However, in the case of entities covered by rule 28AB [given in para 426.2-1], the Assessing Officer may issue a certificate to the recipient authorizing payment of incomes without deduction of tax at source.

The recipient may furnish copies of such certificate to the person responsible for paying the income for the purpose of no deduction of tax at source.

426.2-1 ***ADDITIONAL CONDITIONS FOR CHARITABLE TRUST, SCIENTIFIC RESEARCH ASSOCIATION, ETC. [RULE 28AB]*** - With effect from April 1, 2004, if the recipient of income is one of the two entities given below, then a few additional conditions should be satisfied to make the above application in Form No. 13 :

a. it is in receipt of income (or deemed income) derived from property held under trust wholly for charitable or religious purposes and it claims exemption under section 11 or section 12; or

b. it is required to file a return in respect of a scientific research association, news agency, association or institution, fund or trust or university or other educational institution or any hospital or other medical institution or trade union referred to in section 139(4C).

Additional conditions - In any of the above cases, application in Form No. 13 can be made if the following conditions are satisfied—

a. the person concerned has furnished the returns of income for all assessment years for which such returns became due on or before the date on which the above application in Form No. 13 is made;

b. the trust, scientific research association, news agency, association or institution, fund or trust or university or other educational institution or any hospital or other medical institution or trade union referred to above is for the time being approved for the purpose of exemption from income-tax; and

c. the applicant gives a list of deductors from whom amounts are to be received without deduction of tax at source every six months alongwith the names, addresses and the amounts received.

426.2-2 ***HOW LOWER RATE IS DETERMINED*** - By virtue of rule 28AA, the lower rate is determined on the basis of the higher of the following rates:

Average rate of the current year - Current year's average rate is determined on the basis of the total income-tax payable on estimated income, as reduced by the sum of advance tax already paid and tax already deducted at source as a percentage of the amount in respect of which the certificate of lower tax deduction is required.

Average of the average rate of tax of preceding three years - Average of the average rate of tax assessed in the last three assessment years and total tax paid for each year.

426.2-3 ***OTHER POINTS*** - The following points should be noted—

■ Certificate under section 197 cannot be issued with retrospective effect, it can be effective only prospectively

■ The Board has directed all Assessing Officer to ensure that all certificates under section 197(1) are issued by them strictly as per the manner prescribed above. No certificate under section 197(1) shall be issued under circumstances, which are not covered by the above provisions, howsoever genuine and compelling such circumstances may be. Moreover, the Assessing Officer shall obtain prior administrative approval of the Range Jt. CIT/Addl. CIT before issuing a certificate under section 197(1). The Jt. CIT/Addl. CIT shall satisfy himself of the fact that the certificate is being issued strictly in accordance with by the above provisions, before according his approval for issuance of the certificate. A record of such certificate issued should be maintained in the office of the Assessing Officer—**Instruction No. 8/2006,** dated October 31, 2006.

426.2-P1 *The following information is given by X Ltd. on September 15, 2008 —*	Rs.
Interest on debentures (from April 1, 2008 to September 15, 2008)	*90,000*
Tax deduction at source	*18,540*

Interest liability of 2008-09 as borrowed money was invested in debentures 4,10,000

Advance tax paid up to September 15, 2008 2,000

On September 20, 2008, X Ltd. is likely to get Rs. 4,50,000 as interest on debentures.

Assessed income and tax liability of X Ltd. of preceding 3 years is as follows—

1. *Previous year*	*2005-06*	*2006-07*	*2007-08*
2. *Assessment year*	*2006-07*	*2007-08*	*2008-09*
	Rs.	Rs.	Rs.
3. *Interest on debentures*	*7,15,000*	*6,00,000*	*8,70,000*
4. *Interest liability*	*6,68,000*	*5,10,000*	*7,00,000*
5. *Net interest*	*47,000*	*90,000*	*1,70,000*
6. *Net income as per return of income*	*30,000*	*87,000*	*1,65,000*
7. *Income-tax, surcharge and education cess*	*10,010*	*29,280*	*50,990*
8. *Average rate of income-tax on interest on debentures (i.e., 7 as % of 3)*	*1.40%*	*4.88%*	*5.86%*
9. *Average of the average rates of tax paid in the last 3 years*		*4.05%*	

SOLUTION : *For the purpose of rule 28AA, the lower rate of tax deduction is to be determined on the basis of the following :*

Average rate of the current year :	*Rs.*
Interest on debentures (Rs. 90,000 — Rs. 4,10,000 + Rs. 4,50,000)	1,30,000
Gross total income	1,30,000
Less : Deduction	*Nil*
Net income	1,30,000
Tax on Rs. 1,30,000	39,000
Add : Surcharge	*Nil**
Tax and surcharge	39,000
Add: Education cess (2% of tax and surcharge)	780
Add : Secondary and higher education cess (1% of tax and surcharge for the assessment year 2009-10)	390
Total	40,170
Less : Prepaid tax (*i.e.*, Rs. 18,540 + Rs. 2,000)	20,540
Balance (*a*)	19,630
Interest on security for which certificate of lower tax deduction is required (*b*)	4,50,000
Average rate of tax of the current year [*i.e.*, (*a*) ÷ (*b*)] (*c*)	4.36%
Average tax rate of the preceding 3 years	4.05%
For the purpose of rule 28AA, the lower rate of tax deduction will be 4.36% [being the higher of (c) or (9)].	
Income-tax	4.24%
Surcharge	0%
Education cess (@ 2% of income-tax and surcharge)	0.08%
Secondary and higher education cess (@ 1% of income-tax and surcharge)	0.04%

Time of tax deposit, annual reports, etc.

427. Other provisions are summarised below—

	Time of deposit of tax [see para 428.4]	*Certificate of tax deduction* [see para 428.4]	*Returns of tax deduction*			*Tax deduction at lower rate*
			Particulars	*Form No.*	*Time limit*	
Salary [Sec. 192]	Tax should be deposited within one week from the last day of the month in which tax is deducted However, the Assessing Officer may, in special cases and with the prior approval of the Joint Commissioner, permit the employer to make quarterly payments on June 15, September 15, December 15 and March 15	Issue certificate in Form No. 12BA, 16 or 116AA within one-month from the close of the financial year	● Tax deducted from contribution paid by trustees of an approved superannuation fund ● Quarterly return	 24Q	May 31 every year 15 days after the expiry of each quarter (76 days in the case of last quarter)	The recipient may apply to AO in Form No. 13
Interest on securities [Sec. 193]	● If the amount is credited to the account of the payee on the last day of the accounting year: Within 2 months from the end of the month in which credit is made ● In any other case : Within one week from the last day of the month in which deduction is made	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	● The recipient may apply to AO in Form No. 13 ● The recipient may make a declaration in Form No. 15G to the payer of interest on securities
Dividends [Sec. 194]	Tax shall be deposited within one week from the last day of the month in which tax is deducted	Issue certificate in Form No. 16A within one month from the end of the month during which cheques/warrants for dividend payments are issued	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in case of last quarter)	● Apply in Form No. 13 to AO ● The recipient may make a declaration in Form No. 15G/15H
Interest other than interest on securities [Sec. 194A]	● If interest is credited to the account of the payee on the last day of accounting year : Within 2 months from the end of the month in which credit is made ● In any other case : Within one week from the last day of month in which deduction is made ● Quarterly payment is permitted by the Assessing Officer (with the approval of the Joint Commissioner) in special cases on July 15, October 15, January 15, and April 15	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid; where tax has been deposited quarterly, certificate shall be issued within 14 days of payment of tax	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	● Apply in Form No. 13 to AO ● Make a declaration in Form No. 15G/15H to the payer of interest
Winnings from lottery or crossword puzzle [Sec. 194B]	Tax should be deposited within one week from the last day of the month in which tax is deducted	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	—
Winnings from horse race [Sec. 194BB]	Tax should be deposited within one week from the last day of the month in which tax is deducted[1]	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	—
Payment to contractors/ sub-contractors [Sec. 194C]	Where amount is credited to the payee's account on the last day of the accounting year: Within 2 months from the end of the month in which credit is made. In any other case : Within one week from the last day of the month in which deduction is made	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	Apply in Form No. 13 to the AO
Insurance commission [Sec. 194D]	When insurance commission is credited to payee's account on the last day of the accounting year : Within 2 months from the end of the month in which credit is made. In any other case : Within one week from the last day of the month in which deduction is made ● Quarterly payment is permitted by the Assessing Officer (with the approval of Joint Commissioner) in special cases on July 15, October 15, January 15 and April 15.	Issue a certificate in Form No. 16A within one month from the close of the financial year	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	Apply in Form No. 13 to the AO

	Time of deposit (see para 428.4)	Certificate of tax deduction (see para 428.4)	Return of tax deducted			Tax deducted at higher rate
			Particulars	Form No.	Due date	
Non-resident sportsmen or sports association [Sec. 194E]	When amount is credited to payee's account on the last day of the accounting year: Within 2 months from the end of the month in which credit is made. In any other case: Within one week from the last day of the month in which deduction is made	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly statement of amount payable to non-resident sportsmen or sports-association	27Q	Within 14 days from the end of the quarter [*see* also 428.4]	—
National Savings Scheme [Sec. 194EE]	Within one week from the last day of the month in which tax is deducted	Issue certificate in Form No. 16A within one month from the end of the month in which the amount is paid	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	Make declaration in Form No. 15G/15H to the payer
Equity Linked Saving Scheme [Sec. 194F]	Within one week from the last day of the month in which tax is deducted	Issue certificate in Form No. 16A within one month from the end of the month in which the amount is paid	● Quarterly return	26Q	15 days after the expiry of each quarter (76 days in the case of last quarter)	—
Commission on sale of lottery tickets [Sec. 194G]	When commission is credited to the payee's account on the last date of the accounting year: Within 2 months from the end of the month in which credit is made. In any other case, within one week from the last day of month in which deduction is made	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	June 30 every year 15 days after the expiry of each quarter (76 days in the case of last quarter)	Apply to the AO in Form No. 13
Commission or brokerage [Sec. 194H]	When commission or brokerage is credited to the payee's account on the last date of the accounting year: Within 2 months from the end of the month in which credit is made. In any other case, within one week from the last day of month in which deduction is made ● Quarterly payment is permitted by the Assessing Officer (with the approval of the Joint Commissioner) in special cases on July 15, October 15, January 15, and April 15	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	June 30 every year 15 days after the expiry of each quarter (76 days in the case of last quarter)	Apply to the AO in Form No. 13
Rent [Sec. 194-I]	When amount is credited to the payee's account, on the last day of the accounting year: Within 2 months from the end of the month, in which credit is made. In any other case: Within one week from the last day of the month in which deduction is made.	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	June 30 every year 15 days after the expiry of each quarter (76 days in the case of last quarter)	Apply in Form No. 13
Fees for professional or technical services [Sec. 194J]	When amount is credited to the payee's account, on the last day of the accounting year: Within 2 months from the end of the month, in which credit is made in any other case: Within one week from the last day of the month in which deduction is made.	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly return	26Q	June 30 every year 15 days after the expiry of each quarter (76 days in the case of last quarter)	Apply in Form No. 13.
Payment to non-resident [Sec. 195]	● If the amount is credited on the last day of the accounting year: Within 2 months from the end of the month in which credit is made[1] ● In any other case: Within one week from the last day of the month in which deduction is made	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly statement	27Q	Within 14 days from the end of the quarter [*see* also Para 428.4]	● Apply in Form No. 15C/15D to the ITO ● Apply in Form No. 13 to the AO

	Time of deposit of tax [see para 428.4]	*Certificate of tax deduction [see para 428.4]*	*Returns of tax deduction*			*Tax deduction at lower rate*
			Particulars	*Form No.*	*Time limit*	
Units held by an Off-shore Fund [Sec. 196B], income from foreign currency bonds [Sec. 196C] and income of Foreign Institutional Investors from securities [Sec. 196D]	● If interest or income by way of long-term capital gain is credited to the account of the payee on the last day of the accounting year : Within 2 months from the end of the month in which credit is made ● In any other case : Within one week from the last day of the month in which deduction is made	Issue certificate in Form No. 16A within one month from the end of the month during which credit is given or the amount is paid	● Quarterly statement	27Q	Within 14 days from the end of the quarter [*see* also Para 428.4]	—

Other points for consideration

428. Apart from what has been discussed earlier, the following points merit consideration —

428.1 ***Amount payable to Government/RBI/certain corporations not subject to tax deduction*** - No tax is deductible under any provision of the Act in respect of amount payable to the following—

a. Central Government or State Government;

b. the Reserve Bank of India;

c. a statutory corporation whose income is exempt from income-tax*; or

d. a mutual fund.

If any person makes payment to the aforesaid, no tax is deductible at source.

428.2 ***Recipient gets credit*** - Tax deducted at source is deemed as income of the recipient [sec. 198].

If tax is deducted up to March 31, 2010, tax credit is given to the recipient on the basis of certificate in Form No. 16/16A/16AA to be issued by the deductor.

Where though tax at source has been deducted from the assessee's salary but no TDS certificate is issued to the assessee by the employer despite repeated requests by the assessee, in view of section 205, income-tax authorities, under no circumstances, can make the assessee liable to make payment of any tax to the extent to which such tax had been deducted at source by the person paying salary to the assessee—***Capt. J.G. Joseph*** v. ***CIT*** [2005] 92 ITD 358 (Mum.), ***Yashpal Sahni*** v. ***CIT*** [2007] 165 Taxman 144 (Bom.).

The scheme of giving credit to the deductees has been modified with effect from April 1, 2008 so that the manner in which credit of TDS is to be given will be governed by Rules to be framed. In other words, the Board may make such rules as may be necessary for the purpose of giving credit in respect of TDS or tax paid by employer on perquisite under section 192(1A).

428.3 ***Issue of certificate of tax deduction to the recipient*** - The payer of the income is supposed to issue a certificate of tax deduction to the recipient in the following format—

Different payments	*Form No.*
In case of salary payment to a resident individual where the income from salary before deduction under section 16 does not exceed Rs. 1,50,000	16AA
In case of salary payment not covered by above	12BA and 16
In case of payment other than salary	16A

*Corporations which are established by a Central, State or Provincial Act for the welfare and economic upliftment of ex-servicemen and whose income qualifies for exemption from income-tax under section 10(*26BBB*), are exempt from tax deduction/collection at source on their receipts. In other words, these corporations can receive payments without TDS and can purchase goods without TCS. This exemption shall not absolve such organisations from their statutory obligations of deducting TDS on all contractual payments made by them to other parties including sub-contractors etc. —**Circular No. 7/2008,** dated August 1, 2008.

■ The following points should be noted—

1. For time-limit of issue of certificate, see column 3 of the table given below.

2. Even if tax is paid by the deductor out of its own pocket, the above TDS certificate shall be issued to the recipient.

3. If tax is not deducted, the payer is not supposed to give TDS certificate.

4. In the case of road-transport industry, trucks or other goods carriages are booked by the consignor but the payment is made by the consignee on delivery of the goods. In such a case, TDS certificate in Form No. 16A shall be issued by the consignee to the truck/goods carriage operators within the prescribed time and in favour of such truck/goods carriage operators—**Circular No. 6/2006,** dated June 23, 2006.

5. Deductors, at their option, in respect of the tax to be deducted at source from income chargeable under the head "Salaries" can use their digital signatures to authenticate the certificates of deduction of tax at source in Form No. 16. The deductors will have to ensure that TDS certificates in Form No. 16 bearing digital signatures have a control No. with log to be maintained by the employer (deductor). The deductor will ensure that its TAN and the PAN of the employee are correctly mentioned in such Form No. 16 issued with digital signatures. The deductors will also ensure that once the certificates are digitally signed, the contents of the certificates are not amenable to change by anyone. The income-tax authorities shall treat such certificate with digital signatures as a certificate issued in accordance with rule 31—**Circular No. 2/2007**, dated May 21, 2007.

6. Where the last Quarterly Statement in Form No. 24Q/26Q/27Q has not been furnished as on the date of issuance of Form No. 16 or Form No. 16A and Acknowledgment No. is, therefore, not available, the deductor may mention - 'Not Available as the last Quarterly Statement is yet to be furnished' in Form No. 16 or 16A—**Circular F. No. 142/44/2006** - TPL, dated April 25, 2007.

428.3-1 *DE-MATERIALISATION OF TDS AND TCS CERTIFICATES* - In respect of tax deducted at source on or after April 1, 2010, the payer of income will not issue TDS certificate directly to the recipient as stated above.

428.4 ***Time-limit for payment of tax deduction at source to the Government*** - Tax deducted at source is required to be paid to the credit of the Central Government within the time given below—

Different situations	*Time-limit for deposit of tax*	*Time-limit for issue of certificate to the recipient (TDS certificate is required up to March 31, 2010)*
When payer is the Government or when payment is made on behalf of the Government	Same day	In case of salary or insurance commission within 30 days from the close of the financial year; otherwise within one month from the end of the month in which tax is deducted at source.
When tax is deducted by a person other than Government under sections 193, 194A, 194C, 194D, 194E, 194G, 194H, 194-I, 194J, 195, 196A, 196B, 196C and 196D and the amount is credited to the account of the recipient as on the last date of the accounting year	Within two months from the last date of the accounting year	Within two months and seven days from the last date of the accounting year
When the Assessing Officer has permitted (with the prior approval of Joint Commissioner) to make payment quarterly —		
- when such payment is covered by sections 194A, 194D, 194H	July 15, October 15, January 15 and April 15	Within 14 days from the date of payment

Different situations	*Time-limit for deposit of tax*	*Time-limit for issue of certificate to the recipient (TDS certificate is required up to March 31, 2010)*
- when such payment is payment of salary	June 15, September 15, December 15, March 15	Within 14 days from the date of payment
Any other case	Within one week from the last date of the month in which deduction is made	In case of salary or insurance commission within 30 days from the close of the financial year otherwise within one month from the end of the month in which tax is deducted at source†

Note - After March 31, 2008, all corporate assessees and other assessees (who are subject to compulsory audit under section 44AB) will have to make electronic payment of tax (including TDS) through internet banking facility offered by authorized banks. Alternatively, these taxpayers can make electronic payment of tax through internet by way of credit or debit cards. It is not necessary for the assessee to make payment of taxes from his own account in an authorized bank. An assessee can make electronic payment of taxes also from the account of any other person. However, the challan for making such payment must clearly indicate the Permanent Account Number (PAN) of the assessee on whose behalf the payment is made—**Circular No. 5/2008,** dated July 17, 2008.

428.5 ***Quarterly returns*** - The person deducting tax at source will submit a quarterly statement to the income-tax authority (or the person authorised by such authority) in respect of tax deducted at source on or after April 1, 2005.

428.5-1 *FORM NO. AND MODE OF SUBMISSION* - Quarterly returns should be submitted as follows :

Different payments	*When deductor is (a) company (b) Government (c) any person who is required to get his accounts audited under section 44AB in the immediately preceding financial year, or (d) a person in whose case the number of deductees' records in a quarterly statement for any quarter of the immediately preceding financial year is equal to or more than 50*	*In case of any other person*
Salary	Form No. 24Q in electronic format and Form No. 27A	Form No. 24Q
Payment (other than salary) to a resident	Form No. 26Q in electronic format and Form No. 27A	Form No. 26Q
Payment (other than salary) to a non-resident	Form No. 27Q in electronic format and Form No. 27A	Form No. 27Q

Notes

1. The PAN data of deductees/collectees should not be lower than the threshold limit given below; otherwise these returns will not be accepted -

	For the quarter ending September 30, 2007 or December 31, 2007	*For and from the quarter ending March 31, 2008. Also applicable in the case of TDS or TCS returns submitted after March 31, 2008 for any of the earlier quarters*
Form No. 24Q	90%	95%
Form Nos. 26Q and 27EQ	70%	85%

2. Returns on computer media may be generated through *Taxmann's TDS on CD* by Dr. Vinod K. Singhania and Dr. Kapil Singhania.

†At the request of recipient, annual TDS certificate can be given by April 30 after the end of the financial year.

428.5-2 ***DUE DATES OF QUARTERLY RETURNS*** - One has to submit quarterly return of tax deposited/collected in respect of a period beginning April 1, 2005. These returns are to be submitted in computer media by a company/Government deductor. Other taxpayers can submit these returns in paper format (even return in paper format will be accepted by only TIN centres and not by Income-tax Department). The due dates of different returns are given below—

Salary

Form No.	*Particulars*	*Due date*
24Q	For the quarter ending June 30	July 15
24Q	For the quarter ending September 30	October 15
24Q	For the quarter ending December 31	January 15
24Q	For the quarter ending March 31	June 15

Payment other than salary to a resident

Form No.	*Particulars*	*Due date*
26Q	For the quarter ending June 30	July 15
26Q	For the quarter ending September 30	October 15
26Q	For the quarter ending December 31	January 15
26Q	For the quarter ending March 31	June 15

Payment other than salary to a non-resident

Form No.	*Particulars*	*Due date*
27Q	For the quarter ending June 30	July 14
27Q	For the quarter ending September 30	October 14
27Q	For the quarter ending December 31	January 14
27Q	For the quarter ending March 31	April 14 (June 14 in case the amount is credited on the last date of accounting year)

Tax collection at source

Form No.	*Particulars*	*Due date*
27EQ	For the quarter ending June 30	July 15
27EQ	For the quarter ending September 30	October 15
27EQ	For the quarter ending December 31	January 15
27EQ	For the quarter ending March 31	April 30

428.5-3 ***CLARIFICATION ON FORM NO. 24Q*** - The following clarifications are given by NSDL—

■ *Particulars to be filled in Annexures I and III* - It is as follows—

1. In Annexure I, actual figures for the relevant quarter should be reported.

2. Annexure II should have actual figures for the whole financial year in and Annexure II should be submitted for the whole year in Quarter 4.

■ *Particulars of employees whose income is below the threshold limit/the income after giving deductions for savings etc. is below the threshold limit* - Particulars of only those employees are to be reported in whose case the estimated income for the whole year is above the threshold limit.

1. In case the estimated income for the whole year of an employee, after allowing deduction for various savings like PPF, GPF, NSC, etc., comes below the taxable limit, his particulars need not be included in Form No. 24Q.

2. In case due to some reason, estimated annual income of an employee exceeds the exemption limit during the course of the year, tax should be deducted in that quarter and his particulars be reported from that quarter onwards.

■ *Particulars of those employees, who are with the employer for a part of the year* - It is as follows—

1. Where an employee has worked with a deductor for part of the financial year only, the deductor should deduct tax at source from his salary and report the same in the quarterly statement of the respective quarter(s) up to the date of employment with him. Further, while submitting Form No. 24Q for the last quarter, the deductor should include particulars of that employee in Annexures II and III irrespective of the fact that the employee was not under his employment on the last day of the year.

2. Similarly, where an employee joins employment with deductor during the course of the financial year, his particulars should be reported by the current deductor in Form No. 24Q of the relevant quarter. Further, while submitting Form No. 24Q for the last quarter, the deductor should include particulars of such employee for the actual period of employment under him in Annexures II and III.

■ *Explanation for lower/no deduction of tax* - Certificate for lower or no deduction of tax from salary is given by the Assessing Officer on the basis of an application made by the deductee. In case where the Assessing Officer has issued such a certificate to a deductee, deductor has to mention whether no tax has been deducted or tax has been deducted at lower rate on the basis of such a certification in column 326.

428.5-4 *TAX AND INTEREST TO BE PAID* - Quarterly return cannot be submitted before payment of tax and (with effect from June 1, 2006) before payment of interest under section 201(1A) for late payment.

428.6 ***Tax deduction and collection account number*** - Every person, deducting tax or collecting tax, who has not been allotted a tax deduction account number or, as the case may be, a tax collection account number, shall, apply to the Assessing Officer for the allotment of a "tax deduction and collection account number" in Form No. 49B. Time-limit for application is 1 month from the end of the month in which tax is deducted or collected. Where a "tax deduction account number" or "tax collection account number" or "tax deduction and collection account number" has been allotted to a person, such person shall quote such number in all challans for the payment of TDS/TCS to the Government, in all TDS/TCS certificates, in all the quarterly returns and in all other documents pertaining to such transactions as may be prescribed.

428.7 ***The deductor has not remitted tax deducted to the Government - Can tax credit be refused*** - In the landmark ruling of the Gauhati High Court in the case of *CIT* v. *Om Prakash Gattani* [2000] 242 ITR 638 the court held that the payee will not have any control on the deductor to see if the tax deducted from his payment has been ultimately remitted to the Government treasury or not. The department does not have any option against the recipient but to allow him the credit. The only way left for the department is to proceed against the deductor by holding him to be an assessee-in-default. A similar ruling is given by the Karnataka High Court in ***Annusuya Alva*** v. ***CIT*** [2005] 147 Taxman 152.

428.8 ***Can tax be demanded from the person responsible for tax deduction when the same has been paid by recipient*** - Where deductee, recipient of income, has already paid taxes on amount received from deductor, department once again cannot recover tax from deductor on the same income by treating deductor to be assessee-in-default for shortfall in its amount of tax deducted at source—***Hindustan Coca Cola Beverage (P.) Ltd.*** v. ***CIT*** [2007] 163 Taxman 355 (SC). However, in the case of default, the payment of interest is mandatory for the period of delay caused by the omission for the tax to reach the coffers of the Government—*IAC* v. *Tata Chemicals* [1999] 68 ITD 205 (Mum.), *CIT* v. *Dhanalakshmy Wvg. Works* [2000] 109 Taxman 395 (Ker.).

428.9 ***Furnishing of quarterly returns regarding the details of non-deduction of tax by certain persons [Sec. 206A, applicable from June 1, 2005]*** - Section 206A has been inserted with effect from June 1, 2005. It has two sub-sections.

• *Sub-section (1)* - Sub-section (1) is applicable if the following conditions are satisfied—

1. The person who is otherwise responsible for deducting tax at source is (*a*) any banking company, (*b*) a co-operative society, (*c*) a public company.

2. It is responsible for paying to a resident, interest (other than interest on securities).

3. Such interest (other than interest on securities), paid or payable during the financial year does not exceed Rs. 5,000.*

If the above three conditions are satisfied, the person, responsible for making payment, is not required to deduct tax at source under section 194A. However, with effect from June 1, 2005, a banking company£ shall prepare quarterly returns (*i.e.*, consolidated return for all branches) for the period ending on June 30, September 30, December 31 and March 31 in each financial year and deliver the same to the prescribed income-tax authority (or the person authorized by such authority). Such return should be submitted within one month from the end of each quarter (June 30 in the case of last quarter) in digital format on a floppy, diskette, magnetic cartridge tape, CD-ROM or any other computer readable media [Form No. 26QAA‡].

• *Sub-section (2)* - Sub-section (2) is applicable if the following conditions are satisfied—

1. The payer is a person other than the person who is covered by sub-section (1).

2. Such person is responsible for paying to a resident any income which is liable for deduction of tax at source under sections 192 to 194LA.

If the above two conditions are satisfied, the Central Government may require (by notification in the Official Gazette) such person to prepare and deliver quarterly returns in the prescribed digital format**. Such return should be submitted to the prescribed income-tax authority (or the person authorised by such authority) on a floppy, diskette, magnetic cartridge tape, CD-ROM or any other computer readable media.

Tax collection at source [Sec. 206C]

429. Under section 206C in some cases tax has to be collected at source.

429.1 ***Who is responsible to collect tax at source*** - Every person, being a seller, shall collect tax from the buyer of goods specified in section 206C(1) [*see* table in para 429.3] tax at source. Tax will also be collected by a person who grants lease or a licence in respect of parking lot or toll plaza or mine or quarry, to another person (not being a public sector company).

429.1-1 *"SELLER" - MEANING OF* - "Seller" means the Central Government, a State Government or any local authority or corporation or authority established by or under a Central, State or Provincial Act, or any company or firm or co-operative society.

If "seller" is an individual, then section 206C is not applicable—*Madan Mohan Gupta* v. *Union of India* [1993] 204 ITR 384 (Pat.). However, the expression "seller" shall include from June 1, 2003 an individual or a Hindu undivided family whose books of account are required to be audited under section 44AB(*a*)/(*b*) during the financial year immediately preceding the financial year in which goods are sold. Consequently, tax will be collected at source by such individuals/Hindu undivided families from June 1, 2003.

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*From June 1, 2007, Rs. 10,000 where the payer is a banking company or co-operative society and Rs. 5,000 where payer is any other person.

£Only a banking company is required to submit this return as per rules 31AC and 31ACA.

‡Each branch of a banking company which is required to submit quarterly return under section 206A in respect of interest on time deposit without TDS shall keep and maintain the particular of such time deposit in Form No. 26QA.

**No such format is notified till the publication of this book. Consequently, sub-section (2) of section 206A does not have any practical utility.

Where liquor licence had been granted to an individual but business was being carried on by a firm of which he himself was a partner, firm would nevertheless be regarded a seller within meaning of section 206C—*Bhagwan Singh* v. *Union of India* [1994] 76 Taxman 423/209 ITR 824 (Pat.).

429.1-2 *"BUYER" - MEANING OF* - "Buyer" means a person who obtains in any sales by way of auction, tender or any other mode, goods of the nature specified in the Table in section 206C(1) [*see* para 429.3] or the right to receive any such goods. It, however, does not include the following :

a. a public sector company, the Central Government, a State Government, and an Embassy, a High Commission, Legation, Commission, Consulate and the trade representation, of a foreign State and a club; or

b. a buyer in the retail sale of such goods purchased by him for personal consumption.

■ *Meaning of 'club'* - The dictionary meanings of the word, which are relevant in the present context, are 'group who meet for social purposes or sports, etc. purposes, their premises' and 'organisation offering benefit to subscribers'. Among the specified goods, a 'club' will be interested in purchasing only alcoholic liquor for human consumption, and hence it can be safely said that a 'club' in the present context has reference to social clubs, recreation clubs, sports clubs, and the like.

■ *Purchase for personal consumption from retailer* - A buyer in the retail sale of such goods purchased by him for 'personal consumption' will alone be excluded from being treated as a 'buyer'. This means that if a retailer sells any specified goods to a customer for personal consumption only (and not for any other purpose), the purchasing customer will not be treated as a 'buyer'. The resultant effect will be that the retailer need not collect tax from the customer, provided he is satisfied that the customer is purchasing the goods for personal consumption. The Act has not provided any mechanism by which the seller will be able to satisfy himself that the requirement of personal consumption is fulfilled, so that he need not collect tax. As a minimum requirement, at least a declaration from the purchaser that the goods are for personal consumption may have to be prescribed.

■ *Mere licensee is not a "buyer"* - When the Government issues a licence, it only enables the licensee to carry on trade or business in that item. The payment made by the licensee by way of licence fee does not *ipso facto* entitle the licensee to lift the goods. For obtaining the goods mentioned in the Table (*infra*) the licensee has to place an order on the manufacturer or the supplier of the said goods and it is at that point of time that section 206C would get attracted. To put it differently, 'buyer' would mean where a person by virtue of the payment gets a right to receive specific goods and not where he is merely allowed/permitted to carry on business in that trade. 'Buyer' has to be buyer of goods and not merely a person who acquires a licence to carry on the business—*Union of India* v. *Om Prakash S.S. & Co.* [2001] 115 Taxman 325 (SC).

■ *When income of buyer is exempt* - If income of buyer is exempt under section 10(*26*), then tax cannot be collected at source.

429.2 *When tax has to be collected at source* - Tax has to be collected by the seller at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of receipt of such amount from the buyer in cash or by issue of cheque/draft, or by any other mode, whichever is earlier.

429.3 *How to compute tax deducted at source* - The seller shall collect income-tax of a sum equal to the amount given in the Table for the financial year 2008-09 :

Sl. No.	*Nature of goods*	*Percentage rate of tax collection at source (TCS) applicable*
(1)	*(2)*	*(3)*
1.	Alcoholic liquor for human consumption (other than Indian made foreign liquor)	1
2.	Indian made foreign liquor	1
3.	Tendu leaves	5

Sl. No.	Nature of goods	Percentage rate of tax collection at source (TCS) applicable
(1)	(2)	(3)
4.	Timber obtained under a forest lease	2.50
5.	Timber obtained by any mode other than under a forest lease	2.50
6.	Any other forest produce not being timber or tendu leaves	2.50
7.	Scrap	1
	Parking lot, toll plaza, mining and quarrying (other than mining and quarrying of mineral oil, petroleum and natural gas)	2

Surcharge, education cess and secondary and higher education cess - The above rates are subject to surcharge, education cess and secondary and higher education cess [*see* para 406, footnote]; read "purchaser" in place of "recipient" and "amount subject to tax collection at source" in place of "payment or credit subject to tax deduction".

429.3-1 *SCRAP* - 'Scrap' has been defined as waste and scrap from the manufacture or mechanical working of materials which is definitely not usable as such because of breakage, cutting up, wear and other reasons.

It would include only such waste or scrap which arises from manufacture or mechanical working of materials. Further, such waste should not be usable as such. Accordingly, it would not include any waste or scrap—

a. which does not arise from manufacture or mechanical working of materials; or

b. which is usable as such.

Thus, the following are not covered—

a. waste or scrap arising from packing materials, newspapers, old machinery scrapped, etc., which cannot be said to arise from manufacture; or

b. by-products generated from the manufacturing process as the same could be used as such.

It can be inferred that, in case of sale of scrap, the provision would apply to only those sellers who are engaged in the business of manufacturing or mechanical working of materials.

429.3-2 *PERCENTAGES ARE APPLICABLE ON PURCHASE PRICE* - If total amount payable by a buyer to the "seller" is Rs. 100, the sum to be collected at source will be Rs. 2.5* in the case of timber obtained by any mode other than under a forest lease by an individual.

429.3-3 *WHEN PURCHASE PRICE IS TO BE RECEIVED BY DIFFERENT AGENCIES* - There may be cases where for the purchase of any of the items specified above, the "buyer" may have to pay the cost of the item *plus* excise duty to a particular "seller" and any other tax or payment towards the purchase of the same item to another "seller". For example, in some States for the purchase of liquor, the retailer has to pay the cost of liquor *plus* excise duty to the State excise department. The sales tax is paid by this retailer for the liquor directly to the sales tax authorities. For the price of the bottles, label and sealing charges, the payments are made to the distilleries from where the liquor is lifted. In such cases, the State excise department will have to collect tax at source at 1* per cent of the total of the cost of liquor, excise duty, sales tax, cost of bottles, label/sealing charges.

However, the Patna High Court in *Ramjee Prasad Sahu* v. *Union of India* 1993 Tax LR 593, *Bharat Prasad Choudhary* v. *Union of India* [1978] 229 ITR 363, the Punjab and Haryana High Court in *Fairdeal Trading Co.* v. *Union of India* [1993] 70 Taxman 121 and Madhya Pradesh High Court in ***Harvach & Sons*** v. ***UOI*** [2003] 133 Taxman 926 have held that tax can be collected under section 206C only in respect of the cost price paid by vendors of country liquor to the wholesalers and not in respect of the excise duty paid to the Government.

**Plus* SC + EC + SHEC, *see* para 406.

The Excise Department of a State Government grants licence to a taxpayer for purchasing country liquor from distilleries or wholesalers. On the licence fees charged by the Excise Department, tax cannot be collected at source under section 206C. The Excise Department in such a case cannot be termed as a "seller" as goods are not sold by the Excise Department —*Naresh Kumar & Co.* v. *Union of India* [2000] 110 Taxman 420 (Punj. & Har.), *Chander Bhan & Co.* v. *Union of India* [2000] 112 Taxman 517 (Punj. & Har.).

429.3-4 *TAX COLLECTION AT LOWER RATE [SEC. 206C(9), (10), (11)]* - Where the Assessing Officer is satisfied that the total income of the buyer justifies the collection of the tax at any lower rate than the relevant rate specified in para 429.3, the Assessing Officer shall, on an application made by the buyer in Form No. 13 in this behalf, give to him a certificate for collection of tax at such lower rate. Where such certificate is given, the person responsible for collecting the tax shall, until such certificate is cancelled by the Assessing Officer, collect the tax at the rates specified in such certificate. The certificate shall be valid for the assessment year specified in that certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period. An application for a fresh certificate may be made, if required, after the expiry of the period of validity of the earlier certificate. The certificate shall be valid only for the person named therein. The certificate shall be issued direct to the person responsible for collecting the tax under advice to the buyer who made an application for issue of such certificate.

429.4 ***Goods utilised for manufacturing/processing is not subject to tax collection*** - No tax will be collected at source from a resident buyer who purchases goods for the purposes of manufacturing, processing or producing any article or thing and not for the purpose of trading. If the resident buyer, gives a declaration in duplicate in Form No. 27C to the seller that the goods to be purchased are to be utilised in the carrying on of any of the activities referred to above, no tax will be collected under section 206C.

■ *Form No. 27C in duplicate* - The declaration furnished by the buyer shall be obtained in duplicate by the seller.

■ *Copy of Form No. 27C to be submitted to Commissioner by seller* - The seller shall deliver one copy of each Form No. 27C to the jurisdictional Commissioner. All the Forms collected in a month should be delivered up to 7th of each succeeding month. For instance for forms collected in April, 2005, the last date of submission to the Commissioner is May 7, 2005.

Buyer shall fill in and sign part I of the declaration Form. Seller shall fill in and sign part II of the declaration Form before furnishing both parts of the Form to the Commissioner.

The last date of delivering the form to the jurisdictional Commissioner is counted from the month in which the declaration is furnished by the buyer to the seller and not from the month in which the goods are sold. However, a declaration should be obtained along with the sale of goods as far as possible.

■ *Fresh form every time* - Buyer should furnish fresh declaration every time he buys timber for the purpose of manufacturing, processing or producing articles or things.

