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WP 5314/96

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IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6413/97, 2246/98, 6414/97 and 5314/96.

In the matter of:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

- And -

In the matter of:

Bangladesh Rural Advancement Committee (BRAC)

..... Petitioner in all the writ petitions.

- Versus -

The Commissioner of Taxes and others

..... Respondents in all the writ petitions.

Mr. Md. Asaduzzaman with

Mr. Syed Afzal Hasanuddin

..... For the Petitioner in all the writ petitions.

Mr. Md. Mosharraf Hossain Khan, D.A.G.

..... For the respondents in all the writ petitions.

Present:

Mr. Justice Md. Awlad Ali.

And

Mr. Justice Mirza Hussain Haider.

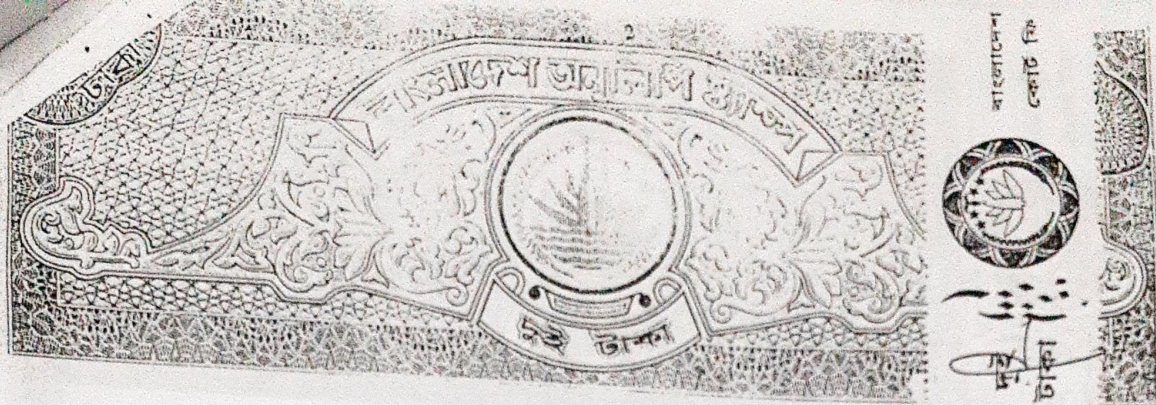
MD. AWLAD ALI, J.

The 5th August, 2003.

Md. Awlad Ali, J.

This four Rules obtained at the instance of the same petitioner, namely, Bangladesh Rural Advancement Committee (BRAC) raise identical question of law having been heard together and are disposed of by this judgment.

The petitioner is a society registered under the Societies Registration Act, 1960 and is a public charitable organization. The petitioner's activities are clearly enumerated



in Clause 3 of the Memorandum of the Society and the petitioner according to the objective clause is engaged in charitable and social welfare activities on non-profit basis. The petitioner for the assessment year 1993-94, 1994-95, 1995-96 and 1996-97 filed income tax return and claimed exemption of taxes in view of the provision as laid down under Paragraph 1(2) of Para A of the 6th Schedule of the Income Tax Ordinance, 1984. The Deputy Commissioner of Taxes rejected the claim of the petitioner and computed the income and imposed taxes by different assessment orders for the respective assessment years. Being aggrieved by the assessment order made by the Deputy Commissioner of Taxes the petitioner preferred four appeals under the provision of section 153 of the Income Tax Ordinance before the Commissioner of Taxes. The petitioner also filed four separate applications before the appellate authority with a prayer for granting waiver as respect 15% deposit of the tax payable according to the proviso to section 153(3) of the Income Tax Ordinance, 1984 stating inter alia, that the Taxes Appellate Tribunal held in Income Tax Appeal No. 551 and 552 of 1994-95 relating to the assessment years 1989-90 and 1990-91 that the petitioner's activities are wholly for charitable purposes and the same is to be treated as order other legal obligation and its income is exempted from tax clearly under paragraph 1 and 2 of Part A of the 6th Schedule. The Commissioner of Taxes (Appeals) despite the aforesaid decision of the Taxes Appellate Tribunal rejected the application for waiver by the respective impugned orders.

