One of the probable commonest cases of overlapping tax jurisdictions is the combination of 'residence taxation' and 'source taxation'. But the English law has formulated the test of 'central Management & Control', doing away with this probability. A company is held to be resident in the 'country' in which its 'Central Management & Control' is located. This rule is accepted by most countries, including India, with systems following the English pattern of company law. Obviously, this test is more akin to 'Residence Taxation' rather than 'source taxation'.

One of the judgments of the House of Lords, Unit Construction Co. Ltd. v. Bullock (Inspector of Taxes) focussed the rule of 'residence taxation'. The three wholly-owned subsidiaries of a U.K. company were companies registered in Kenya. Initially, the management of the Kenyan subsidiaries was carried on in Kenya. The meetings of the Directors of these subsidiaries, in whom the powers of management were vested by the articles of association, could not be validly held. Subsequently, the control and management of the Kenyan subsidiaries was taken over by the parent company though this was contrary to the Articles of Association of the Kenyan subsidiaries. The local directors of the Kenyan subsidiaries stood aside and did not exercise their powers of

1. Section 6(3), Income Tax Act, 1961 uses the words 'control and management of its affairs situated wholly in India' which bear the same scope as 'Central Management and Control' under U.K. law.

2. (1960) AC 351; (1959) 3 All ER 831, H.L.
management. Certain 'subvention payments' were made to the subsidiaries by the Parent Company.

The question before the House of Lords was, as to whether such subvention payments to associated companies could be deducted by the parent company, while computing its profits for income tax purposes. The House of Lords held that the deduction on account of 'subvention payments' could be claimed, only if such subsidiary companies were resident in the U.K. The place where the Central Management and Control of a company was situated determined the place of 'residence' of the company. The 'Central Management & Control' of the subsidiaries being situated in U.K. was irregular and contrary to the constitution of the company. Hence, the 'subvention payments' could not be deducted.

II. Previous Year—Accounting Procedure Dependent

The Income Tax Act does not prescribe any particular system of accounting which should be followed by the companies. Section 145 of the Act provides that an assessee can follow any system of accounting, which it wishes to follow, but it must be followed consistently. Though the generally accepted accounting systems are i. cash system ii. mercantile system; iii. Hybrid system; but an assessee-company can adopt only Mercantile System of accounting, according to the requirements of Companies Act, 1956. The reason is that a particular format of balance sheet in accordance with Schedule VI of the Companies Act, 1956 has to be followed. In essence, the mercantile system of accounting is the 'sine qua non' of business operations. Dealing with the characteristics of this system, the Supreme Court observed in Keshav Mills Ltd. v.

3. CIT v. Sarangpur Cotton Manufacturing Co. Ltd. (1938) 6 ITR 36 (PC); New Victoria Mills Co. Ltd. v. CIT (1966) 61 ITR 395 (All)
4. (1953) 23 ITR 230, 239 (SC)
"The mercantile system of accounting or what is otherwise known as
the double entry system is opposed to the cash system of book-
keeping under which a record is kept of actual cash receipts and
actual cash payments, entries being made only when money is
actually collected or disbursed. That system brings into credit
what is due, immediately it becomes legally due and before it is
actually received and it brings into debit expenditure the amount
for which a legal liability has been incurred before it is
actually disbursed."

The writer has discussed at length the concept of 'legal liability'
under Chapter 2, where the dual meaning of the word 'due' has been
considered, in one sense including the amounts immediately payable and
in another sense represents sums which a person may be legally liable
to pay though not actually payable immediately. It is submitted that
this legal syndrome ultimately centres around the 'theory of relating
back' or 'cause of action'. As discussed earlier, the only viable
solution is to acknowledge the 'theory of relating back' or 'cause of
action' as under English Law.

It is submitted that the Supreme Court took a very narrow concept
of 'debts due', as in contradistinction to 'debts owing' in Keeson
Industries & Cotton Mills Ltd. v. CIT. The Supreme Court followed the
observations of the Supreme Court of California in People v. Arguello,
as under:

"Standing alone, the word 'debt' as applicable to a sum of
money which has been promised at a future day as to a sum now
due and payable. If we wish to distinguish between the two,
we say of the former that it is a debt owing, and of the latter
that it is a debt due. In other words, debts are of two kinds:

5. Supra, 282-288
6. Supra, 286
7. (1966) 59 ITR 767 (SC). In the instant case, the question
involved was as to whether the liability to pay Income Tax was
'debt owed' by the assessee-company on the valuation date within
the meaning of section 2(m) of the Wealth Tax Act, 1957. The
Supreme Court bringing about a distinction between 'contingent
liability' and 'perfect liability' held that the liability to pay
income tax was an existing liability, even though the quantifica-
tion of the liability may be determined subsequently.
8. Ibid, 779; 1869 37 Calif 521.
'Solvendum in praesenti' and 'solvendum in futuro'. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt, until the contingency has happened.

In other words, an expenditure or outgoing could be said to have accrued or arisen when it is 'debt due' or 'debt owed'. On the other hand, if it is 'debt owing' (so to say, 'solvendum in futuro'), then such an expenditure or outgoing cannot be held to have 'accrued' or 'arisen'. The writer submits that this judicial hypothesis cuts at the very root of 'scope of total income' underlined in section 5, Income Tax Act, 1961. In order to contain the sway of narrow interpretation of the expression 'debt due' or 'debt owed', the Supreme Court had no way out, except to go a step further in Metal Box Company of India Ltd. v. Their Workmen as under:

"Even if the liability is a contingent liability, provided its discounted present value is ascertainable, it can be taken into account. Contingent liabilities discounted and valued as necessary can be taken into account as trading expenses if they are sufficiently certain to be capable of valuation and if profit cannot be properly estimated without taking them into account...".

It is submitted that the 'doctrine of substance' is not available at every aspect in the revenue matters. The tax attaches, corresponding to the event, so to say, the 'cause of action', as it emerges or unfolds itself. The judicial dictum of the House of Lords in Duke of Westminster's case is pertinent here, as under:

"The doctrine of substance does not, however, mean that the court may brush aside deeds, disregard the legal rights and liabilities arising under the terms of the said deeds, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being very different from what in law they were."

9. The Very concept of total income is based on the mercantile system of accounting, wherein the terms 'accrues' or 'deemed to accrue' have been very rightly incorporated.


11. (1935) 19 TC 490 (HL)
The age-old concept of right or liability corresponds with the 'cause of action', the court merely declares such a right or signifies such a liability. General principles of liability allow a coherent body of law to be developed in a more consistent fashion than if the law is confined in too many pigeon-holes. As a consequence of the foregoing discussion, it could be very well concluded that section 43B Income Tax Act, 1961, inserted by virtue of the Finance Act, 1983 may be omitted.

While introducing the Finance Bill, 1983 in the Parliament the Finance Minister made a mention regarding the insertion of 'disallowance of unpaid statutory liability' in the following words:

"Broadly stated, under the mercantile system of accounting, income and outgo are accounted for on the basis of accrual and not on the basis of actual disbursements, or receipts. For the purposes of computation of profits and gains of business and profession, the Income Tax Act defines the word 'paid' to mean 'actually paid or incurred' according to the method of accounting on the basis of which the profits or gains are computed.

Several cases have come to notice where taxpayers do not discharge their statutory liability, such as in respect of excise duty, employer's contribution to provident fund, employees State Insurance Scheme etc., for long periods of time, extending sometimes to several years. For the purpose of their income tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid. To curb this practice, it is proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any provident fund, or superannuation fund or gratuity fund or any other fund for the welfare of employees, shall be allowed only in computing the income of that previous year, in which such sum is 'actually paid by him'.

It is submitted that the definition of the term 'paid' in section 43(2) clearly acknowledges the mercantile system of accounting, whereas

14. "(2) 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head 'profits and gains of business or profession'. 
the newly inserted section 43B transmutes the mercantile system of accounting insipid. It cuts at the very root of the concept of accounting. The writer is constrained to mention that the tax code is being treated by the Parliament as a 'rectifying reservoir'-rectifying the evils being perpetrated through the mechanism of other legislations. Could it not be a look of askance to the corporate sector, in general, when separate statutes on every aspect, for example, excise duty, provident fund, employees state insurance, gratuity fund exist? Could it not be said that the mechanism of the concerned statutes bemoans their spirit, so as not to be resilient?

Moreover, the Income Tax Act empowers the ITO to reject the method of accounting adopted by the assessee, howsoever consistently it might have been employed by the assessee over a number of years, if in the opinion of the taxing authorities income of the trade cannot be properly deduced therefrom. There is an English authority in the judgment of the House of Lords, B.S.C.Footwear Ltd. v. Bidgway that the department is entitled to reject a particular method of accounting, even if the same had been accepted over a period of 30 years. The House of Lords observed:

"The rejection of the method of accounting in such cases would become inevitable if the method consistently followed by the assessee prior to the year of rejection, however commercially sensible, does not reproduce the profits and gains for a particular year taken in isolation".

