M.RAMACHANDRA MURTHY
Advocate & Tax Consultant

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To,
The Appellate Dy. Commissioner (CT)
Punjagutta Division,
Hyderabad.

Sir,

Sub:- Filing the appeal in the case of M/s. **Nilgiri Estates., MG Road, Secunderabad.**
For the Period July 2015 to June 2017/Penalty – reg.

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Please find enclosed herewith the following appeal papers:

1. Form –APP 400 2 copies.
2. Grounds of Appeal 2 copies.
3. Challan No. 6201693359 for Rs.1000/- towards appeal fee.
4. A.O.No.17547 dt.13/7/2022 passed by Assistant Commissioner (ST) (FAC), M.G.Road – S D Road Begumpet Division, Hyderabad Telangana.
5. Form APP 400A
6. Letter relating to the proof of payment 12.5% disputed tax challan enclosed.
7. Vakalatnama

Thanking you
Yours sincerely

M.Ramachandra Murthy
Advocate &Tax Consultant

Nilgiri Estates
5-4-187/3 & 4, II Floor, Soham Mansion, M.G. Road, Secunderabad

Tax Period: July, 2015 to June, 2017/PENALTY

Statement of Facts:-

1) The appellant is a registered VAT dealer engaged in the business of construction and selling of independent residential villas and is an assessee on the rolls of the CTO, MG Road Circle, Hyderabad with TIN36607622962. The appellant opted to pay tax @ 1.25% under Section 4 (7) (d) of the TVAT Act, 2005 (hereinafter referred to as Act) under composition scheme.

2) In the course of business the appellant enters into agreement with their prospective buyers for sale of villas along with certain amenities. The agreement of sale which is the mother or initial agreement consists of the consideration received through sale of land, development charges of land and cost of construction of the entire villa. The appellant has paid VAT @ 1.25% on the total consideration received from these three components of the agreement.

3) Claiming authorization from the DC (CT), Begumpet division the CTO, Marredpally Circle (for short CTO) issued notice of assessment in Form VAT 305 A dated 07-03-2018 proposing tax of Rs.2,47,28,037/- on the contractual receipts under Section 4 (7) (a) read with Rule 17 (1) (g) of VAT Rules by allowing standard deduction during the tax period July, 2015 to June, 2017.

4) The appellant has filed detailed objections to the show cause notice by claiming that they are liable to tax under Section 4 (7) (d) of the Act only and not under Section 4 (7) (a) of the Act. However without properly considering the objections filed the learned CTO confirmed the proposed levy under Section 4 (7) (a) read with Rule 17(1)(g) after allowing standard deduction of 30% on a turnover of Rs. 16,03,22,162/- demanding a tax of Rs. 1,57,41,135/-.

5) Aggrieved by the said order appellant filed appeal before the Appellate Deputy Commissioner (CT), Punjagutta Division. The ADC (CT) remanded the appeal vide his order dt.27/02/2019.

6) Appellant submits that the CTO issued a notice in Form VAT 203A dated 23-04-2018 proposing to levy a penalty of Rs. 39,35,284/-as per Section 53 (1) (ii) of the Act which is equal to 25% of the alleged under declared tax of Rs. 1,57,41,135/-. Subsequently the learned CTO issued assessment of penalty in Form VAT 203 dated 24-07-2018 confirming the proposed levy of penalty of Rs. 39,35,284/-.

7) Aggrieved by such penalty order, appellant preferred appeal before this Honourable Authority. On a consideration of the grounds and the documents, this Honourable authority has set aside the said penalty order and remanded the matter with specific directions to the assessing authority vide order No.494 dated 05/03/2019.

