12 SCOB [2019] HCD

HIGH COURT DIVISION

SPECIAL ORIGINAL JURISDICTION

WRIT PETITION N0. 933 OF 2007

Proshika Manobik Unnayan Kendro
.... Petitioner

-Versus-
The Commissioner of Taxes and others
..... Respondents

Mr. Sardar Jinnat Ali, Advocate
..... For the Petitioner

Ms. Mahfuza Begum, A. A. G
..... For the Respondent No.1

Judgment dated: 28.10.2018

Present:
Mr. Justice Borhanuddin
And
Mr. Justice Sardar Md. Rashed Jahangir

Section 158 of the Income Tax Ordinance 1984;

The proviso to Sub-Section (2) of section 158 of the Ordinance vests discretion with the Commissioner of Taxes to reduce statutory requirement of payment under Sub-Section(2) of section 158 of the Ordinance, if the grounds stated in the application filed by the assessee applicant under the proviso appears reasonable to him/her. From the language of the proviso, we do not find any statutory duty of the CT to pass an order assigning reason. ... (Para 18)

Though there is no requirement to give an opportunity of hearing to the assessee-applicant or recording reason, but still the Commissioner of Taxes should be aware that his /her order must reflect reasonableness from where it can be transpire that the Commissioner of Taxes applied his/her judicial mind in passing the order. But for inadequacy or absence of reasonableness, the order cannot be set aside. It is discretion of the Commissioner of Taxes. ... (Para 22)

JUDGMENT

Borhanuddin, J:

1. The rule Nisi has been issued calling upon the respondents to show cause as to why the impugned order bearing Nothi No. Misc.8/law/ka au-5/2006-07 dated 17.08.2006 (Annexure-A) passed by the respondent No.1 purportedly under section 158(2) of the Income Tax Ordinance, 1984, rejecting petitioner's application for exemption from payment of 15% of the demanded income tax prior to preferring an appeal before the Income Tax Appellate Tribunal for the Assessment Year 2004-2005 should not be declared to have been issued without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. Facts relevant for disposal of the rule are that the petitioner is a Non-Government Voluntary Organization registered under the Societies Registration Act. The petitioner submitted Income Tax return for the assessment year 2004-2005 to the Deputy Commissioner

of Taxes, (hereinafter called 'the DCT') respondent no.3 herein, with audited accounts showing a loss of taka 61,12,27,742/-.But the respondent no.3 by his order dated 29.04.2015 determined taxable income of the petitioner at taka 21,10,62,372/-ignoring audited accounts submitted by the petitioner. Against the order, assessee-petitioner preferred appeal to the Appellate Joint Commissioner of Taxes (hereinafter called 'the AJCT'), respondent no. 4 herein. Upon hearing the parties and perusing relevant papers/documents, the AJCT affirmed order of the DCT vide its order dated 03.05.2006. At the relevant period, pre-deposit of 15% tax determined by the AJCT or Commissioner of Taxes (appeal), as the case may be, was a condition precedent under section 158(2) of the Income Tax ordinance (hereinafter stated 'the ordinance') for preferring appeal to the Appellate Tribunal. A Proviso attached to sub-section (2) of section 158 runs as follows:

> *"Provided that on an application made in this behalf by the assessee, the commissioner of taxes, may reduce, the requirement of such payment, if the grounds of such application appears reasonable to him."*

3. Accordingly, the assessee-petitioner filed an application to the Commissioner of Taxes (hereinafter called 'the CT'), respondent no.1 herein,to reduce the amount of 15% statutory requirement under section 158(2) of the ordinance and allow the petitioner to file appeal depositing taka 10,000/-only. Respondent no.1 on perusal of the application and materials on record reduced the amount at taka 50,00,000/- from taka 87,16,569/- which is 15% of the tax determined by the AJCT vide order dated 14.08.2006.

4. Being aggrieved, the assessee-petitioner moved this application under Article 102 of the Constitution of the People's Republic of Bangladesh and obtained the present rule along with an order of stay.

