

VAT ASSESSMENTS

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- 1) What is the meaning of assessment?
- 2) Change of concept of assessment under Vat as compared to BST
- 3) Importance of Section 23 under Vat Act?
- 4) Any proceeding can be converted into assessment. e.g. refund –asst, 64-Asst,22-Asst
- 5) What is the first step after receiving Notice for assessment?
- 6) At least 15 days should be given for appearance as per Rule 21(1).
- 7) As per rule 21- Notice in 301 for 23(2)(3)(3A) and 4

Notice in Form 302 for 23(5)

Notice in Form 315 for 23(6)

- 8) First read the particulars mentioned in notice 301 carefully and see that under which sub-section, the STO initiated asst proceeding against your dealer. i.e. 23(2) or (3) Then check your return status.
- 9) Two times the dept. has increased the time limit for completion of asst-
 - a. For Asst up to 31.03.08- Amendment made in 2011- i.e. Seven years
 - b. For Asst. 05-06 & 08-09 Amendment made in Apr-2013 i.e. 30.06.2013

Refer decision of Sahyadri Sah.Sakhar Karkhana Ltd, 2013 (58) VST 323

- 10) Now there is amendment in act to sec. 32(A) by which dept can take recovery action without issue of demand notice against the dealer who is showing accepted dues in Form 704, & has not paid it.
- 11) You have to be careful while showing the amount of accepted dues in Form 704-

According to me dues for non production of declaration are not accepted dues.

Following trade circulars are important from view point of assessment

Cir. No.	Date	Subject
10A - 2013	30.08.2013	Administrative instructions in respect of Assessment / Audit Plan for the period 2006-07 to 2010-11
1A – 2013	01.10.2013	Guidelines regarding cross checks
9A – 2013	01.10.2013	Procedure for cross checks of transactions of the sellers who have filed incomplete Annexure J1 for the F.Y. 2009-10 & 2010-11
9T - 2013	11.12.2013	Grant of Refund – ITC denied due to purchases from non – filer suppliers
12T – 2012	02.08.2012	Automatic cancellation of unilateral Assessment order
21T – 2012	26.11.2012	Cancellation of Assessment order under Section 23(11)
4A – 2012	02.03.2012	Scope of Issue Based Audit

Assessment Section 23

Sec 23(1)

- I. Registered Dealer
- II. **Non- filing of Return** by Prescribed date
- III. A.O. can pass ex-parte order without issue of notice.
- IV. No order can be passed after 3 years (from the end of the year containing the said period.)

Proviso :- 1) After order is passed dealer files return and pays taxes as per returns and submits evidence – the order shall be cancelled.

2) Order is passed but the dealer shows that return was filed taxes as per return were paid before passing of order – order shall be cancelled.

Interest penalty however leviable as per law.

(Rule 24(1)- Application for cancellation of asst. order shall be made in Form 304 and also refer Circular No.12 T of 2012)

Sec 23(2)

- (i) Registered Dealer
 - (ii) Return filed by prescribed date
 - (iii) Commissioner considers necessary the presence of dealer, for production of documents.
 - (iv) Commissioner Shall serve a notice to attend and produce records/documents.
 - (v) "Thereafter the commissioner shall.....assess the amount of tax due from the dealer".
 - (vi) "Ex-parte" assessment if dealer fails to comply terms of notice.
 - (vii) No order can be passed after the expiry of 4 years from the end of the year containing the said period.
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Sec 23(3)

- (i) Registered Dealer
 - (ii) Return not filed by the prescribed date.
 - (iii) Commissioner may serve a notice for producing record.
 - (iv) Proceed to assess the amount of tax due.
 - (v) No order can be passed after 5 years from the end of the year containing the said period.
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Sec 23(3A)

- (i) Sec 23(2) & (3) for periods ending up to 31.3.2008.

- (ii) No order is to be passed after a period of seven (7) years. From the end of the year containing the said period.

Sec 23(4)

Not registered dealer liable to pay tax.

Not obtained registration within prescribed time.

