CASC BULLETIN

The Chartered Accountants Study Circle

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INDEX

MEETINGS

Date	Time	Speaker	Topic
01.09.2016 Thursday	06.30 p.m.	**CA. M P Vijaykumar**	CARO 2016 - Government Trust Auditors for Corporate Governance.
22.09.2016 Thursday	06.30 p.m.	**CA. Shaik Abdul Samad**	Excise - Gold Jewellery - An In-depth Analysis

Preceeded with High Tea Half an hour before the scheduled time of meeting.

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EDITORIAL

GST - "One Nation One Tax" - It will be a reality now

One of the most important tax reforms ever brought in India after Independence is GST. The Constitution (122nd Amendment) (GST) Bill, 2014, has finally reached its final journey in the first part, which had commenced on 19th December, 2014, passing through various stages of referral to the select committee and obtaining of report thereto, before it was finally adopted by the Rajya Sabha on 3rd August, 2016 and thereafter got ratified by Lok Sabha, for amendments made by Rajya Sabha, on 8th August, 2016 whereby the total time taken for the journey to complete as far as the Indian Parliament is concerned, is 598 days.

Stage	Date
Introduction	Dec 19, 2014
Com. Ref.	May 14, 2015
Com. Rep.	July 22, 2015
Lok Sabha	May 06, 2015 and Aug 8, 2016
Rajya Sabha	Aug 3, 2016

In the second part of the journey, now the ball is in the court of the State Assemblies. According to the Clause (2) of Article 368 of the Constitution, more than 50% of the State legislatures have to have ratify the same and already few of the states have ratified the same.

State	Date
Assam	August 12, 2016
Bihar	August 16, 2016
Jharkhand	August 17, 2016
Himachal Pradesh	August 22, 2016
Chhattisgarh	August 22, 2016
Gujarat	August 23, 2016
Madhya Pradesh	August 24, 2016
Delhi	August 24, 2016
Nagaland	August 26, 2016

With the above trend, the amendment bill will go through the second part of its journey quickly. Thus the GST may become a reality from 1st April, 2017. It is expected that 11 types of taxes are to be subsumed in single tax. Thus it is a game changer for Indian Economy. The mute question to be answered now is whether all the stakeholders are ready for implementation. This will require use of technology to the core. Already humans have become machine dependent and highly influenced by its impact. Technology will be boon only if used judiciously else become a bane. This could be seen in many areas already like the notices received from Income tax Department based on AIR information which has created many unproductive opportunities. Implementation would be major challenge going forward and we have to wait and watch what is store for us. There is no doubt that there will more professional opportunities and one more arena of practice is in store for the professionals. It is right time for us to prepare and equip ourselves to the grab the opportunity and help the nation in its growth.

CAG Report – CENVAT credit Scheme

The CAG has submitted its report to the Department of Revenue on the Cenvat Credit Scheme vide its report No. 10 of 2016. In the performance audit on Cenvat Credit Scheme, the CAG has concluded that the audit process has revealed certain inadequacies and deficiencies in internal controls relating to the Cenvat Credit Scheme and made recommendations which are as stated here in under:

1. The Ministry may insert a provision in Cenvat Credit Rules, to reverse the proportionate Cenvat credit of input services at the time of clearance of input/capital goods.

2. Government may consider making suitable amendment to the Notification to restrict credit on input services.

3. The government may consider inserting provision for reversal of Cenvat credit where the inventories were declared as obsolete but were not written off from the books of accounts and where capital goods after being used are written off but not removed from the factory.

4. The Government may consider inserting provision for charging interest in case of non/delayed reversal of Cenvat credit in respect of non/delayed receipt of goods sent to job worker.

5. The government may consider inserting provision for furnishing detailed information regarding Cenvat credit availed by the assessee containing invoices/documents nos., date of invoices, name of goods with chapter heading, amount of credit taken etc. so that preliminary

Check may be exercised at Range level."

Appeal

Members are requested to attend the programs conducted by CASC and are also requested to send their suggestions and / or value additions to the services provided by CASC including this Bulletin. The same can be sent by hard copy to the office of the CASC or emailed to admin@casconline.org or any of the Members on the Management Committee.

For and on behalf of Editorial Board

Editor

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RECENT DECISIONS - SERVICE TAX

1. BANKING AND OTHER FINANCIAL SERVICES – HANDLING OF APPLICATION FORMS FOR RBI BONDS DOES NOT TANTAMOUNT TO A PROVISION OF BROKERAGE SERVICE, NOTWITHSTANDING ITS NOMENCLATURE BY RBI:

CA. VIJAY ANAND

In CST, Mumbai-I v. J.M.Morgan Stanley RetaiL Services (P) Ltd 2016 43 STR 198 (Tri.-Mum.), the assessee had filed applications on behalf of intending purchasers of bonds, designated as 6.5% Savings Bond, issued by the Reserve Bank of India and are received commission for the bonds that were issued against these applications which was designated as 'brokerage' by RBI. The adjudicating authority confirmed the demand under 'banking & other financial services', holding that the assessee received brokerage from RBI and overruled the objections of the assessee that they rendered distributing application forms to the prospective investors of the Bonds and submitting the completed forms to the receiving offices alone and not anything more.

On appeal, the Tribunal observed as under:-

1. The adjudicating authority had relied on the designation of the payment received by the assessee and was influenced by its status as a body corporate to confirm liability to tax as provider of Banking and other financial services.

2. A demand that has been confirmed by mere reference to a description in unrelated documents was contrary to all canons of taxation. A service is taxable only to the extent that it finds coverage in one of the sub-clauses of section 65(105) as articulated by the the High Court of Gauhati in Magus Construction (P) Ltd v Union of India [2008 (11) STR 225 (Gau] and reiterated in a number of judgements thereafter.

3. The tax would be leviable, in the context of the present dispute, if the assessee was a broker dealing in the savings bonds and received brokerage as the fee thereon.

4. Brokerage is earned by a broker in the course of sale and purchase. The fact that the assessee is registered as a broker with the Securities and Exchange Board of India does not automatically tantamount to all its activities to be that of brokering.

5. Brokering of securities requires the existence of securities as well as a buyer and seller of securities. Purchase and sale of securities is predicated upon stock being available for trading. It is clear from the scheme of the savings bond issue that these are not tradeable. The bonds are subscribed to by individuals & RBI manages the issue on behalf of the Central Government.

6. RBI is not the seller of the savings bond as the bonds do not belong to it. The subscriber to the bond issue is a regular customer of the assessee as a broker of securities. Such a relationship or equation does not, for that reason alone, attract tax burden on other transactional activities of the two.

7. There is no allegation of receipt of any consideration from the subscriber of the bond issue. It is from the RBI that designated intermediaries receive payment. However, as RBI is not the seller of the said bonds, it cannot be a customer of a broker and the payment it makes cannot be considered to be brokerage.

8. RBI undertakes the management of the issue as an agency function for the Central Government in exercise of a statutory responsibility. There is no brokering of securities in the disputed transaction.

9. The fee paid to receiving offices and brokers for their role in the bond issue is not brokerage but commission. The foundation for confirmation of the demand in the impugned order is to totter.

10. In Morgan Stanley Mutual Fund v Kartick Das [(1994) 4 SCC 225], it was held that prior to allotment, shares do not exist and the handling of application forms for an intending subscriber cannot constitute brokering in securities because the securities do not exist at that stage. The foundation for the demand in the impugned order no longer totters but collapses.

11. Taxing of a transaction under 'banking & other financial services' merely because the remuneration is designated as brokerage and the recipient of that brokerage is a body corporate is not sustainable without a clear finding that the bond is a tradeable security and that the recompense flows to the assessee.

12. Hence, the assessee's appeal was allowed with consequential relief.

2. REFUND UNDER NOTIFICATION NO. 41/ 2007-ST DATED 06.10.2007 – ORIGINAL CLAIM FILED WITHIN THE TIME PERIOD – RETUNED CITING DEFICIENCIES – SUBSEQUENT FILING REJECTED AS TIME BARRED – NOT SUSTAINABLE:

In Repro India Ltd. V. CCE, Belapur - [2016] 43 STR 203 (Tri. – Mum.), the appellant is in the business of producing, single colour/multi-colour printed books that are exported for which they have availed a number of credits which, being used as inputs for exports, that were exempt from being taxed. The appellant claimed exemption on the same through a refund route prescribed in notification no. 41/2007-ST dated 06.10.2007. The appellants filed refund claim for the quarter ending September 2008 on 31.03. 2009 and for the quarter ending December 2008 on 30.06.2009 respectively, which was the very last permissible day for the respective periods.

Thereafter, on grounds of insufficiency of supporting evidence, both these claims were returned to the applicant on more than one occasion with re-submissions thereon, after a lapse of time. The quantum in the claims was also revised during this period of correspondence. Ultimately, separate show cause notices for rejection of the refund claim of the two quarters were issued on 06.05.2011, which was also sustained by the Commissioner (Appeals). The appellants preferred a further appeal before the Tribunal, which observed as under:-

1. For the quarters relevant to the two claims, the stipulated deadline was six months from the end of the quarter which was complied with by the appellants. Subsequent return of the applications for rectifying deficiencies and the re-filings is a clear indication that the competent authorities were unaware that the claims had been filed on time. If the completeness of the application was a sine qua non for

admissibility of the application, the claim could well have been rejected by immediate issue of a show cause notice and adjudicated thereupon instead of taking the course that it did.

