There is always a possibility of finding in the twists and turns of the Income Tax maze some relief or refuge for the harassed taxpayer, and this possibility we must now examine.

- Lord Maugham

CHAPTER THREE

ANALYSIS AND INTERPRETATION OF STATUTORY PROVISIONS

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CHAPTER THREE
ANALYSIS AND INTERPRETATION OF STATUTORY PROVISIONS

3.1 INTRODUCTION:

The discussion in the present Chapter focuses on the analysis and interpretation of the statutory provisions reproduced in the preceding Chapter. As already stated, the exercise concentrates on judging the overall significance and correlatioship of these provisions vis-a-vis the procedural aspects of the collection and recovery of tax under the Income-tax Act, 1961.

3.2 A. - GENERAL (Sections 190 and 191):

These are two broad heads of tax-levy; one being direct levy and the other being levy through deduction-at-source. **Section 190** provides that tax on any class of income may be levied by deduction at source or advance payment, although a regular assessment may follow later. **Section 191** provides for a direct levy and assessment of tax in either of the two cases, namely:

(1) where no provision has been made for deduction at source; or

(2) where there is such provision for deduction, but no deduction has actually been made at source.

Deduction of tax at source is a convenient method

of tax collection since it effects early realization and is less painful to the person from whose income such tax is deducted. Moreover, it saves time on the part of the income-tax staff inasmuch as all calculations and other attendant work are performed by the person responsible for paying. The deduction of tax at source is only one of the modes of tax recovery and the device is without prejudice to any other prescribed mode of recovery (section 202). But once tax has been deducted at source from the prescribed income of a person, the latter enjoys an immunity thereabout. The Department cannot call upon him to pay the tax himself once again to the extent to which the tax has been deducted from that income (section 205).

3.3 B. - DEDUCTION AT SOURCE (Sections 192 to 206B):

The sub-head 'B' could be divided into two parts, viz. (1) the substantive provisions for deduction of tax at-source (sections 192 to 195), and (2) other provisions, subject to which the substantive provisions could be made applicable for the deduction of tax at source.

The incomes which are subject to tax deduction at source are:

S.192 Salary income,

S.193 Interest on securities,

S.194 Dividends,

S.194A Interest other than interest on securities,

S.194B Winnings from lottery or crossword puzzle,

S.194BB Winnings from horse race,

S.194C Payments to contractors and sub-contractors,

S.194D Insurance commission,

S.194E Payments to non-resident sportsmen or sports associations,

S.195 Payment of other sums.

The other provisions governing the substantive provisions contained in sections 192 to 195 relate to the following aspects:

S.195A Income payable "net of tax"

S.196 Interest or dividend or other sums payable to the Government, Reserve Bank or certain corporations,

S.196A Tax not to be deducted from any income payable to unit-holders of Mutual Fund,

S.197 Certificate for deduction at lower rate,

S.197A No deduction to be made in certain cases,

S.198 Tax deducted is income received,

S.199 Credit for tax deducted,

S.200 Duty of person deducting tax,

S.201 Consequences of failure to deduct or to pay,

S.202 Deduction only one mode of recovery,

S.203 Certificate for tax deducted,

S.203A Tax deduction account number,

S.204 Meaning of 'person responsible for paying',

S.205 Bar against direct demand on assessee,

S.206 Persons deducting tax to furnish prescribed returns,

S.206A Person paying interest to residents without deduction of tax, to furnish prescribed return,

S.206B Person paying dividend to certain residents without deduction of tax to furnish prescribed return.

Besides the above provisions contained in the Act, Rules 26 to 37A of the Income-tax Rules 1962, make necessary prescriptions about the deduction of tax at source. These rules, together with the relevant forms (nos.13 and 14) contained in Appendix-II to the Income-tax Rules, 1962, are designed to take care of the procedural formalities of deduction of tax at source.

Circular no.147 dated 28.10.1974 issued by the Central Board of Direct Taxes states that:

> "Under the provisions of **section 192** of the Income-tax Act, 1961, any person responsible for paying any income chargeable under the head "Salaries" is required, at the time of payment to deduct income-tax from the amount payable. In any case, where an employee claims that his salary is not chargeable to income-tax and, therefore, no income-tax should be deducted at source from the salary receivable by him, the employer should require the employee to obtain from the concerned Income-tax Officer a certificate under section 197(1) of the Income-tax Act authorizing no deduction

or deduction at such lower rate as may be prescribed in the said certificate. In the absence of such a certificate from the employee, the employer should deduct income-tax on the salary payable at the normal rates".

The contents of the above circular are amply clear. Furthermore, no arrangement or agreement privately arrived at between an employee and employer can affect, alter or modify the statutory liability of the employer to deduct tax at source at the appropriate rates from payment to the employee.[1]

As regards deduction of tax at source under **section 193** from the payment of dividend, no deduction be made in the following cases:

(1) where the **Assessing Officer** has granted to the shareholder not being a company, a certificate in terms of the proviso to section 194 to the effect that his income will be less than the minimum liable to income-tax;

(2) where the Assessing Officer determines, under section 197(3), that the whole or a portion of the dividend will be deductible under section 80K, in computing the total income of the shareholder (exemption from deduction available to the whole or the portion, as the case may be).

