HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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WRIT PETITION No.36202 OF 2015

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ORDER: (*Per* Hon'ble Sri Justice M. Satyanarayana Murthy)

This writ petition, under Article 226 of the Constitution of India, is filed by the petitioner, Sri B. Sunil Kumar, to issue a writ of *Mandamus* by declaring the assessment order dated 31.05.2013, for the period from 2009-10 to 2012-13 (up to 5/12) under the provisions of the Andhra Pradesh Value Added Tax Act, 2005 (for short, 'the AP VAT Act'), as void, without jurisdiction, barred by limitation, violative of principles of natural justice, violative of Articles 14 and 19 of the Constitution of India and *set-aside* the consequential penalty order dated 25.11.2013.

The case of the petitioner, in brief, is that he along with his brother and mother ran a partnership firm under the name and style of M/s. Visakhapatnam Steel Corporation (for short, 'the firm'), which was registered on the rolls of 3rd respondent, and carried on the business till 30.06.2012 in sale of Iron, Steel and Cement and as such the firm was regular in filing returns and payment of taxes. While so, Smt. B. Victoriamma, mother of the petitioner, who was one of the partners, expired on 06.09.2002 and after her death, the other partners *i.e.,* the petitioner and his brother, B. Anil Kumar, carried the business and, later, closed the same. Subsequently, registration of the firm was cancelled by the Registering authority with effect from 30.06.2012 by issuing Form VAT 124 on the application of partners of the firm. After cancellation of registration of the firm, the 2nd respondent issued assessment and penalty orders assessing the firm to impose a penalty of Rs.9,58,869/-. Aggrieved thereby, the petitioner preferred this Writ Petition raising the following grounds:

a) The assessment order, for the period from 2009-10 to 2012-13, is barred by limitation, as it was passed on 31.05.2013, and it was not passed in terms of Section 21(3) of the AP VAT Act, it is null and void;

b) on the basis of authorization issued by the 4th respondent, the 2nd respondent issued notices to the petitioner for production of records and books of accounts, brother of the petitioner filed letter dated 01.08.2012 informing the 2nd respondent about the closure of the firm and due payment of relevant taxes by enclosing a copy of the notification of cancellation of VAT Registration in Form VAT 124, with a request to drop the proposed audit. Thereafter, the petitioner or other partners did not receive any notices from the respondents till 10.04.2014, on which date the 3rd respondent issued a demand notice for a sum of Rs.19,17,738/-, being arrears of tax and penalty levied and issued the demand notice without passing an order of assessment and penalty by following necessary procedure, the orders are against the principles of natural justice. On receipt of demand notice dated 10.04.2014, the petitioner and his brother enquired the 3rd respondent about their liability; thereupon, the 3rd respondent informed the petitioner that the firm was audited and assessed by the 2nd respondent on 31.05.2013 and that a penalty, under Section 53(3) of the AP VAT Act, was imposed by order dated 25.11.2013; later obtained certified copies of the order of assessment and penalty on 19.09.2015. In the meanwhile, the Deputy Commercial Tax Officer-I, Autonagar Circle, Vijayawada issued a notice in Form No.4, demand prior to attachment, dated 10.09.2015. The alleged assessment and penalty orders were passed without any notice to the petitioner and his brother or the firm and the said assessment and penalty orders are illegal and against the principles of natural justice;

c) It is further contended that though the audit officer proposed to levy a penalty of 25% of the tax in terms of Section 51(1)(ii) of the AP VAT Act but levied penalty at 100% without issuing any notice to the petitioner or his partners. In the absence of any such show-cause notice, proposing to pass assessment order and imposing penalty is in violation of principles of natural justice; on this ground also, the order of assessment and penalty are liable to be set-aside;

d) It is specifically contended that the Assistant Commissioner (CT), (LTU), (Int.), II Division, Vijayawada audited the books of accounts of the firm for the period from 01.04.2000 to 05.01.2011, passed orders on 31.03.2011 and 06.04.2011 levying tax and penalty respectively; the firm paid tax and penalty levied by the Assistant Commissioner but the 2nd respondent without going through the records of the firm, levied tax and penalty for the period already assessed by the Assistant Commissioner. Thus, the firm was mulcted twice with tax liability, which is unauthorized and without jurisdiction and, on this ground also, part of the assessment order and penalty are liable to be set-aside;

e) It is further contended that imposition of tax twice and penalty for the tax period from 01.04.2010 to 05.01.2011 is illegal, arbitrary and inconsistent with the provisions of the AP VAT Act and the same is liable to be set-aside;

finally, prayed to allow the Writ Petition.

The 2nd respondent filed counter-affidavit admitting levy of tax and penalty for the period under dispute; denied the material allegations made in the affidavit annexed to the writ affidavit. It is the specific contention of the 2nd respondent that the assessment under challenge is best judgment assessment under Section 21(3) of the AP VAT Act; against the assessment and penalty orders, appeal lies to the Appellate Deputy Commissioner, Commercial Taxes, Vijayawada but without taking recourse to the alternative remedy approached this Court. Therefore, on this ground, this Court while exercising discretionary power under Article 226 cannot entertain short-cut methods or to circumvent the provisions of the Act; thereby, the writ petition is liable to be dismissed, on this sole ground.

The petitioner is the managing partner of M/s. Visakhapatnam Steel Corporation bearing TIN No.28740135711 carried on the business in sale of iron, steel and cement, based on the authorization dated 05.07.2012 issued by the Deputy Commissioner (CT), II Division, Vijayawada, the 2nd respondent visited the business premises of the petitioner on 13.07.2012, recorded the statements of the Manager and representative of the firm Sri S. Joshi. At the time of audit, the representative of the firm was present and promised to produce all relevant records on 16.07.2012. Again, the 2nd respondent issued a notice in Form VAT 310 dated 16.07.2012. Having received the same by the managing partner, B. Sunil Kumar, on 18.07.2012 had neither produced the record nor any information for completion of audit but requested further time up to passing of assessment order in Form VAT 305 on 31.05.2013 by the 2nd respondent. Thus, the managing partner did not respond to the notices in time. If the managing partner co-operated for auditing, the assessment would have been completed within the limitation period. If the time taken for issuances of notice is excluded, the assessment order passed is within 4 years period and consequently the assessment is not barred by limitation and it is in accordance with law. Therefore, on the ground of limitation the order of assessment and penalty cannot be set-aside.