8) On such remand, the jurisdictional authority ie., the Assistant Commissioner(ST) (FAC), M.G.Road-S.D.Road Circle (for short AC) issued Show cause notice dated 10/05/2022 to produce books of account to pass consequential orders . Pursuant to that notice, the appellant has filed letter on 18/05/2022 requesting time for submission of objections and documentary evidence. However without giving sufficient time, the learned AC passed the consequential order No.17547 dated 13/07/2022 raising the very same demand of **Rs.39,35,284/-.**

9) Aggrieved by such consequential order, appellant prefers this appeal on the following grounds, amongst others:-

Grounds of Appeal:

a. The impugned order is ex-facie illegal, arbitrary, improper and unjustifiable and is passed against the principles of natural justice and hence the same is liable to be set aside.

b. It is submitted that the learned AC is not justified in passing the impugned order in haste without providing sufficient opportunity. It is submitted that the learned ADC has set aside the first assessment order and has remanded the issue back to the assessing authority to pass consequential orders.

c. It is submitted that as per Section 37 of the TVAT Act, the assessing authority is having time of 3 years to pass the consequential orders in order to give effect to the order passed by the learned Appellate Deputy Commissioner. It is submitted that the learned ADC has passed the appeal order on 05.03.2019 and the assessing authority is having time up to 04.03.2022 to pass the consequential orders. It is true that the learned AC has issued notice for production of documents, however, due to illness of the concerned accounts head who is looking about the VAT issues, the appellant is not able to provide the relevant data to the learned AC. However, the learned AC without giving sufficient further time to the appellant has passed the impugned order with the very same demand.

d. It is submitted that the appellant is having all the information that is required to complete the assessment and this information is already produced before this Honourable ADC.

e. The appellant submits that the learned AC ought to have issued one more notice to the appellant instead of passing the impugned order in haste. The appellant therefore submits that the impugned order is liable to be set aside on the principles of natural justice. In any case appellant submits that they are having strong case on merits.

f. Without prejudice to the above submissions the appellant submits as under.

g. It is submitted that the impugned order is highhanded and non-speaking beyond a point. It has been passed in clear violation of principles of natural justice, in as much as the learned authority has refused to look into the letter of objections as nothing has been discussed by him.

h. It is sad that the learned authority has not at all considered single objection. The impugned order has been passed only for the purpose of harassing a genuine dealer and nothing else, in the humble submission of the appellant.

i. Appellant submits herewith a copy of grounds of appeal filed against the tax proceedings which may kindly be read as part and parcel of these grounds.

j. Appellant submits that penalty proceedings are in the nature of quasi-criminal proceedings. Therefore, penalty should not be levied merely because law provides for its imposition. The prescribed authorities competent to impose penalty should exercise the power conferred judiciously and on a consideration of all the relevant circumstances.

k. The appellant questioned levy of tax itself and as such levy of penalty is neither correct nor legal. When the levy of tax itself is not in accordance with the provisions of the Act, there cannot be levy of any penalty, as a consequence of levy of such tax.

l. Appellant submits that accord'ng to the provisions contained in Section 53 (1) (ii) of the Act, where any dealer has under declared tax, and where it has not been established that fraud or willful neglect has been committed and where the under declared tax is more than twenty five percent of the tax due; a

penalty shall be imposed at twenty five percent of such under-declared tax.

m. It is submitted that in the appellant's case the learned CTO has simply stated in the notice that the appellant has committed an offence under the provisions of the APVAT Act, 2005 and liable to pay a penalty @25% on the amount of under declared tax of Rs. 1,57,41,135/- as per Section 53 (1) (ii).

n. It therefore follows from this provision that the assessing authority is bound to prove that the appellant has under declared tax. The notice of penalty says that the appellant has to play a penalty of 25% on the amount of under declared tax. The learned CTO has not proved that the tax amount of Rs. 1,57,41,135/- is under declared tax and also that it has also not been established that fraud or wilful neglect has been committed by the appellant to authorize him to levy penalty @25% on the alleged under declared tax. The notice issued proposing penalty @25% is very much bald for the appellant to file any reply as the CTO has not inferred that there is under declaration of tax. When the notice of penalty is silent on this crucial issue the notice issued itself is cryptical for the proposal of penalty. Appellant submits that the learned CTO failed to put on the notice the reasons for the proposal of levy of penalty. The learned CTO has also not given any opportunity of personal hearing to explain the case and passed the impugned order which is against the principles of natural justice. The penalty order passed is liable to be set aside on this ground alone.

