FORM APP 406

APPLICATION FOR STAY OF COLLECTION OF DISPUTED TAX

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

01. Appeal Office Address:
To, The Addl. Commissioner (CT) Legal O/o the Commissioner of Commercial Taxes, Nampally, Hyderabad

Date	Month	Year
	06	2012

02	TIN	28840298894

03. Name : M/s. Mehta & Modi Homes
Address: D.No.5-4-187/ 3& 4,
III Floor, M.G. Road,
Secunderabad – 500 003.

04.	Tax period	2005-06 & 2006-07/VAT
05.	Authority passing the order or proceeding disputed.	Revision order passed by Dy. Commissioner (CT), Begumpet Division, Hyderabad
06	Date on which the order or proceeding was Communicated.	26/05/2012
07.	(1) (a) Tax assessed (b) Tax disputed (2) Penalty / Interest disputed	Rs.38,81,737/- Rs.38,81,737/- NIL
08	Amount for which stay is being sought	Rs.27,46,805/-
09.	Address to which the communications may be sent to the applicant.	M.Ramachandra Murthy Chartered Accountant Partner , N. Saibaba & Company Flat No.303, Ashoka Scintilla, Opp. To KFC, Himayathnagar Main Road, Hyderabad – 500 029. Tel.:040-30878935/36 Email.: mrc_murthy@yahoo.com

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 tax pending disposal of the appeal.

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

Hence it is just and necessary that the Addl. Commissioner(CT) Legal may be pleased to grant stay of collection of the balance disputed tax of Rs.27,46,805/- pending disposal of the appeal.

VERIFICATION

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

Verified today the 28 day of June'2012

Signature of the Dealer(s)

Signature of the Authorised Representatives if any

M/s. Mehta & Modi Homes

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

Tax Period: 2005-06 & 2006-07/VAT

Statement of Facts:

1. The appellant is a registered VAT dealer engaged in the business of construction and selling of independent bungalows 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. The Commercial Tax Officer (Audit), Begumpet Division (herein after called as CTO) has issued show cause notice for the tax period 01/09/2006 to 28/02/2007 proposing to levy tax @ 4% on the alleged receipts / receivables under Sec.4 (7) (c) of the APVAT Act. On a consideration of the objections filed and based on the clarification given by the Advance Ruling Authority in the case of M/s. Maytas Hills County Pvt. Ltd., vide CCT's Ref. No. PMT/P&L/A.R.Com 180/2006 dated 30/07/2006 the CTO passed assessment order dated 29.4.2008 holding that the payment of tax made @ 1% under Sec. 4 (7) (d) is in order.

3. The DC(CT), Begumpet Division issued revision show cause notice dated 24/01/2012 under Sec 32 (2) of the Act stating that the Vigilance & Enforcement Officials visited the work site of the appellant on 10/12/2008 and sent the records to the

CTO, M.G. Road Circle. The DC proposed to revise the said assessment order passed by the CTO for the tax period 01/09/2006 to 28/02/2007 by proposing to levy tax on all the receipts @ 4% under Section 4 (7) (c) of the said Act.

4. The appellant has filed detailed objections in the letters dated 10/02/2012, 02/03/2012, 27/03/2012 and 11/04/2012. However without properly considering the objections, the learned DC passed revision order dated 23/04/2012 revising the assessment order passed by the CTO and confirming the proposed levy under Section 4 (7) (c) of the Act alleging that the appellant is not a builder but only a works contractor.

5. Aggrieved by said revision order, the appellant prefers this appeal on the following grounds, amongst others:-

Grounds of Appeal:

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

b. The appellant is engaged in the business of construction and selling of independent bungalows / Villas at Charlapally and has opted for payment of tax @4% on 25% of the consideration received or receivable (1%) under composition scheme under Sec. 4 (7) (d) of the Act. The appellant has declared the turnover relating to the construction and sale of bungalows in the monthly VAT returns and paid tax on the amounts received from the customers @ 1%.

c. It is submitted that the prospective buyers approache the appellant to book the bungalow. Accordingly the appellant books a particular bungalow in favour of that particular purchaser and issues a 'booking form' showing the total consideration towards sale of bungalow. On the back side of the booking form, the terms and conditions with the buyers for purchase of bungalow were also given. At clause 1, it is clearly written that this is a provisional booking for a particular bungalow and this does not convey in favour of purchaser any right, title or interest of what so ever nature unless and until the required documents such as sale agreement/sale deed/ work order etc., are executed. At clause No.11.2 it was very clearly mentioned that the builder (the appellant) shall deliver possession of the completed bungalow together with land to the purchaser only on payment of all dues to the builder.

