

LEX/BDHC/0274/2016

Equivalent Citation: 70 DLR (2018) 683

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Writ Petition Nos. 8323, 8324, 8325, 8327, 8328, 8329, 8330, 9148, 9149, 9150, 10749, 8307, 8308, 8309, 8310, 8311, 8312, 8313, 8314, 8315, 8316, 8317, 9319, 9320, 8497, 8498, 9136, 9137, 8140, 9573, 13266, 9119, 9201, 9202, 11002, 8513, 8514, 8515, 8516, 8517, 8518, 8519, 8520, 9216 of 2011, 253, 14346, 1233, 1234, 13266, 13357, 10233, 6893, 4422, 4423, 4424, 4425, 4426, 4427, 4428, 4429, 6631, 6847, 13712, 11023, 4707, 4708, 3008, 3009, 11213, 11214, 11215, 11216, 11217, 11218, 11219, 11220, 2146, 209, 12283, 12284, 8164, 7315, 7127, 1226, 1229, 3607, 9063, 13814, 2236, 3366, 12003, 6843, 6844, 6845, 6846, 5378, 5379, 5997, 5998, 428, 16570 of 2012, 4821-4822, 9606, 3114, 3115 of 2013, 12272, 4869, 4117, 4118, 4119, 2635, 11381, 5309, 5761, 5762, 5763, 8075 of 2014 and 2884, 11869, 445, 1935, 1936, 3415, 3416-3417 of 2015

Decided On: 24.08.2016

Appellants: **TK Paper Products Limited**
Vs.

Respondent: **Bangladesh**

Hon'ble Judges:

A.F.M. Abdur Rahman, Md. Ashfaqul Islam and Md. Ashraful Kamal, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mahmudul Islam, Senior Advocate, Sarder Jinnat Ali, Mosharaf Hossain, Md. Mizanul Hoque Chowdhury, Abu Amzad, Ramzan Ali Sikder, Tanjib-ul Alam, M.A. Hannan, A.M. Amin Uddin, Md. Asaduzzaman, Omar Sadaq, Mustafa Tariq Husain, Sharif Bhuiyan, S.M. Azmal Hossain, Rezina Mahmud, Faisal Reza, Sankar Prasad Dey, Manjur Alam, Harun-or-Rashid, Taifur Kabir, A.H.M. Ziauddin, Bazlur Rashid, Shakhawat Hossain, Shah Monjurul Hoque and Tajul Islam Majumder, Advocates

For Respondents/Defendant: Murad-e-Reza, Additional Attorney General, Rashed Jahangir, Kazi Zinat Haque, DAGs, Nurun Nahar and Shaikat Basu, AAGs

JUDGMENT

A.F.M. Abdur Rahman, JJ.

1 . The Honorable Chief Justice of Bangladesh, by his order dated 8-10-2013, constituted this Special Bench to hear and dispose of the following writ petitions on the ground that serious common question of law is involved in these rules. Accordingly all these writ petitions have been heard analogously by this larger bench of three honorable judges of this court and now disposed off by this single judgment.

Number of the writ petitions.

2. Writ petition No. 8323 of 2011 analogously heard with writ petition No. 8324 of 2011, writ petition No. 8325 of 2011, writ petition No. 8327 of 2011, writ petition No. 8328 of 2011, writ petition No. 8329 of 2011, writ petition No. 8330 of 2011, writ petition No. 9148 of 2011, Writ petition No. 9149 of 2011, writ petition No. 9150 of 2011, writ petition No. 10749 of 2011, writ petition No. 253 of 2012, writ petition No. 14346 of 2012, writ petition Nos. 8307-8317 of 2011, writ petition Nos. 1233-

1234 of 2012, writ petition No. 9319-9320 of 2011, writ petition No. 8497-8498 of 2011, writ petition No. 10026 of 2011, writ petition Nos. 9136-9137 of 2011, writ petition No. 8140 of 2011, writ petition No. 9573 of 2011, writ petition No. 13357 of 2012, writ petition No. 10233 of 2012, writ petition No. 6893 of 2012, writ petition Nos. 4422-4429 of 2012, writ petition No. 6631 of 2012, writ petition No. 6847 of 2012, writ petition No. 13712 of 2012, writ petition No. 11023 of 2012, writ petition Nos. 4707-4708 of 2012, writ petition No. 3008-3009 of 2012, writ petition No. 9119 of 2011, writ petition Nos. 9201-9202 of 2011, writ petition No. 11002 of 2011, writ petition No. 11213-11220 of 2012, writ petition Nos. 9200 of 2012, writ petition Nos. 8513-8520 of 2011, writ petition No. 2146 of 2012, writ petition No. 209 of 2012, writ petition Nos. 12283-12284 of 2012, writ petition No. 8164 of 2012, writ petition No. 7315 of 2012, writ petition No. 7127 of 2012, writ petition No. 1226 of 2012, writ petition No. 9216 of 2012, writ petition No. 1229 of 2012, writ petition No. 3607 of 2012, writ petition No. 9063 of 2012, writ petition No. 13814 of 2012, writ petition No. 2236 of 2012, writ petition No. 4708 of 2012, writ petition No. 3366 of 2012, writ petition No. 12003 of 2012, writ petition No. 13266 of 2012, writ petition No. 6843-6846 of 2012, writ petition No. 5378-5379 of 2012 and writ petition No. 5997-5998 of 2012, for disposal. Later, the learned Advocates of this court prayed for inclusion of similar matter along with the instant proceeding for analogous hearing and upon their prayer this court has included the writ petition being writ petition No. 428 of 2012, writ petition No. 12272 of 2014, writ petition No. 9606 of 2012, writ petition No. 16570 of 2012, writ petition No. 4117 of 2014, writ petition No. 4118 of 2014, writ petition No. 4119 of 2014, writ petition No. 445 of 2015, writ petition No. 2635 of 2014, writ petition No. 11381 of 2014, writ petition No. 1229 of 2012, writ petition No. 3607 of 2012, writ petition No. 9063 of 2012, writ petition No. 10717 of 2013, writ petition No. 3114 of 2013, writ petition No. 3115 of 2013, writ petition No. 5309 of 2014, writ petition No. 5761 of 2014, writ petition No. 5762 of 2014, writ petition No. 57.63 of 2014, writ petition No. 8075 of 2014, writ petition No. 1935 of 2015, writ petition No. 1936 of 2015, writ petition No. 3415 of 2015, writ petition No. 3416 of 2015, writ petition No. 11869 of 2015, writ petition No. 4869 of 2014, writ petition No. 2884 of 2015, writ petition No. 3417 of 2015, writ petition No. 4821 of 2013 and writ petition No. 4822 of 2013.

Claim of the writ petitions.

3. Challenging the incorporation of section 16CCC in the Income Tax Ordinance 1984, through the provision of section 15 of the Finance Act 2011 and amended through the Finance Act 2013, the Assessee-writ-petitioner TK Papers Products Limited, in writ petition No. 8323 of 2011, obtained the instant rule Nisi, to the following effect;

Let a Rule Nisi be issued calling upon the respondents to show cause as to why section 16CCC of the Income Tax Ordinance 1984 incorporated by section 15 of the Finance Act 2011 purportedly imposing minimum tax 0.50% on gross receipts of every company irrespective of its profit or loss in an assessment year (Annexure-A) should not be declared to have been passed, made and inserted without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this court may seem fit and proper.

4. Identical factual aspects have been asserted in all these writ petitions and almost similar rules have been issued in the said writ petitions. For the purpose of convenience, this court has primarily taken the assertion made in writ petition No. 8323 of 2011 in hand, along with examination of the assertions made in other writ petitions, since the Honorable Chief Justice constituted the instant Larger Bench by

endorsing his order in the record of the writ petition No. 8323 of 2011, preferred by the assessee-writ petitioner TK Papers Product Ltd. and all other writ petitions were made analogous with it from time to time.

5. It has been asserted in the instant writ petition No. 8323 of 2011 that the assessee-writ-petitioner TK Paper Products Limited is a private limited company incorporated under the Companies Act, 1994, a subsidiary of a group of companies and being income tax and VAT Assessee, regularly paying the said taxes to the Government. The Assessee-writ-petitioner pays its income tax under the TIN 376-200-4466 by submitting return, complying the provision of section 75 and section 35(3) of the Income Tax Ordinance 1984, on the income it derives from the business conducted by it and the said return were assessed under the provision of Chapter VIII of the Income Tax Ordinance 1984, on the basis of the income of the assessee writ petitioner, as calculated pursuant to the books of accounts maintained by the assessee-writ petitioner. But the legislature suddenly incorporated section 16CCC of the Income Tax Ordinance 1984 in the Income Tax Ordinance 1984 through the provision of section 15 of the Finance Act, 2011, imposing liability of paying minimum tax @ 0.50% on gross receipts of every company, irrespective of its profit or loss in an assessment year from all source. Previously similar provision was also introduced by the legislature in the Income Tax Ordinance 1984 as section 16CC by the Finance Act, 2006, but that was subsequently omitted by Finance Act 2008, realizing the illegality and inconsistency of the provision with the Income Tax Ordinance 1984.

6. It has been further asserted that practically, for the purpose of charging income tax and assessing the actual income of an assessee for the income tax purpose under the Income Tax Ordinance 1984, the total income of an assessee is required to be computed as per the provision of section 43 read with section 2(34), 2(62), 2(65), (16), (17), (20), (28), (29), (35) and 37 of the Income Tax Ordinance 1984 and the concept of charging 'minimum tax on gross receipts' is not contemplated or provided anywhere in the Income Tax Ordinance 1984 in general, and in section 43 of the Income Tax Ordinance 1984 in particular, and, as such, no tax can be realized from an assessee ignoring the provision of section 43 of the Income Tax Ordinance 1984. The impugned provision of section 16CCC of the Income Tax Ordinance 1984 is nothing but created an opportunity to the taxes, department to realize double tax from the Assessee-writ-petitioner, considering that every company is liable to pay minimum tax @ 0.50%, irrespective of its profit and loss in an assessment year on the gross receipts and in addition to income of the Assessee-writ-petitioner, which is violative and contradictory to the provision of section 43 of the Income Tax Ordinance 1984.

7. It has been further asserted that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is a harsh one and against the protection of lawful trade and business of the Assessee-writ-petitioner, as guaranteed under Article 40 of the Constitution and, as such, this provision cannot be treated as a provision by which the Assessee-writ-petitioner can be ensured as to its right to have protection of law, guaranteed under Article 31 of the Constitution and it is contrary to the provision of Article 27 of the Constitution, in as much as it affects the Assessee-writ-petitioner's rights. Therefore the newly inserted provision of the section 16CCC of the Income Tax Ordinance 1984 is inconsistent with Articles 27, 31 and 40 of the Constitution and, as such, the same is ultra vires.

8. It has been further asserted that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is also contrary and inconsistent with the other provisions of the Income Tax Ordinance 1984, since the gross receipts of a company

does not fall within the definition of income or total income and therefore the provision of section 16CCC of the Income Tax Ordinance 1984 is liable to be declared as inconsistent with the provision of Income Tax Ordinance 1984 and thereby ultra vires to the Constitution.

9. It has been further asserted that the newly inserted provision of section 16CCC of the Income Tax Ordinance 1984 is discriminatory, in as much as the same is only applicable against the 'company' and not for any proprietorship, firm and other trade and business concern or individual and therefore it created a discrimination in between the tax payer, thereby the same is ultra vires to the Constitution.

10. It has been further asserted that the Assessee-writ-petitioner company when filed its income tax return for the assessment year after the insertion of the provision of section 16CCC in the Income Tax Ordinance 1984, the concerned Deputy Commissioner of Taxes refused to accept the income tax return, on the plea that the Assessee-writ-petitioner did not comply the provision of section 16CCC of the Income Tax Ordinance 1984. Therefore, unless the said provision of section 16CCC of the Income Tax Ordinance 1984 is declared ultra vires to the Constitution the Assessee-writ-petitioner shall face irreparable loss and injury.

11. Similar factual aspects have been stated in other writ petitions and identical grounds are also taken in all these connected writ petitions.

12. The Taxes department entered appearance through the learned Deputy Attorney-General Ms Kazi Zinat Haque and the learned Assistant Attorney-General Mr. Sk. Saifuzzaman and submitted affidavit-in-opposition, wherein it has been claimed that the incorporation of the provision of section 16CCC of the Income Tax Ordinance 1984 is neither illegal nor ultra vires to the Constitution. The very understanding of the Assessee-writ petitioner as to the purpose of introducing the provision of section 16CC of the Income Tax Ordinance previously, through the Finance Act 2006 and the subsequent omission thereof, through the Finance. Act 2008 is misconceived. The legislature was aware of the revenue implication of section 16CC and in its wisdom has chosen first to include and then to omit the said section, considering the realities, such as compliance trends of company tax payer, principle of tax system, fiscal policy and other relevant matters. The 'minimum' tax is a modern tax concept and as a member of global tax unity, Bangladesh also embraced this modern concept of 'alternative tax' in the name of 'minimum tax', in line with global practice. Minimum tax concept was first introduced in Bangladesh by Finance Act 1997 for non-company tax payer i.e. individual, since then it is being imposed by Finance Act every year, which amount is now stand with certain amount of taka on total income of an individual. For company tax payer 'minimum tax concept' was introduced by Finance Act 2006 (section 16CC) but was subsequently omitted by Finance Act 2008. The newly inserted provision of section 16CCC of the Income Tax Ordinance 1984 is applicable for a firm having a gross receipts of more than 50,00,000 or a company tax payer and its charge is @ of 0.5% on gross receipts.