At the same time, it is important to note that rejection of books of account does not tantamount to rejection of an accounting method.

The Madras High Court held in Sree Shanmugar Mills Ltd. v. CIT as under:

"The impropriety of the method of accounting should be distinguished from the falsity and unreliability of the books of account. While a method of accounting may be rejected under the

15. Investment Ltd. v. CIT (1970) 77 ITR 533 (SC)
16. (1972) 83 ITR 269 (HL)
17. (1974) 96 ITR 411 (Mad)
proviso to section 145, the account books can be rejected in exercise of the power under section 143 (3), for the power to reject the accounts is inherent in the power to call for evidence in support of the return and investigate the same".

It is, therefore, submitted that with such an enormous gamut of powers vested in the hands of the taxing authorities, the insertion of section 43B makes a bedlam of a galore of provisions in the Income Tax Act.

1. Requirements of the Companies Act Relating to Accounts

The most pertinent query in this regard is the extent of powers of the ITO, after the company has gone in winding up. For most of the purposes, the Supreme Court's judgment in S.V.Kondaskar v. V.M. Deshpande, ITO remains the judicial hallmark on this point. The facts were that the assessee company was ordered by the Bombay High Court on Oct. 7, 1959 to be wound up under the provisions of the Companies Act, 1956. On Aug 23, 1966, the ITO issued notices under section 148 of the 1961 Act, proposing to reopen the assessment of the company in respect of the assessment years 1950-51 to 1955-56.

The question before the Supreme Court, whether the ITO was entitled to commence or continue assessment or re-assessment proceedings in respect of a company ordered to be wound up by the court without leave of the court under section 446(1) of the Companies Act, 1956, Dua, J., delivering the judgment of the Supreme Court held as under:

"The liquidation court cannot perform the functions of Income Tax Officer while assessing the amount of tax payable by the assessee, even if the assessee be the company which is being wound up by the court. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income tax.

The liquidation court would have full power to scrutinize the claim of the revenue after income tax has been determined,

18. (1972) 83 ITR 685; AIR (1972) SC 878
and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law the amount of income tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interest of the company and its creditors under the Act.

The same position was obtained by the Federal Court in Governor-General in Council v. Shiromani Sugar Mills Ltd. The words 'other legal proceedings' in section 171, Companies Act, 1913 comprise any proceedings by the revenue authorities under section 46(2) of the Income Tax Act, 1922, and, accordingly, before forwarding the requisite certificate under section 46(2) to the Collector, which would put the machinery for the collection of the arrears of land revenue into motion, the ITO should have applied under section 171 of the Indian Companies Act for leave of the winding-up court.

It is to be noted that the total sum of these decisions is that the expression 'other legal proceeding' occurring in section 446(1) and (2) of the Companies Act, 1956 includes only the proceedings pertaining to collection and recovery of the arrears of taxes, whereas assessment or reassessment proceedings are outside the pale of Companies Act. The scrutiny of this very point was before the Kerala High Court in ITO v. Official Liquidator: Swaraj Motors (P) Ltd. After the winding-up order, the ITO demanded the tax due. That was paid by the official liquidator. But there was a delay of 7 days in paying it due to the time taken to get the sanction of the liquidation court. For this delay, the ITO levied interest under section 220(2) of the 1961 Act. The question of

20. (1946) 14 ITR 248, 257 (PC)
21. Section 171, Indian Companies Act, 1913 provided for preventing litigation against a company in the process of being wound up. It read as under:

"171. When a winding-up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose."
22. (1982) 134 ITR, 132 (Ker)
Whether the demand by the ITO of interest levied under section 220 (2) of the Income Tax Act after the winding-up order is not a 'legal proceeding' as contemplated by section 446 of the Companies Act, 1956 and if so, there is no need to take the sanction of the liquidation court. Affirming the decision of the single judge, the Division Bench of the Kerala High Court observed:

"The provisions of the Companies Act, 1956 are special and those of the Income Tax Act general and if there is an apparent conflict between the provisions of these two enactments, the provisions of the Companies Act, 1956, has to prevail. The provisions of section 446(2) of the Companies Act, 1956, besides being special, contain a non-obstante clause also. Section 446 of the Companies Act prohibits the commencement of any legal proceeding against a company after the making of a winding-up order except with the leave of the court".

Furthermore, the Kerala High Court held as under:

"One reason given by the Supreme Court in S.V.Kondaakar v. V.M. Deshpande, for holding that section 446 (1) and (2) of the Companies Act did not apply to re-assessment proceedings was that section 148 of the Income Tax Act occurred in Chapter IV of the Income Tax Act, which dealt with procedure for assessment and that was not a legal proceeding. Unlike that section, section 220(2), which is involved in the present appeal, occurs in..."

23. Ibid, Headnote.

24. Ibid, 135. The Kerala High Court had to answer the same nature of question again, and, that too, very soon, in ITO v. Official Liquidator (1982) 134 ITR 136 (Ker), and the court reiterated its stand as under:

"While enacting sub-section (1) of section 220, Parliament had in contemplation only an assessee who could obey its mandate and not one who by virtue of other laws made by Parliament itself, is not in a position to do so. Interest claimed in respect of tax due from a company prior to the date of winding-up is not entitled to priority under section 530(1) of the Companies Act. It is settled law that in estimating the value of a debt or other claim under sections 528 and 529 of the Companies Act, the position as at the commencement of the winding-up has to be taken; and if there is any doubt, rule 154 of the Companies (court) rules, 1959 removes it. Rules 147 to 179 of the Companies (court) Rules lay down an elaborate procedure for estimating and finally assessing the company's liabilities as on the relevant date. Thus, the companies Act and the Rules framed thereunder place legal impediments against the liquidator complying with a demand for tax within 35 days as required under section 220 of the Income..."
Chapter XVII of that Act, which deals with collection and recovery of tax. So, the provisions of section 446 of the Companies Act would be attracted to the demand for interest under section 220(2) of the Income Tax Act, and the decision of the Federal court in *Governor-General in Council v. Shiromani Sugar Mills Ltd.*, would apply to a case like that involved in the present appeal.

Thus it can be safely said that the Supreme Court's judgment in *S.V.Kendaskar v. V.M.Deshmunde, ITO* holds the ground on the relevant point even now. Another question is regarding the priority of taxes due from a company in liquidation, in contradistinction to the claims of other secured and unsecured creditors. The position of law on this point may be said to be settled, but even then due to the over-anxiety of the revenue department, litigative syndrome prevails. Section 530(1) of the Companies Act, 1956 and section 178 of the Income Tax Act, 1961 are the relevant sections for consideration. The writer has already dealt with the contrariety in the provisions of section 530(1)(a) of the Companies Act and section 178(6) of the Income Tax Act, 1961 under the heading 'Provisions for taxation' in Chapter 1. Section 178 is contrary in the sense that it legislatively directs the liquidator to arrange for the payment of taxes. The subsequent legislation, Income Tax Act, 1961 (as compared to Companies Act, 1956) submerges the effect of section 530(1)(a) of the Companies Act. The writer again submits that in order to do away with such a predicament the words 'which had become due and payable within 12 months next before the date of the winding-up order' may be inserted in sub clause...

24 contd. Tax Act, 1961. The application of sub-section (2) of Section 220 of the Income Tax Act, 1961, should be confined to an assessee who is free to comply with the requirement of sub-section (1) of section 220".

25. Section 530(1)(a), Companies Act, 1956 states:

"In a winding-up, there shall be paid in priority to all other debts, all revenues, taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in clause (c) of sub-section (8), and having become due and payable within the 12 months next before having that date".

26. Supra.

27. *ITO v. Official Liquidator (1975) 101 ITR 470 (AP)*
(b) of section 178(3), as under:

"b. on being so notified shall set aside an amount equal to the amount which had become due and payable within 12 months next before the date of the winding-up order, notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands".