2. With the elapse of time in finalizing the claim for refunds, the validity of which was not questioned, the original authority has been actuated by the probability of claim for interest arising from the delay and resorted to the rejection of the claims, not on merit but on bar of limitation, at the end of the protracted process reflects lack of responsibility and lack of accountability.

3. The appellant is an exporter whose prices, in accordance with well-entrenched policy, are not to be loaded with the tax element should have been sufficient cause to demonstrate judiciousness in disposing off the claims.

4. In Premier Tyres Ltd. v. Collector of Customs 1984 (16) ELT 419 (Tri.-Del.), it was held that if on a proper classification refund of larger amount than admissible under the heading or item originally claimed becomes payable to the appellant, such larger amounts should be refunded to the appellants and should not be limited to the amount admissible under the item or heading originally claimed.

5. Consequent to the above, the limitation should be computed with effect from date of original, albeit incomplete, filing and the appellant is entitled to refund as per claim.

Hence, the appeal was allowed.

3. CONSTRUCTION OF OWN LAND FOR SALE FOR CONSTRUCTING RESIDENTIAL COMPLEX – TAXABLE UNDER CONSTRUCTION OF RESIDENTIAL COMPLEX AND NOT WORKS CONTRACT W.E.F. 01.06.2010 NOTWITHSTANDING THE PAYMENT OF VAT UNDER WORKS CONTRACT.

In Vinayaka Homes v. CCE & ST, Cochin [2016] 43 STR 251 (Tri.- Bang.), the appellants were involved in designing, planning, developing and clearing site on their own for construction activities for buyers / clients and were not doing the execution of any works contract. The adjudicating authority confirmed the demand under 'works contract' services on the ground that the

appellants were paying VAT under 'works contract', against which the appellants filed an appeal before the Tribunal which observed as under:-

1. It is incomprehensible as to how the services rendered by the appellants could fall under the ambit of 'works contract', when they were constructing residential complex on their own land when there was no element of service of 'works contract' in the activity performed by the appellants.

2. The activities of the appellants fall under the ambit of 'construction of residential complex' which were exempt for the period from January 2009 to March 2009 under paragraph 3 of the CBEC Circular No. 108/2/2009-ST dated 29.01.2009.

3. This Circular excludes any person who provides construction of complex services from the applicability of service tax under 'construction of complex'.

4. However, such services would be taxable only w.e.f. 01.07.2010, consequent to the introduction of Explanation to section 65(105)(zzzh).

Hence, the appeal was allowed and the impugned order set aside.

4. UNJUST ENRICHMENT – ASSESSEE PRODUCING LEDGER COPIES TO INDICATE THAT THE SERVICE TAX PORTION FOR WHICH REFUND HAS BEEN CLAIMED WAS DEBITED FROM HIS ACCOUNT - BURDEN OF PROOF HAS BEEN DISCHARGED – ASSESSEE ENTITLED TO REFUND.

In Men Power Security Services v. CCE&ST, Meerut 2016 (43) STR 316 (Tri.-Del.), the appellant is a proprietary concern which provided security agency service to M/s Ashok Hall Girls Residential School. Along with remuneration for rendition of such services, the appellant also collected the service component from the recipient of the service. The recipient school had a running account with the appellant where under the school was remitting the consideration for the security agency services received, along with the service tax component incurred by the appellant for remittance of tax on the taxable services provided.

CBEC, vide Circular dated 19.9.2013, clarified that in terms of the master Notification No.25/2012-ST dated 20th

June, 2012 enumerating exemptions provided to educational institution in respect of certain services for the period subsequent to introduction of the negative list, auxiliary services provided to educational institutions are exempt from the levy of service tax. Thereafter, the appellant submitted a claim for refund of the service tax remitted by it on 20.3.2015, being the service tax initially collected from the school but was reversed by the service recipient in the ledger maintained by it.

The refund sanctioning authority rejected claim for refund on the ground of unjust enrichment alone, which was also sustained by the Commissioner (appeals), notwithstanding the fact that the appellant had produced copies of ledger accounts of the school during the course of personal hearing. On further appeal, the Tribunal observed as under:-

1. Section 12B of the Central Excise Act, 1944 casts the burden of proof on the assessee and enacts a rebuttable presumption as to unjust enrichment, relying on the decision in UOI v. A K Spinet Ltd. 2009 (234) ELT 41 (Raj.).

2. This presumption could, however, be rebutted by showing cogent and probative evidence as to there being no enrichment and for claiming refund.

3. In the instant case, the appellant had produced the ledgers maintained by the recipient of services, in the ledger, which clearly records debit of the earlier credited amount to the appellant towards service tax.

4. Thus the component of service tax earlier borne by the service recipient and passed on by the appellant, stood reversed by the school and stood debited from the consideration due to the appellant from the school.

5. Consequently, the appellants have clearly established that there is no unjust enrichment and that they are entitled to refund.

Hence, the appeal was allowed and the impugned order set aside.

(The author is a Chennai based Chartered Accountant. He can be reached at reachanandvis@gmail.com)

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Alternative remedy: When no personal hearing was granted, the court quashed the revision orders and directed the Assistant Commissioner to grant personal hearing and pass orders afresh. After many opportunities and personal hearing, the Assistant Commissioner rejected the objections of the dealer giving specific and elaborate findings and holding that the dealer had merely crushed the stone boulders into smaller size as blue metal jelly and therefore, no new commodity had come into existence falling within the definition of "manufacture" under section 2(27) of the TNVAT Act. Though the dealer claimed to have substantiated its claim by producing documentary evidence, no such documents were submitted. Therefore, it would only be appropriate for the petitioner to approach the appellate authority where the factual aspects can be gone into. Factual disputes cannot be decided by this court sitting-under article 226. The issue whether the activity of extracting, altering and processing brought into existence a different commodity altogether was to be decided by the authorities. Each activity had to be analysed. Under these circumstances, the proper recourse for the dealer was to approach the appellate authority.

CA. V.V. SAMPATHKUMAR

[2016] 91 VST 278 (Mad) SRC PROJECTS (P) LIMITED V. ASSISTANT COMMISSIONER (CT), SALEM TOWN ASSESSMENT CIRCLE, SALEM AND ANOTHER

Notice: The assessment proceedings issued may be not considered to be vitiated because notice had been issued in the trade name of the dealer and not in the name of the sole proprietors.**[2016] 91 VST 262 (Born) COMMISSIONER OF SALES TAX V.KLIP NAIL CARE**

Input tax credit: The function of a proviso is normally to carve out an exception to the main provision. However, it could also in cases, which leave the court in no doubt, have the effect of being an independent enactment and held that the dealer was not entitled to the benefit of input-tax credit in respect of packing materials used for its finished goods,

which were stock transferred. **[2016] 91 VST 298 (Uttarakhand) HINDUSTAN UNILEVER LIMITED v. STATE OF UTTARAKHAND AND OTHERS**

Larger Bench: Where the principle of law has been correctly laid down by the Division Bench, it is not necessary for the subsequent Division Bench hearing the matter of granting relief to refer the matter to a Larger Bench.**[2016] 91 VST 339 (All) TARA CHAND NAND LAL AND OTHERS V.STATE OF U. P AND OTHERS**

Revision: When there was sufficient material on the basis of which an opinion had been formed that turnover had escaped assessment and since turnover of the recorded compact discs had not been disclosed separately in the returns or at the time of assessment, the assessing authority had no occasion to examine, whether such recorded compact discs would be eligible for exemption under the eligibility certificate. This aspect of the matter had neither been examined nor was any opinion formed. Therefore, it was not a case of change of opinion. Therefore, the approval granted by the Additional Commissioner for issuance of revision notice were justified and no interference was called for. **[2016] 91 VST 349 (All) MOSER BAER INDIA LIMITED v. STATE OF U. P. AND OTHERS [2016] 91 VST 349 (All)**

Natural Justice : When the orders passed by the Officer, assessing the escaped turnover for the relevant assessment years which is contended as a non-speaking orders, without considering the documents filed by the dealers and without affording an opportunity of being heard the Court held that the issue in question was an escaped turnover to be assessed under section 27 of the Tamil Nadu Value Added Tax Act, 2006 and hence in terms of which, the petitioner was entitled to get an opportunity of being heard and passing, Stating so, the orders passed without affording an opportunity of personal hearing was set-aside. **[2016] 91 VST 382 (Mad) INDUS TEQSITE PRIVATE LIMITED v. COMMERCIAL TAX OFFICER, KODAMBAKKAM ASSESSMENT CIRCLE; CHENNAI**

Form F: A circular by itself cannot displace a legal provision. Interpretation of a legal provision is the duty of the court. The court cannot abdicate its function and duty relying on some circulars issued by the executive or its language. The amendment brought into the 1956 Act by insertion of section 6A was with a specific object and purpose. That is to emphasise that the Central sales tax is not leviable in respect of the transactions of transfer of goods from head office to branch or vice versa, as these transactions do not amount to sale,

but the Legislature was mindful of the fact that a blanket understanding of this type encourages evasion of taxes. Therefore, by an amendment, it stepped in and placed burden on the dealers to prove transfer of goods in such cases is not by way of sale. The circular only states that in the light of the judgment of the Allahabad High Court in Ambica Steels Limited v. State of U. P. [2008], dealers situated in other States may require a declaration form from Maharashtra dealers, if the goods are sent from these States to Maharashtra for job-work, etc. Similarly, if a Maharashtra based dealer sends any goods to another State for job-work, then, the job-worker in that State may require the Maharashtra dealer to issue a decla-ration in form F while returning the goods to Maharashtra. The Department in Maharashtra, therefore, decided to issue a declaration in form F as per normal procedure to dealers in Maharashtra. **[2016] 91 VST 385 (Bom) JOHNSON MATTHEY CHEMICALS INDIA PVT. LTD.V. STATE OF MAHARASHTRA AND OTHERS**

