IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 8841 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 8163 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH Sd/-

and
HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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M/S S. S. INDUSTRIES
Versus
UNION OF INDIA

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Appearance:
MR. P.M. DAVE, LD. COUNSEL WITH MR. A S TRIPATHI(7613) for the Petitioner(s) No. 1,2
for the Respondent(s) No. 1,4
MR PY DIVYESHVAR(2482) for the Respondent(s) No. 2,3

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH**
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA

Date : 24 /12 /2020

CAV JUDGMENT

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

1. Since the issues involved in both the captioned writ applications are by and large the same, those were heard analogously and are being disposed of by this common judgment and order.

2. So far as the Special Civil Application No.8841 of 2020 is concerned, two issues are involved therein. The first issue relates to the true interpretation of Rule 86A of the CGST Rules inserted vide the Notification No.75/2019-CT dated 26th December, 2019 in the CGST Rules. The Rule 86A is in respect of the power and procedure for blocking the input tax credit (ITC) in the electronic credit ledger of a registered person. The second issue involved is with respect to the scope of exercise of power under Rule 86A of the Rules. In other words, the issue is 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 and, more particularly, without issuance of a show-cause notice and assessment/adjudication order imposing any tax liability on the assessee.

3. So far as the connected writ application, i. e., the Special Civil Application No.8163 of 2020 is concerned, the question arising therein is whether the authorities could have debited a sum of Rs.7.65 Crore from the credit ledger thereby debiting the ITC availed by the writ applicant on various inputs and input services without there being any demand or any final assessment order.

4. We first take up the Special Civil Application No.8841 of 2020.

5. The facts giving rise to the Special Civil Application No.8841 of 2020 may be summarized as under:-

5.1 By this writ application under Article 226 of the Constitution of India, the writ applicants have prayed for the following reliefs;

> *"(A) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, direction or order, thereby quashing and setting aside blocking of Input Tax Credit (ITC) aggregating to Rs.84,34,547/- in the Petitioner's Electronic Credit Ledger and also directing Respondent No.2 to allow the Petitioner to utilize such ITC of Rs.84,34,547/- and also allow the Petitioner to take credit of Rs.25 Lakhs in electronic credit ledger for paying GST/IGST on the goods manufactured and supplied by the Petitioner.*
>
> *(B) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, direction or order, quashing and setting aside DRC-03 Form dated 21.12.2019 (Annexure-'G') thereby ordering cancellation of debit entries of Rs.25,00,000/- in the Petitioner's Electronic Credit Ledger maintained under the CGST Act;*
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> *(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay the blocking of ITC of Rs.84,34,547/- by the Respondents and direct Respondent No.2 herein to allow the Petitioner to utilize such ITC of Rs.84,34,547/- as well as Rs. 25 Lakhs for paying GST on supplied of the final products on the terms and conditions that may be deemed fit by this Hon'ble Court.*
>
> *(D) An ex-parte ad-interim relief in terms of Para-17(C) above may kindly be granted.*
>
> *(E) Any other further relief that may be deemed fit in the facts and circumstances of the case may also please*

be granted."

5.2 The writ applicant No.1 is a partnership firm, inter alia, engaged in the business of manufacture of goods like the TMT Bars etc. The writ applicant No.2 is one of the partners of the partnership firm. The factory premises and manufacturing activities of the writ applicant is located within the jurisdiction of the Bhavnagar GST Commissionerate. The respondent No.2-Deputy Commissioner of CGST has the jurisdiction to initiate appropriate inquiry in respect of the writ applicants under the laws of the GST. The third respondent- Additional Commissioner of CGST (Anti Evasion) is a proper officer of the GST Department, in charge of the Bhavnagar Commissionerate for carrying out inquiries and investigation under the GST laws. The respondent No.4-Joint Director, Directorate General of Goods and Services Tax, Jaipur (Rajasthan) is an Investigating Agency called the Directorate General of Goods & Service Tax Intelligence, and this agency is the Investigating Agency for the Jaipur Zone. It appears from the materials on record that the respondent No.4 has been conducting the investigation against the writ applicant through the respondent No.3.

5.3 It is not in dispute that the writ applicant is registered with the GST Department, and while paying the GST on the goods manufactured, it has been availing the ITC on the input transactions upon receiving the tax paid inputs and tax invoices. The dispute in the present litigation is pertaining to the A.Y.2017-18 and 2018-19 respectively. During this period of two assessment years, referred to above, the writ applicant received tax paid inputs from 36 registered dealers, the details of those has been furnished at Annexure-A to the writ application. It appears that the suppliers of inputs are located

across the Country and registered with the GST Authorities, in charge of their respective divisions and commissionerates.

5.4 The writ applicant 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 having jurisdiction over the business place of the writ applicant. The payment of price of the inputs and the GST on such inputs to all the suppliers is made through the RTGS.

5.5 It appears from the materials on record that the Directorate General of Goods & Services Tax Intelligence, Jaipur Zonal Unit 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 herein had also received inputs from them involving the ITC to the tune of Rs.2.40 Crore. In such circumstances, the Investigating Agency thought fit to initiate an inquiry against the writ applicant herein by drawing the Panchnama dated 4th April, 2019. It is the case of the Department that the inquiry, so far, prima facie reveals that the concerned suppliers of inputs, referred to above, 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 herein on such tax invoices of these input suppliers is

inadmissible. It further appears from the materials on record that in the course of the inquiry, various statements of the representative of the writ applicant were recorded at Jaipur. The writ applicant was pressurized, as alleged, to deposit an amount of Rs.25 Lakh in cash by uploading the Form DRC-03 dated 23rd July, 2019. Over and above the same, the ITC of Rs.84,34,547/- came to be blocked by the Jaipur based agency under Rule 86A of the CGST Rules on 14th January, 2020.

5.6 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 of Rs.84,34,547/-, the writ applicants are here before this Court with the present application.

Submissions on behalf of the writ applicants:-

6. Mr. Paresh M. Dave, the learned counsel assisted by Mr. A.S. Tripathi, the learned counsel appearing for the writ applicants submitted that the firm has been receiving the tax paid inputs from the 36 input suppliers, referred to above. It is pointed out that all the 36 input suppliers are registered with the GST Department. The same pattern and method of receiving the inputs and tax invoices including the paying price and tax by the RTGS has been followed in case of all the input suppliers who have submitted their returns before the jurisdictional GST Officers. It is argued that despite the same pattern and method being adopted, referred to above, the dispute has arisen only with respect to the supplies received from six out of the 36 registered dealers. This, according to Mr. Dave, is something which is not palatable or sufficient enough

to block the ITC of a huge amount.

7. Mr. Dave would argue that his client has paid an amount of Rs.13,36,23,413/- to the input suppliers through the RTGS and it is not the case of the Department that such payment made towards the price inclusive of the tax to this input suppliers through the normal banking channel was received back by the writ applicant in any manner. In other words, the argument of Mr. Dave is that the payment of a substantial amount, as referred to above, to the input suppliers would go to show that the transactions were not sham or merely on paper but those were genuine. Mr. Dave further pointed out that all the inputs received by his client from these suppliers have been recorded in the credit ledger maintained by the writ applicant along with the details of ITC and the final products like the TMT Bars, Rounds etc. Mr. Dave pointed out that approximately 3,821 MTs of the inputs received from these suppliers has also been recorded in the statutory production register maintained by the firm and such final products were supplied to the customers on payment of the appropriate GST by the firm. It is argued by Mr. Dave that if transactions involving 3,821 MTs of inputs were only on paper, as alleged by the Department, then the firm could not have manufactured the final products cleared on payment of the GST.

8. Mr. Dave further argued that the GSTR-3B Returns of the firm regarding the availment of the ITC on all such input transactions and utilization thereof were assessed finally by the jurisdictional Bhavnagar GST Officers without any objection and the same signifies the actual receipt of the tax paid inputs and utilization thereof by the firm. In this context,

Mr. Dave pointed out that even in the reply affidavits of the respondents, such facts are not disputed.

9. Mr. Dave would argue that the respondents have not been able to furnish an iota of material before this Court in the form of statements, if any, of the input suppliers or the statements of the transporters etc. to suggest that the transactions were sham. It is vociferously argued that in the case on hand, there is no final order of assessment and in the absence of any confirmed liability towards duty, the amount voluntarily deposited by the assessee during such inquiry cannot be retained by the Revenue. In other words, the argument of Mr. Dave is that in the case on hand, there is no assessment by following the mandatory procedure as prescribed under Section 74(1) of the CGST Act by issuing the show-cause notice and there is no order under Section 74(9) of the Act, determining the short payment of tax as a result of the alleged wrong availment of ITC.

10. In the aforesaid context, Mr. Dave, with a view to fortify his submissions, noted above, has placed strong reliance on the following decisions;

(i) ***Century Metal Recycling Pvt. Ltd. vs. Union of India***, (2009) 234 ELT 234 (P & H);

(ii) ***Concepts Global Impex vs. Union of India***, 2019 (365) ELT 32 (P & H);

(iii) ***Abhishek Fashions Pvt. Ltd. vs. Union of India***, 2006 (202) ELT 762 (Guj.)

