CHAPTER II
ADMINISTRATION

Sec. 3 Income-tax authorities.–There shall be the following classes of income tax authorities for the purposes of this Ordinance, namely:-

(1) The National Board of Revenue,
(2) Directors-General of Inspection (taxes),
(2A) Commissioner of Taxes (Appeals),
(2B) Commissioner of Taxes (large Tax payer Unit)
(3) Commissioners of Taxes,
(3A) Additional Commissioners of Taxes who may be either Appellate Additional Commissioner of Taxes or Inspecting Additional Commissioner of Taxes,
(4) Joint Commissioner of Taxes who may be either Appellate Joint Commissioners of taxes or Inspecting Joint commissioner of Taxes,
(5) Deputy Commissioners of Taxes,
(6) Tax Recovery Officers,
(7) Assistant Commissioners of Taxes,
(8) Extra Assistant Commissioners of Taxes; and
(9) Inspectors of Taxes.

Sec. 4. Appointment of income tax authorities.–(1) Subject to the rules and orders of the Government regulating the terms and conditions of service of persons in public services and post, appointment of income tax authorities shall be made in accordance with the provisions of this Ordinance.

(2) The Board may appoint as many Directors-General of Inspection, Commissioners (Appeals), Commissioners, Joint Commissioners of Taxes, Deputy Commissioners of Taxes, Tax Recovery Officers and Assistant Commissioners of Taxes and such other executive or ministerial officers and staff as it may think fit.

(3) Subject to such orders of instructions as the Board may, from time to time, issue in this behalf, any other income tax authority may appoint any income tax authority subordinate thereto and such other executive or ministerial officers and staff as may be necessary for assistance in the execution or its functions.

Sec. 4(A): Delegation of powers.–The Board may, by notification in the official Gazette, and subject to such limitations or conditions, if any, as may be specified therein, empower by name or designation,–

(a) any Inspecting Additional Commissioner of Taxes to exercise the powers of a Commissioner of Taxes, and

(b) any appellate additional Commissioner of taxes to exercise the powers of a Commissioner of Taxes (Appeal).

Sec. 5: Subordination and control of income tax authorities.–(1) The Directors-General of Inspection, Commissioners (Appeals) and Commissioners shall be subordinate to the Board,

(2) The Additional Commissioners of Taxes, Joint Commissioners of Taxes, Deputy Commissioners of Taxes and Inspectors shall be subordinate to the Commissioners or the Commissioners (Appeals), as the case may be, within whose jurisdiction they are appointed to perform their function:

Provided that no order, direction or instruction shall be given so as to interfere with the discretion of the Appellate Joint Commissioners or the Commissioners (Appeals), in the exercise of their appellate functions.

(3) The Deputy Commissioners of Taxes and Inspectors shall be subordinate to the Inspecting Joint Commissioner within whose jurisdiction they perform their functions.

(4) The Inspectors shall be subordinate to the Deputy Commissioners of Taxes within whose jurisdiction they perform their functions.

Sec. 6: Jurisdiction of income tax authorities.–(1) Subject to the provisions of this Ordinance,

(aa) the Director-General of Inspection shall perform the following functions, namely:-

(i) to carry out inspection of income tax cases;

(ii) investigate or cause investigation to be carried out in respect of cases involving leakage of revenue or evasion of taxes;

(iii) carry out audit of cases of offices involving income tax cases only;

(iv) furnish annual report about the working of income tax offices dealing with revenue matters to the Board by

the thirty first day of December following the end of the financial year to which it relates; and

(v) such other functions as may be assigned to them by the Board.

(b) the Commissioners or the Commissioner (Appeals) and the Appellate Joint Commissioners shall perform their functions in respect of such areas, or such persons or classes of persons, or such cases or classes of cases, or such incomes or classes of incomes, as the Board may assign to them;

(bb) the Commissioner (Large Tax payer unit) shall perform his functions in respect of such areas, or such persons or classes of persons, or such cases or classes of cases or such incomes or classes of incomes, as the Board may assign to him.

(c) the Inspecting Joint Commissioners and the Deputy Commissioners of Taxes shall perform their functions in respect of such areas, or such persons or classes of persons, or such cases or classes of cases, or such incomes or classes of incomes as the Commissioner to whom they are subordinate may assign to them; and

(d) other income tax authorities shall perform such functions as may be assigned to them by the income tax authority to whom they are subordinate.

(2) (a) Any area or other jurisdiction or function assigned to an income tax authority under sub-section (1) may be modified or varied, or may be transferred to any other income tax authority with respect to areas, persons or classes of persons, or cases or classes of cases, or proceeding or classes of proceedings;

(b) any such transfer as is referred to in clause (a) may be made at any stage or the proceedings and further proceedings may be commenced from the stage at which such transfer takes place.

(3) Where more income tax authorities than one have been assigned the same functions in respect of any area, or persons or classes of persons, or cases or classes of cases, or incomes or classes of incomes,

they shall perform those functions in accordance with such allocation or distribution of work as the authority assigning the functions may make.

(4) The powers of the Board, Commissioners and Deputy Commissioners of Taxes, to assign any case to any authority, or to transfer any case from one authority to another, or to perform any function or functions under this section, shall include the power in respect of all or any proceedings relating to such case; and except as provided in sub-section (5), no such assignment, transfer or performance of functions shall be called in question by or before any court or other authority.

(5) Any person aggrieved by any order passed under this section may, within thirty days of such order, make a representation–

(a) to the Inspecting Joint Commissioner if the order was passed by a Deputy Commissioner of Taxes;

(b) to the Commissioner, the Commissioners (Appeals), if the order was passed by an Inspecting Joint Commissioner; and

(c) to the Board if the order was passed by a Commissioner; and any order passed on such representation shall be final.

Sec.7: Exercise of jurisdiction by successor.–Where, in respect of any proceeding under this Ordinance, an income tax authority is succeeded by another, the income tax authority so succeeding may continue the proceeding from the stage at which it was left by his predecessor.

Sec.8: Officers, etc. to follow instructions of the Board.–All officers and other persons engaged in the performance of any functions under this ordinance shall, in the matter of discharging those functions, observe and follow such orders, directions or instructions as the Board may issue form time to time:

Provided that no order, direction or instruction shall be given so as to interfere with the discretion of the Appellate Joint Commissioner or the Commissioner (Appeals) in the exercise of their appellate functions.

Sec.9: Guidance to the Deputy Commissioner of Taxes, etc.–In the course of any proceedings under this ordinance, the Deputy Commissioner to Taxes may be assisted, guided or instructed by any income tax authority to whom he is subordinate or any other person authorised in this behalf by the Board.

Income-tax Authorities–Secs. 3-5:

A. Appointment and control.–The Income tax authorities may be classified into two groups-(i) Executive and (ii) judicial, the former generally looks after the administration, which includes the National Board of Revenue; Directors-General of Inspection (Taxes); Commissioner of Taxes (Large Tax payer units); Commissioners of Taxes; Inspecting Additional Commissioner of Taxes; which includes a person appointed to hold current charge of an Inspecting Joint Commissioner of Taxes; Inspecting Joint Commissioner of Taxes, Deputy Commissioner of Taxes; Taxes Recovery Officers; Assistant Commissioner of Taxes; which includes a person appointed to hold current charge of Extra-Assistant Commissioner of Taxes; Extra-Assistant Commissioner of Taxes and Inspectors of Taxes. The latter group exercises judicial function which includes Commissioner of Taxes (Appeals); Appellate Additional Commissioner of Taxes; Appellate Joint Commissioner of Taxes. The Commissioner of Taxes have the quasi-judicial power, Deputy Commissioner of Taxes may also be said to be quasi-judicial officer. The Appellate Tribunal is not an Income-tax authority which is dealt in Sec. 158.

National Board of Revenue.–The highest executive Authority is the National Board of Revenue. It is a statutory body appointed by the Government under the National Board of Revenue Order, 1972 (P.O. No. 76 of 1972). Its powers of administration, supervision and control extend over the whole Department. It is authorised to make rules but is not empowered to give interpretation of any word used in a section–it cannot impose on tax payer a burden than he is in statute (1985 BTD 131 (Trb.)); and to issue directions and instructions to all officers of the Department for smooth running of administration, with one exception – it cannot interfere with the discretion of Commissioners of Taxes (Appeals), Appellate Additional Commissioners of Taxes and Appellate Joint Commissioner of Taxes. The judicial discretion vested in the Commissioner of Taxes in exercise of his revisional powers under Sec. 121 cannot also be controlled by the Board–*(C.I.T.* v. *Lala Rajshwar Parsad [1956] 29 I.T.R. 792).*

The main powers and functions of Board are set in the following sections-Sec. 2(20)(c)–(to declare any foreign unincorporated association a company); Sec. 2(35)(e)–(to determine a commercial year as income year); Sec. 4A–[to delegate powers to the Inspecting Additional Commissioner of Taxes to exercise the powers of a Commissioner of taxes and to the Appellate Additional Commissioner of Taxes to exercise the powers of a Commissioner of Taxes (Appeals)]; Sec. 6 – (to determine the functions of the Directors-General of Inspection and jurisdiction of the Income-tax, Authorities; Sec. 8–(to issue orders, directions or instructions to all officers and other persons engaged in the performance of any functions under this Ordinance; Sec. 173A(3) (to determine place of assessment when jurisdiction of an assessee falls in more than one Zone; Sec. 59 (to direct to make payment of tax deducted at source within time specified by it; Sec. 174 (to recognise and authorise Chartered Accountant and cost and management accountant for appearance as authorised representative).

B. **Jurisdiction.–Sec. 6**–*(Jurisdiction of Income-tax Authorities):*

Sec. 6(1)(aa) –Directors-General of Inspection.–The Directors-General of Inspection which include a person appointed to be Addl. Director-General of Inspection (Taxes), Deputy Director-General of Inspection (Taxes) or an Assistant Director General of Inspection (Taxes) shall be appointed by the Board subject to the rules and orders of the Government regulating the terms and conditions of service of persons in public service. They are subject to control by the Board to which they are subordinate (Sec. 5). They will perform such function as will be assigned to them by the Board. Their main function is to conduct inspection. Their powers of inquiry and to cause production of documents and power to search and seize have been given in secs. 116 and 117.

6(1)(b) –Commissioners of Taxes and Commissioners of Taxes (Large Tax payers units) are appointed by the Board to whom they are subordinate. A Commissioner may be appointed to head the income tax administration of any specified area or he may be appointed without any specified territorial jurisdiction, to deal with such persons, incomes or cases or classes of persons, income or cases as the Board may direct. The Commissioner being the head of the income-tax Department of a zone or other area entrusted to him, exercises control over the Inspecting Additional Commissioner, Inspecting Joint Commissioners and Deputy Commissioner of Taxes and is responsible for the efficient administration in all respects within his own jurisdiction.

Commissioner's power to allocate work and transfer cases-Sec. 6(1)(c) and sub-section 4. –The Inspecting Joint commissioner of Taxes and the Deputy Commissioner of Taxes shall perform their functions in respect of such area or such persons or classes of cases or such incomes or classes of incomes as the Commissioner to whom they are subordinate directs, –6(1)(c). Such jurisdiction or function assigned to an income-tax authority as given in Sec. 6(1) may be modified or varied or may be transferred to any other authority–Sec. 6(2) and any such transfer may be made at any stage of the proceedings and further proceedings may be commenced from the stages at which such transfer takes place. Such power to allocate work should not be read as a power to allocate or distribute certain work only once. His power is not exhausted when he once allocates the work to an authority. The power to assign any case to any authority, or to transfer any case from one authority to another should not be called in question by or before any court or other authority subject to sub-sec. (5) – Sec. 6(4).

Sec. 6(5).–Any person calling in question against the order made under sec. 6(4) may make a representation within 30 days of such order (I) to the Inspecting Joint Commissioner, if the order was passed by the Deputy Commissioner of Taxes, (II) to the Commissioner, Commissioner (Appl.) if the order was passed by an Inspecting Joint Commissioner; and (iii) to the Board, if the order was passed by a Commissioner, and the order passed on such representation shall be final.

Some of the important powers of the Commissioner (Taxes) are the following–(i) he has the power of enquiry and cause production of documents and

make search and seizure of the books of accounts of a person if he feels necessary to whom summons or a notice under this Ordinance has been or might be issued (Sec. 116 & 117); (ii) he can revise any order passed by any authority subordinate to him (Sec. 121); (iii) He may assume the same powers, as are vested in a court under the Civil Procedure code when trying a suit in certain matters; (iv) He is empowered to direct the Deputy Commissioner of Taxes to appeal to the Appellate Tribunal from an order passed by the Appellate Joint or Additional Commissioner of Taxes or Commissioners (Appeals) (Sec. 158); (iv) on behalf of the Revenue he can ask for a reference to the Supreme Court (High Court Division) from an order of the Appellate Tribunal (Sec. 160); (vi) he has the power to compound offences after the institution of any proceeding or prosecution for an offence (Sec. 170). Although he has to obey the orders, instructions and directions of the Board but judicial discretion vested in him by statute in the exercise of his revisional powers under Sec. 121 cannot be controlled by any orders, instructions or directions of the Board.

Sec. 6(1)(b) –Commissioners (Appeals), Appellate Additional Commissioners of Taxes and Appellate Joint Commissioners of Taxes.–They are appointed by the Board. They are under the direct control of the Board, though their discretion in the exercise of their appellate functions cannot be interfered with by the Board–Proviso to sub-section (2) of Sec. 5. They should not seek the advice of the Board on any point arising in cases before them and that their promotion and prospects will not depend on whether their decisions go against the Department. They may be directed by the Board to perform their functions in respect of specified areas or persons or classes of persons or income or classes of income. An appeal lies to the Appellate Joint Commissioner of Taxes which includes Appellate Additional Commissioner under Sec. 153(1) against an order of the Deputy Commissioner of Taxes in respect of an assessee not being a company; and any assessee, being a company aggrieved by any order of the Deputy Commissioner of Taxes or any assessee aggrieved by the order of an Inspecting Joint Commissioner of Taxes may prefer an appeal to the Commissioner (Appeals) against such order–Sec. 153(1A).

The main functions and powers of the Appellate Joint Commissioner and Commissioner (Appeal) are enumerated in Sec. 155.

Sec. 6(1)(bb). –The Commissioner (Large Taxpayer Unit) shall perform his functions in respect of such areas, or such persons or classes of persons, or such cases or classes of cases or such incomes or classes of incomes, as the Board may assign to him.

Sec. 6(1)(c) –Inspecting Joint/Addl. Commissioner of Taxes (which means a person appointed to be an Inspecting Joint Commissioner of Taxes under section 3, and includes an Inspecting Additional Commissioner of Taxes and also a person appointed to hold current charge of an Inspecting Joint Commissioner of Taxes) (sub-sec. 2(36).–They are appointed by the Board and subordinate to the Commissioner of Taxes within whose jurisdiction they perform their functions, their functions being in respect of such areas or of such persons or classes of persons or of such incomes or classes of income as the Commissioner

directs. In respect of any specified case or classes of cases or persons or classes of persons within his jurisdiction the Inspecting Joint Commissioner may be directed by the Commissioner, with the prior approval of the Board, to exercise the powers of the Deputy Commissioner of Taxes. The Additional Commissioner of Taxes may also be directed to exercise the functions of the Inspecting Joint Commissioner of Taxes–(Sec. 10).

The main function of the Inspecting Joint Commissioner of Taxes which includes Additional Commissioner of Taxes is to supervise the work of the Deputy Commissioner of Taxes particularly to detect the tax evasion in his area. He issues instructions with regard to the assessment work and the general administration and examines the technical accuracy of the assessments of the Deputy Commissioner of Taxes. No penalty excepting penalty for non-submission of return under section 124 can be imposed by the Deputy Commissioner of Taxes without his approval (Sec. 131). The discretion of the Deputy Commissioner of Taxes to make assessment according to his judgment cannot be fettered and dominated by the Inspecting Joint Commissioner of Taxes. The Deputy Commissioner cannot be directed to make a "draft assessment order and get it approved by the Inspecting Joint Commissioner before completing the assessment". In the case of *Sewa Singh Gill* v. *C.I.T.* it was held that "the direction of the Commissioner to make a draft assessment order and submit it to the Inspecting Assistant Commissioner for approval before the assessment was finalised was illegal and unwarranted and the so-called draft assessment order even if unsigned must be regarded as the final assessment of the Income-tax Officer".

Some of his other powers are: (i) he has the powers to inspect register of Companies (Sec. 114); (ii) he has the powers of enquiry and cause production of documents in respect of any person liable to tax under this Ordinance; (iii) he can revise assessment of the Deputy Commissioner of Taxes when it is erroneous and prejudicial to the interest of Revenue (Sec. 120); (iv) he may assume the same powers as are vested in a Court under the Civil Procedure Code (Sec. 122).

Sec. 6(1)(c): Deputy Commissioner of Taxes.–Deputy Commissioner of Taxes which includes Assistant Commissioner and Extra Assistant Commissioner of Taxes and Tax Recovery Officer (Sec. 2(23) is the most important authority and the administration of law is vested primarily in the hands of the Deputy Commissioner of Taxes. He has both executive and judicial powers. He is subordinate to the Commissioner of Taxes who may issue instructions for the guidance of the Deputy Commissioner of Taxes in the matter of assessment. He will perform his functions in respect of specified areas or in respect of specified persons or specified incomes as the Commissioner, to whom he is subordinate directs.

Guidance to the Deputy Commissioner of Taxes Sec. 9.–In the course of any proceedings under this Ordinance he may be assisted, guided or instructed by any income tax authority to whom he is subordinate or any other person authorised by the Board for this purpose. He has large discretionary powers and his discretion to make an assessment according to his judgment cannot be interfered with and dominated by any authority. An appeal lies against the assessment made by him and several of his

other orders and decisions to the Appellate Joint/Addl. Commissioner of Taxes (Sec. 153) and Commissioner (Appeals).

Deputy Commissioner of Taxes is the Authority who initiates the assessment. He calls for a return from assessees within his jurisdiction and makes the assessment under Chapter-IX and thereafter, issues notices for collection of tax. For the purpose of assessment he issues notices, examines evidences and assesses income, as he is the actual assessor of income. In his work he is assisted by his subordinate officers, like inspectors in making enquires and outdoor inspection so as to discover new assessees or new sources of income of the existing assessees.

Some of his other functions and powers besides assessment of income and determination of tax are –(i) he will send notice of demand in consequence of the assessment of income to the assessee or forward a certificate to the Tax Recovery Officer for collection of arrear demand (Sec. 135); (ii) he may direct to pay penalty for default in payment of tax (Sec. 137); (iii) like Inspecting Joint Commissioner or Commissioner may call for information from the firm, Hindu undivided family and a trustee on behalf of a person about the names and addresses of the partners, names and addresses of the managers and names and addresses of the persons for whom he is the trustee respectively; ask any assessee to furnish the names and addresses of persons to whom he has paid rent, brokerage etc. of a sum exceeding three thousand taka; and from the dealer or broker of the Stock Exchange about the particulars of payments or receipts or from banks about certain information subject to prior approval of the Commissioner (Sec. 113); (iv) he may inspect registers of company like Inspecting Joint Commissioner (Sec. 114) and for the purpose of this Ordinance like Joint Commissioner and Commissioner he may assume the same powers as are vested in the Code of Civil Procedure (Sec. 122). In this section he will act in a quasijudicial capacity so as to conform to the more elementary rules of judicial procedure –*Dinshah Darashad Shrof* v. *C.I.T. 1943 I.T.R. 172, 177.*

Jurisdiction and place of assessment.–The Deputy Commissioner of Taxes will perform his functions in respect of specified areas and specified cases as the Commissioner directs. What will be the place of assessment that has been dealt in general in section 173A which provides the limits of the area within which he has jurisdiction–

(a) in respect of any assessee carrying on business or profession, if the place at which he carries it on is situated within the area, or where it is carried on in more places than one, if the principal place of business or profession is situated within the area.

(b) in respect of any other person residing within the area.

The section (sec. 173A) applies only where the Deputy Commissioner of Taxes has been directed under section 6(1)(c) to perform his functions in respect of a specified area. It has no application to cases where the allocation of work to the Deputy Commissioner is not with the reference to any area but with reference to persons or classes of persons or incomes or classes of incomes or with reference to cases where the Commissioner in exercise of his power under Sec. 6(4) transfers a

case from one Deputy Commissioner to another. In such cases the Deputy Commissioner would have jurisdiction irrespective of the question whether the assessee carries on business or resides within his jurisdiction.

The principal place of business is the place from which the business is directed and controlled. The place where goods are manufactured or where even the bulk of the practical business is conducted is not necessarily the principal place of business–*Dina Nath Hemraj* v. *C.I.T. to I.T.C. 304, 315.*

The section (Sec. 6) refers to the jurisdiction of the income-tax authorities and not "place of assessment" as referred to in the Income-tax Act, 1922 and the distinction between the term 'jurisdiction' and 'place of assessment' which is dealt in Sec. 173A is of much significance. The distinction between want of inherent jurisdiction, i.e. inherent incompetency on the one hand, and irregular exercise or assumption of jurisdiction as is in Civil Procedure Code is to be noted. An assessee may waive objection to irregular exercise or assumption of jurisdiction; but there can be no question of waiver where there is a want of 'inherent' jurisdiction because in such a case the order must be treated as a nullity. Under the Ordinance, if an order is made by any officer other than the officer entitled to exercise jurisdiction, it would amount merely to irregular exercise or assumption of jurisdiction; and if the assessee has not objected within the time prescribed by sub-sec. (5) of the Section, he would be deemed to have waived his objection and the order would be valid.

Sec. 6(4) –Transfer of cases from one Deputy Commissioner of Taxes or from one authority to another.–The Board and the Commissioner are the authorities who are empowered to transfer any case at any stage of the proceedings from one Deputy Commissioner of Taxes to another, or from one income tax authority to another. But while a Commissioner can transfer a case only from one Deputy Commissioner subordinate to him to another, the Board can transfer any case from any Deputy Commissioner in the whole of Bangladesh to any other Deputy Commissioner. In that case on such a transfer it is not necessary to reissue any notice already issued by the Deputy Commissioner from whom the case is transferred–*Gaya Ram Gabbu Lal* v. *C.I.T. [1951] 19 I.T.R. 114*, and the Deputy Commissioner to whom the case is transferred is entitled to proceed from the stage at which he receives the case from his predecessor–*Kamakhya Narayan Singh* v. *C.I.T. [1948] I.T.R. 68.* When the Board transfers the case from one Deputy Commissioner to another it is necessary that such transfer may properly be made by the Board first assigning the case to a particular Commissioner and then Commissioner assigning the case to the Deputy Commissioner within his jurisdiction. Sub-sec. (4).

In a case returns were submitted and assessment proceedings were initiated by the I.T.O. who were regularly assessing. Subsequently directive was given by the C.I.T. transferring the case to other I.T.O. who had a partial jurisdiction. The assessee objected to the assessment by the transferee I.T.O. but his objection was not referred to the C.I.T. Held, that the assessment made by the transferee I.T.O. is an irregular assessment and the assessment was set-aside with direction to make a fresh assessment–*Mahalliram Ramnivanjan Das* v. *C.I.T. (Patna H.C.) 1991 BTD XIX.*

Concurrent jurisdiction.–Notwithstanding the general rule that a person should be assessed by the Deputy Commissioner of Taxes of the area in which the person carries on business or resides, every Deputy Commissioner shall have the powers assigned to him under this Ordinance in respect of any income accruing or arising or received within the area for which he is appointed. Thus though the total income of the assessee must be made at the assessee's principal place of business, it would be open to the Deputy Commissioner having the jurisdiction over the branch office to assess income received by the branch office *(Sarupchand & Hukumchand* v. *Union of India [1953] 23 I.T.R. 382, 409)* subject to the rule that two assessments cannot be made at different places upon the same person in respect of the same income – *Ram Khelwan Ugamlal* v. *C.I.T. 3 I.T.C. 225, 234.*

The Deputy Commissioner having jurisdiction at the assessee's principal place of business would have the power to call for a return of the assessee's total income which would include the income of all the branches. He can call for the accounts pertaining to any branch office even if independent inquiries have already been made and the accounts have been examined by the Deputy Commissioner having jurisdiction at the branch office–*Lachhman Das Babu Ram* v. *C.I.T. 4 I.T.C. 61.* It would be open to the Deputy Commissioner having jurisdiction at the branch office to frame an estimate of the profits of that branch and to send that estimate to the assessing officer at the tax-payer's principal place of business. But the assessing officer at the principal place of business is entitled to determine the income of the branch office himself and is not bound by the report or estimate submitted by, nor is he bound to refer the matter back to the Deputy Commissioner exercising jurisdiction at the place where the branch office is situate–*Lachhman Das Babu Ram* v. *C.I.T. 4 I.T.C. 61.*

It, therefore, appears that where two or more Deputy Commissioners have territorial jurisdiction in respect of the same income, they exercise concurrent jurisdiction in the matter of issuing notice to assessee (Sarupchand and Hukumchand) and where notice have been issued by one officer, it is unnecessary for the other officer to issue the same notice again–*Tarak Nath Bagchi* v. *C.I.T. [1946] I.T.R. 319.* Where two Deputy Commissioners have concurrent jurisdiction in respect of a given case, the case may be validly transferred from one Deputy Commissioner to the other–*Tarak Nath Bagchi* v. *C.I.T.*.

Assessment on partner.–A partner may be assessed by the Deputy Commissioner having jurisdiction over the place where the partnership carries on business, even if the partner takes no active part in the partnership business. This has been established by the decision of the Privy Council in *Wallace Bros. Co. Ltd.* v. *C.I.T. 1948 I.T.R. 240, 247.* "The essence of partnership is that each of the partners is the agent of the others for the purpose of carrying on the partnership business. Failure by any one partner to take part in the management of the business does not therefore have the result that he is not carrying on business as a partner."

Representation against jurisdiction–sec. 6(5).–Where a person has been aggrieved by the order of jurisdiction under section 6 he may make a representation against such order within 30 days of such order and if the order is of Deputy

Commissioner the representation is to be made to the Inspecting Joint Commissioner and if it is against the order of the Inspecting Joint Commissioner it is to be made to the Commissioner or Commissioner (Appeals) and if it is against the order of the Commissioner the representation to be made to the Board.

If the jurisdiction of the Deputy Commissioner is called in question it must be ensured that the objection is raised within the prescribed time and before the assessment is completed. Where the objection is sent by post it must reach the proper authority within the prescribed period–*(Vishwanath Gopal Oil Mill* v. *Prashar [1957] 32 I.T.R. 344)*. The assessee may call in question the Deputy Commissioner's jurisdiction on any ground, such as, he may call it in question the order of transfer of a case from one Deputy Commissioner to another or it is an order allocating work to different Deputy Commissioners or that another Deputy Commissioner in the same area has jurisdiction over the assessee's case or on the ground that having regard to the assessee's place of business or residence, the Deputy Commissioner of another area has jurisdiction over his case.

If such a question is raised as to the jurisdiction of the Deputy Commissioner and if the Deputy Commissioner does not agree with the assessee he will have to refer the matter to the Commissioner to whom he is subordinate and it is the Commissioner who assigns jurisdiction to the officers subordinate to him, as provided for in Sec. 173A(5). The assessee has been given opportunity of representing his views before the question was decided–Proviso to Sec. 173A(3). If the question is one relating to areas within the jurisdiction of different Commissioners, the question would be decided by different Commissioners concerned, if they are not in agreement, by the Board–Sec. 173A(3). In no case the Deputy Commissioner can decide the question himself. In the case of *(Mahaliram Ramniranjan Das* v. *C.I.T.)* where an objection was raised by the assessee to the assessment by a transferee I.T.O. and the case was not a case of total lack of jurisdiction, the I.T.O. without refering the matter to the Commissioner for deciding the matter, himself completed the assessment. In that case assessment was set-aside and fresh assessment was directed by the Patna High Court - 1991 BTD XIX 199.

The question as to whether a D.C.T. has jurisdiction within Sec. 6 to assess any person, cannot be the subject matter of appeal–the Appellate Authorities are not competent to decide the question as to the jurisdiction of the Deputy Commissioner of Taxes such a question is to be decided by the Commissioner.

Exercise of jurisdiction by successor.–Sec. 7: This section provides that whenever during the pendency of any proceeding a Deputy Commissioner is succeeded by another, the successor may continue the proceeding from the stage at which the proceeding was left by his predecessor. In such a case the assessee has the right to demand that before the proceeding is so continued, (i) the previous proceeding or any part thereof should be reopened, that is, a witness should be examined afresh, and (ii) the assessee should be reheard before the assessment is passed against him–*(Kanailal Galoki* v. *C.I.T. [1963] 48 I.T.R. 262)*. In such reopening the proceeding or in rehearing the assessee the time taken has been excluded in computing the period of limitation for assessment in the Indian Income-tax Act, 1961 but there is no such provision in the Income-tax Ordinance, 1984.

Officers to follow instruction of the Board-Sec. 8.–(See *ante* notes on National Board of Revenue).

Inspectors of Taxes.–They are appointed by the Board or subject to the orders and instructions of the Board by any other authority for assistance or execution of its functions. They are subordinate to the Inspecting Joint Commissioner of Taxes [Sec. 5(3)] as well as to the Deputy Commissioner of Taxes [Sec. 5(4)] within whose jurisdictions they perform their functions.

The duties of the Inspectors are generally (i) outdoor inspection and survey in order to find new assessees, (ii) recovery of outstanding demand from defaulter assessees, and (iii) enquires regarding the new sources of income of the existing assessees.

Sec.10: Exercise of assessment functions by the Inspecting Joint Commissioners and the Inspecting Additional Commissioners.– The Commissioner may, with prior approval of the Board, by general or a special order in writing, direct that in respect of all or any proceedings relating to specified cases or classes of cases or specified persons or classes of persons within his jurisdiction, the powers and functions of the Deputy Commissioner of Taxes, the Inspecting Joint Commissioner, the Inspecting Additional Commissioner and the Commissioner under this Ordinance shall be exercised by the Inspecting Joint Commissioner, the Inspecting Additional Commissioner, the Commissioner and the Board, respectively and for the purpose of any proceedings in respect of such cases or persons reference in this Ordinance or the rules made thereunder to the Deputy Commissioner of Taxes, the Inspecting Joint Commissioner the Inspecting Additional Commissioner, or the Commissioner shall be deemed to be references to the Inspecting Joint Commissioner, the Inspecting Additional Commissioner, the Commissioner and the Board, respectively.

CHAPTER III
TAXES APPELLATE TRIBUNAL

Sec. 11. Establishment of Appellate Tribunal.–(1) For the purpose of exercising the functions of the Appellate Tribunal under this Ordinance, the Government shall establish a Taxes Appellate Tribunal consisting of a President and such other judicial and accountant members as the Government may, from time to time, appoint.

(2) A judicial member shall be a person who is or has been a District Judge or who has practiced as an advocate in a court not lower than that of a District and Sessions Judge for a period of not less than ten years.

(3) An accountant member shall be a person who is a Commissioner of Taxes or who has practiced professionally for a period of not less than eight years as a chartered accountant or cost and management accountant or who has practised professionally for a period of not less than twenty years as an income tax practitioner within the meaning of section 174(2)(f) or an advocate who has practised professionally in any taxes office for a period of not less than ten years.

