<u>The mischief"</u>

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In 1950s, Prostitutes used to loiter or solicit in the street for the purpose of prostitution by inviting the men. To avoid this mischief of harassment, Street Offenders Act, 1959 was enacted. As per this Act, it was crime for prostitutes to "loiter or solicit in the street for the purposes of prostitution". To counter this enactment, the prostitutes found an ingenuous method and started soliciting from their balconies and windows and claimed immunity on the ground that they are not soliciting in "streets". The Judges applied the mischief rule in the case of ***Smith v Hughes [1960] 2 All E.R. 859***, and came to the conclusion that the prostitutes were guilty as ***the intention of the Act*** was to cover the mischief of harassment from prostitutes.

2.0. Now, we are concerned with the mischief that may be played by the officers of the Central Excise Department by conveniently forgetting the intention of the legislation instead of suppressing the mischief. We wish to elaborate the said situation in the succeeding paragraphs.

3.0. As per Cenvat Credit Rules, 2004, one can take cenvat credit on the capital goods. Due to many reasons, such capital goods could have been removed either without using the same or by using for a considerable period of time. Under such circumstances, how much credit should be reversed, either full credit or proportionate credit?

3.1. Initially, the requirement was to pay an amount ***equal*** to the credit availed thereon. Subsequently, the rules were amended to the effect that ***full credit*** needs to be reversed in case of removal without usage and in case of removal after usage, ***rebate at the rate of 2.5%*** per quarter on the total credit

taken, has been allowed. From 01.04.2000, the above concept has changed to payment of duty at the appropriate rate on the transaction value of the capital goods at the time and place of removal. This is also an indirect concept of allowing the depreciation of the capital goods. Since, 1.3.2003, the said concept has again changed to reversal of credit for as "such removals". The law is silent about the removals after usage. Since, 13.11.2007, the law has again changed to the effect that ***full credit*** needs to be reversed in case of removal without usage and in case of removal after usage, ***rebate at the rate of 2.5%*** per quarter on the total credit taken, has been allowed.

3.2. What is the position between 1.3.2003 to 13.11.2007? Whether to reverse the full credit or proportionate credit or no credit, when the capital goods are removed after a considerable period of usage since the rules cover only "as such removals"?

3.3. The Hon'ble Tribunal, Bangalore in the case of ***CCE versus M/s Madura Coates Limited, reported in 2005 (190) ELT 450*** held that removal of capital goods after a considerable period of usage can not be equated with "as such removals" and no credit needs to be reversed. However, this was referred to the larger bench. The Hon'ble Larger bench in the case of ***M/s Modernova Plastyles (P) Ltd, reported in 2008-TIOL-1771-CESTAT-MUM-LB*** has overruled the decision in Madura Coats and held that even the removal of used capital goods shall be removal of capital goods "as such" and credit has to be reversed.

3.4. Based on the decision of the Hon'ble Larger Bench, the Officers of the Department may apply the "mischief of levy" by issuing demands for the reversal of full credit on those capital goods removed after a considerable period of time for the period from 1.3.2003 to 12.11.2007. How the said mischief has to

be suppressed and the remedy has to be advanced? The answer is in the succeeding paragraphs.

4.0. Initially, the Rules are very clear; subsequently, it is ambiguous; finally, the said ambiguity was cured by the legislation. During, the period of ambiguity, the above said mischief has to be suppressed and the remedy has to be advanced. To do so, the principles of "Interpretation of Statutes" have to be applied. There are primary rules of interpretation, secondary rules of interpretation, internal aids of the statute and the external aids of the statute. The primary rules of interpretation are the Literal Construction and Golden Rule of Interpretation. Both these rules can not be applied here since there is patent ambiguity and plain reading of the statute will not be helpful to come to a conclusion. Therefore, reference has to be made to the secondary rules of interpretation. To suppress the said mischief, the Mischief Rule of Interpretation, one of the secondary rules of interpretation, has to be applied.

