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HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 1335 of 2015
With
WRIT PETITION NO. 1336 of 2015
With
WRIT PETITION NO. 1337 OF 2015
With
WRIT PETITION NO. 1338 OF 2015
With
WRIT PETITION NO. 1340 OF 2015
With
WRIT PETITION NOS. 10057,10058 & 10059 OF 2014
With
WRIT PETITION NOS. 4748 & 4749 OF 2015
With
WRIT PETITION NOS. 4750 & 4751 OF 2015
With
WRIT PETITION NO. 6343 OF 2015
With
WRIT PETITION NO. 6344 OF 2015
With
WRIT PETITION NOS. 10947, 10948, 10949 of 2013 and 11946 of 2014
With
WRIT PETITION NOS. 10950, 10951, 10952 of 2013 and 11947 of 2014
With
WRIT PETITION NOS. 12174, 12175,12176 of 2013 and 10120 of 2014
With
WRIT PETITION NOS. 8076, 8077, 8078 and 8079 of 2014
With
WRIT PETITION NOS. 11155, 11156, 11157 and 11158 of 2014
With
WRIT PETITION NO. 9085 of 2013
With
WRIT PETITION NO. 5308 of 2014
With
WRIT PETITION NO. 6672 of 2014
With
WRIT PETITION NO. 7245 of 2014

Golam Mohammad Faroque Uddin and others
...Petitioners
Vs.
Bangladesh and others
...Respondents

Mr. Mosharaf Hossain with
Mr. Md. Nasim Miah, Advocates.
..For the petitioner in Writ Petition Nos. 1335-1338 of 2015 and 1340 of 2015.

Mr. Ashek-E-Rasul, Advocate
..For the petitioner in Writ Petition Nos. 10057-10059 of 2014.

Mr. Ashikur Rahman, Advocate
..For the petitioner in Writ Petition Nos. 4748-4751 of 2015 and 6343-6344 of 2015.

Mr. Sarder Jinnat Ali with
Mr. Md. Umbar Ali, Advocates.
..For the petitioner in Writ Petition Nos. 10947-10952 of 2013, 11946-11947 of 2014, 12174-12176 of 2013, 10120 of 2014, 8076-8079 of 2014 and 11155-11158 of 2014.

Mr. Mustafa Tarique Husain, Advocate
..For the petitioner in Writ Petition Nos. 9085 of 2013 and 5308 of 2014.

Mr. Md. Tajul Islam Majumder, Advocate
..For the petitioner in Writ Petition Nos. 6672 of 2014 and 7245 of 2014.

Mr. A.F. Hassan Ariff, Senior Advocate and
Mr. Rokanuddin Mahmud, Senior Advocate
…Submitted as Amici Curiae.

Mr. S. Rashed Jahangir, D.A.G with
Ms. Israt Jahan, D.A.G. with

Mr. Swarup Kanti Deb, A.A.G with
Ms. Nurun Nahar, A.A.G

…..For the respondent no.5 in W.P. Nos. 1335-1338 of 2015 and 1340 of 2015

Heard on 13.08.2015, 11.11.2015, 18.11.2015, 24.11.2015, 29.11.2015, 02.12.2015, 08.12.2015 and 09.12.2015.
Judgment on: 12.01.2016.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice J. N. Deb Choudhury

Section 16A of the Income Tax Ordinance, 1984
And
Section 36 of the Finance Act, 2013:
Power of imposition of surcharge is very much within the plenary power of legislation of the Parliament:
Though the term 'surcharge' is not specifically mentioned in the Constitution or not defined in the said Ordinance, the basic concept of 'surcharge' was always there in our Constitution and the said Ordinance. The only difference being that while the Indian Constitution, under Article 271, specifically has mentioned the word 'surcharge', our Constitution has not mentioned the same in such specific way. Not only that, upon examining the dictionary meaning of the word "impost" as used under the definition of 'taxation' as provided by our Constitution under Article 152, there is no semblance of doubt that the Parliament has always had the plenary power to legislate provisions for imposition of 'additional tax', 'extra charge' or 'impost', through whatever terms it may be called, by which some additional charges may be levied on the tax payers in addition to their ordinary tax payments. In consideration of the above wide definition of 'taxation' as given by our Constitution and the definition of term 'Tax' as provided by the relevant provision of the said Ordinance, we are, therefore, of the view that the power of imposition of surcharge, as has been done by the impugned provisions, was very much within the plenary power of legislation of the Parliament. ...(Para 34)

Constitution of Bangladesh
Article 8, 10, 27:
Courts have always emphasized that having regard to the wide variety of diverse economic criteria that go into the formation of a fiscal policy, the Legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc. for the purposes of taxation ("see also Elel Hotels and Investments Ltd. Vs. Union of India AIR-1990 SC 1664). In enacting legislations regarding fiscal matters, it is the obligation of the State or the Legislature to bring about equality in the society in order to establish equality before law in real sense as contemplated by Articles-8 and 27 of our Constitution. According to sub-article-(2) of Article-8, the principle set-out in Part-II of the Constitution shall be fundamental to the Government of Bangladesh and shall be applied by the State in the making of laws and shall be a guide to interpretation of the Constitution and of other laws of Bangladesh. In addition, Article-10 of our Constitution contemplates achievement of socialist economic system for ensuring the attainment of a just and egalitarian society free from the exploitation of man by man. Therefore, while Legislating a particular enactment, it is the obligation of the State as well the Legislature to keep in mind the said fundamental principles of State policy, in

particular Article-8, in order to attain a just and equitable society in real sense so that the equality before law, as guaranteed under Article-27 of the Constitution, can be established in real sense. It has to be further borne in mind that equality before law, under no circumstances, cannot be achieved if the people of the country are situated un-equally. In an unequal society, equality before law is a mere myth. Therefore, considering the above aspects, it has become a long practice that the Courts allow a larger or extended latitude to the Legislature in taxing matters inasmuch as that while legislating a financial policy of a particular government, the Legislature has to contemplate various complicated issues, which are beyond the contemplation of judicial review. ...(Para 38 & 39)

The inherent distinction between a juristic person like company and an individual can easily be a basis for classification between a company and an individual. Under no circumstances that can be said unreasonable classification. Again, the classification between people having certain amount of properties or assets and the people not having such properties or amounts of assets is also reasonable in as much as that such classification is always there even if it is not made by law. An individual having total net worth above two crores or ten crores is always in a distinct group than an individual having total net worth of one crore or below two crores. Therefore, a Legislature cannot be insisted on not to differentiate between two classes of people when such classification is already there in the society, and it is the obligation of the State to enact law to reduce such disparity between different classes, in particular rich and poor. ...(Para 40)

Judgment

Sheikh Hassan Arif, J:

1. Since the questions of law and facts involved in the aforesaid writ petitions are almost same, they have been taken up together for hearing, and are now being disposed of by this single judgment.

