IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.09.2024

+ **W.P.(C) 10980/2024 and CM Nos.45297/2024 and 45298/2024**

BEST CROP SCIENCE PVT. LTD. THROUGH AUTHORIZED REPRESENTATIVE .....Petitioner

versus

PRINCIPAL COMMISSIONER, CGST COMMISSIONERATE, MEERUT AND ORS .....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Himanshu Tyagi and Mr Jitin Singhal, Advocates.

For the Respondent : Mr Harpreet Singh, SSC, Ms Suhani Mathur, and Mr Jatin Kumar Gaur, Advocates.

AND

+ **W.P.(C) 15380/2023 CM APPL. 61699/2023**

SH RAGHAV AGARWAL .....Petitioner

Versus

COMMISSIONER OF CENTRAL TAX AND GST DELHI NORTH & ORS. .....Respondents

Advocates who appeared in this case:

For the Petitioner : Ms Vibhooti Malhotra, Mr Bhuvnesh Satija and Mr Udit Sharma, Advocates.

For the Respondent : Mr Harpreet Singh, SSC, Ms Suhani Mathur, and Mr Jatin Kumar Gaur, Advocates.
Mr. Anurag Ojha, Sr SC and Mr. Subham Kumar, Mr Kumar Abhishek, Mr Dipak Raj Singh, Advocates for R2 and R3.

AND

\+ **W.P.(C) 5250/2024**

M/S JAI MAA ENTERPRISES .....Petitioner

Versus

PRINCIPAL CHIEF COMMISSIONER CGST AND CX, DELHI & ORS. .....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Mohit Gupta, Advocate.

For the Respondent : Mr. Anurag Ojha, Sr SC and Mr. Subham Kumar, Mr Kumar Abhishek, Mr Dipak Raj Singh, Advocates for R2.
Mr R Ramchandran, Sr SC for R3.

AND

\+ **W.P.(C) 5395/2024**

HILBERT INNOVATIONS PVT LTD ....Petitioner

Versus

COMMISSIONER OF DELHI GOODS AND SERVICE TAX & ANR. .....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Rajesh Mahna, Mr. Ramanand Roy, Mr. Mayank Routs, Ms Silky Wadhwa and Mr Shiva Narang, Advocates.

For the Respondent : Mr.Rajeev Aggarwal, ASC Ms.Shaguftha Hameed Mr.Prateek Badhwar and Mr. Shubam Goel, Advocates for Department of Trade and Taxes Delhi
Mr. Anurag Ojha, Sr SC and Mr. Subham Kumar, Mr Kumar Abhishek, Mr Dipak Raj Singh, Advocates for R3.

AND

\+ **W.P.(C) 5397/2024**

M/S NDCON CONSTRUCTIONS ....Petitioner

Versus

COMMISSIONER OF DELHI GOODS AND SERVICE TAX & ANR. .....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Mayank Routs, and Ms Silky Wadhwa and Mr Shiva Narang, Advocates.

For the Respondent : Mr.Rajeev Aggarwal, ASC Ms.Shaguftha Hameed Mr.Prateek Badhwar and Mr. Shubam Goel, Advocates for Department of Trade and Taxes Delhi
Mr. Anurag Ojha, Sr SC and Mr. Subham Kumar, Mr Kumar Abhishek, Mr Dipak Raj Singh, Advocates for R3.

AND

\+ **W.P.(C) 6997/2024**

GNG ELECTRONICS PVT LTD .....Petitioner

versus

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX & ORS. .....Respondents

Through:

Advocates who appeared in this case:

For the Petitioner : Mr. Rajesh Mahna, Mr. Ramanand Roy, Mr. Mayank Routs, Ms Silky Wadhwa and Mr Shiva Narang, Advocates.

For the Respondent : Mr R Ramchandran, Sr SC for R1-2.
Mr. Rajeev Aggarwal, ASC Ms.Shaguftha Hameed Mr.Prateek Badhwar and Mr.

Shubam Goel, Advocates for Department of Trade and Taxes Delhi.
Mr. Anurag Ojha, Sr SC and Mr. Subham Kumar, Mr Kumar Abhishek, Mr Dipak Raj Singh, Advocates for R3.

AND

\+ **W.P.(C) 7183/2024**

KAY KAY OVERSEAS CORPORATION .....Petitioner

versus

COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX & ORS. .....Respondents

Through:

Advocates who appeared in this case:

For the Petitioner	: Mr. Rajesh Mahna, Mr. Ramanand Roy, Mr. Mayank Routs, Ms Silky Wadhwa and Mr Shiva Narang, Advocates.
For the Respondent	: Mr.Rajeev Aggarwal, ASC Ms.Shaguftha Hameed Mr.Prateek Badhwar and Mr. Shubam Goel, Advocates for Department of Trade and Taxes Delhi. Mr Abhinav Kalia, and Mr Ajit Kumar Kalia, Advocates for R1 to R3. Mr.Anurag Ojha, Sr SC, Mr. Subham Kumar, Mr Kumar Abhishek, Mr Dipak and Mr Vipul Kumar, Advocates for R4.

AND

\+ **W.P.(C) 9350/2024 CM APPL. 38315/2024**

SHRI BALAJI POLYMERS THROUGH ITS PROPRIETOR MR. ANIL KUMAR .....Petitioner versus

SALE TAX OFFICER OF DELHI GOODS AND SERVICE TAX AND ANOTHER .....Respondents

Through:

Advocates who appeared in this case:

For the Petitioner	: Mr Rakesh Kumar, Mr Praveen Kumar and Mr Atul, Advocates.
For the Respondent	: Mr Harpreet Singh, SSC, Ms Suhani Mathur, and Mr Jatin Kumar Gaur, Advocates for CGST.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE SACHIN DATTA

JUDGMENT

VIBHU BAKHRU, J

THE CONTROVERSY

1. The petitioners, in these batch of petitions, are taxpayers and are registered under the Central Goods and Services Tax Act, 2017 (hereafter *the CGST Act*) / Delhi Goods and Services Tax Act, 2017 (hereafter *the DGST Act*). They impugn the respective orders passed by the Commissioner/officer authorized by Commissioner, under Rule 86A of the Central Goods and Services Tax Rules, 2017 (hereafter *the Rules*) to the extent that the said orders purport to block the input tax credit (hereafter also referred to as *ITC*) in their respective Electronic Credit Ledgers (hereafter also referred to as *ECLs*) in excess of the credit available in their respective ECLs. The same creates an artificial negative balance in the ECL. Resultantly, till the negative

balance in the ECL of the respective petitioners is not extinguished by further addition (credit) of ITC in the ECL, the petitioners are disabled to utilize the ITC availed by them for payment of their dues. Thus, in effect, only the ITC remaining after adjusting the negative balance, would be available to the taxpayer for discharging its dues.

2. It is the case of the petitioners that Rule 86A of the Rules does not permit blocking of the ITC, which is unavailable in a taxpayer's ECL. They claim that on a plain reading of Rule 86A of the Rules, the power of the competent officer to block the ITC of a taxpayer is confined to the ITC that is available at the material time in the taxpayer's ECL. The Revenue counters the said contention. According to the Revenue, the Commissioner / authorized officer has the power to not allow the debit of an amount equivalent to the ITC, which he has reason to believe was fraudulently availed or is ineligible. The said amount is not confined to the credit balance of the ITC as available on the date of the order under Rule 86A of the Rules. The amount of ITC that can be blocked may exceed the credit balance of ITC as available in the ECL on the date of the order and the taxpayer would not be permitted to utilize the ITC for discharge of its dues or to seek a refund, till the full amount, which is alleged to have been fraudulently availed is blocked. The taxpayer can, thus, use or seek refund of the ITC, which is in excess of the amount, which the Commissioner or the authorized officer has reasons to believe is fraudulently availed or is inadmissible.

