$~43

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on: 29.08.2022*

\+ **W.P.(C) 1856/2022**

DELHI INTERNATIONAL AIRPORT LIMITED

..... Petitioner

Through: Mr Sparsh Bhargava, Adv.

versus

COMMISSIONER OF CGST AND CENTRAL EXCISE APPEALS DELHI II & ORS.

..... Respondents

Through: Mr Akshay Amritanshu & Mr Ashutosh Jain, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

TARA VITASTA GANJU, J. (ORAL):

1. The present Petition has been filed by the Petitioner, *inter alia*, challenging the Miscellaneous Order No. 50885/2019 dated 13.11.2019 and Final Order No. 53978/2014 dated 16.10.2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the CESTAT").

2. The facts, briefly, as averred in the Petition are as follows:

2.1 The Petitioner has filed a Petition for refund of Service Tax

amounting to Rs.39,09,130/-. It is averred in the Petition that Service Tax amounting to Rs.39,09,130/- was paid twice, i.e., first by the Petitioner through challan dated 06.05.2010 (Annexure-P/12), and thereafter by utilisation of CENVAT Credit.

2.2 On 04.05.2011, the Petitioner applied for a refund of Service Tax amounting to Rs.39,09,130/- which was deposited *via* challan dated 06.05.2010 under Section 11B of the Central Excise Act, 1944 (hereinafter referred to as "the CE Act").

2.3 After filing the application for refund, the Petitioner explained the circumstances in which its Service Tax liability was defrayed twice over through personal appearance of its authorised representative as well as *via* letters dated 28.06.2011, 10.01.2013, and 21.01.2013.

2.4 The refund application filed by the Petitioner was rejected by the Order-in-Original dated 28.06.2013 (hereinafter referred to as "the OIO") passed by the Respondent No. 2. The refund was rejected on the ground that the Petitioner, having opted to discharge Service Tax liability through a challan, should not have debited the same amount from its CENVAT Credit Account.

2.5 Aggrieved by the OIO, the Petitioner filed an Appeal before the Commissioner (Appeals). The said Appeal was rejected by the Respondent No. 1 in its Order-in-Appeal dated 30.04.2014 (hereinafter referred to as "the OIA") and the OIO was upheld.

2.6 Aggrieved by the OIA, the Petitioner filed a further Appeal before the CESTAT, New Delhi on 28.07.2014. In the Memorandum of Appeal, the Petitioner had provided two addresses for service of any notice/communication:

(i) Delhi International Airport (P) Ltd. – ESCROW PSF (SC), Terminal-1B, Domestic Airport, New Delhi (hereinafter referred to as "the First Address"), and

(ii) New Udaan Bhawan, Opp. Terminal-3, International Terminal, Indira Gandhi International Airport, New Delhi-110037 (hereinafter referred to as "the Second Address").

2.7 On 20.08.2014, the Petitioner was served with a memo setting out the defects in the Appeal filed on the Second Address. The Petitioner had cured the defects raised pursuant to which the Appeal was numbered as ST No. 54605/2014 on 09.09.2014 (hereinafter referred to as "the Appeal").

2.8 It is averred by the Petitioner that after registration of the Appeal, the Petitioner did not receive any notice for hearing for a long period of time and hence decided to apply for an early hearing of the Appeal. It is further averred that it was at that time, upon enquiry made by the Petitioner, it was informed that an Order dated 16.10.2014 had already been passed by the CESTAT (hereinafter referred to as "the Final Order").

2.9 On 25.06.2019, the Petitioner applied for a certified copy of the Final Order, which was received by the Petitioner on 09.07.2019. A perusal of the Final Order revealed that the Appeal, filed on 09.09.2014, was dismissed on 16.10.2014 for non-prosecution. The Final Order recorded that the hearing notice in the case has come back as unserved. The relevant extract of Final Order in this regard states as follows:

"Notice in this case has come back unserved with the

postal remark "addressee not known". It appears that the appellant is not keen to pursue his appeal, but to abuse the process of law to deprive Revenue to realize its legitimate due. Accordingly, the appeal is dismissed."

