CHAPTER X
LIABILITY INSPECIAL CASES

Sec.95: Liability of representative in certain cases.–(1) Every person who is a representative of another person in respect of any income for the purpose of this section shall, in respect of such income,–

(a) be subject to the same duties, responsibilities and liabilities as if such income were received by, or accruing to, or in favour of, him beneficially;

(b) be liable to assessment in his own name; and

(c) be deemed, subject to other provision of this Chapter, to be the assessee for all purposes of this Ordinance.

(2) A person who is assessed in pursuance of this section as a representative in respect of any income shall not, in respect of the same income, be assessed under any other provision of this Ordinance.

(3) Nothing in this section shall prevent either the direct assessment of the person for whom, or on whose behalf or for whose benefit, the representative is entitled to receive any income or recovery from such person of the tax payable in respect of such income.

(4) For the purposes of this section,–

(a) the guardian, manager or trustee, who receives or is entitled to receive any income for, or on behalf or for the benefit, of any minor, lunatic or idiot, shall be the representative in respect of such income;

(b) the Administrator–General, the Official Trustee, or any receiver, manager or other person, however designated, appointed by or under any order of a Court, who receives or is entitled to receive any income for, or on behalf or for the benefit, of any other person shall be the representative in respect of such income;

(c) the trustee or trustees appointed under a trust declared by a duly executed instrument in writing, whether testamentory or otherwise, including a legally valid deed of waqf, who receive or are entitled to receive any income for, or on behalf or for the benefit, of any person shall be the representative in respect of such income; and

(d) a person who is treated under section 96 as an agent in relation to a non-resident, shall be the representative in respect of such income of the non-resident as is deemed to accrue or arise in Bangladesh under section 18.

Representative assessee–Sec. 95: Sec. 95 deals with assessment on the legal representative or other person administering the estate of a deceased person. But the legal representative is not a "representative assessee" within the meaning of this Ordinance. Sec. 95(4) enumerates the four categories of representative assessees who are assessable in respect of the income which beneficially belongs to other persons–

(i) the guardian or manager of a minor, lunatic or idiot,

(ii) the Court of Wards, the Administrator-General, the Official Trustee or any receiver or manager appointed by or under an order of a Court,

(iii) a trustee appointed under a trust declared by a duly executed instrument in writing, and

(iv) the agent of a non-resident.

Every representative assessee is defined by sub-sec. (4) in relation to certain income: it is only "in respect of the income" specified in that sub-section that any person may be held to be a representative assessee. Sec. 95(1), which is the only section in the Ordinance imposing a substantive liability on the representative assessee expressly confines the liability to "the income in respect of which he is a representative assessee". This point is of particular significance in the case of agents of non-residents. See further under s. 96. "Agent is chargeable as representative assessee only in respect of income specified in sec. 18. Sec. 146 entitles a representative assessee in certain cases to claim or receive a refund due to the person he represents.

Department's option to assess representative assessee or person beneficially entitled to income.–Sec. 95(3) makes it clear that this section is an enabling section, i.e., the Department has the option to make an assessment on the representative assessee or a direct assessment on the person beneficially entitled to the income *(Saldhana* v. *C.I.T. 6 I.T.C. 114, 117)*. The Deputy Commissioner of Taxes may assess the agent or the non-resident *(Maharaja of Patiala* v. *C.I.T. 1943 I.T.R. 202, 224-6)*; he may assess the guardian, manager, receiver or trustee, or assess the beneficiary direct *(Mahanth Ramswaroop Das* v. *State of Bihar [1961] 42 I.T.R. 770 (S.C. of India); See also Hamabai Mehta* v. *C.I.T. 1948 I.T.R. 115)*. For instance, if an incapacitated person has no trustee or guardian *(Rex* v. *Newmarket comrs. (Exparte Huxley) 7 T.C. 49 (C.A.). (See also Shridhar Udai Narayan* v. *C.I.T. [1962] 45 I.T.R. 577))* or if the trustee or guardian is non-resident in Bangladesh and cannot be got at *(Archer-Shee* v. *Baker 11 T.C. 740 (H.L.) and Nelson* v. *Adamson 24 T.C. 36)*, the assessment may conveniently be made direct on the incapacitated person.

Sec. 97 further provides that even in a case where the assessment has been made on the representative assessee, the tax may be recovered from the beneficial owner of the income *(Ganesh Chandra Dhar* v. *C.I.T. [1959] 35 I.T.R. 84)*. The Department to recover the tax assessed on the beneficial owner of the income fro

the property vested in or under the control or management of the representative assessee in his representative capacity. The combined effect of ss. 95 and 97 is that the Department has two options–(a) to assess the representative assessee or the person beneficially entitled to the income and (b) having assessed either of the two, to recover the tax from the property held by him or by the other.

Basis of assessment on representative assessee.–Sec. 95 is an enabling section in the sense that it leaves the option with the Department to tax either the representative assessee or the beneficial owner of the income; but it is not enabling in the sense that it is the option of the Department to make an assessment on the representative assessee on any basis different from that enjoined by the provisions contained in this Chapter. The language of sub-sec. (3) is mandatory: if the Department chooses to assess a representative assessee, irrespective of the question as to the head under which the income falls, the tax must be levied only on the basis contemplated by sub-sec.(3) in like manner and to the same extent as it would be leviable upon the person beneficially entitled to the income although the Ordinance does not contain an express provision to that effect.

Guardian or manager of minor, lunatic or idiot.–Sub-sec. (4) Cl. (a): The guardian or manager of a minor, lunatic or idiot is chargeable to tax in respect of the income which he receives or is entitled to receive on behalf of the beneficiary. It is immaterial whether the beneficiary is resident or non-resident in Bangladesh. It is equally immaterial whether the guardian is a *de facto* guardian or a *de jure* guardian.

The tax is levied upon and recoverable from the guardian or manager in like manner and to the same extent as it would be leviable on and recoverable from the beneficiary (cl. (a) of sub-sec.(1)).

Under sec. 16(1) the tax is chargeable in respect of the total income of every person". The word "person" includes a minor or a person of unsound mind *Rex* v. *Newmarket comrs. (Exparte Huxley) 7 T.C. 49, 54 (C.A.). See also Shridhar ldai Narayan* v. *C.I.T. [1962] 45 I.T.R. 577).* In the case of such an incapacitated erson the tax should be assessed, generally speaking, not on such individual but on is guardian or manager.

Where executors have fully administered or cleared the estate and hold it erely as trustees for the residuary legatee who is a minor, they would be assessable der this section –*See P.C. Mullick* v. *C.I.T. 1938 I.T.R. 206, 209 (P.C.)).* See rther legal representative which includes, Executors and trustees (sub-sec. (4) of c. 92).

If the guardian of a minor is entitled to receive, or is in receipt of, income on half of the minor, the guardian would be chargeable under s. 95 even if he does not ntrol or hold the property from which the income is derived *(Drummond* v. *Collins* C. 525 *(H.L.)).*

Administrator-general, the official trustee or any receiver, manager or er person–Cl.(b): Where income is receivable on behalf of any person by

(a) the Administrator-General,

(b) the Official Trustee,

(c) any receiver or manager appointed by or under any order of a Court, or

(d) other person which includes any trustee or trustees appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise, and including any trustees appointed under a *wakf* deed which is valid under the Mussalman *Wakf* Validating Act, 1913,

an assessment may be made and the tax levied upon the persons enumerated above in like manner and to the same extent as the tax would be leviable upon and recoverable from the beneficiary.

Only those receivers and managers fall within this section who are appointed by or under any order of a Court *(See Mohamed Noorullah* v. *C.I.T. [1961] 42 I.T.R. 115 (S.C. of India). Joint Receivers of Estate of Dewan Bahadur Arunachala Mudaliar* v. *C.I.T. [1961] 41 I.T.R. 432, Estate of Warde* v. *C.I.T. [1961] 43 I.T.R. 219).* The fact that one of the parties is a minor and therefore the law requires the Court to give leave to the guardian to enter into a compromise on behalf of the minor, does not alter the position *(Jamalabdeen Sahib* v. *C.I.T. 1944 I.T.R. 285).* A receiver cannot be assessed in respect of the income of a year prior to his appointment *(Asit Kumar Ghose* v. *C. Ag. I.T. [1952] 22 I.T.R. 177).*

Official Assignee and liquidator.—When upon an insolvency the property of the insolvent becomes vested in the Official Assignee, an assessment may be made on the Official Assignee in respect of the income derived from the property *(In re Official Assignee for Bengal 1937 I.T.R. 233. The question whether the case fell within s. 41 (as it then stood) of 1922 Act was left open. Cf. Hibbert* v. *Fysh 40 T.C. 305 (C.A.)).* A company in liquidation is a "company" for the purposes of this Ordinance, and the Deputy Commissioner of Taxes is entitled to call upon the liquidator of the company which is being wound up to make a return of the company's income *(C.I.T.* v. *Official Liquidator, Agra Spg. & Wvg. Mills 1934 I.T.R. 79; See also C.I.T.* v. *Express Newspapers Ltd. [1960] 40 I.T.R. 38)(See also sec. 101).* The liquidator may be included in the word "manager" used in this section, but since an assessment may be made direct on the company in liquidation, it would not be necessary to have recourse to sec. 95.

Executors and trustees.—This section applies to trustees appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise (cl. (c)). A deed of trust executed by a debtor for the benefit of the general body of creditors is covered by this section *(C.I.T.* v. *Dutt's Trust 1942 I.T.R. 477).*

A mere executor as such is *not* a trustee: after he has fully administered and cleared the estate and ceased to be an executor, he may become a trustee for certain purposes *(Asit Kumar Ghose* v. *C. Ag. I.T. [1952] 22 I.T.R. 177; Dubash's Executors* v. *C.I.T. 1948 I.T.R. 90, affirmed on another point, [1951] 19 I.T.R. 182 (S.C. of India)).* He may, in some cases, cease to be an executor and become a trustee and the administration may be regarded as completed, even while some liabilities due by the

estate remain undischarged *(C.I.T.* v. *Estate of Ramaswami Pillai [1962] 46 I.T.R. 666)*. Where the executors pay an amount to a legatee, not in discharge of any trust but in the course of administration of the estate, this section would not apply in respect of the amount so paid over to the legatee *(Dubash's Executors* v. *C.I.T. supra)*. But if the executors purchase and hold securities for the purpose of giving the interest thereon by way of annuity to a beneficiary as directed by the will, they may, after the estate is administered, become trustees for the beneficiary in respect of such investments and the interest thereon may become taxable in their hands under s. 95 *(Dubash's Executors* v. *C.I.T. supra, at 98)*. As regards application of the income of the estate by executors, see under s. 16(1), "Application of income and its diversion by overriding title".

The section is expressly made applicable to trustees or *mutawallis* appointed under a valid wakf-deed *(See Habibur Rahman* v. *C.I.T. 1945 I.T.R. 189 and C.I.T.* v. *Jamal Mohamad Sahib 1941 I.T.R. 375)*, in this case the assessee executed a deed of *wakf* by which he dedicated the income from his business with ultimate benefit to the poor, for the maintenance and support of himself and his family and for other purposes and constituted himself the sole *Mutridly* of the trust. The deed provided that the beneficiaries should be benefited concurrently and in the same proportion. It was held that the assessee should be taxed on the basis of profit falling to the share of each beneficiary and not on the footing of all the beneficiaries constituting an association of person who would be assessable as holding the property on behalf of the beneficiaries and not the Almighty *(C.I.T.* v. *Puthiya Ponmanichintakam Wakf 1962] 44 I.T.R. 172 (S.C. of India))*.

The section applies to testamentary as well as non-testamentary trusts, but the trust must be one which is declared by a duly executed instrument in writing *(Joint committee of Action, B. Group Merchants* v. *C.I.T. [1963] 48 I.T.R. 427)*. The section does not apply to oral trusts, but the sub-section is *not* exhaustive of cases where trustees are liable to charge in respect of income received by them on behalf of beneficiaries; and therefore the trustee of an oral trust, who is in actual receipt and control of the trust income, would, apart from this section, be assessable in respect of such income under the general charging section *(In re Probynabad Stud Farm 1936 T.R. 114)*. Similarly, a body of trustees, incorporated or otherwise, appointed under statute, is chargeable to tax in respect of the trust income *(Sir currimbhoy Ibrahim Baronetcy Trust* v. *C.I.T. 1934 I.T.R. 148 (P.C.))*.

Where there are more trustees than one, they may be assessed as an association of persons, though the tax must be levied on them to the same extent as it would be leviable upon the beneficiaries. But persons appointed merely to manage property which is bequeathed to and *vest* in legatees who are minors, cannot be regarded as either executors or trustees and cannot be taxed as if they constituted an association of persons to whom the income belonged *(Lala Shankar shah's Estate* v. *C.I.T. 1945 I.T.R. 500)*.

Agent of non-resident–Cl. (d) of sub-section (4):–Sec. 95 is the only section which imposes a vicarious liability on an agent to be assessed in respect of the income of the principal. The liability is in respect of the income of *non-resident*

principals only; and secondly, it is only in respect of income falling within s. 18 and not any other income. However, the person assessable as an agent may not be an agent in fact or under the general law. The principles regulating the appointment and liability of agents are discussed *post* in notes to s. 96. Agent, is chargeable as representative assessee only in respect of income specified in s. 18.

Measure of representative assessee's liability.–Sub-sec. (1): This section imposes a liability to tax on the trustee or other representative assessee in respect of all income which reaches his hands, whether it is from investments in securities and immoveable properties *(Sir currimbhoy Ibrahim Baronetcy Trust* v. *C.I.T. 1934 I.T.R. 148 (P.C.); Birendra Kumar Datta* v. *C.I.T. [1961] 42 I.T.R. 661)*, or from a business which he conducts on behalf of the beneficiaries *(Mohamed Noorullah* v. *C.I.T. [1961] 42 I.T.R. 115 (S.C. of India); Razzak* v. *C.I.T. [1963] 48 I.T.R. 276; Habibur Rahman* v. *C.I.T. 1945 I.T.R. 189)*.

An assessment on a representative assessee under this section is separate and distinct from his personal assessment. Every representative assessee is liable to tax under this section in like manner and to the same extent as the person beneficially entitled to the income. Since the liability of the turstee or guardian is co-extensive with that of the beneficiary, in the assessment on the trustee or guardian all such exemptions, deductions and abatements should be given as the beneficiary would have been entitled to in case of direct assessment *(Willimas* v. *Singer 7 T.C. 387, 411, 2 (H.L.))*. The trustee or guardian is also entitled to claim a refund where the total income of the ward or beneficiary justifies such claim *(I.R.* v. *Dewar 16 T.C. 84, 9 (H.L.))*. If the beneficiary has made advance payment of tax and the assessment is subsequently made on the trustees, credit must be given to the trustees for the tax so paid in advance by the beneficiary *(Trustees of Sir R.J. Vakil* v. *C.I.T. [1958] 3 I.T.R. 517)*. Thus the interposition of the trustee does not affect, generally speaking, the incidence of tax on the beneficiary *(Cf. Archer-Shee* v. *Baker 11 T.C. 749 (H.L.) and Nelson* v. *Adamson 24 T.C. 36, 40)*.

Where the beneficiary is not liable to tax at all in respect of certain income there would be no liability to tax on the trustee or guardian in respect of that income *(Reid's Trustee* v. *I.R. 14 T.C. 512, 525; Kelly* v. *Rogers 19 T.C. 692, 713 (C.A.))*. If income from investments is received abroad by a beneficiary who is non-resident in this country, he would not be chargeable in respect of that income under the Ordinance merely by reason of the fact that the investments stand in the names of trustees who are resident here and under whose mandate the income is paid direct to the beneficiary abroad. Since the beneficiary would not be chargeable in respect of such income, the trustees would not be chargeable either in respect thereof *(Williams* v. *Singer 7 T.C. 387 (H.L.))*. Conversely, if the beneficiary is a resident in this country and is entitled to income arising from a foreign trust estate held by foreign trustees, he would nevertheless be chargeable in respect of such income *(Archer-Shee* v. *Baker 11 T.C. 749 (H.L.))*, and since the beneficiary, unlike the trustees, would be resident in this country the assessment in such a case may conveniently be made on the beneficiary direct *(See Archer-Shee* v. *Baker, ibid., and Nelson* v. *Adamson 24 T.C. 36)* or on his guardian in this country in case the beneficiary is a minor *(Drummond* v. *Collins 6 T.C. 525 (H.L.))*.

If, as frequently happens, the entire income accruing to the trustees is not passed on to the beneficiary but administration charges and expenses are paid or a capital debt is discharged out of the trust income, the entire trust income would be assessable in the hands of the trustees and not merely the net income which reaches the beneficiary, just as the entire income would have been assessable in the hands of the beneficiary if he had been in direct receipt of such income *(See Reid's Trustees* v. *I.R. 14 T.C. 512, 523; Aikin* v. *Macdonald's Trustees 3 T.C. 306; I.R.* v. *Dewar 16 T.C. 84, 94 (H.L.))*. If a beneficiary has no present beneficial right to any part of the income of the trust but has only a contingent interest, the trustees would be assessable in respect of the trust income even though the beneficiary's total income might be below the minimum taxable limit *(I.R.* v. *Dewar 16 T.C. 84 (H.L.))*, for in such a case no part of the trust income can be held to be the income of the beneficiary *(I.R.* v. *Blackwell Minor's Trustee 10 T.C. 235)*.

Assessment on representative assessee where several persons are beneficially entitled to income.–Since the tax is to be levied on the representative assessee in like manner and to the same extent as it would be leviable upon the persons beneficially entitled to the income, in a case where several persons are beneficially entitled to the income the assessment on the representative assessee should be at the individual rates of tax applicable separately to the total income of each beneficiary *(C.I.T.* v. *Balwantrai Jethalal Vaidya [1958] 34 I.T.R. 187; Birendra Kumar Datta* v. *C.I.T. [1961] 42 I.T.R. 661. Cf. Hobbs* v. *Ag I.T. [1963] 49 I.T.R. 811)*. However, this principle would not apply in the exceptional case where the persons beneficially entitled to the income constitute an association of persons. In such an exceptional case the representative assessee would be chargeable at the rate appropriate to the total income received on behalf of all the beneficiaries as constituting a unit of assessment, and consequently the incidence of tax may be higher. But in order to constitute an association of persons the beneficiaries must *voluntarily* join in a common purpose or common action and the object of the association must be to *produce* income, it is not enough that the income is *received* jointly. (See under s. 46, "Association of persons"). Thus where income is merely received from investments, the beneficiaries cannot be said to have joined together to produce income; and likewise, where a business is carried on by a guardian or trustee and the beneficiaries have not, of their volition or free will, joined together in having the business conducted through their common representative, they cannot be treated as constituting an association of persons.

Where a business is inherited by the widow and minor children of the deceased owner and the widow carries on the business on behalf of herself and of her minor children as their guardian or trustee, the business profits should be assessed on the basis of the portion of assessable profits falling to the share of each beneficiary and at the individual rates of tax applicable separately to the total income of each beneficiary *(Habibur Rahman* v. *C.I.T. 1945 I.T.R. 189 and Lala Shankar Shah's Estate* v. *C.I.T. 1945 I.T.R. 500)*. An assessment on guardians carrying on a business inherited by minor children or on trustees carrying on business for the benefit of several beneficiaries, should be made on the same basis of division of income among the beneficiaries and charge at the rate appropriate to each beneficiary *(C.I.T.* v.

Balwantrai Jethalal Vaidya [1958] 34 I.T.R. 187; Razzak v. *C.I.T. [1963] 48 I.T.R. 276).*

Where a person carries on a business on behalf of an estate of which he has been appointed the receiver by an order of the Court, the parties who have a beneficial interest in the business may or may not constitute an "association of persons". If they do constitute an association of persons, the assessment would be made on the receiver at the rate appropriate to the total income of the business *(Mohamed Noorullah* v. *C.I.T. [1961] 42 I.T.R. 115 (S.C. of India)).* If they do not constitute an association of persons, the assessment may be made separately on each party having a beneficial interest in the business; or, an assessment may be made under this section on the receiver, not as the principal officer of an association of persons but as the representative of the parties, and the tax should be levied upon the receiver only to the same extent as it would be leviable upon and recoverable from each of the beneficial owners separately *(C.I.T.* v. *Court Receiver [1957] 31 I.T.R. 885).* Similarly, where a business is carried on by the mutawalli of a Wakf comprising several beneficiaries, the mutawalli is taxable on the basis of the profits falling to the share of each beneficiary and not on the footing of all the beneficiaries constituting an association of persons *(Habibur Rahman* v. *C.I.T. 1945 I.T.R. 189).*

A receiver of the properties of a disrupted Hindu family which is deemed to continue to be joint under s. 90, should be assessed as representing the joint family and not as representing the individual members *(Joint Receivers of Estate of Arunachala Mudaliar* v. *C.I.T. [1961] 41 I.T.R. 432).* A receiver appointed by the Court to manage the estate of a deceased person pending the grant of probate to the executors, receives the income on behalf of the executors and not the beneficiaries under the will, and therefore tax is leviable on him in like manner and to the same extent as it would be leviable on the executors as an association of persons, i.e. at the rate applicable to the total income of the estate *(Estate of Warde* v. *C.I.T. [1961] 41 I.T.R. 219).*

Where a deed of trust is executed by a debtor for the benefit of the general body of creditors, the income would be received by the trustees on behalf of the general body of creditors and therefore the tax should be levied on the trustees representing the general body of creditors and not as if the debtor was the beneficiary under the trust *(C.I.T.* v. *Dutt's Trust 1942 I.T.R. 477).*

The beneficiary under a trust may in his turn be himself a trustee. For instance, if under a deed of trust the income is payable by the trustees to a person for the maintenance of himself, his wife and children, the income he receives is impressed with a trust in favour of his wife and children; and in respect of such income he can be assessed not in his individual capacity but as a trustee and in accordance with the provisions of this section *(C.I.T.* v. *Manilal Dhanji [1962] I.T.R. 876 (S.C. of India)).*

If the shares of the beneficiaries are indeterminate or unknown the assessment should be made on the basis of the total income–*C.I.T.* v. *Puthu Ponmanichin Takam Wakf (1862) 44 I.T.R. 172 (S.C. of India).*

Sec.96: Persons to be treated as agent.–(1) For the purposes of this Ordinance, the following persons shall, subject to the provisions of sub-sections (2) and (3) be treated as agent in relation to a non-resident, namely–

(a) any person in Bangladesh–
  (i) who is employed by, or on behalf of, the non-resident;
  (ii) who has any business connection with the non-resident;
  (iii) who holds, or controls the receipt or disposal of, any money belonging to the non-resident;
  (iv) who is a trustee of the non-resident; or
  (v) from or through whom the non-resident is in receipt of any income, whether directly or indirectly;

(b) any person, whether a resident or non-resident, who has acquired, by means of transfer, a capital asset in Bangladesh from a person residing outside Bangladesh; and

(c) any person who, for any other reasonable cause, is declared or treated as an agent of the non-resident.

(2) An independent broker in Bangladesh, who in respect of any transaction, does not deal directly with, or on behalf of, a non-resident principal but deals with, or through, a non-resident broker shall not be treated as an agent in relation to a non-resident in respect of such transaction if–

(a) the transaction is carried on in the ordinary course of business through the non-resident broker; and

(b) the non-resident broker is carrying on such transaction in the ordinary course of business.

(3) No person shall be treated under this Ordinance as an agent in relation to a non-resident unless he has been given by the Deputy Commissioner of Taxes an opportunity of being heard.

Persons who may be regarded as agent–Sec. 96: Statutory agents of non residents: Under s. 96 the agent of a non-resident is personally liable to assessment in respect of the non-resident's income. Sec. 96 deals with the appointment of a statutory agent on whom an assessment may be made in respect of income covered by s. 95. The purpose of these sections is to secure payment from the non-resident of the tax chargeable on him, though the person directly affected is the statutory agent *(Trinidad Lake Asphalt Operating Co.* v. *C.I.T. 1945 I.T.R. Suppl. 14, 17 (P.C.)).*

In *Abdul Azeez* v. *C.I.T. ([1958] 33 I.T.R. 154)* the Madras High Court held that the provisions imposing tax liability on the non-resident, and vicarious liability on the agent as the representative assessee, in respect of income arising from a business connection in India did not offend against the Fundamental Rights embodied in arts. 14 and 19(1)(g) (corresponding to article 27 of Bangladesh Constitution) of the Constitution.

A person who is an agent of a non-resident under the general law may be assessed as an agent. Even if a person is not an agent under the general law, he may still be assessed as an agent if–

(a) he is employed by or on behalf of the non-resident, or
(b) he has any business connection with the non-resident, or
(c) who holds or controls the receipt or disposal of any money beginning to the non-resident, or
(d) from or through him the non-resident is in receipt of any income, whether directly or indirectly, or
(e) he is the trustee of the non-resident, or
(f) any person who is declared or treated as an agent of the non resident, or
(g) he has acquired, by means of a transfer from the non-resident, a capital asset in Bangladesh from a person outside Bangladesh.

In the first six cases it is further necessary that the person sought to be assessed as an agent should be "in Bangladesh"; whereas this condition is not necessary in the seventh case.

Persons "employed by or on behalf of" a non-resident would include authorised agents in fact and in law *(Muller & Co. (London) Ltd.* v. *Lethem 13 T.C. 126 (H.L.))*. The second category of statutory agents comprises those who have a business connection with the non-resident *(See Raghava Reddi* v. *C.I.T. [1962] 44 I.T.R. 720 (S.C. of India))*. Statutory agents of the fourth category are those from or through whom the non-resident is in receipt of any income *(C.I.T.* v. *Currimbhoy Ebrahim & Sons Ltd. 1933 I.T.R. 341)*, *e.g.* an agent for sale *(Turner Morrison & Co. Ltd.* v. *C.I.T. [1953] 23 I.T.R. 152 (S.C. of India))*. Where a solicitor on behalf of his resident client makes an income payment to a non-resident, the solicitor, being the person through whom the non-resident receives the payment, may be treated as the statutory agent of the non-resident *(Rye & Eyre* v. *I.R. 19 T.C. 164 (H.L.). Cf. Howells Iv. I.R. 22 T.C. 501)*.

Sub-sec. (2) provides that when transactions are carried on in the ordinary course of business through a broker in Bangladesh and the broker does not deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker, the broker in Bangladesh cannot be treated as an agent under this section in respect of such transactions. Thus where *bona fide* "hedging and straddling" operations take place through a broker in Bangladesh and a foreign broker acting for an undisclosed principal, the Bangladesh broker cannot be deemed to be the agent of the foreign principal.

Sub-sec. (3) lays down that a person cannot be treated as the agent of a non-resident unless and until he has had an opportunity of being heard by the Deputy Commissioner of Taxes as to his liability.

Sec. 23(2) enacts that interest which is chargeable under this Ordinance and which is payable outside Bangladesh should not be allowed as a deduction to the payer except in the case in which there is a person in Bangladesh "who may be treated as an agent under s. 96 in respect of the interest".

Principles regulating the appointment and liability of agents.–The following principles govern the appointment and liability of agents:

Agent is chargeable as representative assessee only in respect of income specified in s. 18(2).–Every representative assessee is defined by s. 95 in relation to certain income: it is only "in respect of the income" specified in s. 95 that any person may be held to be a representative assessee. Sec. 95 which is the only section in the Ordinance imposing a substantive liability on the representative assessee, expressly confines the liability to "the income in respect of which he is a representative assessee". An agent is defined by s. 95(2)(d) as a representative assessee only in respect of the income of a non-resident specified in s. 18(2)(a), and it is only in respect of such income specified in s. 18(2)(a) that a substantive vicarious liability is imposed on the agent by s. 95. The income specified in s. 18(2)(a)(c) is income "arising, whether directly or indirectly, through or from any business connection in Bangladesh or through or from any property in Bangladesh, or through or from any asset in Bangladesh or through or from any money lent at interest for the purposes of business or profession carried on in Bangladesh.

There may be no agent in Bangladesh in whose hands the income specified in s. 18(2) may be assessed, and to get over that difficulty s. 95(4)(d) provides for the appointment by the Deputy Commissioner of Taxes of a statutory agent. Thus s. 96 really provides only the machinery for giving effect to ss. 95, and 96 (1)(c) and the mere appointment of an agent would be of no consequence unless there is income in respect of which the agent can be held to be a representative assessee under s. 95 and can be assessed as such under s. 95. In other words, any person appointed an agent under s. 96(1)(c) is not necessarily assessable as a representative assessee in respect of the non-resident's income; it is only in relation to the income covered by s. 95 that the status of representative assessee emerges and the liability to be assessed under s. 95 arises. Thus though there may be a business connection between a resident and a non-resident company, where there is no evidence to show that any profits accrued to the non-resident company through the business connection, no assessment can be made on the resident company as the agent of the non-resident company and the mere appointment of the resident company as such agent under this section would be of no avail *(C.I.T.* v. *Bombay Trust Corpn. Ltd. 1936 I.T.R. 323 (P.C.))*.

A person "from or through whom the non-resident is in receipt of any income" may be regarded as an agent under s. 96(i)(a)(v), but unless such income falls within s. 18(2) the agent would not be a representative assessee in respect of such income under s. 95 and would not be assessable under s. 95.

Sec. 18(2) deems the income specified therein to accrue in Bangladesh. However, if the income of a non-resident is of the nature specified in that section, the agent can be assessed to tax in respect of it, even if the income actually accrues in Bangladesh or is received in Bangladesh and therefore the question of deeming it to accrue in India (to make it chargeable) does not arise. But in such a case, only that part of the income which is reasonably attributable to the operations carried out in Bangladesh would be covered by s. 18(2) and the balance of the income attributable to the operations carried out abroad would not be taxable in the hands of the agent even though the entire income may be received in Bangladesh by the agent *(Turner Morrison & Co. Ltd.* v. *C.I.T. [1953] 23 I.T.R. 152 (S.C. of India))*.

Agent is chargeable in like manner and to the same extent as the non-resident.–See *ante* under "Measure of representative assessee's liability in section 95".

Agent is assessable in respect of income of non-residents only.–This section and s. 95 make it clear that the appointment and vicarious liability of an agent are in respect of the income of non-residents only and not of residents.

Statutory agent may not be agent in fact.–The person deemed to be an agent under this section may not be an agent at all in fact and in law *(In re Nandlal Bhandari Mills Ltd. 1939 I.T.R. 452, 462)*. any person who comes within the terms of s. 96 is put by that section artificially into the position of agent *(C.I.T.* v. *Remington Typewriter Co. (Bombay) Ltd. 5 I.T.C. 177, 180 (P.C.))*. Thus where the non-resident managing agents of a non-resident limited company, in accordance with the powers conferred on them, open in Bangladesh a branch of the company, and the managing agents supply goods to the branch for sale in Bangladesh and receive a commission on the sales so effected, there is a business connection between the managing agents and the branch of the company in Bangladesh, and the company may be fictionally deemed to be and assessed as the agent of the managing agents, though the position is the reverse in fact *(In re Nandlal Bhandari Mills Ltd. 1939 I.T.R. 452. Sarupchand Hukamchand* v. *C.I.T. 5 I.T.C. 108)*.

Agent need not be in receipt of income on behalf of non-resident. –A person in Bangladesh who has not received any income on behalf of a non-resident but has actually paid the non-resident the sums sought to be taxed (*e.g.* by way of interest on a loan advanced by the non-resident, or by way of dividend) may be treated as an agent under this section and assessed as a representative assessee *(C.I.T.* v. *Bombay Trust Corpn. Ltd. 4 I.T.C. 312 (P.C.); C.I.T.* v. *Remington Typewriter Co. (Bombay) Ltd. 5 I.T.C. 177 (P.C.); Bank of Chettinad Ltd.* v. *C.I.T. 1940 I.T.R. 522 (P.C.))*.

Agent's liability is personal.–The liability of the statutory agent appointed under this section and assessed under s. 95 is personal and not conditional upon his having in hand any funds of the non-resident *(Plunkett* v. *Narayan Parashram Tullu 1 I.T.C. 1.)* The Supreme Court of India has held that if he is unable to recover from the non-resident the amount of tax, he cannot claim it as a bad debt or as a business loss on ordinary principles of commercial accounting *(C.I.T.* v. *Abdullabhai Abdulkadar*

[1961] 41 I.T.R. 545). But whereas the agent would become personally liable to tax in respect of the non-resident's income if he is assessed as the representative assessee, there is no provision for recovering the tax from his personal assets where the assessment is made direct on the non-resident.

Agent must have some connection or concern with the income sought to be assessed. –The statutory agent must have some connection or concern with the income sought to be assessed *(Ramnarayan Rajmal* v. *C.I.T. [1953] 24 I.T.R. 442; Subramania Chetty* v. *C.I.T. [1962] 46 I.T.R. 724)*. Thus a borrower in Bangladesh may be assessable as the agent of the non-resident lender in respect of the interest payable to the non-resident lender, but the borrower cannot be assessed as the agent in respect of the income arising to the lender from immovable property in Bangladesh with which the borrower has no concern *(C.I.T.* v. *Currimbhoy Ebrahm & Sons Ltd. 1935 I.T.R. 395, 402 (P.C.))*. A separate assessment may be made on the agent managing the property on behalf of the non-resident *(C.I.T.* v. *Currimbhoy Ebrahim & Sons. Ibid.)*. Where a non-resident has business connection in Bangladesh with several agents, each agent can be assessed in respect of the profits accruing *through the dealings with him only* and not with the other agents, and the Department should make separate assessments on the different agents *(Ramnarayan Rajmal* v. *C.I.T. [1963] 24 I.T.R. 442; Subramania Chetty* v. *C.I.T. [1962] 46 I.T.R. 724)*. But where an agent receives overriding commission even in respect of orders placed directly by customers with the non-resident and carries out certain obligations with regard to such orders, the agent may be held assessable in respect of profits arising to the non-resident from such orders *(Soho House* v. *C.I.T. [1957] 31 I.T.R. 727)*. It was held in that case that "if a non-resident company earns profits in territories outside India through work done by their agents in India, whose agency territory comprises foreign territories also, the agents in India can be assessed to tax in India as the statutory agents of the non-resident company in respect of the profits made by the latter in those foreign territories through the Indian agent. Where under the terms of agency the agents in India of a non-resident were entitled to a commission on all orders whether they were placed directly with the company or through the agents ... and the records showed that the agents carried out important obligations with regard to the customers who placed their orders directly. Held, that the non-resident was liable to pay tax in India through the agents in respect of all such orders not merely in respect of orders placed through the agents."

"An opportunity of being heard–Sub-sec. (3): Sec. 43 of the 1922 Act expressly required a notice to be served on the person proposed to be treated as an agent and further required that he should be given an opportunity of being heard as to his liability. This sub-section does not refer to service of a notice but only provides for an opportunity of being heard. However, it seems that a proper opportunity of being heard in a matter of this importance would, generally speaking, involve the service of a notice, though such notice need not be in any particular form. If a reasonable opportunity of being heard has been given, it is not further necessary to the validity of a notice calling for a return of income where it is served upon a person as agent of a non-resident that it should be preceded by an order declaring him to be the agent of the non-resident.

The assessment for each year is self-contained and therefore a determination as to the generation of agency under this section should be made afresh in respect of each assessment year *(Tata Engineering & Locomotive Co. Ltd.* v. *I.T.O. [1963] 49 I.T.R. 866)*. The mere fact that the assessee was found to be an agent in one assessment year does not lead to the necessary inference that he is also an agent in the next assessment year. But if the assessee by his conduct admits the position and status of an agent of a non-resident for the purposes of this Ordinance and makes a return or pays the tax on that footing, failure to serve a notice under this section would not invalidate the assessment *(Harakchand Makanji & Co.* v. *C.I.T. 1948 I.T.R. 119; Habib & Sons* v. *C.I.T. [1963] 49 I.T.R. 792)*. Where a person has been validly assessed as an agent for a particular financial year and subsequently reassessment proceedings are taken under s. 93 in respect of that year, no fresh determination need be made under this section, for the facts necessary to determine the question of agency would be the same as in the original assessment *(Govindram Seksaria 1943 I.T.R. 104)*.

Limitation.–An assessment on the principal or agent under s. 83 read with this section should be made within the period of limitation prescribed by s. 94. If the income of the non-resident principal has escaped assessment or has been under-assessed, action under s. 93 can be taken against the agent, but the notice must be issued within the limitation period.

Appeal.–There is no express provision for appeal in the Ordinance, but the person assessed as an agent could appeal, *after* the assessment, on the general ground of "denying his liability to be assessed" under cl.(b) of sec. 153–*Gokul Das Chunilal* v. *C.I.T. A.I.R. 1932 Nag. 152)*.

Sec. 97: Right of representative to recover tax paid.–(1) A representative who, on account of his liability under section 95, pays any sum shall be entitled to recover the sum so paid from the person on whose behalf it is paid, or to retain out of any moneys that may be in his possession or may come to him in his possession or may come to him in his capacity as a representative, an amount equivalent to the sum so paid.

(2). A representative, or any person who apprehends that he may be assessed as a representative, may retain, out of any money payable to the person (hereinafter referred to as beneficiary) on whose behalf he is liable to tax under section 95, a sum not exceeding his estimated liability;

(3) In the event of any disagreement between the beneficiary and the representative or, as the case may be, the person apprehensive of being assessed as representative, as to the amount to be retained under sub-section (2), such representative or person may secure from the Deputy Commissioner of Taxes a certificate stating the amount to be so retained pending the settlement of the liability and the certificate so obtained shall be the warrant for retaining that amount.

Representative assessee's right to recover tax or other sum.–Sec. 97: This section extends to every representative assessee the right to retain, out of moneys in his possession in his representative capacity, an amount equal to any sum paid or payable by him under this Ordinance, or to recover such sum from the person beneficially entitled to the income. Such a right of retention and recovery was expressly provided for in the 1922 Act only in the case of agents of non-residents. The agent who apprehends that he may be assessed as a representative assessee, has the right to retain such sum, irrespective of the fact that the non-resident may turn out to be not assessable at all when the assessment is ultimately made upon him–*Aggarwal chamber of Commerce Ltd.* v. *Ganpat Rai Hira Lal [1958] 33 I.T.R. 245 (S.C. of India)*. It was held that persons who are bound to pay the tax under the Income-tax Act are not concerned with the ultimate result of the assessment.

Sec. 98: Liability of firm or association for unrecoverable tax due from partners or members.–(1) Where any tax payable by partner of a firm or a member of an association of persons in respect of his share of the income from the firm or association, as the case may be, cannot be recovered from him, the Deputy Commissioner of Taxes shall notify the amount of the tax to the firm or association.

(2) Upon notification of the amount of tax under sub-section–(1), the firm or association so notified shall, notwithstanding anything contained in any other law for the time being in force, be liable to pay the said tax and shall, for the purpose of recovery thereof, be deemed to be an assessee in respect of such tax: and the provisions of this Ordinance shall apply accordingly.

Sec. 99: Liability of partners, etc., for discontinued business of a firm, etc.–(1) Where any business or profession carried on by a firm or an association of persons has been discontinued, or where a firm or an association of persons is dissolved, assessment of the total income of the firm or association may be made as if no such discontinuance or dissolution had taken place and all the provisions of this Ordinance shall, so far as may be, apply accordingly.

(2) Where an assessment is made under sub-section (1) in respect of a firm or an association of persons, every person who was a partner of the firm or member of the association at the time of discontinuance of business, or as the case may be, dissolution of the firm or association and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax found payable by the firm or association upon such assessment and shall, for the purpose of recovery of such tax, including penalty and other sum payable, be deemed to be an assessee; and the provisions of this ordinance shall apply accordingly.

Liability of firm or association of persons for partners or members of the association and liability of partners or members when business is discontinued.–Sec. 98 and 99: If any tax payable by a partner of a firm or a member of an association in respect of his share income from the firm or the association cannot be recovered from him, section 98 imposes liability on the firm or association for such tax due from the partner of the firm or the member of the association. But if such partner or member has any other income in addition to the share income from the firm or the association the section does not authorise to recover the entire liability to pay tax on the total income of the partner or member. The firm or the association is concerted only to such proportion of the liability of the partner or member as it relates to the share income of the firm or association and for the recovery of tax of the partner or member the firm or association shall be deemed to be an assessee in respect of the tax due from such partner or member.

Liability of partners on dissolution of firm or discontinuance of its business.–Sec. 99: Section 98 lays burden of tax-liability of the partners of a firm or a member of an association of persons on the firm or association in respect of his share income from the firm or the association when such tax cannot be recovered from the firm or the association as the case may be. Similarly section 99 imposes tax liability of the firm or association of persons as determined on the basis of assessment made on the firm or association on the partners or members, as the case may be, but the application of this section is limited only when there has been discontinuance of business or dissolution of firm or association. This section further imposes tax liability of the firm or association on the legal representative of any such deceased person.

Joint and several liability of partners on dissolution of firm or discontinuance of its business.–This section provides that where any business or profession carried on by a firm or an association of persons has been discontinued or where a firm or an association of persons is dissolved, the assessment should be made of the total income of the firm or association of persons as if no such discontinuance or dissolution had taken place. Thus the notice under s. 93 may be issued in the name of the dissolved firm or association –*Ramniwas Hanumanbux Somani* v. *Venkataraman [1961] 43 I.T.R. 152; Muthappa Chettiar* v. *I.T.O. [1961] 41 I.T.R. 1 (S.C. of India) and Pandu Rao* v. *Coll. of Madras [1954] 26 I.T.R. 99.* In this case notices under sections 22(2) and 23(1) were issued in the name of a firm (which had been dissolved in the meantime) and were served on one of the partners of the firm. On account of non-compliance with the said notice an *exparte* assessment was made under section 23(4). Held, that the assessment could not be challenged as invalid because notices had not been issued and served on all the partners. The assessment was valid. The section is not confined to the profits of only the year of discontinuance or dissolution but extends also to the profits of the preceding years. The concept of "discontinuance" has been dealt with *ante* under s. 89.

