IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 18059 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/-

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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SAMAY ALLOYS INDIA PVT. LTD.
Versus
STATE OF GUJARAT

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Appearance:
UCHIT N SHETH(7336) for the Petitioner(s) No. 1,2
MR. UTKARSH SHARMA, LD .AGP for the Respondent(s) No. 1,2

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 03/02/2022

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ application under Article 226 of the Constitution of India, the writ applicants have prayed for the following reliefs;

> *"(A) This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order directing the Respondents to forthwith withdraw the negative block of the electronic credit ledger of the Petitioners as visible from the extract of credit ledger annexed at Annexure-A;*
>
> *(B) Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to direct the Respondents to forthwith withdraw the negative block of the electronic credit ledger of the Petitioners as visible from the extract of credit ledger annexed at Annexure-A;*
>
> *(C) Ex parte ad interim relief in terms of prayer-B may kindly be granted;*
>
> *(D) Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioners shall forever pray."*

2. The facts, giving rise to this litigation, may be summarized as under;

2.1 The writ applicant No.1 is a private limited company. The writ applicant No.2 is one of the Directors and share holder of the writ applicant No.1-Company. The Company is engaged in the business of manufacture and sale of MS

Billets. It is not in dispute that the Company is registered under the GST Act.

2.2 It appears from the materials on record that at the relevant point of time when the writ applicants attempted to file their return for the month of September, 2021, there was no credit balance in the electronic credit ledger. Despite the same, the portal displayed a message that the electronic credit ledger had been blocked by the respondent No.2. It was further noticed by the writ applicants that a negative balance had been entered in their electronic ledger by the respondent No.2. In such circumstances and as a result of such negative balance, if the writ applicants would file return for the month of September, 2021 by claiming input tax credit, the writ applicants would be required to pay an additional amount of output tax under the provisions of the GST Act to the extent of negative balance of the input tax credit in the electronic credit ledger.

2.3 It appears that the writ applicants addressed a letter dated 22nd October, 2021 to the respondent No.2, requesting for reasons to block the input tax credit. The respondent No.2, however, thought fit not to pay any heed to such request.

2.4 In such circumstances, referred to above, the writ applicants are here before this Court with the present application.

3. Mr. Uchit Sheth, the learned counsel appearing for the writ applicants vehemently submitted that his clients were unable to file the return for the month of September, 2021 because of the negative block in the ledger. He would submit that his clients would immediately be liable to additional amount of tax equivalent to the negative block even without any adjudication if they would proceed to file such return.

4. He submitted that the negative block of electronic credit ledger with Nil balance in the credit ledger as on the date of the imposition of the block is wholly without jurisdiction and beyond the scope of Rule 86-A of the GST Rules.

5. Mr. Sheth would submit that the *sine-qua-non* for the exercise of power under Rule 86A of the GST Rules is that there should be credit available in the electronic credit ledger which is alleged to be ineligible. In other words, the submission of Mr. Sheth is that if any credit balance is available, then the authority may, for reasons to be recorded in writing, not allow the debit of amount equivalent to such credit. However, there is no power of negative blocking for the credit to be availed in future.

6. In such circumstances, referred to above, Mr. Sheth prays that there being merit in his writ application, the same be allowed and the respondent No.2 may be directed to unblock the electronic credit ledger.

7. On the other hand, this writ application has been vehemently opposed by Mr. Utkarsh Sharma, the learned AGP appearing for the respondent No.2. Mr. Sharma would submit that the action of blocking the electronic credit ledger of the writ applicants in exercise of powers under Rule 86-A of the Rules 2017 is in accordance with law and needs no interference.

8. Mr. Sharma, the learned AGP, appearing for the State has filed his written submissions as under;

> *"The department proposes to file the following written submissions with reference to the controversy and the question of law involved in the present petition. The submissions are restricted to the questions of law.*
>
> *1. It is submitted that the main controversy involved in the present petition is surrounding the Rule-86A of the GST Rules, 2017, wherein, in the petition the petitioner has prayed that the blocking was not permissible and it amounts to negative block of the 'Electronic Credit Ledger' and that the invocation of powers under Rule-86A was not proper and not tenable in the eyes of law.*
>
> *2. It is respectfully submitted that the petitioner has tried to read into the provision and has also tried to create an artificial interpretation by basically harping upon two points one that the debit can be only restricted if there is balance and second it amounts to recovery, which otherwise, has to be done after issuance of show-cause notice and final orders u/s 73/74 as the case may be.*
>
> *3. It is submitted that dealing the second point first,*

it does not amount to recovery as the amount in all cases till the final adjudication remains in the account, only the debits are not permitted and therefore, the said submission is not only deviating from the original controversy but also misapplied.

4. Now dealing with the main issue involved in the petition i.e. permissibility of invocation of powers under Rule-86A and not permitting the debit of an amount equivalent to such credit in electronic credit ledger as seems to be fraudulently availed or ineligible upon recording reasons is concerned, the said powers are not limited to the available balance or the amount in the electronic credit ledger on that day it relates to the amount in general to the said extent.

5. In fact, the rule is very clear and has consciously used 'equivalent to such credit' instead of the words 'equivalent to such 'available' credit' in the second part of the said rule the non-usage of word 'available' draws lot of significance. There is one more facet to the issue that is the words 'equivalent to such credit in electronic credit ledger' do not speak about balance as on date, it speaks about extent, therefore, the available balance in ledger on the day of recording reasons and passing order may be NIL, however, the same dwells into insignificance, more particularly when maintenance of Electronic Credit Ledger is a continuous exercise.