3. It is material to note that the petitioners have raised several other issues in their respective petitions; however, they have confined their

challenge solely to the aforesaid controversy. This was also noted in the order dated 22.08.2024.

4. In view of the above, the only question that requires to be addressed is – whether Rule 86A of the Rules permits the Commissioner or an officer authorized by him, to block a taxpayer's ECL (Electronic Credit Ledger) by an amount exceeding the credit available at the time of issuance of the said order?

SUBMISSIONS OF THE COUNSEL

5. The learned counsel appearing for the petitioners referred to the decision of the Gujarat High Court in ***Samay Alloys India Pvt. Ltd. v. State of Gujarat***[1] and the decision of the Telangana High Court in ***Laxmi Fine Chem vs Assistant Commissioner***[2], which covers the controversy.

6. They submit that a taxpayer has a vested right in utilising the ITC as available in his ECL for discharge of its dues or in appropriate cases for seeking a refund of the same. Thus, the same could not be blocked or appropriated except by a specific statutory provision to the said effect. They contend that Rule 86A of the Rules is required to be strictly interpreted and a taxpayer's ECL can be blocked only to the extent as permitted under Rule 86A of the Rules. They submit that the said provision is unambiguous and therefore, is required to be interpreted by applying the Rule of literal interpretation.

---

[1] Neutral Citation No. 2022:GUJHC:6969-DB
[2] W.P.No.5256/2024 decided on 18.03.2024

7. The learned counsel referred to the decision of a Coordinate Bench of this Court in ***Brand Equity Treaties Ltd. and Ors. v. Union of India***[3] and the decision of the Division Bench of the Bombay High Court in ***Dee Vee Projects Ltd. v. Government of Maharashtra***[4] in support of the contention that the credit balance as available in the ECL on account of the input tax availed by a taxpayer, is his property and thus, in terms of Article 300A of the Constitution of India, a taxpayer cannot be deprived of the same except by authority of law.

8. The learned counsel appearing for the Revenue countered the aforesaid submissions. Mr Harpreet Singh, learned counsel appearing for the Revenue in W.P.(C) 10980/2024 contended that the view of the Gujarat High Court in ***Samay Alloys India Pvt. Ltd. v. State of Gujarat***[1], is erroneous. He relied upon the decisions of the Calcutta High Court in ***Basanta Kumar Shaw v. Assistant Commissioner of Revenue, Commercial Taxes and State Tax, Tamluk Charge & Ors.***[5] where the Court had taken a contrary view. He submitted that the Calcutta High Court had interpreted the provisions of Rule 86A of the Rules by applying the rule of purposive construction to give effect to the legislative intent. He submitted that the legislative intent was clearly to exclude a taxpayer from utilising ITC to the extent that it was inadmissible or was fraudulently availed. Interpreting Rule 86A of the Rules, bearing in mind the said objective, would clearly indicate that the Rule enables the Commissioner or an officer authorized by him to

[3] Neutral Citation No. 2020:DHC:1868-DB
[4] W.P (C) 2693/2021 decided on 11.02.2022
[5] 2022 SCC OnLine Cal 4544

block the ITC equivalent to the amount of the ITC which is fraudulently availed or was ineligible. He submitted that there is no express provision that limits the scope of power under Rule 86A of the Rules, to block only the credit balance as available on the date of the issuance of the said order.

9. He also referred to the decision of the Allahabad High Court in ***R.M. Dairy Products LLP v. State of U.P. & Ors.***[6] and on the strength of the said decision submitted that the words "not allow debit" are the operative words of Rule 86A of the Rules and the same did not restrict the power under Rule 86A only to the amount that is available in the taxpayer's ECL on the date of the issuance of the order.

10. Mr Rajiv Aggarwal, appearing for the Revenue in W.P.(C) Nos.5395/2024 and 5397/2024, submitted that the language of Rule 86A of the Rules is clear and therefore, the same is required to be interpreted in its literal sense. He referred to the decision of the Supreme Court in ***Britannia Industries Ltd. v. CIT***[7] in support of his contention. He also referred to the decision of the Constitution Bench of the Supreme Court in ***Commissioner of Customs (Import), Mumbai v. Dilip Kumar and Company & Ors.***[8] and contended that the statute must be construed according to the intent of the legislature. He submitted that the intent of framing Rule 86A of the Rules was clearly to deprive the taxpayer of availing the ITC to the extent that such ITC was availed

[6] 2021 SCC OnLine All 1144
[7] (2006) 1 SCC 646
[8] (2018) 9 SCC 1

fraudulently or was ineligible. He submitted that the power to block the ITC is confined to sum equivalent to the ineligible and fraudulently availed ITC.

11. Next, he submitted that Rule 86A of the Rules use the words 'equivalent to such credit' instead of the words 'equivalent to such available credit'. He submitted that this clearly indicates the legislative intent is not to limit debit to the extent of the ITC, which is ineligible and/or fraudulently availed, which is available in the taxpayer's ECL.

12. He submitted that it is also apparent that Rule 86A of the Rules comes into play after the act of availing fraudulent or ineligible credit has already taken place. Thus, the ITC available at the given point of time in the ECL may be wholly tainted, partially tainted or wholly untainted. However, the same would be immaterial, as in terms of Rule 86A of the Rules, the Revenue may freeze the taxpayer's ECL to an amount equivalent to the fraudulent or ineligible credit.

13. Mr Ohja, learned counsel also advanced submissions on behalf of the Revenue. He submitted that Rule 86A of the Rules is akin to 'a no debit' provision. It does not allow debit of the ECL to the extent of fraudulently availed or ineligible credit. He also submitted that Rule 86A of the Rules cannot be construed as a provision for recovery of tax. It is merely a temporary measure of not permitting the taxpayer to use the ITC for discharge of its dues or to seek a refund of the same. He stated that this is the least invasive method adopted to protect the revenue. He submitted that the expression "available" as occurring in

the opening part of Rule 86A of the Rules would include the ITC, which had been passed on or was utilised. He submitted that the words, "has been fraudulently availed", reinforces the said interpretation. It could also be construed to include tax credit that was available in the ECL. In such cases, invocation of Rule 86A of the Rules impedes the use of tainted credit. He submitted that it is also possible that the balance available in ECL is partly tainted. However, since it is a fungible food, Rule 86A of the Rules would permit blocking of ITC to the extent of fraudulent and / or ineligible credit.

14. He submitted that the moment the taxpayer expresses the intention to avail the ITC by filing his return in Form GSTR 3B, he avails of the ITC. The same is made available to the taxpayer once it is reflected in the ECL and he can utilise the same thereafter.

15. Next, he submitted that the ITC is not a vested right and at best a 'legal interest'. He submitted that legal right imposes a corresponding duty on the State to ensure that the taxpayer's right of the ITC is not impeded. However, conferring of the tax credits is in the nature of a 'privilege'. Although, a taxpayer may have beneficial interest in tax credit, it cannot be enforced against the State beyond the scheme of the Rules conferring such benefit. He referred to the decision of the Supreme Court in ***ALD Automotive Pvt. Ltd. v. Commercial Tax Officer now upgraded as Assistant Commissioner (CT) & Ors.***[9] in support of his contention.

[9] (2019) 13 SCC 225

16. He submitted that the ITC must, thus, be viewed as an exemption and therefore, the principle governing exemption notifications would necessarily apply. He referred to the decision of the Supreme Court in ***Commissioner of Customs (Import), Mumbai v. Dilip Kumar and Company & Ors***[8] and submitted that where two views are possible in case of an exemption notification, the one which is favourable to the Revenue is required to be accepted.

17. He submitted that Rule 86A of the Rules must be interpreted by applying principles of purposive interpretation and therefore, Rule 86A of the Rules must be interpreted in a manner so as to further the remedy sought to be achieved.

