IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

TUESDAY, THE 12TH DAY OF SEPTEMBER 2023 / 21ST BHADRA, 1945

WP(C) NO. 29769 OF 2023

PETITIONER:

DIYA AGENCIES,
XXI/221A, PULLIKANAKKU P. O., KAYAMKULAM,
ALAPPUZHA REPRESENTED BY ITS PROPRIETOR
SRI. K. ANIL KUMAR, PIN – 690537.

BY ADVS.
SRI. AJI V. DEV
SRI. H. ABDUL LATHIEF
SRI. ALAN PRIYADARSHI DEV
SRI. S. SAJEEVAN

RESPONDENTS:

1 THE STATE TAX OFFICER,
STATE G.S.T DEPARTMENT, MINI CIVIL STATION,
KAYAMKULAM - 690 502
(PRESENTLY RE-DESIGNATED AS THE ASSISTANT COMMISSIONER,
TAXPAYER SERVICES CIRCLE, STATE G.S.T DEPARTMENT,
MINI CIVIL STATION, CHENGANNUR, ALAPPUZHA, PIN– 689121).

2 THE STATE TAX OFFICER,
ARREAR RECOVERY, TAXPAYER SERVICES,
STATE GST DEPARTMENT, BSNL BUILDING,
HEAD POST OFFICE ROAD, ALAPPUZHA, PIN – 688001.

3 UNION OF INDIA,
REPRESENTED BY ITS SECRETARY (REVENUE),
MINISTRY OF FINANCE, GOVERNMENT OF INDIA,
NORTH BLOCK, NEW DELHI, PIN – 110001.

4 THE CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS,
REPRESENTED BY ITS CHAIRMAN, DEPARTMENT OF REVENUE, NORTH
BLOCK, NEW DELHI, PIN – 110001.

5 THE STATE OF KERALA,
REPRESENTED BY ITS SECRETARY, TAXES DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM, PIN – 695001.

BY ADV.
SMT. JASMINE M.M.-GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

DINESH KUMAR SINGH, J.

W.P.(C) No.29769 of 2023

Dated this the 12th day of September, 2023

JUDGMENT

1. The present writ petition in essence has been filed to challenge the assessment order Exhibit P-1 for the assessment year 2017-18 dated 24.05.2022. The petitioner's claim for the input tax credit of Rs.44,51,943.08/- for CGST and SGST has been limited at excess claim of Rs.1,04,376.05/- as CGST and same amount as SGST credit has been denied on the ground that as per the GSTR 2A in respect of invoice supply, the tax payer is only eligible for input tax amount shown in CGSTR 2A.

2. The Learned Counsel for the petitioner submits that the claim of input tax credit cannot be denied merely on the ground of amount mentioned in the GSTR 2A for which the petitioner does not have any control. Learned Counsel for the petitioner further submits that the assessing authority is required to independently examine the claim of input tax credit of the assessee irrespective of the amount mentioned in the GSTR 2A. Learned Counsel for the petitioner placed reliance on the

Judgment of the High Court of Judicature at Calcutta in ***MAT 1218 of 2023 (Suncraft Energy Private Limited and Another v. The Assistant Commissioner, State Tax, Ballygunge Charge and others) delivered on 02.08.2023*** . The Learned Counsel for the petitioner also placed reliance on the Judgment of the Supreme Court reported in ***2023 (3) TMI 533 SC (The State of Karnataka v. M/s. Ecom Gill Coffee Trading Private Limited)***.

3. For a dealer to be eligible to avail credit of any input tax, the conditions prescribed in Section 16 (2) of the GST Act has to be fulfilled. Sub-section 2 of Section 16 commences with a non-obstinate clause stating that notwithstanding anything contained in Section 16 (1) no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless mentioned in the clause under Section 2A of the Act.

4. Learned Counsel for the petitioner submits that the petitioner has fulfilled all the conditions as stipulated under Sub-section 2 of Section 16 and he has paid the tax to the seller dealer and valid tax invoice has been issued by the seller dealer. The grievance of the petitioner is that despite having fulfilled all the conditions as per the conditions enumerated under Sub-section 2

of Section 16 of the Act, the assessing authority has reversed the credit availed and directed the petitioner to deposit the tax to the extent of disallowance of input tax credit. Learned Counsel for the petitioner submits that the petitioner has supplier dealers and, if they have not deposited the tax paid by the petitioner, petitioner cannot be asked to pay the tax again .

