THE INCOME TAX ORDINANCE, 1984

Ordinance No. XXXVI of 1984

An

ORDINANCE

to consolidate and amend the law relating to Income tax

WHEREAS it is expedient to consolidate and amend the law relating to income tax;

Now, THEREFORE, in pursuance of the Proclamation of the 24th March, 1982, and in exercise of all powers enabling him in this behalf, the President is pleased to make and promulgate the following Ordinance:

CHAPTER 1
PRELIMINARY

1. Short title and commencement.—(1) This Ordinance may be called the Income tax Ordinance, 1984.

2. It shall come into force on the first day of July, 1984.

Interpretation

A. Consolidating Statute:—As the statute is a consolidating and amending statute, the law is to be ascertained by interpreting the language used in it in its natural meaning uninfluenced by considerations derived from the previous state of the law, but in cases of doubts regarding the interpretation, assistance may be sought from previous legislation. When legislation follows a continuous practice and repeats the very words on which that practice is founded, it may be inferred that the legislature in re-enacting the statute intended those words to be understood in their accepted meanings.

B. The Ordinance is exhaustive: The essence of a code is to be exhaustive and it is exhaustive, exhaustively defining the obligations and remedies of the tax payer. When rights and obligations, remedies or procedures are defined in a codifying or a consolidating enactment it is wholly incompatible to introduce collateral rights or

remedies founded on principles of equity and good conscience. Any such right or remedy should be found on principles of equity and good conscience. Any such right or remedy should be found within the four corners of the enactment; if not none can be invoked. Any expression or phrase in the Ordinance should be construed in the light of the other provisions in the Ordinance. The expression "assessment made under this Ordinance" in section 182 which bars any suit in a civil court to set aside or modify the assessment made under this Ordinance" would have to be construed in the light of other sections in the Ordinance. The principle that an assessment could be questioned only by use of the machinery expressly provided by the Act was laid down by the Privy Council in the case of *Raleigh Investment Co. Ltd. 1947-ITR 332* and by the Supreme Court (India) in *Kelwa Devadattam* v. *Union of India [1963] 49 I.T.R. No. 5)*. But the Supreme Court held in *State of Tripura* v. *Prov. of East Bengal* that where a person has been served with a notice calling for a return of income, it is open to him to file a suit for a declaration that the provision of law under which he is sought to be assessed is ultra vires and void and for a perpetual injunction to restrain the State and the taxing authority from taking any steps to assess him. The Supreme Court held, distinguishing the decision of the Privy Council in *Raleigh Investment Co. Ltd.* v. *Gov.-Gen.-in-C.*, that such a suit is not a suit to set aside or modify an assessment, as no assessment is yet made when the suit is instituted. See s. 182 under "Bar of suit and prosecution etc.

Order or notice under wrong section.–If a power is conferred by the law, its exercise is not vitiated merely because a wrong section or rule is referred to as the source of power–*Hukumchand Mills Ltd.* v. *State of Madhya Pradesh 52 I.T.R. 583, 589 (S.C. of India)*, or the source of the power is not referred to at all–*C.I.T.* v. *Sheolal Ramlal 33 I.T.R. 47*. A notice issued or an order passed by an Income-tax authority under a wrong provision of law may be justified and upheld under another provision of law under which could have been properly taken *(Hazarimal Kuthiala* v. *I.T.O. 41 I.T.R. 12 (S.C. of India)*. If an appeal does not lie against an order under a particular section, the mere fact that the order purports to have been made under that section does not shut-out the appeal; it must be shown that the circumstances of the case bring it within the scope of that section–*C.I.T.* v. *Khemchand Ramdas 6 I.T.R. 414, 426*. (See further under sec. 153 "Appeal").

In some cases where returns were filed purported to be assessed under the old sec. 23(4) of the I.T. Act, 1922 but assessments were made by application of sec. 144 of the new Act (1961) instead of the old Act and it was held by some High Courts and the Supreme Court of India that the assessments were not invalid merely because wrong sections were quoted in the notices as well as in the assessment order. The rectification of such an order made by substituting the correct sections for incorrect ones was also valid–*Bidyut Prova Raha* v. *I.T.O. (Assam) 1971, 79 I.T.R. 187; Ram Chand & Sons (Alld.) 1967, 63 I.T.R. 252 and Hazarimal Kuthiala* v. *I.T.O. (S.C. of India)*.

Fundamental rights.–In *Raja Jagannath Baksh Singh* v. *State of Uttar Pradesh* the Supreme Court of India laid down the principles to be applied in determining whether a taxing statute violates the fundamental rights. In *Ujjam Bai* v.

State of Uttar Pradesh a majority of the Supreme Court held that an order of assessment passed within jurisdiction and under a valid law cannot be regarded as violating the fundamental rights merely because it proceeds upon a misconstruction of the statute. Therefore the validity of such an order cannot be challenged in a petition to the Appellate Division. But under art. 26 of the Bangladesh Constitution, guaranteeing fundamental rights, it has been provided that any law inconsistent with the provisions of the constitution, shall to the extent of such inconsistency, become void, hence if any law framed in the taxing statute violating the fundamental rights guaranteed by the Constitution may be challenged on a petition to the High Court Division of the Supreme Court of Bangladesh.

C. Construction of the Ordinance.–*Favourable to the Assessee*–Fiscal statutes must be interpreted strictly in favour of the subject and the Court is not justified in straining the language in order to hold a subject liable to tax *C.I.T.* v. *Ellis C. Ried-A.I.R. 1931 Bom. 333.* "If a section in a taxing statute is of doubtful and ambiguous meaning it must be resolved in favour of the subject". "If the legislature has failed in achieving its object to tax, it is the less regrettable, for such legislation has not the meritorius object of preventing evasion of taxation, but the less laudable design of subjecting to tax what otherwise is not taxable." "Tax avoidance is an evil, but it would be the beginning of much greater evil if the courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved."

No tax can be imposed on the subject without words in the statute clearly showing an intention to lay a burden upon him. In other words, the subject cannot be taxed unless he comes within the letter of the law: the argument that he falls within the spirit of the law cannot avail the Department –*C.I.T.* v. *Provident Investment Co. Ltd. [1957] 32 I.T.R. 190 (S.C.).* Tax and equity are strangers and an equitable construction cannot be put upon the words of a taxing statute. "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"–*Per Rowlatt, J., Cape Brandy Syndicate* v. *I.R. [1921] 1 K.B. 64, 71, 12 T.C. 358, 366.* If the interpretation of a fiscal enactment is open to doubt, the construction most beneficial to the subject should be adopted, even if it results in his obtaining "a double advantage"–*C.P. & Berar, etc., Bank* v. *C.I.T. 1946 I.T.R. 479, 481.*

"Words used in the sections of the Act are presumed to have been used correctly and exactly as defined in the Act, and it is for those who assert the contrary to show that there is something repugnant in the subject or context" *[C.I.T.* v. *Srinivasan & Gopalan (1953) 23 I.T.R. 87].* Words which are not specifically defined must be taken in their legal sense *[C.I.T.* v. *Gaekwar Foam & Rubber Co. Ltd. (1959) 35 I.T.R. 662]* or their dictionary meaning *[C.I.T.* v. *Raja Benoy Kumar Sahas Roy (1957) 32 I.T.R. 466 (S.C. of India)]* unless a contrary intention appears. Intention of legislature is to be gathered from the words used in the statute, and the words so used are presumed to have been used correctly and exactly, in the sense in which these words have been defined in the Act and it is for those, who assert that

that is not the case, to show by something in the context or subject-matter that the words have not been used in the sense–*[C.I.T. Madras* v. *the Hindu (1950) 18 I.T.R. 237]*.

Generally speaking, the sections in the Ordinance do not overlap one another: each section deals only with the matter specified therein and goes no further, and each section completely covers the matter with which it deals. If a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be assessed under that one which leaves him with a lighter burden *[H.C. Kothari* v. *C.I.T. (1951) 20 I.T.R. 579]*. Those sections which impose the charge or levy should be strictly construed; but those which deal merely with the machinery of assessment and collection should not be subjected to rigorous construction but should be construed in a way that makes the machinery workable–*C.I.T.* v. *Mahaliram Ramjidas 8 I.T.R. 442, 448 (P.C.)*.

Regardless of the practice of the Department and the directions for the guidance of the officials contained in the Income-tax Manual, the Court should put its own construction upon the provisions of the Ordinance–*C.I.T.* v. *Srinivasan & Gupalan 23 I.T.R. 87, 100 (S.C. of India)*. Needless to say, press notifications issued by the Government have no legal force–*Ved Prakash Gupta* v. *C.I.T. 32 I.T.R. 133*.

Charging and Machinery Sections.–In the matter of construction distinction should be made between the charging section and the machinery section. Those sections which impose the charge or levy should be strictly construed: but those which deal merely with the machinery of assessment and collection should not be subjected to a rigorous construction but should be construed in a way that makes the machinery workable *[Gursahai Saigal* v. *C.I.T. (1963) 48 I.T.R. (S.C. of India) 1]*.

Conflict between Statute and Rule.–Rules made under the Ordinance have the same force as the sections in the Ordinance, but no exercise of the rule-making power can affect, control or detract from the full operative effect of the provisions of the sections. Rules cannot enlarge meaning of words used in the provisions of the Ordinance–*C.I.T.* v. *Handwan Exchange (Gauhati) 1994 B.T.D. xxii 174*. Public order issued by the Deptt. has no binding force as far as the courts are concerned.

Where there is a conflict between a rule and a provision of the Ordinance, reconciliation between the two should be attempted. If that is found impossible the subordinate provision must give way to the leading provision. The enactment itself would be treated as the governing consideration and the rule as subordinate to it, which should have to yield. Where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself.–*The Queen* v. *Bird and Others, Ex-parte Needs, 1989 Q.B. 340*.

Regardless of the practice of the Department and the directions for the guidance of officials contained in the Income-tax Manual, the Court should put its own construction upon the provisions of the Ordinance. Needless to say, press notifications issued by the Government have no legal force.

Legal Avoidance.–*Legal Evasion.*–It is open to a person to avoid payment of duty by disposing of his property in any way not forbidden by law, and the question of the man's motive is wholly irrelevant. Every man is entitled to order his affairs so that his property is not liable to be taxed *[Mustafa Ali Khan. C.I.T. Oudh, 1945 I.T.R. 98; A.I.R. 1945 Oudh 44, 48].*

Legal fiction.–The word "deemed" to include the obvious, the uncertain and the impossible–*C.I.T.* v. *Vind 58 I.T.R. 100, 105-6.* A legal fiction has to be carried to its logical conclusion–*I.T.O.* v. *Alfred 44 I.T.R. 442 (S.C. of India)*, but only within the field of the definite purpose for which the fiction is created–*C.I.T.* v. *Amarchand Shroff 48 I.T.R. (S.C.) 59.* As far as possible, a legal fiction should not be so interpreted as to work injustice–*C.I.T.* v. *Nathimal Gaya Lal 89 I.T.R. 190, 197-8.*

Marginal Notes.–Marginal notes to the section cannot control the construction of the statute–*C.I.T.* v. *Ahmedbhai 18 I.T.R. 472, 487 (S.C. of India)* but they may throw light on the intention of the legislature–*C.I.T.* v. *Vadilal Lallubhai 86 I.T.R. of 11 (S.C. of India).*

D. Interpretation of Statutes.–When the statute is beneficial its provisions cannot be interpreted in a manner so as to bring out a result contrary to the object of the legislation – Interpretation likely to advance the remedy and suppress the mischief must be adopted in case of statutes which confer benefit on individuals or any class of persons – Court can always extend the language of the law to give effect to the legislative intent or to extend the benefit of the law to cases which were not intentionally excluded from the purview of any beneficial provision in an enactment"–*M/s. National Food* v. *C.I.T. (Karachi H.C.) 1993 B.T.d. XVI 196.*

Ambiguity in Law.–In case of any ambiguity in fiscal statute it must be so construed as to give benefit to the subject. The principle as is followed by the Pakistan Tribunal (1965 P.T.D. 120) is also followed by Dhaka Tribunal as it observed that "any ambiguity in the language of the section should be resolved in favour of the tax-payer and not the state"–*I.T.A. 71 or 72 or 1985–86 as is reported in 1986 B.T.D. XIIV 17 (Trib.).*

In the case of *C.I.T.* v. *Ellis C. Reid. I.L.R. Bombay, 312, 318, A.I.R. 1931* it has been observed that fiscal statutes must be interpreted strictly in favour of the subject and the court is not justified in straining the language in order to hold a subject liable to tax. If a section in a taxing statute is of doubtful and ambiguous meaning it must be resolved in favour of the subject–*Vestey's (Lord) Executors* v. *I.R.C. (1949) 1 All. E.R. 1108, 1134.* It was further observed in that case that if the legislature has failed in achieving its object to tax, it is the less regrettable, for such legislation has not the meritorious object of preventing evasion of taxation, but the less laudable design of subjecting to tax what otherwise is not taxable. The court will not stretch the arms of taxing statutes in order to improve on the efforts of the Parliament and to stop gaps which are left open by the statutes. Tax avoidance is an evil, but it would be the beginning of much greater evils if the courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved.

The provisions of the Income-tax statute are of necessity arbitrary and an advantage here or a drawback there are almost certain to occur in almost any set of arbitrary rules. The duty of the courts is simply to interpret the provisions and if they are plain to give effect to them regardless of consequences; and if there is ambiguity, to construe the provision in favour of the subject, and this, even if it results in his obtaining a double advantage –*Ahmed Bhai Umor Bhai* v. *Excess Profits Tax Officer, 1948 I.T.R. 192, 200 affirmed by S.C. (India) 134, 1950 I.T.R. 472.*

E. Double Taxation.–Broadly stated, the principle of the Income-tax Ordinance, is to charge all income with tax, but in the hands of the same person only once. "There could be double taxation if the legislature distinctly enacted it, but upon general words of taxation, and when you have to interpret a Taxing Act, you cannot so interpret it as to tax the subject twice over to the same tax." Thus if an association or a firm is taxed in respect of its income, the same income cannot be charged again in the hands of the members individually, and vice versa–*Joti Prasad Agarwal* v.*I.T.O. [1959] 37 I.T.R. 107.* By saying that the same income is not taxed twice is meant that tax is not levied more than once on one passage of the money in the form of one sort of income. As Rowlatt, J., said in *I.R.* v. *Sanderson*, "If a man earns £100 by his profession and gives it to his son to clothe himself, or to his daughter, for the year, the son or the daughter does not pay Income Tax; there is only one passage of the money in the form of that income. If a man earns £100 and pays it to somebody else for services rendered in a trade or profession by that other person, the sum of £100 enters upon another passage, in another form of income, and therefore attracts income tax again. And if you hand over your dividend, which you have received as dividend, as a payment of a debt to somebody else, it cannot attract another tax as a dividend, although it may or may not attract another tax as part of the profits of the person to whom you paid the debt" *Kedar Narain Singh* v. *C.I.T. 1938 I.T.R. 157, 162.*

F. Functions of provisos.–A proviso cannot be held to control the substantive enactment or to withdraw by mere implication any part of what the main provision has given. A proviso is not applicable unless the substantive clause is applicable to the facts of the case. "The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case."

A proviso is generally something engrafted on the main enactment. sometimes, however, a subject matter of the proviso may operate not merely to qualify the main enactment, but also add to the main enactment. A proviso may be used to give the selection of one or other of two possible constructions of the words to be found in the main enactment. But it cannot enable something to be done which is not to be found in the enacting clause itself on the ground that otherwise the proviso would be meaningless and senseless.

E. Retrospective legislation.–The legislature as well as the President in the exercise of their legislative powers can make laws with retrospective operation. They have the power to make the taxing statutes with retrospective effect. Such retrospective operation may be expressed by equivalent language, such as deemed to

have etc. When such operation is expressed, pending assessment proceedings must be disposed of, at whatever stage they may be, in conformity with the statutes so made applicable. It cannot, however, unsettle completed proceedings which are no longer on the court's file.

In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as is existed when the action was begun, unless the new statute shows a clear intention to vary such law. In the absence of such an indication a new law cannot be understood as disturbing vested rights already existing on the date of the enactment of the new law. A right to prefer an appeal to a superior court and have one's grievances heard in that court is a vested right which cannot be taken away by a new legislation in the absence of a contrary statutory indication. So any amendment imposing a fetter or condition on that right would not apply to cases where the proceedings had been initiated prior to the amendment. It is not the law of the date of assessment or order which governs the assessment but it is the law concerning the assessment year in question then prevalent will govern the assessment. When however, such new legislation does not affect vested rights, but merely introduces changes in matters of procedure, such as in service of notices or in regard to the type of evidences required etc. there would be no reason to withhold retrospective operation. Hence, such procedural legislation would apply to all pending suits.

