IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 17202 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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M/S NEW NALBANDH TRADERS
Versus
STATE OF GUJARAT & 2 other(s)

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Appearance:
MR HARDIK P MODH(5344) for the Petitioner(s) No. 1
for the Respondent(s) No. 2,3
GOVERNMENT PLEADER for the Respondent(s) No. 1,2,3

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

Date : 23/02/2022

ORAL JUDGMENT

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

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1. Having regard to the facts of the present litigation and also considering the present day scenario of the implementation of the Goods and Services Tax, Act, 2017, the following observations by the Constitution Bench of the Supreme Court in the case of ***Pannalal Binjraj vs. Union of India***, AIR 1957 SC 397 are apt:

> *"A humane and considerate administration of the relevant provisions of the Income-tax Act would go a long way in allaying the apprehensions of the assessees and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act with " an evil eye and unequal hand ".*

1.1 All that we need to do is to erase the expression "provisions of the Income Tax Act" and replace the same with the expression "provisions of the Goods and Services Tax Act, 2017".

2. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

> *"(a) That this Hon'ble Court be pleased to issue a Writ of Certiorari, or a Writ in the nature of Certiorari, or any other appropriate Writ, Order or direction, calling for the papers and proceedings leading to the records relating to blocking of Input Tax Credit of the Petitioner to the tune of Rs.97,17,290/ (Rupees Ninety Seven Lakhs Seventeen Thousand Two Hundred and Ninety Only) and after looking into the same and the legality thereof, this Hon'ble Court be pleased to quash and set aside the action of Respondent No.3 regarding blocking of Input Tax Credit of the Petitioner which has been shown on the login credential of GSTN portal of the Petitioner* ***(Annexure-E);***
>
> *(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus, or a Writ in the nature of Mandamus, or any other appropriate writ Order or direction to the Respondents to unblock the Input Tax Credit to the tune of Rs.97,17,290/- (Rupees Ninety Seven Lakhs Seventeen Thousand Two Hundred and Ninety Only) of the Petitioner;*
>
> *(c) for ad-interim relief in terms of prayer (b) above;*

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(d) for costs of the petition be provided; and

(e) for such further and other reliefs, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. The facts giving to this writ application may be summarized as under:

3.1 The writ applicant is a proprietary concern. It is engaged in the trading of M.S. Scrap past 13 years. The proprietary firm purchases the scraps from different suppliers and sale the same to different entities. In the case on hand, the writ applicant is said to have purchased M.S. Scrap from one of its suppliers namely, M/s. Anmol Enterprise during the period between 22.12.2020 and 27.03.2021.

3.2 It is the case of the writ applicant that when it received the goods from the said supplier, it also received tax invoices, weighment slips, e-way bills etc. which are the documents prescribed for the purchase under the provisions of the CGST Act, 2017. It is also the case of the writ applicant that the purchase made by it were duly reflected in the Form GSTR – 3B, Form GSTR – 2A and Form GSTR – 2B respectively. It appears that one day, it came to the notice of the writ applicant that the respondent no.3 herein had blocked the ITC in exercise of power under Rule 86A of the Rules to the tune of Rs.97,17,290/- (Rupees Ninety Seven Lakhs Seventeen Thousand Two Hundred and Ninety Only) on the purchases made from M/s. Anmol Enterprise.

3.3 It is the case of the writ applicant that he came to know about such blocking of the ITC through E-mail and SMS on 28.07.2021. Upon receipt of an E-mail and SMS referred to

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above, the writ applicant checked up with the GST portal wherein it is was displayed that the ITC had been blocked by the respondent no.3 without assigning any reasons. It is the case of the writ applicant that he inquired with the respondent no.3 as to on what basis, the ITC was blocked but, there was no response at the end of the respondent no.3. In such circumstances referred to above, the writ applicant is here before this Court with the present writ application.