(3) where the shares are owned by the Government, the Reserve Bank of India, or a corporation referred to in section 196.

Exempting the three cases specified above, the section enjoins that the principal officer of the company paying the dividend, to deduct at the time of making payment, the income-tax at the rates in force for the assessment year concerned. The provision for deduction of tax at source applies to the dividend payable on the equity as well as preference shares.

Section 194A relates to the deduction of tax at source from the interest (other than 'interest on securities') payable, except the interest receivable by certain entities specified in proviso (3)(iii) to (vii). The section and its attendant rule cast certain obligations and liabilities on the persons responsible for deducting the tax. Firstly, the tax deducted at source from interest income is to be paid to the credit of the Central Government within the time and in the manner specified. Secondly, any default in this behalf is liable to prosecution and may invite a penalty in terms of fine or conviction. The interest accrued on the Postal Saving Deposits as well as provident funds have been exempted from the applicability of this section.

The winnings from lotteries and crossword puzzles, being the casual and non-recurring receipts, became chargeable

to income-tax under **sections 194B** and **194BB** vide modifications introduced by the Finance Act 1972, with effect from the asseessment year 1973-74 onwards. At the time of this introduction, the amount of winnings chargeable to tax was Rs.1,000 for lottery and crossword puzzles and Rs.2,500 in respect of horse-races, but the same have since been increased to Rs.5,000 with effect from 1.6.1986 vide Finance Act, 1986. The rates for deduction of tax at source have been prescribed in Part-II of the First Schedule to the respective annual Finance Acts. The Central Board of Direct Taxes (CBDT) has spelt out the following obligations and liabilities of the persons deducting tax at source under sections 194B and 194BB:

(1) to pay tax to the credit of the Central Government,

(2) to issue certificate of deduction,

(3) to furnish quarterly returns of deduction of tax.

The provisions of **section 194C** regarding deduction of tax at source from the payment to contractors apply only in relation to 'work contracts' and 'labour contracts' and do not cover contracts for sale of goods. Further, the provisions of this section are attracted only in cases where the total payment under contract is likely to exceed Rs.10,000 for the entire period during which the contract remains in force and income-tax will have to be deducted at source.

The definition of the term 'contract' under the Income-tax Act could only be an inclusive definition, that is, it will have to be precisely laid down as to what constitutes

'contract'. Soon after the introduction of this section, there was a considerable interpretational confusion and the Supreme Court had to hand down the following case law:

> "Where the principal objective of work undertaken by the payee of the price is not the transfer of a chattel, qua chattel, the contract is of work and labour. The test is whether or not the work and labour bestowed and in anything that can properly become the subject of sale; neither the ownership of the materials nor the value of skill and labour as compared with the value of the materials is conclusive although such matters may be taken into consideration in determining in the circumstances of a particular case, whether the contract is, in substance, one of work and labour or one for the sale of a chattel".[2]

The obligations and liabilities cast on the person deducting the tax at source from the payments made to the contractors are synonymous with those under sections 194B and 194BB.

Section 194D pertains to the deduction of tax at source from the insurance commission, at such rates as may be prescribed by the Finance Act for the relevant year. In addition, for taking care of the formalities involved, the CBDT has issued a number of circulars and instructions over the years for the governance of this section.

Section 194E was inserted by the Direct Tax Laws (Second Amendment) Act, 1989, with effect from 1.11.1989 and pertains to the deduction of tax at source from the payments made to the non-resident sportsmen or sports associations, at the flat rate of ten per cent.

The deduction of tax at source under **section 195** relates to the payments made to the non-residents and excludes the payments made towards interest on securities, dividend and salary. The section requires the person responsible for making payments of the incomes referred to in section 195(1) to a non-resident to deduct tax, if such payment is taxable under the Act. Where such a person is not sure as to which part of the amount of income referred to in section 195(2) payable to the non-resident is chargeable to tax, he can apply to the Income-tax Officer to determine the proportion of the sums so chargeable and on such application, the Income-tax Officer is to make an order determining the proportion of such income on which tax is to be deducted under sub-section (1). Sub-sections (3), (4) and (5) provide the machinery under which any non-resident may apply for, and the Income-tax Officer may give, a certificate to the effect that any such payment to the non-resident may be madee without deduction of tax at source, or with deduction at a lesser than the prescribed rate of tax.

Section 195A relates to the income payable 'net of tax',

that it merely gives statutory recognition to the well-settled principle that when any amount is paid net of tax, the tax liability has to be calculated by grossing up the income amount since the tax itself (borne by the payer) represents the income of the payee. But this principle has to be read subject to the other provisions of the Act, particularly section 10(6A), which provides that in certain circumstances, where tax-free royalty or technnical fees are paid to a foreign company, the tax thereon payable by the payer is exempt in the hands of the payee. On the same reasoning, where tax is borne by the employer, where tax is borne by the employer, to the extent it is exempt under section 10(6)(vii-a), the remuneration is not to be grossed up.