The section further provides that every person who was at the time of such discontinuance or dissolution a partner of the firm or a member of the association and the legal representative of a deceased partner, or member are jointly and severally

liable for the amount of tax payable. Thus the entire tax due by the firm or association may be recovered from one partner *(Om Prakash Gupta* v. *I.T.O. [1956] 29 I.T.R. 495)*. The joint and several liability is not confined to cases where an assessment has been made after the discontinuance or dissolution : the words "tax found payable" in sub-sec. (2) mean the tax which the firm would be liable to pay but for the discontinuance or dissolution, or the tax either found to be due already or which may be found to be due in the future, and so they include the tax which was assessed on the firm or association before dissolution but not recovered from it *(Subba Rao* v. *I.T.O. [1963] 48 I.T.R. 808)*.

However, the tax payable referred to in sub-sec. (2) means the tax payable by the firm or association and not the tax assessed on the partners or members personally.

The section applies where the business of the firm or association is discontinued *(Shivram Poddar* v. *I.T.O. [1962] 46 I.T.R. 1076)* or the firm or association is dissolved. If the business is not discontinued but there is a succession to the business *(See under s. 88, "succession", ante)*, and the firm is not dissolved but continues to exist, this section would have no application. However, even if there is succession to the firm's business or the business of the association but the firm or association is dissolved, this section would apply *(Karuppiah Pillai* v. *C.I.T. 1941 I.T.R. 1)*. Although there is no specific section to make assessment on the association but the principle underlying is that when a unit of assessment breaks up, the liability to tax should devolve on the component members.

Penalty on dissolved firm.–The Supreme Court of India held in *Abraham* v. *I.T.O. ([1961] 41 I.T.R. 425. See also C.I.T.* v. *Bhikaji Dadabhai & Co. [1961] 42 I.T.R. 123 (S.C.))* authorised the levy of penalty on a firm after it had ceased to be in existence. This section expressly makes its provisions applicable to the levy of "a penalty or any other sum chargeable under any provision of this Ordinance.

Sec. 100: Liability of directors for unrecoverable tax of private companies.–(1) Where any private company is wound up and any tax assessed on the company, whether before, or in the course of, or after its liquidation, in respect of any income of any income year cannot be recovered, every person who was, at any time during the relevant income year, a director of that company, shall, notwithstanding anything contained in the Companies Act, 1913 (VII of 1913), be jointly and severally liable to pay the said tax and shall, for the purpose of recovery thereof, be deemed to be an assessee in respect of such tax; and the provisions of this Ordinance shall apply accordingly.

(2) Notwithstanding the provisions of sub-section (1), the liability of any person thereunder in respect of the income of a private company shall cease if he proves to the Deputy Commissioner of Taxes that non-recovery of tax from the company cannot be attributed to any gross

neglect, misfeasance or breach of any duty on his part in relation to affairs of the company.

Personal liability of directors of private company in liquidation.–Sec. 100: This section imposes a personal liability on the directors of only a private company in liquidation. This section introduces a dangerous innovation in fiscal legislation. It cuts at the root of the doctrine of limited liability of companies. Whereas under company law a director is not personally liable for the company's debts unless a Court of competent jurisdiction finds him guilty of misfeasance or other wrong, the vicarious liability under this section can be imposed on a director by the Deputy Commission of Taxes without an adjudication by a Court. Secondly, whereas company law proceeds on the basic principle of jurisprudence that a director is presumed to be innocent till he is proved to be a wrong-doer, this section is an instance of the disquieting drift in modern legislation towards presuming a citizen to be a wrong-doer till he is proved to be innocent. A director is liable under this section *unless he proves* the absence of gross neglect, misfeasance or breach of duty on his part.

Sec. 101: Liability of liquidator for tax of private companies under liquidation.–(1) A liquidator of a private company which is wound up, whether under the orders of a court or otherwise shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Deputy Commissioner of Taxes having jurisdiction to assess the company.

(2) The Deputy Commissioner of Taxes shall, after making such enquiries or, calling for such information as he may consider necessary, notify to the liquidator within three months of the date of receipt of the notice under sub-section (1) the amount which, in his opinion, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company.

(3) On being notified under sub-section (2), the liquidator shall set aside an amount equal to the amount so notified and shall not, before he sets aside such amount, part with any of the assets of the company except for the purpose of payment of tax payable by the company or for making payment to secure such creditors as are entitled under the law to priority of payment over debts due to Government on the date of liquidation.

(4) The liquidator shall be personally liable for payment of the tax on behalf of the company to the extent of the amount notified, if any, under sub-section (2), if he–

(a) fails to give notice as required by sub-section (1) ; or

(b) contravenes the provisions of sub-section (3).

(5) Where there are more liquidators than one, the obligations and liabilities of a liquidator under this section shall attach to all the liquidators jointly and severally.

(6) This section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

Explanation.–In this section, "liquidator" includes any person who has been appointed to be the receiver of the assets of the company under liquidation.

Liquidator's liability for company in liquidation.–Sec. 101: Under this section the liquidator of any private company which is being wound up, whether under the order of a Court or otherwise, is bound, within thirty days of his appointment, to give notice to the Deputy Commissioner of Taxes who in his turn after making proper enquiry or calling for necessary information is bound within three months to intimate to the liquidator the estimated amount of tax liability of the company. Until the liquidator has set aside an amount to meet the tax liability, he should not part with any of the assets except for paying secured creditors entitled to priority over Government dues. However, this section does not confer on the Government any higher priority than that enjoyed under the company law. If the liquidator fails to set aside the amount notified by the Deputy Commissioner of Taxes, he would be personally liable for the company's tax to the extent of that amount. (Cf s. 100 imposes personal liability on directors of a private company in liquidation in certain cases.) Where there are more liquidators than one, their liabilities are joint and several under this section.

The provisions of this section override anything to the contrary in company law or any other law in force. They apply equally to every person who is appointed the receiver of any assets of a company.

Sec. 102: Liability to tax in case of shipping business of non-resident.–(1) Notwithstanding anything contained in this ordinance, where a non resident carries on the business of operation of ships as the owner or charterer thereof (hereinafter in this section referred to as the principal) tax shall be levied and collected in respect of such business in accordance with the provisions of this section.

(2) Before the departure from any port in Bangladesh of any ship, the master of the ship shall prepare and furnish to the Deputy Commissioner of Taxes a return showing–

(a) the amount paid or payable whether in or out of Bangladesh to the principal, or to any person on his behalf, on account of the carriage of passengers,

livestock, mail or goods shipped at the port since the last arrival of the ship; and

(b) the amount received, or deemed to be received in Bangladesh by, or on behalf of, the principal on account of the carriage of passengers, livestock, mail or goods at any port outside Bangladesh.

(3) On receipt of the return, the Deputy Commissioner of Taxes shall determine the aggregate of the amounts referred to in sub-section (2) and, for this purpose, may call for such particulars, accounts or documents, as he may require and the aggregate of the said amounts so determined shall be deemed to be income received in Bangladesh by the principal from the said business chargeable to tax under this Ordinance under the head "Income from business or profession" and tax thereon shall be charged at the rate of eight percent. of such income.

(4) Where the Deputy Commissioner of Taxes is satisfied that it is not possible for the master of the ship or the principal to furnish the return required under sub-section (2) before the departure of the ship from the port and the principal has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Deputy Commissioner of Taxes may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the principal as sufficient compliance with sub-section (2).

(5) No port clearance shall be granted to the ship until the Collector of Customs, or any other officer duly authorised to grant the same, is satisfied that the tax payable under sub-section (3) has been duly paid or that satisfactory arrangements have been made for the payment thereof.

(6) Nothing contained in this Ordinance shall be so construed as to allow any expense against the aggregate amount of receipts as determined under sub-section (3).

(7) The tax paid under this section shall be deemed to be the final discharge of the tax liability of the assessee under this Ordinance, and the assessee shall not be required to file the return of total income under section 75 nor shall he be entitled to claim any refund or adjustment on the basis of such return.

Shipping business of non-residents.–Sec. 102: This section deals with occasional shipping. It makes special provisions for the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, live-stock, mail or goods shipped at a port in Bangladesh. An assessment under this section must be made in the case of every such ship unless necessary arrangement has been made for filing of the return and payment of tax or there is an agent of the non-resident from whom the tax would be recoverable (s. 96).

The provisions of this section are intended to ensure the due recovery of tax from the owners or charterers of ship in respect of the profits made by them from the carrying of passengers or cargo from Bangladesh ports. A summary assessment in substitution of the regular assessment is contemplated by this section. (Cf. ss. 91 and 105.) Before the departure of any ship from any port in Bangladesh the master of the ship shall prepare and furnish in a return showing the amount paid or payable in and out of Bangladesh to the principal or his agent for carriage and the amount received or deemed to be received in Bangladesh by the principal or his agent in Bangladesh and the aggregate of the said amounts, without any allowance for any expenses so determined by the Deputy Commissioner of Taxes, shall be deemed to be income received in Bangladesh by the principal and tax at eight per cent shall be charged on such gross income which shall be deemed to be the final discharge of the tax-liability of the assessee who will not be entitled to claim any refund.

Sec. 103A: Liability to tax in case of air transport business of non-residents.–(1) Notwithstanding anything contained in this Ordinance, where a non-resident person carries on the business of operation of aircraft, as the owner or charterer thereof (hereinafter in this section referred to as the principal), and any aircraft owned or chartered by him calls on any airport in Bangladesh, the aggregate of the receipts arising from the carriage of passengers, livestock, mail or goods loaded at the said airport into that aircraft shall be deemed to be income received in Bangladesh by the principal from the said business chargeable to tax under the head "Income from business or profession" and tax thereon shall be charged at the rate of three percent. of such income.

(2) The principal or an agent authorised by him in this behalf shall prepare and furnish to the Deputy Commissioner of Taxes, within forty-five days from the last day of each quarter of every financial year, that is to say, the thirtieth day of September, the thirty-first day December, the thirty-first day of March and the thirtieth day of June, respectively, return in respect of each quarter as aforesaid showing–

(a) the amount paid or payable whether in or out of Bangladesh to the principal, or to any person on his behalf, on account of the carriage of passengers, livestock, mail or goods loaded at the said airport; and

(b) the amount received, or deemed to be received, in Bangladesh by, or on behalf of, the principal on account of the carriage of passengers, livestock, mail or goods at any airport outside Bangladesh.

(3) On receipt of the return, the Deputy Commissioner of Taxes may, after calling for such particulars, accounts or documents, as he may require, determine the aggregate of the amounts referred to in sub-section (2) and charge tax as laid down in sub-section (1).

(4) Where the principal fails to pay the tax payable under sub-section (1), for more than three months the Commissioner of Taxes may issue to the authority by whom clearance may be granted to that aircraft a certificate containing the name of the principal and the amount of tax payable by him; and on receipt of such certificate, the said authority shall refuse clearance from any airport in Bangladesh to any aircraft owned or chartered by such person until the tax payable has been paid.

(5) Nothing contained in this Ordinance shall be so construed as to allow any expense against the aggregate amount of receipts as determined under sub-section (3).

(6) The tax paid under this section shall be deemed to be the final discharge of the tax liability of the assessee under this Ordinance, and the assessee shall not be required to file the return of total income under section 75 nor shall he be entitled to claim any refund or adjustment on the basis of such return.

Air-transport business of non-residents.–Sec. 103A: This section makes similar provisions for the levy and recovery of tax in the case of any air transport belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods loaded at any airport in Banglades.An assessment shall be made in the case of every aircraft and the income to be computed in the like manner as in the case of shipping business (See Sec. 103) and tax at the rate of three per cent of the gross receipts shall be charged which shall be deemed to be the final discharge of tax liability. For so computation of income the principal or his agent shall furnish quarterly return beginning from September in each year showing the particulars of the amount paid in and out of Bangladesh to the principal or his agent and the amount received or deemed to be received in Bangladesh by the principal or his agent.

For any default for payment of tax for more than three months by any such person the Commissioner of Taxes may ask the authority, authorised to give clearance certificate to refuse clearance from any airport in Bangladesh to any aircraft owned or chartered by such person until the tax payable is paid.

CHAPTER XI
SPECIAL PROVISIONS RELATING TO AVOIDANCE OF TAX

Sec. 104: Avoidance of tax through transactions with non-residents.–Where any business is carried on between a resident and a non-resident and it appears to the Deputy Commissioner of Taxes that, owing to the close connection between them, the course of business is so arranged that the business transacted between them produces to the resident either no profits or profits less than the ordinary profits which might be expected to yield in that business, the Deputy Commissioner of Taxes shall determine the amount of income which may reasonably be considered to have accrued to the resident from such business and include such amount in the total income of the resident.

Business so arranged to avoid tax-liability of residents.–Sec. 104: Business may be carried on between a resident and a person who is not resident in Bangladesh, and owing to the close connection between them the course of business may be so arranged that the resident makes either no profits or less than the ordinary profits in that business. Such an arrangement would deprive the Bangladeshi Revenue of the tax which would otherwise be payable by the resident. In such cases the provisions of this section would be attracted and the resident may be charged in respect of the profits which he has not in fact made but which he might reasonably be expected to have made had he done the business on ordinary commercial terms. Rule 35, read with r. 34, of the Income-tax Rules, 1998, prescribes the method of determining the quantum of notional profits in respect of which the resident may be charged under this section. Such notional profits should not be separately assessed but should be added on to the other income of the resident–*Mazagaon Dock Ltd.* v. *C.I.T. [1958] 34 I.T.R. 368 (S.C. of India).*

In *Mazagaon Dock Ltd.* v. *C.I.T. ([1958] 34 I.T.R. 368)* the Supreme Court held that the subject of charge under s. 42(2) of the 1922 Act which corresponded to this section, was the business of the resident and not the business of the non-resident. In that case two non-resident companies, engaged in the business of ships, had entered into an arrangement with a resident company which was their subsidiary and which was engaged in the business of ship-repairing. According to the arrangement the resident company was to repair the ships of the non-resident companies without charging profits. The Supreme Court of India held that the dealings between the parties formed concerted and organized activities of a business character and the non-resident companies carried on business with the resident company, and the provisions of the old s. 42(2) were attracted. The fact that the dealings were such as to yield no profit to the non-resident companies was held to be immaterial. That judgment of the Supreme Court would apply in all respects to cases arising under this section, and its correctness, with reference to the provisions of this section, would not be in doubt. But, in the opinion of the learned author, N.A. Palkhirale decision requires to be reconsidered in its application to cases arising under the old s. 42(2) which was

worded very differently from the present section. It was suggested that the old s. 42(2) imposed a charge on the resident in respect of the profits which were actually derived or which might reasonably be regarded as derived by the non-resident, as a result of the artificial arrangement, from the business done with the resident. On this construction of the old s. 42(2), the resident subsidiary could not have been assessed in respect of the repairing contracts carried out at cost, since the non-resident companies actually derived no profit and could not possibly derive any profit from those transactions. However, the language of the present s. 104 would be wide enough to cover a case like *Mazagaon Dock* had there been the words "deemed to have accrued to the resident" which would mean that profits are in fact not derived by the resident from the business but are deemed by a fiction of law to be derived and in which case the purpose of this section would have been served.

Sec. 105: Avoidance of tax through transfer of assets.–(1) Any income which becomes payable to a non-resident by virtue, or in consequence, of any transfer of assets, whether alone or in conjunction with associated operations, shall be deemed to be the income of the person who–

(a) has acquired, by means of such transfer or associated operations, any right by virtue, or in consequence, of which he has power to enjoy, where forthwith or in future, the income which becomes so payable to the non-resident, or

(b) has received or is entitled to receive at any time, for reasons attributable to such transactions or associated operations, any sum paid or payable by way of loan or repayment of loan or any other sum, not being a sum paid or payable as income or for full consideration of money or money's worth.

(2) The income which becomes payable to a non-resident and is deemed under sub-section (1), to be the income of the person referred to therein shall be so deemed for all purposes of this Ordinance, whether such income would or would not have been chargeable to tax apart from the provisions of this section.

(3) The provisions of this section shall not operate if it is shown to the satisfaction of the Deputy Commissioner of Taxes–

(a) that neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation; or

(b) that the transfer and all associated operations were bonafide commercial transaction and were not designed for the purpose of avoiding liability to taxation.

(4) Where any person has been charged to tax on any income which is deemed under sub-section (1) to be his income, that income shall not again be deemed to form part of his income for the purpose of this Ordinance if it is subsequently received by him whether as income or in any other form.

(5) A person shall, for the purposes of this section, be deemed to have power to enjoy the income payable to a non-resident if–

(a) such income is in fact so dealt with as to be calculated to ensure at any time for the benefit of such person in any from; or

(b) the receipt or accrual of such income operates to increase the value of any assets held by such person or for his benefit; or

(c) such person receives or is entitled to receive at any time any benefit provided or to be provided–

(i) out of such income; or

(ii) out of moneys which are or will be available for the purpose by reason of the effect or successive effects of associated operations on such income and on any assets representing the income; or

(d) such person has, by means of the exercise of any power of appointment, revocation or otherwise, power to obtain for himself, with or without the consent of any other person, the beneficial enjoyment of such income; or

(e) such person is able to control, directly or indirectly, the application of such income in any manner whatsoever.

(6) In determining whether a person has power to enjoy income, regard shall be has to the substantial result and effect of the transfer and any associated operations, and to all benefits which may at any time accrue to such person as a result of the transfer and associated operations irrespective of the nature or form of the benefit.

Explanation.–For the purposes of this section–

(a) "assets" includes property or rights of any kind and "transfer", in relation to assets being rights, includes creation of those rights;

(b) "associated operation", in relation to any transfer, means as operation of any kind effected by any person in relation to–
  (i) any of the assets transferred: or
  (ii) any income arising from such assets; or
  (iii) any assets representing, directly, any of the assets transfered or the accumulation of the income arising from such assets;

(c) "benefit" includes a payment of any kind;

(d) references to assets representing any assets transferred or any income or accumulation of income arising therefrom includes references to shares in or obligation of any company to which, or the obligation of any other person to whom, any such assets or that income or accumulation of income is or has been transferred; and

(e) any body corporate incorporated outside Bangladesh shall be treated as if it were a non-resident.

Avoidance of tax by transfer of income to non-resident–Sec. 105: The proper heading of this section should have been as has been shown here as the provisions of this section relate to transfer of income by means of transfer of assets to non residents to avoid tax-liability.

As Viscount Simon, L.C., pointed out in *Latilla* v. *I.R. (25 T.C. 107, 117 (H.L.) 1943 I.T.R. Suppl. 78, 79)*, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which the tax-payer might be enabled to enjoy the benefits of residence in a country while receiving the equivalent of such income, without sharing in the appropriate burden of taxation in that country. One result of such methods is that amendments have been made to the Income-tax code, both in England and in India (inclusive of Bangladesh), which aim at nullifying the effectiveness of such schemes. The provisions of this Chapter hit transactions which are effected with a view to avoiding liability to taxation. Facts of the case were : In this case partners transferred their shares to a Rhoderian Company and in consideration the company allotted the partners ordinary shares and non-interest bearing debentures in the company, which made substantial profits. Such profits were not distributed as dividends but each year money was taken out of the profits for the redemption of debentures and for loans to the debenture-holders. In was held that the trading profits of the company must be classed as income

payable because of the transfer of the partners' assets and that there was evidence to support the finding that the transfer of partnership assets in consideration of the transfer of shares and debentures was made to avoid British taxation ... It was further held that by receiving sums in redemption of the debentures there was "power to enjoy income" of the company ... and the right by virtue of which there was such "power to enjoy" had been acquired by means of the sort of transfer to which sec. 18 of the Finance Act, 1936 applied.

Broadly speaking, sub-s. (1)(a) of this section comes into operation where (a) a transfer of assets is effected in such a manner that the income becomes payable to a person not resident in Bangladesh, (b) the transferor acquires any rights by virtue of which he has, within the cl. (a) to sub-s. (1), the power to enjoy such income, whether forthwith or in the future, and (c) it is not proved that the transfer has not for its purpose or for one of its purposes the avoidance of liability to taxation. In such a case the income is deemed by sub-s (1)(a) to be the income of the transferor. Other cases where the transferor is charged in respect of income arising from assets transferred to another are to be found in sec. 43(4).

Sub-sec. (1)(b) is wide enough to cover a variety of transactions including cases where assets are transferred to a person who is non-resident and the transferor indirectly gets the income under the guise of obtaining loans or repayment of loans.

A transaction may be an "associated operation" within the meaning of sub-sections (1) and (6) though it may be separated by an interval of time from the earlier transfer with which it is sought to be associated *(Corbett's Executrices* v. *I.R. 25 T.C. 305 (C.A.). Cf. Fynn* v. *I.R. 37 T.C. 629, [1959] 36 I.T.R. 107).*

The scheme of s. 44D of the 1922 Act which corresponded to this section, was considered by the Madras High Court in *C.I.T.* v. *Chidambaram Chettiar ([1960] 38 I.T.R. 612)* and *Kadar Mohideen* v. *C.I.T. ([1960] 38 I.T.R. 647)* where it was held that the section would cover the case of transfer of assets to a non-resident limited company in consideration of allotment of shares to the transferor; and that the transferor may become assessable under this section in respect of the income of the company derived from those assets, since by holding a sufficiently large number of shares the transferor can be said to have acquired a right by virtue of which he has "power to enjoy" the income of the company whether forthwith or in the future. The decisions under the analogous provisions of the English law are useful in construing this section. The meaning of "power to enjoy" and other provisions of the English law closely similar to the provisions of this section have been considered by the House of Lords in *Lord Vestey's Executors* v. *I.T. (31 T.C. 1). Congreve & Congreve* v. *I.R. (30 T.C. 163), Latilla* v. *I.R.* and *Bambridge* v. *I.R.* and have also been dealt with in the following cases–*(Lord Howard De Walden* v. *I.R. 25 T.C. 121 (C.A.), 1942 I.T.R.).*

Double taxation.–Sub-sec. 4: Sub-sec. (4) is intended to avoid double taxation. It provides that where an assessee has been charged to tax in respect of a sum deemed to be his income under this section, the subsequent receipt of that sum by the assessee, whether as income or in any other form, would not again attract tax in his hands at the date of such receipt.

Burden of proof.–Sub-sec. 5: The section does not call upon the Income-tax authorities to establish the existence of any intent in the taxpayer's mind to avoid any liability to tax. It is enough for them to establish the fact that by virtue or in consequence of the transfer of assets certain results within the purview of the section follow. If the case falls within sub-s. (1), the onus is on the tax-payer to satisfy the Deputy Commissioner of Taxes regarding the absence of any intention to avoid liability to taxation *(Kadar Mohideen* v. *C.I.T. [1960] 38 I.T.R. 647)*. This is made clear by sub-s. (5) which is so framed as to cast the burden of proof on the assessee. However, the mere fact that the assessee had knowledge that the *effect* of the transfer would be avoidance of tax liability, cannot mean that such avoidance was the *purpose* or *design* behind the transaction *(C.I.T.* v. *Mohammad Ibrahim Sahib [1962] 45 I.T.R. 166)*. In this case although there was a transfer of the entire assets of proprietary business in Ceylon to a non-resident private limited company the purpose of which was the preservation of the family business but not avoidance of tax liability.

Sec. 106: Avoidance of tax by transactions in securities.–(1) Where the owner of any securities sells or transfers those securities and buys them back or reacquires them, or buys or acquires similar securities, and the result of the transactions is that any interest becoming payable in respect of the original securities sold or transferred by the owner is not receivable by the owner, the interest payable as aforesaid shall be deemed for all purposes of this Ordinance to be the income of such owner and not of any other person, whether the interest payable as aforesaid would or would not have been chargeable to tax apart from the provisions of this sub-section.

(2) Where any person has had for any period during an income year any beneficial interest in any securities and the result of any transactions within that year relating to such securities or the income thereof is that no income is received by him, or that the income received by him is less than the sum which the income would have amounted to had the income from such securities accrued from day to day and been apportioned to the said period, then the income from such securities for the said period shall be deemed to be the income of such person.

(3) Where any person carrying on a business which consists wholly or partly in dealing in securities buys or acquires any securities from any other person and either sells back or retransfers those securities, or sells or transfers similar securities, to such other person, and the result of the transactions is that the interest becoming payable in respect of the securities bought or acquired by him is receivable by him but is not deemed to be his income by reason of the provisions of sub-section (1), no account shall be taken of the transactions in computing for any of the

purposes of this Ordinance any income arising from, or loss sustained, in the business.

(4) The Deputy Commissioner of Taxes may, by notice in writing, require any person to furnish him, within such time, not being less than twenty-eight days, as may be specified in the notice such particulars in respect of all securities of which such person was the owner, or in which he had beneficial interest at any time during the period specified in the notice, as the Deputy Commissioner of Taxes may consider necessary for the purpose of ascertaining whether tax has been borne in respect of the interest on all those securities and also for other purposes of this section.

Explanation.–For the purposes of this section–

(a) "interest" includes dividend;

(b) "securities" includes stocks and shares; and

(c) Securities shall be deemed to be similar if they entitle their holders to the same right against the same persons as to capital and interest and the same remedies for the enforcement of these rights, notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or in the manner in which they can be transferred.

Sale and repurchase of securities–Sub-sec. (1): This sub section aims at preventing avoidance of tax by certain transactions in securities which are known as bond-washing. It has been noted *ante (See under s. 22, "Securities sold cum-interest: No apportionment of interest" and under s. 33 "shares sold cum-dividend")* that interest on securities does not accrue from day to day but on certain fixed days and that the seller of securities cum-interest is not assessable on the amount which he receives from the purchaser as the equivalent of the impending interest for such amount is a part of the capital price realised for the securities. The result is that if a person, on the eve of payment of interest, sells or otherwise transfers securities to another, and buys back or re-acquires the securities after the interest has been received by the transferee, the transferor would be able to escape tax in respect of such interest. To prevent the avoidance of taxation in this manner this sub-section provides that where the owner of any securities sells or transfers them and buys them back or re-acquires them, the interest received by the transferee is deemed to be the income of the transferor.

This section is somewhat different in its ambit from the corresponding provision in s. 44E of the 1922 Act. Unlike this section, the old s. 44E applied only to cases where the agreement (or acquisition of option) to buy back or re-acquire the securities was by the same agreement by which the sale or transfer was effected or by

any collateral agreement. But then, unlike this section the old s. 44E did not contain any provision exempting from the operation of that section cases where the avoidance of tax was exceptional and not systematic.

Sales of securities cum-interest.–Sub-sec. (2): Interest on securities does not accrue from day to day but on certain fixed days and the person who holds the securities on the date of accrual of interest receives the whole interest from such securities and becomes liable to pay tax for such interest. Taking advantage of this principle systematic sales of securities cum interest are made with a view to avoiding liability to tax in respect of the interest. This sub-section nullifies the effectiveness of this device, which provides that of transfers or any other transactions result in avoidance of tax in any year then in that case the interest on such securities would be deemed to accrue from day to day and a part thereof apportioned upto the date of transfer would be deemed to be the income of the transferer.

Business of dealings in securities–Sub-sec. (3): Sub-sec. (1) shall have no application where a person deals in securities and in the course of his business he purchases securities from any person to whom he sells such securities or similar securities and the interest becoming payable in respect of such securities is receivable by him would not have to be deemed to be his income because of the application of the provisions of sub-section (1) it shall be his income under this sub-section and no account shall be taken of the transaction in computing the profit or loss in the business.

Sec. 107: Tax clearance certificate required for persons leaving Bangladesh.–(1) Subject to such exceptions as the Board may make in this behalf, a persons who is not domiciled in Bangladesh, or a person who being domiciled in Bangladesh at the time of his departure is not, in the opinion of an income tax authority likely to return to Bangladesh, shall not leave Bangladesh without obtaining from the Deputy Commissioner of Taxes authorised in this behalf by the Board.–

(a) a tax clearance certificate, or

(b) if he has the intention of returning to Bangladesh an exemption certificate which shall be issued only if the Deputy Commissioner of Taxes is satisfied that such person has such intention; and such exemption certificate may be either for a single journey or for all journeys within the period specified in the certificate.

(2) The owner or charterer of any ship or aircraft, who issue any authority to any person referred to in sub-section (1) for travel by such ship or aircraft from any place in Bangladesh to any place outside Bangladesh unless such person has a certificate required by that sub-section, shall–

(a) be liable to pay the amount of tax, if any, which has or may become due and payable by such person and also to a penalty which may extend to two thousand taka; and

(b) be deemed, for the purposes of recovery of such tax and penalty, to be an assessee in default, and all the provisions of this Ordinance shall apply accordingly.

Explanation.–For the purposes of this section–

(a) "exemption certificate", in relation to any person, means a certificate to the effect that such person is exempt from the requirement of having a tax clearance certificate for the purpose of the journey or journeys specified therein;

(b) "owner' or 'charterer", includes any representative, agent or employee who may be empowered by the owner or charterer of a ship or aircraft to issue an authority to travel by the ship or aircraft; and

(c) "Tax clearance certificate", in relation to a person, means a certificate to the effect that such person has no liability under this Ordinance, the Income tax Act, 1922(XI of 1922), the Gift-tax Act, 1963 (XIV of 1963), or the Wealth-tax Act, 1963 (XV of 1963), or that satisfactory arrangements have been made for the payment of all or any of such taxes which are or may become payable by such person.

Tax clearance certificate.–Rules 61, 62 and 63 of the Income-tax Rules, 1998, are relevant to this section. The section requires only two categories of persons leaving Bangladesh to obtain a tax clearance certificate–(i) those who are not domiciled in Bangladesh and (ii) those who, even if domiciled in Bangladesh at the time of their departure, have no intention of returning to Bangladesh. Certain persons have been exempted from the provisions of this section (rule 63). Further, a person who is not domiciled in Bangladesh but intends to return to Bangladesh may be given individual exemption by the competent authority under the sub-sec. (1)(b). Every person who is not domiciled in Bangladesh shall be required to produce a tax clearance certificate or an exemption certificate to an officer of immigration or customs for examination before he leaves Bangladesh – Rule 62(1).

Under sub-s. (2) the owner or charterer of a ship or aircraft who allows a person to whom this section applies to travel out of Bangladesh without a tax clearance or exemption certificate is personally liable to pay the tax payable by such passenger.

CHAPTER–XII
REQUIREMENT OF FURNISHING CERTAIN INFORMATION

Sec. 108: Information regarding payment of salary.–Every person responsible for making any payment constituting income classifiable under the head "Salaries" not being payment made by the Government, and the prescribed officer in cases where such payments are made by the Government, shall, before the first day of 'September each year, furnish to the Deputy Commissioner of Taxes, a statement prepared in the prescribed form and verified in the prescribed manner so as to give the following information, namely: –

(a) the name and address of every person to whom such payment has been made, or was due, during the preceding financial year if the payment exceeds such amount as may be prescribed;
(b) the amount of payment so made or due;
(c) the amount deducted as tax from such payment; and
(d) such other particulars as may be prescribed:

Provided that the Deputy Commissioner of Taxes may extend the date for the delivery of the statement.

Return by employer showing salaries due or paid and deduction made thereon.–Sec. 108 (read with rules 21-23): This section requires information to be given regarding accrual and payment of income under the head "Salaries" in order to help detection of any avoidance of tax. The section requires the particulars of salaries of both government and non-government employees. In case of the government employees such particulars are to be given by the respective officers as prescribed in rule 23 and on the form prescribed in that rule. In case of non-government employees every person responsible for making deduction before payment of salaries to them shall send forthwith a statement prepared in the form prescribed in rule 21 to the Deputy Commissioner of Taxes within whose jurisdiction the deduction is made and in case where more then one Deputy Commissioner of Taxes has jurisdiction in the same area, to the Deputy Commissioner of Taxes as specified by the Commissioner. The Commissioner of Taxes may under rule 22 permit an employer to pay tax on the income of his employees in a hemp sum every month based on the average amount of tax deductible from such income from salaries and submit at the end of the year the statement in the form prescribed in rule 23(3). Such statement must show not only the salary which is paid but also the salary due, since under section 21 salary due is chargeable, whether paid or not.

Failure to furnish a return or statement is punishable under section 124(b) and for making a false return under section 165.

Sec. 109: Information regarding payment of interest.–Every person responsible for making any payment of interest constituting income not classifiable under the head "Interest on securities" shall, if such payment exceeds [fifteen thousand taka], before the first day of September each year, furnish to a prescribed officer a statement prepared in the prescribed form and verified in the prescribed manner so as to give the following information, namely: –

(a) the name and address of every person to whom such payment has been made, or was due, during the preceding financial year;

(b) the amount of payment so made or due; and

(c) such other particulars as may be prescribed.

Return showing interest paid.–Sec. 109 (read with rule 20): Rule 20 of the Income-tax Rules, 1984, provides that a return should be made of the name and address of every person to whom the assessee has paid interest (other than "Interest on securities") exceeding taka fifteen thousand prescribes the form of return to be delivered to the Deputy Commissioner of Taxes having jurisdiction over the person responsible for paying the interest. Such return or statement shall be furnished by the principal officer in the case of a company and in other cases by the person who is responsible for making payment of interest.

The obligation to make a return under this section is not dependent on any order from the Income-tax authorities, whereas under s. 113(d) information regarding payment of interest, etc., is to be furnished by an assessee only when an order is served on him in that behalf. Failure to furnish the return mentioned in this section is punishable under s. 124(b), while making a deliberately false return is punishable under s. 165.

Sec. 110: Information regarding payment of dividend.–The principal officer of every company shall, before the first day of September each year, furnish to the prescribed officer a statement prepared in the prescribed form and verified in the prescribed manner so as to give the following information, namely:–

(a) the name and address of every shareholder, as entered in the register of shareholders, to whom a dividend or the aggregate of dividends has been paid or distributed during the preceding financial year if such payment exceed such amount as may be prescribed;

(b) the amount of dividend or dividends so paid or distributed; and

(c) such other particulars as may be prescribed.

Return showing dividends paid.– Sec. 110 (read with rule 19): Just as s. 109 requires information to be furnished by the person responsible for paying any interest, not being "Interest on securities", this section requires information to be furnished by companies regarding payment of dividends. The section applies to every company, public or private.

Under this section the principal officer of a company must furnish a return of the names and addresses of the shareholders who are paid dividends exceeding one taka in the case where the shareholder is a company and dividends exceeding Tk.30,000 in the case of any other shareholder (Rule 19). (with the amendment in the Finance Act of 2000 the amount should be forty thousand taka as the exemption limit has been raised to Tk.40,000. See Para 22 of Part A of Sixch Schedule) The rule prescribes the form of the return and provides that the return should be delivered to the Deputy Commissioner of Taxes who assesses the company. As regards dividends amounting to taka 30,000 or under the Deputy Commissioner of Taxes may procure information by exercising this power of inspecting the registers of the company under s. 114.

Failure to furnish a return in compliance with this section is an offence punishable under s. 124, while furnishing a deliberately false return is an offence punishable under s. 165.

CHAPTER XIII
PROVISION'S FOR REGISTRATION OF FIRMS (Omitted)

CHAPTER XIV
POWERS OF INCOME TAX AUTHORITIES

Sec. 112: Powers under this chapter not to prejudice other powers.–The powers exercisable by income tax authorities under this Chapter shall not prejudice, unless otherwise provided in the provision thereof, the powers exercisable under the other provisions of this Ordinance.

Sec. 113: Power to call for information.–The Deputy commissioner of Taxes, the Inspecting Joint Commissioner, the Commissioner or any other officer authorised in this behalf by the Commissioner or the Board may, for the purposes of this Ordinance, by notice in writing, require–

(a) any firm to furnish him with a statement of the names and address of the partners and their respective shares;

(b) any Hindu undivided family to furnish him with a statement of the names and addresses of the manager and the members of the family;

(c) any person whom he has reason to believe to be a trustee, guardian or agent to furnish him with a statement of the names and addresses of the persons for or of whom he is trustee, guardian or agent;

(d) any assessee to furnish him with a statement of the names and address of all persons to whom he has paid in any income year any rent, interest, commission, royalty or brokerage, or any annuity, not being an annuity classifiable under the head "Salaries", amounting to more than three thousand taka, together with particulars of all such payment;

(e) any dealer, broker or agent, or any person concerned in the management of a Stock Exchange to furnish a statement of the names and addresses of all person to whom he or the Exchange has paid any sum in connection with the transfer of capital assets, or on whose behalf or from whom he or the

Exchange has received any such sum, together with the particulars of all such payments and receipts; or

(f) any person, including a banking company, to furnish information in relation to such points or matters, or to furnish such statements or accounts giving such particulars, as may be specified in the notice:

Provided that no such notice on a banking company shall be issued by the Deputy Commissioner of Taxes or the Inspector without the approval of the Commissioner, and by any other officer without the approval of the Board.

Power to call for information.–Sec. 113: Powers as are given to the Income-tax authorities under the provisions of this chapter shall not injure the powers of the said authorities as given in other provisions of this Ordinance unless otherwise provided for in the Ordinance–sec. 112.

The Deputy Commissioner of Taxes, the Inspecting Joint Commissioner, the Commissioner or any other officer authorised by the Commissioner for the purposes of this Ordinance can require by notice in writing:

(a) a firm to give returns of names and addresses of the partners; (b) any Hindu undivided family to give names and addresses of the manager and the members of the family; (c) any person whom he has reason to believe to be a trustee, guardian or agent to furnish him with a return of the names, and addresses of the persons for or of whom he is trustee, guardian or agent; (d) statement of the names and addresses of persons to whom the assessee has paid in any year rent, interest, commission, royalties, brokerage or any annuity (not being an annuity taxable under the head "Salary") amounting to more than three thousand taka and the particulars of all such payments made; (e) any dealer, broker or agent or any person concerned in the management of Stock Exchange to furnish a statement of the names and addresses of all persons to whom he or the Exchange has made any payment.

A bank is bound to furnish a return under this section even as any other person *(See Att.-Gen.* v. *National Provincial Bank Ltd. 14 T.C. 111)*. Powers to require a bank to furnish statement of accounts has been specifically conferred on the Commissioner, Inspecting Joint Commissioner and Deputy Commissioner of Taxes. But no such notice on a banking company can be issued by the Deputy Commissioner or the Inspector without the prior approval of the Commissioner and by any other officer without the approval of the Board–(Proviso to cl. (f)). For failure on the part of the bank to furnish the return or information called for will make it liable to a fine under cl. (b) of sec. 124.

Sec. 114: Power to Inspect register of companies.–The Deputy Commissioner of Taxes, the Joint Commissioner of Taxes or any person authorised in writing in this behalf by either of them, may inspect and, if

necessary, take copies, or cause copies to be taken, of any register of the members, debenture-holders or mortgagees of any company or any entry in such register.

Sec. 115: Power of survey.–(1) For the purpose of survey of liability of any person to tax under this Ordinance, an income tax authority may, notwithstanding anything contained in other provisions of this Ordinance but subject to such directions or instructions as the Board may issue in this behalf, enter any place of premises within the limits of its jurisdiction and–

(a) inspect any accounts or documents and check or verify any article or thing;

(b) make an inventory of any cash, stock or other valuable articles or things checked or verified by it;

(c) place marks of identification on or stamp the books of accounts or other documents inspected by it and make or cause to be made extracts or copies therefrom;

(d) record the statement of any person which may be useful for, or relevant to, any proceeding under this Ordinance; and

(e) make such enquires as may be necessary.

(2) Subject to the provisions of section 117, any income-tax authority exercising powers under sub-section (1) shall not remove or cause to be removed from any place or premises wherein he has entered, any books of account or other document, or any cash, stock or other valuable article or thing.

(3) Every proprietor, employee or other person who may be attending in any manner to, or helping in, the carrying on of any business or profession or every person who may be residing in the place or premises in respect of which an income tax authority may be exercising power under sub-section (1), shall in aid of the exercise of such power,–

(a) afford the authority necessary facilities for inspection of books of accounts or other documents or for checking or verifying the cash, stock or other valuable article or thing found in such place or premises; and

(b) furnish such information as the authority may require in respect of any matter which may be useful for, or relevant to, any proceeding under this Ordinance.

Power of survey.–Sec. 115: In order to find out the liability of any person to tax under this Ordinance an Income-tax authority may, notwithstanding anything in any other provision, but subject to the directions or instructions as the Board may issue, enter any place within the limits of the area assigned to him and inspect such books of account or other documents as he may require and which may be available at such place; make an inventory of any cash, stock or other valuable articles or things checked or verified by it, place marks of identification, if he deems necessary, on the books of account or other documents inspected by him and make extracts or copies therefrom and record the statement of any person which may be useful for or relevant, any proceeding under this Ordinance and make such enquires as he may require as to any matter which may be useful for, or relevant to any proceeding under this Ordinance.

While acting under this section such authority shall not remove or cause to be removed from the place which he has entered any books of account or other documents. Where a person under this section is required to afford facility to the Income-tax authority to inspect books of account or other documents or to check or verify any cash, stock or other valuable article or thing or to furnish any information he shall afford necessary facilities in aid of the exercise of such power to such income-tax authority under this section.

