CHAPTER-VI
EXEMPTIONS AND ALLOWANCES

Sec. 44. Exemption.–(1) Notwithstanding anything contained in this ordinance, any income or class of income or the income of any person or class of persons specified in Part A of the Sixth Schedule shall be exempt from the tax payable under this Ordinance, subject to the limits, conditions and qualifications laid down therein and shall be excluded from the computation of total income under this Ordinance.

(2) Subject to the provisions of this Ordinance and the limits, conditions and qualifications laid down in Part B of the Sixth Schedule, –

(a) tax shall not be payable by an assessee in respect of any income or any sum specified in paragraphs 15 and 16 of the said Part B; and

(b) an assessee shall be entitled to a credit from the amount of tax payable on his total income of an amount equal to fifteen percent of the sums specified in paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, [17 and 21] of the said Part B.

(3) The aggregate of the allowances admissible under paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, [17 and 21] of Part B of the sixth Schedule shall not exceed twenty percent of the total income of the assessee [or one lakh and fifty thousand taka,] whichever is the less];

(4) The Government may, by notification in the official Gazette,–

(a) make such amendments by way of addition, omission, alteration or qualification in the Sixth Schedule as it may deem fit; and

(b) make any exemption, reduction in rate or other modifications in respect of tax in favour of any class of income or in regard to the whole or any part of the income of any class of persons.

Amendment as made by the Finance Act 2000:-

(i) Insertion of Paragraphs 11A and 11B of Part B of Sixth Schedule in sub-section 2(b) and sub-section (3), and

(ii) amount of exemption limit has been raised to two lakh taka and where the investments are made under Paragraph 8 exceeds two lakh taka and the investments are made in the acquisition otherwise than by purchase

or transfer from previous holders of shares of a company listed with any Stock-Exchange in Bangladesh.

Exemption-sec. 44.–It has already been discussed (See under "Income exempt from tax" s. 2(65) *ante*) that there are certain incomes which are exempt from charge and are also excluded from the assessee's total income.

Sub-sec.(1) –The sub-section excludes certain income or classes of income, or the income of any person or class of persons receiving them. The exemptions embodied in this sub-section may be divided into *two* categories–exemption to which certain classes of income from their very *nature* are entitled, and exemption to which the *character* of the assessee entitles him. In the first category are income derived from property held under trust or other legal obligation wholly for religious or charitable purposes (Paragraph 1) and any interest classifiable under the head, 'Interest on securities' receivable by an assessee on any security of the Government which is issued with the condition that interest thereon shall not be liable to tax (Paragraph 24) of Part A of Sixth Schedule respectively. In the case of these classes of income, "the exemption is conferred and conferred indelibly on a particular kind of income and does not depend on the character of the recipient" as Lord Macmillan said in *C.I.T.* v. *Sir Kamertwar Singh* (1935 I.T.R 305, 308/9 (P.C.) applied in *Raja Mustafa Ali Khan* v. *C.I.T.* 1948 I.T.R. 330, 340 (P.C.)). Instances of the second category of exempted income are the income of local Government (Paragraph 3) and of any Ambassador, High Commissioner and other diplomatic officers (Paragraph 7) of Part A of Sixth Schedule respectively.

Income exempted from tax and are excluded from the assesse's total income, as are specified in different paragraphs of Part A of Sixth Schedule (to be dealt in separately) and some items in the Notification issued by the Government under cl. (b) of sub-section 4 of this section. Certain other incomes are exempted from income-tax but they are to be included in the assessee's total income, e.g. sums exempted under cl.(a) of sub-section (2) which are expressly declared by the provisos of paragraph 15 and 16 of Part B of Sixth Schedule to be includible in the assessee's total income. Therefore it follows that the total income of an assessee is not necessarily wholly subject to tax.

The sums exempted from tax under specified paragraphs in Part A of Sixth Schedule are not only exempt but they do not form part of total income subject to certain limits and conditions as provided for in respective paragraphs.

Burden of proof– The onus of showing that a particular item of income falls within the exemption clause is on the assessee–*Becha Guzdar* v. *C.I.T. (1955) 27 I.T.R. 14 (S.C. of India).*

Cl.(b) of sub-section (2) grants some relief in the form of tax-credit to the resident assessees for investments made in specified fields as mentioned in different paragraphs of Part B of Sixth Schedule. This is an incentive to encourage savings and investment in share capital. An amount equal to fifteen percent of the sums of the investments specified in these paragraphs shall be given as tax credit which will be deducted from the total tax payable on the total income. Sub-section (3) has however,

put a ceiling on the total allowable investments made for tax credit which has been fixed at twenty percent of the total income of the assessee or one lakh fifty thousand taka whichever is the less. This amount has been raised by the Finance Act of 2000 to two lakh taka and two lakh 25 thousand taka where the investment exceeding two lakh taka is made under paragraph 8 of Part B of Sixth Schedule in the acquisition otherwise then by purchase or transfer from previous holders. of shares of a company listed which any Stock Exchange. The allowances for investments in different Paragraphs of Part B of Sixth Schedule have also been subjected to certain restrictions and limitations as provided for in the respective paragraphs (to be dealt in separately).

The Government has been given the power by issuing Notification to make any amendment both in Part A and Part B of Sixth Schedule by way of addition, alteration or omission or put limitation or conditions in allowing the exemptions as provided for in Part A and in the matter of investments to be made as specified in Part B for tax-credit. The Government is also authorised to grant exemption in favour of the assessee in respect of certain income or classes of income or give relief to persons in respect of certain income of those persons. It may also reduce the rate of tax or may make modifications in respect of tax payable by the assessee but in all such cases the Government can only reduce not increase the tax liability of the assessee.

Sec. 45. Exemption of income of an industrial undertaking.– (1) Subject to the provisions of this Ordinance, the income, profits and gains of an industrial undertaking set up in Bangladesh between the first day of July, 1974, and the thirtieth day of June, 1985 (both days inclusive), shall be exempt from tax payable under this Ordinance for the period specified below–

(a) if the undertaking is set up in such areas as the Board may, by notification in the official Gazette, specify to be "Special Economic Zone", for a period of twelve years beginning with the month of commencement of commercial production of the undertaking;

(b) if the undertaking is set up on such areas as the Board may, by notification in the official Gazette, specify in this behalf, for a period of nine years beginning with the month of commencement of commercial production of the undertaking; and

(c) in other areas, for a period of five years beginning with the month of such commencement.

Explanation.–For the purposes of this section, "industrial undertaking" includes expansion of an existing undertaking if such expansion constitute–

(a) an identifiable unit for production of similar or other goods or class of goods; or

(b) a similar unit carrying on an identifiable industrial process, but does not include an undertaking which is formed by splitting up or reconstruction of an existing business or by the transfer of machinery or plant of an existing business in Bangladesh to a new business.

(2) The exemption under sub-section (1) shall apply to an industrial undertaking (hereinafter referred to as the "said undertaking") which fulfills the following conditions, namely:-

(a) that the said undertaking is owned and managed by–

(i) a body corporate established by, or in pursuance of, an Act of Parliament with its head office in Bangladesh; or

(ii) a company registered under the Companies Act, 1913(VII of 1913), with its registered office in Bangladesh and having a subscribed and paid up capital of not less than one lakh taka on the date of commencement of commercial production;

(b) that the said undertaking belongs to such class of industry as the Board may, by notification in the official Gazette, specify for the purposes of this section;

(c) that a part of the income exempted under this section is reinvested in the said undertaking or is invested in the purchase of bond issued by the Government and such reinvestment or investment is not–

(i) less than fifteen percent of such income, if it is an undertaking set up in the areas referred to in sub-section (1)(a) and (b); and

(ii) less than thirty percent in other areas;

(d) that the said undertaking is approved and, during the relevant income year, stands approved by the Board for the purposes of this section;

(e) that the application in the prescribed form for approval for the purposes of this section, as verified in the prescribed manner, is made to the Board within one hundred and twenty days from the date of commencement of commercial production:

Provided that the Board may admit an application after the expiry of the said period of one hundred and twenty days if it is satisfied that there was sufficient cause for not making the application within the said period.

(2A) Subject to the provisions o this Ordinance, the income, profits and gains of an industrial undertaking set up in Bangladesh between the first day of July, 1985, and the thirtieth day of June, [1995] (both days inclusive), shall be exempt from the tax payable under this Ordinance for the period specified below–

(a) if the undertaking is set up in such areas as the Board may, by notification in the official Gazette, specify to be "Special Economic Zone", for a period of twelve years beginning with the month of commencement of commercial production of the undertaking;

(b) if the undertaking is set up in such areas as the Board may, by notification in the official Gazette, specify to be "Least Developed Areas", for a period of nine years beginning with the month of commencement of commercial production of the undertaking;

(c) if the undertaking is set up in such areas as the Board may, by notification in the official Gazette, specify to be "Less Developed Areas", for a period of [seven] years beginning with the month of commencement of commercial production of the undertaking; and

(d) if the undertaking is set up in the city of Dhaka, Chittagong or Khulna or the municipality of Narayanganj, or within ten miles from the outer limits thereof, for a period of [five] years beginning with the month of commencement of commercial production of the undertaking.

(2B) The exemption under sub-section (2A) shall apply to an industrial undertaking (hereinafter referred to as the "said undertaking") which fulfills the following conditions, namely–

(a) that the said undertaking is owned and managed by–

(i) a body corporate established by, or in pursuance of, an Act of Parliament with its head office in Bangladesh; or

(ii) a company registered under [the Companies Act, 1913 (VII of 1913) or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন)], with its registered office in Bangladesh and having a subscribed and paid up capital of not less than one lakh taka on the date of commencement of commercial production;

(b) that the said undertaking belongs to such class of industry as the Board may, by notification in the official Gazette, specify for the purpose of this sub-section;

(cc) that a part of the income exempted under sub-section (2A) is invested, [during the period, or within one year from the end of the period] to which the exemption under that sub-section relates, in the said undertaking or in any new industrial undertaking or in any productive assets being stocks and shares of a public company or bonds or securities issued by the Government and such investment is not less than [thirty percent] of such income, failing which the income so exempted, shall, notwithstanding the provisions of this Ordinance, be subject to tax in the assessment year for which the exemption was allowed:

[Provided that the quantum of investment referred to in this clause shall be reduced by the amount of dividend, if any, declared by the company enjoying tax exemption under this section;]

(d) that the said undertaking is approved and, during the relevant income year, stands approved by the Board for the purposes of this section;

(e) that the application in the prescribed form for approval for the purposes of this section, as verified in the prescribed manner, is made to the Board within [one hundred and eighty days] from the date of commencement of commercial production:

Provided that the Board may admit an application after the expiry of the said period of [one hundred and eighty days] if it is satisfied that there was sufficient cause for not making the application within the said period.

(2C) The Board shall give its decision on an application made under clause (e) of sub-section (2B) within [three months] from the date of receipt of the application by the Board, failing which the undertaking shall be deemed to have been approved by the Board for the purposes of this section.

(3) The income, profits and gains of the said undertaking to which this section applies, shall be computed in accordance with the provisions of sections 28 and 29:

Provided that in respect of depreciation, only the allowances for normal depreciation specified in paragraph 3 of the Third Schedule shall be allowed.

(4) The profits and gains of the said undertaking shall be computed separately from other income, profits and gains of the assessee, if any and where the assessee sustains a loss from such undertaking, it shall be carried forward and set off against the profits and gains of the said undertaking for the following year, and where it cannot be wholly set off, the amount of the loss not so set off, shall be carried forward for the next year and so on, but no loss shall be carried beyond the period of exemption allowed under this section.

(5) Nothing contained in this section shall be so construed as to exempt the following:

(a) any dividend paid, credited or distributed or deemed to have been paid, credited or distributed by a company to its share-holders out of the profits and gains exempt from tax under this section; and

(b) any income of the said undertaking classifiable as "Capital gains" chargeable under the provisions of section 31.

(6) Where any exemption has been allowed under this section and it is subsequently discovered by the Deputy Commissioner of Taxes that any one or more of the conditions specified in this section were not fulfilled, the exemption originally allowed shall be deemed to have been wrongly allowed, and the Deputy Commissioner or Taxes may,

notwithstanding anything contained in this Ordinance, re-compute the total income of, and the tax payable by, the assessee for the relevant income year and the provisions of section 93 or 94 shall, so far as may be, apply thereto, the period of two years specified in section 94 being reckoned from the end of the assessment year relevant to the income year in which the infringement was discovered.

(7) An industrial undertaking approved under this section may, not later than six months from the date of approval, apply in writing to the Board for the cancellation of such approval, and the Board may pass such orders thereon as it may deem fit.

(8) Notwithstanding anything contained in this section, the Board may, in the public interest, cancel or suspend fully or partially any exemption allowed under this section.

Sec. 46. Exemption of income of a tourist industry.–(1) Subject to the provisions of this Ordinance, the income, profits and gains of a tourist industry set up in Bangladesh between the first day of January, 1976, and the thirtieth day of June, 1985 (both days inclusive), shall be exempt from the tax payable under this Ordinance, for the period specified below–

(a) if the industry is set up in such areas as the Board may, by notification in the official Gazette, specify to be "Special Economic zone", for a period of twelve years beginning with the commencement of its commercial service;

(b) If the industry is set up in the cities of Dhaka, Chittagong, Khulna and Rajshahi and the areas within fifteen miles from the outer municipal limits of those cities, for a period of five years beginning with the month of commencement of its commercial service; and

(c) in other areas, for a period of seven years beginning with the month of such commencement.

Explanation. –For the purposes of this section, the expression "tourist industry" means a business, industry or undertaking which caters for the tourists including setting up, establishment or running of hotels, motels, hunting lodges and private picnic spots of such standard as may be proscribed by the Board.

(2) The exemption under sub-section (1) shall apply to a tourist industry (hereinafter referred to as the "said industry"), which fulfils the following conditions, namely:-

(a) that the said industry is owned and managed by a Bangladeshi company having a subscribed and paid up capital of not less than one lakh taka on the date of commencement of its commercial service;

(b) that the said industry shall have such service facilities as the Board may, by notification in the official Gazette, specify in this behalf;

(c) that a part of the income, profits and gains derived from the said industry exempted under sub-section (1) is reinvested in it or is invested in the purchase of bond issued by the Government, and such reinvestment or investment is not–

(i) less than thirty percent, if it is an industry set up in the areas referred to in sub-section (1)(b); and

(ii) less than fifteen percent., in other areas;

(d) that an application in the prescribed form for approval for the purposes of this section, as verified in the prescribed manner, is made to the Board within one hundred and twenty days of the date of commencement of commercial service;

(e) that the said industry is approved and, during the relevant income year, stands approved by the Board for the purposes of this section.

((2A) Subject to the provisions of this Ordinance, the income, profits and gains of a tourist industry set up in Bangladesh between the first day of July, 1985, and the 30th day of June, [1995] (both days inclusive) shall be exempt from the tax payable under this Ordinance, for the period specified below–

(a) if the industry is set up in such areas as the Board may, by notification in the official gazette, specify to be "Special Economic zone", for a period of twelve years

beginning with the month of commencement of its commercial service;

(b) if the industry is set up in such areas as the Board may, by notification in the official Gazette, specify to be "Least Developed Areas", for a period of nine years beginning with the month of commencement of its commercial service;

(c) if the industry is set up in such areas as the Board may, by notification in the official Gazette, specify to be "Less Developed Areas", for a period of [seven years] beginning with the month of commencement of its commercial service; and

(d) if the industry is set up in the city of Dhaka, Chittagong or Khulna or the municipality of Rajshahi, or within 15 miles from the outer limits thereof, for a period of [five years] beginning with the month of commencement of its commercial service.

(2B) The exemption under sub-section (2A) shall apply to a tourist industry (hereinafter referred to as the "said industry"), which fulfils the following conditions, namely:-

(a) that the said industry is owned and managed by a Bangladeshi company having subscribed and paid up capital of not less than one lakh taka on the date of commencement of its commercial service;

(b) that the said industry shall have such service facilities as the Board may, by notification in the official Gazette, specify in this behalf;

(cc) that a part of the income exempted under sub-section (2A) is invested, [during the period, or within one year from the end of the period] to which the exemption under that sub-section relates, in the said undertaking or in any new industrial undertaking or in any productive assets being stocks and shares of a public company or bonds or securities issued by teh Government and such investment is not less than [thirty percent.] of such income, failing which the income so exempted shall, notwithstanding the provisions of this Ordinance, be subject to tax in the assessment year for which the exemption was allowed:

Provided that the quantum of investment referred to in this clause shall be reduced by the amount of dividend, if any, declared by the company enjoying tax exemption under this section.

(d) that an application in the prescribed form for approval for the purposes of this section as verified in the prescribed manner, is made to the Board within [one hundred and eighty days] of the date of commencement of commercial service;

(e) that the said industry is approved and, during the relevant income year, stands approved by the Board for the purposes of this section.

(2C) The Board shall give its decision on an application made under clause (d) of sub-section (2B) within [three months] from the date of receipt of the application by the Board, failing which the industry shall be deemed to have been approved by the Board for the purposes of this section.

(3) The profits and gains of the said industry to which this section applies shall be computed in accordance with the provisions of sections 28 and 29:

Provided that in respect of depreciation, only the allowance for normal depreciation specified in paragraph 3 of the Third Schedule shall be allowed.

(4) The profits and gains of the said industry shall be computed separately from other income, profits and gains of the assessee, if any, and where the assessee sustains a loss from such industry, it shall be carried forward and set off against the profits and gains of the said industry for the following year and where it cannot be wholly set off, the amount of the loss not so set off, shall be carried forward for the next year and so on, but no loss shall be carried forward beyond the period of exemption allowed under this section.

(5) Nothing contained in this section shall be so construed as to exempt the following:-

(a) any dividend paid, credited or distributed or deemed to have been paid, credited or distributed by a company to its shareholders out of the profits and gains exempt from tax under this section; and

(b) any income of the said industry classifiable as "Capital gains" chargeable under the provisions of section 31.

(6) Where any exemption has been allowed under this section and it is subsequently discovered by the Deputy Commissioner of Taxes that any one or more of the conditions specified in this section were not fulfilled, the exemption originally allowed shall be deemed to have been wrongly allowed and the Deputy Commissioner of Taxes may, notwithstanding anything contained in this Ordinance, re-compute the total income of, and the tax payable by, the assessee for the relevant income year, and the provisions of section 93 shall, so far as may be, apply thereto, the period of two years specified in section 94 being reckoned from the end of the assessment year relevant to the income year in which the infringement was discovered.

(7) A tourist industry approved under this section may, not later than six months from the date of approval, apply in writing to the Board for the cancellation of such approval, and the Board may pass such order thereon as it may deem fit.

(8) Notwithstanding anything contained in this section, the Board may, in the public interest, cancel or suspend fully or partially the exemption allowed under this section.

Exemption of income of an industrial undertaking and of a tourist industry–Secs. 45 and 46.

To give impetus for set-up of new industry provisions are being made to give tax-exemption to such industry in the income-tax law. In 1959 by insertion of sec. 15 BB in the income-tax Act, 1922 such exemption for industry, known as "Tax holiday" was introduced but this exemption was withdrawn in 1972. Again in 1974 by amendment of 1922 Act sec. 14A was inserted to reintroduce tax exemption or tax holiday for new industries. Provisions have been made to give such exemption to industries in sections 45 (exemption for industrial undertaking) and section 46 (exemption for tourist industry) in Income-tax Ordnance, 1984. In 1995 a new section (s. 46A) has been inserted in the Ordinance to give exemption to newly established industrial undertakings, tourist industry or industry of physical infrastructure facility.

By amendments of secs. 45 and 46 the period for tax exemption has been extended to industries, set-up upto thirtieth day of June, 1995 and by insertion of sec. 46A the period of exemption has been extended in a new form to an industrial undertaking, tourist industry or industry of physical infrastructure facility set-up between the period from 1st day of July, 1995 to thirtieth day of June, 2000.

Exemption of income of an industrial undertaking–Sec. 45: The income, profits and gains of an industrial undertaking which fulfil the conditions as prescribed

in sub-section (2) are entitled to exemption from income-tax if the said undertaking is set-up in Bangladesh between the period from 1st day of July, 1974 to 30th day of June, 1985 (sub-section (1)). This exemption was extended for application to the industrial undertaking set-up between the period from 1st day of July, 1985 to 30th day of June, 1995 (sub-section (2A)).

The period for exemption would depend on the areas where such undertaking is set-up and for this purpose areas as prescribed by the Board were originally divided into three parts (sub-section 1) and with the insertion of sub-section (2) the areas were divided into four parts, such as, (a) Special Economic Zone; (b) Least Developed Areas (S.R.O. No. 482–L/85 dated 22.9.85); (c) Less Developed Areas (S.R.O. No. 411–L/85 dated 22.9.85) and lastly (d) "Developed Areas" which includes Dhaka, Chittagong, Khulna or the Municipality of Narayanganj or within ten miles from the outerlimits thereof. The period of exemption for these areas specified is twelve years, nine years, seven years and five years respectively beginning with the month of commercial production if the undertaking is set-up in such areas during the period from 1st day of July, 1974 to 30th day of June, 1985, or 1st day of July, 1985 to 30th day of June, 1995 and fulfills the conditions as laid down in sub-sec. 2B.

That a part of the exempted income, being not less than fifteen percent, in case of undertaking set-up between the period 1st day of July, 1974 to thirteenth day of June, 1985 will have to be reinvested in the said undertaking or is invested in the purchase of Government Bond in cases the undertaking is set-up in the specified areas mentioned in clauses (a) and (b) of sub-section (1) and thirty percent in case the undertaking is set-up in other areas as mentioned in clause (c).

A part of the exempted income of the undertaking set-up between first day of July, 1985 and thirtieth day of June, 1995, the amount being not less than thirty percent, shall have to be invested during the year or within one year from the end of the year to which the exemption relates in the said undertaking or in any new industrial undertaking or in any productive assets of a public company or in Government bonds or securities–2B (cc). Provided that the investment as referred to above shall be reduced by the amount of dividend declared by the industry enjoying tax exemption.

Under this section "industrial undertaking" includes expansion of an existing undertaking, income of which will be computed separately under the provisions of sections 28 and 29 subject to allowance of normal depreciation and in case of loss, such loss shall be carried forward and set-off against the income of the said undertaking, but no loss shall be carried forward beyond the period of exemption allowed under the section.

The Board has specified (S.R.O. 340–L/75 dt. 30-9-75) classes of industries to be the industries for the purpose of tax-exemption on fulfilment of prescribed conditions as mentioned in sub-sections(2) and (2B) of this section.

It may be mentioned here that the income, profits and gains of tax-holiday industries are exempt in this section but any dividend paid or deemed to have been paid out of the exempted income and any income of the undertaking under the head,

"Capital gains" shall not be exempt from tax–2B(5) of sec. 46. But dividend from exempted income from a publicly traded company received by an assessee excepting company shall be exempt from tax (S.R.O. 265–L/86 dt. 1st July, 1986).

Exemption of income of a tourist industry. sec. 46: –This section provides exemption from tax of the income, profits and gains of a tourist industry. The expression "tourist industry" means any business undertaking or industry which caters for the tourists including setting up of business of running hotels, motels, hunting lodges and private picnic spots of such standards as has been prescribed by the Board (S.R.O 288–L/79 dt. 11th October, 1979) –(Expln. to cl. (c)). Any service industries which do not fall under any classes of the industries as specified by the Board will not be eligible for tax-holiday (C. No. 14(9)/T-11/82 dt. 3rd May, 1983).

The exemption was originally applicable to a tourist industry set-up between the period from first day of July, 1976 and thirtieth day of June, 1985 but with the insertion of sub-section (2A) the exemption becomes available to such industry set-up between the period from first day of July, 1985 to thirtieth day of June, 1995.

Similar to the provisions of section 45, for the purpose of period of exemption, the areas were originally divided into three parts and subsequently the areas were divided into four parts as specified by the Board–"Special Economic Zone" (S.R.O. 53–L/85 dated 27th January, 1985), "Less Developed Areas" (S.R.O. 413–L/85 dated 22nd September, 1985, and other areas which include Dhaka, Chittagong or Khulna or the municipality of Rajshahi or within 15 miles from the outer limits thereof. The period of exemption depending on the areas in which the industry is set-up is, like the provisions of section 45, twelve years, nine years, seven years and five years.

That a part of the exempted income of such industry as referred to in sub-section (1) has to be reinvested in such industry or in the purchase of Government Bond. The amount of investment shall not be less than thirty percent if such industry is set-up in areas referred to in cls. (a) and (b) of sub-section(1) and fifteen percent in other areas–sub-sec. (2) of cl.(c). In cases of industry set-up between the first day of July, 1985 and thirtieth day of June, 1995 as referred to in sub-section 2A the amount of investment out of the exempted income shall have to be made during the period of exemption or within one year from the end of the period to which the exemption relates and the amount of exemption shall not be less than thirty percent of such income–sub-sec. 2B(cc).

Provided that the amount of investment as referred to in sub-sec. 2B(cc) shall be reduced by the amount of dividend declared by the company enjoying tax exemption–proviso to sub-sec. 2B(cc). All other provisions of this section are similar to the provisions applicable for tax-exemption to industrial undertaking under sec. 45.

Sec. 46A. Exemption from tax of newly established industrial undertakings, etc. in certain cases.–(1) Subject to the provisions of this Ordinance, profits and gains of an industrial undertaking, tourist industry or physical infrastructure facility (hereinafter referred to as the said

undertaking) set-up in Bangladesh between the first day of July, 1995 and the thirtieth day of June, 2000 (both days inclusive) (extended upto 2005 in the Finance Act, 2000) shall be exempt from the tax payable under this Ordinance for the period specified below–

(a) if the said undertaking is set-up in [Dhaka and Chittagong and Sylhet divisions. (Sylhet division has been excluded by the Finance Act, 2000) excluding the hill districts of Rangamati, Bandarban and Khagrachari, for a period of five years beginning with the month of commencement of commercial production or operation of the said undertaking;

(b) if the said undertaking is set-up in Rajshahi, Khulna and Barisal divisions (Sylhet division has been included by the Finance Act, 2000) and the hill districts of Rangamati, Bandarban and Khagrachari, for a period of seven years beginning with the month of commencement of commercial production or operation of the said undertaking.

Explanation.–For the purposes of this section, industrial undertaking, tourist industry or physical infrastructure facility, herein called the "said undertaking", includes expansion of an existing undertaking, if–

(a) the expansion unit constitutes an identifiable unit for production or operation of similar or other goods or class of goods or services;

(b) It is not found by splitting up or reconstruction of an existing business or by the transfer of machinery or plant of an existing business in Bangladesh to a new business; and

(c) the expansion unit has not applied for accelerated depreciation under paragraph 7 of the Third Schedule to this Ordinance];

(2) The exemption under sub-section (1) shall apply to the said undertaking if it fulfils the following conditions, namely: –

(a) that the said undertaking is owned and managed by–

(i) a body corporate established by or under an Act of Parliament with its head office in Bangladesh; or

(ii) a company as defined in the Companies Act, 1913 (VII of 1913) or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন) with its registered office in Bangladesh and having a subscribed and paid up capital of not less than one lakh taka on the date of commencement of commercial production or operation;

(b) that the said undertaking is engaged in–

(i) the manufacture of goods or materials or the subjection of goods or materials to any such process, or the exploration and extraction of mineral resources and processing of agricultural products;

(ii) providing, on commercial basis, physical infrastructure facility;

(iii) tourist industry as defined in the explanation to section 46.

Explanation.–For the purposes of this section, "physical infrastructure facility" means generation, transformation, conversion, transmission and distribution or supply of electrical energy or hydraulic power, or road, highway, bridge, airport, or the system of railway or telecommunication, or such other public facility of similar nature as may be specified by the Board in this behalf by notification in the official Gaxette;

(c) [that a part of the income exempted under sub-section (i) is invested during the period of exemption or within one year from the end of the period] to which the exemption under that sub-section relates, in the said undertaking or in any new industrial undertaking or in any productive assets being stocks and shares of a public company or bonds or securities issued by the Government and such investment is not less than thirty percent. of such income, failing which the income so exempted shall, notwithstanding the provisions of this ordinance, be subject to tax in the assessment year for which the exemption was allowed:

[Provided that the quantum of investment referred to in this clause shall be reduced by the amount of dividend, if any, declared by the company enjoying tax exemption under this section]

(d) that the said undertaking is not formed by splitting up or by reconstruction or reconstitution of business already in existence or by transfer to a new business of any machinery or plant used in business which was being carried on in Bangladesh at any time before the commencement of the new business;

(e) that the said undertaking is approved, and during the relevant income year, stands approved by the Board for the purposes of this section;

(f) that the application in the prescribed form for approval for the purposes of this section, as verified in the prescribed manner, is made to the Board within one hundred eighty days from the date of commencement of commercial production or operation.

(3) The Board shall give its decision on an application made under clause (f) of sub-section (2) within three months from the date of receipt of the application by the Board, failing which the undertaking shall be deemed to have been approved by the Board for the purposes of this section.

(4) The Board may, on an application of any person aggrieved by any decision or order passed under sub-section (3), if the application is made within four months of the receipt of such decision or order, review the previous decision or order and pass such order in relation thereto as it thinks fit.

(5) The profits and gains of the undertaking to which this section applies shall be computed in the same manner as is applicable to income chargeable under the head "Income from business or profession".

[Provided that in respect of depreciation, only the allowances for normal depreciation specified in paragraph 3 of the Third Schedule shall be allowed.]

(6) The profits and gains of the said undertaking shall be computed separately from other income, profits and gains of the assessee, if any, and where the assessee sustains a loss from such undertaking it shall be carried forward and set off against the profits and gains of the said undertaking for the following year and where it cannot be wholly set off, the amount of the loss not so set off, shall be carried forward for the next

year and so on, but no loss shall be carried forward beyond the period specified by the Board in the order issued under sub-section (3) or (4).

(7) Unless otherwise specified by the Government, nothing contained in this section shall be so construed as to exempt the following from tax chargeable under this section:-

(a) any dividend paid, credited or distributed or deemed to have been paid, credited or distributed by a company to its share-holders out of the profits and gains; and

(b) any income of the said undertaking classifiable as "Capital gains" chargeable under the provisions of section 31.

(8) Where any exemption is allowed under this section and in the course of making assessment, the Deputy Commissioner of Taxes is satisfied that any one or more of the conditions specified in this section are not fulfilled, the exemption will stand withdrawn for the relevant assessment year and the Deputy Commissioner of Taxes shall determine the tax payable for such year.

(9) Any such undertaking approved under this section may, not latter than one year from the date of approval, apply in writing to the Board for the cancellation of such approval, and the Board may pass such orders thereon as it may deem fit.

(10) Notwithstanding anything contained in this section, the Board may, in the public interest, cancel or suspend fully or partially any exemption allowed under this section.

(11) The Board may make rules regulating the procedure for the grant of approval under sub-section (3), review under sub-section (4) and furnishing of information regarding payment of other taxes by the said undertaking and any other matters connected with or incidental to operation of this section.

Amendments in the Finance Act, 2000: Sec. 46A

Sub-sec.(1) For "June, 2000" "June, 2005" shall be substituted.

Cl.(a) For the words, "Dhaka, Chittagong and Barisal Divisions", "Dhaka & Chittagong Divisions" shall be substituted

Cl.(b) for the words, "Rajshahi, Khulna and Barisal Divisions", "Rajshahi, Khulna & Sylets Divisions" shall be substituted.

Sub-sec.(2) Cl.(f) for the words "within one hundred eighty days from the date the words, "within sixth months from the end of the month" shall be substituted.

Exemption for newly established industrial undertaking, tourist industry etc.–Sec.46A: The section, which is intended to encourage the continuance of setting-up of new industrial enterprises as sections 45 and 46 were applicable to industries set-up upto June, 1995. This section applies to industrial undertaking, tourist industry or undertaking of physical infrastructure facility set-up between 1st day of July, 1995 to thirtieth day of June, 2000, the period has, however, been extended by the Finance Act of 2000 from June 2000 to June 2005. In order to obtain exemption under this section the industrial undertaking shall be engaged in the manufacture of goods or the exploration and extraction of mineral resources and processing of agricultural products. The expression, "tourist industry" means as is defined in the Explanation to cl. (c) of sec. 46(1). The standard of tourist industry has been prescribed by the Board under rule 66. The expression "physical infrastructure facility" has been defined in the Explanation to cl.(b) of sub-section (2) of this section.

This section which is to give exemption to the newly set-up industrial enterprises must be construed liberally–*Webbing & Belting Factory Pv. Ltd.* v. *C.I.T.* (1961) 43 I.T.R. 234, 238. In this case the assessee set-up a new factory in which about one-third of the machinery installed used in another factory for experimental and training before April 1948, it was held by the Supreme Court of India that the assessee was entitled to exemption on the total income from the sale of the products manufactured with the help of the machinery, including the one which had been used in another factory.

The exemption under this section is confined only to the profits from the new industrial undertaking and does not extend to the profits of any other business activity even though closely connected with that undertaking–*Ashok Motors Ltd.* v. *C.I.T.* (1961) 41 I.T.R 397. It has been observed in this case that exemption in respect of new industrial undertaking can be granted only if any profit is derived from such undertaking. If there are no profits no exemption can be granted. Even where the new industrial undertaking is intimately connected with the assessee's other business and is of such a character that its advancement depends on the other business exemption shall be confined only to the profits of the undertaking.

Taxes Appellate Tribunal, Dhaka Bench observed that the tax holiday has been granted to the industry and not to any particular nature of business and there is no concept of taxable income in such a type of industry. The receipt on account of sewing charges was not beyond the normal business activities carried on by the industry. Hence, the income therefrom is entitled to exemption–(Reported in 1995 BTD xxiii 1-3). In another case (reported in 1980 BTD vi 56) on account of short-term deposit interest received by a company enjoying tax-holiday was held to be exempted from tax. But interest received from Fixed deposit was held to be taxable (reported in 1996 B.T.D. xxiv 110).

The profits and gains of the undertaking shall be computed in the same manner as is applicable to income chargeable under the head "Income from business or profession" after allowing normal depreciation specified in Paragraph 3 of the Third Schedule (sub. sec. (5)). It is only if any taxable income remains after setting-

off the unabsorbed depreciation and carried forward loss of past years that the question of granting exemption under this section arises–*C.I.T.* v. *National Electrical Industries Ltd.*(1959) 37 I.T.R. 131. The unabsorbed depreciation of a past year relating to the new industrial undertaking has to be set-off against the profits of that undertaking and the question of exemption has to be considered only in respect of the balance; the section does not contemplate a set-off of such depreciation against the combined profits of all business activities and exemption of the balance–*Ashok Motors Ltd.* v. *C.I.T. (1961) 41 I.T.R. 397.*

The profits and gains which are to be computed separately from other income, profits and gains of the assessee if any, and in case of loss that will be carried forward and set-off against the profits of the said undertaking for the following year. The loss if not wholly set-off shall be carried forward next year and in no case the loss of the undertaking shall be carried forward beyond the period of tax-exemption and the period of exemption has been specified in sub-section (1) depending on the area in which the industrial undertaking is set-up.

The industrial undertaking shall enjoy exemption for tax-holiday for a period of *five years* beginning with the commencement of commercial production or operation of the undertaking if it is set-up in Dhaka, Chittagong and Sylhet Divisions excluding the hill districts of Rangamati, Bandarban and Khagrachari (Sylhet Division has been excluded by the Finance Act of 2000). As a result of the exclusion of Sylhet Division from cl.(a) and its inclusion in cl.(b) by the Finance Act of 2000 Sylhet Division is entitled to tax-holiday for seven years. The tax exemption period is therefore, *seven years* if the undertaking is set-up in Rajshahi, Khulna, Sylhet and Barisal Divisions and the hill districts of Rangamati, Bandarban and Khagrachari. The tax exemption period is seven years if the undertaking is set-up in Rajshahi, Khulna, Sylhet and Barisal Division and the hill districts of Rangamati, Bandarban and Khagrachari (Sylhet Division was excluded from the provisions of cl.(a) and has been included in cl.(b) by the Finance Act of 2000).

The provisions of tax-exemption under this section shall apply to such industrial undertaking which fulfils certain conditions. One of the conditions is that the undertaking shall be owned and managed by a body corporate established by or under an Act of Parliament with its head office in Bangladesh or by a company as defined in the Companies Act, 1913 or 1994 with its registered office in Bangladesh having a subscribed and paid capital of not less than one lakh taka.

The section also does not apply to an industrial undertaking which is formed by "splitting-up or by reconstruction or reconstitution of business already in existence or by transfer to a new business of any machinery or plant used in business which was being carried on in Bangladesh at any time before the commencement of the new business–cl.(d) of sub-section (2). The term "reconstruction or reconstitution" implies that the identity of business should not be lost and substantially the same business should be carried on by substantially the same persons: if the business is sold or if its very nature is changed, it is not a case of reconstruction–*C.I.T.* v. *Gaekwar Foam & Rubber Co. Ltd. (1959) 35 I.T.R. 662.* In this case a partnership firm was converted into a limited company which took over all the assets of the firm except the

outstanding debtors and creditors and the partners of the firm became share holders of the company. It was held that the transaction amounted to a sale and the setting-up of a new business and not reconstruction of an existing business. Hence, the company was entitled to the exemption, as it is not a case of reconstruction but of newly established undertaking ("Reconstruction" interpreted). The other part of the condition is "not formed ..... by transfer to a new business of any machinery or plant used in business which was being carried on in Bangladesh ...". This part of the condition has been dealt in this section with reference to the decision given in the case of *Webbing and Belting Factory Pv. Ltd.* v. *C.I.T.*. The word, "formed" should be given its due significance–*C.I.T.* v. *Indian Alluminium co. Ltd. (1973) 88 I.T.R. I.T.R. 257 276*. It was held in that case that (i) the new business need not be a different kind of business, (ii) the newness of the industrial undertaking does not necessarily exclude expansion or extension of the original business and the term, "reconstruction" would include substantial extension or expansion of the original business, provided the extensions or expansion is not by splitting-up of the original business. The said industrial undertaking must not be formed by transfer to a new business of any machinery or plant used in Bangladesh before the commencement of the new business. Unless the second-hand machinery or plant is sufficiently important and essential to justify the inference that the new undertaking is *formed* by its acquisition this condition should be regarded as fulfilled. The Explanation to cl.(b) of sub-section (i) also provides that the provisions of exemption shall also apply to the expansion unit of an existing undertaking which has not applied for accelerated depreciation under paragraphs 7 or 7A of the Third Schedule.

That a part of the exempted income has to be invested during the period of exemption or within one year from the end of the period to which the exemption relates in the said undertaking or in any new industrial undertaking or in any stocks or shares of a public company or in Government bonds or securities and such investments shall not be less than thirty percent of such income–cl. (c) of sub-sec. (2).

Provided that the amount of investment to be made as referred to in this clause shall be reduced by the amount of dividend declared by the company enjoying tax-exemption– Proviso to cl. (c).

The income, profits and gains of the undertaking are enjoying tax-exemption under this section but any dividend, paid credited or distributed or deemed to have been paid out of the exempted income to the share-holders are not exempt from tax. But dividend income received out of the profits of a publicly traded company enjoying tax-holiday shall be exempt from tax–(S.R.O. 265–L dated 1st July, 1986). Any income of the said undertaking chargeable under the head, Capital gains shall not be exempt from tax–cl.(b) of sub-sec.(7).

Application for tax-exemption shall be made in the form prescribed under rule 59A to the Board within one hundred eighty days from the date of commencement of commercial production or operation. The period for making application has been altered to six months (by the Finance Act 2000) from the end of the month in place of one hundred eighty days from the date of commencement of commercial production or operation. The Board has, however, the power to cancel or

suspend any exemption allowed under this section in the public interest. The Deputy Commissioner of Taxes in the course of making assessment, if satisfied that any or more of the specified conditions have not been fulfilled the exemption will stand with-drawn for the assessment of that relevant year and thereby may determine the tax payable for such year–sub-section(8).

Se. 47: Exemption of income of co-operative societies.–(1) Tax shall not be payable by a co-operative society including a co-operative society carrying on the business of banking in respect of–

(a) So much of its income as is derived by it as a result of such of its dealings with its members as involve sale of goods, the lending of money or the lease of buildings and land which is for the personal use of such members, or where such member is a firm or an association of persons, for the personal use of the partners or members thereof;

(b) The entire income from business carried on by it, if it is engaged in the following:-

(i) agricultural or rural credit;
(ii) cottage industry;
(iii) marketing of agricultural produce of its members;
(iv) purchase of agricultural implements, seeds, livestock or other articles intended for agriculture for the purpose of supplying them to its members; or
(v) such processing, not being the performance of any manufacturing operation with the aid of power, of the agricultural produce of its members as is ordinarily employed by a cultivator to render marketable the agricultural produce raised by him;

(c) any income from interest and dividends derived from its investments with any other co-operative society; and

(d) any income derived from the letting of godowns or warehouses for the purpose of storage, processing or facilitating the marketing of commodities belonging or meant for sale to its members.

Explanation.–For the purpose of this section, –

(a) "cottage industry" means an enterprise, not being owned by a joint stock company which fulfils the following conditions, namely:-

(i) it is basically an enterprise in which the owner is the investor, a full-time worker and the actual entrepreneur;

(ii) the capital invested in plant, machinery and equipment does not exceed [three lakh taka] at any time during the income year;

(iii) the number of workers; including the owner and the members of his family, shall not on any one twenty-four hour day during the income year, exceed [fifteen]; and

(iv) the owner of the enterprise or any member of his family does not own any other industrial or commercial enterprise either in his own name or in the name of any other person; and

(b) "member of his family", in relation to the owner of an enterprise, means the parents, spouse and children dependent on the owner and employed in the enterprise, whether working full-time or part-time, or whether for or without any wages, remuneration or compensation in any form.

(2) Nothing contained in sub-section (1) shall apply to a co-operative society carrying on such business of insurance as is carried on by a mutual insurance association in respect of its profits and gains to which paragraph 8 of the Fourth Schedule applies.

Definition of co-operative society. –"Co-operative society" means a co-operative society registered under the Co-operative Societies Act, 1940 or under any other law for the time being in force governing the registration of co-operative societies–sec. 2(21).

Exemption of income of co-operative society–sec.47: Certain categories of income of co-operative societies are exempt from tax under this section. The profits of the following specified businesses are totally exempt from tax while the profits of a co-operative society carrying on the business of banking are exempt only in respect of so much of its income as is derived out of its dealings with its members by providing credit facilities to its members, by sale of goods, or the lease of buildings and land for personal use of such members. Where a firm or an association of persons is a member of the co-operative society the exemption is extended to the partners or members of the firm or association of persons.

Income-tax is totally exempt in respect of profits and gains of business carried on by the society, if it is engaged in providing agricultural or rural credit facilities; it is engaged in cottage industry; in supplying agricultural implements, seeds, livestock, or other articles for agricultural purpose; in the processing of agricultural produce of its members (excluding manufacturing operation with the aid of power) as is ordinarily employed by the cultivator for marketing of the produce. It is exempt in respect of interest and dividends derived from its investments with any other co-operative society in respect of income derived from the letting of godowns or warehouses for storage, processing or facilitating the marketing of commodities belonging to or for sale to its members. An association of motor vehicles owners disclosed profit. Profit or income was applied in promoting the object of the association. Even if profit or income would have been distributed amongst its members then *Doctrine of Mutuality* would have attracted–1987 B.T.D. 163 (Trib). Provided that the exemption shall not apply to a co-operative society if it carries on insurance business, the profits of which are computed in accordance with the provisions of Paragraph 8 of the Fourth Schedule, not in accordance with the provisions of secs. 21 to 33.

CHAPTER VII
PAYMENT OF TAX BEFORE ASSESSMENT

Sec. 48. Deduction at source and advance payment of tax.–(1) Notwithstanding that regular assessment in respect of any income is to be made later in any assessment year, and without prejudice to the charge and recovery of tax under this Ordinance after such assessment, the tax on income shall be payable by deduction or collection at source, or by way of advance payment, in accordance with the provisions of this Chapter.

(2) any sum deducted or collected, or paid by way of advance payment, in accordance with the provisions of this Chapter, shall, for the purpose of computing the income of an assessee, be deemed to be the income received, and be treated as payment of tax in due time, by the assessee.

Deduction at source and advance payment–sec. 48: The Ordinance provides for two modes of collecting taxes–levy by deduction at source and advance payment before assessment. Deduction of tax at source is provided for only in specified cases which are enumerated in section 49(1). If default is made in the deduction of tax at source, the tax may be collected directly from the assessee (sec. 63) and, further, the person who is bound to deduct and has not deducted the tax may be held personally liable and treated as an assessee in default in respect of the tax (sec. 57).

Section 63 provides for direct levy on the assessee in three cases–(i) where tax has not in fact been deducted or collected at source; (ii) where tax as deducted is found to be less than the tax due; (iii) where no provision has been made for deduction at source in respect of any income. If the tax has been deducted but not paid to the Government, it cannot be levied once again on the assessee who has suffered the deduction. In that event the person making the deduction would be treated as an assessee in default (sec. 57).

The tax deducted at source under secs. 50 to 56 is deemed to be income received and should be included in the assessee's total income. Thus gross salaries, gross interest etc. have to be taken into account in computing the total income. Similarly, when tax is deducted from other payments which include not only the income or profit element, that is, gross payment, tax as deducted shall be included with the net payment for computation of income from such payment-sub-sec.(2).

Sec. 49. Income subject to deduction at source.–(1) Tax payable under this Ordinance shall be deducted or collected at source in respect of the following income, namely:-

(a) income classifiable under the head "Salaries";

(b) income classifiable under the head "Interest on securities";

(c) income derived on account of supply of goods, execution of contracts or services rendered;

(d) income derived by the importers and exporters on account of import and export of goods;

(e) income derived on account of indenting commission;

(f) income derived on account of winnings from lottery or crossword puzzles, as referred to in section 19(13);

(g) any income chargeable under this Ordinance which is paid or payable to a non-resident;

(h) income classifiable under the head "Income from house property";

(i) income derived on account of export of manpower;

(j) income derived on account of purchase by public action;

(k) income derived on account of acting in films;

(m) income derived on account of shipping agency commission;

(n) income derived on account of commission or fees payable to distributors for distribution or marketing of manufactured goods;

(o) income derived on account of interest on saving deposits, fixed deposits or term deposits and share of profit on term deposits;

(p) income derived on account of insurance commission;

(q) income classifiable under the head "Capital gains";

(r) income derived on account of fees for professional or technical services;

(s) income derived on account of manufacture of cigarettes manually without any mechanical aid whatsoever;

(t) income derived from compensation against acquisition of property;

(u) income derived on account of interest on savings instruments;

(v) income derived on account of bonus or bonus shares issued by a company registered under the Companies Act, 1913 (VII of 1913) or কোম্পনী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন)

(w) income derived on account of running of brick field;

(x) income derived on account of services rendered by the doctors;

(y) income derived on account of real estate business; and

(z) income derived on account of commission of letter of credit;

(2) Tax to be deducted at source under sub-section (1) in respect of any income shall be deducted in accordance with the provisions of this Chapter by the person responsible for making payment which constitutes the income of the payee.

(3) For the purpose of this Chapter, "person responsible for making payment", with its grammatical variations and cognate expressions, means–

(a) in the case of payments constituting income classifiable under head the "Salaries," not being payments made by the Government, the employer himself or, if the employer is a local authority, company or institution, such authority, company or institution, including the principal officer thereof;

(b) in the case of payments constituting income classifiable under the head "Interest on securities," not being payment made by or on behalf of the government, the authority company or other institution issuing the security or the principle officer thereof; and

(c) in the case of payment of any other sum which constitutes an income of the payee chargeable to tax under this Ordinance the payer himself, or if the payer is a company or other institution, such company or institution including the principle officer thereof.

Amendments made in the Finance Act, 2000:

Sub-section (1) cl.(y) will be omitted

After cl.(z) the following clauses shall be inserted:

(za) income derived on account of survey by a surveyor of general insurance company;

(zb) income derived on account of commission received by travel agency from airlines; and

(zc) income derived on account of commission, remuneration or charges as a foreign buyer's agent."

As a result of the amendments made in section 49 by the Finance Act, 2000 provision for deduction of tax at source from the real state business at the time of giving approval of any plan for the purpose of construction of any residential or commercial building has been omitted.

Provisions have also be made in this amendment by adding to list of sources from which tax shall be deducted in advance by insertion of sections 53GG, 52J and 53EE as are mentioned in clauses, Z(a), Z(b) and Z(c)

Income subject to deduction at source-sec. 49(1): Provisions for deduction of tax at source have been made for specified classes of income under secs. 50, 51, 52, 52A, 52B, 52C, 52D, 52E, 52F, 52G, 52H, 52I, 53, 53A, 53B, 53C, 53D, 53E, 53F, 53G, 53H, 54, 55, and 56. All these sections provide for levy by deduction at source from income from specified sources and from any sum payable to non-residents and for certain other payments. Deduction of tax at source from the income specified in different sections shall be made in accordance with the provisions as made in the relevant sections and the rules framed therefor. Such deductions shall be made by the person responsible for making payment which constitutes income of the recipients–sub-sec. (2) and cl.(c) of this section. The payment as referred to a sum which is "pure income profit"–*P.C. Roy Co. (India) Pv. Ltd.* v. *Mukherjee* [1955] 36 I.T.R. 866. "Payment of any other sum which constitutes an income" would not apply to payments which are in reality trading receipts in the hands of the recipient. One reason is that income-tax is chargeable on income and trading receipts are not income: a trader's income from his trade can only be determined after he has deducted his expenditure from his receipts and a trading receipt is only one element in the ascertainment of income. But the Calcutta High Court in the case of *Anglo Indian Jute Mills Co. Ltd.* v. *Mukherjee* [1959] 36 I.T.R. 365 held that the words, "any other sum" also apply to payments which are not in reality "not pure income profit" but gross trading receipts in the hands of the recipient, and tax has to be deducted in such case. But the decision of the Supreme Court of India in the case of *Aggarwall Chamber of Commerce* does not justify the Calcutta High Court's view. But provisions have, however, been made in certain section of the Ordinance, such as, in sections 52 (Deduction for payment made for supply of goods or execution of contract), 53 Deduction of tax from value of imported goods, 53 Deduction from sale-price of goods or property by public auction etc. for deduction of tax from payments which are not pure income profits and "payment of any sum which constitutes

income" as mentioned in sub-section (2) and cl.(c) of sub-section (3) are not appropriate to cover such payments.

Sub-section (3) has specified the person responsible for making deduction at source from income classifiable under different heads. Rules 13, 14, 16, 17, 17A, 17B, 17C, 17D, 17E, 17F, 17H, and 17I have to be read with the section under this chapter.

Because of the amendments in 2000 section 52H has been omitted and sections 53GG, 52J and 53EE have been inserted in the provision under this *chapter*.

Sec. 50. Deduction at source from salaries.–(1) The person responsible for making any payment which constitutes income of the payee classifiable under the head "Salaries" shall, at the time of making such payment, deduct tax on the amount so payable at a rate representing the average of the rates applicable to the estimated total income of the payee under that head.

(2) At the time of making any deduction under sub-section (1), the amount to be deducted may be increased or decreased for the purpose of adjusting any excess or deficiency arising out of any previous deductions or failure to make deductions.

(3) For the purpose of deduction under sub-section (1) in respect of salary payable in a foreign currency, the value in taka of such salary shall be calculated at such rate as the Board may prescribe.

Deduction at source from salaries–sec. 50.–Income tax has to be deducted at source from income chargeable under the head, "Salaries"-(sec. 21) and the deduction must be made every time when an amount is paid (and not accrued as observed by the Taxes Appellate Tribunal, Dhaka bench in I.T.A. nos 1211 to 1214 of 1993–94 reported in 1998 B.T.D. xxvi 61 although salary is taxable on accrual basis also) which is taxable under the head "salaries" and it should be calculated at the rate prescribed for the year in which the payment to the employee is made and the rate as calculated on the average of the rates applicable to the estimated total income of the payee under this head. The person responsible for paying the salary has a right to increase or reduce the amount to be deducted, for the purpose of adjusting any previous deficiency or excess of deduction (sub-section (2)). Failure to deduct tax from salaries disentitles the employer in certain circumstances to any allowance on account of salaries (sec. 30(a)). The employer's liability to deduct tax is absolute and is not affected by any private arrangement whereby the employee has undertaken to discharge his own liability–*John Patterson & Co. (India) Ltd.* v. *I.T.O (Cal.)* (1959) 36 I.T.R. In that case it was held that no arrangement or agreement privately arrived at between a company and its employee can affect, alter or modify the statutory liability if the company for deduction of tax at source under section 18(2) and payment thereof under section 18(7). of I.T. Act, 1922. The Taxes Appellate Tribunal, Dhaka Bench in I.T.A. No. 395 of 1996–97 has observed that when sec. 63 provides

for payment of tax by the assessee direct the restrictive provision of sec. 30(a) should not apply in the case of the assessee company if tax is paid direct by the employee since the purpose of law has not been frustrated.