4. Mr. Modh, the learned counsel appearing for the writ applicant would submit that it was expected of the respondent no.3 to atleast convey the reasons, if not in details atleast in brief, for blocking the ITC under Rule 86A of the Rules. Mr. Modh would submit that without any reasons how would a dealer come to know as to why his ITC has been blocked. He would submit that all the transactions of his client with M/s. Anmol Enterprise are clean. If there is any information or material with the department to doubt the credentials of M/s. Anmol Enterprise then for such reason alone, the ITC of the writ applicant could not have been blocked. In other words, what Mr. Modh is trying to convey is that his client is a bona fide purchaser of the goods. The goods were delivered in accordance with law. In such circumstances referred to above, Mr. Modh prays that there being merit in his writ application, the same be allowed and the impugned order/action on the part of the respondent no.3 in blocking the ITC be quashed and set aside.

5. On the other hand, this writ application has been vehemently opposed by Mr. Utkarsh Sharma, the learned AGP appearing for the respondents. Mr. Sharma would submit that

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having regard to the satisfaction arrived at by the authority based on some information/material, it cannot be said that the action on the part of the respondent no.3 in blocking the ITC is illegal. Mr. Sharma, upon the request made by this Court has made available the satisfaction note dated 28.07.2021. The English translation of the same reads thus:

> *"With respect to the Letter No: XIV/001/2017 dated 12/07/2021 of Deputy Commissioner of State Tax (CGST & CE, DIV – I, Surat) and the Departmental Circular No – 19 dated 06/05/2020, Mr. Mohmadyusuf Abdulgafar Shaikh's M/s. New Nalbandh Traders (GSTIN – 24AMMPS4317A1ZA) claimed tax credit of Rs. 97,17,290/- from Mr. Dipakbhai Rathod's M/s. Anmol Enterprise (GSTIN-24BXMPR0367R1ZN) in December, 2020, January, 2021, February, 2021, March, 2021 and when CGST investigated at the main business location of M/s. Anmol Enterprise on 08/07/2021 under Rule – 25 of the CGST with regard to the said letter, no existence of the tax-payer was found. Thereafter, on conducting investigation with regard to the GSTRZA register, it appeared that purchase had been made by M/s. Nalbandh Traders from M/ s. Anmol Enterprise and on checking the GSTN Portal, the GST number of M/s. Anmol Traders was found suspended. Therefore, considering the legal provisions under Departmental Circular No – 19 dated 06/05/2020 and Gujarat Goods and Services Act, 2017 and Rules in the interest of the government revenue, I order to block the doubtful tax credit of Rs. 97,17,290/- for the purchase made from M/s Anmol Enterprise.*
>
> *Sd/-*
> *(Illegible)*
>
> *- The trader is instructed to prepare the intimation form DRC- 01A.*
>
> *Sd/-*
> *(Illegible)"*

6. Mr. Sharma, also placed before us the intimation in Form GST – DRC -01A dated 30.07.2021, which reads thus:

> ***"FORM GST DRC-01A***
> ***Intimation of tax ascertained as being payable under section 74(5)***
> ***[See Rule 142(1A)]***
> ***Part A***
>
> ***To,***
> ***NEW NALBANDH TRADERS***
> ***PLOT NO-14-13, OPP, JAY METAL TECH,***
> ***UDHYOGNAGAR UDHNA, ROAD NO-8, 394210***
> ***GSTIN-24AMMPS4317AIZA***

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Email-anshaikh1977@gmail.com

Sub: *Intimation of liability under section 74(5) of CGST/SGST act.*

Please refer to the above proceedings. In this regard, the amount of tax/interest/ penalty payable by you under section 74(5) with reference to the said case as ascertained by the undersigned in terms of the available information, as is given below:

Sr. No.	***Act***	***ITC Wrongly Availed***	***Interest***	***Penalty***
1	*CGST/SGST*	*9717290*	*@24%*	*@15%*

The grounds and quantification are given below:

Based on information available with this office your supplier Anmol Enterprise has not conducted any business from any place for any period during which registration has been obtained and found a FAKE/BOGUS UNIT. Therefore, your firm does not satisfies the conditions u/s 16 of CGST/SGST Act and uses of ITC under rule 86(A)(1).