Under **Section 196,** no deduction of tax is required to be made from any sums payable by way of interest on securities or dividends on shares or any other income to the Government or the Reserve Bank of India or a corporation established by or under a Central Act which is, under any law for the time being in force, exempt from income-tax on its income, where the Government, Reserve Bank or such corporation is the owner of the securities or shares has full beneficial interest therein.

Section 196A expressly forbids the deduction of tax from any income payable to the unit holders of the Mutual Funds, since vide section 10(23D), "in computing the total income ... any income of Mutual Fund ... shall not be included"

therein, provided the unit holders are other than 'foreign companies'. Sub-section (2), however, lays down that in respect of the foreign companies, the deduction should be effected at the rate of 25 percent.

Sections 197 to 206B are the machinery sections incorporated in the Act to ensure smoothness in the procedure of collection of tax at source.

Vide **Section 198,** the tax deducted at source under sections 192 to 195A and 196A is deemed to be income received and should be included in the assessee's total income.

Section 199 is a natural concomitant of section 198. Thus the tax deducted at source is part of the income of the assessee and its gross amount should be included in the assessee's total income. Conversely, the tax deducted at source and paid to the Government should be treated as having been paid on behalf of the assessee. If at the end of the year, the tax assessed is more than the amount deducted at source, the amount of the deficiency is to be recovered from the assessee direct. On the other hand, if the tax deducted at source exceeds the tax found payable, the assessee is entitled to a refund order under section 237. Clause (i) of the first proviso lays down that where another's income is included in the assessee's total income under sections 60, 61, 64, 93 or 94, the tax in respect of such income should be deemed to have been paid on behalf of the assessee and credit should

be given to him in the assessment. The second proviso enacts that where any share or security is owned jointly by two or more persons not constituting a partnership, credit in respect of the tax deducted should be given to each such person in the same proportion in which the interest or dividend is included in his total income.

Section 200, together with Rule 30, provides for the payment of the sums deducted at source as tax to the credit of the Central Government. When the tax has been deducted at a source, it does not lie at the risk of the revenue and, therefore, the person making the deduction is bound to account for it to the revenue even if the sum deducted and set aside is stolen or otherwise lost by inevitable accident.[3]

Section 201 spells out the consequences for the failure to deduct the tax at source or to pay the deducted tax to the credit of the Central Government. Under this section, the 'person responsible' would be deemed to be an assessee in default in respect of the tax and would be personally liable to pay the tax[4] with interest thereon[5] and would further be liable to a penalty under section 221. In the absence of reasonable cause, failure to pay to the Government the tax deducted at source would also be an offence punishable under section 276B read with section 278AA. While the section punishes the default, section 290 affords indemnity for deduction of tax from another's income in pursuance of the Act.

Section 202 lays down that the deduction of tax at source from an assessee's income is only one mode of recovery and accordingly, preserves the power to levy the tax on and recover it from the assessee even in cases where levy by deduction at source is provided.

Section 203, together with Rule 31, prescribes the forms of the certificates to be furnished by every person deducting the tax. Failure without reasonable cause to furnish a certificate attracts penalty under section 272A(2) read with section 273B. Deliberate furnishing of a false certificate is an offence under section 277 and abettment of that offence is punishable under section 278.

Section 203A casts the obligation on the person responsible for the deduction of tax to apply for a Tax Deduction Account Number (as prescribed in Rule 114A). Failure to comply with this provision may attract penalty under section 272BB read with section 273B.

Section 204 defines the 'person responsible for paying' on whom is cast the obligation, under the preceding sections, to make a deduction of tax. Where the payer is a company, the person responsible means the company as well as its principal officer.[6] The text itself of this section is amply clear as to identify the person responsible for deduction of tax and its subsequent payment to the credit of the Central Government.

Section 205 puts a bar against direct demand on the assessee, where the tax has already been deducted, or is supposed to have been deducted, at source, under sections 192 to 194, 194A, 194B, 194BB, 194C, 194D, 194E, 195 and 196A, but the same has not been paid to the credit of the Central Government, the person who is bound to deduct and has not deducted the tax may be held personally liable and treated as an assessee in default in respect of the tax and may also be held liable for the penalty under sections 221 or 271C read with section 273B.

Section 206A requires information to be given regarding accrual or payment of income, in order to help the detection of any avoidance of tax. Failure without reasonable cause to furnish a return in due time attracts penalty under section 272A(2) read with section 273B. Deliberately making a false return is an offence under section 277 and abettment of that offence is punishable under section 278.

Section 206B relates to the return to be filed by a person paying dividend to resident assesses without deduction of tax at source. The first proviso to section 194 permitted payment of dividend by a company without deduction of tax in certain cases where a shareholder furnished to the company a statement in the form prescribed by rule 28A that his estimated total income of the relevant accounting year would be below the taxable minimum; and in such cases, this section

required the company to furnish a return in respect of such shareholders. In 1984, that proviso to section 194 was replaced by the present proviso which does not provide for such a statement from any shareholder; it is section 197A which now provides for such a statement or declaration. Section 206B which still refers to a return showing the statements of shareholders, therefore, is no more valid.

