
(2012) 09 CAL CK 0077

In the Calcutta High Court

Case No : Writ Petition No. 21053 (W) of 2011 with W.P. No. 20517 (W) of 2012

SKP Securities Ltd.

APPELLANT

Vs

Deputy Director (Ra-IDT)

RESPONDENT

Date of Decision : 26-09-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14A
Chartered Accountants Act, 1949 — Section 2
Companies Act, 1956 — Section 209, 227, 233A, 233B, 288
Comptroller and Auditor-Generals (Duties, Powers and Conditions of Service) Act, 1971 — Section 13, 14, 14(2), 15, 16
Constitution of India, 1950 — Article 148(5), 149, 151
Cost and Works Accountants Act, 1959 — Section 2
Finance Act, 1994 — Section 72A
Income Tax Act, 1961 — Section 142(2A), 149, 44AB

Citation : (2013) 291 ELT 33 : (2013) 29 STR 337 : (2013) 59 VST 19

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : J.K. Mittal, Abhratosh Majumder, Paritosh Sinha, Amitava Mitra, Ms. Anupa Banerjee and Ms. Dolon Dasgupta, for the Appellant; Tapas Kr. Hazra, Sandip Bhattacharya, Indrajit Dasgupta, Ms. Ranjana Guha and K.K. Maiti, for the Respondent

Judgement

Indira Banerjee, J.—This writ application has been filed inter alia challenging a Notice No. RA/ST/Prog/D/18/131, dated 3rd November, 2011 issued by the Office of the Principal Director of Audit, Central Kolkata for audit, by the Central Excise Revenue Audit (CERA) team, an audit team under the Comptroller and Auditor General of India, of the Service Tax records, accounts and other related documents of the petitioner-company. The audit was proposed to be held between 12th December, 2011 and 16th December, 2011 and the petitioner-company was required to provide suitable accommodation for the audit team. The short-question involved in this writ application is whether CERA, an audit wing of the Principal Director of Audit (Central), Kolkata under the Comptroller and Auditor General of India, has power and/or authority and/or jurisdiction to

audit the accounts, Service Tax records or other documents of the petitioner-company, which is not an undertaking of the Central Government or any State Government.

2. The petitioner-company, incorporated under the Companies Act, 1956, is engaged in the business inter alia of trading in stocks and securities. The petitioner-company is a member of the Bombay Stock Exchange as well as the National Stock Exchange. Admittedly, the petitioner-company is not run out of funds or loan provided by the Central Government or any State Government or any other Government Undertaking or organization.

3. The petitioner-company has since 2004 been registered with the Service Tax authorities under the categories of "Stock Broking service", "Banking and Other Financial services" and "Business Auxiliary Services" its Registration number being AAEC3847AST004.

4. As a company incorporated under the Companies Act, 1956, the petitioner-company is governed by the provisions of the Companies Act, 1956 and is required to maintain its accounts in the manner prescribed by the Companies Act, 1956.

5. The accounts are required to be maintained in a manner that gives a true and proper picture of the affairs of the company. With the amendment of Section 209 of the Companies Act, 1956 it is now necessary for the companies incorporated under the Companies Act to maintain their accounts as per the mercantile system of accounting. The accounts are required to be maintained as per accounting standards laid down by the Institute of Chartered Accountants of India (ICAI). For preparation of accounts all companies maintain running account books of all sales and receipts.

6. Under the Companies Act and/or rules or regulations framed thereunder, the accounts so maintained are required to be audited by a Chartered Account and presented in the manner prescribed in the Companies Act. In addition, the petitioner-company is also required to have its accounts audited in terms of Section 44AB of the Income Tax Act. Public companies like the petitioner-company work in a glass house. All its activities have to be transparent. Its annual accounts and annual report are published and circulated inter alia amongst its share holders. The Accounts and Annual Reports are required to be filed with the Registrar of Companies and are available for inspection. All books of accounts of a company are available for inspection at its Registered Office.