■ *A builder is not competent to submit Form No. 27C* - A builder is not authorized to furnish Form No. 27C. A builder does not buy timber for the purpose of manufacturing, processing or producing articles or things. A builder generally purchases timber for the purpose of construction of a building. A building is not an article or thing. The doors, frames made by the builder for the purpose of fixing them in the building do not qualify "for the purpose of manufacturing". Building is a construction activity and not a manufacturing activity.

429.5 ***Deposit of tax*** - Tax collected under section 206C shall be deposited within 7 days from the last day of the month in which tax is collected to the credit of Central Government. For non-payment or late payment, interest is payable at the rate of 1 per cent per month or part thereof.

429.6 ***Issue of certificate*** - Within a period of one month from the end of the month in which tax is collected, the person collecting tax should issue a certificate of tax collected to the buyer. The certificate shall be issued in Form No. 27D.

Such certificate should contain the amount of tax collected, the rate at which tax is collected, other particulars as may be prescribed. Such certificates shall be issued in respect of tax collected up to March 31, 2010.

Consolidated certificate - Where more than one certificate is required to be furnished to a buyer for tax collected at source in respect of the period ending on September 30 and March 31 in each financial year, the person collecting the tax, may (on request from such buyer), issue within one month from the end of such period, a consolidated certificate in Form No. 27D for tax collected during whole of such period.

Duplicate certificate - Where the certificate for tax collected at source is lost, the person collecting tax at source may issue a duplicate certificate of collection of tax at source on a plain paper giving necessary details as contained in Form No. 27D. However, the Assessing Officer (before giving credit for the tax collected at source on the basis of duplicate certificate) shall get the payment certified from the Assessing Officer designated in this behalf by the Chief Commissioner or Commissioner and shall also obtain an Indemnity Bond from the assessee.

429.7 ***Quarterly returns to Government*** - The person collecting tax at source will submit a quarterly statement to the income-tax authority (or the person authorised by such authority) in respect of tax collected at source on or after April 1, 2005 [Form No 27EQ]. Quarterly returns should be submitted within 15 days from the end of each quarter (30 days from the end of last quarter).

429.7-1 *FILING OF TCS QUARTERLY RETURN* - Every person collecting tax at source is required to submit quarterly TCS returns as follows—

Person collecting tax at source	*Annual TCS return*
Company, Central Government or State Government, or the collector is required to get his accounts audited under section 44AB in the immediately preceding financial year; or the collector is person in whose case the number of collectees' records in a quarterly statement for any quarter of the immediately preceding financial year is equal to or more than 50.	Computer readable media in Form No. 27EQ along with hard copy of Form No. 27B
Any other person	Hard copy in Form No. 27EQ or computer readable media as given above

Defective return : Where the Assessing Officer considers that the return delivered is defective, he may intimate the defect to the person collecting tax and give him an opportunity of rectifying the defect within a period of 15 days from the date of such intimation (or within such further period which is extended by the Assessing Officer, on an application made by the person collecting tax). If the defect is not rectified within the said period of 15 days (or within the extended period), such return shall be treated as an invalid return and the provisions of the Income-tax Act shall apply as if such person had failed to deliver the return.

429.7-2 *QUARTERLY RETURN NOT POSSIBLE BEFORE PAYMENT OF TAX AND INTEREST* - Quarterly return cannot be submitted before payment of tax and (with effect from June 1, 2006) before payment of interest for late payment under section 206C(7).

429.7-3 *PAN DATA OF COLLECTEE* - If PAN data of collectee is lower than 85 per cent, quarterly return will not be accepted.

429.8 ***Tax credit to one who pays*** - The amount collected is deemed as payment of tax on behalf of the person from whom the amount has been collected. A tax credit is given to him for the amount so collected on production of certificate [Form No. 27D] in the assessment for which the income is assessable.

The scheme of giving credit to the collectees has been modified with effect from April 1, 2008 so that the manner in which credit of TCS is to be given will be governed by Rules to be framed. In other words, the Board may make such rules as may be necessary for the purpose of giving credit in respect of TCS or tax paid by employer on perquisite under section 192(1A).

429.9 ***Consequences if tax is not collected or paid*** - If a seller does not collect or after collecting fails to pay the tax, he shall be deemed to be an assessee in default in respect of the tax and the amount of the tax together with the amount of simple interest, calculated at the rate of 1 per cent per month, or part thereof, shall be a charge upon all the assets of the seller. Section 276BB provides for prosecution of a person who fails to pay the tax collected at source for a period which shall not be less than 3 months but which may extend up to 7 years and with fine.

429.10 ***Tax collection account number*** - *See* para 428.7.

429.11 ***If income of buyer is exempt*** - The Gauhati High Court in the case of *Sing Killing* v. *ITO* [2002] 255 ITR 444/125 Taxman 403 has held that no tax is to be collected at source where the income of the buyer is itself exempt.

CHAPTER TWENTY-FOUR

Refund of excess payments

Right to claim refund - When arises [Sec. 237]

430. Refund means "to pay back". If, therefore any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under the Act for that year, he is entitled to a refund of the excess amount paid.

Who can claim refund [Sec. 238]

431. Generally refund can be claimed only by a person who has made excess payment of tax or fringe benefit tax. Where, however, income of a person is included in the total income of another person under sections 60 to 64, the refund can be claimed by the latter and not by the former. Likewise, if a person is unable to claim any refund due to him because of his death, incapacity, insolvency, liquidation or other cause, his legal representative or the trustee or guardian or receiver, as the case may be, is entitled to claim and receive such refund for the benefit of such person or his estate.

How to claim refund

432. Claim for refund should be in Form No. 30 and verified in the prescribed manner. The refund should be claimed within one year from the last day of the assessment year.

432.1 ***Claim after the statutory time limit*** - The Board has directed that in all cases where an otherwise valid refund claim under section 237 is filed by an assessee after the expiry of the aforesaid statutory time, the Assessing Officer having jurisdiction over the case, may admit the said refund claim and dispose of the same on merits and in accordance with law provided the following conditions are satisfied :

- It has been decided that cases where delayed claims of refund are being considered would be taken up for scrutiny.
- The refund has arisen as a result of excess tax deducted/collected at source and payment of advance tax and the amount of refund does not exceed Rs. 50,00,000 for one assessment year.
- The income of the assessee is not assessable in the hands of any other person under any of the provisions of the Act.
- No interest will be admissible on the belated refund claims.
- No claims under this provision will be entertained where a period of more than 6 assessment years has elapsed.

Board have also decided that in such cases—

a. where the refund does not exceed Rs. 10,00,000 for any assessment year, the Assessing Officer shall obtain the prior approval of the Commissioner of Income-tax before entertaining a belated refund claim ;

b. where the refund exceeds Rs. 10,00,000 but does not exceed Rs. 50,00,000 for any assessment year, the Assessing Officer shall obtain the prior approval of CCIT or DGIT before entertaining a belated refund claim; and

c. where the refund exceeds Rs. 50,00,000, approval of the Board is required.

Other points

433. One should also keep in view the following points :

433.1 ***Refund on appeal [Sec. 240]*** - Where refund arises as a result of any order passed in appeal or other proceedings under the Act, no formal application from the assessee is required. The Assessing Officer is bound to grant refund *suo motu.*

433.1-1 *WHEN REFUND BECOMES DUE* - Under section 240, refund becomes due as follows—

Situations	Due date
1. An assessment is set aside or cancelled and an order of fresh assessment is directed to be made	The refund becomes due only on the making of such fresh assessment
2. Assessment is annulled	The refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee.

433.2 ***Power to withhold refund [Sec. 241]*** - Section 241 has been omitted from June 1, 2001.

433.3 ***Interest on delayed refunds*** - *See* para 386.

433.4 ***Set off of refunds against tax remaining payable [Sec. 245]***- If a refund is found to be due to any person, the tax authorities may, in lieu of payment of the refunds, set off the amount to be refunded against the sum payable under the Act. No adjustment of refund due to assessee can be made against outstanding demand without service of a proper notice under provisions of section 245 and without giving proper opportunity of hearing to the petitioner—*Shiv Narain Shivhare* v. *Asstt. CIT* [1996] 88 Taxman 93/222 ITR 620 (MP).

One should also keep in view the following points —

1. Where no intimation, in writing, is given by the Assessing Officer prior to the proposed action of set off, the adjustment will be in violation of section 245—*State Bank of Patiala* v. *CIT* [1999] 105 Taxman 326/239 ITR 421 (Punj. & Har.).

If an order is passed straightaway intimating the taxpayer about the action for set off taken by the assessing authority, it is contrary to the mandate of section 245 and liable to be quashed in writ petition—*Pithambardas Dulichand* v. *Union of India* [2000] 112 Taxman 351 (MP).

Intimation under section 143(1) is not "intimation" for purposes of section 245 —***Japson Estates (P.) Ltd.*** v. ***CIT*** [2006] 285 ITR 40 (AP).

2. Adjustment of arrears of tax against refund due is not permissible on the assessee's request—*Bank of Tokyo Mitsubishi Ltd.* v. *CIT* [1999] 107 Taxman 261 (Cal.).

3. Amount of interest-tax found refundable to the assessee cannot be set off against the amount of income-tax outstanding against the assessee—*State Bank of Patiala* v. *CIT* [1999] 105 Taxman 326/239 ITR 421 (Punj. & Har.).

4. Where certain assessments had been held to be bad, the amount of tax recovered for such assessment years which became refundable cannot be retained by the Department for being adjusted against tax due in respect of other assessment years—*S.S. Ahluwalia* v. *ITO* [1996] 135 CTR (Gauhati) 225.

5. Demand outstanding against any other person cannot be set off against refund due to the taxpayer—*Archana Shukla* v. *CIT* [2000] 112 Taxman 573 (Delhi).

6. A further implicit requirement is that the revenue will have to be satisfied that the assessee will not be in a position to satisfy the demand of tax and that but for the set off, the outstanding tax amount cannot be recovered at all—***Glaxo Smith Kline Asia (P.) Ltd.*** v. ***CIT*** [2007] 160 Taxman 261 (Delhi).

CHAPTER TWENTY-FIVE

Appeals and revisions

Meaning of appeal

435. The expression "appeal" has been defined in *Mozley and Whiteley's Law Dictionary* as "a complaint to a superior court of an injustice, done by an inferior one". The party complaining is styled as the "appellant". The other party is known as "respondent". The right to appeal must be given by express enactment and cannot be implied—*Harihar Gir* v. *CIT* [1941] 9 ITR 246 (Pat.).

Appellate hierarchy

436. An appeal against the order of the Assessing Officer lies with the Commissioner (Appeals). Alternatively, the assessee can file revision petition to the Commissioner. An appeal against the order of the Commissioner (Appeals) can be preferred by the assessee or the income-tax department and such appeal lies with the Appellate Tribunal. The assessee or the Commissioner of Income-tax may prefer an appeal against the order of the Appellate Tribunal to the High Court on any substantial question of law arising out of order of the Tribunal.

Order of the High Court can be challenged either by the assessee or by the income-tax department by preferring an appeal to the Supreme Court which is the final appellate authority.

The table given below highlights the provisions of appeal and revision in brief —

Alternative One - Appeal

Nature of action	*To whom it should be filed*	*Against which order it can be preferred*	*Who can prefer*
First appeal	Commissioner (Appeals) [CIT(A)]	Against the order of Assessing Officer [*see* para 437]	Taxpayer
Second appeal	The Income-tax Appellate Tribunal [ITAT]	Against the order of the CIT(A) [*see* para 439.1]	Taxpayer or Commissioner of Income-tax
Appeal to High Court	High Court	Substantial question of law arising out of ITAT order	Taxpayer or Commissioner of Income-tax
Appeal to Supreme Court	Supreme Court	Judgment of High Court	Taxpayer or the Commissioner of Income-tax

Alternative Two - Revision under section 263

Nature of action	*Against which order it can be taken*	*Who can prefer*
Revision under section 263	Order of the Assessing Officer if it is prejudicial to the interest of revenue [*see* para 438.1]	Action can be taken by the Commissioner of Income-tax himself
First appeal	Appeal to ITAT against the revision order under section 263	Taxpayer
Appeal to High Court	*See* under Alternative One	
Appeal to Supreme Court	*See* under Alternative One	

Alternative Three - Revision under section 264

Nature of action	*Against which order it can be taken*	*Who can prefer*
Revision under section 264	Order of the Assessing Officer [*see* paras 438.2-1 and 438.2-2]	The taxpayer may apply the Commissioner for revision under section 264 or the Commissioner can *suo motu* take action*

*No further action is generally required as no order can be passed under section 264 which is prejudicial to the assessee. However, writ petition under article 226 to High Court is maintainable.

Appeal to the Commissioner (Appeals) [Sec. 246A]

437. First appeal against the order of the Assessing Officer lies with the Commissioner (Appeals).

437.1 ***Appealable orders*** - An assessee aggrieved by any of the following orders of Assessing Officer may appeal to Commissioner (Appeals) against such order :

- Order passed by a Joint Commissioner under section 115VP(3)(*ii*) or an order against assessee where the assessee denies liability to be assessed or order under section 143(3) or section 144 where the assessee objects to amount of income assessed or the amount of tax determined or amount of loss computed or status under which he is assessed.
- An intimation under section 143(1) where the assessee objects to the making of adjustment.
- Order of assessment under section 115WE(3) or 115WF where the employer objects to the value of fringe benefits assessed.
- Order of assessment or reassessment of fringe benefits under section 115WG
- An order of assessment, reassessment or recomputation under section 147 or section 150.
- An order of assessment/reassessment under section 153A.
- An order of rectification of mistake under section 154 or section 155 having effect of enhancing assessment or reducing refund or order refusing to allow claim made by assessee under these sections.
- An order under section 163 treating assessee as an agent of non-resident.
- An order under section 170(2) or 170(3) relating to succession of business otherwise on death.
- An order under section 171 regarding assessment after partition of a HUF.
- An order under section 201.
- Order made under section 206C(6A).
- An order under section 237, relating to refund.
- An order imposing penalty under section 221, 271, 271A, 271F, 271FB, 272AA or 272BB.
- An order of assessment made by an Assessing Officer under section 158BC(*c*) in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A on or after January 1, 1997.
- An order imposing a penalty under section 158BFA(2).
- An order imposing penalty under section 271B or section 271BB.
- An order made by a Joint Commissioner imposing a penalty under section 271C, section 271CA, section 271D or section 271E.
- An order made by a Joint Commissioner or a Joint Director imposing a penalty under section 272A.
- An order made by a Joint Commissioner imposing a penalty under section 272AA.
- An order imposing penalty under Chapter XXI (*i.e.*, under sections 270 to 275).
- An order made by an Assessing Officer (other than a Joint Commissioner) under the provision of the Act in the case of such person or classes of persons, as the Board may, having regard to the nature of the cases, the complexities involved and other relevant considerations direct.

437.1-1 *APPEAL BY A PERSON WHO IS CHARGED AS AN ASSESSEE IN DEFAULT UNDER SECTION 201* - If a person has deducted and paid tax in accordance with sections 195 and 200 in respect of any sum (but other than interest) chargeable under the Act, he is entitled to prefer appeal under section 248 to be declared not liable to deduct tax, if he denies his liability to make such deduction. In other words,

the right to appeal under section 248 is conditional and can be exercised only if tax is deducted at source and paid to the Government—*ITO* v. *Tata Iron & Steel Co. Ltd.* [2001] 116 Taxman 186 (Cal.).

■ *Modified provisions applicable from June 1, 2007* - Section 248 has been substituted with effect from June 1, 2007. The modified version provides that where under an agreement or other arrangement, the tax deductible on any income (not being interest) under section 195 is to be borne by the payer (*i.e.*, "net of tax" arrangement) and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.

437.1-2 *PRINCIPLES EMERGING FROM RECENT JUDICIAL PRONOUNCEMENTS* - In respect of order appealable to Commissioner (Appeals), the following propositions emerge from recent judicial pronouncements—

1. Appeal is possible even if revision under section 264 has been refused—*CIT* v. *D. Lakshminarayananathi* [2001] 250 ITR 187 (Mad.).

2. It is not open to challenge validity of the assessment order in an appeal against the order of penalty—*CIT* v. *Hotel Highland Park* [2000] 246 ITR 130/[2004] 118 Taxman 509 (J&K).

3. Addition which had been upheld in appeal against the original assessment cannot be made subject-matter of appeal by the assessee against the order of reassessment—***CIT*** v. ***V.N.A.S Chandran*** [2003] 130 Taxman 618 (Mad.).

4. The provisions of section 246A do not provide any appeal against the order under section 220(2) and interest on the outstanding tax payable by the assessee. Secondly the order under section 220(2) does not form part of the order under section 143(3). In fact while calculating the interest under section 220(2), the Assessing Officer has no discretion or option, but to simply calculate the interest at a particular rate on the outstanding tax payable by the assessee. Interest under section 220(2) is not part of the assessment. Thus, order of calculation of interest under section 220(2) while giving effect appellate order, is not appealable since while giving effect to the appellate order, the Assessing Officer simply has to recompute the taxable income or carry out the direction and he has no discretion to ignore the appeal order and if any mistake is committed in giving effect to the order that mistake can be rectified under section 154 or 155. It is well settled law that appeal lies against levy of interest under the various provisions of Income-tax Act, such as interest under section 234B provided the assessee denies its liability to be assessed *in toto.*

Appeal against the order under section 154 wherein interest under section 244A is reduced is maintainable—***Progressive Construction Seenaiah & Co.*** v. ***CIT*** [2003] 85 ITD 277 (Hyd.).

5. Appeal does not lie against agreed additions—*Pawn Construction* v. *ITO* [2001] 78 ITD 176 (Rajkot).

6. Where while holding return as defective the Assessing Officer observed that the assessee was not entitled to carry forward loss, communication to the effect that the assessee was not entitled to carry forward loss for period under consideration, would amount to an 'order' of assessment appealable under section 246—*CIT* v. *Tata Cummins Ltd.* [2002] 82 ITD 798 (Kol.).

437.2 ***Procedure for filing appeal*** - Appeal under section 246A shall be in Form No. 35 and should be verified in the manner prescribed therein.

437.2-1 *WHO HAS TO SIGN THE APPEAL* - Form No. 35, the grounds of appeal and the form of verification appended thereto relating to an assessee shall be signed and verified by the person who is authorised to sign the return of income under section 140 as applicable to the assessee[1].

1. *See* para 360.

437.2-2 *DOCUMENTS TO BE SUBMITTED ALONG WITH APPEAL* - Appeal is required to be made in duplicate. The memorandum of appeal, statement of facts and the grounds of appeal must be in duplicate and should be accompanied by a copy of the order appealed against and the notice of demand in original, if any.

437.2-2a FEES - Appeal should be accompanied by a fees as follows —

	Fees in Rs.
Assessed total income of Rs. 1 lakh or less	250
Assessed total income of more than Rs. 1 lakh but less than Rs. 2 lakh	500
Assessed total income of more than Rs. 2 lakh	1,000
Any other subject-matter	250

437.2-3 *TIME-LIMIT* - The appeal shall be presented within 30 days of the following date —

a. where the appeal relates to any tax deducted under section 195(1), the date of payment of the tax (or with effect from June 1, 2007, where appeal is under section 248, the payment of tax); or

b. where the appeal relates to any assessment or penalty, the date of service of the notice of demand relating to the assessment or penalty ; or

c. in any other case, the date on which intimation of the order sought to be appealed against is served.

437.2-3a HOW TO DETERMINE THE TIME-LIMIT - In computing the aforesaid time-limit of 30 days, the day on which the order complained of was served shall be excluded. Moreover, if the assessee was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order shall be excluded.

■ Where the assessment order was served on a person who was not an authorised agent of the assessee, and later on, the assessee applied for and obtained a copy of the assessment order for the purpose of filing an appeal, it was held that the time-limit for filing the appeal should be reckoned from the date on which the assessee obtained the copy of the assessment order and notice of demand and not from the earlier date of service of the assessment order—*CIT* v. *Prem Kumar Rastogi* [1980] 124 ITR 381 (All.).

437.2-3b APPEAL AFTER THE EXPIRY OF TIME-LIMIT - The Commissioner (Appeals) may admit an appeal after the expiration of the said period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

■ The following points should be noted —

1. Expression 'sufficient cause' for condonation of delay should receive a liberal construction so as to advance substantial justice—***Shakti Clearing Agency (P.) Ltd.*** v. ***ITO*** [2003] 127 Taxman 49 (Rajkot) (Mag.), ***Ganga Sahai Ram Swarup*** v. ***ITAT*** [2004] 271 ITR 512 (All.).

2. Where the reason for delay in filing first appeal is attributed to negligence or inaction on the part of tax consultant and there is no *mala fide* imputable to the assessee, the delay can be condoned—***Shakti Clearing Agency (P.) Ltd.*** v. ***ITO*** [2003] 127 Taxman 49 (Rajkot) (Mag.).

3. Before dismissal of the assessee's appeal as time barred the assessee should not only be intimated about fact of filing appeal beyond limitation but if he had any reason for filing appeal beyond limitation, the appellate authority should exercise its discretionary powers under section 249(3) in appropriate and judicious manner—*J&K Small-Scale Industries Development Corpn. Ltd.* v. *CIT* [1999] 71 ITD 367 (Asr.).

4. Where the assessee sent appeals to Commissioner (Appeals) through UPC on last day of statutory time claiming that it had to do so since last day being a Saturday, the Income-tax Office would have

remained closed and as said the UPC did not reach its destination, duplicate set of appeals was filed and was acknowledged, the Commissioner rightly held that there was sufficient cause for delay in filing appeal—*ITO* v. *Jagtar Singh* [2002] 123 Taxman 142 (Chd.) (SMC) (Mag.).

5. Where the appellant-assessee filed an application for condonation of delay in filing appeal on the ground of his own illness and disturbance in office of his lawyer, the delay ought to have been condoned—*Punam Singh* v. *ITO* [2002] 125 Taxman 80 (Jodh.) (Mag.).

6. When an application for condonation of delay in filing an appeal is preferred, it is statutory obligation of the appellate authority to consider whether sufficient cause for not presenting an appeal in time was shown by the appellant—*Shrimant Govindrao Narayanrao Ghorpade* v. *CIT* [1963] 48 ITR 54 (Bom.).

437.3 ***Payment of tax before filing appeal [Sec. 249(4)]*** - An appeal under section 246A (or under any other provision) shall not be admitted unless tax is paid by the assessee as follows :

Situations	*Payment of tax*	*Power to stay*
1. If a return has been filed by the assessee	Tax due on the returned income should be paid before filing appeal [*see* Note]	Tax due on return should be paid before filing the appeal (no power to stay collection of demand).
2. If no return has been filed	The assessee should pay tax (before filing an appeal) of an amount equal to the amount of advance tax which was payable by him [*see* Note]	On application made by the appellant, the Commissioner (Appeals) may exempt from payment of tax for any good and sufficient reason to be recorded in writing [*see* para 437.3-2]

■ The following points should be noted —

1. Under section 249(4), there is no condition that interest, if any, payable under sections 234A, 234B, 234C and 140A also should be paid before the appeal could be admitted—***Subbiah Nadar & Sons*** v. ***Asstt. CIT*** [2003] 84 ITD 55 (Chennai), ***Jagdish Raj Chauhan*** v. ***ITO*** [2006] 6 SOT 629 (Asr.)

2. Section 249(4) cannot be read down so as to restrict it to appeal against assessment only; it will be applicable in case of appeal against penalty also—*CIT* v. *Samanthakamani* [2002] 125 Taxman 424/[2003] 259 ITR 215 (Mad.).

3. The provisions of section 249(4) cannot be applied for filing of appeals before the Tribunal—*Malwa Texturising (P). Ltd.* v. *CIT* [2002] 77 TTJ (Indore) 995, ***Pawan Kumar Ladha*** v. ***CIT*** [2003] 84 ITD 178 (Indore).

4. Provisions of section 249(4) do not apply to an appeal directed against an order imposing under section 221—***Satyam Enterprises*** v. ***CIT*** [2005] 1 SOT 675 (Mum.).

5. Merely for reason that for certain issues appeal from order of assessment lies before Tribunal and by this process it is termed as first appeal as matter of expression by parties, it would not lead to conclusion that restriction on admission of appeal before Commissioner (Appeals) as per section 249(4) is to be extended to the Tribunal—*V.N. Sudhakaran* v. *CIT* [2002] 83 ITD 159 (Chennai).

6. Where despite payment of tax by way of adjustment of seized amount, full amount of tax due from assessee is not paid before filing appeal, the assessee's appeal is not maintainable—*Bharatkumar Sekhsaria* v. *CIT* [2002] 82 ITD 512 (Mum.).

7. Where though admitted tax is not paid by the assessee before filing appeal but it is paid before hearing of appeal, appeal is to be admitted—*S. Venkatesh* v. *Asstt. CIT* [2000] 112 Taxman 31 (Chennai) (Mag.).

8. In *CIT* v. *Rama Body Builders* [2001] 117 Taxman 68 (Delhi), the appeal was heard by the Commissioner (Appeals) on several dates and at none of these dates the deficiency in the assessee's appeal (*i.e.*, non-payment of tax) was pointed out. By November 4, 1977 (being the last date of

hearing) the assessee paid the entire tax. The Commissioner (Appeals) refused to entertain the appeal on the ground that tax due had not been paid by April 2, 1997 (*i.e.*, the date on which appeal was filed). On these facts, the court held that the assessee had deposited the tax due before the issuance of show-cause notice, and in view of proviso to section 249(4), it was correct in law in holding that after deposit of the amount of tax, requirement of section 249(4) should be taken as having been fulfilled and the appeal should have been heard on merits.

9. Dismissal of appeal under section 249(4)(*a*) for non-payment of taxes is not justified where all the properties of the assessee has been attached by the Department and the assessee neither has other sources of income nor is holding any liquid assets and all admitted tax and interest has been paid by the assessee by selling properties as soon as attachment is lifted—***Shamraj Moorjani*** v. ***CIT*** [2005] 2 SOT 321 (Hyd.).

437.3-1 *POWER OF ASSESSING OFFICER TO STAY UNDER SECTION 220(6)* - If an assessee has presented an appeal under section 246A, the Assessing Officer may under section 220(6) in his discretion, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of.

One should note the following points regarding the operation of section 220(6) :

1. The order of the Assessing Officer may be subject to such conditions as he may think to impose in the circumstances of the case.

2. The power of the Assessing Officer under section 220(6) is quasi-judicial and coupled with a duty. It should be exercised reasonably and fairly and not arbitrarily or based upon matters extraneous or irrelevant. In exercising his power, the Assessing Officer should not act as a mere tax-gatherer but as a quasi-judicial authority vested with the power of mitigating hardship to the assessee. If the Assessing Officer does not discharge his duty, he may be compelled by Court (by a writ under article 226) to discharge his duty, or (to put it differently), to exercise his discretion honestly and objectively—*Vetcha Sreeramamurthy* v. *ITO* [1956] 30 ITR 252 (AP).

■ Section 220(6) confers power on the assessing authority to keep the recovery proceedings in abeyance till the disposal of the appeal with or without conditions. In *Gajanana Agencies* v. *ITO* [1995] 78 Taxman 466 (Mad.), the order of the Assessing Officer, *inter alia,* provided, that the petitioner be allowed to pay the demand in 10 equal monthly instalments. The Court held that it was difficult to read this order as an order contemplated under section 220(6). This order was another mode of enforcing the recovery of tax. It was apparent that the proceedings for collection of tax had not been kept in abeyance at all. What was directed was that the assessee must pay the entire amount in 10 equal instalments. In other words, by virtue of this order the assessee was compelled to pay the entire amount in 10 equal instalments. It appeared that the order was intended to gather tax and not to stay the collection of tax as contemplated under section 220(6).

3. The Assessing Officer should give a hearing to the assessee before rejecting his application and should record in writing his reasons for rejection.

4. Vide Circular No. 530, dated March 6, 1989, the Assessing Officer shall exercise his discretion under section 220(6) (subject to such conditions as he may think fit to impose) so as to treat the assessee as not being in default in respect of the amount in dispute in the appeal in the following situations :

a. the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which, there exist conflicting decisions of one or more High Courts or, the High Court of jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment ; or

b. the demand in dispute relates to issues that have been decided in favour of the assessee in an earlier order by an appellate authority or Court in assessee's own case.

In the two situations mentioned above, the assessee will be treated as not in default only in respect of the amount attributable to such disputed points. Further, where it is subsequently found that the assessee has not co-operated in the early disposal of appeal or where a subsequent pronouncement by a higher appellate authority or Court alters the situation referred to above, the Assessing Officer will no longer be bound by these instructions and will exercise his discretion independently.

In respect of other cases, not covered by (*a*) or (*b*) above, the Assessing Officer will take into account all the relevant factors and communicate his decision to the assessee in the form of a speaking order. While exercising discretion under this provision, the financial capacity of the assessee to pay the demand will not be relevant.

5. The Calcutta High Court in ***Golam Momen*** v. ***CIT*** [2003] 131 Taxman 428 laid down the following considerations which may form guidance for exercising the discretion : (*a*) whether there is a *prima facie* case in favour of the assessee; (*b*) the amount of tax and penalty involved in the appeal; (*c*) the capacity of the assessee to pay the amount; (*d*) undue hardship to the assessee; and (*e*) nature of security offered by the assessee. While considering the above aspects, the authority must have also in mind the adverse effect that may ensue on the public revenue in case stay is granted, though it may not be the primary concern. Further, the Calcutta High Court in *Dunlop India Ltd. (No. 2)* v. *Asstt. CIT* [1990] 183 ITR 532/53 Taxman 473 held that the order must specify why, how and in what manner such discretion has been exercised assuring that the reason that has been given does not seem to be unreasonable.

437.3-2 *POWER OF APPELLATE AUTHORITY TO GRANT STAY* - The following points should be noted—

1. Even in a case where the assessee has not filed an application under section 220(6), he can very well approach the appellate authority for staying collection of tax pending the appeal—*Kesav Cashew Company* v. *CIT* [1994] 122 CTR (Ker.) 52.

2. The power of the appellate authority to stay the recovery of the demand of dues which are the subject-matter of appeal pending before him, is independent of the provisions of section 220(6)—*Prem Prakash Tripathy* v. *CIT* [1994] 208 ITR 461 (All.)

3. It is not necessary that before invoking the power of the first appellate authority, an assessee should approach the Assessing Officer under section 220(6) or that the Assessing Officer must reject the assessee's prayer for stay of the demand—*Tin Mfg. Co. of India* v. *CIT* [1995] 78 Taxman 249 (All.). But once the first appellate authority grants stay, there is no power in the Act authorising the first appellate authority to review its order passed staying tax collection—*A.P. Kuruvilla & Co.* v. *CBDT* [1995] 214 ITR 183 (Ker.).

437.4 ***Procedure in appeal*** - The Commissioner (Appeals) shall fix a day and place for the hearing of the appeal, and shall give notice of the same to the appellant and to the Assessing Officer against whose order the appeal is preferred.

■ The following shall have the right to be heard at the hearing of the appeal —

a. the appellant, either in person or by an authorised representative;

b. the Assessing Officer, either in person or by a representative.

■ The Commissioner (Appeals) shall have the power to adjourn the hearing of the appeal from time to time.

■ The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the Commissioner (Appeals).

■ The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

■ The Commissioner (Appeals), where it is possible, may hear and decide every appeal within a period of one year from the end of the financial year in which the appeal is filed. Further, the appellate order shall be issued within 15 days of last hearing.

■ The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision.

■ On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the assessee and to the Chief Commissioner or Commissioner.

437.4-1 *PRODUCTION OF ADDITIONAL EVIDENCE* - Except in circumstances given below the appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer. In the following cases additional evidence shall be admitted by the Commissioner (Appeals) :

a. where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or

b. where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer ; or

c. where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal ; or

d. where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

■ No additional evidence shall be admitted unless the Commissioner (Appeals) records in writing the reasons for its admission.

■ The Commissioner (Appeals) shall not take into account any additional evidence produced unless the Assessing Officer has been allowed a reasonable opportunity —

a. to examine the evidence or document or to cross-examine the witness produced by the appellant ; or

b. to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

Thus, the first stage is that the assessee seeks permission for the admission of additional evidence, the next stage would be that such permission would be granted by recording reasons and thereafter, the additional evidence would be sent to the Assessing Officer for examination—***Shahrukh Khan*** v. ***CIT*** [2007] 13 SOT 62 (Mum.).

■ Moreover, the Commissioner (Appeals) may direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer) under section 251(1)(*a*) or the imposition of penalty under section 271.

■ *Admission of additional evidence without giving opportunity to the Assessing Officer* - Any order passed by the Commissioner (Appeals) granting relief to the appellant by admitting additional evidence but without giving a specific opportunity of being heard to the Assessing Officer to rebut the same, is in contravention of rule 46A(3). Such orders are liable to be set aside and the matters are normally restored back to the file of the Assessing Officer for fresh examination.

If, however, additional evidence furnished by the assessee before the first appellate authority is in the nature of a clinching evidence leaving no further room for any doubt or controversy, in such a case no useful purpose would be served by forwarding evidence/material to the Assessing Officer to obtain his report and in such exceptional circumstances, the said requirement may be dispensed with—***ITO*** v. ***Industrial Roadways*** [2008] 112 ITD 293 (Mum.).

437.5 ***Powers of Commissioner (Appeals) under section 251*** - The Commissioner (Appeals) enjoys the following powers :

■ In an appeal against an order of assessment, he may confirm, reduce, enhance, or annul the assessment.*

■ In an appeal against an order imposing a penalty, he may confirm or cancel such order to make a variation to reduce or enhance the amount of penalty.

■ In an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, the Commissioner (Appeals) can (with effect from April 1, 2008) confirm, reduce, enhance or annul the assessment after taking into consideration the following -

1. The material and other information produced by the assessee before the Settlement Commission.

2. The results of the inquiry held by the Settlement Commission.

3. The evidence recorded by the Settlement Commission in the course of proceedings before it.

4. Such other material as may be brought on his record.

■ In any other case, he can pass such orders as he thinks fit.

■ The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant is given a reasonable opportunity of showing cause against such enhancement or reduction. Section 251(2) requires that the assessee must be made aware of the proposed action of the Commissioner (Appeals) for enhancement of income and explanation be obtained and considered. There is no statutory notice prescribed under the Act for issuing show cause notice for enhancement of income — ***Honda Siel Cars India Ltd.*** v. ***CIT*** [2006] 157 Taxman 76 ITAT Delhi Bench.

■ According to *Explanation* to section 251, in disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.

437.6 ***Frequently asked questions*** - The following are some of the frequently asked questions —

437.6-1 *CAN COMMISSIONER (APPEALS) ADMIT ADDITIONAL GROUNDS FOR RAISING NEW CLAIM* - A reading of sections 251(1)(*a*) and 250 makes it clear that the scheme of the Act empowers the first appellate authority to allow the appellant to submit any ground not taken in the grounds of appeal and decide the same unless he is satisfied that failure to raise such ground earlier was wilful or unreasonable. Where there is material evidence before the Assessing Officer to support such claim, such claim (even if not raised before the Assessing Officer), (if raised before the first appellate authority), he ought to consider and decide it, if he is satisfied about the *bona fides*. In each case, it has to decide on facts of its own to entertain or not to entertain new claim or new ground—*CIT* v. *Gokuldass & Co.* [2002] 122 Taxman 849/253 ITR 663 (Raj.). For instance the Commissioner (Appeals) has power to allow assessee to raise its claim for deduction under section 80HH for first time before it, though assessee had not raised such claim before Assessing Officer in view of the fact that returned income was insufficient to absorb deduction—*CIT* v. *Pioneer Press (P.) Ltd.* [2002] 120 Taxman 887 (Mad.).

■ The following points should be noted —

1. The Apex Court in *CIT* v. *Gurjargravures (P.) Ltd.* [1978] 111 ITR 1 has not laid a straight-jacket rule that in no circumstance additional ground for raising new claim which had not been raised before the Assessing Officer, can be permitted to be raised before the appellate authority. It was only in the facts and circumstances of that particular case that the Court held that the permission to raise new grounds had rightly been refused. Moreover, the view contemplated by a two Judge Bench of

*In an appeal filed before the Commissioner (Appeals) against an order of assessment, the Commissioner (Appeals) may not set aside the assessment or refer the case back to the Assessing Officer for making fresh assessment. It will be applicable to appellate orders passed by the Commissioner (Appeals) on or after June 1, 2001.

the Supreme Court in *CIT* v. *Gurjargravures (P.) Ltd.* [1978] 111 ITR 1 that a claim of deduction not made before Assessing Officer cannot be allowed to be raised before the appellate authority if necessary material supporting the claim was not on record, appears (it is respectfully submitted) to be incorrect, especially in view of the decision rendered by a larger bench of the Supreme Court in *CIT* v. *Kanpur Coal Syndicate* [1964] 53 ITR 225. The aforesaid observation gets support from the remarks made by the Supreme Court in *Jute Corporation of India* v. *CIT* [1991] 187 ITR 688 and *CIT* v. *Nirbheram Deluram* [1997] 91 Taxman 181. Moreover, *Explanation* to section 251 clearly envisages in support of decisions in *Jute Corporation of India's* case and *Nirbheram Deluram's* case.

2. The interpretation of rule 46A of Income-tax Rules, 1962 is that it only fetters the rights of the assessee to produce additional evidence but it does not restrain the Commissioner (Appeals)'s powers under section 250(4) or section 250(5)—*CIT* v. *Doyang Wood Products Ltd.* [2002] 124 Taxman 120 (Gauhati) (Mag.).

3. Section 250(4) empowers the first appellate authority, before disposing of an appeal, to make such further enquiry himself as he thinks fit; he does not exceed his jurisdiction if he asks the assessee to produce or file additional evidence or papers in the manner he thinks fit—*CIT* v. *Kamini Finance & Investment Co. Ltd.* [2002] 125 Taxman 259 (Gauhati) (Mag.).