5. Mr. Sardar Jinnat Ali, learned advocate appearing for the petitioner challenged the impugned order on two counts, firstly, arbitrary fixation of the amount for pre-deposit at taka 50,00,000/- without affording an opportunity of hearing to the petitioner. Secondly, the respondent no.1 did not record any reason how he arrived such a finding that the assessee has the ability to deposit taka 50,00,000/-. Mr. Ali submitted that the impugned order is without lawful authority and is of no legal effect and also violative of Article 27 and 31 of the Constitution inasmuch as respondent no.1 passed the order without providing an opportunity of hearing to the petitioner and without recording any reason to arrive its finding. In support of his submission, learned advocate referred to the case of J.T (India) exports and another – Vs- Union of India and another, reported in 2003 ITR (Vol 262) 269 and the case of Commissioner of Income Tax, East Pakistan, central Secretariat, Dacca, -Vs- Fazlur Rahman, reported in 16 DLR506.

6. On the other hand, Ms. Mahfuza Begum learned Assistant Attorney General appearing for the respondent no.1 submits that pre-deposit of 15% was a condition precedent at the relevant period for filling appeal to the Taxes Appellate Tribunal under section 158(2) of the ordnance and the proviso attached to the section conferring power to reduce the statutory requirement for filling appeal was a discretionary power of the CT and to exercise the discretion the CT had no legal obligation to provide personal hearing or record reasoning since the DCT and AJCT determined tax liability of the petitioner after hearing representative of the assessee-petitioner and taking into consideration the points raised by the assessee as such the rule is liable to be discharged. In support of her submissions, learned Assistant Attorney General referred to the case of Union of India & another-Vs-M/S. Jesus Sales Corporation, reported in 1996 AIR1509 and the case of Vijay Prokash D. Meheta and

another –Vs- Collector of Customs, reported in 1989 ITR (Vol-175) 540 and the case of Shyam Electric Works –Vs- Commissioner of Income Tax, reported in (2006) 284 ITR 413.

7. Heard learned advocate for the petitioner and learned Assistant Attorney General for the respondent. Perused the application under Article 102 of the constitution and annexure appended thereof along with citations referred by learned counsels.

8. Since the dispute centered round section 158 of the ordinance, it will be profitable to quote the section as it was at the relevant period:

> *"158. **Appeal to the Appellate Tribunal** (1) An assessee may appeal to the Appellate Tribunal if he is aggrieved by an order of*
> *a) an Appellate Joint Commissioner or the Commissioner (Appeals) as the case may be, under section 128 or 156.*
> *2) No appeal under sub-section (1) shall lie against an order of the Appellate Joint Commissioner or the Commissioner (Appeals), as the case may be, unless the assessee has paid fifteen per cent of the amount representing the difference between the tax as determined on the basis of the order of the Appellate Joint Commissioner or the Commissioner (Appeals), as the case may be, and the tax payable under section 74.*
> *Provided that on an application made in this behalf by the assessee, the Commissioner of Taxes, may reduce, the requirement of such payment, if the grounds of such application appears reasonable to him".*

9. On the basis of the proviso attached to section 158(2) of the Ordinance, the assessee-petitioner filed an application to the CT to reduce the amount of 15% statutory requirement from taka 87,16,659/- to taka 10,000/- only for preferring appeal to the Appellate Tribunal under Section 159 of the ordinance against order of the AJCT.