(4) The Government shall appoint one of the members a judicial member of the Appellate Tribunal to be the president thereof.

Explanation.–For the purpose of this section, period of practice as chartered accountant shall include any period of practice as chartered accountant within the meaning of the Chartered Accountants Ordinance, 1961 (X of 1961) or as registered accountant enrolled on the register of accountants under the Auditor's Certificate Rules, 1950.

Sec. 12. Exercise of power of the Tribunal by Benches.–(1) Unless the president in any particular case or class of cases otherwise directs, the powers and functions of the Appellate Tribunal shall be exercised by Benches of the Appellate Tribunal, hereinafter referred to as Bench, to be constituted by the President.

(2) A Bench shall be so constituted that it has not less than two members and that there is equality in number of judicial members and accountant members.

Sec. 13: Decision of Bench.–(1) Subject to the provisions of sub-sections (2) and (3), the decision of bench in any case or on any point shall be given in accordance with the opinion of the majority of its members.

(2) Any point on which the members of a Bench are equally divided shall be stated in writing and shall be referred by the president to one or more other members of the Appellate Tribunal for hearing and the Point shall be decided according to the majority of the members of the Appellate Tribunal who have heard it including those who first heard it.

(3) Where there are only two members of the Appellate Tribunal and they differ in any case, the Government may appoint an additional member of the Appellate Tribunal for the purpose of hearing the case; and the decision of the case shall be given in accordance with the opinion of the majority of the members of the Appellate Tribunal as constituted with such additional member.

Sec. 14: Exercise of power by one member.–Notwithstanding anything contained in section 12, the Government may direct that the powers and functions of the Appellate Tribunal shall be exercised by any one of its members, or by two or more members jointly or severally.

Sec. 15: Regulation of Procedure.–Subject to the provisions of this Ordinance, the Appellate Tribunal shall regulate its own procedure and the procedure of its Benches in matters arising out of the discharge of its functions including the places at which a Bench shall hold its sittings.

Taxes Appellate Tribunal–Secs. 11-15:

Constitution of the Appellate Tribunal.–The Appellate Tribunal is the final fact-finding authority. These sections mainly lay down the constitution of the Appellate Tribunal and how the decision of the Tribunal will be given by the benches of the Tribunal. An appeal lies to the Tribunal under section 158 against an order of the Appellate Joint Commissioner or the Commissioner (Appeals). Since the Tribunal is the final fact finding authority a reference to the High Court Division under Section 160 lies on any question of law arising out of any order of the Tribunal. The powers and functions of the Tribunal are set out in Secs. 158 and 159.

CHAPTER IV
CHARGE OF INCOME TAX

Sec. 16: Charge of Income-tax.–(1) Where an Act of Parliament provides that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall, subject to the provisions of that Act, be charged, levied, paid and collected in accordance with the provisions of this Ordinance in respect of the total income of the income year or income years, as the case may be, of every person:

Provided that where under the provisions of this Ordinance income tax is to be charged in respect of the income of a period other than the income year, income tax shall be charged, levied, paid and collected accordingly.

(2) Where under the provisions of this Ordinance income tax is to be deducted at source, or paid or collected in advance, it shall be deducted, paid and collected accordingly.

(3) Notwithstanding anything contained in sub-section (1), income tax shall be charged at the rates specified in the Second Schedule in respect of–

(i) a non-resident person, not being a company;
(ii) any income classifiable under the head "Capital gains"; and
(iii) any income by way of "winnings" referred to in section 19(13)

Sec. 16: The charging Section.–This section deals with income-tax. The charging section for surcharge is Sec. 16A. This section imposes income-tax upon a person in respect of his income. "Income-tax is a tax on a person in relation to his income ... The tax is not made a charge on the income upon which it is "levied" – as observed in the case of *The Patiala State Bank–1941 I.T.R. 95 112-3, affirmed 1943 I.T.R. 617 (P.C.).*

The liability to tax arises by virtue of the charging section, the liability to tax does not depend on assessment, the assessment order only quantifies the liability which is finally created by the charging section.

Basic Principles.–From an analysis of the charging section the following basic principles come into view:

(A) Income-tax is to be charged at the rate or states fixed for the year by the annual Finance Act.

(B) The charge is on every person which includes the assessable entities as enumerated in Sec. 2(46).

(C) The income taxed is that of the income year and not of the assessment year.

(D) Tax is levied on the total income of the assessable entity computed in the manner as laid down in specified sections and subject to the provisions of this Ordinance.

A. Rates of Tax fixed by the Finance Act.–The purpose of this section is to charge income-tax at the current rate and the rate of tax must be related to the total income of the income year. This Ordinance, although a permanent enactment but the liability to tax does not arise until the annual Finance Act is passed–*(Kamakhya Narayan Singh* v. *C.I.T. 1946 I.T.R. 685)*. It has been observed in the case of *(Maharaja of Pithapuram* v. *C.I.T. 1945 I.T.R. 221, 223-4)* that this Ordinance (Act) "has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act", but Sec. 183 provides that if on the first day of July in any year provision has not been made by any Act for the charging of income-tax for that year, the provision in force in the preceding year or the provision proposed in the bill then before Parliament, whichever is more favourable to the assessee, shall apply until the new provision becomes effective.

B. Units of Assessments.–Tax is charged on every person which under Sec. 2(46) includes (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an Association of Persons, (vi) a local Authority, and (vii) every other artificial juridical person.

C. Tax is charged on income of the Income year.–Under this section the subject of charge is the income of the income year and not the income of the assessment year, that is, "tax is assessed and paid in the next succeeding year upon the results of the year before"–*(Indian Iron and Steel Co. Ltd.* v. *C.I.T. 1943 I.T.R. 328)*. The Proviso to sub-sec. (1) refers to exceptional cases in which the income of the assessment year may be taxed in that very assessment year, such as, the income of a discontinued business under Sec. 89; income of person leaving Bangladesh under Sec. 91. There are, however, certain exceptions to the general rule, e.g. deduction of tax at source which is effected during the income year.

Source of income need not necessarily exist in the assessment year.–Since under this Ordinance tax is levied on the actual income of the income year, the facts must be taken as they existed during the income year, therefore, it is immaterial whether the source of income is actually existing or it is defunct in the assessment year–*(Muthappa Chettiar* v. *C.I.T. 1945 I.T.R. 311)*.

D. Each year is a separate, self-contained period.–Each year is a self-contained period. For the purpose of assessment each "income year is a distinct unit of time and the profit made or the losses incurred before or after the relevant income year are immaterial in assessing the profits of that year–*(Sir Kikabhai Premchand* v. *C.I.T. [1953] 24 I.T.R. 506 (S.C. of India)* and other cases unless there is a statutory

provision to the contrary, e.g. in Sec. 38 which allows business losses to be carried forward. Expenses and losses claimed should have been incurred in the accounting year. Facts of the previous years cannot be the deciding factors in arriving at the income of the subsequent year, though assistance may be sought from the previous history of the case. The assessment of income-tax for a particular year based on the income on the income year is, therefore, valid even though the source of the income in respect of which assessment is made has become non-existent in that particular assessment year. The mere fact that certain income has not suffered tax in this relevant assessment year, because of a device adopted by the assessee or otherwise, would not enable the Department to assess the same as the income of the subsequent year when the mistake becomes apparent–*(Jagannath Ram Dayal* v. *C.I.T. 1950 I.T.R. 375)*. However in this case reassessment u/s. 93 may be made.

Law to be applied is that in force in the assessment year.–Though the subject of the charge is the income of the income year, the law to be applied is that in force in the assessment year unless otherwise stated or implied–*(C.I.T.* v. *Isthmian Steamship Liner [1951] 20 I.T.R. 572, 577 (S.C. of India))* and any amendment made which is in force at the beginning of the relevant assessment year must govern the case though the amendment is made after the income under assessment is earned –*(C.I.T.* v. *Sind Hindu Provident Funds Society 1940 I.T.R. 467)*. Any amendments in the Ordinance which come into force after 1st day of July of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendment came into force–*(C.I.T.* v. *Scindia Steam Navigation Co. Ltd. [1961] 42 I.T.R. 589 (S.C. of India))*. But any amendment of the Ordinance, though effected after the close of the assessment year but before the assessment is made, would still be given retrospective effect and would apply to the assessment, if the amendment is purely procedural and affects the machinery for collecting tax rather than the tax itself–*(C.I.T.* v. *Bagchi & Co. [1951] 20 I.T.R. 33)*. If after an assessment is passed but pending in appeal or reference, legislation with retrospective effect comes into operation, the deciding tribunal must give effect to such legislation–See *ante* under "Retrospective Effect of provision".

E. Tax in respect of total income.–The tax is on "the total income" of the assessable entity and the charge in respect of the total income is in accordance with and subject to the provisions of this Ordinance. These words and the definition of total income in Sec. 2(65) suggest mainly three things–

(a) The income charged is that the total income referred to in Sec. 17.

(b) full effect must be given to the exemptions from tax granted under various provisions of the Ordinance, and

(c) the income must be computed in accordance with the provisions of this Ordinance after making the allowances and deductions provided for the different heads of income in relevant sections.

Income, Profits and Gains

Income, profits and gains.–The object of the Ordinance is to tax "income", a term of wide and vague import. The word "income" as defined in Sec. 2(34) is of

inclusive nature including profits and gains but income is of more general terms than profits and gains–*(Kamakhya Narain Singh* v. *C.I.T.)*. It is an expression of elastic ambit and the Courts have described it by saying that it is not exhaustive. A receipt may be taxable as income although it may contain no element of profit. Profits and gains mean something which is of the nature of interest or fruit as opposed to principal or tree. "Gains" is the equivalent of "profits". The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning these receipts. The tax is on income, profits and gains, it is not a tax on gross receipts.

The Ordinance describes the sources of income and prescribes the method of computation of income, but it refrains from saying what is income. The definition of "income" in sec. 2(34) is inclusive and not exhaustive; it merely adds certain artificial categories (including capital gains) to the natural connotation of "income" without throwing any light on the general concept of the word "income". "'Income' includes not only those things which the interpretation clause declares that it shall include, but such things as the word signifies as to its natural import".

In the case of–*Rani Amrita Kunwar* v. *C.I.T. [1946] I.T.R. 561, and Maharani Vijaykuvarba* v. *C.I.T. [1963] 49 I.T.R. 594* it was laid down that income need not necessarily arise from any business activity, investment or outlay, or any enforceable obligation to pay, –it may be voluntary or may be attributable to some custom, usage or traditional obligation.

Income has been generally described as the annual or periodical yield in money or reducible to a money value, arising from the use of real or personal property, or from labour or services rendered. Dividends, and rents derived from houses and lands, are instances of income arising from the use of property, whilst salaries, wages and professional earnings (including pensions) are instances of income arising from labour or services rendered. Income derived from business may in certain cases be a combination of both the classes–*Jyoti Prasad SinghDeo*.

The definition of income has been approached in three decisions of the Privy Council. In the case of *C.I.T.* v. *Shaw Wallace & Co.*, Sir George Lowndes gave the following definition of "income":

"Income in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as 'capital'. It is not correct to say that every receipt which is not capital receipt is assessable. On the other hand it is only receipts that are of the nature of income receipts that are assessable."

This definition was followed in *Gopal Saran Narain Singh* v. *C.I.T.* which however, added the important amplification: "Anything which can properly be described as income, is taxable under the Act unless expressly exempted".

Income is the annual or periodical yield in money or reducible to a money value arising from the use of real or personal property or from labour or services rendered–*(Jyoti Prosad Singh Deo (1921))*.

The word "income is a word of elastic ambit, and though the Courts have attempted to give a certain description to the word, they have always qualified the said description by saying that it is not exhaustive. It is however clear that the words "income, profits and gains" are used in the Act in a disjunctive sense and the word "income" is not limited by the words "profits and gains". Anything which can properly be described as income is taxable under the Act unless expressly exempted –*(Kedar Narain Singh* v. *Commissioner of Income-tax [1938] (6 I.T.R. 157))*.

Income is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation ... It is not correct to regard as an essential element in any of these or like definitions a reference to the analogy of fruit, or increase or sowing or reaping of periodical harvests. Sir George Lowndes speaks of "income" being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similes cannot be used to limit the true character of income in general.

Under the Income-tax Act (Ordinance), income in order to be taxable need not arise from any business activity, investment or enforceable obligation to pay but may arise from voluntary or customary payments. Nor is it necessary that it should be the result of some outlay on the part of the assessee–*(Rani Amrit Kunwar* v. *Commissioner of Income-tax, C.P. and U.P. [1946] 14 I.T.R. 561)*.

In the light of the above authorities, the position may be summed up as follows:

The categories of income are never closed. It would be impossible to define income precisely without excluding some species of it. The effect of the definition of "income" given by the Privy Council in *Shaw Wallace's* case has been whittled down to a very large extent by the subsequent amendments in the Ordinance. The definition given in law should be taken in conjunction with the facts of that case. Income is not necessarily a recurrent return from a definite source, –in fact it may never recur at all and the source may never yield a periodic return. An isolated adventure may constitute business. Even a casual and non-recurring receipt may be income as in Sec. 19(13). Anything which can properly be described as income is taxable under the Ordinance unless expressly exempted. That perhaps is the best definition of taxable income, from the practical, though not from the logical, point of view.

Tax-free income.–Where income is received free of tax, the amount of the tax should be added and brought in, and the gross income should be included in the total income of the recipient. Cases of tax-free salaries are discussed in Salary Chapter.

Income tainted with illegality.–The taint of illegality or wrong-doing associated with income, profits or gains is immaterial for the purpose of taxation. Once the character of an enterprise has been ascertained as being of the nature of

trade, the person who carries it on cannot find out elements of illegality to avoid tax. In the leading case of *Minister of Finance* v. *Smith*, Lord Haldane said that the Income-tax Acts are not necessarily restricted in their application to lawful businesses only. The assessee may be prosecuted for the offence and at the same time taxed upon the profits arising out of its commission. Profits arising from a trade which necessarily involves fraud upon the customs authorities, or from illicit trafficking in drugs, illicit trafficking in liquor contrary to prohibition laws, keeping automatic gaming machines for public use, or illegal bets taken by bookmakers on racecourses, street betting or betting through the post, or wagering agreements, are all chargeable to tax. They are taxable as profits of business under s. 28, even if the business involves the perpetration of crimes. A man who lives by regularly receiving and reselling stolen goods would be taxable on the profits. "Pugrees" or "abwabs" illegally exacted from tenants by landlords, or income derived by trustees from forbidden investments or acts amounting to breaches of trust, are also within the purview of the Act (Ordinance).

The invalidity of a partnership does not affect its liability or that of its members to assessment. An illegal partnership may be assessed as an association of persons. For instance, an association of 133 persons not registered under the Companies Act can be assessed as an "association of persons" in spite of its illegal constitution.

Where title to income is in dispute.–Income is taxable notwithstanding the pendency of another's claim to it. Where money has been received, a rival claim or a threat of litigation cannot be regarded as reducing the interest of the recipient to a contingent basis. The recipient is taxable although there may be a rival claim to the source of the income and the recipient may some day have to give up the income and account for what he is taxed upon. On the other hand, a mere claim by a person against another who has actually received the money, is not sufficient to make income accrue to the claimant and render him liable to tax.

The mere existence of a dispute as to title, even where a suit has been filed, cannot of itself hold up an assessment. Where the assessment is on income from property under s. 22, the Deputy Commissioner of Taxes has *prima facie* the power to decide whether the assessee is the "owner" of the property, without waiting for the determination of any suit filed in respect of the property.

Mere relief from expense is not income.–Mere relief from expense is not income. A person is chargeable to tax not on what saves his pocket but on what goes into his pocket.

Whether remission of a debt is income.–Where a finally ascertained debt or liability is subsequently remitted in whole or in part, such remitted amount cannot be treated as income of the year of remission under the general law. In the case of *British Mexican Petroleum Co. Ltd.* v. *Garrison* the House of Lords observed that the amount remitted cannot be included as a revenue receipt in the accounts of the year of remission and that the accounts of the preceding year should not be reopened and adjusted by reference to the remission. But the above principle of general law has

been superseded by Section 19 which expressly makes the amount remitted taxable as the income of the year of remission, see further Sec. 19(11).

Unclaimed deposits or balances due to clients.–If deposits received by a businessman in substance partake more of the nature of trading receipts than of security deposits, such unreturned deposits would be taxable as income. But a receipt which is not in the first instance a trading receipt cannot become a trading receipt by any subsequent process. In *Morley* v. *Tattersall-22 T.C. 51 (C.A. 1939 I.T.R. 316)*, a firm of auctioneers had large unclaimed balances of their clients in their hands. Several years' accumulations of those balances were divided by the firm among the partners. Held, they were not trading receipts and could not be taxed as income. The quality and nature of a receipt for income-tax purposes is fixed once and for all when it is received. The unclaimed balances, when first received from the auction-purchasers, were obviously liabilities, and no subsequent operation or alteration in the accounts could turn them into trading receipts.

Income in money's worth or equivalent of cash.–Income, profits and gains may be realised in the form of money's worth as well as money, in kind as well as in cash. Lord Halsbury, L.C., observed in *Tennant* v. *Smith [1892 A.C. 150, 156 (H.L.) 3 T.C. 158, 164]*, that profits include anything "capable of being turned into money from its own nature." This is the general law, apart from the fact that even certain things which are not capable of being turned into money from their own nature–e.g. rent-free accommodation to an employee or any benefit (even though not convertible into money) obtained from a company by a director or by a person having a substantial interest in the company or by a relative of the director or such person–have yet by statute been artificially deemed to be income. The essence of the matter is that there must be an actually realised or realisable profit, though the profit may not be *immediately* realisable. When a company sells its trading assets for fully-paid shares in another company, the profit on the transaction is assessable although no cash passes, and even though the shares are neither realised nor realisable till later. The fact that they cannot be realised at once may reduce their present value but that is no reason for treating them as though they had no value until they could be realised. Where shares are allotted to the Directors or employees of a company at face value when the market value is higher, the allottees are assessable to tax on the difference between the *par* value actually paid for the shares and their market value–*Weight* v. *Salmon 19 T.C. 174*. The same principle would apply even if the shares are issued to the employees with a condition that they are not to part with the shares without the permission of the Directors of the company so long as they remain servants of the company, but in this case the market value would have to be taken subject to diminution in value caused by the restriction under which the allotment is accepted.

Valuation of money's worth.–Where realisation consists in money's worth, the market value of the money's worth in the accounting year must be ascertained and brought into computation for the purpose of determining the year's profits–*Ramjilal Rais* v. *C.I.T. [1963] 47 I.T.R. 127, 138*. Where goods presented by an employer are taxed as a perquisite in the hands of the employee, the value to be taxed is not their cost to the employer but their value to the employee, i.e. the price the employee

would get if he sold them second-hand –*Wilkins* v. *Rogerson 39 T.C. 344*. Similarly, as stated above, directors or employees of a company would be assessable on shares issued to them at par to the extent of the premium value of the shares in the market at the date of issue, subject to abatement where a restriction is imposed on alienation. But an option to an employee to subscribe for shares at a specified price at any time during a fixed period of years must be valued as the income of the year in which the option is *granted*. "If the asset takes the form of fully paid shares, the valuation will take into account not only the terms of the agreement but a number of other factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, and so forth. There may also be an element of value in the fact that the holding of the shares gives control of the company ....."

When a money-lender takes land in satisfaction of his debt, the market value of the land would have to be ascertained and brought into account, and to the extent to which the market value exceeds the principal sum advanced there would be a realisation of interest. Unless the lands are sold by the assessee in the accounting year, the actual value of the land cannot be ascertained but an estimate of its value must be made.

Income does not necessarily mean profit.–The word "income" as used in the Income-tax Ordinance is not limited by the words 'profits and gains" and in order that income may be taxable it is not necessary that it should constitute or provide a profit or gain to the assessee. Income means a periodical monetary return coming in with some sort of regularity from definite sources as laid down in *Shaw Wallace's case* and anything which can properly be described as income is taxable under the Act (Ordinance) unless expressly exempted–*(Maharajkumar Gopal Saran Narain Sing* v. *Commissioner of Income-tax, Bihar & Orissa [1935] (3 I.T.R. 237 at 242) (P.C.))*.

Moneys which are not really "profits" of a business may yet be "income" of a taxpayer and the real question is whether a receipt is "income" and not whether it is profits from business–*(King* v. *B.C. Fir and Cedar Lumber Co. [1932] (A.I.R. 1932))*.

The Act makes a difference between income and profits. Profits are included within the term income but profits are not synonymous with income–*(Per Mullick, J., in Jyoti Prasad Singh Deo)*.

Income on capitalisation of interest.–Capitalisation of arrears of interest is not equivalent to receipt of interest by the creditor. It is immaterial whether capitalisation takes place by virtue of a provision in the original contract for the automatic conversion of unpaid interest into principal money carrying interest, or the optional exercise of a power in that behalf given to the creditor–*(I.R.* v. *Oswald 1945 I.T.R. Suppl. 39, 42 (H.L.))*, or a customary practice of banks–*(Paton* v. *I.P. 1938 I.T.R. 644 (H.L.))*. The effect of an agreement to capitalise arrears of interest is merely to pay compound interest. However, "the unpaid interest never ceases to retain its character as interest, although it has from time to time been added to the capital indebtedness and has carried interest in turn." When the whole capital, including the

capitalised interest, is paid off, whatever is paid over and above the original capital sum advanced is for revenue purposes a payment of interest–*(I.R.* v. *Oswald 1945 I.T.R. Suppl. 39, 48 (H.L.))*.

Income means real income-not fictional or technical income.–A mere book-keeping entry cannot be income unless income has actually resulted–*(C.I.T.* v. *Shoonji Vallabdas & Co. 1991 BTD XIV 74)*. The way in which entries are made by the assessee in the books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. The important question to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee–*(State Bank of India* v. *C.I.T. (S.C. of India) 1991 BTD XIX 279)*.

Transactions entered into by commercial men must be looked at for income tax purpose from a commercial point of view and in trying to determine whether a certain transaction resulted in profits, we have to see whether the transaction resulted in real profits, profits which from the commercial point of view meant a gain to the person who entered into the transaction, not profits from any narrow, technical or legalistic point of view. The assessee and his sons formed a private limited company and transferred to that company shares in several joint stock companies which the assessee had held jointly with his sons, for Rs. 40,97,000 which was the market value of the shares at that time. It was found that these shares had cost to the assessee only Rs. 30,45,017 and the Income-tax authorities levied income-tax on the difference between the market price and the cost price of the shares on the ground that the assessee had made a profit to that extent by this transaction: Held, that though the assessee and his sons on the one hand and the private limited company formed by them were distinct entities in law, the real result of the formation of the company and the transfer of the shares to that company was only that instead of the shares being jointly held as individuals they were held by these very persons as a limited company; the so-called sale of the shares to the company was not a business activity entered into with the object of earning a profit, and was not really a sale but merely a procedure adopted for readjustment of their position as holders of the shares; the assessee did not make any profit or gain in a commercial sense by transferring the shares to the company; and the income-tax authorities were not entitled to levy income-tax on the difference between the market price and cost price of the shares merely because the market price of the shares at the time of transfer was higher than the cost price – *(Californian Copper Syndicate (limited and Reduced)* v. *Harris [1904] 5 Tax Cas. 159; The Royal Insurance Company Ltd.* v. *Setphen [1928] 14 Tax Cas 22; Westminster Bank Ltd.* v. *Osler [1933] (1 I.T.R. 65); Commissioner of Income-tax, Bombay City* v. *Sir Homi Mehta's Executors [1955] (28 I.T.R. 928))*.

Appropriation as between capital and interest.–Where interest is outstanding on a principal sum which has become due and the creditor receives an open payment from the debtor, and neither the debtor nor the creditor makes any appropriation of the payment as between capital and interest, the Department is entitled to treat the payment as applicable to the outstanding interest and assess it as income–*(C.I.T.* v. *Maharajadhiraja of Darbhanga 1933 I.T.R. 94, 104 (P.C.))*.

Application of income and diversion of income by overriding title - Distinguished.– Cases arise where income is applied in a particular manner under a statutory or contractual obligation or under the provisions of a company's memorandum or articles of association. Such appropriation or destination of profits, or the charge which has been made on them by previous agreement or otherwise, is perfectly immaterial and has nothing to do *prima facie* with the question whether they are liable to income-tax. If a person has *alienated or assigned the source* of his income so that it is no longer his, he may not be taxed upon the income arising after the assignment of the source, apart from special statutory provisions like Sec. 43 which artificially deem it to be the assignor's income. But if he does not transfer the source of income and merely *applies* the income so that it passes through him and goes on to an ultimate purpose, even though he may have entered into a legal obligation to apply it in that way, still it remains his income. Thus all income arising to any person by virtue of a settlement from assets while the assets remain the property of the settlor, the case would be one of mere application of income–*(Tulsidas Kalachand* v. *C.I.T., Bombay)*. This principle has been given statutory effect by s. 43(5).

In *Pondicherry Rly. Co.* v. *C.I.T. (5 I.T.C. 363, A.I.R. 1931 P.C. 165, followed by the Bom. H.C. in C.I.T.* v. *Macdonald & Co. 1935 I.T.R. 459)* a company was bound by contract to pay half its net profits to the French Government and was held by the Privy Council to be liable to tax on the moiety so paid over to the Government. Lord Macmillan said, "Profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits". Similarly, a company is liable to tax on the income which is applied in the formation of a sinking fund in pursuance of a contractual or other legal obligation or applied in paying guaranteed interest to the holders of shares or debentures.

The amount paid by way of bonus by an insurance company to its participating policy-holders was taxable in the company's hands in its entirety.

Salaries are taxable although for some reason or another the recipient may not have the full right to apply them just as he likes. Compulsory deductions from remuneration by the employer are instances of mere application of income, and the full salary is taxable without any allowance for the compulsory deductions. The fact that the recipient of emoluments has made them over to another person does not render the former any the less assessable to tax. Sums set aside by a man for the benefit of his family out of his income in pursuance of a covenant in his marriage settlement or out of his salary under a compulsory provision contained in the agreement of employment, are still his income. Similarly, an assessee is not entitled to any deduction in respect of maintenance paid by him to his wife and children under a decree of a Court but the decree did not make the payment of this maintenance a charge on his property –*(C.I.T.* v. *Sitaldas Tirahdas [1961] 41 I.T.R. 367 (S.C. of India))*.

Income applied in liquidation of a voluntarily incurred debt is exigible to tax although the application may be under a legally binding covenant entered into by the recipient of the income or under a charge created on the debtor's property. An

exception is provided by s. 25(1)(g) under which an annual charge is deductible in computing income from house-property.

Just as a man's income does not cease to be his income merely because it is applied in payment of his debts, so the money of another person applied in paying the assessee's debts is not necessarily the assessee's income.

Where executors having received the whole of the income of the estate apply a portion in a particular way pursuant to the directions of the testator or other legal obligation, it is merely a case of application of income. Periodic payments to beneficiaries out of the income of the estate in compliance with the obligatory directions of the testator, cannot be excluded in computing the chargeable income of the estate.

Allocation out of Revenue before it becomes income is not income.–Diversion by overriding title.–Though a voluntary payment is included in the income of the payer, where an obligatory charge is imposed by a testator or by the law upon some property, the sum so charged must be excluded from the income of the person in enjoyment of the property. In other words, where income is not applied but "diverted by an overriding title" from the assessee who would otherwise have received it, it cannot be considered the income of the assessee at all– *(Mullick* v. *C.I.T. 1938 I.T.R. 206)*. The real profit of a business man cannot obviously include the amounts returned by him by way of rebate under statutory compulsion. It is as if he received only the original amount minus the amount to be returned–*(Poona Electric Supply Co. Ltd.* v. *C.I.T. [1966] 57 I.T.R. 525 (S.C. of India))*.

Income in respect of which liability to tax is attracted must be the real income of the tax-payer and not his artificial or notional income. In a case where the income of a tax-payer is required to be directed even before it reaches him as a result of an over-riding obligation, there would be neither accrual nor receipt of income which can be brought to law in his hands. The income, in such a case, is taken away from him even before its accrual since it is already allocated for a particular purpose prior to its receipt, in his hands. The tax payer even if he collects it, does so, not as a part of his income, but for and on behalf of the person to whom it is payable and such income is not subject to tax in his hands.

In a case of sub-partnership, formed under Sec. 29 of Partnership Act, 1932 the sub-partnership creates a superior title and diverts the income before it becomes the income of the partner. The partner in the main firm receives the income not only on his behalf but on behalf of the partners in the sub-partnership–*Sunil Kinariwala* v. *C.I.T. (Guzrat H.C.) 1995 BTD XVIII 48.*

In another case of *Meghna Petroleum Ltd.* v. *C.T. (East Zone)*, Dhaka the S.C. of Bangladesh held that the windfall profit having been credited in favour of the Bangladesh Petroleum Corpn. under a Government decision before it became an income in the hands of the assessee company, the principle of diversion of income by over-riding title is attracted as the disputed amount never reached the assessee as his income – *1998 BTD XXVI 74.*

In *Bejoy Singh Dudhuria* v. *C.I.T. 1933 I.T.R. 135*, the assessee succeeded to the family ancestral estate on his father's death. Subsequently, his step-mother who had a legal right to maintenance out of the estate, brought a suit for maintenance against him in which a consent decree was passed directing the assessee to pay a fixed monthly sum to his step-mother and declaring that the maintenance was a charge on the ancestral estate. It was conceded that the assessee was liable to be assessed as an individual and that he and his step-mother were not members of an undivided family. The Privy Council held that the sums paid by the assessee to his step-mother were not "income" of the assessee at all. Lord Macmillan, delivering the judgment of the Board, said, "In the present case the decree of the Court by charging the appellant's whole resources with a specific payment to his step-mother has to that extent diverted his income from him and has directed it to his step-mother the sums paid by the assessee to his step-mother were held not the income of the assessee at all and to that extent what he receives for her is not his income. It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands. "Where a decree of Court declared that a certain property belonged to the assessee as the residuary legatee subject to certain payments for maintenance to members of the family *(C.I.T.* v. *Naik 1939 I.T.R. 362)*, or where under an arbitration award or under a decree in terms of an arbitration award two widows were to be given maintenance allowance in lieu of their share on partition in the family property which was awarded to the assessee, the sums paid by way of maintenance were excluded from the income of the assessee since they amounted to diversion of a portion of the income before it reached his hands. Such diversion of income by an overriding title need not necessarily be by a decree of Court but may be under the provisions of a will or deed, e.g., a deed of partition of joint family property. Where the beneficiaries under a settlement pay a maintenance allowance to the settler's widow who is entitled under the terms of the settlement to maintenance for life, or where testator bequeaths a property to legatees with a direction to pay annuities or other sums out of the income of the property to members of the family and not when the legatee creating a charge himself for a debt payable by him *(Jagdish Chandra* v. *Dhanpati Singh 1945 I.T.R. 64)*, the payments constitute diversion and not application of income. In all such cases the amount paid by way of maintenance would be–taxable in the recipient's hands though not in the hands of the payer.