3.4 BB. - COLLECTION AT SOURCE (Section 206C):

The sub-head 'BB' relates to the collection of tax at source and refers to the 'Profits and gains from the business of trading in alcoholic liquor, forest produce', vide section 206C. This sub-head was introduced by the Finance Act, 1988, with effect from 1.6.1988. The provisions of this section are almost similar to those of section 44C. The section stipulates that the tax is to be 'collected at source' by the seller at the specified percentage of the sale price. Both, sections 44C and 206C, raise a conclusive presumption of law that the buyers of the alcohol and timber will indeed make a net taxable income of the specified percentage bby selling these commodities later. Ever since the insertion of this section vide the Finance Act, 1988, a controversy is ranging about the validity or otherwise of this section. The Kerala High Court has held this section to be within the legislative competence of the Parliament (apart from Fundamental Rights),[7] while the Andhra Pradesh High Court

has held that the presumptive income dealt with by this section is for the limited purpose of collection of tax at source and it would be open to the assessee to prove later in the assessment proceedings what is his real assessable income.[8] N.A.Palkhivala, however, contends as follows:

> "The question at issue is not the profits or tax liability of liquor and timber traders. The real issue is - how far is arbitrary authoritarianism in fiscal matters permissible under the Constitution or can be held to be justified merely because of the inadequacy of tax administration? It is submitted that sections 44AC and 206C are unconstitutional."[9]

It is the present researcher's humble opinion that the provisions of these sections, irrespective of being Constitutionally valid or not, are a breeding ground for unrecorded transactions in alcoholic liquor and forest produce that eventually generate unaccounted income.

Thus is completed the discussion of the sections under the sub-heads "B. - Deduction at source" and "BB. - Collection at source". Taken together, these sections present a picture of well laid-out substantive and administrative provisions for the deduction of tax at source. The Direct Tax Laws Committee (Chokshi Committee), in its Report submitted to the Government in September 1978 has stated that:

> "Deduction of tax at source is, at present, required to be made from payments of salaries, interest on securities, dividends on shares in companies, other types of interest payable to residents, winnings from lotteries or crossword puzzles, payments to contractors and sub-contractors, payment by way of insurance commission, all categories of income payments to non-residents ... also winnings from horse-racing. Thus, these provisions already cover a wide area. **It is neither necessary nor advisable to extend their area of operation any further**".[10] (emphasis added).

The Chokshi Committee has also offered following specific recommendations, after giving logical and rational explanations:

"Salaries -

...specific provision should be made enabling the employer to take into account the relief to which the employee is entitled while deducting tax at source from payments on account of arrears of salary.

"Payments to contractors -

...the limit for deduction of tax under section 194C- should be raised to Rs.25,000.

Insurance Commission -

...deduction of tax from payments by way of insurance commission should be required to be made

only when the payment to any one person during a financial year exceeds Rs.1,500".[11a.]

An important suggestion is made by the Committee relates to the monitoring of deduction of tax at source:

"...Central Monitoring should be extended to cover all deductions of tax at source, ... that suitable arrangements should be made for Government Departments, both at the Centre and the State, to submit returns of tax deducted at source from payments of salaries, payments to contractors, payments of interest, lottery winnings, etc., and arrangements should be made for checking these centrally...".[11b]

3.5 C. - ADVANCE PAYMENT OF TAX (Sections 207 to 219):

Sections 207 to 219 [of which sections 209A, 212 and 213 stand omitted vide Direct Tax Laws (Amendment) Act, 1987, with effect from 1.4.1988], pertain to the advance payment of tax. These provisions for advance payment of tax afford another mode of quick collection of tax. "Pay as You Earn" (PAYE) is a basis involving lesser risk to the revenue and comparatively less painful to the taxpayer. The procedure also incorporates the consideration of convenience propounded by Adam Smith. In India, the procedure for advance payment of tax was introduced initially vide Section 18A of the Income-tax Act, 1922, as a war measure, probably to combat inflation. The provisions apply to those assessees whose total income in the latest

assessment, and also to those hitherto unassessed whose total income of the previous year, exceeded a certain sum. The sections attempt to reconcile the principle of advance payment of tax with the scheme of the Act, which is to tax the income of the previous year.

For the purpose of analysis, it would be convenient to divide the sections of the sub-head 'C' into two groups, first group containing sections 207 to 211, and the second group containing sections 214 to 219. The sections within these two groups are inter-dependent on and interlinked with each other.

Under the basic scheme of the Act, the subject of charge is the income of the previous year and not the income of the assessment year; in other words, the tax is assssed and paid in the next succeeding year upon the results of the year before (refer section 4).

Sections 207 to 211 make a departure from the basic scheme. Credit is given for advance tax in the assessment for the assessment year next following the financial year in which the advance tax was payable (S.219); and if the tax paid in advance is found to be in excess of the tax payable on completion of the assessment, the assessees would be entitled to a refund of such excess (S.237). The procedure for the operation of these sections, however, is somewhat complicated and is not easily comprehensible to a layman, on

account of the successive amendments and deletions these sections have undergone.

