

### **CAG have no jurisdiction to audit the accounts of a non-government entity**

The Hon'ble Bombay High Court in *Kiran Gems Private Limited v. Union of India and Ors.* [Writ Petition No. 1135 of 2019, decided on January 29, 2021] quashed the notice/intimation demanding audit of a private entity by Central Excise Revenue Audit ("CERA") and requiring information/records for the period 2015-16 to 2017-18 to the officers of CERA for audit. Held that, Comptroller or Auditor General ("CAG") cannot have jurisdiction to audit the accounts of a non-government entity unless requested by President of India or Governor of the State or Administrator of the Union Territory as prescribed.

#### **Facts:**

Kiran Gems Private Limited ("**the Petitioner**") is engaged in manufacture and export of cut and polished diamonds.

The office of the Assistant Commissioner of Central Tax ("**Respondent**"), by email dated January 10, 2019 ("**Impugned notice/ intimation**"), 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. The Petitioner was called upon to submit information / records for the period 2015-16 to 2017-18 directly to the officers of CERA.

The Petitioner filed a reply with regard to the same vide letter dated February 20, 2019, inter alia, stating that CERA audit cannot be conducted for the period prior to introduction of GST. Rule 5A of the Service Tax Rules, 1994 ("**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 CERA and required appointment of Chartered Accountant or Cost Accountant. However, it was not responded.

Aggrieved, the present writ petition has been filed to challenge the Impugned notice / intimation, as ex facie illegal and without jurisdiction. The Petitioner's primary assertion is that the Impugned notice / intimation seeking audit of the Petitioner's accounts is without jurisdiction as the same has been issued without invoking the provisions of statutory laws under which a special audit, as purported, can be conducted.

#### **Issue:**

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Whether CERA has power to and / or authority and / or jurisdiction to audit the account of the Petitioner where the Petitioner is not an undertaking of the Central Government or of any State Government and is purely a private entity?

**Held:**

The Hon'ble Bombay High Court in ***Writ Petition No.1135 of 2019, decided on January 29, 2021***, held as under:

- Analyzed Rule 5A of the Service Tax Rules and stated **that it is crystal clear that in case of a private assessee, Commissioner will refer the matter to an officer to collect the material or to 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 of the Service Tax Rules 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 ("**IT Act**"), for the scrutiny by the officer or the audit party, as the case may be.
- Observed that, in the present case, the Impugned notice / intimation seeking audit of the Petitioner's accounts is not contemplated under the provisions of Rule 5A of the Service Tax Rules. On the contrary, it is the assertion of the Respondent that these have been issued under Section 16 of Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971. ("**CAG's Act**").
- Stated that, the statutory responsibility of the CAG is to audit receipts of the Union and States, which include both direct and indirect taxes. It is duty of the 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 Act, clearly states that the CAG shall, from the accounts compiled by him or by the Government or any person responsible to 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.
- Noted that **Section 16 of the CAG's Act, pertaining to audit of all receipts which are payable into the Consolidated Fund of India and each State and each Union Territory is required to be construed with respect to the accounts maintained in the Government departments / Corporations belonging to the Government.**

- Held that, **in view of the mandate of Section 16 of the CAG's Act, CERA audit cannot be extended to call for audit of a private entity such as the Petitioner.**

**Relevant Provisions:**

**Rule 5A of the Service Tax Rules:**

*"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."*

**Section 16 of the CAG's Act:**

*"Audit of Receipts of Union or of States-*

*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."*

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