- (i) Commissioner may after giving reasonable opportunity.
- (ii) Proceed to assess
- (iii) No order can be passed after 8 years form the end of the year containing the said period.

(Rule 21- For the purpose of Sub-section (2),(3),(3A) or 4 of section 23, the notice for assessment is in Form No.301)

Sec 23(5) (a)

“During the course of any proceedings”.

- (i) **Prescribe Authority is satisfied.**
- (ii) **“Tax evaded or sought to be evaded or tax liability not disclosed correctly or excess set-off claimed.**
- (iii) **By not recording or incorrectly recording sale/purchase transaction or claim incorrectly made – Notwithstanding notice for assessment has been issued under other provisions initiate assessment for such transaction or claim.**

(Rule 21-Notice for asst. under this section is issued in Form 302)

Sec 23(5) (b)

- (i) During course of any proceeding u/s 64.
- (ii) Prescribe Authority is satisfied.
- (iii) "Tax evaded or sought to be evaded or tax liability not disclosed correctly or excess set-off claimed.
- (iv) By not recording or incorrectly recording sale/purchase transaction or claim incorrectly made – Notwithstanding notice for assessment has been issued initiate assessment for such transaction or claim.

Sec 23(5)(c)

The transaction assessment as per clause (a) & (b) can be undertaken by any officer irrespective of the fact that assessment proceedings may have been initiated by other jurisdictional officer for the whole period containing that transaction.

Sec 23(5)(d)

Assessment under this sub-section (5) in respect of transaction or claim relating to said period is separate irrespective of the fact dealer may be assessed separately under other provisions of this section. Proviso that once tax is levied under this sub-section, no tax on such transactions or claim shall be demanded, under other proceedings.

AUDIT PARAMETER

Sr.No.	Audit Parameter
1	Tax credit from wrong TIN shown in Annexure J2
2	Tax Credit from Hawala(Beneficiary of Hawala)as per Annexure J2
3	From 704 Non Filer showing hawala purchases in 2011-12
4	Tax Credit Passed on by Hawala in his Anx.J1
5	Tax Credit From RC Cancelled sellers

6	Wrong ITC from Composition dealer
7	Tax Credit From Return Non Filer
8	Excess credit in Annexuer J2 with others J1
9	J4 J3 Negative mismatch(Excess ITC)
10	Sales Suppression J2 Rev
11	Asked to pay amount MVAT
12	Asked to pay amount CST
13	CST Declaration Tax
14	From C excess Value
15	From F excess Value
Tax Risk/Proposed Tax Liability	

Issue base Assessments-

Old comm. Had increased these parameters from 14 to 42

New comm. has reduced the same from 14 to 13,

Sec 23(6)

- (i) Commissioner is of opinion, that in respect of any period covered by a return.
- (ii) Any turnover of sales/purchase not disclosed or tax paid at lesser rate or set-off/deduction wrongly claimed.
- (iii) Notwithstanding other provision.
- (iv) Serve notice & proceed to assess.
- (v) No order can be passed after 6 years from the end of the year containing the said period.

(Rule 21-Notice for asst. under this section is issued in Form 315)

Sec 23(7)

- (i) Fresh assessment pursuant to any direction or finding in order including that of tribunal & Hc/Sc.
 - (ii) To be made within 36 months of the date of communication of the order to commissioner by such authority or by dealer whichever is earlier.
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Sec 23(8)

Comm. may call for record, books & evidence in respect of dealers covered u/s 23(2) return filed in prescribed time.

- (i) Even when adverse order in similar matter is passed by tribunal & dept. or govt. has gone in appeal & matter pending before appropriate forum.
 - (ii) Recovery, penalty & interest proceeding shall be kept pending and completed after appropriate form gives decision in such matter & after hearing.
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Sec 23(9)

Commissioner may on application by dealer in prescribed Form (Form 305 Rule 22)

- (i) Call for an examine record of any proceeding of pending assessment.
- (ii) Issue directions for the guidance of assessing authority, which such authority has to follow.
- (iii) No directions Prejudicial to dealer to be issued without reasonable of being heard.

