

**ASSOCIATION OF PERSONS TAXATION AND RELEVANT MATTERS
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Ladies and gentlemen I have been given the onerous task to explain the scope, mechanism of taxation and other relevant matters of the entities such as Registered and Unregistered Firms, Co-ownership, Association of persons, Co-operative Societies, Societies, Trusts, and Local Authorities etc. Before dilating on the subject, it is to be kept in mind that there is plethora of judicial decisions in which the superior courts have deliberated on the issues of taxation and other matters of above mention entities. It has been observed that after the promulgation of the Income Tax Ordinance, 2001, there is a general impression that the judicial decisions given by considering the provisions of Repealed Income Tax Ordinance, 1979 have become redundant, which trend in my humble opinion is too precarious. Starting our discussion, firstly we have to examine the scope of the charging section and then proceed further. Section 4 of the Income Tax Ordinance, 2001, the charging section, stipulates that subject to the provisions of the Ordinance, income tax shall be imposed for each tax year, at the rate or rates specified in Division-I or II of Part-I of the First Schedule, as the case may be, on every person who has taxable income for the year. Thus, the charge is founded on section 4 which is income tax liability **on a person in relation to his income**. The tax is not imposed on income generally; it is imposed on the income of a person that may be any natural person or an artificial person as defined in the existing statute. The above opinion of mine gets support from the judgments of Hon'ble Supreme Court of Pakistan in the case of Ibrahim Ishaq Johri vs. the Commissioner of Income Tax (West), Karachi (A) (1993 SCMR 287,) which was subsequently, reaffirmed in case of M/s. Ellahi Cotton Mills Limited and others versus the Federation of Pakistan (B) (reported as PLD 1997 SC 582). The relevant portion of dicata of the Hon'ble Supreme court in the latter case is reproduced for convenience.

".....income tax is a tax on a person in relation to his income. It is a tax imposed upon a person (natural or artificial) in relation to his income."

What is the connotation of word "person" in law would be an interesting discussion. The scholars of modern jurisprudence have written scores of treatises on the nature of a personality used in legal diction. In law there are two kinds of persons, the natural and artificial. The Natural person is without doubt a human being or more precisely an individual. Salmond in his treatises JURISPRUDENCE has written that "personality is a wider and vaguer term in humanity and in the law this coincidence between the class of persons and that of human being is still more marked". According to him so far as the legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person whether a human being or not and no being that is not so capable is not a person even though he be a man. The persons are the substance of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance and this is the exclusive point of view from which personality receives legal recognition.(C) (1973) 27 TAX 149 Haripur Rosin & Turpentine Factory Ltd, Lahore Vs. Commissioner of Income Tax, North Zone (West Pakistan), Lahore) Therefore, a person, may be defined for the purposes of the law as any being to whom the law attributes a capability of interest and, therefore of rights, of acts and therefore, of duties. In the modern jurisprudence, persons are defined are in two kinds, distinguishable as natural and legal persons. A natural person is a being to whom the law attributes personality in accordance with the reality and truth, whereas, the legal persons are beings, real or imaginary to whom the law attributes personality by way of fiction.(D) (Jurisprudence by Sir John Salmond, Ninth Edition at page 416, 417 & 418). It may be stated at this juncture that legal persons being the arbitrary creations of the law may be of as many kinds as the law pleases, which are actually recognized by the adopted system of law. Few examples of such persons are Corporations or Bodies Corporate. Some of the authors

of modern jurisprudence have also analyzed what part the term "Person" plays in relation to statutory provisions. The concept "Person" focuses larger principles of jural relations, but it allocates relationship differently in different cases.

The concept of legal personality is not so limited in its application and, there are, at least three distinct varieties. They are distinguished by reference to the different kinds of things, which the law selects for personification. In the first class of the legal persons, it consists of Corporation which is a group or series of persons which by a fiction is regarded and treated as itself a person. Individuals, who thus, form the corpus of the legal persons, are termed as its members. The second class is that in which the corpus or object selected for personification is not a group or series of persons but an institution. It may be stated that the law may, if it pleases, regard a Church, a Mosque, a Hospital, a Library or a University as a person meaning thereby that it may attribute the personality not to any group of persons connected with the institution but to the institution itself. The third kind of legal persons is that in which the corpus is some Fund or Estate devoted to special uses, such as Charitable Fund, Trusts, Societies etc. The law may prefer the process of incorporation, but if the law chooses to personify at all, it personifies, not the fund or the estate, but the body of persons who administer it. It has been the opinion of the Jurists that personifying of the body of the persons, which are engaged to administer such funds, trusts etc. may also be equally expedient and it is also opinion of the Jurists that such choice of personification of the corpus shall be of the law. Keeping in view the above discussion, let us now examine the statutory provisions, which deal with the persons under the Income Tax Ordinance, 2001. Here, I would respectfully submit that I have confined my discussion to the persons defined under the Income Tax Ordinance, 2001 other than the individuals and companies according to scope of the subject assigned to me today. However, where-ever, it has been deemed necessary, appropriate references and discussions have been made. The term "Person" has been defined under Clause 42 of Section 2, which by legislation by reference refers to section 80. It would be beneficial to reproduce the section 80 for the convenience.

SECTION 2.

(42) "person" means a person as defined in section 80;

SECTION 80

80. Person.

(1) The following shall be treated as persons for the purposes of this Ordinance, namely:-

(a) An individual;

(b) a company or association of persons incorporated, formed, organised or established in Pakistan or elsewhere; (c) the Federal Government, a foreign government, a political subdivision of a foreign government, or public international organisation.

(2) For the purposes of this Ordinance -

(a) "association of persons" includes a firm, a Hindu undivided family, any artificial juridical person and any body of persons formed under a foreign law, but does not include a company; (b) "company" means - (i) a company as defined in the Companies Ordinance, 1984 (XLVII of 1984); (ii) a body corporate formed by or under any law in force in Pakistan; (iii) a modaraba;

(iv) a body incorporated by or under the law of a country outside Pakistan relating to incorporation of companies; (v) a trust, a co-operative society or any other society established or constituted by or under any law for the time being in force or a finance society; (vi) a foreign association, whether incorporated or not, which the Central Board of Revenue has, by general or special order, declared to be a company for the purposes of this Ordinance; (vii) a Provincial Government; or (viii) a local authority in Pakistan; (c) "firm" means the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all; (d) "trust" means an obligation annexed to the ownership of property and arising out of the confidence reposed in and accepted by the owner, or declared and accepted by the owner for the benefit of another, or of another and the owner, and includes a unit trust; and (e) "unit trust" means any trust under which beneficial interests are divided into units such that the entitlements of the beneficiaries to income or capital are determined by the number of units held. It will be observed that Section 80 has classified the persons for the purposes of the Ordinance into three broader categories, namely: (a) Individual

(b) A company or association of persons incorporated, formed, organized or established in Pakistan or elsewhere; (c) The Federal Government, a foreign government, a political subdivision of a government or public International Organization.

Clause (b) is relevant for today's discussion. For bringing more clarity, an attempt has been made to define the terms "company" and association of persons". Before I discuss the concept regarding "Association of Persons" , let me say few words about the definition of term "Company" , which in my opinion is very important and quite relevant. The company as defined under Sub-Clause (b) of Sub-Section 2 of Section 80 means; a) a company as defined in the Companies Ordinance, 1984. b) a body corporate formed by or under any law in force in Pakistan c) a modaraba d) a body incorporated by or under the law of a country out side Pakistan relating to incorporation of companies e) a trust, a co-operative society or a finance society or any other society established or constituted by or under any law for the time being in force.

f) a foreign association, whether incorporated or not, which the Central Board of Revenue has, by general or special order declared to be a company for the purposes of Ordinance g) a Provincial Government h) a local authority in Pakistan. The first clause referred above is referring the definition of a Company as defined under the Companies Ordinance, 1984 by legislation by reference. The term "Company" has been defined under clause (7) of Section 2 of the Companies Ordinance, 1984. The other kinds and types of companies have also been defined under clause 2, 8, 9, 18, 20, 23, 28 and 30 of Section 2 of the said Ordinance.. The second clause (b) refers to such body corporate which are formed by or under any law in force in Pakistan. It will be recalled that under the Repealed Income Tax Ordinance, 1979, the departmental officers started charging tax under Section 80 D on the societies and other entities by bringing them within the folds of term "body corporate". It was the judgment of learned Tribunal reported in (1998) 78 Tax 71 (Trib) which resolved the issue by interpreting the statutory provisions of Section 2 (16) and 2 (32). In the said decision, the learned Tribunal after considering the relevant provisions held that a society is a body Corporate. However, since the society was not formed by or under any law, it was held that it cannot be considered within the definition of Body Corporate formed by or under any law. The relevant passage from the said decision is reproduced for convenience. **(E)**

50. From the above discussion we are of the considered opinion that whenever the Legislature has used the words, formed, established, or created by or under the law it refers to the body corporate formed, established or created directly by the Legislature under the law enacted by

it and, therefore, such expression shall not include a body corporate owing its existence to any instrument such as memorandum and articles of association and the registration thereof. In the case of societies registered under the Societies Registration Act they are formed under section 1, of the said Act with a memorandum of association and filing the same with the Registrar of Joint Stock Companies and the registration thereof under section 3 of the said Act. It is, therefore, held that although a society registered under the Societies Registration Act is a body corporate but it is not a company as defined under section 2(16) (b) because such society is not formed by or under any law for the time being in force but is a body corporate which is constituted under an instrument and is registered in pursuance of the provisions contained in the Societies Registration Act, 1860.

It may be stated that the view of the learned Tribunal has been recently approved by Hon'ble High Court of Sindh in the case of the Commissioner of Income Tax Versus M/s Spring Field Secondary School, Karachi. **(F)**2003PTD1264. In the said judgment, judgment of Hon'ble high Court of Lahore in the case of The Commissioner of Income Tax Vs. M/s Engineering Co-operative Housing Society, Lahore **(G)** (2000 PTD 3388) has been referred and agreed upon. It is therefore, submitted that only such body corporate come within the definition of the "company" which are formed by or under any law.