You are hereby advised to pay the amount of tax as ascertained above along with the amount of applicable interest and penalty under section 74(5) within thirty ***(30)*** *days failing which Showcause Notice will be issued under section 74(1).*

In case you wish to file any submissions against the above ascertainment, the same may be furnished within thirty ***(30)*** *days in Part B of this form.*

Sd/-
Assistant Commissioner of
State Tax,
Unit – 62, Surat."

7. Mr. Sharma would submit that the inquiry is in progress. He fairly conceded that although 7 months have elapsed, since the ITC came to be blocked yet, no show cause notice has been issued till this date under Section 73 or 74 respectively as the case may be. He would submit that the object of blocking the ITC in exercise of power under Rule 86A of the Rules is to protect the interest of the Revenue. In such circumstances referred to above, Mr. Sharma prays that there being no merit in this writ application, the same be rejected.

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8. 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 the respondent no.3 was justified in blocking the ITC under Rule 86A of the Rules.

9. Before adverting to the rival submissions canvased on either side, we must first look into the provisions of Rule 86A of the Rules. Section 86A reads thus:

> *"Notification No.75/2019 – Central Tax New Delhi, the 26th December, 2019*
>
> *G.S.R. 954(E).— In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:-*
>
> *1. (1) These rules may be called the Central Goods and Services Tax (Ninth Amendment) Rules, 2019.*
>
> *(2) Save as otherwise provided, they shall come into force on the date of their publication in the Official Gazette.*
>
> *2. In the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the said rules), with effect from the 1st January, 2020, in rule 36, in sub-rule (4), for the figures and words "20 per cent.", the figures and words "10 per cent." shall be substituted*
>
> *3. In the said rules, after rule 86, the following rule shall be inserted, namely:-*
>
> *"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 nonexistent or not to be conducting any business from any place for which registration has been obtained; or*

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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.".

4. In the said rules, with effect from the 11th January, 2020, in rule 138E, after clause (b), the following clause shall be inserted, namely:-

"(c) being a person other than a person specified in clause (a), has not furnished the statement of outward supplies for any two months or quarters, as the case may be."

10. Having referred to Rule 86A above, we must now look into Section 16 of the CGST Act. The same reads thus;

"Section 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,—

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(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;

(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.*

(c) subject to the provisions of section 41 or section 43A, 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 installments, the registered person shall be entitled to take credit upon receipt of the last lot or installment:

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 added to his output tax liability, along with interest thereon, 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 of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961, the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return,

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whichever is earlier.

> *"Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under subsection (1) of said section for the month of March, 2019."*

11. Analysis of the Rule 86A:-

A. Supplier found non-existent or not conducting business at its registered place- It has been availed on the basis of the documents prescribed under Rule 36 i.e. tax invoice, debit note etc issued by a registered supplier who has been found non-existent or not to be conducting any business from any place for which registration has been obtained.

B. Non receipt of goods or services or both: It has been availed on the basis of the documents prescribed under Rule 36 i.e. tax invoice, debit note etc without receipt of goods or services or both.

C. Tax not paid into the Government treasury: It has been availed on the basis of documents prescribed against which no tax has been paid into the Government treasury.

D. Recipient found non-existent or not conducting business at its registered place: It has been availed on the basis of documents prescribed under Rule 36 i.e. tax invoice, debit note etc issued by a registered person availing the credit (i.e. recipient) who has been found non-existent or not to be conducting any business from any place for which registration

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has been obtained.