Maintenance paid to a member of a joint family *out of the joint family income* is merely application of the income and cannot be deducted in computing the income of the joint family, even though the amount of such maintenance is fixed by a decree of Court and made a charge on the joint family properties. But where another is entitled to maintenance out of a non-coparcenary property, for instance, an impartible estate-holder's brother being entitled to maintenance out of the estate, there is a diversion of income and the amount should be deducted in calculating the assessable income of the estate-holder. On the other hand, where a man grants an allowance to his wife, child or aged parent whom he is under a personal obligation to maintain, it is merely a case of application of the man's own income. So an allowance paid to a wife in pursuance of an order of the Court or a covenant contained in a deed

of separation would not be excluded in computing the husband's income *(C.I.T.* v. *Sitaldas Tirathdas)*, unless the allowance is made a charge on the husband's house-property.

See, further, under cl. (xxvii) of See 29(1), "Payments out of profits and payments ascertained by reference to profits".

CAPITAL AND INCOME

The problem of discriminating between capital receipts and income receipts, and between capital disbursements and income disbursements, has very frequently engaged the attention of the Courts. In general the distinction is well recognised and easily applied but from time to time cases arise where the item lies on the borderline and the task of assigning it to income or to capital becomes one of much refinement. As the Ordinance does not define income except by way of adding artificial categories, it is to the decided cases that one must go in search of light.

CAPITAL AND REVENUE

Receipts:

The distinction between capital receipts and revenue receipts is of great importance in income-tax, as tax is levied on income, that is, revenue receipts and not on capital receipts (except capital gains), similarly, the distinction between revenue expenditure and capital expenditure is to be recognised, as in order to ascertain the trading receipts it is the former one, that is revenue expenditure, that is to be deductible. The problem of discriminating between capital receipts and revenue receipts, and between capital expenditure and revenue expenditure has frequently engaged the attention of the Courts.

In general, the distinction between capital and revenue is well recognised and easily applied but in many cases the item lies on the borderline and it becomes very difficult to judge whether a particular receipt a capital receipt or a revenue receipt or whether a particular expenditure is capital expenditure or a revenue expenditure. The Ordinance does not define income except by way of adding artificial categories, it is to the decided cases that one must go in search of light. Court also cannot draw a line of demarcation: each case is to be decided on its own facts and decide cases will serve as useful illustration which will indicate the kind of considerations which may relevantly be borne in mind in approaching the problem.

Where a single amount received by the assessee is partly on capital account and partly on income account, it should be apportioned and the part which is of a revenue nature should be brought to charge.

Immaterial Considerations.–There are some considerations which are immaterial in deciding the question whether a certain item is a capital receipt or an income receipt:-

(1) **Payment measured by estimated profits.**–The fact that a certain payment is measured (as is usually done in computing damages) by the estimated annual yield or profits does not make the payment an income receipt. "There is no

relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test".

(2) **Lump sum and periodic sums.**–That the receipt is a periodic receipt or a single receipt is immaterial for the purpose of determining its nature. An income receipt is not necessarily recurring, nor a capital receipt necessarily single. A single receipt may be an item of income and an annual receipt recurring over a number of years may be capital *(See under "Annuities and annual instalments of capital").*

(3) **Magnitude of the receipt.**–The magnitude of a sum is not material for the purpose of determining its nature, for magnitude is a relative term. But at the same time the magnitude of a transaction is not an entirely irrelevant consideration.

(4) **Name given by parties concerned and treatment in accounts.**–"The name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. The question always is what is the real character of the payment, not what the parties call it." Likewise, the way in which the receipt is dealt with in the accounts of the assessee is not conclusive against or in favour of the assessee.

(5) **Form of transaction.**–If the transaction, on its true construction, escapes tax as being on capital account, it is immaterial that the same result could be brought about by a transaction in another form which would yield taxable income as in the case of "Disposition of property so as not to attract tax."

(6) **Income from wasting assets.**–It is well settled since the decision of the House of Lords in *Coltness Iron Co.* v. *Black I.T.C. 287*, that profits from capital which is consumed and exhausted in the process of realisation may none the less be taxable as income. Thus income derived from mines and quarries, or from timber-bearing forests, or annuities, is not realisation of capital but is taxable as income regardless of the consumption of capital involved in the process of profit-earning. Lord Wright said in *(Kamakshya Narain Singh* v. *C.I.T.)* "If the receipts are income, it is not material for tax purposes that that for which they are paid comes from a wasting property. If the payment ceases because the source ceases, so does the tax. Once it is established that the royalties are income within the meaning of the Ordinance it is not material that the mines are in course of being exhausted.

(7) **Payments made out of capital.**–The nature of a receipt is determined entirely by its character in the hands of the receiver, and the source from which the payment is made has no bearing on the question. Where an amount is paid which, so far as the payer is concerned, is paid wholly or partly out of capital, and the receiver receives it as income on his part, the entire receipt is taxable in the hands of the receiver *(Michelham's Trustees* v. *I.R. 15 T.C. 737, 745)*. This would be so where a trustee pays an annuity to a beneficiary partly out of the corpus or from borrowed capital to make up for deficiency of income of the estate. But if the recipient is beneficially entitled not only to the income but also to the capital, payments made to him by his trustees out of the corpus would be capital receipts. The intention of the

settlor or testator is immaterial for the purpose of determining the nature of the beneficial receipt.

(8) **Disallowance to the payer.**–The fact that the payment is not allowed as a revenue deduction to the person making it, does not lead to the conclusion that it is a capital receipt in the hands of the recipient *(Lakshmi Rajyam* v. *C.I.T. [1960] 40 I.T.R. 340, 352).*

CAPITAL AND REVENUE RECEIPTS –Tests to distinguish.

The following tests may be applied to distinguish between capital receipts and revenue receipts:-

Fixed capital and circulating capital.–A receipt is not taxable when it is referable to fixed capital; it is taxable as a revenue item when it is referable to circulating capital or stock-in-trade *(Davies* v. *Shell Co. of China Ltd. [1952] 22 I.T.R.).* In *John Smith & Son* v. *Moore* the distinction was drawn by Adam Smith between fixed and circulating capital: "Fixed capital [is] what the owner turns to profit by keeping it in his own possession; circulating capital [is] what he makes profit of by parting with it and letting it change masters". In other words, circulating capital is capital which is turned over, and in the process of being turned over yields profit or loss. Fixed capital is not involved directly in that process, and remains unaffected by it. Circulating capital or stock-in-trade is also known as "trading assets," and fixed capital as "capital assets". What is a capital asset in the hands of one person may be a trading asset in the hands of another, and the nature of a receipt may consequently vary according to the nature of the trade in connection with which it arises. Romer, L.J., said in *Golden Horse Shoe (New) Ltd.* v. *Thurgood,* "The determining factor must be the nature of the trade in which the asset is employed. The land upon which a manufacturer carries on his business is part of his fixed capital. The land with which a dealer in real estate carries on his business is part of his circulating capital. The machinery with which a manufacturer makes the articles that he sells is part of his fixed capital. The machinery that a dealer in machinery buys and sells is part of his circulating capital, as is the coal that a coal merchant buys and sells in the course of his trade. So, too, is the coal that a manufacturer of gas buys and from which he extracts his gas. The purchase and resale of amusement equipment would be on revenue account in the case of an amusement caterer.

Reimbursement of a capital outlay is a receipt on capital account *(C.I.T.* v. *Poona Electric Supply Co. Ltd. 1946 I.T.R. 622),* even though the receipt may exceed the cost of the outlay. Similarly compensation received for the destruction or loss, total or partial, of a capital asset is a capital receipt, whereas compensation for injurious affection of a trading asset is an income receipt *(London Investment & Mortgage Co. Ltd.* v. *Worthington 38 T.C. 86 (H.L.), (1959) 37 I.T.R. 56).*

ILLUSTRATIONS

A company which carried on business as manufacturer of fireclay goods was the lessee of certain fireclay fields over a part of which ran the lines of a railway. In the exercise of its statutory powers, the railway company required the part of the

fireclay which was under the Railway to be left unworked on payment of compensation. The compensation was held to be a capital receipt, being payment made for the immobilisation or sterilisation of the fireclay deposits which were a capital asset. The fact that the amount of compensation was computed on the basis of the profits which would have been earned by working the fireclay did not make it an income receipt *(Glenboig Union Fireclay Co. Ltd.* v. *I.R. 12 T.C. 427, 463 (H.L.))*. If the compensation had been recovered for wrongful interference for a period of time with the working of a particular part of the field, the compensation would have been an income receipt because the damage would have been to the trade in fireclay goods during the period of wornging interference and not to the clayfield as a capital asset.

1. A company doing the business of building contractors and estate developers was refused permission to build houses on a certain plot by the local authorities and was paid compensation as required by statute. It was held that in the trade of building houses for sale the lands and the right to build thereon were trading assets or stock-in-trade, and the compensation being for the injurious affection of trading assets must be regarded as a trading receipt.

2. The assessee, which had installed machinery for the generation of electricity and had laid mains and distributing lines for supplying it to consumers, charged contributions at certain rates from the consumers for the laying of service lines from its distributing mains to the consumers' premises. The assessee received as contributions from the consumers a sum which exceeded the actual cost of laying the service lines. The Supreme Court of India held that the contributions by the consumers, being essentially reimbursement of capital expenditure, were not income, and even the excess of the contributions over the actual cost was a capital receipt in the hands of the assessee–*(Hoshiarpur Electric Supply Co.* v. *C.I.T. [1961] 41 I.T.R. 608)*.

1. **Capital Sales and Business Sales.**–Where profit accrues from the sale of any asset, the question arises whether it is business income or capital gains. Where the property sold is a capital investment or a capital asset, there is an accretion of capital, for the sale-proceeds represent capital in another form; where, on the other hand, the sale is in course of business, the profit is on revenue account. The distinction between capital accretion and income is to be seen from the question simply and decisively: "Is the article acquired for the purpose of trade?" If it is, the profits arising from its sale must be brought into revenue account. The profit is chargeable as capital gains under s. 31 if the sale is of a capital asset, and as business profit under s. 28 if the sale is in the course of business or the transaction constitutes an adventure in the nature of trade.

The line between "capital sales and sales producing income," is correctly drawn by Lord Justice Clerk in *Californian Copper Syndicate* v. *Harris 5 T.C. 159, 165-6* in a passage which has become classical: "It is quite a well-settled principle in dealing with questions of assessment of income-tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit ..... assessable to income-tax. But it is equally well established that enhanced values obtained from realisation or

conversion of securities may be so assessable where what is done is not merely a realisation or change of investment, but an act done is the carrying on, or carrying out, of a business ... What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being–Is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit-making *(Visheshwara Singh* v. *C.I.T. [1961] 41 I.T.R. 685 (S.C. of India).*

In the absence of any evidence of trading activity in cases of purchase and resale of shares, and land and buildings, the Court reversed the finding of the Tribunal and held the profit arising from the resale to be an accretion of capital. On a finding that the assessee did not carry on any trading activity in relation to the disposal of slag heaps, the sales of slag heaps were held to be on capital account. An isolated sale of trees with roots may be treated as a capital transaction *(C.I.T.* v. *Patwardhan [1961] 41 I.T.R. 313).* On the other hand, where the purchase and sale of mining rights *(British South Africa Co.* v. *C.I.T. 1946 I.T.R. Suppl. 17 (P.C.))*, ships *(J. Bolson & Son Ltd.* v. *Farrelly 34 T.C. 161 (C.A.))* or wagons were in the course of the assessee's trade and in pursuance of his scheme of profit-making, the transactions were held to result in trading profits.

2. **Transactions in the assessee's ordinary line of business.**–If a transaction is in the assessee's ordinary line of business, there can be no difficulty in holding that it is in the nature of trade. A banker's or financier's dealings in foreign exchange or his sales of securities and shares are, as a general rule, in the course of his business. So are a ship-broker's purchases of ships in his own name, or sales of passenger ships by a company carrying on business as ship-builders and repairers and also operating a passenger boat service, or a share-broker's purchases of shares on his own account *(Knopp* v. *C.I.T. 1948 I.T.R. 398).* Where a firm of cotton brokers deal in cotton for actual delivery and some of the partners on their own account speculate in cotton futures, the transactions in futures are in the line of the partners' ordinary business and the resulting profit is chargeable to tax. But even transactions in the ordinary line of the assessee's business may be on capital account. Sales of land taken over by a money-lender from a debtor in liquidation of a debt are dealt with post under "Sales of land".

ILLUSTRATIONS

1. At the time of a serious crisis in the cotton market, the assessee, a cotton merchant, was appointed under a power of attorney as an agent for the sale and disposal of all the cotton bales which had been purchased by a certain firm. It was a venture of considerable magnitude and the assessee earned a very large sum by way of commission. Held, the adventure was extraordinary, but it was connected with the business carried on by the assessee as a cotton merchant *(C.I.T.* v. *Sir Purshottamdas Thakordas A.I.R. 1925 Bom. 318, 2 I.T.C. 8).*

2. A company carried on business *inter alia* as selling agent for various colliery companies. In the course of its business it had to purchase wagons on behalf

of its clients. Anticipating a steep rise in prices due to war, it bought a large number of wagons on its own behalf, not for use but to sell again at a profit. The profit on the resale was held to be taxable as being made "in the operation of the company's business" *(T. Beynon & Co.* v. *Ogg 7 T.C. 125, 133)*.

The assessee was a motor engineer and also a partner in a land development scheme. He purchased two farms on his own account and sold them at a profit. He did not effect any development on the farms nor did he advertise or otherwise offer them for sale. The profit was held to arise from business *(Reynolds's Executors* v. *Bennett 25 T.C. 401)*.

3. **Transactions outside the assessee's ordinary line of business.**–Where the transaction is outside the assessee's line of business, it must depend upon the facts and circumstances of each case whether the transaction is in the nature of trade *(Jaldu Manikyala Rao* v. *C.I.T. [1955] 28 I.T.R. 220)*. Profits made by the sale of land or the realisation of securities or other moveables may, in the case of one man, be merely successful realisations of capital assets or alterations of investment, while in the case of another man they may be part of the income of a business.

The general principles set out in the following paragraphs are useful in ascertaining whether a venture outside the assessee's line of business is in the nature of trade or not:

(a) **Some transactions in course of and some outside trade.**–Where a person has effected several transactions of purchase and sale, some of the sales may be of capital investments and the other sales in course of business. Though a man may be found to be carrying on a trade in the buying, developing and selling of land, he may still hold and deal with some lands as capital investments outside his trade; such investments would not be trading assets and their sales would be on capital account. Likewise, the sales of some buildings by a builder may be sales of capital investments. In *Hudson* v. *Wrightson* the assessee was in business as a druggist until 1923. Since 1910 he had invested the whole of his savings in real estate. In 1924 he purchased an estate in Searborough which he sold in one lot at a profit in 1925. In 1923 and 1924 he also bought three other estates which were sold in lots between 1923 and 1931. He also owned other properties which he did not sell. Held, the Searborough estate was bought and sold as a capital investment, the sales in lots of the three estates were in course of trade, and the other properties owned by the assessee were not his trading assets but investments outside his trade.

(b) **Shares and securities.**–The profit realised on the sale of shares and securities would be capital if the seller is an ordinary investor realising his holdings but it would be revenue if he carries on a business in shares and securities. The profit is revenue where the realisation or conversion of shares or securities is in the course of the carrying on, or carrying out, of a business *(Rajputana Textiles (Agencies) Ltd.* v. *C.I.T. [1961] 42 I.T.R. 743 (S.C. of India))*. Viscount Maugham observed in *Punjab Co-operative Bank* v. *C.I.T. Sardar Indra Singh & Sons Ltd.* v. *C.I.T. 1953 24 I.T.R. 415* that liability to tax arises on sales of investments, where the sales are in course of business, although the taxpayer may not be carrying on a separate and

severable business of buying and selling investments with a view to profit. The realisation or conversion of securities by banks, loan and finance companies and insurance companies is usually held to yield trading profit, for varying investments and turning them to account are among the appointed means of such companies' gains. The sale of some of its securities by a bank, in order to meet withdrawals by depositors, or the varying of investments by a company which carries on the business of financiers and promoters, is a normal step in carrying on the company's business and the profits made on such a sale are on revenue account. But the realisation of a banking or insurance company's investments would result in an accretion of capital if the particular transaction is found to be purely on capital account and not in course of business *(V.S.R.M. Firm* v. *C.I.T. [1963] 47 I.T.R. 720 (money-lending))*, although it might have gone into the revenue account in the books of the company. An investment company may merely hold its shares and securities as capital investments or may deal in them as stock-in-trade. Any profit made by other companies on the realisation of shares or securities would be deemed to be part of the profits of their trade, if the dealings are in course of business. It is immaterial whether the profit is realised on sale of the shares or on liquidation of the company in which the shares are held *(Dalmia Cement etc., Co. Ltd.* v. *C.I.T. 1949 I.T.R. 141)*.

The Supreme Court (India) held in *Kishan Prasad & Co. Ltd.* v. *C.I.T., Rammarain Sons (Pr.) Ltd.* v. *C.I.T.* and *C.I.T.* v. *National Finance Ltd.* that profits or losses made on sale of shares acquired merely with the intention of obtaining a managing or selling agency or a directorship, and not of dealing in the shares, would be on capital account.

If an assessee acquires bonus shares as a result of his holding shares which are his stock-in-trade, the profit made on the sale of bonus shares would be taxable as a revenue business receipt *(Motilal* v. *C.I.T. 1961 41 I.T.R. 382)*.

(c) **Sales of land.**–Where an individual inherits or otherwise acquires land and deals with it as an owner, he may be regarded as holding it as an investment rather than as something with which to trade. A landlord may lay out part of his estate with roads and sewers and sell it in lots at various times for building, but if he does this as a landed proprietor and not as a land speculator, the sales would be on capital account. "If a landowner, finding his property appreciating in value, sells part of it, and uses part of his money still further to develop the remaining parts, and so on, he is not carrying on a trade or business; he is only properly developing and realising his land and the position would be the same if a company or a firm thus deals with land as a landowner.

However, the circumstances of a case may indicate that the land is acquired, developed and sold in plots by way of a venture in the nature of trade. A purchase and resale of land may be held to be in the nature of trade even if the land is not parcelled out or developed or advertised for sale. See further ante under "Some transactions in course of and some outside trade".

Sales of trees made by a talukdar in anticipation of zamindari abolition law were held to be non-taxable *(Jagdish Pratap Sahai* v. *State [1958] 34 I.T.R.)*.

Where a money-lender takes over land from his debtor in satisfaction of a debt or a mortgage-decree and keeps it for a period of time during which the income and expenses of the land are not brought into the business accounts of the lender, the subsequent sale of the property may be regarded as the sale of a capital investment *(A.H. Wadia* v. *C.I.T. 1949 I.T.R. 63 F.C.)*. But if a money-lender treats such land as part of the capital of the money-lending business and brings the income and expenses of the estate into the business accounts, the sale of the land would be in the course of business and the profit arising on the sale would be a revenue receipt. On the other hand, if the land is purchased by a firm doing money-lending business, not from debtors in lieu of discharge of debts of the money-lending business but independently from the partnership funds, the land may be regarded as a capital investment even if the income from it is included in the profits of the business. The onus of proving that the land formed part of the business assets is on the Department, and in the absence of any evidence or finding to the contrary the Court would conclude that the land was treated and held as a capital investment *(A.H. Wadia* v. *C.I.T. 1949 I.T.R. 63 76-7, 105-8)*.

In *Venkataswami Naidu & Co.* v. *C.I.T. (1959 35 I.T.R. 954, 609-10)* purchase of lands by managing agents with the sole object of reselling them to the managed company at a profit was held by the Supreme Court (India) on the facts of the case, to constitute an adventure in the nature of trade.

4. **Single or isolated transaction.**–Even a single transaction may constitute "business" under the definition of that word "Adventure in the nature of trade". It is not essential to constitute trade that there should be a series of transactions, both of purchase and of sale. A series of retail purchases followed by one bulk sale, or a single bulk purchase followed by a series of retail sales, may constitute a trade *(Senaji Kapurchand* v. *Pannaji Devichand A.I.R. 1930 P.C. 300)*. Even a single bulk purchase followed by a single bulk sale may be regarded as business *(Kalyan Mal Budhulal, In re, 1950 I.T.R. 54)*. A single transaction of purchase and sale outside the assessee's line of business may constitute an adventure in the nature of trade even if the assessee does nothing to the article or commodity purchased before he sells it. Neither repetition nor continuity of similar transactions is necessary to constitute a transaction an adventure in the nature of trade *(Regent Estates Ltd.* v. *C.I.T. 1963 48 I.T.R. 162)*.

In the case of an isolated transaction of acquisition and sale of property, there is really no middle course open. It is either an adventure in the nature of trade or else it is simply a case of sale and resale of a capital asset. The principles underlying the distinction between a capital sale and an adventure in the nature of trade were examined by the Supreme Court of India in *Venkataswami Naidu & Co. I.T.* As Lord Sands *(I.R.* v. *Livingston 11 T.C. 538, 545)* remarked, it is "a matter of impression" with the Court whether a particular transaction is in the nature of trade or not.

But a single transaction will not be a trading adventure unless it bears clear *indicia* of "trade" *(Venkataswami Naidu & Co.* v. *C.I.T. [1959] 35 I.T.R. 594, 608 (S.C. of India))*. Unless *ex facie* the single transaction is obviously commercial, the profit from it is more likely to be an accretion of capital and not an yield of income.

In the absence of any *indicia* of trade or trading activity, the gains made from a transaction of purchase and resale cannot be brought to charge. The onus of proving that an isolated transaction constitutes an adventure in the nature of trade is on the Department *(Saroj Kumar Mazumdar* v. *C.I.T. 1959)*.

Trafficking in Government permits for commercial commodities, even if done only once, would amount to an adventure in the nature of trade. In *Chunnilal Ganpatrai* v. *C.I.T.* the assessee obtained a licence from the Government for an electric undertaking which he started and after some time sold as a going concern to a limited company. It was found as a fact that from the beginning the assessee intended not to work the licence himself but to sell the whole business as a going concern at a profit. Held, the project was an adventure in the nature of trade and the excess of the price realised by the assessee over the cost incurred by him was not a capital accretion but was assessable as business profit.

5. **Isolated speculations.**–Every speculation is an adventure but not necessarily an adventure in the nature of trade *(Mrs. Alexander* v. *C.I.T. [1952] 22 I.T.R. 379, 399)*. Where the speculation is not in the nature of trade and is rounded off by a capital sale, the resulting profit would not be business income but may be chargeable as capital gain.

6. **Purchase without intention to resell.**–Where the purchase of any article or of any capital investment, e.g. shares, securities or land, is made without the intention to resell at a profit, a resale under changed circumstances would only be a realisation of capital.

Illustration.–The assessee company purchased in 1932 a ginning factory with extensive lands appurtenant thereto and also a plot containing some fruit stalls. In 1942 the assessee sold the factory with some of the lands into several plots and small plots and sold some of them by public auction. In the subsequent accounting year the assessee sold the remaining plots and also the fruit stalls and realised a profit. Held (reversing the Tribunal's finding), it was a capital receipt, there being no evidence of intention to resell at the time of purchase *(Sri Gajalakshmi Ginning Factory Ltd.* v. *C.I.T. [1952] 22 I.T.R. 502)*.

7. **Purchase with intention to resell.**–Where a purchase is made with the intention of resale, it depends upon the conduct of the assessee and the circumstances of the case, e.g., the nature and quantity of the article purchased and the nature of the operations involved, whether the venture is on capital account or in the nature of trade. A transaction is not necessarily in the nature of trade because the purchase was made with the intention of resale *(Mrs. Alexander* v. *C.I.T. [1952] 22 I.T.R. 379, 402)*. A capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment. This was definitely established in England by the House of Lords in *Leeming* v. *Jones 15 T.C. 333*, and here by the Indian Supreme Court's decision in *Saroj Kumar Mazumdar* v. *C.I.T. [1959] 37 I.T.R. 242, 250-1* where a purchase and resale of land were held to be on

capital account. A short-term investment may be as much an affair of capital as a lock-up investment.

"An accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income" *(15 T.C. 333, 357)*. "The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or a concern in the nature of trade in respect of his investments, but *per se* it leads to no conclusion whatever" *(15 T.C. 33, 360)*. Likewise, the Supreme Court of India laid down in *Venkataswami Naidu & Co.* v. *C.I.T. [1959] 35 I.T.R. 594, 610, 622* that the dominant or even sole intention to resell is a relevant factor and raises a strong presumption, *but by itself is not conclusive proof*, of an adventure in the nature of trade.

In *I.R.* v. *Reinhold 34 T.C. 389* the assessee purchased four houses in 1945 and sold them at a profit in 1947. It was an isolated transaction outside the assessee's ordinary line of business, but he admitted that he had *bought the property with a view to resale and had instructed his agents to sell whenever a suitable opportunity arose.* The Court of Session held that the intention to resell did not *per se establish* that the transaction was an adventure in the nature of trade and the Commissioners were justified in treating the profit as a capital accretion. A man may purchase land, shares or securities as a capital investment producing revenue, or may purchase an article with a view to using it, and coupled with the intention to invest or use there may be the intention of reselling at a profit when the market is favourable. The purchases would nonetheless be on capital account and not in the nature of trade. A man may purchase stocks and shares with a view to selling them at an early date at a profit, but if he does so, he is purchasing something which is itself an investment, a potential source of revenue to him while he holds it. A man may purchase land with a view to realising it at a profit, but it may also yield him an income while he continues to hold it. If he continues to hold it, there may also be a certain pride of possession."

The intention to resell may, *in conjunction with the conduct of the assessee and other circumstances*, point to the business character of the transaction:-

(a) *Commercial Commodities.*–If a man purchases a large quantity of a commercial commodity greatly in excess of his personal needs, or a purely commercial asset, and the commodity or asset is one which can yield no pride of possession, which cannot be considered an investment and which cannot be turned to account except by a process of realisation, it is an adventure in the nature of trade *(Regent Estates Ltd.* v. *C.I.T. [1963] 48 I.T.R. 162)*. Likewise, acquiring Government permits for commercial commodities, with the intention of reselling the permits, would constitute an adventure in the nature of trade *(Bisheshwar Singh* v. *C.I.T. [1955] 27 I.T.R. 376)*.

Illustration.–The assessee, a money-lender, was interested in a cinema company. Being in Berlin in 1920 on business connected with the cinema company, he took the opportunity of purchasing very cheaply a large quantity of toilet paper from a bankrupt German firm. He brought it over to England and sold the whole

consignment to one person at a considerable profit. Held, it was an adventure in the nature of trade. "The nature and quantity of the subject dealt with excluded the suggestion that it could have been disposed of other-wise than as a trade transaction.

(b) *Trading operations.*–A venture would, generally speaking, be in the nature of business if in the interval between the purchase and the resale the purchaser embarks on operations of the same kind and carried on in the same way as those which are characteristic of ordinary trading in the line of business in which the venture is made *(Leeming* v. *Hones 15 T.C. 333, 340 (H.L.)).*

Illustration.–A ship repairer, a blacksmith and a fish salesman's employee purchased as a joint venture a cargo vessel with a view to converting it into a steam-drifter and reselling it. They were not connected in business and they had never previously bought a ship. It took almost four months to carry out the extensive reconstruction and alteration, and thereafter the vessel was sold as a steam-drifter at a profit. Held, a trading venture. "Making an article marketable at a profit is of the very essence of trade" *(I.R.* v. *Livingston 11 T.C. 538).*

(c) *Multiplicity of transactions.*–A transaction of purchase and resale which standing by itself may not have been in the nature of trade may, by being repeated lose its capital nature, and the repeated, lose its capital nature, and the repeated transactions may jointly constitute a trade or may constitute a series of adventures in the nature of trade. A Manufacturer of agricultural implements who effects several transactions in cotton futures over a period of four years is doing a business in speculation, and is as much taxable on the profits as a cotton broker speculating in cotton futures or a share-broker having repeated dealings in shares on his own account.

But a transaction by being repeated does not necessarily assume a trading character. The frequency or repetition of the activity, though at times a decisive factor, is by no means indispensable–*Lalit Ram Mangilal* v. *C.I.T. 1950 I.T.R. 286 (purchases and sales of gold held to be on capital account despite the finding that the operations did not constitute a single transaction).*

(d) *Other circumstances.*–The conduct of the assessee and other circumstances may show that the venture was not an investment of capital but a trading transaction. For instance, the fact that the venture was financed from borrowed moneys may point to a business transaction.

Illustration.–The assessee who was a planter sold his main estate when he was in the employ of planting associations. Subsequently he purchased a group of estates for Rs.2,50,000. The conduct of the assessee between the date of the purchase of the estates and the date of their resale was consistent with that of a regular dealer in such plantations. The Tribunal found that the transaction of purchase and sale constituted an adventure in the nature of trade. Held, there was evidence to support the finding *(Mrs. Alexander* v. *C.I.T. [1952] 22 I.T.R. 379).*

Sales by a company: "Objects clause" in the memorandum is not conclusive.–Where a company is formed to trade in land or to carry on business as

speculative builders, its sales of land or tenements would, generally speaking, be in the course of business, for the company is formed for that very purpose. A company's purchases and sales of properties may be held to be in the course of business, even if the profits are in fact carried, or required by the articles of association to be carried, to a capital reserve fund which is not available for dividend.

To ascertain the business of a limited company one must look first at its memorandum of association and see for what business it provides and whether its objects are still being pursued. But merely from the circumstance that a company is formed with trading objects in certain fields it cannot be inferred that all the transactions of the company in those fields are necessarily in pursuance of those objects and in course of trade. Even where one of the objects of a company as stated in its memorandum is "to lend money, with or without security", a loan advanced by the company may be an affair of capital and not in the course of its business. An insurance or banking company may have the usual powers under its memorandum and articles to deal in securities and turn its investments to account, still its realisations of particular investments may be on capital account and not in course of business. Likewise, a company having power to deal in shares may yet hold all or some shares on capital account. In short, the provisions of the memorandum and articles of association are not conclusive against or in favour of the company, for question is not what business the taxpayer professes to carry on but what business he actually carries on. Every case must be determined on its own facts.

Sales in winding-up: Sale of the whole concern.–*Prima facie* the sale by a liquidator of the whole undertaking of a company is a capital realisation. But where such sale essentially forms part of the company's original scheme of profit-making which was on hand when the liquidation commenced, the sale of the undertaking by the liquidator would be a business operation resulting in revenue profits *(Rhodesia Metals Ltd.* v. *Comr. of Taxes 1941 I.T.R. Suppll. 45 P.C.).*

In *Doughty* v. *Comr. of Taxes* the Privy Council laid down the following principles: –The sale of a whole concern engaged in production business, e.g., dairy farming or sheep-rearing, does not give rise to a revenue profit. The same might be said of a manufacturing business which is sold with the leaseholds and plant, even if there are added to the sale the piece-goods in stock and even if those piece-goods form a very substantial part of the aggregate sold. Where, however, a business consists entirely in buying and selling, it is difficult in distinguish for income-tax purposes between an ordinary and a realisation sale, the object in either case being to dispose of the goods at a profit. The fact that the stock is sold out in one sale does not render the profit obtained any different in kind from the profit obtained by a series of gradual and smaller sales. In the case of such a realisation sale, if there is an item which can be traced as representing the stock-in-trade sold, the profit obtained by the sale of the stock-in-trade though it is in conjunction with the sale of the whole concern, may be treated as taxable income. But where there is a slump sale of the whole concern and a transfer of all the assets for a single unapportioned consideration, there cannot be said to be any revenue profit realised on sale of the stock-in-trade which is sold with all the other assets, although the business of the

concern may consist entirely in buying and selling. The Privy Council case was followed by the Supreme Court of India in *(C.I.T.* v. *West Coast Chemicals & Industries Ltd. (In Liq.)* where the entire price received on sale of a manufacturing concern together with the fixed assets, raw materials and stock-in-trade, was held to be on capital account.

