IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on:07.03.2023*

\+ **W.P.(C) 7017/2022 & CM No. 21510/2022**

M/S PARITY INFOTECH SOLUTIONS PVT. LTD.….. Petitioner

Versus

GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Puneet Agarwal, Ms. Purvi Sinha, Mr. Ketan Jain, Mr. Chetan Kumar Shukla, Advs.

For the Respondents : Mr. AvishkarSinghvi, Mr. Naved Ahmed, Mr. Vivek Kumar & Mr. Vijay Bhandari & Mr. Neeraj Malik, Advs.

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HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition impugning a show cause notice dated 28.02.2022 (hereafter '**the impugned show cause notice**') and an order dated 30.03.2022 (hereafter **'the impugned order'**) passed under Section 74 of the Central Goods and Services Tax Act, 2017 (hereafter '**the CGST Act**'), pursuant to the impugned show cause notice. In terms of the impugned order, the Adjudicating Authority had raised a demand of ₹27,88,200/- for the Financial Year

2020-21 and had called upon the petitioner to pay the same by 30.04.2022. In addition, the petitioner also impugns the instructions dated 08.03.2022 issued by the Department of Trade & Taxes (Policy Branch), Government of NCT of New Delhi (hereafter **'the impugned instructions'**).

2. The Input Tax Credit (hereafter **'ITC'**) available in the petitioner's Electronic Credit Ledger (hereafter '**ECL**') was blocked on 26.11.2020 under Rule 86A of the Central Goods & Services Tax Rules, 2017 (hereafter **'the Rules'**). The respondents did not unblock the same immediately on the expiry of the period of one year. The respondents did so on 30.03.2022, but appropriated the blocked ITC against a tax demand created on the same date. The petitioner claims that the said demand was created artificially with the object of denying the ITC, which would be available to the petitioner on the same being unblocked. The petitioner claims that the same was done pursuant to the impugned instructions, which are contrary to law.

3. It is also the petitioner's case that the blocking of the ITC was done without any tangible material or justifiable reasons, and merely on the instruction of another authority, which is impermissible.

Factual Context

4. Briefly stated, the relevant facts necessary to address the controversy in the present petition are as under:

4.1 The petitioner received a summons under Section 70 of the Central Goods & Services Tax Act, 2017, requiring the petitioner to appear before the Principal Commissioner of Central Taxes in

connection with a case relating to issuance of fake GST invoices by one, Sh. Aman Handa & others, without actual supply of goods under the CGST Act. The summons indicated that the said case was being inquired into by the Commissioner of Central Taxes, Delhi and that the petitioner was called upon to provide details of the transactions between the petitioner and twenty-three companies as set out in the schedule to the said summons. The petitioner claims that its representative appeared before the concerned officials on the date specified and explained that it had no transactions relating to the purchase of goods with any of the entities as mentioned in the summons dated 17.08.2020.

4.2 On 26.11.2020, the petitioner received an e-mail from the e-mail ID "donotreply@gst.gov.in", *inter alia,* stating that *"Some amount of ITC available in your Electronic Credit Ledger of GSTIN 07AAECP8257F1Z8 has been blocked/unblocked by Shri/Mr/Ms Manoj Dahiya, Sales Tax Officer Class II / AVATO, Ward 76, Admn.:- STATE. Please view the details in the said ledger on the portal.*" The petitioner checked the status on the ECL on the Goods & Services Tax Network Portal (hereafter **'the Common Portal'**) and found that the balance of ₹27,88,200 available in the petitioner's ECL relating to Integrated Goods and Services Tax (hereafter **'the IGST'**), was blocked by respondent no.4. However, no reasons for blocking were reflected on the portal.

4.3 The petitioner, on becoming aware that the amount of ₹27,88,200 IGST has been blocked, sent a letter dated 28.12.2020 requesting for the reasons for blocking the credit. The petitioner also sought

information as to how to unblock the same. However, it did not receive any response to its letter.

4.4 The petitioner claims that, thereafter, it sent e-mails dated 04.01.2021, 07.01.2021 and 25.01.2021 seeking information regarding the reasons for blocking of the ITC and further enquiring as to how the same could be unblocked. But it did not receive any satisfactory response.