E. **Availing of credit without documents:** 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.

12. Rule 86A undoubtedly could be said to have conferred drastic powers upon the proper officers if they have reason to believe that the activities or invoices are suspicious. The Rule 86A is based on "reason to believe". "Reason to believe" must have a rational connection with or relevant bearing on the formation of the belief. It is a subjective term and can be interpreted differently by different individuals. Prima facie, it appears that the Rule 86A does not even contemplate for issue of any show-cause notice or intimation notice. In such circumstances, the person affected may be taken by surprise when he would go to the portal to pay taxes and finds that his ITC is not usable.

13. This very Bench in one of its recent pronouncements in the case of ***Samay Alloys India Pvt. Ltd. Vs. State of Gujarat,*** (Special Civil Application No.18059 of 2021) decided on 03.02.2022 had the occasion to consider the scope of Rule 86A more particularly, in a case wherein the balance in the electronic credit ledger is NIL. In ***Samay Alloys India Pvt. Ltd. (Supra),*** this Court took the view that the Rule 86A is not the Rule which entitles 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 the debit from the electronic credit ledger for the limited period of time and on a provisional basis. This Court

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took the view that in case the debit entries are made by the proper Officer, the same would tantamount to permanent recovery of the input tax credit and the permanent recovery is governed by the statutory provisions (Sections 73 or 74 respectively of the CGST Act as the case may be) and it would certainly travels beyond the plain language and the underlined intent of Rule 86A.

14. Rule 86A has two pre-requisites to be fulfilled before the power of disallowing of debit of suitable amount to the Electronic Credit Ledger or blocking of ECL to the extent of the amount fraudulently or wrongly availed of is exercised. The first pre-requisite is of the Competent Authority or the Commissioner having been satisfied on the basis of the material available before him that blocking of ECL for the afore-stated reasons is necessary. The second pre-requisite is of recording the reasons in writing for such an exercise of the power. From the language used in rule 86-A it becomes very clear that unless both these pre-requisites are fulfilled, the authority cannot disallow the debit of the determined amount to the ECL or cannot block the ECL even to the extent of amount found to be fraudulently or wrongly availed of.

15. It must be noted that the power under rule 86-A which in effect is the power to block ECL to the extent stated earlier is drastic in nature. It creates a disability for the tax payer to avail of the credit in ECL for discharge of his tax liability, which he is otherwise entitled to avail. Therefore, all the requirements of rule 86-A would have to be fully complied with before the power thereunder is exercised. When this rule requires arriving at a subjective satisfaction which is evident

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from the use of words, “must have reasons to believe”, the satisfaction must be reached on the basis of some objective material available before the authority. It cannot be made on the flights of one’s fancies or whims or imagination. The power under rule 86-A is an administrative power with quasi-judicial hues exhibited in the aforestated twin pre-requisites and has civil consequences for a tax payer in the sense, it acts as an obstruction to right of a tax payer to utilise the credit available in his ECL. Any administrative power having quasi-judicial shades, which brings civil consequences for a person against whom it is exercised, must answer the test of reasonableness. It would mean that the power must be exercised fairly and reasonably by following the principles of natural justice.

16. In the case of Maneka Gandhi Vs. Union of India : AIR 1978 SC 597 , it was held that the principle of reasonableness which legally as well as philosophically, is an essential element of equity or non-arbitrariness and it pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. Fair and reasonable exercise of power would be there only when the power is exercised in the manner prescribed in the provision of law conferring the power and for the purpose for achievement of which it exists. This would underline the importance of existence of reasons to believe that there is fraudulent or erroneous availment of credit standing in the ECL. In other words, the power under rule 86-A cannot be exercised unless there is a subjective satisfaction made on the basis of objective material by the authority.