2.10 By an application dated 27.09.2019, the Petitioner applied for Restoration of its Appeal (hereinafter referred to as "the Restoration Application"). In paragraph 4 of the Restoration Application (Annexure-P/19), it was stated as follows:

"4. Now the applicant would request that the notice for hearing or any other correspondence may kindly be sent to the applicant at the following address:

Delhi International Airport Limited – PSF (SC)
New Udaan Bhawan, Opposite T-3
India [sic: Indira] Gandhi Internatoional [sic: International] Airport
New Delhi -110037"

To be noticed, the address, as set forth above, is the Second Address.

2.11 The Restoration Application was taken up for hearing by the CESTAT on 13.11.2019 in the absence of the Petitioner and was dismissed for non-prosecution as well as failure to show sufficient cause for Restoration of the Appeal.

2.12 It is averred by the Petitioner that once again there was no communication received by it. On 24.12.2021, the Petitioner applied for inspection of the records of the CESTAT and was informed that an Order dated 13.11.2019 had come to be passed by the CESTAT dismissing its Restoration Application (hereinafter referred to as "the Restoration-Dismissal Order").

2.13 On 07.01.2022, the Petitioner inspected the records of the CESTAT. It

is averred by the Petitioner in its Petition that, based on the inspection conducted, the Petitioner ascertained the following:

> *"i. Petitioner's Appeal was received by the Tribunal on 28.07.2014.*
> *ii. As per record of orders, notice for hearing of the appeal on 16.10.2014 was issued to the Petitioner on 15.09.2014, however the same was 'received back'.*
> *iii. Without issuance of a fresh notice for hearing, the appeal was taken up for hearing on 16.10.2014 and was dismissed for non-prosecution.*
> *iv. Thereafter, communication of certified copy of the Final Order dated 16.10.2014 was issued by the registry of the Tribunal on 12.11.2014. The communication has been sent by speed post at Terminal 1B address. However, no acknowledgement indicating the receipt of the communication has been placed in the file.*
> *v. On receipt of Petitioner's application for restoration, notice dated 14.10.2019 was issued to the Petitioner at Terminal 1B address for hearing on 05.11.2019. However, application was taken up for hearing only on 13.11.2019, for which no notice has been issued.*
> *vi. Thereafter, communication for certified copy of the order dated 13.11.2019 was issued by the registry on 09.12.2019. However, no acknowledgement indicating the receipt of the communication has been placed in the file."*

2.14 It is in the aforegoing circumstances that the Petitioner has filed the present Petition, *inter alia*, stating that the impugned orders of the CESTAT, i.e., the Final Order and Restoration-Dismissal Order have been passed without affording the Petitioner an opportunity of being heard and are in violation of the principles of natural justice, and hence are liable to be set aside.

3. Notice was issued in the Petition on 03.03.2022 and thereafter the

Respondents filed their Counter Affidavit. In the Counter Affidavit filed by the Respondents, it is contended that the Petitioner did not appear before the CESTAT on 16.10.2014 because it was not keen on pursuing the Appeal.

3.1 It is also contended that it is unclear as to why the Petitioner did not check the status of the Appeal for almost 5 years and why there was such a delay in filing of the Restoration Application.

3.2 The Respondents further contended that since the Petitioner took no steps after filing of the Restoration Application, it was dismissed not only on the ground of the non-appearance of the Petitioner but also on the ground that the presumption of the Petitioner that its Appeal was pending for 5 years before the CESTAT was absolutely unreasonable.

3.3 It was further submitted that the Petitioner enquired about the status of the Restoration Application on 24.12.2021, i.e., almost 2 years after its filing, further shows that the Petitioner was not concerned with the status of its Restoration Application either.

