

LEX/BDAD/0230/2012

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IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Civil Appeal Nos. 38-39 of 2007

Decided On: 01.08.2012

National Board of Revenue **Vs.** Abu Saeed Khan and Ors.

Hon'ble Judges/Coram:

Md. Muzammel Hossain, C.J., Surendra Kumar Sinha, Md. Abdul Wahhab Miah, Nazmun Ara Sultana, Syed Mahmud Hossain, Muhammad Imman Ali and Md. Shamsul Huda, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mahbubey Alam, Attorney-General, Murad Reza, Additional Attorney-General, A.S.M. Moniruzzaman, Deputy Attorney-General, Sk. Shaifuzzaman, Assistant Attorney-General instructed by Madhu Maloti Chowdhury Barua Advocate-on-Record

For Respondents/Defendant: Asaduzzaman, Advocate instructed by Syed Mahbububur Rahman, Advocate-on-Record

JUDGMENT

Surendra Kumar Sinha, J.

1. In these appeals we are primarily concerned with the powers of the National Board of Revenue, (NBR) to determine the tariff value on new Subscriber's Identity Module (SIM) Card/Removable User Identification Module (RUIM) Card in exercise of powers under sub-section (7) of Section 5 of the মূল্য সংযোজন আইন, ১৯৯১ (Act of 1991). Short facts relevant for the disposal of this question are that one Abu Sayed Khan, the respondent No. 1, instituted a writ petition in the High Court Division challenging the order under memo dated 9th June, 2005 (annexure-B) issued by the appellant, the NBR, fixing tariff value on programmed SIM/RUIM Cards. According to the writ petitioner, the NBR imposed tax of Taka 1,200 on every new SIM/RUIM card in exercise of the powers under VAT Act; the tariff value of a SIM/RUIM Card was fixed at Taka 2,172 by notification dated 9th June, 2005 and the said amount was subsequently reduced to Taka 1,628.96 on 30th June, 2005. The said tariff value has been fixed for the programmed SIM/RUIM Card treating the same as a service. By SRO No. 159 dated 9th June, 2005 the previous SRO No. 170 dated 8th June, 2000 was amended. Those cards have been included as taxable items for the purpose of imposition of supplementary duty by the Finance Bill, 2005 with effect from 9th 2005 and the tariff value was fixed in order to ensure the collection of tax of Taka 1,200. Subsequently the tax was reduced to Taka 900 against sale of each SIM/RUIM Card which has not been fixed either on the basis of market price or for public interest. The actual average price of a SIM/RUIM Card in the international market is much lower than the tariff value fixed for those cards. The new mobile connections were made at the rate of Taka 2172 which rate was refixed at Taka 1628.96 was based on the calculation of 35% supplementary duty and 15% VAT proportionately of Taka 1,200 in order to realize the targeted amount of "tax and duty" disregarding the actual value of SIM/RUIM Cards. The guidelines for fixing tariff value is provided in section 5 of Act, 1991 and in total disregard of the said provision the tariff value, was fixed by

the impugned order and this arbitrary fixation of tariff value is without any lawful authority.

2. The appellants contested the petition asserting that the supply of a programmed SIM/RUIM Card is a service as contemplated by Act, 1991. The tariff value has been fixed in accordance with law and the guidelines provided therefor. The SIM/RUIM Cards imported into Bangladesh are of no use until and unless they are programmed by the respective mobile phone operators. The writ petitioner had no locus standi to file the writ petition, inasmuch as, he was not an aggrieved person contemplated by law and the impugned order dated 9th June, 2005 having been modified by order dated 30th June, 2005 during the pendency of the rule, the writ petition had become infructuous. It is further stated that the price of a SIM/RUIM Card has no nexus or relationship whatsoever with the fixation of price for the services provided through a SIM/RUIM Card by the mobile phone operators and that the NBR in exercise of powers conferred under section 5(7) of Act, 1991 fixed the tariff value in relation to the sale of a SIM/RUIM card and it is not under any obligation to show that the value has been fixed arbitrarily. The mobile phone users were required to pay Taka 1,500 as duty in order to procure cell phones and also had to pay separately to purchase SIM/RUIM Cards for enjoying various service; from the mobile phone operators. The said duty of Taka 1,500 has been reduced to Taka 300 "levying and Collecting", Taka 900 as tax while selling SIM/RUIM Cards and Taka 300 as import duty on each mobile set as levy of VAT at the rate of 15% and supplementary duty at the rate of 35% on Taka 900 for fixation and realization of tariff value in order to provide services by the SIM/RUIM Cards suppliers. No supplementary duty has been imposed of such services rendered through SIM/RUIM Cards by the mobile phone operators.

3. Before I proceed to decide the question involved in the appeals, I would like to dispose of one preliminary point raised on behalf of the appellants about the maintainability of the writ petition and the locus-standi of the writ petitioner to challenge the impugned order. This point was raised in the High Court Division. The High Court Division without disposing of the said preliminary point at the initial stage decided the matter on merit and then entitled to procure a mobile phone connection but because of the fixed excessive tariff value he could not procure such mobile phone for himself and for his other family members. We are of the view that the petitioner "is an aggrieved person and hence he has locus-standi to move the writ petition and the writ petition is maintainable".

