

Md Bodruzzaman Munshi  
Deputy Commissioner  
Large Taxpayer Unit, VAT

***How a lawful demand of the VAT Authority becomes void:  
Causes and Solutions***

***Demand VAT/SD and Interest in Section 55:***

In some demand notice it is found that vat authority claims interest in the same demand notice claiming VAT and/or SD which is completely violation of the judgment of honorable High Court Division. VAT/SD has to be demanded in section 55 and then in different notice interest has to be charged under section 37(3) of the Value Added Tax Act 1991. Sometimes it is found that some company pay VAT/SD before demand notice, even then VAT authority should issue show cause notice under section 55(1). Somebody may argue that it is unnecessary however it should be understood that before imposing penalty any demand notice should be finalized which has been decided in many cases by the honorable High Court Division of Bangladesh Supreme Court. In some cases, some company pay demanded VAT/SD merely after primary demand under section 55(1) of the VAT Act, even then VAT Authority must finalize the demand notice under section 55(3) and then and only then vat authority can go for interest or penalty under section 37.

Regarding this there is a decision made by the honorable High Court Division of Bangladesh Supreme Court in the case Abdul Mottaleb and others v Customs Excise and VAT Appellate Tribunal that ..... The Act does not empower any of the authorities created to become Zealot to overpower and/or overawe any tax payer. Invoking and/or resorting to section 37 while issuing a notice under section 55(1) of the VAT Act therefore, could not be said to have been issued bonafide for the simple reason that at the time of issue of the notice, the authority concerned had not yet arrived at as to any evasion of VAT by the petitioner. This principle was also applied in the case of Hotel Zakaria International vs. National Board of Revenue, 30 BLD 388

In the case Mr. Baker Cake and Pastry Shop v Commissioner, Customs, Excise and VAT it was held that the provision of s.37 of the VAT Act is a penal provision, which can be exercised only after determination of the VAT evaded by any person under a given situation. Section 55 of the VAT Act provides for realization of

unpaid or less paid VAT and others to the concern authority to issue notice of show cause notice or make demand as the case may be for unpaid VAT, or less paid VAT would not be deposited and adjusted.

In the case of Alhaj Ahsanullah Khan Moni v NBR (Writ No-5417/2008) the honorable High Court Division held that "..... Section 37 of the VAT Act is absolutely an independent penal provision having no nexus with section 55 of the VAT Act and section 37 is not in any way dependent on section 55 of the VAT Act....."

"..... section 37 and 55 were incorporated in VAT Act by the legislature for two different purposes one not being connected with/dependent on the other in any way. ...."

It is apparent that section 55 is related to collecting less paid or unpaid VAT or Supplementary Duty. On the other hand section 37 is a penal provision; it has two parts. One is S. 37(3) which empowers the VAT Authority to charge interest and second one is S. 37(2) which empowers the VAT Authority to impose penalty when intentional evasion is proved. However, S 37(2 Kha) provided that when a person mistakenly does not pay VAT or pay less VAT then no penalty is imposed but interest must pay.

Intention of parliament for inserting a penal provision i.e. S. 37 is to restrict nonpayment or less payment of VAT or SD. That means interest is charged so that no person keeps himself away from paying VAT or SD in the specified time. Interest is calculated from specific date when the person was under a duty to pay the Revenue to the date immediate before paying unrealized amount.

### **Demand VAT/SD for a time barred period:**

Before the amendment of VAT Act in Finance Act 2010 the vat authority could demand for the period of three years. In Finance Act 2010 this period has been enhanced to five years. Sometimes VAT authority demand for more than three years during the demanded period before 2010 as they think that by Finance Act 2010 the stipulated time has been enhanced from three years to five years. Some may argue that it is stated in the proviso in section 55(1) that in case of vat evasion this time limit of five years is not applicable. They should understood that this proviso has been inserted in VAT Act by the Finance Act 2013. It is well established law that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act.

Prior to the amendment of section 55 of the VAT Act by Finance Act 2010 (33 no Act of 2010), less paid or unpaid VAT could be demanded with a notice in writing within three years of the date on which it was payable.

Effect of repeal and Repeal of Act making textual amendment in Act or Regulation has been stated in section 6 and section 6A of the General Causes Act, 1897.

