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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 5th December 2022*

+ **W.P.(C) 6444/2022, CM Nos.19502/2022 & 33763/2022**

SUNNY JAIN

..... Petitioner

Through: Counsel for the petitioner
(Appearance not given)

Versus

THE UNION OF INDIA ANR ORS. Respondents

Through: Mr. Rajkumar, Adv. for UOI.
Mr. Harpreet Singh, Sr. Standing
Counsel with Ms. Suhani Mathur
& Mr. Jatin Kumar Gaur, Adv.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition impugning the action of the respondents in blocking the Input Tax Credit (hereafter 'the ITC') of ₹1,37,17,022/- (IGST of ₹1,29,80,631/- and CGST of ₹7,36,391/-), which is credited in the Electronic Credit Ledger (hereafter 'ECL') of the petitioner. The said ITC was blocked on 11.02.2020.

2. The respondents do not controvert that the ITC was blocked without informing the petitioner or without affording the petitioner any opportunity to be heard. The respondents sent an e-mail dated 01.04.2022, informing the petitioner that ITC has been "unblocked /

blocked”. The petitioner claims that prior to that, on 07.09.2021, he had filed a letter with respondent no.3 raising a grievance that his ECL had been locked for a period of eighteen months without any intimation or enquiry. He had also raised an issue that in terms of Rule 86A of the Central Goods and Services Tax Rules, 2017 (hereafter ‘**the CGST Rules**’), it was impermissible to block the ECL for a period exceeding one year. Accordingly, the petitioner requested the respondents to unblock his ECL, however, the respondents did not accede to the same.

3. The petitioner claims that he sent an e-mail dated 06.10.2021 to the office of the respondent nos.3,4 and 5 (Anti Evasion Office CGST, Delhi), requesting the respondents to furnish the list of documents required for unblocking the ECL. In response to the aforesaid e-mail, the respondents sought certain documents including copies of the Bills of Entry reflecting the IGST paid on import of goods for the financial year 2017-18 to financial year 2020-21; copy of the GSTR – 2A reflecting the IGST paid on account of import for the financial year 2017-18 to financial year 2020-21; and, comparative statements of GSTR-1 and GSTR-3B and GSTR-2A and GSTR-3B for the financial year 2017-18 to financial year 2020-21. It is stated that these documents were provided by the petitioner. Thereafter, the petitioner submitted further documents to the respondents under cover of his communication dated 18.10.2021 and 02.11.2021 as well.

4. Respondent no.2 issued a letter dated 12.11.2021, directing the petitioner to deposit interest on account of non-payment of consideration to a supplier (D.G. Impex), within a period of 180 days

as required in terms of Section 16(2) of the Central Goods and Services Tax Act, 2017 (hereafter '**the CGST Act**') and Rule 37 of the CGST Rules. The petitioner disputes the said demand. He claims that he is not required to pay any interest on the ITC as he had not utilized the ITC in respect of supplies received from D.G. Impex. The petitioner also contends that recovery of interest cannot be effected without issuing a show cause notice and initiating the proceedings to adjudicate the same.

5. The petitioner claims that on 01.04.2022, he received another system generated e-mail from the GST portal informing him that the ITC available in the ECL has been "*blocked/unblocked by Shri/Mr/Ms 10037590, Assistant Commissioner, Range-13*". Yet another similar e-mail was received by the petitioner on the same day informing him that the ECL has been "*blocked/unblocked by Shri/Mr/Ms 10055109, Deputy Commissioner, Range-13*". Thus, the ECL of the petitioner was unblocked on 01.04.2022 and was again blocked on the same date.

6. Respondent nos. 2 to 5 have filed a counter affidavit. The only explanation provided in the counter affidavit is that the ECL of the petitioner was blocked pursuant to an e-mail dated 11.02.2020, received from Directorate General of Analysis and Risk Management (DGARM). The said email enclosed a list of tax payers who had allegedly availed inadmissible ITC during the period 2017-18 and 2018-19, and the petitioner's name was included in the said list. The respondents claim that in view of the said e-mail, they have reason to believe that the ITC available in the ECL of the petitioner had been wrongly availed and therefore, the same was blocked on 11.02.2020.