Clause (c) refers to a Modaraba. Although the definition clause does not refers to the law regulating Modarabas, however, according to the well settled principle of interpretation, we can safely refer the definition from the Statutory provisions of Modaraba (Flotation and Control) Ordinance, 1980. However, it is suggested to clarify the definition, the legislature may in its power amend the definition by referring to the Modaraba (Flotation and Control Ordinance, 1980, as it has been done under Clause 23 of Section 2 of the Companies Ordinance, 1984. . Clause (d) refers to those bodies incorporated which are incorporated by law outside Pakistan. Clause (e) speaks of such trust, co-operative societies or a finance society or any other society established or constituted by or under any law for the time being in force. Here also, the purpose is to include only such trusts, Co-operative societies and kinds of societies which are formed by a particular statutory provision. The discussion we had while discussing clause (b) will apply mutates mutandis. Clause (f) refers to foreign associations whether incorporated or not and which are recognized by general or special order by the Central Board of Revenue as company for the purposes of Ordinance. Clause (g) refers to the Provincial Government Clause (f) refers to a Local Authority in Pakistan. The term has not been defined under the Income Tax Ordinance, 2001. However the said term has been define under Clause 28 of Section 3 of the General Clauses Act, 1897 which have to be considered while interpreting and dilating upon its concept. Clause 23 of Section 3 of General Clauses Act, 1897 reads as under: "Local Authority shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government, with the control or management of a municipal or local fund. I hope I have not strayed from the main subject in hand, i.e. to explain the scope and mechanism of taxation and relevant matters of the entities such as Registered and Unregistered Firms, Co-ownership, and Association of persons, Co-operative Societies, Societies, Trusts, and Local Authorities etc. Now if we peruse the definition of Association of Persons under the new dispensation a major change will be observed. The Firm, a Hindu Undivided Family, any artificial juridical person and any body of person form under a foreign law but other than a company has been brought within the folds of the term Association of Persons. Thus distinction between a registered firm and unregistered firm has been done away. Under clause-C of Sub-Section (2) of Section 80, the term "Firm" has been defined and in fact if I am permitted to say that said definition has been borrowed from Section 4 of the Partnership Act, 1932.

Coming back to the term "Association of persons" as referred in clause-(a) of Sub-Section (2) of Section 80, it will be observed that the term has been defined by use of word "includes". We are well aware of the principal of interpretation of statutes that when the words "include" is used in a definition clause, it is used with a view to enlarge the meaning of the word and it intends that while the term defined should retain its ordinary meaning its scope should be widened by special enumeration of certain matters which its ordinary meaning may or may not comprise, so as to make the definition enumerative but not exhaustive **(H)** (PLD 1961 Lahore 111, PLJ 1987, Quetta 195 and 1986 PCrJL 2917). It will be observed that although a wider scope of Association of Persons has been incorporated, but the said term it self has not been defined. Similar was the position under the Repealed Income Tax Act, 1922 and Income Tax Ordinance, 1979. Here we are reminded of another principal of interpretation of statute that when words are not defined, guidance has to be sought from ordinary dictionary meaning and the judicial pronouncement of the superior courts. The term "Association of persons" came under consideration before the Hon'ble Supreme Court of Pakistan and Indian **(I)** ((1960) 39 ITR 546 (Commissioner of Income Tax , Bombay North , Kutch and Saurashtra Vs. Indira Balkrishna) and PLD 1956 Federal Court 72 The Punjab Province Vs. The Federation of Pakistan.) (Jullunder Co-operative Transport Society Ltd Vs. Income Tax Officer (1977) 36 Tax 7 (SC Pak). In CIT vs. Indra Balkrishna **(J)** the Hon'ble Supreme Court of India inter alia observed while giving the meaning to the term.

".....Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains."

Similarly, in the case of Punjab Province vs. The Federation of Pakistan **(K)** which has been followed ever since by the superior courts, **(L)** (Jullunder Co-operative Transport Society Ltd Vs. Income Tax Officer (1977) 36 Tax 7 (SC Pak), Haji Muhammad Zakaria & Faruqui Flour Mills Vs. Commissioner of Income tax, Karachi (1962) 5 Tax 147) the Hon'ble Federal Court observed as under:

``The word `association' has no technical meaning and is wide enough to include all groups or aggregation of persons formed for the promotion of a joint enterprise, whether that enterprise is in the field of business or in the field of art, literature, science, philanthropy or some profession, and for the purposes of the section. ``It is wholly immaterial whether such association is brought into existence by law or by agreement or whether it is or it is not registered under the Registration of Societies Act. Thus a Bar Association, a Club, or a Society for the prevention of cruelty to animals, or for any other charitable, religious, or cultural purpose, would be an `association of persons' though its liability to income-tax will depend upon the other provisions of the Act. A firm is an Association of Persons and so is a company, though firms and companies are separately mentioned in the section.."

The Hon'ble Supreme Court of Pakistan in the case of Pakistan through the Commissioner of Income Tax, Karachi vs. Majestic Cinema, Karachi, **(M)** inter alia observed.

" The view taken by the High Court that to constitute an association of persons within the meaning of the Income-tax Act what is necessary is that a number of individuals should be associated with each other in a joint enterprise for the purpose of profits and income, is, we say so with respect, entirely correct and consistent with precedent judicial decisions."

Let us now discuss the broader concepts of a Trust, a Co-operative Society, a society, a firm etc.

TRUST

A trust may be defined as a device whereby property is vested in a person or persons who promise to exercise his control of it only for the purposes of permitting another to have beneficial enjoyment of it. The Trust Act, 1882 regulates the law of the trusts in Pakistan. It defines a trust as an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another and the owner. The person who reposes or declares the confidence is called the "author of the trust, the person who accepts the confidence is called the "trustee", the person for whose benefit the confidence is accepted is called "beneficiary" The subject matter of the trust is called "trust property or trust money or beneficial interest or interest" of the beneficiary. The instrument by which such declaration is made is called "instrument of trust." A trust may be created by every person competent to contract and in case a trust is intended to be created on behalf of a minor, permission has to be sought from the Civil Court of Original Jurisdiction. The subject matter of a trust must be property transferable to the beneficiary and it must not be merely beneficial interest under a subsisting trust. Every person capable of holding property may be beneficiary and every person capable to hold property and competent to contract may be trustee. A trust is said to be extinguished when its purpose is completely fulfilled, when its purpose becomes unlawful, when the fulfillment of its purpose becomes impossible by destruction of the trust property or when the trust is revoked.

A trust shall be created only for any lawful purpose which includes laws of foreign countries. A trust can be created in relation to immovable and movable property and shall be created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create a trust, (b) the purpose of the trust, the beneficiaries and the trust property.

It may be noted that the provisions of the Trust Act, 1882 does not affect the rules of Islamic law as to Waqf, or to any other kind of relationship between the members of undivided family as determined by any customary or personal law or to public or private, religious or charitable endowments.

It is important to note the difference between a Public and a Private Trust. In a Public trust beneficial interest must be vested in uncertain and fluctuating body of person, whereas the Private Trust is for benefit of ascertainable Individuals or class of persons. The provisions of Trust Act, 1882 are arranged in the following manner.

SECTION 1 To 10 Deals with Introduction and creation of trust

11 To 30 Deals with the duties & liabilities of the Trustees.

31 To 45 Deals with the Rights and Powers of the Trustees.

46 To 54 Deals with the Disabilities of Trustees.

55 To 62 Deals with the Rights and Liabilities of the beneficiaries.

70 To 76 Deals with the vacation off the office of the trustee.

77 To 79 Deals with the Extinction of the Trusts.

80 To 96 Deals with certain obligations in the nature of trust etc.

REGISTRATION / FORMATION

A Trust can be registered before a Registrar having territorial jurisdiction of the place of the Trust by minimum 9 persons who have to furnish their National Identity Cards. Out of 9 members, at least 4 members should be office bearers, this is the minimum requirement. The person going for registration has to file a Trust Deed and a Resolution in his favour from the Trustees for authorization of the registration on behalf of the other trustees. The prescribed fee according to the prevailing rules is Rs. 35,000.

CO-OPERATIVE

SOCIETY

Co-operative organizations founded for mutual economic aid exist in most countries of the world, in advanced as well as in under developed countries. The co-operative way of doing business takes many forms, ranging from local to centralized, federated organizations and from highly specialized to multipurpose societies.

Since earliest times people have worked together in large or small groups to attain social, religious, or economic objectives, but the modern co-operative movement is not much more than 100 years old. The underlying social philosophy was formulated during the first half of the 19th century by writers such as Robert Owen (q.v.) in Great Britain and Charles Fourier (q.v.) in France. (N) (ENCYCLOPEDIA BRITANNICA VOLUME 6 PAGE 451)

A Co-operative Society is a form of an organisation wherein persons voluntarily associate together as human beings on the basis of equality for the promotion of their economic interest and aims. The persons voluntarily join together because of the reasons that they cannot achieve individual goals because of the weakness of the economic position of a large majority of them. The element of individual weakness is overcome by pooling their resources by making self-help effective through mutual aid by strengthening of economic solidarity between them. Thus, Co-operative society may be defined as voluntary association of person combined to achieve improvement in their respective social and economic conditions through the common ownership and democratic management. It is an Association of Person as held by Hon'ble Supreme Court of Pakistan in the case Jullundar Co-operative Transport Society Ltd's case (O) (Jullunder Co-operative Transport Society Ltd Vs. Income Tax Officer (1977) 36 Tax 7 (SC Pak)).

It is stated that to facilitate the formation and working of co-operative societies. The Co-operative Societies Act, 1925 has been adopted in Pakistan. The preamble of the Act gives the scope for the formation of such societies among agriculturist and other persons with common economic needs so as to bring better living, business and better production. The Co-operative societies in their operating technique and organizational structure closely resemble other type of business. They may engage in manufacture, trading and rendering services and may have the essential features of industrial and commercial establishments. However, they are not charitable institutions. Section 3 of the Act gives definition of some of its kinds such as "Financing bank" "Resource society", "Producer society", "Consumers society", "Housing society" and "General society". The relevant definitions of aforesaid societies as defined under Section 3 of he Co-operative Society Act, 1925 are reproduced below for the convenience.