The emphasis is applied on the following set of words more particularly the bold portion:

'....may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger...'

6. It is submitted that while interpreting any provision of law, the only acceptable method of interpretation is constructive interpretation and not the negative interpretation. It can neither be the

statutory intent to protect a wrong doer or someone who has availed a wrongful benefit, which otherwise, was not permissible nor shall it be permitted by hyper-technical attempt to misinterpret the provisions of law. It is undisputed fact that interpretations are of utmost significance as the statutory provisions would not envisage any and every eventuality and therefore, for such eventualities, interpretation is required to meet the ultimate ends of justice.

7. It is submitted that the rule in question i.e. Rule-86A has given broad powers to ensure that the debits are not permitted at a stage before the proceedings attain finality and therefore, it cannot be termed as recovery. In a given case if someone has already availed an alleged wrong claim and utilized the same it would not mean that now the debits to that extent cannot be freezed or restricted by operation of Rule-86A as there were no balances on the day reasons were recorded. In fact, the returns which would be filed may result into accumulation of the amounts in the electronic credit ledger. It is submitted that the ledger accounts are a continuous process, wherein, the amounts get accumulated and are utilized by the registered person and therefore, not permitting debit of a particular amount of particular quantum has nothing to do with the available balance or non-availability of balance.

8. As far as the Rule-86A and its overall operation and exercise of powers are concerned, the same has been comprehensively covered by the judicial dictum of the Hon'ble Court in the Case of 'M/S S.S. Industries Versus Union Of India' 'Special Civil Application No.8841 of 2020' and 'Special Civil Application No.8163 of 2020'. The Hon'ble Court, while, adjudicating the said issue has held in favour of revenue, however, the challenge to the Rule being independent issue pending in other cases, the Hon'ble Court has not interfered with.

9. It is further submitted that neither does the exercise of powers make a future recovery nor would it mean that if there is no balance, the resultant effect of the exercise of powers is giving effect to a future eventuality. In fact, the most significant part is that for an act already committed by which wrongful ITC has been availed, to safeguard the same, to that extent debits are not permitted irrespective of the source of such an amount in the electronic credit ledger.

10.The department attempts to cite four different eventualities and exercise of power, to dislodge the illusion created by the petitioner:

i. There is a reason to believe that around Rs.20 lakhs odd amount has been wrongfully availed as ITC and the balance in the said electronic credit ledger is around Rs.1 crore, the department after recording the reasons to believe would nor permit debiting the Rs.20 lakh for any purpose as stipulated under Section-49, however, the remaining amount can always be utilized upon which, the department would not be able to impose any restrictions.

ii. There is a reason to believe that around Rs.20 lakhs odd amount has been wrongfully availed as ITC and the balance in the said electronic credit ledger is around Rs.10 lakhs, in such an eventuality, whether, the petitioner would be in position to say that as Rs.10 lakhs is already utilized out of alleged Rs.20 lakh wrongful availment and therefore, the remaining Rs.10 lakh shall also be permitted to be utilized as there is already a negative balance by way of deficit of Rs.10 lakh in the ledger.

As per the humble submission, the answer would be otherwise, in fact, the department would still be within powers to not permit the debits to the tune of Rs.20 lakhs for any purposes under section-49 and the reason is that the Rule does not identify that very amount as deposited is to be withheld, it uses the

word 'equivalent', which can be from any deposits before or after such wrongful availment.

There is no usage of words 'amount as 'available' in ledger account ' etc Certain relevant words are reproduced hereunder:

'...may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger...'

iii. There is a reason to believe that around Rs.20 lakhs odd amount has been wrongfully availed as ITC and the balance in the electronic credit ledger is NIL even in such a scenario, the department would be restricting and not permitting the debits to the tune of Rs.20 lakhs and as cited hereinabove, there is neither a bar in exercising of such powers nor it can be said to be bad.

To further support the said contention the last eventuality is cited as under:

iv. There is a reason to believe that around Rs.20 lakhs odd amount has been wrongfully availed as ITC and the balance in the electronic credit ledger becomes NIL and thereafter, upon filing returns there is again a deposit of around Rs.25 lakhs odd and the department exercises powers under Rule-86A after the deposits of Rs.25 lakhs odd, whether, the petitioner can claim that the balance had gone NIL and the ITC was already utilized and therefore, this particular amount which is of a subsequent transaction cannot be withheld for debits under section-49.

As per the humble submission, the answer would be NO the petitioner would not be in the position to raise such a claim, more particularly in view of usage of words '....may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger...' where, again

the emphasis is on 'equivalent' the amount can be from any deposits/availments previous or prior.

Therefore, if the present submission in scenario (iv) is accepted, the same analogy would apply to scenario (iii), wherein, there was no balance available on that day.

9. Before we proceed to discuss the scope and applicability of Rule 86A, we must give a fair idea as to what is an electronic credit ledger in the GST. One of the benefits under the GST regime is that the payment of tax under the different heads is done online. To make the GST payment process convenient, each registered taxpayer gets two electronic ledgers. These ledgers include; (1) Electronic Liability Register and (2) Electronic Credit ledger. The electronic liability register reflects the cash available to settle the tax liability. Whereas, the Electronic liability ledger showcases the amount of tax payable by the taxpayer. Finally, the electronic credit ledger displays the input tax credit balance available to the registered taxpayer.

