

ITC availment right not 'indefeasible' - Gujarat HC upheld DGGSTI's action under Rule 86A

The Hon'ble Gujarat High Court in *S.S. Industries v. Union of India [R/Special Civil Application No. 8841 of 2020 with R/Special Civil Application No. 8163 of 2020 decided on December 24, 2020]* upheld the Directorate General of Goods & Services Tax Intelligence's ("**Respondent No. 4**" / "**DGGSTI**") action of blocking Input Tax Credit ("**ITC**") in the electronic credit ledger of the assessee by invoking Rule 86A of the Central Goods and Service Tax Rules, 2017 ("**CGST Rules**") and while refusing to interfere when the investigation is in progress, the Court held that it would be too much for this court at this stage to stall a legitimate investigation into the allegations of fraudulent transactions and permit the writ applicants to avail the ITC of a huge amount in exercise of its writ jurisdiction.

Facts:-

The S.S. Industries ("**Writ Applicant No. 1**") is a partnership firm, *inter alia*, engaged in the business of manufacture of goods like the TMT Bars, Rounds etc. Another Writ Applicant ("**Writ Applicant No. 2**") is one of the partners in a partnership firm.

The Writ Applicant No. 1 while paying the GST on the goods manufactured, has been availing ITC on the input transactions upon receiving the tax paid inputs and tax invoices. In two assessment years i.e., A.Y.2017-18 and 2018-19, the Writ Applicant No. 1 received tax paid inputs from 36 registered dealers, located across the Country and registered with the GST Authorities, in charge of their respective divisions & commissionerates.

The Writ Applicant No. 1 received the tax invoices from its suppliers and the transactions of inputs received and the ITC availed have been recorded in the electronic credit ledger maintained by the Writ Applicant. The monthly returns in the Form GSTR-3B are being submitted by the Writ Applicant before the Deputy Commissioner of CGST, Bhavnagar Division ("**Respondent No. 2**") having jurisdiction over the business place of the Writ Applicant No. 1. The payment of price of the inputs and the GST on such inputs to all the suppliers is made through the RTGS.

The Respondent No. 4 received information that some registered dealers have been supplying only the tax invoices to the various manufacturers of steel products located across the Country, and in the course of such inquiry against such registered dealers/supplies, it was revealed that the Writ Applicant No.1 had also received inputs from them involving the ITC to the tune of Rs. 2.40 Crore. Respondent No. 4 through the Additional Commissioner of CGST (Anti Evasion) ("**Respondent No. 3**") initiated an inquiry against the Writ Applicant No. 1 by drawing the Panchnama dated April 4, 2019.

It is the case of the Department that the inquiry, so far, prima facie reveals that the concerned suppliers of inputs, had issued only the tax invoices without supplying any tax paid inputs and the transactions of these input suppliers/registered dealers are only on paper and, therefore, the ITC

availed by all the buyers including the Writ Applicant No. 1 on such tax invoices of these input suppliers is inadmissible.

The Writ Applicant No. 1 was pressurized, as alleged, to deposit an amount of Rs. 25 Lakh in cash by uploading the Form DRC-03 dated July 23, 2019. Further, the ITC of Rs. 84,34,547/- has been blocked by the Respondent No. 4 under Rule 86A of the CGST Rules on January 14, 2020. As the Revenue Authorities declined to refund the amount of Rs. 25 Lakh deposited by the Writ Applicant in cash as well as declined to unblock the ITC in the credit ledger of the Writ Applicant No. 1 of Rs. 84,34,547/-, hence, the present application has been filed.

The case of Writ Applicant No. 2 is that the officers of the Respondent No. 4 visited his office premises at Bhavnagar and seized various documents, files etc. by drawing a Panchnama and recorded the statement of one of the Directors of the Company. Under pressure and coercion of the Investigating Officer, the ITC availed by the Writ Applicant No. 2 on the various inputs and input services aggregating to ₹ 7.65 Crore in the electronic credit ledger has been debited.