11. The ratio of the three judgments, referred to above, is that unless there is assessment and demand, the amount deposited by the assessee under coercion/threat of arrest, cannot be appropriated. The Revenue cannot justify retaining the amount deposited by merely saying that the same was voluntarily deposited. The Revenue should bear in mind that they are creatures of statute and are bound by statutory law; the powers that they exercise are conferred upon them by the statute and there are no powers *de hors* the statute. In such circumstances, the Revenue is duty bound to act as provided by the provisions under which it can exercise such powers. The Revenue is not an organization which is entitled to retain money without any sanction of law.

12. Mr. Dave vociferously argued that the unilateral action of blocking the ITC thereby preventing the writ applicants from utilizing such credit is illegal and unjustified, more particularly, when there is no assessment of any tax liability against the writ applicant firm. He would argue that the documentary evidence in the form of statutory returns and records indicates that the transactions were genuine. The ITC related transactions were not only recorded in the statutory registers but were also reported to the jurisdictional GST Officers on monthly basis all throughout the period of two years in question.

13. Mr. Dave has a very serious grievance to redress while pointing out that all the input suppliers under cloud have been allowed to scott free of the GST Net by accepting their respective applications for de-registration. Mr. Dave pointed out that the GST Officers in charge of their divisions and

Commissionerates allowed such applications and permitted de-registration. According to Mr. Dave, the orders for cancellation of registration passed by the jurisdictional GST Officers would indicate that no tax was found to be outstanding or payable from any of the concerned input suppliers. If the Department had a slightest of the doubt in this regard, then it would have initiated proceedings under Section 76(2) of the CGST Act against all such input suppliers. Mr. Dave further argued that when the registered input suppliers alleged to have issued the tax invoices without supplying the tax paid inputs to the writ applicants, were allowed to surrender their registrations without any liability, then no proceedings for the very same transactions against the recipients like the writ applicants would be justifiable nor permissible in view of Section 76 of the CGST Act.

14. Mr. Dave argued that there is nothing on record to even prima facie indicate that his clients had availed the ITC wrongly. Mr. Dave pointed out that no show-cause notice has been issued though more than one year has passed. It is argued that Rule 86A could not have been invoked by the respondents during the investigation or inquiry. Mr. Dave vehemently argued that Rule 86A has prescribed a mandatory procedure to be followed for the purpose of invoking the same. The Rule provides for “reasons to be recorded in writing” for blocking or not allowing the utilization of the ITC. It is argued that the procedure, as prescribed under Rule 86A of the rules requires two conditions to be satisfied; namely, recording of the reasons in writing by the officer ordering blocking of the ITC and secondly communication of such reasons to the affected person. It is argued that the bare minimal

requirement of the principles of natural justice is recording of reasons and communicating such reasons to the affected party.

15. In the aforesaid context, Mr. Dave seeks to rely on the following judgments;

(i) ***M/s. Ajantha Industries & Ors. vs. Central Board & Direct Taxes, New Delhi & Ors***., (1976) 1 SCC 1001

(ii) ***CIT, West Bengal vs. Oriental Rubber Works***, (1984) 1 SCC 700.

16. Mr. Dave vehemently argued that it is a settled principle of law that the credit of tax paid on inputs, in different services, and capital goods is an indefeasible right of the assessee. Since credit is a vested right of the assessee, the same cannot be extinguished or curtailed in any manner without the proper authority of law. Mr. Dave argued that with the introduction of Rule 86A of the CGST Rules, the aforesaid right to such credit is sought to be curtailed on flimsy grounds though temporarily. In the context of being an indefeasible right of the assessee, Mr. Dave, seeks to rely significantly on the decision of the Supreme Court in the case of ***Eicher Motors Ltd. vs. Union of India***, reported in *1999 (106) ELT 3 (SC).*

17. Mr. Dave submitted that indisputably, no reasons have been recorded by the Joint Director, Jaipur Zonal Unit (respondent No.4) on file of this case or even independently for blocking a substantial amount of ITC in the firm's credit ledger. It is pointed out that even in the reply affidavit as also in the course of the hearing of this writ application, it was not argued

by the learned Assistant Solicitor General of India appearing on behalf of the respondents that the reasons have been recorded by the respondent No.4 in the form of notings in the file. Mr. Dave would submit that assuming for the moment that some reasons have been recorded in the form of notings in the file, such reasons, at no point of time, were communicated to his clients. It is only when his clients attempted to use the ITC lying in the credit ledger for discharging their GST liability, it was reported on the GST Network (GSTN) Portal that the credit of Rs.84,34,547/- had been blocked. Mr. Dave would argue that his clients are seriously prejudiced by blocking of the ITC.

18. Mr. Dave further pointed out that Sub-Rule (3) of Rule 86A provides that the restriction on utilization of the credit shall cease to have effect after the expiry of period of one year from the date of imposing such restriction. The argument of Mr. Dave in this regard is that if the decision of blocking credit is not communicated to the person affected by it, then how would such affected person come to know that the restriction has ceased to have effect with efflux of time. Therefore, according to Mr. Dave, keeping this aspect in mind also, the communication of the reasons with respect to blocking of the ITC is a must.

19. Mr. Dave pointed out that such drastic powers as conferred under Rule 86A could not have been exercised merely on the ground that an inquiry has been initiated as there is a suspicion that the transactions were sham. The jurisdictional officers of the Bhavnagar Commissionerate have not filed any affidavit in this case, supporting the allegations of the Jaipur based Investigating Agency.

20. In such circumstances, referred to above, Mr. Dave prays that there being merit in both the writ applications, those be allowed and the reliefs prayed for in the respective writ applications may be granted.

21. Mr. Dave prays that the DRC-03 Form dated 21st December, 2019, Annexure-G in the Special Civil Application No.8841 of 2020 may be quashed and the order of the fourth respondent herein, blocking the ITC of Rs.84,34,547/- may also be quashed and set aside. Mr. Dave prays that so far as the Special Civil Application No.8163 of 2020 is concerned, the two DRC-03 Forms both dated 9th April, 2019 (Annexure-F to the petition) may be quashed and the respondents may be directed to permit the writ applicants to avail the credit entry of Rs.7.65 Crore in the credit ledger for utilizing such credit in accordance with law.

Submissions on behalf of the respondents:-

22. Mr. Devang Vyas, the learned Asst. Solicitor General of India assisted by Mr. P.Y. Divyeshwar, the learned Addl. Standing Counsel for Union of India appearing for the respondents has vehemently opposed both the writ applications. Mr. Vyas would submit that both the litigations on hand are very serious as there are allegations of availing the ITC by the writ applicants on the strength of fake/bogus invoices. Mr. Vyas would submit that the investigation inboth the cases is in progress and there is more than a prima facie case to invoke Rule 86A of the Rules for the purpose of blocking of the unutilized ITC. Mr. Vyas would submit that the investigation undertaken so far has prima facie revealed that

the cases on hand are one of fraudulent transactions. Mr. Vyas pointed out that in the course of the investigation, the statements of various persons have been recorded including one of the partners of the partnership firm, i.e,. the writ applicant No.1 herein and, in such statements, there is a clear cut admission of fraud. Mr. Vyas submitted that no sooner the investigation is over, then a show-cause notice shall be issued under Section 74 of the CGST Act, and along with the show-cause notice, the materials relied upon, more particularly, the documentary evidence would also be made available to the writ applicant herein. Mr. Vyas argued that the formalities like recording the transactions in the statutory returns and forms, and payment through the RTGS against the goods in accordance with the invoice and payment for the transportation etc. was all just a show so as to give a color of genuineness to such transactions. Mr. Vyas argued that the amount of Rs.25 Lakh was paid by the writ applicant of the Special Civil Application No.8841 of 2020 voluntarily by using the Login ID and password and, in such circumstances, such voluntary payment cannot be refunded at this stage. It is argued that the allegations of coercion or pressure are reckless and without any foundation for the same.

