

WIRC Branch of ICAI

Issues in Business / Refund Audits, Assessments

and others under MVAT Act on 27.06.2015

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Introduction

Under any Fiscal law there are bound to be issues which are required to be tackled in day to day practice. Under MVAT Act the issues are more as it is new enactment and everything is on trial basis. Further issues go on changing as per facts of each case. Here below a note is given about aspects of important provisions which we as practitioners come across day to day.

Assessments

As compared to BST Act, the scheme of assessment under MVAT Act,2002 is on different footing . Under BST Act,1959 the assessment of dealer for each year was mandatory, giving a chance to dealer to update his position in course of assessment, though in returns there may be deficiency. However, under MVAT Act,2002, assessment will be taken up only if the Sales Tax Department feels it necessary. If no assessment, the returns filed will be final. Brief note on important aspects is as under.

Kinds of Assessment under Section 23:

As stated above to ensure that return is correct and complete and if Commissioner of Sales Tax (CST) thinks that presence of the dealer is necessary, assessment may be undertaken for which following provisions are made:

Sections	Period for passing of A.O.
23(2): In case return is filed by prescribed date	Before expiry of four years from the end of the said financial year.
23(3): In case return is not filed by prescribed date	Within five years from the end of the respective financial year.
23(3A): Assessment for any	Before seven years from end of the respective

period ending on or before 31-3-2008	financial year.
23(4): In case dealer is unregistered	Before expiry of eight years from the end of the respective financial year.

Special Provisions for and about assessments:

1. Sec. 23(1): Where the dealer fails to file a return for any period within time, the Commissioner may assess for such period to the best of his judgment without a notice and opportunity of being heard. The said order is non appealable. However, on dealer's furnishing evidence of return being filed with payment of tax, such order will be cancelled.
2. Sec. 23(5): If the prescribed authority has reason to believe that there is tax evasion or incorrect recording of transactions/claim is noticed then transaction wise assessment can be completed. This assessment shall be without prejudice to the other provisions of assessment. There is time limit of six years from the end of the concerned year for passing the assessment order.
3. Sec .23(6): If Commissioner is of the opinion that there is non disclosure of sales/purchases, wrong set-off claim, payment of tax at lesser rate, he may within five years from end of the year containing the said period serve a notice and assessment has to be completed within six years from such period.
4. Sec. 23(7): Fresh assessment to give effect to directions of higher appellate authority shall be made within 36 months from the date of communication of such finding or direction.
5. Sec. 23(8): The Commissioner may pass assessment order by ignoring the decision of the Tribunal, if it is appealed before the appropriate forum. No recovery of such dues shall be made pending decision by such forum.

6. Sec. 23(10): As per provisions, a dealer can be assessed for return wise period. However a dealer may be assessed under a single notice and by a single order of assessment in respect of more than one period covered by a return as long as all such periods are comprised in one year.
7. Sec. 23(11): In case an ex parte assessment order is passed u/s.23 (2), (3), (4) and (5), then dealer may apply to the same authority for cancellation of such order within thirty days from the date of service of the assessment order. The assessing authority will cancel the ex parte order and may make a fresh assessment.

Some aspects of Business & Refund Audit

Business Audit

Introduction

From 1.4.2005 the Bombay Sales Tax Act, 1959 (BST Act,1959) was abolished and as per national consensus the Value Added Tax system (VAT) was introduced from 1.4.2005. For that purpose, the Maharashtra Value Added Tax Act, 2002 (MVAT Act,2002) came into operation. The said new Act has many distinguishing features as compared to earlier BST Act,1959. One of them is change in assessment procedure. Under the provisions of BST Act, 1959 the assessment of the dealer for each year was mandatory. It is well settled position that whatever position might have been shown by returns, the dealer was entitled to put the last updated position before the assessing authority in the course of assessment. The assessing authority was also under obligation to assess the dealer as per the final records produced by the dealer. Therefore, pre-assessment procedures like returns, etc., had no much effect on the final assessment. This was a very good opportunity in the hands of dealer to get himself assessed as per law and as per books, in spite of fact that in the returns etc., correct position might not have been shown.

