

Ref No. 2b/ 7755

16 May 2009

The Executive Director,  
Udyog Bandhu,  
12-C, Mall Avenue, Lucknow  
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Principal Secretary  
Commercial Tax & Registration,  
Govt. of U.P  
Bapu Bhawan, Lucknow

**Subject :- Regarding withholding of refunds as notified vide Notification No. 497 dated 28/2/09.**

Sir,

When the proposed VAT Act was displayed on the web of Commercial Tax in 2007, IIA had made concrete & pin-pointed suggestions to delete certain provisions as were against natural justice or damaging the interests of MSMEs. IIA is thankful that the Deptt. in a rational approach considered & conceded certain suggestion & made amends or alters accordingly. In those suggestions one of our suggestion related to Sec-42 of "Proposed VAT Act 2007".

The then Section -42 related to with holding of Refunds in certain cases" . IIA objected to this section on the ground that the provision was in direct contrast to constitution, Natural justice and Common sense. This section by virtue of being presumptive, arbitrary & imaginary did not fulfill the test of legal propriety. The Deptt, in simple cannot with hold the legally due refund on the analogy that a huge demand was likely to be created culminating from Assessment proposed. Presumptive action based on S.I.B; Mobile squad or other Report will be no less then arbitrary. The Dealer is well registered & his credentials are well conserved by parameters of security/surety adequate enough to contain such dealer. The Deptt considered the argument & dropped the same provision form the Act. In place, the provision of section 42 was finally set out & substituted for deferment. IIA thanked the Deptt for the objective rationale.

It is surprising to note that vide Notification No. 497 dated 28/2/09 of Deptt of Tax & Registration Govt of U.P a wholly new section instead of Sec-42 has been inserted after Sec- 40 as 40-A, which now provides for withholding of Refunds in certain cases" ----- as under:-

Insertion of new section 40-A- After Section 40 of the principal Act, the following section shall be inserted, namely:-

"40A. Withholding of refund in certain cases- **(1)** Notwithstanding anything to the contrary contained in any other provision of this Act or in any judgment, decree or order of any Court. Tribunal or other authority, where after giving reasonable opportunity of being heard to the dealer or the person concerned, the Commissioner is satisfied on the report of the assessing authority that:-

- (a) the dealer has submitted false return of the turnover or has concealed particulars of his turnover or has deliberately furnished in accurate particulars of such turnover or has prevented the assessing authority or any other competent

- authority from making inspection and examination of books, accounts or documents maintained or goods shown to be held in stock by such dealer or obstructed any competent authority in performing his functions under this Act or any purchase in respect of which input tax credit in any return has been claimed, is not verifiable; or
- (b) any purchase in respect of which input tax credit in any return has been claimed, is not verifiable; or
  - (c) the dealer has failed to furnish any security demanded from him under any provision of this Act or the Central Sales Tax Act, 1956; or
  - (d) the dealer has failed to furnish any security demanded from him under any provision of this Act or the Central Sales Tax Act, 1956; or
  - (e) the circumstances exist involving fraud,

and where the Commissioner is of the opinion that if refund is allowed, it may not be possible to realize any amount of tax or penalty likely to be levied, he may permit the assessing authority to pass an order for withholding, as a security, such amount of refund as would be sufficient to cover the amount of tax or penalty or both, as the case may be, likely to be levied, for a period as may be determined by the Commissioner.

1. Where the assessing authority finds that the circumstances mentioned in sub-section (1) exist and sufficient material is available on the record, it shall send a report to the Commissioner along with the material for seeking the permission to withhold the amount of refund.
2. The assessing authority shall complete the proceeding for assessment or penalty or both, pending before him within such period as may be determined by the Commissioner.  
PROVIDED that if the Commissioner is satisfied that the circumstances exist which would prevent the assessment or penalty proceeding within the determined period, he may extend the period not exceeding 90 days.
3. After the completion of the proceeding withheld amount shall be adjusted against demand created due to assessment or penalty proceeding and the balance if and shall be refunded along with interest at the rate of twelve percent per annum from the date on which refund has become due, in the manner provided under this Act and the rules made there under.

The provision is more regressive arbitrary, presumptive, imaginative & arming the field officers with unfettered huge powers of Discretion, vent of bias & so many thing. It directly infringes the constitution & the principle of Natural justice. There was no such provision in easstwhile Act (U.P.T.T). Moreover the due I.T.C which is to be given after a sustained & long procedure of time has too been dragged in its ambit.

Therefore IIA requests that the Section once agreed to be Arbitrary & excessively discretionary be dropped & may not be allowed a repeated back-door Entry. Otherwise the Refund will be a thing of past in VAT Regime.

Thanking you,

Yours faithfully

D.S. Verma  
Executive Director

