

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1910 OF 2018**

1. JSW Dharmatar Port Pvt. Ltd.
A Company registered under
The Companies Act, 1956
Having its registered office at,
JSW Centre, Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051
2. Mr. Vikram Agarwal
Authorized Signatory and
an Indian Citizen, having its
place of work at JSW Centre,
Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051 .. Petitioners

v/s.

1. Union of India, through the Secretary
Department of Revenue,
Ministry of Finance
Aykar Bhavan, Churchgate,
Mumbai – 400 020
2. Assistant Commissioner, Division V,
CGST & CX, Plot No.1, Sector-17,
Khandeshwar, Navi Mumbai .. Respondents

**WITH
WRIT PETITION NO. 3388 OF 2018
WITH
WRIT PETITION NO. 3391 OF 2018**

1. JSW Jaigarh Port Ltd.
A Company registered under
The Companies Act, 1956
Having its registered office at,
JSW Centre, Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051
2. Prasad Rane

Authorized Signatory and
an Indian Citizen, having its
place of work at JSW Centre,
Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051

.. Petitioners

v/s.

1. Union of India, through the Secretary
Department of Revenue,
Ministry of Finance
Aykar Bhavan, Churchgate,
Mumbai – 400 020

2. Assistant Commissioner,
Goods and Service Tax, Group V
Ratnagiri Goods and Service Tax Building
Jail Road, Ratnagiri – 415 612

.. Respondents

Mr. Vikram Nankani, Sr. Counsel a/w Mr. Vipin Jain, Ms. Sparsh Prasad
I/b P.K. Shetty for the petitioners

Mr. Pradeep S. Jetly a/w Mr. J.B. Mishra for the respondents

CORAM : AKIL KURESHI &

M.S. SANKLECHA, J.J.

DATED : 14th DECEMBER, 2018.

ORAL JUDGMENT : (Per Akil Kureshi, J.)

1. These petitions arise in com`mon back ground, though some minor facts may differ.

2. Primary facts may be gathered from Writ Petition No. 1910 of 2018. The petitioner is a company registered under the Companies Act and is engaged in the business of developing and operating the Port at Dharamtar. In the course of its activity of developing the port, the

petitioner had availed services of construction from one Paresh Constructions and Foundation Pvt. Ltd. These services fall under the head "Construction of Port Services" which were exempt from service tax by virtue of exemption Notification No.25/2012-ST dated 20.06.2012 and in particular, Entry No.14 therein. The relevant portion of which reads as under :-

*“14. Services by way of construction, erection, commissioning or installation of original works pertaining to –
(a) an airport, port or railways, including monorail and metro.”*

3. By Notification dated 01.03.2015 which came into effect on 01.04.2015, the words "airport" and "port" were omitted from the said Entry No.14 of the Notification dated 20.06.2012. Thus, the exemption of the construction, erection, commission or installation of works pertaining to airports and ports was withdrawn w.e.f. 01.04.2015. Accordingly, the service providers would levy service tax on such services starting from 01.04.2015. The petitioner discharged service tax liability to the tune of Rs.102.53 lakhs for the period between 01.04.2015 to 31.12.2016.

4. Subsequently, Section 103 was inserted in the Finance Act, 1994 by virtue of Section 159 of Finance Act, 2016 w.e.f. 14.05.2016. This

newly inserted Section 103 granted retrospective exemption in respect of services of construction, erection, commissioning or installation of original works pertaining to airports and ports for the period between 01.04.2015 to 29.02.2016. The refund would be granted subject to certain conditions contained in the said section 103, which reads as under :-

“SECTION 103. Special provision for exemption in certain cases relating to construction of airport or port – (1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of services provided by way of construction, erection, commissioning or installation of original works pertaining to an airport or port, under a contract which had been entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date, subject to the condition that Ministry of Civil Aviation or, as the case may be, the Ministry of Shipping in the Government of India certifies that the contract had been entered into before the 1st day of March, 2015.

(2) Refund shall be made of all service tax which has been collected but which would not have been so collected had subsection (1) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President.”

5. We would revert back to the said provision later. For the time being, we may note that the refund of the tax for the past period would be granted, provided application for claim of refund is made within six

months from the date on which the Finance Bill received the assent of the President. It is not in dispute that the bill received the assent of the President on 14.05.2016. We may also note that the exemption would be available as per sub-section (1) of Section 103 subject to the condition that the Ministry of Civil Aviation or the Ministry of Shipping, Government of India, as the case may be, certifies that the contract had been entered into before 01.03.2015.