4.5 The petitioner claims that it could not file its statutory returns on time as it was unable to utilise the ITC, which had been blocked. The petitioner sent another e-mail dated 15.02.2021 to the respondents expressing its difficulty in filing GSTR-3B returns as the system was not permitting the petitioner to file the same for the period from December, 2020 to January, 2021, because the ITC amount was reflected as blocked. The petitioner received a response to the said e-mail informing the petitioner that since its GST registration fell within the administrative jurisdiction of the State, the petitioner's e-mail had been forwarded for necessary action.

4.6 The petitioner claims that it continued to pursue the GST authorities by sending e-mails and had also personally visited the jurisdictional officers and submitted copies of the GST returns as well as system-generated statements of inward supplies in Form GSTR-2A. The petitioner contended that the authorities had wrongfully blocked the ITC without providing any reasons for the same. The petitioner claims that since no effective response was received and the ITC continued to remain blocked, it was constrained to deposit ₹36,49,074/-

in cash against its liability for the month of December, 2020. It filed the return in form GSTR-3B without availing the ITC.

4.7 On 28.02.2022, respondent no.4 (Sales Tax Officer Class II, AVATO, Ward 76, Zone 7, Delhi) issued the impugned show cause notice calling upon the petitioner to furnish a response along with supporting documents in support of its claim. Although the notice also stated that the petitioner could appear before the concerned officer, however, the column against the entry date of personal hearing and time of personal hearing, was entered as 'NA'.

4.8 The petitioner was also issued a summary show cause notice dated 28.02.2022, indicating the facts of the case as "*Input Tax Credit wrongly availed or utilised from the non-existent firm.*" The ground for issuing the summary show cause notice referred to a letter dated 28.09.2020 received from the Office of the Commissioner of Central Tax, GST. A table was set out reflecting IGST of ₹27,88,200/- for the period of April 2020 to March 2021 against the heading 'tax and other dues'.

4.9 The petitioner responded to the said show cause notice by a letter dated 27.03.2022. A few days later, on 30.03.2022, respondent no.4 issued the impugned order under Section 74 of the "*GST Act, 2017*" calling upon the petitioner to pay an amount of ₹27,88,200/-.

4.10 Immediately thereafter, the petitioner's ECL reflected that the said amount, as demanded in terms of the impugned order, had been debited.

Submissions

5. Mr. Agarwal, learned counsel appearing for the petitioner assailed the impugned show cause notice on the ground that it was bereft of any particulars. The petitioner's ECL had been blocked at the instance of the Commissionerate of Central Tax on the basis that the said Commissionerate had initiated an investigation into fake invoices. He submitted that the petitioner had received the summons dated 17.08.2020 in connection with the case of fake invoices allegedly issued by Sh. Aman Handa and others and had explained that he had no dealing with Sh. Aman Handa or any of the parties mentioned in the summons dated 17.08.2020. However, despite the clarification, respondent no.4 mechanically issued a show cause notice at the instance of the Commissionerate, West. He submitted that respondent no.4 had devised the process of mechanically issuing an order under Section 74 of the CGST Act immediately before unblocking the ITC with the sole object to scuttle the provision of Rule 86A(3) of the Rules, which did not permit the authorities to block the ECL for a period exceeding twelve months.

6. He also submitted that in terms of the impugned instructions, the officers were directed to create a demand by disallowing the ITC in cases where the ITC had been blocked. He submitted that following the impugned instructions, the proper officers were not unblocking the ITC, even though the period of one year had elapsed, prior to creating an illusory demand for appropriating the ITC on the same being unblocked.

Reasons and Conclusions

7. As is apparent from the above, the grievance of the petitioner, principally, relates to the blocking of its ITC and the subsequent appropriation of the said amount to satisfy the demand as raised by the impugned order. At the outset, it is relevant to refer to Rule 86A of the Rules, in exercise of which, the petitioner's ITC available in the ECL was blocked. Rule 86A of the 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 –
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> (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-
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> (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
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> (ii) without receipt of goods or services or both; or
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> (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
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> (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
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> (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,
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> 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.
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> (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.
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> (3) Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction."