SHORT BACKGROUND FACTS:-

2. Though the background facts towards the issuance of the aforesaid Rules are not that much material, yet they are stated below in short keeping some similar facts in separate groups.

Writ Petition Nos. 1335-1338 of 2005, 1340 of 2015, 10057 of 2014, 10949 of 2013, 10952 of 2013, 12176 of 2013, 8077 of 2014 and 11157 of 2014.

3. Rules in the aforesaid writ petitions were generally issued calling in question the constitutionality of Section 16A of the Income Tax Ordinance, 1984 (in some writ petitions), as inserted therein by Finance Act, 1988, and Section 36 of the Finance Act, 2013 (Act No.25 of 2013), thereby, incorporating the provisions in the Second Part of the Schedule-2 thereto imposing surcharge at a rate of 10% on the tax payable by the individual assessees having total net-worth exceeding Tk. 02(two) crore and at a rate of 15% on the tax payable by the individuals having total net worth exceeding Tk. 10(ten) core. Apart from challenging the aforementioned provisions, the petitioners also challenged the legality of the respective demands of surcharge on them made by the concerned tax authorities in the relevant

assessment years or sought a direction from the Court on the concerned tax authorities to allow the petitioners to submit their returns without payment of any surcharge.

4. More particular background facts are narrated below:

W.P. Nos. 1335-1338 of 2015:

5. The petitioners, being individual assessees, having TIN No. 320-101-6496/Sha-81 and E-TIN No. 129369223588, TIN No. 320-101-6517/Sha-81 and E-TIN No. 114403298089, TIN No. 320-101-8851/Sha-81 and E-TIN No. 198060384543 and TIN No. 320-101-8868/Sha-81 and E-TIN No. 661881651462, respectively, are engaged in the business of importation of complete trees, i.e. round wood, from Myanmar, Malayasia Indonesia etc. As importers, the petitioners paid advance income tax under Section 53 of the Income Tax Ordinance, 1989 ("the said Ordinance", in short) read with Rule 17A of the Income Tax Rules, 1984 ("the said Rules", in short). The petitioners, accordingly, submitted their returns for the assessment year 2014-2015 under Section 82BB(1) of the said Ordinance and obtained receipt thereof from the concerned Deputy Commissioner of Taxes (DCT). Thereafter, the concerned Extra Assistant Commissioner of Taxes (Current charge), Circle-81, Tax Zone-04, Chittagong issued impugned demand letters, all dated 25.01.2015 (Annexure-B in writ petitions), upon the petitioners asking them to pay surcharges for Tk. 5,17,072/-, 14,00,976/-, 2,77,505/- and 3,83,423/- respectively on the said advance income tax as deducted from the petitioner at the time of import. Since such demands were issued pursuant to the impugned provisions under Section 16A of the said Ordinance and Section 36 read with 2nd Part of the Schedule 2 to the Finance Act, 2013, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. Nos. 1340 of 2015, 10949 of 2013, 10952 of 2013 and 12176 of 2013

6. The petitioners in these writ petitions, being individual assessees having E-TIN No. 757699520135 (petitioner of Writ Petition No. 1340 of 2015, but no TIN or E-TIN number mentioned in W.P. Nos. 10949 of 2013, 10952 of 2013 and 12176 of 2013) and engaged in different types of business, intended to submit their returns for concerned assessment years. However, when they tried to submit the same, the concerned tax officials at the tax offices refused to accept them and asked them to deposit surcharges on the taxes payable by them in view of the impugned provisions. Being aggrieved by such actions of the tax officials, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. 10057 of 2014:

7. The petitioner in this writ petition is an individual assessee having TIN No. 314-100-9491 and E-TIN No. 350175670404. Being an importer, he was subjected to deduction of advance income tax in the normal course of business in view of the previsions under Section 53 of the said Ordinance. The petitioner, accordingly, submitted his return for the assessment year 2013-2014 under universal self-assessment scheme under Section 82BB of the said Ordinance and, accordingly, obtained receipt thereof. Thereafter, the concerned tax officer issued impugned demand notice dated 30.06.2014 (Annexure-E) asking the petitioner to pay an amount of Tk.56,55,715/- on account of surcharge payable on the said advance income tax. Being aggrieved by such demand, the petitioner moved this Court and obtained the aforesaid Rule.

W.P. 8077 of 2014 and W.P. No. 11157 of 2014:

8. The petitioners in these writ petitions are individual assessees having TIN No. 351-100-9369 (E-TIN No. 544218590837) and TIN No. 354-101-6076 (E-TIN No.

639216748212), respectively. Being businessmen, they submitted their returns for the assessment year 2013-2014 under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance. The petitioners, accordingly, obtained receipts thereof and paid surcharges on the tax payable by them for an amount Tk. 20,44,854/- and Tk. 5,78,968/-, respectively, at a rate of 15%. Being aggrieved by such payment of surcharges, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. Nos. 10058-10059 of 2014, 7245 of 2014, 6672 of 2014, 10951 of 2013 and 10948 of 2013.

9. Rules in the aforesaid writ petitions were generally issued challenging the constitutionality of imposition of surcharges vide Section 58 read with the 2nd Part of Schedule 2 to the Finance Act, 2012 along with demands of surcharges vide different demand letters.

