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

Reserved on: 26.05.2014
Pronounced on : 04.08.2014

\+ **W.P.(C) 3774/2013, C.M. NO.7065/2013**

TRAVELITE (INDIA) ..... Petitioner
Through : Sh. J.K. Mittal and Sh. Vipul Dubey, Advocates.

versus

UOI AND ORS. ..... Respondents
Through : Sh. Anuj Aggarwal and Sh. Gaurav Khanna, Advocates, for Resp. No.1.
Sh. Rahul Kaushik, Advocate, for Service Tax Department.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S. RAVINDRA BHAT

The assessee (hereafter "the petitioner") approaches this Court under Article 226 of the Constitution of India, challenging a letter dated 07-11-2012 of the respondent Commissioner seeking records for the period 2007-08 till 2011-12 for scrutiny of an audit party; Rule 5A (2) is also impugned as *ultra vires.*

2. The petitioner is a registered service tax assessee. It is aggrieved by the letter of the Commissioner of Service Tax ("CST") dated 7.11.2012, which sought its records for the years 2007-08 till 2011-12 for scrutiny by an audit party, under Rule 5A(2) of the Service Tax Rules, 1994.The Petitioner also challenges the validity of Rule 5A(2) of the Service Tax Rules, 1994, brought into force by Notification no. 45/2007 dated 28.12.2007 as well as the instruction of the Central Board of Excise and Customs ("CBEC") no. F. No. 137/26/2007-CX.4 dated 1.1.2008. It is contended that the powers of an assessing officer to call for records in respect of any period during which the respondents seek to intensively scrutinize receipts etc. i.e. a special audit can be ordered by recourse to Section 72-A of the Finance Act, 1994. Barring these, the Finance Act, does not contain any substantive power to call for records for scrutiny as is permissible under Rule 5A(2) or for the purpose of scrutiny by any authority outside of those created under the Act, such as the Comptroller and Auditor General's office.

3. The petitioner relies on *Municipal Corporation v. Birla Cotton, Spinning and Weaving Mills,*AIR 1968 SC 1232 and *General Officer, Commanding in Chief v. Subhash Chandra Yadav,* (1988) 2 SCC 351, and argues that a rule must conform to the statute under which it was framed, and must be within the rule making power of the authority. The submission is that the impugned rule is not only unjustified in the context of the substantive provisions of law in the relevant statute i.e. Chapter V of the Finance Act but also is squarely inconsistent with Section 72-A of the Finance Act, 1994, which empowers the Commissioner of Central Excise to order an audit under special circumstances only. In addition, the rule is not within the rule-making power conferred on the executive under Section 94 of the Act.

4. The petitioner further submits, relying on *Pahwa Chemicals P Ltd. CCE, Delhi* 2005 (181) ELT 339 (SC) and *Collector CentralExcise, Bhopal v. Ram Melting & Wire Industries,* (2008) 13 SCC 1 that the impugned instruction, which stipulates the modalities for the conduct of the audit, cannot widen the scope of the law. Likewise, a substantive obligation, such as that of handing over records to an audit party, cannot find its basis in a non-statutory instrument like the Service Tax Manual. Finally, the petitioner submits, relying on *Sahara India v. CIT* (2008) 14 SCC 151 that in any event, an audit, since it carries civil consequences, cannot be ordered without a notice issued to the assessee, indicating reasons for the audit.

5. The respondent justifies the impugned notice and introduction of Rule 5A, arguing that the rule authorizing audit was made pursuant to the power conferred under Section 94 of the Finance Act, 1994 and not pursuant to Section 72A. The rule is also sought to be justified by invoking the Service Tax Audit Manual, 2011 as the basis for ordering an audit. The respondent states that after its initial letter, it had sent repeated reminders to the petitioner (dated 26.12.2012, 30.1.2013, 8.3.2013) before

it had issued summons on 17.5.2013. It urges that the petitioner alleged arbitrariness of the rule only on 1.4.2013 for the first time; until then, the petitioner had maintained that it would cooperate with the authorities of the respondent towards completing the audit. These delaying tactics of the petitioner, the respondent argues, betray *mala fides.*

6. Rule 5A though titled "Access to a registered premises", directs the assessee, in sub-rule (2), to provide records to an audit party. It reads:

"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.