(Rule 22-Application for this section is to be made in Form 305)

Sec 23(10)

Single notice, Single assessment can be done for more than one period covered by a return within one year.

Sec 23 (11)

- (i) Assessment done u/s 23(2) (3) or (4)
- (ii) Dealer applies within 30 days of service for cancellation of order on the ground of his being unable to attend at the time of hearing.
- (iii) Assessing authority on correctness of claim as above shall cancel order of assessment (Inclusive of tax, Interest & penalty).
- (iv) Proviso – only one such application for cancellation.

(Rule 24-Application for cancellation of order under this section is to be made in Form 316)

Sec 23(12)

Fresh order pursuant to cancellation of order as per 23 (11) shall be made before expiry of 18 months from the date of service of cancellation order.

(Rule 23- Assessment order is to be passed in Form 303 for the purpose of Section 23)

Time limits for assessment enhanced

- Return filed in time - 3 yrs to 4 yrs
- Return not filed in time - 4 yrs to 5 yrs
- Periods upto 31.3.08 - 7 yrs
- URD / late registration - 8 yrs
- For any return turnover not disclosed, set-off excess, under assessed - 6 yrs

Issues

- 1) Whether once notice of assessment issued in Form 301 can it be withdrawn by S.T.O.?
- 2) If dealer has received various notices in Form 301 from different officers for the same period as under –
 - a. U/s 23
 - b. U/s 22
 - c. U/s 64
 - d. On verification of Form 704.

Whether dealer has any choice to accept or avoid any notice?

- The notice of assessment in Form 301 cannot be withdrawn once issued, however it is possible that after he collects the details and verifies the records, he allows the time limit for passing the order to lapse and there by the claim as per the return becomes final.
- However, when assessment is done u/s 23(2) it shall be compulsory for the assessing officer to pass an order in view of the special wordings of the section.
- All the officers have been granted jurisdiction to do assessment, in view of this, assessing officer, Refund audit officer, Desk audit officer as well as Business audit officer can issue notice of assessment.
- Once the notice of assessment in form 301 is issued by more than one office, the dealer certainly will have an option to get the assessment done from any one officer, however while the assessment is under process the other proceedings should to be kept pending either by taking dates or informing them that assessment is being done by other officer (this may some times cause problem, as one officer may intimidate the other officer depending on the case)

II Business Audit u/s 22 has wide powers.

The powers also include power of assessment of the transaction which he finds fault with.

The above power is specifically given vide sec 23(5) (a).

In the event the assessment notice is issued in respect of the period during which a transaction is faulted by business audit then too, business audit officer has power to assess those faulty transactions.

The law provides only for assessment qua transaction by business officer, however if no assessment notice is issued he has the power to do assessment for complete period.

Q. In case of acceptance with the result of business audit, whether to pay by filing revised return along with interest u/s 30(4) @ 25% or insists for assessments which have a risk of levy of 100% penalty u/s 29(4)

Issues:

The Act of B.A.O. in asking the dealer to file revise return is not appropriate. At worst it is an option available with the dealer if he wants to avoid assessment for whatever reason.

The intimation sent by the B A O in Form 604 may or may not be acceptable to the dealer and the same is not appealable also.

The dealer has the option to pay the tax along with interest and write a letter stating that the tax has been paid along with interest u/s 30(2). The B A O may thereafter initiate assessment proceedings in the event the dealer is not filing the revised return.

The payment of tax is only for stopping the meance of interest which is running. In the event we do not opt for assessment and revise the return and if subsequently C forms are received we cannot apply for rectification u/s 24(2) as there shall be no order which can be rectified and interest paid u/s 30(4) to that extent shall go waste as extra payment although later you may have received the C form.

The threat of penalty u/s 29(4) is ill founded. 29(4) reads ' any person or dealer 'knowingly ' issued or produced any document by reason of which transaction not liable to be taxed or taxed at a reduced rate or incorrect set off.

Firstly it would be on the department to prove that it was done "knowingly". The dealer has various options and available data to rebut "knowingly" although tax may become payable, penalty is certainly not leviable.