In a reassessment case, period of limitation was extended by amendment from eight years to ten years and the amending Act came into force before expiry of the period of limitation prescribed under the old Act and notices were issued for reopening the case within the extended period. It was observed that before the limitation period prescribed expires, if the same is enlarged, the limitation being a procedural one, the extended period of limitation will apply to such proceedings. So far as the quantum is concerned there was no question of retrospective operation of the amending provisions. The decision as given by the Supreme Court of India in *Karim Tharuvi Tea Estate Ltd.* v. *State of Kerala [1966] I.T.R. 262* wherein it was held "... that the Income-tax Act as it stands amended on the first day of April of any financial year must apply to the assessment of that year. Any amendments in the Act which come into force after first day of April of a financial year would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force". However, with regard to the procedural aspect, it was held that the law was clear that when there was any change in law, pending proceedings were to be governed by new law – see case of *Steel Strips Ltd. v. Assistant Commissioner of Income-tax, decided in September, 23 1994 in the Panjab and Haryana High Court–1998 B.T.D. XXVI 96.*

G. Res judicata.–The principle of *res judicata* does not apply to orders passed by the Deputy Commissioner of Taxes and they are not bound to take the same view as in the previous years of assessment of the assessee. But if no fresh facts came to light which on investigation would entitle the Deputy Commissioner of Taxes to come to a different conclusion from that of his predecessor, he is not, on principles of natural justice and expediency, entitled to reopen the question, nor is he entitled to go

behind the decision of a court of law if a test case had been taken to the court and the principles touching the assessee had been settled therein –*Tribunal Trust, Lahore* v. *C.I.T. Punjab, 1944 I.T.R. 370, 385.* Though the Deputy Commissioner of Taxes is not a Court yet his decisions are final for the year, unless they can be re-opened in a way known to the Act. See notes to section 83, heading, "Estoppel and Res Judicata."

Territorial jurisdiction.–The Income-tax Ordinance, 1984 shall extend to the whole of the Republic of Bangladesh.

Applicability.–The Ordinance shall come into force on first day of July, 1984. But "in view of the provisions of section 186 of the Ordinance assessment for the assessment year 1984-85 is to be framed under the provisions of the Income-tax Act, 1922"–*C.I.T. Khulna zone, Khulna* v. *M/s. Raza Brothers (S.C. of Bangladesh).* "The income of the assessee upto the year 1983-84 would be assessed at the rate or rates mentioned under the Finance Ordinance, 1984 but the proceedings would be under the repealed Income-tax Act of 1922"–S.C. (Bangladesh) BTD 1997 XXV 144. In another case where the assessee followed calendar year as the accounting year ending December, 1983 was assessed under section 83(2) of I.T. Ordinance 1984 and the High Court Division of the Supreme Court of Bangladesh observed that I.T. Ordinance 1984 came into force on 1st day of July 1984 and since no assessment has been made under the provision of 1922 Act the assessment as made under the I.T. Ordinance 1984 is *ex facto bonafide* mistake and should be annulled–*M/s S. Nawab Brothers* v. *C.T. (West) Zone, Dhaka (Reported in 2000 BTD XXVIII 106-108.*

The enactment does not bind the Government.– The Ordinance does not bind the Government; the Government can claim immunity in respect of income received by them as well as in respect of their income received on their behalf by a Government servant in the course of his official duties.

Directions contained in Income-tax Manual cannot be considered to be proper guide when the construction of statutes is involved –*C.I.T.* v. *Srinivasan & K. Gopalan [1953] 23 I.T.R. 87 (P.C.).*

Section 2: Definitions.–In this Ordinance, unless there is anything repugnant in the subject or context, –

(1) "agricultural income" means–

(a) any income derived from any land in Bangladesh and used for agriculture purposes–

(i) by means of agriculture; or

(ii) by the performance of any process ordinarily employed by a cultivator to render marketable the produce of such land; or

(iii) by the sale of the produce of the land raised by the cultivator in respect of which no process,

other than that to render the produce marketable, has been performed; or

(iv) by granting a right to any person to use the land for any period; or

(b) any income derived from any building which–

(i) is occupied by the cultivator of any such land as is referred to in sub-clause (a) in which any process is carried on to render marketable any such produce as aforesaid;

(ii) is on, or in the immediate vicinity of such land; and

(iii) is required by the cultivator as the dwelling house or storehouse or other out-house by reason of his connection with such land;

Agricultural income–Definition.–The definition of agricultural income in this sub-section is wide enough to cover the income of cultivators as well as the income of landholders.

Like all other income, agricultural income may be realised in cash or in kind. *See Dooars Tea Co. Ltd.* v. *C. Ag. I.T. (1962) 44 I.T.R. 6 (S.C. of India).* For instance, the landlord may recover rents in the form of a share of corps. Where an assessee obtains a decree against his tenant for arrears of rent for agricultural lands and in execution of the decree puts up the tenant's holding for sale and purchases it himself, setting off the purchase price against the decretal dues, there is a receipt or realisation of agricultural income. *Maharaja Ram Ran Vijaya* v. *of Bihar 1949 I.T.R. 164.*

Income derived from land in Bangladesh.–cl.(a) –This sub-cl. requires three conditions to be satisfied:

I. Income should be derived from land.
II. The land should be situated in Bangladesh.
III. The land should be used for agricultural purpose.

I. Income derived from land.–The word, "'derived' is synonymous with arising or accruing." Income can be said to be 'derived from land' only if land is the immediate and effective source of the revenue and not the secondary and indirect source–*C.I.T.* v. *Kamakhaya Naranyan Singh 1948 I.T.R. 325, 328 (P.C.); Bacha Guzdar* v. *C.I.T. (1935) 27 I.T.R.* If a person transfers his agricultural land to another in consideration inter *alia* of a life annuity which is charged upon the land, the annual payment is not agricultural income–*Gopal Saran Narain Singh* v. *C.I.T. 1935 I.T.R. 237 (P.C.).* It is not rent or revenue derived from land; it is money payable under a contract imposing a personal liability on the covenantor, the discharge of which is secured by a charge on land. The covenantor is at liberty to make the payments out of

any moneys and is bound to make them whether the land is sufficiently productive or not. The source of the life annuity is the covenant, not land. Similarly, an amount paid annually in consideration of feudal proprietors of the land relinquishing their claims to the land is not agricultural income, even though secured by a charge on the land, for the source of the income is not land but the covenant to pay–*Raja Mustafa Ali Khan* v. *C.I.T. 1948 I.T.R. 330, 337 (P.C.)*.

There was a diversity of judicial opinion as to whether interest on arrears of rent payable in respect of land used for agricultural purposes is agricultural income. The Calcutta *(In re Manager, Radhika Mohan Roy Wards Estate 1940 I.T.R. 460)* and Madras *(Pethaperumal Chettiar* v. *C.I.T. 1943 I.T.R. 532)* High Courts held that it was not agricultural income, while the Patna *(Lakshmi Daiji* v. *C.I.T. 1944 I.T.R. 309)*, Allahabad and Nagpur High Courts held that it was. The conflict has been set at rest by the decision of the Privy Council in *C.I.T.* v. *Kamakhaya Narayan Singh (1948 I.T.R. 325)* where their Lordships held that interest on arrears of rent payable in respect of agricultural land is not agricultural income, for it is neither "rent" nor "revenue derived from land."

II. Land should be situated in Bangladesh.–The definition of agricultural income postulates the further condition that the land from which it is derived should situate in Bangladesh. If the land is situate outside Bangladesh the income therefrom would not be agricultural income. Thus if the income is derived from agricultural lands situated in a foreign country, the income would fall outside the definition of "agricultural income", and the entire income from purely agricultural operations as well as from manufacture, would be taxable under section 28 as income from business–*Mohanpura Tea Co., in re 1937 I.T.R. 118.*

III. The land should be used for agricultural purpose.–Sub-Cl.(1): Under sec. 2(1)(a) the primary condition must be satisfied that the land in question is used for agricultural purposes *(Raja Mustafa Ali Khan* v. *C.I.T. 1948 I.T.R. 330, 335 (P.C.))*. The land must be *actually used* for agricultural purposes in the accounting year; the purpose for which the land is leased or the purpose for which the land was used when the lease was originally made, are immaterial considerations–*(Sir Bijay Chand Mahtab Bahadur of Burdwan, In re, 1940 I.T.R. 378)*

The judgment of the Supreme Court (India) in *C.I.T.* v. *Raja Benoy Kumar Saha Roy [1957] 32 I.T.R. 466)* and the Federal Court in *Meghraj* v. *Alla Rakhia* are leading authorities on the connotation of "agricultural land" and "agricultural purposes".

On the question whether land is used for agricultural purposes, the Privy Council laid down the proposition in *Raja Mustafa Ali Khan* v. *C.I.T.* – unless there is *some measure of cultivation of* the land, some expenditure of skill and labour upon it, it cannot be said to be used for agricultural purposes within the meaning of this Act. All Courts were agreed that income from the sale of forest trees, fruits and flowers growing on land naturally, spontaneously and without the intervention of human agency, is not agricultural income. But there was a conflict of judicial opinion on the question whether in cases where there is no tilling or cultivation of the land and the

trees are all of spontaneous germination, regular operations in forestry to aid the growth of the trees would constitute agriculture. This conflict of judicial opinion was resolved by the Supreme Court of India in *C.I.T.* v. *Raja Benoy Kumar Sahas Roy (1957 32 I.T.R. 466, Affirming 1953 24 I.T.R. 70 Cal.)*. After exhaustively discussing the entire case-law on the subject, Bhagwati, J., laid down in that case the following principles:

(a) Some *basic* operation, prior to germination, involving expenditure of human skill and labour *on the land itself* and not merely on the growths from the land, is essential to constitute agriculture; illustrative instances of such basic operations are tilling of the land, sowing or disseminating of seeds, and planting.

(b) *Subsequent* operations, i.e. operations performed after the produce sprouts from the land–e.g., weeding, digging the soil around the growth, removal of undesirable undergrowth, tending, pruning, cutting, felling and preservation of the plants from insects, pests and other animals *by themselves* would *not* constitute agriculture. But in cases where the subsequent operations are combined with the basic operations, the subsequent operations would also constitute part of the integrated activity of agriculture.

(c) Agriculture connotes not merely the raising of grain and food products for men and animals but also the raising of all commercial crops, e.g. the cultivation of tea, coffee, tobacco, cotton, sugar-cane, toddy-tress, rubber, jute, hemp and indigo.

(d) Activities not involving any basic operation on the land would not constitute agriculture merely because they have relation to or connection with the land. For instance, breeding and rearing of livestock, dairy-farming, butter and cheese-making and poultry-farming would not by themselves be agricultural purposes.

Applying the above principles the Supreme Court of India held in *C.I.T.* v. *Jyotikana Chowdhurani (1957; 32 I.T.R. 705)*, *Sir Kameshwar Singh* v. *C.I.T. (1957, 32 I.T.R. 587) and C.I.T.* v. *Ramakrishna Deo (1959, 35 I.T.R. 312)* that in a forest where there is no tilling of the land or other basic operations like sowing or planting, and all the trees are of spontaneous germination, subsequent operations for the conservation, growth and improvement of the forest trees would not constitute agricultural operations. But in *C.I.T.* v. *Raja Benoy Kumar Shahs Roy (1957, 32 I.T.R. 466 (S.C. of India))* where the denuded parts of the forest were replanted and subsequent operations in forestry were carried out, the income from the sale of such replanted trees was held to be agricultural income.

Income derived from sale of wild grass and reeds of spontaneous growth is not agricultural income, –wild grass and forest trees of spontaneous growth stand on the same footing. But land leased for grazing or pasturing animals required for agricultural pursuits is used for an agricultural purpose and the grazing fee realized from such a lease is agricultural income, irrespective of whether the grass on the land

is cultivated or of spontaneous growth. Running a dairy as purely incidental to agriculture, where cattle are pastured upon agricultural land, has been held to be an agricultural purpose.

But rent of the site of a flour mill, income derived from land used for potteries or as brick fields or as stone quarries or from land let out for storing crops or stacking timber, ground rent for permanent shops at bazaars and stall fees paid by temporary daily sellers at bazaars, compensation for requisition of land for military purposes, income from fisheries, income from ferries or moorings, are not derived from land "used for agricultural purposes" and none of them can be regarded as agricultural income. Similarly, income derived from letting land and trees for cultivation of lac, or the profits of salt produced by flooding the land with seawater, are not income derived from land used for agricultural purposes.

Sub-Cls. (ii) & (iii) Income from agricultural produce and from manufacturing process.–Sub-Cls.(i) deals with "income derived from such land" by the methods specified. The phrase "such land" refers to land described in sub-cl. (a), viz., "land which is used for agricultural purposes and is situated in Bangladesh. If this primary condition regarding the quality of the land is not satisfied, the case for bringing the income in question within the ambit of sub-cl. (a) or (b) must fail–*(Raja Mustafa Ali Khan* v. *C.I.T. 1948 I.T.R. 330, 335 (P.C.)).*

A cultivating owner or tenant of land who sells a standing crop, or the produce after harvest, derives his income from his land by agriculture within the meaning of s. 2(1)(i); but not so a merchant who purchases a standing crop and sells it after harvest,–his profit from the trading operation of purchase and sale of the crop is not agricultural income.

Sub. cl. (a)(i) refers to income derived from land which is used directly for agricultural purposes; and sub-cl. (a)(ii) also covers by-products, such as the selling of milk, the pasturing of cattle, etc., provided the endeavour is agricultural and provided it is reasonably connected with land used for agricultural purpose. It must be noted that even under sub-cl. a (ii), the income must be "derived from land". If a farmer has cattle pastured on the farm and the cattle are kept solely for agricultural purposes, the income from the sales of milk as well as of cream and butter made on the farm would be agricultural income as being income "derived from land used for agricultural purposes"–*(C.I.T.* v. *Kokine Dairy, Rangoon 1938 I.T.R. 562).* But if the farmer contents himself with separating his cream and sending it to the creameries or butter factories, the making of butter would be a factory process, separated from the farm, and the income from the sale of butter would not be income "derived from land".

This is further made clear by the provision in sub-cls. (ii) and (iii) under which the process to which the agricultural produce is subjected should not be other than that ordinarily employed by a cultivator to render the produce fit to be taken to the market. Sub.cl. (iii) requires two conditions to be fulfilled. First, the process must be one which is ordinarily employed by a cultivator, –it is immaterial whether the process is manual or whether it involves the use of machinery. Secondly, the process must be employed to render the produce fit to be taken to the market. In other words,

the produce must retain its original character in spite of the process unless there is no market for selling it in that condition. This clause contemplates the marketing of the produce in the ordinary way and not the mere possibility of selling it: the process must be one ordinarily employed by the cultivators of a particular locality at the relevant time to render the produce fit for market. Tobacco leaves are ordinarily dried to make them suitable for the market, hence income from the sale of dried tobacco leaves would be agricultural income. But if sugar-cane is ordinarily marketed in a given area without being subjected to any process, the process of converting sugarcane into gur or refined sugar would not be a process which can be said to be employed "to render the produce fit to be taken to the market", and the profits attributable to the process of converting sugar-cane into gur or refined sugar would not be agricultural income. Similarly, the green tea leaf is a marketable commodity, and the process of manufacturing it into tea fit for human consumption cannot be said to yield agricultural income. "The manufacturing process cannot properly be said to be employed to render the tea leaves *fit to be taken to the market*". So also unginned cotton has a ready market, and the profit attributable to the ginning operation is not agricultural income.