8. It is apparent from the above, that the ITC can be blocked by a Commissioner or an officer authorised by him in his behalf, not below the rank of an Assistant Commissioner, provided that he has reasons to believe that the ITC available in the ECL has been "*fraudulently availed or is ineligible"* on account of the reasons as set out in Clauses (a) to (d) of Sub-rule (1) of Rule 86A of the Rules. In ***Sunny Jain v. Union of India & Ors.: W.P. (C) 6444/2022 decided on 05.12.2022***, this Court had examined the language of Rule 86A(1) of the Rules and had held that the reasons set out in Clauses (a) to (d) of Rule 86A(1) of the Rules exhaustively set out the conditions of ineligibility. Thus, unless the competent officer has reasons to believe that the conditions in the said

clauses are satisfied or the ITC was fraudulently availed, the ITC in the ECL cannot be blocked.

9. It is also relevant to note that in terms of Rule 86A of the Rules, it is also necessary for the concerned officer (Commissioner or an officer authorized by him not below the rank of Assistant Commissioner) to record the reasons for blocking the ITC in writing.

10. Blocking of the ITC effectively deprives the taxpayer of a valuable resource to discharge its liability and realise the value in monetary terms. Thus, undisputedly, the said action is a drastic step and it is necessary that all legislative checks and balances, enacted in respect of exercise of power to take such measures, are duly satisfied.

11. In ***Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax, Calcutta: (1972) 3 SCC 234***, the Supreme Court had interpreted the expression 'reason to believe' in the context of Section 34(1A) of the Income Tax Act, 1922 and had observed as under:

> "10. …..There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour….."

12. In ***The Income Tax Officer, I Ward, District VI, Calcutta & Ors. v. Lakhmani Mewal Das: (1976) 3 SCC 757***, the Supreme Court emphasised that the expression '*reason to believe*' could not be construed as 'reason to suspect' and held as under:

> "12. The powers of the Income Tax Officer to reopen assessment though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect" The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the Income Tax Authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income Tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned Judges in the High Court, in our opinion, were not in error in holding that the said material could not have led to the formation of the belief that the income of the assessee respondent had escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs".

13. In ***Commissioner of Income Tax, Delhi v. Kelvinator of India Limited: (2010) 2 SCC 723***, the Supreme Court had, in the context of

re-opening of the assessment under Section 147 of the Income Tax Act, 1961, construed the expression 'reason to believe', to denote reasons, which are based on tangible material and have "*a live link with the formation of the belief.*" This view was also followed by the Supreme Court in a later decision in the case of ***Income Tax Officer, Ward No. 16(2) v. Techspan India Private Limited & Anr.: (2018) 6 SCC 685.***

14. In ***Commissioner of Income Tax-15 (Erstwhile Cit-IX) v. Shri Chintoo Tomar: 2014 SCC OnLine Del 7544***, a Division Bench of this Court had observed as under:

> "5. …..The expression "reasons to believe" predicates a belief which is founded and induced by existence of palpable or cogent material or information. Reason to suspect cannot amount to reason to believe. As it is the beginning of the inquiry, having a *prima facie* opinion is sufficient; and irrebuttable conclusive evidence or finding is not required. But the *prima facie* formation of belief should be rational, coherent and not *ex facie* incorrect and contrary to what is on record."

15. Although the aforesaid decisions were rendered in the context of Section 147 of the Income Tax Act, 1961, the interpretation of the expression '*reason to believe'* is also relevant for understanding the meaning of the said expression as used in Rule 86A of the Rules. This is because income tax assessments, once concluded, are final. Re-opening of the assessments subjects the assessee to the rigors of the assessment procedure and, therefore, upsets the finality of the concluded assessment. Thus, initiation of such proceedings, which have adverse consequences, can be resorted to only if the specific conditions, as enacted, are satisfied. As stated above, Rule 86A of the Rules also

provides for a drastic measure of blocking ITC. The same can be resorted to only if the conditions specified therein are fully satisfied. The existence of a 'reason to believe' that the ITC has been availed fraudulently or the conditions of ineligibility, as specified in clauses (a) to (d) of Rule 86A of the Rules, are satisfied, is necessary to trigger the action under Rule 86A of the Rules. In the absence of 'reasons to believe' that the given criteria are satisfied; recourse to measure under Rule 86A of the Rules is impermissible.