The petitioner being managing partner of the firm, on receipt of the audit notice from the 2nd respondent, filed a letter before the Commercial Tax Officer, Autonagar Circle, Vijayawada on 21.07.2012 with a request to cancel the registration with effect from 30.06.2012. The Assistant Commercial Tax Officer, Autonagar Circle, Vijayawada, without knowing the fact of pending audit proceedings, cancelled the registration as per the request of the dealer on 31.07.2012. The information regarding death of Smt B. Victoriamma on 06.09.2002 has not been informed to the respondents. Hence, cancellation of the registration before the audit is not correct.

The petitioner himself has filed letter before the 2nd respondent on 01.08.2012 on receipt of the VAT Form 124, dated 31.07.2012 from the Assistant Commercial Tax Officer, Autonagar Circle, Vijayawada, but the letter filed by his brother and one of the partners of the firm before the 2nd respondent is not correct. Due to non availability of the dealer, VAT Audit notices and orders have been served by affixture at the last known business premises of the dealer and also notices and orders sent through registered post have been returned to the Audit officer with an endorsement "*left without instructions, returned to the sender*". The audit officer has completed the audit based on best judgment assessment and transferred the file to the regular jurisdictional authority *i.e.,* 3rd respondent herein on 01.04.2014. Till then, the regular jurisdiction authority has no information regarding audit of the firm. On receipt of the file, the 3rd respondent issued notice dated 10.04.2014 for payment of tax of Rs.9,58,869/- and penalty of Rs.9,58,869/- but the said notice was refused. Again, the notice sent, through registered post to the residential address of the managing partner, was duly acknowledged by the partner of the petitioner's firm *i.e.,* petitioner. On coming to know about the information from the 3rd respondent, the managing partner submitted a letter of request dated 30.07.2014 for issue of certified copy, enclosing challan bearing No.4709, dated 28.07.2014 for Rs.100/-. Accepting the request, the certified copy of the assessment order has been prepared and handed over to the brother of petitioner on 04.08.2014. Even after receiving certified copy, the petitioner and other partners did not respond; thereupon the 3rd respondent initiated action under the Revenue Recovery Act, 1864 for realization of the amount due towards tax and penalty. Again, the petitioner-dealer requested for issue of certified copy on 18.09.2015, enclosing a challan for Rs.100/-, for second time. Accordingly, certified copy was supplied for second time on 30.09.02015. Thus, the petitioner did not comply the legitimate demand of the respondents for payment of penalty; having no other alternative, the demand prior to attachment under Section 25 in form No.4 was issued by the Deputy Commercial Tax Officer, Auto Nagar Circle, Vijayawada. Thus, the proceedings are in accordance with law and the same cannot be set-aside on any of the grounds; finally, prayed to dismiss the writ petition.

During course of argument Sri P. Balaji Verma, learned counsel for the petitioner, mainly contended that the assessment order is barred by limitation for a period more than one month and, on this ground, the assessment order and consequential penalty order are liable to be set-aside. Further, it is contended that when the firm was closed, it is the obligation of the respondents to send notices to the address of the petitioner and serve notice personally but in the absence of any show-cause notice before assessment and imposing penalty, the orders passed by the authorities are contrary to the principles of natural justice; on this ground alone, the assessment and consequential penalty orders are liable to be set-aside. Finally, it is contended that the firm was already assessed by the respondents and again assessed for the same period. Therefore, it amounts to mulcting the firm twice for the tax liability and for payment of penalty. Thus, the orders passed by the authorities are without jurisdiction; since the orders are void, the petitioner need not raise any plea in the writ petition as to why the order is void and prayed to set-aside both the assessment and penalty orders respectively.

Whereas Sri SK. Jeelani Basha, learned special standing counsel for Commercial Taxes (AP), would contend that despite sending notices, the partners of the firm did not respondent and they did not furnish the details of their changed address, if any, enabling the respondents to serve notice personally on them. In those circumstances, the respondents sent notices to their last known business premises. Even recording the statement of manager of the firm shows that the petitioner's firm exists in the same premises though not carrying on any business. Therefore, sending notices and its return by the postal authorities with a specific endorsement is sufficient service and a presumption can be drawn under Section 27 of the General Clauses Act, 1897 (for short, 'the Act of 1897'). Even otherwise, one of the modes of service is affixture and by following one of the prescribed modes of service *i.e.,* by affixture, the respondents complied the requirement of giving show-cause notice to assess and passed a best judgment assessment. Therefore, the assessment order and consequential penalty order cannot be set-aside even without jurisdiction and against the principles of natural justice.

It is further contended that the assessment for the period from 01.04.2010 to 05.01.2011 is by way of re-assessment of the assessment order passed by the authorities since the dealer filed returns without disclosing the actual sales and assessment was an escaped assessment. Therefore, by following necessary procedure, re-assessment order was passed and consequently there is no illegality in the order passed by the authorities and apart from that if the time taken for issuance of show-cause notice is excluded, the assessment order is in time and that the conduct of the petitioner is to be taken into consideration while exercising jurisdiction under article 226 and, if it is considered, no relief under Article 226 can be granted. Finally, it is contended that the affidavit is totally silent as to how the assessment and consequential penalty orders are void; in the absence of any pleadings, it is difficult for the respondents to meet any contention raised during argument and to rebut the allegations made in the affidavit. Therefore, the argument advanced by the learned counsel for the petitioner that the Revision order passed by the authorities for the period from 01.04.2010 to 05.01.2011 is without any jurisdiction, cannot be entertained in the absence of any pleadings and affording opportunity to the respondents to rebut the same by filing a counter-affidavit does not arise. On this ground also no relief can be granted to the petitioner and finally prayed to dismiss the writ petition.

Considering rival contentions and perusing the material available on record, the points that arise for consideration are as follows:

1) Whether the assessment is barred by limitation?

2) Whether the assessment order and consequential penalty order are passed without serving any notice on the petitioner and as such the orders are in violation of principles of natural justice? If so, are they liable to be set-aside?

3) Whether imposition of tax for the period from 01.04.2010 to 05.01.2011 by order of re-assessment is invalid? If so, whether the order of re-assessment and penalty are liable to be set-aside?

