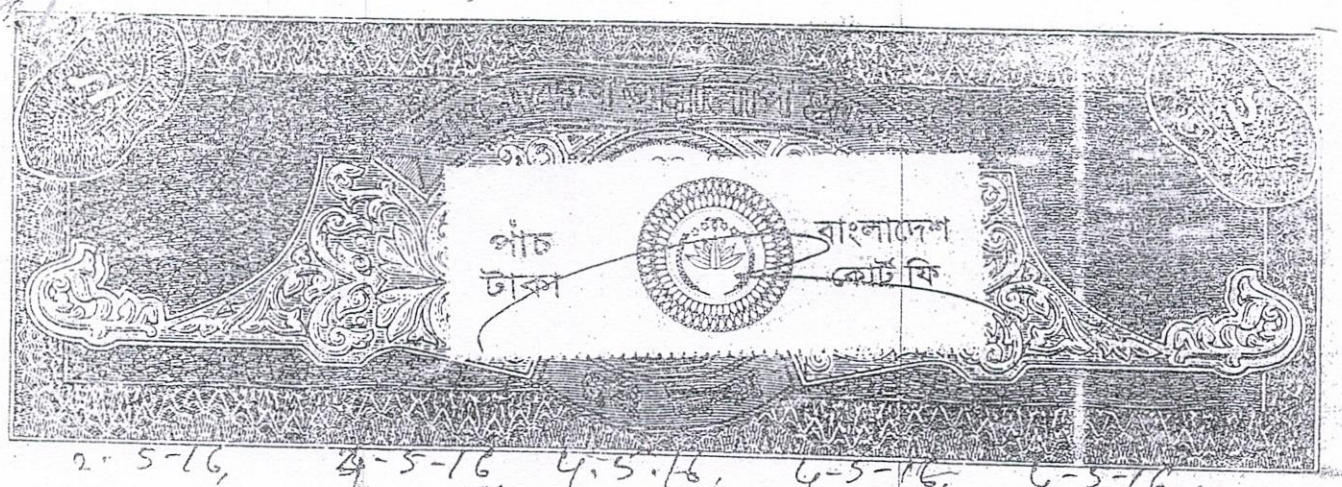


2-5-16, 4-5-16, 4.5.16, 4-5-16, 4-5-16, a

Judgement on AG Audit

Judgement On AG Audit

In the Supreme Court Bangladesh
High Court Division
(Special Original Jurisdiction)

Writ Petition No. 5151 of 2015

In the matter of:

An application under Article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of:

Radiant Pharmaceuticals Ltd.
.....Petitioner.

Vs.

Government of Bangladesh and others.
.....Respondents.

Mr. A. M. Amin Uddin with
Mr. Sagir Hossain, Advocate
.....For the petitioner.

Ms. Salma Rahman, A.A.G
....For the respondent no.2

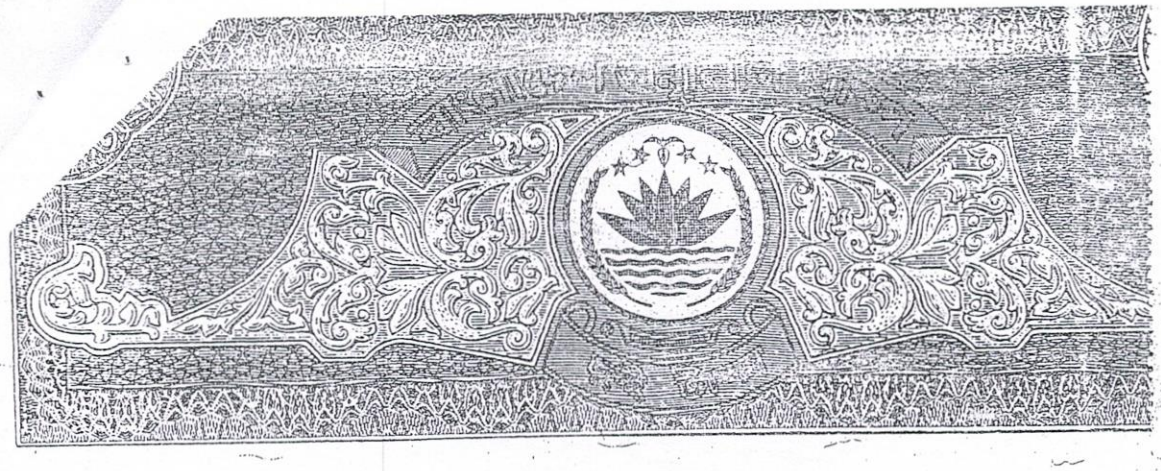
Heard on 09.03.2016 and
judgment on: 10.03.2016.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Abu Taher Md. Saifur Rahman

