A.F.R.

Court No. - 3

Case :- WRIT TAX No. - 434 of 2021

Petitioner:- M/s. R M Dairy Products LLP
Respondents:- State of U P and 3 Ors.
Counsel for Petitioner:- Nishant Mishra, Yashonidhi Shukla
Counsel for Respondents:- C.S.C., A.S.G.I.

Hon'ble Naheed Ara Moonis,J.
Hon'ble Saumitra Dayal Singh,J.

Heard Mr. Nishant Mishra along with Ms. Yashonidhi Shukla, learned counsel for the petitioner, Mr. Manu Ghildyal, learned counsel representing respondent nos. 1 to 3 and Mr. Ashok Singh, learned counsel for respondent no.4.

The present writ petition has been filed against the order dated 25.06.2021 passed by respondent no.3 under Rule 86A(1)(a)(i) of the State/Central Goods and Services Tax Rules, 2017 (hereinafter referred as the *"Rules"*).

Four fold submissions have been advanced by learned counsel for the petitioner**.** First, relying on Rule 86A (1) of the Rules, it has been submitted that the respondents had no jurisdiction or authority to block any input tax credit over and above any amount that may have been actually available on the date of the order (in this case 25.6.2021).

Second, it has been submitted that Rule 86A of the Rules obliges the respondents to record a positive 'reason to believe' that credit of input tax had been fraudulently availed by the petitioner or the petitioner was wholly ineligible to avail the same. Inasmuch as the petitioner had not committed any fraud and it was otherwise eligible to avail the input tax credit, the action taken by the respondents is wholly without jurisdiction.

Third, it has been submitted that the input tax credit in dispute arose on account of the purchases made by the petitioner from M/s Darsh Dairy & Food Products, Agra with respect to which,

adjudication proceedings are underway against the petitioner in accordance with Section 74 of the UP GST Act, 2017 (hereinafter referred to as the Act). Till those proceedings are concluded, no amount would become recoverable from the petitioner and, therefore, the impugned order passed by respondent no.3 under Rule 86A is wholly premature. In that context, it has also been submitted that Section 78 of the Act provides the manner and mode of recovery. An amount may be recovered only after lapse of three months time from the date of service of the adjudication order. Since the adjudication proceedings are still pending, it has been submitted, the impugned order is wholly premature and without basis.

Last, it has been submitted the Act clearly provides for the manner in which an amount may be determined to be due and recoverable from the petitioner. No other procedure may be adopted, as it would violate the settled principle of law, if the legislature requires an act to be done in a particular manner, it must be done in that manner or not at all.

The writ petition has been vehemently opposed by learned counsel for the revenue.

Having heard the learned counsel for the parties and having perused the record, plainly, there can be no dispute that the Act prescribes the manner for determination of any tax not paid or short paid. Section 74 of the Act provides for determination of input tax credit wrongly availed or utilized by reason of fraud etc through the process of adjudication. Section 78 of the Act further mandates that any amount that may be determined under Section 74 of the Act may not be recovered for a period of three months from the date of service of the adjudication order.

Here, it may be seen that the recovery provision are contained in Section 79 and the enabling Rules. The recovery Rules fall under Chapter XVIII of the State GST Rules 2017 being Rules 142 to 161. On the other hand, Rule 86-A falls under the Chapter heading

IX of the Rules regarding payment of tax.

Besides the Chapter heading being different, we may record that it is not that difference that prevails in our mind. It is the ambit and purpose of the Rule 86A that appears to be inherently different and independent of the recovery provisions. For that reason we are not inclined to accept the contentions advanced by the learned counsel for the petitioner.

Rule 86-A of the Rules reads as below:

> "***86A. (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."*

Plainly, the Rule does not contemplate any recovery of tax due from an assessee. It only provides, in certain situations and upon certain conditions being fulfilled, specified amount may be held back and be not allowed to be utilized by the assessee towards discharge of its liabilities on the outward tax or towards refund. It creates a lien without actual recovery being made or attempted.

The words 'input tax available' used in the first part of sub-rule (1) of Rule 86-A cannot be read as actual input tax available on the date of the order passed under that Rule. Those words are relevant for the purpose of laying down the first condition for the exercise of power by the Commissioner or the authorized officer. Thus, for a valid exercise of power, the authorized officer must have 'reasons to believe' that any credit of 'input tax available' (i.e. that was available in the electronic credit ledger of an assessee) had either been fraudulently availed or the assessee was not eligible to avail the same.

The words 'input tax available' have to be read only in the context of the infringement being alleged by the revenue. i.e. fraudulent availment or availment dehors eligibility to the same. Consequently, if an assessee is found to have either fraudulently availed or to have availed such 'input tax credit' that he was ineligible to avail, he may expose himself to action under the Rule, in future, when such an event may come to the knowledge of the authorized officer, subject of course to the rule of limitation.