10. The petitioners in these writ petitions are individual assessees having TIN No. 314-100-9491 [(E-TIN No. 350175670404/C-53(Companies)], TIN No. 393-101-3102, TIN No. 393-105-0157, TIN No. 376-100-4464 and TIN No. 381-101-0281, respectively. In the course of their business, they imported several goods. In such imports, advance income taxes were deducted from the petitioners in view of the provisions under Section 53 of the said Ordinance. The petitioners, accordingly, filed their returns for the assessment year 2012-2013 under universal self-assessment scheme in view of the provisions under Section 82BB of the said Ordinance and obtained receipts thereof. Thereafter, the concerned tax officers issued the impugned notices demanding certain amounts of money from the petitioners on account of surcharges payable by them on the advance taxes deducted from their aforesaid imports. Being aggrieved, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court, vide Rule issuing orders, stayed operation of the said demand notices.

W.P. Nos. 11156 of 2014, 8076 of 2014 and 12175 of 2013

11. Rules in the aforesaid writ petitions were generally issued questioning the constitutionality of Section 58 read with Schedule 2 of the Finance Act, 2012 and Section 16A of the said Ordinance (in writ petition No.12175/2013).

12. The petitioners in these writ petitions are individual assessees having TIN No. 354-101-6076, TIN No. 351-100-9369 and TIN No. 351-102-3697, respectively. They submitted their returns for the concerned assessment years under universal self assessment scheme in view of the provisions under Section 82BB of the said Ordinance. Through the said returns, the petitioners paid taxes and further amounts as surcharges, being 10% of the tax paid, pursuant to the impugned provisions. Being aggrieved by such payment of surcharges, the petitioners moved this Court and obtained the aforesaid Rules.

W.P. Nos. 4748-4751 of 2015, 6343-6344 of 2015

13. Two individual petitioners in the aforesaid writ petitions challenged the constitutionality of Section 16A of the said Ordinance and Section 57 read with 2nd Part of Schedule 3 to the Finance Act, 2011 imposing surcharges.

14. The petitioners are individual assessees having TIN No. 557-288-317255 and TIN No. 856737857654, respectively. They filed their returns for different assessment years under self assessment scheme in view of the provisions under Section 82BB of the said Ordinance.

Since the petitioners did not pay the surcharges on the tax paid by them, the concerned tax officials issued the impugned demand notices asking them to pay the said surcharges. Being aggrieved by such demands, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court stayed operation of the said demand of surcharges.

W.P. Nos. 10947 of 2013, 11155 of 2014, 10950 of 2013, 12174 of 2013 and 8079 of 2014:

15. The petitioners in the aforesaid writ petitions challenged the constitutionality of Section 16A of the said Ordinance as well as the corresponding provisions of the Finance Act, 2011 imposing surcharges.

16. The petitioners are individual assessees having TIN No. 381-101-0281, TIN No. 354-101-6076, TIN No. 326-100-4464, TIN No. 351-102-3697 and TIN No. 351-100-9369, respectively. They submitted their returns for the concerned assessment years under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance along with tax and surcharges on the said tax, pursuant to the impugned provisions of the said Ordinance. Being aggrieved by such payment of surcharges, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court, in some writ petitions (W.P. No. 10947 of 2013 and W.P. No. 10950 of 2013), directed the concerned tax Officials to accept the returns of the petitioners for the assessment year 2013-2014.

W.P. Nos.11946-11947 of 2014, 10120 of 2014, 8078 of 2014 and 11158 of 2014:-

17. The petitioners in the aforesaid writ petitions challenged the constitutionality of Section 16A of the said Ordinance as well as imposition of surcharges vide Section 57 of the Finance Act, 2014.

18. The petitioners are individual assessees having TIN No. 776176782854 (in W.P. No. 11946 of 2014) and E-TIN No. 727126527155 (in W.P. No. 11947 of 2014) (but no TIN or E-TIN number has been mentioned in W.P. Nos. 10120 of 2014, 8078 of 2014 and 11158 of 2014). They submitted their returns for the concerned assessment years 2014-2015 under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance. However, the said returns having been submitted without payment of surcharges as imposed by the impugned provisions, the concerned officials refused to accept the same. Being aggrieved by such actions, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court directed the concerned Tax Officials to accept the returns of the petitioners for the said assessment year.

W.P. Nos. 9085 of 2013 and 5308 of 2014:-

19. The petitioners in the aforesaid writ petitions challenged the imposition of surcharge vide Section 58 read with 2nd Part of the Schedule 2 to the Finance Act, 2012 and Section 16A of the said Ordinance as well as the demands of unpaid surcharges.

20. The petitioners are individual assessees having TIN No. 620063782637/Circle-05(Co)/ 311-101-1849/Circle-05(Co) and TIN No. 311-101-1849/Circle-05, respectively. They submitted their returns under universal self declaration scheme in view of the provisions under Section 82BB of the said Ordinance, which were accordingly accepted and receipts were issued. Thereafter, the tax authorities issued the impugned demand notices demanding certain amount of money as surcharges alleging that though the advance income taxes were deducted at source from the petitioners, surcharges thereon were not collected.

Being aggrieved by such demands, the petitioners moved this Court and obtained the aforesaid Rules. At the time of issuance of the Rules, this Court, vide Rule issuing orders, stayed operation of the said demand notices.

Common contention:

21. It is commonly stated by some of the above petitioners that since, unlike the Constitution of India, there is no such provision of 'surcharge' in the Bangladesh Constitution, the very incorporation of Section 16 A in the Income Tax Ordinance, 1984 vide Finance Act, 1988, and, pursuant to that, imposition of surcharges upon the petitioners vide different corresponding provisions enacted vide different Finance Acts are ultra vires the Constitution and as such should be knocked down by this Court. It is further stated that since either in the Constitution or in the entire provisions under the Income Tax Ordinance, 1984 there is no such concept for imposition of Tax on Tax, the imposition of surcharges at certain rates on the taxes payable by the petitioners are beyond the scope of the Constitution as well as contrary to the scheme of the said Ordinance. Alternatively, it is stated by the petitioners that, since, vide Section 16-A, Parliament itself has set a parameter for imposition of surcharges on every person, imposition of the same by different Finance Acts only on some individuals is beyond the scope of such parameter and as such should be struck down. Further common contention of the petitioners is that since the surcharge has been imposed by different Finance Acts at different rates on the petitioners on the basis of their net- worth and not on income, which can only be the basis of the imposition of tax, the impugned imposition of surcharges are beyond the scope of the taxation scheme under the said Ordinance as well as the Constitution inasmuch as that such imposition of surcharges were not been done under the authority of the Parliament in accordance with Article 83 and other relevant provisions of the Constitution. Petitioners further contend that since only the individuals with net-worth beyond certain amount having been classified for imposition of surcharges, the said classification among the individuals as well as the classification between the individuals and the juristic persons are not reasonable classifications and that by such classification the rights of the petitioners to hold property and their rights to equality before law as guaranteed vide Articles 42, 27 and 31 have been violated and as such the impugned provisions of the relevant Finance Acts should be declared to be ultra vires the said Articles of the Bangladesh Constitution.

