

4 SCOB [2015] HCD 80

**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 5093 of 2014

BSRM Steels Ltd.

..... Petitioner.

-Versus-

National Board of Revenue and others
..... Respondents.

Mr. Mosharaf Hossain, Advocate
..For the petitioner in both writ petitions.

WRIT PETITION NO. 5094 of 2014

BSRM Iron and Steels Co. Ltd.

..... Petitioner.

Ms. Shuchira Hossain with
Ms. Nurun Nahar, A.A.G
.....For the Government in both writ
petitions.

-Versus-

National Board of Revenue and others
..... Respondents.

Heard on: 03.09.2015 and 09.09.2015.
Judgment on: 17.09.2015.

Present

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice J. N. Deb Choudhury

Income Tax Ordinance, 1984

Section 53 and 82C:

According to sub-section (3) of the said Section 53, the importers are given credit for such advance payment of income tax during their assessment of tax in the concerned assessment year. Not only that, according to Section 82C as quoted above, such deduction shall even be deemed to be the final discharge of tax liability of an assessee-importer from that source. Therefore, since the source in the present case in respect of the petitioners is the source of importation of scrap vessels by the ship breaking industries, or sometimes by the petitioners themselves, and there is no dispute that at the time of importation of the scrap vessels AIT were deducted in view of the provisions under Section 53, the said deduction of tax shall be deemed to be the final discharge of liability from that source in view of Clause (g) sub-section (2) of Section 82C of the said Ordinance.(Para 9)

Judgment

SHEIKH HASSAN ARIF, J:

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

2. Rules in the aforesaid writ petitions were issued in similar terms, namely calling upon the respondents to show cause as to why the Circular being No. 08.010000.031.03.004.2013/109 dated 07/11/2013 (Nothi No.08.010000. 031.03.004.2013/109 dated 07.11.2013) issued by the National Board of Revenue (NBR) under the signature of its 1st Secretary (Annexure-A) and Circular being No. 22 dated 19.12.2013 (BRPD Circular No. 22 dated 19.12.2013) issued by the Bangladesh Bank, in so far as they relate to the deduction/collection of advance income tax (AIT) by the respondent banks from the transaction of pay orders/account payee cheques issued by the petitioner Company in favour of the scrap-iron sellers as against direct purchase of scrap iron (raw materials) from the local Market, should not be declared to be without lawful authority and are of no legal effect and as to why the respondents should not be directed not to deduct or collect advance income tax (AIT) from the transaction of pay orders/account payee cheques given by the petitioner Company against such direct purchases of scrap iron (raw materials).

3. Short facts, relevant for disposal of the Rules, are that the petitioner-companies, being engaged in business of manufacturing steel products, namely rod, angel, bar, panel and steel plates etc., purchase iron scraps, to be used as raw materials for the production of said goods, directly from ship breakers or scrap importers in the country. In such purchases, they make payments of price by way of pay orders or account payee cheques drawn on their bankers. Since the petitioners are listed companies in the stock exchange, other modes of payment are not allowed. It is further stated that, in view of the relevant provisions of law, namely section 53 of the Income Tax Ordinance, 1984 read with Rule 17A of the Income Tax Rules, 1984, the importers of scrap vessels pay advance income tax during import of the vessels. According to the petitioners, there are two types of scrap vessel importers in this country, namely the Steel Re-Rolling Mills like the petitioners and the Ship Breaking Industries, and both classes of importers pay advance income tax at the time of import of the scrap vessels in view of the above provisions in addition to other applicable duties and charges. That being the admitted position, according to the petitioners, such payment of advance income tax on the said scrap vessels at the time of importation of the same are deemed to be final discharge of tax liability in view of the provisions under Section 82C(2)(g) of the said Ordinance and as such whoever purchases the scraps from the said importers or from the ship breakers after dismantling of the said scrap vessels, he is not required to deduct AIT from the payments in view of the provisions under Section 53 of the said Ordinance. However, according to the petitioners, out of a sheer misconception of law, the NBR has issued the impugned circular dated 07.11.2013 asking the concerned banks, through which the payments are made by the petitioners, to deduct AIT in view of the provisions under Section 52 of the said Ordinance read with Rule 16 of the Income Tax Rules, 1984. That circular was followed by the impugned BRPD circular dated 19.12.2013 issued by the Bangladesh Bank directing the concerned banks in Bangladesh to comply with the impugned circular issued by the NBR. It is further stated that, because of the aforesaid circulars asking the concerned banks to deduct AIT from payments of invoice finance and supplier finance, the payments usually made by the petitioners through cheques and/or pay orders as against direct purchases of scraps from the ship breaking industries and other importers have become subjected to such deduction thereby discouraging the concerned sellers of the scraps not to sell any scraps to the petitioners. Under such predicament, the petitioners moved this Court and obtained the aforesaid Rules. Thereafter, upon applications by the petitioners for injunction, this Court, vide orders both dated 04.09.2014, restrained the respondents from deducting/collecting any AIT from the pay orders and account payee cheques issued by the petitioners as against direct purchases of scrap irons from the ship breakers as well as from the importers of scrap vessels.