(iv) Income derived by granting a right to use the land.– Agricultural income may be realised in kind or in cash granting a right to the tenant for a certain period. The landlord may recover rents in the form of share of crops. Where an assessee obtains a decree against his tenant for arrears of rent for agricultural lands for granting him the right to use such land and in execution of the decree puts up the tenant's holding for sale and purchases it himself, selling off the purchase, purchase price against the decretal dues, there is a receipt or realisation of agricultural income–*Maharaji Ram Vijaya* v. *Prov. of Bihar 1949 I.T.R. 164.*

Agricultural house property-Cl.(b).–Income from house property is assessed under sections 24 and 25 on the basis of its annual value. But income from such house property as satisfies the conditions of this clause would be agricultural income. The main requirements of this clause are (i) the building should be occupied by the cultivator or the recipient of agricultural income in which any process as referred to in sub-clauses (ii) and (iii) of cl.(a) is carried on; (ii) the building should be in the *immediate vicinity* of agricultural land, it should be occupied by cultivator or the recipient of the agricultural income, and the cultivator or recipient should, by reason of his connection with the land, require it as a dwelling-house, or as a store-house or other out-building. As to the last requirement, once it is shown that the assessee by reason of his connection with the land does require a dwelling-house in the vicinity, it is not open to the Department to raise the further question whether the house is more commodious than other persons in the assessee's position would consider sufficient for their actual needs *(Maharajadhiraj of Darbhangn* v. *C.I.T. 3 I.T.C. 158, 164)*. "It would no doubt be open to the Income-tax authorities to hold that a particular building on account of its size or situation is not a building which the receiver of rent or revenue does require, by reason of his connection with the land, as a dwelling-house and in that case it would be open to them to assess the income from the entire building, but the moment they find that the house is required by the receiver of the rent or revenue by reason of his connection with the land as a dwelling-house

or a store-house or other out-building, it is beyond their jurisdiction to determine what portion of the building is or should be required by the assessee as such receiver of the rent or revenue" *(Rajendra Narayan Bhanja Deo* v. *C.I.T. 4 I.T.C. 15, 29).*

Non-agricultural income does not become agricultural income by reason of indirect connection with agricultural land.–As stated above, where the income falls within the definition of agricultural income it earns a partial exemption, if the assessee is an individual whose only source of income is agriculture–see Para 29 of Part A of Sixth Schedule. Conversely, as the Privy Council laid down in *Premier Construction Co.* v. *C.I.T. (1948 I.T.R. 380, 384)* – "Where an assessee receives income, not itself of a character to fall within the definition of agricultural income contained in the Act, such income does not assume the character of agricultural income by reason of the source from which it is derived, or the method by which it is calculated." In that case the assessee, as the managing agent of a company, received remuneration calculated at the rate of 10 per cent of the net profits of the company. A part of the company's income was agricultural income. The assessee claimed that such part of its remuneration as was proportionate to the agricultural income of the company was itself agricultural income and as such exempt from tax. Their Lordships held that the assessee received remuneration under a contract for personal service calculated on the amount of profits earned by the employer, and payable, not in specie out of any item of such profits, but out of any moneys of the employer available for the purpose; the remuneration was therefore not agricultural income and was not exempt from tax. Interest received by the lender in the form of agricultural produce *(Hajee Cassim Tayoob Surty* v. *C.I.T. 6 I.T.C. 41)*, or a share of agricultural produce given by way of price for water supplied to the land, or the profit made by a trader who purchases a standing crop from a cultivator and sells it after harvest, is not agricultural income.

Where the Mutawalli of a Wakf received as remuneration for his services a monthly salary, it was held that the fact that the income of the Wakf was derived from agricultural land did not make the remuneration paid to the Mutawalli "agricultural income", since the remuneration did not depend either on the nature of the Wakf properties or on the amount of income derived therefrom by the Wakf estate. But where the Mutawalli of a Wakf was entitled, under the Wakf-deed, by way of remuneration for his services, to retain as a beneficiary a part of the agricultural income of the Wakf estate, such remuneration was held to be agricultural income.

Income having agricultural and non-agricultural elements– Apportionment.– Where the assessee's income is partly agricultural and partly from manufacture–*e.g.* in the aforesaid cases where the assessee grows tea, cotton, tobacco or sugar-cane, subjects it to a manufacturing process, and sells the manufactured product-the profits on the sales would have to be apportioned, and the element in the profits referable to the manufacturing process would be taxable as business profits, while the balance referable to agricultural activities being agricultural income. In such cases the task of apportionment of profits is simplified by Rules 30 and 32 made in exercise of the powers conferred by s. 185. Under Rule 30 the market value of the agricultural produce used as raw material in the business is deductible from the

business profits, as representing agricultural income. Under r. 31, which applies only in cases where the assessee himself grows tea leaves and manufactures tea in Bangladesh, 40% of the profits on sales is taxable as business income. Under Rule 32 income derived from sale of rubber grown and manufactured by the seller in Bangladesh should be computed after deduction of development expenditure as if 40% of such income was derived from business and 60% of such income was derived from agriculture.

If the income is derived from agricultural lands situate in a foreign state, the income would fall outside the definition of "agricultural income" in this sub-section, and the entire income, from purely agricultural operations as well as from manufacture, would be taxable under s. 28 as income from business.

Sec. 2(2): Amalgamation in relation to companies.– Amalgamation means the merger of one or more companies with another company, or the merger of two or more companies to form one company (the company or companies which so merged being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger as the amalgamated company) in such a manner that by virtue of and for reasons attributable to the merger,-

(a) all the property of the amalgamating company or companies immediately before the merger, becomes the property of the amalgamated company;

(b) all the liabilities of the amalgamating company or companies immediately before the merger, become the liabilities of the amalgamated company; and

(c) the shareholders holding not less than nine-tenths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the merger by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company.

Sec. 2(3): Annual value.–"annual value" shall be deemed to be–

(a) in relation to any property let out, –

(i) the sum for which property might reasonably be expected to let from year to year; or

(ii) where the annual rent in respect thereof is in excess of the sum referred to in paragraph (i), the amount of the annual rent.

(See further under "Income from House Property–Section 25)

Sec. 2(4): "Appellate Joint Commissioner" means a person appointed to be an Appellate Joint Commissioner of Taxes under section 3 and includes an Appellate Additional Commissioner of Taxes and also a person appointed to hold current charge of an Appellate Joint Commissioner of Taxes.

Sec. 2(5): "Appellate Tribunal" means the Taxes Appellate Tribunal established under section 11.

Sec. 2(5A): "Approved gratuity fund" means a gratuity fund which has been and continues to be approved by the Board in accordance with the provisions of Part C of the First Schedule.

Sec. 2(6): "Approved superannuation fund or a pension fund" means a superannuation fund or a pension fund which has been and continues to be approved by the Board in accordance with the provisions of Part A of the First Schedule.

Sec. 2(7): Assessee.–"Assessee" means a person by whom any tax or other sum of money is payable under this Ordinance, and includes–

(a) every person in respect of whom any proceeding under this Ordinance has been taken for the assessment of his income or the income of any other person in respect of which he is assessable, or of the amount of refund due to him or to such other person;

(b) every person who is required to file a return under section 75, section 89 or section 91;

(c) every person who desires to be assessed and submits his return of income under this ordinance; and

(d) every person who is deemed to be an assessee, or an assessee in default, under any provision of this Ordinance.

Assessee.–"Assessee" is defined as meaning a person by whom Income-tax or any other sum of money (which would include penalty or interest) is payable under this Ordinance. It also includes every *person* in respect of whom any proceeding under this Ordinance is taken for the assessment (a) of his income, (b) of his loss or (c) of the amount of refund due to him. Thus the definition covers two categories: *first*, persons by whom any tax, penalty or interest is payable under this Ordinance, whether any proceeding under this Ordinance has been actually taken against them or not; and *secondly*, persons against whom any of the proceedings specified in this clause has been taken, whether he is or is not liable to pay any tax, penalty or interest. This clause makes explicit that "assessee" includes a person who is assessable in

respect of the income or loss of another, or who is deemed to be an assessee or an assessee in default under any provision of the Ordinance. Representative assessees are deemed under s. 92 to be assessees in respect of another person's income or loss; and under Chapter VII a person who is bound to deduct tax at source and who does not deduct or after deducting fails to pay the tax, is deemed to be an assessee in default.

Under s. 2(46) "person" includes (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) a local authority, and (vii) every artificial juridical person, not falling within any of the preceding sub-clauses; and these are the seven categories of assesses chargeable under the Ordinance.

Should therebe any person or body which cannot properly be placed in any of these groups, such person or body cannot be made liable to tax even though it may have income. Because of this the Government was absolved from Income-tax.

If under an agreement A promises to pay the tax dues of B, the Revenue, not being a party to the agreement, cannot treat A as the assessee and demand from him the tax due by B *(C.E.P.T.* v. *Ramnath Bajoria 1951 19 I.T.R. 79, 83).*

Sec. 2(8): Assessment.–"Assessment", with its grammatical variations and cognate expressions, includes re-assessment and additional or further assessment.

Assessment.–Assessment has to be construed in a wide sense and means not only the computation of income but the entire process of computation of income and tax-payable, including re-assessment under sec.34 – *C.I.T.* v. *Balkrishna Malhoka (S.C. of India) 1971, 81 I.T.R. 759.* But the term "assessment" cannot be construed to include recovery proceedings– *Nagappa Chetri* v. *Union of India (Madras) 1969, 72 I.T.R. 255.*

The term, "Regular Assessment" in the old Act, Sec. 18A (5), (6) does not include reassessment – Sec. 18A (5) or (6) of old Act speaks of the date of assessment made under section 23 (old Act) and refers to it as the "regular assessment", it is the first assessment or one might say as the original assessment order made by the Income-tax Officer for that year. Reassessment made under Sec. 34 is not a regular assessment, but an assessment under Sec. 34 for the first time is a regular assessment–1987 BTD XV 142-147 (Trib.).

"An order made by an I.T.O. to give effect to the order of the A.A.C. in appeal is an order of assessment comes within the meaning of regular assessment – The order passed by the Income-tax Officer revising the assessment made originally under the direction of the Appellate Tribunal, would partake the character of a fresh assessment and would be no less an order made under Sec. 23(3) of the Act within the ordinary acceptation of the term from which an appeal would lie to the Appellate Assistant Commissioner–*Reported in (1964) 54 I.T.R. 54.* "The Income-tax Officer's duty to assess the total income of the assessee and to determine the sum payable by him on the basis of the return under Sec. 23 of the old Act is the whole process of assessment which may end with his order or may be revised by the higher appellate

authorities including the Appellate Commissioner and the Tribunal recognized by the Income-tax Act.", Finality of assessment does not attain unless the case is finally disposed of by the Appellate Authority – *Dhaka Vegetable Oil Industries Ltd.* v. *C.I.T. Dhaka (S.C.) 1997 BTD XXV 118.*

The term "assessment" covers rectification proceedings, reassessment or revised assessment" – *Uppala Pada Venkataramaniah* v. *First Addl. I.T.O. (A.P) 1964 53 I.T.R. II.* But assessment does not include penalty imposed under section 46 (1) for non-payment of tax.

Sec. 2(9): Assessment year.– "Assessment year" means the period of twelve months commencing on the first day of July every year; and includes any such period which is deemed, under the provisions of this Ordinance, to be assessment year in respect of any income for any period.

Sec. 2(10): "Assistant Commissioner of Taxes" means a person appointed to be an Assistant Commissioner of Taxes under section 3.

Sec. 2(11): "Bangladeshi Company" means a company formed and registered under the Companies Act, 1913 (VII of 1913) [or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন), and includes a body corporate] established or constituted by or under any law for the time being in force in Bangladesh having in either case its registered office in Bangladesh.

Sec. 2(12): "Banking company" has the same meaning as in the Banking Companies Ordinance, 1962 (LVII of 1962), and includes any bodycorporate established or constituted by or under any law for the time being in force which transacts the business of banking in Bangladesh.

Sec. 2(13): "Board" means the National Board of Revenue constituted under the National Board of Revenue Order, 1972, (P.O. No. 76 of 1972).

Sec. 2(14): Business. – "Business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.

Business

Sec. 2(14).–The definition of business as given in this clause is inclusive and not exhaustive – it has an extending force and does not limit the meaning of the term–*Lala Indra Sen, 1949 I.T.R. 187, 202.* As for example, the rendering of various and continuous services as managing agents to a company amounts to carrying on a business even though such services are not covered by this inclusive definition. The case law on the concept given by the Supreme Court of India in the case of *(Lakshminarayan Ram Gopal & son. Ltd.* v. *Govt. of Hyderabad [1954] 25 I.T.R. 611)* and on various aspects of the term "business" have been discussed under Sec. 28.

"Adventure in the nature of trade"– A single and isolated transaction may fall within the definition of business, as being an adventure in the nature of trade, but to bring it within the transaction must be of the nature of trade. The case law on the elusive boundary-line separating transactions on capital account and transactions constituting adventures in the nature of trade, is discussed under sec. 16, "Capital sales and business sales" see under "Income from business or profession".

Sec. 2(15): Capital Asset.–"Capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include–

(a) any stock-in-trade (not being stocks and shares), consumable stores or raw materials held for the purposes of his business or profession;

(b) personal effects, that is to say, movable property (including wearing apparel, jewellery, furniture, fixture, equipment and vehicles), which are held exclusively for personal use by, and are not used for purposes of the business or profession of the assessee or any member of his family dependent on him; and

(c) agricultural land in Bangladesh, not being land situate–

(i) in any area which is comprised within the jurisdiction of municipality (whether known as a municipality, municipal corporation, town, or by any other name) or a cantonment Board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the income year; or

(ii) in any area within such distance not being more than five miles from the local limits of any municipality or cantonment board referred to in paragraph (i), as the Government may having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the official Gazette.

Capital assets.–Capital gains arising from the *transfer* of capital assets are assessable under sec. 31. Under Sec. 2(66) transfer in relation to a capital asset includes "the sale, exchange or relinquishment of the asset or the relinquishment of any right therein." But it does not include transfer of the capital asset under a gift, bequest, will or an irrecoverable trust; any distribution of the assets of a company to

its shareholders on its liquidation; and any distribution of capital assets on the dissolution of a firm or other association of persons or on the partition of a Hindu undivided family:

Capital assets include lease hold rights–*(Rajendra Mining Syndicte* v. *C.I.T. [1961] 43 I.T.R. 460)*; a partner's share in a firm excepting on dissolution of the firm–*(Sharfuddin* v. *C.I.T. [1960] 89 I.T.R. 333)* and a manufacturing licence–*(Seshasayee Bros. Ltd.* v. *C.I.T. [1961] 42 I.T.R. 568)*.

Capital assets also include goodwill as is decided in the case of *Haji Abdul Kader Saheb* v. *C.I.T. [1961] 43 I.T.R. 460*. But since this has been held as self-generated asset, the actual cost of acquisition cannot be determined, money received from transfer of goodwill cannot be capital gain for tax purpose–*C.I.T.* v. *B.C. Srinivas Setty (S.C. of India) 1981, 128 I.T.R. 294*. Sec. 19(10) has overruled the decision. Under this sub-section any income received by way of goodwill money will be taxed under the head "Income from other Sources."

Agricultural land situated in Bangladesh with certain exceptions as defined in the sub-section has been included into the definition of capital assets, irrespective of whether any income is derived from it or not but it must be agricultural land at the time of sale–*Mohammad Othuman Sahib* v. *C.I.T. [1957] 31 I.T.R. 480*. [See further 'capital gains' under sec. 31].

Sec. 2(16): "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any object of general public utility.

Sec. 2(17): "chartered accountant" means a chartered accountant as defined in the Bangladesh Chartered Accountants Order, 1973 (P.O. No. 2 of 1973).

Sec. 2(18): "child", in relation to any individual, includes a step-child and an adopted child of that individual.

Sec. 2(19): "Commissioner" means a person appointed to be Commissioner of Taxes under section 3, and includes a person appointed to hold current charge of a Commissioner of Taxes.

Sec. 2(19A): "Commissioner (Appeals) means a person appointed to be a Commissioner of Taxes (Appeals) under section 3 and includes a person appointed to hold current charge of a commissioner of Taxes (Appeals).

Sec. 2(19B): Commissioner (Large Taxpayer Unit) means a person appointed to be a Commissioner of Taxes (Large Taxpayer Unit) under section 3, and includes a person appointed to hold current charge of Commissioner of Taxes (Large Taxpayer Unit).

Sec. 2(20): Company.–"Company" means a company as defined in the Companies Act, 1913 (VII of 1913) or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন), and includes–

(a) a body corporate established or constituted by or under any law for the time being in force;

(b) any nationalised banking or other financial institution, insurance body and industrial or business enterprise;

(bb) an association or combination of persons, called by whatever name, if any of such persons is a company as defined in the Companies Act, 1913 (VII of 1913) or কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন),

(bbb) any association or body incorporated by or under the law of a country outside Bangladesh; and];

(c) any foreign association or body, [not incorporated by or under any law], which the Board may, by general or special order, declare to be a company for the purposes of this Ordinance.