7. Some of the statutes by which the petitioner-company is governed contain provisions for special audit. u/s 233A of the Companies Act, 1956, where the Central Government is of the opinion that the affairs of the company are not being managed in accordance with sound business principles or prudent commercial practices or that any company is being managed in a manner likely to cause serious injury or damage to the interests of the trade, industry or business to which it pertains or that the financial position of any company is such

as to endanger its solvency, the Central Government might by the same or a different order direct that a special audit of the company's accounts for such period or periods as may be specified in the order, shall be conducted and may by the same or by different order appoint either a Chartered Accountant as defined in Clause (b) of sub-section (1) of Section 2 of the Chartered Accounts Act, 1949 or the company's auditor himself to conduct such special audit.

8. The special auditor appointed by the Central Government u/s 233A of the Companies Act, has the same power and duties in relation to special audit as an auditor of a company u/s 227 of the Companies Act. The only difference is that in spite of making his report to the members of the company the special auditor submits its report to the Central Government.

9. Section 233B of the Companies Act provides that where in the opinion of the Central Government it is necessary so to do in relation to any company required u/s 209 to include in its books of account the particulars referred to therein, the Central Government might by order direct that an audit of cost accounts of the company shall be conducted in such manner as may be specified in the order by an auditor who shall be a Cost Accountant within the meaning of the Cost and Works Accounts Act, 1959. If the Central Government is of the opinion that sufficient number of Cost Accountants are not available for conducting the audit of the cost accounts of companies then a chartered accountant may be directed to conduct the audit of the cost accounts of the companies.

10. The Income Tax Act, 1961 and the Central Excise Act, 1944 also contain provisions for special audit. Section 142(2A) of the Income Tax Act provides as follows:

If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of Section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report to such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the [Assessing] officer may require:

[Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard]

11. Similarly, Section 14A of the Central Excise Act, 1944 provides as follows:

Special Audit in Certain cases

(1) If at any stage of enquiry, investigation or any other proceedings before him, any Central Excise Officer not below the rank of an Assistant Commissioner or

Deputy Commissioner of Central Excise, having regard to the nature and complexity of the case and the interest of revenue, is of the opinion that the value has not been correctly declared or determined by a manufacturer or any person, he may, with the previous approval of the Chief Commissioner of Central Excise, direct such manufacturer or such person to get the accounts of his factory, office, depots, distributors or any other place, as may be specified by the said Central Excise Officer, audited by a cost accountant or chartered accountant, nominated by the Chief Commissioner of Central Excise in this behalf.

(2) The cost account or Chartered Accountant, so nominated shall, within the period specified by the Central Excise Officer, submit a report of such audit duly signed and certified by him to the said Central Excise Officer mentioning therein such other particulars as may be specified:

Provided that the Central Excise Officer may, on an application made to him in this behalf by the manufacturer or the person and for any material and sufficient reason, extend the said period by such further period or periods as he thinks fit; so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (1) is received by the manufacturer or the person.

(3) The provisions of sub-section (1) shall have effect notwithstanding that the accounts of the manufacturer or person aforesaid have been audited under any other law for the time being in force or otherwise.

(4) Deleted

(5) The manufacturer or the person shall be given an opportunity of being heard in respect of any material gathered on the basis of audit under sub-section (1) and proposed to be utilised in any proceedings under this Act or rules made thereunder.

12. Section 72A of the Finance Act, 1994, as amended, provides as follows:

72A. Special audit.-(1) If the Commissioner of Central Excise, has reasons to believe that any person liable to pay Service Tax (herein referred to as "such persons"), -

(i) has failed to declare or determine the value of a taxable service correctly; or

(ii) has availed and utilized 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 willful 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) The chartered accountant or cost accountant referred to in sub-section (1) shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him.

(3) The provisions of sub-section (1) shall have effect notwithstanding that the accounts of such person have been audited under any other law for the time being in force.

(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 sub-section (1) and proposed to be utilized in any proceeding under the provisions of this Chapter or rules made thereunder.