18. He submitted that the taxpayer would have no right to deduct the input tax, which is founded on an abusive practice. He contended that it is a part of revenue neutral jurisprudence to impede the flow of tax credit derived from an abusive practice which is proscribed. He referred to the decision of the U.K. Supreme Court in ***Commissioner of His Majesty's Revenue and Customs v. NHS Lothain Health Board***[10]

19. Next, he submitted that a construction, which enables a person to profit from his own wrongful act, ought to be avoided. Thus, Rule 86A of the Rules ought to be interpreted in order to enable protection of the Revenue's interest to the full extent.

---

[10] 2022 UKSC 28.

20. He also countered the submission that the Revenue's interpretation of Rule 86A of the Rules would in effect extend the duration of the said order. He submitted that if the power under Rule 86A of the Rules was confined to block only the credit balance of the input tax in the ECL, the concerned officer would require to pass multiple orders to freeze the credit as and when it becomes available. Each of such orders would be operative for a period of one year. Thus, cumulatively the full duration of a debit freeze would exceed one year. He submitted that this would also require the Revenue to keep a round the clock watchful eye on the amounts being credited to the taxpayer's ECL, which would make the task of the Revenue more onerous.

NATURE OF INPUT TAX CREDIT

21. The debate in the present petitions regarding the principles to be applied for interpretation of Rule 86A of the Rules centers around the nature of the right of a taxpayer to avail ITC and the principles of statutory interpretation. The petitioners contend that ITC is a vested right. Invocation of the provisions of Rule 86A of the Rules has the effect of temporarily denuding the taxpayers of their right and thus, such provisions must be strictly construed. The Revenue contends to the contrary. It contends that the nature of ITC is that of a concession. Therefore, if Rule 86A of the Rules is capable of more than one interpretation, the construction which favours the Revenue must be adopted.

22. Before proceeding to address the question regarding the nature of ITC, it is necessary to bear in mind the scheme of the levy of Goods and Services Tax (GST). The GST is an indirect tax, which is effectively borne by the ultimate consumer. However, the tax is levied and collected at multiple stages of the supply chain. The GST is in the nature of a value added tax. It is chargeable on the supplies at multiple stages. However, a taxpayer is entitled to credit for the tax paid by him on the supplies received subject to the conditions as set out under the relevant statues.

23. Chapter V of the CGST Act and also the corresponding State and Union Territory legislations, contain provisions regarding ITC. For convenience and brevity, we shall refer to the provisions of the CGST Act for addressing the controversy in these petitions. It is relevant to refer to Sub-sections (1) and (2) of Section 16 of the CGST Act. The same are set out below:

> "16. **Eligibility and conditions for taking input tax credit.** – (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.
>
> (2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless, –

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37.

(b) he has received the goods or services or both.

Explanation.- For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services –

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.;

(ba) the details of input tax credit in respect of the said supply communicated to such registered person under Section 38 has not been restricted;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of

> invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be paid by him along with interest payable under section 50, in such manner as may be prescribed:
>
> **Provided** also that the recipient shall be entitled to avail of the credit of input tax on payment made by him to the supplier of the amount towards the value of supply of goods or services or both along with tax payable thereon."

24. In terms of Section 16(1) of the CGST Act, every registered person is entitled to take credit of the input tax charged on supply of goods or services or both, which is used or intended to be used in furtherance of his business. The said amounts are to be credited to the taxpayer's ECL. However, the entitlement is subject to the conditions and restrictions as may be prescribed and, in the manner, as posited under Section 49 of the CGST Act. Sub-section (2) of Section 16 of the CGST sets out the conditions, which if not complied with disentitles a registered person of any credit of input tax in respect of supply of goods or services or both. Sub-section (3) of Section 16 of the CGST Act disentitles a taxpayer for any ITC in respect of a depreciable capital goods where the registered person has availed of depreciation on the tax component of the value of such capital goods. Sub-section (4) of Section 16 of the CGST Act sets out the time limit within which a registered person is entitled to take ITC.

25. Section 17 of the CGST Act contains the provisions for apportionment of the ITC in respect of goods or services or both, which are used partly for business purposes and partly otherwise. Under Sub-section (1) of Section 17 of the CGST Act, ITC is confined to the input tax, which is attributable to goods or services or both, as is attributable

to a registered taxpayer's business. In terms of Section 17(2) of the CGST Act, the ITC is permissible for effecting taxable supplies including zero rated supplies. It is not available in respect of exempted supplies. Thus, the credit of ITC is restricted to input tax, that is attributable to taxable supplies including zero rated supplies. Sub-section (3) of Section 17 of the CGST Act provides value of exempted supplies under Sub-section (2) of Section 17 of the CGST Act and would include tax liable to be paid by the recipient of the supplies. The value of exempt supplies is such as may be prescribed and would include supplies on which tax is payable by the recipient on a reverse charge method. Sub-section (4) of Section 17 of the CGST Act provides the manner for a bank, company or a financial institution to avail ITC. Sub-section (5) of Section 17 of the CGST Act refers to certain supplies on which ITC is not available to a taxpayer. Sub-section (6) of Section 17 of the CGST Act enables the government to prescribe the manner in which the credit referred to in Sub-section (1) and (2) of Section 17 of the CGST Act may be attributed.

26. Section 18 of the CGST Act contains provisions regarding availability of credit in certain exceptional circumstances. Section 19 of the CGST Act provides the conditions and the manner for availing ITC in respect of inputs and capital goods sent for job work. Section 20 of the CGST Act contains provisions for distribution of credit by an Input Service Distributor and Section 21 of the CGST Act contains provisions regarding recovery of credit distributed in excess.

27. Section 41 of the CGST Act contains provisions regarding availment of the ITC on self-assessment basis.

28. Chapter X of the CGST Act contains provision regarding payment of tax. Section 49(3) of the CGST Act expressly provides that the amount available in the ECL may be used for making payments of tax, interest, penalty and other amounts as may be payable under the CGST Act and the Rules made thereunder.

29. Sub-section (5) of Section 49 of the CGST Act prescribes the manner in which the amount of the ITC available in the ECL of a registered person can be used. Section 49A and 49B of the CGST Act prescribes the manner of utilization of the ITC and the order in which the ITC is required to be utilized.

30. A brief purview of the provisions of the CGST Act clearly indicate that a taxpayer is entitled to ITC only to the extent as provided under the CGST Act and subject to the stipulated conditions being satisfied. There is no cavil that if the conditions as set out under the CGST Act are not satisfied, the registered taxpayer would not be entitled to avail and utilize the ITC in respect of supplies received by it. The right to avail and utilize the ITC is thus a statutory right, which accrues by virtue of the provisions of the CGST Act and is subject to the conditions as set out therein. This right to avail and utilize the ITC is a valuable right. It is, undeniably, an asset, which vests with a taxpayer if the taxpayer satisfies all the stipulated conditions for such entitlement.

31. In ***ALD Automotive Pvt. Ltd. v. Commercial Tax Officer now upgraded as Assistant Commissioner (CT) & Ors.***[9] the Supreme Court had, in the context of Tamil Nadu Value Added Tax, 2006, observed as under:

> "**34**. The input credit is in the nature of benefit/concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute."

