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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1135 OF 2019

Kiran Gems Private Limited

.. Petitioner

Versus

Union of India and Ors.

.. Respondents

-
- Mr. Bharat Raichandani, Advocate for the Petitioner.
 - Mr. Pradeep S. Jetly, senior counsel a/w. Mr. J. B. Mishra, Advocate for the Respondents.
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CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

RESERVED ON : JANUARY 11, 2021.
PRONOUNCED ON : JANUARY 29, 2021.

JUDGMENT : (Per : Milind N. Jadhav,J.)

Heard Mr. Bharat Raichandani, learned counsel for the petitioner and Mr. Pradeep Jetly, learned senior counsel alongwith Mr. J.B. Mishra, learned counsel for the respondents.

2. This petition has been filed under the provisions of Articles 226 and 227 of the Constitution of India by the petitioner, Kiran Gems Private Limited, a private limited company, seeking quashing of notice / intimation dated 10.01.2019 issued by Superintendent, Range-III, CGST, Division IV, Mumbai East, *inter alia*, intimating that petitioner's case has been selected for scrutiny / audit by LAP-XII CERA (GSTA) for the period January 2019 to March 2019 and to submit information / records for the period 2015-16 to 2017-18 to the officers of CERA for audit.

3. Central Excise Revenue Audit (for short '**CERA**') is conducted under the overall supervision of the Principal Director of Audit, (Central) Kolkata in the Indian Audit Department of Government of India.

4. Petitioner's primary assertion is that the impugned notice / intimation seeking audit of petitioner's accounts is without jurisdiction i.e it has been issued without invoking the provisions of statutory laws under which a special audit, as purported, can be conducted. The period for which the accounts are sought to be audited appear differently in the covering letter and the annexure to the intimation letter. There is no enabling statutory provision available to the respondents to seek information pertaining to pre and post GST era for CERA audit from a private entity; such action suffers from a jurisdictional error since power to audit being a statutory power traceable to the relevant statute being absent in the present case. In the affidavit-in-reply respondents have contended that power to conduct CERA audit has been invoked under the provisions of Section 16 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service, Act 1971 (for short '**the CAG's (DPC) Act**'); the said section cannot apply to a private entity as the said Act provides for audit by the Comptroller and Auditor General of India (for short '**the CAG**') of all receipts which are payable into the Consolidated Fund of India and of each State and each Union Territory. This contention of respondents is challenged by the petitioner on the ground of lack of inherent jurisdiction being not available to the respondents to invoke the provisions of Section 16 of the CAG's (DPC) Act in the petitioner's case.

5. Before we advert to the submissions made by learned counsel for the parties, it will be apposite to briefly refer to the relevant facts:-

5.1. Petitioner is engaged in manufacture and export of cut and polished diamonds and is registered as service provider under the provisions of Finance Act, 1994 bearing service tax registration No.AADCK1665MST001.

5.2. Petitioner had been paying service tax diligently and had been filing ST-3 returns periodically as required.

5.3. By email dated 10.01.2019, office of respondent No.3 i.e. Assistant Commissioner of Central Tax, intimated the petitioner that CERA audit was being conducted for the period from January 2019 to March 2019 and that petitioner's case was selected for scrutiny / audit by LAP-XII CERA (GSTA). Petitioner was called upon to submit information / records for the period 2015-16 to 2017-18 as per annexure attached to the letter directly to the officers of CERA. It may be mentioned that from July, 2017 the Goods and Services Tax (GST) regime came into force and the erstwhile service tax stood subsumed in GST.