Till 1978, in the case of a person who had been assessed by way of regular assessment, there was no liability to pay advance tax unless the Assessment Officer made on order under section 210 and issued a notice of demand in the form prescribed by Rule 38 for advance tax. A person who had not been previously assessed by way of regular assessments had to make volutary payment of advance tax without being served with any order. From 1978, every person liable to pay advance tax, whether assessed in the past or not, has to pay advance tax of his own accord.

In the case of a person who had been previously assessed, prior to 1st April 1988, the advance tax was ordinarily payable on the basis of the regular assessment completed for the latest previous year. Regular assessment is defined by section 2(40) as 'an assessment made under sections 143 or 144'; it is different from a self-assessment under section 140A or a provisional assessment under section 141 before its deletion in 1971. But a self-assesssment for a latter previous year than that for which a regular assessment had been made, might increase the liability for advance tax. From 1st April 1988, these principles would operate only for the purposes of the Assessment Officer's demanding advance tax and amending the demand; the advance tax payable by the

assessee of his own has to be based solely on the estimated current income (section 209).

The above description of the whole tricky procedure for the payment of advance tax is based on the interpretation of these sections offered by N.A.Palkhivala.

Section 210 deals with the estimate of advance tax by the assessee and demand of payment of advance tax by the assessing officer. Under sub-section (1), the assessee, whether or not he has been previously assessed, is bound to estimate the advance tax payable by him and pay it in three instalments specified in section 211. If after paying the first or the second instalment, the assessee finds that his original estimate needs revision, he may accordingly increase or reduce the balance of advance tax remaining payable, vide sub-section (2). Under sub-section (3), if an assessee who has been previously assessed by way of regular assessment, has not paid any advance tax, the Assessing Officer may send him a demand, which may subsequently be amended under sub-section (4). Even at this stage, the assessee is entitled to estimate the advance tax payable by him after intimating the assessing officer (vide sub-section 5), and if the estimated advance tax is higher than that demanded, he should pay the higher tax (sub-section 6). The Assessing Officer, however, is not bound to give a notice before passing an order under this section, nor is he bound to pass such

order prior to the date of first instalment and thus afford an opportunity to the assessee to make advance payment of tax in three instalments. Section 211(2) clearly contemplates that the Assessing Officer may pass an order for advance tax later, with the result that the advance tax may have to be paid in two instalments on the two remaining dates or even in one lump sum. The dates specified for the payment of instalments of advance tax are to be observed scrupulously, failing which the assessee would become liable to the payment of interest under sections 234B and 234C. The proviso to section 211(1) gives statutory recognition to the judicial view that any advance tax paid after the due date but before the end of the relevant financial year should be treated as advance tax for the purposes of this Act.

Sections 214 to 217 deal with the interests payable. **Section 214** applies only in respect of assessments for the years prior to 1988-90. In the circumstances set out in this section, interest is payable on advance tax paid but not on any part of the tax deducted at source. The interest paid to the assessee under this section is liable to tax as income and the excess interest refunded later to the Government can be claimed as a deduction. Neither the fact that the assessee has computed advance tax on an erroneous basis nor the fact that he has voluntarily paid it before the Assessing Officer makes a demand under section 210 would absolve the Department of its liability to pay interest under this Section.[12]

"The date of regular assessment", upto which interest is payable to an assessee on the advance tax paid by him, refers to the date of the assessment under sections 143 or 144 [section 2(40)]. Where an assessment under section 143 is set aside or modified in appeal, fresh or revised assessment made pursuant to the appellate order is nonetheless a regular assessment under section 143 and the assessee is entitled to interest on the advance tax upto the date of the subsequent assessment.

In the absence of a statutory provision to the contrary, interest should be paid at the rate prevailing at the time the assessment is completed, even for the prior period when a different rate was in force.[13] The mode of calculating interest is set out in Rule 119A. In calculating the excess of advance tax over the tax determined on regular assessment, the tax deducted at source should also be taken into account.[14]

The provisions governing the payment of interest payable by the assessee are set out in Sections 215, 216 and 217. These three sections apply only in respect of the assessment years prior to 1988-90, because sections 209A and 212, to which these sections relate were deleted by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1st April, 1988. The sections corresponding to sections 215, 216 and 217, which apply in respect of the assessments for the assessment year 1989-90 and thereafter ar sections 234B and 234C.

Any discussion on these sections would, therefore, be of academic nature only and hence, is skipped.

Interest payable is dealt with in sections 215 to 217 (since become redundant), while the penalty leviable, if any, is dealt with in section 273.