If a person purchases the entire assets, including the book-debts, of a concern which is going to be dissolved, and the subsequent realisation or collection of those debts results in an excess over the amount paid for them, the excess cannot be charged as a revenue receipt in the hands of the purchaser *(Reynolds & Gibson* v. *Crompton 33 T.C. 288 H.L.)*, unless the purchaser carries on a business and those debts are treated as debts incidental to the business.

Where a person sells his business to a limited company under an agreement providing that all contracts unexecuted at the date of sale should be carried out by the company as the agent and for the benefit of the vendor, the net receipts from such contracts would be taxable as business income in the hands of the vendor who may be treated as setting up a new business of carrying out uncompleted trading contracts through the agency of the company.

Sale to limited company consisting of vendors as shareholders.–In *C.I.T.* v. *Sir Homi Mehta's Executors (Reynolds & Gibson* v. *Crompton 33 T.C. 288 H.L.)* the assessee and his sons formed a private limited company in which they alone were the shareholders. The assessee sold to the company shares in several companies which were held by the assessee jointly with his sons as his stock-in-trade. The shares were sold at the prevailing market value which was higher than the cost to the assessee, and the purchaser company allotted its own shares to the assessee and his sons by way of consideration for the sale. The Bombay High Court held that the assessee was not assessable on the difference between the market value of the shares at the date of transfer to the limited company and the cost price, on the ground that the sale to the limited company was not a business transaction at all but was a transfer by the assessee to himself in his corporate character, and no man can make a profit out of himself. The Calcutta High Court and the Kerala High Court took the same view. The Patna High Court has dissented from this view in *Sir Kameshwar Singh* v. *C.I.T. 1963 48 I.T.R. 483, Cf. s. 33(4)* and held that income is nonetheless income and nonetheless taxable, although the vendors may be the sole shareholders in the purchasing company, because the company is a separate legal entity. The Patna View appears to be correct.

Sale by partner to firm.–A person may sell his stock-in-trade to a firm in which he is a partner and the resulting profit would be taxable just as it would be in the case of a sale to an outsider *(C.I.T.* v. *Dahanukar [1959] 36 I.T.R. 450)*.

Sale by coparcener of property acquired on partition.–The stock-in-trade of a joint family, when allotted to a member on partition, would become capital assets in his hands and subsequent sales by him would result in capital gains, unless there is evidence to show that he treated them as his stock-in-trade *(Kannappa Chettiar* v. *C.I.T. 1962 46 I.T.R. 576)*.

Annuities and annual instalments of capital.–An annuity, in the ordinary sense of the expression, means the purchase of an income. It involves the conversion of capital into income. The classic definition as given by Baron Watson in *Foley* v. *Fletcher:* "An annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity." Such an annuity, which is properly so called, is always exigible to income-tax. No doubt the tax upon an annuity is to some extent a tax upon capital or an equivalent of capital and not merely upon income, but income includes any returns which come from a waste of capital, such as returns from leaseholds, quarries or mines,–there is therefore nothing anomalous in the taxation of annuities, though they are partly repayments of capital. An annuity payable by an employer is taxable under s. 21 (salaries). Other taxable annuities fall under s. 33 (Income from Other Sources), whether they are payable under a deed of family arrangement or an insurance policy *(See below, "Insurance annuity ...")*, or payable to a wife under a deed of separation *(Chamney* v. *Lewis 17 T.C. 318)* or a decree for alimony *(I.R.* v. *Anderstrom 13 T.C. 482)*, or to a widow under a consent decree, or to the estate of a deceased partner by the remaining partners for the privilege of using the firm's name and goodwill *(Mackintosh* v. *I.R. 14 T.C. 15)*. A contract to pay an annuity may be entered into in consideration of money paid or in consideration of property assigned. The fact that an annuity is contingent or variable in amount does not affect its character as income.

But annual payments are sometimes loosely called "annuities" where they are in fact annual instalments of capital. The purchase price of a business or property may be agreed to be paid by instalments, in which event the payments would be of a capital nature and not liable to tax. Their nature is finally determined by the circumstance that the obligation is to pay a capital sum and instalments are merely a method of effecting that payment. There must be a real existing capital sum, not necessarily pre-existing but existing in the sense that it represents some kind of capital obligation. Payments of instalments of a capital debt are capital payments, whether the debt is pre-existing or not. Similarly, annual instalments towards repayment of the cost of a capital outlay, or annual instalments of a premium which represents the capital price of a leasehold interest or of compensation payable on acquisition of zamindari lands, are on capital account.

The fine distinction between an annuity properly so called and an annual capital payment has repeatedly been emphasised, and no sure or simple test has been or can be laid down for the solution of this problem. The only principle that can be deduced from the cases is that regard must be had to the true nature and character of the transaction as ascertained from the contract which embodies the transaction and the other circumstances of the case *(National Cement Mines Industries Ltd.* v. *C.I.T. 1961 42 I.T.R. 69 S.C.)*: one must see what "the look of the thing" is. One test is to ascertain whether the principal is gone for ever and is satisfied by periodical payments. In other words, the question is whether or not it is the purchase of an annual income in return for the surrender of capital *(Kameshurar Singh* v. *State of Bihar 1959 37 I.T.R. 388 S.C.)*. If it is the purchase of an income, the annual payment is taxable; if it is a capital payment it is not (except as capital gains). What the parties have chosen to call the transaction is immaterial.

In *I.R.* v. *Ramsay 20 T.C. 79, 98 (C.A.)* Romer, L.J., said that the owner of a property may sell it "in consideration of a payment by the purchaser to him of an annuity of £ 10,000 to be paid by equal instalments of £ 500 over the next twenty years. If he adopts the former of the two methods, then the sums of £ 500 received by him each year are exigible to income tax. If he adopts the second method, then the sums of £ 500 received by him in each year are not liable to income tax. The vendor has the power of choosing which of the two methods he will adopt, and he can adopt the second method if he thinks fit, for the purpose of avoiding having to pay income tax on the £500 a year. The question which method has been adopted must be a question of the proper construction to be placed upon the documents by which the transaction is carried out.

Four types of cases arise on a sale of property or business in consideration of annual payments:-

(1) If the sale is for a price which is to be paid in instalments, the instalments represent capital payments. In *Foley* v. *Fletcher 3 H. & N. 769, 117 R.R. 967* part of the purchase money for an estate was agreed by the conveyance to be paid by annual instalments of fixed amount, extending over a period of thirty years. The instalments were held to be not chargeable as it is repayment of capital by instalments –*National Cement Mines Industries Ltd.* v. *C.I.T. [1961] Tax 86.*

(2) Where the property is sold for what is an annuity in the strict sense of the word, the principal disappears and the annuity which takes its place is chargeable to tax. In *Gopal Saran* v. *C.I.T. [1905] 2 K.B. 507* a man aged 47 transferred an estate worth Rs. 2 crores in consideration of (a) payment of the transferor's debts amounting to Rs. 10 lakhs odd; (b) a cash payment of Rs. 4 lakhs odd and (c) an annual payment of Rs. 2,40,000 to the transferor for his life. Held, the owner of the estate had exchanged a capital asset for *inter alia* a life annuity which was taxable as income in his hands. The annual payments were not instalments of a capital sum. They were part of "the Price" of the sale, but that did not make them necessarily capital payments.

A man may sell his property for what looks like an annuity, but actually there may be no transmutation of a principal sum into income and the annual payments may be merely instalments of a principal sum with interest on an actuarial calculation. In such a case only so much of each instalment as represents interest is chargeable to tax. In *Scoble* v. *Sec. of State 4 T.C. 618* the Indian Government purchased the G.I.P. Railway for a certain sum. In exercise of their option, the Government elected to pay off the purchase price, which constituted a present debt due to the Railway Company, by annual instalments which were called in the contract "annuities." The House of Lords held that the annuity was merely the payment of the purchase price by instalments together with interest at a certain rate. The tax was payable only in respect of that portion of each instalment which represented on an actuarial valuation the interest on the unpaid purchase price but not on the remaining portion which represented payment of the principal of a present debt. The use of the word "annuity" did not affect the real nature of the transaction.

The consideration for the sale may be a share of the profits or gross receipts of a business. The payment of the share would undoubtedly be the sale price, but still it would bear the character of income in the hands of the payee if the true bargain is to secure an income and not a fixed capital sum *(National Cement Mines Industries Ltd.* v. *C.I.T. [1961] 42 I.T.R. 69 (S.C. of India))*. On the other hand, the circumstances of the case may point to the fluctuating annual payments, measured by a share of profits or gross receipts, as being instalments of a capital sum. Thus the purchase price of a partner's share, fixed at a sum equal to a certain fraction of the firm's profits for three years, would be a capital sum.

The same principles apply where the periodical payments are fixed with reference to the turnover of a business, as is commonly done in the case of patent royalties, instead of being fixed with reference to profits. In *National Cement Mines Industries Ltd.* v. *C.I.T.* the Supreme Court, after reviewing the authorities, held that a periodical payment fixed with reference to the sales, in consideration of the transfer of leasehold rights and concessions, was taxable as income.

Annuities payable under a trust and voluntary annual payments.—An annuity payable to a *cestui que trust* under a will or trust deed is taxable as income in the hands of the beneficiary. Although the trustees may pay the annuity partly out of the corpus or out of borrowed capital to make up for deficiency of income from the estate, still the entire annuity would be taxable in the hands of the beneficiary; for the nature of a payment is determined by its character in the hands of the receiver and not the funds out of which it is made.

The above rule applies in the case of a *cestui que trust*. But where payments out of trust funds are made to a person who is not a *cestui que trust* injurying as of right the moneys, the payments are mere gifts and they may not be taxable as income although they may be repeated year after year. Such payments amount, in each half year or year when they are made, to fresh donations to the recipient. A voluntary allowance made without consideration, which is not traceable to any source but depends upon the whim of the donor, which has no relation to any employment or office and which the payer may discontinue at any time, is not taxable as income although it may be continued for years *(Rani Amrit Kunwar* v. *C.I.T. 1946 I.T.R. 561)*. A simple illustration of such an annual allowance which cannot be brought to charge is a voluntary allowance made by a father to his son.

An annuity payable by a mutual insurance society to one of its members upon his permanent disablement resulting from an accident was held to be income, notwithstanding that under the terms of the contract the member had to continue paying premiums during the period he was in receipt of the annuity.

But every life annuity is not necessarily income. It would be capital if the bargain is not to secure an income but to secure payment of a capital sum, for instance repayment of a pre-existing debt. In *Dott* v. *Brown 1936 1 All E.R. 543*, by an agreement of compromise in respect of a pre-existing debt of over £9,000 the debtor covenanted *inter alia* to pay to the assessee two sums of £1,000 each on the dates therein mentioned and £259 in each successive month so long as the assessee should

live, the covenant being binding on the debtor's estate after his death. The Court of Appeal held that the annual payments for life were not income. They did not replace a capital liability but were in fact instalments of the capital sum. The fact that this method of repaying the capital amount of the debt made the total repayment fluctuate with the length of the creditor's life, did not affect the capital nature of the payments.

Compensation

Compensation for restraint on trading or on exercise of profession.– Compensation paid for restraint on trading or on the exercise of a profession is a capital receipt, for it is in substitution not of income but of the source of income. But this principle does not apply where a covenant not to manufacture certain materials and the compensation therefore merely form an integral part of a composite agreement made in the ordinary course of business for procuring supply of those materials.

ILLUSTRATIONS

1. A Company employed a director for a term of five years at a certain salary. The agreement of service contained a covenant on the part of the director not to engage in a competing business for a certain period after the determination of the agreement, and as separate consideration for his entering into that covenant the director was paid £7,000 by the company on the execution of the agreement. Held, it was not a profit from the office of director but a capital payment for a covenant which would come into effect only when the service was concluded. The contract of service and the remuneration in respect of that service were entirely separated from the restrictive covenant and the consideration which was given for it *(Agrawala* v. *C.I.T. [1960] 38 I.T.R. 67).*

2. A company sold its business to another company for a certain sum which included the price of the goodwill. As separate consideration for the transferor company's entering into a covenant restraining it from doing similar business for a period of ten years, it was to be paid a further sum of Rs. 10,000 per annum for ten years. Held, the annual payment of Rs. 10,000 was not a revenue receipt. The intention was not to secure an income but it was to spread a capital payment over the period of the restrictive covenant in order to afford a safeguard to the transferee company against any breach of that covenant *(C.I.T.* v. *Mills Store Co. 1941 I.T.R. 642).*

Compensation for requisition, acquisition, damage or interference with business by Government.–Sums paid by the Government for use of requisitioned premises *(Gobardhandas Jagannath* v. *C.I.T. [1955] 27 I.T.R. 225),* or in respect of stock-in-trade damaged or destroyed by enemy action or compulsorily acquired by the Government *(Raj Kishen Prem Chandra Jain* v. *C.I.T. [1959] 35 I.T.R. 590 (land as stock-in-trade)),* or as compensation for the loss of profits caused by the exercise of their powers of controlling and interfering with the carrying on of a business *(C.I.T.* v. *Shamsher Printing Press [1960] 39 I.T.R. 90 (S.C. of India)),* are revenue receipts. But compensation paid for acquisition of zamindari lands or a leasehold interest which constituted a capital asset of the lessee, or compensation paid on requisition of

business premises for stoppage of the business, or compensation for cancellation by the Government of a licence resulting in cessation of business *(C.I.T.* v. *Kashmiri Mal Vasdev [1960] 39 I.T.R. 150)*, is on capital account.

Compensation for loss of office or employment, or for cessation of business.–The income arising from an *employment* is taxable as "salaries" under s. 21; the profits of a *business* are taxable under s. 28; while the income arising from an *office which does not involve employment* would be taxable under s. 28 as business profits, e.g. in the ordinary case of managing agents or selling agents *(Lakshminarayan Ram Gopal & son Ltd.* v. *Govt. of Hyderabad [1954] 25 I.T.R. 449 (S.C. of India))*, the activities amount to the carrying on of a business, and in other cases, e.g. an ordinary director of a company *(C.I.T.* v. *Lady Navajbai Tata 1947 I.T.R. 8)*, it would be taxable under s. 33 as income from other sources. The question whether compensation received for loss of employment or office or for cessation of business is taxable under any of the three sections, may be considered first with reference to general principles of income-tax law and then with reference to the special provision of the Ordinance.

In the case of *C.I.T.* v. *Braham Dutt Bhargar (1963 P.T.D. 99)* it was held that damage received for termination of services payable in monthly instalments are not of revenue nature and the compensation does not change its nature by restrictive covenants. But compensation received for loss of secretaryship did not effect the income earning apparatus of the company ... due to cancellation of contract there is no impact on the trading capacity of the company ... procurement of agency was a trading asset and hence compensation received for termination thereof is a revenue receipt – *C.T.* v. *Messes. McNeil & Kilburn Ltd. 1988 BTD XVI 68.*

The leading case on the point that compensation paid for *cessation of business* is a capital receipt is *C.I.T.* v. *Shaw Wallace & Co.* In that case the assessee company did business as merchants and agents of several companies. It acted as the distribution agent of two petroleum companies for a number of years without any formal agreement with either of them. The two petroleum companies combined and decided to terminate the agency of the assessee company. Each of the two companies paid large sums to the assessee company, the payment by one company being as "full compensation for the cessation of the agency" and by the other as "Compensation for loss of your office as agents to the company." The Privy Council held that the payments were not income receipts. The sums were paid not for carrying on any business but as compensation for the compulsory cessation of business. Following this decision it has been held that compensation paid for premature termination of a sole distributing agency agreement *(Divecha* v. *C.I.T. [1963] 48 I.T.R. (S.C. of India) 222)* or of an agreement to carry on a business as a joint venture with another, is a capital receipt.

The Supreme Court while holding that the compensation was a capital receipt, laid down the following propositions:

(a) Compensation for termination of an agency agreement would be a capital receipt, if the agreement constitutes the assessee's capital asset

and his profit-making apparatus *(C.I.T.* v. *Ram Ratan Gupta [1963] 48 I.T.R. 531)*. On the other hand, it would be a revenue receipt, if the agreement constitutes the assessee's trading asset and is entered into in the ordinary course of business.

(b) The facts that the agency agreement was terminable at will by the company and therefore (i) the assessees had no legal right to claim damages and (ii) the agreement was not an enduring asset, were irrelevant.

In *Divecha* v. *C.I.T. (1963 48 I.T.R. S.C. of India)* where compensation was paid to the assessees for termination of a long-standing agreement under which they were the sole distributors of goods which constituted the preponderant part of their turnover, the Supreme Court held that the agreement was a capital asset and the compensation a capital receipt. Likewise, in *Sabine* v. *Lookers Ltd. (38 T.C. 120)* compensation received for an unfavourable variation of an exclusive distributorship agreement was held by the Court of Appeal to be on capital account.

In *Kelsall Parsons & Co.* v. *I.R. (21 T.C. 608)* the assessees carried on business as selling agents of various manufacturers and entered into about a dozen agency agreements for that purpose. It was a normal incident of the assessees' business that the agency agreements might be modified, altered or discharged from time to time. One of the agreements which was for a period of three years was terminated at the end of the second year by the manufacturer concerned upon payment to the assessees of £1,500 as compensation. It was held to be a revenue receipt *(Anglo-French Exploration Co. Ltd.* v. *Clayson 36 T.C. 545, [1956] 33 I.T.R. 309)*. In *Barr, Crombie & Co. Ltd.* v. *I.R.* the assessee company acted as the ship managers of a shipping company under various agreements. The last agreement which was of 1937 and was to expire in 1951, provided that if the shipping company went into liquidation or otherwise ceased to carry on business, the remuneration of the assessee company for the unexpired period of the agreement would become immediately due. In 1942 the shipping company went into liquidation and paid the assessee company £16,306 under the agreement. Held, that the sum of £16,306 was a capital sum, being the price of the extinction of the assessees' only important capital asset. In the first case it appeared that the agency agreements were "temporary and variable elements of the assessees' profit-making enterprise" and further, as the agreement in question had only a year more to run and was not likely to be renewed, the sum though called "compensation" was "really and substantially a surrogatum for one year's profits." In the second case the sum, though called "remuneration," was clearly compensation for cessation of business.

A firm of ship-managers was employed by a steamship company. When the company went into voluntary liquidation, it paid £50,000 to the ship-managers as compensation for loss of employment. Subsequently, in pursuance of arrangements already made, the undertaking of the old company was transferred to a new company of the same name and consisting of the same shareholders, and the firm of ship-managers was employed by the new company to be its first managers. The sum was held to be not taxable. It was a voluntary payment made as compensation for the loss

of the profits of their employment under the old company. Though they were employed by the new company which carried on the undertaking of the old and which consisted of the same shareholders, there was nevertheless termination of employment under the old company, for in law the two companies were distinct and separate entities. The fact that there was no formal agreement of employment for any period of time with the old company was immaterial. Compensation for loss of an employment which need not continue but which was likely to continue, is not income *(Chibbett* v. *Joseph Robinson & Sons 9 T.C. 48).*

Under a managing agency agreement the managing agents of a company were appointed for a period of twenty years. The agreement also cast an obligation upon the managed company to employ only the managing agents as muccadams, brokers and selling agents. Before the period expired, the managing agents accepted the termination of their appointment as managing agents and released their managing agency rights in consideration of the payment of a lump sum as compensation. They however continued to be brokers, muccadams and selling agents of the company. Held, the compensation was a capital receipt, though only a part of the capital rights were surrendered *(C.I.T.* v. *Asiatic Textile Co. Ltd. [1955] 27 I.T.R. 315).*

Compensation for breach or cancellation of contract or other injury.–Where damages are recovered for an injury inflicted on a man's trading, making, so to speak, a hole in his profits, the amount of damages would go to fill that hole and would be a trading receipt *(C.I.T.* v. *Helen Rubber Industries Ltd. [1962] 44 I.T.R. 714 S.C. of India).* For instance where assessees who carried on business as ship-owners received from a firm of ship-builders damages for the ship-builders failure to complete within the agreed time repairs to a ship belonging to the assessees, the damages were held to be a trading receipt, because they were for loss of trading profits and not for any loss in the capital value of the vessel. But on the other hand, where the injury is inflicted on the capital assets of the trade, making, so to speak, a hole in them, the damages recovered are meant to be used to fill that hole and are a capital receipt. Thus were a vessel is negligently run down and sunk, the amount of damages recovered would be the value of the sunken vessel and must be regarded as capital *(Burmah Steam Ship Co. Ltd.* v. *I.R. 16 T.C. 67, at 71 per Clyde, L.P.).*

Cases of compensation paid on termination of service or agency agreements have been dealt with above under "Compensation for loss of office or employment, or for cessation of business". Cases of such termination resulting in loss of employment or cessation of business, must be distinguished from cases of cancellation of contracts which are of a trading nature or are entered into in the course of business or the exercise of a profession. Compensation paid for the cancellation or wrongful termination of a *contract which is made in the ordinary course of business* or the exercise of a profession, is an income receipt,–for the compensation in such cases represents profits which would or might have been made under the contract. As the Supreme Court held in *C.I.T.* v. *Jairam Valji [1959] 35 I.R.R. 148* and *C.I.T.* v. *South India Pictures Ltd. [1956] 29 I.T.R. 910* a contract entered into in the ordinary course of business cannot be regarded as a capital asset of the business, and compensation received for termination of such a contract would be a revenue receipt even if the

contract had, at the date of termination, some years to run. "If a sum represents profits in a new form, then that is income and income in the year in which it is received". But where an agreement relates to the whole structure of an assessee's profit-making apparatus and affects the whole conduct of his business, the congeries of rights enjoyed under such an agreement is a capital asset, and money received for the cancellation *(Divecha* v. *C.I.T. [1963] 48 I.T.R. (S.C. of India))* or variation of such an agreement would be a capital receipt.

Special provisions of the Ordinance on Remuneration.–The foregoing general law on remuneration has been to a very large extent superseded by the specific provisions of the Ordinance.

Sec. 2 (50): Profits in lieu of salary include–

(a) the amount of compensation due to or received by, an assessee from his employer at, or in connection with the termination of, or the modification of any terms and conditions relating to his employment;

Sec. 19(10): Where any amount is received by an assessee during any income year by way of goodwill money or receipt in the nature of compensation or damages for cancellation or termination of contracts and licenses by the Government or any person, such amount shall be deemed to be the income of such assessee for that income year classifiable under the head, "Income from Other Sources";

Sec. 19(12): Any managing agency commission including compensation received during any income year by an assessee for termination of agencies or any modification of the terms and conditions relating thereto shall be deemed to be his income for that income year classifiable under the head, "Income from Other Sources".

Therefore the resulting position comes as below:

(i) Compensation received for loss of employment or for modification of the terms of employment will be taxable as income under Sec. 21. It will be in no circumstances be a capital receipt.

(ii) Compensation received for loss of office or cessation of business or damages received for cancellation of contracts or license is now not a capital receipt. It will be taxed as income under Sec. 33.

(iii) Any compensation received by the Managing Agents under managing agency agreement for termination of their appointment as managing agents or modification of the terms and conditions of the managing agency, which was held as capital receipts vide *C.I.T.* v. *Asiatic Textile Co. Ltd. [1955] 27 I.T.R. 315* is in no circumstances now a capital receipt.

Damages for personal injury.–Where damages are recovered for permanent disablement as a result of an accident, they constitute a capital receipt. But if the disablement is only temporary and damages are recovered for the loss of income during the period the disablement lasts, the damages may be held to be a revenue

receipt, just as the income (if earned) would have been *(Per Clyde, L.P. Renfrew Toun Council* v. *I.R. 19 T.C. 13, 19)*.

Interest and damages.–Where a sum which is received by way of interest under a contract, award or decree, is interest proper, it is clearly income. That which reaches the hands of the recipient as interest upon a principal sum is income liable to tax not withstanding that it may come to him in a single sum and as the result of hostile suit *(C.I.T.* v. *Sir Kameshwar Singh [1953] 23 I.T.R. 212)*. On the other hand, where the sum received is not interest proper, but is interest by way of damages, the case would fall within one of two categories: (a) the "interest" which is in reality damages may still be *income* in nature and therefore taxable, or (b) the calculation of interest may be used merely as a means of arriving at a *capital* sum of damages, in which event it would not be exigible to tax. The distinction depends on substance and not on the mere name "interest" or "compensation" by which the amount may be called *(Westminster Bank Ltd.* v. *Riches 28 T.C. 159, 191 H.L.)*.

Lump sum paid in commutation of salaries, pensions, royalties and other periodic payments.–A sum paid in lieu of a series of recurrent and periodic income payments is itself income. Thus a lump sum in lieu of future royalties *(National Steel Works Ltd.* v. *C.I.T. [1962] 46 I.T.R. 646 (S.C. of India))*, or a single amount paid in advance in respect of ginning charges of cotton for ten years, would be income. Likewise, a lump sum taken in commutation of a right to future commission or remuneration, or in compromise or reduction of salary, would be equally taxable as income on general principles *(Godrj & Co.* v. *C.I.T. [1959] 37 I.T.R. 381 (S.C. of India))*.

But the position is different under *the general law* as regards a lump sum received in commutation of a pension. Though a pension is taxable as income, a sum received in commutation of the whole or a portion of a pension would ordinarily be a capital receipt, even if the sum in commutation of the pension rights is paid to the employee while he is still in service *(Wales* v. *Tilley 1943 I.T.R. Suppl. 69, 76 (H.L.))*. Thus while a lump sum in commutation of future salary would be an income receipt, such a sum in commutation of pension would be a capital receipt. The reason for the difference is that the sum in commutation of salary is regarded as in lieu of future remuneration while that in commutation of pension is regarded as representing the purchase price of an annuity *(Wales* v. *Tilley 1943 I.T.R. Suppl. 69, 74 (H.L.))*.

Insurance receipts.–*Property or profits of insurance.*–Where property is insured, receipts under the policy would be capital or trading receipts according as the policy relates to capital or trading assets. Where a manufacturer insures his premises and plant against fire, the moneys received under the policy would be on capital account under the general law.

In the case of insurance of trading stock, the insurance moneys must be treated in exactly the same manner as receipts from a sale of the goods would have been.

Where an assessee insures himself against loss of profits in the event of loss of market, or deficiency or stoppage of output caused by fire, strike, etc., the amount received under such a policy would be income and not capital: the insurance moneys

must be brought into the revenue account for they replace the estimated trading profits.

Life or accident insurance.–Insurance moneys received under a life or accident policy are revenue receipts where the policy is taken out by a business concern on the life of an employee to cover the business loss which would result from his death or injury by accident. In the case of a trading company, both goods and services fall into the same class. The insurance moneys received to cover the employer against the revenue loss which he suffers by being deprived of those services must therefore be deemed to be receipts on revenue account.

On the other hand when a life or accident policy is effected in personal or family interest, and a lump sum is paid under the policy, it would normally be a capital receipt. But if under the terms of the policy the assured is entitled in the event of accident to receive an annuity or similar recurrent payments over a period of time, those payments may be chargeable as income.

Subsidies or grants from public funds.–Where subsidies or grants are given by the Government to assist a trader in his business, they are payments of a revenue nature. The are supplementary trade receipts and not capital payments, although they might be called advances and might be subject to contingencies of repayment.

Premium (salami) paid for lease.–Premium (salami) is a single payment, made for the acquisition by the lessees of the right to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset and the money paid to purchase it may properly be held to be a payment on capital account *(Board of Ag. I.T., Assam* v. *Sindhurani Chaudurani [1957] 32 I.T.R. 169 (S.C. of India))*. This principle has been superseded by Sec. 19(22) under which it will be taxed as income from House Property.

Patent and copyright royalties: Remuneration of writers.–A patent is a capital asset. Patent royalties are payments, periodic or in a lump sum, made for the assignment of a patent. Royalties paid of a patent are taxable as income where there is a working license and the transaction does not amount to an exclusive license affecting the capital rights of the patentee: such royalties are income even though they may be paid in a lump sum for user extending over several years. But where the owner of a patent sells or surrenders it or grants an exclusive license to another which *pro tanto* disentitles the owner from exercising his capital patent rights, the transaction amounts to a *total or partial assignment* of the capital rights and the royalty is a capital receipt *(Anant Ram Khem Chand* v. *C.I.T. 1937 I.T.R. 511, 515)*. For in such a case the owner parts with a capital asset, *viz.* the corpus of the patent, even if he parts with it only for a certain limited period, for a certain limited area, or for a certain limited type of customer. But an annual royalty, particularly if it is based upon the assignee's turnover or turnover or profits, may be regarded in some cases as an income receipt even if it is in consideration of a total *assignment* of a patent; and in such cases the assignor may be regarded as having exchanged his capital asset for a recurring income payment *(Jones* v. *I.R. 7 T.C. 310 Cf. ante under)*. The question

whether it is a case of user or assignment must be determined with regard to the substance of the matter, and the mere use of the words "capital sum" "royalty" by the parties is not conclusive. Nor is it material whether the consideration is given in a lump sum or in instalments, or how the item has been dealt with in the balance sheet or in the profit and loss account.

A patentee sold his entire patent rights for a lump sum and annual royalties. The royalties were to be based upon the volume of business done. Held, the lump sum was a capital receipt, but the royalties which rose or fell with the chances of the business were income *(Jones* v. *I.R.* 7 *T.C. 310)*.

Copyright.–The foregoing principles apply to payments in respect of copyright as well. In cases *other than those of professional authors*, royalties payable for a licence to translate and publish a copyright book are income; but if there is a total or partial assignment of the copyright which is a capital asset, the payments therefore would be capital. Between a licence and a partial assignment of copyright the line runs very fine, and each agreement must be construed in the light of its own facts *(I.R.* v. *Longmans Green & Co. Ltd. 17 T.C. 272, 280)*. The use of the word "royalty" is not decisive, nor is it material whether the payment is periodic or in lump sum. In *I.R.* v. *Longmans Green & Co.* royalties (per number of copies sold) for the exclusive right of translation and publication of a French book in the English language in certain specified editions were held to be income on the ground that the agreement did not amount to an assignment of the copyright. If the whole and unlimited rights of translation and publication in English had been transferred, the transaction would have constituted an assignment.

Where the publishers paid the author a sum of £150 for licence to publish one edition of his book, and the Commissioners found that it was a capital payment, it was held that there was evidence to support the Commissioner's finding, for there was an implied obligation on the part of the author "to give no licence to anybody else to publish the book for a period of time".

Where a man exercises the *profession of an author*, the price realised by the sale of the whole or part of the copyrights of his books is as much taxable under s. 28 (professional income) as royalties received from his books, for the sale of copyright is only one way of making a profit from the exercise of a writer's profession. It was so laid down by the Court of Appeal in *Mackenzie* v. *Arnold (33 T.C. 363)*.