SHEIKH HASSAN ARIF, J

Rule Nisi was issued calling upon the respondents to show cause as to why the impugned Memo No. Ka.Oa-8/Pa.Re-2/120 Dhara/2014-15/15 dated 08.03.2015 (Annexure-A) issued under the signature of respondent No.3 under Section 120 of the Income Tax Ordinance, 1984 in respect of Assessment Year 2011-2012, pursuant to Memo No. Local and Revenue Audit Directorate Letter No 179/Dal No.-2/Ni. Karmashuchi/Prothom Parbo 2013-2014/05 dated 22.10.2013 issued by the respondent No.6, should not be declared to be without lawful authority and is of no legal effect.

Short facts, relevant for disposal of the Rule, are that; the petitioner, being a private limited Company and engaged in the business of pharmaceuticals,



returned or refunded within a period of 03(three) years, the same should have been treated as taxable income for the assessment year 2011-2012, and, on this account, the revenue suffered a loss of Tk. 1,39,750/-. Pursuant to such notice, the petitioner, vide its letter dated 24.02.2015, sought an adjournment, and, thereafter, vide another letter dated 31.03.2015, sought the copy of the said audit report as referred to in the impugned notice. However, it is stated that, the petitioner did not get any positive response. Being aggrieved by such actions of the respondents, the petitioner moved this Court and obtained the aforesaid Rule. At the time of issuance of the Rule, this Court, vide order dated 26.05.2015, stayed operation of the impugned notice dated 08.03.2015 (Annexure-A) for a period of 3 (three) months, which was subsequently extended time to time.

The Rule is opposed by the concerned Commissioner of Taxes by filing an affidavit-in-opposition.

Mr. A.M. Amin Uddin, learned advocate appearing for the petitioner, submits that, it is evident from record that the concerned Inspecting Additional Commissioner of Taxes acted purportedly under Section 120 of the said Ordinance being instructed/directed/requested by the concerned Local Office of the CAG. Therefore, according to him, since the power vested on the said tax officer under Section 120 of the said Ordinance has not been exercised independently, rather it was exercised being motivated or directed through an instruction from the local office of the CAG, entire exercise of jurisdiction was without lawful authority and of no legal effect. Mr. Amin Uddin further submits that, since the merit and demerit of a particular assessment order can only be determined by the higher income tax officials either under Section 121A or Section 120 of the said Ordinance

and such examination has to be done without being instructed or directed by any other authority on the merit of the case, the impugned proceedings under Section 120 should be declared to be without lawful authority inasmuch as that the said proceedings have been initiated on the basis of some allegations raised by the local office of the CAG as regards the merit of some allowances and expenses which have been allowed and determined by the concerned DCT as an assessing officer on merit of that particular case. This being so, according to him, since the local office of the CAG has acted as a supervisory authority of the concerned tax authority as regards merit of some issues in the assessment order, the same is without lawful authority, and any proceedings initiated on the basis of such judgment of the local office of the CAG on merit of a case cannot stand in the eye of law, the same being contrary to the provisions of Section 120 and 121A of the said Ordinance.

Ms. Salma Rahman, learned Assistant Attorney General, appearing for the department, on the other hand, submits that since the local office of the CAG performed its constitutional function as mandated under Article 128 of the Constitution as well as the relevant provisions of law under Section 163 of the said Ordinance, no illegality has been committed either on the part of the local office of the CAG or on the part of the concerned Inspecting Additional Tax Commissioner. This being so, the revised assessment order to be made pursuant to the said notice being an appealable order, this writ petition is not maintainable.

