

**GOVERNMENT OF ANDHRA PRADESH
COMMERCIAL TAXES DEPARTMENT**

NOTIFICATION FOR PENALTY TO A VAT DEALER



FORM VAT 203

01. Tax Office Address:
Commercial Tax Officer (INT)
O/o. the Dy. Commr. (CT)
Begumpet Divn, Hyd.
6th Floor, Pavani Prestige,
Amberpet, Hyderabad.

A.O. 32800

Date	Month	Year
29	04	2013

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01. Name: M/s. MEHTA AND MODI HOMES ,
Address: Door No 5-4-187/3 & 4, M.G. Road, Sec'bad

M/s Mehta and Modi Homes, 5-4-187/3 & 4, M.G. Road, Sec - Bad are registered VAT dealers with Commercial Tax Officer, M G Road Circle. On audit noticed under declared tax of Rs: 44,85,000/- on account of levy of tax under sec 4 (7) (b) / (c) on value of construction of building as there is no single deed for sale of land & building during the year 2009 - 2010 to 2012 - 2013 (Jan) which was assessed vide VAT 305 notification dt: 19.03.2013 (A.O. 17318). This omission attracts penalty as per section 53 (1) (i) of APVAT Act 2005 to 10% of under declared tax hence proposed a penalty Rs: 4,48,500/- as the omission is not intentional. Accordingly a penalty notice in VAT 203 A was issued on 17.04.2012 and served on Sri Jaya Prakash accounts Manager on 18.04.2013 requesting them to file written objections if any within (7) days of the receipt of the notice. On receipt of the notice the assessee neither filed any written objections nor asked for any adjournment so far. Hence it is constructed that the assessee do not have any valid objections to file to above proposed penalty of Rs: 4,48,500/- hence there is no other option left before the under signed but to confirm the penalty as proposed in VAT 203 A dt: 17.04.2013. In view of the above penalty of Rs: 4,48,500/- is here by confirmed under section 53 (1) (i) of APVAT Act 2005 and issued VAT 203 penalty notification accordingly.

The above penalty of Rs: 4,48,500/- shall be paid within (30) days of receipt of this penalty order.

[Signature]
Commercial Tax Officer (INT)
Begumpet Division., Hyderabad.
Commercial Tax Officer (INT.)
O/o. The Deputy Commissioner (CT)
Begumpet Division, Hyderabad.

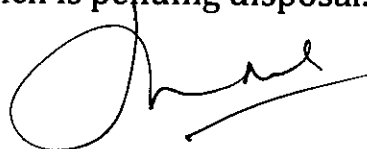
M/s. Mehta & Modi Homes

5-4-187/3 & 4, II Floor, Soham Mansion, M.G. Road, Secunderabad – 500 003.

Tax Period: 2009-10 to 2012-13 (upto January'2013)/PENALTY

Statement of Facts:

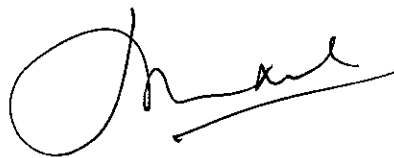
- 1) The appellant is a registered VAT dealer engaged in the business of construction and selling of independent residential villas in fully developed/ operational gated housing complex at Charlapally, Ghatkesar Mandal, R.R. District and is an assessee on the rolls of the CTO, MG Road Circle, Hyderabad, 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 the 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 agreement consists of the consideration received through sale of land, development charges of land and cost of construction of the bungalow. The appellant has paid VAT @ 1% on the total consideration received from these three components of the agreement.
- 3) The CTO (Int.) has issued Notice of Assessment of VAT in Form VAT 305A dated 23/02/2013 proposing levy of tax of Rs. 44.85 lakhs under Section 4 (7) (b) on the estimated turnover of construction @4% for the years 2009-10,2010-11and 2011-12(upto 15th September and @5% for the years 2011-12 (after 15th September) and 2012-13 after deducting the tax paid by the appellant under Section 4 (7) (d).
- 4) The appellant has filed detailed objections before CTO against the proposed levy of tax of Rs.44,85,000/- by letter dated 12/03/2013 and reiterated the same in personal hearing on 16/03/2013. Without properly considering the objections raised by the appellant, the learned CTO has completed the assessment proceedings in Form VAT 305 dated 19/03/2013 confirming the proposed levy of tax of Rs. 44.85 lakhs.
- 5) Aggrieved by the said assessment order the appellant has filed appeal before this Hon"ble Authority which is pending disposal.



- 6) The appellant submits that the CTO issued notice of penalty in Form 203A dated 17/04/2013 proposing penalty of Rs. 4,48,500/- under Sec. 53(1)(i) of the said Act which is 10% of the tax demanded in the assessment order. The appellant could not file the objections within the time allowed in the notice as the appellant is out of station. However the CTO issued penalty order in Form VAT 203 dated 29/04/2013 levying penalty of Rs. 4,48,500/- under Sec.53(1)(i) without calling for objections and without giving an opportunity of personal hearing.
- 7) Aggrieved by the said penalty order the appellant prefers this appeal on the following grounds, amongst others:-

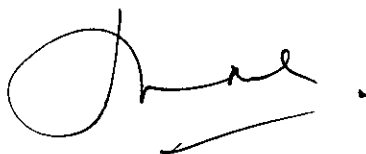
Grounds of Appeal:

- a) The impugned penalty order is highly illegal, arbitrary, unjustifiable and contrary to facts and law.
- b) In the notice the learned CTO stated that the appellant is selling land/plot separately and entering into separate agreement for construction of villa and paying tax under section 4(7) (d) and their payment under Section 4 (7) (d) is against the clarification issued in the below mentioned Advance Rulings.
- c) In the notice the learned CTO 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 villa and 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. The learned CTO has also relied on the advance ruling given in the case of VPL Projects (P) Ltd dated 01-02-2007 wherein it was clarified that on the land already owned by the customer and the applicant has no rights to sell or to register the housing unit, such transactions does not come under the purview of construction and selling of residential houses. The learned CTO has also referred to the advance ruling given in the case of M/s Kashi Kanchan, Tirmulgherry wherein it was clarified that the tax rate of 4% on 25 % of the consideration received or receivable or market value fixed for the purpose of stamp duty. Referring to these three advance rulings the learned CTO has confirmed levy of tax of Rs. 44,85,000/-



under Section 4 (7) (b) of the APVAT Act rejecting the payment by the appellant under Section 4 (7) (d).

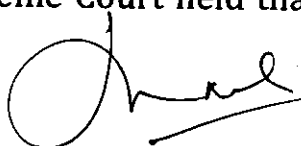
- d) The grounds of appeal filed by the appellant against the levy of tax in the assessment may kindly be read as part and parcel of the grounds of the present appeal. In the penalty notice or order the learned CTO has not established the fact that the appellant has under declared tax of Rs. 44,85,000/- and confirmed penalty proposed only on the ground that the appellant has not filed objections. On this ground alone the impugned penalty order passed by the learned CTO may be set aside.
- e) Without prejudice to the above, 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**".
- f) 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.
- g) 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."

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.

- h) In the case of *Brugumalla Venkatappaiah 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.
- i) In the case of *Salzigitter Hydraulics Pvt. Ltd., Hyderabad Vs. State of Andhra Pradesh* (48 APSTJ 276) the Honourable Tribunal held that where the 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.**
- j) 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.
- k) 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.**
- l) 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.**

m) For these grounds and the other grounds that may be urged at the time of hearing, the appellant prays to set aside the impugned order as illegal and to allow the appeal.



(APPELLANT)