CHAPTER 22

LIABILITY IN SPECIAL CASES

LEARNING OUTCOMES

After studying this chapter, you would be able to

- comprehend the manner in which assessment is made in the hands of the legal representative.
- explain the extent of liability of the legal representative in respect of tax dues of the deceased person.
- comprehend the meaning of “Representative assessee”.
- explain the right of a representative assessee to recover the tax paid from the person on behalf of whom he has paid tax.
- explain the manner of taxation of discretionary trusts.
- discuss the chargeability of income in the hands of the executor.
- explain the liability of successor to business in respect of tax chargeable from the predecessor.
- identify the cases where income earned during a financial year is assessed in the same financial year.
- discuss the obligations of the liquidator of a company in liquidation.
- examine the liability of directors of a private limited company in liquidation.
22.1 LEGAL REPRESENTATIVES [SECTION 159]

(1) **Meaning:** Section 2(29) states that the term “legal representative” in the Income-tax Act, 1961 has the meaning assigned to it in clause (11) of section 2 of the Code of Civil Procedure, 1908.

Section 2(11) of the Code of Civil Procedure - “Legal representative” means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

It is not necessary that the legal representative should be the beneficial owner of the estate. Nor need he be in possession of any property of the deceased. It is sufficient that the estate devolves on him. So far as HUF is concerned it continues to exist as an assessable unit despite change in its composition including the change of its Karta by death or otherwise and consequently there is no scope or necessity for involving this section when a Karta dies. Where a person leaves a will appointing executors, the executors are the legal representative. The Act expressly declares that the legal representative is deemed to be an assessee for the purpose of this Act.

(2) **Assessment on legal representative:** This section applies irrespective of whether the assessment proceedings has not been started, or were pending, or were completed and the assessment made, before the death of the deceased.

For the purpose of making an assessment and for the purpose of levying any sum in the hands of the legal representative –

- any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from that stage.

- any proceedings which could have been taken against the deceased for a default committed by him, can be started against the legal representative.

- all the provisions of the Act shall apply accordingly.

If at the date of death of the deceased, a return of income had not been made under section 139(1) and a notice under section 142(1)(i) or section 148, as the case may be, had not been served on him, the Assessing Officer should first issue the notice under appropriate section to the legal representative of the deceased and then proceed to assess the income of the deceased in the hands of the representative as if the representative were the assessee.

It is obligatory upon the representative to comply with the notices appropriately served.
Assessment may be made on the representative under section 147 in respect of income of the deceased which had escaped assessment in the relevant years.

(3) **Penalty on legal representative:** Similarly, penalty proceedings which could have been taken against the deceased for a default committed by him, can be started against the legal representative. He, being an assessee, is also liable to a penalty for his own default.

(4) **Income upto the date of death and the end of the accounting year:** Students should carefully note that section 159 applies in respect of the income of the deceased only upto the date of death and not upto the end of the accounting year in which the death occurs. The income of the estate for the period from the date of death upto the end of the accounting year in which the death occurs should be assessed under section 168 in the hands of the executor. Thus in respect of the year of death two separate and distinct assessments would have to be made, the prior one on the legal representative under section 159 and the latter one on the ‘executors’ under section 168. This may even lower the incidence of tax for the year. The position will be the same even if the representative and the ‘executor’ are one and the same.

(5) **Apportionment:** As a consequence of two separate assessments as mentioned above apportionment of income between the two periods becomes necessary. Here it is to be noted that certain incomes like dividends or interest if they become payable after the death cannot be apportioned to the period upto the date of death because they do not accrue from day to day.

(6) **Liability of legal representative:** The Act imposes a liability on the legal representative not only in respect of tax but also any other sum (penalty, fine or interest) which the deceased would have been liable to pay if he had not died. This liability is limited to the extent to which the estate is capable of meeting the liability. But if the legal representative, while his tax liability remains undischarged, creates a charge on or disposes off or parts with any of the assets of the estate of the deceased which are, or may, come into his possession, this personal liability shall, however, be limited to the value of the assets so charged, disposed of or parted with. This personal liability is imposed by sub-section (4) only in respect of tax and not in respect of penalty, fine or interest.

The provisions of section 161(2), 162 and 167 (discussed later in this chapter) shall apply to legal representative to the extent they are not inconsistent with the provisions of this section.

