CONCLUSIONS

INCOME TAX ACT, 1961

I.

1. In view of the Supreme Court’s judgment in A Ltd v. CIT and views of the various High Courts, particularly of the Punjab & Haryana High Court in CIT v. Dalmia Dadri Cement Company Ltd, 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, in order to provide a degree of finality and sanctity to the completed assessments. It is, therefore, submitted that 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".

Else, could the law sustain the novelty of reassessment, being dependent, inter alia, on the whims and caprice of the assessing authority?

2. The fourth classification ‘advancement of any other object of general public utility’ in section 2(15) defining the term ‘charitable purpose’ may be omitted. The measure adopted by the Finance Act, 1983 omitting the ten words ‘not involving the carrying on of any activity for profit’ would not circumvent the forensic syndrome, and it is likely to be as green a forensic battle as ever before. Hence section 2(15) may read as under:

"‘charitable purpose’ includes relief of the poor, education, medical relief, not involving the carrying on of any activity for profit."

* The submissions hereunder have been arranged exactly according to the format of the Income Tax Act, 1961, only with this variation, that wherever any submission creeps in by way of implication or as a sequel thereof, it has been taken alongwith the main submission. All the more reason for it, that even certain submissions, though under the Companies Act, 1956, but arising by necessary implication, have been dealt likewise.

1. (1977) 108 ITR 367 (SC)
2. CIT v. Bilal Engineers Coop Pvt Ltd (1982) 133 ITR 687 (MP), Burmah Shell Refineries Ltd. v. G.R. Chad (1966) 61 ITR 493 (Bom)
3. (1970) 77 ITR 410 (P&H)
4. Supra, 489.
5. Supra, 250-258.
Perhaps, "it is wrong to think that all springs of charity in India will dry up if true effect is given to section 2(15) of the Act in accordance with the minority judgment in the Sirat Art Silk case... one need not go in search of charitable persons amongst the tax payers only".

As a sequel to the omission of the fourth classification 'advancement of any other object of general public utility' in section 2(15), even clause (a) of sub-section (4A) of section 11 inserted by virtue of the Finance Act, 1983, may be nugatory, thus it may be omitted. It is submitted, that the 'chameleon' of 'public utility' or 'public interest' could get prominence again by virtue of the words 'or is of a kind notified by the Central Government in this behalf in the official gazette' occurring in sub-clause (a) of section 11(4A).

"There is no law of charitable trusts which says that the objects avowed by the beneficiaries are at once the objects of the trust itself. While self-denial has no positive purpose, charity involves affirmative action and is by no means a negative virtue. Supreme acts of self-sacrifice are good in their own way but they are not charitable acts".

It is submitted that the words "and the work in connection with the business is mainly carried on by the beneficiaries of the institution occurring in sub clause (b) of section 11(4A) also needs to be omitted. Thus, sub-section (4A) of section 11 may be altogether omitted.

iii. It is common knowledge that the investment companies are one of the best conduits of tax avoidance. In order to circumvent this practice, such companies may be allowed to function only if their shares are quoted on the stock exchange, so as to convert widely-held companies or companies in which public are substantially interested. In order to achieve this, an Explanation may be added to item (A) in section 2(18)(b) as under:

"Explanation - In its application to an investment company whose business consists mainly of income which is chargeable under the heads 'interest on securities', 'income from house property', 'capital gains' and 'income from other sources', item A shall have effect as if to carry on such a business".

Consequently, section 109(11) would be redundant and otiose, since an investment company pursuing the business mainly of income from 'interest on securities', 'income from house property', 'capital gains'

6. (1980) 121 ITR 1 (SC)
8. CIT v. Workshop Trust (1983) 12 Taxmann 239 (Mad)
9. Supra, 6-7
and 'income from other sources' would be necessarily a company in which public are substantially interested. Secondly, all the provisions, for example, sub clause (1)(a) of section 104, sub clause (1)(i) of section 105 shall be equally redundant, and therefore, may be omitted. It is submitted that it would be a positive step towards rationalisation of the tax structure too.

iv. The expression 'revenue expenditure' may be defined under section 2 as under:

"Revenue Expenditure' includes -

a. An annual payment based on a percentage of the turnover or net profits, and unrelated to any fixed sum, even if it is for acquiring a capital asset; or

b. An annual payment diverted by virtue of an overriding charge of the profit-making apparatus, before it reaches the assessee*.

It is submitted that such a provision in section 2 would dispense with much of the forensic syndrome, mostly related to foreign collaborations. This definition would really act as a pragmatic fillip towards encouragement of foreign collaborations.

v. It is submitted that differentiation on the basis of long-term and short-term capital asset is without any justification. It is paradoxical that such a differentiation could keep a check on the speculative tendencies. Consequently, section 2(42A) may be omitted. It is submitted that the entire range of provisions under sections 48 to 55 relating to short-term capital assets would be redundant and otiose. Consequently, a capital asset may be only labelled as a capital asset and not as a short-term or long-term capital asset. Hence, both the sub clauses (1) and(ii) of section 70(2) would be redundant and only one clause may serve the purpose. As under:

"70(2) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any capital asset is loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset".

The words occurring in the brackets "whether relating to short-term capital assets or any other capital assets" in sub clause (i) of section 71(2) would be also redundant, and sub clause (ii) of section 71(2), as a whole, would be equally redundant. Moreover section 71(3) would have also to be omitted.

As regards section 72(1), the words 'other than short-term capital assets' may be omitted. Further, the words 'and has exercised

9A. Supra, 365
the option under sub section (2) of that section occurring in section 72(1) would be also otiose, thus may be omitted. In section 74(1)(a), the term 'short-term' in sub clause (i) occurring at two places would be redundant. Consequently, sub clause (ii) of section 74(1)(a) may be altogether omitted. In section 74(1)(b), the words 'or other than short term' may be inserted just after 'short-term' in sub clause (i) thereof, and sub clause (ii) thereof may be omitted. In section 74(2) the words 'sub clause (ii)' may be omitted in sub clause (a). Consequently, sub clause (b) of section 74(2) also stands omitted. Of course, the writer submits that the only time limit for set off would be only eight years, and not the present one of 8 years in the case of short-term and 4 years in the case of long-term capital assets.

Furthermore, the words 'other than short-term capital assets' occurring in section 109(1)(d) would be redundant, and therefore, may be omitted. The words 'other than short-term capital assets' occurring in section 115 may be omitted. Even the words in the bracket 'such income being hereinafter referred to as long-term capital gains' may be otiose, hence may be omitted. Similarly the words 'long-term', wherever occurring in sub section (1) and (ii) may be omitted.

vi. Proviso (ii) to section 2(22) saps away the mechanism of clause (e) to section 2(22). This proviso reads as:

'Dividend' does not include -

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

It is submitted that this mechanism underlined in proviso (ii) could very well avoid the tax, particularly in the case of pyramid companies being operated by investment companies. Proviso (ii) and as a consequence of it, proviso (iii) to section 2(22) may be omitted.

The writer fails to appreciate the basis of distinction, if any, made between preference shareholder and equity shareholder for the purpose of section 2(22). It is submitted that the traditional law could have given way, in order to accommodate this modern view of company legislation that the issue of bonus shares definitely entails 'release of assets' of the company, whether it relates to the preference shareholders or the equity shareholders. As a consequence of it, the word 'preference' occurring in section 2(22)b in the expression "any distribution to its preference shareholders of shares by way of bonus" may be omitted. Thus, preference shareholders or equity shareholders may be treated alike for the purpose of 'distribution' by way of 'bonus'.
Why such a favoured treatment in the case of an equity shareholder? Less subtle, it smacks of irrational law. It would be too specious an argument that Paragraph 1, Regulation 96, or Paragraph 2, Regulation 96 of Schedule I - Table A, Companies Act, 1956 do not justify such an approach. As a matter of fact, section 2(22) has already made deep inroads into the mechanism of these Regulations.

