CHAPTER VI
CHAPTER-VI

TAX PLANNING IN RESPECT OF ADMISSION OF MINORS TO THE BENEFITS OF PARTNERSHIP AND ITS COMPLICATIONS

In the previous Chapter the present Scholar has elaborately discussed about the necessity of Registration and its relevance and also present at length how different Courts differs on the self same matter i.e. on the subject of legal position of minor in the partnership firm attaining majority. In this present and concluding Chapter the Scholar proposes to analyse on the topic of Tax Planning in respect of admission of minors to the benefits of partnership and its various complications.

At the outset the endeavour of the Scholar remains incomplete without a discussion on the different aspect of Tax planning regarding minor.

Thus, to start with, while planning, one should take all the precautions already discussed in the previous Chapters. But the most vital aspect which sometimes puts either the minor or the Guardian into a position of inconvenience is the clubbing provisions of Income Tax Law, but before further examining the topic, it will be proper to understand what is meant by “Tax Planning”.
6.1 Concept of Tax Planning:-

Planning means where we stand and where we want to go. It has assumed a dominating role in the present 21st Century. This is so particularly in the economic life of not only an individual but also that of any body politic or the largest community of human beings known as a State or a Nation or a Country and the craze for ushering and leading a decent life in the 21st Century with happiness and prosperity has further enhanced its value and utility. For the proper implementation of the development programme, a sound base of Public Finance has to be built up which requires huge revenue and the revenue collecting authority has to generate the said revenue through the execution of taxation laws and brunt of said execution has to be borne by the public at large. It is for this purpose that laws on taxation have been suffering legislative experiments by frequent or (and) periodical amendments in order to cope with the space of changing times. The practical concept of the taxation laws is to realise the maximum revenue, of course within the four corners of laws and the days are gone by when Justice Holmes paid taxes for civilization.

Generally human beings by his very nature, is selfish. A person would like to have first of all good things for himself, he would hardly like that the fruits of his labour are enjoyed by others and particularly by those with whom he has no relationship. It is also a duty of the
individual to save some of his hard earned income legally after payment of due taxes so that the said savings may be available with him to make him and his dependants to feel more secured which resulted in leading a decent and honourable life and become a responsible citizen. Thus the method adopted by a person within the fore corner of law to reduce one’s burden of taxes is now known as ‘Tax Planning’.

Lord Tomlin\(^1\), the propounder of the famous West Minister doctrine said in 1936, that every man was entitled if he could to order his affairs so as to diminish the tax burden. Justice Hegde of the Hon’ble Supreme Court\(^2\) on this issue rightly concluded that it is a well accepted principle of law that an assesseee can so arrange his affairs as to minimise his tax burden. However Justice Sabyasachi Mukerhji of Supreme Court\(^3\) in this regard has summed up the mood of people at large when he sarcastically remarked that :-

"one could get the enthusiasm of justice Holmes that taxes are the prices of civilization. But the question which many ordinary tax payers very often in a country of shortages with ostentatious consumption and deprivation for the large masses ask is “Do they with taxes buy civilisation or do they facilitate the waste and ostentations of the few ? Unless waste and ostentation in Governmental spending are avoided or eschewed, no amount of moral
sermons could change People's attitude to tax avoidance".

6.2 Aggregation and its purpose:
Section 64 of the Income Tax Act 1961 contains special provisions for aggregation of Income in computing the total income of tax payers who are individuals. The provisions are intended to check attempts on the part of individuals to divert their income and avoid liability to tax. This provision is mandatory in nature and the assessing officer has no discretion in this regard i.e. even if the application of the provisions puts the revenue into the loss, yet the officer has nothing to do but to accept it. Even Apex Court in several cases while dealing with the matter very categorically held that since these provisions of clubbing in tax laws create vicarious and artificial tax liability, they are to be construed strictly. In other words, if on a plain language of the section an assessee cannot be hit, the language cannot be stretched or bent to some how rope him and assets transferred in any other manner will not attract the provisions of clubbing.

The effect of a clubbing provision is to enhance the assessee's liability to pay tax and by virtue of the applicability of the provisions for the aggregation, the assessee is subjected to an additional burden of tax than what he would otherwise have been subjected to in the matter of assessment to Income Tax. This artificial
liability over which the assessee has hardly any control, puts him into a considerable disadvantage. It is therefore essential that every effort should be made by the assessee to receive the maximum benefits of the provisions of law, to the extent these are lawfully permissible to reduce the burden.

Again whenever, the assessee, due to paucity of funds or otherwise is not in a position to pay the extra burden of tax created by the provision of aggregations, then he may take the shelter of Section 65 of the Income Tax Act thereby asking the assessing officer to recover the extra demands of tax from the person due to clubbing of whose income, his tax liability increased all the more rendering him unable to pay.

Even some time the clubbing provisions of Income Tax put the minor to a disadvantage position which creates more controversy then solve the issue. For example, if the minor and his natural Guardian assessed separately, though it may so happened that they may not have to pay tax at all depending on which slab their income falls. But by clubbing the income of both, it may so happen that the income of the Guardian may reached the highest slab of income and the Guardian may have to cough up a sizable chunk of his income as income tax and if the Guardian invoked the Section 65 of Income Tax Act with a prayer that as his funds does not permit to bear the burden of extra tax arises out of clubbing of income of his minor wards, the said tax may be reimbursed from the
income portion of the minor. Here a question arises as to how to deduct that amount. Because if they are assessed separately, they would have been assessed at lower rate of income tax and it is due to the clubbing, that the income of the guardian is subjected to highest marginal rate and after application of Section 65 the father’s income tax dues is to be calculated according to his income and when the income tax dues of the minor is added thereto would be the total income tax dues. Hence there is every possibility that the rate of income tax of the minor child may exceed the prevalent maximum marginal tax, which will violate the very provision of law.

The above eventuality can be proved by an hypothetical illustrative calculation as per, the rate of tax prevalent for the assessment year 2011-12 relevant to the financial year 2010 – 11.

The income of guardian Rs.2,00,000.00
(Assumed that guardian is not a senior citizen)

The income of minor child Rs.1,60,000.00

If both the guardian and the minor child are assessed separately, the rate of income tax is @ 10%(within the income bracket of Rs. 1,60,000/- to 3,00,000/-) i.e. the tax due of father is Rs.4120/- including Education Cess of 2% and Secondary & Higher
Education Cess of 1% total being 3% on income tax due and the tax due of minor son Rs. NIL.

But if the income of both are clubbed together and income tax is charged on the total income of both i.e. on Rs. 3,60,000/- the tax due will be Rs.20,600/- Education Cess of 2% and Secondry & Higher Education Cess of 1% total being 3% on the income tax due.

If the father invokes Section 65 of the *Income Tax Act* then he has to pay only Rs.4,120/- and the son has to pay the rest i.e. Rs.16,480/- instead of nil tax which comes to about 10.3% of minor's total income which is quite high because, if the minor would be assessed separately, then he does not have to pay any taxes. So instead of benefit it is a substantial loss situation for a minor who has been admitted to the benefit of the partnership.

As the Present Scholar has discussed earlier, unlike other laws such as law of Contract, Partnership etc. Income Tax law is a dynamic one in the sense that each year, the Income Tax Act/Rules under goes several amendments to suit the Governmental policy, need of the people and demand of the Society. So in one sense it is not a settled law till date and it cannot be so because society changes with time and so also the need of the people and fiscal requirement of the Government.
Thus in the light of the above dynamism of the *Indian Income Tax Act* 1961, the Scholar plan to divide the present discussion into the position of minor and tax planning up to the financial year 1992-93 and from the financial year 1993-94 onwards.

6.3 **Tax Planning in respect of admission of minors to the benefits of Partnership up to the Financial year 1992-93**-

According to Section 64 (i) (iii) of Income Tax Act 1961 in computing the total income of any individual, there shall be included all such income as arises directly or indirectly to a minor child of such individual from the admission of the minor to the benefits of partnership in a firm. In order to attract this provision, it is essential that the minor should have been admitted to the benefits of partnership and the minor must have derived income by way of share of a profit from the partnership firm. If there is no connection between the minor's admission to the benefits of partnership and the income derived by the minor, there is no question of clubbing of income for purpose of assessment of the parents of the minor. The above contention has been reinforced by the judgement of Allahabad High Court\(^7\), Gujarat High Court\(^8\) and M.P. High Court\(^9\).

Hon'ble Bombay High Court\(^10\) held that Income includes salary, commission or other remuneration paid by the firm, that any Salary, Commission or other remuneration paid by the firm to the minor child for
services rendered would be income arising from membership in the firm and would be covered by this clause i.e. this income would be clubbed with that of guardian because a partner cannot be an employee of the firm.

With regard to interest received on capital contribution by the minor children, it was held by two High Court i.e. Assam High Court\textsuperscript{11}, Allahabad High Court\textsuperscript{12} that where a minor is admitted to the benefits of Partnership in a firm in which his father or mother is a partner, and the minor supplies capital, any income accruing to the minor as interest on the capital would be an indirect result of his being admitted to the benefit of the partnership and hence includible in the total income of the father or mother, as the case may be under section 64(ii) of the Act.

Further Punjab & Haryana High Court\textsuperscript{13} went a step further ahead pronouncing that interest on accumulated balance of minor's share is profit of firm which was not authorised by partnership deed was to be clubbed in the assessee's income as the same was not deposit lying with firm.