The impugned CBEC instruction reads:

"… A new Rule 5A has also been incorporated in the said Rules to prescribe that an officer authorised by the Commissioner shall have access to any premises registered under the Service Tax Rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue and that the assessee shall provide, on demand, the specified records including trial balance or the equivalent. It may be noted that this rule does not envisage issue of any notification by a Commissioner for such authorisation of officers. The requirement of authorisation could be fulfilled by issue of an office order.

2. In this regard, it is clarified that records/documents required to be maintained under various laws such as the Income Tax Act, Companies Law the CENVAT Credit Rules, 2004, VAT and other State legislation would be acceptable, and the amendment made in the rule does not cast any additional responsibility on taxpayers in terms of maintenance of records.

3. The list of records, as required to be provided under said sub-rule (2) should be submitted once only. Once filed, further intimation would be required to be given only in case there is any change in the list (i.e. addition, deletion, modification in the types of records maintained) that had been furnished by the assessee.

4. A copy of the list furnished by the assessee would be sent by the jurisdictional superintendent to the audit section.

5. The audit team or any other officer authorised by the Commissioner to visit the registered premises of an assessee shall give prior intimation to the asseseee along with the list of documents that he requires for the purposes of scrutiny, verification or audit.

6. That taxpayer shall provide the records as required by the authorized officer within a period of fifteen days from the date of request. In case, the taxpayer is unable to produce any of the records called for within the stipulated time, he shall intimate the same along with reasons, for non-production of records, and the officer may also further time for production of such records keeping in view the overall facts into account.

7. These amendments have been made in the service tax rules to enable the duly authorised offices to carry out audit or scrutiny as may be necessary to safeguard the interest of revenue. However, it may be ensured that only such records are demanded which are necessary for conducting such audit scrutiny or verification.

7. The rule making power conferred upon the executive in Section 94 of the Finance Act reads in the following terms:

"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: -
xxx xxx
xxx"

8. The only provision in Chapter V of the Finance Act on scrutiny and audit of records of the assessee is Section 72A of the Finance Act, 1994, which reads:
"72A. (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) xxx xxx xxx
(3) xxx xxx xxx
(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 subsection (1) and proposed to be utilised in any proceeding under the provisions of this Chapter or rules made thereunder.

Explanation.xxx

9. Section 72A envisages an audit of an assessee's records only in special circumstances, namely, when there is a failure to declare or compute the value of the taxable service, when the utilization of CENVAT credit in excessive of the limit permissible or by fraud etc., and when the business operations of the assessee are dispersed across multiple locations. Apart from Section 94, the Revenue could not show any other substantive provision which justifies a probe into the records of the assessee, under conditions akin to those contemplated by Rule 5A(2). The Revenue was also unable to show the compulsion of arming authorities with such sweeping powers, under the Rules.

10. It is well known that if the legislature contemplates a situation and enacts or provides for a part of it, the other parts are deemed to have been excluded. The law is also well settled that a rule acquires statutory force, so long as it *first,* conforms to the provisions of the statute under which it is framed and *second,* it must be within the rulemaking *power* of the executive authority charged with framing the rules. Ref. *General Officer, Commanding-in-Chief v. Dr. Subhash Chandra Yadav*, *(1988) 2 SCC 351 and Dr.Mahachandra Prasad Singh v. Honourable Chairman, Bihar Legislative Council and Ors., (2004) 8 SCC 747.* The *"generality"* of the rule-making power conferred under Section 94(1) is thus only to the extent that rules made in exercise of that power are in conformity with the provisions of the statute. The reasoning for this is stated in simple terms in *Mahachandra Prasad Singh (supra):*

"The rules being delegated legislation are subject to certain fundamental factors. Underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it. The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object while at all times remaining true to it.

