HIGH COURT OF GUJARAT *(D.B.)*

ESSAR BULK TERMINAL SALAYA LTD
V/S
UNION OF INDIA

Date of Decision: 27 June 2018

Citation: 2018 LawSuit(Guj) 509

Hon'ble Judges: M R Shah, A Y Kogje

Case Type: Special Civil Application

Case No: 22097 of 2017

Subject: Constitution, Customs, Excise

Acts Referred:
Constitution Of India Art 19(1)(g), Art 226, Art 14
Central Excise Act, 1944 Sec 11B
Finance Act, 1994 Sec 103, Sec 103(3)

Final Decision: Petition dismissed

Advocates: Mihir Joshi,Kunal Nanavati, Shriraj Khambete, Dimple K Gohil, Nirzar S Desai

Reference Cases:
Cases Referred in (+): **7**

Judgement Text:-

M R Shah, J

[1] By way of this petition under Article 226 of the Constitution of India, the petitioner Essar Bulk Terminal Salaya Ltd. have prayed for the following reliefs.

"(a) That this Hon'ble Court be pleased to declare Section 103(3) of the Finance Act, 1994 as arbitrary and, unconstitutional and ultra vires to Article 14, Article 19(1)(g) of the Constitution of India;

(b) That this Hon'ble Court be pleased to read down Section 103(3) of the Finance Act, 2016 which states:

(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.

To be read as :

(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 certificate from the Ministry of Civil Aviation or, as the case may be, the Ministry of Shipping in the Government of India certifying that the contract had been entered into before the 1st day of March, 2015, is received.

(c) This Hon'ble Court be pleased to issue a Writ of mandamus or writ in the nature of Mandamus or any other appropriate Writ, order or direction under Article 226 of the Constitution of India directing Respondents to compute the six months period within which the refund claim was to be filed in terms of Section 103 of the Finance Act, 1994, from the date the requisite certificate was issued by the Ministry of Shipping.

(d) This Hon'ble Court be pleased to issue a Writ of mandamus or writ in the nature of Mandamus or any other appropriate Writ, order or direction under

Article 226 of the Constitution of India, to exclude the period from the date of application made to the Ministry of Shipping till the date of grant of the requisite certificate by the Ministry of Shipping, while computing the 6 months' period in terms of section 103 of the Finance Act, 1994; Ad-interim relief in terms of prayer (c) above;

(e) This Hon'ble Court be pleased to issue a Writ of Certiorari or writ in the nature of Certiorari or any other appropriate Writ, order or direction under Article 226 of the Constitution of India, quashing and setting aside Order No.A/12660/2017 dated 20.09.2017 passed by Respondent No.3;

(f) This Hon'ble Court be pleased to issue a Writ of mandamus or writ in the nature of Mandamus or any other appropriate Writ, order or direction under Article 226 directing Respondent No.2 to refund the service tax incidence borne by the petitioner, along with appropriate interest thereon"

[2] The facts leading to the present Special Civil Application in nut-shell are as under:

[2.1] That the petitioner is engaged in developing Marine Material Handling Facility / Jetty at Salaya and for the said purpose it had availed services of civil works construction, erection and installation of the Facility from Essar Constructions (India) Ltd..

That the services provided vide the contract dated 13.09.2009 fell under the heading "Construction of Port services", which were exempt from service tax vide mega exemption Notification 25/20102-ST dated 20.06.2012 under S. No.14. That vide Notification No.6/2015-ST dated 01.03.2015, which came into effect from 01.04.2015, the words 'airport' and 'port' were omitted from S. No.14 of Notification 25/2012-ST dated 20.06.2012, thereby withdrawing the exemption to construction, erection, commissioning or installation of original works pertaining to an airport and port w.e.f. 01.04.2015. Therefore, after the exemption was withdrawn, the service provider started levying service tax on the services being rendered by it. During the period from 01.04.2015 till 28.02.2016, the service provider discharged service tax and the tax paid alongwith value of the services was reimbursed by the petitioner

to the service provider.

