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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: May 25, 2016
Decided on: June 03, 2016

\+ **W.P.(C) 5192/2015 & CM No. 9417/2015**

MEGA CABS PVT. LTD. ..... Petitioner
Through: Mr. J.K. Mittal and Mr. Rajveer Singh, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mrs. Sonia Sharma, Senior Standing counsel with Ms Neha Chugh,Advocate for R-2 and R-3.
Ms. Jyoti Dutt Sharma, CGSC with Ms. Nimisha Gupta, Advocate for UOI/R-1.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T

% 03.06.2016

Dr.S. Muralidhar, J.:

Introduction

1.1 The challenge in this petition by Mega Cabs Private Limited is to Rule 5A(2) of the Service Tax Rules, 1994 ('ST Rules') as amended by the Service Tax (Third Amendment) Rules, 2014 made by the Central Government in terms of a Notification No. 23/2014-Service Tax dated 5th December 2014 in exercise of the powers conferred under Section 94(1)

read with Section 94 (2)(k) of the Finance Act, 1994 ('FA') to the extent that the amended Rule 5A(2) empowers deputing departmental officers or officers from the Comptroller and Auditor General of India ('CAG') to 'demand' documents mentioned therein. It is contended that this is in conflict with Section 72A of the FA and beyond the rule making power of the Central Government.

1.2 The Petitioner has also challenged the constitutional validity of Section 94(2)(k) of the FA on the ground that it gives "plainly unguided and uncontrolled" delegated powers to the Central Government for framing rules. It is stated that Section 94(2)(k) of the FA suffers from the vice of excessive delegation.

1.3 Also challenged is the Circular No. 181/7/2014-ST dated 10th December 2014 issued by the Central Board of Excise and Customs ('CBEC') stating that since a clear statutory backing for conducting audit is available under Section 92(4)(k) of the FA, the Departmental Officers would be directed to audit service tax Assessee in terms of the departmental instructions already issued.

1.4 Lastly, the petition challenges a letter dated 30th April 2015 issued by the Commissioner of Service Tax, Audit-1, New Delhi (Respondent No.2) informing the Petitioner that a team of officers of Circle-4, Group-1 of the said Commissionerate comprising three Superintendents and an Inspector would be verifying the relevant records of the Petitioner's business in terms of Rule 5A to the ST Rules read with Section 94(1), 94 (2)(k) and 94(2)(n)

of the FA as amended, during the first week of May 2015 for the financial years 2010-11 to 2013-14. The Petitioner was asked to cooperate and facilitate the officers in conducting the audit and verification.

Background facts

2. The Petitioner states that it is in the business of running a radio taxi service and is also engaged in selling advertisement space. The Petitioner got registered with the Service Tax Department in Delhi on 27th December 2004. Since then it is stated to be regularly been paying service tax and also filing its service tax returns. The Petitioner changed its name from Mega Cabs Ltd. to Mega Cabs Pvt. Ltd. with effect from 27th October 2014.

3. By a Notification dated 28th December 2007, the Central Government in the Ministry of Finance, Department of Revenue inserted Rule 5A in the ST Rules. Consequent thereto, the CBEC also issued an instruction on 1st January 2008 explaining the scope of the powers of the various officers of the Department to carry out audit or scrutiny of the records of service tax payers.

4. Rule 5A as inserted by the aforementioned Notification dated 28th December 2007 reads as under:

> "**Rule 5A. Access to a registered premises**
> (1) An officer authorised by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.
>
> (2) Every assessee shall, on demand, make available to the

officer authorised under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, within a reasonable time not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by such officer or the audit party, as the case may be, -

(i) the records as mentioned in sub-rule (2) of Rule 5;

(ii) trial balance or its equivalent; and

(iii) the income-tax audit report, if any, under Section 44AB of the Income-tax Act, 1961 (43 of 1961),

for the scrutiny of the officer or audit party, as the case may be."

5. Both the Notification dated 28th December 2007 inserting Rule 5A as well as the CBEC Instruction dated 1st January 2008 were challenged before this Court in a writ petition by Travelite (India). The challenge in the said petition was also to a letter issued by the Commissioner of Service Tax dated 7th November 2012 seeking the records of the said Petitioner Travelite (India) for the years 2007-08 till 2011-12 to be made available for scrutiny by an audit party.