5.4. Annexure to the impugned letter called upon petitioner to produce the following record for the period 2015-16 to 2017-18:

- (i) *Annual financial statement viz. Profit & Loss Account, Balance Sheet, Trial Balance;*
- (ii) *Tax Audit Report, Cost Audit Report;*
- (iii) *Cenvat register containing details of Cenvat credit availed and utilised;*
- (iv) *List of MOUs, contract / agreements signed with other companies to whom services have been provided / received from which is having its office outside India;*
- (v) *Copies of ST / Excise returns of the period covered by Audit;*
- (vi) *List of running projects / lease agreements;*

- (vii) *List of purchase orders / contracts;*
- (viii) *Internal Audit Report (EA 2000), SCN and any other communication from the Department;*
- (ix) *All ledger accounts in respect of related party transactions;*
- (x) *List of fire cases / theft, cases / destroyed, goods / records ceased by the department along with related correspondences with the department and insurance companies;*
- (xi) *Job work register;*
- (xii) *Cost sheet for goods captively consumed;*
- (xiii) *List of exempted goods / services option exercised, value and notification under which exemption claimed (Rule 6 of Cenvat Credit Rules, 2004);*
- (xiv) *Tran-1 return and list of invoices on which transitional credit claimed;*
- (xv) *GSTR-3B of July 17 to March 18.*

5.5. By letter dated 20.02.2019 petitioner sent a reply, *inter alia*, stating that CERA audit cannot be conducted for the period prior to introduction of GST. Rule 5A of the Service Tax Rules did not apply to the petitioner's case and that audit being a special function cannot be carried out by officers of the Department and required appointment of Chartered Accountant or Cost Accountant. However, it was not responded.

5.6. Aggrieved, the present writ petition has been filed to challenge the impugned notice / intimation and annexure, both dated 10.01.2019, as *ex facie* illegal and without jurisdiction.

6. Respondents have filed affidavit. Stand taken in the affidavit is that CERA had proposed to conduct audit of Range-III, Division IV of Mumbai East Commissionerate during the period 02.01.2019 to 28.03.2019 under section 16 of the CAG's (DPC) Act which provides for audit by CAG of all receipts which are payable into the consolidated fund of India. CERA conducts audits of the department as part of which they examine the records of the assesseees which focus the basis for performance of the department. This is to ascertain

whether private companies are properly depositing their taxes etc.

7. Petitioner has filed rejoinder affidavit refuting the stand taken by the respondents and reiterating its contentions made in the writ petition.

8. Mr. Raichandani, learned counsel appearing on behalf of the petitioner submitted that power to conduct special audit is a statutory power traceable to the relevant statutes and the impugned communication calling for audit of petitioner company for the period 2015-16 to 2017-18 being traceable to no such power is wholly without jurisdiction. Respondent's reliance on the provisions of Section 16 of the CAG's (DPC) Act to conduct audit of accounts of petitioner company is wholly misplaced as Section 16 does not authorise the CAG or any audit team under the control of CAG to audit accounts of a non-government company unless the CAG is requested to do so by the President of India or the Governor of the State or the Administrator of Union Territory as prescribed under Section 20 of the Act. In the absence of such permission seeking audit of a non-government company, impugned notice / intimation to petitioner is *ex-facie* without jurisdiction, illegal, unconstitutional and therefore be quashed.

8.1. Petitioner company being incorporated under the Companies Act, 1956, it is governed by the provisions of the Companies Act, 1956 and is thus required to maintain its accounts in the manner prescribed by the Companies Act, 1956. 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 and books of all sales and receipts. Under the Companies Act and the rules and 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. 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.

8.2. Some of the statutes governing the petitioner company contain provisions for special audit; viz,:-

- (i) Under Section 233A of the Companies Act, 1956 (for short '**the Companies Act**') 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, Central Government may direct a special audit and

appoint a Chartered Accountant for the same. The special auditor appointed by the Central Government under Section 233A of the Companies Act, has the same power and duties in relation to special audit as an auditor of a company under Section 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;

- (ii) Section 233B of the Companies Act provides that where in the opinion of the Central Government it is necessary to do so and as required under Section 209 to include in the books of account the particulars referred to therein, the Central Government may by order direct a special audit of cost accounts and appoint a Cost Accountant for the same;
- (iii) Under Section 142(2A) of the Income Tax Act, 1961 (for short '**the Income Tax Act**') under the Assessing Officer at any stage of the proceedings before him having regard to the nature and complexity of the accounts of the assessee and the interest of revenue, is of the opinion that it is necessary to do so, may with the previous approval of the Chief Commissioner or Commissioner direct the assessee to get the accounts audited by an accountant after following the principles of natural justice and furnish the report of such auditing of accounts in the prescribed form;
- (iv) Under Section 14A of the Central Excise Act, 1944