13. It has been submitted in the affidavit-in-opposition that under the newly inserted provision of section 16CCC of the Income Tax Ordinance 1984, tax liability of tax payer is calculated under regular method and also in alternative method i.e. 0.5% of gross receipts. If the tax liability, as calculated under regular method falls short of the tax calculated under alternative method i.e. 0.5% of gross receipts, alternative tax will prevail and, as such, the following table shall reflect the picture of such taxation;

A: Calculate tax under regular method.

B: Calculate tax under alternative method.

C: Compare A and B.

If A is greater than B, tax liability will be A.

If A is lesser than B, tax liability will be B.

14. For example if a company's gross receipts is Taka 10,00,000 and net profit is Taka 10,000 and the rate of tax is 37.5%, tax liability under the normal procedure vis-a-vis under section 16CCC of the Income Tax Ordinance 1984 will be determined in the following manner;

A. Tax under regular method

Net profit Tk. 10,000

Tax liability @ 37.5% Tk. 3,750

B. Tax under alternative method

Gross receipts Tk. 10,00,000

Tax @ 0.5% on gross receipts Tk. 5,000

Since alternative tax is higher, tax liability will be 5,000.

15. Any tax paid under Chapter VII (tax before assessment, e.g. source tax), such as advance tax or tax paid under section 74, shall be given credit against the tax liability, and the residual amount shall be payable by the tax payer. This concept of alternative tax calculation is globally followed.

16. It has been further mentioned that in section 16CCC of the Income Tax Ordinance 1984 minimum tax is calculated amongst other, on the basis on gross receipts as because, net receipts is nothing but the profit of the assessee i.e. gross receipts-expenses = net receipts. Therefore, in case of net receipts, no minimum tax could have been imposed as one has to pay tax on net income. Minimum tax is therefore, imposed on gross receipts in order to defeat tax evasion.

17. Finally, on the issue of introducing section 16CC in the year 2006 and omission of section 16CC in the year 2008 and subsequent introduction of section 16CCC through Finance Act 2011, as referred to in the paragraph under reference, it is stated that imposition/revocation/amendment of tax liability, including minimum tax, is legislative prerogative and a method of collection and demand of the prevailing situation of the country as well as a policy decision of the government. This imposition of method of collection is a normal and common practice in the fiscal legislation as well as in our prevailing fiscal law, in order to keep the flexibility in the fiscal law and also in order to meet the demand of time. Therefore, there cannot be any legal impediment in reintroduction of a law/tax as there cannot be estoppel against statute.

18. It has been further asserted in the affidavit-in-opposition that with the non-obstante clause in the newly introduced section 16CCC of the Income Tax Ordinance 1984, the legislature in its wisdom, intends to override any other provisions in the Ordinance to make ways for charging minimum tax in appropriate cases. It is also submitted that charging of minimum tax has long been the part of the fiscal laws, both in Bangladesh and in other countries including India, Pakistan, USA, Singapore, Korea, France, Austria, Malaysia, Latvia, Colombo, Nigeria, Madagascar, Panama, Honduras, Tunisia, Senegal Solomon Island and Ivory Coast.

19. It has been categorically prayed in the affidavit-in-opposition that the insertion of section 16CCC of the Income Tax Ordinance 1984 not being illegal and ultra vires the constitution, the instant rules Nisi are required to be discharged.

20. In this matter this Larger Bench has heard the learned Advocates, appearing for the different petitioners namely the learned Advocates Mr. Mahmudul Islam, Mr. Sarder Jinnat Ali. Mr. Mosharaf Hossain, Mr. Mustafa Tariq Hossain, Mr. Mizanul Haque Chowdhury, Mr. Abu Amzad, Mr. Ramzan Ali Sikder, Mr. M.A. Hannan, Mr. A.M. Amin Uddin, Mr. Asaduzzaman, Mr. Omar Sadat and Dr. Sharif Bhuiyan on behalf of the respective assessee-writ-petitioner and the learned Additional Attorney-General Mr. Murad-e-Reza, represented the Taxes department.

Arguments of the writ petitioners.

21. The learned senior Advocate Mr. Mahmudul Islam, appearing as senior counsel along with the learned Advocate Mr. M.A. Hannan, appearing on behalf of the Assessee-writ-petitioners in writ petition No. 9119 of 2011, writ petition No. 9201 of 2011, writ petition No. 9202 of 2011, writ petition No. 11002 of 2011, writ petition No. 11213 of 2012, writ petition No. 11214 of 2012, writ petition No. 11215 of 2012, writ petition No. 11216 of 2012, writ petition No. 11217 of 2012, writ petition No. 11218 of 2012, writ petition No. 11219 of 2012, writ petition No. 11220 of 2012, writ petition No. 9200 of 2012 at the very outset has taken this court through the impugned provision of the newly inserted section 16CCC of the Income Tax Ordinance 1984 and vigorously argued that the said provision illegally made discrimination among the different tax payer by imposing 'minimum tax' liability only upon the shoulder of the company and firm tax payer. Such a provision violates the provision of Article 27 of the Constitution as the illogical classification of tax payers violates the equal treatment of law, since the provision has made irrational basis in classifying the company and other class of tax payer. This being a total arbitrary, the rule of law is being infringed, which also hits the provision of Article 31 of the Constitution and the maxim of due process of law. In this respect the learned senior Advocate Mr. Mahmudul Islam relied on the case reported in 9 DLR (SC) 21, 44 DLR 521 and the case reported in LEX/BDHC/0189/1995 : 48 DLR 1, LEX/BDHC/0023/2005 : 58 DLR 5, 1, BLC (AD) 71 respectively.

22. The learned senior Advocate Mr. Mahmudul Islam drew the attention of this bench to the definition of 'Income,' 'Total income' and 'tax'. as provided in section 2(34), 2(65) and 2(62) of the Income Tax Ordinance 1984 and strenuously argued that the definition of 'Income', 'Total income' and 'Tax' neither contemplates 'minimum tax' nor 'ejusdem Generis' indicates that 'gross receipt' can be treated as 'income'. since the scheme and object of the Income Tax Ordinance 1984 is directed to collect 'tax' upon the income of an assessee and not upon its 'gross receipt', which apparently admittedly denotes that income is nothing but the outcome of gross receipt minus the expenses which has been categorically admitted in the affidavit-in-opposition. But the aim of minimum tax is to impose tax liability on gross receipt which by no stretch of imagination contemplated in the income tax statute. In this respect the learned Senior Advocate Mr. Mahmudul Islam relied upon the case reported in LEX/BDHC/0039/2012 : 65 DLR 1.

23. The senior learned Advocate Mr. Mahmudul Islam drew the attention of this bench to the provision of section 43 of the Income Tax Ordinance 1984 and strenuously argued that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 has practically nullified the provision of section 43 of the Income Tax Ordinance 1984 and consequently admittedly allowed the taxes department to ignore all the provision of the Income Tax Ordinance 1984 as to assessment of income of

the assessee making an opportunity to demand minimum tax on the gross receipt of the tax payer entity straight way, which practically contradicts the aim and object of income tax statute.

24. The learned senior Advocate Mr. Mahmudul Islam next argued that the provision of the impugned newly inserted section 16CCC of the Income Tax Ordinance 1984, has conflicted with several provisions of the Income Tax Ordinance 1984, especially the provision of section 82C of the Income Tax Ordinance 1984, since non-obstante clause existing in both the provisions makes confusion as to the applicability of the both sections, whether either of the section is applicable or not and if the later provision prevails over the earlier provision than that simply distorts the entire Income Tax Statute by implication.

25. The learned senior Advocate Mr. Mahmudul Islam vigorously argued that the taxes department falsely claimed that the 'minimum tax' is an 'alternative tax' which will be imposed only when the regularly assessed tax shall fall short of the amount assessed as minimum tax. But the actual fact remains that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 has created an opportunity to the taxes department to extort double tax from the Assessee-writ-petitioner by way of compelling the assessee to pay the minimum tax at the time of filing the return and then also to pay the tax under the regular assessment, under section 83 of the Income Tax Ordinance 1984, which is clearly hit by the provision of Article 83 of the Constitution of Bangladesh.

26. The learned senior Advocate Mr. Mahmudul Islam argued that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is against the protection of business and trade of the country and has hit the profession and business of the citizens in general, since irrespective of loss and profit a huge amount of tax has to be paid to the exchequer making the assessee further indebted to the Bank to manage fund for payment of minimum tax and therefore the same is violative of Article 42 of the constitution.

27. The learned Senior Advocate Mr. Mahmudul Islam finally contends that is unbelievable that liability of income tax can be imposed on other amount than the 'income' which practically nullifies the entire assessment process and makes opportunity to impose tax directly on the gross receipt which cannot be termed as sound law rather a 'jungle law'.

28. The learned Advocate Mr. Sarder Jinnat Ali appearing in writ petition No. 14346 of 2012, writ petition No. 4821 of 2013, writ petition No. 4822 of 2013, while taken this court through the entire provision of the impugned provision of section 16CCC of the Income Tax Ordinance 1984, strenuously argued that the newly inserted provision of 'Minimum Tax' not only contradicts with the provision of section 17 of the Income Tax Ordinance 1984, but also made the entire provisions of the Income Tax statute a nugatory one, since section 17 of the Income Tax Ordinance 1984 defined the scope of 'total income' of an assessee to be read with the definition of income as embodied in section 2(34) of the Income Tax Ordinance, 1984.

29. The learned Advocate Mr. Sarder Jinnat Ali in elaborating his submission argued that the object of the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is to impose tax on gross receipt of the assessee in an income year without taking into consideration its expenditure, meaning thereby that the 'income tax' will be imposed not on the income but on the expenditure like salary, service bill etc, which is not aim and object of the income tax statute. The several provisions of the income tax statute are directed to impose tax liability on income, the admitted

meaning of which is nothing but profit, being outcome of gross receipt minus the expenses. Therefore the introduction of minimum tax upon gross receipt grossly contradicts the universally recognized basic principle of income tax statute. The learned Advocate drew the attention of this court to the provision of section 244 of the Bangladesh Labour Act 2006 and argued that even the payment of the wages to the labour will also be taxed under the provision of section 16CCC of the Income Tax Ordinance 1984.

30. The learned Advocate Mr. Sarder Jinnat Ali contends that a company may have 200 crore taka in gross receipt and after deducting the raw material cost, import cost, employees salary, over head expenses, various expenditure, the net income comes to taka 10 crore only. Then if 0.50% tax has to be paid on gross receipt of Taka 200 crore that will simply destroy the whole business concern, making it to go out of business. Therefore the impugned provision hits the provision of article 40 of the Constitution.

31. The learned Advocate Mr. Mosharaf Hossain appeared in 12 (twelve) writ petitions, being writ petition No. 8323 of 2011, writ petition No. 8324 of 2011, writ petition No. 8325 of 2011, writ petition No. 8327 of 2011, writ petition No. 8328 of 2011, writ petition No. 8329 of 2011, writ petition No. 8330 of 2011, writ petition No. 9148 of 2011, writ petition No. 9149 of 2011, writ petition No. 9150 of 2011, writ petition No. 10749 of 2011, writ petition No. 253 of 2012, who upon submitting a written argument at the very initiation refuted the statement made in the affidavit-in-opposition as to the modus operandi of implementation of minimum tax and argued at length. He submits that the taxes department in order to spread smoke over the procedural matter, narrated in the table in the affidavit-in-opposition as to modus operandi of implementation of minimum tax in a manner which is far from true, but termed as better yielding. But as the imposition of minimum tax is contradictory with the provision of the income tax statute, no superior modus operandi against the avoidance of concealment of income can be allowed under the provision of our constitution. The learned Advocate Mr. Mosharaf Hossain, strenuously argued that the provision of section 16CCC of the Income Tax Ordinance 1984 is completely ultra vires of the constitution and the parliament has no unlimited power to enact anything it wishes. Because, the ultimate intention for incorporation of the provision of section 16CCC of the Income Tax Ordinance 1984, through the provision of section 15 of the Finance Act 2011, was to stop the tax avoidance by the companies and firms and therefore however valiant the said provision is, it must be within the four corners of the law. The learned Advocate Mr. Mosharaf Hossain submits that a plain reading of the impugned provision shows that the legislature by inserting the provision of section 16CCC of the Income Tax Ordinance 1984, imposed liability to pay income tax on gross receipts, rather than on income, which in turn practically curtails assessee's right to business and property.

32. The learned Advocate Mr. Mosharaf Hossain relying upon a French proposition LAISSEZ FAIRE argued that the said proposition says that 'the state has to be merely a passive policemen, protecting private property and administrating justice, but not interfering with the affairs of the citizens'. The imposition of minimum tax on gross receipt of a business is nothing but interference upon the business affairs of the citizens which is hit by the proposition LAISSEZ FAIRE.

33. The learned Advocate Mr. Mosharaf Hossain next argued that the explanation provided in section 16CCC of the Income Tax Ordinance 1984 'hammered the final nail in the coffin of income tax'. He submits that as the explanation provides with the section goes on, the chance for an assessee to deduct various deductions and allowable expenses from the receipts portion under section 29 of the Income Tax

Ordinance 1984 to ascertain its actual income, withers away.

34. The learned Advocate Mr. Mosharaf Hossain vigorously argued that 'Income' means any income, profit or gains and there is no reference of 'gross receipts' as income in the definition of 'income' embodied in section 2(34) or in the definition of 'tax' under the provision of section 2(62) of the Income Tax Ordinance 1984, to include all the receipts of the company or firm as income of the assessee. Under the provision of section 2(34) of the Act the word 'income' includes profits and gains. The charge of tax is not on gross receipts, but on profit or gains. Imposition of tax on gross receipts not only violates the provision of sections 28 and 29 of the Income Tax Ordinance 1984, and other various provisions of the statute, but clearly stands against the scheme and object of enactment of the statute to impose tax on income of the citizens. Therefore imposition of tax on the gross receipt does not allow or leave any room for Allowance and Deduction which are essential features of calculating the actual income of an assessee.