Rule 23 has specified the persons who are responsible to make deduction at source from salaries as per sec. 108 of the Ordinance who are also responsible under that section (s. 108) read with rule 21 to send to the Deputy Commissioner of Taxes concerned the particulars of salaries paid and deduction thereof has been made in the form as prescribed in that rule.

Where salary is payable by a person other than the Government in foreign currency rule 9 prescribes that it shall be paid at the rate of exchange as determined by the Government for the conversion of foreign currency into Bangladesh currency (sub-section (3)).

Sec. 50A. Deduction at source from discount on the real value of Bangladesh Bank bills.–Any person responsible for paying any amount on account of discount on the real value of Bangladesh bills shall, at the time of making such payment, deduct tax at the maximum rate on the amount so payable or the rate applicable to such amount, whichever is greater.

Deduction at source from discount on Bangladesh Bills.–Sec. 50A: Deduction at source from interest on Government securities is made at the maximum rate or at the rate applicable to the total income of the recipient of the interest whichever is higher. But there was no provision for deduction of tax at source from discount on Bangladesh Bank bills. From the assessment year 1997–98 such deduction shall be made from the discount on the real value of Bangladesh Bank Bills at the rate applicable to the interest on Government Securities.

Sec. 51. Deduction at source from interest on securities.–(1) Unless the Government otherwise directs in the case of any security of the government, the person responsible for making any payment which constitutes income of the payee classifiable under the head "Interest on securities," shall, subject to the provisions of sub-section (2), at the time of making such payment, deduct tax at the maximum rate on the amount so payable or the rate applicable to such amount, whichever is the greater.

(2) Where the Deputy Commissioner of Taxes, on an application made in this behalf, gives a certificate that, to the best of his belief, the total income of the recipient of any payment referred to in sub-section (1) will be less than the minimum liable to tax, or will be liable to tax at a rate less than the maximum, such payment shall be made without any deduction of tax or as the case may be, with deduction of tax, at the lesser rate specified in the certificate, until the certificate is cancelled.

(3) Nothing in this section shall apply to any payment on account of interest payable on debentures issued by or on behalf of a local authority or a company.

Deduction at source from interest on Government Securities.–Sec.51: Government may issue tax-free securities in which case no deduction of tax is to be made; but in case of other securities, which may or may not be issued by the Government, the person responsible for paying income chargeable under the head, "Interest on Securities" must deduct tax from interest on such securities at the time of making such payment at the maximum rate on the amount so payable or at a rate applicable to such amount, whichever is greater.

Sub-section (2) enacts that on the production of a certificate from the Deputy Commissioner of Taxes that the total income of the payee is below the taxable minimum or liable to income tax at a lower rate than the maximum rate, the interest on securities should be paid to him without deduction at all or after deduction at a lower rate, as the case may be. The Deputy Commissioner of Taxes is bound to grant such a certificate on the application of the assessee made in the form prescribed in rule 11 in a proper case (sub-section (2)).

"At the time of making such payment".–Deduction of tax in all cases covered by this section is to be made at the time of payment. Merely crediting the amount of interest to the creditors, account in the books of the borrower would not amount to payment–*C.I.T.* v. *Nagaria Oil Mills* [1954] 25 I.T.R. 258. "Payment", as held in that case, under sec. 18(3A) of I.T. Act, 1922 should be interpreted as meaning actual payment and therefore crediting of the amount of interest to the accounts of the lenders could not be deemed to be payment within the meaning of that sub-section so as to attract the provisions of sec. 18(7) of I.T. Act, 1922.

The provisions of this section shall not apply to any payment on account of interest payable on debentures issued by or on behalf of a local authority or a company and as such no question of deduction of tax from interest on debentures can arise for debentures issued by a company.

Sec. 52. Deduction from payment to contractors, etc.–(1) where any payment is to be made, whether in full or in part, or by way of advance, on account of indenting commission or shipping agency commission or supply of goods or execution of contract, to any such person or class of persons as may be prescribed, the person responsible for making the payment shall, at the time of making such payment deduct tax on the amount so payable at such rate as may be prescribed.

(2) Any amount deducted under sub-section (1) shall be deemed to be an advance payment of tax by the payee and shall be given credit for in the assessment of his tax.

Deduction of tax from payment to contractors, etc.–sec. 52(1): For the purpose of making a deduction of tax under this section to any person including a company, firm association of persons or Hindu undivided family on account of supply of goods or execution of contract with the Government or any authority or Corporation or on account of indenting commission or shipping agency commission shall deduct tax from the payment made, whether in part or in full or any payment made by way of advance. Such tax shall be deducted at the time of making the payment.

Rule 16 prescribes the rate of tax to be deducted or collected from the payments made to the contractors or suppliers and also in case of oil supplied by oil marketing companies. Such tax shall be calculated according to the rates as applicable appropriate to the slab of total payments in case the payments are made in part in the concerned financial year.

Sub-section (2) as enacted provides that the tax so deducted under sub-section (1) shall be deemed to be an advance payment of tax by the payee, who shall be given credit for in his assessment of tax.

Rule 17 provides for deduction of tax from indenting commission or shipping agency commission at a fixed rate as prescribed in the rule to be calculated on the total receipts of commission and such deduction shall be deemed to be an advance payments of tax made by the indentor or shipping agent (sub-section (2)).

Sec. 52A. Deduction at source from fees for professional or technical services.–The government or any other authority, corporation or body, including its units, the activities of which are authorised by any Act, Ordinance, Order or instrument having the force of law in Bangladesh, or any company as defined in clause (20) of section 2 or any banking company or any insurance company or any co-operative bank or any non-government organisation registered with Bureau of Non-governmental Organisations, responsible for making any payment on account of fees for professional or technical services shall deduct or collect, at the time of credit of such fees to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, as advance tax [at the rate of five percent] of such fees:

Provided that where the Board, on an application made in this behalf, gives a certificate in writing that the person rendering professional or technical services is not likely to have any assessable income during the year or the income is otherwise exempted from tax under any provision of this Ordinance, payment referred to in this section shall be made without any deduction until the certificate is cancelled.

Explanation–For the purposes of this section–

(a) "professional services" means services rendered by a person in the course of carrying on legal, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising;

(b) "fees for technical services' shall have the same meaning as in clause (31) of section 2.

Deduction of tax at source from fees for professional or technical services–sec. 52A: This section provides for deduction of tax at source from fees paid or credited to the account of a lawyer, engineer, architect, chartered accountant, or a person engaged in the profession of accountancy or technical consultancy or interior decoration or advertising or management services for their professional or technical services but excluding the consideration received for any work mentioned in sec. 2(11) and also the consideration as received by the recipient which will be taxed as salary income. The deduction shall be made by the Government or any authority, Corporation or body or by any company under the Companies Act, including bank and insurance companies, multinational companies, joint venture companies or non-government organisations registered by bureau of non-government organisations for activities which are authorised by any Act or Ordinance, order or instrument having the force of law in Bangladesh.

The tax shall be deducted at the rate of five percent of such fees wherever paid or credited to the account of the payee. The Board, however, on an application made in this behalf, may give a certificate in writing to the effect that the professional or technical services as referred to above is exempted from tax under any provision of the Ordinance or the person rendering such professional or technical services is not likely to have any assessable income and in which case the payment referred to in this section shall be made without any deduction.

Sec. 52B. Collection of tax from Cigarette manufacturers.–Any person responsible for selling banderols to any manufacturer of cigarettes shall, at the time of selling banderols, collect tax from such manufacturer on account of the manufacture of cigarettes at the rate of five percent of the value of the banderols.

Explanation–For the purposes of this section, "manufacture of cigarettes" means manufacture of cigarettes manually without any mechanical aid whatsoever.

Collection of tax from cigarette manufacturers–sec. 52B: Any person authorised to sell band rolls to the cigarettes manufacturers shall collect tax at the rate of five percent (which has been reduced to 3 percent by the Finance Act 2000) on the value of band rolls on account of the manufacture of cigarettes at the time of selling band rolls from such manufacture of cigarette. As per the expln. to the section, manufacture of cigarettes means "manufacture as done manually without any mechanical aid".

The concerned manufacturer of cigarettes for purchase of band rolls, shall first deposit the tax to the Government treasury and on production of the challans to the person selling band rolls shall purchase the required band rolls from him.

Sec. 52C. Deduction at source from compensation against acquisition of property.–Any person responsible for paying any amount of compensation against acquisition by the Government of any immovable property situated within the jurisdiction of any city corporation, paurasava or cantonment board shall, at the time of paying such compensation, deduct advance tax at the rate of six percent of the amount of such compensation.

Deduction at source from compensation against government acquisition of property–sec. 52C: This section was inserted by the Finance Act, 1998 which provides that the person, who is responsible for paying compensation for acquisition of property by the Government shall deduct advance tax at the rate of six percent at the time of making payment of such compensation money. The provision of deduction of tax shall apply only in the case of Government acquisition of immovable property situated within the jurisdiction of any city, corporation, poursava or cantonment board, but this provision shall apply even in a case where acquisition was made before but acquisition money is paid on or after first July, 1998.

Sec. 52D. Deduction at source from interest on savings instruments. –Any person responsible for making any payment by way of interest on any savings instruments shall, at the time of such payment, deduct income tax at the rate of ten percent on such interest:

Provided that no tax shall be deducted under this section if the total amount of interest does not exceed twenty five thousand taka:

Provided further that the provisions of this section shall not apply to the savings instruments purchased on or before the tenth day of June, 1999.

Deduction at source from interest on savings instruments.–Sec. 52D: Any person responsible for making any payment of interest on any savings instruments shall deducts income tax at the rate of ten percent on such interest at the time of making such payment but no tax shall be deducted if the amount of interest does not exceed twenty five thousand taka (1st proviso). If the amount of interest in any year exceeds twenty five thousand taka the provision of exemption shall not apply in that case and deduction of tax shall be made from the entire amount of interest paid to the recipient.

The provision for deduction under this section shall not apply to such savings instruments which were puchased on or before the tenth day of June, 1999.

Sec. 52E. Collection of tax on account of bonus or bonus shares.–The principal officer of any company registered under the Companies Act, 1913 (VII of 1913) or কোম্পনী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮নং আইন) shall, at the time of issuing any bonus share or bonus to its shareholders, collect income tax at the rate of ten percent on the face value of the bonus share or the amount of the bonus.

This section has been substituted by the Finance Act of 2000 and substituted section is as below:

"**52E. Collection of tax on account of bonus.**–The principal officer of any company registered under the Companies Act, 1913 (VII of 1913) or কোম্পনী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮নং আইন) shall, at the time of issuing any bonus to its shareholders, collect Income-tax at the rate of ten percent on the amount of the bonus."

Deduction of tax on account of bonus or bonus shares.–Sec. 52E (before amendment in 2000): If a company formed under the Companies Act 1913 or 1994 issues bonus or bonus shares to its shareholders the principal officer of the company at the time of issuing such bonus or bonus shares shall collect income tax at the rate of ten percent on the amount of bonus or the face value of the bonus share. The company at the time of distribution of bonus or bonus share shall deduct tax at the rate of ten percent on the total amount of bonus or bonus share to be distributed and the balance shall be paid either in cash or in the form of bonus shares to the shareholders. Such tax as deducted shall be paid to the Government by the principal officer of the company as per law.

This section has been substituted by the Finance Act 2000 to remove the anomaly in the system of deduction of tax when a company issues bonus shares to its shareholders. The Principal Officer of the company, because of the amendment, is now liable to collect Income-tax at the rate of *ten percent* only from the bonus issued to its shareholders.

Sec. 52F. Collection of tax from brick manufacturers.–Any parson responsible for issuing any permission for the manufacture of bricks shall, at the time of issuing such permission, collect income tax from such manufacturer, at the rate of taka five thousand for each brick field.

Collection of tax from brick manufacturers–Sec. 52F: Provision has been made to collect tax from a person intending to manufacture bricks in a brick-field. Any person responsible for issuing license to the brick manufacturers for manufacture of bricks shall collect tax of five thousand taka from such brick manufacturer for each brick-field. The brick manufacturer shall deposit the tax in favour of the Deputy Commissioner of Taxes of the area in which the brick manufacturer resides and

obtain license from the license-issuing authority on production of a certified copy of the challan showing deposit of tax.

Sec. 52G. Deduction from fees for services rendered by doctors.–The principal officer of any company registered under the Company Act, 1913 (VII of 1913) or কোম্পনী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮নং আইন) or the chief executive or any non-government organisation registered with the Bureau of Non-government Organisation or the chief executive of any trust registered under the Trusts Act, 1882 (II of 1882) running any general or specialised hospital or any diagnostic centre shall be responsible for making any payment to any doctor which may be payable to him on account of fees for services rendered by him to a patient in such hospital or diagnostic centre and shall, at the time of making such payment, deduct income tax at the rate of ten percent on the amount so payable.

Deduction of tax from fees for services rendered by doctors–Sec. 52G: Provision has been made in the Finance Act of 1999 for deduction of tax from the fees paid to the doctors for rendering services to the patients in any company or any general or specialised hospital or any diagnostic centre run by any non-government organisation registered with the Bureau of Non-government organisation or any trust registered under the Trusts Act, 1882. The Principal Officer of the company or the chief executive of the non-government organisation, as the case may be, shall deduct income tax at the rate of ten percent on the amount of fees payable to any visiting doctor or any physician rendering services by way of treatment of patients, making operation or doing diagnostic work in such hospital or diagnostic centre. The paying authority shall make payment of fees to the concerned doctors through account payee cheque after deduction of tax from the fees so payable and the tax so deducted shall be deposited in the Government treasury through issue of bank cheque in favour of the Deputy Commission of Taxes.

Sec. 52H.–Collection of tax from persons engaged in the real estate business.–(1) Any authority responsible for approving any plan submitted by any person engaged in the real estate business for the purpose of construction of any residential or commercial building shall, at the time of giving such approval, collect income tax from the person submitting such plan at the following rates:-

(a) where the proposed building is situated within the limits of Dhaka City Corporation or Chittagong City Corporation, three percent of the estimated cost of construction of such building or the aggregate of taka one hundred and fifty per square metre, whichever is higher;

(b) where the proposed building is situated within the limits of any other city corporation or of a pourasava of a divisional headquarters or district headquarters, one percent of the cost of construction of such building or the aggregate of taka thirty per square metre, whichever is higher.

(2) The amount of tax referred to in sub-section (1) shall be treated as a payment of tax in respect of the income of the period which would be the income year in which the building referred to in the said sub-section is completed.

Collection of tax at source from persons engaged in the real estate business.–Sec. 52H: This section, inserted in the Finance Act, 1999, provides for collection of tax from a person inclusive of a company, public or private, a firm, an association of persons or a co-operative society, engaged in the real estate business at the time of submission of any plan for the purpose of construction of any residential or commercial building to obtain approval of the plan from the authority responsible for approving such plan. The authority at the time of giving such approval shall collect Income-tax from the person submitting such plan at the following rates depending on the location of the proposed building and the size of the building:

(a) where the building is situated within the limits of Dhaka City Corporation or Chittagong City Corporation collection of tax shall be at three percent of the estimated cost of construction of such building or the aggregate of the amount as computed at the rate of taka one hundred and fifty per square metre on the total area inclusive of all the floors of the building, whichever amount is higher;

(b) where the proposed building is situated within the limits of any other city corporation or of a pourasava of a divisional head quarters or district head quarters, rate of tax shall be at one percent of the cost of construction of such building or the tax will be an amount equal to the aggregate amount as computed at the rate of taka thirty per square metre on the total area inclusive of all the floors of the building, whichever is higher.

The tax so collected under this section shall be deemed to be the Income-tax payable by that person and shall be treated as payment of tax in final settlement in respect of the income of the period which would be the income year in which the construction of the building is completed. (sub-section 2).

(The Finance Act, 2000 has omitted this section and as a result no such collection of tax under this section is necessary before obtaining any approval for construction).

Sec. 52I. Deduction from the commission of letter of credit.–Any person responsible for opening letter of credit for the purpose

of import of goods for himself or for any other person shall, at the time of collecting commission with respect to letter of credit, deduct income tax at the rate of five percent on the amount of such commission.

Deduction of tax from the commission received for opening letter of credit.–Sec. 52I: All the scheduled banks including co-operative banks receiving commission for opening letter of credit for the purpose of import of goods either for himself or for other person shall deduct Income-tax at the rate of five percent at the time of collecting commission on the amount of such commission. Such banks including the co-operative bank shall report to their respective Head Offices their monthly collection of commission and the Head Offices, shall deposit the amount of tax on such commission in favour of the concerned Deputy Commissioner of Taxes by the fifteenth of the next month.

Sec. 53: Collection of tax from importers and exporters.–(1) The Collector of Customs shall make collection of tax payable by the importers on account of import of goods and the bank through which the exporters receive payment shall make collection of tax payable by the exporters on account of export of goods.

(2) The Board shall, for the purpose of collection of tax under sub-section (1),–

(a) specify the importers and exporters from whom collections are to be made; and

(b) prescribe the method and rate of calculation of the amount to be collected and the manner of collection.

(3) Any amount collected under sub-section (1) shall be deemed to be an advance payment of tax by the importer or exporter concerned, and shall be given credit for, in the assessment of his tax.

Collection of tax from importers–Sec. 53 read with rule 17A and collection of tax from exporters–Sec. 53: The collector of customs or any other appropriate officer, shall make collection of tax under this section from importer of goods including from those importing under the Wage Earners Scheme at the rate of three percent of the value of the imported goods. The words, "value of the imported goods" shall mean the value of the imported goods as determined by the Customs Authorities and not on the value as shown in the Bill of Entry.

The rule (Rule 17A) has specified certain goods, if imported shall not be subjected to tax-deduction under this section. Such goods which are exempted from tax deduction are–(i) capital machinery; (ii) raw materials imported by cottage industry; and (iii) cotton and fertilizer. The Board on application of an importer may exempt tax-deduction if it is satisfied to the effect that such importer during any income year has no assessable income or his income is otherwise exempted from payment of tax.

Under sec. 82C the amount of tax collected under this section for import of goods shall be deemed to have been paid by the importer for final discharge of tax-liability of such importer.

In the case of export of goods the concerned banks through which the exporters receive their payments were making deduction of tax at 0.25 percent under Rule 17J are not required to deduct tax since in the Finance Act, 1999 such rule has been omitted (S.R.O. No. 176 dated 1.7.99) and hence no tax is to be collected from the exporter of goods.

Sec. 53A. Deduction at source from house property.– [(1) Where, the Government or any authority, corporation or body, including its units, the activities or the principal activities of which are authorised by any Act, Ordinance order or instrument having the force of law in Bangladesh or [any company as defined in clause (20) of section 2], or any banking company or any co-operative bank established by or under any law for the time being in force or any non-governmental organisation run or supported by any foreign donation or assistance is a tenant in respect of a house property, the tenant shall deduct from the house rent paid or payable as advance tax such amount as may be prescribed.

Explanation.–For the purpose of this section, "house rent" means any payment, by whatever name called, under any lease, tenancy or any other agreement or arrangement for the use of any building including any furniture, fittings and the land appurtenant thereto.

(2) Where, after the assessment made for the relevant year, it is found that no tax was payable by the owner of the house property or the amount of tax deducted is in excess of the amount payable, the amount deducted shall be refunded,–

(a) if no tax was payable, in full, or

(b) if the amount deducted is in excess of the amount payable, to the extent of the excess deduction to the owner of the house property.

(3) Where the Deputy Commissioner of Taxes, on an application made in this behalf, gives a certificate in the prescribed form to an owner of house property that, to the best of his belief, the owner is not likely to have any assessable income during the year or the income is otherwise exempted from payment of income tax under any provisions of this Ordinance, payment referred to in sub-section (1) shall be made without any deduction until the certificate is cancelled.

Deduction of tax at source from income from house property–Sec. 53A read with rule 17B: The section provides for deduction of tax at source from income from house property by persons who are tenants and the rule prescribes the rate at which such tax shall be deducted. Any person including the Government or any authority, Corporation or body including its units, any company including any banking company or any co-operative bank or any non-government organisation run by any foreign donation or assistance who makes payment of rent as a tenant in respect of a house property to the owner of such house property shall deduct tax from house rent paid or payable as advance tax.

In the Explanation to sub-section (1) of this section "house rent" means any amount of payment in connection with the lease, tenancy or any other agreement or arrangement for the use of any building including any furniture, fittings and the land appurtenant thereto payable to the owner of the house property. The excess deduction shall be refunded or if the owner of the house property is not liable to pay tax the amount of tax deducted shall be refunded to him (sub-sec. 2).

The Deputy Commissioner of Taxes in a fit case, may give a certificate on an application to the effect that the owner of the house property is not liable to tax for having no taxable income during the income year or is otherwise exempt from payment of income-tax under any provision of this Ordinance in which case rent shall be paid without any deduction of tax.

Sec. 53B.–Deduction of tax from income derived on account of export of manpower.–The Director General, Bureau of Manpower, Employment and Training shall, before giving clearance for export of any manpower, collect from the exporter concerned as advance tax on income on account of such export [at such percentage] of the service charge or fees mentioned in clause (n) and clause (r), respectively, of section 19(2) of the Emigration Ordinance, 1982 (XXIX of 1982), as may be prescribed.

Deduction of tax from income derived on account of export of manpower–Sec. 53B (read with rule 17C): For the purpose of making collection of tax under this section, the Director General, Bureau of manpower, Employment and Training, who is responsible for giving clearance for export of any manpower, shall collect from the exporter concerned as advance tax on income on account of such export at the rate of ten percent of the service charge or fees mentioned in cl.(n) and cl.(r) respectively of sec. 19(2) of the Emigration Ordinance, 1982.

Sec. 53C. Collection of tax on sale price of goods or property sold by public auction.–Any person making sale, by [public auction through sealed tender or otherwise,] of any goods or property belonging to the Government or any authority, corporation or body, including its units, the activities or the principal activities of which are authorised by any Act, Ordinance, order or instrument having the force of law in Bangladesh or any company, other than a private limited company, as defined in {the

Companies Act, 1913 (VII of 1913) or কোম্পনী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন)}, or any banking company, or any insurance company or any co-operative bank established by or under any law for the time being in force shall collect, before delivering the possession of the goods or the property, as advance tax on the income from the sale price of such goods or property from the auction purchaser at such rate, not exceeding seven and a half percent of the sale price, as may be prescribed.

Explanation.–For the purposes of this section, sale of any goods or property includes the awarding of any lease to any person, including a lease of the right to collect octroi duties, fees or other levies, by whatever name called, but does not include sale of a plot of land.

Collection of tax on sale-prices of goods or property sold by public auction–Sec. 53C (read with rule 17D): Any person making sale by public auction through sealed tender or otherwise any goods or any property belonging to the Government or any authority, Corporation or body including its units or any company other than a private limited company formed under the Companies Act or any banking company or insurance company or co-operative bank shall before delivery of the possession of goods or property deduct advance tax at the rate of three percent on the sale-price of such goods or property.

Expln. to this section provides that 'sale' includes awarding of any lease to any person including a lease of the right to collect duties, fees or levies but it does not include sale of a plot of land. It may be mentioned here that sale of goods by public auction includes sale through sealed tender.

(It is to be noted that as per the language of the section advance tax "on the income from the sale price of such goods or property" to be deducted, but as per the rule which prescribes the mode of collection of tax, is to be deducted on sale-price of such goods or property. Further, as per the section tax at a rate not exceeding seven and half percent has to be deducted but the rule prescribes the deduction at the fixed rate of three percent).

Sec. 53D. Deduction from payment to actors and actresses.– Where any payment is to be made, in full or in part or by way of advance, by a person producing a film, on account of acting in any film by a film actor or actress and such payment exceeds or is likely to exceed thirty six thousand taka in the aggregate in any income year, the person producing the film shall deduct, before making such payment, tax on the income from acting in such film at such rate, not exceeding seven and a half percent of such payment, as may be prescribed.

Deduction of tax from the remuneration paid to the actors or actresses–Sec. 53D (read with rule 17E): Any person producing any film shall before making payment to the actors or actresses either in full or in part or by way of

advance, any remuneration on account of acting in any such film shall deduct tax at the fixed rate of five percent on the remuneration so paid, although the section provides that tax at the rate not exceeding seven and half percent on the income from acting shall have to be deducted. No deduction shall, however, be made if the payment does not exceed or is not likely to exceed thirty six thousand taka in the aggregate in any income year.

Sec. 53E. Deduction or collection at source from commission or fees.–Any person being a corporation, body or authority established by or under any law including any company or enterprise owned, controlled or managed by it, or a company registered under the Companies Act, (VII of 1913) or কোম্পনী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন) which makes any payment to any distributor or to any other persons by way of commission or fees for distribution or marketing of goods manufactured by it, shall deduct or collect at the time of credit of such commission or fees or at the time of payment thereof, whichever is earlier, as advance tax an amount at the rate five percent of commission or fees payable.

Deduction of tax at source from commission or fees paid to the distributors–Sec. 53E (read with rule 17J): A person being a corporation or any authority or any enterprise or any company making payment of commission or fees to its distributors for distribution or marketing its products manufactured by it shall before making such payment or at the time of credit of such commission or fees, whichever is earlier, deduct advance tax at the rate of five percent of such commission or fees.

Sec. 53F. Deduction at source from interest on saving deposits and fixed deposits, etc.–Any person responsible for paying to a resident any sum by way of interest on any saving deposits or fixed deposits or any term deposit maintained with any scheduled bank including a co-operative bank or by way of share of profit on term deposits maintained with any bank run on Islamic principles, as the case may be, shall deduct, at the time of credit of such interest or share of profit to the account of the payee or at the time of payment thereof, whichever is earlier, income tax on such sum at the rate of ten percent:

Provided that nothing contained in this section shall apply to such payee or class of payees as the Board may, by a general or special order, specify in this behalf.

Deduction of tax at source from interest on saving deposits and term deposits–Sec. 53F (read with rule 17H): The deduction of income-tax at source in this section shall be made by each branch of a scheduled bank including a cooperative bank from the interest on any saving deposits or any term deposits maintained with

any such bank or deduction shall be made by way of share of profit on term deposits with any bank run on Islamic principle. Such deduction shall be made at the time of credit of such interest or share of profit to the account of the payee or at the time of payment thereof, whichever is earlier, at a rate of ten percent on such sum and report the total amount of tax deducted to its head office who will deposit the total amount of tax by its branches in the prescribed manner.

The Board may exempt any payee or class of payees from payment of tax under this section. Interest on deposits in the Post Office Savings Bank Account has been exempted by S.R.O No. 297-160 L/80 dated 31.12.80.

Sec. 53G. Deduction at source from insurance commission.– Any person responsible for paying to a resident any sum by way of remuneration or reward, whether by way of commission or otherwise, for soliciting or procuring insurance business including business relating to the continuance, renewal or revival of policies of insurance, shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque of draft or by any other mode, whichever is earlier, deduct income tax on such sum at the rate of five percent

Provided that no tax shall be deducted under this section if total amount of insurance commission during the income year does not exceed twenty five thousand taka. (by the amendment of this section in the Finance Act, 2000 the exemption limit has been raised to forty thousand taka).

Deduction of tax at source from insurance commission–Sec. 53G: Under this section when an amount of insurance commission is payable to any insurance agent who is resident of Bangladesh by the insurance company for procuring insurance business, such company shall deduct tax at the rate of five percent at the time of credit of such sum to the account of the agent or at the time of payment of such commission to the payee, whichever is earlier. The commission as payable to the agent may be paid by way of remuneration or reward but no deduction shall be made if the total amount of such payment in any income year does not exceed twenty five thousand taka (raised to forty thousand taka by the amendment made by the Finance Act, 2000).

Sec. 53H. Collection of tax on transfer, etc. of property.–(1) Any person responsible for registering any document of a person under the provisions of clause (b), (c) or (e) of sub-section (1) of section 17 of the Registration Act, 1908 (XVI of 1908), shall collect from the person whose right, title or interest is sought to be transferred, assigned, limited or extinguished thereby, at the time of registration of such document, income tax at such rate and in such manner as may be prescribed on the value of

the property to which the document relates and on which stamp-duty is chargeable under the Stamp Act, 1899 (II of 1899).

(2) Nothing in this section shall apply to a document relating to:

(a) sale by a bank or any financial institution as a mortgagee empowered to sell;

(b) mortgagee of any property to the Bangladesh House Building Finance Corporation established under the Bangladesh House Building Finance Corporation Ordinance, 1973 (P.O. No. 7 of 1973), against loan;

(c) mortgage to any bank of any property;

(d) transfer of any agricultural land in Bangladesh, not being land situate in any area mentioned in paragraph (i) or (ii) of sub-clause (c) of clause (15) of section 2;

(e) transfer of any non-agricultural land valued at a sum not exceeding one lakh taka, situated outside the jurisdiction of any city corporation, paurashava or cantonment board.

Explanation.—In this sub-section, "financial institution" shall mean the Bangladesh House Building Finance Corporation, the Bangladesh Shilpa Bank and the Bangladesh Shilpa Rin Sangshta.

Collection of tax on transfer of property—Sec. 53H (read with rule 171): For the purpose of collection of income tax under this section the registrar, the sub-registrar or any other person responsible for registering any document of a person under the Registration Act, 1908 shall collect from the person whose right, title or interest in the property is sought to be transferred, assigned, limited or extinguished by such registration of the document, income-tax at the rate of ten percent on the value of the property to which the document relates and on which stamp duty is chargeable under the Stamp Act, 1899.

Sub-sec. (2) provides for exemption from deduction of tax under this section where the document sought to be registered relates to the following classes of transfers:

(i) sale by a bank or any financial institution as a mortgagee empowered to sell;

(ii) mortgagee of any property to the Bangladesh House Building finance Corporation against loan;

(iii) mortgage to any bank of any property;

(iv) transfer of any agricultural land in Bangladesh excepting the land situated in any area within the jurisdiction of municipality, municipal corporation or a Cantonment Board or the land situated in any area

within the distance of five miles from any municipality or cantonment Board where there is the possibility of urbanisation of that area; and

(v) transfer of any non-agricultural land valued at a sum not exceeding one lakh taka, situated outside the jurisdiction of any city, corporation, pourshava or cantonment Board.

Sec. 54. Deduction of tax from dividends.–(1) The principle officer of a company registered in Bangladesh, or of any other company, shall, subject to the provisions of sub-section (2), at the time of paying any dividend to a shareholder, deduct tax on the amount of such dividend, in the case of–

(a) a non-resident,–

(i) if the shareholder is a company, at the rate applicable to a company;

(ii) if the shareholder is a person other than a company, at the maximum rate;

(b) a resident,–

(i) if the shareholder is a company, at the rate applicable to a company;

(ii) if the shareholder is a person other than a company, at the rate of ten per cent.

(2) Where, the Deputy Commissioner of Taxes, on an application made in this behalf, gives a certificate to a resident shareholder, not being a company, to the best of his belief that the aggregate amount of dividends to be received by such resident shareholder from one or more public limited companies will not exceed thirty thousand taka or, to a non-resident shareholder, not being a company, to the effect that he will be liable to tax at a rate less than the maximum rate, payment of the dividend to such shareholder shall be made, until the certificate is cancelled,–

(a) in the case of the resident shareholder, without any deduction; and

(b) in the case of the non-resident shareholder, with deduction of tax at the rate specified in the certificate, being a rate less than the maximum rate:

Provided that no tax shall be deducted under this section in the case of a person, not being a company, resident in Bangladesh whose total receipt of dividend during the income year does not exceed [taka thirty thousand].

Deduction of tax from dividends–Sec.54: The principal officer of a company registered in Bangladesh shall, at the time of making payment of dividend to its shareholder, deduct tax on the amount of such dividend, in the case of a shareholder, being non-resident–

(i) at the rate applicable to a company, if the shareholder is a company and at the maximum rate if the shareholder is a person other than a company; and

(ii) in case of a resident shareholder, at the rate applicable to a company, if the shareholder is a company and if the shareholder is a person other than a company, tax will be deducted at ten percent on the amount of dividend.

Sub-section (2) provides that the Deputy Commissioner of Taxes may, on an application made in this behalf, give a certificate to a resident shareholder, not being a company, to the effect that to the best of his belief the aggregate amount of dividend to be received by such shareholder from one or more public limited companies will not exceed thirty thousand taka, and since dividend from public limited companies is exempt upto thirty thousand taka the dividend will be paid without any deduction. A similar certificate may also be issued to a non-resident shareholder, not being a company, to the effect that he will be liable to tax at a rate less than the maximum rate and tax will be deducted at the rate specified in such certificate. The effect of the certificate as given by the Deputy Commissioner of Taxes will continue and deduction will be made accordingly until the certificate is cancelled.

Sec. 55. Deduction from income from lottery, etc.–The person responsible for paying any amount on account of winnings referred to in section 19(13) shall, at the time of making such payment, deduct tax [payable on the amount at the rate of twenty percent.

Explanation.–For the purposes of this section, the expression "any amount" means the value of any goods or assets where the payment on account of such winnings is made not in the form of cash but in the form of goods or other assets.

Deduction of tax from income from lottery, etc.–Sec. 55: Under sec. 19(13) any income by way of winnings from lotteries, cross word puzzles, card games or from gambling of any nature shall be taxed under the head, "Income from other sources". Under paragraph 3 of the Second Schedule tax on the said income shall be payable at the rate applicable to the total income including that income or at the rate of twenty percent, whichever is the lower.

Under this section (S. 55) tax at the rate of twenty percent on such income from lotteries including income from any kind of gambling either in the form of cash or in the form of goods or any other assets shall have to be deducted by the person responsible for making payment of such income at the time of making payment of such income.

Sec. 56. Deduction from income of non-residents–(1) Subject to the provisions of sub-section (2), any person responsible for making payment to a non-resident of any amount which constitutes income of such non-resident chargeable to tax under this Ordinance shall, unless such person is himself liable to pay tax thereon as agent, at the time of making such payment, deduct tax on the amount so payable–

(a) where the payee is a company, at the rate applicable to a company.

(b) where the payee is a person other than a company, at the maximum rate.

(2) Where, the Deputy Commissioner of Taxes, on an application made in this behalf, gives a certificate that, to the best of his belief, the non-resident will not be liable to pay any tax under this Ordinance, or will be liable to pay tax at a rate less than the maximum rate, payment referred to in sub-section (1) shall be made without any deduction, or, as the case may be, with deduction at the lesser rate specified in the certificate.

Deduction of tax at source from income of non–residents–Sec. 56: If any non-resident person is liable to pay tax under this Ordinance for income which constitutes the income of such non-resident chargeable to tax, unless such person is himself liable to tax on such income as an agent, such income shall be subjected to deduction of tax at source and the person responsible for making payment of income to the non-resident shall at the time of making such payment deduct tax on the amount payable at the maximum rate if the payee is a person other than a company or if the payee is a company tax will be deducted at the rate applicable to a company.

Sub-sec. (2) provides that the Deputy Commissioner of Taxes, on an application made in this behalf, may give a certificate to the effect that to the best of his belief that the non-resident person will not be liable to pay any tax under this Ordinance, or will be liable to pay tax at a rate lower than the maximum rate, the payment of the income as referred to in sub-section(1) shall be made without deduction of any tax or tax at a rate as specified in the certificate shall be deducted from such income.

Newly inserted sections by the amendments in the Finance Act, 2000.

Sec. 52J. Collection of tax from travel agent.–A person responsible for paying to a resident any sum by way of commission or discount for selling tickets of an airline or for carrying cargo shall deduct or collect advance tax at the time of paying such commission or allowing discount, at such rate and in such manner, as may be prescribed.

Collection of tax from travel agency commission–Sec. 52J (read with rule 17F): Under the section provisions have been made for collection of tax from

travel agents on travel agency commission or discount and the Rule made thereunder (Rule 17F) has prescribed the manner of computation of such commission or discount. The amount of commission or discount shall be computed at the rate of four percent on sale of Air-tickets or fare from carrying cargo on which tax shall be collected at the rate of five percent and, every Air-line while paying the commission or discount to a resident travel agent shall deduct tax at the rate of five percent on commission or discount so computed.

Sec. 53EE. Deduction of tax from commission or remuneration paid to agent of foreign buyer.–Where in accordance with the terms of the letter of credit or under any other instruction, a bank, through which an exporter receives payment for export of goods, pays any amount out of the export proceeds to the credit of any person being an agent or a representative of the foreign buyer, as commission, charges or remuneration by whatever name it may be called, the bank shall deduct or collect tax in advance at the rate of two and half percent on the commission, charges or remuneration so paid at the time of such payment.

Deduction of tax from commission or remuneration paid to agent of foreign buyer.–Sec. 53EE: Where an exporter receiving payment for export of goods from any bank and in accordance with the terms of letter of credit or any other instrument an amount is paid as remuneration or commission by way of credit to the agent or any other representative of foreign buyer out of the export proceeds, the bank shall deduct tax in advance at the rate of two and half percent of such amount when so paid.

Sec. 53GG. Deduction at source from fees, etc. of Surveyors of general insurance company.–A person responsible for paying to a resident any sum by way of remuneration or fees for conducting any survey regarding settlement of claim of an insurance shall, at the time of payment, deduct Income-tax on such sum at the rate five percent.

Deduction at source from fees, etc. of Surveyors of general insurance company.–Sec. 53GG: Any person making payment of a bill towards the remuneration or fees of the surveyors of a resident general insurance company for conducting any survey in connection with the settlement of an insurance claim shall deduct tax at the rate of five percent on such bill at the time of making such payment to the insurance company.

Sec. 57. Consequences of failure to deduct, etc.–(1) Where a person required by or under the provisions of this Chapter to deduct, collect or pay to the credit of the Government tax, and, in the cases mentioned in section 54, the principal officer and the company of which he is the principle officer, fails to so deduct, collect or pay, or having

deducted or collected, fails to pay the tax in accordance with the provisions of this Chapter, he or it shall–

(a) without prejudice to any other consequences to which he or it may be liable, be deemed to be an assessee in default in respect of the tax; and

(b) in addition to such tax, pay an amount at the rate of two percent per month of such tax for the period commencing on the date following the expiry of the time within which it is to be paid under section 59 and ending on the date of the actual payment of tax.

(2) The Commissioner of Taxes or the Deputy Commissioner of taxes, as the case may be, to whom the statement in respect of deduction or collection of tax is required to be submitted in accordance with the rules made under this Ordinance, shall, notwithstanding the provisions of section 137, take necessary action for realization of tax along with the additional amount payable under clause (b) of sub-section (1) from the person deemed to be an assessee in default under clause (a) of that sub-section.

Default on part of a person found to deduct tax–consequences thereof–Sec. 57: If the person who is responsible to deduct tax at source does not deduct or after deducting fails to pay to the Government, he would be deemed to be an assessee in default in respect of the tax and he would be personally liable to pay the tax–*Phaltan Sugar Works Ltd.* v. *C.I.T.* 1949 I.T.R. 499. He would also be liable to a penalty at the rate of two percent per month of such tax for a period commencing on the date following the expiry of the time within which it is to be paid, that is, within one week from the date of such deduction as prescribed in rule 13, till the date of actual payment.

Sub-section(3) of section 49 defines "the person responsible for making payment" makes it clear that in any case of failure to deduct tax at source in respect of a payment made by a company or other institution the principal officer of the company as well as the company itself or other institution is liable as an assessee in default.

Sub-section(2) provides that the Commissioner of Taxes or the Deputy Commissioner of Taxes to whom the particulars of deduction of tax are required to be submitted under rules 21 and 23 shall in addition to the penalty for default in payment of tax under section 137, take necessary action for realisation of the tax from the person who is an assessee in default under cl.(b) of sub-section(1) of this section.

Sec. 58. Certificate of deduction, etc. of tax.–Every person who deducts or collects tax as required by the provisions of this Chapter shall, at the time of making any payment in relation to which tax has been

deducted or collected, furnish to the person to or from whom such payment or collection has been made, a certificate to the effect that the tax has been deducted or collected specifying therein–

(a) the amount deducted or collected;

(b) the rate at which deduction or collection has been made; and

(c) such other particulars as may be prescribed.

Certificate of deduction–Sec. 58 read with rule 18: The person who is responsible to deduct tax under the provisions of this Chapter, shall at the time of making payment deduct tax and furnish to the person from whom such collection of tax has been made, a certificate in the form as prescribed in rule 18 specifying the particulars of amount of tax deducted, rate at which deduction has been made and such other particulars as prescribed in the rule, such as, deduction of security deposit, cheque or challan no. and date and any amount of refund of security deposit etc.

There is no provision for penal action in case of failure to furnish certificate without reasonable cause.

Sec. 59. Payment to Government of tax deducted.–All sums deducted or collected as tax under the provisions of this Chapter shall be paid within the prescribed time by the person making the deduction or collection to the credit of the Government or as the Board may direct.

Time-limit for payment of tax–(rule 13): Advance tax as deducted at source under this Chapter shall be paid to the credit of the Government within one week from the date of such deduction or collection by the person making the deduction. The Deputy Commissioner of Taxes and in special cases with the approval of the Additional/Joint Commissioner of Taxes, may permit an employer to pay the tax deducted from income under the head, "Salaries" quarterly on September, 15, December 15, March 15 and June 15.

Manner of payment of tax–(rule 14): The person responsible for making payment of tax deducted at source shall make the payment to the credit of the Government by remitting it to the Bangladesh Bank or the Sonali Bank, as the case may be, accompanied by an income tax challan. But in cases of taxes deducted at source under sections 52, 52A, 525G, 53A, 53E, and 53G the person responsible for making the deduction shall issue a cheque equivalent to the amount of the tax deducted at source in favour of the concerned Deputy Commissioner of Taxes and hand over the cheque to the person from whose payment tax has been deducted who will deposit the cheque through income tax challan form to the Bangladesh Bank or the Sonali Bank, as the case may be, and on production of the counterfoil of the challan he will be entitled to receive his balance amount of payment.

Sec. 60. Unauthorised deduction prohibited.–Save as provided in this Ordinance, no person shall charge, withhold, deduct or collect any sum, directly or indirectly, as tax, and, where any sum is so charged

withheld, deducted or collected, it shall be paid in the manner provided in section 59.

Deduction of tax only in respect of specified incomes.–Deduction or collection of tax at source has been provided for only in respect of specified cases and such cases are enumerated in section 49(1). Manner of deduction and rates at which such tax shall be deducted have been mentioned in the respective sections and rules made therefor. Deduction of tax from any other income besides, the specified incomes is not only permitted but prohibited in this section. Similarly, where there is provision for deduction of tax in Chapter VII for any income, the payment of tax by the assessee himself direct will not absolve of the liability of the person responsible to deduct tax at source. It was held in the case of *John Patterson & Co. (India) Ltd.* v. *I.T.O.* [1959] 36 IT.R. 449 that the employer's responsibility to deduct tax is absolute and is not affected by any private arrangement whereby the employee has undertaken to discharge his own tax-liability. (The Appellate Tribunal, Dhaka Bench took a different view). In certain cases, as provided for in section 63, tax may be paid by the assessee himself and the provisions for deduction of tax at source are not attracted.

Sec. 61. Power to levy tax without prejudice to other mode of recovery.–The power to levy tax by deduction or collection under this Chapter shall be without prejudice to any other mode of recovery.

Sec. 62. Credit of tax deducted or collected at source.–Any deduction or collection of tax made and paid to the account of the Government in accordance with the provisions of this Chapter shall be treated as a payment of tax on behalf of the person from whose income the deduction or collection was made, or of the owner of the security or of the shareholder, as the case may be, and credit shall be given to him therefor on the production of the certificate furnished under section 58 in the assessment, if any, made for the following year under this Ordinance:

Provided that, if such person or such owner obtains, in accordance with the provisions of this Ordinance, a refund of any portion of the tax so deducted, no credit shall be given for the amount of such refund:

Provided further that where such person or owner is a person whose income is included under the provisions of section 43 (4) or (5) or section 104 or 105 or 106 in the total income of another person, such other person shall be deemed to be the person or owner on whose behalf payment has been made and to whom credit shall be given in the assessment for the following year.

Credit of tax deducted–Sec. 62: This section is a natural concomitant of the last. Deduction at source is only a mode of collecting tax from the person from whose

income the deduction is made and amounts to a levy on such person as much as direct assessment would be. Therefore, the tax deducted at source is part of the income of the assessee and the gross amount has to be included in the total income; and on the same principle the tax deducted at source and paid to the Government is treated as having been paid on behalf of the assessee. Levy by deduction amounts to payment of tax before assessment. Till the year is over, the assessee's total income from all sources cannot be determined. When the year is over and the assessment is made, credit is given to the assessee for the tax deducted at source. If the tax assessed is more than the amount deducted at source, the amount of the deficiency is recovered from the assessee direct. If, on the other hand, the tax deducted at source exceeds the tax found payable, the assessee would be entitled to a refund under sec. 146.

The judgments of the Supreme Court of India in *Howrah Trading Co. Ltd.* v. *C.I.T.*, *(C.I.T.* v. *Shakuntala [1961] 43 I.T.R. 352 (S.C.))* and *I.T.O.* v. *Arvind Mafatlal ([1962] 45 I.T.R. 271)* establish that as regards dividends the benefit of credit for the tax deducted at source can be claimed under this section only by a *registered shareholder*, and not by a beneficial owner of shares, e.g., a purchaser of shares who has not got the shares transferred to his name in the books of the company. The tax deducted at source is deemed under this section to have been paid on behalf of "the owner of the security" and credit is to be given to him therefor. The word "owner" would include a beneficial owner. Therefore, a beneficial owner of securities, who is entitled to the interest on securities and in whose total income the interest *as such* is included, would be entitled to credit under this section for the tax deducted at source, even though the securities may not have stood in his name at the time when the interest was paid.

The second proviso lays down that where another's income is included in the assessee's total income under s. 43(4) or (5) or sec. 104 or 105 or 106 the tax in respect of such income should be deemed to have been paid on behalf of the assessee and credit should be given to him therefor in the assessment.

Sec. 63. Payment of tax where no deduction is made.–The tax under this Ordinance shall be payable by the assessee direct–

(a) in any case where tax has not been deducted or collected as required by, and in accordance with, the provisions of this Chapter;

(b) in any case where the amount deducted or collected is found, after regular assessment, to be less than the tax due from the assessee, to the extent of deficiency; and

(c) in the case of income in respect of which no provision has been made for deduction or collection of tax under the provisions of this Chapter.

Direct payment of tax by assessee–Sec. 63: Under chapter VII provisions have been made for deduction of tax at source by the person responsible for such deduction from certain classified incomes and the payee assessee is not permitted to

pay the tax himself *(See notes on See 60 ante)*. Under this section the assessee himself shall pay the tax himself (i) where tax has not been deducted at source under the provisions of this Chapter as required; (ii) where the tax deducted at source falls short of demand as made after regular assessment; and (iii) in the case of income where there is no provision for deduction of tax at source.

B. Advance Payment of Tax

Sec. 64. Advance payment of tax.–(1) Except as provided in sub-section (2), tax shall be payable by an assessee during each financial year by way of advance payment of tax, hereinafter referred to as "advance tax", in accordance with the provisions hereafter made in this Chapter if the total income of the assessee for the latest income year in respect of which he has been assessed by way of regular assessment, or has been provisionally assessed under this Ordinance, or the Income-tax Act, 1922 (XI of 1922), exceeds one lakh taka;

(2) Nothing in sub-section (1) shall apply to any income classifiable under the heads "Agricultural income" and "Capital gains".

Sec. 65. Computation of advance tax.–The amount of advance tax payable by an assessee in a financial year shall be the amount equal to the tax payable on his total income of the latest income year as assessed on regular basis or provisionally, as the case may be, as reduced by the amount of tax required to be deducted or collected at source in accordance with the preceding provisions of this Chapter.

(2) The tax payable under sub-section (1) shall be calculated at the rates in force in respect of the financial year referred to therein.

Sec. 66. Instalments of advance tax.–Advance tax shall be payable in four equal instalments on the fifteenth day of September, December, March and June of the financial year for which the tax is payable:

Provided that, if before the fifteenth day of May of the year, an assessment of the assessee is completed in respect of an income year, later than that on the basis of which the tax was computed under section 65, the assessee shall pay in one instalment on the specified date or in equal instalments on the specified dates, if more than one falling after the date of the said assessment, the tax computed on the revised basis as reduced by the amount, if any, paid in accordance with the original computation.

Sec. 67. Estimate of advance tax.–(1) Where, an assessee who is required to pay advance tax under section 64 estimates, at any time before

the last instalment is due, that the tax payable by him for the relevant assessment year is likely to be less than the amount of tax as computed under section 65, he may, after giving to the Deputy Commissioner of Taxes an estimate of the tax payable by him, pay such estimated amount of advance tax, as reduced by the amount, if any already paid, in equal instalments on the due dates of payment under section 66.

(2) The assessee may furnish a revised estimate of such amount at any time before any of such instalments become payable and may thereby adjust any excess or deficiency, by reference to the amount already paid by him under this section, in any subsequent instalment or instalments payable in such financial year.

Sec. 68. Advance payment of tax by new assessees.–Any person who has not previously been assessed by way of regular assessment under this Ordinance or the Income-tax Act, 1922 (XI of 1922), shall before the fifteenth day of June in each financial year, if his total income, subject to section 64 (2), of the period which would be the income year for the immediately following assessment year is likely to exceed [one lakh taka], send to the Deputy Commissioner of Taxes an estimate of his total income and advance tax payable by him calculated in the manner laid down in section 65 and shall pay such amount on such dates specified in section 66 as have not expired by instalments which may be revised according to section 67(2).

Advance payment of tax.–Sec. 64: These sections deal with advance payment of tax, referred to in this Chapter as "advance tax". They correspond to s. 18A which was inserted in 1944 in the 1922 Act. The provision was introduced as a war measure to combat inflation and to withdraw a part of the unprecedented amount of money then in circulation, but, like many other innovations in taxation legislation, it has outlived the exigency which gave it birth–*Purshottamdas Thakurdas* v. *C.I.T.* [1963] 48 I.T.R. (S.C. of India) 206, 211). The section applies to those assessees whose total income in the completed assessment for the latest income year, exclusive of agricultural income and capital gains, exceeded one lakh taka (s. 64(2)). It also applies to those persons, previously unassessed, whose total income (exclusive of agricultural income and capital gains) of the income year relevant to the immediately following assessment year is likely to exceed one lakh taka (s. 68).

Under the basic scheme of this Ordinance the subject of charge is the income of the income year and not the income of the assessment year; in other words, the tax is assessed and paid in the next succeeding year upon the results of the year before. These sections mark a departure from that basic scheme. They rest on the principle of "pay as you earn", *i.e.* paying tax by instalments in respect of the income of the very year in which the tax is paid *(Purushottomdas Thakurdas* v. *C.I.T. [1963] 48 I.T.R.*

206, 211 (S.C. of India). Unlike the 1922 Act, this Ordinance makes a provision in the charging section itself for payment of tax in advance. (s. 16(2)).

The old s. 18A did not apply to the classes of income from which tax was deducted at source. However, this section makes the provision for advance tax applicable to all classes of income except agricultural income and capital gains but provides that the advance tax should be reduced by the amount of tax deductible at source (s. 65). Where the tax is deducted at source, that in itself amounts to advance payment of tax *(See under s. 62 "Credit for tax deducted")*. It was held under the old s. 18A that advance tax was not payable in respect of dividend income even prior to 1959 when the shareholder's tax was not deducted at source but credit was given to the shareholder for the tax paid by the company on its own profits.

Credit is given for advance tax in the regular assessment for the assessment year next following the financial year in which advance tax was payable (s. 71); and if the tax paid in advance is found to be in excess of the tax payable on completion of the assessment, the assessee would be entitled to a refund of such excess (s. 46).

In the case of a person who has been previously assessed, the advance tax is payable on the basis of either regular or provisional assessment (see post secs. 81, 83 and 93) completed for the latest income year. If any assessment is completed before fifteenth day of May of the year in respect of an income year that will be the latest income year on the basis of which advance tax will have to be computed. Regular assessment means an assessment made under sec. 83 and refers to it as the original assessment or first assessment. Reassessment made under section 93 is not a regular assessment but an assessment made under sec. 93 for the first time is a regular assessment. Since the advance tax is payable on the basis of the regular or provisional assessment completed before fifteenth day of May of the year in respect of an income year and if the total income for that year does not exceed the limit of one lakh taka this section is not attracted.

Computation of advance tax.–Sec. 65: Since advance tax is payable on the basis of the regular or provisional assessment completed for the latest income year, it may bear no relation to the actual tax payable in respect of the income of the income year relevant for advance tax. But sec. 67 gives the right to the assessee to estimate his actual income of the relevant income year and pay advance tax on the basis of his own estimate. The assessee thus may pay advance tax either on the basis of the income assessed for the latest income year or on the basis of his own estimate, and if the tax as paid on the basis of the assessed income for the latest income year falls short of the required amount of advance tax payable he will not be charged for such short-fall. But if the assessee pays advance tax on the basis of his own estimate and if the tax paid falls short of the required amount of tax payable he will be liable to pay interest for such short fall. (sec. 73). The assessee is thus at liberty to pay advance tax either on his latest assessed income or on his own estimate.