Explanation-For the purposes of this section, -

(i) "chartered accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of Section 2 of the Chartered Accountants Act, 1949 (38 of 1949);

(ii) "cost accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of Section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959)].

13. It is now well settled by judicial pronouncements that an order for special audit is required to be made upon compliance with principles of natural justice. Reference may in this context be made to the judgment of the Supreme Court in Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I and Another, The Supreme Court held that the expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. Anything which affects a citizen in his civil life comes under its wide umbrella.

14. Section 142(2A) of the Income Tax Act, 1961 was held to entail civil consequences and the rule of audi alteram partem was held to be a necessary prerequisite for an order of special audit u/s 142(2-A) of the Income Tax Act. Even though the judgment of the Supreme Court in Sahara India (Firm), Lucknow (supra) relates to Section 142(2-A) of the Income Tax Act, there is no reason why the same principle should not apply to Section 14(A) of the Central Excise Act and Section 72A of the Finance Act, 1994, as amended.

15. The condition precedent for special audit u/s 72A of the Finance Act, 1994, as amended, is reason to believe that any person liable to pay Service Tax, has failed to declare or determine the value of a taxable service correctly, or has

availed and utilized credit of duty or tax paid in excess of entitlement by means of fraud, collusion or any wilful misstatement or suppression of facts or has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of its accounts from the registered premises falling under the jurisdiction of the said Commissioner.

16. The condition precedent for an order of special audit is reason to believe that the circumstances stipulated in the various sub-sections of Section 72A exist. Such insinuation of wrongful act affects the citizen in his social life and would come within the ambit of civil consequences as laid down in Sahara India (Firm), Lucknow (supra).

17. Be that as it may, in these proceedings, the petitioner has not questioned special audit under the Finance Act, 1944 or under the Central Excise Act, 1944.

18. The impugned notice in the instant case has been issued by the Office of the Principal Director of Audit (Central) Kolkata for audit by CERA of the Service Tax records, accounts and other related documents of the petitioner company.

19. The Comptroller and Auditor General of India is a Constitutional Authority appointed u/s 148 of the Constitution of India. The duties and powers of the Comptroller and Auditor General of India are circumscribed by Article 149 of the Constitution of India, set out herein below for convenience:

Section 149 -Duties and powers of the Comptroller and Auditor General.-The Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

20. Article 148(5) of the Constitution of India provides as follows:

Article 148(5)-Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

21. Article 151 of the Constitution of India provides that the reports of the Comptroller and Auditor General of India relating to the accounts of the Union are to be submitted to the President, who is to cause them to be laid before each House of Parliament and the reports of the Comptroller and Auditor General of India relating to the accounts of the State are to be submitted to the Governor who is to cause them to be laid before the Legislature of the State.

22. In view of Article 149 of the Constitution of India the Comptroller and Auditor General of India is to perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament.

23. None of the statutes referred to above, namely, the Companies Act, 1956, the Income Tax Act, 1961, the Central Excise Act, 1944 or the Finance Act, 1994 as amended from time to time contain any provision for audit by the Comptroller and Auditor General of India or any audit team subordinate to the Comptroller and Auditor General of India, of any company incorporated or existing under the Companies Act, 1956, except a government company within the meaning of Section 619 of the said Act.

24. The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 (herein after referred to as the CAG Act) has been enacted inter alia to prescribe the duties and powers of the Comptroller and Auditor General of India and/or matters connected therewith or incidental thereto. The duties and powers of the Comptroller and Auditor General are enumerated in Chapter III of the CAG Act.

25. Mr. J.K. Mittal appearing on behalf of the petitioner submitted, and in my view, rightly that there is no provision in the CAG Act which enables the Comptroller and Auditor General of India to audit the accounts of a non-government company which is not operated out of the funds of the Union of India or any State Government or any Union Territory or any entity owned and/or financed by them.