35. The learned Advocate Mr. Mosharaf Hossain next argued that the impugned provision of impugned section 16CCC of the Income Tax Ordinance 1984 violates "set-off and carry forward of losses" as provided in section 37, 38, 42 and 43 of the Income Tax Ordinance 1984, in as much as, when an assessee sustained any loss in his business, then the assessee would be entitled to set-off that loss against the profit under any other head. But due to impugned section 16CCC of the Income Tax Ordinance 1984, the assessee will be deprived off from claiming such set off with any of the profit on other hand it made in the year.

36. The learned Advocate Mr. Mosharaf Hossain argued that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 at its first initiation imposed liability of minimum tax only on the shoulder of company. Later it further imposed such liability on the firms through the amendment by the Finance Act 2013. But the provision still violates the provision of Article 40 of our constitution against making a discriminatory treatment violating the provision of Article 27 of the Constitution and also the provision of Article 31 of the Constitution of the People's Republic of Bangladesh as to due process of law.

37. The learned Advocate Mr. Mosharaf Hossain vigorously argued the right to Appeal is a statutory right under chapter XIX of the Income Tax Ordinance 1984. But that right has also been infringed by the impugned section 16CCC. since the said provision contains non-obstante clause meaning thereby that other provisions are not applicable against any decision made under section 16CCC of the Income Tax Ordinance 1984. Therefore, it curtails the assessee's statutory right to appeal provided in the Income Tax Ordinance 1984 which in a sense also violates the provision of Article 31 of the constitution as to be treated in accordance with law.

38. The learned Advocate Mr. Mosharaf Hossain further argued that the impugned provision of the impugned section 16CCC of the Income Tax Ordinance 1984 makes an assessee compelled to pay entire amount without giving a minimum opportunity to satisfy his grievances and also it forces the assessee to pay tax even before regular assessment, which violates the underline objective of Income Tax Ordinance 1984 and it further drags the assessee to be prosecuted under the criminal and civil proceeding, being assessee in default, if the payment of minimum tax is not made out.

39. The learned Advocate Mr. Mosharaf Hossain drew the attention of this bench that in the Budget speech of 2011-2012 nothing has been said about insertion of section 16CCC in the Income Tax Ordinance 1984 and in the Budget speech of earlier year of

2008-2009 it has been said that the inclusion of identical section in the Income Tax Ordinance 1984 was illegal and, as such, the same was proposed to be repealed from the Income Tax Ordinance 1984. Therefore, inclusion of section 16CCC of the Income Tax Ordinance 1984 is nothing but an admitted illegality committed by the legislature knowing fully well as to its implication.

40. The learned Advocate Mr. Mosharaf Hossain before concluding his arguments drew the attention of this bench to the fact that earlier those writ petitioners also challenged the similar provision of 'minimum tax' as provided by the insertion of section 16CC before it was repealed during the pendency of those writ petitions and, as such, those writ petitions became infructuous and, as such, the questions raised in these writ petitions could not be decided by this court. But now since the same issue was again raised, the same is required to be decided by this court once for all.

41. The learned Advocate Mr. Mosharaf Hossain submits that there is no similar unlawful provision in other jurisdiction, wherein income tax is imposed on gross receipts. The legislatures of other jurisdictions also realized and tried to stop avoidance of income tax and implemented various devices, but none tried to impose tax on gross receipts, as it is complete derogation from the basic principle of the income tax laws.

42. The learned Advocate Mr. Mosharaf Hossain finally argued that article 83 of the Constitution provides that no tax can be collected without the authority of Act of parliament. But any act of parliament if violates the provision of Article 7(2) and 26 of the constitution that cannot be treated as valid piece of law. The impugned provision of section 16CCC contradicts the entire provisions of the existing law and acts against the scheme and object of the said existing law, which made it a piece of legislation hit by the provision of the constitution for which the provision of section 16CCC of the Income Tax Ordinance 1984 is required to be declared ultra vires of the constitution.

43. The learned Advocate Mr. Md. Mizanul Haque Chowdhury, appearing on behalf of the Assessee-writ-petitioner in 21 (twenty one) writ petitions, being writ petition No. 8513 of 2011, writ petition No. 8514 of 2011, writ petition No. 8515 of 2011, writ petition No. 8516 of 2011, writ petition No. 8517 of 2011, writ petition No. 8518 of 2011 writ petition No. 8519 of 2011, writ petition No. 8520 of 2011, writ petition No. 4422 of 2012, writ petition No. 4423 of 2012, writ petition No. 4424 of 2012, writ petition No. 4425 of 2012, writ petition No. 4426 of 2012, writ petition No. 4427 of 2012, writ petition No. 4428 of 2012, writ petition No. 4429 of 2012, writ petition No. 6631 of writ petition No. 6647 of 2012, while taken this court through the definition of 'tax' as made in section 2(62) of the Income Tax Ordinance 1984 and the 'charge of income tax' as provided in section 16 of the Income Tax Ordinance 1984 and also 'charge of surcharge' as provided in section 16A of the Income Tax Ordinance 1984, vigorously argued that 'minimum tax', imposed through the inclusion of the impugned section 16CCC, has not been included in the definition of tax, since imposition of any tax upon the gross receipt is not contemplated in any of the existing provisions of the Income Tax Ordinance 1984. Moreover it is unimaginable that any tax could be paid on the gross receipt of a business concern in the name of 'income tax' treating the gross receipt as income of the concern.

44. The learned Advocate Mr. Mizanul Hoque Chowdhury next argued that the taxes department falsely claimed that 'minimum tax' will be collected as 'alternative tax' and shown in the affidavit-in-opposition. But the facts remain that no procedure of collecting the minimum tax is given either in the enactment or through any rule which violates the provision of Article 87 of the Constitution, although an untrue

attempt has been made in the affidavit-in-opposition to justify the so called modus operandi that minimum tax will be collected only when the same will be higher than the regularly assessed tax. But such modus operandi has not been made in the statute, especially in chapter VII, under which the modus operandi of imposition of tax liability upon an assessee has been operative.

45. The learned Advocate Mr. Mizanul Haque Chowdhury next argued that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 has made discrimination in between the company, firm and the individual, since minimum tax has to be paid by the Company and Firm only and not the individuals doing the same business as per the provision of section 16CCC of the Income Tax Ordinance 1984, although all the assesseees may derive income from the similar nature of business. This discrimination hits articles 27, 31 and 40 of the constitution and, as such, the entrepreneurship is being hampered which will ultimately jeopardize the economics of the country.

46. The learned Advocate Mr. Mizanul Haque Chowdhury next vigorously argued that the provision of section 16CCC of the Income Tax Ordinance 1984 is inconsistent with the basic scheme of the Income Tax Ordinance 1984 and unreasonable, being tax on gross receipts, since gross receipts could never be treated as income as it includes the raw material cost, overhead expenses, office salaries, loan repayment and miscellaneous expenditure. Except the impugned provision of section 16CCC of the Income Tax Ordinance 1984 all other charging provisions are admittedly on income, profit or gain, so far the provision of section 16, 16A, 16B and 16C of the Income Tax Ordinance 1984 is concerned and to that extent section 16CCC of the Income Tax Ordinance 1984 is inconsistent with the provision of all these sections and therefore hit by the provision of article 26(2) of our constitution. The learned Advocate Mr. Mizanul Hoque Chowdhury contends that a piece of new legislation if contradicts the provisions of an existing enactment, the new legislation must be treated as violative of the existing legislation and consequently violative of the constitution, since the constitutional mandates requires the parliament to abide by the provision that 'state shall not make any law inconsistent with any provision of the constitution and any law so made shall, to the extent of such inconsistency, be void. Therefore the provision of the impugned section 16CCC of the Income Tax Ordinance 1984 is required to be declared as void and ultra vires of the constitution.

47. The learned Advocate Mr. Abu Amzad, appearing on behalf of the Assessee-writ-petitioner in writ petition No. 13357 of 2012 and 10233 of 2012 argued that the business independence of a company and firm is being hampered by the impugned provision of section 16CCC of the Income Tax Ordinance 1984, as it imposes tax upon the gross receipts of the assessee, irrespective of loss or profit and therefore the entrepreneurship of this country is being jeopardized and, as such, must be treated as an attempt to destroy the trade and business in the garb of tax collection. The provision of article 83 of the constitution does not permit collection of certain tax in wrongful manner or through a wrong legal provision. The entire impugned provision of section 16CCC of the Income Tax Ordinance 1984 is not only unreasonable, but also violates the provision of Article 31 and 40 of the Constitution, so far the right to property and carrying on profession, is concerned. Since a citizen will be out of business if he has pay tax on his gross receipt which includes all his expenditure in dealing with the business.

48. The learned Advocate Mr. Abu Amzad vigorously argued that no question of imposing income tax upon the gross receipts, violating the entire provision of Income Tax Ordinance 1984, is consistent with the aim and object of the Income Tax statute since the definition of income, as has been provided in section 2(62) of the Income

Tax Ordinance 1984 is the prime concern of the Income Tax Ordinance 1984 in order to impose tax liability upon an assessee. Therefore, the provision of section 16CCC of the Income Tax Ordinance 1984 is liable to be declared as ultra vires of the constitution of Bangladesh.

49. The learned Advocate Mr. Ramzan Ali Sikder appearing on behalf of the Assessee-writ-petitioners in writ petition No. 8307 of 2011, writ petition No. 8308 of 2011, writ petition No. 8309 of 2011, writ petition No. 8310 of 2011, writ petition No. 8311 of 2011, writ petition No. 8312 of 2011, writ petition No. 8313 of 2011, writ petition No. 8314 of 2011, writ petition No. 8315 of 2011, writ petition No. 8316 of 2011, writ petition No. 8317 of 2011, writ petition No. 1233 of 2012, writ petition No. 1234 of 2012, writ petition No. 9319 of 2011, writ petition No. 9320 of 2011, writ petition No. 8497 of 2011, writ petition No. 8498 of 2011, writ petition No. 9136 of 2011, writ petition No. 9137, writ petition No. 8140 of 2011, writ petition No. 13266 of 2012, writ petition No. 9575 of 2011 and writ petition No. 10026 of 2011 at the very outset has drawn the attention of this court to the definition clause of firm, as provided in section 2(34) of the Income Tax Ordinance 1984, and argued that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 caused discrimination in between the three class of tax payers i.e. individual, company and firm in as much as these three class of business entities although stands on the same footing, but only one of them, i.e. the company was primarily imposed with the liability of minimum tax. Later by the Finance of 2013 firms were also imposed with the same liability and now the laws stand that two of them shall pay the minimum tax and other assessee, the individual, pursuing the same business shall not be liable to pay tax on gross receipt. This has cause irrational competition among the assessees. So also the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is unreasonable and the same may be taken into consideration for striking down the provision, so far their lordship in the Indian Jurisdiction decided in a case, reported in AIR 1966 SC 1627.

50. The learned Advocate Mr. Ramzan Ali Sikder next argued that the apex court of this country in the case of Siddique Ahmed vs. Bangladesh, popularly known as 'Eighth amendment case' struck off the eighth amendment made to the constitution on the ground that it nullifies some of the provision of the constitution. This rule is also applicable in the instant case since the provision of section 16CCC of the Income Tax Ordinance 1984, entirely nullifies the entire Income Tax Ordinance 1984 and became an independent weapon to the tax authority to rely upon it for the collection of income tax, leaving aside the whole statute of income tax, since no other provisions of the statute is required to be taken into consideration in order to impose income tax liability upon an assessee and only his gross receipt is required to be taken into consideration, which although reduced the work load of the taxes department but violates the scheme and object of the Income Tax Ordinance 1984 to impose tax upon income. But the impugned provision of section 16CCC of the Income Tax Ordinance 1984, imposes tax liability on gross receipts and therefore violative of the provision of the constitution.

51. The learned Advocate Mr. Ramzan Ali Sikder next argued that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 has also made an opportunity to impose tax upon tax and there will be no relief to be given under the provision of section 144 of the Income Tax Ordinance 1984 which deals in double taxation relief.

52. The learned Advocate Mr. Ramzan Ali Sikder finally argued that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 will nullify the provision of sections 25, 26, 27, 29, 30, 37, 38, 42, 43, 6th Schedule Part A, Part B,

section 44(1), 46B, 46C up to section 47 and Chapter VII, sections 48, 74, and 82C of the Income Tax Ordinance 1984 and, as such, the same cannot be sustained as a valid piece of law and therefore liable to be declared as ultra vires to the constitution.

53. The learned Advocate Mr. MA Hannan appearing on behalf of the Assessee-writ-petitioner while taken this court through the Budget Speech of 2008-2009 of the Finance Adviser to the Chief Advisor of the Caretaker Government for the period, drew the attention of this 2006-2008 bench to the fact that earlier through the Finance Act 2006 the identical provision of minimum tax was introduced in the Income Tax Ordinance 1984 by way of incorporation of section 16CC and later the government realized that such provision, being derogatory to the provision of the Income Tax Ordinance 1984, cannot be sustained and accordingly it repealed the same which has been stated in the Budget Speech of 2008-2009 of the Finance Advisor Mr. AB Mirza Muhammad Azizul Islam. But surprisingly after the change of the Government, identical provision has again been incorporated by the Finance Act 2011, without stating any reason as to why the similar provision will be lawful now as to imposition of minimum tax upon gross receipts, which is not an income, since the definition of income' and 'Tax' has not been amended to include the gross receipts as to be treated as income.