It appears that the issues involved in this case has already been settled by this Court in various decisions on one aspect in that any authority vested

with specific power to exercise particular discretion under the statute cannot act in a manner dictated by other authority. In this regard, earlier reported and unreported decision of this Court (see **Sekandar Spinning Mills Ltd. Vs. Commissioner, Customs Excise and VAT and others, 63 DLR-272** and unreported decisions in **Mombay Sweets Company Ltd. vs. National Board of Revenue** in Writ Petition No. 9441 of 2007, the decisions in **Otobi Limited vs. NBR** in Writ Petition No.7787 of 2014) have extensively examined the relevant provisions of the Constitution, namely Article 128, and the concerned provisions, namely, the Comptroller and Auditor Generals Additional Function Act, 1974 as well as the scope of exercise of power by the auditor general's office under the said provisions. Not only that, in the said cases, this Court also examined the extent of discretion that can be exercised by an officer under the statute when that officer is vested with the discretion to exercise such power. Therefore, on the aspect whether a statutory functionary vested with particular discretion to exercise under a provision of law can act in a manner dicteted by another authority has been decided by this Court in that such officer may be compelled to exercise such discretion, but cannot be compelled to exercise such discretion in a particular manner or in any particular way. Exactly this has been happened in the said reported cases as well as in the instant case. The reasons for our such conclusion are as follows:-

(a) The impugned notice dated 08.03.2015 starts with a reference of a letter dated 22.10.2013 issued by the local office of CAG;

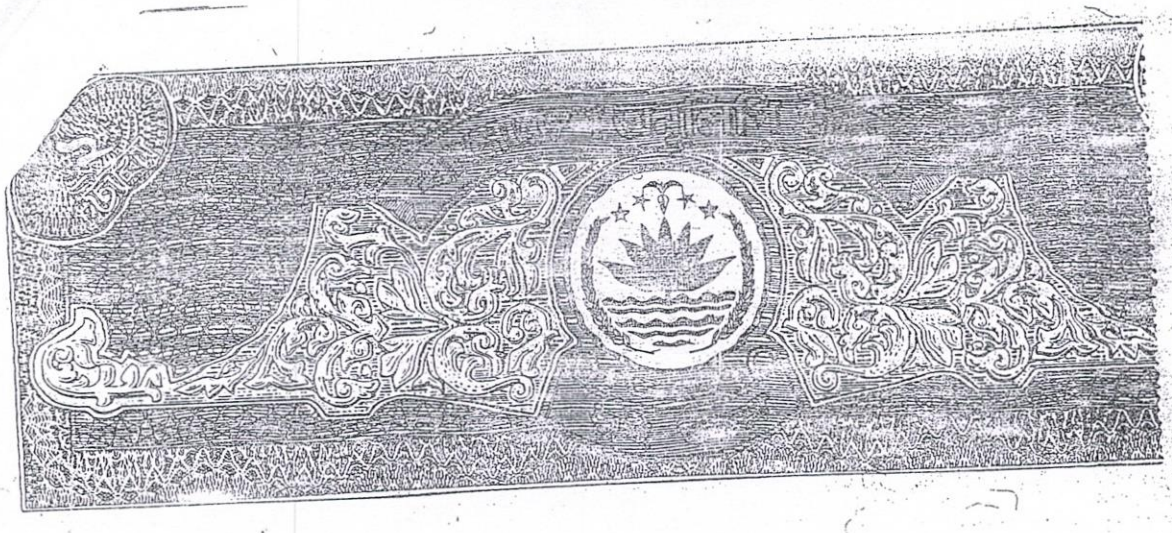
(b) Impugned notice categorically states that the notice has been issued because of such report of the CAG as regards some

specific objection on certain issues which have been allowed or disallowed by the concerned DCT in the assessment order;

(c) Since the auditors have expressed their opinion to exercise discretion under Section 120 of the said Ordinance in a particular manner through the said report, the concerned Inspecting Additional Tax Commissioner was exercising such power in that way;

Therefore, from every angle of this impugned notice, it appears that, the concerned Inspecting Additional Tax Commissioner in fact did not exercise his power in a manner as he thought fit. Rather, he exercised the same in a manner as the local office of the CAG thought fit. Therefore, from that point of view, such exercise of power is without jurisdiction and any proceedings initiated pursuant to such exercise of power cannot stand in the eye of law.