Regarding the necessity of this Section M.P. High Court\textsuperscript{14} held that the Section 64(i) (iii) was introduced to check tax avoidance by diverting the income
to the minor children of the family by their admission to
the benefits of the partnership in the firm.

For the application of Section 64 (iii) admission of the minor to the benefits of partnership need
not necessarily be on the basis of any consideration as
money or money’s worth given by the parent or guardian
of the minor child. However even if there is no law in this
regard, in a professional firm, generally, the minor
dependents of a deceased partner are admitted to the
benefits of the partnership replacing the deceased partner
until they attain majority and in some cases goodwill of
the deceased partner is taken as consideration of the
minor child admitted to the professional partnership firm.

6.3a Income derived from the Benefit of partnership
only Subject to clubbing provision-

Therefore in the opinion of the Scholar for the
application of Section 64(i)(iii) there must be a nexus
between the money earned from the firm and minor’s
admission to the benefit of the partnership. So if a minor
derives a rental income from the firm for the property
owned by him and which is taken on hire by the firm for
its business purposes, there is no question of rental
income being clubbed with the income of the parent
unless the rental income arises to the minor child by
virtue of an assets transferred directly or indirectly
without any consideration by the parent to the minor
child.
Deliberating with the importance of nexus of consideration with that of admission to the benefit of partnership by the minor, the P & H high Court\textsuperscript{15} opined that if interest was paid on 'deposit' and not on 'capital', interest paid as such to minor was not includible in the hand of guardian.

Allahabad High Court\textsuperscript{16} viewed while pronouncing that interest derived by the minors on the investment made with the firm was not as a result of their admission to the benefits of the partnership and that it could not be included in the assessee's income under section 64(i)(iii).

However, deliberating on the same issue, Hon'ble Supreme Court\textsuperscript{17} analysed the issue more critically and opine that where, if the interest is paid by the firm on the deposits made or loans advanced, in a case where the partnership firm was free to accept the deposits or to raise loans from any persons even if not connected with the firm, the minors concerned do not keep their money to be used by the firm merely having regard to their interest in the business of the firm. In such cases, it cannot be said that there was any connection, direct or indirect in the earning of the interest on the deposits or loans made and the admission of the minor to the benefits of the partnership and the provisions of clause (i) (ii) of Section 64 of the Act would not be applicable. On the other hand, if the minor child allows his or her money to
remain with the firm without any direction and then allowed the firm to use those money without any specific arrangement as could have been entered into if the money belonged to a stranger, it would be reasonable to infer that the use of the money was allowed by the minor child because he/she had interest in the profits of the firm and in such circumstances, the interest income at least indirectly arises and accrues to the minor child, because of the capacity mentioned in Section 64(i)(ii) of the Income Tax Act 1961 and hence would he includible in the total income of the individual concerned.

This view of Hon’ble Supreme Court simply endorsed the view taken by Allahabad High Court in an earlier decision.

In a case Gujarat High Court held that if the investment of any money in the firm for and on behalf of the minor is connected with his admission to the benefits of the partnership, any interest paid to him by the firm thereon would come within the ambit of Section 64(ii) of the Act.

Bombay High Court elaborately differentiated and held that if the minor who has been admitted to the benefit of partnership has separate deposit in the said firm, then interest received from such deposit from the firm will not be added with the income of the father who is a partner in the firm. The legislature has made a distinction between the share of a minor for the purpose
of assessing him to tax with regard to his profit and the benefits, which the minor received from his admission to a partnership, which benefits are not to be taxed in his assessment but in the assessment of his father.

Delhi High Court\textsuperscript{21} also endorsed the above view and held that Minor admitted to benefit of partnership and his Interest relating to deposit amount or loan lying in his accounts is not includible in the hands of assessee i.e. his father. However interest on balance amount lying in accounts of minor is includible in the hands of Assessee.

The view of Mysore High Court\textsuperscript{22} that any remuneration paid to a partner, who may even be a minor child by the firm under his separate contract of employment or for other services, is not income arising from membership in the firm and is not covered by Section 64. This view was subsequently affirmed by the Apex Court\textsuperscript{23}.

In a far reaching Judgement Delhi High Court\textsuperscript{24} held that Pin money collection by the minor wife out of savings effected by her out of household expenses which can not be deemed to be an asset transferred to the wife and accordingly income from investment of such money can not be included in the income of the husband.
The position would however be different according to Bombay High Court\textsuperscript{25}, wherein it was held that if there is no clause in the Deed of Partnership requiring the minor to contribute any capital and in such a case if the minor has merely deposited his money in the firm for earning interest then such interest on his deposit cannot be included along with the income of concerned parent as that is an independent transaction creating the relationship of debtor and creditor and the interest on deposit can not be regarded as arising due to the admission of the minor to the benefit of partnership. Delhi High Court\textsuperscript{26} also subsequently supported the above view. However Madras High Court\textsuperscript{27} dissented from the above view of the Bombay and Delhi High Courts. But Hon’ble Supreme Court\textsuperscript{28} in a case supported the view of Bombay High Court and said that where interest is earned on a deposit or loan differs from cases where interest is earned on the accumulated profits arising from the firm itself thereby settling the law.

In another case\textsuperscript{29} Bombay High Court also followed the view of Hon’ble Supreme Court and held that interest on minor’s personal investment other than the Capital couldn’t be clubbed.

If a minor gets admitted to the benefits of the partnership by virtue of the capital contributed by the parents, then also it must be said that the income arises to the minor child by virtue of the admission to the benefits
of partnership and not necessarily because of the capital contribution made by the parents. In this regard, the Supreme Court\textsuperscript{30} held that there should be proximity for the connection between the income sought to be clubbed and the admission of the minor child to the benefits of partnership.

If the minor is merely a nominee of his father and the income arising from the benefit of partnership does not belong to him then in such a case the share income of the minor from the firm in which he has been admitted to the benefits of partnership can be clubbed with the income of the father even though the father may not be a partner in the said firm. But the onus to prove that the minor is a \textit{benamidar}\textsuperscript{31} for the father would be upon to the Income Tax Department because it is well settled presumption of law that the apparent is the real state of affairs unless otherwise proved. There Lordship of Bombay High Court\textsuperscript{32} observed that it couldn’t be held on mere suspicion that the minor sons of the assessee were merely \textit{benamidar} of the father and that the income derived from the firm really belonged to the father and that such inference must be justified by evidence and materials.

In another peculiar case where a minor was admitted as a full partner instead of admitting him to the benefit of partnership, and on this ground Registration of the firm was denied by the Income Tax Department, then it was held by the Bombay High Court\textsuperscript{33} that the share
income of the minor can not be included in the income of the parents since the minor has not at all been admitted to the benefits of the partnership. With respect the present scholar differs from the view of the Hon'ble Bombay High Court, no doubt by admitting a minor as a partner is a fundamental mistake and the Deed in itself is wrong, but the facts remained that the firm has already earned income and the minor has a share in it if such income exempted from the dragnet of the clubbing provision with the income of Guardian, than indirectly the decision of court shall encourage such planning to avoid the clubbing provision of Income Tax.

Further interesting point in this regard is that if the amount of the minor's income which is already liable to be clubbed with the income of the minor's parents remains with the firm year after year and on the amounts so accumulated the minor is being paid interest on accrual basis, the accrual income so derived by the minor by way of interest has been clubbed with the income of his guardian for assessment purpose each year and thus would represent income which was already clubbed with the total income of the parent and on physical receipt of such accumulated interest so derived should not be clubbed with the total income of the parent for purposes of assessment as it has already suffered tax earlier. The above view was supported by Allahabad High Court\(^3\).

The same would be the case even if the minor withdraws the amount of his share of firm's profits every
year and invest the same in any other form of investment which derives income. That income is the income of the minor alone and cannot be clubbed with the parents’ income. The above view was supported by Bombay, Madras, and Allahabad High Court decisions.35

6.4 Minor Married Daughter and Clubbing Provision-

Another critical area is regarding the clubbing provisions and position of a married minor daughter. Before the Scholar jump to the clubbing provision, he prefers to analyse the position of minor married girl as per provisions contained in the major prevalent personal laws of India i.e. Hindu Law, Mamohedan Law, and Christian Law.

6.4a Minor married daughter under Hindu Law:

As per Classical Hindu Law, usually the girls have been permitted to marry between the ages of 13 to 16 with the due permission of their respective guardians. But to prevent this system of child marriage in traditional Hindu Society, Hindu Marriage Act of 1955 fixed the age of bridegroom at 21 and bride at 18 years at the time of marriage. But unfortunately, the policy of law accepts the fact that underage does not render the marriage void or voidable. In other words, even if this provision of law is violated then also the marriage is not illegal but it is a valid one. Even 59th Report of the Law Commission felt that “the general understanding is that the breach of that
condition does not affect the validity of marriage" should remain undisturbed.

In this background, as per Hindu system of marriage, a married minor daughter severs her parental connection and responsibility after the solemnisation of her marriage and the father performs the most sacred of "Dana"36 called "Kanya Dan"37 which is irreversible one. "The obligation of the Hindu father also ceases when the daughter is given in marriage"38. And the responsibility of maintenance is shifted at the very moment she is married. And she would in future be maintained by her husband only and as per law the husband will be the natural guardian of her person and property. Even in case of widowhood of Hindu Minor girl, the eldest among the nearest Sapindas39 of her husband becomes her guardian in preference to her father or other paternal relatives40.