In order to justify the above submission, it is pertinent to quote the observations of the Company Law Committee Report, 1955. This committee was constituted to suggest and recommend, interalia, the additions, alterations, insertions or modifications in the then existing Companies Act, 1913. In its paragraph 219 of the Report, it has been stated as under:

"In this connection, we would like to refer to a memorandum that we received from the Central Board of Revenue, on the question of a priority to be given to Crown demands generally and in particular to arrears of Income Tax, Super Tax and Corporation Tax. It was suggested that there should be no time-limit for the preferential payment of those Crown debts and that section 230 of the Indian Companies Act, 1913, should be amended accordingly. The practical difficulty of giving effect to this suggestion is that it would place a great majority of the unsecured creditors of the company at the mercy of the income-tax authorities, in as much as whatever may be the nature of the security on which they may have lent money to a company at the time of the loan, the unforeseeable demands of the Income Tax authorities on the company without any time-limit would rank over the claim of such creditors. In these circumstances, it may be extremely difficult for the company to raise capital for its working. In this connection we would draw attention to the provisions of clause (a) of sub-section (1) of section 319 of the English Companies Act, 1948, under which arrears of land tax, Income Tax, profits tax, excess profits tax or other assessed taxes rank in priority over other debts of a company only if they have been assessed on the company up to a particular date, namely, 5th April, prior to the appointment of the liquidator or resolution for the winding-up of the company and do not exceed in amount the whole of one year’s assessment. It will be noticed that by comparison, the provision of clause (a) of sub-section (1) of section 230 of the Indian Companies Act, 1913, is much wider and gives much more latitude to the income tax authorities for, under these provisions, arrears of tax would rank in priority if they have become due and payable within twelve months next, before the date on which they are payable irrespective of whether such taxes have been assessed on the company or not".

Much more pertinent, the company law committee’s attention was specifically brought down to the large arrears of income tax, super tax
and corporation tax, upon which it observed as under:

"...The remedy for this unsatisfactory situation is not the conferment of preferential rights without limit to the income tax authorities under section 230 of the Indian Companies Act, 1913, but the energetic completion of assessment proceedings and vigorous measures for the collection of the assessed taxes".

This abovementioned recommendation has been aptly given effect in section 530(1)(a), Companies Act, 1956. The relevant law on this section already shows that a tax is due and payable only when it has been ascertained, quantified and notified to the assessee. On this principle, even advance tax demanded from a company under section 210, within twelve months before the date of the winding-up order, is a tax covered by section 530(1)(a). Though section 530 lists 'preferential payments', wherein at fourth preference the amount due in respect of contributions payable during the twelve months before the winding-up under the Employee's State Insurance Act, 1948 or any other law is to be paid, but such a preference does not apply when the company is being wound-up voluntarily merely for the purpose of reconstruction or amalgamation with another company. It is evident that the mechanism underlined in section 530, Companies Act, 1956 is meaningful and pragmatic. With this in view, the writer submits that the order of the ITO under section 178 does not have the effect of submerging the provisions of section 530 and in particular, of section 530(1)(a) of the Companies Act. Consequently, in order to provide clarity in law, an insertion may be made in clause (b) of section 178(3), as aforementioned.

ii. Requirements of the Income Tax Act Relating to Accounts

As often in other laws too, one is faced with two principles, equity and administrative convenience, which are diametrically opposed.

The word 'assessment' is, in point of fact, used in the Income Tax Act, 1961 in no less than eight different senses. It may mean:

a. the amount at which profits are computed;
b. the amount of tax payable, before deducting allowances;
c. the amount of tax payable, after deducting allowances;
d. the entry of the particulars in the return of income;
e. the 'return of income' itself;
f. the action of the appropriate authority in computing the profits;
g. the action of appropriate authority in computing the tax;
h. the notice of assessment.

The immediate question is whether these eight different senses are superfluous, or in the nature of an 'abundant cautela'; if so, 'trial and error' method may narrow down the canopy of the variegated nature of 'assessment'. Perhaps the best answer has been exhibited in a Calcutta High Court's judgment in CIT v. Income Tax Appellate Tribunal. The sense of the word 'assessment', mentioned at item 'f' above, was under question. The facts of the case were that a company claimed as business expenditure the salary and commission paid to its joint managing directors. The ITO disallowed part of the remuneration without specifying the provision of law under which he acted. The AEC upheld the disallowance. He also did not specify the section under which he acted but the cases cited in his order were those under section 10(2) (XV) of the Income Tax Act, 1922. Thereafter, the

31. (1977) 109 ITR 267 (Cal)
Tribunal disallowed the remuneration under section 10(4A) of the Act.

On an application by the assessee-company, the Tribunal rectified its order on the ground that it had discussed 'the applicability of section 10(4A) to the facts of the case to the exclusion of section 10 (2)(xv). This was against the trend of discussions made by the AAC in his order'. Thereupon the latter order of the tribunal was challenged by the revenue as being beyond its jurisdiction, under Article 226 of the constitution.

Mukharji, Sabyasachi J., delivering the judgment of the Calcutta High Court held as under:

"Rectifications or corrections of erroneous decisions and orders of the courts, tribunals and quasi-judicial authorities are parts of the processes for administration of justice... It is, however, important to emphasise that existence of express power eliminates the scope of exercise of implied or ancillary power. It is also necessary to emphasise that courts or tribunals created by statutes have no inherent plenary powers like civil courts, though sometimes, as part of the incidental or ancillary powers these have certain inherent powers, inherent in the sense that these are parts of the ancillary or implied powers. The aforesaid principles are well-settled".

Furthermore, quashing the Tribunal's latter order, the Calcutta High Court observed as under:

"The Tribunal, like the Income Tax Appellate Tribunal, cannot be said to have inherent jurisdiction as such like a Civil Court. Such Tribunals certainly do have ancillary and implied powers to exercise the jurisdiction vested in them and as part of that vested in them and as part of that ancillary and incidental

32. Section 10(2)(xv), Income Tax Act, 1922 corresponds to section 37(1), Income Tax Act, 1961, enunciating the principle of 'commercial expediency'.
   Section 10(4A), Income Tax Act, 1922 corresponds to section 40(c)(1), Income Tax Act 1961, stating that in the case of a director or a person substantially interested in the company, such an expenditure or allowance would not be deductible in the assessment of the company which, in the opinion of the ITO, was excessive or unreasonable having regard to the legitimate business income and the benefit derived by the company from incurring the said expenditure.

33. Ibid, 274-75.
34. Ibid.
powers to discharge the jurisdiction vested in them. Certain amount of authority may be considered to be inherent in the implied or ancillary powers. Beyond that, in my opinion, it cannot be said that such tribunals exercise inherent powers.

In the ultimate analysis, there is a constricted circle within which the law acknowledges the role of inherent powers vested in the tribunal; and rightly so, the over-lapping jurisdiction in matters pertaining to inherent powers cannot be ascribed to the Tribunals, otherwise it may lead to one of the major retarding factors of administration of justice. The writer is conscious of this fact that the administrative tribunals are essentially instruments of adjudication, and this principle has raised endless technical controversy. Allen states as under:

"Oceans of ink have been spilt upon the distinctions between the judicial and the administrative, the quasi-judicial and the quasi-administrative. The Franks Committee wisely declined to be drawn into these scholastic disputations (as the Donoughmore Committee was, with dubious results), and took its stand on the principle that these numerous agencies, whatever juristic label be attached to them, are engaged in deciding issues of right and liability...".

Allen further states:

"The committee did not recommend that all tribunals should be exactly assimilated to courts of law, but in accordance with the principles of openness, fairness, and impartiality, it urged what may be interpreted as certain counterweights to dangerous doctrines which have been derived from Local Government Board v. Arlidge (1915) AC 120, and which have sometimes been understood to mean that administrative adjudications are of a wholly different substance from judicial decisions".

In precise, therefore, an administrative Tribunal in India has vestiges of English Administrative Tribunals. It is this reason that

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35. Allen, CK, 'Law in the Making' (Paperback 1961 Edn) 619. The committee on Administrative Tribunals and Inquiries, 1957 is popularly named as Franks Committee, after the name of its Chairman, Sir Oliver Franks.

36. Ibid 619-20, Allen states at page 567 of his novel work that Local Government Board v. Arlidge (1915) AC 120 is still the governing precedent for the principle that a statutory quasi-judicial authority is 'not bound to follow the procedure of a court of justice'.
impels the variegated nature of the word assessment in no less than eight different senses. The Tribunal being the final fact-finding authority, process of computation or recomputation, quantification or re-quantification goes on till the facts are finally established by the Tribunal.

iii. Concept of Income Escaping Assessment

'Income Escaping Assessment' has had been one of the most baffling concepts in tax jurisprudence. The dynamics of the word 'information' used in section 147(b), which looked ultimately to be on firm grounds with the judgment of the Supreme Court in Indian & Eastern Newspaper Society v. CIT (hereinafter referred as IENS) has been again shaken, and that too, by the Supreme Court itself by granting special leave to the department to appeal against the judgment of the Karnataka High Court in T.T.(P) Ltd. v. ITO on the limited question of reviewing the IENS by a larger Bench, whereas IENS was delivered by a Bench of three eminent judges, Bhagwati, P.N.J., Tulzapurkar, V.D.J., and Pathak, R.S.J.,

Section 147(b), Income Tax Act, 1961 states:

"Notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year";

then he may assess or reassess such income.