4. It appears that the High Court Division had made out a third case while expressing its opinion about the maintainability of the writ petition in failing to notice that the writ petitioner stated on the point of the locus standi to maintain the petition that he being "a freelance journalist used to report and write articles on telecommunications activities, operations, events and business and issues affecting the quality, standard and prospects of telecommunications services in Bangladesh, are frequently published in National Daily Newspapers with wide circulation in Bangladesh. The petitioner is also engaged from time to time as consultant communications in matters. The petitioner is a strong advocate of affordable, efficient and effective telecommunications services for the citizens of Bangladesh. The petitioner on reading various news items and communications was alerted, concerned and aggrieved by the arbitrary fixation of tariff value and imposition of supplementary duty on the said arbitrary tariff value at the SIM Cards and/or mobile telephone connection and the consequence of increased tariff value of a mobile telephone connection".

5. So apparently the writ petitioner was not concerned about the fixation of tariff value

for procuring mobile phone for himself or his family members, rather he was concerned with the increase of the charge of mobile phone connections which would go beyond the affordable capacity of the citizens of the country because if the fixation of the tariff value is increased, the supplementary duty on mobile phone connections would also increase. In its concise statement the NBR had asserted that the writ petitioner had failed to produce any documentary evidence to show that he was personally aggrieved by the issuance of the impugned order and that he did not allege any public wrong affecting an indeterminate number of persons nor a grave violation of the Constitution which shocks the judicial conscience.

6. Both the Learned Attorney-General and Mr. Murad Reza questioned the bonafide of the writ petitioner to challenge the impugned order. According to them, the writ petitioner was none but an interloper who was set up by the mobile phone operators for evading taxes and duties which are being paid by them from before the filing of the writ petition. Mr. Mahmudul Islam, Dr M Zahir and Mr. Rokunuddin Mahmud appearing for the mobile phone operators, who were added as writ respondents at their instance, argued the appeals supporting the judgment of the High Court Division and Mr. Asaduzzaman appearing for the writ petitioner adopted their submissions. On our query as the locus-standi to defend the impugned judgment despite the fact that they did not challenge the impugned order determining the tariff value, particularly when they had been paying duty and taxes on the basis of the fixation of tariff value on SIM/RUIM cards, learned counsel argued that these respondents had supported the writ petitioner in the High Court Division and that since they have filed concise statements, they are legally entitled to support the impugned judgment. This seems to us that the writ petitioner has been picked up by the mobile phone operators who has moved the writ petition not for the causes of disadvantaged citizens of the country on the apprehension that if the tariff value is increased the mobile phone connections would go beyond their affordable capacity but for the interest of the mobile phone operators.

7. While arguing about the maintainability of a writ petition in the nature of Public Interest Litigation (PIL) ATM Afzal, J in *Dr Mohiuddin Farooque v. Bangladesh*, 49 DLR (AD) 1 observed:

"A person pleading sufficient interest may be able to cross, what is called the threshold stage on the averments made in the writ petition but it will always remain open for a prospective respondent to contest the said claim on facts and also to assail the bonafides on even the appropriateness in a particular case of the petitioner for seeking a relief invoking the constitutional jurisdiction of the High Court Division under Article 102 of the Constitution. For example, standing was denied to the Bangladesh Sangbad Patra Parishad to represent its opulent members, namely, the newspaper owners who were directly affected by the Wage Board Award but even then none of them moved personally, but the consideration would have been different if any organization representing a weaker section of the society had come to complain about a breach of any fundamental right of its members or any public wrong done to the members generally in breach of any provision of the Constitution or law. The Court will have to decide in each case, particularly when objection is taken, not only the extent of sufficiency of interest but also the fitness of the person for invoking the discretionary jurisdiction under Article 102 of the- Constitution. Ordinarily, it is the affected party which is to come to the Court for remedy. The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it

may refuse to entertain the application".

8. BB Roy Chowdhury J added "In such harrowing conditions of our people in general if socially conscious and public-spirited persons are not allowed to approach the court on behalf of the public or section thereof for the enforcement of their rights the very scheme of the Constitution will be frustrated. The inescapable conclusion, therefore, is that the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations. It does not, however, extend to a person who is an interloper and interferes with things which do not concern him. This approach is in keeping with the constitutional principles that are being evolved in the recent times in different countries".

9. This Division in a later case in Ms Syeda Rizwana Hasan, Civil Appeal No. 200 of 2004 after reviewing the views taken in Dr Mohiuddin Farooque v. Bangladesh, 49 DLR (AD) 1, BRAC v. Professor Mozaffar Ahmed, 54 DLR (AD) 36, BALCO Employees Union (Regd) v. Union of India, 2001 AIR SCW 5135, SP Gupta v. Union of India, 1981 (Supp) SCC 87, Janata Dal v. HS Chowdhury, (1991) 4 SCC 305, opined that the filing of PIL petition is essentially meant to protect basic human rights of the disadvantaged citizens and the High Court Division should guard that the filing of such petition does not convert into a "publicity interest litigation" or "private interest litigation", it was further argued that in type petition a jurisprudence has been innovated where a public spirited person or organization invokes the jurisdiction of the court, on behalf of such persons, who by reason of poverty, lack of education, helplessness, social disabilities or economic paucity cannot seek legal redress for the violation of their rights, fundamental or legal in the court of law. There is, thus, need to reemphasize the parameters within which the High Court Division should extend its jurisdiction. The High Court Division should guard to see that its processes are not abused by any person or lawyer and exercises its jurisdiction sparingly. It was further argued "the underprivileged or poor who are unable to come to the court due to illiteracy or monetary helplessness, a petition on their behalf will be welcomed". The litigation must be initiated for the benefit of the poor or for any number of people who have been suffering the common injury but their grievances cannot be redressed as they are not able to reach the court. Every wrong or curiosity is not and cannot be subject matter of PIL. In the name of public interest frivolous applications should be avoided.