Section 3
 Clause (bb) "Financing Bank" means a society the main object of which is to make loans in cash or in kind to any other society or to an agriculturist who is not a member of a society or to both societies and such agriculturists;

Clause (h) "Resource society " means a society formed with the object of obtaining for its members the credit, goods or services required by them;

Sub-Section 2 of Section 3
 (2) a "Producers' society" means a society formed with the object of producing and disposing of goods as the collective property of its members and includes a society formed with the object of the collective disposal of the latter of the members of such society;

Sub-Section 3 of Section 3
 (3) a "Consumers' society" means a society formed with the object of obtaining and distributing goods to or of performing services for its members, as well as to other consumers and of dividing among its members and customers in a proportion prescribed by the rules or by the bye-laws of such society, the profits accruing from such supply and distribution;

Sub-Section 4 of Section 3
 (4) a "Housing society" means a society formed with the object of providing its members with dwelling house on conditions to be determined by its bye-laws;

Sub-Section 5 of Section 3
 (5) a "General society" means a society not falling under any of the four classes above-mentioned.

REGISTRATION / FORMATION

WThe condition prescribed for a registration of Cooperative Society is contained under section 7 which stipulates that no Cooperative Society other then a Society of which a

member is a Society shall be registered under the Act which does not consist of at least 10 persons above the age of 18 years. It has also been provided that if the object of the Society is for creation of funds to be lent to its members, the condition for registration is that unless such persons reside in the same Town and Village or in the same group of villages or where the members of the same tribe, class, cast or occupation. The later kind of Society would be registered with subject to the directions of the Registrar. It may be noted that for the purposes of registration, according to the amendment applicable to the Province of Sindh, the number of members for registration have been increased from 10 persons to 31 by virtue of amendment made in 1997. For a Banking Society, the registration will be made when a society has share capital for Rs. 20,000 or more which is a mandatory requirement. The application to the Registrar has to be submitted under section 9 which will include copy of bye-laws and name of persons. It will be registered before the Registrar of Cooperatives.

SOCIETY

Law in respect of Societies is regulated in Pakistan by the Societies Registration Act, 1860 which has been made for improving conditions of societies established for the promotion of literature, science, the fine arts, the diffusion of useful knowledge, the diffusion of political education or for charitable purposes. Section 20 of the Act stipulates the application of the Act. It applies to Charitable Societies, society established for the promotion of science, literature, fine arts, diffusion of political education or useful knowledge, foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, public museums, galleries of paintings and other works of art, collection of natural history, mechanical and philosophical inventions, instruments or design

It is stated that it has been held by the Income Tax Appellate Tribunal that a society is a body corporate.**(P)**. As discussed earlier, it has been held that a society is an Association of Persons.**(Q)**.

REGISTRATION / FORMATION

A Society can be registered before a Registrar having territorial jurisdiction of the place of the Society by minimum 9 persons who have to furnish their National Identity Cards. Out of 9 members, at least 4 members should be office bearers, this is minimum requirement. The person going for registration has to file Bye-laws and a Resolution in his favour from the members for authorization of the registration on behalf of the other members. The prescribed fee according to the prevailing rules is Rs. 15,500.

PARTNERSHIP FIRMS

The provisions relating to Partnership were originally contained under Section 239 to 266 of Chapter XI to the Contract Act 1872. The Partnership Act 1932 was promulgated to define and amend the law relating to Partnerships, which repealed and superseded Chapter XI (Section 239 to 266) of the Contract Act, 1872. After its promulgation, considerable changes in definition and arrangement gave effect to the mercantile view of firm's continuity and added provisions for voluntary registration of firms.

Originally Partnership was defined under the Contract Act 1872 (Section 239) as the relation which subsists between persons who have agreed to combine their property,

Labor or skill in some lawful business and to share the profits thereof between them. Under the Partnership Act, the definition was improved after considering weighty criticism and dialogue by the Jurists like Kent, Sir F Polloch and M.R. Jessel.

The definition of Partnership therefore explained relation between Parties who have agreed to share the profit of a business carried on by all or any other acting for all. Persons who have entered into Partnership with one and other are called individually "Partners" and collectively "a firm" and the name and style under which their business is carried on is called the firm name. A "firm" is only collective name of its members. It is not a legal person or entity distinct and separate from Partners **(R)** (PLD 1968 Kar. 635)

On the above basis a firm cannot enter into Partnership with another firm **(S)** PLD 1956 Supreme Court (India 273). However, the question so far as our country is concerned has been left undecided. **(T)** (PLD 1959 S.C. 172).

Essential requisites of Partnership are:

- i) There must be an agreement entered into by all the persons concerned.
- ii) The agreement must be to share to profit of a business and
- iii) The business must be carried on by all or any of the partners concerned acting for all.

The law of Partnership does not prescribe any special mode for the creation of partnership which can validly come into being even upon an oral agreement between the Partners. **(U)** (PLD 1966 SC 328). It is existence of the relationship which must depend on the real intention and contract of the Partners. A Partnership which is opposed to public policy is illegal. Similarly if object being unlawful, it is an illegal Partnership.

It may be stated that Wakf created under Muslim law cannot enter into partnership. Similarly Trade Union and association does not fall within the definition of Partnership and like wise Co-ownership (excluding) exceptional case differs from Partnership.

I may also refer to the distinction between a company and a partnership firm. Companies are really partnership with the added attribute that a company is a juristic entity which is really a convenient method for the transaction of business and the acquisition and transfer of property.

In a Partnership minor can be admitted to the benefits of partnership with the consent of all the Partners in a firm.

REGISTRATION / FORMATION

The registration of Partnership is regulation through Section 58 of the Partnership Act, 1932 which require that registration of a firm may be effected at any time by sending by post or delivering to the Registrar of Firms of the area in which place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and

accompanied by the prescribe fee stating (a) firm name (b) the place or principal of business of firm (c) the names of any other places where the firm comes or business (d) the date when each partner from the firm, name and address of partners and the duration of firm and nature of business intended to be under taken Practically the documents required are.

a) Covering Letter (Court Fee Stamp of Rs. Two)
b) Prescribed Form A (u/s 58 of the Act)
c) Prescribed fee of Rs. 110 through Challan to be deposited in National Bank of Pakistan or State Bank of Pakistan.

d) Copy of National Identity Cards of All the Partners.

e) Copy of Deed of Partnership on Rs. 500/- Judicial Stamp Paper.

f) A Blank Judicial Stamp Paper of Rs. 20/-

g) Authority Letter.

Since the scope of today's discussion is very wide, and to avoid reading the other provisions, I am submitting the relevant provision of Partnership Act which have to be considered while dealing with a Partnership firm.

Section 9 to 17
Deals with the Duties, rights of Partner, the conduct of business, property of firm, applicant of the firm's profit.

Section 18 to 30
Deals with related of Partner with Third parties including Partners liability.

Section 31 to 31
Deal with incoming and out going partners and their relation ship.

Section 39 to 55
Deals with the provision of Dissolution of firm including its mode of settlement of account between the Partners.

Section 56 to 76
Deals with registration of firm, Rules making authority and other miscellaneous provisions in respect of registration and incidental actions..

It is stated that the concept of registration of a partnership under the Repealed Income tax Act, 1922 and Income Tax Ordinance, 1979 was quit distinct and different from the concept of registration of a partnership firm under the Partnership Act, 1932. The registration under the Repealed Income tax laws was for the tax management point of view, whereas the registration under the Partnership Act, 1932 is for regulation of partnership firms, their rights, responsibilities, working of the firms and relationship between the partners. Since under the Income Tax Ordinance, 2001, the rates of tax

for Registered and Unregistered firms are same, it has been felt by the legislature not to provide any provisions which regulate the registration of firms under the Ordinance.

As we have discussed the formation and registration process of different entities, I humbly submit that provisions of Section 14 of the Companies Ordinance, 1984 has to be kept in mind which stipulates obligation for registration under the said Ordinance. The relevant statutory provision is reproduced in extenso for reference.

14. Obligation to register certain associations, partnerships, etc., as companies:

(1) No association partnership or company consisting of more than twenty persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association, partnership or company, or by the individual members thereof, unless it is registered as a company under this Ordinance.

(2) Every person who is a member of any association, partnership or company carrying on business in contravention of the provisions of this section shall be punishable with fine which may extend to five thousand rupees and also be personally liable for all the liabilities incurred in such business.

(3) Nothing in this section shall apply to-

(a) any society, body or association, other than a partnership, formed or incorporated under any other Pakistan law, or

(b) a joint family carrying on joint family business, or

(c) a partnership of two or more joint families where the total number of members of such families, excluding the minor members, does not exceed twenty.

(d) A partnership formed to carry on practice as Lawyers, accountants or any other profession where practice as a limited liability company is not permitted under the relevant laws or regulations for such purpose.

Subject to the Conditions contained sub-section (3) of Section 14 referred above, It is compulsory and mandatory for an association, partnership or a company to be registered under the Companies Ordinance, if same is formed for the purpose of carrying on any business that has for its object the acquisition of gain by it and which consists of more than twenty people. Association contemplated under Section 14 would be one in which its members should be so associated that there is a legal relation between them giving rise to joint and mutual rights and obligation. There should be mutual agency between the members.

It is submitted that it is the number of persons of association or partnership which determines the questions whether it should or should not be registered under the said Ordinance. It is mandatory to be registered if the members exceed twenty at any time. Now if we examine Section 14 very carefully it will be noted that other requirement is that particular partnership or association should be formed for the purpose of carrying

on any business that has for its object the acquisition of gain. It is my humble submission that the phrase "carrying on business" is a very elastic one and is almost incapable of definition and it depends on circumstance of each case to adjudge its definition. The other phrase "acquisition of gain" is also of very important significance. It has been the opinion of superior courts that in determining the purpose, the primary and original object of the association, partnership has to be looked into. The word "gain" precedes the word "acquisition" which is not limited to mere pecuniary gain and does not necessarily mean the acquisition of a commercial profit. Mere fact that the gain is used for charitable purposes does not exclude such organizations from the provision for compulsory registration under Section 14 of the Companies Ordinance, 1984.