[2.2] That thereafter section 103 came to be inserted in the Finance Act, 1994 w.e.f. 14.05.2016, by which retrospective exemption by way of refund was granted, in respect of services provided by way of construction, erection, commissioning or installation of original works pertaining to an airport or port, for the period from 01.04.2015 to 29.02.2016, subject to the following conditions:

(i) The said services should have been provided under a contract which had been entered into prior to 01.03.2015, and on which appropriate stamp duty, if applicable had been paid before 01.03.2015

(ii) The Ministry of Civil Aviation / Ministry of Shipping in the Government of India certified that the contract had been entered into prior to 01.03.2015

(iii) An application for the claim of refund of service tax should have been made within six months from the date on which the Finance Bill, 2016 received the assent of the President.

[2.3] That the Finance Bill, 2016 received the assent of the Hon'ble President on 14.05.2016. Accordingly, in view of the amendment, the exemption to construction, erection, commissioning or installation of original works pertaining to an airport and port which had been withdrawn from 01.04.2015 was restored in respect of the period from 01.04.2015 to 29.02.2016. At this stage it is required to be noted that in respect of the period after 01.03.2016, by Notification No. 9/2016-ST dated 01.03.2016, exemption was restored in respect of the services of construction of airport by insertion of section 14A in Notification 25/2012-ST dated 20.06.2012.

[2.4] It is the case on behalf of the petitioner that on 10.03.2016, it applied to the Ministry of Shipping for grant of the necessary certificate (in terms of requirements of section 103). It is the case on behalf of the petitioner that thereafter the Ministry of Shipping issued the required certificate to the

petitioner vide communication dated 22.11.2016.

[2.5] That thereafter the petitioner submitted the claim for refund of Rs.12,67,61,271/- on 28.11.2016 with the respondent No.2. That a show-cause notice came to be issued upon the petitioner dated 07.12.2016 by which the petitioner was called upon to show cause why the refund claim filed by them should not be rejected.

[2.6] That the petitioner filed a reply to the show-cause notice under cover of its letter dated 09.12.2016 and separately the documents asked for in the show cause notice under the cover of their letter dated 12.12.2016.

[2.7] That thereafter the respondent No.2 vide order dated 19.12.2016 rejected the refund claim mainly on the ground that in terms of section 103(3) of the Finance Act, 1994, the claim for refund had to be filed within six months from the date when the President gives assent to the Finance Act, 2016 and since the refund claim was filed after the said stipulated period the same was not maintainable.

[2.8] Feeling aggrieved and dissatisfied with the OIO dated 19.12.2016 rejecting the refund claim, the petitioner preferred appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide order in Appeal dated 13.01.2017 allowed the said refund claim, setting aside the OIO.

[2.9] Feeling aggrieved and dissatisfied with the order dated 13.01.2017 passed in OIA by the Commissioner (Appeals), Revenue preferred appeal before the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT"). That by impugned order dated 21.09.2017 the learned CESTAT has allowed the said appeal and has quashed and set aside the OIA and consequently restored the OIO rejecting the refund claim.

[2.10] Feeling aggrieved and dissatisfied with the impugned order dated 21.09.2017 passed by the learned CESTAT confirming the OIO rejecting the refund claim, the petitioners have preferred the present Special Civil

Application under Article 226 of the Constitution of India.

[3] Shri Mihir Joshi, learned Senior Advocate appearing on behalf of the petitioners has vehemently submitted that in the facts and circumstances of the case the learned Tribunal has materially erred in allowing the appeal and quashing and setting aside the OIA and consequently confirming the OIO rejecting the refund claim.

[3.1] It is vehemently submitted by Shri Joshi, learned Counsel appearing on behalf of the petitioners that the learned Tribunal has not properly appreciated the fact that infact the petitioner submitted the application for refund within a period of six months from the date of receipt of required certificate from Ministry of Shipping, which the petitioners received by communication dated 22.11.2016. It is submitted that immediately on receipt of the required certificate from the Ministry of Shipping, the petitioners submitted the claim for refund on 28.11.2016. It is submitted that therefore the claim for refund cannot be rejected on the ground that same was filed beyond the period prescribed under Section 103 of the Finance Act, 1994.