Sec. 116: Additional powers of enquiry and production of documents.–(1) The [Directors-General of Inspection,] the Commissioner and the Inspecting Joint Commissioner may, without prejudice to other powers which they may have under other provisions of this Ordinance, make any enquiry which they consider necessary as respects any person liable, or believed by them to be liable, to assessment under this Ordinance, or require any such person to produce, or cause to be produced, any accounts or documents which they may consider necessary.

(2) For the purpose of sub section (1), the [Directors-General of Inspection,] the Commissioner and the Inspecting Joint Commissioner shall have the same powers as the Deputy Commissioner of taxes has under this Ordinance for the purpose of making enquiry or requiring the production of accounts or documents including the powers under section 117(2).

(3) The Commissioner, the Inspecting Joint Commissioner, the Deputy Commissioner of Taxes or an Inspector, if he is so authorised in writing, may, for the purpose of making any enquiry which he considers necessary, enter the premises in which a person liable or believed by him

to be liable to assessment carries on his business or profession, and may call for and inspect any such person's accounts or any documents in his possession and may stamp any accounts or documents so inspected and may retain such accounts or documents for so long as may be necessary for examination thereof or for the purposes of a prosecution:

Provided that the Deputy Commissioner of Taxes or an Inspector shall not make any enquiries from any scheduled bank regarding any client of such bank except with the prior approval of the Commissioner.

Additional powers of enquiry and production of documents.–Sec. 116: Directors-general of Inspection, Commissioner or Inspecting Joint Commissioner shall have the same powers as the Deputy commissioner of Taxes to make any enquiry which he considers necessary as respects any person which he believes to be liable to assessment under this Ordinance or require any such person to produce or cause to be produced any accounts or documents which he feels necessary.

The Commissioner, Inspecting Joint Commissioner, the Deputy Commissioner or an Inspector, if he is authorised in writing enter any business premises of any person liable to assessment and may call for and inspect any books of accounts or documents and also may stamp such accounts and documents so inspected and may retain such accounts and documents for such period as he considers necessary for examination purpose or for the purposes of prosecution. But the Deputy Commissioner of Taxes or the Inspector without the prior approval of the Commissioner cannot make any enquiries from any scheduled bank about any client of such bank.

Sec. 117: Power of search and seizure.–(1) Where the Directors-general of Inspection or the Commissioner or such other officer empowered in this behalf by the Board has, on account of information in his possession, reason to believe that–

(a) any person to whom a summons or notice under this Ordinance has been or might be issued to produce, or cause to be produced, any books of accounts or other documents has failed to, or is not likely to, produce or cause to be produced such books of accounts or other documents, or

(b) any person is in possession of any money, bullion, jewellery or other valuable article or thing which represents wholly or partly income or property which is required to be disclosed under this Ordinance but has not been so disclosed,

he may authorise any officer subordinate to him, being not below the rank of the Deputy Commissioner of Taxes, to exercise the powers under sub-section (2).

(2) An officer authorised under sub-section (1) (hereinafter referred to as the authorised officer) may, notwithstanding anything contained in any other law for the time being in force,–

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that any books of accounts, documents, money, bullion jewellery or other valuable article or thing referred to in sub-section (1) are or have been kept;

(b) break-open the lock of any door, box, locker, safe, almirah or other receptacle for the purpose of the said entry and search if keys thereof are not available;

(c) search any person who has got out of, or is about to get, into, or is in, the building, place, vessel, vehicle or aircraft, if he has reason to suspect that such person has secreted about his person any such books of accounts, documents, money, bullion, jewellery or other valuable article or thing;

(d) seize any such books of accounts, documents, money, bullion, jewellery or other valuable article or thing found as a result of such search;

(e) place marks of identification on or stamp any books of accounts or other document or make or cause to be made extracts or copies therefrom; and

(f) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing.

(3) The authorised officer may requisition the services of any police officer or other officer, of the Government to assist him for all or any of the purposes specified in sub-section (2); and it shall be the duty of every such officer to comply with such requisition.

(4) The authorised officer may, where it is not practicable to seize any such books of accounts, documents, money, bullion, jewellery or other valuable article or thing, by order in writing, require the owner or the person who is in immediate possession or control thereof not to remove, part with or otherwise deal with it without obtaining his previous permission; and the authorised officer may take such steps as may be necessary for ensuring compliance with the order.

(5) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of accounts, documents, money bullion, jewellery or other valuable article or thing and any statement made by such person during the examination may thereafter be used in evidence in any proceeding under this Ordinance, or the Income-tax Act, 1922 (XI of 1922).

(6) Where any books of accounts, documents, money, bullion, jewellery or other valuable article or thing is found in the possession or control of any person in the course of a search, it may be presumed that–

(a) the books of accounts, documents, money, bullion, jewellery, article or thing belong to such person;

(b) the contents of the books of accounts and documents are true; and

(c) the signature on, or the handwriting in, any such books or documents is the signature or handwriting of the person whose signature or handwriting it purports to be.

(7) The person from whose custody any books of accounts or other documents are seized under sub-section (2) may make copies thereof, or take extracts therefrom, in the presence of the authorised officer or any other person designated by him, at such place and time as the authorised officer may appoint in this behalf.

(8) The books of accounts or other documents seized under sub-section (2) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of the seizure unless for reasons recorded in writing, approval of the Commissioner has been obtained for such retention:

Provided that the Commissioner shall not approve such retention for a period exceeding thirty days after all the proceedings under this Ordinance in respect of the years for which the books of accounts or other documents as are relevant have been completed.

(9) If any person legally entitled to the books of accounts or other documents seized under sub-section (2) objects to the approval given by the Commissioner under sub-section (8), he may make an application, stating therein the reasons for his objection, to the Board for the return of

the books of accounts or other documents: and the Board may, after giving the applicant an opportunity of being heard, pass such orders thereon as it may think fit.

(10) Subject to the provisions of this Ordinance and the rules, if any, made in this behalf by the Board, the Provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to search and seizure shall apply, so far as may be, to search and seizure under sub-section (2).

Explanation.–For the purposes of this section, the word "Proceeding" means any proceeding in respect of any year under this Ordinance which may be pending on the date on which a search is authorised under this section or which may have been completed on or before such date and includes also all proceedings under this Ordinance which may be commenced after such date in respect of any year.

Power of search and seizure.–Sec. 117: Where the Director-general of Inspection or the Commissioner or any other officer as may be empowered by the Board in this behalf, in consequence of information in his possession, has reason to believe that any person to whom summons under sec. 37 of the Income-tax Act, 1922 or notice under section 116 was issued to produce or cause to be produced such books of accounts or other documents as required by such summons or notice would not produce such books of accounts or other documents which will be useful or relevant to any proceeding under this Ordinance or any person is in possession if any money, bullion, jewellery or other valuable article or thing which represents either wholly or partly income or property which should have been disclosed but has not been, or would not be disclosed for the purposes of this Ordinance, then he may authorise any officer not below the rank of the Deputy Commissioner of taxes to exercise the powers as given under sub-section (2) of this section to be regulated by Rule 67 (See Income-tax Manual – Part II, as amended in 1998, pp. 103-108).

This section confers dangerously wide powers of search and seizure on the income-tax authroities, without any external cheque or safeguard for the citizen. The provisions of the code of criminal procedure relating to searches and seizure apply so far as may be, to searches and seizure under this section (sub-sec. (10)).

The scope of this section (which corresponds to sec. 132A of I.T. Act, India) was examined in the case of *I.T.O.* v. *Seth Bros* 74 *I.T.R. 836 (S.C. of India)* and in allied cases, like the cases of *Balawant Singh* v. *Shah* 71 *I.T.R. 550, Mamchand & Co.* v. *C.I.T.* 76 *I.T.R. 217*. The provisions of this section were held to be constitutional and valid–*Pooran Mal* v. *Director of Inspection 93 I.T.R. 505 (S.C. of India); Bhupendra Thakkar* v. *C.I.T. 102 I.T.R. 531 (S.C. of India)*. If action taken under this section is mala fide or arbitrary, or does not comply with the requirement it would be illegal and the court would interfere –Commissioner of *Commercial Taxes* v. *Ramkeshan Jhaver 66 I.T.R. 664 (S.C. of India); Hindustan Metal Works* v. *C.I.T. 68 I.T.R. 798*. The section does not permit a sweeping search or seizure of documents or

things irrespective of their relevancy to or usefulness for some proceeding under this Ordinance–*Senairam Doongarmall Agency Ltd.* v. *Johnson 52 I.T.R. 637.*

In *I.T.O.* v. *Seth Bros (74 I.T.R. 836, 443-4)*. Shah J. delivering the judgment of the Supreme Court, observed. "Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the officer issuing the authorization or of the designated officer is challenged, the officer concerned must satisfy the court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed. But where power is exercised bona fide, and in furtherance of the statutory duties of the tax officers any error of judgment on the part of the officers will not vitiate the exercise of the power.

The issue of a search warrant under this section is not a judicial or quasi-judicial act *(I.T.O.* v. *Seth Bros 74 I.T.R. 836, 845 (S.C.); I.T.O. Madan Mohan Damma Mal 70 I.T.R. 293)*. It is not necessary that the warrant of authorization should specify the particulars of the account books or documents, or that before effecting search and seizure under this section the Department should give to the person concerned a notice to produce the relevant books and documents *(Jain* v. *Union of India 98 I.T.R. 469; Pooran Mal* v. *Director of Inspection 93 I.T.R. 505, 520-1 (S.C.))*.

The power of seizure under sub-s. (1) cannot be exercised in respect of assets or documents which are in the custody of the court, or in the custody of a department of the Government under legal authority e.g. the customs or excise authorities or the police *(C.I.T.* v. *Ramesh Chander 93 I.T.R. 450. Cf. Satishchanara* v. *Mohammed Hanif 93 I.T.R. 445)*; nor can a prohibitory order under sub-s. (3) be passed in such a case *(Choyi* v. *Syed Abdulla 91 I.T.R. 144; Union of India* v. *Hadibandhu Das 91 I.T.R. 156. Contra Pannalal* v. *I.T.O. 93 I.T.R. 480)*. This lacuna has now been filled by s. 132A in Indian law which was inserted by the Taxation Laws (Amendment) Act 1975. That section empowers the Income-tax authorities to requisition assets and documents which are in the custody of any officer or authority under any other law.

Generally, the person affected by the search warrant issued under this section is entitled to inspection and copies of the relevant departmental record *(New Kashmir & Oriental Transport Co. Ltd.* v. *C.I.T. 92 I.T.R. 334)*.

Sec. 118: Retention of seized assets.–(1) Where any money, bullion, jewellery or other valuable article or thing (hereinafter referred to as assets) is seized under section 117, the authorised officer shall, unless he himself is the Deputy Commissioner of taxes, forward a report thereof together with all relevant papers to the Deputy Commissioner of Taxes.

(2) Where he has seized any assets under section 117 or, as the case may be he has received a report under sub-section (1), the Deputy

Commissioner of Taxes shall, after giving the person concerned a reasonable opportunity of being heard and making such enquiry as the [Directiors-General of Inspection] or the Commissioner may direct, within ninety days of the seizure of the assets, and with the previous approval of the Commissioner.–

(a) estimate the undisclosed income (including income from the undisclosed property), in a summary manner to the best of his judgement on the basis of such materials as are available with him;

(b) calculate the amount of tax payable under this Ordinance on the income so estimated; and

(c) specify the amount that will be required to satisfy any existing liability under this Ordinance, the Income-tax Act, 1922 (XI of 1922), the Gift-tax Act, 1963 (XIV of 1963), and the Wealth-tax Act, 1963 (XV of 1963), in respect of which such person is in default or is deemed to be in default:

Provided that if, after taking into account the materials available with him, the Deputy Commissioner of Taxes is of the view that it is not possible to ascertain to which particular income year or years such income or any part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized.

Explanation.–In computing the period of ninety days for the purposes of sub-section (2), any period during which any proceeding under this section is stayed by an order or injunction of any Court shall be excluded.

(3) After completing the proceedings under sub-section (2), the Deputy Commissioner of Taxes shall, with the approval of the Commissioner, make an order requiring the person concerned to pay the aggregate of the amounts referred to in sub-section (2)(b) and (c) and shall, if such person pays, or makes satisfactory arrangement for the payment of, such amounts or any part thereof, release the assets seized under section 117 or such part thereof as he may deem fit in the circumstances of the case.

(4) Where the person concerned fails to pay, or to make satisfactory arrangements for the payment of, any amount required to be

paid in pursuance of the order under sub-section (3) or any part thereof, he shall be deemed to be an assessee in default in respect of the amount or part, and the Deputy Commissioner of Taxes may retain in his custody the assets seized under section 117 or any part thereof as are in his opinion sufficient for the realisation of the said amount or, as the case may be, of such part thereof as has not been paid.

(5) If the Deputy Commissioner of Taxes is satisfied that the assets seized under section 117 or any part thereof were held by a person for or on behalf of any other person, he may proceed under this section against such other person and all the provisions of this section shall apply accordingly.

(6) If any person objects, for any reason, to an order made under sub-section (3), he may, within thirty day of the date of such order, make an application, stating therein the reasons for his objection, to the Commissioner for appropriate relief in the matter; and the Commissioner may, after giving the applicant an opportunity of being heard, pass such orders thereon as he may think fit.

Sec. 119: Application of retained assets.–(1) Where the assets retained under sub-section (4) of section 118 consist solely of money, or partly of money and partly of other assets,–

(a) the Deputy Commissioner of Taxes shall first apply such money towards payment of the amount in respect of which the person concerned is deemed to be an assessee in default under that sub-section; and thereupon such person shall be discharged of his liability to the extent of the money so applied; and

(b) where, after application of the money under clause (a), any part of the amount referred to therein remains unpaid, the Deputy Commissioner of Taxes may recover the amount remaining unpaid by sale of such of the assets as do not consist of money in the manner movable property may be sold by a Tax Recovery Officer for the recovery of tax; and for this purposes he shall have all the powers of a Tax Recovery Officer under this Ordinance.

(2) Nothing contained in sub-section (1) shall preclude the recovery of the amount referred to in section 118 (4) by any other mode

provided in this Ordinance for the recovery of any liability of an assessee in default.

(3) Any assets or proceeds thereof which remain after the discharge of the liability in respect of the amount referred to in section 118(4) shall forthwith be made over or paid to the persons from whose custody the assets were seized.

Power to retain seized assets and application of retained assets.–Sec. 118 and 119: Sec. 118 gives power to the income-tax authorities to complete the proceedings on retention of seized assets and prescribes the method of computing the tax liability of the assessee for the purpose of recovery of tax. Sec. 119 prescribes the procedure for applying the assets seized and retained under secs. 117 and 118 with the release of the assets which remain after the tax-liabilities are discharged (sub-sec. (3)).

Sec. 120: Power of Inspecting Joint Commissioner to revise orders of Deputy Commissioner of Taxes.–(1) The Inspecting Joint Commissioner may call for from the Deputy Commissioner of Taxes and examine the record of any proceeding under this Ordinance, and, if he considers that any order passed therein by the Deputy Commissioner of Taxes is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard, and after making or causing to be made, such inquiry as he thinks necessary, pass such order thereon as in his view the circumstances of the case would justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment to be made.

(2) No order shall be made under sub-section (1) after the expiry of four years from the date of the order sought to be revised.

Revisional powers of Inspecting joint Commissioner of Taxes.–Sec. 120: Before the introduction of section 34A in 1959 the Department had no power to revise assessment made by the Income-tax officer prejudicial to the interests of revenue. It was in 1959 when section 34A was introduced in the Income-tax Act, 1922 by which the then Inspecting Assistant Commissioner of Taxes was empowered to examine the record of any proceeding under that Act and if he could find that the order which was prejudicial to the interest of revenue he could cancel the said order.

The Department has no right of appeal to the Appellate Joint Commissioner of Taxes against any order passed by the Deputy Commissioner of Taxes. Therefore this section has been enacted to arm the Department with the power of revising any order of the Deputy Commissioner of Taxes where the order is erroneous *and* the error has resulted in prejudice the interests of the revenue–*Tara Devi Aggarwal* v. *C.I.T. 86 I.T.R. 323 (S.C. of India).*

"It is to be kept in mind that sec. 120 of the I.T. Ordinance does not provide unlimited power of revision to the inspecting Joint Commissioner. The power of revision under sec. 120 is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Inspecting Joint Commissioner to exercise the power of revision under this section: (i) the order is erroneous: (ii) and because of the erroneous order prejudice has been caused to the interests of revenue. Otherwise the Inspecting Joint Commissioner cannot exercise his powers under this section. It is pertinent to note here that a vague suspicion that prejudice has been caused to the interest of revenue is not a sufficient ground to exercise power under sec. 120 of the I.T. Ordinance. It is also to be made clear that an order cannot be formed as erroneous unless it is proved to have been made not in accordance with law. If the assessing officer, acting in accordance with law, makes certain assessment and determines the total income of the assessee at a certain figure, the same cannot be branded as erroneous by the Inspecting Joint Commissioner simply because according to him the total income should have been determined at a higher figure".

If the circumstances justify the Inspecting Joint Commissioner may under this section pass such orders including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment, or any other order to the detriment of the assessee.

The words "any order passed therein by the Deputy Commissioner of Taxes is erroneous" in the section convey the sense that there is a deviation from the law and there is something unlawful, only then the Inspecting Joint Commissioner can exercise his powers and may cancel an order passed during any proceedings. So far as the underestimate of sales and application of low rate profit are concerned the assessing officer might have rightly applied the provisions of section 35 and there does not seem anything which may be taken as "unlawful" or "incorrect". If the Inspecting Joint Commissioner re-opens a case on these very grounds it will be nothing but mere change of opinion. There is a good deal of case law on the point as to whether an under-estimate of sales or application of low rate of profit warrants re-opining of the case. If section 120 is freely applied then there will hardly be a case which may not fall within the purview of this section.

The revision under this section is confined only to orders passed by the Deputy Commissioner. The reason is that if an order passed by the Appellate Joint Commissioner is prejudicial to the interests of the revenue, the Department can avail itself of the right of appeal to the Tribunal given to it by s. 158(3). In a case in which the Appellate Joint Commissioner has passed an order disposing of an appeal against the Deputy Commissioner's assessment order, the Joint Commissioner is not competent to pass an order under this section revising the assessment order and enhancing the assessment, for in such a case *the original assessment order is merged in the appellate order* even if the appellate order merely confirms the assessment order and dismisses the appeal *(C.I.T.* v. *Tejaji Farasram Kharawala [1953] 23 I.T.R. 412. See also C.I.T.* v. *Amritlal Bhogilal & Co. [1958] 34 I.T.R. 130, 136 (S.C. of India))*. In such a case it is immaterial whether the subject-matter of the purported revision under this section was or was not the subject-matter of appeal before the

Appellate Assistant Commissioner, because in either case the original assessment order is merged in the appellate order.

The decision of the Supreme Court of India in *C.I.T.* v. *Amritlal Bhogilal & Co. ([1958] 34 I.T.R. 130, 140-1. (See also Industrial Stores & Agency Co.* v. *C.I.T. [1960] 40 I.T.R. 364)* establishes that it would be open to the Inspecting Joint Commissioner to revise an assessment order while an appeal against it is still *pending* before the Appellate Joint Commissioner, because the order of the Deputy Commissioner of Taxes must be regarded as subsisting and effective in law despite the pendency of the appeal. One important sequence to an order under section 120 which is made the subject of appeal, shall be that it will be followed by another assessment for the same year while the matter is still sub-judice before the Commissioner of Taxes (Appeals) or the Appellate Tribunal. If the appellate authority holds that the order passed by the Inspecting Joint Commissioner was erroneous and uncalled for and there was no ground for cancellation of the assessment under the said section what will be the fate of the second assessment. It will be in the fitness of the matter if some suitable provision is made in respect of the orders passed under sec. 120 or atleast fresh proceedings in consequence of the order passed under this section are stayed till decision of the appellate authority.

The power of the Inspecting Joint Commissioner under this section is quasi-Judicial in character, therefore the Inspecting Joint Commissioner must give reasons in his order otherwise the order would be vitiated–*C.I.T.* v. *Sunder Lal 96 I.T.R. 310.*

The assessee must be given an opportunity of being heard before an order can be made under this section. Where the Inspecting Joint Commissioner seeks to reverse an order recording a partition under s. 90, notice must be given to *all* the members of the family *(Sulakhe* v. *C.I.T. [1960] 39 I.T.R. 394)*. However, the issue of a valid formal notice is not a condition precedent to the IJCT's jurisdiction to pass a revisional order–*Gita Devi Aggarwal* v. *C.I.T. 76 I.T.R. 496 (S.C. of India)*. A consolidated notice of several years would be valid–*Sumitra Devi Khirwal* v. *C.I.T. 84 I.T.R. 26.*

A time-limit of four years from the date of the order sought to be revised is prescribed for the exercise of revisional power under this section. However, where the Inspecting Joint Commissioner's order, passed within time, is set aside by a higher authority and the Inspecting Joint Commissioner is directed to pass a fresh order, the time-limit of four years would not apply to such fresh order *(C.I.T.* v. *Kishoresinh Kalyansinh Solanki [1960] 39 I.T.R. 522).*

Sec. 121: Revisional power of Commissioner.–(1) The Commissioner may, either of his own motion or on an application made by the assessee, call for the record of any proceeding under this Ordinance in which an order has been passed by any authority subordinate to him and may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Ordinance, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

(2) The application for revision of an order under this Ordinance passed by any authority subordinate to the Commissioner shall be made within ninety days of the date on which such order is communicated to the assessee or within such further period as the Commissioner may consider fit to allow on being satisfied that the assessee was prevented by sufficient cause from making the application within the said ninety days.

(3) The Commissioner shall not exercise his power under sub-section (1) in respect of any order–

(a) where an appeal against the order lies to the Appellate Joint Commissioner [or to the Commissioner (Appeals) or to the Appellate Tribunal and the time within which such appeal may be made has not expired or the assessee has not waived his right of appeal;

(b) where the order is pending on an appeal before the Appellate Joint Commissioner or it has been made the subject of an appeal to the [Commissioner (Appeals) or to the Appellate Tribunal]; or

(c) where a period of more than one year has elapsed from the date of the order in the case of action by the Commissioner on his own motion, unless the Commissioner is satisfied that there is sufficient causes to be recorded in writing, for exercising his power under sub-section (1).

(4) No application under sub-section(1), shall be entertained unless–

(a) it is accompanied by a fee of [two hundred] taka; and
(b) the undisputed portion of the tax has been paid.

Explanation.–The "undisputed portion of the tax" means–

(i) where the application is against an order of a Deputy commissioner of Taxes, the tax payable under section 74; and

(ii) where the application is against an order of an Appellate Joint Commissioner, the undisputed portion of the tax as determined on the basis of that order.

(5) For the purposes of this section, an order by the commissioner declining to interfere shall not be construed as an order prejudicial to the assessee.

(6) Notwithstanding anything contained in this Ordinance, an application for revision made under sub-section (1) shall be deemed to have been allowed if the Commissioner fails to make an order thereon within a period of one year from the end of the year in which the application was made.

Explanation.–For the purpose of this section, the Appellate Joint Commissioner of Taxes shall be deemed to be an authority subordinate to the Commissioner to whom the Deputy Commissioner of Taxes, whose order was the subject-matter of the appeal order under revision, is subordinate.

Revision by Commissioner–Not being an order prejudicial to the assessee–Sec. 121: While section 120 empowers the Joint / Additional Commissioner to exercise his revisional power in favour of the revenue this section empowers the Commissioner to exercise it in favour of the assessee. In this section he can either of his own accord or on the application of the assessee call for the records in which the order has been passed by any of his subordinates. He can himself make enquiry or cause such enquiry to be made and may pass such order thereon as he thinks proper. The Commissioner shall not pass order which may be prejudicial to the assessee. A prejudicial order is that order which places the assessee in a different and worse position than before. The Commissioner may, in the exercise of his revisional powers under this section, grant relief to the assessee, but the section in terms provides that in no case can the Commissioner pass an order prejudicial to the assessee. The decision of the Privy Council in *C.I.T.* v. *The Tribune Trust (1948 I.T.R. 214)* is an authority for the proposition that an order made by the Commissioner under this section can be said to be prejudicial to the assessee only when he is, as the result of it, in a *different* and worse position than that in which he was placed by the order under review. If the order passed in revision under this section does not worsen the position of the assessee, for instance, where the Commissioner merely rejects the assessee's application for relief, the order cannot be said to be prejudicial to the assessee. This view is now given statutory effect by sub-sec. 5 which enacts that an order by the Commissioner declining to interfere shall not be deemed to be an order prejudicial to the assessee.

The Commissioner's revisional jurisdiction under this section is "subject to the provisions of this Ordinance". He has the discretion to grant or refuse relief or grant appropriate relief *(Nanhe Mal Janaki Nath* v. *C.I.T. 1940 I.T.R., 437; Edara Venkaiah* v. *C.I.T. [1959] 35 I.T.R. 24; Khan Chand Ram Das [1938] I.T.R. 414)* and the power to pass such order in revision as he may think fit. But this power is not an arbitrary one to be exercised according to his fancy. He must act according to the rules of reason and justice, not according to private opinion; according to law, and not humour. His discretion is to be not arbitrary, vague and fanciful, but legal and regular *(Cf. Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd. 1947 I.T.R. Suppl. 104 (P.C.))*. It is a power coupled with a duty to exercise it in the interest of justice to the assessee–*(See Hirday Narain* v. *I.T.O. 78 I.T.R. 26 (S.C. of India))*. It is his duty

to revise an assessment which is found to be erroneous in the light of a latter dicision of the Supreme Court (India) –*Parshuram Pottery Works Co. Ltd.* v. *Trivedi 100 I.T.R. 651*. He should not surrender his judgment to the directions of the Board – *Sirpur Paper Mills Ltd.* v. *C.W.T. 77 I.T.R. 6 (S.C. of India)*. Even if the assessee had himself offered an income for assessment, the Commissioner cannot reject his revision petition on that ground, but is bound to decide on merits the question of its taxability–*Sheonath Prosad Sharma* v. *C.I.T. 66 I.T.R. 647*. (Cf. ground not taken before the lower authority). Likewise, an application for inserting an additional ground in the revision petition should not be rejected merely because it raises a point which had not been taken before the lower authorities–*See Nanhe Mal Janaki Nath* v. *C.I.T. 92 I.T.R. 483*. After having revised an order on one point, the Commissioner may on a subsequent occasion revise the same an order on another point which was not agitated on the first occasion *(See Nanhe Mal Janaki Nath* v. *C.I.T. 1940 I.T.R. 437)*. Again if the Commissioner effects a reduction of income under one head an increases under another head but on the whole reduces the assessment, his order cannot be said to be prejudicial to the assessee–*Lucknose* v. *I.T.O. 92 I.T.R. 450*.

Whether revision order is judicial or administrative.–The Calcutta and Andhra Pradesh High Courts have held that the Commissioner's revisional power under this section are of an administrative nature and he is not bound to hear the assessee before passing his order under this section even when dealing with a revision application made by the assessee *(Sitalpore Colliery Concern Ltd.* v. *Union of India [1957] 32 I.T.R. 26)*. But in a case the assessee filed revision petition under sec. 33A(2) of I.T. Act, 1922 contending that his agricultural income in India has wrongly been included. The Commissioner dismissed the petition without giving any hearing. The assessee approached the High Court for issuing a writ of *certiorari and mandamus*. It was held by the Dhaka High court that the power exercised by the Commissioner are judicial and quasi-judicial and the Commissioner is bound to give hearing to the assessee before disposing of the petition–*(Syedur-ur-Rahman, Dhaka* v. *C.I.T. Dhaka [1962] 6 Tax 25)*. Where an application for revision of an order of the Deputy Commissioner of Taxes is dismissed by the Commissioner, there is no confirmation of the order but only a refusal by the Commissioner to exercise his power of revision and the refusal to interfere should not be construed as an order prejudicial to the assessee - sub-section (5). In such a case the order of the Deputy Commissioner of Taxes is not merged in the order of the Commissioner but remains untouched *(Bhagwandas kevaldas* v. *Mehrotra [1959] 36 I.T.R. 538)*.

Limitation and other conditions.–The Commissioner may act *suo motu*, without notice to the assessee and without giving him an opportunity of being heard; in fact the review may be a purely departmental matter of which the assessee knows nothing *(C.I.T.* v. *Tribune Trust 1948 I.T.R. 214 (P.C.))*, or, the Commissioner may act on an application made by an assessee.

The Commissioner's power of revision under this section is subject to the following conditions: –

(a) The order should have been passed by an authority *subordinate* to the Commissioner. The Deputy Commissioner of Taxes is subordinate to

the Commissioner. The Appellate Joint commissioner is not subordinate to the Commissioner but for the purposes of this section he is deemed under the Expln. to be subordinate to the Commissioner, with the result that his orders can be revised by the Commissioner under this section.

(b) If the Commissioner acts *suo motu* he must exercise his revisional power *within one year* of the date of the original order. If the assessee moves the Commissioner under this section, the assessee's application must be made within a period of ninety days from the date on which he came to know of the impugned order or within such further period as the Commissioner may consider fit to allow on being satisfied that the assessee was prevented by sufficient cause for making the application within the said ninety days. The Commissioner may condone delay on sufficient cause being shown. Where the assessee applies within the prescribed period, the Commissioner may exercise his revisional power even after the expiry of the period.

(c) If the order is appealable that is, where an appeal lies to the Appellate Joint Commissioner or to the Commissioner (Appeals) the Commissioner cannot revise it till the time within which the appeal may be made expires. But if an appeal lies against the order to the Appellate Tribunal and the assessee waives his right of appeal, the Commissioner may revise the order even before the time for the appeal has expired.

(d) If an appeal has been made to the Appellate Joint Commissioner, the revisional power cannot be exercised while the appeal is *pending* but it may be exercised after the appeal has been disposed of.

(e) Once an order has been made the subject of an appeal *to the Appellate Tribunal*, the Commissioner's revisional power comes to an end; it cannot be exercised at all while the appeal is pending or even after it is disposed of.

(f) No order can be passed under this section which is *prejudicial* to the assessee. Application for revision shall be deemed to have been allowed if no order is passed by the Commissioner on the application within period of one year from the end of the year in which the application was made-sub.-sec. (6).

No reference to Court.–An order of the Commissioner passed under this section is not appealable to the Tribunal. Under s. 159 a reference to the Court lies only from an order passed by the Tribunal under s. 160. No reference lies from an order passed in-revision by the Commissioner under this section.

Sec. 122: Power to take evidence on oath, etc.–(1) The Deputy Commissioner of Taxes, the Joint Commissioner of Taxes, the Commissioner, [the Commissioner (Appeals)] and the Appellate Tribunal shall, for the purpose of this Ordinance, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters, namely:-

(a) discovery and inspection;

(b) enforcing the attendance of any person and examining him on oath or affirmation;

(c) compelling the production of accounts or documents (including accounts or documents relating to any period prior or subsequent to the income year); and

(d) issuing commissions for the examination of witness.

(2) The Deputy Commissioner of Taxes shall not exercise his powers under this section for the purpose of enforcing the attendance of an employee of a scheduled bank as a witness or compelling the production of books of account of such a bank except with the prior approval of the Commissioner.

(3) Any authority mentioned in sub-section (1) may impound and retain in its custody for such period as it considers fit any books of accounts or other documents produced before it in any proceeding under this Ordinance.

(4) Any proceeding under this Ordinance, before any authority mentioned in sub-section (1), shall be deemed to be a judicial proceeding within the meaning of section 193 and 228, and for the purposes of section 196, of the Penal Code (Act XLV of 1860).

Judicial proceedings.–**Sec. 122:** Any proceeding before the Deputy Commissioner of Taxes, Inspecting Joint Commissioner of Taxes, the Commissioner, the Commissioner (Appeals) and the Appellate Tribunal, which is deemed to be a "judicial proceeding" by this section for certain purposes must be treated as a "proceeding in any court" within the meaning of section 193 and 228, and for the purposes of section 196 of the penal code *(See Sannana Chetty v. I.T.O. 76 I.T.R. 177);* and Criminal Court can take cognizance of the offence of making false statements in a proceeding before the above mentioned income-tax authorities only on a complain in writing–*Lalji Haridas* v. *State of Maharastra 52 I.T.R. 423 (S.C. of India)* See further under sec. 83(2) "Quasi–Judicial enquiry).

CHAPTER-XV
IMPOSITION OF PENALTY

Sec. 123: Penalty for not maintaining accounts in the prescribed manner.–Where any person has, without reasonable cause, failed to comply with the provisions of any order or rule made in pursuance or for the purposes of section 35(2), the Deputy Commissioner of Taxes may impose on him a penalty,–

(a) of a sum not exceeding one and a half times the amount of tax payable by him; and

(b) where the total income of such person does not exceed the maximum amount on which tax is not chargeable, of a sum not exceeding one hundred taka.

Sec. 124: Penalty for failure to file return, etc.–Where any person has, without reasonable cause, failed to file or furnish or, as the case may be, obtain and display within the time laid down therefor,–

(a) a return of income required by or under sections 75, 77, 89(2), 91(3), or 93(1); or

(b) any certificate, statement, accounts or information required by or under sections 58, 108, 109, 110 or 113.

(c) the tax-payer's identification number (TIN) certificate under section 184C;

the Deputy Commissioner of Taxes shall impose upon such person a penalty of taka five hundred and in the case of a continuing default a further penalty of taka two hundred and fifty for every month or fraction thereof during which the default continues.

Sec. 125: Failure to pay advance tax, etc.–Where, in the course of any proceeding in connection with the assessment of tax under Chapter IX, the Deputy Commissioner of Taxes is satisfied that any person has–

(a) without reasonable cause, failed to pay advance tax as required by section 64; or

(b) furnished under section 67 any estimate of tax payable by him which he knew, or had reason to believe, to be untrue,

he may impose upon such person a penalty to a sum not exceeding the amount by which the tax actually paid by him falls short of the amount that should have been paid.

Sec. 126: Penalty for non-compliance with notice.–Where any person has, without reasonable cause, failed to comply with any notice issued under sections 79, 80 or under sub-section (1) [or (2) of section 83] the Deputy Commissioner of Taxes may impose on him a penalty not exceeding the amount of tax chargeable on the total income of such person.

Sec. 127: Failure to pay tax on the basis of return.–Where, in the course of any proceeding under this Ordinance, the Deputy Commissioner of Taxes is satisfied that any person has not paid tax as required by section 74, or the tax paid by him under that section is less than eighty percent of the amount payable thereunder, he may impose upon such person a penalty of a sum not exceeding twenty-five percent of the whole of the tax or as the case may be, of such portion of the tax as has not been paid.

Sec. 128: Penalty for concealment of income.–(1) Where, in the course of any proceeding under this Ordinance, the Deputy Commissioner of Taxes the Appellate Joint Commissioner, [the Commissioner (Appeals)] or the Appellate Tribunal is satisfied that any person has, either in the said proceeding or in any earlier proceeding relating to an assessment in respect of the same income year,–

(a) concealed particulars of his income or furnished inaccurate particulars of such income; or

(b) understated the value of any immovable property in connection with its sale or transfer with a view to evading tax,

he or it may impose upon such person a penalty of a sum not exceeding two and a half times the amount of tax which would have been avoided had the income as returned by such person or as the case may be, the value of the immovable property as stated by him been accepted as correct:

Provided that where concealment referred to in this sub-section is in a case where the assessment of tax was made by the assessee himself in accordance with any provision of this Ordinance or rules made thereunder and accepted by the Deputy Commissioner of Taxes as correct, the words

"two and a half times" occurring in this sub-section shall be read as "five times".

(2) For the purpose of sub-section (1), concealment of particulars of income or furnishing of inaccurate particulars of income shall include,–

(a) the suppression of any item of receipt liable to tax in whole or in part or

(b) showing any expenditure not actually incurred or claiming any deduction therefor.

Sec. 130: Bar to imposition of penalty without hearing.–No order imposing a penalty under this Chapter shall be made on any person unless such person has been heard or has been given a reasonable opportunity of being heard.

Sec. 131: Previous approval of Inspecting Joint Commissioner for imposing penalty.–The Deputy Commissioner of Taxes shall not impose any penalty under this Chapter without the previous approval of the Inspecting Joint Commissioner except in the cases referred to in section 124.

Sec.131A: Previous approval of the Board for imposing penalty.–Notwithstanding anything contained in section 131, no penalty under sub-section (3) of section 128 shall be imposed without previous approval of the Board.

Sec. 132: Orders of Appellate Joint Commissioner, etc., to be sent to Deputy Commissioner of Taxes.–The Appellate Joint Commissioner, or the Commissioners (Appeals) or the Appellate Tribunal making an order imposing any penalty under this Chapter shall forthwith send a copy of the order to the Deputy Commissioner of Taxes and thereupon all the provisions of this Ordinance relating to the recovery of penalty shall apply as if such order were made by the Deputy Commissioner of Taxes.

Sec. 133: Penalty to be without prejudice to other liability.–The imposition on any person of any penalty under this Chapter shall be without prejudice to any other liability which such person may incur, or may have incurred, under this Ordinance or under any other law for the time being in force.

Power to levy penalty: Secs. 123 to 133 make provision for the imposition of a penalty on obstinate or fraudulent assessees. The penalty is in addition to the

income-tax if any determined as payable by the assessee. Of course, tax includes penalty (Sec. 2(62)). The word, "assessment" would cover penalty proceedings, if it is used to denote the whole procedure for imposing liability on the tax-payers.. The power to impose penalty is given to the Deputy Commissioner of Taxes, Appellate Joint Commissioner of Taxes, Commissioner of Taxes (Appeals) and the Appellate Tribunal. The power of the Deputy Commissioner of Taxes to impose a penalty is subject to the previous approval of the Inspecting Joint Commissioner of Taxes except in the cases referred to in section 128 (Sec. 131). Penalty proceedings can be initiated by the Deputy Commissioner of Taxes only in the course of any proceedings in connection with the regular assessment, i.e. initial assessment or first assessment–*French Dyes and Chemicals (India) (Pvt.) Ltd.* v. *C.I.T. (Bombay) reported in 1993 BTD XXI 217-223* and no proceeding can be started after the passing of the assessment order. If the penalty proceedings are not finalised but the assessment is completed there is nothing to bar the DCT to pass the final order for imposing penalty. If no hearing is given and the penalty is imposed, proceedings will be illegal. In other words, the assessee must be heard before imposing penalty–*P.C. Dwadash Sherni & Co. Ltd.* v. *C.I.T. (V.P.) [1953] 23 I.T.R. 432.*

A penalty may be imposed in the course of any proceedings under this Ordinance. For instance, a penalty may be imposed on the assessee by the Appellate Joint Commissioner in an appeal filed by the assessee himself *(Kamalapat Motilal* v. *C.I.T. [1962] 45 I.T.R. 266 (S.C. of India). See Malk Damsaz Khan* v. *C.I.T. 1947 I.T.R. 445 (P.C.)).* Where the assessee files an appeal against an order of penalty under this section, the Appellate Joint Commissioner can himself impose a fresh penalty while allowing the appeal *(Hajii Ghulam Hussain* v. *C.I.T. [1953] 23 I.T.R. 309. The observations to the contrary in Banarsi Das* v. *C.I.T. 1936 I.T.R. 217, 221, require reconsideration).* If the order of penalty is set aside in appeal on the ground that a hearing was not given to the assessee, the Deputy Commissioner of Taxes would be competent to impose a penalty again after correcting the proceedings and hearing the assessee *(Guduthur Bros.* v. *I.T.O. [1960] 40 I.T.R. 298 (S.C.)).* If the status of an assessee taken by the Deputy Commissioner of Taxes as that of an individual, is converted on appeal into that of a Hindu undivided family, the penal proceeding originally started against the assessee as an individual cannot be continued in the same status and a penalty cannot be imposed on him as an individual in respect of the concealed income ultimately assessed in the hands of the family – *Venkataraman* v. *C.I.T. 75 I.T.R. 65 (S.C. of India).*

Discretion to levy or not to levy penalty.–These sections prescribe the maximum penalty which can be levied in certain cases. But the fact that the maximum is prescribed does not mean that penalty must necessarily be imposed in every case. The discretion of the Deputy Commissioner of Taxes or the Appellate Joint Commissioner to levy or not to levy a penalty is still preserved by these sections and in exercising the discretion the revenue should treat humble citizens in the same manner as ministers–*C.I.T.* v. *Narain Kaur 76 I.T.R. 662.*

Penalty for non-maintenance of accounts in the prescribed manner.– Sec. 123 (Read with Rule 8): In 1959 an amendment was made in sec. 13 of the

Income-tax Act. 1922 according to which the Central Board of Revenue was to formulate rules to compel different types of persons to maintain their accounts in the prescribed manner. Subsequently, a rule (rule 8) was framed which prescribed that medical practitioners known as doctors, surgeons, physicians, dentists, psychiatrists, homeopaths, veterinary surgeon other than medical practitioners, who do not make any separate charge for consultation but make a charge for the medicines supplied by them and legal practitioners (including income-tax practitioners) accountant and auditors, architects and engineers, are to maintain accounts in the manner prescribed in that rule. This section has provided for imposition of penalty of a sum not exceeding one and a half times the amount of tax payable by him and in a case where the total income of a person does not exceed the maximum amount of the exempted limit a penalty of a sum not exceeding one hundred taka in case of default.

