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The use of discretions in taxation: the case of VAT in Bangladesh

Ahmed Munirus Saleheen*

Abstract

Discretion is an inevitable part of bureaucratic action and tax discretion is positioned between the tax authority's immediate concern for maximizing revenue and the wider concern for good governance. Striking a balance between the conflicting concerns is more challenging in developing countries than in others. The paper explores the extent of tax discretions in the context of Value Added Tax (VAT) in Bangladesh. Based primarily on documentary analysis, the paper adopts a social science perspective to argue that the discretionary powers in the Bangladesh VAT regime infringe taxpayers' rights to certainty, transparency and fairness and hence they require an effective control mechanism for confining, structuring and checking these discretions. The paper also argues that besides striking a balance between the revenue authority's discretion and the rule of law, the administrative discretionary behaviour of the revenue authority needs to be streamlined by the social control that entails a paradigm of good governance as well as by specific written guidelines.

Keywords: Bangladesh, tax discretion, corruption, value-added tax, social control, good governance

1. INTRODUCTION

Among different executive branches of the state, it is taxation where the use of discretionary power by the tax authority spawns strong feelings as well as grievances among taxpayers. Though it is admitted in literature 'that tax discretions should be treated as an integral part of the legal system and judged to the same – if not higher – standards of legitimacy as other forms of administrative law' (Cogan 2011:4), many tax administrations seem to have been entangled in the paradox of discretion, or, in the problem of deciding the boundaries or the breadth of discretion to be allowed (Freedman and Vella 2011).

Grappling with this paradox is particularly challenging in developing countries like Bangladesh where the immediate concern for maximizing tax revenue to fund the ever increasing demand to finance the government's expenditure sometimes outweighs the far reaching concern for good governance in general and rule of law in particular. The situation becomes further compounded with the perennial presence of corruption in different parts of the public sector in developing countries in general and in tax administration in particular; tax administration in developing and transitional countries is believed to be more vulnerable to corruption than many other public service departments (Le 2007). The corruption scenario takes on another dimension with the presence of excessive discretions.

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Bangladesh is one of the first two South Asian countries that adopted VAT in 1991 by replacing the age old 'excise'¹ duty on the domestically produced goods and services and sales tax at the importation stage with the express aim to 'to expand the tax base, simplify the tax collection procedure and curb the tax evasion' (Government of Bangladesh 1991a).

Allegedly characterized by the presence of undue and excessive discretionary powers vested in the tax administration by the primary and secondary legislation, Bangladesh's VAT has caused a great deal of grievances amongst taxpayers since its inception. Among the tax issues that have attracted wide media coverage are key stakeholders' complaints, specifically business people about excessive tax discretions which surely figure more prominently than others.

Given the wide ramifications of excessive and uncontrolled discretions in Bangladesh's VAT regime and that no academic study of this phenomenon has so far been done, the aim of the present paper is to investigate, in the context of VAT in Bangladesh, the level of discretion accorded the executive branch of government including the tax administration. Essentially explorative in nature, the study attempts to consider discretionary powers from the social science perspective in terms of decision goals and decision process (Hawkins 1992) as impacting the principles of good governance such as transparency, accountability and certainty. Rather than considering the relationship of discretion with the conceptions of justice or rule of law, which is the domain of jurisprudence, an attempt has been made in the paper to explore social problems that uncontrolled or excessive discretions can create in the tax jurisdiction of a developing country.

Based primarily on documentary analysis and secondary sources of data, the remainder of the paper has been organized as follows. The first section will provide a brief contextual background that will consequently touch upon the conceptual framework of discretion in general and tax discretion in particular with reference to the literature. The second section will attempt a careful study of the state of discretionary powers in the VAT domain to fit the primarily legislative elements into the wider framework of simplicity and transparency. The third section provides an analysis of those discretions in the light of available literature, and the final section provides some concluding remarks.

2. BACKGROUND: CONTEXT AND CONCEPT

2.1 VAT in Bangladesh

Prior to the introduction of VAT, Bangladesh had an enduring legacy of excise taxes characterized by some disadvantageous features such as cascading and presumptive taxation. In addition to the overarching goal of improving the country's poor tax to GDP ratio to a satisfactory level, VAT was introduced. With a very poor tax-GDP ratio² and a tax structure overwhelmingly dependent on indirect taxes, Bangladesh

¹ As opposed to a selective tax, as it is known internationally, the excise duty in Bangladesh was a kind of sales tax.