If we glean section 6 and section 6A of the General Causes Act, 1897 we find that, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act.

In the case China Bangla Ceramic Industries Ltd vs Secretary , Internal Resource Division under Writ Petition no 4177 of 2009 and in case British American Tobacco Bangladesh Ltd vs National Board of Revenue under writ no 2848 of 2015 and 2849 of 2015, the honorable High Court Division gave the same judgment. The Ratio decidendi of the judgment is : *the respondent is directed to calculate the balance amount of VAT excluding time barred period.*

### ***Demand based on unsigned documents:***

If we follow section 101 of the Evidence Act 1872 we find that the burden of proof lies on the claimant. The section 101 states that Whoever desires any Court to give judgment as to any legal right or liability depend on the existence of facts which he asserts, must prove that those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

It was decided by the honorable Appellate Division of Bangladesh Supreme Court in the case **Md. Khairullah Bhuiyan Vs. Haji Nurul Alam Chowdhury** (Civil Appeal No. 18 of 1982) that ***an unsigned document was void.***

In the Supreme Court of Bangladesh (Appellate Division) , in the Civil Appeal No 228 & 11 of 2003 (Appellants: **Meher Banu and others and Haji Abdul Berek & Moslem Bepari Vs.** Respondent: **Abdul Berek and Muslim Bepari and Meher Banu and Others**) , ***the appeal was not granted as it was based on an unsigned judgment of lower court.*** The trial court dismissed the suit and on appeal the suit was sent back on remand for fresh hearing. The defendant as against the order of remand moved the High Court Division in revisional jurisdiction and a Rule was obtained in Civil Revision No. 358 of 1989. The High Court Division after hearing made the Rule absolute and upon setting aside the order of remand directed the appellate court to dispose of the appeal. Thereafter the appellate court set aside

the judgment and decree of the trial court and decreed the plaintiff's suit. The appellant then moved the High Court Division in revisional jurisdiction and obtained a rule as mentioned above. The High Court Division upon hearing the parties passed judgment but later on recalled the unsigned judgment and thereupon keeping the same reserved directed the appellate court to take additional evidence in respect of certain documents of the years 1923, 1924 and 1934 and also directed the appellate court to obtain the report of the Thumb Impression Expert as regards the thumb impressions appearing in the above mentioned documents and to call the relevant officials of the office of the Sub-registrar, Sadar, Dhaka, as court witness. In view of the discussion above, we are of the view that there is no substance in the appeals. Accordingly, the appeals are dismissed without any order as to costs.

The observation made by the High Court Division of Bangladesh Supreme Court in paragraph 41 of the decision reported in 62 DLR (AD) 290 as reproduced below is an obiter dicta : "If any person acts beyond his authority, to the prejudice of any person, such acts cannot be ratified or validated by post facto legislation, his action remains void."

The observation made by the England and Wales Court of Appeal (Civil Division) in **Naidu, R (on the application of) v. Secretary of State for the Home Department** is that *burden of proof lies on claimant in civil standard*.

The decision made by the England and Wales High Court (Administrative Court) in **Veolia ES Landfill Ltd and Anor, R (on the application of) v. HM Revenue and Customs** that The burden of establishing justification is on the Revenue. It is for the Court to decide whether the Revenue has justified its decision, applying the question of whether the decision is unfair. ...."whether the decision is so unfair as to amount to an abuse of power, that requiring conspicuous or substantial unfairness" ..... which are justified by the authorities ..... referred to and which were not in effect disputed.

"It is clear that the Commissioners must treat taxpayers fairly as between each other, and must not discriminate between classes of taxpayers. I accept that the duty identified by Mr Mullan exists, and is an important part of the Commissioners' functions. But that does not mean that every case of inconsistent treatment amounts to an abuse of the Commissioners' powers, far from it. The three domestic cases on which Mr Nawbatt relies are illustrations of inconsistency falling short of abuse. There may be other cases where the nature or scale of the different treatment will be so unfair as to be abusive. The issue for the Commissioners, and for the Court on judicial review of a decision of the Commissioners in a case of this kind, is to establish where that unfairness falls on the scale; specifically, to determine whether it is so conspicuously unfair as to amount to an abuse of the Commissioners' powers."