That is the rule of primary intention. Power delegated by an enactment does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act to add new and different means of carrying them out or to depart from or vary its ends. (see Section 59 in chapter Delegated Legislation in Francis Bennion's Statutory Interpretation 3rd Edn.)." *(emphasis added)*

11. The mere fact that a rule-making power is phrased in terms that indicates a general delegation of power,cannot lead to the inference that such power may be exercised to make rules that exceed the bounds of the statute. Rules may only give effect to the statute's provisions and intent and cannot be used to create substantive rights, obligations or liabilities that are not within the contemplation of the statute. (Ref.*Kunj Behari Lal v. State of H.P*, (2000) 3 SCC 40 and *Global Energy Ltd. v. Central Electricity Regulatory Commission*, (2009)15SCC570. It is apparent that the only type of audit within the contemplation of the statute is that stipulated for in Section 74A, i.e. a special audit when only certain circumstances are fulfilled. The Parliament thus had a clear intention to provide for only a special audit. The fact that Section 74A prescribes the conditions meriting such special audit compels the necessary inference that the Parliament did not intend to provide for a general audit that *"every assessee"* may be subjected to, "*on demand".* This Court is thus of the opinion that any attempt to include provision for such a general audit through the back-door, such as through the impugned rule, is *ultra-vires* the rule making power conferred under Section 94(1). Rule 5A(2) must consequently be struck down.

12. Likewise, this Court finds that the impugned CBEC instruction, being in furtherance of Rule 5A(2), which rule is *ultra-vires* the Finance Act, 1994, is void for the same reasons. Executive instructions without statutory force, cannot possibly override the law; consequently, any notice, circular, guideline etc. contrary to statutory laws cannot be enforced. (See *Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi Cooperative Housing Society Jaipur* (2013) 5 SCC 42; *B.N. Nagarajan v. State of Mysore*, AIR 1966 *SC 1942. As observed in B.N. Nagarajan (supra): "It was settled by this Court in Ram Jawaya Kapur v. The State of Punjab: [1955] 2 SCR 225 that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these law. …….It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under art. 162 of the Constitution ignore or act contrary to that rule or act."* (emphasis added)

13. It is clear that Section 83 of the Finance Act, 1994 authorises that Section 37B, *inter alia,* of the Central Excise Act, 1944 "*shall apply, so far as may be, in relation to service tax, as they apply in relation to a duty of excise*". Section 37B of the Central Excise Act, 1944 reads:

***"Section** 37B. Instructions to Central Excise Officers. The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board :*

xxx xxx xxx"

14. It is clear that the CBEC, under the power vested in it by Section 37B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 issues these circulars as instructions with respect to the levy of service tax. Consequently, such circulars cannot possibly override the statute, or be contrary to the statute. The impugned circular seeks to put in place a mechanism for audit and scrutiny of documents with the objective of safeguarding the interests of the Revenue, in furtherance of the amendments made in the Service Tax Rules, as indicated in paragraph 7 of the circular. Since the parent statute in this regard, the Finance Act, 1994 itself does not authorise a general audit of the type envisioned by the impugned Rule 5A(2), and furthermore only stipulates that a special audit can be undertaken if the circumstances outlined in Section 72A are fulfilled, this Court finds that the impugned CBEC circular is not only an attempt to widen the scope of the law impermissibly but also is patently contrary to the statute. The impugned circular, to the extent it provides clarifications on a Rule5A(2) audit, is hereby quashed; consequently, the impugned letter is quashed and set aside.

15. The Service Tax Audit Manual, 2011 is merely an instrument of instructions for the service tax authorities; it is but obvious that it is not a statutory instrument and has no statutory force. Thus, Rule 5A(2) cannot be sought to be justified as against it.

16. The writ petition is accordingly allowed with no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

AUGUST 4, 2014