Therefore the most vexed question is as to what constitutes 'information'. What is the ambit of the term 'information'? The

37. (1979) 119 ITR 996 (SC)

38. (1980) 121 ITR 551 (Kar). In this judgment of the Karnataka High Court, it has been held that the ITO could not reopen the assessment on an objection of the internal audit that the payment of commission to its selling agent could not be allowed under section 40(2)(a) of the Income Tax Act, 1961 for the purposes of computing the income of the company and that the case had to be dealt with under section 40(c)(i) of the Act.
Gujarat High Court has openly admitted the vacillating nature of the principles involved in determining the nature and scope of the term 'information' in *K. Hansukhram & Sons v. CIT*, as under:

"This is a well-worn subject on which the decisions are galore. The difficulty in each case arises, however, in the application of the principles laid down in those decisions..."

In one of the leading pronouncements of the Supreme Court *CIT v. A. Raman & Co.*, the meaning and scope of the term 'information' was involved. A firm consisting of two partners made sales to the Hindu Undivided families of which the partners were the Kartas. The contention of the department was that the goods were sold at understated prices to the families, as a result of which the profits which the families made were really the profits of the firm. The department sought to treat the income as 'income escaping assessment', thus initiating action under section 34(1)(b) of the 1922 Act, which corresponds to section 147(b) of the 1961 Act.

Shah, J., who delivered the judgment of the Supreme Court observed:

"The expression 'information' in the context in which it occurs (in section 147(b) of the Income Tax Act, 1961) must, in our judgment, mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment... That information must, it is true, have come into the possession of the ITO after the previous assessment, but even if the information be such that it could have been obtained during the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the ITO is not affected."

As a matter of fact, 'information' derived from an 'external source' was not taken up, in particular, by the Supreme Court in

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39. (1982) 133 ITR 65 (Guj)
40. (1968) 67 ITR 11 (SC). This decision has been acknowledged by now an authority on the precepts of 'Tax avoidance'.
41. Ibid 15-16.
In a Gujarat High Court judgment, Kasturbhai Lalbhai v. R.K. Malhotra, ITO, explaining the ratio of the decision in Raman's case, the question as to what constitutes 'information' derived from 'an external source' was considered. Bhagwati, C.J., (as the learned Judge then was) speaking for the court observed as under:

"Now, if information is as to any fact, it may be received from any person who knows the fact. The external source in case of information as to fact cannot be limited to any particular person, body or authority, since such fact may be within the knowledge or in the possession of anyone and it may be received by the ITO from any source. But so far as information as to the correct state of the law is concerned, the external source from which it may be received must necessarily be of a limited character. It must have an element of authority behind it. It must be, as already stated by us, a statement or expression of the correct state of the law by a person, body or authority competent and authorised to pronounce upon the law, so that it is invested with some definiteness and authority."

Thereafter, the aforementioned decision of the Gujarat High Court was reversed on appeal by the Supreme Court in R.K. Malhotra, ITO v. Kasturbhai Lalbhai. The Supreme Court held that the audit department is the proper machinery to scrutinize the assessments of the ITO and point out errors, if any, in law. It is important to note that the aforementioned passage of the Gujarat High Court's judgment on the ambit of 'information' remains unaffected by the Supreme Court's judgment, in as much as, the Gujarat High Court said that 'information as to the correct state of the law is concerned, the external source from which it may be received must necessarily be of a limited character'.

42. (1971) 80 ITR 188 (Guj)
43. Ibid, 192-93.
44. (1977) 109 ITR 537 (SC)
45. The Supreme Court upheld the views taken by Delhi and Kerala High Courts in CIT v. H.H. Smt. Chand Kanwarji (1972) 84 ITR 584 (Del) and CIT v. Kelukutty (1972) 85 ITR 102 (Ker) respectively. In these cases it was held that an audit note is instruction or knowledge derived from an external source, within the ratio of the Supreme Court's decision in A. Raman & Co's case.
In between came the decision of the Supreme Court in Kalyanji
Marji & Co. v. CIT. On a review of the statutory language and authorities, the Supreme Court laid down that the following conditions must be satisfied in order to constitute 'information':

1. The information may be derived from an external source concerning facts or particulars as to law relating to a matter bearing on the assessment;

2. ...

3. That the information may be obtained even on the basis of the record of the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby from other enquiry or research into facts or law.

The last word on the pinpointed subject of 'information' came in the Supreme Court's decision in Indian and Eastern Newspaper Society v. CIT. The question for consideration was the same as in the case of R.K. Malhotra v. Kasturbhai Lalbhai, as to whether audit report constitutes 'information'. Bhagwati, J., delivering the judgment of the Supreme Court observed as under:

"In so far as the word 'information' means instruction or knowledge concerning facts or particulars, there is little difficulty. By its inherent nature, a fact has concrete existence. It influences the determination of an issue by the mere circumstance of its relevance. It requires no further authority to make it significant. Its quintessential value lies in its definitive vitality. But when 'information' is regarded as meaning, instruction or knowledge as to law the position is more complex... Law may be statutory law or what is popularly described as judge-made law. In the former case, it proceeds from enactment having its source in competent legislative authority. Judge-made law...

46. (1976) 102 IT R 287 (SC). In the instant case the ITO completed the original assessment of the registered partnership firm, because the balance sheet without any further scrutiny could not have revealed that the amount of deduction of interest claimed was in fact on account of interest free loans given to the partners to meet their income tax liabilities. In a subsequent assessment year, the ITO discovered that the deduction claimed by the assessee was not correct as a result of which the initiation of the proceedings under section 34(1)(b) of the 1922 Act were taken up.

47. (1979) 119 ITR 996 (SC)
48. Ibid
49. Ibid, 1001.
emanates from a declaration or exposition of the content of a legal principle or the interpretation of a statute, and may in particular cases extend to a definition of the status of a party or the legal relationship between parties, the declaration being rendered by a competent judicial or quasi-judicial authority empowered to decide questions of law between contending parties. The declaration or exposition is ordinarily set forth in the judgment of a court or the order of a tribunal. Such declaration or exposition in itself bears the character of law. In every case, therefore, to be law, it must be a creation by a formal source, either legislative or judicial authority. A statement by a person or body not competent to create or define the law cannot be regarded as law...

Furthermore, the Supreme Court mollified the effect of the aforementioned passage in the following words:

"But although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communicator of the law is carefully maintained, the confusion which often results in applying section 147(b) may be avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose".

Overruling its earlier decision in R.K. Malhotra, ITO v. Kasturbhai Lalbhaf, The Supreme Court held in IENS case, that as long as the content is 'law', it would be 'information', whether the communicator of law may be CBDT, Ministry of Law or the Comptroller & Auditor General of India or an audit cell of the Revenue Department itself. The writer submits that this judgment in IENS case makes the entire position on the subject extremely clear. Not only this, the Supreme Court in IENS negatived, inter alia, the second principle enunciated by the Supreme Court in Kalvanji Mavji & Co. v. CIT, West Bengal. The second principle laid down to determine the applicability of section 34(1)(b) was enunciated by Fazal Ali, J., as under:

"(2) Where in the original assessment the income liable to tax

50. Ibid, 1003.
51. Ibid.
52. Ibid.
53. Ibid.
has escaped assessment due to oversight, inadvertence or a mistake committed by the ITO. This is obviously based on the principle that the tax payer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority."

On this Bhagwati, J., observed:

"... The proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power... Any observations in Kalvani Mayil & Co. v. CIT suggesting the contrary do not, we say with respect, lay down the correct law."

Following IBNS, the Gujarat High Court has held in Anil Starch Products Ltd v. ITO as under:

"... That part alone of the note of an audit party which mentions the law which escapes the notice of the ITO constitutes 'information' within the meaning of section 147(b). The part which embodies the opinion of the audit party with regard to the application or interpretation of the law cannot be taken into account by the ITO."

In essence, this vexed question as to what constitutes 'information' and when the ITO gets empowered to open an assessment under section 147(b) revolves around an important premise, as under:

Could the law help, while interpreting this provision underlined in section 147(b), in striking a proper balance between the twin requirements, in built in this provision viz., safeguarding the interests of revenue on the one hand and adorning the sanctity of completed assessments on the other hand?

The writer is of this view that to revert back to R.K. Malhotra, ITO v. Kasturbhai Lalbhai would mean the assessing authorities falling hook, line and sinker for their high-stakes even in genuine assessments, in the hope of finding their pot of gold. IBNS does not preclude.