It is a travesty of the modern law by saying that the 'substance' is being considered by laying down the norms of *Bouch v. Scoulle*. A declaration of bonus shares in these circumstances would be a bare machinery for capitalising the profits of the company. For the removal of doubts, the words 'bonus shares' may be inserted after the word 'dividend' in the definition of income in section 2(24)(ii). Further, in order to safeguard the interests of the workers of the company who may receive bonus shares, an insertion under section 10 may be made as under:

"Any income chargeable under the head 'salaries' received by the worker of the company by way of 'bonus shares', whose chargeable total income from 'salary' does not exceed Rs 18,000 per annum".

Moreover, a fortiori, when the writer has favoured the same treatment, either to an equity or preference shareholder, for the purposes of 'distribution' by way of 'bonus shares', then full force should be given to such a treatment under section 78, Companies Act, 1956 as well. Consequently, the provisions of sections 78(2)(a) reading as 'in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares' may be omitted. The writer submits that such outlets are the major conduits of tax avoidance.

The writer has also submitted that by introducing 'imputation system' for the taxability of dividends, it becomes imperative to tax the bonus shares received by equity shareholder. In essence, the viable answer is the introduction of 'imputation system', where the shareholder is 'deemed' to have himself paid income tax in respect of his dividends to the extent to which the company had paid. In other words, the shareholder would not be subjected to taxes on dividends again, unless the 'total income' of the shareholder falls in a 'higher bracket', as compared to the 'appropriate bracket' applicable to the income of the company. Factually, 'imputation system' would be in the interests of the small shareholders.

As a sequel to the introduction of 'imputation system', the provisions regarding non-deductibility of taxes, for example, wealth
tax could be dispensed with. Thus, sub clauses (ii) and (iiia) of section 40(a) may be omitted.

vii. It is submitted that the words "not being contributions made with a specific direction that they shall form part of the corpus of the trust or institution" in clause (iia) of clause (24) of section 2 itself defeats the very purpose of the expeditious legislative measures. It may be, therefore, omitted. As a consequence of this submission, even clause (x) of section 11(5) may be omitted. It is submitted that the Parliament in its own wisdom exercises the wobbling flexibilities through the yearly legislative fiscal exercises in the name of 'rationalisation' of the law, or to put the cloak of socio-economic fabric on the law, whereby the very dynamism of the legislation is being sapped away by inserting a generalised clause after enumerating specific modes. One such example, too glaring to ignore, is clause (x) of section 11(5) inserted by virtue of the Finance Act, 1983, which enumerates 'investment in immovable property', which deserves omission.

viii. The two expressions 'splitting up' or 'reconstruction' used in sections 80 HH and 80 HHA have been a constant source of impediment in the setting up of new undertakings in backward areas. Could it not be said that these expressions have been judicially proved to be antithetic to the very spirit underlying these sections? It is submitted, that these expressions may be defined under section 2 of the Income Tax Act in the negative manner, as under:

"'splitting up' or 'reconstruction' shall not include a business
a. where employment of capital out of the reserves of the existing business has been made;
b. where the separate amounts of the new undertaking are maintained;
c. where the new undertaking is an identifiable and viable unit on its own."

Alternatively, an Explanation may be inserted below section 80HH (2)(ii), 80 HHA (2)(ii), 80J (4), as under:

"'splitting up' or 'reconstruction' of a business shall not include a business where employment of capital out of the reserves of the existing business has been made."

II. 1. Indian fiscal legislation is yet to realise the ramifications of 'workers participation in management', though the relevant legislations, for example, companies Act, 1956 and

11. Supra, 512-513.
Industrial Disputes Act, 1947 are in the process of acknowledgment of this concept of 'industrial democracy'. Where an option is granted to an employee/worker to purchase unissued shares or 'right shares' in a company, such an option is a valuable right having a potential value. Perhaps the law could move ahead of the casting shadows by incorporating under section 10, as under:

"Value of perquisite by way of difference between the market value and the value at which the employee has been provided with an option to purchase shares in the company, in which he is working".

ii. One reason why subsidies tend to be sticky is that they are often related to the periphery of the activity and not to the structure of the activity itself. If something had to be done, it could have been done through the technologically neutral route of omnibus section 10, rather than through the route of capital-linked fiscal concessions such as investment allowance. It is submitted, that an insertion on the following lines under section 10 could have been much more effective for combating pollution, rather than insertion of sub-section (2C) to section 32A by virtue of the Finance Act, 1983:

"In the case of an assessee who carries on such a business which is a source of pollution, the fund (to be called the pollution eradication fund) created out of the operating profits for combating the pollution:

Provided that the assessee furnishes to the ITO along with his return of income for the assessment year concerned or within such further time as the ITO may allow a certificate from the Central Government as to the quantum of a requisite fund for such a purpose.

Explanation I: Such a fund in the case of an assessee-company shall have the same meaning as the 'share premium account' under section 78(2), Companies Act, 1956, for withdrawal of any part of the funds, for purposes other than combating pollution.

Explanation II: Interest on account of moneys borrowed for the creation of such a fund shall be on revenue account, and it will have the same meaning as in section 2(28A) of the Act".

III

1. It would be a travesty of the law to say that the doctrine of 'lifting the veil' is permissible only in the case of a company with a view to finding out the real persons behind the corporate body. The very underlying concept behind the provisions of section 64 or section 104 embodies the nexus of 'lifting the veil', with particular emphasis on the income being diverted through the conduit of 'trust'. It is

12. Supra, 353
13. Supra, 506
submitted that with this in view, in order to circumvent the tax avoidance practices, the renewal of registration of the 'trust' may be on an annual basis. This submission gets support from the Supreme Court's judgment in CW v. Trustees of H.E. Hizan's Family (Remainder Wealth) Trust. Hence, third condition may be inserted under section 12A as under:

"(c) where the total income of the trust or institution as computed under this Act without giving effect to the provisions of section 11 and section 12 exceeds twenty five thousand rupees in any previous year, the person in receipt of the income has made an application for renewal of the registration of the trust or institution in the prescribed form and in the prescribed manner to the commissioner, before he furnishes the return of income for the relevant assessment year."

ii. The growing proclivity of companies to charge 'customary levy' from the constituents or customers for charitable and religious purposes being diverted to a separate trust impels to counter this measure of tax avoidance. Hence, clause (bb) may be inserted in section 13(1) as under:

"In the case of a trust for charitable purposes created by a customary levy from the constituents or customers, whether on their own volition, or for the benefit of such customers or constituents."

iii. As mentioned earlier too, the very dynamism of the legislation is being sapped away by inserting a generalised clause amongst the catena of specific clauses. It is too late in the day that even now our fast-developing economy could sustain such legislative manoeuvrings. It is, therefore, submitted that clause (iii) along with Explanation thereof, of the proviso to section 13(1)(d) may be omitted.

IV.

i. The holding-subsidiary alliance would have to be viewed with an integral perspective. The phenomenon of 'grants-in-aid' or 'subsidy' to the subsidiary company from holding company has assumed great importance, as to whether it constitutes revenue receipt in the hands of the subsidiary. The answer lies in the determination of the nature of obligation.

"There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee where, by the obligation, income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence in law, does not follow"17.

14. (1977) 108 ITR 555 (SC)
15. Supra, 450
16. Supra, 444
taldas Tirathdas (1961) 41 ITR 367, 374 (SC)
Could it be inferred in a holding-subsidiary alliance that by virtue of the obligation inter-se, income is diverted before it reaches the subsidiary company? To conceive such an obligation would give rise to one of the best conduits of tax avoidance. It is, therefore, submitted that the words 'subsidy' or 'grants-in-aid' may be inserted in Explanation 1 to section 28 as under:

"Explanation 1: The profits and gains of a business shall include the 'subsidy' or 'grants-in-aid' received from the holding company, or the profits and gains of managing agency".

