

### **Delhi High Court: Upheld the power to conduct Service Tax Audit post GST regime**

The Hon'ble Delhi High Court in the case of **M/s Vianaar Homes Pvt. Ltd [ W.P.(C) 2245/2020 & CM APPL. 7832/2020 dated November 3, 2020]** has held that Section 174(2)(e) of the Central Goods and Services Tax Act, 2017 ("**CGST Act**"), specifically empowers the authorities to institute any investigation, inquiry, verification, assessment proceedings, adjudication, etc. including service tax audit under Rule 5A of the Service Tax Rules, 1994 ("**Service Tax Rules**"), as said Rule framed under the repealed or omitted chapter V of the Finance Act, 1994 ("**Finance Act**"), is saved.

#### **Facts:**

M/s Vianaar Homes Pvt. Ltd. ("**Petitioner**") is a company engaged in the business of construction of residential complexes since its incorporation. The officers of Central Goods and Service Tax, Audit-II ("**Respondents**") visited the business premises of the Petitioner, directed the production of certain documents and sought information in relation to the disputed period i.e. 2014-15 to 2016-17 (upto June, 2017)

In addition, thereto, the officers also demanded information pertaining to several group companies of the Petitioner. Despite Petitioner's compliance with the above and submission of the requisite information, the officers visited the business premises again. Their conduct exhibited the intention to continue with the visits, conduct audit/verification proceedings, and give further directions for production of documents and information.

The Petitioner has challenged the letter dated November 11, 2019 by virtue of which the Respondents have commenced the audit/verification, on the ground that the same is void ab initio, being wholly without jurisdiction as well as without any statutory or legal authority.

#### **Issue:**

Whether the audit/verification by revenue, contemplated under Rule 5A of Service Tax Rules, is saved despite the repeal of Chapter V of the Finance Act.

#### **Held:**

The Hon'ble Delhi High Court in ***W.P. (C) 2245/2020 & CM APPL. 7832/2020 dated November 3, 2020*** held as under:

- Upheld audit-initiation and held that the Service Tax Audit can be conducted under GST regime.
- The Court observed that the repeal of the Chapter V of the Finance Act and re-enactment of the new CGST Act is simultaneous. According to the legislature, the repeal along with re-enactment was necessary to update the law to make it most suitable to the contemporary concept of indirect taxation. However, it did not mean that all investigations, enquiries, audits, assessment proceedings, adjudications and other legal proceedings which form the subject matter of the Service Tax Rules stood abrogated the moment the new law was enacted, or that the officers carrying out the above exercise were stripped of their power to continue with the same because the Service Tax Rules were purportedly not saved.
- And that the obligation to pay service tax arose at the time of rendering taxable service, which fell during the disputed period, at which time Chapter V of the Finance Act was very much in force.
- That, in the disputed period [i.e. 2014-15 to 2016-17 (upto June, 2017) or the period last audited], Chapter V of the Finance Act was very much on the statute book. The present proceedings cannot be carried out under the provisions of goods and services tax, because, as explained earlier, the concept of taxation under the GST regime is not the same. For the purpose of adjudication and other aspects related to service tax, the mechanism provided under the Service Tax Rules has to be followed. Thus, the HC opined that the Central Goods and Services Tax Rules, 2017 ("**CGST Rules**") cannot be understood to have superseded the Service Tax Rules. The service tax rules will continue to govern and apply for the purpose of Chapter V of the Finance Act. Any interpretation to the contrary would do violence to the repeal and saving clause and Section 6 of the General Clauses Act, 1897 ("**General Clauses Act**").
- The HC highlighted the concept of GST and the effect of Section 24 of the General Clauses Act to understand the legislative intent of the saving provisions. Clause 174(3) of CGST Act serves the purpose of ensuring the general application of Section 6 of the General Clauses, notwithstanding what has been specifically provided under the saving Section 174 of CGST Act. This saving provision safeguards, inter alia, that the shift to the new taxation would not affect the

Flat no. 34B, Ground Floor, Pocket -1, Mayur Vihar, Phase -I, Delhi - 110091

Email: [bimaljain@a2ztaxcorp.com](mailto:bimaljain@a2ztaxcorp.com); Web: [www.a2ztaxcorp.com](http://www.a2ztaxcorp.com); Tel: +91 11 4242 5076

previous operation of the amended Act or the repealed Acts. Section 174(2) of the CGST Act, expressly saves all pending and new proceedings to be initiated under the old regime, and Section 174(3) of the CGST Act, allows the operation of Section 6 of the General Clauses Act.

- While emphasizing the expression “including scrutiny and audit” and “any other legal proceedings”, Hon’ble Delhi High Court held that the saving clause is framed in the widest possible language. Section 24 of the General Clauses Act introduces a concept of extending the life of rules, regulations and by-laws made under the old Act and the purpose of same is to uninterruptedly continue the subordinate legislation that may be made under the Central Act which is repealed and re-enacted, with or without modification. The repealing Act often comes with saving clauses to preserve certain provisions, which if allowed to be obliterated with the repealed Act, would not only destroy the continuity of the object and purpose of the repealing Act, but wreck great hardship and injustice. Thus, general saving statutes such as the General Clauses Act take care of this situation. Section 24 of the General Clauses Act has to be read along with the re-enacted Act in order to comprehend whether the rules framed under the old Act are kept alive even after the repeal of the old Act.

#### **Our comments:**

The Hon’ble Gujarat HC in in ***Oil Field Warehouse and Service Ltd v. Union of India [Special Civil Appeal No. 16232 of 2018 dated 17.10.2018]*** stayed CAG audit of a private limited company providing warehouse and logistical support services in SEZ, after observing that as per Section 174(2) of the CGST Act, prima facie, show that there was no saving of Rule 5A of the Service Tax Rules in such manner that fresh proceedings for audit could be initiated in exercise of powers under the said Rule. The Court stated that they have serious doubts whether, with the aid of rule 5A of the Service Tax Rules, the CAG can carry out compulsory Service Tax audit of private agencies like the petitioner.

#### **Relevant Provisions:**

##### **Section 6 of the General Clauses Act:**

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

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

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

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

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

*(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”*

**Section 24 of the General Clauses Act:**

*“24. Continuation of orders, etc., issued under enactments repealed and re-enacted. — Where any Central Act or Regulation, is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided any appointment notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment notification, order, scheme, rule, form or bye-law, made or issued under the provisions so re-enacted and when any Central Act or Regulation, which, by a notification under section 5 or 5A of the Scheduled Districts Act, 1874, or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from the re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this section.”*

**Section 174 of the CGST Act:**

*“174. (1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (1 of 1944.) (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, (16 of 1955.) the Additional Duties of Excise*

*(Goods of Special Importance) Act, 1957, (58 of 1957.) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, (40 of 1978.) and the Central Excise Tariff Act, 1985 (5 of 1986.) (hereafter referred to as the repealed Acts) are hereby repealed.*

*(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (32 of 1994.) (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not-*

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

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

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

*Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or*

*(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or*

*(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;*

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

*repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.*

*(3) The mention of the particular matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897.) with regard to the effect of repeal.”*

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