After having discussed various kinds of entities falling within the fold of the term Association of person and before discussing the other relevant provisions for entities (being discussed today) it is my duty to point out that since these entities have no physical existence under the law they are represented by a natural person which in common parlance is said to be its representative. It will be observed from the various provisions as contained in the Income Tax Ordinance, 2001 according to peculiar situation and statutory need terms like "PERSON", "TAX PAYER", "COMPANY", and "INDIVIDUAL" have been used. I may humbly submit that while examining the provisions of the Ordinance such usage has to be kept in mind. In this regard and with reference to today's discussion I would invite attention and refer to the definitions of the term "TAX PAYER" which has been defined under Clause (66) of Section 2 which reads as follows:

Section 2. (66)
"taxpayer" means any person who derives an amount chargeable to tax under this Ordinance, and includes -

- (a) any representative of a person who derives an amount chargeable to tax under this Ordinance;
- (b) any person who is required to deduct or collect tax under Part V of Chapter X and Chapter XII; or
- (c) any person required to furnish a return of income or pay tax under this Ordinance;

It will be observed that in the definition under clause (a) word "any representative of person" has been used. The connotation of the word "representative" has been given by the law makers under Section 172, while Section 173 stipulates the liability and obligations of representatives. Both the relevant Provisions are being reproduced for convenience and ready reference:

Section 172. Representatives.-

- (1) For the purposes of this Ordinance and subject to sub-sections (2) and (3), "representative" in respect of a person for a tax year, means -
- (a) where the person is an individual under a legal disability, the guardian or manager

who receives or is entitled to receive income on behalf, or for the benefit of the individual;

(b) where the person is a company (other than a trust, a Provincial Government, or local authority in Pakistan), the principal officer of the company;

(c) where the person is a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including any Wakf deed which is valid under the Mussalman Wakf Validation Act, 1913 (VI of 1913)), any trustee of the trust;

(d) where the person is a Provincial Government, or local authority in Pakistan, any individual responsible for accounting for the receipt and payment of moneys or funds on behalf of the Provincial Government or local authority;

(e) where the person is an association of persons, the principal officer of the association or, in the case of a firm, any partner in the firm;

(f) where the person is the Federal Government, any individual responsible for accounting for the receipt and payment of moneys or funds on behalf of the Federal government;

(g) where the person is a public international organisation, or a foreign government or political subdivision of a foreign government, any individual responsible for accounting for the receipt and payment of moneys or funds in Pakistan on behalf of the organisation, government, or political subdivision of the government.

(2) Where the Court of Wards, the Administrator General, the Official Trustee, or any receiver or manager appointed by, or under, any order of a Court receives or is entitled to receive income on behalf, or for the benefit of any person, such Court of Wards, Administrator General, Official Trustee, receiver, or manager shall be the representative of the person for a tax year for the purposes of this Ordinance.

(3) Subject to sub-sections (4) and (5), where a person is a Federal Government; or non-resident person, the representative of the person for the purposes of this Ordinance for a tax year shall be any person in Pakistan -

(a) who is employed by, or on behalf of, the non-resident person;

(b) who has any business connection with the non-resident person;

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

(d) who holds, or controls the receipt or disposal of any money belonging to the non-resident person;

(e) who is the trustee of the non-resident person; or

(f) who is declared by the Commissioner by an order in writing to be the representative of the non-resident person.

(4) A bona fide independent broker in Pakistan who, in respect of any transactions, does not deal directly with, or on behalf of, a non-resident principal but deals with, or through a non-resident broker, shall not be treated as a representative of the non-resident principal in respect of such transactions, if -

(a) the transactions are carried on in the ordinary course of business through the first-mentioned broker; and

(b) the non-resident broker is carrying on such transactions in the ordinary course of its business

(5) No person shall be declared as the representative of a non-resident person unless the person has been given an opportunity by the Commissioner of being heard.

Section 173. Liability and obligations of representatives.-

(1) Every representative of a person shall be responsible for performing any duties or obligations imposed by or under this Ordinance on the person, including the payment of tax.

(2) Subject to sub-section (4), any tax that, by virtue of sub-section (1), is payable by a representative of a taxpayer shall be recoverable from the representative only to the extent of any assets of the taxpayer that are in the possession or under the control of the representative.

(3) Every representative of a taxpayer who pays any tax owing by the taxpayer shall be entitled to recover the amount so paid from the taxpayer or to retain the amount so paid out of any moneys of the taxpayer that are in the representative's possession or under the representative's control.

(3A) Any representative, or any person who apprehends that he may be assessed as a representative, may retain out of any money payable by him to the person on whose behalf he is liable to pay tax (hereinafter in this section referred to as the "principal"), a sum equal to his estimated liability under this Ordinance, and in the event of disagreement between the principal and such a representative or a person as to the amount to be so retained, such representative or person may obtain from the Commissioner a certificate stating the amount to be so retained pending final determination of the tax liability, and the certificate so obtained shall be his authority for retaining that amount.

(4) Every representative shall be personally liable for the payment of any tax due by the representative in a representative capacity if, while the amount remains unpaid, the representative -

(a) alienates, charges or disposes of any moneys received or accrued in respect of which the tax is payable; or

(b) disposes of or parts with any moneys or funds belonging to the taxpayer that is in the possession of the representative or which comes to the representative after the tax is payable, if such tax could legally have been paid from or out of such moneys or funds.

(5) Nothing in this section shall relieve any person from performing any duties imposed by or under this Ordinance on the person which the representative of the person has failed to perform.

Another important term used for specific statutory need is the term "Principal officer" which has been defined in Clause (44A) of Section 2 which reads as follows.

"Section 2 Clause (44A)

"principal officer" used with reference to a company or association of persons includes- (a) a director, a manager, secretary, agent, accountant or any similar officer; and (b) any person connected with the management or administration of the company or association of persons upon whom the Commissioner has served a notice of treating him as the principal officer thereof;

Now, at this stage I would like to make an attempt to give brief references (with comments) to the provisions of Income Tax Ordinance, 2001 which covers, the determination, computations and assessment of income and tax of Unit of assessment namely Association of Persons.

I am still a student of law, my following remarks may not be considered as pompous or arrogant. In my humble opinion the arrangement of the statutory provisions made in the Income Tax Ordinance, 2001 is without any logic and arrangements seems to have been made without properly understanding the art of legislative drafting. However, to avoid the confusion I have tried to deliberate and explain determination of Income and tax, notwithstanding the said confusion. Firstly I will refer to Section 4 the charging Section and then will directly refer to Section 10 & 11 so as to avoid the confusion.

Under the Income Tax Ordinance, 2001 charge has been created under Section 4 with reference to the taxable income of every person on the rates specified in first Schedule. Section 4 also provides the methodology of tax credits and separate taxation commonly known as final tax liability or presumptive regime. Sub-section 5 of Section 4 stipulates that incomes which are subjected to separate taxation under Section 5 (Dividend Income), 6 (Tax on Fee for technical services or royalty to non residents) 7 (Tax on non residents on shipping and air transport income) or final tax under Part V Chapter-X shall not be included in the computation of income in accordance with section 8 or 169 as the case may be.

Section 5 imposes tax at the gross amount of receipt of dividend from a company at rates specified in Division III of Part I of First schedule. The final tax liability is for **all the Tax Payers** and is subject to the other provisions of this Ordinance which excludes exempt dividends from its purview. I have separately dealt with incomes in succeeding paragraphs.

The term taxable income has been defined under clause (64) of Section 2 which refers to Section 9. It gives general statement that the taxable income of a person shall for tax year shall be the total income of the person reduced (but not below zero) by the total of any deductible allowances under part IX of Chapter -III. The term total income has been defined under clause (69) of Section 2 with reference to Section 10 which states that total income of a person shall be the sum of the person's income under each of the heads of income for the year. As we are well aware that heads of income for the purposes of the imposition of tax and the computation of total income has been classified under Section 11, which are (a) Salary (b) Income from property (c) Income from business {including Speculation business} (d) Capital gains and (e) income from other sources.

Since it is a very important classification and would be applicable to all class of persons, it is necessary to refer briefly to sub-section 2, 3, 4, 5 & 6 of Section 11 accordingly.

Subsection (2) stipulates that subject to the provisions of the Ordinance, the income of a person under a head of income for a tax year shall be the total of the amounts derived by the person in that year that are chargeable to tax under the head as reduced by the total deductions, if any, allowed under this Ordinance to the person for the year under that head.

Subsection (3) stipulates that the amount subject to the Ordinance, if under a head of income, total deductions allowed under the Ordinance to a person in a tax year, the person shall be treated as having sustained loss for that head for the year.

Subsection (4) stipulates that a loss in a head of income for a tax year shall be governed according to the provisions of Part-VIII of Chapter-III.

Subsection (5). It has been stipulated that income of a resident person shall be computed by taking into account of Pakistani and foreign source income.

Subsection (6) stipulates that income of a non-resident person under the head of a income shall be computed by taking into account only amounts that are Pakistani source of income.

RESIDENTIAL STATUS

Before we proceed further, it would be appropriate to discuss and take note of Residential Status of an Association of Persons. Section 81 to 84 describes the residential status to various units of Assessments. Under Section 81 read-with Section 84 , it will be observed that any Association of Persons shall be a resident Association of Person for a tax year if the control and management of affairs of the association is situated wholly or partly in Pakistan at any time for the year.

RETURN OF INCOME / STATEMENT

Since the entire process of assessment under the new dispensation start with the filing of return, an Association of Persons has to file its return of income under Section 114 on the basis that ;

a) The taxable income exceeds the maximum amount that of not chargeable to tax under the Ordinance for the year.

b) Has been charged to tax in respect of any of the four preceding tax years.

c) Claims of loss carried forward under the Ordinance for a tax year

d) Owns immovable property with land area of 250 Sq. yards or more located in areas following in the limits of a metropolitan / municipal corporation, Cantonment board or the Islamabad capital territory. Owns any flat.

e) Owns the motor vehicle other than motor cycle in Pakistan.

f) Subscriber of telephone including a mobile phone in Pakistan.

In addition to the above an Association of Persons is required to file statement under Section 115 (4) if any income falls under the presumptive or final discharge of tax liability.

It may be stated that in case of discontinued business, a notice has to be sent to the Commissioner within 15 days of the discontinuance under Section 117 and a return has to be filed for the period commencing on the first day of the Tax year in which the discontinuance occurred and ending on the date of discontinuance and the said period shall be treated as separate Tax year for the purposes of Ordinance.