POINT No.1: The first and foremost contention raised by learned counsel for the petitioner is that the order of assessment is hopelessly barred by limitation and it is against the purport of Section 21 of the AP VAT Act. Specific contention is raised in the affidavit that the assessment order is barred by limitation under Section 21(3) of the AP VAT Act, as the assessment order was passed on 31.05.2013 for the period from 2009-10 to 2012-13 (up to 5/11). For the period April, 2009, the period of 4 years for assessment expired on 20.05.2013. Undisputedly, the assessment order was passed on 31.05.2013; whereas, the assessment for the month of April, 2009 was expired on 20.05.2013. Therefore, only part of the assessment order expired but not the whole order. The assessment of turnover for the period prior to 20.04.2009 alone is barred by limitation as the other part of the assessment is within limitation as per Section 21(3) of the AP VAT Act. Therefore, merely because a part of the assessment for one month two days is barred by limitation, the entire order cannot be set-aside, holding that the entire assessment is barred by limitation. Learned special standing counsel for the Commercial Taxes contended that time taken for serving notice is to be excluded from calculation of limitation but this submission is not based on any provision in the AP VAT Act. However, Section 15 of the Limitation Act, 1963 saves such time in filing a suit or application for execution of the decree but not to quasi judicial proceedings by administrative authorities. Therefore, this contention of learned standing counsel is without any substance and the same is rejected. Hence, we find that the order of assessment of turnover for the period of one month twenty days is barred by limitation and the assessment from 20.04.2009 till the end of assessment year 2012-13 is within time. Accordingly, the point is answered.

POINT No.2: The 2nd contention raised by learned counsel for the petitioner during argument is that no show-cause notices either before assessment or before passing penalty order were issued and that the assessment and penalty orders were not served on the petitioner. Therefore, the assessment and penalty orders passed by the 2nd respondent are without any show-notice affording reasonable opportunity to explain the reasons. Hence, it is against the principles of natural justice and thereby liable to be set-aside.

It is the case of the petitioner from the beginning that M/s. Visakhapatnam Steel Corporation was registered with the 3rd respondent, carried on business, filed returns and paid tax as assessed by the department. However, one of the partners Smt. B. Victoriamma, died on 06.09.2002 but the partnership firm continued its business by the petitioner and his brother till 30.06.2012; closed the business, evicted the business premises and later applied for cancellation of registration with effect from 30.06.2012 and, accordingly, issued proceedings in Form VAT 124 cancelling the registration. Since the business was closed and the premise was evicted, the question of carrying on business and assessing the firm to tax does not arise. Even otherwise, a show-cause notice is required to be issued in Form VAT 305-A to the assessee-firm, before assessing the firm, but no such show-cause notice was served to the last known business address of the petitioner or to his brother Anil Kumar but passed the assessment order and did not serve the same on the assessee-firm. Similarly, show-cause notice proposing to impose penalty and penalty order were served neither on the petitioner nor to the firm. Therefore, the assessment and consequential order of penalty are illegal, arbitrary and without jurisdiction.

Refuting the said contention, learned special standing counsel for the Commercial Taxes contended that the notices as required under the provisions were issued at every stage, to the last known address of the assessee-firm; since no new address was furnished, after cancellation of registration by the assessee-firm, all the notices addressed to the last known address of the assessee-firm by registered post were returned with a postal endorsement "*left without instructions, returned to the sender*". In those circumstances, having no other alternative, notices were affixed at the conspicuous place of the business premises, as per rules, and it is sufficient service. Thus, the 2nd respondent complied the procedure contemplated under the AP VAT Act and Rules, did violate no provision or rule in assessing the firm to tax and imposing penalty. It is also contended that when a show-cause notice was sent to the last known address of the assessee-firm by registered post, it is a deemed service and in such case, in the absence of furnishing any specific address after cancellation of the registration, sending notices to the last known address of the assessee-firm is sufficient, in view of Rule 64 of AP VAT Rules under the AP VAT Act.

In view of rival contentions, we directed the learned special standing counsel for commercial taxes to produce the original record to come to a definite conclusion regarding service of notice under VAT Form 305-A and service of assessment in Form VAT 305, notice of penalty and penalty order in Form VAT 203-A and 203.

Undisputedly, 2nd respondent levied VAT on the firm on best judgment basis, by exercising power under Section 21(3) and imposed penalty under Section 53(3) of the AP VAT Act. It is the specific case of the 2nd respondent that the 4th respondent authorized 2nd respondent, who in turn visited the business premises of the assessee-firm on 13.07.2012. It is also contended by 2nd respondent that he recorded the statement of Manager and representative of firm by name Sri S. Joshi, who was present in the premises but recording of statement is disputed by the petitioner. However, the record produced before us contained the statement dated 13.07.2012, wherein the statement of Sri S. Joshi, representative and Manager of the assessee-firm, is readily available, discloses that the assessee-firm is carrying on business in sale of iron and steel and purchased several items within the state and affecting sales to the customers only and that they have no branches or godowns to the business and maintaining books of accounts *viz.,* day-book, ledger, purchase invoices and sale invoices and they are available with their accountant. Hence, the assessee-firm could not produce those books before the 2nd respondent office and promised to produce them before the 2nd respondent office on 16.07.2012 without fail. The petitioner did not deny engaging Joshi as manager of M/s. Visakhapatnam Steel Corporation and the allegations made in the said statement by filing additional affidavit. Again, on 16.07.2012, a notice in Form VAT 310 was issued by the 2nd respondent and the same was received by the managing partner of the assessee-firm Sunil Kumar on 18.07.2012 but no purpose was served. On the other hand, a final notice dated 25.07.2012 was issued calling upon the assessee-firm to produce books of accounts, to conduct audit of the accounts for the purpose of assessment and the said notice was served on a person by name G. Naga, for Visakhapatnam Steel Corporation on 26.07.2012; on receipt of the same, petitioner being the managing partner and his brother, the other partner, submitted a letter dated 01.08.2012 informing about cancellation of registration of the assessee-firm, enclosing the xerox copy in Form VAT 124 issued by the 3rd respondent, dated 30.06.2012 while stating that no amount was due towards tax payable to the department and they cleared tax dues, if any, to the department and requested to drop action.

Undisputedly, registration of the assessee-firm was cancelled with effect from 30.06.2012 but the proceedings were issued on 31.07.2012 based on the application submitted by the assessee dated 21.07.2012. There is a discrepancy in mentioning date of the order, instead of mentioning the date as 31.07.2012, a date 30.06.2012 was mentioned. The question of cancellation of the assessee-firm on

30.06.2012 is a patent error for the reason that the assessee-firm made an application for cancellation on 21.07.2012. Therefore, question of issuing any order on 30.06.2012 does not arise and it should be read as 31.07.2012 only and in fact it is not disputed by the petitioner.