10. The taxpayer raises a challan in the form GST PMT – 06 to begin with the GST payment. This challan contains the details of the amount to be deposited towards the tax, interest, penalty, fees or any other amount and it is valid for a period of 15 days. Thus, the taxpayer deposits the tax amount at the common portal after generating the Challan. Once this is done, the collecting bank generates the CIN (Challan Identification Number). This number is

indicated on the GST Payment Receipt. Hence, the amount so deposited is credited to the electronic cash ledger of the taxpayer on whose behalf the payment was deposited. This happens only on receipt of the CIN.

11. Both the CGST and SGST are paid in equal proportions for the intra–state supplies. The IGST is paid for the inter – state supplies. The taxpayer's monthly GST return reflects the amount of tax to be paid as well as the input tax credit (ITC) details. These ITC details are self assessed by the taxpayer via the monthly returns. Furthermore, these details get reflected in the electronic credit ledger. And the amount of ITC in the electronic credit ledger gets utilized as per the rules mentioned in section 49.

ITC Utilization

12. The ITC is utilized in the following sequence to set off the CGST liability:

(1) The ITC standing under the CGST is used to set off the CGST output liability.

(2) Then, the ITC standing under the IGST is used to set off the remaining CGST output liability.

13. Further, the ITC is utilized in the following sequence to set off the SGST liability:

(1) The ITC standing under the SGST is used to set off the SGST output liability

(2) Then, the ITC standing under the IGST is used to set off the remaining SGST output liability

14. Finally, the ITC is utilized in the following sequence to set off the IGST liability:

(1) The ITC standing under the IGST is used to set off the IGST output liability

(2) The ITC standing under the CGST is used to set off the remaining IGST output liability

15. Finally, the ITC standing under the SGST is used to set off the remaining IGST output liability.

16. Furthermore, no set off is available between the CGST and SGST.

17. Hence, from the above, it is clear how the electronic credit ledger is used while making the tax payment.

What is Electronic Credit Ledger in GST?

18. The electronic credit ledger reflects the amount of Input Tax Credit available to the taxpayer. Thus, every

claim of input tax credit of the registered taxpayer eligible for claiming such a credit is credited to this ledger. The amount available in the electronic credit ledger is utilized in making payments towards the outward tax liability by the registered taxpayer.

19. The electronic credit ledger shall be maintained in the form GST PMT – 02. This form shall be maintained on the common portal for every registered person eligible to claim input tax credit under GST Act. Every claim of the input tax credit is credited to the electronic credit ledger.

20. The following are the components of Form GST PMT-02:

- Serial Number
- Date of Deposit
- Time of Deposit
- Reporting Date by Bank (Reference Number)
- Reference Number
- Tax period, if applicable
- Description
- Transaction Type (Debit/Credit)
- Amount Debited/Credited
- Integrated Tax
- Central Tax (CGST)
- State Tax (SGST)
- Cess
- Total

- Integrated Tax
- Central Tax
- State Tax
- Cess
- Total

21. In the aforesaid context, we must also look into Section 49(2) of the CGST Act. Section 49(2) reads thus;

> *"49(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed."*

22. Thus, the aforesaid provision explains as to when the input tax credit can be said to be availed in the electronic credit ledger. Sub-section (2) of Section 49 of the CGST Act provides that the input tax credit self-assessed in the return of a registered person shall be credited to the electronic credit ledger.

23. Sub-section (4) of Section 49 reads thus;

> *"49(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed."*

24. Sub-section (4) of Section 49, referred to above,

provides that the amount available in the electronic credit ledger may be utilized for making payment of the output tax credit. Thus, the input tax credit available is the actual amount of credit lying in the ledger prior to its utilization/debit.

25. Sub-section (5)(e) and (f) of Section 49 reads thus;

> *"(e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and*
>
> (f) the State tax or Union territory tax shall not be utilised towards payment of central tax."

ANALYSIS

26 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether it is open for the authority to block the electronic credit ledger in exercise of powers under Rule 86-A of the Rules, more particularly, when the balance in such ledger is Nil.

27. Rule 86-A of the GST Rules reads thus;

> *"(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-*

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

i. issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

ii. without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount. "

28. Rule 86A of the CGST Rules empowers the Commissioner or his subordinates to freeze the debit in the electronic credit ledger provided he has reasons to believe that the credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible. Thus, the condition precedent is that the input

tax credit should be available in the electronic credit ledger before the power under Rule 86-A is invoked by the authority. In the case on hand, it is not in dispute that the amount of input tax credit available in the electronic credit ledger as on the date of blocking of ledger was Nil. If no input tax credit was available in the ledger, the blocking of electronic credit ledger under Rule 86-A of the Rules and insertion of negative balance in the ledger would be wholly without jurisdiction and illegal.

29. On a plain reading of the opening part of Rule 86A(1) of CGST Rules, 2017, it transpires that the power conferred under Rule 86A can be exercised by the Commissioner or an officer authorised by him (not below the rank of an Assistant Commissioner). Further the powers can be exercised if the following cumulative conditions are satisfied.

i) Credit of input tax should be available in the electronic credit ledger,

ii) The Commissioner of an officer authorised by him should have reason to believe that such credit has been fraudulently availed or is ineligible,

iii) The reason to believe are be recorded in writing.

30. In case the above referred conditions are satisfied, a proper officer can invoke Rule 86A. Upon invocation of

Rule 86A, a proper officer can -

a) Disallow debit from the electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

b) Such restriction should be for an amount equivalent to the amount claimed to have been fraudulently availed or is ineligible

31. Rule 86A (1) of CGST Rules, 2017 is broadly divided into two parts. The opening part of the rule deals with the conditions required to be fulfilled in order to invoke the powers under the rule. The second part of the rule provides for the consequences in case Rule 86A is invoked.

