Bureaucratic red tape and investment: An SC decision

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Investment (both foreign and local) for setting up industries is typically considered as an engine for creation of jobs and economic development. Government agencies in Bangladesh often claim that the government is very keen on promoting investment. The government offers various liberal policies such as tax holiday for a certain period and pursues various promotional activities such as investment summits, road shows etc. for promoting investment. However, unfortunately, often the government's policies on paper and actions on the ground do not match. This paper would exemplify such a tendency of gap between law and policies on the one hand and action on the other hand, through a reported decision of the Appellate Division (AD) of the Supreme Court [Chairman, National Board of Revenue v Beximco Infusions Ltd, Dhaka (1997) 17 BLD (AD) 93].

In this case, Beximco Infusions Limited, in collaboration with Dutch and German companies, ventured into setting up of an Intravenous Fluid Industry for the purpose of manufacturing life-saving medicines. All machineries for the plant which were imported from West Germany arrived at Chittagong port in February 1991. In importing, the company availed of the advantage of payment of customs duty at the rate of 10% ad valorem and also of exemption from payment of sales tax and development surcharge under a Statutory Regulatory Order (SRO) upon securing a certificate from the Board of Investment (BOI) as mandated by the SRO. For availing the benefit under this particular SRO, it was compulsory that the importation of machineries takes place with the approval of a competent authority for the establishment of an industry, or for balancing, modernisation, replacement, or extension of an existing industry and also be complemented by a certificate from the proper authority.

Unfortunately, while these machineries were awaiting clearance at the port, the devastating cyclone and tidal bore of 29th April 1991 reached and damaged them. For replacing the impaired parts of the capital machineries, the company again opened a letter of credit for importation and imported them in 1992. A problem arose when the company offered to pay concessionary customs duty under the SRO for the machineries to be replaced (imported again) which National Board of Revenue (NBR) declined and demanded the payment of standard duties and taxes. NBR reasoned its demand for the payment of standard duties on the basis that the company had failed to submit the required certificate from the concerned officer of BOI. Being confronted with this demand of the submission of the certificate, the company authorities sought assistance from BOI. BOI recommended the release of the machineries at the exempted rate as per the SRO and issued a letter addressing the Chairperson of NBR. In the letter, BOI even categorically mentioned that the damage to the machineries have been investigated by an approved surveyor.

However, the unequivocal letter from BOI failed to sway NBR officials. By a letter issued in September 1992, NBR advised the company that the exemption under the SRO would not be granted, reiterating the same reason (i.e. failure to produce a certificate from BOI). Upon this final decision by NBR, the company was forced to file a writ petition with the High Court Division (HCD) of the Supreme Court and obtained an order for payment of 10% ad valorem duties as prayed for by the company. At this stage, NBR filed a petition in the AD for leave to appeal against the decision rendered by the HCD. Surprisingly, BOI which supposedly should have assisted the company was also a party to the appeal petition preferred in the AD and thus, clearly stood against its own recommendation issued to NBR earlier.

Before the AD, lawyers for the government argued that the machineries at issue were fresh import of machinery parts and not a replacement of capital machineries imported in the first instance, and thus, the company was ineligible for the benefits under the SRO. It was also claimed that since BOI had not issued a formal certificate for the machineries at issue, the recommendation made by BOI was not at all obligatory for NBR. The AD rejected the first claim on the ground that even NBR in its exchange of letters did not deny that the import was bona fide replacement for the damaged machineries; rather, its sole ground for refusal to grant benefits under the SRO was that the company had failed to produce the required certificate from BOI.

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Regarding the second contention, the AD noted that BOI had not issued a formal certificate as was required under the SRO, but the Court posed a question as to whether NBR had any legal authority to defy the decision of BOI as conveyed to it. The court rightly answered that to hold that NBR could do so would mean flouting the letter and spirit of the Investment Board Act, 1989. The Court reasoned that BOI had been established for promoting investment in the private sector. It took note of Section 3 of the Investment Board Act which unequivocally provides that the provisions of the Act would have effect notwithstanding any contrary provision contained in any other law. The AD also referred to Section 11(5) of the Board of Investment Act which provides that at the time of approving an industrial project, BOI will give its decisions on all facilities that may be required for the implementation of the project in due time and section 11(6) which provides that a decision rendered by BOI under sub-section (5) will be deemed to be a decision rendered by the Government or by such other person or authority as is authorised to give such a decision on the relevant subject.

The AD acknowledged that technically speaking, the decision of BOI to recommend for importing the machineries at issue at the exempted rate was not rendered at the time of approving the investment project under section 11(4), but nonetheless found that it was a decision taken in exercise of BOI's power of implementation of the investment project following the approval of the project. As per the AD, under the Act, a decision of BOI relating to facilities for implementation of a project in due time would be implemented as a decision of the Government. According to the AD, under section 11(6), when BOI decided that the company should be eligible for the exempted rate under the SRO, it was equivalent to a decision of NBR itself, which was to be implemented. Regarding the non-issuance of the certificate by BOI, the AD noted that BOI had explained the technical difficulty through a letter to NBR and clearly recommended for releasing the disputed machinery at the exempted rate. For these reasons, the AD found no reason to interfere with the decision of the HCD and accept the petition by NBR.

Of course, the decision is quite old. However, to investors and industry analysts, this may not seem like an isolated incident from the past, rather things of this nature may sound like a rather common phenomenon in this country and prove to be a disincentive for investors. After all, laws and policies in themselves are of little value unless the bureaucrats in charge of applying and implementing them act rationally. And while this company opted to seek recourse of the law, some other companies may have sought an alternative route of managing the bureaucrats through extra-legal means. If that happened, it could have acted as a disincentive for investment or an added cost of doing business. And that could also have a corrupting effect on the bureaucracy in the form of a domino effect.

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