The above mentioned submission gets fortified for the reason that 'subsidy' or 'grants-in-aid' have a tendency to create differential treatment between the public sector and private sector of the mixed economy.

ii. As regards Explanation 2 to section 28, the word 'transactions' may be substituted by its singular thereof — 'transaction'. The Bombay High Court held in CIT v. Indian Commercial Company Pvt Ltd., that in order to bring the transaction within the mischief of Explanation 2, there should be an activity of more than one speculative transactions. It is submitted that this proposition is against the well-established norms of law. An adventure in the nature of trade is trade, provided it bears the clear indicia of trade.

iii. The deduction on account of repairs to the business premises occupied by the assessee as a tenant or as an owner thereof, often gets trapped in the legal syndrome. In order to clear any doubts, an Explanation to section 30(a) may be inserted as under:

"Explanation — Maintenance or preservation of an existing asset by any technical or scientific process would constitute repairs".

iv. Due to certain business exigencies the phenomena of 'leasing out' has become quite popular during the past one decade. Lessee-company may come across many hurdles, for example, section 32 which deals with 'depreciation allowance' uses the word 'owned'. In order

19. (1977) 106 ITR 465 (Bomb)
20. The Supreme Court has many a times approved the following celebrated dictum of Lord Clyde LP in Balgowine Land Trust Ltd v. IR (14 TC 684, 691) quoted with approval in Venkata Swami Naidu v. CIT (35 ITR 594, 615(SC)):
   "A single plunge may be enough provided it is shown to the satisfaction of the court that the plunge is made in the waters of trade..."
21. Supra, 503
to do away with this predicament, the word 'owned' may be substituted by the word 'possessed' in section 32(1). It is important to note that section 32 already gives credence to 'leasing out', but only with regard to small-scale industrial undertaking.

Paton states that it is convenient to distinguish between:

a. Ultimate ownership, where but the residual core is left to the owner, the rights of present enjoyment being held temporarily by others;

b. Complete or beneficial ownership, where the owner enjoys all the rights and privileges which it is legally possible for an owner to have;

c. Fractions split off from ownership, some or all of which may be held by persons other than the owner, so long as the 'magnetic core' remains in the owner.

It is easily discernible from above that the submissions made by the writer does not militate against any of the aforementioned distinctions, which have been acknowledged even by 'American Restatement of the Law of Property'.

One fundamental difference between the phraseology of the operative parts of sections 32 and 32A is that, in the case of 'investment allowance' the asset "which is owned by the assessee and is wholly used for the purposes of the business" create avoidable hardships for the lessor company to avail investment allowance. It is submitted that the word 'wholly' may be deleted from section 32A(1), so that the lessor company, which owns the asset, but does not 'wholly' use it for the purposes of the business, may avail the investment allowance. The net result of these submissions would be that the lessee-company who uses the machinery or plant for its business purposes would be entitled to depreciation allowance whereas investment allowance could be availed of only by the lessor-company, and very logically too, who 'acquired' and 'owns' such a machinery or plant.

v. Instead of keeping an important provision of law regarding 'Extra-shift allowance' under Rule 5, Income Tax Rules, 1962, it may be brought on a substantive footing. Moreover, the traditional view

22. Small-scale Industrial undertaking means whose aggregate - value of the machinery does not exceed Rs 7,50,000.

Sub-clause (b) of section 32(3) states as under:
"(b) in the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant".

may yield in favour of a pragmatic and socio-economic view, that 'extra shift allowance' must be related to all such machineries otherwise entitled for it, so long the 'concern' as a whole works on multiple shifts. Thus, a proviso to section 32(1)(ii) may be inserted as under:

"Provided that where the 'concern as a whole' works on multiple shifts, extra shift allowance shall be related to all such machineries, otherwise entitled for the double or triple shift allowance".

vi. The law has gone much ahead from the days of Sahu Rubbers Pvt Ltd v. CIT. The writer is of this view that it is the entitlement of the assessee to defer his claim for depreciation in order to avail the galore of time-essence incentives. Consequently, the words 'at the option of the assessee' may be inserted in the operative part of section 32(1) itself, before the words "subject to the provisions of section 34". Alternatively, a clarificatory provision may be introduced by way of a proviso to section 32(1)(ii), as under:

"Provided that the assessee may before the expiry of the time allowed under sub-section (1) of sub section (2) of section 139, whether fixed originally or on extension, for furnishing the return of income for the assessment year in respect of which he desires to defer his claim for depreciation allowance, furnish to the ITO a declaration in writing that the provisions of this clause shall not apply to him for that assessment year or assessment years; so, however, that the assessee may, by notice in writing furnished to the ITO before the expiry of the time allowed under sub section (1) or sub section (2) of section 139, whether fixed originally or on extension, for furnishing the return of income for any such subsequent assessment year, revoke his declaration and upon such revocation, the provisions of this clause shall apply to the assessee for that subsequent assessment year and thereafter".

Howsoever, the writer submits that the insertion of the words 'at the option of the assessee' in the operative part of section 32(1) would be a positive step towards the rationalization of law.

vii. An anomalous condition which occurred at the stages of consideration of the Income Tax Bill of the 1961 Act, occurs even now in Explanation to sections 32A(7) and 33(4), as under:

"all the shareholders of the company were partners of the firm immediately before the succession".

24. The emerging ethics of law clearly reveals that the view taken by the Tribunal in South India Viscose Ltd v. CIT(1992) 135 ITR 206 (Mad) off-beats the traditional view.

Supra, 604

26. (1963) 48 ITR 464 (Bom)

27. Supra, 304
The obvious implication of this condition is that the succeeding company cannot exceed in strength the number of partners in the firm. Since a partnership cannot exceed 20 in number, the succeeding company would have to be contented with only 20 shareholders, at least in the initial year in which such a take-over bid has taken place. The writer fails to appreciate the logic or any other viable reasoning behind this condition. It is, therefore, submitted that this condition occurring in Explanations to sections 32A(7) and 33(4) may be omitted.

viii. Rehabilitation allowance is proposed to be omitted by virtue of the Finance Bill, 1984. To advance the contention that wherever the directors want to rehabilitate their manufacturing unit, they are at liberty, but the privilege of rehabilitation allowance shall not be given, is too specious an argument. The proposition 'Heads you win, tails I lose' is indeed inscrutable here. It is legal interference by other under the second head of Hohfeldian analysis of 'Fundamental Legal Conceptions', which relates to 'privilege', that has gained prominence in Indian conditions, much in particular to tax laws. Where qualified privilege arises, a person has a privilege to make use of that act, provided he makes an honest use of the occasion; the person affected being the Revenue (does the Revenue only?) can have 'claim' to prevent only if it is for ulterior purposes, for example, tax avoidance. Does the Income Tax Act classify or differentiate between 'qualified privilege' and 'unqualified privilege'? Else, does every privilege has a grain of truth of the prefix 'qualified'? In which category does the privilege of 'depreciation allowance' is included? Indubitably, this privilege of 'depreciation allowance' is also in the nature of 'qualified privilege'. Had it not been so, section 34 could have become nugatory. In essence, Tax Jurisprudence has yet to crystallise the answers to such questions.