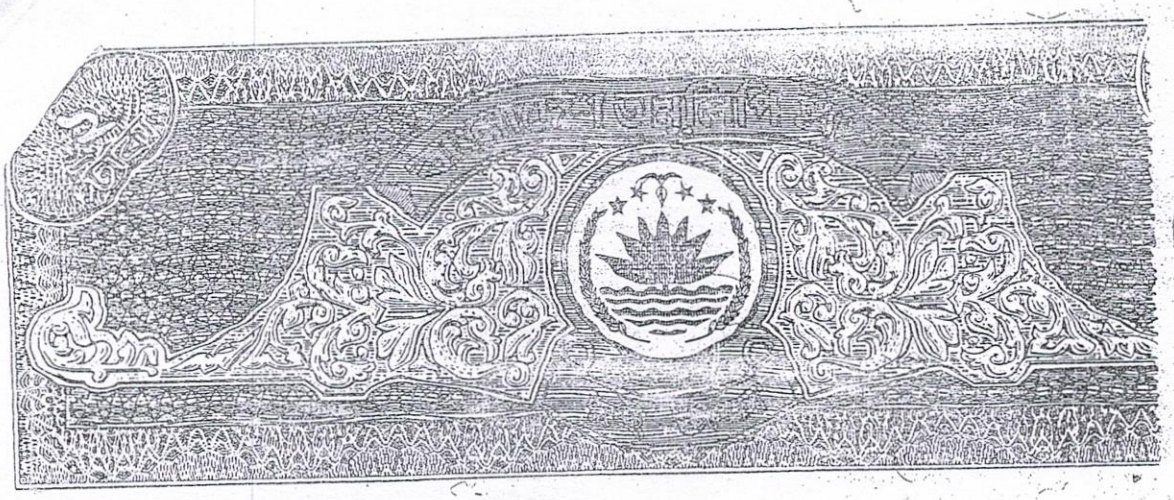
Another aspect, which has been decided by this Bench in a recent case (see **Writ Petition No. 6020 of 2014**), is that whether the CAG or the local office of the CAG can go into the merit of subjective opinion of the assessing officer with regard to some particular issues before him. This Court, in that case, has categorically held that, since the Legislature has empowered some officers of the tax department, namely the Commissioner of Tax, Inspecting Joint Commissioner of Tax or Inspecting Additional Tax Commissioner, either under Section 121A or under Section 120 of the said Ordinance, to check the error, irregularities or anomalies in the orders passed by the concerned DCT based on his subjective conclusions with respect to allowing or disallowing some claims of the concerned assessees,



no other authority has any power to check the merit or demerit of such decision of the DCT.

Though it is the power of the CAG or local office of the CAG to audit on the files in the tax department in order to check the receipts/refunds of public funds in view of Clause (g) of sub-section (3) of Section 163 of the said Ordinance and express its opinion in their reports to be submitted before the President for laying down the same before the Parliament in view of the provisions under Article 128 of the Constitution, it has got no authority to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. If the auditor is allowed to do so, the entire purpose for incorporating the provisions under Section 120 and/or Section 121A of the said Ordinance will be frustrated. Not only that, when a particular job has been assigned by the Parliament to some particular designated officers through an enactment, such jobs cannot be performed by other departments or other bodies, be it statutory or constitutional, unless, such exercise of power is clearly authorized by the act of parliament or the relevant provisions of the Constitution. From this view point, let us examine the opinion expressed by the auditors, which are reproduced in the impugned notice in the following terms;