(for short '**the Central Excise Act**') if at any stage of inquiry, investigation or any other proceeding before the Central Excise Officer not below the rank of Assistant Commissioner or Deputy Commissioner of Central Excise, the Officer is of the opinion that the value has not been correctly declared or determined by a manufacture 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 etc. audited by a Cost Accountant or Chartered Accountant;

- (v) Under Section 72A of the Finance Act, 1994 (for short '**the Finance Act**') if the Commissioner of Central Excise has reasons to believe that any person liable to pay service tax has failed to declare or determine the value of taxable service correctly or for such other reasons specified under the said Section, he may direct such person to get his accounts audited by a Chartered Accountant or Cost Accountant to the extent and for the period as specified.

8.3. Aforesaid statutes governing the petitioner company can be invoked for conducting special audit in compliance with the principles of natural justice. Admittedly no such case has been made out or permission obtained for carrying out special audit of the petitioner company as required under the above statutes. As none of the aforesaid provisions have been invoked, impugned letter / action seeking special audit of the accounts of petitioner for the period 2015-16 to 2017-18 is wholly without jurisdiction.

8.4. In reply to respondents' stand that impugned action is invoked under the provisions of Section 16 of the CAG's (DPC) Act, Petitioner asserts that none of the statutes referred to above contain any provision for conducting audit / special audit by the CAG. Articles 148(5), 149 and 151 of the Constitution of India read with the relevant provisions contained in Chapter III of the CAG's (DPC) Act do not empower the CAG to carry out CERA audit of petitioner which is a non-government company. No request to the CAG by either the President of India or by the Governor of the State in which the Petitioner Company carries on its operations has been made for seeking special audit. Hence, the impugned notice / intimation is without jurisdiction and liable to be set aside;

8.5. Reliance is placed on the constitutional provisions read with the CAG's (DPC) Act and reference is made to the case of *M/s. Ram Textiles Ltd., Rampur Vs. Income Tax Officer, Rampur*¹, arguing that the question as to whether the jurisdictional fact has rightly been decided or not was a question open to examination by the High Court in an application under Article 226 of the Constitution of India. It has been held that no authority, much less a *quasi-judicial* authority, could confer jurisdiction on itself by deciding the jurisdictional fact wrongly. The case of *Shrisht Dhawan Vs. Shaw Brother*², is referred to wherein the Apex Court while following its earlier judgment in *M/s. Roza Textiles Ltd.*, held that a Court or Tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly. Reliance is also placed on the Constitution Bench judgment of the Apex Court in the case of *Calcutta Discount Company Ltd. Vs. Income Tax Officer, Companies District – I,*

1 AIR 1973 SC 1362

2 (1992) 1 SCC 534

*Calcutta & Anr.*³, wherein it is held that where the action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or direction to prevent the same.

9. PER CONTRA, Mr. Jetly, learned Senior counsel appearing on behalf of the respondents submitted that the impugned communication issued under the provisions of Section 16 of the CAG's (DPC) Act provides for audit by the CAG of all receipts payable into the Consolidated Fund of India and of each State and each Union Territory having a legislative assembly. CERA conducted audit of the department as part of which examination of records of the assessee i.e. the petitioner company which form the basis for performance of the concerned department is necessary. Therefore CERA has called for records of the petitioner for the period 2015-16 to 2017-18 which it is legitimately entitled to audit. Every private party such as the petitioner is bound to provide all records and documents called for by CAG in CERA audit. Petitioner company being selected for audit / scrutiny, CERA is authorized under the provisions of Section 16 of the CAG's (DPC) Act to conduct audit of the concerned government department and as a part of which examination of records of the petitioner has become necessary. Reliance is placed on the provisions of Section 16 of the CAG's (DPC) Act relating to audit of receipts of Union or of States in the Consolidated Fund of India. It is contended that there is no merit in the writ petition and the same be dismissed.