437.6-2 *IS IT POSSIBLE TO RECALL AN EX PARTE ORDER* - Under the residuary power conferred on the Commissioner (Appeals) under section 251(1)(*c*), he is competent to recall his order passed *ex parte*. The powers under this residuary clause are wide enough to cover the recall of an *ex parte* order passed by him.

437.6-3 *IS IT POSSIBLE TO DISMISS APPEAL BECAUSE OF DEFECT IN MEMO OF APPEAL* - Merely because there is a defect in the memo of appeal, the dismissal of appeal without giving opportunity to cure the said defect will be improper—*Malani Trading Co.* v. *CIT* [2001] 252 ITR 670/[2002] 120 Taxman 304 (Bom.). Appeal cannot be dismissed because of defect in memorandum of appeal which is due to default on the part of the assessee's counsel—*Prayag Udyog (P.) Ltd.* v. *ITAT* [2000] 245 ITR 288 (All.). Limitation period applies to the filing of appeal and not to the amendment of memo of appeal—***Shilpa Associates*** v. ***ITO*** [2003] 263 ITR 317 (Raj).

437.6-4 *CAN CIT (APPEALS) DISCOVER NEW SOURCE OF INCOME* - The Commissioner (Appeals) has plenary powers in disposing of an appeal. The scope of his power is coterminous with that of the Assessing Officer. He can do what the Assessing Officer can do and also direct him to do what he has failed to do. If the Assessing Officer has the option to assess one or other of the entities in the alternative, the Commissioner (Appeals) can direct him to do what he should have done in the circumstances of a case—*CIT* v. *Kanpur Coal Syndicate* [1964] 53 ITR 225 (SC). The declaration of law is clear that the power of the Commissioner (Appeals) is coterminous with that of the Assessing Officer.

However CIT (Appeals) cannot discover new source of income. Whenever the question of taxability of income from a new source of income is involved, which has not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may come within the provisions of section 147/148 and section 263, if relevant conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the CIT (Appeals). Thus, the Commissioner (Appeals) has no power to consider a new source of income—*CIT* v. *Sardari Lal & Co.* [2001] 251 ITR 864/[2002] 120 Taxman 595 (Delhi) (FB).

437.6-5 *CAN CIT (APPEALS) ENHANCE TAXABLE INCOME COMPUTED BY ASSESSING OFFICER* - CIT (Appeals) can enhance taxable income computed by the Assessing Officer. The Commissioner (Appeals) cannot, however, enhance income of the assessee without confronting the assessee with the facts of the case relied upon by him—*Brij Lal* v. *ITO* [2002] 75 TTJ (Jodh.) 374. Keeping in view the plain language of section 251, the power to enhance income can be exercised by the Commissioner (Appeals) even on an information furnished by the Assessing Officer—***Goel Die Cast Ltd.*** v. ***CIT*** [2008] 171 Taxman 253 (Punj. & Har.). Moreover, the enhancement of penalty by the Commissioner

(Appeals) without issue of show-cause notice would be without jurisdiction—*Standard Salt Works Ltd.* v. *ITO* [2001] 73 TTJ (Ahd.) 71.

It is now a settled law that the entire assessment is open before the Commissioner (Appeals) and the Commissioner (Appeals) is empowered to deviate from the method of estimating income of the assessee—*Assessing Officer* v. *Ganesh Co-op. (L&C) Society Ltd.* [1998] 67 ITD 436 (Asr.). The Commissioner (Appeals) can invoke provisions of proviso to section 145(1)—*Greater Ashoka Land & Dev. Co. (P.) Ltd.* v. *CIT* [2001] 79 ITD 595 (Delhi).

437.6-6 *WHAT IS THE STATUS OF CIT (APPEALS) VIS-A-VIS ASSESSING OFFICER* - The powers of the Commissioner (Appeals) in the course of its appellate jurisdiction are coterminus with the powers of the Assessing Officer. In other words, the Commissioner (Appeals) can do what the Assessing Officer could do but has not done. This applies in a reverse way as well. The Commissioner (Appeals) cannot do what the Assessing Officer could not have done. He does not get the jurisdiction to do certain acts for which the Assessing Officer did not have the jurisdiction—***Elel Hotels & Investments Ltd.*** v. ***CIT*** [2005] 2 SOT 659 (Mum.).

437.7 ***Other points*** - One should also keep in view the following—

■ *Power to levy penalty* - Commissioner (Appeals) is competent to levy penalty if in course of the appellate proceedings, he is satisfied that the assessee has furnished incorrect particulars of his income—*Kamlapat Motilal* v. *CIT* [1962] 45 ITR 266 (SC).

■ *Power to reject books of account* - Commissioner (Appeals) has power to reject assessee's books of account which have been accepted by Assessing Officer—*CIT* v. *McMillan & Co.* [1958] 33 ITR 182 (SC).

■ *No time-limit for passing the order* - Order passed by the Commissioner (Appeals) is not hit by limitation in section 153(1)—*H.A. Shah & Co.* v. *CIT* [1958] 34 ITR 401 (Bom.).

■ *Doctrine of merger* - Only that part of the Assessing Officer's order merger with the order of the Commissioner (Appeals) in respect of which the Commissioner (Appeals) has exercised appellate jurisdiction—*CIT* v. *Saksteria Cotton Mills Ltd.* [1980] 124 ITR 570 (Bom.).

■ *Law applicable* - If during pendency of appeal or reference, law is amended retrospectively, amended law is to be applied by the authority deciding appeal/reference—*CIT* v. *Straw Products Ltd.* [1966] 60 ITR 156 (SC).

■ *Appeal against withdrawal of interest* - Appeal is maintainable before Commissioner (Appeals) against withdrawal of interest granted under section 244A—***Kanubhai A. Patel*** v. ***CIT*** [2004] 89 ITD 255 (Ahd.).

Revision by the Commissioner of Income-tax

438. In the following cases the Commissioner of Income-tax can revise an order passed by the Income-tax Officer.

438.1 ***Revision of orders prejudicial to revenue [Sec. 263]*** - The provisions of section 263 are given below-

1. The Commissioner may call for records and examine the proceedings under the Act.

2. The Commissioner thinks that—

a. the order passed by the Assessing Officer is erroneous; and

b. the error must be such that it is prejudicial to the interest of the revenue.

3. If conditions 2(*a*) and 2(*b*) are satisfied, the Commissioner can pass such order as the circumstances of the case justify. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct a fresh assessment. The Commissioner is fully empowered to adopt any one of the three courses. Before passing an order, the Commissioner should give a reasonable opportunity to the assessee of being heard.

■ *Two requisites* - Two pre-requisites must be present before the Commissioner can exercise the revisional jurisdiction conferred on him. First is that the order passed by the Assessing Officer must be erroneous. Second is that the error must be such that it is prejudicial to the interests of the revenue. If the order is erroneous but it is not prejudicial to the interests of the revenue, the Commissioner cannot exercise the revisional jurisdiction under section 263(1)—*H.H. Maharaja Raja Pawar Dewas* v. *CIT* [1982] 138 ITR 518 (MP). Conversely, if the order is not erroneous but is prejudicial to the revenue, the Commissioner cannot take action under section 263(1)—*Malabar Industrial Co. Ltd.* v. *CIT* [2000] 109 Taxman 66 (SC).

438.1-1 *ORDERS WHICH CAN BE REVISED BY THE COMMISSIONER UNDER SECTION 263* - Apart from orders passed by an Assessing Officer [including an order under section 143(1)], the following orders can also be revised by the Commissioner —

a. an order of assessment made by the Assistant Commissioner or the Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A ;

b. an order made by the Joint Commissioner in exercise of the powers (or in the performance of the functions) of an Assessing Officer conferred on (or assigned to), him under the orders (or directions) issued by the Board or by the Chief Commissioner or Director General (or Commissioner authorised by the Board in this behalf) under section 120.

438.1-2 *"RECORD" - MEANING OF* - The Commissioner may call for and examine the "record" of any proceeding under the Act. The term "record" means record as it stands at the time of examination by the Commissioner. In other words, the materials which were not in existence at the time the assessment was made and came into existence afterwards can be taken into consideration by the Commissioner for the purpose of invoking his jurisdiction under section 263(1).

■ *"Record" of other persons* - The power of a Commissioner under section 263 is wide enough to make enquiry in case of an assessee on the basis of any other person's record—*CIT* v. *Arunaben Sumankumar* [2002] 124 Taxman 57 (Guj.). Even a statement in search operation carried out in relation to another person can be considered as forming part of the 'record' which can be examined by the Commissioner for invoking his power under section 263(1)—*CIT* v. *Vallabhdas Vithaldas* [2002] 253 ITR 543/123 Taxman 110 (Guj.).

438.1-3 *PREJUDICIAL TO THE INTEREST OF REVENUE* - The phrase "prejudicial to the interests of the revenue" is not an expression of art and is not defined in the Act.

■ *Losing tax lawfully payable* - If due to an erroneous order of the Assessing Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue.

■ *Where two views are possible* - Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue. For instance, when an Assessing Officer adopts one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Assessing Officer is unsustainable in law—*Malabar Industrial Co. Ltd.* v. *CIT* [2000] 109 Taxman 66 (SC), ***Haryana State Co-op. Supply & Marketing Federation Ltd.*** v. ***CIT*** [2004] 90 ITD 551 (Chd.). In section 263 proceeding, there is no scope for substituting one view for the other—***SSI Limited*** v. ***CIT*** [2004] 85 TTJ (Chennai) 1049. Mere audit objection and merely because a different view can be taken, are not enough to say that order of the Assessing Officer is erroneous or prejudicial to interest of revenue—***CIT*** v. ***Sohana Woollen Mills*** [2007] 207 CTR (Punj. & Har.) 178.

■ *Order based upon Tribunal's order* - If an order of the Assessing Officer is in accordance with view taken by Tribunal in assessee's case for another year, it cannot be said to be erroneous and prejudicial to interests of Revenue, notwithstanding that a reference was pending before High Court against Tribunal's order — ***Oil & Natural Gas Corpn. Ltd.*** **v. *CIT*** [2006] 157 Taxman 123 (Mag.)/ 104 TTJ 900 (Delhi).

438.1-4 ***ORDER WHICH IS SUBJECT-MATTER OF APPEAL CANNOT BE REVISED*** - If an order passed by the Assessing Officer has been the subject-matter of any appeal, it cannot be revised by the Commissioner. However, the powers of the Commissioner under section 263(1) shall extend to such matters as had not been considered and decided in such appeal.

For instance, in the case of assessment of X Ltd., the Assessing Officer (*i.e.*, Deputy Commissioner) allows and disallows the following expenses.

	Amount Rs.	*Allowed by Assessing Officer* Rs.	*Disallowed by Assessing Officer* Rs.
1. Interest paid to A	40,000	—	40,000
2. Salary paid to B	50,000	20,000	30,000
3. Salary paid to C	60,000	60,000	—

X Ltd. files appeal to the Commissioner (Appeals) in respect of disallowance of Rs. 40,000 (*i.e.*, interest paid to A) and partial disallowance of Rs. 30,000 (*i.e.*, salary paid to B). The Commissioner (Appeals) allows the entire interest paid to A as deduction, though he refuses to interfere with the order of the Assessing Officer on partial disallowance of salary paid to B. In this case, the Commissioner can revise the order of the Assessing Officer only on point *3* (*i.e.*, salary paid to C). He cannot revise the Assessing Officer's order on points *1* and *2* as these points have been the subject-matter of appeal under section 246A. In view of the Supreme Court decision in *CIT* v. *Shri Arbuda Mills Ltd.* [1998] 231 ITR 50, the Commissioner has jurisdiction and powers to initiate proceedings under section 263 in respect of issues not touched by the Commissioner (Appeals) in his appellate order—*CIT* v. *Jaykumar B. Patil* [1999] 236 ITR 469 (SC).

438.1-5 ***PROCEDURE TO BE ADOPTED BY COMMISSIONER*** - The following procedure may be adopted—

1. Examination of record and recording of reasons - For making a valid order under section 263, it is essential for the Commissioner to record an express finding that the order sought to be revised is erroneous as well as prejudicial to the interests of the revenue—*CIT* v. *Seshasayee Paper & Boards Ltd.* [2000] 108 Taxman 464/242 ITR 490 (Mad.).

The Commissioner must examine personally the assessment records before coming to the satisfaction that action is required under section 263—*Sahara India Mutual Benefit Co. Ltd.* v. *CIT* [2002] 74 TTJ (All.) 67.

2. Reasons to be disclosed - The Commissioner must disclose, in his notice to the assessee, the grounds on which he desires to revise. This is essential; otherwise the assessee may not be able to show any cause and the "opportunity of being heard", which section 263 requires, may prove illusory to the assessee. If the assessee does not know on what point he is to be heard, he may not visualise what he has to say at the hearing at all.

3. Reasonable time - The notice to show cause must be served upon the assessee reasonably ahead of the date fixed for hearing. A notice calling upon an assessee to show cause as to why assessment orders for several years should not be revised within an unreasonably short time, should be condemned. What should be the reasonable time must always depend on the facts of each case.

4. Enquiries - The Commissioner is entitled to make his own enquiries for the purpose of revising an order. Ordinarily he must disclose to the assessee materials collected by him on enquiry, if he wants to use the materials against the assessee. The Commissioner, however, need not disclose the source wherefrom he collected the materials.

5. When some of grounds in the notice fails - Even if some of the several grounds disclosed in the notice fail (say, for example, for violation of the rules of natural justice or for want of evidence), even then the revision of assessment may be made on grounds which are substantiated.

6. Absence of assessee - Even if an assessee is absent at the hearing, the Commissioner must not proceed against him on undisclosed grounds or on undisclosed basic materials collected against him. He must give further notice to the absent assessee, if it becomes necessary for him to proceed on the basis of new grounds and undisclosed basic materials.

7. Revision on different grounds - If the Commissioner disclosed one or more grounds in the notice, but revises the order on an entirely different ground, not disclosed to the assessee, that order cannot

be sustained—***Asia Resort Ltd.*** v. ***CIT*** [2005] 143 Taxman 9 (Chd.), ***Colorcraft Kashimira Ceramic Compound*** v. ***ITO*** [2007] 105 ITD 599 (Mum.).

438.1-6 *TIME-LIMIT* - The Commissioner can pass revisional order within the period of two years from the end of financial year in which order sought to be revised was made. The requirement is to make or pass order within limitation and not to serve order within limitation—***Asia Resort Ltd.*** v. ***CIT*** [2005] 143 Taxman 9 (Chd.). Moreover, the time-limit is not applicable in the case of revisional order passed on the direction of the Appellate Tribunal, the High Court or the Supreme Court.

For instance, if the issue of depreciation is not in appeal before the Commissioner (Appeals) and the Assessing Officer's order has reached finality so far as depreciation is concerned, the Commissioner, can revise the part of the order concerning depreciation up to 2 years from end of financial year in which order of the Assessing Officer was passed . This period of limitation cannot be counted from end of financial year in which the order giving effect to the Commissioner (Appeals) was passed—*Tarapore & Co.* v. *CIT* [2002] 83 ITD 473 (Chennai). Similar view is taken by the Apex Court in ***CIT*** v. ***Alagendran Finance Ltd.*** [2007] 162 Taxman 465.

In computing the aforesaid period of limitation, the time taken in giving an opportunity to the assessee to be re-heard under the proviso to section 129 and any period during which any proceeding under section 263 is stayed by an order or injunction of any Court shall be excluded.

438.1-7 *FREQUENTLY ASKED QUESTIONS* - The following are some of the frequently asked questions—

■ *Writ petition - Is it generally permitted* - Since the Act provides for an appeal against an order under section 263 to the Tribunal, the assessee should normally go in appeal when he is aggrieved by such an order. He should not go up or be allowed to invoke the extraordinary jurisdiction of the Court in writ proceedings, even if the grievance is that there was no service of notice or that the service of notice was defective—*CIT* v. *Ramendra Nath Ghosh* [1971] 82 ITR 888 (SC).

■ *Is it possible to invoke section 263 for initiation of penalty proceedings* - Under section 263, the Commissioner cannot set aside the assessment to direct initiation of penalty proceedings—*CIT* v. *Precision Metal Works* [1984] 19 Taxman 584 (Delhi), *CIT* v. *Keshrimal Parasmal* [1985] 48 CTR (Raj.) 61. In other words, non-initiation of penalty proceedings under section 271(1)(*c*) does not render assessment, erroneous or prejudicial to the interest of revenue—*CIT* v. *C.R.K. Swamy* [2002] 254 ITR 158 (Mad.). A contrary view is, however, given in *CIT* v. *Surendra Prasad Agrawal* [2005] 142 Taxman 653 (All.).

■ *Can a debatable issue be taken up under section 263* - The Commissioner can exercise the power under section 263 even in a case where the issue is debatable. The revisional power under section 263 is not comparable with the power of rectification of mistake under section 154—*CIT* v. *M.M. Khambhatwala* [1992] 198 ITR 144 (Guj.).

When, however, two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to interest of the revenue so as to exercise the powers under section 263 unless the view taken by the Assessing Officer is unsustainable in law—***CIT*** v. ***Mehsana Distt. Co.-Op. Milk Producers Union Ltd.*** [2003] 130 Taxman 235 (Guj.). The Commissioner cannot revise order merely because he disagrees with the conclusion arrived at by the Assessing Officer as to allowability of an expenditure as revenue expenditure or because in his opinion Assessing Officer's order should have been written more elaborately—*CIT* v. *Gabriel India Ltd.* [1993] 203 ITR 108 (Bom.).

■ *Is revision extended to all orders or merely assessment order* - The power of the Commissioner under section 263 is not confined to only an order of assessment passed by the Assessing Officer but it extends to all orders passed by him—*CIT* v. *Christian Mica Inds. Ltd.* [1979] 120 ITR 627 (Cal.).

■ *Assessment originally made without enquiry - Can it be revised*- Failure of the Assessing Officer to make an inquiry before granting deduction would render the assessment erroneous and prejudicial to the interest of revenue—*CIT* v. *Seshasayee Paper & Boards Ltd.* [2000] 108 Taxman 464/242 ITR 490 (Mad.). Where the Assessing Officer had accepted entry in the statement of account filed by the assessee showing certain income as agricultural income, without making any enquiry, the exercise of jurisdiction by the Commissioner under section 263(1) would be justified—*Malabar Industrial Co. Ltd.* v. *CIT* [2000] 109 Taxman 66/243 ITR 83 (SC).

Where the Assessing Officer completed assessment proceedings under section 143(3) and admitted that he could not make proper enquiries as assessment was becoming time-barred, there is valid assumption of jurisdiction under section 263 by the Commissioner, in setting aside the assessment and directing the Assessing Officer to make a fresh assessment—***Jagdish Kumar Gulati*** v. ***CIT*** [2004] 139 Taxman 369 (All.). However, one should also keep in view that the normal practice is that whenever any claim of the assessee is accepted, the Assessing Officer may not give any discussion in his order and the discussion is confined only to disallowance made by him. If all the relevant details have been filed by the assessee and the Assessing Officer allows the claim, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make any elaborate discussion in that regard—***Anil Shah*** v. ***CIT*** [2007] 162 Taxman 39 (Mum.) (Mag.).

■ *After subsequent amendment of law - Can action be taken under section 263* - As a consequence of the amendment made with retrospective effect, the power of Commissioner under section 263 shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal—*Dharmapuri District Co-operative Sugar Mills Ltd.* v. *CIT* [2002] 124 Taxman 849 (Mad.).

■ *Revision after raid at the premises of purchaser - Is it possible* - Where the Commissioner having found that the assessee had suppressed the true value of the property which it had sold and that the fact of suppression had come to light when the premises of the purchaser were raided, it was held that the assessment order was prejudicial to the revenue—*Express Newspapers (P.) Ltd.* v. *CIT*[2002] 255 ITR 137/[2003] 126 Taxman 29 (Mad.).

■ *Subsequent adverse ruling by the Supreme Court - Can action be taken under section 263* - Law laid down by the Supreme Court is binding on authorities and if law as laid down by the Supreme Court shows that any of the orders of the authorities is contrary to or inconsistent with decision of the Supreme Court, in that event, such order must be held to be bad and illegal and to that extent it is erroneous and prejudicial to the interests of the revenue, action can be taken under section 263—*CIT* v. *United Commercial Bank* [1993] 201 ITR 162 (Cal.).

Where, however, the decision of the Assessing Officer is based on a jurisdictional High Court decision which was operative at the time of his order, the Assessing Officer's order cannot be treated as erroneous even though subsequently the Supreme Court has reversed such order—***CIT*** v. ***G.M. Mittal Stainless Steel (P.) Ltd.*** [2003] 130 Taxman 67 (SC).

■ *Fresh claim - Can it be entertained* - Even where Commissioner, acting under section 263, sets aside assessment order for a specific purpose, it will be open to assessee to make fresh claim for deduction in fresh assessment and the Assessing Officer would be bound to consider such claim on merits — *CIT* v. *GEO Industries & Insecticides (I) (Pvt.) Ltd.* [1998] 234 ITR 541 (Mad.).

■ *Is revision possible even after issuance of notice under section 148* - Mere issuance of notice under section 148 would not take away jurisdiction of the Commissioner under section 263 to revise an assessment order —*CIT* v. *Gulam Rasool* [1997] 91 Taxman 167/225 ITR 904 (MP). Even after reassessment, the original assessment survives and can be revised if it is erroneous and prejudicial to interests of revenue—*CIT* v. *Kanubhai Engineers (P.) Ltd.* [2000] 241 ITR 665/[2001] 118 Taxman 745 (Cal.).

■ *Mistake of law or mistake of fact - Which can be considered under section 263* - The wordings of section 263 do not distinguish between mistakes of law and facts. The Commissioner assumes jurisdiction if the order passed by the Assessing Officer is 'erroneous and prejudicial to the interest of revenue'. In ***Jubilant Organosys*** v. ***CIT*** [2004] 265 ITR 420/137 Taxman 515 (All.), it was held that under section 263, the Commissioner can correct both the errors of fact and errors of law. His jurisdiction is not limited to correcting errors of law alone as there is no such express restriction in the language of section 263.

438.1-8 *OTHER POINTS* - One should also keep in view the following points—

■ *Speaking order* - The revisional power conferred on the Commissioner is a quasi-judicial power, and hence he must pass a speaking order, giving his own reasons for being satisfied that the order passed by the Assessing Officer was prejudicial to the interests of revenue. An order passed without giving any reason is vitiated in law—*CIT* v. *Sunder Lal* [1974] 96 ITR 310 (All.).

■ *Opportunity of being heard* - Even where the assessee has filed written submissions, oral hearing is still required to be given—*Acme Fabric Plastic Co.* v. *ITO* [1995] 125 CTR (MP) 339.

■ *Erroneous* - An order cannot be termed as 'erroneous' unless it is not in accordance with law—*Anita Jain* v. *CIT* [2002] 122 Taxman 116 (Delhi) (Mag.).

■ *Single line order* - Where single-line order dropping penalties along with detailed office note, which accompanied it, revealed that there was application of mind on the part of the Assessing Officer, the Commissioner is not justified in setting aside such an order holding that a single-line order dropping penalty proceedings does not show application of mind—*Sangrur Vanaspati Mills Ltd.* v. *CIT* [2002] 80 ITD 143 (Chd.)(TM).

■ *Combined order for 2 years* - There is no bar in section 263 that a combined order for two years cannot be passed—***P.N. Writer & Co. Ltd.* v. *CIT*** [2006] 7 SOT 346 (Mum.).

■ *Rectification* - Initiation of a proceeding under section 263 cannot be held to have become bad in law only because an order of rectification was passed—***CIT* v. *Ralson Industries Ltd.*** [2007] 158 Taxman 162 (SC).

■ *Order based upon SC's ruling* - Where the Assessing Officer had given a specific findings, by relying upon the decision of the Supreme Court, that the amount received by the assessee by virtue of restrictive covenant agreement was not taxable as revenue receipt in hands of assessee, merely because Commissioner does not agree with view taken by the Assessing Officer, it cannot be said that the assessment order is erroneous and prejudicial to interest of revenue—***Ravi K. Mody* v. *ITO*** [2006] 151 Taxman 11 (Ahd.)(Mag.).

■ *Ground not mentioned in notice* - If a ground of revision is not mentioned in the show-cause notice issued under section 263, that ground cannot be made on the basis of the order passed under the section, for the simple reason that the assessee would have no opportunity to meet the point—***Maxpak Investment Ltd.* v. *CIT*** [2006] 104 TTJ (Delhi) 881. Order of Commissioner under section 263 cannot be upheld where reasons given in order for holding assessment order as erroneous and prejudicial to interest of revenue, are different from reasons given in show-cause notice issued to assessee—***Colorcraft Kashimira Ceramic Compound* v. *ITO*** [2007] 105 ITD 599 (Mum.).

438.2 *Revision in favour of assessee [Sec. 264]* - The following points should be noted—

1. An assessee can file appeal against the order passed by the Assessing Officer to the Commissioner (Appeals).

2. Alternatively, he can prefer an application to the Commissioner of Income-tax for revising orders passed by the Assessing Officer.

3. Moreover, those cases which are not appealable before the Commissioner (Appeals) can be referred by the assessee to the Commissioner for seeking revision or modification.

4. Revision under section 264 can be made by the Commissioner, either on his own motion or on an application by the assessee, in all cases which are not covered by section 263.

5. No order under section 264 can be passed which is prejudicial to the assessee.

438.2-1 *ORDERS WHICH CAN BE REVISED BY THE COMMISSIONER UNDER SECTION 264* - Under section 264 the Commissioner can take action only on an order passed by the following authorities subordinate to him—

1. The Assessing Officer is subordinate to the Commissioner.

2. By virtue of *Explanation 2* to section 264, the Deputy Commissioner (Appeals) is deemed to be an authority subordinate to the Commissioner. It may be noted that Commissioner (Appeals) is not subordinate to the Commissioner.

438.2-2 *ORDERS WHICH CANNOT BE REVISED BY THE COMMISSIONER UNDER SECTION 264* - The following orders cannot be revised by the Commissioner :

■ If the order is appealable (but appeal is not made) to the order, the Commissioner (Appeals) or the Tribunal, the Commissioner cannot revise it till the time within which the appeal may be made, expires. Moreover, if the appeal lies to the Commissioner (Appeals)/Tribunal, and the right of appeal

is waived by the assessee, the Commissioner may revise the order even before the time for appeal has expired.

■ Where the order has been made the subject of an appeal to the Commissioner (Appeals) or the Tribunal (whether appeal to the Tribunal is by the assessee or Department), the revisional power of the Commissioner under section 264 comes to an end. In other words, it cannot be exercised at all during the pendency, or even after disposal of the appeal by the Commissioner (Appeals) or Tribunal. The remedy under section 264 is not, in the scheme of the Act, meant to serve as supplement to the remedy available by way of an appeal to an appellate authority. The assessee has to make a choice. He has either to choose the appellate forum or revisional forum, and cannot avail of both the forums with regard to the same order. If the assessee has chosen to file an appeal, it is for the assessee to seek all its remedies in respect of matters which can be considered by the appellate forum, before that forum. The assessee's omission to do so cannot afford a justification for invoking the revisional jurisdiction—*Kadri Mills (Coimbatore) Ltd.* v. *CIT* [2000] 243 ITR 861 (Mad.).

438.2-2a WHEN AN ORDER IS SUBJECT OF AN APPEAL TO THE COMMISSIONER (APPEALS) OR TRIBUNAL - Section 264(4)(*c*) provides that the Commissioner shall not revise any order under that section where the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal. A doubt has been raised whether in the following situations the order can be said to have been made "subject of an appeal" :

a. where the appeal was withdrawn by the assessee and it was dismissed as such ;

b. where the appeal was dismissed on the ground that the appeal was incompetent ;

c. where the appeal was dismissed on the ground of limitation.

The Board are of the view that the order cannot be said to have been made "subject of an appeal" if the appeal has been disposed of by the Commissioner (Appeals) or the Tribunal without passing an order under section 251(1) or 254(1) on merits—Circular No. 367, dated July 26, 1983.

■ Where no appeal lies and yet an incompetent appeal is preferred, such appeal will not bar the jurisdiction of the Commissioner to exercise his powers of revision—*Swadeshi Cotton Mills Co. Ltd.* v. *CIT* [1975] 101 ITR 621 (All.).

■ If tax is not paid as required under section 249(4) and the appeal is dismissed, a subsequent revision by the Commissioner under section 264 is not possible—*Manmala Exhibitors* v. *M.C. Joshi* [2002] 257 ITR 563/124 Taxman 762 (Bom.), *Arun Kumar Jain* v. *CIT* [2000] 112 Taxman 357 (All.).

■ The Commissioner does not have the power to revise an order under section 264 if the same order has been made subject to an appeal to the Tribunal, even though the relief claimed in revision is different from the relief claimed in appeal before the Tribunal irrespective of fact whether the appeal is by the assessee or by the department—*Hindustan Aeronautics Ltd.* v. *CIT* [2000] 110 Taxman 311/243 ITR 808 (SC). For instance, where interest has been levied under section 234B and the assessment order is under an appeal to the CIT (Appeals) or Tribunal, the revision application against levy of interest is not maintainable—*G.K. Nair* v. *CIT* [1999] 103 Taxman 151/240 ITR 617 (Ker.).

438.2-3 *TIME-LIMIT* - The time-limit is given below—

438.2-3a COMMISSIONER ACTING *SUO MOTU* - If the Commissioner acts *suo motu* under section 264, he must revise the order within one year from the date of original order.

438.2-3b APPLICATION BY THE ASSESSEE - If the assessee refers to the Commissioner, the application must be made within one year from the date of communication of order, or the date on which he otherwise came to know of it, whichever is earlier.

■ *When delay can be condoned* - The Commissioner may condone delay if the assessee is prevented by "sufficient cause" from making an application within the specified period. When an application for condonation of delay in filing revision petition is made, it is incumbent on the Commissioner to consider whether sufficient cause for condonation of delay is made out by the petitioner, and his order should disclose that he has applied his mind to this aspect—*Maganti Ramachandra Rao & Co.* v. *CIT* [1974] 95 ITR 147 (AP).

■ *Time-limit for passing the order on assessee's application* - The Commissioner can pass an order under section 264 within a period of 1 year from the end of the financial year in which the application is made for revision.

The above stated time-limit shall not apply in cases where an order could not be passed within the prescribed time-limit, in order to give effect to any finding or direction contained in an order of the Appellate Tribunal, High Court or the Supreme Court. Moreover, in computing the period of limitation for this purpose, the time taken in giving an opportunity to the assessee to be re-heard under the proviso to section 129 and any period during which any proceeding of section 264 is stayed by an order or injunction of any Court shall be excluded.

438.2-4 *SCOPE OF COMMISSIONER'S POWER UNDER SECTION 264* - Section 264 does not place any limitation on the extent of the exercise of power by the Commissioner. Hence, the power of the Commissioner is co-extensive with that of the original and the first appellate authority under the Act which means that he can interfere both on questions of fact and law.

■ *Second time revision not possible* - The Commissioner cannot decide a matter second time, on the basis of fresh application of revision filed by the assessee, even if such application is made pursuant to any observations made by him while dealing with the first application. Such observations cannot confer jurisdiction on him to consider the matter once again—*Pt. Sheo Nath Prasad Sharma* v. *CIT* [1967] 66 ITR 647 (All.).

■ *Overall order not to be prejudicial to the assessee* - If there are two errors in an order sought to be revised, one in favour of the assessee and the other against him, and the assessee raises in revision the error against him, the Commissioner acting under section 264 would be seized of the whole case and would be entitled to correct all the errors therein including the one against the assessee and pass an order subject to the limitation that his order should not be prejudicial to the assessee—*K.C. Luckosė* v. *ITO* [1973] 92 ITR 450 (Ker.).

■ *Opportunity of being heard* - A written submission cannot be substituted for oral argument before the Commissioner when dealing with a revision petition. The Commissioner should fix a date for hearing and give an opportunity to the party to say what he has to say through his counsel—*Dulal Chand Pramanick* v. *CIT* [1972] 84 ITR 720 (Ori.), *Pravia V. Asher* v. *Jaidev* 2000 Tax LR 660 (Guj.).

■ *Principle of natural justice* - No principle of natural justice is violated if the Commissioner does not serve upon the assessee a copy of the report of the Assessing Officer filed in answer to the revision petition of the assessee. But it would conduce to a more effective administration of justice if a copy of the report was made available to the assessee—*Asharfi Lal* v. *ITO* [1967] 66 ITR 63 (All.).

438.2-5 *OTHER POINTS* - The following points one should also keep in mind :

1. Every application by an assessee for revision under section 264 shall be accompanied by a fee of Rs. 500.

2. An order by the Commissioner declining to interfere shall, for the purpose of section 264, be deemed not to be an order prejudicial to the assessee.

3. An order of the Commissioner under section 264 is not appealable to the Tribunal under section 253. Moreover, appeal does not lie against such order to the High Court, as an appeal under section 260A to the High Court lies only from an order passed by the Tribunal under section 254. However, the orders passed by the Commissioner under section 264 should satisfy the well settled tests of "judicial act". Therefore, a petition for a writ of *certiorari* under article 226 for quashing the orders of the Commissioner is maintainable—*Dwarka Nath* v. *ITO* [1965] 57 ITR 349 (SC). Illegality, irrationality and impropriety are the only factors, which warrant exercise of power of judicial review by the Court under article 226 of the Constitution. Refusal to condone delay in preferring application under section 264, where no irrationality in such order is pointed out, will not attract writ jurisdiction—*Malibu Estate (P.) Ltd.* v. *CIT* [2002] 122 Taxman 658 (Delhi).

4. The powers under section 264 are much wider than those under section 263. Under section 264, the Commissioner is empowered to entertain even fresh pleas and new grounds and claims, which could not be made by the assessee before the lower authorities.

5. The assessee cannot claim the right of revision in respect of an earlier year on the basis of a finding of the Tribunal for a subsequent year—*Namdang Tea Co. Ltd.* v. *CIT* [1982] 138 ITR 326 (Cal.).

Appeal to the Appellate Tribunal

439. The Appellate Tribunal, constituted by the Central Government, functions under the Ministry of Law. It consists of two classes of members—judicial and accountant.

439.1 ***Appealable orders [Sec. 253]*** - An assessee aggrieved by the following orders may appeal to the Appellate Tribunal :

- The following orders passed by the Deputy Commissioner or Commissioner (Appeals) :

a. order making rectification under section 154 ;

b. order passed by the Commissioner (Appeals) under section 250 ; or

c. order imposing penalty under section 271, 271A or 272A.

- An order passed by an Assessing Officer under clause (*c*) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after June 30, 1995, but before January 1, 1997.
- Order passed by the Commissioner of Income-tax under sections 12AA, 80G(5)(*vi*), 263, 271, 272A or an order passed by him under section 154 amending his order under section 263 or an order passed by a Chief Commissioner, Director General or Director under section 272A.
- An order passed by Assessing Officer under section 115VZC(1) with effect from October 1, 2004.

439.1-1 ***APPEAL TO THE TRIBUNAL BY COMMISSIONER*** - The Commissioner may, if he objects to any order passed by a Commissioner (Appeals) under section 154 or section 250, direct the Assessing Officer to appeal to the Tribunal against the order. However, such direction shall be given only in those cases where tax effect exceeds the specified amount Rs. 2 lakh [*see* para 439.1-2].

439.1-2 ***"TAX EFFECT" SHOULD EXCEED MINIMUM AMOUNT - IN CASE APPEAL IS TO BE FILED BY THE REVENUE*** - Appeals will be filed by the Commissioner of Income-tax only in cases where the tax effect exceeds monetary limits given hereunder—

Appeals in income-tax matters	*Monetary limit (in Rs.)*
Appeal before Appellate Tribunal	2,00,000
Appeal under section 260A before High Court	4,00,000
Appeal before Supreme Court	10,00,000

- *"Tax effect"* - For this purpose, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issue against which appeal is intended to be filed (hereafter referred to as 'disputed issues'). However, the tax will not include any interest thereon. Similarly, in loss cases notional tax effect should be taken into account. In the cases of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.
- *"Tax effect" to be calculated separately for every assessment year* - The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal shall be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified above. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified above. In other words, appeals will be filed by a Commissioner of Income-tax only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one year, appeal shall be filed in respect of all assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed.
- *Reasons to be recorded* - In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income-tax shall specifically record that 'even though the decision is not acceptable, appeal is not

being filed only on the consideration that the tax effect is less than the monetary limit specified above'. Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits—**Instruction No. 5/2008,** dated May 15, 2008. *See* also para 443.

■ *Appeal by revenue not maintainable in cases where "tax effect" is lower* - Where the tax effect involved in revenue's appeal is less than the monetary limit stated above, such appeals are not maintainable even on the ground that the above instructions are private—***CIT*** v. ***Kapoor Singh*** [2008] 23 SOT 297 (Delhi), ***CIT*** v. ***Ashish Gupta*** [2008] 23 SOT 184 (Delhi), ***ITO*** v. ***Amrutha Wines*** [2008] 21 SOT 401 (Hyd.).

439.2 ***Procedure for filing appeal*** - The aggrieved party (*i.e.*, the assessee, or the Commissioner of Income-tax) can submit the appeal within 60 days* of the date on which order sought to be appealed against is communicated to him.

439.2-1 *FORM* - The appeal should be filed in Form No. 36 and should be verified in the prescribed manner.