The liability of the assessee-firm is concerned, the 2nd respondent though issued several notices, the assessee-firm did not produce books of accounts, purchase and sale invoices to conduct audit. On the other hand, both the managing partner, Sunil Kumar, and the other partner, Anil Kumar by addressing letter dated 01.08.2012 contended that the assessee-firm is not liable to pay any tax. Based on that letter, it is difficult to hold that the assessee-firm is not liable to pay any tax. Since the assessee-firm did not comply the demand of the 2nd respondent, audit could not be completed; thereupon, a letter dated 09.10.2012 was addressed by the 2nd respondent to the 4th respondent informing that he could not complete audit as the assessee-firm stopped and left the place of business. Later, on 25.10.2012, the 2nd respondent addressed a letter to M/s. Visakhapatnam Steel Corporation, Srinagar Colony, Vijayawada bearing door No.54-20/8-6 by registered post on 29.10.2012 calling upon the assessee-firm to produce account books within a period of one week from the date of receipt of that notice but the notice was returned with an endorsement "*left without instructions, return to sender*". Thereupon, the 2nd respondent addressed letter to the 4th respondent requesting to authorize him to pass assessment on best judgment basis to complete the audit programme of the assessee-firm (dealer). Accordingly, authorization for assessment was issued by the 4th respondent on 01.03.2013 to assess the assessee-firm. subsequently, a show-cause notice under Rule 25(5) in Form VAT 305-A dated 25.03.2013 was issued to the assessee-firm proposing to levy tax of Rs.13,10,931/- calling for objections, if any, with documentary evidence within 7 days from the date of receipt of show-cause notice through office subordinate of C.T.O. Krishnalanka and the same was returned with an endorsement that the assessee-firm closed the business, left the premises and returned the same. A notice by registered post was also sent to the assessee-firm (dealer) and the same was returned with an endorsement "*left without instructions, return to sender*". Since the registered notice was returned with the above endorsement, again a notice was entrusted to office subordinate to serve on the assessee-firm and, accordingly, Sk. Abdul Jeelani, office subordinate, visited the premises on 4 occasions *i.e.,* on 26.04.2013, 30.04.2013, 06.05.2013 and 10.05.2013 but none were available at the business premises of the petitioner to receive notice. Thereupon, the office subordinate affixed the notice in Form VAT 305-A to the outer door of the business premises on 11.05.2013 returned the copy of the same with an endorsement. Thus the 2nd respondent made honest and sincere attempts to serve notice on the assessee-firm but no purpose was served. Therefore, having no other alternative, the notice was affixed to the outer door of the premises.

The 2nd respondent passed the best judgment assessment on 31.05.2013 in Form VAT 305 and the same was entrusted for service to office subordinate K. Venkateswara Rao but as none were present at the last known business premises address, he affixed the assessment order to outer door of the business premises. Subsequently, the assessment order sent by registered post was returned with an endorsement "*Left without instructions, return to sender.*" Therefore, this service is in strict compliance of Rule 64 of AP VAT Rules.

As the assessee-firm failed to pay the tax demanded in Form VAT 305, the 2nd respondent *i.e.,* Commercial Tax Officer, Krishnalanka Circle, Vijayawada, issued notice to levy penalty to a

VAT dealer in Form VAT 203-A proposing to impose penalty of Rs.9,58,869/- with a request to file written objections against the proposed penalty and the notice was entrusted to K. Venkateswara Rao, office subordinate and the same was returned with an endorsement that the assessee-firm left the premises as per his enquiry and therefore affixed the notice to the outer door of the business premises. Notice in Form VAT 203-A was also sent by registered post and the same was returned with an endorsement 'left, return to sender' on 27.11.2013. Thus, the Commercial Tax Officer, Krishnalanka Circle, Vijayawada, complied the procedure contemplated under Rule 64 of Rules by issuing notice of penalty. As there was no response from the assessee-firm within 7 days, penalty order in Form VAT 203 was passed on 23.11.2013 imposing penalty of Rs.9,58,869/- and again entrusted the same to K. Venkateswara Rao, office subordinate for service but he could not serve the same personally and affixed the penalty order to the outer door of the business premises. The order of penalty was also sent by registered post, the cover was returned with an endorsement "*left, return to sender*". Thus, the notice and orders were deemed to have been served, in view of the strict compliance of Rule 64 of the Rules framed under the AP VAT Rules.

As per Rule 25(5) of the AP VAT Act, the authorities are competent to assess on best judgment basis when the assessee-firm failed to file its returns, after affording reasonable opportunity to the assessee-firm for serving notice. So an opportunity is to be provided to the assessee-firm to raise objections to the notice in Form VAT 305-A but curiously, in the present case, the assessee-firm closed the business, left the premises after receiving notice from the 2nd respondent in Form VAT 310 to audit the books of accounts, purchase and sale invoices while promising to produce books of accounts *etc.,* by the manager by his letter, referred supra and even the partners of the assessee-firm also had knowledge about issuance of notice for audit by the 2nd respondent and submitted letters denying their liability to pay tax, enclosing a copy before cancellation of registration but in the said letter, the petitioner or the other managing partner Anil Kumar did not furnish their address for service. Thus, it is clear from the conduct of the petitioner and Anil Kumar, they wantonly avoided to receive notices leaving their official place of business, after receiving audit notice only with a view to avoid receipt of notices in the other proceedings like Form VAT 305-A and assessment order, if any, passed in Form VAT 305. In such case, sending notices in Form VAT 305-A and notice in form VAT 203-A, order in form VAT 203, by registered post, through office messenger and by affixture to the outer door business premises can be held to be sufficient service, in view of Rule 64 of AP VAT Rules.