o. Even otherwise appellant submits that as per the following settled law, there cannot be any levy of penalty.

p. It is submitted that in the case of Hindustan Steel Ltd., Vs, State of Orissa (1970) (25 STC 211) the Hon'ble Supreme Court held that "an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal

proceeding and, therefore, penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. The court further observed that penalty will not be imposed merely because it is lawful to do so and whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of authority to be exercised judicially and on a consideration of all the relevant circumstances".

q. In the case of CTO Vs Rajdhani Wines (87 STC 362), the Rajasthan High Court held that there may be instances where because of ignorance of law or on improper understanding of law or on wrong interpretation of law, the assessee may not consider that part of the turnover as taxable and that the assessee may take a bonafide legal plea that a particular transaction is not liable to tax or it may happen that the taxability of the item is not shown based on a bonafide mistake as in the present case. This decision also squarely applies to the present case.

r. In the case of Modi Threads, Hyderabad Vs The State of Andhra Pradesh (16 APSTJ 277), the Honourable STAT held as follows:- Simply on account of the fact that such a provision is there in section 15(4) relating to levy of penalty, it cannot be said that such penalty should follow automatically irrespective of the circumstances of the case and the reasons due to which the tax could not be paid by the assessee."

s. In the case of BrugumallaVenkatappaiah Sons & Co. Vs. CTO (1973) 32 STC 34 the Hon'ble High Court of A.P. held that before levy of penalty there must be a clear finding by the authority that an offence had been committed by the dealer as the jurisdiction of that authority arises only when the dealer is found guilty of the offence. The onus is on the authorities to prove that not only has the offence been committed but the person accused of it has committed it consciously.

t. In the case of Salzigitter Hydraulics Pvt. Ltd., Hyderabad Vs. State of Andhra Pradesh (48 APSTJ 276)theHonourable Tribunal held that where non-payment of the tax is due to a genuine interpretation of issue, where no contumaciousness or unreasonable or malafide intention can be attributed to the dealer, **penalty under Section 53 read with Rule 25 (8) of the APVAT Act and Rules cannot be levied.**

u. The Hon'ble Supreme Court in the case of EID Parry (I) Ltd. Vs. Asst. Commissioner of Commercial Taxes & Another Batch (117 STC 457) held that when the dealer is under a bonafide belief that his transactions are exempted/taxable at a lower rate and when the legal position is not clear the levy of penalty is not justified. When there is a reasonable cause for the failure to pay tax, the imposition of penalty is not correct.

v. In the case of Kamal Auto Finance Ltd. (8 VST 274) the CESTAT, New Delhi has held that **short payment of tax for bonafide reasons does not attract penalty.**

w. In the case of Uniflex Cables Limited Vs Commissioner, Central Excise (2011—40 PHT 28) (AIFTP October, 2011 Journal) the Honourable Supreme Court held that the imposition of penalty was not justified where the **issue under dispute in relation to the liability of tax was of interpretational nature.**

x. Proviso under Section 53 of the Act mandates grant of personal hearing. This shows that levy of penalty is not automatic and that the authority must consider the objections advanced by the dealer. If it is automatic, there is no necessity to grant personal hearing. On such consideration of the objections and grounds, even levy can be wholly dropped. Appellant submits that if provisions of Section 53 are mandatory, then the proviso to Section 53 will became mere formality.

y. The Honourable Apex Court in Commissioner of Income Tax V Reliance Petro products P Limited (2010—322 ITR 158), while dealing with similar issue held as follows:-

z. "We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was upto the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271 (1) ©. If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the assessing officer for any reason, the assessee will invite penalty under Section 271 (1) ©. That is clearly not the intendment of the Legislature."