16. In a recent decision of the Supreme Court in ***Radha Krishan Industries v. State of Himachal Pradesh & Ors.: (2021) 6 SCC 771***, the Supreme Court had applied the said test while construing the provisions of Section 83 of the Himachal Pradesh Central Goods and Services Tax Act, 2017. Although the said provision uses the expression "*opinion*" and not 'reasons to believe', the Supreme Court applied the same test as postulated by the Supreme Court in ***The Income Tax Officer, I Ward, District VI, Calcutta & Ors. v. Lakhmani Mewal Das*** (*supra*) and ***Commissioner of Income Tax, Delhi v. Kelvinator of India Limited*** (*supra*) and held that formation of opinion must be based "*on tangible material which indicates a live link to the necessity to order a provisional attachment to protect the interest of the government revenue*."

17. In the present case, it is admitted that respondent no.2 had blocked the petitioner's ITC solely on the basis of a communication dated 24.07.2020 received from the Joint Commissioner, GST West Commissionerate, Central Tax. There is some confusion as to the date

of the said letter. Although it was mentioned that the letter is dated 24.07.2020, it also bears the date 10.07.2020 and has been signed by the issuer on 23.07.2020. The said letter merely states that the Commissionerate has initiated an investigation regarding the fake invoices and during the initial investigation, firms mentioned in the list annexed as Annexure A were found to be involved as beneficiaries and are within the jurisdiction of the GST Delhi East. The petitioner's name is mentioned at serial no.13 of the said list. It also mentions that the taxable value involved is ₹1,54,90,000/- and the total tax to be paid by the party (the petitioner) is ₹27,88,200/-. Respondent no.4, based on the said letter, proceeded to block the petitioner's ITC without any further information.

18. It is relevant to note that, in the counter affidavit, the respondents have stated that the Delhi State GST Department has no authority to investigate the petitioner and the status of investigation, initiated by the Central GST Department, is not known. It is also asserted that the Delhi State GST Department – which has blocked the petitioner's ITC – has no authority to be involved in the investigation against the petitioner.

19. It is clear that the petitioner's ITC was blocked on an allegation that the ITC availed was on account of fake invoices. However, the respondent, who had blocked the petitioner's ITC, had no information as to the fake transactions and had proceeded solely on the basis of a directive issued by the Joint Commissioner, GST West Commissionerate, Central Tax. It is, thus, clear that respondent no.4 had no tangible material to form any belief that the ITC lying in the

petitioner's ECL was on account of any fake invoice; it had proceeded to take action solely on the basis of a direction issued by another authority.

20. Before the drastic measure to block a taxpayer's ECL is taken, it was necessary for the concerned officer to have some material to form a belief that the conditions under Rule 86A of the Rules are satisfied.

21. The petitioner had repeatedly approached the respondents for seeking reasons for blocking of its ITC and had also enquired about the steps that it was required to take for unblocking the same. However, the petitioner had received no satisfactory response; understandably so, for the reason that the respondents themselves had no information or details as to why the petitioner's ITC had been blocked.

22. Notwithstanding that respondent no.4 had no information as to any offending transaction, it issued the impugned show cause notice under Section 74 of the CGST Act, asserting as under:

> "It has come to my notice that tax due has not been paid or short paid or refund has been released erroneously or input tax credit has been wrongly availed or utilized by you or the amount paid by you through the above referred application for intimation of voluntary payment for the reasons and other details mentioned in annexure for the aforesaid tax period."

23. It is clear from the above that the respondents had no clue as to the transaction in respect of which the petitioner's ITC was blocked. Respondent no.4 had, thus, mechanically reproduced the words of Section 74 of the CGST Act without any tangible material that could

provide any reasons to believe that the petitioner had availed of the ITC fraudulently or was ineligible for availing the ITC.