54. Ibid, 1004.
55. (1982) 134 ITR 355 (Guj)
56. Ibid.
the percolation of 'information', it merely stresses on the very
competence of the authority, as to whether it could pronounce or
declare the law. Communication of law is not the same thing as
declaration or pronouncement of law. The protagonists of Kasturbhai
57 Lalbhai may raise an eye-brow that restricting the external source
to persons, bodies or authorities competent to declare the correct
state of the 'law' or to pronounce upon it would amount to the test
of externality of the source of information being 'unduly circumscribed'.
Could it be proper then circumscribing such apex authorities, for
example CBDT, Ministry of Law, Comptroller & Auditor General of India
within that inner circle, whose word would constitute 'information';
and a concentric outer circle of such authorities, as internal audit
party of the department, whose word would not constitute 'information'? Else, could the 'law' meet the challenge that the word of every busybody
would constitute 'information'?  

The writer submits that the judgment of the Allahabad High Court
58 in Rai Kumar Shrawan Kumar v. CBDT raises certain other interesting
issues. It is true that the statute does not restrict the sources
from which the information as to a question of law can be derived by
the ITO, but to inject the element of prudence once again stirs the
hornet's nest. The Allahabad High Court observed in the instant case
that 'information' must be from such a source as would lead a prudent
man to form the belief that it is prima facie correct. Would it
imply then that only the authorities comprising the inner circle could
be a source of 'information' within the meaning of section 147(b)?
Could then the authorities comprising the outer circle be looked in
askance by the taxpayer? Or, could the prudence would be omniscient
at large?

57. (1977) 109 ITR 537, (SC)
58. (1977) 107 ITR 570 (All)
The writer humbly submits that the very essence of the problem speaks volumes about the incoherence and incoordination amongst the different wings of the Revenue Department. The writer has had the privilege to look into and study the actual working of the department and it is writer's view that upholding the principles enunciated by the Supreme Court Bench of three eminent judges in *IBNS* case calls upon the need to vitalize the ingredients of coherence and coordination amongst the different wings of the Revenue Department. The pragmatic solution does not lie in widening the area of 'information'. Perhaps it would not be wrong to say that *IBNS* implies an expeditious disposal of the cases, whereby the audit is to be equally responsive just at the stages of the assessment itself. It is to be borne in mind that the Income Tax Act itself provides many stages in the process of assessment, before a final assessment is arrived at.

Perhaps on the 'formal source of law', *IBNS* could be vulnerable. But it is not so. The judgment answers and sums up every aspect of this problem. It is true that the law declared by the Supreme Court is binding on all courts in India under Article 141 of the Constitution whereas the opinions of courts of equal or subordinate jurisdiction have only persuasive value. The Supreme Court held in *IBNS*, as under:

"...Judge-made law...may in particular cases extend to a definition of the status of a party or the legal relationship between parties, the declaration being rendered by a competent judicial or quasi-judicial authority empowered to decide questions of law between contending parties. The declaration or exposition is ordinarily set forth in the judgment of a court or the order of a tribunal. Such declaration or exposition in itself bears the character of law...".

Thus, the judgment makes it crystal clear that in certain particular cases, the determination or formulation of law is 'law' as between the contending parties embodying the status or legal

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59. *Supra*, 465 The word 'assessment' is used in not less than eight senses in the Income Tax Act.
relationship of the parties. It is common knowledge that much like other laws, there are often divergent opinions of various High Courts on a particular point of law. By way of an analogy derived from the case, it can be clearly said that the opinions of courts of equal or subordinate jurisdiction being only of persuasive value, the judicial authority may opt for either of the views. In K. Mansukhran & Sons v. CIT such a question was involved on which there are different opinions of various High Courts, whether interest paid by a firm to a partner, who represents his HUF is to be allowed as a deduction in the assessment of the firm by virtue of section 40(b). Yet, the Gujarat High Court accepted the decision of the Appellate Tribunal on this point in another case as 'information' on a point of law on the authority of the decision. In essence, this is the very ratio of the decision.

A Calcutta High Court's judgment in CIT v. Assam Oil Co., Ltd., howsoever, pinpoints the complexity of the problem, but in no way it militates the authority of the decision; rather it clarifies the position further. The facts of Assam Oil Company were that in the original assessment for 1960-61, the assessee had claimed deduction of payments of royalties on crude oil and gas and this was allowed by the ITO. Subsequent to the completion of the original assessment, the ITO became aware of the decision of the Rajasthan High Court in CIT v. Gotan Lime Syndicate, wherein it was held that payment of royalties by the assessee for obtaining mining rights for the mining of limestone was capital expenditure. The ITO initiated proceedings, as if 'income escaped assessment'. Interestingly enough, thereafter, the decision of the Rajasthan High Court was reversed by the Supreme Court.

61. (1982) 133 ITR 65 (Guj)
62. (1982) 133 ITR 204 (Cal)
63. (1964) 51 ITR 533 (Raj)
Following the judgment of the Supreme Court in *Raman’s case*, the Calcutta High Court held as under:

"A decision of the High Court that a particular kind of expenditure is not deductible would constitute 'information' within the meaning of section 147(b) and reassessment proceedings taken in consequence of such information would be valid. A subsequent reversal of the decision of the High Court by the Supreme Court would not render the reassessment proceedings void ab initio. On principle, the Supreme Court does not make the law from the date it is pronounced but declares it to be so from its very inception. But the knowledge about the law is not always there."

Such cases as CIT v. *Assam Oil Co., Ltd.* are bound to recur again, but it is the dynamics of law which cannot be jacketed; neither the various stages of assessment or reassessment can be circumvented.

**iv. Concept of Advance Payment of Tax**

One of the leading judicial controversies prevails in regard to the amount of interest on excess payment of advance tax. The question as to what constitutes excess payment of advance tax by the assessee and, if so, how the interest payable to the taxpayer is to be calculated, has been the subject matter of judicial scrutiny in the recent past. There are at least five aspects of this matter which would be dealt herewith. Section 214 of the *Income Tax Act, 1961* is one of the inexorable provisions of law on this aspect. It states that simple interest at the rate of 12% per annum shall be paid to the assessee on the amount by which the aggregate sum of any instalments of advance tax paid during any financial year exceeds the amount of the

64. Ibid, Headnote.

65. The *Income Tax Act, 1961*, requires the taxpayer to pay the tax due from him normally in four stages, namely:
   
   1. by way of deduction of tax at source in respect of such incomes as are covered by sections 192 to 206B, subject to the limits, conditions and other requirements specified therein in respect of each type of income;
   2. by way of advance payment of tax as and when the income is earned in accordance with the provisions of sections 207 to 219.
   3. by way of tax on self-assessment under section 140A at the time of filing the return of income; and
   4. by way of payment of tax on receipt of a notice of demand from the ITO on completion of the assessment under
tax determined on regular assessment, from the 1st April next following the said financial year to the date of the regular assessment. The words 'regular assessment' has had been a source of litigation even though section 2(40) defines the term 'regular assessment' as under:

"Regular Assessment" means the assessment made under section 143 or section 144;" At the same time, section 2(8) defines 'assessment', as under:

"assessment' includes reassessment", 66

Accordingly, in Chloride India Ltd. v. CIT, the Calcutta High Court held that the expression 'regular assessment' includes within its scope any order which the ITO is bound to make in pursuance of the directions of the AAC or the Commissioner (Appeals). Chloride India was a company in which the public were substantially interested, fulfilling all the conditions laid down in section 2(18)(b) of the 1961 Act, as a result of which the incidence of tax reduced. But the ITO refused to allow interest on the amount under sections 214 and 244 of the Act. The assessee filed a revision petition before the commissioner and he allowed interest under section 244 but he disallowed interest under section 214 in view of the words 'regular assessment', that it means the first or original assessment and not an assessment made as a consequence of the order of AAC.

Mukherji, Sabyasachi, J., delivering the judgment of the Calcutta High Court held as under:

"In my opinion, these sections are not indicative of the fact that the expression 'regular assessment' in the catena of

65 contd. section 143 or section 144, as the case may be, or even by way of a reassessment made under section 147 read with section 143(3).

The provisions relating to payment of interest on the tax paid by the assessee in excess were contained even under the Income Tax Act, 1922 in section 18A(5) mostly on the same lines.

66. (1977) 106 ITR 38 (Cal) Chloride India has been followed by the Madras High Court in CIT v. Madurai South India Corporation Pvt.Ltd (1977) 110 ITR 322, that if the interest rate is increased in between the date of commencement of the relevant assessment year and the date of completion of the regular assessment, the assessee-company would be entitled to claim interest at the rate prevailing on the date of completion of the regular assessment, although the rate of interest prevailing at the time while advance payment of tax was made by the assessee might have been less.