Company.–Sec. 2(20)–Under the general law a company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders– *Becha Guzdar* v. *C.I.T. [1955] 27 I.T.R. 1, 5 (S.C. of India)*. For the purposes of this Ordinance, "company" has a much wider connotation than the word bears under the company laws. According to sec. 2(20) "company" means (i) a company as defined in the Companies Act. 1913 and 1994, (ii) banks or financial institutions, insurance corporations, industrial and business enterprises nationalised by the Government, (iii) any association or combination formed between a company and other association of persons, (iv) any association incorporated outside Bangladesh, whether Bangladeshi or not and (v) any foreign association, whether incorporated or not, which the Board may, by general or special order declare it to be a company.

It is to be noted that even an unincorporated association may be declared to be a company under this Ordinance. In other words, what is not a legal entity may be assessable as a company, Foreign unincorporated association may also be declared by the Board to be company for the purpose of this Ordinance. A company may be incorporated for a purpose other than that of carrying on business–*Lakshminarayan Ram Gopal & Son Ltd.* v. *Gov. of Hyderabad [1954] 25 I.T.R. 449, 460 (S.C. of India)*. A Company in liquidation is a "company within the meaning of this sub-section and the Department is entitled to call upon the liquidator of the company as its principal officer to make a return–*C.I.T.* v. *Official liquidator of Agra Spg. & Wvg. Mills Co. Ltd. 1934 I.T.R. 79*. Likewise penalty proceedings may be commenced

against a company in liquidation for a default committed prior to liquidation–*Artisan Press Ltd.* v. *I.T. Appellate Tribunal [1958] 33 I.T.R. 670 [See also Sec. 100-101].*

"Limited companies who carry on business are separate taxable persons, and the profits and gains of their several businesses are separate profits and gains for the purpose of the Income-tax Act. This is none the less true if one of the companies should be the parent company and the other or others may be its subsidiaries of which the shares are held or owned by the parent company"–*Per Viscount Manghanum Odhams Press Ltd.* v. *Cook [1941] Suppl. 92, (H.L.).*

Assessment on Companies.–As regards liability to tax, a company differs from other assessees in some respects–(i) under the Finance Acts the minimum taxable limit prescribed for other assessees does not apply in the case of a company, (ii) A company has to pay income-tax at a flat rate on the *whole* of its total income, whereas other assessees are taxed at the graduated scale or slab system. The rate of tax, of course, differs depending on the kinds of companies, as well as on the nature of income of the company. The rate of tax is lower in case of publicly traded company and it is the lowest for its income from dividend.

The company is assessed on its income of the income year and not on the amount it distributes by way of dividend. If the company's total assessable income during the income year is nil, it will not be liable to pay income-tax although it may pay dividends out of its reserve fund.

An assessment cannot be made on a company after it has ceased to exist and has been, struck-off the register of companies–*C.I.T.* v. *Express Newspapers Ltd. [1960] 40 I.T.R. 38, 56-7.*

Company does not pay tax on behalf of shareholders.–The company, having a separate entity, is chargeable to tax on its profits as a distinct entity, and it pays the tax in discharge of its own liability and not as an agent of the shareholders. The result is that the shareholder is liable to income-tax in respect of the gross dividend without any credit for the tax assessed in the hands of the company.

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

Sec. 2(22)–"cost and management accountant" means a cost and management accountant as defined in the Cost and Management Accountants Ordinance, 1977 (LIII of 1977).

Sec. 2(23)–"Deputy Commissioner of Taxes" means a person appointed to be a Deputy Commissioner of Taxes under section 3, and includes a person appointed to be an Assistant Commissioner of Taxes, an Extra Assistant Commissioner of Taxes and a Tax Recovery Officer.

Sec. 2(24)–Director and manager.–"Director" and "Manager" in relation to a company have the meanings assigned to them in the Companies Act, 1913 (VII of 1913) and কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন).

Director.–"Director" includes any person occupying the position of director, by whatever name called." "Manager" means an individual who subject to the superintendence, control and direction of the Board of Directors has the management of the whole, or substantially the whole of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not".

Sec. 2(25): "Director-General of Inspection (Taxes)" means a person appointed to be a Director-General of Inspection (Taxes) under section 3, and except for the purpose of section 117, includes a person appointed for the purpose of this Ordinance to be an Additional Director-General of Inspection (Taxes), a Deputy Director-General of Inspection (Taxes), or an Assistant Director-General of Inspection (Taxes).

Sec. 2(26): Dividend.–"Dividend" includes–

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of its assets or reserves;

(b) any distribution by a company, to the extent to which the company possesses accumulated profits, whether capitalized or not, to its shareholders of debentures, debenture-stock or deposit certificates in any form, whether with or without interest;

(c) any distribution made to the shareholders of a company on its liquidation to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalized or not;

(d) any distribution by a company to its shareholders on the reduction of its capital, to the extent to which the company possesses accumulated profits, whether such accumulated profits have been capitalized or not;

(e) any payment by a private company of any sum (whether as representing a part of the assets of the company or

otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company, in either case possesses accumulated profit; but does not include–

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share including preference share for full cash consideration, or redemption of debentures or debenture-stock, where the holder of the share or debenture is not entitled in the event of liquidation to participate in the surplus assets;

(ii) any advance or loan made to a shareholder in the ordinary course of its business, where the lending of money is a substantial part of the business of the company;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as dividend within the meaning of sub-clause (e) to the extent to which it is so set off; and

Explanation.–The expression "accumulated profits"–

(a) wherever it occurs in this clause, includes any reserve made up wholly or partly of any allowance, deduction or exemption admissible under this Ordinance or under the Income tax Act. 1922 (XI of 1922), but does not include capital gains arising before the first day of April, 1946, or after the thirty-first day of March, 1949, and before the eighth day of June, 1963.

(b) as used in sub-clauses (a), (b) and (d), includes all profits of the company up to the date of such distribution; and

(c) as used in sub-clause (c), includes all profits of the company up to the date of its liquidation.

Dividend

Dividend–Sec. 2(26): The definition of dividend is inclusive and not exhaustive. It only gives some instances of dividend comprising items of distribution

of accumulated profits of the company which may not normally be regarded as 'dividend'. Thus normal dividend which is paid out of current profits even if it is from exempted profit of tax-holiday company would of course, be dividend under the general law and would be taxable as such even if it is not attributable to the company's "accumulated profits."

Under the Companies Act, 1913 and 1994 a company cannot pay dividend otherwise than out of the profits of the year or any other undistributed profit. But there is nothing in law to prevent a company using an income receipt as cash in its hands to discharge a capital liability or to purchase a capital asset and then, after the close of its financial year, paying a dividend out of other cash, or borrowing for the purpose, to the extent of the credit balance standing on profit and loss account. But a distribution of dividend out of the subscribed or paid-up capital would be illegal. What is taxable as dividend need not necessarily be paid in money; it may be paid in money's worth by the delivery, say, of goods or securities or shares in another company–*Kantilal Manilal* v. *C.I.T. [1961] 41 I.T.R. 275 (S.C. of India).*

Profits again may be of two classes, "income profits", and "capital profits". The former refers to the excess of revenue receipts during the year over expenditure for the year and figures in the profit and loss account of the company, while the latter generally refers to the excess realisations on a sale of a capital asset of a company, (e.g., plant, buildings, furniture, etc.) over its written down value as noted in the company's books, and figures in the statement of assets and liabilities of the company. Capital profit would include share premium as well. The term "accumulated profits" in this clause would include all these profits. The income profits of income years may be divided as dividends even if the company's capital account should be in debit. The value of the plant and machinery and the distilling stock and other assets might have so depreciated that it is far less than the capital subscribed and hence the assets and liabilities statement might disclose a debit. But that has no relation to the earning capacity of the company, which might be in a flourishing condition and be yielding an excess of income over its expenditure, out of which dividends may be declared and distributed–*Hill* v. *Permanent Trustee Co. of New South Wales, [1930] (A.C. 720, 729).*

A share holder is liable to pay income-tax on his dividend income without any credit for the tax paid by the company on its own profits; and further, the company must deduct under sec. 54 the share holder's tax at source when paying the dividend (See Deduction of Tax at Source). "Company does not pay its tax on behalf of its shareholders."

A distribution of accumulated profits among shareholders, the amounts being not paid in cash but credited to the share holders' individual loan accounts with the company, would none the less be taxable as dividend in the share holders' hands, unless the dividend is set-off by the company against a loan which itself has been assessed as dividend [S.2(26) (e)]. Similarly, a dividend would be taxable as such though it may be distributed on the understanding that it should be used by the shareholders in purchasing further shares in the company.

Distribution of Accumulated profits entailing release of company's assets–Bonus Shares.–Under the Company Law, it is open to a company either to distribute its profits or carry them to reserve. A shareholder acquires no rights in the profits of the company nor is he entitled to claim that the company should apply its undivided profits in payment to him of dividends. It is only on distribution that his rights arise. If the distribution be in cash *in specie*, or in monies' worth, there is no question that it is income in his hands. But, if the distribution should take the shape of shares in the declaring company, called "bonus shares", the question arises whether the distribution is to be treated as dividends assessable to tax. It is that situation that the present clause deals with. The effect of the clause is to state that if the distribution should entail a release by the company of all or any of its assets then, it would be a dividend; otherwise not. A Company might genuinely capitalise its undistributed profits and appropriate the same for its won use, for the purpose, say, of expanding or organising its business, or for increasing its plant or machinery or acquiring fresh assets and so forth. It can do so by appropriating its undistributed profits to its capital account. If there are unissued shares of the company, or if the issued shares are only partly paid-up, they may all be converted as fully paid-up utilising the accumulated profits for such purpose or if a company has power to raise its nominal capital, its share capital might be increased and the accumulated profits be appropriated to the payment of the fresh issue of shares. In all these cases there would be a genuine capitalisation of the profits by the appropriation of the accumulated profits towards such share capital and the existing shareholders instead of receiving any monies out of the undistributed profits would only be receiving *pro-rata* fresh shares, out of the old shares converted as fully paid-up or out of the new issue. Such fresh shares issued to the shareholders would not be dividends because they do not entail any release of the company's assets. The assets, i.e., the profits, remain in the hands of the company as capital and what the shareholders receive is merely a paper certificate as evidence of their interest in the additional authorised or subscribed capital of the company, as the case may be. The new shares would only confer a title to a larger proportion of the surplus assets, if and when a general distribution takes place, as in a winding-up, that is all. *The transaction would take nothing out of the company's coffers and put nothing into the shareholders' pockets.* The declaration of bonus in those circumstances would be a bare machinery for capitalising its profits. Even if the shareholder were to sell his bonus shares, he would only be realising a capital asset in his hands and the proceeds would not be income chargeable to tax. The same would be the resalt if a company instead of issuing shares declares bonus in the shape of its own stock, known as stock-dividends, such an issue would take away nothing from the property of a company.

On the other hand, if a company should utilise its accumulated profits for the purpose of starting a subsidiary company and issue shares fully paid-up of the subsidiary company to its own shareholders, though, calling them as bonus shares, there would really be a release of assets by the parent company, for, the share capital of the parent company would stand unaffected by the operations, and to the extent to which the monies of the parent company are utilised in payment to the shares of the subsidiary company, there would be a release of assets by the parent company. In law,

a subsidiary and a parent company are two different entities *(Odham's Press Ltd.* v. *Cook. 23 T.C.: 1941 I.T.R. Supp. 92, 109)* and what goes to a subsidiary company is really lost to the parent company though to the individuals behind the parent company, there may be no loss.

The question whether there has been an *effective capitalisation* by a company or not, has to be answered by determining the *real* intention of the company and for this purpose, reference must be had to the documents, the books and the resolutions of the company and the surrounding facts. If there is real intention to capitalise, the fact that an option is given to the shareholders to demand cash instead of shares would be immaterial, though to the extent to which the option is so exercised, there would be a release of assets. Hence such cash receipts would be dividend under this definition and taxable accordingly. The "capitalisation" in the context is not a mere matter of terminology but a factual capitalisation. If there is no effective capitalisation and the profits are distributed in whatever form or kind without any increase in share capital of the company, it would be a case of distribution of dividends falling within this definition.

The concept of distribution of accumulated profits which does not entail release of assets of the company so far as bonus or bonus shares issued by the company is concerned has been greatly affected by the omission of sub-cl. (iv) of cl. (c) of sub-section 26 of section 2 in the Finance Act, 1999 and as a result any bonus shares issued by a company shall be dividend income in the hands of the shareholders from the assessment year 1999–2000 although there is no release of company's assets. This may discourage capitalisation of accumulated profits.

When bonus shares are paid off.–It has been noted above that bonus shares are not taxable as dividend when they are allotted to ordinary shareholders. But the further question that arises is whether, when bonus shares are paid off by the company, the payment constitutes a dividend within the meaning of this clause. Where accumulated profits are capitalised and redeemable preference shares are issued by way of bonus, the payment made by the company *on redemption* would constitute a distribution of capitalised profits entailing a release of some of the company's assets and would consequently be taxable as dividend under sub-cl. (a) of this definition. If accumulated profits are capitalised in the form of ordinary or preference bonus shares and such bonus shares are paid off by way of reduction of capital or on the liquidation of the company, tax may likewise be attracted under sub-cl. (c) or (d) and the distribution to the holders of bonus shares may be treated as dividend.

Debentures, debenture stock and deposit certificates.–Bonus shares to preference shareholders.–Sub-cl. (b): On general principles, where a company capitalised its accumulated profits and distributed bonus debentures among its shareholders, it was held that the debentures were not dividend or income at all in the hands of the shareholders–*I.R.* v. *Fisher's Executors 10 T.C. 302 (H.L).* but the Legislature has deliberately departed from this view in the present clause. Under this sub-clause, distribution of bonus debentures, debentures, debenture stock or deposit certificates in any form, by a company among its shareholders, would be distribution

of dividend and consequently income in the hands of the shareholders, but only to the extent to which the company possesses accumulated profits, whether capitalised or not. The reference to deposit certificates was inserted to supersede the decision of the Madras High Court *(C.I.T.* v. *Viswanath Rao 1950 I.T.R 68)* that where a company did not pay dividend in cash but issued to shareholders bearer deposit certificates payable on or before a certain date, the deposit certificate was like a post-dated cheque or a promissory note, and in such a case there was no release by the company of any of its assets and no distribution of dividend within the meaning of this clause as it then stood.

Unlike the 1922 Act, this Ordinance taxes as dividend bonus shares issued to preference shareholders. The issue of bonus shares to ordinary shareholders before the amendment in the Finance Act in 1999 was not taxable as dividend. See ante "Distribution of accumulated profits entailing release of company's assets.–Bonus shares."

Distribution on liquidation of a company-Sub-cl.–In *(I.R.* v. *Burrell 9 T.C. 27)*, the Court of Appeal held that accumulated and current profits distributed by the liquidator among the shareholders on the liquidation of a company are not dividend or income at all in the hands of the shareholders. The ground of the decision was that a liquidator cannot declare or distribute a dividend; on the liquidation of a company undistributed profits can no longer be distinguished from capital; the accumulated and current profits become merely surplus assets in the hands of the liquidator, and what he distributes among the shareholders is capital being merely their share in the property and assets of the company *(Girdhardas & Co. Ltd.* v. *C.I.T. [1957] 31 I.T.R. 82)*. To supersede the decision in Burrell's case, sub-cl. (c) expressly provides that any distribution made to shareholders on the liquidation of a company to the extent of the company's accumulated profits falls within the definition of "dividend" and is consequently taxable as income in the shareholders' hands *(Dhandhania Kedia & Co.* v. *C.I.T. [1959] 35 I.T.R. 400, 405 (S.C. of India))*.

The clause would apply even if the accumulated profits were capitalised. Thus, a distribution on liquidation out of capitalised profits, e.g., a distribution made in respect of bonus shares or a distribution out of profits capitalised by converting partly paid into fully paid shares, is dividend.

Expln. C makes it clear that distribution on liquidation out of the accumulated profits of any past year and even out of the current profits of the year of liquidation but up to the date of liquidation, is taxable as dividend. However, any distribution out of the profits of the company after the date of liquidation would not be covered by this clause.

Distribution on reduction of capital–Sub-cl. (d).–A company may, instead of increasing its capital by capitalising its accumulated profits, devote its accumulated profits to reducing its capital. In other words, the company may, out of its accumulated profits, pay off any share capital which is in excess of the wants of the company. Or, a company may first capitalise its accumulated profits and increase its capital by issuing bonus shares and then reduce its capital by paying off such bonus

shares. Under this clause any such distribution by a company on the reduction of its capital is "dividend" to the extent to which the company possesses accumulated profits.