² The tax-GDP ratio in Bangladesh is 8.96% (NBR 2011) which is one of the lowest in the world and lower than the average 14.9% of the low income countries (Keen, M. and A. Simone (2004). Tax Policy in Developing Countries: Some Lessons from the 1990s and some Challenges Ahead. Helping

obtains the lion's share of its tax-revenue from VAT. VAT including supplementary duty³ presently accounts for 56.85% of the total tax revenue and 5.09% of GDP (NBR 2011).

As in many other tax administrations in different countries, in Bangladesh, the presence of excessive discretionary powers in the tax laws has been a butt of criticism as well as grievances from the business quarter. The grievances manifested especially during the series of consultative meetings that the National Board of Revenue (NBR), the apex body for tax policy and implementation, held with different stakeholders prior to the annual budget. For example, in a recent meeting with the NBR, the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI), the country's peak representative organisation representing the interest of the private sector in trade and industry, proposed the reduction of discretionary powers of VAT officials in a bid to ensure hassle-free business (Financial Express 2012). FBCCI particularly expressed its concern over VAT officials' excessive power to search and seize conveyances carrying VAT-able goods.

Not only business bodies, the general taxpayers and civil society members have also expressed their concern over the tax office's discretionary power (Financial Express 2010). As a result of the growing concern over this issue, the Finance Ministers of different governments in Bangladesh have pledged to reduce tax officials' discretionary powers in their budget speeches. For example, in the FY 2005-06 budget speech, the Finance Minister mentioned the reduction of discretionary powers of tax officials along with measures to ensure transparency and dynamism in tax administration as a major reform measure (Government of Bangladesh 2005). The same commitment to further reducing administrative and liability discretion of tax authorities appeared in the budget speeches in the following period. In the most recent budget speech (FY2012-2013), the Finance Minister mentioned limiting the discretionary powers of tax officials as one of the fundamental principles of revenue collection (Government of Bangladesh 2012).

2.2 Discretion and tax discretion

The use of discretions as a central and inevitable part of the legal system as well as a feature of decision-making process has been a contested issue. There are a host of arguments for and against the use of discretion both in judicial and administrative laws. While Hawkins (1992) regarded discretion as a "central and inevitable part of the legal order", Davis (1969, cited in Hawkins 1992) regarded discretion as the major source of injustice. Advantages and disadvantages of the use of discretion with reference to both legal jurisprudence and bureaucracy have been quite widely discussed in the literature on discretion. While some consider the relationship between rules and discretion as opposing entities (e.g. Davis) some others (e.g. Dworkin) refuted the supposed dichotomy between rules and discretion; Dworkin's metaphor for discretion as 'the hole in the doughnut' - discretion like the hole in the doughnut, does not exist except as an area left open by a surrounding area of restriction' - (1977b:31 cited in Sainsbury 1992) implies that discretion is in fact bounded by rules. Here

Countries Develop: The Role of Fiscal Policy. S. G. e. al. Washington, D.C., International Monetary Fund.

³ Supplementary duty is an excise-like selective tax imposed by VAT Act. VAT alone accounts for 39.45% of tax revenue.

emerges the argument that ‘the use of rules involves discretion, while the use of discretions involves rules’ (Hawkins 1992:12). Though in the Weberian bureaucracy there is no room for discretion in decision-making, later scholars have recognized that discretion is an inevitable part of bureaucratic action (Feldman 1992).

Discretion has been defined by scholars in numerous ways. All definitions, more or less, posit discretion as the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives. Despite considerable agreement on defining discretion as well as its inevitability prompted by ‘vagaries of language, the diversity of circumstances and the indeterminacy of purposes’ (Galligan, cited in Hawkins 1992:11), what is actually a contested area, is the boundary of discretion- both in judicial and administrative laws. Admitting the need for some discretion for officials, Davis advocated the use of precise rules to confine discretion when it is too broad. As protection against arbitrariness he argued for discretion to be checked and scrutinized by another. As in other areas of law, there needs to be a balance between legitimate needs for the exercise of discretion by the revenue administration and the equally legitimate interests and rights of taxpayers (Cogan 2011:4).

The literature on discretion reveals different levels of the use of discretion:

- Discretion in the interpretation of rules and their application;
- Discretion as the space between legal rules in which legal actors may exercise choice (Hawkins 1992);
- Discretion explicitly granted by rules for decision-making by an authority; and
- Discretion embedded in rules (Harlow and Rawlings, 1984, cited in Sainsbury 1992).

Galligan (1986) argued that the use of discretionary powers is increasing in the modern state. He attributed the following reasons to the increased use of discretionary powers:

- In order to have comprehensive control in areas of welfare, the economy and the environment, diffusion of a wide range of powers among a variety of officials is necessary;
- Many regulatory undertakings have to be handled by specialist authorities who may not perform them through a rigid rational framework.