5. The Central Board of Indirect Tax and Customs had issued press release dated 18.10.2018 clarifying that furnishing of outward details in Form GSTR-1 by the corresponding supplier(s) and the facility to view the same in Form GSTR-2A by the receipent is in the nature of taxpayer facilitiation and does not impact the ability of the tax payer to avail ITC on self-assessment basis in consonance with the provisions of Section 16 of the Act. Further, it has been clarified that the apprehension that ITC can be availed only on the basis of reconciliation between Form GSTR-2B and Form GSTR-3B conducted before the due date for filing of the return in Form GSTR-3B for a particular month will be unfounded and the same exercise can be done thereafter also. The Supreme Court in ***Union of India (UOI) v. Bharti Airtel Ltd. And Others reported in 2022 (4) SCC 328*** has opined that Form GSTR-2A is only a facilitator for taking a confirm decision while making the

self-assessment. The High Court of Judicature at Calcutta in ***Suncraft Energy Private Limited and Another*** (supra) considering the provisions of Section 16 and press release dated 04.05.2018 and 18.10.2018 issued by the Central Board of Indirect Tax and Customs has held that non-performance or non-operatability of Form GSTR-2A or for that matter, other forms will be of no avail because the dispensation stipulated at the relevant time obliged the registered persons to submit return on the basis of such self-assessment in Form GSTR-3B manually on electronic platform. The High Court of Judicature at Calcutta in ***Suncraft Energy Private Limited and Another*** (supra) has held that before revetring the input tax credit by the assessee, the assessing authority should take action against the selling dealer if it is found that he has not deposited the tax paid by the assessee. Unless the collusion between the assessee and the seller dealer is proved, the input tax credit is not to be denied if the assessee has genuinely paid the tax to the seller dealer.

6. The Supreme Court in ***The State of Karnataka v. M/s. Ecom Gill Coffee Trading Private Limited*** (supra) has held while interpreting the Section 70 of the Karnataka Value Added Tax Act, 2003 which are in respect of claim of input tax credit under KVAT

and similar to the provisions of Section 16 of the GST Act has held that; c*learly stipulate that the burden of proving that the ITC claim is correct lies upon the purchasing dealer claiming such ITC. Burden of proof is that the ITC claim is correct and is squarely upon the assessee who has to discharge the said burden. Merely because the dealer claiming such ITC claims that he is a bonafide purchaser is not enough and sufficient. The burden of proving the correctness of ITC remains upon the dealer claiming such ITC. Such burden of proof cannot get shifted to the Revenue. It has been further held that mere production of the invoices or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under Section 70 of the Karnataka Value Added Tax Act, 2003. The dealer claiming ITC has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgment of taking delivery of goods, tax invoices and payment particulars etc. The genuineness of the transaction has to be proved as the burden to prove the genuineness of transaction would be upon the purchasing dealer. It has been held that mere production of the invoices and/or payment by cheque is not sufficient and cannot be said to be proving the burden as per section 70 of the Karnataka Value Added Tax Act, 2003.*

7. From the perusal of Exhibit P-1 impugned assessment order for the assessment year 2017-18 dated 24.05.2022 it is evident

that the petitioner's claim for higher input tax has been denied only on the ground that the said amount was not mentioned in the GSTR 2A. If the seller dealer (supplier) has not remitted the said amount paid by the petitioner to him, the petitioner cannot be held responsible. Whether the petitioner has paid the tax amount and the transactions between the petitioner and seller dealer are genuine are the matter on facts and evidence. The petitioner has to discharge the burden of proof regarding the remittance of tax to the seller dealer by giving evidence as mentioned in the Judgment of the Supreme Court in ***The State of Karnataka v. M/s. Ecom Gill Coffee Trading Private Limited*** (supra).

8. In view thereof, I find that the impugned Exhibit P-1 assessment order so far denial of the input tax credit to the petitioner is not sustainable, and the matter is remanded back to the Assessing Officer to give opportunity to the petitioner for his claim for input tax credit. If on examination of the evidence submitted by the petitioner, the assessing officer is satisfied that the claim is bonafide and genuine, the petitioner should be given input tax credit. Merely on the ground that in Form GSTR-2A the said tax is not reflected should not be a sufficient ground to deny the assessee the claim of the input tax credit. The assessing

authority is therefore, directed to give an opportunity to the petitioner to give evidence in respect of his claim for input tax credit. The petitioner is directed to appear before the assessing authority within fifteen days with all evidence in his possession to prove his claim for higher claim of input tax credit. After examination of the evidence placed by the petitioner/assessee, the assessing authority will pass a fresh order in accordance with law.

With the above directions the writ petition is finally disposed of.

Sd/-

DINESH KUMAR SINGH

JUDGE

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APPENDIX OF WP(C) 29769/2023

PETITIONER'S EXHIBITS

EXHIBIT P1	TRUE COPY OF THE PROCEEDINGS OF ASSESSMENT PASSED U/S.73 OF THE GST ACTS PERTAINING TO THE YEAR 2017-18 DATED: 24.05.2022
EXHIBIT P1(a)	TRUE COPY OF THE SUMMERY OF THE ORDER ISSUED IN FORM GST DRC-07 FOR 2017-18 DATED: 28-05-2022
EXHIBIT P2	TRUE COPY OF THE REVENUE RECOVERY NOTICE ISSUED BY THE 2ND RESPONDENT DATED: 22.07.2023 WITH ENGLISH TRANSLATION