10. Now-a-days, it is noticeable that a group of lawyers have developed a tendency of filing PIL petitions on behalf of persons or organisations challenging the propriety of the Government in taking decision relating to policy matter, its development works, Orders of promotion and transfer of public servants, imposition of taxes and fixation of tariff value by the authority for achieving dubious goal for generating publicity for themselves or to create public sensation. The High Court Division has been taking cognizance of those petitions without looking at whether or not such petitions are at all maintainable in the light of the principles settled by this Division in Mohiuddin Farooque, Professor Mozaffar Ahmed, and Ms Syeda Rizwana Hasan. It is also noticeable that after seeking an order from the High Court Division by filing a PIL, the lawyers are appearing before the electronic and print medias propagating that the Court has made such and such directions, which suggest that those petitions had not been made for the cause of the needy or underprivileged or less fortunate people, who could not seek redress for a wrong done by the Government or a local authority, rather it were moved for achieving dubious goal for generating personal publicity.

11. Once again, we would like to make it clear that a person or organization who has personal interest or directly affected by reason of the wrong done by the Government is not entitled to move such petition. A person who has filed a petition for personal gain or for private profit or personal propaganda or Political motive or any other extraneous consideration will not be entertained. It is only such person who is acting bonafide having no personal interest to the cause involving public wrong or public injury will alone has a locus-standi and can approach the court to wipe out the tears of the poor and the needy ones. All or every default on the part of the Government or a public authority is not immune from interference. No person shall, overtake the limits and similarly, the High Court Division does not have power to take 'cognizance of any petition which trespasses into the areas which is reserved to the executive and legislative by the Constitution. We reaffirm and approve the views taken by this Division in professor Mozaffar Ahmed, Dr Mohiuddin Farooque and Syeda Rizwana Hasan.

12. What's more, the writ petitioner had challenged annexure-B to the writ petition by which the NBR in exercise of its powers under section 5(7) of Act of 1991 refixed the tariff value in respect of Code No. 802 mentioned in the first column to the Table' and Seba Code No. 801:20 mentioned in column 2 thereof, declaring the "সিম কার্ড সরবরাহকারী (SIM card distributor) i.e. mobile phone operator as service. By way of explanation it is said "মোবাইল টেলিফোনের ক্ষেত্রে প্রতিটি সিম Subscriber's Identity Module-(SIM) "কার্ড বা রিম for Removable User Identification Module-(RUIM) "কার্ড বা অনুরূপ অন্য কোন Microchip "সম্বলিত কার্ড সরবরাহ অথবা একই উদ্দেশ্যে পুনরুদ্ধারিত কার্ড ব্যতীত প্রতিবার Code Division Multiple Access (CDMA)" বা অনুরূপ অন্য কোন পদ্ধতি ব্যবহারের জন্য]" that is to say, the NBR has power to estimate the tariff value in case of mobile phone on each SIM/RUIM Card or on any supply of microchip containing card or with that end in view, I the use of CDMA other than those Cards or the use of other devices. On the same day, it issued SRO No. 159 (annexure C) wherein it is said, in exercise of powers under section 3(5) of Act of 1991, the SRO No. 170 dated 8th June, 2000 was modified as under:

"উপরি-উক্ত প্রজ্ঞাপনের টেবিলের কলাম (১) এর শিরনামা সংখ্যা ০১২ এবং উহার বিপরীতে কলাম (২) ও (৩) এ বর্ণিত এন্ট্রিসমূহের পরিবর্তে নিম্নরূপ এন্ট্রিসমূহ প্রতিস্থাপিত হইবে, যথাঃ

So১২.০০ টেলিফোন, টেলিপ্রিন্টার, টেলেক্স ফ্যাক্স বা ইন্টারনেট সংস্থা ও সিম কার্ড সরবরাহকারী

So১২.১০ টেলিফোন, টেলিপ্রিন্টার, টেলেক্স ফ্যাক্স বা ইন্টারনেট সংস্থা

ব্যাখ্যাঃ

টেলিফোন, টেলিপ্রিন্টার, টেলেক্স ফ্যাক্স বা ইন্টারনেট সংস্থা অর্থ টেলিফোন, টেলিপ্রিন্টার, টেলেক্স ফ্যাক্স বা ইন্টারনেট এর মাধ্যমে বাণিজ্যিক ভিত্তিতে যোগাযোগ স্থাপন, তথ্য বা উপাত্ত আদান-প্রদানের ব্যবস্থাকারী কোন ব্যক্তি, প্রতিষ্ঠান বা সংস্থা।

