally and without any lawful authority and as such are of no legal effect vide judgement and order dated 17.08.2004, which is impugned herein.

9. Being aggrieved, the writ-respondents as petitioners preferred Civil Petition for Leave to Appeal No. 966 of 2005 before this Division under Article 103 of the Constitution and obtained leave granting order on 21.04.2008.

10. Consequently, instant civil appeal arose.

11. Mr. A. M. Amin Uddin, learned Attorney General with Ms. Tahmina Polly, learned Assistant Attorney General, appearing for the appellants submits that the High Court Division committed an error of law based on facts in not considering that the aforesaid transaction as stated by the writ-petitioners cannot be brought within the ambit of 'deemed export' inasmuch as the foreign currencies received from the purchasers against the supply have not been repatriated through Bangladesh Bank as required under Rule 31 of the VAT Rules, 1991 and therefore the demands were made legally and lawfully as such the impugned judgment and order is liable to be set-aside. He also submits that the High Court Division erred in law in interpreting Section 3(2) of the VAT Act, 1991 and Rule 31 of the VAT Rules, 1991 in the context of 'deemed export' as claimed by the respondents herein as such the impugned judgment and order is liable to be set-aside.

12. On the other hand Mr. Probir Neogi with Mr. Munshi Moniruzzaman, learned Advocates, appearing for the respondents submits that Section 3(2) of the VAT Act, 1991 provides that 'notwithstanding anything contained in Sub-Section 1 of Section 3 of the VAT Act, 1991, VAT shall be rebated at zero rate on the goods and the service exported or deemed to have been exported from Bangladesh' and since the words 'রপ্তানীকৃত বলিয়া গণ্য' as mentioned in Section 3(2) of the VAT Act, 1991 includes the goods supplied by the respondents to international contractors for implementation of mega projects in Bangladesh against foreign currency and consequently, the concern VAT circle received Musak-11 with zero percent VAT, and thus no VAT is payable against the said supply as per Section 3(2) of the VAT Act, 1991 as such the High Court Division rightly passed the impugned judgment and order. He also submits that the respondents being successful bidders in an open tender supplied the goods to the purchasers on receiving foreign currency as per the tender instructions and encashed the foreign currency from authorised dealers (Local Banks) of the Bangladesh Bank and thus the supply of goods comes within the purview of Section 3(2) of the VAT Act, 1991 read with the Rule 31(1) of the VAT Rules, 1991 and as such there is nothing to interfere with the impugned judgment and order.

13. Heard the learned Attorney General for the appellants and learned Advocate for the respondents. Perused the papers/documents contained in the paper book.

14. Admittedly, the respondents participated in an open tender floated locally and being successful supplied the goods to the purchasers and received foreign currency as per the tender instructions. The respondents encashed the foreign currency in the local Banks and annexed encashment certificates. In this regard claim of the respondents-writ petitioners is that since they supplied the goods as per instructions of the locally floated tender against which foreign currencies were encashed through the authorised dealers of the Bangladesh Bank i.e. local Banks, as such, the aforesaid supply shall be treated as 'deemed export' under Section 3(2) of the VAT Act, 1991 read with Rule 31 of the VAT Rules, 1991.

15. Let us see the provisions of Section 3(2) of the VAT Act, 1991 and Rule 31 of the VAT Rules, 1991.

16. Section 3 of the VAT Act, 1991 runs as follows:

“৩। মূল্য সংযোজন কর আরোপ।-

- (১) প্রথম তফসিলে উল্লিখিত পণ্যসমূহ ব্যতীত বাংলাদেশে আমদানিকৃত সকল পণ্য ও উক্ত তফসিলে উল্লিখিত পণ্যসমূহ ব্যতীত সকল পণ্যের সরবরাহের উপর এবং দ্বিতীয় তফসিলে উল্লিখিত সেবাসমূহ ব্যতীত [বাংলাদেশে প্রদত্ত] সকল সেবার উপর ধারা ৫ এ বর্ণিত মূল্যের ভিত্তিতে পনের শতাংশ হারে মূল্য সংযোজন কর ধার্য ও প্রদেয় হইবে।
- (২) উপ-ধারা (১) এ যাহা কিছুই থাকুক না কেন, নিম্নবর্ণিত পণ্য বা সেবার উপর অন্য হারে কর আরোপিত হইবে, যথাঃ-
 - (ক) বাংলাদেশ হইতে রপ্তানিকৃত বা বলিয়া গণ্য কোন পণ্য বা সেবা:
 - (খ) -----
 - (অ) -----
 - (আ) -----
- (৩) -----
- (ক) -----
- (খ) -----
- (গ) -----
- (ঘ) -----
- (৪) -----
- (৫) -----
- (ক) -----
- (খ) -----