The only section in the Ordinance dealing specifically with the topic of copyright is s. 36. The provisions of that section have no bearing whatever on the question whether the amounts received by an author by way of royalty or as the price of assignment of his copyright are income or capital. The only object of that section is to give the author of a literary or artistic work the option of having his taxable income from his work spread over two or three years depending the time taken in making such work.

Capital gains tax.–Both patent and copyright are capital assets and consequently the sale price received on their assignment, if not chargeable as revenue, may be exigible to capital gains tax under s. 31.

Profits on currency exchange.–In the case of a business in the buying and selling of foreign currency, the profits are clearly taxable. Where foreign currency is bought for the purpose of trading transactions with foreign countries and afterwards sold, then also the profits arising from the exchange operation are assessable. But when foreign currency is kept or used as an investment, or on capital account *e.g.* to acquire capital assets, and not as circulating capital, the profit made on realisation is capital appreciation, even though the foreign currency may have been originally acquired as a revenue receipt.

Issue of shares and forfeited shares.–The issue of shares by a limited company is not a trading transaction at all. Upon an issue of shares, the assets of the company are increased by the amounts obtained from the subscribers. These amounts are obviously not profits or gains of the trade, and they are not liable to be brought into the accounts for income-tax. This is so whether the shares are allotted at par or at a premium. The amount of the premium would not be a trading profit.

Similarly, where shares are forfeited by a company for non-payment of calls, and re-issued to other shareholders, the amount which was paid on the shares by the original shareholder prior to the forfeiture is capital and not income in the hands of the company.

Amounts received on winding up of company or dissolution of firm.–Apart from the special provision made in s. 2(26)(c), the receipt by a shareholder of his share of the assets of a company upon a winding up is wholly a capital receipt under the general law, and for the purpose of ascertaining such assets it is quite immaterial whether the company originally possessed them by way of capital or profits. The position is however different in respect of a partnership. The Privy Council held in *C.I.T.* v. *Muthukaruppan Chettiar (1935 I.T.R. 208)* that on the dissolution of a partnership an outgoing partner has a right to receive, not as in the case of a shareholder in winding up a company only a share of the assets, but to receive payment of his share of the profits, –profits which were his before dissolution and which do not cease to be *his profits* on dissolution: and therefore the share of profits received by a partner on dissolution of the firm is assessable as a revenue receipt.

Assets received by member of joint family on partition.–The Madras High Court held in *Veerappa Chettiar* v. *C.I.T. (1950 I.T.R. 396)* that what is divided on a partition of a joint family is the entire family estate consisting of the original family property with all subsequent accretions in the shape of profits: the share which a member gets on partition is, generally speaking, a capital receipt and it cannot be artificially dissected into capital and income. Stock-in-trade of the joint family, allotted to a member on partition, becomes a capital asset in the hands of the allottee.

Payments in respect of a partner's interest.–A payment in respect of a partner's interest in the profits of the firm *(D.D. Shroff & Co.* v. *C.I.T. [1963] 48 I.T.R. 780)* or profits arising from use of the firm's asserts, is income. But a claim to an interest in the capital of a firm is a capital claim and a sum received in settlement

of such a claim is a capital receipt. Compensation received by a partner for relinquishing all his rights in the partnership is a capital receipt *(Sharfuddin* v. *C.I.T. [1960] 39 I.T.R. 333)*.

Under the terms of a partnership deed, on the death of a partner the remaining partners continued to use the firm's name and goodwill, paying to the executors of the deceased partner for this privilege a sum of £500 quarterly for a period of five years. The payments were held to be income receipts.

Recovery of embezzled sums and refund of revenue payments.–Where an employer claims, and is allowed, a loss by reason of embezzlement of money by an employee, any part of the embezzled sum recovered in a subsequent year would be a revenue gain. "The assessee having alleged that the embezzlement was an embezzlement of income, which could properly be set off against income in a previous year, cannot affirm in another year that it was not income and that a recovery in respect of it is a casual appreciation of capital". Likewise, where an asessee is allowed a deduction in respect of payment of a licence fee, any part of the fee refunded in a subsequent year would be a revenue receipt *(Sheikh Rahmat Ali* v. *C.I.T. [1960] 39 I.T.R. 506)*. This principle is now given statutory effect by s. 19(15) under which any amount received subsequently in respect of a loss or expenditure which had been allowed as a deduction in an earlier year is deemed to be income and to have accrued in the year of receipt.

Miscellaneous cases.–If an assessee takes over a book debt or book debts at a price from a person to whom he succeeds in business, the excess of the ultimate realisations over the purchase price would not be business profit, for even a trading debt upon assignment ceases to be a trading debt and the money paid in discharge of it cannot be regarded as the fruit of any trading by the assignee, unless the assignee trades in book debts *(Reynolds & Gibson* v. *Crompton 33 T.C. 288 (H:L.))*.

Reference to Court.–Generally speaking, the question whether a receipt is of a capital or an income nature, though it depends to a great extent on the particular facts of each case, is a question of law *(C.I.T.* v. *Jain [1962] 44 I.T.R. 535 (S.C. of India))*. Whether a transaction constitutes a capital sale or an adventure in the nature of trade is a mixed question of fact and law.

Sec. 16A: Charge of surcharge.–(1) Where any Act of Parliament enacts that a surcharge on income shall be charged for any assessment year at any rate or rates, such surcharge at that rate or those rates shall be charged for that year in respect of the total income of the income year or the income years, as the case may be, of every person.

(2) All the provisions of this Ordinance relating to charge, assessment, deduction at source, payment in advance, collection, recovery and refund or income tax shall, so far as may be apply to the charge,

assessment, deduction at source, payment in advance, collection, recovery and refund of the surcharge.

Sec. 17: Scope of total income.–(1) Subject to the provisions of this Ordinance, the total income of any income year of any person includes–

(a) In relation to a person who is a resident, all income, from whatever source derived, which–

(i) is received or deemed to be received in Bangladesh by or on behalf of such person in such year; or

(ii) accrues or arises, or is deemed to accrue or arise to him in Bangladesh during that year; or

(iii) accrues or arises to him outside Bangladesh during that year; and

(b) in relation to a person who is a non-resident, all income from whatever source derived, which–

(i) is received or deemed to be received in Bangladesh by or on behalf of such person in such year; or

(ii) accrues or arises, or is deemed to accrue or arise, to him in Bangladesh during that year.

(2) Notwithstanding anything contained in sub-section (1), where any amount consisting of either the whole or a part of any income of a person has been included in his total income or the basis that it has accrued or arisen, or is deemed to have accrued or arisen, to him in any year, it shall not be included again in his total income on the ground that it is received or deemed to be received by him in Bangladesh in another year.

Sec. 17. Scope of total income.–This section defines the whole range of total income. Sec. 2(65) which purports to define total income merely says that "total income" means the total amount of income referred to in section 17 computed in the manner laid down in this Ordinance, and includes any income which under any provision of this Ordinance, is to be included in the total income of an assessee. Sec. 43 deals with the computation of whole income by inclusion in some cases of other person's income. The principle underlying this section is to make the chargeability of income depending upon the locality of receipt or accrual.

Assessees are divided into two categories–(a) resident and (b) non-resident. Resident and non-resident have been defined in Secs. 2(55) and 2(42) respectively. This section defines the extent of total income with-reference to the residence of an assessee. in other words. the incidence of tax depends upon and is determined by the question whether the assessee is resident in Bangladesh. Residence in Bangladesh entails certain liabilities to tax but being non-resident entitles a person to partial exemption from chargeability to which resident is not entitled to. Generally speaking, the incidence of tax is higher in the case of persons who are resident and lower in the case of persons who are non-resident. Residence must be determined with reference to the income year and not the assessment year–*Wallace Bros. & Co. Ltd.* v. *C.I.T. I.T.R. 240. 244 (P.C.).*

Chargeability varies with the factor of residence.–The ambit of taxation varies, as stated above, with the factor of residence in the income year. The incidence of tax on the two categories of taxpayers is as follows:

I. *Assessment of residents*–Persons who are resident are charged on

(a) income received or deemed to be received in Bangladesh in the accounting year, the date or place of its accrual being immaterial (s. 17(i)(a)(i));

(b) income which accrues or arises or is deemed to accrue or arise in Bangladesh during the accounting year, the date or place of its receipt being immaterial (s. 17 (i)(a)(ii);

(c) income which accrues or arises outside Bangladesh during the accounting year, even if it is not received in or brought into Bangladesh (s. 17(i)(a)(iii).

II. *Assessment of non-residents.*–Persons who are not resident in Bangladesh in the accounting year are charged on

(a) income received or deemed to be received in Bangladesh in the accounting year, the date or place of its accrual being immaterial (s. 17(i)(b)(i));

(b) income which accrues or arises or is deemed to accrue or arise in Bangladesh during the accounting year, the date or place of its receipt being immaterial (s. 17(i)(b)(ii)).

To sum up the general position in a sentence, *all assessees, whether resident or not, are chargeable in respect of income accruing, arising or received, or deemed to accrue, arise or to be received, in Bangladesh; while residents alone are chargeable in respect of income which accrues or arises and is received outside Bangladesh.*

"Subject to the provisions of this Ordinance".–The definition of total income in s. 17 is "subject to the provisions of this Ordinance. The result is that while income cannot be taxed, unless it falls within s. 17 it is not necessarily to be taxed because it falls within this section; any other section may operate to save from taxation income which is within the purview of this section.

The ambit of taxation being "subject to the provisions of this Ordinance, principally involves two things. First, provisions of the Ordinance, e.g. ss. 44 to 47 and Part A of Sixth Schedule, may have the effect of exempting income which would otherwise be chargeable under this section. Secondly, the amount of income from the various sources is to be ascertained subject to the provisions of the particular sections dealing with those sources, viz. ss. 21 to 34.

"From whatever source derived".–These words indicate that if the conditions regarding accruing, arising or receipt set out in this section are satisfied, the income, profits and gains will not escape by reason of any quality or circumstance of the source. The words "from whatever source derived" are not there as a guide to the place where the profits accrue or arise but merely to make clear that source is irrelevant for determining chargeability under this section *(C.I.T.* v. *Chumilal Mehta 1938 I.T.R. 521, 530 (P.C.))*.

"Taxation under the Act is the rule, and exemption the exception. All income from whatever source derived must, therefore, be chargeable to income-tax, and the burden of proving that a particular class of income is not so chargeable must necessarily lie on the person claiming exemption from the liability to pay income-tax".

Sub-sec. (1). Assessment of residents.–The tests of "residence", for the purposes of the Ordinance, are laid down in s. 2(55). The effect of sub-s. (1) of this section is to bring within the ambit of taxation the resident's entire income, accruing or arising in any part of the world, irrespective of whether it is received in Bangladesh or not.

Sub-secs. 1(a) and 1(b) "Received or deemed to be received".–These clauses charge all income, received or deemed to be received in Bangladesh of all assessees, whether they are resident or non-resident *(Ranghava Reddi* v. *C.I.T. [1962] 44 I.T.R. 720 (S.C. of India))*. Receipt in Bangladesh attracts tax, irrespective of whether the income accrued or arose in Bangladesh or without Bangladesh. In other words, the liability to tax depends upon the locality of the receipt, and if the receipt is in Bangladesh, the question of the place of accrual does not arise at all *(Raghava Reddi* v. *C.I.T. [1962] 44 I.T.R. 720 (S.C. of India))*. The receipt must be in the "income year", i.e. the accounting year. If income is in fact received, the nature of the payment cannot be changed nor can tax in the relevant year be avoided by carrying the receipt to suspense account or by any other book-keeping device.

The receipt may be "by or on behalf of" the assessee, which obviously includes receipt by the assessee's agent. (See below under "Actual and constructive receipt"). If a settlement is held to be bad, there would be a resulting trust in favour of

the settlor and the trustee would receive the income "on behalf of" the settlor; in that event the settlor can be charged in respect of the income of the trust received on his behalf by the trustee *(Dwarkadas Bhimji* v. *C.I.T. 1948 I.T.R. 160)*.

If income is received or deemed to be received in Bangladesh, the whole amount would be chargeable to tax and there is no scope for apportionment as is done in cases where goods are manufactured in one place and sold in another".

Actual and constructive receipt.–Income, profits and gains may be received in the form of money's worth as well as money, in kind as well as in cash (See *ante* "Income in money's worth or equivalent of cash"). A sum of money may be received in more ways than one, for example, by the transfer of a coin or a negotiable instrument or the acceptance of a cheque or other document which represents and produces money *(C.I.T.* v. *Ogale Glass Works Ltd. [1954] 25 I.T.R. 529, 536 (S.C. of India))*. Adjustment of cross-claims, a settlement in account, an exchange effected by a book entry, or a set-off, would be equivalent to actual receipt of a sum of money although no money may pass. In *Trinidad Lake Asphalt Operating Co.* v. *C.I.T. (945 I.T.R. Suppl. 14, 18, 19 (P.C.)* a company declared a dividend to a shareholder who owed a like amount to the company for goods supplied by the company to him. The company effected a settlement by cancelling the debt for goods supplied and setting it against the dividend. The agreement was effected by both the parties making corresponding entries in their books. The Privy Council held that they were not merely book-keeping entries but represented the actual receipt of the dividend by the shareholder and concurrently the actual receipt by the company from the shareholder of the amount due for goods supplied.

Constructive receipt is as much within the meaning of this sub-section as actual receipt. Receipt by an agent, e.g. a bank *(Keshav Mills Ltd.* v. *C.I.T. [1953] 23 I.T.R. 230 (S.C. of India))*, a broker or an agent for sale, who is authorised to collect and give a valid discharge, would be constructive receipt by the person entitled to receive.

If an employer pays the income-tax *(North British Rly.* v. *Scott. 8 T.C. 332 (H.L.))* or the insurance premiums which are payable by the employee, or deducts an amount from the salary and enters it as the employee's contribution to a Provident or other Fund, the sums so paid or deducted would be held to be constructively received by the employee as income. Where a debt is not actually received from the debtor but the creditor agrees to treat the debt as realised and let the amount stand in the hands of the debtor by the way of a deposit or a fresh loan, there is a constructive receipt of the debt by the creditor *(Board of Revenue* v. *Arunachalam Chettiar I.L.T. 44 Mad. 65, 91, 92 (F.B.))*.

Where an assessee has a head office in Bangladesh and a branch office without Bangladesh and the branch office sends goods to the head office at an invoice value which represents a margin of profit over the cost price of the goods, the profit is not received at the branch office even if the whole or a part of the invoice price is remitted by the head office to the branch office, for no man can trade with himself or

make a profit by dealing with himself; but the profit is received at the head office where the goods are sold and the sale-proceeds are realised.

"Deemed to be received"–Statutory receipt.–The meaning and implications of the expression "deemed to be received" are considered below under "Deemed to accrue or to be received". The phrase "statutory receipt" might be conveniently employed to cover income which is deemed by the statute to be received *(Keshav Mills Ltd.* v. *C.I.T. [1953] 23 I.T.R. 230, 241 (S.C. of India)).*

Income cannot be "deemed to be received" within the meaning of this section under the mercantile system of accounting when it is credited in the accounts. "Deemed to be received" can only mean "deemed by the statute to be received". The phrase must be restricted to cases specified and set out in the statute itself. Profits are neither actually nor constructively received, nor deemed to be received, merely by reason of entry in accounts under the mercantile system. See further under "When and where is income received?

First receipt: Income cannot be received twice.–The "receipt" of income refers to the first occasion when the recipient gets the money under his own control *(Keshav Mills Ltd.* v. *C.I.T. [1953] 23 I.T.R. 230, 242 (S.C. of India)).* Once an amount is received as income, any remittance or transmission of the amount to another place does not result in "receipt", within the meaning of this clause, at the other place. This was definitely established by the Privy Council in *Pondicherry Rly. Co.* v. *(A.I.R. 1931 P.C. 165, 5 I.T.C. 363).* "It cannot be disputed that the words used ... relate to the first receipt after the accrual of income. Once it is received by the party entitled to it, in respect of any subsequent dealing with the said amount it cannot be said to be 'received' as income on that occasion" *(Raghunath Madhavlal* v. *C.I.T. 1945 I.T.R. 376, 381).* These observations were approved by the Supreme Court of India in *Keshav Mills Ltd.* v. *C.I.T.* Income, after the first receipt, moves merely as money.

In *Sunder Das* v. *Collector of Gujarat (1923 Lah. 14, 1 I.T.C. 189)* the assessee received income in British Baluchistan where it was not liable to tax and subsequently transmitted it to the Punjab to pay for the purchase of an immoveable property. Held, the income could not be said to be "received" by the assessee in the Punjab. The word "receives" implies two persons–the person who receives and the person from whom he receives. A man cannot receive an amount from himself. The assessee having already received the income in Baluchistan could not be said to receive it again when he brought it into the Punjab. On the other hand, in *Tora Gul Boi* v. *C.I.T. (I.L.R. 8 Lah. 335 A.I.R. 1927 L.A.H. 512)* an agent, whose terms of commission were not settled, sold furs in Europe and received the sale-proceeds in Europe on behalf of his principal. subsequently by a consent decree passed in India he was awarded a certain amount by way of commission which he was entitled to retain out of the sale-proceeds which had been transmitted to and were lying in India. Held, the commission was received in India. He had received the sale-proceeds in England not as owner but merely as an agent. For the purposes of income-tax, he must be held to have received his commission in India for the first time after it had been allotted to

him by virtue of the consent decree. This view is supported by the observations of Kania, J., in *Hiralal Kalyanmal*, In re *(1943 I.T.R. 128, 140)*.

If a sum is received by an agent of the assessee outside India and the agent merely performs the mechanical act of transmitting it to its recipient in India, the receipt by such an agent does not count at all and the receipt in India must be considered the first receipt of the sum as income *(Narasammal* v. *Sec. of State I.L.R. 39 Mad. 885, 1 I.T.C. 10)*. But if the agent does more than merely act as an animated post-office and his functions transcend the mere mechanical operation of transmitting the sum to the principal, the receipt by such an agent would be held to be a proper receipt of the sum as income and the place and time of the subsequent receipt by the principal would be immaterial from the point of view of taxation *(Turner Morrison & Co. Ltd.* v. *C.I.T. [1953] 23 I.T.R. 152 (S.C. of India); C.I.T.* v. *S.K.F. Ball Bearing Co. Ltd. [1960] 40 I.T.R. 444 (S.C. of India))*. Receipt by a bank, a broker or an agent for sale on behalf of the assessee would generally amount to first receipt of income.

It is the first receipt that determines the year and place of receipt for the purpose of taxation. A non-resident is taxed on his foreign income only if it is "received" in Bangladesh i.e., received for the first time from the foreign source. If he has already received the income without Bangladesh he would not be chargeable when he remits or transmits it to Bangladesh. "You cannot receive the same sum of money *qua* income twice over, once outside ..... Bangladesh and once inside it."

The mere signing of a receipt in Bangladesh is not conclusive proof of receipt of income in Bangladesh *(Saiyid ali Imam* v. *Croun I.L.R. 4 Pat., 210, A.I.R. 1925 Pat. 281, 1 I.T.C. 402)*.

Receipt is not the sole test of taxability.–Rowlatt, J., said in *Leigh* v. *(11 T.C. 590, 595); Grey* v. *Tiley 16 T.C. 414 and Amarendra Lal Khan* v. *C. Ag. I.T. [1959]* "for income tax purposes 'receivability' without receipt is nothing." This principle applies under this Ordinance only to a restricted number of cases where the provisions of the Ordinance or the assessee's method of accounting require receipt as the sole test of taxability. In such cases where the principle does apply, income cannot be brought to charge if it has not been received, whether the non-receipt is due to the default of the person bound to pay or whether the non-receipt is due to the assessee's choosing to refrain from exercising his right to receive. In *Dewar* v. *I.R. (19 T.C. 561, 579)* a legatee was entitled, under the terms of the will, to interest in case of delay in payment of the legacy. He received the legacy from the executors and elected to let the question of interest stand over. The Department sought to assess him on the interest he could have demanded but did not in fact demand or receive. The Court of Appeal held that it was not a mere voluntary forgoing tantamount to application of his income by the assessee. A person is entitled to retain the corpus of an interest-bearing security and release the interest in any year in order to avoid a higher rate of tax. As Romer, L.J., said, the question is what income the man has received and not what income he might have received but for his wilful default. For the purposes of income tax one does not take an account of an impossible income on the footing of wilful default.

From the following provisions of the Ordinance it can be marked that receipt is not the sole test of taxability:

(a) Sec. 17 expressly brings to charge not only income which has been received but also income which has *accrued or arisen (Keshav Mills Ltd.* v. *C.I.T. [1953] 23 I.T.R. 230 (S.C. of India); C.I.T.* v. *Singari Bai 1945 I.T.R. 224 (F.B.))*.

(b) Income may not have accrued, arisen or been received, yet it may be brought to charge under s. 17 if it is *deemed* to have accrued, arisen or to have been received under the provisions of the Ordinance.

(c) Receipt is no test of chargeability at all as regards at least two heads of income. Sec. 21 speaks of salary or wages which are *due*, whether paid or not. Sec. 33 charges the *annual value* of house-property.

(d) Sec. 35 provides that income, profits and gains are to be computed for the purposes of s. 28 (business or profession and s. 33 (other sources) in accordance with the method of accounting regularly employed by the assessee. If the assessee employees the cash system of accounting, income cannot be brought to tax unless it has been received–*(C.I.T.* v. *Maharajadhiraja Kameshwar Singh of Darbhanga 1933 I.T.R. 94 100 (P.C.))*. But if the assessee follows the mercantile system of accounting he would be liable to tax on profits accrued though they may not be received, because under this system profits are computed by taking into account the income and the expense, irrespective of whether such income has been received or not and whether such expense has been paid or not–*(C.I.T.* v. *Singari Bai 1945 I.T.R. 224, 227)*.

The effect of the above provisions is that *receipt is in no sense the sole test of chargeability* under the Ordinance: an assessee might be taxed on income, profits or gains which have accrued or arisen but have not been actually or constructively received. This is now established by the decisions of the Supreme Court of India in *Keshav Mills Ltd.* v. *C.I.T.* and *C.I.T.* v. *Thiagaraja Chetty & Co.* However, even under this Ordinance, a *non-trader* who has not regularly employed any method of accounting cannot be assessed, generally speaking, under s. 33 ("income from Other Sources") in respect of money not received by him; because, in the case of such a non-trader, until be gets the money it is not part of his income.

When and where is income received.–The date of realisation or receipt is important when accounts are maintained on cash basis. For in that case the income can be charged only in the year in which it is received or realised. Under the mercantile system of accounting, on the other hand, the date of receipt is immaterial, for profits are computed on the basis of accrual and not on the basis of receipt. Under the mercantile system of accounting there is no receipt, actual or constructive, merely by reason of entry in the accounts. The unrealised income is assessed, not on the ground of constructive receipt but on the ground that it accrues or arises, for under

s. 17 income which has merely accrued or arisen is taxable as well as income which is received. Broadly speaking, the mercantile system of accounting makes unrealised income taxable but it does not make unrealised income realised. Therefore, as a general rule, the method of accounting does not affect the question of the date or place of receipt though it does affect the question of the date of taxability.

When moneys are paid to the assessee in cash, the date of receipt is obviously the date when the moneys are received by the assessee. Sale proceeds include, profits if the business of the year ends in profit, and therefore profits would be received at the time and place at which the sale proceeds are received–*(Keshav Mills Ltd.* v. *C.I.T. [1953] 23 I.T.R. 230 (S.C. of India))*. If only a part of the sale-proceeds are received in Bangladesh, only a part of the profits would be regarded as received in Bangladesh.

In the case of moneys paid to the banker, broker or other agent of the assessee, the time and place of payment to the banker, broker or other agent are the time and place of receipt by the assessee for the purposes of this Ordinance. For instance, where goods are sent by V.P.P., or are sent by rail and the railway receipt is sent through a bank for being delivered to the buyer against payment, income is received at the time and place of payment by the buyer to the post office or the bank – *(C.I.T.* v. *Bhopal Textiles Ltd. [1961] 41 I.T.R. 72 (S.C. of India))*.

Where income is realised in money's worth, the date of receipt is the date on which the money's worth is received because the money's worth is itself income. For instance, when a cheque or other bill of exchange or a third party's bond is taken in discharge of a debt, the date of receipt is the date on which the instrument is received and not the date on which payment is made under it *(Singreni Collieries Co. Ltd.* v. *C.I.T. [1952] 21 I.T.R. 375)*. In *C.I.T.* v. *Ogale Glass Works Ltd. (1954 25 I.T.R. 529), C.I.T.* v. *Kirloskar Bros Ltd. and Shri Jagdish Mills Ltd.* v. *C.I.T.* the Supreme Court of India laid down the following propositions:

(a) When payment is received by cheque, the receipt is at the time when the cheque is delivered and not when it is encashed. This would be so even if the cheque was accepted conditionally in the first instance, provided it is not dishonoured subsequently on presentation *(Keshav Mills Ltd.* v. *C.I.T. 1950 I.T.R. 407)*.

(b) If the cheque is sent by post, the receipt would be at the place where the cheque is posted, provided the mode of sending it by post is adopted at the express or implied request of the recipient, the post office in such cases being the agent of the addressee *(C.I.T.* v. *Indore Malua United Mills Ltd. 1960 39 I.T.R. 438)*; otherwise, the receipt would be at the place where the cheque is delivered by the post office to the addressee *(C.I.T.* v. *New Jehangir Vakil Mills Ltd. [1960] 39 I.T.R. 427)*.

(c) Having regard to business usage, a request to make payment by cheque may in itself *imply* request to send it by post; while a request to "remit" the amount would be tantamount to an *express* request to send it by post.

In the later case of *C.I.T.* v. *Patney & Co. (1959 36 I.T.R. 488)* the Supreme Court of India held that the rule laid down in *Ogale Glass Works'* case would be inapplicable in cases where there is an express agreement between the parties that payment should be made at a certain place and the cheque is received at that place. In such cases the income would be received at the agreed place of payment where the cheque is received, regardless of the question whether the cheque was sent by post at the recipient's request, express or implied.

The date of realisation of money's worth in other cases is the date when the assessee's title to the property taken over becomes completely effective in law. When lands are accepted in satisfaction of a claim, the date of receipt is not the date when possession is given but when a conveyance-deed is executed *(C.I.T.* v. *Maharajadhiraja of Darbhanga 1933 I.T.R. 94, 109 (P.C.))*. When mortgage-property is bought at a court-sale, the date of receipt is the date of confirmation of the sale *(Raghunandan Prasad* v. *C.I.T. 1933 I.T.R. 113, 124 (P.C.))*.

In cases where profit is realised in the form of a valuable asset, the profit must be held to be realised in the year in which the asset is received, even though the asset may be neither realised nor realisable till later. In *Gold Coast Selection Trust* v. *Humphrey (1949) I.T.R. Suppl. 19, 26* the House of Lords held that where a company sold its trading assets for fully paid shares in another company, the profit should be treated as realised in the accounting year in which the shares were allotted to the vendor company, even though the shares were neither realised nor realisable till later *(1949 I.T.R. Suppl. 19, 26)*.

Where a part of the price is unpaid.—In the case of an agreement to let a part of the purchase price stand in the hands of the purchaser as a loan, the entire price should be regarded as received on the date of the sale, unless there is some evidence that the debt is not worth its face value *(Lock* v. *Jones 23 T.C. 749, 1942 I.T.R. Suppl. 153)*. But where speculative builders effected sales to small purchasers and a part of the price was to be paid by instalments extending over several years, though with interest and secured on the property sold, the House of Lords held that the whole price could not be treated as income in the year of sale.

Single transaction.—In the case of a single venture in the nature of trade, the question of assessing profits would normally arise when the venture comes to an end or after the entire cost has been recouped. So where a person purchases a piece of land, gets it surveyed, lays out a scheme of development, divides it into a number of building plots and sells some of the plots from time to time, he cannot be charged on the profits of the sales while the rest of the plots are still in his hands and their sale might result in a loss wiping out the earlier gains. Assessable profits in such a case would arise when all the plots are sold and the venture has come to an end, unless the

entire cost is recouped earlier in which event profits may be assessed before the venture comes to an end *(C.I.T.* v. *Nanduri Suryanarayana [1962] 46 I.T.R. 894)*.

Sub-secs. 1(a)(ii) and (b)(ii)–Distinction between "accruing," "arising" and "received".–In *Rogers Pyatt Shellac & Co.* v. *Sec. of State (1 I.T.C. 363, 372)*, Mukerji, J., said, "Perhaps the two words (accrue and arise) seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out in *Colquhoun* v. *Brooks (1888 21 Q.B.D. 52, 59)* that both the words are used in contradistinction to the word 'receive and indicate a right to receive" *(T.V. Sundaram Iyengar & Sone Ltd.* v. *C.I.T. 1959 37 I.T.R. 26, 38)*. Income may accrue at a point of time prior to its quantification or computation which is not a condition precedent to accrual. Profits may accrue or arise in one place and be received in another.

Where a contract of agency, according to which commission does not accrue till the end of the accounting year, is varied before the expiration of the relevant year, the commission taxable on the basis of accrual is that determined according to the varied agreement.

In several cases the distinction between "income accruing or arising" and "income received" has been pointed out, but no clear distinction has been drawn between "accrue" and "arise". However, in the context of this section a distinction may be drawn between the two words. The section requires that income, profits and gains should not only accrue or arise in Bangladesh but they should accrue or arise "during the income year". The words "accrue" and "arise" may be synonyms as far as the locale is concerned–income cannot perhaps be conceived of as *accruing* in one place and arising in another place. But the two words may not mean the same thing so far as the date is concerned–income accruing in the income year may not *arise* in the income year. This distinction between the two words as regards the point of time arises in the following way:–Under s. 35 the profits and gains of business or profession (s. 28) and income from other sources (s. 33) are to be computed in accordance with the method of accounting regularly employed by the assessee. Income, profits and gains *accrue* when they first *come into existence* or the right to receive them comes into existence; but they may be said to *arise when the method of accounting shows them in the shape of profits or gains.* Now there are several hybrid systems of accounting, and a case may very well arise where income accrues in one year, arises (according to the method of accounting) in a different year and is received at some third point of time. When the statute requires that income, profits or gains should accrue, arise or be received in the income year, it contemplates three different points of time at which they can possibly be brought to charge; the actual charge being at such one of the three points of time as the assessee's method of accounting warrants.

It follows from the above principles that where accounts are maintained on the mercantile basis or a hybrid system, the date of taxability of income is the date when the appropriate entries, *are* made or *should be* made in the books in accordance with the method of accounting regularly employed.

Date of accrual of business profits.–Income can be held to accrue only when the assessee acquires a right to receive that income. Damages claimed for breach of contract, or any claim to profit, would accrue only when decreed or admitted and not when merely a claim is made *(C.I.T.* v. *Jai Parkash Om Parkash Co.)*. Where a businessman supplies goods at stipulated rates in an accounting year, and, finding that the rates are uneconomical, asks for additional payments which are agreed to in a subsequent year, the additional payments are assessable as the income of the subsequent year in which the right to receive them arises and not as the income of the year in which the transactions of sale took place *(C.I.T.* v. *Kalicharan Jagannath 1961 41 I.T.R. 40)*.