**22.2 REPRESENTATIVE ASSESSEE**

(1) **Meaning [Section 160]:** Besides the legal representatives mentioned above, in certain cases, the income received by one person can be assessed in the hands of another. Persons who are liable to be assessed on behalf of other because of their
association with the real recipient of the income are known as representative assessees. The expression ‘representative assessee’ means:

<table>
<thead>
<tr>
<th>In respect of</th>
<th>Representative assessee</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Income of a non-resident which is deemed to accrue or arise to him in India</td>
<td>Agent of a non-resident including a person who is treated as an agent under section 163</td>
</tr>
<tr>
<td>2. Income of a minor, a lunatic or an idiot</td>
<td>Guardian or a manager of such person who is entitled to receive or is in receipt of income on such person.</td>
</tr>
<tr>
<td>3. Income for which the Court of Wards, Administrator-General, Official Trustee, Receiver or Manager appointed by or under any order of a court, to receive such income on behalf of or for the benefit of any person</td>
<td>Such Court of Wards, Administrator-General, Official Trustee, Receiver or Manager so appointed</td>
</tr>
<tr>
<td>4. Income for which a trustee is appointed under a trust deed by a duly executed instrument in writing, whether, testamentary or otherwise, to receive such income on behalf of or for the benefit of any person</td>
<td>Such trustee or trustees so appointed</td>
</tr>
<tr>
<td>5. Income for which a trustee is appointed under an oral trust to receive such income on behalf of or for the benefit of any person</td>
<td>Such trustee or trustees so appointed</td>
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Every representative assessee is deemed to be an assessee under the Income-tax Act.

A trust which is not declared by a duly executed instrument in writing (including a Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913) shall be deemed to be a trust declared by a duly executed instrument in writing if a statement in writing signed by the trustee or trustees and setting out the purpose or purposes of the trust, particulars of the trustee or trustees, the beneficiary or beneficiaries and the trust property, is prepared and forwarded to the Assessing Officer within the specified time limit. The specified time limit will be three months from the date of the declaration of the trust. [Explanation 1]

For this purpose, the item ‘oral trust’ means a trust which is not declared by a duly executed instrument in writing including any Wakf deed and which is also not deemed under Explanation 1 to be a trust declared by a duly executed instrument in writing. [Explanation 2]

(2) **Liability of representative assessee [Section 161]**: Every representative assessee has the same responsibilities, duties and liabilities as if the income were being received by or accruing to or in favour of him beneficially. He is liable to be assessed in his own name in respect of such income but the assessment is deemed to have been made upon him in his representative capacity. The tax is levied on and is recovered from such an
assessee, in like manner and to the same extent as it would have been levied upon and recovered from the person represented by him.

Where any income in respect of which the trustee, appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise, including any valid wakf deed, is liable as a representative assessee, consists or includes profits and gains of business, tax shall be charged on the whole of the income in respect of such a person at the “maximum marginal rate”.

However, this provision will not apply in cases where 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 and such trust is the only trust so declared by him.

If certain income is assessed in the hands of any person in the capacity of representative assessee, the same income shall not be assessed in his hands under any other provision of the Act [Section 161(2)].

(3) **Right of a representative assessee to recover tax paid [Section 162]:** Every representative assessee who pays any amount under the Act, is entitled to recover the sum so paid from the person on whose behalf he had paid it or to adjust it against any moneys in his possession, but belonging to the other persons. The representative assessee has the right to retain out of the moneys in his representative capacity, an amount equal to any sum paid or payable by him under the Act in addition to the right to recover the same from the beneficial owner of the income.

Any representative assessee or any person who apprehends that he may be assessed in respect of any other person (principal) as a representative assessee, has the right to retain out of the money payable by him to such other person, amount to the extent of his estimated liability.

In case of disagreement between the principal and representative assessee, such representative assessee, may secure from the Assessing Officer a certificate stating the amount to be so retained pending final settlement of the liability. The certificate so obtained shall be treated as warrant authorising retention of the amount.

The amount recoverable from such representative assessee at the time of final settlement shall not exceed the amount specified in such certificate. However, where representative assessee holds, in his hands, any additional assets of the principal at the time of final settlement, then the Assessing Officer may initiate the recovery of the balance tax liability of the principal from such representative to the extent of assets hold by him.

(4) **Statutory agent of non-residents [Section 163]:** An agent is considered a representative assessee but only if he is the agent of non-resident person. According to section 163, an agent, in relation to a non-resident person, includes any person in India:

(i) who is employed by or on behalf of the non-resident;
(ii) who is having any business connection with the non-resident;

(iii) from or through whom the non-resident is in receipt of any income, whether directly or indirectly;

(iv) who is trustee of the non-resident; and

any other person who (whether resident or non-resident) has acquired a capital asset in India by means of a transfer from the non-resident.

In the first four cases stated above, the person sought to be assessed as the agent of a non-resident must necessarily be in India whereas it need not be so in the fifth case. Thus, a non-resident may be treated as the agent of another non-resident. The appointment of the agent may be made any time before or after the expiry of the relevant previous year. An agent of a non-resident may be appointed under this section even if at the date of such appointment, the non-resident is not alive.