Therefore it will not be out of place to mention here that the assets belonging to a minor married daughter will remain under the control of her husband, during her minority and natural parents cannot have a control over that.

6.4b Minor married daughter under Mamohedan Law:

In Muslim Personal Law, marriage is a form of civil contract and any body who has attained the age of majority can enter into a contract of marriage. Here the
The word "majority" is most important and unlike the definition of "majority" in *Indian Majority Act* or for that matter what we normally understand by that word, is not applicable to Mohammedans Law. In the later case, it is linked to puberty of the girl, i.e. who has attained puberty is deemed to have attained majority. Thus attainment of puberty and majority are synonymous in Muslim personal law. And as we know, no medical science can fix the date or age for attainment of puberty. It differs from person to person. The normal presumption is that a person attains puberty at the age of 15 years. But Privy Council in a case\(^4\) held that the girl has attained puberty at the age of nine. Even as per *Indian Majority Act* 1875, which is still applicable in case of Mohammedans people, entitles a Mohammedans to act on his / her own on attaining puberty on "matter of marriage, dower / mehr and divorce only. In all other matter his minority continues until the completion of at least 18 years of age.

Thus it can be safely said that on attainment of puberty even at the age of nine a girl can enter into a contract of marriage. Her consent is of paramount importance and her guardians only communicate the wish of the bride and once the marriage has been solemnized, it is the husband alone who is the sole guardian of wife in respect of her person and property unless he is declared to be unfit by the court.
6.4c Minor Married Daughter under Christian Law:

The obligation of the Christian father to maintain his daughter obviously ceases when he has given her away in marriage. Once the marriage takes place the obligation to maintain her is shifted to her husband. The peculiarity of the law is that, the daughter cannot enforce her right to be maintained by her father through a Civil Court. Even the General principle of justice, equity and good conscience does not compel a father to maintain his daughter or to provide for her future maintenance since that obligation had passed on to her husband. This position of law had confirmed by Kerala High Court on two occasions.

Under the principles of Justice, equity and good conscience, obligation of a Christian husband to maintain his wife is not a mere moral obligation but is a legal duty, which can be enforced in law, although not by direct action by the wife.

This above decision shows that on the marriage of a Christian lady, the obligation to maintain her passes to the husband even if we assume that until then the Christian father has the legal obligation to maintain his daughter because in an earlier decision, the Kerala High Court opine that “there was no obligation on the part of a
Christian father to maintain his minor child which can be enforced through a Court of Law\textsuperscript{43}.

6.4d Minor under Income Tax Law:

In the above backgrounds, an analyse of Section 64(1A) of the Income Tax Act along with its proviso it is absolutely clear elaborate that all income of minor child (whether married or not is immaterial) shall be included with the income of either parents whose income is more with some exception and those exception are.

(a) "any Income from manual work done by Minor"

(b) "any Income from activity involving application of skill, talent or specialized knowledge and experience" of the minor.

Thus any income of minor girl child (whether married or not is immaterial) which does not come under this exception clauses, has to be included with income of her either parents whose income is more.

6.4e Controversy:

If we analyse the above provision of Income Tax law in the light of the different personal law as we have already discussed above then it is totally unjustified that the income of the minor married daughter should be included with the income of her parents. At best, it can be included with the income of her husband.
Let us take an example to show the absurdity of this provision. Suppose the husband has taken a Life Insurance Policy in his name for a substantial amount and nominee is his minor wife without having any issue. In the event of the death of the husband the wife naturally inherits his entire property along with the Insurance amount and as she does not have any child the entire income derived from investment of such property along with the insurance amount is nothing but her individual income. Thus, in such circumstances clubbing of those income with that of her parents appears totally unjustified. This position is also true in case of Muslim Minor widow girl and Christian minor widow.

Furthermore, another peculiarity in case of Muslim marriage system is Dower or *Mahr*, which the wife is entitled to receive from the husband in consideration of marriage. And the wife has full right over the amount of dower / *Mahr*. It is more important in the context of deferred dower, which a wife receives after the death of her husband. A minor widow can invest the dower / *Mahr* amount and receive interest on it for her own maintenance. And in such circumstances the controversy is whether the interest earned thereon will be clubbed with the income of her parents or it will be her own income. Here also the interest income is not covered by the Exemption clause to Section 64 (1A).
6.4\textbf{f} Views of Judiciary:

Till date there is no such pinpointed case law on the above issue but the ratio of two case laws are useful in the present context.

Hon'ble Kerala High Court in a case\textsuperscript{44} where the father, his minor married daughters and their husband were partners, the legal question arose whether the income of minor married daughter should be included in the hands of husband or parent. It has been decided there that the income of the minor married daughter should be included in the total income of the parent.

Following the footstep of Kerala High Court, facing a similar situation, Madras High Court also confirmed the above view\textsuperscript{45}.

Both the above judgements have been pronounced while deciding the issue under section 64 (i) (iii) which have been already omitted by Finance act, 1992, with effect from 01.04.1993. but it appears the ratio of both the above judgements, still rule the field and are very much applicable in the light of section 64(1A) of Income Tax Act because the spirit of Section 64 is one and the same.
6.5 Income of Parents with whom the income of minor will be clubbed:

Another critical question arise in the minds of the Scholar is regarding the fact that when the income of both the parents are assessable under the Income Tax Law, then with whose income, the income of the minor will be clubbed?

Prior to the enactment of the new Income Tax Act of 1961, the income arising to a minor child from his admission to the benefits of the partnership could be included with the father as decided by Hon’ble Supreme Court\textsuperscript{46} who held that the word “individual” in Section 16(3) of the Income Tax Act 1922 was restricted in its context to mean only the male of the species and did not include the female of the species. Accordingly in computing the total income of the mother, the income of the minor child arising from his/her admission to the benefits of Partnership of the firm could not be included in the hands of the mother under the old Act.

However, it has now been specifically laid down in Section 67 of the Income Tax Act 1961 that the income of the minor can be included in the income of the mother if the mother is the partner where minor has been admitted to the benefits of Partnership. And if both the parents are partners, then it could be included with those parent whose income is more or greater.
Explanation I to Section 64(1) of the above Act specifically seeks to clarify that the income of the minor child by virtue of his or her admission to the benefits of partnership shall be included in the total income of that parent whose total income, excluding the income from the firm is greater, if the income of either parent is equal then it is up to the Assessing Officer to decide with whose income it will be clubbed. But when one of the parents is no more, then definitely the income of the minor will be included with that of the surviving parent. But suppose if the income of one of the parent (say father) is more than the total income of the other parent (say mother) in a particular assessment year, the Assessing Officer may include the income of the minor child in the hands of the father, whereas in the preceding assessment year, the income of the minor was clubbed with the income of mother as in that assessment year the income of mother was more than the income of father of the minor child. It is obligatory for the assessing officer to give an opportunity to the guardian of the minor child before including the minor’s income in the hands of the father if in the earlier assessment years such income was clubbed in the hands of the father. Allahabad High Court in a case 47 has endorsed the above position.
6.6 Attainment of majority and clubbing provisions:

Let us assume that before the completion of the financial year, a minor attains majority, then what would be the fate of the clubbing provisions regarding the income of the minor earned till he attains majority. The view of the present scholar is that, a minor who is admitted to the benefits of partnership would be entitled to a share of profits from the firm only if he continues to remain a minor at the end of the previous year of the firm. This is because of the fact that income by way of share of profits from the firm does not accrue day by day but arises to the person who is entitled to the same only at the end of the previous year. This Principle was laid down by Supreme Court\textsuperscript{48} and Gujarat High Court\textsuperscript{49}.

Long back Bombay High Court in a case\textsuperscript{50} held that when a minor attains majority during the relevant previous year, the provisions of Section 64 would not be attracted.

The Income Tax amendment of 1987 made it mandatory to follow the particular period i.e. 1\textsuperscript{st} April to 31\textsuperscript{st} March as the one unit of accounting year. However it is not out of place to mention here that \textit{Indian Partnership Act} 1932, does not provide any such period and for that purpose it is up to the firm to decide the unit for an Accounting year. But due to the provision of \textit{Income Tax Act} and convenience, every body has to follow the above period as one unit. So there will be no question of clubbing of income of minor up to his attaining majority.
in a particular financial year because his income accrues to him only at the end of the accounting period, i.e. at the last day of the financial year after all the transactions of business is over. The above position has its support in the decisions of Bombay High Court\textsuperscript{51}, Gujarat High Court\textsuperscript{52} and Hon’ble Supreme Court\textsuperscript{53}.

6.7 Whether financial consideration is essential for a minor for admission to the benefits of Partnership:

While considering the applicability of the provisions of Section 64(i)(iii), a critical legal question arises in the mind of the present scholar that when consideration is not mandatory to admit a minor to the benefit of partnership at the time of assessment how the Income Tax law treat such benefit? Hon’ble Supreme Court\textsuperscript{54} answering the above question pronounced that irrespective of consideration, the clubbing should be made with the total income of that parent whose total income is greater and the court further held that here the old age principle that there should be proximity of connection between the assets transferred and the income arising to the transferee does not apply. However, in the view of the present scholar, the law pronounced by Hon’ble Supreme Court is in very bad taste and needs review.