32. In other words, in case the conditions prescribed for the invocation of Rule 86A are not fulfilled, the officer cannot invoke the rule, and in such scenario, the consequences provided in the rule becomes ex-facie inapplicable.

33. One of the primary conditions in order to invoke Rule 86A is that the Credit of input tax should be available in the electronic credit ledger. Further, such credit should be claimed to have been (supported by reason to believe recorded in writing) fraudulently availed.

34. Accordingly, in case where (i) Credit of input tax is

not available in the electronic credit ledger or (ii) such credit has already been utilised, the powers conferred under Rule 86A cannot be invoked.

35. Further, Rule 86A is not the rule which entitled the proper officer to make debit entries in the electronic credit ledger of the registered person. The rule merely allows the proper officer to disallow the registered person debit from the electronic credit ledger for the limited period of time and on a provisional basis. In case debit entries are made by the proper officer, the same will tantamount to permanent recovery of the input tax credit and certainly permanent recovery is governed by the statutory provisions (Section 73 of 74 of CGST Act) and it certainly travels beyond the plain language and underlined intent Rule 86A.

36. Reference may be made to a judgement of the Patna High Court in the case of Rohtas Industries Limited Vs. Superintendent of Central Excise (2000) 123 ELT 124, wherein the High Court in context of central excise law held that the proper officer cannot make debit entries in the personal ledger account maintained by the assessee. A personal ledger account is like a bank account maintained by the assessee with the excise department. Similarly, the electronic credit ledger is a credit account maintained by the registered person with the department and revenue cannot be authorised to make debit entries in such account without express provision of law.

37. We may look into the Division Bench decision of the Patna High Court, wherein N.L. Untwalia, CJ (as His Lordship then was) observed as under;

> *"4. The questions which fall for determination in this case are--*
>
> *(i) Whether the debit entries (annexures 3 to 6) could be made by respondent No. 1 in the accounts maintained by the petitioner in its various factories in exercise of his power under Section 11 of the Act?*
>
> *(ii) Whether the demand in respect of the Chemical Factory could be realised by adjustment and the making of the debit entries in the accounts of the other three factories ?*
>
> *5. Rule 9-B deals with provisional assessment of duty. But this provisional assessment is to be made by the proper officer and not by the assessee himself. The matter of recovery of duties or charges short-levied or erroneously refunded is dealt with in Rule 10 and residuary powers for recovery of sums due to Government are provided in Rule 10-A. By notification dated the 11th October, 1969. 12th Amendment of the Rules was introduced, whereby Rules 10 and 10-A were amended. The purpose of this amendment is mentioned in a copy of the letter dated the 30th September, 1969 (annexure 13) from the Ministry of Finance. Department of Revenue and insurance, to all Collectors of Central Excise. The amended Rule 10-A provided for giving of a notice of show cause to the assessee in the matter of deficiency of duty. But it would be noticed from the language of Rules 10 and 10-A even as it stood after the 12th Amendment that they do not apply to a case which is covered by the Rules incorporated in Chapter VII-A introduced for the first time in the Rules on 14-7-1969. That is the relevant Chapter*

which deals with clearance of goods on provisional determination of the excise duty payable by the assessee himself. And, as I read these Rules, they are the only relevant Rules some of which will be specifically referred to in this judgment. The heading of Chapter VII-A is--

"Removal of excisable goods on determination of duty by producers, manufacturers or private warehouse licensees."

The provisions of Chapter VII-A are to apply to such excisable goods as the Central Government may, by notification in the Official Gazette specify in this behalf under Rule 173-A. Under Rule 173-B the assessee would file the list of goods for approval of the proper officer and he has to file a price list of goods assessable ad valorem under Rule 173-C. The assessee is under an obligation to furnish information regarding principal raw material under Rule 173-D. The normal production is to be determined under Rule 173-E. Then Rule 173-F says--

"*Where the assessee has complied with the provisions of Rules 173-B, 173-D and where applicable, 173-C, he shall himself determine his liability for the duty due on the excisable goods, intended to be removed and shall not, except as otherwise expressly provided in these rules remove such goods unless he has paid the duty so determined.*"

What procedure the assessee is to follow is provided in Rule 173-G. Under Sub-rule (1) he is to keep an account-current with the Collector separately for excisable goods falling under different items of the First Schedule to the Act, in such form and manner as the Collector may require, of the duties payable on the excisable goods. He is required to maintain triplicate account by using indelible pencil and double sided carbon. He has to make periodically credit in such account-current, by cash payment into

the treasury or by cheque if the Collector so specifies. Thereafter in the various other sub-rules of Rule 173-G a procedure has been prescribed for removal of the goods. Under Sub-rule (5) every assessee has to furnish to the proper officer a list in duplicate of all accounts maintained and returns prepared by him in regard to the production, manufacture, storage, delivery or disposal of the goods, including the raw-materials. The return has to be filed in a proper form under Sub-rule (3). The assessee is obliged to produce on demand to the Central Excise Officers or the audit parties deputed by the Collector the accounts and returns for the scrutiny of the officers or the audit parties as the case may be under Rule 173-G (6). I shall quote Rule 173-1.