Deferral Scheme: When the State Industries Promotion Corporation by proceedings December 8, 2003 granted approval to the transfer of the deferral facility, the finding of the Assistant Commissioner that the dealer was not entitled to such facility was baseless. Even after cancellation of the registration certificates, a direction was given to include the turnovers of the unit, while passing final assessment order. The Assistant Commissioner without issuing any prior notice and looking into the G.Os. the registration certificates and without considering the records and the agreement and the returns filed by the petitioners, passed the order, without any basis. However, since there were allegations with regard to the violation of the conditions by the petitioner in respect of the products manufactured other than that specified, the order in question was liable to be set aside and the respondents were to redo the entire assessment on the basis of the documents produced, after giving sufficient opportunity to the petitioner, on the merits and in accordance with law. **[2016] 91 VST 443 (Mad) ITC LIMITED V.ASSISTANT COMMISSIONER (CT), ZONE VIII, CHENNAI AND OTHERS**

Best of Judgement Assessment: When the dealer could not reconcile daily average sale of his business and he took up the best judgment assessment procedure. The order did not show how the DC put the daily average business of the dealer at Rs. 15,000 when the return was filed showing the sale business as Rs. 2,000. No document or statement of any person or the report of the Sales Tax Officer had been placed on record by the DC to

determine the daily average business sale of the dealer as Rs. 15,000. Moreover, when the dealer is engaged in selling low cost tiffin, and some rasgola by no stretch of imagination would the daily business reach to such an amount. The best judgment procedure adopted by the DC was held to be illegal, perverse and based on caprices and whims of the DC and quashed. **[2016] 91 VST 493 (Orissa) JAGANNATH SWEETS V.DEPUIY COMMISSIONER OF SALES TAX, CUTTACK-I, EAST CIRCLE**

Revision: The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the assessing authority. The satisfaction ought to be a satisfaction reached by the assessing authority on the basis of facts or materials available before it.If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it is tantamount to a "change of opinion". If an assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous, it is not a valid reason under the law for re-assessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some turnover has escaped assessment. **[2016] 91 VST 1 (SC) STATE OF UTTAR PRADESH AND OTHERS V.ARYAVERTH CRAWL UDYOUG AND OTHERS**

Input tax credit: No input-tax credit will be available to the dealer when petroleum products and natural gas are used as fuel or when they are exported out of the State. It had been categorically recorded by the Tribunal that there was no mention in the assessment order of any petroleum products purchased inside the State and used in manufacture whether as fuel or otherwise. The petroleum products had been purchased inside the State at concessional rate of tax. There was no finding to the effect that the furnace oil was used as fuel by the dealer. In the absence of any clear finding recorded by the revisional authority that the furnace oil was used as fuel by the dealer, the disallowance of input-tax credit on purchase of furnace oil was not sustainable. **[2016] 91 VST 38 (P&H) STATE OF HARYANA v KARNAL AGRICULTURAL INDUSTRIES LIMITED AND ANOTHER**

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LEGAL UPDATE ON DIRECT TAXES

I. Whether re-opening of assessment u/s 147 of ITA is valid for the 'disallowance of replacement of tools' as capital expenditure after completing the assessment u/s 143(3) on the ground of 'change of opinion' and whether such replacements are capital expenditure?

The issue came up for consideration in the case of UCAL MACHINE TOOLS (P.) LTD. *v.* ITO, Company Ward-III (1), Chennai, [2016] 71 taxmann.com 230 (Chennai - Trib.), JULY 15, 2016.

FACTS:

1. The assessee is engaged in the manufacture of automobile components and has incurred replacement of tools to the tune of Rs. 67,39,084/- for the assessment year 2008-09. Originally the assessment was completed u/s 143(3) and subsequently reopened within 4 years u/s 147 on the ground that such replacements are capital in nature.

2. The re-opening was challenged, by the assesse, before CIT(A) that having collected all the details while making assessment u/s 143(3), this will result in change of opinion; CIT(A) negated the assessee's claim and held the reassessment is valid in law.

CA. G. PARI & CA. P. PRADEEP KUMAR

3. Aggrieved, the assessee filed an appeal before ITAT on the following grounds:

a. Reassessment u/s 147 results in change of opinion by placing reliance on *CIT* v. *KELVINATOR OF INDIA LTD.* [2010] 320 ITR 561 (SC) and

b. Replacement of tolls are revenue expenditure by relying on the decisions of *CIT* v. *MANOHAR LAL HIRA LAL LTD.* [2013] 39 Taxmann.com 110 (Allahabad) and *CIT* v. *TVS MOTORS LTD.,* [2014] 45 Taxmann.com 94(Madras)

4. Revenue countered that the replacements are capital in nature as it has enduring benefit by placing reliance on *CIT* v. *SARAVANA SPINNING MILLS PV. LTD.* 293 ITR 201.

ITAT DECISION:

5. Sec. 147, after amendment with effect from 1.04.1989 widens the scope of AO

to re-open the assessment even if information is obtained from proper investigation from the materials and records or from any enquiry or research into the facts or law and not necessary that such information is derived from external source and fresh matters submitted after re-opening. The decision of Kelvinator is on the law prior to its amendment and hence not applicable.

6. Referring the principles in Accounting Standard (AS) 2 and AS 10, machinery spares which are not specific to any fixed asset and used generally shall be treated inventory and charged to profit and loss account as and when they are consumed; On the other hand, if the machinery spares are specific/insurance, i.e. which are used only to a particular item of fixed asset and their use is irregular, it shall be capitalized and depreciated over the remaining useful life of the specific fixed asset. Held, the replacement spares are revenue in nature. The arguments of revenue that accounting treatment shall not be considered for tax purposes have been negated.

AUTHORS' NOTE:

'Reason to believe' and 'escapement of income – essential ingredients:

7. The Assessing Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on mere change of opinion. The concept of "change of opinion" must be treated as an in-built test to check the abuse of power. The Assessing Officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief - CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC).

'Escaped assessment' – meaning:

8. The term 'escaped assessment' includes both 'non-assessment' as well as 'underassessment'. Income is said to have 'escaped assessment' within the meaning of this section when it has not been charged in the hands of an assessee in the relevant year of assessment - CIT *v.* SUN ENGINEERING WORKS (P.) LTD. [1992] 198 ITR 297 (SC).

Replacement of moulds and dies – current repairs u/s 31 of ITA:

9. Moulds and dies attached to the machinery like press designs specification are not independent of

the plant and machinery, but are parts of the machinery. Once the dies are worn out, the machine cannot turn out the product to the business specifications and this has to be obtained only on a replacement of the dies and moulds and the plea that the claim would fall for consideration u/s 31 is deserved to be accepted - *CIT* v. *TVS MOTORS LTD.,* [2014] 45 Taxmann.com 94 (Madras).

Spinning Mill cannot be regarded as one plant:

10. To examine, whether ring frames in spinning mill constitute a part and its replacement whether can be claimed as current repairs u/s 31 of ITA, it is held that 'spinning mill' in textile industry could not be characterized as a single process industry; consequently replacement could not be automatically allowed in every case as revenue expenditure. It found that items like ring frames could not, therefore, be treated as a part of a larger machinery, since they are capable of operation by themselves - *CIT* v. *SARAVANA SPINNING MILLS PV. LTD.* 293 ITR 201.

Replacement in Revised AS-10, Plant Property and Equipment:

11. In paragraph 6 of Revised AS-10, applicable from 01.04.2016, 'Plant, Property and Equipment' is defined as, *'Property, plant and equipment are tangible items that a) are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes; and b) are expected to be used during more than a period of twelve months'.*

Accounting treatment of replacement – with effect from 01.04.2016:

12. Paragraph 13 of AS-10 indicates that replacement of parts, which has useful life of more than 12 months ought to be recognized separately and depreciation shall be provided in line with its useful life. Though this is in line with replacement of parts under Schedule II of Companies Act, 2013, significant difference arose on determining a part in Plant, Property and Equipment. Replacement of part in Schedule II necessitates, 'Where cost of a part of the asset is significant to total cost of the asset and useful life of that part is different from the useful life of the remaining asset, useful life of that significant part shall be determined separately'. The ingredient spelt out in Schedule II i.e. 'part having significant value' is missing in Revised AS-10, where it mandates in the recognition criteria that 'it (part) has useful life of exceeding twelve months'. Moreover,

the term 'significant value' has also not defined in the COA 2013, perhaps has given discretion to the industry to define the same in their accounting policy. Parts having lesser useful life of 12 months will be regarded as inventory and charged to profit and loss account as and when the same are consumed. However, the treatment for insurance or specific spares remain same under old and revised AS-10. Consequent to the change in accounting treatment, claiming these expenditure as revenue u/s 31 as 'current repairs' will certainly pose an issue for assesses.

II. Whether income, being capital gains, from the transfer of right, title and interest in intangible asset being Trade Mark by an Australian Company in India is taxable in a situation where the Australian Company, at the time of transfer, does not have any presence in India?