22. The Rules are opposed by the Government through the concerned Commissioner of Taxes contending, inter alia, that the term "surcharge", though not specifically mentioned in the Bangladesh Constitution, the definition of 'tax', as provided in our Constitution and the said Ordinance, are so wide that no illegality has been committed by enacting the said provisions for imposition of surcharge. The further contention of the respondents is that since the Parliament has the plenary legislative power in view of Article 65 of the Constitution and enacted the relevant impugned provisions by way of placing money bills in the Parliament and the same having been passed by the Parliament in exercise of its power under Article 83, no question of illegality or unconstitutionality can arise in so far as the enactments of the said provisions are concerned, and, as such, the Rules in the aforesaid writ petitions should be discharged. The further contention of the respondents is that since imposition of tax is part of the financial policy of the State, which is approved by the Parliament, Court should not enquire into the exigencies of such policies inasmuch as that such enquiry will be a futile exercise given the fact that before adopting such policy a government has to take into consideration different factors which are beyond the judicial contemplation. It is further contended by the respondents that since surcharges have been imposed on a particular group of individuals, namely the rich individuals having net worth beyond certain amount, such

classification among individuals as well as the classification between the individuals and juristic persons are reasonable classification as has been decided by our Apex Court in various cases.

Appointment of Amici Curaie:

23. After preliminary hearing of the learned advocates for the petitioners and respondents, this Court, vide order dated 11.11.2015, requested two learned Senior Counsels of this Court, namely Mr. A.F. Hassan Ariff and Mr. Rokanuddin Mahmud, senior advocates, to assist this Court as Amici Curaie. Accordingly, the said learned advocates have made extensive submissions before this Court and cited several decisions as well as text books.

Submissions:

24. Mr. Sarder Jinnat Ali, Mr. Mosharaf Hossain, Mr. Md. Tajul Islam Mojumder, Mr. Ashik-E- Rasul, and Mr. Ashikur Rahman, learned advocates, appearing for different sets of petitioners, presented extensive submissions before this Court. At the very outset, Mr. Mosharaf, learned advocate, has presented the historical aspect of the imposition of surcharge in this sub-continent, including how the same secured it's place in the Government of India Act, 1935 (vide Section 137) and the Indian Constitution (vide Article 271). Thereafter, referring to different dictionary meaning of the term 'surcharge', learned Advocate has referred to different decisions of the Indian subcontinent, namely, **Sarojini Tea Company Ltd. vs. Collector of Dibrugarh, Assam, 1992 SCR supl. 2 25 1993 SCC Supl**:, **Bisra Stone Lime Company Ltd. vs. Orissa State Electricity Board, (1976) 2 SCR 307 and CIT vs. K. Srinivasan, 1972 AIR 491, 1972 SCR (2) 309,** to explain the meaning of the said term. Referring to such decisions and dictionary meaning, Mr. Mosharaf submits that 'surcharge' is in fact 'an additional tax' or 'a tax at an increased rate' or 'a super added charge' or 'additional charge' on the tax payers. By referring to Article 271 of the Indian Constitution along with Article 83 and definition of 'taxation' as provided under Article 152 of our Constitution, learned Advocate submits that since the very term 'surcharge' has no-where been mentioned or incorporated in our Constitution, insertion of the provisions under Section 16 A of the said Ordinance, declaring thereby that the Parliament can impose surcharge, is ultra vires the Constitution, the same having not been done under the authority of the Constitution. Learned advocate argues that since the very provision in the Constitution under Article 83 as well as the entire provisions of the Income Tax Ordinance, 1984 contemplate only tax on income and not on property or total net-worth, the imposition of surcharges by the impugned provisions on the total net worth of individual tax payers is beyond the scope of the Constitution as well as the relevant provisions of the said Ordinance and as such the same should be declared to be ultra vires the Constitution. Further drawing our attention to specific words, namely 'every person' as occurring in the impugned Section 16 A, learned advocate submits that since the impugned provisions of different Finance Acts have imposed surcharges only on two categories of individuals having net worth beyond certain amounts, the same is directly in conflict with the provisions of Section 16 A and as such should be declared to be ultra vires the Constitution. Further referring to the relevant words in the Second Part of the Second Schedule as incorporated by different provisions of the concerned Finance Acts for imposition of surcharges, learned advocate submits that tax on tax has never been contemplated either by the Constitution or by the said Ordinance and as such the same cannot stand in the eye of law. Learned advocate further argues that since the impugned provisions have classified and separated two particular groups of individuals having net-worth beyond certain amount from the rest of the individuals as well as the juristic persons like, the companies without any reasonable basis, such classification is not a reasonable classification and as such the same is hit by Article 27 as well as Article 31 of the Constitution. Again, referring to Article 42 of the Constitution, learned advocate submits that,

by imposing surcharge on a particular group of individuals, the impugned provisions have unreasonably restricted the petitioners' rights to hold property as guaranteed under Article 42 of the Constitution and as such the said impugned provisions should be declared to be ultra-vires the Constitution inasmuch as that the same are directly contrary to some particular fundamental rights guaranteed under Part-III of the Constitution.