"*(1) The proper officer shall on the basis of the information contained in the return filed by the assessee under Sub-rule (3) of Rule 173-G and after such further inquiry as he may consider necessary, assess the duty due on the goods removed and complete the assessment memorandum on the return. A copy of the return so completed shall be sent to the assessee.*

(2) The duty determined and paid by the assessee under Rule 173-F shall be adjusted against the duty assessed by the proper officer under Sub-rule (l) and where the duty so assessed is more than the duty determined and paid by the assessee, the assessee shall pay the deficiency by making a debit in the account-current within ten days of receipt of copy of the return from the proper officer and where such duty is less, the assessee shall take credit in the account-current for the excess on receipt of the assessment order in the copy of the return duly counter-signed by a Superintendent of Central Excise."

The proper officer is to assess the duty due on the goods removed and complete the assessment

memorandum on the return filed by the assessee. A copy of the return so completed has to be sent to the assessee. Then it is the obligation of the assessee to pay the deficiency, if any by making a debit in the account-current within ten days of the receipt of the copy of the return from the proper officer and where the amount paid is in excess, the assessee has to make a credit entry in that account. It would thus be seen that the account which is to be maintained by the assessee on his own provisional assessment of the amount of duty payable is subject to the control of the proper officer. To put it in other words, the scheme is like this. The assessee has to put sufficient amount in deposit in the treasury in the account-current with the Collector. From that amount in credit, he can go on adjusting the amounts of duty payable by him on his own assessment. But finally the assessment is to be made by the proper officer and according to that final assessment the assessee has to make debit or credit entries in the accounts maintained by him under Rule 173-G. The rules, so far I have examined, do not provide that if the assessee fails to pay the deficiency by making a debit entry in the account-current within ten days of the receipt of copy of the return from the proper officer then the proper officer can himself make that debit entry in the account-current. For failure of the assessee to pay the deficiency by making the debit entry in the account-current, whatever else may follow, but certainly it does not follow that the proper officer himself can make the debit entry in the accounts. In support of the right of the proper officer to make such debit entry reliance is placed upon Section 11 of the Act. And. now I proceed to examine it.

6. Section 11 reads as follows--"

“In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the Central

Board of Revenue to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his (hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue."

Apart from the other modes of recovery, one of the methods of recovery of sums due to the Government provided under Section 11 is that the officer concerned may deduct the amount of deficiency from any amount which may be payable to the person from whom the deficiency is recoverable. If suppose, a sum of Rs. 50,000/- was payable to the assessee by the Department then the officer concerned could deduct the amount of deficiency, say. Rs. 30,000/- from that amount and would pay the balance of Rs. 20,000/-. But then it is difficult to interpret this provision to say that the proper officer can himself make the debit entries in the account-current maintained by the assessee under Rule 173-G. The proper officer may inform the assessee that under various accounts-current say, if a sum of Rupees 50,000/- is in deposit, he would adjust the amount of Rupees 30,000/- payable by the assessee on account of deficiency in the duty paid from the sum of Rs. 50,000/- and thenceforward would treat the amount of deposit only at Rs, 20,000/-. If he does so then the assessee in order to carry on his business further, in accordance with Chapter VII-A would be obliged to show in his account books the sum of deposit, as determined by the proper officer. From a

practical point of view, the same result can be achieved but by the legal and legitimate method just indicated. Instead of following this legitimate and legal method, respondent No. 1 adopted a course of making the entries himself which are annexures 3 to 6 in this case --a method which was not warranted by law. In annexure 1 he had rightly asked the assessee to debit the amount by 22-2-1970, namely, the period of ten days counting from the date of the letter. On failure of the assessee he had a right to recover the sum in the mode indicated in the second paragraph of annexure 1, if it is permissible in law or to adopt any other method including the one indicated by me above. But then I do not feel persuaded to hold on failure of the assessee to debit the amount in accordance with Rule 173-1 (2), the proper officer had a right to do so.

7. Learned Counsel for the respondent in support of his submission that the proper officer had the authority to make the debit entries in the accounts, placed reliance upon an unreported decision of a learned single Judge of Gujarat High Court in The Union of India v. Prithivi Cotton Mills Ltd. (Second Appeal 531 of 1965 decided on 15-3-1971 (Guj)), There also, the debit entries had been made by an Officer of Excise Department. The Court of appeal below had held that he was not the proper officer to exercise the power under Section 11 of the Act. The High Court did not agree with this view and reversed the decision. No argument seems to have been advanced nor is there any discussion as to whether in exercise of the power under Section 11 an officer could make a debit entry in the account maintained under Rule 173-G of the Rules."

38. The revenue may legitimately argue that such an interpretation may make the entire Rule 86A toothless as parties can claim and immediately utilise the credit fraudulently availed by filing monthly returns. Accordingly,

it may be practically impossible to invoke Rule 86A in large number of cases. This may be the actual implication of the present interpretation, however, the Government in its wisdom has framed Rule 86A and this rule is not framed to recover the credit fraudulently availed. In case where credit is fraudulently availed and utilised, appropriate proceeding under the provisions of section 73 or section 74, as the case may be, can be initiated. Secondly, Rule 86A is not the rule which provides for debarring the registered person from using the facility of making payment through the electronic credit ledger. In case the intention was to disallow future debits or credit in electronic credit ledger, the text of the rule would be entirely different.

39. Accordingly, even though Rule 86A may be invoked in very limited number of cases, this cannot be the basis to invoke the rule in the cases which are not supported by the plain language of the rule.