Estimate of advance tax payable by instalments–Secs. 66 and 67: Section 66 provides for quarterly advance payment of tax in four equal instalments payable on the fifteenth day of September, fifteenth day of December, fifteenth day of March and

fifteenth day of June. But if before fifteenth day of May of the year an assessment of the assessee is completed in respect of an income year later than that on the basis of which the tax is computed, the assessee shall pay in one instalment on the specified date or in equal instalments on the specified dates, if more than one falling after the date of the said assessment, the tax computed on the revised basis as reduced by the amount, if any paid in accordance with the original computation. Such tax will be calculated at the rates in force for the year in which he is required to pay the tax–proviso to sec. 66.

Revised estimate.–If any assessee thinks that his income during the current year will be below the income of the last assessment and the amount of tax will be less, he is at liberty to revise his estimate of income at any time during the current financial year and may pay tax according to his revised income in four or less instalments as the case may be: but the revised estimate must be sent before the last instalment becomes due. When he pays tax on his own estimate, he can also revise his estimate of tax payable by him and adjust any excess or deficiency in respect of any instalment already paid in the subsequent instalments–sec. 67. When the assessee submits his own estimate he must nevertheless pay those instalments which have fallen due prior to the date when he submits his estimate – *Dutt* v. *C.I.T.* (1958) I.T.R. 428.

The assessee is thus, at liberty to pay advance tax either on the basis of his latest assessed income or on his own estimate. In the former case he has no other liability even if the income during the current year is greater than that of his latest assessment. But when he chooses to pay on the basis of his own estimate and the tax so paid is less than seventy five percent of the amount of tax payable as determined on the basis of his regular assessment he will be required to pay an additional amount as interest (s. 73). Tax deducted at source shall, however be considered in such computation of advance tax payable.

Estimate by person not previously assessed–Sec. 68: An estimate has to be sent under this section by "any person who has not previously been assessed by way of regular assessment under this Ordinance or the Income tax Act, 1922". Since a firm is a distinct assessable entity different from its partners, a person cannot escape his liability under this section on the ground that an unregistered firm in which he is a partner was previously assessed–*Meka Venkatappiah* v. *I.T.O.* [1957] 32 I.T.R. 274. The new assessee shall send his estimate of total income and advance tax payable by him to the Deputy commissioner of Taxes in a case where his total income, excluding "Agricultural Income" and income from "Capital gains", of the income year immediately following the assessment year is likely to exceed one lakh taka. Such estimate shall be sent before fifteenth day of June in each financial year. But the assessee must nevertheless pay those instalments which have fallen due prior to the date when the assessee submits his own estimate–*Dutt* v. *C.I.T. [1958] 33 I.T.R. 428.* Where an assessee who has not been previously assessed fails to make an estimate and pay advance tax, interest would be chargeable–*Gursahai Saigal* v. *C.I.T. [1963] 48 I.T.R. (S.C. of India).*

The new assessee is liable to pay advance tax if his assessed total income of the latest income year exceeded the limit. If it does not exceed the limit on the date on which the advance tax is due he will not be liable to pay any advance tax–as observed by the Dhaka Tribunal–reported in 1975 B.T.D. III 20.

Penalty.–If the assessee has furnished an estimate of advance tax payable by him which he knew or had reason to believe to be untrue, he would be liable to a penalty (sec. 125) *See Post Sec. 125.*

Sec. 69. Failure to pay instalments of advance tax.–Where, an assessee who is required to pay advance tax fails to pay any instalment of such tax, as originally computed or, as the case may be, estimated, on the due date, he shall be deemed to be an asessee in default in respect of such instalment.

Assessee deemed to be in default. –Sec. 69: If any assessee does not pay on the date as specified in section 66 any instalment of advance tax that he is required to pay under section 64 or does not, before the date on which any such instalment as is not paid becomes due, send under section 67 an estimate or a revised estimate of the advance tax payable by him and pay such estimated amount of advance tax under that section he shall be deemed to be an assessee in default in respect of such instalment or instalments. The assessee who has not without any reasonable cause failed to pay advance tax as required by section 64 or 67 shall be liable to a penalty under section 125. The assessee cannot be treated as being in default if the notice of demand is not duly served – *Shanmugha Sundaram* v. *Tashildar* [1963] 49 I.T.R. 9.

Sec. 70. Levy of interest for failure to pay advance tax.– Where, in respect of an assessee who is required to pay advance tax, it is found in the course of regular assessment that advance tax has not been paid in accordance with the provisions of this Chapter, there shall be added, without prejudice to the consequences of the assessee being in default under section 69, to the tax as determined on the basis of such assessment, simple interest thereon calculated at the rate and for the period specified in section 73.

Sec. 71. Credit of advance tax.–Any sum, other than a penalty or interest, paid by or recovered from an assessee as advance tax, shall be treated as a payment of tax in respect of the income of the period which would be the income year for an assessment for the year next following the year in which it was payable and shall be given credit for in the assessment of tax payable by the assessee.

Sec. 72. Interest payable by government on excess payment of advance tax.–(1) The government shall pay simple interest at [ten percent] per annum on the amount by which the aggregate sum of advance

tax paid during a financial year exceeds the amount of tax payable by him as determined on regular assessment.

(2) The period for which interest under sub-section (1) shall be payable shall be the period from the [first day of July of the year of assessment] to the date of regular assessment in respect of the income of that year or a period of two years from the said first day of July, whichever is shorter.

Sec. 73. Interest payable by the assessee on deficiency in payment of advance tax.–(1) Where, in any financial year, an assessee has paid advance tax on the basis of his own estimate and the advance tax so paid together with the tax deducted at source, if any, under this Chapter is less than seventy-five percent of the amount of tax payable by him as determined on regular assessment, the assessee shall pay, in addition to the balance of tax payable by hm, simple interest at [ten percent] per annum on the amount by which the tax so paid and deducted falls short of the [seventy-five percent of the assessed tax].

(2) The period for which interest under sub-section (1) shall be payable shall be the period from the first day of April of the year in which the advance tax was paid to the date of regular assessment in respect of the income of that year or a period of two years from the said first day of April, whichever is shorter.

(3) Notwithstanding anything contained in sub-section (1) and (2), where–

(a) tax is paid under section 74, or

(b) provisional assessment has been made under section 81 but regular assessment has not been made, the simple interest shall be calculated in accordance with the following provisions–

(i) up to the date on which tax under-section 74 or as provisionally assessed, was paid;

(ii) thereafter, such simple interest shall be calculated on the amount by which the tax as so paid falls short of the said assessed tax.

(4) Where, as a result of appeal, revision or reference, the amount on which interest was payable under sub-section (1) has been reduced, the amount of interest payable shall be reduced accordingly and the excess

interest paid, if any, shall be refunded together with the amount of tax that is refundable.

Sec. 74. Payment of tax on the basis of return.–(1) Every person who is required to file a return under section 75 shall, on or before the date on which he files the return, pay the amount of the tax payable by him on the basis of such return as reduced by the amount of any tax deducted from his income or paid by him in accordance with the provisions of this Chapter.

(2) Any amount paid under sub-section (1) shall be deemed to have been paid towards the sum as may be determined to be payable by him after regular assessment.

(3) A person who, without reasonable cause, fails to pay the tax as required by sub-section (1) shall be deemed to be an assessee in default.

Interest payable by assessee–Sec. 69 and 73: Under section 66 an assessee is liable to pay advance tax on four equal instalments on the dates specified in that section. If it is found that advance tax has not been paid by the assessee according to the provisions of this Chpater he shall be liable to pay an additional amount as simple interest as determined on the basis of the assessment. Besides, he will also be treated as an assessee in default (sec. 69).

If an assessee does not pay advance tax on dates specified but makes payment of advance tax within the financial year simple interest cannot be imposed if the required amount of tax is paid–*Anup Engineering Ltd.* v. *I.T.O (Gujurat High Court), Ahmedabad.* (reported in 1986 BTD xiv 101-2). It was held in another case–*Chandrakant Damordas* v. *I.T.O.* [1980] 123 I.T.R. 748 that there is no indication in the law that the dates of instalments are strictly to be adhered to and, if they are not adhered to, interest will be payable. In such a case where required amount of advance tax is paid during the financial year, not paid by instalments, the assessee shall be deemed to be an assessee in default and the Deputy Commissioner of Taxes can take action under section 125. This view has been accepted by the Appellate Tribunal, Dhaka Bench (1987 B.T.D. xv 7-15).

The Supreme Court of India in the case of *L.Hirday Narain* v. *I.T.O* [1970] 78 I.T.R. 26 (reported in 1994 B.T.D. XVII 3-12) held, "where advance tax had been paid before the end of the financial year, even though after the end of the accounting year of the assessee or after the expiry of the specified dates, interest was not leviable. There was no warrant for the interpretation that any amount paid after the date on which the last instalment of advance tax was payable would not be an amount paid in advance. Where all payments have been made within the financial year ..... all payments had to be deemed as payments of advance tax within the meaning of section 215 (corresponding to sections 64 and 66). "Where interest was not charged for non payment of advance tax it cannot be charged on the direction of the Commissioner of Income tax", "The I.T.O. was authorised to exercise his discretion in favour of the

assessee ..... and it happened, no penal interest had been added by the I.T.O. when he made the original assessment". The I.T.O cannot rectify the error on the direction of the C.I.T.–*C.I.T., Delhi* v. *Caxton Press (Private) Ltd.* (1980) reported in করদাদালত, February, 1997.

In the case of *C.I.T., Patiala* v. *Rahtak Delhi Transport P. Ltd.* (reported in 1983 B.T.D. XI 99-100) the facts were that cheques were handed over to the I.T.O before the advance tax was payable but it was collected after the expiry of the due date. For imposition of interest for non payment of advance tax issue of prior notice is not necessary–*Bangladesh Services Ltd.* v. *C.I.T. Dhaka (S.C. of India)* reported in 1993 B.T.D. XXI (1). Held, that the handing over of the cheques constituted valid payment of advance tax.

Interest payable by assessee in case of underestimate, etc.–Sec. 73: If the advance tax is paid on the basis of an estimate made by the assessee himself under section 67(1) and the estimated amount of advance tax together with the amount of tax deducted at source is less than the amount of tax required to be paid, interest will be payable by the assessee. Where the assessee has underestimated his income liable to advance tax on the basis of his own estimate and the advance tax so paid is less than seventy five percent of the tax determined on the basis of the regular assessment, reduced by the amount of tax deductible at source, simple interest at ten percent per anum shall be payable by the assessee upon the amount by which the advance tax so paid and deducted falls short of the said seventy five percent of the assessed tax–sub-sec.(1).

The period for which the assessee will be liable to pay simple interest shall be the period from the first day of July (as amended) in which the advance tax was paid to the date of regular assessment in respect of the income of that year or for a period of two years from the said first day of April whichever is shorter. So simple interest at the rate of ten percent per anum from the first day of July next following the financial year upto the date of the regular assessment, not exceeding two years from the said first day of July, shall be payable by the assessee upon the amount of by which the advance tax so paid falls short of the said seventy five percent. Here the term, "regular assessment" means the regular assessment when made for the first time including assessment made for the first time under section 93 and not reassessment under section 93. In determining liability to pay interest under this section amount of tax deduction at source are to be taken into consideration. No separate order charging interest under these sections need be made–*Santamal Petamber Prosad* v. *I.T.O. [1963] 47 I.T.R. 562.*

In respect of interest income from which deduction of tax at source should have been made, the liability to pay interest is fastened on the person or authority who failed to make deduction as required in law"–*C.I.T.* v. *Madras Fisheries Ltd.* (reported in 1989) B.T.D. XVII 71.

Under sub-section (3) of this section the periods for which interest will be calculated and the amount of interest payable have been reduced in cases where tax under section 74 (at the time of filing the return) or the tax as provisionally assessed

has been paid. In such cases interest will be calculated on the balance amount of advance tax payable after deduction of tax paid at the time of filing the return or tax paid after the provisional assessment.

In a case where income is reduced in appeal and consequently the interest payable is also reduced, the excess amount of interest paid, if any, together with the amount of tax shall be refundable to the assessee (sub-section (4)). But in a case where income is enhanced under section 34 and thereby increasing the amount of interest payable than that of the amount originally calculated on the basis of regular assessment, the excess amount of interest cannot be demanded from the assessee–*Rayon Traders (P) Ltd.* v. *I.T.O. (Madras)* 1980 (reported in 1981 B.T.D. IX 136. In the case of *Natarantan Chettiar* v. *I.T.O. (1961) 42 I.T.R. 29* it was pointed out that the amount ascertained on the basis of regular assessment under sec. 23 brought about a finality, subject only to the provision contained in the second proviso to sec. 18A(6) (corresponding to sub-section (4) of section 73) which related to the reduction of the amount on which interest was payable as a result of an appeal, revision or reference. It was held that there was no provision to meet the contingency where the amount of tax payable by the assessee was increased by proceedings taken under section 34 of the Act. The result was that the assessee was held as not being liable to pay any interest on the amount subsequently demanded under section 34, even though the said sum was in excess of the advance tax paid by the assessee". The same lacuna is also found in the Ordinance.

Interest payable by Government.–Sec. 72: The Government shall pay simple interest at ten percent per anum on the amount by which the aggregate sum of instalments of advance tax paid during any financial year in which they are payable under sections 64 to 68 exceeds the amount of tax determined on regular assessment. Such interest as will be payable shall be calculated from the first day of July of the year of assessment to the date of regular assessment in respect of the income of that year or for a period of two years from the first day of April, whichever period is shorter. Nothing has been mentioned in the section what will be the position if the tax is paid after the end of the financial year.

"The date of regular assessment" upto which interest is payable to the assessee on the advance tax paid by him, refer to the date of assessment as made for the first time which may be called original assessment, if any assessment is set aside in appeal and a fresh assessment is made at a subsequent date, that would not entitle the assessee to interest on the advance tax upto the date of the subsequent assessment–*Sarangpur Cotton Mfg. Co. Ltd.* v. *C.I.T. [1957] 31 I.T.R. 698.*

An assessee is entitled to interest under this section on the excess amount paid for advance tax by instalments on specified dates. But the question remains to be finally settled whether an assessee is entitled to interest where advance tax is paid not on specified dates but before the end of the financial year. The majority of the High Courts in India in the cases of *C.I.T.* v. *Traub (India) Pvt. Ltd. [1979] 188 I.T.R. 525 (Bombay); Chandrakant Damodardas* v. *I.T.O. [1980] 123 478 (Guj); Santha S. Shenoy* v. *Union of India [1982] 135 I.T.R. 39 (Ker); and C.I.T.* v. *Jagannath Narayan Kutumbik Trust [1983] 144I.T.R. 526 (M.P.)* held that in the cases of the

belated payment of advance tax the assessee will be eligible for interest if it was deposited during the financial year. But the Andhra Pradesh High Court in the case of *Kangundi Industrial Works (P) Ltd.* v. *I.T.O. [1980] 121 I.T.R. 339* and the *Kerala High Court in Sethumadhavan* v. *C.I.T. [1980] 122 I.T.R. 587* have held that the assessee is not entitled to interest on advance payment if such payment is not made on the due dates. The point, therefore, could be said to be an arguable point and it cannot be considered non-controversial. The decision in the recent case of *C.I.T.* v. *Sunil Kumar [1995] 212 I.T.R. 238 (Raj)* is that interest is payable under section 214 (corresponding to this section) since the advance was paid late but within the financial year.

Interest paid by Government to the assessee under this section is liable to tax as income–*Vishweshwara Singh* v. *C.I.T. [1954] 26 I.T.R. 573 588.*

Credit of advance tax.–Sec. 62: This section is a natural concomitam of the last. Deduction at source is only a mode of collecting tax from the person from whose income the deduction is made and amounts to a levy on such person as much as direct assessment would be. Therefore, the tax deducted at source is part of the income of the assessee and the gross amount has to be included in the total income; and on the same principle the tax deducted at source and paid to the Government is treated as having been paid on behalf of the assessee. Levy by deduction amounts to payment of tax before assessment. Till the year is over, the assessee's total income from all sources cannot be determined. When the year is over and the assessment is made, credit is given to the assessee for the tax deducted at source. If the tax assessed is more than the amount deducted at source, the amount of the deficiency is recovered from the assessee direct. If, on the other hand, the tax deducted at source exceeds the tax found payable, the assessee would be entitled to a refund under s. 146.

The judgments of the Supreme Court of India in *Howrah Trading Co. Ltd.* v. *C.I.T. (C.I.T.* v. *Shakuntala [1961] 43 I.T.R. 352 (S.C. of India))* and *I.T.O.* v. *Arvind Mafatlal ([1962] 45 I.T.R. 271)* establish that as regards dividends the benefit of credit for the tax deducted at source can be claimed under this section only by a *registered shareholder*, and not by a beneficial owner of shares, *e.g.*, a purchaser of shares who has not got the shares transferred to his name in the books of the company. The tax deducted at source is deemed under this section to have been paid on behalf of "the owner of the security" and credit is to be given to him therefor. The word "owner' would include a beneficial owner. Therefore, a beneficial owner of securities, who is entitled to the interest on securities and in whose total income the interest *as such* is included, would be entitled to credit under this section for the tax deducted at source, even though the securities may not have stood in his name at the time when the interest was paid.

The second proviso lays down that where another's income is included in the assessee's total income under s. 43(4) or (5) or Sec. 104 or 105 or 106, the tax in respect of such income should be deemed to have been paid on behalf of the assessee and credit should be given to him therefor in the assessment.

Payment of tax on the basis of return. –*(See post notes under section 74)*

CHAPTER VIII
RETURN AND STATEMENT

Sec. 75. Return of income.–(1) Save as provided in section 76, every person shall file or cause to be filed, with the Deputy Commissioner of Taxes, a return of his income or the income of any other person in respect of which he is assessable to tax under this Ordinance,–

(a) if his total income during the income year exceeded the maximum amount which is not chargeable to tax under this Ordinance, or

(b) if he was assessed to tax for any one of the [three years] immediately preceding that income year:

Provided that any non-resident Bangladeshi may file his return of income along with bank draft equivalent to the tax liability, if any, on the basis of such return, to his nearest Bangladesh mission and the mission will issue a receipt of such return with official seal and send the return to the Board.

(1A) A person who does not furnish return under sub-section (1) and who resides within the limits of a city corporation or of a paurashava of a divisional headquarters or district headquarters and who at any time during the relevant income year fulfils any of the following conditions, namely:–

(i) owns a building which consists of more than one storey and the plinth area of which exceeds one thousand six hundred square feet;

(ii) owns a motor car;

(iii) subscribes a telephone;

(iv) owns a membership of a club registered under মূল্য সংযোজন কর আইন, ১৯৯১ (১৯৯১ সনের ২২ নং আইন)

shall file a return of his income during the income year, on or before the date specified in clause (c) of sub-section (2).

Explanation.–In this sub-section, the term "motor car" means a motor car as defined in clause (25) of section 2 of the Motor Vehicles Ordinance 1983 (LV of 1983) and includes a jeep and a micro-bus.

(2) The return under sub-section (1) [and (1A)] shall be–

(a) furnished in the prescribed form setting forth therein such particulars and information as may be required thereby including the total income of the assessee;

(b) signed and verified–

(i) in the case of an individual, by the individual himself; where the individual is absent from Bangladesh, by the individual concerned or by some person duly authorised by him in this behalf; and when the individual is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf;

(ii) in the case of Hindu undivided family, by the Karta, and, where the Karta is absent from Bangladesh or is mentally incapacitated from attending to his affairs, by any other adult member or such family;

(iii) in the case of a company or local authority, by the principal officer thereof;

(iv) in the case of a firm, by any partner thereof, not being a minor;

(v) in the case of any other association, by any member of the association or the principal officer thereof; and

(vi) in the case of any other person, by that person or by some person competent to act on his behalf;

(c) filed, unless the date is extended under sub-section (3),–

(i) in the case of a company, by the fifteenth day of July next following the income year or, where the fifteenth day of July falls before the expiry of six months from the end of the income year, before the expiry of such six months; and

(ii) in all other cases, by the fifteenth day of September next following the income year; and

(d) accompanied, in the case of an individual whose total income in the income year exceeds three lac taka, by a statement in the prescribed form and verified in the prescribed manner giving particulars specified in section

80 in respect of himself, his spouse, his minor children and dependants;

(3) The last date for the submission of return as specified in sub-section (2) may be extended by the Deputy Commissioner of Taxes in respect of any person or class of persons:

Provided that the Deputy Commissioner of Taxes shall not extend the date beyond three months from the date so specified except with the approval of the Inspecting Joint Commissioner.

***Note.**–By the amendment as made in the Finance Act, 2000, sub-cl.(ii) of cl.(c) of sub-sec.(2) has been substituted by which the date of filing the return has been extended from fifteenth September to thirtieth September.*

Sec. 76. Certificate in place of return.–Where the entire total income of an assessee during the income year consisted of income classifiable under the head "Salaries" or any other income from which the full amount of tax payable by him has been deducted, such assessee may, instead of filing a return under section 75, file a certificate in such form as may be prescribed accompanied, where applicable, by a statement referred to in section 75 (2) (d); and the certificate and statement so filed shall be deemed for all purposes of this Ordinance to be a return and statement filed under that section.

Sec. 77. Notice for filing return.–(1) The Deputy Commissioner of Taxes may, at any time after expiry of the date specified in section 75, by a notice in writing, require any person to file a return of his total income as provided in that section if, in the opinion of the Deputy commissioner of Taxes the total income of such person was, during the income year, of such amount as to render liable to tax.

(2) The return under sub-section (1) shall be filed within such period, not being less than [twenty-one days], as may be specified in the notice or within such extended period as the Deputy commissioner of Taxes may allow.

Sec. 78. Filling of revised return.–Any person who has not filed a return as required by section 75 or 77 or who, having filed return, discovers any omission or incorrect statement therein, may, without prejudice to any liability which he may have incurred on this account, file a return or a revised return, as the case may be, at any time before the assessment is made.

Voluntary return of income.–Sec. 75: *Liability to file a return–sub-sec. (1) of sec. 75:* Under this section every person is bound to furnish voluntarily a return of his total income or the total income of any other person in respect of which he is assessable to tax under this section (i) if such total income during the income year exceeded the maximum amount which is not chargeable to income-tax, or (ii) if he has once been assessed to tax in any of the three years immediately preceding that income year; or (iii) if he resides in a city or divisional head quarter having owned a building of more than one storey with a plinth area exceeding one thousand six hundred square feet; or having owned a motor car or he subscribes a telephone or owns a membership of a club registered under মূল্য সংযোজন কর আইন, ১৯৯১. A representative assessee (sec. 95) would have to file a return in respect of the total income of a non-resident or a minor or a beneficiary. A non-resident Bangladeshi may also file his return of income along with a bank draft equivalent to the tax liability on the basis of such return to his nearest Bangladesh mission (Proviso to sub-section (1)).

Where any business or profession is discontinued in any financial year and assessment may be made in that year under Sec. 89 he is liable to file return showing income of the period between the end of the income year and the date of such discontinuance.

The firm and the individual are each required to render a return of total income and each may be required to produce accounts or documents *(Arunachalam Chettiar* v. *C.I.T.* 1936 I.T.R. 173, 181 (P.C.)). But there is no double assessment, that is to say, the income is not taxed in the hands of both the firm and the individual partners. The levy is made on the firm directly.

Where there is no major male member in a Hindu undivided family, a return may be filed on behalf of the family by the eldest adult minor male member who manages the family affairs *(Shridhar Udai Narayan* v. *C.I.T.* [1962] 45 I.T.R. 577*)*.

A company in liquidation is a company and a person within the meaning of this Act, and the Income-tax authorities are entitled to call upon the liquidator of a company which is being wound up to make a return under this section *(C.I.T.* v. *Official Liquidator, Agra Spg., etc., Co.* 1934 I.T.R. 79*)*. But the notice calling for a return should be served on, and the return should be filed by, the liquidator or a person duly authorised *(C.I.T.* v. *Express Newspapers Ltd.* [1960] 40 I.T.R. 38*)*.

In the case of a deceased person, a return of his income should be made by his executor, administrator or other legal representative in accordance with the provisions of s. 92.

Failure to make a valid return would result in the assessment of a person in default "to the best of his judgment" under s. 84.

A return filed without any notice under s. 77 would be a valid return even if it declares income below the taxable limit *(C.I.T.* v. *Ranchhoddas Karsondas* [1959] 36 I.T.R. 569 (S.C.)*)*, or even if it shows a loss *(Radhakrishna Rungta* v. *I.T.O.* [1963] 49 I.T.R. 846; *Anklesaria* v. *C.I.T.* [1959] 35 I.T.R. 532*)*.

Voluntary return was filed showing loss after assessment under sec. 23(4). Such assessment was cancelled by the Tribunal. Notice under sec. 34 was served on the assessee. It was held that as the assessment has been cancelled the return was valid return under sec. 22(3) (corresponding to sec. 78) and proceedings under sec. 34 were held illegal.

In a case the assessee filed a voluntary return after the limitation period showing income below the taxable limit. The I.T.O treated the return as invalid and initiated proceedings under section 34(1)(a) (corresponding to section 93(3)(a).

Held, that action under section 34(1)(a) was valid, as the voluntary return filed after expiry of limitation period was invalid. "The provision under section 22(3) postulates that the return must be filed at a point of time when the assessment can be lawfully made and, therefore, it must follow that the return to be a valid return under section 22(3) must be filed before the expiration of the time limited for making an assessment under section 23"–*C.I.T.* v. *A.L. Patal [1966] 60 I.T.R. 685.* In such a case action can be validly initiated under section 34. In response to such a notice the assessee may submit that the voluntary return already filed (though after the limitation period) may be considered as a return filed under section 34. Assessment under section 34 on the basis of such a return is valid–*K.S. Ratnaswami (Mad.) 1863, 48 I.T.R. 508; Iqbal Singh Atwal (Cal.) 1984, 147 I.T.R. 599.* If voluntary return is filed (within the limitation period) after completion of original assessment but before the service of demand notice that return can be ignored and action may be taken under section 34 as "there is no provision under the I.T. Act for filing a voluntary return after the assessment is completed, such a return does not debar the I.T.O. from initiating action under section 34"–*Balchand* v. *I.T.O. (S.C. of India)* 1969, 72 I.T.R. 197.

The word "voluntary" as said has not to be read in the context of the filing of a return voluntarily, what is required is making voluntarily and in good faith full disclosure of income or wealth, as the case may be. The mere fact that a return has been filed under the advice of the I.T.O. or the W.T.O. (otherwise than by a notice under section 77) it does not cease to be a voluntary return–*Madhukar Manilal Modi* v. *C.W.T. (Guj.) 1971, 113 I.T.R. 318.*

The mere filing of a return does not amount to an admission on the part of the person filing the return that he is also liable to assessment. Mere filing of a return cannot be said to be tantamount to an admission by the person submitting the return that he is liable to assessment–*Rani Anand Kunwar (Oudh)* 1940 8 *I.T.R. 126 at 129.* But if a person who desires to be assessed and submits his return under cl.(c) of sub-sec.(7) of sec. 2 he may be assessed to tax.

Where a return of income was not accompanied with copies of profit and loss account and balance sheet but was complete in other respects it could not be said that the return was no return in the eye of law. In such a case the I.T.O. made an assessment under section 23(4) without allowing any opportunity to complete the return by issuing a notice under sec.23(2), the assessment would be invalid–*Gopinath Bishwambar Roy*–(Dhaka) 1950, 18 I.T.R. 976).

Return of income cl.(a).–The return of total income and total world income to be furnished under this section should be in the form, Form A or Form B, whichever is applicable prescribed by r. 24 of the Income-tax Rules, 1984, and should be verified in the manner indicated in that form.

Under the 1922 Act it was held that there was no statutory obligation on an assessee to include in his return the income of his wife or minor child which was includible in his total income under s. 16(3) of the 1922 Act (corresponding to the present s. 43 *(Akula Venkatasubbaiah* v. *C.I.T.* [1963] 47 I.T.R. 458). But these decisions have been superseded by the form of return prescribed by the present r. 24 which expressly requires an individual to show in his or her return the income of the spouse or minor child which falls within s. 43 as well as other income of other persons which is included in the assessee's total income under sec. 43.

Return by whom to be signed.–cl.(b) of sub-sec. (2): This clause mentions the person who has to sign and verify a return of income. There was no corresponding section in the 1922 Act but the prescribed forms of return of income under that Act contained a similar provision. The Supreme Court of India held in *C.Ag. I.T.* v. *Keshab Chandra Manda* (1950 I.T.R. 569 580) that the use by the Legislature of words like "himself" or "by him" or "under his hand" or "personally" indicate that even a duly authorised agent is precluded from signing on behalf of his principal. In the light of this decision it is clear that where the assessee is an individual, the return of income must be signed by him personally and not *by his agent even if the agent holds a power of attorney*. There are only two exceptions to this rule–(a) where the individual is absent from Bangladesh, the return may be signed by the individual himself or by some person duly authorised by him in this behalf, and (b) where the individual is mentally incapacitated, it should be signed by his guardian or by any other person competent to act on his behalf.

Cl.(b) of sub–sec.(2) of this section has specifically mentioned the persons who are to sign the return for different classes of assessees.

Return to be filed within the specified date–cl.(c) of sub-section (2) and sub-section 3.–Cl.(c) has specified the date within which the return of income is to be filed unless it is extended by the Deputy Commissioner of Taxes under sub-section(3).

(i) if the assessee is a company the return of income is to be filed by the fifteenth July next following the income year, or where the fifteenth day of July falls before the expiry of six months from the end of the income year, it is to be filed before the expiry of such six months;

(ii) in case of other assessees (not being a company) it is to be filed by the fifteenth day of September next following the income year.

Under sub-section (3) the Deputy Commission of Taxes has the discretion to grant extension of time for filing a return upto a certain period but not beyond three months from the specified date. But with the approval of the Joint commissioner of Taxes he can extend beyond a period of three months.

An application for extension of time to submit the return of income can be filed even after the expiry of the date prescribed for filing the return–*Karan Singh (Punj)* 1977, 110 I.T.R. I.T.R. 726.

By the amendment of sub-clause (ii) of clause (c) of sub-section (2) the date for filing the return in the case of assessee other than the company has been fixed on the thirtieth day of September next following the income-year unless it is extended by the Deputy Commission of Taxes. The Deputy Commissioner of Taxes cannot extend the date beyond three months which he could do before this amendment of the provision with the approval of the inspecting Joint Commissioner of Taxes (Proviso to sub-section (3)). The amendment as made has thus put some bar on the discretion of the Deputy commission of Taxes in the matters of extention of the date for filing the return.

Return of income as filed under this section by an individual assesee shall accompany a statement of assets and liabilities and expenses as prescribed under rule 25 giving particulars specified in section 80 where the total income of the individual in the income year exceeds three lakh taka–cl.(d) of sub-section (2).

Certificate in place of return.–Sec.76: Two alternative forms have been prescribed under rule 24. Form A and Form B. Form A has been prescribed for use for all classes of assessess in which income from all sources can be shown. Form B has been prescribed for use by individual assessee having limited income from salary, wages and/or for self employment. An assessee, having income from salaries or any other income from which tax payable has been fully deducted at source, may instead of filing a return in Form A may file a certificate of income in form B, such return shall also accompany a statement of assets and liabilities and expenses if applicable as referred to in section 75 2(d). The certificate if filed in this section along with the statement so filed shall be deemed to be a return and statement filed under section 75 for all purposes of this Ordinance.

Consequences of non-compliance.–Any person who fails without reasonable cause to furnish the return under section 75 or fails without reasonable cause to furnish it within the time allowed or in the manner required, is liable to pay a penalty under sec. 124(1). Failure to comply with an individual notice issued under sec. 77 also attracts penalty under sec. 127, and brings into operation the provisions of sec. 84 (best judgment assessment). Making a deliberately false return is an offence punishable under sec. 165.

Payment of tax on the basis of return.–Sec. 74: Any person who files return under section 75 (including certificate of income under section 76) shall be liable to pay tax on the basis of such return if the income shown in the return exceeds exemption limit. The tax so paid shall be deemed to be the tax paid towards the demand made after regular assessment. The amount of tax to be paid under this section shall be reduced by the amount of tax deducted at source (sub-section (2)). Failure to make payment of tax under this section shall attract penal provision under section 127 treating the assessee as an assessee in default (sub-sec. (3)).

Individual notice for filing return of income.–Sec. 77: The Deputy Commissioner of Taxes may in any case serve a notice on an assessee or representative assessee whose total income, in the opinion of the Deputy Commissioner of Taxes which is final on the point *(Kunwarji Ananda* v. *C.I.T.* 5 I.T.C. 417, 430*)*, renders him liable to income-tax, requiring him to furnish within twenty one days such a return under this section. The notice may be issued *at any time in the course of the assessment year*. If notice is not issued in the course of the assessment year, and the assessee does not voluntarily submit a return, and consequently the income is not assessed in the normal course under sec. 82 or 83, the Deputy Commissioner of Taxes *must* proceed under sec. 93 if he wants to assess such income in a subsequent year *(C. Ag. I.T.* v. *Sultan Ali* [1951] 20 I.T.R. 432*)*. However, if an assessee, on whom no notice has been served under sec. 77, *voluntarily* makes a return after the expiration of the assessment year, the Deputy Commissioner of Taxes should proceed to make an assessment under secs. 82 or 83 without having recourse to sec. 93 at all *(C.I.T.* v. *Ranchhoddas Karsondas* [1959] 36 I.T.R. 569 (S.C.)*)*. It was held in that case that "where in respect of any year a return has been voluntarily submitted before assessment, the Income-tax Officer cannot choose to ignore the return, and any notice of reassessment and consequent assessment under section 34 ignoring the return is invalid". But if the assessee makes no such voluntary return and the Deputy Commissioner of Taxes serves the assessee, *after* the expiry of the assessment year, with a notice under sec. 77 without reference to section 93, any assessment made would be vitiated even if the assessee submits a return in response to such belated notice but without waiving proper notice *(Maharaja of Patiala* v. *C.I.T.* 1943 I.T.R. 202*)*. The reason is that without a notice under sec. 77 issued in the course of the assessment year no valid assessment can be made under sec. 82 or 83 on an assessee who has not voluntarily filed a return (see below under "individual notice is condition precedent to assessment in default of return") and no valid assessment can be made under sec. 93 either, without the issue of a notice under this section 93. The law on the point has been exhaustively discussed by the Calcutta High Court in *(C. Ag. I.T.* v. *Sultan Ali ([1951] 20 I.T.R. 432))*.

Under the 1922 Act there was a conflict of judicial opinion as to when assessment proceedings could be said to commence. The Bombay *(Harakchand Makanji & Co.* v. *C.I.T.* 1984 I.T.R. 119, 122*)* and Madras *(Govindarajulu Iyer* v. *C.I.T.* 1948 I.T.R. 391*)* High Courts held that assessment proceedings commenced with the public notice under sec. 22(1) of that Act (by publication in the press). The Calcutta High Court *(C. Ag. I.T.* v. *Sultan Ali [1951] 20 I.T.R. 432, 436)* held that no assessment proceeding was started by the public notice under that section: the proceeding commenced only when a return of income was filed, or, if no such return was filed, when an individual notice under the old s. 22(2) (which corresponded to the present sec. 77) was served. This Ordinance does not provide for any public or general notice at all; consequently the assessment proceeding commences under this Ordinance when a voluntary return is filed under sec. 75 or an individual notice under sec. 77 is served.

The assessee is under an obligation to file return in response to a notice under this section even where the assessee claims that his income is exempt from tax

for it is not the Department to determine whether the income is entitled to exemption–*Lala Gopi Mal Kusiala Charitable Trust* v. *I.T.O. (Punj) 1962, 76 I.T.R. 436.*

Any return filed in response to any invalid notice or where no return was filed where the notice issued was invalid, any assessment made on the basis of the invalid notice was held invalid–*S. Raman Chellian (Mad) 1960, 42 I.T.R. 700.*

The assessee is liable to file a return in response a notice under section 139(2) (corresponding to section 77) even before the expiry of the time limit allowed for the submission of the return under section 139(1) (corresponding to section 75(2)(c)) –*Tarzan Hosiery Pvt. Ltd.* v. *I.T.O. (Alld.) 1968, 69 I.T.R. 842.*

Merely because a return is not accompanied by a profit and loss account, it cannot be held to be invalid–*Dammar Uddin & Sons (Del.) 1981, 129 I.T.R. 703.*

Return not verified by assessee, if filed, such a return is invalid and assessment made on its basis is also invalid–*C.I.T.* v. *Dr. Krishan Lal Goyal*– 1984, 148 I.T.R. 283.

Individual notice is condition precedent to assessment in default of voluntary return.–An assessment may be made upon a return filed under section 75 for a notice under section 77 is not a condition precedent to assessment in every case *(Kamakshya Narain Singh* v. *C.I.T.* 1948 I.T.R. 68*)*. But no assessment can be made on a person who fails to make return under section 75 and on whom an individual notice under section 77 has not been served *(C.I.T.* v. *Express Newspapers Ltd.* [1960] 40 I.T.R. 38, 56*)*. It is only if a person fails to make a return in response to such a notice that a "best judgment assessment" may be made by the Deputy Commissioner of Taxes under sec. 84 on the ground of default in filing a return. Even the penalty under sec. 124 for non-compliance with sec. 75 can be imposed only after a notice under sec. 77 is served, assessment is made and the tax-payable determined, because the penalty is calculated by reference to the tax payable, and the tax payable cannot be determined till the assessment is made, and the assessment cannot be made till an individual notice is served. Thus a notice under sec. 77 is a condition precedent to the making of any assessment or the levy of any penalty in cases of non-compliance with sec. 75. See further below under 'Validity of notice".

Validity of notice.–A notice is not illegal or invalid on account of the fact that it does not specify the section of the Income-tax Ordinance under which it is issued *(Ram Khelwan Ugamlal* v. *C.I.T.* 3 I.T.C. 225 (F.B.). If the Deputy commissioner of Taxes having jurisdiction issues the notice and makes the assessment, the fact that he designates himself wrongly *(Kanhaiyalal* v. *C.I.T. 1937 I.T.R. 739)* or that the notice contains a small error which does not mislead the assessee *(Tarak Nath Bagchi* v. *C.I.T. 1946 I.T.R. 319, 323-4)*, would not invalidate the notice or the assessment. Where a business is carried on at several places, the assessment must be made under s. 6(d) by the Deputy Commissioner of Taxes of the area in which the principal place of the business is situate, and there is nothing in s. 77 which requires that separate notices should be issued for separate places of business *(Tarak Nath Bagchi* v. *C.I.T. 1946 I.T.R. 319)*. A notice under s. 77 issued

by the Deputy Commissioner of Taxes having jurisdiction at a branch office, followed by assessment by the Officer having jurisdiction at the head office, is valid,–a fresh notice under sec. 77 by the Officer making the assessment is not necessary in such cases *(Bisheshar Prasad Parshotam Das* v. *C.I.T.* 7 I.T.C. 74*)*. When a case is transferred from one Deputy Commissioner of Taxes to another, it is not necessary to reissue any notice already issued by the Deputy Commissioner of Taxes from whom the case is transferred (See *ante* under "**cases transferred from one income tax officer to another**" sec. 6(4))–*Gaya Ram Gabhu Lal* v. *C.I.T. [1951] 19 I.T.R. 114 See also Sarupchand Hukumchand* v. *C.I.T. 1949 I.T.R. 213*.

No form is prescribed for a notice under sec. 77. It is not obligatory upon the Deputy Commissioner of Taxes to strike off such of the capacities (individual, Hindu undivided family, firm, etc.) mentioned in the notice as do not apply to the proposed assessee and to indicate in what capacity the assessee is required to submit the return: it is the duty of the person receiving the notice to score out the irrelevant capacities in the notice *(Gopaldas Parshottamdas* v. *C.I.T.* 1941 I.T.R. 130*)*. "The notice under s. 22(2) [of the 1922 Act] is the very first step which is taken by the Income-tax authorities and it is obvious that at this initial stage the Income-tax Officer may be in no position to know whether the potential assessee is to be taxed as an individual, or a Hindu undivided family or firm etc., whereas the person who receives notice has obviously precise information for this very matter" *(*In re *Radhey Lal Balmukand* 1942 I.T.R. 131, 140*)*. But if separate notices issued to some persons indicate that each of the proposed assessees is to be assessed as an individual, and in the course of the assessment proceedings it transpires that the proposed assessees are members of a Hindu undivided family, it is an open question whether they can be assessed as members of a Hindu undivided family without the issue of a fresh notice under s. 77 to the joint family *(Sardar Kirpal Singh* v. *C.I.T.* 1937 I.T.R. 548*)*. In any event the Deputy Commissioner of Taxes cannot assess them jointly as members of an undivided family without calling on them to show cause why they should not be assessed jointly *(Radhey Lal Balmukand* v. *C.I.T.* 4 I.T.C. 454*)*. The Deputy Commissioner of Taxes cannot proceed to assess a firm in pursuance of a notice issued under sec. 77 on a partner of the firm in his individual capacity *(Bose* v. *Manindra Lal Goswami* [1958] 33 I.T.R. 435*)*.

The old s. 22(2) required that the assessee should be given a period of "Not ... less than thirty days" at present 21 days within which to furnish the return. Those words were construed to mean thirty clear days from the date of service *(Jamna Dhar Potdar & Co.* v. *C.I.T.* 1935 I.T.R. 112*)*, and a notice requiring an assessee to furnish a return of his income "within thirty days" was held to be bad *(C.I.T.* v. *Ekbal & Co.* 1945 I.T.R. 154*)*. But such a notice would be good under the present sec. 77 which provides that the assessee should be required to furnish a return "within such period not being less than twenty one days from the date of service of the notice". If the assessee is asked to furnish a return within less than twenty-one days, such an initial defect in the notice cannot be cured by any subsequent extension of time *(Jamna Dhar Potdar & Co.* v. *C.I.T.* 1935 I.T.R. 112*)*.

The Federal Court held in *Chatturam* v. *C.I.T. (2)* that the assessment on a person who submits his return would be valid notwithstanding that no valid notice, or no notice at all, might have been issued calling for a return. Kania, J., said, "The income-tax assessment proceedings commence with the issue of a notice. The issue or receipt of a notice is not however the foundation of the jurisdiction of the Income-tax Officer to make the assessment or of the liability of the assessee to pay the tax. It may be urged that the issue and service of a notice under s. 22(1) or (2) [of the 1922 Act] may affect the liability under the penal clauses which provide for failure to act as required by the notice. The jurisdiction to assess and the liability to pay the tax, however, are not conditional on the validity of the notice" *(Sarupchand & Hukumchand* v. *Union of India* [1953] 23 I.T.R. 382, 405*)*. These observations apply where the assessee makes a return, but that they would not apply *in toto* where the assessee has not made any return. The income would have to be computed and the assessment made under s.82 or 83(2) or 84. No assessment can be made under s. 82 or 83 unless the assessee has made a return, and the contingencies mentioned in s. 84 are such that no assessment can be made under that section either, unless the assessee has made a return or has been served with a notice under s. 77. Thus a notice calling for a return under s. 77 would be a condition precedent to assessment under s. 84 on a person who has not made a return, and the validity of the notice would be a vital consideration in determining the validity of such an assessment made under s. 84 in default of a return. (see *ante* "Individual notice is condition precedent to assessment in default of return") Likewise, in other cases where the issue of a notice is a condition precedent to assessment, as in proceedings under s. 93, the failure to issue a notice or the failure to issue a valid notice would vitiate the assessment.

Belated return before assessment is completed and before the limitation period expires.–If a return is not furnished within the time allowed under sec. 75 or in a notice under sec. 77, the person bound to furnish the return may furnish it at any time before the assessment is made. The assessee who has not been served with an individual notice under sec. 77 may voluntarily file a return even after the expiry of the assessment year *(C.I.T.* v. *Ranchhoddas Karsondas* [1959] 36 I.T.R. 569 (S.C. of India)*)*. Even if an assessee is late in filing his return, nevertheless if he does file it before the assessment is actually made, the return has to be considered and dealt with *(Raman Chettiar* v. *C.I.T.* [1961] 42 I.T.R. 700, 706*)*. But failure without reasonable cause to furnish the return within the time allowed may be punished by a penalty under sec. 124 even if the return is furnished after the lapse of the period allowed. The penalty may be imposed in the course of proceedings under sec. 93 taken in a subsequent year *(Govindarajulu Iyer* v. *C.I.T.* 1948 I.T.R. 391*)*. In a case where no return is filed even after the lapse of the time allowed by a notice under sec. 77, the Deputy Commissioner of Taxes has to make a best judgment assessment under s. 84. If a return is filed after such assessment is made, it would be of no avail, even though it may be filed before the assessment order or the notice of demand under s. 135 is served on the assessee *(Dhaniram Dharam Pal* v. *C.I.T.* 1936 I.T.R. 113*)*.

Revised return.–Sec. 78: If the person who has not filed a return as required under section 75 or 77 or who having filed a return discovers any omission or wrong statement therein, he may furnish a revised return at any time *before* the assessment is

made *(Esthuri Aswathiah* v. *I.T.O [1961] 41 I.T.R. 539 (S.C.))*. But the benefit of this provision cannot be claimed by a person who has made a false return knowing it to be false *(C.I.T.* v. *Badridas Rumrai Shop* 1939 I.T.R. 613; *See also Arunachalam Chettiar* v. *C.I.T. 6 I.T.C. 58, 63)*. In any event the offence of filing a deliberately false return, which is punishable under sec. 165 is not condoned by the filing of a revised return *(Ganga Sagar* v. *C.I.T. 6 I.T.C. 58)*, and a penalty may be imposed under s. 128 in respect of the previous false return notwithstanding the filing of the revised return *(Arunachalam Chettiar* v. *C.I.T. 6 I.T.C. 58)*. An application by the assessee to the Deputy Commissioner of Taxes asking him to add certain income to the income already disclosed in the return would not be furnishing a revised return within the meaning of this sub-section *(Gopaldas Parshottamdas* v. *C.I.T. 1941 I.T.R. 130)*.

Sec. 79. Production of accounts and documents.–The Deputy commissioner of Taxes may, by notice in writing, require an assessee who has filed a return under section 75, or to whom a notice has been issued under section 77, to produce or cause to be produced on such date as may be specified in the notice. Such accounts, statements and documents including those relating to any period, not being earlier than three years prior to the income year, as he may consider necessary for the purpose of making an assessment under this Ordinance.

Notice to produce accounts and documents.–Sec. 79: The Deputy Commissioner of Taxes has power under this section to issue a notice for the production of such accounts and documents as he may require. To acquire information which may be necessary for making assessment this notice may be issued. The power under this section can be exercised in two cases–(a) where a return has been made under s. 75, and (b) where a notice has been served under s. 77. In the case where a notice under s. 77 has not been served, the Deputy Commissioner of Taxes has power to require the production of accounts and documents only after a return is filed. On the other hand, where a notice is served under s. 77, the Deputy Commissioner of Taxes may call for accounts and documents even before the return is filed *(Ram Kissendas Bagri* v. *C.I.T.* 2 I.T.C. 324, 327), or he may issue a notice under this section after the return under s. 77 is furnished and *at any time before he finally makes the assessment (Ram Khelwan Uganlal* v. *C.I.T. 3 I.T.C. 225 (F.B.)(Pat.); See also – Lachhman Ds Babu Ram* v. *C.I.T. 4 I.T.C. 61 (All.))*. Combined notice under section 79 and section 83(1) is not illegal *Harmukhrai Dulichand* v. *C.I.T. 3 I.T.D. 198 (F.B.); Rajmoni Devi* v. *C.I.T.* 1937 I.T.R. 631, 643.

The word "require" in this sub-section has been held to mean "require as a piece of relevant evidence" *(Gamga Sagar* v. *C.I.T. 5 I.T.C. 142, 145)*. But the Deputy Commissioner of Taxes is the sole judge of what is relevant. His discretion to issue a notice under this section is unfettered *(Kunwariji Ananda* v. *C.I.T. 5 I.T.C. 417, 430)*. The assessee must comply with the notice, even if he thinks that the accounts or documents required by the Deputy Commissioner of Taxes are irrelevant *(Tulsi Das Nagin Chand* v. *C.I.T. 1938 I.T.R. 385)*. "It is for the Income-tax Officer to

determine what account books and documents are necessary to enable him to make an estimate of the income of the assessee, and an assessment under section 23(4) cannot be held to be invalid merely because some of the accounts called for which were not produced were irrelevant in the opinion of the assessee". Failure to produce books which the assessee considers to be irrelevant is a default which can justify an exparte assessment. The relevancy or otherwise of the account books to be produced is a question which the Deputy Commissioner of Taxes and not the assessee has to decide.

The assessee must be given reasonable time within which to produce his books *(C.I.T. v. Bombay Trust corpn. Ltd. 1936 I.T.R. 323, 338 (P.C.); Sadaram Puranchand* v. *C.I.T. 5 I.T.C. 459))*. It would be a question of law whether the Deputy Commissioner of Taxes gave the assessee such reasonable opportunity as the Ordinance requires, to produce his accounts and other evidence *(Sadaram Puranchand* v. *C.I.T. 5 I.T.C. 459, 464)*.

No special form has been prescribed for the notice under this section. The mode of service provided in s. 178 is permissive and not exhaustive. Where the Deputy Commissioner of Taxes, after examining the accounts produced by the assessee, passed an order entered in the order-sheet directing the assessee to produce other accounts, the order-sheet was shown to the assessee who signed his name in its margin as an acknowledgment of the receipt of the order, and the assessee's conduct showed that he waived any more formal notice, the assessee was held to be properly served with the notice *(Ram Khelwan Ugamlal* v. *C.I.T. 3 I.T.C. 225)*. Failure to specify in the notice the section under which it is issued or served *(Ram Khelwan Ugamlal* v. *C.I.T. 3 I.T.C. 225)*, or some other small error which does not mislead the assessee *(Lachhman Das Babu Ram* v. *C.I.T. 4 I.T.C. 61)*, would not vitiate the notice. See further under s. 77, "Validity of notice" and notes to s. 178 *post*.

While this section empowers the Deputy Commissioner of Taxes to issue a notice requiring the assessee to produce such accounts, documents or information as the Deputy Commissioner of Taxes may require, s. 83(1) empowers him to issue a notice requiring the assessee to attend at the office of the Deputy Commissioner of Taxes or to produce any evidence on which the assessee may rely in support of his return. "If he fails to issue such notice there is no obligation on the assessee to produce his accounts"– as observed by the Appellate Tribunal, Dhaka Bench ITA Nos. 3119-3122 (reported in 1987 B.T.D. 63). The notice under this section may be issued even before the return is filed, whereas the notice under s. 83(1) can be issued only after the return is filed. Under s. 83(1) the assessee *may* produce such evidence as he pleases or elect not to produce any evidence at all, whereas under this section the assessee *must* produce the accounts or documents required by the Deputy Commissioner of Taxes and wilful failure to produce the same would be punishable under and would entail a best judgment assessment under sec. 126 and would entail a best judgment assessment under s. 84. Upon the assessee's refusal or failure to comply with the notice under s. 79, the Deputy Commissioner of Taxes would have a right to enter on the assessee's business premises to examine the accounts (s. 116(3)). A combined notice under ss 79 and 83(2) is legal and valid *(Harmukhrai Dulichand* v. *C.I.T. 3 I.T.C. 198 (F.B.))*.

"Under section 23(4) the officer is to make an assessment to the best of judgment against a person who is in default as regards to supplying information." The Deputy Commissioner of Taxes is to ask for information under section 22(4) ..... Issue of notice under section 22(4) (corresponding to section 79) is a condition precedent for best judgment assessment under section 23(4) (corresponding to sec. 84) –*Luxmi Naranayan Badridas (P.C.) 3 I.T.R.* v. *(1937) 170 (reported in 1987 B.T.D. 55 (Trib.)*.

The Deputy Commissioner of Taxes, Appellate Joint Commissioner, Commissioner and Tribunal have the power to impound and retain in their custody any books of account or other documents produced before them (s. 118).

Accounts of past three years only.–The section restricts power of the Deputy Commissioner of Taxes to call for accounts to a period of only three years preceding the relevant accounting year. No such time-limit is imposed in respect of documents. But even in respect of accounts, since no time-limit is laid down in ss.116 and 83(2), the Deputy Commissioner of Taxes who proceeds to make an inquiry under s. 83(2) as regards the truth or otherwise of the statements made by the assessee in his return, may require the assessee to produce any evidence, including accounts relating to a period more than three years prior to the relevant accounting year *(Fatehchand Chhakodilal* v. *C.I.T. 1945.* (See also note under "assessment after hearing evidence"). In such a case if the accounts relating to a period prior to three years before the accounting year are not produced, that would not be a ground for making a best judgment assessment under s. 84 but would justify the drawing of an adverse inference against the assessee *(Sankaralinga Nadar Bros.* v. *C.I.T. 4 I.T.C. 226, 244 (F.B.))*.

If the Deputy Commissioner of Taxes by a single notice calls upon the assessee to produce accounts of the three years prior to the accounting year as well as of any earlier year, the whole notice is not invalid but it is only bad to the extent to which it relates to the accounts of such earlier year; therefore if there is failure to produce the accounts of the three years prior to the accounting year in response to such a notice a best judgment assessment under s. 84 would be justified *(Murlidhar Madanlal* v. *C.I.T. [1954] 26 I.T.R. 231)*.