According to the proviso to this section, where transactions are carried on in the ordinary course of business through a broker in India and the broker does not deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker, the broker in India cannot be treated as statutory agent in respect of the income arising to the non-resident from such transactions. Thus, where bona fide hedging transactions take place through a broker in India and a foreign broker acting for an undisclosed principal, the Indian broker cannot be deemed to be agent of the foreign principal. But generally a broker is not deemed to be the agent of a non-resident person so long as he functions exclusively in his capacity as a broker.

For the purposes of section 163(1), the expression “business connection” shall have the meaning assigned to it in Explanation 2 to clause (i) of section 9(1) of the Income-tax Act, 1961. [Explanation to section 163(1)]

Before a person can be treated as an agent of a non-resident he must be given a reasonable opportunity of being heard by the Assessing Officer as to his liability to be so treated.

22.3 TAXATION OF DISCRETIONARY TRUSTS

[SECTION 164(1)]

Section 164 deals with taxation of trustees of discretionary trusts. This section applies in the case of a representative assessee referred to in clause (iii) or clause (iv) of sub-section (1) of section 160 in a case where any income or part thereof is not specifically receivable on behalf of or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown.

The representative assessees referred to in clauses (iii) and (iv) of section 160(1) are the Court of Wards, the Administrator General, the Official Trustee or any receiver or manager.
including any person whatever his designation who in fact manages the property on behalf of another, appointed by or under any order of a Court and a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including any Wakf Validating Act, 1913).

Such a discretionary trust will be liable to tax at the maximum marginal rate of income-tax on their entire income.

With a view to obviating hardship in genuine cases where the circumstances are such that tax evasion could not be considered to be main purpose of creating a trust, certain exceptions have been specified where the trust would not be taxed at the maximum marginal rate. The exceptions are as under:

1. Where none of the beneficiaries has any other income chargeable to tax exceeding the maximum amount not chargeable to income-tax in the case of an AOP and none of the beneficiaries is a beneficiary under any other trust; or

2. Where the discretionary trust is created under a will and such trust is the only trust so created under the will.

3. In case of a discretionary trust created prior to 1.3.1970 by a non-testamentary instrument if the Assessing Officer is satisfied that the trust was so created bona fide exclusively for benefit of the dependent relatives of settlor or where the settlor is a H.U.F. for the benefit of the members of such families in circumstances where such relatives or members are mainly dependent on the settlor for their support and maintenance.

4. In cases where the income is receivable by the trustee on behalf of provident fund, superannuation fund, gratuity fund, pension fund or any other fund created bona fide by a person carrying on a business or profession exclusively for the benefit of persons employed in such business or professions.

In the above four cases the income of the trustees will not be taxed at the marginal rate but at the rate applicable to the income of an association of persons.

Where any income in respect of which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise, is liable as a representative assessee consists of or includes profits and gains of business, the above concessional treatment i.e. assessing the income at the rate applicable to an AOP will 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 and such trust is the only trust so declared by him.

For the purposes of these provisions, a trust under which a discretionary power is given to the trustees, to decide the allocation of the income every year or a right is given to the beneficiary to exercise the option to receive the income or not each year will all be regarded as discretionary trusts and assessed accordingly. This is made clear in Explanation 1 to section
164 which provides as under.

(a) Any income in respect of which the Court of Wards, the Administrator General, the Official Trustee, receiver, manager, trustee or mutawalli appointed under a Wakf deed is liable as a representative assessee or any part thereof shall be regarded as not being specifically receivable on behalf or for the benefit of any person unless the person on whose behalf or for whose benefit such income or such part thereof is receivable during the previous year is expressly stated in the order of the Court or the instruments of trust or wakf deed, as the case may be, and is identifiable as such on the date of such order, instrument or deed. For this purpose, it is not necessary that the beneficiary in the relevant previous year should be actually named in the order of the Court or the instrument of trust or wakf deed, all that is necessary is that the beneficiary should be identifiable with reference to the order of the Court or the instrument of trust or wakf deed on the date of such order instrument or deed.

(b) The individual shares of the person on whose behalf or for whose benefit such income or part thereof is receivable will be regarded as indeterminate or unknown unless the individual shares of such persons are expressly stated in the order of the court or the instrument of trust or wakf deed, as the case may be, and are ascertainable as such on the date of such order, instrument or deed.

This explanation seeks to prevent trustees and beneficiaries from manipulating the arrangements in such a manager that a discretionary trust is converted into a specific trust whenever it suits them tax-wise.

(1) **Income from property held under trust wholly for charitable or religious purposes [Section 164(2)]:** In case the income, in respect of which the shares of the beneficiaries are indeterminate or unknown, is derived from property held under trust wholly for charitable or religious purpose or which is of the nature referred to in section 2(24)(iia) [voluntary contributions received by a trust] or which is of the nature referred to in sub-section (4A) of section 11 [business income received by a trust], the tax shall be charged on so much of the income as is not exempt under section 11 or section 12 as if the income not so exempt were the income of an association of persons.