[3.2] It is further submitted by Shri Joshi, learned Counsel appearing on behalf of the petitioners that the learned Tribunal has not properly appreciated, which as such was appreciated by the Commissioner (Appeals) that in absence of any required certificate from the Ministry of Shipping, the petitioner could not have submitted the application for refund. It is submitted that therefore when the petitioner filed the claim for refund on 28.11.2016 after receipt of the required certificate from the Ministry of Shipping dated 22.11.2016, the claim for refund could not have been rejected on the ground that the same was not filed within the period of limitation prescribed under Section 103 of the Finance Act, 1994.

[3.3] It is further submitted by Shri Joshi, learned Counsel appearing on behalf of the petitioners that refund allowable under Section 103 of the Finance Act, 1994 was subject to three conditions and one of the pre-requisite was that the procurement of a certificate from the Ministry of Shipping / Ministry of Civil Aviation. It is submitted that on a plain reading of section 103 in its entirety, it comes out that an applicant was precluded from filing a refund claim till such time that it was able to obtain a certificate from

the Ministry, certifying that the contract in terms of which the services were provided was entered into prior to 01.03.2015. It is submitted that the section do not provide any time limit for the Ministry to issue the certificate once an application for the same was made. It is submitted that in absence of such a time limit for issuing the certificate, the applicant was under an unreasonable restriction, as provided in sub-section (3) of section 103, to mandatorily file the application within six months from the date when the Finance Bill, 2016 received the assent of Hon'ble The President, especially since it was not within the petitioner's control to obtain the requisite certificates from the Ministry within the stipulated period. It is submitted that therefore section 103(3) of the Finance Act, 1994 places an unreasonable restriction on the applicant and the time period of six months, ought to start running from the date of receipt of certificates from the Ministry of Shipping or Ministry of Civil Aviation and from the date on which the Finance Bill, 2016 received the assent of Hon'ble The President.

[3.4] It is further submitted by Shri Joshi, learned Counsel appearing on behalf of the petitioners that even the stipulations under Section 103(3) cannot be regarded as mandatory in nature. It is submitted that section 103 was introduced as a beneficial provision to enable the assessees to claim refund of service tax paid. It is submitted that object of the clause as provided in section 103(3) is to overcome the hurdle of litigation under Section 11B of the Central Excise Act, 1944 and not to create one. It is submitted that therefore the provisions of sub-section (3) of Section 103 cannot be regarded as mandatory.

[3.5] Shri Joshi, learned Counsel appearing on behalf of the petitioners has further submitted that even otherwise the petitioner cannot be made to suffer on account of the delay on the part of the authority / Ministry in issuing the required certificate. It is submitted that when the Ministry of Finance had subjected the refund to certificate being issued by the Ministry of Shipping, it was obligatory on the part of the Ministry to have issued the said certificate immediately upon an application for the same being made. It is submitted that it is settled law that an assessee cannot be made to suffer for the fault on the part of the departmental authorities. In support of his above

submissions, Shri Joshi, learned Counsel appearing on behalf of the petitioners has heavily relied upon the decision of the Division Bench of this Court in the case of Cosmonaut Chemicals vs. Union of India, 2009 233 ELT 46 (Gujarat). It is further submitted by Shri Joshi, learned Counsel appearing on behalf of the petitioners that even otherwise sub-section (3) of Section 103 of the Finance Act, 1994 is unreasonable and/or would cause great hardship to the assessee. It is submitted that under Section 11B of the Central Excise Act, 1944 the time provided for claiming the refund is one year. It is submitted that however the time limit provided under sub-section (3) of section 103 is six months. It is submitted that section 83 of the Finance Act provides that certain provision of Central Excise Act, 1944 would apply in relation to service tax as well. It is submitted that under the said Act, section 11B of the Central Excise Act, which provides for the procedure for claiming refund is made applicable to service tax as well. It is submitted that therefore the time limit provided under sub-section (3) of Section 103 is prescribed as limitation for six months for the purpose of claiming refund of service tax creates an artificial distinction between claim for refund of service tax on port construction as opposed to other refund claims without there being any justification for the same. It is submitted that as such artificial distinction sought to be created by sub-section (3) of section 103 is discriminatory in nature and therefore, violative of Article 14 of the Constitution.