54. The learned Advocate Mr. M.A. Hannan while taken this court through the provision of section 16CCC and the provision of section 20 of the Income Tax Ordinance 1984, strenuously argued that non-obstante clause stated in both the provision, is contradictory, so also it contradicts the provision of section 82C of the Income Tax Ordinance 1984, which also contain a non-obstante clause. While the provision of section 82C of the Income Tax Ordinance 1984 provides a final discharge of tax liability upon payment of Advance Income Tax (AIT), the same goes in vain by the insertion of the provision of section 16CCC, as the Assessee has to pay further tax on entire gross receipts.

55. The learned Advocate MA Hannan next argued that the provision of section 83 of the Income Tax Ordinance 1984 gives a procedure for assessment, which does not include the provision of section 16CCC of the Income Tax Ordinance 1984, but only total income to be taken for assessment. Therefore, without amendment made to the other sections, namely section 2(34), 2(65), 16, 17, 20, 82BB, 82(3), 84 of the Income Tax Ordinance 1984, the provision of section 16CCC of the Income Tax Ordinance 1984 is sure to be treated as causing contradiction to those sections.

56. The learned Advocate Mr. M.A. Hannan argued that the explanation (a) and (b) as provided in the impugned section 16CCC of the Income Tax Ordinance 1984 is akin to the provision of Value Added Tax Act 1991 and that being the principle of indirect tax, that cannot be incorporated in the provision of direct tax like income tax. The provision of section 16CCC of the Income Tax Ordinance 1984 is a deviation of section 16(1) of the Income Tax Ordinance 1984, since income tax is a personal liability of the assessee. Further the provision Of section 37 and 38 of the Income Tax Ordinance 1984 having given the right to set off losses, the provision of section 16CCC takes it away by implication and the legitimates expectation of the assessee goes and thereby the statutory right of the assessee is being hampered.

57. The learned Advocate Mr. M.A. Hannan finally argued that the rate of tax is being fixed each year by the Finance Act and different rate is being fixed for different year under the provision of section 16(1) of the Income Tax Ordinance 1984. But the provision of section 16CCC of the Income Tax Ordinance 1984 makes a minimum rate fixed forever and, as such, the same is derogatory to the aim, scheme and object of the Income Tax Ordinance 1984. All these being contradiction of the Income Tax

Ordinance itself, the same is also violative of the provision of the constitution and, as such, liable to be declared ultra vires of the constitution.

58. The learned Advocate Mr. A.M. Amin Uddin, appearing on behalf of the Assessee-writ-petitioner, in writ petition No. 4707 of 2012, writ petition No. 4708 of 2012, writ petition No. 3366 of 2012, writ petition No. 3008 of 2012 and writ petition No. 3009 of 2012, while taken this court through the provision of section 29(3) of the Income Tax Ordinance 1984, argued that the provision Of section 16CCC of the Income Tax Ordinance 1984 made the provision of section 29 of the Income Tax Ordinance 1984 as to deduction of allowable expenditure, a nugatory one and, as such, the same contradicts the scheme of the Income Tax Ordinance 1984. The learned Advocate Mr. AM Aminuddin further taken this bench to different provisions of the Income Tax Ordinance 1984 and argued that all this provisions became superfluous since the tax authority can only rely upon the provision of the impugned section 16CCC of the Income Tax Ordinance 1984, without entering into the complicated assessment process to find out the actual income of the assessee. This is really violative of the right to be treated in accordance with law and therefore is liable to be declared as ultra vires.

59. The learned Advocate Mr. Md. Asad-uz-zaman, appearing on behalf of the Assessee-writ-petitioner in writ petition No. 12003 of 2012 drawn the attention of this bench to a decision popularly known as 7th Amendment case, the judgment of which was passed on 15th May, 2011, after which the provision of section 16CCC of the Income Tax Ordinance 1984 was incorporated on 30th June, 2011 by the Finance Act 2011 and argued that as such the provision of section 16CCC, included after the said decision, is nothing but a fraud on the constitution. Because, by the 7th Amendment judgment, the Income Tax Ordinance 1984 became an invalid piece of legislation and long thereafter on 26th February, 2013, by the provision of Act 7 of 2013 the Income Tax Ordinance 1984 was revived. But in the meantime since the impugned provision of section 16CCC was included in the Income Tax Ordinance, through the Finance Act 2011, the same must be treated as having been improperly incorporated in the Income Tax Ordinance 1984. Therefore, so far the provision of Article 81(1) Article 82 of the Constitution is concerned, the insertion of the provision of section 16CCC in the Income Tax Ordinance 1984 is required to be declared as ultra vires of the Constitution.

60. The learned Advocate Mr. Omar Sadat, appearing on behalf of the Assessee-writ-petitioner in writ petition No. 428 of 2012 and writ petition No. 9606 of 2013 argued that the imposition of minimum tax violates the definition of income, since income tax is directed only to impose tax upon the income. The gross receipts of a company or firm can never be treated as an income, since the Income Tax Ordinance 1984 itself has allowed deduction of allowable expenditure from it. But the provision of section 16CCC of the Income Tax Ordinance 1984 simply curtailed down the same and imposed tax liability on gross receipts of the company. That being a derogatory provision to the entire schemes of the Income Tax Ordinance 1984, the same violates the constitution and, as such, it cannot be sustained and liable to be declared as ultra vires.

61. The learned Advocate Mr. Mustafa Tariq Hossain, appearing on behalf of the Assessee-writ-petitioner in writ petition No. 1229 of 2012, writ petition No. 3607 of 2012, writ petition No. 9063 of 2012, writ petition No. 10717 of 2013, writ petition No. 3114 of 2013, writ petition No. 3115 of 2013, writ petition No. 5309 of 2014, writ petition No. 1935 of 2015, writ petition No. 1936 of 2015, writ petition No. 3415 of 2015, writ petition No. 3416 of 2015, writ petition No. 3417 of 2012 and writ petition No. 8075 of 2014 argued in the same line that contradicting the existing

provision of law by incorporating derogatory provision in the same law practically deprives the citizens from being treated in accordance with the existing provision of law, which thereby hits the provision of article 27 of the constitution, which guarantees to be treated in accordance with law.

62. The learned Advocate Mr. Mustafa Tariq Hussain argued that the object of the income tax is to impose tax upon the income and income has been defined in section 2(34) of the Income Tax Ordinance 1984, which does not include the gross receipts and therefore the imposition of income tax within the bounds of the Income Tax Ordinance 1984, on the gross receipts, is nothing but violative of the Constitutional rights of an assessee, to be treated in accordance with law.

63. The learned Advocate Mr. Mustafa Tariq Hussain finally argued that the parliament is not empowered to enact any provision of law beyond the provision of the constitution as embodied in Article 7(2) and 26 of the Constitution, since the parliament is not sovereign as omnipotence, but sovereign, within the four corners of the constitution. Therefore the enactment of any provision of law, like the provision of section 16CCC of the Income Tax Ordinance 1984 violating the provision of the constitution is nothing but ultra vires and, as such, the insertion of the provision of section 16CCC of the Income Tax Ordinance 1984 is required to be declared as ultra vires of the constitution.

64. The learned Advocate Dr. Sharif Bhuiyan, appearing on behalf of the Assessee-writ-petitioner in writ petition No. 9136 of 2011 and writ petition No. 9137 of 2011 argued that the Article 42 of the Constitution guaranteed the right to property to the citizen and the tax law is nothing but ex-proprietary of property. But the provision of section 16CCC of the Income Tax Ordinance 1984 is taking away the property, since when there is a loss there will be no gain in hand, but the Assessee will be still liable to pay tax on loss and therefore it violates the provision of Article 42 of the Constitution and liable to be declared as ultra vires.

65. The learned Advocate Dr. Sharif Bhuiyan strenuously argued that irrespective of the provision identical/operative in other jurisdiction, the same that must be taken into consideration and, as such, similar provision cannot be incorporated in the Bangladesh context, since the social and other parameters of other jurisdiction being completely different, the same cannot be incorporated in Income Tax Ordinance 1984. Therefore the provision of section 16CCC of the Income Tax Ordinance 1984 is required to be declared ultra vires.

Arguments of the Taxes department.

66. On the other hand the learned Additional Attorney-General Mr. Murad-e-Reza appearing on behalf of the respondent Taxes department, while taken this bench through the prayer portion of the Assessee-writ-petitioner in all the writ petitions, argued that nothing has been stated as to any prejudice of the Assessee-writ-petitioner due to the incorporation of the provision of section 16CCC of the Income Tax Ordinance 1984 and the aim of these writ petitions appear to be an attempt to avoid the payment of tax as a whole. The provision of law, the constitutionality of which has been challenged in these proceedings, have imposed a liability upon the business houses to pay income tax in order to contribute to the economic need of the country which being beneficial to the financial health of the country is immune from such challenge.

67. The learned Additional Attorney-General Mr. Murad-e-Reza in eloquent voice next argued that it is misconceived to state the provision of minimum tax as ultravires of the constitution, since the constitution in article 83, has mandated the state to

impose tax upon the citizens through the authority of an Act of Parliament. The Finance Act 2011 being the Act of Parliament, through which the provision of minimum tax has been incorporated in the Income Tax Ordinance upon observing the provision of articles 81 and 82 of the Constitution, is squarely a lawful Act of parliament constitutional ability of which cannot be challenged as to merit of such enactment.

68. The learned Additional Attorney-General Mr. Murad-E-Reza next argued that the legislature although has omitted the provision of section 2(63) of the Income Tax Ordinance 1984 as to definition of 'taxable income' earlier, through Finance Act 1993 and did not include 'minimum tax' in the definition of 'tax' as provided in section 2(62), nevertheless the definition of the 'total income' as defined in section 2(65) of the Income Tax Ordinance 1984, clearly included 'any receipts' including 'loss' by the assessee as 'income' which also includes 'gross receipt' of an assessee. The assessee-writ-petitioners have not challenged the provision of now repealed section 2(63) of the Income Tax Ordinance 1984 and therefore the challenge to the provision of section 16CCC of the Income Tax Ordinance 1984 cannot be sustained.

69. The learned Additional Attorney-General Mr. Murad-e-Reza next argued that the provision of section 16CCC of the Income Tax Ordinance 1984 is an alternative charging section and its fully consistent with the provision of sections 2(34), 2(62), 2(65), 16, 17, 20, 28, 29, 35, 37 and 43 of the Income Tax Ordinance 1984 and with the object and scheme of the Income Tax Ordinance 1984. The term "gross receipt" as explained in the explanation attached to section 16CCC of the Income Tax Ordinance 1984, falls very much within the definition of "income" under clause (a) and (b) of section 2(34) of the Income Tax Ordinance 1984 and, as such, 'Minimum tax' must necessarily mean 'minimum income tax' under the definition of tax.

70. The learned Additional Attorney-General very confidently argued that by inserting 'non obstante' clause with section 16CCC of the Income Tax Ordinance 1984, the legislature, in its wisdom, intends to override the applicability of the concept of 'total income' to make way for the alternative method of tax calculation, which is very much consistent not only with the provision of the other sections of the Income Tax Ordinance 1984, but also confirmative with the integral part of fiscal laws. In this respect the learned Additional Attorney-General relied upon the cases reported in 42 DLR (AD) 221, MANU/SC/0012/1992 : AIR 1992 SC 81 and 1998 SC 1388; R.K. Gar vs. Union of India, (1982) (SC) ITR 239.

71. The learned Additional Attorney-General Mr. Murad-e-Reza next argued that the taxpayer's tax liability is absolutely "single". In calculating tax liability under 16CCC, of the Income Tax Ordinance 1984 any tax, paid in advance at source or under section 74 is duly given credit. Moreover, when any income of a taxpayer falls under the ambit of final settlement of tax liability under section 82C of the Income Tax Ordinance 1984, that income does not come under the ambit of section 16CCC. Thus, there is absolutely no scope of alleged double taxation under section 16CCC of the Income Tax Ordinance 1984, since the provision of section 16CCC is used by the taxes department as alternative charging method, meaning thereby that in either way the tax avoidance shall have to be contained.

72. The learned Additional Attorney-General Mr. Murad-e-Reza vigorously argued that the classification of taxpayers for the purpose of taxation is an essential and legally accepted characteristics of tax laws. Classification for the purposes of taxation or for exempting from tax, with reference to the source of the income, is integral to the fundamental scheme of the income tax law all over the world and, as such, imposition of liability to pay minimum tax upon the company and later also on the

firm is consistent with the practice and therefore it did not cause any discrimination among the tax payers.

73. The learned Additional Attorney-General Mr. Murad-e-Reza argued with emphasis that the wisdom or ethic of a legislation cannot be challenged as there is always a presumption which remains in favour of the constitutionality of an enactment. The provision of section 16CCC of the Income Tax Ordinance 1984 was incorporated in tax law which strictly remaining within the authority granted to the legislature, under the provision of Article 65 of the Constitution and the provision of Section 16CCC is included in the Ordinance by the Finance Act, 2011 duly passed by the parliament under the power and authority vested upon it by the provision of Article 65(1) of the Constitution and is fully consistent with the provision of the Article 27, 31, 40 or any other Article of the Constitution and, as such, not liable to be declared ultra virus of the constitution.

74. The learned Additional Attorney-General Mr. Murad-e-Reza in support of his arguments, relied on the case of Sheikh Abdus Sabur vs. The Returning Officer, reported in 41 DLR (AD) 30, the case of PTR Exports (Madras) (P) Ltd. vs. Union of India (1996), reported in MANU/SC/0943/1996 : AIR 1996 SC 3461, the case of R.K Garg vs. Union of India (1982) (SC) ITR 239, the case of A.R. Shams-ud-Doha vs. Bangladesh reported in LEX/BDHC/0144/1992 : 46 DLR 405, the case of Brahmanbaria Pourashava vs. Ministry of Land reported in 7 BLT (AD) 95 : 51 DLR (AD) 84, respectively.