It is submitted that the proposed deletion of section 331 does not stand the Scrutiny of Company Legislation.

ix. The expression 'for the purposes of the business' used in section 10(2)(xv) of the 1922 Act and in section 37(1) of the 1961 Act has extreme nuances of law inherent in it, which entails the forensic syndrome. Though the judicial pronouncements have very

effectively counteracted the onslaught of the Revenue Department many a
times, but there is an imperative need to have a dispassionate look at
these words which are most of the times, sinecure of the Revenue
Department. Indeed, there is a galore of case law which goes to justify
that the element of subjectivity itself attains vulnerable dimensions
when the negative norm based on the first principles of the non-
exhaustive rule is applied to particular circumstances. The Madras High
Court held in CIT, Madras v. Bush Boake Allen (I) Ltd., as under:

"But abstract logic has seldom conditioned the evolution of
principles in tax law, as in other law. Recent judgments of
courts have tended to regard the nature and allowability of legal
expenses not as derivative expense taking the colour from the
transactions to which they relate, but as items which are entitled
to be judged in their own character. This line of approach may
be said to have been firmly established as part of the law
relating to allowance of expenditure by the decision which the
Supreme Court rendered in India Cements Ltd. v. CIT."

With a view to provide more definitive vitality to this head of
'residuary allowance', it is submitted, that the expression "for the
purposes of the business" may be substituted by a more pragmatic and
generic expression "for managing the business operations" in section 37
(1) of the Act. Incidents "for the purposes of the business" could be
incidents "for managing the business operations", but not all incidents
"for managing the business operations" could be incidents "for the
purposes of the business". The term 'managing' has an inherent virtue
of the negative test by itself. Further, the term 'operations' would
have the tendency to curb the element of subjectivity. Indubitably,
howsoever wide the canopy of this allowance may be, the limits could be
implicit in it. The Indian fiscal legislation is yet to acknowledge
the sanctity of 'corporate management'. The sine qua non of a business
or industry is the ethics of corporate management.

Less subtle, the statutory law could be more synonymous with the
emerging law. Could it not be said that purchasing loom hours in order
to produce larger quantities of goods was short of any 'enduring benefit'
in Empire Jute Co Ltd. v. CIT? What type of profit-making apparatus
or acquisition of any capital asset does the non-ephemeral quality of
'capital expenditure' envisage? Does it envisage a radical distinction

29. (1982) Tax 64(3)-226 (Mad)
30. (1968) 60 ITR 52 (SC); AIR 1966 SC 1053.
31. CIT v. Malyalam Plantations Ltd (1964) 53 ITR 140 (SC)
32. (1980) 3 Taxmann 69 (SC)
x. 'Hospitality' and 'entertainment' are two different terms. It could have been more appropriate to clearly discern an area of business hospitality which stands within the concept of business expenditure. The Finance Act, 1983 has inserted an inclusive definition of 'entertainment expenditure' by virtue of Explanation 2 below section 37(2A), which aims at roping in all types of hospitality—elementary or special—to the ambit of entertainment expenditure. It is submitted that at least the words "and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade" may be omitted from the Explanation 2 to section 37(2A).

xi. Advertisement is a necessary concomitant of a business. Subsection (3A) to section 37 inserted by virtue of Finance Act, 1983 lays down that the maximum limit of deduction of aggregate expenditure incurred by the assessee on i. advertisement, publicity and sales promotion; ii. running and maintenance of aircrafts and motor cars; iii. payments made to hotels shall be Rs 1,00,000 and thereafter, 20% of the excess amount shall not be allowed as deduction. It is submitted that at least the first item relating to 'advertisement, publicity and sales promotion' may not be included in this restricted category of expenditures, as it could be more counter-productive rather than swelling the coffers of the exchequer. Too many controls give rise to intensification of the 'Black market'.

Curiously enough, sub-clause (i) of section 37(3C) clearly states that an expenditure incurred by the domestic company on advertisement, publicity and sales promotion outside India in respect of the goods, services or facilities which the assessee deals in or provides in the course of his business, shall bear no restriction; whereas such activities within India shall have restriction on their quantum of deductibility. The writer fails to understand this distinction on the basis of territorial nexus. Could it be said that the promotion of the business with the help of advertising media has reached an optimum point within India? Advertising is a primary link between the manufacturer of saleable goods and the consumer. It is, therefore, submitted that sub-clause (i) of section 37(3B), and as a consequence thereof, sub-clause (i) of section 37(3C), may be omitted.

35 contd. business expenditures having regard to the wider plenitude of the expression 'managing the business operations'.

36. This Explanation has been made effective retrospectively from 1.4.76. It supersedes the Gujarat High Court's decision in CIT v. Patel Brothers & Co. Ltd (1977) 106 ITR 424 (Guj)
xii. Section 40A(8) of Income Tax Act, 1961 lays down that 15% of the interest on moneys borrowed by way of deposits from the public by a company (other than a banking company or a financial company) is disallowed, while computing the profits of the company. It is submitted that once interest on moneys borrowed for the payment of income tax is a deduction for the purposes of computing total income, there is no valid justification for disallowing 15% of the amount of interest on moneys borrowed in respect of deposits received by the company, as a deduction. A company could not pursue its business activities, without gearing up its working capital, in the absence of which payment of income tax stands no meaning. The borrowing is intimately connected with the liquidity aspects in terms of public finance. It is, therefore, submitted that section 40A(8) which principally hampers the growth and efficiency of industrial or manufacturing units deserves no place in the fiscal legislation.

xiii. The concept of 'balancing charge' has been always a subject of legal conundrum. Section 41(2) states that the term 'sold' shall have the same meaning as in Explanation to section 32(1)(iii), with the result that only the process of amalgamation of companies is outside the pale of 'balancing charge'. It is pertinent to reproduce the Explanation to section 32(1)(iii), as under:

"(2) 'sold' includes a transfer by way of exchange of a compulsory acquisition under any law for the time being in force but does not include a transfer, in a scheme of amalgamation, of any asset by the amalgamating company to the amalgamated company where the amalgamated company is an Indian company".

At the same time, the term 'transfer' occurring in the above Explanation has been defined in section 2(47). It means that this definition shall control this 'term', wherever used in the Act. The obvious implications are not far-fetched to seek, which are ordinarily taken help of by an HUF on its total or partial partition, or by a partnership firm on any distribution of capital assets on its dissolution. Since clauses (i) and (ii) of section 47 clearly state that such transactions shall not be regarded as 'transfers', therefore, these transactions remain outside the pale of Explanation to section 32(1)(iii) as well. The only viable person which is included within the mischief of this Explanation is a company. It is, therefore, submitted that section 41(2) has hardly any justification; of course, if the sale price of any machinery or plant of the company exceeds the actual cost, then sections 46, 48, 50 dealing with the mechanism of capital gains would take care of such a situation.
This legal conundrum could be looked at from another angle too. When an asset is partly damaged, the insurance money ordinarily payable being partly utilised to restore the plant or machinery to its working condition; the excess of such an insurance money neither bears any charge of tax on the basis of the excess of actual cost over the written down value nor over and above the actual cost of the asset, for the simple reason that the conditions for creating the balancing charge or the charge of capital gains could not be satisfied. Neither the asset could be said to be "sold, discarded, demolished or destroyed", nor it could be said to be under a 'transfer'. In precise, the assessee would be in a better situation where the asset has been partly damaged, and insurance moneys are payable. Curiously enough, if the asset has been completely destroyed, as a consequence of which it had to be discarded and their scraps sold, then the law ordains for the balancing charge, and may be, capital gains too. It is, therefore, submitted that the only viable way out of this predicament is to dispense with the concept of 'balancing charge'.