6. In ***Travelite (India) v. Union of India 2014 (35) STR 653 (Delhi)***, a Division Bench of this Court struck down Rule 5A(2) as being ultra vires Section 72A read with Section 94(2) of the FA. The consequent Circular of CBEC Instruction dated 1st January 2008 was also struck down. It was clarified that Service Tax Audit Manual, 2011 was merely an instrument of instructions for the Service Tax authorities and has no statutory force.

7. Against the aforementioned judgment of this Court in ***Travelite (India) v. Union of India*** (*supra*), Special Leave Petition No. 34872/2014 was filed in the Supreme Court by the Union of India. By order dated 18th December 2014, the Supreme Court while directing notice in the said Special Leave Petition directed that there would be a stay of the operation of the decision of this Court in ***Travelite (India) v. Union of India*** (*supra*).

8. To complete the factual narration, following the decision in ***Travelite (India)*** (*supra*), an amendment was made to Section 94 of the FA by the Finance Act 2014 with effect from 6th August 2014 by inserting clause (k) of sub-section (2) which read as under:

> "**94. Power to make rules**.-(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely
>
> (k) "imposition, on persons liable to pay service tax, for the proper levy and collection of tax, of duty of furnishing information, keeping records and the manner in which such records shall be verified"

9. An amendment was also made to the ST Rules by replacing Rule 5 A (2) with a new Rule 5A(2) by the aforementioned central government notification dated 5th December 2014. Soon thereafter on 10th December 2014, the impugned Circular No. 181/7/2014-ST was issued by the CBEC clarifying that in view of the insertion of Section 94 (2) (k), the officers of the Service Tax Departments could proceed with conducting audits as before. It was stated that that expression 'verified' used in Section 94 (2) (k)

of the FA was of wide import and would include within its scope audit by the departmental officers.

10. Thereafter Circular No. 995/2/2015-CX dated 27th February 2015 was issued by the CBEC on the subject "Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates" and this too contemplated the Department's officers themselves undertaking audits. A Central Excise and Service Tax Audit Manual, 2015 was also issued by the Directorate General of Audit of the CBEC in this regard.

11. Meanwhile on 9th July 2013, the Additional Commissioner (Audit) issued a letter with 6 annexures to the Petitioner seeking information for conducting audit of the records of the Petitioner under Rule 5A of the ST Rules, 1994 as it then stood for the years 2008-09 to 2012-13. The Petitioner in a reply sought deferment of the audit in view of the challenge to Rule 5A of the ST Rules as it then stood in the petition filed before this Court by Travelite (India). After the insertion of Section 94 (2) (k) of the FA, the Assistant Commissioner of Service Tax Department issued a letter dated 25th September 2014 stating that the Department has deputed its officers to conduct the verification/scrutiny of the records of the Petitioner. By a reply dated 8th October 2014, the Petitioner referred to the decision in ***Travelite (India)*** (*supra*) and took the stand that the Department had no power to conduct an audit. Thereafter the Deputy Commissioner Audit-I (Respondent No. 3) herein issued the impugned letter dated 30th April 2015 citing the impugned notification dated 5th December 2014, Rule 5A(2) of the ST Rules as amended, and Circular

dated 10th December 2014, and informed that its officers had been deputed to conduct the audit/verification of the Petitioner's records for the period from 2010-11 to 2013-14.

12. Thereafter the present petition was filed seeking the reliefs as noted hereinbefore. Notice was directed to issue on 22nd May 2015.

13. The Court would like to clarify at the outset that in view of the fact that the decision of this Court in ***Travelite (India)*** (*supra*) has been stayed by the Supreme Court, the Court in the present petition proposes to examine the question of the constitutional validity of the amended Rule 5A(2) of the ST Rules and the circulars and letter in question independent of the decision in ***Travelite (India)*** (*supra*).

Submissions of counsel for the Petitioner

14. The submissions of Mr. J.K. Mittal, learned counsel for the Petitioner, could be summarised as under:

(i) Although Rule 5A(2) of the ST Rules has purportedly been amended to overcome the defect pointed out by the Court in ***Travelite (India)***, the amended Rule 5A(2) continues to be *ultra vires* Section 72A of the FA.