23. Mr. Vyas argued that the newly inserted Rule 86A (w.e.f. 26.12.2019) confers power upon the authority concerned to block the ITC if it is prima facie found that the transactions are fraudulent. Mr. Vyas would submit that over a period of time the Government has unearthed many cases of fake input tax credit due to issuance of fake invoices, issuance of invoices without supply and other fraudulent activities which has led to decline in the revenue's exchequer. According to Mr. Vyas, to

meet with such situations, the Government introduced the concept of blocking of input tax credit by way of Rule 86A of the CGST Rules, 2017. In other words, according to Mr. Vyas, the object behind the introduction of Rule 86A of the Rules is to curb such fraudulent activities. Mr. Vyas invited the attention of this Court to the affidavit-in-reply filed on behalf of the respondents, duly affirmed by one Shri Rajendra Kumar Jeet Ram, Addl. Director General, Directorate General of Goods & Services Tax intelligence, Jaipur Zonal Unit, Jaipur. Mr. Vyas seeks to rely on the following averments;

> *"5 With reference to Para 1 to 5.1 of the petition, it is true that the dispute involved in the case in hand is about inputs, purportedly sold and supplied by various registered taxpayers including (i) M/s Anjani Metals and Steels, Chhattisgarh (GSTIN-22AWNPS2137D1ZP); (ii) M/s Kanchan Alloys and Steels, Jharkhand (GSTIN-20BVTPP5808C1ZL); (iii) M/s Om Shiv Jharkhand (GSTIN-20AALHM5998L1ZJ); (iv) Alloys and Steels, Chhattisgarh 22AALHM5998L1ZF); (v) M/s Shakambari Jharkhand (GSTIN-20AJMPP3256C1ZJ) and Vishkarma Industries, Jharkhand Metalicks, M/s Shiv (GSTIN- Metalicks, (vi) M/s (GSTIN- 20FJWPS4147A1Z5), as mentioned in this para, who have supplied invoices to the Petitioner, on the basis of which they have availed Input Tax Credit (ITC) during F.Y. 2017-18 and F.Y. 2018-19. Apart from above said six suppliers, M/s Sumeg Steels Pvt. Ltd., Rajasthan (08AAGCK3978G2Z4) have also supplied invoices to the Petitioner, without actual supply of goods on the basis of which Petitioner has availed Input Tax Credit (ITC) during 2017-18. However, it is pertinent to submit that acting upon specific information that M/ s Vishkarma Industries, Jaipur, a trading firm (GST Number 08FJWPS4147A1ZR), have indulged themselves in facilitation of fraudulent ITC by issuing merely GST invoices, without actual supply of goods, coordinated simultaneous search operation was planned and executed on 13.09.2018 at 19 premises spread over in three states viz. Rajasthan, Jharkhand and Chhattisgarh which included various trading firms, recipients of such GST invoices and residences of suspected persons. During the course of search*

operations various records/documents in the form of purchase invoices, sale invoices, LRs of fake transportation firms, gadgets, mobile phones, blank signed cheque books, private records containing incriminating details have been seized under Panchnama proceedings from all over the places. Evidences recovered from all over the searched places conclusively established that all such transactions are only on papers and no physical movement of goods has taken place. By this way, recipients of invoices have availed ITC involved in such invoices merely on the strength of such invoices, without actual receipt of goods. Subsequently, cases were booked by this office against the trading firms, who have supplied invoices, recipients of such invoices who have availed ITC, merely on the strength of such invoices, without actually receipt of goods and other persons involved in facilitation of such ITC, wrongly and thereby defrauded the Government Exchequer of its legitimate dues.

Statement of master mind behind creation of all such firms have been recorded, wherein they admitted their wrongdoings of providing invoices, without actual supply of goods to the recipients of such GST invoices. They also admitted to have flouted all the above firms on papers only and that no physical movement of goods has taken place under such invoices. He further revealed that he used to withdraw the amount received through RTGS from the recipients of GST invoices in cash and the same is returned back to the recipients of GST invoices after deduction of certain amount as their commission for providing such GST invoice only without supply of goods. Indulging in such an act is against the basic tenets of the GST law.

Sr. No.	*Name of the supplier of invoice*	*Total Amount of ITC of IGST availed by the Petitioner during the F.Y.2017-18 and 2018-19*
1	*M/s Anjani Metals and Steels, Chhattisgarh*	*31,43,990/-*

2.	*M/s Kanchan Alloys and Steels, Jharkhand*	*3,88,874/-*
3.	*M/s Om Shiv Metalicks, Jharkhand*	*83,84,996/-*
4.	*M/s Shakambri Metalicks, Jharkhand*	*2,52,06,800/-*
5.	*M/s Shiv Alloys and Steels, Chhattisgarh*	*86,16,958/-*
6.	*M/s Vishkarma Industries, Jharkhand*	*5,25,068/-*
7.	*M/s Sumeg Steels Pvt. Ltd., Rajasthan*	*33,02,362/-*
	Total	*4,95,69,048/-*

Investigation conducted so far have indicated that petitioner, M/s S.S. Industries, Bhavnagar, Gujarat is one such beneficiary, who have arranged such invoices and availed ITC amounting to Rs. 4,95,69,048/ -, merely on the strength of invoices issued by the aforementioned seven taxpayers, without actual receipt of goods. Such act of the petitioner is against the basic principles as set out in sub-sections (2) of section 16 of the CGST Act, 2017 and liable for penalty under section 74 read with section 122 of the CGST Act, 2017. Further, such action is also punishable under section 132 of the said Act, for their criminal liability. The bifurcation of ITC availed by the Petitioner herein is as under:

The Petitioner have availed ineligible ITC to the tune of Rs. 4,95,69,048/- based on fake/bogus invoices without actual receipt of goods. Further, Anti-Evasion Wing of Bhavnagar Commissionerate has also initiated investigation against M/s S.S. Industries for making supplies, clandestinely, without payment of applicable GST. Subsequently, Investigation conducted by the Anti Evasion wing of Bhavnagar Commissionerate revealed

that M/s S.S. Industries had supplied/cleared TMT Round Bars from their factory, totally valued at Rs. 91,64,364/ -, without issuing any invoice thereof and without payment of applicable GST thereon. By this way M/s S.S. Industries has evaded payment of GST amounting to Rs. 16.49 lakh. Partners of M/s S.S. Industries, Shri Sher Singh Shekhawat has categorically admitted this fact in his statement dated 20.05.2019. On being asked by this office, entire investigation was transferred to DGGI, JZU, Jaipur by the Bhavnagar CGST Commissionerate.

With reference to para 5.2 of the petition, Section 16 of the CGST Act, 2017 specifies Eligibility and Conditions for taking Input Tax Credit. The same is reproduced here as under:

Section 16. Eligibility and conditions for taking input tax credit-

(1) Every Registered Person shall be entitled to take Input Tax Credit on any supply of goods or services or both to him which are used or intended to be used in the course of furtherance of his business and said amount will 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 taxpaying documents as may be prescribed;

(b) he has received the goods or services or both

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In light of the Section 16(1) and 16 (2)(a)(b), above, the Petitioner herein was eligible to take credit of any Input Tax Credit (ITC), only if they have received the goods from its suppliers under the cover of proper GST invoice. However, undergoing investigation indicated that the petitioner has availed ITC amounting to Rs. 4,95,69,048/-, wrongly, merely on the strength of

invoices issued by aforementioned seven firms, without actual receipt of goods and hence such ITC is not admissible to the petitioner in light of the provisions of Section 16(1) and 16 (2)(a)(b) of CGST Act, 2017. With reference to para 7 of the petition, in addition to what has already been stated herein above it is respectfully submitted that this office (Respondent No. 4, which is headed by Additional Director General) is the premier investigating agency of the country for the matters related to evasion of tax matters of GST, Central Excise and Service Tax. The officers of the Directorate General of Goods 86 Services Tax Intelligence have been invested with all powers under the Central Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax, 2017 and the rules made thereunder, throughout the territory of India, as are exercisable by the Central Tax Officers of the corresponding rank vide Notification No. 14/2017-Central Tax dated 01.07.2017. As stated above, investigation in this case is underway. It is worth mentioning that Show Cause Notice in the case is yet to be issued. This petition is premature as the same has been filed before issuance of Show Cause Notice and, thus, also before adjudication of the same. It is pertinent to submit that the petitioner has made general allegations without any basis with intent to delay the investigation from escaping their legitimate tax liability. Further, on completion of ongoing investigation, a Show Cause Notice will be issued to the petitioner by Respondent No. 4 for which petitioner can file his reply. However, instead of using the efficacious alternative remedy available with them, petitioner has chosen to file this petition under Article 226 of the Constitution.

With reference to para 8 to 8.2 of the petition, investigation of the case is underway. Copies of all the relied upon documents, including statements, will be provided along with the show cause notice, which will be issued on completion of the investigation, within the time frame and as per the provisions of the CGST Act, 2017 and Rules made thereunder. This is clearly an afterthought of the petitioner. The contention of the petitioner is not true. Shri Sher Singh Shekhwat, Partner in the petitioner firm had voluntarily deposited an amount of Rs. 25,00,000/-, vide debit entry no. DC2407190355399 dated 23.07.2019 on being

convinced with the evidences available with this office and subsequently being confronted with the same he not only deposited an amount of Rs. 25,00,000/- but also assured to pay remaining amount of such ITC, totally amounting to Rs. 4,95,69,048/ -. Further, such payments have been deposited voluntarily by the Petitioner. More so, payment in GST is system based and entirely under the control of Taxpayer. There is no intervention of the Department. There has been no threat or coercion, whatsoever. At this juncture, after expiry of more than a year, raising this issue is nothing but clearly an afterthought. Further, kind attention is invited to the provisions of Rule 86A (1) (a) of the CGST Rules, 2017, which reads as under:-

"86A. Conditions o f use of amount available in electronic credit ledger:-

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

Petitioner has paid only an amount of Rs. 25,00,000/- against their GST liability (Ineligible ITC) amounting to Rs. 4,95,69,048/-. Therefore, respondent No. 4 blocked the ITC of Rs. 84,34,547/- in terms of the Rule 86A(1)(a) of the CGST Rules, 2017.