10. Submissions made by learned counsel for the parties have been duly considered. Material on record has been perused.

3 AIR 1961 SC 372

11. Section 72A of the Finance Act, 1994, which relates to special audit reads as under:--

“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 person"),--

(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 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) 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)."

11.1. The above-mentioned section is applicable, where the assessee is not maintaining the books of account properly to ascertain the liability of service tax. To determine the correct tax, books will have to be examined and if need be, audited by a qualified Chartered Accountant.

11.2. It may be mentioned that the accounts will be audited by a Chartered Accountant or a Cost Accountant to be appointed by the Commissioner. In Clause (2) to Section 72A, it is stated that the Chartered Accountant or Cost Accountant will submit a report duly signed and certified by him to the Commissioner. In Clause (4), it is stated that 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. Copy of the audit report may be made available to the assessee and a proper opportunity will also be provided to him, as per law.

12. Rule 5A of the Service Tax Rules, 1994 is to facilitate the above-mentioned provision. It reads thus:-

"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."

(Emphasis Added)

12.1. Rule 5A sub-rule (2) states that every assessee shall, on demand, make available to the officer authorised or the audit party, records, trial balance and income-tax audit report, if any. The officer may demand the documents to ensure correctness of the books of accounts and ultimately, the audit will be conducted by the audit party headed by the Chartered Accountant/Cost Accountant, as the case may be, deputed by the Commissioner. It is Commissioner on whose behalf the officer will collect the material and the auditor will perform the audit. In any case, the final report duly signed by the Chartered Accountant will be submitted to the Commissioner. In case of government autonomous bodies, the function of audit has been assigned to CAG.

13. From the above, it is crystal clear that in case of a private assessee, Commissioner will refer the matter to an officer to collect the material or Chartered Accountant for the purpose of audit. Thus, for the purpose of audit, material can be collected either by the officer authorized by the Commissioner or by the auditor himself. But, audit will be performed only by the Chartered Accountant. It is the pious duty of the assessee to make available the record as mentioned in Rule

5A i.e. trial balance or its equivalent; and the Income-tax audit report, if any, under Section 142(2A) of the Income Tax Act, 1961, for the scrutiny of the officer or the audit party, as the case may be.

14. Admittedly, in the present case the impugned notice / intimation dated 10.01.2019 seeking audit of petitioner's accounts is not contemplated under the provisions of Rule 5A of the Service Tax Rules, 1994. On the contrary, it is the assertion of the respondents that these have been issued under section 16 of CAG's (DPC) Act.

15. Thus the controversy lies in a narrow compass i.e. interpretation and application of Section 16 of the CAG's (DPC) Act read with Articles 148, 149 and 151 of the Constitution of India dealing with CAG. The question involved is whether CERA, an audit wing of the Principal Director of Audit (Control), Kolkata under the CAG, has power to and / or authority and / or jurisdiction to audit the account, of the petitioner company under Section 16 of the CAG's (DPC) Act, where admittedly the petitioner company is not an undertaking of the Central Government or of any State Government and is prely a private entity.

16. In the above backdrop, we may briefly refer to the relevant statutory provisions.

16.1. Comptroller and Audited General of India (CAG) is an authority constituted under the provisions of Article 148 of the Constitution of India. 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.”

16.2. Duties and powers of CAG are circumscribed by Article 149 of the Constitution of India which reads thus;

“Article 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.”

16.3. Under Article 151 of the Constitution of India, reports of the CAG relating to 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 CAG 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.

16.4. The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 i.e. CAG's (DPC) Act is an Act to determine the conditions of service of the CAG and prescribe his duties and powers and for matters connected therewith or incidental thereto. Duties and powers of the CAG are enumerated in Chapter III of the CAG's (DPC) Act. The relevant provisions contained in Chapter III i.e. Sections 10 to 20 of the Act are extracted as under :-

“10. (1) The Comptroller and Auditor-General shall be responsible-

(a) for compiling the accounts of the Union and of each State from the initial and subsidiary account rendered to the audit and accounts offices under his control by treasuries, offices or departments responsible for the keeping of such accounts; and

(b) for keeping such accounts in relation to any of the matters specified in clause (a) as may be necessary:

(2)

(3)

11. The Comptroller and Auditor-General shall from the accounts compiled by him or by the Government or any other person responsible in that behalf prepare in each year accounts (including, in the case of accounts compiled by him, appropriation accounts) showing under the respective heads the annual receipts and disbursements for the purpose of the Union, of each State and of each Union territory having a Legislative Assembly, and shall submit those accounts to the President or the Governor of a State or Administrator of the Union territory having a Legislative Assembly, as the case may be on or before such dates as he may, with the concurrence of the Government concerned, determine.

