

The order for blocking of Electronic credit ledger (ECL) under GST contain two pre-requisite i.e. Reason to believe & recorded in writing.

M/s New Nalbandh Traders Vs. State of Gujarat (The High Court of Gujarat) [23.02.2022]

The order of blocking of ECL of taxpayer is quashed and set aside as authority passed order without fulfilling pre-requisite.

The Government has introduced Rule 86A to block ineligible or fraudulently availed Input Tax Credit (ITC) by the taxpayers vide Notification No. 75/2019 dated 26.12.2019. As per this rule, the Commissioner or any officer authorized by him can block the ITC available in the ECL of the taxpayer if he has 'reasons to believe' that taxpayer has fraudulently availed ITC. This Rule was inserted to curb the malpractice of fake invoicing without actual supply of goods. Recently Hon'ble High Court of Gujarat has allowed the writ application filed by the petitioner M/s New Nalbandh Traders and order of blocking of ECL is quashed and set aside.

Petitioner purchased goods on the strength of tax invoice, weighment slips, e-way bills etc. from M/s. Anmol Enterprise. The department authority herein blocked the ITC in exercise of power under Rule 86A of the CGST Rules to the tune of Rs. 97,17,290/- on the purchase made by petitioner from M/s. Anmol Enterprise. As per the department investigation said Anmol enterprise was not in existence at its main business location and GST number was also suspended. The petitioner has challenged the order of blocking of ECL.

The petitioner submitted that **the said blocking of ECL was done without communicating any reason to petitioner. The petitioner further submitted that without any reason how a dealer would come to know as to why his ITC has been blocked. He would submit that all the transaction with M/s. Anmol Enterprise are clean and pleaded to Hon'ble Court to quash and set aside the action of Respondent.**

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 rational connection with or relevant bearing on formation of the belief. It is 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.

The Rule 86A has two pre-requisites to be fulfilled before the power of disallowing of debit of suitable amount to the ECL or blocking of ECL to the extent of the amount fraudulently or wrongly availed of is exercised. The first pre-requisite is of the Competent Authority or the commissioner have been satisfied on the basis of material available before him that blocking of ECL for aforesaid reason is necessary. The second pre-requisite is recording the reasons in writing for such an exercise of the power. From the language used in rule 86A it becomes very clear that unless both these pre-requisites are fulfilled, the authority cannot disallow the debit of the determined amount to the ECL or cannot block the ECL even to the extent of amount found to be fraudulently or wrongly availed of. Therefore, all requirements of Rule 86A would have to be fully complied with before the power thereunder is exercised.

On the grievance of the petitioner, The Hon’ble High Court examined the power under Rule 86A which is an administrative power and any administrative power having quasi-judicial shades, which brings civil consequences for a person against whom it is exercised, must answer the test of reasonableness. It would mean that the power must be exercised fairly and reasonably by following the principles of natural justice. It cannot be made on the flights on one’s fancies or whims or imagination.

The High Court held that post decisional or remedial hearing would have to be granted to the person affected by blocking of his ECL. Such hearing opportunity must be granted within reasonable period of time which may not be beyond two weeks from the date of order

blocking ECL. After grant of such hearing, authority may proceed to confirm the order or revoke such order. After examining the above rule, the Hon'ble Court also directed that authorities have to record the reason to believe, which is pre-requisite before proceeding to block ECL.

The High Court also observed that the bona fide recipient dealer cannot be penalized for default of selling dealer. This particular issue has led to interesting evolution of tax jurisprudence. Rule 86A may subject a *bona fide* assessee to undue hardship by blockage of his ECL due to default of his supplier. This may tantamount to equating the default of the recipient with that of supplier. Section 43A was inserted through GST Amendment Act which is not notified yet, section 43A(6) provides that the supplier and recipient of a supply shall be jointly and severally liable to pay tax, or to pay ITC availed as the case may be in relation to outward supplies. Therefore, in absence of section 43A being notified, this power has not been contemplated by Act. Further, the notification of rule 86A prior to section 43A is indicative of the fact that the rule did not intend to the validity of section 43A. Thus, blocking of recipient's ECL on account of default of a supplier, vide rule 86A, and is wanting of statutory authority at present. In this regard, the Hon'ble Gujarat High Court relied on decision of Delhi High Court which is affirmed by Supreme Court.

On perusal of above provisions, it can be said that there is specific mechanism for reversing the credit in case of a discrepancy in the ITC availed by recipient, against the output liability of the supplier. However, there is no system-based matching of ITC being carried out presently, and till the time such provisions are given effect, the recipients shall be eligible to claim ITC provisionally on the basis of invoice issued by the customer.

The said judgement of Hon'ble High Court of Gujarat is enable to many taxpayer's business who are harassed by the authorized officer on exercising the power given under Rule 86A. The High Court observed that Rule 86A should not be used as a tool to harass the taxpayers. CBIC has issued detailed guideline for officers to exercise the power of Rule 86A. In these

guidelines, the CBIC has clarified grounds for disallowing debit of an amount from ECL by proper authority for the purpose of Rule 86A.

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