With reference to para 8.3, contentions of the petitioner are misleading. The amount paid by them is not reversal of ITC but payment against wrongly availed ITC by them on the strength of invoices supplied by the aforementioned seven firms. Since they have already utilised the ITC involved (though ineligible) and availed on the strength of such invoices, as per available alternate they had opted to pay it from their ITC ledger

balance. If they wished to pay such amount from their current account ledger, they could have done so.

Further, ITC amounting to Rs. 84,34,547/ -, which was available in their credit ledger was blocked for wrongly availed ITC by them merely on the strength of invoices supplied by the aforementioned seven firms. Since they have already utilised the ITC involved (though ineligible) and availed on the strength of such invoices. The amount was paid by the petitioner voluntarily and the same was paid by them on GSTN by using their Login Id & Password subsequent to perusal and being convinced with the available evidences. Apart from statement dated 01.05.2019, four more statements of Shri Sher Singh Shekhawat have been recorded on 20.05.2019, 21.06.2019, 23.07.2019 and 20.01.2020. Further, the amount has been deposited voluntarily, there is no requirement for issuance of acknowledgement in DRC-04 and/or DRC-05 forms by any proper officer. DRC-04 and DRC-05 are issued under Rule 142(2) and 142(3), respectively which basically deals with `Notice and order for demand of amount payable under the CGST Act, 2017, which is not the issue in the present case.

5.11 Rule 142 of the Central Goods and Services Tax (CGST) Rules, 2017 relating to "Notice and Order for Demand of Amounts Payable under the Act", provides as under:„

;

;

(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act, whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.

(3) Where the person chargeable with tax makes payment of tax and interest under subsection (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within fourteen days of detention or seizure of the goods and conveyance, he shall intimate the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an order in FORM GST DRC- 05 concluding the proceedings in respect of the said notice. In this case, petitioner has deposited a partial amount of Rs. 25,00,000/ -, voluntarily, against the wrongly availed ITC totally amounting to Rs. 4,95,69,048/-."

24. Mr. Vyas, in support of his submissions, has placed reliance on the following judgments;

(I) ***CCT, Orissa & Ors. vs. Indian Explosive Ltd***., *AIR 2008 SC 1631*;

(ii) ***UOI vs. Cisco Laboratories***, *2007 (11) TMI 21 (SC)*;

(iii) ***Bhubaneshwar Development Authority vs. Commissioner of Central Excise & Service Tax***, *2015 (4) TMI 464 (Orissa High Court)*;

(iv) ***Mega Corporation vs. Commissioner of Service Tax***, *2015 (1) TMI 1095 (Delhi High Court*);

(v) ***Kirloskar Computer Service Ltd. vs. UOI*** *1997 (6) TMI 35 (Karnataka High Court)*;

25. In such circumstances, referred to above, Mr. Vyas, the learned Assistant Solicitor General of India prays that there being no merit in both the applications, those be rejected.

26. Mr. Vyas further pointed out that affidavit-in-reply has also been filed on behalf of the respondents in the connected writ application, i.e. the Special Civil Application No.8163 of 2020 and the same is also on the same line like the one referred to above.

27. In such circumstances, referred to above, Mr. Vyas prays that the connected writ application also does not merit any consideration and the same be rejected.

ANALYSIS

28. 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 pending inquiry or investigation into the allegations of fraudulent transactions with respect to fake/bogus invoices for the purpose of availing the ITC, the respondents could have blocked/debited the input tax credit (ITC) in the electronic credit ledger of the writ applicants by virtue of the power under Rule 86A of the CGST Rules which came into force vide the Notification No.75/2019-CT dated 26th December, 2019.

29. Before adverting to the rival submissions canvassed on either side, we may 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 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.".

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."

30. Having referred to Rule 86A above, we may 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,––

(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, 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 sub-section (1) of said section for the month of March, 2019.*"

31. **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 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.

32. 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.

33. The Constitutional validity of Rule 86A of the Rules is not under challenge in the present case and we do not intend to test its validity in the absence of any specific challenge to the same. In such circumstances, we would confine our adjudication in the present litigation only to the question whether the respondents could be said to be justified in invoking Rule 86A of the Rules for the purpose of blocking the input tax credit of the writ applicants pending the inquiry as regards the fraudulent transactions.

Indefeasible right vis-a-vis the benefit of the ITC:-

34 We first propose to deal with the submission of Mr. Dave as regards the indefeasible right of the assessee to avail the benefit of the ITC.

35. In ***Eicher Motors Ltd. (supra)***, the validity and application of the scheme as modified by introduction to **Rule 57F (read as 57F (4-A) of the Central Excise Rules, 1944** under which the credit which was lying unutilised on 16th March, 1995 with the manufacturers, stood lapsed in the manner set out therein was questioned. Mr. Dave has pressed into service the following observation/conclusion of the Supreme Court, as contained in Paras-4 and 5 respectively;

> "*4.....As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is*

as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the earlier scheme necessarily the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees.

5. We may look at the matter from another angle. If on the inputs the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus, a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16.3.1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

36. As significant reliance has been placed on ***Eicher Motors Ltd. (supra)***, we may also look into the decision of the Supreme Court in the case of ***C.C.E vs. Dai Ichi Karkaria Ltd***., reported in 1999 (112) ELT 353 (SC). In the said case, the manufacturers purchased raw material and used the same in the manufacture of an intermediate product and, in turn, used the intermediate product in the manufacture of the final product. The raw material and the intermediate product were liable to excise duty and they were specified goods for the

purposes of the Modvat Scheme. The assessable value of the intermediate product for the purposes of excise duty in the instant case was admittedly to be determined on the basis of its cost which necessitated the taking into account of the cost of the raw material. The Revenue contended that the excise duty paid by the seller on the raw material was also to be included in the cost of the excisable goods (the intermediate product) in this case. On the other hand, the manufacturers contended otherwise. The Supreme Court rejected the contentions of the Revenue and held in Paras-18 and 19 as under;

> *" 18. It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provisions in the rules which provides for a reversal of the credit by the Excise Authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been vaildly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.*
>
> *19. It is, therefore, that in the case of* ***Eicher Motors Ltd. v. Union of India****, this Court said that a credit under the Modvat Scheme was "as good as tax paid."*

37. With the above principles, it is the claim of the writ

applicants that Rule 86A of the Rules extinguishes a vested right which the writ applicants had for claiming credit of duty paid on inputs.

38. We shall now look into the decision of the Apex Court in ***Osram Surya (P.) Ltd. vs. CCE, Indore, 2002 (102) ECR 515 (SC),*** in which, the Supreme Court considered the second proviso to Rule 57G of the Excise Rules. The history of this litigation is somewhat like this. In regard to the interpretation of the second proviso to Rule 57G, two different Benches of the Customs, Excise and Gold [Control] Appellate Tribunal took conflicting views consequent to which the issue came to be referred to a Larger Bench of the Tribunal which by its order dated 11.7.2000 made in Appeal No. E/273/99-NB and other connected matters took the view that after the introduction of the said proviso, a manufacturer cannot take the Modvat credit after six months from the date of the documents specified in the first proviso to Rule 57G of the Rules. Being aggrieved by the said order of the Tribunal, the appellants [Osram Surya (P) Limited] preferred appeals before the Supreme Court, questioning the correctness of that order. The appellants therein had not challenged the validity of the said proviso, accordingly the Supreme Court proceeded on the basis that the proviso in question is a valid one. In that context, the Supreme Court considered whether the proviso to the Rule in question is applicable to the cases of manufacturers who had received their inputs prior to the introduction of the said proviso and are seeking to take credit in regard to the said inputs beyond the period of six months. The following conclusion in Paras-7,8 and 9 respectively of Their Lordships are relevant;

"7. Having heard the arguments of the parties and after considering the Rule in question, we think that by introducing the limitation in the said proviso to the Rule, the statute has not taken away any of the vested rights which had accrued to the manufacturers under the Scheme of Modvat. That vested right continues to be in existence and what is restricted is the time within which the manufacturer has to enforce that right. In support of their arguments, they have placed reliance on a judgment of this Court in Etcher Motors Ltd., v. UOI wherein this Court had held that a right accrued to an assessee on the date when it paid the tax on the raw-materials or the inputs would continue until the facility available thereto gets worked out or until those goods existed. In that background, this Court held that by Section 37 of the Act, the authorities concerned cannot make a Rule which could take away the said right on goods manufactured prior to the date specified in the concerned Rule. In the facts of Eicher's case (supra) it is seen that by introduction of rule 57f(4a) to the rules, a credit which was lying unutilized on 16.3.1995 with the manufacturer was held to have lapsed. Therefore, that was a case wherein by introduction of the Rule a credit which was in the account of the manufacturer was held not to be available on the coming into force of that Rule, by that the right to credit itself was taken away, whereas in the instant case by the introduction of the second proviso to Rule 57G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has not been taken away by the introduction of the proviso to the Rule in question but a procedural restriction was introduced which, in our opinion, is permissible in law. Therefore, in or (sic) opinion, the law laid down by this Court in Eicher's case (supra) does not apply to the facts of these cases. This (sic, is) also the position with regard to the judgment of this Court in CCE, Pune and **Ors. v. Dai Ichi Karkaria Ltd. and Ors.**, 1999 (65) ECC 354 (SC) : **1997 (7) SCC 448**.