d. The appellant submits that as per the conditions of the booking form, the appellant himself is a builder of the project known as 'Silver Oak Bungalows'. In token of proof of total consideration of sale of land, development charges and construction charges the appellant herewith files the booking forms for plot no.64 and plot no.200A booked for a total consideration of Rs.24,91,000/- and Rs.58,87,000/- respectively along with the agreement of sale in the case of both the purchasers. These facts show that the prospective buyers intended to purchase only a fully finished bungalow.

e. It is submitted that the 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 the appellant has paid tax @ 4% on 25% of total consideration based on this agreement of sale, which is the 'mother agreement'. Even though the appellant enters 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 agreement) and the 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) which is also accepted by the assessing authority.

f. In the revision notice it is alleged that the appellant executes a sale deed for sale of land and later enters into two separate contracts for development of plot and for construction of bungalow. Based on the Advance Ruling issued in the case of Maytas Hill Company Pvt. Ltd., Begumpet dated 30/07/2006 it was stated that the appellant is not eligible to opt to pay tax @ 4% of 25% of the consideration received towards construction cost by excluding cost of land though it could be registered separately at any stage. It is further stated that this clarification

matches with the transactions of the appellant's company and hence the transactions of development and construction of bungalow fall under the category of execution of civil works contract and proposed to tax @ 4% on receipts under Sec.4 (7) © of the APVAT Act.

g. In the Advance Ruling vide CCT Ref. No.PMT/P&L/A.R.Com 180/2006 dated 30/07/2006 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 cast 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.

h. 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. The appellant reiterates that in the course of business the appellant enters into agreement with the prospective buyers for sale of independent bungalows of similar size, similar elevation, same colour, scheme etc., along with certain amenities. The appellant enters into agreement of sale with the prospective buyers wherein 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 the appellant enters into agreement for construction and agreement for development charges subsequently the amounts mentioned in these two agreements were already been shown in the original agreement of sale.

i. The appellant submits that the Advance Ruling Authority in the above ruling without any ambiguity has clearly given the ruling that VAT has to be paid @ 1% on the total consideration received **as per initial agreement of sale originally agreed upon whether in separate portions for land and construction cost.**

j. The appellant submits that the said ruling is binding on all the officers under Section 67 (4) (iii) of the Act. The appellant therefore is eligible for payment of tax @ 1% on the total consideration as per the mother agreement (initial agreement).

k. The appellant also relied upon the Advance Ruling in CCT's Ref. No. PMT/P&L/A.R. Com/566/2005 dated 18-05-2006 in the case of M/s Kashi Kanchan, Tirumalghery. In this case the Department has given a clarification that the provisions of composition under clause (d) sub section (7) of Section 4 of APVAT Act, 2005 are applicable only in respect of land developers who have right to sell such constructed apartments, houses, buildings or commercial complexes. It was also clarified that the tax rate of 4% of 25% of the consideration received is specifically linked to consideration or market value fixed for the purpose of stamp duty. Therefore this provision is not applicable in respect of contractors who execute for construction of building but do not have any right to sell such property. This category of contractors can opt for composition under clause (b) or (c) of sub section (7) of Section 4 as the case may be.

l. The appellant submits that the above clarification is clearly applicable to the appellant's case as the appellant is very much a builder and developer and has exclusive right to sell the property and very much entitled to opt for composition under clause (d) of sub section (7) of Section of the said Act.

m. Section 4 (7) (d) of the Act, during the relevant time reads as follows:-

"Any dealer engaged in construction and selling of residential apartments, houses, buildings or commercial complexes may opt to pay tax by way of composition at the rate of 4% of twenty five percent (25%) of the consideration received or receivable or the market value fixed for the purpose of stamp duty whichever is higher subject to such conditions as may be prescribed;..."