(ii) While Section 72A of the FA only contemplates a special audit to be got done by the Assessee on the direction of the Commissioner, by a Cost Accountant or a Chartered Accountant ('CA'), Rule 5A(2) permits any officer of the Department or an audit party deputed by the Commissioner or the CAG (in addition to the Cost Accountant and the CA undertaking the

special audit) to ask for production by the Assessee for books of accounts etc. "on demand". Apart from the fact that Rule 5A(2) expands the list of persons who could seek production of records and that too on demand, none of the safeguards spelt out in Section 72A require to be observed by the persons making such demand under Rule5A(2) of the Rules.

(iii) Relying on the decisions in ***Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills AIR 1968 SC 1232, Union of India v. S. Srinivasan (2012) 7 SCC 683***, ***General Officer Commanding-in-Chief v. Subhash Chandra Yadav AIR 1988 SC 876*** and ***Sahara India (Firm) v. Commissioner of Income Tax (2008) 14 SCC 151***, it is submitted that the essential conditions for a validity of a subordinate legislation viz., that it (a) must conform to the provision of the statute under which it is framed (b) must be within the scope and purview of the rule making power of the authority, are not fulfilled in the present case.

(iv) Relying on the decision in ***CCE v. Ratan Melting and Wire Industries 2008 (12) STR 416 (SC)***, it is submitted that even the circulars and instructions issued by the CBEC would have to conform to the FA. Such circulars issued on the understanding of the Central or State Governments of the statutory provisions are not binding on the Courts.

(v) The provisions of the CAG's Duties Powers and Conditions of Service Act, 1971 ('CAG Act') and the provisions of Articles 148 and 149 of the Constitution of India do not envisage the CAG performing audit of private entities. Referring to the decision in ***K. Satyanarayanan v. Union of India ILR (1996) II Delhi***, it is contended that the CAG is not expected to conduct

audit of the books of accounts and records of an individual service tax Assessee. The decisions in ***Inter Continental Consultants v. Union of India 2013 (29) STR 9 (Delhi)*** and ***Indian & Eastern Newspaper Society, New Delhi v. Commissioner of Income Tax, New Delhi (1979) 4 SCC 248*** were also referred to.

(vi) Drawing a comparison with the corresponding provisions of the Companies Act, 1956, the Income Tax Act, 1961 and Central Excise Act, 1944 ('CE Act') it was submitted that the safeguards incorporated in the above provisions are not to be found in Rule 5A(2) and, therefore, it gave a wide unguided powers to the officers of the Department and to the audit parties deputed by the Commissioner to 'demand' the past record of any number of years without explaining the reasons for doing so.

(vii) The requirements for an Assessee to have its accounts, records etc. audited in terms of Section 72A of the Finance Act had to be preceded by formation of a belief by the Commissioner that any of the four contingencies listed out in Section 72(1)(a) to 72(1)(d) *prima facie* exist. That function cannot be performed without putting the Assessee to notice i.e. at a stage prior to the Commissioner deciding to direct the Assessee to get its accounts audited. Reliance was placed on the decisions in ***Sahara India (Firm), Lucknow v. Commissioner of Income Tax*** (*supra*), ***SKP Securities Ltd. v. Deputy Director 2013 (29) STR 337 (Cal.)***, ***A.C.L. Education Centre (P) Ltd. v. Union of India 2014 (33) STR 609(All)*** and ***Sadbhav Engineering Ltd. v. Union of India*** (decision dated 3rd December 2014 of the Gujarat High Court in Special Civil Application No. 14928/2014). Reference is also

made to the decision of this court in ***Larsen & Toubro Ltd. v. Commissioner of Value Added Tax (2014)73 VST 190 (Delhi)***.

(viii) Even assuming the information was being sought pursuant to the powers of assessment of the service tax under Section 72 of the FA, considering that the Petitioner has been regularly filing service tax returns and regularly paying service tax, there was no occasion for a special audit to be ordered.