32. The learned counsel appearing for the Revenue had founded their submissions on the above observations made by the Supreme Court. The said observations have to be read in the context in which the said observations were made. In the said case, the Supreme Court was considering a challenge to the constitutional validity of the provisions of Section 19(11) of the Tamil Nadu Value Added Tax Act, 2006, which curtailed the right of the registered dealer to claim ITC. Section 19(11) of the said Act provided that if a registered dealer had failed to claim ITC in respect of a transaction of a taxable purchase in any month, he shall make the claim before the end of the financial year or before ninety days from the date of purchase, whichever is earlier. It was the appellant's case in the aforementioned matter that it had received taxable invoices late from the registered dealer and therefore its claim was delayed. The appellant contended that the credit for input tax was its vested right, which could not be curtailed or fettered by any unreasonable restrictions imposed under Section 19(11) of the Tamil Nadu Value Added Tax Act, 2006. According to the appellant, the said restriction requiring that the claim be made within ninety days from the

date of purchase or before the end of financial year was an unreasonable restriction and violated Articles 14 and 19 of the Constitution of India. The Supreme Court rejected the said contentions. The Court accepted that the right of the ITC is circumscribed by the provisions of the statute in terms of which the said right is granted. In the said context, the Court referred to the right to entitlement of the ITC as a concession, which would necessarily have to be determined on the basis of the statutory provisions.

33. A close examination of the said judgment also indicates that the Court has accepted that once all conditions for availing the ITC are satisfied, the taxpayer would have a substantive right to claim the same. The Supreme Court had referred to an earlier decision in ***Commissioner of Central Excise, Madras v. Home Ashok Leyland Ltd.***[11] and held that the same was not applicable since all conditions for availing Cenvat credit in that case were satisfied. It is relevant to note that in that case[11] the question that fell for consideration was whether the taxpayer could be denied the benefit of Rule 57-E of the Central Excise Rules, 1944 as amended with effect from 15.04.1987. The amended Rule stipulated that where the duty paid on any inputs in respect of which credit has been allowed under Rule 57-A, and if the said duty is varied subsequently due to any reason resulting in refund or if the duty is varied due to change in classification resulting in the recovery, then the credit allowed shall also be varied accordingly, by adjustment in the credit account. The High Court held that Rule 57-E as amended was

---

[11] (2007) 4 SCC 51

clarificatory and therefore did not affect the right of the manufacturer to claim MODVAT credit for the duty paid on inputs. The Supreme Court upheld the said view. It held that Section 57-E is procedural and therefore did not affect the substantive rights of the manufacturer. However, the Supreme Court also observed that the right would accrue to a manufacturer subject to him complying with the procedure of adjustment as contemplated under Rule 57-E as amended.

34. In ***Eicher Motors Ltd. & Anr. v. Union of India & Ors.***[12], the Supreme Court considered the challenge to a rule which provided for lapsing of unutilized credit on a stipulated date. In the said case, it was contended on behalf of the taxpayer that the MODVAT credit lying in its balance as on the stipulated date (16.03.1995) represented a vested right accrued to the taxpayer under the existing law and the Central Government had no powers to make a rule for taking away such vested rights. The Supreme Court, in effect, accepted the said contention as is apparent from paragraphs 5 and 6 of the said decision, which are reproduced below:

> "**5.** Rule 57-F(4-A) was introduced into the Rules pursuant to the Budget for 1995-96 providing for lapsing of credit lying unutilised on 16-3-1995 with a manufacturer of tractors falling under Heading No. 87.01 or motor vehicles falling under Headings Nos. 87.02 and 87.04 or chassis of such tractors or such motor vehicles under Heading No. 87.06. However, credit taken on inputs which were lying in the factory on 16-3-1995 either as parts or contained in finished products lying in stock on 16-3-1995 was allowed. Prior to the 1995-96 Budget, the Central excise/additional duty of customs paid on inputs was allowed as credit for payment of excise duty on the

[12] (1999) 2 SCC 361

final products, in the manufacture of which such inputs were used. The condition required for the same was that the credit of duty paid on inputs could have been used for discharge of duty/liability only in respect of those final products in the manufacture of which such inputs were used. Thus it was claimed that there was a nexus between the inputs and the final products. In the 1995-96 Budget, the MODVAT Scheme was liberalised/simplified and the credit earned on any input was allowed to be utilised for payment of duty on any final product manufactured within the same factory irrespective of whether such inputs were used in its manufacture or not. The experience showed that credit accrued on inputs is less than the duty liable to be paid on the final products and thus the credit of duty earned on inputs gets fully utilised and some amount has to be paid by the manufacturer by way of cash. Prior to the 1995-96 Budget, the excise duty on inputs used in the manufacture of tractors and commercial vehicles varied from 15% to 25%, whereas the final products attracted excise duty of 10% or 15% only. The value addition was also not of such a magnitude that the excise duty required to be paid on final products could have exceeded the total input credit allowed. Since the excess credit could not have been utilised for payment of the excise duty on any other product, the unutilised credit was getting accumulated. The stand of the assessees is that they have utilised the facility of paying excise duty on the inputs and carried the credit towards excise duty payable on the finished products. For the purpose of utilisation of the credit, all vestitive (*sic*) facts or necessary incidents thereto have taken place prior to 16-3-1995 or utilisation of the finished products prior to 16-3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing Scheme. Now by application of Rule 57-F(4-A), the credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed, that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate that the Scheme is merely being altered and, therefore, does not have any retrospective or retroactive effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the Rules available, certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that the right, which had accrued to a party such as the availability of a scheme, is affected and, in particular, it loses sight of the fact that the provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier Scheme necessarily that the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said Rule would result in affecting the rights of the assessees.

6. We may look at the matter from another angle. If on the inputs, the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the Rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.”

35. In a subsequent decision in the case of ***Collector of Central Excise, Pune and Ors. v. Dai Ichi Karkaria Ltd. & Ors.***[13] the Supreme Court held that the credit which is validly taken is indefeasible. The relevant extract of the said decision is set out below:

> "**18.** It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the rules which provides for a reversal of the credit by the Excise Authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. <u>The credit is, therefore, indefeasible.</u> It should also be noted that there is no corelation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.
>
> **19.** It is, therefore, that in the case of *Eicher Motors Ltd.* v. *Union of India* (1999) 2 SCC 361 this Court said that a credit under the MODVAT Scheme was "as good as tax paid"." [emphasis added]

36. In a scheme for taxation, which provides for credit for taxes on inputs, the taxpayer would be entitled to such credit subject to

[13] (1999) 7 SCC 448

Signature Not Verified
Digitally Signed
By:DUSHYANT
RAWAL

complying with all the necessary conditions for validly availing the same. If the conditions for validly availing the same are satisfied, it would vest a right with the taxpayer to utilize the same in accordance with the relevant statute. Undeniably, the said right is a valuable right and a taxpayer cannot be deprived of the same except by a validly enacted statute or rules. It is settled law that legislature has wide latitude in laws relating to economic activities. The legislature is required to be allowed sufficient 'play in the joints' as it has to deal with complex problems[14]. Although, the legislature has a wide discretion and the Courts must defer to the legislative wisdom, the fiscal statutes are not immune from the constitutional framework and must necessarily be compliant with the constitutional guarantees[15].

37. In ***M/s S.S. Industries v. Union of India,***[16] the Gujarat High Court accepted that the right to utilize validly availed ITC, is a vested right. The Court examined the Scheme of the Rule 86A of the Rules and summarized its conclusion as under:

> "65. Our final conclusions may be summarized as under: -
>
> (I) 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

[14] R.K. Garg v. Union of India: (1981) 4 SCC 675
[15] Kunnathat Thateunni Moopil Nair, Etc. v. State of Kerala & Anr.: 1960 SCC OnLine SC 7, Union of India v. A. Sanyasi Rao, (1996) 3 SCC 465
[16] Neutral Citation No.2020: GUJ HC: 40484-DB

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."

RULE 86A OF THE RULES – A DRASTIC POWER

38. Rule 86A of the Rules falls within Chapter IX of the Rules, and expressly empowers the Commissioner or any other officer authorized by him, not below the rank of Assistant Commissioner, to not allow debit of an amount from the ECL subject to the conditions specified therein being satisfied.

39. As noted above, ITC can be availed by a taxpayer only if the necessary conditions for availing the same are complied with and the same is subject to the conditions and restrictions under the CGST Act and the Rules made thereunder. But it cannot be disputed that it is a valuable right.