439.2-2 *ANNEXURE* - The memorandum of appeal must be in triplicate and should be accompanied by two copies (at least one of which should be a certified copy) of the order appealed against, two copies of the relevant order of the Assessing Officer, two copies of the grounds of appeal before the first appellate authority, two copies of the statement of facts, if any, filed before the said appellate authority, and also —

a. in the case of an appeal against an order levying penalty, two copies of the relevant assessment order ;

b. in the case of an appeal against an order under section 143(3) read with section 144A, two copies of the directions of the Deputy Commissioner under section 144A ;

c. in the case of an appeal against an order under section 143, read with section 147, two copies of the original assessment order, if any.

The requirement of that memorandum of appeal shall be accompanied by a certified copy of the order appealed against and is mandatory—*New India Construction Co.* v. *CIT* [1979] 120 ITR 763 (Cal.).

439.2-3 *FEE* - It should be accompanied by a fee as follows —

Particulars	Rs.
Assessed total income : Rs. 1 lakh or less	500
Assessed total income is more than Rs. 1 lakh but not more than Rs. 2 lakh	1,500
Appeals involving total income more than Rs. 2 lakh	1% of the assessed income subject to a maximum of Rs. 10,000
Miscellaneous applications under section 254(2)	50
Stay petitions (Note 1)	500
Any other matter (Note 2)	500

■ *Other points* - One should also keep in view the following-

1. Under same enactment a single stay application can be filed in respect of different appeals or assessment years and as such it would be unreasonable to insist that the assessee should pay the filing fees under section 253(7) not on the basis of number of applications but on the basis of the number of appeals or the number of assessment years involved—*Chiranjilal S. Goenka* v. *WTO* [2000] 66 TTJ (Mum.) 728.

2. Any other matter covers any case not covered above [*e.g.*, filing appeal relating to penalty under section 271(1)(*c*)]—***Vinod Khatri*** v. ***CIT*** [2004] 138 Taxman 27 (Delhi).

*30 days in the case of appeal against order passed under section 158BC(*c*).

3. The above fees will not be payable in the case of an appeal filed by the Assessing Officer against any order passed by a Commissioner (Appeals) under section 154 or section 250.

4. In a case where total income other than agricultural income is less than Rs. 1 lakh, a fee of Rs. 500 is payable for filing appeal before Tribunal even though total income exceeds Rs. 1 lakh on inclusion of agricultural income—*Andhra Pradesh State Electricity Board* v. *ITO* [1994] 49 ITD 552 (Hyd.).

5. Where the assessee's income before set off of unabsorbed depreciation and business losses is more than Rs. 1 lakh but is reduced to *nil* upon such set off, a fee of Rs. 500 is payable—*Andhra Pradesh State Electricity Board* v. *ITO* [1994] 49 ITD 552 (Hyd.).

6. For filing an appeal before the Tribunal, the assessee is required to pay fee on the basis of income as computed by the Assessing Officer under section 143(3) without taking into account the relief granted by the Commissioner (Appeals)—***Kothari Departmental Stores (P.) Ltd.*** v. ***Assessing Officer*** [2005] 96 ITD 142 (Jodh.)(TM).

439.2-4 *SIGNATURE AND VERIFICATION* - The memorandum of appeal must always be signed and verified by the appellant himself, and if there be an authorised representative, it can also be signed by him—*Sheonath Singh* v. *CIT* [1958] 33 ITR 591 (Cal.). Absence of or defect in signature of appellant in memorandum of appeal can be rectified by amendment, the amendment taking effect from the date when the document has originally been filed—*Sheonath Singh* v. *CIT* [1958] 33 ITR 591 (Cal.).

439.2-5 *MEMORANDUM OF CROSS OBJECTION* - The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Commissioner (Appeals) has been preferred by the other party may (even if he may not have appealed against such order or any part thereof) within 30 days of the receipt of the notice, file a memorandum of cross-objections.

439.2-6 *FORM NO. 36A FOR CROSS OBJECTION* - Such memorandum of cross-objections shall be filed in Form No. 36A in triplicate. No fee is required to be paid for filing the memorandum of cross-objections. Such memorandum of cross-objections shall be disposed by the Tribunal as if it were an appeal presented within period of 60 days as prescribed by section 254(3).

439.2-7 *ADMISSION AFTER THE EXPIRY OF TIME-LIMIT* - The Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period of 60 or 30 days, if it is satisfied that there was sufficient cause for not presenting it within that period. Where the assessee sent the memorandum of appeal by registered post, and the fee to the Tribunal by money order and, while the memorandum of appeal reached the Tribunal seven days before the last day for filing the appeal, the money order reached five days later than the last day, it was *held* that since the postal delay was of an unusual type and could not be taken to be an event of normal occurrence, the Tribunal should have condoned the delay under the discretionary powers vested in it and admitted the appeal—*Kella Appalaswamy & Sons* v. *CIT* [1977] 106 ITR 487 (Ori.).

Where the delay in filing appeal to the Tribunal was due to the fact that the assessee had, in accordance with demand notices, erroneously filed appeal to the Deputy Commissioner (Appeals) against the Deputy Commissioner's order, it was held that the delay could be condoned—*Avtar Krishan Dass* v. *CIT* [1982] 133 ITR 338 (Delhi).

A distinction must be made between a case where delay is inordinate and a case where delay is of a few days. Where the assessee appeals for condonation of delay of only seven days on genuine ground of illness, the delay should be condoned—*Vedabai alias Vaijayanatabai Baburao Patil* v. *Shantaram Baburao Patil* [2002] 122 Taxman 114 (SC). Where, however, no reasons whatsoever had been given for delay of 1623 days in filing cross-objection and it was simply a case of negligence, delay could not be condoned—***CIT*** v. ***Turquoise Investments & Finance Ltd.*** [2004] 89 ITD 155 (Indore)

Where appellant is a class IV employee, he is not conversant with income-tax law and he is not being assisted by a legal adviser, delay in filing appeal is to be condoned—***Ram Dayal Kalla*** v. ***ITO*** [2004] 1 SOT 73 (Jodh.).

439.3 ***Order of the Tribunal*** - The Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The Tribunal where it is possible

may hear and decide every appeal within a period of four years from the end of the financial year in which the appeal is filed (applicable from June 1, 2000). The Tribunal shall send a copy of any orders to the assessee and to the Commissioner.

439.3-1 *GROUNDS WHICH MAY BE TAKEN IN APPEAL BEFORE TRIBUNAL* - The appellant shall not (except by leave of the Tribunal) urge or be heard in support of any ground not set forth in the memorandum of appeal. But the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal. However, the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.

439.3-2 *PRODUCTION OF ADDITIONAL EVIDENCE BEFORE TRIBUNAL* - The following points should be noted—

1. The parties to the appeal cannot produce additional evidence (oral or documentary) before the Tribunal.

2. However, if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable to pass the order, the Tribunal may allow such document to be produced or witness to be examined or affidavit to be filed.

3. If the Income-tax Authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence, the Tribunal may allow such evidence to be adduced.

4. For taking action as stated in *2* and *3* (*supra*), reasons should be recorded by the Tribunal.

439.3-3 *CLAIMS NEVER AGITATED BEFORE TAX AUTHORITIES - WHETHER CAN BE ENTERTAINED BY THE TRIBUNAL* - On the basis of different judicial pronouncements, the following broad conclusions may be drawn :

■ *Question of law* - A question of law can be raised for the first time before the Tribunal—*Shaik Ibrahim* v. *CIT* [1968] 69 ITR 117 (AP).

The Bombay High Court in *J.S. Parkar* v. *V.B. Palekar* [1974] 94 ITR 616 has further held that the Tribunal was under a statutory obligation to entertain a pure question of law, or a plea which could not be considered on the evidence already on record, and decide the same, no matter at what stage it was taken.

■ *A new ground* - A new ground connected with another aspect of principal question can be raised for the first time before the Tribunal—*CIT* v. *Home Industries & Co.* [1977] 107 ITR 609 (Bom.). Section 254 defines the power of Tribunal in the widest possible terms. For example, if as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason to prevent the assessee from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item—*National Thermal Power Co. Ltd.* v. *CIT* [1999] 229 ITR 383/97 Taxman 358 (SC).

■ *Discretionary power* - The matter of granting or refusing leave to raise new ground before the Tribunal is at the discretion of the Tribunal. It has to exercise the discretion judicially, *i.e.*, not arbitrarily. So long as, it exercises it for reasons which have some logical connection with the way in which it is exercised, it cannot be said to have acted arbitrarily. It must act on the assumption of the correctness of the reasons found by it ; if the reasons are subsequently found by another authority to be incorrect it cannot be said that the Tribunal acted arbitrarily merely because the reasons on which it based its discretion were incorrect, provided it acted *bona fide*. It is required to act judicially and not correctly—*Phool Chand Gajanand* v. *CIT* [1966] 62 ITR 232 (All.). If, however, it is found that discretion has been exercised arbitrarily, such exercise of discretion can be interfered with by the High Court—*Byramji & Co.* v. *CIT* [1943] 11 ITR 286 (Nag.).

■ *Other rulings* - The following rulings should also be kept in view—

1. Even if additional ground is filed late, the Tribunal can admit it if there are sufficient reasons to condone the delay—*Paras Rice Mills* v. *CIT* [2002] 124 Taxman 216 (Chd.)(Mag.).

2. Where materials were already present on record through balance sheets, mere failure of the assessee to raise legal plea before lower authorities would not bar the Tribunal to admit and consider the same—*CIT* v. *Soni Photo Films (P.) Ltd.* [1998] 67 ITD 81 (Delhi) (SB).

3. Additional ground relating to deletion of interest charged under section 234B involves consideration of a legal point and, therefore, the same deserves to be entertained—*S.K. Patel Family Trust* v. *CIT* [2001] 71 TTJ (Ahd.) 121.

4. Raising of a new additional ground regarding the enhancement of net profit rate, not agitated in original grounds taken in appeal, would tantamount to filing of a fresh appeal and as such admission of new ground will be impermissible if appeal has become time-barred under section 253(3)—*ITO* v. *Hiralal Bhat* [2001] 117 Taxman 122 (Mag.)/72 TTJ (Jodh.) 163.

5. Where the ground raised by the assessee was a pure question of law relating to interpretation of rule 115 and the entire relevant material and evidence in the form of TDS certificates were already available on records, such a ground could be raised before Tribunal even for first time—*Sedco Forex International Drilling Inc.* v. *CIT* [2000] 72 ITD 415 (Delhi).

6. Additional ground regarding assumption of jurisdiction under section 263, can be admitted as it involves interpretation of the provisions of law—*Anita Jain* v. *CIT* [2002] 122 Taxman 116 (Delhi) (Mag.).

439.3-4 ***PROCEDURE FOR FILING AND DISPOSAL OF STAY PETITION*** - Every application for stay of recovery of demand of tax, interest, penalty, fine or any other sum shall be presented in triplicate by the applicant. It should be accompanied by a fees of Rs. 500. Separate applications shall be filed for stay of recovery of demands under different enactments. Every application shall be neatly typed on one side of the paper and shall be in English and shall set forth concisely the following : (*i*) short facts regarding the demand of the tax, interest, penalty, fine or any other sum recovery of which is sought to be stayed ; (*ii*) the result of the appeal filed before the Commissioner (Appeals); (*iii*) the exact amount of tax, interest, penalty, fine or any other sum demanded, as the case may be, and the amount undisputed therefrom and the amount outstanding ; (*iv*) the date of filing the appeal before the Tribunal and its number, if known; (*v*) whether any application for stay was made to the revenue authorities concerned, and if so, the result thereof ; (*vi*) reasons in brief for seeking stay ; (*vii*) whether the applicant is prepared to offer security, and if so, in what form ; (*viii*) prayers to be mentioned clearly and concisely ; (*ix*) the contents of the application shall be supported by an affidavit sworn by the applicant or his duly authorised agent.

■ *Other points* - One should also keep in view the following—

1. An application which does not conform with the above requirements is liable to be summarily rejected.

2. Though there are no hard and fast rules regarding grant of stay, prudence, discretion and circumspection are called for and that stay should not be granted as a matter of course. Considerations about balance of convenience, question of irreparable injury and implications to public interest are to be borne in mind. The power of stay should be exercised when a strong *prima facie* case is made out that the Tribunal will consider whether to stay the recovery proceedings and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal—*ITO* v. *M.K. Mohammed Kunhi* [1969] 71 ITR 815 (SC).

3. Where the reasons recorded by the Tribunal in rejecting the assessee's application for stay of recovery proceedings are opposed to judicial canons, the High Court can direct the Tribunal to consider merits of application for stay in pending appeal on basis of accepted judicial principles—*Shiv Shakti Rubber & Chemicals Works* v. *ITAT* [1995] 80 Taxman 179 (All.).

4. Until the application of a petitioner for stay of the demand appealed against is considered by the Tribunal and the orders are passed by the Tribunal, the demand appealed against should be stayed—*Bongaigaon Refinery & Petrochemicals Ltd.* v. *CIT* [2002] 256 ITR 698 (Gauhati).

5. Stay application is listed for hearing and the Assessing Officer is duly informed to that effect. During pendency of stay application for disposal, the Assessing Officer attaches bank account of assessee and takes bank draft from bank. Once application is made and listed for hearing, the Assessing Officer is not justified in recovering amount under section 226(3)—***KLM Royal Dutch Airlines*** v. ***CIT*** [2005] 1 SOT 659 (Delhi).

6. Merely because the assessee has approached Commissioner for stay of recovery of demand and given some instalments as per order of the Commissioner, it cannot be estopped from filing an application for the stay of demand before the Tribunal—***Reuters India (P.) Ltd.*** v. ***CIT*** [2004] 3 SOT 886 (Delhi).

7. It is a well-settled proposition that the assessee before invoking the jurisdiction of the Tribunal for the grant of stay must establish that he has a *prima facie* case, balance of convenience and likelihood of suffering of irreparable loss if the stay is not granted. Not a single Court has deviated ever from this settled proposition—***Deeshe Appliances (P.) Ltd.*** v. ***CIT*** [2004] 84 TTJ (Delhi) 293.

439.3-4a OUT OF TURN HEARING - If the Tribunal proceeds to stay recovery of taxes or penalties payable by or imposed on the assessees as a matter of course, the revenue will be put to great loss because of inordinate delay in disposal of appeals by the Tribunal—*ITO* v. *M.K. Mohammed Kunhi* [1969] 71 ITR 815 (SC), and, therefore, the grant of stay by the Tribunal is always coupled with grant of an out of turn hearing—*B.N. Nobis & Co.* v. *Joint CIT* [2001] 117 Taxman 150 (Cal.) (Mag.). *Vide* **Instruction No. 17/2003,** the Board has desired that the concerned Chief Commissioners/Director-Generals should invariably request the Tribunal for priority hearing of appeals wherever the demand in dispute is Rs. 10 crore or more, for early resolution of the dispute as also recovery of the disputed demand.

439.3-4b STAY ORDERS GRANTED BY TRIBUNAL TO BE INOPERATIVE IF APPEAL NOT DISPOSED OF IN CERTAIN PERIOD - These provisions were inserted by the Finance Act, 2001 and later on modified by the Finance Act, 2007 and Finance Act, 2008. Provisions as modified by the Finance Act, 2007 are given below -

1. Initially the Tribunal can pass an order of stay only for a period not exceeding 180 days from the date of the order staying the demand [first proviso to section 254(2A)].

2. The Tribunal shall dispose of appeal within the aforesaid period.

3. If appeal is not disposed of within the aforesaid period, the period of stay may be extended. The total period of initial stay and extended period or periods cannot be more than 365 days. Extension is possible only if delay is not attributable to the assessee [second proviso to section 254(2A)].

4. Appeal shall be disposed of by the Tribunal within the extended period.

5. If appeal is not disposed of within the extended period or periods, the order of stay shall stand vacated after the expiry of such period [third proviso to section 254(2A)].

■ *Judicial interpretation of the above provisions* - The Bombay High Court, in the case of ***Narang Overseas (P.) Ltd.*** v. ***ITAT*** [2007] 295 ITR 22 has examined the aforesaid provisions and concluded that third proviso to section 254(2A) is applicable only when the hearing of the appeal has been delayed for acts attributable to the assessee and there would be power in the Tribunal to extend the period of stay on good cause being shown and on the Tribunal being satisfied that the matter could not be heard and disposed of for reasons not attributable to the assessee.

■ *Amendment by the Finance Act, 2008* - To supersede the aforesaid judicial pronouncement, the third proviso to section 254(2A) has been substituted with effect from October 1, 2008 by the Finance Act, 2008. The substituted proviso provides that the order of stay shall be vacated after the expiry of 365 days, even if the delay in disposing of the appeal is not attributable to the assessee.

439.3-5 AWARD OF COST OF APPEAL - The cost of any appeal to the Appellate Tribunal shall be at the discretion of the Tribunal.

439.3-6 *RECTIFICATION OF MISTAKES [SEC. 254(2)]* - The following points should be noted—

■ Any mistake in the order passed by the Tribunal, which is apparent from the record, may be rectified by the Tribunal.

■ For rectification, mistake can be brought to the notice of the Tribunal by the assessee or the Assessing Officer. Action can also be taken *suo motu.*

■ Such rectification can be done within four years from the date of the order under section 254(2).

Section 254(2) is in two parts—

Part 1 - Suo motu exercise of power of rectification by the Tribunal.	Tribunal can rectify its own order within four years from the date of the order.
Part 2 - Rectification of the order passed by Tribunal when mistake is brought to its notice by the assessee or the Assessing Officer.	The Tribunal can rectify order passed by it within four years from the date of the order. However, if application for rectification is made within four years, and the Tribunal takes his own time to dispose of the application, it is not correct to state that the application cannot be entertained by the Tribunal beyond four years—***Sree Ayyanar Spinning & Weaving Mills Ltd. v. CIT*** [2008] 171 Taxman 498 (SC).

■ If an amendment has the effect of enhancing an assessment (or reducing a refund or otherwise increasing the liability of the assessee), it shall not be made unless the Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

■ Where decision of Tribunal in reported cases had not been placed on record or brought to notice of Tribunal and Tribunal did not follow those decisions, it cannot be said that there was mistake in order of Tribunal falling within ambit of section 254(2). However, where Tribunal has recorded finding that there is no decision of the Tribunal in case of other assessees without making any enquiry from the assessee or the department, there is a mistake in order of Tribunal which should be rectified—***Vesta Investment & Trading Co. (P.) Ltd.*** v. ***CIT*** [2007] 13 SOT 23 (Chd.) (URO).

439.3-6a FREQUENTLY ASKED QUESTIONS - The following are some of the frequently asked questions—

■ *Is it possible to get rectification on the basis of subsequent High Court or Supreme Court ruling* - Rectification of the Tribunal's order can be made on the basis of a subsequent High Court or Supreme Court decision—*Neeta S. Shah* v. *CIT* [1991] 191 ITR 77 (Kar.), *M.A. Muthiah Chettiar* v. *CIT* [1999] 107 Taxman 37 (Mad.).

■ *Omission on the part of Tribunal- Whether rectification is available* - In a case where Tribunal fails or omits to deal with an important contention affecting maintainability/merits of appeal, it must be deemed to be a mistake apparent from record, which empowers the Tribunal to reopen appeal and rectify same if it is so satisfied—*Laxmi Electronic Corpn. Ltd.* v. *CIT* [1991] 54 Taxman 515 (All.).

■ *Is it possible to raise fresh grounds* - An assessee cannot apply for rectification of the Tribunal's order by raising fresh grounds which were not raised earlier—*Kaluram* v. *CIT* [1983] 141 ITR 589 (MP).

■ *Whether rectification is available in respect of rejection of rectification appeal* - An order rejecting an application for rectification under section 254(2) is not available to be rectified under section 254(2), since, though it may relate to an appeal, it is not an order passed by the Tribunal under section 254(1)—*CIT* v. *President, ITAT* [1992] 63 Taxman 338 (Ori.).

■ *Can the entire order be reopened* - In the garb of application for rectification, the assessee cannot seek to reopen and reargue the whole matter which is beyond the scope of section 254(2)—*Jain Dharam Shalal Charitable Trust* v. *CIT* [1994] 77 Taxman 424 (Delhi).

Thus, in the normal course, the power of rectification cannot be extended for recalling the entire order, obviously it would mean passing of a fresh order. That does not appear to be the legislative intent. However, in a case where the factual mistake is so apparent that it becomes necessary to correct the same, the Tribunal would be justified in not only correcting the said mistake by way of rectification but if the judgment has proceeded on the basis of that fact, it would be justified in recalling such order and posting it for hearing—***Champa Lal Chopra*** v. ***State of Rajasthan*** [2003] 131 Taxman 417 (Raj.).

■ *Is it possible to get rectification because a different interpretation of law is available* - Possibility of a different view of law does not justify the Tribunal to recall appellate order in exercise of the power under section 254(2)—*Asstt. CIT* v. *Dr. Ved Prakash* [1994] 209 ITR 448 (AP).

■ *Is it possible to get rectification if a ruling is not considered* - Non-consideration by the Tribunal of a judgment cited before the Tribunal, constitutes a mistake apparent from record within meaning of section 254(2)—***Mohan Meakin Ltd.*** v. ***ITO*** [2004] 89 ITD 179 (Delhi) (TM). Moreover, where a decision of three Member Bench of the Tribunal is not taken into account by the Tribunal while it takes into account a two-member Bench decision, it is a mistake apparent from record in Tribunal's order—***Rati Ram Gotewala*** v. ***CIT*** [2004] 84 TTJ (Delhi) 513.

■ *Can the Tribunal consider latest ruling of High Court or Supreme Court which was not available at the time rectification proceedings were initiated* - When a proceeding is pending before the Tribunal for disposal, the Tribunal is bound to take note of latest decisions pronounced by High Court or Supreme Court on subject. It will be so even if decision is not available when rectification proceedings under section 154 are initiated—***CIT*** v. ***Dynavision Ltd.*** [2004] 88 ITD 213 (Chennai).

439.3-6b CONCLUSIONS - On the analysis of various judgments of High Courts and the Supreme Court, the following principles emerge with regard to the powers of the Tribunal to rectify and recall its own order :

■ The power of the Tribunal under section 254(2) is confined to rectifying any mistake apparent from the record.

■ If the error or mistake is one, which could be established only by long-drawn arguments or by way of process of investigation and research, it is not a mistake apparent from the record. A debatable point of law is not a mistake apparent from record.

■ The Tribunal cannot, in exercise of its power of rectification, look into some other circumstances which would support or not support its conclusion. The Tribunal cannot re-decide the matter and it has no power to review its order.

■ Where the Tribunal has over-looked the relevant material on record, there would be an error apparent from record, which can be rectified by setting aside the order for fresh consideration.

■ Where a material fact brought to the notice of the Tribunal has been lost sight of, the Tribunal has the power to rectify the mistake so committed, provided the material fact has an important bearing on the ultimate decision—*Puransingh M. Verma* v. *ITO* [2001] 78 ITD 277 (Ahd.) (TM).

■ The rectification power can be invoked in the following situations, *viz.*,—

A provision is misread and wrong view is taken.

- There is a glaring and obvious error.
- The appropriate provision of law has not been considered.
- The order is passed under an erroneous impression (of fact or law).
- The order is contrary to the decision of a High Court (even though non-jurisdictional), and there is no contrary decision to that decision from any other High Court.
- The contentions raised by the appellant are not dealt with by the Tribunal in its order.
- One or more grounds in the memorandum of appeal or cross memorandum are not considered in the order.
- There is a wrong application of a judgment of a High Court.

439.4 *Judicial rulings* - One should keep in view the following judicial rulings :

■ *Withdrawal of appeal not permissible* - An assessee having once filed an appeal cannot withdraw it. Consequently, the Tribunal cannot allow such withdrawal of appeal, and if it does so, the Tribunal would be acting without jurisdiction—*Bhartia Steel & Engg. Co. (P.) Ltd.* v. *ITO* [1974] 97 ITR 154 (Cal.). Cross-objection is nothing but an appeal and even where appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined—*CIT* v. *Kripa Chemicals (P.) Ltd.* [2002] 82 ITD 449 (Pune).

■ *Appeal against order of penalty* - In an appeal against the order of penalty, the power of the Tribunal is wide enough to include the power to call for a report after giving opportunity to the assessee as well as the revenue to adduce such evidence as it deems necessary for the purpose of disposal of the controversy in dispute—*Thakur V. Hari Prasad* v. *CIT* [1987] 167 ITR 603 (AP).

■ *Creature of law* - As the Tribunal is a creature of the statute, it can only decide a dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of constitutionality and vires of a provision is foreign to the scope of its jurisdiction—*Mysore Breweries Ltd.* v. *CIT*[1987] 166 ITR 723 (Kar.), *CIT* v. *Ved Parkash*[1989] 178 ITR 332 (Punj. & Har.), *Singhai Nathuram Shrinandanlal* v. *CWT*[1968] 69 ITR 484 (MP).

■ *Court of appeal* - The position of the Appellate Tribunal is the same as a Court of appeal under the Civil Procedure Code and the powers of the Appellate Tribunal are identical with the powers enjoyed by an appellate Court under the Code—*New India Life Assurance Co. Ltd.* v. *CIT*[1957] 31 ITR 844 (Bom.).

■ *Only for assessment year in appeal* - The Tribunal, hearing an appeal, may give directions for reopening assessment of the year to which the appeal relates. It cannot give any directions to reopen the assessment of a period not covered by that year—*CIT* v. *Manick Sons* [1969] 74 ITR 1 (SC).

■ *Speaking order* - Tribunal must record all facts and decisions on it even if point in issue is covered by decision of another bench of Tribunal—*CIT* v. *Hyderabad Asbestos Cement Products Ltd.* [1988] 172 ITR 762 (AP).

■ *Granting of relief* - The Tribunal cannot grant relief larger than what was prayed for in the appeal—*CIT* v. *Krishna Mining Co.* [1977] 107 ITR 702 (AP).

■ *Judicial authority* - The Tribunal performs a judicial function under the Income-tax Act. It is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner of Income-tax in the light of the evidence and the relevant law. The Tribunal is undoubtedly competent to disagree with the view of the Commissioner (Appeals). But in proceeding to do so, the Tribunal has to act judicially, *i.e.*, to consider all the evidence in favour of and against the assessee. An order recorded on a review of only a part of the evidence and ignoring the remaining evidence cannot be regarded as conclusively determining the question of fact raised before the Tribunal—*Udhavdas Kewalram* v. *CIT*[1967] 66 ITR 462 (SC).

■ *Constitutional validity* - Tribunal cannot entertain a question about vires of parent Act but can test vires of subordinate legislation, rules, Notifications, etc.—*CIT* v. *Tata Iron & Steel Co. Ltd.* [1999] 106 Taxman 62 (Mum.) (Mag.).

■ *Appeal only when the assessee/Commissioner is aggrieved against order of CIT (Appeals)* - Where the only ground of appeal was regarding carry forward of loss and it was allowed by the Commissioner (Appeals) and the assessee filed a second appeal on the ground that the assessment itself was time barred which ground was not raised before Commissioner (Appeals), the assessee could not be said to be aggrieved against the order of Commissioner (Appeals) so as to maintain appeal—*Season Rubbers Ltd.* v. *CIT*[2000] 75 ITD 95 (Coch.).

■ *High Court ruling must be followed* - Unless and until there are reasons compelling the Tribunal to take a different view, the decision of any High Court in the country on a particular issue must be followed and should not be ignored only for the reason that the Tribunal does not come under territorial jurisdiction of that particular High Court—*Shriram Transport Finance Co. Ltd.* v. *CIT* [1999] 70 ITD 406 (Mad.). Once an authority higher than the Tribunal, *i.e.*, the High Court, has expressed an opinion on an issue, the Tribunal is no longer at liberty to rely upon earlier decisions of Tribunal even if it were a party to them; such a High Court being a non-jurisdictional High Court does not alter the position—*Tej International (P.) Ltd.* v. *CIT*[2000] 69 TTJ 650/[2001] 118 Taxman 59 (Delhi) (Mag.).

■ *Giving relief to a party not in appeal* - The Tribunal is supposed to pass appropriate order as it may deem fit in the appeal preferred by any of the parties. In case on the principle laid down, if it appears that the order appealed against is contrary to the principle so laid down then the Tribunal cannot

allow the order to remain intact unless there are other reasons for not interfering with the order. There is nothing to prevent the Tribunal from passing an appropriate order in such an appeal preferred by one of the parties even though it might amount to granting of relief to a party, who has not preferred any appeal—***C.C.A.P. Ltd.*** v. ***CIT*** [2004] 141 Taxman 472 (Cal.).

■ *Non-filing against illegal order* - Non-filing of an appeal against an illegal order or an order which has become a nullity cannot, in any way, either validate such order or render it enforceable in law—***CIT*** v. ***Rane Brake Linings Ltd.*** [2005] 272 ITR 405 (Mad.).

Appeal to High Court

440. With effect from October 1, 1998, sections 260A and 260B have been inserted. Under these sections, an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. The appeal may be filed by the Chief Commissioner† or the Commissioner† or an assessee aggrieved by any order passed by the Tribunal. The expression "every order passed in appeal" cannot be construed to take in its fold all interlocutory orders that may be passed by the Appellate Tribunal, during the pendency of the appeal, particularly such orders which are procedural in nature—***Zenith Ltd.*** v. ***CIT*** [2004] 271 ITR 135 (Bom.).

On and from the appointed date (which is not notified till the publication of this book) an appeal shall lie to the National Tax Tribunal from every order passed by the Appellate Tribunal if the National Tax Tribunal is satisfied that the case involves a substantial question of law.

440.1 ***Substantial question of law*** - Appeal under section 260A can be only in respect of a 'substantial question of law'. The expression 'substantial question of law' has not been defined anywhere in the Act. But it has acquired a definite meaning through various judicial pronouncements.

In *Sir Chunilal V. Mehta & Sons Ltd.* v. *Century Spinning & Mfg. Co. Ltd.* AIR 1962 SC 1314, the Apex Court laid down the following tests to determine whether a substantial question of law is involved. The tests are :

a. whether directly or indirectly it affects substantial rights of the parties; or

b. the question is of general public importance; or

c. whether it is an open question in the sense that issue is not settled by the pronouncement of the Supreme Court or Privy Council or by the Federal Court; or

d. the issue is not free from difficulty; and

e. it calls for a discussion for alternative view.

440.1-1 *QUESTION OF LAW v. SUBSTANTIAL QUESTION OF LAW* - There is a difference between a question of law and a substantial question of law. It is not a mere question of law but a substantial question of law that is required for the purpose of appeal under section 260A.

The word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradiction with 'technical', of no substance or consequence, or merely academic. However, it is clear that the Legislature has chosen not to qualify the scope of 'substantial question of law' by suffixing the words "of general importance" as has been done in many other provisions such as section 109 of the Civil Procedure Code or article 133(1)(*a*) of the Constitution—*Santosh Hazari* v. *Purushottam Tiwari* [2001] 251 ITR 84 (SC).

A question of law will be a substantial question of law if it directly and substantially affects the rights of the parties. In order to be 'substantial', it must be such that there may be some doubt or difference

†Appeal will be filed by the Commissioner/Chief Commissioner only in those cases where revenue effect exceeds Rs. 4,00,000 [*see* also para 439.1-2]. The Board has also decided that in cases involving substantial question of law of importance as well as in cases where the same question of law will repeatedly arise, either in the case concerned or in a similar case, such cases should be separately considered on merits without being hindered by the monetary limits—**Instruction No. 2/2005**, dated October 24, 2005.

of opinion or there is room for difference of opinion. If the law is well-settled by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law.

Substantial question of law does not necessarily mean that the question of law must be of general importance. It would be a substantial question of law if there is a substantial question of law between the parties—*Nek Ram Sharma & Co.* v. *ITAT* [2001] 115 Taxman 636 (J&K). It is any question of law which affects the substance of the case. If one is satisfied that the question is one of law, and if it is decided in favour of the prospective appellant it will substantially affect the tax liability or some other matter of substance in the case, then it is a "substantial question of law". Substantial question of law is certainly not a point of law which is sufficiently serious— *West Bengal Electricity Board* v. *CIT* [2002] 248 ITR 252 (Cal.).

440.1-2 *WHEN QUESTION OF FACT BECOMES QUESTION OF LAW* - A question of fact becomes a question of law, if the finding is either without any evidence or material, or if the finding is contrary to the evidence, or is perverse or there is no direct nexus between conclusion of fact and the primary fact upon which that conclusion is based. But, it is not possible to turn a mere question of fact into question of law by seeking whether as a matter of law the authority came to a correct conclusion upon a matter of fact—*Mahavir Woollen Mills* v. *CIT* [2000] 111 Taxman 566 (Delhi).

There is no scope for interference by the Court on a finding recorded when such finding can be treated to be a finding of fact —*M. Pappu Pillai* v. *ITO* [2000] 111 Taxman 381 (Ker.), *Chaman Lal* v. *CIT* [2000] 112 Taxman 291 (Delhi).

440.1-3 *CONCLUDING REMARKS - SCOPE OF SECTION 260A* - On the basis of different court rulings on "substantial question of law", the following broad conclusions may be drawn on the scope of section 260A—

1. An appeal under section 260A cannot be entertained by the High Court on the plea that on the same question of law, a reference has been made and it has been admitted for hearing by the High Court.

2. A finding of fact cannot be disturbed by the High Court in exercise of its powers under section 260A.

3. A question of law which substantially affects the rights of the parties will be "substantial question of law" if it is an open question in the sense that it is debatable and it is not finally settled by the Apex Court or by the concerned High Court or is not free from difficulty or calls for discussion of alternative views.

4. If the question has already been settled by the highest court or the general principles to be applied in determining the question are well-settled and there is a mere question of applying those principles or that the point raised is palpably absurd, the question will not be "a substantial question of law."

5. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the Tribunal (or the first appellate authority). If in a case two inferences are possible, the one drawn by the Tribunal (or the first appellate authority) shall be binding on the High Court in appeal under section 260A. The High Court can substitute its opinion for the opinion of the Tribunal only if it is found that conclusions drawn by the Tribunal are erroneous being contrary to the mandatory provisions of law applicable or the settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. Where a point of law has not been pleaded or found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in appeal under section 260A.

6. Where it is found that the Tribunal or appellate authority has assumed jurisdiction which did not vest in it, the same can be adjudicated in the appeal, treating it as a substantial question of law.

7. An appeal to the High Court lies only when a substantial question of law is involved. It is essential for the High Court to first formulate question of law and thereafter, proceed in the matter.

Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under section 260A without adhering to the procedure prescribed under section 260A.

Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law—***M. Janardhana Rao*** v. ***CIT*** [2005] 142 Taxman 722 (SC).

440.1-4 *QUESTION HELD AS "SUBSTANTIAL QUESTION OF LAW"* - The following have been held as "substantial question of law"—

- An order refusing to condone delay under section 253(5) (but not one condoning it) raises a substantial question of law—*CIT* v. *Agarwal Hardware Works (P.) Ltd.* [2001] 248 ITR 155/117 Taxman 249 (Cal.).
- Where the Tribunal's findings are contrary to documentary evidence, and are based on surmises and conjectures, a question of law will arise—***CIT*** v. ***H.V. Shantharam*** [2003] 128 Taxman 34/261 ITR 435 (Kar.).
- Where the Assessing Officer passed an order under section 201(1A) though jurisdiction in this regard had been transferred by a notification to another ITO, a substantial question of law arose from the Assessing Officer's order—*West Bengal State Electricity Board* v. *CIT* [2001] 248 ITR 152/[2003] 128 Taxman 535 (Cal.).
- Entitlement to relief under section 80HHC is a substantial question of law—***Reena Sethi*** v. ***ITO*** [2003] 261 ITR 288 (Delhi).
- Whether there was any material for Tribunal to hold that a sum of Rs. 3,49,000 representing the estimated family expenses during the block period 1987-88 to 1997-98 represented the undisclosed income of the appellant, involved a substantial question of law—*H. Shahul Hameed* v. *CIT* [2002] 125 Taxman 337/258 ITR 266 (Mad.).

440.1-5 *QUESTION NOT HELD AS SUBSTANTIAL QUESTION OF LAW* - The following are not held as substantial question of law—

- No substantial question of law can be said to be involved where the Tribunal upholds disallowance of interest paid on borrowed capital, attributable to interest-free advance to the sister concern—*CIT* v. *Marudhar Hotels (P.) Ltd.* [1999] 107 Taxman 452/[2000] 245 ITR 138 (Raj.).
- Where the Tribunal had given sufficient and cogent reasons based on evidence, no substantial question of law can arise—***Vijay Kumar Talwar*** v. ***ITO*** [2003] 260 ITR 266/123 Taxman 181 (Delhi).
- Question as to whether the assessee, who is only providing financial assistance to educational institutions, is entitled to the benefit of section 10(*22*), is not a substantial question of law—***Director of Income-tax*** v. ***Sir Shri Ram Education Foundation*** [2003] 262 ITR 164 (Delhi).
- Question whether provident fund payments actually made during the previous year but beyond the due date would have to be disallowed, is not a substantial question of law—***Halmira Estate Tea (P.) Ltd.*** v. ***CIT*** [2003] 179 CTR (Cal.) 312.
- No substantial question of law arises from Tribunal's finding as to the estimate of valuation of cinema hall—*Nataraj Cinema* v. *CIT* [2002] 257 ITR 415/[2003] 131 Taxman 377 (Cal.).
- Where the Assessing Officer, during assessment on remand, did not give opportunity to the assessee to cross examine DVO, despite directions given by Tribunal to do so, while restoring the matter, no substantial question of law arose from the Tribunal's order upholding setting aside of assessment made on remand—***ITO*** v. ***Mahavir Builders*** [2003] 131 Taxman 442/259 ITR 332 (Guj.).
- Simply because a question of law is involved in the appeal and, on the same question, a reference has been made, it will not be a substantial question of law for the purpose of section 260A—*CIT* v. *Marudhar Hotels (P.) Ltd.* [1999] 107 Taxman 452/[2000] 245 ITR 138 (Raj.).
- Sufficiency or adequacy of evidence does not give rise to a question of law—*Rameshwar Lal Mali* v. *CIT* [2002] 256 ITR 536 (Raj.).
- Question not raised before the Tribunal and not having a finding of the Tribunal on such question, cannot be raised before the High Court as a substantial question of law—*CIT* v. *Ashima Syntex Ltd.* [2001] 251 ITR 133/[2002] 122 Taxman 230 (Guj.).