6.8 Concept of ‘CHILD’:

Further more, another interesting area regarding this provision is the definition of the expression
“Child” in the *Income Tax Act* which also include a step child and/or adopted child of an individual. So in cases where any person gives his child in *adoption*\(^5\) to another person under the provisions of law, he ceases to be the parent of that child and the person who has adopted him becomes the adoptive parent. Therefore where an adopted minor child admitted to the benefits of Partnership, the income derived by the minor child from the Partnership would be clubbed only with the total income of the adoptive father/mother of that child but not with that of the natural parent. Madras High Court\(^6\) has supported this view.

The definition of minor child under Section 2 (15B) of the Income Tax Act provides that ‘child’ in relation to an individual includes a stepchild and an adopted child. The concept may be useful in certain context.

The word child under section 16(3) of Income Tax Act 1922 corresponding to Section 64(iii) of Income Tax Act 1961 does not include illegitimate child. *Prima facie* relationship means relationship by the legitimate descent unless there is any thing inconsistent in the Status. Consequently, the income of a minor illegitimate son of an assessee from a partnership in which the assessee is a partner cannot be included in the total income of the assessee.
These principles of interpretation have been lucidly summarised in Lord Hailsham's Halsbury's Laws of England in these terms.

"In the absence of a contrary intention either express or deducible by necessary inference, all provisions respecting 'children' contained in any laws or instruments having a legal operation refer exclusively to legitimate children".

Applying these principles one is not able to find anything to indicate a contrary intention in the Statue now under consideration, nor are there any circumstances, which compel us to infer that the legislature did not intend by the use of the word "child" to convey its prima facie meaning, viz, legitimate child. On the other hand, the use of the word in juxtaposition with the word wife occurring in the same sub clause seems to indicate that it is only the legitimate relations that have been intended to be covered by the language of the section.

It is not out of place to mention here the view of Andhra Pradesh High Court that 'child' must be taken to mean only a legitimate child and the income of an illegitimate child cannot be clubbed with the income of the parent. The above view of the A.P. High Court got its support from Kerala and Madras High Court. The
Income Tax Investigation Commission urged thirty years ago that the definition of 'child' should be expanded to cover a foster child or an illegitimate child, but this suggestion has not so far been implemented though there are various Court decisions adverse to the Revenue.

It is necessary for the individual in whose hands the income is to be included to have his own minor child as such admitted to the benefits of Partnership. It looks some what involved to say so but there it is. That is what the laws say. A husband and wife have a minor child born out of their wedlock. These days, due to changes in established customs and personal law and in some instances owing to the necessities, second marriages take place between persons, either or both having children of their own born out of the previous wedlock, and about whose upbringing, at the time of the second marriage, there may be agreed arrangements. What happens to the connotation of the term minor child of such individual? In the view of the present scholar, the minor child through former wedlock would not attract the application of Section 64 (1)(iii) of Pre 92-93 era or 64 (1 A) of the post 92-93 era as it would apply where the man and wife who gave birth to their child exist and alive and are in wedlock.

After all, the object of Section 60 to 65 is to prevent evasion of tax by diversion of income and/or assets. It is possible to conceive of such transfers as between the husband and wife on the one hand and the parents and minor children on the other. The minors
through a former wedlock cannot be brought within the ambit and scope of Section 64(1)(iii).

Ahmadabad Bench of Income Tax Appellate Tribunal\textsuperscript{61} supported the above view but the limitation of this decision is that it is purely based on Muslim Personal Law.

The facts of the case is that a firm named N.B. had two partners being Muslim brothers, R. & K. They had equal shares. K. died on November 12, 1966 and his place was taken by his widow A and his two minor sons, the former as partner and the latter as being admitted to the benefits of Partnership. R. married A on February 22, 1970. In the assessment year 1972-73, she retired from the Partnership and the firm was reconstituted and the two minors were again admitted to the benefits of Partnership. The Income Tax Officer felt that since the date of marriage of R, the two minor children became his step-children and therefore, he added their share income to the income of R under Section 61 (ii) read with Section 2 (15A).

It was held by the Tribunal that the new husband has no relationship with and obligations to the children of the former husband. At Page 82 of Taiyabji's Muslim Law (4\textsuperscript{th}Ed), it has been mentioned that a stepfather and a stepmother are not related in law to their stepchildren. Stepparents, and stepchildren are considered
no relations for the purpose of legal rights and liabilities, there being between the two, no tie of consanguinity. Even adoption is not recognised in Muslim Law and adoption does not confer upon any person the Status of a child except where there is a custom or it is permitted by the provisions of any law for the time being in force.

Thus, the concept of stepchildren is unknown to Muslim Law, and Section 2(15A) would be applicable only if there can be stepchildren and if there cannot be any stepchildren the section has no legal application. As such the Tribunal concluded that Section 64 did not apply in the instant case as the minors were not the stepchildren of the assessee.

In cases, where a Muslim individual who has more than one wife and children of that individual through different wives are admitted to the benefits of partnership, the clubbing provisions should be invoked only after examining the income in respect of each child so derived then the question arises as to whether by virtue of the explanation I, it should be clubbed with the total income of the father or mother of that child whoever has a greater total income. In the understanding of the present scholar this is because of the fact that although father may be the same for all the children, the mothers would be different and is of one of the parents who are not common for each of the children; the applicability of the clubbing provisions cannot be the same for all of them.
6.9 Some novel Tax planning to avoid the provision of Clubbing:

Further there are few exceptional methods by which one can avoid this clubbing provision.

By creating a trust ‘A’ and the beneficiary of that trust ‘A’ is another trust ‘B’ and the beneficiary of the trust ‘B’ is the minor. Trust ‘A’ becomes a partner in a partnership firm and whatever income trust ‘A’ will get, it will be passed on to trust ‘B’ and from that profit, the minor can be benefited during his minority. Hence the law of proximity does not apply because here the Trustee of the trust ‘B’ in which the child is a beneficiary and the trustee of trust ‘A’ who is effectively a partner in the firm are different. In the above case explanation 2(A) cannot be applied.

Added to above, another planning is the trustee of the trust of which the minor is the beneficiary first becomes a partner of a firm, then opts to retire from that firm and allows the firm to use his interest in the firm including the good will and gets a percentage of profits of the firm so long as it is used by it. The amount so received, when passed on to the minor child through the trust would not attract the clubbing provisions and would therefore be assessable in the hands of the trustee in his
representative capacity or the minor child in his individual capacity, of course through his guardian.

Section 64 l(iii) of the *Income Tax Act* 1961 provides that in computing the total income of any individual, there shall be included all such income as arises directly or indirectly to a minor child of such individual from the admission of the minor to the benefits of partnership in a firm.

However in case the Partnership Deed contains a clause whereby the minor is not entitled to receive his share of profits but the same has to be accumulated over the years and the minor shall be entitled to receive the same only upon his attaining majority then in such a case as per view of the present scholar, the income of the minor credited to his account can not be clubbed with that of his parents because here no income arises to the minor during the period of his minority. This view gets its support from Hon'ble Supreme Court\(^6\) time and again. Here the assessee created a trust in respect of a sum of Rs.25,000/-. The interest income received from this amount was to be accumulated during the minority of the minor daughter and upon her attaining majority; the income from the accumulated fund was to be paid to her during her lifetime. On this facts, it was held that the provision of 16(3)(b) of Income Tax Act' 1922 corresponding to 64 l(iii) of Income Tax Act' 1961 were not applicable in respect of the income of the trust during the minority of the child.
Even Kerala High Court\textsuperscript{63} in a case went a step further and held on the following facts that the assessee has created a trust for the benefit of his minor daughter. The income from the trust fund was to be accumulated and the accumulated trust fund was to be paid over to the beneficiary on her attaining the age of 21 years. Applying the ratio of the above Supreme Court decision, the High Court held the section 16(3)(b) of 1922 Act and 64 1(iii) of the 1961 Act did not apply to the income from a partnership firm derived by the trust during the minority of the daughter. Subsequently Bombay High Court\textsuperscript{64} also corroborated the above view. In the instant case the assessee created a trust for the benefit of his minor son. The income from the trust fund was to be accumulated and the enlarged fund was to be handed over to the beneficiary on his attaining the age of 21 years. Bombay High Court\textsuperscript{65} followed its own decision, which got the approval of Supreme Court\textsuperscript{66} and ruled in favour of the assessee and held that such income cannot be clubbed with the income of the parents.

To nullify the decision of the Hon‘ble Supreme Court\textsuperscript{67}, the Government amended the provision of law and inserted the provision of Section 64(1)(vii) in \textit{Income Tax Act} 1961 which reads as follows-

\"In computing the total income of any individual, there shall be included all such income as arises directly or indirectly to any
person or association of persons from assets transferred directly or indirectly otherwise than for adequate consideration to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his spouse or minor child or both”.

On analysing the above provisions of law it is clearly mentioned that even if the benefit arises to the minor child out of the transferred amounts is deferred than also such benefits will be clubbed with that of his/her parents. This provision of law has come for confirmatory litmus test before the Bombay High Court68. Here the assessee created trusts for the benefit of his minor daughters. The income from the trust fund was to be accumulated and when the beneficiary attained majority, the income from the accumulated trust fund was to be paid to the beneficiaries. And again the trust deed provided that on attaining majority; the beneficiary could withdraw half of the accumulated trust fund.

