

(2020) 03 DEL CK 0271

In the Delhi High Court

Case No : Civil Writ Petition No. 2580 Of 2020

Aargus Global Logistics Pvt. Ltd

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:

Service Tax Rules, 1994 — Rule 5, 5(2), 5A, 5A(2)
Finance Act, 1994 — Section 72(A), 73, 77, 94, 94(2), 94(2)(a), 94(2)(b), 94(2)(c), 94(2)(d), 94(2)(e), 94(2)(f), 94(2)(g), 94(2)(h), 94(2)(i), 94(2)(j), 94(2)(k), 94(2)(l), 94(2)(m)
Central Goods and Service Tax Act, 2017 — Section 174(2)(e)
Central Goods and Services Tax Act, 2017 — Section 173, 174, 174(2)(a), 174(2)(b), 174(2)(c), 174(2)(d), 174(2)(e), 174(2)(f)
General Clauses Act, 1897 — Section 6

Citation : (2020) 03 DEL CK 0271

Hon'ble Judges : Vipin Sanghi, J; Sanjeev Narula, J

Bench : Division Bench

Advocate : G. Saikumar, Soumya Saikumar, T.P. Singh, Sonu Bhatnagar, Anushree Narain, Venus Mehrotra

Final Decision : Dismissed

Judgement

Vipin Sanghi, J

C.M. No. 9012/2020 (exemption)

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

W.P.(C) 2580/2020 & C.M. No. 9011/2020

3. Petitioner has preferred the present petition to seek directions quashing Rule 5A of the Service Tax Rules, 1994 by declaring that it is in conflict

with various provisions of the Finance Act, 1994, and it is beyond the rule-making power of Respondent No. 1 and ultra vires the Finance Act, 1994.

In the alternative, the Petitioner seeks a writ of Certiorari declaring Rule 5A of the Service Tax Rules, 1994 as having lapsed w.e.f. 01.07.2017 i.e.

after introduction of the Central Rules and Services Tax Act (CSGT), 2017, on the premise that there is no saving of the said provision under the

CGST Act. Petitioner also assails the notices dated 06.11.2019 and 13.01.2020 issued by Respondent No. 2 requiring the Petitioner to provide several

documents and records, on the ground that the same is without jurisdiction and authority of law.

4. The case of the Petitioner is that it is a company engaged in the business of providing freight forwarding services to its clients. It has offices across

the country, including at Delhi, Gujarat, Haryana, Karnataka etc. For the purpose of service tax, the Petitioner had a centralized registration with the

service tax department at Delhi. Petitioner states that it regularly paid taxes and filed service tax returns.

5. The Petitioner states that according to the Respondents, the impugned notice issued on 06.11.2019, was actually not served on the Petitioner. This

notice has been filed along with the writ petition and the same reads as follows:

â??M/s Aargus Global Logistics Pvt Ltd.

(STC NO. AAACP3701AST001)

150, AGL Chambers

Village Kapashera, New Delhi-110037.

Subject: Intimation for verification of Financial Records â?" Service Tax for the period from 2014-15 (Oct 2014) to 2017-18 (June 2017)-

reg.)

Sir,

The Service Tax verification of accounts/records of your above unit for the period 2014-15 to 2017-18 (upto June 2017) or for the period

since last audited is to be done. In this regard, you are requested to furnish the following documents also within 07 working days from the

date of receipt of this letter:

g) Copies of Balance Sheet, Trial Balance and Annual Financial Statement for the year 2014-15 to 2017-18 (June).

h) Copies of ST-3 Returns and Cenvat Register for the year 2014-15 to 2017-18 (upto June 2017).

l) Annual Returns submitted to the Registrar of Companies, Sales Tax Returns, Income Tax Returns along with Annexure for the financial

years year 2014-15 to 2017-18 (upto June 2017).

m) Returns if any submitted to Banks/financial Institutions for the period year 2014-15 to 2017-18 (upto June 2017).

n) Cost, Audit, Tax Audit and Internal Audit Reports, wherever applicable for the period 2014-15 and 2017-18 (upto June 2017).

2. It may please be noted that non-furnishing of information/documents within the stipulated time may attract penal action under Section 77

of the Finance Act, 1994 read with Section 174 (2) (e) of the Central Goods and Service Tax Act, 2017.

