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UP GST Rule: Rule 86A: Violative of Article 300A

On 05-02-2020 the Government of UP in exercise of delegated power under Section 164 of UPGST Act. 2017, gazette UP GST (35th) Amendment Rule, 2020 and from the said dated inserted Rule 86A, in the Rules. This insertion authorizes the Commissioner and his subordinate officers (Leaving Assistant Commissioner) to defer the claim of the registered person for a period of one year from the date of such order.

However to meet the end of justice it also provided certain riders, such as:-

- a) Credit of ITC has been fraudulently obtained.
- b) The person on whose behalf ITC is appearing in Electronic Credit Ledger.
- c) The officer issuing the notice must have Reason to believe that credit appearing in Electronic Credit Ledger have been obtained fraudulently.

d) The person who deposit the tax and found appearing in Electronic Credit Ledger never did business at the declared place of business or business at all.

Since certain well known words in taxing laws have been used in this Rule and they are mandatorily to be followed by the authority exercising jurisdiction hence there meaning in the present context should be clear.

A- Reason to believe:

In the case of reported as **Ganga Saran & Sons vs. I.T. Officer (1981) AIR SC 1363**, Hon'ble Supreme Court defined meaning of reason to believe and accordingly there should be existence of rational and intelligible nexus between the reasons and the belief, so that on such reasons one can properly be instructed on facts and law. Further, in **I.T.O. vs. Lakhmani Mewal Das (1976) AIR 1753**, Hon'ble Apex Court clarified that to sustain reason to believe it must be *subjective* and done in *good faith*. Similar view was reiterated in **Pratap Singh vs. Director of Enforcement F.E.R. Act, (1985) AIR SC 989**.

B- Satisfied:

The phrase '*satisfied*' occurs in many taxing statutes and is a familiar word it means, simply "*makes up its mind.*"

It is a neutral word "with a wide range of meanings covering the criminal burden of proof (satisfied to be sure) through the civil burden of proof (satisfied on a balance of probabilities) to a synonym for 'conclude' or 'determine'."

In Principles of Statutory Interpretation by small G.P. Singh mention that be construed to mean '*reasonably satisfied*'. The satisfaction of the authority should not be capricious satisfaction but must be capable of being tested in an objective manner.

The term '*satisfied*' has been understood to mean, free from anxiety, doubt, perplexity, suspense or uncertainty. In this context it is synonymous with "convince" the understanding; or convince beyond a reasonable doubt.

[Faquir Chandra Sultani Ram Vs. Bhana Ram Mausam Ram [AIR 1957 Pun 303, 304]

C- Show Cause Notice:

In a Show Cause Notice the issuing authority "must show the real cause for issuing the notice pointing out with regard to the subject matter of enquiry." Naturally, it should not be with a closed or prejudged mind otherwise it will be against the principles of natural justice and fair play. Assessee may not be fully able to explain his submission.

It was clarified in **M/s. Rajam Industries (P) Ltd. Vs. The Deputy Commercial Tax Officer [2010 (178) ECR 0095]** authority must be impartial and its fairness and impartiality can be culled out from the show cause notice.

D- Fraudulent:

Hon'ble Apex Court in State of Andhra Pradesh Vs. T. Suryachandra Rao (AIR 2005 S.C. 3110)

“fraud” is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression “fraud” involves two elements, deceit and injury to the person deceived.

According to cases decided in England

The representation to become fraudulent must be of the fact with knowledge that it was false.

‘Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false’.

“Fraud” is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter.

E- CENVAT:

It will be appropriate to add that CENVAT is the abbreviated form of Central Value Added Tax. Under CENVAT scheme the credit of the excise duty/additional duty of customs paid on the inputs and capital goods and service tax paid on input services is allowed to be utilized for the payment of excise duty on the final products or service tax on output services in order to avoid cascading effect of the duty/tax.

F-CENVAT is accrued property right under Article. 300A:

Recently Hon'ble Delhi High Court in the case reported as Brand Equity Treaties Ltd. Vs. UOI in W.P.(C)11040/2018 and others decided on 05.05.2020.