12. The Comptroller and Auditor-General shall, in so far as the accounts, for the compilation or keeping of which he is responsible, enable him so to do, give to the Union government, to the State Governments or to the Governments of Union Territories having Legislative Assemblies, as the case may be, such information as they may, from time to time, require, and render such assistance in the preparation of their annual financial statements as they may reasonably ask for.

13. It shall be the duty of the Comptroller and Auditor-General-

(a) to audit all 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 to which they have been applied or charged and whether the expenditure conforms to the authority which governs it;

(b) to audit all transactions of the Union and of the States relating to Contingency Funds and Public Accounts;

(c) to 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; and in each case to report on the expenditure, transactions or accounts so audited by him.

14.(1)

15.(1)

16. It shall be 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.

17. The Comptroller and Auditor-General shall have authority to audit and report on the accounts of stores and stock kept in any office or department of the Union or of a State.

18.(1) The Comptroller and Auditor-General shall in connection with the performance of his duties under this Act, have authority-

(a) to inspect any office of accounts under the control of the union or of a State, including treasuries, and such offices responsible for the keeping of initial or subsidiary accounts, as submit accounts to him;

(b) to require that any accounts, books, papers and other documents which deal with or form the basis of or are otherwise relevant to the transactions to which his duties in respect of audit extend, shall be sent to such place as he may appoint for his inspection;

(c) to put such questions or make such observations as he may consider necessary, to the person in charge of the office and to call for such information as he may require for the preparation of any account or report which it is his duty to prepare.

(2) The person in charge of any office or department, the accounts of which have to be inspected and audited by the

Comptroller and Auditor-General, shall afford all facilities for such inspection and comply with requests for information in as complete a form as possible and with all reasonable expedition.

19.(1) The duties and powers of the Comptroller and Auditor-General in relation to the audit of the accounts of Government companies shall be performed and exercised by him in accordance with the provisions of the Companies Act, 1956 (1 of 1956).

(2) The duties and powers of the Comptroller and Auditor-General in relation to the audit of the accounts of corporations (not being companies) established by or under law made by Parliament shall be performed and exercised by him in accordance with the provisions of the respective legislations.

(3) 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.

20.(1) Save as otherwise provided in section 19, where the audit of the accounts of any body or authority has not been entrusted to the Comptroller and Auditor-General by or under any law made by Parliament, he shall, if requested so to do by the President, or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, undertake the audit of the accounts of such body or authority on such terms and conditions as may be agreed upon between him and the concerned Government and shall have, for the purposes of such audit, right of access to the books and accounts of that body or authority:

(2) The Comptroller and Auditor-General may propose to the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, that he may be authorised to undertake the audit of accounts of any body or authority, the audit of the account of which has not been entrusted to him by law, if he is of opinion that such audit is necessary because a substantial amount has been invested in, or advanced to, such body or authority by the Central or State Government or by the Government of a Union territory

having a Legislative Assembly, and on such request being made, the President or the Governor or, the Administrator, as the case may be, may empower the Comptroller and Auditor-General to undertake the audit of the accounts of such body or authority.

(3) The audit referred to in sub-section (1) or sub-section (2) shall not be entrusted to the Comptroller and Auditor-General except where the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, is satisfied that it is expedient so to do in the public-interest and except after giving a reasonable opportunity to the concerned body or authority to make representations with regard to the proposal for such audit.”

