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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	:28840298894
3.	Name & Address	: M/s.Mehta & Modi Homes D.No. 5-4-187/3 & 4, IInd Floor, Soham Mansion, M.G. Road, Secunderabad – 500 003.
4.	I wish to appeal the following decision / assessment received from the tax office on	: 10/09/2013
5.	Date of filing of appeal	: /10/2013
6.	Reasons for delay (if applicable enclose a separate sheet	: Not Applicable
7.	Tax Period / Tax Periods	: 2007-08/VAT
8.	Tax Office decision / assessment Order No.	: Assessment order dated 06/09/2013 passed by Commercial Tax Officer, M.G. Road Circle, 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	: Rs.15,28,160 + Rs.73,541 =Rs.16,01,701/-
	If rate of tax is disputed	
	a) Turnover involved	: NIL
	b) Amount of tax disputed	: NIL
11.	12.5% of the above disputed tax paid	: Rs.1,98,096/- (As per the assessment order)
	Note: Any other relief claimed	: 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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M/s. Mehta & Modi Homes
5-4-187/3 & 4, II Floor, Soham Mansion, M.G. Road, Secunderabad– 500 003.

Assessment year: 2007-08/VAT

Statement of Facts: -

1) The appellant is a registered VAT dealer engaged in the business of construction and selling of independent residential villas in fully developed/ operational gated housing complex at Charlapally, Ghatkesar Mandal, R.R. District and is an assessee on the rolls of the CTO, MG Road Circle, Hyderabad (for short CTO), with TIN No 28840298894. The appellant opted to pay tax @ 1% under Section 4 (7) (d) of the APVAT 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 independent Bungalows of similar size, similar elevation, same colour scheme etc., 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 bungalow. The appellant has paid VAT @ 1% on the total consideration received from these three components of the agreement.

3) Based on the record received from the Vigilance & Enforcement Officials, the CTO, MG Road Circle issued notice of assessment in Form VAT 305 A dated 24-08-2012 proposing tax of Rs. 61,18,693/- on the contractual receipts of Rs. 16,61,25,381/- @4% during the year **2007-08** under Section 4 (7) © of the said Act.

4) The appellant has filed detailed objections before CTO against the proposed levy of tax through letter dated 12/09/2012 stating that the notice of assessment is served on 24-08-2012 which is barred by limitation. Without prejudice to the said contention of period of limitation the appellant has also requested the learned CTO to drop the proposal of levy of tax under Section 4 (7) ©, but to levy tax under Section 4 (7) (d) of the Act as they are engaged in the business of construction and selling of independent bungalows and opted for payment of tax under composition.

5) As there is no assessment order from the CTO, the appellant has filed further objections through letters dated 12-11-2012, 28-11-2012 and 30-05-2013 and reiterated its earlier request to adopt the contractual receipts as Rs. 5,26,32,200/- and to levy tax under Section 4 (7) (d) of the Act only. The

learned CTO has accepted the request to adopt the receipts as Rs. 5,17,44,561/-.

6) Accepting the appellant's request to adopt the contractual receipts as Rs. 5,19,77,561/- the learned CTO has again issued a revised show cause notice in Form 305 A dated 17-06-2013 proposing to levy tax under Section 4(7) © of the Act only. In addition the learned CTO has also proposed afresh to levy tax @ 4 % and 12.5% on the non VAT purchases under Section 4 (7) (e) of the Act.

7) The appellant has again filed detailed objections through letter dated 10-07-2013. However, without properly considering the objections raised by the appellant, the learned CTO has completed the assessment proceedings in Form VAT 305 dated 06/09/2013 confirming the levy of tax of Rs. 20,37,546/-under Section4 (7) © of the Act and tax of Rs. 73,541/- on non VAT purchases.

8) Aggrieved by the said assessment order the appellant prefers this appeal on the following grounds, amongst others:-

Grounds of Appeal:-

a) The impugned order is highly illegal, arbitrary, unjustifiable and contrary to facts and law.

b) In the original show cause notice dated 24-08-2012 the CTO stated that the Vigilance & Enforcement officials visited the work site of the appellant on 10-12-2008 and obtained the details of the entire construction work of the appellant and sent the record to the CTO.