However, where the whole or any part of the relevant income is not exempt under section 11 or section 12 because any income thereof is for the benefit of prohibited persons or the rules with regard to investments in specified channels have not been followed, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate.

(2) **Income from property held under trust partly for charitable or religious purposes and partly for other purposes [Section 164(3)]:** In case the income is derived from property held under trust partly for charitable or religious purposes and partly for other purposes or which is of the nature referred to in section 2(24)(iia) (voluntary contributions received by a trust) or which is of the nature referred to in sub-section (4A) of section 11
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(business income received by a trust) and the individual share of the beneficiaries in the income applicable to purposes other than charitable or religious purposes is not known, tax liability will be the aggregate of the following:

(a) the tax which would be chargeable on that part of the relevant income which is applicable to charitable or religious purposes (as reduced by the income, if any, which is exempt under section 11 as if such part (or such part so reduced) were the total income of the association of persons; and

(b) the tax on that part of income which is applicable to purposes other than charitable or religious and in respect of which shares of beneficiaries are indeterminate or unknown, at the maximum marginal rate.

However, in the following cases, income will be charged to tax as if it were income of an association of persons:

(a) where none of the beneficiaries has any other income chargeable to tax exceeding the maximum amount not chargeable to income-tax in the case of an AOP and none of the beneficiaries is a beneficiary under any other trust; or

(b) where the trust is created by will and such trust is the only trust so declared by him; and

(c) where the trust is a non-testamentary one created before March 1, 1970 for the exclusive benefit (to the extent it is not utilised for charitable or religious purposes) or relatives of the settler mainly dependent on the settler for their support or maintenance or where settler is a Hindu undivided family, for the exclusive benefit of its members so dependent upon it.

Where the relevant income consists of or includes profits and gains of business, the preceding concessional method of taxation shall apply only if the income is 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.

Where the whole or any part of the relevant income is not exempt under section 11 or section 12 because any income thereof enures to the benefit of prohibited persons or the rules with regard to investment in specified channels have not been followed, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate.

(3) **Taxation of Oral Trusts [Section 164A]**: Under this provision, any income which a trustee receives or is entitled to receive on behalf of or for the benefit of any person under an oral trust will be chargeable to income tax at the maximum marginal rate.

(4) **Case where part of trust income is chargeable [Section 165]**: In cases where only same portion of the trust income to which the beneficiary or beneficiaries is/are entitled is
22.10 **DIRECT TAX LAWS**

taxable and the other portion is not taxable, the taxable portion of the income received by him from the trust as a beneficiary shall be only such portion thereof as bears to the whole income of the trust. In other words, where a part only of the trust income is chargeable to tax under this Act, the beneficiaries’ share of the income should be taken to be that derived proportionately from the chargeable and non-chargeable portions of the trust income and should be assessed accordingly in the hands of trustee/s.

22.4 **DIRECT ASSESSMENT OR RECOVERY NOT BARRED [SECTION 166]**

In case of a beneficiary or the person on whose behalf or for whose income is receivable is received by any other person, then such beneficiary or the person on whose behalf or for whose benefit, it is so received shall be liable to be assessed directly and tax can also be recovered from him.

22.5 **REMEDIES AGAINST PROPERTY IN CASES OF REPRESENTATIVE ASSESSEES [SECTION 167]**

The Assessing Officer shall have the same remedies against all property of any kind vested in or under the control or management of any representative assessee as he would have against the property of any person liable to pay any tax irrespective of the fact whether the demand is raised against the representative assessee or against the beneficiary direct.

22.6 **EXECUTORS AND ADMINISTRATORS [SECTIONS 168 AND 169]**

(1) **Who is an executor or administrator?**

Executor is a person appointed to carry out to carry out the instructions and wishes of the deceased and to administrate the estate of a deceased person. The executor is appointed by the testator of the will (the individual who makes the will). An administrator is a person appointed by competent authority to administer the estate of a deceased person when there is no executor.

Executor includes an administrator or other person administering the estate of a deceased person. [Explanation to section 168]

(2) **Chargeability of income in the hands of executor:** Where executors and administrators or other persons have been appointed to administer the estate of a deceased, the income arising from such an estate shall be chargeable to tax in the hands of the executor or executors, as the case may be.
In case there is one executor - If there is one executor the assessment shall be made on him in the status of an individual.

In case of more than one executor - If on the other hand, there are more executors than one, then the assessment will be made on them in the status of an association of persons.

The residential status of the executor shall be determined on the basis of the residential status of the deceased person during the previous year in which his death took place.