Loans to Shareholders and other benefits–Sub-cl. (e) and sub-cls. (ii) and (iii).–Sub-cl. (e) has the effect of bringing to tax as dividend in the hands of the shareholders three types of payments made by a private company: (a) any payment of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder; (b) any payment on behalf of a shareholder; and (c) any payment for the individual benefit of a shareholder. Two conditions have to be fulfilled in order to attract tax under this clause: –

(a) The company should be a private company;

(b) The company should possess accumulated profits at the time it makes the payment, –the payment being deemed to be dividend only to the extent of such profits.

Sub-cl. (ii) constitutes the only exception to the above rule, and it applies only where two cumulative conditions are fulfilled–first, the loan should have been made by the company in the ordinary course of its business, and secondly, money-lending should be a substantial part of the company's business. Sub-cl. (iii) gives relief by providing that any subsequent dividend paid by a company would not be taxable to the extent to which it is set off by the company against any loan or other monetary benefit which has been treated as a dividend within the meaning of sub-cl. (e). If the dividend is not so set off but is paid to the shareholder while the loan remains outstanding, the benefit of sub-cl. (iii) cannot be obtained.

Under sub-cl. (e) the loan or other payment is taxable as dividend in the year in which the loan is paid to the shareholder or the payment is made by the company on behalf or for the benefit of the shareholder.

Shares issued for full cash consideration or redemption of debenture or debenture-stock-sub. cl. (i).–This sub-clause enacts that a distribution on liquidation of the company or on reduction of its capital is not dividend if it is made in respect of any share (i) which has been issued for full cash consideration and (ii) which is not entitled in the event of liquidation to participate in the surplus assets and in respect of any redemption of debenture or debenture stock. Generally speaking, preference shares are not entitled to participate in the surplus assets on liquidation.

Bonus Shares-Sub-cl. (iv).–Bonus shares issued by a company were excluded from the definition of dividend, but since 1999 it has been included into the definition of dividend by exclusion of cl. (v) of sub-section (26). The definition of income under cl. (34), has also been amended to keep uniformity with the amendment made in cl. (v) of sub-section (26).

Accumulated Profits–Explanation (a) & (b).–***Dividend paid out of capital profits.***– Expln. 1 to this clause enacts that the words "accumulated profits", wherever they occur in this clause and which includes any reserve made up wholly or partly of

any allowance, deduction or exemption admissible under this Ordinance or under the Income-tax Act. 1922 do not include capital gains arising before the 1st April 1946, or after the 31st March 1949 and before the 8th June, 1963. The only effect of the Explanation is that for the purposes of the artificial categories of dividend which are created by this definition "accumulated profits" would not include capital gains made during a period when they were not taxable under the 1922 Act. Thus any distribution made to the shareholders of a company on liquidation out of the non-taxable accumulated capital gains of the company would not be dividend. But, as noted above, the definition in this sub-section is inclusive and not exhaustive and what normally would be dividend apart from this definition is not touched in any manner by this Explanation.

If a company pays an ordinary dividend out of its capital profits, e.g., profits realised upon sale or acquisition of some of its capital assets, the payment would nonetheless be dividend income taxable under s. 33 in the shareholder's hands, whether the payment is called dividend or bonus. It would be so taxable even if the company's capital profits are not chargeable to capital gains tax and are not "accumulated profits" within the meaning of Expln. 1 A profit derived from the sale of a capital asset would not be taxable in the hands of the company, if the sale took place at a time when the capital gains tax was not in force. But the capital profit which, while it remained in the hands of the company, was not income of the company, becomes income of the shareholders when it is paid to them.

Expln. (b) & (c) defines "accumulated profits" as including all profits of the company up to the date of distribution or payment, for the purposes of all sub-clauses except sub-cl. (e). This provision, which was absent in the 1922 Act, virtually renders the expression "accumulated profits" wide enough to cover current profits, i.e., current profits of the year in which the distribution or payment is made, up to the date of such distribution or payment. For the purposes of sub-cl. (c) which deals with distribution on liquidation, "accumulated profits" includes the profits of the year of liquidation up to the date of liquidation, but not the profits made between the date of liquidation and the date of distribution to the shareholders.

Employee and Employer-Sec. 2(28 & 27)

Sec. 2(27) –"employer" includes a former employer;

Sec. 2(28) –"employee", in relation to a company, includes the managing director, or any other director or other person, who irrespective or his designation, performs, any duties or functions in connection with the management of the affairs of the company;

Note.– By the amendment of rule 33(2) in 2000 definition of 'employee' for the purpose of calculation of perquisite has been changed. 'Employee' for the purpose does not include a shareholder director of a company. This amendment will curb the tendency atleast of the private companies to show excessive expenditure in the name of perquisites to the employees so as to evade tax.

Sec. 2(29)–"Extra Assistant Commissioner of Taxes" means a person appointed to be an Extra Assistant Commissioner of Taxes under section 3 and includes a person appointed to hold current charge of an Extra Assistant Commissioner of Taxes;

Sec. 2(30)–"fair market value", in relation to capital asset, means the price which such asset would ordinarily fetch on sale in the open market on the relevant day, and, where such price is not ascertainable, the price which the Deputy Commissioner of Taxes may, with the approval in writing of the Inspecting Joint Commissioner, determine;

Sec. 2(31)–"fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient, or consideration which would be income of the recipient classifiable under the head "Salaries";

Sec. 2(32) –"firm" has the same meaning as assigned to it in the Partnership Act, 1932 (IX of 1932);

Sec. 2(43) –"partner" has the same meaning as assigned to it in the Partnership Act, 1932 (IX of 1932), and includes a person who, being a minor, has been admitted to the benefits of partnership;

Sec. 2(44) –"partnership" has the same meaning as assigned to it in the Partnership Act, (IX of 1932).

PARTNER AND PARTNERSHIP

Partnership.–"Partnership is the relationship between persons who have agreed to *share the profits* of a business carried on by all or any of them acting for all. Persons who have entered into Partnership with one another are called individually "partner" and collectively "a firm" – Sec. 4 of Partnership Act. The phrase "business carried on by all or any of them acting for all" means that one of the partners may have a dominant role in carrying on the business over others but there must be a feeling of participation by all in the business–1986 BTD XIV 155 (Trib.). In a case a contract work was undertaken by an individual who subsequently forms partnership with other persons to which the contract work was transferred and the partnership firm executed the contract work. It was held that income from the said contract work will be assessed in the hands of the firm–*C.I.T.* v. *R.L. Misra [1989] BTD XVII 186.* The fact that one of the partners has been given exclusive authority to operate the firm's bank accounts does not militate against the notion of the firm being a genuine one–I.T.A. Nos. 293 & 294 of 1976-77. The mere fact that two persons have a

commission agency business jointly would not necessarily constitute a Partnership between them–*Beniram Moolchand* v. *C.I.T. [1954] 25 I.T.R. 287.* Partnership formed with wife and brother-in-law contributing their own share in the capital will also be a valid partnership even if the withdrawl of the wife is nil and that of the brother-in-law is meagre. It is open to the partners to agree not to take the whole of the firm' profits for their personal use.

In order to constitute a partnership there must be two adults – *C.I.T.* v. *Durgabati [1961] 43 I.T.R. 228 (S.C. of India).* Where a partnership deed purports to be an agreement between a minor and adults, making the minor a *partner* and therefore liable for losses such a partnership is not valid–*C.I.T.* v. *Dwarkedas Khetan & Co. [1961] 41 I.T.R. 528 (S.C. of India).* A minor can, however, be admitted into the benefits of partnership formed between two or more major partners. If after attaining majority the minor does not repudiate the partnership and the instrument of partnership provides both for his share of profit as well as for the loss incurred by the firm during the minority of such partner, there is no change in the constitution of the firm when that minor partner attains majority. But if an instrument confers on a minor the benefit of the partnership and then it is silent, the general law will apply; and it will be deemed that in view of sec. 30 of the Partnership Act, the instrument evidences that on the minor electing to remain a partner on his attaining majority he will be a partner–*Besant Beheri Gopal Behari* v. *C.I.T. [1986] BTD XIV 65.* However, a guardian of minors may himself become a partner and undertake liability even for losses–*Manvi Bros.* v. *C.I.T. [1960] 39 I.T.R. 173.*

Firm, partner, partnership–Sec. 2(32), (42) & (44).–In this Ordinance, "firm", "partner" and "partnership" have the same meanings respectively as in the Partnership Act, 1932, with one difference, viz., that for the purposes of this Ordinance "partner" includes a minor admitted to the benefits of partnership *[S. 30 of the Partnership Act, 1932].*

Validity of partnership.–"Partnership" is the relation between persons who have agreed to *share the profits* of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". The mere fact that two persons take a commission agency business jointly would not necessarily constitute a partnership between them–*Beniram Moolchand* v. *C.I.T. [1954] 25 I.T.R.* 287. A person,–e.g., a deceased partner's widow,–may be entitled to a share in the firm's profits, without being a partner–*I.R.* v. *Lebus's Executors 27 T.C. 136 (C.A.).* It is open to the partners to agree not to take the whole of the firm's profits for their personal use.

In order to constitute a partnership there must be at least two adults–*C.I.T.* v. *Durgabati [1961] 43 I.T.R. 228 (S.C. of India).* Where a partnership deed purports to be an agreement between a minor and adults, making the minor a *partner* and therefore liable for losses, such a partnership is not valid. However, a guardian of minors may himself become a partner and undertake liability even for losses–*Manvi Bros.* v. *C.I.T. [1960] 39 I.T.R. 173.*

An association of persons would not constitute a partnership unless they carry on a business –*Ramniklal Sunderlal* v. *C.I.T. [1959] 36 I.T.R. 464*. The partners may do business in a line not mentioned in the deed of partnership–*(C.I.T.* v. *Dhanalakshmi Corpm. [1962] 46 I.T.R. 103)* and may carry it on not personally but entirely through servants or agents–*(C.I.T.* v. *Hind Commission Agents [1963] 48 I.T.R. 615)*. It is essential that the principle of agency should regulate the relationship between the partners. An agreement to share profits is equally essential to a valid partnership –*(Kaura Lal Vishwan Das* v. *C.I.T. [1954] 26 I.T.R. 642. An agreement to share losses is not essential to a valid partnership)*. But the profits need not be actually distributed every year. They may be allowed to accumulate in the business–*(Kikabhai* v. *C.I.T. 4 I.T.C. 178)*. The division of profit is an internal matter of partnership having no bearing on the genuineness of partnership firm–1982 BTD X 44 (Trib.). Partners are assessable on their firm's profits irrespective of whether the profits are distributed and paid over to the partners or not–*I.R.* .v. *Lebus's Executors 27 T.C. 136, 147 (C.A.)*. The amount which the partners are actually entitled to receive by way of share in profits may be made to depend upon the time which they devote to the business of the firm – *C.I.T.* v. *Mangoomal Lamidasingh 1939 I.T.R. 208*.

The question whether the relationship between two persons is that of partners, or of employer and employee or principal and agent, is a question to be determined upon a proper construction of the relevant documents and all the other circumstances of the case–*Davis* v. *C. Ag. I.T. [1959] 35 I.T.R. 803, 807 (S.C. of India)*. In the absence of other evidence the mere fact that a person is remunerated by a share in the business profits would not be sufficient to establish partnership. Where the parties to an agreement are entitled to profits and are liable to bear losses of a business, a strong presumption arises that a partnership has come into existence. It is not essential that in a partnership all the partners should be owners of the assets or the goodwill of the firm, or that the right of borrowing money on behalf of the partnership business should be exercisable by every partner–*Lalli Ram Sunderlal Jhansi, In re, [1951] 19 I.T.R. 372*. The partnership would be valid though there may be various restrictions on some of the partners and one of the partners may be empowered to conduct the business at his sole discretion and to expel other partners from the firm or may be given other exclusive powers of dominating control–*C.I.T.* v. *Pathrose Rice & Oil Mills [1960] 40 I.T.R. 353*.

Partnership must be distinguished from co-ownership of property and from the relationship of licensor and licensee or vendor and purchaser. On a true construction of a document, it may be held that the agreement between the parties constitutes a partnership, even if the document expressly declares that the arrangement set out therein shall not constitute partnership between the parties–*Fenston* v. *Johnstone 23 T.C. 29*. Conversely, an agreement which is merely to share expenses (and not profits) and which lacks the element of agency, would be held not to constitute a partnership although the parties may describe themselves as partners, procure registration under the Partnership Act.

Partnership must be deemed to commence from the date when in fact it has commenced, even though a partnership deed may be executed later–*Waddington* v. *O'Callaghan 16 T.C. 187, 197.* Where partnership has in fact commenced from the date of execution of the partnership deed, it cannot be deemed to have commenced earlier even if the deed provides for retrospective operation: no deed can alter the past. Likewise, if a partnership was in fact dissolved on a particular date, it cannot be held to have been dissolved earlier even though the deed of dissolution might refer to an earlier date as the date of dissolution for the purposes of adjusting the rights of the partners *inter se–Shaik Mohamed Rawther & Co.* v. *C.I.T. [1956] 39 I.T.R. 747.* A partnership may be assessed as such even after its dissolution, for instance, if it carries out after its dissolution contracts entered into before *[Business carried on in the course of administration or winding up or liquidating a concern can be assessed as such].*

Two firms consisting of same partners.–Two firms consisting of exactly the same partners may nonetheless constitute separate and distinct partnerships and carry on different businesses; and the question whether two such firms are separate and distinct or whether they constitute only one firm, is a question of fact to be determined upon the circumstances of each case–*(Jesingbhai Ujamshi* v. *C.I.T. 1950 I.T.R. 23, and [1955] 28 I.T.R.).* But a different view was taken in the case of– *(C.I.T. Chittagong* v. *Messrs Pakistan Tubewell Co.)* wherein it was observed that if same partners having the same set of shares are allowed to carry on different business under different deed of partnership they will be in a position to evade payment of income tax which is otherwise assessable on their aggregate income by creating an artificial separation between the two firms the purpose of income tax can be defeated. But the Patna High Court of India held in the case of *(C.I.T.* v. *Brijnandan Prosad and Sons reported in 1999 BTD XXVII 12-20)* that there is no legal bar to the same persons joining hands and constituting more than one partnership. The Supreme Court of India in the case of *(C.I.T.* v. *Sivatkasi Match Exporting Co. [1964] 53 I.T.R. 204)* observed that it is open to any person to so arrange his affairs that his tax-liability is reduced to the minimum by adopting a legal device permissible under the law. Such a device cannot be called an attempt to evade tax as long as the action is not contrary to law. In case of two firms having same partners, sharing profits in same ratio, with same firm-name and operating at same office cannot be taken as a conclusive matter to treat such firms as one. The real character of the partnership firm has to be determined on the basis of the facts and materials available on record, such as, whether there was any interlocking or interlacing of the funds between the two businesses or that the management was common. The conclusion has to be arrived at taking into account the cumulative effect or totality of all the material facts and circumstances in that regard.

Joint family, company or firm, or the same individual in different capacities as a partner.–It is not only individuals who can be partners in a firm. An incorporated company may form a partnership with an individual–*(Latilla* v. *I.R. 25 T.C. 107 (H.L.)).* A joint Hindu Family *as such* cannot be a partner in a firm–*(C.I.T.* v. *Kaln Babn Lal Chand [1959] 37 I.T.R. 123, 127).* But a joint Hindu family

through its *karta* may enter into a valid partnership with a stranger–*(Lachhman Das* v. *C.I.T. 1948 I.T.R. 35, 41-2 (P.C.))*, or with a separated member of the family–*(Atmaram Bhogilal* v. *C.I.T. [1952] 22 I.T.R. 305)*. But in such a case it is the *karta* alone who becomes the partner and not the individual members of the family–*(C.I.T.* v. *Kalu Babu Lal Chand [1959] 37 I.T.R. 123 (S.C. of India))*. S.R. Das, J., delivering the judgment of the Supreme Court in *Kshetra Mohan–Sannyasi Charan Sadhukhan* v. *C.E.P.T.* said, "When two *kartas* of two Hindu undivided families enter into a partnership agreement the partnership is popularly described as one between the two Hindu undivided families but in the eye of the law it is a partnership between the two *kartas* and the other members of the families do not *ipsofacto* become partners. There is, however, nothing to prevent the individual members of one Hindu undivided family from entering into a partnership with the individual members of another Hindu undivided family and in such a case it is a partnership between the individual members and it is wholly inappropriate to describe such a partnership as one between two Hindu undivided families". A partnership between two members of a Hindu undivided family and strangers would be valid, although the two members may represent, and receive their shares of profits on behalf of, one and the same family. If after the formation of a partnership between the karta and a stranger, the joint family is disrupted, or there is a partial partition by way of division of the interest in the partnership, the validity, constitution or existence of the partnership is not affected thereby. A widow is competent to become the manager of a joint family and enter into an agreement of partnership in her representative capacity as the manager *(C.I.T.* v. *Laxminarayan Raghunathdas 1948 I.T.R. 313)*.