The case-law dealing with the question as to when income can be said to have accrued or arisen has been exhaustively discussed in a judgment of the Indian Supreme Court, *E.D. Sassoon & Co. Ltd.* v. *C.I.T. (1954 26 I.T.R. 27)*, Where the principle was reaffirmed that income must be held to accure at the date when a debt becomes due *(Cotton Agents Ltd.* v. *C.I.T. [1960] 40 I.T.R. 135 (S.C. of India) and Ramaswami Nadu* v. *C.I.T. [1950] 35 I.T.R. 33)*. The Supreme Court further held in *C.I.T.* v. *Thiagaraja Chetty & Co.* that the mere fact that an amount due to the assessee has been carried to "suspense account" in the debtor's books or that the debtor withholds payment on account of a pending dispute, cannot be held to mean that income has not accrued to the assessee. Conversely, the mere fact that an amount has been entered in the assessee's books is not conclusive proof that income has accrued *(C.I.T.* v. *Shoorji Vallabhadas & Co. [1962] 46 I.T.R. 144 (S.C. of India)*.

Place of accrual of business profits.–It would be nearly impossible and wholly unwise to lay down any general test to determine the place where profits or gains of business or employment accrue. In some cases it may be the place of the formation of the contract, but other matters–for instance the place where the contract is carried out or acts are done under the contract–may be decisive in certain circumstances *(C.I.T.* v. *Modern Theatres Ltd. [1951] 20 I.T.R. 588)*. The question should be decided on the facts of each case in the light of common sense and plain thinking.

Sale of goods.–Where the business consists merely of buying and selling goods, profits arise, as a general rule, at the place *where the contracts of sale are made or sales are effected (Singareni Collieries Co. Ltd.* v. *C.I.T. [1952] 21 I.T.R. 375)*. A contract is made at the place where the offer is accepted *(Rajkumar Mills Ltd.* v. *C.I.T. [1955] 28 I.T.R. 184, 188 (S.C. of India))*. In the case of sale of unascertained goods, the sale takes place at the place where property in the goods passes to the purchaser *(C.I.T.* v. *Anamallais Timber Trust 1950 I.T.R. 333)*. If the right of disposal is reserved till the payment is made, the property passes and the sale is effected at the place where the payment is made against delivery of goods or documents of title. In *Rahim* v. *C.I.T. (1949 I.T.R. 256)* and *Pudukottah Co. Ltd.* v. *C.I.T. (1963 47 I.T.R. 352)* goods purchased in an erstwhile Indian State were sold in British India, and the entire profit arising from the sales was held to accrue or arise in British India. Conversely, profits derived from the sale in a foreign country of goods purchased in India do not accrue or arise in India but in the foreign country where

they are sold *(Nadar* v. *C.I.T. 1940 I.T.R. 619, 626 S.B.)*. In *Jiwan Das* v. *C.I.T.* the assessee purchased goods in British India and sent them for sale to his shop in Kashmir (outside British India). It was held that no portion of the profits derived from the sales outside British India was assessable as profit accruing or arising in British India, Because the mere purchase of goods has too remote a connection to justify the conclusion that a part of the profits accrued in British India. Shadi Lal, C.J., repelling the argument that the purchase of goods is one of the several processes the combination of which results in profits and that a part of the profits should therefore be attributed to that process, said: "The place where the sale is effected and the price realised is the principal place, if not the place, of the accrual of profits *(Pudukottah Co. Ltd.* v. *C.I.T. 1963 47 I.T.R. 352)*.

If the contracts of sale are made abroad and the sales are effected abroad, the entire profits would accrue abroad, and no part of the profits can be said to accrue in Bangladesh merely because the assessee's agents or brokers canvass here for orders *(Hukumchand Mills Ltd.* v. *C.I.T. 1963 47 I.T.R. 169)*.

In cases where the *contracts of sale* are made in one place and the *sales* take place in another, profits may accrue, partly at the place where the contracts of sale are made, and partly at the place where the *sales* are effected and the contracts are executed. The correct view is that taken in *C.I.T.* v. *Rodriguez & Co. (1951 20 I.T.R. 247 E.P.T. case)*, *viz.* that in such cases the profits should be apportioned and a part of the profits should be held to accrue at the place where the income-producing contracts for sale are made, and a part at the place where the contracts are performed and the sales are actually effected.

Profits which are gathered merely as a result of entering into contracts, as in the case of dealings in "futures," accrue at the place where the contracts are made *(C.I.T.* v. *Chunilal Mehta 1938 I.T.R. 521 P.C.)*.

Selling agents' commission.–On the same principles a *selling agent's* commission accrues at the place where he effects the sales. In *C.I.T.* v. *Sarupchand Hukamchand (5 I.T.C. 108, 113)* the assessees were the selling agents in Bombay of a mill in the Indore State and were entitled under their agreement of agency to deduct their commission from the proceeds of sales which took place in Bombay. The commission was held to accrue in British India where the sales took place, although the ultimate right to the commission arose under the agency agreement made in the Indore State. The agents' right to deduct their commission from the sale proceeds received in British India was held to be an important consideration, although as a matter of practice between the parties the commission was paid to the agents in the Indore State.

Managing agents' commission.–Normally, the commission payable to the *managing agents* of a company accrues at the place where the services are performed by the managing agents; and if it is possible to apportion the commission and attribute a part of it to services rendered outside Bangladesh, such part should be held to accrue outside Bangladesh.

Other types of commission.–Commission paid for rendering other services accrues at the place where the services are rendered *(Kathiawar Coal Distributing Co.* v. *C.I.T. 1958 34 I.T.R. 182).*

Direction and control.–Profits accrue at the place where the business transactions are actually effected and not at the place from which the business is controlled or directed. Where a business was carried on in a Native State through agents, its profits did not accrue in British India by an individual proprietor or by the board of directors of a limited company having its registered office in British India *(Board of Revenue* v. *Ramanathan Chetty 1 I.T.C. 37).* In the leading case of *C.I.T.* v. *Chunilal Mehta (1938 I.T.R. 521 P.C.)*, the assessee, carrying on business in India, directed and controlled transactions abroad in the course of such business. The profits of the transactions effected abroad were held not to accrue or arise in India.

Where an assessee has a head office in Bangladesh and a branch office without Bangladesh and the branch office sends goods to the head office at an invoice value which represents a margin of profit over the cost price of the goods, the profit does not accrue at the branch office, for *no man can trade with himself or make a profit out of himself;* but the profit accrues at the head office where the goods are sold and the sale-proceeds are realised.

Place where business is carried on or source of income is situate.–The source of dividend-income is shareholding and that source is situate at the place where the share-register is kept, but the dividend may yet accrue at a different place where the dividend is declared and made payable *(Kusumben Mahadevia* v. *C.I.T 1963).* There are, however, cases in which the source of income is helpful in ascertaining the place where the income accrues. Interest on Government of India Promissory Notes which were issued and repayable in British India, was held to accrue or arise in British India even though the notes were enfaced for payment of interest at a place outside British India. The interest payable outside British India and actually received also outside British India still accrued or arose in British India because the words "accruing or arising" could not be equated with the word "payable".

Apportionment of profits where goods are manufactured in one place and sold in another.– The general rule, as stated above, is that profits accrue at the place where sales are effected. But where the assessee is both a manufacturer and trader, and manufactures goods in one place and sells them in another, the question arises whether the profits should be apportioned and a part of the profits should be held to accrue at the place where the goods are manufactured and the rest at the place where the sales take place. For the purposes of s. 17 the general principle underlying the case of Commissioner of Taxation v. Kirk (1900 A.C. 588) should be applied, *viz.*, that where an assessee sells goods of his own manufacture, profits do not accrue solely at the place where the sales take place but the profits must be apportioned and a part should be considered as accruing at the place where the goods are manufactured and a part at the place where they are sold. This is now established by the decisions of the Indian Supreme Court in *C.I.T.* v. *Ahmedbhai Umarbbai & Co.* and *Anglo-French*

Textile Co. Ltd. v. *C.I.T. (1954 25 I.T.R. 27). See also American Bureau of Shipping* v. *C.T. (South Zone) Chittagong*, reported in (করাদালত, এপ্রিল, ৯৮).

"Deemed" to accrue or to be received.–When income is deemed to accrue or to be received in Bangladesh, the only meaning possible is that whereas it is not in reality so, the statute requires it to be treated as if it were *(Kamakshya Narain Singh* v. *C.I.T. 1947 I.T.R. 311, 310 F.C.)*. The Words "deemed to accrue" and "deemed to be received" refer to cases set out in the statute itself *(See Keshav Mills Ltd.* v. *C.I.T. 1953 23 I.T.R. 230, 241 S.C. of India)*. "Deemed to accrue or arise to him in Bangladesh during such year" and the corresponding words with reference to receipt, may mean one of four things: (a) artificial year of receipt, (b) artificial place or accrual of receipt, (c) artificial chargeability of a person and (d) artificial year of taxability:-

(a) The income *does not accrue or is not received at all* in reality, but the Ordinance requires it to be treated as income accruing or received. Such artificial accrual or receipt of income is provided in s. 24. In effect s. 24 deems the "annual value" of property to be income accruing or received, whereas in reality the property may be lying unoccupied or may be in possession of a gratuitous licensee and no income at all may actually accrue or be received from the property. Alternatively, income may in reality accrue but may not be actually received, yet the statute may deem it to be received as in the cases of deduction at source from income from salaries, Interest on Securities etc. gross salaries, gross interest have to be taken into account in computing the whole income.

(b) The income *in fact accrues or is received, but not in Bangladesh,* and the Ordinance requires it to be treated as if it accrued or where received in Bangladesh. In this sense the legal fiction does not purport to tax income which has never accrued at all in reality; "the income is there, it has accrued or arisen, the fiction only fixes the place where it is deemed as having accrued or arisen". Income is deemed to accrue in Bangladesh in the cases set out in s. 18.

(c) The income may be *deemed* to be the income of the *person* sought to be taxed, though in reality it is the income of some one else (See Secs. 43(3)(4)(5)). In this sense the word "deemed" may be used to point to the statutory owner of the income in contradistinction to the real owner.

(d) The income may be *deemed* to be the income of the *income year* (i.e. the accounting year) when actually it may be the income of a different year. See Paragraph 4 of First Schedule (annual accretion to recognised Provident Fund); Paragraph 3(c) of Part A of Sixth Schedule (when income is set apart for application to charitable purposes) and Sec. 31 (income of capital gains). In this sense the word

"deemed" would have reference to the artificial year of taxability as opposed to the actual year of accrual or receipt.

Thus the phrase "deemed to accrue or arise to him in Bangladesh during that year" and the corresponding phrase with reference to receipt in this section, involve four possible concepts: (a) artificial accrual or receipt, (b) artificial place of accrual or receipt, (c) artificial chargeability of person other than the actual owner of the income, and (d) artificial year of taxability.

Sub-sec. 1(a)(iii)–Income accruing outside Bangladesh.–Under this clause, in the case of residents, income accruing outside Bangladesh is taxed just like income accruing in Bangladesh, it being immaterial whether the foreign income is or is not received in or brought into Bangladesh. Residents cannot escape assessment by the simple expedient of allowing the foreign income to lie abroad.

Sub-sec. 1(b) Assessment of non-residents.–Persons who are not resident in Bangladesh are liable to charge under this sub-section. They may be taxed under sub-cl. (i) on income received or deemed to be received in Bangladesh even if it accrues elsewhere, or under sub-cl. (ii) on income which accrues or arises or is deemed to accrue or arise in Bangladesh even if it is received elsewhere.

A non-resident, unlike a resident, is not chargeable in respect of income accruing or arising outside Bangladesh and not received in Bangladesh. But where the assessee is a firm, the residence or non-residence of any of its partners is immaterial for the purpose of computing and charging the firm's profits. The Privy Council laid down in *Badridas Daga* v. *C.I.T. (1949 I.T.R. 209)* that a non-resident partner of a resident firm is not entitled to exclude from his total income a proportion of his share of the firm's income corresponding to the portion of the firm's income which accrued or arose outside Bangladesh.

17(2)–Charge on accrual or receipt basis: Income cannot be taxed twice.–If an income is taxed under one of the clauses of this section on the ground of accrual or deemed accrual, it cannot be taxed again under another clause either in the same year or in a different year on the ground of receipt. This principle which was implicit in the 1922 Act is given express recognition by this sub-section. Whether an assessee should be assessed on accrual basis or receipt basis would depend on the method of accounting regularly employed by him (s. 35).

Sec. 18: Income deemed to accrue or arise in Bangladesh.–The following income shall be deemed to accrue or arise in Bangladesh, namely:–

(1) any income which falls under the head "Salaries", wherever paid if–

(a) it is earned in Bangladesh; or

(b) it is paid by the Government or a local authority in Bangladesh to a citizen of Bangladesh in the service of such Government or authority;

(2) any income accruing or arising, whether directly or indirectly, through or from–

(a) any property, asset, right or other source of income in Bangladesh;

or

(c) transfer of capital assets in Bangladesh:

Provided that in the case of a business all the operations of which are not carried-out in Bangladesh, only such part of the income as is reasonably attributable to the operation carried out in Bangladesh shall be deemed to accrue or arise in Bangladesh;

(3) any dividend paid outside Bangladesh by a Bangladeshi company;

(4) any income by way of interest payable–

(a) by the Government; or

(b) by a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside Bangladesh or for the purpose of making or earning any income from any source outside Bangladesh; or

(c) by a person who is a non-resident where the interest is in respect of any debt incurred, or moneys borrowed and used for the purposes of a business or profession carried on by such person in Bangladesh or for the purpose of making or earning any income from any source in Bangladesh;

(5) any income by way of fees for technical services payable–

(a) by the Government; or

(b) by a person who is a resident, except where such fees are payable in respect of services utilised in a business or profession carried on by any such person outside Bangladesh or for the purposes of making or earning any income from any source outside Bangladesh; or

(c) by a person who is non-resident where such fees are payable in respect of services utilised in a business or profession carried on by such person in Bangladesh or

for the purposes of making or earning any income from any source in Bangladesh.

(6) any income by way of royalty payable–

(a) by the Government; or

(b) by a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person outside Bangladesh or for the purposes of making or earning any income from any source outside Bangladesh; or

(c) by a person who is a non-resident where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person in Bangladesh or for the purposes of making or earning any income from any source in Bangladesh.

Sec. 18: Income deemed to accrue or arise in Bangladesh.–In this section there are various provisions under which income actually accruing to an assessee abroad is deemed to accrue in Bangladesh. Under section 17 all residents and non-residents are alike chargeable in respect of income which accrues or is deemed to accrue in Bangladesh or is received in Bangladesh. Non-residents who are not assessable in respect of income accruing or received abroad are rendered chargeable under section 17(1)(b)(ii) in respect of income deemed by this section to accrue in Bangladesh.

Section does not apply where income actually accruess or is received in Bangladesh.–This section which deems certain categories of income to accrue in Bangladesh has no application in cases where income *actually accrues* in Bangladesh. The fiction which is created in this section does not also apply to cases where income is *received* in Bangladesh. The reason is that in respect of income which is received in Bangladesh, residents and non-residents are alike chargeable under Sec. 17 irrespective of the place of accrual of the income; therefore, if an assessee received income in Bangladesh, that would be sufficient to attract the tax, and the further question should be deemed to accrue in Bangladesh by virtue of this section would not arise for consideration–*Anglo French Textiles Co. Ltd.* v. *C.I.T. [1954] 25 I.T.R. 27 (S.C. of India)*. If the income is not received in Bangladesh, a non-resident would not be chargeable upon it unless it accrues or is deemed to accrue in Bangladesh. Thus a general charge of income tax is imposed by Secs. 16 and 17, and the general charge is given a particular application in respect of non-residents by this section which enlarges the ambit of taxation by deeming income to arise in Bangladesh in certain circumstances.

Sub-sec. (1) Cl. (a)(b): Salaries paid by Government or Local Authority.–These clauses provide an artificial place of accrual for income taxable, under head "Salaries" under Sec. 21. It has been said that the income chargeable under the head "Salaries" is deemed to accrue or arise in Bangladesh if it is earned in Bangladesh, i.e. if the services under the agreement are or were rendered in Bangladesh, the place of receipt or actual accrual being immaterial for this purpose.

This clause applies even to salary paid by foreign Government to its employees serving in Bangladesh with the exception as provided for in Paragraphs 7 and 15 of part A of Sixth Schedule.

In the case of Bangladeshi citizen who is employed by Government or a local authority, income chargeable under the head "Salaries" which is payable for service outside Bangladesh would be deemed to accrue in Bangladesh even if the salary is payable or paid outside Bangladesh, the place of actual accrual of the salary being immaterial for this purpose. The intention is to bring to charge salaries received by Government servants posted abroad, who technically become non-residents after sometime and thus escape taxation in Bangladesh.

Sub-Sec. 2(a).–Income is deemed to accrue or arise in Bangladesh if it accrues directly or indirectly through or from any business connection.

Business connection: The expression, "Business Connection" has a wide meaning and it admits of no precise definition. The solution of the question must depend upon the particular facts of each case–*Abdullah Bhai Abdul Kader* v. *C.I.T. [1952]*. The meaning of the expression, "business connection" in this section is not restricted by the definition of "business" contained in Sec. 2(14) for that definition is enumerative and not exhaustive. The Privy Council held that the phrase "business connection" is different from, though doubtless related to the word, "business" of which there is a definition in Sec. 2(14) of the Ordinance and that income arising from a business connection may be chargeable under a head other then "business", for instances, it may be interest chargeable under the head "Income from other sources". All that is necessary is that there should be a business in Bangladesh and a connection between that person sought to be charged and that business, and the person should have earned income through that connection.

But "business connection" denotes some *element of continuity* in the relationship between the agent, licensee or other person in Bangladesh who helps to make the profits and the non-resident who receives or realises them–*Anglo French Textile Co. Ltd.* v. *C.I.T. [1953]*. An isolated transaction or stray transactions would not normally amount to a business connection.

The categories of "business connection" are incapable of exhaustive enumeration. Illustrative instances of business connection are–

(i) A branch office is maintained in Bangladesh for the purchase or sale of goods or transacting other business,–*Motor Union Insurance Co. Ltd.* v. *C.I.T. [1945] I.T.R. 272.*

(ii) A *factory* is erected where the raw materials purchased locally undergo a certain process and work into a form suitable for export abroad–*C.I.T.* v. *Sheet Bros. & Co. Ltd. 2 I.T.C. 119.*

(iii) An *agent* is appointed in Bangladesh for regular purchase of raw materials or other commodities a for sale of non-resident's goods–*Anglo French Textile Co. Ltd.* v. *C.I.T. [1953] 33 I.T.R.*

(iv) A local *subsidiary* company is formed to sell the product of the non-resident parent company–*C.I.T. Remington Type Writer Co. (Bombay) Ltd.* v. *5 I.T.C. 177 (P.C.).*

(v) There is a *close financial association* between a resident and a non-resident company–*C.I.T.* v. *Bombay Trust Corpn. Ltd.4 I.T.C. 312 (P.C.).*

(vi) The resident is granted a *continuing licence* to exploit for profit an asset belonging to a non-resident–*C.I.T.* v. *Metro Goldwyn Mayer (India) Ltd. 1939 I.T.R. 176.*

A business connection may exist even without any regular agency, branch, or other definite organization. But the mere fact that substantial part of a non-resident's output finds its way into local market or is sold directly to various customers in Bangladesh would not amount to a business connection in Bangladesh–*Hira Mills Ltd.* v. *I.T.O. 1946 I.T.R. 417, 428.*

Profits accruing to a non-resident in foreign countries through work done in Bangladesh by his agents here whose agency territory includes those foreign countries, or profits arising to a non-resident even from sales made by him directly to his agent in Bangladesh pursuant to a clause in the sole agency agreement may be deemed to accrue in Bangladesh under this section on the ground that they arise directly or indirectly from a business connection in Bangladesh.

ILLUSTRATIONS

A Company incorporated in Hong Kong to carry on a finance business virtually used *its entire capital in advancing loans* at interest to a company with similar objects in Bombay. Held, the Hong Kong Company had a business connection in India–*Bombay Trust Corpn. Ltd.* v. *C.I.T. 3 I.T.C. 135, 154.*

An American Company formed a *subsidiary Company* in Bombay for the express purpose of acquiring from the American Company and carrying on in Bombay the American Company's business of selling its products. Although *no contractual obligation* existed to compel the Bombay Company to purchase any of the manufactures of the American Company, the flow of business between the two companies was secured by the fact that the ultimate and complete control of the Bombay Company was vested in the American Company which owed all its shares. Held, a business connection existed between the American Company and the Bombay Company and that the estimated profits at which the American Company sold its manufactures to the Bombay Company as well as the dividends paid by the Bombay

Company to the American Company were income which must be deemed to have accrued to the American Company in India and consequently the Bombay Company was assessable in respect thereof *(C.I.T.* v. *Remington Type Writer Co. (Bombay) Ltd. 5 I.T.C. 177).*

Property, asset or source of income.–Any income is deemed to accrue in Bangladesh if it accrues directly or indirectly through or from any property, asset or source of income. As the Privy Council pointed out in *C.I.T.* v. *Currimbhoy Ebrahim & Sons Ltd.1935 I.T.R. 395 400-401,* the word property in this clause is used as an ordinary English word to be taken in its usual signification and is not confined to "buildings or lands appurtenant thereto" as in s. 24 which deals with "income from property" and that in the context of the section the word "property" includes both movable and immovale property but means something *tangible– C.I.T.* v. *Metro Goldwyn Mayer (India) Ltd. 1939 I.T.R. 176, 185-6.* If tangible property is situated in Bangladesh, the income arising through or from such property is deemed to be income arising in Bangladesh under this section, e.g., in a case where a machinery situated in Bangladesh has been hired under an agreement which makes the hire payable outside Bangladesh *(C.I.T.* v. *Currimbhoy Ebrahim & Sons Ltd. 1935 I.T.R. 395, 401 P.C.).* Intangible property like a debt is not "property" within the meaning of this section *(C.I.T.* v. *Currimbhoy Ebrahim & Sons Ltd. ibid.),* but it would be covered by the additional words, "any asset or source of income" which were inserted to fill the lacuna arising from the Privy Council's decision. "Source" means not a legal concept but something which a practical man would regard as a real source of income *(Rhodesia Metals Ltd.* v. *Comr. of Taxes 1941 I.T.R. Suppl. 45, 52 (P.C.); Rani Amrit Kunwar* v. *C.I.T. 1946 I.T.R. 561, 582).*

Dividends paid by a Bangladesh company, which accrue abroad because they are declared and made payable abroad, may nevertheless be deemed to accrue in Bangladesh under this clause, since the source of the income, viz. the shareholding, is situate in Bangladesh *(Kusumben Mahadevia* v. *C.I.T. 1963 47 I.T.R. 214).* But such cases would now be covered by the more specific provision in sub-section (3). The Bombay High Court held in *Caltex (India) Ltd.* v. *C.I.T. (1952 21 I.T.R. 278)* that where a company carries on business in India and pays dividends out of profits accruing and taxed in India, the dividends arise directly from a "source of income" in India, for the source of the dividends is the same as the source of the profits made by the company. Therefore, the dividend-income of a non-resident shareholder may be deemed to accrue in India under this clause and in respect of such dividends the company may be assessed as the "agent" of the shareholder. But this decision overlooks the principle that the source of dividend-income is the *shareholding (Kusumben Mahadevia* v. *C.I.T. 1963 47 I.T.R. 214 Cf. Bacha Guzdar* v. *C.I.T. 1955 27 I.T.R. 1 (S.C. of India)).* The decision requires reconsideration as regards companies which are incorporated abroad, which declare dividends abroad (though out of Indian profits) and the situs of whose shares is abroad. It is noteworthy that cl. (iv) of this sub-section which deems dividends to accrue in India, is restricted in its application of Indian companies only. This principle also applies to cases in Bangladesh and its application should be restricted to Bangladeshi companies since source of dividend is the shareholding.

Transfer of capital assets in Bangladesh.–Here the word "capital assets" refers to capital asset as is in Sec. 2(15). Any income accruing or arising, whether directly or indirectly through or from a transfer of capital assets situated in Bangladesh that would be deemed to have accrued or arisen in Bangladesh. Capital gains arising from the transfer of a capital asset, whether movable or immovable, situate in Bangladesh at the time of the transfer, are deemed by this clause to accrue in Bangladesh irrespective of the place where the agreement of transfer is made or the consideration for the transfer is payable. Transfer of capital asset includes sale, exchange or relinquishment of the asset or the extinguishment of any rights therein–see Sec. 2(66).

Proviso to Sec. 18(2) – Apportionment of Profits.–The proviso makes a provision for the allocation of profits in respect of different operations of a single business. It provides that in the case of a business of which some of the operations are carried out within, and some without Bangladesh, the profits of the business should be apportioned and only that portion of the profits which is reasonably attributable to the operations carried out in Bangladesh should be deemed to accrue in Bangladesh. The expression "income" used in this proviso means the total result of the business; so that if in place of income there are losses, they are as much to be apportioned as income would be *(Harakchand Makanji & Co.* v. *C.I.T. [1952] 22 I.T.R. 33)*. This principle was followed by the High Court Division of S.C. of Bangladesh in the case of *American Bureau of Shipping Co.* v. *C.T. (South Zone) Chittagong*.

In *C.I.T.* v. *Ahmedbhai Umarbhai & Co. (1950 I.T.R. 472)* the Supreme Court of India held that the principle laid down in this Explanation applies where the goods are manufactured in one place and sold in another and that the profits may be apportioned between the manufacturing and the selling operations. In the case before the Supreme Court, the assessee carried on the business of manufacturing and selling ground-nut oil. The oil was manufactured without, but sold within, India. It was held that the profits arising from such sales should be apportioned between the two operations, viz. manufacture and sale, and only such portion of the profits as was reasonably attributable to the sale should be deemed to accrue in India. Even apart from this when considering the place of actual accrual of profits under s. 18 in cases where the assessee carries on both manufacturing and selling operations the whole of the profits should not be considered as accruing from the sale or at the place of sale but a part of the profits should be held to accrue at the place where the goods are manufactured.

If raw materials are regularly and systematically purchased in Bangladesh and the manufacture and the sale take place abroad, the purchase of raw materials would be a business operation within the meaning of this proviso. It may be reasonable to attribute a portion of the profits to such acts of purchase in Bangladesh and such portion of the profits may be deemed to arise in Bangladesh under this section *(Anglo French Textile Co.* v. *C.I.T. [1953] 23 I.T.R. 101 (S.C. of India))*.

Similarly, where goods are purchased abroad and sold in this country, the profits realised on the sales may, in some cases, be apportioned and a part of the profits may be attributed to the buying operations *(Rahim* v. *C.I.T. 1949 I.T.R. 156,*

267-8); but in other cases the mere act of buying may be so negligible a part of the business operations as not to justify the allocation of any portion of the profits to that act *(Rahim* v. *C.I.T. 1949 I.T.R. 256.* Mahajan, J., said in *Anglo French Textile Co. Ltd.* v. *C.I.T.),* "..... It is not every business activity of a manufacturer that comes within the expression 'operation' to which the provisions of s. 42(3) [of the 1922 Act] are attracted. These provisions have no application unless according to the known and accepted business notions and usages the particular activity is regarded as a well defined business operation. Activities which are not well defined or are of a casual or isolated character would not ordinarily fall within the ambit of this rule. Distribution of profits on different business operations or activities ought only to be made for sufficient and cogent reasons, ... In a case where all that may be known is that a few transactions of purchase of raw materials have taken place in British India, it could not ordinarily be said that the isolated acts were in their nature 'operations' within the meaning of that expression".

The apportionment of profits under this proviso should not be arbitrary but should be on a rational basis *(Annamalais Timber Trust & Co.* v. *C.I.T. [1961] 41 I.T.R. 781).* In a case where the only operation within India was the negotiation and conclusion of the contract and the contract was performed entirely outside India, only ten per cent of the profits was deemed to accrue in India *(Annamalais Timber Trust & Co.* v. *C.I.T. [1961] 41 I.T.R. 781).*

Proviso to sub-section (2) does not apply where profits actually accrue or are received in Bangladesh.—The proviso applies in terms only to cases where the profits are *deemed* under Sec. 18 to accrue in Bangladesh; it does *not* operate to give relief in cases where profits actually accrue or are received in Bangladesh and are therefore chargeable under s. 17 apart from this section *(Turner Morrison & Co. Ltd.* v. *C.I.T. [1953] 23 I.T.R. 152 (S.C. of India)).* This proviso cannot afford any relief to residents, since the resident is chargeable in respect of income arising in any part of the world (s. 17(a)).

Sub-sec. 3. Dividend paid abroad by Bangladeshi Company.—Expln. 3 to s. 4(1) of the 1922 Act deemed dividends paid abroad by a company registered in taxable territories shall be deemed to be income accruing in taxable territories only to the extent to which they were paid out of profits subjected to income-tax in taxable territories. This sub-section is wider in scope and deems a dividend paid abroad by a Bangladeshi company to accrue in Bangladesh in every case.

A Bangladeshi company must have its registered office in Bangladesh and therefore its share-register would be kept in Bangladesh. The situs of the shares is the place where the share-register is kept *(Bradbury* v. *English Sewing Cotton Co. 8 T.C. 481, 508 (H.L.)).* Now, the situs of the shares may be material as the source of dividend income is the shareholding. Thus such a dividend declared by a Bangladesh company would be deemed to accrue in Bangladesh under this sub-section or, in any event under sec. 2(b) on the ground that the source of income is situate in Bangladesh. The effect of this clause is that all shareholders—even those who are non-resident are liable to charge under s. 17 in all cases in respect of a dividend declared by a Bangladeshi company, wherever it is payable or paid.

Sub-sec. 4. Income by way of interest payable.–

(a) Interest payable by the Government, wherever paid and by whomsoever it is received, that interest shall be deemed to have accrued in Bangladesh.

(b) Any income by way of interest payable by a resident person is deemed to have accrued in Bangladesh, but that presupposes that the loan money or borrowed money for which interest is payable shall be used for the purpose of business or profession carried on by him in Bangladesh or in earning from any source in Bangladesh. This clause has excluded the situation where such borrowed money is used for the purpose of carrying out any business or profession outside Bangladesh or is used in earning any income from any source out side Bangladesh. Interest will be deemed to have accrued to the recipient of interest, so where the recipient of interest is a resident person that interest shall be deemed to have received by him under sec. 17 in which case this section shall not apply.

(c) Any income by way of interest payable by a non-resident person shall be deemed to have accrued in Bangladesh where the loan money or borrowed money for which the interest is payable shall be used for the purpose of business or profession carried on by such non-resident person in Bangladesh or such money is used for the purpose of earning from any source in Bangladesh.

Sub-sec. 5(a). Income by way of fees for technical services. –

(a) Any income by way of fees for technical services payable by the Government shall be deemed to have accrued in Bangladesh wherever paid and by whomsoever it is received.

(b) and (c) Any income by way of fees for technical services by a resident or non-resident person shall be deemed to have accrued in Bangladesh where such fees are payable for services utilised in business or profession carried on by him in Bangladesh or such services are utilised for the purpose of earning any income from any source in Bangladesh. This provision shall not apply in a case where the person paying fees for technical services is a resident person and the services are utilised outside Bangladesh.