Accounts of branch offices or foreign business.–Where business is carried on in several places, the assessment on the total profits is made by the Deputy Commissioner of Taxes having jurisdiction at the principal place of the business. He can call for the accounts pertaining to any branch office even if independent inquiries have already been made and the accounts have been examined by the Deputy Commissioner of Taxes exercising jurisdiction at the branch office *(Lachhman Das Babu Ram* v. *C.I.T. 4 I.T.C. 61)*. See *ante* "under concurrent" *jurisdiction* (s. 6(b)). Similarly, the Deputy Commissioner of Taxes has power under this section to call for the account books of a foreign business carried on abroad provided such books are in the possession or control of the assessee *(C.I.T.* v. *Bombay Trust Corpn. 1938 I.T.R. 445)*. In this case it was held that no assessment can legally be made under sec. 23(4) for the assessee's failure to produce account books or accounts which are not in his possession or under his control. A Bangladeshi company cannot be called upon to

produce the books of a foreign company, (which are not in the possession or control of the Bangladeshi company) simply because the two companies are on friendly terms *(C.I.T. v. Bombay Trust Corpn. 1938 I.T.R. 445)*.

Sec. 80. Statement of assets and liabilities.–(1) The Deputy Commissioner of Taxes may, by notice in writing, require an assessee to file by the date specified in the notice a statement giving particulars in respect of the following unless they have already been given in or with return filed under section 75, 77 or 78, or with a certificate filed under section 76 namely:-

(a) the total assets, liabilities and expenses of the assessee as on the date or dates specified in the notice:

(b) the total assets, liabilities and expenses of the spouse, minor children and dependants of the assessee as on the date or dates so specified; and

(c) any assets transferred by the assessee to any person during the period or periods so specified, and the consideration therefor.

(2) The statement to be filed under sub-section (1) shall be prepared in such form and verified in such manner as may be prescribed.

" **Statement of assets and liabilities and expenses.–Sec. 80 (read with rule 25)**: The Deputy Commissioner of Taxes has power to issue a notice for the production of such accounts and documents as he may require under section 79 and under this section (see 80) he has similar powers to ask for wealth statements and other information on such matters or points as he may require or other information as specified in this section. The Deputy Commissioner of Taxes may issue a notice asking the assessee to file a statement of Assets and Liabilities and Expenses of the assessee as well as of the spouse, minor children and dependents of the assessee on a specified date in the form prescribed under rule 25 if these have not been filed along with the return under section 75 or 77 or with the certificate of income under section 76. This power to call for statement of assets and liabilities and expenses can be exercised only where a return has been filed. On the other hand where notice has been served under section 77, the Deputy Commissioner of Taxes may call for production of accounts and documents even before the return is filed–*Ram Kissendas Bagi* v. *C.I.T. 2 I.T.C. 324, 327*. Under this section the Deputy Commissioner of taxes may call for production of statement of total wealth statements and other informations as specified in this section, such as (i) total assets, liabilities and expenses of the assessee as on a specified date, (ii) total assets, liabilities and expenses of the spouse, minor children and dependents of the assessee as on a specified date, and (iii) any assets transferred by the assessee to any person during the period or periods specified in the

notice and the consideration money received therefor, *at any time before he finally makes the assessment– Ram Kishwan Ugamlal* v. *C.I.T. 3 I.T.C 225 (F.B.)*. The statement as required shall be given in the form prescribed under rule 25.

Accretion to wealth– The assessee while filing the statement shall give all the particulars of assets and liabilities including his personal expenses and family expenses. The amount of family expenses as shown by the assessee may not be acceptable to the Deputy Commissioner of Taxes who may estimate such expenses in consequence of which there may appear an excess of wealth, that is, accretion to wealth, in comparison to that of the preceding year after due consideration of the income earned during the relevant year which may lay additional burden on the assessee: Since the scope of estimate of family expenses is limited, the D.C.T cannot enhance the expenses shown by the assessee without giving due consideration to the actual facts of expenditure incurred and before obtaining the explanation from the assessee as to the source of the find to meet such expenditure. The Taxes Appellate Tribunal, Dhaka Bench has laid down some principle to meet such situation (I.T.A. No. 1718 of 1983-84 reported in 1988 BTD xvi 83-86) which observed that in estimating family expenses the Deputy Commissioner of Taxes must be definite about the expenses so incurred and pin-point such expenditure and then ask for the explanation as to the source of money from which these expenses are met and only on his being not satisfied with the explanation given by the assessee, he can estimate giving reasons for his non-satisfaction and in that case also he must incorporate the explanation offered by the assessee" ..... It is not the subjective standard of the income-tax Department but the objective standard of the tax payer which is to be considered in determining facts'.

CHAPTER IX
ASSESSMENT

Sec. 81. Provisional assessment.–(1) The Deputy Commissioner of Taxes may, at any time after the first day of July of the year for which the assessment is to be made, proceed to make, in a summary manner, a provisional assessment of the tax payable by the assessee on the basis of the return and the accounts and documents, if any, accompanying it and where no return has been filed, on the basis of the last assessment including an assessment under this section.

(2) In making a provisional assessment under this section, the Deputy Commissioner of Taxes shall–

(a) rectify any arithmetical errors in the return, accounts and documents;

(b) allow, on the basis of the information available from the return, accounts and documents, such allowances as are admissible under the Third Schedule and any loss carried forward under section 38 or 39 or 41.

(3) For the purposes of payment and recovery, the tax as determined to be payable upon provisional assessment shall have effect as if it were determined upon regular assessment.

(4) The tax paid or deemed to have been paid under Chapter VII, in respect of any income provisionally assessed under sub-section (1), shall be deemed to have been paid towards the provisional assessment.

(5) Any amount paid or deemed to have been paid towards provisional assessment under this section shall be deemed to have been paid towards regular assessment; and the amount paid or deemed to have been paid towards provisional assessment in excess of the amount found payable after regular assessment shall be refunded to the assessee.

(6) Nothing done or suffered by reason or in consequence of any provisional assessment made under this section shall prejudice the determination on merit of any issue which may arise in the course of regular assessment.

(7) There shall be no right of appeal against a provisional assessment under this section.

Provisional assessment.–**Sec. 81:** The desire to secure the tax at the earliest possible stage is reflected in ss. 50 to 56 in Chapter VII which deal with deduction of tax at the source, and in ss. 64 to 68 which provide for advance payment of tax. The acceleration of the process of recovering tax is sought to be promoted by this section which authorises provisional assessment in advance of regular assessment. The Deputy Commissioner of Taxes at any time after 1st day of July of the year for which the assessment is to be made may issue notice under this section to make provisional assessment in a summary manner.

The provisional assessment under this section is to be made strictly on the basis of the assessee's return that is, on the income as shown by the assessee in his return (24). For instance, if the assessee claims, however wrongly, in his return that certain income is exempt from tax, the provisional assessment cannot purport to bring such income to charge. He can make provisional assessment where no return has been filed.

Sub-section (2) has made provisions for adjustment in the income shown in the return by the assessee in a case–(i) to rectify arithmetical errors in the return, accounts and documents; (ii) to allow admissible depreciation allowances where particulars required for making such allowances are available from the return, accounts and documents; and (iii) to set-off loss carried forward under section 38, or 39 or 41.

There is no right of appeal against a provisional assessment made under this section (Sub-section 7). The assessee would have to wait till the regular assessment is made and then take proceedings before the appellate authorities. but in the meanwhile, and before the regular assessment is made, the tax may be recovered from the assessee as it was determined on regular assessment.

Any tax deducted at source under ss. 50 to 56 or paid in advance under ss. 64 to 68 is deemed to have been paid towards the provisional assessment and credit for the same would be given to the assessee in the provisional assessment. Similarly, any amount paid or deemed to have been paid towards the provisional assessment is deemed to have been paid towards the regular assessment (sub-section (5)); credit for the same would be given to the assessee in the regular assessment and if any sum has been paid in excess of the amount payable under the regular assessment, such excess would be refunded to the assessee.

No issues are decided on the merits in provisional assessment proceedings. Therefore, sub-section (6) provides that a provisional assessment will not in any manner prejudice the determination of any issue that may arise in regular assessment proceedings.

Sec. 82. Assessment on correct return.–Where a return or a revised return has been filed under Chapter VIII and the Deputy Commissioner of Taxes is satisfied, without requiring the presence of the assessee or the production of any evidence, that the return is correct and complete, he shall assess the total income of the assessee and determine

the sum payable by him on the basis of such return and communicate the assessment order to the assessee within thirty days next following:

Provided that a return filed by an assessee, being a company not less than fifty percent of whose paid-up capital is owned by persons other than Bangladeshis or a public limited company or a body corporate established or constituted by or under any law for the time being in force, or any nationalised banking, insurance or other financial institution, shall be deemed to be correct and complete if the return is accompanied by a certified copy of the accounts of the assessee audited by a chartered accountant and a certificate as to the correctness of the total income of the assessee signed and issued by the chartered accountant himself in the prescribed form:

Provided further that–

(a) such return shall be filed on or before the date specified in clause (c) of sub-section (2) of section 75;

(b) the amount of tax payable shall be paid on or before the date on which the return is filed;

(c) such return does not show any loss or lesser income than the last assessed income, or assessment on the basis of such return does not result in refund.

Explanation.–For the purpose of this section, "company" means a company as defined in the Companies Act, 1913 (VII of 1913) or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন).

Assessment on correct return.–Sec. 82: Scope of the section–Total income is assessed and the tax payable is determined. Under this section assessment is made on the basis of the return subject to the conditions laid down in the proviso.

Prior to the assessment year 1998-99 if the Deputy Commissioner of Taxes was satisfied that a return filed was correct and complete he was bound under this section to assess the total income of the assessee and determine the tax payable on the basis of the return–*Ashok Mills Ltd.* v. *C.I.T. 6 I.T.C. 339*. If by a mistake larger amount is shown in the return than it should have been, the remedy of the the assessee is to file a revised return before the assessment is made in this section or to go in revision under section 121 against the assessment made under this section. The present section gives discretion to the Deputy Commissioner of Taxes to make the assessment without requiring the presence of the assessee or the production by him of any evidence in any support of the return after examining the return and documents accompanied with the return, if any, to see that the conditions laid down in provisos have been fulfilled.

If the assessee, being a company, registered under the Companies Act, 1913 or 1994 having fifty percent or more of its share capital owned by persons other than Bangladeshis or a public limited company or a body corporate established under any law or any nationalised banking, insurance or other financial institution files a return accompanied by a certified copy of accounts audited by a chartered accountant and a certificate as to the correctness of the total income of the assessee signed and issued by the chartered accountant in the form prescribed under rule 64A the Deputy Commissioner of Taxes shall make the assessment accepting the return if (i) such return is filed on the date specified in section 75(2)(c), (ii) the amount of tax payable on the basis of the return is paid under section 74(1); (iii) such return does not show loss or lessor income than the last assessed income; and (iv) assessment on such income does not result in refund.

In case the assessment is made under this section the Deputy Commissioner of Taxes shall have to make the prescribed adjustments, including the correction of an apparent mistake which the assessee may have made in the return and statements accompanied with the return, if any, even where the mistake is detrimental to the interest of the assessee.

Sec. 82A. Assessment under simplified procedure.–Where, an assessee, other than a public company as defined in the Companies Act, 1913 (VII of 1913) or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন), who has previously been assessed for any assessment year ended on or before the thirtieth day of June, 1995, files a return showing income for the income year relevant to the assessment year commencing on or after the first day of July, 1995 and ending on or before the thirtieth day of June, 1997 and the income shown in such return is higher by not less than ten percent over the last assessed income and has also increased by at least a further sum of ten percent for each preceding assessment year in respect of which the assessment is pending, the return filed by the assessee shall be deemed to be correct and complete, and the Deputy Commissioner of Taxes shall assess the total income of the assessee on the basis of such return and determine the tax payable by him [on the basis of such assessment, and communicate the assessment order to the assessee within thirty days next following], provided–

(a) he has, at the time of filing such return, made payment of the tax on the basis of the return, or taka twelve hundred, whichever is higher, and the assessment on the basis of such return shall not result in any refund; and

(b) the net accretion of his wealth, if he is required to submit statement of assets and liabilities under section

75(2)(d). along with his disclosed family expenses and taxes paid during the year, shall not exceed the income disclosed for the year and the income or receipt, if any, exempted from tax.

Sec. 82B. Assessment on the basis of return.–(1) the Deputy Commissioner of Taxes shall assess under section 82, the total income of such classes of assessees as the Board may direct, from time to time, on the basis of the returns filed by such assessees and determine the tax payable by them.

(2) Notwithstanding anything contained in sub-section (1) and section 93, any authority subordinate to the Board, if so authorised by the Board within three years from the end of the assessment year, shall, in relation to any particular assessee, audit the assessment in respect of not more than one assessment year out of the assessments for the three relevant assessment years completed as per direction under sub-section (1) and refer the same to the Deputy Commissioner of Taxes for re-assessment, if so required, and the Deputy Commissioner of Taxes shall thereupon proceed to make the assessment under section 83 or section 84, as the case may be.

Sec. 82C. Tax on income of certain persons.– (1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, where any amount referred to in sub-section (2) is received by, or accrues or arises, or is deemed to accrue or arise to, a person, the whole of such amount shall be deemed to be income of such person, and tax thereon shall be charged at the rates specified in this Ordinance or the rules made thereunder.

(2) The amount referred to in sub-section (1) shall be the following, namely–

(a) the amount representing the payments on account of supply of goods or execution of contract to which tax is deductible under section 52;

(b) the amount of the value of the banderols computed for the purpose of collection of tax on account of the manufacture of cigarettes under section 52B;

(c) the amount as computed for the purpose of collection of tax under section 53 in respect of goods imported,

not being goods imported by an industrial undertaking as raw materials for its own consumption:

(d) the amount of the value of the property as mentioned in section 53H for the purpose of collection of tax under that section:

(e) the amount of interest on savings instruments on which tax is deductible under section 52D:

(f) the amount of the estimated cost of construction of residential or commercial building referred to in section 52H:

Provided that provisions of sub-section (1) shall not be applicable in the case of–

(i) clause (a) of this sub-section with respect to a contractor of an oil company or a sub-contractor to the contractor of an oil company as referred to in rule 39 of the Income Tax Rules, 1984, and

(ii) clause (d) of this sub-section with respect to any investment made under sub-section (6), (8), (9) and (10) or section 32.

(3) Nothing contained in this Ordinance shall be so construed as to authorise any allowance or deduction against the amount deemed to be income under sub-section (1) or any refund of tax deducted or collected under Chapter VII or set off any loss under any provision of this Ordinance.

(4) Income referred to under sub-section (1) in respect of which tax has been deducted or collected on account of supply of goods or execution of contract under section 52, manufacture of cigarettes under section 52B, import of goods under section 53, value of property for the purpose of collection of tax under section 53H [interest on savings instruments under section 52D and business of real estate for the purpose of collection of tax under section 52H] shall be deemed to be the final discharge of tax liability under this Ordinance.

(5) Where an assessee, while explaining the nature and source of any sum, investment, money, valuable article, excess amount or expenditure referred to in section 19, takes into account any source of income which is subject to tax in accordance with the provisions of the

section, he shall not be entitled to take credit of any sum as is in excess of any amount which, if taxed at a rate or rates, other than the rate applicable to income chargeable to tax under this section, would have resulted in tax liability equal to the tax payable in respect of income under this section.

(6) For the purpose of determining the share of a partner of a firm out of such income of the firm as is determined under this section, the said income of the firm shall be taken to be an amount which, if taxed at the rate or rates, other than the rates applicable to income chargeable to tax under this section, would have resulted in tax liability equal to the tax payable in respect of income under this section.

Tax on importers, contractors etc.–Sec. 82C: The word, "assessment" as used in this Ordinance means the computation of income and determination of tax payable on such income. In this section provisions have been made for imposition of tax on the amount (not income) received by certain persons from which tax has been deducted at source and income is to be computed on the basis of the amount of tax deducted at source, thus there is a clear departure from the basic principle that "income tax is imposed on a person in relation to his income". Although in sub-section (1) of this section it has been said that any amount (not income) as is received by or accrued to certain persons as referred to in this section shall be deemed to be income of that person on which tax shall be charged, such amount may have element of income but the entire amount cannot be the income since gross receipts cannot be income before deduction of admissible expenses. But the application of the normal law has been hindered by the provision as made in sub-section (3) of this section which further provides for exclusion of the provision of section 37 relating to set-off of loss in determining the total income. This sub-section also provides that the assessee shall not be entitled to any refund due to excess deduction or collection at source.

Persons chargeable to tax under this section are– (a) supplier or contractor in respect of the payments received for supply of goods or execution of contract from which tax has been deducted at source under sec. 52; (b) manufacturer of cigarettes in respect of the value of the banderoles computed for the purpose of collection of tax on account of the manufacture of cigarettes under section 52B; (c) importer in respect of the import value of goods imported as computed for the purpose of collection of tax under section 53 excluding import value of industrial raw materials (Imported goods subjected to deduction of tax at source, if supplied by the importer, no further deduction of tax at source shall be made on the bill for such supply but the profit from supply of imported goods shall be charged to tax - নথি নং-৮(৪০১) ঝিঃ সঃ-১৭ (কঃঅঃ-২) ৯৮ তাং ১৪.৮.২০০০; (d) transferor of property in respect of the amount of the value of property as mentioned in sec. 53H excluding the amount received by transfer of land and building which is exempt from capital gains for reinvestment; (e) person making investments on savings instruments in respect of the amount of interest from saving instruments from which tax has been deducted at source under section 52D; and (f) persons engaged in real estate business in respect of the estimated cost of construction

of any residential or commercial building from which tax at the prescribed rates has been collected under section 52H. The tax as deducted or collected at source under the sections mentioned above shall be deemed to have been paid in final discharge of tax liability of the person in respect of the amount received by or accrued to him – sub-section (2).

Although the amount as received by or accrued to the person as referred to in sub-section(2) shall be deemed to be the income of the assessee but he shall be allowed to take credit of the income into account of that income as will be computed by application of the normal rate of tax on the amount of tax deducted at source. In normal way tax is to be determined on the basis of total income by application of the rate of tax on such income but in this section income will be determined on the basis of tax deducted at source by application of the rate of tax of that year. The amount of income as computed and credited into account may be taken as the source to explain the unexplained investments or excess cash or expenditure in section 19 (sub-sec (5)). Similarly, in the case of determining the share income of a partner of firm, the partner shall be entitled to take credit of the income as computed in the manner as referred to in sub-section (5).

The inconsistent provisions of this section have made the provisions of many of the basic sections inoperative.

Sec. 82D. Spot assessment.–Notwithstanding anything contained in this Ordinance, where an assessee, not being a company, who has not previously been assessed under this Ordinance, carrying on any business or profession in any shopping centre or commercial market or having a small establishment, the Deputy Commissioner of Taxes may fix the tax payable by him in such manner and at such rate as may be prescribed and the receipt obtained for payment of such tax shall be deemed to be an order of assessment under section 82.

Spot assessment.–Sec. 82D (read with rule 38B): By this newly inserted section providing for spot assessment in certain cases there appears to have been a complete departure from the basic principle of law of income tax–"tax is imposed on a person in relation to his income". The provision gives a scope to think that the amount of tax will be determined not on the basis of income of a person but on the basis of certain other factors in relation to that person, such as, *location* of the place of business or profession, amount of *capital investment* in the business and length of the period engaged in the profession. This type of assessment will, however, be applicable to certain classes of persons, mainly small assessees.

The Rule (Rule 38B) prescribes the procedure of spot assessment which provides that for the purpose of imposition of tax the locale of business or profession, capital invested in the business or the period for which the professional person is engaged in his profession will be the determining factor which will fix-up the amount of tax to be paid by a person and the actual amount of income is immaterial consideration.

For the purpose of determination of the amount of tax the areas in which the business or profession is being carried on have been specified as– (a) area within the limits of the city corporation and (b) area within limits of Pourasava of any divisional or district head quarter. In case of person carrying on a business the amount of tax will be determined depending on the amount of initial capital investment which may vary from five lac taka to ten lac taka besides the place of business in which the business is being carried on. This section will not apply in a case where initial capital investment will exceed ten lac taka. In a case when the person is carrying on profession the length of the period for which the profession is being carried on will be the deciding factor besides the area in which the profession is being carried on.

For the purpose of assessment under this section return in form B as prescribed under Rule 24(1) shall have to be filed which will be supplied by visiting Deputy Commissioner of Taxes who will go with a programme to visit the shopping centre or commercial market or the area in which such establishments are located with the approval of the Inspecting Joint Additional Commissioner of Taxes. The Deputy Commissioner of Taxes shall make assessment at the prescribed rate and issue challan and the receipt of payment of such tax shall be deemed to be an order of assessment under section 82. The assessment so made and the tax fixed shall remain in force for two subsequent assessment years.

The following persons shall not be eligible for assessment under this section and rule (sec. 83 read with rule 38B):

(i) a person who has been assessed hereto before;
(ii) a person claiming for adjustment for tax deducted or collected at source;
(iii) a person carrying on a wholesale business; and
(iv) a person having capital investment exceeding ten lac taka.

ASSESSMENT

The word "assessment" is used in this Ordinance as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable, and sometimes the whole procedure laid down in the Ordinance for imposing liability on the tax-payer *(C.I.T.* v. *Khemchand Ramdas 1938 I.T.R. 414, 416 (P.C.))*. The word "assessment" must be understood in each section of this Ordinance with reference to the context in which it is used: in some sections it has a comprehensive meaning and includes reassessment and in some sections it has a restricted meaning and is used as distinct from reassessment (*e.g.* s. 93) *(Lakshman Shenoy* v. *I.T.O. and I.T.O* v. *City Tobacco Mart [1958] 34 I.T.R. 275, 289-91 (S.C. of India))*. Generally, "assessment has to be construed in a wide sense and means not only the computation of income but the entire process of computation of income and tax payable, including re-assessment under section 34"–*C.I.T.* v. *Balkruitne Maltatra (S.C. of India)* 1971, 81, I.T.R. 759*)*. The word, "assessment" is not confined in the statute to the definite act of making an assessment: it also refers to the "course of assessment", i.e. assessment proceeding–*Sir Rajendra Nath Mukterju ... (P.C.) 1934, 21, I.T.R 71 at* 77. As the Privy Council pointed out in *Badridas Daga* v. *C.I.T. (1949 I.T.R. 209, 211)*, in this section and the next words "assess" and "assessment" refer primarily to

the computation of the amount of income, and "assessee" means primarily a person the amount of whose income is being computed. See further under s.2(7), "Assessee".

The method prescribed by the Ordinance for making an assessment to tax–using the word assessment in its most comprehensive sense as including the whole procedure for imposing liability upon the tax-payer–consists of the following steps. In the first place, the taxable income of the assessee has to be computed. In the next place, the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form specifying the sum so payable has to be served upon the assessee *(C.I.T.* v. *Khemchand Ramdas 1938 I.T.R. 414, 423 (P.C.))*. The first two steps are taken under this section *(Badridas Daga* v. *C.I.T. 1949 I.T.R. 209, 211 (P.C.))*, while the final step, i.e., the notice of demand, is dealt with by s. 135.

Fresh assessment.–See further *post* Fresh assessment after appeal.

Assessment on company in liquidation or on defunct company.–Leave of the winding up court is not necessary for the Deputy Commissioner of Taxes to commence or continue assessment proceeding against a company in liquidation. An assessment cannot be made on a company after it has ceased to exist and has been struck off the register of companies *(C.I.T.* v. *Express Newspapers Ltd. [1960] 40 I.T.R. 38, 56-7)*.

Assessing Officer.–The assessment under this sections and the following sections has to be made by the Deputy Commissioner of Taxes. The discretion of the Deputy Commissioner of Taxes to make an assessment according to his judgment cannot be fettered and dominated by the Inspecting Joint/Additional Commissioner: The Deputy Commissioner of Taxes cannot be directed to make a "draft assessment order" and get it approved by the Inspecting Joint/Additional Commissioner before completing the assessment *(Sewa Singh Gill* v. *C.I.T.* [1962] 46 I.T.R. 152*)*. In this case the I.T.O on the direction of the Commissioner sent a draft assessment order for his approval by the Inspecting Assistant Commissioner. The draft assessment order was neither signed nor dated by the I.T.O. Held, that the direction of the Commissioner to make a draft assessment order and submit it to the Inspecting Assistant Commissioner for approval before the assessment was finalised was illegal and unwarranted and the so-called draft assessment (though not signed must be regarded as the final assessment of the Income Tax Officer.

Assessment by succeeding officer.–If assessment is made by successor officer without allowing any opportunity to the assessee of being heard although hearing was given by his predecessor the assessment was annulled–Appellate Tribunal, Chittagong Bench (1987) BTD 78. (See also *ante* under "Exercise of Jurisdiction by successor" in sec. 7).

Place of assessment.–See s. 173 and the notes thereunder.

Assessment under wrong section.–An assessment purported to be made under a section which does not apply is not invalid if it can be justified under another section–*Ram Chand* v. *C.I.T. 63 I.T.R. 252*.

Sec. 83. Assessment after hearing.–(1) Where a return or revised return has been filed under Chapter VIII and the Deputy Commissioner of Taxes is not satisfied without requiring the presence of the person who filed the return or the production of evidence that the return is correct and complete, he shall serve on such person a notice requiring him, on a date to be therein specified, to appear before the Deputy Commissioner of Taxes, or to produce or cause to be produced before him or at his office, any evidence in support of the return.

(2) The Deputy Commissioner of Taxes shall, after hearing the person appearing, or considering the evidence produced in pursuance of the notice under sub-section (1) and also considering such other evidence, if any, as he may require on specified points, by an order in writing assess, within thirty days after the completion of the hearing or consideration, as the case may be, the total income of the assessee and determine the sum payable by him on the basis of such assessment, and communicate the order to the assessee within thirty days next following.

Notice to attend or produce evidence.–Sec. 83(1): The provisions of this sub-section are mandatory. If the Deputy Commissioner of Taxes does not accept the return as correct and complete, he is *bound* to serve a notice under this sub-section on the assessee requiring him, on a specified date, either to attend at the Deputy Commissioner's office or to produce or cause to be produced any evidence on which the assessee desires to rely in support of his return *(Rajmani Devi* v. *C.I.T.* 1937 I.T.R. 631; *Muhammad Hayat* v. *C.I.T.* 5 I.T.C. 159*)*. Where the Deputy Commissioner of Taxes has reason to believe that the return is false, incorrect or incomplete, he cannot purport to compute the income without issuing a notice under this sub-section *(Kesaridas & Sons* v. *C.I.T.* 2 I.T.C. 213*)*. The meaning of this sub-section is that when a return is made the Deputy Commissioner of Taxes shall not reject it and take some other basis as the basis of assessment without giving the assessee an opportunity to appear before him and give any evidence which he may desire to give *(Harmukhrai Dulichand* v. *C.I.T.* 3 I.T.C.*)*. The assessee filed a return showing some income. He subsequently discovered some omission of income and made an application to the I.T.O. stating that some income will be included into the income shown in the return, but he did not submit revised return. The assessment as made without issue of any notice u/s. sub-section 23(2) was not illegal.

If the Deputy Commissioner of Taxes is unable to accept the return he shall have to call for the appearance or production or causing production of evidence in support of the return filed by the assessee under section 23(2) and under section 22(4) he is to call for the books of accounts and other evidences as required by him. Sub-section (3) of section 23 does not dispense with service of notice under section 22(4).

The choice as to whether the assessee should attend the office of the Deputy Commissioner of Taxes or whether he should produce or cause to be produced any evidence in support of his return lies with the assessee and not with the Department.

A notice under this sub-section which merely calls upon the assessee to attend the office of the Deputy Commissioner of Taxes and does not give him the choice of producing or causing to be produced any evidence on which he may rely in support of the return, is therefore invalid *(Rajmani Devi* v. *C.I.T.* 1937 I.T.R. 631*)*. The sub-section itself indicates that a general notice calling upon the assessee to appear or to produce evidence or cause it to be produced is sufficient. However, in some cases it has been held that the notice issued under this sub-section should ordinarily specify the points upon which the assessee has to produce evidence, specially where the objection of the Deputy Commissioner of Taxes is that the accounts are incomplete *(Chan Lo Chwan* v. *C.I.T. 3 I.T.C. 397, 404)*, but not where the accounts are fabricated or cooked for income-tax purposes *(Ibid)*. If the notice contains a small error which does not in any way mislead the assessee, it may not vitiate the notice *(Lachhman Das Babu Ram* v. *C.I.T.* 4 I.T.C. 61*)*. The power of the Deputy Commissioner of Taxes under this sub-section is not confined to issuing one notice only; he may issue further notices requiring the assessee to produce evidence on specified points *(*In re *Lachhman Das Narain Das* 2 *I.T.C. 1, 3)*. No form has been prescribed for a notice under this sub-section.

The Income-tax authorities and the Tribunal have the power to impound and retain in their custody any books of account or other documents produced before them in any proceeding under this Ordinance (secs. 117 and 118).

Incomplete return.–The incompleteness of return contemplated by this sub-section is not the incompleteness which arises from non-verification and want of signature. A return which is not duly signed and verified or is otherwise invalid,–*e.g.*, a return signed by an agent when it is required to be signed by the assessee personally *(C.I.T.* v. *Keshab Chandra Mandal 1950 I.T.R. 569 (S.C. of India))* is no return at all and will not fall under this sub-section but will warrant a best judgment assessment under s. 84 on the basis of no return being made *(Behari Lal Chatterji* v. *C.I.T.* 1934 I.T.R. 377*)*.

Reasonable opportunity.–The notice under this sub-section must give the assessee a reasonable opportunity to comply with its requirements: the assessee is entitled to a reasonable opportunity not merely to collect and produce his books but to support or supplement his books by any other evidence on which he might rely *(Sadaram Puranchand* v. *C.I.T. 5 I.T.C.)*. Since there is limited scope for admission of further or additional material or evidence by the A.A.C. or Tribunal, so it is incumbent upon the Deputy Commissioner of Taxes to provide all opportunity to the assessee to produce all material as far as practicable so as to make an assessment properly – *Bhabish Das Gupta* v. *C.T. Chittagong Zone*, (reported in 1998 BTD XXVI p. 10).

Notice under section 79 and 83(1).–While s. 79(1) gives power to the Deputy Commissioner of Taxes to call for such accounts, documents or information as he may require, s. 83(1) gives the right to the assessee to produce any type of evidence that he may desire to produce *(Harmukhrai Dulichand* v. *C.I.T.* 3 I.T.C. 198, 206*)*. Although the issue of a notice under s. 83(1) is not a condition precedent to an assessment under s. 84, yet where the Deputy Commissioner of Taxes has reason to

believe that the return is incorrect or incomplete he is bound to issue a notice under s. 83(1); he should not proceed, without issuing a notice under s. 83(1), to make a best judgment assessment under s. 84 for mere non-compliance with a notice issued under s. 79 for production of accounts *(Rajmani Devi* v. *C.I.T. 193[illegible] I.T.R. 631)*. A combined notice under ss. 79 and 83(1) is valid *(See the cases cited under s. 79)*. (See further under s. 79, "Notice to produce accounts, documents or other information".

"Reasonable time must be given to produce evidence".—A return made before assessment is a return made in due time, and before such a return can be disregarded, the assessee is entitled to a reasonable opportunity to produce any evidence upon which he might rely in support of return. If an assessee has books and does not produce them, he can be assessed in default under section 23(4), whatever other evidence he might choose to put forward in support of the return. But it was never intended by the Act that failure to produce books, prior to the filing of a return should deprive the assessee of his right to have the return duly and properly inquired into. An assessment in default is a very serious thing; and notice under section 23(2) (corresponding to section 83(1)) and 22(4) (corresponding to section 79) must be given so as to afford reasonable opportunity to an assessees to comply with their requirements. Assessees who are not diligent or straight forward may be treated very strictly, but in such cases it is a plain and unnecessary mistake to order them to comply with the statutory requirements in an unreasonable time and to base an assessment in default upon their non-compliance. Where a notice was served at 3 p.m. on the 18th of a month requiring the assessee to produce any evidence on which he might rely in support of his return on the next day. Held, that "the notice was not such a reasonable notice as required affording the assessee proper opportunity to comply with its requirements. Whether a given time is a reasonable time is a question of fact, but the time allowed may be so short that it cannot be reasonable at all" *(Sadaram Puranchand In re (1931) (A.I.R. 1931 Cal.729); 5 I.T.C. 459)*.

Service of and compliance with notice.—The notice may be served in the manner provided in s.178(1). If assessment is made without service of statutory notices, or statutory notices were served on wrong person that assessment should have been annulled not set-aside -1996 BTD XXV 203 (Tribunal). Where after the service of a notice under this sub-section the assessee files a revised return under s. 78, a fresh notice under this sub-section would have to be given to him *(Gopaldas Parshottamdas* v. *C.I.T. 1941 I.T.R. 130)*. If the assessee does not comply with the terms of a notice issued under this sub-section, he would be liable to a penalty under s. 126 and the Deputy Commissioner of Taxes would have no alternative but to make an assessment to the best of his judgment under s. 84. If the assessee complies with the notice, the Deputy Commissioner of Taxes is bound to hear the evidence which the assessee may desire to produce and he would have to make an assessment on the merits *(Muhammad Hayat* v. *C.I.T. 5 I.T.C. 159, 167 (F.B.))*. It is not necessary that the assessee should attend personally in response to the notice; an authorised representative may appear on his behalf as provided in s. 174.

Assessment after hearing evidence.-Sec.83(2): If the assessee complies with the notice under sub-s.(1) and produces evidence, the Deputy Commissioner of Taxes

must hear such evidence. The Deputy commissioner of Taxes is not bound to rely on such evidence produced by the assessee as he considers to be false - *Gurmukh Singh* v. *C.I.T. (1944) I.T.R. 393, 416, 424)*. While making an assessment under this sub-section the Deputy Commissioner of Taxes is not entitled to make a pure guess without any evidence or material at all *(Gunda Subhaya* v. *C.I.T. (1939) I.T.R. 21/26*. There must be something more than suspicions to support an assessment -*Gourdas Hukamchand (1943) I.T.R. 462/469*. The Deputy Commissioner of Taxes may himself also call for further proof *(Muhammad Hayat* v. *C.I.T.* 5 I.T.C. 159, 167 (F.B.)*)*. He may issue further notices under sub-s.(1) requiring the assessee to produce evidence on specified points *(*In re *Lachhman Das Narain Das 1 I.T.C. 1.3)*. In the course of such inquiries the Deputy Commissioner of Taxes may issue a notice to the assessee under s.-79 asking for the production of information, accounts and documents *(Muhammad Hayat* v. *C.I.T. 5 I.T.C. 159, 167 (F.B.))*. He may issue notice under section 80 asking to file wealth statement (See further under s. 79). "Notice to produce accounts, documents, or other information"). Though under s. 79 the Deputy Commissioner of Taxes cannot call for accounts relating to a period earlier than three years prior to the relevant accounting year, it has been held that when inquiring into the truth or otherwise of the statements made by the assessee in his return the Deputy Commissioner of Taxes may, in exercise of his powers under ss.-83(2) and 122, call for accounts of a period more than three years pror to the accounting year *(Fatehchand Chhakodilal* v. *C.I.T.* 1945 I.T.R. 198*)*. In this case it was held that (i) the assessee had not followed a system of accounting from which its correct income for the year could be accurately determined and the Income Tax Officer was therefore, entitled to compute the income under the proviso to section 13; (ii) that no limit of time has been laid down in sections 23(3) and section 37 of the Act (1922) and the Income Tax Officer was therefore entitled to call for accounts of more than three years back.

If the assessee has failed to produce evidence on which the Deputy Commissioner of Taxes can make a proper assessment of the income, the Deputy Commissioner of Taxes must himself take steps to procure material for the purpose from other sources *(Gunda Subbayya* v. *C.I.T.* 1939 I.T.R. 21 (F.B.)*)*. The Deputy Commissioner of Taxes may examine witnesses on oath, compel the production of documents, and issue commissions for the examination of witness (s. 122). He may interrogate tradesmen in the same line as the assessee, experts, past employees or managers, acquainted either with the particular business of the assessee or that class of business in the neighbour-hood *(*In re *Lachhman Das Narain Das* 2 I.T.C. 1, 3*)*. He may gather information from the returns submitted by persons paying salaries, interest and by companies paying dividends, may inspect the register of members of any company under s. 114, and may call for information in exercise of his powers under s. 113. After he has received the evidence produced by the assessee and also the evidence, if any, which he has himself called for on specified points, he must make the assessment on the materials produced before him *(Muhammad Hayat* v. *C.I.T.* 5 I.T.C. 159, 167 (F.B.)*)*.

The mere fact that the assessee has made a return as an "individual" would not debar the Deputy Commissioner of Taxes from making the assessment on the

"Association of persons" of which the individual is found to be the principal officer and member *(Mohd. Haneef* v. *C.I.T.* [1955] 27 I.T.R. 447*)*. But in assessment proceedings against a particular association of persons, the Deputy Commissioner of Taxes cannot make an assessment on an entirely different association of persons, even if the principal officer of the two associations is the same individual *(Mohd. Haneef* v. *C.I.T.* [1955] 27 I.T.R. 447, 461*)*. But in a case where return was filed in the status of firm assessment in the status of A.O.P. on the basis of that return was held to be invalid - *C.I.T.* v. *Associatiated Cement Steel Agencies - (Bombay) 1984, 147.*

Quasi-judicial inquiry.- The Deputy Commissioner of Taxes when he holds an inquiry and makes an assessment under this sub-section is not a court, nor are the proceedings before him "judicial proceedings" in the strict sense *(Ganga Ram Balmokand* v. *C.I.T.* 1937 I.T.R. 464; *Gopinath Naik* v. *C.I.T.* 1936 I.T.R. 1, 15*)*. The proceedings before the Deputy Commissioners are not judicial proceedings in the sense in which this term is ordinarily used, and all that is required of him is to proceed without bias and give sufficient opportunity to the assessee to place his case before him, or in other words, to conduct himself in accordance with the rules of justice, equality and good conscience.

"The quasijudicial enquiry under this section should be conducted by the Income Tax Officer alone. It would be a gross irregularity to allow any other revenue officer particularly an officer superior to the Income Tax Officer to allow and take part in the assessment proceedings" - *Dinshan Darashaw Shroff* v. *C.I.T. (1943)* 23 I.T.R. 172*)*. The proceedings are deemed to be judicial only to the extent and for the purposes indicated in s. 122 also gives certain powers of a court to the Deputy Commissioner of Taxes. He may draw inferences and consider evidence, which may not be justified by or admissible under the Evidence Act *(Dhakeswari Cotton Mills Ltd.* v. *C.I.T. [1954] 26 I.T.R. 775, 782 (S.C. of India))*. But as Rankin, C.J., pointed out in *Harmukhrai Dulichand* v. *C.I.T.* (3 I.T.C. 198, 207*)*, though the Deputy Commissioner of Taxes is not a court and is to some extent a party or judge in his own case (See *Abdul Baree Chowdhury* v. *C.I.T. 5 I.T.C. 352, 355)*, fundamentally he must proceed in a judicial manner and come to a judicial conclusion upon properly ascertained facts. The cases on the point are collected in *Ganga Ram Balmokand* v. *C.I.T. (1937 I.T.R. 464.)* and *Gurmukh Singh* v. *C.I.T. (1944 I.T.R. 393)*.

In *Suraj Mall Mohta & Co.* v. *Visuanatha Sastri(11)*, Mahajan, C.J., delivering the judgment of the Indian Supreme Court, said, "The assessment has to be made on all relevant materials and on evidence and the assessee ordinarily has the fullest right to inspect the records and all documents and materials that are to be used against him. Under the provisions of section 37 of the Indian Income-tax Act [1922], the proceedings before the Income-tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at. In other words, the assessee would have a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal." It will be noticed that the assessee's "right to inspect the record and all relevant documents" in the possession of the Deputy Commissioner of Taxes is recognised in the above pronouncement of the Supreme Court. This right of inspection would, however, be

subject to the provisions of s. 168. The broad principles which emerge from the earlier judgments of the various High Courts are summarised below-

The assessing Officer exercises quasi-judicial functions and should be governed in his procedure by judicial considerations and must conform to the rules of natural justice *(Gopinath Naik* v. *C.I.T.* 1936 I.T.R. 1, 16-17; *Dinshaw Darashaw Shroff* v. *C.I.T. 1943* I.T.R. 172, 177*)*. That is to say, he must proceed without bias and give sufficient opportunity to the assessee to place his case before the Department: he must conduct himself in accordance with the principles of justice, equity and good conscience *(Ganga Ram Balmokand* v. *C.I.T. 1937 I.T.R. 464, 488)*. The Income-tax Officer cannot rely on any evidence or any fact in arriving at his conclusions without first pointing out the same to the assessee and giving him *a reasonable opportunity of meeting the case* which is ultimately made out in the assessment order *(Sarupchand Hukamchand* 1945 I.T.R. 245, 256; *Dhakeswari Cotton Mills Ltd.* v. *C.I.T. [1954] 26 I.T.R. 775, 783 (S.C. of India))*. These fundamental principles of justice which were judicially established under the 1922 Act, *viz.* that the Income-tax Officer is entitled to make such inquiry as he considers necessary and that the assessee should be given an opportunity of being heard in respect of any material proposed to be utilised for the purpose of assessment under this section should be given statutory recognition as has been done in the Indian Law. But in any case the Deputy Commissioner of Taxes is not bound to settle, as it were, the issues between himself and the assessee or in the presence of the assessee to call all the evidence and marshal and exhibit the documents *(Gurmukh Singh* v. *C.I.T. 1944 I.T.R. 393, 425 (F.B.))*. See further *post* under "Private sources of information".

In the circumstances of a case, the power of the Deputy Commissioner of Taxes to call for evidence, examine witnesses, etc., under s. 122 may be coupled with a duty, *e.g.*, a duty to enforce the attendance of a witness whose evidence is material or to call for books of account which are in the custody of a public authority.

If the Deputy Commissioner of Taxes has served some persons with notices under s. 77 calling upon them to submit returns of income in their capacity as individuals, he cannot assess them as members of a Hindu undivided family without calling upon them to show cause why they should not be assessed jointly *(Radhey Lal Balmukand* v. *C.I.T.* 4 I.T.C. 454*)*. Facts of the case - three assessees were separately assessed to income tax and three separate notices were sent to them under section 22. During their examination the taxing officer came to the conclusion that they were members of a joint Hindu family and he taxed them jointly with certain amount of tax. Held, that there was a material irregularity and disregard of the procedure laid down in sections 22 and 23 of the Act (1922) in assessing the assessess without giving them any information of the taxing officer's intention to assess them as members of a joint family and without allowing them an opportunity to show cause why he should not do so.

Sec.84 deals with an assessment by the Deputy Commissioner of Taxes "to the best of his judgment." But this does not mean that the Deputy Commissioner of Taxes has not to assess to the best of his judgment under this sub-section or that an assessment order made under this sub-section would be bad in law if the fact that it

was made to the best of the judgment of the Deputy Commissioner of Taxes is mentioned in the order *(C.I.T. v. Ein Shin 1947 I.T.R. 290)*. Broadly speaking, the difference between ss. 83(2)/84 is that in cases falling within s. 83(2) the Deputy commissioner of Taxes has to assess to the best of his judgment on the evidence before him, whilst under s. 84 he has often to assess to the best of his judgment in the absence of such evidence *(C.I.T. v. Ein shin* 1947 I.T.R. 290*)*. See under s. 84, "Summary assessment: Judicial exercise of judgment").

Presence of third party.-The quasi-judicial inquiry under this sub-section should be conducted by the Deputy Commissioner of Taxes alone. It would be a gross irregularity to allow any other revenue officer, particularly an officer superior to the Deputy Commissioner of Taxes (*e.g.* the Inspecting Assistant/Additional Commissioner), to attend and take part in the assessment proceedings and to put questions to the assessee directly or through the mouth of the Deputy Commissioner of Taxes who is conducting the inquiry *(Dinshaw Darashaw Shroff* v. *C.I.T. 1943 I.T.R. 172)*. The Deputy Commissioner of Taxes would not be justified in allowing even the assessee's partner who is not concerned with the assessment to be present at and to take part in the assessment proceedings, since under s. 122 such proceedings should be treated as confidential.

Materials for assessment.- The Deputy Commissioner of Taxes must not act arbitrarily but must obtain materials and base his decision on the materials before him *(Muhammad Hayat* v. *C.I.T.* 5 I.T.C. 159, 167; *Gunda Subbayya* v. *C.I.T. 1939* I.T.R. 21 (F.B)*)*. The principle laid down in the cases that the Deputy Commissioner, though not bound by strict judicial principles, should be guided by rules of justice, equity and good conscience. The assessment should be reasonable and should not proceed purely on the officer's private opinion to the exclusion of the materials before him. "Though the Deputy Commissioner of Taxes has very wide powers and is not fettered by technical rules of evidence and pleadings, there is one overriding restriction on his judgment and that is that he must act honestly on the material, however inadequate, before him, and not vindictively, capriciously or arbitrarily" *(Dhakeswari Cotton Mills Ltd.* v. *C.I.T.* [1954] 26 I.T.R. 775, 782 (S.C. of India)*)*. When making an assessment under this sub-section the Deputy Commissioner of Taxes is not entitled to make a pure guess without any evidence or any material at all. A criminal practice, like that of selling by short measure *(Hirabai D. Desai & Sons* v. *C.I.T.* 1936 I.T.R. 95*)*, or at prices in excess of the controlled rates *(Sivan Pillai* v. *C.I.T.* [1958] 34 I.T.R. 328*)*, or selling smuggled goods *(Lalchand Bhagat Ambica Ram* v. *C.I.T.* [1959] 37 I.T.R. 288 (S.C. of India)*)*, cannot be attributed to the assessee in the absence of any evidence to show that the assessee followed such practice. *There must be something more than bare suspicion to support an assessment (Dhakeswari Cotton Mills Ltd.* v. *C.I.T.* [1954] 26 I.T.R. 775, 782 (S.C. of India)*)*. In *Dhirajlal Girdharilal* v. *C.I.T. ([1954] 26 I.T.R. 736)*, *Dhakeswari Cotton Mills Ltd.* v. *C.I.T. ([1954 26 I.T.R. 775)* Omar Salay *Mohamed Sait* v. *C.I.T. ([1959] 37 I.T.R. 151)* and *Lalchand Bhagat Ambical Ram* v. *C.I.T. ([1959] 37 I.T.R. 288)*. The Indian Supreme Court set aside the assessment on the ground that it was based on bare suspicion, conjectures and surmises and further held in the first case that a finding of fact would be vitiated if it is based partly on conjectures or on material which is partly

inadmissible or irrelevant, even though there may be some other relevant and admissible material to support the finding. However, the Tribunal's order must be read as a whole to see whether the findings are so vitiated *(Homi Jehangir Gheesta* v. *C.I.T.* [1961] 41 I.T.R. 135 (S.C. of India)*)*.

However, no hard and fast rule can be laid down by the Court to define the sort of material on which the estimate of income of the Deputy Commissioner of Taxes should be based *(Ganga Ram Balmokand* v. *C.I.T. 1937 I.T.R. 464, 484-5)*. The *material* need not be direct evidence: it may be circumstantial evidence *(C.I.T.* v. *Maharajadhiraja of Darbhanga* 1933 I.T.R. 94, 106 (P.C.)*)*. The word "material" is here used advisedly, because the Deputy Commissioner of Taxes is not confined to what would be evidence in a Court of law *(Dhakeswari Cotton Mills Ltd.* v. *C.I.T.* [1954] 26 I.T.R. 775, 782 (S.C. of India)*)*. He may use his local knowledge *(See Forest Side Properties [Ching ford] Ltd.* v. *Pearce 39 T.C. 665, 678 (C.A.)*). "Past history" may be legitimate material, but that is not sufficient by itself without more, to justify assessment in a particular year", for there must be some material related to the accounting year to justify a finding of concealed income *(Banshidhar Onkarmall* v. *C.I.T.* [1953] 23 I.T.R. 353, 360*)*. From one proved or admitted incident of suppression of income the Department is entitled to infer that there were other similar incidents *(Bhimraj Pannalal* v. *C.I.T.* [1957] 32 I.T.R. 289. Affirmed, [1961]*)*. Documents recovered during a search illegally conducted can be utilised for the purpose of assessment - *C.S.T.* v. *Esufali Abdulali 90 I.T.R. 271 (S.C. of India)*.

The Deputy Commissioner of Taxes is not bound to rely on all the evidence produced by the assessee *(Gurmukh Singh* v. *C.I.T.* 1944 I.T.R. 393, 416, 424 (F.B.)*)*. He may disbelieve the oral testimony of the assessee and other withnesses and hold that certain items in the accounts represent profits from undisclosed sources *(In re Mohammad Ayub Mohammad Jamil* 1941 I.T.R. 610*)*, or that the income is larger than shown in the return *(In re Baghat Halwai 3 I.T.C. 48)*. He may reject account books which he believes to be false and unreliable, although there may be no direct and definite evidence to prove them incorrect *(Ganga Ram Balmokand* v. *C.I.T.* 1937 I.T.R. 464, 484*)*. The law does not impose any burden on the Income-tax authorities to prove by positive evidence that the accounts are unreliable or that the figure at which they assess is the correct figure ... In matters like these a very wide discretion vests in the Income-tax authorities and what alone has to be seen in such cases is whether the discretion has been judiciously exercised and if it is once found to be so exercised no court can interfere with the order. "There is no rule of law compelling a Judge to accept evidence, even though it is uncontradicted, which he believes to be a pack of lies" *(Nihora Lal Prabhudayal* v. *C.I.T.* [1951] 19 I.T.R. 240, 246*)*. But if the Deputy Commissioner of Taxes proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the material on which he is going to found that estimate *(Dhakeswari Cotton Mills Ltd.* v. *C.I.T.* [1954] 26 I.T.R. 775, 783 (S.C. of India)*)*.

Where a business is carried on in several places, the Deputy Commissioner of Taxes having jurisdiction at the principal place of the business, who makes the assessment, is entitled to call for and inspect the accounts pertaining to any branch office and is not bound by the report submitted by, nor is he bound to refer the matter

back to, the Deputy Commissioner of Taxes exercising jurisdiction at the place where the branch office is situate. The provisions of section 64(4) of the Income-tax Act do not oust the jurisdiction of the Income-tax Officer of the area in which the principal place of the business situates so far as the assessment of the profits or gains of a branch business in another area and proceedings relating thereto are concerned.

Private sources of information - The Deputy Commissioner of Taxes is not debarred from relying on private sources of information, which sources he may not disclose to the assessee at all *(C.I.T.* v. *Khemchand Ramdas* 1940 I.T.R. 159*)*. But in case he proposes to use against the assessee the result of any private inquiry made by him, he should communicate to the assessee the substance of such information so as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him sufficient opportunity to meet it *(Gopinath Naik* v. *C.I.T. 1936 I.T.R. 1, 17)*. In these cases it was held that "though the Income-tax Officer while acting under section 23(3) or other sections of the Act, except section 37, is not a court and the proceedings before him are only of a quasijudicial nature, the Income-tax Officer has to conduct the proceedings according to the rules of natural justice, equity and good conscience. This principle is now established by the judgment of the Indian Supreme Court in *Dhakeswari Cotton Mills Ltd.* v. *C.I.T.* ([1954] 26 I.T.R. 775, 783 (S.C.)) where an assessment based on the result of private inquiries conducted behind the back of the assessee was set aside. Leach, C.J., said in *Gunda Subbayya* v. *C.I.T. (1939 I.T.R. 21, 28 (F.B.)*, "There is nothing in the [1922] Act itself which requires the Income-tax Officer to disclose to the assessee the material on which he proposes to act or to refer to it in his order but natural justice demands that he should draw the assessee's attention to it before making the order. The Supreme Court of Bangladesh in the case of *Bhabesh Das Gupta* v. *C.I.T., Chittagong (reported in 1988 BTD XXVI 10)* relying on this case observed further that since there is limited scope for admission of further or additional material or evidence by the A.A.C. or Tribunal it is incumbent upon the Deputy Commissioner of Taxes to provide all opportunity to the assessee to produce all material as far as practicable so as to make the assessment properly. In the case of *Messrs. Friends Corporation* v. *C.I.T. (1975 BTD)* The High Court Division of the Supreme Court also held, where a local enquiry is made by the Departmental Inspector, that if any information was collected from any enquiry made locally and the same was sought to be used against the assessee, in all fairness, the information should have been disclosed to the assessee providing an opportunity to meet it ... although there is nothing in the Income-tax Act itself requiring the assesing authority to disclose to the assessee the material on which he proposed to act or to refer to it in the order, but natural justice demands that he should draw the assessee's attention to it before making the order providing the assessee with an opportunity to meet the same. In a case where the basic requirements to make the assessment order judicious have not been complied with, the assessment order becomes illegal. "Information which the Income-tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source that he should give the assessee an opportunity of showing, if he can, that the Income-tax Officer has been misinformed; but the Income-tax Officer is obviously not bound to disclose the source of his information". There ought to be an express statutory provision in the statute

empowering the Deputy Commissioner of Taxes to make the necessary inquiry and directing him to give the assessee an opportunity of being heard in respect of any material proposed to be utilised for the purpose of assessment under this section (s. 83(2). Further the Deputy Commissioner of Taxes should satisfy himself about the correctness of the information which he has secured before acting upon it - *Chiranji Lal, Steel Rolling Mills* v. *C.I.T. 84 I.T.R. 222 See further ante under quasijudicial enquiry and post under comparable cases.*

It was held in the undermentioned cases *(Gopinath Naik* v. *C.I.T.* 1936 I.T.R. 1*)* that a finding, so far as it is based on private inquiries, of which the substance was not disclosed to the assessee, would be vitiated; but if it is also based on or can be supported by other materials which are relevant and admissible, the finding would be legal and the assessment would be upheld by the Court. But these cases seem to be no longer good law after the abovenoted decision of the Indian Supreme Court in *Dhirajlal Girdharilal* v. *C.I.T. ([1954] 26 I.T.R. 736, 740)* where a finding based on material which was only partly irrelevant or inadmissible was held to be vitiated. It was observed in that case that "when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court is affected by the irrelevant material used by it arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises.