75. The learned Additional Attorney-General contends that in order to combat the tax avoidance tendency of the companies and firm assesseees, the Government has to take legislative measure, since government cannot ignore how such evasions eat into the vitals of the economic life of the country, since the tax avoidance occurs in many way, the imposition of tax on gross receipt is the correct method to contain the tax avoidance.

76. The learned Advocate Mr. Murad-e-Reza prays that the instant writ petitions, being not maintainable, the rules Nisi be discharged.

77. We have heard the learned Advocates and perused the materials on record, the various documents, decisions, written arguments etc. We have also pondered over the valuable arguments advanced by the learned Advocates and considered the same in its true perspective.

Issues.

78. The constitutionality of the impugned provision of section 16CCC of the Income Tax Ordinance 1984 has been challenged in these writ petitions by various writ-petitioners and, as such, this larger bench has to resolve two vital issues (1) as to whether the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is violative of the fundamental rights as guaranteed under articles 31, 27, 40 and 42 of the constitution of Bangladesh, having violated the scheme and object of the entire Income Tax Ordinance 1984 through contradicting its various provisions and then to ascertain (2) whether the parliament has the omnipotence to enact such a piece of law in order to incorporate the same in the Income Tax Ordinance 1984. These two issues not only affects the financial interest of the petitioners, rather these issues have public importance too. From the trends of the arguments of the parties a further issue may be required to be resolved (3) whether the impugned provision of section 16CCC is a discriminatory provision being hit by the provision of article 27 of the constitution.

Deliberation of the Court

79. Due to interconnection of the issues raised, both of them are being taken into consideration together for the sake of convenience and brevity.

80. In this proceedings relief has been sought pursuant to the provision of fundamental right, as embodied in Article 26(2) of the Bangladesh Constitution on the ground that the provision of section 16CCC of the Income Tax Ordinance 1984 is violative of Articles 31, 27 along with Article 40 and 42 of the Constitution and, as such, hit by the provision of article 26(2) of the constitution.

81. On the other hand the taxes department hailed the incorporation of section 16CCC in the Income Tax statute as a very beneficial piece of legislation having useful method for containing the tax evasion with special emphasis that the method is an alternative charging method, as prevailing in other developed countries and, as such, the provision is not ultra vires to the constitution, since the parliament has all the authority to enact any law in its wisdom.

82. The inserted provision of section 16CCC of the Income Tax Ordinance 1984 was incorporated in the Income Tax Ordinance 1984 through the provision of section 15 of the Finance Act 2011 and came into effect from 1st July 2011. The impugned provision of section 16CCC is reproduced below for better appreciation;

"Income Tax Ordinance 1984 Section 16CCC. Charge of minimum tax.-- Notwithstanding anything contained in any other provisions of this Ordinance, every company shall, irrespective of its profits or loss in an assessment year for any reason whatsoever, including the sustaining of a loss, the setting off a loss of earlier year or years or the claiming of allowances or deductions (including depreciation) allowed under this Ordinance, be liable to pay minimum tax at the rate of zero point five zero (0.50%) per cent of the amount representing such company's gross receipts from all sources for that year.

Explanation : For the purpose of this section, gross receipts mean--

- (a) all receipts derived from the sale of goods;
- (b) all fees or charges for rendering services or giving benefits including commissions or discounts;
- (c) all receipts derived from any heads of income.

83. The original provision of section 16CCC had imposed minimum tax liability upon the companies only. Later through the Finance Act 2013 the said liability has also been extended to the 'Firms'. Thereafter, the aforesaid provision of imposing 'Minimum Tax' is only applicable to the income of 'companies & firms' leaving aside the other classes of assesses, the 'individuals'. The gross receipt of these two classes of assessee have been made liable to income tax, irrespective of any profit or loss in the relevant income year.

84. It appears that admittedly identical provision was incorporated in the Income Tax Ordinance 1984 as section 16CC by the Finance Act 2006 and subsequently the same was omitted by the Finance Ordinance 2008. The said repealed provision of section 16CC of the Income Tax Ordinance 1984 is reproduced below in order to make a comparison in between these two section 16CC and section 16CCC.

Income Tax Ordinance 1984

Section 16CC: Charge of minimum tax.--

(1) This section shall apply to a company in the case where, for any reason whatsoever, including the sustaining of a loss, the setting off of a loss of an earlier year, the application of tax credits or rebates, on the claiming of allowances or deductions (including depreciation and amortization deductions) allowed under this Ordinance or any other law for the time being in force, tax is not payable or paid by such company for an assessment year, or tax payable or paid by such company for an assessment year is less than point two five percent (0.25%) of the amount representing such company's turnover from all sources for that year or taka five thousand whichever is higher.

(2) Where this section applies,--

(a) The aggregate of the company's turnover assessed for the assessment year shall be deemed to be the income of such company for the year chargeable to tax;

(b) Such company shall pay as income tax for the assessment year an amount equal to point two five per cent (0.25%) of the turnover assessed for the year or taka five thousand whichever is higher.

Explanation : For the purposes of this section, "turnover" means--

(a) The gross receipts derived from the sale of goods;

(b) the gross fees for rendering services or giving benefits including commissions or discounts;

(c) The gross receipts derived from any heads of income excluding income from capital gains and receipts under speculation business;

(d) The company's share of the amounts stated above of any association of persons of which the company is a member.

85. Upon comparison of both the sections, it appears that both the provisions are substantially same and identical, so far the 'turn over, gross receipt' etc. and the target assesses are concerned.

86. It has been argued from the bar that in the Budget Speech of 2008-2009 the then Finance Advisor of the Caretaker Government of Bangladesh of the year 2006-2009, Dr. AB Mirza Md. Azizul Islam had admitted that the provision of section 16CC of the Income Tax Ordinance 1984 is inconsistent with the other provisions of the Income Tax Ordinance 1984 and, as such, the same is required to be omitted from the statute.

87. In order to examine the said factual aspect this bench has consulted the Budget Speech of 2008-2009, wherefrom it appears that in paragraph No. 157 the then Finance Advisor Dr. AB Mirza Md. Azizul Islam has stated on the point, in the following language;

“বর্তমান আয়কর অধ্যাদেশের ১৬ সিসি ধারা অনুযায়ী লোকসান হলেও যে কোন কোম্পানীকে টার্নওভারের ভিত্তিতে নির্ধারিত ন্যূনতম অংকের কর পরিশোধ করতেই হয় যা আয়করের মূলনীতির পরিপন্থি তাই আয়কর অধ্যাদেশের ১৬ সিসি ধারা বিলোপ করার প্রস্তাব করছি।”

88. Accordingly it was provided in section 12 of the Finance Act 2008 that the provision of section 16CC of the Income Tax Ordinance 1984 be deleted.

89. This bench has also examined the budget speech of the Honorable Minister Mr. Abul Mal Md. Abdul Muhit, for the Fiscal year 2011-2012, consequent to which the impugned provision of section 16CCC was incorporated in the Income Tax Ordinance 1984, but nowhere of it, this bench found any expressed reason for again incorporating the admitted contradictory provision in the income tax Ordinance 1984.

90. The arguments advanced by the learned Additional Attorney-General in this respect to the extent that there cannot be estoppel against law and the imposition/revocation/amendment of tax liability including minimum tax being legislative prerogative and demand of the prevailing situation of the country as well as policy decision of the government, as normal and common practice, is devoid of to be accepted by this bench since it is not the case of re-introduction of a legal provision which was not only described as illegal, rather the highest authority of the Fiscal affairs of the Government admitted its illegality, so far the provision of section 16CC of the Income Tax Ordinance 1984 was concerned.

91. However this bench will examine the constitutionality of the impugned provision for the decisive decision on the issue and shall not be strict to the said admission as made by the Honourable Finance Advisor of the Caretaker Government.

92. The preamble of the statute named 'Income Tax Ordinance, 1984' declares that the said law was enacted in order to consolidate and amend the law relating to 'Income tax'. This preamble directs to the proposition that the Income Tax Law has been enacted for the purpose of imposing tax liability on 'income' of an income tax assessee. The definition of 'Income' as provided in section 2(34) of the Income Tax Ordinance 1984 is not 'exhaustive' rather included certain income within it, which runs in the following terms;

Income Tax Ordinance 1984

Section 2(34);

In this Ordinance, unless there is anything repugnant in the subject or context,--

(2)-(33)....

(34) "income" includes--

(a) any income, profits or gains, from whatever source derived, chargeable to tax under any provision of this Ordinance under any head specified in section 20;

(b) any loss of such income, profits or gains;

(c) the profits and gains of any business of insurance carried on by a mutual insurance association computed in accordance with paragraph 8 of the Fourth Schedule;

(d) any sum deemed to be income, or any income accruing or arising or received, or deemed to accrue or arise or be received in Bangladesh under any provision of this Ordinance:

But does not include, in the case of a shareholder of a Bangladeshi company, the amount representing the face value of any bonus shares or the amount of any bonus declared, issued or paid by the company to its shareholders with a view to increasing its paid-up share capital:

Provided that the amount representing the face value of any bonus share or the amount of any bonus declared, issued or paid by any company registered in Bangladesh under কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন) to its shareholders with a view to increase its paid-up share capital shall not be included as income of that share-holder.

93. The aforesaid non-exhaustive definition of 'income' although in so many words included different 'receipts' into the definition of income, but nowhere of it the 'gross receipt' of an assessee has been included to be treated 'as income'.

94. The learned Additional Attorney-General Mr. Murad-e-Reza in order to refute the challenge of the petitioners, developed his argument on the basis of the definition of 'Tax', as defined in section 2(62) and on the definition of 'total Income' defined in section 2(65) of the Income Tax Ordinance 1984, which prompted this bench to examine these two provisions, wherefrom it appears that the term 'tax' has been defined in section 2(62) of the Income Tax Ordinance 1984 in the following language;

Income Tax Ordinance 1984

Section 2(62): Definitions.--

"tax" means the income-tax payable under this Ordinance and includes any additional tax, excess profit tax, penalty, interest fee or other charges leviable or payable under this Ordinance;

95. The aforesaid definition of 'tax' although includes (1) Additional tax, (2) Excess profit tax (3) Penalty (4) Interest (5) Fee (6) other charges, yet it does not include 'minimum tax' in the definition of tax. Even the ejusdem generis of the provision does not indicate that it includes 'minimum tax' within the meaning of 'other charge leviable or payable under this Ordinance'.

The term 'Total income' has been defined in section 2(65) of the Income Tax Ordinance 1984 in the following language;

Income Tax Ordinance 1984

Section 2(65),

"total income " means the total amount of income referred to in section 17 computed in the manner laid down in this Ordinance, and includes any income which, under any provision of this Ordinance, is to be included in the total income of an assessee;

(Emphasis supplied)

96. Prior to examination of the implication of total income the provision of section 16 of the Income Tax Ordinance 1984 is required to be considered which categorically provides for the scheme and object of the Income Tax Ordinance 1984 in the following language;

Income Tax Ordinance 1984

Section 16: Charge of income tax.--

(1) Where an Act of Parliament provides that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall, subject to the provisions of that Act, be charged, levied, paid and collected in accordance with the provisions of this Ordinance in respect of the total income of the income year or income years, as the case may be, of every person.

Provided that where under the provisions of this Ordinance income-tax is to be charged in respect of the income of a period other than the income year, income tax shall be charged, levied, paid and collected accordingly.

(2) Where under the provisions of this Ordinance income-tax is to be deducted at source, or paid or collected in advance, it shall be deducted, paid and collected accordingly.

(3) Notwithstanding anything contained in sub-section (1), income-tax shall be charged at the rates specified in the Second Schedule in respect of--

(i) a non-resident person, not being a company;

(ii) any income classifiable under the head "Capital gains",
and

(iii) any income by way of "winnings" referred to in section 19(13).

(emphasis supplied)

97. The aforementioned section provides that in order to impose tax liability on an income tax assessee, the total income of the said assessee shall have to be taken into consideration. It appears that the 'scope of the total income' as has been defined in section 2(65) of the Income Tax Ordinance 1984 has been elaborated in section 17 of the Income Tax Ordinance 1984. The provision of section 17 of the Income Tax Ordinance 1984 runs as follows;

Income Tax Ordinance 1984

Section 17: Scope of the total income.--

(1) Subject to the provisions of this Ordinance, the total income of any income year of any person includes--

(a) In relation to a person who is a resident, all income, from whatever source derived, which-

(i) Is received or deemed to be received in Bangladesh by or on behalf of such person in such year; or

(ii) Accrues or arises, or is deemed to accrue or arise to him in Bangladesh during that year; or

(iii) Accrues or arises to him outside Bangladesh during that year; and

(b) In relation to a person who is a non-resident, all income from whatever source derived, which--

(i) is received or deemed to be received in Bangladesh by, or on behalf of such person in such year; or

(ii) accrues or arises, or is deemed to accrue or arise, to him in Bangladesh during that year.

(2) Notwithstanding anything contained in sub-section (1), where any amount consisting of either the whole or a part of any income of a person has been included in his total income on the basis that it has accrued or arisen, or is deemed to have accrued or arisen, to him in any year; it shall not be included again in his total income on the ground that it is received or deemed to be received by him in Bangladesh in another year.