26. Mr. Tapas Kr. Hazra, has emphatically argued that Section 16 of the CAG Act empowers the Comptroller and Auditor General of India to conduct the audit impugned in the writ application. Before advertng to Section 16 it could perhaps be pertinent to refer to Sections 13 to 15 of the CAG Act where-from it will be absolutely clear that the primary duty and function of the Comptroller and Auditor General of India is to audit expenditure from the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to ascertain whether the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose for which they have been applied or charged and whether the expenditure conforms to the authority which governs it.

27. The Comptroller and Auditor General of India is required to audit all transactions of the Union and of the States relating to Contingency Funds and Public Accounts and also audit all trading, manufacturing, profit and loss accounts and balance sheets and other subsidiary accounts kept in any department of the Union or of a State.

28. In addition, where any body or authority is substantially financed by grants or loans from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly, the Comptroller and Auditor General shall

subject to the provisions of any law for the time being in force, applicable to the body or authority, as the case may be, audit all receipts and expenditure of that body or authority and report on the receipts and expenditure audited by him.

29. As observed above, it is nobody's case that the petitioner was financed by, or is run out of any loan from the Union of India or any State Government or any Union Territory.

30. Section 14(2) of the CAG Act provides that notwithstanding anything contained in sub-section (1) the Comptroller and Auditor General might, with the previous approval of the President, or the Governor of a State, or the Administrator of a Union Territory having a Legislative Assembly, as the case may be, audit all receipts and expenditure of any body or authority where the grants or loans to such body or authority from the Consolidated Fund of India or of any State or of any Union Territory having a Legislative Assembly, as the case may be, in a financial year is not less than Rupees one crore. This section admittedly also has no application.

31. u/s 16 referred to by Mr. Hazra, it is the duty of the Comptroller and Auditor General to audit all receipts which are payable into the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed, and to make for this purpose such examination of the accounts as he thinks fit and report thereon.

32. It is difficult to appreciate how the aforesaid provisions can empower the Comptroller and Auditor General to audit the accounts of a nongovernmental company which does not receive any grant or loan or aid from any government or any government undertaking. What the Comptroller and Auditor General of India is obliged to do is to audit all receipts which are payable into Consolidated Fund of India.

33. There is a difference between receipts and receivables Receipts necessarily means that which has been received. In other words, u/s 16 it is the duty of the Comptroller and Auditor General of India to audit the tax and other amount which has been collected and are payable into the Consolidated Fund of India or the Consolidated fund of the State or of a Union Territory having a Legislative Assembly. In course of such audit the Comptroller and Auditor General of India is to satisfy himself that the rules and procedures are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed, and to make, for this purpose, such examination of the accounts as the Comptroller and Auditor General of India might deem fit and make a report thereon. The word "Accounts" is to be read and construed in the light of the definition of "accounts" in Section 2(A) of the CAG Act. Unless the context otherwise requires, "accounts" in relation to commercial undertakings of a Government are to include trading, manufacturing and profit and loss accounts

and balance sheets and other subsidiary accounts. In the absence of any enabling provision which empowers the Comptroller and Auditor General of India to audit the accounts of a non-government company, Section 16 of the CAG Act is to be construed to empower the Comptroller and Auditor General of India to examine the accounts of the government, in the context of his duty to audit all receipts of the government which are payable into Consolidated Fund of India or of the Consolidated Fund of a State or of a Union Territory having a Legislative Assembly.

34. This Court accepts the submission of Mr. Mittal that Section 16 of the CAG Act does not authorize the Comptroller and Auditor General of India or any audit team under the control of the Comptroller and Auditor General of India to audit the accounts of a non-government company and that too in the absence of any request either from the President of India or the Governor of the State.

35. Section 19(3) of the CAG Act provides as follows:

The Governor of a State or the Administrator of a Union territory having a Legislative Assembly may, where he is of opinion that it is necessary in the public interest so to do, request the Comptroller and Auditor General to audit the accounts of a corporation established by law made by the Legislature of the State or of the Union territory, as the case may be, and where such request has been made, the Comptroller and Auditor General shall audit the accounts of such corporation and shall have, for the purposes of such audit, right of access to the books and accounts of such corporation.