c) Based on these details the learned CTO issued show cause notice dated 24-08-2012 proposing to levy tax @ 4% on the contractual receipts of Rs. 16,61,25,381/- under Section 4 (7) © of the Act during the year 2007-08 relying on the second category of advance ruling in the case of Maytas Hill County Pvt. Ltd., Begumpet, Hyderabad dated 30-07-2006. In the reply dated 12-09-2012 the appellant has submitted that the assessment or the period 2007-08 ought to have been completed on or before April, 2012 and that as the notice of assessment was served on 24-08-2012 the said notice is barred by limitation under Section 21(3) of the Act and requested to drop the proposed levy. Subsequently in the revised show cause notice dated 17-06-2013 the learned CTO stated that that this is not a case of an incorrect and incomplete return as laid down under Section 21 (3) of the Act, but is based on an extraneous material

recovered by the V& E Officials according to whom the purchases from unregistered dealers were not reported in the monthly returns and but for the inspection of the Enforcement officials, such non disclosure or turnovers relatable to unregistered dealers could not have seen the light. By this non disclosure of the unregistered purchases the appellant attempted to evade tax and hence the assessment has to be made under Section 21 (5) of the Act having six years limitation, but not under Section 21 (3). Saying so, the learned CTO has not accepted the argument of the appellant on the issue of limitation.

d) Against such observation, the appellant in the reply dated 10/07/2013 has stated that Section 21 (5) mentions 'where any willful evasion of tax has been committed by a dealer....' The question now is whether any willful evasion of tax has been committed by us so as to apply six year limitation. The allegation made in the notice is that there are certain purchases which are taxable under Section 4 (7) (e) of the Act, which are not reported in the returns and that it could be known through the extraneous material received from Vigilance and Enforcement Department. It is also alleged that we have not filed any VAT 213 return." The appellant submits that these are no grounds at all for converting the issue to make it fall in the net of six year limitation.

e) It is submitted that there is no extraneous material as alleged. All the figures and facts are from the books of account of the appellant only. Whether a particular transaction is liable to tax or not is always a question of interpretation. There is no suppressed turnover. There is no evasion of tax.

f) The appellant submits that no specific charge has been created in Section 4 (7) (e) of the Act to pay tax. This clause (e) says tax is payable when the dealer 'uses' such goods. It is only tax on the transfer of property in goods. Hence there is substantial ambiguity in clause (e). Further it is not purchase tax as alleged because Section 5 of the Act prohibits such levy of tax on inter State purchases etc.

g) The appellant has therefore entertained a bonafide legal plea that such tax is not payable. There is no wrong in entertaining a bonafide legal plea in the matters of interpretation. Because of all such infirmities only, this clause has been subsequently omitted from the statute book.

h) Appellant submits that 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. Due to ambiguity in clause (e) appellant has not paid tax on the unregistered purchases under bonafide legal plea. This decision also squarely applies to this case.

i) Appellant also submits that in the original show cause notice dated 24/08/2012 no tax was proposed to be levied on the consideration received from the customers Under Sec.4(7)(e) of the Act. The unregistered purchases were not at all proposed in spite of the fact that all such purchases were duly accounted for in the books of account. It is only when appellant objected that the original pre assessment is barred by limitation of time the said unregistered purchases were brought to assessment under Sec.4 (7) (e) of the Act. In the revised show cause notice the said purchases were alleged to have not been reported in the returns and as such there is willful evasion of tax only to gain the advantage that the tax period 2007-08 was not barred by limitation of time of four years and has six years of time under Sec. 21(5) of the Act.

j) Further all the purchases were duly accounted for in the books. The so called figures are not ascertained from outside the books of account. Extracting Section 21(5) of the ACT it is stated that by non disclosure of unregistered purchases appellant has attempted to evade the tax willfully and it is nothing but willful evasion of tax. There is neither mens rea nor any deliberate conduct on appellant's part, as appellant has entertained a legal plea. There is no evasion of tax as alleged, not to speak of 'willful evasion'

k) Appellant submits that mens rea is an essential or sine qua non for criminal offence. Mens rea in its technical sense means knowledge of the wrongfulness of the Act. In the case of Natraj Rubbers and Another Vs STO, Bhavnagar, (113 STC 575), the Rajasthan High Court held as follows:-

"**one finds it difficult to imagine on what premise the levying of tax at lower rate in the present case can at all be said to be an act of evasion on the part of dealer or an attempt on the part of the dealer to evade the payment of tax** requiring recourse to extraordinary step of seizure. If the putting forth of a claim by any dealer to a provision of law inviting lesser amount of tax is to be considered an act of evasion, **it would tantamount to denying even the fundamental liberty to the taxpayer to question and ask for proper determination of his tax liability** in accordance with law which, according to him, applies to him.