Paponette v A-G of Trinidad and Tobago [2010] UKPC 32 for the proposition that although the initial burden lies on the applicant to prove the legitimacy of his expectation - that is, to prove the promise, and that it was clear, unambiguous and devoid of relevant qualification (and if he wishes to reinforce his case by saying that he relied on the promise to his detriment, then he must prove that too) .....

In the Court of Appeals for the Second Circuit, in the case **Min Xiu Chen, Petitioner, v. Loretta E. Lynch, United States Attorney General, Respondent** Decided On: 3.09.2016 that unsigned witness is not valid.

### **Demand based on LRAD without examination by VAT Authority:**

According to section 62(ka) of the VAT Act all the following descriptions and information will remain secret, viz: (a) any statement accepted under this Act, return, or information and documents received as per Sub-Section (2) of Section 24 and any documents seized under Section 26 and books and files kept by the registered person as per Section 31 or any commercial documents supplied by him; (b) any testimony or affidavit or statement received under this Act (c) any document relating to realization of demand under this Act. However, according to section 24(Ka) of the Act VAT authority may help by providing information to the authority who enforce Income Tax Ordinance 1984, Gift Tax Act 1963, Value Added Tax Act 1991 and Customs Act 1969. However by violating all those laws and provisions vat authority provides information to LRAD and LRAD without being the competent vat authority arise some disputes. Based on the disputes vat authority sometimes demand directly without further verification which is completely unlawful in the eye of law.

In the case of Sekandar Spinning Mills Ltd vs Commissioner, Customs, Excise and VAT (63 DLR 272, 2011) honorable High Court Division of Bangladesh Supreme Court decided that The law does not provide that the VAT Authority can issue any demand notice on the request of the audit team (Local and Revenue Audit Department) but it is their absolute power in case of any discrepancy found, it may initiate proceeding under section 55 of the VAT act.

In the case of Singer Bangladesh Ltd. and Others v National Board of Revenue a division bench formed by Justice Md. Ashfaqul Islam and Justice Md. Nazrul Islam Talukder announced their unanimous judgment that ..... "The Comptroller and Auditors General relates to audit of the public accounts of the Republic." .....

..... "No provision of the VAT act, 1991 empowers the VAT authority to direct the VAT registered person to deliver any documents or records directly to any

third party authority , i.e. Local Audit Directorate. Neither a notice can be issued either directing deposite of revenue or under section 55(1) of VAT act on that count. ....

....."It must not do what it has been forbidden to do, nor must it do what it has not been authorized to do." .....

....."Local Audit Directorate can authocitatively look into the papers and documents of the NBR and do the needful to ascertain whether the thinks are in the right direction or not. Deviation of any kind if could be ascertained by the audit department in the process, the statutory public body ( like NBR) would certainly account for that." .....

....."The law does not provide that the VAT authority can issue any demand notice on the request of the audit team (Local Audit Department) but it is the absolute power of the VAT authority in case of any discrepancy found, it may initiate proceeding under section 55 of the VAT Act. The VAT authority must not act under the direction of another authority. The VAT authority cannot issue any notice of a kind making a demand on behalf or at the behest of the Local Audit Department. The notice shall have to be issued independently following the provisions laid down in the VAT Act, 1991.".....

..... "In all the cases where there is a direct demand for depositing the amount or asking for documents or even merely a notice served under section 55(1) of the VAT Act if found to be tainted being done under express direction of Local Audit Directorate, or so to say issued under the flagrant direction of Local Audit Directorate, cannot legally sustain having curtailing effect on the provisions of the Constitution and the VAT Act of 1991." .....

....." Failure shall result in a dire consequence."

Honorable Appellate Division announced the judgment regarding the audit of LRAD on 12 March 2017 in writ no 3397/2015 and 3399/2015 that "..... However, we modify the operation part of the judgment of the High Court Division to the extent that if the audit department finds irregularities in the assessment of VAT and other duties, it shall ask the Board of Revenue to supply the relevant documents of the VAT payers and the Board of Revenue shall hand over the documents to the audit department. The assesses are not under obligation to furnish or submit documents directly to the Comptroller and Auditor General. The documents shall be furnished through the Board of Revenue. The accounts department cannot ask any business organizations or persons to submit documents for the purpose of accounting for ascertaining as to whether they paid VAT in accordance with law....."