25. Mr. Sardar Zinnat Ali, learned advocate appearing in W.P Nos.10947-10952 of 2013, 11946-11947 of 2014, 12174-12176 of 2013, 10120 of 2014, 8076-8079 of 2014 and 11155-11158 of 2014, for the petitioners, after adopting the submissions made by Mr. Mosharaf, submits that tax on tax has already been declared void by our Appellate Division in **Commissioner I. Tax Vs. Zeenat Textile, 27 DLR (AD) (1975)-85.** This being so, according to him, the imposition of tax on tax by the impugned provisions under different Finance Acts being not contemplated either by the Constitution and the relevant provisions of the said Ordinance, the same should be declared to be ultra vires the Constitution.

26. As against the aforesaid submissions, Mr. Rashed Jahangir, learned Deputy Attorney General, has also made extensive submissions referring to different provisions of the Constitutions as well as the said Ordinance. Drawing our attention to different paragraphs of the affidavit-in-opposition filed by the respondents, learned DAG submits that since the enactment of Section 16 A as well as the impugned provisions of the concerned Finance Acts for imposition of surcharge have been enacted through the passage of money bills in view of the provisions under Article 81, the same cannot be called in question by any Court including this Court. According to him, only if it is found that by passage of such money bills a fraud has been committed either on the Constitution or on the Parliament, that can only be looked into by this Court. Referring to the very provisions under Section 16 A of the said Ordinance, in particular the words 'every person' as mentioned therein, learned DAG submits that, under no circumstances, this usage of the words 'every person' in Section 16 A can be taken to be imposing a restriction on the Parliament by which the Parliament may be prevented from imposing surcharges on certain persons and/or individuals. According to him, since it is an enabling charging provision recognizing the legislative power of the Parliament to impose surcharge on every person, by such provision the plenary legislative power of the Parliament cannot be interpreted to have been curtailed. He further argues that even if it is remotely found that there is a conflict between Section 16 A and the plenary legislative power of the Parliament under Article-65, the plenary power of the Parliament shall prevail without any doubt. Further drawing our attention to the preamble of the Constitution as well as Article-8, wherein principle of equality has been enshrined for adoption by the State in enacting laws as well as interpreting the law and the Constitution, learned DAG submits that the wealthy group of individuals have been selected by the Legislature purposefully for bringing about equality in the society so that equal protection and right to equality as guaranteed under Article-27 of the Constitution can be ensured. According to him, as the wealthy group of individuals have been selected depending on their total net-wroth, no tax has been imposed on their wealth. Rather, tax has been imposed on the income of the said wealthy group. Therefore, he submits, the submission that tax has been imposed on wealth has no substance. Again, drawing this Court's attention to different paragraphs in the books of Mr. Mahamudul Islam (Constitution of Bangladesh, 3rd eddition), namely paragraphs-2.28, 2.29, 2.32, 2.35 and 2.44, learned DAG submits that since the Legislature has deliberately picked up the wealthy groups of individuals depending on their total net-worth for imposition of additional charge on them, the impugned classification, under no circumstances, can be said to be an unreasonable classification. In this regard, he refers to a decision of this Court in **Sheikh Abdus Sabur vs. Returning Officer and others, 41 DLR (AD)-30,** in particular

Paragrph-29 therein. Further drawing our attention to paragraph-6 of the affidavit-in-opposition, learned DAG submits that surcharge is not a new concept in our country. According to him, it has been there since1988 and in different years different rates of surcharges have been imposed vide different Finance Acts. In this regard, to have an idea of the intention of the Legislature, learned DAG even refers to the relevant portion of budged speech of the Finance Minister for the 2011-2012 fiscal year, which is reproduced in paragraph-7 of the affidavit-in-opposition. Learned DAG further argues that, in taxation matters, the Courts of the subcontinent have always given larger latitude to the Legislature considering the economic and social policies of the State and the complexity of fiscal adjustment involved therein. Therefore, since the Legislature, within their wisdom, has chosen a particular rich group of individuals for imposition of surcharge, this Court should not interfere into it considering the same as unreasonable classification inasmuch as that the petitioners have failed to show anything on record that such classification is unreasonable in any way. In this regard, learned DAG refers to some decisions of Indian Jurisdiction, namely **P.M. Ashwathanarayana Setty vs. State of Karnataka (1989) Suppl. 1 SCC 696, 723 and In Re The Special Courts Bill, (1978) (1979) 2 SCR 476, page 478 of AIR 1979 SC.** Further drawing our attention to the definition of the word 'taxation' as provided by Article-152 of our Constitution, learned DAG submits that the word "impost" occurring therein clearly refers to 'additional charge', which corresponds to the admitted definition of the term 'surcharge' as presented by the learned advocate for the petitioner. Thus, according to him, imposition of surcharge can easily be found to have been contemplated by the framers of our Constitution and, as such, under no circumstances, it can be said that the 'surcharge' is a concept which is beyond the scope of the Constitution. Learned DAG then argues that imposition of different rates of taxes for different groups is an inherent and historic process of taxation in every country without which no taxation can be done. Therefore, the only obligation of this Court is to examine whether such differentiation or classification between groups is unreasonable and thus hit by Articles-27 and 31 of the Constitution. Since, according to him, every enactment by parliament have strong presumption of constitutionality, the onus is on the petitioner to point out in clear terms the unconstitutionality therein, and, in the present cases, since the petitioners have failed to do so, the Rules should be discharged.