3. It is also requested to designate a person (employee of the company/registered concern) for coordinating with the Audit team and

communicate the name, designation and contact numbers and e-mail id of the person so designated.

4. It is further requested that full co-operation may be extended to the Audit party in carrying out the audit and keep all the relevant records

ready so that the audit can be conducted smoothly.

5. In case of any difficulty, you can get in touch with the undersigned through the telephone number/fax/email mentioned below.

The receipt of this letter may please be acknowledged.

Sd/-

Assistant Commissioner??

(Emphasis supplied)

6. The Petitioner further states that it received the second impugned notice dated 13.01.2020, which was accompanied with the first impugned notice

dated 06.11.2019. The second notice dated 13.01.2020 reads as follows:

??M/s Aargus Global Logistics Pvt Ltd.

(STC NO. AAACP3701AST001)

150, AGL Chambers

Village Kapashera, New Delhi-110037.

Subject: Intimation for verification of financial Records Service Tax for the period from 2014-15 (Oct-2014) to 2017-18 (June 2017)-reg.

Sir,

Please refer to this office letter of even no. 6397 dated 06/11/2019 (copy Enclosed) on the above subject vide which the financial records

for service tax audit/Central Excise Audit were sought.

In this regard, it is to inform that the same have not been received by this officer so far. It is, therefore, once again requested to furnish the

requisite records within 5 working days. If the documents are not submitted within time, then penalty under Section 77 of the finance act

1994 read with section 174 (2)(e) of the Central Goods and Service Tax Act 2017 will be imposed.

Encl. as above

Sd/-

Assistant Commissioner??

7. We may at this stage itself notice that though the first prayer of the Petitioner as stated hereinabove, is that Rule 5A of the Service Tax Rules, 1994

be declared to be in conflict with the provisions of the Finance Act, 1994 and beyond the rule making power of Respondent No. 1, there is no specific

submission advanced in this regard. The feeble submission advanced by learned Senior Counsel for the Petitioner is that the rule making power does

not specifically grant the power to the Central Government to make a rule of the kind framed in Rule 5A. At this stage itself, we may take note of the

rule making power contained in the Finance Act, 1994 as also Rule 5A. Section 94 of the Finance Act, 1994 contains the rule making power of the

Central Government which reads as follows:

??94. (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 :-

(a) collection and recovery of service tax under sections 66 and 68;

(aa) determination of the amount and value of taxable service, the manner thereof, and the circumstances and conditions under which an

amount shall not be a consideration, under section 67;]

(b) the time and manner and the form in which application for registration shall

be made under [sub-sections (1) and (2) of] section 69;

(c) the form, manner and frequency of the returns to be furnished under sub-sections (1) and (2) and the late fee for delayed furnishing of

return under sub-section (1) of section 70;]

(cc) the manner of provisional attachment of property under sub-section (1) of section 73C;

(ccc) publication of name of any person and particulars relating to any proceeding under sub-section (1) of section 73D;]

(d) the form in which appeal under section 85 or under sub-section (6) of section 86 may be filed and the manner in which they may be

verified;

(e) the manner in which the memorandum of cross-objections under sub-section (4) of section 86 may be verified;

(eee) the credit of service tax paid on the services consumed or duties paid or deemed to have been paid on goods used for providing a

taxable service;]

(eeee) the manner of recovery of any amount due to the Central Government under section 87;]

(f) provisions for determining export of taxable services;

(g) grant of exemption to, or rebate of service tax paid on, taxable services which are exported out of India;

(h) rebate of service tax paid or payable on the taxable services consumed or duties paid or deemed to have been paid on goods used for

providing taxable services which are exported out of India;

(hh) rebate of service tax paid or payable on the taxable services used as input services in the manufacturing or processing of goods

exported out of India under section 93A;]

(hhh) the date for determination of rate of service tax and the place of provision of taxable service [under section 66C];]

(i) provide for the amount to be paid for compounding and the manner of compounding of offences;

(j) provide for the settlement of cases, in accordance with sections 31, 32 and 32A to 32P (both inclusive), in Chapter V of the Central

Excise Act, 1944 (1 of 1944) as made applicable to service tax vide section 83.]