98. Out of total income of an assessee the provision of section 20 of the Income Tax Ordinance 1984 classified the heads, of 'Income' which will be chargeable to income tax. The said provision of section 20 of the Income Tax Ordinance 1984 reads as follows;

Income Tax Ordinance 1984

Section 20: Heads of income.--

Save as otherwise provided in this Ordinance, all incomes shall, for the purpose of charge of income-tax and computation of total income, be classified and computed under the following heads of income, namely:--

- (a) Salaries.
- (b) Interest on securities.
- (c) Income from house property.
- (d) Agricultural income.
- (e) Income from business or profession.
- (f) Capital gains.
- (g) Income from other sources.

(Emphasis supplied)

99. The object of income tax statute is to determine the 'tax liability on income of an assessee' deriving from the aforementioned (a-g) heads mentioned in section 20 of the Income Tax Ordinance 1984. Out of the heads if a company or firm derives income from business, from interest on security, from house property, from agricultural activity, from capital gain and from any other sources, the same will be

liable to income tax as per the provision of the Income Tax Ordinance 1984. Now the provision of section 16CCC requires, all gross receipt from these sources shall be subject to payment of 'income tax' in the name of minimum tax.

100. Therefore the question has arisen whether the 'gross receipt' can be read in the non-exhaustive definition of 'income' as embodied in section 2(34) of the Income Tax Ordinance 1984.

101. We have already opined that the definition of the term 'income' as has been defined in section 2(34) of the Income Tax Ordinance 1984, not being exhaustive, there is scope to consider the term income in the light of the practice prevailing in the financial arena and, as such, this has also to be ascertained whether "gross receipt" can be treated as income.

102. Under this scenario of the scheme and object of the income tax statute and the definition of 'Income', the 'Heads of income', the 'Charge of income tax' and the 'Scope of total income' it has been vigorously argued on behalf of the writ petitioners that 'minimum tax', as has been inserted in the Income Tax Ordinance 1984, under the provision of impugned section 16CCC and amended thereafter, is inconsistent with the scheme and object of the entire statute which deprived the assessee from being treated with in accordance with law and therefore accordingly violative of the provision of the constitution.

103. Further it has been vigorously argued that the parliament not being sovereign beyond the constitution and not having omnipotence, cannot enact such pieces of law, for which relief under the provision of Article 26(2) read with Article 44(1) of the Constitution is required to be given.

104. At this juncture it will be profitable to examine some of the referred cases regarding the scheme and object of taxation under the Income Tax Statute, having the similar provisions, as has been and was prevailing in the Indian subcontinent, far and near;

105. In the case of *Raja Probhat Chandra Barua vs. The King Emperor*, reported in (1930) LR 57IA 228 : ILR 58 C. 430 : 59 MLJ 814 (Privy Council), dealing with the incident of taxation under the Indian Income Tax Act 1922, his lordship Russell, J. considered the taxability of gross receipt and observed:

"The tax is upon income, profits and gains. It is not a tax on gross receipts. With this fact in view, each section which deals with one of the first five heads specified in section 6 contains, where proper, specific provisions for the necessary deductions and allowance to be made for the purpose of arriving at the taxable balance. Section 12, which deals with the general residuary group, is necessarily framed in general terms and authorizes the allowance of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains."

106. In the case of *CIT vs. Bokaro Steel Ltd.* (No. 1) reported in [1988] MANU/BH/0043/1987 : 170 ITR 522 (Pat) their lordship considered the non-exhaustive definition clause of income, while dealing with the provisions of Indian Income Tax Act 1961, and held;

"the law is well-settled and no discordant note to the contrary has been struck so far that section 2(24) is merely an inclusive statutory provision. The definition of "income" in this Clause is not exhaustive. It is inclusive and

fictionally cover things which this Clause declares to include but also such things as the word signifies according to its natural import. This Clause merely brings in artificial categories to the natural connotation of "income". The object of the Act is to tax "income", a term of formidably wide and vague import: The word "income" is an expression of elastic ambit. The word "income" is a more general term than "profits" or "gains". A receipt may be taxable as income, although it may contain no element of profit or gain. "Profits" or "gains" mean something which is in the nature of interest or fruit, as opposed to the principal or a tree. "Gains" are really the equivalent of "profit". The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. The tax is upon income, profits or gains; it is not a tax on gross receipts."

107. In the case of *Kedarnath Jute Mfg. Co. Ltd. vs. CIT* reported in [1971] MANU/SC/0438/1971 : 82 ITR 363 (SC) their lordship in the Indian Supreme Court considered the status of profit for the purpose of tax liability and it was held that:

"The assemble profits of a business must be real profits and they have to be ascertained on ordinary principles of trading and commercial accounting. Where the assessee is under a liability or is bound to make a certain payment from the gross profits, the profits and gains can only be the net amount after the said liability or amount is deducted from the gross profits or receipts."

108. In the case of *Mahadeva Upendra Sinai Etc. vs. Union of India* reported in [1975] MANU/SC/0436/1974 : 98 ITR 209 (SC), 1975 AIR 797, 1975 SCR(2) 64 their lordship in the Indian Supreme Court considered the taxability of gross receipt vis-a-vis the profit and gain and held;

"Section 2(24) (i) of the act defines "income" to include "profits and gains". Section 28(i) makes the "profits and gains of any business or profession which was carried on by the assessee at any time during the previous year" chargeable to income tax. Section 29 requires that the income referred to in section 28 shall be computed in accordance with the provisions including those for deductions contained in ss. 30 to 43-A. Since the tax is chargeable on "profits and gains" and not on gross receipts, the profits to be assessed must be the real profits computed, subject to the special requirements of the Act in accordance with the ordinary principles of commercial accounting. It follows that if the deduction of a particular item from the income of the business, or profession is neither expressly covered by the aforesaid sections, nor prohibited expressly or by necessary implication by those provisions, it can be allowed under section 28(1) provided on ordinary commercial principles, it is proper item to be debited against the incoming in ascertaining the "profits and gains" property so-called see *Badridas Degu vs. Commissioner of Income Tax and Commissioner of Income tax vs. Plymaun*."

109. In the unreported case of *CIT vs. M/s. Lakshmi Machine Works Appeal (civil) 4409 of 2005* their lordship in the Indian Supreme Court categorically decided the taxability of gross receipt and it was held;

"It is important to note that tax under the Act is upon income, profits and gains. It is not a tax on gross receipts. Under section 2(24) of the Act the word "income" includes profits and gains. The charge is not on gross receipts but on profits and gains properly so called. Gross receipts or sale proceed however include profits. According to the "The Law and Practice of Income

Tax" by Kanga and Palkhivala, the word "profits" in Section 28 should be understood in normal and proper sense. However, subject to special requirements of the income tax, profits have got to be assessed provided they are real profits. Such profits have to be, got to be, ascertained on ordinary principles of commercial trading and accounting. However, the income tax has laid down certain rules to be applied in deciding how the tax should be assessed and even if the result is to tax as profits what cannot be construed as profits, still the requirements of the income tax must be complied with. Where a deduction is necessary in order to ascertain the profits and gains, such deductions should be allowed. Profits should be computed after deducting the expenses incurred for business though such expenses may not be admissible expressly under the Act, unless such expenses are expressly disallowed by the Act."

110. In the case of CIT vs. Rao Bahadur Calavala Cunnan reported in MANU/TN/0381/1979 : 1982 135 ITR 485 Mad, their lordship in the Madras High Court considered the non-exhaustive definition of income and it was held;

"The same position holds good in India also because what is chargeable to income tax is left to be determined according to the statutory provisions of the act in the light of the elastic concept of 'income'. That is why section 2(24) defines "income" as including particular category of receipts. The idea is to bring in all the categories of income which are brought to tax by applying a legal fiction so that by their non-inclusion in the definition, such categories did not escape taxation. In the absence of any definition of "income" we have to proceed on the basis of it as a concept, as understood in general parlance. Income would ordinarily exclude a receipt by way of capital 'Gross receipts' cannot also be taxed as income. It may be broadly stated that what is taxed is not also any gross receipt. The receipt must be revenue in nature and is to be taxed after excluding the necessary outgoings."

111. In an another unreported case of CIT vs. Williamson Financial Services, Appeal (civil) 3803-3808 of 2005, their lordship in the Indian Supreme Court categorically decided that what is chargeable to income tax is not the gross receipt but the income. Accordingly it was held;

"It is also important to bear in mind that under Section 4 the levy is on 'total income' of the assessee computed in accordance with and subject to the provisions of the IT Act. What is chargeable to tax under the IT Act is the 'profits and gains', of a year. What is chargeable to tax under the IT Act is not 'gross receipts' but 'income'. Under the IT Act the tax is on 'income' and not on 'gross receipts' section 4 is the charging section. Section 5 defines gamut of total income. Section 4 charges every person in respect of his 'total income ', however, income cannot be taxed unless it falls within Section 5 subject to it being saved by any other section from taxation. The ambit of taxation, being subject to the provisions of the IT Act, involves two consequences. Firstly, provisions of the IT Act, example, Section 10 to Section 12 and various sections under Chapter VIA, may have the effect of exempting income which would otherwise be chargeable under Section 5. Secondly, the amount of income from whatever sources derived is to be ascertained subject to the provisions of particular sections dealing with the sources namely, section 15 to section 59"

In the same judgment their lordship further held;

The word income is an expression of elastic ambit. It is not exhaustive. That is why Section 2(24) defines income as including a particular category of receipts. Mere gross receipts cannot be taxed as income.

112. In the case of *Re: Dhv Consultants Bv vs. Unknown* (2005) reported in 197 CTR AAR 105, 2005 277 ITR 96 AAR, it was held by their lordship in the High Court;

"Profits and gains of business cannot be excess of receipts over expenditure. Gross receipts cannot by any stretch of imagination be considered as income, this would be blatant negation of basic accounting principles as well as logic and commonsense. Accrual of revenues and cost is the most fundamental assumption of accounting standards which underlie preparation and presentation of financial accounts. Such fundamental premise is deeply ingrained in the Indian as well as International Accounting Standards. Laws of domestic taxation as well as tax treaties are invariably in consonance with such basic accounting concepts. Therefore, any attempt to treat gross receipts of technical fees as income without deducting expenses connected therein would run counter to the basic principle of accountancy as well as provisions of tax laws and tax treaties. In fact "income tax " is a tax on income. It cannot be treated as a tax on 'gross receipts'.

113. In the case of *Dooars Tea Co. Ltd vs. Commissioner of Agricultural, Income Tax* 1962 AIR 186 (SC), their lordship in the Indian Supreme Court held;

"The diverse forms which income may assume, cannot exhaustively be enumerated and so in each case the decision of the question as to whether any particular receipt is income or not must depend upon the nature of the receipt and the true scope and effect of the relevant taxing provision. The receipt may be an income for the purpose of taxation though it may not amount to profit. The case of *Gopal Saran Narain Singh* itself is an illustration in point. In that case the assessee aged 47 had transferred an estate worth two crores of rupees for relatively small annuity of Rs. 2,40,000 for life. The, said annuity could not constitute or provide a profit or gain to the assessee but all the same it was taxable as income.

114. In the case of *Poona Electric supply Co. Ltd. vs. CIT* 1966 AIR 30 it was held;

"The income tax is a tax on the real income, i.e., the profits arrived at on commercial principles subject to the provisions of the Income Tax Act. The real profits can be ascertained only by making the permissible deductions."

115. The proposition which has been decided in these referred decisions of the Indian Jurisdiction is that the 'gross receipt' can and never be treated as 'income' for the purpose of imposition of income tax liability upon it.

116. Practically income is an item of calculation taking into account the gross receipt minus the expenditure and thereby to be calculated during the assessment process by the Income Tax Authority under the provision of section 83 of the Income Tax Ordinance 1984, by way of ascertaining the gross receipts of an assessee minus the allowable expenses, as has been provided in sections 29 and 30 of the Income Tax Ordinance 1984. When allowable expenses exceeds the gross receipts, then the difference is loss, which is also treated as income, as per the definition of income embodied in section 2(34) of the Income Tax Ordinance 1984. This method of calculating income has been provided in section 43 of the Income Tax Ordinance 1984, which reads as follows;

Income Tax Ordinance 1984

Section 43: Computation of total income

(1) For the purpose of charge of tax, the total income of an assessee shall be computed in the manner provided in this Ordinance.

(2) In computing the total income of an assessee, there shall be included any exemption or allowance specified in Part B of the Sixth Schedule and any income deemed to be the income of the assessee under section 19, subject to the limits, conditions and qualifications laid down therein.

(3) Where the assessee is a partner of a firm, then, whether the firm has made a profit or a loss, his share (whether a net profit or a net loss) shall be taken to be any salary, interest, commission or other remuneration payable to him by the firm in respect of the income year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary, commission or other remuneration payable to any partner in respect of the income year [and also, the case of a registered firm, of the tax payable by it;] and such share shall be included in his total income:

Provided that if his share so computed is a loss, such loss may be set off or carried forward and set off in accordance with the provisions of section 42.

(4) In computing the total, income of any individual for the purpose of assessment, there shall be included--

(a) So much of the income of the spouse or minor child of such individual as arises, directly or indirectly

(i) from the membership of the spouse in a firm of which such individual is a partner;

(ii) from the admission of the minor child to the benefits of partnership in a firm of which such individual is a partner;

(iii) from assets transferred directly or indirectly to the spouse otherwise than [by way of gift or] for adequate consideration or in connection with an agreement to live apart; or

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than [by way of gift or] for adequate consideration; and

(b) So much of the income of any person or association of persons as arises from assets transferred, otherwise than [by way of gift or] for adequate consideration, to such person or association of persons by such individual for the benefit of the spouse or minor child or both.

(5) All income arising to any person by virtue of a settlement or

disposition whether revocable or not from assets remaining the property of the [settler] or disponent, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor and shall be included in the total income of such person.

