

**THE HON'BLE SRI JUSTICE P.SAM KOSHY**

**AND**

**THE HON'BLE SRI JUSTICE N.TUKARAMJI**

**WRIT PETITION No.31039 of 2023**

**ORDER** : *(per Hon'ble Sri Justice P.SAM KOSHY)*

The present writ petition has been filed by the petitioner seeking for issuance of a Writ in the nature of Mandamus declaring the action on the part of the respondent No.2/The Assistant Commissioner of Income Tax in blocking the Input Tax Credit (ITC) of the petitioner in the electronic cash ledger without any reasons and without serving any notice or order to be illegal, arbitrary and in violation of the principles of natural justice.

**2.** Heard Sri V. Siddharth Reddy, learned counsel for the petitioner (appearing through VC) and Sri Dominic Fernandes, learned Senior Standing Counsel for CBIC appearing for the respondent-Department.

**3.** The facts of the case in brief are that the petitioner herein is a supplier of goods and is registered under the provisions of Central Goods and Services Tax Act, 2017, and State Goods and Services Tax Act, 2017, and is carrying on the business of sale and purchase of iron and steel scrap. On the alleged ground of the petitioner having utilized irregular Input Tax Credit (for short 'ITC') relying upon the invoices issued to two supplying dealers by name M/s. Sri Lakshmi Narsimha Traders and M/s. PMS Enterprises which according to the

respondent No.2 are non-existing firms, the respondent No.2 had issued notice dated 07.07.2023. To the said notice, the petitioner is said to have responded vide correspondences dated 21.07.2023, 26.10.2023 and 27.10.2023 and in addition he had also made representations to various authorities in this regard. Without there being any further deliberations, discussions and notice, the authority concerned have straightaway now issued the order of blocking the ITC of the petitioner on 14.08.2023 which is under question in the present writ petition.

**4.** Challenging the same, the learned counsel for the petitioner contends that the authority concerned has not given any reasons to believe that the invoices have been issued by the non-existing firms and assigning reasons is mandatory in terms of Rule 86A of the Central Goods and Services Tax Rules, 2017. It was further contended that in fact blocking the ITC has been carried out by the authority concerned without there being any written order passed or served upon the petitioner. Therefore, the said action is *per se* illegal, arbitrary, high handed and also in violation of the principles of natural justice.

**5.** It was the further ground of challenge on the part of the learned counsel for the petitioner that the issuance of the order for blocking of the ITC is bad in law for the reason that the petitioner had already responded to the notice dated 07.07.2023 where the petitioner was

asked to pay the ITC by reversing the same, to which the petitioner had made various representations and replies which were not duly considered by the authority concerned. According to the learned counsel for the petitioner, the impugned order is bad in law also for the reason that after the notice dated 07.07.2023 had been issued demanding the payment of ITC by reversing the same. There has been no show cause notice or a notice for personal appearance or any other notices issued and served upon the petitioner and in the absence of which the action would amount to be one with total denial of the principles of natural justice.

**6.** On the previous occasion, the learned counsel for the respondent-Department was directed to seek instructions. Today, the learned counsel did produce before this Court certain documents in respect of the action that was initiated by the authority concerned.

**7.** At this juncture, it would be relevant to take note of the provisions of Rules 86A of the Central Goods and Services Tax Rules, 2017, which specifically enumerates the conditions requisite for availing the benefit under Rule 86A. For ready reference, sub-clause 1 of Rule 86A is being reproduced herein under:

“RULE 86A- Conditions of use of amount available in electronic credit ledger- (1) “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:”

**8.** Though the learned counsel for the respondent-Department has produced records, but what is apparent is the fact that the impugned order does not seem to have been any specific order issued by the authority concerned blocking the ITC available to the petitioner in the electronic cash ledger. Neither was any such order issued or served upon the petitioner intimating the action of blocking the ITC. The documents also do not reflect any specific steps being taken after the initial notice was issued upon the petitioner on 07.07.2023 to which the petitioner had immediately responded on 21.07.2023 followed by various reminders of the same nature with correspondences made to the higher officers in the Department as well.

**9.** What is also reflected is the fact that though there has been repeated representations, reminders and responses given by the petitioner to the initial notice dated 07.07.2023, there has been no discussion on any of the contempt's on the part of the authority concerned while passing the order of blocking the ITC available to the petitioner in the electronic cash ledger.