7. The petitioner is engaged in the business and supply of mobiles and mobile parts under the name 'Mahavir Impex'. The allegation against the petitioner is that he had not paid the consideration for supplies received from D.G. Impex within the period of 180 days and therefore, was liable to pay interest under Section 16(2)(d) of the CGST Act. Rule 86A of the CGST Rules entitles the Commissioner or any officer authorized by him in this behalf, not below the rank of Assistant Commissioner, to not permit debit (utilization) of the ITC lying to the credit in the ECR of a taxpayer in certain circumstances. Concededly, the action of the respondents to block the petitioner's ITC lying in his ECR is in exercise of the power under Rule 86A of the CGST Rules

8. Rule 86A of the CGST Rules reads as under:

“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.”

9. A plain reading of Rule 86A of the CGST Rules indicates that the restriction, as contemplated under Rule 86A(1) of the CGST Rules, can be imposed only where the ITC available in the ECR has been “*fraudulently availed*” or is “*ineligible*” as specified in the said Sub-Rule.

10. There is no allegation that the petitioner has fraudulently availed the ITC lying to the petitioner’s credit in the ECR. Mr. Harpreet Singh, learned counsel appearing for the respondents, states that the only reason for blocking the ITC in the petitioner’s ECR is that he is ineligible to avail the same in view of Section 16(2) of the CGST Act.

11. Blocking of an ITC in the ECR of a tax payer, effectively prevents him from using the ITC for discharge of his liabilities. It is a drastic measure and therefore, can be taken only when the conditions for taking such measures are met. It is trite law that statutory provisions empowering harsh measures such as freezing the assets of a person, have to be strictly construed.

12. In *CST v. Modi Sugar Mills Ltd.: (1961) 2 SCR 189*, the Supreme Court has observed as under:-

“10.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.”

13. The words “*inasmuch as*” as used in Rule 86A(1) of the CGST Rules qualify the word “*ineligible*”. The expression “*inasmuch as*” is not of a wide import; it is used in a restrictive sense to qualify the subject.

14. According to *A Dictionary of Modern Legal Usage by Bryan A. Garner, second edition*, the expression “*inasmuch as*” is defined as:

“In modern AmE usage, the standard spelling of each group is *inasmuch as* and *insofar as*, both single words except for the final element. In modern BrE, usage is split: *inasmuch as* is standard and the expression *in so far as* is preferred as four separate words. However the phrase is

spelled, through, *inasmuch as* is almost always inferior to *because* or *since*.”

15. If the expression “*inasmuch as*” is considered as synonymous with ‘because’ or ‘since’, the sub clauses of Rule 86A(1) of the CGST Rules would qualify the word “*ineligible*” and exclude the possibility of expanding the import of the said word. In *Empire State Bldg. Corp. v. City of N.Y.*; 274 N.Y.S.2d 208, the Appellate Division of the Supreme Court of New York, First Department, interpreted the meaning of a clause that read as: “*this act shall not authorize the imposition of a tax on any transaction by or with the United States of America insofar as it is immune from taxation.*”. The court construed the said clause, which used the expression “*insofar as*”, to restrict the immunity from taxation only to the extent it is made immune. The court held that, “*so where the tax is in terms levied upon the transaction, a person who is a party to that transaction is immune when the transaction has been made immune, and otherwise not.*” The expression “*insofar as*” is used synonymously as the expression “*inasmuch as*”.

16. According to the *Oxford English Dictionary*, ‘*inasmuch*’ is defined as: “*In so far as, to such a degree as*”.

17. It is clear from the above that the expression “*inasmuch as*” cannot be considered as an expression that is used in an expansive sense, it qualifies the subject and restricts the provision that it qualifies.

18. The use of the expression “*inasmuch as*” restricts the scope of ineligibility to the conditions as set out in sub clauses of Rule 86A(1) of the CGST Rules. It is only if any of these conditions are satisfied that the restriction under Rule 86A(1) can be imposed in respect of

ITC on the ground that the ITC available in the taxpayer's ECL is 'ineligible'.

19. It is also relevant to refer to the proviso to Section 16(2) of the CGST Act. Section 16(1) and (2) of the CGST Act are set out below:

“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,—

(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;]

[(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 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.”