So১২.০০ সিম কার্ড সরবরাহকারীঃ

ব্যাখ্যাঃ

“সিম কার্ড সরবরাহকারী” অর্থ পণের বিনিময়ে Subscriber’s Identity Module (SIM), Removable User Identification Module (RUIM) Card বা অনুরূপ অন্য কোন Microchip সম্বলিত কার্ডের মাধ্যমে মোবাইল টেলিফোন সংযোগ প্রদানকারী সংস্থা এবং একই উদ্দেশ্য পূরনকল্পে উল্লিখিত কার্ড ব্যতীত Code Division Multiple Access (CDMA) “বা অনুরূপ অন্য কোন পদ্ধতি ব্যবহারও এই সেবার অন্তর্ভুক্ত হইবে।”

13. In this SRO it was provided that if SIM/RUIM cards are used for the purpose of mobile phone connections by the mobile phone operators it would be treated as service. No rule was issued to examine the legality as regards the explanation given by the NBR treating the mobile phone connections by its operators as 'service'. The writ petitioner has not challenged the vires of sections 3 and 5 of Act, 1991 and no rule was also issued for examining the propriety of the NBR to impose tax and supplementary duty in pursuance of such estimation of tariff value on SIM/RUIM Cards treating the supply of the said Cards by the operators as service. Section authorizes the NBR to impose VAT on all goods imported other than the goods mentioned in the First Schedule and the services mentioned in the Second Schedule, on the services provided in Bangladesh or the basis of the estimation of tariff value under section 5. In the notification it was clearly mentioned that the tariff value was fixed on the services rendered by the SIM card suppliers i.e. the mobile phone operators and not upon mobile phone users.

14. Therefore, it is difficult to assume that the writ petitioner was in any way aggrieved by the refixation of tariff value on programmed SIM cards. Secondly, the tax and duty have been fixed by the SRO No. 159 dated 9th June, 2005, (Annexure-C), and keeping this SRO 159 dated 9th June, 2005, as it stands, the writ petition is not maintainable because the taxes are being imposed in pursuance of this modification. The writ petitioner is admittedly not a SIM card supplier. This leads us to believe that the writ petitioner is none but an interloper who has moved the petition on behalf of the added writ respondent Nos. 6, 7, 8 and 9, who are well-to-do mobile phone operators and well-to-do business organizations. It cannot be said that they are unable to reach the doors of the Court owing to abject poverty, illiteracy, ignorance or disadvantaged condition. Therefore, the writ petitioner is not a person aggrieved within the meaning of Article 102(1) of the Constitution by reason of the refixation of tariff value by the impugned order. The writ petition, is thus, not maintainable and the judgment of the High Court Division is liable to be interfered with on this ground alone.

15. Since we have heard the matters for days together on merit, we would like to express our opinion on the legal points raised at the bar as to whether NBR has legally refixed the tariff value. The learned Attorney-General pointed out that by the impugned order the tariff value was fixed at Taka 2,172.02 and the supplementary duty of Taka 760.20 @ 35% and VAT Taka 439.80 at the rate of 15% totaling Taka 1,200 on a

programmed SIM/RUIM Card. After issuance of the rule on 25th June, 2005, the tariff value was refixed on 30th June, 2005 at Taka 1,628.96, and the supplementary duty of Taka 570.14, VAT Taka 329.86 totaling Taka 900. It was brought to our notice that during the period between 9th June, 2005 and 7th June, 2006, the mobile phone operators, such as, Bangla Link, Aktel, City Cell and Grameen Phone paid supplementary duty and VAT respectively of Taka 188.35, Taka 173.22, Taka 28.23 and Taka 458.64 crores against supply of 21,08,413, 19,39,386, 3,15,387 and 51,46,876 number of SIM cards to its users. On 8th June, 2006, the tariff value was refixed at Taka 1447.97 and supplementary duty, and VAT were fixed at Taka 506.79 and Taka 293.29 respectively in total Taka 800, and during 'the period between 8th June, 2006 and 31st July, 2006, the aforesaid mobile phone operators paid Taka 9.96, Taka 3.85, Taka 55, Taka 35.23 crores respectively against 1,24,517, 48,190, 6,862 and 4,40,413 SIM cards.

16. It was further contended that after the delivery of the judgment by the High Court Division and the stay order, the said operators paid in all Taka 6,924.46 crores keeping a balance of Taka 741.59 crores. It was further contended that on 9th June, 2011 the tariff value was refixed at Taka 195.97 and supplementary duty was fixed at Taka 383.59 and VAT Taka 221.93 in total Taka 605.5 crores. The learned counsel appearing for the mobile phone operators did not dispute the data furnished by the learned Attorney-General. From these figures, it is clear that "the operators are paying supplementary duties and VAT in pursuance of notification dated 9th June, 2005 (annexure-C) on the basis of tariff value estimated by the NBR.

17. The High Court Division on construction of section 5 arrived at the finding that "the Value Added Tax" is to be imposed on the value of commodity imported or the value of the commodity supplied, after adding all expenses connected with such import or supply, as the case may be, and thus apparently there is no nexus with the tariff value as fixed with the value of the SIM/RUIM Cards imported or produced locally, if there be any..... The supply of SIM Cards, having regard to the provisions of section 5(4) cannot be said to be or considered to be "service rendered" rather it is apparent that SIM/RUIM Cards are commodity, a special kind of electronic instrument, to be programmed by the mobile phone operators for rendering services. These observations show that the High Court Division has accepted the claim of the NBR that after importing SIM/RUIM Cards, the telephone operators programmed them by using/applying electronic/specialized devices for rendering different services to the mobile phone.

