

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 14931 of 2020****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J.B.PARDIWALA****Sd/-****and****HONOURABLE MR. JUSTICE ILESH J. VORA****Sd/-**

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

**NIPUN A BHAGAT, PROPRIETOR OF STEEL KRAFT INDUSTRIES****Versus****STATE OF GUJARAT****Appearance:****MR. TUSHAR HEMANI, LD. SR. COUNSEL WITH MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1****MR. CHINTAN DAVE, LD. AGP for the Respondent(s) No. 1,2****CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA****and****HONOURABLE MR. JUSTICE ILESH J. VORA****Date : 04/01/2021****ORAL JUDGMENT****(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs;

*“a) Pending the admission, hearing and final disposal of this petition, to release the amount of input Tax Credit available to the Petitioner.*

*b) to quash and set aside the action of the Respondent No.2 in blocking the Input Tax Credit.*

*c) any other and further relief deemed just and proper be granted in the interest of justice;*

*d) to provide for the cost of this petition.”*

2. The facts, giving rise to this application, may be summarized as under;

2.1 The writ applicant seeks to challenge the action of the respondent No.2 in blocking the input tax credit in exercise of power under Rule 86A of the Central Goods & Service Tax Rules, 2017 (for short “the Rules, 2017”) to the tune of Rs.17,94,723/- allegedly towards effecting the recovery of dues under the Gujarat Value Added Tax Act, 2003 (for short “the GVAT Act”) in the case of one Dolphin Metals (India) Ltd.

2.2 The writ applicant is engaged in the business of manufacturing of brand kitchenware and home appliances and is registered under the provisions of the CGST Act. It appears from the materials on record that the writ applicant, at one point of time, was a Director in a public limited company named Dolphin Metals (India) Ltd. The writ applicant was a Director in the said Dolphin Metals (India) Ltd. since 23<sup>rd</sup> November, 2009 and, thereafter, from 20<sup>th</sup> December,

2018 till the date of filing of this writ application. The writ applicant is also a director in one another company named Bhagat Marketing Private Limited since 21<sup>st</sup> March, 1994.

2.3 It appears that the respondent No.2 sent a notice dated 5<sup>th</sup> September, 2020 under Section 44 of the GVAT Act to the Union Bank of India proposing to attach the bank account maintained by Bhagat Marketing Private Limited, referred to above, wherein the writ applicant is a Director, seeking recovery of the amount of outstanding tax and interest for the years 2006-07 to 2013-14 in the case of Dolphin Metals wherein the writ applicant was a Director for some period of time. It appears that the bank declined to act as per the notice dated 5<sup>th</sup> September, 2020 as the name and PAN of the account holder differed from that of the Dolphin Metals to whom the notices were addressed. It appears that the respondent No.2, on the very same day, i.e., 5<sup>th</sup> September, 2020, blocked the input tax credit of the amount of Rs.17,94,723/- available to the writ applicant in his electronic credit ledger under the provisions of the CGST Act. This action was with an intention to recover the amount of tax and interest due and payable by the Dolphin Metals under the GVAT Act for the period during which the writ applicant was not even the Director.

2.4 The writ applicant addressed a letter dated 23<sup>rd</sup> September, 2020 to the respondent No.2 requesting to release the input tax credit blocked for the recovery of the amount of

tax and interest in case of the Dolphin Metals under the GVAT Act.

2.5 As the respondent No.2 declined to release the input tax credit, the writ applicant was left with no other option but to come before this Court with the present writ application.

3. Mr. Tushar Hemani, the learned senior counsel assisted by Ms. Vaibhavi Parikh, the learned counsel appearing for the writ applicant vehemently submitted that the action of the respondent No.2 in blocking the input tax credit of the writ applicant under the CGST Act is patently bad, illegal, contrary to law and in gross violation of the fundamental rights as enshrined to the writ applicant under Articles 14 and 19(1)(g) of the Constitution. Mr. Hemani would submit that it is a settled position of law that the Directors of a Company are not to be held personally liable for the dues of the Company and the same cannot be recovered from the Directors under any of the provisions of the GVAT Act.

4. Mr. Hemani submitted that the GVAT Act does not empower the respondent No.2 to recover any amount towards the liability of a Company from its Directors in the absence of any enabling provisions which are to be found in the other taxing statutes. Mr. Hemani pointed out that the legislature has explicitly empowered the officer under Section 179 of the Income Tax Act and Section 89 of the CGST Act to recover the dues towards the liability incurred by the Company from its Directors after following the due process of law. Under the CGST

Act, there is no such provision.

5. Mr. Hemani, further pointed out that the Dolphin Metals is a Public Limited Company and, therefore, also its outstanding dues cannot be recovered from its Directors. He would submit that there is no enabling provision even under the CGST Act, 2017 by virtue of which the input tax credit can be utilized for discharging any liability other than the liabilities under the CGST Act and or SGST Act. Mr. Hemani invited the attention of this Court to Rule 86A which came to be inserted in the Rules, 2017 with effect from 26<sup>th</sup> December, 2019. Rule 86A empowers the Commissioner or Officer authorized in his behalf, not below the rank of Addl. Commissioner to restrict the use of input tax credit from the electronic credit ledger if the Commissioner has reasons to believe that the credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible on the grounds as stated in Rule 86A (1)(a) to (d). Thus, according to Mr. Hemani, the debit on account of discharge of liability towards any other law is not permissible under Rule 86A of the CGST Act.