(3) **Separate assessments on executor:** The assessment of an executor shall be made separately from any assessment that may be made on him in respect of his own income.

Separate assessment shall be made on the executor or executors on the total income of each completed previous year or part thereof as is included in the period from the date of death of the deceased to the complete distribution to the beneficiaries of the estate according to their several interests.

The income chargeable in the hands of the executor or administrator is the income of the period commencing from the date of the death of the deceased. Any income in respect of any period prior to the date of death i.e., from the first day of the accounting year and ending with the date of death should be assessed in the hands of the legal representative under section 159.

(4) **Income applied for the benefit of specific legatee to be excluded from total income of executor:** In computing total income of any previous year, any income of the estate of that previous year which is distributed or applied to the benefit of any specific (but not residuary) legatee of the estate during that previous year shall be excluded from the computation of the total income of that previous year assessed in the hands of the executors. The income so excluded shall, however, be included in the total income of the previous year of the ‘specific legatee’ himself.

However, where the executors apply a portion of the income received by them from the estate in a particular way pursuant to the directions of the testator or other legal obligations, it is merely an application of income and would not entitle the executors to claim any deduction in respect of the income so applied. Thus, payment of the cost of the probate, death duties and other debts due to the State or periodic payments to the beneficiaries (other than the specific legatees) property of the testator or to a Court cannot be excluded in computing the executor’s chargeable income from the estate.

Under the general law when an executor gives his assent to a specific legatee, the title of the legatee relates back to the date of death and consequently the income arising after the death and before the asset belong to the legatee is taxable in his hands but not as the income of the executor. However, it is only the income distributed to or applied for the benefit of any specific legatee during the previous year which should be excluded from
the executors' total income. In other words, if the income is not so distributed or applied in the previous year, it would be taxable as part of the income of the executor. If the executor is also the sole beneficiary it does not necessarily follow that he receives the income in the latter capacity.

If the legatee is a residuary legatee, the income from the residue is the income of the executor taxable in his hands so long as the estate has not been completely administered; it is only after the estate is fully administered and the net residue is ascertained that the residuary legatee gets a title and the income, therefore, can be said to accrue to him and can be taxed in his hands. This principle would apply irrespective of the fact whether the residue is settled in trust for a life tenant or is bequeathed absolutely and it would apply even if a part of the income of the estate had been actually paid on account to the residuary legatee pending the administration of the estate. However, the administration may be regarded as completed, the executor’s assent to the residuary legacy as valid and the legatee’s title as established, although some liabilities due by the estate may remain undischarged.

(5) **Right of executor to recover tax paid:** According to section 169, the rights of the executors for retention and reimbursement or for the recovery of the tax paid by them are the same as those of representative assessees under section 162 i.e., the executor will be able to recover such tax from the estate or from the persons on whose behalf it is paid.

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**22.7 LIABILITY OF SUCCESSOR TO BUSINESS IN RESPECT OF TAX CHARGEABLE FROM THE PREDECESSOR [SECTION 170]**

(1) **Assessment of successor and predecessor:** Where a person carrying on any business, profession, or vocation is succeeded by another person who continues to carry on that business or profession, both the successor and the person who is succeeded to (hereinafter called the predecessor) shall be assessed in respect of the actual share to which he is separately entitled in his income, profits and gains of the previous year. Thus, the predecessor in business would be assessable in respect of the income of the year of succession up to the date of succession while the successor would be assessable in respect of the income of that year after the date of succession. Accordingly, the income of the year in which the succession takes place is to be apportioned between the predecessor and the successor with the share of each. The income must be computed separately and each must be granted the deductions and allowance applicable to him. The assessment on each of these persons must be separate and distinct.
(2) **Assessment when predecessor cannot be found:** Where the predecessor cannot be found, the assessment of

- the income of the year in which the succession took place up to the date of succession and

- of the one year preceding the year of succession

should be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of the Act shall apply accordingly.

(3) **Recovery of sum payable by predecessor from the successor:** If the assessment has already been made on the predecessor for either or both of the years aforesaid, but the sum payable in pursuance of each assessment cannot be recovered from the predecessor or any person, the sum payable by the predecessor shall be payable and recoverable by the successor. Successor shall be entitled to recover the full amount of sum paid by him from the predecessor.

Under this section, the Assessing Officer is required to record a finding that the sum in respect of the income of the year of succession or the preceding year cannot be recovered from the predecessor, before seeking to recover such sum from the successor.

(4) **Predecessor income includes capital gain by virtue of succession:** The successor’s liability to tax arises also in respect of any gain (e.g., capital gains) accruing to the predecessor from the transfer of the business or profession as a result of the succession. [Explanation to section 170].