As per the above clause a dealer engaged in the construction and sale of apartments, houses, buildings or commercial complexes etc., is liable to pay tax @ 4% of 25% of the consideration received or receivable or the market value fixed for the purpose of stamp duty whichever is higher.

n. Extracting the clauses from the copy of agreement with one of the buyers M/s. Mohd Abdul Aleem, the DC stated in the revision order that the vendor and vendee are required to enter into three separate agreements, one with respect to sale land, second with respect to development charges on land and the third with respect to the construction of bungalow. As per clause No.10 it is stated that the possession of the plot of land shall be delivered by the vendor to the vendee immediately upon registration of the sale deed (land). The vendee thereafter shall handover the possession of the plot of land

back to the vendor for the purpose of carrying out construction of the bungalow thereon.

o. Referring to the above provisions of the agreement the learned DC stated that upon registration of land the vendee becomes the absolute owner of land and possession of the land also is transferred to the vendee and any construction on the land after registration will be only a works contract as the vendor (the appellant) has no right to sell such building as he is not the owner of the land on which the building is constructed. Based on the above opinion the learned D C construed that the appellant is not eligible to be treated as a builder and as a result he is not eligible to pay tax @ 1% on the value of consideration received for carrying out development of site and construction of the building on the site owned by the vendee.

p. The appellant submits that the provisions of the mother agreement entered into by the appellant with the prospective buyers amply clarify that the appellant did construction and sale of independent bungalows (houses). Without referring to the provisions of this mother agreement wherein the total sale consideration for sale of land, development charges and cost of construction for the entire sale of bungalow/villa is mentioned the learned D C tried to impress that the vendee will become the absolute owner of the land and construction on the land after this registration is only a works contract. The learned DC thus has totally failed to understand the conditions contained

in the mother agreement which is the basic and original document. Thus the conclusion of the learned D C that the appellant is a works contractor is totally wrong.

q. The learned DC extracted the preamble E from the agreement of sale in the above case, which reads as follows:-

"The vendor in the scheme of the development project of Silver Oak Bungalows have planned that the prospective buyers shall eventually become the absolute owner of the identifiable land (i.e. plot of land) together with independent bungalow constructed thereon. For this purpose the vendor and the vendee are required to enter into three separate agreements, one with respect to the sale of land, second with respect to development charges on land and the third with respect to the construction of the bungalow. These agreements will be interdependent, mutually co-existing and inseparable though in the scheme of the project **the vendor will execute a sale deed (for land only?) in favour of the vendee before commencing construction of the bungalow."**

Though the above clause categorically and expressly says that the three agreements will be interdependent, mutually co-existing and inseparable throughout the scheme of the project, the learned DC has for the purpose of confirming revision has ignored this portion. When all the three agreements (sale of land, development charges and construction) are mutually co-

existing, it cannot be said that the appellant has sold only land and lost all the rights.

r. Clause G in the said agreement is to the following effect:-

"The Vendee is desirous of purchasing a plot of land together with bungalow to be constructed thereon as detailed below in the project—Silver Oak Bungalows and Vendor is desirous of selling the same."

The learned DC ought to have seen that the agreement made by the appellant is not selling the land alone but to sell the land along with bungalow thereon. For that purpose, there can be several subsequent agreements and actions but what is to be seen is what is the intention of the parties to the agreement.

s. Even clause 1 of the agreement says 'Vendee hereby agrees to purchase from the Vendor **plot of land....together with a Deluxe bungalow** to be constructed thereon as per the specifications and other terms and conditions..."

t. The table under clause 1 of the agreement shows the total value of the bungalow including the land. The parties therefore intended to have deal with reference to bungalow and not with reference to land only.

u. Clause 3 specifies the schedule for payment of the entire consideration including the value of bungalow.

v. The learned DC has misconceived and misunderstood the nature of transaction in this case.

w. The learned DC has consciously ignored clause 13 of the agreement, which reads as follows:-

"The Vendee therefore shall not be entitled to alienate in any manner the plot of land registered in his favour and/or enter into an agreement for construction in respect of the bungalow with any other third parties. However, the Vendee with the prior consent in writing of the vendor shall be entitled to offer the scheduled plot as a security for obtaining housing loan for the purposes of purchase and construction of the proposed bungalow in the Scheduled plot".