(k) [Clause (k) of Section 94 (2) is as it existed upon the passing of the Finance Act, 1994] imposition, on persons liable to pay service tax,

for the proper levy and collection of the tax, of duty of furnishing information, keeping records and the manner in which such records shall

be verified;

(l) make provisions for withdrawal of facilities or imposition of restrictions (including restrictions on utilisation of CENVAT credit) on

provider of taxable service or exporter, for dealing with evasion of tax or misuse of CENVAT credit;

(m) authorisation of the Central Board of Excise and Customs or [Principal Chief Commissioners of Central Excise or] Chief Commissioners

of Central Excise to issue instructions, for any incidental or supplemental matters for the implementation of the provisions of this Act;

(n) any other matter which by this Chapter is to be or may be prescribed.]

(3) The power to make rules conferred by this section shall on the first occasion of the exercise thereof include the power to give

retrospective effect to the rules or any of them from a date Â not earlier than the date on which the provisions of this Chapter come into

force.

(4) Every rule made under this Chapter, [Scheme framed under section 71 and every notification] issued under section 93 shall be laid, as

soon as may be, after it is made or issued, before each House of Parliament, while it is in session for a total period of thirty days which may

be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session

or the successive sessions aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the

rule should not be made or the notification should not be issued, the rule or notification shall thereafter have effect only in such modified

form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity

of anything previously done under that rule or notification.â??

8. Rule 5A of the Service Tax Rules, 1994 reads as follows:

â??5A. Access to a registered premises. (1) An officer authorised by the [Principal Commissioner or 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 empowered 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 72A

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 44AB 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 may be.??

9. From Section 94 of the Finance Act, 1994 it would be seen that the Central Government has been empowered to make Rules for carrying out the

provision of Chapter 5 of the Finance Act, 1994, which contains the provisions in relation to levy of service tax. Therefore, the Central Government is

empowered to make rules with a view to enforce and recover service tax. Sub-Section (2) of Section 94 opens with the words "In particular, and

without prejudice to the generality of the foregoing power".

10. The specific aspects in respect of which the Rules may be framed as enumerated in clauses (a) to (m) of Section 94(2) do not take away the

general and omnibus power to make Rules conferred by the opening words of Section 94 (2). The Parliament consciously while enumerating the

specific matters in respect of which Rules may be framed, preserved the general Rule making power of the Central Government. The only statutory

limitation placed on the said Rule making power is that the Rule(s) should be framed for the purpose of enforcing the service tax regime. Therefore,

the power of the Central Government to frame rules for carrying out the provisions of the service tax regime was exhaustive, and there is absolutely

nothing to suggest that the said power did not encompass the power to frame a

Rule of the kind as Rule 5A, as framed w.e.f. 28.12.2007.

11. Turning to Rule 5A, we notice all that it does is to empower an Authorized Officer - as authorized by the Commissioner, to have access to any

premises registered under Service Tax Rules for the purpose of carrying out scrutiny, verification and checks as may be necessary to safeguard the

interest of Revenue. It also obliges every assessee to, on demand, make available to the officer empowered under Sub Rule (1), or the audit party

deputed by the Commissioner, or the Comptroller and Auditor General of India, or Cost Accountant or Chartered Accountant nominated under Section

72 (A) of the Finance Act, 1994 to produce the enumerated records and documents for scrutiny of the officer or audit party, or Cost Accountant or

Chartered Accountant within the specified time limit. Without such power in the Authorized Officer, and corresponding obligation on the assessee, it

goes without saying that it would be practically impossible for the officers charged with the responsibility of enforcing the Finance Act, 1994, to

effectively enforce the provisions of the said Act. The power vested in the Competent Authorities to recover service tax not levied or paid, or short

levied or short paid, or erroneously refunded [under Section 73 of the Finance Act, 1994] would remain a dead letter, if the Competent Authority under

the Act is not empowered in terms of the Rule 5A. The said Rule 5A is, even otherwise, relatable to Clause (k) of Section 94 (2), since the said Rule

â?" while casting an obligation on the assessee to produce the records, he is obliged to maintain under the Finance Act, 1994, simultaneously

empowers the Competent Authorities to ensure compliance of the said obligation. Thus, we reject the submission of learned senior counsel for the

Petitioner that the Central Government lacked the authority and competence to frame Rule 5A.