18. On behalf of the appellants it was contended that whenever a SIM/RUIM Card is imported, it remains a good or commodity which cannot be activated or used unless it is programmed for using it for different services, such as, talking, sending email, SMS, MMS etc by the operators by their customers. Therefore, the High Court Division fell in an error in not accepting the appellants claim that whenever a SIM/RUIM card is supplied by the operators, after programming for using by its customers it becomes a service and by an Act of Parliament the NBR has been authorised to declare any taxable goods as taxable service. It has committed further error in failing to distinguish between the imposition of VAT on imported commodity and the fixation of tariff value on SIM/RUIM cards after they are programmed for use by the customers of mobile phone operators.

19. The High Court Division having admitted that after SIM/RUIM Cards are imported they are programmed by the mobile phone operators for rendering services, they do not remain the same and they are converted and/or transformed into a different specific substance so that it becomes useable differently by the consumers, and in that case, the

service value is added to the said manufactured goods/tax will, therefore, be imposed on all services on the total value added to such services under section 3(3) of Act, 1991 after, declaring the taxable goods as taxable service under section 3(5) and VAT is imposed upon provider of services on the total receipts under section 5(4). The High Court Division was totally confused as to the imposition of VAT under sections 3(1), 3(3) and 4(5) of Act, 1991. Suppose, an importer imports yarn, he is required to pay VAT under section 3(3)(a) and the rate will be fixed in accordance with section 4(2) on the tariff value of the said imported yarn. If Such imported item is used for manufacturing purpose, say garments, the value will be ascertained in accordance with section 5(2) as they did not remain the same as imported commodity and whenever the importer sells the garments, he is required to pay tax again in accordance with section 3(3) (b) and (c) on such finished goods on, the total receipts for providing service. The imported commodity is converted into manufactured item within the meaning of section 2 Bangla. If the programmer or manufacturer sells the finished goods then certainly the NBR has power to determine tariff value under section 5(7) which is a non-obstante clause authorising it to declare the said 'taxable goods' as 'taxable service' under 'section 3(5) of Act 1991 for the purpose of determination of VAT on total receipts and impose VAT under section 5(4) on such manufactured product.

20. Section 2(ঘ) defines কর (tax) means “কর অর্থ সরবরাহকৃত পণ্য বা প্রদত্ত সেবার ক্ষেত্রে প্রদেয় মূল্য সংযোজন কর বা, ক্ষেত্রমত, মূল্য সংযোজন কর ও সম্পূর্ণক তক্ক এবং ধারা ১৩-তে বর্ণিত ক্ষেত্রসমূহে উপকরণের ওপর প্রদত্ত মূল্য সংযোজন কর, সম্পূর্ণক তক্ক, আমদানি তক্ক, আবগারি তক্ক ও অন্যান্য সকল প্রকার তক্ক ও করও (আগাম আয়কর ব্যতীত) ইহার অন্তর্ভুক্ত হইবে।” which means, value added tax and supplementary duty, as the case may be, payable for supply of goods or services and shall include value added tax- and supplementary duty, import duty, excise duty or any other duty or tax as may be imposed. Section 2 (ম) defines সরবরাহ (supply) means, sale, transfer, lease or disposal in any manner of goods manufactured or by manufacturer or producer or of goods imported or purchased or acquired or otherwise procured by a person in Bangladesh registered or registrable under sections 15 or 17. Section 2(খ) defines “প্রভূত কারক বা উৎপাদক” include any person in the categories mentioned in (অ) to (ঙ), of them, clause (অ) provides for transforming or reshaping of any substance by processing individually or in combination with any other substance/material or components of production to changing, transforming or reshaping it into a different specific substance or goods so that it becomes usable differently or specifically.

21. ‘উৎপাদন কর’ (output tax) defined in section 2(খ) and ‘উপকরণ’ (input) defined in section 2(ga) are also relevant for our consideration. 'Output Tax' means the VAT levied under the Act, and 'Input Tax' means VAT paid on inputs imported by registered person or purchased by him from any other registered person and advance collected VAT at import level on imported goods will also be included in it. Section 3(1) of Act, 1991 says, tax will be levied and collected on all goods imported into Bangladesh or supplied except the goods mentioned, in the First Schedule. Subsection (4) of section 5 says, in case of service VAT will be imposed on all services on the total value added to such services. So, tax within the meaning of section 3(1) which is collected from the point of importation, and production to the point of supply to the consumers. Such tax is charged on the supply of goods and services where goods or services are supplied by a taxable person in course of business carried by him. But when a SIM/RUIM is imported, it cannot be used by the mobile phone user unless it is programmed/transformed or reshaped by processing by operators so that it becomes useable differently or specifically. So, after it is programmed it transformed or reshaped into a different specific substance within the meaning of section 2(খ) (অ) and VAT is ascertained as per provisions of section 5(2) of the Act.