8. It is vehemently argued on behalf of the appellants that in effect by introduction of this Rule, a manufacturer in whose account certain credit existed, would be denied

the right to take such credit consequently, as in the case of Eicher (supra), a manufacturer's vested right is taken away, therefore, the Rule in question should be interpreted in such a manner that it did not apply to cases where credit in question had accrued prior to the date of introduction of this proviso. In our opinion, this argument is not available to the appellants because none has questioned the legality or the validity of the Rule in question, therefore, any argument which in effect questions the validity of the Rule, cannot be permitted to be raised. The argument of the appellants that there was no time whatsoever given to some of the manufacturers to avail the credit after the introduction of the Rule also is based on arbitrariness of the Rule, and the same also will have to be rejected on the ground that there is no challenge to the validity of the Rule.

9. Without such a challenge, the appellants want us to interpret the Rule to mean that the Rule in question is not applicable in regard to credits acquired by a manufacturer prior to the coming into force of the Rule. This we find difficult, because in our opinion the language of the proviso concerned is unambiguous. It specifically states that a manufacturer cannot take credit after six months from the date of issue of any of the documents specified in the first proviso to the said sub-rule. A plain reading of this sub-rule clearly shows that it applies to those cases where a manufacturer is seeking to take the credit after the introduction of the Rule and to cases where the manufacturer is seeking to do so after a period of six months from the date when the manufacturer received the inputs. This sub-rule does not operate retrospectively in the sense it does not cancel the credit nor does it in any manner affect the rights of those persons who have already taken the credit before coming into force of the Rule in question. It operates prospectively in regard to those manufacturers who seek to take credit after the coming into force of this Rule. Therefore, in or (sic, our) opinion, the Tribunal was justified in holding that the Rule in question only restricts a right of a manufacturer to take the credit beyond the stipulated period of six months under the Rule. Therefore, this appeal will have to fail."

39. Though in the aforesaid case, the validity of the Rule had

not been challenged, it is clear that the Supreme Court upheld the decision arrived at by the Tribunal holding that the rule in question only restricts a right of a manufacturer to take the credit beyond the period of six months under the Rule and consequently dismissed the appeal. It is also clear from the above decision that even after the introduction of the Rule, the substantive right has not been taken away, but a procedural restriction alone was introduced. This was permissible in law (vide para 7 of their order).

40. Thus, what is discernible from the above is that the Supreme Court categorically 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. In ***Tungabhadra Industries Ltd., v. Union of India (supra)***, the Supreme Court considered the dictum laid down in Eicher's case (supra). The theory of “vested right” has been diluted by the Supreme Court. It is clear that even a vested right can be restricted or controlled by Notifications. It is a settled law that in the case of subordinate legislation, the authorities are conferred with the power to fill up the gaps when on functioning they are able to notice the loop holes or the areas left open. The very purpose of subordinate legislation is to only achieve this, since it may not be possible for the Parliament to make Laws frequently with precision. In the case of ***R.K. Garg vs. Union of India***, *AIR 1981 SC 2138*, the Supreme Court has held that every legislation, particularly, the economic legislation is essentially empiric and it is based on experimentation or what one may call trial and error method. It

cannot anticipate all possible abuses. There may be crudities and inequities in the complicated experimental economic Legislation, but on that account alone, it cannot be even struck down as invalid. It is also relevant to note that in the case of ***Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd. and Ors.***, *1999 (65) ECC 354 (SC)*, the Supreme Court ruled that 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. In the case of **Tungabadra Industries (supra)**, referred to above, the Supreme Court approved the view taken by the Karnataka High Court in the case of ***Union of India v. Modern Mills Ltd.*****,** *1994 (45) ECC 135 (Kar)***,** in which it was ruled that the accumulated credit could be utilized only subject to the conditions of the Notification and thus even in the case of accumulated credit, no vested right accrued**.**

41. Thus, in view of the aforesaid discussion, we hold that the vociferous submission of Mr. Dave, the learned counsel appearing for the writ applicants as regards the indefeasible right to avail the ITC vis-a-vis Rule 86A of the Rules should fail and hereby fails.

42. The aforesaid takes us to consider the second limb of Mr. Dave's submission. According to Mr. Dave, the power conferred upon the Revenue under Rule 86A is to be exercised with due care and caution, and that too, based on cogent materials and not on mere suspicion.

43. Rule 86A talks about “reason to believe” which is necessary to be formed for the purpose of blocking the input tax credit 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 input tax credit 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.

44. The use of the word “may” indicates not only the discretion, but an obligation to consider that a necessity has arisen to pass an order of provisional attachment with a view to protect the interest of the government revenue. Therefore, the opinion to be formed by the Commissioner or take a case by the delegated authority cannot be on imaginary ground, wishful thinking, howsoever laudable that may be. Such a course is impermissible in law. At the cost of repetition, the formation of the opinion, though subjective, must be based on some credible material disclosing that is necessary to provisionally attach the goods or the bank account for the purpose of protecting the interest of the government revenue. The statutory requirement of reasonable belief is to safeguard the citizen from vexatious proceedings. “Belief” is a mental operation of accepting a fact as true, so, without any

fact, no belief can be formed. It is equally true that it is not necessary for the authority under the Act to state reasons for its belief. But if it is challenged that he had no reasons to believe, in that case, he must disclose the materials upon which his belief was formed, as it has been held by the Supreme Court in ***Sheonath Singh's case*** *[AIR 1971 SC 2451]*, that the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court.

45. In the case on hand, Mr. Vyas, the learned Assistant Solicitor General of India appearing for the respondents submitted that there is no specific order passed by the authority concerned, blocking the input tax credit invoking Rule 86A of the Rules. According to Mr. Vyas, there is no such requirement that a specific order should be passed assigning, prima facie, reasons to block the input tax credit and communicate the same to the person concerned. Mr. Vyas would submit that ordinarily, the reasons are found in the form of notings in the original file,on the basis of which, the Court may be in a position to ascertain the genuineness of the belief formed by the authority. We shall deal with this issue as regards whether it is necessary for the authority to pass some order and communicate the same to the person concerned, little later. At present, we are looking into the true purport and scope of Rule 86A of the Rules. The formation of the opinion by the authority undoubtedly should reflect intense application of mind with reference to the materials available on record that

it had become necessary to order blocking of the input tax credit pending the inquiry. (See ***Bhikhubhai Vithlabhai Patel & Ors. vs. State of Gujarat***, ***AIR 2008 SCC 1771)***

46**. In *J. Jayalalitha vs. U.O.I*.**, ***[AIR 1999 SC 1912]***, the Supreme Court while construing the expression "as may be necessary" employed in Section 3 (1) of the Prevention of Corruption Act, 1988 which conferred the discretion upon the State Government to appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases to try the offences punishable under the Act, observed :

> *"The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement. Further, the discretion conferred upon the Government is not absolute. It is in "The nature of a statutory obligation or duty. It is the requirement which would necessitate exercise of power by the Government. When a necessity would arise and of what type being uncertain the legislature could not have laid down any other guideline except the guidance of "necessity". It is really for that reason that the legislature while conferring discretion upon the Government has provided that the Government shall appoint as many Special Judges as may be necessary. The words "as may be necessary" in our opinion is the guideline according to which the Government has to exercise its discretion to achieve the object of speedy trial. The term "necessary" means what is indispensable, needful or essential."*

47. In ***Barium Chemicals Ltd. vs. Company Law Board [AIR 1967 SC 295]***, the Supreme Court pointed out, on consideration of several English and Indian authorities that

the expressions "is satisfied", "is of the opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. The Supreme Court while construing Section 237 of the Companies Act, 1956 held :

> "64. The object of S. 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the government or the Board. Since the legislature enacted S. 637 (i) (a) it knew that government would entrust to the Board its power under S. 237 (b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in subclauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose

is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three subclauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose.

It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower's Modern Company Law (2nd Ed.) p. 547 where the learned author, while dealing with S. 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of nonapplication of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.”

48. The Supreme Court while expressly referring to the expressions **such as "reason to believe", "in the opinion" of observed :**

> "*Therefore, the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective to process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative.*"

49. In the ***Income-tax Officer, Calcutta and Ors. vs. Lakhmani Mewal Das [AIR 1976 SC 1753],*** the Supreme Court construed the expression "reason to believe" employed in Section 147 of the Income-Tax Act, 1961 and observed: the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence**.**

50. In ***Bhikhubhai Vithalabhai Patel (supra)***, the Supreme Court observed in paras 32 and 33 as under**:**

> *"32. We are of the view that the construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion" employed in the proviso to Section 17 (1) (a) (ii) of the Act. The expression "is of opinion", that substantial modifications in the draft development plan and regulations, "are necessary", in our considered opinion, does not confer any unlimited discretion on the Government. The discretion, if any, conferred upon the State Government to make substantial modifications in the draft development plan is not unfettered. There is nothing like absolute or unfettered discretion and at any rate in the case of statutory powers. The basic principles in this regard are clearly expressed and explained by Prof. Sir William Wade in Administrative Law (Ninth Edn.) in the chapter entitled 'abuse of discretion' and under the general heading the principle of reasonableness' which read as under :*
>
> "*The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.*
>
> *The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents,*

dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."