Basis of estimate.- The Deputy Commissioner of Taxes may, *in the absence of any better evidence,* fall back on the assessment of the last preceding year, even if that assessment had been a best judgment assessment *(Gopinath Naik* v. *C.I.T.* 1936 I.T.R. 1, 23. Cf. *Harakchand Radhakisan* v. *C.I.T.* [1962] 46 I.T.R. 196*)*. This principle is being followed by that Appellate Tribunals "It is now almost settled in law that past records serve as a best guide when Deputy Commissioner of Taxes in absence of books of accounts take recourse to estimate -*(I.T.A. No. 115-117 of 1981-82) 1985 BTD XIII 53*. He may estimate the income after taking into consideration the state of affairs in earlier years and previous returns by and assessments of the tax-payer *(C.I.T.* v. *Maharajadhiraja of Darbhanga* 1983 I.T.R. 94, 106 (P.C.)*)*. He may also take into consideration the extent of the assessee's business in the relevant accounting year *(C.I.T.* v. *Maharajadhiraja of Darbhanga 1933 I.T.R. 94, 106 (P.C.)*), recent investments and acquisitions made and expenditure incurred by the assessee *(Paras Dass Munna Lal* v. *C.I.T.* 1937 I.T.R. 523*)*, and local knowledge and repute in regard to the assessee's circumstances *(See C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 170, 180 (P.C.))*. But an assessment cannot be based solely on "local reputation and the conditions of business during the year" *(In re Ram Khelawan & Sahu Thakur Das* 1939 I.T.R. 607*)*. Local reputation cannot be said to be a judicial basis or legal basis under section 13 of the Indian Income-tax Act. Consequently an assessment based solely on local reputation and the conditions of the business during the year is not in accordance with the provisions of section 13 of the Act -*Ram Khelwan and Sahu Thakur Das, In re [1939] ITR 607*. The Deputy Commissioner of Taxes may found his estimate upon his personal observation and inspection of the assessee's business *(In re Baghat Halwai 3 I.T.C. 48; C.I.T.* v. *Ein Shin 1947 I.T.R. 290, 296)*, or upon the average rate of profits made by other tradesmen in the same line *(C.I.T.* v. *Abdul Aziz Sahib* 1959 I.T.R. 647*)*. The assessee is entitled to get so

much of the information regarding the comparable cases as can possibly be disclosed by the Department with a view to appraising him of the basis on which his income is sought to be estimated, as the Supreme Court of India held in *Dhakeswari Cotton Mills Ltd. v. C.I.T. ([1954] 26 I.T.R. 775, 783 (Confirming the decision as given in the case of Gadireddy Peda* v. *C.I.T. [1952] 21, I.T.R. 70)*, but he is not entitled to detailed information regarding the businesses of the other tradesmen whose profits are taken as the standard of comparison *(See also Gadireddy Peda* v. *C.I.T.* [1952] 21 I.T.R. 70*)*.

Even where the account books are found to be false, the Deputy Commissioner of Taxes may use and act on any admissions which they may contain. For instance, he may accept the figure of sales and estimate the profits without accepting the trading account as a whole or he may accept the expenditure shown in the books and on that basis estimate the sales *(Gurmukh Singh* v. *C.I.T.* 1944 I.T.R. 393, 427 (F.B.); *Ganeshdas Kaluram* v. *C.I.T.* [1951] 19 I.T.R. 102*)*.

The assessment order under this sub-section should disclose the basis on which the assessment is made, for it is an appealable order under s.156 and the appellate authority must know the ground on which the assessment was based. *(Gunda Subbayya* v. *C.I.T.* 1939 I.T.R. 21, 28 (f.B.); *Nathuram Munnalal* v. *C.I.T.* [1954] 25 I.T.R. 216, 219*)*.

Comparable cases.- In some cases the Deputy Commissioner of Taxes may be justified in estimating the assessee's profit after taking into account the average rate of profits made by other tradesmen in the same line -*C.I.T.* v. *Pilliah & Sons 63 ITR 441 (S.C. of India)*. But as the S.C. (India) held in *Dhakeshwari Cotton Mills Ltd.* v. *C.I.T.*, the assessee is entitled to get so much of the information regarding the comparable cases as can properly be disclosed by the Department with a view to appraising him of the basis on which his income is sought to be estimated.

Benami transactions.- In cases where the assessee purchases property with his own money and for himself but benami, *i.e.*, in the name of another, or transfers it to another without intending to pass the beneficial interest, the Department is entitled to hold that the transaction is not genuine and that the beneficial interest in the property and income really belongs to the assessee: in such cases, the income may be included in the assessee's total income and taxed in his hands, apart from the provisions of sec. 43(a)(iii), (iv) and (b). But the ordinary presumption of law is that *the apparent state of affairs is real unless the contrary is proved;* and therefore the burden of proving that a transaction is sham or that the person in whose name the property stands is not the real owner but is only a benamidar for another, is on the taxing authorities *(See below under "Burden of proof")*. In the case of *Messrs. E.R. Chowdhury* v. *C.I.T. Chittagong the High Court Division of the Supreme Court of Bangladesh* (reported in 1986 BTD XIII 66-74) where property was purchased in the names of the wife and sons of the assessee. The house was let out and rent was being collected by the husband assessee. The Income-tax Tribunal without any basis held that it was *prima fscie* a case of benami and shifted the burden of proof to the assessee instead of the Taxing authorities. The High Court Division held relying on the judgment of Dhakeshwari Cotton Mills Ltd. (1954) and other cases that it is a well-

settled principle of law that a heavy burden lies on the Taxing authorities to prove that the persons in whose name the property stands are not the real owners but only benamidars for another. The well-settled principle of law is that the apparent state of affairs is real unless the contrary is proved. The assessee has absolutely no burden to show that the properties purchased in the names of his sons and wife are not his properties. Where a property stands in the name of the wife, in the absence of any evidence that she is a benamidar for her husband, she must be taken to be the real owner *(Ganguly v. C.I.T. [1953] 24 I.T.R. 16)*. Similarly, where a man buys property in the name of his children with the intention of donating it to them, and the gift is found to be effective and complete, the children cannot be regarded as the benamidars or nominees of their father - the property and the income must be held to belong to them *(I.R. v. Wilson 13 T.C. 789 (H.L.)*. However, such a gift to minor children would fall under s. 43(a)(iii) and (iv).

The finding of the Tribunal that a transaction is a benami one is a finding of fact, but it would be set aside by the Court if there is no evidence to support it *(Gopi Nath Agarwal v. C.I.T. [1955] 28 I.T.R. 753)*. the Bombay High Court set aside the finding of the Department that the minor sons of the assessee who were admitted to the benefits of a certain partnership (in which the assessee was not a partner) were mere nominees of their father. Referring to the facts relied upon by the Department, Beaumont, C.J., said, "Now, all those facts undoubtedly give rise to a suspicion that the two minor sons are really nothing but nominees of the assessee. The question really is whether those facts not only give rise to a suspicion, but justify the inference of fact drawn by the Income-tax Officer that the minors were mere nominees of the assessee. I do not think that they do justify such an inference, though they certainly give rise to suspicion." The cases in which it was held that there must be something more than bare suspicion to support an assessment are cited *ante* under "Materials for assessment".

Rejection of incomplete or incorrect accounts.- If the Income-tax Officer finds that the assessee's accounts are incorrect or incomplete, he may reject such accounts and either make an assessment under s. 83(2) or make a best judgment assessment under s. 84. Further, the impropriety of the method of accounting should be distinguished from the falsity or unreliability of account books. These topics are discussed *ante* in notes to s. 35.

Computation of profits at a flat rate. –See notes to s.35

Cash credits, undisclosed income, and unexplained investments.–See notes to sec. 19(1).

Adjournment.–It so happens that an assessee on account of certain unavoidable reasons is unable to produce the account books called for under section 83(1) on a particular date and he puts in an application for postponement of the date. The Deputy Commissioner of Taxes has power to adjourn an inquiry under this section. His reply to an application for adjournment is not "a notice or requisition" within the meaning of section 178 of the Ordinance and may be sent to the assessee by unregistered post–*Perianna Pillai C.I.T. 41 T.C. 217*. There is some difference of

opinion over the matter as to whether the assessee is bound to ascertain the orders passed on his application or his responsibility absolves on mere filing of the application for adjournment. The Privy Council held in *C.I.T.* v. *Laxminarain Badridas* (1937 I.T.R. 170) that there is no rule by which the Income-tax Officer is bound to announce beforehand how he proposes to deal with an application for adjournment. It is the duty of the assessee to enquire of the fate of his applications, i.e. whether another date has been given or that the application has been rejected. Where the assessee has already obtained one adjournment, it is his duty if he desires a further adjournment to apply at a date sufficiently early to enable him, in the case of a refusal, to be prepared to proceed on the appointed day. If the application for extension of time is not granted and the assessee does not comply with a notice under section 77 or 79 or 83(1) on or by the appointed day, the DCT would be justified in making an assessment under section 84 to the best of his judgment –*C.I.T.* v. *Laxminanayan Badridas (1937) I.T.R. 170 (P.C.)*

A case was fixed for hearing on a certain date and an application for adjournment was made much earlier before the date of hearing but the application was placed before the I.T.O. on the date of hearing who passed an order "seen the petition dated ..." and completed the assessment. It was held by the Tribunal that no order was passed on the application either rejecting or granting time to produce the accounts. As no opportunity under section 23(2) or 22(4) was given the assessment was not justifiable in the eye of law [(1961)5-Tax-51-Trib].

Burden of proof. –The ordinary presumption of law is that *the apparent state of affairs is real unless the contrary is proved;* and therefore the burden of proving that a transaction is sham or that the person in whose name the property stands is not the real owner but is only a benamidar for another, is on the taxing authorities *(Kalwa Devadattam* v. *Union of India [1963] 49 I.T.R. (S.C.) 165, 174)*, the ordinary presumption being that the apparent state of affairs is real. That whether the plea was one of benami or of sham, the burden was not on the assessee but on the Department to prove that what was apparent was not real– *Madura Knitting Co.* v. *C.I.T & E.P.T. (1956) 30 I.T.R. 764* (See *ante* under "Benami transactions"). The presumption is in favour of good faith and non-concealment of income *(In re Bishnu Priya Chowdhurani 1 I.T.C. 261)*, but that presumption may be displaced by circumstantial evidence, *e.g.*, the state of affairs which admittedly existed in earlier years and the extent of the assessee's business in the relevant accounting year *(C.I.T.* v. *Maharajadhiraja of Darbhanga 1933 I.T.R. 94, 106 (P.C.); In re Lachhman Das Narain Das 2 I.T.C. 1)*. The initial burden of finding some material, however slight, to support a finding of concealed income, is on the Department *(Banshidhar Onkarmall* v. *C.I.T. [1953] 23 I.T.R. 353, 361)*.

The law does not impose any burden on the Income-tax authorities to prove by positive evidence that the accounts are unreliable or incomplete, or that the figure at which the income is assessed is the correct figure *(Ganga Ram Balmokand* v. *C.I.T. 1937 I.T.R. 464, 475)*, for the facts necessary to prove this would be specially within the knowledge of the assessee *(Ganga Ram Balmokand* v. *C.I.T. 1937 I.T.R. 464, 475)*. The DCT may reject account books which he believes to be false and unreliable

though there may be no direct and definite evidence to prove them incorrect. The burden of proving losses in business *(Radhakisan Ramnarain* v. *C.I.T. 3 I.T.C. 366)* any allowance or deduction or to any exemption, is on the assessee.

Onus of proof as a determining factor comes into play only where either there is no evidence on either side or where it is equally worthless or where it is equally balanced. But if such is not the case and the Tribunal comes to a determinate conclusion after considering all available evidence and without regard to the question of onus, the question of onus does not at all arise *(Kalwa Devadattam* v. *Union of India [1963] 49 I.T.R. (S.C.) 165, 175).*

Time limit for completion of assessment.–The assessment under this sub-section must be completed before the expiry of the period of limitation laid down in sub-section (1) and proviso to the sub-section of section 94. Any assessment in respect of any income relating to the assessment year prior to 1995-96 shall have to be made before the period of *two years* from the end of the assessment year in which the income was first assessable and in respect of income relating to the assessment year 1995-96 and onwards assessment shall have to be completed before the expiry of *one year* in which the income is assessable.

The income tax law is an amending law and the law as it stands on the first day of July of any financial year must apply to the assessment of that year. Any amendment made after the first day of July of a financial year would not apply to the assessment for that year even if the assessment is made after that amendment came into force–*Karim Tharin Tea Estate* v. *State of Kerala [1966] 60 I.T.R. 262 (Reported in 1999 BTD 17 96.*

The Deputy Commissioner of Taxes shall complete the assessment under sub-section(2) of this section within thirty days after the completion of hearing or examination of evidences as required to be produced under sub-section(1) of this section and communicate the order of assessment to the assessee within thirty days from the date of completion of the assessment (sub-sec. (2)).

Assessment by the Deputy Commissioner of Taxes with the prior approval of the Inspecting Joint Commissioner of Taxes–validity of. –In the case of *S. Sewa Singh* v. *C.I.T. (1962) 6. Tax 111* the Income tax Officer was directed by the Commissioner of Income tax to get the draft assessment for the assessment year 1945-46 approved by the Inspecting Assistant Commissioner of Income-tax before finalising the said assessment. In pursuance of this direction the Income-tax Officer submitted "the draft assessment order" to the Inspecting Assistant Commissioner for his approval. The draft assessment order was neither signed nor dated by the Income-tax Officer and no where in the order itself it was described as "a draft order". On a writ petition by the assessee before the High Court, the High Court contended that there is no legal warranty in the Income-tax Act or any other Act for an assessment to be made subject to the approval of a superior officer and therefore, once the Income-tax Officer had made his assessment it *at once* became final and could not be changed by him even with the approval of his superior officer. The technical point that was

raised that the "draft assessment order could not be regarded as an assessment by the reason of the fact that at was not signed by the Income-tax Officer.

Held, that the direction of the Commissioner to make a draft assessment order and submit it to the Inspecting Assistant Commissioner for approval before the assessment was finalised was illegal and unwarranted, and the so called draft assessment must be regarded as the final assessment of the Income-tax Officer.

Appeal and revision. –Section 153 makes provision for an appeal against computation of income and determination of tax payable including advance tax. If by mistake the return showed the taxable income as larger than it should be, the assessee's remedy is to file a revised return before the assessment is made. But after the Deputy Commissioner of Taxes accepts the return and makes an assessment under sec. 82 assessee's only remedy is to apply in revision to the Commissioner under s. 121 against the assessment.

If the assessment is made under sub-s.(2) of this section, the tax-payer may appeal to the Appellate Joint Commissioner and in the case of an assessee being a company to the Commissioner of Taxes (Appeals) under s. 153; may further appeal from the order of the Appellate Joint Commissioner or Commissioner of Taxes (Appeals) to the Tribunal under s. 158; and may finally come to the High Court Division of the Supreme Court on a reference under s. 160 for determination of questions of law.

Fresh assessment. –The order passed by the Deputy Commissioner of Taxes revising the assessment made originally under the direction of the appellate authority would partake the character of a fresh assessment –*Kooka Sidhwa And Co.* v. *C.I.T., West Bengal (Calcutta High Court)* and other cases followed by the Appellate Tribunal, Dhaka Bench (reported in 1990 BTD XVIII in I.T.A. No. 917 & 921). The assessment as made would be no less an order as made under section 83 of the Ordinance within the ordinary acceptation of the term from which an appeal would lie to the Appellate Joint Commissioner of Taxes. In making such fresh assessment the Deputy Commissioner of Taxes has, subject to the appellate authority's directions, the same powers which he had while making the original assessment; he is entitled to disregard his own previous findings, to take into materials not previously existing and to tax income not originally assessed –*J.K. Cotton Spinning & Wvg. Mills Co. Ltd.* v. *C.I.T. [1963] 47 I.T.R. 906.*

Finality of assessment. –Finality of assessment does not attain unless the case is finally disposed of by the Appellate Authority. Because of the pendency of appeal assessments were quite open. Like Deputy Commissioner of Taxes the Appellate Authority had all the authority to finalise the assessment admitting fresh materials produced before it. Effect of Board's circular continues till the assessments had not attained finality. Board' circular was plainly meant to be retrospective and does not interfere with the discretion of the Appellate Joint Commissioner of Taxes –*Dhaka Vegetable Oil Industires Ltd.* v. *C.T., Dhaka (S.C.) 1997) (reported in 1997 BTD XXV 118).*

The Privy Council laid down in *C.I.T.* v. *Khemchand Ramdas (1938 I.T.r. 414, 424, 426)* that once a final assessment is arrived at, it cannot be re-opened except in the circumstances detailed in, and within the time limited by, the other express provisions of the ordinance *(See ss. 93, 173, and 120)*: the Department cannot "go on making fresh computations and issuing fresh notices of demand to the end of all time". The Supreme Court of India has re-affirmed this principle *(I.T.O.* v. *Habibullah [1962] 44 I.T.R. 809)*. Income which has escaped assessment may be assessed, and mistakes apparent from the record may be rectified, in the circumstances and within the time-limits laid down in s. 93 and s. 173 respectively.

The notice of demand under s. 135 should be served after the assessment is made. The proceedings for recovery of tax under ss. 135 to 143 must be taken after the demand is made, except as otherwise provided in the proviso to sub-sec. (3) of sec. 135.

Reference to Court.–The question of the unreliability of accounts is a question of fact and has primarily to be determined by the Income-tax authorities alone. If, therefore, it is found by them that the accounts are incomplete, incorrect or unreliable, their finding and their estimate of income cannot be disturbed by the Court unless the finding is capricious or unsupported by any materials or the discretion has not been judicially exercised *(Arumugaswami Nadar* v. *C.I.T. [1961] 2 I.T.R. 237; Ganga Ram Balmokand* v. *C.I.T. 1937 I.T.R. 464, 475)*. Similarly, where the assessee does not keep books of account, the estimate of the Deputy Commissioner of Taxes of his income does not ordinarily involve any question of law *(In re Baghat Halwai 3 T.T.C. 48)*. But where the assessment is based on suspicion, surmises and conjectures *(Dhirajlal girdharilal* v. *C.I.T. [1954] 26 I.T.R. 736 (S.C. of India))* or on partly inadmissible material *(Dhirajlal girdharilal* v. *C.I.T. [1954] 26 I.T.R. 736 (S.C. of India))*, if the court of fact whose decision on a question, is final, arrives at the decision by considering material which is irrelevant to the enquiry or by considering material which is partly relevant or partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions and partly on evidence, then in such a situation clearly an issue of law arises or where relevant evidence is ignored *(Omar Salay Mohamed Sait* v. *C.I.T. [1959] 37 I.T.R. 151 (S.C. of India))*, or where the assessment is made in violation of the fundamental rules of justice *(Dhakeswari Cotton Mills Ltd.* v. *C.I.T. [1954] 26 I.T.R. 775 (S.C. of India))*, an issue of law arises. When the court reaches the conclusion that a person has been dealt with arbitrarily or that a court or tribunal has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of the law is that it is the duty of the Supreme Court to see that injustice is not perpetrated or perpetrated by decisions of courts and tribunals because certain laws have made the decisions of these courts or tribunals final and conclusive. The question whether the Deputy Commissioner of Taxes gave the assessee such reasonable opportunity as the Ordinance requires, to produce his accounts and other evidence, is a question of law *(Modh. Ishaq* v. *C.I.T. [1955] 27 I.T.R. 510; Sadaram Puranchand* v. *C.I.T. 5 I.T.C. 459, 464)*.

The question whether the beneficial interest under a benami transaction passed to the assessee *(Dalchand & Sons* v. *C.I.T. 1944 I.T.R.)*; and the determination

of a fair figure as the assessable income when the accounts or other evidence produced by the assessee are disbelieved *(C.I.T. v. Ein Shin 1947 I.T.R. 290, 296. See also Feroz Shah v. C.I.T. 1933 I.T.R. 219, 226 (P.C)*, are questions of fact. The Tribunal's finding that cash credits, or high denomination notes encashed, represent the assesse's undisclosed income, would be set aside by the Court where there is no evidence to support it.

RES JUDICATA

Extracts from the decisions given in the following cases will help in understanding the principle of application of *res judica* to income-tax proceedings:

Applicability of the rule to income-tax proceedings. –"The doctrine of *res judica* has no application to income-tax proceedings so as to prevent a decision in a prior year from being re-opened in assessment made in years subsequent"–*C.I.T. v. Massey & Co. Ltd. (1929) Mad. 453; 3 I.T.C. 302).*

–"An Income-tax Officer proceeding to assess an assessee after making an enquiry as contemplated by the Income-tax Act is not a Court and the doctrine of *res judicata* applicable to the decisions of civil courts does not apply to his decisions. Where the question relating to assessment does not vary with the income of every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, *e.g.* whether a certain property is trust property or not which has nothing to do with the fluctuations in the income such question if decided by court on a reference made to it would be *res judicata* in that the same question cannot be subsequently agitated. But if the question is decided by a court on a reference which depends upon considerations which may vary from year to year there could be no question of *res judicata*. But if fresh facts come to light which on an investigation, would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor, he would be entitled to re-open the question and if there is evidence on which he could have acted, it is not for the court to constitute itself into a Court of Appeal and see whether the evidence is sufficient or insufficient ..." *Sankavlinga Wadar v. C.I.T. (Madras) 1930 4 I.T.C. 226) and Kasiram Ganpat Rai v. C.I.T. (1941) I.T.R. 332).*

–"Where the matter in issue in assessment proceedings for a certain year has been decided by the High Court on a reference made by the Income-tax Commissioner the assessee is debarred from having the same matter agitated and decided over again in a subsequents year by the Income-tax authorities where no new facts have come into existence and it is not open to him to apply to the High Court to require the Commissioner to state the case on the same point over again" –*M.E.R. Malak v. C.I.T. C.P & Berar (1932) A.I.R. 1992 Nag. 68).*

Applicability to income-tax authorities and Appellate Tribunal.–As a general rule the principle of *res judicate* is not applicable to decisions of Income-tax Authorities. An assessment for a particular year is final and conclusive between the parties only in relation to the assessment for that year and the decisions given in an assessment for an earlier year are not binding either on the assessee or the Department in a subsequent year. But this rule is subject to limitations, for there should be finality

and certainty in all litigations including litigation arising out of the Income-tax Act and an earlier decision on the same question cannot be reopened if that decision is not arbitrary or perverse. if it had been arrived at after due inquiry, if no fresh facts are placed before the Tribunal giving the later decision, and if the Tribunal giving the earlier decision has taken into consideration all material evidence ... There is also a further limitation, namely, that the effect of revising the decision in a subsequent year should not lead to injustice and the court must always be anxious to avoid injustice to the assessee. If in the assessment year of 1941-42 it was held that a person is a partner in a firm not in his individual capacity but as a trustee for his minor son, but in the assessment year for 1942-43 it went into the question in greater detail and after consideration of certain documents which were not considered in earlier year it came to the conclusion that he was a partner in his individual capacity and not as a trustee of his minor son. Held that under the circumstances it was open to the Tribunal dealing with the assessment 1942-43 to re-consider the question and to come to a different conclusion from that arrived at by the former Tribunal which decided the question in the assessment year 1941-42 –*M.A. Shah & Co.* v. *C.I.T. and Excuss Profits Tax, Bombay (1956) 30 ITR 618).*

Re-opening predecessor's order.–The principles of natural justice and judicial dealing which courts impose upon Income-tax Officers would prevent them from capriciously setting aside the order of their predecessors based on an enquiry, though if fresh facts come to light which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor's he is entitled to re-open the question .... But they cannot arbitrarily change the assessment simply on the ground that the successor does not agree with the predecessor's findings –*C.I.T. Nagpur* v. *S.M. Chitnavis (117 I.C. 256)* and other cases.

Revision proceeding. –The principle of *res judicata* does not apply to an order passed under section 33 of I.T. Act–*C.I.T.* v. *Massey & Co. (1929) A.I.R. M. 453; 3 I.T.C. 302.*

Res judicata: Estoppel. –Since the assessing Officer is not a court, the doctrine of *res judicata* or estoppel by record does not apply to his decisions: a finding or decision of the Income-tax authorities in one year may be departed from in a subsequent year *(Sankaralinga Nadar Bros.* v. *C.I.T. 4 I.T.C. 226, 241 (F.B.); Shah & Co.* v. *C.I.T. [1956] 30 I.T.R. 618).* In *I.R.* v. *Sneath (17 T.C. 149, 163 (C.A.)* Hanworth, M.R., said, "The assessment is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made. no doubt, a decision reached in one year would be a cogent factor in the determination of a similar point in a following year, but I cannot think that it is to be treated as an estoppel binding upon the same party for all years." The findings in an earlier year by the Deputy Commissioner of Taxes that a certain amount was non-taxable as constituting surplus accruing to a mutual concern *(C.I.T.* v. *Royal Western India Turf Club Ltd. [1953] 24 I.T.R. 551, 566 (S.C. of India))*, or that the assessee was an investor (or conversely, a dealer) in shares *(Visheshwara Singh* v. *C.I.T. [1961] 41 I.T.R. 685 (S.C. of India)*, or that certain deductions or expenditure should be allowed

(I.R. v. *Sneath 17 T.C. 149 (C.A.))*, or that a particular form of accounts was sufficient *(Jamna Das Rameshwar Das* v. *C.I.T. [1952] 21 I.T.R. 109)*, or that the status of the assessee was that of a Hindu undivided family and not an individual *(Baji Nath* v. *C.I.T. [1954] 26 I.T.R. 324)*, or of a firm and not a joint family *(Umacharan Shaw & Bros.* v. *C.I.T. [1959] 37 I.T.R. 271 (S.C. of India))*, or that there was or was not a partition of a joint family *(Mathuradas* v. *C.I.T. [1962] 44 I.T.R. 517 (S.C. of India))*, or that a debt had not yet become bad *(Sir Kameshwar Singh* v. *C.I.T. 1947 I.T.R. 246)*, or that the income of a trust was assessable in the hands of the beneficiaries individually and not the trustees *(Trustees, Nagore Durgah* v. *C.I.T. [1954] 26 I.T.R. 805)*, have no binding effect against or in favour of the assessee in a subsequent year. If the Department wrongly arrived at a certain finding in a past year and the assessee accepted it, that can give the assessee no claim to have the mistake repeated in a subsequent year in his favour *(Sir Kameshwar Singh* v. *C.I.T. 1947 I.T.R. 246, 262-3 (Part.))*. Conversely, the assessee may discover that in past years he had paid tax on an erroneous basis or had returned as income that which was not assessable as income at all; such past practice would not prevent him in any later year from making a return on a correct basis *(C.I.T.* v. *Kalu Babu Lal Chand [1959] 37 I.T.R. 123, 130 (S.C. of India))*. Lord Atkin said in *Absalom* v. *Talbot (26 T.C. 166, 192 (H.L.))*, "The practice of the tax-payer, acquiescing in the claim of the Inland Revenue, is of little value, when the practice is sought to be put upon a legal footing." Similarly, the Department may depart from its existing practice and change its opinion, *e.g.* regarding the taxability of certain classes of income (interest on arrers of rent was held to be not an agricultural income)–*(Pethaperumal Chettiar* v. *C.I.T. 1943 I.T.R. 532, 538)*, and may raise inconsistent contentions in successive cases of different assessees *(C.I.T.* v. *Muthukaruppan Chettiar 1935 I.T.R. 208, 210 (P.C.))*.

But the above view has been qualified in some cases by saying that though the Deputy Commissioner of Taxes is not bound by the rule of *res judicata* or estoppel by record, he can re-open a question previously decided *only if fresh facts come to light*, which on investigation would entitle the Officer to come to a conclusion different from the one previously reached *(Sankaralinga Nadar* v. *C.I.T. 4 I.T.C. 226, 243 (Mad. (F.B.); Tarachand Pohumal* v. *C.I.T. 1936 I.T.R. 312 where an assessee taxed as a firm in past years was taxed as a Hindu undivided family on investigation into fresh facdts*, or if the earlier decision had been rendered *without taking into consideration material evidence (Shah & Co.* v. *C.I.T. [1956] 30 I.T.R. 618)*. In the absence of such fresh facts, the Deputy Commissioner of Taxes cannot arbitararily depart from the finding reached after due inquiry by his predecessor in office, simply on the ground that the succeeding Officer does not agree with the preceding Officer's finding *(Sankaralinga Nadar* v. *C.I.T. 4 I.T.C. 226, 243 (Mad.) (F.B.))*.

A third view of the matter taken in some cases, which rests more on the principle of justice than on any principle of law or logic, is that the Department should not depart from its earlier decision where such departure would result in injustice to the assessee *(Shah & Co.* v. *C.I.T. [1956] 30 I.T.R. 618)*. Thus the Department is *bound to treat the accounts of a continuing business in a consistent manner;* for example, a debt which had been treated by the Department as a good debt

in a particular year cannot subsequently be held by it to have become bad prior to that year *(Sir Kameshwar Singh* v. *C.I.T. 1947 I.T.R. 246)*. Again, where the Department has treated certain bonds and promissory notes as part of the money-lending transactions of the assessee, it cannot, when the question of deduction of irrecoverable loans arises, be permitted to take up the position that those bonds and promissory notes were not part of the money-lending transactions of the assessee *(Sir Kameshwar Singh* v. *C.I.T. 1947 I.T.R. 246)*. Similarly, the assessee was not permitted to take up, in her personal assessment proceedings, an attitude inconsistent with that taken up by her at the time of assessment on her as the administratrix of her deceased husband's estate *(In re Charusila Dassi 1937 I.T.R. 1)*.

The above principles govern as much the decisions of the Tribunal as of the Income-tax authorities *(Shah & Co.* v. *C.I.T. [1956] 30 I.T.R. 618)*.

In any view of the matter, the admissions made by the assessee in assessment proceedings are admissible as evidence against him in a subsequent year *(Sirdar Bahadur Indra Singh* v. *C.I.T. 1943 I.T.R. 16, 31)*.

Decisions of Court on reference.—In *Sankaralinga Nadar Bros.* v. *C.I.T. (4 I.T.C. 226, 242-3)* a Full Bench of the Madras High Court dealt with the question as to how far the principle of *res judicata* applies to the decisions of the Court on reference: "Where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, *e.g.* whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income; such questions if decided by a Court on a reference made to it would be *res judicata* in that the same question cannot be subsequently agitated. But if the question is decided by a Court on a reference, which depends upon considerations which may vary from year to year, *e.g.* the case in which the average valuation had to be taken, there could be no question of *res judicata (Kamlapat Motilal* v. *C.I.T. 1950 I.T.R. 812)*". The Indian Supreme Court observed in *Subbayya Chettiar* v. *C.I.T. ([1951] 19 I.T.R. 168)* that where a case is decided mainly with reference to the question of onus of proof, the decision must be confined to the year of assessment to which the case relates, and it would be open to the losing party to show in subsequent years by proper evidence that a different or contrary decision is warranted by the facts of the case.

Estoppel. —Where in assessment proceedings commenced against executors in respect of income received by them during their administration, a receiver who was subsequently appointed erroneously applied to the Deputy Commissioner of Taxes to substitute his name in place of the executors', and the Deputy Commissioner of Taxes did so, the assessment on the receiver was held to be bad in law despite the fact that it was made at the receiver's own request *(Asit Kumar Ghosh* v. *C.I.T. [1953] 24 I.T.R. 578)*.Chakravartti, C.J., said, "Estoppel is not a basis of liability to assessment under the Indian Income-tax Act, and, therefore, the assessment of a person for an amount of income to which he is a stranger cannot be based on the ground that he himself wanted to be assessed on it" *(Ibid. at 581-2)*.

Agreement between assessee and Department. – Any arrangement or agreement between the tax-payer and the Income-tax authorities providing for a basis of assessment different in any respect or particular from that laid down in the Act would be void and cannot estop either party, even if it has been acted upon in the past, from relying in any year upon the proper construction of the relevant provisions of the statute *(Allahabad Milling Co.* v. *C.I.T. 6 I.T.C. 286).*

Sec. 83A. Self assessment.–(1) Notwithstanding anything contained in this Ordinance, where the return of income for any income year filed by an assessee, in accordance with the rules for self assessment made by the Board for that year or any instructions or orders issued thereunder, the Deputy Commissioner of Taxes shall receive such return himself or cause to be received by any other official authorised by him and issue a receipt of such return with signature and official seal affixed thereon and the said receipt shall be deemed to be an order of assessment under section 82 for the assessment year for which the return is filed.

(2) Notwithstanding anything contained in sub-section (1) and section 93, the Board or any authority subordinate to the Board, if so authorised by the Board in this behalf, may select, in the manner to be determined by the Board, a portion, not exceeding twenty percent of the returns filed under sub-section (1) and refer the returns so selected to the Deputy Commissioner of Taxes for the purpose of audit and the Deputy Commissioner of Taxes shall thereupon proceed, if so required, to make the assessment under section 83 or section 84, as the case may be:

Provided that the Deputy Commissioner of Taxes shall not proceed to make any audit in respect of a return, where such return shows at least fifteen percent higher income than the income last assessed, even if the return is selected for audit.

Self assessment–Sec. 83A read with rule 38: The regular income-tax system involves filing of a return of income with the Income-tax Department along with the statement of accounts maintained, if any, production and examination of books of accounts, determination of total income, issue of a demand notice for payment of tax and finally its payment. As the system was thought to be a dilatory and cumbersome one causing sufferings specially for assessees of low income groups, a new system, known as self assessment system was introduced by the National Board of Revenue by inserting Rule 46 and issuing a press note giving guideline for the system for application to the assessments for 1964-65 and later years. Subsequently, the system was found unsuccessful and the system was discontinued. In 1981 through issue of notification (No. S.R.O. 237 L/181 dt. 13.7.81). Rule 45A was formed by the Board to reintroduce the system again. In 1985 the Rule was substituted by a new rule (Rule 38) which along with the circulars issued by the Board governed the provisions of self-assessment and since 1990 a section (sec. 83A) was inserted in the ordinance,

1984. Since then provisions of self-assessment are being embodied in the amending section 83A and Rule 38 supplemented by circulars, instructions and orders issued by the board which provide for guideline of the self-assessment.

Assessees, old or new, deriving income under any head may avail themselves of this procedure. This procedure for self-assessment does not apply to a limited company registered under the Companies Act, 1913 or 1994 or a director holding shares exceeding 10% of the paid-up-capital of a limited company registered under that Act.

A new assessee, not hitherto been assessed, during income under the head, "Income from business or profession" may take advantage of declaring initial capital investment upto ten lakh taka for which no explanation as to the sources of such investment will be required if the assessee shows income in his return which is not less than one-fourth of the capital invested. The assessee shall not be entitled to transfer or lend any portion of the capital investment so made or the whole of it within the period of five years from the end of the assessment year in respect of which his return of income has been filed and in case of transfer or lending of any amount within the period as specified, the amount so transferred or lent out shall be deemed to be the income of the assessee.

The assessee filing return of income in accordance with the rules for self-assessment or any instructions or orders issued by the Board in this behalf shall have to fulfil the following conditions:

(i) the return shall have to be filed with the description "Self-Assessment" superscribed on the top of the return on or before the date specified in section 75(2)(c) or within the time extended under sub-section(3) of the section and such return shall accompany the following:

(a) a bank certificate from a scheduled bank confirming maintenance of an account either in the name of the assessee or in the name of the business or profession where the assessee derives income from business or profession; and

(b) a Trading and Profit and Loss account and Balance sheet in case the assessee derives income from business or profession and maintains proper books of accounts; or

a statement showing the particulars of his income and expenditure in case the assessee deriving income from business or profession does not maintain proper books of accounts; or

(c) a statement showing particulars of his income where the assessee derives income from any other head other than income from business or profession:

(d) a statement of assets and liabilities, if required under cl.(d) of sub-section(2) of sec. 75. The assessee is liable to file statement of assets and liabilities of himself, his spouse, his minor children and dependants in the from prescribed in Rule 25 in case the assessee

is an individual whose total income in the income year exceeds three lakh taka giving particulars as specified in section 80. This provision shall not apply to an assessee having income from salary, wages or self-employment not exceeding two lakh taka and if he submits return of income in form B prescribed in rule 24(1), which is meant for salaried persons.

If the assessee shows receipt of gifts in the statement of assets and liabilities filed by him that can be accepted if such gift is supported by particulars of the donors, such as, their names, addresses, TIN nos. and an attested declaration testifying the gift. If any gift is received from abroad out of the foreign exchange earned by the donor and remitted through official channel that will also be accepted if such gift is supported by the certified copy of a declaration of the donor, and proof of remittance. In both the cases the return as filed shall accompany the relevant papers and documents as mentioned above. If the assessee shows in his statement of assets and liabilities any investment in the purchase of house property or motor car such investment shall be supported by the explanation given by the assessee which is also to be attached with the return filed by the assessee;

(ii) the return so filed under this self-assessment procedure does not show any loss or lesser income than the income last assessed and incase the assessee has income from any other source in addition to the source or sources as shown in the last assessment, income from the additional source shall be in excess of the income last assessed. In the determination of last assessed income, income from "capital gains" shall not be taken into consideration.

(iii) the assessment, when made on the basis of the return so filed shall not result in refund; the refund that may be created because of deduction of tax at source shall not be accepted under this procedure (S.R.O. No. 177 Law/92 dt. 1.7.92 effective from the assessment year 1992-93) but if the refund is created for excess payment of advance tax under section 64 and/or payment of tax on the basis of return under section 74, in such case the return will be accepted for self-assessment procedure-Circular No. 3(1) Tax-7/আঃ আঃ বিঃ/17 dated 7.12.97.

(iv) tax as calculated on the basis of the total income as shown in the return after adjustment of advance tax if paid or tax deducted at source, shall have to be paid on or before the date on which the return will be filed and the amount shall not be less than one thousand taka in any case but the assessee under self-assessment procedure shall not be liable to pay simple interest (Circular No. 6(28)81 dated 24.11.81).

Certain amendments have been made in the Rule by S.R.O. No. 200 law/2000 dated third July 2000 by which the restrictions imposed in filing return under self-assessment procedure have been withdrawn:

(i) the director of a company, whatever be his holding of shares in the company can now file return under this procedure;

(ii) any return showing lessor income than the previously assessed income and even showing loss shall also be accepted under this procedure:

(iii) with the omission of First proviso to sub-rule(1) any return which creates refund shall also be accepted

The initial investment of capital made by a new assessee has been raised to twenty lakh taka if the income shown in the return is not less than one-fourth of the capital investment.

If any return, duly verified and signed by the assessee and accompanied by relevant document as mentioned in the rule and the notifications issued by the Board, is filed under this procedure the Deputy Commissioner of Taxes or any other official authorised by him shall receive such return who will issue a receipt of such return with his signature and official seal affixed thereon and the said receipt shall be deemed to be an order of assessment under section 82 for the assessment year for which the return is filed (sub-section(1) of sec. 83A). It is submitted that the provision to the effect that no assessment order shall be required to be made is not in consistence with the basic law of income tax. The procedure of assessment culminating in the order of assessment should equally apply to self-assessment cases and that the issue of a receipt of the return filed might not stand-in-equivalent with the order of assessment. Further, the assessee is entitled to claim certified copy of the order of assessment as a piece of evidence under the Evidence Act. The Board has also taken the view that no certified copy of order sheet in which the assessment is incorporated will be supplied to the assessee which is not in consistence with the general law and this decision of Board may not stand the test of law.

In self-assessment cases there is no scope for invoking the provisions of section 120. It can however be re-opened under section 93 if there is any clear case of concealment of income as observed by the Appellate Tribunal reported in 1996 BTD XXIV 30. In a case completed assessment under self-assessment procedure was re-opened for wrong calculation of depreciation. In that case which was re-opened under section 34 reassessment was made estimating sales and allowing correct depreciation. The Appellate Tribunal Dhaka Bench (reported in 1982 BTD X 8-10) held that the total income should be recalculated by allowing admissible depreciation but without estimating sales.

To check evasion of tax through self-assessment procedure the system of random sampling for audit or reexamination of completed cases was introduced in 1994 and sub-section(2) of this section (sec. 83A) has made the similar provision. Under this provision the Board or any official authorised by the Board may select under the supervision of the Commissioner of Taxes concerned by application of the system of random sampling by the computer some portion of the returns, not exceeding twenty per cent of the returns filed under sub-section(1) of this section and refer the returns so selected to the Deputy Commissioner of Taxes for audit or reexamination purpose. The Deputy Commissioner of Taxes after making proper scrutiny make assessment, if so required, under the normal procedure by application of section 83 or 84. Under the proviso of this sub-section the return showing income

at least fifteen per cent higher than the last assessed income shall not be subjected to audit or even if selected for the audit, the Deputy Commissioner of Taxes shall not proceed to make any audit and accept the return under this procedure.

Sec. 83AA. Self-assessment for private limited companies.– Where, an assessee, being a private limited company within the meaning of the Companies Act, 1913(VII of 1913) or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন) files a return on or before the date specified in clause (c) of sub-section (2) of section 75 showing income and the income shown in such return is higher by not less than ten per cent over the last assessed income and has also increased by at least a further sum of ten per cent. for each preceding assessment year in respect of which the assessment is pending and pays tax on the basis of such income or twenty five thousand taka, and shows income which is proportionate to the tax so paid, the return filed by the assessee shall be deemed to be correct and complete and the Deputy Commissioner of Taxes shall assess total income of the assessee on the basis of such return and communicate the assessment order to the assessee within thirty days next following:

Provided that–

(a) such return shall be accompanied by a copy of the accounts of the company audited by a chartered accountant;

(b) the amount of tax payable shall be the highest of the taxes computed in the manner specified in this sub-section and the tax so payable shall be paid on or before the date on which the return is filed;

(c) the assessment on the basis of such return shall not result in any refund.

(2) No order under sub-section (1) shall be made in any case after the thirtieth day of June of the assessment year in respect of which a return of total income has been filed under section 75.

(3) Notwithstanding anything contained in sub-section (1) and section 93, the Board or any authority subordinate to the Board, if so authorised by the Board in this behalf, may select, in the manner to be determined by the Board, a portion, not exceeding twenty per cent. of the returns filed under sub-section (1) and refer the returns so selected to the Deputy Commissioner of Taxes for the purpose of audit and the Deputy Commissioner of Taxes shall thereupon proceed, if so required, to make the assessment under section 83 or section 84, as the case may be:

Provided that the Deputy Commissioner of Taxes shall not proceed to make any audit in respect of a return, where such return shows at least twenty per cent. higher income than the income last assessed, even if the return is selected for audit.

Self-assessment for private limited companies.–Sec. 83AA: The contribution of the private limited companies towards the national budget is not significant, as in most cases the returns filed by the private limited companies show loss. After assessment litigation arises which is a time consuming factor and the consequential result is also not satisfactory. In the Finance Act of 1997 this section was inserted to bring under self-assessment procedure the private limited companies which are registered under the Companies Act 1913 or 1994 which can file return under the self-assessment procedure.

The return is to be filed under this section by the private limited company on or before the date specified in section 75(2)(c) and it must show income which will be higher by not less than ten per cent over the last assessed income and in case of pending assessment years such income has to be increased by at least a further sum of ten per cent for each proceeding assessment year in respect of which the assessment is pending and tax is paid on the basis of such income on or before the date of filing the return. The tax to be paid shall not be less than twenty five thousand taka and as such the return will show income which is proportionate to the tax so paid. The assessment on the basis of such return shall not result in refund.

In a case where return is filed fulfilling the above conditions and accompanied by a copy of the accounts audited by the chartered accountant such return shall be deemed to be correct and complete and the Deputy Commissioner of Taxes shall assess the total income of the assessee on the basis of such return and communicate the assessment order to the assessee within thirty days next following.

Sub-section (3) has provided that the Board or any official authorised by the Board may select some portion of the return, not exceeding twenty per cent of the returns filed under sub-section (1) which has been reduced to fifteen per cent by the Finance Act, 2000 and refer the returns so selected to the Deputy Commissioner of Taxes for the purpose of audit who will proceed to make normal assessment under section 83 or 84, if so required. The Deputy Commissioner of Taxes shall not proceed to make any audit in respect of any return which shows twenty per cent higher income than the last assessed income even if the return is selected for audit.

Sec. 83AAA. Assessment on the basis of report of a chartered account.– (1) Where a return or revised return is filed under Chapter VIII by an assesse being a company and the Board has reasonable cause to believe that the return or revised return is incorrect or incomplete, the Board may appoint a registered chartered accountant to examine the accounts of that assessee.

(2) The chartered accountant appointed under sub-section (1) shall exercise the powers and functions of the Deputy Commissioner of Taxes as referred to in section 79 and clauses (a), (b), (c), (d) and (e) of section 113.

(3) The chartered accountant, after examination of the accounts of that assessee, shall submit a report in writing to the Board alongwith findings within a time as may be specified by the Board.

(4) On receipt of the report referred to in sub-section (3), the Board shall forthwith forward the report to the concerned Deputy Commissioner of Taxes for consideration.

(5) On receipt of the report under sub-section (4), the Deputy Commissioner of Taxes shall serve a notice upon the assessee under sub-section (1) of section 83.

(6) The Deputy Commissioner of Taxes shall, after hearing the person appearing and considering the evidences produced including the findings stated in the report received under sub-section (5) and also considering the other evidences, by an order in writing, assess within thirty days after the completion of hearing or consideration, as the case may be, the total income of an assessee and shall determine the sum payable by the assessee on the basis of such assessment, and communicate the said order to the assessee within thirty days from the date of such order.

Sec. 84. Best judgement assessment.–Where any person fails–

(a) to file the return required by a notice under section 77 and has not filed a return or revised return under section 78; or

(b) to comply with the requirements of a notice under section 79 or 80; or

(c) to comply with the requirements of a notice under section [83(1)];

the Deputy Commissioner of Taxes shall, by an order in writing, assess the total income of the assessee to the best of his judgement and determine the sum payable by the assessee on the basis of such assessment; and in the case of a firm, may refuse to register it or may cancel its registration if it is already registered, and communicate such order to the assessee within thirty days next following.

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Deputy

Commissioner of Taxes to the firm intimating his intention to cancel its registration.

Sec. 84 Cases in which best judgment assessment is compulsory.–This section provides that the Deputy Commissioner of Taxes shall make the assessment to the best of his judgment in three cases. The terms of the section are mandatory: the Deputy Commissioner of Taxes has *no discretion* to make or not to make an assessment under this section *(Abdul Baree Chowdhury* v. *C.I.T. 5 I.T.C. 352, 357-8 (F.B.); C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 170, 179 (P.C.))*. The following are the three cases where a best judgment assessment has to be made:

(i) where the assessee has failed to make the return required by a notice under s.77 and has not made a revised return under s. 78;

(ii) where there has been a failure to comply with the terms of a notice issued under s. 79 requiring the assessee to produce accounts or other documents or information specified therein;

(iii) where the return has been made, but the Deputy Commissioner of Taxes considers it to be incorrect or incomplete and serves a notice under s. 83(1) upon the assessee requiring his appearance or the production by him of evidence in support of his return, but the assessee does not comply with the terms of the notice.

The three contingencies mentioned above are *alternative and not cumulative*. Default in compliance with any one of the three notices referred to in this section would entail a best judgment assessment *(Behari Lal Chatterji* v. *C.I.T. 1934 I.T.R. 377)*. For instance, if the assessee complies with the terms of a notice under s. 83(1) by producing the evidence upon which he relies, but fails to comply with a notice under s. 79 to produce account books, that would justify an assessment in default under this section *(Harmukhrai Dulichand* v. *C.I.T. 3 I.T.C. 198)*.

The guide line laid down in this case is as follows: If an assessee has made a return under section 22(2) (corresponding to section 77) and thereafter a notice under section 23(2) has been served on him (corresponding to section 83(1) and also a notice under section 22(4) (corresponding to section 79) and the assessee has complied with the terms of the notice under section 23(2) by producing the evidence upon which he relies but has failed to comply with the notice under section 22(4). The Income-tax Officer is not bound to proceed under section 23(3) (corresponding to section 83(2)), and is entitled to make an assessment under section 23(4) (corresponding to section 84) for failure to comply with the notice under section 22(4) (corresponding to section 79).

If the assessee's application for extension of time is refused by the Deputy Commissioner of Taxes in the proper exercise of his discretion and the assessee does not comply with a notice under s. 79, or 83(1) on or by the appointed day, a best judgment assessment under this section would be justified *(C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 170 (P.C.); See also case law discussed under, "guideline for best judgment assessment")*. See further under s. 83(1), "Adjournment".

All admissible expenses and allowances must be assumed to have been taken into consideration in arriving at the estimate of income under this section.

Cases in which best judgment assessment is discretionary.–Whereas in the three cases mentioned in this section the Deputy Commissioner of Taxes to make a best judgment assessment, s. 35(4) confers on him a discretionary power to make a best judgment assessment under this section or an ordinary assessment under s. 83(2)–

(i) where the assessee's accounts are incorrect or incomplete, or

(ii) where no method of accounting has been regularly employed by the assessee.

The case-law dealing with the method of accounting and the incorrectness or incompleteness of accounts is dealt with *ante* under s. 35.

Failure to make a return: Invalid return.–If there is a failure to make a return in compliance with notice under s. 77, the Deputy Commissioner of Taxes would have to make a best judgment assessment under this section *(Nawal Kishore Kharani Lal* v. *C.I.T. 4 I.T.C. 451 and Beharilal Chatterjee* v. *C.I.T. (1934) 2 I.T.R. 377)*. It was held in these two cases that failure to submit a return in compliance with a notice under section 22(2) (corresponding to section 77) is enough to justify and assessment under section 23(4) (corresponding to section 84). It is not obligatory to issue a notice under section 22(4) (corresponding to section 79) before making such an assessment. A person who has been served with a notice under s. 77 must furnish a return *even if he has no assessable income;* failure to make a return would attract the application of this section *(Bhagat Dumichand* v. *C.I.T. 4 I.T.C. 33, 38)*. Upon the assessee's failure to submit a return to the Deputy Commissioner of Taxes having jurisdiction at the assessee's principal place of business, the Deputy Commissioner of Taxes would be entitled to proceed to assessment under this section without waiting for reports from the Deputy Commissioner of Taxes to whom returns of profits of the assessee's branch offices might have been submitted *(Mohan Lal Hardeo Das* v. *C.I.T. 5 I.T.C. 127; Abhay Ram Chunlal in re [91933] 1 I.T.R. 126)*. But the best judgment assessment would not be justified unless a valid and proper notice has been duly served on the assessee *(Hardeodas Jagannath* v. *I.T.O. [1961] 43 I.T.R. 562; Ananda* v. *C.I.T., Behar [1936] I.T.R. 11 (Pat))*. The case-law dealing with the validity and service of the notice has been discussed under s. 79, "Validity of notice", and under s. 178.

A return which is invalid or incomplete or does not give the requisite particulars, may be treated as no return at all under s. 75 –*Pitta Ramaswamiah* v. *C.I.T. (Madras) [1927] 45 M 831*. In cases of such invalid or incomplete returns it would be the duty of the Deputy Commissioner of Taxes to make a best judgment assessment under this section. Thus where the return made is not in the prescribed form *(C. Ag. I.T.* v. *Keshab Chandra Mandal 1950 I.T.R. 569 (S.C. of India) (a return signed by an agent, instead of being signed by the assessee personally, held to be invalid)*, or is not signed and verified as required by law, or deliberately omits to give the prescribed particulars *(Abdul Baree Chowdhury* v. *C.I.T. 5 I.T.C. 352; Mohan Lal Hardeo Das* v. *C.I.T. 5 I.T.C. 127)*, or does not even purport to disclose the total

income in that it deliberately excludes the profits earned by branch offices (*Mohan Lal Hardeo Das* v. *C.I.T. 5 I.T.C. 127*). It may not be regarded as a return at all and the Deputy Commissioner of Taxes may proceed to make a best judgment assessment under this section. But it would be a valid return even if the figure of total income given by the assessee is only his estimate (*Malik Damsaz Khan* v. *C.I.T. 1947 I.T.R, 445 (P.C.)*); or even if the return, filed without any notice under s. 77, declares income below the taxable limit, or declares a loss.