24. It is also admitted in the counter affidavit filed by the respondents that the impugned show cause notice had been issued based on the impugned instructions dated 25.02.2022, issued by the Department of Trade & Taxes (Policy Branch), Government of NCT of New Delhi.

25. It is relevant to refer to paragraph nos. 11 and 12 of the counter affidavit filed by respondent nos. 2 to 4, which clearly establishes that the impugned show cause notice was issued in a mechanical manner and solely for the reason that the petitioner's ITC was required to be unblocked as the period of one year had elapsed after it was blocked. Paragraph nos. 11 and 12 of the counter affidavit filed by respondent nos. 2 to 4 are reproduced below:

> "11. It is stated that thereafter, the ITC of the Petitioner was kept blocked beyond the period of 1 year as the Central GST Department did not provide any further instructions as to what to do with the blocked ITC. It is stated that in absence of such directions from the CGST, the present matter remained in limbo until the State GST Department issued further directions. It is stated that whether the Petitioner's ITC should be blocked or not can only be ascertained by the Central Tax Commissioner as the SGST is not involved with the investigation.
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> 12. That thereafter, the Delhi Govt. Dept. of Trade & Taxes issued a circular on25.02.2022 where it was notified that in all cases where the ITC has been kept pending blocked for more than 1 year, all ward in-charges and Zonal In-Charges are requested to take

> necessary action. The copy of circular dated25.02.2022 is annexed herewith as **ANNEXURE C-2**."

26. It is also relevant to refer to Section 74(1) of the CGST Act, which reads as under:

> "**74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.**
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> (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice."

27. It is apparent from the above that a show cause notice under Section 74(1) of the CGST Act can be issued only where it appears to the proper officer that the tax has not been paid or short paid or erroneously refunded or where the ITC has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax.

28. In the present case, the respondents had no material to form any opinion that the ITC had been availed wrongly on account of any fraud or any wilful-misstatement or suppression of facts to evade tax.

Concededly, the respondents had no material to form any independent opinion whatsoever. It is apparent that the impugned show cause notice was issued in a mechanical manner to comply with the impugned instructions.

29. In view of the above, we have no hesitation in holding that the impugned show cause notice is not in conformity with the provisions of Section 74 of the CGST Act and is, thus, without authority of law.

30. It is also apparent from a plain reading of the counter affidavit that the impugned show cause notice was issued only to overcome the provisions of Rule 86A(3) of the Rules, which expressly provide that any restriction under Section 86A will cease to have effect after the expiry of a period of one year from the date of imposition of such restriction. The petitioner's ITC was blocked on 26.11.2020 and therefore, the order blocking the ITC had ceased to have any effect from 25.11.2021, on account of the passage of one year.

31. Notwithstanding that the restriction placed on the petitioner's ITC had ceased; the respondents continued to illegally block the petitioner's ITC solely because no other instructions had been received. It is also apparent that the respondents were fully aware that their action of continuing to block the petitioner's ITC was contrary to Rule 86A of the Rules, however, the same did not deter them from continuing to block the ITC.

32. It is also apparent that respondent no.4 had proceeded to pass the impugned order not because it found that the petitioner had wrongly availed of the ITC by reason of a fraud or wilful-misstatement or

suppression of facts to evade tax, but solely to deprive the petitioner from utilising the ITC, which could no longer be kept blocked by virtue of Rule 86A(3) of the Rules.

33. The petitioner has also assailed the impugned instructions. The impugned instructions indicate that the ITC amounting to ₹2037.31 crores in respect of 6414 registered taxpayers was blocked by Delhi State GST Officers, and is lying blocked for a period exceeding one year. The said Circular also records that GSTN is contemplating introducing a functionality for automatically unblocking such ITCs in view of Rule 86(3) of the Rules. In the aforesaid context, the Department of Trade and Tax had emphasized the need for the proper officers to take immediate steps to finalise investigations and proceedings, in all these cases. And, subsequent to the same, either utilise the blocked credit against the demands issued or unblock the ITC if, during investigation/proceedings, it is found that the conditions for blocking the ITC no longer exist.