Submissions by the Amici Curiae:

27. Mr. A.F. Hassan Ariff, learned senior counsel acting as Amicus curiae, has also made elaborate submissions. However, he begins with the submission that Section 16 A of the said Ordinance has nothing therein to hold the same unconstitutional or ultra vires the Constitution. Basing on this premise, Mr. Ariff submits that even imposition of surcharge is also a valid taxation process as the term used in the definition of 'taxation' in Article 152 may easily encompass imposition of surcharge. Again, according to him, fixation of a rate to impose surcharge on the tax payable by a tax payer (tax on tax) being a method of calculation, no objection should be raised against the same. Nevertheless, he submits, by imposing surcharges only on the individuals vide different concerned Finance Acts, the Legislature has gone beyond the scope of Section 16A of the said Ordinance. According to him, since the Legislature, by providing the words 'every person' in Section 16-A of the said Ordinance, has set an obligational parameter itself to impose surcharge on every person, it has gone beyond the said parameter set by itself and, accordingly, though the impugned provisions of different Finance Acts are not directly in conflict with the constitutional provisions, they are contrary to and/or beyond the scope of Section 16A of the said Ordinance. From that point of view, according to him, the impugned provisions under different concerned Finance Acts should be knocked down. Mr. Ariff further argues that

though the tax has not been imposed on wealth directly, by incorporating a provision for imposition of surcharge on a particular group of individuals depending on their total net-worth is in fact a taxation on wealth in disguise. Therefore, he submits, such provision of imposition of surcharge is not within the contemplation of the relevant provisions of the Constitution, and that can only be done by separate legislation by the Parliament, as has been done in the past vide Wealth Tax Act, 1963. Further referring to Articles 27 and 31 of the Constitution, Mr Ariff submits that since some particular groups of individuals have been picked up for imposition of surcharge and thereby excluded the rich juristic persons there from, the classification is not a reasonable classification inasmuch as that it does not have a nexus with its object of bringing about equality in the society. Mr. Ariff then, drawing our attention to different authoritative paragraphs of Text Books of some renowned authors, namely **Statutory Interpretation, F.A.R. Bennion MA (Oxon), Barrister, London Butterworths, 1984, The Construction of Statues, Earl T. Crawford, 1998, Pakistan Law House, Karachi, Lahore and N.S. Bindra's interpretation of Statutes, Revised by Justice K. Shanmukham, Eighth Edition, 1997, The Law Book Company (P) Limited, Allahabad,** submits that when there is a conflict between the Schedule and the main provision of a particular Act, the main provision should prevail over the Schedule. In this regard, he submits that, since there is an apparent conflict between the provisions under Section 16A and the impugned provisions as incorporated in the 2nd schedule vide different provisions of different Finance Acts, the Schedule should go and the said Section 16A should prevail.

28. Mr. Rokanuddin Mahmud, the other Amicus Curiae, however, has adopted a totally different position. According to him, there is no un-constitutionality either in the provisions under Section 16A or in the impugned provisions of the concerned Finance Acts by which surcharges have been imposed. Drawing our attention to the definitions of 'tax', and 'total income' as well as different charging provisions under Sections 16, 16A etc., as provided in the said Ordinance, learned advocate submits that though the term 'surcharge' has not been specifically mentioned in the Constitution, the same should be taken to be included in the definitions of 'taxation' and 'tax' as provided by Article 152 of the Constitution and Section 2(62) of the said Ordinance respectively. According to him, since rich groups of individuals depending on their total net worth have been selected by the Legislature and no discrimination has been made within the same group, the classification is a reasonable classification and as such this Court has got nothing to interfere into the same. Mr. Mahmud further argues that even if it is found that there is a conflict between the impugned imposition of surcharge and the provisions under Section 16A of the said Ordinance, this Court should not interfere. According to him, this Court should only interfere if it is found that the imposition of surcharge vide relevant enactments are ultra vires the provisions of the Constitution. Learned advocate finally submits that since the Parliament, in exercise of it's plenary legislative power under Article 65 of the Constitution, has enacted Section 16A and impugned provisions under different Finance Acts for imposition of surcharge, the same should not be interfered with by this Court.

DELIBERATIONS OF THE COURT:

29. In these writ petitions, the constitutionality of charging provision under Section 16A of the Income Tax Ordinance, 1984 as well as relevant provisions of some Finance Acts imposing surcharges at different rates have been questioned. It should be mentioned at the very outset that a law is enacted by our Parliament in exercise of its plenary legislative power under Article 65 of the Constitution. According to sub-article (1) of Article 65, the legislative powers of the republic are vested in the Parliament subject to the provisions of the

Constitution. Thus, the power in vested in the Parliament to legislate over all subjects except those excepted by the Constitution itself. Not only that, such legislation must be in conformity with different Articles mentioned under Part-III of the Constitution as well as with the Constitution in view of Article 26 and Article 7 respectively, and any provision enacted by the Parliament shall be void or declared ultra vires to the extent it is inconsistent either with the Constitution or with the fundamental rights guaranteed under Part-III. However, the petitioners have challenged Section 16A of the said Ordinance and concerned provisions of different Finance Acts imposing surcharges on both counts, namely that the surcharges have been imposed contrary to the provisions of Article 83 of the Constitution and that such imposition has violated fundamental rights guaranteed in favour of the petitioners under Articles 27, 31 and 42 of the Constitution.

30. Let us first examine whether by enacting Section 16A or by enacting different concerned provisions under different Finance Acts and thereby imposing surcharges, the Legislature has in any way violated Article 83 of the Constitution. For such examination, let us quote Article 83:-

"83. No tax shall be levied or collected except by or under the authority of an Act of Parliament."

31. Upon mere reading of above Article, it appears that the impugned imposition of surcharge will have to pass the test that the same has been enacted under the authority of an Act of parliament. However, to be an Act of Parliament, the concerned enactment has to be within the scope of the legislative power of the Parliament. Thus, imposition of surcharge has to be within the scope and contemplation of the Constitution; otherwise, the Parliament will be bereft of authority to impose surcharge. The definitions of surcharge, as referred to by learned advocate for the petitioners, are very much pertinent in this regard, which are quoted below:

> ***Black's Law Dictionary**: Surcharge- (noun) an additional tax, charge, or cost, usually one that is excessive. Surcharge-(verb) To impose an additional usually excessive tax, charge, or cost.*
> ***Oxford**: Surcharge-(n.) an extra amount of money that you must pay in addition to the usual price.*
> ***Cambridge**: Surcharge- (n.) a charge in addition to the usual amount paid for something; (v.) to charge an extra amount.*
> (Underlines supplied)

32. It appears from the above definitions of the term 'surcharge' that surcharge is basically understood as an additional charge or extra charge, or an additional tax, in addition to the ordinary tax payable by a taxpayer. It is true that, unlike Indian Constitution, our Constitution does not specifically mention the word 'surcharge'. However, our Constitution, under Article 152, defines the word 'taxation' in the following terms:-