33. The Court is entitled to examine whether there has been any material available with the State Government and the reasons recorded, if any, in the formation of opinion and whether they have any rational connection with or relevant bearing on the formation of the opinion. The Court is entitled particularly, in the event, when the formation of the opinion is challenged to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the court to examine the question whether reasons for formation of opinion have rational connection or relevant bearing to the formation of such opinion and are not extraneous to the purposes of the statute."

51. 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. 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. In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of ***Smt. S.R. Venkatraman vs. Union of India***, reported in ***(1979) ITLJ 25 (SC)***, where it had been held;

> *"There will be an error of fact when a public body is prompted by a mistaken belief in the existence of a nonexisting fact or circumstances. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience and as things go, they may well be said to run into one another. The influence of extraneous matters will be undoubtedly there where the authority making the order has admitted their influence. An administrative order which is based on reasons of fact which do not exist must be held to be infected with an abuse of power.*"

52. We may also refer to and rely upon a decision of the Supreme Court in the case of ***ITO Calcutta vs. Lakhmani Mewal Das,*** reported in ***[(1976) 103 ITR 437 (SC)]*** wherein it had been held as under:

> "*The reasons for the formation of the belief contemplated by Section 147(a) of the Income-tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the I.T.O. and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the I.T.O. on the point as to whether action should be initiated for reopening the assessment. At the same time we have to bear in mind that it is not any and every*

material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence."

53. Having given our due consideration to the relevant aspects of the matter, we may only say that 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 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.

54. The only question now remains to be looked into is whether Rule 86A of the 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.

55. We intend to examine the aforesaid question posed by us bearing in mind the principles explained by the Supreme Court in ***Pannalal Binjraj vs. Union of India, (1957) S.C.R 233***.

56. The principles laid down by the decision in ***Pannalal Binjraj (supra)*** are;

“(i) Discretion conferred by a statute must not in effect confer arbitrary power on the executive in the absence of any guidance as to how that discretion should be exercised. Sound discretion is one which is guided by law, by rule and by humour, it must not be arbitrary, vague and fanciful.

(ii) A statute which confers discretion based on the rule of "reason to believe" on the executive must furnish criteria or guidelines for exercise of that discretion. Without such criteria or guidelines, if the discretion in effect confers arbitrary power, the statute will be hit by Article 14 of the Constitution of India.

(iii) The criteria or guidelines may be furnished by express provisions in the statute concerned or by the aims and objects of the statute and the policy and scheme of the statute as disclosed by the various provisions thereof. The preamble to the statute may indicate the purpose and policy of the statute.

(iv) Where the subject-matter dealt with by a statute relates to wide-spread activity of a complex nature, giving rise to various cases of different types, posing various problems, the Legislature may leave discretion to responsible officers of the executive to select persons or objects for the application of particular provisions of the statute. This will not render the statute invalid, if the statute provides either expressly or impliedly sufficient guidance for exercise of the discretion.

(v) Discretionary power conferred by a statute, though wide, is not necessarily discriminatory.

(vi) Mere possibility of abuse of a discretionary power will not invalidate a statute.

(vii) Provision for sanction is one of the safeguards to control arbitrary exercise of power.

(viii) If discretion is conferred on high officials, in the absence of evidence of mala fides, it can be considered as a safe-guard against arbitrary exercise of discretion.

(ix) It is not the function of the Court to strive to find out the policy of the statute from its crevices, if it cannot be reasonably ascertained from the purpose and provisions of the statute. "

57. When we are talking about Rule 86A of the Rules, it reminds us of Section 83 of the CGST Act. Section 83 of the CGST Act provides for provisional attachment of any property including bank account of the taxable person with a view to safeguard the interest of the Revenue. Section 83 of the Act reads thus;

"83. ***Provisional attachment to protect revenue in certain cases:-***

(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1)."

58. It is pertinent to note that Section 83 can be invoked during the pendency of any proceedings under Section 62 or Section 64 or Section 67 or Section 73 or Section 74 of the Act. Section 83 provides for order in writing. In other words, if the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary to attach provisionally any property including bank account, he may, by order in writing, do so. Even Section 83 of the Act talks about order to be passed in writing on the basis of

the reasonable belief of the concerned authority.

59. We may also examine few similar provisions operating during the Pre-GST regime like the Section 11DDA of the Central Excises Act, 1944 and Section 73C of the Finance Act, 1994 respectively. The same are reproduced hereunder:-

> *"SECTION 11DDA. Provisional attachment to protect revenue in certain cases. – (1) Where, during the pendency of any proceedings under section 11A or section 11D, the Central Excise Officer is of the opinion that for the purpose of protecting the interest of revenue, it is necessary so to do, he may, with the previous approval of the [Principal Commissioner of Central Excise or Commissioner of Central Excise], by order in writing, attach provisionally any property belonging to the person on whom notice is served under [* * *] section 11A or sub-section (2) of section 11D, as the case may be, in accordance with the rules made in this behalf under section 142 of the Customs Act, 1962 (52 of 1962).*
>
> *SECTION 73C. Provisional attachment to protect revenue in certain cases. — (1) Where, during the pendency of any proceeding under section 73 or section 73A, the Central Excise Officer is of the opinion that for the purpose of protecting the interests of revenue, it is necessary so to do, he may, with the previous approval of the Principal Commissioner of Central Excise or Commissioner of Central Excise, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 73 or sub-section (3) of section 73A, as the case may be, in such manner as may be prescribed."*

60. The procedure/guidelines prescribed under the above referred provisions are as extracted below:

60.1 In respect of Section 11DDA of CEA:-

"*Circular No. 874/12/2008-CX., dated 30-6-2008*

F.No. 201/51/2004-CX-6

Subject : Instructions regarding Section 11DDA of the Central Excise Act, 1944.

I am directed to refer to the Section 11DDA of the Central Excise Act, 1944 (hereinafter referred to as "the Act") inserted by the Taxation Laws (Amendment) Act, 2006, with effect from 13-7-2006. This section provides for provisional attachment of property for the purpose of protecting the interests of revenue during the pendency of any proceedings under Section 11A or Section 11D of the Act.

2. In this connection, the Law Ministry has advised that suitable guidelines should be issued to implement Section 11DDA of the Act. The following guidelines are, therefore, issued to maintain uniformity in its implementation by field formations :

(i) The proceedings for provisional attachment can be initiated only after issue of Show Cause Notice (SCN) under Section 11A or 11D of the Act. "

60.2 In respect of Section 73C of the Finance Act,1994:-

"Circular No. 103/6/2008-S.T., dated 1-7-2008*;*

F.No. 137/120/2006-CX.4

Subject : Instructions regarding provisional attachment of property under section 73C of Finance Act, 1994 – Regarding

Section 73C of the Finance Act, 1994 (hereinafter referred to as the Act) provides for provisional attachment of property for the purposes of protecting the interests of revenue during the pendency of any proceedings under section 73 or section 73A of the Act.

2. In this connection the following guidelines are issued to maintain uniformity in its implementation by field formations.

(i) The proceedings for provisional attachment can be initiated only after issue of Show Cause Notice under section 73 or section 73A of the Act."

60.3 From the above, it is clear that the provisional attachment in terms of Section 11DDA and Section 73C could be made only after issuance of a show-cause notice.

60.4 *Further, Section 67 provides for inspection, search and seizure. Sections 73 and 74 provides for the determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized.*

60.5 The Government has prescribed the procedure for the subject attachment vide Rule 159 of the CGST Rules

"159. Provisional attachment of property. — (1) Where the Commissioner decides to attach any property, including bank account in accordance with the provisions of section 83, he shall pass an order in FORM GST DRC-22 to that effect mentioning therein, the details of property which is attached.

(2) The Commissioner shall send a copy of the order of attachment to the concerned Revenue Authority or Transport Authority or any such Authority to place encumbrance on the said movable or immovable property, which shall be removed only on the written instructions from the Commissioner to that effect.

(3) Where the property attached is of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such property or the amount that is or may become payable by the taxable person, whichever is lower, then such property shall be released forthwith, by an order in FORM GST DRC-23, on proof of payment.

(4) Where the taxable person fails to pay the amount referred to in sub-rule (3) in respect of the said property of perishable or hazardous nature, the Commissioner may

dispose of such property and the amount realized thereby shall be adjusted against the tax, interest, penalty, fee or any other amount payable by the taxable person.

(5) Any person whose property is attached may, within seven days of the attachment under sub-rule (1), file an objection to the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in FORM GST DRC-23.

(6) The Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in FORM GST DRC-23."

60.6 The relevant portion of DRC-22 is reproduced below:

"Provisional attachment of property under section 83

It is to inform that M/s ————————————- (name) having principal place of business at ———————— (address) bearing registration number as ———————— (GSTIN/ID), PAN ——— is a registered taxable person under the <<SGST/CGST>> Act. ***Proceedings have been launched against the aforesaid taxable person under section << —>> of the said Act <u>to determine the tax or any other amount due from the said person"</u>***

61. The sole idea in referring to the provisions of the Pre-Gst regime is to indicate that the Government had issued guidelines and had also laid down a procedure for provisional attachment to protect the interest of the revenue in certain cases. As noted above, Section 83 also talks about passing of an order.