**22.8 INCOME EARNED IN A FINANCIAL YEAR ASSESSED IN THE SAME FINANCIAL YEAR - EXCEPTIONS TO THE GENERAL RULE [SECTIONS 174 TO 176]**

Generally, the assessment year is always ahead of the previous year. In other words, income which is earned during one financial year is not charged to tax in that very same year but in the next following financial year. To this general rule, there are certain exceptions which are as under:

(1) **Persons leaving India [Section 174]**

Where it appears to the Assessing Officer that any individual may leave India during the current financial year or shortly after its expiry and that there is no present intention of his returning to India, the Assessing Officer may proceed to assess his total income for the period comprised in the current financial year i.e. the total income of the period from the expiry of the last previous year and if a previous year has already been determined in his
case upto the probable date of his departure.

The total income of each completed previous year or part thereof including such period shall be chargeable to tax at the rates in force in that assessment year and separate assessment must be made in respect of each such completed previous year or part thereof. The Assessing Officer is entitled to estimate the income of the individual leaving India for such period or part thereof in cases where his income cannot be readily determined in the manner provided in the Act for the computation of income under each head.

For the purposes of making this assessment, the Assessing Officer may serve a notice upon the assessee requiring him to furnish within such time (not being less than seven days), as may be specified in the notice, a return under section 142(1)(i) setting forth his total income for each completed previous year comprised in the period of assessment, and his estimated total income for any part of the period. If an assessee does not furnish the return as required by the notice of the Assessing Officer, a best judgment assessment must be made on him under section 144; non-compliance with the requirements of the notice may also attract liability to penalty under section 271.

The tax chargeable on any individual under the section shall be over and above the tax, if any, chargeable under any other provision of the Act.

Assessment under this section may be made even on the income of the period beyond the expiry of the assessment year if the probable date of the assessee’s departure is after the expiry of the assessment year. In addition to the issue of notice for making an assessment under this section, the Assessing Officer may as well issue notice under sections 142 (1)(i) and 148(1) requiring him to furnish a return and other relevant information within such period being not less than seven days, as he may think fit. Thus, the Assessing Officer is empowered to make more assessment than one on a person leaving India before his departure from India.

(2) **AOP or BOI or Artificial Juridical Person formed for a particular event or purpose [Section 174A]**

Section 174A provides for accelerated assessments in cases of certain AOP, BOI etc. If such AOP, BOI etc. is formed or established for a particular event or purpose and the Assessing Officer apprehends that the AOP/BOI is likely to be dissolved in the same year or in the next year, the Assessing Officer can make assessment of the income upto the date of dissolution as income of the relevant assessment year. The proceedings in this case shall be on the same basis as contained in section 174 which deals with accelerated assessment of persons leaving India.

(3) **Persons trying to alienate their assets [Section 175]**

If it appears to the Assessing Officer during any current assessment year that any person
is likely to charge, sell, transfer, dispose of or otherwise part with any of his assets with a view to avoiding payment of the whole or any part of his liability under the Income-tax Act, the total income of such person, for the period from the expiry of the previous year for that assessment year to the date when the Assessing Officer commences proceedings under this section shall be chargeable to tax in that assessment year itself. The proceedings in this case also shall be on the same basis as contained in section 174 which deals with accelerated assessment of persons leaving India.

(4) **Discontinuance of business or profession [Section 176]**

Where any business or profession is discontinued in any assessment year, an assessment may be made in that very year of the income from business for the period between the expiry of the previous year relevant to that assessment year and the date of discontinuance, in addition to the assessment, if any, made on the income, profits or gains of the earlier previous year or years. Thus, the Assessing Officer has an option to make a premature assessment of the profits earned up to the date of discontinuance in the year of discontinuance instead of the usual financial year.

Discontinuance and dissolution of business or profession by an association or a firm do not fall within the provisions of section 176 as they are dealt with under sections 177 and 189 respectively.

(i) **Meaning of discontinuance of business:** The term ‘discontinuance’ used in this context, refers to complete cessation of the business instead of a mere change of ownership or change in the constitution of firm. A change of ownership may involve succession and, for purpose of this section, a business must be regarded as being continued despite successive changes in its ownership. Since succession and discontinuance are two mutually exclusive concepts there cannot be a discontinuance in cases where there is succession. If a part of the business of an assessee is dropped owing to its non-profitable nature, either permanently or temporarily, it would not imply that the business has been discontinued. In other words, inactivity in trade does not lead to the conclusion that the trade has been discontinued. There may be cases where the trade may be carried on even after the dissolution of the firm or the liquidation of the company. The amalgamation of two separate and independent business belonging to two distinct owners may result in the discontinuance of those business and the change of ownership. Where the business of a joint family or a firm is split up on partition of the family or the dissolution of the firm and the business is divided into branches or portions amongst the members, it would be a case of discontinuance of the old business even if some or all the members carry on their business in the same premises and take advantages of the old business connections. This is because of the fact that in such a case of the assessee i.e., the family or the firm, has ceased to carry on the business and their is no succession insofar as the integrity of the business is not preserved as was held in Sait Nagjee Purshotam and Co. Vs. C.I.T. (1964) 51 I.T.R. 489 (S.C.).