5.0. ***The Mischief Rule:*** This Mischief Rules says that Judges must go deep to see the intention of the legislation to find out what is the mischief sought to be remedied by the legislature. For this purpose, the court may take the assistance of advocates, counsels, internal aids of the statute and external aids of the statute. This rule requires the court to look to what the law was before the statute was passed in order to discover what gap or mischief the statute was intended to cover. The court is then required to interpret the statute in such a way to ensure that the gap is covered. The rule is contained in *Heydon's Case* (1584), where it was said that for the true interpretation of a statute, four things have to be considered:

- What was the common law before the making of the Act;
- What was the mischief and defect for which the common law did not provide;

- What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth.
- The true reason of the remedy; and then the office of the Judges is to make such construction as shall suppress the mischief and advance the remedy.

6.0. The evolution of the legislation and the internal as well as external aids of the legislation will give the solutions for the above four things.

6.1. The evolution of the legislation is furnished below to bring out the legislative intention.

6.2. Credit on capital goods was introduced with effect from 01.03.1994 vide Notification 4/1994 CE NT dated 01.03.1994. The relevant portion of Rule 57 S of the then Central Excise Rules, 1944, dealing with removal of credit availed capital goods, is reproduced below:

> ***The capital goods in respect of which credit of specified duty has been allowed under rule 57Q, may -***
>
> ***(i) be used in the factory of the manufacturer of the final products; or***
>
> ***(ii) be removed, after intimating the Assistant Collector of Central Excise, having jurisdiction over the factory and after obtaining dated acknowledgment of the same, from the factory for home consumption or for export on payment of appropriate duty of excise leviable thereon or for export under bond, as if such capital goods have been manufactured in the said factory:***

Provided that where the capital goods are removed from the factory for home consumption on payment of duty of excise, or for export on payment of duty of excise, such duty of excise shall in no case be less than the amount of credit that has been allowed in respect of such capital goods under rule 57Q.

6.3. Subsequently, the above provision has been amended vide Notification 23/1994 CE NT Dated 20.05.1994, as mentioned below.

In rule 57S of the said rules, in sub-rule (1) :-

(i) in proviso, after the words "where the capital goods" the words "without being used in or in relation to manufacture of final products" shall be inserted;

(ii) in sub-rule (1), after the proviso, the following proviso shall be inserted, namely :-

"Provided further that where the capital goods are removed after being used in or in relation to manufacture of final products from the factory for home consumption on payment of duty of excise or for export under rebate on payment of duty of excise, such duty of excise shall be calculated by allowing deduction of 2.5 per cent of credit taken for each quarter of a year of use or fraction thereof, from the date of availing credit, except where such capital goods are sold as waste and scrap, the duty leviable shall be at the rate applicable on such waste and scrap";

6.4. From the above amendment it may be observed that the intention of the Government was to demand reversal of entire credit, if the capital goods are removed **without being used** and when the capital goods are to be removed after usage, 2.5 % of the credit taken was allowed to be retained by the manufacturers, for every quarter of use of such capital goods, thus fortifying the objective of cenvat credit scheme.

6.5. Vide the amendments carried out through Notification 6/1997 CE NT Dated 01.03.1997 also, the above scheme has been maintained in the following wordings of Rule 57 S.

> ***57S. Manner of utilisation of the capital goods and the credit allowed in respect of duty paid thereon. - (1) The capital goods in respect of which credit of specified duty has been allowed under rule 57Q may be -***
>
> ***(i) used in the factory of the manufacturer of the final products; or***
>
> ***(ii) removed, after intimating the Assistant Commissioner of Central Excise, having jurisdiction over the factory and after obtaining dated acknowledgement of the same, from the factory for home consumption or for export, on payment of appropriate duty of excise leviable thereon or for export under bond, as if such capital goods have been manufactured in the said factory.***
>
> ***(2) In a case, -***
>
> ***(a) where capital goods are removed without being used from the factory for home consumption, on payment of duty,***

or for export on payment of duty of excise, such duty of excise shall in no case be less than the amount of credit that has been allowed in respect of such capital goods under rule 57Q;

(b) where capital goods are removed after being used in the factory for home consumption on payment of duty of excise or for export under rebate on payment of duty of excise, such duty of excise shall be calculated by allowing deduction of 2.5 per cent of credit taken for each quarter of a year of use or fraction thereof, from the date of availing credit under rule 57Q; and

(c) where capital goods are sold as waste and scrap, the manufacturer shall pay the duty leviable on such waste and scrap.