40. The Rule 86A empowers the proper officer to disallow debit from the electronic credit ledger for an amount equivalent to the amount claimed to have been fraudulently availed. Accordingly, the rule provides for restriction on an amount and not on the very credit which is fraudulently availed. Accordingly, the rule can be invoked even when the credit fraudulently availed is utilised.

41. In the aforesaid regard, first the language of an amount equivalent appears in the later portion of the rule which provides for the consequences in case the conditions for invocation of the rule are satisfied. As already discussed, the rule itself can be invoked only in case where the credit of input tax is available in the electronic credit ledger and accordingly, the consequence of the invocation cannot determine the applicability of the rule. Secondly, once the input tax credit is claimed in electronic credit ledger, the credit becomes part of one fungible pool and the credit cannot be separately identified. Having regard to the same, the rule provides for restriction on an equivalent amount and not the credit itself. However, the rule presupposes existence of such credit in the electronic credit ledger.

42. A doubt may also arise that a registered person may persistently and continuously avail and utilise the fraudulent credit and in such scenario the strict interpretation of Rule 86A will defeat the underlying purpose of enacting such a preventive provision. In this regard. Rule 86A is not the only measure available with the Government. The Government can certainly initiate proceedings under the provisions of section 73 or section 74, as the case may be, for recovery of credit wrongly claimed. Further, the Government in an appropriate case may initiate proceeding for Cancellation of registration (either of the supplier of the recipient or both) under Section 29 of CGST Act. Furthermore, the Government can

also provisionally attach any property, including bank account, belonging to the taxable person under Section 83 of CGST Act

43. Accordingly, the fact or possibility of registered person availing and utilising the fraudulent credit persistently and continuously cannot be the basis to invoke Rule 86A.

44. The power to restrict debit from the electronic credit ledger is extremely harsh in nature. The rule outreaches the detailed procedure provided in the legislature for determination of input tax credit wrongly availed or utilised provided in Section 73 and 74 of CGST Act and empowers the officer to unilaterally impose certain restrictions in compelling circumstances. In other words, Rule 86A is invoked at a stage which is anterior to the finalization of an assessment or the raising of a demand. Accordingly, it should be governed strictly by specific statutory language which conditions the exercise of the power.

45. Mr. Sheth, the learned counsel appearing for the writ applicants is right in his submission that the heading of Rule 86-A itself is suggestive of its scope and applicability. The heading reads “conditions of use of amount available in electronic credit ledger”. It appears on plain reading of the heading itself that Rule 86-A can be invoked only if the amount is available in the electronic credit ledger and not otherwise. It is a settled rule of interpretation that the

section heading or marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of the provision to discern the legislative intent. [vide Uttamdas Chela Sunder Das vs. SGPC (1996) 5 SCC 71 and Bhinka & Ors. vs. Charan Singh, AIR 1959 (SC) 906]

46. In the aforesaid context, we may also refer to two more decisions of the Supreme Court (i) ***Commissioner of Income Tax, Madras vs. Kasturi & Sons Ltd.***, (1999) 3 SCC 346 and (ii) ***Kapil Mohan vs. Commissioner of Income Tax***, Delhi (1999) 1 SCC 450.

47. In Kasturi & Sons (supra), the Supreme Court observed in Para-9 as under;

> *"9. The principle that a taxing statute should be strictly construed is well settled. In Principles of Statutory Interpretation by Justice G.P. Singh, Sixth edition 1966, the law is stated thus:-*
>
> "*The well-established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY and LORD SIMONDS, means: "The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words". In a classic passage LORD CAIRNS stated the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction,*

certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute". VISCOUNT SIMON quoted with approval a passage from ROWLATT, J. expressing the principle in the following words: "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". Relying upon this passage LORD UPJOHN said: "Fiscal measures are not built upon any theory of taxation."

48. In Kapil Mohan (supra), the Supreme Court observed in Para-13 as under;

"As to the argument based on equity, it has long been recognised that tax and equity are strangers. Just as reliance upon equity does not avail an assessee, so it does not avail the Revenue. The legal representative of a deceased depositor cannot be made to pay income-tax upon the annuity only because the original depositor had not been required to pay income-tax on the amount of the annuity deposit, on the basis that what the Revenue had lost out on then should be recouped to it now. The original depositor did not voluntarily make the annuity deposit; he was required by the Act and Scheme to do so. Insofar as he was concerned, the Act provided that the annuity he received would be taxable as income. Whether advisedly or otherwise, the Act did not provide that the annuity would be taxed as income in the hands of his legal representative, and there it must remain."

49. Thus, the principle of law discernible from the aforesaid two decisions of the Supreme Court is that there can be no action based on any supposed intendment of the provision. Since the plain language of Rule 86A does

not permit its exercise without there being availability of credit, the same could not have been invoked in the present case.

50. Our attention has also been drawn to the Circular No.4 of 2021 dated 24.05.2021 issued by the Office of the Commissioner of State Tax, State Goods & Services Tax Department, Kerala. The circular has explained what would be the position if the balance in the electronic credit ledger is Nil. It would be appropriate to quote the entire circular placing much emphasis on Clauses-12 and 14 respectively therein. The same reads thus;

"Office of the Commissioner of State Tax, State Goods and Services Tax Department, Kerala, Tax Towers, Karamana, Thiruvananthapuram

Dated: 24/05/2021

CIRCULAR No.04 /2021

Sub: Blocking of Credit under Rule 86A of SGST Rules- 2017 - Guidelines issued-reg:

Ref: 1. order No. CT/17859/2018-A2 GSTC dated 22/01/2020

2. SoP for blocking/ unblocking of ITC

1. As per the new Rule 86A inserted in the GST Rules;

[86A. Conditions of use of amount available in electronic credit ledger.- (1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to

believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

i. issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

ii. without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2)The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

(3) Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction.