Penalty for failure to file returns etc.–Sec. 124: This section prescribes penalty for miscellaneous defaults. A penalty may be imposed for not furnishing a return of income, as required under section 75 (voluntary return); section 77 (a return as required to be furnished in response to notice); section 89(2) (a return along with the notice of discontinuance of business); section 91(3) (a return along with the particulars of income in case of a person leaving Bangladesh) or section 93(1) (a return in response to notice in case of income escaping assessment). A penalty may be imposed for not furnishing a return within the time allowed in the notice calling for a return, even if the assessee does furnish a return after the expiration of the time allowed. Penalty may be levied in proceedings under section 93 for non filing a return of income as required by section 75, even if no individual notice under section 77 was served on the assessee during the relevant assessment year–*Govindarajuln Iyer* v. *C.I.T. (1948) I.T.R. 391)*. If the assessee has any reasonable cause which prevented him from furnishing any return under this clause (cl.(a)) a penalty may not be imposed. Absence of reasonable cause is necessary to justify a penalty-mere non-furnishing of, or delay in furnishing a return of income is not enough–*C.I.T.* v. *Gujrat Travancore Agency 103 I.T.R. 149 (F.B.)*.

Imposition of penalty as contemplated under sec. 271(1)(a) (corresponding to sec. 124(a) of I.T. Ordinance, 1984) is not compensatory but punitive and the proceeding to impose penalty is quasi criminal. It is well settled that the liability to pay penalty does not arise merely on proof of default in filing the return on time and the discretionary power of the authority to impose penalty for failure to file return on time is to be exercised judicially and on consideration of all the relevant circumstances .... In the absence of finding that the assessee acted in conscious disregard of his obligation to file the return and/or acted deliberately in defiance of law it is not justified in upholding the penalties levied against the assessee–*SMT Shibani Dulla* v. *C.I.T. (Patna) 1995 reported in 1997 BTD xxv 95-97*.

With the substition of the word, "shall" for the word, "may" in the amended section although the discretionary power of the Deputy Commissioner of Taxes has been curbed but the Deputy Commissioner of Taxes has not been given the absolute power to impose penalty without giving due regard to see the circumstances which caused default on the part of the assessee to file the return on time and if there is any

reasonable cause for which he failed to file the return on time penalty should not be imposed.

Under cl.(b) of this section a penalty may be imposed if any person has failed to furnish a certificate to the person as required under section 58 showing payment made to the person and the amount of tax deducted or collected from such payment; any person has failed to furnish a statement showing payment of salaries and tax deducted therefrom as required under section 108; any person who fails to furnish a statement showing payment of interest constituting income not classifiable under the head, 'Interest on securities' as required under section 109; any principal officer who has failed to furnish a statement showing payment of dividend as required under section 110; and any person who has failed to furnish information called for by the Deputy Commissioner of Taxes under section 113.

A penalty may also be imposed under cl. (c) of this section on a person having income from business or profession who fails to obtain and display tax-payer's identification number (TIN certificate) as required under section 184 C.

If the only default on the part of the assessee is that he did not furnish return of income as mentioned in cl.(a) or failed to furnish any certificate or statement which he is required to furnish in the cases mentioned in cl.(b) of this section that is not tantamount to concealment of the particulars of income–*Suraj Mal Mathure Prosad Deoki* v. *C.I.T. (1962) 46 I.T.R. 226.*

The Deputy Commissioner of Taxes may impose penalty for default under this section of a sum of taka five hundred and in the case of a continuing default a further sum of two hundred and fifty taka for a month or a fraction thereof during which the default continues. "The offence caused on account of the failure to furnish a return becomes complete if no return is filed by the assessee on the due date and as such the offence under this section cannot be considered to be a continued wrong. If the return is filed subsequently at some later point of time or if no return is filed at all, it would not affect the default committed by the assessee and the penalty has to be computed in accordance with the law which was in force on the due date by which the return ought to have been filed by the assessee–*Prithvi Singh* v. *C.I.T. Rajasthan (reported in 1988 BTD XVI 79-90).* "The distinction between two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and, therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all".

Quoting some decisions of different High Courts in India, Venkataramiah J. in Suresh Seth's case [1981] 129 I.T.R. 328 (S.C. of India) made a conclusion that the default had been committed on the last day allowed to file the return and there was no case of continuing default. The facts found in Suresh Seth's case were than the returns for the assessment years 1964-65 and 1965-66 had been filed on March, 18 1971 and for which assessment was made on March 22, 1971.

Penalty in proceedings under sec. 93(1): Penalty on the ground of concealment can be imposed only if there is *conscious and deliberate concealment* on the part of the assessee–*C.I.T.* v. *Mohammad Haneef 83 I.T.R. 215 (S.C. of India); C.I.T.* v. *Khodey Eswara 83 I.T.R. 369 (S.C. of India).* These principles were reaffirmed by the Supreme Court in India in *C.I.T.* v. *Anwar Ali 76 I.T.R. 606.* In *C.I.T.* v. *Khodey Eswara* the Supreme Court further ruled that a penalty cannot be levied solely on the basis of the reasons given in the order of assessment.

The levy of penalty must be shown to be justified by the facts of the case. The mere fact that the assessee agreed to the inclusion of cash credits or other amounts in the total income on account of his inability to prove the source or to avoid protracted litigation with the Department *(C.I.T.* v. *Ashoka Marketing Ltd. 103 I.T.R. 543 (S.C. of India)* or that his representative consented to the imposition of the minimum penalty before the lower authorities *(Halappa Sons* v. *C.I.T. 95 I.T.R. 542);* or that cash was seized in a raid and assessed under sec. 69A (corresponding to sec. 19(1)) as unexplained investments *(C.I.T.* v. *Jewels paradise 101 I.T.R. 265)* does not by itself justify the levy of penalty. Where upon the death of a karta a succeeding karta makes a return of income based on the accounts kept by the deceased without any knowledge of the falsity of the accounts no penalty can be imposed on the joint family–*Radha Ruskmani Ammal* v. *C.I.T. 31 I.T.R. 704.* If, however, a karta deliberately files a false return penalty can be imposed on the joint family represented by the succeeding karta–*Nataraja Gounder* v. *C.I.T. 50 I.T.R. 487.*

If an assessee conceals his income or commits any other default in the course of proceedings under s. 93 to assess a past year's income which has escaped tax, penalty would clearly be leviable under this section *(Batuk Prasad Khatri* v. *C.I.T. 5 I.T.C. 138).* But there is a difference of judicial opinion as to whether in a case where an assessee is guilty of no default in such proceedings under s. 93, a penalty may still be imposed in such proceedings in respect of the original default which resulted in the escape of income from tax in the relevant assessment year. In *Govindarajulu Iyer* v. *C.I.T. (1948 I.T.R. 391),* the Madras High Court held that where assessment or reassessment proceedings are taken under s. 93, a penalty can be imposed not only in respect of a default committed in the course of such proceedings but also in respect of failure to file a return in the relevant assessment year as required by s. 75 or a default committed in the course of the original assessment proceedings of the past year to which the proceedings under s. 93 relate. A similar view has been taken by the Patna *(Mukherjee* v. *C.I.T. [1959] 37 I.T.R. 224),* Andhra Pradesh *(C.I.T.* v. *Angara Satyam [1959] 37 I.T.R. 230)* and Bombay *(Malbary & Bros* v. *C.I.T. [1962] 44 I.T.R. 674)* High Courts. Further if a penalty had already been imposed on the basis of the estimated income in the original assessment proceedings, and in the reassessment proceedings such estimate is found to be low, the DCT may recall the original order of penalty and impose a higher penalty on the basis of the reassessed income–*Malbary & Bros v. C.I.T. 51 I.T.R. 295 (S.C. of India).*

An assessee who had deliberately filed an incorrect return submitted a revised return when the omission in the first return was *on the point of being discovered* and the Income-tax officer (DCT) white assessing on the basis of the

revised return imposed a penalty under sec. 28 of I.T. Act, 1922 for concealment of income. Held, that the previous incorrect return could be looked into for imposing the penalty though the latter return was a revised return, within the meaning of sec. 22(5) (corresponding to section 77) for assessment thereon–*Arunchalan Chettiar* v. *C.I.T. (Madras) 6 I.T.C. 58.*

In another case where reassessment was made after voluntary disclosure of income penalty was imposed for concealment of income in original returns–*K.P. Kandasami Mudaliar And Sons* v. *C.I.T. (Madras) 1983 (reported in 1991 BTD XXIV 203-204.* In this case for another year before the returns were taken up for inquiry, revised returns were filed on the basis of the voluntary disclosure of the assessee to give effect to the settlement between the Income-tax Department and the assessee–it was held that although the original returns furnished by the assessee contained omission the omissions were *made good voluntarily before any investigation* was started by the assessing officer. There was therefore, no concealment of income and penalty could not be imposed *(M. Radhakrishnan* v. *C.I.T. (1984) 147 I.T.R. 133* followed).

In the assessment for other years the imposition of penalty was valid notwithstanding the fact that it was the assessee's own voluntary disclosure which brought about the reassessment and despite the circumstance that not a pie was added to the amount disclosed by the assessee. This decision followed the decision of the Supreme Court (India) in the case of *Malbary & Bros.* v. *C.I.T. (1961) 51 I.T.R. 295 (S.C. of India)* in which it was held that for a concealment in the original assessment proceeding the assessee may be rendered liable for penalty in the course of the reassessment proceedings. That was a case where an assessee did not report his income from a foreign branch in the course of original assessment proceedings but on the assessment being re-opened, he disclosed the entire branch income with correct and complete particulars. The reassessment was based solely on the basis of the figures furnished by the assessee. There was also no other default on his part in the reassessment proceedings. Nevertheless, penalty was levied on the assessee on the score that he concealed the branch income in the course of the original assessment proceedings. The penalty was upheld by the Supreme Court of India.

With regard to the assessment for other years the assessee could not be absolved from his wrongful act of concealment of income merely because the original assessments were set-aside on appeal by the Appellate Assistant Commissioner. The imposition of penalty for these years was found valid. In this case reassessments were made on the very basis of the assessee's revised returns filed during the course of reassessment proceedings which disclosed an income far higher than the income returned by the assessee in the original assessment proceedings. The Tribunal sustained the penalty on the score that there was a prolonged enquiry in the cash credits in this year which made the assessee come out with voluntary disclosure.

The power to levy a penalty under this section cannot be exercised in the course of proceedings under s. 93, if such proceedings had not been properly commenced by the issue of a valid notice under sec. 93.

Burden of proof.–Since this section is purely penal in character, the onus is on the Department to prove its right to impose a penalty under this section *(C.I.T. v. Gokuldas Harivallabhadas [1958] 34 I.T.R. 98)*. See further *post* under s. 128, "Inquiry before imposing penalty".

Appeal.–An appeal lies to the Appellate Joint Commissioner against an order by the Deputy Commissioner of Taxes imposing a penalty under this section (s. 153). The Appellate Joint Commissioner may in appeal confirm, cancel, enhance or reduce the penalty (s. 156(1)(a). An appeal lies to the Appellate Tribunal against an order passed by the Appellate Joint Commissioner under this section imposing a penalty or against an order passed by him under s. 158 in appeal against a penalty imposed by the Deputy Commissioner of Taxes (s. 124), or against a penalty imposed under s. 274(2) by the Inspecting Joint Commissioner (s. 132).

Reference to Court.–The quantum of the penalty within the statutory limit, that ought to be imposed in a given case, is obviously a matter of fact and not of law and is to be determined by the Income-tax authorities and not by the Court *(In re Gopaldas Purshottam Dass 1941 I.T.R. 372)*. The question whether there has been a *deliberate* concealment of income is a question of fact *(In re Lachhman Das Brijballabh Das 1942 I.T.R. 186)*.

Penalty for failure to pay advance tax or for false estimate.–Sec. 125: A penalty may be imposed under this section for deliberately furnishing an untrue estimate of advance tax. The fact that the assessee himself later returns a higher income in the regular assessment proceedings than what he had estimated under s. 64, does not by itself lead to the inference that at the time of sending the estimate he knew that it was incorrect *(Kurian* v. *I.T.O. [1961] 43 I.T.R. 432)*.

In the case of failure to send an estimate of advance tax under s. 67, a penalty may be imposed under this section *(C.I.T.* v. *Teja Singh [1959] 35 I.T.R. 408 (S.C. of India))*.

Apart from this section a penalty may be imposed under s. 125 for default in payment of the advance tax besides interest is payable under sec. 73 on deficiency in payment of advance tax.

An appeal lies to the Appellate Joint Commissioner against an order imposing a penalty under this section *(North Deccan Transport Ltd.* v. *C.I.T. [1956] 29 I.T.R. 937)* (sec. 153).

Penalty for non-compliance with notice.–Sec. 126: Failure to comply with a notice under section 79, 80 or 83(1) –which warrants a best-judgment assessment under se. 84 also attracts a penalty under this section–*K.M.O Chettian Firm* v. *C.I.T. 2 I.T.R. 159*.

Failure to pay tax on the basis of return.–Sec. 127–(See Ordinance)

Penalty for concealment of income.–Sec. 128: This section prescribes a penalty for concealment of income. The word "income" in this section is not used in the popular sense of money received but connotes the assessable figure arrived at

after accounting for all the legitimate deduction and exemptions–*Nagin Chand Shir Sahai* v. *C.I.T. 6 I.T.R. 534.* Therefore, if an assessee falsely claims a deduction, it would amount to concealing the particulars of his income or deliberately furnishing inaccurate particulars of such income within the meaning of cl.(a) of sub-section 1 and can be penalised under this section–*C.I.T.* v. *Gates Foam & Rubber Co. 91 I.T.R. 467.* Concealment of income in the original return would attract penalty even if the assessee submits a revised return before the assessment is completed or the penalty proceedings are started. In a case the assessee, a managing director of a company, filed a revised return showing income from dividends and property. The I.T.O. issued a notice under sec. 28(3) of I.T. Act 1922 for not disclosing the income from the interim dividends. The Andra Pradesh High Court following the case of *Govindarajula Iyer* v. *C.I.T. (1948) 16 I.T.R. 391* approved the action of the I.T.O. in the case of *C.I.T.* v. *Angara Satyam (1959) 1 Tax-25).* In another case original return was revised on detection of concealment. It was held that the previous incorrect return could be looked into for imposing the penalty, though the latter return was a revised return within the meaning of sec. 22(2) (corresponding to sec. 77) for assessment thereon–*Arunchalan Chelliar* v. *C.I.T. (Madras) 6 I.T.C. 58.*

This section specifies the different nature of concealment and prescribes the maximum amount of penalty to be imposed depending on the nature and circumstances of the case. For concealing particulars of income or for furnishing inaccurate particulars of income which includes suppression of any item of receipt liable to tax or showing such expenditure which has not been actually incurred or claiming any deduction which is not legally allowable. For such type of concealment and for understatement of value of immovable property transferred a penalty of a sum not exceeding two and half times of the amount of tax which would been avoided had the shown income been accepted as correct and in a case of self assessment under section 83A and the rule made thereunder (rule 38) an amount of penalty not exceeding fives times of the tax which has been avoided because of the acceptance of the income shown in the return may be imposed.

Bar to imposition of penalty–Inquiry before imposing penalty.– Sec. 130: This section contemplates an inquiry before the imposition of a penalty. It provides that no penalty shall be imposed unless the assessee has been heard or has been given a reasonable opportunity of being heard. If such opportunity to show cause is not given to the assessee, the imposition of a penalty would be invalid *(Banarsi Das* v. *C.I.T. 1936 I.T.R. 217).* The Calcutta High Court has held that where an Income-tax Officer is succeeded by another, the succeeding Officer cannot pass an order of penalty without giving the assessee an opportunity of being heard, even if the case was fully heard by his predecessor. In another case it was held that where an I.T.O. is succeeded by another the succeeding officer can pass an order of penalty without giving the assessee an opportunity of being heard if the case was fully heard by his predecessor, but not if the case was not fully heard or if the assessee had rested his case on a personal hearing or if the assessee is not aware that the I.T.O. has been succeeded by another and that the successor proposes to pass the penalty order – *Calcutta Tanneris (1944) Ltd.* v. *C.I.T. 40 I.T.R. 178.*

A notice calling upon the assessee "to show cause in writing or in person" fulfills the requirements of the section–*Ayyasami Nadar & Bros* v. *C.I.T. 30 I.T.R. 565*. A notice in the printed form, in which the ground on which the penalty is sought to be levied is not indicated by striking out the other grounds, would be invalid–*Subramania Iyer* v. *Union of India 97 I.T.R. 228*. The notice may, in the case of a firm, be served on only one partner–*Vedachala Mudaliar* v. *Ranganaju Naidu 39 I.T.R. 308*.

The levy of a penalty is not a matter of guess-work. For instance, before imposing a penalty for non-compliance with a notice to produce certain books, the Deputy Commissioner of Taxes must have in his possession such materials as would convince a reasonably minded man that the books which are not produced actually exist *(C.I.T.* v. *Vedlapatla Veera Venkataramiah 1943 I.T.R. 308)*. It is not possible to lay down any hard and fast rule as to what material is actually required. Each case must depend upon its own circumstances. The findings given in assessment proceedings would be relevant and admissible materials in penalty proceedings; but those findings cannot operate as *res judicata* because the considerations that arise in penalty proceedings are different from those in assessment proceedings *(Dwarka Prasad Sheokaran Das* v. *C.I.T. [1953] 24 I.T.R. 410)*. The fact that the assessee's explanation regarding a cash credit or other receipt is disbelieved and the amount is assessed in his hands, does not by itself justify the Department in imposing a penalty: the Department must have evidence on record to show that the amount constitutes the assessee's *taxable income (C.I.T.* v. *Gokuldas Harirallabhdas [1958] 34 I.T.R. 98; Lakshmi Narain Shambhuram* v. *C.I.T. [1963] 49 I.T.R. 350)*. Penalty on the ground of concealment can be imposed only if there is *conscious and deliberate* concealment on the part of the assessee *(Hariram Sait* v. *C.I.T. [1955] 28 I.T.R. 231)*.

Where a best judgment assessment has been made under s. 84, evidence sought to be adduced, in the course of penalty proceedings, by the assessee, purporting to disclose his real income, is relevant and admissible, not for the purpose of varying or affecting the assessment already made but to prove that he has no income liable to tax *(P.C. Dwadash Sherni & Co. Ltd.* v. *C.I.T. [1953] 23 I.T.R. 432)* or as an extenuating fact showing that the amount of the penalty ought to be less than the maximum prescribed *(C.I.T.* v. *A.A.R. Chettiar Firm 1933 I.T.R. 285)*.

No time limit is prescribed for the imposition of penalty under this section either for commencing penalty proceeding or for completing them and passing a penalty order. The Lahore High Court in *Ver Bhan* v. *C.I.T. (1938) I.T.R. 616* held that where the Income-tax officer started penalty proceedings by the issue of a notice under sec. 28(3) before making an assessment order, the imposition of penalty after making the assessment order was valid. The Calcutta High Court further held that even the notice under this section may be issued and the penalty proceedings may be started after the assessment is completed, and that it is not necessary that the penalty proceedings should be started during the pendency of those proceedings in the course of which the default of the assessee is discovered–*Gmu Prosad Shaw* v. *C.I.T. (1944) I.T.R. 233*. However, it was held that although no time-limit has been prescribed in

the section for penalty proceedings, action has to be taken within a reasonable time–*Mohd. Atiq* v. *I.T.O. (1962) 46 I.T.R. 452.*

The section contemplates an enquiry before the imposition of penalty. Where penalty proceedings are started by the issue of a notice under s. 130 to the assessee giving him an opportunity of showing cause why a penalty should not be levied, though if the assessee is actually heard on the point, the absence of a formal notice would not make any difference *(Anant Ram Kanhaiyalal* v. *C.I.T. [1957] 32 I.T.R. 75).* The section as it stands makes it incumbent upon the Deputy Commissioner of Taxes to give a hearing before finalisation of the penalty proceedings. A notice calling upon the assessee "to show cause in writing or in person" would fulfil the requirements of the section *(Ayyasami Nadar & Bros* v. *C.I.T. [1956] 30 I.T.R. 565).* The notice may, in the case of a firm, be served on only one partner *(Vedachala Mudaliar* v. *Rangaraju Naidu [1960] 39 I.T.R. 308).*

The Deputy Commissioner of Taxes has no power to impose penalty under this section without the previous approval of the Inspecting Joint Commissioner of Taxes (sec. 131) but if the case falls within section 124 (for non-submission of return or for not furnishing any certificate, statement, accounts or information as required) the jurisdiction of the Deputy Commissioner of Taxes is not in any way affected by section 131.

The Appellate Joint Commissioner, Commissioner (Appeals) or the Appellate Tribunal who are empowered to impose penalty for concealment of income by the assessee under sec. 128 shall have to send his order of penalty to the respective Deputy Commissioner of Taxes for the purpose of recovery of such penalty (sec. 132).

The penalty so imposed under this Chapter (cl. XV) shall be in addition to any other liability of the assessee of so he has incurred in any other provisions under this Ordinance or under any other law–sec. 133.

CHAPTER-XVI
RECOVERY OF TAX

Sec. 134: Tax to include penalty interest, etc.–For the purposes of this Chapter, "tax" includes any sum imposed, levied or otherwise payable under this Ordinance as penalty, fine, interest, fee or otherwise; and the provisions of this chapter shall accordingly apply to the recovery of any such sum.

Sec. 135: Notice of demand.–(1) Where any tax is payable in consequence of any assessment made or any order passed under or in pursuance of this Ordinance, the Deputy Commissioner of Taxes shall serve upon the assessee (which expression includes any other person liable to pay such tax) a notice of demand in the prescribed form specifying therein the sum payable and the time within which, and the manner in which, it is payable, together with a copy of an assessment order.

(2) Where the assessee upon whom a notice of demand has been issued under sub-section (1) makes an application in this behalf before the expiry of the date of payment specified in the notice, the Deputy Commissioner of Taxes may extend the time for payment or allow payment by instalments subject to such conditions, including payment of interest on the amount payable, as he may think fit in the circumstances of the case.

(3) If the sum payable is not paid within the time specified in the notice of demand issued under sub-section (1) or, as the case may be, within the time as extended under sub-section (2), the assessee shall be deemed to be in default:

Provided that where the assessee has presented an appeal under this Ordinance in respect of the assessment of imposition of the tax or of the amount thereof, [the Deputy Commissioner of Taxes shall] treat the assessee as not being in default for so long as such appeal is not disposed of.

(4) If, in a case where payment by instalment has been allowed under sub-section (2), the assessee commits default in paying any one of the instalments within the time fixed therefor, the assessee shall be deemed to be in default as to the whole of the amount then outstanding, and the other installment or installments shall be deemed to have been due on the

same date as the installment in respect of which default has actually been committed was due for payment.

(5) Where an assessee has been assessed in respect of income arising outside Bangladesh in a country the laws of which prohibit or restrict the remittance of money to Bangladesh, the Deputy Commissioner of Taxes shall not treat the assessee as in default in respect of that part of the tax which is due in respect of such amount of income as cannot, by reason of the prohibition or restriction, be brought into Bangladesh, and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

Explanation.–For the purposes of this section, income shall be deemed to have been brought into Bangladesh if it has been or could have been utilized for the purposes of any expenditure actually incurred by the assessee outside Bangladesh or if the income, whether capitalized or not, has been brought into Bangladesh in any form.

Notice of demand.–Sec. 135: A notice of demand is issued under this section in respect of any tax, interest, penalty, fine or any other sum payable under this Ordinance. Recovery proceedings cannot be taken unless and until a notice of demand is served–*Misri Bai* v. *I.T.O. 51 I.T.R. 487*. A notice of demand for tax determined as payable under the different sections of this Ordinance cannot be issued unless an *assessment order* is passed *(Rasiklal Amritlal Doshi* v. *Nundy [1961] 42 I.T.R. 35)*. Similarly, if there is no valid order under which tax, interest, penalty or fine is payable by the assessee, no valid notice of demand can be issued under this section. Thus where an order passed by the Deputy Commissioner of Taxes under secs. 125 and 137 did not specify the amount of penalty, the order was bad, and the notice of demand which was issued pursuant to that order and which mentioned the amount of penalty was held to be equally bad *(Kotak* v. *C.I.T. [1952] 21 I.T.R. 18)*. The notice of demand under this section has to be served on "the assessee" which expression means a person by whom tax or any other sum of money is payable under this Ordinance. Thus "assessee" includes a partner of firm, and after the dissolution of the firm a notice of demand can be served on him *(Motilal* v. *I.T.O. [1962] 44 I.T.R. 454)*.

Tax and interest are distinct and different concepts *(Subramanyan* v. *Simplex Mills Ltd. [1963] 48 I.T.R. (S.C. of India) 182)*, and so are tax and penalty *(see ante under s. 124)*. The "interest" referred to in this section is the interest payable under the provisions of secs. 70 and 73 which deals with advance payment of tax. Though the tax is calculated and assessed by reference to the income of the assessee for a given year, the tax when demanded by a notice under this section does not become a debt due only for a particular period *(Doorga Prosad* v. *Sec. of State [1945] I.T.R. 285, 289 (P.C.))*. Income tax is calculated and assessed by reference to the income of an assessee for a given year, but it is due when demand is made whether for income-tax

or for penalty. It then becomes a debt to the government, but not for any particular period.

This section provides that the amount specified as payable in the notice of demand must be paid within the time specified in the notice. If an assessee makes default in payment, proceedings may be taken under secs.135, 137 to 143 for recovery of the tax and he may be liable to a penalty up 137. The date of the service of the notice of demand is important as fixing the starting-point of limitation for an appeal, since under s. 154 an appeal must ordinarily be presented within sixty days of service of the notice of demand accompanied by assessment form (I.T. 30).

Where a proper notice of demand has already been given in respect of the tax determined by the assessment order and the subsequent orders in appeal or revision have either enhanced or reduced the amount of tax demanded, it is necessary to issue a fresh notice of demand under this section–*I.T.O.* v. *Seghu Buchiah Setty* v. *52 I.T.R. 338*. Where an assessee upon whom a notice of demand has been issued and served he may make an application for extension of the date for payment of tax before the expiry of the date of payment as specified in the notice the Deputy Commissioner of Taxes may extend the time of payment and in a case where the assessee has been allowed to make payment of tax by instalments the Deputy Commissioner of Taxes may allow extension for payment by instalments subject to such condition including payment of interest on the amount payable (Sub-sec. (2)) as he thinks fit. If pursuant to a notice of demand the assessee has paid part of the sum demanded, it is not necessary for the Deputy Commissioner of Taxes to issue a fresh notice of demand for the unpaid balance before taking recovery proceedings *(Sushil Chandra Ghose* v. *I.T.O. [1959] 35 I.T.R. 379, 385)*. As to the necessity of issuing a fresh notice of demand after rectification of an order, see under sec. 173.

Form and service.–Rule 26 of the Income-tax Rules, 1984, prescribes the form of the notice of demand under sec. 135(1). The mode of service of the notice is dealt with by s. 178. The notice of demand must be accompanied by assessment form, i.e. Tax/Refund computation form (I.T. 30). Since the provision of issuing and service of I.T. 30 are mandatory failure or omission in furnishing the form along with the notice is illegal and without any effect–1977 BTD v. 48 (Trib.) and I.T.A. No. 2128 of 1980-81 (reported in 1984 BTD XII 53-54).

After the death of the assessee on whom a notice of demand was served, it is not necessary to serve a fresh notice on the heir *(Koteswara Rao* v. *C.I.T. [1962] 46 I.T.R. 882, 893-4)*. But if no notice of demand was served on the deceased, all the heirs who are sought to be held liable must be served with a notice *(Shah Mahmood* v. *Asst. Comr. [1963] 47 I.T.R. 55)*.

Where a valid notice of demand has been served in accordance with the provisions of the Ordinance on an association of persons represented by its principal officer, there is no necessity to issue a further notice of demand conforming to the requirements of r. 26 on the members of the association individually before proceeding to recovery the tax from them *(Kumaraswam Chettiar* v. *I.T.O. [1957 31 I.T.R. 457)*. But where the tax payable by firm is sought to be recovered from the

partners, they must be served with notices of demand *(Moti Lal Purshottam Das* v. *I.T.O. [1960] 39 I.T.R. 497; Subba Rao* v. *I.T.O. [1963] 48 I.T.R. 808 (discontinuance of firm))*.

Invalidity of or mistake in notice.–If the notice of demand is defective and bad in law, the assessee who does not comply with it cannot be regarded as a defaulter and recovery proceedings under this Ordinance cannot be commenced against him *(Murlidhar Jalan* v. *I.T.O. [1961] 41 I.T.R. 80, 91)*. If the notice of demand contains a mistake or an inaccuracy, the notice may be cancelled and the issue of a fresh notice to the assessee would be valid *(Protap Chandra Ganguly* v. *C.I.T. 4 I.T.C. 418)*. The notice would not be invalid merely because the status of the addressee is incorrectly mentioned, particularly if he is not thereby misled *(Motilal* v. *I.T.O. [1962] 44 I.T.R. 454)*. nor will the deletion of the words in the printed form inviting attention to the statutory right of appeal vitiate the notice. Sec. 179 provides that no notice shall be deemed to be void or inoperative by reason of any mistake, defect or omission therein if such mistake, defect or omission is not of a substantial nature prejudicially affecting the assessee.

No time-limit prescribed.–An assessment must be completed within the time-limit laid down in s. 94, but the Ordinance nowhere imposes any limit of time within which service of the notice of demand under this section has to be effected *(See C.I.T.* v. *Khemchand Ramdas 1938 I.T.R. 414, 424 (P.C.))*. But it seems that though no time-limit is laid down by the statute, the notice of demand must be issued within a reasonable time *(Rajendra Narayan Bhanja Deo* v. *C.I.T. 2 I.T.C. 82 (notice of demand issued fourteen months after the expiry of the assessment year held to be issued within a reasonable time)*.

Assessee in default–Sub-sec. (3): Sec. 69 deals with the question as to when an assessee is deemed to be in default in respect of advance tax. This sub-section provides that any tax (other than advance tax) interest, penalty or any other sum specified in the notice of demand under this section should be paid within the time specified in the notice. An assessee is deemed to be in default if he does not pay the tax within the time mentioned in the notice or the extended time under sub-section (2). In case of such a default, a penalty may be imposed under section 137. An exception is provided by the proviso to this sub-section which enacts that where an appeal has been presented by the assessee against the assessment for the imposition of the tax he shall not be deemed to be in default in respect of that part of the tax demanded which is disputed by him in respect of such disputed amount for so long as such appeal is not disposed of. Before the amendment of the proviso in 1995 the Deputy Commissioner of Taxes had the discretion to treat the assessee being not in default or he could proceed with the proceedings for realisation of the demand. By the substitution of the word "shall" in place of "may" the Deputy Commissioner of Taxes is bound to treat the assessee who has presented an appeal against the assessment as being not in default.

Where the assessee, who has been allowed to make payment of tax by instalments, makes a default in payment of any of the instalment, he shall be deemed to be an assessee in default in respect of the whole amount of unpaid tax on the date

on which the instalment was due in respect of which he has committed the default as the outstanding instalments shall be deemed to be due on that date–sub-sec. (4).

Foreign income.–Sub-sec.(5): Where an assessee has been taxed in respect of his foreign income arising in a country the laws of which prohibit or restrict the remittance of money to Bangladesh, the assessee cannot be treated as being in default in respect of that part of the tax which is due on income which by reason of such prohibition or restriction cannot be and has not been brought into Bangladesh, and the assessee must continue to be treated as not being in default so long as the prohibition or restriction continues. The inability to remit the income to Bangladesh should have been *by reason of such prohibition or restriction*. If an assessee, by negligence, collusion or fraud, does not get the requisite permit for remittance, it cannot be said that his inability to bring money into Bangladesh is by reason of such prohibition or restriction *(Muthuwappa* v. *I.T.O. [1952] 21 I.T.R. 344)*. But where the assessee applies for and is refused the requisite permit for remittance, he cannot be regarded as a defaulter in respect of tax on such foreign income, and if the authorities threaten to take recovery proceedings they may be restrained from doing so by a writ under the Constitution.

Foreign income shall be deemed to have been brought into Bangladesh if such income has been utilized for the purpose of expenditure by the assessee outside Bangladesh or such income whether capitalized or not, has been brought into Bangladesh in any form-expln. to sub-sec. (5).

Amendment.–The Finance Act of 2000 has made an amendment in this section by insertion of sub-sec. (1A) which reads as "Where any amount of tax is refundable in consequence of any order, except an order passed under section 83A and 83 AA in pursuance of this Ordinance, the Deputy Commissioner of Taxes shall specify in the notice referred to in sub-section (1) the sum refundable to the assessee together with a copy of an assessment order and a refund voucher unless such refund is set off against tax as per provision of section 152."

Sec. 137: Penalty for default in payment of tax.–(1) Where an assessee is in default or is deemed to be in default in making payment of tax, the Deputy Commissioner of Taxes may direct that, in addition to the amount of tax in arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

(2) Where, as a result of any final order, the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded.

Penalty for default in payment of tax. –Sec. 137: Like s. 46(1) and (1A) of the 1922 Act, this section gives discretion to the Deputy Commissioner of Taxes to impose or not to impose a penalty when an assessee is in default in payment of tax. But, there was no provision in the 1922 Act corresponding to sub-s. (2) of this section

under which the penalty has to be cancelled and the amount of penalty refunded if the tax, the non-payment of which led to the imposition of the penalty, is wholly reduced in further proceedings. In a case where penalty was imposed for default in making payment of tax without issue of a show-cause notice was held invalid by the Bangladesh Appellate Tribunal–1987 BTD XV 83 (Trib.).

It is not obligatory on the Deputy Commissioner of Taxes to impose a penalty in every case where there is default in payment of tax and the amount of the penalty is also in his discretion, but the total amount of penalty should not exceed the amount of tax in arrear.

This section provides for imposition of penalty for default in payment of tax, including advance tax under s. 69, but not for imposition of penalty for default in payment of the penalty already imposed *(Mathew* v. *I.T.O. [1956] 29 I.T.R. 456)*. The imposition of penalty under this section must take the form of an order and the order must state the specific sum which the assessee has to pay by way of penalty *(Kotak* v. *C.I.T. [1952] 21 I.T.R. 18)*. A penalty may be imposed on a legal representative for his own default in paying the tax due under an assessment on himself under s. 92 or on the deceased *(I.T.O.* v. *Alfred [1962] 44 I.T.R. 442 (S.C. of India); I.T.O.* v. *Abdul Kassim [1962] 46 I.T.R. 149 (S.C. of India))*.

No penalty can be imposed unless there is default in payment of tax on the due date; and even where a wrong date is specified in the notice of demand by mistake, no penalty can be imposed till the specified date has passed *(Abbu Chettiar* v. *I.T.O. [1958] 33 I.T.R. 340)*. Again, no penalty can be imposed unless a notice of demand has been served on the assessee, since the assessee who is not served with a notice of demand cannot be said to be in default if he does not pay the tax *(Cherian* v. *I.T.O. [1959] 36 I.T.R. 210)*. In the case of *C.I.T. Madras* v. *H.T. BIT (Pvt.) Ltd.* the Madras High Court held that where the assessee could not deposit tax on self assessment for paucity of funds no penalty can be imposed–*(reported in 1997 BTD XXV 23-26)*.

It would be improper to impose a penalty on the assessee pending his application for stay of recovery *(Maratti Kutti Naik* v. *Ag. I.T.O. [1963] 47 I.T.R. 751)*. If an assessee has preferred an appeal against the assessment order and applied for stay of recovery of tax, the Deputy Commissioner of Taxes must first decide under sub-sec. (3) whether the assessee should be treated as not being in default pending the appeal: imposition of a penalty without first coming to a decision under this sub-section would be invalid *(Esthuri Aswathaiah* v. *I.T.O. [1959] 37 I.T.R. 518)*. The discretion as was given to the Deputy Commissioner of Taxes to treat the assessee as being not in default was withdrawn with the amendment in 1995 by which the word "may" has been substituted by the word "shall" and the Deputy Commissioner of Taxes shall be bound to treat the assessee as being not in default where an appeal against the assessment order has been presented by him. An order of penalty passed after an injunction has been issued by a Court restraining the Deputy Commissioner of Taxes from taking any recovery proceedings would be void, even if the Deputy Commissioner of Taxes was not aware of the injunction *(Sarupchand & Hukumchand* v. *Union of India [1953] 23 I.T.R. 382, 411)*.

Appeal.–An appeal lies under s. 153 against an order imposing a penalty under this section. This right of appeal is conditional upon the assessee's first paying certain amount of tax. under sec. 154(3).

Sec. 138: Certificate for recovery of tax.–(1) When an assessee is in default or is deemed to be in default in making payment of tax, the Deputy Commissioner of Taxes may, forward to the Tax Recovery Officer a certificate for recovery of the tax, under his signature specifying the amount of arrears due from the assessee: and such certificate may be issued notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

(2) A certificate under sub-section(1) may be forwarded to–

a) the Tax Recovery Officer within whose jurisdiction the assessee carried on his business or profession or the principal place of business or profession of the assessee is situate; or

(b) the Tax Recovery Officer within whose jurisdiction the assessee resides or any movable or immovable property of the assessee is situate; or

(c) the Tax Recovery Officer who has jurisdiction in relation to the assessee whose income is assessable by the Deputy Commissioner of Taxes forwarding the certificate.

Sec. 139: Method of recovery by Tax Recovery Officer.–(1) Upon receipt of a certificate forwarded to him under section 138, the Tax Recovery Officer shall, notwithstanding anything contained in any other law for the time being in force, proceed, in accordance with the rules made in this behalf by the Board, to recover from the assessee the amount specified in the certificate by one or more of the following modes, namely:-

(a) attachment and sale, or sale without attachment, of any movable or immovable property of the assessee;

(b) arrest of the assessee and his detention in prison;

(c) appointment of a receiver for the management of the movable and immovable properties of the assessee.

(2) While recovering under sub-section (1) the amount specified in the certificate forwarded to him, the Tax Recovery Officer may also

recover in the same manner from the assessee in default, in addition to such amount,-

(a) the interest for which the assessee is liable under section 136; and

(b) any cost and charges, including expenses of the service of any notice or warrant, incurred in the proceedings for the recovery of the tax in arrears.

(3) If the Tax Recovery Officer to whom a certificate is forwarded under section 138 is not able to recover the entire amount by the sale of movable and immovable properties of the assessee within his jurisdiction, but has information that the assessee has property within the jurisdiction of another Tax Recovery Officer, he may send the certificate to such other Tax Recovery Officer or to the Tax Recovery Officer within whose jurisdiction the assessee resides; and the Tax Recovery Officer to whom the certificate has been so sent shall proceed to recover under this Chapter the amount remaining unrecovered as if the certificate was forwarded to him by the Deputy Commissioner of Taxes.

Assessee in default.–Recovery proceedings can be taken only in cases where an assessee is in default or is deemed to be in default. Sec. 69 indicates when an assessee is deemed to be in default in respect of advance tax; and s. 135(3) indicates when an assessee is deemed to be in default in respect of any other tax, and also interest, fine, penalty or any other sum payable under this Ordinance. No person can be deemed to be in default unless a notice of demand under s. 135 has been duly served on him and is not complied with. Thus in case of non-compliance with a notice of demand issued to firm which is a separate assessable entity, a partner of the firm to whom no such notice has been issued cannot be considered an assessee in default and the Tax Recovery Officer has no jurisdiction to take proceedings against him individually for recovering the dues of the firm *(Govindaswamy* v. *I.T.O. [1960] 38 I.T.R. 197. See also Shanmugha Sundaram* v. *Tahsildar [1963] 49 I.T.R. 9)*. Likewise, an heir on whom no notice of demand has been served (although such notice might have been served on his co-heir) cannot be proceeded against as an assessee in default in respect of the tax dues of the deceased *(Shah Mahmood* v. *Asst. Comr. [1963] 47 I.T.R. 55)*.Similarly a recovery certificate cannot be issued against the karta in his individual capacity in respect of the tax payable by the Hindu undivided family–*Baladin Ram Kalwar* v. *I.T.O. 62 I.T.R. 392)*. The fact that the outstanding tax liability of an assessee has been written off by the Department in its own accounts does not preclude it from subsequently taking proceedings for recovery of the dues *(Luxman & Co.* v. *I.T.O. [1958] 34 I.T.R. 113)*.

If the entire assessment is set aside in appeal, the assessee cannot be treated as an assessee in default and any recovery proceedings started on the strength of such assessment must be completely dropped–*Ganashyamdas Jatia* v. *I.T.O. 87 I.T.R. 683*.

Certificate for recovery of tax and method of recovery by tax recovery officer.–Sec. 138 and 139: Sec. 138 provides for recovery through the Taxes Recovery Officer who is defined by s. 2(64). The Deputy Commissioner of Tax may also recover the tax (sec. 143) or he may forward to the Collector of District (s. 142) or to a Magistrate of the first class (sec. 142(A) for the purpose of recovery of taxes.

When an assessee is in default, the Deputy Commissioner of Taxes may forward to the Tax Revoery Officer a certificate under his signature specifying the amount of arrears due from the assessee, and thereupon the Tax Recovery Officer should proceed to recover the specified amount including any cost and charges, expenses incurred in the proceedings for the recovery of tax in arrear in one or more of the modes laid down in s. 139. The certificate may be issued for only a part of the amount in arrear *(Mohamed Dastagir Sahib* v. *I.T.O. [1962] 44 I.T.R. 460)*. It is not essential to the validity of the certificate that the year for which the demand is due should be stated therein. Although income-tax may be popularly described as due for a certain year, it is not in law so due. The amount mentioned in a notice of demand is a debt due to the Government, but not for any particular period *(Doorga Prosad* v. *Sec. of State 1945 I.T.R. 285, 289 (P.C.))*. It was held in this case that "income-tax is calculated by reference to the income of an assessee for a given year, but it is due when demand is made under sec. 29 and 45 of I.T. Act. It then becomes a debt due to the crown but not for any particular period.