The assessment as envisaged under Section 120, 121 and 122 shall be made accordingly.

HEAD OF INCOMES

Now, we come to the different heads of income. Since the head of income 'Salary' is not relevant for the entities which come within the definition of an Association of Persons. We will skip said head of income and will discuss the income from property, the subsequent head of income under section 11.

INCOME FROM PROPERTY

If, an Association of Person receives the rent or such rent is receivable for a tax year other than any rent which is exempt under the Ordinance, same shall be chargeable to tax under the head of income from property.

Under subsection (2) of section 15, the rent has been defined which means any amount received or receivable by the owner of the land or a building as consideration for the use or occupation of, or right to use or occupy the land or a building and which also includes forfeited deposit paid under a contract for the sale of land or a building. Here, I wish to highlight one important aspect that unlike definition of rent of the repealed Ordinance in which the chargeability of income from house property was governed under the philosophy of annual value of the property which was restricted to rent only. However, in the Income Tax Ordinance, 2001, the lawmakers have included the concept of Lease and License within the definition of rent . Although, we are aware of the definition and distinction between the two expressions i.e. "Lease" and "License", but for the convenience, I will refer to the case (V) PLD 1964 SC 106 in which distinction between

the said two terms have been given. An additional source of income has been included within the definition of rent, which is forfeited deposit paid under the contract for the sale of land or a building.

Subsection (3) stipulates that the provisions of section 15 will not apply to a person who receives the rent in respect of lease of a building together with plant and machinery which is chargeable under the different head of income from other source. Similarly, any amount received or receivable to any person for the provisions of amenities, utilities or any service charges that the renting of the building would also be chargeable to tax under the head of income from other sources.

Under sub-section (4), concept of Fair Market Rent has been introduced. It has been stipulated that where the rent received or receivable by a person is less than the Fair Market Rent for the property, the person shall be treated as having derived the Fair Market Rent for the period, the property is let on rent in the tax year. Here, I wish to point out that Fair Market Value has been defined under section 68, which includes the rent. The Commissioner has been conferred powers, in case the said fair market rent is not ordinarily ascertainable, such rent may be determined by the Commissioner. Absolute discretion without any guidance and guidelines have been given to the Commissioner, which in my humble opinion is against the canons of law.

Section 16 stipulates the addition of such amount of income under the head of income from the property, which are not adjustable against the rent payable for the tenant and 1/10th of the amount would be included in the income of a person.

Subsection (2) of section 16 stipulates that if such amount is refunded by the owner to the tenant on the termination of the tenancy before the expiry of a tax year, no portion of amount shall be allocated to the tax year in which it is refunded to any subsequent tax year.

Section 17 provides deductions in respect of income chargeable under the head of income from the property. Subsection (2) of section 17 provides that where unpaid rent allowed as deduction is wholly or partly recovered, the amount recovered shall be chargeable to tax in the tax year in which it is recovered. Subsection (3) of section 17 provides that if a person has been allowed the deduction of any expenditure incurred in deriving rent chargeable to tax and the said person had not paid the liability or part of the liability to which the deduction relates within the three years of the end of the tax year in which the deduction was allowed, the unpaid liability shall be chargeable to tax under the head income from the property in the first tax year following the end of three years. It may be noted that this is an identical to the provisions of section 25© of the repealed ordinance. Subsection (4) of section 17 is also materially same to section 25© and it has been provided that if said unpaid liability added in the income is subsequently paid, the same shall be allowed as the deduction for the year in which it is paid.

After covering the heads of income as submitted above, I would like to refer to the provisions of section 66 which deal with the income of joint owners. Section 66 provides

that other than income chargeable under the head of income from business, where any property is owned by two or more persons, their respective shares are definite and ascertainable then the person shall not be assessed as an Association of Persons in respect of property and that share of each person in the income from the property for a tax year shall be taken into account in the computation of person's taxable income for that year. If we compare the present provisions with the provisions of section 21 of the repealed Ordinance, it will be observed that application of section 21 was restricted to the provisions of section 19, which was the income from house property, whereas, under the new law, only income from business has been excluded. What is connotation of definite and ascertainable share, guidelines can be taken from the judgment of the Hon'ble High Court of Sindh in the case of Qasim Ali Vs The Commissioner of Income Tax (W) (2000 PTD 1288).

INCOME FROM BUSINESS

Section 18 deals with the income from business and it stipulate that the following income other than exempt under the ordinance shall be charge to tax under the head of income from the business;

- a) Profit and gains of any business carried on by a person at any time for the year,
- b) Any income derived from any trade, profession or similar association from the sale of goods or provision of services to its members.
- c) Any income from hire or lease of tangible movable property.
- d) The Fair Market Value of any benefit or perquisite whether convertible into money or not derived by a person in the course of or development of past, present or prospective business relationship.
- e) Any management fee derived by a management company including Modaraba Management Company.

Subsection (2) of section 18 provides that where a person is deriving income from profit on debt and it is the person's business is to drive the same shall be charged to tax under the head of income from business and not under the head of income from other sources.

Subsection (3) of section 18 provides that where a scheduled bank, investment bank, development finance institution, modaraba or leasing company, is as a lessor has leased out any asset where such asset is owned by them or not, to another person any amount paid or payable by the said person in connection of the lease of said asset, shall be treated as income of the said lessor and shall be chargeable under the head income from business.

Sub-Section (4) provides that any amount representing distribution by a mutual fund out of its income from profit on debts received by a banking company or non-banking finance company

shall be charged to tax under the head of income from business and not under the income from other sources.

It is humbly submitted that in natural consequence, the provisions of Section 20 (Deductions in computing income chargeable under the head "income from business"), Section 21 (Deductions not allowed), Section 22 (Depreciation) Section 23 (Initial Allowance), 24 (Intangibles), Section 25 (Pre-Commencement Expenditure), 26 (Scientific Research Expenditure), Section 27 (Employee Training and Facilities) Section 28 (Profit on Debt, Financial costs and Lease payments) Section 29 (Bad Debts) will be applicable for determining the income from business.

It may be further stated that Profit and gains arising from Speculative business shall be included in person's income chargeable to tax under the head income from business, off course said Speculative business shall be treated as distinct and separate from any other business. If any Association of Person is engaged in Speculative business, provisions of Section 19 will squarely apply.

CAPITAL GAINS

Similarly, the provisions of Section 37 and 38 will apply if any gain arises to an Association of Person on the disposal of Capital asset. The term "Capital Asset" has been defined under Sub-Section (5) of Section 37 which reads as under:

(5) In this section, "capital asset" means property of any kind held by a person, whether or not connected with a business, but does not include -

(a) any stock-in-trade (not being stocks and shares), consumable stores or raw materials held for the purpose of business;

(b) any property with respect to which the person is entitled to a depreciation deduction under section 22 or amortisation deduction under section 24;

(c) any immovable property; or

(d) any movable property excluding capital assets specified in sub-section (5) of section 38 held for personal use by the person or any member of the person's family dependent on the person.

INCOME FROM OTHER SOURCES.

The provisions of Section 39 and 40 shall squarely apply to the extent same are applicable to an Association of Person. Under Section 39 it has been stipulated that Income of every kind (other than to any income received by a person in a tax year that is chargeable to tax under any other head of income or subject to tax under section 5, 6 or 7) received by a person in a tax year, other than income exempt from tax under this Ordinance, shall be chargeable to tax in that year under the head "Income from Other Sources", includes namely:-

- (i) Dividends; (ii) royalties;
- (iii) Profit on debt; (Subject to conditions laid down therein) (iv) ground rent;
- (v) rent from the sub-lease of land or a building;
- (vi) Income from the lease of any building together with plant or machinery;
- (vii) Any annuity or pension;
- (viii) Any prize bond, or winnings from a raffle, lottery or cross-word puzzle;
- (ix) Any other amount received as consideration for the provision, use or exploitation of property, including from the grant of a right to explore for, or exploit, natural resources;
- (x) The fair market value of any benefit, whether convertible to money or not, received in connection with the provision, use or exploitation of property;
- (xi) any amount received by a person as consideration for vacating the possession of a building or part thereof, reduced by any amount paid by the person to acquire possession of such building or part thereof. The said be chargeable to tax under the head "Income from Other Sources" in the tax year in which it was received and the following nine tax years in equal proportion.
- (xii) any amount received as a loan, advance (other than advance for payment for sale of goods or supply of services), deposit or gift by a person in an income year from another person (not being a banking company or financial institution) otherwise than by a crossed cheque drawn on a bank or through a banking channel from a person holding a National Tax Number Card.

Under Sub Section (6) it has been provided that Expenditure is of a capital nature if it has a normal useful life of more than one year. In my humble opinion, the said Sub-Section is misplaced in Section 39.

At this stage it will be convenient, if I may list out various kinds of income which are Final Tax Liability.

FINAL TAX LIABILITY

Section 5 Dividend Income

Section 6
Pakistan Source Royalty or Fee For Technical Services of a non Resident Person (if such non resident is a foreign association whether incorporated or not which has not been declared by general or special order as a company by CBR.)

Section 7
Shipping and Air Transport income of Non Resident Person (if such non resident is a foreign association whether incorporated or not which has not been declared by general or special order as a company by CBR.)

Section 113A
Fixed tax on Retailer being an AOP - Turn over up to 5 Million (Optional)

Section 148
Imports in the case of Resident AOP

Section 153
In the case of Resident AOP - Sale of goods execution of a contract (other than a contract for sale of goods or the rendering of services.

In case of Non-Resident AOP
(if such non resident is a foreign association whether incorporated or not which has not been declared by general or special order as a company by CBR.)

(a) Turkey contract

(b) A contract or sub contract for the design, construction or supply of plant and equipment under Power project.

(c) A contract or sub-contract under a construction, assembly or installation projection in Pakistan including a contract for the sale of Supervisory activities in relation to such project.

(d) Any other contract or services rendered other than a contract to which section 152 apply.

(e) Contract for advertisement services rendered by T.V. Satellite Channel.

Section 154 Export of goods by an exporter

Export of goods under an inland back to back letter of credit or other arrangement as prescribed by CBR.