[emphasis added]

20. The second proviso to Section 16(2) of the CGST Act provides the consequences where the recipient of goods/services fails to pay the consideration of those goods/services to the supplier within a period of 180 days from the date of issue of the invoice by the supplier. This provision is to address a situation where the recipient of taxable goods or services or both, avails the ITC without, in fact, paying for the same.

Resultantly, the taxpayer avails of a reduction in his output liability against liability which he has not discharged. In such a circumstance, the amount equal to the ITC availed by the recipient is added to his output liability along with interest payable thereon.

21. It is, clearly, not the scheme of the CGST Act to restrain a person from availing the ITC till he has paid the supplier for such goods/services. A recipient of goods/services who receives goods and services on supplier's credit is also entitled to avail the ITC. However, if he fails to discharge his liability within a period of 180 days (one hundred and eighty days), he is liable to disgorge the benefit of the ITC along with interest. The taxpayer's liability to account for the ITC availed without paying for the same within the period of 180 days, is required to be assessed as a part of his output liability.

22. The third proviso to Section 16(2) of the CGST Act further specifies that in the event the recipient pays the amount due towards the value of the supply of goods or services or both, along with the tax payable thereon, the recipient would be entitled to avail of the ITC. The second and third provisos to Section 16(2) of the CGST Act make it amply clear that a party is not disentitled to avail the ITC in respect of goods/services prior to his discharging the liability to pay the supplier for such goods/services and tax thereon. However, if the taxpayer does not discharge his liability to the supplier within a period of 180 days, he is required to account for the benefit of the ITC availed by the taxpayer along with interest as a part of the output liability. In terms of the third proviso to Section 16(2) of the CGST Act, the

taxpayer would be entitled to avail of the ITC once again on payment being made to the supplier.

23. Rule 37 of the CGST Rules provides for the mechanism for reversal of the ITC availed in case of non-payment of consideration.

The said Rule is set out below:

“RULE 37. Reversal of input tax credit in the case of non-payment of consideration.-(1)A registered person, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to subsection(2) of section 16, shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in **FORM GSTR-2** for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice:

Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:

[**Provided** further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.]

(2) **The amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.**

(3) **The registered person shall be liable to pay interest at the rate notified under subsection (1) of section 50 for the period starting from the date of**

availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule (2), is paid.

(4) The time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier.”

24. A conjoint reading of Rule 37 of the CGST Rules and the proviso to Section 16(2) of the CGST Act leaves no room for doubt that a taxpayer is entitled to avail of ITC in the first instance even though he has not paid the supplier for the goods/services. He has to, however, reverse the same with interest by including the amount of ITC availed as a part of his output liability, if he does not make the payment to the supplier within the stipulated period of 180 days.

25. The respondents have completely misdirected themselves in proceeding on the basis that unless a taxpayer pays the supplier, he is ineligible to avail of the ITC lying to his credit in the ECL.

26. It is also important to note that in terms of Rule 86A(3) of the CGST Rules, the restrictions imposed under Rule 86A of the CGST Rules cannot extend beyond the period of one year from the date of imposing such restriction. Thus, there may be merit in the petitioner's contention that the Order under Rule 86A(1) of the CGST Rules cannot be extended beyond the period of one year by successively issuing further orders. However, Mr. Harpreet Singh states that he has not addressed the said issue in this petition and, given the view of the court on the interpretation of provisos to Section 16(2) and Rule 86A(1) of the CGST Rules, it is not necessary to decide the said

question. In view of the above, we are refraining from further examining the said question in this petition.

27. In the given facts and circumstances of the case, the action of the respondents to continue blocking the ITC available in the ECR of the petitioner for such extended period is without the authority of law.

28. In the circumstances, the respondents are directed to forthwith unblock the ITC available to the petitioner in his ECR.

29. It is clarified that nothing stated in this order would preclude the respondents from taking such steps as are necessary for recovering any ITC along with interest from the assessee, if the same is otherwise required to be added to the petitioner's output liability in terms of the second proviso to Section 16 of the CGST Act.



VIBHU BAKHRU, J

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PURUSHAINDRA KUMAR KAURAV, J

DECEMBER 05, 2022

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