Provided that no such request shall be made except after consultation with the Comptroller and Auditor General and except after giving reasonable opportunity to the corporation to make representations with regard to the proposal for such audit.

36. In this case, there was no request to the Comptroller and Auditor General by the Governor of the State in which the petitioner company carries its operations. A perusal of the Regulations of Audit and Accounts 2007, framed by the Comptroller and Auditor General of India in pursuance of Section 23 of the CAG Act, also makes it clear that all audits are to be undertaken by the Comptroller and Auditor General of India as per the Constitution of India and as per the CAG Act.

37. The only provision of the CAG Act, under which the accounts of a non-government company can be audited, is perhaps sub-section (1) of Section 20. Audit cannot be undertaken under the aforesaid provision, unless the Comptroller and Auditor General is requested to do so by the President of India or the Governor of a State or the Administrator of Union Territory.

38. The condition precedent for audit of a non-government body is a request from the President of India, Governor of the State concerned or the Administrator of a Union Territory concerned after consultation with the

Comptroller and Auditor General of India. The conditions precedent for an audit by the office of the Comptroller and Auditor General of India are wholly absent in the facts and circumstances of the case.

39. In exercise of power conferred by sub-section (1) read with subsection (2) of Section 94 of the Finance Act, 1994 the Central Government has made the Service Tax Rules, 1994. Section 94(1) of the Finance Act, 1994 empowers the Central Government to make rules for carrying out the provisions of Chapter V of the said Act, by notification in the official gazette. Sub-section (2) of Section 94 enumerates the matters for which rules might be made. The power conferred under sub-section (2) of Section 94 to make rules in respect of the matters enumerated in the said sub-section is without prejudice to the generality of Section 94 sub-section (1) whereby the Central Government has power to make rules for carrying out the provisions of Chapter V.

40. Mr. Hazra appearing on behalf of the respondent authorities submitted that Rule 5A of the Service Tax Rules, 1994, which is almost in pari materia with Rule 173G(6)(c) of the Central Excise Rules, 1944 provides for audit by an audit team deputed by the Comptroller and Auditor General of India.

41. Rule 173G(6)(c) of the Central Excise Rules, 1944 and Rule 5A of the Service Tax Rules are set out herein below for convenience:

Rule 173G(6)(a): Every assessee shall, on demand make available to the Central Excise Officer or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India:

(i) the records maintained or prepared by him in terms of clause (a) of sub-rule (5),

(ii) The cost audit reports, if any, u/s 233B of the Companies Act, 1956; and

(iii) The income tax audit report, if any, u/s 44AB of the income tax Act, 1961 for the scrutiny of the officer or audit party, as the case may be;

(b) Every assessee who is having more than one factory and maintains separate records in respect of every factory for the purpose of audit then, he shall produce the said records for audit purposes.

(c) Where the Commissioner or the Comptroller and Auditor General of India decide to undertake the audit of the records of any assessee, the said assessee shall be given notice thereof at least fifteen days before the commencement of such audit. The audit party deputed for the purpose shall also call for in writing the records, which are required to be produced by the assessee, either before or during the course of audit.

(d) Every assessee, who maintains or generates his records by using computer, shall provide the required records in the form of tapes or floppies or cartridges or compact disk or any other media in an electronically readable format as prescribed by the Commissioner at the time of audit. The copies or records, so

furnished, shall be duly authenticated by the assessee.

(e) All records submitted to audit party in electronic format shall be used only for verification of payment of duties of excise or for verification of compliance of the provisions of the Central Excise Act, 1944 or the rules made thereunder and shall not be used for any other purpose without the written consent of the assessee.

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, u/s 44AB of the income tax Act, 1961 (43 of 1961), for the scrutiny of the officer or audit party, as the case may be.]

42. As observed above the Central Government derives the power to make rules from Section 94 of the Finance Act, 1994, Section 94 empowers the Central Government to make rules for carrying out the provisions of Chapter V of the said Act and without prejudice to the generality of the power to make rules for carrying out the provisions of Chapter V to make rules in respect of the matters enumerated in sub-section (2) of Section 94 of the Finance Act.