Thirdly, even in terms of macro-economics, full taxation of realised gains would be detrimental to the capital market and techniques of capital formation. Since transference of assets (selling and reinvesting) would occasion a tax, such shifts would be discouraged. The tax would tend to 'lock in' investments, especially where the investor is subject to a high bracket rate, for example, controlled companies or closely-held companies. It is submitted that the entire theory of 'balancing charge' has no justification in regard to the utilitarian norms of public finance.

xlv. There is no rationale, either in logic or law, to depart from the English practice of 'reopening the accounts'. The economic conditions and the exigencies of public finance of the past prevailing in this country do not warrant at this stage the continuance of the old practice. Grave implications arise out of the continuance of this old practice, for example, the Supreme Court held in CIT v. Swadeshi Cotton and Flour Mills Pvt Ltd., that the right of the worker to receive the bonus accrued only when the 'settlement' was arrived at or 'award' made, as a result of which the company could claim the deduction on account of such an expenditure only in such a later year. It is common knowledge that with this state of prevailing law the companies defer the
claims of the workers arising on account of bonus, gratuity, retrenchment compensation, compensation in lieu of termination of services, etc., till the 'settlement' is not reached or 'award' is not made. Going to the root of the problem, one cannot escape this conclusion that a hazy distinction persists between an 'actual liability' 'in praesenti' and a 'contingent liability' 'de futuro'. Much to the chagrin of the Revenue Department, if the 'deferred liability', being a legal liability, to be discharged in future by reason of a present obligation, could be estimated on certain scientific basis, then such a contingent or 'de futuro' liability transmutes in the nature of an 'actual liability', thus pertaking the colour of an admissible expenditure.

Conceptually, the 'acknowledgement of the doctrine of 'reopening of accounts' is the only viable solution to this menacing problem of 'accrual of liability'. The writer fails to understand that which norm of prevailing law stops the full conceptual force of the doctrine of 'relation back' or 'cause of action'; whereas it is recognised in a piecemeal manner, for example, 'income escaping assessment' or 'bad debts'.

It would not be too naive to say that Indian law has gone haywire on this important aspect of tax jurisprudence. Perhaps the law has given much credence to the 'formal source' of law rather than to the 'evolutionary source' of law. The normal function of a court, while adjudicating between two parties is to declare a right or to determine a liability, where there is a pre-existing right or a pre-existing liability. In essence, the point of time at which such a right or liability accrues corresponds to the 'cause of action'. Could it not be said that the existing Indian practice transmutes the 'cause of action' to a further assessment year? If it is so, does it not militate against the concept of the 'charging section'? It is, therefore, submitted that on the grounds of semantics, logic or law, the only answer is the acknowledgement of the doctrine of 'reopening of accounts'.

xv. Associated with this fiscal syndrome, the Finance Act, 1983, inserted section 43B, an imponderable amongst imponderables, which allows certain deductions only when an 'actual payment' would be made. Paton states that general principles of liability allow a coherent body of law to be developed in a more consistent fashion than if the law is

38. Metal Box Company of India Ltd. v. Their Workmen (1969) 73 ITR 53 (SC)
confined in too many pigeon-holes. Curiously enough, whereas the
definition of the term 'paid' in section 43(2) clearly acknowledges the
mercantile system of accounting; section 43B occurring in the same
parentheses transmutes the mercantile system of accounting an insipid
one. It cuts at the very root of the concept of mercantile accounting.

The writer is constrained to mention that the Indian Tax Code,
Income Tax Act in particular, is being treated by the Parliament as a
'rectifying reservoir' - rectifying the evils being perpetrated through
the mechanism of other enactments. Could it not be an askance upon the
corporate sector in general, when separate statutes on every aspect, for
example, Excise Duty, Provident Fund, Employee's 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? It is
submitted that section 43B may be omitted.

xvi. The wavering judicial approach caused by Poddar's case and
Davenport's case needs to be settled, as the law on one of the important
aspects is in an unhappy situation. It is submitted that the term
'actual delivery' may be defined by adding an Explanation to section 43(5)
as under:

"Explanation - "Actual delivery" includes the constructive delivery
of possession where the physical or manual delivery or possession
is not required".

V.

i. It is submitted that it is tenuous to apply the ratio of
Srinivasa Setty to 'export entitlement' cases. For the removal of doubts
on this subject of far-reaching importance in tax jurisprudence, perhaps
a clause could be inserted under the catalogue of exemptions in section
47 to the following effect:

"Sums received on the transfer of intangible assets, provided the
assessees's endurance, skill and ingenuity created such an asset".

This submission derives strength from the judicial pronouncements
exhibiting English and Indian practice, that notwithstanding the

39. Paton, A Text Book of Jurisprudence 319
40. Raghunath Prasad Poddar v. CIT, Cal (1973) 90 ITR 140 (SC);AIR
1973 SC 2061
41. Davenport & Co. v. CIT, West Bengal (1975)100 ITR 115 (SC)
42. Supra; 155-159; 517.
44. Supra, 336-337
45. I.R.V. Morris 44 T.C. 685
46. CIT v.C.Karthikeyan (1980) 124 ITR 85
exclusionary provisions of the general rule under section 10(3), non-
recurring incomes are exempted from the charge of income tax, provided suc.
 incomes are the outcome of one's own personal skill, ingenuity or endurance.
Perhaps, it may be a positive step towards the rationalisation of law.

ii. An insertion under section 47 may be made as under:

"Any transfer of capital assets by a firm to the succeeding company,
provided it is taken over as a going concern as a whole".

Such a step would be a fillip to the business and industry, since

\cite{48} corporate form of business organisation is the best-suited, even from the
point of taxation. Needless to emphasise, courts have always the
jurisdiction to scrutinise techniques of capital formation, if they are
ultimately for the purposes of tax-avoidance. The approval by the general
meeting of the shareholders of the company is not an 'imprimatur' to outst
the jurisdiction of the courts.

iii. Though much has been poured into the vitality of 'capital
gains', but certain signs of debility persist. When section 46(2) creates
a charge on the money received by the shareholder from the company in
liquidation, then it ought to be equally responsive to capital losses
arising under such a situation. As a matter of fact section 46 is silent
on this point. In order to resolve this impasse, an Explanation to the
following effect may be added below section 46(2):

"Explanation - Notwithstanding anything contained in section 2(47),
where the shareholder on the liquidation of a company incurs capital
losses, such losses shall be regarded as capital losses".

Thus, it clearly implies that the amount to be received as dividend
which the company in liquidation could not distribute, would also form a
part of Capital losses. Reference to section 2(47) rather than section 45
may be termed as an 'abundant cautela', but the writer submits that, for
obvious reason, it is imperative.

iv. The Indian Tax Code is yet to acknowledge the 'indexation system.'
It is true that only few developed countries, France, USA and some European
countries have gradually resorted to this system, but on the other
hand, the system itself has many inherent pitfalls. Howsoever,
the protagonists of the system advocate that the merits

\cite{47} Alternate to this aforementioned submission, and in order to
supersede Srinivasa Setty, the Parliament could temper with the
provisions of section 48, which itself proves that Srinivasa Setty holds the grounds.

\cite{48} Supra, 409.

\cite{49} Wood Polymer Ltd, In re(1977) 109 ITR 177 (Guj)

\cite{50} Supra, 342-343.

\cite{51} The oft-quoted demerits of the system are:

i. It limits the State's efficacy to adopt taxation policies
commensurate to economic needs;

ii. It requires data-processing on a wide-scale.
It is worth-mentioning that the Supreme Court has recently acknowledged the importance of this system in what has been popularly known as, "Taxability of Salaries of Judge's case": Justice Deokinandan v. Union of India and M. Kalvanchand v. Union of India, heard by a Division Bench of the court. The relevant question, for our immediate purposes, which has been referred to the Constitution Bench of the Supreme Court by the Division Bench relates to, interalia, question No. 2, which is as under:

"2. Whether the expression 'rupees' in Part D of the Second Schedule, which stipulates the sums payable to the Judges of the Supreme Court and the Judges of the High Court, implies the sum which should be fixed so as to be buyable in the year 1950. That is to say, whether the salaries so fixed should be construed as meaning their real value in terms of goods and services which they could buy at the commencement of the Constitution or do they represent the nominal value at any given point of time?"