Here the Court while pronouncing the judgement said that where assets are transferred, is not a vested interest. In view of the provisions of Section 21 of the Transfer of Property Act and Section 120 of the Succession Act the interest is contingent. And this Section of 64 (1)(vii) would have no application where the
interest of a minor child in assets transferred is contingent and not vested.

Gujarat High Court\textsuperscript{69} also supported the above view of the Bombay High Court\textsuperscript{70}. Added to this even Andhra Pradesh High Court\textsuperscript{71} while supporting the above view of Bombay High Court\textsuperscript{72} and Supreme Court\textsuperscript{73} opines that in cases of accumulation and payment being made to the minors only on their attaining majority, the income will have to be treated as deferred income and cannot be treated as having been received or accrued in the relevant year in question.

In a case\textsuperscript{74} Karnataka High Court while upholding the above position of law held that since the income has to be accumulated in the relevant year, the minor child has no right to receive that income and nothing has accrued to the minor child and hence nothing could be included in his/her father’s income. At best, there can be a deferred benefit which is payable on the extinguishment of the trust which is beyond the period of minority of the child which is not being for a minor child, the clubbing clause under Section 64(1)(vii) is not attracted and cannot be applied at all.

In a recent case Orissa High Court\textsuperscript{75} on the following facts i.e. the assessee having taken a housing loan and constructed a house. He had four minor children, three daughters and a son. He created a trust in
accordance with law. It was incorporated in the trust deed that every minor child after attaining the age of majority would get the benefit of 25% share from the accumulated rent, the benefit from which was deferred held that the minor child did not have any vested interest in the property in question while he/she was a minor and the income in terms of the trust deed was to vest in the beneficiaries when they attain majority and hence, the income gets capitalised from year to year. With a fine remark the court held that evading of payment of tax is quite different from ‘tax planning’. A person may plan his finances in such a manner, strictly within the four corners of the taxing statute, that his tax liability is minimised or made nil. If this is done and strictly in accordance with and taking advantage of the provisions contained in the Act, by no stretch of imagination can it be said that payment of tax has been evaded.

On the similar facts Madras High Court\textsuperscript{76} also held that as under the term of the trust deed, the corpus and income of the trust were to be accumulated and paid over to the assessee beneficiary only on her attaining the age of 18 years and in case she died before attaining the age of 18 years the corpus and income would be handed over to her legal heirs, that income from the trust was not assessable in the hands of the assessee.

However, Calcutta High Court\textsuperscript{77} on identical facts has taken a contrary view on the ground that the benefits, the right to have the income accumulated,
accrued to the minor in the relevant years. It further stated that it was not a case of deferred benefit, the benefit arose in the year of account but the enjoyment of that right was postponed.

To sum up, the above legal controversy of interpretation, it is clear that most of the High Courts except Calcutta High Court are of the view that in such case the clubbing provisions are not attracted. However when the minor received the benefit after attaining majority, then those income will be treated as income of the major person in that year. Because due to the specific clause of the partnership deed, the income of the minor deferred and on receipt it will be charged to tax.

However this positions of law is held good up to 31st March’1980 because of the insertion of Explanation 2A to Section 64 by Finance Act 1979 with effect from 01.04.1980 after acceptance of the recommendation of the Chokshi Committee which at Para I-11.4 recommends in following lines.78

"Our attention has been drawn to instances where the new provisions are being circumvented by the interpolation of a trust for the benefit of minors and the trustees of such trusts entering into partnerships. According to this device, a trust is created for the benefit of minors with express power to the trustees to
utilize the trust funds by way of investment in business enterprises and partnerships. The legal position under partnership law is that partnership is the relationship between the persons who are named as partners and the fact that a partner is, in turn, accountable for his share of income to any third party is irrelevant to the partnership. The introduction of a trust takes advantage of this position under the partnership law and seeks to avoid the clubbing under section 64(1). It is appropriate that the adoption of such a device is countered and the underlying provisions of the section are given proper effect. We, accordingly, recommend that where a minor receives income as beneficiary under a trust and such income is derived from the profits and gains of business carried on by the trustees in partnership with others, such income of the minor should be added to the income of the parent. The clubbing provision in section 64 should be extended to cover such cases”.

The Explanation 2A to section 64 reads as follows:-

“for the purposes of clause (iii) where the minor child of an individual is a beneficiary under a trust, the income arising to the trustee from the membership of the trustee in a firm
shall, to the extent such income is for the benefit of the minor child, be deemed to be income arising indirectly to the minor child from the admission of the minor to the benefit of partnership in a firm”.

Section 64 (iii) reads as under-

“to a minor child of such individual from the admission of the minor to the benefits of partnership in a firm”.

Thus a holistic reading of the above changes of law clearly shows that even if one plans his/her affairs basing on the above various High Courts decisions and that of the Hon’ble Supreme Court, still it can not succeed after 01.04.1980.

The above position of law for the first time came to test by Madras High Court which held that Explanation 2A to section 64 of I.T. Act 1961 makes it clear that income is deemed to arise indirectly to the minor from the admission of the trustees to the benefits of the partnership. The mere fact that the minor’s right to receive the income is postponed till he attains majority does not defeat this Explanation. The law deems the income to have arisen indirectly to the minor by virtue of the trustee having been admitted to the benefits of the
partnership and the time at which it is to be distributed has no relevance in this context.

However this provision of law was again amended in the Finance Act 1992 w.e.f. 1st April 1993 and again the above planning to avoid the clubbing provision of the minor with that of his parents is restored.

Other methods of planning is to venture into such business by the firm in which the minor admitted as beneficiary whose income is exempted by Income Tax Laws. It may be noted that the effect of the clubbing provisions is only to shift the liability to tax from one person to another but not to change the nature of the income or the head of income. For example, if the income derived by the partnership firm is agricultural income, the share of profits allocated to the partners must also be regarded as agricultural income. Hon’ble Supreme Court also supported the above view.

6.10 Position from the financial year 1992-93:

The Government, by a single stroke through Finance Act, 1992 inserted a new Sub Section (IA) in the Section 64, effective from Dated 01.04.1993 requiring clubbing of all the incomes of the minors with one of the parents unless they fall within the scope of exception provided in the same Sub section or Section 10 (32). The
same Act also thoroughly changed the scheme of taxation of Partnership Firm.

The fundamental change in the taxation of partnership firms happened to be the taxation of the firms' income at the maximum marginal rate and the exemption under Section 10 (2A) of the share income of the partner in the partner's hands. So Section 64(i) (iii) which provides for the clubbing with the parent's income with the income arising to a minor child from the admission of the minor to the benefits of the partnership in a firm, became redundant.

The new Section 64 (IA) read as follows:-

(IA) in computing the total income of any individual there shall be included all such income as arises or accrues to his minor child { not being a minor child suffering from any disability of the nature specified in Section 80(U)}.

Provided that nothing contained in this Sub section shall apply in respect of such income as arises or accrues to the minor child on account of any:-

(a) manual work done by him or
(b) Actively involving application of his skill, talent or specialised knowledge and experience.

Explanation – For the purpose of this Sub Section, the income of the minor child shall be included:-

(a) where the marriage of his parents subsists, in the income of that parent whose total income (excluding the income includible under this Sub section) is greater or

(b) where the marriage of his parents does not subsist, in the income of that parent who maintains the minor child in the previous year and where any such income is once included in the total income of either parents, any such income arising in any succeeding year shall not be included in the total income of the other parent, unless the assessing officer is satisfied, after giving that parent an opportunity of being heard that it is not necessary so to do.

The above Section provides some exception also and apart from these exceptional clauses, a new Sub Section (32) in Section 10 of *Income Tax Act* has been inserted which provides that out of the income so included in the income of an individual income an amount to the extent of Rs.1,500/- in respect of each minor child whose
income is includible, will not be included in the income of the individual.

Further more Section 10(2A) of the Finance Act 1992 exempts from taxes the share of a partner in the total income of the firm. So, such share of income, which a minor is entitled to, is not includible as minor's income as partner and the clubbing provisions of Section 64(1A) also cannot therefore, be attracted in respect of exempted income.

The meaning of the words 'accrue' or 'arise' as used in this section has been given in the Oxford English Dictionary as under — 'accrue' means "to fall as natural growth or increment, to come as accession or advantage". The word 'arise' is defined as "to spring up, to come into existence.

Thus, the words 'accrue' and 'arise' do not, mean actual receipt of the profits or gain. Both the words are used in contradistinction to the words 'receive' and indicate right to receive. This view was also expressed by Hon'ble Supreme Court\(^81\) and Allahabad High Court\(^82\).

Even though, the share income of the partners are excluded from the tax provision still due to the high incidence of tax to a partnership firm, some provisions are made by the Government in the same Finance act 1992, to reduce the net profit of the firm. The Finance Act provides for remuneration to partners and interest to partners on their outstanding capital subject to certain
limitation and this remuneration and interest are not exempted from the clubbing provision, of course to certain extent that if the minor child draws the remuneration in lieu of the manual work done by him, or the remuneration and interest put together does not exceed Rs.1,500/- per annum.