At this stage, it is relevant to advert to the Rules for service of notices and orders framed under the AP VAT Rules, 2005. Rule 64 is the relevant Rule, which deals with service of notices and orders passed under the provisions of the AP VAT Act and it is extracted hereunder for better appreciation:

> "**64. Mode of service of orders and notices**: (1) Unless otherwise provided in the Act, or these Rules, a notice or other document required or authorized under the Act or these Rules to be served shall be considered as sufficiently served –
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> (a) on a person being an individual other than in a representative capacity if -
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> (i) it is personally served on that person; or
>
> (ii) it is left at the person's usual or last known place of residence or office or business in the State; or
>
> (iii) it is sent by registered post to such place of residence, office or business, or to the person's usual or last known address in the State; or
>
> (b) on any other person if –
>
> (i) it is personally served on the nominated person; or
>
> (ii) it is left at the registered office of the person or the person's address for service of notices under the Act; or

> (iii) it is left at or sent by registered post to any office or place of business of that person in the State:
>
> (iv) where it is returned un-served, if it is put on board in the office of the local chamber of commerce or traders association.
>
> (2) The certificate of service signed by the person serving the notice shall be evidence of the facts stated therein."

When a specific mode of service is contemplated, serving notice in any of the modes is held to be sufficient service. In the present case, notice was sent to the petitioner, through a messenger, to the last known business address, by registered post and also effected service by affixture as contemplated under Rule 64(1)(a)(i to iii) of the AP VAT Rules. When a specific mode is prescribed for service of orders and notices in the special enactment, service of notice strictly adhering to the Rules can be held to be sufficient service.

At this stage, it is relevant to advert to the provisions regarding presumption of due service under other enactments. Section 14 of the Indian Post Office Act, 1898 (for short, 'the Act of 1898') and Sections 16 and 114 illustration (f) of the Indian Evidence Act, 1872 (for short, 'the Act of 1872') are the relevant provisions. According to Section 14 of the Act of 1898, endorsements made on the notices are *prima-facie* evidence of taking the notices to the address of the petitioner. Section 14 of the Act of 1898 reads as follows:

> "**14. Post Office marks prima facie evidence of certain facts denoted**: In every proceeding for the recovery of any postage or other sum alleged to be due under this Act in respect of postal article –
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> (a) the production of the postal article, having thereon the official mark of the Post Office denoting that the article has been refused, or that the addressee is dead or cannot be found, shall be prima-facie evidence of the fact so denoted, and
>
> (b) the person from whom the postal article purports to have come, shall, until the contrary is proved, be deemed to be the

sender thereof."

Therefore, from the language used under Section 14 of the Act of 1898, notings made on the postal article are *prima-facie* evidence of fact so noted on the article or postal cover.

In ***Parimal Vs. Veena @ Bharti***[1], the Apex Court, relying on its earlier decision in ***Greater Mohali Area Development Authority and others Vs. Manju Jain and others***[2], held that in view of the provisions of Section 114 illustration (f) of the Act of 1872 and Section 27 of the Act of 1897 a presumption that the addressee has received the letter sent by registered post, can be raised.

In similar circumstances, the Apex Court in ***Gujarat Electricity Board and another Vs. Atmaram Sungomal Poshani***[3], held as follows:

> "There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the Court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service."

The presumption contained in the Act of 1897 is a rebuttable presumption and in the present case, the question of adducing any evidence to rebut the presumption does not arise except producing documents which are not disputed but no documents were produced to rebut the presumption contained in Section 114 of the Act of 1872.

At this stage, it is relevant to refer Section 16 of the Act of 1872, which reads as follows:

> "**16. Existence of course of business when relevant** - When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact."

Illustrations contained therein says that when a question is whether a particular letter was despatched, the fact that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant; and the question is, whether a particular letter reached the addressee, the fact that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

In well established offices or firms, books are kept or business is conducted on such settled lines and principles that when the doing of a particular act comes in question, it may be reasonably inferred that the uniformity of the general course was followed in the particular case. When the course of business usually followed is proved, the probability is that there was no departure from the common course of business in the particular transaction. In the case of public offices like the post office, where work is carried on with almost mechanical regularity, the probability becomes stronger that the letter was despatched in due course or reached destination.

Thus, it is clear from Section 16 of the Act of 1872, when a letter was sent by registered post in the course of its business, the post office would have taken the letter to the address mentioned on the postal cover and when it is returned, the notings thereon are the *prima-facie* proof of absence of the addressee at the address given.

Section 114(f) of the Act of 1872 says that the Courts may presume the existence of any fact which it thinks likely to happen, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. So, a presumption shall be drawn that a particular thing was done in the course of its business by public office or in private office; illustration (f) is relevant for deciding the controversy involved in the instant case.

The presumptions contained in Section 114 of the Act of 1872 are only to draw an inference as to the existence of one fact from the existence of some other fact. Service of a letter sent by registered post is a presumption of fact and it is a rebutable presumption. The parties may adduce evidence to rebut the presumption contained under Section 114 of the Act of 1872. If the party disputes the presumption of fact he can adduce evidence to rebut the same but here the scope is too limited to adduce any evidence to rebut the presumption in a petition filed under Article 226 of the Constitution of India.

The cumulative effect of both Sections 16 and 114 of Act of 1872 is that when a letter was sent by registered post, the act of postal peon carrying the letter to the addressee is said to have done in its regular course of business, which the postal authorities have been done is a relevant fact. Section 114(f) enables the Court to presume the existence of any fact which it thinks likely to happen, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case, the court can presume that common course of business has been followed in a particular case. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee.

In ***Ravi Raghuramayya Vs. Koneru Rama Tulasamma***[4], this Court while deciding the question about validity of service of notice when it was returned with an endorsement ‘that the addressee failing to take delivery', placing reliance on Section 14 of the Act of 1898 and relied on the earlier decision of this Court in ***Saladi Srirama Murthy Vs. K. Swaminaidu***[5], wherein this Court held as follows:

> "Under Section 114 of the Indian Evidence Act, the presumption would be that a letter posted by the sender would reach the addressee in usual course. Once a letter has been delivered to the Post Office, it is presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. There is no dispute that Ex.A-4 registered letter was delivered to the Post Office on February 25, 1972 for the purpose of service to the addressee (defendant). It was returned with an endorsement dated March 9, 1972 that the defendant had been "avoiding to take delivery. Hence, presumption of due service be drawn"

In ***Madan and Company Vs. Wazir Jaivir Chand***[6], the Apex Court had an occasion to decide the similar question and held as follows:

> "……….., But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, <u>it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for sometime, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone, or to deliver them to some other person authorized by him</u>. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by the tenant."

On the strength of these decisions, this Court in ***Ravi***

***Raghuramayya*[4]**, concluded that notice is deemed to have been served when it was returned with an endorsement 'avoiding service' or 'left'.