22. Section 5(2) authorizes NBR to determine the value on the supply of SIM/RUIM

cards which are taxable goods for the purpose of fixing tax and other duty and the basis for determination shall be the value of purchase inputs including all costs for the manufacture, that is to say, for transforming it into a specific substance for making it useable by mobile phone operators customers. Subsection (4) of section 5 authorises the NBR to determine VAT for providing service by the operators on the total receipts. The NBR has been authorised as per first proviso to determine the VAT on the basis of actual value added in respect of any specific service by official Gazette. In the second proviso, it is provided, even in case of service provider provides services, free of cost, the Government has been authorised to impose minimum tax by Gazette notification. Since the mobile phone operators are registered organizations who are rendering specific services to its subscribers/customers in course of their business and therefore, the NBR has power to assess tariff value for the purpose of levying VAT and supplementary duty.

23. It was contended on behalf of the respondents that a supplier of SIM card has been illegally treated as service it is taken as service only by virtue of a legal fiction, namely, a declaration by the NBR. It is further contended that a supplier of a SIM card cannot be a service and a tariff may not be (imposed on the supplier of a SIM card. Since the SIM card operators offer various services/it is contended, it was not possible to determine tariff value of various services by applying a single basis on all services and that the NBR has not applied its mind to evaluate the services rendered by various applications operators, of SIM cards. It is further added that even without challenging section 5 of Act of 1991, so far as it relates to re-fixation of tariff value, the writ petition is maintainable, inasmuch as, the application of section 5(7) is misconceived. In this connection Mr. Mahmudul Islam has referred the case of Mostafa Kamal v. Commissioner of Customs, 52 DLR (AD) 1.

24. There is no doubt that the law has authorized the NBR to declare any taxable goods as taxable service. Therefore, the contention on behalf of the respondents on the point is devoid of substance. The question is whether an importer after importing a SIM/RUIM Card programmed it by means of electronic devices for service by its customer, such importer shall be liable to pay tax or supplementary duty as taxable service. The ascertainment of value for determining VAT has been provided in subsections (1) to (4a) of section 5 and the rules framed thereunder. The High Court Division itself found that the mobile phone operators are programming the SIM/RUIM Cards so that it becomes useable" differently by their customers and naturally, there is no doubt that they derive profit from the services rendered and therefore, the NBR has power to declare them as 'taxable service' under section 3(5) for the purpose of payment of tax. I fail to understand why a SIM/RUIM Card after it is programmed and sold by the mobile phone operators cannot be treated as taxable service within the meaning of 2^(B) of the said Act. It is certainly a taxable service rendered by the mobile phone operators and therefore, the NBR has power to impose tax with supplementary duty on such programmed SIM/RUIM Cards. Sub-section (7) of section 5 authorises the NBR to fix tariff value for the purpose of determining VAT and supplementary duty on taxable goods i.e. programmed SIM/RUIM cards for public interest after making investigation.

25. The NBR declared programmed SIM/RUIM Cards as service by way of explanation by SRO No. 159 dated 9th June, 2005 in exercise of powers under section 3(5) of Act, 1991. The writ petitioner though challenged the fixation of the tariff value, he did not challenge the said SRO and the explanation given in it declaring the suppliers of SIM/RUIM Cards as service. He also did not challenge the vires of sections 3(5) and 5(7) of the Act, which empower it to declare any taxable goods as taxable service and to determine tariff value on such taxable goods. The High Court Division has overlooked

this aspect of the matter and declared the determination of tariff value on SIM/RUIM Card was made without lawful authority.

26. The question involved in the case referred by Mr. Islam was whether there was arbitrariness in the determination of tariff value of the imported Soda Ash Light in view of the difference between the invoice price and tariff value determined by the customs authority. The importer claimed import of Soda Ash Light at US \$ 130 per metric ton but the customs authority directed the importer to declare tariff value at US \$ 220 per metric ton. This Division after examination of the evidence produce by the parties noticed that the documents relied upon by the importer and those taken into consideration by the committee (high powered committee) were not worthy of credit, that is to say, did not tally with the international market price. It was also noticed that though rule's were framed for the purpose of determination of tariff value, the customs authority did not follow the rules. In view of the above, this Division though upheld the submission of the Learned Attorney-General that the guidelines followed by the committee as attested earlier are not extraneous and that those are germane to the Customs Act in determining tariff value the Government having framed rules governing the fixation of tariff value of the imported goods the tariff value of the goods should be determined in accordance with the rules', observed in paragraph 20 that in determining the tariff value the customs authority did not possess arbitrary discretionary power it should have possessed "contemporaneous documents to show that the international market price of a particular item of import or export has either gone up or down during the interim between the last meeting of the committee and the impugned committee". These observations are obiter dictum in view of the ultimate decision in the Case that the determination of tariff value should be in accordance with rules. More so, the facts of that case are quite distinguishable, inasmuch as, in the case in hand there is no dispute regarding the difference in price for determining tariff value.