67. Ibid, 42.
sections should be confined only to first assessment. ... sub-section (1A) deals with the situation where interest first allowed under sub-section (1) of section 214, which is on tax determined on 'regular assessment' is subsequently reduced on completion of 'regular assessment'. If the subsequent order made pursuant to the order of the revisional or appellate authority cannot be treated as 'regular assessment', this clause would become nugatory.

Taking cue from section 2(40), the court further observed:
"...An order which is made by the ITO to give effect to the order of the AAC is an order of assessment under section 143. If that is the position, then, in view of section 2(40) of the Act, the regular assessment as contemplated by section 214(1) should be the assessment made by the ITO initially or the first assessment made by the ITO, if there is no appeal therefrom, but in a case where there is an appeal, the order passed by the ITO finally to give effect to the direction, if any, of the appellate authority...".

The same view has been taken by the Madras High Court in CIT v. Rajalakshmi Mills Ltd. The assessee's claim for relief under section 80J was accepted by the ITO only at the stage of rectification proceeding under section 154. Consequently, the advance tax paid by the assessee was found to be in excess of the tax due from him. The Madras High Court observed as under:

"The order of rectification passed subsequently to the order of original assessment must be treated as forming part of the regular assessment and thus the regular assessment must be regarded as having been completed on the date of completion of the proceedings for rectification. Accordingly, the assessee would be entitled to claim interest up to the date of rectification which would necessarily form part of the original assessment made on him".

It is important to note that sub-section (1A) was inserted in section 214 by virtue of the Finance Act, 1968, which has the effect of making a radical departure from section 18A(5) of the Income Tax Act, 1922 (corresponding to section 214 of the 1961 Act). Thus two important

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68. Ibid, 38
69. (1980) 125 ITR 141 (Mad). In Rayon Traders Pvt. Ltd v. ITO (1980) 126 ITR 135 (Mad) the same principle has been followed that wherever the advance tax paid is in excess of the tax ultimately found to be due from the assessee, he would be entitled to receive interest under section 214(2) read with section 211 up to the date of actual refund even if the refund is granted after the regular assessment is made.
70. Ibid, Headnote.
decisions rendered under the 1922 Act, Sarangpur Cotton Mfg. Co. Ltd. v. CIT and Shadilal Sugar & General Mills Ltd. v. Union of India have been superseded by this legislation.

Second aspect relates to the 'withdrawal of interest' paid earlier. The Allahabad High Court has taken the view in CIT v. Baza Baland Sugar Co. Ltd. that when as a result of rectification the income originally determined gets enhanced, and consequently the interest originally paid to the assessee on the excess amount of advance tax paid becomes greater than the amount of interest actually payable to the taxpayer, the ITO would be well within his jurisdiction to withdraw the excess interest paid to the taxpayer by taking necessary action under section 154 read with section 214 of the Income Tax Act. It is important to mention at this stage that sub-section (1A) of section 214 states that "the excess, if any, paid shall be deemed to be tax payable by the assessee and that the provisions of this Act shall apply accordingly".

On the other hand, the courts are also of this opinion that rectification proceedings under section 154 cannot be initiated to the disadvantage of the assessee. The Supreme Court has clearly held in T.S. Balram v. Volkart Brothers that if the ITO has not charged interest under section 215, the omission or mistake cannot be said to be 'apparent on the face of the record', so as to impose interest by initiating rectification proceedings under section 154. The Calcutta High Court held in Amalgamated Coal Fields Ltd v. CIT that when there could be conceivably more than one opinions, it would not be appropriate to consider the interest paid, as being a 'mistake apparent from the record'. If the income assessed on the taxpayer is reduced on appeal, and consequently interest has been already paid to the assessee, it would not be open to the ITO to initiate rectification proceedings under section 154 to withdraw the interest amount paid to the assessee.

Third aspect relates to one of the most controversial aspects of the payment of advance tax by instalments on or before the specified

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71. (1957) 31 ITR 698 (Bom)
72. (1972) 85 ITR 363 (All)
73. (1980) 123 ITR 185 (All)
74. (1971) 82 ITR 50 (SC)
75. (1979) 116 ITR 383 (Cal)
The Gujarat High Court held in the case of Chandrakant Damodadas v. ITO that there is no indication in section 214 that the dates of instalments are strictly to be adhered to and, if they are not adhered to, interest will not be payable. This decision of the Division Bench of the Gujarat High Court has been again followed by the same High Court in a recent case, Anup Engineering Ltd v. ITO, where Mankad, J., has reiterated the ratio of Chandrakant Damodadas as under:

"In view of the language used in section 214 particularly with reference to the 1st day of April and not with reference to the dates on which the instalments are actually paid by the assessee, it is clear that the legislature intended to provide that irrespective of the dates on which the instalments of advance tax are paid, interest will be payable on the excess tax if two conditions are satisfied, i.e., the entire amount of advance tax is paid-up, and ii. it is paid up before the end of the financial year. There is no further condition that the instalments of advance tax must have been paid on or before the due dates mentioned in section 211. Failure to pay the instalments on the due dates might involve an assessee in imposition of penalty if the other conditions regarding penalty are satisfied, but the concept under section 214 being totally unconnected with deprivation of interest where penalty is incurred, the interest on excess advance tax must be paid if the two conditions are satisfied."

The same view has been taken by the Bombay High Court in CIT v. Chitra Sagar, where the assessee filed the estimate of income subject to advance tax and made the payment of advance tax on 15th March, whereas it was due on or before 1st March of the financial year. The CIT in exercise of 'revisional powers' under section 263 withdrew the interest granted to the assessee; he also directed the ITO not to charge interest under section 217 for the delay of 15 days. The question arose whether the advance tax paid after the specified date, but before the end of the financial year could be regarded as tax paid in advance or not. The Bombay High Court observed as under:

"That the subject matter of the mandatory provisions of section 214 and 217 is the same except for the difference that section 214 contemplates the government paying interest on the amount of advance tax which is in excess of the tax"
payable under the regular assessment while section 217 enables
the government to recover interest from the assessee who had
not paid advance tax in accordance with the relevant statutory
provisions. Hence if the amount paid on March 15, 1965 is not
advance tax for section 214, it cannot also be advance tax for
purposes of section 217. If the commissioner can hold that
no interest need be recovered under section 217, it must
inevitably follow that the mandatory provisions of section 214
also must apply and interest is payable by the government to
the assessee. He cannot take a totally inconsistent stand
when the question of payment of interest by the government
under section 214 arises..."

On the contrary, the Andhra Pradesh High Court in Kangundi
Industrial Works (P) Ltd v. ITAT and the Kerala High Court in A.
Sethumadhavan v. CIT have held in favour of the department. The
recondite reasoning given by the Andhra Pradesh High Court was as under:

"A careful reading of sections 214 and 218 of the Income Tax
Act, 1961, makes it clear that the assessee is entitled to
payment of interest under section 214 of the Income Tax Act
on the advance tax paid, under section 207 to 213 of the
Income Tax Act in excess of the income tax ultimately
determined as payable under regular assessment only if the
assessee had paid the instalments of advance tax by the due
dates without committing any default. When once the assessee
commits default by making belated payment of advance tax, he
exposes himself to penalty proceedings and consequently
forfeits his right to claim interest under section 214 of the
Income Tax Act."

It is important to note that the Kerala High Court has itself
did not follow its decision in A. Sethumadhavan v. CIT in one of its
subsequent decisions, Santha S. Shenoy v. Union of India, but expressly
dissenting only from the Andhra Pradesh High Court's judgment in
Kangundi Industrial Works (P) Ltd v. ITAT. As a matter of fact, the
facts in Santha Shenoy relate to a corollary to the third aspect,
which is being dealt herewith. The relevant facts of Santha Shenoy
were that the assessee estimated the income for the assessment year
1976-77 much in excess of the tax demanded by the notice under section
210 and, therefore, made an estimate of such higher income voluntarily
and paid tax in accordance with such an estimate. The first two
instalments required to be paid in terms of section 210 in 3 equal

80. (1980) 121 ITR 339 (AP)
81. (1980) 122 ITR 597 (Ker)
82. Ibid
83. (1982) Tax 66(3)-60(Ker)
84. Ibid
Instalments were paid @ Rs 6,600/- on the due dates; the third one was paid on 13-3-76 by means of a demand draft for Rs 55,760/- along with the enhanced estimate of income.

The entire question centred around the interpretation of the words "advance tax paid during any financial year in which they are payable under sections 207 to 213" contained in section 214. The Department contended that these words 'in which they are payable under sections 207 to 213' are qualified by the expression 'advance tax paid'. Negating the contention of the department, Poti, P. Subramonian, Acting CJ (as the learned Judge then was) held as under:

"The words 'in which they are payable under sections 207 to 213', evidently qualifies the term 'financial year'. That also indicates that the liability to pay advance tax under sections 207 to 213 is in relation to a financial year, though no doubt the dates are specified... Even payments made pursuant to notices on dates other than last dates specified would be advance tax payable under the Act and if they are paid during the financial year concerned, it will be given credit to under section 219... Even under section 211, the obligation to pay advance tax is during the financial year..."