The certificate should be forwarded to the Tax Recovery Officer within whose jurisdiction the assessee resides or carries on his business or profession or any movable or immovable property of the assessee is situated *(See Bhattacharya* v. *C.I.T. [1956] 30 I.T.R. 635)*; or to the Tax Recovery Officer who has jurisdiction in relation to the assessee whose income is assessable by the Deputy Commissioner of Taxes forwarding the certificate (s. 138(2)), and that Tax Recovery Officer has the power to send the certificate to the Tax Recovery Officer of another area in the circumstances set out in s. 139(3).

Sec. 141 prohibits an assessee from disputing the correctness of the assessment, or raising any objection to the validity of the certificate, before the Tax Recovery Officer and also provides for withdrawing, or rectifying any clerical or arithmetical mistake in the certificate.

Method of recovery by Tax Recovery Officer–Sec. 139. Attachment and sale.–The Tax Recovery Officer to whom a certificate is forwarded by the Deputy Commissioner of Taxes or by another Tax Recovery Officer has the power to attach and sell the assessee's movable or immovable property, but in every case the sale should be by public auction. The concept of "sale by public auction" was explained by the Supreme Court of India in *Ramrao Jankiram Kadam* v. *State of Bombay ([1963] 48 I.T.R. (S.C. of India) 108)*. The title which passes to the purchaser at a sale of the assessee's property was considered in the case of *(Kadir Mohideen Markayar* v. *Muthukrishna Ayyar 1 I.T.C. 6* and *Chinnamal Chena Muna* v. *Saitha Kathi Rowthar and others 1935 I.T.R. 364)* where a person who is assessed to income-tax is a co-sherer, his share only can be sold for arrears of tax payable by him – where the property of an assessee is sold by the collector for arrears of income-tax the purchaser

does not get the property free from encumbrances. Income-tax cannot be converted into land revenue but the Revenue Recovery Act extends the procedure prescribed by the Act to the recovery of the arrears of income-tax.

On receipt of a certificate from the Deputy Commissioner of Taxes, the Tax Recovery Officer has to serve a notice on the defaulter requiring payment, and thereupon, without any attachment, the defaulter is debarred from dealing with any of his properties in any manner, and the Civil Court is debarred from issuing any process against any property of the defaulter in execution of a money decree—*N.B. Films* v. *Daya Sanker 98 I.T.R. 676.*

If a party other than the assessee contends that the property alleged by the Department to belong to the assessee and sought to be sold by the Tax Recovery Officer really belongs to such other party, a claim should be made by him before the Tax Recovery Officer; and if his claim is rejected by the Tax Recovery Officer, he may file a suit to vindicate his rights *(Dhanalakshmi Ammal* v. *I.T.O. [1957] 31 I.T.R. 460).* In this case it was held that even in the absence of any provision for recovery of land revenue in the Revenue Recovery Act by the Collector but in exercise of the additional powers conferred on the Collector under sec. 46(1) (corresponding to sec. 142), i.e. the powers of a Civil Court for the powers of the recovery of an amount due under a decree, the Collector may attach property ostensibly standing in the name of a person other than the defaulter on the assertion by the Income-tax Department that the property really belongs to the defaulting assessee. Even without following the procedure of filing a claim before the Tax Recovery Officer, the third party who contends that his properties are wrongly attached and sought to be sold for recovery of arrears of tax due from an assessee, may file a suit to vindicate his proprietary rights *(Union of India* v. *Ralla Ram Raj Kumar [1954] 26 I.T.R. 602)* or a petition for a writ under the Constitution *(New India Tannery* v. *Nigam [1956] 29 I.T.R. 54).*

The Tax Recovery Officer has the right to arrest and detain the defaulting assessee (cl. (b) of sec. 139(1)). The validity of arrest and detention was considered in the under-mentioned cases which arose under the 1922 Act *(Coll. of Malabar* v. *Erimmal Ebrahim Hajee [1957] 32 I.T.R. 124 (S.C. of India) and Shaikh Ali Ahmad* v. *Coll. of Bombay 1943 I.T.R. 371).* Upon payment of the amount due, the assessee would be entitled to be released from custody *(Coll. of Malabar* v. *Erimmal Ebrahim Hajee [1957] 32 I.T.R. 124, 132 (S.C. of India)).*

The tax assessed on a Hindu undivided family cannot be recovered by the arrest and detention of any of the members of the family *(Prahlad Rai Bairoliya* v. *Union of India [1956] 30 I.T.R. 678).* Conversely, the tax due from a coparcener in respect of his personal income cannot be recovered out of property belonging to the joint family *(Kakkirala Rama Rao* v. *I.T.O. [1958] 33 I.T.R. 457)* except to the extent of his undivided share in that property *(Ulchala Illuru Hanumanthaiah* v. *I.T.O. [1961] 43 I.T.R. 174).* But in the case of a total or partial partition, the tax payable by the Hindu family for the pre-partition period can be recovered from every one of the members to the extent of the family properties in their hands *(Esthuri Aswathaiah* v. *I.T.O. [1963] 49 I.T.R. 977).*

If the tax recovery certificate names only the firm as the defaulter an individual partner cannot be arrested nor can any other recovery proceedings be taken against him on the strength of such certificate–*Kethmal Parekh* v. *TRO 87 I.T.R. 174)*.

The tax payable by an association or firm can, even after its dissolution, be recovered from the members or partners (ss. 98 and 99).

When an assessee has made a gift of all his properties, his tax dues may be realised by attachment of the gifted properties in the hands of the universal donee *(Jabarani Gunin* v. *Union of India [1961] 42 I.T.R. 104)*.

Intra vires–The Supreme Court (of India) held in *Purshottam Govindji Halai* v. *Collector of Bombay ([[1955] 28 I.T.R. 891)* and in *Collector of Malabar* v. *Erimmal Ebrahim Hajee ([1957] 32 I.T.R. 124)* that the provisions which authorise the arrest and detention of assessees, are *intra vires* the Constitution and do not violate any of the fundamental rights and that the arrest and detention is not by way of punishment but is merely a mode of recovering the amount due.

Recovery under "protective" assessment.–The Calcutta High Court held in *Jagannath Hanumanbux* v. *I.T.O. ([1957] 31 I.T.R. 603. (See also Lali Haridas* v. *I.T.R. [1961] 43 I.T.R. 387 (S.C. of India))* that though there is no provision in the Income-tax Act but it is open to the Department to make assessments on two persons in respect of the same income where it is doubtful which assessee is really liable to charge, because unless such "protective" or "alternate" assessment is made assessment proceedings against the party ultimately found to be liable may become time-barred; but the Department cannot recover the tax from both the assessees in respect of the same income. In this case the Income-tax authorities held in 1945-46 that firm A which was being assessed as such until then, was only a *benamidar* of firm B. While an appeal to the Supreme Court was pending from this order, firm A submitted a return for the next year. The authorities made a "protective assessment" on firm A which was being assessed as such until then, and issued notices under section 46 (5A) of I.T. Act. (corresponding to sec. 143(2)) to various persons who owed money to firm A not to pay the moneys to firm A or its partners. Firm A applied for a writ of *mandamus* directing the Income-tax authorities to withdraw or cancel the notices. Held, that the order of protective assessment was not illegal, but the Income-tax authorities could not recover the tax from firm A.

Recovery from legal representative.–The Supreme Court of India held in *I.T.O.* v. *Abdul Kassim ([1962] 46 I.T.R. 149)* that a legal representative assessed under s. 159 (corresponding to sec. 92) becomes an "assessee" as that word is defined in s. 2(7) and must be regarded as an assessee for the purpose of recovery proceedings *(See also Sheik Abdul Sattar* v. *Dist. Collector [1960] 40 I.T.R. 27)*. But recovery proceedings cannot be started against him unless he has been served with a notice of demand under s. 135 *(Shah Mahmood* v. *Asst. Comr. [1963] 47 I.T.R. 55)*. Further, he is not personally liable for the tax payable by the deceased unless he is in the position of a person administering the estate of the deceased (s. 92(4)).

Assessment cannot be re-opened in insolvency or liquidation.–The Ordinance exhaustively defines the obligations and remedies of the tax-payer. Once

an assessment is made it is final as against the assessee and it cannot be set aside or modified, re-opened, revised or reviewed, except in one of the ways specified in the Ordinance. This principle applies even where the assessee is adjudicated an insolvent or the assessee company goes into liquidation. An Insolvency Court or a Court winding up a company is not entitled to go behind an assessment or penalty order, and the Income-tax authorities cannot be called upon to prove their claim in the Court otherwise than by the production of the order *(I.T.O.* v. *Lucknow Sugar Works 1935 I.T.R. 322)*. It has been so held by a Full Bench of the Lahore High Court in *Ravi Paint Colour & Varnish Works Ltd.* v. *Federation of Pakistan ([1955] 27 I.T.R. 475)* overruling an earlier decision to the contrary in *Gov.-Gen.-in-C.* v. *Sargodha Trading Co. ltd. ([1943] I.T.R. 368)*.

Where a company is under liquidation the Income-tax authorities can prove their claim against the company, by the production of the assessment order made by them. A company under liquidation is still an assessee and subject to the income-tax law and if the liquidator feels aggrieved by the assessment he must pursue the same remedies as are open to other assessee.

Priority for tax dues.–Liquidation of company and insolvency.–The Government has priority over unsecured creditors in the payment of debts, and therefore in the administration of assets arrears of tax, penalty or interest must be paid before unsecured creditors are satisfied *(Builders Supply Corpn.* v. *Union of India [1955] 28 I.T.R. 797; Associated Pictures Ltd.* v. *Union of India [1959] 37 I.T.R. 487)*, subject to the provisions noted below pertaining to companies. The fact that a creditor has attached the assessee's property or sold it in execution of a money decree, does not give him any preferential right over the Government' nor does the appointment of a receiver of a mortgaged property give the mortgagee any preferential right over the Government in respect of the rents and profits of the property collected by the receiver, though the mortgagee is entitled to priority in respect of the property itself *(I.T.O.* v. *Indian Ins. & Banking Corpn. Ltd. [1953] 24 I.T.R. 334)*. Sec. 73(3) of the Code of Civil Procedure preserves the priority to which debts due to the Government are entitled.

Where in pursuance of a final decree in a suit for dissolution of a partnership in the firm's assets are collected and placed in the Court, the Department is not entitled to claim priority for the tax due from a partner personally in respect of his individual income–*Union of India* v. *Salankayala 85 I.T.R. 109*.

Similarly, under s. 325(1) of the Companies Act, 1994, the Government is entitled to priority in respect of arrears of tax owing by a company in liquidation, but the priority is confined to tax which had become due and payable within the twelve months next before the date of winding up and is shared with some other creditors. For the purposes of that section, a tax is due and payable only when it has been ascertained, quantified and notified to the assessee with a demand for payment *(Joint Official Liquidators of Peerdan Juharmal Bank Ltd.* v. *C.I.T. [1954] 25 I.T.R. 140, 149)*. The Federal Court held in *Gov.-Gen.-in-C.* v. *Shiromani Sugar Mills Ltd. [1946] I.T.R. 248, 253* that the Government is not entitled to any prerogative, priority or preferential rights or treatment, in the administration of assets in the liquidation of

a company, save those which are expressly conferred and limited by the company law itself. In the case before the Federal Court a company had been ordered to be wound up before the assessment was made (though the assessment related to a year prior to the winding up), and consequently the Government was not entitled to any priority under s. 230 of the Companies Act, 1913, in respect of the tax but ranked as an unsecured creditor. It was held that a proceeding by the Income-tax authorities to recover the tax payable by the company was a "legal proceeding" within the meaning of s. 171 of the Companies Act, 1913, and accordingly before forwarding the requisite certificate to the Tax Recovery Officer which would put the machinery for recovery of the tax in motion, the Deputy Commissioner of Taxes should first apply for leave of the winding-up Court, as required by s. 171 of the Indian Companies Act, 1913 *(See also Janda Rubber Works v. I.T.O. 1950 I.T.R. 951. Sec. 171 of the Indian Companies Act, 1913, corresponded to s. 318 of the Companies Act, 1994).* The position is the same under the Companies Act, 1994. The Deputy Commissioner of Taxes would be committing contempt of Court if he takes recovery proceedings against the Official Liquidator without prior leave of the winding-up Court *(State v. Topno [1959] 36 I.T.R. 135).* It was held that the issue of a notice under sec. 46(5A) of I.T. Act (corresponding to sec. 143(2)(a)) amounts starting a legal proceeding. The official liquidator of a company which has been ordered by the court to be wound up is an officer of the court and any initiation of a legal proceeding against him without the leave of the court amounts to contempt of Court. The action of the Income-tax officer in issuing a notice under sec. 46(5A) of the I.T. Act to the official liquidator of a company, without the leave of the court amounts to contempt of court. *Governor General in Council v. Shiromani Sugar Mills Ltd. (1946) 14 I.T.R. 248 applied.* Likewise, leave of the winding-up Court is necessary before the Deputy Commissioner of Taxes can commence or continue assessment or penalty proceedings against the company in liquidation *(Union of India v. Seth Spg. Mills Ltd. (In Liq.) [1962] 46 I.T.R. 193).* The Income-tax authorities may prove their claim in liquidation like any other creditor *(Gov.-Gen.-in-C.v. Shiromani Sugar Mills Ltd. 1946 I.T.R. 248, 255; Ravi Paint Colour & Varnish Works Ltd. v. Federation of Pakistan [1955] 27 I.T.R. 475, 491-2).* The income-tax payable by the company in respect of profits earned by it from business carried on through its liquidator after the commencement of the winding-up would be entitled to priority under s. 325(1) of the Companies Act, 1994, as part of the "costs and expenses of the winding up" *(See In re Beni-Felkai Mining Co. Ltd. 18 T.C. 632, 1934 I.T.R. 309).*

If the liquidators of a company give away all the assets of the company to the contributories and others without making provision for income-tax dues, they would be liable for misapplying the assets of the company and bound to pay personally the amount of the tax *(In re Watchmakers' Alliance & Ernest Goode's Stores Ltd. 5 T.C. 117)* (s. 101(3)). Sec. 101 specifically deals with the duties and liabilities of liquidators and with the personal liability of directors of a private company in liquidation – See notes to that section.

The provisions of s. 101 do not have any bearing on the question of priority for the company's tax dues. They do not confer on the Government any higher rights or wider priorities than those enjoyed by the Government under the Company Law.

Sec. 101 is enacted for the very limited purpose of ensuring that the Government's existing rights and priorities under the law are not defeated by sale of the company's assets or distribution among the shareholders or creditors who under the Companies Act are not entitled to be paid before the Government. If the assets of the company in liquidation are insufficient to pay the unsecured creditors in full, the administration must be in accordance with the aforesaid provisions of s. 325 of the Companies Act, 1994, under which the Government's right to priority (a) is no higher than that of other specified preferential creditors and (b) is limited to tax which had become due and payable within the twelve months next before the date of winding up. Sub-sec. (6) of s. 101, which provides that the provisions of that section "shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force", does not militate against the view stated above. Since the provisions of that section do not affect or alter the existing law of priorities, it is obvious that there is nothing in s. 101 to override the provisions for preferential payments contained in s. 325 of the Companies Act.

Sec. 140: Power of withdrawal of certificate and stay of proceeding.–(1) Notwithstanding the issue of a certificate for recovery under section 138, the Deputy Commissioner of Taxes shall have power to withdraw, or correct any clerical or arithmetical error in the certificate by sending an intimation to that effect to the Tax Recovery Officer.

(2) Where the order giving rise to a demand of tax for which a certificate for recovery has been issued has been modified in appeal or other proceedings under this Ordinance and, as a consequence thereof, the demand is reduced but the order is the subject matter of further proceedings under this Ordinance, the Deputy Commissioner of Taxes shall stay the recovery of such part of the amount of the certificate as pertains to the said reduction for the period for which the appeal or other proceedings remain pending.

(3) Where a certificate for recovery has been issued and subsequently the amount of outstanding demand is reduced as a result of appeal or other proceedings under this Ordinance, the Deputy Commissioner of Taxes shall, when the order, which was the subject-matter of such appeal or other proceeding, has become final and conclusive, amend the certificate or withdraw it, as the case may be.

(4) The Deputy Commissioner of Taxes shall communicate to the Tax Recovery Officer any orders of cancellation, correction, stay of proceeding, withdrawal or amendment, as the case may be, of a certificate for recovery.

Power to correct or withdraw the certificate or stay of proceedings under certificate.–Sec. 140: After the issue of a certificate for recovery the Deputy

Commissioner of Taxes may withdraw or correct any clerical or arithmetical mistake in the certificate (sub-sec. 1).

Stay of recovery and amendment of certificate.– If the tax payable is reduced in further proceedings but the Department does not accept the reduction and takes the matter to a higher Tribunal or Court, recovery of the amount in dispute should be stayed while the further proceedings taken by the Department are still pending (sub-sec. (2)). But when the tax is reduced as a result of an order in appeal or other proceeding, and the order has become final and conclusive, the Deputy Commissioner of Taxes should amend or withdraw the certificate (sub-sec. (3)) and should give intimation thereof to the tax Recovery Officer (s. (4)). Thus upon reduction of the tax in appeal, it would not be necessary for the Deputy Commissioner of Taxes to issue a fresh certificate to the Tax Recovery Officer; it would be enough if he intimates to the Tax Recovery Officer the fact of reduction and amends the certificate and that the recovery proceedings cannot be attacked as invalid in a case where a fresh notices of demand was not issued consequent to the reduction of demand in appeal and thereupon the Tax Recovery Officer would have jurisdiction to recover only the reduced amount *(Santosha Nadar* v. *I.T.O. [1961] 42 I.T.R. 715)*. It was held in that case that where a certificate of recovery was issued to the Collector for the realisation of a certain amount of arrears of tax and subsequently, the amount due is reduced the certificate does not become invalid. But the Collector will be entitled to raise only the reduced amount of tax and where he proceeds to make an attachment of the defaulter's property on the basis of the original unreduced demand the attachment or sale is bad in law.

Sec. 141: Validity of certificate for recovery not open to dispute.–When the Deputy Commissioner of Taxes forwards a certificate for recovery under section 138 to a Tax Recovery Officer, it shall not be open to the assessee to dispute before the Tax Recovery Officer the correctness of the assessment; and the Tax Recovery Officer shall not entertain any objection to the certificate on any ground whatsoever.

Validity of certificate.–Sec. 141: There was no provision in the 1922 Act corresponding to this section which provides that the assessee cannot dispute before the Tax Recovery Officer the correctness of the assessment or raise any objection to the certificate on the ground of invalidity or any other ground. If the certificate is invalid, the assessee may move the High Court Division for an appropriate writ, direction or order under the Constitution.

Sec. 142: Recovery of tax through Collector of District.–(1) The Deputy Commissioner of Taxes may forward to the Collector of District in which the office of the Deputy Commissioner of Taxes is situate or the district in which the assessee resides or owns property or carries on business or profession, a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipts of

such certificate, shall proceed to recover, from such assessee the amount specified therein as if it were an arrear of land revenue.

(2) Without prejudice to any other powers which the Collector of District may have in this behalf, he shall, for the purposes of recovery of the amount specified in the certificate for recovery forwarded to him under sub-section (1), have the powers which a Civil Court has under the Code of Civil Procedure, 1908 (Act V of 1908), for the purposes of recovery of an amount due under a decree.

(3) The Deputy Commissioner of Taxes may, at any time, recall from the Collector of District a certificate forwarded to him under sub-section (1) and upon such recall, all proceeding commenced in pursuance of the certificate shall abate:

Provided that the recall of a certificate shall not affect any recoveries made by the Collector before the recall as if the certificate had not, to the extent of such recovery, been recalled; nor shall the recall of a certificate issued at any time prevent the recovery, by issue of a fresh certificate, of any amount which was recoverable at the time the certificate so recalled was issued.

Sec. 142A.: Recovery of tax through Special Magistrates.–(1) Without prejudice to the provisions of section 142, the Deputy Commissioner of Taxes may forward to a Magistrate of the First Class, specially empowered in this behalf by the Government, hereinafter referred to as *"the Special Magistrate"*, a certificate under his signature specifying the amount of arrears due from the assessee, and the Special Magistrate shall, on receipt of such certificate, proceed to recover from the assessee the amount specified therein as if it were an arrear of land revenue and the Special Magistrate were a Collector of District.

(2) Without prejudice to any other powers of a Collector of District which the Special Magistrate may have in this behalf, he shall, for the purposes of recovery of the amount specified in the certificate for recovery forwarded to him under sub-section (1), have the powers which a Civil Court has under the Code of Civil Procedure, 1908 (Act V of 1908), for the purposes of recovery of an amount due under a decree.

(3) The Deputy Commissioner of Taxes may, at any time, recall from the Special Magistrate a certificate forwarded to him under sub-section (1) and upon such recall, all proceedings commenced in pursuance of the certificate shall abate:

Provided that the recall of a certificate shall not affect any recoveries made by the Special magistrate before the recall as if the certificate had not, to the extent of such recovery, been recalled; nor shall the recall of a certificate issued at any time prevent the recovery, by issue of a fresh certificate of any amount which was recoverable at the time the certificate so recalled was issued.

Recovery of arrears of tax through collector of District and special Magistrates.–Sec. 142 and 142A: When an assessee is in default the Deputy Commissioner of Taxes may forward to the collector of District (sec. 142) in which the office of the Deputy Commissioner is situate or the Special Magistrates (sec. 142A) especially empowered by the Government in this behalf, a certificate under his signature specifying the amount of arrears due from the assessee. The validity of a certificate forwarded to the Collector within the meaning of the Bengal public Demand Recovery Act, 1913 has been discussed in the case of *Doorga Prosad* v. *Secy. of state 1945 I.T.R. 285*. Income-tax is calculated and assessed by reference to the income of an assessee for a given year becomes a debt due to the crown. The collector or the Special Magistrate, as the case may be, on receipt of such certificate, has to proceed to recover from the assessee the arrears of tax, interest, penalty, as if they are arrears of land revenue and the Collector of the District has the further power under sec. 5 of the Revenue Recovery Act, 1890 to send a certificate of the amount to be recovered to the Collector of another district–*Venkata Ramayya* v. *Collector of Madras (1952) 21 I.T.R. 582*. It is not essential to the validity of the certificate that the year for which the demand is due should be stated therein since when income-tax is calculated and assessed by reference to the income of the assessee for a given year it is due when demand is made and then it becomes a debt due to the Government but not for any particular period–*Doorga Prosad* v. *Secy of state (1945) I.T.R. 285, 289 (P.C.)*.

Sub-section (2) of sec. 142 or 142A enacts that without prejudice to any other powers of the Collector or to any other powers of the Collector which the special Magistrate may have in this behalf he shall, for the purpose of recovering arrears have the powers which a Civil Court has under the Code of Civil procedure for recovering a decretal amount. Sec. 46(2) of I.T. Act entitled the Collector to exercise all the powers of a Civil Court only for the recovery of arrears of income tax but it does not confer upon him the powers of Civil Court as a whole. The provision of this chapter for recovery of tax constitute a self-contained code for recovery of tax and other sums payable under this Act (Ordinance). The provisions of Civil procedure code cannot be invoked for recovering the tax assessed under the income-tax law–*Lakshmi Commercial Bank Ltd.* v. *Dharam Singh 94 I.T.R. 416*. The Deputy Commissioner of Taxes may, at any time, recall from the Collector or the Special Magistrate a certificate forwarded to him and upon such recall all proceedings commenced in pursuance of the certificate shall subside. But the recall of the certificate shall not affect any recoveries made by the Collector or the Special Magistrate before the call. Because of such recall of the certificate issued at any time the Deputy Commissioner of Taxes shall not be prevented from issuing a fre

certificate for recovery of any amount which was recoverable at the time the certificate was recalled sub-sec. (3).

–(1) Notwithstanding the issue of a certificate for recovery of tax under section 138 or section 142, the Deputy Commissioner of Taxes may also recover the tax in the manner provided [in sub-section (1A) or (2)].

(1A) For the purpose of recovery of tax payable by an assessee which is not disputed in appeal to any appellate forum, the Deputy Commissioner of Taxes may, with the previous approval of the Commissioner, after giving the assessee an opportunity of being heard, stop movement of any goods and services from the business premises of such assessee and also shutdown such business premises till the recovery of the tax referred to above or any satisfactory arrangement has been made for the recovery of such tax.

(2) For the purposes of recovery of any tax payable by an assessee, the Deputy Commissioner of Taxes may, by notice in writing, require any person–

(a) from whom [any money or goods] is due or may become due to the assessee, or who holds, or controls the receipt or disposal of, or may subsequently hold, or control the receipt or disposal of, [any money or goods] belonging to, or on account of, the assessee, to pay to the Deputy Commissioner of Taxes the sum specified in the notice on or before the date specified therein for such payment; or

(b) who is responsible for payment of any sum to the assessee classifiable as income of the assessee under the head "Salaries", to deduct from any payment subsequent to the date of the notice, any arrear of tax due from the assessee, and to pay the sum so deducted to the credit of the Government.

(3) A person who has paid any sum as required by sub-section (2)(a) shall be deemed to have paid such sum under the authority of the assessee and the receipt by the Deputy Commissioner of Taxes shall constitute a good and sufficient discharge of the liability of such person to the assessee to the extent of the sum specified in the receipt.

(4) A person who has deducted any sum as required by sub-section (2)(b) shall be deemed to have deducted the tax under section 50 and the relevant provisions of Chapter VII shall apply accordingly.

(5) If the person to whom a notice under sub-section (2) is sent fails to make payment or to make deductions in pursuance of the notice, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and proceedings may be taken against him for realisation of the amount as if it were an arrear of tax due from him; and the provisions of this Chapter shall apply accordingly.

(6) The Deputy Commissioner of Taxes may at any time amend or revoke any notice issued under sub-section (2) or extend the time for making any payment in pursuance of such notice.

(7) In any area with respect to which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of Bangladesh, the Deputy Commissioner of Taxes may proceed to recover the amount due by such process.

(8) The Commissioner may direct by what authority any powers or duties incident under any such enactment as aforesaid to the enforcement of any process for the recovery of a municipal tax or local rate shall be exercised or performed when that process is employed under sub-section (7).

Explanation.–For the removal of doubts it is hereby clarified that the several modes of recovery specified in this Chapter are neither mutually exclusive nor affect in any way any other law for the time being in force relating to the recovery of debts due to Government, and it shall be lawful for the Deputy Commissioner of Taxes, if for any special reasons to be recorded by him, to have recourse to any such mode of recovery notwithstanding that the tax due is being recovered from an assessee by any other mode.

Other modes of recovery.–Sec. 143: Sec. 138 provides for recovery through the Tax Recovery Officer and secs. 142 and 142A provide for recovery of arrears of tax as a land revenue through the Collector of district and Special Magistrate especially empowered by the Government in this behalf. This section provides other modes of recovery which may be adopted concurrently with proceedings under sections 138, 142 and 142A. Sub-section 1A of this section gives an additional power to the Deputy Commissioner of Taxes for recovery of an

undisputed amount of tax subject to the previous approval of the Commissioner and after giving the assessee an opportunity of being heard. He can stop movement of goods and services from the business premises and also shut down such business premises of the defaulter assessee till the arrear amount of tax is recovered or the assessee has made satisfactory arrangement for the recovery of such tax.

Collection from persons who owe money or goods to the assessee. Cl. (a) of sub-sec. (1): Cl (a) of this sub-section provides that the Deputy Commissioner of Taxes may, at any time, by a written notice require any person from whom money or goods is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the Deputy Commissioner of Taxes an amount out of the money due to the assessee sufficient to satisfy the claim of the revenue. The receipt of the Deputy Commissioner of Taxes constitutes a good and sufficient discharge of the liability of such person to the assessee (sub-sec. 4). If a person to whom a notice under this sub-section is sent and who does not deny his liability to the assessee, fails to make payment to the Deputy Commissioner of Taxes, he would be deemed to be an assessee in default and recovery proceedings may be taken against him for realisation of the amount as if it were an arrear of tax due from him–*Lakshmi Commercial Bank Ltd.* v. *Dharam Singh 94 I.T.R. 416, 423*–sub-sec. 5. If the person in disregard of the notice makes a payment to the assessee he would be personally liable to the extent of the payment made to the assessee or to the extent of the amount of tax or other sum due from the assessee, whichever is less.

The essential criterion for a notice under this sub-section is that on the date of service of the notice the person served should be under an *existing liability* to pay an amount *to the assessee –P.K. Trading Co.* v. *I.T.O 28 I.T.R. 427* (the notice cannot be served on a debtor of a suspected benamidar of the assessee), though the liability may be required to be discharged, (i.e. the amount may become payable to the assessee at a later date; but the notice cannot operate in respect of a liability which is not in existence at all at the date the notice is served–*Buddha Pictures* v. *I.T.O. 52 I.T.R. 321 affirmed I.T.O.* v. *Buddha Pictures 65 I.T.R. 620 (S.C. of India)*. Notice under this sub-section should not be issued to the Official Liquidator appointed by the Court for winding up a company, without prior leave of the Court *(State* v. *Topno [1959] 36 I.T.R. 135)*. This sub-section cannot be resorted to as a credit-freeze in the case of an unutilised overdraft account in a bank *(Adam* v. *I.T.O. [1958] 33 I.T.R. 26)* or for appropriating a grant due from a statutory authority to the assessee which the authority can legally give, and the assessee is bound to use, only for certain specific purposes. It does not violate the fundamental rights *(Murlidhar Jalan* v. *I.T.O. [1961] 41 I.T.R. 80)*.

The issue of a notice under this sub-section is not a quasi-judicial act but an administrative act; and it corresponds to garnishee proceedings under the Code of Civil Procedure *(Union of India* v. *Elbridge Watson [1951] 20 I.T.R. 400 407)*.

Deduction from salary–Cl. (b) of sub-sec. (1): Where the assessee is in receipt of any income chargeable under the head "Salaries" *(See All India Reporter Ltd.* v. *Ramchandra Datar [1961] 41 I.T.R. 446 (S.C.))*, the Deputy Commissioner of

Taxes may require the person paying the same to deduct from such payments any arrears due from the assessee, whether the arrears are in respect of income chargeable under the head "Salaries" or under any other head. "A person who has deducted any sum as required by sub-section (2)(b) shall be deemed to have deducted the tax under section 50 and the relevant provisions of Chapter VII shall apply accordingly" (sub-sec. 4).

Process enforceable for the recovery of arrears of municipal tax or local rate–Sub-secs. (7) and (8): The Deputy Commissioner of Taxes may recover the arrears by any process enforceable for the recovery of an arrear of municipal tax or local rate, provided the commissioner has directed that any arrears may be recovered by such process in the area.

The Deputy Commissioner of Taxes has been given the power to amend or revoke any notice issued under sub-section (2) at any time or extend the time for making any payment in pursuance of the notice so issued–sub-sec. (6).

Modes of recovery

The Explanation to sub-sec. (8) makes it clear that the modes of recovery specified in this section are neither exhaustive nor mutually exclusive: the section does not take away from the Government the right of enforcing payment by any other method open to it–*Manickam Chettiar* v. *I.T.O. 1938 I.T.R. 180; Builders Supply Corpn.* v. *Union of India [1955] 28 I.T.R. 797, 807 18.* The Government may, instead of pursuing any mode of recovery under this section, file a suit against the assessee for a decree for the amount of the arrears and the Government's right of suit may be exercised even when other modes of recovery are being followed. If moneys belonging to the assessee, i.e. sale proceeds of property sold in execution of a money decree, are lying with the Court, the Deputy Commissioner of Taxes may make an application to the Court for an order directing payment, out of such moneys, of the arrears payable by the assessee, and the Court has the inherent power to make such an order on the petition of the Deputy Commissioner of Taxes; it is not necessary for the Government to obtain a decree against the assessee or to effect an attachment before making such an application.

The Explanation further provides that recovery proceedings under any other law may be taken simultaneously with recovery proceedings under this section, if the Deputy Commissioner of Taxes thinks fit to do so for any special reasons to be recorded by him.

The various modes of recovery specified in this section may be pursued concurrently.

CHAPER XVII
DOUBLE TAXATION RELIEF

Sec. 144: Agreement to avoid double taxation.–(1) The Government may enter into an agreement with the Government of any other country for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income leviable under this Ordinance and under the corresponding law in force in that country, and may, by notification in the official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where any such agreement as is referred to in sub-section (1) is made with the Government of any country, the agreement and the provisions made for implementing it shall, notwithstanding anything contained in any other law for the time being in force, have effect in so far as they provide for–

(a) relief from the tax payable under this Ordinance;

(b) determining the income accruing or arising, or deemed to be accruing or arising, to non-residents from sources within Bangladesh;

(c) where all the operations of business or profession are not carried on within Bangladesh, determining the income attributable to operations carried on within or outside Bangladesh, or the income chargeable to tax in Bangladesh in the hands of non-residents, including their agencies, branches or establishments in Bangladesh;

(d) determining the income to be attributable to any person resident in Bangladesh having any special relationship with a non-resident;

(e) recovery of tax leviable under this ordinance and under the corresponding law in force in that country; or

(f) exchange of information for the prevention of fiscal evasion or avoidance of tax on income chargeable under this Ordinance and under the corresponding law in force in that country.

(3) Any agreement made in pursuance of sub-section (1) may include provisions for relief from tax for any period before the commencement of this Ordinance or before the making of the agreement and provisions as to income which are not themselves subject to double taxation.

(4) The provisions of the Seventh Schedule shall have effect where an agreement under this section provides that the tax payable under the laws of the country concerned shall be allowed as a credit against the tax payable in Bangladesh.

Sec. 145: Relief in respect of income arising outside Bangladesh.–If any person who is resident in Bangladesh in any year proves to the satisfaction of the Deputy Commissioner of Taxes that, in respect of any income which has accrued or arisen to him during that year outside Bangladesh, he has paid tax, by deduction or otherwise, in any country with which there is no reciprocal agreement for relief or avoidance of double taxation, the Deputy Commissioner of Taxes may, subject to such rules as the Board may make in this behalf, deduct from the tax payable by him under this Ordinance a sum equal to the tax calculated on such doubly taxed income at the average rate of tax of Bangladesh or the average rate of tax of the said country, whichever is the lower.

Explanation.–The Expression "average rate of tax" means the rate arrived at by dividing the amount of tax calculated on the total income by such income.

Agreement for granting relief in respect of double taxation or for avoidatee therefor.–Sec. 144: This section empowers the Government to make provision by notification in the official Gazette for granting relief in respect of double taxation or for the avoidance of double taxation. The purpose of this section is also to make provision for prevention of tax evasion in respect of taxes on income leviable under the Ordinance and under the corresponding law of the country with which such agreement shall be made.

If the agreement with the foreign country is under cl. (a) of sub-section (2) for relief against double taxation the assessee must show that the identical income has been doubly taxed and that he has paid tax both in Bangladesh and in the foreign country of the same income. The double taxation avoidance basis differs from the double taxation relief basis the assessee has not to pay tax first and then claim relief.

Agreement may be made with a foreign country and to give effect to that provisions may be made for (i) determining the income of a non-resident accruing or arising to that non-resident from any source in Bangladesh (cl. (b)); (ii) determining the income of a non-resident carrying on business from within and outside

Bangladesh (cl. (c)); (iii) determining the income of a resident person having special relation with a non-resident (cl. (d)); (iv) recovery of tax leviable under the provision of the Ordinance and the corresponding law in force in that country (cl. (e)); prevention of tax evasion or avoidance on income chargeable under the Ordinance and under the corresponding law of that country by exchange of information (cl. (f)).

Agreement may be made making provision for relief from tax for any period before the commencement of the Ordinance or before making any agreement with that country which may include specifying the income which is not subjected to double taxation–sub-sec. (2).

Agreement may be made so that credit is to be allowed against Bangladesh tax of the amount of the tax payable in the concerned country–sub-sec. (4).

Relief in respect of income arising outside Bangladesh of a resident person.–Sec. 145: This section provides for relief of a person resident in Bangladesh in respect of the tax of the income accruing outside Bangladesh. If any resident person pays tax to a country in respect of any income accruing in that country with which there is no agreement for relief or avoidance of double taxation he may be allowed to deduct the amount of tax paid in that country from the tax payable by him under the Ordinance. The tax to be deducted shall be calculated on the doubly taxed income at the average rate of tax of Bangladesh or of that country, whichever is lower. The average rate so referred to shall be arrived at by dividing the amount of tax calculated on the total income by such income–*Expln.*

CHAPER XVIII
REFUNDS

Sec. 146: Entitlement to refund.–(1) A person, who satisfies the Deputy Commissioner of Taxes or other authority appointed by the Government in this behalf that the amount of tax paid by him or on his behalf, or treated as paid by him or on his behalf, for any year exceeds the amount with which he is properly chargeable under this Ordinance for that year, shall be entitled to a refund of any such excess.

(2) Where the income of the person is included under any provision of this Ordinance in the total income of any other person, such other person alone shall be entitled to a refund under this chapter in respect of such income.

Sec. 147: Claim of refund for deceased or disabled persons.–Where through death, incapacity, insolvency, liquidation or other cause, a person, is unable to claim or receive any refund due to him, his legal representative, or the trustee, guardian or receiver, as the case may be, shall be entitled to claim or receive such refund for the benefit of such person or his estate.

Sec. 148: Correctness of assessment, etc., not to be questioned.–In any claim for refund under this chapter, it shall not be open to the claimant to question the correctness or validity of any assessment or other matter which has become final and conclusive or to ask for a review of the same, and the claimant shall not be entitled to any relief on any such issue raised except refund of the tax paid in excess.

Sec. 149: Refund on the basis of orders in appeal.–Where, as a result of any order passed in appeal or other proceeding under this Ordinance, refund of any amount becomes due to an assessee, the Deputy Commissioner of Taxes shall, [refund the amount, unless set off against tax or treated as payment of tax as per provisions of section 152,] to [the assessee, within thirty days from the date on which the refund has become due] without his having to make any claim in that behalf.

Sec. 150: Form of claim and limitation.–(1) Every claim for refund under this chapter shall be made in such form and verified in such manner as may be prescribed.

(2) No claim for refund under [sections 146 and 147] shall be allowed unless it is made within two years from the date of service of the demand notice which relates to the refund.

Sec. 151: Interest on delayed refund.–Where a refund due to an assessee is not paid within two months of the date of the claim for refund, [or refund becoming due consequent upon any order passed in appeal or other proceeding under this Ordinance] interest at the rate of [seven and a half per cent] per annum shall be payable to the assessee on the amount of refund from the month following the said two months to the date of issue of the refund.

Sec. 152: Adjustment of refund against tax.–Where, under the provisions of this Ordinance, the Income-tax Act, 1922 (XI of 1922), the Gift-tax Act, 1963 (XIV of 1963), or the Wealth-tax Act, 1963 (XV of 1963), any refund or repayment is found to be due to any person, the amount to be refunded or repaid or any part thereof may be set off against the tax, payable by that person under this Ordinance [or treated, at the option in writing of that person, as payment of tax payable under section 64 or section 74 thereof.]

Refunds.–Sec. 146 to 152: Persons entitled to claim refunds.–Sec. 146: When the tax paid exceeds the amount with which the assessee is properly chargeable under this Ordinance, he is entitled to claim under s. 146 a refund of such excess. The section comes into operation only when the tax has been actually paid in excess, and not earlier.

The pendency of an appeal does not necessarily prevent the collection of tax on the basis of the assessment appealed against (s. 135(3)). If the assessment is reduced in appeal or in any other proceeding under this Ordinance, *e.g.* reference to the Court, rectification or revision, and as a result any amount becomes refundable to the assessee, the Deputy Commissioner of Taxes is bound to refund the amount to the assessee without his having to make any claim in that behalf *(Sohan Pathak & Sons* v. *C.I.T. [1962] 46 I.T.R. 523)* (s. 149).

Where the income of one person is included in the total income of another, the latter alone is entitled to a refund in respect of such income *(Tarunendra Nath Tagore* v. *C.I.T. [1958] 33 I.T.R. 492)* (s. 146(2)). If through death, incapacity, insolvency, liquidation or other cause a person is unable to claim or receive any refund due to him, his legal representative or the trustee, guardian or receiver is entitled to claim or receive such refund for the benefit of such person or his estate (s. 147).

In a claim for refund under this Chapter the correctness of any assessment cannot be called in question (s. 148). Interest is payable by the Government in case of delay in granting the refund (s. 151).

Every claim for refund should be made in the form and manner prescribed by r. 36 of the Income-tax Rules 1984 (s. 150). The requirements of the rule are mandatory and if an application for refund is not in compliance with r. 36, it would be invalid *(Indra Singh Trust* v. *C.I.T. [1954] 26 I.T.R. 670)*.

Foreign State's claim for refund.–The opening words of s. 146 make it clear that a claim for refund under that section can be made only by a person, *i.e.* the entities enumerated in s. 2(46) which are chargeable to tax under s. 16. A foreign State *(A.H. Wadia* v. *C.I.T. 1949 I.T.R. 63 (F.C.))*, does not fall within any of the categories of assessable entities, is neither liable to tax under the charging provisions of this Ordinance nor entitled to claim a refund under s. 146.