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17. As regards the following of principles of natural justice, the law is now well settled. In cases involving civil consequences, these principles would be required to be followed although, the width, amplitude and extent of their applicability may differ from case to case depending upon the nature of the power to be exercised and the speed with which the power is to be used. Usually, it would suppose prior hearing before it's exercise (See Swadeshi Cotton Mills Vs. Union of India : (1981) 1 SCC 664 and Nirma Industries Limited and another Vs. Securities and Exchange Board of India : (2013) 8 SCC 20). But, it is not necessary that such prior hearing would be granted in each and every case. Sometimes, the power may be conferred to meet some urgency and in such a case expedition would be the hallmark of the power. In such a case, it would be practically impossible to give prior notice or prior hearing and here the rule of natural justice would expect that at least a post decisional hearing or remedial hearing is granted so that the damage done due to irrational exercise of power, if any, can be removed before things get worse. In Smt. Maneka Gandhi (supra), it was laid down that where there is an emergent situation requiring immediate action, giving of prior notice or opportunity to be heard may not be practicable but a full remedial hearing would have to be granted. The power conferred upon the Commissioner under rule 86-A is one of such kind. It has civil consequences though for a limited period not exceeding one year and has an element of urgency which perhaps explains why the rule does not expressly speak of any show cause notice or opportunity of hearing before the ECL is blocked. Of course, in order to guard against arbitrary exercise of power, the rule creates certain checks which are found in the twin

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requirements explained by us earlier. But, in our view, that may not be enough, given the nature of power, and what settled principles of law tell us in the matter. They would, in such a case, require this Court to read into the provisions of rule 86-A something not expressly stated therein, and so, we find that post decisional or remedial hearing would have to be granted to the person affected by blocking of his ECL. We may add that such post decisional hearing may be granted within a reasonable period of time which may not be beyond two weeks from the date of the order blocking the ECL. After such hearing is granted, the authority may proceed to confirm the order for such period as may be permissible under the rule or revoke the order, as the case may be.

18. The second pre-requisite of rule 86-A is of recording of reasons in writing. It comes with the use of the word “may”, which, in our opinion, needs to be construed as conveying an imperative command of the rule maker, and that means, reasons must be recorded in writing in each and every case. This is because of the fact that any order which brings to bear adverse consequences upon the person against whom the order is passed, must disclose the reasons for it so that the person affected thereby would know why he is being made to suffer or otherwise he would not be able to seek appropriate redressal of his grievance arising from such an order. Right to know the reasons behind an administrative order having civil consequences is a well embedded principle forming part of doctrine of fair play which runs like a thread through the warp and weft of the fabric of our Constitutional order made up by Articles 14 and 21 of the Constitution of India. In the case of Andhra Bank V/s. Official Liquidator : (2005) 3 SCJ 762 , the

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Apex Court has held that an unreasoned order does not subserve the doctrine of fair play. It then follows that the word, “may” used before the words, “for the reasons recorded in writing” signifies nothing but a mandatory duty of the competent authority to record reasons in writing.

19. There is another reason which we would like to state here to support our conclusion just made. The power under rule 86-A is of enabling kind and it is conferred upon the Commissioner for public benefit and, therefore, it is in the nature of a public duty. Essential attribute of a public duty is that it is exercised only when the circumstances so demand and not when they do not justify its performance (see Commissioner of Police, Bombay Vs. Gordhandas Bhanji : AIR (39) 1952 Supreme Court 16). It would then mean that justification for exercise of the power has to be found by the authority by making a subjective satisfaction on the basis of objective material and such satisfaction must be reflected in the reasons recorded in writing while exercising the power. (Vide: Dee Vee Projects Ltd. v/s. Union of India & Ors., Writ Petition No.2693/2021, dated 11.02.2022 (Bombay High Court)).

20. Examined in the light of above principles of law, the provisions made in rule 86-A would require the Competent Authority to first satisfy itself, on the basis of objective material, that there are reasons to believe that credit of input tax available in ECL has been fraudulently or wrongly utilised and secondly to record these reasons in writing before the order of disallowing debit of requisite amount to the ECL or requisite refund of unutilised credit, is passed or otherwise the order of blocking the ECL under rule 86-A would be

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unsustainable in the eye of law.

