

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16226 of 2018**

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M/S OWS WAREHOUSE SERVICES LLP THROUGH ASADULLAH
SIDDIQUE S/O VASIULLAH SIDDIQUE
Versus
UNION OF INDIA

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Appearance:
MR J.K. MITTAL WITH MR HARDIK P MODH AND MR AMIT LADDHA
(5344) for the PETITIONER(s) No. 1
for the RESPONDENT(s) No. 1,2,3,4

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 17/10/2018

ORAL ORDER
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner is a limited liability partnership firm and is engaged in the business of providing services to the industries of polymer and associated products. The petitioner, on behalf of such industries, sets up warehouse service centers and provides support services in Special Economic Zones.

2. The petitioner has challenged the communication issued by the Comptroller and Auditor General of India ("the CAG", for short) calling upon the petitioner to submit Service Tax audit at the hands of the officers of the CAG.

3. In this context, the petitioner would draw our attention to the final communication dated 09.10.2018 issued by the CAG rejecting the petitioner's objection to initiation of such audit. The respondents seem to be relying heavily on Rule 5A of the Service Tax Rules, 1994 for exercising such powers of audit. Such Rule 5A, as it stood earlier, was challenged before the Delhi High Court and was struck down, as being unconstitutional, in the judgment in case of *Travelite (India) v. Union of India* reported in 2014 (35) S.T.R. 653 (Delhi). Before this Court, one *Sadbhav Engineering Limited* had disputed the authority of CAG to carry out such Service Tax audit. This Court, in case of *Sadbhav Engineering Limited v. Union of India* reported in 2016 (46) S.T.R. 22 (Guj.), by recording brief reasons, had granted stay against further proceedings. The Court had noted the decision of Delhi High Court in case of *Travelite (India)* striking down the validity of the said Rule. It was observed as under;

"4. Prima facie, therefore, if Rule 5A is not valid, a serious question of the powers of the authority to issue the impugned communication would arise. Subsidiary question would be, even if Rule 5A is valid, would the communication in question be covered within the powers of the Commissioner

as envisaged under subrule (1) of Rule 5A, which empowers the Commissioner to authorize any person to carry out the inquiry with respect to the accounts of an assessee. Whether such authorized persons can be an outsider of the organization of the Commissioner would also be an issue."

4. Counsel for the petitioner pointed out that the Union of India has asked for transfer of such petitions along with other proceedings filed before different High Courts. Our attention was drawn to an order dated 31.08.2018 passed by the Supreme Court, in which, reference to the said order of this Court is made and the proceedings before the High Court have been stayed. The stay granted by the High Court, however, does not appear to have been disturbed.

5. Counsel for the petitioner submitted that thereafter, Rule 5A of the Service Tax Rules, 1994 was amended. The amended Rule also came to be challenged before the Delhi High Court in case of *Mega Cabs Pvt. Ltd. v. Union of India*. The Delhi High Court again struck down the Rule in judgment reported in 2016 (43) S.T.R. 67 (Del.). Counsel candidly stated that the Supreme Court has stayed the judgment of the Delhi High Court in case of *Mega Cabs Pvt. Ltd.* by an order dated 26.09.2016.

6. Quite apart from these legal controversies, counsel for the petitioner raised an additional contention that with the introduction of the Goods and Service Tax Act, the Finance Act, 1994 and the Service Tax provisions made thereon, stand repealed. He referred to Section 174 of the Central Goods and Service Tax Act, 2017 ("the CGST Act" for short) and contended that the Saving Clause contained therein would not save Rule 5A of the Service Tax Rules, 1994, so as to enable the respondents to initiate fresh proceedings for audit under the said Rule.

7. Section 173 of the CGST Act provides that save and otherwise provided in the said Act, Chapter-V of the Finance Act, 1994, shall be omitted. Section 174 of the CGST Act contains Repeal and Saving Clauses. Sub-section (1) thereof provides that save and otherwise provided, on and from the date of commencement of the said Act, several Acts mentioned therein would stand repealed. Sub-section (2) of Section -174 is a Saving Clause and it inter alia provides that the amendment of the Finance Act, 1994 to the extent mentioned in Sub-section (1) of Section 173, shall not revive anything not in force or existing at the time of such amendment or repeal. Clause (e) of this Saving Clause reads as under;

“(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;”

8. A perusal of the said clause of Sub-section (2) of Section 174 and other clauses would, *prima facie*, show that there was no saving of Rule 5A in such manner that fresh proceedings for audit could be initiated in exercise of powers under the said Rule. We, therefore, have serious doubts whether, with the aid of Rule 5A of the Service Tax Rules, 1994, the CAG can carry out compulsory Service Tax audit of private agencies like the petitioner.

9. Under the circumstances, issue Notice, returnable on 28.11.2018. By way of ad-interim relief, the impugned order dated 09.10.2018 is

stayed. In other words, the CAG shall not carry out any further Service Tax audit of the petitioner. Direct service permitted.

(AKIL KURESHI, J)

PRAVIN KARUNAN

(B.N. KARIA, J)