6. The petitioner applied for such certificate to Ministry of Shipping on 17.10.2016. The Ministry granted the certificate on 31.01.2017. The petitioner applied for refund on 27.06.2017.

7. In so far as the other two petitions namely Writ Petition Nos. 3391 of 2018 and 3388 of 2018 are concerned, the relevant facts till this stage are similar. The only difference is that these petitioners after having applied for necessary certificate to the concerned Ministry on 17.10.2016, were issued the Certificates on 31.01.2017 and they applied for refund on 31.03.2017.

8. All the refund applications of the petitioners came to be dismissed by separate orders which are challenged in the respective

petitions. Since the gist of these orders is similar, we may refer to the one dated 31.01.2018 which is challenged by the petitioner in Writ Petition No.1910 of 2018. In this order, the said authority referred to the provisions contained in Section 103 of the Finance Act, 1994 and held that the refund applications were barred by the period of limitation of six months prescribed therein.

9. In such background, the petitioners have challenged the respective impugned orders rejecting the refund applications. They have also challenged the vires of Section 103 of the Finance Act, 1994.

10. In such background, Counsel for the petitioners raised following contentions :-

(a) In order to claim refund, the petitioners need to produce the certificate from the concerned Ministry. The petitioners cannot be expected to obtain such certificate within a period of six months, provided for filing refund application. Sub-section (3) of Section 103 is, therefore, unconstitutional since it expects the petitioners to fulfill an impossible condition.

(b) Counsel submitted that in the alternative sub-section (3) of Section 103 may be read down so as to permit the petitioners full

period of six months for making the refund applications, ignoring the period consumed by the Ministry in granting the certificate.

(c) Counsel submitted that any other view would amount to curtailing the period of one year, prescribed in Section 11B of the Central Excise Act, which permits filing of refund claims within one year from the date when right to receive refund arise. It was also submitted that sub-section (3) of Section 103 should be seen as an enabling provision, covering a period of refund which may be beyond one year. In the absence of sub-section (3) of Section 103, it may be possible for the Revenue to argue that *qua* such period, the refund applications are barred by limitation.

11. On the other hand, learned Counsel for the Department opposed the petitions contending that Section 103 of the Finance Act, 1994 envisages grant of refund, subject to certain conditions. The period of limitation for making refund application is one of them and the same cannot be ignored. He relied on the decision of the Supreme Court in the case of *Mafatlal Industries Ltd. Vs. UOI, 1997 (89) ELT 247* and submitted that the refund applications which are filed beyond the period of limitation, cannot be entertained.

12. If we analyze Section 103 of the Finance Act, 1994, we may notice that sub-section (1) provides that notwithstanding anything contained in Section 66B, no service tax shall be levied or collected during the period from 01.04.2015 to 29.02.2016 in respect of services provided by way of construction, erection, commissioning or installation of original works pertaining to an airport or port under a contract which has been entered into before 01.03.2015. The condition imposed in sub-section (1) of Section 103 of the Act is that the Ministry of Civil Aviation or as the case may be, Ministry of Shipping, certifies that the contract had been entered into before 01.03.2015. Sub-section (1) of Section 103 thus, while granting exemption from payment of service tax for the past period in respect of contracts which were entered prior to 01.03.2015, made it conditional that the certificate being issued by the concerned Ministry that the contract for such service had been entered before 01.03.2015.

13. Sub-section (2) of Section 103 pertains to refund to be granted of the service tax already paid. It provides that the refund shall be made of all such service tax which has been collected but would be refundable under sub-section (1). Sub-section (3) of Section 103 starts with a non-obstinate clause, which provides that notwithstanding anything

contained in Section 103, an application for claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill 2016 receives the assent of the President.