17. Again, the provision of Rule 31 of the VAT Rules, 1991 are as follows:

“৩১। স্থানীয় বা আন্তর্জাতিক দরপত্রের বিপরীতে বৈদেশিক মুদ্রায় পণ্য সরবরাহ বা সেবা প্রদান।-

- (১) কোন বাংলাদেশী নিবন্ধিত ব্যক্তি কর্তৃক স্থানীয় বা আন্তর্জাতিক দরপত্রের বিপরীতে বৈদেশিক মুদ্রার বিনিময়ে কোন পণ্য সরবরাহ বা কোন সেবা প্রদত্ত হইলে উক্ত পণ্য বা সেবার বিনিময়ে প্রাপ্ত বৈদেশিক মুদ্রা রপ্তানীর সাধারণ নীতি অনুযায়ী বাংলাদেশ ব্যাংকের মাধ্যমে প্রত্যাবসিত হইলে আইনের ধারা ৩ এর উপ-বিধি (২) অনুযায়ী রপ্তানীকৃত বলিয়া গণ্য হইবে।
- (২) যে নিবন্ধিত ব্যক্তি [আইনের] ধারা ৩৫ অনুযায়ী দাখিলপত্র প্রদানের বাধ্যবাধকতা রহিয়াছে তিনি তৎকর্তৃক স্থানীয় বা আন্তর্জাতিক দরপত্রের বিপরীতে বৈদেশিক মুদ্রার বিনিময়ে সরবরাহকৃত পণ্য বা প্রদত্ত সেবায় ব্যবহৃত উপকরণের ক্ষেত্রে কর প্রত্যর্পণ গ্রহণ করিতে চাহিলে তাহার ক্ষেত্রে বিধি ২৯ এর সংশ্লিষ্ট বিধানাবলী প্রযোজ্য হইবে।
- (৩) যে নিবন্ধিত ব্যক্তি ক্ষেত্রে উপ-বিধি (২) এ বর্ণিত বাধ্যবাধকতা প্রযোজ্য নহে তিনি তৎকর্তৃক স্থানীয় বা আন্তর্জাতিক দরপত্রের বিপরীতে বৈদেশিক মুদ্রার বিনিময়ে সরবরাহকৃত পণ্য বা প্রদত্ত সেবায় ব্যবহৃত উপকরণের ক্ষেত্রে কর প্রত্যর্পণ গ্রহণ করিতে চাহিলে তাহার ক্ষেত্রে বিধি ৩০ এর সংশ্লিষ্ট বিধানাবলী প্রযোজ্য হইবে।
- (৪) উপ-বিধি (২) ও (৩) এ বর্ণিত ক্ষেত্রে যথাক্রমে দাখিলপত্র ও আবেদনপত্রের সহিত সংশ্লিষ্ট দরপত্রের অনুলিপি, দরপত্র গ্রহণের প্রমাণপত্র, কার্য সম্পাদনের নির্দেশনামা এবং বৈদেশিক মুদ্রায় মূল্য প্রাপ্তির প্রমাণপত্র সংযুক্ত করিতে হইবে।”

18. No doubt that the respondent-writ petitioners supplied the goods to the contactors and received foreign currencies as per tender instructions. Now the only question is whether the foreign currencies received by the supplier-respondents repatriated through the Bangladesh Bank or not because Rule 31(1) of the VAT Rules, 1991 clearly states that:

“উক্ত পণ্য বা সেবার বিনিময়ে প্রাপ্ত বৈদেশিক মুদ্রা রপ্তানীর সাধারণ নীতি অনুযায়ী বাংলাদেশ ব্যাংকের মাধ্যমে প্রত্যাবসিত হইলে আইনের ধারা ৩ এর উপ-বিধি (২) অনুযায়ী রপ্তানীকৃত বলিয়া গণ্য হইবে।”

(Emphasis supplied)

19. On perusal of the annexures annexed to the writ-petition it appears that the

respondent-writ petitioners annexed some encashment certificates to show that it has complied with Rule 31 of the VAT Rules, 1991 i.e. the foreign currencies are repatriated through Bangladesh Bank. Two of the annexed encashment certificates are reproduced below:

Standard Chartered

Standard Chartered Bank
Standard Chartered Grindlays Bank Ltd.
2, Dilkusha Commercial Area
G.P.O. Box 502, Dhaka-1000, Bangladesh
Tel : (880-2) 955 0181
Fax : (880-2) 956 2332
Telex : Dhaka 642597, 642841 & 632654 GBLD F

ENCASHMENT CERTIFICATE

We certify that Demand Draft for having encashed Foreign an amount of Bangladesh Tk.3183117.00 (Tk. Thirty One Lac Eighty Three Thousand One Hundred and Seventeen only) @ BDT57.40 below favouring M/S. RAHIM STEEL CO. (PVT.) LIMITED, 29/10 K.M. Das Lane, Tikatuly, Dhaka-1205, Bangladesh.