21. We now proceed to look into the so called impugned order. The impugned order reads thus:

> *"Some amount of ITC available in the Electronic Credit Ledger of GSTIN 24AMMPS4317A1ZA has been blocked/unblocked by Shri/Mr/Ms SHIVAM SHAILESHKUMAR JANI, Assistant Commissioner, Ghatak 62 (Surat), Admn.:- STATE. Please view the details in the said ledger on the portal.GSTN"*

22. The details of the electronic credit ledger reads thus:

> *"Blocked by Shri/Mr/Ms SHIVAM SHAILESHKUMAR JANI, Assistant Commissioner, Ghatak 62 (Surat), Admn. STATE."*
>
> *Viewing Electronic Credit ledger details from 21/07/2021 to 01/09/2021*

Sr. No	Date	Reference No.	Tax Period, if any	Description	Transaction Type (Debit/Credit)	Credit/Debit (Rs.)				
						Integrated tax (Rs.)	Central tax	State Tax	Cess	Total
1	-	-	-	Opening Balance	-	-	-	-	-	-
2	28/07/2021	BL240721000015 4	Jul-21	Blocked	Debit	1.00	48,58,644 .00	48,58,645 .00	0.00	97,17,290
3	-	-	-	Closing Balance	-	-	-	-	-	-

23. The aforesaid order is bereft of any reasons and therefore, there is no question of any reflection therein of the authority passing the order on being satisfied about the necessity of passing it. When the first requirement of Rule 86A is of, "having reasons to believe" and it has manifestly been not followed, the impugned order would have to be treated as erroneous in law. The second requirement regarding recording of reasons in writing is also followed in breach. In such circumstances, it can be said that the case on hand is one of an arbitrary exercise of power under Rule 86A.

24. Before we close this judgment, we must observe

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something as regards Section 43A of the Act, 2018.

24.1 Rule 86A may subject a *bona fide* assessee to undue hardship by the blockage of his credit ledger due to the default of his supplier. This may tantamount to equating the default of the recipient with that of the supplier. Section 43A was inserted into the Act vide the CGST (Amendment) Act, 2018. Section 43A(6) provides that the supplier and the recipient of a supply shall be jointly and severally liable to pay tax, or to pay the input tax credit availed, as the case may be, in relation to the outward supplies.

24.2 However, section 43A has not been notified yet. Therefore, the same does not apply. In the absence of section 43A being notified, this power has not been contemplated by the Act. Further, the notification of rule 86A prior to the section 43A is indicative of the fact that the rule did not intend to draw the validity from section 43A. Thus, the blocking of a recipient's credit ledger on the account of default of a supplier, vide rule 86A, is wanting of statutory authority at present.

24.3 On the perusal of the aforesaid provisions, it can be said that there is a specific mechanism for reversing the credit in the case of a discrepancy in the ITC availed by the recipient, against the output liability of the supplier. However, the ITC reversal mechanism, as laid down in section 41 read with Rules, is kept in abeyance. The facility to furnish GSTR – 2 and GSTR – 3 Forms is also not available. Accordingly, there is no system-based matching of the ITC being carried out presently, and till the time such provisions are given effect, the recipients shall be eligible to claim ITC provisionally on the basis of the invoice issued by customer.