[3.6] It is further submitted by Shri Joshi, learned Counsel appearing on behalf of the petitioners that making an application claiming the refund can be said to be procedural and therefore, such procedural provision cannot defeat the substantive right of claiming the refund when otherwise the assessee is entitled to the refund.

Making above submissions and relying upon above decisions, it is requested to allow the present petition and grant the reliefs as sought.

[4] Present petition is vehemently opposed by Shri Nirzar Desai, learned Counsel appearing on behalf of the Department. He has heavily relied upon the affidavit in reply filed on behalf of the Department. It is vehemently submitted by Shri Desai, learned Counsel appearing on behalf of the Department that in the facts and circumstances of

the case more particularly when the application claiming the refund submitted by the petitioner was beyond the period of limitation provided under sub-section (3) of section 103 of the Finance Act, 1994, the same is rightly rejected by the learned Tribunal. Shri Desai, learned Counsel appearing on behalf of the Department has vehemently submitted that subsection (3) of section 103 of the Finance Act, 1994 cannot be said to be in anyway unreasonable and/or harsh and/or discriminatory as contended on behalf of the petitioner. It is submitted that as such during the period between 01.04.2015 till 28.02.2016 the service provided was subjected to the service tax as the exemption was withdrawn for the aforesaid period. However, thereafter, the policy decision was taken in form of section 103 of the Finance Act, 1994 by which the service in question was exempted retrospectively which otherwise the assessee could not have prayed as a matter of right. It is submitted that however the said policy decision and the refund provided under section 103 of the Finance Act, 1994 was subject to fulfillment of condition that the application for refund must be made within a period of six months from the date on which Hon'ble The President gives the assent. It is submitted that therefore the right of refund conferred in favour of the petitioner / assessee was conditional one. It is submitted that as a matter of right the assessee neither could have prayed for exemption retrospectively nor the assessee could have claimed / prayed the refund as a matter of right. It is submitted that therefore when the refund was allowable on fulfilling certain conditions, it was a conditional right more particularly conditional right of refund and therefore, the assessee is required to fulfill and/or comply with the same strictly. It is submitted that it is a cardinal principle of law as propounded by the Hon'ble Supreme Court and this Court in catena of decisions that taxing statute must be construed strictly. Therefore, relying upon the decisions of the Hon'ble Supreme Court in the case of Shri Bakul Oil Industries and Another vs. State of Gujarat and Another, 1987 27 ELT 572 (S.C.); Kasinka Trading and Another vs. Union of India and Another, 1995 1 SCC 274 and in the case of Indian Oil Corporation Limited & Anr. vs. Kerala State Road Trading Corporation & Ors.,2017 SCCOnLine(SC) 1393 rendered in Civil Appeal No.18917/2017, it is submitted that sub-section (3) of Section 103 cannot be said to be discriminatory and/or unreasonable and/or suffering from vice of unreasonableness and/or harshness as sought to be contended on behalf of the petitioners.

[4.1] Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Cosmonaut Chemicals heavily relied upon by the learned Counsel appearing for the petitioners is concerned, it is vehemently submitted by Shri Desai, learned Counsel appearing on behalf of the Department that considering sub-section (3) of Section 103 of the

Finance Act, 1994, the said decision shall not be applicable to the facts of the case on hand. It is submitted that the said decision was on constitution of section 11B of the Central Excise Act, 1944 which is not pari materia to sub-section (3) of Section 103 of the Finance Act, 1994. It is submitted that the refund claim by the petitioner in the present case is in view of the specific provision viz. section 103 of the Finance Act, 1994 and therefore, the petitioner is bound to comply with and/or satisfy the compliance of sub-section (3) of section 103 of the Finance Act, 1994 and was bound to make an application within six months from the date on which Hon'ble The President gives assent. It is submitted that submitting an application for refund was not depending upon the requisite certificate from the Ministry of Shipping and Ministry of Civil Aviation. It is submitted that there is a distinction between the entitlement of the refund and submitting the application for refund. It is submitted that like the provision under Section 11B of the Central Excise Act, 1944 that the application for refund shall be accompanied by such documentary evidence, there is no provision in section 103 of the Finance Act, 1994 that the refund claimed must be accompanied with the certificate issued by the Ministry. It is submitted that therefore the decision of the Division Bench of this Court in the case of Cosmonaut Chemicals shall not be applicable with respect to the refund claim under Section 103 of the Finance Act, 1994.