17. The impugned notice / intimation dated 10.01.2019 calling on the petitioner to submit its records to the officers of CERA for audit will have to be considered with reference to the above provisions of the CAG's (DPC) Act. The CAG's (DPC) Act is enacted to determine and prescribe duties and powers of the CAG and for matters connected or incidental thereto. The scheme of chapter III prescribes the duties and powers of the CAG.

17.1. Section 10 of the CAG's (DPC) Act pertains to the power of CAG to compile accounts of the Union and the States / Union Territories and states that the CAG shall be responsible for keeping the accounts of the Union and each State from the initial and subsidiary accounts rendered to the audit and accounts offices under his control by treasuries, offices or departments responsible for keeping such accounts.

17.2. The term “accounts” is defined under Section 2(a) of the Act and refers to the accounts in relation to commercial undertakings of a Government, include trading, manufacturing, profit and loss accounts, balance-sheets and other subsidiary accounts. Pertinently definition of “accounts” under the Act

clearly envisages that it is not in relation to any private entity but it is in relation to commercial undertakings of a Government.

17.3. Sections 11 and 13 refer to the statutory scheme whereby the CAG is required to prepare and submit accounts to the President, Governors of States and Administrators of Union Territories having Legislative Assembly. Section 11 states that the CAG shall from accounts compiled by him or by the Government or any other person responsible in that behalf, prepare in each year accounts (including, in the case accounts compiled by him, appropriation accounts) showing under the respective heads the annual receipts and disbursements for the purpose of the Union, of each State and of each Union Territory having a Legislative Assembly, and shall submit those accounts to the President or the Governor of a State or Administrator of the Union Territory as the case may be, on or before such dates as he may, with the concurrence of the Government concerned, determine.

17.4. Section 13 refers to the general provisions relating to audit and is relevant to the present case. Section 13 states that it shall be the duty of the CAG to audit all 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 to which they have been applied or charged and whether the expenditure conforms to the authority which governs it, to audit all transactions of the Union and of the States relating to Contingency Funds and Public Accounts, to 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 and in each case to report on the expenditure, transactions or accounts so audited by him. Section 13 envisages audit of all expenses from the Consolidated Fund of India, Contingency Fund and Public Accounts. The key words “.....kept in any department of the Union or of a State” clearly define the intent of the legislation in unambiguous words and certainly the audit exercise cannot therefore extend to a private entity though the audit may pertain to the accounts receipts of a private party kept in any government department.

17.5. Audit of receipts and expenditure of bodies or authorities financed from Union or State revenues and the functions of the CAG in case of grants or loan given to other authorities or bodies is covered under Sections 14 and 15 of the CAG's (DPC) Act.

17.6. Section 16 of the Act pertains to audit of receipts of the Union or of the States. It shall be the duty of the CAG 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. The provisions of Section 16 are clear and unambiguous in as much that it shall be the duty of the CAG to audit all receipts which are payable into the Consolidated Fund of India 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 to make for this purpose such examination of the accounts as he thinks fit and report thereon. The legislative scheme of Section 16 requires the CAG to audit all receipts which are payable into the Consolidated Fund and not receivables. The entire data base with respect to receipts which are payable into the Consolidated Fund of India are available with the respective departments. It is these receipts payable into the Consolidated Fund of India that the CAG is required to audit and follow the scheme as prescribed. Section 16 makes it clear that the exercise is undertaken for the purpose of such examination of the accounts as the CAG thinks fit and report thereon.

17.7. Section 17 states that the CAG shall have authority to audit and report the accounts of stores and stock kept in any office or department of the Union or of a State.

17.8. Section 18 defines the power of CAG in connection with audit of accounts and is also relevant. Section 18(1) states that the CAG shall in connection with the performance of his duties under the Act have authority- (a) to inspect any office of accounts under the control of the Union or of a State, including treasuries and such offices responsible for the keeping of initial or subsidiary accounts, and submit accounts to him;

(b) to require that, any accounts, books, papers and other documents which deal with or form the basis of or are otherwise relevant to the transactions to which his duties in respect of audit extend, shall be sent to such place as he may appoint for his inspection;

(c) to put such questions or make such observations as he may consider necessary, to the person in charge of the office and to call for such information as he may require for the preparation

of any account or report which it is his duty to prepare. Section 18(2) further makes it clear that the person in charge of any office or department, the accounts of which have to be inspected and audited by the CAG shall afford all facilities for such inspection and comply with requests for information in as complete a form as possible and with all reasonable expedition.