62. Rule 86A 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. 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 Rule 86A of the Rules.

63. In the case on hand, the inquiry, so far, has revealed a prima facie case for the respondents to exercise the power under Rule 86A of the Rules. 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.

64. In the overall view of the matter, we are convinced that we should not interfere at this stage. more particularly, when the investigation is in progress. The respondents have made themselves clear in the reply affidavit filed in both the matters that at the end of the investigation if they decide to issue a show-cause notice under Section 74 of the Act, then all the materials relied upon by the Department shall be disclosed to the writ applicants. 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.

65. Our final conclusions may be summarized as under:-

(I) The invocation of Rule 86A of the Rules for the purpose of blocking the input tax credit may be justified if the concerned authority or any other authority, empowered in law, is of the

prima facie opinion based on some cogent materials that the ITC is sought to be availed based on fraudulent transactions like fake/bogus invoices etc. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the belief.

(II) The power conferred upon the authority under Rule 86A of the Rules for blocking the ITC could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on subjective weighty grounds and reasons.

(III) The power under Rule 86A of the Rules should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

(IV) The aspect of availing the credit and utilization of credit are two different stages. The utilization of credit is a vested right. No vested right accrues before taking credit.

(V) The Government needs to apply its mind for the purpose of laying down some guidelines or procedure for the purpose of invoking Rule 86A of the Rules. In the absence of the same, Rule 86A could be misused and may have an irreversible and detrimental effect on the business of the person concerned. In this regard, the Government needs to act promptly.

Special Civil Application No.8163 of 2020

66. We shall now look into the connected writ application, i.e., the Special Civil Application No.8163 of 2020. In this writ application, the writ applicant has prayed for the following reliefs;

> *"(A) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, direction or order, quashing and setting aside DRC-03 Forms dated 09.04.2019 (Annexure-"F") thereby ordering cancellation of debit entries of Rs.7,02,10,842/- and Rs.62,89,158/- in the Petitioner's Electronic Ledger maintained under the CGST Act;*
>
> *(B) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, direction or order, thereby directing Respondent No.2 to allow the Petitioner to take credit of input Tax Credit aggregating to Rs.7,65,00,000/- in the Petitioner's Electronic Credit Ledger and to allow the Petitioners to utilize such ITC of Rs.7.65 Crore for paying GST/IGST on the goods manufactured and supplied by the petitioner;*
>
> *(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct Respondent No.2 herein to allow the Petitioner to take ITC of Rs.7,65,00,000/- in the Petitioner's Electronic Credit Ledger and utilize such ITC for paying GST on supplies of final products on the terms and conditions that may be deemed fit by this Hon'ble Court;*
>
> *(D) An ex-parte ad-interim relief in terms of para 17(C) above may kindly be granted.*
>
> *(E) Any other further relief that may be deemed fit in the facts and circumstances of the case may also please be granted."*

67. Mr. Dave, the learned counsel appearing for the writ applicant submitted that the officers of the Jaipur Zonal Unit of the DGGI visited the office premises of his client at Bhavnagar and seized various documents, files etc. by drawing a Panchnama. He further pointed out that a statement of one of the Directors of the Company was also recorded, and in the said statement, his client made himself very clear that the transactions with the six registered dealers in question were legal and genuine. Mr. Dave would submit that under pressure and coercion of the Investigating Officer, his client had to debit a total sum of Rs.7.65 Crore from the credit ledger thereby debiting the ITC availed by the writ applicant on the various inputs and input services. He would submit that the two DRC-03 Forms for the above referred sum was debited under pressure and was uploaded on the GSTN Portal. He pointed out that his client submitted a letter stating that the reversal of the ITC aggregating to Rs.7.65 Crore was under protest and that there was nothing wrong in the ITC availed by his client. According to Mr. Dave, his client has, time and again, requested the Divisional GST Officers for reversing the debit entries made on 09.04.2019 in the credit ledger of his client and allow his client to utilize such ITC that had to be debited as a deposit because of the pressure of the Investigating Officers. According to Mr. Dave, his client is not allowed to take credit entry of such ITC aggregating to Rs.7.65 Crore, though no proceedings in accordance with law have been initiated till this date. He further pointed out that more than one year has elapsed but no proceedings for issuance of show-cause notice under Section 74 of the Act nor for determination of any unpaid tax or wrongly availed ITC has been initiated against his client.

68. According to Mr. Dave, in the three decisions relied upon by him, i.e, in the case of Century Metal Recycling Pvt. Ltd. (supra), Chitra Builders Pvt. Ltd. (supra) and National Organic Chemical Industries Ltd. (supra), the view taken by different High Courts is that if any amount is deposited voluntarily, the Revenue cannot retain such amount without the determination of liabilities because retention of such amount would be in violation of Article 265 of the Constitution of India. He would submit that the Bombay High Court, in National Organic Chemical Industries Ltd. (supra), had an occasion to consider a similar case and the central excise authorities were directed to pay back the amount collected from the assessee towards excise duty liability in the absence of any determination of any liability by following the procedure of issuing show-cause notice and passing adjudication order for determining any duty liability. He would submit that this High Court, in M/s. Abhishek Fashion Pvt. Ltd. (supra), has also taken a similar view. In such circumstances, Mr. Dave prays that the DRC—03 Forms be set aside and thereby order cancellation of the debit entries of Rs.7.02,10,842/- and Rs.62,89,158/- respectively in the electronic credit ledger of the writ applicant maintained under the CGST Act.

69. By and large, the dispute compared to the facts of the connected writ application is the same. In the Special Civil Application No.8841 of 2020, the ITC has been blocked in exercise of power under Rule 86A of the Rules, whereas in the Special Civil Application No.8163 of 2020, it appears that the ITC in the electronic credit ledger has been debited, which

according to the writ applicant, was done under pressure of the officers, whereas the case of the department is that the same was voluntary.

70. In the aforesaid context, we may now look into the averments made in the reply affidavit filed by the Department. We quote the relevant averments;

> *"5. With reference to **Para 1 to 5.1** of the petition, it is true that the dispute involved in the case in hand is about inputs, purportedly sold and supplied by various registered taxpayers including (i) M/s Anjani Metals and Steels, Chhattisgarh (GSTIN-22AWNPS2137D1ZP); (ii) M/s Kanchan Alloys and Steels, Jharkhand (GSTIN-20BVTPP5808C1ZL); (iii) M/s Om Shiv Metalicks, Jharkhand (GSTIN-20AALHM5998L1ZJ); (iv) Shiv Alloys and Steels Chhatisgarh (GSTIN-22AALHM5998L1ZF); (v) M/s Shakambari Metalicks, Jharkhand (GSTIN-20A JMPP3256C1ZJ) and (vi) M/s Vishkarma Industries, Jharkhand (GSTIN- 20FJWPS4147A1Z5), as mentioned in this para, who have supplied invoices to the Petitioner, on the basis of which they have availed Input Tax Credit (ITC) during 2017-18 and 2018-19. However, it is pertinent to submit that acting upon specific information that M/s Vishkarma Industries, Jaipur, a trading firm (GST Number 08F JWPS4147 A1ZR), have indulged themselves in facilitation of fraudulent ITC by issuing merely GST invoices, without actual supply of goods, coordinated simultaneous search operation was planned and executed on 13.09.2018 at 19 premises spread over in three states viz. Rajasthan, Jharkhand and Chhattisgarh which included various trading firms, recipients of such GST invoices and residences of suspected persons. During the course of search operations various records/documents in the form of purchase invoices, sale invoices, LRs of fake transportation firms, gadgets, mobile phones, blank signed cheque books, private records containing incriminating details have been seized under Panchnama proceedings from all over the places. Evidences prescribed from all over the searched places conclusively established that all such transactions are only on papers and no physical movement of goods has taken place. By this way, recipients of invoices have*

availed ITC involved in such invoices merely on the strength of such invoices, without actual receipt of goods. Subsequently, cases were booked by this office against the trading firms, who have supplied invoices, recipients of such invoices who have availed ITC, merely on the strength of such invoices, without actually receipt of goods and other persons involved in facilitation of such ITC, wrongly and thereby defrauded the Government Exchequer of its legitimate dues.

5.1 Statement of master mind behind creation of all such firms have been recorded, wherein he admitted his wrongdoings of providing invoices, without actual supply of goods to the recipients of such GST invoices. He also admitted to have flouted all the above firms on papers only and that no physical movement of goods has taken place under such invoices. He further revealed that he used to withdraw the amount received through RTGS from the recipients of GST invoices in cash and the same is returned back to the recipients of GST invoices after deduction of certain amount as his commission for providing such GST invoice only without supply of goods. Indulging in such an act is against the basic tenets of the GST law.