aa. In the case of Assistant Commercial Tax Officer V KumawatUdhyog (97 STC 238), the Rajasthan High Court held as follows:-

ab. "If an entry exists in the books of account and the matter relates only to an interpretation of the nature of the transaction and the law relating to its taxability, the authorities would not be justified in levying penalty."

ac. Prima facie an entry in the books of account disclosing the correct nature of the transaction is sufficient to come to the conclusion that no offence has been committed unless the assessing authority proves by some other evidence, apart from the finding given in the assessment order that the non-disclosure in the return is because of the deliberate action on the part of the assess to evade the tax."

ad. The Honourable STAT in the case of Karnataka Silk Marketing Board Limited, Janagam VS State of AP (57 APSTJ 125) held as follows:-

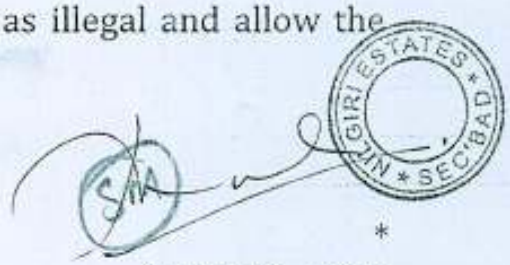
ae."Proviso to sub Section (1-B) of Section 14 of the APGST Act, 1957 mandates the assessing authority to give the dealer a reasonable opportunity of being heard before levying such a penalty for non-furnishng of a certificate of audit and other statements attested by a Chartered Accountant within the time stipulated by Rule 17 (5-A) of the APGST Rules, **which is not automatic**, as the dealer availing of a reasonable opportunity of being heard, could assign valid and genuine reasons for such a delay, leaing an in-built discretion to the assessing authority to waive penalty for such a delayed furnishing of the certificate of audit and other statements."

af. Appellant submits that the Proviso under Section 53 of the Act lays down categorically that the competent authority prescribed shall give a reasonable opportunity of being heard. The expression 'reasonable opportunity of being heard' occurring in the Proviso denotes that the prescribed authority shall examine the causes. The principles of natural justice come into play and demand, the authority prescribed to examine the willfulness or otherwise and exercise jurisdiction to either proceed to levy the Penalty or to desist from doing so, for reasons to be recorded. The Proviso thus cannot be deemed to authorize the authority to invoke and levy penalty as an 'automatic provision', bestowing no jurisdiction whatsoever to drop the proposal.

ag.As the Proviso under Section 53 of TVAT Act, 2005 is also to the same effect of giving reasonable opportunity, the above decisions squarely applies to the facts of the case. The assessing authority will be well within his limits in refusing to levy penalty, for the reasons explained herein above. It appears penalty has been proposed to be levied as a matter of routine instead of strictly in accordance with the statutory provisions.

ah. In view of the above grounds and other grounds that may be urged at the time of hearing the appellant prays the Honourable Appellate Deputy Commissioner to set aside the

impugned order of the learned CTO as illegal and allow the appeal.



(APPELLANT)

FORM APP 400

FORM OF APPEAL UNDER SECTION 31

[See Rule 38(2)(a)]

1.	Appeal Office Address	: The Appellate Dy. Commissioner (CT) Punjagutta Division, Hyderabad
2.	TIN/GRN	: 36607622962
3.	Name & Address	: M/s. Nilgiri Estates, 5-4-187, 3&4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad.
4.	I wish to appeal the following decision / assessment received from the tax office on	: 13/07/2022
5.	Date of filing of appeal	: /08/2022
6.	Reasons for delay (if applicable enclose a separate sheet	: Not Applicable
7.	Tax Period / Tax Periods	: July'2015 to June'2017/Penalty
8.	Tax Office decision / assessment Order No. Date.	: Consequential order no.17547 dated 13/07/2022 passed by Assistant Commissioner (ST) (FAC) M.G Road – S.D. Road Circle, Begumpet Division, Hyderabad
9.	Grounds of the appeal (use separate sheet if space is insufficient	: Separately Enclosed
10.	If turnover is disputed	
	a) Disputed turnover	: NIL
	b) Tax on the disputed turnover	: NIL
	If rate of tax is disputed	
	a) Turnover involved	: NIL
	b) Amount of tax disputed	: NIL
11.	12.5% of the above disputed penalty paid	: Rs.4,91,911/-
Note:	Any other relief claimed	: 1) To set aside the demand raised on account of Penalty of Rs.39,35,284/- 2) Other grounds that may be urged at the time of hearing.