Cases in which refund may be claimed.–The words of s. 146 are wide and a refund may be claimed in *any* case in which the amount of tax paid by the assessee or on his behalf or treated as paid by him or on his behalf for any year exceeds the amount with which he is properly chargeable under this Ordinance for that year. For instance, where the tax deducted at source, *e.g.* from various incomes as mentioned in Ch. VII, is in excess of the amount with which the recipient of the income is properly chargeable, a refund may be applied for under this section.

Firm.–Where the tax payable by a firm is recovered from its partners, the tax should be treated as paid by the firm, and consequently any application for refund should be made by the firm and not by an individual partner *(Manoharlal* v. *C.I.T. [1961] 41 I.T.R. 791)*.

Tax-free income.–When a salary or annuity is paid tax-free, the amount of the tax should be added to the net sum paid and it is the gross amount which should be included in the total income of the recipient *(See under s. 21, "Tax-free salary")*. Since the tax in such cases is deemed to be paid on behalf of the recipient of the income, he would be entitled to claim a refund if the tax so paid is in excess of the amount with which he is properly chargeable *(See I.R.* v. *Cook 26 T.C. 489 (H.L.))*.

Time limit for refund application.–Sec. 150(2): This subsection provides that the assessee should make a claim for refund within two years from the last day of the assessment year in which the income in respect of which the claim is made was assessable. The Court has no power to extend this period of limitation *(Adam Haji Dawood & Co. Ltd.* v. *C.I.T. 1936 I.T.R. 100)*.

In any case where, as a result of any order passed in appeal, reference, revision, rectification or amendment proceeding, refund of any amount becomes due to the assessee, the Deputy Commissioner of Taxes is bound to refund the amount to the assessee within sixty days from the date on which the refund has become due without his having to make any claim in that behalf (s. 149). Therefore, in such cases the period of limitation laid down in this sub-section would not apply *(Sohan Pathak & Sons* v. *C.I.T. [1962] 46 I.T.R. 523)*, i.e. the two year limitation period provided in section 150(2) for refunds does not apply at all to refunds arising as a result of the appellate order-*Sohan Pathak & Sons* v. *C.I.T. [1962] 46 I.T.R. 523)*. To hold otherwise would be to deprive the assessee of the right to refund in cases where, for

instance, the appellate order is made after the expiry of the two year period laid down in this sub-section.

Appeal and suit.–The assessee is entitled under s. 153 to appeal against refusal of an order of the Deputy Commissioner of Taxes to allow a claim for refund under s. 146 or against the amount of the refund allowed.

If the assessee mistakenly includes in his return income which is not taxable under the Ordinance, and voluntarily pays the tax on an assessment being made upon the basis of the return, a suit would not lie for refund of the tax so paid under a mistake of law *(Rajah of Ramnad* v. *Sec. of State 3 I.T.C. 263)*. In other cases where no question of setting aside or modifying any assessment or making any assessment is involved, but refund of tax is due to the assessee on the basis of a completed assessment, the assessee may file a suit for the refund due to him *(Inderchand* v. *Sec. of State 1941 I.T.R. 673)*.

Correctness of assessment cannot be questioned.–Sec. 148: The section makes it clear that under the cloak of applying for a refund the assessee cannot ask for a revision, review or modification of the assessment or otherwise attempt to go behind the finality of the assessment *(Ramkrishna Ashanna Bukekar* v. *C.I.T. [1956] 30 I.T.R. 833)*. If an assessment is unjustified in law and the tax has been paid on the basis of such assessment, the assessee's remedy is to go in appeal against the assessment and not to apply for a refund *(Cf. C.I.T.* v. *Tribune Trust 1948 I.T.R. 214, 222, 224 (P.C.))*.

Interest on delayed refund.–Sec. 151: Where a refund due to an assessee is not paid within two months of the date of the claim for refund made under sec. 150(2) or a refund becoming due to the assessee in pursuance of an order under sec. 149 within sixty days from the date on which it has become due is not paid, the Government shall pay interest at the rate of seven and half per cent per annum to the assessee of the amount of refund due but not paid from the month following the expiry of the period of which it has become due to the date on which the refund is granted.

Set-off of refunds against tax remaining payable.–Sec. 152: Where under any of the provisions of this Ordinance or of Gift-tax Act, 1963 and 1990 or Wealth-tax Act, 1963 a refund is found to be due to any person the Deputy Commissioner of Taxes may, in lieu of payment of the refund, set-off the amount to be refunded or any part of the amount against the sum, if any payable under this Ordinance by the person to whom the refund is due but such an adjustment can be made only at the option of that person in writing.

The provisions of this section are not merely for the benefit of the Department but for the convenience of both the Department and the tax-payer. It would be the duty of the Deputy Commissioner of Taxes to allow a set-off under this section if the assessee claims it and proves that he is entitled to a refund *(Dwarka Dass* v. *I.T.O. [1956] 29 I.T.R. 60)*. But such a claim can be entertained only if there has been an adjudication under which an amount is found due by way of refund to the assessee *(Hindustan Construction Co. Ltd.* v. *Gaitonde [1961] 42 I.T.R. 249)*. It was

held in that case that adjustment of refund under sec. 49E of I.T. Act, can be made against the tax due only if the claim of refund has been considered and the amount of refund ascertained. The question whether a refund is due or what amount of refund is due can neither be taken up nor decided under sec. 49E (corresponding to section 152).

The tax payable on foreign income in respect of which the assessee cannot be treated as in default (proviso to sec. 135(3)) would nevertheless be tax "remaining payable" and the amount of any refund due to the assessee may be set off under this section against such tax *(Ramanathan Chettiar* v. *I.T.O. [1956] 29 I.T.R. 683)*. But this section does not empower the Department to set off the amount of refund against the tax dues of a company in liquidation in respect of which the Department ranks merely as an unsecured creditor *(Indian Fisheries (Pr.) Ltd.* v. *Union of India [1961] 41 I.T.R. 763)*.

CHAPER XVIIIA
SETTLEMENT OF CASES

Sec. 152A: Definitions.–In this Chapter, unless there is anything repugnant in the subject or context,–

(i) "bench" means a bench of the Commission;

(ii) "case" means any proceedings under this Chapter relating to any order mentioned in clause (a) and (b) of sub-section (1) of section 152D;

(iii) "Chairman" means the Chairman of the Commission;

(iv) "Commission" means the Taxes Settlement Commission appointed under section 152B; and

(v) "member" means a full-time or a part-time member of the Commission, and includes the Chairman thereof.

Sec. 152B: Taxes Settlement Commission.–(1) The Government shall appoint a Commission to be called the Taxes Settlement Commission which shall exercise the powers conferred upon and discharge the functions assigned to it under this Chapter.

(2) The Commission shall consist of a Chairman and as many full-time and part-time members as may be determined by the Government from time to time.

(3) The Chairman and other members of the Commission shall be appointed by the government from amongst persons of integrity and outstanding ability having special knowledge of, and experience in, matters relating to income tax law, accounts, trade, commerce, industry, business and administration.

Sec. 152C: Powers and Functions of the Commission.–(1) The powers and functions of the Commission shall be exercised and discharged by benches of the Commission to be constituted by the Chairman.

(2) A bench shall ordinarily consist of two full-time members or one full-time member and one part-time member and shall be presided over by the Chairman:

Provided that where the Chairman is not a member of the bench, the Chairman shall authorise any member of the bench to preside over it.

(3) Subject to the provisions of this Ordinance, the Commission shall regulate its own procedure and the procedures of its benches in all matters arising out of the discharge of its functions including the places at which a bench shall hold its sittings.

(4) If the members of a bench differ in opinion as to the decision to be given on any point,–

(a) the point shall be decided according to the opinion of the majority, if there is a majority;

(b) if the members are equally divided and the Chairman of the Commission is not himself a member of the bench, the case shall be referred to the Chairman and the decision of the Commission shall be expressed in terms of the opinion of the Chairman; and

(c) if the members are equally divided and the Chairman of the Commission is himself a member of the bench, the opinion of the Chairman shall prevail and the decision of the Commission shall be expressed in terms of the opinion of the Chairman.

(5) The order of the Commission in any case or on any point shall be final and conclusive:

Provided that in case where the Commission is of the opinion that the case involves a substantial question of law, it may, at any time, transfer the case to [the Taxes Appellate Tribunal], and the provisions of Chapter XIX shall apply to the case so transferred.

Sec. 152D: Application for Settlement of Cases.–(1) An assessee, not being a company having a paid up capital of taka fifty lakhs or above, may make an application in the prescribed form and verified in the prescribed manner, to the Commission if he is aggrieved by an order of–

(a) an Inspecting Joint Commissioner of Taxes under section 10 or section 120; or

(b) a Deputy Commissioner of Taxes under Chapter IX of this Ordinance.

(2) No application under sub-section (1) shall lie before the Commission unless–

(a) the assessee has filed the return of income under this Ordinance and the income tax payable on the basis of such return has been paid;

(b) the assessee has waived his right of appeal or revision, as the case may be;

(c) the application has been made within sixty days of the receipt of the order referred to in sub-section (1); and

(d) the application made under sub-section (1) is accompanied by a fee of taka three hundred.

(3) An assessee having made an application under sub-section (1) shall not be allowed to withdraw it.

152E: Disposal of application by the Commission.–(1) The Commission, on having received the application, may either allow the application or may reject the same if it is satisfied that any one or more of the conditions laid down in sub-section (2) of section 152D have not been complied with:

Provided that the application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard.

(2) Where an application is allowed under sub-section (1), the Commission may call for the relevant records from the Commissioner and after examination of such records and such other evidences, as it may deem fit, pass [such order as it thinks fit] after giving to the applicant and the Commissioner an opportunity of being heard in person or through their authorised representatives.

(3) Every order passed under sub-section (2) shall provide for the terms of settlement including any demand of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters necessary to make the settlement effective.

(4) The Commission shall pass its order under this section within six months from the date of the receipt of the application, and shall communicate the order to the applicant and to the Commissioner within thirty days from the date of passing of such order.

Taxes settlement Commission.–Sec. 152A to 152E: This chapter was inserted by the Finance Acts 1994. Constitution of the Taxes Settlement Commission has been provided for in section 152B. Any application once made under section

152D for settlement of cases shall not be allowed to be withdrawn by the assessee and the order of the commission in any case or on any point shall be final and conclusive (sec. 152C(5)). But the commission may transfer any case which involves a substantial question on law to the Taxes Appellate Tribunal and such case shall be decided as per the provisions relating to Appeal and Reference laid down in Chapter XIV of the Ordinance.

Subject to the provisions of this Ordinance the Commission shall regulate its own procedures for the discharge of its functions in accordance with the regulations as made by the Commission authorised in this behalf or under section 152C (sec. regulations of Taxes Settlement Commission gazetted on 18th June, 1995 (Income tax Manual Part-II).

CHAPER XIX
APPEAL AND REFERENCE

Sec. 153: Appeal against Order of Deputy Commissioner of Taxes and Inspecting Joint Commissioner.–(1) Any [assessee, not being a company, aggrieved] by any order of a Deputy Commissioner of Taxes in respect of the following may prefer an appeal to the Appellate Joint Commissioner against such order, namely,–

(a) the amount of loss computed under section 37;

(b) assessment of income, determination of liability to pay, or computation of tax including advance tax;

(c) imposition of interest under section 73;

(d) refusal to register a firm or cancellation of registration under section 84 or 111;

(e) imposition of penalty under {section 124, 125, 126, 127, (128) or 137}; and

(f) refusal to allow a claim to a refund or the determination of the amount of refund admissible under Chapter XVIII.

(1A) Any assessee, being a company aggrieved by any order of a Deputy Commissioner of Taxes or {any assessee aggrieved by any order} of an Inspecting Joint Commissioner in respect of the following may prefer an appeal to the Commissioner (Appeals) against such order, namely:–

(a) any matter specified in clauses (a), (b), (c) and (f) of sub-section (1);

(b) imposition of penalty under Chapter XV {or section 137};

(c) assessment under section 10 or 120.

(1B) Notwithstanding anything contained in any other law for the time being in force, all such appeals pending before an Appellate Joint Commissioner at the time of the commencement of অর্থ আইন, ১৯৯০ (আইন নং-৪৫, ১৯৯০) as are appellable under this section to a Commissioner (Appeals) shall be heard and disposed of by the Appellate Joint Commissioner as if this section were not amended by অর্থ আইন, ১৯৯০।

(1C) Notwithstanding anything contained in sub-section (1) or (1A), the Board may, on an application or on its own motion, transfer an appeal from an Appellate Joint Commissioner to a Commissioner (Appeals) or from a Commissioner (Appeals) to an Appellate Joint Commissioner.

(2) Where the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may appeal to the Appellate Joint Commissioner against the order of the Deputy Commissioner of Taxes determining the amount of total income or loss of the firm or the apportionment thereof between several partners but he may not agitate in any such appeal, matters relating to assessment of his own total income.

(3) No appeal under this section against any order of assessment shall lie, unless, [five per cent.] of the tax payable on the basis of such assessment or the tax payable on the basis of return under section 74, whichever is higher, has been paid before filing the appeal:

Appeal.–There is no inherent right of appeal: if a right of appeal is not given by the statute, no appeal would lie *(Harihar Gir* v. *C.I.T. 1941 I.T.R. 246)*. An appeal lies to the Appellate Joint Commissioner against certain orders of the Deputy Commissioner of Taxes which are expressly specified in the section. This section gives the right of appeal only to the tax-payer and not to the Department. Therefore the Department cannot appeal against any order of the Deputy Commissioner of Taxes, to the Appellate Joint Commissioner or Commissioner (Appeals) *(See C.I.T.* v. *Amritlal Bhogilal & Co. [1958] 34 I.T.R. 130, 137-8 (S.C.))*. But the Joint Commissioner has the power under s. 120 to revise any order passed by the Deputy Commissioner of Taxes which is prejudicial to the interests of the revenue, and in the exercise of his revisional power under section 121 the Commissioner may revise any assessment and pass such order not being an order prejudicial to the interests of assessee.

Against an order of the Appellate Joint Commissioner or Commissioner (Appeals) passed in appeal, a further appeal lies under s. 158 to the Appellate Tribunal. Under the direction of the Commissioner, the Deputy Commissioner of Taxes may also appeal to the Tribunal against an order of the Appellate Joint Commissioner.

If an appeal does not lie against an order under a particular section, the mere fact that the order purports to have been made under that section does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that section *(C.I.T.* v. *Khemchand Ramdas 1938 I.T.R. 414, 426 (P.C.))*. In that case it was held that "if an order is really one under section 34 or 35, an appeal would lie and the Commissioner not by deciding that the order is one under section 23(4) deprive the assessee of the right of having the question whether an appeal therefrom

was competent decided by the High Court." If an order is appealable under this section, an appeal would lie to the Appellate Joint Commissioner even if in the circumstances of a case the Deputy Commissioner of Taxes had no jurisdiction to pass that order *(C.I.T.* v. *Bhikaji Dadabhai & Co [1961] 42 I.T.R. 123 (S.C. of India))*.

Appeal to the Appellate Joint Commissioner against assessment.–Sec. 153(1): An appeal lies under this section against any assessment made under s. 83(2) or s. 84, but not against an assessment under s. 82 accepting the return as correct and complete without calling for any evidence. A best judgment assessment involves the exercise of judicial discretion and an appellate authority should not interfere with it unless the discretion has been exercised *mala fide*, arbitrarily or capriciously *(Singh Engineering Works* v. *C.I.T. [1953] 24 I.T.R. 93, 107)*. The question which could arise in a best judgment "whether in the circumstances of the case the Income-tax Officer had made a fair estimate of the assessable income and whether his decision was reasonable". Interference by the appellate or other higher court with the exercise of the best judgment by an Income-tax Officer must be on the same principles on which appellate courts usually interfere with the exercise of discretion by a trial court. The exercise of the best judgment depends on an application of judicial discretion by the Income-tax Officer and there should be no interference with his order unless it is shown to the satisfaction of the appellate court that the discretion has been exercised *mala fide* or arbitrarily or capriciously. The burden of satisfying the appellate court in this respect must rest on the party challenging the exercise of the best judgment by the Income-tax officer".

But the right of appeal under this section is restricted to the amount of income or loss assessed or the amount of tax or status determined. Where a best judgment assessment has been made under s. 84 and the assessee objects to the validity of the assessment and wants to have the assessment cancelled on the ground that he was prevented by sufficient cause from complying with the notice, the non-compliance with which has resulted in the best judgment assessment, –such a contention cannot be considered by the Appellate Joint Commissioner in an appeal under this section. However, in an appeal against the best judgment assessment it would be open to the assessee to deny his liability to be assessed at all (*e.g.* on the ground that his residential status has been wrongly determined), as distinct from his liability to be assessed under s. 84–*(Muthuwappa* v. *C.I.T. [1962] 46 I.T.R. 1107)*.

An objection as to the place of assessment cannot be raised on an appeal against the assessment.

Appeal against orders of correction of errors and levy of interest for failure to pay advance tax.–This section does not grant a right of appeal against an order for correction of errors under section 173 and also for levy of interest for failure to pay advance tax.

Assessee.–Under this section the right of appeal is given to the "assessee". Where an assessment is made on the representative, *e.g.* the trustee or the Court of Wards *(Govindrao Narayanrao Ghorpade* v. *C.I.T. [1963] 48 I.T.R. 54)* or the agent

of a non-resident *(See Inder Singh Gill* v. *C.I.T. [1963] 47 I.T.R. 284, 299)* under s. 96, the person beneficially entitled to the income is nevertheless an "assessee" within the meaning of this section and has therefore a right of appeal.

A disrupted Hindu family or a dissolved assessable unit like a firm, which objects to the assessment made or penalty levied after the disruption or dissolution, is still entitled to appeal through those who were formerly the coparceners or members of the dissolved unit *(Mahindra Kumar Mohanlal* v. *C.E.P.T. [1958] 33 I.T.R. 360)*. Where persons who were assessed as a Hindu undivided family, and not as a firm as contended by them, preferred an appeal in the name of the firm, the appeal was held, on the facts of the case, to be by the "assessee" and therefore maintainable *(Gadodia & Co.* v. *C.I.T. [1958] 34 I.T.R. 416)*.

Computation of loss–cl.(a): Where in the computation of income the net result under any head is a loss that loss shall have to be set off under sec. 37 against his income under any other head in that year excepting the loss of any speculation business or of capital gain. If the assessee has any objection as to the computation or set off of loss he has a right under this clause to appeal.

Cl.(b): An assessee has the right to appeal against any assessment made under section 82A (Assessment under simplified procedure); 82C (Tax on income of certain persons); 82D (Spot assessment); 83 (Assessment after hearing) and 83A (Self assessment). But no appeal lies against an assessment under sections 81 (provisional assessment); 82 (Assessment on correct return) and 82B (Assessment on the basis of return).

This clause gives the right of appeal to the assessee who denies his liability to pay any tax under this Ordinance. An assessee who denies his liability to be assessed under this Ordinance is entitled to appeal on that ground, even if he had not denied his liability before the Deputy Commissioner of Taxes *(Rani Anand Kunwar* v. *C.I.T. 1940 I.T.R. 126; Muthuwappa* v. *C.I.T. [1962] 46 I.T.R. 1107)*, but only *after* the assessment is made *(Sarupchand & Hukumchand* v. *Union of India [1953] 23 I.T.R. 382, 409)*. A person treated as a partner in the assessment on a firm may appeal if he denies his liability to be assessed as a partner *(Gokuldas* v. *Kikabhai Abdulali [1958] 33 I.T.R. 94)*. Mere filing of a return of income is not tantamount to an admission by the person submitting the return that he is liable to assessment under this Ordinance.

If the assessee believes that computation of tax has not been property made or the computation of advance tax has not been made correctly under section 65 he can prefer an appeal against such computation of tax under this clause.

Appeal against order imposing interest on deficiency in payment of advance tax.–Cl.(c): An appeal lies under this section against an order imposing an interest under sec. 73 for deficiency in payment in advance tax. Generally, confusion arises in the computation of interest and if the assessee is aggrieved as to the amount of interest as determined he has a right to appeal under this clause.

Appeal against refusal to register a firm or cancellation of its registration.–Cl.(d): The assessee had the right to file an appeal against an order refusing to register a firm under section 111 or an order cancelling the registration of a firm for default justifying a best judgment assessment. Since section 111 has been omitted and there is now no provision for registration of a firm with the omission of Chapter XIII, the provision of filing appeal under this clause is of no effect.

Appeal against order of penalty under some sections in Chapter XV.–Cl (e): An appeal lies under this section against an order imposing penalty under section 124 (for non-submission of return in time under section 75 or for failure to file return in compliance with the notices under secs. 77, 89(2), 91(3) or 93(1) without reasonable cause or any certificate, statement, accounts or information as required under sections 58, 108, 109, 110 or 113 or for failure to display Tax Identification Number under section 184 C); section 125 (for failure to pay advance tax or an estimate of advance tax as required to be furnished); section 126 (for non-compliance with notices under sections 79, 80 or 83(1)); section 127 (for failure to pay tax on the basis of the return under section 74); section 128 (for concealment or deliberate omission of income) or section 137 (for default in payment of tax as demanded under section 135).

Appeal against refusal of a claim to a refund or to the amount of refund as determined.–Cl. (f): The right of appeal under this section is restricted to the amount of refund as determined and to the refusal to grant refund when claimed under Chapter XVIII; but no provision has been made in the Ordinance to meet the situation when the Deputy Commissioner of Taxes neither refuses the claim to a refund nor grants any refund as claimed nor make any payment of refund which becomes due in consequence of any appellate order.

Appeal by a person charged as an assessee in default under section 57: Where a person who has not deducted tax at source under Chapter VII or after deducting has not paid tax to the Government, is held as an assessee in default under sec. 57 and is liable to pay an additional amount in addition to the tax to be paid; but there is no provision for appeal in this section for such a defaulter assessee.

Appeal to the Commissioner (Appeals)–Sub-sec. 1A: This sub-section makes provision granting right of appeal to the assessee being a company aggrieved by an order of the Deputy Commissioner of Taxes or any assessee aggrieved by an order of the Inspecting Joint Commissioner of Taxes. Such appeal may be made to the Commissioner (Taxes) against orders made by the Deputy Commissioner of Taxes as specified in clauses (a), (b), (c) and (f) of sub-section (1) of this section and against order imposing penalty under Chapter XV or section 137. Appeal to the Commissioner (Taxes) also lies against any order made by the Inspecting Joint Commissioner under section 10. When the Inspecting Additional/Joint Commissioner exercises functions of assessment or under section 120 when he exercises powers of revision to revise the orders of the Deputy Commissioner of Taxes if he considers that the assessment made by the Deputy Commissioner of Taxes is erroneous and prejudicial to the interest of revenue.

the appellate assessee or the Commissioner–*See Dhanapat Mal Dewanchand* v. *C.I.T. [1954] 26 I.T.R. 363*. In computing the period of limitation, the time requisite for obtaining a copy of the order appealed against should be excluded. "Time spent for obtaining certified copy can only be excluded while counting limitation of 60 days if the appellant files appeal on the basis of the certified copy (which is charged for in the case of assessee) and not on the basis of unsolicited" certified copy issued by the Appellate Joint Commissioner's or Commissioner's (Appeals) office (which is not charged for) as a matter of course. In a case the assessee filed an appeal to the Appellate Tribunal on the basis of appellate order (certified copy without court fee) after 60 days. Meanwhile the assessee applied for certified copy of the order of the Appellate Joint Commissioner charged with court fee. He did not receive the second certified copy charged with court fee but submitted second apeal to the Tribunal beyond 60 days of the receipt of the first certified copy (without court fee). It was held by the Tribunal that the appellant could have waited for the receipt of the second certified copy and then to submit appeal within 60 days of the receipt thereof, but when he preferred appeal on the basis of the first certified copy (without court fee) it must be within 60 days of the receipt of that first certified copy–I.T.A. No. 686 of 1979–80 decided on 3.2.1982 (reported in 1984 BTD XII 72-73 Trib.) (relied on the decision of Rasipuram Union Motor Service Ltd. v. C.I.T. Madras (1956) XXX I.T.R. 687.

The Appellate Tribunal, Dhaka Bench observed in a case that the counting of the period of limitation starts from the date on which the assessee informed the Deputy Commissioner of Taxes of the order of the Appellate Additional Commissioner who took into cognizance of unofficial copy of the order as valid and thereby acted upon it although before the receipt of the order by the commissioner vide I.T.A. No 2052 and 2053 of 1997-98 decided on 9.10.99 (reported in 2000 BTD xxviii 3-5 Trib.).

The Tribunal has the discretion to admit an appeal or cross-objections after the expiry of the prescribed time limit, if it is satisfied that there was sufficient cause for the delay–Proviso to this sub-section *(For instances where the Tribunal rightly refused to admit a time barred appeal, see Sreenivasalu Maidu* v. *C.I.T. 1948 I.T.R..; For a converse case where the Tribunal did not judicially exercise its discretion to condone delay, see Renganayaki Ammal* v. *C.I.T. [1960] 38 I.T.R. 20).*

Sec. 159: Disposal of appeal by the Appellate Tribunal.–(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders on the appeal as it thinks fit.

(2) Before disposing of any appeal, the Appellate Tribunal may call for such particulars as it may require respecting the matters arising in the appeal or cause further enquiry to be made by the Deputy Commissioner of Taxes.

(3) Where, as a result of the appeal, any change is made in the assessment of a firm or association of persons, or a new assessment of a

(3) The Appellate Joint Commissioner [or the Commissioner (Appeals) as the case may be.] may admit an appeal after the expiration of the period of limitation specified in sub-section (2) if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within that period.

Prescribed form of appeal.–Sec. 154 (1): This sub-section provides that the appeal shall be in the prescribed form and shall be verified in the prescribed manner. Rules 27 and 27A have to be read with this section. Non-compliance with the requirements prescribed by the rules would render the appeal invalid and justify the Appellate Joint Commissioner's or Commissioner's (Appeals) refusal to entertain the appeal. In cases where the rules require that the appeal should be signed and verified by the appellant *himself*, the appeal would be invalid if the memorandum of appeal is unsigned or unverified *(Damodar Prasad* v. *C.I.T. 3 I.T.C. 405)*. It was held in that case that the Asstt. Commissioner of Income-tax is entitled to reject an appeal *in limine* where the memorandum of appeal does not comply with the provisions of rule 21 (corresponding to rule 27 or 27A). There is no provision of law which renders it obligatory on him to call upon the appellant to rectify his mistakes. But in some other cases it was held that the absence of or defect in the signature of the appellant in a memorandum of appeal is not a fatal defect or an illegality of so serious a nature as to render the appeal a nullity. It is only an irregularity which can be rectified by amendment and the amendment will operate retrospectively from the date when the original memorandum of appeal was filed. Such an appeal, therefore, cannot be dismissed as barred by time–*Sheonath Singh (Cal) 1958, 33 ITR 591; Gouri Kumar Devi*–(Pat) 1959, 37 ITR 220. But the appeal to the A.A.C. signed by the authorised agent of the appellant personally, was held to be invalid–*C. Agl. I.T.* v. *Sri Keshab Chandra Mondal (S.C. of India) 1950, 18 ITR 569*. In another case an appeal to the AAC filed on behalf of a H.U.F. is not signed by the Karta but by another person, the defect is only an irregularity and not an illegality and such irregularity should be allowed to be rectified –*Addl. C.I.T.* v. *K. Padmalochan Sahu (Ori) 1974, 95 I.T.R. 113*, or is signed and verified by an agent (even though duly authorised) on behalf of the appellant *(C.Ag. I.T.* v. *Keshab Chandra Mandal 1950 I.T.R. 569 (S.C. of India); Special Manager, Court of Wards, Naraindas Narsinghdas* v. *C.I.T. 1950 I.T.R. 204)*. There is no provision in the Ordinance requiring the Appellate Joint Commissioner to call upon the appellant to rectify the mistake in such cases.

But the impossible cannot be expected of the tax-payer in the way of compliance with the prescribed requirements. In the case of an appeal against an assessment order the prescribed form requires that the date of service of the notice of demand should be specified in the appeal. If the contention of the assessee is that he never received the notice of demand and therefore cannot give the date of its service, the Appellate Joint Commissioner should investigate into the truth of this contention and not refuse to entertain the appeal on the ground that it does not comply with the prescribed form *(Maharani Gyan Manjari Kuari* v. *C.I.T. 1944 I.T.R. 59)*. Even when the notice of demand has been received, failure to attach it to the memorandum of appeal is a mere irregularity which can be subsequently rectified *(Arunachalam*

Chettiar v. *C.I.T. [1962] 45 I.T.R. 407)*. It was held in that case that there is no mandatory obligation on the assessee to file the notice of demand along with the memorandum of appeal to AAC under sec. 30. The non-filing of the notice of demand is a mere irregularity which can be rectified.

Where the memorandum of appeal is filed in time but the demand notice is submitted later on, memorandum of appeal cannot be rejected.

Appeal fee–Another requirement the assessee shall have to comply with in filingthe appeal is to pay appeal fee of two hundred taka. The form of appeal to be filed shall be accompanied by such appeal fee. In a case the assessee filed an appeal in time but without a chalan of two hundred taka as appeal fee for unavoidable circumstances with a prayer for condonation of delay. It was held that the Tribunal should have condoned the delay and the Tribunal's order dismissing the appeal was invalid–*Laharia Sarai Central Co-operative Bank Ltd (Pat.) 1968, 69 I.T.R. 441.*

Period of limitation.–Sub-sec. (2): The appeal should ordinarily be presented within sixty days of service of notice of demand relating to the assessment or penalty objected to (cl. a) and in any other case intimation of the order appealed against is served. Provision of limitation is not attracted if no Assessment Order (I.T. 88). Assessment form (I.T. 30) and Demand notice are served on the assessee in which case the assessee has an unlimited time for filing appeal–I.T.A. No 1280 of 1992-93 of Taxes Appellate Tribunal, Dhaka Bench (reported in 1986 BTD XXIV page 19-20). Service of I.T. 30 is obligatory–without I.T. 30 the service of Demand notice is not complete and the service is required to be made on the assessee and not on his legal representative–I.T.A. no. 3 805 of 1993-94 of Taxes Appellate Tribunal, Dhaka Bench (reported in 1998 BTD XXVI page 11-16. In another case Bangladesh Taxes Appellate Tribunal, Dhaka in I.T.A. no. 766 of 1984-85 (reported in 1985 BTD XIII 203-210) following the principle laid down by their lordships of the Indian High Court in the case or Nandram Hunatram v. C.I.T. reported in 1960-2 TAXATION (III) 56 observed that the advocate cannot be treated as an authorised agent within the meaning of the Civil Procedure Code for the purpose of service of notice on the advocate and as such the service of notice on the advocate cannot be deemed to be sufficient compliance of mandatory requirement of law which spells up that such notice shall be served on the assessee. If any notice or order which is required to be served on the assessee as per mandatory provision of statute it has to be served accordingly. The date of receipt of the demand notice on the advocate cannot be taken to be the starting point of limitation and the appeal filed by the assessee after receipt of the certified copy of the assessment order is within time.

The Appellate Tribunal, Lahore relying on the judgment in the case of *C.I.T.* v. *Muhammad Idress Baree & Co. (S.C. of Pakistan) (1967) 15 Taxation (1963) 47 I.T.R. 825* held that the son had admittedly no authority to act on behalf of the appellant or receive notices or copies of order for him. Therefore, the period of limitation shall be computed from the date the copy of the order was actually received by the appellant–I.T.A. no. 132 of 1965-66 (reported in 1968 TAXATION xviii 83-84.

Sub-section (2) enacts that an appeal shall be presented within sixty days of the service of notice of demand and in computing the period of limitation the time requisite for obtaining a copy of such order should be excluded and there is nothing to warrant an inference that the certified copy issued by the Department has to be filed along with the memo of appeal–*I.T.A. no. 2113, 2134 and 2114 to 2116 of 1980-81 (reported in 1985 BTD xiii 12).*

An assessee has a statutory right to present an appeal within sixty days without any order being required from the Appellate Joint Commission of Taxes for admission of appeal, but after the expiry of the prescribed period, an appeal can be entertained only if it is admitted by the Appellate Joint Commissioner after condoning the delay–*C.I.T.* v. *Mysore Iron and Steel Works (1949) I.T.R. 478, 480.* The power to condone the delay as given in sub-sec. (2) is discretionary and the Appellate Joint Commissioner would be justified in refusing to admit a time-barred appeal if in his opinion there was no sufficient cause for not presenting the appeal within the limitation period–Special Manager, Court of Wards, Naraindas Narsinghdas v. C.I.T. 1950 I.T.R. 204 and allied cases.

Where the period of limitation prescribed for an appeal or application under this Ordinance expires on a day which is a closed holiday, the appeal or application may be made on the day next following such holiday–1996 BTD (Trib.) 185.

Refusal to admit appeal, and order disposing of appeal.–Time-barred appeal.–Second appeal to Tribunal.–In the appeal the Appellate Joint Commissioner or Commissioner (Appeals) passes an order under s. 155 and it is against an order under s. 155 that an appeal lies to the Appellate Tribunal under s. 158. There was a sharp conflict of judicial opinion as to whether an order of the Appellate Joint Commissioner or Commissioner (Appeals) refusing to condone delay and to admit a time-barred appeal was an order under s. 154 and consequently not appealable to the Tribunal or whether it was an order under s. 155 and consequently appealable to the Tribunal. Observations of the Supreme Court (India) by way of dictum though not by way of decision, in *C.I.T.* v. *Arunachalam Chettiar ([1953] 23 I.T.R. 180)* suggested that an order refusing to admit an appeal was one under s. 154. These observations are no longer law in view of the later pronouncement of the Supreme Court in *Mela Ram & Sons* v. *C.I.T. ([1956] 29 I.T.R. 607)* where the point directly arose for decision. The following propositions emerge from the judgment of Venkatarama Ayyar, J., in *Mela Ram's* case:

(a) An order of the Appellate Joint Commissioner refusing to condone delay (if there is any application for condonation) and refusing to admit, or rejecting after hearing, an appeal as time barred, is in all cases an order passed in the appeal and must be regarded as an order under s. 155 *(Mau Calendering Co.* v. *C.I.T. [1963] 47 I.T.R. 925).*

(b) An appeal is no less an appeal because it is irregular or incompetent, and an order of the Appellate Joint Commissioner or Commissioner (Appeals) refusing to admit or rejecting an appeal on any preliminary ground, *e.g.* irregularity or incompetence, is, likewise, in all cases an

order passed in the appeal and must be regarded as an order under s. 155 *(See Moti Lal Padampat Sugar Mills Co. Pr. Ltd.* v. *C.I.T. [1962] 46 I.T.R. 208; See also C.I.T.* v. *Bhikaji Dadabhai & Co. [1961] 42 I.T.R. 123 (S.C. of India).*

(c) In all such cases of refusal to admit an appeal or rejection of an appeal on the ground of limitation, irregularity, incompetence or any other preliminary ground, the Appellate Joint Commissioner's order or commissioner's (Appeals) would amount to a confirmation of the order of the Deputy Commissioner of Taxes appealed against, and a second appeal would lie to the Tribunal (s. 158) and thereafter a reference would lie to the High Court Division on a question of law (s. 160).

Review and rectification.–The Appellate Joint Commissioner has no power to review his own order in any case but he is empowered to rectify any mistake apparent from the record (s. 173).

Reference to Court.–The Question whether an appeal lies against a certain order is a question of law *(C.I.T.* v. *Khemchand Ramdas 1938 I.T.R. 414, 422 (P.C.)).* The Appellate Joint Commissioner's refusal, in the proper exercise of his discretion, to condone delay and admit a time-barred appeal does not involve any question of law *(Kasi Chettiar* v. *C.I.T. 2 I.T.C. 98).*

Sec. 155: Procedure in appeal before the Appellate Joint Commissioner or the Commissioner (Appeals).–The Appellate Joint Commissioner [or the Commissioner (Appeals)] shall fix a day and place for the hearing of the appeal and give notice thereof to the appellant and Deputy Commissioner of Taxes against whose order the appeal has been preferred.

(2) The appellant and the Deputy Commissioner of Taxes shall have the right to be heard at the hearing of the appeal either in person or by a representative.

(3) The Appellate Joint Commissioner [or Commissioner (Appeals)] may, if he considers it necessary to do so, adjourn the hearing of the appeal from time to time.

(4) The Appellate Joint Commissioner [or the Commissioner (Appeals)] may, before or at the hearing of an appeal, allow the appellant to go into any ground of appeal not earlier specified in the grounds of appeal already filed if he is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

(5) The Appellate Joint Commissioner [or the Commissioner (Appeals)] may, before disposing of an appeal, make such enquiry as he

thinks fit or call for such particulars as he may require respecting the matters arising in appeals or cause further enquiry to be made by the Deputy Commissioner of Taxes.

(6) While hearing an appeal the Appellate Joint Commissioner [or the Commissioner (Appeals)] shall not admit any documentary material or evidence which was not produced before the Deputy Commissioner of Taxes unless he is satisfied that the appellant was prevented by sufficient cause from producing such material or evidence before the Deputy Commissioner of Taxes.

Procedure in appeal.–Sec. 155: The hearing before the Appellate Joint Commissioner or the Commissioner (Appeals) being a quasi-judicial proceeding, must conform to the rules of natural justice, and one of the first principles of natural justice is that a party must have an opportunity of being heard in support of his case *(See Bhagwati Prasad* v. *C.I.T. 6 I.T.C. 105)*. The Appellate Joint Commissioner or the Commissioner (Appeals) before hearing an appeal against an order under s. 90, is bound to serve notice of the date of the hearing on all the members of the family *(Tuljansa Janardhansa Pawar* v. *C.I.T. 1950 I.T.R. 648)* and in the case of an order under sec. 92, on all the legal representatives of the assessee. He must also give notice of the hearing in every case to the Deputy Commissioner of Taxes; under sub-s. (2) the Deputy Commissioner of Taxes has the right to be heard either in person or by a representative at the hearing of the appeal.

Power to make further inquiry.–This section expressly authorises the Appellate Joint Commissioner or Commissioner (Appeals) to make, before disposing of any appeal, such further inquiry as he thinks fit or direct further inquiry to be made by the Deputy Commissioner of Taxes. The Appellate Joint Commissioner's or Commissioner's (Appeals) power to make inquiry would be subject to the same principles as those which govern the Deputy Commissioner of Taxes' power to make inquiry and collect materials at the time of making an assessment *(See Gopinath Naik* v. *C.I.T. 1936 I.T.R. 1)* under s. 83 or 84. Reference may be made to the notes to those sections *ante* for a discussion of the principles governing such inquiries.

Production of accounts.–The nature of the inquiry under this section is left to the discretion of the Appellate Joint Commissioner or Commissioner (Appeals). He is not bound to put the assessee upon oath *(Queen* v. *Special Comrs. (In re Fletcher) 3 T.C. 289)*. He has the power to call upon the assessee to produce accounts and documents, and if the assessee does not produce the required accounts and documents, the Appellate Joint Commissioner or Commissioner (Appeals) would be entitled to make an order in the appeal to the best of his judgment *(E.M. Chettiar Firm* v. *C.I.T. 4 I.T.C. 111)*. It has been observed in the case of *E.M. Chettiar Firm* v. *C.I.T. [1930] I.T.C. 111* that the Act does not impose a duty on the officer who hears an income-tax appeal to set-out fully the reasons for his decisions and the High Court will not therefore, interfere with his decisions merely because he has not stated any reasons.