In ***Vijay Kumar Vs. Vijay Laxmi and others***[7], High Court of Himachal Pradesh at Shimla had an occasion to decide a similar question and held that when a notice was sent by registered post, a presumption of service under Section 27 of the Act of 1897 and under Section 114(f) of the Act of 1872 shall be drawn that the notice is deemed to have been served though it was returned with an endorsement 'left' *etc.,*

In ***C.C. Alavi Haji Vs. Palapetty Muhammed and another***[8], wherein the Full Bench of the Apex Court had an occasion to consider scope of Section 114 of the Act of 1872 along with Section 27 of the Act of 1897 and observed as follows:

> "When Section 114 of the Evidence Act, 1872 is applied to communications sent by post, it enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the General Clauses Act, 1897 is a far stronger presumption. While Section 114 of the Evidence Act refers to a general presumption, Section 27 of the 1897 Act refers to a specific presumption."

I n ***Smt. Vandana Gulati Vs. Gurmeet Singh @ Mangal Singh***[9], the Allahabad High Court reiterated the same principle.

In ***Bachan Lal Vs. Ram Prakash***[10], the Allahabad High Court basing on various decisions of the Apex Court and other Courts had an occasion to deal with the presumptions under Sections 16 and 114 of the Act of 1872 as well as Section 14 of the Act of 1898 and Section 27 of the Act of 1897 and held that when a registered letter was sent to the proper address, a presumption shall be drawn that the letter was deemed to be served though it was returned with an endorsement refused/addressee left/ avoiding to take delivery *etc.,*

In ***Harcharan Singh Vs. Smt. Shivrani and others***[11], the Full Bench of the Apex Court discussed a situation where the letter was returned with an endorsement of '*refusal'* and held as follows:

> "7. Section 27 of the General Clauses Act, 1897 deals with the topic-'Meaning of service by post' and says that where any Central Act or Regulation authorises or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting it by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The section thus arises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, pre-paying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgement due is received from the addressee or not. It is obvious that when the section raises the presumption that the service shall be deemed to have been effected it means the addressee to whom the communication is sent must be taken to have known the contents of the document sought to be served upon him without anything more. Similar presumption is raised under Illustration (f) to Section 114 of the Indian Evidence Act whereunder it is stated that the Court may presume that the common course of business has been followed in a particular case, that is to say, when a letter is sent by post by pre-paying and properly addressing it the same has been received by the addressee. Undoubtedly, the presumptions both under Section 27 of the General Clauses Act as well as under Section 114 of the Evidence Act are rebuttable but in the absence of proof to the contrary the presumption of proper service or effective service on the addressee would arise…………..'"

In ***Miss. D. Ennis Vs. M/s. Calcutta Vyapar Pratisthan Limited and another***[12], the Division Bench of Calcutta High Court, basing on the principle laid down by the Apex Court in ***Madan and***

Company Vs. Wazir Jaivir Chand[13], wherein both **Harekrishna Vs. Hanamann** {1996 (70) Cal. WN 262} and **Surajmull Vs. Samadarshan** {ILR (1969) 1 Cal 379} are of the view that when a notice was sent by registered post to the correct address a presumption shall be drawn that the letter was duly served.

In view of the law declared by the Apex Court and various High Courts and based on Sections 16 and 114 of the Act of 1872 and Section 14 of Act of 1898, the Court can draw a presumption that the petitioner in this case conveniently avoided to receive notice obviously for different reasons known to him; apart from that a presumption shall be drawn under Section 114 of the Act of 1872 as to due service since the petitioner did not leave any instructions to the postal authorities to detain the letters or to redirect the letters to any other address where he has gone or authorising any person to receive any letters on his behalf. In such case, it is hardly difficult task for the 2nd respondent to serve any notice on the petitioner.

In ***Palapetty Muhammed***[8], the Apex Court, while considering the service of notice under the Negotiable Instruments Act, 1881 adverted to Section 27 of the Act of 1897 and Section 114 illustration (f) of the Act of 1872 and, held as follows:

> "It is not necessary to aver in the complaint under Section 138 of the NI Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice un-served.
>
> When Section 114 of the Evidence Act, 1872 is applied to communications sent by post, it enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the General Clauses Act, 1897 is a far stronger presumption. While Section 114 of the Evidence Act refers to a general presumption, Section 27 of the 1897 Act refers to a specific presumption.

> Section 27 of the 1897 Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice un-served, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. The Supreme Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed."

In the decision cited supra, interpretation of expression "giving of notice" used in clause (b) of the proviso to Section 138 of the N.I. Act came up for consideration and basing on the earlier decision of the Apex Court in ***K. Bhaskaran Vs. Sankaran Vaidhyan Balan***[14], it was concluded that failure on the part of the drawer to pay the amount should be within 15 days 'of the receipt' of the said notice. 'Giving notice' in the contest is not the same as 'receipt of notice'. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address and for the drawer to comply with Clauses (c) of the proviso.

In the facts of the decision referred supra, notice was returned with an endorsement 'avoiding to receive notice' and the Apex Court made serious comments based on ***D. Vinod Shivappa Vs. Nanda Belliappa***[15] case, which is as follows:

> "Elaborately dealing with the situation where the notice could not be served on the addressee for one or the other reason, such as his non-availability at the time of delivery, or premises remaining locked on account of his having gone

> elsewhere etc., it was observed that if in each such case, the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for some time after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. It was further observed that once the payee of the cheque issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non-availability, can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the notice, which may be returned with an endorsement that the addressee is not available on the given address."

In view of the law declared by the Apex Court and this Court, persuaded by the decisions of other High Courts, coupled with Rule 64 of the AP VAT Rules, sending notices and orders in all three different modes, contemplated under Rule 64(1)(a)(i to iii), is sufficient service though notices and orders sent through office messenger by registered post to the last known business address were returned but the notices and orders were affixed to the outer door of the business premises of the last known address of the assessee-firm. Strangely, the partners received notices issued for audit in Form VAT 310 and reply letter was submitted by one Joshi, Manager of the assessee-firm and other reply letter was submitted by the partners without disclosing the address for correspondence and in such case, the alternative open to the 2nd respondent is to send notices to the last known business premises address of the assessee-firm. Accordingly, 2nd respondent sent notices to the assessee-firm, strictly adhering to Rule 64 of the Rules. In view of the affixture of notice, assessment order, show-cause notice to the pre-penalty and penalty orders to the outer door and return of notice by the messenger with his endorsement is sufficient to conclude that the notice and assessment order in Form VAT 305-A and 305, penalty notice in Form VAT 203-A and order in Form VAT 203 are held sufficient.