It is submitted that there is practically no title that has been conferred upon the Vendee in the land, as per the above clause. Even for the purpose of obtaining loan on such piece of land, the Vendee is at the mercy of the appellant seeking his written consent. Appellant is surprised to know that the revisional authority has just ignored these clauses, inspite of they being brought to his notice during the course of personal hearing.

x. Under clause 15, even the Vendee cannot make any alterations to the bungalow or its portion without authorization from the appellant.

y. Under clause 17, Vendee has no right to stop construction of the bungalow.

z. The Schedule to the agreement speaks of both land and bungalow.

aa. Appellant submits that viewed from any angle, the transaction in this case is only sale of constructed bungalow as per the terms and conditions in the mother agreement and not simple sale of land. Several restrictions have been placed on the Vendee for the enjoyment of the land, even after registration, which shows that the intention of the parties is to sell the constructed bungalow along with land and not otherwise. The learned DC ought to have properly appreciated the clauses in the agreement, instead of adopting pick and choose method.

bb. Without prejudice to the above that appellant has also drawn the attention of the learned D C to the Government Memo No. 33263/CT.II (1)/2010-5 dated17-06-2011 through which directions were issued to the effect that the builders, who are not registered with the Department and who have not opted for composition of tax under Section 4 (7) (d) of the Act can pay tax @ 1% only. Hence clause (d) is specifically applicable to 'BUILDERS' and the appellant is undoubtedly a builder. The appellant submits that when an unregistered builder, who is not on the rolls of the Department and who has not opted to pay tax by filing Form VAT 250 is permitted by

Government without any hair splitting to pay tax @1% on the consideration, **it is highly discriminatory and unjustifiable to raise huge demand on the registered dealer** and who is regularly filing the VAT returns and paying taxes due thereon, by misinterpreting the provisions.

cc. To this objection raised, the learned D C has stated in the impugned order that the directions issued in the said Government Memo are not relevant to the appellant's case and has simply rejected the contention saying that the appellant is not a builder and only a works contractor under Section 4 (7) (c) of the said Act. It appears that the learned D C has predetermined to treat the appellant as a works contractor but not as a builder to bring the appellant under Section 4 (7) (c) of the Act. Thus the revision order passed by the learned D C is not based on facts but appears to have been passed to follow the observations of the Vigilance & Enforcement officials and to satisfy the V & E Wing, that their report has been complied with, as has been happening in many cases with the Department. The standard answer in most of the cases from the authorities, during personal hearing is 'this is a case referred to by V & E Wing and we are helpless'. Eventhough it has been brought to the notice of the authorities that the V & E report is not binding on them, as per settled law, still nothing is happening.

dd. The learned DC committed a factual error in observing that the said Advance Ruling is not applicable to the facts of this case.

ee. In view of the above grounds and other grounds that may be urged the appellant prays to set aside the revision order and allow the appeal.

(Signed) Appellant(s)

VERIFICATION

I, Sohan Satish Modi, partner of the appellant(s) do hereby declare that what is stated above is true to the best of my / our knowledge and belief.

Verified today the 25th day of June'2012

(Signed) Appellant(s)

(Signed) Authorised representative, if any

Appeal 2006-07 VAT

ORIGINAL

GOVERNMENT OF ANDHRA PRADESH

DTO/STO ... Treasury/PAO Code

Treasury Challan No. 000012707

Major Head	0040 Sales Tax
Sub-Major Head	
Minor Head	102 S.T. Act
Group Sub-Head	05 VAT Act
Sub-Head	81 Other Receipts
Detailed Head	
Sub-Detailed Head	000012707

Non-plan=N/ Plan=P: ... Charged=C/ Voted-V: ... Contingency Fund MH/ Service Major Head ...

మొత్తం రూ॥ / Amount Rs 2000

అక్షరాలా రూ. In words Rupees Two Thousand Only

జమచేయు వారి పేరు, చిరునామా Remitter's Name & Address M/s Menta & Moji Chartered Accountants

దేని నిమిత్తము నైకము జమచేయబడినది. Purpose for which the amount is deposited Appeal Fees 2006-07/VAT

DDO Code : 2500 2303 006

Head of Account Verified

తేది Dated 21/12/12 ... జమచేయు వారి సంతకం Signature of the Remitter ... S.T.O/T.O

అక్షరాలా రూ॥ ముట్టినది Received Rs 2000/-

AXIS BANK LTD. TOKEN Counter Hyderabad CASH RECEIVED COMMERCIAL TAXES COUNTER

నగదు/డి.డి./బ్యాంకు జమ/చెక్ నెం. by Cash/D.D./Account Credit/Cheque No. ... బ్యాంకు & బ్రాంచ్ కోడ్ Bank Branch Code ... S.T.O./Bank Manager

CTBST / Bank Seal

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