43. The Central Government has no power and/or authority u/s 94 of the Finance Act, 1994 to frame rules for any purpose other than those specified in sub-section (2) of Section 94 of the Finance Act or for any purpose other than carrying out the provisions of Chapter V of the said Act.

44. In this writ petition the petitioner has also challenged the vires of Rule 5A of the Service Tax Rules contending inter alia, that the said rule is in excess of the rule making power conferred under the Finance Act, 1994.

45. Mr. Mittal submitted that Rule 5A(2) of the Service Tax Rules which provides that every assessee shall, on demand, make available to the officer authorized by the Commissioner, or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, the records and documents, as specified in the said Section, within reasonable time, is ultra vires the rule making power conferred on the Central Government by Section 94 of the Finance Act, 1994, since there is no provision in Chapter V of the Finance Act, 1994

which empowers the CAG to audit the accounts of an assessee which is a non-government company, not in receipt of any aid or assistance from any government or government entity.

46. As rightly argued by Mr. Mittal, there is no provision in Chapter V of the Finance Act, 1994 or for that matter in the CAG Act which empowers the CAG to audit the accounts of an assessee which is a non-government company, not in receipt of aid or assistance from any government or government entity. Sub-section (2) of Section 94 also does not empower the Central Government to frame rules for audit of the accounts of an assessee by any audit team under the Comptroller and Auditor General of India. There can be no doubt that statutory rules, framed in exercise of power conferred by statute cannot introduce something not contemplated in the statute, from which it derives its rule making power.

47. In the absence of any provision in Chapter V of the Finance Act, 1994 for audit of the accounts of a non-government company by the Comptroller and Auditor General of India or any team under him, the Central Government could not have framed, and has not framed any rules which provide for audit by the Comptroller and Auditor General of India or any audit team under his control of an assessee which is not a government company.

48. It is well settled principle of interpretation that statutory rules must be construed in harmony with the rule making power, in exercise of which, the statutory rule has been made. If it were possible to interpret the statutory rule in more ways than one, the Courts would prefer that interpretation which would make the statutory rule workable and intra vires, to that interpretation which would render the rule ultra vires and invalid.

49. On a plain reading of Rule 5A(2) of the Service Tax Rules, the said Rule does not empower the CAG to audit the accounts of any assessee. While sub-rule (1) of Rule 5A provides for access of any officer authorized by the Commissioner to any premises registered under the Service Tax Rules, for carrying out any scrutiny, verification or check, as may be necessary to safeguard the interest of revenue, sub-rule (2) of Rule 5A only casts an obligation on the assessee to make the records and documents as specified in the said Rule available to the officer authorized by the Commissioner, or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India within a reasonable time not exceeding 15 working days from the date of demand.

50. On a harmonious reading of Rule 5A of the Service Tax Rules with the provisions of Chapter V of the Finance Act, 1994, as amended, it may be deduced that any officer authorized by the Commissioner would have to be interpreted to include the members of an audit team, an auditor or an accountant authorized by the Commissioner, and they would all have access to any premises registered under the Rules, for the purpose of carrying out scrutiny, verification and checks as might be necessary, including auditing of

accounts, to safeguard the interest of Revenue. It is, however, pertinent to note the difference in the language and tenor of sub-rule (2) of Rule 5A under which every assessee is required, on demand, to make available to the officer authorized by the Commissioner or the Comptroller and Auditor General of India the records and documents specified in the said Rule, within a reasonable time. The obligation to produce records is in harmony with the power conferred on the Central Government to make rules for carrying out the provisions of Chapter V of the Finance Act, 1994 including collection and recovery of Service Tax, determination of amount of value of taxable service etc. In course of audit of receipts of the Government, if the audit team under the Comptroller and Auditor General of India require the records and documents specified in the Rule, the same would have to be made available within a reasonable time from the date of demand.