12. The next submission of learned counsel for the Petitioner is that rule 5A of the Service Tax Rules does not survive the enactment of the CGST

Act. In this regard, learned Senior Counsel for the Petitioner has drawn our attention to Sections 173 and 174 of the CGST Act, which read as

follows:

â??173. Save as otherwise provided in this Act, Chapter V of the Finance Act, 1994 shall be omitted.

174. (1) Save as otherwise provided in this Act, on and from the date of

commencement of this Act, the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, and the Central Excise Tariff Act, 1985 (hereafter referred to as the repealed Acts) are hereby repealed.

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or

"amended Act", as the case may be) to the extent mentioned in the subsection (1) or section 173 shall not

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under

such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said

notification is rescinded on or after the appointed day; or

(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or

inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or

(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;

(f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under

the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act

had not come into force and the said Acts had not been amended or repealed;

(3) The mention of the particular matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general

application of section 6 of the General Clauses. Act, 1897 with regard to the effect of repeal.â??

13. The submission of learned Senior Counsel for the Petitioner is that Chapter V of the Finance Act, 1994 â?" which brought in the service tax

regime, stands omitted. Thus, the provisions of Chapter V of the Finance Act, 1994 do not survive the enactment of the CGST Act. He further

submits that Clauses (d) and (e) of Sub Section (2) of Section 174 have to be read in conjunction. Therefore, what is not affected by the omission of

Chapter V of the Finance Act, 1994, is the â??duty, tax, surcharge, fine, penalty, interestâ? which were due, or may become due even after the

enactment of the CGST Act and the omission of Chapter V of the Finance Act, 1994. He submits that such â??duty, tax, surcharge, fine, penalty,

interestâ? could be only in respect of, and arising out of proceedings already initiated, and ongoing proceedings on the date of enactment of the CGST

Act. In this regard, learned Senior Counsel for the Petitioner has laid special emphasis on the use of the words â??in respect of the any such duty,

tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaidâ? contained in Clause (e), as also the

words â??and any such investigation, inquiry, verificationâ?|â?|â? used in the same clause. We cannot agree with this submission of learned Senior

Counsel for the Petitioner. Clause (e) expressly empowers the Competent Authorities to initiate and institute even fresh proceedings under the omitted

chapter V of the Finance Act, 1994 and the rules framed thereunder, despite the said omission by Section 173 of CGST Act. This is clear from the

use of the expression â??may be instituted, continued or enforcedâ?|â?|â?|â? in Clause (e) of Section 174 (2) of the Act. Clause (d) of Section 174

(2) saves â??any duty, tax, surcharge â?|â?|.. as are due or may become dueâ?

!â?|â?. There is nothing to suggest that the â??duty, tax, surchargeâ?

etc. should relate to proceedings initiated under, inter alia, Chapter V of the Finance Act, 1994 before the coming into force of the CGST Act, and not

to proceedings initiated under the enactments after the coming into force of the CGST Act. If this submission of the Petitioner were to be accepted, it

would mean that all evasions of, inter alia, service tax and all infractions of the provisions of the Finance Act, 1994 which remained suppressed and

uninvestigated up to the point of time when, inter alia, the said Chapter V of the Finance Act was omitted and CGST Act was enacted, would go

uninvestigated without the violators of the law being brought to justice. That, in our view, was clearly not the intent and there is nothing to show that

the Parliament intended to grant blanket immunity to all assesseees whose past acts and omissions may, otherwise, fall foul of the provisions of, inter

alia, Chapter V of Finance Act, 1994. On the contrary, it is clear to us that the intention of the Parliament was clearly to save not only ongoing

investigation, inquiry, verification etc. but also to specifically enable the initiation of fresh investigation, inquiry verification etc. in respect of acts and

omissions relating to inter alia, the erstwhile service tax regime.

14. The further submission of learned Senior Counsel for the Petitioner is that there is no provision in Section 174 to save the Service Tax Rules, as it

is only Chapter V of the Finance Act, 1994 which has been saved for the specific purposes mentioned in Clauses (a) to (f) of Section 174 (2). The

failure of the Parliament to mention the word â??Rulesâ?, along with the Finance Act, 1994 in Section 174 (2), according to the Petitioner, means that

the Service Tax Rules were not saved even for the purpose of enforcing the saving provisions. We find this submission to be completely meritless.