■ Once the Commissioner (Appeals) and then lastly the Tribunal have accepted certain explanation of assessee and, accordingly, deleted certain addition made by the Assessing Officer, it does not involve any substantial question of law—***CIT*** v. ***Om Prakash Porwal*** [2004] 141 Taxman 281 (MP).

■ No substantial question of law arose from order of Tribunal allowing deduction for commission where there was a finding as to genuineness of payments and that commission was paid for business purposes only—***CIT*** v. ***Pure Pharma (P.) Ltd.*** [2004] 270 ITR 382 (MP).

■ Inquiry about assessee's claim and explanation about any business expenditure is essentially factual in nature and does not involve any question of law—***CIT*** v. ***Chemifine*** [2004] 140 Taxman 535 (MP).

440.2 ***Memorandum, fees and time-limits*** - In an appeal the Memorandum of Appeal shall precisely state the substantial question of law involving the appeal.

■ *Time-limit* - The memorandum appeal shall be filed within 120 days from the date on which order is received by the assessee or the Chief Commissioner or the Commissioner.

■ *How to calculate period of limitation* - The period of limitation commences from the date of service of order of Tribunal on concerned Commissioner who has jurisdiction over the assessee and not from the date of service on Commissioner of another circle who has no jurisdiction—*CIT* v. *ITAT* [2000] 112 Taxman 355 (Delhi).

■ *Can delay be condoned* - Section 260A prescribes special period of limitation for preferring appeal under section 260A. However, it does not by necessary implication exclude application of sections 4 to 24 of the Limitation Act, 1963 for condoning delay in filing appeal under section 260A. In other words, the provision of section 5 the Limitation Act, 1963 would be applicable for condoning delay in filing appeal under section 260A—***CIT*** v. ***Anandilal Poddar & Sons Ltd.*** [2005] 148 Taxman 513 (Cal.), ***CIT*** v. ***Velingkar Bros.*** [2007] 161 Taxman 264 (Bom.).

■ *Fees* - The fee for filing the appeal to the High Court shall be such fee as may be specified in the relevant law relating to Court fees for filing appeals to the High Court.

■ *Points not raised in memo of appeal* - A point not raised in memo of appeal cannot be permitted to be raised in appeal—*CIT* v. *Diners Club India Ltd.* [2000] 163 CTR (Bom.) 330.

440.3 ***Formulation of question of law*** - Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. The appeal shall be heard only on the questions of formulated, and the respondents shall at the hearing of appeals, be allowed to argue that the case does not involve such question. However, nothing shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such questions.

440.4 ***Issues which may be determined by the High Court*** - The High Court may determine any issue which has not been determined by the Tribunal or has been wrongly determined by the Tribunal by reason of a decision on such question of law.

440.5 ***Case to be heard by not less than two Judges*** - Section 260B provides that an appeal filed under section 260A shall be heard by a bench of not less than two Judges of the High Court and shall be decided in accordance with the opinion of such Judges or the majority, if any. Where, however, there is no such majority, the point of law upon which they differ shall be referred to one or more of the Judges of the High Court and shall be decided according to the opinion of the majority of the Judges who have heard the case, including those who first heard it.

440.6 ***Decision of High Court*** - The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

440.7 ***Stay of recovery proceedings*** - Section 265 states that tax shall be payable in accordance with the assessment made in the case even if reference is pending in the High Court under section 256 or the Supreme Court under section 257 or an appeal is pending in the Supreme Court under section 261.

Section 265 is not applicable if an appeal is pending in the High Court under section 260A.

440.7-1 *STAY OF RECOVERY WHEN REFERENCE IS PENDING IN HIGH COURT UNDER SECTION 256* - The following propositions emerge from rulings given in *CIT* v. *Bansi Dhar & Sons* [1986] 157 ITR 665 (SC), *CIT* v. *Chathuram Bhadani* [1986] 157 ITR 665 (SC), *Dwarka Prasad Bajaj* v. *CIT* [1980] 126 ITR 219 (Cal.) :

1. The High Court has no power to stay recovery of tax while exercising its advisory jurisdiction under section 256.

2. Even during the pendency of the reference under section 256 such power to stay continues with the Tribunal.

3. If the Tribunal exercises such power or fails to exercise such power properly, on writ under article 226 or 227 such action or non-action can be corrected by the High Court.

440.7-2 *STAY OF DEMAND WHEN APPEAL IS PENDING IN HIGH COURT UNDER SECTION 260A* - From a careful comparison of the language used in section 260A of the Act and the language used in section 100 of the CPC, it cannot be disputed that the language used in section 260A is similar to the language used in section 100 of the CPC. Similarly, sub-section (6) of section 260A is somewhat similar to section 103 of the CPC. After a plain reading of the provisions contained in sub-section (7) of section 260A, there cannot be any doubt to hold that the provisions of the CPC shall apply in the case of an appeal filed under section 260A.

Order 41, rule 5 of the CPC confers powers on the High Court as well as to the Appellate Court to stay proceedings under a decree or order. Therefore, ordinarily in view of sub-section (7) of section 260A, the provisions of order 41, rule 5 of the CPC would be readily applicable to an appeal filed under section 260A and the High Court is conferred with the power to stay a proceeding for recovery of demand arising out of the assessment order pending disposal of the appeal under section 260A—*SBI Home Finance Ltd.* v. *CIT* [2000] 163 CTR (Cal.) 382.

The principles by which an application for waiver of condition of pre-deposit of tax for entertainment of an appeal is to be governed, are well settled by a catena of decisions of the Supreme Court and High Courts. These are: (*a*) whether there is a *prima facie* case in favour of the assessee; (*b*) the balance of convenience *qua* deposit or otherwise; (*c*) irreparable loss, if any, to be caused in case stay is not granted; and (*d*) safeguarding of public interest. In *Assistant CCE* v. *Dunlop India Ltd.* [1985] 154 ITR 172, the Apex Court held that normally four factors for grant of a stay order should be kept in view, *i.e., prima facie* case, which by itself is not enough; balance of convenience; possibility of irreparable injury and safeguarding the public interest.

The same principles need to be kept in view while dealing with an application for stay of realisation of a disputed demand under the Act—*JCT Ltd.* v. *ITAT* [2002] 125 Taxman 866/258 ITR 291 (Delhi).

440.7-2a STAY OF PENALTY PROCEEDINGS - Where the penalty proceeding has been initiated against the assessee from the assessment order itself, it can be easily said that the penalty proceedings has been initiated pursuant to the order of assessment passed by the Assessing Officer. Accordingly, it cannot be said that the penalty proceeding is a distinct and separate proceeding from the appeal pending under section 260A in the Court. It is true that while deciding the appeal on the substantial questions of law, formulated for decision, the Court shall decide the same only on the questions formulated out but in view of the proviso to sub-section (4) of section 260A, it can always be open to High Court to decide any other substantial question of law not formulated earlier by the Court, if the Court is satisfied that the case involves such question. Therefore, it cannot be said that only because no question has been formulated regarding the direction to initiate a penalty proceeding against the assessee, it is not open to the court to decide a question as to whether the direction given by the Assessing Officer in the assessment order to initiate a penalty proceeding pursuant to the order of assessment was liable to be set aside. Therefore, there cannot be any difficulty to hold that where the assessment order contains directions to initiate a penalty proceeding against the assessee, the provisions of order 41, rule 5 of the CPC can very well be applied to stay a penalty proceedings as well.

Further, if one reads sub-section (7) of section 260A and section 275 together, it would be clear that the High Court, in an appeal filed under section 260A, has the power to grant stay or injunction in respect of the penalty proceeding—*S.B.I. Home Finance Ltd.* v. *CIT* [2000] 163 CTR (Cal.) 382.

440.8 *Judicial rulings* - One should keep in view the following judicial rulings —

■ *Question of law or fact* - If rule of law is to be applied to undisputed facts, it is a question of law. If however, something more than application of law is required in order to reach a final conclusion, it is a question of fact—*Eckhardt* v. *Industrial Commission* 7 NW 2d. 841, 842 , 242 Wis. 325.

■ *Mixed question of law and fact* - If the Tribunal has applied wrong principles of law and has relied upon incorrect principles of law for arriving at its conclusion on facts, than those conclusions—which become in such cases mixed questions of law and fact—would be vitiated and it is open to the High Court in exercise of its jurisdiction under section 260A to arrive at its own conclusions in the light of facts which are otherwise not in dispute or facts which otherwise emerge from the materials on record—*CWT* v. *Officer-in-Charge (Court of Wards)* [1976] 105 ITR 133 (SC).

■ *Raising new questions even if no appeal is filed* - As per section 260A(7), all the provisions relating to an appeal under the CPC would apply when appeal preferred is under section 260A. It is well known that a respondent in appeal can sustain the order, which is being challenged in appeal relying on any ground that is decided against him.

Where the assessee's claim for deduction of certain expenditure under section 31 is disallowed, even though no separate appeal is filed by the assessee claiming this relief (appeal is filed on other points by the Commissioner), the question of considering the claim that it would be a revenue expenditure, can be adjudicated—*CIT* v. *S.T.N. Textiles Ltd.* [2002] 257 ITR 161 (Ker.). *See* also ***CCAP Ltd.*** v. ***CIT*** [2004] 141 Taxman 472 (Cal.).

■ *Decision of the High Court of the State* - A decision of a High Court would have binding force in the State in which it has jurisdiction but not outside that State. Thus, the Tribunal should not follow the decision of a different High Court when there is a specific circular of the Central Board of Direct Taxes to the contrary which is binding on the Income-tax Officer—*Dr. T.P. Kapadia* v. *CIT* [1973] 87 ITR 511 (Mys.).

■ *Other High Courts' order* - Unless a judgment of another High Court dealing with an identical or comparable provision can be regarded as *per incurium*, it should be ordinarily followed—*CIT* v. *Jayantilal Ramanlal & Co.* [1982] 137 ITR 257 (Bom.).

■ Res judicata - Plea of *res judicata* on general principles can be taken in respect of a judgment of the High Court will render in a proceeding under section 256 provided decision pertains to an issue of fundamental nature—*CIT* v. *S. Murugappa Chettiar* [1991] 59 Taxman 252 (Ker.).

The Delhi High Court, in ***CIT*** v. ***Moonlight Builders & Developers*** [2007] 163 Taxman 134, held that the revenue cannot pick and choose case for further litigation. Having accepted one decision, it cannot challenge such decision in subsequent stance either in same case or another assessee's case provided the same is identical in the two cases. The High Court in this regard followed the Supreme Court decision in *Union of India* v. *Satish Panalal Shah* [2001] 249 ITR 221/117 Taxman 373. The Supreme Court then dismissed these appeals holding that it was not open to the revenue to accept the earlier judgment in the case of one assessee and challenge its correctness without just cause in the case of other assessee.

■ *Not determined by Tribunal* - A careful reading of section 260A(6)(*a*) will show that the High Court can decide only that question which was raised but not determined by the Tribunal. Therefore, it is necessary that the question sought to be raised ought to have been raised before the Tribunal and then if it has not determined it, one can say that it has not been determined by the Tribunal and, therefore, the High Court should look into it—*CIT* v. *Tata Chemicals Ltd.* [2002] 122 Taxman 643/256 ITR 395 (Bom.).

■ *Remand* - The High Court, exercising jurisdiction under section 260A, can directly remand the appeal filed by the assessee to the Commissioner (Appeals) for a decision on merits. The Court's

present powers under section 260A are wide enough to justify the adoption of this course—*CIT* v. *P.N. Krishnakumar* [2002] 122 Taxman 397/254 ITR 31 (Ker.).

■ *Law declared by Supreme Court* - What is applicable to the Courts inferior to the Supreme Court in regard to the law declared by the Supreme Court in terms of article 141 of the Constitution will with equal force apply to the Tribunals which are inferior to the High Court over which the Court has corrective jurisdiction under the Constitution—*Sterling Foods* v. *CIT* [1991] 59 Taxman 89 (Kar.).

■ *Review or rectification* - Omission to consider a circular by the High Court would not be a ground for review of its order—***CIT*** v. ***Ruby Traders and Exporters Ltd.*** [2004] 270 ITR 526 (Cal.). In exercise of jurisdiction to review, the High Court cannot correct any mistake which is not apparent on face of record but requires long-drawn argument to establish same or in respect whereof two opinions are possible—***CIT*** v. ***Ruby Traders and Exporters Ltd.*** (*supra*).

Appeal to the Supreme Court [Sec. 261]

441. The aggrieved party (*i.e.*, the assessee or the Commissioner†) can prefer an appeal to the Supreme Court against the judgment delivered by the High Court provided the High Court certifies the case fit for appeal to the Supreme Court. The right of appeal to the Supreme Court can, therefore, be availed only if the High Court gives a certificate of such fitness.

If, however, the High Court refuses to certify a case to be fit for appeal to the Supreme Court, the aggrieved party can make an application to the Supreme Court under article 136 of the Constitution for special leave to appeal against the decision of the High Court.

The Supreme Court upon hearing any such case should decide the questions of law raised therein. It should deliver its judgment thereon containing the grounds on which such decision is founded.

Where the judgment of the High Court is varied or reversed by the Supreme Court, the Appellate Tribunal should pass such orders as are necessary to dispose of the case conformably to such judgment.

441.1 ***Judicial rulings on the scope of section 261*** - The following judicial rulings should be kept in view :

■ *Independent issue* - An independent issue, not considered by Tribunal or High Court, could not be permitted to be raised for first time before Supreme Court - *RM Arunachalam* v. *CIT* [1997] 93 Taxman 423/227 ITR 222 (SC).

■ *Binding law* - Article 147 of the Constitution of India states that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Thus, when the judgment of a High Court is found to be inconsistent with a decision of the Supreme Court, the High Court on a later occasion is bound to follow the decision of the Supreme Court and is not bound by its own earlier decision which cannot stand with the decision of the Supreme Court—*CIT* v. *Standard Motor Products of India Ltd.* [1983] 142 ITR 877 (Mad.). What is binding is the ratio of the decision and not any finding on facts. It is the principle underlying a decision which is binding. It is to be read in the context of the questions which arose for consideration—*Sree Bhagavathi Textiles Ltd.* v. *CIT* [2000] 244 ITR 496 (Ker.).

Provision for avoiding repetitive appeals [Sec. 158A]

442. The provisions of section 158A are given below—

1. The case of the assessee in respect of a question of law pertaining to an earlier assessment year is pending in an appeal/reference before the High Court or Supreme Court (hereinafter referred to as "earlier case").

2. An identical question of law arises in a later assessment year before the Assessing Officer or the appellate authority (hereinafter referred to as "later case").

†The Commissioner can prefer appeal only in those cases where revenue effect exceeds Rs. 10,00,000 [*see* also para 439.1.-2]

3. The assessee may give a declaration in Form No. 8 to the Assessing Officer/appellate authority that—

a. if the Assessing Officer or the appellate authority agrees to apply in the "later case", the final decision of High Court or Supreme Court on question of law in the "earlier case";

b. the assessee shall not raise such question of law in the "later case" in appeal before any appellate authority/High Court/Supreme Court.

4. If the aforesaid declaration is given to any appellate authority, a report shall be called from the Assessing Officer by the appellate authority on the correctness of the claim made by the assessee. An opportunity of being heard may be given by the appellate authority to the Assessing Officer.

5. The Assessing Officer or the appellate authority may pass the following order under section 158A(3)—

Different situations	*Admission or rejection of claim [see Note]*	*Action by the Assessing Officer/appellate authority*
If the Assessing Officer/ appellate authority is satisfied about the correctness of the contention of the assessee as mentioned in 3 (*supra*)	The Assessing Officer or appellate authority may admit the claim of the assessee	The Assessing Officer/appellate authority will make an order disposing of "later case" without awaiting the final decision on question of law in the "earlier case". The assessee will not be able to raise such a question of law in appeal in the "later case" [*see* point 6 given below].
If the Assessing Officer/appellate authority is not so satisfied	He may reject the claim of the assessee	

Note : The order of admission/rejection of the claim of the assessee shall be final and not appealable.

6. When the decision on the question of law in the "earlier case" becomes final, it shall be applied to the "later case" and the Assessing Officer or the appellate authority, will (if necessary) amend the order passed in the "later case" in conformity to such decision.

Consequence of non-filing of appeal in respect of cases where the tax effect is less than the prescribed monetary limit

443. The Central Board of Direct Taxes have issued instructions from time-to-time directing departmental officers not to file an appeal if the tax effect is less than the monetary limit prescribed by it. [*See* para 439.1-2].

443.1 ***Judicial interpretation*** - The Apex Court in the case of *Berger Paints India Ltd.* v. *CIT*[2004] 135 Taxman 586 has held that if the revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge the correctness in the case of other assessees without just cause. Judicial authorities on this consideration generally dismiss department's appeals that the disputed issue was not agitated in the case of the same assessee or in the case of any other assessee.

443.2 ***The amendment*** - The underlying objective of the Board's instruction is to reduce litigations in small cases. With a view to protecting the revenue's right to file (or not to file) an appeal, a new section 268A has been inserted with retrospective effect from April 1, 1999. This section provides as follows—

■ *Orders, instructions or directions by the Board to subordinate authorities [Sec. 268A(1)]*- The Board may issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit. Such fixing of monetary limit is to be for the purpose of regulating filing of an appeal or an application for reference by any income-tax authority under the provisions of the Act.

■ *When appeal is not filed because of aforesaid orders, instructions, etc. [Sec. 268A(2)/(3)]*- Where an income-tax authority has not filed any appeal or application for reference on any issue in the case

of an assessee for any assessment year, due to abovementioned order/instruction/direction of the Board, such authority shall not be precluded from filing an appeal or an application for reference on the same issue in the case of—

a. the same assessee for any other assessment year; or

b. any other assessee for the same or any other assessment year.

The above provisions of sub-section (2) shall be applicable only if an income-tax authority has not filed any appeal/reference on any issue due to an order/instruction/direction issued by the Board under sub-section (1) where a monetary limit is fixed. To put it differently, if an income-tax authority has not filed an appeal or reference in a case where revenue effect was more than the minimum monetary limit specified by the Board under an order/instruction/direction issued under sub-section (1), then the ruling of *Berger Paints India Ltd.* v. *CIT* (*supra*) will apply.

Where no appeal or application for reference has been filed by an income-tax authority pursuant to the abovementioned orders/instructions/directions of the Board, it shall not be lawful for an assessee to contend that the income-tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or an application for reference in any case.

■ *Other points [Sec. 268A(4)/(5)]*- The Appellate Tribunal or the Court shall have regard to the above mentioned orders/instructions/directions of the Board and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case.

Every order/instruction/direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) of this section and all the provisions of this section shall apply to such order/instruction/direction.

CHAPTER TWENTY-SIX

Income-tax authorities

Tax authorities [Sec. 116]

445. The following income-tax authorities have been constituted under the Act to discharge executive and administrative functions :

- The Central Board of Direct Taxes.
- Director-General of Income-tax or Chief Commissioners of Income-tax.
- Directors of Income-tax or Commissioners of Income-tax.
- Commissioners of Income-tax (Appeals).
- Additional Directors of Income-tax, Additional Commissioners of Income-tax, or Additional Commissioners of Income-tax (Appeals).
- Joint Directors of Income-tax or Joint Commissioner of Income-tax.
- Deputy Directors of Income-tax or Deputy Commissioners of Income-tax or Deputy Commissioners of Income-tax (Appeals).
- Assistant Directors of Income-tax or Assistant Commissioners of Income-tax.
- Income-tax Officers.
- Tax Recovery Officers.
- Inspectors of Income-tax.

Central Board of Direct Taxes [Sec. 119]

446. It was constituted under the Central Boards of Revenue Act, 1963. It works under the Ministry of Finance. The Act has assigned main powers and functions in sections 2(*17*), 2(*18*), 11(1)(*c*), 35(3), 35D(3), 36(1)(*iv*), 44AA, 80RRA, 80U, 118, 119, 120, 124(2), 127, 132(1), 138, 139A(4), 197(2A), 200, 228A, 246, 273A(2), 279, 288, 293B and 295, the Second Schedule, and the Fourth Schedule.

446.1 ***Instructions to subordinate authorities*** - From time to time the Board may issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of the Act. Such authorities (and all other persons employed in the execution of the Act) shall observe and follow such orders, instructions and directions of the Board.

446.1-1 *WHEN INSTRUCTIONS CANNOT BE ISSUED TO SUBORDINATE AUTHORITIES* - In the following two cases, the Board cannot issue orders, instructions or directions to the subordinate authorities :

1. The Board cannot issue any instruction, direction or order so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner.

2. Moreover, the Board cannot issue any direction, order or instruction so as to interfere with the discretion of the Commissioner (Appeals) in the exercise of his appellate functions.

446.1-2 *JUDICIAL RECOGNITION OF CIRCULARS/CLARIFICATIONS ISSUED BY THE CENTRAL BOARD OF DIRECT TAXES* - It is a well settled law, as laid down by the Supreme Court, in the case of *Navnit Lal C. Javeri* v. *K.K. Sen, AAC* [1965] 56 ITR 198, that, under section 119, a circular issued by the Board would be binding on all persons and officers employed in the execution of the Act. A similar ruling is given in *T.P. Kapadia* v. *CIT* [1973] 87 ITR 511 (Mys.), *Tata Iron & Steel Co. Ltd.* v. *N.C. Upadhyaya* [1974] 96 ITR 1 (Bom.), *M.M. Annaiah* v. *CIT* [1970] 76 ITR 582 (Mys.), *CIT* v. *Official Liquidator* 1974 Tax LR 445 (Raj.), *Ellerman Lines Ltd.* v. *CIT* [1971] 82 ITR 913 (SC), *CIT* v. *B.M. Edward, India Sea Foods* [1979] 119 ITR 334 (Ker.) and *New Bank of India Ltd.* v. *ITO* [1982] 136 ITR 679 (Delhi).

■ *Not binding on the Court* - What is binding on administrative authorities is not necessarily binding on the Courts. In the case of *Delhi Flour Mills Co. Ltd.* v. *CIT*[1974] 95 ITR 151, the Delhi High Court observed that the decisions of the Board are not binding upon Courts : they are meant only for the guidance of the departmental authorities and if these departmental decisions are not in accordance with the provisions of the statute, they have to be disregarded. To the similar effect is the decision of the Calcutta High Court in *CIT* v. *Swedish East Asia Co. Ltd.* [1981] 127 ITR 148 wherein it was held that, ordinarily, a circular containing instructions which are inconsistent with the provisions of the statute is of no effect.

■ *Benevolent circulars* - Benevolent circulars issued by the Board even if they deviate from the legal position are required to be followed by the department since such circulars would go to the assistance of the assessee—*Laxmichand Hirjibhai* v. *CIT* [1981] 128 ITR 747 (Guj.), *Rajan Ramkrishna* v. *CWT* [1981] 127 ITR 1 (Guj.), *Kirtilal Jaisinglal & Co.* v. *CIT* [1980] 121 ITR 279 (Bom.), *CIT* v. *Mothooram Premchand*[1980] 121 ITR 59 (Punj. & Har.), *CIT* v. *T.S. Venkiteswaran* [1979] 120 ITR 675 (Ker.), *CIT* v. *Wilh Wilhelmsen*[1978] 115 ITR 10 (Cal.), *CIT* v. *S.R.Y. Ankineedu Prasad* [1978] 115 ITR 78 (AP) and *CWT* v. *Suresh Chandra Badrilal* [1983] 142 ITR 89 (MP). Further, benevolent circulars have to be applied in a sympathetic as well as in a broad and liberal manner—*CIT* v. *K.T.M.S. Mohamed* [1981] 128 ITR 580 (Mad.).

Apart from the fact that the circulars issued by the Board are binding on the department, the department is precluded from challenging the correctness of the said circulars even on the ground of the same being inconsistent with the statutory provision. The ratio of the judgment of the court further precluded the right of the department to file an appeal against the correctness of the binding nature of the circulars. Therefore, it is clear that so far as the department is concerned, whatever action it has to take, the same will have to be consistent with the circular which is in force at the relevant point of time—*Paper Products Ltd.* v. *CCE* [2001] 115 Taxman 147 (SC).

■ *Aid to construction* - Further a circular provides extraneous aid to construction being *contemporanea expositio—see K.P. Varghese* v. *ITO* [1981] 131 ITR 597 (SC).

■ *Contrary opinion of High Courts* - In the case of *T.P. Kapadia* v. *CIT* (*supra*), it was held that the Tribunal was not right in following the decision of a different High Court in a situation where a specific Board circular on the point in dispute existed containing a contrary view, as the High Court decisions are binding only in the State concerned. In *Pankaj Oil Mills* v. *CIT* [1978] 115 ITR 824 (Guj.), the Court extended benefit of a circular to an assessee even though there is a decision of the High Court of the same State to the contrary rendered without noticing the circular.

■ *Earlier orders* - Where a circular is issued after the date on which a particular order is passed, the later issued circular can have no application to the earlier passed order unless there is something in the circular itself making it operative even retrospectively—*see Rajarajeswari Wvg. Mills* v. *ITO* [1978] 113 ITR 405 (Ker.) and *Rajnikant Narmadashankar* v. *C.L. Munshi*[1982] 134 ITR 310 (Bom.). Where, however, the Supreme Court or the High Court have declared the law on the question arising for consideration, it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision of the Supreme Court or the High Court—*Hindustan Aeronautics Ltd.* v. *CIT*[2000] 110 Taxman 311/243 ITR 808 (SC).

Where a circular was issued and came into force after the completion of the original assessment, such circular cannot be invoked even in reassessment proceedings for the same year started after the date of the circular—*Peria Karamalai Tea & Produce Co. Ltd.* v. *CIT* [1980] 124 ITR 899 (Ker.). Reassessment proceeding cannot be initiated on the basis of a post-assessment circular—*Rajeshwari Birla* v. *WTO* [1979] 119 ITR 629 (Cal.).

■ *Withdrawn circulars* - Sometimes a circular is withdrawn or the section concerned is amended. The legal position in either of these eventualities has also been spelt out in some of the cases. In the case of *Ellerman Lines Ltd.* v. *CIT* (*supra*), the Supreme Court held that instructions issued by the Board prior to the amendment of a section will hold good even if they are not strictly in accordance with the related section but merely lay down certain just and fair methods of approach to a difficult problem. In *Tata Iron & Steel Co. Ltd.* v. *N.C. Upadhyaya* (*supra*), it was made clear that the

withdrawal of a circular, subsequent to an assessment or any other action in pursuance of the same, will not affect the legal position. In *CIT* v. *B.M. Edwards, India Sea Foods (supra)*, it was held that though the Board has the power to withdraw or recall its circulars, the assessee's right to have the assessment effected or carried out in accordance with the said circular cannot be prejudicially affected.

■ *Binding on officers of Income-tax Department* - A circular issued by the Board is binding on the subordinate officers of the Income-tax Department. However, such a circular, if opposed to the provisions of the Act, is not enforceable against an unwilling assessee. The assessee is entitled to ignore the circular if its terms are beyond the scope of the provisions of the Act—*K. Bhoomiamma* v. *CIT* [1991] 98 CTR (Kar.) 184, ***CIT*** v. ***Ruby Traders & Exporters Ltd.*** [2004] 220 ITR 526 (Cal.).

446.2 ***Orders issued by way of relaxation of certain provisions under section 119(2)(a) in certain cases*** - Without prejudice to the general provisions of section 119(1) described above, the Board may from time to time issue certain orders, instructions or directions to subordinate authorities under section 119(2)(*a*) if the following conditions are satisfied :

1. Such orders, instructions or directions may be issued by the Board if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue.

2. Such orders, etc., may be issued whether by way of relaxation of any of the provisions of sections 115P, 115S, 115W, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK, 139, 143, 144, 147, 148, 154, 155, 158BFA, 201(1A), 210, 211, 234A, 234B, 234C, 271 and 273 or otherwise.

3. Such orders etc., may be issued by general or special orders in respect of any class of incomes or fringe benefit or class of cases.

4. Such order, etc., cannot be prejudicial to the assessee.

5. Such order, etc., are the guidelines, principles or procedures to be followed by other income-tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties.

6. If the Board is of opinion that it is necessary in the public interest so to do, such orders may be published and circulated in the prescribed manner for general information. For relevant instructions issued under section 119(2)(*a*)—*see Taxmann's Direct Taxes Circulars*, 2003 edition.

446.3 ***Orders giving extension of time-limit [Sec. 119(2)(b)]*** - The Board (if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases) may by general or special order, authorise any income-tax authority, to admit an application or claim for any exemption, deduction, refund or any other relief under the Act after the expiry of the period specified under the Act (for making such application or claim) and deal with the same on merits in accordance with law.

However, such order cannot be issued to a Commissioner (Appeals).

446.4 ***Orders giving relaxation for claiming deduction [Sec. 119(2)(c)]*** - The Board by general or special order (if it considers it desirable or expedient so to do) for avoiding genuine hardship in any case or class of cases (for reasons to be specified therein) relax any requirement contained in sections 14 to 59 and 80A to 80U where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder.

Such order shall be issued subject to the following conditions :

1. The default in complying with such requirement was due to circumstances beyond the control of the assessee.

2. The assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed.

3. The Central Government shall cause every order issued under section 119(2)(*c*) to be laid before each House of Parliament.

Director General/Director

447. Director General/Director, appointed by the Central Government, are required to perform such functions as may be assigned by the Central Board of Direct Taxes. The Director General/ Director enjoy the following powers under different provisions of the Act :

a. to give instructions to Income-tax Officers [sec. 119(2)] ;

b. to enquire or investigate into concealment [sec. 131(1A)] ;

c. to search and seizure [sec. 132] ;

d. to requisite books of account [sec. 132A] ;

e. to survey [sec. 133A] ;

f. to make any enquiry [sec. 135].

Commissioners of Income-tax

448. Commissioners of Income-tax are appointed by the Central Government. Generally, they are appointed to head income-tax administration of specified area. As head of administration, a Commissioner of Income-tax enjoys the following administrative as well as judicial powers and functions under the different provisions of the Act. These powers pertain to registration of a charitable trust or institution [sec. 12A(*a*)] ; approval of an annuity contract [sec. 80E]; appointment of Income-tax Officers (Class II) and Inspectors of Income-tax [sec. 117(2)]; instructions to subordinate authorities [sec. 119] ; shifting of jurisdiction [sec. 125] ; transfer of cases [sec. 127] ; assignment of functions to Inspectors of Income-tax [sec. 128] ; discovery, production of evidence [sec. 131] ; search and seizure [sec. 132] ; requisite books of account [sec. 132A] ; any enquiry [sec. 135] ; disclosure of information respecting assessees [sec. 138] ; granting sanction for issue of notice to reopen assessment after the expiry of 4 years [sec. 151(2)] ; authorising Income-tax Officers to recover any arrear of tax due from an assessee by distraint and sale of his movable property [sec. 226(5)] ; set off of refunds against tax remaining payable [sec. 245] ; directing the Assessing Officer to prefer an appeal to Appellate Tribunal against the order of the Commissioner (Appeals) [sec. 253(2)] ; appeal to High Court [sec. 260A] ; revision of orders passed by Assessing Officer which are prejudicial to the revenue [sec. 263] ; revision of orders passed by subordinate authorities on his own motion or on the application of the assessee [sec. 264] ; reduction or waiver of penalty in certain cases [sec. 273A] ; to award and withdraw recognition to provident funds [Schedule IV].

Commissioners (Appeals)

449. Commissioners of Income-tax (Appeals) are appointed by the Central Government. It is an appellate authority vested with the following judicial powers :

- Power regarding discovery, production of evidence, etc. [sec. 131].
- Power to call for information [sec. 133].
- Power to inspect registers of companies [sec. 134].
- Power to set off refunds against tax remaining payable [sec. 245].
- Power to dispose of appeals.
- Power to impose penalty [secs. 271 and 272A].

Joint Commissioners

450. Joint Commissioners are appointed by the Central Government. The main function of this authority is to detect tax evasion and supervise subordinate officers. Under the different provisions of the Act, the Joint Commissioner enjoys the following powers, namely, instruction to the Assessing Officers [sec. 119(3)] ; powers regarding discovery, production of evidence [sec. 131] ; search and seizure [sec. 132]; power to call for information [sec. 133] ; power to survey [sec. 133A] ; power to

inspect registers of companies [sec. 134] ; power to make any enquiry [sec. 135] ; and to grant approval to the concerned Assessing Officer to impose penalty [sec. 274].

Income-tax Officers

451. While Income-tax Officers of Class I services are appointed by the Central Government, Income-tax Officers of Class II services are appointed by the Commissioner of Income-tax. Powers, functions and duties of Income-tax Officers are provided in many sections, some of which are summarised below ; discovery and production of evidence [sec. 131] ; power regarding search and seizure [sec. 132] ; power to requisition books of account [sec. 132A] ; application of retained assets [sec. 132B] ; power to call for information [sec. 133] ; power of survey [sec. 133A] ; power to inspect registers of companies [sec. 134] ; allotment of permanent account numbers [sec. 139A] ; to make assessment [secs. 143 and 144] ; to impose penalties ; to issue direction for getting accounts audited [sec. 142] ; to reassess escaped income [sec. 147] ; rectification of mistakes [sec. 154] ; to grant approval for deduction of tax at source at lower rates of tax [sec. 197] ; to demand advance payment of tax [sec. 210] ; to grant refunds [secs. 237 and 240] ; etc.

Inspectors of Income-tax

452. Inspectors of Income-tax are appointed by the Commissioner of Income-tax. Inspectors of Income-tax have to perform such functions as are assigned to them by the Commissioner or any other authority under whom they are appointed to work.

CHAPTER TWENTY-SEVEN

Settlement of cases

Introduction

457. Based on the recommendation of the Wanchoo Commission, the Central Government constituted Settlement Commission. Instead of the cumbersome procedure of issuing notice, calling for details and personal hearing before completion of assessment and the final outcome subject to appellate proceedings, settlement of cases provides an easy solution to the taxpayer to come out clean by offering the taxable income for assessment. The provisions are contained in Chapter XIX-A consisting of sections 245A to 245M.

Meaning of case [Sec. 245A(*b*)]

458. An assessee can make an application to the Settlement Commission at any stage of a "case" relating to him. The Finance Act, 2007 substituted clause (*b*) of section 245A which has changed the meaning of the term "case" and reduced the scope for settlement of cases to a great extent.

458.1 ***A pending proceeding is a "case"*** - A "case" means any proceeding for assessment under the Act of any person, in respect of any assessment year which may be pending before the Assessing Officer on the date on which an application under section 245C(1) is made.

458.2 ***When a proceeding is not taken as "pending proceeding"*** - The following shall not be treated as pending proceedings and, consequently, application cannot be filed before the Settlement Commission in respect of the following—

Not to be taken as pending proceeding and, consequently, settlement is not possible in the cases given below—	*Date of commencement of proceedings given in column 1 (on or after the dates given below settlement application cannot be filed)—*
A proceeding for assessment or reassessment or re-computation under section 147	From the date on which a notice under section 148 is issued
A proceeding for assessment or reassessment for any of the assessment years referred to in section 153A(*b*) in the case of a person referred to in section 153A (in the case of a person on whom a search is initiated under section 132 or a requisition is made under section 132A) or section 153C (meaning any other person who is subjected to assessment in consequence of a search on the person referred to in section 153A). "For any of the assessment years" referred to above would mean 6 assessment years preceding the assessment year in which the search is conducted or requisition is made	On the date of initiation of search under section 132 or requisition under section 132A
A proceeding for assessment or reassessment under section 153B(1)(*b*) in respect of a person referred to in section 153A or section 153C	On the date of initiation of search under section 132 or requisition under section 132A
A proceeding for making fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment	From the date on which order under section 254 or 263 or 264, setting aside or cancelling the assessment is passed

458.3 ***When a proceeding is taken as "pending proceeding"*** - In respect of a proceeding for assessment of other cases, proceeding shall be deemed to have commenced on the first day of assessment year and concluded on the date on which the assessment is made. In other words, in all other cases (except four cases given above), one can have recourse to the commission for settlement at any time on or after first day of the assessment year but before the date of making assessment.

Settlement Commission [Sec. 245B]

459. Section 245B describes the constitution of the Income-tax Settlement Commission and the qualifications and mode of appointment of its Chairman and members. It provides that the Settlement Commission shall consist of a Chairman and as many Vice-Chairmen and other members as the Central Government thinks fit.

The Chairman, Vice-Chairman and other members of the Settlement Commission shall be appointed by the Central Government from amongst persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts. Where a member of the Board is appointed as the Chairman, Vice-Chairman or as a member of the Settlement Commission, he shall cease to be a member of the Board.

Application for settlement of cases [Sec. 245C]

460. An application for settlement of cases can be made by an assessee within the parameters given below—

■ *Application only in respect of "case"* - An application for settlement can be filed only in respect of a "case".

■ *Tax on undisclosed income should be above Rs. 3,00,000* - No application shall be made for settlement of the case unless the income-tax payable on the income disclosed in the application exceeds Rs. 3,00,000.

■ *Tax should be paid* - Tax on income disclosed and interest thereon should be paid on or before the date of making such application and the proof of such payment should be attached with the application.

■ *Prescribed form* - An application for settlement of a case shall be made in quintuplicate in Form. No. 34B and shall be verified in the manner indicated therein.