27. The NBR in exercise of its powers under section 72 of the Act, 1991 has already framed rules namely, the value Added Tax Rules, 1991 by Gazette notification dated 12th June, 1991 governing the guidelines for fixation of tariff value and other related matters. It is not the case of the writ petitioner that the tariff value was determined by the NBR arbitrarily without following the rules. In any event, we would like to observe that in determining the tariff value on SIM/RUIM cards after programming/transforming/reshaping into a different specific substance to make it useable by customers, it shall, follow the rules and if the said rules are not compatible with section 5(2) to (4a) of the Act, 1991 it shall amend the rules in accordance with law.

28. It is contended that tariff value can only be fixed, by the Bangladesh Telecommunication. Regulatory Commission (BTRC) and if VAT is going to be charged on the tariff value fixed by the NBR, then BTRC will cease its jurisdiction to determine the tariff value on SIM cards because neither the SIM card operators nor the consumers should be burdened with two sets of taxes. It is further argued that since the BTRC has exclusive powers to fix tariff value under section 31(2) of the Bangladesh Telecommunication Act, 2001, the NBR has no power to fix the tariff value again.

29. The High Court Division has accepted the said argument and observed that since the mobile operators are levying charges upon the subscribers of mobile phones at the rate fixed by the BTRC together with VAT, the NBR has no power to add tax or supplementary duty. The opinion appears to us erroneous. There are conflicting findings of the High Court Division on the question of determination of tariff value on programmed/transformed SIM/RUIM cards, inasmuch as, it was observed that for

availing a mobile phone service, the mobile phone operators, not the NBR, would arrange the required program on the SIM/RUIM Card at their own expenses and sell such programmed SIM/RUIM Cards to the subscribers therefore, the government is entitled to fix the tariff value on the basis of import price or the price of such SIM/RUIM Card plus the costs incurred for import or supply of SIM/RUIM Cards, as the case may be', and on the other breath, it was observed. The tariff value for the purpose SIM/RUIM cards is to be fixed as per section 5 of the Vale Added Tax Act, 1991, whereas the tariff value for telephone calls or other service provided by the mobile phone operators has to be fixed 'by the Bangladesh telephone Regulatory Commission.....' The latter finding of the High Court Division was made without making any discussion on the Act of 2001. If the mobile phone operators programmed the cards at their own expenses for selling such programmed devices to their customers, law empowers the NBR to determine the tariff value on such programmed cards. Secondly, when such programmed devices are sold to their customers, it becomes a taxable service within the meaning of the Act, 1991. It is the NBR which has power to determine the tariff value. The imposition of tariff by the Commission in accordance with Act, 2001 is altogether different.

30. The Bangladesh Telecommunication Act, 2001 was promulgated for the purpose of development and efficient regulation of telecommunication system and Telecommunication services in Bangladesh and with that end in view, an independent Commission under the name the Bangladesh Telecommunication Regulatory Commission (BTRC) has been established. Telecommunication' according to the Act means transmission and reception of any speech, sound, sign, signal, writing, visual image or any other intellectual expression by way of using electricity or electro-mechanical energy through cable, pipe, radio, optical fiber or other electro-magnetic or electro-chemical or electro-mechanical or satellite communication system'.

31. In the Act the expression 'tariff has been, defined which means, a tariff approved by the Commission under Chapter-VI of this Act or a tariff mentioned in section92. Chapter VI contains sections 48 to 50-this Chapter provides the procedure and principle for fixation of tariff charges to be paid by an operator of telecommunication service. Section 48 provides that an operator shall before providing service, submit to the Commission a tariff containing the maximum and minimum charges that may be realised for such service. Section 49 provides the principles for determination of tariff by the Commission. 'Telecommunication Service' within the meaning of the Act means;

- (a) transmission or reception, with the help of a telecommunication system, of anything that falls within the purview of the definition of telecommunication;
- (b) any value added telecommunication service (e.g. fax, voice-mail, paging service)
- (c) internet service.
- (d) supply of information or directory relating to a telecommunication system for the convenience of using a service, mentioned in (a), (b) and (c) above;
- (e) a service for installation, or maintenance of telecommunication apparatus (e.g. switching system, transmission apparatus, terminal apparatus, satellite etc.) whether or not those equipments are visibly connected with one another, or whether or not they are combinedly used in the transmission or reception of any information or message. So

32. Under this Act, consumer means, 'a person who takes communication service from an operator'. This definition clearly indicates those who use mobile phone with SIM/RUIM Card supplied by the mobile phone operators. Operator means a person licensed for establishing or operating a telecommunication service or operating a system which is the combination of more than one of those facilities' that is to say, the facilities mentioned above. Section 92 relates to the approval of pro-commencement tariff, that is to say, all tariff, call charges and other charges shall be paid according, to the existing rate then prevailing until the said charges are charged by the Commission.