Currency	Amount	Account Number which has been debited	Date of Encashment	Name of Statement schedule and the period in which the relevant transaction has been/will be reported to Bangladesh Bank	Purpose
USD	55,455.00	01-1725262-02	08/01/2001	S 1, J-1/03/30 January 2002	Sale Proceeds Received Against Supply of High strength Deformed bars Grade-60 from CAMC- TEL- CC1. JV

For Standard Chartered Grindlays Bank Ltd.
(Signed)
Pro. Manager
2, Dilkusha C/A, Dhaka.
Authorised Signature

UTTARA BANK LIMITED	Phone : 9666255,9568186
CORPORATE BRANCH	Cable : CORPBANIJYA
Motijheel C/A, Dhaka-1000, Bangladesh.	Telex : 632438 UBL CB BJ
CORP/FEX/2002/	

April 8, 2002

Encashment Certificate

We certify that the Cheque/Payment order No. 3285846 dated 06.02.2002 for Tk.14,67,555.00 (Taka Fourteen Lac Sixty Seven Thousand Five Hundred Fifty Five) only Eqv. US\$=25,560.00 @ 57.42 (less our P.O. Commission Tk.100.00) has been issued on 06.02.2002 in favour of Rahim Steel Mills Co. (Pvt.) Ltd. by debit to account No.FCAD- 165 maintained by us in the name of M/s. Mir Akhter

Hossain Ltd. The transaction has been reported to Bangladesh Bank in Schedule J- 1/O-3 for the month of March, 2002.

For Uttara Bank Ltd.

Corporate Branch

(Signed)

Authorised Signature

20. The learned Advocate for the respondents argued that this encashment certificates proves that the foreign currencies repatriated through Bangladesh Bank.

21. On perusal of the encashment certificates we do not find any basis of such argument inasmuch as the encashment certificates only shows that the transactions regarding encashment of foreign currencies have been reported to Bangladesh Bank which in our opinion cannot be treated as repatriation through Bangladesh Bank. It may be mentioned here that the writ-respondent No. 5 vide memo dated 11.04.2002 asked the petitioners to furnish the documentary evidence that the foreign currencies against the 'deemed export' in question was repatriated through Bangladesh Bank. But the petitioners only submitted encashment certificates to the respondent No. 5 vide letter dated 15.04.2002. There are no proceed realization certificates in support of said 'deemed export' which amply proves that the claimed 'deemed export' do not come within the ambit of Section 3(2) of the VAT Act, 1991 and Rule 31 of the VAT Rules, 1991. In the aforesaid transactions the respondent-writ petitioners as a local supplier supplied the construction materials to the local contractors on receipt of foreign currencies locally as per instructions of the locally floated tender. The goods were not shipped abroad against master Letter of Credit or any internationally accepted export documents. Consequently, the respondents failed to submit any proceed realization certificates against the claimed 'deemed export'. Mere encashment certificate cannot be treated as proceed realization certificate.

22. Following observation of the High Court Division:

"We have already indicated that 'deemed export' is not an actual export. There is no L/C nor the goods go out of the country. Therefore, in case of 'deemed export' there cannot be export proceeds realisation certificate and they would be replaced by encashment certificate and that has been furnished in the instant case both to the respondents before filing of the writ petition and also before this Court as annexures.

It, therefore, appears to us that the transactions in question qualifies as 'deemed export' and they have fulfilled the requirements of repatriation of the

sale proceeds through Bangladesh Bank."

23. Based on purely misconception of law and ignorance of transaction in international business. High Court Division misdirected itself in making the Rule absolute with wrong findings beyond the scope of law.

24. Accordingly, the civil appeal is allowed.

25. The judgment and order dated 17.08.2004 passed by the High Court Division in Writ Petition No. 4132 of 2002 is hereby set-aside.

26. The appellants VAT authority can make demand for the evaded VAT amount and cancel the rebate illegally availed by the writ-petitioners.

27. However, there is no order as to costs.

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