The terms of the section make it clear that a best judgment assessment cannot be made on the ground of default in complying with s. 75, nor can it be made on the ground of default in making a return if the assessee who has initially failed to comply with the notice under s. 77 sends in a return under s. 78 before the assessment is made (*Sadaram Puranchand* v. *C.I.T. 5 I.T.C. 459*). The observation as made in this case is that "a return made before assessment is a return made in due time under section 22(3) (corresponding to section 78), and before such a return can be disregarded, the assessee is entitled to a reasonable opportunity to produce any evidence upon which he might rely in support of the return. If an assessee has books and does not produce them, he can be assessed in default under section 23(4) (corresponding to section 84) whatever other evidence he might choose to put forward in support of the return. But it was never intended by the Act that failure to produce books, prior to the filing of a return, should deprive the assessee of his right to have the return duly and properly inquired into ... notice under section 23(2) and 22(4) (corresponding to section 83(1) and 79) must be given so as to afford reasonable opportunity to an assessee to comply with their requirements ... the assessee must also be given reasonable time to produce evidence".

The Deputy Commissioner of Taxes has jurisdiction to serve abroad a notice on a non-resident Bangladeshi calling for a return of income, and upon the non-resident's failure to file a return the Deputy Commissioner of Taxes may make a best judgment assessment under this section.

Failure to comply with notice under sec. 79 or 83(1).–Non-compliance with a notice under s. 79 to produce accounts, documents or information (*Harmukhrai Dulichand* v. *C.I.T. 3 I.T.C. 198; Muhammad Hayat* v. *C.I.T. 5 I.T.C. 159*), or with a notice under s. 83(1) to attend or produce evidence in support of the return (*Mohan Lal Hardeo Das* v. *C.I.T. 4 I.T.C. 90. Cf. E. M.C. (Works) Pr. Ltd.* v. *I.T.O. [1963] 49 I.T.R. 650*), is penalised by an assessment in default under this section. A notice under section 22(4) (corresponding to section 79) to produce the account books may be issued even after the assessee has submitted his a return of his income and an assessment under section 23(4) (corresponding to section 84) can be made if the assessee fails to comply with such notice – *Harmukhrai Dulichand [1928] 56 Cal. 39.*

Where the Income-tax Officer has issued more notices than one under s. 83(1), failure to comply with any one of such notices would justify an assessment in default under this section *In re Lachhman Das Narain Das 2 I.T.C. 1, 3).*

The power to make a best judgment assessment on the basis of default in complying with a notice under s. 79 or 83(1) presupposes that a valid and proper notice has been duly served on the assessee. If the notice was not valid or proper, a best judgment assessment made in case of non-compliance with such an improper or invalid notice cannot stand. Cases dealing with the validity of a notice under section 79 and 80 have been reviewed under these sections "Notice to produce accounts, documents, total wealth statements or other information", "Accounts of past three years only", and "Accounts of branch offices or foreign business". Authorities on the validity of a notice under s. 79 have been dealt with under "Notice to attend or produce evidence". These cases establish that if the notice is improper or invalid, a best judgment assessment under this section in case of non-compliance with such a notice would itself be invalid *(Sadaram Puranchand* v. *C.I.T. 5 I.T.C. 459, 465)*.

The application of this section would be attracted if the assessee fails to comply with *all the terms* of a notice issued under s. 79 or 83(1). In other words, a summary assessment under this section would follow the failure to comply with *any of the terms* of the notice, and a partial default involves the same consequences as a total default *(Tejmal Bhojraj* v. *C.I.T. [1952] 22 I.T.R. 208; Tulsi Das Nagin Chand* v. *C.I.T. 1938 I.T.R. 385)*. As a matter of practice, however, the Department should not take its stand on a strictly technical ground and should not invoke its powers of "assessment in default" where there has been a substantial compliance with its requisition *(Mohan Lal Hardeo Das* v. *C.I.T. 4 I.T.C. 90, 96)*.

It is for the Deputy Commissioner of Taxes to determine what account books and documents are necessary to enable him to make an estimate of the income, and an assessment in default under this section cannot be held to be invalid merely because some of the accounts which were called for and not produced were irrelevant in the opinion of the assessee *(Tulsi Das Nagin Chand* v. *C.I.T. 1938 I.T.R. 385)*. Who is to determine the relevancy of accounts has been discussed in this case "(i) it is for the Income-tax Officer to determine what account books and documents are necessary to enable him to make an estimate of income of the assessee, and an assessment under section 23(4) cannot be held to be invalid merely because some of the accounts called for which were not produced were irrelevant in the opinion of the assessee. (ii) if an Income-tax Officer after calling for the previous accounts relating to the various businesses of the assessee utilises the accounts produced by the assessee in making his estimate, it cannot be said that those accounts which were not produced by the assessee were not required for the purposes of assessment. If the accounts of a branch office are not produced in response to a notice under section 79 issued by the Deputy Commissioner of Taxes making an assessment at the principal place of the company's business, the assessing Officer would be entitled to make a summary assessment under this section, regardless of the fact that such accounts were produced before and considered by the Deputy Commissioner of Taxes exercising jurisdiction at the branch office *(Lachhman Das Babu Ram* v. *C.I.T. 4 I.T.C. 61)*.

Mere denial by the assessee of the existence of the account books required to be produced, when it is found upon the evidence that the books are really in existence, would not prevent or invalidate a best judgment assessment *(Lachhman Das Babu Ram* v. *C.I.T. 4 I.T.C. 61, 75)*. But if there are no materials from which the Deputy

Commissioner of Taxes could reasonably infer that undisclosed account books exist, the assessment under this section on the basis of non-production of account books would not be justified *(Ram Datta Sita Ram, In re, 1947 I.T.R. 61, 83-5)*.

It has been noted above that where the Deputy Commissioner of Taxes does not accept the return as correct and complete, he is bound to serve a notice on the assessee under s. 83(1) giving the assessee a chance to justify his return by attending the office of the Deputy Commissioner of Taxes or producing evidence. If the Deputy Commissioner of Taxes regards the return as incorrect or incomplete and yet does not serve any notice on the assessee under section 83(1), but only issues a notice to produce accounts under s. 79 and proceeds to make a best judgment assessment in case of non-compliance with the notice issued under s. 79, such assessment cannot stand *(Rajmani Devi* v. *C.I.T. 1937 I.T.R. 631)*.

Summary assessment: Judicial exercise of judgment.–The difference between an assessment under s. 83(2) and an assessment under this section is that the Ordinance contemplates a more summary method when the Deputy Commissioner of Taxes is acting under this section by reason of the *deliberate default* of the assessee *(Gunda Subbayya* v. *C.I.T. 1939 I.T.R. 21, 27 (F.B.))*. The difference between section 23(3) and 23(4) (corresponding to section 83(2) and 84) has been discussed in this case. The only difference between an assessment under section 83(2) in a case where the assessee's books are found unreliable and are rejected and the assessee fails to produce other evidence and an assessment under section 84 is that the Ordinance contemplates a more summary method when the Deputy Commissioner of Taxes is acting under section 84. Although the assessment proceeding under this section is not a judicial proceeding in the strict sense, the Deputy Commissioner of Taxes must be guided by judicial considerations and by rules of justice, equity and good conscience *(Abdul Qayum & Co.* v. *C.I.T. 1933 I.T.R. 375)*. As a best judgment assessment is a quasijudicial process, that assessee is entitled to have an opportunity of being heard in respect of the material gathered under section 79 on the basis of which the estimate of the assessee's income is proposed to be made. The writ petition challenging an order under section 144 of I.T. Act (corresponding to section 84) without affording the above mentioned opportunity was allowed - *T.C.N. Menon* v. *I.T.O. (Ker) 1974, 96 I.T.R. 148*.

It was held under the 1922 Act that even in a best judgment assessment if the Income-tax Officer took into account material from comparable cases, such material had to be disclosed to the assessee so that he might have an opportunity to explain *(Swamy Bros.* v. *C.I.T. [1958] 34 I.T.R. 123)*. This rule may apply in some cases and not in others under this Ordinance. The present law position is that the assessee shall, except in the case of a best judgment assessment, be given an opportunity of being heard in respect of any material proposed to be utilised for the purpose of the assessment. That law cannot be construed to mean that in a best judgment assessment the assessee shall not be given an opportunity of being heard in respect of any material gathered by the Deputy Commissioner of Taxes. There are different types of defaults which result in a best judgment assessment and the default of the assessee may be such as not to disentitle him to an opportunity of meeting the case and of

being heard in respect of certain materials proposed to be utilised for the purpose of the assessment.

The assessing Officer should not be influenced by a desire to punish the assessee for the default which attracts the operation of this section, however culpable such default might be *(Jot Ram Sher Singh* v. *C.I.T. 1934 I.T.R. 129). Ex hypothesi* an assessment under this section must be made upon inadequate materials *(C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 170 (P.C.))*. But that does not mean that the Income-tax Officer can make the assessment capriciously or without regard to any available material at all *(Muhammad Hayat* v. *C.I.T. 5 I.T.C. 159, 171)*. The assessment must be "to the best of his judgment"; and the word "judgment" itself implies consideration of something: here it must be consideration of the facts relating to the income of the assessee *(Chetandas Gulabchand* v. *C.I.T. [1963] 49 I.T.R. 951)* and of the materials which are admittedly available to the Deputy Commissioner of Taxes.

The classic passage on the point is to be found in the judgment of the Privy Council in *C.I.T.* v. *Laxminarain Badridas (1937 I.T.R. 170, 180)*, which is in brief as follows:

In this case it was held that in every case before an assessment in made under section 23(4), the Income-tax Officer must invariably conduct such "local enquiry" to ascertain the income of the proposed assessee for the previous year as the circumstances of the case may warrant: and the said authority must place on the record a note of the details and results of his enquiry in order that the Commissioner of Income-tax under section 33 or the High Court under section 66(2) or (3) may be in a position to see that the assessment was according to the rules of reason or justice and not arbitrary. Such an assessment alone would satisfy the requirements of the assessment by the Income-tax officer "to the best of his judgment" within the meaning of section 23(4) of the Income-tax Act. Where an assessment purporting to be one under section 23(4), dues not satisfy these conditions a point of law would invariably be involved so as to make it the subject of reference to and decision by the High Court under section 66(2) or (3) of the Income-tax Act. An assessee failed to comply with a notice under section 22(4) and 23(2). The Income-tax Officer purporting to act on the basis of an undated "report" assessed the income at Rs.100000 and levied assessment thereon. In the preceding two years the income of the assessee did not exceed Rs. 47,000 and the so called "report" did not contain any materials or finding that the income was one lac of rupees. Held, that under the circumstances the assessment was capricious one and not an assessment to the best judgment contemplated by section 23(4). The decision was given by the Privy Council in this case reversing the judgment of the Nagpur High Court which held that the assessee had sufficient cause for not complying with another notice is irrelevant. "The Officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own

knowledge of previous returns by and assessments of the assessee *(Mohan Lal Hardeo Das* v. *C.I.T. 5 I.T.C. 127, 133)*, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary." Their Lordships expressed their approval of similar views held by a Full Bench of the Rangoon High Court in *Abdul Baree Chowdhury* v. *C.I.T. (5 I.T.C. 352)*.

The Privy Council further laid down in the above-mentioned case *(C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 170, 180-1)* that it is not an essential ingredient of a valid best judgment assessment that the Income-tax Officer should have conducted a local inquiry and recorded the details and results of that inquiry *(See also Singh Engineering Works* v. *C.I.T. [1953] 24 I.T.R. 93, 106-7)*. The Income-tax Officer is in no way bound to confine himself to any special kind of materials in making the assessment *(Kissendas Bagri* v. *C.I.T. 2 I.T.C. 324 (F.B.))*. He need not take any evidence *(Gopinath Naik* v. *C.I.T. 1936 I.T.R. 1, 22)*. In computing the total income, he may gather materials from the sources referred to by the Privy Council in the passage quoted above, or from the assessee's account books of the relevant year or preceding years *(Jot Ram Sher Singh* v. *C.I.T. 1934 I.T.R. 129, 136)*, or he may take the profits of one branch office as shown by the books and of another branch office as estimated in the report of the Income-tax Officer exercising jurisdiction at the branch office *(Kissendas Bagri* v. *C.I.T. 2 I.T.C. 324 (F.B.))*. He may compute the income on the basis of a flat rate of profit *(C.I.T.* v. *Sen 1949 I.T.R. 355)*. (See also the cases cited under s. 83(2), "Quasi-judicial inquiry" and "Materials for assessment".

However, as an appeal lies (since 1939) against a best judgment assessment, it is eminently desirable that the order should disclose the basis so that the higher authorities may know the ground on which the assessment was based *(Gunda Subbayya* v. *C.I.T. 1939 I.T.R. 21, 28 (F.B.)*.

Reference to Court.–Whether or not the default of the assessee is such that the provisions of this section are brought into play is a question of fact *(C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 42)*. But when the best judgment assessment is made on the ground of default in producing account books which according to the assessee do not exist, it is a question of law whether there is any evidence to justify the presumption of the Income-tax Officer that the account books exist *(Ram Datta Sita Ram, In re, 1947 I.T.R. 61, 83-5)*.

The quantum of the income assessed under this section is a decision on a question of fact *(C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 170 (P.C.))* and cannot be interfered with in appeal or on reference unless it is capricious *(Sir Padampat Singhania* v. *C.I.T. [1953] 24 I.T.C. 141; Singh Engineering Works* v. *C.I.T. [1953] 24 I.T.R. 93, 107)*.

Sec. 85. Special provisions regarding assessment of firms.–(1) Notwithstanding anything contained in this Ordinance, where the assessee is a firm and the total income of the firm has been assessed under sections 82, 83, or 84, as the case may be, –

(b) in the case of [a firm], the tax payable by the firm shall be determined on the basis of the total income of the firm.

(2) Whenever any determination is made in accordance with the provisions of sub-section (1), the Deputy commissioner of Taxes shall, by an order in writing, notify to the firm–

(a) the amount of tax payable by it, if any;

(b) the amount of the total income on which the determination has been based; and

(c) the apportionment of the amount of [income] between the several partners.

Sec. 86. Assessment in case of change in the constitution of a firm.–(1) Where, at the time of assessment of a firm, it is found that a change has occurred in the constitution of the firm, the assessment shall be made on the firm as constituted at the time of making the assessment:

Provided that–

(a) the income of the year shall, for the purpose of inclusion in the total income of the partners, be apportioned between the partners who, in such income year, were entitled to receive the same; and

(b) when the tax assessed upon a partner cannot be recovered from him, it shall be recovered from the firm as constituted at the time of making the assessment.

(2) For the purposes of this section, there is a change in the constitution of a firm–

(a) where all the partners continue with a change in their respective shares or in the shares of some of them, or

(b) where one or more persons who were partners continue to be so with a change by cessation of one or more partners or addition of one or more new partners.

Sec. 87. Assessment in case of constitution of new successor firm.–Where, at the time of assessment on a firm, it is found that a new firm has been constituted to succeed the firm to which the assessment relates and it cannot be covered by section 86, separate assessments shall be made on the predecessor firm and the successor firm in accordance with the provisions of section 88 relating to assessment in case of succession to business.

Assessment of firms–Sec. 85, 86 and 87–(See *ante* notes under the head, firm, partner and partnership–sub. secs (32), (43) and (44)).

These sections deal with the assessment of firms. Under the general law a firm is not a legal person but for the purposes of Income-tax Ordinance a firm has an assessable entity. The liability to pay tax is the liability of the firm exclusively for its own income and not on behalf of the partners.

There are three distinct steps in assessment proceedings–(i) computation of the total income, (ii) determination of the tax payable, and (iii) demand for the tax so found due –*C.I.T.* v. *Khemchand Ramdas–1938 I.T.R. 414, 423 (P.C.)*. Since the firm is a unit of assessment the firm may be assessed under sections 82, 83 or 84 as the case may be, and its income is computed in its hands as that of an entity, and the tax payable by the firm itself is determined as in the case of any other distinct entity and the demand or levy is also made on the firm itself. When tax is paid by the firm itself, no tax will be payable by the partners in respect of their respective shares which has already borne tax in the hands of the firm.

When a firm is assessed as a unit, the rates of tax applicable may be higher than those which would be applicable to the total income of a partner, inclusive of his share of the firm's profits, but a partner would not be entitled to any refund of the tax paid by the firm at the higher rates. The reason is that a firm is a distinct assessable entity for the purposes of this Ordinance, and pays the tax in discharge of its own liability and not on behalf of its partners.

Apportionment between the partners:

Cl.(c) of sub-section (2) of section 85 requires that whenever the Deputy Commissioner of Taxes makes an assessment on a firm, he shall, by an order in writing, intimate to the firm the amount at which the total income of the firm has been computed and the apportionment thereof between the several partners.

Sec. 43(3): Computation of partner's share in the firm's profit or loss–This section lays down the mode of computing a partner's share in the profit or loss of the firm. The formula is to take any interest, salary, commission or other remuneration payable to the partner by the firm, and to add to or substract from it respectively the partner's share in the balance of the profit or loss of the firm after the deduction of interest, salary, commission or other remuneration payable to any partner. Though the interest, salary, commission or other remuneration payable to any partner is to be deducted from the firm's profit before computing a partner's, share income under this sub-section, such deduction is not permissible in computing the business income of the firm.

So the share of a partner in a firm (whether a net profit or net loss) will be taken to be any salary, interest, commission or other remuneration payable to him by the firm in the income year increased or decreased respectively by his share in the balance of the profit or loss of the firm and any interest, salary, commission or other remuneration payable to any partner in respect of the income year. If the partners of a firm have their individual income, the share income from the firm, where the firm has

already been assessed to tax, shall be added to their individual income but such share income shall not be charged to tax. (Paragraph 16 of part B of sixth schedule). This addition of share income to the partner's other income may enhance the rate of tax for such other income or may bring the partners within the ambit of taxation where such partner's individual income was below the taxable limit.

If in fact a partner is paid, by consent of parties, more than his share specified in the partnership deed, it is the sum actually paid to him which is to be taken as his share of the firm's profits and not the sum he is entitled to receive in accordance with the terms of the partnership deed–*C.I.T.* v. *Raiji 1949 I.T.R. 180.* Where an increase in a partner's share in the firm is contingent upon an event which is to happen in some future year, and a sum representing the increase is set apart to meet such contingency, the partner cannot be taxed in respect of the sum representing such increase till the event has happened–*Franklin* v. *I.R. 15 T.C. 464.* But a third party's claim to a share in the firm's profits, e.g., claim by the son of a deceased partner, would not reduce the income actually received by the partners to a contingent basis, each partner would be taxable in respect of his share in the profits of the firm notwithstanding the pendency of the rival claim–Franklin v. *I.R. 15 T.C. 464.*

Where as a result of an appeal any change is made in the assessment of a firm, the Deputy Commissioner of Taxes shall amend accordingly on the basis of the appeal any assessment made on any partner of the firm if he is so directed by the Appellate Joint/Additional Commissioner of Taxes or Commissioner of Taxes (Appeals sec. 156(4)).

Determination as to who are partners [illegible]–The Bombay High court held in *Gokuldas* v. *Kikabhai Abdulali ([1958] 33 I. [illegible]94)* that when assessing a firm, it is the duty of the Deputy Commissioner of Taxes to determine who the partners of the firm are and to give notice to all the individuals who are alleged to be partners, so that they may appear and show cause against being treated as partners. If the Deputy Commissioner of Taxes completes the assessment on the firm without notice to all the alleged partners, he would have no right to take recovery proceedings against an alleged partner who was not heard and whose liability as a partner has not been duly adjudicated upon.

Liability of firm for unrecoverable tax due from partners.–(See notes of sec. 98)

Change in constitution of a firm–Sec. 86: Scope of the section.–This section deals with the case where at the time of making an assessment it is found that a change has occurred in the constitution of a firm, while s. 87 deals with the case of succession. These two sections are concerned not with the computation of tax but with the person upon whom the liability is to be imposed–*Indian Iron & Steel Co. Ltd.* v. *C.I.T. 1943 I.T.R. 328, 337 (P.C.).* They distribute a tax already charged as between old and new members of a firm or between the predecessor and the successor in a business–*C.I.T.* v. *Polson 1945 I.T.R. 384, 387 (P.C.).*

At the time of assessment of a firm.–This section would apply if at the time of making an assessment under ss. 82, 83(2) or 84 it is found that a change has

occurred in the constitution of a firm. The change might have occurred either in the relevant accounting year or in the assessment year, or even later. The word "assessment" in section 26(2) (corresponding to section 86) is not confined to the definite act of making an order of assessment. The words "at the time of an assessment" mean in the course of the process of assessment and do not refer merely to the act of making an assessment order–*Maharajadhiraj of Darbhanga* v. *C.I.T. ibid.* Thus where a notice calling for a return has been issued to any person under s. 77 the process of assessment has begun and continues until an order of assessment is made, and if a change in the partnership personnel occurs at any time before the assessment is made, this section would apply–*See Maharajadhiraj of Darbhanga* v. *C.I.T. 1934 I.T.R. 345 (P.C.).* But the section would have no application to a case where the change occurs after the assessment of the firm is completed–*In re Chimanlal Lalbhai 1944 I.T.R. 199.*

Meaning of change in constitution of firm.–Unlike the old s. 26(1), this section clearly indicates what is meant by a change in the constitution of a firm. First, the words cover the case of a partner ceasing to be a partner or a new partner coming in, but at least one of the partners before the change should continue as a partner after the change. If all the old partners go out and an entirely new set of partners comes in, it would not amount to a change in the constitution of a firm but would amount to the succession of one firm by another and s. 87 would apply. Secondly, a mere change in the proportion in which the partners divide the profits would amount to a change in the constitution of the firm, whereas it was not so under the 1992 Act–*In re Moolji Sicka 1938 I.T.R. 234.*

Where the partnership is dissolved and one partner takes over and continues the partnership business, it would be a case of succession covered by s. 87 and not of change in the constitution of the firm, for "a change in the constitution of the firm" presupposes the continued existence of the firm–*See the cases cited under s. 88 "Succession", ante.* Likewise, if a firm is dissolved and some of the partners take over the firm's business or carry on a similar business, with or without new partners, this section would not apply, although there would be some common partners between the old firm and the new; in such a case the new firm may be held to succeed to the old firm or the business of the old firm may be held to be discontinued–*Hari Ram Gopi Nath* v. *C.I.T. 1944 I.T.R. 367 and Kannappa Naicker & Co.* v. *C.I.T. 1937 I.T.R. 49.* For the difference between succession or discontinuance on the one hand and change in the constitution of a firm on the other hand, see further notes to s. 88 (succession) and s. 89 (discontinuance).

Cases of succession to one firm by another, and of dissolution of a firm or discontinuance of its business, are dealt with by ss. 87 and 89 respectively.

Assessment in case of change in partnership business.–In assessing a firm, the revenue is not concerned with changes in the constitution of the firm, for the firm is charged as a unit of assessment. The total income of the firm would be computed and the tax payable by the firm would be determined as if there had been no change in the constitution of the firm. The firm as constituted at the time of making the assessment would be liable to pay the tax; in other words, the new

partners would be liable to pay the tax even in respect of that portion of the previous year's profits which was received by the old partners prior to the change. But for purposes other than taxing the firm, *e.g.* for the purpose of determining the rate of tax applicable to the total income of a partner, cl. (i) of the proviso of sub-section (1) of sec. 86 would apply and only that portion of the firm's profits of the accounting year, to which the partner was entitled, would be included in his total income. In other words, the tax on the firm's profits of the year in which the change occurs is borne by the old and the new partners in proportion to their actual shares in those profits–*Ghella Dayal* v. *C.I.T. 1945 I.T.R. 133, 138. Facts of the case are*– A firm of three partners carrying on business in piece goods was started in 1932. On October 30, 1939 one of the partners died. On November, 12, 1939, a new firm was formed by the two surviving partners with three more new partners and the shares of the five partners were reshuffled. The new firm carried on the same business in the same premises under the old trade name with separate set of account books and the management of the business before and after the change remained identical. There were several outstanding contracts of the old firm. The assets and liabilities of the old firm were taken over by the new firm after some months. During the relevant accounting year the net profit of the old firm was Rs. 56,000 and that of the new firm was Rs. 10,500. In assessing the new firm the I.T.O held that both the profits were the profits of the new firm in as much as the business of the old firm was continued by the new firm and there was no more than the change in the constitution of the firm. The Appellate Tribunal agreed with the decision of the I.T.O. and the new firm was rightly assessed to income tax and the partners were liable in respect of the share to which they were individually entitled. If the tax assessed upon any partner cannot be recovered from him, it must be recovered from the firm as constituted at the time of making the assessment; thus in the case of default by any old partner the new partners would be liable for the amount of the tax in respect of which the default is committed.

Succession of one firm by another–87: Change in constitution of firm–distinguished from succession. –Secs. 86 and 87 expressly deal with change in the constitution of a firm, and succession to one firm by another firm, respectively. They provide that in order to constitute a change in the constitution, at least one of the partners should continue in the firm. If all the old partners go out and a set of all new partners comes in, or if the partnership is dissolved and some of the partners take over and carry on the same business, it would be case of succession to the old firm by a new firm and not merely of a change in the constitution of the firm, and separate assessments would have to be made under this section on the predecessor firm and the successor firm. See notes to ss. 86 and 87.

Sec. 88: Assessment in case of succession to business otherwise than on death.–(1) Where, a person, carrying on any business or profession (in this section, referred to as the *predecessor*), has been succeeded therein otherwise than on death by another person (in this section, referred to as the *successor*) in any income year, and the successor continues to carry on that business or profession, –

(a) the predecessor shall be assessed, in respect of the income of the income year in which the succession took place, for the period up to the date of succession, and

(b) the successor shall be assessee, in respect of the income of the income year, for the period after the date of succession.

(2) Notwithstanding anything contained in sub-section (1), where the predecessor cannot be found, the assessment of the income year in which the succession took place up to the date of succession and of the income year or years preceding that year shall be made on the successor in the like manner and to the same extent as it would have been made on the predecessor; and the provisions of this Ordinance shall, so far as may be, apply accordingly.

(3) Where any sum payable under this section in respect of the income of a business or profession cannot be recovered from the predecessor, the Deputy Commissioner of Taxes shall record a finding to that effect, and thereafter the sum payable by the predecessor shall be payable by, and recoverable from, the successor who shall be entitled to recover it from the predecessor.

Succession to business otherwise than on death–Sec. 88(1): This section applies to cases of succession to a business or profession and not of succession to any other income-producing source. The corresponding provision in s. 26(2) of the 1922 Act was held to apply to cases of succession *inter vivos* as well as succession on death–*Dubash's Executors* v. *C.I.T. [1951] 19 i.t.r. 182 (S.C. of India); Maharajadhiraj of Darbhanga* v. *C.I.T. 1934 I.T.R. 345 (P.C.)*. But, as the marginal note indicates, this section does not apply to succession on death. There is nothing in the section itself to indicate that cases of succession on death fall outside its ambit; but the section should be construed as excluding cases of succession on death, because such cases fall within the more specific provisions of ss. 92 and 95. Legal representatives are assessable under s. 92 in respect of the income up to the date of death, and the person administering the estate is assessable under s. 98 in respect of the income from the date of death. In the 1922 Act there was no provision corresponding to s. 98.

The effect of this section is that the predecessor in business is assessable in respect of the income of the year of succession up to the date of succession, while the successor is assessable in respect of the income of that year after the date of succession. Thus the income of the year in which the succession occurs is to be apportioned between the predecessor and the successor according to the share of each. The predecessor and the successor would each be liable to tax at the rate applicable to

each–*C.I.T.* v. *Western India Turf Club Ltd.* 2 *I.T.C.* 490 *(P.C.)*. The income of the predecessor and the successor must be computed separately, and each must be granted the deductions and allowances appropriate to his case–*Indian Iron & Steel Co. Ltd.* v. *C.I.T. 1943 I.T.R. 328, 337 (P.C.)*. The assessment on each must be separate and distinct.

In *E.D. Sassoon & Co. Ltd.* v. *C.I.T. ([1954] 26 I.T.R. 27)* where on the transfer of a managing agency in the course of the accounting year no share in the managing agency commission for the broken period accrued to the assignor, the Supreme Court of India held that s. 26(2) of the 1922 Act did not apply and the assignor was not chargeable in respect of any part of the managing agency commission for the year of succession. The old s. 26(2) referred to the "actual share" of the predecessor and of the successor in the income of the year of succession. Despite the change in the statutory wording, the decision of the Supreme Court would apply under this section, because even this section makes the predecessor assessable only in respect of the income accruing to or received by him up to the date of succession. The section would apply even if the succession takes place at the very end of an accounting year–(*Ramniwas Hanumanbux Somani* v. *Venkataraman [1961] 43 I.T.R. 152. If the succession has taken place on the last day of the relevant year of account, the income of the whole of that year would be assessable in the hands of the predecessor*).

The fact that the predecessor has been wrongly assessed in respect of profits which are chargeable in the hands of the successor under this section would not entitle the successor to immunity from tax in respect of such profits–*Karuppiah Pillai* v. *C.I.T. 1941 I.T.R. 1.*

Where predecessor cannot be found or tax cannot be recovered from him.–Sub-section (2) and (3): These sub-sections lay down two exceptions to the general principle that the successor is not liable to tax in respect of the income of the period prior to the date of succession. If the predecessor cannot be found *assessment* can be made on the successor, and if the tax assessed on the predecessor cannot be recovered from him *recovery* of the tax can be made from the successor, in respect of the income of the year in which the succession took place up to the date of succession and of the year or years preceding that year. It is only in these two cases and only in respect of the income of the year of succession and of the preceding income year or years of succession, that the successor can be held liable for the tax which is primarily chargeable on the predecessor. Further, the successor is assessable only in respect of the income of the predecessor from the business in which the succession has taken place. In respect of the tax for which the predecessor is primarily liable, even reassessment proceedings under s. 93 may be taken against the successor within the limits laid down by sub-s. (2) *(C.I.T.* v. *Express Newspapers Ltd. [1960] 40 I.T.R. 38)*. In a Calcutta case where reassessment proceedings were taken against the successor after 1939 but they related to income which should have been charged in an assessment year prior to 1939, s. 26(2) of the 1922 Act as it stood before its amendment in 1939 was held to govern the liability of the successor in those proceedings–*Krishna Hydraulic Press Ltd.* v. *C.I.T. 1943 I.T.R. 504*. Any tax paid by

the successor in discharge of his vicarious liability under sub-s. (3) may be recovered by him from his predecessor in interest.

It has been noted above that sub-s. (2) authorises an assessment on the successor in respect of the income of the predecessor when the predecessor "cannot be found". An assessment cannot be made on the successor under that sub-section when the predecessor is alive and his whereabouts are known or can be ascertained–*C.I.T.* v. *National Cycle Importing Co. 1941 I.T.R. 502.* It would be incorrect to say that a firm which has been dissolved "cannot be found" when its partners are alive and their whereabouts are known–*Ibid.* But a company which has ceased to exist and is struck off the register of companies is one which "cannot be found" – *C.I.T.* v. *Express Newspapers Ltd. [1960] 40 I.T.R. 38. 59.*

Unlike the old s. 26(2), sub-s. (3) requires the Deputy Commissioner of Taxes to record a finding that the tax assessed on the predecessor cannot be recovered from him, before seeking to recover such tax from the successor. Whereas the old s. 26(2) referred to "the tax", sub-s. (3) refers to 'any sum". However, having regard to the collocation of the words "any sum payable under this section *in respect of the income ... assessed* on the predecessor", it seems that only tax and not penalty, fine or interest levied on the predecessor would be payable by the successor.

The successor against whom an order of assessment or recovery is made under sub-s. (2) or (3) respectively, has a right of appeal.

Carry–forward of predecessor's losses.–The successor cannot claim to carry forward and set off the losses incurred by his predecessor – *United Steel Cos. Ltd.* v. *Cullington 23 T.C. 91 (H.L.), 1941 I.T.R. Suppl. 20.* He has no right to carry forward the unabsorbed depreciation allowance of the years prior to his succession to the business – *Indian Iron & Steel Co. Ltd.* v. *C.I.T. 1943 I.T.R. 328 (P.C.).* Nor can the predecessor carry forward his loss, because the right of carry-forward is conditional upon the continuance of the business in which the loss was incurred (s. 38). Sec. 42(5) expressly deals with the question of carry-forward and set-off of losses in cases of change in the constitution of a firm or succession to a business (See notes to that section). The only exceptional case where that section allows the successor to carry forward losses incurred by his predecessor is where the succession is by inheritance (s. 42(4)).

Succession

It will be convenient to note here in one place the cases dealing with succession, including succession on death, although, as stated above, this section should be construed as being inapplicable to cases of succession on death (*See ante "Succession to business otherwise than on death*).

In the words of Madhavan Nair, Offg. C.J., in *Jupudi Kesava Rao* v. *C.I.T. (1935 I.T.R. 339, 343)*, the word "succession" "connotes a transfer of ownership and the person who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in 'such capacity', that is, the capacity as owner." Succession may be by

transfer *inter vivos*, or by inheritance or devolution on the death of the owner – *Dubash's Executors* v. *C.I.T. [1951] 19 I.T.R. 182 (S.C. of India)*, or by acquisition where the whole property and undertaking of the trader vests in the Government – *Bramford's Road TRansport Ltd.* v. *Evans 35 T.C. 145*. The simplest case of succession is the transfer by one trader to another of the business along with the goodwill, *i.e.*, the right to that benefit which arises from connection and reputation – *Thomson & Balfour* v. *Le Page 8 T.C. 541, 548*.

The person succeeding need not be a *beneficial* owner. As the Supreme Court of India laid down in – *Dubash's Executors* v. *C.I.T. ([1951] 19 I.T.R. 182, 186-7)*, succession takes place where an executor succeeds to the estate of the testator and carries on the business in his capacity as the representative of the estate, or where a trustee acquires and carries on business on behalf of beneficiaries.

It is well established that where there is a change of ownership, *e.g.* where the business devolves on an heir or is transferred to a purchaser, it is a case of succession and not discontinuance – *I.T. Appellate Tribunal* v. *Bachraj Nathani 1946 I.T.R. 191, 203*. Thus in cases where–

(a) an individual owning a business transfers it to a company –*C.I.T.* v. *Naraindas & Co. 1939 I.T.R. 305 (firm transferring its business to a company)*, or a partnership is converted into a limited company – *C.I.T.* v. *A.W. Figgies & Co. [1953] 24 I.T.R. 405 (S.C. of India)*,

(b) a company acquires the business of another company – *Bell* v. *National Provincial Bank of England Ltd. 5 T.C. 1 (C.A.)*, or a parent company absorbs its subsidiary company – *Briton Ferry Steel Co. Ltd.* v. *Barry 1941 I.T.R. Suppl. 122, 23 T.C. 414 (C.A.)*, or a company goes into voluntary liquidation and the liquidators transfer the entire business and undertaking of the company to another company which continues the business – *C.I.T.* v. *Sanjana & Co. Ltd. 2 I.T.C. 110*.

(c) an individual admits partners to a business or professional practice hitherto carried on solely by himself – *Subbaraya Iyer* v. *C.I.T. [1962] 44 I.T.R. 801*.

(d) a partnership is dissolved and one partner or a new firm takes over and continues the business of the partnership – *Satya Narayan Khan* v. *I.T.O. [1962] 46 I.T.R. 920*.

(e) a Hindu undivided family disrupts and the members or some of them continue the family business in partnership – *Meyyappa Chettiar* v. *C.I.T. 1943 I.T.R. 247, approved. C.I.T.* v. *Polson 1945 I.T.R. 384 (P.C.)*, or the family business is allotted on partition to a member of the family who continues the business – *C.I.T.* v. *Saran Singh Ram Singh 1946 I.T.R. 152*, or where without effecting a complete partition the members form themselves into a limited company and the company carries on one of the separate and distinct businesses of the

family – *Ram Rakha Mal & Sons Ltd.* v. *C.I.T. 1937 I.T.R. 137*, or where the business of a partnership between two *kartas* representing their joint families is taken over and continued after partition of both the families by a partnership of the separated members of the two families – *Kshetra Mohan-Sannyasi Charan Sadhukhan* v. *C.E.P.T. [1953] 24 I.T.R. 488 (S.C. of India)*.

there is no discontinuance of the business, generally speaking, but there is succession. However, it would not be a case of succession where the business of a joint family devolves on a coparcener by survivorship under Hindu law while the family remains joint *(Kshetra Mohan-Sannyasi Charan Sadhukhan* v. *C.E.P.T. [1953] 24 I.T.R. 488 (S.C. of India))*.

Date of succession. –As a general rule, succession takes place at the time when the property in the business passes to the person succeeding *(Ranchi Electric Supply Co. Ltd.* v. *C.I.T. 1948 I.T.R. 134)*. However, *de facto* succession may take place on an earlier date, although the contract of sale may be executed and other legal formalities may be completed later on *(Dodd* v. *Jones Bros. Ltd. 15 T.C. 396, 411)*. In *Dubash's Executors* v. *C.I.T.*, where executors carried on the business of the deceased for a certain period in accordance with the directions contained in the will and thereafter sold the business, it was held that succession to the deceased took place on the date of the death.

Requisites of succession.–The requisites of succession are as follows:–

(i) There should be a *change of ownership*.

(ii) The integrity of the business should remain–the *whole* business should devolve upon the successor.

(iii) The identity and continuity of the business should be substantially preserved–the *same* business should be carried on by the person succeeding.

(i) Change of ownership.–There should be a change of ownership, *e.g.* by a transfer *inter vivos* or by inheritance. Cases of change of ownership, of transfer and inheritance, have been dealt with *ante* under "Succession". In a case where there is no transfer of ownership, *e.g.* where a receiver is appointed, there is no succession *(I.R.* v. *Thompson 20 T.C. 422)*. If there is only an agreement to transfer, it would not be regarded as involving a succession *(Bhagavandas Harikishandas* v. *C.I.T. 1938 I.T.R. 176. See also Ranchi Electric Supply Co. Ltd.* v. *C.I.T. 1948 I.T.R. 134)*. A sham or fictitious transfer may be disregarded and the transferee may not be recognised as the person succeeding within the meaning of the Ordinance *(Bhagavandas Harikishandas* v. *C.I.T. supra)*.

The old s. 26(2) contained the words "a person carrying on any business, profession or vocation has been succeeded in such capacity by another person". The expression "in such capacity" apparently meant "in the capacity of a person carrying on the business as the owner" *(The meaning of the expression "in such capacity" has been considered in Maharajadhiraj of Darbhanga* v. *C.I.T. 1934 I.T.R. 345, 347*

(P.C.)). According to Patanjali Sastri, J., *(Dubash's Executors* v. *C.I.T. [1951] 19 I.T.R. 182, 189 (S.C. of India))*, the expression meant "noting more than the capacity of a person who carries on the business as the predecessor was carrying it on, that is with a liability to be taxed on its profits and gains". This section does not use the words "in such capacity", but instead refers to the successor "who continues to carry on that business". The change of wording has made no material difference. That the successor should carry on the business is implicit and necessarily involved in the concept of succession. See below under "Identity and continuity of business: Same business should be carried on by successor".

(ii) Integrity of business: Succession to the whole business–Separate business. –Succession necessarily implies devolution of the business *as a whole:* there can be no succession unless the business retains its integrity despite the change of ownership *(I.T. Appellate Tribunal* v. *Bachraj Nathani 1946 I.T.R. 191, 203-4)*. Page, C.J., said in *C.I.T.* v. *N.N.Firm (1934 I.T.R. 85, 87-8)*, "In order that a person should be held to have 'succeeded' to another person in carrying on a business, profession or vocation, it is necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole. Where a business is split up and thereafter another person carries on part of the business ... he does not succeed his predecessor in carrying on the business."

But the fact that the person succeeded retains some of the assets or liabilities of the business *(Chambers* v. *C.I.T. [1963] 47 I.T.R. 80)*, or that the person succeeding does not take over the vendor's selling organization and book debts *(Malayalam Plantations Ltd.* v. *Clark 19 T.C. 314)* or one of the branches of the business *(Jittanram Nirmalram* v. *C.I.T. [1953] 23 I.T.R. 288)* or that new capital is brought in by the person succeeding *(Hassan Ganpatrai* v. *C.I.T. [1953] 23 I.T.R. 314, 322)*, would not necessarily destroy or impair the integrity or identity of the business so as to negative the idea of a succession. Ramaswami, J., said, "... it is not essential in every case that the successor firm should have mathematically the same extent of business as the predecessor firm or that it should have taken over the same extent of trade or the same line or set of customers, as belonging to the predecessor firm, nor does it mean that the successor firm should have taken over all the assets and liabilities of the predecessor firm. In my opinion it is sufficient if there is substantial identity and similarity in the nature and extent of the activities carried on between the two firms, and if the major portion of the liabilities and assets have been taken over by the new firm from the old partnership" *(Kaniram Ganpatrai* v. *C.I.T. [1953] 23 I.T.R. 314, 322)*.

In determining whether there has been succession to the whole business, it is necessary to consider all the concerns or shops or branches belonging to the original owner. If the businesses carried on by the same owner constitute separate and distinct businesses, the person acquiring one of them succeeds to the business within the meaning of this section, for he takes over the *whole separate business (Ram Rakha Mal & Sons Ltd.* v. *C.I.T. 193 I.T.R. 13 (succession by a limited company to one of the separate businesses of a joint family which had not completely disrupted)*. If on the other hand the original owner was carrying on a number of branches in different

places of one and the same business, the person acquiring one of the branches would not succeed to the business, for he does not take over the whole of the single business *(C.I.T. v. A.L.V.R.P. firm 1940 I.T.R. 531, 542)*. The case-law on the question whether various concerns constitute one and the same business or separate and distinct businesses has been discussed at length under s. 38.

(iii) Identity and continuity of business: Same business should be carried on by successor.– Succession occurs only where the same business is carried on by a different person. There is no succession where a business terminates and a different though similar business is carried on by another person or by a newly constituted firm *(Industrial Development & Investments Co. Ltd. v. C.E.P.T. [1957] 31 I.T.R. 688)*. Succession presupposes the preservation in substance of the identity and continuity of the business. If goodwill is sold along with other assets, that would be an important factor in determining whether the case is one of succession *(Ibid.)*.

Where the purchaser does not acquire the business but only some of the assets of the business, there would be no succession *(Reynolds Sons & Co. Ltd. v. Ogston 15 T.C. 501 (C.A.))*, even if the purchaser employs the servants of the previous owner of the business and proceeds to carry on a business similar to that of the previous owner on the same premises *(Kannappa Naicker & Co. v. C.I.T. 1957 I.T.R. 49, where the old business was held to be discontinued and a similar business started on the same premises was held to be a different business)*. If a person merely gives up an agency and that is given to another, there would be no succession to a business *(Tolaram Ramdas v. C.I.T. 1957 I.T.R. 680)*; but if an agency business is sold as a going concern, there would be continuity and identity and the purchaser would be regarded as the successor in business *(C.I.T. v. Naraindas & Co. 1939 I.T.R. 305)*.

"Where there is no continuity in carrying on the business and when one business has come to an end and after a time another business is started, it may be with the same assets and under the same conditions and in the same premises as the old business, the persons carrying on the new business do not 'succeed' those who had carried on the old business ..." *(Per Page, c.J., C.I.T. v. N.N. Firm 1934 I.T.R.)*. But this is not an invariable principle of universal application. Delay or gap between the former business and the business which is supposed to have succeeded to it does not necessarily militate against the idea of a succession. The delay or gap is a question of degree, and in some cases it may only mean a cesser of profit-making operations and not a real cessation of the business at all: the real test is whether the identity of the business has been maintained or not *(C.I.T. v. Naraindas & Co. 1939 I.T.R. 305)*.

The fact that upon the dissolution of a firm, a new firm comprising all or some of the partners of the dissolved firm carries on a similar business on the same premises, would not mean that the new firm has succeeded to the dissolved firm, if the continuity and identity of the business is not preserved *(Hari Ram Gupinath v. C.I.T. 1944 I.T.R. 367)*.

Change in constitution of firm–distinguished from succession.–Secs. 86 and 87 expressly deal with change in the constitution of a firm, and succession to one

firm by another firm, respectively. They provide that in order to constitute a change in the constitution, at least one of the partners should continue in the firm. If all the old partners go out and a set of all new partners comes in, or if the partnership is dissolved and some of the partners take over and carry on the same business, it would be a case of succession to the old firm by a new firm and not merely of a change in the constitution of the firm, and separate assessments would have to be made under this section on the predecessor firm and the successor firm. See notes to ss. 86 and 87.

Sec. 89: Assessment in case of discontinued business.–(1) Without prejudice to the provision of section 87, where any business or profession is discontinued in any financial year, and assessment may be made in that year, notwithstanding anything contained in section 16, on the basis of the total income of the period between the end of the income year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income year.

(2) Any person discontinuing any business or profession in any financial year shall give to the Deputy Commissioner of Taxes a notice of such discontinuance within fifteen days thereof; and such notice shall be accompanied by a return of total income in respect of the period between the end of the income year and the date of such discontinuance and that financial year shall be deemed to be the assessment year in respect of the income of the said period.

(3) Where, a person fails to give the notice required by sub-section (2), the Deputy Commissioner of Taxes may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income from the business or profession up to the date of its discontinuance.

(4) Where, an assessment is to be made under sub-section (1), the Deputy Commissioner of Taxes may serve–

(a) on the person whose income is to be assessed;

(b) in the case of a firm, on the person who was a partner of the firm at the time of discontinuance of the business or profession; and

(c) in the case of a company, on the principal officer of the company;

a notice to furnish within such time, not being less than seven days, a return of his total income giving such particulars and information as are required to be furnished with a return to be filed under section 75 along with such other particulars, records and documents as may be specified in the notice.

(5) The provisions of this Ordinance shall, so far as may be, apply to a notice under sub-section (4) for the purpose of assessment of tax as if it were a notice under section 77.

Sec. 89: Assessment in case of discontinued business.–Sec. 91, s. 105 and this section constitute exceptions to the general rule that the subject of charge under this Ordinance is the income of the income year and not the income of the assessment year *(See under s. 16(1). "Tax is on income of the income year).* In the case of any business or profession which is discontinued in any assessment year, the Deputy Commissioner of Taxes may, in his discretion, make an assessment under this section in the year of discontinuance on the income of the period between the end of the income year relevant to that assessment year and the date of such discontinuance, in addition to the assessment, if any, made on the income of the income year. As the Supreme Court of India said in *C.I.T. v. Srinivasan & Gopalan*, this section gives the Deputy Commissioner of Taxes "an option to make a premature assessment on the profits earned up to the date of discontinuance in the year of discontinuance itself instead of in the usual financial year". The observation as made in this case was "the words of section 25(1) (corresponding to sec. 89) do not empower the Income-tax Officer to make a cumulative assessment in respect of profits earned in two different accounting periods or entitle him to merge the profits of two years is to one total sum and apply to them the rate of one of the financial years. All that the section authorises the Income-tax Officer to do is that it gives him an option to make a premature assessment on the profits earned upto the date of discontinuance itself instead of the usual financial year. This assessment he is entitled to make in addition to the normal assessment for the financial year of discontinuance. Sec. 25(1) imposes a liability of premature assessment on the assessee. The assessment on the profits of the said period and the assessment on the profits of the income year should be separate and distinct *(C.I.T. v. Srinivasan & Gopalan [1953] 23 I.T.R. 87 97 (S.C.))*. This section applies only to cases of discontinuance of business and not to cases of succession *(C.I.T. v. The Hindu 1950 I.T.R. 237, 252, on appeal, C.I.T. v. Srinivasan & Gopalan [1953] 23 I.T.R. 87 (S.C. of India))*.

"Any person discontinuing any business, profession or vocation is under an obligation to give to the Deputy Commissioner of Taxes notice of such discontinuance within fifteen days thereof" (sub-s. 2), "and default in giving such notice attracts penalty" under sub-section 3.

There is no repugnancy, inconsistency or conflict between any of the provisions of s. 88 (succession), s. 90 (partition of a Hindu undivided family) and this section. Each section deals with a different set of circumstances.

"Discontinuance".–The words "discontinued" and "discontinuance" in this section do not cover mere change of ownership or a change in the constitution of the firm, but refer to a complete cessation of business *(Meyyappa Chettiar v. C.I.T. 1943 I.T.R. 247; C.I.T. v. A.W. Figgies & Co. [1953] 24 I.T.R. 405 (S.C. of India))*. Change of ownership may involve succession as explained in notes to s. 88 above. The business must be regarded as being continued despite the successive changes of

ownership *(City of London I.T. comrs.* v. *Giggs 24 T.C. 221, 239 (H.L.), 1942 I.T.R. Suppl. 121, 125)*. Thus where there is succession there cannot be discontinuance, for the two are mutually exclusive concepts *(Kaniram Ganpatrai* v. *C.I.T. [1953] 23 I.T.R. 314, 325)*. The facts of the case are that the assessee firm, consisting of two partners I and M, was carrying on business and was assessed under the Income-tax Act, 1918. The income year of the firm was the period 8th November, 1942 to 27th October, 1943. On 27th October, 1943 M. retired from the partnership. On the next day, a new partnership composed of I. and R. was formed. The stock-in-trade and most of the book debts and liabilities of the assessee firm were transferred to the new firm who continued to carry on the same business under different name. Held, that there was no discontinuance of the business within the meaning of section 25(3) but there was succession to the assessee firm under sec. 25(4). It is sufficient if there is substantial identity and similarity in the nature of business activities between the two firms and if the major portion of liabilities and assets have been taken over by the new firm from the old firm. Cases of change of ownership are dealt with under s. 88, "Succession".

Where a commercial asset, susceptible of being put to a variety of different uses in which gain might be acquired, is put to a different use, that would not involve the discontinuance of the old business and the setting up of a new one *(Sutherland* v. *I.R. 12 T.C. 63)*. If a part of the assessee's business becomes unprofitable and is dropped, either permanently or for the time being, that would not mean discontinuance of the business or undertaking *(Highland Rly. Co.* v. *Special Comrs. 2 T.C. 151)*. Inactivity in trade does not imply discontinuance of business *(Ghanshyam Das Gangadhar* v. *C.I.T. [1951] 19 I.T.R. 349)*. A concern may be a going concern though a very quiet and dormant one. (See under s. 28, "Business may be passive or dormant.–Periods of lull and inactivity"). Even if a company passes a resolution that it will undertake no further business, the Department may hold that the resolution is colourable and that the company has not discontinued its business *(Gladstone Development Co. Ltd.* v. *Strick 30 T.C. 131)*. The trade may be continued even after a company has gone into liquidation or after the dissolution of a firm or other business concern. (See under s. 28, "Business carried on in the course of administration, or winding up or liquidating a concern").

It is a case of discontinuance and not succession where the managing agents of a company give up the managing agency and new managing agents are directly appointed by the managed company under a fresh agreement *(Ramgopal Ganpatrai & Sons Ltd.* v. *C.E.P.T. [1953] 24 I.T.R. 362)*. The amalgamation of two separate and independent business belonging to different owners may result in the discontinuance of those businesses and the creation of a new business *(George Humphries & Co.* v. *Cook 19 T.C. 121)*. When a firm is dissolved, its business may, on the facts of a given case, be held to be discontinued, even if a new firm having for its partners all or some of the members of the dissolved firm starts carrying on a similar business on the same premises *(Kannappa Naicker & Co.* v. *C.I.T. 1937 I.T.R. 49)*. The Madras High Court has held that where the business of a joint family or firm is split up on partition or dissolution, and portions or branches of the business are divided among the members, there is a discontinuance of the old business, even if the members carry on their

business in the same premises and avail themselves of the old business connections *(Annamalai Chettair* v. *C.I.T. [1951] 20 I.T.R. 238)*. The view taken by the Madras High Court is correct, because in such a case the assessee, *viz.* the joint family or the firm, ceases to carry on the business, and there is no succession since the integrity of the business is not preserved. (See under s. 88, "Integrity of business: Succession to the whole business".

Discontinuance of professional practice.–A firm may discontinue its profession though its partners may remain in the profession, and similarly a partner may discontinue his profession though the firm may carry on the same. The Calcutta High court held in *C.I.T.* v. *Mandal (1949 I.T.R. 591)* that when a professional man, *e.g.* a solicitor, joins a firm, he does not cease to carry on his profession, and when he retires from the firm and ceases to practise there would be discontinuance of his profession even though the firm in which he was a partner might continue to function after his retirement with or without new partners. Likewise, in *Motichand & Devidas*, In re *[1946 I.T.R. 534)*, it was held that where a firm is dissolved by the death of a partner, the firm may be held to have discontinued its profession even if the remaining partners form a new firm and carry on their profession; and that the business of the old firm may be held to have been discontinued even if the new firm carries on its business under the same name and on the same premises as the old firm, provided the new firm does not take over the business of the dissolved firm as a going concern.