Thus the word 'available' used in the first part of sub-Rules of Rule 86-A would always relate back in time when the assessee

allegedly availed input tax credit either fraudulently or which he was not eligible to avail. It does not refer to and, therefore, it does not relate to the input tax credit available on the date of Rule 86-A being invoked. The word "has been" used in Rule 86-A (1) leave no manner of doubt in that regard.

Prima facie, in the facts of the present case, the revenue alleges fraudulent utilization of input tax credit. Even otherwise, what may fall within the ambit of the word 'ineligible' has been clarified by means of Rule 86-A (1)(a)(i) to include a transaction performed with a registered dealer who may be found to be non-existent or to have not conducted any business etc. Plain reading of the impugned order reveals that it is the revenue's allegation that M/s Darsh Dairy & Food Products, Agra products was found to be non-existent at the disclosed place of business.

The recital of that 'reason to believe', is contained in the impugned order. The correctness or otherwise or the sufficiency of the 'reason to believe' is not subject matter of dispute in the instant proceedings. It is the relevancy of that reason to believe with which we are in agreement with Mr. Ghildiyal. Thus, at present, the 'reason to believe' is based on material with the competent authority indicating non-existence of the selling dealer. It is thus alleged the petitioner was not eligible to avail input tax credit as the seller M/s Darsh Dairy & Food Products, Agra was a non-existent dealer.

In such facts, purely on a *prima facie* basis and leaving it open to the adjudicating authority to draw its own final conclusion in that regard, for the purpose of the present writ petition, it cannot be denied that, at present, their exist 'reason to believe' with the revenue authorities that the assessee had fraudulently availed or was ineligible to avail 'input tax credit' with respect to which the impugned order has been passed.

As to the third submission advanced by learned counsel for the petitioner, the provision of Rule 86-A is not a recovery provision. In

fact, it does not allow the revenue to reverse or appropriate any part of the credit existing in the electronic credit ledger of an assessee or to adjust that credit against any outstanding demand or likely demand. It is at most a provision to secure the interest of revenue, to be exercised in the presence of the relevant 'reasons to believe', as recorded.

The Rule only enables the authorized officer to not allow debit of an amount equivalent to 'such credit'. The submission of Shri Mishra that the words 'such credit' refers only to any existing amount of positive credit in the electronic credit ledger or that it must be credit arising from the same seller, cannot be accepted as that intent is clearly non-existing in the Rule.

The operative portion of sub-rule (1) of Rule 86-A limits the exercise of power (by the authorized officer), to the amount that would be sufficient to cover the input tax that, according to the revenue, had either been fraudulently availed or to which the assessee was not eligible. It is an amount equal to that amount which has to be kept unutilised.

To that effect, the legislature has chosen the words 'not allow debit'. To not allow debit and to appropriate the same are two different things in the context of the Statute. They lead to different consequences. While the first only creates a lien in favour of the revenue by blocking utilization of that amount, appropriation of an amount would necessarily involve transfer of title over the money with the revenue. Plainly, the Rule does not contemplate or speak of such a consequence.

Thus, if the petitioner was to earn any further input tax credit in its electronic credit ledger upto the tune of Rs.7,06,66,700.00/-, the same would be retained by way of a lien in favour of the revenue, so however, that the revenue may not appropriate it under that Rule. Adjustment or appropriation may arise only upon an adjudication order attaining finality or after lapse of three months from the date of it being passed if there is no stay granted in

appeal etc. that too as a consequence of the recovery provisions but not under Rule 86-A of the Rules.

Since, according to us, the provision of Rule 86-A is not a recovery provision but only a provision to secure the interest of revenue and not a recovery provision, to be exercised upon the fulfillment of the conditions, as we have discussed above, we are not inclined to accept the further submission advanced by the learned counsel for the petitioner that there is any violation of the principle when a legislative enactment requires an act to be performed in a particular way it may be done in that manner or not at all.

It also stands to reason, if there is no positive credit standing in the electronic credit ledger on the date of the order, passed under Rule 86-A, that order would be read to create a lien upto limit specified in the order passed as per Rule 86-A of the Rules. As and when the credit entries arise, the lien would attach to those credit entries upto the limit set by the order passed under Rule 86-A of the Rules. The debit entry recorded in the electronic credit ledger would be read accordingly.

Therefore should the assessee earn further credit of 'input tax' the revenue would be entitled to a lien upto the limit of Rs.7,06,66,700.00/-. However, the same shall not be adjusted in favour of the revenue except in accordance with law, as discussed above. Any further credit that may arise over and above that amount would be allowed to be utilized without objection by the revenue.

Writ petition is **dismissed**. No order as to costs.

Order Date:- 15.7.2021

M. Tariq