On the other hand, in most of the good governance and anticorruption discourses, administrative discretionary power has been seen as an element that curtails transparency and hence contributes to corruption. For example, ‘undue’ administrative discretion and lack of transparency have been seen as contributing to corruption by the Commonwealth Secretariat (2000) and hence, the elimination of the use of discretionary authority in tax administration has been advanced as policy reform agenda. In the same vein, the corruption formula devised by the American economist Robert Klitgaard (1988) shows discretion as a major factor of corruption:

$$\text{Corruption} = \text{Monopoly} + \text{Discretion} - \text{Accountability}$$

This formula clearly highlights the general perception that the higher the rate of discretion in decision-making coupled with higher monopoly and lower rate of accountability, the broader the corruption potential.

Tax discretion thus can be seen from this point of view also. It is argued that tax administrations in developing and transitional countries are more vulnerable to corruption (Le 2007)⁴ than many other branches of the state machinery. Researchers have attributed the generally more tangible presence of corruption in tax administrations, particularly in those of developing countries, to their complex tax and trade regimes including multiple discretionary exemptions, confusing and non-transparent procedures for tax compliance and excessive discretionary power of tax inspectors (Le 2007; Zuleta, Leyton et al. 2007). In this context, it has remained a matter of debate to what extent the tax administration should be given discretion and how the paradox of discretion will be balanced.

Admitting the inevitability of administrative discretion as what he calls a necessary evil, Dillman (2002) argued that though discretion appears to be antithetical to a rule-based democracy, it is essential for making democratic practices responsive and effective. This paradox of discretion, he suggests, can be resolved through striking a balance between discretionary powers and their exercise within certain constraints that include political, organizational and cultural realities coupled with professional and ethical standards. Tax discretions, as noted earlier, are no exception. Given that effective and efficient operation of revenue authorities requires a certain amount of discretion, it is equally important that discretions used for efficient collection of taxes do not negate or undermine the taxpayers' rights and interests. Hence, the critical question that faces scholars as well as politicians is: how to strike a balance between revenue authority discretions and the principles of good governance in general and the rule of law in particular?

Against this background, the following section will investigate the level of discretionary powers in VAT, which, as far as revenue is concerned, is the most important area of the tax regime in Bangladesh. In the course of analyzing the findings, the answer to the question, posed above, in the context of Bangladesh will emerge.

2.3 Discretionary powers in Bangladesh VAT

Committed to the principle of the rule of law as well as equality before law, Bangladesh operates under the doctrine of separation of powers with separate legislative, executive and judicial powers vested respectively in the Parliament, the Executive Government and the Judiciary. The Parliament has the fundamental power to impose tax as, according to Article 83 of the Bangladesh Constitution, 'No tax shall be levied or collected except by or under the authority of an Act of Parliament'. And within the framework of the constitutional provision, it is through express legislation of Parliament that a great deal of authority has been delegated to executive Government including the tax authority.

⁴ Though Le (2007) argued that surveys in developing and transitional countries indicate that revenue administration agencies are typically the most corrupt public institutions, in the case of Bangladesh, Transparency International Bangladesh survey has so far not ranked the revenue administration as one of the first few most corrupt departments.

Discretionary powers have been granted by the Value Added Tax Act, 1991 (henceforth the VAT Act) (Government of Bangladesh 1991b) to three sets of actors as follows:

- The Government⁵ represented by the Internal Resources Division under the Ministry of Finance;
- NBR, the apex body for the formulation and implementation of tax policy;
- VAT officials at different hierarchical levels.

The functions of these three sets of actors overlap with each other. While the VAT officers act as the agents of the Government and the NBR, the functions of the Government and the NBR differ only in the procedure of discharging their responsibilities. The first two actors are in fact two facades of the same body⁶ reinforcing the argument that in developing countries, tax administration is tax policy (Casanegra de Jantscher 1990).

In terms of the contents of discretions, there are essentially three types of discretions granted to the above mentioned actors:

- Discretions to produce secondary legislation and to sub-delegate powers to VAT officers, granted to both the Government and NBR. This type of discretion includes the power to grant tax concessions;
- Specific administrative and liability discretions granted to the Government and the NBR;
- Specific administrative and liability discretions granted to VAT officers.

The delegation and exercise of discretionary powers in Bangladesh's VAT thus can be looked at from two levels: the organization and the individual.