The issue came up for consideration in the case of CUB PTY LTD. *v.* UOI, [2016] 71 taxmann.com 315 (Delhi HC), JULY 25, 2016

FACTS:

1. CUB P LTD (CPL) has its ultimate subsidiary (through many intermediaries) in India viz.,Foster India Limited (FIL) and executed, initially, a Brand License Agreement (BLA) for the use of its four (4) trade marks in India and the consideration, being royalty, paid by FIL to CPL were subject to withholding tax.

2. On 04.08.2006, an agreement, known as 'India sale purchase agreement' (ISPA), was executed in Melbourne between DISMIN (one of the intermediary of CPL and referred hereinafter as `Petitioner' hereinafter), SABMiller (A & A2) and SABMiller Africa & Asia B.V, which, inter-alia, includes transfer or assignment of 16 Trademarks, including the said four licensed already to FIL. Accordingly on assignment, SAB Miller (A& A2) will be the owner of 16 Trademarks.

3. On 12.09.2006, a deed of termination of the BLA was executed in Australia since there are under assignment of SAB Miller. Further on the same day (i.e. on 12.09.2006), a deed of assignment was executed in Australia, whereby the petitioner assigned the said 16 trademarks to Skol Breweries Limited [nominee of SABMiller (A & A2)].

4. On 22.09.2006, the petitioner sought an advance ruling on the assignment of 16 Trade Marks, where the AAR ruled that income from the transfer of right, title and interest in Trade Mark by the petitioner (an Australian Company) in

India is taxable as these intellectual property rights are capital assets situated in India and therefore income is accrued in India.

5. On a writ filed against the decision of AAR:

HC DECISION:

6. The issue of 'situs' exists in case of intangible assets. The legislature does not provide any deeming provisions also in respect of intangible assets. Explanation 5 to section 9(1)(i) added by the FA 2012, with retrospective effect from 01.04.1962, provide deeming income only in case of shares or interest in a company, where it derives, directly or indirectly, its value substantially from assets located in India. Therefore, applying the principle of '*mobilia sequuntur personam' it is concluded that 'The situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset'*.

7. Held, since the owner of trademarks and intellectual property rights was not located in India at the time of the transaction, the situs of such trademarks and intellectual property rights are not in India and therefore, it's assigning pursuant to the ISPA, would not be in India.

BUTTRESSES/GROUNDS for the DECISION:

Registration does not have impact on 'situs':

8. Registration of a trademark does not entail creation of trademark and also does not have any impact on its location - *CIT* v. *FINLAY MILLS LTD.* [1951] 20 ITR 475 (SC). Therefore, registration of trademarks in India does not mean that 'situs' of trademarks had been shifted from Australia to India.

   Rule of '*mobilia sequuntur personam*', which means `*Movables follow the person. A person's powers of dealing with his movable estate and its devolution on his death are governed by the law of his domicile'*:

9. In India, the legislature has not specifically provided for the situs of trademarks and therefore, in the absence of contrary statutory provisions, the common law rule of '*mobilia sequuntur personam*' would be applicable - *RELIABLE STORES CORP.* v. *CITY OF DETROIT:* 260 mich. 2 (Pg 2 and 3); *HUMBLE OIL & REFINING CO.* v. *CALVERT*: 414 S.W.2d 172 (Tex. 1967) (Pg 8).

10. Income from intangibles are different from capital gains on the transfer of intangibles. The case referred by AAR, GEOFFREY INC. V. SOUTH CAROLINA TAX COMMISSION 437 S.E. 2d 13 (para 4) deals only with income from intangibles and not capital gains on its transfer.

III. 'Set-up of Business' Vs 'Commencement of Business' - Whether consultancy charges paid for the purpose diligence of the investments to be made by the assesse-company into the share capital of other companies prior to commencement of business of NBFC can be claimed as deduction u/s 37(1) of ITA as these were incurred for the purpose of business?

The issue came up for consideration in the case of PINEBRIDGE INVESTMENTS CAPITAL INDIA (P.) LTD. *v.* ITO [2016] 71 taxmann.com 374 (Mumbai - Trib.), JULY 27, 2016

FACTS:

1. The assesse-company, having the objects of NBFC, has incurred consultancy charges for the purpose of assessing investments to be made in other companies prior to its commencement of business and claimed the expenditure as deduction u/s 37(1) of ITA as these were incurred for the purpose of business. AO disallowed the claim as these were not incurred for the purpose of business as there was no nexus between the expenses incurred and interest income earned.

2. CIT (A) upheld the order of AO on the ground that though the business activities of assessee-company are in the nature of NBFC, during the year it has not made any investments but simply parked its surplus funds in the bank and received interest.

ITAT DECISION:

3. Consultancy charges incurred for the purpose of due diligence of a proposed investment is clearly a part of the business activities of the assessee and further this has been incurred in the ordinary course of its business. The reasons that no investment was made during the year and parking of funds in the bank cannot hold that these expenses were not incurred for the purpose of business, as the well settled law endorses that results of the business activities or fruits of efforts to a business organisation may yield in the concerned year or in subsequent years or never. Therefore, it is held that the disallowance was contrary to law and facts.

BUTTRESSES/GROUNDS for the DECISION:

'Previous year' commences from the date of setting up of business:

4. Proviso to Section 3 of ITA provides that in case of newly set up business or profession in a financial year, the previous year begins from the date of set up of business or profession or the date on which the newly source of income comes into existence. Accordingly the 'date of set up' is the stage from where the income is taxable, similarly expenses can be claimed.

   Setting up of business is distinct from commencement of business:

5. As per Oxford English Dictionary "setting up" means, "to place on foot" or "to establish", and in contradistinction to "commence". Therefore when business is established and is ready to commence then it can be said that business is 'set up'. `Actual date of commencement' of business may be different and this may not be required for the purpose of determining the `date of set up' - *WESTERN INDIA VEGETABLE PRODUCTS LTD* v *CIT(A)* (26 ITR 151)(BOM); *CIT BOMBAY* V *RALLIWOLF LTD* (121 ITR 262) (BOM); *CIT(A)* v. *SAURASHTRA CEMENT AND CHEMICAL INDUSTRIES LIMITED* (91 ITR 170) (Guj).

IV. Whether for the purpose of disallowance u/s 43B of ITA, the employer's contribution and employees' contribution ought to be treated in the same manner, considering the repeated amendments carried out in section 43B and intention of Parliament, though the impression of employees contribution in section 2(24)(x) read with section 36(1)(va) indicates that it has to be treated differently?

The issue came up for consideration in the case of BIHAR STATE WAREHOUSING CORPORATION LTD. *v.* CIT 1, Patna [2016] 71 taxmann.com 247 (Patna HC), JULY 19, 2016

FACTS:

1. While completing assessment u/s 143(3), AO disallowed the claim of employer's contribution and employees' contribution as payments were after the due date prescribed under the statue. On appeal CIT (A) allowed the claim of employers contribution and upheld the Order of AO in respect of employees'

contribution referring the provision of section 2 (24)(x) read with section 36(1)(va).

2. ITAT dismissed both the appeals of Reveune and Assessee. On further appeal;

HC DECISION:

3. Relying on the decisions of Bombay HC in the case of *GHATGE PATIL* and P&H HC in the case of *HEMLA EMBROIDERY* it is held that 'on a broader reading of the amendments made in to Section 43B repeatedly and the intention of Parliament, there appears to be sufficient justification for taking the view that the employees' and the employer's contribution ought to be treated in the same manner'.

BUTTRESSES/GROUNDS for the DECISION:

Analysis of ALOM's case in the decision of Patna HC:

- First proviso to Section 43B restricts the benefit of deduction only to tax, duty, cess or fee paid after the closing of the accounting year but before the date of filing of the return of income under Section 139 (1) but not to labour welfare funds. Second proviso to section 43B was then inserted to allow deduction of contribution to, inter alia, any provident fund if made before the due date as per the Employees Provident Fund Act during the previous year. This again resulted in implementation problems as a result of which the second proviso was deleted and the first proviso was amended bringing about uniformity by equating tax, duty and fee with contribution to labour welfare funds. It was made clear that the benefit of deduction would be applicable, provided the payments are made before the due date for filing of the return – *CIT* v. *ALOM EXTRUSIONS LTD.:* [2009] 319 ITR 306 (SC)

Section 43B will be applicable for both employer's contribution and employee's contribution:

4. In Alom's case the apex court does not deal with the distinction of employer's contribution and employees' contribution. However, this has been squarely dealt in the cases of Bombay High Court in *CIT* v. *GHATGE PATIL TRANSPORTS LTD.* [2014] 368 ITR 749 (Bom) and Punjab and Haryana High Court in the case of *CIT* v. *HEMLA EMBROIDERY MILLS (P.) LTD.* [2014] 366 ITR 167 (P. & H.), where it has been held that both employer's contribution and employees contribution are covered in the amendments made u/s section 43B

AUTHOR'S NOTE

Contrary view taken in the case of CIT, COCHIN *v.* MERCHEM LTD [2015] 61 taxmann.com 119 (Kerala), SEPTEMBER 8, 2015:

Kerala HC decision:

5. When Sec.43B as it stood prior to the amendment and Section 36(1)(va) Explanation 1 thereto r/w Sec.2(24)(x) are considered together, it is clear that they operate in different fields. So far as the employee's contribution received is concerned, it should have been paid on or before the due date prescribed under the relevant statutes.