14. From the perusal of this provision, one thing becomes clear that the respondents cannot link the requirement of refund application being made within the period of limitation envisaged in sub-section (3) of Section 103, with the condition of production of certificate from the Ministry that the contract had been entered into before 01.03.2015. Both these conditions namely; production of certificate as well as making the applications within the period of limitation have to be fulfilled, but the assessee cannot be expected to fulfill the condition of making the refund application within limitation, at the same time, produce a certificate of the Ministry within the time envisaged under the section. In other words, if the concerned Ministry consumes substantial time in issuing certificate, the assessee cannot be non-suited on the ground that the refund application was not filed within the period of limitation. Any other view would expose this provision to the vice of arbitrariness. Thus read, we need not hold the provision unconstitutional. Reading down a statutory provision in order to save it from the vice of unconstitutionality, is a well known interpretative

technique often times employed by the Court. Even otherwise, the interpretation that we have adopted is reasonable. No person can be expected to perform a task beyond his control. On one hand, the statute requires the certificate of the concerned Ministry before exemption from duty can be claimed, at the same time, the statute mandates that the refund application must be made within a certain time frame. We are, therefore, of the opinion that the time consumed by the ministry in processing and granting certificate, as referred to in sub-section (1) of Section 103, must be ignored for the purpose of computing the limitation for making refund application under sub-section (3) of Section 103 of the Finance Act, 1994.

15. This conclusion, however, would not enable any of the petitioners to claim the refund. This is so because as noted, even ignoring the entire period that the Ministry had consumed in granting the certificate, none of the refund applications of the petitioners' would come within the period of six months from 14.05.2015. It was in this context, strenuous efforts were made by the Counsel for the petitioners to persuade us to accept the refund applications beyond six months *inter alia* on the ground that limitation prescribed is not mandatory.

16. Section 103 was introduced in the Finance Act, 1994 with a specific purpose of granting exemption from service tax of certain services with retrospective effect. This covers the period between 01.04.2015 to 29.02.2016. Since this exemption was granted with retrospective effect, the question of refund would arise. It is in this context, sub-section (2) of Section 103 envisages refund of the tax already collected and deposited. Sub-section (3) however, provides a limitation of making refund application and as noted starts with non-obstinate clause. The period of limitation of six months for making the refund application is, therefore, notwithstanding anything contained in the chapter, in which the said provision is contained. Section 103 of the Act is thus a complete mechanism for recognition of exemption, refund of the tax so exempted with retrospective effect and the mechanism for claiming such refund. Such limitation period cannot be interpreted as merely directory, particularly when sub-section (3) in addition to providing the period of limitation, overrides any other provisions of the chapter, which may be to the contrary.

17. In a recent judgment, the Supreme Court in the case of ***ALD Automotive Pvt. Ltd. Vs. Commercial Tax Officer, (2018) 58 GSTR 468*** considered the limitation provision contained in Tamil Nadu Value

Added Tax Act, 2006 for availing input tax credit not claimed in a particular month. It was held that the limitation prescribed is mandatory. It was also argued that a right of refund which is granted by the statute, cannot be defeated taking recourse to the limitation provision for making a claim. Such contention was rejected. The Supreme Court while upholding the decision of Madras High Court held that input tax credit is in nature of benefit or a concession extended to the dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute.

18. In a judgment dated 12/19th September, 2018 in Special Civil Application No.4252 of 2018, in case of ***Willowood Chemicals Pvt. Ltd. Vs. Union of India***, a Division Bench of Gujarat High Court had upheld the limitation provision contained in Rule 117 of Gujarat Service Tax Rules, 2017, prescribing limitation for claiming credit of the past taxes.

19. It can thus be seen that looking to the statutory provisions and the language used therein, Courts have often hold that period of limitation for claiming refund is mandatory. Further, the contention that sub-section (3) of Section 103 retains the period of limitation of one year prescribed in the Excise Act and is aimed to protect such

refund application which cover the period beyond such period, cannot be accepted. As noted, Section 103 contains a self contained code, a complete mechanism for claiming refund. For claiming refund under the said provision, limitation period prescribed else where cannot be adopted ignoring the period prescribed in sub-section (3) of Section 103.

20. In view of the discussion, it is not possible to set aside the impugned orders passed by the concerned authorities, rejecting the petitioners' refund claims. However, the reasons that we have recorded are some what different from those recorded by the said authority.

21. All the petitions are disposed of accordingly.

22. We are informed that to the extent the authority had rejected the refund claims on merits, the petitioners are in appeal before the appellate Tribunal. We make it clear that nothing said in this order will come in the way of petitioners in perusing of their contentions before the said authority.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)