Report from Deputy Commissioner of Taxes.–The Appellate Joint Commissioner and Commissioner (Appeals) may remand the case to the Deputy Commissioner of Taxes and call for a report on the assessment generally or on certain points *(Bipan Lal Kuthiala* v. *C.I.T., 4 I.T.C. 111)*. When the Appellate Joint Commissioner and Commissioner (Apeals) sends a case back to the Deputy Commissioner of Taxes for a report on certain facts or findings with a request that the Deputy Commissioner of taxes should hold such local inquiry as he may think fit, there is no obligation upon the Deputy Commissioner of Taxes to record or take evidence of witnesses cited by the assessee *(Abdul Razak* v. *C.I.T. 1935 I.T.R. 361)*. In this case in an income-tax appeal the Assistant Commissioner sent the case back to the Income-tax Officer for a report of the facts and figures which would justify the estimate made by the Income-tax Officer, requesting the latter to give reasons for the estimate and to hold such local enquiry as he thought fit. The Income-tax Officer after summoning the assessee to appear before him to give evidence and to produce his books, paid a surprise visit to the assessee's shop and there discovered certain books which in his report he said were books of the assessee which had not been disclosed. On receipt of his report the Assistant Commissioner acted upon it without giving an opportunity to the assessee to explain the books discovered. Held, that (i) the assessee was entitled, on natural principles of justice, to an opportunity to rebut the information which constituted the basis of the report of the Income-tax Officer; (ii) but there was no obligation on the Income-tax Officer to record or take evidence of witnesses cited by the assessee as the enquiry was made at the appellate stage under the direction of Assistant Commissioner–Abdul Razzak v. C.I.T., Behar and Orssia (1985) 3 I.T.R. 365. However, before the Appellate Joint Commissioner acts on the report made by the Deputy Commissioner of Taxes, he is bound to give the assessee, on principles of natural justice, a reasonable opportunity of rebutting the information which constituted the basis of the report *(Abdul Razzak* v. *C.I.T. ibid)*. But if the report submitted by the Deputy Commissioner of Taxes of a negative character and does not contain anything new, there would be no denial of natural justice if the appellant is not heard by the Appellate Joint Commissioner or Commissioner (Appeals) on such a report *(Maharajadhiraj of Dharbanga* v. *C.I.T. 4 I.T.C. 283, on appeal, 1933 I.T.R. 94 (P.C.))*. In an appeal against the quantum of assessment the Appellate Joint Commissioner or Commissioner is competent to make an order of remand under this section directing or permitting the Deputy Commissioner of Taxes to recompute the income after looking into, *inter alia*, the assessee's books of account which had not been originally produced *(Brij Mohan Rameshwar Dass* v. *C.I.T. [1953] 23 I.T.R. 31)*. In this case it was held that there is nothing in section 31 of I.T. Act which limits the scope of the further enquiry ordered under cl. (i) of the section (corresponding to sec. 155(5)) and therefore there was no bar to the Appellate Assistant Commissioner directing the Income-tax officer to take into consideration account books of the assessee when making his reassessment. Such a remand order can be made to enable the Appellate Joint Commissioner or Commissioner (Appeals) to decide whether the judgment exercised by the Deputy Commissioner of Taxes in determining the quantum of income was proper *(Muthuwappa* v. *C.I.T. [1962] 46 I.T.R. 1107)*, but cannot be made merely because the assessee expresses his regret for not producing the accounts earlier and the Appellate Joint Commissioner or

Commissioner (Appeals) desires to give him a fresh opportunity to produce his books *(Girdher Javer & Co.* v. *C.I.T. [1953] 24 I.T.R. 540)*. No appeal lies from a remand order made under this sub-section *(ibid)*. If the remand order is bad in law, the Appellate Joint Commissioner or Commissioner (Appeals) finally hearing the appeal cannot question the jurisdiction of his predecessor to make the remand order *(Muthuwappa* v. *C.I.T. [1962] 46 I.T.R. 1107)*, but the Tribunal in further appeal may refuse to consider the Income-tax Officer's report made in pursuance of such order *(Girdher Javer & Co.* v. *C.I.T. [1953] 24 I.T.R. 540)*. In this case what the Appellate Assistant commissioner did was issuing a direction under sec. 31(2) of I.T. Act and such a direction was not appealable. The power given to the Commissioner to prefer an appeal against an order passed by the Appellate Assistant Commissioner under section 33(2) is a power confined to prefer appeals against the substantial orders under section 31 and those substantial orders are made by the Appellate Assistant Commissioner under section 31(3) corresponding to section 156 (cl. (c)).

Admission of additional evidence.–The power to make further inquiry under this section would include the power to admit fresh and additional evidence *(Biradhmal Lodha* v. *C.I.T. 1934 I.T.R. 164, 182)*. In the case of *C.I.T.* v. *E.M. Chettiar Firm* it was held that an appellant in income-tax proceeding has no higher right in adducing fresh evidence in appeal than he would have in a Civil case under the Civil Procedure Code and it is within the discretion of the commissioner whether or not he would admit further evidence in the appellate stage. But it was held in the case of *Biradhmal Lodha* v. *C.I.T. [1934] 2 I.T.R. 164* that section 31(2) gives unrestricted discretion to the Assistant Commissioner to make further inquiry, that is, to obtain more evidence throwing light on the question he has to decide unlike the provision of the Civil Procedure Code which confers only very limited powers on a court of Appeal. The view that additional grounds of appeal cannot be filed after the expiry of the period prescribed by section 30(i) of the Income-tax Act for filing an appeal is erroneous. Additional grounds may be filed by the appellant and entertained by the Assistant Commissioner in the exercise of his discretion at any time before the appeal is decided. If the Assistant Commissioner has exercised his discretion in refusing to entertain additional grounds in an improper manner, the discretion would be open to correction–*C.I.T., U.R. & C.P.* v. *Bihari Lal & Ramchandra [1937] 5 I.T.R. 417*.

The Appellate Tribunal, Dhaka Bench in I.T.A. Nos. 917 & 921 of 1980-81 decided on 9.10.89 relying on the judgment of Calcutta High Court in the case of Khoka Sidhwa And Co. v. C.I.T. West Bengal (1964) 54 (Calcutta High Court) observed that it was decided in that case that in appeals preferred by the assessee against the fresh assessment made according to the direction of the Appellate Assistant Commissioner, the assessee can be allowed to raise a new ground which had not been raised in the original appeals filed against the original assessment which had been set aside.

It was also observed by the Appellate Tribunal, Dhaka Bench, I.T.a. No. 1724 & 1725 of 1997-98 for the assessment years 1993-94 and 1994-95 decided on

22.3.99 to the effect that it is well settled fact that the question of law can be taken at any stage of hearing of a case in appeal.

Additional grounds of appeal.–Sub-sec. (4): Sub-section (4) of this section (sec. 155) has removed all doubts by making provision under this sub-section which empowers the Appellate Joint Commissioner and Commissioner (Appeals) to allow an appellant, at the hearing of the appeal, to go into any ground of appeal not specified in the memorandum of appeal. This power to allow a new or additional ground of appeal to be raised at the hearing is subject to the Appellate Joint Commissioner and Commissioner (Appeals) being satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable *(Ramgopal Ganpatrai & Sons Ltd.* v. *C.E.P.T. [1953] 24 I.T.R. 362)*. He may not also admit any documentary evidence at the hearing of the appeal which was not produced before the Deputy Commissioner of Taxes but if he is satisfied that the assessee was prevented by sufficient cause from producing such evidence before the Deputy Commissioner of Taxes at the time of original hearing he may admit it (sub-sec. 6). He may also reverse or modify the impugned order on a point taken by himself *suo motu (Ibid)*.

If the Appellate Assistant Commissioner has exercised his discretion arbitrarily and not judicially in refusing to entertain additional grounds, the discretion would be open to correction by a higher authority *(See also Byramji & Co.* v. *C.I.T. 1943 I.T.R. 286)*.

Sec. 156: Decision in appeal by the Appellate Joint Commissioner and the Commissioner (Appeals).–(1) In disposing of an appeal, the Appellate Joint Commissioner [or the Commissioner (Appeals)] may,–

(a) in the case of an order of assessment, confirm, reduce, enhance, set aside or annul the assessment;

(b) in the case of an order imposing a penalty, confirm, set aside or cancel such order or vary it so as either to enhance or to reduce the penalty; and

(c) in any other case, pass such order as he thinks fit:

Provided that an order of assessment or penalty shall not be set aside except in a case where the Appellate Joint Commissioner or the Commissioner (Appeals) is satisfied that a notice on the assessee has not been served in accordance with the provisions of section 178.

(2) The Appellate Joint Commissioner [or the Commissioner (Appeals)] shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has been given a reasonable opportunity of showing cause against such enhancement or reduction.

(3) The order of the Appellate Joint Commissioner [or the Commissioner (Appeals)] disposing of an appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

(4) Where, as a result of an appeal, any charge is made in the assessment of a firm or an association of persons, the Appellate Joint Commissioner [or the Commissioner (Appeals)] may direct the Deputy Commissioner of Taxes to amend accordingly any assessment made on any partner of the firm or any member of the association.

(5) On the disposal of an appeal, the Appellate Joint Commissioner [or the Commissioner (Appeals)] shall communicate the order passed by him to the appellant, the Deputy Commissioner of Taxes and the Commissioner [within thirty days of the passing of such order.]

(6) Notwithstanding anything contained in this Ordinance, an appeal to the Appellate Joint Commissioner [or the Commissioner (Appeals)] shall be deemed to have been allowed if the Appellate Joint Commissioner [or the Commissioner (Appeals)] fails to make an order thereon within a period of one year [from the end of the month in which the appeal was filed].

Powers of the Appellate Joint Commissioner or the Commissioner (Appeals) –Decision in appeal. –Sec. 156: This section sets out the various powers which can be exercised by the Appellate Joint Commissioner or Commissioner (Appeals) in appeal against different orders. His powers are wider than those of an appellate Court under the Code of Civil Procedure *(Bipan Lal Kuthiala* v. *C.I.T. [1957] 32 I.T.R. 361)*. The section confers full powers on him to remand a case to the Deputy Commissioner of Taxes when the record is in such a shape that he cannot in justice determine the assessable income of the assessee. The power of remand is not limited by any restraining enactment and his competence is not restricted to dealing with the subject-matter of appeal: he may examine *all* matters covered by the assessment order and correct the assessment in respect of all such matters even to the prejudice of the assessee and even may remand the case to the Deputy Commissioner of Taxes for inquiring into items which were not the subject-matter of appeal *(C.I.T.* v. *McMillan & Co. [1958] 33 I.T.R. 182, 193-4 (S.C. of India))*. In the case of an order of assessment, the Appellate Joint Commissioner or Commissioner (Appeals) may confirm, reduce, enhance or annul the assessment or set aside the assessment and direct the Deputy Commissioner of taxes to make a fresh assessment. But he cannot set aside the assessment and direct the making of a fresh assessment unless his is satisfied that no notice has been served on the assessee in accordance with the provisions of section 178.

Where the Appellate Joint Commissioner or Commissioner (Appeals) sets aside an assessment and directs the Deputy Commissioner of Taxes "to make a fresh

assessment after proper inquiries", any notices previously issued do not become inoperative and the Deputy Commissioner of Taxes can, in making the fresh assessment, take into consideration any material already on the record *(Singh Engineering Works* v. *C.I.T. [1953] 24 I.T.R. 93. See ante under s. 83, "Fresh assessment after appeal")*. But the Appellate Joint Commissioner or Commissioner (Appeals) while setting aside the assessment may direct the Deputy Commissioner of Taxes to consider only certain matters when making a fresh assessment, and in that event the Deputy Commissioner of Taxes cannot go behind that direction and inquire into other matters *(Pulipati Subbarao & Co.* v. *A.A.C. [1959] 35 I.T.R. 673)*. In this case the Petitioner firm, which was previously assessed in the status of a registered firm, was assessed in the year as an unregistered firm, on the ground that it did not file an application for registration. The petitioners firm appealed to the Appellate Assistant Commissioner of Taxes only with regard to the refusal of the Income-tax Officer to treat the firm as a registered one. The Appellate Assistant Commissioner being satisfied that there was an application for registration. He, therefore, set aside the assessment and directed the Income-tax Officer to receive a duplicate application and to deal with it according to law. The Income-tax Officer called upon the Petitioners to produce its books to make a fresh assessment. The Petitioners applied to the High Court for the issue of a writ of prohibition restraining the Income-tax Officer from making *de novo* assessment. Held, that since the order was specific and the Income-tax Officer was directed to receive a duplicate copy of the application for registration and dispose of it according to law, and therefore, it was not open to the Income-tax Officer to conduct a fresh enquiry and proceed to make a fresh assessment. Likewise, if the case is sent back by the Tribunal to the Appellate Joint Commissioner or Commissioner (Appeal) without any restrictions, the Appellate Joint Commissioner or Commissioner (Appeals) can exercise all such powers under this section as he could have exercised at the original hearing of the appeal *(Sri Gajalakshmi Ginning Factory Ltd.* v. *C.I.T. [1952] 22 I.T.R. 502)*; but if the case is remanded by the Tribunal for deciding a particular point only, the Appellate Joint Commissioner or Commissioner (Appeals) can deal with that point alone *(C.I.T.* v. *Indo-Aden Salt works Co. [1959] 36 I.T.R. 429)*.

Where the assessee submits a return as an individual but is assessed as a Hindu undivided family, on appeal by the Hindu undivided family the appellate authority is competent to direct the Deputy Commissioner of Taxes to assess the individual if on inquiry the income is found to belong to him *(Lakshman Prakash* v. *C.I.T. [1963] 48 I.T.R. 705)*. The Appellate Joint Commissioner or Commissioner (Appeals) may cancel the assessment made on an association of persons as a unit, if in his opinion the members should be individually assessed on their respective shares of the profits made by the association *(Kanpur Coal Syndicate* v. *C.I.T. [1961] 41 I.T.R. 406)*.

The basis and manner of computation adopted by the Income-tax Officer under the section 35(4) is liable to interference on appeal by the Appellate Joint Commissioner or Commissioner (Appeals) and the Appellate Tribunal *(C.I.T.* v. *Sen 1949 I.T.R. 355)*. Both these appellate authorities have the jurisdiction, in an appeal against an assessment under the section 35, to substitute a different method of

computation for the method which has been adopted by the Deputy Commissioner of Taxes *(In re Lala Sarju Prasad 1943 I.T.R. 525)*, or to change the percentage of the flat rate of profit adopted by the Deputy Commissioner of Taxes *(In re Pearey Lal Shukla 1942 I.T.R. 239)*.

"Finding" that income is chargeable in another assessment year.–Under this Ordinance there is a time limit for commencing assessment or reassessment proceedings (s. 94(3)) or for completing an assessment or reassessment under that section, in cases where the assessment or reassessment is in consequence of a finding or direction contained in an appellate order for another assessment year. 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)*. The contrary view has been taken by the Madras *(Simrathmull* v. *I.T.O. [1959] 36 I.T.R. 41)* and Bombay *(General Construction & Supply Co.* v. *I.T.O. [1962] 44 I.T.R. 16)* High Courts and by M.C. Desai, C.J., of the Allahabad High Court in a later case *(Lakshman Prakash* v. *C.I.T. [1963] 48 I.T.R. 705, 717-20)*. In *Brindaban Chandra Basak* v. *I.T.O. ([1962] 46 I.T.R. 14)* the Calcutta High Court was inclined to prefer the earlier Allahabad view but did not express any definite opinion. In any event, it is not obligatory on the appellate authority to give a direction regarding the assessment of a year other than the one under appeal *(C.I.T.* v. *Hazarimal Nagji & Co. [1962] 46 I.T.R. 1168)*.

But the question whether the appellate authority can or should give a finding that the income in question falls to be taxed in another specified assessment year is only of academic importance under this Ordinance in view of Expln. 1 to s. 94(3) which now expressly provides that where by an appellate order any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income of another assessment year is *deemed* to be one made in pursuance of, or to give effect to, any finding or direction contained in the said order. This fiction of law enables the Department to make an assessment or reassessment for such other assessment year but within the time limits for initiating and completing an assessment or reassessment and irrespective of the question whether the appellate authority is competent in law to give, or has in fact given, a finding that the income in dispute is chargeable as the income of another specified assessment year. See notes to sec. 94(3) and Explanation 1. thereto.

Enhancement of tax or penalty.–The Appellate Joint Commissioner or the Commissioner (Appeals) has the power under sub-s. (1)(a) to enhance the assessment *(In re Lala Sarju Prasad 1943 I.T.R. 525)*. In this case it was held that "An Appellate Assistant Commissioner is entitled under sec. 31(2) to ask for a report from the Income-tax Officer in respect to an assessment and after the submission of the report is entitled under sec. 31(3) either to confirm or to reduce or enhance the assessment and the power under sub-s. (1)(b) to enhance the penalty. The Madras High Court has held that this power of enhancement can be exercised even after a remand by the Tribunal *(Sri Gajalakshmi Ginning Factory Ltd.* v. *C.I.T. [1952] 22 I.T.R. 502)*. In this case it was held that "There is no distinction between cases where the Appellate

Assistant Commissioner is dealing with an appeal which is remanded by the Appellate Tribunal and an appeal which is heard by him in the first instance. The only power which he can exercise in disposing of an appeal whether received by him after remand or by section 31 of I.T. Act (corresponding to section 156), and it is not subject to any restrictions arising out of the subject matter of appeal. But if the case is remanded by the Tribunal for determination of a particular point only, the power of enhancement cannot be exercised, after such a restricted remand, in respect of a different matter *(C.I.T.* v. *Indo-Aden Salt Works Co. [1959] 36 I.T.R. 420)*. The power of enhancement *suo motu* is conferred on the Appellate Joint Commissioner and the Commissioner (Appeals) because the Department has no right of appeal against the order of the Deputy Commissioner of Taxes. On the other hand, both the Deputy Commissioner of Taxes and the assessee have the right of appeal to the Tribunal against the order of the Appellate Joint Commissioner and the Commissioner (Appeals) and therefore the Tribunal has no power of enhancing the assessment as emerging from the Appellate Joint Commissioner and the Commissioner' (Appeals) order except on an appeal or cross-objections by the Deputy Commissioner of Taxes (See note under s. 159, Enhancement of assessment or finding adverse to appellant).

Enhancement of assessment means increase in the amount of total income or tax. If the Appellate Joint Commissioner or the Commissioner (Appeals) does not enhance the total income, but by means of reduction under one head and an increase under another head allows the assessment to remain the same or reduces it, he cannot be said to have enhanced the assessment merely because income under one head has been increased *(C.I.T.* v. *Namberumal Chetty & Sons 1933 I.T.R. 32)*.

Where the assessee's income has been assessed under more heads than one, even if the assessee's appeal is confined to the income assessed under only one of the heads, the Appellate Joint Commissioner and the Commissioner (Appeals) may enhance the assessment by increasing the amount assessed under another head of income in respect of which the assessee has not appealed *(See In re Pearey Lal Shukla 1942 I.T.R. 239)*. The reason is that income-tax is only one tax and the assessee when he goes in appeal exposes the assessment as a whole to the scrutiny of the Appellate Joint Commissioner or the Commissioner (Appeals). But it has been held that the Appellate Joint Commissioner or the Commissioner (Appeals) has no power to enhance the assessment by assessing *entirely new sources of income* outside the subject-matter of the assessment appealed against *(Jagarnath Therani* v. *C.I.T. 2 I.T.C. 4)*. The following propositions emerge from the judgment of the Bombay High Court in *Shapoorji Pallonji Mistry* v. *C.I.T. ([1958] 34 I.T.R. 342)* which was affirmed by the Supreme Court *(C.I.T.* v. *Shapoorji Pallonji Mistry [1962] 44 I.T.R. 891)*:

"(a) The Appellate Assistant Commissioner has no jurisdiction to travel beyond the subject-matter of the assessment; and his power of enhancement relates only to that income which has been subjected to the process of assessment.

(b) The process of assessment includes not only taxing an income but also holding that a particular income is not taxable.

(c) Therefore the Appellate Assistant Commissioner can enhance the income from a source considered by the Income-tax Officer, or tax the income which the Income-tax Officer had considered and held to be not taxable even though that income falls under a head under which no income has been assessed,–irrespective of the question whether the income falls under a head with regard to which an appeal has or has not been preferred. But the Appellate Assistant Commissioner cannot tax income from a source (*e.g.* a separate venture) which had not been considered at all by the Income-tax Officer and was therefore left unassessed, even though that income falls under a head under which other income has been assessed and with regard to which an appeal has been preferred."

The Bombay High Court held in *Shah & Co.* v. *C.I.T. ([1958] 34 I.T.R. 401)* that the power of the Appellate Assistant Commissioner to make an addition to income by applying the proviso to s. 35(4) can be exercised after the period of limitation under s. 94 for completing the assessment has expired. In that case the total income was not enhanced, because the addition was off-set by other reductions in the assessed income. But the ratio of that case indicates that the power of enhancing the total income and consequently the tax can be exercised by the Appellate Joint Commissioner or the Commissioner (Appeals) even after the period of limitation laid down in s. 94 has expired *(Cf. Nawal Kishore-Kharaiti Lal* v. *C.I.T. 1936 I.T.R. 287)*.

Reasonable opportunity of showing cause.–Sub-sec. (2): The Appellate Joint Commissioner or the Commissioner (Appeals) has the power to enhance any assessment or penalty, but he cannot exercise this power of enhancement unless the appellant has had a reasonable opportunity of showing cause against such enhancement *(See E.M. Chettyar Firm* v. *C.I.T. 4 I.T.C. 111)*. What is a reasonable opportunity would depend upon the facts and circumstances of each case *(Sachchidananda Sinha* v. *C.I.T. 1 I.T.C. 381 (a week's time held to be not sufficient in the circumstances of the case)*.

Order of the Appellate Joint Commissioner or Commissioner (Appeals) disposing of the appeal.–Sub-sec. (3): An appeal lies against every order passed by the Appellate Joint Commissioner or Commissioner (Appeals) under this section to the Appellate Tribunal (s. 158). The Appellate Joint Commissioner or the Commissioner (Appeal) must state facts and give reasons for his findings in writing, for the purpose of enabling the Tribunal to see whether the findings are supported by the facts of the case *(E.M. Chettyar Firm* v. *C.I.T. 4 I.T.C. 111)*. This principle which was judicially recognised under the 1922 Act, is given statutory effect by this sub-section.

Where as the result of an appeal any change is made in the assessment of a firm or a body of individuals or an association of persons or a new assessment of a firm or a body or an association is ordered to be made, the Appellate Joint Commissioner or the Commissioner (Appeals) should pass an order authorising the Deputy Commissioner of Taxes either to amend the assessment made on any partner

of the firm or any member of the body or association or to make a fresh assessment on such partner or member.

Appeal cannot be withdrawn.–It is not open to an assessee who has preferred an appeal to withdraw it so as to prevent the Appellate Assistant Commissioner from enhancing the assessment *(C.I.T. v. Nawab Shah Nawaz Khan 1938 I.T.R. 370)*. Once a tax-payer has served a notice of appeal and so set in motion the machinery designed for the purpose of completing the assessment, he cannot stop the further working of that machinery either by withdrawing the appeal or by refusing to be present at the hearing of the appeal *(Rex v. Special Comrs. (Ex Parte Elmhirst) 20 T.C. 381, 395)*. "The fact that the notice of appeal had been given not merely made it possible but made it obligatory upon the Commissioners that they should take certain steps, not merely or primarily in the interests of the individual appellant but in the performance of their duties imposed upon them in the interests of the general body of the tax-payers, to see what the true assessment ought to be, and that process, a public process directed to public ends, cannot be stopped at the option or the whim of the Appellant who after giving notice begins to realise that if he pursues his appeal it may be the worse for him" *(Per Lord Hewart, C.J., ibid. 20 T.C. 381, 384)*.

Time-limit for disposal of appeal.–Sub-sec. (6): Appeal shall be disposed of by the Appellate Joint Commissioner or the Commissioner (Appeals) within a period of one year from the end of the month in which the appeal was filed and such order shall be communicated to the appellant, the Deputy Commissioner of Taxes and the Commissioner within thirty days of the passing of such order (sub-sec. 6). If the appeal is not disposed of within the period of limitation the appeal so filed shall be deemed to have been allowed.

Sec. 157: Appeal against order of Tax Recovery Officer.–Any person aggrieved by an order of the Tax Recovery Officer under section 139 may, within thirty days from the date of service of the order, appeal to the Inspecting Joint Commissioner to whom the Tax Recovery Officer is subordinate, and the decision of the Inspecting Joint Commissioner on such appeal shall be final.

Sec. 158: Appeal to the Appellate Tribunal.–(1) An assessee may appeal to the Appellate Tribunal if he is aggrieved by an order of–

(a) an Appellate Joint Commissioner [or the Commissioner (Appeals) as the case may be,] under section 128 or 156.

(2) No appeal under sub-section (1) shall lie against an order of the Appellate Joint Commissioner [or the Commissioner (Appeals), as the case may be,] unless–

(a) the assessee has paid twenty percent [reduced to ten percent in the Finance Act, 2000] of the amount representing the difference between the tax as

determined on the basis of the order of the Appellate Joint Commissioner [or the Commissioner (Appeals) as the case may be,] and the tax payable under section 74; or

(b) the Board has, on an application made in this behalf, modified or waived, in any case, the requirement of such payment.

(3) The Deputy Commissioner of Taxes may appeal to the Appellate Tribunal against the order of an Appellate Joint Commissioner, [or the Commissioner (Appeals)] under section 156 [if the Commissioner directs] him to prefer an appeal against the order.

(4) Every appeal under sub-section (1) or sub-section (3) shall be filed within sixty days of the date on which the order sought to be appealed against is communicated to the assessee or to the Commissioner, as the case may be.

Provided that the Appellate Tribunal may admit an appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not presenting the appeal within that period.

(5) An appeal to the Appellate Tribunal shall be in such form and verified in such manner as may be prescribed and shall, except in the case of an appeal under sub-section (3), be accompanied by a fee of [five hundred] taka.

Appeal to the Tribunal.–An assessee may file appeal to the Tribunal against any order passed by the Appellate Joint Commissioner or the Commissioner (Appeals) imposing penalty under section 128 or against any order passed by the Appellate Joint Commissioner or the Commissioner (Appeals) under section 156.

Since an appeal lies to the Tribunal against every order passed by the Appellate Joint Commissioner or the Commissioner (Appeals) disposing of an appeal, it is clear that a second appeal lies in the case of every appealable order *(See Burma Oil Co. Ltd.* v. *I.T. Appellate Tribunal [1958] 33 I.T.R. 794 and Sivan Pillai* v. *C.I.T. [1960] 40 I.T.R. 450).* (See under s. 154, "Refusal to admit appeal, and order disposing of appeal.–Time-barred appeal.–Second appeal to Tribunal"). A subsisting assessment or demand is not essential for the maintainability of an appeal before the Tribunal *(Jain* v. *C.I.T. [1961] 41 I.T.R. 700).*

The right of appeal under s. 153 to the Appellate Joint Commissioner or the Commissioner (Appeals) against an order passed by the Deputy Commissioner of Taxes is granted only to the tax-payer. But a second appeal under this section against an order passed in appeal by the Appellate Joint Commissioner or the Commissioner (Appeals) under s. 158 may be preferred not only by the assessee but also by the

Department. The right of appeal is vested in the Commissioner; and he may direct any Deputy Commissioner of Taxes, not necessarily the Deputy Commissioner of Taxes who passed the assessment order, to prefer an appeal *(R.B.L. Benarsi Dass & Co. Ltd.* v. *C.I.T. [1961] 42 I.T.R. 363)*. It was held in that case that the appeal was maintainable because sec. 33(2) conferred the right of appeal on the C.I.T. who could direct an I.T.O. other than the one who made the assessment to file as a matter of administrative convenience.

"Assessee aggrieved".–The Bombay High Court held in *Kikabhai Abdulali* v. *I.T. Appellate Tribunal ([1957] 32 I.T.R. 762)* that the right to appeal to the Tribunal from an order of the Appellate Joint Commissioner or the Commissioner (Appeals) or the right to apply for a reference of a question of law arising out of an order of the Appellate Tribunal is not confined to those who were parties to the appeal before the Appellate Joint Commissioner or for reference to the High Court Division, but is a much wider right which may be exercised by any person who becomes liable to pay tax by reason of the Appellate Joint Commissioner's order or the order of the Tribunal.

Prescribed form and other requirements.–The provision contained in sub-s. (5) for payment of a fee of Tk. 500 in case of an appeal by the assessee is valid *(Seshadri* v. *I.T.O. [1954] 25 I.T.R. 400)*. The Tribunal has no power to direct refund of that fee or to award costs *(Ibid.)*.

Rules have been framed by he Tribunal dealing with the presentation and hearing of appeals (see Income-tax Manual Part II). The form of appeal to the Tribunal is prescribed by r. 28 of the Income-tax Rules, 1998. The memorandum of appeal must be signed and verified by the appellant; and if there is an authorised reprsentative it may be signed by him. However, the absence of or defect in the signature or description of the appellant is not fatal but only an irregularity which can be rectified by amendment, and the amendment would take effect from the date when the memorandum of appeal was originally filed *(Sheonath Singh* v. *C.I.T. [1958] 33 I.T.R. 591)*. The Supreme Court of Bangladesh gave the similar finding in the case of *Udayan New Paribahan Ltd.* v. *C.I.*, Khulna (reported in 1999 BTD XXVII 61-67). Facts of the case were that appeal was admitted by the Registrar but at the time of hearing it was found that the grounds of appeal in separate sheets were not signed either by the appellant or by the authorised representative, hence it was rejected *in limine*. The S.C. following the principle given in the judgment of Mahim Mohan, Das v. Bungsi Baddan Saha Das (1890) I.T.R. 17 cal. 580 gave the finding that it is not the requirement of law that the grounds of appeal when filed on separate paper should be signed by the assessee or his authorised representative. It further observed that absence of or defect in the signature of the plaintiff or the appellant on the plaint or memorandum of appeal, as the case may be, is not an illegality but only a irregularity which does not in any case affect the jurisdiction of the Court to entertain the plaint or the memorandum. The Tribunal may reject the memorandum of appeal if it is not in the prescribed form *(Dhanpat Mal Diwanchand* v. *C.I.T. [1954] 26 I.T.R. 357)*, or may admit it as being within time if it was originally filed within the period of limitation although the defects might be rectified after the period has expired *(Behari*

Appeal against refusal to register a firm or cancellation of its registration.–Cl.(d): The assessee had the right to file an appeal against an order refusing to register a firm under section 111 or an order cancelling the registration of a firm for default justifying a best judgment assessment. Since section 111 has been omitted and there is now no provision for registration of a firm with the omission of Chapter XIII, the provision of filing appeal under this clause is of no effect.

Appeal against order of penalty under some sections in Chapter XV.–Cl (e): An appeal lies under this section against an order imposing penalty under section 124 (for non-submission of return in time under section 75 or for failure to file return in compliance with the notices under secs. 77, 89(2), 91(3) or 93(1) without reasonable cause or any certificate, statement, accounts or information as required under sections 58, 108, 109, 110 or 113 or for failure to display Tax Identification Number under section 184 C); section 125 (for failure to pay advance tax or an estimate of advance tax as required to be furnished); section 126 (for non-compliance with notices under sections 79, 80 or 83(1)); section 127 (for failure to pay tax on the basis of the return under section 74); section 128 (for concealment or deliberate omission of income) or section 137 (for default in payment of tax as demanded under section 135).

Appeal against refusal of a claim to a refund or to the amount of refund as determined.–Cl. (f): The right of appeal under this section is restricted to the amount of refund as determined and to the refusal to grant refund when claimed under Chapter XVIII; but no provision has been made in the Ordinance to meet the situation when the Deputy Commissioner of Taxes neither refuses the claim to a refund nor grants any refund as claimed nor make any payment of refund which becomes due in consequence of any appellate order.

Appeal by a person charged as an assessee in default under section 57: Where a person who has not deducted tax at source under Chapter VII or after deducting has not paid tax to the Government, is held as an assessee in default under sec. 57 and is liable to pay an additional amount in addition to the tax to be paid; but there is no provision for appeal in this section for such a defaulter assessee.

Appeal to the Commissioner (Appeals)–Sub-sec. 1A: This sub-section makes provision granting right of appeal to the assessee being a company aggrieved by an order of the Deputy Commissioner of Taxes or any assessee aggrieved by an order of the Inspecting Joint Commissioner of Taxes. Such appeal may be made to the Commissioner (Taxes) against orders made by the Deputy Commissioner of Taxes as specified in clauses (a), (b), (c) and (f) of sub-section (1) of this section and against order imposing penalty under Chapter XV or section 137. Appeal to the Commissioner (Taxes) also lies against any order made by the Inspecting Joint Commissioner under section 10. When the Inspecting Additional/Joint Commissioner exercises functions of assessment or under section 120 when he exercises powers of revision to revise the orders of the Deputy Commissioner of Taxes if he considers that the assessment made by the Deputy Commissioner of Taxes is erroneous and prejudicial to the interest of revenue.

the appellate assessee or the Commissioner–*See Dhanapat Mal Dewanchand* v. *C.I.T. [1954] 26 I.T.R. 363*. In computing the period of limitation, the time requisite for obtaining a copy of the order appealed against should be excluded. "Time spent for obtaining certified copy can only be excluded while counting limitation of 60 days if the appellant files appeal on the basis of the certified copy (which is charged for in the case of assessee) and not on the basis of unsolicited" certified copy issued by the Appellate Joint Commissioner's or Commissioner's (Appeals) office (which is not charged for) as a matter of course. In a case the assessee filed an appeal to the Appellate Tribunal on the basis of appellate order (certified copy without court fee) after 60 days. Meanwhile the assessee applied for certified copy of the order of the Appellate Joint Commissioner charged with court fee. He did not receive the second certified copy charged with court fee but submitted second apeal to the Tribunal beyond 60 days of the receipt of the first certified copy (without court fee). It was held by the Tribunal that the appellant could have waited for the receipt of the second certified copy and then to submit appeal within 60 days of the receipt thereof, but when he preferred appeal on the basis of the first certified copy (without court fee) it must be within 60 days of the receipt of that first certified copy–I.T.A. No. 686 of 1979–80 decided on 3.2.1982 (reported in 1984 BTD XII 72-73 Trib.) (relied on the decision of Rasipuram Union Motor Service Ltd. v. C.I.T. Madras (1956) XXX I.T.R. 687.

The Appellate Tribunal, Dhaka Bench observed in a case that the counting of the period of limitation starts from the date on which the assessee informed the Deputy Commissioner of Taxes of the order of the Appellate Additional Commissioner who took into cognizance of unofficial copy of the order as valid and thereby acted upon it although before the receipt of the order by the commissioner vide I.T.A. No 2052 and 2053 of 1997-98 decided on 9.10.99 (reported in 2000 BTD Xxviii 3-5 Trib.).

The Tribunal has the discretion to admit an appeal or cross-objections after the expiry of the prescribed time limit, if it is satisfied that there was sufficient cause for the delay–Proviso to this sub-section *(For instances where the Tribunal rightly refused to admit a time barred appeal, see Sreenivasalu Maidu* v. *C.I.T. 1948 I.T.R.. For a converse case where the Tribunal did not judicially exercise its discretion to condone delay, see Renganayaki Ammal* v. *C.I.T. [1960] 38 I.T.R. 20)*.

Sec. 159: Disposal of appeal by the Appellate Tribunal.–(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders on the appeal as it thinks fit.

(2) Before disposing of any appeal, the Appellate Tribunal may call for such particulars as it may require respecting the matters arising in the appeal or cause further enquiry to be made by the Deputy Commissioner of Taxes.

(3) Where, as a result of the appeal, any change is made in the assessment of a firm or association of persons, or a new assessment of a

firm or association of persons is ordered to be made, the Appellate Tribunal may direct the Deputy Commissioner of Taxes to amend accordingly any assessment made on any partner of the firm or any member of the association.

(4) The Appellate Tribunal shall communicate its order on the appeal to the assessee and to the Commissioner [within one hundred and twenty days from the date of such order]

(5) Save as hereafter provided in this Chapter, the orders passed by the Appellate Tribunal on appeal shall be final.

(6) Notwithstanding anything contained in this Ordinance an appeal filed by an assessee to the Appellate Tribunal shall be deemed to have been allowed if the Appellate Tribunal fails to make an order thereon within a period of two years from the end of the year in which the appeal was filed.

Provided that the provisions of this sub-section shall not apply to an appeal filed by an assessee at any time before the first day of July, 1991;

Provided further that the provisions of this sub-section shall, in relation to an appeal filed by an assessee at any time during the period between the first day of July, 1995 and the thirtieth day of June, 1996 (both days inclusive), have effect as if for the words "two years" the words "Three years" were substituted on the day on which section 21 of অর্থ আইন, ১৯৯১ (১৯৯১ সালের ২১ নং আইন) came into force:

Provided further that the provisions of this sub-section shall, in relation to an appeal filed by an assessee on or after the first day of July, 1999, have effect as if for the words "two years from the end of the year" the words "two years from the end of the month" were substituted.

Orders of Appellate Tribunal.–Sec. 159: Notice of hearing.-Hearing ex-parte.–The notice of the date of hearing of the appeal may be served on the assessee by registered post as provided by section 178–*Bhagwan Radha Kishar* v. *C.I.T. [1952] 22 I.T.R. 104*. Even if the appellant does not appear on the day fixed for hearing, the Tribunal is bound to decide the appeal on merits and cannot dismiss it for default: Rule 25 of the Taxes Appellate Tribunal Rules of Bangladesh, 1986 in so far as it provides for dismissal of the appeal for default, is *ultra virus* the Ordinance–*C.I.T.* v. *Chemiappa Mudaliar [1964] (Mad.) 53 I.T.R. 323*. In this case it was held that the rule of the Taxes Appellate Tribunal Rules enabling the Tribunal to dismiss an appeal for default of appearance of the appellant is *ultra virus* because the use of the words "on the appeal in section 33(4) (corresponding to section 159(1))

requires the Tribunal to dispose of an appeal only after adjudicating on the subject matter of appeal. The Tribunal has inherent power to set-aside an order passed on an appeal heard *ex-parte–Mangat Ram Kushiala* v. *C.I.T. [1960] 38 I.T.R. 1.*

Withdrawal of appeal.–The Tribunal has the power to permit an appeal to be withdrawn. The contrary view in *Bhartia Steel & Engineering Co. Ltd.* v. *I.T.O. 79 I.T.R. 154.* based on cases dealing with the AJCT's power of enhancement is incorrect, as observed by the author. Palkhivala. (See notes under section 156 "Appeal cannot be withdrawn so as to prevent enhancement").

Powers of the Tribunal.–The Appellate Tribunal is not a Court *(Seshadri* v. *I.T.O. [1954] 25 I.T.R. 400)*. But the powers of the Tribunal in dealing with appeals are expressed in the widest possible terms *(Oriental Building & Furnishing Co.* v. *C.I.T. [1952] 21 I.T.R. 105; Bhor Industries Ltd.* v. *C.I.T. [1963] 48 I.T.R. 376, 403)*, and are similar to the powers of an appellate Court under the Code of Civil Procedure *(New India Life Assce. Co. Ltd.* v. *C.I.T. [1957] 31 I.T.R. 844)*. This section provides that the Tribunal may, after giving both parties to the appeal an opportunity of being heard, "pass such orders on the appeal as it thinks fit". The words "on the appeal" restrict the jurisdiction of the Tribunal to the subject-matter of the appeal, and the subject-matter of the appeal is constituted by the original grounds of appeal and such additional grounds as may be raised by leave of the Tribunal *(Ramaswamy Iyengar* v. *C.I.T. [1960] 40 I.T.R. 377; Pokhraj Hirachand* v. *C.I.T. [1963] 49 I.T.R. 293)*. The power to pass such orders as the Tribunal thinks fit can be exercised only in relation to the matters that arise in the appeal. It is not open to the Tribunal to adjudicate or give a finding on a question which is not in dispute and which does not form the subject-matter of the appeal *(Periannan Chettiar* v. *C.I.T. [1960] 39 I.T.R. 159)*.

The words "pass such orders on the appeal as it thinks fit" include all the powers (except the power of enhancement) which are conferred upon the Appellate Joint Commissioner by s. 156(1). Consequently, the Tribunal has the authority under this section to direct the Appellate Joint Commissioner *(Bhor Industries Ltd.* v. *C.I.T. [1963] 48 I.T.R. 376)* or the Deputy Commissioner of Taxes *(Koduri Pulleswara Rao* v. *C.I.T. 1947 I.T.R. 425)* to hold a further inquiry and dispose of the case on the basis of such inquiry, or to issue a commission for the examination of a witness *(Tewary* v. *C.I.T. [1955] 27 I.T.R. 630)*. But the power to remand the case should be exercised on judicial principles *(Periannan Chettiar* v. *C.I.T. [1960] 39 I.T.R. 159)*: where all the evidence had been produced and the Appellate Joint Commissioner had, after full investigation of the evidence and examination of the accounts, given a definite finding on the question in issue, the Tribunal's order of remand was held to be invalid *(Maharani Kanak Kumari Sahiba* v. *C.I.T. [1955] 28 I.T.R. 462)*.

If the AJCT sets aside the assessment without directing a fresh assessment, the Tribunal may give such direction–*Ganapathi Asari* v. *C.I.T. 75 I.T.R. 296.* If the AJCT sets aside the assessment and directs a fresh assessment to be made, the questions decided by him, on which an appeal could have been made but is not made before the Tribunal, cannot be raised in a second appeal before the Tribunal against the fresh assessment–*Orient Trading Co. Ltd.* v. *C.I.T. 58 I.T.R. 553.*

Similarly questions which are decided and concluded by the Tribunal's remand order disposing of the appeal cannot be re-agitated before the Tribunal when a fresh appeal comes up again for hearing after the remand *(Trikamlal Maneklal, In re [1958] 33 I.T.R. 725)*. But if the Tribunal does not dispose of the appeal and continues to remain seized of the case after the remand, a view expressed in the remand order may be reconsidered by the Tribunal when finally disposing of the appeal *(Laxmi Co. v. C.I.T. [1959] 37 I.T.R. 461, 476-7)*.

In an appeal by an association of persons against an assessment, the Tribunal cannot convert the assessment into one on a different association, even if the principal officer of both the associations is the same individual *(Mohd. Haneef v. C.I.T. [1955] 27 I.T.R. 447)*. But it can cancel the assessment, if improperly made on the association as a unit, so that the members may be assessed individually on their respective shares of the association's profits *(Kanpur Coal Syndicate v. C.I.T. [1961] 41 I.T.R. 406)*. Where the assessee submits a return as an individual but is assessed as a Hindu undivided family, on appeal by the Hindu undivided family the appellate authority is competent to direct the Deputy Commissioner of Taxes to assess the individual if on inquiry the income is found to belong to him *(Lakshman Prakash v. C.I.T. [1963] 48 I.T.R. 705)*. Similarly it can change the status of the assessee from an unregistered firm to an association of persons–*Mangat Ram Hazari Mal–C.I.T. 67 I.T.R. 788)*.

Like the Appellate Joint Commissioner, the Tribunal also can interfere with the basis and manner of computation adopted by the Deputy Commissioner of Taxes under sec. 35. The Tribunal has the jurisdiction in a second appeal against an assessment under sec. 35 to substitute a different method of computation for the method adopted by the Deputy Commissioner of Taxes *(In re Lala sarju Prasad 1943 I.T.R. 525)* or to change the percentage of the flat rate of profits adopted by the Deputy Commissioner of Taxes *(In re Pearey Lal Shukla 1942 I.T.R. 239)*.