6. The contention that on a reading of Section 43B(b), any sum "payable by the assessee as an employer" by way of contribution to any provident fund meant payment of both employees contribution and employer's contribution, by the employer and therefore the assessee was entitled to pay both contributions together on or before the filing of the return under Sec.139(1) of the Act is not acceptable. If such a contention is accepted, that would make Sec.36(1)(va) and the Explanation thereto otiose.

7. There was no indication in Sec.43B as it stood prior to the amendment and thereafter also to deface Section 36(1)(va) and the Explanation thereto from the Income Tax Act. Thus, it means that both provisions are operative and the contributions have to be paid in accordance with the mandate contained under Section 36(1)(va) and Explanation thereto and under Sec. 43B, respectively.

Amendments by the Finance Act, 2013 in section 43B:

8. By the Finance Act, 2003, the second proviso to section 43B of the Act has been deleted and the first proviso to section 43B has also been amended. Deletion of the second proviso to section 43B would be with respect to section 43B and with respect to any sum mentioned in section 43B(a) to (f) and in the present case, the employer's contribution as mentioned in section 43B(b). Therefore, the deletion of the second proviso to section 43B and the amendment in the first proviso to section 43B by the Finance Act, 2008 is required to be confined to Section 43B alone and the deletion of the second proviso to section 43B cannot be made applicable with respect to section 36(1)(va) of the Act.

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DOCTRINE OF CY PRES AND EXIT TAX ON ERRING CHARITABLE TRUST ORIGIN AND MEANING OF CY PRES

The Norman French legal term is contraction of '*Cy Pres Comme Possible*' and means 'as near as possible' or 'as near as may be'. This doctrine originated in ecclesiastical law of all religions. The doctrine *Cy Pres* is that where the trust fails for whatever reason, the funds of the trust should be repurposed / reapplied or reforms made in management of the trust (as has been directed by the Hon'ble Supreme Court in the case of BCCI) to carry out charitable object more effectively. However, this doctrine will not apply where the terms creating the trust contain alternative power to redirect the funds to another charitable purpose. Nevertheless, where the alternate object in the terms of a trust is unlawful or impractical, *Cy Pres* would apply. In Roman law, Justinian I wrote of similar principle – ***Corpus Juris Civilis***, which means a process that redirected the money held in trust that violated the law to a purpose within law. This doctrine ensures perpetuity of charity. The question of ***prerogative Cy Pres*** (Crown taking over assets of non-existent, defunct and illegal trusts) was settled in Gaynor Jones case in a series of rulings between 1686 and 1690 and held that the Crown could not appropriate funds for its own use but could redirect only to other valid charity.

***Cy pres* in US and UK:**

Uniform Trust Code (UTC) of USA recognized this doctrine and codified that this doctrine applies only to a charitable trust where the original purpose of the trust has failed, and the terms of the trust do not specify alternate charitable object. This principle was made clear in the case of Francis Jackson (US) who bequeathed moneys in trust to be used to create a public sentiment to put an end to slavery. After his death, slavery was abolished and some of Jackson's family attempted to dissolve the trust to revert trust moneys to them. The court ordered that to best fulfill Jackson's wishes the trust should be used Cy Pres, to promote education among freedman.

In the 90s, non-profit organizations made a plea that unless relieved of non-profit status they would be unable to compete, grow and survive. Many states enacted conversion statutes codifying common law of charity to ensure conversions – merger, acquisition, sale of assets, dissolution or reconstruction – can be easily enforced and directed conversion proceeds to charity under the supervision of courts.

In UK, the Charities Act incorporates this doctrine and lists out the circumstances of failure of a trust, when this doctrine will

apply. Charity Commission for England and Wales, subject to the jurisdiction of Courts, is authorized to monitor situations. The question arose in Liverpool and District Hospital for diseases of heart V. Attorney General. The Court held that even if the articles of a charitable company did not contain a provision of transferring the surplus to another charity on liquidation, such a provision was deemed to be there in the A/A. Members in a charitable company were not entitled to dividend or the surplus on liquidation. The Court applied the doctrine of *Cy pres* and transferred the surplus to another charity.

***Cy Pres* in India:**

The doctrine of *Cy-pres* as developed by the Equity Courts in England stands adopted by our Indian Courts since long. This doctrine was applied even prior to insertion of S. 92 (3) of CPC in line with S. 13 of Charities Act, 1960, of UK, which embodies this doctrine. "When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settler the court would not, when there is a general charitable intention expressed by the settler, allow the trust to fail but would execute it *cy pres*, that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions regarding the objects upon which the trust money can be spent." [Ratilal v. State of Bombay AIR 1954 SC 388]

It is trite proposition in law that once a Trust is created in accordance with law, it remains always a Trust. Property of a public charitable trust cannot be allowed to dissipate in any manner. If a public charitable trust fails for whatever reason, the charity must be put on track either by repurposing the object or reapplying the funds as permitted in law or used Cy Pres. This doctrine is embodied in Civil Procedure Code, 1908 as may be seen hereunder.

Under section 92 of CPC the Court of District Judge has the power to administer public charities. Sub-section (3) of section 92, amended in 1976, embodies the doctrine of Cy Pres. Sub-section (3) really extends the occasions on which the property may be applied *Cy pres*. This provides the circumstances in which the "original purposes" of a charitable or religious trust can be altered and the property can be applied *cy pres*. It even allows consolidation of a number of charities under sub-clause (c). The jurisdiction created by sub-section (3) and in particular sub-clause (e) affords the most important relaxation of the old *cy*

pres rule and will probably be of the most practical use in enabling funds to be utilized for the maximum benefit of the public. The relevant part of the section and sub-clause (e) reads:

Sub-section (3): "The Court may alter the original purpose of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property / income of such trust or portion thereof to be applied ***Cy Pres*** in the following circumstances."

Clause (e): "where the original purposes, in whole or in part, have, since they were laid down, (i) been adequately provided for by other means, or (ii) ceased, as being useless or harmful to the community, or (iii) ceased to be in law charitable, or (iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust."

'Exit Tax' and its rationale:

Chapter XII-EB of the Finance Act, 2016, in sections 115TD to 115TF, has introduced a concept of 'Exit Tax' on the net-worth (subject to exceptions and rules of valuation as may be prescribed) of a trust, upon cancellation of registration u/s 12AA or on transfer of its assets to an entity other than a charitable trust registered u/s 12A/12AA of the Income tax Act, 1961. In the Explanatory Memorandum to the Finance Bill, 2016, it is explained that 'there is no provision in the Income Tax Act which ensure that the corpus and asset base of a trust accumulated over a period of time, with a promise of it being used for charitable purpose, continues to be utilized for a charitable purpose. It is always possible for charitable trusts to transfer assets to a non-charitable purpose. In order to ensure that the intended purpose of exemption availed by the trust or institution is achieved, a specific provision in the Act is required for imposing a levy in the nature of Exit Tax, which is attracted when the charitable organization is converted into a non-charitable organization.' The new sections 115TD to 115TF are intended to achieve the objective outlined in the memorandum.

When 'Exit Tax' is attracted?

Notwithstanding any provision under the Income tax Act, 1961 - in particular subsections (3) and (4) of S.12AA ('that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution) - a combined reading of sub-sections (1) and (3) of section 115TD, effective from 01.06.2016, mandates that a trust or institution is not eligible for registration under the following circumstances and are liable to pay 'exit tax' @ 30% on its net-worth:

1. When a trust or institution registered u/s 12A/12AA has converted into any form which is not eligible for registration under the said section/s;

[For the purpose of the above, a trust or institution is deemed to have converted into any form not eligible for registration u/s 12A/12AA, if registration granted is cancelled on any ground and the order cancelling registration is confirmed by ITAT; or has modified its objects which do not conform to the condition of registration and it has not applied for fresh registration; or has filed application for registration but rejected by competent authority.]

2. When a trust or institution registered u/s 12A/12AA has merged with any entity other than an entity which is a trust or institution having objects similar to it and registered u/s 12A/12AA;

3. When a trust or institution registered u/s 12A/12AA has failed to transfer upon dissolution all its assets to another trust or institution registered u/s 12A/12AA or to any institution/fund/trust/university/other educational institution/hospital/medical institution covered under clause (23C) of section 10.

4. The person to whom any asset forming part of accumulated income of the trust or institution has been transferred, he shall be deemed to be an assessee in default in respect of tax, interest and penalty arising on such transfer. [Section 115TE (2)]

Bonam Partem:

As a rule, words and expressions are to be interpreted *Bonam partem*, meaning thereby that they are prima facie to be taken in their lawful and rightful sense [Maxwell on the Interpretation of Statutes]. "Where any law refers to and gives certain efficacy to a word, it refers to it in a lawful sense and presumes that such reference is to the word signifying a legally expected character and accompanying legally recognized action preceding and following it. Words in the Income-tax Act have been generally construed in *Bonam partem* by the Courts. Transfers must be legal and not sham, bogus and benami, to attract tax." [(1975) 99 ITR 583 (Del) and (1980) 122 ITR 461 (P & H)] The only exception to the rule of Bonam Partem is assessment of income from illegal business or other illegal activity. If a trust, without obtaining the permission of jurisdictional court, changes its object or merges with another trust or upon dissolution fails to transfer its assets to another charity, the violations being illegal as the general law stands today, rule Bonam partem applies and such

violations are to be dealt with by jurisdictional court and none else.