(The payment particulars are to be enclosed if ready paid along with the reasons on Form APP 400A)

12. Payment Details:

a) Challan / Instrument No.	:	
b) Date	:	
c) Bank / Treasury	:	------
d) Branch Code	:	------
e) Amount	:	____

TOTAL	:	

Declaration:

I, _____ hereby declare that the information provided on this form to the best of my knowledge is true and accurate.

Signature of the Appellant & Stamp

Date of declaration :

Name :
Designation :

Please Note: A false declaration is an offence.

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FORM APP 406

APPLICATION FOR STAY OF COLLECTION OF DISPUTED PENALTY

[Under Section 31(2) & 33(6)] [See Rule 39(1)]

	Date	Month	Year
		08	2022

01. Appeal Office Address:
To,
The Appellate Deputy Commissioner (CT)
Punjagutta Division, Hyderabad

02	TIN	36607622962

03. Name M/s. Nilgiri Estates,
Address: 5-4-187, 3&4, 2nd Floor,
Soham Mansion, M.G. Road,
Secunderabad.

04.	Tax period	July'2015 to June'2017/Penalty
05.	Authority passing the order or proceeding disputed.	Consequential order No.17547 dt.13/07/2022 passed by Assistant Commissioner (ST) (FAC) M.G. Road – S.D. Road Circle, Begumpet Division, Hyderabad.
06	Date on which the order or proceeding was Communicated.	13/07/2022
07.	(1) (a) Tax assessed	Rs.39,35,284/-
	(b) Tax disputed	NIL
	(2) Penalty / Interest disputed	Rs.39,35,284/-
08	Amount for which stay is being sought	Rs.39,35,284/-
09.	Address to which the communications may be sent to the applicant.	M/s. Nilgiri Estates, 5-4-187, 3&4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad.

Signature of the Dealer(s)

Signature of the Authorised Representatives if any

10. GROUNDS OF STAY

1.) Substantial question of facts and law that may arise in the appeal.

2.) The appellant will be hard hit if it is called upon to pay this heavy amount of penalty pending disposal of the appeal.

3.) The grounds that are stated in the main appeal may kindly be read as grounds of this appeal.

4.) The appellant has already paid 12.5% of disputed penalty for the purpose of admission of the appeal and hence it is requested grant stay on the balance disputed penalty till the disposal of the appeal.

5.) In this regard the appellant relied on the latest decision of the Hon'ble Supreme Court in a case wherein the Hon'ble Court dismissed the SLP filed against the order of the Hon'ble High Court of Andhra Pradesh & Telangana in the case of Deputy Commercial Tax Officer-I, Bhavanipuram Circle, Vijayawada Vs. Sri Dedeepriya Paints in Diary No.11711 of 2019 dt.22/04/2019.

The Honourable High Court of Andhra Pradesh & Telangana in its decision in WP No.20922 of 2018 dated 22.06.2018 in the case of Sri Dedeepriya Paints Vs Deputy Commercial Tax Officer-I, Bhavanipuram Circle, Vijayawada held as follows:-

"When the petitioner concern already paid 12.5% of the disputed tax amount for the purpose of maintaining an appeal as required by law, it would be wholly unjust for the tax authorities to demand the balance of the disputed tax amount notwithstanding the pendency of the appeal".