Export made from area located in Export Processing Zone Authority established Under Export Processing Zone Authority Ordinance 1980.

Direct Exporter and Export House registered under the Duty and Tax Remission for Export Rules 2001 read with Sub-Chapter 7 of Chapter XII of the Customs Rules 2001.

Section 156 Prizes and winnings

Section 156A. Petroleum Products.

Section 233 Brokerage and Commission.

Section 234 Owner of Goods transport vehicle which is plied or hired out.

PRINCIPLES OF TAXATION OF AN ASSOCIATION OF PERSONS.

Under this heading of law, the principles of taxation of an Association of Persons, taxation and its members, treatment of losses in the case of an Association of Persons have been provided.

The principles of taxation of an Association of Persons have been dealt with under section 92. Before dealing with the precise points involved, it is stated that an Association of Persons shall be liable to tax separately from the members of the association and where an Association of Persons had paid tax, the amount received by a member of the association in the capacity as a member out of the income of the Association of Persons shall be exempt from tax. This provision is qualified with an exception that such exemption shall not be applicable to an Association of Persons that is a professional firm prohibited from incorporating by any law or rules of the body regulating the profession. The members of such professional firm shall be taxed in accordance with the provisions of section 93 which stipulates that income of a member of an association chargeable under the head of income from business for a tax year shall include in the case of a resident member, the members share in the total income of the association and in the case of a non-resident member, the member's share insomuch of the total income of the association as is attributed to Pakistani source of income. Referring back to the Association of Persons other than professional firm, provisions of section 114 (return of income, 118 method of furnishing return and documents and section 119 extension of time for furnishing of return and other documents will be applicable).

Section 88 of the Ordinance gives machinery of taxation of an individual as member of an association. It stipulates that for a tax year, if an individual has taxable income and derives an amount or amounts exempt from tax under section 92(1) (i.e. where an Association of Persons had paid tax of the amount received by the member is exempt), the amount of tax payable on the taxable income of the individual shall be computed in accordance with the formula given under section 88 i.e. $(A/B) \times C$ where A is the amount of tax that would be assessed to individual for the year if the amount or amounts exempt from tax under sub-section (1) of section 92 were chargeable to tax. B is the taxable income of the individual for the year if the amount or amounts exempt from tax under subsection (1) of section 92 were chargeable to tax and C is the individual's actual taxable income from the year.

ASSOCIATES

Under Section 85 , it has been stipulated that two persons shall be associate where the relationship between two is such that one may reasonably be expected to act in accordance with the intention of the other, or both persons may reasonably be expected to act in accordance with the intention of a third person. Under Sub-Section (3) (b) and (c) members of an association of Persons and a member of Association and the association relationship has been included within the meaning of the term " Associate", which is subject to condition that where the Commissioner is satisfied that neither person may reasonably be expected to act in accordance with the intention of the other.

In my humble view this provision has to be read with Section 108, which confers power to the Commissioner to make adjustment, distribute, apportion or allocate transaction between persons who are associates in respect of income, deduction or tax credits on the basis of arm's length transactions.

I may also submit that powers conferred through Section 85 and 108 are without any guidelines or parameters which is not legally sustainable in law as no check and balances have been provided neither in the provision of Ordinance nor in the Rules framed there under.

LOSSES

While discussing about the concept and treatment of "Loss" suffered by a Tax payer with reference to a Association of Persons, it is necessary to keep in mind the basic definition of "Income" as defined under Clause 29 of Section 2, which includes a loss. Sub-section 3 of Section 11 stipulates that loss in a tax year is the excess of total deduction under a head of income over the amount chargeable to tax under that head. It is to be noted that as provided under Section 56, loss in a Tax year under any head of income can be set off against income chargeable to tax under any other head of income in that tax year except Capital Loss or Speculative business loss. The business loss shall be set off last. It is also to be noted that Capital loss and Speculative business loss can only be set off against Capital gain and Speculative gains respectively.

Before we dilate upon the concept of carry forward of loss, it has to be kept in mind that claim of Carry Forward of loss can only be claimed if a return of Income is filed (Under Section 114(1)(b)(ii) in which such a Carry Forward of loss is claimed. If no Carry forward is claimed in the return, same cannot in law be carry forwarded.

Following losses can only be carry forwarded.

- a) Business losses
- b) Speculative losses and
- c) Capital Losses.

So far as Carry Forward of loss under the head "Income from Business" is concern (Section 57), if loss cannot be wholly set off in the same tax year, the portion of loss which has not been set off shall be carried forwarded to the following tax year but no loss can be carried forwarded to more than six year immediately succeeding the tax year for which the loss was first computed. It is further submitted that the loss of the earliest tax year shall be set off first.

In this connection let us now discuss the set off of certain deductions. It has been provided under sub-section 4 and 5 of Section 57 that where the loss under the head income from business includes deductions allowed under Section 22 (Depreciation), Section 23 (Initial allowance of Depreciation) and Section 24 (Intangibles) that have not been set off against income, the amount not set off shall be added to the deduction allowed under those sections in the following tax year and so on until completely set off. It thus means that there is no limitation for set off. It is further provided that such deductions allowed under Section 22, 23 and 24 shall be taken into account last.

Section 58 deals with Carry forward of losses from Speculative business, limitation of which is six years for set off and earliest loss will be set off first.

deals with the Carry forward of Capital loss, , limitation of which is six years for set off and earliest loss will be set off first.

Now we come to the relevant provision of Section 59A (which was inserted by Finance, Act, 2003) which deals with the person namely an " Association of Persons". I would humbly submit that to under stand the mechanism provided under Section 59A, the provisions of Section 92 and 93 have to be kept in mind.

In this connection, I would humbly submit that for better understanding the concept of loss incurred by an ASSOCIATION OF PERSONS from the provisions of sections 59A, 92 and 93, firstly we have to discuss the loss incurred/suffered by a professional firm and than it will be convenient to discuss the provisions in respect general ASSOCIATION OF PERSONS. Under the provisions of section 93 in case of professional ASSOCIATION OF PERSONS, if loss which is sustained by such ASSOCIATION OF PERSONS, cannot be set off against any other income of the association as provided under sections 56, the amount of loss shall be apportioned among the members of the association according to their interest in the association and the members shall be entitle to their share of the loss set off and carried forward for set off under sections 56, 57 and 59A in computing the taxable income under this ordinance. This is because of two important provision of law. Under Sub-Section (1) of Section 59A it has been provided that in the case of a professional Association of Persons any loss which cannot be set off against any other income of the Association of Person in accordance with Section 56, same shall be dealt with under Sub-Section (2) of Section 93. Similarly the provisions contained in sub-section (2) of Section 59A bars carry forward and set off of a loss by a professional Association of Person under Section 57, 58 and 59. The share of loss referred above, if is of a non-resident member shall be limited to the extent that the loss relates to the derivation of Pakistani source of income. Under sub-section (4), it has been provided that total income of an ASSOCIATION OF PERSONS of a professional firm for the purposes of sub-sections (1) and (2) shall be computed as if the association were of resident person. It, therefore, means that for the purposes of calculating the loss as envisaged under section 93, the status of the member (non-resident, if any) shall be ignored.

Sub-section

(5)

further stipulates that the income, expenditure and loss of a professional ASSOCIATION OF PERSONS shall retain their character as to geographic source and type of income expenditure and loss in the hands of the member of the association shall be treated as having passed through the association on prorata basis unless the Commissioner permits or otherwise by order in writing to the association.

Sub-section

(6)

provides that share of a member shall be determined according to the member's interest in the association and shall include any profit on debt, brokerage, commission, salary or other remuneration received or due from the association.

Coming back to the section 59A and the provisions contained for a association other than the professional firms, it has been provided under sub-section (3) of Section 59A that any loss of such association shall be set off or carried forward and set off only against the income of the association.

Under Sub- section 4 of Section 59A, certain entitlements contained in sections 56, 57, 58 or 59 have been barred i.e.

a) a member of non professional Association of Person is not entitled to set off or carry forward any loss sustained by such Associations.

b) in the case of succession other than inheritance, carried forward and set off loss of the predecessor shall not be allowed against the income of the successor.

Sub-Section (5) provides that where in computing the taxable income for any tax year, full effect cannot be given to a deduction mentioned in sections 22 (Depreciation) , 23(Initial Allowance), 24 (Intangibles) or 25 (Pre Commencement Expenditure) owing to there being no profits or gains chargeable for that year or such profits or gains being less than the deduction, then, subject to sub-section (12) of section 22, and sub-section (6), the deduction or part of the deduction to which effect has not been given, as the case may be, shall be added to the amount of such deduction for the following year and be treated to be part of that deduction, or if there is no such deduction for that year, be treated to be the deduction for that year and so on for succeeding years.

Sub-Section (6) stipulates that where, under sub-section (5), deduction is also to be carried forward, effect shall first be given to the provisions of section 56 (Set off of Losses) and sub-section (2) of section 58 (Carry forward of Speculation business losses).

Sub-Section 7 makes mandatory statement that notwithstanding anything contained in this Ordinance, no loss which has not been assessed or determined in pursuance of an order made under sections 59, 59A, 62, 63 or 65 of the repealed Ordinance or an order made or treated as made under section 120, 121 or 122 shall be carried forward and set off under section 57, sub-section (2) of section 58 or section 59.

ADVANCE TAX .

As indicated in the preceding paragraphs while examining the provisions of the Ordinance, we have to be mindful of the language used for the purpose of statutory provisions. Keeping in mind the aforesaid principle, let us examine the provisions of Advance Tax and deduction of tax at source and responsibility of an Association of Person.

We are well aware with the provisions of section 147 relate to advance tax payment. Under the said section, advance tax shall be liable to be paid by every tax payer including an Association of Person in respect of following period and dates, namely;

- (a) in respect of the September quarter, on or by 15h day of September;
- (b) in respect of the December quarter, on or before 15th day of December;
- (c) in respect of the March quarter, on or before 15th day of March; and
- (d) in respect of the June quarter, on or before 15th day of June.

However, in the case of an individual and Association of Persons, the said responsibility will be attracted if the persons latest assessed taxable income **excluding** income referred to in clauses (a) (Capital Gains) , (b) (Income chargeable on Dividend, Royalty and Fee for Technical Services , (ba) (Income from Property), (c) (Income from Salary) and (d) (Certain final tax liabilities) of sub-section (1) **exceeds** Rupees Two hundred thousand rupees.