Section 218 merely refers to default which attracts the consequences of section 220, i.e. levy of penalty (under section 221) and recovery of tax and penalty by various modes referred to therein. It may, however, be particularly noted that once a demand has been issued under section 210, the submission of a revised estimate by the assessee later, though prior to subsequent date of instalment, can affect only future instalements; it cannot cure default of a past instalment.[15]

Credit for the advance tax collected on account of the assessee is allowed under **Section 219.** The exclusion of penalty and interest from such credit is for obvious reasons; they are not tax proper. Credit for tax paid under section 140A by self-assessment is given under that section itself. Under this section, though advance tax is calculated without reference to capital gains, it can be adjusted against tax on income, including tax on capital gains.[16]

The above discussion concludes the analysis of sections under sub-head 'C. - Advance payment of tax'. The

legislative histories of these sections reveal that during the course of time, these have undergone numerous additions, amendments and deletions, which have rendered them a piece of almost incomprehesible piece of legislation. Comments of Henry Leist Lutz, Professor of Public Finance, Princeton University, USA, can adequately sum up this situation:

> "...The continual changing and tinkering by legislation by judicial construction, and by administrative rulings render futile any effort to present a comprehensive account of the income-tax. The changes produce even greater complexity, and as the taxpayer's capacity to understand the law is diminished, his dependence upon commentators, expert accountants and legal specialists increases...".[17]

The Direct Tax Laws Committee (Chokshi Committee) also, in its Final Report (1978), has admitted that:

> "The instability of our tax laws is another of their worst feature. The laws are riddled with uncertainities and statutory amendments are as unpredictable as they are frequent. Surely, after more than half a century of the working of the Income-tax Act of 1921 and 1961, it should be posssible to have an enduring tax structure".[18]

The sum total of the above analysis and evaluation is that the sections of sub-head 'C', being the enforcement and procedural sections, are in immediate need of their

simplification and rationalization.

3.6 D. - COLLECTION AND RECOVERY (Sections 220 to 232):

Sections 220 to 232 deal with the subject of collection and recovery of tax after it is assessed but had remained unpaid. These sections further provide statutory force to the recovery procedure as the Revenue may adopt for the recovery of its dues; and if it were not for the provisions laid down in these sections, the collection and recovery of tax would have become the matters for civil courts. The legislature, therefore, has suitably empowered the Revenue to realise the tax dues through 'coercion', if necessary.

Section 220 provides that any tax (other than advance tax), interest, penalty, fine or any other sum specified in the notice of demand under section 156 should be paid within thirty days of the service of the notice, unless a shorter period is specified under the proviso to sub-section (1). The section also provides for the levy of interest in case there is default in payment. The liability to pay interest at the rate prescribed by sub-section (2) is absolute and unconditional. But since 1984, sub-section (2A) has empowered the Commissioner to reduce or waive the amount of interest (the levy of interest being regulated by rules 118, 119 and 119A). Sub-section (3) allows for the extension of time for the payment of tax dues. Vide sub-section (4), an assessee

is deemed to be in default within the time prescribed or extended. Sub-section (5) defines the default where payment of tax by instalment has been allowed. In case of default in payment of tax, a penalty may be imposed under section 221 (in addition to interest), a prosecution may be launched under section 276C(2) and recovery proceedings may be taken under sections 222 to 226A read with Schedule II. Sub-section (5) applies only to the stage of appeal to the Appellate Assistant Commissioner and not to the stages of further appeal or references. As soon as the Appellate Assistant Commissioner has disposed of the appeal, the Income-tax Officer will enforce the demand; in any case, the Income-tax Officer cannot ignore the limitation in section 231 regarding the enforcement of demands in agreeing to stay collection. Sub-section (7) relates to the tax demand in respect of foreign income. When an assessee has been taxed in respect of his foreign income arising in a country, the laws of which prohibit or restrict the remittance of money to India, he cannot be treated as being in default in respect of that part of the tax which is due on income, which by reason of such prohibition or restriction cannot be brought into India, and the assessee should continue to be treated as not being in default so long as the prohibition or restriction continues.[19]

Imposition of penalty for default in payment of tax has been provided in **section 221**. Such an imposition, however, must take the form of an order and the order must

state the specific sum which the assessee has to pay by way of penalty. The power to levy penalty under this section vests with the Assessing Officer. These are discretionary powers and should be exercised judicially. The section also expressly provides that before levying a penalty, the Assessing Officer ought to give the assessee a reasonable opportunity of being heard. No penalty can be imposed unless there is default in payment of tax on the due date and even where a wrong date is specified in the notice of demand by mistake, no penalty can be imposed till the specified date has passed. Again, no penalty can be imposed unless a notice of demand has been served on the assesse. If the notice of demand for tax in itself is invalid, the assesse cannot be said to be in default and no penalty can be imposed. Furthermoree, a penalty should not be imposed on the assessee pending his application for stay of recovery. Sub-section (2) provides for cancellation of the order of penalty where as a result of any final order for the tax for the non-payment of which the penalty as levied as "wholly reduced". Apart from this sub-section, the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964, also makes certain provisions for refund of penalty imposed for non-payment of tax.