Such an act cannot in any sense of term be called an act of evasion or attempt to evade."

l) On submission of the above reply the learned CTO has simply reiterated his stand taken in the revised show cause notice that non disclosure of the unregistered purchases falls under evasion of tax willfully and therefore the assessment gains the time of six years under Section 21 (5) of the Act for completion and rejected the contention of the appellant.

m) The appellant could not understand 'extraneous' information. Simply because there is some report from V & E officers, it does not become 'willful evasion'. As the appellant is of the view that no tax is payable under clause (e), it was felt that it not necessary even to file revised return.

n) Appellant may be permitted to state that by just mentioning 'willful evasion', its action does not become willful evasion. Hence Section 21 (5) is not applicable to appellant's case. The appellant submits that the assessment passed is liable to be set aside on this ground alone.

o) 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:-

"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."

p) Appellant entertained a bonafide belief that it is not liable to tax under Section 4 (7) (e) of the Act, for the reasons hereinafter explained. It does not mean that there is willfulness in such action. **It is therefore submitted that the order is clearly barred by limitation in view of the above binding decision.**

q) Appellant submits that it is engaged in the business of construction and selling of independent Bungalows at Charlapalli, Ghatkesar Mandal, R.R.District and opted for payment of tax @ 1% under composition under Sec. 4(7) (d) of the APVAT Act. It has declared the turnover relating to construction and sale of flats in the monthly VAT returns and paid the tax on the amounts received from the customers @ 1%.

r) Appellant submits that in the course of business it has in the first instance entered into agreement with its prospective buyers for sale of independent Bungalows of similar size, similar elevation, same colour scheme etc., along with certain amenities. The agreement of sale consists of the consideration received through sale of land, development charges of land and cost of construction of the bungalow. It has paid VAT @ 1% on the total consideration received from these three components of the agreement. In the Advance Ruling in the case of Maytas the ruling is given as under:-

1) The applicant shall be eligible for composition under Section 4(7) (d) to pay tax @ 4% on 25% of the total consideration originally agreed upon **whether received in composite manner or in separate portions towards land cost and construction cost.**

2) The applicant is not eligible to opt to pay 4% of 25% consideration received towards construction cost by excluding cost of land though it could be registered separately at any stage.

3) If the property is registered only as a land through a sale deed in the second category of transactions explained by the applicant and there is no subsequent registration after completion of construction, the applicant shall ensure payment of 1% of total consideration received or receivable (as per initial agreement of sale) by way of demand draft in favour of CTO/ Asst. Commissioner concerned at the time of execution of sale deed before Sub- Registrar as prescribed in clause (i) of sub rule (4) of Rule 17 of APVAT Rules,2005.

s) From the above Ruling it is quite clear that if the property is registered only as a land through a sale deed and there is no subsequent registration after completion of construction the applicant shall ensure payment of 1% of total consideration received or receivable as per the initial agreement of sale. Appellant submits that it entered into agreement of sale with its prospective buyers where in the sale value of land, development charges of land for laying of roads, drains, parks etc., and cost of construction are mentioned in this single document of sale agreement. Even though it entered into agreement for construction and

agreement for development charges subsequently the amount mentioned in these two agreements has already been shown in the original agreement of sale and it has paid VAT @ 1% on the total consideration received as per the original agreement of sale. Thus the payment of tax @ 1% is as per the provisions of Section 4(7) (d).

t) In spite of the submissions made as above in the earlier replies it is stated in the revision show cause notice that the fact of registration of the bungalow in favour of the prospective buyer also is not substantiated by adducing the necessary documents. It was also stated that in Maytas case there existed a tripartite agreement, in that, land owner, developer, and the buyer of the land in the first instance, and subsequently for construction of a bungalow by the developer and that in the case on hand there is no such tripartite agreement. It is stated that the clarification sought for in M/s. Maytas case is not akin to the facts of the case on hand.

u) It is again submitted that appellant has initially entered into agreement of sale with the prospective buyers where in the sale value of land, development charges of land for laying of roads, drains, parks etc., and cost of construction are mentioned in this single document of sale agreement. This initial agreement of sale is the legal document which speaks about full and total consideration receivable for the sale of bungalows on which appellant has paid tax @ 4% on 25% of total consideration based on this agreement of sale, which is the 'mother agreement'. Even though appellant entered into agreement for construction and agreement for development charges subsequently the amounts mentioned in these two agreements have already been shown in the original agreement of sale (mother or initial agreement) and appellant has paid VAT @ 1% on the total consideration received as per the original agreement of sale. Thus the payment of tax @ 1% by the appellant is strictly as per the provisions of Section 4(7) (d).