34. The impugned instructions also set out the indicative steps that may be taken by the proper officer on an urgent basis. In case of a taxpayer whose registration is active, the indicative steps, as directed to be taken, reads as under:

> "a. An immediate field visit of all such GSTINs whose credit have been blocked, be conducted and in case the firm is found non-existing, suspension and cancellation of registration of the firm may be carried out. Further, a show cause notice (DRC-01) should be issued proposing to create a demand by disallowing the ITC availed and thereafter demand should be created (DRC-07) in case of

no reply or no satisfactory reply is received from the registered person, as per law. If considered appropriate, summary assessment under Section 64 may also be considered. Finally, the blocked ITC should be unblocked and utilised towards payment of the demand created.

b. In case, during the field visit the taxpayer is found existing, then a show cause notice (DRC-01) should be issued proposing to create a demand by disallowing the ITC to the extent, fraudulently availed or for which the taxpayer is not eligible, keeping in view the provisions of clause (a) to (d) of sub rule (1) of rule 86A. Thereafter, DRC 07 should be issued, if no response or non satisfactory response is received, as per the law and finally, the blocked ITC should be unblocked and utilised towards payment of the demand created through DRC-07.

c. Here, it should also be kept in mind that earlier when the ITCs were blocked, some or all of these steps might have already been taken, so only the remaining steps should be taken now and the matter should be taken to the logical conclusion as mentioned above.

d. In the above said cases, proper officer should also search whether the said firm exists in the name of some other firm (same PAN), and if such cases are found then intimation of those firms, claiming the wrong ITC, shall also be sent to the concerned jurisdictional authority (other firm)."

35. The directive to issue a show cause notice proposing to create a demand by disallowing the ITC and thereafter, creating a demand cannot be read in isolation and in disregard of the provisions of the Act and the Rules. If the impugned instructions are understood to mean that a show cause notice be issued mechanically and a demand be created to appropriate the blocked ITC, the same would be contrary to law. A

show cause notice can be issued only if the conditions under Section 74 of the CGST Act are satisfied. In case relating to ITC, the show cause notice can be issued only if the proper officer believes that ITC has been *"wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax"*. No show cause notice can be issued without the proper officer forming at least a *prima facie* view that the tax has not been paid or short paid or erroneously refunded or the ITC had been wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.

36. Concededly, in the present case, respondent no.4 had no particulars as to the transaction in respect of which the ITC was blocked. He had no material whatsoever to come to the conclusion that the petitioner had wrongly availed or utilized the ITC by reason of fraud, wilful-misstatement or suppression of facts to evade tax. The respondents had blocked the petitioner's ITC solely on the directions issued by the Joint Commissioner, GST West Commissionerate, Central Tax.

37. It is also clear from a plain reading of the impugned instructions that it suggests that the exercise of issuing a show cause notice and creating a demand should be completed before unblocking the ITC notwithstanding that the period of one year has elapsed after the blocking of the ITC. This is contrary to the express provisions of Rule 86A(3) of the Rules. It is apparent that the impugned instructions, to the aforesaid extent, has been issued only to overcome the provisions of

Rule 86A(3) of the Rules and the impugned instructions, to this extent, cannot be sustained.

38. In view of the above, the present petition is allowed.

39. The impugned show cause notice and the impugned order are set aside. The impugned instructions, to the extent that it suggests that the ITC of the taxpayers can continue to be blocked beyond a period of one year, is set aside. It is also clarified that the impugned instructions cannot be read to direct issuance of a show cause notice and creation of demands in disregard of the provisions of the DGST Act, the CGST Act or the Rules made thereunder.

40. The respondents are directed to forthwith restore the ITC appropriated pursuant to the demand created by the impugned order, to the ECL of the petitioner.

41. It is clarified that the respondents are not precluded from ascertaining the petitioner's liability under the DGST Act or the CGST Act in accordance with law.

42. The petition is allowed in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MARCH 7, 2023
'gsr'