33. On a combined reading of the provisions it is found that the 'tariff within the meaning of the Act, 2001 is charged and collected from the telecommunication service operators/that is to say, the mobile phone operators for the purposes of telecommunication for the use of telecommunication apparatus, radio apparatus, telecommunication network and telecommunication system etc. The distinction between the determination of tariff value by the NBR and the submission to the Commission a tariff for approval can easily be inferred from the definition of the expressions 'consumer' and 'operator' defined in the Act, 2001. The determination of tariff by the NBR and the Commission is for different objects and purposes. A licence to operate telecommunication system is given to an operator in accordance with Chapter-V of the Act of 2001 for establishing or operating telecommunication system subject to the fulfilment of conditions mentioned in sub-section (3) of section 35 and for operating the telecommunication, he shall submit to the Commission a tariff containing maximum and minimum charges for providing such service. Therefore, the High Court Division has fallen in an error, in holding that the tariff value for telephone calls or other service provided by the mobile phone operators has to be fixed by the BTRC for collecting charges against different kinds of services rendered by the them which is being paid by their subscribers which is not the subject matter in the writ petition. The conclusion that can be made is that 'tariff value' is estimated by the NBR on taxable service for the purpose of imposing VAT and supplementary duty for the services rendered to the consumers or subscribers of mobile phone operators, whereas, an operator has to submit to the Commission a tariff containing the maximum and minimum charges that may be realised for providing telecommunication service and until the tariff is approved by it, the operator cannot start providing the service or realize charges for the service.

34. The High Court Division while declaring annexure-B to the writ petition also declared annexure-Y to be without lawful authority. By these annexures, the NBR refixed the tariff value at Taka 1,628.96 from Taka 2,171. The NBR in fact has reduced the tariff value and accordingly the supplementary duty and VAT have also been reduced according to the ratio, such as, from Taka 760.20 and 439.80 respectively to Taka 383.59 and Taka 221.93. However, the High Court Division directed the appellants to fix the tariff value in accordance with section 5, but on the other breath, it has observed that BTRC is the authority to fix the tariff. These findings are absolutely erroneous for, the NBR has already framed rules and the determination of tariff value for programmed SIM/RUIM Cards should be made in accordance with the said rules. This view has been taken by this Division in the case of Mustafa Kamal referred by Mr. Mahmudul Islam.

35. When policy according to which or purpose for which discretion is to be exercised is clearly expressed in the statute it cannot be said to be an unrestricted discretion but on matters requiring technical expertise, the court should leave the matter for decision of those who are qualified to address the issue. Unless the policy or action is inconsistent with the Constitution and the laws, or arbitrary or irrational or by exercise of abuse of power, the court will not interfere. If the policy cannot be faulted on grounds of arbitrariness/or irrationality or perversity or malafide, judicial interference is

impermissible even if it hurts the business interest of a party. Court cannot dictate either that a certain policy ought to have been adopted nor can it opine that a policy should be changed. An executive policy is not open to impeachment unless it infringes any constitutional or statutory provision. In economic regulation or tax matters judicial restraint is necessary and the judgment of the executive should not be interfered with.

36. As observed above, the writ petition is not maintainable since the writ petitioner is not an aggrieved person within the meaning of Article 102 of the Constitution and since the mobile phone operators have taken no exception to the impugned order or the SRO 159, annexure-C; and since they have been paying VAT and supplementary duty even after issuance of the rule, they have no subsisting cause of action to get the benefit out of the judgment of the High Court Division. Their claim is also barred by the doctrine of estoppel. They are under obligation to pay supplementary duty and VAT in the manner they have been making payment. We reemphasize the parameters within which the High Court Division should extend its discretionary jurisdiction in entertaining a PIL.

1. Before entertaining a petition the Court will have to decide the extent of sufficiency of interest and the fitness of the person invoking the discretionary jurisdiction.

2. The Court which considering the question of bonafide in a particular case will have to decide as to why the affected party has not come before it and if it finds no satisfactory reason for non-appearance of such affected party/it may refuse to entertain the petition.

3. If a petition is filed to represent opulent members who were directly affected by the decision of the Government or Public Authority, such petition would not be entertained.

4. The expression 'person aggrieved' used in Article 102(1) means not any person who is personally aggrieved but one, whose heart bleeds for the less fortunate fellow beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority.

5. If the person making the application on enquiry is found to be an interloper who interferes with the action of any person or authority as above which does not concern him is not entitled to make such petition.

6. The Court is under an obligation to guard that the filing of a PIL does not convert into a publicity interest litigation or private interest litigation.

7. Only a public spirited person or organisation can invoke the discretionary jurisdiction of the Court on behalf of such disadvantaged and, helpless persons.

8. The Court should also guard that its processes are not abused by any person.

9. The Court should also guard that the petition is initiated for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the Court.

10. It must also be guarded that every wrong or curiosity is not and cannot be the subject matter of PIL.

11. No petitions will be entertained challenging the policy matters of the Government, development works being implemented by the Government, Orders of promotion or transfer of public servants, imposition of taxes by the competent authority.

12. The Court has no power to entertain a petition which trespasses into the areas which are reserved to the executive and legislative by the Constitution.

13. A petition will be entertained if it is moved to protect basic human rights of the disadvantaged citizens who are unable to reach the Court due to illiteracy or monetary helplessness.

14. Apart from the above, the following some categories of cases which will be entertained:

a) for protection of the neglected children

(b) non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of labour laws (except in individual case).

c) petitions complaining death in jail or police custody, or caused by law; enforcing agencies.

d) petitions against law enforcing agencies for refusing to register a case despite there are existing allegations of commission of cognizable offences.

e) petitions against atrocities on women such as, bride burning, rape, murder for dowry, kidnapping.

f) petitions complaining harassment or torture of citizens by police or other law enforcing agencies.

g) petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life.

h) petitions from riot victims.

The appeals are, therefore, allowed without any order as to costs with the above observations.

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