1.) The appellant relied on the latest decision of the Honourable High Court of Telangana in the case of M/s. Capart Industries, Hyderabad in WP Nos.3954,3976,4089,4115,4518,4556 and 4577 of 2020, wherein it is held as follows:-

"4. Counsel for the petitioner relies upon the order of the Division Bench of this court in Sri Dedeepriya Pains Vs. Deputy Commercial Tax Officer – I wherein a similar action on the part of the Department in proposing to collect the balance disputed tax through 12.5% of the disputed tax amount was already deposited with the Department pending appeal before the Appellate Deputy Commissioner fell for consideration. In that case, this court held that once the assesse had already paid 12.5% of the disputed tax amount for the purpose of maintaining an appeal as required by law, it would be wholly unjust for the tax authorities to demand the balance of the disputed tax amount notwithstanding the pendency of appeal.

5. This above order was later confirmed by the Supreme Court in SLP (CIVIL)Diary No.11711 of 2019 on 22.04.2019.

6. The special Government Pleader for Commercial Taxes appearing for respondents does not dispute **the principle laid down** in these cases.

7. Since the petitioner had already paid 12.5% or more of the disputed tax pending appeals before the Appellate Deputy Commissioner and the

Telangana VAT Appellate Tribunal, we are of the considered opinion that the respondents are not justified in refusing to grant the petitioner stay of collection of the balance disputed tax and issuing Garnishee orders to the Petitioner's banker for recover of the balance disputed tax".

Copy of the High Court order mentioned above is attached herewith

Hence it is just and necessary that the Appellate Dy. Commissioner (CT) may be pleased to grant stay of collection of the disputed penalty of Rs.39,35,284/- pending disposal of the appeal.

VERIFICATION

I, _____ applicant (s) do hereby declare that what is stated above is true to the best of my / our knowledge and belief.

Verified today the _____ day of August'2022

Signature of the Dealer(s)

Signature of the Authorised Representatives if any

Nilgiri Estates

5-4-187/3&4, II floor, MG Road,
Secunderabad – 500 003.
Phone: +91-40-66335551

Date:08-08-2022

To,
The Appellate Dy. Commissioner (CT),
Punjagutta Division,
Hyderabad.

Sir,

Sub: TVAT Act, 2005 - Appeal filed in the case of M/s. Nilgiri Estates, Secunderabad - For the tax period from July'2015 to June'2017/penalty - Proof of payment of 12.5% disputed penalty paid - Reg.

Ref: Consequential order no.17547 dt.13/07/2022 passed by Assistant Commissioner (ST)(FAC), M.G. Road- S.D. Road Circle, Hyderabad.

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We submit that aggrieved by the consequential order no.17547 dt.13/07/2022 passed by the Assistant Commissioner (ST)(FAC), M.G. Road- S.D. Road Circle, Hyderabad for the tax period from July'2015 to June 2017-18 (upto June'2017) under the TVAT Act, 2005, we are filing appeal before your Hon'ble Authority. For admission of appeal, we have to pay 12.5% of the disputed penalty as under:-

Penalty disputed in the appeal	Rs.39,35,284
12.5% disputed penalty	Rs.4,91,911

We submit that aggrieved by the penalty order dt.24/07/2018 passed by the Assistant Commissioner(ST), M.G. Road- S.D. Road Circle, Hyderabad for the tax period form July'2015 to June'2017 we have filed first round of appeal before this Hon'ble ADC (CT), Punjagutta Division, Hyderabad by paying Rs.4,91,911/- towards 12.5% of the disputed penalty. (copy is enclosed). This Honourable ADC remanded the appeal vide order No.494 dated 05/03/2019.

We submit that consequent on the remand the Assistant Commissioner(ST) (FAC) passed the present consequential order dated 13/07/2022 levying same penalty of Rs.39,35,284. Against the said order we are filing the appeal. As such we have paid 12.5% of the disputed penalty and we need not pay anything now.

In view of the above submissions we request to kindly admit the appeal.

Yours truly,

for Nilgiri Estates

NILGIRI ESTATES * SECUNDERABAD

PENALTY

e-Payments

Payment Done Successfully!

Challan No	6201693359
Remitter	NILGIRI ESTATES
DDO Code	25002303017
HOA	0040001020005000000NVN
Amount	1000