4. Rules are opposed by the respondent no. 3 (Commissioner of Taxes, Chittagong) by filing affidavits-in-opposition contending, inter alia, that the NBR rightly issued the impugned circular under which the concerned banks are obliged to deduct AIT from the petitioners pay orders and cheques issued in favour of the sellers of the scraps. Therefore, according to the respondent, the Rules should be discharged.

5. Mr. Mosharaf Hossain, learned advocate appearing for the petitioners in both the writ petitions, at the very outset, reading out the relevant provisions of law, namely Sections 52, 53, 82C(2) (g) of the Income Tax Ordinance, 1984 and Rule 16 and 17A of the Income Tax Rules, 1984, submits that since, in view of the provisions under Section 53(2) read with Rule 17A of the Income Tax Rules, 1984, the ship breaking industries and other importers, while importing scrap vessels, are bound to pay advance income tax which are deducted at a prescribed rate at the time of import, the said importers of vessels are not liable to pay further advance income taxes in so far as the scraps as derived from the said scrap-vessels are concerned. Drawing this Court's attention to Clause (g) of sub-section (2) of Section 82C, learned advocate submits that, according to this provision, the advance income tax deducted from the said imported scrap vessels at the time of import has to be deemed to be final discharge of tax liability in so far as the payment of AIT in respect of said scrap vessels are concerned. Therefore, he continues, neither the NBR nor the Bangladesh Bank can direct the concerned banks to deduct further AIT from the payments made in the direct purchases of scraps through pay orders and account payee cheques in favour of the said importers or ship breakers. Mr. Hossain further argues that in view of the specific provisions under Section 52 of the Income Tax Ordinance, 1984, it is the person responsible for making payment is required to deduct AIT from such payments. However, according to him, since the banks are just custodian of money of the depositors and make payment upon specific direction given by its depositors/clients like the petitioners, under no circumstances a particular bank can be directed by the NBR to deduct AIT inasmuch as that the banks cannot be regarded as the 'person responsible' for making such payment. Therefore, according to him, even if such direction is given by the NBR, a bank in Bangladesh is not bound to comply with such direction. However, in the instant case, he submits, since the Bangladesh Bank has directed the concerned banks to comply with the said directions given by the NBR through the impugned circular, the banks are now bound to follow such direction.

6. Learned Assistant Attorney General, as against the above submissions, submits that since the NBR is authorized to issue such circular for ensuring correct deduction of AIT for the sake of the interest of the national exchequer, this Court has got nothing to interfere in the same.

7. For better understanding of the issues involved in the aforesaid writ petitions, Sections 52, 53 and relevant parts of Section 82C are quoted below:

“ 52. Deduction from payment to contractors, etc.-(1) Where any payment is to be made, whether in full or in part, or by way of advance, on account of indenting commission or shipping agency commission or supply of goods or [execution of contract or sub-contract] to any such person or class of persons as may be prescribed, the person responsible for making the payment shall, at the time of making such payment deduct tax on the amount so payable at such rate as may be prescribed.

(2) Any amount deducted under sub-section (1) shall be deemed to be an advance payment of tax by the payee and shall be given credit for in the assessment of his tax”.

“53. Collection of tax from importers.- (1) The [Commissioner of Customs] shall make collection of tax payable by the importers on account of import of goods.

(2) The Board shall, for the purpose of collection of tax under sub-section (1)-

(a) specify the importers from whom collections are to be made : and

(b) prescribe the method and rate of calculation of the amount to be collected and the manner of collection.

(3) Any amount collected under sub-section (1) shall be deemed to be an advance payment of tax by the importer concerned, and shall be given credit for, in the assessment of his tax”.