Under MVAT Act, 2002 there is drastic change in the above procedure. Under MVAT Act, 2002 there is no compulsion for carrying out assessment of

the dealer. The same is optional for the department and if it feels necessary then only it may take up the assessment, otherwise the position shown in return will be final. Therefore under MVAT Act, 2002 returns are more important documents. The dealer has to correctly file the returns. Normally there will not be any opportunity to correct the situation, as it was under earlier BST Act, 1959 where assessment was mandatory. If the sales tax department initiates assessment then dealer may be in position to put his latest position, which was not reflected in returns. However, if there is no assessment, he will not have such opportunity and has to remain contended with the position shown in returns.

Concept of Business Audit

However, sales tax department has taken care of their own right of supervising the dealer. There is provision for audit by outside agencies like VAT Audit by CA & Cost Accountant. However, in spite of the same, sales tax department also wants to supervise the position on its own. Therefore, the sales tax department has brought in concept of Business Audit. This is a new concept and it is provided by way of section 22 of the MVAT Act, 2002. When this section was originally inserted had eight (8) sub-sections detailing various aspects of the same. Subsequently, six (6) sub-sections are removed and now there are only two (2) sub-sections.

Some aspects

Few important pros and cons of Business Audit provision can be noted as under;

1. As stated above, initially all the procedural aspects about Business Audit, were specified in the section 22 itself. After removal of such sub-section, the only thing remains in section 22 is giving authority for carrying out Business Audit and the authority of the officer during Business Audit. Therefore, in relation to other aspects, the Commissioner of Sales Tax has issued Circular bearing no. 25T of 2008 dated 23.7.2008. Thus, number of procedural aspects has been left to the

sweet will of Commissioner of Sales Tax. As in other cases, the Commissioner of Sales Tax has interpreted the scope of section 22 in wider way than intended by the said section.

2. The intention of Legislature in carrying out Business Audit is to promote compliance of VAT Law by the dealers. Therefore, it is in the nature of guiding the dealers. To serve the real purpose, it is expected that the Business Audit will be carried out for initial year of the dealer, whereby he will be able to note his non compliance at early stage and will be able to correct it at the earliest. In fact, it should be at the beginning of the year, so for rest of the year, as well as in future, he will get guided. However, our experience is that the Business Audits are being carried out late. Like Business Audit from 2005-06 onwards was done in 2010-11. This completely demolishes the real purpose of the Business Audit. By such late action, the non compliance gets accumulated for past number of years and if it is attracting liability, it gets multiplied. The sales tax department should rethink over making the above provision more dealer friendly.
3. The Business Audit appears to be a pre-assessment verification of the records. If Business Audit officer is satisfied with the compliance, there will not be further action. If he is not satisfied, he will give intimation in form 604 for correcting the position. If dealer agrees to the same, the Business Audit may be closed. If the dealer does not agree, the officer may initiate assessment.

In the above whole process, it is seen that the sales tax department is using the provision, only to find out additional liability. However, this is misunderstanding of the provision. The intention of the Legislature is that Business Audit should be carried out for promoting compliance of the provisions of MVAT Act, 2002. The provisions include various beneficial provisions in favour of dealer, like set off. Therefore, if in the course of Business Audit, the officer finds out any short claim of set off

by the dealer, he is duty bound to give opportunity to the dealer to correct the said position and grant additional set off. However, no such instructions are given in the Circular, nor it is done practically. It shows that the provision is being used in unfair manner and against the real purpose of the Business Audit provision.