The Privy Council held in *(Lachhman Das* v. *C.I.T. [1948 I.T.R. 35])*, that there can also be a valid partnership between a karta of a Hindu undivided family representing the family on the one hand and an undivided member of that family in his individual capacity on the other. But there can be no partnership in law between the same individual acting, on the one hand, as the *karta* of a joint Hindu family and, on the other, as a partner in his individual capacity, even as there can be no partnership in law between the Mutawalli of a Wakf or a trustee in his representative capacity and the same individual in his personal capacity, or between the guardian of minors in his representative capacity on the one hand and himself in his individual capacity on the other.

The Supreme Court of India laid down in *(Dulichand Laxinarayan* v. *C.I.T. [1956] 29 I.T.R. 535)* that since a firm is not a legal entity, a firm as such cannot enter into a partnership. But if the facts show that the constituent members of smaller firms, and not the firms as such, had entered into a partnership, the partnership would be valid *(Chhotalal Devchand* v. *C.I.T. [1958] 34 I.T.R. 351)*. As a Full Bench of the Allahabad High Court held in *(Chandrika Prasad Ram Swarup* v. *C.I.T. [Lachhman Das* v. *C.I.T. 1948 I.T.R. 35, 42 (P.C.)])*, where two firms purport to enter into a larger partnership, and the deed shows that the larger partnership is really a partnership between the individual members of the two firms, it would be valid *(C.I.T.* v. *Jadavji Narsidas & Co. [1963] 48 I.T.R. (S.C. of India))*. Similarly, if a firm purports to enter into a larger partnership with an individual or with a karta as representing his joint Hindu family, the larger partnership may in law be composed of

the members of the firm and the individual or the karta. The larger partnership may be assessed as a firm *(C.I.T.* v. *Shantilal Vrajlal & Chdndulal Dayalal & Co. [1957] 31 I.T.R. 903)* or in any event as an "association of persons".

Firm is an assessable entity.–It is well settled that under the general law a firm is not a legal person or a juridical entity *(Dulichand Laxminarayan* v. *C.I.T. [1956] 29 I.T.R. 535 (S.C. of India))*. But as the Supreme Court pointed out in *(C.I.T.* v. *Figgies & Co. [1953] 24 I.T.R. 405)*, the technical view of the nature of partnership under the general law cannot always be taken in applying the law of income-tax. For some of the purposes of the Ordinance a firm "is treated as an entity distinct from the persons who constitute the firm". Under s. 16(1) read with s. 2(46) a firm is a unit of assessment.

Sec. 2(33) –"foreign company" means a company which is not a Bangladeshi company.

Sec. 2(34) –"income" includes–

(a) any income, profits or gains, from whatever source derived, chargeable to tax under any provision of this Ordinance under any head specified in section 20;

(b) any loss of such income, profits or gains;

(c) the profits and gains of any business of insurance carried on by a mutual insurance association computed in accordance with paragraph 8 of the Fourth Schedule;

(d) any sum deemed to be income, or any income accruing or arising or received, or deemed to accrue or arise or be received in Bangladesh under any provision of this Ordinance.

Income.–Cl. (34): Under clause 2(34) income is artificially declared to include various items. These items are dealt with in their appropriate places under the relevant sections in the commentary. The subject of business of insurance carried on by a mutual insurance association (Sub-cl. (c) is also covered by the commentary under Paragraph 8 of Fourth Schedule).

The definition of income in this clause is inclusive and not exhaustive. "Income" includes not only those things which this clause declares that it shall include, but such things as the word signifies according to its natural import *(Raghuvanshi Mills Ltd.* v. *C.I.T. [1952] 22 I.T.R. 484, 488 (S.C. of India))*. This clause merely adds some artificial categories to the natural connotation of "income".

The concept of "income" is discussed under Sec. 16 *post*.

Sec. 2(35): Income year.– "Income year", in respect of any separate source of income, means–

(a) the financial year immediately preceding the assessment year; or

(b) where the accounts of the assessee have been made up to a date within the said financial year and the assessee so opts, the twelve months ending on such date; or

(c) in the case of a business or profession newly set up in the said financial year, the period beginning with the date of the setting up of the business or profession and–

(i) ending with the said financial year; or

(ii) where the accounts or the assessee have been made up to a date within the said financial year and the assessee so opts, ending on that date; or

(d) in the case of a business or profession newly set up in the twelve months immediately preceding the said financial year–

(i) if the accounts of the assessee have been made up to a date within the said financial year and the period from the date of the setting up of the business or profession to the first-mentioned date does not exceed twelve months, then, at the option of the assessee, such period, or

(ii) if any period has been determined under sub-clause (e), then the period beginning with the date of the setting up of the business or profession and ending with the last day of that period, as the case may be; or

(e) in the case of any person or class of persons or any business or profession or class of business or profession such period as may be determined by the Board or by such authority as the Board may authorize in this behalf;

(f) in respect of the assessee's share in the income of a firm of which the assessee is a partner and the firm has been assessed as such, the period determined as the income year for the assessment of income of the firm;

(g) where in respect of a particular source of income an assessee has once been assessed or where in respect of a business or

profession newly set up, an assessee has once exercised the option under sub-clause (b) or sub-clause (c) (ii) or sub-clause (d) (i) then, he shall not, in respect of that source, or as the case may be, business or profession, be entitled to vary the meaning of the expression "income year" as then applicable to him, except with the consent of the Deputy Commissioner of Taxes upon such conditions as the Deputy Commissioner of Taxes may think fit to impose.

Assessment year and Income year.–The tax is levied for each financial year commencing on the first of July at the rate or rates prescribed in the Finance Act for the year and is actually charged on the total income of the income year [See sec. 16(I)]. The year for which the tax is paid is called the assessment year [See sec. 2(9)] or the income-tax year.

Income year–Sec. 2(35): The "income year" on the income of which the tax is levied is also called the "accounting year". The meaning of the expression "income year" was considered by the Supreme Court of India in *C.I.T.* v. *Srinivasan & Gopalan (1953 23 I.T.R. 87, 99)* where it was observed, "The expression "income year" substantially means an accounting year comprised of a full period of twelve months and usually corresponding to a financial year preceding the financial year of assessment. It also means an accounting year comprised of a full period of twelve months adopted by the assessee for maintaining his accounts but different from the financial year and preceding a financial year." For purposes of the charging sections of the Ordinance unless otherwise provided for it is co-related to a year of assessment immediately following it, but it is not necessarily wedded to an assessment year in all cases and it cannot be said that the expression 'income year' has no meaning unless it is used in relation to a financial year.

Sub Cls.(a) and (b).–"Income year" must end with or within the preceding financial year.– The "income year", as defined by this sub-section, is generally the financial year next preceding the assessment year. But an assessee may have made up his accounts on the basis of the Bengali, English or other calendar year, or he may have made up his accounts on the basis of a twelve-month period starting from any odd day of the year. In that event the option is given to the assessee to have as his "income year" either the next preceding financial year or the period ending within such year for which he has made up his accounts. But the option must be exercised clearly by making a statement or by other conduct which expresses or implies the exercise of the option: mere production of accounts for a period other than the financial year would not be tantamount to exercise of the option *(Bisheshwar Singh* v. *C.I.T. 1955 27 I.T.R. 376).*

Sub Cl. (e). Power to determine the Income year.–The assessee may keep and make up his accounts on the basis of a "commercial year" which may terminate a few days after the end of the financial year preceding the assessment year. In such a case, having regard to the rule that the assessee's income year must end with or within the financial year preceding the assessment year, the assessment would lag behind by

a year. Thus if the assessee's accounting year started on the 3rd July 1996 and ended on the 2nd July 1997, the income of the accounting year 1996-97 could not be charged in the assessment year 1997-98 (since the accounting year terminated two days after the end of the preceding financial year), but it would have to be charged in the next assessment year, 1998-99. To obviate such difficulties, power is given under this clause to the Board of Revenue or to any authority authorized by the Board in this behalf to determine *any period* as the "income year" in the case of any person or business or class of persons or business. In the exercise of this power, the Board, or a Commissioner of Taxes authorised by the Board in this behalf, may determine as the income year a period exceeding twelve months or even a period which does not end within the previous financial year but extends into the assessment year.

Newly Set-up business–Cls. (c) and (d).– Where a business or profession has been newly set-up in the financial year preceding the assessment year the income year would be–

(i) the period from the date of setting up of the business or profession to the 30th June next following, that is, upto the end of the said financial year; or

(ii) if the accounts of the assessee are made upto a date within the said financial year, that is from the date of setting up of the business to some date other than 30th June at the option of the assessee, the period from the date of the setting up of the business or profession to such other date. To illustrate, if an assessee starts a business on 1st January, 1997, he can close his books of accounts on 30th June, 1997, or on any other date at his option, but not a date covering more than twelve months. In this case he can close his accounts on 31st December, 1997. In the former case only a few months will be the income year for the assessment year 1997-98 and in the latter case the English calendar year of 1997 will be the income year for 1998-99 assessment year since the accounts are closed on a date beyond 30th June, 1997 there will be no income-year for 1997-98 assessment year.

Cls. (d)(i): Where a business or profession has been newly set-up in the twelve months immediately preceding the said financial year and the accounts are made up to a date within the said financial year and the period does not exceed twelve months from the date of setting-up of the business or profession, then at the option of the assessee the period will be the income year. An assessment of income on the basis of a period more than 12 months cannot be done under law-*Mrs. Rawshan Ara Begam & other* v. *C.I.T. [1987] BTD IX 261*. To illustrate, if the business or profession is newly set-up within the period of twelve months of the financial year 1997-98, say, from 1st January, 1997 and the accounts are made upto 31st December, 1997, the calendar year of 1997 shall be the income year for the assessment year 1998-99. In any case the period of the accounting year shall not exceed twelve months *(Ibid)*.

Sub–cl. (ii).– In a case of newly set-up business, the period will be from the date of setting-up of the business or profession to the last day of the period as determined by the Department under cl. (c).

Cl. (e) –The Board or any other authority authorised by the Board may determine any period as the income year in case of any person or class of persons or any business or profession or class of business or profession.

Cl. (f). Income year of a partner.–This clause lays down that in respect of a partner's share of the profits of the firm, the income year must necessarily be taken to be the income year as determined for the assessment of the firm in a case where the firm has been assessed as such–*C.I.T.* v. *Sheik Rowther [1962] 46 I.T.R. 259.* In a case where the firm has not been assessed as such, *i.e.* where an assessment is made directly on a partner in respect of his share of the firm's profits without any assessment being at all made on the firm, the income year of the partner would be governed by the provisions of cls.(a), (b), (c) and (d). Even in the former case, the assessee partner, in respect of his *personal* income, may, of course, have a different income year from that of the firm, since this clause has no application to such income.

Different Income years.–An assessee is entitled to have different years in respect of separate sources of his income. For instance, an assessee may have as his "income year" the financial year for one business and the Bengali year for another business–*C.I.T.* v. *Savumiamurthy 1946 I.T.R. 185.* "Source" means not a legal concept but something which a practical man would regard as a real source of income–*Rani Amrit Kunwar* v. *C.I.T. 1946 I.T.R. 561, 582.*

Each branch of a business is a separate source–*C.I.T.* v. *Lady Kanchanbai [1962] 44 I.T.R. 242.* An assessee having a head office and branch offices may have two "income year", one for the head office and one for the branches, but in his assessment he must add the results of the two each year and make his return on this basis. He cannot accumulate the results of two years of the branches and account for them in one year's results of the main office. The principle is that where an assessee has different previous years in respect of separate sources of income, the income of the varying income years from the different sources should be lumped together to arrive at the total income. The provisions of this section make it clear that except in cases where income year is determined by the Board or other authority under cl.(e), the varying income years must all necessarily end with or within the financial year next preceding the assessment year.

Change of Income year.–Where in respect of a particular source of income or in respect of a business or profession newly set up, (i) once an assessee has been *assessed–C.I.T.* v. *Lady Kanchanbai [1962] 44 I.T.R. 242* or (ii) he has once exercised the option under cl. (c)(ii) and (d) (i) or other appropriate clause although no assessment may have yet been made or could have been made as a result of the exercise of the option–*General Commercial Corpn. Ltd., In re, [1954] 26 I.T.R. 316, 232*, the assessee cannot in respect of that source, business or profession change his income year except with the consent of the Deputy Commissioner of Taxes and upon such conditions as the Deputy Commissioner of Taxes may impose–*Ormerods (India)*

Pr. Ltd. v. *C.I.T. [1963] 49 I.T.R. 485.* In a case assessee's assessment was made on Bengali year as previous year, subsequent assessment was made under sec. 34 taking financial year as previous year–*I.T.A. No. 152 of 1981-82 [1981] BTD XIII (Trib.).*

Sec. 2(36) –"Inspecting Joint Commissioner" 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.

Sec. 2(37) –"Inspector" means a person appointed to be an Inspector of Taxes under section 3.

Sec. 2(38) –"Interest" means interest payable in any manner in respect of any money borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the money borrowed or debt incurred or in respect of any credit facility which has not been utilised.

Sec. 2(39) –"legal representative" has the same meaning as assigned to it in section 2(11) of the Code of Civil Procedure, 1908 (Act V of 1908);

Legal representative–Sec. 2(39): There was no definition of 'legal representative' in the 1922 Act. Under this Ordinance "legal representative" has the meaning assigned to it in the Code of Civil Procedure. Sec. 2(11) of the code of Civil procedure runs as follows:–

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who inter-meddles with the estate of the deceased and where a party sues or is sued in a representative character the person whom the estate devolves on the death of the party so suing or sued". 'Legal representative' means all the legal representatives

Liability of legal representative of deceased person.–(See under "Assessment in case of income of a deceased person"–Sec. 92 *post*).

Sec. 2(40) –"market value", in respect of agricultural produce, means–

(a) Where such produce is ordinarily sold in the market in its raw state or after application to it of any process employed by a cultivator to render it fit to be taken to the market, the value calculated according to the average price at which it has been sold during the year previous to that in which the income derived from such produce first becomes assessable; and

(b) Where such produce is not ordinarily sold in the market in its raw state, the aggregate of–

(i) the expenses of cultivation;

(ii) the land development tax or rent paid for the lands in which it was grown; and

(iii) such amount as the Deputy Commissioner of Taxes finds, having regard to the circumstances of each case, to represent a reasonable rate of profit on the sale of the produce in question as agricultural produce;

Sec. 2(41) –"money borrowed" includes, in the case of a banking company, money received by way of deposit.

Sec. 2(42) –"non-resident" means a person who is not a resident.

Sec. 2(45) –"perquisite" includes–

(a) the value of rent-free accommodation;

(b) the value of any concession in the matter of rent respecting any accommodation;

(c) any sum payable by the employer, whether directly or indirectly, to effect an insurance on the life of, or to effect a contract for an annuity for the benefit of, the assessee or his spouse or any of his dependent child;

(d) the value of any benefit provided free of cost or at a concessionary rate; and

(e) any sum paid by an employer in respect of any obligation of an employee.

Sec. 2(46)–"person" includes an individual, a firm, an association of persons, a Hindu undivided family, a local authority, a company and every other artificial juridical person:

Person–sec. 2(46): The definition of 'person' as given in Sec. 2(46) did not exhaust the various assessable units. The charging sections as Sections 16 and 17 of the Ordinance levy tax on every person, and "person" has been defined by this clause as including (i) an individual, (ii) a firm, (iii) an association of persons; (iv) a Hindu Undivided Family; (v) a local authority; (vi) a company and (vii) an artificial juridical person.

This definition is inclusive and not exhaustive. The word "person" has been held to include a minor or a person of unsound mind (i). But the estate of the deceased person is not a person or an assessable unit, the assessment must be made on the legal representative.