3.4 The Respondents have, therefore, contended that the Petitioner has been negligent in pursuing the matter, and hence this Petition is without merit.

4. The matter was heard on 25.08.2022. The Petitioner has filed a detailed compilation of Judgments in support of its plea that the CESTAT failed to give an opportunity of being heard and passed the impugned Order(s) without adhering to the principles of natural justice. Counsel for the Respondents on the other hand contended that the Petitioner has failed to diligently pursue its Appeal and Restoration Application hence CESTAT has rightly dismissed its

Appeal and Restoration Application.

5. A perusal of the record showed that while filing its Memorandum of Appeal before the CESTAT, Petitioner did not claim any interest on the delay on refund of Service Tax. The prayers in this Petition don't claim any interest either and read as follows:

> *"a. Issue a Writ of certiorari, or a Writ in the nature of certiorari, or any other appropriate Writ, Order or direction, quashing the Impugned Miscellaneous Order No. 50885/2019 dated 13.11.2019 (ANNEXURE - P/3) and Impugned Final Order no. 53978 of 2014 dated 16.10.2014 (ANNEXURE - P/4) passed by the Hon'ble Customs, Excise and Service Tax Appellate Tribunal, New Delhi;*
> *b. Issue a Writ of mandamus, or an order or directions in the nature of mandamus or any other writ, order or direction of like nature, to direct the Hon'ble Customs, Excise and Service Tax Appellate Tribunal, New Delhi to restore the Service Tax Appeal no. 54605 of 2014 filed by the Petitioner and to decide it on merits, after affording an opportunity of being heard to the Petitioner;"*

5.1 We had, therefore on 25.08.2022, asked the Counsel for the Petitioner to obtain instructions on whether the Petitioner would raise a claim for interest in the event that we would be inclined to restore the Petition since, there is admittedly a delay on the part of the Petitioner in prosecuting his Appeal and Restoration Application as follows:

> *"2. Counsel for the petitioner will obtain instructions as to whether, in case we are persuaded to remand the matter to the Customs, Excise & Service Tax Appellate Tribunal [in short "The Tribunal"] for hearing, he will press for interest between the period when the appeal was lodged and the order dated 13.11.2019 was passed, whereby the application for*

restoring the appeal was dismissed."

5.2 We are informed by the Counsel for the Petitioner that he has obtained instructions from the Petitioner and that the Petitioner agrees that it will not make a claim for interest for the period between the date of filing of the Appeal, i.e., on 28.07.2014/09.09.2014 and the date of the Restoration-Dismissal Order, i.e., on 13.11.2019.

6. We have pursued the record before us. The CESTAT has, while passing both the Final Order and the Restoration-Dismissal Order, not given an opportunity of being heard to the Petitioner. In fact, it is recorded in the Final Order that the notice issued to the Petitioner was returned as "*unserved*."

6.1 The Supreme Court has, in the case of *Balaji Steel Re-Rolling Mills v. Commissioner of C. Ex. & Customs*, reported as *2014 (16) SCC 360*, discussed the import of the provision of Section 35 C (1) of the CE Act.

6.2 Section 35 C (1) of the CE Act is reproduced for ready reference:

> *"**35 C.Orders of Appellate Tribunal**.—*
> *(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary."*

6.3 In the *Balaji Steel Case* (supra), it has been held that in an Appeal filed under Section 35 C (1) of the CE Act, the use of the words "*pass*

such orders thereon as it thinks fit" as appearing in the provision, enjoins the Tribunal to pass an Order on the Appeal confirming, modifying or setting aside the decision or order appealed against or it may remand the matter. It does not give any power to the Tribunal to dismiss the Appeal in default or for want of prosecution if the appellant is not present when the Appeal is taken up for hearing. The relevant extract is below:

> *"10. From a perusal of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or may remand the matter. It does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.*
>
> .....
>
> *13. Applying the principles laid down in the aforesaid case to the facts of the present case, as the two provisions are similar, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing. The High Court also erred in law in upholding the order of the Tribunal.*
>
> *14. We, therefore, set aside the order dated 18-1-2014 passed by the High Court of Judicature of Bombay, Bench at Aurangabad and also the order dated 22-8-2012 passed by the Tribunal and directs the Tribunal to decide the appeal on merits."*
>
> [Emphasis is ours.]