Furthermore, the following passage occurring in the later part of the judgment makes the position very clear.

"The Act imposes penal consequences in respect of certain acts. Independently, it provides for the rights of parties such as for interest on excess payments. The fact that penal consequences may follow, failure to pay on dates specified, need not affect the right to interest envisaged under other provisions...If he could get the excess paid by him despite the failure to pay the amounts in time there is no logic in saying that he can get principal but not interest. In other words, the return of excess paid has no nexus with the incurring of any liability by way of penalty for non-compliance with the obligation to pay on specified dates. We, therefore, hold that in these cases where payments have been made of the advance tax within the financial year, there is no question of denial of the right under section 214 of the Act..."

From the foregoing discussion, it becomes quite clear that the provisions relating to advance tax, particularly the payment by instalments on or before the specified dates have lost much of their significance. The various High Courts hold the same view that if the entire advance tax has been paid before the end of the financial year, then the payment by way of instalments on or before the three dates specified have no meaning. It is submitted that a proviso may be

85. Ibid, 63-64
86. Ibid, 65
Provided that in respect of the excess amount over the aggregate sum of any instalments of advance tax paid within the financial year, the interest shall be allowed."

Fourth aspect of the matter relates to adjustment of tax deducted at source for the purposes of computing advance tax. The complete answer on this aspect is contained in the judgment of the Allahabad High Court in Addl CIT v. Bareilly Corporation Bank Ltd. "It is not open to construe this section as laying down that the tax deducted at source in respect of the income by way of dividend and interest on securities has not to be taken into account for the purpose of determining whether an assessee is entitled to get interest under this provision. The object of the section is to compensate an assessee for the over payment which he has made by way of advance tax by giving him interest on the amount paid as advance tax... There is no provision for payment of interest on the excess tax deducted at source in addition to the interest on advance tax. It is not possible for the High Court to employ any principles of equity to award interest in cases not covered by the provisions of the Act."

Though the problem seems to be apparently very simple, but it had quite complicated manifestations; the Finance Act 1969 removed the anomaly by inserting sub-section (5) in section 215. This sub-section reads as under:

"In this section and sections 217 and 273, 'assessed tax' means the tax determined on the basis of the regular assessment reduced by the amount of tax deductible in accordance with the provisions of sections 192 to 194, section 194A, Section 194C, section 194D and section 195 so far as such tax relates to income subject to advance tax and, so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made."

In such cases where the tax deducted at source is in excess of the tax ultimately payable on regular assessment, there would be no question of the interest payable by the assessee under section 215. This has been made clear by sub-section (5) of section 215. It is important to note that an identical provision corresponding to sub-section (5) of section 215 is not there under section 214, with the result that if tax deducted at source is in excess of the tax ultimately payable on regular assessment, then the assessee cannot claim interest under section 214. He will have to seek relief for refund under the provisions of sections 237 to 244 dealing with refunds. The reason is

87. (1978) 115 ITR 449 (All)
that there is altogether a sharp distinction between the mechanism itself of sections 214 and 215.

Fifth aspect of the matter relates to chargeability of interest under section 216, where due to under estimate of either of the first two instalments of the advance tax payable as compared to the amount which should have been paid, the question of payment of interest on the deficient amount arises. In CIT v. Elgin Mills Co Ltd, the Allahabad High Court stated as under:

"The charging of interest under section 216 is not automatic. It is discretionary and the ITO is required to consider whether the estimate filed by the assessee was in fact an under-estimate. The words 'estimate' and 'under-estimate' have not been defined in the Income Tax Act. It is not correct to say that while making an estimate the maker should project himself into the future. If at the time when the estimate is filed, there is proper basis and justification shown for it, then it cannot be said that it is an under-estimate."

A similar view has been taken by the Bombay High Court in Hind Products Ltd v. CIT, where it was held as under:

"The very word 'estimate' implies the concept of approximation and it can never be accurate. An estimate cannot be untrue merely because the income returned is higher than the estimate. While furnishing an estimate it will be perfectly reasonable for an assessee to take into account the normal trend of business up to the time when he is required to file the estimate. If at that point of time the assessee has been incurring continuous losses, then unless there is material to show that he had reason to believe that in the months to come he was sure to make profits, an estimate filed on the basis of trial balance showing a loss cannot be said to be untrue."

In both the aforementioned decisions, Hind Products and Elgin Mills, the Bombay and Allahabad High Courts were of the view that

Section 215 states that where in any financial year, an assessee-company has paid advance tax under section 209A or section 212 on the basis of its own estimate, and the advance tax so paid is less than eighty three and one-third percent of the assessed tax, simple interest @ 12% per annum from the 1st day of April next following the said financial year up to the date of the regular assessment shall be payable by the assessee-company upon the amount by which the advance tax so paid falls short of the assessed tax.

(1980) 123 ITR 712 (All)
121 ITR 903 (Bom)
clubbing is not warranted by the provisions of the Income Tax Act, as well as there would not be any case of default on the part of the assessed.

Keeping in view the entire case law discussed to bring about these aspects, one could not escape this conclusion that section 216 deserves to be omitted altogether. The writer has already submitted that a proviso to the following effect may be inserted in section 214(1)

The myth of clubbing can be analytically analysed with the help of an illustration:

<table>
<thead>
<tr>
<th>Accounting year</th>
<th>Ist Jan to 31st Dec</th>
</tr>
</thead>
<tbody>
<tr>
<td>Demand by ITO by order under section 210 or statement of advance tax u/s 209A</td>
<td>Rs 12,000</td>
</tr>
<tr>
<td>Amount paid on 1st instalment on 15th June</td>
<td>a</td>
</tr>
<tr>
<td>Amount paid on 2nd instalment as per estimate u/s 209A (4) or 212(3A)</td>
<td>Rs 8,000</td>
</tr>
<tr>
<td>Amount paid on 3rd instalment as per revised estimate u/s 209A(4) or 212(3A)</td>
<td>Rs 9,000</td>
</tr>
<tr>
<td>Total</td>
<td>21,000</td>
</tr>
</tbody>
</table>

There can be two probabilities of charging interest in the following manner:

1st probability:

| Tax to be paid in every instalment | 7,000 |
| Interest on deferment of 1st instalment by Rs 3,000 in each a and b for 6 months @ 12% p.a. | 150 |
| Interest on deferment of 2nd instalment by Rs 1,000 in b only for 3 months @ 12% p.a. | 30 |
| Total | 150 |

2nd probability:

| Total of 1st and 2nd instalment; 2/3 of aggregate advance tax payable during 1st and 2nd instalments | 12,000 |
| Hence deferment of 2nd instalment | 2,000 |
| Interest on deferment of 1st instalment by Rs 3,000 each in a and b for 6 months | 250 |
| Interest on deferment of 2nd instalment by Rs 2,000 and Rs 4,000 in a and b for three months | 60 |
| Total | 210 |
"Provided that in respect of the excess amount over the aggregate sum of any instalments of advance tax paid within the financial year, the interest shall be allowed".

It is submitted that as a direct consequence of this submission, section 216 would be redundant and otiose, hence it may be omitted altogether. The term 'estimate', according to the dictionary meaning merely connotes an 'opinion', and it has a vacillating attitude by its very nature. Perhaps it would not be wrong to say that the deletion of section 216 would not militate any of the provisions on advance payment of tax ranging from sections 207 to 219.

v. Documents to be Filed With the Taxing Authority

The Income Tax Rules, 1962 have prescribed the following types of rules in connection with advance payment of tax depending upon which the forms are to be filed.

<table>
<thead>
<tr>
<th>Special notices for payment of</th>
<th>Form</th>
<th>Relevant</th>
</tr>
</thead>
<tbody>
<tr>
<td>advance tax under section 210</td>
<td>28</td>
<td>38</td>
</tr>
<tr>
<td>Right of the assessee to estimate income of the previous year and pay advance tax on the basis of his own estimate if the income is likely to be less than that on the basis of which advance tax demanded or likely to be more</td>
<td>29</td>
<td>39</td>
</tr>
<tr>
<td>Mode of calculating interest payable by government u/s 214 or interest payable by assessee u/s 215</td>
<td>28A</td>
<td>119A</td>
</tr>
<tr>
<td>Discretion to waive or regulate the interest charged u/s 215 or 217</td>
<td>40</td>
<td></td>
</tr>
</tbody>
</table>

The Income Tax Act, 1961, and the Income Tax Rules, 1962 do not leave any choice to the assessee to pay the demand made on him by convenient instalments at intervals of less than 30 days, so that the interest payable by him under section 215 or 217 is reduced to nil, because of the provisions of rule 119A. It is important to note that paragraph 3 of form No.7 issued under rule 15 says that if the assessee...
does not pay the demand within the specified period of 35 days, he would be liable to pay simple interest @ 12% p.a. in accordance with section 220(2). Failure to pay tax even by the extended date would entail penalty and even attachment of the property of the assessee. Even if tax is allowed by the ITO to be paid in instalments at intervals of less than 30 days, rule 119A(a) will not help the assessee to avoid interest liability altogether. For example, if the instalments are spread over, say, six months, interest will in any case, be due for periods comprising whole months for the instalments of advance tax.