Individual.–It is a unit, human being and an isolated person. In one view the word 'individual' did not mean only a human being but was wide enough to include a group of persons forming a unit and included a Corporation created by a State, e.g., University, Bar Council etc. The other view, accepted by S.C. of Pakistan, was that an individual could only mean a natural person, a human being. Under this Ordinance it seems that since artificial juridical persons are placed in separate category by themselves, the word "individual" would mean only a natural person, i.e., a human being, and statutory corporation should be assessed as juridical persons.

"Individual" would include a minor or a person of unsound mind. Assessment may be made u/s. 95 on the guardian or trustee of the minor or lunatic.

Firm.–A firm may be charged as a distinct assessable entity or the partners of the firm may be assessed as individuals. When the firm is assessed as an entity the levy of tax is on the firm like an individual–see Firm, Partner and Partnership in Sub-Secs. (32), (43) & (45) of Sec. 2.

Association of persons.–The words "association of persons" are not used in any technical sense but must be construed in their plain ordinary meaning. When there is a combination of persons formed for the promotion of a joint enterprise, in other words, when co-adventurers are banded together in common action, they are assessable as an association of persons, when they do not in law constitute a partnership. Where the income does not result from any joint venture or joint act, assessment in the status of an association of persons would not be justified. The S.C. of India held in the case of *(C.I.T.* v. *Indira Balkrshna and Mohammed Nurullah* v. *C.I.T.)* that in order to constitute an association, persons must join in a common purpose or common action and the object of the association must be to produce income – it is not enough that the persons receive the income jointly.

Co-heirs joining together in a common purpose of action and co-trustees or co-executors would be chargeable as an association of persons. In the case of co-owners of property, if their shares are not definite and ascertainable they may be assessable as an association of persons.

Illegal association.–In order to constitute an association it is not necessary that there should be any mutual rights or obligation among the members enforceable in a court of laws. A partnership which is illegal or otherwise void may be assessed as an association of persons.

Assessment on association of persons.–In the case of association of persons, the tax will be assessed on the association itself as a unit of assessment. If it is assessed on the members of the association as individuals in respect of their respective share income from the association, the Department cannot assess the same income in the hands of the association–*(Prosad Agarwalla* v. *I.T.C. [1959])*. Section 3 (New Sec. 16) which is the main charging section, only talks of charging the income of certain persons and does not talk of income-tax being charged on persons. This implies that the charge is to be levied on an income only once. This section is clear enough to indicate that the same income cannot be charged repeatedly in the hands of different persons or in the hands of the same persons.

The share of profit received by the members from the Association is exempt u/s. 44(2)(a) if the association is taxed for its income but it will be included into their other income, if any, for rate purpose only. If the income of the association is below the limit and no tax is imposed on it, the members are liable to pay tax on their proportionate shares along with the amount of tax payable in respect of their income.

Hindu undivided family.–The relation of partnership arises from contract, while the relation of a Hindu joint family arises from status. Under section 5 of Partnership Act members of a Hindu undivided family carrying on a family business as such are not partners in such business. Thus business profits made by a trading joint family are chargeable as the income of the undivided family.

A Hindu undivided family consists of all major and minor members (of either sex) of the family. It may also be composed of smaller or branch joint families which may hold properties in their own right and may themselves be assessable units as distinct from the apex joint family. It is assessed to income-tax as a distinct entity like an individual.

A member of a Hindu undivided family is not required to pay any tax in respect of his share of income of the joint family property. Such an income is not even included in his total income for rate purpose whether such a share has been taxed in the hands of the Hindu undivided family or not. But income from separate and self-acquired property of a Hindu which has not been thrown into the common stock is assessable as the income of the individual and not as the income of the Hindu undivided family, even though the Hindu has sons from whom he is not divided for the sons have no interest in such income. A father has a right to impress his self–acquired property with the character of joint family property even if the joint family does not already posses property of its own–*(Kalyanji Vithaldas* v. *C.I.T. [1937] and Damodar Krishnanji Nirgude* v. *C.I.T. [1962])*. Such conversion of separate property into joint family property can be effected merely by *clear* expression of intention e.g., by conduct and does not require any formalities, like a registered document to be complied with.

The salary received by the treasurer of a bank, whose office requires personal responsibility would be his individual income although joint family properties may have been furnished as security to the bank–*Piyara Lal Adishawar Lal* v. *C.I.T. [1960])*. The fees or other remuneration received by the karta as director of a company would not be joint family income merely because the qualification shares had been purchased out of joint family fund–*Pujara Lal Adilshowar Lal* v. *C.I.T.* Where a joint family consisting of father and sons transferred certain shares held by it in a company to the father to enable him to hold the necessary qualification shares and become a director of the company, the dividends were held to be the income of the family, while the director's fees earned by the father were held to be his separate individual income –*(Sirdar Indra Singh* v. *C.I.T. 1943 I.T.R. 16, 36)*. However, where a company floated and financed by a joint family, acquired the family business and allotted shares to the family in lieu thereof, and its articles of association provided for the appointment of the karta as the managing director, the Indian Supreme Court held on the facts that there was a composite scheme and even the remuneration received by

the karta as the managing director was the income of the family –*(C.I.T. v. Kalu Babu Lal Chand [1959] 37 I.T.R. 123 (S.C. of India))*.

A member of a trading joint family may carry on business on his personal account, in which event the profits would be his individual income and not the income of the joint family –*(Sir Padampat Singhania v. [1953] 24 I.T.R. 184)*, although the member might have borrowed the requisite capital out of the joint family funds or the member might, *after earning the income as his own*, throw it into the family hotch-pot –*(Amar Chand bishan Dass v. C.I.T. [1956] 30 I.T.R. 238)*. Such members carrying on business on their personal account in partnership may be assessed as a firm –*(South Indian Lucifer Match Works v. C.I.T. [1961] 43 I.T.R. 319)*. But the mere execution of a partnership deed by the members of the family will not preclude an assessment on the undivided family as such in respect of the profits of the business. If a karta enters into a partnership, on behalf of and as representing the joint family, with a stranger or with another member of the family, the karta's share of partnership profits may be assessed in the hands of the joint family as its income –*(Kaniram Hazarimull v. C.I.T. [1955] 27 I.T.R. 294)*. The joint family which has actually received the income can be so assessed irrespective of the question whether the coparcener who entered into the partnership on behalf of the joint family had a right to represent the joint family and to enter into the partnership on its behalf. If a coparcener utilises joint family funds for contributing his share of capital in the firm, he must be regarded as having entered into partnership on behalf of and as representing the family –*(C.I.T. v. Kalu Babu Lal Chand [1959] 37 I.T.R. 123, 128 (S.C. of India))*, and not only his share in the firm's profits but also the salary received by him for services rendered as a partner would be the income of the family –*(Bhagwant Singh v. C.I.T. [1960] 38 I.T.R. 436)*.

There is no presumption that a business carried on by a member of a joint family, either by himself or in partnership with strangers, is joint family business–*(Premsukhdas Jagnani v. C.I.T. [1962] 46 I.T.R. 376)*; or that a business started even by the karta is joint family business, or that the capital contributed by the individual members of a joint family came out of the joint family funds –*(Mangilal Rungta v. C.I.T. [1955] 28 I.T.R. 167)*. But if there is an adequate nucleus of joint family property, the presumption arises that new acquisitions belong to the joint family. Once there is a separation of one of the members of a Hindu undivided family, the presumption of Hindu law that the family is joint ceases to apply–*(Sahu Ram Kishun v. Stat of Uttar Pradesh [1957] 31 I.T.R. 895)*. The mere fact that the profits of a business carried on by a member of a joint family are entered in the joint family accounts would not be sufficient to justify the finding that the profits constitute the income of the joint family.

A bona fide gift of joint family property by the karta is only voidable and not void *abinitio*, at any rate when the gift is to a member of the family –*(C.I.T. v. Braham Dutt Bhargava [1962] 46 I.T.R. 387)*. Such a gift can be attacked only by the members of the family and not by strangers; and if it is not avoided by the members, the income from the property gifted cannot be assessed as the income of the joint family. The Supreme Court of India laid down in –*(Arunachala Mudaliar* v.

Muruganatha Mudaliar [1954 S.C.R. 243]) that where a father gifts property to his son, the language of the document and the surrounding circumstances must be looked at to determine whether he intended the son to take it exclusively for himself or whether he intended the son to hold it as ancestral property for the benefit of the son's branch of the family: there is *no presumption* that the father intended either the one or the other. Income from a portion of the joint family property which has been validly gifted by the *karta* to his wife would not be taxable in the hands of the joint family, even if the motive for making the gift was to reduce the tax liability of the family –*(Raghbir Singh Sandhauralia* v. *C.I.T. [1958] 34 I.T.R. 719).*

Income of an impartible estate.–An impartible estate is owned by the joint family, but the income therefrom belongs solely and absolutely to the holder of the estate for the time being –*(C.I.T.* v. *Maharani Gyan Manjuri Kuari 1945 I.T.R. 55).* Therefore the holder of an impartible estate is liable to be taxed on the income of the estate as an individual and not as the representative of a Hindu Undivided family, not withstanding that he has sons from whom he is not divided. This is now established by the decision of the Privy Council in *C.I.T.* v. *Dewan Krishman Kishore [(1941) I.T.R. 695, 701, reversing]* setting at rest the conflict of judicial opinion on the point. Hence any income accruing during the lifetime of the holder and realised after his death would be taxable in the hands of his personal heirs and representatives and not in the hands of the Hindu undivided family *(Kali Prasad Singh, In re, (1956) 29 I.T.R. 42).*

Assessability of maintenance allowance.–Impartible estate - on the death of the holder of an impartible estate a protracted civil litigation ensued between the assessee and the widows of the deceased holder in which the widows claimed that the assessee was not a member of the joint family with their deceased husband and as there was no male member in the family, the entire property of the deceased belonged to them. It was decided that the assessee was a member of the family of the deceased and he was therefore entitled to the properties and that the widows, being members of an undivided family, were entitled to maintenance which should constitute a charge upon the estate. The income-tax authorities held that a sum of Rs. 19587 which the assessee paid as maintenance allowance to the widows in the year of assessment was assessable as income in his hands.

Local Authority. –

It has been defined under Sec. 3(28) of General Clauses Act, "as a municipality, district board, body of port Commissioners or other authority legally entitled to or entrusted by the Government with the control or management of a municipality or local fund. A local authority is taxable only in respect if that part of its income which arises from any business carried on by it so far as that income does not arise from jurisdictional area.

A local authority is a taxable unit. Para 3 of Sixth Schedule Para A exempts from tax the entire income of a local authority, from whatever source derived, except in one case only, the single case in which the income of a local authority is liable to tax is where the income is derived from a trade or business carried on by the authority

and such income does not arise from the supply of a commodity or Service within its own jurisdictional area. Thus the profits made by a Municipal Corporation from the supply of water or electric energy outside its jurisdictional area are chargeable under the Ordinance. A local authority, carrying on a trade or business undertaking, stands in the same position, apart from express statutory exemption for income-tax purpose as a company or an individual.

Company. –See Sub-Sec. 20 of Sec. 2 *ante*.

Artificial juridical person.–Under the Income-tax Act. 1922 there was no such separate category of assessee with the result that statutory corporations were assessable as 'individuals'. Under the present Ordinance statutory corporations would be assessable in the status of artificial juridical person and not as an individual.

Sec. 2(47) –"prescribed" means prescribed by rules made under this Ordinance.

Sec. 2 (48) –"principal officer", used with reference to a local authority, a company, any other public body or any association of persons, includes–

(a) managing director, manager, secretary treasurer, agent or accountant whatever designation known), or any officer responsible for management of the affairs, or of the accounts, of the authority, company, body or association; and

(b) any person connected with the management or the administration of the local authority, company, body or association upon whom the Deputy Commissioner of Taxes has served a notice of his intention to treat him as principal officer thereof.

Principal Officer-2 (48).–This sub-section requires that a person to be connected with the *management or administration* of the assessable entity in order that he may be treated as its principal officer.

Principal officer, in reference to a company, a local authority or other public body or a body or association of persons, means its secretary, treasurer, or manager. Further, the Deputy Commissioner of Taxes may serve upon any person connected with the management or administration of such assessable entity a notice of his intention of treating him as the principal officer, and such person would thereupon become the principal officer for the purpose of this Ordinance. In the case of a company which is being wound up, the Deputy Commissioner of Taxes would be entitled to serve upon the liquidator a notice of his intention of treating him as the principal officer and to call upon him to make a return in accordance with sec. 77 of this Ordinance.

Sec. 2(49) –"profession" includes a vocation.

Sec. 2(50) –"profits in lieu of salary" includes–

(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; and

(b) any payment due to, or received by, an assessee from a provident or other fund to the extent to which it does not consist of contributions by the assessee and the interest on such contributions.

Sec. 2(51)–"public servant" has the same meaning as in section 21 of the Penal Code (Act XLV of 1860).

Sec. 2(52)–"recognised provident fund" means a provident fund which has been, and continues to be, recognised by the Commissioner in accordance with the provisions of Part B of the First Schedule.

Sec. 2(54)–"relative", in relation to an individual, means the husband, wife, brother, sister or any lineal ascendant or descendant of that individual.

Sec. 2 (55) –"resident", in respect of any income year, means–

(a) an individual who has been in Bangladesh–

(i) for a period of, or for periods amounting in all to, one hundred and eighty-two days or more in that year; or

(ii) for a period of, or periods amounting in all to, ninety days or more in that year having previously been in Bangladesh for a period of or periods amounting in all to, three hundred and sixty-five days or more during four years preceding that year;

(b) a Hindu undivided family, firm or other association of persons, the control and management of whose affairs is situated wholly or partly in Bangladesh in that year, and

(c) a Bangladeshi company or any other company the control and management of whose affairs is situated wholly in Bangladesh in that year;

Resident and Non-Resident-Sec. 2 (55) & 2 (42):

Tests of residence for individuals-Sec. 2(55)(a)(i) & (ii).–Under this section an individual is resident in Bangladesh if he satisfies any of the *two alternative conditions.* The question of residence refers to residence during the accounting year and this question must be determined with reference to each year. The finding of residence during one year would not warrant the assumption that the assessee was resident in the next–*Wallace Bros & Co. Ltd.* v. *C.I.T. 1945 T.R. 39, 44.*

Tests of residence.–The tests of residence provided in this clause for individuals are alternative and not cumulative. Each of the two tests requires the personal presence of the assessee in Bangladesh, in the course of the accounting year. If the assessee is continuously out of Bangladesh during the *whole* of a year, he must be treated as non-resident in that year.

If the assessee's stay in Bangladesh is of the requisite duration and quality, he would be deemed to be a resident although he may put up at hotels, and not always at the same hotel, and never for long together. As Rowlatt, J., observed in *Levence* v. *I.R. 13 T.C. 486, 492,* a complete wanderer, an absolute tramp, or a rich person of the same type wandering from hotel to hotel and never staying two nights in the same place, may still be a resident here although he cannot be called a resident in any particular spot. Stay on a yacht moored in the territorial waters of Bangladesh would be stay in Bangladesh for the purposes of this section–*(Brown* v. *Burt 5 T.C. 667).* Again, a man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, nonetheless, if the conditions of the section are satisfied he must be held to be a resident here. In law a man may be resident in two different countries in the same year, although he can have only one domicile–*(Levene* v. *I.R. 13 T.C. 486, 505 (H.L.)).*

Stay for an aggregate period of 182 days.–If an individual stays here for at least 182 days in the aggregate in the course of the relevant accounting year, he is to be regarded as resident irrespective of any other consideration–*(On the question whether a fraction of a day should be counted as a whole day, see Wilkie* v. *I.R. 32 T.C. 495).*

Stay in four preceding years-Sub-cl. (a)(ii).–This sub-clause imposes two conditions–(i) an aggregate stay of at least 365 days in Bangladesh in the course of the four years preceding the accounting year, and (ii) presence in Bangladesh in the accounting year for a period or periods amounting in the aggregate to at least 90 days. Under the 1922 Act the second condition was different: the assessee had to be in Bangladesh "for any time" during the accounting year "otherwise than on an occasional or casual visit". The test in the present sub-clause is more precise and definite. The expression "four years preceding" should be taken as referring to the period of four years, of twelve calendar months each, immediately preceding the commencement of the relevant accounting year, and not to the period of four calendar

years ending on the 31st December next preceding the commencement of such year–*(C.I.T.* v. *Savumiamurthy 1946 I.T.R. 185)*.