(ix) The recent Circular No. 995/2/2015-CX dated 27th February 2015 issued by the CBEC on the subject "Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates" contemplated the Department's officers themselves undertaking the audit and had no statutory basis. The recent Central Excise and Service Tax Audit Manual, 2015 issued by the Directorate General of Audit of the CBEC again did not take in to account the statutory scheme of the FA which did not permit such exercise to be undertaken.

(x) Section 94 (2) (k) of the FA did not permit Rules to be made in respect of examination of accounts and records by any officer of the Service Tax Department. If the provision were so interpreted it would suffer from the vice of excessive delegation.

Submissions of counsel for the Respondents

15. Countering the above submissions, Mrs. Sonia Sharma, learned Senior Standing counsel appearing for Respondent Nos. 2 and 3 and Ms. Jyoti Dutt Sharma learned counsel appearing for Respondent No. 1 submitted as under:

(i) that the decision of this Court in ***Travelite (India)*** (*supra*) is of no avail to the Petitioner since the said decision has been stayed by the Supreme Court. It is submitted that the defect pointed out in Rule 5A(2) by this Court in ***Travelite (India)*** (*supra*) has been rectified by amending Rule 5A(2).

(ii) Rule 5A(2) has to be read in continuation of and consequent to Sections 72, 73 and 73A of the FA. Rule 5 A (2) so read cannot be said to be *ultra vires* the FA.

(iii) Section 94 (2) (k) did not suffer from the vice of excessive delegation. It only acted as a check on the general powers under the unamended Rule 5A. Section 94(2)(k) of the FA was not in conflict with Section 72A of the FA since Section 94(2) begins with the words "In particular and without prejudice to the generality of the foregoing power...". Reliance is placed on the decision in ***Pandit Banarsi Das Bhanot v. State of M.P. AIR 1958 SC 909***. There was enough legislative guidance under Chapter V of the Finance Act for exercise of the rule making power under Section 94(2)(k) of the Act.

(iv) The Petitioner has not demonstrated how its rights were prejudiced by the audit party of the Department seeking to inspect the Petitioner's records. Reliance was placed on the decisions in ***Association of Leasing & Financial Service Companies v. Union of India 2011 (2) SCC 352*** regarding the legislative competence of the Parliament to levy and collect service tax. Reliance is also placed on the decision in ***Government of Andhra Pradesh v. P. Laxmi Devi 2008 (4) SCC 720*** to urge that a mere fact that a hardship would be caused to the Assessee as a result of the fiscal

statute, would not invalidate such statute.

(v) The amendment was in the nature of a 'validating' law which was only to plug a loophole and correct the defects pointed out by this Court. Relying on the decision in ***R.K. Garg v. Union of India 1981(4) SCC 675*** it was submitted that greater play in the joints had to be allowed to the legislature and that too in the field of economic regulation. The Court should grant greater deference to legislative wisdom.

Analysis of the provisions of the FA

16. At the outset it requires to be noticed that unlike the Income Tax Act, 1961 or even the Delhi Value Added Tax Act, 2004 there is no provision in the FA for re-assessment of a service tax return. There can be a self-assessment in which case the return filed by the Assessee is accepted as such and the tax amount indicated therein is accepted as being correct. However under Section 72 of the FA two scenarios are envisaged. Section 72 reads as under:

> "**72. Best judgement assessment**:-
>
> If any person, liable to pay service tax,-
> (a) fails to furnish the return under section 70;
>
> (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made there under,
>
> the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the

> person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

17. Under Section 72 of the FA, one scenario is where a person who is liable to pay service tax fails to furnish a return under Section 70. The second is where such person has filed a return but "fails to assess the tax in accordance with the provisions of this Chapter or rules thereunder". The Assessing Officer (AO) is in the either scenario empowered to require the production of such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, give an order in writing after complying with the rules of natural justice. The assessment in such circumstance is made on the value of the taxable service "to the best of his judgment". The AO determines the sum payable by the Assessee or refundable to the Assessee on the basis of such assessment. Therefore, even for the purpose of Section 72 a *prima facie* satisfaction is to be arrived at that the return filed by the Assessee fails to assess the tax in accordance with law. Even in such an instance the calling for the accounts, documents and other evidence is not to be undertaken by an AO mechanically.

