

Note on Representation in Purchases from Suspicious Dealers- Business Audit/Assessment under MVAT Act

Under VAT era, the assessment is not a regular phenomenon as it used to be under BST Act. It was clarified at the time of introduction of VAT that assessments may not be undertaken for all years. The system has its advantages as well as disadvantages. Let us understand the scheme of the Act in respect of assessment. Section 23 is the main provision dealing in assessments. They can be broadly classified as under:-

(1) Pertaining to registered dealers:-

- a) When returns are not filed within prescribed time-section 23(1) and (3)
- b) When returns are filed within the prescribed time-section 23(2)
- c) When returns are filed, whether in time or not, and the Commissioner is of the opinion that the turnover or tax or set off is improperly disclosed or paid or claimed respectively-section 23(6)

(2) Pertaining to unregistered dealers-Section 23(4)

Transaction based or “issue based assessment” as it is commonly known-Section 23(5).

Assessment under 23(1)- The Commissioner has right to assess ex-parte when the dealer does not file a return for any period. This is fully contrary to the principles of natural justice. The proviso thereunder inserted from 1-5-13 provides for automatic cancellation of the order when the dealer files the return. No need to pass any order for the same. The dealer can be assessed under other provisions of the Act, if necessary. There is a limitation of three years provided for passing such order.

Assessment u/s 23(2)- The assessments where the dealer has filed the return for any period within prescribed date are made on selective basis to ensure that return filed is correct and complete. The term is defined under the Act and has to be interpreted in that sense. The notice is mandatory but not in the prescribed form. Normally, it is given in form 310. The limitation period is four years which was earlier three years. Best judgement order also can be passed under this section.

Assessment u/s 23(3)- where the dealer has not filed the returns or filed them late, assessment can be made under this section. The limitation period is five years. In the event of non-prosecution by the dealer, best judgement order can be passed.

Assessment u/s 23(3A)- First three years of VAT given more leverage and limitation period extended to seven years. For 2005-06 alone, limitation period extended to 30th June, 2013.

Assessment for unregistered dealers u/s 23(4)- URDs now have to file returns u/r 18. Best judgement orders can be made based on such returns. Limitation period is eight years.

Issue based assessment u/s 23(5)- There is a prescribed form in which the notice needs to be given namely, form no. 302. This is transaction based assessment. Where during the course of proceedings, it is found that tax is sought to be evaded

or transactions of sale or purchase are not shown correctly or set off is claimed in excess etc., assessment under this section can be made. The assessment under other sections also can be made simultaneously. Now EIU selects the cases for these assessments and the criteria are non-production of declarations, claim of set off from defaulters etc.

Issue regarding non-filing of form 501- The recent case of Sagar Enterprises has been argued where the main issue related to the year 2010-11 since the time limit for filing form 501 is curtailed from 3 years to 18 months. The 252 case compiled by the applicant are allowed the relief but others may not get the same relief based on the judgement. Final verdict is awaited. The general issue is not pressed in this petition. The right to get the books assessed is taken away which causes major prejudice to the dealers.

Input Credit

Under the VAT era, we by and large, find that purchasers are placed in a vulnerable position and ITC is denied on some or the other pretext. There is a long and ever-growing list of suspicious dealers on the web-site of the Govt. and taking recourse to that list, ITC is denied to the purchasers. After the landmark judgement in the case of M/s Mahalakshmi (51 VST)(Bom), the state is vindicated in its stand that tax can be recovered from the buyers if not paid by the sellers. The undertaking given by the State to pursue the sellers first is conveniently forgotten and relying upon the provisions of section 48(5), the set off is denied to the purchasers. Broadly, the following categories of sellers are found where set off is sought to be denied.

- 1) Non-genuine (hawala) dealers as per the web-site.
- 2) Non-filers of returns and non-payers of taxes
- 3) Mismatch between sale and purchase as disclosed in J1 and J2 annexures.

In the first category where the buyers and sellers are hand in hand to defraud the Govt. by showing mere paper transactions, no set off can ever be granted. However, there is a large section of dealers who have genuinely purchased the goods which is evident from the physical movement of goods and their subsequent use, presence of tax invoices, delivery chalangans, transporter's confirmation etc. These purchases cannot be treated as bogus but at the same time, set off cannot be granted when the selling dealer has not paid the taxes into the Govt. treasury. However, the State can certainly consider the prayer for deletion of interest and penalty. The latest judgement of ITAT in the case of DCIT Vs. Rajeev G. Kalathil (ITA No. 6727/MUM/2012 pronounced on 20-08-14) has ruled that purchases cannot be treated as bogus merely because the selling dealers are declared as hawala on the Maharashtra Govt.'s web-site when other documentary evidence proves the purchase.