Firstly, the Parliament omitted Chapter V of the Finance Act, 1994 by amending the same. No part of the Finance Act, 1994 was repealed by the

provision of the CGST Act. This omission came into effect only from the date of enforcement of the CGST Act and not earlier. Therefore, Chapter V

of the Finance Act, 1994 remained on the statute book till the enforcement of the CGST Act. Secondly, even this Amendment of the Finance Act,

1994 (by Section 173 of the CGST Act) saves what was otherwise provided in the Act, which included what is provided in Section 174. Therefore, to

the extent the provisions of Chapter V of the Finance Act, 1994 are saved, they

do not stand omitted by amendment of the Finance Act, 1994. Thirdly, the Rules under Chapter V of the Finance Act, 1994, were framed, as noticed hereinabove, to carry out the provisions of Chapter V of the Finance Act, 1994. The rules are subordinate legislation and without the said Rules, the provisions of Chapter V of that Act itself could not be worked. The Service Tax Rules were framed under Chapter V of the Finance Act, 1994. Those rules are, therefore, saved by Clause (b) of Section 174 (2) which states that, inter alia, anything duly done under the Chapter V of the Finance Act, 1994 shall not be affected by the amendment of the Finance Act, 1994. Thus, the amendment of the Finance Act, 1994 does not affect the Service Tax Rules. Fourthly, Section 6 of the General Clauses Act which deals with the effect of repeal reads as follows:

6. Effect of repeal. - "Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or

punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or

punishment may be imposed as if the repealing Act or Regulation had not been passed.

(emphasis supplied)

15. From the above, it would be seen that the repeal of the Central Act, unless a different convention appears, shall not, inter alia, affect any

investigation, legal proceeding or remedy in respect of any such right, privilege,

obligation, liability or penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy maybe instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or regulation have not been passed. Far from exhibiting a different intention, Section 174 of the CGST Act expressly seeks to preserve the powers of the Competent Authorities to, inter alia, institute investigation, inquiry etc. In fact, even if Section 174 (2) of the CGST Act were not to expressly so provide, the said power of the Competent Authorities stood preserved by virtue of Section 6 of the General Clauses Act.

16. The last submission advanced by learned Senior Counsel for the Petitioner is that under Sub-Clause (2) of Rule 5A, only specified documents

could be called for and not the documents as sought by the Respondents vide the notice dated 06.11.2019, read with notice dated 13.01.2020. We do

not find any merit in this submission as well. Rule 5A (2) of the Service Tax Rules, as noticed hereinabove, empowers the Competent Officer to

demand records mentioned (sic: maintained) or prepared in terms of Sub Rule (2) of Rule 5. This takes us to Rule 5 (2) of the Service Tax Rules

which reads as follows:

“(2) Every assessee shall furnish to the Superintendent of Central Excise at the time of filing of return for the first time or the 31st day of

January, 2008, whichever is later, a list in duplicate, of-

(i) all the records prepared or maintained by the assessee for accounting of transactions in regard to,-

[(a) providing of any service;]

(b) receipt or procurement of input services and payment for such input services;

(c) receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;

(d) other activities, such as manufacture and sale of goods, if any.

(ii) all other financial records maintained by him in the normal course of business.”

17. Thus, the assessee is obliged to maintain and provide all the records prepared or maintained by it for accounting of transactions with regard to

providing of any service; receipt or procurement of input services and payment for such input services; receipt, purchase, manufacture, storage, sale

or delivery, as the case may be, in regard to inputs and capital goods; other activities such as manufacture and sale of goods, if any and; all other

financial records maintained by him in the normal course of business. A perusal of the notice dated 06.11.2019 shows that the Respondents have

called for records which the Petitioner is obliged to maintain in terms of Rule 5 of the Service Tax Rules. Therefore, we do not find merit in this

submission either.

18. For all the aforesaid reasons, we do not find merit in this petition and the same is dismissed.

19. The Petitioner is directed to comply with the aforesaid notices within next two weeks.