18. The second important factor to be noted as far as Section 72 of the FA is concerned is that it is not any or every officer of the service tax department who can exercise the power thereunder. The function of making an assessment has to be assigned to such officer. It is only such officer who is entrusted with such power who can proceed to ask for the documents, records, accounts etc.

19. Section 72 A of the FA, which deals with the special audit, reads as under:

> "**72A. Special Audit**: (1): If the Commissioner of Central Excise, has reasons to believe that any person liable to pay service tax (herein referred to as "such person")—
>
> (i) has failed to declare or determine the value of a taxable service correctly; or
>
> (ii) has availed and utilised credit of duty or tax paid-
>
> (a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or
>
> (b) by means of fraud, collusion, or any wilful misstatement or suppression of facts; or
>
> (iii) has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner,
>
> he may direct such person to get his accounts audited by a chartered accountant or cost accountant nominated by him, to the extent and for the period as may be specified by the Commissioner.
>
> (2) The chartered accountant or cost accountant referred to in sub-section (1) shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him.
>
> (3) The provisions of sub-section (1) shall have effect notwithstanding that the accounts of such person have been

audited under any other law for the time being in force.

(4) The person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit under sub- section (1) and proposed to be utilised in any proceeding under the provisions of this Chapter or rules made thereunder.

Explanation. — For the purposes of this section—

(i) "chartered accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949;

(ii) "cost accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959."

20. The scheme of Section 72A is that in the first instance the Commissioner has to record "reasons to believe" that the person who is liable to pay service tax has:

(i) failed to correctly declare or determine the value of the taxable service; or

(ii) wrongly availed or utilised credit or paid tax beyond the normal rebates having regard to the nature of the taxable services provided or by means of fraud, collusion or any wilful misstatement or suppression of facts; or

(iii) operations spread out in multiple locations and it is not practicable to obtain a true and complete picture of the accounts from the registered premises in the jurisdiction of the concerned Commissionerate.

21. It is only where one of the above three contingencies exists that the Commissioner may direct the Assessee to "get his accounts audited either by a Chartered Accountant or a Cost Accountant nominated by such Commissioner". The extent of the audit and the period for which it should be conducted is also to be specified by the Commissioner.

22. Although Section 72A of the FA itself does not expressly provide for giving the Assessee a hearing prior to passing of an order thereunder, the implied necessity for doing so has been explained by the Supreme Court in ***Sahara India (Firm) v. Commissioner of Income Tax*** (*supra*) in the context of Section 142 (2A) of the Income Tax Act, 1961 which also envisages the Assessee having to get its accounts audited by a special auditor appointed therein.

23. Under Section 72A (4) of the FA, the Assessee is given a hearing in respect of any material gathered on the basis of the audit under Section 72A (1). Section 142 (3) of the Income Tax Act, 1961 also contemplates such post-decisional hearing. However the Supreme Court was of the view that such post-decision hearing is "no substitute for pre-decisional hearing". It emphasised in para 32 of the decision as under:

> "32. The upshot of the entire discussion is that the exercise of power under Section 142(2-A) of the Act leads to serious civil consequences and, therefore, even in the absence of express provision for affording an opportunity of pre-decisional hearing to an assessee and in the absence of any express provision in Section 142(2-A) barring the giving of reasonable opportunity to an assessee, the requirement of observance of principles of natural justice is to be read into

> the said provision. Accordingly, we reiterate the view expressed in ***Rajesh Kumar*** case."

24. The Court is of the view that Section 72A would also envisage such a pre-decisional hearing which acts as an additional safeguard against the arbitrary exercise of the power of the Commissioner of Service Tax to order a special audit. The statutory limitation on the exercise of the powers of the Commissioner to order a special audit will have to be kept in view while analysing Rule 5A(2) of the ST Rules, as amended.

25. To complete the analysis of the provisions of the FA, notice must also be taken of Section 73 of the FA which talks of recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. Relevant to the present discussion is the requirement in Section 73 of issuing a show cause notice ('SCN') to the person who is suspected of having not paid or short-paid or having obtained erroneously a refund of service tax.