18. From the above it is clearly discernible that the power of the CAG under Chapter III extends to any office or department of the Government and cannot be construed to extend to a private entity. The provisions of Chapter III envisage that for the purpose of audit it shall be the duty of the CAG to conduct audit of the receipts payable into the Consolidated Fund of India of the Union or a State as applicable and to put such questions or make such observances as the CAG may consider necessary to the person in-charge of the office or to call for such information as required for preparation of any account or report pertaining to the concerned Government office or department. This scheme clearly concludes that the CAG cannot have jurisdiction to audit the accounts of a private entity directly.

18.1. However there is one exception to the above power and duty of the CAG which is contemplated under Section 20 of the CAG's (DPC) Act. Section 20 states that if the CAG is requested by the President of India or by the Governor of a State or by the Administrator of an Union Territory, as the case may be, to undertake the audit of accounts of any body or authority on such terms and conditions as may be agreed upon, then the CAG shall undertake such an exercise. This special power of audit of any body or authority which has not been entrusted in the CAG by or by any law made by Parliament is the only

provision under which the CAG is empowered either by the President or by the Governor or by the Administrator to undertake the exercise of audit of accounts of any body or authority. But on a reading of this provision it is quite evident that even this provision would extend to a body or authority which undertakes the functions of the Government.

18.2. It has been asserted by the petitioner that though Section 20 applies to audit of accounts of any body or authority not been entrusted to the CAG by or under any law made by Parliament, assuming at the highest that the petitioner (though a private limited company) is covered by the definition of “any body” or “authority” as appearing in Section 20(1) of the said Act, even then also it is imperative for the respondents to show the request / sanction obtained in respect of the petitioner. However since respondents have not been able to show any such request / sanction obtained to audit the petitioner’s accounts for the years 2015-16 to 2017-18, the impugned action of respondents is wholly without jurisdiction. We find sufficient force in the assertion of the petitioner keeping in mind provisions of Chapter III of the CAG’s (DPC) Act.

19. Further submission of learned counsel for the petitioner that the Central Goods and Services Tax Act, 2017 has no provision empowering CERA to conduct audit of the petitioner’s records also merits acceptance. Brief perusal of the annexure to the impugned communication reveals that detailed audit of the petitioner’s accounts and records is sought for the period 2015-16 to 2017-18 i.e. for a period of three years by respondent No.3. Such a detailed audit can only be called for under relevant and specific statutes. It is settled law that jurisdiction goes to the root of a matter and power of any

authority invoking such jurisdiction to call for special audit needs to be traceable to the relevant statutory provision. In the absence of statutory backing, such an exercise of power would be invalid and nonest. In the present case, the impugned notice / letter dated 10.01.2019 calls for CERA audit and respondents in their affidavit-in-reply have relied on the provisions of Section 16 of the CAG's (DPC) Act to justify the impugned communication. If that be the case then as discussed hereinabove, the respondent's action is wholly without jurisdiction and unconstitutional.

20. In the case of **SKP Securities Ltd Vs. Deputy Director (Ra-IDT)**⁴, a single Judge of the Calcutta High Court was considering a challenge to a notice 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 question framed in the said writ petition was whether CERA, an audit wing of the Principal Director of Audit (Central), Kolkata under the Comptroller and Auditor-General of India, had the power and / or authority and / or jurisdiction to audit the accounts, service tax records or other documents of the petitioner company therein, which was not an undertaking of the Central Government or any State Government. It was an admitted position in that case that the petitioner company was not run out of funds or loans provided by the Central Government or by any State Government or by any other Government Undertaking or organization. In this backdrop, after considering governance of the petitioner company by the provisions of the Companies Act, 1956 containing provisions for special audit, the learned Single Judge in

⁴ 2013(1) TMI 549

paragraphs 47 to 49 of the said decision made the following observations:-

"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."