10. Relevant portion of the application filed by the assessee-petitioner are reproduced below:

> "মারকেনটাইল সিস্টেমে রক্ষিত প্রশিকার হিসাব সমূহ এবং নিরীক্ষা প্রতিবেদন সমূহ, বিল ভাউচার ও হিসাবের খাতাপত্র দাখিল করা সত্ত্বেও বিজ্ঞ উপ-কর কমিশনার তার দপ্তর কর্তৃক প্রাপ্তি স্বীকার করা কাগজপত্র পান নাই বলিয়া মন্ড়ব্য করিয়াছেন এবং আক্রোশমূলক , কাল্পনিক ও বেআইনিভাবে নিরীক্ষা রিপোর্ট সমূহ অগ্রাহ্য করিয়া নিরীক্ষা রিপোর্টে উলে- খিত বিবিধ খরচ সমূহকেও অগ্রাহ্য করিয়াছেন এবং দাতা সংস্থার সহিত সংশিষ্ট প্রকল্প Towards a Proverty- Free Society (Phase VI) program, Disaster management programme, Collaborative project সমূহের মোট ব্যয় (১২৮,৫৭,৪৪,৪৫১ + ১৩,৭৬,০৯৯ + ৫৪,৫৭,৯২৯) = ১২৯,২৫,৭৮,৪৭৯/- টাকা হিসাবে না নিয়া শুধু এ প্রকল্প সমূহ থেকে প্রাপ্ত অর্থ (৮,৫০,৬১,৪১৯/- + ২,৭০,৫৮২/- + ৫৭,০৭২/- টাকা) মোট ৮,৫৩,৮৯,০৭৩/- টাকা আয় হিসাবে নিয়া এবং তথ্যগত ভিত্তি না থাকা স্বত্তেও কাল্পনিকভাবে ইন্টিগ্রেটেড এগ্রিকালচার ফার্ম হতে আয় ১,২৫,৭৬,০৪৫/- টাকা, সেন্ট্রাল আই এ এফ এর হিসাব হতে আয় ৫৯,০৯,০১৩/- টাকা, প্রশিকা কম্পিউটার সিস্টেম (পিসিএস) থেকে আয় ৫,১২,৮৮,৩৩২/- টাকা, গোলাম মাওলা ফাতেমা ওয়েলফেয়ার ট্রাষ্ট থেকে ১২,৪৮,৩৫৭/- টাকা আয় দেখাইয়া সংস্থা প্রশিকার প্রকৃত নীট ক্ষতি ৬১,১২,২৭,৭৪২/- টাকা এর স্থলে সর্বমোট ২১,১০,৬২,৩৭২/- টাকা আয় দেখাইয়া ২৯/১২/২০০৫ তারিখে কর নির্ধারণ আদেশ প্রদান করিয়াছেন এবং আয়কর ৫,২৬,৬৮,০৯৩/- + সুদ ৫৪,৪২,৩৬৯/- টাকা সহ মোট ৫,৮১,১০,৪৬২/- টাকা আয়কর প্রদানের জন্য আইটি-১৫ প্রেরন করিয়াছেন। উপকর কমিশনার কর্তক কর বছর ২০০৪-২০০৫ এর বেআইনি কর নির্ধারণ আদেশ তারিখ ২৯-১২-২০০৫ এর অনুলিপি করদাতা প্রশিকা ১৭/০১/২০০৬ তারিখ পাইয়াছে। এজেসিটির আয়কর আপীল আদেশ পত্র ৯৭৯/সাঃ-৫১/কঃঅঃ-৫/০৫-০৬, তারিখ ০৩/০৫/২০০৬ এর অনুলিপি করদাতা প্রশিকা ০৬/০৭/২০০৫ইং তারিখ পাইয়াছে। সেহেতু, কর বছর ২০০৪-২০০৫ এর উপকর কমিশনার কর্তৃক কর নির্ধারণ আদেশ তারিখ ২৯/১২/২০০৫ এবং ০৩/০৫/২০০৫ তারিখের এজেসিটির আয়কর আপীল আদেশ পত্র ৯৭৯/সাঃ-৫১/কঃঅঃ-৫/০৫-০৬ এর

বির"দ্ধে ট্যাকসেস আপীলাত ট্রাইবুনালে আপীল করা প্রয়োজন। কিন্তু বর্তমানে আয়কর অধ্যাদেশের ১৫৮(২) ধারায় সংশোধনী অনুযায়ী ১৫% কর সরকারী কোষাগারে জমা করিয়া ট্যাকসেস আপীলাত ট্রাইবুনালে আপীল করার বিধান রহিয়াছে।

সংস্থা প্রশিকার প্রকৃত নীট ক্ষতি ৬১,১২,২৭,৭৪১/- টাকা এর বিপরীতে উপ-কর কমিশনার কর্তৃক উপরোলে- খিত কাল্পনিক ও বেআইনিভাবে ২১,১০,৬২,৩৭২/- টাকা আয় নির্ধারন তথা আয়কর ৫,৮১,১০,৪৬২/- টাকা ধার্য করার পরিপ্রেক্ষিতে করদাতা প্রশিকাকে শুন্য আয়করের স্থলে আয়কর ৫,৮১,১০,৪৬২/- টাকার ১৫% সমপরিমান ৮৭,১৬,৫৬৯/- টাকা কোষাগারে জমা দিয়া ট্যাকসেস আপীলাত ট্রাইবুনালে আপীল করার প্রয়োজনিয়তা দেখা দিয়াছে। কিন্তু প্রশিকার বর্তমান আর্থিক অবস্থার পরিপ্রেক্ষিতে এত বিপুল পরিমান অর্থ কোষাগারে প্রদান করার সম্ভব নয়। ইহা ব্যতিত উক্ত অর্থ পরিশোধ করতে আপীলকারীর hardship এর কারন হইবে। প্রশিকার বর্তমান আর্থিক অবস্থা খুবই খারাপ।