[4.2] It is further submitted by Shri Desai, learned Counsel appearing on behalf of the Department that even otherwise on facts also the learned Tribunal has not committed any error in allowing the appeal and confirming the OIO rejecting the refund claim. It is submitted that the petitioner submitted only certain documents alongwith the application dated 10.03.2016 and certain documents were not submitted. It is submitted that however thereafter the petitioner filed a refund claim claiming the refund of service tax under Notification 09/2016-ST dated 01.03.2016 vide its application dated 28.11.2016 which was hit by the bar of limitation provided under the Statute.

[4.3] It is further submitted by Shri Desai, learned Counsel appearing on behalf of the Department that in the present case even the petitioner submitted the application to the concerned Ministry for issuance of the

required certificate only on 15.11.2016 i.e. after the prescribed period under sub-section (3) of Section 103 of the Finance Act, 1994 was over. It is submitted that the petitioner submitted an application on 15.11.2016 and the same was promptly considered and replied by the Ministry immediately vide communication dated 22.11.2016. It is submitted that therefore it cannot be said that there was any delay on the part of the Ministry in not issuing the required certificate as contended on behalf of the petitioner. Making above submissions and relying upon above decisions, it is requested to dismiss the present petition.

[5] In rejoinder Shri Joshi, learned Counsel appearing on behalf of the petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of Excise Commissioner and Others vs. Ajith Kumar and Another, 2008 5 SCC 495 and it is submitted that as observed by the Hon'ble Supreme Court in the said decision the procedural provisions are normally directory and not imperative. Now, so far as the submission on behalf of the Department that at the time when the first application was made, along with the same the required documents were not produced, it is submitted that on the aforesaid ground the refund claim has not been rejected and even the same has also not been considered by the learned Tribunal.

Making above submissions it is requested to allow the present petition.

[6] Heard learned Counsel appearing on behalf of the respective parties at length.

At the outset it is required to be noted that as such the petitioner has mainly prayed to quash and set aside the impugned order passed by the learned CESTAT allowing the appeal and quashing and setting aside the Order in Appeal and confirming the order passed in OIO rejecting the refund claim of the petitioner. The main ground on which the first Authority as well as the learned CESTAT has rejected the claim of the petitioner is that the application submitted by the petitioner for refund of claim was beyond the period of six months prescribed in sub-section (3) of Section 103 of the Finance Act, 1994. Therefore, the petitioner has prayed for other reliefs viz. (i) to declare section 103(3) of the Finance Act, 1994 as arbitrary, unconstitutional and ultra vires to Article 14 of the Constitution of India; (ii) to read down sub-section (3) of Section 103 of the Finance Act, 2016 as

mentioned in para 30(b) of the petition; (iii) to direct the respondents to compute six months' period within which the refund claim was to be filed in terms of section 103 of the Finance Act, 1994, from the date the requisite certificate was issued by the Ministry of Shipping; (iv) directing the respondents to exclude the period from the date of application made to the Ministry of Shipping till the date of grant of requisite certificate by the Ministry of Shipping, while computing six months' period in terms of section 103 of the Finance Act, 1994.

[6.1] While considering the aforesaid reliefs and the issue whether in the facts and circumstances of the case the learned Tribunal is justified in rejecting the refund claim of the petitioner under Section 103 of the Finance Act, 1994 on the ground that the application submitted by the petitioner claiming the refund was barred by limitation as provided under sub-section (3) of Section 103 of the Finance Act, 1994. Section 103 of the Finance Act, 1994 is required to be referred to and reproduced which is 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 such 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."