“82C. Tax on income of certain persons.-(1) subject to sub-section (3), (4), (5), (6), (7), (8) and (9), notwithstanding anything contained in any other provisions of this Ordinance, tax deducted or collected at source in accordance with the provisions mentioned in sub-section (2) shall be deemed to be the final discharge of tax liability from that source.

(2) The provisions referred to in sub-section (1) shall be the following, namely-

(a).....

(b).....

(c).....

(d).....

(e).....

(f).....

(g) the amount as computed for the purpose of collection of tax under section 53 in respect of goods imported, not being goods imported by an industrial undertaking as raw materials for its own consumption;

(h).....

(i).....

(j).....

(k).....

(l).....

(m).....

(n).....

(o).....

(p).....

(q).....

(r).....

(s).....

(t)..... ”

8. It appears that one entire chapter in the Income Tax Ordinance, namely Chapter-VIII, is dedicated to the provisions involving payment of tax before assessment, or deduction of tax at source, which is normally called advance income tax (AIT). This AIT, or taxes at source, are deducted even before assessment and the such deduction at source from the income of an assessee in the income year is given credit at the time of assessment in the corresponding

assessment year. The provisions under the said Chapter have made it mandatory for the persons specified therein to make such deductions at source with specific harsh consequences for their failure of such deductions. One such obligation of deduction is imposed by the above quoted Section 52 of the said Ordinance on the persons responsible for making payment to contractors or suppliers etc. from such payment at rates prescribed by the said Ordinance or Rules made thereunder. According to Section 52, it is the person responsible for making such payment who is required to deduct AIT at certain rates at the time of making payment.

9. The next quoted provision, namely Section 53, has made specific provision for deduction of AIT by the concerned Commissioners of Customs at the time of importation of goods. Therefore, by virtue of the provision of Section 53, the Commissioner concerned is required to deduct AIT from the importers in respect of goods imported by them at the time of assessment of duties on the bill of entries and it is the NBR, under sub-section (2), who is to determine or specify the specific type of importers who are to be subjected to such deduction of AIT in respect of goods to be imported by them. According to sub-section (3) of the said Section 53, the importers are given credit for such advance payment of income tax during their assessment of tax in the concerned assessment year. Not only that, according to Section 82 C as quoted above, such deduction shall even be deemed to be the final discharge of tax liability of an assessee-importer from that source. Therefore, since the source in the present case in respect of the petitioners is the source of importation of scrap vessels by the ship breaking industries, or sometimes by the petitioners themselves, and there is no dispute that at the time of importation of the scrap vessels AIT were deducted in view of the provisions under Section 53, the said deduction of tax shall be deemed to be the final discharge of liability from that source in view of Clause (g) sub-section (2) of Section 82C of the said Ordinance.

10. Now, when the NBR is directing a particular bank to deduct AIT from the payment made by the purchasers like petitioners, it is in fact directing to deduct AIT from the income of the said importers or ship breaking industries who had already been subjected to AIT at the time of importation of the said vessels. The scheme of law in this regard is that when a 'person responsible to make payment' is required to deduct AIT in view of the provisions under Section 52, he is in fact deducting AIT on behalf of the sellers, and that AIT, as deducted by the said persons, are to be deposited in the national exchequer. Therefore, it is evident from the aforesaid provisions as well as facts and circumstances of the cases that if the impugned circular is implemented in respect of the petitioners in case of their direct purchases from the ship breaking industries or any other importers of scrap vessels, the 'person responsible for making payment' like the petitioners is subjecting the said importers to double taxation in so far as the AIT is concerned, which is not permitted by law. In this regard, though the impugned circular does not specifically mention anything for deduction in respect of petitioners' aforesaid payments, the words mentioned therein, namely 'invoice financing' or 'supplier financing' are admittedly attracting the petitioners such purchases, and that is the reason why the petitioners are aggrieved. On the other hand, by filing a supplementary-affidavit to the writ petition today, the petitioners have referred to some specific letters issued by their bankers (Annexures-B & B1) where in the bankers have stated that they are bound to deduct AIT from such payments.

11. However, we are of the view that, the applicable laws, namely Section 52, Section 53 and Section 82C of the Income Tax Ordinance, do not permit the NBR to compel the bankers of the petitioner's or even the petitioners to deduct AIT from such payments made by way of