4. In the Circular 25 T of 2008, the Commissioner of Sales Tax has given certain aspects of scope of audit. Some of the items mentioned cannot fall in the scope of Business Audit under the MVAT Act, 2002.
 - a) It is mentioned that the Business Audit Officer will be entitled to look into other Acts also like Profession Tax Act. This appears to be incorrect, as Profession Tax Act does not refer to MVAT Act, 2002 for procedural aspects and hence such substantial provision of MVAT Act, 2002 cannot be used for Profession Tax Act.
 - b) The provision in section 22(5) suggests the dealer to afford necessary facility for inspection of books etc.. Therefore, there cannot be compulsion about any of the matters. In any case, Business Audit Officer cannot have power of civil court about proof of facts by affidavit, summoning and enforcing the attendance etc.. This is so because, the Business Audit Officer is not assessing the dealer, so as to pass final order of liability. He is only verifying the records for looking into compliance by the dealer. If after noticing irregularities, he wants to initiate assessment and to decide the liability as per statutory provision then he may get above powers for determining the facts before passing order of liability. Therefore, granting such powers in the course of Business Audit, appears to be pre-mature and excessive.
 - c) In the Circular no. 25T of 2008, it is mentioned that the Business Auditor can also come without intimation, if he wishes to carry out surprise audit. This power also appears to be beyond scope of section 22. Whenever sales tax department wants to carry out

surprise checking, there are separate powers (Investigation) u/s 64 of the MVAT Act, 2002. Therefore, sales tax department can utilize the said powers. If section 22 powers of Business Audit are used for such purpose, it will amount to circumventing requirements of section 64. As per section 64, a surprise visit can be given, if there is 'reason to believe' for tax evasion etc.. Thus, there is burden upon sales tax department to record the reasons about tax evasion and then to take out surprise visit. There are cases where investigation actions have been struck down by courts, if it is established that the investigation action is without discharging burden of establishing 'reason to believe'. Now, because of above circular, investigation action will take place as per section 22 without discharging the burden of establishing 'reason to believe'. This appears to be over use of powers granted under section 22. This is also contrary to intention of the Legislature.

- d) In the above circular, it is also mentioned that wherever necessary, the Business Audit Officer can seek intervention by the Investigation Branch. Thus, this again is a situation of avoiding necessary parameters of section 64 and beyond scope of section 22 of MVAT Act, 2002. It is expected that such unintended and unauthorized instructions should be withdrawn, if the provision is really to be used for guiding the dealers.

Provisions in MVAT Act for refund of tax.

Section 51 of the Act governs the refund of tax. The provisions of Section 51 are briefly discussed hereunder.

- The application for refund is required to be uploaded in Form No. 501. The application will be entertained only if return is filed. The refund granted under this Section is final unless scrutiny assessment is done by the authorities.

In case of **Vichare and Co. Pvt. Ltd. & others (W. P. No. 557 of 2015 dt.3.3.2015)**, Hon. Bombay High Court directed that irrespective of Form 501 the returns showing refunds are required to be processed to find out real liability. Therefore, it can be said that even if, due to any reason, application has remained to be filed the dealer can write to the authority to initiate assessment in light of above judgment. However, this should be only in unavoidable circumstances and in normal course the dealer should follow the above procedure of filing Form 501.

- If the dealer demands early refund, the Commissioner may ask for bank guarantee.
- An exporter covered by Section 5(1) or 5(3) of C.S.T Act read with limits laid down in Rule 55A (3), a unit situated in SEZ, 100 % EOU, unit in STP/EHTP, developer of SEZ, any unit situated in backward area holding entitlement certificate or Canteen Stores Departments or dealer making interstate sales with turnover limit can apply for refund after filing of the return due as per their periodicity. On receipt of the application for refund, the Commissioner can ask for further information or ask for bank guarantee as may be required.
- In case of other dealers, the application for refund can be filed after end of the year.
- If assessment or any enforcement action u/s. 63(3)/(4) is taken before the grant of refund, then refund due as per return or enforcement proceedings will be then granted as per normal procedure on completion of the said action. However, if any bank guarantee is already furnished before the initiation of assessment or enforcement action, then the amount equal to bank guarantee will be granted without waiting for completion of respective action. If it is found as a result of any order passed under this Act that the refund granted under this section is in excess of the refund, if any, determined as per the said order, then the excess amount of refund shall be recovered as if it is an amount of tax due from the dealer and the dealer shall be liable to pay simple interest at the

prescribed rate per month or part thereof from the date of the granting of refund.