(ii) **Meaning of discontinuance of profession:** In the case of a profession a firm may discontinue its profession though its patterns may remain in the profession and vice
versa. Where a professional man joins a firm, he does not cease to carry on his profession and only when he retires from the firm and ceases to practice once and for all he would be said to have discontinued his profession even though the firm in which he was a partner might continue to function after his retirement with or without new partners. In order to constitute proper discontinuance of the profession for purposes of this section it is not essential that there should be a complete cessation of the professional practice for the rest of man’s life. For instance, an advocate would be said to have discontinued his professional practice when he takes up a full-time assignment as a judge or a legal adviser; but after retirement or resignation from the service he is entitled to return to his professional practice again.

(iii) **Separate assessment of each year:** The total income of each completed previous year or part thereof included in the period for which assessment is to be made shall be computed separately and shall be chargeable to tax at the rate or rates in force in respect of each of the relevant assessment years.

(iv) **Notice to Assessing Officer:** Any person discontinuing his business or profession must necessarily give notice to the Assessing Officer of the fact of discontinuance within fifteen days from the date thereof. Failure to give this notice would entail the levy of penalty under section 272.

(v) **Income received after discontinuance:** In the case of discontinuing any business or profession on account of the cessation of the profession by, or on the retirement or death of the person carrying on profession, any sum received in any year after the date of discontinuance is deemed to be the income of the recipient and charged to tax accordingly in the year of receipt in his hands as if the amount would have been included in his total income if it had been received before the discontinuance.

The other procedural provisions in regard to service of notice, mode of assessment, collection of tax etc. are the same as those applicable to a person leaving India, as discussed earlier.

# 22.9 LIABILITIES ARISING WHEN AN ASSOCIATION CARRYING ON BUSINESS IS DISSOLVED OR BUSINESS IS DISCONTINUED [SECTION 177]

(1) Where any business or profession carried on by an association of persons had been discontinued or where an association of persons is dissolved, the Assessing Officer is bound to make an assessment of the total income of the association of persons as if no such discontinuance has taken place. Consequently, all the provisions of the Act, including those relating to the levy of penalty or any other sum chargeable under the Act, apply to such an assessment.

(2) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceeding under the Act, in respect of any association of persons is satisfied that the association of
persons is guilty of any of the acts attracting the provisions of sections 270 to 275, he may impose or direct the imposition of a penalty in accordance with those sections.

(3) Every person who was at the time of discontinuance or dissolution a member of the association of persons, and the legal representative of any such member who is deceased, shall be jointly and severally liable for the amount of tax penalty or other sum payable and all the provisions of the Act, so far as may be, shall apply to any such assessment, imposition of penalty etc.

(4) Where the dissolution or discontinuance had taken place after the commencement of any proceeding under the Act, the proceeding may be continued against the member of the association immediately prior to the discontinuance or dissolution and the legal representative of any deceased member from the stage at which they stood at the time of discontinuance or dissolution. The liability of the legal representative of any deceased member shall, however, be limited to the extent to which the estate is capable of meeting the liability. But if the legal representative, while his tax liability remains undischarged, creates a charge on or disposes off or parts with any of the assets of the estate of the deceased which are, or may, come into his possession, this personal liability shall, however, be limited to the value of the assets so charged, disposed of or parted with.

### 22.10 COMPANIES UNDER LIQUIDATION [SECTIONS 178 AND 179]

(1) **In the case of all companies [Section 178]**

(i) **Notice to Assessing Officer:** Every person

   (a) who is the liquidator of any company which is being wound up, whether under the orders of a Court or otherwise, or

   (b) who has been appointed as the receiver of any assets of a company

   is bound under a statutory obligation to give notice of his appointment as liquidator or receiver, as the case may be. This notice may be given within thirty days of his appointment to the Assessing Officer having jurisdiction to assess the income of the company.

(ii) **Information of tax due by the Assessing Officer:** The Assessing Officer, in his turn is bound after making such enquiries or calling for such information as he may deem fit, to notify to the liquidator, within three months from the date of receipt of the notice of appointment, of the amount which in his opinion would be sufficient to provide for any tax which is then or likely thereafter to become payable by the company.

(iii) **Restriction on liquidator to part with assets:** The liquidator is debarred from
parting with the assets of company and its properties in his hands until he is notified by the Assessing Officer of the amount which will be sufficient to provide for any tax which is then, or is likely thereafter, to become payable by the company except with the prior approval of
- the Principal Chief Commissioner or
- Chief Commissioner or
- Principal Commissioner or
- Commissioner

and on being so notified, shall aside an amount equal to the amount notified.