Conclusion:

In the year 1973, law relating to charity under sections 11 to 13 of the Income tax Act, 1961, underwent a sea change in respect of charitable trusts / institutions as to registration, application of income and assets, prohibition on certain application of income, pattern of investment of accumulated income, reinvestment of sale proceeds of assets for a charitable purpose, accumulation of income subject to conditions etc. It was not the intention of Parliament to mop up revenue by these measures but to regulate and discipline the financial affairs of charitable trusts, without expressly embodying the doctrine of *cy pres* in the Income tax Act. Even in USA, 'Statutes on Conversion' directed the proceeds of conversion must be directed to charity only.

In the year 1976, Parliament made its intentions clear that the doctrine of cy pres is applicable to charitable trusts in India, by inserting sub-section (3) of section 92 in Civil Procedure Code, 1908, on the lines of Charities Act, 1960 of UK, without waiting for an amendment to law relating to public trusts of a religious or charitable nature. The Madras High Court in the case of TKVTSS Medical, Educational and Charitable Trust v State of TN AIR 2002 Mad 42 (DB) held, "The courts have acted on the principle that where a gift is made to charity and that charity failed for any reason, the object of the donor or testator should not be defeated, but the property endowed should be applied to another object approximating as nearly as possible to the objects which the testator had in view."

A charity remains charity forever as it is irrevocable. Cy Pres is applicable to all common law countries on principles of equity. In practice, trusts approach the court only for framing a scheme of management in case of dispute. Otherwise, trusts seek permission of jurisdiction CIT or Registrar of companies, as the case may be, to alter the terms of trust or Memorandum and Articles, respectively. Nevertheless, the question is whether the exit tax on conversion can remain a sequitur when charity cannot be obliterated under common law. Care must certainly be exercised not to import by analogy what is not germane to the general law of trusts, but we need have no inhibitions in administering the law by invoking the universal rules of equity and good conscience upheld by the Courts.

"We are all imperfect teachers, but we may be forgiven if we have advanced the matter a little, and have done our best." – Will Durant"

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RECENT DECISIONS - EXCISE AND CUSTOM LAWS

CA. B.DEBASIS NAYAK & CA. SRIHARI V.K.

CENTRAL EXCISE

Penalty collected from dealers for violating terms of agreement is not in connection with sale and not includible in Assessable Value

In the case of CCE vs Skoda Auto Ltd 2016-TIOL-2050-CESTAT-MUM the taxpayer was a manufacturer of motor vehicles. Taxpayer appointed dealers for various geographical jurisdictions for selling the motor vehicles. In terms of agreement, the dealers were required to sell goods in their own geographical jurisdictions and in case the sale was made in other dealers' geographical jurisdiction, a penalty was charged by the taxpayer. Such penalty was recovered through debit notes.

Revenue sought to include the amount of penalty recovered from the dealers in the assessable value for the purpose of calculation of excise duty. The original authority confirmed the demand along with interest and equivalent penalty. The Commissioner (A) reduced the mandatory penalty while upholding the demand. Both, taxpayer & Revenue are before the Tribunal.

The Tribunal observed that every amount collected by the manufacturer from the buyer is not includible in the assessable value. Tribunal further observed that the Revenue did not produce evidence to show that the penalty amount received by the taxpayer is in connection with the sale of goods by them to dealers. Hence it was held that the value cannot be included in the assessable value for the purpose of calculation of excise duty.

Cenvat Credit fraudulently taken and used for payment of Excise duty by the supplier - Cenvat credit of duty passed on by supplier cannot be denied at the buyers end as the buyer was not aware of the fraud

In the case of **Laxmi Organic Industries Ltd vs CCE 2016-TIOL-2086-CESTAT-MUM** the taxpayer was denied Cenvat

credit on special denatured spirit on the ground that the supplier fraudulently used Cenvat credit by overstating opening balance of Cenvat credit and used the same for payment of excise duty on denatured spirit cleared by them. The demand was confirmed by the Revenue Authorities and the taxpayer filed an appeal before the Tribunal against demand order.

The Tribunal observed that receipt of goods and use thereof has not been challenged. There is no evidence produced to assert that the taxpayer knew that the supplier of goods had wrongly availed Cenvat Credit. Relying on the decision of *RS Industries* the Tribunal held that the Cenvat credit cannot be denied and the appeal filed by taxpayer was allowed.

Once taxpayer opts to pay proportionate credit under Rule 6(3)(ii) of Cenvat Credit Rules, 2004, they cannot later seek change in the option of paying 5%/10% under Rule 6 (3)(i) of said rules and consequently seek a refund of differential Credit.

In the case of **Jubilant Life Science Ltd vs CCE 2016-TIOL-2026-CESTAT-MUM** the taxpayer was engaged in the manufacture of Organic Chemicals. Couple of products manufactured by taxpayer was exempted goods for which proportionate Cenvat Credit was reversed under Rule 6(3)(ii) of the Cenvat Credit Rule, 2004 ("Cenvat Rules"). Subsequently, the taxpayer submitted a refund claim in terms of Section 11B of Central Excise Act, 1944 ("Excise Act") on the grounds that they should have paid an amount @5%/10% of the value of the exempted goods instead of Rule 6(3) (ii) reversal. By adopting proportionate method under Rule 6(3) (ii) of Cenvat Rules they reversed excess credit, which is being claimed as refund.

The Revenue authorities rejected the refund claim. On Appeal, the rejection was upheld by Commissioner (Appeal). Aggrieved by the order of Commissioner (Appeals), taxpayer filed an appeal before the Tribunal.

The Tribunal observed that Explanation (1) to Rule 6(3) of Cenvat rules is very clear that once a particular option is availed in a financial year, the same cannot be withdrawn. When the taxpayer has availed option for payment of proportionate credit as provided under Cenvat Rule, they are not allowed to change the option and claim to pay 5%/ 10% of value of the exempted goods. The Tribunal held that the refund of differential duty is not admissible.

Packing of pre-determined quantity of already marketable goods in a plastic bag has not made products further marketable – Excise duty not leviable.

In the case of **Electropneumatics & Hydraulics India Pvt Ltd vs CCE 2016-TIOL-1882-CESTAT-MUM**, the taxpayer was a manufacturer of Pneumatic Cylinders & valves. In an Audit by the Revenue, it was observed that during the period June 1999 to March 2004, taxpayer had cleared 'Seal kits' for Pneumatic Cylinders & valves without Central Excise duty. The taxpayer contended that the goods were bought out items and not manufactured by them hence Excise duty was not leviable.

However, the Revenue Authorities confirmed the demand. On Appeal before the Commissioner (Appeal) the Revenue demand was upheld on the ground that the taxpayer was involved in packing and repacking of the said bought out goods which was a manufacturing activities.

Taxpayer is before the Tribunal against the order passed by the Commissioner (Appeal). The Tribunal observed that the question of considering the packing as manufacture does not arise as regards the subject goods ie 'O' Ring & 'U' Cap seals as they were already marketable when the supplier/manufacturer had manufactured the same and cleared to taxpayer. Subsequent packing of pre-determined quantity in a plastic bag has not made the products further marketable. In the absence of any note to the chapter that packing of pre-determined quantity would amount to manufacture, the Tribunal held that the said activity cannot be considered as a manufacturing activity. The Order of Commissioner (Appeal) was set aside.

There is no time limit prescribed for issue of SCN u/s 11B and thus it is open to Revenue to point out shortcomings in refund claim even after one year

In the case of **Behr India Ltd vs CCE 2016-TIOL-2156-CESTAT-MUM**, the taxpayer filed a refund claim on December 1, 2005 and a Show Cause Notice ("SCN") was issued on January 23, 2006 seeking to deny the refund claim on the ground of unjust enrichment. Another SCN in respect of the same refund claim was issued on January 29, 2007 seeking to deny the same on the ground of limitation.

Both the notices were heard together and the refund claim was rejected on the ground of limitation. As the lower appellate authority upheld this order, the taxpayer is before the Tribunal.

The Tribunal observed that the taxpayer could have opted for provisional assessment if the assessable value was undeterminable at the time of clearances from the factory. However, the taxpayer chose to pay duty voluntarily instead of provisional assessment. Hence the only recourse is to file a refund claim under Section 11B of Central Excise Act, 1944. The show-cause notice issued under Section 11B are in the nature of communication of the objection. No time limit is prescribed for issue of show-cause notice under Section 11B. On the above grounds, the Tribunal dismissed the appeal filed by the taxpayer and upheld that decision of the lower authority in rejecting the refund claim.

Cenvat credit on repair and maintenance of guesthouse is allowable.

In the case of **JSW Steel (Salav) Ltd vs CCE 2016-TIOL-2078-CESTAT-MUM** the taxpayers were issued show-cause notices demanding reversal of credit availed on repair and maintenance of guesthouse. Lower authorities upheld the demand and imposed penalties, interest. Aggrieved by the order of lower authorities, the taxpayer is before the Tribunal.

The Tribunal observed that the guesthouse is located right next to the factory premises. It is not the case of the Revenue that these services are used for personal consumption of the employees. The fact that the guesthouse is located right next to the factory implies that it is used in relation to the manufacturing activity. In view of the above, the Tribunal allowed the credit of repair and maintenance services of the guesthouse.

CUSTOMS:

Interest on delayed refund of excess customs duty paid: Interest payable from the date of refund application even if the application was defective and the same was not communicated to the applicant.