⁵ Though the word 'government' has been used throughout the VAT legislations, it has not been defined. But practices suggest that the word 'government' refers to the executive branch of the government and specifically to the division of the Ministry that is responsible for tax policy formation and its implementation.

⁶ According to the Rules of Business, the functions of the government are carried by a ministry or a division. On the other hand, National Board of Revenue, the apex authority for collection of all tax revenue in the country, is an attached department of Internal Resources Division under the Ministry of Finance. While a division is a self-contained administrative unit responsible for the conduct of business of the Government in a distinct and specified sphere, an attached Department means the department which has direct relation with a Ministry/Division [Government of Bangladesh (1996). Rules of Business. C. Division. Dhaka, Cabinet Division.]. The difference between NBR and the government is quite indistinct as the secretary of the Internal Resources Division (IRD) is the ex-officio chairman of the Board which comprises four members from the indirect tax wing and four members from direct tax wing. In addition to its main responsibility of formulating and implementing tax policy, NBR performs all the functions and exercise the powers vested in the government by various tax laws. The structure and the functions of NBR clearly vindicates the proposition that in developing countries, tax administration is tax policy (Moore, M. (2007). *How Does Taxation Affect the Quality of Governance?* IDS Working Paper 280. Brighton, Institute of Development Studies).

2.3.1 Organisation Level

Delegation of legislative power to the government and the revenue authority is quite common in many countries. Research shows that within the framework of the rule of law, the parliament makes policy decisions and assigns policy guidelines to the executive (Dourado 2011; Walpole and Evans 2011). In the case of Bangladesh, legislative competences as well as specific discretionary powers has been delegated to the Government and the revenue authority.

Government's discretionary powers

Among the discretionary powers that the Government enjoys under the VAT Act in Bangladesh, the following are prominent:

- Power to exempt any goods and service from VAT and/or supplementary duty; (s 147)
- Power to write-off any Government dues when it can be ascertained that the dues cannot be realized; (s 71ka)
- Power to determine the goods on which VAT will be assessed on the basis of the maximum retail price as printed on the packet of the goods [s 5(3)].

NBR, the revenue authority

The most important delegation of powers bestowed on the tax authority is authorizing the NBR to produce secondary legislation. Section 72 of the VAT Act confers to the NBR the power to make rules 'for carrying out the purposes of this Act'. Within the limits of not breaching the generality of the legal provision laid down in the primary legislation, the NBR has the power to make rules on a wide range of areas that include determination, assessment, and collection of VAT. In exercising this power, the NBR produced the Value Added Tax Rules, 1991 (Government of Bangladesh 1991c) and a number of other special rules, Statutory Regulatory Orders (SROs) and general orders (see Hossain 2010). In addition to the overwhelming power to make rules, the NBR has been granted a number of specific powers in the VAT Act. Prominent among them are as follows:

- Power to exempt any goods or services for any special purpose [s 14(2)];
- Power to determine the threshold for VAT registration [s15];
- Power to determine the rate and amount of value addition in respect of goods and services at the retail stage [s5(2)];
- Power to impose VAT on services based on the specific rate of value [S 5(4)];
- Power to impose a tariff on any goods for assessment of VAT [s 5(7)];
- Select goods or services for withholding and advance payment of VAT [s 6(4)];
- Use of banderol or stamp for any goods [s 6(4)];
- Determine the turnover threshold and bring any goods or services under the VAT regime, irrespective of their turnover (s 8).

The above examples show that the scope of delegation of powers to the Government and the revenue authority is much wider than that in many other countries.

⁷ All references to sections in this paper are to the sections in the VAT Act.

2.3.2 Individual Level

VAT officials have been granted enormous discretionary powers both under the VAT Act and the VAT Rules. The most prominent discretion that the Bangladesh VAT officers enjoy is their power to adjudicate offences committed under VAT law. Drawn heavily from the excise regime, this power is popularly known as a quasi-judicial power of VAT officers. Adjudication power is conferred on all VAT officers except an assistant revenue officer on the basis of the limit of the value of goods and services related to the offence. As adjudicating officers, they have the discretion to impose a penalty, in case of evasion, of up to two and a half times the amount of payable tax. Among other discretions that different levels of VAT officers in Bangladesh exercise, the following are noteworthy:

- A commissioner has the power to grant an exemption of VAT to any goods that fall within the given criteria of a cottage industry;⁸
- A commissioner has the power to issue an order for supervised clearance for any goods if he has reasons to believe (emphasis added) that it is required [s 26kha(1)] and determine the amount of payable tax for a tax period on the basis of a single verification [s26kha (4)];
- A commissioner of VAT has the power to fix, suo moto, for any reason he considers fit the base value of any goods on which VAT will be calculated (Rule 3, VAT Rules);
- A VAT divisional officer has the power to grant a VAT registration on being fully satisfied and also to give forced registration to a taxable business on being satisfied (s15);
- An officer not below the rank of an assistant commissioner has the power to order a sale verification if he thinks that it is needed to determine the input-output coefficient or the sale price has been suppressed [s 35(3)];
- Under Rule 3 of the VAT Rules, a VAT divisional officer has the power to revise a declared price if it appears that the declared price is-
 - inconsistent with the provision of the Act
 - significantly lower than the price of similar goods
 - significantly low due to some relationship between the buyer and the seller; and
 - amount of value addition is significantly low.

The judgment of ‘inconsistency’, ‘significantly low’ or ‘low’ is, however left to the VAT officer’s discretion for no parameters for the exercise of this judgement have been prescribed in the VAT Act.

Besides the above examples, a reading of the complete list of discretionary powers in the VAT Act and the VAT Rules and orders made under it, unequivocally shows that they are pervasive. The discretions are either explicit or implicit. The reference to the requirements of “necessary”, “essential”, “exceptional”, “reasonable” or “satisfactory” found in those discretions nevertheless empower the officers with significant freedom to manoeuvre (Harlow and Rawlings, 1984, cited in Sainsbury 1992) in making their administrative decisions in the realm of VAT.

⁸ According to an SRO (No. 168-Law/2003/376-VAT dated June 12, 2003), a VAT commissioner has the power to grant exemption from paying VAT to certain businesses defined as cottage industry.

3. EXERCISE OF DISCRETIONS: SOME INSTANCES AND THEIR (POSSIBLE) CONSEQUENCES

Having laid out the wide scope of discretions conferred on the executive branch by the VAT Act and Rules, we can now turn to examine a selection of the use of discretions by different actors.

3.1 Government's extra statutory power to grant tax concession

The Government in the exercise of the powers conferred under section 14 of the VAT Act to exempt any goods or services from VAT has issued as many as 36 Statutory Regulatory Orders (SROs)⁹ which deal with different general and specific exemptions, listing the goods, services or persons entitled to exemptions at different stages of business transaction. These exemption SROs supplement the list of VAT-exempt goods and services appended to the primary law as the First Schedule. This means, in order to find out the taxability of a good or service in the Bangladesh VAT regime, one will have to go through not only the First Schedule of the VAT Act but also all the exemptions set out in the SROs.

3.2 Assessment of VAT on the basis of printed retail price

By exercising the power conferred in section 5(3) of the VAT Act to assess VAT on goods on the basis of their retail price at the production level, the Government initially included seventeen items which has now been reduced to two, namely cigarette and disinfectants. The provision in section 5(3) of the VAT Act allows a cascading method of calculation of VAT. For example, if the MRP is Taka 100, then VAT payable at the manufacturing level is TaKa 15 (Taka 13.04 as would have been derived from a backward calculation). So the MRP equals the manufacture's share of Taka 85 plus VAT Taka 15, which means Taka 15 has been realized as VAT on a selling price of Taka 85 therefore the VAT rate increases to 17.65% instead of the statutory rate of 15%. Though in this instance, the problem is not so much with the exercise of discretionary powers as with the legal provision itself, the Government's decision to resort to this method of calculation was challenged in the Supreme Court by a multinational footwear manufacturer in 1998.¹⁰

3.3 NBR's power to assess VAT on the basis of tariff value and truncated base

The "strong"¹¹ discretionary power that NBR derives from the law, enables it to fix a tariff value for the assessment of VAT for any goods, or, a truncated base for any services. In line with the best international practice, there are two statutory rates of VAT in Bangladesh: 15% for all goods and services for home consumption and 0% for all goods and services to be exported and deemed-exported from the country. But by dint of its discretionary powers, NBR issued an SRO entitled "Determination of

⁹ Total number of SROs, issued as gazette notifications either by the government or by the Board in exercise of their discretionary powers, is more than 600. Many of them, though, have been cancelled or repealed or substituted by others over the period of last twenty years.

¹⁰ It has been known through personal communication with a VAT official that the case is still pending with the High Court Division of the Supreme Court.

¹¹ According to Dworkin, there are two types of discretion: strong and weak. While strong discretion implies creating one's own standards for judgment, weak discretion involves interpreting a given standard in order to apply it (cited in Galligan Galligan, D. J. (1986). *Discretionary Powers: A Legal Study of Official Discretion*. Oxford Clarendon Press).

