

One More Opportunity - Service Tax Audit

Background

The conduct of an audit today maybe the ONLY check against the tax payer taking the payment of tax lightly. The philosophy is that the Government trusts the tax payer but wishes to ensure compliance and payment of just dues. Earlier all tax years were scrutinized. The reduction in the number of assesses picked up for audit makes the need for audit imperative. In this backdrop we examine legality of service tax audit and the recent notification 23/2014-ST chartered accountants and Cost accountants's can conduct service tax audit.

Whether service tax audit is legal?

As per Rule 5A(2) of Service Tax Rules, 1994 every assessee was required to make available on demand specified documents to the authorized officer or audit party deputed by the Commissioner or C&AG within 15 days from date of demand or such extended period allowed.

A special audit could be undertaken if the circumstances outlined in Section 72A are fulfilled. The fact that Section 72A prescribes the conditions meriting such special audit leads to the inference that there was no intend to provide for a general audit that "every assessee" may be subjected to, "on demand".

In *ACL Education Centre Private Limited v. UOI - 2014-TIOL-120-HC-ALL-ST*, the Allahabad High Court held that Rule 5A(2) only empowers the officers, as duly authorized by the Commissioner to ask for and collect records from the assessee. The audit can only be undertaken by an authorized Chartered Accountant or Cost Accountant, as provided in Section 72A.

The Calcutta High Court in *SKP Securities Limited v. Deputy Director - 2013-TIOL-38-HC-KOL-ST* held that no provision in Chapter V of the Finance Act, 1994 or the CAG Act, 1971 empowers the CAG to undertake audit of accounts of a non-governmental assessee as these assesseees are not in the receipt of any aid or grant from the government.

In terms of Delhi HC decision in *Travelite (India) Vs. UOI &Ors. 2014-TIOL-1304-HCD* on the Service Tax Audit issue it is held that: Rule 5A(2) of the Service tax Rules is ultra vires the provisions of the Finance Act and the rule has been struck down.

As can be seen, the issue of maintainability of Rule 5A(2) had been dealt with by the High Courts of Calcutta and Allahabad and finally struck down by Delh. It is pertinent to note

that the FA (No.2)Act, 2014 amended the provisions of rule-making powers under Section 94(2)(k) to impose duty of furnishing information, keeping records and the manner in which such records shall be verified..

Though it fixes a responsibility on the tax payer in relation to his obligation for furnishing of information, keeping records and the manner in which the records shall be verified. It does not specify who the records shall be verified by, and circumstances in which such verification is to be done. Already audit intimation letters are being issued to assesseees by department officers citing legality of service tax audit in view of the substituted sub-clause in Section 94.

Scope and impact of the recent notification

As per latest notification 23/2014-ST sets out as under:

.....*In the Service Tax Rules, 1994, in rule 5A, for sub-rule (2), the following sub-rule shall be substituted, namely:-*

*“(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.”*

This notification seems to give effect to the direction in ACL Education where the Additional Solicitor General of India has assured that the audit will be performed by a qualified Chartered Accountant and as per accounting standard”. **Here the important aspect maybe to ensure the independence and integrity of the auditor who does the service tax audit.**

Despite the recent notification empowering a CA to conduct service tax audit, the judiciary view is that legality of service tax audit seems to be under doubt. It was also held in

Sadbhav Engineering Ltd vsUOI(2014-TIOL-2136-HC-AHM-ST)while granting stay that prima facie, 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. Stay granted.

Conclusion

As of date there is no clarity as to the powers of conducting audit of private parties under service tax law. Notwithstanding the legality of audit, sufficient checks and balances to be put in place to ensure that the mandate to the CA/CMA to undertake audit is done by competent persons with requisite knowledge of service tax provisions. This is also a landmark opportunity for professionals to be able to contribute to the country and uphold the high ethical standards of the profession.