■ *Signature* - The application, the verification appended thereto, the Annexure to the said application and the statements and documents accompanying the Annexure shall be signed by the person who is authorised to sign return of income under section 140.

■ *Fees* - Every application in connection with the settlement of a case shall be accompanied by a fee of Rs. 500.

■ *Full and true disclosure* - The application in Form No. 34B should contain a full and true disclosure of income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived and the additional amount of income-tax payable on such income. Disclosure under section 245C(1) must be full and true and it cannot be half way and argument that an applicant was not required to disclose that part of his income which has not been detected by the revenue, is wholly unacceptable and is to be rejected—*Raja Ram Industries* v. *Settlement Commission* [1995] 81 Taxman 506 (ITSC - Delhi). If disclosure is made in a given case after the assessee felt that the game is over or when he has been pushed to wall and concealment of income has been established, such a disclosure may not be a disclosure as contemplated within mischief of section 245C(1)—*Raja Ram Industries* v. *Settlement Commission (supra), Nirmal & Navin (P.) Ltd.* v. *D. Ravindran, Deputy Commissioner* [2002] 253 ITR 19 (Mad.).

■ *Intimation to the Assessing Officer* - The applicant must, on the date of making the application to the Settlement Commission, also intimate the Assessing Officer in Form No. 34BA about having made an application for settlement.

■ *Withdrawal not possible* - An application made shall not be allowed to be withdrawn.

■ *Revision of application* - Unlike section 139 which provides for filing of revised return, there is no provision for revision of an application made in terms of section 245C. That shows clear legislative

intent that the applicant for settlement has to make a true and fair declaration from the threshold—***CIT*** v. ***Om Prakash Mittal*** [2005] 143 Taxman 373 (SC).

All conditions contemplated under section 245C(1) and proviso thereto are *sine qua non* for a valid application and in absence of them or any one of them petition for settlement will not be in order—*Raja Ram Industries* v. *Settlement Commission* [1995] 81 Taxman 506 (ITSC - Delhi).

460.1 ***Additional tax - How computed*** - Additional tax shall be computed as follows -

Situations	*Additional tax (it should be above Rs. 3 lakh otherwise settlement application cannot be made)*
1. Where the income disclosed in the application relates to only one previous year	
1.1 If the applicant has not furnished a return of income of that year	Tax on income disclosed in the application as if such income were the total income
1.2 If the applicant has furnished a return in respect of total income of that year	Tax on the aggregate of the total income returned and income disclosed in the application for settlement *minus* tax calculated on returned income†
2. Where the income disclosed relates to more than one previous year	Aggregate of the amount of tax determined for each year according to rules mentioned in *1.1* and *1.2 supra.*

†Suppose there is a brought forward loss of Rs. 40,000 of the assessment year 2006-07 and undisclosed income for the assessment year 2007-08 is Rs. 15 lakh which is disclosed in the settlement application. The additional tax will be tax on Rs. 14.60 lakh and it should be paid before making the application—***Gobind Builders & Developers*** v. ***ITSC*** [2008] 170 Taxman 618 (Bom.).

Procedure on receipt of application under section 245C [Sec. 245D]

461. The following procedure is followed by the Settlement Commission :

461.1 ***Application*** - A settlement application shall be presented in Form No. 34B by the applicant (or by his agent) to the Secretary at the Headquarters of the Commission at New Delhi (or of the Bench within whose jurisdiction his case falls or to any Officer authorized in this behalf by the Secretary) or shall be sent by registered post to the Secretary (or to such Officer). A settlement application sent by post shall be deemed to have been presented to the Secretary or the Officer authorized by the Secretary on the day on which it is received in the Office of the Commission.

461.2 ***Notice to the applicant*** - On receipt of application, the Settlement Commission shall within 7 days from the date of receipt of application issue a notice to the applicant requiring him to explain as to why the application made by him is to be allowed to be proceeded with.

461.3 ***Settlement Commission can allow the application to proceed or outrightly reject it [Sec. 245D(1)]*** - Settlement Commission within a period of 14 days from the date of application by an order in writing allow or reject the application. Where the Settlement Commission makes no order within 14 days from the date of application it shall be deemed that the application is allowed to be proceeded with.

Where an application is made before June 1, 2007 but an order under section 245D(1) has not been made before June 1, 2007 such application shall be deemed as allowed if the additional tax on the income and interest thereon is paid on or before July 31, 2007. July 31, 2007 shall be deemed to be the date of the order of rejection or allowing the application for settlement of the case.

461.4 ***Report from the Commissioner of Income-tax [Sec. 245D(2B)/(2C)]*** - If the application is allowed to be proceeded with by the Settlement Commission, the Commission shall call for a report from the Commissioner of Income-tax within 30 days* from the date on which the application was made—

The law requires that Commissioner of Income-tax should submit the report within 30 days of the receipt of communication from the Settlement Commission	The Settlement Commission on the basis of the report of the Commissioner of Income-tax within a period of 15 days of the receipt of the report declare the application

*On or before August 7, 2007, if application was made before June 1, 2007.

and the report is submitted by the Commissioner of Income-tax within 30 days	as invalid and shall send a copy of such order to the applicant and the Commissioner. However, before declaring the application as invalid, an opportunity of hearing must be given to the applicant
If the report is not submitted by the Commissioner within 30 days	The Settlement Commission shall proceed further in the matter without the report of the Commissioner.

If the application was made before June 1, 2007 and the order allowing the application to proceed with has also been passed before June 1, 2007, no action in respect of such application can be taken unless the applicant on or before July 31, 2007 pays the additional tax on income disclosed in the application.

461.5 ***A second report from the Commissioner of Income-tax [Sec. 245D(3)]*** - After the application is not declared as invalid and the application has been allowed to be proceeded with, the Settlement Commission may again call for records from the Commissioner and after examination of such records if it is of the opinion that a further enquiry or investigation is necessary, it may direct the Commissioner to make such further enquiry. The Commissioner shall furnish such report within a period of 90 days of the receipt of communication from the Settlement Commission. This report, however, cannot result in rejection of application as it is sought only for settlement of the case, long after admission of the application.

If the Commissioner does not furnish a report within 90 days, the Settlement Commission may proceed to pass an order without such report.

One should also keep in view the following—

■ *Quasi-judicial* - The power conferred on the Settlement Commission under section 245D is a *quasi-judicial* power, and the discretion of the Commission is required to be exercised judicially—*Raja Ram Industries* v. *Settlement Commission* [1995] 81 Taxman 506 (ITSC - Delhi).

■ *Power of High Court* - Section 245D gives jurisdiction to the Settlement Commission to proceed with application or to reject the same and a High Court has no jurisdiction to interfere with an order of the Commission unless it is shown that there is no nexus between reasons given and decision taken, or an order complained of is without jurisdiction or in excess of jurisdiction or the same is perverse causing manifest injustice or is arbitrary—*Raja Ram Industries* v. *Settlement Commission* (*supra*).

■ *Material collected* - Material collected by Commissioner after date of filing of application under section 245C is not irrelevant for purposes of section 245D(1)—*CIT* v. *Express Newspapers Ltd.* [1994] 206 ITR 443 (SC).

■ *Change of assessee's stand* - Settlement Commission cannot reject applications summarily under section 245D(1) only on the ground that while all throughout the proceedings, the stand of the concerned applicants was that they were assessees under the Act, subsequently they had switched their stand to the effect that they were not genuine partnership firms but were benamis of the applicant AOP and that such stand was an afterthought—*Swadeshi Industries* v. *ITSC* [1993] 199 ITR 293 (Guj.).

461.5 ***Order of Settlement Commission*** - The Settlement Commission has power to call for relevant records from the Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case.

■ After examination of the records and the reports of the Commissioner, and after giving an opportunity to the applicant and to the Commissioner to be heard (either in person or through a representative), and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of the Act, pass such order as it thinks fit on (*a*) the matters covered by the application, and (*b*) any other matter relating to the case not covered by the application, but referred to in the report or reports of the Commissioner.

Tax payable in pursuance of the order shall be paid within 35 days of the receipt of a copy of order by the applicant. The assessee shall be liable for simple interest under section 245D(6A) at the rate of 1.25 per cent per month (or part of month) on the amount remaining unpaid after the expiry of 35 days. Interest is payable even if Settlement Commission has extended the time for payment.

- In respect of application made for settlement of the case before June 1, 2007, the Settlement Commission shall pass an order on or before March 31, 2008*. In respect of application for settlement of the case made on or after June 1, 2007, the time limit shall be 12 months from the end of the month in which the application is made.

- Every order passed by the Settlement Commission shall provide (*a*) for the terms of settlement including any demand by way of tax, penalty, or interest, (*b*) for the manner in which any sum due under the settlement shall be paid, (*c*) for all other matters to make the settlement effective, and (*d*) for that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

- The proceedings before the Commission shall not be open to the public and no person (other than the applicant, his employee, the concerned officers of the Commission or the Income-tax Department or the authorised representatives) shall, without the permission of the Commission, remain present during such proceedings.

461.5-1 *A FEW INSTANCES FROM JUDICIAL RULINGS* - The following propositions have been taken from judicial rulings—

- Mere co-operation of an assessee cannot be the basis or criteria for granting immunity from prosecution and penalty; it is obligatory on the part of the Settlement Commission to address itself on the question as to whether full and true disclosure of income has been made by the applicant or not—*CIT* v. *ITSC* [2000] 112 Taxman 523 (Bom.).

- Where no additional income is offered, the application is not fit for admission but where complexities are involved, the case is to be allowed to be proceeded with—*Prem Chand Jain, In re* [2002] 124 Taxman 424 (ITSC).

- Settlement Commission has no power to reduce/waive tax or interest statutorily payable—***CIT*** v. ***Hindustan Bulk Carriers*** [2003] 259 ITR 449 (SC). The Commission has, however, power of waiver or reduction of interest under section 220(2A), if prescribed conditions are satisfied—***CIT*** v. ***Damani Brothers/CIT*** v. ***Hindustan Bulk Carriers*** [2003] 126 Taxman 321 (SC).

- The assessee cannot invoke section 245C(1) where the income-tax authority has alleged that he failed to deposit the appropriate amount of the tax deducted at source—***Shaw Wallace & Co. Ltd.*** v. ***Settlement Commission*** [2004] 139 Taxman 59 (Cal.).

- The assessee's application for settlement cannot cover income already disclosed to the Assessing Officer—***CIT*** v. ***Hindustan Bulk Carriers*** [2003] 259 ITR 449 (SC).

- Settlement Commission has no inherent power to exercise jurisdiction under section 154 after a final order is passed and becomes conclusive by reason of section 245-I, unless it is necessary in extreme cases—***ITSC*** v. ***Netai Chandra Rarhi & Co.*** [2004] 271 ITR 514 (Cal.). The Gujarat High Court in the case of ***AOP of Sanjay Bhai R. Patel*** v. ***Assessing Officer*** [2004] 267 ITR 129 has taken the view that the power of rectification is available to the Settlement Commission if the ruling of the Settlement Commission was based upon a decision which has now been reversed by the Supreme Court.

461.6 ***Consequences if settlement order is obtained by fraud or misrepresentation*** - In case the settlement becomes void on being found to have been obtained by fraud or misrepresentation of facts, the proceedings with regard to the matters covered by the settlement will be deemed to have been revived from the stage at which the application was allowed to be proceeded with.

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*Requirement that the settlement application shall abate if an order under section 245D(4) is not made by March 31, 2008 is unfair, unjust and arbitrary and the application for settlement would not abate on March 31, 2008—***Vatika Farms (P.) Ltd. v. Union of India*** [2008] 169 Taxman 366 (Delhi).

■ The following points should be noted—

1. The provision relating to period of limitation laid down by section 153 will not be applicable to such a case and a period of two years from the end of the financial year in which the settlement became void will be available to the income-tax authority concerned to complete the relevant proceedings.

Provisions illustrated - For the assessment year 1998-99, the case of X Ltd. is pending before the Assessing Officer under section 143(3) on June 13, 2000. On June 13, 2000, the company applies for settlement by forwarding an application in Form No. 34B. On August 14, 2000, the application is accepted by the Settlement Commission and from August 14, 2000, the Assessing Officer ceases to exercise jurisdiction over the case. Order of settlement is passed by the Commission on September 19, 2001. Later on, it is found on October 13, 2002 that the settlement was obtained by fraud. In this case income-tax proceedings shall be deemed to revive from August 14, 2000 and the Assessing Officer can complete the assessment under section 143(3) for the assessment year 1998-99 up to March 31, 2005.

2. The plea of the assessee that the initiation of proceeding to find out as to whether the order had been obtained by fraud or misrepresentation of facts had to be initiated by the Commission *suo motu* is not spelt out in section 245D(6). The decision, whether the order has been obtained by fraud or mis-representation of facts, is that of the Commission. But it is not a requirement that the Commission must *suo motu* initiate the action—***CIT*** v. ***Om Prakash Mittal*** [2005] 143 Taxman 373 (SC).

461.7 ***Section 153 time-limit not to apply*** - The time-limits under section 153 shall not apply to the order of the Settlement Commission or any order of assessment, reassessment or recomputation required to be made by the Assessing Officer if the Settlement Commission directs the Assessing Officer in its order to make assessment, reassessment or recomputation.

Power of Settlement Commission to order provisional attachment to protect revenue [Sec. 245DD]

462. If (during the pendency of any proceeding before it) the Settlement Commission is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, it may, by order, attach provisionally any property belonging to the applicant in the manner provided in the Second Schedule.

Every provisional attachment shall cease to have effect after the expiry of a period of 6 months.

The Settlement Commission may, however, extend the aforesaid period by such further period or periods as it thinks fit.

Power of Settlement Commission to reopen completed proceedings [Sec. 245E]

463. The Settlement Commission does not have any power to reopen completed proceedings if settlement application is made on or after June 1, 2007. If, however, such application was made before June 1, 2007, then completed proceedings may be reopened by the Settlement Commission but only subject to the following limitations—

463.1 ***Power can be exercised only with the concurrence of applicant*** - The Settlement Commission is empowered to reopen completed proceedings with the concurrence of the applicant, if it is of the opinion that it is necessary or expedient to do so for the proper disposal of the case pending before it. The reasons for such an opinion will have to be recorded in writing.

463.2 ***Time-limit of 9 years*** - No proceeding can be reopened by the Settlement Commission if period between the end of the assessment year to which such a proceeding relates and the date of application for settlement under section 245C exceeds 9 years.

■ *Provisions illustrated* - On July 10, 2001 a company files an application for settlement of its pending cases for the assessment years 1996-97, 1997-98 and 1998-99. Cases of the company up to the assessment year 1995-96 have already been completed. With the concurrence of the assessee-company, the Settlement Commission wants to re-open cases for the assessment years 1989-90 onwards. In this case, the Settlement Commission has

no power to open completed assessments for the years 1989-90 to 1991-92. In other words, the cases for the assessment years 1992-93 onwards can be reopened by the Settlement Commission, as the time between March 31, 1992 (*i.e.*, the last day of the assessment year 1991-92) and July 10, 2001 (date of application for settlement) exceeds 9 years.

463.3 ***Power to reopen is limited for which concurrence is given by applicant*** - In *CIT* v. *Paharpur Cooling Towers (P.) Ltd.* [1996] 85 Taxman 357 (SC), the assessee requested for spread over of the enhanced value of opening stock in six years 1970-71 to 1975-76 because, doing so would have reduced his overall tax liability. It was for this purpose that the assessee gave his consent/ concurrence for reopening the assessment of the earlier years. It, therefore, followed that the Commission could re-open the assessment proceedings for the said earlier assessment years only for the aforesaid limited purpose, *i.e.*, for spreading over the said enhanced value. Under the guise of re-opening the said assessments for the aforementioned limited purpose, the Commission could not, settle the other matters relating to the said earlier assessment years. It was not permissible for the Commission to say that since it had reopend the assessments of earlier assessment years for the limited purpose of giving relief for the assessment year before it, it got full command and total jurisdiction over all the said earlier assessment years and that it could pass such orders as it thought fit in respect of all the matters (relating to the said assessment years including the penalty proceedings for some other concealments). This would amount to doing indirectly what could not be done directly. The ultimate orders passed by the Commission should relate to the case before it. It is only for the purpose of effectively setting the case before it that the Commission can reopen concluded proceedings.

Powers and procedure of Settlement Commission [Sec. 245F]

464. In addition to the specific powers given to the Settlement Commission, all the powers that are available to an income-tax authority under the Income-tax Act are also exercisable by the Settlement Commission. After an application for settlement is made, the Settlement Commission will have exclusive jurisdiction over the case until the order under section 245D(4) is passed (or if the application is not allowed to be proceeded with or rejected, the jurisdiction of the Commissioner expires on that date). In relation to the matters before the Settlement Commission, it will be competent during the period for the Settlement Commission to exercise the powers and perform the functions of any income-tax authority under the Income-tax Act. However, in the absence of any express direction to the contrary, this will not affect the operation of the provisions of the Income-tax Act insofar as they relate to any other matter or to the operation of the provisions relating to the payment of tax on self-assessment in respect of the matters before the Settlement Commission. The Settlement Commission has power to regulate its own procedure and the procedure of Benches in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

Inspection, etc., of reports [Sec. 245G]

465. Although no person is entitled to inspect or obtain copies of any reports given by any income-tax authority to the Settlement Commission, the Settlement Commission has been given full discretion to allow inspection of such reports or to furnish copies thereof to the applicant on an application and on payment of the prescribed fee. In case, however, some evidence has been brought on record against the applicant in any report furnished by the income-tax authority, he will be entitled to obtain a certified copy of any such report or part thereof on making an application to the Commission and on payment of the prescribed fee. The provision is intended to enable the applicant to rebut the evidence against him.

Powers of Settlement Commission to grant immunity from prosecution, etc. [Sec. 245H]

466. The Settlement Commission has been given the power to grant immunity to the applicant from prosecution as also (either wholly or partly) from imposition of penalty. The immunity from

prosecution may relate to any offence under the Income-tax Act or Wealth-tax Act, for the time being in force. Such an immunity can be granted if the Settlement Commission is satisfied that the applicant has extended full co-operation in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived. While granting immunity, the Settlement Commission is competent to impose such conditions as it may think fit. The provision stated above is subject to the following propositions :

1. Mere co-operation of an assessee cannot be a basis or criteria for granting immunity from prosecution and penalty. It is obligatory on the part of the Settlement Commission to address itself on question as to whether full and true disclosure of income and mode and manner in which income has been derived has been done by the applicant or not—*CIT* v. *ITSC* [2000] 112 Taxman 523/246 ITR 63 (Bom.).

2. The Finance Act, 2007 has inserted a further proviso to section 245H whereby the Settlement Commission cannot grant immunity from prosecution under the Indian Penal Code or under any Central Act other than the Income-tax Act and the Wealth tax Act. This is applicable in respect of application for settlement made on or after June 1, 2007.

3. An immunity granted to a person as stated above shall stand withdrawn if such person fails to pay any sum specified in the order of settlement passed under section 245D(4) within the time specified in such order (or within such further time as may be allowed by the Settlement Commission), or fails to comply with any other condition subject to which the immunity was granted. On withdrawal of the immunity the provisions to the Act shall apply as if such immunity had not been granted.

4. In case the Settlement Commission is satisfied that a person to whom an immunity from prosecution or penalty was granted had given false evidence or concealed material particulars, it will be competent for the Settlement Commission to withdraw the immunity. On the withdrawal of the immunity, the applicant will become liable to prosecution and/or imposition of penalty in respect of any offence or default for which he would have been so liable had the immunity not been granted to him.

5. Once the Settlement Commission decides the application for settlement including any direction (or absence thereof) for any penalty or interest, the Assessing Officer cannot later on levy penalty or interest. These powers are available to the Settlement Commission under section 245F and, if in its discretion, the Settlement Commission does not choose to invoke these powers, the Assessing Officer cannot subsequently invoke them after the Settlement Commission has passed an order under section 245D(4)—*Mohanlal S. Doppa* v. *CIT* [2002] 121 Taxman 671 (Guj.).

Abatement of proceeding before Settlement Commission [Sec. 245HA]

467. Proceedings for settlement shall abate from the date given below—

Circumstances in which the proceeding abates	*Date of abatement*
Where the application is made on or after June 1, 2007 and is rejected within 14 days from the date of application under section 245D(1)	Date on which the application is rejected
An application made before June 1, 2007 but the tax is not paid before July 31, 2007 and hence it is rejected under section 245D(2D)	July 31, 2007
An application made under section 245C declared as invalid with or without the report of the Commissioner under section 245D(2C)	The last day of the month in which the application is declared as invalid
An application made under section 245C and the order is not passed within the time prescribed in section 245D(4A) (this time-limit is 12 months from the end of the month in which the application was made; however, it expires on March 31, 2008 if the application was made before June 1, 2007)	Date on which the time period specified in section 245D(4A) expires.

467.1 ***Consequence of abatement of proceedings before Settlement Commission*** - Where the proceedings before the Settlement Commission abates, the Assessing Officer or any other Income-tax authority before whom the proceedings are pending at the time of making the application under

section 245C shall reassume jurisdiction and shall dispose of the case in accordance with the provisions of the Act.

467.1-1 ***MATERIAL PRODUCED BEFORE THE SETTLEMENT COMMISSION CAN BE USED BY THE ASSESSING OFFICER*** - The Assessing officer or the Income-tax authority as the case may be shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of any enquiry held or evidence recorded by the Settlement Commission as if such material, information, enquiry and evidence was produced before him or held or recorded by him in the course of the proceedings before him.

467.1-2 ***TIME-LIMIT*** - The time limit prescribed under sections 149, 153, 153B, 154, 155, 158BE and section 231 and for the purposes of payment of interest under section 243 or 244 or section 244A, for making assessment or reassessment after abatement of proceedings before the Settlement Commission, the period commencing from the date of application and ending with the date of abatement [as given in *Column 2* of the table (*supra*)] shall be excluded.

A proviso has been inserted in section 153 with effect from June 1, 2007 so as to provide that where the proceedings before the Settlement Commission abate under section 245HA, the period of limitation referred to in section 153 available to the Assessing Officer for making an order of assessment, reassessment or re-computation, as the case may be [after excluding the period commencing from the date of application to the Settlement Commission till the date of abatement as given in section 245HA(4)], shall be not less than one year, and where such period of limitation is less than one year, it shall be deemed to be extended to one year.

Provisions illustrated - For the assessment year 2008-09 (which is pending before the Assessing Officer), an application is made to the Settlement Commission on June 13, 2010. The application is rejected on June 20, 2010. The Assessing Officer can complete the assessment within the time-limit given below—

a. January 7, 2011 (i.e., December 31, 2010 + 7 days); or

b. June 19, 2011 (1 year from the date of abatement),

whichever comes later. Consequently, the assessment can be completed on or before June 19, 2011.

467.1-3 ***CREDIT FOR TAX PAID IN THE CASE OF ABATEMENT [SEC. 245HAA]*** - Where an application is made under section 245C on or after June 1, 2007 and it is rejected under section 245D the credit for the tax and interest paid on or before making application or during the pendency of the case, shall be allowed by the Assessing Officer.

Order of settlement to be conclusive [Sec. 245-I]

468. An order made by the Settlement Commission under sub-section (4) of section 245D will not be called into question in any proceeding under the Income-tax Act or under any other law for the time being in force except as provided in this Chapter.

■ The following points should be noted—

1. Every order of the Settlement Commission under section 245D(4) will be final. However, the Settlement Commission is a Tribunal the proceedings before which are judicial proceedings. Such proceedings are subject to the Supreme Court's jurisdiction under article 136 of the Constitution—*CIT* v. *B.N. Bhattacharjee* [1979] 118 ITR 461 (SC). The scope of the Court to interfere with the order of the Settlement Commission is restricted. An order passed by the Settlement Commission cannot be interfered with under article 226 of the Constitution, unless it can be shown that :

a. grave procedural defect such as violation of the mandatory procedural requirements of the provisions of Chapter XIX-A and/or violation of the rules of natural justice is made out;

b. it is found that there is no nexus between the reasons given and the decision taken by the Settlement Commission—*V.B. Desai & R.B. Desai* v. *Administrative Officer, Settlement Commission* [2002] 125 Taxman 1097 (Kar.).

2. Merely because section 245-I provides that order of settlement is conclusive, it does not take away power of Commission to decide whether settlement order had been obtained by fraud or misrepresentation of facts—***CIT*** v. ***Om Prakash Mittal*** [2005] 143 Taxman 373 (SC).

Other points

469. One should also keep in view the following —

469.1 ***Recovery of sums due under order of Settlement Commission [Sec. 245J]*** - For the recovery of any sum due from any person in pursuance of the order passed by the Settlement Commission under section 245D(4), the provisions of Chapter XVII of the Act are applicable.

In case of any default in payment of such sums, penalty can also be imposed and recovered under the provisions of Chapter XVII by the Assessing Officer, having jurisdiction over such person. The recovery will, however, be subject to such conditions, if any, as may be specified by the Settlement Commission in its order.

469.2 ***Bar on subsequent application for settlement in certain cases [Sec. 245K]*** - In the following cases a person cannot apply for settlement under section 245C in relation to any other matter :

a. where an order of settlement passed under section 245D(4) provides for the imposition of a penalty on the person who made the application under section 245C for settlement, on the ground of concealment of particulars of his income ; or

b. where after the passing of an order of settlement under section 245D(4) in relation to a case, such person is convicted of any offence under Chapter XXII in relation to that case ; or

c. where the case of such person is sent back to the Assessing Officer by the Settlement Commission under section 245HA.

Where a person has made an application under section 245C on or after June 1, 2007 and if such application is allowed to be proceeded with under section 245D(1), such person shall not be entitled to make another application under section 245C at any time later. In other words, after June 1, 2007 only once, the benefit of settlement of the case could be availed by the taxpayers.

Purchase of immovable properties

Purchase by Central Government of immovable property in certain cases of transfer

471. Chapter XXC of the Act (*i.e.*, sections 269U to 269UO) deals with the provisions regarding purchase of property. It provides to purchase by the Central Government of immovable properties in certain cases of transfer. The provisions of this Chapter shall come into force on such dates as the Central Government may, by notification, appoint and different dates may be appointed for different areas. *Vide* Notification No. SO 480(E), dated August 7, 1986, the Government has appointed October 1, 1986 as the date on which the provisions of Chapter XXC shall come into force in Delhi, Bombay, Calcutta, and Madras. From October 1, 1987 it has been extended to Bangalore and Ahmedabad. From June 1, 1989 it has been extended to Chandigarh, Jaipur, Trivandrum, Cochin, Pune, Nagpur, Patna, Bhopal, Indore, Cuttack, Bhubaneshwar, Hyderabad, Kanpur, Lucknow, Coimbatore, Madurai and Surat. From April 1, 1991, it has been further extended to Gurgaon, Faridabad, Baroda, Ghaziabad and Noida.

The scheme is not applicable now

472. The scheme of pre-emptive purchase of immovable property under Chapter XXC has been abolished and it will not be applicable in respect of any transfer of immovable property effected on or after July 1, 2002.

CHAPTER TWENTY-NINE

Advance ruling for non-residents

Advance ruling

486. The following are the salient features of the scheme of advance ruling.

486.1 ***Authority for advance ruling [Sec. 245-O]*** - The Authority for Advance Rulings consist of a Chairman who is a retired Judge of the Supreme Court and two other members drawn from the Indian Revenue Service and Indian Legal Service. The headquarters of the Authority is in Delhi. No proceeding of the Authority will be invalid merely on grounds of the existence of any vacancy or defect in the constitution of the Authority.

486.2 ***Meaning of "applicant" and advance ruling [Sec. 245N(a) and (b)]*** - The provisions are given below —

Meaning of 'applicant' under section 245N(b)	*Meaning of advance ruling as per section 245N(a)*	*The authority shall not allow the application when the question raised in the application relates to the following —*
A non-resident [*see* para 486.3] who makes an application under section 245Q(1)	Determination by the authority in relation to a transaction which has been undertaking (or is proposed to be undertaken) by a non-resident applicant and such determination shall include the determination of any question of law or fact specified in the application.	If (*i*) it is already pending before any income-tax authority or Appellate Tribunal or court, or (*ii*) it involves determination of fair market value of any property; or (*iii*) it relates to a transaction or issue which is designed *prima facie* for the avoidance of income-tax [*see* para 488.1]
A resident who makes an application under section 245Q(1) in respect of a transaction which has been undertaken (or proposed to be undertaken) by him or it with a non-resident	Determination by the Authority in relation to the tax liability of a non-resident arising out of a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with a non-resident and such determination shall include the determination of any question of law or of fact specified in the application	If (*i*) it is already pending before any income-tax authority or Appellate Tribunal or court, or (*ii*) it involves determination of fair market value of any property, or (*iii*) it relates to a transaction or issue which is designed *prima facie* for the avoidance of income-tax [*see* para 488.1]
A resident falling within any such class or category or persons as the Central Government may, by notification in the Official Gazette, specify in this behalf (*i.e.*, a public sector company) who makes an application under section 245Q(1)	Determination or decision by the Authority in respect of an issue relating to computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision shall include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application	If it involves determination of fair market value of any property [*see* para 488.1]

■ It is permissible for an applicant under section 245Q to approach the Advance Ruling Authority for questions which pertain to the taxability of its employees serving in India—*Lloyd Helicopters International Pty. Ltd.* v. *CIT* [2001] 115 Taxman 334 (AAR - New Delhi).

■ A domestic company has taken a loan from a foreign bank. Under the agreement, the domestic company has to pay Indian tax in respect of interest earnings of foreign bank. In order to ascertain in advance, the tax liability, the domestic company (*i.e.*, applicant) has requested the authority to determine the tax liability of the bank, which is, admittedly, a non-resident. It is, therefore, clear that the authority has been requested by the applicant to determine the tax liability of the non-resident

lender, *i.e.*, the bank. It appears that under a contractual obligation between the lender and the borrower, the applicant has undertaken to pay Indian taxes. What the applicant is doing was discharging the liability of a non-resident. No liability is attached to him under the Act. Since it is determination of tax liability of non-resident, the authority can give its ruling—***Jay Shree Tea & Industries Ltd., In re*** [2005] 145 Taxman 516 (AAR - New Delhi).

486.3 ***Non-resident in which year*** - While section 245N stipulates that a non-resident can make an application under Chapter XIX-B, it does not say in specific terms that he should be a non-resident as on the date of the application. In fact, residence or non-residence for the purposes of the Act has to be determined with reference to a previous year (which is, generally, a financial year) and not with reference to a particular date.

It is a little difficult to say which "previous year" should be taken into account for purposes of section 245N. It cannot be the "previous year" in which the application is made for an application may be made very early in a financial year and may even have to be disposed of long before the end of the financial year. In such cases, the full picture of the applicant's stay in India during the previous year may not be always available by the date of the application or even by the date of its disposal by the authority. The only "previous year" with reference to which the status of the applicant is determinable for purpose of section 245N, must be the "previous year" preceding the financial year in which the application is made—*Robert W. Smith* v. *CIT* [1994] 77 Taxman 530 (AAR - New Delhi), *Monte Harris* v. *CIT* [1995] 82 Taxman 365 (AAR - New Delhi).

Where on the date of the original application which was rejected as invalid, applicant is not a non-resident but on the date of the second revised application he is a non-resident (first application having been rejected as invalid), the revised application is to be taken into account for the purpose of determining his status and as such, his application is maintainable—*Dr. Rajnikant R. Bhatt* v. *CIT* [1996] 89 Taxman 82/222 ITR 562 (AAR - New Delhi).

Procedure for filing application

487. Procedure for filing application for advance ruling is given below —

487.1 ***Application form number*** - An application shall be made in the forms given below —

Applicant	*Form No.*
❑ When applicant is non-resident	34C
❑ When applicant is resident	
- Person seeking advance ruling in relation to a transaction undertaken or proposed to be undertaken with a non-resident	34D
- Person falling within such class or category of persons as notified by the Central Government (*i.e.*, a public sector company).	34E

487.2 ***Fees*** - The above application (in quadruplicate) should be accompanied with a demand draft of Rs. 2,500 in favour of authority for advance ruling.

487.3 ***Who should sign the application*** - The application, the verification appended thereto, the annexures to the said application and the statements and documents accompanying it, shall be signed by the following :

1. In the case of an individual by the individual himself, or where (for any unavoidable reason) it is not possible for the individual to sign the application, by any person who is duly authorised by him and holds a valid power of attorney from the individual to do so, which shall be attached to the application.

2. In the case of a Hindu undivided family, by the karta thereof, and where (for any unavoidable reason) it is not possible for the karta to sign the application, by any other adult member of such family.

3. In the case of a company by the managing director thereof or where for any unavoidable reason such managing director is not able to sign and verify the application or where there is no managing

director, by any director thereof; or where (for any unavoidable reason) it is not possible for the managing director or the director to sign the application, by any person who is duly authorised by the company in this behalf and who holds a valid power of attorney from the company to do so, which shall be attached to the application.

4. In the case of a firm, by the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign and verify the application, or where there is no managing partner as such, by any partner thereof (not being a minor).

5. In the case of an association of persons, by any member of the association or the principal officer thereof.

6. In the case of any other person, by that person or by some person competent to act on his behalf.

Where a person signing the application and other documents claims to have been duly authorised in that behalf under the rules, the application shall be accompanied by a power of attorney, authorising him to append his signature and an affidavit setting out the unavoidable reason which entitles him to sign it.

487.4 ***Other points*** - The application shall be presented by the applicant in person or by an authorised representative to the Secretary (or any other officer notified in writing by the Secretary) or sent by registered post addressed to the Secretary.

- An application sent by registered post shall be deemed to have been made on the date on which it is received in the office of the Authority.
- If the applicant is not hitherto assessed in India, he shall indicate in Annexure I to the application his head office in any other country, the place where his office and residence is located or is likely to be located in India, and the name and address of his representative in India, if any, authorised to receive notices and papers and act on his behalf.
- The Secretary may send the application back to the applicant if it is defective in any manner for removing the defects within such time as he may allow. Such application shall be deemed to have been made on the date when it is represented after correction.

487.5 ***Withdrawal of application*** - An applicant may withdraw an application within 30 days from the date of the application.

487.6 ***Modification in application*** - After stating questions for seeking advance ruling, the applicant cannot at the time of hearing, so modify questions as to change the very complexion of the application. But if the applicant wants to confine a question to only some of the items/aspects mentioned therein and/or give up some parts of the question, there can be no valid objection to such a course — ***Fidelity Advisor Series VIII, In re*** [2005] 142 Taxman 111 (AAR).

Procedure on receipt of application [Sec. 245R]

488. The Authority on receipt of an application will send a copy to the Commissioner concerned and, wherever considered necessary, also call upon the Commissioner to furnish relevant records. Such records will be returned to the Commissioner as soon as possible. The Authority may either allow or reject an application.

488.1 ***When the application can be rejected*** - In the three cases given below it is specifically provided that the authority shall not allow the application in the case of a non-resident applicant [*see* also column (*3*) of the table given in para 486.2].

488.1-1 *CASES ALREADY PENDING* - The Authority shall not allow an application from a non-resident where the question of law or fact raised is already pending in the case of the applicant, either before any income-tax authority, the Appellate Tribunal or any Court.

- The words "already pending", should be interpreted to mean : "already pending as on the date of the application" and not with reference to any future date—*Monte Harris* v. *CIT* [1995] 82 Taxman 365 (AAR - New Delhi).

■ Where the applicant non-resident company had been awarded a contract by the Orissa State Government and the latter had approached the Assessing Officer in terms of section 195(2) to determine the appropriate proportion of the payments chargeable to tax, the matter cannot be considered as a 'pending proceeding' in terms of proviso (*a*) to section 245R(2), as it was not the applicant who had referred the matter to the ITO (TDS) and, hence, the application by the applicant, before the Authority for Advance Ruling would be maintainable — *Hyder Consulting Ltd.* v. *CIT* [1999] 103 Taxman 73/236 ITR 640 (AAR - New Delhi).

488.1-2 *APPLICATION FOR AVOIDANCE OF TAX* - Applications will also not be allowed where the transaction, in relation to which the question is raised, is designed for the avoidance of income-tax.

Where applicant companies were fully-owned subsidiaries of British Company and were residents of Mauritius and they had made investments in shares in an Indian bank, and purpose of investment by British company through applicant-companies instead of directly, was found to be for avoidance of tax within meaning of clause (*c*) of first proviso to section 245R(2), applications of applicant companies deserved to be rejected by the Authority for Advance Rulings—*X. Ltd., In re* [1996] 86 Taxman 252/220 ITR 377 (AAR - New Delhi).

488.1-3 *APPLICATION FOR DETERMINATION OF FAIR MARKET VALUE* - Application will not be allowed where the question raised relates to the determination of the fair market value of any property.

488.2 ***Pronouncement of advance ruling*** - Where an application is allowed, the Authority shall (after examining such further material as may be placed before it by the applicant or obtained by the Authority), pronounce its advance ruling on the question specified in the application.

The applicant can, on request, appear either in person or can be represented through a duly authorised representative. A time limit of 6 months is provided for the pronouncement of advance ruling after the receipt of the application by the authority.

A copy of the advance ruling pronounced by the Authority (duly signed by the Members and certified in the prescribed manner), shall be sent to the applicant and the Commissioner, as soon as may be, after such pronouncement.

488.3 ***Continuation of proceedings after the death, etc., of the applicant*** - Where the applicant dies or is wound up or dissolved or disrupted or amalgamated or succeeded by any other person or otherwise comes to an end, the application shall not abate and may be permitted by the Authority (where it considers that the circumstances justify it) to be continued by the executor, administrator or other legal representative of the applicant or by the liquidator, receiver or assignee, as the case may be, on an application made in this behalf.