The Ratio decidendi in the case of Faridul Alam & Ors. v Bangladesh & Ors. 30 BLD (HCD) 2010, 500 is "Nobody including the government can violate the law."

In the case of Anti-Corruption vs Barrister Nazmul Huda 60 DLR (AD) 57 Appellate Division observed that in terms of Article 111 of our Constitution the law declared by the Appellate Division is not only binding upon all the courts including High Court Division but also binding upon the whole nation.

According to article 111 of the constitution of the Peoples' Republic of Bangladesh , the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

### **Imposition of Penalty without proving evasion:**

the decision made by the honorable High Court Division of Bangladesh Supreme Court in RAK Ceramics (Bangladesh) private Ltd v Bangladesh, represented by Secretary, Ministry of Internal Resources Division & others (59 DLR 274) that ".....In the absence of clear finding on commission of any offence under the VAT Act, no one could be punished by way of imposing fine.

In writ petition no 9818 of 2013 (Grameen Phone Ltd v Commissioner LTU VAT), The petitioner company duly paid the demanded amount of VAT within the specified period of time given by the VAT authority. Even then the VAT authority imposed penalty under section 37(2) of the VAT act. The honorable High Court unanimously held that :

".....this type of superficial and trivial findings are not sufficient to impose penalty upon a party under section 37(2). The Respondent in his order could not assert as to why the petitioner did not pay the VAT in time. The findings of the respondent ..... should have been accurate and exhaustive with reference to the description of the offence as contemplated in clauses (ka) to (tha) under sub section (2) of section 37 of the VAT Act. But we find it difficult to harmonize the said findings of the respondent with any provision of sub-section (2) of section 37 of the VAT Act....."

Every order of the Government authority and office must be logical, rational, transparent and legal setting forth the reason for the same particularly if the subject matter of the order is the outcome of any the adjudication it must contain and disclose the offence allegedly committed by the incumbent, but we find the serious lacking of the same in the impugned order..... Thus, we find that the impugned order was passed not in accordance with the law."

In writ petition no 9818 of 2013 (General Pharmaceuticals v LTU,VAT) the honorable High Court Division held that ".....From the above provisions of sub-section (2Kha) of section 37 of the VAT Act it appears that non payment of VAT is

not always an offence. The Respondents without considering such provision of law illegally imposed the penalty.

Every order of the government authority and office must be logical, rational, transparent and legal setting forth the reasons for the same particularly if the subject matter of the order is the outcome of any adjudication by the incumbent.....Thus we find that the impugned order was passed no in accordance with the law....."

### **Imposition of Penalty in case of illegal Rebate:**

In the case of T.K. Chemical Complex Limited v NBR and Others (Writ no 301 of 2011) the honorable High Court Division held that " .....where a rebate has been taken in violation of section 9(1) of the said Act.....steps should be taken against the petitioner under section 9(2), 9(2Ka) and 2Kha. That being the position we are of the view that the Respondent no.2 the Commissioner of Customs Excise and VAT Commissionerate, Chittagong misdirected itself by exceeding his limit in issuing the notice under section 37(2) of the VAT Act upon the petitioner. Thus the Rule succeed."

### **Not providing appeal time:**

Customs and VAT authority is a quasi judiciary department, so every order of the customs and vat authority is appealable. According to Code of Civil Procedure 1908 as well as to VAT Act 1991 appeal time is ninety days. Sometimes vat authority apply rules 43 and section 56 for freezing bank account or other actions without giving the appeal time which is completely violation of statutory right and should be no legal effect in the eye of the law.

### **Taking legal Actions illegally even after appeal accepted:**

Honorable High Court Division of Bangladesh Supreme Court in the case PHP Industries v Customs, Excise and VAT (65 DLR 478) held that "In as much as the appeal is admitted, the impugned order is automatically stayed" .... "Upon a perusal of the above decisions of this Court, it is now held that when the appeal was registered and admitted for hearing, the order in question which is impugned in the appeal has been automatically stayed.....".