Title to be written on the first page of the magzine :-

"Rule 86-A should not be exercised in a routine way. The revisional power of the Commissioner under Section 108 should be carried out under certain limitations and prohibitions. "

To be mentioned as the Head Notes before the judgment

Esteemed Readers!

This decision is peculiar because the Commissioner initiated revisional proceedings against an appellate order for the first time in the State. Blocking of I.T.C. under Rule 86-A by an Adjudicating Authority was reversed by the Appellate Authority in the light of circumstantial evidences as well as on legal aspects. In the writ, the Hon'ble High Court, in its elaborate order of 44 pages, for the first time, has enunciated, certain vital obiter-dictums which shall be extremely useful to the bar and bench equally in the forth coming time.

Facts in brief: The petitioner was trading in Mentha Oil. Regarding its inward and out-supplies, proper tax invoices, E-way bills and documents under Mandi Samittee Adhiniyam were raised properly. Books were maintained on centralised electronic platform at the corporate level. Goods were brought from the supplier's place of business directly to the warehouses for storage and subsequent sales which were kept by the holding company of the petitioner. The warehouses used to communicate the stock-position of individual client to the respective Sales Tax Officers on 5th of the succeeding month regularly right from its inception. Despite this practice, goods worth 6.88 crores were seized by the State GST Team pertaining to the petitioner. Consequently business place of its prominent supplier "J" was found closed on an inspection. One nearby person informed the officer that no business was being conducted there. On this sheer report, the adjudicating authority treated this supplier as non- existent and blocked the I.T.C. of the petitioner without issuing any Show Cause Notice and without affording any

opportunity of Cross-examination with the concerned persons. The authority treated this inward supplies of the petitioner as bogus.

On appeal, the appellate authority passed a detailed order in about 118 pages taking into accounts all the substantial materials available on record. He acquainted the concerned officer with all the assertions advanced by the appellant for rebuttal and afforded several occasions to furnish any and every adverse material in the possession of the department. When nothing was communicated to the appellate authority, the appeal was allowed on merits by unblocking the I.T.C.

Despite this order and perpetual requests by the petitioner, I.T.C. was not unblocked. On the contrary, on the recommendations of the Zonal Additional Commissioner Grade –I, alleging that the order was erroneous regarding legality and propriety as well as prejudicial to the interest of the revenue, revisional proceedings were initiated instantly by the Commissioner and effect and operation of the appellate order was stayed till the disposal of the revision. The petitioner preferred the present writ against this order.

Regarding Rule 86-A, the Hon'ble Court has made the following observations:-

(1)- 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. A bare reading of Section 86A indicates that 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, 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)- 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.

(3)- 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.

(4)- 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. 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.

(5)- The 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.

(6)- The utilization of credit is a vested right. No vested right accrues before taking credit. There needs to be 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.

(7)- A department argued that Rule 86-A does not require to furnish a Show Cause Notice to the concerned person. On this issue, the Hon'ble Court narrated a no. of decisions, mainly by the Apex Court and came to the conclusion that furnishing of the Show Cause Notice is the fundamental requirement of natural justice. Unless any statute specifically bars the issuance of Show Cause Notice, the

same should be provided even such provision has not been provided in the concerned statute (i.e. Section or the Rule).

Regarding the actions taken by the Commissioner under Section 108 of the CGST Act/UPSGST Act, the following observations were made by the Hon'ble Allahabad High Court :-

(1)- The pre-conditions to the exercise of this powers were two folds, namely, error in the order passed by an officer subordinate to the revisional authority and prejudicial to the interest of revenue. Once these two conditions stood fulfilled, the revisional authority was authorized to give an opportunity to the assessee of being heard and after making such inquiry as he thought fit he could pass appropriate orders as the circumstances of the case would justify.

(2)- This power was essentially a supervisory power. However, in order to ascertain whether the officer subordinate to him had passed an erroneous order, which was also prejudicial to revenue, the Commissioner was required to call for and examine the record of such proceedings. Therefore, the revisional authority had to call for the records, he had to examine such records, he had to be satisfied regarding fulfilment of the above two conditions and thereafter give opportunity to the assessee of being heard and on making appropriate inquiry the revisional authority is empowered to pass appropriate orders.