2. In order to streamline the process of blocking/unblocking of ITC as per the above rules, the following guidelines are issued;

3. Vide order No. CT/17859/2018-A2 GSTC dated 22/01/2020 the Joint Commissioners of state tax has been authorized to perform the functions to be performed by Commissioner of State Tax under Rule 86A within their respective jurisdiction.

4. Detailed SOP has already been issued prescribing the manner of blocking /unblocking of ITC in the portal.

5. In Rule 86A, 4 scenarios has been mentioned for blocking of ITC. Out of the 4 scenarios, more importance has to be given for situation (a) and (c). It should be ensured that no input tax credit is availed on the strength of tax invoices or debit notes or any other documents prescribed under rule 36 issued by a registered person who has been found non- existent or not conducting any business from the place for which registration has been obtained or without receipt of goods or services or both.

6. With regard to (b), major cases should be identified from the red flag reports or other reports available in the back end. while taking figures from 2A, it shall be ensured that the 2A is updated. Such blocking shall be in terms of Rule 36(4) of the KSGST AND CGST rules and Circular No.123/42/2019- GST dated 11th November, 2019 of CBIC.

7. In respect of cases initiated by the Jurisdictional officers/proper officers, the request for blocking of credits shall be sent to the District Joint Commissioners concerned(Authorized officers) who will examine the same and will take necessary steps to block the ITC in the portal as per the SoP issued.

8. In respect of the requests for blocking ITC received from CBIC, the same has to be received and

processed by Economic Intelligence Wing in the office of the Commissioner of State Taxes and they will examine the case and if found justified, it shall be forwarded to authorized District Joint Commissioner concerned who have the jurisdiction to block ITC of the said taxpayer.

9. Any requests from State Officers to block ITC pertaining to CBIC administrated taxpayers should be sent to Economic Intelligence Wing in the office of the Commissioner and they will process the same and forward to the CGST Commissionerates concerned for necessary action.

10. As stated in the rules, the credit blocked shall be the value equivalent to credit availed fraudulently or ineligible credit. The authorized officer shall determine the amount equivalent to such fraudulent credit and shall block usage of such amount in the portal.

11. The authorized Officer shall inform such blocking/ restriction of credit to the officer under whom the taxpayer is registered and also to the taxpayer whose credit has been blocked. Such intimation shall be send through e-mail to the registered mail id as soon as possible and also shall serve a hard copy of order to the taxpayer with proper acknowledgment.

12. If there is Nil balance or insufficient balance in the tax head to which the credit is to be blocked the credit available in other tax heads, equivalent to the amount fraudulently availed, can be blocked. In such scenario, it should be kept in mind that, this shall be subject to limitations imposed by law on cross-utilization of ITC. That is, as cross utilization of CGST credit to SGST liability and vice versa is not permitted by GST Laws. In case of blocking of CGST credit availed fraudulently, blocking of SGST credit shall not be done, if no credit is available in CGST tax head. As such, for blocking of IGST credit availed fraudulently, if there is no credit balance in IGST tax

head, the amount equivalent to the credit fraudulently availed can be blocked from the ITC credit available in CGST head and/or SGST head and vise versa.

13. Any representation received from the taxpayer against blocking of ITC shall be disposed by the authorized officer within a reasonable time (say 15 days). The authorized officer, after considering the representation, may on being satisfied that the conditions stipulated under Rule 86A no longer exists, or found to be contrary to the belief that led to the blocking, unblock the credits as per Rule 86A (2) in the manner specified in the SOP, under intimation to concerned registered person and the jurisdictional proper officer.

14. Blocking of credit under Section 86A is an emergency measure to prevent the taxpayer from using the credit availed fraudulently or ineligible credit taken. Hence nothing prevents the proper officer from taking any other suitable actions under any other provisions of GST laws including determination of tax under section 73, 74, demand and recovery, provisional attachment of property etc.

15. ITC blocking is a temporary step and should not be seen as equivalent to recovery of tax. Action under section 73/74 is the full and final demand creation exercise as per GST Law. Both are mutually exclusive and SCN under section 73/74 should be issued immediately upon completion of investigation in all cases."

51. The circular referred to above fortifies the contention raised by Mr. Sheth. Clause 12 of the circular, referred to above, clarifies that if there is Nil or insufficient balance in a particular tax head in the electronic credit ledger, then the balance in another tax head can be blocked only if the cross-utilization from such head is permissible in law.

Such cross-utilization between CGST and SGST is not permissible. The circular has clarified that the SGST credit ledger cannot be blocked if sufficient credit balance is not available under the CGST head and vice versa. In the case of the writ applicants herein, there is no balance available under any of the heads in the electronic credit ledger and, hence, the question of blocking of credit would not arise. It is further clarified in clause-15 of the circular that nothing would prevent the authority from proceeding with the adjudication under Sections 73 and 74 respectively and thus from exercising powers of provisional attachment. This is also in tune with what has been submitted on behalf of the writ applicants.

52. Mr. Sheth pointed out to us that his client was forced or rather coerced to pay excess amount of approximately Rs.20 Lakh as a result of illegal negative blocking of the electronic credit ledger. Without making such payment, the writ applicant was not allowed to file his return by virtue of Section 39(7) of the CGST Act. This tantamounts to recovery even without adjudication. The amount was paid by the writ applicant under protest pursuant to the order passed by a Coordinate Bench of this Court dated 08.12.2021. Mr. Sheth would submit that this excess amount which the writ applicant was forced to deposit, may be ordered to be refunded.