But the Tribunal's power of interference with the orders of the lower authorities must be exercised on judicial considerations. In *C.I.T. v. Sen (1949 I.T.R. 355)* the Income-tax Officer had made a best judgment assessment and computed the income by applying a certain flat rate of profit, in the exercise of his discretion under s. 23(4), and the proviso to s. 13, of the 1922 Act. The Tribunal, without causing any further inquiry to be made and without relying on any relevant evidence in the case, adopted a lesser flat rate on the ground that the lesser rate was the general rate adopted by the Tribunal in the cases of other assessees doing the same kind of business in the district. The Orissa High Court held that the Tribunal had committed a mistake of law in reducing the flat rate when the reduction was unsupported by any facts which were justly receivable as evidence. This decision may be justified on the facts of the case, but the general principles which are enunciated in this case, regarding the powers of the Tribunal, narrow down unduly, it is submitted, the scope of the Tribunal's powers as an appellate authority (as observed by the Learned authors, Kanga and Palkhivala).

The Tribunal should give in its order the basis on which the income is computed, so that the correctness of the basis may be tested by the High Court

(Jonnalagadda Yedukondala Rao v. *C.I.T. [1959] 36 I.T.R. 485)*. As the Supreme Court of India pointed out in *(Omar Salay Mohamed Sait* v. *C.I.T. ([1959] 37 I.T.R. 151, 170)*, the Tribunal must consider every fact for and against the assessee with due care and not act on conjectures or irrelevant considerations. As regards points of law, it is the duty of the Tribunal to follow the decisions of the High Court to whose jurisdiction it is subject, unless they are overruled or otherwise modified *(Benoy Kumar Sahas Roy* v. *C.I.T. [1953] 24 I.T.R. 70, 82 affirmed)*.

Where the members of the Tribunal deliver separate concurring judgments, they would together constitute the order of the Tribunal *(J.K. Iron & Steel Co. Ltd.* v. *C.I.T. [1963] 49 I.T.R. 304)*.

Enhancement of assessment or finding adverse to appellant.–The Tribunal would be entitled to enhance the assessment as it stands after the Appellate Joint Commissioner's order, in an appeal or cross-objections by the Department for that purpose. But, as the Bombay High Court held in *Motor Union Ins. Co. Ltd.* v. *C.I.T. (1945 I.T.R. 272, 282-3)*, when the appeal is by the assessee and there is no cross-appeal by the Department, the Tribunal is not competent to enhance the assessment *(See also Vijayaranga Mudaliar* v. *C.I.T. [1963] 47 I.T.R. 853 (Mad.))*. Following this decision, the same High court held in *Puranmal Radhakishan & Co.* v. *C.I.T. ([1957] 31 I.T.R. 294)* that in an appeal by the assessee and without a cross-appeal (or cross-objections) by the Department, it is not open to the Tribunal to give a finding adverse to the assessee which does not arise from any question raised in the appeal *(See also Greaves* v. *C.I.T. [1963] 49 I.T.R. 107)*, nor is it open to the Tribunal to raise any ground which would work adversely to the appellant and pass an order which makes his position worse than it was under the order appealed against. The Madras High Court has taken the same view and held that in such cases the Tribunal cannot exercise the power of remand with a view to enhancing the assessment *(Ramaswamy Iyengar* v. *C.I.T. [1960] 40 I.T.R. 377)*.

Additional grounds of appeal and additional evidence.–Rule 12 the Tax Appellate Tribunal Rules, 1986, provides that the appellant shall not, except by leave of the Tribunal urge or be heard in support of any ground not set forth in the memorandum of appeal. Thus the Tribunal is competent to allow the appellant to raise at the hearing of the appeal an additional ground even without a formal amendment of the grounds set forth in the memorandum of appeal *(New India Life Assce. Co. Ltd.* v. *C.I.T. [1957] 31 I.T.R. 844, 856)*. If the Tribunal has exercised its discretion arbitrarily and not judicially in refusing to entertain additional grounds, the Court would be entitled to interfere on a reference *(Byramji & Co.* v. *C.I.T. 1943 I.T.R. 286. See also C.I.T.* v. *Behari Lall Ramchandra 1937 I.T.R. 417)*. Rule 12 further provides that it is open to the Tribunal to base its decision on a ground not set forth in the memorandum of appeal and not taken by leave of the Tribunal under that rule, provided the party who is affected thereby is afforded sufficient opportunity of being heard on that ground *(Oriental Building & Furnishing Co.* v. *C.I.T. [1952] 21 I.T.R. 105)*. The Tribunal may uphold the assessment on a ground different from the ground on which the assessment was based *(Rajkumar Mills Ltd.* v. *I.T. Appellate Tribunal [1958] 33 I.T.R. 750)*. However, the decision of the Tribunal resting on a ground

which was not at any time urged by the appellant may, in an appropriate case, be set aside if it amounts to making out a new case for the appellant *C.I.T.* v. *Chennabasappa [1959] 35 I.T.R. 261*. In this case it was held that the Tribunal was not justified in making out a new case for the assessee as the assessee did not at any time or even before the Tribunal contend that they should be so treated. The Tribunal was not justified in indulging in guesses and conjectures in holding that the peak credit would be covered by the additions made in the assessment for earlier years as no such case was put forward by the assessee at any time.

Rule 30 of the Taxes Appellate Tribunal Rules 1986, provides that the parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the Deputy Commissioner of Taxes has decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by him or not specified by him, the Tribunal may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced. Under r. 30 the powers of the Tribunal to admit additional evidence are limited, and the Tribunal has discretion to refuse leave to a party to raise a new point of fact and to adduce evidence to establish it *(C.I.T.* v. *Sarat Chandra Bose 1950 I.T.R. 669)*.

Raising new questions.–The Tribunal has the jurisdiction to allow any new question to be raised for the first time in appeal before it *(New India Life Assce. Co. Ltd.* v. *C.I.T. [1957] 31 I.T.R. 844)*, and should allow such a question to be raised if it is a question of law which can be decided on the facts already on record *(C.I.T.* v. *Hazarimal Nagji & Co. [1962] 46 I.T.R. 1168)*. The Tribunal cannot be said to exercise its discretion arbitrarily if it refuses to permit a party to raise an entirely new point involving additional evidence or investigation into fresh facts, which point was within the knowledge of the party and could have been raised at an earlier stage *(Moti Ram* v. *C.I.T. [1958] 34 I.T.R. 646 (S.C.))*. In an appeal by the assessee, the Department cannot, generally speaking, be permitted to support the order on a new ground in respect of which the relevant facts have not been investigated *(C.I.T.* v. *Bhumraddi [1958] 33 I.T.R. 82)*.

The Punjab and Haryana High Court has held that the assessee is entitled to urge before the Tribunal a ground regarding the validity of the assessment which he had given up before the AAC–*Vejay Kumar Jain* v. *C.I.T. 99 I.T.R. 349* but the Gujrat High Court in *Karanchand Prem Chand Ltd. (75 I.T.R. 254)* held that if a point arising in the assessment order is not taken in appeal by the assessee and is therefore not dealt with by the AAC, the assessee cannot raise that point before the Tribunal even if, on a judicial pronouncement subsequent to the AAC's order, he finds that the ITO's decision on that point was incorrect. The main ground of the judgment is that the assessee cannot be said to be "aggrieved" by the order of the AAC on a point which was not agitated before him. But the real position should be that the authorities under the Act/Ordinance have to administer the law correctly, and if, for instance, as a result of a subsequent judicial decision it is found that a non-taxable item is taxed or a

permissible deduction is denied, the assessee can reasonably be said to be aggrieved by the AAC's order in its totality as it finally sustains the assessment. It has been submitted by the learned author, Palkhivala that the correct position of law is that both the AAC and the Tribunal have the jurisdiction in every case to entertain a ground which was not urged before the authority whose order is appealed against, but they, judicially exercising their discretion, may or may not entertain the new ground.

Authorisation to amend assessment on partner or member.–Sub-sec.(3): Where as the result of an appeal any change is made in the assessment of a firm or a body of individuals or an association of persons or a new assessment of a firm or a body or an association is ordered to be made, the Tribunal should pass an order authorising the Deputy Commissioner of Taxes either to amend the assessment made on any partner of the firm or any member of the body or association or to make a fresh assessment on such partner or member.

Hearing of appeal.–As far as possible, the appeal should not be heard by a member of the Tribunal who as an Appellate Joint Commissioner, had occasion to deal with the matter in the past *(Muhammad Yousaff* v. *C.I.T. [1959] 35 I.T.R. 633)*.

Review and rectification.–The Tribunal has no power to review its own order; but it is empowered by sec. 173 to rectify any mistake in its order, provided the mistake is apparent from the record. A similar power of rectification is conferred upon the Deputy Commissioner of Taxes, the Appellate Joint Commissioner and the Commissioner (s. 173).

A reference lies to the High Court Division under s. 160 not only from the Tribunal's appellate order under s. 159, but also from its order of rectification if a question of law arises out of the order of rectification.

Sub-sec. (5). Finality of Tribunal's orders.–Unless a reference is made to the High Court Division under s. 160, the Tribunal's order must be regarded as final, and the Deputy Commissioner of Taxes would be bound to carry out the Tribunal's directions, whether they are correct or not *(Bhopal Sugar Industries Ltd.* v. *I.T.O. [1960] 40 I.T.R. 618 (S.C. of India))*. Since a reference to the High Court Division lies only on a question of law, the Tribunal is the final fact-finding authority.

Procedure of Appellate Tribunal.–Sec. 159. This section empowers the Tribunal to regulate its own procedure. In exercise of this power the Tribunal has made the Taxes Appellate Tribunal Rules, 1986.

Reference to third member.–It is the duty of the members of the Tribunal who heard the appeal in the first instance to formulate clearly the point or points on which they differ and it is only thereafter that a reference can be made to a third member *(Hanutram Chandanmul* v. *C.I.T. [1953] 23 I.T.R. 505)*. After the decision by the third member on the point or points referred to him, the case should go back to the original Bench who heard it, since the third member has not been given the jurisdiction to decide and dispose of the appeal *(Jan Mohammed* v. *C.I.T. [1953] 23 I.T.R. 15)*. See further notes under Decision of Bench in sec. 13.

Time-limits-Sub-secs. (4) and (6).–Time-limit for disposal of appeal by the Tribunal has been provided for in sub-section (6). The Tribunal shall pass orders on the appeal within two years from the end of the month in which the appeal was filed and in case of appeal filed by the assessee such appeal shall be deemed to have been allowed of the Tribunal fails to dispose of the appeal within the limitation period. After disposal of the appeal the Tribunal shall communicate its order on the appeal to the assessee and to the Commissioner within one hundred and twenty days from the date of such order–sub-sec. (4). Although nothing has been provided for in the section in case of failure by the Tribunal in sending the order within the time provided for but since this is a mandatory provision, failure in the compliance of such provision ought to result in the annulment of such order.

Sec. 160: Reference to the High Court Division.–(1) The assessee or the Commissioner may, [within ninety days] from the date of receipt of the order of the Appellate Tribunal communicated to him under section 159, by application in the prescribed form, accompanied, in the case of an application by the assessee, by a fee of one hundred taka, refer to the High Court Division any question of law arising out of such order.

(2) An application under sub-section (1) shall be in triplicate and shall be accompanied by the following documents, namely:–

(a) certified copy, in triplicate, of the order of the Appellate Tribunal out of which the question of law has arisen;

(b) certified copy, in triplicate, of the order of the Deputy Commissioner of Taxes, the Inspecting Joint Commissioner or the Appellate Joint Commissioner, [or the Commissioner (Appeals)] as the case may be, which was the subject-matter of appeal before the Appellate Tribunal; and

(c) certified copy, in triplicate, of any other document the contents of which are relevant to the question of law formulated in the application and which was produced before the Deputy Commissioner of Taxes, the Inspecting Joint Commissioner, the Appellate Joint Commissioner [or the Commissioner (Appeals)] or the Appellate Tribunal, as the case may be, in the course of any proceedings relating to any order referred to in clause (a) or (b).

(3) Where the assessee is the applicant, the Commissioner shall be made a respondent; and where the Commissioner is the applicant the assessee shall be made a respondent:

Provided that where an assessee dies or is succeeded by another person or is a company which is being wound up, the application shall not abate and may, if the assessee was the applicant, be continued by, and if he was the respondent, be continued against, the executor, administrator or successor or other legal representative of the assessee, or by or against the liquidator or receiver, as the case may be..

(4) On receipt of the notice of the date of hearing of the application, the respondent shall, at least seven days before the date of hearing, submit in writing a reply to the application; and he shall therein specifically admit or deny whether the question of law formulated by the applicant arises out of the order of the Appellate Tribunal.

(5) If the question formulated by the applicant is, in the opinion of the respondent, defective, the reply shall state in what particulars the question is defective and what is the exact question of law, if any, which arises out of the said order; and the reply shall be in triplicate and be accompanied by any documents which are relevant to the question of law formulated in the application and which were produced before the Deputy Commissioner of Taxes, the Inspecting Joint Commissioner, the Appellate Joint Commissioner, [the Commissioner (Appeals)] or the Appellate Tribunal, as the case may be in the course of any proceedings relating to any order referred to in sub-section (2)(a) or (b).

(6) Section 5 of the Limitation Act, 1908 (IX of 1908) shall apply to an application under sub-section (1).

Sec. 161: Decision of the High Court Division.—(1) Where any case has been referred to the High Court Division under section 160, it shall be heard by a bench of not less than two judges and the provisions of section 98 of the Code of Civil Procedure 1908 (V of 1908), shall, so far as may be, apply in respect of such case.

(2) The High court Division shall, upon hearing any case referred to it under section 160, decide the question of law raised thereby and shall deliver its judgement thereon stating the grounds on which such decision is founded and shall send a copy of such judgement under the seal of the Court and signature of the Registrar to the Appellate Tribunal which

shall pass such orders as are necessary to dispose of the case in conformity with the judgement.

(3) The costs in respect of a reference to the High Court Division under section 160 shall be in the discretion of the Court.

(4) Notwithstanding that a reference has been made under section 160 to the High Court Division, tax shall be payable in accordance with the assessment made in the case unless the recovery thereof has been stayed by the High Court Division.

Reference to High Court Division.–Sec. 160: This section provides for a reference to the High Court Division at the instance of the assessee or the Commissioner. A reference lies under this section only in respect of an order of the Appellate Tribunal under s. 159. Secondly, a reference lies only on a question of law and not on a question of fact.

The assessee or the Commissioner who desires to have a case referred to the High Court Division may apply under sub-s. (1) in the prescribed form within ninety days from the date of service of notice of the Tribunal's order. If the application is by the assessee, he has to pay a fee of Tk. 100. The Bombay High Court Division held in *Kikabhai Abdulali* v. *I.T. Appellate Tribunal ([1957] 32 I.T.R. 762)* that the right to apply for a reference to the High Court Division is not confined to those who were parties to the appeal before the Tribunal but is a much wider right which may be exercised by any person who becomes liable to pay tax by reason of the Tribunal's order.

The High Court has to decide the questions of law raised by the case and deliver a judgment containing the grounds on which the decision is founded (s. 161).

Rule 29 of the Income-tax Rules, 1986, prescribes the form of reference application to the High Court Division.

Reference only from order under s. 159.–A reference lies to the High Court Division from an order of the Tribunal passed under s. 159, but not from any other order. The Supreme Court of India had held in *C.I.T.* v. *Arunachalam Chettiar ([1953] 23 I.T.R. 180)* that a reference lay only from an appellate order of the Tribunal passed under s. 33(4) of the 1922 Act (corresponding to sec. 159(1)) in an appeal which was a *proper* appeal under s. 33(1) of that Act (corresponding to sec. 160). It was further held under that Act that no reference lay from an order of the Tribunal passed on an application entertained in its supposed inherent jurisdiction, or from an order of the Tribunal dismissing an application for restoration of an appeal dismissed for default of appearance, or from an order passed on appeal against the Appellate Assistant Commissioner's order in a case where the initial appeal to the Appellate Assistant Commissioner and the further appeal to the Tribunal were both incompetent, *e.g.* appeals against an order of rectification passed by the Income-tax Officer or against the Income-tax Officer's order charging interest or against an order of the Income-tax Officer purporting to give effect to the Tribunal's directions in an

earlier appeal, but what is stated above must now be read subject to the later pronouncement of the Supreme Court of India in *Mela Ram & Sons* v. *C.I.T.* where that Supreme Court held that an appeal is no less an appeal because it is irregular or incompetent. Consequently, the correct position seems to be that a reference would lie from an order of the Tribunal passed under s. 159 *even in an appeal which was irregular or incompetent.* (see further under s. 155, "Refusal to admit appeal, and order disposing of appeal.–Time-barred appeal.–Second appeal to Tribunal". An order of the Tribunal dismissing an appeal as time-barred or refusing to condone delay is an order under s. 159 and not under the proviso to sec. 158 (2)(b), and consequently a reference lies from such an order.

QUESTIONS OF LAW AND OF FACT

Reference only on a question of law.–All questions of fact are for the Tribunal to decide and the Court cannot go behind the Tribunal's findings of fact *(See post under "Court cannot go behind Tribunal's findings of fact").* Under this section a reference to the Court lies only on a question of law. If a question of fact has been referred to the Court the Court may refuse to answer that question *(Munshi Gulab Singh & Sons* v. *C.I.T. 1946 I.T.R. 66, 83).* The respondent of the case, on receipt of the notice of the date of hearing shall at least seven days before the date of hearing submit in writing a reply to the application and he shall state thereto whether there has been or not the question of law as formulated by the applicant arising out of the order of the Tribunal–sec. 160(4).

The questions of fact and of law which arise under the various provisions of this Ordinance have been dealt with in the notes to the different sections under the heading "Reference to Court".

But a finding of fact may be reviewed by the Court if there is *no evidence* to support it, and the question whether there is any evidence to support a finding of fact is a question of law and can be raised on a reference *(Liquidators of Pursa Ltd.* v. *C.I.T. [1954] 25 I.T.R. 265, 273 (S.C. of India)).* As Viscount Simon said in *Bomford* v. *Osborne (1942 I.T.R. Suppl. 27, 34 (H.L.),* there are many cases in which the Department having proved or admitted facts before it, may deduce therefrom further conclusions which are themselves conclusions of pure fact, but in such cases the question of law is whether the facts proved or admitted provide evidence to support the Department's further conclusions of fact. To decide that a document is not genuine is to come to a finding of fact: whether there was evidence upon which it was open to the Income-tax authorities to come to such a decision is a question of law *(Sir Sundar Singh Majithia* v. *C.I.T. 1942 I.T.R. 457, 462 (P.C.)).* Likewise, the question whether a finding of fact is inconsistent with the evidence or contradictory of it is a question of law *(Liquidators of Pursa Ltd.* v. *C.I.T. [1954] 25 I.T.R. 265, 273 (S.C. of India)).*

"If a party on whom the burden of proof lies produces evidence which is considered to be unsatisfactory and is therefore, disbelieved, the mere fact that there is no evidence to the contrary does not compel the Tribunal to record a finding in favour of the party on whom the burden lies" *(Nihori Lal Prabhudayal* v. *C.I.T. [1951] 19 I.T.R. 240, 246; In re Baghat Halwai 3 I.T.C. 48, 52).*

Decision based on conjectures, suspicions or irrelevant material.– Mahajan, C.J., delivering the judgment of the Supreme Court (India) in *Dhirajlal Girdharilal* v. *C.I.T. ([1954] 26 I.T.R. 736, 739-40)*, observed: 'If the court of fact, whose decision on a question of fact is final, arrives at this decision by considering material which is irrelevant to the inquiry, or by considering material which is partly relevant and 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 ... It is well established 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 was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises" *(See also Dhakeswari Cotton Mills Ltd.* v. *C.I.T. [1954] 26 I.T.R. 775 (S.C. of India))*. The decision of the Tribunal may be set aside if the Tribunal has excluded or ignored admissible and relevant evidence, or has taken into consideration inadmissible evidence *(Venkataswami Naidu & Co.* v. *C.I.T. [1959] 35 I.T.R. 594, 601 (S.C. of India))*. The Supreme Court of India laid down in *Omar Salay Mohamed Sait* v. *C.I.T. ([1959] 37 I.T.R. 151, 170 (S.C. of India))* and *Lalchand Bhagat Ambica Ram* v. *C.I.T. ([1959] 37 I.T.R. 288, 295 (S.C. of India))*. that the Court would not interfere with the Tribunal's findings of fact provided the Tribunal had considered every relevant fact for and against the assessee with due care and had not acted on conjectures or irrelevant considerations. However, the Tribunal's order must be read as a whole to see whether this test is satisfied *(Homi Jehangir Gheesta* v. *C.I.T. [1961] 41 I.T.R. 135 (S.C. of India))*.

Misdirection.–The Court can interfere if the finding of fact is based upon a misconstruction of a statute *(Liquidators of Pursa Ltd.* v. *C.I.T. [1954] 25 I.T.R. 265, 273-5 (S.C.))* or misunderstanding of a material document *(Mahesh Anantrai Pattani* v. *C.I.T. [1961] 41 I.T.R. 481 (S.C. of India))*, or if the Tribunal has otherwise *misdirected itself in law* in arriving at that finding *(Monghyr Electric Supply Co. Ltd.* v. *C.I.T. [1954] 26 I.T.R. 15)*. Overlooking or ignoring a crucial fact or document may amount to a misdirection in law *(Bhagwati Prasad Misra* v. *C.I.T. [1959] 35 I.T.R. 97)*. Making an assessment in violation of the fundamental principles of justice would also amount to a misdirection in law *(See Dhakeswari Cotton Mills Ltd.* v. *C.I.T. [1954] 26 I.T.R. 775)*.

Question of construction.–What is the proper construction of a statute, or of any document of title, is, needless to say, a question of law *(Sree Meenakshi Mills Ltd.* v. *C.I.T. [1957] 31 I.T.R. 28, 50 (S.C. of India)); Venkataswami Naidu & Co.* v. *C.I.T. [1959] 35 I.T.R. 594, 601 (S.C. of India))*.

Question of degree.–Where the question is one of degree, it should be regarded as a question of fact *(Oriental Investment Co. Ltd.* v. *C.I.T. [1957] 32 I.T.R. 664, 670 (S.C. of India))*.

Inference of law, fact, or mixed law and fact.–It is not always easy to distinguish between questions of fact and questions of law for the purposes of the taxing Acts *(Farmer* v. *William Cotton's Trustees 6 T.C. 590, 600 (H.L.))*. But it is clear enough that a mere question of fact cannot possibly be turned into a question of

law by asking whether as a matter of law the Tribunal came to a correct conclusion upon a matter of fact *(C.I.T.* v. *Laxminarain Badridas 1937 I.T.R. 170, 179 (P.C.))*. On the other hand, the Court must guard against the attempt which is often made to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on a question of pure fact *(Great Western Rly. Co.* v. *Bater 8 T.C. 231, 244 (H.L.))*.

An inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a mixed question of law and fact. After exhaustively reviewing the important authorities, Venkatarama Ayyar, J., delivering the judgment of the Supreme Court in *Sree Meenakshi Mills Ltd.* v. *C.I.T.* laid down the following propositions:

(a) Where an ultimate finding on an issue is an inference to be drawn from the facts found, on the application of any principle of law, there is a mixed question of law and fact, and the inference from the facts found is, in such a case, a question of law and is open to review by the Court *(See also Oriental Investment Co. Ltd.* v. *C.I.T. [1957] 32 I.T.R. 664 (S.C. of India))*. For instance, valuation of goodwill involves a question of law *(S.C. Cambatta & Co. Pr. Ltd.* v. *C.E.P.T. [1961] 41 I.T.R. 500 (S.C. of India))*.

(b) Where the final determination of the issue does not involve the application of any principle of law, an inference from the facts is a pure inference of fact although it is drawn from other basic facts.

(c) The proposition that an inference from proved facts is one of law is therefore correct in its application to mixed questions of law and fact, but not to pure questions of fact.

In the case of pure questions of fact, the inference from proved facts being itself a question of fact can be attacked as being erroneous in law only if there is no evidence to support it or if it is perverse *(See also Lalchand Bhagat Ambica Ram* v. *C.I.T. [1959] 37 I.T.R. 288, 301 (S.C. of India))*.

In *Edwards* v. *Bairstow* the House of Lords laid down the same principles. In that case Lord Simonds observed that even a pure finding of fact may be set aside by the Court "if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe stated that no misconception may appear on the face of the case but "it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances, too, the Court may intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination".

Court cannot go behind Tribunal's findings of fact.—The duty to find facts is on the Tribunal. It is the final fact-finding authority under this Ordinance *(Hanmantram Ramnath* v. *C.I.T. 1945 I.T.R. 203, 208)*. It is for the Tribunal to find facts and it is for the Court to lay down the law applicable to the facts found *(Munshi Gulab Singh & Sons* v. *C.I.T. 1946 I.T.R. 66, 83)*. The Court has no jurisdiction to go behind or to question statements of fact made by the Tribunal in its appellate order, unless there is no evidence to support them or the Tribunal has misdirected itself in law *(C.I.T.* v. *Calcutta Agency Ltd. [1951] 19 I.T.R. 191 (S.C. of India))*. "The decision of the Tribunal on facts is final, unless it can be successfully assailed on the ground that there was no evidence for the conclusions on facts recorded by the Tribunal. It is therefore, the duty of the High Court Division to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. Any departure from this rule of law will convert the High Court Division into a fact finding authority which it is not under the advisory jurisdiction of the High Court in the matter of income-tax reference made by the Tribunal under the Income-tax Ordinance. It is not open to an assessee to ask the Court upon a reference to examine his books of account and to come to findings of fact contrary to those arrived at by the Tribunal in the case stated *(Binjraj Hukumchand* v. *C.I.T. 5 I.T.C. 303, 312)*. An applicant cannot raise in the Court an issue of fact which ought to have been raised before the Tribunal *(Kshetra Mohan-Sannyasi Charan Sadhukhan* v. *C.E.P.T. [1953] 24 I.T.R. 488 (S.C. of India))*.

"Arising out of such order"

No question can be referred to the High Court Division under this section unless it arises out of the order of the Tribunal. If the parties do not raise a certain contention before the Tribunal with the result that the facts relevant to that contention are not dealt with in the judgment of the Tribunal, no question arising out of such a contention can be referred to the High Court Division *(New Jehangir Vakil Mills Ltd.* v. *C.I.T. [1959] 37 I.T.R. 11, 19 (S.C. of India); Bansilal* v. *C.I.T. [1958] 33 I.T.R. 176)*.

In *C.I.T.* v. *Scindia Steam Navigation Co. Ltd. ([1961] 42 I.T.R. 589)* the Supreme Court of India held by a majority, reviewing the conflicting case-law on the point, that

(a) a question of law can be said to arise out of the Tribunal's order only if it is dealt with by the Tribunal or is raised before though not decided by the Tribunal *(C.I.T.* v. *Braham Dutt Bhargava [1962] 46 I.T.R. 387)*;

(b) a question of law not raised before the Tribunal and not dealt with by it in its order cannot be said to arise out of its order even if on the facts of the case stated in the order the question fairly arises *(See also C.I.T.* v. *Braham Dutt Bhargava [1962] 46 I.T.R. 387)*; and

(c) where the question itself was under issue, the reference should not be limited to those aspects of the question which had been argued before the Tribunal. "It will be an overrefinement of the position to hold that

each aspect of a question is itself a distinct question" for the purpose of reference to the Court *([1961] 42 I.T.R. 589 at 612. See also C.I.T.* v. *Kolhe [1962] 46 I.T.R. 1268).*

If the legality of the Tribunal's order itself is questioned, it would be a question of law "arising out of such order" within the meaning of this section *(In re Ram Datta Sita Ram 1947 I.T.R. 61).* Likewise if the Tribunal rejects an appeal as incompetent or on the ground that it has no jurisdiction to entertain it, a question of law as to the Tribunal's jurisdiction would arise out of the Tribunal's order and a reference would lie to the High Court Division *(Mulla Irshad Ali* v. *C.I.T. [1958] 33 I.T.R. 454).*

Death of assessee pending reference proceedings–Proviso to sec. 160(3) or absence at the hearing–Withdrawal of reference–If during the pendency of the reference proceedings the assessee dies, the proceedings may be continued by or against his legal representatives *(Maharajadhiraj Kameshwar Singh of Darbhanga* v. *C.I.T. 4 I.T.C. 283, on appeal 1933 I.T.R. 94 (P.C.)).* A reference does not abate by reason of failure to apply within ninety days of the death to bring the legal representatives of the deceased assessee on the record *(C.I.T.* v. *Gulam Hyderkhan [1962] 46 I.T.R. 463).* It was held in that case that "there was no provision for abatement under sec. 66 in cases where the assessee dies and there is a failure to bring his legal representative on record within a reasonable time. The Court is entitled to call upon the C.I.T. to furnish the addresses of the legal representatives and then direct the Registrar to issue fresh notices to them. If the party at whose instance the reference was made does not appear at the hearing, the Court is not bound to answer the question referred and should not do so *(M.M. Ispahani Ltd.* v. *C.E.P.T. [1955] 27 I.T.R. 188).* If the applicant who has caused a reference to be made under sec. 66(1) fails to appear at the time of hearing it is not incumbent upon the Court to answer the question referred: the court can refuse to decide the question. But, according to the Calcutta High Court, such party cannot appear at the hearing and be allowed to withdraw the reference *(Karnani Industrial Bank Ltd.* v. *C.I.T. [1956] 30 I.T.R. 16).* It is submitted by the great author Palkhivala that this view is incorrect. The applicant is entitled to withdraw the reference before the case is fully heard and argued; and if the reference is for a number of years he may withdraw the reference for such years as he chooses notwithstanding that the material facts and law are the same for all years *(Hood Barrs* v. *I.R. (No. 3) 39 T.C. 209, 235-7, on appeal 244 (C.A.)).*

Reference to be heard by a Bench of at least two judges.–Sec. 161(1): This section provides that every case referred under s. 161 should be heard by a Bench of at least two Judges of the High Court Division and should be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges. If the Judges are equally divided the question on which there is the difference of judicial opinion may be referred to another Judge or to a larger Bench, and the decision of the majority of the Judges would prevail.

Court can answer only the questions actually referred to it.–It is clearly established by decisions of the Privy Council and the Supreme Court that the High Court can answer only those questions which are actually referred to it; it cannot raise

and answer new questions which have not been so referred *(Rajendra Narayan Bhanja Deo* v. *C.I.T. 1940 I.T.R. 495 (P.C.); I.T. Appellate Tribunal* v. *Radha madho Trust 1946 I.T.R. 470, 478 and allied cases)*. The function of the High Court Division referred to it under sec. 160 is advisory only, and is confined to considering and answering the actual question referred to it.

The routine clause, "on the facts and in the circumstances of the case", which occurs in questions of law formulated for the Court's determination, would not entitle the Court to deal with a question of law in respect of which there has been no application for reference *(C.I.T.* v. *Arokiaswami Chetti & Co. 1948 I.T.R. 404, 411)*.

"Court ...shall decide" Sec. 161(2): –Academic questions and other questions which need not be answered.–This section provides that upon the hearing of the reference the Court *shall* decide the questions of law raised by the case. But this does not mean that it is the duty of the Court to answer every question which is referred to it, irrespective of any other consideration.

Any question of law which is purely *academic* and the answer to which would have no bearing on any actual right or liability of the tax-payer, should not be answered by the Court, and should not in the first instance, be made the subject of a reference to the Court. The Court may not answer such a question. Similarly, even if any question of law arises out of the order of the Tribunal and has been referred to the Court, the Court would refuse to answer it if in the circumstances of the case the answer would not dispose of the real questions in issue between the parties *(Thrikamji Jiwan Das* v. *C.I.T. 1 I.T.C. 406, 410)*. Likewise, the Court would be entitled to refuse to answer a question referred to it if the question is unnecessary or irrelevant *(Madanlal Dharnidharka* v. *C.I.T. 1948 I.T.R. 227, 236)*, or does not arise out of the order of the Tribunal *(C.I.T.* v. *Braham Dutt Bhargava [1962] 46 I.T.R. 387)*, or is a question of fact and not of law *(Munshi Gulab Singh & Sons* v. *C.I.T. 1946 I.T.R. 66, 83)*, or is a general or abstract question raised for the guidance of the Department *(Kanpur Tannery Ltd.* v. *C.I.T. [1958] 34 I.T.R. 863, 867)*, or if the party at whose instance the reference was made does not appear at the hearing *(Ispahani Ltd.* v. *C.E.P.T. [1955] 27 I.T.R. 188)*.

Incompetent reference.–The principle established by the Indian Supreme Court's decision in *C.I.T.* v. *Arunachalam Chettair* is that if the reference is incompetent, the Court may decline to entertain it and may refuse to answer the questions raised. See under s. 161, "Reference only from order under s. 159.

Cost of reference. –Sub-sec. (3) provides that the costs of the reference shall be in the discretion of the Court. The costs would normally follow the event, though the Court may depart from this rule in the special circumstances of a case. All submissions as to costs must be argued at the time of the hearing of the reference and before a final order is drawn up: an application for review of the order as to costs cannot be entertained later.

Disposal of the case conformably to Court's decision.–Sub-sec. 2: After a reference has been answered by the Court, it is the duty of the Tribunal under this section to pass such an order as is necessary to dispose of the case conformably to the

judgment *(See C.I.T. v. Bombay Trust Corpn. Ltd. 1936 I.T.R. 323, 334 (P.C.))*. Such an order would be passed under s. 159 read with this section *(I.T. Appellate Tribunal v. S.C. Cambatta & Co. Ltd. [1956] 29 I.T.R. 118)*; and the Tribunal cannot thereafter review or revise its own order *(Bombay Mutual Life Assce. society Ltd. v. A.N. Shah [1955] Bom. (Unrep.))*. But the order that the Tribunal can pass under this section is not merely a formal order; for instance, if the Court has held the ground of assessment to be incorrect, the Tribunal may pass an order confirming the assessment on another ground based on facts or findings already on record *(Rajkumar Mills Ltd. v. I.T. Appellate Tribunal [1958] 33 I.T.R. 750)*.

Under the provisions of this section, the judgment of the High Court Division as a whole is binding between the parties in the particular case. If the judgment expounds a wrong construction of the Ordinance, an appeal against it is open, and there is no other procedure by which it can be corrected *(C.I.T. v. Tehri-Garhwal State 1934 I.T.R. 1, 8 (P.C.))*. But the Income-tax authorities are not obliged to discontinue all proceedings against the assessee after the judgment is delivered by the Court. If any other proceedings are open to the authorities–*e.g.* reassessment proceedings under s. 93 authorities would be entitled to adopt such proceedings against the assessee *(C.I.T. v. Bombay Trust Corpn. Ltd. 1936 I.T.R. 323 (P.C.))*.

Stay of recovery pending reference to Court–Sub-sec. (4): This sub-section provides that tax shall be payable notwithstanding the pendency of a reference in the High Court Division (Sec. 160) or an appeal to the Appellate Division (sec. 162). The High Court Division may in a proper case stay of recovery proceedings pending the disposal of a reference.

Limitation and Fee.–An application shall have to be made by the assessee or the Commissioner to the High Court Division referring the question of law arising out of the order of the Tribunal within ninety days from the date of receipt of the order of the Tribunal under section 159. Such application shall have to be made in the prescribed form which shall be accompanied by a fee of one hundred taka in the case where the applicant is an assessee.

Exclusion of time requisite for obtaining copy of order.–Section 177 provides that (a) the day on which the order complained of was served, and (b) if the assessee was not furnished with a copy of the order, the time requisite for obtaining a copy of such order, should be excluded in computing the period of limitation for an appeal or for an application under the Ordinance *(Rasipuram Union Motor Service Ltd. v. C.I.T. [1956] 30 I.T.R. 687)*. The words "if the assessee was not furnished with a copy of the order when the notice of the order was served upon him" which occur in this section, did not find a place in s. 67A of the 1922 Act. Even prior to the enactment of that section in 1930, the analogous provisions of the Limitation Act were held to apply to appeals and applications under that Act *(Mohan Lal Hardeo Das v. C.I.T. 4 I.T.C. 90)*. In this case it was held that "An assessee who desires to have a reference made to the High Court under section 66, clause (2), on a question of law arising out of an order passed under section 31 or 32 of the Act, is entitled to be furnished with a copy of the reasons for the order and the time taken by the office to furnish such copy must be excluded in computing the period of one month allowed to

the assessee to apply for the reference. Similarly in computing the period of limitation for an application to the High Court under section 66(3) of the Income-tax Act, the applicant is entitled to have the benefit of the time which was spent in obtaining a copy of the Commissioner's order.

In order to entitle the assessee to exclude the time requisite for obtaining a copy of the order complained of, it is necessary that the application for a copy should comply with all the legal requirements. If the application is made by an agent not properly authorised in that behalf *(Basant Lal Ramjidas* v. *C.I.T. 5 I.T.C. 383)*, or if it is not properly stamped *(Merchant Flour Mills co. Ltd.* v. *C.I.T. 1937 I.T.R. 459; Basant Lal Ramjidas* v. *C.I.T. 5 I.T.C. 383)*, the period which elapses between the making of the invalid application and putting the application in order cannot be excluded in computing the period of limitation. The Allahabad High Court *(Haji Ghulam Husain & Sons* v. *C.I.T. [1957] 31 I.T.R. 231)* has held that even in cases where no application for a copy is made by the assessee, if under the usual practice copies of certain orders are sent free of charge to the assessees concerned without any application being made by them, the period between the date of the making of the order and the date of service on the assessee should be excluded under this section as "time requisite for obtaining a copy". If the order is communicated to the assessee in the form of a certified copy charged with court fee, the time requisite for obtaining another certified copy, which is not required to be annexed to any appeal or application would not be excluded *(See Swami & Co.* v. *C.I.T. [1952] 21 I.T.R. 487 and Sardarmal Khumchand* v. *C.I.T. [1963] 49 I.T.R. 961)*.

Sec. 162: Appeal to the Appellate Division.–(1) An appeal shall lie to the Appellate Division from any judgement of the High Court Division delivered under section 161 in any case which the High Court Division certifies to be a fit one for appeal to the Appellate Division.

(2) The Provisions of the Code of Civil Procedure, 1908 (Act V of 1908), relating to appeals to the Appellate Division shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of the High Court Division:

Provided that nothing in this sub-section shall be deemed to affect the provision of section 161 (2) or (4):

Provided further that the High Court Division may, on petition made for the execution of the order of the Appellate Division in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court Division.

(3) Where the judgement of the High Court Division is varied or reversed in appeal under this section, effect shall be given to the order of the Appellate Division in the manner provided in section 161 (2) and (4) in respect of a judgement of the High Court Division.

(4) The provisions of sub-section (3) and sub-section (4) of section 161 relating to costs and payment of tax shall apply in the case of an appeal to the Appellate Division as they apply to a reference to the High Court Division under section 160.

Appeal to the Appellate Division.–Sec. 162: This section provides for an appeal to the Appellate Division of the Supreme Court from any judgment of a High Court Division delivered on a reference made under s. 161, provided the High Court Division certifies the case to be a fit one for appeal to the Appellate Division of the Supreme Court.

The question before the Appellate Division of the Supreme Court in appeal would simply be whether the question referred to the High Court Division has been correctly answered: the Appellate Division would not go beyond the question or consider matters outside its limits *(Keshardeo Chamria* v. *C.I.T. 1939 I.T.R. 394, 400 (P.C.)); Rajputana Textile (Agencies) Ltd.* v. *C.I.T. [1961] 2 I.T.R. 743 (S.C.))*. The jurisdiction of the Appellate division is no more extensive than that of the High Court Division – *Abdul Jabbar Khan* v. *C.I.T. 82 I.T.R. 872 (S.C. of India)*.

The High Court Division would certify the case as a fit one for appeal and grant leave to appeal to the Appellate Division, if a substantial question of law is involved or if the question is likely to occur in successive years *(C.I.T.* v. *Mathias 1938 I.T.R. 8)*, or if the question is otherwise of great public or private importance *(Rajmal Paharchand* v. *C.I.T. 1950 I.T.R. 1011)* and the grounds for regarding the case as a fit one for appeal should be set out in the certificate – *India Machinery Stores Ltd.* v. *C.I.T. 78 I.T.R. 50 (S.C. of India)*. But it has no power on granting leave to appeal to the Appellate Division to impose a condition that the appellant should bear the costs of the appeal in any event *(C.I.T.* v. *Mathias 1938 I.T.R. 8. See also C.I.T.* v. *Tejbhandas Motumal 1936 I.T.R. 227)*.

Since the provisions of the Code of Civil procedure relating to appeal to the Appellate division are, so far as may be applicable in the case of appeals under sub-section (2) of this section, they shall also apply to appeals from decrees of the High Court Division under sub-section (1) of this section.

Appeal to the Appellate Division by special leave.–If the High Court Division refuses to certify a case to be a fit one for appeal to the Appellate Division under this section, an application may be made to the Appellate Division for special leave to appeal from the decision of the High Court Division in special circumstances. The Appellate Division may grant to the Commissioner special leave to appeal on his undertaking to pay the costs of the assessee in any event *(C.I.T.* v. *Arunachalam Chettiar [1953] 23 I.T.R. 180, 185 (S.C. of India))*.