6.4 A Coordinate Bench of this Court while relying on provisions of Section 35 C (1) of the CE Act in *Prakash Fabricators & Galvanizers*

P. Ltd. v. Union of India, reported as *2001 (59) DRJ 296 (DB)*, held as follows:

> *"5. On a bare reading of the provisions and having regard to the scheme of the Act as well as of the Customs Act, there can be no manner of doubt that the appeal filed before the Tribunal has to be disposed of on merits and cannot be dismissed for default of appearance of the appellant. Where there is no appearance on behalf of the appellant, the Tribunal has to decide the appeal ex-parte. The use of the expression "thereon" means that the Tribunal has to pass order on the subject matter of the appeal, and on the issues in controversy. As has been observed by the Gujarat High Court in Viral Laminates' case (supra), the expression "thereon" does not mean that the Tribunal can pass an order of dismissal for default of appearance, since such an order has no nexus with the matter in controversy.*
> *6. .... Accordingly, order dated 03.05.2000 is set aside and the appeal is restored for fresh disposal on merits."*
>
> [Emphasis is ours.]

7. As discussed above, admittedly the CESTAT while passing the Final Order and even the Restoration-Dismissal Order erred in law in not hearing the matter on merits. In the Final Order, the CESTAT dismissed the Appeal for non-prosecution. When the Restoration Application was filed by the Petitioner, it was incumbent on the CESTAT to at least ensure that the Petitioner is served the notice to appear, at the correct address especially in view of the fact that the Petitioner's Appeal has dismissed for non-prosecution. However, it is apparent that there was once again non-application of mind by the learned CESTAT. The notices sent out to the Petitioner were not sent to the address of the Petitioner mentioned in paragraph 4 of its

Restoration Application but instead have been sent to the address as set forth in its Appeal:

M/s. Delhi International Airport P. Ltd.
ESCROW PSF (SC)
Terminal - 1B, Domestic Airport,
New Delhi.

7.1 We also have to keep in mind the Petitioner is not a small individual trader who is operating out of a premises that is not locatable. The Petitioner is the "Delhi International Airport Limited" whose addresses and contact details in addition to being available online, could have easily been ascertained by the CESTAT.

7.2 However, the CESTAT in the Restoration-Dismissal Order records that they are of the opinion that the Appeal should be dismissed, merely for "*want of pursuance on the part of the Petitioner*".

7.3 Clearly, the view of the CESTAT in both the Final Order and the Restoration-Dismissal Order are contrary to law and cannot be sustained.

8. The Petition is therefore, allowed with the following directions:

(i) The Orders dated 16.10.2014 and 13.11.2019 are set aside and the CESTAT is directed to decide the Petitioner's Appeal on merits.

(ii) The Petitioner will, however, not press for interest, as consented, for the period between the date of filing of Appeal, i.e., on 28.07.2014/09.09.2014 and the date of the Restoration-Dismissal Order, i.e., on 13.11.2019.

8.1 Since the Petitioner has not acted with alacrity in pursuing its Appeal, we also deem it appropriate to burden the Petitioner with costs in the

sum of Rs.20,000/- to be paid to the "Bar Council of Delhi- Indigent & Disabled Lawyers Account" within a period of two weeks from the date of receipt of this Judgment.

8.2 The parties will act based on the digitally signed copy of this Judgment.

(TARA VITASTA GANJU)
JUDGE

(RAJIV SHAKDHER)
JUDGE

AUGUST 29, 2022/sk