As the 2nd respondent did not deviate the procedure prescribed under Rule 64 of the AP VAT Rules, it is difficult to hold that the orders were passed violating the Rules or provisions of the AP VAT Act to exercise discretionary jurisdiction under Article 226 of the Constitution of India or that the orders were passed in violation of the principles of natural justice. Therefore, the contention of learned counsel for the petitioner that the assessment order and consequential penalty order are passed in violation of the principles of natural justice is without any substance and on this ground assessment order in Form VAT 305 and consequential penalty order in Form VAT 203 cannot be set-aside. Accordingly, the point is answered.

POINT No.3: The next contention of learned counsel for the petitioner is that the petitioner was assessed to tax for the period from 01.04.2010 to 05.01.2011, passed order on 31.03.2011, levied penalty on 06.04.2011; assessee-firm paid the tax and penalty for the said period; however, again mulcting the petitioner with liability to pay tax 2nd time for the same period is illegal and arbitrary and the same cannot be sustained.

However, learned special standing counsel for the Commercial Taxes would contend that the assessee-firm did not disclose the total turnover during the said period; therefore, re-assessment order was passed within the specified period as per rules. The petitioner filed the assessment order passed by 2nd respondent for the period from 01.04.2010 to 05.01.2011 assessing the assessee-firm to tax at

Rs.1,187/- by order dated 31.03.2011 by the Assistant Commissioner (CT) (LTU) (Int.,), II Division, Vijayawada but again the same period was re-assessed by the 2nd respondent since it was an escaped assessment by exercising power of re-assessment levied tax of Rs.3,36,014/-. If the assessee-firm paid tax of Rs.1,187/- as per the assessment order dated 31.03.2011, the same should have been deducted from the tax liability for the year 2010-11.

Learned counsel for the petitioner contended that when assessment order was passed for the year 2010-11, by the Assistant Commissioner, II Division, the 2nd respondent is not competent to re-assess the order in view of rule 59 of the AP VAT Rules.

Section 21(6) of the AP VAT Act permits the authority prescribed under Rules 59 and 60 of AP VAT Rules to reassess the dealer when the assessment understates the correct tax liability of the dealer within a period of 4 years from the date of such assessment. According to Rule 59(6), re-assessment in case of under assessment can be done by the authority who detects the under assessment but not below the rank of assessing authority who made assessment.

Pleading is the heart and soul of the civil proceedings; pleadings enable the adversary to know the real controversy and rebut the allegations made against the respondent by filing counter-affidavit. Pleadings are important even in writ petitions filed under Article 226 also like any civil proceedings. In the absence of any pleadings, the respondents will have no opportunity to rebut the same by producing any evidence. In the absence of any pleadings as to how re-assessment for the period 2010-11 is illegal, affording opportunity to the respondents to rebut the same by way of counter-affidavit, the contention of the petitioner would not stand to any legal scrutiny.

One of the major contentions of the petitioner is that when the order passed by the 2nd respondent is illegal, on the face of it, no pleadings are necessary. Passing of an assessment order and re-assessment order by the authorities who are competent or not is a matter of pleading; unless it is pleaded as to how it is illegal, the contention of the petitioner cannot be accepted for the reason that there is no brand of invalidity on the forehead of any order as held by the Apex Court in ***Board of Trustees of Port of Kandla Vs. Hargovind Jasraj and another***[16], ***P.K. Palanisamy Vs. N. Arumugham and another***[17] and ***Sultan Sadik Vs. Sanjay Raj Subba and others***[18].

In ***Sultan Sadik***[18], the Apex Court while reiterating the passage from Lord Radcliffe concluded in Para 40 of the decision as follows:

> "This must be equally true even where the 'brand of invalidity' is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects. Lord Diplock spoke still more clearly, saying that it leads to confusion to use such terms as 'voidable' 'voidable ab initio', 'void, or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction."

When a similar issue came up before the Apex Court in ***Smith Vs. East Elloe Rural District Council***[19] to consider a particular act as *void ab-initio*, the Apex Court held as follows:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. This must be equally true even where the brand of invalidity is plainly visible

> : for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed but repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects.
>
> Even if the order is void or voidable, the party aggrieved by the same cannot decide that the said order is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

In ***Pune Municipal Corporation Vs. State of Maharashtra and others***[20], the Apex Court had an occasion to decide the need for determination of invalidity of an order for public purpose and observed as follows:

> "36. It is well settled that no order can be ignored altogether unless a finding is recorded that it was illegal, void or not in consonance with law. As Prof. Wade states: "The principle must be equally true even where the 'brand of invalidity' is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court.
>
> He further states:
>
> The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the Plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another."

Similar view was expressed by the Apex Court in ***R.***

Thiruvirkolam Vs. Presiding Officer and another[21].

In view of the law declared by the Apex Court, it is a well settled principle of law that an order passed by a Court or an authority having jurisdiction shall remain valid till it is set-aside.

In the present case, the petitioner raised a contention during argument that when the re-assessment for the year 2010-11 is illegal as it was passed by an officer subordinate to the assessing authority, the petitioner need not raise a plea in the writ affidavit but this contention is unsustainable for the reason that unless a plea is raised affording opportunity to the respondents to rebut the same by filing counter affidavit, the same cannot be looked into on the ground that the order itself is void or nullity to annul or set-aside such an order, the Court must consider the pleadings of both the parties since pleadings are the basis in the writ petitions.

In the present case, no specific plea was raised in the entire writ affidavit to annul or set-aside the re-assessment for the year 2010-11. In the absence of any plea, the Court cannot set-aside the reassessment order for the year 2010-11 only on the ground that the order is *void ab-initio*, in view of the law declared by the Apex Court in the decisions referred supra. Therefore, on this ground re-assessment for the year 2010-11 cannot be set-aside.

In view of the principles laid down in the decisions referred supra, in the absence of any pleadings, the impugned order cannot be set-aside by exercising discretionary power under Article 226 of the constitution.