The second category of non-filers/non-payers actually casts more burden on the dept. who has to pursue such dealers for recovery of the taxes and filing of returns. Unless that exercise is shown to have been done, the set off cannot be denied.

Here are some of the latest decisions where a supportive view is taken.

(1) In Shantikiran India P. Ltd. (2013) 57 VST 405 the Hon. Delhi High Court opined that 'It is iniquitous to ask the buyer to prove payment of tax by his supplier because it puts an onerous burden on the buyer to keep a vigil over and monitor payment of tax by sellers'.

(2) It was held by the Hon. Madras High Court in Sri Vinayaka Agencies (2013) 60 VST 289 that 'Purchasing dealer could not be penalized for non-payment of tax by the selling dealer unless collusion or connivance is proved.'

(3) The WBTT in PrabirRanjan Roy (2009) 26 VST 172 and again in Shree Shyam Enterprises (2012) 49 VST 177 held that if 'Instead of Tax Invoice input credit is claimed on the basis of Sale Release Order containing all details and the purchase is found genuine and deposit of tax by seller proved then input tax credit cannot be denied on the sole ground of absence of a Tax Invoice.'

(4) In Rakeshkumar Gupta vs. GOI (Allahabad High Court) [June 2nd 2014] {ITAT online} it was held that the assessee cannot be denied credit for TDS on the ground of Form 26AS mismatch because he is not at fault. Non-grant of credit for TDS credit causes harassment, inconvenience and makes the assessee feel cheated. Department was asked to pay to the assessee interest + costs of Rs.25,000/-. Though the case is under the Income Tax Act the message is loud and clear for the VAT authorities too.

Cenvat credit was allowable to assessee even if supplier hadn't discharged its duty.

In the instant case the assessee took deemed Modvat credit benefit under Notification No. 58/97-CE(NT) on basis of invoices issued by supplier of inputs, but on verification it was found that supplier had not paid duty. The Department opined that since rule 57A(6) required the assessee to take all reasonable steps to ensure that duty had been paid, no credit could be allowed if duty had not been paid on inputs supplied.

The Supreme Court held in favour of assessee as under:

- 1)** In this case supplier of inputs had given declaration indicating that excise duty had been paid on said inputs. Fact that supplier had not discharged duty was a lapse on part of seller; it was different and not a condition or rather a precondition postulated in Notification;
- 2)** When there was a prescribed procedure and that had been duly followed by the assessee, it could not be said that the assessee had not taken reasonable steps as prescribed in notification;
- 3)** Due care and caution were taken by the assessee and it was not stated by Department what further care and caution could have been taken. Requirement of "reasonable care" does not mean verification from department whether duty stands paid by supplier because that would be travelling beyond notification and practically impossible and would lead to transactions getting delayed;
- 4)** Thus, the Assessee was entitled to deemed credit under the Notification No. 58/97-CE (NT).

- Commissioner of Central Excise, Jalandhar v. Kay Kay Industries (2013) 38 taxman.com 336 (SC) The third category of mismatch dealers cannot be the ground for denial of set off. Forcing the purchasers to bring the confirmations from the sellers is not lawful and the dept. has to make the efforts to confirm the sales and sort out the discrepancies, if any.

The State is under an obligation to ensure that unnecessary burden of tax may not be imposed upon citizens –ACTO v. Jodhpur Gases (2010) 32 VST 207 (Raj). In CIT v. Textool Co. Ltd (ITAT Online 17-08-2013) the Hon Supreme Court held thus –“While a fiscal statute has to be construed strictly, it doesn’t rule out the application of the principles of reasonable construction to give effect to the purpose and intention of the provision of the Act.” The avowed purpose and intention of the VAT Act is to avoid the cascading effect of the tax by allowing credit for the tax already paid by the buyer on the inputs. Let us hope that our welfare State will take this advice in the right spirit and allow the buyers their rightful claim by removing the technical roadblocks in the process.

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