

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1333 OF 2019

Ess Infraproject Private Limited .. Petitioner.
v/s.
Union of India & Ors. .. Respondent.

Mr.Bharat Raichandani a/w. Pragya Koolwal, i/b.UBR Legal for Petitioner.
Mr.Pradeep S. Jethy a/w. J.B.Mishra for Respondents.

**CORAM: M.S.SANKLECHA, &
M.S.SONAK, JJ.**

DATE : 27th JUNE, 2019.

P.C:-

Heard.

2. Rule. Respondents waive service.

3. This petition seeks a declaration that Respondents do not have power under Rule 5A of the Service Tax Rules, 1994 read with Section 174(2)(e) of the Central Goods and Services Tax Act, 2017 (CGST Act) to conduct audit for the period October 2013 to June 2017 i.e. prior to the introduction of CGST Act on 1st July, 2017. Consequent to the above, the petitioner seeks setting aside of the communications dated 23rd May, 2018, 17th January, 2019 and 1st March, 2019 of Respondent No.2 – the Additional Commissioner, GST and Central Excise, seeking to Audit petitioner's record for the above period.

4. Mr.Raichandani's submission for interim relief is that various courts- i.e. Gujarat High Court in the case of ***OWS Warehouse Services LLP V/s. Union of India, 2018 (19) G.S.T. 27 (Guj.)***, the Delhi High Court in the case of ***M/s.T.R. Sawhney Motors Pvt. Ltd. V/s. Union of India*** in Writ Petition(C) No.2138 of 2019 and Jharkhand High Court in the case of ***M/s.Sulabh International Social Service Organization, (Jharkhand State Branch) V/s. Union of India*** in Writ Petition(T)No. 1599 of 2019 have in respect of identical challenge granted interim relief to the petitioner. It is also submitted that in any event, the Delhi High Court in ***Mega Cabs Pvt. Ltd. V/s. Union of India 2016 (43) S.T.R. 67 (Del.)*** has held that Rule 5A of Service Tax Rules, 1994 is ultra virus to parent Act i.e. Finance Act, 1994. Therefore, bad. Thus, Rule 5A of the Service Tax Rules, 1994, it is submitted, cannot be enforced. However, he hastens to add that the judgment of the Delhi High Court in Mega Cabs Pvt. Ltd. (supra) has been stayed by the Hon'ble Supreme Court as reported in 2015(44) STR 277 (SC). In any event he submits that Section - 174 of the CGST Act does not protect /save any right and/or any action taken in pursuance of the Service Tax Rules, 1994. This as according to him the Service Tax Rules, 1994 are not protected saved under the CGST Act, 2017.

5. We note that the decisions of Gujarat High Court in *OWS Warehouse Services LLP (supra)* (dated 17.10.2018) Delhi High Court in *M/s. T.R.Sawhney Motors Pvt. Ltd. (supra)* (dated 11.03.2019) and Jharkhand High Court *M/s. Sulabh International (supra)* (dated 04.04.2019) relied upon by the petitioners were all at the ad-interim stage subject to further consideration by the Courts itself on the next date. Mr.Raichandani informs us that no further order in the above matters have been passed by the above courts. Thus, not much support can drawn by the petitioner on the basis of the above decisions as they are still awaiting consideration. So also the reliance upon the judgment of Delhi High Court in *Mega Cabs Pvt. Ltd. (supra)* is misplaced at this stage, as the same has been stayed by the Hon'ble Supreme Court.

6. However, the issue of the saving of Rule 5A(2) of Service Tax Rules, 1992 on introduction of CGST Act, 2017 is an issue that requires detailed consideration. This would be appropriately done at the final hearing. Thus, granting of interim relief at this stage would tantamount to granting final relief at the stage of admission. Moreover, the balance of convenience is against the petitioner. The Respondents seeks to carry out audit in terms of Rule 5A of Service Tax Rules, 1994 and Section 174 of the CGST Act for the period prior to the introduction of CGST Act. Grant

of interim relief at this stage would prevent the respondents from carrying out audit as permitted under Rule 5A of Service Tax Rules, 1994 and Section 174(2)(e) of the CGST Act. At the final hearing, if the challenge is negatived, there would be a delay in conducting the audit which would then result in difficulty as papers and persons who are in a position to be respond to audit queries may not be available and/or their memories may fail. Besides any action to be taken pursuant to the audit may become time barred, if not already so. No prejudice will be caused to the petitioners if it subjects itself to audit at this stage. If any further proceedings are taken on the basis of audit report against the petitioners, they are at liberty to move the Court for interim relief. Such an application, if made which would be considered at that point of time by the court to which served an application is made.

(M.S.SONAK,J.)

(M.S.SANKLECHA,J.)