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24.4 It has been held in a catena of judgments that a *bona fide* recipient should be made to suffer on account of a supplier's default. In *Quest Merchandising India Pvt. Ltd. v. Govt. of NCT of Delhi*, *W.P. (C) 6093 of 2017 dated 26.10.2017 (Delhi High Court),* the assessee had duly paid the tax to the supplier, but the supplier had not deposited the tax with the Government. The assessee argued that the purchasing dealer can check on the web portal of the department if the selling dealer is a fictitious person or a person whose registration stands cancelled. The Court held that the purchasing dealer was being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit the tax collected by him from such purchasing dealers to the Government, and therefore avoid transacting with such selling dealers. The Delhi High Court read down the concerned provision to not include a buyer who has *bona fide* entered into the purchase transactions with validly registered dealers who have issued the tax invoices against the transaction. The Court explained that such provision, if not read down, is violative of Article 14 of the Constitution for being inherently arbitrary. The only case when such provision applies is if the tax authorities come across some material to show that the purchasing dealer and the selling dealer, acted in collusion in detriment to the exchequer. However, in the event that the selling dealer has failed to deposit the tax collected, the remedy for the authorities is to proceed against the defaulting selling dealer to recover such tax and not to deny the purchasing dealer his input. The Supreme Court affirmed the said case and dismissed the Revenue's petition seeking special leave to appeal against this decision.

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24.5 In *Sri Vinayaga Agencies v. Assistant Commissioner, W.P. Nos. 2036 to 2038 of 2013, dated 29.01.2013 (Madras High Court)*, the Madras High Court held that law does not empower the tax authorities to reverse the ITC availed, on a plea that the selling dealer has not deposited the tax. It can revoke the input credit only if it relates to the incorrect, incomplete or improper claim of such credit.

24.6 The need for the law to distinguish between honest and dishonest dealers was acknowledged by the Punjab and Haryana High Court in *Gheru Lal Bal Chand v. State of Haryana, Civil Writ Petition No.6573 of 2007, decided on 23.09.2011* where the constitutional validity of Section 8 of the Haryana DVAT Act, 2003 (‘HVAT Act') was being considered. It was held that:

> "*In legal jurisprudence, the liability can be fastened on a person who either acts fraudulently or has been a party to the collusion or connivance with the offender. However, law nowhere envisages imposing any penalty either directly or vicariously where a person is not connected with any such event or an act. Law cannot envisage an almost impossible eventuality. The onus upon the assessee gets discharged on production of Form VAT C-4 which is required to be genuine and not thereafter to substantiate its truthfulness by running from pillar to post to collect the material for its authenticity. In the absence of any malafide intention, connivance or wrongful association of the assessee with the selling dealer or any dealer earlier thereto, no liability can be imposed on the principle of vicarious liability. Law cannot put such onerous responsibility on the assessee otherwise, it would be difficult to hold the law to be valid on the touchstone of Articles 14 and 19 of the Constitution of India. The rule of interpretation requires that such meaning should be assigned to the provision which would make the provision of the Act effective and advance the purpose of the Act. This should be done wherever possible without doing any violence to the language of the provision. A statute has to be read in such a manner so as to do justice to the parties. If it is held that the person who does not deposit or is required to deposit the tax would be put in an advantageous position and whereas the person who has paid the tax would be worse, the interpretation would give result to an absurdity. Such a construction has to be avoided.*

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In other words, the genuineness of the certificate and declaration may be examined by the taxing authority, but onus cannot be put on the assessee to establish the correctness or the truthfulness of the statements recorded therein. The authorities can examine whether the Form VAT C-4 was bogus and was procured by the dealer in collusion with the selling dealer. The department is required to allow the claim once proper declaration is furnished and in the event of its falsity, the department can proceed against the defaulter when the genuineness of the declaration is not in question. However, an exception is carved out in. The event where fraud, collusion or connivance is established between the registered purchasing dealers or the immediate preceding selling registered dealer or any of the predecessors selling registered dealer, the benefit contained in Form VAT C-4 would not be available to the registered purchasing dealer. The aforesaid interpretation would result in achieving the purpose of the rule which is to make the object of the provisions of the Act workable, i.e., realization of tax by the revenue by legitimate methods."

25. In the result, this writ application succeed in part and is partly allowed accordingly. The impugned order of blocking of the ECL of the writ applicant is hereby quashed and set aside. The respondents are at liberty to pass a fresh order under Rule 86A of the Central Goods and Service Tax Rules, 2017 in accordance with law and in the light of the observations made hereinabove.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE,J)

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