> *"In this Constitution, except where the subject or context otherwise requires- "taxation" includes the imposition of any tax, rate, duty or impost, whether general, local or special, and "Tax" shall be construed accordingly.*
> (Underlines supplied)

33. On the other hand, Section 2(62) of the Income Tax Ordinance, 1984 defines "tax" in the following terms:

> *"2(62) "tax" means the income-tax payable under this Ordinance and includes any additional tax, excess profit tax, penalty, interest, fee or other charges leviable or payable under this Ordinance;"*
>
> (Underlines supplied)

34. Upon examination of the above two definitions as against the dictionary meaning of the word 'surcharge', it appears that, though the term 'surcharge' is not specifically mentioned in the Constitution or not defined in the said Ordinance, the basic concept of 'surcharge' was always there in our Constitution and the said Ordinance. The only difference being that while the Indian Constitution, under Article 271, specifically has mentioned the word 'surcharge', our Constitution has not mentioned the same in such specific way. Not only that, upon examining the dictionary meaning of the word "impost" as used under the definition of 'taxation' as provided by our Constitution under Article 152, there is no semblance of doubt that the Parliament has always had the plenary power to legislate provisions for imposition of 'additional tax', 'extra charge' or 'impost', through whatever terms it may be called, by which some additional charges may be levied on the tax payers in addition to their ordinary tax payments. In consideration of the above wide definition of 'taxation' as given by our Constitution and the definition of term 'Tax' as provided by the relevant provision of the said Ordinance, we are, therefore, of the view that the power of imposition of surcharge, as has been done by the impugned provisions, was very much within the plenary power of legislation of the Parliament. This conclusion will be much more clear if we examine the exact provisions under Article 271 of the Indian Constitution, which is quoted below:-

> *"Surcharge on certain duties and taxes for purposes of the Union.-*
>
> *Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated fund of India".*
>
> (Underlines supplied)

35. Thus, it appears from the above provision under Article 271 of the Indian Constitution that the very word 'surcharge' has been used therein to "increase any of the duties or taxes". Therefore, even the contemplation of the framers of the Indian Constitution was that the Indian Parliament would be at liberty to increase ordinary duties or taxes by imposition of surcharge. Exactly the same provision, though in different terms, has been incorporated in our Constitution through Article-83 read with the definition of the term 'taxation' in Article-152. Thus, considering above aspects of our Constitution as well as the Indian Constitution, it can not be said that our Constitution framers did not contemplate the imposition of 'surcharge' while the Constitution was drafted. Accordingly, we are not in a position to accept the submissions of the learned advocates for the petitioners that the imposition of surcharge is not within the scope of the Constitution and as such is not within the authority of the Parliament in view of Article 83 of the Constitution read with Article-65.

36. Now, let us examine whether the imposition of surcharges by the impugned provisions have in any way violated the fundamental rights of the petitioners as guaranteed under Articles 27, 31 or 42. In this regard, the main thrust of the arguments of the petitioners is that picking up of groups of individuals for imposition of surcharge basing on their total net-worth is not a reasonable classification and that it does not have any nexus with the objects sought to be achieved by such enactments. Before examination of this issue of classification, we should first bear in mind that not only in our sub-continent, but also in

European and American countries, Courts have always granted greater latitude to the Legislature in respect of taxing matters considering the intrinsic complexity of fiscal adjustment of diverse elements. Regarding classification in tax-matters, the observation of the Indian Supreme Court in **Khandige Sham Bhai v. Agri. Income. Tax Officer, AIR 1963 SC 591, at page 594-95,** is pertinent to quote here:-

> *"….The courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways."*

37. Similar observation has been made by the Indian Supreme Court in another case, namely in **Hoechst Pharmaceuticals Ltd. v. State of Bihar, 1983 SC-1019** which is as follows**.**

> *"When the power to tax exists, the extent of the burden is a matter for discretion of the law-makers. It is not the function of the court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirements is satisfied".*

38. Therefore, considering the above referred aspects, in particular the complexity of financial policy of a republic, the Courts have always emphasized that having regard to the wide variety of diverse economic criteria that go into the formation of a fiscal policy, the Legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc. for the purposes of taxation ("see also **Elel Hotels and Investments Ltd. Vs. Union of India AIR-1990 SC 1664**).

39. In enacting legislations regarding fiscal matters, it is the obligation of the State or the Legislature to bring about equality in the society in order to establish equality before law in real sense as contemplated by Articles-8 and 27 of our Constitution. According to sub-article-(2) of Article-8, the principle set-out in Part-II of the Constitution shall be fundamental to the Government of Bangladesh and shall be applied by the State in the making of laws and shall be a guide to interpretation of the Constitution and of other laws of Bangladesh. In addition, Article-10 of our Constitution contemplates achievement of socialist economic system for ensuring the attainment of a just and egalitarian society free from the exploitation of man by man. Therefore, while Legislating a particular enactment, it is the obligation of the State as well the Legislature to keep in mind the said fundamental principles of State policy, in particular Article-8, in order to attain a just and equitable society in real sense so that the equality before law, as guaranteed under Article-27 of the Constitution, can be established in real sense. It has to be further borne in mind that equality before law, under no circumstances, cannot be achieved if the people of the country are situated un- equally. In an unequal society, equality before law is a mere myth. Therefore, considering the above aspects, it has become a long practice that the Courts allow a larger or extended latitude to the Legislature in taxing matters inasmuch as that while legislating a financial policy of a particular government, the Legislature has to contemplate various complicated issues, which are beyond the contemplation of judicial review.