(3)- The averments of the department was that so far as the reasons to be recorded in the revisional notice are concerned, 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.

On this allegation, the view of the court was that 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. This means that the order should reflect the reasons therein.

(4)- Rule 109 of the SGST Rules, 2017 provides for service of notice in Form GST RVN-01 before an order under Section 108 is passed and exhaustive procedure is given therein, which requires documents to be enclosed specifying the grounds on the basis of which the revisional jurisdiction is sought to be exercised. Contrarily, the notice dated 7.5.2021 was in fact issued without any ground on the basis of which it could be said that there was no material or record available before the respondent no.3 (i.e. Commissioner) for exercising jurisdiction under Section 108 (this notice was issued by the Commissioner after staying the operation of the Appellate Order for further revisional proceedings).

(5)- The petitioner through R.T.I sought an information from the office of the Appellate Authority that the file relating to appellate proceedings was not summoned by the Commissioner and the same was lying in its office. On this information aspect, the Hon'ble Court asserted that it has been informed that the records of the Appellate Authority in Appeal No.95/2020 (2018-19) were neither called for by the office of respondent no.3 nor the same were ever dispatched by the office of the Appellate Authority to the office of the respondent no.3. As such, the respondent no.3 has assumed the jurisdiction under Section 108 without calling for and examining the record of the aforesaid Appeal filed by the petitioner company. The respondent no.3 has assumed the jurisdiction under Section 108 merely on the basis of letter sent by the respondent no.4 (i.e. Additional Commissioner Grade -I).

(6)- The entire relevant noting, as averred above, clearly reflects to the Court that even though the revisional authority has exercised under-mentioned provision but there was no independent application of mind.

(7)- The preconditions for the exercise of powers are basically two folds, namely, error in the order passed by an officer subordinate to the revisional authority and prejudice to the interest of revenue. Once these two conditions stood fulfilled, it was incumbent upon the revisional authority to give an opportunity to the assessee of being heard and after making such enquiry as he thought fit he could pass appropriate orders as circumstances of the case would justify. This power is

basically a supervisory power. However, in order to ascertain whether the officer subordinate to him has passed an erroneous order, which may be prejudicial to the revenue, the Commissioner is required to call for and examine the record of such proceedings.

(8)- In the present matter, admittedly without summoning the record the notice was prepared by the subordinate officers in which two options were indicated to the revisional authority with an observation that in case second option is approved, accordingly stay order may be prepared (the sub-ordinate authority in the office of the Commissioner had made first option to appeal before the Hon'ble High Court for the stay of the appellate order & the second option was to proceed under Section 108 of the UPSGST Act). This may not be intention of the legislature while incorporating the said feature. Once the supervisory power is being exercised in absence of relevant record merely on the basis of certain noting, which is forwarded to the revisional authority for exercising the powers it is sheer misuse of the power. The said practice cannot be accepted by this Court

Held- "After considering the record, the Court is of the considered opinion that while exercising the revisional power the authority has given go-bye to the procedure, that too without application of independent mind. The intent of the legislature to accord such power under the revision with a rider is to ensure that there may not be errors in the order passed by the officer subordinate to the revisional authority and the order may not be prejudicial to the interest of revenue. On the above parameters there is hardly any scope for taking another view. Admittedly, the order impugned has been passed in absence of record and the revenue authority has proceeded to endorse on the dotted line, which has been submitted by the subordinate officer. Even though, the appellate order was appealable, which clearly reflects that said action is contrary to the procedures contained therein. The order must be supported by reasons but unfortunately the revisional authority/Commissioner did not choose to give reasons in support of order passed by him. This was in plain disregard to the requirement of law. The said

order does not satisfy the requirement of law. Therefore, the said action cannot be accepted."

Note- The Hon'ble Court has used the word "sub-ordinate authority to the Commissioner" everywhere. Hence, this question is left to the vulnerable readers to consider whether the appellate authority may be considered as a sub-ordinate authority to the Commissioner.

Further, the Hon'ble Court has remarked that some procedure must be laid down for invoking Rule 86-A. The latent intention seems to be undue harassment of the dealers under the guise of the action under Rule 86-A which should be controlled by the higher authorities through some guidelines.