It may further be stated that facility of filing estimate has been provided which may be filed before the concerned Commissioner at any time before the last installment is due, that the tax payable by Tax Payer for the relevant tax year is likely to be less than the amount Tax Payer is required to be paid.

It may be humbly submitted that interestingly, the legislature has provided the method of calculating each installment under Sub - Sections (4) and (4A) for Companies and Individuals respectively, however, there is no method prescribed for an Association of Persons. I may submit that although, the provision of Sub-Section (1) confers responsibility in law to pay Advance Tax for an Association of Person, the failure to provide method for calculating Advance Tax for an Association of Person, said unit of Assessment i.e. may argue that provisions are not applicable to them. It may be humbly submitted that there is deficiency and ambiguity in the language of law.

The above reasoning of mine is based on well settled principles of law that (a) Tax is to be levied by a clear and unambiguous legislation and any doubt or ambiguity is to be resolved in favour of tax payer. (b) The law has to be interpreted as it stands and nothing can be added or deleted in the statute. (c) While interpreting a fiscal statute only the letter of the law must be looked into and there is no room for any intendment. The taxing statute must be interpreted in the light of what is clearly expressed. A Court cannot imply anything which is not expressed. It cannot import provisions in the statute, so as to support assumed deficiency.(d) If the words of statute fails, then so must tax (e) If the person sought to be taxed comes within the letter of the law he must be taxed, however great hardship may appear to the judicial mind to be. On the other hand, if the state, seeking to recover the tax, cannot bring the subject within the letter of law, the subject is free, however, apparently within the sprit of the law the case might appear to be. It is adherence to the words alone. **(X)**

Therefore, since there is no method of calculating the Advance tax for each Quarter, an Association of Person though liable to pay Advance tax, will be at liberty not to pay such Advance tax.

DEDUCTION OF TAX AT SOURCE

Coming to the provisions of deduction of tax at source, the responsibility, so far as of an Association of persons is concerned, are as enumerated below:

Section 149 - Deduction of tax at source on salary, if an Association of persons is an employer. Rate of Deduction - Average tax on the estimated salary for the year

Section 151 - profit on debts, if an Association of persons is a financial institution or financial society, which pays a profit on the deposits or instruments mentioned under section 151, the said association of persons is responsible to deduct the tax at source.

The Rate of Tax is 10%.

Section 152 - if an Association of persons pays royalty or fee for technical services to a non-resident, it shall be responsible for deduction of tax at source at 15%. On other payments tax to deducted at 30%.

Section 153 - Payment of goods and services. Under this provision of law, the responsibility has been conferred upon prescribed persons, which have been defined under sub-section (9) of section 153. Clause (c) of sub-section (9) prescribes the persons as association of persons constituted by or under law. We have already discussed the legal implication of the term "constituted by or under law" in preceding paragraphs, which in my humble opinion, it will be applied mutatis mutandis. Thus, only such Association of persons are responsible which are constituted by or under law. Coming to clause (d) and (e) of sub-section (9) of section 153, if the foreign contractor or consultant or consortium or joint venture is an association of persons, then the responsibility of tax deduction is applicable without any qualification, whatsoever.

Section 154 - If the association of persons is dealer in foreign exchange, it will be responsible to deduct the tax at the time of realization of foreign exchange proceeds. Similarly, under sub-section (3b) of section 154, if association of persons is a direct exporter and an export house registered under the Duty and Tax Remission for Export Rules 2001 read with sub-chapter 7) of chapter XII of the Customs rules, 2001 shall be responsible to deduct the tax as specified under sub-section (3b) of section 154.

Section 155 - Under this section, the responsibility has been cast on prescribed persons, which include a non-profit organization, as such, if an association of persons is a non-profit organization within the meaning of clause 36 of section 2 of the income ordinance, 2001, the said Association of Persons shall be responsible to deduct the tax under section 155 while making the payment in full or in part including advance to any person on account of rent of immovable property including rent on furniture and fixture and amount of services relevant to such property. Rate of Deduction is at 5% of the gross rent where annual rent exceeds Rs.300,000

Section 156 - Under this section, if an association of person is paying for, any winning a raffle, lottery, price of winning a quiz or cross word puzzle, shall deduct the tax according. Rate of tax to be deducted is 10%.

Section 156A- If an Association of Person, is selling Petroleum products to a petrol pump operator, shall be responsible to deduct tax at 10%.

Section 158 to 160 shall also be applicable while considering the responsibility of taxed deducted at source simultaneously the penal and recovery provisions contained section 161 shall accordingly apply.

Section 233. Under this section only such Association of persons which are constituted by or under any law shall be responsible to deduct tax on payments made by them on account of Brokerage and Commission.. We have already discussed the legal implication of the term "constituted by or under law" in preceding paragraphs, which in my humble opinion, will be applied mutatis mutandis . As such, only such association of persons is responsible which are constituted by or under law.

Section 236. Under Sub -Section (1) (b) and Sub Section (3) responsibility to collect Advance tax has been provided on a person issuing or selling prepaid Telephone cards at the time of issuance or sale of cards. If an Association of Persons is engaged in such business activity, it will be responsible to collect advance tax at the time of issuance or sale of prepaid Telephone cards.

CERTIFICATE AND STATEMENT

It may be submitted that An Association of Person shall be legally responsible to issue a Certificate of Collection / deduction of tax under Section 163 and simultaneously will be responsible to file Statements under Section 165 on prescribed form, manner and time, if it has with held/ deducted or collected .

TAX

ACCOUNTING.

Unlike the provisions of the repealed Ordinance, the new Ordinance gives option to the taxpayer to adopt any method of accounting either on accrual basis or on cash basis. However, it is mandatory that income chargeable to tax shall be computed in accordance with the method of accounting regularly applied by such persons. So far as the accrual basis accounting is concerned, it has been provided that a company shall account for income from the business on accrual basis while other persons may account for such income on cash or accrual basis. It, therefore, means that an AOP can apply method of accounting on cash basis or accrual basis. However, the machinery has been provided for change in the method of account under subsection (4) and (5) of section 32. The law has further elaborated the cash basis and accrual basis accounting under section 33 and 34 respectively. Similarly, for determination of cost of stock in trade, separate section has been given under section 35 which is of prime importance.

The provisions of Rules 28 to 33 of Chapter VII of the Income Tax Rules, 2002 (as amended from time to time) framed under Section 237 of the Income Tax Ordinance, 2001 have to be kept in mind, more particularly for the reason that concept of No books of accounts has been given away for making the economy documented.

I may also invite attention to the provisions of Sub-Section (5) , (5A) and 6 of Section 34 which are analogous to the provisions of Section 25 (a) and Section 25 (c) of the Repealed Ordinance, 1979. The Section 70 in this regard is also an important provision of law.

OTHER IMPORTANT AND RELEVANT PROVISIONS. TAX CREDITS, DEDUCTIBLE ALLOWANCES AND EXEMPTIONS.

TAX

CREDITS

Tax Credits under Sections 61 (Charitable Donations|), 62 (Investment in Shares) and 63 (Profit on Debt) are entitlements which are available to an Association of Persons. Reference may also be made to Section 63 (Retirement Annuity Scheme) which would be applicable to a member of an Association of Persons in his individual capacity. I may, emphasis that while working out the entitlements / quantum of Tax Credits under provisions referred supra, Section 65 is an important provision, which has to be

always kept in mind which requires to consider the " Amount of Tax" and " Amount of Taxable Income" in the formulas contained in Sections 61, 62,63 and 64 respectively.

DEDUCTIBLE

ALLOWANCES.

An Association of Persons shall be entitled to deductible allowances such as Zakat paid under the Zakat and Usher Ordinance, 1980, Workers Welfare Fund paid under Workers Welfare Fund Ordinance, 1971.

EXEMPTIONS

An Association of Persons shall be entitled to an exemption subject to the conditions laid down by the legislature in the relevant provision of law. I have separately dealt with the exemption of Non Profit Organizations at appropriate place.

INTERNATIONAL TAXATION AND AVOIDANCE OF DOUBLE TAXATION.

It is stated that under Section 101 the legislature has defines the scope of Geographic Source of Income which for today's discussion purposes is relevant. Since scope of discussion of International taxation is much wide, for brevity, I would only submit that provisions of Section 101, 103, 104, 105 and 107 have to be kept in mind while examining the scope international transaction in respect of an Association of persons.

NO GAIN OR LOSS TO BE TAKEN TO ARISE

Under the new ordinance, section 79 provides non-recognition of rules, which provide that for the purpose of this ordinance, no gain or loss shall be taken to arise in the case of a resident person on the disposal of an asset;

a) between spouses under an agreement to leave apart,
b) by reason of transmission of the asset to an executor or beneficiary on the death of a person.

c) by reason of gift of the asset.
d) by reason of the compulsory acquisition of the asset under any law whether the consideration received for the disposal is reinvested by the resident in an asset of a like kind within the one year of the disposal.

e) By a company to its share holders on liquidation of the company or
f) By an AOP to its members on dissolution of the association where the assets are distributed to members in accordance with their interest in the capital of the association. It has been further provided under subsection (3) that a person acquiring an asset shall be treated as acquiring an asset of the same character as the person disposing the asset and acquiring the asset for cost the cost equal to the asset by the person disposing of the asset at the time of disposal.

It may be further stated that to encourage corporatization, a specific procedure of its tax treatment under the Ordinance has been incorporated through Section 96. Its

operation is confined to disposal of all the assets of the business by a resident Association of Persons to a resident company. It has been provided that in such disposal, no gain or loss shall be taken to arise if certain conditions are satisfied.

(i) The consideration received by the association for the disposal is a share or shares in the company (other than redeemable shares);

(ii) the association must own all the issued shares in the company immediately after the disposal;

(iii) each member of the association must have an interest in the shares in the same proportion to the member's interest in the business assets immediately before the disposal;

(iv) the company must undertake to discharge any liability in respect of the assets disposed of to the company;

(v) any liability in respect of the assets disposed of to the company must not exceed the association's cost of / the asset at the time of the disposal;

(vi) the fair market value of the share or shares received by the association for the disposal must be substantially the same as the fair market value of the assets disposed of to the company, as reduced by any liability that the company has undertaken to discharge in respect of the assets; and

(vii) the company must not be exempt from tax for the tax year in which the disposal takes place.