Let us now analyze penalty provision u/s 29(3) and 29(4)

(3) While passing or after passing any order under this Act, in respect of any person or dealer, the Commissioner, on noticing or being brought to his notice, that such person or dealer has concealed the particulars or has knowingly furnished inaccurate particulars of any transaction liable to tax or has concealed or has knowingly mis-classified any transaction liable to tax or has knowingly claimed set-off in excess of what is due to him, the Commissioner may, after giving the person or dealer a reasonable opportunity of being heard, by order in writing, impose upon him, in addition to any tax due from him, a penalty equal to the amount of tax found due as a result of any of the aforesaid acts of commission or omission.

(4) Where any person or dealer has knowingly issued or produced any document including a false bill, cash memorandum, voucher, declaration or certificate by reason of which any transaction of sale or purchase effected by him or any other person or dealer is not liable to be taxed or is liable to be taxed at a reduced rate or incorrect set-off is liable to be claimed on such transaction, the Commissioner may, after giving, the person or dealer a reasonable opportunity of being heard, by order in writing, impose on him in addition to any tax payable by him, a penalty equal to the amount of tax found due as a result of any of the aforesaid acts of commission or omission.

The reading of the provisions clearly lays down that the department has to prove that dealer has knowingly done an act and it would be on the dealers part to prove that the transaction on which the tax is now levied or the set-off is reduced has not been done knowingly and that a valid explanation should be available for the same. It may however be noted here the once a transaction is taxed the dealer shall offer an explanation for not considering the said transaction for taxation before and once this is done , the onus shall shift on the department.

Penalty proceedings : Whenever an addition/disallowance is made, initial burden is upon assessee to prove that it is not his concealed income or he has not furnished inaccurate particulars of such income

When an explanation is offered, the onus stands shifted on to the Revenue whereby it has to be shown that the explanation offered by the assessee is

false or assessee has not been able to substantiate his explanation and failed to prove that such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have not been disclosed

[2010] 5 taxmann.com 70 (Mum. - ITAT)

The Hon. Supreme Court in the case of C.I.T., Ahmedabad V/s Reliance Petro products Pvt. Ltd has held as under after considering the decisions of Union of India Vs. _____Textile Processors [2008(13) SCC 369], as also, the decision in Union of India Vs. Rajasthan Spg. & Wvg. Mills [2009(13) SCC 448] and reiterated in para 13 that:-

"13. It goes without saying that for applicability of Section 271(1)(c), conditions stated therein must exist."

Section 271(1)(c) is as under:-

"271(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income."

Similarly, when any penalty under section 29(3) or (4) is sought to be levied then conditions stated therein should be fulfilled and hence it should be determined that dealer has "knowingly committed the act.

However, it must be pointed out that in Union of India Vs. Dharamendra Textile Processors, no fault was found with the reasoning in the decision in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. (2007(6) SCC 329), where the Court explained the meaning of the terms "conceal" and "inaccurate" as under:

The expression "conceal" is of great importance. According to Law Lexicon, the word

"Conceal" means:

"to hide or keep secret. The word 'conceal' is con+celare which implies to hide. It means to hide or withdraw from observation; to cover or keep away from sight; to prevent the discovery of; to withhold knowledge of. The

offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income-tax authorities."

In Webster's Dictionary, "inaccurate" has been defined as:

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."

It signifies a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing of inaccurate particulars.

The term 'inaccurate particulars' is not defined. Furnishing of an assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the Explanations are taken recourse to, a finding has to be arrived at having regard to cl. (a) of Expln. 1 that the AO is required to arrive at a finding that the explanation offered by an assessee, in the event he offers one, was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which was material to the computation of his income.

In light of the above explanations, we shall now consider different situations pursuant to which the B A O threatens to levy penalty if revised return is not filed.

I) Non receipt of C Forms

All cst sales are reported sales

The dealer is a holder of valid CST registration

The transaction were with same party in previous years where he has given C forms

A copy of application made by that party for C forms

Letter from party that they will give the C forms at the earliest.