6. In such circumstances, referred to above, Mr. Hemani prays that there being merit in his writ application, the same may be allowed and the respondent No.2 may be directed to release the amount of input tax credit available in the electronic credit ledger of the writ applicant.

7. On the other hand, this writ application has been vehemently opposed by Mr. Chintan Dave, the learned AGP appearing for the State-respondents.

8. Mr. Dave invited the attention of this Court to Section 18 of the Central Sales Tax Act, 1956. Section 18 is with



respect to the liability of Directors of Private Company in liquidation. Section 18 of the Central Sales Tax Act, 1956 ( for short “the Act, 1956”) reads thus;

*“Section 18 in the Central Sales Tax Act, 1956*

*\*18. Liability of directors of private company in liquidation.—Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), when any private company is wound up after the commencement of this Act, and any tax assessed on the company under this Act for any period, whether before or in the course of or after its liquidation, cannot be recovered, then, every person who was a director of the private company at any time during the period for which the tax is due shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.*

9. Mr. Dave, thereafter, invited the attention of this Court to Section 49(3) of the CGST Act, 2017. Section 49 of the Act, 2017 falls in Chapter-X, and Chapter-X is with respect to the payment of tax. Section 49(3) reads thus;

*“3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.”*

10. Mr. Dave, thereafter, invited the attention of this Court to the miscellaneous transitional provisions as contained in Section 142 of the Act, 2017, more particularly, Section 142(8)(a), which reads thus;

“8(a) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;”

11. In the last, Mr. Dave invited the attention of this Court to Rule 86A of the Rules which reads thus;

*“86A Condition 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."*

12. Mr. Dave would submit that by virtue of Section 18 of the Act, 1956, when any private company is wound up after the commencement of the Companies Act, 1956 and any tax assessed on the Company under the Act, 1956 for any period whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a Director of the private company at any time during the period for which the tax is due would be jointly and severally liable for the payment of such tax unless he proves that non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the Company.

13. Mr. Dave would argue that by virtue of Section 49(3) of the Act, the amount available in the electronic cash ledger can be used for making any payment towards the tax, interest, penalty, fees or any other amount payable under the provisions of the Act, 2017 or the Rules made thereunder. He would submit that in pursuance of an assessment or adjudication proceedings instituted, if any amount of tax, interest, fine or penalty



becomes recoverable from the person, the same is permissible to be recovered as an arrear of tax under the Act, 2017 and the amount so recovered would not be admissible as the input tax credit under the Act, 2017. The sum and substance of the submissions of Mr. Dave is that by virtue of power under Rule 86A of the Rules, the respondent No.2 could be said to be justified in blocking the input tax credit available in the electronic credit ledger of the writ applicant for the purpose of recovering the dues of Dolphin Metals (India) Limited as the writ applicant was one of the Directors of the said Company.

14. In such circumstances, referred to above, Mr. Dave prays that there being no merit in this writ application, the same may be rejected.

### **ANALYSIS**

15. 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 the respondent No.2 could have exercised power under Rule 86A of the Rules, 2017 for the purpose of blocking the input tax credit available in the credit ledger account of the writ applicant for the purpose of recovering the dues of Dolphin Metals (India) Limited.
16. At the outset, we reject the first contention raised by Mr. Dave, the learned AGP, as regards Section 18 of the Act, 1956. Section 18 of the Act, 1956 specifically talks about "Private Company". Indisputably, Dolphin Metals (India) Limited is a Public Limited Company. There is a specific

averment in this regard in the memorandum of the writ application which has not been denied or disputed. The moot question to be determined is whether Rule 86A could have been invoked for blocking the input tax credit available in the electronic credit ledger of the writ applicant to recover the dues of Dolphin Metals (India) Ltd? In our opinion, the answer has to be in the negative. Rule 86A can be invoked only if the conditions stipulated therein are fulfilled. In other words, it is only if the Commissioner or an Officer authorized by him has reasons to believe that the credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible for the reasons stated in Rule 86A(1)(a) to (d) that the authority would get the jurisdiction to exercise the power under Rule 86A of the Rules. We fail to understand how Rule 86A could have been invoked in the present matter. In our opinion, the issue, as such, stands squarely covered by three decisions of this High Court, i.e, (i) **Mr. Choksi vs. State of Gujarat** (SCA No.243 of 1991) (ii) **Different Solution Marketing Private Ltd. vs. State of Gujarat** (SCA No.19949 of 2015) and (iii) **Paras Shantilal Savla vs. State of Gujarat** (SCA No.7801 of 2019).

17. In view of the aforesaid, we are left with no other option but to allow this writ application and the same is hereby allowed. The respondent No.2 is directed to unblock the input tax credit available in the credit ledger account of the writ applicant at the earliest. We clarify that this order shall not preclude the department from recovering the dues of Dolphin Metals (India) Ltd. by any other mode of recovery permissible

in law.

**(J. B. PARDIWALA, J)**

**(ILESH J. VORA,J)**

Vahid