VAT on the basis of actual rate of value addition Rules, 2010". Arising from that statutory regulatory order, as many as nine other effective rates, namely 1.5%, 2.25%, 3%, 4%, 4.5%, 5%, 5.0025%, 5.5% and 6% have emerged due to different tax bases enumerated in the VAT Rules. For example, the rate of VAT for construction services is 4.5% as the VAT assessment is done on the basis of 30% of the total receipt, i.e. $30 \times 15\% = 4.5\%$. Similarly, NBR's power to fix a notional value for the assessment of VAT yielded glaring examples of presumptive taxation in Bangladesh VAT. The presumptive elements which are particularly responsible for Bangladesh VAT being called a 'so-called VAT' or 'excise/turnover tax' are not only discriminatory but also have an adverse effect on the coherence of the modern tax (Saleheen 2012).

3.4 Commissioner's power to assess on presumption

Section 26kha incorporated in the VAT Act in 2006 empowers a Commissioner of VAT to use his/her discretionary power to determine the minimum amount of sale, amount of value addition, base value for tax payable or amount of payable tax for the supplier of taxable goods or taxable service in question. The presumption described in this provision entails that the assessment of VAT liability that will be based on relevant information of a similar taxable good or service rather than on the taxpayer's actual sale. No explanation in black and white other than 'for public interest' has ever been provided to the taxpayers in defense of presumptive taxation. Nor does the legislation spell out under what circumstances this kind of presumptive taxation should be preferred over taxation according to the actual assessment of the tax base.

3.5 VAT officer's power to re-determine value of goods

The VAT Rule 3 empowers the authority to re-determine the value of the relevant goods for imposition of VAT on any of the following grounds: (i) the declared base value is inconsistent with the provisions of section 5 of the Act, (ii) the declared base value is less than the base value of similar goods or goods of same nature and quality in the same jurisdiction or any other jurisdiction; and (iii) the extent of value addition as shown in Form 'Musak-1' is significantly low.

Though some limits have been set in the exercise of this power, the discretion is quite 'strong'. Particularly, determining 'the extent of value addition being significantly low' depends on the discretion of the VAT officer as there is no specified standard amount or rate of value addition for a particular product. The issue of value declaration and its approval seems to be the most troubling as well as controversial area in VAT at least for a number of reasons. Firstly, in a sharp departure from the standard principle of valuation in VAT, VAT officers have power to resort to notional valuation rather than transaction price. Secondly, the process of value declaration and its revision by VAT officers is a long drawn out process which could end up in re-determining the value with retrospective effect along with a substantial fine and penalty. In the second case, one very crucial principle of tax law design - the principle of non-retroactivity - is undermined.

3.6 Power to interpret the law

It has already been noted earlier in the paper that one important aspect in the exercise of discretionary powers is the interpretation of rules and their application. Unlike the discretion conferred on Her Majesty's Revenue and Customs in the United Kingdom to interpret the law, the primary legislation of VAT, i.e. the VAT Act does not give the Government or the Board any power to interpret law. In contrast, the VAT Rules made by the NBR under the authority derived from the VAT Act has granted both itself and the Commissioners powers to issue orders, notification, explanation or circular on ensuing matters of their jurisdiction. This power has yielded a good number of explanatory orders, circulars and letters some of which have been alleged to be contradictory to one another (Financial Express 2009).

4. ANALYSIS

To begin with the nature of discretions, it can be said that the discretion granted to the Government and the NBR is ultimate as they are not subject to review other than by their own volition. On the other hand, the discretions used by the officers are provisional as they are subject to review and possible reversal by another official (Hawkins, 1992). In another dimension, most of the discretions are "strong" as the parameters for applying them, either by the organization or by individuals, are not clearly defined or standardized or published.

Though all these discretions are legitimate in so far as they are drawn from both primary and secondary legislation, there has been strong criticism from many stakeholders for the inclusion of excessive discretionary powers in tax laws in general and VAT law in particular. Despite repeated ministerial pledges to reduce tax discretions and the resultant actions to curtail discretionary powers of tax officials, the extent of discretionary powers is still wide enough to create uneasiness among the taxpayers as far as transparency in applying tax rules and their certainty are concerned. As undue and excessive discretionary powers with their concomitant unpredictability, inconsistency and unfairness are seen as potential threats to the wider framework of good governance, tax discretions in VAT in Bangladesh have been decried by different segments of stakeholders since the inception of VAT in Bangladesh in 1991. In response to this kind of criticism, as noted earlier, Finance Ministers have been seen to make a promise to reduce tax officers' administrative discretion almost in each of their past budget speeches (see for example, Government of Bangladesh 2005; Government of Bangladesh 2008).