26. In the said proceedings it is possible that the Assessee may be required to produce records, documents, accounts etc. Even here there is no question of the Assessee being asked to produce records simply on demand without being given an opportunity of explaining the Assessee's version of the case. In the present case, it is not denied by the Respondents that the Petitioner has been filing ST returns and paying service tax on that basis regularly. The fact that the Department has sought to itself undertake audit of the Petitioner's accounts is also not denied.

27. Section 82 of the FA is relevant since it authorises search of the premises. It reads as under:

"**82. Power to search premises:-**
(1) Where the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board has reasons to believe that any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Chapter, are secreted in any place, he may authorise in writing any Central Excise Officer to search for and seize or may himself search and seize such documents or books or things.

(2) The provisions of the Code of Criminal Procedure, 1973, relating to searches, shall, so far as may be, apply to searches under this section as they apply to searches under that Code."

28. What is immediately relevant is that the above power to search the premises is also hedged in by certain limitations. One is the requirement of the officer to record reasons to believe that (i) there are documents or books that have been secreted in a place (ii) such documents or books are useful or relevant for any proceedings. A third safeguard is that the provisions of the Code of Criminal Procedure, 1973 (Cr PC) pertaining to searches apply *in toto* to any search in exercise of powers under Section 82 of the FA. Therefore even the power under Section 82 cannot be said to be totally without guidelines or restrictions.

Analysis of the amended Rule 5A(2)

29. It is in the above background that a scrutiny is now undertaken of Rule 5A(2) as amended by Notification No. 23/2014-Service Tax of the Central Government. The amended Rule 5A reads as under:

"**Rule 5A. Access to a registered premises**.

(1) An officer authorised by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

(2) Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, or a cost accountant or chartered accountant nominated under section 72 A of the Finance Act, 1994

(i) the records maintained or prepared by him in terms of sub-rule (2) of rule 5;

(ii) the cost audit reports, if any, under Section 148 of the Companies Act, 2013 (18 of 2013); and

(iii) the income-tax audit report, if any, under Section 44 AB of the Income-tax Act, 1961 (43 of 1961),

for the scrutiny of the officer or the audit party, or the cost accountant or chartered accountant, within the time limit specified by the said officer or the audit party or the cost accountant or chartered accountant, as the case maybe."

30. In the first instance it requires to be noticed that there are three distinct types of documents that can be asked to be made available "on demand" by an Assessee:

(i) the records mentioned in terms of Rule 5(2).

(ii) cost audit reports, if any, under Section 148 of the Companies Act, 2013

(iii) the income tax audit report, if any, under Section 44AB of the Income Tax Act, 1961.

31. Rule 5(2) requires the Assessee to furnish to the Superintendent of Central Excise at the time of filing of return for the first time or on 31st January 2008 whichever is later a list in duplicate of all the records prepared or maintained by the Assessee for accounting of transactions, in regard to providing any service receipt or procurement of anybody's service and payment of such service.

32. Interestingly, Rule 5A(2) does not restrict itself to such records as mentioned in Rule 5(2) but also required production of cost audit reports under Section 148 of the Companies Act, 2013 and the Income Tax Audit report under Section 44AB of the Income Tax Act 1961. These documents are not envisaged to be produced under Rule 5(2) and definitely not under any of the provisions of the FA. This is, therefore, going far beyond the FA itself.

33. Now turning to the persons who can make a demand for such documents from an Assessee, Rule 5A(2) lists out the following persons:

(i) officer empowered under Rule 5A(1).
(ii) the audit party deputed by the Commissioner.
(iii) the CAG
(iv) a Cost Accountant
(v) a Chartered Accountant.

34. It must straightway be noted that as far as a Cost Accountant or a Chartered Accountant (CA) is concerned, Mr. Mittal made it clear that the

Petitioner would have no objection to producing before a Cost Accountant or a CA the documents of accounts, records etc. but only if such Cost Accountant or CA has been nominated by the Commissioner for the purpose of special audit under Section 72A of the Act. As far as an officer of the Department was concerned, he submitted, and rightly, that although under Rule 5A(1) such officer is authorised by the Commissioner to have access to unregistered premises for the purposes of carrying out any "scrutiny, verification and checks as may be necessary to safeguard the interests of the Revenue", such officer can, in terms of Rule 5A(2) simply demand the production of such documents without any requirement of recording reasons to believe that the production of such document is necessary. There is also no requirement of such officer having to be authorised to carry out a search under Section 82 of the FA or an assessment under Section 72 of the FA. If any and every officer is going to be deputed for that purpose it would result in harassment of the Assessees.