(6) For the purpose of sub-section (5),--

(a) A settlement disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the [settler], disponent or transferor, or in any way gives the settler, disponent or transferor a right to resume power directly over the income or assets;

(b) The expression "settlement or disposition" shall include any disposition, trust, covenant, agreement or arrangement, and the expression [settler] or disponent, in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made.

117. Therefore, it appears that for the purpose of income tax liability the 'income' of a business concern is an amount of ascertained money which comes out from the 'gross receipts' of a business, after applying the allowable deduction and other expenditures from the same, as per the provision of section 28 of the Income Tax Ordinance, 1984, to be ascertained through the process of assessment under the various provisions of the Income Tax statute. Therefore the 'gross receipt' of a business concern either company or firm, cannot be termed as 'Income'. The entire provision of Income Tax Ordinance 1984, save and except the provision of impugned section 16CCC, is directed to impose tax liability on the said ascertained amount known as 'Income' and not on 'Gross receipt'.

118. The object of the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is to correct tax on "gross receipts" of a business house assessee, either company or firm on a fixed rate basis. This 'gross receipts' has neither been included nor it could be treated as has been included, in the non-exhaustive definition of 'Income' provided in section 2(34) of the Income Tax Ordinance 1984, nor it could be treated as income, so far the prevailing Income Tax Ordinance 1984 is concerned and, as such, can in no way be treated as compatible with the statute. Therefore any imposition of income tax liability upon such "gross receipts" of a business concern by the impugned provision of section 16CCC is definitely contradictory to the other provisions of the Income Tax Ordinance 1984.

119. The statute Income Tax Ordinance 1984, within its entire ambit, made in general and section 43 in particular, provisions for calculating and ascertaining the income of an assessee, including companies and firms and the tax liability of an assessee depend upon such provisions. But the impugned provision of section 16CCC of the Income Tax Ordinance 1984 allowed the tax authority to avail the opportunity of the 'non-obstante' clause and consequently to ignore the entire provisions regarding the method of calculations and ascertainment of income upon applying allowable deduction and allowances and to directly impose tax liability on the 'gross receipts'. This nullifies not only the entire assessment process but also all other privileges rendered to the assessee under the various provisions of the income tax statute. This being entirely in contradiction with the entire statute, it must be treated as it nullifies the whole income tax statute against the 'minimum tax' provision.

120. It has been argued by the learned Additional Attorney-General that the impugned provision of section 16CCC is an alternative charging section and referred the table as mentioned in the affidavit-in-opposition. But upon meticulous examination of the impugned section we failed to find any merit of such submission. The provision of section 16CCC of the Income Tax Ordinance 1984 does not indicate that the same has been incorporated as alternative method to the general provisions, nor the provision, as incorporated in its present form, may be used as alternative charging method, rather the non-obstante clause remaining in the provision made it exclusive and independent provision against all other provisions of the Income Tax Ordinance 1984. More so even if for the argument's sake it is treated as such, it would definitely contradict the other provisions of the Income tax statute.

121. The categorical further object of the impugned section 16CCC of the Income Tax Ordinance 1984 is to ignore the provisions of income from business or profession as provided in section 28, the deduction from income of the business or profession as provided in section 29 and the deduction not admissible in certain circumstances as provided in section 30 of the Income Tax Ordinance 1984, while it provides 'irrespective of its profit or loss' of a company or firm assessee. Therefore the tax on "gross receipts" violates Section 28 and 29 of the Income Tax Ordinance 1984 as it does not allow/leaves room for Allowances and Deductions.

122. Whether the assessee of income tax is entitled to the deductions and allowances for the purpose of ascertainment of its taxable income, several cases in the Indian Jurisdiction decided the issue in positive, some of which is required to be examined.

123. In this context their lordships in the privy council held in the referred case of Pondicherry Railway Co. vs. CIT, Madras 5 ITC 363 (Privy Council) (D) that;

"turning now to the terms of the Indian Income Tax Act, their lordships find there enacted in section 4(1) that the statute is to "apply to all income, profit, or gains as described or comprised, in section 6, from whatever source derived, accruing or arising or received in British India. " In section 6 the heads of income, profits and gains chargeable to income tax are set out in six categories, of which the fourth is "Business". It is under this head that the appellant Company has been assessed, section 10 enacts that "the tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him" and prescribes that such profits or gains shall be computed after making allowances for inter alia "(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

124. In the case of CIT vs P.M. Muthuraman Chettiar, reported in MANU/SC/0215/1962 : AIR 1967 SC 415, 1962 44 ITR 710 SC: it was held by the Indian Supreme Court that;

"It is worthy of note that through the profits of each distinct business may have to be computed separately, the tax is chargeable under S. 10, not on the separate income of every distinct business, but on the aggregate of the profits of all the business carried on by the assessee

125. In the case of Ramaswami Chettiar vs. CIT reported in MANU/TN/0258/1930 : AIR 1930 Mad 808, it was held that;

"Section 10 no doubt directs that the allowances mentioned in the section should be made in favour of the assessee; but in my view it does not

necessarily follow that the assessee is not entitled to the allowances now in question simply because it is not specially mentioned in Section 10. Under CII. 1, Section 10, tax is payable only in respect of the "profits or gains " of any business carried on by the assessee. The court has to find out what the profits or gains of the business amounted to. In the absence of any specific provisions in the Act the profits or gains of a business have to be ascertained by the ordinary commercial methods."

126. In the case of Aruna Mills Ltd. vs. CIT, reported in MANU/MH/0357/1956 : AIR 1956 Bom 756 : (1956) 58 MOM LR 963 : ILR 1957 Bom 43, it was held that;

"Now, we have had occasion to point out in several decisions that what the Income Tax Act purports to tax is business profits and business profits are the true profits of a business as ascertained according to commercial principles. There may be an expenditure or there may be a loss which may not be an admissible loss under any of the provisions of Section 10(2) and yet such an expenditure or loss would have to be allowed in order to determine what were the true profits of a business, and it is the duty of everyone who has anything to do with taxing business people to understand what are the principles, it is difficult to make a proper assessment on a business or on a businessman"

127. In the case of Motipur Sugar Factory Ltd. vs. CIT, reported in MANU/BH/0098/1955 : AIR 1955 Pat 389 : 1955 28 ITR 128 Patna, it was held;

"the loss of money is a loss, connected with or arising out of the business, of the assessee and should, therefore, be taken into account in calculating the "profits or gains " under section 10(1), Income Tax Act for the purpose of computing the taxable income.

It has further held;

For it is settled by high authorities that the deductions expressly mentioned under section 10(2), Income tax Act are not exhaustive, and the question of computing the "profits and gains" of a, business under Section 10(1) must be approached in a commercial sense.

Their Lordship further held;

The expression "profits and gains" in section 10(1) must obviously be understood in the commercial sense. That was the view expressed by the House of Lords in-The Gresham Life Assurance Society vs. Styles, 1892 AC 309(c) At. P. 315 where the Lord Chancellor Halsbury held:

"That thing to be taxed is the amount of profits and gains. The word profits ' I think is to be understood in its natural and proper sense in a sense which no commercial man would misunderstand....The tax is payable upon the profits realized and the meaning to my mind is rendered plain by the words payable out of profits." The principle was of course laid down with reference to English law on the point.

128. The core points decided in the aforementioned decisions are that the assessee is entitled to these deductions and allowances in order to ascertain its actual income to be taxed upon such income. If these provisions are not taken into consideration then the whole scheme of the taxation on income will be jeopardized and, as such, the taxation on gross receipt is nothing but negation of the provisions of sections 28,

29 and 30 of the Income Tax Ordinance 1984.

129. Further it appears that the impugned section 16CCC of the Income Tax Ordinance 1984 deprived the assessee from the benefit of set off and carry forward of losses as provided in sections 37, 38, 39 and 42 of the Income Tax Ordinance 1984.

130. The learned Additional Attorney-General attempted to impress upon this bench that the method of overriding the assessment exercise, when imposing minimum tax, is in practice in fiscal law in other countries when regular tax is lower than the alternative tax and in fact overriding effect of some section over others is the integral part of the fiscal law. In this respect the reliance upon the decision on the case of New Ideal Engineering Works vs. Bangladesh Shilpa Bank, reported in 42 DLR (AD) 221 appears to be a misconceived one as the same is not applicable against the cases in hand, having distinguishing features. It appears that the existence of non-obstante clause in the impugned provision of section 16CCC of the Income Tax Ordinance 1984 made all other provisions of the Income Tax Ordinance 1984 as in-applicable against the provision of minimum tax, including the provisions of Appeal and reference as provided by sections 156, 158 and 160 of the Income Tax Ordinance 1984. This is not only a innocent over ridding clause of one provision over the other one, rather it has an all pervasive effect upon the entire provisions of the Income Tax Ordinance 1984. The referred case has decided the effect of non-obstante clause saying "Non obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause". How this decision renders help to the Additional Attorney-General is not understood.

131. In view of the contradiction caused by the incorporation of impugned section 16CCC of the Income Tax Ordinance 1984 and in view of the referred persuasive decisions as referred by the petitioners, this bench is in firm view that the impugned provision of section 16CCC has altogether contradicted the other provisions of the Income Tax Ordinance 1984.

132. Upon finding the scenario that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 has contradicted the entire provisions of the Income Tax Ordinance 1984, it is now to be resolved whether such contradictory provision could be treated as violative of the relevant provisions of the constitution.

133. Article 31 of the Constitution renders a fundamental right to the citizen to be treated in accordance with law, which reads as follows;

“গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান
অনুচ্ছেদ ৩১ঃ আইনের আশ্রয় লাভের অধিকার।
আইনের আশ্রয় লাভ এবং আইনানুযায়ী ও কেবল
আইনানুযায়ী ব্যবহারলাভ যে কোন স্থানে অবস্থানরত প্রত্যেক
নাগরিকের এবং সাময়িকভাবে বাংলাদেশে অবস্থানরত
অপরাপর ব্যক্তির অধিকার এবং বিশেষঃ আইনানুযায়ী ব্যতীত
এমন কোন ব্যবস্থা গ্রহণ করা যাইবে না, যাহাতে কোন ব্যক্তির
জীবন, স্বাধীনতা, দেহ, সুনাম বা সম্পত্তির হানি ঘটে।

[English version of the provision

The Constitution of the People's Republic of Bangladesh.

Article 31: Right to protection of law.

To enjoy the protection of the law, and to be treated in accordance with law,

and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular on action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.]

134. The non-obstante clause at the beginning of the impugned provision of section 16CCC surfaced the prime object of the impugned provision of section 16CCC of the Income Tax Ordinance 1984 that minimum tax has to be collected from the company or firm-assessee on their gross receipt irrespective of its loss, profit, expenditure or any other privilege or benefit given under the statute, along with an object that no other provisions of the Income Tax Ordinance 1984 will be operative as against collection of minimum tax along with restriction that appeal or reference shall not be allowed to the assessee, as implicated and established by the non obstante clause, against the imposition of tax liability under the provision of section 16CCC of the Income Tax Ordinance 1984.

135. This is a serious contradiction not only with the remaining provisions of the Income Tax Ordinance 1984, but also interfered with the valuable right of Appeal and further reference to the High Court Division by implication. The provision of an Appeal and reference if not made barred by the specific provision, the same cannot be made unavailable by implication of other provision of the same statute. When the impugned provision of section 16CCC of the Income Tax Ordinance 1984 makes bar for an assessee to be assessed under the other provisions of the Income Tax Ordinance and deprived off from availability of the provisions of Appeal and reference, it cannot be said that assessee will be dealt with in accordance with the said law and, as such, it is nothing but sheer violation of the Article 31 of the Constitution.

136. A provision of law if violative of the provisions of the constitution, the same shall be void to the extent of its inconsistency as per the provision of Article 26 of the Constitution, which reads as follows:--

বাংলাদেশ সংবিধান
অনুচ্ছেদ ২৬ঃ মৌলিক অধিকারের সহিত অসামঞ্জস্য
আইন বাতিল

১) এই ভাগের বিধানাবলীর সহিত অসামঞ্জস্য সকল প্রচলিত আইন যতখানি অসামঞ্জস্যপূর্ণ, এই সংবিধান-প্রবর্তন হইতে সেই সকল আইনের ততখানি বাতিল হওয়া যাইবে।

২) রাষ্ট্র এই ভাগের কোন বিধানের সহিত অসামঞ্জস্য কোন আইন প্রণয়ন করিবেন না এবং অনুরূপ কোন আইন প্রণীত হইলে তাহা এই ভাগের কোন বিধানের সহিত যতখানি অসামঞ্জস্যপূর্ণ, ততখানি বাতিল হইয়া যাইবে।

৩। সংবিধানের ১৪২ অনুচ্ছেদের অধীন প্রণীত সংশোধনের ক্ষেত্রে এই অনুচ্ছেদের কোন কিছুই প্রযোজ্য হইবে না।

[English version of the provision

The Constitution of the People's Republic of Bangladesh. Article 26: Laws inconsistent with fundamental rights to be void.

(1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the

commencement of this Constitution.

(2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.

(3) Nothing in this article shall apply to any amendment of this Constitution made under article 142.]

137. As this bench has found that the impugned provision of section 16CCC of the Income Tax Ordinance 1984 is violative of article 31 of the constitution therefore this bench is in concrete view that the provision of the impugned section 16CCC of the Income Tax Ordinance 1984 is inconsistent with the provision of the fundamental rights and, as such, ultra vires of the Constitution.