However, the above restriction of debarring the liquidator from parting with assets or properties shall not be applicable on
- payment of the tax payable by the company,
- payment to secured creditors whose debts are entitled under law to priority of payments over the debts due to the Government on the date of liquidation and
- meeting such costs and expenses of the winding up of the company

as are, in the opinion of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or the Commissioner, reasonable.

(iv) **Consequences of failure to give notice or set aside the tax due by the liquidator:** If the liquidator fails to notify the Assessing Officer of his appointment within the time specified or fails to set aside the amount intimated by the Assessing Officer as being sufficient to provide for the tax liability of the company or parts with any of the assets or property of the company in his hands in contravention of the above provisions, he shall be personally liable for payment of the tax which the company would be liable to pay.

However, if the amount of any tax payable by the company is notified by the Assessing Officer, the personal liability of the liquidator under this sub-section shall be to the extent of such amount.

Failure to comply with the above requirement would be an offence punishable under section 276A.

Where there are more liquidators than one, their obligations and liabilities under this section are joint and several.

(v) ** Overrides other laws except IBC, 2016:** The provisions of this section have the effect of over-riding anything to the contrary contained under the Companies Act or any other law for the time being in force and apply to all companies, public or
private except the provisions of Insolvency and Bankruptcy Code, 2016.

(2) **In the case of private companies [Section 179]**

(i) **Liability of directors:** Where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was director of a private company at any time during the relevant previous year shall be jointly and severally liable for the payment of the tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

The personal liability imposed by this section on the directors of a private company shall have the effect of over-riding any provision under the Companies Act, 2013 by which the liability of the directors is reduced or curtailed. Thus, personal liability can be imposed by the Assessing Officer on a direction even without any adjudication by a Court.

(ii) **Meaning of Tax Due:** For the purposes of this section, “tax due” includes penalty, interest or any other sum payable under the Income-tax Act, 1961.
Question 1

“NEPTUNE” is a shipliner, used in carrying passengers and cargo, owned by M/s Thomas & Thomas of U.K. The ship carried the passengers and cargo in June, 2016 from Singapore to Chennai and vice versa and collected charges thereof amounting to ₹ 200 lacs. It left Chennai port on 15.6.2016 for its journey to Korea. No other journey to India was undertaken by any of the vessels of the company during the year ended on 31.3.2017. The non-resident company had authorized its Indian agent to comply with the income tax provisions.

You are consulted by the company to explain about the procedure as to return of income to be filed and the period within which the assessment thereof will be completed by the Assessing Officer.

Answer

M/s. Thomas & Thomas of U.K shall be required to file the return of income in India for the journey of its ship before it leaves for onward journey to Korea.

However, as per the proviso to section 172(3), where the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return before the departure of the ship from the port, and if satisfactory arrangements have been made for filing of return and payment of tax by the authorised agent in India, he may permit filing of return within 30 days of departure of the ship.

Section 172(4A) provides a time limit of 9 months for completion of assessment in such cases. The period of 9 months is reckoned from the end of the financial year in which the return under section 172(3) is furnished.

Question 2

The directors of a private company are personally liable to pay the income tax due from the company but their liability does not extend towards interest and penalty payable by the company. Discuss.

Answer

Section 179 contains the provisions relating to the liability of directors of a private company in liquidation in respect of tax due from the company. Where any tax due from a private company in respect of income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of such company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax. However, the director shall not be so liable if he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

Explanation to section 179 clarifies that the expression “tax due” includes penalty, interest or any other sum payable under the Act. Therefore, the directors liability is not confined to tax alone but extends to penalty, interest or any other sum payable by the company.
Question 3

In respect of the taxes due from a private limited company, which could not be recovered from it, the Tax Recovery Officer attached the properties of an erstwhile director for recovery thereof. It was contended by the director that a notice under section 156 had not been served on him and therefore, the proceedings for recovery were not valid. What is the correct legal position?

Answer

The liability of a director of a private limited company for arrears due from the company is provided in section 179. There is no necessity to issue a notice to a director, because the position of a person on whom liability is fastened is equated to that of an ‘assessee’ in default. For the purpose of section 220(4), the person held liable under section 179 would be deemed to be an assessee-in-default. This may be contrasted with the arrears of a partnership firm which may be recovered from the erstwhile partners only after issue of a notice under section 156 and a default is committed by them.

Under section 179, every person who was a director of a private limited company at any time during the relevant previous year shall be jointly and severally liable for the payment of taxes which cannot be recovered from the company, unless he proves that the non-recovery cannot be attributed to any gross negligence, misfeasance or breach of duty on his part in relation to the affairs of the company.