Learned counsel for the petitioner mainly placed reliance on the decision of House of Lords in ***Benjamin Leonard MacFOY Vs. United Africa Company Limited***[22] to contend that when the order is invalid on the face of record, the petitioner need not plead and prove as to how the order is invalid. In the decision, it was observed as follows:

> "So the whole question is whether the statement of claim was validly delivered and filed on September 5, 1958. There is no doubt that it was a breach of the Rules for it to be delivered in the long vacation: for it is quite well settled in England, either by the terms of Order 64, Rule 4 or by the practice of the court that in such a case as this pleadings are not to be delivered or filed during any part of the long vacation except by direction of the court or a judge. The plaintiffs did not comply with this rule. They delivered the statement of claim in the long vacation and filed it without any direction of the court or a judge.
>
> What is the effect of this non-compliance? The framers of the Rules inserted special provisions to deal with non-compliance. Order 50 Rules 1 to 4, of the Rules of the Supreme Court of Sierra Leone is in identical terms with Order 70 Rules 1 to 4, of the Rules of the Supreme Court of England. Rule 1 says that "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court shall so direct, but such proceedings may be set-aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit."
>
> This rule would appear at first sight to give the court a complete discretion in the matter. But it has been held that it only <u>applies to proceedings which are voidable, not to proceedings which are a nullity: for those are automatically void and a person affected by them can apply to have them set aside ex debito justice in the inherent jurisdiction of the court without going under the rule</u>.
>
> The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.

> And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void."

The decision cited supra, is of no assistance to the petitioner to set-aside the assessment and consequential penalty order, in view of law declared by the Apex Court in various other decisions referred supra.

As discussed above, the writ affidavit is totally silent as to how re-assessment for the years 2010-11 is against the provisions of AP VAT Act and thereby denied an opportunity to the 2nd respondent to rebut such contention. When such contention was raised for the first time, during argument, the same cannot be entertained in the absence of any pleadings; if such contention is accepted, it would amount to denial of an opportunity to the respondents and it is against the principles of natural justice.

Learned counsel for the petitioner made a feeble attempt to convince us that imposition of penalty under Section 53(2) of the AP VAT Act is invalid since the alleged suppression is covered by Section 53(1) (i or ii) but as seen from the record, the suppression is more than 10 or 20% and it is nothing but negligent suppression of the turnover to avoid payment of tax.

As stated above the petitioner and his brother conveniently avoided to receive notices absenting themselves at the last known business premises, after receiving notice of audit in Form VAT 310 to lay foundation for the present litigation, avoided receipt of notices in Form VAT 305-A and assessment order in Form VAT 305, consequential penalty notice in Form VAT 203-A and penalty order in Form VAT 203. Thus, the partners of the assessee-firm (dealer) avoided every proceeding to avoid tax liability; their conduct is not above board and their conduct is blameworthy. When the conduct of the assessee-firm is not above board, who had approached the Court with unclean hands, this Court, while exercising power under Article 226, cannot pass any order in favour of the petitioner and against the respondents.

This Court, while exercising writ jurisdiction, must take note of the conduct of the parties and not to take a technical view of the matter. The conduct of the parties when lacks good faith and an intention to frustrate the administration of justice, the same must not have been allowed to succeed by taking a technical view, as held by the Apex Court in ***Krishna Gopal Chawla Vs. State of Uttar Pradesh***[23]. The party who suppresses the material facts does not deserve any relief from the High Court under Article 226 of the constitution. The party whose hands are soiled cannot hold the writ of the Court as held by the Apex Court in ***Prestige Lights Limited Vs. State Bank of India***[24].

Yet, the undisputed fact is that the petitioner, being the managing partner, and his brother obtained certified copy of assessment order on 04.08.2014 but did not pay tax; again the petitioner conveniently applied for certified copy of order on 18.09.2015, received certified copy on 30.09.2015, filed the present petition on 04.11.2015. The petitioner suppressing the certified copy of order obtained on 04.08.2014 by his brother, leisurely approached this Court after a year. Hence, on this ground also the petitioner is disentitled to claim discretionary relief under Article 226 of the Constitution.

If the principle laid down by the Apex Court in the above decisions is applied to the present facts of the case, it is evident from the record that the assessee-firm conveniently avoided to receive notices and proceedings passed by the 2nd respondent at different stages, after receiving notice of audit, avoided to produce the books of accounts, sale and purchase invoices enabling the authorities to assess the assessee-firm to tax and thus the assessee-firm approached the Court with unclean hands, thereby, not entitled to claim any discretionary relief under article 226 of the Constitution of India. Therefore, we are not inclined to exercise our discretionary jurisdiction to grant any relief in this writ petition even to set-aside the re-assessment order for the year 2010-11. Accordingly, the point is answered.

In view of our foregoing discussion, the assessment order for one month twenty days (50 days) *i.e.,* for the month of March and twenty days in April 2009 is barred by limitation. Accordingly, both the assessment order and penalty orders for the period prior to 20.04.2009 are set-aside reducing tax liability and penalty proportionately for the said period while upholding both assessment and penalty orders for the subsequent period and if any tax and penalty are collected for the assessment period that may be given due credit.

Accordingly, the writ petition is disposed of.

In consequence, miscellaneous petitions, if any, pending in this writ petition, shall stand closed. No order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 02-03-2016.
Dsh

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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02032016

WRIT PETITION No.36202 OF 2015
(Order of the Division Bench delivered by
Hon'ble Sri Justice M. Satyanarayana Murthy)

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Date. 02-03-2016

DSH

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[1] AIR 2011 SC 1150
[2] AIR 2010 SC 3817
[3] AIR 1989 SC 1433
[4] 2004 (4) ALT 526
[5] 1992 (1) ALT 555
[6] AIR 1989 SC 630
[7] MANU/HP/0295/2015
[8] 2007 (6) SCC 555
[9] AIR 2013 ALL 69
[10] 2015 (4) ALJ 291
[11] AIR 1981 SC 1284
[12] AIR 1991 Cal. 152
[13] AIR 1989 SC 630
[14] 1999 (7) SCC 510
[15] 2006 (6) SCC 456
[16] 2013 (3) SCC 182
[17] 2009 (9) SCC 173
[18] 2004 (2) SCC 377
[19] 1956 (1) All ER 855
[20] 2007 (5) SCC 211
[21] 1997 (1) SCC 9
[22] (1962) SCC Online 152 (HL)
[23] 2001 (9) SCC 694
[24] 2007 (8) SCC 449