Tests of residence for Hindu undivided family, firm or other association of persons cl.(b).–A Hindu undivided family, firm or other association of persons is resident in Bangladesh if the control and management of its affairs is situated wholly or in part in Bangladesh. It is only when the control and management is situated *wholly outside* this country that these units of assessment are regarded as non-resident. Since partial control is sufficient for the purpose of residence, a firm may have in law two places of residence –*(Erin Estate* v. *C.I.T. [1958] 34 I.T.R. 1 (S.C. of India))*. The residence of partners –*(B.R. Naik* v. *C.I.T. 1945 I.T.R. 124, 130)* or of individual members of a Hindu undivided family –*(C.I.T.* v. *S.P.K.A.R.M. Annamalai Chettiar* v. *I.T.O. [1958] 34 I.T.R. 88)* is immaterial for the purpose of determining the residence of the firm or the family, except in so far as such residence affects the control and management of the affairs of the firm or the family. The residence of partners in Bangladesh normally raises the presumption that the firm is resident in Bangladesh, but the presumption may be rebutted by showing that the control and management of the affairs of the firm is situated wholly outside Bangladesh –*(Erin Estate* v. *C.I.T. [1958] 34 I.T.R. 1 (S.C. of India))*.

"Control and management."–The control and management of a business is situate at the place where, as was said in –*(San Paula [Brazilian] Rly. Co.* v. *Carter C.I.T.* v. *Nadlal Gandalat (1960) 40 I.T.R. 1, 7 (S.C. of India))*, "the head and brain of the trading adventure" is situate; and the place of control may be different from the place where the actual trading is to be found. Control of a business does not necessarily mean the carrying on of the business, and therefore the place where trading activities or physical operations are carried on is not necessarily the place of control and management –*(Erin Estate* v. *C.I.T. (1958) 34 I.T.R. 1 (S.C. of India))*. The leading case on the construction of this clause is *Subbayya Chettiar* – (1951) 19 I.T.R. 39 which was concerned with the residence of a Hindu undivided family. The following propositions are established by the judgment of the Supreme Court of India in this case:

(i) Normally a Hindu undivided family is presumed to be resident in Bangladesh unless the assessee proves that the control and management of its affairs is situated wholly outside Bangladesh. "Control and management" signifies the controlling and directive power, the head and brain; and "situated" implies the functioning of such power at a particular place *with some degree of permanence*.

(ii) The word "affairs" in this clause means affairs which are relevant for the purpose of this and which have some relation to the income sought to be assessed. Mere activity by the family or its karta in a place does not create residence. The place of control, and therefore of residence, may be different from the place where the family does a great deal of business.

(iii) The seat of the management and control of the affairs of the family may be divided, and if so, the family may have more than one residence.

The absence of the karta from Bangladesh throughout the year does not by itself lead to the conclusion that the family is non-resident in that year, since the business of the family, though it is normally controlled by the karta, may at a particular point of time be controlled by some one else –*(Annamalai Chettiar* v. *I.T.O. (1958) 34 I.T.R. 88).*

The foregoing principles apply equally to cases of firms and other associations of persons –*(Erin Estate* v. *C.I.T. (1958) 34 I.T.R. 1 (S.C. of India)).*

De facto control.–It was laid down by the Supreme Court (India) in *Erin Estate* v. *C.I.T. and C.I.T.* v. *Nandlal Gandalal,* approving of the decision of the Bombay High Court in *B.R. Naik* v. *C.I.T. 1945 I.T.R. 124, 127, 128-9,* that control and management means *de facto* control and management and not merely the right or power to control and manage. The same view had been taken by the Madras High Court –*(Estate of Mohamed Rowther* v. *C.I.T. (1963) 49 I.T.R.).* In Naik's case a partner who under the terms of the partnership deed had full powers of control over the firm's business, resided in India, while the firm's business was carried on in South Africa. In the absence of any evidence that he in fact controlled and managed the firm's business from here, his residence was held to be insufficient to establish the residence of the firm in India. But acts of *actual* management and control of the firm's business by a partner residing in India would make the firm resident here –*(Erin Estate* v. *C.I.T. (1958) 34 I.T.R. 1 (S.C. of India)).* Similarly, where the business of a Hindu undivided family is carried on abroad, the mere presence of the karta for some time in Bangladesh would not necessarily imply control in Bangladesh of the foreign business during that period –*(Subbayya Chettiar* v. *C.I.T. (1951) 19. I.T.R. 168, 172 (S.C. of India)).*

The mere receipt in Bangladesh, by the karta or a partner, of copies of the business books would not by itself amount to exercise of control. Nor is the business necessarily controlled and managed at the place where the accounts are submitted and the division of profits is decided on –*(Egyptian Hotels Ltd.* v. *Mitchell 6 T.C. 542, 545 (H.L.)).*

Tests of residence for companies-Sec. 2(55)(c).–A company whether a Bangladeshi company or any other company is resident here if the control and management of its affairs is situated wholly in Bangladesh in the accounting year. Thus, every company, as that expression is defined in s. 2(20), is deemed to be resident in Bangladesh if its management and control is situated wholly in Bangladesh. A company registered abroad is a foreign company, but a foreigner can reside here and so can a foreign company –*(De Beers Consolidated Mines Ltd.* v. *Howe 5 T.C. 198, 214 (H.L.); New Zealand Shipping Co. Ltd.* v. *Thew 8 T.C. 208).*

In the classic words of Lord Loreburn in *De Beers Consolidated Mines Ltd.* v. *Howe 5 T.C. 198 (H.L.),* a company cannot eat or sleep but it can keep house and

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do business, and for purposes of income-tax, a company resides where it really keeps house and does business, i.e. where the central management and control actually abides –*(Bullock* v. *Unit construction Co. Ltd. 38 T.C. 712 (H.L.), (1961) 42 I.T.R. 340)*.

"Control and management" of a company's affairs.–While the locale of control and management is the sole test of residence for a Hindu undivided family, firm and other association of persons, it is also a test for companies.

As a rule, the direction, management and control, "the head and seat and directing power," of a company's affairs is situate at the place where the directors' meetings are held, and consequently a company would be resident in this country if the meetings of directors who manage and control the business are held here–*(B.R. Naik* v. *C.I.T. 1946 I.T.R. 334, 339)*. The control and management would still be wholly situate in this country, although one or more of the directors may reside in the country where the company's physical undertaking and subjects of the trade are situate, provided their powers are delegated to them by, and their actions are subject to the control of, the Board of Directors in this country–*(Calcutta Jute Mills* v. *Nicholson 1 T.C. 83)*. On the other hand, if the actions of the directors residing abroad are not in fact subject to the control of the directors in this country, the control and management would not be situate wholly in Bangladesh. It is not what the directors have power to do, but what they actually do, that is of importance in determining the question of the place where the control is exercised–*(Egyptian Hotels Ltd.* v. *Mitchell 6 T.C. 542, 550 (H.L.))*. In the clause control means *de facto* control and not merely *de jure* control –*(Narottam & Perira Ltd.* v. *C.I.T. (1953) 23 I.T.R. 454)*. The control and management, the head and brain, does not reside where there is some ultimate power of control such as the power to alter the articles of association by a special resolution or the power to interfere with fundamental finance, nor where a clever manager looks after the business –*(Narottam & Pereira Ltd.* v. *C.I.T. (1953) 23 I.T.R. 454)*, nor where dividends are declared and paid –*(Egyptian Hotels Ltd.* v. *Mitchell 6 T.C. 542, 552) (H.L.))*.

A company may be resident here even though its entire trading operations are carried on abroad. If the management and control is situated here, the company is resident here, and it does not in the least matter where the actual selling and buying of the goods takes place –*(Egyptian Hotels Ltd.* v. *Mitchell 6 T.C. 542, on appeal, 548 (H.L.))*.

Residential Status may change.–A company may change the place of its control and management. Hence a company which is resident in Bangladesh in one year may, like any other assessee, not be resident in the next –*(Wallace Bros. & Co. Ltd.* v. *C.I.T. 1945 I.T.R. 39, 44-5 (F.C.))*.

Sec. 2(56). –"royalty" means consideration (including any lump sum consideration but excluding any consideration which is classifiable as income of the recipient under the head "Capital gains") for–

(a) transfer of all or any rights, including the granting of a licence in respect of a patent, invention, model, design, secret process for formula, or trade mark or similar property;

(b) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret process or formula, trade mark or similar property;

(c) the use of any patent, invention, model, design, secret process or formula, or trade mark or similar property;

(d) the imparting of any information concerning technical, industrial, commercial, or scientific knowledge, experience or skill;

(e) the transfer of all or any rights, including granting of a licence, in respect of any copyright, literary, artistic or scientific work, including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for sale, distribution or exhibition of cinematograph films; or

(f) the rendering of any services in connection with any of the aforesaid activities;

Sec. 2(57)–"rules" means rules made under this Ordinance.

Sec. 2(58). – "salary" includes–

(a) any wages;
(b) any annuity pension or gratuity;
(c) any fees, commissions, allowances, perquisites or profits in lieu of, or in addition to, salary or wages;
(d) any advance of salary;
(e) any leave encashment.

"Salaries".–Every kind of remuneration of every kind of servant, public or private and however highly and lowly placed he may be, is covered by the term, salary. According to Oxford 20th century Dictionary the word salary means 'fixed periodical' payment made to persons doing other than manual or mechanical work. But as 'salary includes wages, remuneration paid to laboures will be covered by the term, 'salary'. An employee is the servant of his employer. He is paid salary according to section 2(58), Salary includes wages. The labourers are paid wages. Therefore according to the definition of 'salary' wages are salaries and labourers are therefore, employees.

Relationship of employer and employee.–No payment can fall to be taxed as salary unless the relationship of employer and employee exists between the payer and the payee– *David Mitchel* v. *C.I.T. (1956) 30 I.T.R. 701)*. Every servant is an employee, but an agent may or may not be employee. It was held by the Lahore High Court in the case of *Bhagerati Sankar (1944 ITR 193)* that a person appointed by the court as the official liquidator of a company in liquidation is an employee and the remuneration received by him falls to be taxed as salary. But the Bombay High Court in the case of –*C.I.T.* v. *Lady Narajbai Tata (1947) I.T.R. 8, 13, 15* disapproved the conclusion on the ground that the official liquidator is an office-holder but not an employee and therefore, the remuneration paid to him would not be taxed as salary income. It seems that the Bombay High Court is correct in its view.

Income from office not amounting to employment–See post under the head *'Salaries'–Sec. 21.*

Annuity, pension and Gratuity.–Annuities paid by employees are taxable as salary. Annuities paid by a person other than the employer, e.g. annuities paid under an insurance policy or other contract are taxable as "Income from other Sources" under section 33 (Discussed under the head "salaries" in Sec. 21-See.

Fees, Commission and Allowances, Perquisites or Profit in lieu of salary or in addition to salary or wages – (Discussed under the head, "salary" in sec. 21).

Sec. 2(59).–"scheduled bank" has the same meaning as in the Bangladesh Bank Order, 1972 (P.O. No. 127 of 1972).

Sec. 2(60).–"Shareholder" includes a preference shareholder.

Sec. 2(61).–"speculation-business" means business in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scripts, but does not include business in which–

(a) a contract in respect of raw materials or merchandise is entered into by a person in the course of his manufacturing or mercantile business to guard against loss through future price fluctuations for the purpose of fulfilling his other contracts for the actual delivery of the goods to be manufactured or the merchandise to be sold by him;

(b) a contract in respect of stocks and shares is entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; and

(c) a contract is entered into by a member of a forward market or a stock exchange in the course of any transaction in the

nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member.

Speculation Business.–Sec. 2(61).–See under the head, Business or Profession in Sec. 28 *post*.

Sec. 2(62).–"tax" means the income tax payable under this Ordinance and includes any penalty, interest, fee or other charges leviable or payable under this Ordinance.

Sec. 2(64).–"Tax Recovery Officer" means a person appointed to be a Tax Recovery Officer under section 3.

Sec. 2(65).–"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.

Total Income.–Sec. 2(65).– Total income as defined in sub-sec. (65) of sec. 2 has two ingredients: (i) the income must comprise the total amount of income, profit and gains referred to in sec. 17 and (ii) it must be computed in the manner laid down under the provisions of the Ordinance. The manner of computation laid down by the Ordinance forms an integral part of the definition of total income.

Section 17 deals with the total income in terms of the residence of the assessee (see post sec. 17). After determining the question of his residence, the items of income includible in his total income must be ascertained with reference to Sec. 17 and then the income must be computed in the manner laid down in the various provisions of the Ordinance–Sec. 19; Sec. 43, where these are included in an assessee's total income which may not be his income at all in fact or under the general law; Sec. 104, Sec. 105, Sec. 106 and Paragraph 4 of Part B of First Schedule.

See further under Sec. 19 "unexplained investments etc. discussed to be income", Sec. 43 "computation of total income", Sec. 104 "Avoidance of tax through transactions with non-resident; Sec. 105 "Avoidance of tax through transfer of assets", Sec. 106 "Avoidance of tax by transactions in securities" and Paragraph 4 of Part B of First Schedule: "Annual accretion deemed to be income received by the employee participating in a recognized Provident Fund".

Income exempt from tax.–Exemption granted under this Ordinance is of two kinds. Certain incomes are exempt from tax and are also excluded from the assessee's total income, e.g. the income exempted under Sec. 44(1) has been provided for in part A of Sixth Schedule and some items of exemption made by the Government in different Notifications issued under Section 44(4), where the Ordinance grants exemption from tax in respect of a certain sum, the sum does not form part of total income.

But there are certain incomes which are exempt from tax but they are included into total income. Such exemption has been expressly given in Sec. 44(2)(a). The items of income as exempted has been provided for in Paragraphs 15 and 16 of Part B of Sixth Schedule, e.g. the amount received by the member of the association of persons out of the income of such association on which tax has already been paid and share income of the assessee from a firm where the firm has paid tax on its income. The purpose of inclusion of such exempted income into total income of the member of A.O.P. or partner of firm is to enhance the average rate of tax on the chargeable income of such person.

Sec. 2(66). –"transfer", in relation to a capital asset, includes the sale, exchange or relinquishment of the asset, or the extinguishment of any right therein, but does not include–

(a) any transfer of the capital asset under a gift, bequest, will or an irrevocable trust;

(b) any distribution of the assets of a company to its shareholders on its liquidation; and

(c) any distribution of capital assets on the dissolution of a firm or other association of persons or on the partition of a Hindu undivided family.

Transfer in relation to capital assets.–Sec. 12B(1) of 1922 Act levied tax on capital gains arising from sale, exchange, relinquishment or transfer of capital. Sec. 31 of I.T. Ordinance levies tax on gains arising from the "transfer" of capital assets and this sub-section defines "transfer" as indicating sale, exchange or relinquishment of the asset or the extinguishment of any rights therein. The compulsory requisition of the assets under any law was excluded from the definition of "transfer" which was included in the definition of "transfer" under 1922 Act.

This sub-section defines the word 'transfer' only in relation to *capital asset* and has no bearing on the meaning of that word in any section when it is not used in relation to capital assets. The expression "capital asset" is used only in the provisions relating with the head "capital gains", and therefore this definition is relevant only for the purpose of that head. The implications of this definition are dealt with under Sec. 31 which deals with capital gains.

This sub-section enacts that any transfer of a capital asset under a gift, bequest or will or an irrevocable trust or any distribution of assets of a company to its shareholders on liquidation or any distribution of capital assets on the partition of Hindu undivided family shall not be covered by the word "transfer" and as such shall not be assessable as capital gains. The Madras and Bombay High Court have held in the case of *–C.I.T.* v. *James Anderson (1960)* that this sub-section applies to a *distribution of capital assets* in *specie* only; and therefore capital gains made by an administrator on sale of the testator's assets effected with a view to distributing the sale proceeds among the legatees as directed by the will or capital gains made by a

liquidator of a company on sale of the company's assets with the object of distributing the sale proceeds among the share-holders or capital gains made by the Receiver appointed by the court on sale of the assets of the dissolved firm would not be exempted from tax under section 31.–*(Sri Kannan Rice Mills Ltd.* v. *C.I.T. (1954))*.

Under cl. (b) of this sub-section a company cannot be regarded as having made any capital gains if it merely distributes its assets among its shareholders on liquidation. But in such a case the shareholder may be chargeable to tax in respect of the money received or the market value of other assets distributed in specie on liquidation, as reduced by the amount assessed as dividend.

See *post* under 'Capital Gains'–Sec. 31.

Sec. 2(68).–"written down value" means the written down value as defined in the Third Schedule.

Sec. 2(69).–"year" means a financial year.