Whatevsoever the nuances of law involved in the adoption of 'indexation system' sititing the present Indian conditions may be, but at least on one point it may be adopted. Section 50 prescribes 1st January, 1964 for computing cost of acquisition of depreciable assets where such an asset was acquired free of cost by the assessee under any of the modes enumerated in section 49. It is submitted that the words 'on the 1st day of January, 1964', wherever occurring, in sections 50, 55 may be substituted by the words "fifteen years thereafter", as already mentioned, the transactions through the conduit of an 'investment company' have a tendency to adopt increasingly innovated forms of tax avoidance. In order to curb this practice, the writer has submitted that an Explanation may be added to item (A) in section 2(18)(b), thus such companies may be allowed to function only if their shares are quoted on the stock exchange. Alternatively, an insertion may be made in section 56(2), as under:

52. The outstanding merits are:
   i. It provides an in-built mechanism to take care of inflationary tendencies;
   ii. The basis and limits get continuously shifted in order to correspond with the real purchasing power.

53. Civil Appeal No. 411 (NT) of 1982
54. Transfer Petition (Civil) No. 79 of 1983
55. Sen, A.P., Venkataramiah, E.S., JJ
56. Formerly this date was 1st January, 1954 which was substituted by 1st January, 1964 by the Finance Act, 1977.
57. Supra, 422 - 423
"56(2)(ic): Income from dealing in shares by an investment company or by a company in which public are not substantially interested, or by its members thereof.*

It is submitted that the word 'member' rather than the popular word 'shareholder' has been used for the reason that many investment companies operating in the country are companies limited by guarantee having no share capital as such, with the result that the company legislation prohibits the use of the word 'shareholder' in such cases.

VII

1. Indubitably, the implications of the mischief of section 64 are far-fetched, but even then, too glaring a tax-avoidance measure to ignore escapes the net. The income arising to the trustee from the membership of the trustee in a firm, to the extent such an income may be for the benefit of the son's wife or son's minor child, no clubbing is warranted under the existing provisions. It is, therefore, submitted that Explanation 3 to section 64(1) may be amended by the insertion of clause '(vi) and (vii)', in the first line, 'son's wife or son's minor child' in the second line and 'including a business by the trustees on their behalf' in the 3rd line, as under:

"For the purposes of clause (iv), (v), (vi) and (vii), where the assets transferred directly or indirectly by an individual to the spouse, minor child, son's wife or son's minor child are invested by the spouse, minor child, son's wife or son's minor child in any business, including a business by the trustees on their behalf that part of the income arising out of the business to the spouse, minor child, son's wife or son's minor child in any previous year, which bears the same proportion to the income of the spouse, minor child, son's wife or son's minor child from the business as the value of the assets aforesaid as on the first day of the previous year bears to the total investment in the business by the spouse, minor child, son's wife or son's minor child as on the said day shall be included in the total income of the individual in that previous year".

VIII

1. The conditions laid down under section 72A in order to avail the privilege of carry forward and set off of accumulated losses and unabsorbed depreciation allowance by the amalgamated company taking over the sick unit, have been quite adversely hit upon by the Supreme Court in CIT v. Mahindra & Mahindra Ltd. In view of this judgment, therefore, the first and third conditions may be omitted. It is submitted that the second condition - "the amalgamation was in the public interest" itself has the potentiality to counter any tax-avoidance

58. Supra, 449
59. (1983) 14 Taxmann 11(S) affirming Mahindra & Mahindra Ltd v. Union of India (1983) 141 ITR 174 (Del)
measures. Consequently, sub-section (2) of section 72A possess.
all the same as in the first and third conditions, may also be omitt

ii. The Taxation Laws (Amendment) Act, 1975, inserted an
Explanation to section 73 which states that the business of purchase
and sale of shares by companies, other than investment or finance
companies, shall be treated as speculation business. The implication is
that the losses arising from transactions of purchase and sale of
shares by non-investment or non-financial companies can be set off only
against gains from similar speculative transactions. It is submitted
that the object behind the enactment of this Explanation to plug the
tax avoidance practice has not much force behind it, since the
investment companies could be more prone to the practice of 'cornering
the shares'.

It is submitted that the real solution to such problems lies in the
setting up of Securities & Exchange Commission, exactly on the same
lines as in USA. As a corollary to it, Securities Contracts (Regulation)
Act, 1956, may be scrapped and instead thereof, the Securities Exchange
Act on the U.S. lines may be enacted, thus paving the way for one of
the strongest statutory bodies, Securities & Exchange Commission, to
regulate and monitor all the innovated methods of corporate management.

Associated with it, increasing the frequency of 'corporate
reporting' say semi or quarterly, would go a long way in curbing the
'insider trading' in corporate control. It is the very essence of the
'social reporting', popularly known as 'social accountability' in the
developed or developing countries. This concept of 'social
accountability' is yet to be fully acknowledged by the corporate
behaviouralism in India. With this in view, the words 'as at the end of
six months and at the end of its financial year' may be substituted in
place of "as at the end of its financial year" in clause (i) of section
227(2) and similarly these words for the words "for its financial year"
in clause (ii) of section 227(2), Companies Act, 1956.

IX

1. In order to make the scheme of section 80CC - "Deduction in
respect of investment in certain new shares" - more meaningful and
pragmatic, either Explanation to sub-section (1) may be omitted; in case
such an altogether omission may be considered to be a tax-avoidance
measure, then at least the words 'six months' may be substituted by
the words 'one year'. Much more important, the set of anomalous
conditions applicable on the conversion of a private company into a
public company, by way of second proviso to sub section (3) may also
be omitted. It is submitted that such a step would be in conformity with the true perspective of an 'integration system', howsoever partial it may be.

ii. An anomalous sub-section (6) of section 80I saps away the 'tax holiday' benefit, which makes a reference to sub-section (1), where the words "derived from" are used. Sub-section (6) lays down that "for the purposes of determining the quantum of deduction under sub-section (1) for the assessment year...be computed as if such industrial undertaking...were the only source of income of the assessee during the previous years". The inevitable implication is that the depreciation allowance, investment allowance, business losses etc., set off against other items of income in earlier years would have to be notionally allowed against the profits of the new industrial undertaking; for the limited purpose, of reducing the quantum of 'tax holiday' benefit. It is submitted that the words "attributable to" may be substituted in place of the words "derived from" in sub-section (1) of section 80I, or alternatively, sub-section (6) may be omitted. The writer is constrained to mention that the Parliament has yet to acknowledge the concept of 'real income', being evaded by the courts of law over the years.

iii. The Finance Bill, 1984 proposes to reduce the quantum of deduction from 100% to 60% in respect of even those inter-corporate dividends received from companies pursuing manufacturing in channelised or approved directions. Curiously enough, those amendments which may lead to enormous counter-productive effects in the economy are made in the name of 'rationalisation' or 'uniformity' of law, whereas scores of enviable provisions escape such yearly fiscal exercises. It is submitted that the inevitable purpose behind this proposed amendment could have been to put a check on the sharply increasing tendency of investment companies to invest and control such manufacturing companies pursuing channelised or approved activities of manufacturing. It is submitted that it is not the proper means to achieve such an end. The writer has already made few submissions in regard to the proper monitoring of the investment companies.