[6.2] It is required to be noted that as such the service in question was subjected to service tax for the period between 01.04.2015 to 29.02.2016 and therefore, the service tax was allowable to be paid during the aforesaid period and infact the petitioner paid the same which was reimbursed by the petitioner to the service provider. However, by Finance Bill, 2016, section 103 came to be inserted in Finance Act, 2014 and the exemption which was available prior to 01.04.2015 which as such was withdrawn between 01.04.2015 to 29.02.2016 came to be restored retrospectively. However, the very section 103 of the Finance Act, 2014 provided that the assessee shall be entitled to the relief of all such service tax which has been collected but which would not have been so collected on subsection (1) within force at all material times and it further provided that notwithstanding anything contained in the said Chapter, 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 Hon'ble The President. It is required to be noted that the assent of Hon'ble The President was received on 14.05.2016 and therefore, the application for claim of refund of the service tax was required to be made within a period of six months from 14.05.2016. In the present case admittedly the petitioner submitted the application for claim of refund of the service tax on 28.11.2016 i.e. much after the completion of six months' period from 14.05.2016. Thus, from the aforesaid and considering section 103 of the Finance Act, 2014, it can be seen that a policy decision was taken by the Government to restore exemption retrospectively and allowing the refund of the service tax paid during the period between 01.04.2015 to 29.02.2016, provided the refund application is made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of Hon'ble The President. Therefore, a conditional exemption and conditional refund was provided by policy decision contained in section 103 of the Finance Act, 2014. It cannot be disputed that but for section 103 of the Finance Act, 2014 and the exemption being granted retrospectively, the petitioner could not have as a matter of right claimed such exemption and/or even consequently the refund of the tax

paid. As such the Union Government was not under any obligation to provide the exemption retrospectively and that too with refund of the tax already paid. By way of policy decision which was culminated into section 103 of the Finance Act, 2014, such an exemption was provided retrospectively and the refund was provided, however subject to sub-section (3) of section 103 of the Finance Act, 2014.

[6.3] As observed and held by the Hon'ble Supreme Court in the case of Indian Oil Corporation Limited , such policy decisions are not amenable to judicial review. In paras 16 and 17 the Hon'ble Supreme Court has observed and held as under:

"16. Firstly, coming to the issue of the policy framed by the Government of India; the grant of subsidy is a matter of privilege, to be extended by the Government. It cannot be claimed as of right. No writ lies for extending or continuing the benefit of privilege in the form of concession. Subsidy is the matter of fiscal policy. Such privilege can be withdrawn at any time is the settled proposition of law. Thus, it was open to the Government of India to take a decision to withdraw the subsidy enjoyed by the bulk consumers; and, it was a decision based upon the aforestated rationale to direct funds for social welfare scheme for common man and that by grant of subsidy, the OMCs had suffered heavy losses, and had borrowed the excessive money to the extent indicated in the aforesaid paragraphs. Thus, it was decided by the Government of India, not to the extend subsidy to bulk consumers; same could not be said to be an arbitrary decision, discriminatory or in violation of the principles contained in Article 14 of the Constitution of India.

17. Such policy decisions are not amenable to judicial review. In State of Rajasthan v. J.K. Udaipur Udyog Ltd., 2004 7 SCC 673, this Court has observed that exemption is a privilege. In fiscal matters the concession granted by the State Government to the beneficiaries cannot confer upon them legally enforceable right against the Government to grant a concession, except to enjoy the benefits of the concession during the period of its grant. Enjoyment is defeasible one and can be taken away in exercise of very power under which such exemption was granted. This Court

observed :

"25. An exemption is by definition a freedom from an obligation which the exemptee is otherwise liable to discharge. It is a privilege granting an advantage not available to others. An exemption granted under a statutory provision in a fiscal statute has been held to be a concession granted by the State Government so that the beneficiaries of such concession are not required to pay the tax or duty they are otherwise liable to pay under such statute. The recipient of a concession has no legally enforceable right against the Government to grant of a concession except to enjoy the benefits of the concession during the period of its grant. This right to enjoy is a defeasible one in the sense that it may be taken away in exercise of the very power under which the exemption was granted. (See Shri Bakul Oil Industries v. State of Gujarat, 1987 1 SCC 31, Kasinka Trading v. Union of India, 1995 1 SCC 274 and Shrijee Sales Corporation v. Union of India, 1997 3 SCC 398)."