"(ক) Administrative expenses খাতে ফাইন্যান্সিয়াল এক্সপেন্সেস বা সুদ বাবদ ৫,৭৫,৫৯,২৪৯/- খরচ দাবী করা হয়েছে। ব্যালেন্সশীট পর্যালোচনায় দেখা যায় স্বল্প মেয়াদী ঋণ ৯,৫৯,১৪,৭৩০/- এবং ব্যাংক ঋণ ৩৪,৬৪,০৭,৫৭৫/- সর্বমোট (৯,৫৯,১৪,৭৩০+৩৪,৬৪,০৭,৫৭৫)= ৪৪,২৩,২২,৩০৫/-। নিজ ব্যবসায়িক কাজের জন্য সুদযুক্ত ব্যাংক ঋণ গ্রহণ করে অব্যবসায়িক ভাবে সুদবিহীন ঋণ ও অগ্রিম বাবদ Advance, deposits & Prepayments ৪,৫১,৪৭,৮৩০/- প্রদান। কি উদ্দেশ্যে

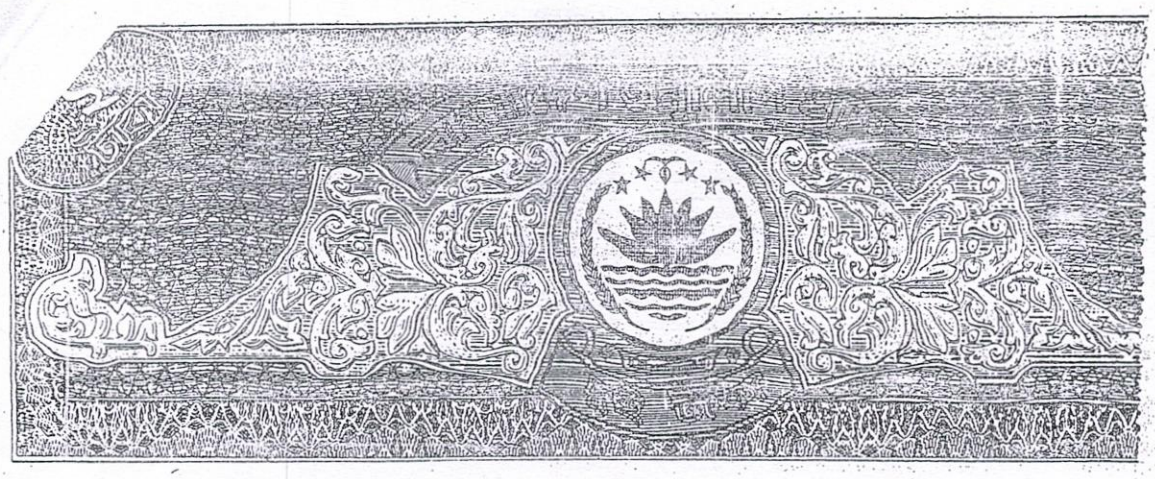


এবং ক্লোন প্রতিষ্ঠানকে অগ্রিম প্রদান করা হয়েছে তাহার কোন সুনির্দিষ্ট প্রমাণ এ্যানুয়াল রিপোর্টে প্রদর্শন করা হয়নি। নিজস্ব ব্যবসায়ের জন্য ব্যবসায়ের জন্য ব্যবহার না করায় আয়কর অধ্যাদেশ ১৯৮৪ এর ধারা ২৯(i)(iii) শর্তানুযায়ী প্রদত্ত ঋণের সুদ খাতের খরচ (৫,৭৫,৫৯,২৪৯÷৪৪,২৩,২২,৩০৫x ৪, ৫১,৪৭,৮৩০)= ৫৮,৭৫,০৭২/- আনুপাতিক হারে আয় হিসাবে যোগ করা যোগ্য।