Sub-sec. 6(a). Income by way of royalty payable. –

(a) Any income by way of royalty payable by the Government shall be deemed to have accrued in Bangladesh.

(b) and (c) any income by way of royalty payable by a person, resident or non-resident in respect of any right, property or information used or services utilised for the purpose of a business or profession carried on by him in Bangladesh or for the purpose of earning any income from

any source situate in Bangladesh shall be deemed to have accrued in Bangladesh. But in case the royalty is payable by a resident person in respect of any right, property or information used or services utilised for the purpose of business or profession carried on outside Bangladesh or for earning from any source outside Bangladesh shall not be under the purview of this sub-section if the recipient of royalty is not resident.

Sec. 19: Un-explained investments, etc., deemed to be income.–(1) Where any sum is found credited in the books of an assessee maintained for any income year and the assessee offers no explanation about the nature and source thereof, or the explanation offered is not, in the opinion of the Deputy Commissioner of Taxes, satisfactory, the sum so credited shall be deemed to be his income for that income year classifiable under the head "Income from other sources".

(2) Where, in any income year, the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article and the Deputy Commissioner of Taxes finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income and the assessee offers no explanation about the excess amount or the explanation offered is not, in the opinion of the Deputy Commissioner of Taxes, satisfactory, the excess amount shall be deemed to be the income of the assessee for such income year classifiable under the head "Income from other sources".

(3) Where, in any income year, the assessee has incurred any expenditure and he offers no explanation about the nature and source of the money for such expenditure, or the explanation offered is not in, the opinion of the Deputy Commissioner of Taxes, satisfactory, the amount of the expenditure shall be deemed to be the income of the assessee for such income year classifiable under the head "Income from other sources."

(4) Where, in the financial year immediately preceding the assessment year, the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of fund for the investments, or the explanation offered is not, in the opinion of the Deputy Commissioner of Taxes, satisfactory, the value of the investments shall be deemed to be the income of the assessee for such financial year classifiable under the head "Income from other sources".

(5) Where, in the financial year immediately preceding the assessment year, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article which is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of fund for the acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered is not, in the opinion of the Deputy Commissioner of Taxes, satisfactory, the money or the value of the bullion, jewellery or other valuable article, shall be deemed to be the income of the assessee for such financial year classifiable under the head "Income from other sources".

(6) Any income derived by an assessee in any income year (hereinafter in this sub-section referred to as the said income year) from any business or profession, which has been or was, discontinued at any time before the commencement, or during the courses, of the said income year shall, if such income would have been chargeable to tax if it had been received in the income year in which it accrued or arose, be deemed to be income chargeable to tax from such business or profession which shall, for the purposes of this Ordinance, be deemed to have been carried on before the commencement, or during the course, of the said income year.

(7) Any dividend declared or distributed by a company shall be deemed to be the income of the income year in which it is declared and shall be included in the total income of the assessee of that year.

(8) Where any assets, not being stock-in-trade or stocks, and shares, are purchased by an assessee from any company and the Deputy Commissioner of Taxes has reason to believe that the price paid by the assessee is less than the fair market value thereof, the difference between the price so paid and the fair market value thereof, shall be deemed to be income of the assessee classifiable under the head "Income from other sources".

(9) Where any lump sum amount is received or receivable by an assessee during any income year on account of salami or premia receipts by virtue of any lease, such amount shall be deemed to be income of the assessee of the income year in which it is received and classifiable under the head "Income from other sources".

Provided that at the option of the assessee such amount may be allocated for the purpose of assessment proportionately to the years

covered by the entire lease period, but such allocation shall in no case exceed five years.

(10) Where any amount is received by an assessee during any income year by way of goodwill money or receipt in the nature of compensation or damages for cancellation or termination of contracts and licences by the Government of any person, such amount shall be deemed to be the income of such assessee for that income year classifiable under the head "Income from other sources".

(11) Where any benefit or advantage, whether convertible into money or not, is derived by an assessee during any income year on account of cancellation of indebtedness, the money value of such advantage or benefit shall be deemed to be his income for that income year classifiable under the head "Income from other sources".

(12) Any managing agency commission including compensation received during any income year by an assessee for termination of agencies or any modification of the terms and conditions relating thereto shall be deemed to be his income for that income year classifiable under the head "Income from other sources".

(13) Any amount received by an assessee during any income year by way of winnings from lotteries, crossword puzzles, card games and other games of any sort or from gambling or betting in any form or of any nature whatsoever shall be deemed to be his income for that income year classifiable under the head "Income from other sources".

(14) Any profits and gains derived in any income year from any business of insurance carried on by a mutual insurance association computed in accordance with the provisions of paragraph 8 of the fourth schedule shall be deemed to be the income of such association for that income year.

(15) Where, for the purpose of computation of income of an assessee under section 28, any deduction has been made for any year in respect of any loss, bad debt expenditure or trading liability incurred by the assessee, and –

(a) Subsequently, during any income year, the assessee has received, [except as provided in clause (aa)] whether in cash or in any other manner whatsoever, any amount in respect of such loss, bad debt, or expenditure, the amount so received

shall be deemed to be his income from business or profession during that income year;

(aa) such amount on account of any interest which was to have been paid to any commercial bank or the Bangladesh Shilpa Bank or the Bangladesh Shilpa Rin Sangstha or on account of any share of profit which was to have been paid to any bank run on Islamic principles and which was allowed as a deduction in respect of such expenditure though such interest or share of profit was not paid by reason of the assessee having maintained his accounts on mercantile basis, within [three years] after expiry of the income year in which it was allowed, shall, to such extent as it remains unpaid, be deemed to be income of the assessee from business or profession during the income year immediately following the expiry of the said three years;

(b) the assessee has derived, during any income year, some benefit in respect of such trading liability, the value of such benefit, if it has not already been treated as income under clause (c), shall be deemed to be his income from business or profession during that income year;

(c) such trading liability or portion thereof as has not been paid within three years of the expiration of the income year in which deduction was made in respect of the liability, such liability or portion, as the case may be, shall be deemed to be the income of the assessee from business or profession during the income year immediately following the expiry of the said three years;

and the business or profession in respect of which such allowance or deduction was made shall, for the purposes of section 28, be deemed to be carried on by the assessee in that year:

Provided that where a trading liability referred to in clause (c) is paid in a subsequent year, the amount so paid shall be deducted in computing the income in respect of that year.

(16) Where any building, machinery or plant having been used by an assessee for purpose of any business or profession carried on by him is disposed of during any income year and the sale proceeds thereof exceeds the written down value, so much of the excess as does not exceed

the difference between the original cost and the written down value shall be deemed to be the income of the assessee for that income year classifiable under the head "Income from business or profession".

(17) Where any machinery or plant exclusively used by an assessee for agricultural purposes has been disposed of in any income year and the sale proceeds thereof exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be the income of the assessee for that income year classifiable under the head "Agricultural income".

(18) Where any insurance, salvage or compensation moneys are received in any income year in respect of any building, machinery or plant which having been used by the assessee for the purpose of business or profession is discarded, demolished or destroyed and the amount of such moneys exceed the written down value of such building, machinery or plant, so much of the excess as does not exceed the difference between the original cost and the written down value less the scrap value shall be deemed to be the income of the assessee for that income year classifiable under the had "Income from business or profession".

(19) Where any insurance, salvage or compensation moneys are received in any income year in respect of any machinery or plant which having been used by the assessee exclusively for agricultural purpose is discarded, demolished or destroyed and the amount of such moneys exceed the written down value of such machinery or plant, so much of the excess as does not exceed the difference between the original cost and the written down value less the scrap value shall be deemed to be the income of the assessee for that income year classifiable under the head "Agricultural income".

(20) Where an asset representing expenditure of a capital nature on scientific research within the meaning of section 29(1)(xx) is disposed of during any income year, so much of the sale proceeds as does not exceed the amount of the expenditure allowed under the said clause shall be deemed to be the income of the assessee for that income year classifiable under the head "Income from business or profession."

Explanation 1.–For the purpose of this sub-section and sub-sections (16) and (17), "sale proceeds" shall have the same meaning as in the Third Schedule.

Explanation 2.–For the purposes of this sub-section and sub-sections (16) and (18), the business or profession in which the building, machinery, plant or assets, as the case may be, was used before its disposal, shall be deemed to be carried on by the assessee during the income year in which such disposal takes place.

(21) Where any sum, or aggregate of sums exceeding taka fifty thousand is claimed or shown to have been received as loan by an assessee during any income year from any person, not being a banking company or a financial institution, otherwise than by a crossed cheque drawn on a bank, and has not been paid back in full within three years from the end of the income year in which it is claimed or shown to have been received, the said sum or part thereof which has not been paid back, shall be deemed to be the income of the assessee for the income year immediately following the expiry of the said three years and be classifiable under the head "Income from other sources".

Provided that where the loan referred to in this sub-section is paid back in a subsequent income year, the amount so paid shall be deducted in computing the income in respect of that subsequent year.

(22) Where an assessee being the owner of a house property, receives from any person to whom such house property or any part thereof is let out any amount which is not adjustable against the rent payable, the amount so received shall be deemed to be income of the assessee for the income year in which it is received and be classifiable under the head "Income from house property":

Provided that at the option of the assessee such amount may be allocated, for the purpose of assessment in equal proportion to the year in which such amount is received and the four years next following:

Provided further that where such amount or part thereof is refunded by the assessee in a subsequent income year the amount so refunded shall be deducted in computing the income of the assessee in respect of that income year.

(23) Where during any income year an assessee, being an exporter of garments, transfers to any person, the export quota or any part thereof allotted to him by the Government, such portion of the export value of the garments exportable against the quota so transferred as may be prescribed for this purpose shall be deemed to be income of the

assessee for that income year, classifiable under the head "Income from business or profession.";

Sec. 19A–Exemption in refund of investment in new industry .....

19AA–Exemption in investments for expensive of industry .....

19B–In purchase of shares, stocks etc.

Sec. 19. Unexplained investments, etc., deemed to be income.–There was no provision in the Income Tax Act, 1922 corresponding to this section. The section gives statutory recognition to the principle that cash credits which are not satisfactorily explained may be assessed as income. Further, the section has embodied some provisions besides the provision of cash credits which will be deemed to be income as noted below:

Sub-Sec. 1. Cash credited in the books of accounts maintained by the assessee.

Sub-Sec. 2. Investments made in excess of the expenditure recorded in the books of accounts.

Sub-Sec. 3. Unexplained source of expenditure as made by the assessee.

Sub-Sec. 4. Unexplained investments not recorded in the books of accounts maintained by the assessee.

Sub-Sec. 5. Possession of unexplained wealth, like, money, bullion, jewellery and other assets not recorded in the books of accounts of the assessee.

Sub-Sec. 6. Income from the business of the year which was discontinued either before the commencement of the year or during the courses of the year.

Sub-Sec. 7. Dividend income declared in a year being the income of the year.

Sub-Sec. 8. Purchase of assets, not being stock-in-trade or stocks and shares from a company at a price lesser than market value – difference being income.

Sub-Sec. 9. Salami or premia received by virtue of any lease being income.

Sub-Sec. 10. Goodwill money or compensation or damages received for cancellation or termination of contract and licenses is deemed income receipt.

Sub-Sec. 11. Any benefit derived on account of cancellation of indebtedness by an assessee debtor.

Sub-Sec. 12. Managing agency commission or compensation for termination or modification of agencies.

Sub-Sec. 13. Money received by way of winnings from lotteries, cross-word puzzles or gambling or betting.

Sub-Sec. 14. Profits and gains from insurance business carried on by mutual insurance association.

Sub-Sec. 15. Where deduction was allowed in the computation of profits & losses from business in respect of bad debt, trading liability etc. the assessee subsequently received any cash or benefit for such expenditure, or in respect of bank interest allowed but not paid within two years (period extended to three years), such cash received, benefit derived by the assessee and unpaid bank interest shall be deemed to be the income of the assessee.

Sub-Sec. 16. Excess in difference between the written-down-value and sale-proceeds but upto the original cost of building, machinery or plant used in business or profession when disposed of is deemed as profits and gains.

Sub-Sec. 17. Excess in difference between the sale-proceeds and written-down-value upto the original cost of plant or machinery exclusively used for agricultural purpose when disposed of is deemed to be agricultural income.

Sub-Sec. 18. Insurance money or compensation received against building, machinery or plant used for business or profession when discarded or demolished or destroyed as is in excess of written-down-value upto the original cost less the scrap value being Income from Business or Profession.

Sub-Sec. 19. Insurance money or compensation received against machinery or plant used for agricultural purpose when discarded, demolished or destroyed as is in excess of the written-down-value upto the original cost less scrap value being Income from Agriculture.

Sub-Sec. 20. Excess in the sale-proceeds of capital assets for scientific research over the expenditure allowed for the purpose be deemed to be income from Business or Profession.

Sub-Sec. 21. Aggregate amount of loan exceeding taka fifty thousand claimed to have been taken from any person other than bank or financial institution otherwise than by a crossed cheque in any year if not repaid within two years (subsequently extended upto three years) be deemed to be income after the expiry of the said two (three) years. such loan if repaid subsequently shall be deducted in computing income in that subsequent year.

Sub-Sec. 22. Advance rent received from tenant if not adjusted against rent payable shall be deemed to be income from property. The amount may be divided in equal proportion and be deducted from income in four subsequent years. Such rent if refunded shall be deducted in computing income.

Sub-Sec. 23. The amount of export value of quota of garments allotted by the Government if transferred to any person by the exporter shall be deemed to be income from Business or Profession.

Sec. 19. This section to a greater extent corresponds to Sec. 10(2A) of 1922 Act. Sec. 10(2A) was inserted in the 1922 Act in 1966. that is, during the martial law regime and the provisions of this section are more or less are based on arbitrary legislation.

Cash Credits –Sub-Sec. (1).–(i) *Income year.*–This sub-section enacts that if a sum is found credited in the books of an assessee maintained by him for any income year (which may be different from the financial year) the cash credit must, in

all cases excepting as provided for in sub-section 4 and 5, be treated –as the income of that income year, and the financial year should not be taken as the income year for such cash credit although the unexplained credit which is deemed to be "Income from other Sources" whereas the assessee maintains his books of accounts for his regular business adopting a different year other than the financial year.

(ii) *Cash credits on first day of accounting year.*– Where a large amount of cash is credited on the first day of the accounting year, considering the extent of the business it was held that it is not possible that the assessee earned a profit of that amount in one day, the amount could not be assessed as the income of the year on the first day of which it is credited in the books –*Muthoo Lal Tek Chand* v. *C.I.T. [1953] 23 I.T.R. 494.* Under this section, even in such a case the unexplained cash credit would be assessed as the income of the accounting year for which the books are maintained.

Cash credits–Intangible additions:

The Deputy Commissioner of Taxes very often raises the gross profit shown by the assessee on the ground that the profit shown is lower than normal. The difference of gross profit declared and the gross profit worked out by the Department generally represents intangible additions. In subsequent years when some cash credits are discovered in the account sometime no allowance is made for the intangible addition made in earlier years. This practice entails hardship in as much as the same income comes to be taxed over again. The Central Board of Revenue, therefore, directed that when additions for concealed profits are made in any year and a cash credit is discovered in later years, in such cases the I.T.O. should reduce the amount from the amount of cash to the extent of the intangible, if any, made in earlier year's assessment. In doing so he should not, however, go back more than four years earlier to the previous year in which the cash credit was discovered as the reduction of cash credit was observed as a concession (Circular No. 11 of 1954). The underlying idea behind the concession was that if the Department charges tax on an income much above the income declared by the assessee the tax payers should have the concession of not paying the tax again either on the whole of that income or a part thereof if it is introduced in the business and the assessee has a right to claim such addition as part of his capital if and when introduced but the instructions given in the Circular provide that it does not go back four years preceding the year in which the addition is made. This Circular was, however, followed by an open Circular dated 28th December, 1958 which was in connection with the processing of declaration of excess income that was filed in pursuance of Martial Law Regulation.

The position was however, re-examined and the C.B.R. revised the order in September, 1961 and issued a Circular realising that the assessee has a right to introduce as a part of his capital of the income which has already been subjected to tax. It was laid down in that Circular that cash credit must not relate to the preceding four years barring the assessment year the assessment of which is to be framed.

Whether the income, which is evolved from the difference of the gross profit declared and the gross profit worked out, can be taken to be the real income? In the

case reported in *(S. Kuppa Swami Mudaliar* v. *C.I.T. [1964] Taxation 28)*, their Lordships held that it was not the notional but the real income. Our Appellate Courts particularly the Tribunal has also been holding that the intangible additions, where introduced would amount to real and not the notional income. It was held in that case that intangibles that arise in a particular year must be considered to be the real receipts relevant to that very year although the quantification of the same may be made much later by the I.T.O. by making addition to the income of the assessee of that particular year. In a case cash credit was introduced in the account of 1960-61 but intangible for that year was determined later in the year 1961-62 by the I.T.O. by making addition to the income of that particular year and such cash credit for 1960-61 was covered by the intangibles actually made in 1961-62.

"If additions are made to returned income the Department cannot contend that the amount of addition is not the real income but something which the assessee may not have earned, it would be illogical for the Department to contend that the addition is only for tax purpose ... and if certain sum is dealt with as the income of one year of assessment and if the assessee in any succeeding year brought that amount into the account of the business it will still continue the character of the income of the previous year *(B. Abdul Qader [1964] 52 I.T.R. 364, 369-370)(Madras)*. Cash credits of investments made in particular accounting year may, in proper cases, be explained to have proceeded from earlier out of the books' additions as held in *(C.I.T.* v. *Ram Actal Ram Sewak [1969] 73 I.T.R. 501 (All.)* and other cases *(Reported in 1997 BTD XXV 144-146)*. Though the additions are made at the time of making assessment, money would actually be available during the course of the relevant accountable year itself. Merely because the additions are made much later, it cannot be contended that the amounts added were not available to the assessee during the relevant accounting year *(C.I.T.* v. *K.V. Muniswamy Mudaliar [1978] 113 I.T.R. 802 (Madras))*.

Approving the view taken in *(Legadapath's case (1956) 30 I.T.R. 593 (A.P.)* and *Kuppuswami's [1964] I.T.R. 757 (Mad.))* the Supreme Court of India in *(Anantharam Veerasenghalal & Co.* v. *C.I.T. [1980] 123 I.T.R. 457, 462)* observed "Now it can hardly be denied that when an intangible addition is made to the book profits during the assessment proceeding it is on the basis that the amount represented by that addition constitutes the undisclosed income of the assessee. That income, although commonly described as intangible, is as much a part of his real income as that disclosed by his account books. It has the same concrete existence. It could be available to the assessee as the book profits could be" –(Reported in 1997 BTD XXV 145, 146). The Appellate Tribunal, Dhaka Bench in I.T.A. No. 4495 of 1994-95 relying on the above mentioned cases also observed that intangible additions not only refers to additions to the Trading Account but also it includes excess profits of land as estimated by the Deputy Commissioner of Taxes more than the value shown in the sale-deed. The assessee was entitled to the benefit of intangible addition to the extent of the excess price as estimated by the Deputy Commissioner of Taxes although it was not a trading benefit.

In another case the Revenue declined to accept the books of the company and estimated its income at a higher sum on which tax was assessed and paid. In dealing with the matter Andhrapradesh High Court observed that when Revenue

Authorities levied tax on the company for its secret profits, it would have been open to the company to bring these profits into the books and distribute them as dividend ... the Department cannot contend that the addition is not the real income but something which the assessee may not have earned. The Appellate Tribunal, Dhaka Bench followed the decision in the case of Deputy Commissioner of Taxes, Companies Circle–I, Dhaka v. M/s. Catering Service Ltd., Dhaka (Case No. I.T.A. 1125 of 1983-84).

Cash credits and undisclosed Income.–The Deputy Commissioner of Taxes may add a lump sum as representing undisclosed income and may include cash credits, alleged borrowings, etc., in the total income as representing suppressed or secreted profits (See "Burden of Proof"). A sum representing profits from undisclosed transactions may be added to the total income even when the other income from the assessee's ordinary business is computed at a flat rate by making additions to that income *(Srinivas Ramkumar* v. *C.I.T. 1948 I.T.R. 254; Ratanchand Dipchand* v. *C.I.T. [1960] 38 I.T.R. 188).* Income from undisclosed sources cannot be treated as business income unless there is any circumstance from which the inference may be drawn that it is business income –*Lakhmichand Baijanth* v. *C.I.T. [1950] 35 I.T.R. 416, 424 (S.C. of India).*

When on an examination of the books of account of a business, a particular amount is determined as representing undisclosed profits, and there is also an aggregate amount of cash credits which are suspected to represent undisclosed profits, the Department should add to the total income the greater of the two amounts but not both, since the cash credits would themselves represent the undisclosed profits,–*Auto Stores, Dacca* v. *C.T. Dacca* (See illustration) unless there is some material to indicate that the cash credits represent the secreted profits of another independent business or other source of income –*Kumaraswami Reddiar* v. *C.I.T. [1960] 40 I.T.R. 590* (See illustration). The same principle applies in cases where the Department rejects the assessee's books which contain cash credits and computes his business profits at a flat rate–*Maddi Sudarsanam Oil Co.* v. *C.I.T. [1959] 37 I.T.R. 369* (See illustration). But this principle is not universal, and the Department may estimate the business profits on a percentage basis and at the same time add cash credits–*Kale Khan Mohammad Hanif* v. *C.I.T. [1963] 50 I.T.R. 1 (S.C. of India)* (see illustration). The Appellate Tribunal, Dhaka Branch followed the same view but from a different angle. It was held that the assessee is entitled to the benefit of intangible addition in the instant year and that for unexplained capital the amount to be added to income should be reduced by the amount of intangible addition–(I.T.A. No. 15 of 1976-77) reported in 1981 BTD 65-66.

Illustration:

1. *Rejection of accounts –Cash credits–Failure of assessee to discharge burden of proof–Unexplained cash credits to be income of assessee–Further presumption, without material on record, that cash credit is income from a source unconnected with known source of business–Whether tenable in law–Held no.*

The Income-tax Officer rejected the book version of the assessee, a dealer in motor parts, tyres and tubes, and made a total addition of Rs. 11,100 to the gross profit declared. Further he included in the total income a sum of Rs. 24,000 shown in the accounts of the assessee as *amanat jama* from his father. The Income-tax Officer declined to accept the explanation of the assessee and his father and treated this amount as income from undisclosed source. On appeal the Appellate Assistant Commissioner deleted the amount from the total income on the ground that the explanation offered by the assessee and his father was plausible and that the Income-tax Officer should not have treated the amount in question as income from undisclosed source. When the matter went up to the Tribunal it was contended on behalf of the assessee that this cash credit had already been considered by the Income-tax Officer by making additions to the declared version and further addition on this account, if any, should have been adjusted accordingly. The Tribunal overruled the contention holding that the Income-tax Officer had treated the sum of Rs. 24,000 as income arising from undisclosed source and not as an undisclosed income of the known business; so no question of double taxation and adjustment could have arisen. The Tribunal, however, reduced the amount of the concealed income from Rs. 24,000 to Rs. 20,000.

Before the High Court it was urged on behalf of the assessee that there was no material, no basis before the Income-tax Officer or the Appellate Tribunal, to treat it as an income derived from an undisclosed source, source other than the known source of business. On the other hand it was contended on behalf of the Department that when the assessee failed to explain the amount of Rs. 24,000 shown in his account as *amanat* from his father or when the explanation tendered by the assessee and his father was not accepted the Income-tax Officer was quite entitled to treat the amount as an income derived from undisclosed sources, that is, sources other than the known source for which the assessee had submitted an account for assessment. It was held that.

(i) The amount of Rs. 20,000 was illegally added to the assessed income of the assessee. The income estimated by the Income-tax authority exceeded by Rs. 11,100 in the income shown by the assessee in his books of accounts. To the extent, out of Rs. 20,000 can be related to the estimated income of the assessee. Therefore, this Rs. 11,100 is to be deducted from the sum of Rs. 20,000 as covered by the income assessed by the Income-tax Officer and the balance may be treated as an income from undisclosed source, namely, source unconnected with the known source of income of the assessee;

(ii) There is no doubt that burden of proof lies on the assessee; if he failed to prove satisfactorily that it is not his money but the money of somebody else, the Income-tax Officer is entitled to presume that it is his income. To this extent there is no dispute; the dispute is whether the Income-tax authority can presume further that it is his income from an undisclosed source unconnected with the known source of income. There is no law or authority for such double presumption. The Income-tax Officer or the authority cannot make any such presumption nor can they draw any such inference simply from the failure of the assessee to explain it, in the absence of circumstances or materials on record justifying it; and

(iii) If it is found that the cash credit cannot be attributed to or accommodated in the estimated amount of the income in part or in whole, then and then only the Income-tax Officer may perhaps consider it to be an income from other sources; unconnected with the known source of the assessee, because in that case the very fact that it cannot be attributed to or accommodated in part or in whole, even in the estimated income of the known source of income of the assessee, will by itself be a circumstance for holding that the cash credit in part or in whole, as the case may be, is on account of business unconnected with the known source of the assessee. In that case it can be added, if at all, to the estimated gross profit of the assessee from the known source of business or there must be some materials or circumstances in the case which will justify the Income-tax Officer to consider it that it is an income derived from source unconnected with the known source of the income of the assessee –*(Auto Stores, Dacca* v. *C.I.T. Dacca [1962] Taxation-1).*

2. *Rejection of accounts–Addition to the declared profit made on estimate–Further addition of cash credits as income from undisclosed source–Held permissible.*

The Income-tax Officer rejected the assessee's accounts and made certain addition to the declared profits. He further found that certain deposits in banks and certain advances entered in the books of accounts were only secret profits. He added these amounts also to the estimated income. On appeal the Appellate Assistant Commissioner allowed certain reductions in the estimates. On further appeal the assessee contended before the Tribunal that (i) the adoption of a flat rate percentage as well as rounding up of sales was without any basis, (ii) the absence of a stock register was not such a serious flaw as to lead to an estimate of gross profit, (iii) the departmental officials were wrong in adding up certain credits as secret profits after having made an estimate of profit from business and (iv) the addition of cash credits as undisclosed income after the estimate of each source of assessee's income from business was again wrong. The contentions were rejected by the Tribunal who upheld both the estimate of income and further addition on account of cash credit, as reduced by the Appellate Assistant Commissioner.

Held, that it was permissible to the Income-tax Officer, on finding that the accounts maintained by the assessee were unreliable and the profits had to be estimated, to make additions to the book version of his profits on estimate and also bring to tax unexplained amounts representing deposits in bank accounts as income from undisclosed sources–*(S. Kumaraswami Reddiar* v. *C.I.T. Madras [1961] 3 Tax 75).*

3. *Application of flat rate after rejection of accounts–Further additions towards cash credits–Permissible–Held no.*

The book version of the assessee being unreliable was rejected by the Income-tax Officer. He made additions of four sums, under different heads, to the declared income which yielded a gross profit rate of 9.5% against declared rate of 5.1%. He further added a sum of Rs. 56,345 on account of unproved cash credits. The Tribunal upheld the rate and observed that the addition should be unitary where the

proviso to section 13 is applied. The amount finally computed by the Tribunal, however, included the amount of the cash credits added back by the Appellate Assistant Commissioner.

Held, that where the Income-tax authorities reject the assessee's account books and compute the gross profit of his business on the total turnover, they cannot rely on the books for the purpose of adding cash credits, which were part of the scheme of balancing accounts, to the profits so ascertained–*(Maddi Sudarasonam Oil Mills Co. v. C.I.T. [1960] 2–Tax 41)*.

Addition to the declared profit made Further addition made on the point of cash credits in suspense account towards income from undisclosed sources–

Certain amounts were added to the declared profits. Besides another amount, was added being the excess credit in the suspense account as income from undisclosed sources. The assessee contended that excess credit stood explained to the extent of additions to the profits of his business and to that extent there would be double taxation.

Held, that as the amount of excess credit was found to be income from undisclosed sources unconnected with the business of the assessee and the other additions were to the profits of his business both the additions could be made and that the assessee had not explained the excess credit in his suspense account to the extent of the additions to the profits in his business–*(Ratan Chand Dip Chand v. C.I.T. [1960] 2–Tax 112)*.

Cash credits in the names of partners having other sources of income–Firm is not accountable.–Certain amounts standing to the credit of some of the partners of the assessee firm were found to be amounts actually brought in by them from their native place by means of bank drafts. They stated that they brought the moneys to meet losses but they were unable to explain how these moneys were available to them in their native place. The income-tax authorities and the Appellate Tribunal treated the credits as undisclosed profits of the firm. On a reference under Sec. 66(2): *Held*, that there were no materials on which the Tribunal could come to the conclusion that the credits represented undisclosed profits of the firm–*(Narayandas Kedarnath v. C.I.T. Bombay [1952] 22 I.T.R. 18)*.

Note.–In this sub-section there has been specific provision that unexplained cash credits shall be taxed under the head, "Income from other Sources" unlike the provision as is in the Indian Income Income-tax Act, 1961. Cash credit representing secreted profits or profits from other source may be taxed under the head, "Income from Other Sources" but unexplained credit representing profits from undisclosed business transactions should be taxed under the head, Income from Business or Profession. It is therefore, difficult to reconcile with the specific provision that unexplained cash credit, whatever be the nature and source, should be taxed under the head, Income from Other Sources.

Burden of proof.–Where an assessee has failed to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the

Deputy Commissioner of Taxes is entitled to draw the inference that the receipts are of an income nature–*Govindarajula Mudaliar* v. *C.I.T. [1958] 34 I.T.R. 807 (S.C. of India)*. The burden of proving that they are of an income nature will not be on Department merely because he had failed to notice similar unexplained cash receipts in the accounts of earlier years in the course of the assesment proceedings of those years–*Madappa* v. *C.I.T. 1948 I.T.R. 385*. As the Supreme Court (India) laid down in *Kale Khan Mohammad Hanif* v. *C.I.T. [1963] 50 I.T.R. 1* the onus is on the assessee to explain the nature and source of cash credits, whether they stand in the assessee's account or in the account of a third party. In either case, the burden lies upon the assessee to explain the credit entry, though the onus might shift to the Department under certain circumstances. Where the assessee shows that entries regarding cash credits in a third party's account are genuine and the sums were in fact received from the third party as loans or deposits, he has discharged the onus; in that case it is for the third party to explain the source of the moneys, and they cannot be charged as the assessee's income in the absence of any material to indicate that they belong to the assessee–*Orient Trading Co. Ltd.* v. *C.I.T. [1963] 49 I.T.R. 723*. The observations as made by the Bombay High Court in the case of *Orient Trading Company Ltd.* v. *C.I.T. Central Calcutta [1963] 49 I.T.R. 723* are as below.