40. Undisputedly, the exercise of power under Rule 86A of the Rules effectively denies a taxpayer its ability to discharge its dues by utilizing the ITC or seeking a refund which it is entitled to do under the CGST Act and the Rules. The ITC, undoubtedly, is a valuable resource available to a taxpayer for payment of taxes and other dues. Thus, the denial of access of this resource in fact denies a taxpayer, albeit temporarily, access to its assets. An order under Rule 86A of the Rules in effect reduces the working capital available to a taxpayer. Thus, notwithstanding that the entitlement to ITC may not be an indefeasible right and can be curtailed by the provisions of the CGST Act and the Rules, an act of blocking taxpayer's ITC, which is availed by the taxpayer has significant adverse consequences as far as a taxpayer is concerned.

41. Rule 86A of the Rules, is not a provision for recovery of tax or other dues. It enables the concerned authority to take temporary measures for the protection of the interest of revenue.

42. The same is necessarily to be borne in mind while interpreting the provisions of Rule 86A of the Rules.

RULE 86A NOT CONDITION OF GRANT OF EXEMPTION/ CONCESSION

43. As noted above, it was contended on behalf of the Revenue that ITC is in the nature of a concession in support of its contention that if two interpretations are possible, the one in favour of the Revenue ought to be accepted. Insofar as provisions relating to concessions and exemptions are concerned, it is settled that the same would be available

only if the taxpayer discharges the burden of satisfying the necessary conditions for the same. To the said extent, the said principle may be applicable for conditions to be satisfied for availing ITC. In ***Jayam & Company v. Assistant Commissioner & Anr***[17]***.*** the Supreme Court applied the said principle while considering the interpretation of Section 3 and Section 19 of the Tamil Nadu Value Added Tax, 2006 and held as under:

> "12. It is a trite law that whenever concession is given by statute or notification etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the "dealers" to get the benefit of ITC but it is a concession granted by virtue of Section19. As a fortiori, conditions specified in Section 10 must be fulfilled. In that hue, we find that Section 10 makes original tax invoice relevant for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect do hors the issue of ITC as per the Section 19 of the VAT Act, possibly the arguments of Mr Bagaria would have assumed some relevance. But, keeping in view the scope of the issue, such a plea is not admissible having regard to the plain language of sections of the VAT Act, read along with other provisions of the said Act as referred to above."

44. However, insofar as the interpretation of Rule 86A of the Rules is concerned, the said principle may not be an apposite one. Rule 86A of the Rules does not impose a condition, which the taxpayer has to satisfy for availing the ITC as the same stands credited in the assessee's ECL. At the stage of issuing an order under Rule 86A of the Rules, there

[17] (2016) 15 SCC 125

is no determination that the ITC availed by the assessee is fraudulent or ineligible. An order under Rule 86A of the Rules is premised on the Commissioner or the officer authorized by him, having reason to believe that the available ITC has either been availed fraudulently or is ineligible on account of the circumstances as set out in Clauses (a) and (d) of Sub-rule (1) of Rule 86A of the Rules. An order under Rule 86A of the Rules is not in the nature of a condition to be complied by the taxpayer or a burden to be discharged by it. It is an order passed in exercise of drastic powers that are granted to the concerned authority. Such a power can be exercised only if the conditions set out in Sub-rule (1) of Rule 86A of the Rules are satisfied and the extent of such power is circumscribed by Rule 86A of the Rules.

45. There is some similarity in the language of Section 83(1) of the CGST Act, which enables the Commissioner to provisionally attach a taxpayer's assets for protecting the interest of the Revenue, with the language of Rule 86A of the Rules. The powers under Sub-section (1) of Section 83 of the CGST Act and under Rule 86A of the Rules, can be exercised only if the concerned authority has reasons to believe that the conditions as stipulated in the respective provisions are satisfied. In ***M/s S.S. Industries v. Union of India***[16]**,** the Gujarat High Court had also observed that the provisions of Rule 86A of the Rules are reminiscent to Section 83 of the CGST Act.

PRINCIPLES FOR INTERPRETATION OF RULE 86A

46. The provisions of Rule 86A of the Rules are required to be interpreted bearing in mind (a) that utilization of credit is a vested right *albeit* in respect of credit that has been validly accrued; (b) that the power under Rule 86A of the Rules is a drastic power and the same may have serious consequences for the taxpayer; and, (c) Rule 86A of the Rules concerns the power of the Commissioner, under defined circumstances, to interdict the taxpayer from accessing its valuable resource for discharging its dues or in given cases seeking a refund. It is not a provision, which imposes a condition to be satisfied by the taxpayer for availing the ITC. It is not a provision, which imposes a burden to be discharged by the taxpayer to be entitled to the ITC.

47. Insofar the principles regarding statutory interpretation are concerned, it is well settled that a statute must be interpreted as it reads. In ***CST v. Modi Sugar Mills Ltd.***[18] the Supreme Court had observed as under:

> "…..In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

48. The Supreme Court in ***Baidyanath Ayurved Bhawan (P) Ltd. v. Excise Commr.***[19] observed that: -

[18] 1960 SCC OnLine SC 118
[19] (1971) 1 SCC 4

"6. ….In interpreting a taxing provision, the courts should not ordinarily concern themselves with the policy behind the provision or even with its impact. As observed by Rowlatt, J. in *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* [(1921) 1 KB 64] that in a taxing act one has to look 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 a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

49. The Court may apply the rule of purposive interpretation in case a statutory provision is capable of more than one interpretation. In cases of ambiguity, it would be expedient to adopt a construction, which would further the purpose and objective of the statute. It is relevant to refer the following observations of the Supreme Court in ***District Mining Officer & Ors. v. Tata Iron and Steel Co. & Another***[20]:

"….A statute is an edict of the legislature and in construing a statute, it is necessary, to seek the intention of its maker. A statute has to be construed according to the intent of them that make it and the duty of the court is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation the court has to choose that interpretation which represents the true intention of the legislature. This task very often raises the difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. Nonetheless, the function of the courts is only to expound and not to legislate. Legislation in a modern state is actuated with some policy to curb some public evil or to

[20] (2001) 7 SCC 358

effectuate some public benefit. The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed…"

50. However, it is also well settled principle that if the words used in a statute are unambiguous, the same must be construed in their literal sense notwithstanding that the Court may be of the view that the legislative intent may have been different. If the legislative intent is not expressed by the language of the provisions enacted, the Court ought to follow the language of the statute. This is based on the principle that the intent of the legislature must be found in the language of the statutes enacted and not on the basis of any subjective notions of legislative intent.

51. At this stage, it is relevant to refer to the following passage from **Craies on Legislation**[21] which sets out the aforesaid Rule:

[21] Craies on Legislation, A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation, Daniel Greenburg, South Asian Edition, 2010.

"**Effect of rule (1): unintended consequences of clear language**

The principal effect of the cardinal rule, subject to the restrictions and modifications explored below, is that a court is bound to give effect to clear legislative language even if the consequences in the instant case are such that the legislature did not contemplate and would not have countenanced. As Jervis C.J. said in *Abley v Dale* —

> "If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

So, for example, the following dictum of Lord Herschell in *Cox v Hakes* remains valid today—

> "It is not easy to exaggerate the magnitude of this change; nevertheless, it must be admitted that, if the language of the legislature, interpreted according to the recognised canons of construction, involves this result, your lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the legislature."

The only difference in the application of this dictum today and when it was said is that the "Recognised canons of construction" leave greater flexibility today, as will be seen below, for the use of matters outside the language of the text, where it is not clear, in order to discern the legislative intent.

This principal effect of the rule requires to be considered in the light of the principal qualification, mentioned in the quotation from Lord Wensleydale above and considered further below. The distinction requires to be drawn between a result which appears absurd merely in the sense that it is hard to believe that the legislature would have wanted it and one which is absurd in the sense that it falsifies or produces inconsistency in the legislation, so that even looking at nothing but the literal meaning of the text as a whole a difficulty emerges.