Sections 222 and 223 ought to be read jointly since they relate to the Tax Recovery Officer and his powers for the recovery of tax. Section 222 makes it clear that the

various modes of recovery set out in that section as well as in sections 226 to 228A are not mutually exclusive but may be pursued concurrently. Further, the several modes of recovery specified in this Chapter are not exhaustive and the Government has right to recover the amounts due under the Act by a suit or by proceedings under any other law (vide section 232). The various modes of recovery set out in this Chapter are operative not only for recovery of tax, but also of interest, fine, penalty or any other sum payable under this Act (vide section 229) and of the expenses of audit fixed by the Commissioner [vide section 142(2D)]. For the purposes of section 222(1), the recovery proceedings can be taken only in cases where an assessee is in default or is deemed to be in default, or a person is deemed to be an assessee in default. Section 218 indicates when an assessee is deemed to be in default in respect of advance tax and section 220 indicates when an assessee is deemed to be in default in respect of any other tax and also interest, fine, penalty or any other sum payable under this Act. Except in cases where an assessee makes his own estimate of advance tax, no assessee can be deemed to be in default unless a notice of demand under section 156 has been duly served on him and is invalid, the assessee who does not comply with it cannot be treated as in default and recovery proceedings cannot be taken against him.

Section 222 provids for recovery by the Tax

Recovery Officer (TRO). Section 2(44) defines "Tax Recovery Officer" as meaning any Income-tax Officer who may be authorized by the Commissioner of Income-tax to exercise the powers of the TRO. Rule 19A of the Second Schedule enables the TRO to delegate any of his functions as TRO to subordinate officers in certain circumstances.

The tax recovery procedure has been somewhat changed after an amendment was made to sections 222 and 223 by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1.4.1989. According to the changed procedure, instead of the Assessing Officer forwarding the certificate to the TRO, now the TRO himself can draw up the certificate specifying the amount of arrears due from the assessee and thereafter, he should proceed to recover the specified amount by one or more of the modes laid down in section 222. Such a certificate is a condition precedent to recovery proceedings. The next step after drawing up a certificate is that the TRO has to serve a notice on the defaulter assessee requiring payment (Rule 2 of Schedule II). After the service of such a notice, without any attachment, the defaulter is barred from dealing with any of his properties in any manner and the Civil Court is prohibited from issuing any process against any property of the defaulter in execution of a money decree.

The TRO has the power to attach and sell the assessee's movable or immovable property and also has the right to arrest and detain the defaulting assessee. Also, a

recovery certificate drawn up by the TRO during the lifetime of the assessee may, after his death, be enforced against his legal representatives (Rule 85 Schedule II).

Section 224 prohibits an assessee from disputing the correctness of the certificate drawn up by the TRO and also empowers the TRO to cancel the certificate or correct any clerical or arithmetical mistake therein. On such cancellation, even if it is made under an error of judgement, the TRO is bound to stop the recovery proceedings.

Section 225 enables the TRO to grant time for payment of tax and stay recovery proceedings initiated by him and also provides for cases where the demand of tax is reduced in appeal or other proceedings.

As is already seen, section 222 provides for recovery by the TRO after a certificate is drawn up for that purpose. **Section 226** provides other modes of recovery which may be adopted concurrently with proceedings under section 222 or even without them. The specific modes for recovery provided are:

Sub-section (2) : Deduction from salary,

Sub-section (3) : Collection from persons who owe money to the assessee,

Sub-section (3) : Application to Court for payment of money in Court's custody.

Under **Section 227**, the recovery machinery of the State and Local Governments is sought to be employed for the money due under the Income-tax Act, and is a logical concomitant of the recovery modes set out in section 226.

Prior to its deletion, **Section 228** pertained to the recovery of Indian Tax in Pakistan and Pakistani tax in India and was a leftover from section 48(6)(9)(10) of the Indian Income-tax Act, 1922. The Section has since been deleted by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1.4.1989.

Section 228A pertains to the recovery of tax in pursuance of agrements with foreign countries. This is, more or less, a piece of ornamental legislation on the statute book. In fact, the decision of the House of Lords in "Government of India v. Taylor (27 ITR 356)" establishes that:

(a) In no circumstances will the courts of a country directly or indirectly, enforce the revenue laws of another country and, therefore, no State can sue in a foreign country for taxes due under the laws of that State;

(b) A claim for foreign taxes is not a liability which the liquidators of a company in liquidation are bound to discharge;

(c) These principles would apply even as between States which are members of the Britith Commonwealth of Nations.[19]

To the best of anyone's knowledge, no country in the world has entered into an agrement with another country to recover the tax dues on each other's behalf.

Provision for recovery of penalties, fine, interest and other sums is made in **Section 229.** The underlying principle of the section is that there should be a demand and a default or there should be a deemed default in respect of items for which no demand is necessary and the person has to pay without a demand.

Under the provisions of **Section 230,** only two categories of persons leaving India have to obtain a Tax Clearance Certificate, viz. (1) those who are not domiciled in India, and (2) those who fall within clause (b) of sub-section (1). A person who is not domiciled in India but intends to return to India may be given individual exemption by the Competent Authority. Under sub-section (2), the owner or a charterer of a ship or aircraft who allows a person to whom this section applies to travel out of India without a tax clearance or exemption certificate is personally liable to pay the tax payable by such passengera. Rules 42, 43 and 44 are relevant to this section.