53. Mr. Sheth is also right in his submission that the authorities are not remediless with respect to the alleged

wrongful availment of the input tax credit by the writ applicant. The admissibility of input tax credit can be verified through issuance of show-cause notice and, thereafter, with the adjudication of the liability. The authorities have ample powers of recovery including the power of provisional attachment under Section 83 of the CGST Act. However, the power under Rule 86A could not have been invoked in the absence of any credit balance in the electronic credit ledger.

54. We are not impressed with the submission of Mr. Sharma that the legislature has consciously used the expression “equivalent to such credit” instead of the words “equivalent to such “available” “credit”. The emphasis which is sought to be placed by Mr. Sharma is on the non-usage of word “available”. In our opinion, the expression “equivalent to such credit” necessarily implies the available credit. The absence of the word “available” would not make any difference.

55. Our attention has also been drawn to a circular issued by the Central Board of Indirect Taxes & Customs dated 2nd November, 2021. This circular is in the form of guidelines for disallowing the debit of electronic credit ledger under Rule 86-A of the CGST Rules, 2017. It appears that such circular, providing for guidelines, came to be issued pursuant to the directions issued by this very High Court in the case of S.S. Industries vs. Union of India, reported in (2021) 87 GSTR 71 (Guj.). Paras-3.1.2, 3.1.3

and 3.1.4 are relevant. We quote as under;

> *"3.1.2 Perusal of the rule makes it clear that the Commissioner, or an officer authorised by him, not below the rank of Assistant Commissioner, must have "reasons to believe" that credit of input tax available in the electronic credit ledger is either ineligible or has been fraudulently availed by the registered person, before disallowing the debit of amount from electronic credit ledger of the said registered person under rule 86,4. The reasons for such belief must be based only on one or more of the following grounds:*
>
> *a) The credit is availed by the registered person on the invoices or debit notes issued by a supplier, who is found to be non-existent or is found not to be conducting any business from the place declared in registration.*
>
> *b) The credit is availed by the registered person on invoices or debit notes, without actually receiving any goods or services or both.*
>
> *c) The credit is availed by the registered person on invoices or debit notes, the tax in respect of which has not been paid to the government'*
>
> *d)The registered person claiming the credit is found to be non-existent or is found not to be conducting any business from the place declared in registration'*
>
> *e) The credit is availed by the registered person without having any invoice or debit note or any other valid document for it.*
>
> *3.1.3 The Commissioner, or an officer authorised by him, not below the rank of Assistant commissioner, must form an opinion for disallowing debit of an amount from electronic credit lodger in respect of a registered person, only after proper application of mind considering all the facts of the case, including the nature of prima facie fraudulently availed or*

ineligible input tax credit and whether the same is covered under the grounds mentioned in sub-rule (l) of rule 86A' as discussed in para 3.1.2 above; the amount of input tax credit involved; and whether disallowing such debit of electronic credit ledger of a person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue.

3.1.4 It is reiterated that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine case(s) fit for exercising power under rule 86A. The The remedy of disallowing debit of amount from electronic credit ledger being, by its very nature. Extraordinary' has to be resorted to with utmost circumspection and with maximum care and caution. It contemplates an objective determination based on intelligent care and evaluation as distinguished from a purely subjective consideration of suspicion. The reasons are to be on the basis of material evidence available or gathered in relation to fraudulent availment of input tax credit or ineligible input tax credit availed as per the conditions/grounds under sub-rule(1) of rule 86A."

56. In S.S. Industries (supra), this Court summarized its final conclusions as under;

"65. Our final conclusions may be summarized as under:-

(l) The invocation of Rule 86A of the Rules for the purpose of blocking the input tax credit may be justified if the concerned authority or any other authority, empowered in law, is of the prima facie opinion based on some cogent materials that the ITC is sought to be availed based on fraudulent transactions like fake/bogus invoices etc. However, the subjective satisfaction should be based on some

credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the belief.

(II) The power conferred upon the authority under Rule 86A of the Rules for blocking the ITC could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on subjective weighty grounds and reasons.

(III) The power under Rule 86A of the Rules should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

(IV) The aspect of availing the credit and utilization of credit are two different stages. The utilization of credit is a vested right. No vested right accrues before taking credit.

(V) The Government needs to apply its mind for the purpose of laying down some guidelines or procedure for the purpose of invoking Rule 86A of the Rules. In the absence of the same, Rule 86A could be misused and may have an irreversible and detrimental effect on the business of the person concerned. In this regard, the Government needs to act promptly."

57. For all the foregoing reasons, this writ application succeeds and is hereby allowed. The respondents are directed to withdraw negative block of the electronic credit ledger at the earliest. We rule that the condition precedent for exercise of power under Rule 86A of the GST Rules is the availability of credit in the electronic credit ledger which is alleged to be ineligible. If credit balance is

available, then the authority may, for reasons to be recorded in writing, not allow the debit of amount equivalent to such credit. However, there is no power of negative block for credit to be availed in future. The writ applicants are also entitled to the refund of Rs.20 Lakh deposited by them to enable them to file their return. The respondents shall refund this amount of Rs.20 Lakh to the writ applicants within a period of two weeks from the date of the receipt of the writ of this order.

58. With the aforesaid, this writ application is disposed of.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE,J)

Vahid