A mere anomaly, however, is not in itself sufficient to prevent the application of the literal meaning of an Act. See, for example, the following passage of the judgment of Peter Gibson L.J. in *Slamon v Planchon* –

"I share the judge's unease at a construction which gives rise to the two 'anomalies' which he has identified as arising, being circumstances in which a landlord is not a resident landlord for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993, viz. (1) freehold held by a bare trustee for a beneficiary for part of the period between the date of conversion and the relevant date and by the beneficiary for the remainder of the period, and (2) freehold held by the trustee for A for life, remainder to A's son, for part of that period and on A's death by the son. Those examples seem to me not so much anomalies as surprising consequences of the construction which, as the judge acknowledged, was what the clear words of s.10(1) and (4) suggested. One is entitled to wonder what was the intention of Parliament in so providing.

However, the duty of the court is to give effect to the intention of the legislature as ascertained from the language used and I do not think it permissible to arrive at a construction other than what the clear statutory words dictate either by leaning in favour of the landlord or by mixing interests when it is plain that the interest relied on had to be continuous singe before the conversion. It was not open to the judge to write into s. 10(4) the words "at any time" (particularly when the words are found in s. 0(1)), nor to rewrite s.10(1)(b) in the way he suggests is its meaning when read with s.10(1)(a).

To revert to the intention of Parliament, it can only be assumed from the statutory language that Parliament intended a simple test: at the relevant date either own the freehold from before the conversion or be a beneficiary under the same trust since before the conversion. It would surely have been obvious to Parliament that so unsophisticated a test would give rise to consequences such as those identified by the judge. Nevertheless, that is the test which was enacted and the courts must give effect to it."

52. It is also relevant to refer to the text of Maxwell[22] on interpretation of statutes which pens a note of caution regarding interpretation of a taxing statute on the basis of the perceived legislative intent. The same is set out below:

> **"Taxing Acts and "the substance"**
>
> Although statutes imposing pecuniary burdens are construed strictly in favour of those on whom the burden is sought to be imposed, and in revenue statutes in particular the subject is aided by presumptions such as that against double taxation, the question is primarily that of the "full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision." "So often, particularly in Tax Statutes, the spirit and intention of the Act... is subject to such uncertainty ... that it may provide a misleading rather than a reliable guide, and in any case affords a less certain guide than the construction of the words without a resort to conceptions of spirit and intention." The language used is not to be either stretched, in favour of the Crown or narrowed in favour of the taxpayer. So, where the court has to consider a provision expressly designed to prevent tax evasion, which uses unnecessarily wide language to achieve its purpose, that language will be given effect to even though the section is thereby made to apply to cases which it was probably never intended to catch. And where a statute referred to the surveyor of taxes "discovering" an undercharge, the House of Lords could "see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged."

[22] Maxwell on the Interpretation of Statutes, P. St. J. Langan, 12th edition, 1976

INTERPRETATION OF RULE 86A

53. At the outset, it would be apposite to refer to Rule 86A of the Rules, as the controversy in this batch of petitions centers around the interpretation of the said Rule. Rule 86A of the Rules is set out below:

> **"Rule 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."

54. We may now proceed to examine the plain language of Rule 86A of the Rules to examine its literal meaning and whether the same leads to an anomaly or any absurdity that requires this Court to take recourse to other principles of statutory interpretation.

55. The opening line of Sub-rule (1) of Rule 86A of the Rules stipulates that an order under Rule 86A (1) can be passed only if the Commissioner or any other officer authorized by him in this behalf has reasons to believe that the credit of input tax available in the ECL has been fraudulently availed or is ineligible. If the said condition is satisfied, the officer may after recording the reasons in writing, not allow debit of an amount equivalent to such credit. The relevant portions of Rule 86A (1) of the Rules are highlighted below:

"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 **<u>credit of input tax available in the electronic credit ledger</u>** has been fraudulently availed or is ineligible in as much as–
>
> ** ** ** **
>
> may, for reasons to be recorded in writing, **<u>not allow debit of an amount equivalent to such credit in electronic credit ledger</u>** for discharge of any liability under section 49 or for claim of any refund of any unutilised amount."

56. On a plain reading of the opening sentence of Rule 86A(1) of the Rules, the necessary conditions to be satisfied at the threshold are:

(a) that there is a credit of input tax available in the Electronic Credit Ledger; and,

(b) that the Commissioner or an officer authorized on his behalf has reasons to believe that the credit of input tax available has been fraudulently availed or is ineligible on account of the reasons as set out in Clauses (a) to (d) of Rule 86A(1) of the Rules.

57. In view of the aforesaid, it follows that if there is no credit of input tax available in the ECL, one of the necessary conditions for passing an order under Rule 86A(1) of the Rules would not be satisfied. The fact that the Commissioner (or an officer authorized by him) may have reasons to believe that in the past a taxpayer had availed and utilized ITC by debiting its ECL is not the condition precedent for passing an order under Rule 86A(1) of the Rules.

58. Much emphasis was laid by the learned counsel appearing for the Revenue that Rule 86A(1) of the Rules contemplates an order which

prohibits a debit of an amount equivalent to "such credit in the electronic credit ledger" for discharge of any liability under the CGST Act, which the concerned officer has reasons to believe has been fraudulently availed or is ineligible. According to the Revenue, the expression "amount equivalent to" cannot be read in conjunction with the words "credit of input tax available in the electronic credit ledger". However, we are not persuaded to accept this contention. This is because this interpretation disregards the opening sentence of Rule 86A(1) of the Rules, which sets out the conditions to be satisfied for passing an order under the said provision.

59. Plainly, the expression "amount equivalent to such credit" refers to the credit of input tax available in the taxpayer's ECL, which the Commissioner or the officer authorized by him has reasons to believe has been fraudulently availed or is ineligible. It does not refer to the ITC used in the past for payment of dues or which has been refunded.

60. Mr. Rajeev Aggarwal, learned counsel appearing for the Revenue submitted that there are three possibilities. First, that the ITC available in a taxpayer's ECL is wholly tainted, that is, that the Commissioner or the officer authorized by him has reasons to believe that the same has been fraudulently availed or is ineligible; second, that part of the available ITC is tainted and there is no suspicion that the remaining part have been validly availed; and third, that the available ITC is wholly untainted. He submitted that in all the three situations the expression "available" must not be co-related to the ITC, which is credited in the ECL at the time of the decision to block a debit from the ECL. He

submitted that the ITC, which is wrongfully availed (fraudulently availed or is ineligible) may have been available at another point of time but that would not preclude the Commissioner or an officer authorized by him, to issue an order under Rule 86A(1) of the Rules. However, the amount in respect of which debit is not allowed is confined to the quantum of the ITC, which the Commissioner has reasons to believe was fraudulently availed or is ineligible. He submits that this is a necessary construct of Rule 86A of the Rules as in most cases the reasons of fraudulent availment of the ITC or ineligible ITC would be available only after the same has been utilized by a taxpayer. The aforesaid contention was also articulated by other counsels. He also referred to a Circular (Circular No. CBEC-20/16/05/2021-GST) dated 02.11.2021 issued by the Central Board of Indirect Taxes and Customs (CBIC) and drew the attention of this Court of paragraphs 3.3.2 and 3.4.3 of the said Circular in support of the aforesaid contentions.

