**(2011) 09 BOM CK 0189**

**In the Bombay High Court**

**Case No :** Central Excise Appeal (L) No. 61 of 2011

Cummins India Ltd. APPELLANT

Vs

Commissioner of Central Excise, Pune RESPONDENT

**Date of Decision :** 14-09-2011

**Acts Referred:**
CENVAT (Credit) Rules, 2004 — Rule 6, 6(1), 6(2), 6(3), 6(4)

**Citation :** (2012) 279 ELT 5

**Hon'ble Judges :** D.Y. Chandrachud, J;A.A. Sayed, J

**Bench :** Division Bench

**Advocate :** Prakash Shah with Jus Snghavi instructed by PDS Legal, for the Appellant; Jitendra B. Mishra, for the Respondent

## Judgement

1. The present appeal arises out of an order of the CESTAT dated 20 May 2011 on an application for waiver of pre-deposit. The Tribunal by its order has directed that a prima facie case for total waiver was not made out and accordingly, the Appellant was called upon to deposit 60% of the amount demanded with interest within a period of ten weeks. On the question as to whether a prima facie case was made out, the Tribunal adverted to the provisions of Rule 6(6)(i) of the Cenvat Credit Rules, 2004. The question was as to whether the Appellant had failed to reverse an amount equivalent to ten percent of the value of the goods from the Cenvat Credit account in relation to goods cleared to SEZ Developers.

2. Rule 6(6)(i) as it stood at the relevant time stipulated that the provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are : "(1) cleared to a unit in a special economic zone." Subsequently by a notification dated 31 December 2008 sub-clause (i) of Rule 6(6) was substituted in the following terms :

cleared to a unit in a special economic zone or to a developer of a special economic zone for their authorized operations, or.

3. The issue before the Tribunal was whether prima facie the aforesaid

amendment was clarificatory or whether it brought about a substantive change and, therefore, would be prospective in nature. The Tribunal in its impugned order has observed that prima facie the amendment by the notification dated 31 December 2008 could not be retrospective since it was not clarificatory.

4. The attention of the Tribunal was drawn to various orders passed on applications for stay/waiver. The Tribunal dealt with the submission based on the stay orders of its Coordinate Bench as follows :

As far as the order in MTC Rolling Mills Pvt. Ltd. is concerned, the same was squarely based on Sujana Metal Products Ltd. case and Dalmia Cements (Bharat) Ltd. case which were undisputedly stay orders. The order did not discuss the provision of law and being a stay order cannot be said to lay down a binding precedent. Similarly, the order in Bhagwati Steel Cast Ltd. case was based on the order in Surya Roshni Ltd. case and hence is of no help.

5. Now the submission which has been urged is that at the hearing of the application, the attention of the Tribunal was drawn to the order of the Tribunal in the case of MTC Rolling Mills Pvt. Ltd. which in turn, as the Tribunal noted, was based on another order in the case of 2011 (273) ELT 112 . Counsel submitted that the Tribunal ought not to have ignored its own interim order in similar cases. But more fundamentally, Counsel submitted that after the impugned decision was rendered by the Tribunal on 20 May 2011, the Bangalore Bench of the Tribunal decided the case of 2011 (273) ELT 112 finally on 5 September 2011 and has taken the view therein that the amendment by the notification dated 31 December 2008 is clarificatory and hence retrospective in nature.

6. In the decision in the case of Sujana Metal Products Pvt. Ltd. (supra), the following conclusion has been drawn by the Tribunal:

In the present case, taking into account the provisions of the erstwhile SEZ in chapter XA of the Customs Act, the provisions in the SEZ Act and the clarification of the Board (except the clarification dated 7-1-2009), it is apparent that the intention was to make available the benefits to SEZ developer for the authorized operations in addition to SEZ units and therefore the amendment No. 50/2008-C.E. (NT.), dated 31-12-2008 Cenvat Credit Rules, 2004 is applicable retrospectively. However, as the amendment by No. 50/2008 is only to Rule 6 of Cenvat Credit Rules, 2004, the question of extending the benefit of amendment to Cenvat Credit Rules, 2002 does not arise.

7. At this stage, particularly when the Court is dealing with an appeal arising out of an application for waiver of pre-deposit, we are not inclined to render a final opinion of this Court on whether as a matter of law the amendment is clarificatory or otherwise. We are, however, of the view that the ends of justice would require an order of remand for a fresh determination of the Tribunal. Admittedly, even before the Tribunal, when the impugned order was delivered, the Appellant had relied upon an interim order of the Tribunal in Sujana Metal Products'' case. The Bangalore Bench of the Tribunal has now taken a final view

 

in Sujana Metal Products. Hence, we are of the view that the ends of justice would warrant that the Tribunal should reconsider the application for waiver having regard to the subsequent development. Hence, without expressing any opinion as to whether a prima facie case has been made out for the grant of a waiver of pre-deposit, we set aside the impugned order of the Tribunal dated 20 May 2011 and restore Central Excise Application No. E/Stay/1004/10 to the file of the Tribunal for a fresh decision. In view of the order of remand, we do not consider it necessary to decide the question of law raised in the appeal by the Appellant. The appeal shall accordingly stand disposed of in the aforesaid terms. There shall be no order as to costs.

 