[6.4] In the case of Shri Bakul Oil Industries and Another , the Hon'ble Supreme Court has observed and held that the State Government is not under an obligation to grant exemption. It is further observed that exemption granted by the Government is only a concession and can be withdrawn at any time. It is true that the aforesaid two decisions are with respect to revocation and/or withdrawal of exemption granted. However, the same analogy can be applied to the exemption granted retrospectively but with a right to claim the refund already paid subject to certain terms and conditions like in the present case sub-section (3) of section 103. Being a policy decision it is always open to impose certain conditions. Under the circumstances such a provision more particularly provision like sub-section (3) of section 103 of the Finance Act cannot be the subject matter of judicial review and the same cannot be declared as arbitrary, unconstitutional and/or ultra vires to Article 14 of the Constitution. Section 103 is a statutory provision and section 103 is inserted which can be said to be a policy decision. It is not the case on behalf of the petitioner that section 103 is beyond the competence of the Union Government. Nothing has been pointed out how the said provision can be said to be arbitrary and/or unconstitutional. In any case being a policy decision culminated into

statutory provision the same is not subject to judicial review and therefore, the prayer of the petitioner to declare section 103(3) of the Finance Act, 1994 as unconstitutional deserves rejection.

[6.5] Now, so far as the prayer in paragraph 30(b) to read down sub-section (3) of section 103 of the Finance Act, 2016 as mentioned in the said paragraph 30(b) is concerned, the same also deserves rejection. The question of reading down will arise only if there is an ambiguity in section. Section 103 is very clear and the intention of the legislature is very clear. Therefore, there is no question of reading down the same as submitted on behalf of the petitioners.

[6.6] Even the prayer of the petitioners to direct the respondents to compute six months' period within which the refund claim was to be filed in terms of section 103 of the Finance Act, 1994, from the date the requisite certificate was issued by Ministry of Shipping also cannot be granted in exercise of powers under Article 226 of the Constitution of India. No directions can be issued in exercise of powers under Article 226 which shall be contrary to the statutory provision. Grant of such relief in exercise of powers under Article 226 of the Constitution of India would be contrary to the statutory provision.

[6.7] Now, so far as the main submission on behalf of the petitioner that as the Ministry of Shipping took considerably long time in issuing the required certificate but for such certificate the refund was not allowable and the said certificate was received only on 22.11.2016 and immediately on 28.11.2016 the refund claim was submitted and therefore, for the delay on the part of the Ministry the petitioner may not be made to suffer and the submission on behalf of the petitioner that earlier the petitioner did not make an application and/or could not have made the application without the requisite certificate from the Ministry of Shipping and for that the reliance placed upon the decision of the Division Bench of this Court in the case of Cosmonaut Chemicals is concerned, the aforesaid submission seems to be attractive but has no substance.

At the outset it is required to be noted that there is a distinction between

making an application for refund and allowability of the claim. Section 103 of the Finance Act, 2014 is very clear. It does not provide that application for refund is required to be accompanied with the certificate issued by the Ministry of Shipping. Therefore, making / submitting the application for refund was not dependent upon the certificate issued by the Ministry of Shipping. Considering sub-section (3) of Section 103 of the Finance Act, 2014, the assessee was required to make an application for refund within a period of six months from the date on which the Finance Bill, 2016 receives the assent of Hon'ble The President. The petitioner was required to make an application for refund within six months from 16.05.2016 i.e. the date on which Hon'ble The President gave assent to the Finance Bill, 2016. While submitting the application for refund the petitioner could have stated that the certificate from the Ministry of Shipping is already applied but the same is awaited. That thereafter on receipt of the certificate from the Ministry of Shipping the application could have been processed. Therefore, when the petitioner made the application for refund admittedly on 28.11.2016 the same was beyond the period of six months from the date on which Hon'ble The President gave assent to Finance Bill, 2016. Therefore, the refund application submitted by the petitioner was liable to be rejected on non-compliance of sub-section (3) of Section 103 of the Finance Act, 2014 and the same is rightly rejected.