However, with the submission made by the writer in the preceding paragraphs for deletion of section 216, the necessary implication would be that rule 119A would be nugatory. Hence this rule may also be omitted altogether.

III. Concept of Natural Justice in Income Tax Proceedings

The concept of natural justice has been universally acknowledged as an inevitable concomitant of administrative justice, and income tax proceedings are no exception to it. At the same time, it is also equally true that there are no limitations on the rule of exclusion of the doctrine of 'res judicata' in tax cases. Perhaps this rule leans much in favour of the Revenue Department, much to the chagrin of the assessee. Even the mechanism of the Income Tax Act acknowledges the rule of exclusion of this doctrine.

The doctrine of res judicata is rested on two most invulnerable pillars:

1. One, public policy that finds expression in the maxim 'interest repubicae ut sit finis litium' - it is in the interest of the state that litigations come to an end, and

2. Two, private justice, that one may not be vexed by litigation after litigation on the same cause of action.

The writer is conscious of this fact that it is in public interest that there ought not to be any bar or prohibition in examining the same question afresh for another assessment year, since the very essence of the charging section, namely section 4 of the 1961 Act is synonymous with the water-tight compartment - an assessment year. Recurrence of the same question for a subsequent assessment year is an inevitable feature of taxation. The question which goes to the root of the problem is, as a matter of fact, as follows:

Whether the completed assessment could be reopened on the basis of this pretext that since the circumstances have changed in the subsequent assessment year, as a result of which, even the previous assessment is also affected.
Such a question came up before the Supreme Court in New Jehangir Vakil Mills Co Ltd v. CIT. The assessee-company contended as under:

"It was not open to the taxing authorities to consider and find that the assessee was a dealer in shares in 1943, because for all years prior to 1944, the department had already assessed the assessee on the footing that it was an investor of shares and not a dealer and those assessments having become final could be reopened only either under section 34 or section 35 of the Income Tax Act, 1922."

Thus the argument of the assessee-company was that in assessing the assessee for the accounting year 1944, it was open to the department to treat the assessee as a dealer in 1944, but not for any earlier year which was not the subject of the assessment proceedings. The Supreme Court, overstretching the scope of the second pillar - 'Private Justice', of the doctrine of 'res judicata' held as under:

"On the principle stated above, it seems to us that it was open to the taxing authorities to consider the position of the assessee in 1943 for the purpose of determining how the gains made in 1944 should be computed, even though the subject of the assessment proceedings was the computation of the profits made in 1944. The circumstance that in an earlier assessment relating to 1943, the assessee was treated as an investor would not in our opinion stop the assessing authorities from considering, for the purpose of computation of the profits of 1944, as to when the trading activity of the assessee in shares began...".

Indubitably, the findings reached for one particular assessment year cannot be held to be binding in the assessment proceedings for the subsequent years, yet this general rule is subject to the qualification that a finding reached in the assessment proceedings for an earlier year, after due enquiry, would not be reopened in a subsequent year if it is not arbitrary or perverse, and if no fresh facts are found in the subsequent assessment year. This is based on the principle that there should be a finality and certainly in all litigations including litigations arising out of the Income Tax Act.

It is submitted that the aforementioned qualification to the general rule does not in any way militate the Supreme Court's decisions in New Jehangir Vakil Mills or Instalment Supply. In a recent judgment,  

92. (1963) 49 ITR 137 (SC).

93. Ibid, 143. The Supreme Court relied on certain English authorities in arriving at this conclusion, viz., Broken Hill Proprietary Company Ltd. v. Municipal Council of Broken Hill (1925) AC 94(FC), Society of Medical Officers of Health v. Hope (1960) AC 551 (HL).
of the Madhya Pradesh High Court, CIT v. Bhilai Engineering Corporation Pvt Ltd this very qualification to the general rule was applied, that the department should not depart from its earlier decision where such departure would result in injustice to the assessee. This view gets fortified by a Supreme Court's decision in Indian Aluminium Co., Ltd. v. CIT wherein it was held that a finding reached in the assessment proceedings for an earlier year, after due enquiry, would not be reopened in a subsequent year if it is not arbitrary or perverse, and if no fresh facts are found in the subsequent assessment year.

In Bhilai Engineering Corporation Case, the assessee was granted relief under section 80J of the 1961 Act for the assessment year 1973-74, since the assessee had made substantial expansion by the installation of new plant and machinery and the construction of a new building. However, for the assessment years 1974-75 and 1975-76, the ITO declined to grant the relief under section 80J on the ground that the expansion of an existing undertaking did not make it a new undertaking.

Following the judgment of the Supreme Court in Indian Aluminium Co., Ltd. v. CIT, the Madhya Pradesh High Court observed as under:

"The question of the liability of the tax payer for the subsequent year's tax is to be regarded as the same question as that of his liability for the first, otherwise uncertainty in such litigations arising out of the Income Tax Act will put the asssessees to lot of hardship. Of course, it will hold good only if the income tax authorities reached to such a finding after due enquiry and such a finding is not arbitrary or perverse, and no fresh facts are found in the subsequent assessment year".

In Indian Aluminium Co., Ltd. v. CIT, the Supreme Court approved the views taken by the Bombay High Court in Burmah Shell Refineries Ltd v. G.B. Chang, and Panjab & Haryana High Court in CIT v. Dalmia Dadri Cement Ltd. The question in Burmah Shell Refineries was

95. (1982) 133 ITR 687 (MP)
96. (1977) 108 ITR 367 (SC)
97. Ibid
98. (1977) 108 ITR 367 (SC)
99. (1966) 61 ITR 495 (Bom)
1. (1970) 77 ITR 410 (Del)
identical to the one in Philai Engineering Corporation, that the process of refining crude oil being a manufacturing process, the condition that the industrial undertaking should manufacture or produce articles was satisfied in order to avail the deduction under section 80J. In subsequent assessment years the ITO did not allow the deduction, but the Bombay High Court went in favour of the assessee, that no fresh facts were found in the subsequent assessment year. The ITO can reopen a question previously decided only if fresh facts come to light, which on investigation would entitle him to come to a conclusion different from the one previously reached, or if the earlier decision had been rendered without taking into consideration material evidence.

In Dalmia Dadri Cement Ltd. expenditure was allowed on revenue account because it was incurred not to secure any capital asset but to enable the business to continue its same course as before and only to remove a difficulty in carrying the business on the same lines as before. An annual payment to another was made who assisted the assessee-company in locating the source of raw materials. Without any fresh facts than only these one, the succeeding ITO did not agree with the findings of the preceding ITO. The Punjab & Haryana High Court held that the succeeding ITO cannot arbitrarily depart from the finding reached after due inquiry by his predecessor. There should be cogent material present for it, so as to warrant the different conclusion from the previous one.

Keeping in view the aforementioned state of law, one could not escape this conclusion that certain limitation on the rule of exclusion to the doctrine of 'res judicata' would be desirable in Income Tax Proceedings. An Explanation to section 2(8) may be inserted as under:

"Explanation - Reassessment includes a finding reached in the assessment proceedings for an earlier year, after due enquiry where fresh facts are found in the subsequent assessment year."

The writer submits that the galore of cas law, few of them being mentioned in the preceding paras go to show that the novelty of reassessment merely depends on the whims and caprice of the assessing authority. The judgment of the Punjab & Haryana High Court in Dalmia Dadri Cement is a clear-cut pointer to this effect. Even the Supreme Court's decision in Indian Aluminium Co Ltd v. CIT fortifies the writer's submission that an Explanation on the above lines may be

2. CIT v. Dalmia Dadri Cement Ltd (1970) 77 ITR 410 (P&H)
3. (1977) 108 ITR 367 (SC)
It is important to note that it is not only the aforementioned submission for putting a limitation on the rule of exclusion to *Res Judicata*. It is by now well-settled that technical rules of evidence are not applicable to Income Tax Proceedings. The ITO is empowered to act on such material which may not be acceptable as evidence in a court of law, and while doing so, he has to give a fair hearing to the person.