If a man merely suspends his practice, –*e.g.* during the period of imprisonment,–he cannot be said to have discontinued it. Whether a man discontinues his practice or merely suspends it, depends very largely upon the state of his mind and that is to a very large extent, if not altogether, a question of fact. There need not be a complete cessation of the profession for the rest of a man's life in order to constitute discontinuance: an assessee may be held to have discontinued his professional practice at a particular point of time even if he is found to have returned to it later *(C.I.T.* v. *Sarat Chandra Bose 1950 I.T.R. 669)*. An advocate discontinues his profession when he is elevated to the Bench *(In re Mr. Justice Iqbal ahmad 1942 I.T.R. 152; Hillerns & Fowler* v. *Murray 17 T.C. 77, 89. But not when he becomes a Q.C.: Seldon* v. *Croom-Johnson 16 T.C. 740)*.

Receipts after discontinuance of profession.–Sec, 19(6): This subsection provides that any sum received after the discontinuance of a profession is deemed to be income and is chargeable to tax in the year of receipt, if the sum would have been chargeable as income had it been received before such discontinuance. This sub-section applies to business or profession. It constitutes an exception to the rule that business or professional receipts would be chargeable only if the profession is carried on in the year of account. (See *ante* under s. 28, "Business should have been 'carried on' in the accounting year",). There was no provision in the 1922 Act corresponding to this sub-section.

Sec. 90: Assessment in case of partition of a Hindu undivided family.–(1) A Hindu family hitherto assessed as a Hindu undivided family shall be deemed, for the purposes of this Ordinance, to continue to be a Hindu undivided family except where, and in so far as, a finding of partition has been given under this section in respect of that family.

(2) Where, at the time of an assessment of a Hindu undivided family, it is claimed by any member thereof that a partition has taken place amongst the members of the family, the Deputy Commissioner of Taxes shall make an enquiry there into after giving notice to all the members of the family.

(3) On the completion of the enquiry, the Deputy Commission of Taxes shall record a finding as to whether there has been a partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

(4) In the case of a finding under sub-section (3) that the partition of the undivided family took place after the expiry of the income year, the total income of the income year of the undivided family shall be assessed as if no partition has taken palace; and each member or group of members of the family shall, in addition to any tax for which he or it may be separately liable, be jointly and severally liable for the tax on the income of the family so assessed.

(5) In the case of finding under sub-section (3) that the partition of the undivided family took place during the income year, the total income of the undivided family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and each member or group of members of the family shall, in addition to any tax for which he or it may be separately liable, be jointly and severally liable for the tax on the income of that period as so assesseed.

(6) Notwithstanding anything contained in this section, if the Deputy Commissioner of Taxes finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, the tax shall be recoverable from every person who was a member of the family before the partition; and every such person shall be jointly and severally liable for tax on the income of the family so assessed.

(7) For the purposes of this section, the several liability of any member or group of members of a Hindu undivided family shall be

computed according to the portion of the property of the undivided family allotted to him or it at the partition.

(8) The provisions of this section shall, so far as may be, apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of the partition of a Hindu undivided family as they apply in relation to levy and collection of tax in respect of any such period.

Assessment after partition of a Hindu undivided family–Sec. 90: Scope and scheme of the section. –This section is a machinery section and not a charging section *(Waman Sanwappa Kalghatgi* v. *C.I.T. 1946 I.T.R. 116, 125, 128)*. The corresponding provision in s. 25A of the 1922 Act was enacted to meet the difficulty of levying and collecting the tax in cases where a Hindu undivided family had received income in the year of account but was no longer in existence as such at the time of assessment *(Lakhmichand Baijnath* v. *C.I.T. [1959] 35 I.T.R. 416, 422 (S.C. of India)*. Whereas the old s. 25A applied only to cases where there was a total partition of the joint family, this section applies to cases of both total partition and partial partition, *i.e.*, partial either as regards the persons constituting the joint family or as regards the properties belonging to the joint family or both. The section provides that the total income of the joint family in respect of the period upto the date of partition should be assessed as if no partition had taken place and the members should be held jointly and severally liable for the tax assessed on the family, the several liability of any member or group of members being computed according to the portion of the joint family property allotted to him or it at the partition.

Sub-sec.(1). Disrupted Hindu family deemed to be undivided. –This section deals with two distinct and different situations–

(a) the case where a Hindu undivided family undergoes total partition and ceases to exist as an undivided family, and

(b) the case where a Hindu undivided family continues to exist as an undivided family, but only some property is divided by way of partial partition among the members or some member separates from the undivided family.

Sub-sec. (1) of this section deems the family "to continue to be a Hindu undivided family" in the absence of a finding under this section to the contrary. But it contains no words to deal with the second case where the family continues to exist as a Hindu undivided family in reality and there is only a partition as regards some member or some family property or both. In such a case no purpose would be served by invoking the fiction in sub-s. (1) that the family is "deemed ... to continue to be a Hindu undivided family", for in fact it would so continue. To deal with such a case what is needed are words to indicate that the partial partition should be deemed not to have taken place–*i.e.*, the property or source of income should be deemed to continue to belong to the Hindu undivided family or the member should be deemed not to have separated–in the absence of a finding of partial partition under this section. If the

intention of the legislature was that income which no longer belongs to a continuing Hindu undivided family should be deemed to belong to it and be assessable in its hands in the absence of a finding under this section of partial partition, the legislature seems to have missed fire. To seek to effectuate any such supposed intention of the legislature by construing the words of sub-s. (1) to mean that the family is deemed to continue to be a Hindu undivided family *in relation to* a particular property or source of income "except where and in so far as a finding" of partial partition is given under this section, would be to put an undue strain on the words which are in the sub-section and to introduce other words which are not there.

As regards cases of complete partition, the position is clear: once a Hindu undivided family is assessed as such, it would continue to be so assessed even after it has disrupted and has ceased to exist unless a finding is given under this section recording the total partition. Therefore, where a joint family has come to an end in law, if a physical division of the family property, though possible, has not been effected and consequently no finding is given under this section, the family would be deemed, for the purposes of this Ordinance, to continue to be a joint family and would continue to be charged as a unit of assessment *(Sir Sundar Singh Majithia* v. *C.I.T. 1942 I.T.R. 457, 465 (P.C.))*. Even where there has been a total partition and a physical division of the family properties, if no claim of partition is made by any of the members at the time of making the assessment or though a claim is made, no finding is given recording the partition, the family should be deemed, for the purposes of this Ordinance, to continue to be a Hindu undivided family *(Kalwa Devadattam* v. *Union of India [1963] 49 I.T.R. (S.C. of India) 165, 173)*.

Sub-secs. (2) and (3). Order recording partition. –The jurisdiction of the Deputy Commissioner of Taxes to make an order under this section recording total or partial partition depends upon the concurrence of the following conditions:–

(a) At the time of making an assessment under s. 83 or 84 a claim should be made by or on behalf of any member of a Hindu family that a partition, total or partial, has taken place among the members.

(b) The family should hitherto have been assessed as undivided.

(c) The Deputy Commissioner of Taxes should make inquiry into the matter and he is further bound to give notice of the inquiry to all the members of the family.

(d) The Deputy Commissioner of Taxes should be satisfied that the joint family property has been partitioned among the various members or groups of members by physical division.

Unlike the 1922 Act, this Ordinance enjoins the Income-tax Officer to record the date on which the partition has taken place.

Once a total partition is effected and an order is passed under this section, a joint family constituted by some of the members of the disrupted joint family would be a different assessable entity *(Arunachala Nadar* v. *E.E.P.T. [1957] 32 I.T.R. 222 affirmed, [1962] 44 I.T.R. 352 (S.C. of India))*.

"At the time of making an assessment".–"At the time of making an assessment under section 83 or section 84 means in the course of the process of assessment under that section. The expression is not restricted to the time of making the final order determining the tax payable *(Maharajadhiraj of Darbhanga* v. *C.I.T. 1934 I.T.R. 345, 349 (P.C.))*. The plea of partition must be raised before the Deputy Commissioner of Taxes at the time of the assessment proceedings: it cannot be raised for the first time on an appeal against the assessment *(Biradhmal Lodha* v. *C.I.T. 1934 I.T.R. 164)*. It is not necessary that a partition should have been effected during the relevant accounting year. At the time of making an assessment, a member of a family hitherto assessed as undivided may put forward a claim in respect of a partition effected prior to or after the close of *(Rajmal Paharchand* v. *C.I.T. 1950 I.T.R. 1)*, the relevant accounting year, and the Deputy Commissioner of Taxes would be bound to inquire into such a partition and make or refuse to make an order in accordance with the provisions of this section.

"Family hitherto assessed as undivided".–This section has no application to the case of a Hindu family which has never been assessed before as a joint family, *i.e.* as a unit of assessment. Once an order is made under this section recording the partition, the family would thereafter cease to answer the description of "a Hindu family hitherto assessed as undivided", and therefore this section cannot be invoked again (apart from cases of re-union) in a subsequent year after an order has been made under this section. Thus the section exhausts itself in the first assessment after the claim of partition is made and upheld. However, if the Deputy Commissioner of Taxes is not satisfied regarding the factum of the alleged partition and refuses to make an order under this section, that would not preclude a member from repeating in a subsequent year his claim that there has been a partition.

Assessee wrongly assessed in the past as joint family or property wrongly assessed as joint family property.–The doctrine of *res judicata* and estoppel does not apply to income-tax proceedings and therefore it is open to the assessee to contend that certain properties and the income therefrom, which were treated in past years as belonging to the joint family, belong in fact to an individual member, and therefore the income should be assessed in the hands of the individual member *(Baij Nath* v. *C.I.T. [1954] 26 I.T.R. 324)*.

Where an assessee has been wrongly assessed in the past in the status of a Hindu undivided family, he is entitled to claim in a subsequent year that he should be assessed as an individual, but in such a case an application under this section for recording a "partition" would be misconceived. The Allahabad High Court held in *Baij Nath* v. *C.I.T. ([1954] 26 I.T.R. 324)* that this section does not apply to a case where an assessee claims that he has never been a member of a joint family and therefore there is no question of any partition, or that he has become the sole survivor of a Hindu undivided family and the property which had once belonged to the joint family has become his exclusive property.

Physical division of family properties.–Under the Hindu law partition may be either notional or reflected in the physical division of the family properties. But in order to secure a finding under this Ordinance it is not enough that the joint family

has come to an end; it is necessary to prove a partition by metes and bounds, or a physical division of the joint family properties, wherever possible. This principle also applied under s. 25A of the 1922 Act which required the partition of family properties to be "in definite portions".

A mere division in interest or a mere change of the coparcenary to a tenancy-in-common by a severance of the joint status is not enough *(Gordhandas Mangaldas* v. *C.I.T. 1943 I.T.R. 183)*. According to the Dayabhaga law, unlike the Mitakshara law, the members of a joint family always have definite and ascertained shares in the family property. This section is as applicable to Hindu families under the Dayabhaga system as to those under the Mitakshara system. Partition of the family property is defined to mean physical division and not mere division in interest, because division in interest always exists, even before partition, in the case of families governed by the Dayabhaga law and this section would have no effect at all on families under the Dayabhaga system unless it requires a physical division of the property into definite portions. Thus where the members of a joint family put an end to their joint status by an express declaration of their intention to separate but the immovable properties belonging to the family are not divided by metes and bounds, or where there is a mere reference to arbitration with a view to procuring a partition of the family property, or where only a preliminary decree is passed in a partition suit appointing commissioners or receivers to effect an actual partition by metes and bounds, the family property cannot be regarded as partitioned within the meaning of this section.

However, the expression "partition" must be construed with regard to the nature of the property concerned. A business cannot be physically divided into parts in the same manner as a piece of land; division may be possible only in the books of the business, *i.e.*, by making appropriate entries in the books of account; and in such special cases, having regard to the nature of the property, a partition may be recognised under this section even if there is not, and cannot be, a physical division of the property *(Bansidhar Dhandhania* v. *C.I.T. 1944 I.T.R. 126, 142)*. Whereas in the case of property which admits of a physical division, a physical division of merely the income is not enough; where the property does not admit of a physical division partition means such division as the property admits of, and in such a case even a physical division of the income may be enough. For instance, a share in a firm in which the karta is a partner representing the family, may be effectively partitioned by dividing the income *(Charandas Haridas* v. *C.I.T. [1960] 39 I.T.R. 202 (S.C.))*. If the shares of a company belong to a joint family but stand in different lots in the individual name of each of the members of the family, and if on partition of the family each member takes the shares standing in his own name, needles to say, the shares are "partitioned" within the meaning of this section.

If the property has been physically divided in definite portions, the Deputy Commissioner of Taxes cannot refuse to recognise the partition merely because the shares allotted to the various members are not in accordance with the parties' legal rights *(Sir Sundar Singh Majithia* v. *C.I.T. 1942 I.T.R. 457, 463 (P.C.))*.

Total partition means completed partition of entire family property.–Total partition under this section means completed partition of the *entire* family property, even of the properties which are not the source of any assessable income. If some assets are divided while other substantial assets are left for division at a future date, it would be a case of partial partition *(Meyyappa Chettiar* v. *C.I.T., ibid.)*. But the Orissa High Court held that "where the entire joint family has, in fact, become disrupted in status and where the properties of the family have been partitioned between the members thereof in definite portions, the assessee would be entitled to an order under section 25A(1) of the 1922 Act, recording total partition, notwithstanding that some items of the family property which are comparatively small in proportion to the entire family assets and which produce only a substantially small income in relation to the total income of the family properties, are kept undivided for solid and substantial reasons whether of practicability convenience or reasonable sentiment not affecting the general *bona fide* intention of becoming completely separated units for all purposes" *(Rangalal Modi* v. *C.I.T. 1950 I.T.R. 383, 395)*. In such a case where assets producing some income are not physically divided for any reason although a physical division is possible, the finding under this section may be of partial partition and not total partition.

Property divided among members by way of partial partition.–Although an order under s. 25A of the 1922 Act could be passed only upon total partition, by physical division wherever possible, of the entire family property, it was held under that Act that income from properties which were actually divided among the members by way of partial partition could not be taxed as the income of the family. This section simplifies the position by providing for the making of an order recording a partial partition in cases where some of the family properties are divided among the members.

Where a joint family has *disrupted* but only some properties have been partitioned by physical division and the others not, it is only the income arising from the undivided properties that is assessable as the income of the joint family *(Meyyappa Chettiar* v. *C.I.T. 1950 I.T.R. 586)*. Likewise where the members of a joint family, while *remaining joint*, partition some of the properties among themselves, this section would apply, and the income from such properties would be regarded as the income of the individual members to whom the properties are allotted. The Supreme Court of India laid down in *Charandas Haridas* v. *C.I.T. ([1960] 39 I.T.R. 202. See also C.I.T.* v. *Ramakrishnier [1963] 49 I.T.R. 608)* that where a share in a firm in which the *karta* was a partner representing the family, is partitioned, the joint family cannot thereafter be assessed in respect of the share of income from the firm. The Privy Council held in *Sir Sundar Singh Majithia* v. *C.I.T. (1942 I.T.R. 457, 464)* that there was nothing in the old s. 25A to prohibit the members of a Hindu undivided family, while remaining joint, from entering into a partnership in respect of a business, being a portion of the joint property, which they had partitioned among themselves; in such a case the income from the business would be assessable as the income of the partnership and would not form part of the joint family income. The joint family "need not have the same assets or the same income in each year and it can part with an item of its property to its individual members if it takes the proper steps".

The joint family may settle its business or other property upon trust under which the members of the family may be beneficiaries, and in that event the trust income may be assessed under s. 161 in the hands of the trustees. Similarly, if the members of a joint family, after the severance of the joint status, divide some of the family properties among themselves while the physical partition of the entire family estate remains to be completed, –for example, if they divide the family businesses among themselves pending the final division of the immovable properties and the businesses are carried on by the members separately for their own benefit–the income from such businesses as from the date of the division would be the individual income of the members and cannot be included in the total income of the family, whereas the income from the other properties which are not partitioned would continue to remain the income of the family *(Meyyappa Chettiar* v. *C.I.T. 1950 I.T.R. 586)*. In such a case the family must be treated and assessed as a joint family till all the assets are finally partitioned and an order recording a total partition is made under this section.

Evidence of partition.–The Deputy Commissioner of Taxes should be satisfied that the family property has been partitioned among the members. He is not bound to accept as correct the recitals in a deed of partition or partnership and may call upon the executants to prove the facts recited therein; he may disbelieve the oral or documentary evidence produced and hold that the alleged partition is a sham or that in any event there has been no partition within the meaning of the Ordinance *(Kalwa Devadattam* v. *Union of India [1963] 49 I.T.R. (S.C.))*. The burden of proving partition is on the assessee *(Nihori Lal Prabhudayal* v. *C.I.T. [1951] 19 I.T.R. 240, 244)*. The act that the partition was effected with the open and avowed object of securing benefit in tax would be immaterial in deciding the factum of partition or the assessee's right to an order under this section *(Sulakhe* v. *C.I.T. [1960] 39 I.T.R. 394)*.

Assessment or reassessment proceedings after disruption of joint family but for pre-partition period.– If after a joint Hindu family has come to an end any portion of its income earned before partition is found to have escaped assessment, a reassessment may be made on the family under section 93 read with this section *(Lakshminarain Bhadani* v. *C.I.T. [1951] 20 I.T.R. 594 (S.C. of India))*. Such action under section 93 may be taken against the family even after an order has already been made under this section in assessment proceedings of another year, accepting the claim of partition. The Supreme Court of India held in *Lakshmnarain Bhadani* v. *C.I.T.* that in such a case where proceedings are initiated under section 93 after an order has been passed under this section recording total partition, but the proceedings are in respect of escaped income which had accrued to the joint family before partition, it is not necessary that the notice under section 93 should be served on every member of the family individually; it is sufficient if the notice under that section is issued in the name of the joint family and served on the karta. The same principle would apply where normal assessment proceedings are taken against the joint family under section 83 or 84 after partition to assess income which had accrued to the family prior to partition. But after making the assessment on the joint family, *i.e.*, after computing the total income of the family and determining the amount of tax payable by the family, the amount of tax should be apportioned among the members of the family according to the portion of the joint family property allotted to each of

them and a notice of demand should be issued against each member for the amount apportioned as payable by him *(Lakshminarain Bhadani* v. *C.I.T. [1951] 20 I.T.R. 594, 596-7 (S.C. of India))*.

Sub-secs. (4) to (7). Members' liability for tax assessed on family. –In every case where an order has been made recording the partition of joint family property among the members or groups of members, the assessment of the total income received by or on behalf of the joint family as such must be made in accordance with the procedure laid down in sub-ss. (4) and (5) which is the same as that under the 1922 Act although the relevant provisions of this Ordinance are differently cast. The procedure is to compute the total income of the joint family up to the date of partition and also determine the tax payable by the joint family as such, as if no partition had taken place and as if the joint family was still in existence, and then to hold each member or group of members liable for a share of the tax determined as payable by the joint family *(Lakshminarain Bhadani* v. *C.I.T. [1951] 20 I.T.R. 594 (S.C. of India))*. The tax assessed as payable by the joint family should be apportioned among the members or groups of members "according to the portion of the joint family property allotted to" each of them; but fresh assessments under section 83 have not to be made on them in respect of the income of the joint family *(Kailash Nath Bhargava* v. *C.I.T. [1962] 46 I.T.R. 928)*. Further, the section makes all the members and groups of members jointly and severally liable for the whole amount of the tax assessed on the total income of the joint family; and it would not be correct to say that it is only on the failure or default of payment by one of the members that the revenue can recover his portion of the tax from the other members *(Lakshminarain Bhadani* v. *C.I.T. [1951] 20 I.T.R. 594 (S.C. of India))*.

Apart from the provisions of this section, the Department can invoke the principle of Hindu law that if a partition takes place after the family had incurred a debt but no provision is made at the time of partition for payment of the debt, the creditor can proceed to recover it from every one of the members to the extent of the family property in his hands.

Discontinuance of or succession to family business. –If the business of the joint family is discontinued, an assessment may be made on the joint family under section 89 on the profits of the year of discontinuance. If there is a succession to the joint family business,–*e.g.* where the members of the family continue the business in partnership–the joint family would be liable under section 88 in respect only of its share of the profits of the year in which the succession occurs, and each member would be liable under this section for a share of the tax so assessed on the family. It is thus clear that there is no repugnancy, inconsistency or conflict between the provisions of ss. 88, 90 and 89 for each section deals with a different set of circumstances.

Sub-sec. (8). Penalty, fine or interest on joint family after disruption.–This sub-section specifically enacts that the provisions of the section apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of total or partial partition, as they apply in relation to the levy and collection of tax. The provisions of s. 25A of the 1922 Act did

not apply to penalty proceedings. However, even under that section it was held that a Hindu family once assessed as undivided was deemed to continue to be a Hindu undivided family for all the purposes of the Act in a case where an order accepting the partition was not passed under that section, and therefore a penalty could be imposed on the family in such a case *(Govardan Hathi Bhai & Co.* v. *I.T.O. [1962] 46 I.T.R. 430).*

Sec. 91: Assessment in case of persons leaving Bangladesh.–(1) Where it appears to the Deputy Commissioner of Taxes that any person may leave Bangladesh during the current financial year or shortly after its expiry and that he has no intention of returning, an assessment may be made in that year, notwithstanding anything contained in section 16, on the basis of the total income of such person–

(a) if he has been previously assessed, for the period from the expiry of the last income year of which income has been assessed to the probable date of his departure from Bangladesh; and

(b) if he has not been previously assessed, of the entire period of his stay in Bangladesh up to the probable date of his departure therefrom.

(2) Assessment under sub-section (1) shall be made–

(a) in respect of each completed income year included in the period referred to in sub-section (1), at the rate at which tax would have been charged had it been fully assessed; and

(b) in respect of the period from the expiry of the last of the completed income years to the probable date of departure, at the rate in force for the financial year in which such assessment is made and that financial year shall be deemed to be the assessment year in respect of the income of the said period.

(3) For the purpose of making an assessment under this section, the Deputy commissioner of Taxes may serve a notice upon the person concerned requiring him to file, within such time, not being less than seven days, as may be specified in the notice, –

(a) a return in the same form and verified in the same manner as a return under section 75 setting forth, along

with such other particulars as may be required by the notice, his total income for each of the completed income years comprised in the relevant period referred to in sub-section (1): and

(b) an estimate of his total income for the period from the expiry of the last of such completed income year to the probable date of his departure from Bangladesh.

(4) All the provisions of this Ordinance shall, so far as may be, apply to the notice under sub-section (3) for purpose of assessment of tax as if it were a notice under section 77.

(5) Nothing in this section shall be deemed to authorise a Deputy Commissioner of Taxes to assess any income which has escaped assessment or has been under assessed or has been assessed at too low a rate or has been the subject of excessive relief under this Ordinance but in respect of which he is debarred from issuing a notice under section 93.

Assessment of persons leaving Bangladesh–Sec. 91: This section provides for assessment in the case of a person who is likely to leave Bangladesh during the current assessment year or shortly after its expiry, without an intention of returning. In such a case the Deputy Commissioner of Taxes may assess him under section 83 in respect of the income of the income year, and under section 93 in respect of the income of earlier years, and the notice calling for a return of income may give him seven days or more to file a return instead of the usual twenty one days. An assessment may also be made under this section in such a case on the estimated income of the current year up to the probable date of the assessee's departure from Bangladesh and even on the income of the period beyond the expiry of the assessment year if the probable date of the assessee's departure from Bangladesh is after the expiry of the assessment year. The scheme of the Ordinance is to charge the income of the year and not the income of the assessment year *(See under section (16(1), "Tax is on income of the income year")*. This section forms an exception to the general principle in that it provides for an assessment of the income of the assessment year itself. The justification for this is the obvious exigency of the situation which calls for prompt recovery of tax before the assessee leaves the country.

A notice calling for a return issued under this section has to be treated for all purposes of the Ordinance as if it were a notice issued under section 77. Thus if the assessee does not make a return in response to the notice, a best judgment assessment must be made under section 84. Non-compliance with the notice would also attract penalty under section 124 and would be an offence punishable under cl. (c) of section 164.

Sub-section (4) lays down that no assessment can be made under this section in any case where income has escaped assessment or has been under assessed or has

been assessed at too low a rate or has been the subject of excessive relief under this ordinance but in respect of which action cannot be taken under section 93. Thus if the income of any year has escaped assessment, i.e. has not been assessed at all, the Deputy Commissioner of Taxes cannot assess it under this section after the period of limitation laid down in sec. 93 has expired. But whereas the provisions as given in other sub-sections empowers the Deputy Commissioner of Taxes only to assess the income of any year if the income has not been assessed at all, it does not empower him to reopen any assessment on the ground that the income has been under assessed or had been assessed at too low a rate or had been subject to excessive relief. Therefore, the provision under this sub-section which restricts the power to reopen assessment, which power is not given at all by the substantive provisions in sub-sections (1) and (2), seems somewhat pointless.

Sec. 92: Assessment in case of income of a deceased person.–(1) Where a person dies, his legal representative shall be liable to pay any tax or other sum payable under this Ordinance which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased: and the legal representative of the deceased shall, for the purposes of this Ordinance, be deemed to be an assessee:

Provided that before deeming the legal representative of the deceased to be an assessee, a notice to that effect shall be issued to him by the Deputy Commissioner of Tax.–

(2) For the purposes of making an assessment of the income of the deceased and recovery of tax, –

(a) any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued from the stage at which it stood on the date of the death of the deceased: and

(b) any proceeding which could have been taken against the deceased, if he had not died, may be taken against the legal representative:

and all the provisions of this Ordinance shall, so far as may be, apply accordingly.

(3) The liability of legal representative under this Ordinance shall be limited to the extent to which the estate of the deceased is capable of meeting the liability.

(4) For the purposes of this section and other provisions of this Ordinance in which the rights, interest and liabilities of the deceased are

involved, "legal representative" includes an executor, an administrator and any person administering the estate of the deceased.

Assessment on income of a deceased person–Sec. 92: Object and Scope of this section.–Section 24 of the income-tax Act 192 (which corresponded to this section) was inserted in that Act in 1933 the object was to set at rest the doubt in regard to the assessability of a deceased person's estate. In the case of *C.I.T. Bombay* v. *Ellis c. Reid (5 I.T.C. 100)* it was held that the definition of assessee in section 2(2) meant a living person and that there was no machinery in the Act for assessing a deceased person's income or to continue proceedings after the death of the assessee. The principle of section 146, C.P.C. which provides for the starting or continuation of the proceedings against the legal representative of a deceased, it was observed, would not apply to Income-tax law. Power, hence, was taken by the introduction of this section to meet the situation *(See also Mitchell* v. *McNeill & Co. (AIR 1927 Cal. 518))*.

The Bombay High Court held in that case that where a person died after the commencement of the assessment year but before his income of the previous year was assessed, his executor was not liable to pay the tax and that if the death occurred while assessment proceedings were pending, the proceedings could not be continued and the assessment could not be made after the person's death *(Mitchell* v. *McNeill & Co. 2 I.T.C. 298)*. With a view to removing the difficulties pointed out in that case, s. 24B (which corresponded to this section) was introduced in the 1922 Act in 1933. That section was held not to be retrospective and not to apply to cases in which death took place prior to the date when that section came into force *(C.I.T.* v. *Mehta 1935 I.T.R. 147. See also Vijaykunrerba Maharani of Morvi* v. *Narayanan [1962] 45 I.T.R. 223)*. Sec. 147 entitles the legal representative to claim a refund due to the deceased.

A Hindu undivided family continues to exist as an assessable unit despite changes in its composition including the change of its karta by death or otherwise, and consequently there is no scope or necessity for invoking this section when a karta dies *(Vidyasagar* v. *I.T.O. [1957] 31 I.T.R. 173)*.

A legal representative assessed under this section is different from a representative assessee to whom s. 95 applies. A legal representative does not fall within any of the categories of representative assessee enumerated in s. 95.

Liability of legal representative of a deceased person–Sub-sec.(1): Under this section the legal representative as defined in section 2(11) of the Civil Procedure Code, is liable to pay out of the estate of the deceased any sum payable by the deceased *(In re Usharani Roy Chondhuraui 1942 I.T.R. 199)*. The term, "legal representative" means a person who, in law, represents the estate of the deceased assessee and would include any person, who intermeddles with the estate of the deceased and where the assessee held a representative character the person on whom he estate devolved by reason of such representation. It has an extended meaning so as o include persons, who claim to be in possession of the estate of the deceased as heir, xecutor or administrator, whatever their real title might be. Where the deceased held representative character, as for instance, as trustee of an institution or shebait of a

mutt, his successor in office would be the legal representative for tax purposes. The expression "dies" in the section would cover civil death also and hence where an assessee becomes an insolvent, his legal representative would be the Official Receiver or Official Assignee in Insolvency on whom the estate devolves. The imposition of tax on the estate being a State demand would have precedence over all other simple debts of the estate, though subject to all secured debts. This liability is subject to two limitations:–

(i) The liability under this section is only in respect of the tax or any other sum which the deceased would have been liable to pay under this Ordinance if he had not died.

(ii) The liability of the legal representative is limited to the extent to which the estate is capable of meeting the liability (sub-sec. 3) – *Banu Asan* v. *I.T.O. [1963] 47 I.T.R. 99).*

The word 'estate' includes income accruing after death from the corpus left by the deceased – *Ram Lakhen* v. *I.T.O [1962] 46 I.T.R. 613).* The liability of the estate would subsist not only where an assessee dies after assessment without paying the tax, but also where he dies before an assessment is made and the tax is determined. This section covers both these contingencies.

The expression "any tax which would have been payable by him under this Act if he had not died" does not mean that if the income accrued and became payable by reason of the death there can be no charge on the executor. Thus, if an employee in a company, were, besides his fixed salary and commission, entitled under the agreement of service to a "terminal sum" payable to him or to his executors upon the final termination of his services from any cause whatsoever, e.g., dismissal or death, any sum payable to the executors under such a contract, would not cease to be subject to tax, though it became payable to the executors by reason of the death of the employee. The sub-section on its true construction is directed to remove the obstacle of death and to substitute as the persons to be charged the executors or administrators of the deceased person, after taking into consideration the facts as have actually happened, namely the receipt of income.

Operation of this section as against section 88: As was pointed out above, this section was inserted to meet the difficulty of assessing the deceased person's estate where he happened to die before the assessment was complete. Such a difficulty would not arise in respect of the source, "business, profession or vocation" to which there can be a succession. If the heirs-at-law were to carry on the business, etc., they would be successors liable to be assessed under section 88. If the executors appointed under the will of the deceased should carry on the business, they would have also "succeeded" to the business. The succession in either case would have taken place on the date of the death of the deceased. Hence where an assessee dies leaving several heads of income including the one under section 28, to which there has been a succession, then, the income under section 28 shall have to be charged separately in the hands of the successor under section 88, while the other heads of income would have to be aggregated and charged in the hands of the executor or administrator or

other legal representative separately under this section. The history of legislation also confirms this procedure. Section 24B only supplemented and did not override sec. 26(2) (corresponding to sec. 88).

Income of deceased till date of death and income of estate after that date.–The Supreme Court of India held in *C.I.T. v. Amarchand Shroff ([1963] 48 I.T.R. (S.C. of India) 59)* that section 24B of the 1922 Act (which corresponded to this section) authorised assessment on the legal representatives in respect of the income of the deceased till the time of his death and also the income received after his death by his legal representatives in the accounting year in which he died, but not in respect of any amount received by the legal representatives after the end of the accounting year in which the death occurred: in other words, there could be no assessment under the old s. 24B in respect of any accounting year subsequent to the year of death.

Facts of the case were: A, who was one of three partners of a firm of attorneys and who was being assessed to income-tax on the cash basis, died on the 7th July, 1949 and his son *'R'* joined the firm as partner on 1st December, 1949. The realisations during the five years subsequent to *A's* death in respect of the work done prior to the 7th July, 1949 were divided between the three original partners and certain sums of money were paid to *A's* estate as his share. The Department sought to assess these amounts as income in respect of the work done by *A*, in the hands of an entity styled "the heirs and legal representatives of the late *A*" and the status of that entity was described to be that of a Hindu undivided family. When the matter came before the Appellate Tribunal the members took divergent views on certain aspects of it but were agreed that the amounts in question could not be assessed as income of "the heirs and legal representatives of the late *A*". Subsequently reassessment proceedings were initiated by the Department under section 34 of the Income-tax Act, in respect of the same amounts, the entity sought to be assessed being styled as "*A* by his legal heirs and representatives" and the status was given to be that of an individual. When the matter came up before the High Court it held that section 24B of the Act did not apply to the case (and that the amounts were not the income of the heirs and they were capital receipts forming part of the estate of the deceased *A*. On appeal by the Department the Supreme Court affirmed the judgement of the High Court. It was held that:–

(i) section 24B did not authorise the levy of tax on receipts by the legal representative of a deceased person in the years of assessment succeeding the year of account being the previous year in which such person died. The assessee under the Act had ordinarily to be a living person and could not be a dead person because his legal personality ceased on his death. By section 24B the legal personality of a deceased assessee was extended for the duration of the entire previous year in the course of which he died and, therefore, the income received by him before his death and that received by his heirs and legal representatives after his death but in that previous year became assessable to income-tax in the relevant assessment year. The section was enacted by the legislature to bring to tax, after his death, income

received during his lifetime, and fill up the lacuna which was pointed out in *Ellis C. Reid* v. *Commissioner of Income-tax [5 I.T.C. 100]*. Any income received in the year subsequent to the previous or the accounting year could not be called income received by the deceased person. The provisions of section 24B did not extend to tax liability of the estate of a deceased person beyond the previous or the account year in which that person died: and

(ii) the amounts received by the legal representatives of *A* could not be taxed in their hands as they could not be said to be income which might be deemed by fiction to have been received by the deceased *A*.

Legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field.

The individual assessee has ordinarily to be a living person and there can be no assessment on a dead person.

Assessment under the Income-tax Act is a charge in respect of the income of the previous year and not a charge in respect of the income of the year of assessment as measured by the income of the previous year. *[C.I.T. Bombay* v. *Amarchand Shroff (1963) 8-Tax-257]*.

In the light of the observation as made by the Supreme Court of India that the assessee under the Ordinance had ordinarily to be a living person and could not be a dead person and because his legal personality ceased on his death but by section 92 the legal personality of a deceased assessee, as observed by that Supreme Court, was extended for the duration of the entire previous year (income year) in the course of which he died and, therefore, the income received by him before his death and that received by his heirs and legal representatives after his death but in that previous year (income year) became assessable to income-tax in the relevant assessment year.

The Bombay High Court in that case also held that the realisation of the amounts in the years subsequent to the year of death of the deceased were not the income of the heirs and they were capital receipts forming part of the estate of the deceased. The provisions of the section do not extend to tax liability of the estate of a deceased person beyond the previous or the account year in which that person died and the amounts received by the legal representatives of the deceased could not be taxed in their hands as they could not be said to be income which might be deemed by fiction to have been received by the deceased. Assessments for the years subsequent to the year of death should be made on the executors till the administration of the estate is completed since legal representative includes an executor, an administrator and any person administering the estate of the deceased (sub-sec. 4).

The Bombay High Court – Nagpur Branch in the case of Trustees and Executors of the late *Shri Shamji Kheta* v. *Income Tax Officer, Nagpur (Circle v) (reported in 1989 BTD XVII)* relying on the decisions of *C.I.T.* v. *James Anderson (1964) 51 I.T.R. 345 (S.C. of India) and C.I.T.* v. *Amarchand N. Shroff (1963) 48 I.T.R. (S.C. of India)* discussed the extent of liability of the legal representative and

held that reassessments of income of deceased in previous years prior to the year in which the deceased died cannot be made in the hands of the legal representatives. It was further held that sec. 24B (corresponded to section 92) did not authorise levy of tax on the income of the deceased person in the year of assessment succeeding the year, being the previous year (income year) in which such person died and the trustees or executors could not be called upon to participate in a proceeding relating to reassessment of the deceased assessee prior to the previous year of death. The section also did not authorise the levy of tax on receipts by the legal representative of a deceased person in the years of assessment succeeding the year of account in which such person died and accordingly the income received by him before his death and that received by his heirs and legal representatives after his death but in that previous year (account year) becomes assessable to income-tax in the relevant assessment year.

Assessment on legal representative. –Proviso to sub-sec. (1) and sub-sec. (2): If at the date of death of the deceased a return of income had not been made under sec. 75 and a notice under sec. 77 or sec. 93, as the case may be, had not been served on him, the Deputy Commissioner of Taxes should first issue the notice under sec. 77 or sec. 93 to the legal representative of the deceased and then proceed to assess the income of the deceased in the hands of the representative as if the representative were the assessee. If there are more legal representatives than one to the knowledge of the Deputy Commissioner of Taxes the notice should be served on all of them *(Alfred* v. *I.T.O. [1957] 32 I.T.R. 401)*. Non-service of notice under the proviso to sec. 92(1) to all the legal representatives shall not render the assessment void abinitio but it cannot be effective against the legal representative who cannot be made liable to pay taxes, rendering the execution of the assessment order ineffective–Taxes Appellate Tribunal, Dhaka Bench *(I.T.A* v. *1109 1110 of 1988-89 & 1989-90) reported in 1997 BTD XXI 3-97 (In that case the assessment was set-aside)*. A notice under sec. 93 addressed to a person who is dead to the knowledge of the Deputy Commissioner of Taxes is invalid and proceedings cannot be taken against the legal representative pursuant to such notice *(Shaikh Abdul Kadar* v. *I.T.O. [1958] 34 I.T.R. 451)*. It is obligatory upon the representative to comply with the notice served on him under sec. 77 or sec. 93. Assessment may be made on the representative under sec. 93 read with this section in respect of income of the deceased which had escaped assessment in the relevant years *(Palmer* v. *Cattermole 21 T.C. 191)*.

In *Maharaja of Patiala* v. *C.I.T.* (1943 I.T.R. 202), Beaumont, C.J., and Kania, J., laid down–(a) that a notice served on the legal representative under this section should state on the face of it that it was issued to that person in his representative capacity and on service of such notice the legal representative becomes the assessee for all purposes under the Ordinance, except, of course, that he is not personally liable for the tax but shall have to pay the sum out of the estate of the deceased; but if this is not done the irregularity would not invalidate the notice if it was in fact served on the legal representative and was understood and acted upon by him as served on him in that character, and (b) that an assessment should be made *on the legal representative* in respect of the income of the deceased, and if an assessment is made on the deceased it would, as a general rule, be a nullity. An assessment made

on "the successors in interest" to the deceased. without specifying the names of the legal representatives. is invalid *(Sahasrangshu Kanta Acharya* v. *Coll. of Malda [1963] 47 I.T.R. 754)*. In case of death of the assessee reference application cannot be filed without substituting his legal representative–*C.I.T.* v. *Laxman Das Bhateya (M.P.) (reported in 1997 BTD XXI 75)*.

Penalty on legal representative.–Sec. 24B of the 1922 Act imposed a liability on the legal representative only in respect of the tax payable by the deceased. and not penalty or any other sum. Therefore penalty proceedings could not be started or continued against the legal representative for any default committed by the deceased *(Cf. Ellis Reid* v. *C.I.T. 5 I.T.C. 100)*. But now penalty proceedings for a default committed by the deceased can be started or continued against the legal representative under this section which applies not only in respect of tax but also any other sum. –penalty. fine or interest. Further. under this Ordinance as under the 1922 Act. the legal representative. being an assessee for the purposes of the Ordinance. is liable to a penalty for his own default. e.g. penalty under sec. 137 for his own default in paying the tax assessed on him or on the deceased *(I.T.O.* v. Alfred [1962] 44 I.T.R. 442 (S.C. of India). or penalty under sec. 128 for having himself concealed income and submitted an incorrect return of the income of the deceased *(Sukumar Mukherjee* v. *C.I.T. [1958] 33 I.T.R. 231)*. A penalty already imposed on the deceased prior to his death may be demanded from the legal representative and collected out of the estate *(Maddula Appa Rao* v. *I.T.O. [1959] 36 I.T.R. 140)*.

Rights and liabilities of legal representative. –Sub-sec. (3) and (4): The liability of the legal representative is "limited to the extent to which the estate is capable of meeting the liability" (sub-sec. 3).

Sec. 93–Assessment in case of income escaping assessment.–(1) If. for any reason. any income chargeable to tax for any assessment year has escaped assessment or has been under assessed or has been assessed at too low a rate or has been the subject of excessive relief or refund under this Ordinance. the Deputy Commissioner of Taxes may issue a notice to the assessee containing all or any of the requirements which may be included in a notice under section 77 and may proceed to assess or determine. by an order in writing. the total income of the assessee or the tax payable by him. as the case may be. and all the provision of this Ordinance shall. so far as may be. apply accordingly:

Provided that the tax shall be charged at the rate or rates applicable to the assessment year for which the assessment is made.

(2) No proceeding under sub-section (1) shall be initiated unless definite information has come into the possession of the Deputy Commissioner of Taxes [and he has obtained] the previous approval of the Inspecting Joint Commissioner in writing to do so, except in a case where a return has not been filed under section 75 or 77.

(3) A notice under sub-section (1) may be issued by the Deputy Commissioner of Taxes,–

(a) in any case in which he has reason to believe that the assessee or any other person on his behalf has not filed a return under section 75 or 77, at any time;

(b) in any case in which he has reason to believe that the assessee has for any assessment year concealed the particulars of his income or furnished inaccurate particulars thereof or omitted or failed to disclose all material facts necessary for the assessment for such year, within [five years] from the end of the assessment year for which the assessment is to be made:

Provided that in a case where a fresh assessment is made for any assessment year in pursuance of an order sections 120, 121, 156 or 159, the period of [five years] referred to in this clause shall commence from the end of the year in which the fresh assessment is made:

(c) in any other case, within two years from the end of the assessment year for which the assessment is to be made.

(4) In computing the period of limitation for the purpose of making an assessment or taking any other proceedings under this Ordinance, the period, if any, for which such assessment or other proceedings has been stayed by any Court, tribunal or any other authority, shall be excluded.

(5) Notwithstanding anything contained in sub-section (3), where an assessment or any order has been annulled, set aside, cancelled or modified, the concerned income tax authority may start the proceedings from the stage next preceding the stage at which such annulment, setting aside, cancellation or modification took place, and nothing contained in this Ordinance shall render necessary the re-issue of any notice which has already been issued or the re-furnishing or refiling of any return, statement or other particulars which has already been furnished or filed, as the case may be.

Income escaping assessment–Sec. 93: Scope.–This section empowers the Deputy Commissioner of Taxes to assess income which escaped assessment in the relevant assessment year. The power to take proceedings under this section is not confined to cases where the assessee had concealed his income; it also extends to

cases where though there was no concealment by the assessee the Deputy Commissioner of Taxes has reason to believe, in consequence of information in his possession, that income has escaped assessment.

The act that an assessment had become "final" in appeal would not preclude the Deputy Commissioner of Taxes from exercising his powers under this section *(In re Haider & Sons 1942 I.T.R. 79)*. But the finality of an order cannot be disturbed unless the requirements of the law are satisfied –*I.T.O. v. Lakhmani Newal Das 103 I.T.R. 437, 448 (S.C. of India)*. Reassessment proceedings may be taken more than once under this section in respect of the same assessee for the same assessment year *(Jagmohan Goenka v. Banerjee [1954] 26 I.T.R. 637)*.

The present sections of reassessment, that is, sections 93 and 94 have taken the place of the old section 34 of 1922 Act. The earlier provisions of the old section 34 had undergone several changes to meet the exigencies of the far reaching effect of the old decisions when applied to questions arising under the provisions of this section.

Retrospective effect of amendments as applicable to the period of limitation under section 34 of the 1922 Act: –The Calcutta High Court held in *I.T.O. v. Calcutta Discount Co. Ltd. ([1953] 23 I.T.R. 471)* that under the new sec. 34 which was substituted in 1948 action could be taken in respect of assessment years prior to 1948-49.

The Supreme Court held by a majority that even an assessment which had become final and in respect of which reassessment proceedings had become time-barred before the new sec. 34 was substituted in 1948, could be re-opened under the substituted section *(C.I.T. v. Janaba Mohammad Hussain Nachiar Ammal [1963] 49 I.T.R. (S.C. of India) 80)*. That Court further held, again by a majority, that an assessment in respect of which action under sec. 34 had already become barred by limitation on the 1st April 1952, from which date the amending Act of 1953 was given retrospective effect, could still be re-opened under the amended section in which the period of limitation was enlarged *(Prashar v. Vasantsen Dwarkadas [1963] 49 I.T.R. (S.C. of India) 1)*. It is submitted, with respect, that these decisions are found incorrect and that the dissenting judgments of S.K. Das and Kapur, JJ., are correct both in enunciation of the principle of construction and in its application to the relevant statutory provisions. "Section 31 of the Indian Income-tax (Amendment) Act 1953 and section 34 as amended in 1948, did not revive the right of the Income-tax Officer to initiate proceedings which had been barred under section 34 before it was amended in 1948"– as observed by S.K. Das and Kapur.

The Supreme Court of India in *Karim Tharuvi Tea Estate Ltd.* v. *State of Kerala* and Punjab and Haryana High Court in the case of *Steel Strips Ltd.* v. *Assistant Commissioner of Income-tax* (reported in 1998 BTD XXV 96) it was observed that before the limitation period prescribed expires, if the same is enlarged, the limitation being a procedural one, the extended period of limitation will apply to such proceedings" *See further ante under "retrospective legislation"*.

Construction of the section. –This section imposes no charge on the subject but deals merely with the machinery of assessment *(Bhimaraj Pannalal* v. *C.I.T. [1957] 32 I.T.R. 289, affirmed, [1961] 41 I.T.R. 221 (S.C. of India))* (It was observed in that case that sec. 34 is not a charging section but a machinery section; and a machinery section should be so construed as to effectuate a charging section, which makes the machinery workable) and in interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable *(C.I.T.* v. *Mahaliram Ramjidas 1940 I.T.R. 442, 448 (P.C.))*.

Nature and basis of assessment.–The proceedings taken under this section must be deemed to relate to the original assessment proceedings which commenced with a return filed under sec. 75 or the issue of a notice under sec. 77 calling for return of income *(Govindarajulu Iyer* v. *C.I.T. 1948 I.T.R. 391)*. If a particular income was not included in the total income of the relevant year of account, it can be brought to charge only by taking proceedings under this section and not by including it in the total income of any other year of account *(Muhammad Ibrahim* v. *C.I.T. 1942 I.T.R. 64)*.

The assessment under this section must be made as if it were made in the relevant assessment year *(Lakshminarain Bhadani* v. *C.I.T. [1951] 20 I.T.R. 594 (S.C.))*. The assessment must be based on the provisions of the Ordinance as it stood in the year in which the income ought to have been assessed *(Maneklal Chunilal & Sons Ltd.* v. *C.I.T. [1953] 24 I.T.R. 375, 385-6)*. The tax should be charged at the rate at which it would have been charged had the income not escaped assessment (proviso to sec. 93(1)).

Requisite conditions.–This section provides for assessment or reassessment in cases where income has escaped assessment in the relevant assessment year. The Department's right to take action under this section is subject to the following conditions:–

I (a) Income chargeable to tax should
- (i) have escaped assessment for the relevant year, or
- (ii) have been under-assessed, or
- (iii) have been assessed at too low a rate, or
- (iv) have been made the subject of excessive relief or refund

II (a) The Deputy Commissioner of Taxes should have reason to believe that income has escaped assessment as the assessee has for any assessment year concealed particulars of his income or furnished inaccurate particulars of income or by reason of the omission or failure on the part of the assessee–

(i) to disclose fully and truly all material facts necessary for the assessment for such year;

(ii) to make a return of his income under section 75 for the year–*Pannalal Nandalal Bhandari* v. *C.I.T. (1961) 41 I.T.R. 76 (S.C. of India)* wherein it has been observed that notice under section 75 in the press is effective and binding even on a non-

resident or even if he has not actually seen or read the notice in the papers.

(b) the Deputy Commissioner of Taxes should have, in consequences of definite information in his possession, reason to believe that income has escaped assessment and he has obtained the previous approval of the Inspecting Joint Commissioner in writing except in a case where a return has not been flied under section 75.

III A notice under section 93 calling for a return of income must be issued within the prescribed time limit – cls. (a), (b) and (c) of sub-section (3).

IV The assessment or reassessment under section 93 should be completed within the prescribed time-limit (sec. 94).

Cl.(b) requires that the Deputy Commissioner of Taxes should have in his possession definite *information* and in consequence of such information he should have *reason to believe* that income has escaped tax *(Koppuravari Venkateswarlu* v. *I.T.O. [1957] 32 I.T.R. 644)*. The words "reason to believe" suggest something more than the satisfaction of the Deputy Commissioner of Taxes. The expression suggests reasonable grounds on which the Deputy Commissioner of Taxes may take action. Power under this section cannot be exercised on mere rumours or suspicion –*R.S. Chirasijulal & Sons* v. *C.I.T. [1959] 36 I.T.R.*. Further, where the assessee has failed to make a return of his income or to disclose fully and truly all material facts necessary for his assessment, leading to a reasonable belief that his income has escaped assessment, cl. (a) comes into operation and that clause does not require any other condition to be fulfilled. In such a case, there is the only question of any "definite information" coming into the possession of the Deputy Commissioner of Taxes. All that cl. (a) requires is that the Deputy Commissioner of Taxes should have reason to believe that as a result of the assessee's failure to make a return or to disclose the full particulars of his income the income has escaped assessment. Cl. (b) also requires that the Deputy Commissioner of Taxes should have reason to believe, in consequence of definite information in his possession, that income has escaped assessment. The words "if the Deputy Commissioner of Taxes has reason to believe" are stronger than the words "if the Deputy Commissioner of Taxes is satisfied". They suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds, and that the Deputy Commissioner of Taxes may act under this section on direct or circumstantial evidence but not on mere suspicion, gossip or rumours *(Lakshman Shenoy* v. *I.T.O. and I.T.O.* v. *City Tobacco Mart [1958] 34 I.T.R. 275, 288 (S.C. of India))*. The *powers under this section are wide but they are not plenary; the words of the section are "reason to believe" and not "reason to suspect"* –*Bhimraj Pannalal* v. *C.I.T. [1957] 32 I.T.R. 289, 304, affirmed, [1961] 41 I.T.R. 221 (S.C. of India)*.

Under the present sec. 93 as under sec. 34 of the 1922 Act before and after the amendment in 1948, the Deputy Commissioner of Taxes cannot institute a fishing investigation or inquiry merely with the object of finding out facts which would entitle him to reopen a past year's assessment *(Bhimraj Pannalal* v. *C.I.T. [1957] 32*

I.T.R. 289, affirmed, [1961] 41 I.T.R. 221 (S.C. of India); but if in the course of the assessment of a subsequent year some definite information comes into his possession, from which he has reason to believe that income has escaped assessment, he would be entitled to proceed under this section *(Hyderabad Allwyn Metal Works Ltd.* v. *I.T.O. [1962] 46 I.T.R. 988)*. "Definite information" which is something more then mere gossip or rumours which must lead to the belief. The "information" must be definite and it appears from the words "which has come into his possession" that this information must be of new facts. If these facts were already in the possession of the Deputy commissioner of Taxes the language of the section would not be satisfied. If no definite information has come to the possession of the Deputy Commissioner of Taxes and previous approval of the Inspecting Joint Commissioner has not been obtained proceedings under this section will not be initiated (sub-sec. 2).

Two conditions– The decisions of the Supreme Court (India) in *Narayanappa* v. *C.I.T. (63 I.T.R. 219)* and numerous other cases and the judgements of various High Court establish the following principles. Two distinct conditions precedent are required to be fulfilled before the I.T.O. (D.C.T.) can exercise jurisdiction under this section:

(i) he must have reason to believe (sec post "reason to believe") that income has escaped assessment; and

(ii) he must have reason to believe that such escapement is by *reason of* the omission or failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment for the relevant year –(Disclosure may be other-wise than in the return of income *C.I.T. Malegaon Electricity Co. Ltd. 62 I.T.R. 789, 804)*.

