

Mehta & Modi Homes

Office: 5-4-187/3 & 4, II floor,
Soham Mansion, M G Road,
Secunderabad – 500 003.
Ph: +91 40 66335551.

Date: 6th August 2014 ✓

To,
The Commercial Tax Officer,
M.G. Road Circle,
Hyderabad.

Ref: VAT Penalty notice dated 25.04.2014.

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- 1) We submit that we are in receipt of your notice proposing to levy penalty of Rs.15,84,765 in form VAT 203A dated 25.04.2014 under Section 53 (3) of APVAT Act, 2005 (for short Act). The present penalty notice is a consequence of the assessment order dated 06.09.2013 for the year 2007-2008 demanding the so called under declared tax of Rs.15,84,765. We request to kindly consider our objections on the following grounds:-
- 2) At the outset we submit that aggrieved by the assessment order dated 06.09.2013, we have filed appeal before the Honourable ADC (CT), Punjagutta Division, Hyderabad, which is pending disposal. Copy of the grounds of appeal filed is herewith enclosed for kind perusal.
- 3) We submit that your goodself has proposed to levy penalty @ 100% under Section 53(3) of the Act. Section 53(3) reads as follows:

“Any dealer who has under declared tax, and where it is established that fraud or willful neglect has been committed he shall be liable to pay penalty equal to the tax under declared; besides being liable for prosecution:

Provided that before levying penalty under this Section the authority prescribed shall give the dealer a reasonable opportunity of being heard”.

As per Section 53(3) shows that in the case of a dealer who has under declared tax and where it is established that fraud or willful neglect has been committed, he shall be liable to pay penalty equal to the tax under declared. Thus the burden to establish that the dealer has committed fraud or willful neglect is on the assessing authority levying penalty.

- 4) There is no mention of fraud or willful neglect in the notice. There is no basis for the conclusion “they have committed on offence U/S.53(3)” penalty cannot be levied as a matter of routine. No mensrea has been established.

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- 5) We submit that your goodself failed to establish any willful neglect or fraud committed by us. Even otherwise we submit that as per the following settled law, there cannot be any levy of penalty.
- 6) 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".
- 7) In the case of Shilpa Homes P Limited Vs State of AP (23 TTR page 1), the Honourable Tribunal while dealing with the same issue held as follows:-

"Penalty under Section 53 (3) of APVAT Act can be initiated mainly on two grounds, fraud or wilful neglect by any dealer. According to Concise Oxford English Dictionary (edition 2010), the word 'fraud' means wrongful or criminal deception intended to result in financial or personal gain, a person or thing intended to deceive and 'wilful neglect' means intentional or deliberate or fail to do something.
- 8) The AP High Court in Delta Lubricants, Vijayawada Vs DCTO (43 APSTJ 27) held that penalty under Section 53 (3) of APVAT Act can be imposed only when it is established that under valuation of tax was a result of fraud or willful neglect, which is an essential ingredient of the Section.
- 9) In view of the aforesaid discussion, we hold that the levy of penalty 100% by the revisional authority in revising the penalty order is unsustainable and accordingly, we set aside the impugned order and allow the appeal."
- 10) 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

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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.”

- 11) In the case of Century Flour Mills Limited Vs. Tamilnadu STAT (61 VST 457), the Madras High Court held that for the purpose of levy of penalty under Section 12 (3), the authority had to consider the bonafides of the petitioner. Even though the Tribunal in the order had stated that ‘suppression’ had been found in the accounts of the dealer, there was absolutely no willful suppression or want of bonafides on the part of the petitioner. This aspect had not been considered by the Tribunal and therefore the order of the Tribunal restoring penalty was to be set aside.
- 12) All the above decisions would show that the present proposal to levy penalty is illegal and unwarranted.
- 13) 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.
- 14) The above binding case law requires the statutory authorities to drop such proposals so that the ends of justice would meet. We therefore request to kindly drop the proposal to levy penalty. In case you like to proceed further we request to kindly provide an opportunity of personal hearing.

Kindly acknowledge

Thanking you,

Yours faithfully
For **MEHTA & MODI HOMES**

Authorised Signatory