Again, regarding payment of remuneration, Section 40(b) Explanation 4 of the *Income Tax Act* provides that the remuneration will be provided to only a working partner. So a question here arises whether a minor who has been admitted to the benefits of the partnership can be a working partner or can be admitted to the benefit of a working partners? Vide Section 2(23) of the *Income Tax Act*, minors are also partner. The definition of 'Partner' also includes any person who, being a minor is admitted to the benefits of partnership, if the deed of Partnership authorises any payment of interest or remunerations to such minor partner it is a valid payment. Again a minor of say 10 years onwards, can carry on several duties for the partnership firm allotted to him, like preparations of bills, writing of books, collection of bills and other such duties which may be expected from him according to his ability.

It will be not out of place to discuss here that Art. 24 of the Indian Constitution provide that no child below the age of fourteen years shall be employed to work in any hazardous employment. However the Constitution
of India does not define the word 'hazardous' but from Art. 39, one can infer that any occupation that shunts a child's emotional or physical growth is hazardous. Since regular employment prevents a child from going to school, all regular employment is hazardous for children. However by making a minor aged in between 14 to 18 years of age, a working partner, provides him/her a practical knowledge of commercial activities and business which instead of being hazardous, helps her/his mind to grow in a positive direction.

Though there are various laws in Industrial jurisprudence prohibiting employment of small children to manual work but there is no such ban on children under 18 years working in offices. They may not be given signing powers, but even so often, in traditional business families, it is observed that, children joining the family business at a very tender age, sometimes even while at School. In all such cases, the children may be paid a fair wage, which will be taxed in their own hands and not with their parent's income, as it would fall squarely within the proviso to Section 64(1A)

Here, for his service rendered, he cannot be called as salary holder because he has been admitted to the benefits of partnership. There cannot be two relations. A partner cannot be an employee of the firm. The analogy is that a person cannot be his own employer. So normally his income cannot be exempted as per proviso to Section
64(1A). Then a critical legal question arises whether the minor's remuneration and interest will be clubbed with that of his/her parents? Prima facie, it looks that answer will be in affirmative. However, as a critical analysis of the present law by the scholar together with the legislature intensions and the decisions of the different courts, it can be safely conclude that such remuneration/interest received by a minor who is admitted to the benefits of the partnership can not be clubbed with that of his parents due to the reason that such remuneration, interest are nothing but share income from the firm.

When a partner enters into a partnership or a minor is admitted to the benefit of partnership, the sole motive is to earn profits. And whatever he receives, in the shape of interest, remunerations, commission or share of profit, is received by him as fruit or return of his share in the partnership. Nomenclature or method of working or division of profit in different ways is not material.

Again in this connection a landmark decision of the Hon'ble Supreme Court83 said that:-

"Sec. 13 of the Partnership Act brings out the basis of partnership business, viz, the firm is not legal person even though it has some attributes of personality. Partnership is a certain relation between person, the product of agreement, to share the profits of a business."
According to the Income Tax Law a firm is a unit of assessment by special provisions but is not a full person, which leads to the next step that since a contract of employment requires two distinct person, i.e. the employer and the employee, there can not be a contract of service between a firm and its partner as it happens in Service jurisprudence. Hence any agreement for remuneration of a partner for taking part in the conduct of the business of the partnership must be regarded as portion of the profits being made over as reward for the human capital brought in. So it represents a special share of profit of the firm. Thereby nomenclature of remuneration is synonymous to share of profits and it is to be taxed in the hands of the partner.

Apart from the above analysis of the present Scholar which is also supported by the Hon'ble Supreme Court it can be stated here that remuneration are nothing but a diversion of profits of a firm to its partner. While moving the Finance Bill in 1992 the than Finance Minister had said in his Budget speech that:

"There has been a long standing criticism that by subjecting the income of both partnership firms as well as the partners to taxation, we are engaging in double taxation. The Chelliah Committee has also stressed that double
taxation in this regard should be avoided. I agree that we should avoid double taxation and I propose as a measure of relief, to treat the firm as a separate tax entity and do away with the taxation of the same in the hands of partner”

Therefore, in the light of the various judicial pronouncements that remuneration and interest on capital are nothing but a diversion of profits of a firm to its partner, and the legislative intention of doing away with the taxation of the share of profits in the hands of the partner, it can be safely concluded that the remuneration and interest on capital of the minor partner are nothing but share of profits received from the firm which cannot be taxed at the partners hands. Thus clubbing provision cannot be applicable here.

Another possible interpretation of the proviso to 64 (1A) as traced out by the present Scholar is that, when a minor who is admitted to the benefits of partnership receives remuneration as a working partner, then his remuneration is eligible to the benefits of the exemption as he is entitled to remuneration as a working partner and while so acting he is putting labour or skill, talent and specialised knowledge and experience for the same. The said income appears to be covered by the exception from the applicability of Section 64 (1A) as per
the proviso thereof and accordingly clubbing provisions does not appear to be attracted in respect of such income.

Further the Section 64(1A) certainly violates the very spirit and purpose behind the insertion of that Section into the Income Tax Act. The Finance Minister in his Budget speech before the Parliament while introducing the Finance Bill 1992\textsuperscript{85} stated as under -

"It is said that the child is the father of man, but some of our tax payers have converted children into tax shelters for their fathers. The tax law provides for clubbing of income from gift given by parents but this does not apply to other income, including income from other gifted assets, and the practice of cross gifting is widely used to evade clubbing. The Chelliah Committee has recommended that in order to plug this loophole, which accounts for a substantial leakage of revenue, the income of a minor child should be clubbed with that of the parent. There is merit in this suggestion and I propose to accept it. Recognizing however the existence of a number of child prodigies, especially child artists in our country, I propose to exclude their professional income as also any wage income of minors, from the purview of such clubbing. The practice of clubbing the income of minor children with
that of the parent for tax purposes is in vogue in a number of countries".

Thus, when the very income is exempted from the clubbing provisions how come the income derived out of deposits of those incomes can be clubbed with the income of parents?

In a case Hon'ble Supreme Court accepted the reasoning and decision of the Supreme Court of America wherein the clubbing provision to tax the husband with the income of the wife and vice versa was declared ultra vires and arbitrary because there was no nexus between the persons and the income sought to be taxed and mere relationship of spouse was held to be inadequate to justify the clubbing of income.

The above proposition is certainly applicable in case of 64 (1A) where the interest income of prior professional income of minor children are clubbed with their parents. Because mere relationship is not enough, there must be nexus between the incomes of the minor child with that of his parents i.e. the money or the property must be diverted by the parents just to avoid tax. That it cannot be argued by the Revenue that in every case minor child exists only for tax avoidance or evasion and there is no evasion or avoidance in case the child attaining majority. Mere age and relationship is not the justifiable criteria to warrant clubbing of income. Thus,
the existence of minor child cannot therefore, be the only basis to tax the parent on the income of the minor child unless and until it is established that the minor derived income only by virtue of gifts made by the parents in favour of the minor child resulting in diversion of income and/or wealth so as to avoid or evade the tax otherwise payable by the parent.

Therefore to the proviso, another clause should be added to make the Section 64(1A) a more transparent one i.e. “interest / dividend or any other income derived by the minor child out of investment made out of his professional income” should be excluded from the clubbing provisions. Because even if interest/dividend income is derived by the minor out of his professional income which is not attributable to any gift or other transfers of assets by the parent without consideration, the clubbing provisions would apply, whereas in the case of major child with identical facts, the entire income will be taxed in his hands. This violates the Fundamental Right of Equality before the law as per Art. 14 of the Constitution of India as both the minor as well as major fall under the same category “an individual” under Section 2(31)(i) of the Income Tax Act 1961.

Where, none of parents of minor child is alive entire income will be assessed in hands of minor child only. In case the marriage of parents does not subsist and the minor is not maintained by any parent in the previous
year, his income will not be clubbed. Grounds for deciding to switch over the parent for the purpose of clubbing the income of minor are not specified. Merely on ground of higher tax collection the Assessing Officer cannot call other parent to include income of minor child in his/her hands, instead of the parent in whose hands income was included in the first year.

It appears to the present Scholar that, the assessee's parents have also no obligation to inform the Assessing Officer if there is a change in the position of income of parents.

Another controversial area is regarding the clubbing of minor's income when the marriage of the parents does not subsist. There may be a situation when it may not be possible to decide who maintained the child during the year. Suppose, father and mother both bore expenses for six months each, then in whose income minor child's income will be clubbed. In such a case it cannot be said that either the father or the mother has maintained the child. Even if a small contribution was made by one of the parents and a major one by the other, it cannot be said that child was maintained by a particular parent or that the child was not maintained by the other parent during the previous year. In such a case both the parents may deny their liability to assessment of the income of the child, on the ground that he or she did not maintain the
child in the previous year, and it is quite likely that in such a case the charge to tax may fail.

There may arise a different situation which is very much true particularly in majority of Indian cases that in case when the marriage does not subsist, the mother of the minor child herself becomes dependent on her father, so here the child is maintained by his maternal grand father and in such a case if there is any income from investment, etc on account of minor child, in whose hands it will be taxed? In such circumstances it is the view of the Scholar that it should be taxed at the hand of the child.

Again while dealing with the provision to section 64(1A), M.P. High Court\(^8\) in a case held that according to the proviso to Section 64(1A), such income of the minor child shall not be clubbed with the income of his parents which is earned by his self-manual work or which is earned by applying his own skill, knowledge or experience. This does not mean that he should posses a qualification issued by a recognised body.