5.2 Investigation conducted so far have indicated that petitioner M/s Rudra Global Infra Products Ltd. Bhavnagar, Gujarat is one such beneficiary, who have arranged such invoices and availed ITC amounting to Rs.15,25,12,636/-, merely on the strength of invoices issued by the aforementioned six taxpayers, without actual receipt of goods. Such act of the petitioner is against the basic principles as set out in subsections (2) of section 16 of the CGST Act, 2017 and liable for penalty under section 74 read with section 122 of the CGST Act, 2017. Further, such action is also punishable under section 132 of the said Act, for their criminal liability. The bifurcation of ITC availed by the Petitioner herein is as under:

Sr. No.	***Name of the supplier of invoice***	***Total Amount of ITC of IGST availed by the Petitioner during the F.Y. 2017-18 and 201819.***
1	*M/s Anjani Metals and Steels,*	*3,97,70,482/-*

	Chhattisgarh	
2	*M/s Kanchan Alloys and Steels, Jharkhand*	*1,18,54,336/-*
3	*M/s Om Shiv Metalicks, Jharkhand*	*5,41,50,283/-*
4	*M/s Shakambri Metalicks, Jharkhand*	*77,51,672/-*
5	*M/s Shiv Alloys and Steels, Chhattisgarh*	*2,71,06,744/-*
6	*M/s Vishkarma Industries, Jharkhand*	*1,18,79,119/-*
Total		***15,25,12,636/-***

The petitioner have availed ineligible ITC to the tune of Rs.15,25,12,686/- based on fake/bogus invoices without actual receipt of goods.

*5.8 With reference to **Para 8 to 8.2** of the petition, investigation of the case is underway. Copies of all the relied upon documents, including statements, will be provided along with the show cause notice, which will be issued on completion of the investigation, within the time frame and as per the provisions of the CGST Act, 2017 and Rules made hereunder. This is clearly an afterthought of the petitioner. The contention of the petitioner is not true. Shri Nikhil Ashokkumar Gupta, Director in the petitioner company had voluntarily deposited an amount of Rs. 7,65,00,000/-, vide debit entry no.DI2404190041877 & DI2404190042105 both dated 09.04.2019 on being convinced with the evidences available with this office and subsequently being confronted with the same he not only deposited an amount of Rs.7,65,00,000/- but also assured to pay remaining amount of such ITC, totally amounting to Rs.15,25,12,636/-. Further, such payments have been deposited voluntarily by the Petitioner. More so, payment in GST is system based and entirely under the control of Taxpayer. There is no intervention of the Department. There has been no threat or coercion, whatsoever. At this juncture, after expiry of more than a year, raising this issue is nothing but clearly an afterthought.*

*5.9 With reference to **Para 8.3** of the petition, contentions of the petitioner are misleading. The amount paid by them is not reversal of ITC but payment against wrongly availed ITC by them on the strength of invoices supplied by the aforementioned six firms. Since they have already utilised the ITC involved (though ineligible) and availed on the strength of such invoices, as per available alternate they had opted to pay it from their ITC ledger balance. If they wished to pay such amount from their current account ledger they could have done so.*

*5.10 With reference to **Para 8.4** of the petition, submissions made by the petitioner are not acceptable as the same are far from truth. The amount was paid by the petitioner voluntarily and the same was paid by them on GSTN by using their Login Id & Password subsequent to perusal and being convinced with the available evidences. Apart from statement dated 09.04.2019, two more statements of Shri Nikhil AshokKumar Gupta have been recorded on 01.05.2019 and 27.05.2019. However, he did not raise any such issue. Also the letter dated 17.04.2019, as referred by the petitioner, has never been received by this office. Copy of the referred letter, annexed as Annexure- "G" does not contain any mark of acknowledgement by this office.*

*5.11 With reference to **Para 8.5** of petition, in addition to what has already been stated herein before it is humbly submitted that though the amount has been deposited voluntarily, there is no requirement for issuance of acknowledgement in DRC-04 and/or DRC-05 forms by any proper officer. DRC-04 and DRC-05 are issued under Rule 142(2) and 142(3), respectively which basically deals with 'Notice and order for demand of amount payable under the CGST Act, 2017, which is not the issue in the present case. Rule 142 of the Central Goods and Services Tax (CGST) Rules, 2017 relating to "Notice and Order for Demand of Amounts Payable under the Act", provides as under:*

Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount

due in accordance with the provisions of the Act, whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in ***FORM GST DRC-03*** *and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in* ***FORM GST DRC-04.***

(3) Where the person chargeable with tax makes payment of tax and interest under subsection (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within fourteen days of detention or seizure of the goods and conveyance, he shall intimate the proper officer of such payment in ***FORM*** *GST* ***DRC-03*** *and the proper officer shall issue an order in* ***FORM*** *GST* ***DRC-05*** *concluding the proceedings in respect of the said notice.*

In this case, petitioner has deposited a partial amount of Rs. 7,65,00,000/-, voluntarily, against the wrongly availed ITC totally amounting to Rs. 15,25,12,636/-.

5.12 With reference to ***Para 9 and 10*** *of the petition, apart from what has already been stated in foregoing paras it is humbly submitted that investigation of the case is going on and outcome of the same would be known from the Show Cause Notice (SCN). Before issuance of the SCN, petitioner should not make any assumption or presumption in respect of the same. Hon'ble Court is hence requested to direct petitioner to wait till issuance of a SCN in the case. So far as cancellation of registration is concerned it may have been done by the jurisdictional state/central GST authorities at the request of the Taxpayer. However, investigation in respect of GST evasion can be initiated against any taxpayer for the last five years as per GST law, even if registration of such Taxpayer has been cancelled. In addition to what has already been stated under foregoing paras it is humbly submitted that Section 74 of the CGST Act, 2017 deals with 'Determination of tax not paid or short paid or erroneously refunded or <u>input tax credit wrongly availed or utilised</u> by reason of fraud or any willful misstatement or suppression of facts.' As per subsection (10) of Section*

74 "The proper officer shall issue the order under sub-section (9) within a period of five years from the due date of furnishing of annual return for the financial uear to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund. Thus, petitioner's contention about issuance of show cause notice is not correct as the same would be issued in terms of above referred provisions. However, before issue of SCN, proper investigation is needed to be conducted to unearth entire modus operandi. This office has taken all required action, as prescribed under law, against each and every person/taxpayer involved in this case. The amount paid by the petitioner was voluntarily and same has been deposited by them admitting their wrong done, which is against the GST law. The quantum of evasion against the petitioner is huge i.e. Rs. 15,25,12,636/- and government cannot allow anyone to misuse the revenue which legitimately belongs to the exchequer. Petitioner terming action taken against them and subsequently voluntary payment made by him as illegal is objectionable and strongly denied. Considering and Judging action of the department, at this stage, as illegal in this manner is not appropriate at the end of the petitioner. Statements of Shri Nikhil Ashokkumar Gupta, Director of M/s Rudra Global Infra Products Ltd. have been recorded more than once and while concluding the same he himself had certified that he has given the said statement willingly, on his own free will and without any threat, coercion or inducement. It is established law that Respondent No. 3 i.e. officers of Indirect Tax are not the Police Authorities and statement tendered before the Gazetted officer of such authorities has legal acceptance. These statements have not been retracted so far, even after passing of more than one year and suddenly under this petition, raising such questions is nothing but a well thought/calculated attempt by the petitioner to derail the ongoing investigation being conducted in respect of availing ITC, wrongly and fraudulently, without actual receipt of goods, merely on the strength of invoices issued by various firms. This part of the case (availing fraudulent ITC} is still under investigation to unearth more such instances where legitimate due of the Government has been denied, through such fraudulent practice."

71. None of the aforenoted averments made in the reply affidavit have been refuted or denied by filing any rejoinder.

72. Having considered the stance of both the sides, we have reached to the conclusion that 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 we may only say that 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 Rules prescribes one year time limit. In such circumstances, we direct the respondents to complete the investigation within a period of four 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 Act or not. At the fag end of the investigation, we do not deem fit and reasonable to pass an order in exercise of our writ jurisdiction directing the respondents to give back the credit of the ITC to the writ applicant and permit them to avail the same. Therefore, we are saying that let the investigation be completed within six weeks and appropriate decision shall be taken and communicated to the writ applicant.

73. 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 :

(i) Cases where the Constitutional vires of the very enactment under which the proceedings are initiated is under challenge;

(ii) Cases where the proceedings have been initiated or concluded in total violation of the principles of natural justice; and

(iii) 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 the 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 the orders that the Authorities may make, interference either at the initial or at the intermediate is not viewed by Courts with affection.

74. In view of the aforesaid discussion, both the writ applications fail and are hereby rejected with appropriate observations;

*75***.** We, once again, clarify that we have not gone into the issue as regards the constitutional validity of Rule 86A of the Rules. None of the observations made by us in this judgment should prejudice any of the litigant who might have challenged or who may deem fit to challenge the constitutional validity of Rule 86A on the grounds available in law. The challenge to the constitutional validity of Rule 86A, if any, shall be examined independently. The view taken by us in the present litigation is substantially based on the facts of the case, more particularly,

the materials as disclosed in the reply affidavits filed by the respondents and on the plain reading of the provisions of Rule 86A of the Rules.

(VIKRAM NATH, CJ)

(J. B. PARDIWALA, J)

Vahid