In the case of **Sun Tex vs CC 2016-TIOL-2069-CESTAT-MUM** the taxpayer imported certain goods. The duty was assessed by the original authority based at a higher value. On appeal, the Commission (Appeal) set aside the order of assessment. Taxpayer filed a refund application for the refund of excess duty paid. This consequential refund was sanctioned but the claim for interest on delayed payment of refund was not allowed on the ground that though the refund application was filed on

July 27, 2009, the original documents required for processing were furnished only on September 22, 2010 and the refund had been sanctioned within three months of the latter date. Taxpayer is in appeal before the Tribunal.

The Tribunal observed that as per Customs regulations, if the refund application was not complete, the proper officer should have returned the application to the applicant or deficiency should have been brought to the notice of the taxpayer. However, no deficiency was brought to the notice of the Taxpayer. Based on the above, the Tribunal held that the claim of Revenue that the application was incomplete does not find any support and ordered payment of interest to the taxpayer from the date of filing refund application.

Delay in filing appeal before Commissioner (Appeals): Appellate Authority has no power to condone delay beyond extendable period as per statute

In the case of **Falcon Tyres Ltd vs CESTAT & CC 2016-TIOL-1712-HC-MAD-CUS** the taxpayer filed an appeal before the Commissioner (A) against assessment of Bill of Entry. The Commissioner (A) dismissed the appeal on the ground of delay being beyond condonable period. Taxpayer contended before the Tribunal that they did not file appeal against the bill of entry but against rejection of re-assessment which was filed subsequently and was rejected by the department which is not justified.

The Tribunal upheld the order of Commissioner (A) after observing that that the appeal is filed against Bill of Entry and not against the re-assessment letter/ order.

Aggrieved by the same, the taxpayer appealed before the High Court. The High Court observed that Appeals filed before the Commissioner of Customs (Appeals) shows that the appeal was filed only against the assessment order/bill of entry and not against the decision or order for re-assessment. The High Court relied on several Apex Court rulings which holds that the Commissioner of Customs (Appeals), the Appellate authority, has no powers to condone the delay, beyond the extendable period. Based on the above ground, the High Court dismissed the appeal filed by the taxpayer.

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INSOLVENCY AND BANKRUPTCY CODE 2016 - AN INSIGHT

CS. S. DHANAPAL

The existence of several laws to deal with Insolvency for the companies such as the Sick Industrial Companies Act, The Recovery of Debt Due to Banks & Financial Institutions Act, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Companies Act etc and for the Individuals, sole proprietorships and partnership firms such as The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency act, 1920 (Section 107 of The Presidency Towns Insolvency Act, 1909 and Section 8 of The Provincial Insolvency act, 1920 specifically prohibits any insolvency petition against corporation or association or company registered under any enactment for the time being in force) are failed to recover the loans and debts due from debtors.

Therefore, it is felt by the Government that there is a need to have a consolidated law or code to govern and regulate those matters of recovery of money from debtors who have borrowed and failed to repay after due date more particularly those are not secured.

If we look at the provisions in the Constitution of India, the item "Bankruptcy & Insolvency" is stated as Entry 9 in List III - Concurrent List, (Article 246-Seventh Schedule to the Constitution) that is to say both Central and State Governments can make laws relating to this subject.

It appears as follows:

LEGISLATIVE AUTHORITY UNDER CONSTITUTION OF INDIA FOR INSOLVENCY		
Entry 43	List I	Regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including co-operative societies.
Entry 44	List I	Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.
Entry 32	List II	Incorporation, regulation and winding up of corporations, other than those specified in List I
Entry 9	List III	Bankruptcy & Insolvency

The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha on 21 December, 2015 and the same was referred to Joint Committee on The Insolvency and Bankruptcy Code, 2015 for examination. The report of the Joint committee was presented in Lok Sabha and laid down in Rajya sabha on April 28, 2016. The code has been passed by Lok Sabha on May 05, 2016 and Rajya Sabha on May 11, 2016.

It is stated in the preamble of the Code that the law is enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Fund, and for matters connected therewith or incidental thereto. Therefore upon the code becoming into force, various remedies as stated under the following laws will be covered under one roof:

a) SICA, 1985

b) Recovery of Debts Due to Banks and Financial Institutions Act, 1993

c) SARFAESI Act, 2002; and

d) Companies Act, 2013

The Code seeks to amend the following 11 enactments while repealing Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920.

- The Indian Partnership Act 1932
- The Central Excise Act 1944
- The Income Tax Act 1961
- The Customs Act. 1962
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993

- The Finance Act 1994
- The Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002
- Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- The payment and Settlement Systems Act 2007
- The Limited Liability Partnership Act 2008
- Companies Act, 2013 / 1956

It is stated in the Press information released by Ministry of Finance dated 11th May 2016 that the objective of this new law is to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner and for maximization of value of assets of such persons and matters connected therewith or incidental thereto and the salient features of the law are as follows:

i. Clear, coherent and speedy process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.

ii. Two distinct processes for resolution of individuals, namely- "Fresh Start" and "Insolvency Resolution".

iii. Debt Recovery Tribunal and National Company Law Tribunal to act as Adjudicating Authority and deal with the cases related to insolvency, liquidation and bankruptcy process in respect of individuals and unlimited partnership firms and in respect of companies and limited liabilities entities respectively.

iv. Establishment of an Insolvency and Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.

v. Insolvency professionals would handle the commercial aspects of insolvency resolution process. Insolvency professional agencies will develop professional standards, code of ethics and be first level regulator for insolvency professionals members leading to development of a competitive industry for such professionals.

vi. Information utilities would collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.

vii. Enabling provisions to deal with cross border insolvency.

The simplified outline of the corporate insolvency resolution process under the insolvency and bankruptcy code, 2016 is as below:

1. ***When Loan Default occurs:***

   Either the borrower / the lender approach the adjudicating authority which is the NATIONAL COMPANY LAW TRIBUNAL (NCLT - in case of Company's & LLP's) or the Debt Recovery Tribunal (DRT – in case of individuals or partnership firms) for initiating the resolution process.

2. ***Appointment of Interim Insolvency Professional (IP)***

   An Interim Insolvency Professional will be appointed by the Creditors to take control of the debtor's assets and company's operations, collect financial information of the debtor from the information utilities, and ascertain the claim and to constitute a creditor's committee.

3. ***Decision of the Creditor's Committee***

   Every item that requires the approval of the creditors in their committee meeting needs to be passed with a voting share percentage of 75%.

4. ***Restructuring Process:***

   Upon passing of the resolution by the creditors committee, the committee shall decide on the restructuring process that could either be a revised repayment plan for the company or liquidation of the assets of the company. If no such decision is taken by the creditors in their meeting then, the debtor's assets will be liquidated to repay the debt.

5. ***Approval of the Tribunal / Liquidation***

The resolution plan shall be sent to the NCLT for its approval and implementation thereafter. If the NCLT does not approve the resolution plan, then the liquidation process shall begin.

Notification of few provisions of the code recently by ministry of corporate affairs;

Ministry of Corporate Affairs has recently notified on 5th of August, 2016 the provisions of sections 188 to 194 (both inclusive). Sections 188 to 194 (both inclusive) of the Insolvency and Bankruptcy Code, 2016 and these sections fall under Chapter I of Part IV (Regulation of Insolvency Professionals, Agencies and Information Utilities) of the Code and relate to the establishment, incorporation and constitution of The Insolvency and Bankruptcy Board of India ("Board"), and include provisions relating to powers of the chairman of the Board and meetings of the Board and also on 19th August 2016 following sections of the said Code shall come into force:—

Section 3 - (i) clause (1); (ii) clause (5); (iii) clause (22); (iv) clause (26); (v) clause (28); (vi) clause (37);	section 221; section 222; section 225; section 226; section 230; section 232; section 233;	sub-section (1) and clause (zd) of sub-section(2) of sec 239; sub-section (1) and clause (zt) of sub-section (2) of section 240; section 241; and section 242

Wrap up

The primary objective of The Insolvency and Bankruptcy Code 2016 is to provide a specialised and quick resolution mechanism in debt recovery. The Code attempts to provide one stop solution by amending various laws relating to insolvency and reorganisation of corporate persons, partnership firms and individuals in a time bound manner and for providing rehabilitation opportunity to persons who are unable to repay their debts and for maximization of value of the assets of such persons and matters connected therewith or incidental thereto.