With this in view, it is submitted, that even the prevailing quantum of deduction of 60% from the dividend income received by way of inter-corporate investment from non-priority industries may be increased to 100%. Needless to emphasise, that the quantum of 100% prevailing hitherto in the case of priority industries may be resorted to. In essence, this would be the real step towards 'uniformity' or
'rationalisation' of law. Perhaps the Parliament in the wake of wobbling flexibilities through the yearly fiscal exercises lost sight of this paramount norm that the mechanism of section 80M is one of the potent factors of 'full-capacity utilisation'. Differentiation in the incentive patterns based on the nature of channelised or approved directions, or otherwise, does not stand the scrutiny of a fast-developing economy.

However, in order to counteract the sharply increasing tendency of investment companies to invest and control manufacturing companies pursuing channelised or approved activities of manufacturing, an Explanation to section 80M may be inserted as under:

"Where the gross total income of an investment company includes any income by way of dividends from a domestic company, no deduction shall be allowed under this section."

This submission is in line with the thinking of wizards on public finance. It is important to mention that the writer has made the aforementioned submission only as an alternative to the earlier submission with regard to an investment company.

1. As an alternative to the earlier submission that sub-clause (iia) of section 40(a) may be omitted, the words 'wealth tax' may be inserted just after the words 'income tax' in sub-clause (a) of section 109(1), as under:

"109(1)(a): The amount of income tax or wealth tax payable by the company in respect of its total income or net wealth, as the case may be, but excluding the amount of any income tax payable under section 104."

It is not favoured to have the inclusion of the words 'wealth tax' in clause (b) of section 109(1) for the simple reason that the parameters of wealth tax have been enormously widened by virtue of the Finance Act, 1983. Further, in clause (b) of section 109(1), the words 'interest or penalty' may be inserted just after the word 'tax'. It is submitted that these provisions could have made the machinery of section 104 more articulate.

11. An anomalous condition exists in section 108 that a subsidiary company would be outside the pale of section 104, only if the share

60. Supra 330, 509-511.

61. The notable Indian Wizard among them Mr. S. Bhootalingam, has categorically advocated that the investment companies should meet their deserved fate and be taxed in the normal way without any palliatives.

62. Supra a, 520.
capital of such a subsidiary company has been held by the parent company throughout the previous year. It is submitted that the legislature might not have intended such a hardship to the subsidiary in the initial year in which the holding company has taken it into its fold. Therefore, the words "throughout the previous year" may be omitted, and section 108(b) may read as under:

"(b) to a subsidiary company of such company if the whole of the share capital of the subsidiary company is held by the holding company or its nominees".

It is submitted that a holding company may eventually hold the stocks in the subsidiary thereof, yet it might not have initially produced forth the subsidiary. In other words, the word 'holding' has in common parlance of corporate legislation more wider amplitude than the word 'parent'. With this in view, the term 'holding' has been substituted in place of the term 'parent' in the aforementioned submission.

XI

1. 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 has been again shaken by the same court by granting special leave to the department to appeal against the judgment of the Karnataka High Court in T.T.(P) Ltd. v. ITD on the limited question of reviewing the IENS by a larger Bench.

The writer submits that the very essence of the problem speaks volumes about the incoherence and incoordination amongst the different wings of the Revenue Department. It is once again pertinent here to quote from the IENS, as under:

"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".

In its true perspective, the real solution does not lie in providing more lanes on the highway of 'information'; of course, with the orderly and well-organised traffic the existing lanes could sustain the onslaught of increasing propensity of the traffic. Cases like CIT v. Assam Oil Company Ltd., did occur in the past and are bound to recur again, but it is the dynamics of law which cannot be jacketed; neither the various stages of assessment, the term 'assessment' being...
used in no less than eight different senses in the Income Tax Act, could be circumvented.

XII

Indubitably, the fangs of the Finance Act, 1983 and Finance Bill, 1984 have endeavoured in the right direction to plug the vast conduit of tax avoidance - 'discretionary trusts', but the ways of human ingenuity are infallible. Under section 164, income received by trustees of discretionary trusts is charged to tax at the maximum marginal rate of income tax. However, it further provides that income received by discretionary trusts will not be charged to tax at the maximum marginal rate, but at the normal rates of tax applicable to individuals, association of persons, etc., in cases where any one of the following conditions is fulfilled namely:

1. None of the beneficiaries has any other income chargeable under the Income Tax Act exceeding the exemption limit or is a beneficiary under any other trust;

2. the trust is declared by a person by will and such trust is the only trust so declared by him;

3. the trust has been created before 1st March, 1970 by a non-testamentary instrument and the ITO is satisfied that the trust was created bonafide exclusively for the benefit of the relatives of the settlor or where the settlor is a HUF exclusively for the benefit of the members of such family, in circumstances where such relatives or members were 'mainly' dependent on the settlor for their support and maintenance;

4. the trust has been created bonafide by a person carrying on business or profession exclusively for the benefit of his employees.

The Finance Bill, 1984 seeks to provide that the afore-said conditions will not apply in a case where the income of a discretionary trust consists of, or includes, profits and gains of business. In such cases, the entire income of the trust would be charged at the maximum marginal rate of tax, except in cases where the profits and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance, and such trust is the only trust so declared by him. In such an exceptional case, the income of the discretionary trust would be charged to tax at normal rates applicable to individuals and not at the maximum marginal rate of income tax.

It could be easily discernible from above that the interests of a relative of the settlor are being considered by the Parliament, in its own wisdom, at a higher pedestal as compared to the interests of the workers employed in the business for whose welfare or benefit such a fund was created. Whereas the Finance Bill, 1984, seeks to protect the
interests of the former, the interests of the latter are thwarted. It is submitted that perhaps higher propensity of tax avoidance may be in the former case, for the simple reason that the benefit can percolate to 'any relative' of the settlor. Could it not be said that except the fourth condition aforementioned, all the remaining three conditions have been kept intact with an acumen of legal drafting? Could it not be possible that a settlor may be related to more than one individuals, and such individuals are dependent on these settlors for support and maintenance?

The pertinent words occurring hitherto in section 164 are

"For the benefit of the relatives of the settlor, or where the settlor is a HUF, exclusively for the benefit of the members of such family, in circumstances where such relatives or members were mainly dependent on the settlor for their support and maintenance".

These words have been sought to be substituted by the Finance Bill, 1984, as under:

"...The preceding proviso shall apply only if such profits and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance...".

It is important to note that the word 'mainly' occurring hitherto before the word 'dependent' is missing in the proviso sought to be substituted by the Finance Bill, 1984. It is submitted that one cannot escape from this conclusion, that this mushroom non-utilitarian growth is to be weeded out, hence proviso to sub section (1A) of section 161, second proviso to sub section (1) of section 164, proviso before Explanation 1 to sub section (3) of section 164 sought to be inserted by virtue of the Finance Bill, 1984 may be omitted. To quote the words of the learned Judge, Venkataramiah, J., in CIT v. FICCI would be pertinent once again:

"It is wrong to think that all springs of charity in India will dry up...One need not go in search of charitable persons amongst the tax payers only".

XIII

1. It is abundantly plain that the provisions of section 178 are contrary to the provisions of section 530(1)(a) of the Companies Act, 1956, in the sense that section 178 legislatively directs the liquidator to arrange for the payment of taxes. The prevailing position of law on this aspect is really inscrutable, in as much as the workers of the company in liquidation may be left at the mercy of the Revenue Department.

Though the law has definitely crystallised on the corporate aspects under section 530(1)(a), Companies Act, 1956; nevertheless, due to the over-zealous revenue authorities, the litigative syndrome prevails. With a view 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 (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."

The scheme underlined in section 530, Companies Act, 1956 is a very coherent and pragmatic one. The writer submits that the order of the ITO under section 178 does not have the effect of submerging the provisions of section 530, in particular of section 530(1)(a).