61. The aforesaid contentions are fashioned on the reasoning of the Hon'ble Calcutta High Court in ***Basanta Kumar Shaw v. Assistant Commissioner of Revenue, Commercial Taxes and State Tax, Tamluk Charge & Ors.***[5] which is in consonance with the decision of the Hon'ble Allahabad High Court in ***R.M. Dairy Products LLP v. State of U.P. & Others.***[6] The relevant extract of the decision of the ***Basanta Kumar Shaw's case***[5] is reproduced below:

> "10…..In our respectful view, we are not able to persuade ourselves to the interpretation given in ***Samay Alloys*** rather we are persuaded by the interpretation of the rule given in ***R.M. Dairy Products LLP***. The word "available" occurring

in rule 86(1) cannot be read in isolation and it has to be read along with the remaining words which is "in the electronic credit ledger has been fraudulently availed or is ineligible", "has been fraudulently availed" would undoubtedly denote a situation which has occurred in the past. This becomes clear if we peruse the allegations contained in the show cause notice. It has been stated therein that as per the data base record, there is a mismatch between the input-tax credit from GSTR-2A and GSTR-3B for the periods mentioned above which in the prima facie view of the first respondent is inadmissible as per the provisions of the WBGST/CGST Act, 2017. In this regard, the first respondent has referred to section 42(l)(a) of the WBGST/CGST Act, 2017.

*** *** ***

19. Bearing in mind the above decisions, if we examine Rule 86A(1) of the Rules, we find the key words are "available in" and "has been". Oxford Dictionary defines "available" as "able to be used" or "obtained"; "at someone's disposal". The word "available" is to be read in conjunction with the words "has been", if done so, it clearly manifests that what was "available" in the electronic credit ledger at the relevant time has been fraudulently availed or is ineligible. This interpretation alone would be in consonance with the object of the Act and Rules. One of the objectives of the CGST Act is to incentivize tax compliance by tax payers. An interpretation of rule 86A which would render the object of the enactment is to be avoided."

[Emphasis added]

62. We are, respectfully, unable to concur with the aforesaid interpretation for the reason that it is not in conformity with the opening line of Rule 86A(1) of the Rules. The words "credit of input tax available in the electronic credit ledger" plainly refers to the credit, which is at the given point of time available in the taxpayer's ECL. If the same had already been utilized in payment of tax, penalties or other dues, or has been refunded, the same would not be available in the ECL.

63. It is relevant to understand the meaning of the words, "availed", "available in the electronic credit ledger", "used" and "utilized" as used in the CGST Act and the Rules.

64. Section 41 of the CGST Act contains provisions regarding availment of ITC. It is relevant to refer to said Section at this stage and the same is set out below:

> **"41. Availment of input tax credit.**—(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to avail the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited to his electronic credit ledger.
>
> (2) The credit of input tax availed by a registered person under sub-section (1) in respect of such supplies of goods or services or both, the tax payable whereon has not been paid by the supplier, shall be reversed along with applicable interest, by the said person in such manner as may be prescribed:
>
> **Provided** that where the said supplier makes payment of the tax payable in respect of the aforesaid supplies, the said registered person may re-avail the amount of credit reversed by him in such manner as may be prescribed."

65. In terms of Section 41(1) of the CGST Act, every registered person, subject to the conditions and restrictions as may be prescribed, is entitled to avail credit of eligible ITC. Such credit is to be availed by filing a return on self-assessment basis. Such an amount is then required to be credited in the taxpayer's ECL. Sub-section (2) of Section 41 of the CGST Act provides that if ITC has been availed by a registered person in respect of supplies of goods or services or both and the tax

payable on such supplies has not been paid by the supplier then such input tax is required to be reversed along with applicable interest.

66. There is no cavil that ITC is availed by a registered person when he files a return and the same is credited in his ECL. The credit of input tax as available in the ECL is then available to the taxpayer for discharging his dues under the CGST Act or in given cases, for seeking its refund.

67. Section 49(4) of the CGST Act expressly provides that the amount available in the ECL "may be used" for making payments towards tax, interest, penalty or other amount. The opening sentence also indicates that the expression amount "available in the electronic credit ledger" is the amount that stands to a taxpayer's credit in the ECL. It is that amount that can be used or utilized by the taxpayer for payment of his dues. Sections 49A and 49B of the CGST Act provide for the manner of utilizing ITC. Section 49(4), Section 49A and Section 49B of the CGST Act are reproduced below:

> "**Section 49. Payment of tax, interest, penalty and other amounts.-**
>
> ***** *** *****
>
> (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 restrictions within such time as may be prescribed.
>
> **49A. Utilisation of input tax credit subject to certain conditions.-** Notwithstanding anything contained in section

> 49, the input tax credit on account of central tax, State tax or Union territory tax shall be utilised towards payment of integrated tax, central tax, State tax or Union territory tax, as the case may be, only after the input tax credit available on account of integrated tax has first been utilised fully towards such payment.]
>
> **49B. Order of utilisation of input tax credit.-** Notwithstanding anything contained in this Chapter and subject to the provisions of clause (e) and clause (f) of sub-section (5) of section 49, the Government may, on the recommendations of the Council, prescribe the order and manner of utilisation of the input tax credit on account of integrated tax, central tax, State tax or Union territory tax, as the case may be, towards payment of any such tax."

68. Clearly, if ITC has been wrongly availed or utilized, the taxpayer is required to pay the said amount along with interest under Section 50(3) of the CGST Act as well as penalty leviable under the provisions of the CGST Act.

69. In view of the above, when Rule 86A(1) of the Rules refers to the ITC available in the ECL of a taxpayer (which the Commissioner or the officer authorized by him has reason to believe has been fraudulently availed or is ineligible), it clearly refers to the amount that is lying to the credit of the taxpayer in his ECL. It is difficult for us to accept that the expression "available in the electronic credit ledger" should be read as the ITC that was available in the ECL sometime earlier, prior to the same being used.

70. There is no ambiguity in the plain language of Rule 86A of the Rules. The literal construction of the said Rule also does not lead to any absurdity. The words "not allow debit of an amount equivalent to such

credit in the electric credit ledger" clearly refers to such amount as is credited to the ECL to the extent that the Commissioner or an officer authorized by him has reason to believe has been fraudulently availed or is ineligible for the reasons specified in Clauses (a) to (d) of Rule 86A(1) of the Rules. In a case where the Commissioner or an officer authorized by him has a reason to believe that the tainted ITC is less than the ITC credited in the ECL, then it would necessarily follow that the order under Rule 86A(1) of the Rules would be confined to such amount as equivalent to the ITC, which the Commissioner or an officer authorized by him has reasons to believe has been fraudulently availed or is ineligible.

71. The amount credited in a taxpayer's ECL may be partly tainted. Illustratively, a taxpayer may have availed ITC on the strength of certain invoices in respect of any supply against which the entire tax has not been paid. In such a case, it is not necessary for the Commissioner or an officer authorized by him to ascertain which portion of the ITC is tainted as the entire ITC once credited in the ECL is in a fungible pool. Thus, the concerned officer can, in exercise of powers under Rule 86A of the Rules, freeze the ECL to the extent of inadmissible ITC by disallowing debit of an amount equivalent to the inadmissible ITC. However, such an order can be passed only if ITC is available in the taxpayer's ECL and the concerned officer has reasons to believe that the same has been fraudulently availed or is ineligible for the reasons as set out in Clauses (a) to (d) of Rule 86A of the Rules.