[6.8] Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Cosmonaut Chemicals is concerned, the same shall not be applicable to the facts of the case on hand. In the case before the Division Bench, the Division Bench was considering the refund application submitted under Section 11B of the Central Excise Act, 1944, in which it is not provided that the application for refund shall be made before the expiry of one year (from the relevant date) and in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence. In subsection (3) of Section 103 the words "the refund application shall be accompanied by the certificate issued by the Ministry of Shipping" is missing. Therefore, the aforesaid decision shall not be applicable with respect to the refund application claiming the refund under Section 103 of the Finance Act, 2014. Section 11B of the Central Excise Act, 1944 as such claiming the refund shall not be applicable in stricto senso as

the petitioner is claiming the refund under Section 103 of the Finance Act, 2014 and the right to claim the refund is accrued under Section 103 of the Finance Act, 2014. Therefore, the conditions prescribed in section 103 of the Finance Act, 2014 shall be applicable more particularly sub-section (3) of Section 103 of the Finance Act, 2014. But for section 103 of the Finance Act, 2014, the petitioner could not have claimed the refund and therefore, the petitioner has to comply with all the conditions mentioned in section 103 of the Finance Act, 2014. The time limit is provided under the Statute. Looking to the specific provision of section 103 of the Finance Act, 2014 more particularly the specific provision contained in sub-section (3) of section 103, even there is no scope for reading down the said provision as suggested in para 30(b) of the petition reproduced herein above. For the same reason even the decision of the Hon'ble Supreme Court in the case of Ajith Kumar relied upon by the learned Counsel appearing on behalf of the petitioner shall not be applicable to the facts of the case on hand. At this stage it is required to be noted that in the present case the petitioner submitted the application to the Ministry of Shipping for issuance of the necessary certificate in accordance with the Notification No.9/2016-ST dated 01.03.2016 for the purpose of exemption of service tax on port project sanctioned prior to 01.03.2015 only on 15.11.2016 (Page 213 of the compilation).

At this stage it is required to be noted that even the petitioner asked the Gujarat Maritime Board to issue the certificate as required which thereafter was required to be sent to the Ministry of Shipping for its verification and issuance of the required certificate only on 13.09.2016 (Page 211 of the compilation) and even the Gujarat Maritime Board issued the required certificate on 29.10.2016 which thereafter was sent to the Ministry of Shipping for issuance of the required certificate on 15.11.2016.

[6.9] It is also required to be noted that the application dated 15.11.2016 by the petitioner seems to have been received by the Ministry on 22.11.2016 and thereafter immediately the Ministry of Shipping had issued the required certificate on 22.11.2016. Therefore, it cannot be said that there was any delay on the part of the Ministry of Shipping in issuing the required certificate. Under the circumstances also, the aforesaid decision of the

Hon'ble Supreme Court in the case of Ajith Kumar shall not be applicable to the facts of the case on hand.

[6.10] Now, so far as the submission on behalf of the petitioner that sub-section (3) of Section 103 of the Finance Act, 2014 is discriminatory and violative of Article 14 of the Constitution of India on the ground that the period provided under Section 11B of the Central Excise Act, 1944 shall be one year and the limitation prescribed under sub-section (3) of Section 103 of the Finance Act, 2014 is six months is concerned, the aforesaid has no substance. The petitioner is claiming the refund under Section 103 of the Finance Act, 2014. The right accrued in favour of the petitioner to claim the refund is under Section 103 of the Finance Act, 2014 and therefore, the limitation prescribed under Section 103 of the Finance Act, 2014 shall be applicable. The substantive right to claim the refund in favour of the petitioner would be under Section 103 of the Finance Act, 2014. Therefore, sub-section (3) of Section 103 of the Finance Act, 2014 cannot be said to be discriminatory and/or violative of Article 14 of the Constitution of India as contended on behalf of the petitioner.

[7] In view of the above and for the reasons stated above, the refund application submitted by the petitioner is rightly rejected as the same was beyond the period of limitation prescribed under subsection (3) of Section 103 of the Finance Act, 2014. Under the circumstances, the challenge to the impugned order passed by the learned CESTAT fails and the present petition deserves to be dismissed and is, accordingly, dismissed. Notice discharged.