It has been further stipulated Under Sub-Section (2) that where sub-section (1) applies-

(a) each of the assets acquired by the company shall be treated as having the same character as it had in the hands of the association;

(b) the company's cost in respect of the acquisition of the assets shall be -

(i) in the case of a depreciable asset or amortised intangible, the written down value of the asset or intangible immediately before the disposal;

(ii) in the case of stock-in-trade valued for tax purposes under sub-section (4) of section 35 at fair market value, that value; or

(iii) in any other case, the association's cost at the time of the disposal;

(c) if, immediately before the disposal, the association is subject to tax in accordance with sub-section (1) of section 92 and the association has deductions allowed under sections 22, 23 and 24 in respect of the assets transferred which have not been set off against the association's income, the amount not set off shall be added to the

deductions allowed under those sections to the company in the tax year in which the transfer is made; and

(d) the association's cost in respect of the share or shares received as consideration for the disposal shall be -

(i) in the case of a consideration of one share, the association's cost of the assets transferred as determined under clause (b), as reduced by the amount of any liability that the company has undertaken to discharge in respect of the assets; or

(ii) in the case of a consideration of more than one share, the amount determined under sub-clause (i) divided by the number of shares received.

It has been provided under Sub-Section (3) that in determining whether the association's deductions under Sections 22, 23 or 24 have been set off against income for the purposes of clause (c) of sub-section (2), those deductions are taken into account last.

PROVISIONS REGARDING ANY CHANGES

Section 98 provides that where there is a change of fifty per cent or more in the underlying ownership of an entity, any loss incurred for a tax year before the change shall not be allowed as a deduction in a tax year after the change, unless the entity (a) continues to conduct the same business after the change as it conducted before the change until the loss has been fully set off; and (b) does not, until the loss has been fully set off, engage in any new business or investment after the change where the principal purpose of the entity or the beneficial owners of the entity is to utilise the loss so as to reduce the income tax payable on the income arising from the new business or investment.

Under Sub-Section (2) the terms "entity", "ownership interest" and "underlying ownership" has been defined, which terms read as under:

"entity" means a company or association of persons to which sub-section (1) of section 92 applies;

"ownership interest" means a share in a company or the interest of a member in an association of persons; and

"underlying ownership" in relation to an entity, means an ownership interest in the entity held, directly or indirectly through an interposed entity or entities, by an individual or by a person not ultimately owned by individuals.

Similarly, Section 98A caters the situation when there is change in the constitution of an Association of Persons. It provides that where, during the course of a tax year, a change occurs in the constitution of an association of persons, liability of filing the return on behalf of the association of persons for the tax year shall be on the association of persons as constituted at the time of filing such return but the income of the association of persons shall be apportioned among the members who were entitled to receive it and, where the tax assessed on a member cannot be recovered from him it

shall be recovered from the association of persons as constituted at the time of filing the return.

DISCONTINUANCE / DISSOLUTION

Section 98B stipulates that subject to the notice of discontinuance furnished to the Commissioner under Section 117, where any business or profession carried on by an association of persons has been discontinued, or where an association of persons is dissolved, all the provisions of this Ordinance, shall, so far as may be, apply as if no such discontinuance or dissolution had taken place. It further provides that every person, who was, at the time of such discontinuance or dissolution, a member of such association of persons and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax payable by the association of persons. It may at this juncture be pointed out that term "liable" has been used which means "responsible in law."

SUCCESSION

OF

BUSINESS

Section 98 C stipulates that where a person carrying on any business or profession has been succeeded in any tax year by any other person referred to as the "predecessor" and "successor" respectively, otherwise than on the death of the predecessor, and the successor continues to carry on that business or profession., the predecessor shall be liable to pay tax in respect of the income of the tax year in which the succession took place up to the date of succession and of the tax year or years preceding that year; and the successor shall be liable to pay tax in respect of the income of such tax year after the date of succession.

It has been further stipulated that notwithstanding anything contained in sub-section (1), where the predecessor cannot be found, the tax liability in respect of the tax year in which the succession took place up to the date of succession and of the tax year or years preceding that year shall be that of the successor in like manner and to the same extent as it would have been that of the predecessor, and all the provisions of this Ordinance shall, so far as may be, apply accordingly. It is further provided that where any tax payable under this section in respect of such business or profession cannot be recovered from the predecessor; it shall be recoverable from the successor, who shall be entitled to recover it from the predecessor.

SERVICE

OF

NOTICE.

Service of any notice, order or requisition on any person other than a resident individual subject to the Ordinance shall be treated as properly served on the person if it is personally served on the representative of the person. The term "representative" has been defined under Section 172 and its liabilities and obligations under the Ordinance have been given under Section 173, which has already been discussed in the preceding paragraphs. It is stated that for the purposes of an Association of Person Clause (c) and Clause (e) of Section 172 are relevant which are reproduced for convenience.

"(c) where the person is a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including any Wakf deed which is valid under the Mussalman Wakf Validation Act, 1913 (VI of 1913)), any trustee of the trust;

(e) where the person is an association of persons, the principal officer of the association or, in the case of a firm, any partner in the firm;"

Again the term "Principal Officer as used in Clause (c) and Clause (e) of Section 172 and any where else in the Ordinance, has been defined under Clause (44A) of Section 2 which reads as under:

(44A) "principal officer" used with reference to a company or association of persons includes-

(a) a director, a manager, secretary, agent, accountant or any similar officer; and

(b) any person connected with the management or administration of the company or association of persons upon whom the Commissioner has served a notice of treating him as the principal officer thereof;

The other mode of service is to send notice, order or requisition by registered post or courier service to the person's registered office or address for service of notice in Pakistan or where the person does not have such office or addresses, the notice is sent by registered post to any office or place of business in Pakistan or to be served on the person in manner prescribed for service of summons under the Code of Civil Procedure Code.

In case where an Association of Person is dissolved such notice, order or requisition to be served on any person who was the principal officer or a member of the association immediately before such dissolution.

In case of discontinuance of business and where Section 117 (Notice to be given of discontinuance) applies, the notice may be served on the person personally or on any individual who was the person's representative at the time of discontinuance.

Sub Section (5) of Section 218 provides that validity of any notice or service of notice shall not be called in question after the return has been filed in compliance thereof or notice has been otherwise complied with. I humbly submit that there is plethora of judgments wherein it has been held that compliance will be vitiated if the very notice is bad in law, illegal and without jurisdiction, as consent does not confer jurisdiction. (Y)

COLLECTION AND RECOVERY OF TAXES

Section 137 , 138, 138A, 139 140 are provisions of law under which the Commissioner can initiate collection and Recovery proceedings. The detail functions have been provided under the Income Tax Recovery Rules 122 to 210 contained in the Income Tax Rules, 2002 of Income tax ordinance, 2001.

In my humble view special mention is necessary to Section 139 under where procedure

has been given for recovery of collection of tax in case of private companies and an Association of Persons. Under Sub-Section (4), it has been stipulated that notwithstanding any thing in law where tax any payable by a member of an Association of Persons in respect of the member's share of the income of assessment in respect of any tax year cannot be recovered from the member, the association shall be liable for the tax due by the member. In this regard, I will like to point out a very important aspect that under section 138, the legislation has used words taxpayer. I would respectfully emphasize on the said term, which in fact has been defined under clause 66 of S 2 of the ordinance which means that any person who derives an amount chargeable to tax under the ordinance and includes; (a) any representative of person who derives an amount chargeable to tax under the ordinance, (b) any person who is required to deduct or collect tax under Para-V of Chapter-X and Chapter-XII or (c) any person required to furnish a return of income or pay tax under the ordinance. As such, in my considered and humble opinion, coercive measures like attachment and sell of property including arrest of the representative can be made by the Commissioner for the recovery of tax due. We have already dealt with the definition of representative in the preceding discussion and definition of term " liable".

NON PROFIT ORGANISATION.

Although, scope of the topic of today's discussion is very vast and wide and the areas which I have tried to cover are most relevant to the entities falling within the definition of Association of persons, however, looking to the important of certain provisions, I feel that it is my duty to point out one other very important provision, which directly relate to the taxation of certain kinds of an Association of Persons. As we are aware that Societies and Trusts operate on non-profit basis for general benefit and relief to the general public, for the promotion of education for providing medical facilities and reliefs including relief to the poor, therefore, mention of non-profit organization is very necessary. Under the Income Tax Ordinance, 2001, a non-profit organization has been defined under Clause 36 of S 2 which reads as under:

Section 2 Clause 36.

(36) "non-profit organization" means any person, other than an individual, which is --

(a) established for religious, educational, charitable, welfare or development purposes, or for the promotion of an amateur sport;

(b) formed and registered under any law as a non-profit organization;

(c) approved by the Commissioner for specified period, on an application made by such person in the prescribed form and manner, accompanied by the prescribed documents and, on requisition, such other documents as may be required by the Commissioner;

and none of the assets of such person confers, or may confer, a private benefit to any other person;

It will be firstly seen that a non-profit organization can be established only by any

person other than individual and secondly for the purposes as elaborated in Clause 36. The legislation has defined the term " charitable purpose " under Clause (11A) of S 2, which reads as under:

"Charitable purpose includes relief of the poor, education, medical relief and the advancement of any other object of general public utility".

Under the provisions of S 53 and S 54 read with relevant clauses of Second Schedule exempts the income of non-profit organizations subject to the conditions contained therein in each individual clause. Meanwhile, I may also referring to Rules 212 to 220 which govern and regulate the procedure of approval and allied matters relating to Non-profit organizations.

In the last let me make a confession that without the guidance of my father Mr. Sirajul Haque and my god father Mr Rehan Hassan Naqvi, I would not have been able to prepare such comprehensive paper. I am extremely grateful to the them. I am also extremely grateful to the Executive Committee and C.P.E Committee for directing me to prepare aforesaid paper. I am also extremely grateful to this august gathering, who listen the entire speech with patience and attention.

Thank You

Karachi dated 1.5.2005.