(খ) Marketing & Promotional expense খাতে ১০,২০,৪৫,২০২/- খরচ দাবী করা হয়েছে। Marketing যাহা, বাজারজাতকরণের সহিত সম্পৃক্ত বিধায় আয়কর অধ্যাদেশ ১৯৮৪ এর ৫৩ই ধারা কমিশন কর্তনযোগ্য ছিল। Promotional expense যাহা, ব্যবসা উন্নয়নের জন্য উপহার সামগ্রী, প্রিন্টিং সামগ্রী, ক্রয় ও সরবরাহ নেওয়া হয়ে থাকে। কাজেই জাতীয় রাজস্ব বোর্ডের সাধারণ আদেশ নং-০৯/মুসক/২০১১ তারিখঃ ১২/১০/২০১১ এবং মূল্য সংযোজন করা আইন, ১৯৯১ সেবা কোড এস -০০৮.১০ এবং সেবা কোড এস-০৩৭.০০ মোতাবেক প্রযোজ্য ক্ষেত্রে উৎসে ভ্যাট কর্তনযোগ্য ছিল। দাবীকৃত খরচ সম্পূর্ণ যাচাইযোগ্য নয় বিধায় ডিসিটি কর্তৃক ১,০০,০০,০০০/- অগ্রাহ্য করে, ফলে (১০,২০,৪৫,২০২-১,০০,০০,০০০)= ৯,২০,৪৫,২০২/- উপর আয়কর অধ্যাদেশ ১৯৮৪ এর ৫২ ও ৫৩ ই উৎসে আয়কর ও ভ্যাট কর্তন করা হয়নি। কাজেই আয়কর অধ্যাদেশ ১৯৮৪ এর ৩০ (এএ) ধারা অনুযায়ী কোম্পানির বিয়োজনযোগ্য হিসাবে ভুক্ত না করে আয়কর নির্ধারণযোগ্য"।

(গ) আলোচ্য করবর্ষের জন্য দাখিলকৃত অডিট Balance Sheet এ প্রদর্শিত Loan from un-secured বাবদ প্রদর্শিত ৩,৭২,৫০,০০০/- যা আয় বছর ২০০৭-২০০৮ এ গ্রহণ করা হয়েছে এবং ২০০৯-২০১০ আয় বছরে তিন বৎসর অতিক্রান্ত হওয়া সত্ত্বেও তা পরিশোধ করা হয় নাই। ফলে উক্ত ঋণ আয়কর অধ্যাদেশ, ১৯৮৪ এর ১৯(১৫)(এএ) বিধান অনুযায়ী পরবর্তী বছর অর্থাৎ ২০১১-২০১২ করবর্ষে অন্যান্য আয় (Non Operating) হিসেবে করারোপযোগ্য। ফলে (Non Operating) এর পরিমাণ ৩,৭২,৫০,০০০/-, যার বিপরীতে রাজস্ব ক্ষতির পরিমাণ ১,৩৯,৬৮,৭৫০/-।

It appears from the above opinion of the auditors of the CAG that they have clearly exceeded their jurisdiction, namely that, they have acted like supervisory officers of the concerned assessing officer. When the



concerned assessing officer allowed some expenses and did not treat some expenses as commissions, the local office of the CAG has expressed the opinion that the DCT should have treated those expenses as commission. On the other hand, when some marketing and promotional expenses were allowed as expenses by the DCT, according to the local office of CAG, the same should have been treated as commission and as such advance income tax should have been deducted therefrom. Thus, upon perusal of such opinion of the local office of the CAG, it appears that, they were in fact not conducting an audit but were performing the functions of either the Commissioner of Tax or Inspecting Joint Commissioner of Taxes which are vested on them respectively under Sections 121A and 120 of the said Ordinance. Under no circumstances, such overlapping of jurisdictions can be allowed by this Court.

Regard being had to the above facts and circumstances of the case, this Court is of the view that, on the above mentioned two aspects, the impugned proceedings as initiated vide impugned notice under Section 120 of the said Ordinance suffer from lack of jurisdiction and as such the same cannot stand in the eye of law. Consequently, any actions pursuant to the said impugned notice can also not stand in the eye of law. Accordingly, we find merit in the Rule and as such the same should be made absolute.

In the result, the Rule is made absolute. Thus, the impugned notice dated 08.03.2016 (Annexure-A) and any proceeding pursuant to the same are declared to be without lawful authority and of no legal effect.

Communicate this.

S.H. Arif.
(Sheikh Hassan Arif, J).

I agree.

S. Rahman.
(Abu Taher Md. Saifur Rahman, J).

Typed by: Mahfuz:03.05.2016.

Read by:

Exam. by:

Readied by:

প্রত্যায়িত অবিকল প্রতিলিপি

মোঃ আব্দুর রশিদ
প্রশাসনিক কর্মকর্তা

মোঃ আব্দুল্লাহ
সুপারিনটেনডেন্ট