It is generally argued in the literature that discretion itself is not as unacceptable as the lack of a control mechanism for the exercise of that discretion (Freedman and Vella 2012). In the case of Bangladesh VAT, there is an ostensible lack of a control mechanism for the exercise of administrative discretion, which tends to infuse a great deal of arbitrariness in the application of laws and rules. For example, as noted earlier, a VAT officer has the power to increase the value of a product if it appears to him/her that amount of value addition in the product under consideration is significantly low. But there is no written standard of value of this addition in respect of the goods.

By contrast, tax administrations in many developed countries, for example, the Australian Tax Office (ATO 2004), have written guidelines to guide officers in the exercise of the statutory discretion contained in their tax laws. But, the potential for arbitrariness that negates the spirit of the rule of law (Dicey, 1885, cited in Freedman

and Vella, 2011) is amply evident in the VAT Act and Rules in Bangladesh. Looking at the pervasiveness of the discretionary powers especially on the Government's blanket power to exempt any goods or services from VAT and NBR's power to produce rules, the balance between discretionary powers and the rule of law appears to be tilted towards the former. This bias towards the use of discretionary powers by the Government to some extent explains the fact that the Members of the Parliament (MPs) do not have a significant role in the formulation of the country's annual budget, especially the formulation of tax measures (Sirajuzzaman 2012). This pattern corroborates the fact that despite Parliament being the formal supreme law-making institution, the Government, with its unbridled discretionary powers monopolizes the legislative process from initiation to approval (Rahman 2007).

In addition to adversely contributing to the imbalance between the revenue authority discretions and the rule of law, the use of discretions causes certain other social impacts.

First, the relationship between discretion and corruption is well established. Though there are no empirical studies, the general perception is that a great deal of corruption in the Bangladesh tax administration emerges from the misuse and abuse of discretionary powers. This applies both to organizational and individual discretions.

Second, undue and excessive use of discretionary powers infringes taxpayers' rights. Especially, some of the explicit officials' discretions such as determination of value for the assessment of VAT and determination of tax liability on the basis of presumptive methods clearly violate the core principle of VAT self assessment. The taxpayers' grumbling over the discretionary powers given to tax officials who are widely accused of abusing such powers not only to harass the former but also to benefit themselves frequently makes newspaper reports in Bangladesh (The Daily Star 2011).

Third, the extensive powers of the Government and the Board to produce secondary legislation have complicated the whole legal and administrative framework of VAT in Bangladesh. Though Schneider suggests (cited in Hawkins 1992) the more complex the rule the greater the discretion available to individual decision-makers in its interpretation and application, the reverse proposition i.e. discretionary powers can make the rule complex seems to be equally true. In the case of Bangladesh's VAT, the volume of secondary legislation in the form of SROs, Rules, General Orders, and Notifications is vast. Many taxpayers and VAT practitioners allege that to find a valid legal provision on a certain matter is tantamount to wandering in a maze (Financial Express 2010) comprising a plethora of rules, orders and notifications of which some are still valid, some rescinded and some substituted by others.

Last but not the least, the use of discretionary powers in tax law has prompted much litigation. Litigation filed by aggrieved taxpayers has been identified as a serious bottleneck in the collection of tax revenue in Bangladesh. According to the statement placed before the Parliament in 2010, litigation impeding the collection of different taxes has blocked the revenue flow amounting to Taka 1200 billion¹² (GOB 2010a).

¹² This figure is about 20% of the tax revenue collected in FY 2009-10.

Of this amount, VAT at domestic stage alone accounts for Taka 428 billion (GOB 2010b). It is usually believed by the insiders in VAT administration as well as many stakeholders that many of these cases owe their origin to the excessive discretionary powers of the VAT officials (Financial Express 2010).

4.1 Trends towards strengthening the rule of law in taxation matters

Despite the predominance of discretionary powers in the decision making process in Bangladesh's VAT, there are a couple of encouraging trends. First, Bangladesh's VAT law grants the taxpayers – existing or potential – the right to appeal against any decision of any VAT officer. The first step of the appeal process is limited to departmental ambit: appeal to Commissioner (Appeal) in case of a decision given by an officer below the rank of a Commissioner, and appeal to VAT Tribunal in case of an appeal against the decision of a Commissioner. After exhausting the departmental appeal procedures, the aggrieved can go to a court of law.