Any of the above details will prove that the dealer has not done anything "knowingly". **Besides the tribunal in the case of Desh chemicals Pvt ltd. S.A. No.1081 of 2000 date 5//5/2011 has held that non-receipt of**

forms inspite of requisite effort does not amount to “knowingly furnishing inaccurate particulars of transactions.

II) Set off wrongly claimed more in the return

- a) There can be several possibilities in this case like. Set-off of provision month claimed in the subsequent month by mistake
- b) Set off of some other party claimed in the practioners office
- c) Debit notes which came subsequently left to be taken effect

In any of the above situation it cannot be said that dealer has knowingly filed incorrect details or knowingly claimed excess set- off.

In the event the set-off is disallowed because of Hawala bills, if the dealer was registered with the department as on the date of issuance of bill then it can be argued that the act is not Knowingly, since the dealer was registered, it would be reasonable to presume that he will do his duty and hence penalty cannot be levied. Again the bill is not false as it is issued by a registered dealer.

Attention is drawn towards a decision of the Mumbai Tribunal in the case of alleged bogus purchases, where in it was held as under

Human probability/tendency of non-cooperation by parties after business transaction is over, is required to be considered while deciding bona fide aspect of assessee in penalty matter under section 271(1)(c)

When transactions with a particular party are over that party may not be ready to co-operate in giving information which are exactly asked by the Assessing Officer from the assessee, under these circumstances, the revenue authorities have ample powers under the Act to issue summons to the party and if they are not exercising such powers, the assessee cannot be blamed for concealing particulars and or furnishing inaccurate particulars of income

[2010] 5 taxmann.com 67 (Mum. - ITAT) ITAT, MUMBAI `B' BENCH MUMBAI Chempure v/s. ITO

III) Set-off disallowed by STO which remained to disallowed in the return.

In the above case the nature of disallowance is very importance.

- (i) Disallowance of fuel in 3 months which was left out to be done.
- (ii) Change in set- off due to ratio of retention.

(iii) Defective invoices under section 86.

In all such situations it can be argued that it is not done knowingly. Thus where the dealer has a valid and a bonafide explanation to offer it is a good case to argue that the act has not been done "knowingly".

Attention is drawn towards the following decision

Making a wrong claim is not at par with concealment or giving of inaccurate information, which may call for levy of penalty under section 271(1)(c)

In order to apply the provisions of section 271(1)(c), there has to be concealment of particulars of the income of the assessee; the assessee must have furnished inaccurate particulars of his income.

[2010] 5 taxmann.com 100 (Mum. – ITAT)

IV) Taxes paid wrongly @4% instead of 12.5% .

In the above case it has to be ascertained if the taxes @4% were collected due to what reason. In the event there is an issue of legal interpretation then it can very safely argued that there was a bonafide belief and it is not done knowingly

Again it is possible that you are a trader and the goods are coming to you 4% & hence you sold it @ 4%, here too there is bonafide belief & it is not done "knowingly".

(V) TDS certificates not received.

The above is a term of taxes paid and hence there can never be a situation of levy of penalty under this case. The person responsible for deduction & payment are different & hence if certificates are not received, still it can be ascertained when the TDS payment is made.

(VI) Less tax paid in returns due to totaling or calculation mistake.

In this case also there can be no levy of penalty. The facts are on record & nothing is done knowingly.

INTEREST REMISSION

Whether possible in above situation:

1. There are no provisions under the law for remission of Interest.
2. Under the B.S.T. Act remission of Interest was sought on the basis of out of pocket theory and various other reasons pursuant to proviso to sec 36(3)
3. Whether under MVAT Act, the same theory would apply?

A proviso to sec 36(3)(b) read as under

“Provided that the commission or any appellate authority may subject to the rules & tax reasons recorded in writing, remit the whole or any part of the interest payable in respect of any period”

A similar provision is not provided under MVAT Act. In view of this it would be difficult for any authority to grant remission of interest.