40. Keeping the above view in mind, if we examine the impugned classification that a group of individuals having total net worth above two crores or ten crores have been selected by the Legislature for imposition of surcharge, it will be crystal clear that such selection can

not be hit by Article- 27 of the Constitution. It would have been so hit by Article-27 if it were to be found that the individuals in the same group had been discriminated between them, which is totally absent in the facts and circumstance of the present case. The admitted position is that the individuals having total net worth above two crores or ten crores have been selected by the Legislature for imposition of different rates of surcharge on the tax payable by them, thereby, charging additional tax on a rich group of individuals. Therefore, under no circumstances, it can be said that this classification of a particular group, and/or this differentiation of a particular group from others, has no nexus with the objects sought to be achieved by such classification. Besides, classification is an integral part of taxation which is almost every where in our Income Tax Ordinance, 1984. Classification of different income groups for imposition of different rates of taxes is an accepted legislative practice and has never been questioned by any Courts. The only exception is that persons situated alike in a similar group cannot be discriminated between them. On the other hand, the inherent distinction between a juristic person like company and an individual can easily be a basis for classification between a company and an individual. Under no circumstances that can be said unreasonable classification. Again, the classification between people having certain amount of properties or assets and the people not having such properties or amounts of assets is also reasonable in as much as that such classification is always there even if it is not made by law. An individual having total net worth above two crores or ten crores is always in a distinct group than an individual having total net worth of one crore or below two crores. Therefore, a Legislature cannot be insisted on not to differentiate between two classes of people when such classification is already there in the society, and it is the obligation of the State to enact law to reduce such disparity between different classes, in particular rich and poor.

41. A question has been raised as to why rich companies have been excluded. The answer to such question can only be given by the policy maker of the State. Thus, the Court is not in a position to examine the complexities behind such policy decision, and those complexities involving facts and different issues are always beyond the contemplation of the judicial review. Therefore, such question cannot be asked by the Court. When on the face of the record, and on the facts and circumstances of the case, it is found that the classification of a group of individuals having net worth of more two crores or above ten crores is not an unreasonable classification, we are not in a position to accept the submissions of the learned advocates for the petitioners as well as Mr. A.F. Hassan Ariff, learned Amicus Curiae, on this point. On the other hand, relying on the principle enunciated in the **Sheikh Abdur Sabur's** case, we are of the view that the impugned classification is a reasonable classification.

42. Now, let us examine whether there is any conflict between the provision under Section 16 A of the said Ordinance and the impugned imposition of surcharges in that surcharges have not been imposed on every persons rather on a particular group of individuals. To examine this, let us quote the entire provision of Section 16 A of the said Ordnance:-

"16A. Charge of surcharge.-

(1) Where any Act of Parliament enacts that a surcharge on income shall be charged for any assessment year at any rate or rates, such surcharge at that rate or those rates shall be charged for that year in respect of the total income of the income year or the income years, as the case may be, of every person;

(2) All the provisions of this Ordinance relating to charge, assessment, deduction at source, payment in advance, collection, recovery and refund of

income tax shall, so far as may be, apply to the charge, assessment, deduction at source, payment in advance, collection, recovery and refund of the surcharge"

43. It appears from the provision and the provisions under Sections 16, 16-B, 16-C and 16-CCC of the said Ordnance that the provisions under Chapter-IV of the said Ordinance are in fact enabling charging provisions, by which it has been acknowledged that the Parliament has power to impose different taxes in different names, sometimes 'tax', sometimes 'surcharge', sometimes 'additional charge', sometimes 'access profit tax' and sometimes 'minimum tax'. Therefore, by these provisions, the said Ordnance has merely recognized the plenary legislative power of the Parliament to legislate on financial matters as well. Thus, these provisions cannot be deemed in any way to have curtailed such legislative plenary power of the Parliament under Article 65. Any contrary suggestion will totally be an absurd proposition. An Act of Parliament can not curtail the power of the Parliament. Thus, by mere providing that <u>income tax shall be charged on every person</u> or <u>surcharge shall be charged on every person</u>, either by Section-16 or Section 16A of the said Ordnance, it cannot be said that income tax or surcharge, as the case may be, cannot be imposed on some selected persons or group of persons. When the Act of parliament has recognized that the Parliament can impose tax or surcharge on every person, by necessary implication, it has acknowledged the plenary power of legislation by the Parliament to impose tax or surcharge on some persons or class of persons. Therefore, the submissions, as has been put forward by the learned advocates, that the imposition of surcharge on a particular group of individuals has violated the parent provision of Section-16A, has no substance. For the same reason, this Court does not find any conflict between the impugned provisions under the concerned Schedules as impugned in these writ petitions and the parent provision, namely Section 16 A. Thus, the question that in case of conflict the parent law shall prevail over the Schedule.

44. The other aspect, which has been raised by Mr. Sarder Zinnat Ali, learned advocate, relying on the **Commissioner I. Tax vs. Zeenat HTextile, reported in 27 DLR (AD)-85,** is that our Supreme Court has already declared tax on tax as void and ultra vires the Constitution. Therefore, according to him, tax on tax, as has been imposed by the impugned provisions, should also be declared to be void. To address this issue, we have examined the said decision of our Appellate Division [27 DLR (AD)-85] as well as the decision of the High Court Davison in the same case as reported in 21 DLR-255. It appears from reading of the said judgments that though the then Section 45A of the Income Tax Act, 1922, imposing additional tax on the existing tax for the delay in payment of tax, has not been challenged in the concerned writ petition, the High Court Division declared the said provision void mainly on the ground that the said imposition of Additional Tax was not in the central list of the Constitution i.e. imposition of such additional charge and tax was not within the scope of legislation by the central Legislature in accordance with the central list as provided in the Third Schedule to the then Pakistan Constitution of 1962. Thus, considering this aspect, our Apex Court, in that case, declared such provision void ab-initio. From the very reading of paragraph 10 of the reported decision of the Appellate Division as well as other relevant paragraphs, it is clear that tax on tax in that case was declared void on different context; namely, that such power was not conferred on the central Legislature by the Constitution itself. However, there is no such aspect in our present Constitution. Therefore, this reported case does not have any manner of application in the facts and circumstances of the present case inasmuch as that our present Constitution has not in any way prevented the Parliament from enacting or imposing surcharge.

45. Regard being had to the above facts and circumstances of the case and the discussions of law made therein, we do not find any merit in the Rules and as such the same should be discharged.

46. In the result, the Rules are discharged without any order as to costs. The respondent-Income Tax Authorities are at liberty to take appropriate legal steps for realization of surcharges in accordance with law.

47. Before parting, we convey our gratitude to both the learned Amici Curiae, who took huge trouble to prepare for these cases and make their valuable submissions.