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EXCEL TIPS

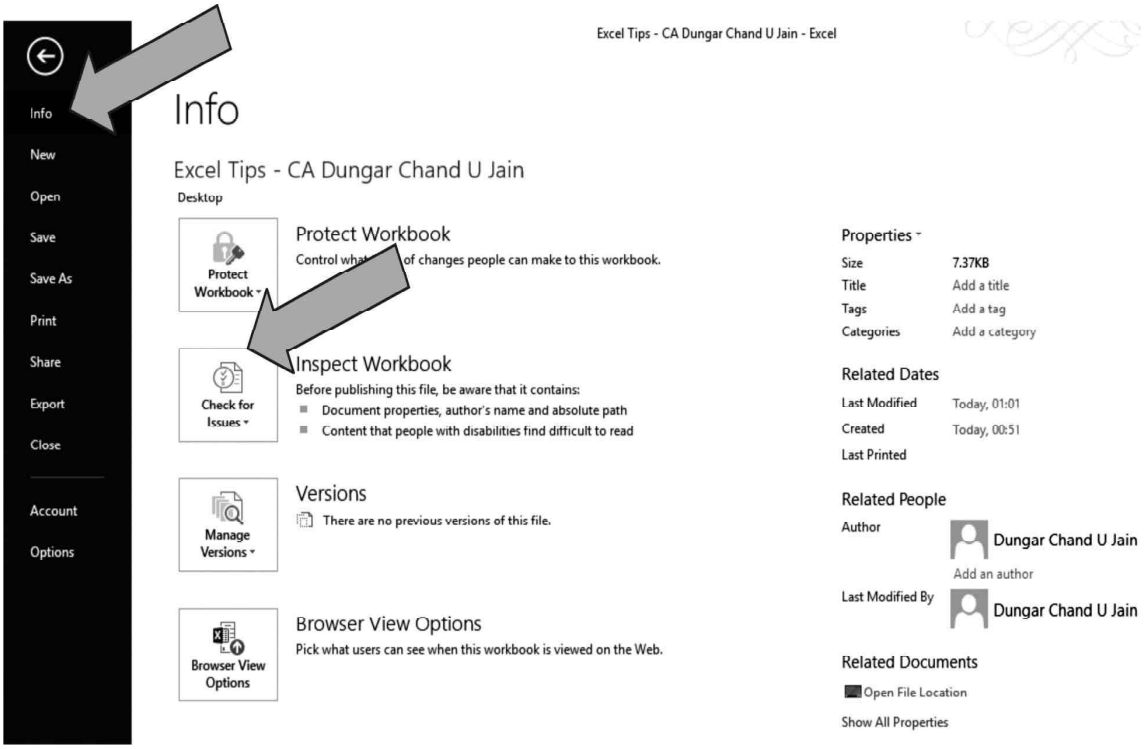
Inspecting a workbook

CA DUNGAR CHAND U. JAIN

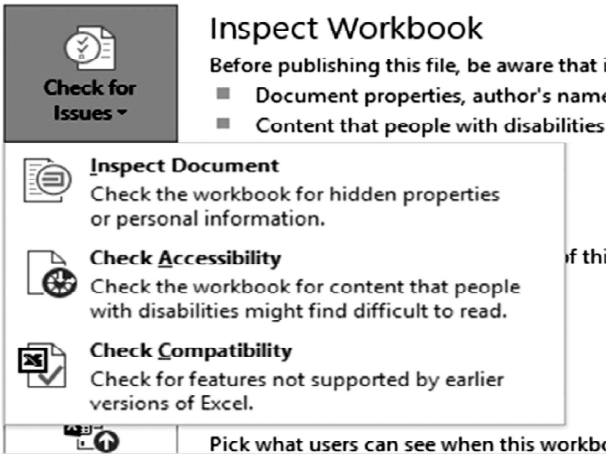
If you plan to share an electronic copy of a Microsoft Office Excel workbook, it is a good idea to review the workbook for hidden data or personal information that might be stored in the workbook itself or its document properties (metadata).

Because this hidden information can reveal details about your organization or about the workbook itself that you might not want to share publicly, you might want to remove this hidden information before you share the workbook with other people.

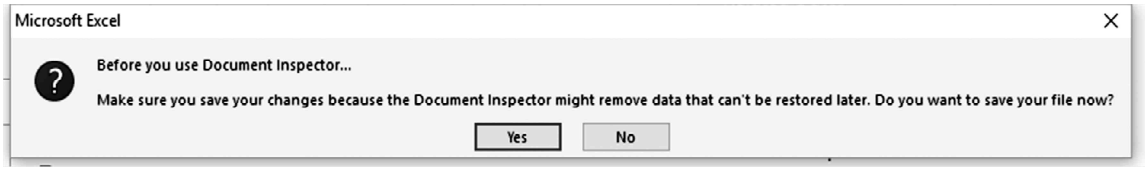
To display the Document Inspector dialog box, choose File?Info?Check for Issues?Inspect Document.



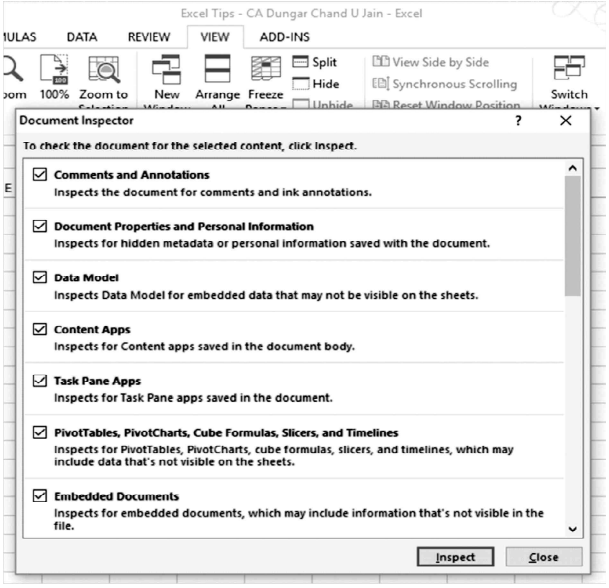
Once you click Check for issues, the following is displayed:



A Confirmation dialog box appears once "Inspect Document" is clicked that whether you want to save the file.



Once you Click Yes, the dialog box with all options to be inspected is displayed. Click "Inspect" to proceed



Types of hidden data and personal information are stored in workbooks

Several types of hidden data and personal information can be saved in an Excel workbook. This information might not be immediately visible when you view the workbook in Office Excel, but it might be possible for other people to view or retrieve the information.

Hidden information can include the data that Office Excel adds to a workbook to enable you to collaborate on it with other people. It can also include information that you deliberately designate as hidden.

Excel workbooks can contain the following types of hidden data and personal information:

- **Comments and ink annotations** If you collaborated with other people to create your workbook, your workbook might contain items such as comments or ink annotations. This information can enable other people to see the names of people who worked on your workbook, comments from reviewers, and changes that were made to your workbook.

- **Document properties and personal information** Document properties, also known as metadata, include details about your workbook such as author, subject, and title. Document properties also include information that is automatically maintained by Office programs, such as the name of the person who most recently saved a workbook and the date when a document was created. If you used specific features, your document might also contain additional kinds of personally identifiable information (PII), such as e-mail headers, send-for-review information, routing slips, printer paths, and file path information for publishing Web pages.

- **Headers and footers** Excel workbooks can contain information in headers and footers.

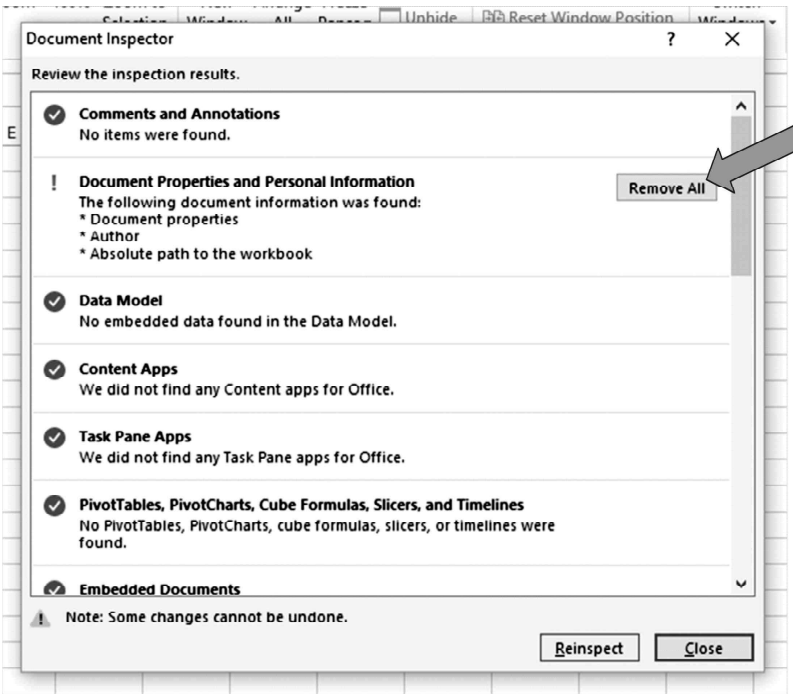
- **Hidden rows, columns, and worksheets** In an Excel workbook, rows, columns, and entire worksheets can be hidden. If you distribute a copy of a workbook that contains hidden rows, columns, or worksheets, other people might unhide these row, columns, or worksheets and view the data that they contain.

- **Document server properties** If your workbook was saved to a location on a document management server, such as a Document Workspace site or a library based on Microsoft Windows SharePoint Services, the workbook might contain additional document properties or information related to this server location.

- **Custom XML data** Workbooks can contain custom XML data that is not visible in the document itself. The Document Inspector can find and remove this XML data.

- **Invisible content** A workbook can contain objects that are not visible because they are formatted as invisible.

Depending upon the information stored, the same shall result like this



Click Remove All next to the inspection results for the types of hidden content that you want to remove from your document.

Important:

- If you remove hidden content from your document, you might not be able to restore it by clicking Undo.

- If you remove hidden rows, columns, or worksheets that contain data, you might change the results of the calculations or formulas in your workbook. If you do not know what information the hidden rows, columns or worksheets contain, close the Document Inspector, unhide the hidden rows, columns, or worksheets, and then review their contents.

- The inspectors for Comments and Annotations, Document Properties and Personal Information, and Headers and Footers cannot be used in a workbook that has been saved as a shared workbook (Review tab, Shared Workbook command). This is because shared workbooks use personal information to enable different persons to collaborate on the same workbook. To remove this information from a shared workbook, you can copy the workbook and then unshare it. To unshare a workbook, on the Review tab, click Shared Workbook. On the Editing tab, clear the Allow changes by more than one user at the same time check box.

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