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From,
M/s. Alpine Estates,
M. G. Road,
Secunderabad.

To
The Assistant Commissioner (ST),
M.G. Road-S.D. Road Circle,
Begumpet Division, Hyderabad.

Sir,

Sub: TVAT Act, 2005 – M/s. Alpine Estates, M. G. Road, Secunderabad—
For the year 2013-14 - Penalty notice issued - Objections
called for – Reply filed – Reg.

Ref:1) AC(ST), M.G. Road- S.D. Road Circle penalty notice in Form VAT
203A dated 31.03.2020.

2) Our letter filed on 03/07/2020 seeking time.

We submit that we are in receipt of the notice of penalty in Form VAT 203A dated 31/03/2020 under the TVAT Act, 2005 (for short Act) proposing levy of penalty of Rs.1,46,738/- under Sec. 53 (1)(i) which is equal to 10% of the alleged under declared tax of Rs.14,67,376 in the assessment order dated 31/03/2020. We request you to kindly consider our objections on the following grounds:-

We submit that aggrieved by the assessment order in Form VAT 305 dated 31/03/2020, we have filed appeal before the Honourable Appellate Deputy Commissioner (CT), Punjagutta Division, Hyderabad. We are herewith enclosing copies of grounds of appeal filed before Appellate Deputy Commissioner which may be read as part and parcel of these objections. We request you to kindly defer the penalty proceedings till the disposal of our appeal on tax by the said Appellate Authority.



Even otherwise we submit that as per the following settled law, there cannot be any levy of penalty. It is the legal plea entertained by us.

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".

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.

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."

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

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only has the offence been committed but the person accused of it has committed it consciously.

In the case of **Salzigitter Hydraulics Pvt. Ltd., Hyderabad Vs. State of Andhra Pradesh (48 APSTJ 276)** the Honourable 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.

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. We particularly place reliance on this binding decision. .

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.

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.

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.

Levy of penalty cannot be a matter of routine. The assessing authority is not duty bound to levy such penalty unless the facts coerce him to do so. Issue of show cause notice cannot be a mere formality.

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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.”

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

“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.”

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.”

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

“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-furnishing of a certificate of audit and other

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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, leaving an in-built discretion to the assessing authority to waive penalty for such a delayed furnishing of the certificate of audit and other statements."

As the Proviso under Section 53 of APVAT Act, 2005 is also to the same effect of giving reasonable opportunity, the above decision 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. We therefore request to kindly follow this binding decision and drop the proposal.

In view of the above we request you to kindly drop the proposal to levy penalty. In case you want to proceed further we request you to kindly provide opportunity of personal hearing to explain the case in detail.

Thanking you,

Yours faithfully

for Alpine Estates

FOR ALPINE ESTATES

Partner

Authorized Signatory.

Encl: As above.

M/S. ALPINE ESTATES
M.G. Road, Secunderabad – 500 003.

TAX PERIOD: 2013-14/TVAT ACT

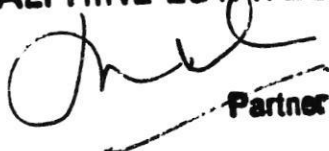
STATEMENT OF FACTS:-

- a. The appellant is a registered VAT dealer on the rolls of the CTO, MG Road Circle, Begumpet Division, Hyderabad, engaged in the business of constructing and selling apartments, villas etc. The appellant has opted for composition scheme of payment of tax as per Section 4 (7) (d) of the TVAT Act for payment of tax on the turnover relating to constructing and selling apartments.
- b. Upon receiving the authorization from the Deputy Commissioner, Begumpet Division, The Assistant Commissioner (ST), M.G.Road – S.D.Road Circle (herein referred to as 'AC') has conducted the audit of books of account of the appellant for the tax periods 2013-14 and subsequently issued a show cause notice in Form VAT 305A dated 18.3.2020 proposing therein to levy tax of Rs.14,67,376/- under the TVAT Act for the year apart from the tax that was declared and paid in the monthly VAT returns.
- c. It is claimed by the learned AC that the show cause notice was served on the appellant on 20.03.2020 inviting objections within 7 days from the date of receipt of the show cause notice.
- d. However, by claiming that no response is given to the show cause notice within the prescribed time, the learned as confirmed the proposed levy of tax of Rs.14,67,376/- vide his order in Form VAT 305 No.52195 dated 31.3.2020.
- e. Aggrieved by the said assessment order the appellant prefers the present appeal on the following grounds amongst others that may be submitted at the time of hearing of the appeal.

GROUND OF APPEAL:

1. At the outset it is submitted that the impugned assessment order is highly illegal, arbitrary and is passed against the principles of natural justice.

For ALPINE ESTATES


Partner

2. It is submitted that the appellant has produced all the relevant records, books of account in connection with the audit notice issued by the learned AC within the time allowed by him. However, the learned AC without properly understanding the nature of business conducted by the appellant and without proper appreciation of the provisions of the TVAT Act relating to the liability of the builders under the TVAT has issued a show cause notice proposing to levy huge amount of tax of Rs.14,67,376.
3. It is submitted that the appellant is in the business of constructing and selling apartments, villas etc and has opted for composition scheme under Section 4 (7) (d) of the Act for making payment of tax on the turnover relating selling of apartments/villas. It is submitted that as per Section 4 (7) (d) of the Act, the VAT dealer is liable to pay tax only on 25% of the gross amount received or receivable at the rate of 5% and the balance 75% of the gross consideration received is not liable to tax.
4. It is submitted that during the year the appellant has received total consideration of Rs.14,51,91,248/- towards constructing selling apartments/villas and accordingly paid tax of 5% on 25% of Rs.14,51,91,243/- i.e. on Rs.3,62,97,812/- amounting to Rs.18,14,891/- and claimed exemption on the 75% of the turnover of Rs.10,90,93,431/-. However, the learned AC in the show cause notice proposed to levy tax even on this exempted turnover of Rs.10,90,93,431/- by allowing 75% exemption under Section 4 (7) (d) of the Act which is highly illegal. The appellant therefore submits that learned AC has not properly considered the turnovers while issuing show cause notice and the same amount is confirmed without properly rechecking before levying tax. Hence the appellant submits that as the learned AC wrongly proposed to tax on exempted turnover under Section 4 (7) (d) of the Act, the same is liable to be set aside.
5. Rs.82,96,623/-: The appellant submits that the learned AC in the impugned order has levied tax on the above alleged turnover by claiming that there is difference between the turnover reported in monthly VAT returns and the P & L account for the year. The appellant submits that the learned AC is not justified in levying tax on this turnover without allowing sufficient time to the appellant to verify the records and make a reply. It is submitted that this turnover is not liable to tax at all as this income is not relating to sale

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of apartments/villas during the year and the appellant will produce the relevant information at the time of personal hearing.

6. It is also submitted the learned AC is also grossly failed to give sufficient opportunity to the appellant to represent its case. It is submitted that during the period the entire city of Hyderabad is under lockdown and nobody in the private employment is allowed to open the offices. The appellant is not able to file effective reply for these reasons and expecting one more notice from the learned AC for submitting the objections. However, the learned AC without even giving the opportunity of personal hearing concluded in the assessment proceedings in hasty manner and on this ground also the impugned order is liable to be set aside.
7. In view of the above grounds and the other grounds that may be urged at the time of hearing of the appeal, the appellant prays the Honourable Appellate Deputy Commissioner to set aside the impugned assessment order and allow the appeal.

For ALPHINE ESTATES


Partner
(APPELLANT)