Mr. Assaduzzaman, the learned Advocate contends that having regard to the decision made by the Taxes Appellate Tribunal as regards the tax liability of the petitioner in Income Tax Appeal No. 551 and 552 of 1994-95 the Commissioner of Taxes (Appeals) ought to have exercised its statutory discretion in favour of the petitioner and waived requirements of payment of 15% of the amount taxed. Not having exercised the discretionary power as contemplated under the proviso to sub-section (3) of section 153 of the Ordinance the Commissioner of Taxes (Appeals) acted illegally and the impugned order as such cannot be sustained in law.

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No affidavit-in-opposition has been filed by the respondents.

Section 153 provides for appeal against order of Deputy Commissioner of Taxes and Inspecting Joint Commissioner which reads thus:

Any assessee, not being a company, aggrieved by any order of Deputy Commissioner of Taxes in respect of the following may prefer an appeal of the Appellate Joint Commissioner against such order, namely:

- (a) the amount of loss computed under section 37;
- (b) assessment of income, determination of the liability to pay, or computation of tax including advance tax;
- (c) imposition of interest under section 73;
- (d) refusal to register a firm or cancellation of registration under section 84 or 111;
- (e) imposition of penalty under section 124, 125, 126, 127, 128 or 137 and
- (f) refusal to allow a claim to a refund or the determination of the amount of refund admissible under Chapter XVIII.

Sub-section (3) of section 153 is in the following terms :

(3) No appeal under this section against any order of assessment shall lie unless —

- (a) in the case of assessment, except presumption assessment under section 84A, fifteen per cent of the tax payable on the basis of such assessment or the tax payable on the basis of return under section 74, whichever is the higher, has been paid; and
- (b) in the case of presumptive assessment ^{under section 84A twenty} five per cent of the tax payable on the basis of such assessment or the tax payable on the basis of return under section 74, whichever is the higher, has been paid:



Provided that the Commissioner of Taxes concerned may, on an application made in this behalf, modify or waive, in any case, the requirement of such payment under clause (a) or (b).

From the foregoing provision as laid down under the proviso it indicate that the Commissioner of Taxes has been invested with a discretionary power and by exercising that power the Commissioner of Taxes on an application made by the appellant may modify or waive the requirement of payment as contemplated in Clause (a) of subsection (3). In exercising such statutory discretion the Commissioner of Taxes may have to consider the facts and circumstances of the case, the tax liability of the applicant *difficulties inn making such payment of advance tax*. In the instant case the petitioner being the appellant made representation in writing and prayed for waiver of such requirement of payment of 15% of the tax estimated on the ground that the assessee-petitioner is not at all liable to pay any tax according to the decision of the highest authority, namely, the Taxes Appellate Tribunal.

Discretion connotes wise judgment.

Judicial discretion is exercised in view of the facts and circumstances of the case in order to do justice and for the sake of fair play to ease the suffering of the justice seeker and to put him in a comfortable position in respect of his right, unless he is found to be otherwise disentitled by his conduct or any legal restriction. Statutory discretion as provided under the statute must be exercised in the same manner and from the same stand point of view to put the citizen or litigant or the justice seeker in a convenient place and comfortable position as regards his right to seek justice before a statutory forum. The Commissioner of Taxes according to our opinion failed to exercise his statutory discretion and the order passed by the Commissioner of Taxes is not in accordance with the established principle of justice.

In the view the impugned orders are struck down.



In the result, the Rules are made absolute. The Commissioner of Taxes is directed to dispose of the appeal according to law. There will be no order as to cost.

Md. Awlad Ali.

Mirza Hussain Haider, J.

I agree.

M. H. Haider.

Momen/13.10.03

Read by:

Exd. by:

প্রত্যক্ষিত
২২/১০/০৩
গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
(১৮৭২ ধারা ১০৩ এর অধীনস্থ)
সহকারী সচিব (স্বতন্ত্র)

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