v) The case of Maytas is that in both the situations, there is 'initial agreement of sale', which is generally called 'mother agreement'. In that agreement the entire price for the sale of land as well as construction cost is mentioned. This fact has been affirmed by the authority itself in the said Ruling as follows:-
"In clause 2(a), it is specified that developer and the landowner have agreed to sell the property consisting of a finished house for a total price specified in Schedule 2 of the agreement. **The specified price is found to be the total price for the land and construction cost."**

w) Thus the case of Maytas is that whatever be the situation, the prospective buyer enters into an agreement for the purchase of a flat/bungalow/villa for a specified price, which includes both the value of land and construction cost. In this mother or initial agreement the full price is mentioned. As a consequence thereof, there is a sale deed for the sale of land/semi finished structure and then a construction agreement. The ACAR (Authority for Clarification and Advance Ruling) held that in a situation where the entire price is mentioned in the initial agreement, tax is payable only @ 1% under Section 4 (7) (d) of the Act.

x) In support of appellant's argument the dates of mother agreement and the subsequent agreements in one case are detailed as under:-
To substantiate the fact that appellant has entered into agreement of sale with the prospective buyer in the first instance showing the total value of the sale of land, construction charges and development charges the following is the dates of agreement and the amounts shown:

Agreement of sale dated 11/05/2007 in favour of Sri.P.Vijaya Kumar Pidugu, Plot No.230, admeasuring 2098 sqft.

Agreement of Sale dated 11/05/2007 (Mother Agreement)	Rs.45,80,000
Sale deed for sale of land dt.29/08/2007	Rs. 3,81,000
Agreement for construction dt.29/08/2007	Rs.26,12,000
Agreement for Development charges dt.29/08/2007	Rs.15,87,000

y) In the Revision order No.LV (1)/464/2009 dated 29.6.2011 passed by the Honourable Commissioner in the case of Ambience Properties Limited, Hyderabad, it has been observed as follows:-
"One more crucial factor that clinches the status of the dealer company as nothing more than the contractor for the construction of the house, **is that in the original tripartite agreement the value of the house is not mentioned**. It is only the value of the land that finds place in that agreement. The deed for the sale of land subsequently registered also conforms to that value. The value of the house is mentioned only in the construction agreement between the dealer company and the purchaser of the plot. In the construction agreement the name of the original land owner does not appear. It is therefore unambiguously proved that the legal status of the dealer company is that of a contractor only for construction but not that of a contractor for construction and sale of apartments or residential houses specified under section 4(7)(d) of the APVAT Act. There is no element of sale in the house. There is no sale deed for the house and in the sale deed for the house site the value of the house is not included for payment of stamp duty. **It should be noted at this juncture that the Advance Ruling in Maytas case cited by the**

dealer company is based on the fact that in the tripartite agreement itself the value of the land, the value of the house are clearly mentioned either jointly or separately. But in the present case the value of the house is not mentioned at all in the original tripartite agreement. The agreement only says that the dealer company who is a developer should be necessarily appointed as contractor. No further additional status is conferred on the dealer company. The house is constructed as per a works contract agreement the purchaser of the plot as contractee entered into with the dealer company as contractor. The dealer company is therefore assessable under 4(7) (c) of the APVAT Act, but not 4(7)(d) of the said Act."

z) The Commissioner has categorically observed that if in the agreement for sale, the value of house is also mentioned as ruled in Maytas case, then tax can be paid under clause (d). In the case before the Commissioner, the value of house is not mentioned in the initial agreement. Hence tax has been levied under clause © of the Act. But in this case the total value of the house is mentioned in the mother agreement which includes the land value, construction value and the development charges. Thus the facts in this case differ from the observation made.

aa) Appellant is squarely covered by the Ruling in Maytas case. The agreement of sale entered into with the prospective buyer clearly shows that what is agreed to be sold is only the 'bungalow with land' for a specified price. This fact cannot be brushed aside. Appellant is squarely covered by the Maytas Ruling and the Revision order of the Honourable Commissioner. In all cases, appellant has entered into Mother or Initial agreement, which clearly mentions the total price including the value of land and constructed bungalow. Hence, payment of tax under clause (d) is correct and such payment cannot be faulted with. With regard to Tripartite agreement appellant submits that in Maytas case, the land is not owned by the builder and hence the owner of the land is made as a party to the construction and selling of apartments agreement, where as in this case appellant is the owner of the land and hence it has directly entered into an agreement with the prospective buyers of the bunglow without a third person. In view of the above appellant submits that the ruling given in the case of Maytas is squarely applicable to this case and appellant is liable to pay composition tax of 1% only on the total value of the agreement which includes the value of land transferred. It is reiterated that appellant has in the business of construction and selling of apartments/buildings, the class of VAT dealer to which the benefit of composition of tax under Section 4 (7) (d) of the Act.