এমতাবস্থায়, আপনার নিকট বিনীত আরজ এই যে, ন্যায় বিচারের স্বার্থে উপ-কর কমিশনার কর্তৃক আক্রশমূলক, কাল্পনিক ও বেআইনিভাবে প্রশিকার শূন্য আয়করের স্থলে প্রশিকার জন্য ধার্যকৃত আয়কর ৫,৮১,১০,৪৬২/- টাকার ১৫% কর সমপরিমান ৮৭,১৬,৬৫৯/- টাকা জমা মওকুফ করিয়া শুধু টোকেন অর্থ ১০,০০০/- টাকা সরকারী কোষাগার বাংলাদেশ ব্যাংকে জমা দান পূর্বক ট্যাক্সেস আপীলাত ট্রাইবুনালে আপীল করিবার অনুমতি দানে বাধিত করিবেন।"

11. Respondent no.1 Commissioner of Taxes disposed of the application vide its order dated 14.08.2006 in the following manner:

"আপনার ১৮-০৮-২০০৬ইং তারিখের গৃহিত আবেদনের প্রেক্ষিতে আয়কর নথি, দাখিলকৃত কাগজপত্র ইত্যাদি পরীক্ষান্তে প্রতীয়মান হয় যে, আপনার কর প্রদানের সামর্থ আছে। অতএব, আয়কর অধ্যাদেশের ১৫৮/(২) ধারার শর্ত অনুযায়ী ২০০৪-০৫ কর বর্ষেও আপীলাত ট্রাইবুনালে মামলা দায়েরের জন্য ৫০,০০,০০০/- (পঞ্চাশ লক্ষ) টাকা পরিশোধ সাপেক্ষে আপীলাত ট্রাইব্যুনালে মামলা দায়েরের জন্য আপনার আবেদন মঞ্জুর করা হইল।"

12. Petitioner's contention is that though there was no statutory requirement under the proviso of section 158 (2) but principle of natural justice demands a personal hearing before passing the order. The moot question is whether the Commissioner of Taxes was under obligation to provide an opportunity of hearing to the assessee-petitioner and passed the order assigning reasons. Learned counsel for the parties referred citations in support of their submission. It need not be pointed out that under different situations and conditions the requirement of the compliance of the principle of natural justice vary. The application of the audi alterem partem is not applicable to all eventualities or to cure all ills. Its application is excluded in the interest of administrative efficiency and expedition. Rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and background of statutory provision, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case. These principles do not apply to all cases and situations. Applications of these uncodified rules are often excluded by express provision or by implication. The rule of audi alteram partem is not attracted unless the impugned order is shown to have deprived a person of his liberty or his property.

13. The question of audi alterem pertam arose in the case of Union of India & Anr.-Vs-M/S. Jesus Sales Corporation, wherein a Full Bench of Delhi High Court observed that:

"Before rejecting the prayer made on behalf of the respondent to dispense with the whole amount of penalty an opportunity should have been given to the said respondent of being heard in terms of the proviso to Section 4-M of the Imports and Exports (Control) Act, 1947."

14. Section 4-M of the Act provides amongst other that where the Appellate authority is of the opinion that the deposit to be made will cause undue hardship to the appellant it may at

its discretion dispense with such deposit either unconditionally or subject to such conditions as it may impose. Union of India challenged the order of the Delhi High Court before the Indian Supreme Court.

