

**THE GANDHIDHAM
CHAMBER OF COMMERCE & INDUSTRY**

(ESTD. 1953)

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(M)

No. GCCI / 777

March 07, 2019

To,
The Commissioner
Office Of The Commissioner Of Service Tax,
'Central Excise Bhavan',
Nr. Panjrapole, Opp. Polytechnic,
Ahmedabad-380 015

Re: Service Tax Audit by the Department

Dear Sir,

With reference to above, we are getting queries, questions and objections from our number of members who are either getting notice for service tax audits or get oral follow ups for getting service tax audit completed.


We draw your kind attention towards recent two judgments (stay proceeding orders) in case of OWS Warehouse Services LLP and M/s. Infinity BNKe Infocity Pvt. Ltd. Though the judgments are clearly referring to Rule 5A and as such the stay orders are applicable to all kind of service tax audits.

We hereby attach recent judgments of Hon'ble Supreme Court, Hon'ble Gujarat High Court and Hon'ble Calcutta High Court for your kind perusal. As the stay orders are quite speaking, we request you to kindly clear your views that whether these orders are applicable or not.

Your detailed reply will increase confidence of tax payer in departmental proceedings and will make their concept clear.

Thanking you,

Yours faithfully


Dinesh Gupta
President

Copy to : Commissioner of CGST, Rajkot
Chairman, CBIO, New Delhi

Encl:

- 1) a copy order of Gujarat high court in the case of OWS Warehouse Services LLP Vs. UDI
- 2) a copy of order of the Hon'ble Supreme court in the case of union of India Vs. Mega Cabs Pvt. Ltd.
- 3) a copy of order of the Hon'ble Calcutta High court in the case of M/s. infinity BNKe Infocity Pvt. Ltd. Vs Union of India & Ors.

**1) GUJARAT HIGH COURT STAY ORDER ON SERVICE TAX AUDIT
(DATE : 17-10-2018)**

Case Name : **OWS Warehouse Services LLP Vs. UOI (Gujarat High Court)**
Appeal Number : Special Civil Application No. 16226 of 2018
Date of Judgement/Order : 17/10/2018
Related Assessment Year :
Courts : All High Courts (4494) Gujarat High Court (391)

OWS Warehouse Services LLP Vs. Union of India (Gujarat High Court)

Hon'ble Gujarat High Court granted stay on conducting audit of records of taxpayers under 5A of Service Tax Rules, 1994, by Officers of C&AG who were sending communications through CGST officers.

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.

Hon'ble High Court held that 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.

Hon'ble High Court further held that 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.

FULL TEXT OF THE INTERIM HIGH COURT JUDGMENT / ORDER IS AS FOLLOWS:

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, nas 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 1, 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.

Download Judgment/Order

**2) HON'BLE SUPREME COURT STAY ORDER ON SERVICE TAX
AUDIT
(DATE : 26-09-2016)**

Case Name : **Union Of India Vs. Mega Cabs Pvt. Ltd. (Supreme Court)**
Appeal Number : Petition (s) of Special Leave to Appeal (C) No. (s) 26675/2016
Date of Judgement/Order : 26/09/2016
Related Assessment Year :
Courts : Supreme Court of India (1023)

In the case of Mega Cabs Pvt. Ltd. Vs. Union Of India & Ors. dated 03.06.2016 , Honorable Delhi High Court has Declared Rule 5A(2) of the Service Tax Rules, as amended, 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, as ultra vires the Finance Act and, therefore, struck it down to that extent.

On Appeal by the department against the Ruling, Honorable Supreme Court has stayed the operation of judgment in the case of Mega Cabs Pvt. Ltd. Vs. Union Of India & Ors. dated 03.06.2016.

**3) CALCUTTA HIGH COURT STAY ORDER ON SERVICE TAX AUDIT
(DATE : 30-08-2018)**

Case Name : **M/s. Infinity BNKe Infocity Pvt. Ltd. Vs Union of India & Ors. (Calcutta High Court)**

Appeal Number : W.P. No.29554 (W) of 2017

Date of Judgement/Order : 30/08/2018

Related Assessment Year :

Courts : All High Courts (4494) Calcutta High Court (181)

M/s. Infinity BNKe Infocity Pvt. Ltd. Vs Union of India & Ors. (Calcutta High Court)

The petitioner seeks a declaration that sub-rule (2) of Rule 5A of the Service Tax Rules, 1994 as substituted by notification no. 23/24/ST dated December 5, 2014 is arbitrary and in conflict with provisions of Section 72A of the Finance Act, 1994. The petitioner also seeks a declaration that, the provisions of clause (k) of subsection (2) of Section 94 of the Finance Act, 1994 is unguided and gives uncontrolled power of delegation. The third prayer is with regard to a notice dated February 16, 2015.

Learned advocate for the petitioner submits that, the issue of vires of similar provisions of the Finance Act, 1994 initially came up for consideration before the Delhi High Court in 2014 (35) S.T.R. 653 (Travelite (India) Vs. Union of India). Such provisions were held to be ultra vires. He submits that, an appeal is pending against such judgment and order of the Delhi High Court before the Hon'ble Supreme Court of India. Subsequently, the provisions as impugned in the present writ petition were introduced. The same was struck down by the Delhi High Court in 2016 (43) STR 67 (Mega Cabs Pvt. Ltd. Vs. Union of India). He submits that, since the provisions have been struck down, the notice impugned herein issued on such basis needs to be quashed also.

Learned Additional Solicitor General appearing for the respondent no.1 seeks direction for filling affidavits. Since sub-rule 2 of Rule 5A of the Service Tax Rules, 1994, as substituted by notification dated December 25, 2014 was declared ultra vires by Mega Cabs Pvt. Ltd. (supra), it would be appropriate to grant interim stay of the proceedings. Such stay will continue till November 30, 2018 or until further orders whichever is earlier.

Let affidavit-in-opposition be filed within four weeks from date. Reply thereto, if any, be filed within two weeks thereafter.

List the writ petition under the heading "For Hearing" in the monthly list of November 2018.