6.11 Carry forward of losses and set off thereof of income of minors assessed in hands of parents—particularly when the minors attains majority in a given assessment Year:

To solve the above problem the explanation 2 to Section 64 (1A) is more important which reads as “for
the purposes of this section, "incomes" includes "loss". This explanation was inserted by Finance Act 1979 with effect from 1980. In this connection it is important to mention here that in a case Hon'ble Supreme Court\(^9\) held that for the purpose of computation/determination of Income the expression includes loss.

Thus, any loss suffered by a minor under any head of income will be clubbed in the hands of his parents under section 64(1A) and will be set off against any income of parents under the same head of income or under some other head of income as per the provisions of the Act.

And as per provisions of the Act, certain loss incurred during an assessment year which are not set off during the same assessment year as per the Act are to be carried forward to the next assessment year for set-off.

And now a pertinent question arises whether the minor child who attains majority during the susequent year (when the loss of minor which is already clubbed with the parent is supposed to set off) will be eligible for carry-forward and set-off of the unabsorbed loss, determined in the hands of father though relating to the minor child, or his father will be eligible to carry forward and set off of the unabsorbed loss in his own hands.

Further, as per Section 64 (1A), income of a minor child is deemed to be the income of the parents.
This legal fiction is enacted for a limited purpose. But theoretically speaking a legal fiction has to be carried to its logical conclusion. And as a natural corollary, a loss deemed to be the loss of parents under deeming provisions should be given effect to its logical conclusion and should be allowed to be carried forward and set off in the hands of parents subject to other provisions of the Act. Otherwise it will create unnecessary legal controversies. So the parents will alone be eligible to carry forward and set off of the loss.

However, in some cases it is the opinion of the expert from revenue side that the purpose of Section 64 is to circumvent tax avoidance by showing income in names of minor children and ladies and not to allow further benefits by way of set off and carry forward of losses. In our view while doing so, they ignore not only the law, but also the facts that once income from a business is to be clubbed in hands of parents, it is deemed that, that business is that of parents for the purpose of computation of income. Therefore, whatever resultant profit/loss of that business may be, it has to be treated as that of parent. Thus to avoid legal controversies, in the opinion of the present Scholar parents should be allowed to carry forward and set off of the losses of the minor children.

To have a handicapped child is certainly a curse and very much an unfortunate event. From the very outset the present Scholar has been praying before the Almighty that such unfortunate event must not come in any body's life. But on happening of such an unfortunate event one must boldly face the same with a smiling face and use the same to one advantage, if possible.

Law has provided various exemptions and deductions for both the parents as well as the handicapped children and exclusion of handicapped children from the clubbing provisions of the Income Tax is one such provision, which has a socio-economic responsibility behind it. Section 64(1A) specifically exempt from clubbing provisions of the income of such minor child suffering from any disability of the nature specified in Section 80U, which has been underwent many changes between my first thesis and present revised one. The present law is as under:-

Section 80U(1) specifically stipulates that individual certified to be a person with disability by medical authority shall be allowed a deduction of Rs. 50000/-. Further, first provision to the above section says that if the disability of the individual is severe one, then
he shall be allowed a deduction rupees one lakh w.e.f. 01.04.2010.

Thus from above it is very much clear that only person with substantial permanent disability prohibiting a persons from earning his own livelihood such as mental retardation or blindness are covered. And certainly children with such deficiencies are a burden to the parents both mentally and financially. Thus if such child is admitted to the benefits of partnership, then all the financial gains i.e. interest received on the capital which otherwise should be clubbed with the parents will be excluded from clubbing provisions.

In this regard Hon’ble Madras High Court reversed the interpretation of the Assessing Officer who rejected the claim of the assessee on the ground that in spite of the assessee’s handicap there was no reduction in his capacity for gainful employment and held as under:

“The fact that a person has a handicap which, even according to the doctor, is a permanent one and impairs the efficiency of the person, is sufficient to infer that such a person suffers a disadvantage and his ability to perform is deficient when compared to a person who does not have a handicap. It is not necessary for the purpose of Section 80U that a handicapped person must be incapable of earning. If that
were the intention, it would be absolutely futile to provide for a concession in income Tax to a person who has no income. Earning of income, therefore, cannot be put against the handicapped person to deny him the relief”.

In a case Allahabad High Court\textsuperscript{91} is of the opinion that to claim deduction under this provision, precedent condition such as unemployment or the person is not earning are not essential.

M.P. High Court\textsuperscript{92} in an important case while interpreting the provision went a step further and very categorically held that even person suffering from blindness in one eye is entitled to deduction.

Even Madras High Court\textsuperscript{93} opined that once the physical disability falls within the specified item, no further enquiry about the earning capacity of the assessee should be made.

6.13 Declaration under Amnesty Scheme by minor and Clubbing Provisions:

In spite of the Rigor of the fiscal laws, each year there are huge generation of unaccounted monies, which in normal parlance called “black money” and circulation of such monies is called Black Economy. Thus there are two type of economy one is called the ‘White Economy’ which generates monies and accountable to each and every law of India. In other words, ‘White
money' is generated after lots of check and balance by Government machineries and it has a social aspects but on the other hand black economy is the dark spot in the overall development of the Nation. And in spite of so many laws, the Government fails to check the generation of the black money and parallel economy. The recent findings of huge deposits in some foreign Banks by some unscrupulous businessman and politicians are some of the example in this regard.

And in the past the Government of India adopted the novel policy of the persuasion time and again and asked the people at large to declare their black money and pay minimum of taxes with out any penalty and prosecution. So many people have taken advantage of such schemes. A question may arise here about the problem such as what will be the treatment of the income generated out of amount declared by minor under such amnesty scheme?

By special act of Parliament the Government has specifically mentioned that the person who declared his income under the amnesty scheme, the declared amount belongs to him. Thus, the amount declared by a minor under the amnesty schemes, is certainly belong to him and if the minor invests such income in a partnership firm and is admitted to the benefit of the partnership then the income generated by such investment must be his own income and should not attract the provision of clubbing.
However on this point there are divergent views of various High Courts and the matter is yet to be resolved by Hon'ble Apex Court.

The Kerala High Court\(^94\) in an important case held that even if such a declaration was made under the \textit{amnesty} scheme in the name of the minor children the income of such declaration could be clubbed with the income of his parents.

However Rajasthan High Court\(^95\) in another case differs from the above view of Kerala High Court and held on the following fact that a Minor aged 17 years declared an amount of Rs.8,000/- under the \textit{amnesty} scheme and started a business of his own and employed his maternal uncle to run the business and paid him monthly salary. He took registration in the name of business as proprietor under Rajasthan Sales Tax Act, Central Sales Tax Act and Shop and Commercial Establishment Act. But the assessing officer, clubbed the income of the above business with that of the father of the minor on the ground that the same belonged to the minor but Rajasthan High Court held that in the above circumstances the income of the above business could not be clubbed with his father merely on the ground that the proprietor of the business is the minor son.

Here in the view of the present Scholar one law contradicts the other. \textit{Amnesty} laws are special enactments
passed by the Parliament with a particular view to flush out Black money and use the same for the development of the Nation. Thus, so far as the question of the ownership of the declarant comes into question then it certainly belongs to the minor child who declares the same under his name and the sources are immaterial, the income generated out of the investment of such income should not be clubbed with that of his parent but should be assessed separately in the hands of the minor.

6.14 Compensation amount received due to accident of minor and clubbing provision.

The above heading itself suggests about the certain unavoidable problem. It is an irony that *Income Tax Act* is very much silent on the above subject thus acting against the very principle of Social Justice as enshrined in the Constitutional Law of India. It is always the accepted principle that as per as good health and life is concerned no amount of compensation is adequate in monetary term. But some times due to ill luck, if a minor met with an accident and survived and received certain amount as compensation as accidental benefit from any insurance company, then by no stretch of imagination it can be called diversion of wealth by parents but on the other hand the minor received it as a social security to meet the future contingencies and the income derives out of investment of such money should not be clubbed with that of his/her parents. But in present practice the law is
silent and such income of minor has to be clubbed with that of the parents.

6.15 Minor's income can not be clubbed with the income of widowed parents.

It is also possible to consider the minor's income being clubbed in the hands of the widowed parent, if one considers the Explanation under sub-section (1A). the Explanation considers two possibilities only. The first possibility is whether the marriage of his parents does not subsist. The subsistence or non-subsistence of marriage of the parents is possible only when both the parents are alive. That means, the clubbing provision is meant only for the purpose whether both the parents are alive, whether married or divorced. It also appears from the provision that the clubbing is to be done only because the parent having greater total income is supposed to have diverted a part of his income into the hands of his minor child.

In case of widowed mother or in the reverse case, whose husband / wife dies in an unfortunate accident while doing his / her duty, there can be no such tax avoiding exercise, as is sought to be thwarted by the provision.

Thus, it can be concluded that such income arising of the minor children is not liable to be clubbed in the
hands of the widowed parents, in spite of the new provision in sub-section (1A) of section 64.

It is the humble suggestion of the present Scholar that the Income Tax Act should be suitably amended in this regard and should be compatible with the demanding progressive Social Justice System of the present day of 21st century and accordingly the scholar suggest for following changes in the present law.