35. Rule 5A(2) envisages that even the CAG can require production of documents from an individual service tax Assessee 'on demand'. This appears to have no rational basis. As rightly pointed out by Mr Mittal, the powers and functions of CAG flow from Articles 148 and 149 of the Constitution of India read with the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971. This Court in ***K. Satyanarayanan v. Union of India*** (*supra*) explained that the essential function of the CAG is to audit the accounts of public sector undertakings. Although in ***Association of Unified Tele Services Providers v. Union of India AIR 2014 SC 1984*** the Supreme Court has, in the context of the

functioning of telecom companies accepted the plea that their accounts can be subjected to scrutiny by the CAG, to expect the CAG to undertake an audit of the records of every service tax Assessee would indeed be extraordinary. Importantly, as far as the telecom service providers are concerned they are subjected to conditions of their licence which envisage their making available all their accounts for scrutiny. As far as the service tax Assessees are concerned one would still have to turn to the provisions of the FA to examine whether this kind of an access to the books of accounts etc. of an Assessee can be given to the CAG or just about any officer of the Department. With there being no such authorisation under the FA, the answer has to be in the negative.

Analysis of the CBEC Instructions and Manual

36. The instructions issued by the CBEC in this regard justify the above apprehension regarding the indiscriminate use of the powers under Rule 5A (2) of the ST Rules. The latest instruction is contained in Circular No. 995/2/2015-CX dated 27th February 2015. It is a very detailed instruction regarding the norms to be followed by the Audit Commissionerates. It sets out the manner in which units would be selected for audit in a year. Para 5.1 of the said circular states that audit groups would be deployed to cover the large, medium and small units and their composition would be of two or three Superintendents and three to five Inspectors for conducting audit of large assesses/tax payers, two Superintendents for medium size Assessee and one to two for small size Assessees. There is no requirement that any of these officers should be duly authorised to carry out an assessment for the purpose of Section 72 of the Act or adjudication for the purposes under

Section 73 of the FA. The entire instruction appears to be without any reference to the applicable provisions in the FA or the Rules.

37. A recent Manual has been issued by the CBEC in 2015, in replacement of the earlier Manual of 2011 which was by this Court in ***Travelite (India)*** to not have any statutory force. This 2015 Manual again fails to acknowledge that there is no statutory backing for the officers of the Department to themselves undertake an audit of the Assessee's accounts and records. This lacuna pointed out by the Court in ***Travelite (India)*** has not been set right.

Section 94 (2) (k) of the FA

38. The main plank of the defence of the Respondents in the present case to justify the amendment to Rule 5A(2) is Section 94(2)(k) of the FA introduced by the Finance Act of 2014 with effect from 6th August 2014. Considerable reliance is placed on the expression "keeping records and the manner in which such records shall be verified" occurring in the above provision. Although in the circular issued consequent upon the amendment by the CBEC on 10th December 2014 it is asserted by the Department that the expression 'verified' is of wide import and would include within its scope audit by the Department officers, the Court is unable to agree. The expression 'verified' has to be interpreted in the context of what is permissible under the FA itself. The verification of the records can take place by the officers of the Department provided such officers are authorised to undertake an assessment of a return or of adjudication for the purposes of Section 73 of the FA. It is not any and every officer of the Department who

could be entrusted with the power to demand production of records of an Assessee. Therefore, the Court does not agree with the submission that the expression 'verify' is wide enough to permit the audit of the accounts of the Assessee by any officer of the Service Tax Department.

39. There is a distinction between auditing the accounts of an Assessee and verifying the records of an Assessee. Audit is a special function which has to be carried out by duly qualified persons like a Cost Accountant or a CA. It cannot possibly be undertaken by any officer of the Service Tax Department.