We are also of the view that the CENVAT credit which stood accrued and vested is the property of the assessee and is a constitutional right under Article 300A of the constitution. The same cannot be taken away merely by way of delegated legislation by framing rules without these being any overreaching provision in GST Act.

And it was followed in catena of cases decided by Hon'ble Delhi High Court.

G- Input and Input Tax Credit defined under GST Act. 2017:

Section-2 (62)"Input Tax" In relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods services or both made to him and includes-

- a) the integrated goods and services' tax charged on import of goods;
- b) the tax payable under the provisions of sub-section (3) and (4) of section 9;
- c) the tax payable under the provisions of sub-section (3) and (4) of section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017); or
- d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the Central Goods and Services Tax Act, 2017 but does not include the tax paid under the composition levy;

(63)"Input Tax Credit" means the credit of Input Tax;

It is to be classified that input tax is in the nature of benefit, concession extended to the dealer under the statutory scheme, it can be availed only as per scheme (Godrej & Boyce mfg.co.(p) ltd. Vs CST (1992) 3 SCC 624.

H- Input Tax credit Case Laws:

Division Bench of Delhi High Court in the case arrayed as "A.B Pal Electricals Pvt. Ltd. Vs Union of India in WP (c) 6537/2019 decided

on dt. 17.12.2019 and subsequently followed in series of judgments held that Input Tax Credit is "Property" as referred in Article 300A. Para 8 of "A.B Pal Electricals Pvt. Ltd. Vs Union of India in WP (c) 6537/2019 decided on dated 17.12.2019 reads as below-

"We way further add that the credit standing in favor of assessee could not be derived of the said property save by authority of law in terms of Article 300A of the constitution of India."

I- Article 300A:

The right of property under Article 300A is not a 'basic feature' of the constitution. It is only a *constitutional right*.

The phrase save by authority of law, at this juncture should be clarified.

J- Rule 86A Delegated legislation:

Finally question arises whether Rule 86A is delegated legislation.

Like CENVAT, GST Regime provided for Input Tax Credit. Therefore in nature both being similar, it may be stated that input tax credit is nothing but property as mentioned in Article 300A of the Constitution of India.

While introducing both schemes it was stated that it is to prevent cascading effect of Taxes on the product.

Newly inserted Rule 86A provides various grounds for initiation of proceeding under the Rules by the competent authority.

Rule 86A, as mentioned in the beginning of this article is delegated legislation, means this Rule has been made exercising power under Section 164 under which Rule making power has been delegated to the executive by the legislature, hence Rule 86A is a piece of delegated legislation.

In essence to deprive an assesses from the property i.e. ITC even temporarily i.e. for a period of extending up to 1 year is clearly violative of the norms of delegated legislation.

K- Save by authority of law:

Thus it is crystal clear that executive i.e. Government has issued Rule 86A in exercise of Power conferred u/s 164 of UPGST Act. 2017. Since the said Rule provided that competent authority may deprive a person from enjoying his property i.e. Input Tax Credit up to a period of 364 days (One day less in a year) and therefore it is not valid in the eyes of law and as laid down by the Hon'ble Supreme

Court particularly (Sri Lakshman Das Vs. Jugal Ram (2007) 10 SCC 448 (para-16), however laudable motive may be behind such Rule.

Conclusion:

As we have noted in the earlier paragraphs of this Article, that Rule 86A inserted w.e.f. 05-02-2020 by the executive is clearly in violation of Article 300A as it provides to deprive the assessee from enjoying his property i.e. Input Tax Credit, may be temporarily.

In entirety, the provision of Rule 86A is not only erroneous but confiscatory also. Since, after blockade of ITC, the assessee is prevented thereby to adjust the said ITC till end of the enquiry. Unfortunately, the said amount of ITC due to blockade will not even after decision, in favour of the assessee, will not earn any interest on one hand or the other, if assessee has no working capital, then will be prevented from filing of return. Thus he can be penalized on daily basis, besides the interest accrued on un-deposited amount.

Finally, if assessee later on wins the case, there is no provision to compensate him by way of interest including penal actions mentioned hereinabove.

Not only this, no prior notice is being issued before the blockade by the competent authority. Thus, assessee has no reasonable opportunity to place his facts related to the case. In any manner, it is clearly violation of principal of audi alteram partem.