Even if there has been such omission or failure on the assessee's part but that did not result in the escapement *e.g.* where although there was non disclosure the escapement was not the consequence of it but was really due to carelessness on the part of the I.T.O. (DCT), or due to his taking an erroneous view of the law or following the High Court's decision which is subsequently reversed by the Supreme Court–action under this clause would not be competent –I.T.O.'s dereliction of duty: *Gemini Leather Stores* v. *I.T.O. 100 I.T.R. 1 (S.C. of India)*; I.T.O.s wrong view of the law: *Bhanji Lavji* v. *C.I.T. 79 I.T.R. 582 S.C. of India*. The I.T.O. (DCT) would be acting without jurisdiction if the reason for his belief that the two conditions are satisfied does not exist or is not relevant and material to the belief required by the section and it is open to the court to examine this aspect–*Sheo Nath Singh* v. *AAC 82 I.T.R. 147 (S.C. of India)*. On the other hand, the adequacy or sufficiency of the reason for the ITO's belief cannot be investigated by the court –*Kantamani Venkata Narayan* v. *I.T.O. 63 I.T.R. 638 (S.C. of India)*

To confer jurisdiction on the Deputy Commissioner of Taxes under the provisions of Sec. 93 to initiate proceedings for reassessment, two conditions have to be satisfied. Firstly, he must have reason to believe that income chargeable to tax has escaped assessment. Secondly, he must also have reason to believe that such

escapement has occured by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment or reassessment ... and his duty to disclose fully and truly all primary relevant facts; it does not extend beyond that ... he is under no obligation to instruct the Deputy Commissioner of Taxes about the inference which the Deputy Commissioner of Taxes may raise from these facts –*C.I.T. v. Premchand Jain, (Gantati) 1991* (reported in 1993 BTD XXI 274-293. If there was no new material before the I.T.O. unknown to him previously which could provide reasons for his belief under sec. 147(b) when he issued the notice for reassessment, it would be a case of mere change of opinion which cannot be a ground for re-opening the assessment –*Purushottom Das Bangur v. I.T.O. Jadhpur reported in 1981 BTD IX 180.* In the case of *C.I.T. British India Corpn (1982) (Reported in 1990 BTD XVIII 66-68* that deduction by the company for contribution to recognised provident fund was allowed by the I.T.O although it contravenes articles of association but subsequently reassessment proceedings were started for alleged failure on the part of the assessee to disclose material facts but it was held that since the articles of association of the company was available to the I.T.O. when he made the original assessment it was not obligatory for the assessee to have specifically invited the attention of the I.T.O. to the article thereof. The words "omission or failure to disclose fully and truly material facts" cover only the case where the assessee, knowing all the material facts does not mention them fully or truly, in other words, deliberately withholds information–*P.B. Mukherji v. C.I.T. (1956) 30 I.T.R. 535.* In a case the assessee did not disclose certain transactions, but the I.T.O. himself discovered these transactions though he did not tax the amount by oversight, subsequently the I.T.O. sought to tax the amount under sec. 147 (corresponding to sec. 93) on the ground that the assessee did not disclose all material particulars. Held, that action under sec. 147(a) was invalid as income had escaped assessment not for assessee's failure to disclose material facts but on account of the error caused by the oversight of the I.T.O.

Section 147(a) cannot be invoked to remedy an error resulting from the oversight of the I.T.O. –*Gemini Leather Stores* v. *I.T.O. (1975) S.C. of India 100 I.T.R. 1 and allied cases.*.

Discovers.–The Supreme Court held in *India United Mills Ltd.* v. *C.E.P.T.* that the word "discovers" in sec. 15 of the Excess Profits Tax Act (which corresponded to sec. 147 of this Act) was wide enough to apply to a case where the facts discovered had *come into existence* after the assessment year and that "discovery" was not limited to facts which were in existence during the accounting year or assessment year. Their Lordships left open the question whether the word "discovers" in the pre-1948 sec. 34 would bear the same interpretation. The view of British Courts has been that in general an additional assessment to income-tax cannot be made by reference to facts which *arise* after the year of assessment. "Discovery" does not connote a conclusion arrived at with certainty at the time of issuing notice but merely means an honest belief upon materials which reasonably support such belief.

Cl.(a) (ii): Failure to file return.–If certain persons had filed a return showing a particular status, say, that of a firm, the Department cannot reopen their assessment under this clause on the ground that the proper "entity" to be assessed was different, say, an association of persons, and that "entity" had failed to file a return *(Lalbhai Ghatabhai* v. *Kadri [1958] 34 I.T.R. 449)*. In this case the assessee, a firm was granted registration under the Income-tax Act but since it was not registered with the Trade Association it was not recognised by that association as a firm. But as the firm was otherwise legal and was not doing an illegal business there was no justification to treat the firm as an association of persons and issue notice for reassessment. If the return filed was incomplete, but the Deputy Commissioner of Taxes accepted it as valid and completed the assessment, action under this clause cannot be taken on the ground that the assessee had failed to make a return, though such action may be justified on the ground that he had failed to disclose all material facts *(Akula Venkatasubbaiah* v. *C.I.T. [1963] 47 I.T.R. 458)*. In this case it was held that where the assessee files the return and the I.T.O. makes the assessment treating the return as correct, it is not open to the I.T.O. to re-open the assessment under sec. 34(1)(a) on the plea that there was omission or failure on the part of the assessee to make a return.

Cl.(a)(i): Concealment of income.–As noted above, where the assessee fails to make a return or to disclose fully and truly all material facts necessary for his assessment for any year, and the Deputy Commissioner of Taxes has reason to believe that as a result of such failure income has escaped assessment, no other condition is required to be fulfilled before the Deputy Commissioner of Taxes can start proceedings under this section. The Calcutta High Court has held that the words of this clause,–"omission or failure ... to disclose fully and truly all material facts"–can refer only to facts *within the knowledge* of the assessee at the material time *(Mukherjee* v. *C.I.T. [1956] 30 I.T.R. 535)*. Where an assessee makes a false return or by misleading the Income-tax authorities evades tax, proceedings may not only be taken under this section to assess such income *(Lokumal Bhojumal 1938 I.T.R. 51)* but penalty proceedings may be launched under sec. 124. The assessee who has inadvertently not included in the total income returned by him the income of his wife or minor son from the firm in which he is a partner, cannot be said to have failed to disclose fully and truly all material facts within the meaning of this clause, if the fact that his wife is a partner in the firm or that his minor son is admitted to the benefits of partnership was disclosed to the Department. If it is not clear whether the concealed income is of an association of persons or of any particular member thereof the Deputy Commissioner of Taxes may simultaneously start proceedings against the association and the individual members–*Dalmia* v. *Union of India 84 I.T.R. 616*.

"Material facts".–In *Calcutta Discount Co. Ltd.* v. *I.T.O. ([1961] 41 I.T.R. 191.)*, the Supreme Court of India held that the expression "material facts", used in cl.(a), refers only to primary facts: the duty of the assessee is only to disclose primary facts and he has not also to indicate what factual or legal inferences should properly be drawn from the primary facts *(Maharaja Shri Umaid Mills Ltd.* v. *I.T.O. [1962] 44 I.T.R. 303)*. In this case it was held that the underassessment, if any, was not due to the assessee's omission or failure to disclose material facts fully and truly, but to the

legal view which prevailed at the time of the original assessment the assessment proceedings would be invalid. In that case the assessee had disclosed all primary facts regarding sale of shares, and the Supreme Court of India held that action under cl.(b) of sub-sec. (3) could not be taken on the ground that the assessee had claimed it to be a mere change of investments and had not disclosed 'the true intention behind the sale".–the question whether the sale was a capital or trading transaction was for the Deputy Commissioner of Taxes to decide. But the assessee must disclose fully and truly all material primary facts if any, if such fact is suppressed, misrepresented or falsified, reassessment under this clause is justified–*C.I.T.* v. *Hemchandra Kar 77 I.T.R. 1 (S.C. of India)* and allied cases. Secret circular cannot constitute material to justify formation of belief that income of the assessee has escaped assessment.

Passive concealment.–*Inadvertence* or *negligence or failure on the part of the Deputy Commissioner of Taxes to scrutinise assessee's books.*–The production before the Deputy Commissioner of Taxes of account books or other evidence from which material evidence could with due diligence have been discovered by the Deputy Commissioner of Taxes will not necessarily amount to disclosure of all material facts necessary for the assessment *(Calcutta Discount Co. Ltd.* v. *I.T.O. [1961] 41 I.T.R. 191, 200-1 (S.C. of India)).* In this case the assessee, a manufacturer of handloom goods submitted to the I.T.O. information about quantity and value of yarn imported used in the manufacture. I.T.O. accepted the assessee's return and completed assessment. Later on reassessment proceedings were started on the ground that the assessee did not furnish details of import licenses and other particulars. It was held that the reassessment proceedings were invalid since the assessee had disclosed all the primary facts in the original assessment. Even in s. 34 which contained no such provision it was held that if income escapes assessment as a result of the Deputy Commissioner's inadvertence or negligence or failure to examine properly the account books produced by the assessee, the Deputy Commissioner of Taxes would be justified in making a reassessment in a subsequent year *(Haji Ahmad Haji Esak & Co.* v. *C.I.T. [1951] 19 I.T.R. 331).* It was held in that case that mere production of account books before the I.T.O., at the time of original assessment does not fasten knowledge upon him and as such mere production of account books before the I.T.O. does not amount to disclosure of all material facts. In the case of *Manikonda Venkata Narashim (1960) 39 I.T.R. 575 at 584* it was further held that due to the I.T.O's., inadvertence or negligence or failure to examine properly the assessee's account books, the I.T.O. is not barred from invoking sec. 34(1)(a).

Definite Information–Mistake of law–Sub-sec. (2) of Sec. 93: No proceeding under this section can be initiated unless definite information has come into the possession of the Deputy Commissioner of Taxes in consequence of which he has reason to believe that income has escaped assessment. "No universal meaning can be given to the meaning of the phrase, definite information" occurring in this section, for the application of the section must depend upon the particular circumstances of each case. It is however, necessary that the definite information should relate to a pure question of fact. Even definite information with respect to the *state of law* will bring the section into operation. The section cannot be invoked merely because the Income-tax Officer changed his mind about the interpretation of law but the section will

doubtless operate if the Income-tax Officer is informed that a case has been overruled or that a statute or regulation had been passed which has not been brought to his attention before"–*Chatturan Hovilram Ltd. In re [1951] (19 I.T.R. 600)*. "A decision of the Privy Council overruling the decision of the High Court is a definite information within the meaning of the section–*Maharaj Kumar Kamal Singh* v. *C.I.T. [1954] 26 I.T.R. 79*. The words "definite information" are placed in the section to protect the subject against any assault by the Income-tax Officer based upon mere suspicions. "Definite information" which is something more than mere gossip or rumour, must lead to the discovery or belief ... such information must be definite and it must be of new facts. If those facts were already in the possession of the officer, the language of the section would not be satisfied.–*Badar Shoe Stores, In re [1946] 14 I.T.R. 431*.

Two conditions have to be satisfied before the assessing officer is clothed with the jurisdiction to make reassessment–i.e. the information must have come to his possession subsequent to the making of the original assessment and he must form a belief on the basis of the information that income chargeable to tax has escaped assessment. Thus "information" and "reason to believe" constitute the essential requisites and basic foundation to set the machinery of reassessment.

A decision of the Tribunal or the Commissioner of Taxes (Appeal) in a given case can constitute "information". Information with regard to new or fresh facts or with regard to facts already on record–*information may be with regard to facts or as to the true state of law*, conclusions on law and fact found to be erroneous by reason of the subsequent judgment/order of a higher Tribunal would constitute information within the meaning of sec. 147(b) (corresponding to sec. 93(2)) of the Ordinance) –*Kumar Engineers* v. *C.I.T. (Panjab and Haryana High Court) 1996 (reported in 1999 BT) XXVII 49-58*.

In cases where there has been no failure on the part of the assessee to make a return of his income and to disclose fully and truly all material facts necessary for his assessment, the Deputy Commissioner of Taxes cannot take any action under this section except in the case covered by sub-sec. (2), and sub-sec. (2) is confined to cases where the Deputy Commissioner of Taxes has in consequence of definite *information* in his possession reason to believe" that income has escaped assessment *(Sankaralinaga Nadar* v. *C.I.T. [1963] 48 I.T.R. 314)*. Two conditions must be satisfied before the Deputy Commissioner of Taxes can take action under sub-sec. (2): (i) the Deputy Commissioner of Taxes should receive the information *after* the original assessment and (ii) the information should lead him to the belief that income has escaped assessment *(Maharaj Kumar Kamal Singh* v. *C.I.T. [1959] 35 I.T.R. 1 (S.C. of India))*. The Deputy Commissioner of Taxes cannot take any action under this section merely because he happens to change his opinion or to hold an opinion different from that of his predecessor, on the same set of facts *(Sanaralinga Nadar* v. *C.I.T. [1963] 48 I.T.R. 314, 323)*. If either condition is not satisfied the Deputy Commissioner's action would be without jurisdiction. "It can never be supposed that section 34 was inserted to give to any I.T.O. a mere license to re-investigate the facts on which a previous assessment has been based. Still less can it be supposed that it

was intended to enable him to do any such thing on mere suspicion, however, well-founded that suspicion may prove to have been"–*Bodar shoe Stores, In re [1964] 14 I.T.R. 431*. Action can be taken with reference to events which happened subsequently, these events having relation to the facts on which the original assessment had been made. In order to hold that income may have escaped assessment "there must have been either some fresh facts brought to the notice of the Income-tax authorities, or some change in the law, which were in existence during the chargeable accounting period, but which were not brought to the notice of the Income-tax authorities during the assessment year, but which arose subsequent to assessment, having relation to the facts on which the original assessment had been made.

Commenting on the condition that the "information" must have come into the possession of the Income-tax Officer after the previous assessment Shah J. speaking for the S.C. of India in *C.I.T. v. Raman & Co. (67 I.T.R. 11, 16)* observed "that even if the information be such that it could have been obtained during the previous assessment from investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the Income-tax Officer is not affected". "All that the Supreme Court (India) meant by saying that the information may be in the nature of some instruction or knowledge derived from an external source" is that a mere internal change of opinion would not justify the re-opening of an assessment–*C.I.T. v. Holck Larsen 85 I.T.R. 467, 476*. Information as to subsequent events which bring to light material circumstances unknown but existing at the date of the original assessment–*Bhimraj Pannalal v. C.I.T. 32 I.T.R. 289, affirmed (S.C. of India)* would equally justify a reassessment under this section.

But the power to act on information is not to be confused with the power to revise. The rule that the Deputy Commissioner of Taxes is entitled to act on information obtained after the original assessment from the record of that assessment does not permit fresh application of the mind to the same issue or enable the Deputy Commissioner of Taxes to correct his own or his predecessor's errors of judgement: the Deputy Commissioner of Taxes cannot take any action under this section merely because he happens to change his opinion or to hold an opinion different from that of his predecessor on the same set of facts–*C.I.T. v. Dinesh Chandra Shah 82 I.T.R. 289 affirmed 41 I.T.R. 221 (S.C. of India)*.

But the word "information" does not necessarily imply factual material in contra-distinction to the legal aspect of a case. "Information" may be as to a fact *(Mahabir Prasad Munna Lal v. C.I.T. 1947 I.T.R. 393, 403)* but the word also includes some cases of information as to the state of the law *(Maharaj Kumar Kamal Singh v. C.I.T. [1959] 35 I.T.R. 1 (S.C. of India))*, *e.g.*, information that a case on a certain point of law has been decided by the Court in a particular way *(Chatturam Horilram v. C.I.T. [1955] 27 I.T.r. 709 (S.C.))*, or that a case has been overruled *(C.I.T. v. Mahomed Yusuf Ismail 1944 I.T.R. 8, 15)*, or that a statute had been passed which was not brought to the attention of the Deputy Commissioner of Taxes when he made the original assessment *(C.I.T. v. Mahomed Yusuf Ismail 1944 I.T.R. 8, 15)*,

or that a statute had been passed after he made the original assessment *(Chatturam Horilram* v. *C.I.T. [1955] 27 I.T.R. 709 (S.C. of India))*. The decision of an appellate authority under this Act, (Ordinance) *e.g.* on the question as to which assessable entity is chargeable in respect of a particular income, may also constitute "information" *(Jawahar Lal Mani Ram* v. *C.I.T. [1963] 48 I.T.R. 837)*. On the strength of such "information", action may be taken under this section.

Information as to an error apparent on the face of the original assessment order itself *(Salem Provident Fund Society Ltd.* v. *C.I.T. [1961] 42 I.TR. 547)* or as to subsequent events which bring to light material circumstances unknown but existing at the date of the original assessment *(Bhimraj Pannalal* v. *C.I.T. [1957] 32 I.T.R. 289, affirmed, [1961] 41 I.T.R. 221 (S.C. of India))* would justify a reassessment under this section.

Income which has "escaped assessment".–Proceedings under this section to assess income which escaped charge in the relevant assessment year can only be taken in respect of income which was chargeable in the relevant assessment year. In *Chatturam Horilram* v. *C.I.T.([1955] 27 I.T.R. 709 and Allied Cases Cf. Laxmi Ins. co. Ltd.* v. *C.I.T. 5 I.T.C. 24)* the Supreme Court of India laid down that where earlier assessment proceedings had been taken but failed to result in a valid assessment owing to a lacuna in the law, despite the chargeability of the income to tax, it would be a case of chargeable income escaping assessment.

Income is said to have escaped assessment within the meaning of this section when it has not been charged in the hands of the *assessee* in the *proper* assessment year; it is immaterial that the income was charged or included in some other assessment *(C.I.T.* v. *Ved Nath Singh 1940 I.T.R. 222)*, or that the failure to charge the income was entirely due to oversight or inadvertence on the part of the Income-tax authorities *(C.I.T.* v. *Narsee Nagsee & Co. [1960] 40 I.T.R. 307, 313 (S.C. of India))*, or that the income consists of dividend deemed to be distributed by a fiction of law *(Sardar Baldev Singh* v. *C.I.T. [1960] 40 I.T.R. 605, 613 (S.C. of India))*. The concept of income escaping assessment is wide enough to cover a claim to a deduction wrongly allowed – *State of Madras* v. *Velayntham Thampy* 70 *I.T.R. 629.*

Assessee's failure to furnish return.–If an assessee fails to furnish a return of his total income as required by s. 75 and the income has not been assessed at all, proceedings may be taken under this section in a subsequent year, although no notice under s. 77 might have been served on the assessee in the relevant assessment year *(C.I.T.* v. *Pirojbai Contractor 1937 I.T.R. 338)*. It was held in this case that section 34 (which empowers an Income-tax Officer to assess income which has escaped assessment) is wide enough to include cases where no notice under section 22(2) had been issued to the assessee and his income had not been assessed at all under section 23". Where an assessment starts with a notice under sec. 34 all the relevant provisions of the Act apply as effectively as where the assessment starts with a notice under sec. 22(2). Sub-section (2) applies in terms to such cases. Income escapes assessment where no notice under s. 77 is issued during the assessment year and no return is filed by the assessee during the assessment year; assessment proceedings can be initiated thereafter *only* by the issue of a notice under s. 93. If a voluntary return is filed by the

assessee when no notice under section 77 was served on him in that case he should be assessed under sec. 83 or 84. But if the assessee submits a return *not voluntarily* but in response to a notice under s. 77 issued *after* the expiry of the assessment year, such a notice would be invalid and the assessment would be vitiated *(C. Ag. I.T. v. Sultan Ali [1951] 20 I.T.R. 432. Cf. Raman Chettiar v. C.I.T. [1961] 42 I.T.R. 700)* unless notice under sec. 93 is waived.

Income not shown in return.–If income is not charged because it is not shown in the return, this section may apply and the income would be regarded as having "escaped assessment" *(State of Bihar v. Maharajadhiraja Sir Kameshwar Singh [1952] 21 I.T.R. 382, 388, on appeal, Maharajadhiraj Sir Kameshwar Singh v. State of bihar [1959] 37 I.T.R. 388 (S.C. of India))*. See further *ante* under "Concealment of income".

Income shown in return.–This section is not confined to cases where income has not been returned. It also covers cases where income is included in the return made by the assessee but is left unassesseed by the Deputy Commissioner of Taxes *(Madan Mohan Lal v. C.I.T. 1935 I.T.R. 438 (F.B.))*. The expression "escaped assessment" is not restricted to those cases only which have not come to the notice of the Deputy Commissioner of Taxes at all. It also applies to those cases where the Deputy Commissioner of Taxes has applied his mind but erroneously decided that the income was not assessable *(Maharaj Kumar Kamal Singh v. C.I.T. [1959] 35 I.T.R. 1 (S.C. of India); Amir Singh Sher Singh v. C.I.T. 1935 I.T.R.* [illegible] was held in that case that there is no justification for confining the meaning o[illegible]ord 'escape' in sec. 34 to those cases only which do not come to the notice of the Income-tax officer at all and excluding those cases where he had applied his mind but on account of an error of judgement has set any part of income free from assessment. The section is wide enough to include any case of non-assessment, to whatever cause it may be due. The section, therefore, empowers an Income-tax Officer to revise an assessment already made and to assess a sum which had not been assessed by his predecessor on account of wrong application of the Act. However, in order to justify action under this section it is not enough that income included in the return has escaped assessment; sub-sec. (2) refers to "information" and rules out action based merely upon a change of opinion on the same facts. Sec *ante* under sec. (2) 'Information'. –Mistake of law".

Income assessed in hands of wrong person.–Where income was assessed in the assessment year in the hands of a wrong person, proceedings may be taken in a subsequent year under this section to assess the person properly chargeable in respect of that income *(Kunwar Bishwanath Singh v. C.I.T. 1942 I.T.R. 322)*. In the case of *I.T.O. v. Bachu Lal Kapoor 60 I.T.R 74* the Supreme Court of India up held action under this section against a joint family in respect of income assessed. But the Deputy Commissioner of Taxes cannot, in the reassessment proceedings under this section against an association of persons, assess an entirely different association as having actually received the income, even if the principal officer of the two associations is the same individual *(Mohd. Haneef v. C.I.T. [1955] 27 I.T.R. 447)*.

Pending assessment proceedings.–Income cannot be said to have escaped assessment within the meaning of this section if assessment proceedings in respect of

that income are still pending and have not yet terminated in a final assessment. Deputy Commissioner of Taxes noting "Not assessed" or "Not assessable" or "No proceeding" or "Filed" would ordinarily amount to final order lawfully terminating the assessment proceedings and thereafter action can be taken under this section–*C.I.T.* v. *Bidhu Bhusan Sarkar 63 I.T.R. 278 (S.C. of India).*

After cancellation of assessment.–If there was an assessment but the assessment has been cancelled or set aside in appeal, revision or reference, –the Deputy Commissioner of Taxes should, where a reassessment is competent, without a fresh notice calling for a return, make a fresh assessment under s. 83 or s. 84 and not take any proceedings under this section–*C.I.T.* v. *Bombay Trust Co. Ltd. 1936 I.T.R. 323 (P.C.).*.

Where on a reassessment under this section two items of income are brought to tax, and on the assessee's appeal against only one of the items the Tribunal erroneously sets aside the entire reassessment and restores the original assessment order, the Deputy Commissioner of Taxes should apply for rectification of or a reference against the Tribunal's order; but he cannot recommence proceedings under this section for bringing to tax the undisputed item of income and thus deprive the Tribunal's order of its finality *(Rao Thakur Narayan Singh* v. *C.I.T. [1962] 44 I.T.R. 178).*

Firm's income escaping assessment.–If a firm had escaped assessment in the relevant assessment year, proceedings may be taken against it under this section, even if one of its partners had been individually assessed on his share of the profits of that year *(Talipatigala Estate* v. *C.I.T. 1950 I.T.R. 320).* A notice under s. 93 may be issued in the name of the firm even if the firm stands dissolved at the time of the issue of the notice. The notice must be issued against the firm and not against an individual partner and the notice must make it clear that it is the income of the firm that is soughed to be reassessed.

Joint family's income escaping assessment.–If after an undivided Hindu family has disrupted and an order recording partition has been passed under s. 90(3), any portion of the family's income earned prior to partition is found to have escaped assessment, a reassessment may be made on the family under this section. In such a case, as the Supreme Court of India laid down in *Lakshminarain Bhadani* v. *C.I.T. ([1951] 20 I.T.R. 594),* it is not necessary to issue the notice under this section to every member of the family; it is sufficient if the notice is addressed to the Hindu undivided family and served on the quondam karta, for the position is as if the Income-tax Officer was proceeding to assess the income of the family in the year in which the escaped income should have been assessed.

Effect of order under section 90 recording partition.–Sec. 93 confers no power to ignore or nullify an order under sec. 90 recording a partition of a Hindu undivided family which order is in its very nature effective for all subsequent years; and no proceedings under this section can be taken on the footing that the order under sec. 90 was obtained by misrepresentation or was otherwise erroneous–*Udayan Chinubhai* v. *C.I.T. 63 I.T.R. 416 (S.C. of India).*

Assessment on representative of deceased assessee.–An assessment may be made on the representative of a deceased assessee under this section read with s. 92 in respect of the income of the deceased which had escaped assessment. See under s. 93, "Assessment on legal representative". Effect of order under sec. 93 – if the notice under section 93 is issued to the legal representatives of a deceased person, assessment cannot be made on the Hindu undivided family of which the deceased was the karta–*Marghabhbhai Patel* v. *Parikh 8 I.T.R. 418.*

Whole assessment cannot be re-opened.–In proceedings under this section the Income-tax Officer may bring to charge items of income which had escaped assessment other than or in addition to that item which had led to the issue of the notice *(Sankaralinga Nadar* v. *C.I.T. [1963] 48 I.T.R. 314, 323).* "In a reassessment under section 34 the I.T.O. has no power to revise the assessment of the items of income which have been conclusively assessed. His power is limited to those matters in respect of which assessment proceedings have been started–*Anglo French Textile Co. Ltd. (Madras) [1950] 18 I.T.R. affirmed by the S.C. of India in 1953.* In another case it was observed that "no jurisdiction is given to the I.T.O by section 34 to make a new assessment for the purpose of taking the whole of the assessment under the Act. Sec. 34 does not require the whole thing to be re-opened and every item under which income is charged to be considered afresh and a fresh assessment levied. The I.T.O. is not bound to re-open the items which are not in question or which have become final. He is only bound to confine himself to the particular item which has been omitted"–*Bhimraj Pannalal (Patna) [1957] I.T.R. 289 298.* So where a reassessment is made under this section in respect of income which has escaped tax, the jurisdiction of the Deputy Commissioner of Taxes under this section is confined to such income which has escaped tax and does not extend to revising, reopening or reconsidering the whole assessment *(Kasinath Bagla* v. *C.I.T. 4 I.T.C. 472).* In proceedings under this section the assessee cannot re-agitate questions which had been decided in the original assessment, nor can the Deputy Commissioner of Taxes make a reassessment inconsistent with the original assessment in respect of matters which are not the subject matters of proceedings under this section *C.I.T.* v. *A.D. Shroff [1957] 31 I.T.R. 284.* If it is once shown that income has escaped assessment, the assessee cannot resist proceedings under this section to assess it merely by showing that other income has been assessed at too high a figure–*Per Rankin, C.J., Satyendra Mohan Roy* v. *C.I.T. 4 I.T.C. 447.*

If in reassessment proceedings under this section it is found that the assessee's total income is actually less than the income assessed, the assessee would not be entitled to have the assessment revised under this section *(Kasinath Bagla* v. *C.I.T. 4 I.T.C. 472),* or to get any refund *(Satyendra Mohan Roy* v. *C.I.T. 4 I.T.C. 447, 450);* or if it is found that actually there is a loss which the assessee could have carried forward, the assessee would not be entitled to claim that the Deputy Commissioner of Taxes should assess the total income at a loss in proceedings under this section. But the Deputy Commissioner of Taxes may enhance income from one branch of the business and reduce income from another branch, the net effect of which is enhancement of income from the single business–*Jagamohan Rao of C.I.T. 75 I.T.R. 373, 380 (S.C. of India)* the observations are too wide.

"Under assessment".–Revision of previous estimate of income.–The view of the Rangoon High Court in the case of *C.I.T.* v. *U Lu Nyo 1933 I.T.R. 373* was that section 34 does not empower the I.T.O. to revise an assessment for the previous year which has become final merely because he thinks that the finding arrived at by his predecessor as to the assessable income is wrong and that on the wording of the old s. 34 prior to 1939 that once a source of income had been assessed the matter was disposed of and it could not be said that any income from that source had escaped assessment, was found incorrect, and was dissented from by the Bombay High Court *(C.I.T.* v. *Gopal Vajinath Manohar 1935 I.T.R. 372).*

Where an assessment was based on an estimate, *e.g.*, a best judgment assessment under s. 84, the Deputy Commissioner of Taxes has the power to revise the estimate and make reassessment under this section if there are materials to show that the first estimate was too low and consequently the profits were under-assessed *(Sheik Mubarak Ali* v. *C.I.T. 1938 I.T.R. 625).* Judging from the reputation of the assessee, his investments and his habitual concealment of income the Income-tax Officer, in this case made a fresh assessment under section 34 and such revised assessment could not be held arbitrary or capricious and was not illegal. But the Deputy Commissioner of Taxes has no jurisdiction to reassess the income of a prior year, without materials to show that any income had escaped assessment, merely because he disagrees with his predecessor's estimate of the income *(Chimanram Motilal* v. *C.I.T. 1943 I.T.R. 44).* It was held in that case that under section 34 an Income-tax Officer or his successor is entitled to reassess an income on the ground that owing to some mistake in the first assessment income has escaped assessment. The power to reassess is not confined to cases where some fresh facts are brought to the notice of the Income-tax Officer or there is a change in the law. But cannot be held to have escaped assessment merely on the *ipse dixit* of the Income-tax Officer. It is for him to establish to his own satisfaction on the assessment and subsequently before the Appellate Tribunal that income has escaped assessment: it is not for the assessee to prove that the original assessment was right and that no income has escaped assessment. But if a deduction was wrongly allowed there would be a resulting under-assessment and in that event a reassessment may be made under this section *(Anglo-Persian Oil Co. (India) Ltd.* v. *C.I.T. 1933 I.T.R. 129).* Overpayment of interest by the Government under s. 72 on the tax paid in advance does not amount to under-assessment of income *(Subramanyan* v. *Simplex Mills Ltd. [1963] 48 I.T.R. (S.C.) 182).*

Assessed at too low a rate.–"When an Income-tax Officer takes action under section 34 of I.T. Act, 1922 for the purpose of raising the rate of tax on the ground that the rate originally fixed was too low, the Income-tax Officer is not bound to re-assess the income and consider every item under which the assessee is charged and levy fresh assessment. He is not bound to re-open the items which are not in question and which have become final and start proceedings again. He is only bound to confine himself to the particular item which has been omitted"–*Palaniappa Chettiar* v. *C.I.T. (Madres) (1930) 4 I.T.C. 196).* Assessments might have been made taking wrong status of the assessee or exact share of the firm was not taken and as a result the assessee was charged at a lower rate of tax in which cases the Deputy

Commissioner of Taxes should confine himself to the item in the reassessment which are the causes of assessment at a low rate of tax.

Burden of proof.–Income cannot be held to have escaped assessment merely on the *ipse dixit* of the Deputy Commissioner of Taxes. It is for him to establish to his own satisfaction in the first instance, and subsequently before the appellate authority, that income has escaped assessment as it is the Department's burden to prove that income has escaped assessment to attract the provisions of sec. 34; it is not for the assessee to prove that the original assessment was right and that no income has escaped assessment *(Chimanram Motilal* v. *C.I.T. 1943 I.T.R. 44, 59)*. The burden is on the Department to prove that the information on which action is taken under this section was not within the knowledge of the Deputy Commissioner of Taxes who made the original assessment; and this burden may ordinarily be discharged by referring to the records of the original assessment proceedings. 'But once the proceedings under this section are validly commenced, there is no difference between an ordinary assessment and an additional assessment under sec. 34 and the same rule as to burden of proof governs the additional assessment so the onus would be on the assessee to prove that cash credits in his books, of account, or high denomination notes encashed, do not represent undisclosed income' *(Sreelekha Banerjee* v. *C.I.T. 1935 I.T.R. 295)*.

Reference to Court.–Whether income which is sought to be assessed under this section has already borne tax in the original assessment, and whether there was omission or failure on the part of the assessee to disclose fully and truly all material facts *(C.I.T.* v. *Lakhiram Ramdas [1962] 44 I.T.R. 726 (S.C.))*, are questions of fact. The Court can interfere with the finding that income had escaped assessment only if there is no evidence on which the Tribunal could come to that conclusion or if the Tribunal has misdirected itself in law *(C.I.T.* v. *Dey Bros. 1936 I.T.R. 209)*.

Issue of notice for reassessment–Sub-sec.(3): It is the Deputy Commissioner of Taxes alone and no other authority who has the right to take action under s. 93 to bring to charge income which has escaped assessment and he has to initiate the proceedings by serving a notice on the assessee as indicated in sub-s.(1) of this section *(Sheik Abdul Kadir Maracayar & Co.* v. *C.I.T. 2 I.T.C. 372)*. This section does not prescribe any standard form of notice. All that the section requires is that a notice containing all or any of the requirements which may be included in a notice under s. 77 shall be served *(In re Burn & Co. 1934 I.T.R. 30, 47 (notice in the form of a letter))*. It is not necessary to issue a separate notice under s. 77 along with a notice under this section *(Vir Bhan Bansi Lal* v. *C.I.T. 1936 I.T.R. 111)*. Nor need a fresh notice be issued under this section by another Deputy Commissioner of Taxes to whom pending proceedings are transferred (s. 7)–*In re Bisheshwar Nath & Co. 1942 I.T.R. 103* and the succeeding Officer may continue the proceeding from the stage at which it was left by his predecessor. The section provides that the provisions of this Ordinance apply as if the notice issued under this section were a notice issued under s. 77. Thus twenty one days' time must be given to the assessee as required by s. 77 *(C.I.T.* v. *Ramsukh Motilal [1955] 27 I.T.R. 54)*, and the provisions of s. 178 as regards service of the notice also apply.

The issue of a notice under this section is a *condition precedent* to the validity of any assessment under s. 93, and therefore if no such notice is issued *(Narayana Chetty* v. *I.T.O. [1959] 35 I.T.R. 388, 392 (S.C. of India))*, or if the notice issued is invalid *(C.I.T.* v. *Maharaja Pratapsingh Bahadur [1961] 41 I.T.R. 421 (S.C. of India))*, or is not served in accordance with law *(C.I.T.* v. *Thayaballi Mulla Jeevaji Kapasi [1963] 47 I.T.R. 184)*, the assessment would be bad. However, if an assessee, on whom no notice has been served under s. 77, *voluntarily* makes a return after the expiration of the assessment year, the Deputy Commissioner of Taxes should proceed to make an assessment under s. 83 or s. 84 without having recourse to s. 93 at all. See under s. 93, "Assessee's failure to furnish return", and under s. 75 or 77, "Voluntary return of income and individual notice" and "Validity of notice".

It is not necessary that the notice under this section calling for a return should specify the item of income which has escaped assessment *(C.I.T.* v. *Jagan Nath Maheshwary [1957] 32 I.T.R. 418)* or the source of such income *(Radhakan Jagannath Prasad* v. *Johri [1960] 39 I.T.R. 182, 192)*, or indicate whether it is issued under cl.(a) or cl.(b) or cl.(c) of s. 93 *(Mukherjee* v. *C.I.T. [1956] 30 I.T.R. 535)*. But in the course of proceedings under s. 93 the Deputy Commissioner of Taxes should sufficiently draw the attention of the assessee to the case which he has to meet *(Chimanram Motilal* v. *C.I.T. 1943 I.T.R. 44)*. Fresh notices may be issued under this section from time to time in respect of different items of income which may have escaped assessment in the same year *(Jagmohan Goenka* v. *Banerjee [1954] 26 I.T.R. 637)*. It was held in that case that within the time limit specified in section 34 of 1922 Act, there is no restriction as to the number of proceedings that can be taken to re-open the assessment, whether by way of assessment or reassessment, computation or recomputation. If the process of reassessment is repeated malafide, the High Court can and will always interfere.

When a notice is given expressly under s. 77 which turns out to be a bad notice under that section because it is out of time, it cannot be held to be a good notice under this section when there is no reason for supposing that the Deputy Commissioner of Taxes ever considered the question whether any income had escaped assessment *(Maharaja of Patiala* v. *C.I.T. 1943 I.T.R. 202, 227)*.

Where an assessment starts with a notice under this section, all the relevant provisions of the Ordinance apply as effectively as where the assessment starts with a notice under s. 77 in the ordinary course *(Lakshman Shenoy* v. *I.T.O. and I.T.O.* v. *City Tobacco Mart [1958] 34 I.T.R. 275, 297 (S.C. of India))*. Thus if a return made by the assessee in response to a notice issued under this section is not accepted, he must be given an opportunity of being heard as he would be under s. 83 in original assessment proceedings *(Haji Ali Mohammad* v. *C.I.T. 1940 I.T.R. 243)*. Similarly, if the assessee fails to comply with a notice calling upon him to make a return *(Ram Chandra Kashi Nath* v. *C.I.T. 5 I.T.C. 58)* or to produce his books of account or other documents *(Haji Ali Mohammad* v. *C.I.T. 1940 I.T.R. 243)* in the course of proceedings under s. 93, a best judgment assessment may be made under s. 83 read with s. 84.

Time limit for notice–This sub-section provides three periods of limitation from the end of the relevant assessment year within which the notice should be issued:

(i) in cases of failure to file return under section 75 or 77, notice can be issued at any time–cl.(a);

(ii) in cases in which the Deputy Commissioner of Taxes has reason to believe that the assessee has for any assessment year concealed the particulars of his income or furnished inaccurate particulars thereof or omitted or failed to disclose all material facts necessary for the assessment of income of that assessee for such year, notice can be issued within five years' time from the end of the assessment year for which the assessment is to be made–cl.(b); but in a case where a fresh assessment is made for any assessment year to give effect to the appellate or revisional order the period of five years as referred to in this clause shall commence from the end of the year in which the fresh assessment is made (proviso to cl. (b)); and

(iii) in cases where there is neither any failure to file a return and nor any concealment has been made, notice can be issued within two years from the end of the assessment year for which the assessment is to be made and no notice can be issued for reassessment more than two years after the last day of the accounting year–*Sumat Parshad* v. *I.T.O., Bhatinda [1960] 60 I.T.R. 692.*

The period of limitation under this sub-section begins to run from the end of the relevant assessment year and not accounting year–*I.T.O.* v. *Iyengar [1962] 44 I.T.R. 437 (S.C. of India).*

The sub-section requires the notice to be issued within the prescribed period of limitation. The two terms, "issue of notice" and "service of notice" are interchangeable–the word "issued" takes in the entire process of sending the notice as well as the service thereof, and the notice is issued to the assessee when it is served upon him–*Banaresi Devi* v. *I.T.O. 53 I.T.R. 100 (S.C. of India); Ispahani Ltd.* v. *C.I.T. 75 I.T.R. 479, 484 and C.I.T.* v. *Mahabur Prasad Puddar 93 I.T.R. 215, 219-70.* Consequently the notice must be served upon the assessee within the period of limitation prescribed by this sub-section –*Indu Prasad Bhati* v. *Jane 58 I.T.R. 559 affirmed Jane* v. *Indu Prosad Bhatt 72 I.T.R. 595 (S.C. of India).* The assessment or re-assessment in pursuance of such notice must be completed within the period of limitation laid down in section 94. If the D.C.T's action does not satisfy either of these two limits, the assessment would be invalid–*C.I.T.* v. *Robert Sas 48 I.T.R. (S.C. of India) 177; Seethai Achi* v. *I.T.O. 40 I.T.R. 170.*

If the assessee files an appeal against a reassessment made under s. 93 the Appellate Joint Commissioner cannot, after the time limit for making an assessment under that section has expired, direct the Deputy Commissioner of Taxes under s. 156, to make a fresh reassessment in respect of a fresh item of income which was not

covered by the original proceedings under s. 93 – *C.I.T.* v. *Nawab Shah Nawaz Khan 1938 I.T.R. 370. Cf. C.I.T.* v. *Khemchand Ramdas 1938 I.T.R. 414 (P.C.). Cf. s. 150(2).*

In computing the period of limitation for the purpose of taking any proceedings under this sub-section or any other section or for making any assessment the period for which such proceedings have been stayed by any Court, Tribunal or any other authority shall be excluded–sub section(4).

No notice under this section can be issued without the prior sanction of the Inspecting Joint Commissioner of Taxes in writing but in cases falling under cl.(a) of sub-section (3) for omission or failure to file a return under section 75 or 77 no prior approval of the Inspecting Joint Commissioner is necessary–sub-section (2). The failure of the Deputy Commissioner of Taxes to obtain the previous sanction of the Inspecting Joint Commissioner would vitiate the assessment–*C.I.T.* v. *Maharaja Pratapsingh Bahadur [1961] 41 I.T.R. 421 (S.C. of India).*

Waiver of notice.–The view of the Calcutta High Court is that the requirement of a valid notice, though a condition precedent to the validity of an assessment under s. 93, can be waived *[(C. Ag. I.T.* v. *Sultan Ali Gharami [1951] 20 I.T.R. 432, 450. Kerala H.C. took the same view in C.I.T.* v. *Tayaballi Mulla Jeevaji Kapasi [1962 45 I.T.R. 304, but accepted the contrary view in Suseela Sadanandan* v. *I.T.O. [1963] 47 I.T.R. 318. See also Uppala Nookaiah Chetty* v. *I.T.O. [1959] 35 I.T.R. 483, 488)]*. The Bombay High Court in *C.I.T.* v. *Ramsukh Motilal ([1955] 27 I.T.R. 54)* and the Assam High Court in *Tansukrai Bodulal* v. *I.T.O. ([1962] 46 I.T.R. 325 (F.B.))* have taken the view that the requirement of a valid notice cannot be waived. It is submitted that the Bombay and Assam view which was based on different particulars of facts cannot properly be applied. The issue of a valid notice is condition precedent to a valid assessment in exercise of the Deputy Commissioner's urisdiction, but it has no bearing on the question of the Deputy Commissioner's nherent jurisdiction. If the Deputy Commissioner of Taxes makes an assessment nder s. 93 without issuing a valid notice under this section, he cannot be said to act ithout inherent jurisdiction. His action would only amount to irregular exercise or ssumption of jurisdiction, and objection to such irregularity can always be waived *ee Mulla's Code of Civil Proceedure, 12th Ed.,pp. 129-31).*

Sub-sec.(5)–Exception to the provision under sub-sec (3) that issue of a tice is a condition precedent to assessment: This sub-section provides that no notice required to be issued afresh or no return is required to be filed which had already en filed for the purpose of making an assessment or reassessment in consequence of to give effect to any finding for annulment, set aside, cancellation or modification ntained in an order passed in appeal, reference or revision. The income-tax hority under this sub-section may start proceedings from the state at which such er of annulment, set aside, cancellation or modification has been made of the pose of assessment or re-assessment and the time limit as provided for in sec. 3) applies for completion of such assessment or reassessment. Similarly, sec. 94(3) vides that 60 days time limit applies for completion of assessment or reassessment ch is made in consequence of, or to give effect to, any such finding or direction.

The assessments to be made in consequence of or to give effect to a finding or direction, and that fiction of law applies for the purposes of both s. 93 and s. 94.

There was no provision in the 1922 Act corresponding to sub-s. (3). That sub-section enacts a principle which is fairly obvious and which would apply even in the absence of an express statutory provision, –*viz.*, that no appellate or revisional authority can give a direction to make an assessment or reassessment which would have been time-barred if it had been made at the time when the order impugned in appeal or revision was made –*Cf. C.I.T.* v. *Estate of Veeraswami Chettiar [1963] 49 I.T.R. 13*. In the case of *Johilla Coalfields Co. Ltd.* v. *C.I.T. [1960] 39 I.T.R. 137* wherein validity of fresh assessment has been discussed, it was observed that where the original assessment was made out of time and that original assessment was without jurisdiction in the sense that the income assessed could not be taxed, its cancellation could have no meaning or legal effect and would give no jurisdiction to make a fresh assessment, and that since the original assessment was not valid the fresh assessment was also bad in law.

Sec. 94. Limitation for assessment.–(1) Subject to the provisions of sub-sections (2) and (3), no order of assessment under the provisions of this Chapter in respect of any income shall be made after the expiry of two years from the end of the assessment year in which the income was first assessable.

Provided that the provisions of this sub-section shall have effect as if for the words "two years", in relation to the income which is first assessable in any assessment year commencing on or after the first day of July, 1995, the words "one year" were substituted.

(2) Notwithstanding anything contained in sub-section (1), assessment under section 93 may be made–

(a) in the cases falling under section 93(3)(a) and (b), within [two years] from the end of the year in which notice under the said sub-section was issued: and

(b) in the cases falling under section 93(3) (c), within [one year] from the end of the year in which notice under the said sub-section was issued.

(3) Notwithstanding anything contained in this section, limiting the time within which any action may be taken, or any order or assessment may be made, order or assessment, as the case may be, to be made on the assessee or any other person in consequence of, or to give effect to, any finding or direction contained in an order under sections 120, 121, [152E,] 156, 159, 161 or 162 or, in the case of a firm, an assessment to be made on a partner of a firm in consequence of an assessment made on the firm, may

be made within sixty days from the date on which the order was communicated] [and such revised order shall be communicated to the assessee within thirty days next following.]

Explanation 1.–Where, by an order under sections 120, 121, [152E,] 156, 159, 161 or 162, any income is excluded from the total income of the assessee for an assessment year, an assessment of such income for another assessment year shall, for the purposes of this section, be deemed to be one made in consequence of, or to give effect to, any finding or direction contained in the said order.

Explanation 2.–Where, by an order under sections 120, 121, [152E,] 156, 159, 161 or 162, any income is excluded from the total income of one person and held to be the income of another person, an assessment of such income of such other person, shall, for the purposes of this section, be deemed to be one made in consequence of or to give effect to, any finding or direction contained in the said order.

Time-limits for completion of assessments and reassessment–Sec. 94(1) and (2): Section 93(3) prescribes the time limit for the issue of notice where income has escaped assessment. This section prescribes the time limits for completion of assessment under sec. 83 or 84 as well as for completion of assessment or reassessment under sec. 93. The Supreme Court of India held in *Gadgil* v. *Lal & Co. (53 I.T.R. 231, 239)* that these time limits are not periods of limitation but are fetters on the I.T.O.'s (D.C.T.'s) power to bring income to tax.

Assessment under section 83 or 84: An assessment under section 83 or 84 i.e. regular assessment, must be completed within two years time from the end of the relevant assessment year in which the income was first assessable (sub-sec.(1)). The period of two years time-limit has been reduced to one year in cases where the income is first assessable in the assessment year 1995-96 and in subsequent assessment years. Thus one year time-limit applies to all assessment years from the assessment year 1995-96 and onwards–(prov. to sub-sec. (1)).

Assessment or reassessment under section 93: In a case of failure to file a return or concealment or for furnishing inaccurate particulars of income or for omission or failure to disclose all material facts, an assessment or reassessment under section 93 must be completed within two years from the end of the year in which notice under section 93(3)(a)(b) was served. If there is no failure to file a return nor any concealment, the assessment or reassessment under sec. 93 must be completed within one year from the end of the year in which notice under section 93(3) was served.

The section requires the assessment to be completed within the period of limitation; it is not further necessary that the order of assessment should be communicated to the assessee–*Viswanathar Chettiar* v. *C.I.T. [1954] 25 I.T.R. 79)* or

the notice of demand should be served on him *(Sushil Chandra Ghosh* v. *I.T.O. [1959] 36 I.T.R. 379)* within that period.

Time-limits for exceptional cases-Sub-section (3): This sub-section provides that the time-limit laid down in sub-section (1) for completion of assessment under sec. 83 or section 84 and the time-limit laid down in sub-sec.(2) for completion of assessment or reassessment under section 93 do not apply to cases where action is taken for making assessment or reassessment in consequence of or to give effect to, any finding or direction contained in an order of appeal or revision or in an order by the court on a reference or in an order of any court in any other proceeding. Under this sub-section the time-limit for taking such action for assessment or reassessment is sixty days from the date on which the order was communicated. This sub-section also provides that the revised order as made in consequence of or to give effect to the *finding or direction* in the appellate or revisional order as mentioned above shall have to be communicated to the assessee within thirty days next following although there is no provision for sending the assessment order as made under sub-sections (1) and (2) to the assessee within the limited period.

This sub-section also provides that where a firm is assessed under section 93 a consequential assessment on a partner of the firm shall have to be made within this limited period of sixty days.

Although the time-limit of sixty days applies to fresh assessments made under this sub-section but a fresh assessment made in consequence of the cancellation of an original assessment which was itself not valid being time-barred and incompetent such fresh assessment cannot be saved by this sub-section–See. *Jholia Coalfields Co. Ltd.* v. *C.I.T. [1960] 39 I.T.R. 137.*

"Finding or direction against assessee"– Construing the words, finding or direction the Supreme Court of India held in *I.T.O.* v. *Muralidhar Bhagwan Das 52 I.T.R. 335 and Sivalingam Chettiar* v. *C.I.T. 66 I.T.R. 586* as follows:

(a) The finding or direction should be within the Jurisdiction of the authority or court giving it–*C.I.T.* v. *Mahammad Shakor Mahammad Bashir 89 I.T.R. 57 (S.C. of India).*

(b) The finding should be necessary for the disposal of the appeal, revision or reference; the authority or court cannot give a finding that the income in dispute does not belong to the relevant assessment year; but though it may incidentally find, it cannot give a finding that the income belongs to another specified year–*Kamalapat Motilal* v. *I.T.O. 29 I.T.R. 192.*

(c) Likewise, the direction should be such as the authority is empowered to give under the appropriate sections of the Act, (Ordinance) for the assessment year under appeal or revision, and it has no jurisdiction to give a direction for any other year–*C.I.T.* v. *Manick Sons 74 I.T.R. (S.C. of India).*

In a given case a finding may be within the jurisdiction of the authority or court although a direction based on the finding may not be; and a finding without a direction is sufficient to lift the possible bar of limitation–(The A.A.C. has jurisdiction to give a finding in the firm's appeal that an addition made by the I.T.O. is the personal income of the partners and not of the firm, though he has no power to direct that the personal assessment should be re-opened; see. *C.I.T. v. Rajindar Nath 85 I.T.R. 298*).

Explanation-1: The Allahabad High Court has held that in disposing of an appeal for one year, the appellate authority cannot give a finding that the income or expenditure in issue falls to be taxed or allowed in another specified assessment year *(Hazari Lal v. I.T.O. [1960] 39 I.T.R. 265)*. Expln. 1 to this sub-section counteracts the effect of the Allahabad view by providing that in any case where income is excluded in appeal, reference or revision from the assessment for any year, an assessment of such income for another assessment year shall be *deemed* to be one made in consequence of, or to give effect to, any finding or direction by the authority hearing the appeal, reference or revision. This fiction of law removes the bar of limitation, irrespective of the question whether the authority has in fact given or can in law give a finding or direction that the income should be taxed in a specified assessment year other than the year for which the authority hears the appeal, reference or revision. The effect of this sub-section read with Expln. 1, is that if any income is deleted from an assessment in higher proceedings on the ground that it is not the income of that year, steps may be taken under s. 93 to assess it as the income of another year applying the time limit to the completion of the assessment or reassessment. Expln. 1 operates to put all assessees on the same footing inasmuch as once income is excluded from the assessment for a particular year on the ground that it is not the income of that year, and assessment of such income for another assessment year shall be deemed to be made in consequence of or to give effect to any finding or direction contained in the said year and so the time limit for assessment as given in this sub-section shall apply for assessment of income of that year. The provision has not specifically mentioned that the said income shall be assessable as the income of the immediately, succeeding year and in the absence of any express finding by the higher authority that the income represents the income of the immediately succeeding year or income of another specified year it will be difficult to make assessment on such income. The bar of limitation is necessarily removed for assessment for another year, regardless of the question whether there is an express finding by the higher authority that the amount represents the income of another specified year.

Explanation-2: *Direction or finding against a person other than the assessee.*–Sub-sec. (3) provides that the time limits in sub-ss. (1) and (2) do not apply to an assessment or reassessment made on *any person other than the assessee* in consequence of, or to give effect to, any finding or direction contained in an order passed in appeal, reference or revision. Likewise, in such cases the time limit for issuing a notice under sub-sec. (3) is also inapplicable. Thus, if A files an appeal against his assessment and the appellate authority deletes certain income on the ground that the income really belongs to B, a notice under s. 93 may be issued to B

and an assessment or reassessment on him must be completed within the specified time. The valuable rights of limitation as regards initiation of proceedings and completion of assessment are lost to B as a result of proceedings to which he was not a party. The corresponding provision contained in the second proviso to s. 34(3) of the 1922 Act. in so far as it affected persons other than the assessee, was declared void by the Supreme Court of India as offending against Art. 14 of the Constitution (equality before the law) (corresponding to Art. 27 of Bangladesh constitution) in *Prashar* v. *Vasantsen Dwarkadas ([1963] 49 I.T.R. (S.C. of India) 1.* and allied cases *(C.I.T.* v. *Sardar Lakhmir Singh [1963] 49 I.T.R. (S.C. of India) 70)*. It was observed in the cases that the proviso authorising the making of an assessment of persons other than the assessee beyond the prescribed time limit in pursuance of order by the A.A.C. or the Tribunal is violative of Art. 14 of the Constitution and therefore, void. The ground of the Indian Supreme Court's decision was that such a finding or direction cannot provide a reasonable basis of classification and cannot justify discrimination against the class of assessees who happen to have a finding given against them in the assessment proceedings concerning another person. This infirmity is present in this section and consequently, having regard to the said decision of that Supreme Court, the provisions of these sections should be regarded as void in so far as they affect persons other than the assessee.