"When, however, in a case where the entry stands in the name of the third party, the assessee satisfies the Income-tax Officer as to the identity of the third party and also supplies such other evidence which show prima-facie, that the entry is not fictitious the initial burden which lies on him can be said to have been discharged by him. It will not, therefore, be for the assessee to explain further how or in what circumstances the third party obtained money and how or why he came to make a deposit with the assessee. The burden will then shift on the Department to show why the assessee's case cannot be accepted and why it must be held that the entry, though purporting to be in the name of a third party, still represents the income of the assessee from a suppressed source." The decision as above was relied on by the Appellate Tribunal, Chittagong Bench vide I.T.A. No. 3078 of 1981-82 for the assessment year 1975-76 reported in 1988 BTD XVI 131. In the case of C. Kant & Co. the Calcutta High Court observed, relying on the judgment of *Luxminarayan Cotton Mills Co. Ltd.* v. *C.I.T. (1969) 73 I.T.R. 634 S.C.* of India and *Shankar Industries* v. *C.I.T. (1978) 114 I.T.R. 689* (Calcutta) that in case of cash credit in the name of third parties the onus on the assessee to prove not only identity but also capacity of creditors to advance money and genuineness of transactions. Letters of confirmation alone will not prove genuineness of transaction. It was further observed that the question whether the onus on the assessee under section 68 (corresponding to sec. 19(1)) had been discharged was a question of fact. This principle is well-settled and has been reiterated in other decisions of the Calcutta High Court–1981 BTD IX 57-62.

Where cash credits appear in the assessee's books in the names of third parties, other than his wife, children, close relations or employees, and the assessee is able to establish the identity of the creditors, who accept that the deposits belong to them, the assessee should be treated as having discharged the burden of proof regarding the genuineness of the cash credits. If even then the Department does not

accept the cash credits to be genuine, the burden shifts to the Department to prove by adequate materials that the credits represent the assessee's undisclosed income–*Sarogi Credit Corporation ... (Pat.) 1976, 103, I.T.R. 344.*

In a recent case the Gauhati High Court observed that in order to establish the fact of receipt of a cash credit as required under section 68 of the Income-tax Act, 1961, the assessee must prove three important conditions, namely (1) the identity of the persons, (2) the genuineness of the transaction and (3) the capability of the person giving the cash credit. Sec. 68 of the Income-tax Act 1961 makes it clear that in respect of a cash credit entry the explanation offered by the assessee can be rejected by the Income-tax Officer on cogent grounds. When such grounds themselves are based on no evidence, the question of presumption against the assessee does not arise–*(Jalan Timbers v. C.I.T. decided in August, 1966 and reported in 1999 BTD XXVII 38-48).*

In making an assessment the Income-tax Officer disbelieved the cash credit of the assessee, while making the assessment of the creditors accepted their returns. Held, that the Tribunal did not make any endeavour to give any cogent reason why the income tax return filed by the creditors and accepted by the Income tax Officer should be ignored. The credits were *prima facie* genuine.

If there are cash credits in the books of a firm in the accounts of the individual partners and it is found as a fact that cash was received by the firm from its partners, in the absence of any material to indicate that they are the profits of the firm, they cannot be assessed in the hands of the firm, though they may be assessed in the hands of the individual partners–*(Narayandas Kedarnath v. C.I.T. [1952] 22 I.T.R. 18).* Cash credits in the individual accounts of members of a joint family with a third party cannot be assessed as the income of the family unless the Department discharges the burden of proof to the contrary.

While making any addition to income for income from undisclosed source the assessee must be afforded the chance to explain wherefrom the amount, in question was procured. This omission to afford chance to assessee to explain his position in this regard offended principle of natural justice–*(I.T.A. No. 115 to 117 of 1981-82 (1985 BTD XIII 54)).*

The length of time after which the assessee is called upon to explain a cash credit is also a relevant factor in considering whether the evidence produced is satisfactory. "After the lapse of ten years the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of his capital contribution but the origin of origin and the source of source as well"–*(Hastimal v. C.I.T. [1963] 49 I.T.R. 273, 279).*

Sec. 19(2).–If in the opinion of the Deputy Commissioner of Taxes the actual value of investments made by the assessee or the cost of acquisition of bullion, jewellery or other valuable article exceeds the value as shown in the books of accounts maintained by the assessee for any income year and the assessee fails to give any explanation or the explanation as given about the source of the excess amount expended in the investments or in the acquisition of such bullion, jewellery or other

valuable articles is not in the opinion of the Deputy Commissioner of Taxes satisfactory, the excess amount of expenditure as determined shall be deemed to be the income for the year in which it is shown in the books of accounts of the assessee and shall be charged under Sec. 33 (Income from Other Sources).

Sec. 19(3): Unexplained expenditure.–This sub-section has made provision for imposition of tax even on unexplained expenditure in cases where such expenditure does not bring into existence any tangible asset. Any expenditure presupposes existence of income or source of fund. If from the circumstances it can be inferred that the assessee has made some expenditure in any income year but he fails to explain the source and nature of money for such expenditure, the amount of the expenditure shall be deemed to be the income of that year and shall be assessed under the head, "Income for Other Sources".

Sec. 19(4): Unexplained Investment.–This sub-section corresponding to Sec. 4(2B) of 1922 Act provides in effect the following:

(a) the value of unexplained investments not recorded in the books of accounts of the assessee may be assessed as income;

(b) the financial year for the above purpose shall be taken as the income year;

(c) the assessment should be made regardless of the question whether income sufficiently large to match the investment could possibly have been earned during the period between the commencement of the relevant financial year and the date of the investment. (See ante "cash credit on first day of accounting year").

Sec. 19(5): Accretion on account of unrecorded assets.–This sub-section, which corresponds to Sec. 4(2C) of 1922 Act, provides the following:–

(i) the value of assets like money, bullion, jewellery or other valuable article not recorded in the books of accounts may be assessed if the nature and source of fund for acquisition of such assets cannot be satisfactorily explained;

(ii) the financial year for the above purpose shall be taken as the income year;

(iii) the value of such unexplained assets shall be assessed under the head, "Income from other Sources".

Sec. 19(6): Income from discontinued business.–This sub-section provides in effect to charge any income under the head, "Income from Business or Profession" even if the income is derived in the year in which the business was discontinued; whereas Sec. 28 provides that to charge to tax income under the head, "Income from Business or Profession" the business or profession must be carried on during the accounting year. Under the general law it has been held that if any income falls under any head of income and that cannot be charged to tax under that head it cannot be charged under any other head, so any income from business or profession derived in any income year in which the business was discontinued cannot attract tax at all *(Curson* v. *Cheyney's Executor 38 T.C. 240 (H.L.))*. By the provision of this sub-section, which has a far-reaching effect, the general law as well as the specified law in

sec. 28 have been superseded and thereby any income from business or profession derived in any income year in which the business was discontinued shall be charged to tax as it will be deemed that the business or profession was carried on in that income year–(See *Post* Sec. 28 under "business should have been carried on or deemed to be carried on in the accounting year").

Sec. 19(7): Dividend is income of the income year in which it is declared.–The definition of "dividend" as given in Sec. 2(26) is inclusive and not exhaustive. (See *ante* in Sec. 2(26)). It merely extends the connotation of the word "dividend" so as to comprise items of distribution by the company which normally may not be regarded as "dividend". Any receipt by a shareholder which is "dividend" under the general law which would be taxable as such under this Ordinance and which is not attributable to the company's accumulated profits within the meaning of Sec. 2(26). The profit from share-holding is of such type of dividend when shares are held as capital assets and this sub-section refers to that type of dividend which will be chargeable to tax when such dividend will be declared or distributed by the company. Under Sec. 16(2) of 1922 Act dividend would be included into total income of an assessee in the income year in which the dividend is paid by the company and not in the year in which the dividend would be declared. This sub-section makes dividend taxable *in all cases* as the income of the year in which it is declared *Irrespective of the method of accounting employed by the shareholder: see Purshottamdas Thakurdas* v. *C.I.T. [1958] 34 I.T.R. 204*, and not the year in respect of which it is declared, for the shareholder's right to dividend arises only upon declaration *(Purshottamadas Thakurdas* v. *C.I.T. [1963] 48 I.T.R. (S.C. of India) 206, 213)*. Thus the year of taxability may be different from the year in which the dividend is payable or paid. Arrears of dividends for past years, which are declared by the company in one accounting year, are all taxable as the income of the year in which they are declared *(Mark Hurll* v. *I.R. 8 T.C. 292)*.

Sec. 2(26) contains an inclusive definition of "dividend", which by fiction of law makes certain payments and distributions by a company taxable as dividend. Such statutory "dividends" are deemed by this section to be the income of the year in which the distribution or payment is made by the company. For the definition of, and general principles regarding, dividend, *see ante* under s. 2(26).

Dividend is taxable in all cases as "Income from other sources" under s. 33. Dividend received out of the profit of a publicly traded company shall be exempt from tax when the company injoys tax-holiday–S.R.O. 265-2/86 dt. 6.7.86.

Sec. 19(8)–Purchase of company's assets at nominal price.–The necessity of this sub-section is to check the unfair deal between the company and the directors mainly which generally happens in the case of private companies which are formed to deprive the general shareholders to the benefit of the directors. The provision as made to check such deal is that in case of sale of a company's assets other than stock-in-trade and shares at a price lower than the fair market value, the difference between the price paid by the purchaser assessee and the fair market value thereof shall be deemed to be the income of such assessee and charged to tax under the head, "Income from other Sources."

Sec. 19(9)–Salami or Premium Receipts.–Salami is a single payment made for the acquisition by the lessee to the lessor to injoy the benefits granted by the lease. That right may properly be regarded as a capital asset and the money paid to purchase it may properly be held to be a payment on capital account and there is no revenue quality in such payment. In the hands of the lessor it ought to be capital receipt, but in this sub-section it has been specified that such type of salami or premium received by the assessee for certain term shall be the income on the assessee.

Since salami is paid by the lessee by which he enjoys the right to the benefits of the lease for a certain period the assessee has been given the option for allocation of the amount of salami or premium received for the purpose of assessment so as to be taxed in certain years proportionately and not at a time in the year in which he received the amount. The period shall not exceed five years. (See ante under "Premium (Salami) paid for Lease").

Sec. 19(10) –Goodwill money or compensation or damages.–Under this sub-section three types of capital receipts have been specified as income–(i) income by transfer of goodwill of the business; (ii) and (iii) compensation money or damages received for cancellation or termination of contracts, that is, money received in exchange of source of income.

Goodwill is recognised capital asset and shown in the balance sheet as asset of the business. Any amount received by the sale of goodwill is a capital receipt. It is not possible to specify the point of time when it became a capital asset. The initial cost of goodwill is probably nothing and although it is a capital asset no capital gain under section 31 can accrue in the case of the transfer of an asset which did not cost anything in terms of money to the assessee in its creation or acquisition–*C.I.T.* v. *K. Rathnam Nader (Mad) 1969, 71 I.T.R. 433.* Goodwill has been said to be a self-generated asset and its cost of acquisition cannot be determined as decided in many High Courts of India and as such no capital gain arises by its transfer. This sub-section has overruled the basic principle of accounting as well as the general law and goodwill will now be assessed to tax under the head, "Income from Other Sources".

Compensation or damages received for cancellation or termination of contract or licenses being generally of a capital receipt since the cancellation or termination of contract or license affects the whole structure of an assessee's profit-making apparatus and the whole conduct of his business. This sub-section has superseded the general law and compensation or damages received for cancellation or termination of contract or licence is now income to be taxed under the head, "Income from Other Sources". (See *ante* "compensation for breach or cancellation of contract or other injury). But compensation received for loss of secretaryship did not affect the income earning apparatus of the company ... due to cancellation of contract there is no impact on the trading capacity of the company ... procurement of agency was a trading asset and hence compensation received for termination thereof is a revenue receipt–*(C.T.* v. *McNeil & Kilburn Ltd. 1988 BTD XV 68).*

Sec. 19(11) – Any benefit for remission from indebtedness.–When a deduction has been allowed in respect of any liability in any year and subsequently

during any income year the assessee is benefitted by remission of such liability that will be deemed to be income under sub-section 15. But in a case where the provision does not apply and the assessee derives any benefit or advantage, either in money or in money's worth, by way of remission of debt, the money value of such benefit or advantage shall be deemed to be income for that income year under the head, "Income from Other Sources". As for example, if the assessee is liable to pay compensation or if a company declares dividend and in both the cases the assessee or the company assessee is not required to pay compensation or dividend, as the case may be, both the assessees are getting some benefit of money value by being relieved of the indebtedness to pay compensation or dividend, such money value shall be treated as income under this sub-section and charged to tax under the head, "Income from Other Sources". Under the general law an ascertained debt or liability if subsequently remitted in whole or in part, such remitted amount cannot be treated as income of the year of remission–*British Mexican Petrolum Co. Ltd.* v. *Jackson 16 T.C. 570*. The House of Lords held that the amount (on account of unpaid price of oil) remitted could not be included into revenue receipt in the account of the year of remission and that the accounts of preceding year, where the whole debt was debited should not be re-opened and adjusted by reference to remission. But this basic law has been superseded by this sub-section.

Sec. 19(12) –Managing Agency Commission and compensation for termination of agency.–In the leading case of *C.I.T.* v. *Shaw Wallace & Co.* which was followed by *Vazir Sultan & Sons [1959] 36 I.T.R. 175* the basic principles were laid down that compensation for termination of an agency agreement would be a capital receipt, if the agreement constitutes the assessee's capital asset and his profit-making apparatus. Agency commission paid for premature termination of agency agreement is also a capital receipt (See under "compensation for loss of office or employment, or for cessation of business").

This sub-section has superseded the general law and agency agreement including compensation for termination of agency or for modification of the terms and conditions of agency agreement shall now be income chargeable under the head "Income from Other Sources".

Sec. 19(13) –Income by way of winnings from lotteries, cross-word puzzles etc.–In defining the nature of income chargeable under the income tax law in the case of Shaw Wallace & Co. "windfall gain" was excluded from income. In Sec. 4(3)(vii) of the Income tax Act, 1922 casual and non-recurring receipts were exempted from tax if the income were casual as well as non-recurring. Winnings from lotteries, cross-word puzzles, card games and other games of gambling nature or from gambling and billing will now be deemed to be income overriding the general law and taxed under the head, "Income from Other Sources". This type of income from "winnings will be taxed at the rate applicable to the total income including the said income or at the rate of twenty per cent whichever is lower-Paragraph 3 of the Second Schedule. Winning from lotteries sponsored by Government to collect fund for national or international sports competition in Bangladesh have been exempted–S.R.O. No. 109-Law/94 dt. 29.3.94.

Sec. 19(14) –Income from business of insurance carried on by a mutual insurance association.–Under the general law, the surplus accruing to a mutual concern cannot be regarded as income, profits and gains for the purpose of this Ordinance. In *Styles* v. *New York Life Insurance Co. –[2 T.C. 460, 471 (H.L.)]* it was said, "when a number of individuals agree to contribute funds for a common purpose ... to some or all of them, on the occurrence of events, certain or nd stipulate that their contributions, so far as not required for that be repaid to them". "Why they should be regarded as traders, or why contributions returned to them should be regarded as profits". "Where the contributors are to receive back a part of their own contributions, the complete identity between the contributors and recipients negatives the idea of any profit, for *no man can make a profit of himself–(National Mutual Life Assn. of Australasia* v. *C.I.T. & I.T.C. 238, 251* and also *Indermani Jatia* v. *C.I.T. [1959] 35 I.T.R. 298, 306-8 (S.C. of India)*. In another case it was also laid down that a mutual concern may be held to carry on *a business or trade* with its members, though the surplus arising from such trade is not taxable income or profits–*General Family Pension Fund* v. *C.I.T. 1946 I.T.R. 488*. But in a latter decision it was held that a mutual concern cannot be held to carry on a trade."

Thus in the case of a mutual insurance association where the surplus goes back to the insured, whether in cash or in reduction of his premium or in enhancement of the sum insured or on winding up, it is in assessee merely a return of his own money which he has overpaid and is not a profit at all. But this sub-section has superseded the general and basic law and brought such type of income or profits from business of insurance carried on by mutual insurance association to be taxed under the head, "Income from Other Sources". Computations of such income shall be made as per the provisions of Para 8 of Fourth Schedule.

Sec. 19(15) –Profits and gains on account of recovery of ascertained losses and expenditures.– Profits and gains imply something in the nature of a credit and debit account in which the receipts appear on the one side and the costs and expenditure necessary for earning these receipts on the other side. Where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains it ought to be allowed. Profits should be computed after deducting the expenses and losses incurred for the purpose of business or profession. Where mercantile system of accounting is followed expenditure incurred but not paid is also allowable in the computation of profits and gains. Where such expenditures as incurred but not paid or losses have been deducted to ascertain the profits and gains, such types of expenditures which are not subsequently paid and in cases of losses which are subsequently recouped, this sub-section has provided for inclusion into profits and gains of business or profession such expenditures not paid and losses recouped in subsequent period. This provision is against the general law as an unascertained loss or expenditure may be adjusted later by re-opening the accounts of the year in which it is debited. But in case of ascertained loss or expenditure deduction of which has been made in a year, recovery of such loss or expenditure in a subsequent year cannot make it income in the subsequent year–*H. Ford & Co. Ltd.* v. *I.R. 12 T.C. 723*.

Cl.(a) Where the assessee has received in cash or in any other manner in a subsequent year in respect of loss, bad debt or expenditure which have been deducted in earlier year in the computation of profits and gains of business or profession the amount so received shall be his income from business or profession in that subsequent year and the business will be deemed to have been carried on in that year.

Cl.(aa) Any interest payable on borrowed capital to any commercial bank, or Bangladesh Shilpa Bank or the Bangladesh Shilpa Rin Sangstha or on account of any share of profit payable to any bank run on Islamic principles which have been deducted on accrual basis having followed mercantile system of accounting are not paid within two years (subsequently extended upto three years) after the expiry of the income year in which it was deducted in the computation of profits or gains from business or profession, the amount not so paid shall be deemed to be the income from business or profession after the expiry of the said period and the business shall be deemed to have been carried on in that year.

Cl.(b) Any benefit in respect of such trading liability during any income year which has not been treated as income under Cl.(c) shall be deemed to be income from business or profession during that income year.

Cl.(c) Under the general law an ascertained debt or liability if subsequently remitted, in whole or in part, such remitted amount cannot be treated as income of the year of remission. In *British Mexican Petroleum Co. Ltd. v. Jackson* –(16 T.C. 570) the assessee company entered into a contract with an oil-producing company for the purchase of petroleum over a period of years. The unpaid price of the oil supplied was debited in the accounts. In subsequent period the producing company accepted payment of a part of the debt and released the assessee company from its liability to pay the balance remaining due. The released amount was carried direct to the assessee company's balance sheet and shown as a separate "reserve" item. The House of Lords held that the amount remitted could not be included into revenue receipt in the accounts of the year of remission and that the accounts of the preceding year, where the whole debt was debited should not be re-opened and adjusted by reference to remission.

But the above principle of general law is superseded by this sub-section which expressly makes the amount either remitted or not paid as the income of business or profession. Under this sub-section, where in computing business profits an allowance for trading liability has been given and the assesse obtains some benefit for not making any payment within three year of time for such liability, such liability, in whole or in part not paid would be deemed to be income from business after the expiry of the said three years. But the trading liability which has been treated as income, if paid in subsequent year shall be deducted in computing the income for that year.

Sec. 19(16) –Balancing charge.–The provision as given in this sub-section is similar to that as given in sub-cl. (b) of Paragraph 10 of Third Schedules. Where any building, machinery or plant used by the assessee for the purpose of business or profession carried on by him is disposed of during the accounting year and the sale-

proceeds thereof exceed the written-down-value so much of the excess as does not exceed the difference between the original cost and the written-down-value shall be deemed to be the profits of the income year in which the sale, transfer or exchange took place and will be charged under the head, Income from business or profession. If the sale proceeds exceed the original cost the excess over the original cost shall be capital gains and charged under Sec. 31. By this sub-section the revenue takes back what allowances granted in the past. In other words, the revenue takes back what it had given by way of depreciation allowance in the earlier years, for otherwise the result would be to recoup the assessee an amount in excess of his original cost–*C.I.T. v. Express Newspapers Ltd. [1960] 40 I.T.R. 38, 61.* The business or profession in which such asset was used before its sale, transfer or exchange shall be deemed to be carried on by the assessee in the year in which the asset was disposed of.

Under sub-cl. (a) of para 10 of the schedule it has been provided that where in any income year any asset representing building, machinery or plant is disposed by the assessee in any year no allowance for depreciation under Paragraphs 3, 7 or 8 shall be allowed in respect thereof in that year.

Sec. 19(17). –Where any machinery or plant exclusively used by the assessee for agricultural purpose has been disposed of in any income year and the sale proceeds thereof exceeds the written-down-value, so much of the excess as does not exceed the difference between the original cost and written-down-value shall be deemed to be the income for that year and chargeable under the head, "Agricultural Income."

Under sub-paragraph (3) of Paragraph 11 of the Fourth Schedule "sale-proceeds" has been defined as below which will apply to "sale-proceeds" as is referred to in sub-Secs. (16 and 17):

(a) Where the asset is actually sold, the sale prices thereof or the fair market value, whichever is the higher;

(b) Where the asset is transferred by way of exchange, the fair market value of the asset acquired through such transfer;

(c) Where the asset is transferred otherwise than by sale or exchange, the consideration for such transfer.

Sec. 19(18): Balancing charges for insured asset.–Where a building, machinery or plant is sold, discarded, demolished or destroyed, the depreciation allowance and the balancing allowance under paragraph 10 of Third Schedule would recoup the assessee the entire capital loss on the asset. But where the assessee is able to recover more then the written-down-value out of the "moneys payable" in respect of the asset together with the amount of scrap value, if any, a balancing charge is levied by this sub-section on the excess recovered to the extent of the total of depreciation allowances granted in the past.

Where the asset, representing any building, machinery or plant which was insured and which was being used by the assessee for the purpose of his business or profession is discarded, demolished or destroyed and the assessee received any insurance, salvage or compensation money, the amount of such moneys as exceed the

written-down-value of such assets, so much of the excess as does not exceed the difference between the original cost and the written-down-value less the scrap value, if any, shall be deemed to be the income for that income year chargeable under the head, "Income from business or profession".

Sec. 19(19): Balancing charge for assets used for agricultural purpose.–As discussed in sub-section (18) of this section balancing charge will be levied in similar cases and when the asset is used exclusively for agricultural purpose the excess moneys will be chargeable to tax under the head, "Agricultural Income."

Sec. 19(20): Recovery of capital expenditure on scientific research.–Capital expenditure on scientific research is an allowable deduction under Sec. 29(1)(xx). When the capital asset used for scientific research is disposed of during any income year, the sale proceeds so far as it does not exceed the expenditure allowed as an allowable deduction shall be chargeable to tax for that income year under the head, "Income from business or profession". In this sub-section also the revenue takes back which it had given to the assessee by way of deductible allowance in earlier years in the computation of income from business or profession.

In this sub-section "sale proceeds" has the similar meaning as in sub-section (16) and (17). Further, it will also be deemed like sub-sec. (16) and (17) that the business or profession in which such capital asset was used before its disposal was carried on by the assessee in the year in which the asset was disposed of.

Sec. 19(21) (22) & (23).–These three sub-sections have been inserted by the Finance Act, 1993 and the Board has attempted to justify the necessity of the provisions to check evasion of tax and to bring discipline in the field of tax-matters by bringing the unexplained investments into the ambit of taxation (নথি নং-১ (আয়কর) ৯৩ তাং-২১.৭.৯৩).

Sub-section (21).–This sub-section has provided that if a sum or aggregate of sums exceeding fifty thousand taka has been claimed or shown to have been received by an assessee from any person in any income year other than from any banking company or a financial institution or otherwise than by a crossed cheque drawn on a bank which he has not paid back within the period from the end of the income year in which it was claimed or shown to have been received, the said sum or a part thereof which has not been paid back within three years, shall be deemed to be the income of the assessee for the income year following the expiry of the said three years and will be chargeable to tax under the head, "Income from other sources." This sub-section may check the money-inflow by showing fictitious loan.

Since this sub-section was inserted in 1993 it is usual that the provision will apply in the cases where loan was taken three years back from 1992-93. But to remove hardship the Board has issued a circular [No. 6(4) Tax 3/94 dt. 30.3.94] by which this provision has been made effective for cases of loan taken from July, 1993.

It has also been provided in the proviso of this sub-section that such loan as referred to above if paid back by the assessee in a subsequent year, the amount shall be deducted in computing the income of that subsequent year.

Sec. 19(22) –**Advance Rent.**–The owner of a house property may let-out his house and receive salami, which generally happens in cases of commercial building, or advance rent from the lessee. Since salami, though a capital receipt, has been specified as income in sub-section (9) of this section the owner of the house property may give it a colour of advance rent. To check this tendency this sub-section has provided that where the owner of a house property receives any amount by letting out his house or a part thereof, the amount received if not adjustable against rent that shall be treated as income of the assessee owner for the income year in which it is received and shall be charged to tax under the head, "Income from House Property".

The amount, if not adjusted against rent, may be allocated at the option of the assessee, to be taxed in a period of four years next following in equal proportion and not at a time in the year of receipt.

In a case where such amount or a part thereof is refunded by the assessee in a subsequent year the amount so refunded shall be deducted in computing the income in respect of that income year.

Sec. 19(23).–An assessee, being an exporter of garments, has to export the entire export quota of garments as allowed to him by the Government. But instead of exporting his quota of garments allotted to him if he transfers in any income year his export quota either in full or in part to any person, a portion of the export value of the garments, which has been prescribed at 3% of the export value by the Board under Rule 30A, shall be deemed to be his income from business or profession in that year. This sub-section is just to check the misuse of export quota allotted by the Government to the exporter.

Sec. 19A. Exemption in respect of investment in new industry.–(1) Notwithstanding anything contained in section 19 or in any other provision of this Ordinance, any sum invested by any person in a new industry during the period between the first day or January, 1997 and the thirty first day of December, 1999 (both days inclusive) shall be exempt from tax and no question as to the source of such sum shall be raised.

(2) Nothing contained in this section or elsewhere in this Ordinance shall be so construed as to exempt from tax the income of the industry in which the investment mentioned in sub-section (1) is made;

Provided that sub-section (2) shall not apply to the income of the industry if the assessee pays, before the filing of return for the relevant income year, tax at the rate of seven and a half per cent on the investment mentioned in sub-section (1).

19AA. Special tax treatment in certain cases of investment.–(1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no question as to the source or any sum invested

by any person in the expansion or balancing, modernisation, renovation and extension of an existing industry or in the purchase of stocks shares of a public limited company listed with any stock exchange in Bangladesh or any sum used for repayment of industrial loan during the period between the first day of January, 1997 and the thirty first day of December, 1999 (both days inclusive), shall be raised if the assessee pays, before the filing of the return for the relevant income year, tax at the rate of seven and half per cent. on such sum.

(2) Nothing contained in this section or elsewhere in this Ordinance shall be so construed as to exempt from tax the income from the investment of the sum mentioned in sub-section (1):

Provided that stocks and shares of a public limited company mentioned in sub-section (1) which are purchased from the secondary market shall, for the purpose of special treatment under this section, be held by the assessee for at least one year from the date of acquisition.

Sec. 19A.–*Note*–New industries have already been encouraged by granting tax-holiday under Sec. 46A. This is a new step to encourage setting-up of new industry by making investment of undisclosed income.

Sec. 19AA.–Special tax-treatment in certain cases of investments.–Both these sections, Sec. 19A and Sec. 19AA, have been inserted in the Ordinance for the common purpose, namely, to attract people who have undisclosed idle money to invest in industries by giving allurement of paying either no tax or lesser tax for undisclosed income and to encourage industrialisation of the country with-least cost.

This section has provided that if any person invests any sum for expansion or balancing, modernisation, renovation and extension of an existing industry or in the purchase of stock and shares of a public limited company listed with Stock-Exchange in Bangladesh or if the money is used in the repayment of industrial loan during the period between the first day of January, 1997 to 31st day of December, 1999, no question shall be raised about the source of the money of such person if he only fulfills one condition, that is, if before filing the return he pays 7.5% of tax of such sum of money. So to get special tax treatment for investments, such investments must be for specified purpose and tax at 7.5% on such money invested has to be paid before filing of the return. The other condition for a person who invests the money in the purchase of share from the secondary market is that he will have to retain such share at least for a year from the date of purchase.

Income arising out of such investments shall not be exempt from tax in any provision of this Ordinance.

19B. Special tax treatment in respect of investment in house property *(as amended by the Finance Act, 2000)*–Notwithstanding anything contained in this Ordinance or any other law for the time being in

force, no question as to the source of any sum invested by any person in the construction or purchase of any building or apartment shall be raised if the assessee pays, before the assessment is completed for the relevant assessment year, tax at the rate of–

(a) taka seventy five per square meter in the case of a building or apartment the plinth area of which does not exceed seventy square meter;

(b) taka one hundred and twenty per square meter in the case of a building or apartment the plinth area of which exceeds seventy square meter but does not exceed one hundred and forty square meter;

(c) taka one hundred and eighty per square metre in the case of a building or apartment the plinth area of which exceeds one hundred and forty square meter but does not exceed two hundred and thirty square meter, and

(d) taka two hundred and fifty per square meter in the case of a building or apartment the plinth area of which exceeds two hundred and thirty square meter.

Sec. 19B. Special tax treatment in respect of investment in house property.–This section was inserted in the Finance Act, 1999 to give protection to those persons who have made investments in the construction or purchase of any building or apartment either from known sources of income or from concealed income and in both the cases they will not be required to explain the sources of such investments if they pay taxes at the rates specified in the section depending on the size of the building or apartment. Even persons having made investments out of past savings from legal sources may be put to undue botheration for failure to explain the sources in the manner as required by the Taxes Department. Other persons who have made investments lavishly in such construction or purchase of any building or apartment even in the posh area of the city out of their concealed income will also not be equally required to explain the sources of their investments if they pay taxes in the similar way and the deciding factor in both the cases is the size of the plinth area of the building or apartment.

Originally, the size of the building or apartment was classified into three parts and in the Finance Act, 2000 it has been classified into four parts and the tax will be determined on the basis of the size of such building or apartment giving more tax benefit for building or apartment of smaller sizes.

This section was followed by open circulars issued by the Board which are for the purpose of giving clarification to the section. The following clarifications have been given by the Board in its (নথি নং-৩(৩) কর–৭/আঃআঃবিঃ/৯৯ তাং-২৮/৯/৯৯ and নথি নং

জারাবো/কর–৭/আঃআঃবিঃ/০১/২০০০ তাং- ২৭/০১/২০০০: wherein it has been stated that (i) this section will be applicable to all investments made in past years if assessments of these years have not been completed but the section will have no application in cases of reassessments to be made to give effect to any appellate order, that is, only where investments have been made in the past but no original assessment was made; (ii) if the construction spreads over a number of years the assessee can take advantage of this section only in the year in which the construction has been completed; and in the case of purchase of building or apartment the year in which the handing over of the building or apartment has been made will be the relevant year; and (iii) the assessee will have to make a choice whether he will take recourse to this section for the entire investment made either in construction or purchase and pay taxes as specified in this section but he cannot take the choice to explain for partial investment in a normal way and for the balance to invoke the provision of this section, that is, he can adopt either of the two.

The language of the section, as it is, is clear and there is nothing ambiguity in it, and it should not therefore be overstretched to construe that the nature of the building should not be other than the residential building and the Board has specifically clarified that section 19B will be applicable in cases of investments "in the construction or purchase of *any* building or apartment".