Rule 5A (2) is ultra vires the FA

40. This brings up the issue of excessive delegation of powers and whether Rule 5A (2) is ultra vires the FA? The basic rules as regards subordinate legislation have been spelt out in ***Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills*** (*supra*) as under:

> "89. On a review of the cases the following principles appear to be well-settled:
>
> (i) Under the Constitution the legislature has plenary powers within its allotted field;
>
> (ii) Essential legislative function cannot be delegated by the legislature, that is, there can be no abdication of legislative function or authority by complete effacement, or even partially in respect of a particular topic or matter entrusted by the Constitution to the legislature;
>
> (iii) Power to make subsidiary or ancillary legislation may however be entrusted by the legislature to another body of

its choice, provided there is enunciation of policy, principles, or standards either expressly or by implication for the guidance of the delegate in that behalf. Entrustment of power without guidance amounts to excessive delegation of legislative authority;

(iv) Mere authority to legislate on a particular topic does not confer authority to delegate its power to legislate on that topic to another body. The power conferred upon the legislature on a topic is specifically entrusted to that body, and it is a necessary intendment of the constitutional provision which confers that power that it shall not be delegated without laying down principles, policy, standard or guidance to another body unless the Constitution expressly permits delegation; and

(v) the taxing provisions are not exception to these rules."

41. In ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav*** (*supra*) the following principles were elucidated:

> "14. ....It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

42. Tested on the above legal principles, the Court has no hesitation in concluding that Rule 5A(2) exceeds the scope of the provisions under the FA. This is the result whether Rule 5A(2) is tested vis-a-vis Section 72A of the FA which pertains to special audit or Section 72 which pertains to assessment or Section 73 which pertains to adjudication or even Section 82

which relates to searches. Under the garb of the rule making power, the Central Government cannot arrogate to itself powers which were not contemplated to be given it by the Parliament when it enacted the FA. This is an instance of the Executive using the rule making power to give itself powers which are far in excess of what was delegated to it by the Parliament.

Validity of the circulars, the manual and the impugned letter

43. The decision in ***Ratan Melting & Wire Industries*** (*supra*) is relevant in the context of the circulars issued and the Manual prepared by the CBEC. As pointed out in that decision, a circular or a manual cannot travel beyond the scope of the statute itself. It will have no binding effect if it does so. In the present case inasmuch as Section 94(2)(k) does not permit the exercise of audit to be undertaken by an officer of the Department, the attempt in the circular to recognise such powers in the officers of the Central Excise and Service Tax Departments is held to be ultra vires the FA and, therefore, legally unsustainable.

44. For all of the above reasons, the impugned communication dated 30th April 2105 issued to the Petitioner by Respondent No.2 informing it of the appointment of an audit team to inspect all the records, books and accounts by the officers cannot be sustained in law.

Conclusion

45. Resultantly, the Court:

(i) declares Rule 5A(2) as amended in terms of Notification No. 23/2014-Service Tax dated 5th December 2014 of the Central Government, to the extent that it authorises the officers of the Service Tax Department, the audit party deputed by a Commissioner or the CAG to seek production of the documents mentioned therein on demand is ultra vires the FA and, therefore, strikes it down to that extent;

(ii) holds that the expression 'verify' in Section 94 (2) (k) of the FA cannot be construed as audit of the accounts of an Assessee and, therefore, Rule 5A(2) cannot be sustained with reference to Section 94(2)(k) of the FA.

(iii) declares the Circular No. 181/7/2014-ST dated 10th December 2014 of the Central Government to be ultra vires the FA and strikes it down as such.

(iv) quashes the letter dated 30th April 2015 issued by the Commissioner of Service Tax, Audit-1, New Delhi addressed to the Petitioner as being unsustainable in law.

(v) Declares that the CBEC Circular No. 995/2/2015-CX dated 27th February 2015 on the subject "Central Excise and Service Tax Audit norms to be followed by the Audit Commissionerates" and the Central Excise and Service Tax Audit Manual 2015 issued by the Directorate General of Audit of the CBEC are *ultra vires* the FA, do not have any statutory backing and cannot be relied upon by the Respondents to legally justify the audit undertaken by officers of the Service Tax Department.

46. The petition and the application are disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

JUNE 03, 2016
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