Issues:-

- Whether the authority concerned is empowered to retain any amount deposited by a registered person during any inquiry or investigation in the absence of any confirmed liability against the assessee, without issuance of a show-cause notice and assessment/adjudication order imposing any tax liability on the assessee?
- Whether Rule 86A of the CGST Rules contemplate any passing of a specific order with an obligation to communicate the same to the affected person so that such person can take recourse to any legal remedy available to him?

Held:-

The Hon'ble Gujarat High Court in ***R/Special Civil Application No. 8841 of 2020 with R/Special Civil Application No. 8163 of 2020 decided on December 24, 2020*** held as under:

- Analyzed Rule 86A of the CGST Rules and noted that, it undoubtedly have conferred drastic powers upon the proper officers if they have reason to believe that the activities or invoices are suspicious. 'Reason to believe' is necessary to be formed for the purpose of blocking the ITC in cases of inquiry or investigation into fraudulent transactions. Any opinion of the authority to be formed is not subject to objective test. The language leaves no room for the relevance of an official examination as to the sufficiency of the ground on which the authority may act in forming its opinion. But, at the same time, there must be material, based on which alone the authority could form its opinion that it has become necessary to block the ITC pending an inquiry or investigation into the fraudulent transactions of fake/bogus invoices. The existence of relevant material is a pre-condition to the formation of the opinion.

- In the absence of any cogent or credible material, if the subjective satisfaction is arrived at by the authority concerned for the purpose of blocking the ITC in exercise of power under Rule 86A of the Rules, then such action would definitely amount to malice in law. Malice, in its legal sense, means such malice as may be assumed from the doing of a wrongful act intentionally but also without just cause or excuse or for want of reasonable or probable cause. Further, any use of discretionary power exercised for an unauthorized purpose amounts to malice in law. It is immaterial whether the authority acted in good faith or bad faith.
- It cannot be said that the inquiry or investigation initiated as regards the fake/bogus invoices for the purpose of ITC is malafide or based on absolutely no materials. From what has been stated in the reply affidavit filed on behalf of the respondents, it could be said that prima facie, there is something which the Revenue has noticed and, therefore, are looking into the same before taking any final call as regards the claim of the Writ Applicants to avail the ITC. Even, otherwise, Rule 86A of the CGST Rules provides that on expiry of the period of one year, the restriction shall cease to have effect from the date of imposition of such restriction.
- Rejected the submission of Writ Applicants with regard to the indefeasible right to avail the ITC vis-a-vis Rule 86A of the CGST Rules. Relied on the judgments of the Hon'ble Supreme Court in *Osram Surya (P.) Ltd. v. CCE, Indore [2002 (102) ECR 515 (SC)]*, *Tungabhadra Industries Ltd., v. Union of India [Civil Appeal No. 4668 of 1999 dated May 5, 2000]* and *Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd. and Ors. [1999 (65) ECC 354 (SC)]* and stated that the Hon'ble Supreme Court categorically has considered the aspect of availing the credit and utilization of credit as two different stages and declared that the utilization of the accrued credit is a vested right. **No vested right accrues before taking credit.** Once the credit has been taken validly the right is indefeasible. In the instant case, the Writ Applicants have not been able to avail the ITC and, in such circumstances, it cannot be said that they have an indefeasible right.
- Stated that, interference with the proceedings initiated by the Statutory Authority in exercise of the extraordinary writ jurisdiction would be justified only in exceptional circumstances. Three situations in which Courts have interfered even when the statutes under which the proceedings are initiated provide for a complete machinery to challenge the orders passed are:
 - Cases where the Constitutional vires of the very enactment under which the proceedings are initiated is under challenge;
 - Cases where the proceedings have been initiated or concluded in total violation of the principles of natural justice; and