**10.** In the admitted factual backdrop of the case, it would be relevant at this juncture to take note of the policy decisions of the Central Board of Indirect Taxes and Customs dated 02.11.2021. Clause 3.1.4 and 3.3.1 of the said Circular of the Government of India, Ministry of Finance, Department of Revenue, reads as under:

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

3.3.1 The amount of fraudulently availed or ineligible input tax credit availed by the registered person, as per the grounds mentioned in sub-rule (1) of rule 86A, shall be prima facie ascertained based on material evidence available or gathered on record. It is advised that the powers under rule 86A to disallow debit of the amount from electronic credit ledger of the registered person may be exercised by the Commissioner or the officer authorized by him, as per the monetary limits detailed in Para 3.2.1 above. The officer should apply his mind as to whether there are reasons to believe that the input tax credit availed by the registered person has either been fraudulently availed or is ineligible, as per conditions/ grounds mentioned in sub-rule (1) of rule 86A and whether disallowing such debit of electronic credit ledger of the said person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue. Such “Reasons to believe” shall be duly recorded by the concerned officer in writing on file, before he proceeds to disallow debit of amount from electronic credit ledger of the said person.”

**11.** The Division Bench of the High Court of Gujarat in the case of ***M/S. New Nalbandh Traders vs State Of Gujarat on 23 February, 2022***<sup>1</sup> in somewhat similar circumstances and in respect of the same provisions of law in paragraph Nos.17, 18, 19, 20 and 23 held as under:

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<sup>1</sup> R/SPECIAL CIVIL APPLICATION NO. 17202 of 2021

“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 its 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 C/SCA/17202/2021 JUDGMENT DATED: 23/02/2022 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 C/SCA/17202/2021 JUDGMENT DATED: 23/02/2022 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 C/SCA/17202/2021 JUDGMENT DATED: 23/02/2022 unsustainable in the eye of law.

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."

**12.** Recently, the Hon'ble Supreme Court of India vide its decision dated 13.03.2023 in the case of ***State of Karnataka Versus M/s Ecom Gill Coffee Trading Private Limited***<sup>2</sup> in paragraph Nos.14 and 15 held as under:

"14. The burden of proof as per Section 70 of the KVAT Act, 2003 was not an issue before the Delhi High Court. How and when the burden of proof can be said to have been discharged to prove the genuineness of the transactions was not the issue before the Delhi High Court. As observed hereinabove, while claiming ITC as per section 70 of the KVAT Act, 2003, the purchasing dealer has to prove the genuineness of the transaction and as per section 70 of the KVAT Act, 2003, the burden is upon the purchasing dealer to prove the same while claiming ITC.

15. In view of the above and for the reasons stated above and in absence of any further cogent material like furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. and the actual physical movement of the goods by producing the cogent materials, the Assessing Officer was absolutely justified in denying the ITC, which was confirmed by the first Appellate Authority. Both, the second Appellate Authority as well as the High Court have materially erred in allowing the ITC despite the concerned purchasing dealers failed to prove the genuineness of the transactions and failed to discharge the burden of proof as

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<sup>2</sup> CIVIL APPEAL NO. 230 OF 2023  
(Arising from SLP (Civil) No. 2572/2022)



per section 70 of the KVAT Act, 2003. The impugned judgment(s) and order(s) passed by the High Court and the second Appellate Authority allowing the ITC are unsustainable and deserve to be quashed and set aside and are hereby quashed and set aside. The orders passed by the Assessing Officer denying the ITC to the concerned purchasing dealers, confirmed by the first Appellate Authority are hereby restored.”

**13.** Now if we look into the documents produced by the learned counsel for the respondent-Department, it would reveal that there is not much cogent substantial material available to show that the order/decision on the part of the authority concerned in blocking the ITC available in the electronic cash ledger of the petitioner is without primarily issuing an order in this regard or such an official communication being communicated/served upon the petitioner. From the records that have been placed before this Court and also on perusal of the documents would also reflect that the manner in which the authority concerned was required to record the reasons to believe was also lacking except for a vague reference in this regard in the note sheets.

**14.** In the given factual matrix of the case, this Court is inclined to allow the writ petition and declare the action on the part of the respondent No.2 in blocking the ITC available to the petitioner in the electronic cash ledger to be arbitrary, bad in law and also in violation of the principles of natural justice. Therefore, the said impugned action is set aside/quashed holding it to be illegal. The matter stands remitted back to the respondent No.2 for taking a fresh decision so far

as the blockage of ITC available to the petitioner in the electronic cash ledger is concerned. Let the respondent No.2 issue a fresh notice of personal hearing to the petitioner who may enter appearance in person or through his authorized representative and decide the matter on its own merits afresh.

**15.** Considering the fact that the matter stands remitted back and stands restored to the file of the respondent No.2, let a fresh decision be taken after giving a notice of personal hearing to the petitioner within an outer limit of three (3) weeks from the date of receipt of a copy of this order.

**16.** The writ petition to the aforesaid extent, stands allowed.  
No order as to costs.

Miscellaneous petitions, pending if any, shall stand closed.

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**P.SAM KOSHY, J**

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**N.TUKARAMJI, J**

**Date: 20.11.2023**  
GSD