488.4 ***Hearing of application ex parte*** - Where on the date fixed for hearing (or any other day to which the hearing may be adjourned) the applicant or the Commissioner does not appear in person (or through an authorised representative) when called up for hearing, the Authority may dispose of the application *ex parte* on merits. Where an application has been disposed of as above and the applicant or the Commissioner, as the case may be, applies within 15 days of receipt of the order and satisfies the Authority that there was sufficient cause for his non-appearance when the application was called up for hearing, the Authority may (after allowing the opposite party a reasonable opportunity of being heard) make an order setting aside the *ex parte* order and restore the application for fresh hearing.

488.5 ***Modification of order*** - Where the Authority finds *suo motu* or on a representation made to it by the applicant or the Commissioner or otherwise, but before the ruling pronounced by the Authority has been given effect to by the Assessing Officer, that there is a change in law or facts on the basis of which the ruling was pronounced, it may by order modify such ruling in such respects as it considers appropriate, after allowing the applicant and the Commissioner a reasonable opportunity of being heard.

488.6 ***Rectification*** - The Authority may, with a view to rectifying any mistake apparent from the record, amend any order passed by it before the ruling pronounced by the Authority has been given

effect to by the Assessing Officer. Such amendment may be made *suo motu* or when the mistake is brought to its notice by the applicant or the Commissioner, but only after allowing the applicant and the Commissioner reasonable opportunity of being heard.

488.7 ***Appellate authority not to proceed in certain cases*** - No income-tax authority or the Appellate Tribunal shall proceed to decide any issue in respect to which an application has been made by an applicant, being a resident, under section 245Q(1).

488.8 ***Other points*** - One should also keep in view the following points—

1. Where in terms of contract with Indian company, applicant is entitled to payment without any liability to tax and Indian company is to bear tax liability, the fact that tax will be paid by Indian company will not relieve applicant of liability to tax and, therefore, its application for advance ruling as to taxability cannot be dismissed as academic—*Steffen, Robertson & Kristen Consulting Engineers & Scientists* v. *CIT* [1997] 95 Taxman 598 (AAR - New Delhi).

2. Authority cannot give any ruling on questions relating to tax levied under Gift-tax Act, 1958 — *Advance Ruling No. P-12 of 1995, In re* [1997] 228 ITR 61 (AAR - New Delhi).

3. An application for advance ruling concerning liability to interest under sections 234B and 234C in respect of tax on capital gains arising from transaction of purchase and sale of shares, is an application in relation to a 'transaction' within meaning of section 245N and, hence, maintainable— *Y. Ltd., In re* [1996] 87 Taxman 59/221 ITR 172 (AAR - New Delhi).

4. No application shall be rejected unless an opportunity has been given the applicant of being heard. Where the application is rejected, reasons for such rejection shall be given in the order.

5. Authority of Advance Ruling will not pronounce a ruling on the question which is of academic interest—***Acer Computer International Ltd., In re*** [2004] 138 Taxman 271 (AAR - New Delhi).

Applicability of advance ruling [Sec. 245S]

489. The advance ruling shall be binding only on the applicant who has sought it and in respect of the specific transaction in relation to which such advance ruling was sought. It will also be binding on the Commissioner and the income-tax authorities subordinate to the Commissioner. The ruling will continue to remain in force unless there is a change in law or in fact on the basis of which the advance ruling was pronounced.

Advance ruling to be void in certain circumstances [Sec. 245T]

490. Where the Authority finds (on a representation made to it by the Commissioner or otherwise) that an advance ruling pronounced by it has been obtained by the applicant by fraud or misrepresentation of facts, it may (by order), declare such ruling to be void *ab initio* and thereupon all the provisions of the Act shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order declaring such ruling as void), to the applicant as if such advance ruling had never been made.

Powers of authority [Sec. 245U]

491. The Authority will have all the powers of a Civil Court in respect of discovery and inspection, enforcing the attendance of any person including any officer of a banking company and examining him on oath, issuing commissions and compelling the production of books of account and other records. It will also have the power to regulate its own procedure in all matters arising out of the exercise of its powers under the Act. The Authority would be deemed to be a Civil Court for the purposes of section 195 of the Code of Criminal Procedure, 1973, and every proceeding before the Authority shall be deemed to be a judicial proceeding under certain provisions of the Indian Penal Code.

CHAPTER THIRTY

Search, seizure and block assessment

Powers regarding discovery, production of evidence, etc. [Sec. 131]

492. Section 131 gives powers of court of law to the income-tax authority, though they are not strictly judicial authorities—*Dinshaw* v. *CIT* [1943] 11 ITR 172 (Bom.). Therefore, the Assessing Officer acts in a quasi-judicial capacity. The Assessing Officer must follow the basic principles of conforming to the judicial procedure.

492.1 ***Powers of Civil Court [Sec. 131(1)]*** - The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals) and Chief Commissioner or Commissioner shall have powers vested in a Court under the Code of Civil Procedure, 1908 in respect of the following matter—

a. discovery and inspection;

b. enforcing the attendance of any person, including an officer of a banking company and examining him on oath;

c. compelling the production of books of account and other documents; and

d. issuing commissions.

492.1-1 *ENFORCING ATTENDANCE OF THE PERSON AND EXAMINING ON OATH* - If the Assessing Officer considers that evidence of a witness is material, it is for him to enforce attendance—*Nathu Ram Premchand* v. *CIT* [1963] 49 ITR 561 (All.). However, under section 131(1) a witness has no right to be represented by a counsel—*V. Datchinamurthy* v. *Asstt. Director of Inspection* [1984] 149 ITR 341 (Mad.).

492.1-2 *PROCEEDING SHOULD BE PENDING* - The powers of the Income-tax Authorities concerned under section 131(1) are co-extensive with that of a civil court trying a suit and such powers can be exercised only if a proceeding is pending before such authority. However, section 131(1A) is free from such fetter which is an overriding provision—*CIT* v. *Mool Chand Salecha* [2002] 124 Taxman 898 (Raj.).

However, section 131 does not expressly lay down that some proceedings must be pending before the same income-tax authority who exercises the power under section 131—*Peerless General Finance & Investment Co. Ltd.* v. *Assessing Officer* [2001] 117 Taxman 253 (All.).

492.1-3 *PRODUCTION OF BOOKS OF ACCOUNT* - The Assessing Officer can requisition documents—*Jute Mills Co. Ltd.* v. *Dwijendralal Brahmachari* [1973] 90 ITR 467 (Cal.) on the basis of information received from another department. Moreover, the records and documents can be called for a period beyond three years—*Amal Kumar Ghatak* v. *ITO* [1971] 79 ITR 452 (Cal.) and limitations imposed by proviso to section 142 will not whittle down such a requisition.

492.1-4 *ISSUE OF COMMISSIONS* - The Assessing Officer can under the law take recourse to issuing commissions for recording statements, especially when a large number of persons are involved—*V. Datchinamurthy* v. *Asstt. Director of Inspection* [1984] 149 ITR 341 (Mad.).

492.2 ***When power can be exercised in respect of concluded proceedings [Sec. 131(1A)]*** - If six specified authorities, *viz.*; (*1*) Director-General, (*2*) Director, (*3*) Joint Director, (*4*) Assistant Director, (*5*) Deputy Director, and (*6*) the authorised officer referred to in section 132(1) have reason to suspect that any income has been concealed (or is likely to be concealed) by any person (or class of persons) within his jurisdiction, then for purpose of making any inquiry or investigation in relation

to the said income (*i.e.*, concealed income), the authority (who has noticed the concealment of income) will be competent to exercise the powers conferred under section 131(1) notwithstanding that no proceedings with respect to such person/class of persons are pending before him or any other income-tax authority.

492.3 ***Impounding of books [Sec. 131(3)]*** - The Director-General or Director or Joint Director or Assistant Director or Deputy Director or Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals), Chief Commissioner or an officer authorised under section 132(1) to carry out search and seizure is authorised to impound and retain in its custody any books of account or other document produced before it in any proceedings under the Act.

However, an Assessing Officer or an Assistant Director or Deputy Director can neither impound any books before recording in writing the reasons for impounding books of account [and it should be communicated to the assessee too—*Plyast (Delhi) (P.) Ltd.* v. *ITO* [1986] 159 ITR 750 (Delhi)] nor they can retain books of account or any other documents beyond 15 days (excluding holidays) without obtaining the approval of Chief Commissioner or Director General or Commissioner or Director. It is to be noted that a prior approval is needed for impounding books for more than 15 days. In other words, approval has to precede the impounding of books beyond 15 days—*Sri Ramakrishna Talkies* v. *ITO* [1985] 153 ITR 794 (AP). However, it is not necessary to communicate the reasons for impounding books to the assessee.

Retention of books of account beyond the period sanctioned by the Commissioner is unauthorized—*Tarachand Hotilal Babauram* v. *ITO* [1973] 89 ITR 298 (All.).

Search and seizure [Sec. 132]

493. This section confers upon the income-tax authorities wide powers relating to search and seizure and provisions of Code of Criminal Procedure shall apply. However, limitations prescribed by section 165 of that Code shall not apply—*ITO* v. *Seth Bros.* [1969] 74 ITR 836 (SC).

Since section 132 confers enormous powers to the income-tax authorities regarding search and seizure which invades upon the privacy and freedom of the taxpayer, it has to be exercised keeping statutory requirement and principles of natural justice in mind—*Sibal* v. *CIT* [1975] 101 ITR 112 (Punj. & Har.), *Anand* v. *CIT* [1976] 103 ITR 575 (Punj. & Har.) and not arbitrarily—*ITO* v. *Seth Bros.* [1969] 74 ITR 836 (SC). If the action of income-tax authority is challenged, then the concerned Officer must satisfy the Court regarding *bona fides* of his action—*Naraindas* v. *CIT* [1984] 148 ITR 567 (MP). If, however, powers have been exercised *bona fide* and according to the statutory requirements, then a mere error in judgment will not make the search and seizure illegal and void—*ITO* v. *Seth Bros.* [1969] 74 ITR 836 (SC), *Prabhubhai Vastabhai Patel* v. *R. P. Meena* [2000] 112 Taxman 277 (Guj.).

It must be kept in mind that issue of search warrant does not amount to any type of judicial act under this section—*ITO* v. *Seth Bros.* [1969] 74 ITR 836 (SC), *Jain* v. *Union of India* [1987] 168 ITR 815 (Cal.).

493.1 ***Circumstances in which search and seizure can be conducted [Sec. 132(1)]*** - The Director-General or Director or the Chief Commissioner or Commissioner or, such Joint Director who is duly empowered by the Board, has in his possession any information through which he has reason to believe that—

a. a person to whom a summon under section 131(1) or a notice under section 142(1) has been served to produce books of account (or other documents) has failed (or omitted to produce or cause to be produced) the said books of account (or other documents) ; or

b. a person to whom a summon under section 131(1) or notice under section 142(1) has been (or might be) issued is not likely to produce (or cause to be produced) any books of account or other document which will be useful for (or relevant to) any proceedings under the Act ; or

c. a person is in possession of money, bullion, jewellery or other valuable article or thing and such property represents wholly or partly income or property which has not been disclosed or would not be disclosed.

The principles that emerge can be summarized as under:

1. The authority must be in possession of the information and must form an opinion that there is reason to believe that the article or property has not been (or would not be) disclosed for the purposes of the Act.

2. The information must be something more than mere rumour or gossip or hunch. It is abundantly clear from various judicial pronouncements that there has to be specific information rather than vague information. The opinion has to be formed in a subjective manner on which a reasonable and prudent person could act— *Vipan Kumar Jain* v. *Union of India* [2001] 117 Taxman 178 (Punj. & Har.).

3. The information must exist before the opinion is formed. 'Information', in consequence of which the Director-General or the Chief Commissioner, etc., has to form his belief is not only to be authentic but capable of giving rise to the inference that a person is in possession of money, etc., which has not been (or would not be) disclosed for the purpose of the Act. In other words, it must necessarily be linked with the ingredients mentioned in the section.

By now it is well-settled that while the sufficiency or otherwise of the information cannot be examined by the Court in writ jurisdiction but the existence of information and its relevance to the formation of the belief is open to judicial scrutiny— *Ajit Jain* v. *Union of India* [2001] 117 Taxman 295 (Delhi).

4. It has been held that the words 'reason to believe' means that a reasonable man, under the circumstances, would form a belief which will impel him to take action under the law. The formation of opinion has to be in good faith and not on mere pretence. For the purpose of section 132, there has to be a rational connection between the information or material and the belief about undisclosed income, which has not been and is not likely to be disclosed by the person concerned— *Ajit Jain* v. *Union of India* [2001] 117 Taxman 295 (Delhi).

5. The opinion must be based on the material that is available at that time and it should not be formed on the basis of extraneous or irrelevant material.

6. The information of opinion shall have rational connection and bearing to the reasons for such an opinion. The formation of opinion should be based on active application of mind and be *bona fide* and not based on extraneous or irrelevant material. The belief must be *bona fide* and cogently supported. The existence or otherwise of the condition precedent is open to judicial scrutiny— *Vipin Kumar Jain* v. *Union of India* [2001] 249 ITR 728 (Punj. & Har.).

7. The courts would examine whether the authorised person had material before it on which he could form the opinion whether there is rational connection between the information possessed and the opinion formed. However, the court would not sit in appeal over the opinion formed by the authorised person if the authorised person had information in his possession and the opinion formed is on the basis of such material. The court would not examine whether the material possessed was sufficient to form an opinion.

8. The court cannot go into the question of sufficiency of the grounds upon which the subjective satisfaction is based.

493.2 ***Who is the authorised officer*** - For the purpose of carrying out search and seizure, if Director-General or Director or the Chief Commissioner or Commissioner has reasons to believe due to the information (as given in para 493.1) which he has in his possession, then he may authorise any Joint Director, Joint Commissioner, Assistant Director, Deputy Director, Assistant Commissioner, Deputy Commissioner or Income-tax Officer.

If duly authorised Joint Director or Joint Commissioner has reasons to believe due to the information in his possession (as given in para 493.1), then he may authorise any Assistant Director, Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer.

493.3 ***Powers of authorised officer in respect of search and seizure*** - The authorised officer [*see* para 493.2] is empowered to —

a. enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery and other valuable articles are kept ;

b. break open the lock of any door, locker, safe, almirah or other receptacle for exercising the powers conferred under (*a*) *supra* where the keys thereof are not available ;

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

d. require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in section 2(1)(*t*) of the Information Technology Act, 2000, to afford the authorised officer the necessary facility to inspect such books of account or other documents;

e. seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search (however, from June 1, 2003, any bullion, jewellery or other valuable article or thing being stock-in-trade of the business found as a result of search shall not be seized but the authorised officer shall make a note or inventory of such stock-in-trade of the business);

f. place marks of identification on any books or other documents or make or cause to be made extracts or copies therefrom ; and

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

It may be noted that the search comes to an end when the search party leaves the premises after carrying with them the seized material and thus the authorisation for search is fully implemented and the execution is complete—*Ananta N. Naik* v. *CIT* [2000] 112 Taxman 281 (Mag.)/66 TTJ (Pune) 533.

493.3-1 ***DEEMED SEIZURE*** - Where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may serve an order on the owner (or the person who is in immediate possession thereof) that he shall not remove, part with or otherwise deal with it, except with the previous permission of the authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing [second proviso to section 132(1)]. However, from June 1, 2003 the aforesaid provision shall not apply in case of any valuable article or thing, being stock-in-trade of the business.

493.3-2 ***WHERE THE CONCERNED PERSON IS NOT IN THE JURISDICTION OF CHIEF COMMISSIONER OR COMMISSIONER*** - Where the building, place, vessel or aircraft in which search is to be conducted is within the area of jurisdiction of a Chief Commissioner or Commissioner but such Chief Commissioner or Commissioner has no jurisdiction over the person in relation to whom search is proposed, even then he can still exercise the powers given under para 493.3 if he has reason to believe that delay in getting the authorisation from the proper Chief Commissioner or Commissioner may be prejudicial to the interest of the revenue.

493.3-3 ***JUDICIAL PRONOUNCEMENTS*** - One should keep in view the following judicial pronouncements—

■ *No prior notice is necessary* - Prior notice is not required to the person whose account books and documents are sought to be seized—*Lit Light & Co.* v. *CIT* [1982] 136 ITR 513 (All.), *V.K. Jain* v. *Union of India* [1975] 98 ITR 469 (Delhi).

■ *Officers have the right to remove obstructions or resistance* - If in the exercise of the power or the performance of the official duty, improper or unlawful obstruction or resistance is encountered, there must be the right to use reasonable means to remove the obstruction or overcome the

resistance. This accords with commonsense and does not seem contrary to any principle of law—*Matajog Dobey/Nand Ram Agarwala* v. *H.C. Bhari* [1955] 28 ITR 941 (SC).

■ *Relevance/usefulness of documents at initial stage* - It is scarcely to be expected that at the stage of seizure there must be conclusive proof of the relevancy or usefulness of the material seized—*Sri Venkateswara Lodge* v. *CIT* [1969] 71 ITR 629 (AP).

■ *Standard of living cannot form the basis* - Living in a posh house or having a high standard of living alone cannot constitute a basis for 'reasonable belief' without anything on record to demonstrate that the standard of living is not proportionate to income so as to warrant the conclusion that the person is concealing his income—*Dr. Nand Lal Tahiliani* v. *CIT* [1988] 170 ITR 592 (All.).

■ *Belief must relate to non-disclosure of income* - The words 'reason to believe' under section 132(1)(*c*) refer to a belief that money or other asset belongs to a particular individual and such money or other asset represented undisclosed income of that individual. What is important and relevant is the reason to believe that it is the undisclosed income of a person and not in whose physical possession the same is—*Gulab & Co.* v. *Supdt. of Central Excise (Preventive)* [1975] 98 ITR 581 (Mad.).

■ *Blank warrants are illegal* - The most serious content of the warrant of authorisation is the name of the person whose premises, etc., are sought to be searched. There is abundant authority in support of the proposition that general warrants are no warrants at all because such warrants know no one. Where the Commissioner signed blank warrants in which the Commissioner (Appeals) filled the particulars, the search would be illegal and the articles seized were liable to be returned—*Jagmohan Mahajan* v. *CIT* [1976] 103 ITR 579 (Punj. & Har.), *Manmohan Krishan Mahajan* v. *CIT* [1977] 107 ITR 420 (Punj. & Har.).

■ *Irrelevant documents* - Seizure of voluminous/irrelevant documents or inordinate time taken in search will not invalidate search—*Pooran Mal* v. *Director of Inspection (Investigation)* [1974] 93 ITR 505 (SC).

■ *Sale of seized asset not permissible* - Where FDRs are seized during the search, the income-tax authorities will have no jurisdiction to order the encashment of the FDRs and recover the proceeds thereof under section 132(1); they could only attach FDRs by means of a prohibitory order under section 132(3)—*Raj Kumar* v. *Union of India* [2000] 110 Taxman 483/242 ITR 584 (Punj. & Har.).

■ *Seizure must be physical* - The seizure envisaged in section 132(1)(*iii*) is effected only when the authorised officer takes possession of the seized articles to enable the revenue to appropriate the same towards the payment of the amount that may be determined to be due under the Act. A mere order issued for taking possession of the keys to the bank locker will not constitute 'seizure' as contemplated by section 132(1)—*Kanwal Shamsher Singh* v. *Union of India* [1974] 95 ITR 80 (Delhi).

■ *Money in custody of other departments cannot be seized* - Where money was in the custody of the excise authority or police authority and was held by the authority pursuant to a seizure made by it, the income-tax department could not issue a search warrant and seize the money from that authority—*ITO* v. *Bafna Textiles* [1987] 164 ITR 281 (SC). In other words, the term 'possession' in the context of section 132, connotes physical possession and, not legal possession—*CIT* v. *Tarsem Kumar* [1986] 161 ITR 505 (SC).

■ *Assets/money known to the department as existing cannot be seized* - Where the existence of the money or assets is known to the income-tax department and where the case of the assessee is that the said money or the valuable asset is not liable to be taxed, the provisions of section 132(1)(*c*) would not be attracted—*L.R. Gupta* v. *Union of India* [1991] 59 Taxman 305 (Delhi).

■ *Burden to prove* - The burden to prove that the authorisation of search is *mala fide* is on the assessee—*Subir Roy* v. *S.K. Chattopadhayay* [1986] 158 ITR 472 (Cal.).

493.3-4 *RIGHTS AND DUTIES OF PERSONS SEARCHED* - The person searched has the following right —

- To see the warrant of authorisation duly signed and sealed by the issuing authority.
- To verify the identity of each member of the search party.

- To make personal search of all members of the search party before the start of the search and on conclusion of the search.
- To insist on personal search of ladies being taken only by lady, with strict regard to decency.
- To have at least two respectable and independent residents of the locality as witnesses.
- A lady occupying an apartment being searched has a right to withdraw before the search party enters, if, according to custom, she does not appear in public.
- To call a medical practitioner in case of emergency.
- To allow the children to go to school, after checking their bags.
- To have the facility of having meals, etc., at the normal time.
- To inspect the seals placed on various receptacles, sealed in course of search and subsequently at the time of reopening of the seals.
- Every person who is examined under section 132(4) has a right to ensure that the facts so stated by him have been recorded correctly.
- To have a copy of the panchnama together with all the annexures.
- To have a copy of any statement that is used against him by the Department.
- To have inspection of the seized books of account, etc., or to take extracts therefrom in the presence of any of the authorised officers or any other person empowered by him.
- To make an application objecting to the approval given by the Commissioner of Income-tax for retention of books and documents beyond 30 days from the date of assessment under section 153A or 158BC(*c*).

❑ Duties of the person searched are—

- To allow free and unhindered ingress into the premises.
- To see the warrant of authorisation and put signature on the same.
- To identify all receptacles in which assets or books of account and documents are kept and to hand over keys to such receptacles to the authorised officer.
- To identify and explain the ownership of the assets, books of account and documents found in the premises.
- To identify every individual in the premises and to explain their relationship to the person being searched. He should not mislead by personation. If he cheats by pretending to be some other person or knowingly substitutes one person for another, it is an offence punishable under section 416 of the Indian Penal Code.
- Not to allow or encourage the entry of any unauthorised person into the premises.
- Not to remove any article from its place without notice or knowledge of the authorised officer. If he secretes or destroys any documents with the intention of preventing the same from being produced or used as evidence before the court or public servant, he shall be punishable with imprisonment or fine or both, in accordance with section 204 of the Indian Penal Code.
- To answer all queries truthfully and to the best of his knowledge. He should not allow any third party to either interfere or prompt while his statement is being recorded by the authorised officer. In doing so, he should keep in mind that—
  - ❑ If he refuses to answer a question on a subject relevant to the search operation, he shall be punishable with imprisonment or fine or both, under section 179 of the Indian Penal Code.
  - ❑ Being legally bound by an oath or affirmation to state the truth, if he makes a false statement, he shall be punishable with imprisonment or fine or both under section 181 of the Indian Penal Code.
  - ❑ Similarly, if he provides evidence which is false and which he knows or believes to be false, he is liable to be punished under section 191 of the Indian Penal Code.
- To affix his signature on the recorded statement, inventories and the panchnama.

- To ensure that peace is maintained throughout the duration of the search, and to co-operate with the search party in all respects so that the search action is concluded at the earliest and in a peaceful manner.
- Similar co-operation should be extended even after the search action is over, so as to enable the authorised officer to complete necessary follow-up investigations at the earliest.

493.4 ***If books of account, etc. are kept in building not specified in the search warrant [Sec. 132(1A)]*** - Where a search for any books of account or other documents or assets has been authorised by Director-General, Director, Chief Commissioner or Commissioner, Joint Director or Joint Commissioner (*i.e.*, the authorised officer), and the Chief Commissioner or Commissioner has reasons to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or things of the assessee are kept in any building, place, vessel, vehicle or aircraft not specified in the search warrant, then such Chief Commissioner or Commissioner may authorise the authorised officer to search such other building, place, vessel, vehicle or aircraft.

493.5 ***Police assistance [Sec. 132(2)]***- The authorised officer may requisition the services of any police officer or any officer of the Central Government or both to assist him for the purposes as laid out in paras 493.3 and 493.4 and it shall be the duty of every such officer to comply with such requisition.

The following point should be noted —

■ Keeping police officers will not amount to use of excessive force—*ITO* v. *Seth Bros.* [1969] 74 ITR 836 (SC).

■ Police officers cannot detain a person against his will without arresting him—*CIT* v. *Ramesh Chander* [1974] 93 ITR 450 (Punj. & Har.).

493.6 ***Where it is not practicable to seize books of account etc. [Sec. 132(3)]*** - Where in any particular case it is not practicable to seize books of account, other documents, money, bullion, jewellery or other valuable article or thing [for reasons other than those mentioned in second proviso to section 132(1)], then in such a case the authorised officer may serve an order on the owner or the person who is in the immediate possession or control of the books of account, etc., to the effect that such person shall not remove, part with or otherwise deal with it except with the prior permission of the authorised officer. Such authorised officer may take such steps as he deems necessary for proper compliance of his orders. Serving of aforesaid order is not to be deemed as case of seizure [*Expln.* to section 132(3)].

493.6-1 *TIME-LIMIT* - According to section 132(8A), the aforesaid order shall not be operative for a period exceeding 60 days from the date of order with effect from June 1, 2002.

493.7 ***Examination on oath [Sec. 132(4)]*** - The authorised officer may during the course of search and seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, etc. Any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Act. However, all persons who are found at place of search are not automatically covered by action under section 132—***CIT*** v. ***Latika V. Waman*** [2005] 1 SOT 535 (Mum.).

According to *Explanation* to sub-section (4) of section 132, the examination of any person may not be merely in respect of any books of account, documents or other assets found as a result of search but also in respect of all matters relevant for the purpose of any investigation, connected with any proceedings under the Act.

493.8 ***Presumptions [Sec. 132(4A)]*** - Where any books of account, other documents, money, bullion, jewellery and other valuable article is found in possession or control of any person in the course of a search,* the following presumption can be made —

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*The scope of this provision has been modified by amending section 292C with effect from June 1, 2002 so as to extend this presumption also to books of account, other documents, etc., found in the possession or control of any person in the course of a survey operation.

1. Those books of account, other documents money, bullion, jewellery and other valuable article or thing belongs to such person.

2. The contents of such books of account and documents are true.

3. The signature and every other part of such books of account and other documents which purports to be in the handwriting of any particular person are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped, executed or attested by the person by whom it purports to have been so executed or attested.

■ Section 292C has been amended with retrospective effect from October 1, 1975 so as to extend this presumption also to books of account, other documents or assets which have been delivered to the requisitioning officer in accordance with the provisions of section 132A.

■ The following points should be noted—

1. The presumption under section 132(4A) is a rebuttable presumption and not a conclusive one—***Straptex (India) (P.) Ltd.*** v. ***CIT*** [2003] 84 ITD 320 (Bom.).

2. Presumption under provisions of section 132(4A) will not be applicable to third party from whose possession such papers and documents have not been found by revenue—*Prarthana Construction (P.) Ltd.* v. *CIT* [2001] 118 Taxman 112 (Ahd.)(Mag.)/ *Unique Organisers & Developers (P.) Ltd.* v. *CIT* [2001] 118 Taxman 147 (Ahd.) (Mag.). However, once it is proved that seized documents belong to a particular person, presumption, if any, under section 132(4A) can be drawn only against that person and not against person from whose possession documents have been seized—***CIT*** v. ***Omprakash & Co.*** [2003] 132 Taxman 99 (Mum.) (Mag.).

3. By applying the presumption under section 132(4A) the ingredients of the offence under sections 276C and 277 cannot be held to have been established—*Prem Dass* v. *ITO* [1999] 103 Taxman 65 (SC).

4. The contention of the assessee that the presumption under section 132(4A) is intended by the Legislature to be made applicable to order under section 132(5) only and not for assessment/penalty proceedings is untenable—***Straptex (India) (P.) Ltd.*** v. ***CIT*** [2003] 84 ITD 320 (Mum.).

493.9 ***Time-limit for retention of seized books of account, etc. [Sec. 132(8)]*** - When the books of account or other documents are seized [*see* para 493.3], then authorised officer cannot retain the possession thereof for a period exceeding 30 days from the date of the assessment under section 158BC or 153A. Retention for a period exceeding (30 days) can be made only if reasons are recorded in writing and the approval of the Chief Commissioner, Commissioner, Director-General or Director is obtained. Moreover, the Chief Commissioner, Commissioner, Director-General or Director cannot authorise the retention beyond 30 days after all the proceedings under the Act in respect of years for which books of account, etc., are relevant are completed.

However, if the person legally entitled to the books of account or other documents, etc., objects to the approval given by the Chief Commissioner, Commissioner, Director-General or Director, he may make an application to the Board stating therein the reasons for the objection and requesting for return of books of account etc. The Board shall pass such order as it thinks fit after providing an opportunity of hearing to the applicant.

493.10 ***Taking copies of seized documents [Sec. 132(9)]*** - The person from whom the books of account or other documents were seized [*see* para 493.3] is permitted to make copies thereof, or take extracts therefrom, in the presence of the authorised officer or any other person empowered by him in this behalf and at such place and time as the authorised officer may provide.

■ *Assessee should not be prevented from inspecting and making out copies* - The authorised officer has no jurisdiction to refuse the inspection —*Ramesh Chander* v. *CIT* [1974] 93 ITR 244 (Punj. & Har.).

■ *Documents of department cannot be shown at preliminary stage* - Where during the course of arguments the petitioner wanted to see the records (documents) maintained by the department including the information and the notings on the basis of which the authority had arrived at his satisfaction for conducting the search and seizure, the aforesaid documents could not be shown to

the petitioners at that stage as their disclosure would hamper the inquiry pending against the petitioner—*Ram Swarup Sahu* v. *CIT* [1992] 196 ITR 841 (Pat.).

■ *Partners of firm* - Partners of firm can make copies of books seized during search without being required to give undertaking that books belonged to them—*Manik Chand Gupta* v. *CIT* [1988] 173 ITR 662 (All.).

493.11 ***Authorised Officer having no jurisdiction [Sec. 132(9A)]***- Where books of account or other documents or assets have been seized by a person having no jurisdiction over the persons, then such an authorised officer is required to hand over the seized papers and assets to the Assessing Officer who has proper jurisdiction within a period of 60 days (15 days up to May 31, 2002) from the date on which the last of the authorisation for search was executed. On handing over the seized papers, the powers referred to in paras 493.9 and 493.10 shall be exercised by latter Assessing Officer.

Requisitioning of books of account, etc. [Sec. 132A]

494. Under section 132A, an authorisation can be issued to the designated income-tax authorities for taking delivery of books of account, etc., which are in the custody of any officer or authority (not a court of law) under any other law, for the purposes of inquiry under the Act—*Abdul Khader* v. *Sub-Inspector of Police* [1999] 240 ITR 489 (Ker.).

494.1 ***Who can exercise powers under section 132A*** - The income-tax authorities who can exercise the powers under section132A are: Director-General, Director, Chief Commissioner or Commissioner.

494.2 ***Requisitioning officers*** - The aforesaid authorities may authorise Joint Director, Joint Commissioner, Assistant Director, Deputy Director, Assistant Commissioner, Deputy Commissioner or Assessing Officer (these officers have been referred to in section 132A as requisitioning officers) to take action under section 132A.

494.3 ***Situations in which powers under section 132A can be invoked*** - Powers can be invoked under section 132A when the Director-General, Director, Chief Commissioner or Commissioner has information in his possession and in consequence thereof has reason to believe that —

a. any person to whom summons under section 131(1) or notice under section 142(1) was issued to produce any books of account or other documents has failed to produce them and the said books of account or other documents have been taken into custody by any officer or authority under any other law for the time being in force, or

b. any books of account or other documents will be useful for, or relevant to, any proceeding under the Act and any person to whom a summons or notice as aforesaid has been or might be issued will not produce such books of account or other documents on their return by any officer by whom they have been taken into custody under any other law for the time being in force, or

c. any assets represent either wholly or partly income or property which has not been, or would not have been disclosed for the purposes of the Act, by any person from whose possession or control such assets have been taken into custody by any officer or authority under any other law for the time being in force.

■ *Seized articles returned by court subject to consequential orders* - Even where article seized by police and requisitioned by revenue under section 132A were ordered to be returned by High Court in writ alleging violation of fundamental right, revenue is entitled to proceed with enquiry under section 132A and, therefore, while revenue is liable to return seized articles to petitioner, the same will be subject to consequential orders that might be passed after inquiry is completed—*Commissioner of Police* v. *Sadruddin H. Javeri* [1999] 103 Taxman 571 (AP).

■ *Bank draft* - A bank draft, when presented by the customer for clearing to the bank, cannot be requisitioned from the bank by the Competent Authority—*Samta Construction* v. *Pawan Kumar Sharma* [1999] 107 Taxman 198 (MP).

■ *Jurisdiction under article 226/227* - While exercising extraordinary jurisdiction under article 226/227 of the Constitution, the High Court is required to examine in each case whether the act of issuance of authorisation under section 132A is arbitrary, *mala fide*, or lacks proper application of mind—*Suresh Bhai Bhola* v. *Union of India* 1999 Tax LR 261 (Raj.).

494.4 ***Requisition procedure*** - The procedure for requisition is given below—

■ The requisitioning officer requires the officer or authority referred to above, as the case may be, to deliver such books of account, other documents or assets to him. Rule 112D(1) provides that the authorisation under section 132A(1) shall be in Form No. 45C, shall be in writing, signed by the issuing authority and shall bear his seal.

■ On receipt of a requisition as aforesaid, the officer or authority concerned shall deliver the books of account, other documents or assets to the requisitioning officer either forthwith or when such officer or authority is of the opinion that it is no longer necessary to retain them in his custody.

■ The delivering officer or authority shall prepare a list of the books of account or other documents delivered to the requisitioning officer. Before effecting delivery of any bullion, jewellery or other valuable article or thing, the delivering officer or authority shall place or cause to be placed such bullion, jewellery, article or thing in a package or packages which shall be listed with details of such bullion, jewellery, article or thing placed therein. Every such package shall bear an identification mark and seal of the requisitioning officer or of any other income-tax authority not below the rank of Income-tax Officer on behalf of the requisitioning officer, and also of the delivering officer or authority. The person referred to in section 132A(1)(*a*)/(*b*)/(*c*) or any other person on his behalf shall also be permitted to place his seal on the said package or packages. A copy of the list prepared shall be delivered to such person and a copy thereof shall also be forwarded by the delivering officer to the Chief Commissioner or Commissioner and also to the Director-General or Director where the authorisation has been issued by him.

Application of assets seized or requisitioned [Sec. 132B]

495. All assets which are seized under section 132 or requisitioned under section 132A shall be dealt with as follows :

a. liability existing on the day of seizure or requisition under Income-tax Act, Wealth-tax Act, Expenditure-tax Act, Gift-tax Act and Interest-tax Act;

b. liability determined on completion of block assessment or assessment under section 153A (including assessment of the previous year in which search is initiated) if such person is in default or deemed to be in default for such liability.

495.1 ***Release of sum remaining after recovery*** - Where any asset or proceeds are left after applying the assets seized or requisitioned as mentioned in para above, then such sum shall be released back to the person from whose custody it was taken if the following conditions are satisfied:

1. The concerned person makes an application to the Assessing Officer within 30 days from the end of the month in which the asset was seized.

2. Nature and source of such assets is explained to the Assessing Officer satisfactorily.

3. All existing liabilities and liability determined on completion of block assessment or assessment under section 153A (including assessment of the previous year in which search is initiated) as mentioned in para above are recovered out of such assets.

4. Prior approval of Chief Commissioner of Income-tax or Commissioner of Income-tax has been obtained.

495.1-1 *WHERE ASSETS SEIZED OR REQUISITIONED CONSISTS OF CASH* - Where assets seized consists solely or partly of cash, then the Assessing Officer is empowered to apply such money in discharge of the existing liabilities and liability determined on completion of block assessment as mentioned in para 495 above and the assessee shall be discharged of such liability to the extent of the money so applied.

495.1-2 *WHERE ASSETS SEIZED OR REQUISITIONED CONSISTS PARTLY OF CASH AND PARTLY OF OTHER ASSETS* - Where assets seized consists partly of cash and partly of other assets, then Assessing Officer is empowered to apply such money in discharge of the existing liabilities and liability determined on completion of block assessment as mentioned in para 495 above and assessee shall be discharged of such liability to the extent of the money so applied. After applying money in discharge of such liability the remaining assets shall also be applied in discharging the remaining liability.

For the aforesaid purpose, such assets shall be deemed to be held in distraint as if such distraint was effected by the Assessing Officer or as the case may be, by the Tax Recovery Officer under authorization from the Chief Commissioner of Income-tax or Commissioner of Income-tax under section 226(5). Therefore, such Assessing Officer or Tax Recovery Officer may recover the amount of such liability by the sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule.

495.2 ***Recovery through any other modes*** - Nothing contained in section 132B(1) shall preclude the recovery of the amount of liabilities as mentioned in para 495 by any other mode laid down under the Income-tax Act.

495.3 ***Payment of interest by the Central Government*** - The Central Government shall pay interest @ ½ per cent for month or part thereof (upto May 31, 2007 @ 6 per cent per annum) on the excess amount seized or requisitioned over and above the amount required to meet all existing liabilities and liability determined on completion of assessment.

Period of interest - The interest shall be paid from the date immediately following the expiry of the period of 120 days from the date on which the last of the authorization for search under section 132 or requisition under section 132A was executed to the date of completion of the assessment under section 153A or Chapter XIV-B.