- Where the orders impugned are totally without jurisdiction or where private and public wrongs are so inextricably mixed up or where prevention of public injury and the vindication of public justice demands that recourse to Article 226 of the Constitution be taken. In cases where public Revenue are involved and the Statutes under which such revenue are being collected provide for a complete code and a comprehensive machinery for correction of the orders that the Authorities may make, interference either at the initial or at the intermediate is not viewed by Courts with affection.
- Opined that Rule 86A of the CGST Rules casts an obligation upon the authority concerned to form an opinion but is silent with regard to passing of any specific order assigning prima facie reasons for invoking Rule 86A of the CGST Rules. To this extent, the Government needs to look into the matter and issue appropriate guidelines and also lay down some procedure to be followed for the exercise of power under the provision. **Although, no specific order has been passed and communicated to the Writ Applicants in this regard, yet in the facts of the present case, it cannot be said that exercise of power under Rule 86A for the purpose of blocking the ITC is mala fide or without any application of mind.**
- There are highly disputed questions of fact as regards the debit of the ITC from the electronic credit ledger. Indisputably, the investigation is in progress. A prima facie case could be said to have been made out against the Writ Applicants. However, the investigation cannot continue for an indefinite period of time. Almost more than a year has elapsed and, in such circumstances, the authorities concerned should arrive at some conclusion or the other. Even Rule 86A of the CGST Rules prescribes one year time limit.
- Directed the Respondents to complete the investigation within a period of 4 weeks from the date of the receipt of this order and take an appropriate decision whether any case has been made out for issue of show-cause notice under Section 74 of the Central Goods and Services Tax Act, 2017 or not.

Our Comments:

Recently, Rule 86A was challenged in the case of ***Kalp sutra Gujarat v. Union of India [R/Special Civil Application 10562 of 2020 decided on September 4, 2020]*** in so far as it gives power to block ITC at no fault of registered recipient and to declare it ultra vires of Section 16 of the CGST Act. Similarly, Rule 86A ibid was challenged in the case of ***Surat Mercantile Association v. Union of India [R/Special Civil Application 15381 of 2020 dated December 4, 2020]*** for allowing blocking the electronic credit ledger unilaterally without issue of Show Cause Notice and without giving an opportunity of fair hearing. Both the cases were listed for hearing on January 21, 2021.

It is to be noted that though the underlying thought behind introduction of Rule 86A ibid may be to prevent claim of fraudulent ITC, but this process turns out to be detrimental for the innocent recipients, claiming ITC on strength of valid duty paying documents but supplier has defaulted in payment of tax. Even pre-GST legal jurisprudence supports the view that as long as the purchasing dealer has taken all the steps required for being eligible for ITC, he could not be expected to keep track of whether the selling dealer has in fact deposited the tax collected with the government or has lawfully adjusted it against his output tax liability - ***Arise India Limited and Ors v. Commissioner of Trade & Taxes, Delhi and Ors [W.P.(C) 6093/2017 & connected matters dated October 26, 2017]***. Also, SLP filed by the revenue in above case has been dismissed with no discussions on merit by the Hon'ble SC in [***Special Leave to Appeal (C) No(s). 36750/2017 dated January 10, 2018]***].

Similar views have been expressed by Karnataka High Court in case of ***M/s. Onyx Designs v. Assistant Commissioner of Commercial Taxes [Writ Petition Nos.17989 & 23971/2018 (T – Res) dated June 17, 2019]***.

Relevant Provision:-

Rule 86A of the CGST Rules:

“86A. Conditions of use of amount available in electronic credit ledger. -

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

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

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

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

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

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

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

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

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

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

We have recently released the 6th Edition of our GST Book titled **“GST LAW AND COMMENTARY – WITH ANALYSES AND PROCEDURES”**, in a set of 3 Volumes. We thank you all for the support and your enduring response.

Have a look at the complete tour of the Book at: <https://rb.gy/3hifj3>

Order your copy now and be a part of GST learning excursion in most comprehensive and lucid form !!

 **Special Discount:** Use Coupon Code: **GST35** for **Flat 35% Discount** 

This book can be ordered online at: <https://rb.gy/benrpb>

DISCLAIMER: The views expressed are strictly of the author and A2Z Taxcorp LLP. The contents of this article are solely for informational purpose. It does not constitute professional advice or recommendation of firm. Neither the author nor firm and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any information in this article nor for any actions taken in reliance thereon.