bb) In the notice it was stated that as per the Advance Ruling given in the case of M/s.Nobel Properties, Banjara Hills dated 15/09/2012, it was clarified that agreement for construction of villa on the land sold by the builder to the buyer will fall under Sec. 4(7)(b) of APVAT Act taxable @ 4% on the total consideration received. Appellant submits that this part of advance ruling is not applicable to this case as appellant enters into initial agreement for sale of villa/apartment along with land for a specific amount where as in the above advance ruling there is no initial agreement as in this case.

cc) In the said Advance Ruling, the clarification sought was whether 'construction and selling of villa along with land in a single deed' will fall under Sec. 4(7) (d) of the APVAT Act. At Para A it was clarified that ' *only first type of transaction, i.e, construction and selling of villas along with land in a single deed will fall under section 4(7)(d) of the APVAT Act, 205, if the dealer engaged in construction and selling of residential apartments, houses, buildings or commercial complexes opts to pay tax by way of composition under section 4(7)(d) of the APVAT Act, 2005 if not, the transaction will fall under section 4(7) (a) of the APVAT Act, 2005*'. Appellant submits that as per clarification given in the second para **B** above appellant is rightly eligible for payment of tax @ 1% on the total consideration under section 4(7) (d) of the Act as it has entered into one single agreement for the sale of Villa along with land. The appellant therefore submits that the levy of tax @ 4% on the contractual receipts of Rs.5,09,38,642/- is illegal and is therefore liable to be set aside.

dd) The appellant submits that clause (e) of Section 4 (7) has been omitted by Act No. 21 of 2011. The very fact of omission would mean that it is omitted from the date of inception. If it is a case of deletion, it shall be effective from the date of deletion. Where it is a case of omission, the authority shall proceed as if there is no such provision on the statute book. Hence though the date of omission is from 15-09-2011, it shall be deemed that it was not there in the Act, even earlier to 15-09-2011.

ee) The appellant submits that even if for any reason the said clause (e) is made applicable, no tax need be paid at the higher rates because clause (e) is very clear in saying that under clause (e) tax is payable only at the rates applicable to those goods under the Act. In the present case appellant have opted for composition under Section 4 (7) (d) of the Act. In respect of the goods used by them in the execution of works contract, the rate of tax is 4% / 5% of 25% of the

consideration received or receivable. Clause (e) says THE RATE APPLICABLE **UNDER THE ACT**. The rate applicable under the Act is 4% / 5% of 25%. Clause (e) does not authorize collection of tax at the full rate of 4% or 12.5%, as **there is no mention of 'Schedules to the Act' in that clause**. For example in respect of 'lease tax', in Section 4 (8) of the Act, it is specifically mentioned 'at the rates specified in the Schedules'. As, such words do not find place in Section 4 (7) (e), it cannot be assumed that the rates in the Schedules have to be applied. It is settled law that there cannot be any presumption with reference to the charge to tax. Any ambiguity in the provision shall be interpreted in favour of the tax payer. It is also settled law that when there is possibility to apply two rates of tax on the same commodity, the least of the two has to be applied. The appellant therefore humbly submits that on mere presumption, higher rates of tax cannot be applied. There is no authorization in clause (e) to collect tax at the rates of 4% or 12.5% as the case may be. Further appellant have paid tax at the rate of 4% only under clause (d) and not at 1%. The appellant has already paid tax 4% on the same goods, the question of paying tax once again @ 4% does not arise. What has been reduced under clause (d) is only the quantum of turnover to 25% but the rate of tax of 4%/ 5% has been retained. In the result no tax becomes payable either @ 4% or @ 12.5%.

ff) It is therefore submitted that levy of tax of Rs.73,541/- under clause (e) is neither correct nor legal.

gg) In view of the above grounds and other grounds that may be urged at the time of hearing the appellant prays the Appellate Authority to set aside the assessment order as illegal and allow the appeal.

(APPELLANT)