20.1. In the above case, Court accepted the statement of the petitioner that Section 16 of the CAG's (DPC) Act does not authorize the CAG or any audit team under the control of CAG to audit the accounts of a non-government company, that too, in the absence of any request either from the President of India or Governor of the State in which the company is having its operation.

21. In a subsequent decision in the case of **A.C.L. Education Centre (P) Ltd Vs. Union of India & Ors.**⁵, a Division Bench of the Allahabad High Court considered the challenge to the vires of Rule 5A(2) of the Service Tax Rules, 1994, *inter alia*, on the ground that the said rule was contrary to the provisions of Section 72 of the Service Tax Act and rejected the said challenge. However, since in the facts of the said case, inquiry and investigation for special audit was specifically invoked under the provisions of Rule 5A of the Service Tax Rules, 1994 in the case of a private assessee i.e the petitioner therein, the Court in paragraphs 25, 26 and 27 held as under :

"25. From the above, it is crystal clear that in case of private assessee, the Commissioner will refer the matter to an officer to collect the material or Chartered Accountant for the purpose of audit. Thus, for the purpose of audit, the material can be collected either by the officer authorized by the Commissioner or by the Auditor himself. But, audit will be performed only by the Chartered Accountant.

26. It is pious duty of the assessee to make available the record as mentioned in Rule 5A i.e. trial balance or its equivalent; and the Income-tax audit report, if any, under Section 142(2A) of the Income Tax Act, 1961, for the scrutiny of the officer or the Audit Party, as the case may be.

27. Thus, we find that there is no inconsistency in Rule 5A and Section 72A of the Finance Act, 1994. The said provision is not arbitrary. The manner for conducting the audit is as per the accounting standard provided by the Institute of Chartered Accountant of India. The audit report will be made available to the assessee, as per law."

22. Petitioner's submission that there are specific statutory provisions under which special audit of accounts of the petitioner company can be conducted by following the due process of law therefore needs to be accepted. Case of the respondents in the affidavit-in-reply that the impugned communication has been issued

under the provisions of Section 16 of the CAG's (DPC) Act and that CERA is authorized to extend the audit exercise to the petitioner's accounts therefore deserves to be rejected for want of jurisdiction and statutory authority. Case of the respondents that CERA is authorised to conduct the audit of the department and as part of the said audit examination of the records of the private company can be examined to ascertain whether the Government is getting its due share by way of indirect taxes deposited by the private company and therefore private company is bound to provide all records and documents called for by CERA deserves to be rejected looking at the scheme of Chapter III discussed above.

23. In view of the above, it is clear that the statutory responsibility of the CAG is to audit receipts of the Union and States. These receipts include both direct and indirect taxes. It is duty of the Central Excise Revenue Audit (CERA) to see that sums due to the Government are properly assessed, realized and credited to the Government account. The scheme enacted and envisaged in Chapter III of the CAG's (DPC) Act, 1971 begins with the word "Comptroller or Auditor General to compile accounts of Union and or States." The statutory scheme clearly states that the CAG shall from the accounts compiled by him or by the Government or any person responsible prepare in each year accounts showing under the respective heads, the annual receipts and disbursement for the purpose of the Union, each State or each Union Territory and shall submit the same to the President or the Governor or the Administrator, as the case may be. It is in such context that the provisions of Section 16 pertaining to audit of all receipts which are payable into the Consolidated Fund of India and each State and of each Union Territory is required to be construed with respect to the accounts maintained in the Government departments / Corporations

belonging to the Government. In view of the mandate of Section 16 of the CAG'S (DPC) Act, 1971, CERA audit cannot be extended to call for audit of a private entity such as the petitioner company.

24. In view of the above discussion, writ petition is allowed in terms of prayer clause (a) which reads thus:

(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certirari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner case and after going into the validity and legality thereof quash impugned letter Fno. GST/ME/Dn.IV/R.III/CERA-AUDIT/61/18 dated 10.01.2019 Exhibit :- 'A' along with annexure issued by the Respondent 3."

25. However, there shall be order as to costs.

[MILIND N. JADHAV, J.]

[UJJAL BHUYAN, J.]