XIV

1. On the basis of the views held by the various High Courts, it can be safely said that the provisions relating to advance payment of tax, particularly the payment by instalments, on or before the specified dates, have lost much of their significance. It is submitted that a proviso to section 214(1) may be inserted as under:

"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 the insertion of the aforementioned proviso would not militate against the provisions of section 211, which enumerates three dates in a year, on or before which the instalments of advance tax are to be paid. As a sequel to the aforementioned proviso, section 216 would be redundant and otiose. The very term 'estimate' has a vacillating notion by its very nature. Hence, section 216, as a whole, may be omitted. Such an omission would not militate against any of the provisions on advance payment of tax ranging from sections 207 to 219.

Consequentially, even rule 119A, Income Tax Rules, 1962 would be rendered nugatory. Hence this rule may be also omitted altogether.

XV COMPANIES (PROFITS) SURTAX ACT, 1964

1. It is interesting to note that the main Surtax Act containing 26 sections itself is simple; the real sting is in the tail - the three

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68. Supra, 19-20.
69. Supra, 482
Schedules to the Act, particularly the First and Second Schedules. The prevailing law on the crucial aspect of differentiation between 'provision' and 'reserve' is in an unhappy situation. In order to do away with this conceptual muddle between 'reserve' and 'provision', the power of the Board of Directors to i. invest the funds of the company, and ii. to transfer, add or create the reserve may be subjected to the consent of the company in general meeting. Therefore, the following two clauses may be inserted in section 293, Companies Act, 1956

1. Invest the funds of the company,
2. Transfer, add or create the reserve.

It is submitted that the reason which governs by virtue of Regulations 85 and 87 to seek the approval of the shareholders in their general meeting for declaration of dividends is equally, if not more, applicable in the case of creation of a 'reserve' or setting apart funds to a reserve. It could be too specious an argument that since the dividends are to be distributed, the approval of the shareholders is necessary; whereas reserves remain with the company for its future use. A catena of case-law is embedded under the surmise, that since the person competent to set apart such a reserve did not do so, the amount could not be treated as a reserve, notwithstanding the needs or exigencies of the corporate behaviouralism. Needless to say, the corporate law acknowledges even an extraordinary general meeting within the concept of general meeting.

ii. Explanation to Rule 1 to the Second Schedule has been responsible for a galore of forensic syndrome. For quite satisfying reasons, it may be omitted and in its place an Explanation may be substituted, as under:

"Explanation - For the removal of doubts it is hereby declared that all the amounts standing to the credit of any account in the books of a company, as on the first day of the previous year, relevant to the assessment year, which can be returned to the shareholders without liquidation or reduction of capital of the company shall be regarded as a reserve."

It is submitted that the aforementioned Explanation does not militate against either the 'Interpretation Clause', clause 7 of Part III of Schedule VI to the Companies Act, 1956, or the Form of Balance Sheet enumerated in Part I of Schedule VI to the Companies Act, 1956.

iii. Rule 3 of the First Schedule to the Surtax Act may be omitted, as it is an antithesis to section 40A(2) of the Income Tax Act, 1961.

70. Supra, 531
71. Supra, 535-536
iv. Rule 4 of the Second Schedule has been proved to be extremely counter-productive, neither holding grounds on the principle of semantics nor revenue-yielding. Even a partial surgery of the rule taking out the ambit of deductions under Chapter VIA, Income Tax Act, 1961 from the trajectory of 'not includible' would not save the myth of Rule 4, where interestingly enough, the Revenue has yet to make litigative acumen in its favour. Consequently, rule 4 to the Second Schedule deserves nothing short of an altogether omission.

It is submitted that the scheme of advance payment of surtax could have been more productive on the lines similar to advance payment of gift tax under section 18, Gift Tax Act, 1958 which envisages rebate on expeditions advance payments.

XVI. WEALTH TAX ACT, 1957

1. The principle enunciated by the Madras High Court in CWT v. M.N. Raja may be given statutory recognition. Even the philosophy of Income Tax Legislation admits that the representation of an income-yielding asset procured from borrowings is not necessary to claim the interest on borrowings as admissible business expense. It is, therefore, submitted that sub-clause (viii) of section 40(3) of the Finance Act, 1983, which is given below, may be omitted.

"(viii) any other asset which is acquired or represented by a debt secured on any one or more of the assets referred to in clause (i) to clause (vii)".

The writer submits that by retaining this onerous sub-clause (viii), perhaps the Revenue Department itself, would be prepared to stir the hornet’s nest by including plant, machinery, stock-in-trade, etc., within the list of 'specified assets'. The question whether these assets would be valued on the basis of the market value or on the basis of closing stock, remains totally inexplicable.

The words "or is not represented by any asset belonging to the assessee" occurring in the proviso to section 40(2) of the Finance Act, 1983 may also be omitted.

As a sequel to these submissions, an insertion by way of an Explanation in the substantive definition of 'net wealth' in section 2 (m)(ii) may be made, as under:

72. Supra, 537-540
73. (1982) 133 ITR 75 (Mad)
74. Eastern Investment Ltd v. CIT, West Bengal (1951) 20 ITR 1 (SC); Hughes v. Bank of New Zealand (1938) 6 ITR 636; 2 ITC 472
75. Supra, 548
76. Supra, 548
"Explanation - For the removal of doubts, debts which are secured on partly exempted assets or not represented by any taxable asset belonging to the assessee, shall not be disallowed."

ii. Yet another judicial hallmark on the combersome aspect of valuation of shares is the judgment of the Gujarat High Court in CIT v. Ashok K. Parikh. The ratio of this judgment is that the break-up value of the shares is reduced, as advance tax is not treated as an asset as per wealth tax rules, and the provision for taxation is treated as a liability. It is submitted, however, that the Rules do not clearly state that the past year's tax liability is deductible. The taxes payable in respect of the book profits for those years for which assessment proceedings are pending, may be considered against the provisions made in the year for which the balance sheet has been prepared. In order to give effect to this proposition, a suitable amendment may be made in sub clause (e) of clause (ii) of Explanation II to Rule ID.

It is important to mention that such an aforementioned submission regarding Explanation II to Rule ID does not militate against the provisions of section 2(m), which defines 'net wealth'. For the purpose of computing 'net wealth' only those taxes are not allowed as 'debts owed' which are either outstanding on the valuation date and claimed by the assessee "in appeal, revision or other proceeding as not being payable by him", or although not so claimed, are "nevertheless outstanding for a period of more than 12 months on the valuation date". The writer has simply referred to that tax liability for which assessment proceedings could not be completed on or before the valuation date.

XVII ESTATE DUTY ACT, 1953

1. Interestingly enough, despite a well-knit machinery of section 17, which curbs the practice of transferring property in favour of a controlled company in order to evade the charge of estate duty, an anomaly too glaring to ignore subsists. As a matter of fact, the discredit could be owned by section 2(9) where the expression 'general power' has been defined. If the property earlier transferred to the controlled company could have been mortgaged, then the provisions of section 17 cannot apply, neither to the owner thereof nor to the mortgagee, for the simple reason that section 17 could operate only if the deceased would have a beneficial interest therein. At the same time, it could not apply to a mortgagee since section 2(9) excludes a mortgagee from the pale of 'general power'.

77. (1981) Tax 61(3)-88(Guj)
It is, therefore, submitted that the words "or exercisable as mortgagee" occurring in section 2(9) may be omitted. Whatever the conditions obtainable in the Indian Society in 1953 might have been, but they are certainly transcendental after three decades.

Unhappily, the word 'economy', which is of a variegated nature, and of many different shades, is yet to have a coherent conception with regard to the tax code. Less subtle, even in the legal, economic or accountancy sense, it is used to describe different concepts at the same time; nevertheless, a minimum coherent formulation for a reasonable period could prove to be a sheet-anchor to the socio-economic polemic.