72. Paragraphs 3.3.2 and 3.4.3 of the Circular (Circular No. CBEC-20/16/05/2021-GST) dated 02.11.2021 issued by the CBIC and referred to by the learned counsel for the Revenue are relevant and the same are set out below:

> "3.3.2 The amount disallowed for debit from electronic credit ledger should not be more than the amount of input tax credit which is **believed to have been fraudulently availed or is ineligible,** as per the conditions / grounds mentioned in sub-rule (1) of rule 86A**.**
>
> *** *** ***
>
> 3.4.3 As the restriction on behalf of electronic credit ledger under sub-rule (1) of rule 86A **is resorted to protect the interests of the revenue** and the said action also has bearing on the working capital of the registered person, it should be endeavored that in all such cases, **the investigation and adjudication are completed at the earliest, well within the period of restriction**, so that the due liability arising out of the same can be recovered from the said taxable person and the purpose of disallowing debit from electronic credit ledge is achieved."
>
> [Emphasis supplied]

73. We find that the aforesaid paragraphs of the Circular dated 02.11.2021 relied upon by the learned counsel for the Revenue do not support the contentions advanced by them. On the contrary, the same support the literal construct of Rule 86A of the Rules and also clarify that the amount of debit to be disallowed from the ECL should not be more than the amount of the ITC, which is believed to have been fraudulently availed or is ineligible. However, this would necessarily be subject to the conditions referred to in the opening sentence of Rule 86A(1) of the Rules, which is that the same is available in the ECL of an assessee. Thus, if the amount of the ITC available in the ECL

exceeds the amount, which the Commissioner or any officer authorized by him, has reason to believe is ineligible or fraudulently availed, the amount which is blocked (not allowed to be debited) is required to be restricted to an amount equivalent to the fraudulent or inadmissible ITC.

74. In ***Samay Alloys India (P) Ltd. v. State of Gujarat***[1]**,** the Division Bench of the Gujarat High Court had examined the provisions of Rule 86A of the CGST Rules and held as under:

> 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.

75. The Division Bench of Telangana High Court has concurred with the said view in ***Laxmi Fine Chem v. Assistant Commissioner***[2] and held as under:

> "7. Taking into consideration the decision of the Division bench of Gujarat High Court which has also been relied upon by this High Court and by this very Bench in yet another writ petition i.e., W.P. No.31039 of 2023, decided on 20.11.2023, we find that the action on the part of the respondents in passing an order of negative credit to be contrary to Rule 86(A). In the event, if no input tax credit was available in the credit ledger, the rules does not provide for insertion of negative balance in the ledger and therefore what was permissible was only to the block the electronic credit ledger and under no circumstances could there had been an order for insertion of negative balance in the ledger. If there is a credit balance available, then the authorities concerned in terms of provisions of Rule 86(A) may for reasons to be recorded in writing not allowed the credit of the said amount available equivalent to such credit. However, there is no power conferred upon the authorities for block of the credit to be availed by the petitioner in future."

76. We respectfully concur with the views of the Division Bench of the Gujarat High Court in ***Samay Alloys India (P) Ltd. v. State of Gujarat***[1] and the Division Bench of the Telangana High Court in ***Laxmi Fine Chem v. Assistant Commissioner***[2].

77. Since there is no ambiguity in the plain language of Rule 86A(1) of the Rules, it is not necessary to resort to the rule of purposive interpretation. However, we find that the aforesaid interpretation is also

in conformity with the legislative scheme of the CGST Act and the Rules.

78. It is necessary to bear in mind that not allowing debit of an ITC is a temporary measure, which is imposed only if the conditions set out in Rule 86A of the Rules are satisfied. It is not necessary for any proceedings to be initiated against the taxpayer prior to passing an order under Rule 86A(1) of the Rules. The said order can be passed at any stage if the Commissioner or an officer authorized by him has reasons to believe that the credit available in the ECL of a taxpayer has been fraudulently availed or is ineligible. This is clearly an emergent provision, which enables the Commissioner to withhold the available ITC in the ECL, which he has reason to believe has been fraudulently availed or is ineligible. An order under Rule 86A(1) of the Rules does not require a prior show cause notice to be issued to a taxpayer as it is by its very nature an emergent provision to immediately block the usage of the ITC credited in the ECL, which the Commissioner or an officer authorized by him has reasons to believe has been fraudulently availed or is ineligible. The concerned authorities are required to proceed to determine whether a taxpayer has wrongly availed or utilized the ITC, under Sections 73 or 74 of the CGST Act and if it is found that the taxpayer has wrongly availed of the ITC the proper officer is required to pass an order to determine the amount of tax, interest or penalty payable. The demand as raised are required to be determined under Sections 73 and 74 of the CGST Act.

79. If at any stage the Commissioner or an officer authorized by him is satisfied that the conditions for disallowing debit no longer exists, Sub-rule (2) of Rule 86A of the Rules requires such officer to permit debit from the taxpayer's ECL. In any event, by virtue of Sub-rule (3) of Rule 86A of the Rules, the order passed under Rule 86A(1) of the Rules is operative only for a maximum period of one year from the date of passing the said order.

80. Rule 86A of the Rules is not a machinery provision for recovery of tax or dues under the CGST Act. It is not a part of the scheme of the machinery provisions for assessment and determination of the tax and dues as payable under the CGST Act. It is an emergent measure for protection of revenue by temporarily not allowing debit of available ITC in the ECL, which the Commissioner or an officer authorized by him has reasons to believe has been wrongfully availed.

81. As noted above, the revenue authorities are required to proceed under Sections 73 and 74 of the CGST Act for determination of the amount due. After the proceedings under Chapters XII, XIV and XV of the CGST Act have commenced and the Commissioner is of the opinion that for the purpose of protection of government revenue, it is necessary to do so, he may pass an order under Section 83(1) of the CGST Act, provisionally attaching any property including the bank account of a taxpayer. This is also one of the measures that may be resorted to pending conclusion of the proceedings.

82. Rule 86A(1) of the Rules does not contemplate an order, the effect of which is to require a taxpayer to replenish his ECL with valid availment of ITC, to the extent of ITC used in the past, which the Commissioner or an officer authorized by him has reasons to believe, was fraudulently availed or was ineligible. Such an interpretation would in effect amount to construe an order under Rule 86A(1) of the Rules as an order for recovery of tax. This is obvious because the taxpayer would now have to incur a larger cash outflow for payment of taxes as he would be denied utilization of validly availed ITC, which he would require to accumulate to compensate for the ITC availed and utilized which the Commissioner or an officer authorized by him, has reasons to believe was fraudulently availed or was ineligible.

CONCLUSION

83. In view of the above, the petitions are allowed and the orders impugned in the present petitions, as tabulated below, are set aside to the extent the impugned orders disallow debit from the respective ECL of the petitioners, in excess of the ITC available in the ECL at the time of passing of the impugned orders (referred to as Negative blocking by the counsel during the course of their submissions):

<table>
<tr><th>Sl. No.</th><th>Writ Petition Nos.</th><th>Date of blocking of ECL</th><th>Amount blocked (in ₹)</th><th>Negative blocked amount in ECL (in ₹)</th></tr>
<tr><td rowspan="2">01</td><td rowspan="2">W.P.(C) No.10980/2024</td><td>26.07.2024</td><td>20,46,09,134.00</td><td rowspan="2">25,85,14,327.00</td></tr>
<tr><td>30.07.2024</td><td>6,82,83,894.00</td></tr>
<tr><td>02</td><td>W.P.(C) No.15380/2023</td><td>27.10.2023</td><td>1,62,88,226.00</td><td>1,62,88,226.00</td></tr>
</table>

03	W.P.(C) No.5250/2024	23.02.2024	1,71,64,374.00	1,71,52,374.00
04	W.P.(C) No.5395/2024	--	4,55,27,380.00	4,44,89,152.00
05	W.P.(C) No.5397/2024	19.01.2024	16,01,760.00	3,83,72,654.00
		21.03.2024	3,83,72,654.00	
06	W.P.(C) No.6997/2024	11.03.2024	2,09,51,206.00	1,63,60,254.00
07	W.P.(C) No.7183/2024	11.03.2024	3,24,00,183.00	2,01,71,196.00
08	W.P.(C) No.9350/2024	29.05.2024	40,04,730.00	40,04,730.00

84. The parties are left to bear their own costs. The pending applications, if any, are also disposed of.

VIBHU BAKHRU, J

SACHIN DATTA, J

SEPTEMBER 24, 2024
RK/GSR