Power to call for information [Sec. 133]

496. The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner or the Commissioner (Appeals) has power to call for information required for the purposes of the Act from the following —

- *Any firm* - To furnish a return of the names and address of the partners of the firm and their respective share.
- *Any HUF* - To furnish a return of the names and address of the manager and members of the family.
- *Any person on whom the authority has reason to believe to be a trustee, guardian or agent* - To furnish a return of the names of the persons for or of whom he is a trustee, guardian or agent, and their address.
- *Any assessee* - To furnish a statement of names and address of all persons to whom he has paid in any previous year rent, interest, commission, royalty, brokerage or annuity taxable under the head "Salaries" amounting to a sum more than Rs. 1,000 together with the particulars of all such payment.
- *Any dealer, broker, or agent or any person concerned in the management of a stock or commodity exchange* - To furnish a statement of the names and address of all persons to whom he or the exchange has paid any sum in connection with the transfer of assets or on whose behalf or from whom he or the exchange has received any sum, together with the particulars of such payments and receipts.
- *Any person including a banking company or a co-operative bank or any officer thereof* - To furnish information or statement of accounts giving information on various matters which will be useful for or relevant to any inquiry or proceedings under the Act. [It may be noted that this power can also be exercised by the Director General, the Chief Commissioner, Director or the Commissioner.]

496.1 ***Other points*** - One should also keep in view the following —

■ *Person cannot be any person or authority belonging to the department* - The information which is contemplated by section 133 is only with reference to either the assessee or any person concerned with the assessee and not with reference to any authority or person belonging to the revenue. A Superintending Engineer or a District Valuation Officer cannot be said to be a person from whom information is sought to be obtained—*Daulatram* v. *ITO* [1990] 181 ITR 119 (AP).

■ *Non-furnishing of information cannot entail disallowance of claim* - The Act does not seem to provide that if an information under section 133(4) is not furnished, the claim for deduction can be disallowed on that ground—*CIT* v. *Goodlass Nerolac Paints Ltd.* [1991] 188 ITR 1 (Bom.).

■ *No pending proceedings* - Where no proceeding is pending, the power in respect of an inquiry cannot be exercised by any authority below the rank of Director/Commissioner without prior approval of Director/Commissioner—***Rechevy Service Co-operative Bank Ltd.*** v. ***CIT*** [2003] 129 Taxman 335 (Ker.).

Power of survey [Sec. 133A]

497. Power of survey is given by section 133A.

497.1 ***Places where an income-tax authority can enter*** - By virtue of section 133A (notwithstanding anything contained in the Income-tax Act), an income-tax authority [*i.e.*, Commissioner, Joint Commissioner, Director, Joint Director, Assistant Director, Deputy Director or Assessing Officer, Tax Recovery Officer] may enter the following places—

a. any place within the limits of the area assigned to him ; or

b. any place which is occupied by any person in respect of whom he exercises jurisdiction ; or

c. any place in relation to which he is authorised by such income-tax authority who is assigned that area within which such place is located or who exercises jurisdiction in relation to such person occupying that place.

■ An income-tax authority can enter the aforesaid place at which a business/profession is carried on whether or not that place is the principal place of the business or profession. No prior notice is required—*N.K. Mohnat* v. *CIT* [1995] 215 ITR 275 (Mad.).

■ Joint Commissioner, who authorises survey, is fully empowered under section 133A to remain present at the spot of survey for supervising and doing all that is necessary for the purpose of the Act—*N.K. Mohnat* v. *CIT* [1999] 104 Taxman 64/240 ITR 562 (Mad.).

■ No action under the aforesaid provision (with effect from June 1, 2003) shall be taken by the Assistant Director or a Deputy Director or an Assessing Officer or a Tax Recovery Officer or an Inspector of Income-tax except with the prior approval of the Joint Director or the Joint Commissioner, as the case may be.

497.1-1 *NEED FOR ENTERING PLACES MENTIONED ABOVE* - On entering the aforesaid place, the income-tax authority may require any proprietor, employee or any other person attending or helping in carrying on such business or profession —

a. to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place ;

b. to afford him the necessary facility to check or verify the cash, stock or other valuable articles or things which may be found therein ; and

c. to furnish such information as he may require as to any matter which may be helpful for or relevant to any proceeding under the Act.

497.1-2 *WHERE BOOKS OF ACCOUNT, CASH, STOCK, ETC., ARE KEPT AT ANY OTHER PLACE* - If the concerned person states that books of account, other documents, cash, stock, etc., are kept at a place other than the place where business/profession is carried on, then the income-tax authority may enter such place for survey.

497.1-3 *TIME* - An income-tax authority may enter any place of business or profession only during the hours at which such place is open for conduct of business/profession and in case of any other place only after the Sunrise and before Sunset.

■ *Business hours* - The section provides that the authority may 'enter' only during business hours. After such entry, no further limitation is imposed by the section regarding the period for which he may remain in that premises. If the volume of materials to be scrutinised is such as to require the survey being continued even after the business hours, the continued presence of the authority in the premises and the continuance of the survey cannot be regarded as 'illegal'—*N.K. Mohnat* v. *CIT* [1995] 215 ITR 275 (Mad.).

497.2 ***Powers of survey*** - Section 133A provides the following powers to the income-tax authority—

1. An income-tax authority may if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make copies therefrom.

2. Such authority may impound and retain in his custody for such period as he thinks fit any books of account or other documents inspected by him. However, books of account or other documents shall not be impounded before recording reasons in writing and where such books or other documents are retained for a period exceeding 10 days (15 days up to May 31, 2003) exclusive of holidays, then income-tax authority will have to obtain the approval (during June 1, 2002 to May 31, 2003) of the Chief Commissioner or Director-General or Commissioner or Director therefor as the case may be, or (from June 1, 2003) of Chief Commissioner or Director-General therefor, as the case may be.

3. Such authority may, make an inventory of any cash, stock or other valuable article or thing checked or verified by him.

4. Such authority may record the statement of any person, which may be useful for, or relevant to, any proceedings under the Act.

5. An income-tax authority having regard to the nature and scale of expenditure incurred by the assessee, in connection with any function, ceremony or event, is of the opinion that it is necessary or expedient to do so, may require (at any time after such function, ceremony or event) the assessee by whom such expenditure has been incurred (or any person who, in the opinion of the income-tax authority, is likely to possess information as regard the expenditure incurred) to furnish such information as he may require as to any matter which may be useful or relevant for any proceeding under the Act and may have the statements of the assessee (or any other person) recorded and any statement so recorded may thereafter be used in evidence in any proceedings under the Act.

6. TRO is an Assessing Officer vested with necessary powers for recovery of arrears of tax in respect of the assessee under his jurisdiction and he has the necessary power and authority to be present during the survey operation—*N.K. Mohnat* v. *CIT* [1999] 104 Taxman 64/240 ITR 562 (Mad.).

497.2-1 *NO POWER TO REMOVE CASH [SEC. 133A(4)]* - An income-tax authority can in no case remove the place wherein he has entered for survey, any cash, stock or other valuable article or thing.

The following should be noted —

1. Premises cannot be sealed under section 133A—*Shyam Jewellers* v. *Chief Commissioner* 1990 Tax LR 696 (All.).

2. Promissory notes are not 'documents' and protection given under section 133A(4) is not available to promissory notes—*N.K. Mohnat* v. *CIT* [1999] 104 Taxman 64/240 ITR 562 (Mad.).

497.2-2 *TAX COLLECTION - NOT PERMITTED* - It is a well settled position of law that a competent income-tax authority can inspect the business premises and record the statements under the provisions of section 133A. Such an authority cannot demand collection of tax on the alleged undisclosed income then and there. Such an authority is required to send the statement of the material collected to the Assessing Officer if he himself is not the income-tax authority carrying out the survey operation. There is no provision for permitting a cross examination of the person, whose statement is recorded during the survey—*Rameshwar Lal Mali* v. *CIT* [2002] 256 ITR 536 (Raj.).

497.3 ***If a person refuses to obey orders [Sec. 133A(6)]*** - In carrying on survey if a person refuses to afford facility to income-tax authority to inspect account books or other documents etc., or evades to do so, the income-tax authority shall have all the powers under section 131(1) for enforcing compliance with the requirement made.

497.4 ***Proceeding - Meaning of*** - The term "Proceeding" means any proceeding which is completed, or pending or which is to be commenced in future.

497.5 ***Presumption as to assets, books of account, etc. [Sec. 292C]*** - *See* para 493.8.

Power to collect certain information [Sec. 133B]

498. For the purpose of collecting any information, which may be useful for the purpose of the Act, an income-tax authority [as defined in *Explanation* to sec. 133B] may enter—

a. any building or place within the limit of the area assigned to such authority ; or

b. any building or place occupied by any person in respect of whom he exercises jurisdiction.

498.1 ***Other points*** - The following points are important —

1. The income-tax authority can enter the aforesaid building only if it is used for the purpose of carrying on a business or profession. It is, however, immaterial whether such place is the principal place of such business or profession or not.

2. The income-tax authority may require any proprietor, employee or any other person who is attending in any manner to furnish information in Form No. 45D.

3. The income-tax authority may enter any place of business or profession only during the hours at which such place is open for conduct of business or profession.

4. The income-tax authority shall on no account remove or cause to be removed from the building or place wherein he has entered, any books of account or other documents or any cash, stock or other valuable article.

Scheme of assessment in case of search or requisition [Sec. 153A, applicable from June 1, 2003]

499. Section 153A has been inserted with effect from June 1, 2003 to provide for assessment in case of search or making requisition.

499.1 ***Notice for submission of return of six assessment years*** - Section 153A provides the procedure for completion of assessment where a search is initiated under section 132 or books of account, or other documents or any assets are requisitioned under section 132A after May 31, 2003. In such cases, the Assessing Officer shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted under section 132 or requisition was made under section 132A.

For instance if search is conducted under section 132 on June 20, 2006, the Assessing Officer shall issue notice requiring the assessee to furnish return of income in respect of assessment years 2001-02 to 2006-07.

499.2 ***Pending assessment*** - The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate.

499.2-1 *ASSESSMENTS ALREADY COMPLETED* - After the search, the total income of the assessee is to be recomputed on the basis of the undisclosed income unearthed during search and the same is to be added with the regular income assessed under section 143(3) or computed under section 143(1) for each of the six preceding assessment years. Where any prepaid taxes are there, the same are required to be given credit for computing the further tax payable by the assessee. The assessee is also required

to pay interest under sections 234A and 234B on the tax due on the basis of new calculation. Where nothing incriminating is found in the course of search relating to any assessment year, the assessments for such year cannot be disturbed.

Suppose in the course of a search, nothing incriminating is found. Does this mean that an honest citizen be unduly harassed by facing automatic reopening of the concluded assessments, merely because there was search action against him? The absurdity of the construction gets all the more pronounced when say, no incriminating material is found relating to the 'other person', but the material found indicates disclosed income. Suppose, loan confirmation relating to loans duly disclosed in the return of income of A is found at the time of search in the premises of B; should the assessments of A be reopened for all the six preceding years merely because search action has been initiated against B? The Courts have held that in selecting out of different interpretations, the Courts shall adopt that which is just, reasonable and sensible rather than that which is none of those things.

A reading of the CBDT Circular No. 7 of 2003, dated September 5, 2003 also clearly indicates that the appeal, revision, etc., arising out of earlier assessments shall not abate. In other words, there is no merger of the earlier assessments with the assessments done under the new scheme, *i.e.*, section 153A or section 153C—***LMJ International Ltd.*** v. ***CIT*** [2008] 22 SOT 317 (Kol.).

499.3 ***Existing provisions for re-assessment*** **vis-à-vis** ***section 153A*** - Save as otherwise provided in sections 153A, 153B and 153C, all other provisions of the Act shall apply to the assessment made under section 153A. Section 153A authorises issue of notice for reassessment or recomputation for six earlier assessments, without the necessity of satisfaction of the superior officers, required under section 151. Moreover, there is no need for income concealment for longer or shorter time-limit under section 147, since provisions of sections 147 and 148 will not be applicable in search cases. On the mere fact of search, all the precautions given to the taxpayer against re-opening of back assessment have been set aside.

499.4 ***Regular tax rate will be applicable*** - In an assessment or reassessment made in respect of an assessment year under section 153A, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

499.5 ***Time-limit for completion of assessment under section 153A [Sec. 153B]*** - Section 153B provides for the time-limit for completion of search assessments. It provides that the Assessing Officer shall make an order of assessment or reassessment in respect of each assessment year, falling within six assessment years under section 153A within a period of 21 months† from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed.

■ This section also provides the time-limit for completion of assessment in respect of the assessment year relevant to the previous year in which the search is conducted under section 132 or requisition is made under section 132A within a period of 21 months† from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed.

■ In case of "other person", the time-limit for making assessment or reassessment in search cases shall be—

a. 21 months† from the end of the financial year in which the last of authorisations for search under section 132 or for requisition under section 132A was executed; or

b. 9 months‡ from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under section 153C to the Assessing Officer having jurisdiction over such other person,

whichever is later.

Provisions illustrated - A search was conducted in the premises of X Ltd. on January 20, 2007. It was completed on January 25, 2007. Certain documents pertaining to Y Ltd. were seized. Y Ltd. is a company based at Nagpur.

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† 24 months if the last of authorisation under section 132 or 132A was executed before April 1, 2004.

‡ 12 months if the last of authorisation under section 132 or 132A was executed before April 1, 2004.

These documents are handed over to the Assessing Officer having jurisdiction over Y Ltd. on April 2, 2008. Assessment/reassessment of Y Ltd. can be completed at any time on or before December 31, 2009 (*i.e.*, 21 months from the end of the financial year 2006-07 or 9 months from the end of the financial year 2008-09, whichever is later).

499.5-1 ***WHEN REFERENCE IS MADE TO TRANSFER PRICING OFFICER*** - With effect from June 1, 2007 the time-limit specified under section 153B in cases where reference is made to Transfer Pricing Officer (TPO) shall be extended by 12 months. However, the extended time-limit is applicable only in the following cases—

Different cases	New time-limit
Case 1 - The last of authorizations for search under section 132 or for requisition under section 132A is executed on or after April 1, 2005 and during the course of the proceedings for the assessment or reassessment of total income, a reference is made to TPO before June 1, 2007 and the order is not passed by TPO up to May 31, 2007 or reference is made to TPO on or after June 1, 2007	*For Assessing Officer* - Within 33 months from the end of the financial year in which the last of authorization for search under section 132 or for requisition under section 132A is executed. *For TPO* - 60 days before the aforesaid time-limit
Case 2 - The last of authorizations for search under section 132 or for requisition under section 132A is executed on or after April 1, 2005 and during the course of the proceedings for the assessment or reassessment of total income in the case of other person referred to in section 153C, a reference is made to TPO before June 1, 2007 and the order is not passed by TPO up to May 31, 2007 or reference is made to TPO on or after June 1, 2007	*For Assessing Officer* - Within 33 months from the end of the financial year in which the last of the authorizations for search under section 132 or for requisition under section 132A is executed or 21 months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under section 153C to the Assessing Officer having jurisdiction over such other person, whichever is later. *For TPO* - 60 days before the aforesaid time-limit

499.5-2 ***PERIOD TO BE EXCLUDED*** - In computing the period of limitation, the following shall be excluded—

a. the period during which the assessment proceeding (*i.e.*, the process of assessment starting from the date of filing of return till making order of assessment) is stayed by an order or injunction of any Court; or

b. the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under section 142(2A) and ending with the date on which the assessee is required to furnish audit report; or

c. the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the proviso to section 129; or

d. in a case where an application made before the Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under section 245D(1) is received by the Commissioner under section 245D(2); or

e. the period commencing from the date on which an application is made before the Authority for Advance Rulings and ending with the date on which the order rejecting the application or, as the case may be, the date on which the advance ruling pronounced by it is received by the Commissioner (applicable from October 1, 2004).

Where immediately after the exclusion of the time or period mentioned above, the period of limitation referred to above, available to the Assessing Officer for making an order of assessment or reassessment orders is less than 60 days, the remaining period shall be extended to 60 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

499.5-3 ***TIME-LIMIT OF COMPLETION OF ASSESSMENT IN THE CASE OF ANNULMENT OF SEARCH PROCEEDINGS IN AN APPEAL/LEGAL PROCEEDINGS*** - Provisions regulating revival of proceedings and time-limits for action were ambiguous before the amendment made by the Finance Act, 2008. The amended provisions which are applicable from June 1, 2003 are given below—

a. if any proceeding initiated under section 153A or any order of assessment or reassessment made under section 153A(1) has been annulled in any appeal or other legal proceeding, the abated

assessment or reassessment relating to any assessment year shall stand revived and if such order of annulment is set aside, such revival shall cease to have effect;

b. that time-limit for completion of such assessment or reassessment shall be one year from the end of the month in which the abated assessment revives or within the period already specified in section 153 or in section 153B(1), whichever is later; and

c. the period commencing from the date of annulment of a proceeding or order of assessment or reassessment referred to in section 153A(2) till the date of the receipt of the order setting aside the order of such annulments by the Commissioner, shall be excluded in computing the period of limitation.

Provisions illustrated - The cumulative impact of the aforesaid amendments may be illustrated as follows—

1. Facts of the case	
1.1 Name of the taxpayer	X Ltd.
1.2 Date on which search proceeding is initiated	May 16, 2008
1.3 Date on which last of authorization related to this search is issued	June 15, 2008
1.4 Assessments pending on May 16, 2008	For assessment years 2006-07 and 2007-08
2. Consequences of search	
2.1 Abatement of pending assessments [second proviso to sec. 153A(1)]	Assessments for the assessment years 2006-07 and 2007-08 pending on May 16, 2008 shall abate
2.2 Assessment/reassessment with respect to each of 6 assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted [first proviso to sec. 153A(1)]	Assessment or reassessment with respect to each of the six assessment years, *i.e.*, from assessment year 2003-04 to assessment year 2008-09 shall be required to be made
2.3 Time-limit for completion of these assessments [sec. 153B(1)(a)]	December 31, 2010
3. Annulment of search proceedings in an appeal/ legal proceedings	
3.1 Date of passing of the annulment order in appeal/legal proceedings	October 25, 2008
3.2 Date when the order is received by the Commissioner	November 20, 2008
4. Consequences of annulment of search proceedings	
4.1 If assessment for the assessment year 2003-04 to assessment year 2008-09 is already completed on October 25, 2008	Automatically becomes annulled due to the order given in (3) (*supra*)
4.2 If assessment for the assessment year 2003-04 to assessment year 2008-09 is not completed by October 25, 2008	No order of assessment/reassessment for these 6 assessment years can be made under first proviso to section 153A(1)
4.3 Pending assessments which had abated under (2.1) (*supra*) shall revive	Assessments for the assessment years 2006-07 and 2007-08 which were pending on May 16, 2008 and which has abated by virtue of search proceeding, shall revive
4.4 Time-limit for completion of aforesaid pending assessments	*For assessment year 2006-07* - December 31, 2008 (normal time-limit under section 153) or November 30, 2009 [new time-limit under sec. 153(4), *i.e.*, one year from the end of the month in which the order of annulment of

	search proceedings is received by the Commissioner], whichever is later. The assessment can be completed on or before November 30, 2009. *For assessment year 2007-08* - December 31, 2009 (normal time-limit under section 153) or November 30, 2009 [new time-limit under sec. 153(4), *i.e.*, one year from the end of the month in which the order of annulment of search proceedings is received by the Commissioner], whichever is later. The assessment can be completed on or before December 31, 2009.
5. Assume that the order of annulment of search proceedings as given in (3) (supra) is set aside under a legal proceeding	
5.1 Date of passing of the order to set aside annulment order	January 25, 2009
5.2 Date when the order is received by the Commissioner	February 2, 2009
6. Consequences of order to set aside received by the Commissioner on February 2, 2009	
6.1 If assessment for the assessment year 2003-04 to assessment year 2008-09 was completed on or before October 25, 2008	Shall automatically get revived
6.2 If assessment for the assessment year 2003-04 to assessment year 2008-09 is yet to be completed	These assessments can now be made under first proviso to section 153A(1)
6.3 Time-limit for completing assessment as mentioned in (6.2) (*supra*)	It should be completed by December 31, 2010. However, the time-limit will be extended to— a. March 15, 2011 (being December 31, 2010 + 74 days; 74 days being the difference between November 20, 2008 and February 2, 2009); b. April 3, 2009 (being February 2, 2009 + 60 days) These assessments can, therefore, be completed by March 15, 2011.

499.6 ***Assessment of income of any other person [Sec. 153C applicable from June 1, 2003]*** - Section 153C provides that where an Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong or belongs to a person other than the person referred to in section 153A, then the books of account, or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A.

The following points should be noted—

■ In case of "other person", the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having the jurisdiction over such other person.

■ In respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A, in case of other person, where—

a. no return of income has been furnished by such person and no notice under section 142(1) has been issued to him, or

b. a return of income has been furnished by such person but no notice under section 143(2) has been served and limitation of serving the notice under section 143(2) has expired, or

c. assessment or reassessment, if any, has been made,

before the date of receiving of books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person for such assessment year in the manner provided in section 153A.

The above provisions would apply where books of account or documents or assets seized or requisitioned referred to in sub-section (1) have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A.

Prior approval in the case of search [Sec. 153D]

500. Section 153D has been inserted with effect from June 1, 2007. It provides that in search cases no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner except with the previous approval of the Joint Commissioner. This provision is applicable in respect of the following orders—

a. orders of assessment or reassessment passed under section 153A(*b*) in respect of each assessment year falling within 6 assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A;

b. orders of assessment passed under section 153B(1)(*b*) in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A;

c. orders in the case of a person referred to in section 153A;

d. orders in the case of other person referred to in section 153C.

CHAPTER THIRTY-ONE

Transfer pricing

Taxation of international transaction

507. The provisions under sections 92 to 92F have been enacted with a view to provide a statutory framework which can lead to computation of reasonable, fair and equitable profit and tax in India so that the profits chargeable to tax in India do not get diverted elsewhere by altering the prices charged and paid in intra-group transactions leading to erosion of Indian tax revenue. Any income arising from an international transaction shall be computed having regard to arm's length price.

507.1 ***Conditions for applicability of arm's length price in the international transaction*** - The following conditions need to be satisfied for the applicability of the arm's length price in the international transaction—

507.1-1 *CONDITION 1 - TWO OR MORE ENTERPRISES* - International transaction is subjected to the arm's length price only in case of transaction between two entities called associate enterprises.

507.1-1a ENTERPRISES - MEANING OF [SEC. 92F(iii)] - Enterprise means a person who engages or has been engaged or proposed to engage in the following activities:

a. any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods;

b. know-how, patents, copyrights, trade-marks, licenses, franchises or any other business or commercial rights of similar nature or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights;

c. any activity relating to the provision of services of any kind;

d. carrying out any work in pursuance of a contract (*e.g.*, construction contract);

e. investment activity;

f. activity relating to provision of loan;

g. business of acquiring, holding, underwriting or dealing with shares, debenture or other securities of any body corporate.

■ A person would be an enterprise if it carries on the specified activity/business directly or through one or more of its units or divisions or subsidiaries.

507.1-2 *CONDITION 2 - ENTERPRISES SHOULD BE REGARDED AS ASSOCIATE ENTERPRISES [SEC. 92A(1)]* - The provisions regarding taxation of international transactions [secs. 92 to 92F] apply in case the two enterprises are associated enterprises.

An enterprise would be regarded as an associated enterprise of another enterprise, if—

a. it participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or

b. in respect of it one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

■ Clause (*a*) of section 92A(1) is about participation by one enterprise into other enterprise. While clause (*b*) of the said section is about participation by a third enterprise into both the enterprises.

■ Clause (*a*) of section 92A(1) provides that the enterprise which participates in management, control or capital is an associated enterprise for the 'other enterprise'. The language of the provision should be construed harmoniously such that both the 'participating enterprise' and 'other enterprise' are regarded as associated enterprises.

■ The word 'control' is of a wider ambit than the word 'management' and, therefore, even if a person is not managing the other but only able to control him, then he will fall within the ambit of phrase "control or management".

507.1-2a DEEMED ASSOCIATED ENTERPRISES [SEC. 92A(2)] - Mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprises, unless the criteria specified in section 92A(2) are fulfilled. For instance, where one enterprise is holding preference shares (not carrying voting rights) in other enterprise then they shall not be regarded as associated enterprises because though one is participating in the capital of other enterprises but still they are not satisfying any of the thirteen categories mentioned in section 92A(2).

Section 92A(2) provides that two enterprises shall be deemed to be associated enterprises if for the purpose of section 92A(1), the two enterprises satisfy, at any time during the previous year, any of the following conditions:

507.1-2a[1] *Thirteen categories [Sec. 92A(2)]* - Two enterprises shall be deemed to be associated enterprises for the purpose of section 92A(1) if, at any time during the previous year,—

i. one enterprise holds (directly or indirectly) shares carrying not less than twenty-six per cent of the voting power in the other enterprise [clause *a*]; or

ii. any person or enterprise holds (directly or indirectly) shares carrying not less than twenty-six per cent of the voting power in each of such enterprises [clause *b*]; or

iii. a loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise [clause *c*]; or

iv. one enterprise guarantees not less than ten per cent of the total borrowings of the other enterprise [clause *d*]; or

v. more than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise [clause *e*]; or

vi. more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons [clause *f*]; or

vii. the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights [clause *g*]; or

viii. ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise [clause *h*]; or

ix. the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise [clause *i*]; or

x. where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual [clause *j*]; or

xi. where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family, or by a relative of a member of such Hindu undivided family, or jointly by such member and his relative [clause *k*]; or

xii. where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals [clause *l*]; or

xiii. there exists between the two enterprises, any relationship of mutual interest, as may be prescribed [clause *m*].

■ *Raw material - Supply of* - According to clause (*h*) of section 92A(2), two enterprises shall be deemed to be associated enterprises only if one of the enterprise or any persons specified by it —

a. supplies 90 per cent or more of raw materials and consumables required by the other, and

b. the price and other conditions relating to the supply are influenced by such enterprise.

Here, limit of 90 per cent is to be applied on the 'value' of raw material and consumables.

■ *Directly or indirectly* - Only clauses (*a*) and (*b*) of section 92A(2) speaks of the phrase 'directly or indirectly'. Thus construing the deeming provisions of section 92A(2) strictly, it appears that clause (*c*) of section 92A(2) comprehends a direct relationship between the associated enterprises.

■ *Book value* - Clause (*c*) of section 92A(2) does not provide for the ingredients of the 'book value'. Hence, increase in value on account of revaluation of assets will not be ignored here.

■ *Appointment of directors* - Clause (*c*) of section 92A(2) contemplates actual appointment of director for application of the deeming provisions of associated enterprises. Thus a 'power to appoint' directors in the absence of actual appointment of directors will not attract the aforesaid provisions.

■ *Wholly dependant on intangible assets* - Clause (*g*) of section 92A(2) provides that two enterprises shall be deemed to be associated enterprises if at any time during the previous year the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent upon the use of know-how, patents, copyrights, trade-marks, licenses, etc., of which the other enterprise is the owner or has exclusive rights.

The aforesaid provisions are applicable if there is complete dependency of one enterprise on the other enterprise. In other words, in case of partial dependency, the two enterprises will not be deemed to be associated enterprises.

507.1-3 *CONDITION 3 - INTERNATIONAL TRANSACTION SHOULD BE CARRIED OUT BY THE ASSOCIATED ENTERPRISES* - An international transaction should be carried out by the associated enterprises. To constitute an international transaction, it should be :

1. A transaction between two or more associated enterprises (either or both are non-residents) in nature of (*a*) purchase, sale or lease of intangible property, or (*b*) provision of services, or (*c*) lending or borrowing money.

2. A transaction between two or more associated enterprises (either or both are non-residents) having a bearing on the profits, income, losses or assets of such associated enterprises.

3. Mutual agreement or arrangement between two or more associated enterprises for (*a*) allocation or apportionment of, or (*b*) contributing to, any cost or expense incurred (or to be incurred) regarding a benefit, service or facility provided (or to be provided) to any one or more of such associated enterprise.

507.1-3a DEEMED INTERNATIONAL TRANSACTION - Section 92B(2) provides that transactions between an enterprise and another person is deemed as transactions entered into between two associated enterprises if either of the following exists:

a. there is a prior agreement in relation to the relevant transaction between such other person and the associated enterprise; or

b. the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.

507.1-3a[1] *Transaction - Meaning of* - Section 92F provides an inclusive definition. According to section 92F, the transaction includes an arrangement, understanding or action in concert, whether or not such arrangement, understanding or action is formal or in writing; or is intended to be enforceable by legal proceeding.

Thus, not only the word 'transaction' includes those things which are included in section 92F(1), but it also includes such things which the term signifies according to its general and natural meaning.

Computation of the arm's length price

508. If conditions mentioned in para 507 are satisfied, then arm's length price shall be computed.

508.1 ***Arm's length price - Meaning of*** - Arm's length price as per section 92F is the price applied (or proposed to be applied) when two unrelated persons enter into a transaction in uncontrolled conditions.

508.1-1 *UNRELATED PERSONS* - Persons are said to be unrelated if they are not associated or deemed to be associated enterprise according to section 92A [*see* para 507.1-2].

508.1-2 *TRANSACTION* - *See* para 507.1-3a[1].

508.1-3 *UNCONTROLLED CONDITIONS* - Conditions which are not controlled or suppressed or moulded for achievement of a pre-determined results are said to be uncontrolled conditions. If a buyer is related to a seller, or where prices are governed by the Government policy then transaction is said to be taking place under controlled conditions.

Therefore to constitute arm's length price :

a. the price should be applied or proposed to be applied in a transaction;

b. the transaction is between unrelated persons; and

c. the transaction is taking place in uncontrolled conditions.

508.1-4 *POINTS TO BE KEPT IN MIND* - In computing such income, allowance for any expense or interest shall also be determined having regard to arm's length price. It has been clarified by insertion of *Explanation* in section 92(1) that even where international transaction comprises of only an outgoing, the allowance for such expenses or interest arising from the international transaction shall also be determined having regard to the arm's length price, and that the provision would not be applicable in a case where the application of arm's length price results in a downward revision in the income chargeable to tax in India.

The following points should also be kept in mind while computing arm's length price :

508.1-4a INCOME - WHETHER INCLUDES 'INCOME NET OF EXPENSES' - This section provides that the allowance for any expense is also to be determined in computing income under section 92. Income includes losses also and the word 'income' as referred to in section 92 will constitute 'income net of expenses' - *see* also *UOI* v. *A. Sanyasi Rao* [1996] 219 ITR 330 (SC).

508.1-4b DOES SECTION 92 OVERRIDE SECTIONS 5 AND 9 - According to section 5, a non-resident is liable to tax in respect of income which is received or deemed to be received in India by him or on his behalf or which accrues or arises or is deemed to accrue or arise in India during the previous year.

Similarly, section 9 provides for income which is deemed to accrue or arise in India.

Section 5 reads as follows : "Subject to the provisions of this Act, the total income of any previous year of a person....."

Use of the phrase "Subject to other provisions of Act" imply that in considering what is total income under section 5, one has to exclude such income as is excluded from the scope of total income by

reason of any other provisions of the Income-tax Act and not that the other provisions of the Income-tax Act override the provisions of section 5.

Therefore, section 92 does not override section 5. In other words, the Assessing Officer is authorised to tax that income only which is taxable in India as per the provisions of sections 5 and 9. In other words, non-residents whose income is not taxable as per sections 5 and 9 do not fall within the ambit of section 92.

508.1-4c 'HAVING REGARD TO' - MEANING OF - According to section 92, income from international transaction is to be computed "having regard to" arm's length price.

The use of the words 'having regard to' denotes that it is not incumbent upon the Assessing Officer to compute the arm's length price for each and every international transactions. In other words, income of the assessee need not compulsorily be computed by replacing contracted price by arm's length price in the international transaction. Therefore, factors other than arm's length price, like restrictions imposed by the Government policy on free market play, should also be taken into account along with the arm's length price.

508.1-4d INTENT TO DECEIT REVENUE OR MALA FIDE MOTIVE TO AVOID/REDUCE TAX IN INTERNATIONAL TRANSACTION - Section 92 has to be applied in every such case where an international transaction has taken place and the price agreed to between the two enterprises is different from the arm's length price, whether or not there is a *mala fide* motive. According to OECD guidelines, the need to make adjustments to approximate arm's length dealings arises irrespective of any contractual obligation undertaken by the parties to pay a particular price or of any intention of the parties to minimize tax. Thus, a tax adjustment under the arm's length principle would not affect the underlying contractual obligations.

508.1-4e RESTRICTIONS IMPOSED BY GOVERNMENT ON FREE MARKET PLAY - If certain Government policies hinder the free market play by restricting, for instance, payment of interest or the rate charged thereupon, then the arm length price shall be computed by taking into account such restrictions of Government policies.

Arm's length price - Computation of [Sec. 92C]

509. The arm's length price shall be determined by any of the method specified in this section, being the most appropriate method. Where an assessee has entered into various types of international transactions with associated enterprises, arm's length price should be determined on a transaction-by-transaction basis and not on an aggregate basis—***Development Consultants (P.) Ltd.* v. *CIT*** [2008] 23 SOT 455 (Kol.).

509.1 ***Method of computing arm's length price*** - Arm's length price can be computed by the following methods :

a. comparable uncontrolled price method;

b. resale price method;

c. cost *plus* method;

d. profit split method;

e. transactional net margin method;

f. such other method as may be prescribed by the Board.

509.1-1 *COMPARABLE UNCONTROLLED PRICE METHOD (CUP)* - Under this method,

a. the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, (*i.e.*, a transaction between enterprises other than associated enterprises whether resident or non-resident) or a number of such transactions, is identified;

b. such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;

c. the adjusted price arrived at under (*b*) *supra* is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction.

CUP is applied when a price is charged for a product or service. This is essentially comparison of prices charged for the property or services transferred in a controlled transaction to a price charged for property or services transferred in a comparable uncontrolled transaction. The bedrock of this method is the identification of an identical transaction, in a situation where a price is charged for products or services between unrelated parties.

While applying CUP, the comparability between controlled and uncontrolled transactions should not be only judged from the point of product comparability; but should also take into consideration, the effect on price of other broader business functions. Even minor differences in contractual terms or economic conditions, geographical areas, risks assumed, functions assumed, etc., could affect the amount charged in an uncontrolled transaction. Comparability under this method depends on close similarities with respect to various factors.

The CUP can be internal or external. The internal CUP is the price that the assessee has paid/charged in a comparable uncontrolled transaction with an independent party when compared to the price paid/charged in a controlled transaction. External CUP is a price charged in comparable uncontrolled transactions between third parties when compared to the price of a controlled transaction. However, where CUP method is to be applied on the basis of public data, it is provided in regulation 1.482-3(b)(5) of US Regulations that following requirements must be met :

- The data is widely and routinely used in ordinary course of business in the industry to negotiate prices for uncontrolled sales.
- The data is used to set prices in the controlled transaction in the same way that it is used by uncontrolled taxpayers in the industry; and
- The amount charged in the controlled transaction is adjusted to reflect product and service variations.

The US regulations further warn that data from public exchanges, quotation media should not be used in extraordinary situations such as war period, economic depression, natural calamities period, etc. The above principles are of universal application and there is no good reason why they should not be applied in transfer pricing determination in India.

509.1-2 ***RESALE PRICE METHOD (RPM)*** - Under this method,

a. the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified;

b. such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;

c. the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;

d. the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;

e. the adjusted price arrived at under (*d*) (*supra*) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise.

The RPM is to be applied when a property purchased or service obtained from an associated enterprise is resold to an unrelated enterprise. The RPM is based on the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. The resale price is reduced by resale price margin for arriving at the ALP. The resale price of goods is reduced

by the direct expenditure and the normal gross profit margin that would have been earned by an unrelated enterprise in a similar transaction. The price is further adjusted on account of different accounting practices and other differences between the transactions. There may be an internal RPM or external RPM as in the case of a CUP. Benchmarking of the margins is critical in this process. RPM could be reasonable method to apply to transactions involving resale of tangible property or in cases where the services are resold without value addition. This method is particularly suitable in cases where goods are sold within a short period of purchases and influence of other factors is found to be minimal.

509.1-3 *COST PLUS METHOD (CPM)* - Under this method,

a. the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined;

b. the amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction, or a number of such transactions, is determined;

c. the normal gross profit mark-up referred to in (*b*) *supra* is adjusted to take into account the functional and other differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect such profit mark-up in the open market;

d. the costs referred to in (*a*) *supra* are increased by the adjusted profit mark-up arrived at under (*c*) *supra*;

e. the sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise.

This method is ordinarily used where some semi-finished goods are sold between related parties or similar situations or in respect of joint facility agreements, long-term buy and supply arrangements of provisions of services, etc.

This is a method, which uses the costs incurred by the supplier of the property or services in a controlled transaction. Here, also as in the case of RPM, benchmarking of normal gross profit margins is necessary. The cost plus mark up of the supplier in a controlled transaction should ideally be established by reference to the cost plus mark up with the supplies of functional similarity earned in a comparable uncontrolled transaction.

Cost Plus Method is adopted in situations where comparable transactions are of functional similarity with that of controlled transactions. In other words, under Cost Plus Method, there is no necessity to benchmark with such product, which is 100 per cent identical. Products, which are functionally comparable, are good enough for benchmarking under Cost Plus Method. Even in this regard, FAR analysis is critical in identifying functionally similar comparable transactions.

As in other methods, the assets employed, the functions performed, the risk assumed, the contractual terms and other differences have to be taken into account. The mark up must be measured consistently between the associated enterprises and independent enterprises.

509.1-4 *PROFIT SPLIT METHOD (PSM)* - This method is applicable mainly in international transactions involving transfer of unique intangibles or in multiple international transactions which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction. As per profit split method, which—

a. the combined net profit of the associated enterprises arising from the international transaction in which they are engaged, is determined;

b. the relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;