- If the officer notice that: (a) the tax has not been paid on the earlier sales bill on which dealer has claimed set off or (b) the dealer has not received the declarations or certificates in form C, D, F, H, I, J, E-I or E-II as prescribed in C.S.T. Act, then the officer will reduce the quantum of refund and grant only the balance amount of refund.

- No interest is given on refund granted under this section.

- No refund under this section shall be granted unless an application in Form No. 501 is made and no application under this section shall be entertained unless it is made within 18 months from the end of the year containing the period to which the return relates.

- Refund is vested right as held in case of **Vaibhav Steel Corporation vs. The Addl. Comm. of Sales Tax (VAT) & Ors. (W.P.1735 of 2013**

dt.26.11.2013)(Bom). The amendment to curtail time limit for filing application to 18 month came into effect from 1.5.2011. Therefore, it will apply for the period from 2011-12 and for earlier periods it will be three years.

- The Commissioner of Sales Tax has issued various Circulars from time to time giving directions to lower authorities for refund. The last one of such Circulars is Circular No.22T of 2010 dated 05.10.2010. This Circular overrides all the Circulars issued earlier. The readers are requested to go through the Circular.

What information is required to be submitted to get the refund?

Following details is required to be submitted at the time of application for refund in Form 501

- Invoice wise details of local taxable purchase on which set off is claimed as following format.

Sr	Tax Invoices	Tax Invoice	TIN	of	Net	Input	Gross Total
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No	/ Cr Note No*/. / Dr Note No.*	/ Cr Note date/ Dr note date (DD/MM/YY)	supplier	Taxabl e Amoun t	VAT amoun t	**

* The figures of debit note & credit note should be entered as a negative value

** Gross total must include other non taxable charges collected in bill such as insurance.

- Details of declaration or certificates not received under CST Act, 1956.

Sr. No	Name of the dealer	CST TIN, if any	Type of declaration or certificate	Invoice No.	Invoice Date	Taxable amount	Tax Amount	Rate of Tax (%)

- Details of declaration or certificates received under CST Act, 1956.

Sr. No.	Name of the dealer	CST TIN, if any	Type of declaration or certificate	Invoice No.	Invoice Date	Taxable amount	Tax Amount

After uploading the application for refund in Form No. 501, dealer is normally expected to submit further details to the prescribed officer to whom the Form No. 501 is allotted for processing.

- Trading, Profit & Loss A/c., Balance Sheet alongwith all annexure.

- Copy of Statutory and Tax Audit report, if applicable
- Copy of VAT audit report in Form No. 704, if applicable alongwith the acknowledgement of uploading/ submission of the same with Sales Tax Department.
- Certified true copy of the VAT and CST returns filed or acknowledgements of returns uploaded.
- Certified true copy of the proof of payment of tax under VAT and C.S.T Act.
- Original declarations in Form C, F, H, D and E1 etc. are to be submitted.
- Ledger accounts (alongwith address and VAT TIN numbers) of all the parties from whom goods are purchased and set off is claimed is to be submitted, if asked by the officer for cross check purpose.

Thereafter, the dealer may be required to submit such other information as may be required by the officer (like debit notes, credit notes in case of sales returns, purchase returns etc.) to confirm and determine the amount of refund.

The officer may ask the dealer to upload the returns once again if the same are not uploaded or filed as per the periodicity appearing on the website. A dealer may check the periodicity of returns for any particular return on website **www.mahaVAT.gov.in**.

Conclusion

In relation to fiscal laws keeping abreast of developments is part and parcel of practice. As a practitioner we have to keep ourselves updated. Further this may be useful for reference in case of issues arising about given topics. I hope my above notes will be useful in giving updated position which will be useful in day today practice. I hope grand success to the seminar.