The second emerging trend is that the tax authority has realized the imperative for gradually reducing excessive discretions in VAT law as well as their negative impacts. As a result, since the late 90s there has been a trend to gradually reduce administrative discretion conferred on VAT officers. In most budget speeches, curtailing discretionary powers of tax officers has been mentioned in the same breath with ensuring simplicity and transparency and curbing corruption. As a combined effect of stakeholders' criticism and the tax authority's realization of the importance of reducing administrative discretionary powers, some powers such as power to enter business premises, seize a conveyance carrying VAT-able goods and imposing penalties in departmental adjudication have been curtailed with some measures to regulate their exercise. Although with the passage of time since the introduction of VAT in 1991, a number of discretionary powers of the field officers have been reduced and brought under some control mechanism, those vested in the Government and the NBR have remained as wide as before. A reading of the draft of new VAT law posted in the NBR website, however, reveals that there has been a conscious attempt to drastically reduce organizational and individual discretion.

5. CONCLUSION

The foregoing discussion shows that the gamut of administrative discretion in Bangladesh's VAT is not only broad but the discretions themselves are also "strong". The impact of the array of administrative discretion ranges from infringing taxpayers' rights such as self-assessment under the law being replaced by presumptive methods of taxation from discriminating between different segments of taxpayers to providing tax officials with opportunities for indulging in potential corrupt practices. Specifically, the present extent of discretionary powers at both organizational and individual levels in Bangladesh's VAT stands as a stumbling block to a transparent and accountable tax system. This scenario can be described as what Davis regarded as a substantial amount of unnecessary discretion threatening the proper application of policy (cited in Hawkins 1992). It is inevitable for any administrative law system to run with some discretion, even within the framework of the rule of law. Tax law is no exception. While the provision to exercise discretion is often essential for achieving the desired outcome of an administrative decision, 'the more discretion built into the system the more chance there is for disagreement as to how it is exercised, and the

more opportunity there is for favouritism and corruption to occur' (ICAC 1995:104). Corruption and unethical behaviour, poor administrative practice, and inconsistent decision making are some of the consequences of unbridled discretion. This aspect needs to be paid special attention to in tax jurisdictions like Bangladesh which are more vulnerable to corruption than others. Moreover, besides the tangible negative consequences of undue discretions, improper exercise of discretion affects all stakeholders as it weakens the integrity of the system, and involves the loss of public trust and faith. This is another dimension to take into consideration for the sake of fostering fair taxation culture in jurisdictions where healthy tax culture is only in a formative stage.

The uniqueness of situation, as some scholars like Handler argue, warrants discretion as its flexibility can be turned to the advantage of social justice (cited in Hawkins 1992) but cannot be a defence for the pervasiveness of discretion in taxation. On the other hand, applying discretions to a set of similar situations can give birth to inconsistent decisions causing discrimination among the taxpayers. Given the excessive and pervasive presence of discretionary powers at different levels of administration currently existing in Bangladesh's VAT law, replication of some international best practice will be worth considering.

Enormous power of the Government and NBR to produce secondary legislation, without any reference to the Parliament, in the form of SROs and other orders, affecting tax liability of taxpayers in particular and other stakeholders' economic decisions in general, has to be regulated in order to ensure certainty and predictability of the system.

In order to prevent discretions from degenerating into arbitrariness as has often been alleged in the Bangladesh revenue context, 'confining, structuring and checking of discretionary power' (Davis, cited in Hawkins 1992:17) is essential at all levels. The confining, structuring and checking of discretionary powers requires a couple of commitments. First, the discretionary behaviour in the decision-making process as a social rather than individual process can be streamlined by some social control (Feldman 1991). This social control obviously entails a paradigm of good governance in the state of affairs as a whole. Given that Bangladesh ranks poorly in the global good governance index (Mahmud, Ahmed et al. 2008), and its taxation system is alleged to lack good governance qualities (Prothom Alo 2012), it is imperative that the tax policy and implementation be infused with good governance principles such as participation, transparency and accountability. Second, as for individual discretionary powers, there must be some written guidelines, especially for applying liability discretion. A guideline may contain principles such as: (i) decisions are based on material that can be logically demonstrated; (ii) reasons are given for decisions; (iii) power is used for the proper purpose; and (iv) a certain action is done with integrity, competence, tolerance and in the public interest (Ombudsman 2006). This guideline, is practiced in many developed countries' tax jurisdictions in exercising discretionary powers and will ease the situation to a great extent and improve administrative practice. Better still, they could be used as tools for making the concerned officers accountable for their action. Moreover, the control mechanism is not only essential but also a prerequisite for gaining and retaining the trust of the taxpayers in the tax system in order for it to be effective and efficient.

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