Section 230A is intended to prevent the alienation of assets which might jeopardise the collection of tax due from the owner of the asset. Sub-section (3) excludes any institution, association or bodies as the Board may notify

in that behalf from the opertion of sub-section (1). The jurisdiction of the Income-tax Officer is only to find out whether tax liability is outstading in respect of the several Acts mentioned in the Section and whether a provision has been made for payment of taxes under those Acts.

Prior to its deletion, vide the Direct Tax Laws (Amendment) Act, 1987 with effect from 1.4.1989, **Section 231** imposed a uniform limit as commencing from the last day of the financial year in which the demand was made or the assessee was deemed to be in default for the commencement of the recovery proceedings.

Section 232 clarifies the position that the modes of recovery provided under the Income-tax Act are not exhaustive. Hence, the Revenue may, instead of pursuing any mode of recovery specified in the Act, file a suit against the assessee for a decree for the amount of arrears. The Government's right to sue may be exercised even after th period of limitation prescribed for proceeding under this Act has expired.

The discussions in the preceding paragraphs deal with the 'coercive recovery procedures' as set out under Head D. - Collection and Recovery. The powers granted to the Revenue for the realization of the amounts due under the Income-tax Act are very wide and the element of 'coercion' is carried forcefully.

However, with a view to further simplify the recovery of taxes, the Chokshi Committee has put forward the following suggestions:

> "The institution of the Tax Recovery Officer should be done away with. The provisions ... should authorise the Assessing Officer himself to issue a show cause notice to the defaulter and thereafter, proceed to recover the taxes by applying various methods, ...
>
> "The notice of commencement of recovery proceedigs should be permitted to be issued at any time before the expiry of three years from the end of the financial year in which the demand was made or in which the person concerned is deemed to be an assessee in default...".[20]

3.7 E. - TAX PAYABLE UNDER PROVISIONAL ASSESSMENT (Sections 233 and 234):

The two sections under this heading have since been delected, **Section 233** by the Taxation Laws (Amendment) Act, 1970, with effect from 1.4.1971; and Section 234 by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1.4.1989.

3.8 F. - INTEREST CHARGEABLE IN CERTAIN CASES (Sections 234A to 234C):

The head entitled 'F. - Interest chargeable in

Certain Cases" contains three sections, viz. 234A, 234B and 234C. **Section 234A** deals with the interest for defaults in furnishing a return of income, **Section 234B** with interest for defaults in payment of advance tax and **section 234C** with interest for deferment of advance tax. These three types of interest are payable by the assessee. The sections have come into force with effect from 1.4.1989. Earlier, section 139(8) imposed interest for default or delay in filing the return of income under section 139 and sections 215, 216 and 217 for defaults pertaining to advance tax. Their place is now taken by the new sections 234A, 234B and 234C, which apply in respect of assessments from 1989-90 onwards. Section 234A imposes interest for omission to furnish or delay in furnishing the return of income; section 234B for failure to pay advance tax and section 234C for paying a lower instalment of advance tax than that payable on 15th September or 15th December. Section 234C also makes a special provision in respect of two items of income - capital gains and winnings from gambling - which the pre-1989 provisions totally excluded for the computing of advance tax.

About section 234C(1), N.A.Palkhivala opines that it is, "singularly clumsy in drafting; it is difficult to make sense out of the words, 'from for a period of three months...'"[21].

3.9 SUMMARY:

The overall picture that emerges through the above analysis of the sections contained in Chapter-XVIII

(Collection and Recovery of Tax) is that the collection and recovery machinery under the Income-tax is rather rigid and tied down with too many procedural formalities. At the same time, it must be conceded that a large quantum of the tax revenue is collected in the pre-assessment stage. The Department has only to remind the assessees gently to meet the deadlines for the payment of advance tax and avoid penalties, fines, etc. However, poorly drafted tax forms, long queues, rude officials and cumbersome procedures all reduce compliance.

contd. on next page.

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4. Phaltan Sugar v. CIT 17 ITR 499.
5. Bennett Coleman v. Damle 157 ITR 812.
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7. Aboobacker v. UoI 177 ITR 358, affirming 176 ITR 481.
8. Sanyasi v. Govt. of AP 178 ITR 31.
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18. Chokshi Committee, _op.cit._, p.2.
19. Paul v. TRO 117 ITR 412.
20. Chokshi Committee, _op.cit._, p.181.
21. Palkhivala, N.A., _op.cit._, p.1462.

NOTE:

The interpretative content of this Chapter is based on the section-wise commentaries contained in:

(1) Chaturvedi, K. and S.M.Pithisaria : "Income Tax Law", 2nd Edition;

(2) Chopra, O.P. : "Income Tax Law and Practice", 2nd Edition;

(3) Palkhivala, N.A. and B.A.Palkhivala : "The Law and Practice of Income Tax", 8th Edition;

(4) Sundaram, V.S. : "Law of Income Tax in India", Eleventh Edition;

and the quotations from the judgments of the High Courts and the Supreme Court of India have been extracted from these authoritative works. The researcher's analytical prowess was also influenced by assorted RBI/IMF/World Bank publications.

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