6.6. With effect from 01.04.2000, a new cenvat of Rules have been introduced to deal with cenvat credit and the relevant portion of Rule 57 AB of the then Central Excise Rules, 1944 dealing with removal of capital goods, stood as below.

Explanation. - When inputs or capital goods are removed from the factory, the manufacturer of the final products shall pay the appropriate duty of excise leviable thereon as if such inputs or capital goods have been manufactured in the said factory, and such removal shall be made under the cover of an invoice prescribed under rule 52A.

6.7. With effect from 01.03.2001, the requirement has been further amended vide Notification 6/2001 CE NT Dated 01.03.2001 and the amended provision of Rule 57 AB read as below:

> ***(1C) When inputs or capital goods, on which credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under section 4 of the said Central Excise Act, and such removal shall be made under the cover of an invoice referred to in rule 52A.***

6.8. When cenvat credit Rules, 2002 were introduced with effect from 01.03.2002, the relevant provision is contained in Rule 3 (4) thereof, which read as

> ***When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be, and such removal shall be made under the cover of an invoice referred to in rule 7.***

6.9. From the foregoing, amendments, it could be seen that the change was that appropriate duty on the transaction value need to be paid. This, otherwise, shows that depreciation has been allowed indirectly.

6.10. With effect from 01.03.2003, the above provision has been amended vide Notification 13/2003 CE NT Dated 01.03.2003, as below.

> ***When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 7.***

6.11. With effect from 10.09.2004, when new Cenvat Credit Rules, 2004 were introduced, the relevant rule, i.e. Rule 3 (5), read as below:

> ***When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9.***

6.12. With effect from 13.11.2007, the following provision has been introduced in Rule 3 (5) ibid.

> ***Provided also that if the capital goods, on which CENVAT Credit has been taken, are removed after being used, the***

manufacturer or provider of output service shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by 2.5 per cent for each quarter of a year or part thereof from the date of taking the Cenvat Credit.

6.13. From the above evolution of the law relating to the said issue, it may be observed that during the period from 01.03.1994 to 19.5.1994 the requirement was as to reversal of equal credit; from 20.4.1994 to 31.3.2000, rebate at the rate of 2.5% of the total credit per quarter on the usage has been allowed; with effect from 1.4.2000, it has been changed to payment of duty at appropriate rate on the transaction value; once, again reversal of credit was restored with effect from 01.03.2003 for the as such removals; from 01.03.2003 to 12.11.2007, there was no provision to deal with the quantum of credit to be reversed upon removal of used capital goods; from 13.11.2007, rebate at the rate of 2.5% of the total credit per quarter on the usage has been allowed.

6.14. The said legislative intention can also be evident by a reference with other taxation statutes. For example, in the Income Tax Act, depreciation benefits have been allowed; in the Central Excise Act, 1944, an 100% EOU, has to pay the appropriate rate of duty on the value of the machinery by allowing the depreciation benefits; such depreciation benefits are also allowed under Customs Act, 1962 to pay the customs duties on the value, while importing second hand machineries; similar benefits are also allowed under Foreign Trade Policy.

6.15. From the foregoing, it is clear that the legislative intention is that due depreciation benefits has to be extended to the capital goods, removed after a considerable period of usage.

7.0. In view of the above position, it is clear that there was law to allow the depreciation benefits. But, the same was omitted since 1.3.2003 and brought back with effect from 13.11.2007. So, the mischief that may be applied during the period from 1.3.2003 to 13.11.2007 is denying the benefits of depreciation. In this context, it is also relevant to refer to the decision of the Hon'ble Supreme Court in the case of **W.P.I.L Limited Vs CCE – 2005 (181) ELT 359 SC,** wherein it has been held that if an exemption was inadvertently omitted and later restored, such restoration shall be retrospective in nature and shall apply for the period prior to such restoration also. Therefore, the said mischief has to be suppressed and the remedy has to be advanced by applying the Mischief Rule.

8.0. I would like to conclude this article by saying that the said mischief has not been suppressed either in Madura Coats case or in Modernova Plastyles, where the counsels have miserably failed to assist the judges by providing the details of the evolution of the legislation, as above.