15. After thorough and meticulous discussions, Indian Supreme Court held.

> *"When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded. This is all the more important in the context of taxation and revenue matters. When an authority has determined a tax liability or has imposed a penalty, then the requirement that before the appeal is heard such tax or penalty should be deposited cannot be held to be unreasonable as already pointed out above. In the case of Shyam Kishore-Vs-Municipal Corporation of Delhi, it has been held by this court that such requirement cannot be held to be harsh or violative of Article 14 of the Constitution so as to declare the requirement of pre-deposit itself as unconstitutional. In this background, it can be said that normal rule is that before filing the appeal or before the appeal is heard, the person concerned should deposit the amount which he has been directed to deposit as a tax or penalty. The non-deposit of such amount itself is an exception which has been incorporated in different statutes including the one with which are concerned. Second proviso to sub-section (1) of Section 4 M says in clear and unambiguous words that an appeal against an order imposing a penalty shall not be entertained unless the amount of the penalty has been deposited by the appellant. Thereafter, the third proviso vests a discretion in such Appellate authority to dispense with such deposit unconditionally or subject to such conditions as it may impose in its discretion taking into consideration the undue hardship which it is likely to cause to the appellant. As such it can be said that the statutory requirement is that before an appeal is entertained, the amount of penalty has to be deposited by the appellant; an order dispensing with such deposit shall amount to an exception to the said requirement of deposit. In this background, it is difficult to hold that if the Appellate authority has rejected the prayer of the appellant to dispense with the deposit unconditionally or has dispensed with such deposit subject to some conditions without hearing the appellant, on perusal of the petition filed on behalf of the appellant for the said purpose, the order itself is vitiated and liable to be quashed being violative of principle of natural justice and with the above observation allowed the appeal filed by the Union of India. As it is stated above that the attached provision of section 158 of the Ordinance is states that the Commissioner of Taxes on an application made by the assessee may reduce the requirement of pre-deposit appears reasonable to him."*
>
> *(Emphasis supplied by us.)*

16. Article 102 of out Constitution empowers the High Court Division to issue certain orders and directions. Language of the Article 102 runs as follows:

> *"102 (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of the this Constitution".*

17. From the language above, it is apparent that existence of fundamental right to be the formation of the exercise of jurisdiction by the High Court Division under this Article. This right has to be a legal right. Legal right means legally enforceable rights and not purely personal right or personal contract having no statutory force. The above words must be read in the context of and in anti-thesis of the words "for the enforcement of any of the rights conferred by part III".

18. The proviso to Sub-Section (2) of section 158 of the Ordinance vests discretion with the Commissioner of Taxes to reduce statutory requirement of payment under Sub-Section(2) of section 158 of the Ordinance, if the grounds stated in the application filed by the assessee applicant under the proviso appears reasonable to him/her. From the language of the proviso, we do not find any statutory duty of the CT to pass an order assigning reason.

19. The rule that decisions of an authority exercising judicial or quasi judicial authority should be reasoned, is not a universally established rule, although in certain situations it is rigidly enforced. The duty to give reasons may be either a statutory requirement or non statutory. Where the duty is laid down by the act or the rules made thereunder, obviously, the authority is bound to give reasoned decision in all cases to which that provision is applicable. But in the absence of a statutory duty, the court have been emphatic to advise judicial or quasi judicial authorities to assign reasons in such a form as to justify the orders being called what are described as speaking orders.

20. It may be mentioned here that, upon hearing the authorized representative of the assessee-petitioner and considering the points raised by the assessee-petitioner the DCT and the AJCT determined tax liability of the assessee as such requirement of further hearing is always with the authority who decides the matter. There is no statutory requirement for hearing the applicant or recording reason under the proviso of section 158(2) of the ordinance.

21. We have perused section 249(4) of the Indian Income Tax Act, 1961, which runs as follows:

A) No appeal under this chapter shall be admitted unless at the time of filing of the appeal,-

a) Where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or

b) Where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him:

"*Provided that in a case of filing under clause (b) and on an application made by the appellant in this behalf, the Commissioner (Appeal) may, <u>for any good and sufficient reason to be recorded in writing,</u> exempt him from the operation of the provisions of that clause".*

(Emphasis supplied by us.)

22. It appears from Section 249(4) of the Indian Income Tax Act, 1961, that there was a statutory requirement to record good and sufficient reason by the Commissioner (Appeal) to exempt assessee applicant from the payment under clause (a) and (b) of the section. But in our statute there is no such requirement. We cannot interprete language of the statute framed by our legislators in between the lines. Legislators framed the law at their wisdom. Though there is no requirement to give an opportunity of hearing to the assessee-applicant or recording reason, but still the Commissioner of Taxes should be aware that his /her order must reflect reasonableness from where it can be transpire that the Commissioner of Taxes applied his/her judicial mind in passing the order. But for inadequacy or absence of reasonableness, the order cannot be set aside. It is discretion of the Commissioner of Taxes.

23. Under the facts and circumstances of the case and for the reasons stated above, we are inclined to discharge the rule with the observation made above.

24. Accordingly, the rule is discharged without any order as to cost.