1. In case of minor married daughter admitted to the benefit of partnership, the clubbing provision should be suitably amendment and in such case income derived by minor married daughter neither should be clubbed either with her parents nor with her husband by invoking the provisions of Section 64 (I-A) of the Income Tax Act in recognition of the empowerment of right of woman because when the fundamental law of the land is recognizing such marriage as legal then all other law should accommodate it.

2. Where the minor is admitted to the benefit of partnership without transferring any asset, then in such situation the benefit derived by the minor should not be clubbed with either of his / her parents as in the instant case the fundamental principles of clubbing provisions i.e. proximity of connection
between the assets transferred and the income arising to the transferee does not apply.

3. The Act should be amended suitably to accept the minor of particular age say in between 15 to 18 years of age as working partner to give them the real benefit of partnership because in the present law of Income Tax unless the minors accepted as working partner, then the minor shall be deprived of major benefit because remuneration provided to the working partner are nothing but diversion of profits.

4. The income derived by minor through admission for the benefit of partnership by investing his / her savings of prior years income earned through special skills, profession, etc. which itself is exempted from the provisions of clubbing should also categorically declared exempted from the dragnet of clubbing provisions.

5. In case of disturb family where both the parents stays separately and the burdens of maintaining the minor child / children is not cleared, in such circumstances, the law should forbids the application of the law of clubbing with either parents and any income derived by such deserted children through benefit of partnership or through any other means, should be entirely exempted from the tax net.
6. The minor suffering from mental retardation or any chronic diseases which prevents him / her to lead a normal life, if such minor admitted to the benefit of partnership, then the income derived out of such admission should not be clubbed with the income of his / her either parents.

7. Income derived from compensation amount received by minor due to some accident, should be placed beyond the provisions of clubbing.

8. Though promised a lot about drastic changes to be made in the existing Income Tax Law with complete replacement of new Income Tax Code 2010 but in reality so far as the existing problems are there in relation to the clubbing provisions of minor income, no attempt are made to alienate them. Rather in Notes and Clauses to Chapter II, at Clause 9 (iv) of the Income Tax Code 2010 the same existing law in relations to clubbing are accepted in toto and more importantly to the detriments of the minor it is inserted that income derived from the property received by the minor from partition of HUF also included in the total income of either parents. It will be needless to reiterate here that Direct Tax Code shall replace the existing Income Tax Act from 1st April’ 2012.
9. In the present day Indian Society, the tax paying population constitutes a very low percentage of the total population and most of them prefer small family primarily as a matter of principles and secondarily as a matter of economic compulsion. Thus, in such a situation the main purpose of diversion of property / income from the parents to their minor children is to build capital with a view to secure the future of the children and not to reduce tax liabilities. Providing support to minor children who are the future wealth of the Indian Nations should not be viewed as a diversion of income rather it should be accepted legally as a correct tax planning measure.

To conclude this chapter it can be said that, it is essential for the individuals having minor children to take the above consideration into account and examine in respect of each one of the assessment year whether it would be advisable to attract the clubbing provisions by admitting the minor child to the benefit of partnership or not. Since each assessment year is separate and distinct and the law to be applied for purposes of assessment is the one which is in force on the first day of the relevant assessment year, it is essential to keep the tax planning scheme sufficiently flexible so as to enable the persons concerned to modify it to suit the changes in the law. Increase or decrease in the amount of income or losses of
particular year or years and the manner in which the minor’s income could be dealt with including the avenues open to the minor to derive income from different sources including the admission to the benefit of partnership are also to be taken into consideration while making tax planning. Last but not the least, in the particular years when it is beneficial, the minors should be admitted to the benefit of partnership and when it is not so, they should be excluded from the partnership.
NOTES & REFERENCES

01. I.R.C.V. Duke of West Minister (1935) All England Reporter 259, 267


04. A person appointed by law of Income Tax to assess the income of people as per provisions of Income Tax Law.


06. A person whose income is assessed by the Assessing Officer as per the provision of Income Tax Law


08. C.I.T. V. Chinabhai M. Modi (1968) 69 I.T.R. 76 (Guj.)


18. Supra Sr. 7

19. Supra Sr. 8


25. Supra Sr. 20
26. Supra Sr. 21
29. C.I.T., Bombay City-II V. Chandanmal Kastruchand (1978) 112 I.T.R. 296 (Bom.)
31. Benamidar means investment in property (both moveables and immovables) by a person in the name of another person. It is the second person in whose name the investment is made is called the benamidar, who is not the real owner of the property but mere a front man.
32. C.I.T. V. Gokuldas Hukumchand (1943) 11 I.T.R. 462 (Bom.)
33. Curestji J. Dubash V. C.I.T. (1943) 11 I.T.R. 462 (Bom.)
34. C.I.T. V. Triveni Devi Khemka (1974) T.L.R. 573 (All)
36. ‘Dana’ means Irreversible gift
37. Kanya Dana means give away of one’s daughter in marriage to another person. In traditional Hindu custom and belief it hails to be the sacred of sacred gift, which one should perform once in a lifetime to reach the God after death.
39. Sapindas means relationship arises between two people by common ancestors. Traditionally there are two school of thought. According to Mitakshara School it means a person connected by the same pinda or particles of the same body but on the other hand according to the Dayabhaga School it means a person connected by the same pinda or funeral cake.
A.I.R. (1929) Mad. 110
41. C.I.T. V. P.M. Paily Pilla, ibid
   C.I.T. V. M.C. George
   (1972) 86 I.T.R. 516 (Ker)
   (2002) 253 I.T.R. 363 (Ker)

42. Cheriya Varkey V. Ouseph Thresia
   A.I.R. 1955 Travncore Chochin 255
   (This case is referred in the case
   cited above at Sr. 41 i.e. C.I.T.
   M.C. George)

43. Chakka Deniel V. Deniel Joshua
   A.I.R. 1953 Travncore-Chochin-
   61 (This case is referred in the
   case cited above at Sr. 41 i.e.
   C.I.T. V. M.C. George)

44. Kumarswamy Reddier V. CIT
   (1963) 49 I.T.R. 687 (Ker)

45. C.I.T. V. AR. RM. M.R. Subramaniam
    Chettiar
    (2001) 250 I.T.R. 358 (Mad.)

46. C.I.T. V. Sorda Devi
    (1957) 32 I.T.R. 615 (S.C.)

47. Rani Rajendra Kumari Bai V. ITO
    (1974) 93 I.T.R. 268 (All)

48. C.I.T. V. Ashok Bhai Chimanbhai
    (1965) 56 I.T.R. 42 (S.C.)

49. Vinod Kumar Ratilal V. C.I.T.
    (1975) 100 I.T.R. 564 (Guj.)

50. Supra at Sr. 20

51. ibid

52. Supra at Sr. 49

53. Supra at Sr. 48

54. ibid

55. Adoption means transformation of child from Natural parents to adoptive
    parents. It tantamount to re-birth in the family of adoptive parents and
    legal death in his / her Natural parents family

56. TSG Ranjan V. Commissioner of
    Agricultural Income Tax
    (1988) 144 I.T.R. 959 (Mad.)

57. Halsbury's Laws of England
    Vol. 17, 2nd Ed. Page 688

58. C.I.T. V. Nawab Mir Barkat Ali Khan
    (1974) T.L.R. 90 A.P.

59. Executor of the Will of T.V. Krishna
    Iyer V. C.I.T.
    (1960) 38 I.T.R. 144 (Ker)

60. C.I.T. V. C.S. Rajasundram Chetty,
    ibid
    A Vairavan Servai V. CIT
    (1980) 124 I.T.R. 557 (Mad.)
H.H. Yeshwant Rao Ghorpode V.
Col. H.H. Sir Harindershing V. C.I.T.
63. C.I.T. V. Haju Hasan Yacoob Sait (1964) 53 I.T.R. 5 (Ker)
64. H.H. Maharani Sri Vijayakurnverba
Saheb of Morvi V. C.I.T. (1975) 99 I.T.R. 162 (Bom.)
66. Supra Sr. 64
67. Ibid
68. Supra Sr. 65
70. Supra Sr. 64
72. Supra Sr. 65
73. Supra Sr. 62
75. C.I.T. V. Sri Abhayananda Rath Family
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78. Chokshi Committee Report cited in
K.V. Kupa Raju V. Govt. of India (2002) 256 I.T.R. 191 (Mad)
83. Supra Sr. 81
84. Finance Bill 1992

Para 65 of the Budget Speech of the Finance Minister Mr. Manmohan Singh (1992) 1994
I.T.R. 20

85. Finance Bill 1992

Para 65 of the Budget Speech of the Finance Minister Mr. Manmohan Singh (1992) 1994
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86. Balaji v. I.T.O

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88. C.I.T. V. Madhubala Shrenik Kumar


89. C.I.T. V. J.H. Gotla


90. C.I.T. V. K. Santhanakrushnan

(2002) 124 Taxman 661 (Mad)

91. Sardar Harpreet V. C.I.T.


92. Madhusudan V. I.T.O.


93. J.K. Abdul Jabbar V. C.I.T.

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94. C.I.T. V. Dr. T.K. Jairaj

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95. Gulzari lal Rawat V. C.I.T.

(2002) 177 C.T.R. 496 (Raj.)