51. Mr. Hazra referred to an unreported judgment and order passed by a Single Bench of this Court, (P.K. Ray, J.) in W.P. 2762 of 2000 (M/s. Berger Paints India Limited and Others v. Joint Commissioner (Audit) Central Excise, Calcutta-II Commissionerate, Calcutta & Ors., where the vires of Rule 173G(6)(c) of the Central Excise Rules, 1944, which is similar to Rule 5A of the Service Tax Rule was under challenge. However, it appears that the challenge to the vires of the rule was not pressed at the time of hearing. The Court recorded:

on the vires point of the Rule 173-G(6)(c) of Central Excise Rules, 1944 as prayed for, nothing has been argued, as such the prayer (a) to that effect is not the subject matter of this writ for adjudication.

52. The Court noted the following points for adjudication:

1. Whether Rule 173(6)(c) of Central Excise Rules, 1944, which provides that Commissioner or the Comptroller and Auditor General of India would be entitled to undertake the audit of records of any assessee, has vested both the authorities, namely, Commissioner of Central Excise and the Comptroller and Auditor General of India to undertake respective audits of the records of any assessee by interpreting the word "or" conjunctively as argued by the respondents.

2. If the answer to point no (1) is "yes", that is, the word "or" has to be read conjunctively, to empower both the said authorities to conduct respective audits, whether the notice for audit issued could be assailed in the writ jurisdiction.

3. Whether writ challenging a notice of audit is maintainable, when such notice to audit does not fix any liability, but is only a procedural check-up by audit of the accounts and other documents as contemplated in the impugned notice, and causes no prejudice.

53. From the judgment in Berger Plaints (supra) it appears that the main thrust of the argument was that a Special Audit having been conducted under the Central Excise Act, further audit could not be conducted by the Office of the

Comptroller and Auditor General. It was emphatically argued that the use of the word "or" should be construed disjunctively. The power of the Comptroller and Auditor General to conduct an audit of a non-government Company, in the absence of request from the President of India or the Governor of a State, was not questioned and hence not in issue. In the context of the arguments made by Counsel, the Court held that the expression "or" was to be construed conjunctively and not disjunctively as sought to be argued.

54. The obligation to provide records to the audit party deputed by the Comptroller and Auditor General is to be construed as an obligation to provide documents and records, when those documents and records are necessary for audit is in accordance with law, subject to the provision of the CAG Act, for example, audit of the receipts of the Government meant for deposit in the Consolidated Fund of India or, may be, an audit on the request of the Governor or the President as indicated above.

55. The obligation under sub-rule (2) of Rule 5A is in my view, to be construed harmoniously to cast an obligation in case of a lawful demand to produce requisite records and documents. The obligation to make records and documents available does not oblige an assessee to agree to unauthorized audit of its accounts by an audit team from the office of the Comptroller and Auditor General of India.

56. In my view, the impugned notice cannot be sustained and the same is liable to be set aside. However, in view of the judgment rendered by P.K. Ray, J. in *Berger Paints India Ltd.* (supra) in the context of Rule 173G(6)(c) which is in *pari materia* with Rule 5A of the Service Tax Rules, this Court is of the view that judicial propriety demands that this writ application be referred to a Division Bench for adjudication.

57. The issues involved in the writ application being W.P. No. 20517 (W) of 2012, though not identical, are to a great extent similar to the issues involved in W.P. No. 21053 (W) of 2011 disposed of earlier inasmuch as proceedings have been reopened on the recommendation of the CERA, which is an audit team subordinate to the Comptroller and Auditor General of India. In the aforesaid case too the audit was undertaken by the Comptroller and Auditor General on his own, without any request from the President of India or the Governor of the State. The findings in Writ Petition No. 21053 (W) of 2011 would have a substantial bearing on the decision in W.P. No. 20517 (W) of 2012. Judicial Propriety demands that W.P. No. 20517 (W) of 2012 should also be placed before the Division Bench along with W.P. No. 21053 (W) of 2011 for analogous hearing. The two Writ Petitions may be placed before the Hon'ble the Chief Justice for assignment to a Division Bench.