26(5)(c) before being omitted permitted only “confirm, cancel or modify it in accordance with provision of this Act”.

The MVAT Act does not allow remission of interest. Modification of Interest would mean that when original demand is reduced the interest should be modified accordingly. Thus under MVAT Act remission provisions are not there & hence no remission.

In Vat S. A. no. 6 of 2008 in case of M/s. Royal motors pvt ltd. Decided on 27/06/2008 it was held that there is no power for remission of interest as compared to the BST act. In spite of sec 26(5) (c) it was held that no specific power was available with appellate authorities for grant of remission.

The provision of sec 26(5) (d) appellate authority may pass such order as it deems just and proper.

The above clause can cover only peculiar circumstances like law amended retrospectively & hence interest cannot be levied for that period. Remission of Interest on account of reasonable cause is possible or not has to be tested before the tribunal.

Other issue pertaining to deletion of sec 26(5) (c)

Whether levy of interest is still appealable?

Yes, u/s 85(2) non-appealable orders include only 30(2) and 30(4) and hence we can still argue that levy of interest u/s 30(1) and (3) are appealable.

The appellate authority has to adjudicate the appeal and hence they will have to take resort to the residuary clause 26(5)(d) " May pass such order in the appeal as it deems just and proper "

The above clause shall be usable when whole of tax is deleted or part tax is omitted and hence consequential interest reduction is to be done.

Whether the residuary power can be used to remit interest especially in cases of BIFR companies or for out of pocket theory needs to be tested before the Tribunal.

Powers of Refund Audit Officer.

The powers of refund audit officer are the same as Business Audit Officer as the Commissioner has in Circular no 22T of 2010 that refund officers shall issue notice u/s 22, for the purpose of visit at the dealer's place. However, in the event that no visit has been done and all the proceedings are done by sending requirement notice then the notice is not covered under section 22..

It is very important to note here that if the notice is not issued u/s 22 by the refund officer and assessment notice in form 301 is issued by any other officer then the refund officer has to be told not to proceed further in the matter and no proceedings may be done with him because once assessment notice is issued refund is to be withheld as per sec 51(6)(a).

Recently the refund officers are calling for the details as per annexure J-1 and J-2.

The officers do have a right to ask for details as per J-2 as set off is eligible only if purchases are from registered dealers and hence information of those registered dealers needs to be granted.

At times we are told that there is a mismatch as the person from whom you have bought the goods has not given the necessary data in J-1 as this was not binding on the dealers till the amendment happened in section 86(2) in May 2010. In such an event the only option left is to get the ledger copy of the party, certified by the party and if possible by the auditor of the party. There can be various issues in this respect, however since our refund is at stake we need to do whatever possible in the matter.

SOME IMPORTANT POINTS

Amendment to section 32A

As per the amendment, the commissioner can now recover the amount shown payable in the Audit report in form 704.

It is provided in the amendment applicable from 1 May 2013, if the Auditor has made a recommendation in respect of a sum payable or the interest payable and the dealer has accepted the recommendations then the said dealer shall pay the same within thirty days from the date of service of the notice issued by the Commissioner.

Interest is payable as if the payment is due as per periodical returns.

Explanation:- For the purposes of this section and section 32, the Commissioner shall not recover dues which are rupees are one hundred or less.

This amendment has given a tool in the hands of Sales Tax Department and the efforts of the Department to issue assessment notice and pass assessment order to recover the dues shown in 704, will now be saved.

Carry forward of Refund

For the period commencing 1st April 2012, a dealer eligible for refund up to 5 lakhs, can carry forward the same to the return for immediate succeeding year.

J-1 & J-2 to filed with every return:

It is proposed that the dealers will have to file annexure J-1 & J-2 along with the return as per his periodicity.

Shifting windows 7

All the programmes which work in Windows 3 Version will be converted in to windows 7 version.

C from intimation to vendor also.

New form for application for C.S.T forms requires you to provide for email address of vendor to whom you will issue the form. All the intimation about receipt, issue, rejection of the form will be emailed to vendor to avoid wrong issue of the forms.

Thank you