138. Upon coming to the decisive decision on the issue No. 1, now we will turn to issue No. 2.

139. The learned Additional Attorney-General has put much emphasis upon the law making power of the parliament stating that the article 65(1) did not restrict such power and accordingly the parliament in its wisdom may enact to amend any law beneficial to the state. In his opinion since the impugned provision section 16CCC of the Income Tax Ordinance 1984 has been incorporated in the existing Income Tax Ordinance 1984 by way of amendment with the beneficial view to combat the income tax avoidance, the same cannot be challenged on its constitutionality.

140. This view of the learned Additional Attorney-General directed this bench to the very pertinent question as relates to the Omnipotence of the parliament to enact any law under its wisdom. It appears that parliament of Bangladesh has been created under the provision of article 65 of the constitution, which reads as follows;

Constitution of Bangladesh

Article 65:

(১) “জাতীয় সংসদ” নামে বাংলাদেশের একটি সংসদ থাকিবে এবং এই সংবিধানের বিধানাবলী সাপেক্ষে প্রজাতন্ত্রের আইনপ্রণয়ন-ক্ষমতা সংসদের উপর ন্যস্ত হইবে।

তবে শর্ত থাকে যে, সংসদের আইন দ্বারা যে কোন ব্যক্তি বা কর্তৃপক্ষকে আদেশ, বিধি, প্রবিধান, উপ-আইন বা আইনগত কার্যকরতাসম্পন্ন অন্যান্য চুক্তিপত্র প্রণয়নের ক্ষমতাপ্রাপ্ত হইতে এই দফার কোন কিছুই সংসদকে নিবৃত্ত করিবে না।

(২) একক আঞ্চলিক নির্বাচনী এলাকাসমূহ হইতে প্রত্যক্ষ নির্বাচনের মাধ্যমে নিয়মানুযায়ী নির্বাচিত তিন শত সদস্য লইয়া এবং এই অনুচ্ছেদের (৩) দফার কার্যকরতাকালে উক্ত দফায় বর্ণিত সদস্যদিগকে লইয়া সংসদ গঠিত হইতে সদস্যগণ সংসদ-সদস্য বলিয়া অভিহিত হইবেন।

[(৩) সংবিধান (দশম সংশোধন) আইন, ১৯৯০ প্রবর্তনকালে বিদ্যমান সংসদে অব্যবহিত পরবর্তী সংসদের প্রথম বৈঠকের তারিখ হইতে শুরু করিয়া দশ বৎসরকাল অতিবাহিত হইবার অব্যবহিত পরবর্তীকালে সংসদ ভাঙিয়া না যাওয়া পর্যন্ত ত্রিশটি আসন কেবল মহিলা-সদস্যদের জন্য সংরক্ষিত থাকিবে এবং তাঁহারা আইনানুযায়ী পূর্বোক্ত সদস্যদের দ্বারা নির্বাচিত হইবেঃ

তবে শর্ত থাকে যে, এই দফার কোন কিছুই এই অনুচ্ছেদের (২) দফার অধীন কোন আসনে কোন মহিলার নির্বাচন নিবৃত্ত করিবে না]

(৪) রাজধানীতে সংসদের আসন থাকিবে।

English version of the provision.

Article 65: Establishment of Parliament

) There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic;

Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye laws or other instruments having legislative effect.

) Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election and, for so long as clause (3) is effective, the members provided for in that clause; the Members shall be designated as Members of Parliament.

) Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of the commencement of the Constitution (Fourteenth Amendment) Act, 2004, there shall be reserved [fifty seats] exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote;

Provided that nothing in this clause shall be deemed to prevent a woman from being elected to any of the seats provided for in clause (2) of this article.

A) For the remaining period of the Parliament in existence at the time of the commencement of the Constitution (fifteenth Amendment) Act, 2011, Parliament shall consist of three hundred members elected by direct election provided for in clause (2) and fifty women members provided for in clause (3)

) The seat of Parliament shall be in the capital.]

141. The provision of Article 7 of the constitution has been identified in judicial pronouncement as 'pole star' of our Constitution which has to be taken into

consideration, in order to examine as to whether the parliament, being the creative of the constitution, enjoys omnipotence in enacting any law in their wisdom. The said article reads as follows;

Constitution of Bangladesh

Article 7;

- (১) প্রজাতন্ত্রের সকল ক্ষমতার মালিক জনগণ এবং জনগণের পক্ষে সেই ক্ষমতার প্রয়োগ কেবল এই সংবিধানের অধীন ও কর্তৃত্বে কার্যকর হইবে।
- (২) জনগণের অভিপ্রায়ে পরম অভিব্যক্তিরূপে এই সংবিধান প্রজাতন্ত্রের সর্বোচ্চ আইন এবং অন্য কোন আইন যদি এই সংবিধানের সহিত অসামঞ্জস্য হয়, তাহা হইলে সেই আইনের যতখানি অসামঞ্জস্যপূর্ণ, ততখানি বাতিল হইবে।

[English version of the provision.]

Article 7: Supremacy of the Constitution

(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.

(2) this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void.]

142. The supreme law of our country has declared the supremacy of the people for exercising power of the republic and such exercise was made subject to the provisions of the constitution. This has restricted the pertinent to exceed its power beyond the provisions of the constitution. The parliament is also restricted in its legislative power under the provision of Article 26 (2) of the Constitution and the same also required to be taken into consideration in order to ascertain whether the parliament has omnipotence in enacting laws.

143. Undoubtedly the parliament has been vested with the legislative power. But that power has to be exercised within the four corners of the Constitution. The provision of article 7 and 26 of the Constitution substantially restricted such legislative power and, as such, when such legislative power is being exercised, the parliament has to take note of it.

144. The provisions of article 65 of the constitution made the parliament sovereign, not as omnipotent, but within the bounds of the constitution and the provisions of article 7(2) and 26(1) and (2) of the Constitution made the parliament not that omnipotent to enact any law as per its wisdom and desire. It can enact law, subject to the provision of the constitution. If it enacts any law that contradicts any provision of the constitution, then that part of the law will be void as has been provided under article 7(2) read with article 26(1)(2) of the constitution.

145. Therefore, this bench finds that provision of section 16CCC of the Income Tax Ordinance 1984 as incorporated in the Income Tax Ordinance 1984 through the provision of section 15 of the Finance Act 2011 being contradictory, inconsistent and contrary to the aim and object of the said statute and violative of the provision of

article 31 and 7(2) and 26(1)(2) of the Constitution, is a piece of legislation which the parliament is not authorized to enact and thereby liable to be declared ultra vires of the constitution.

146. Now turning to the 3rd issue as to discriminatory effect of the impugned section 16CCC this bench examined the provision of article 27 of the Constitution which deal with such issue. The provision of article 27 of the Constitution runs as follows;

বাংলাদেশ সংবিধান
অনুচ্ছেদ ২৭ঃ আইনের দৃষ্টিতে সমতা—
সকল নাগরিক আইনের দৃষ্টিতে সমান এবং আইনের
সমান আশ্রয়লাভের অধিকারী।

[English version of the provision Constitution of Bangladesh Article 27:
Equality before law:

All citizens are equal before law and are entitled to equal protection of law].

147. Equality before law has been a long disputed issue resolved in many previous cases, out of which the referred case of Hayes Haier Appliances Co. Ltd. vs. IRD, reported in LEX/BDHC/0023/2005 : 58 DLR 5 may be profitably examined.

148. In that case his lordship Mr. Justice Syed Amirul Islam while dealing with the issue examined the various decisions of the home and the Indian Jurisdiction and ultimately held that;

"In 41 DLR (AD) 30, it has been held that the term protection of equal law is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way. The legislature which proceeding to make law with certain object in view has power to make classification on reasonable basis. To stand that test of 'equality, a classification, besides being based on intelligent differentia, must have reasonable nexus with the object the legislation intends to achieve by making the classification. What is of fundamental importance in law making is that while making a classification the legislature shall not act arbitrarily but make selection on rational basis.

A review of the aforesaid decision shows that it is now well settled while Article 27 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, namely, geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established that Article 27 condemns discrimination not only by a substantive law but also by a law of procedure.

149. The impugned provision of section 16CCC only imposed minimum tax liability upon two of the three classes of assessee standing on the same footing conducting a similar and identical business the individual tax payer will be relieved from paying

the minimum tax which is hit by the principle as enunciated in the referred case.

150. Similar provision of minimum tax, prevailing in other countries as referred by the learned Additional Attorney-General cannot be taken into consideration in order to treat the constitutionality of a provision of law which is violative of our constitution and, as such, labour and pain exercised by the learned Additional Attorney-General Mr. Murad-E-Reza in this respect falls flat.

151. The learned Additional Attorney-General perhaps failed to recollect the admission of the Honourable Finance Advisor Dr. A.B. Mirza Muhammad Azizul Islam as to the 'illegality of the similar provision embodied in the repealed section 16CC of the Income Tax Ordinance 1984 for which nothing has been heard on that issue of admission from the learned Additional Attorney-General.

152. This bench has meticulously examined the other decisions, as referred to by the learned Additional Attorney-General and found that are not being applicable to the issue of these writ petitions, has no manner of application to the issue in front of this court.

153. Under the reasoning and discussion as above this court finds merit in these rules Nisi, which are required to be made absolute.

154. In the result, these rules Nisi are made absolute.

155. The provision of section 16CCC of the Income Tax Ordinance 1984, as has been incorporated in the Income Tax Ordinance 1984, through section 15 of the Finance Act 2011, is hereby declared ultra vires to the constitution, having been enacted without any lawful authority having no legal implication.

156. However, there shall be no order as to costs. The order of stay against the operation of the said impugned provision of section 16CCC of the Income Tax Ordinance 1984 is hereby made absolute.

Md. Ashfaque Islam, J.

157. I regret that I could not subscribe to the views expressed in the judgment of my learned brother A.F.M. Abdur Rahman, J. while striking down section 16CCC of the Income Tax Ordinance, 1984. The reasons for my disagreement are as under:

158. The background leading to the Rules featured in all the writ petitions has been craftily outlined by His Lordship which I need not require to revisit for expounding my own reasonings. I would quote only those of the relevant laws and related aspects as and when required.

159. The gravamen of the petitioners' grievances in all the petitions is the insertion of section 16CCC in Income Tax Ordinance, 1984 (hereinafter referred to as Ordinance) by the Finance Act 2011 on the plea of the same being violative of the object, spirit, purport and scheme of the Ordinance so to say, law of income tax as a whole and also the fundamental right of the petitioners enshrined in the Constitution. Section 16CCC begins with a non-obstante clause that overriding whatever contained in the Ordinance 1984 a minimum tax @ Zero Point Three Zero percent (0.30%) shall be charged upon every firm having "gross receipts" of more than Taka 50,00,000 lakh (restricted implication) or every company irrespective of profit and loss in an assessment year.

160. The meaning of 'gross receipts' has been construed by an explanation to the law itself.

161. Now the issue that to be addressed with reference to the context of all the petitions is whether under the given situation and upon critical appraisal of the different laws in the Ordinance and divergent submissions from the Bar conjunct with the Constitutional mandate and its bearing on the issue, together with the interpretation of fiscal Statute, Section 16CCC of the Ordinance would sustain in the manner as it has found place in the Ordinance as a valid piece of enactment.

162. For better understanding and appreciating the subject I would like to view it from a totally different perspective. When any legislation is read as it is, a question pertinently comes into mind why is that legislation for. In other words, what is law, and why the law is. What is law, can be sensed at a glance on a mere reading of it but why the law is meant for can only be obviated from the intention of the legislature behind the enactment of a particular law. The intention has to be gathered from the attending circumstances, some probable exigencies and far reaching consequences which may not be crystallized merely upon plain reading of bare provisions of the Ordinance.

163. Saying so much I would now digress to assess the vires of law under challenge on numerous counts which his Lordship has already addressed at length. One of the pivotal arguments from the bar that has been taken into consideration by my brother Rahman, J is that when by Finance Act 2008 section 16CC of the ordinance was omitted, in the budget speech of 2008-2009 the then Finance Minister Advisor Dr. A.B. Mirza Mohammad Azizul Islam had admitted that the provisions of Section 16CC of the Ordinance was inconsistent with the provisions of Ordinance 1984 and, as such, the same was required to be omitted from the Statute. To assess this aspect it would be worthwhile to view it in the light of the observations made by the Supreme Court of India in the case of K.P. Varghese vs. CIT MANU/SC/0300/1981 : 131 ITR 597 (SC):

"It is true that speeches made by the member of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and the purpose for which the legislation was enacted. This is in accordance with the recent trend in juristic thought not only in western countries but also in India that interpretation of Statute being an exercise in the ascertainment of meaning: everything, which is logically relevant, should be admissible."

164. Upon overall analysis of the reasons for introduction of section 16CCC in the Ordinance one aspect comes out clear that intention of legislature to enact the same was mainly for the reason that some Unscrupulous firm and company were willfully trying to avoid payment of tax always contending that they are running at a loss and for that reason the legislature in its wisdom thought it proper to insert the section as it has been done in several countries throughout the World. The concept of charging minimum tax by now has earned status of a beneficial Statute. In case of a beneficial Statute its provisions cannot be interpreted so as to bring about a result contrary to the object of the legislation. An interpretation likely to advance the remedy must be adopted in case of Statute, which confer benefit on individual or any class of person. The perception should be in the context of the nation as a whole.

165. It is well settled that the language employed in fiscal law has to be strictly construed and be given its plain and natural meaning and in such Statute one has to

look merely as what is said therein and there is no room for any intendment. Nothing is to be read in and nothing is to be implied. One can look fairly at the language used. CIT vs. Zeenat Textile Mills Ltd. 6 BTD 85 (AD).

166. While interpreting section 45A of the Income Tax Ordinance 1922 to be unambiguous, CJ Hamoodur Rahman (as he then was), in Md. Ismail vs. State 21 DLR (SC) 161, expressed in the following words

"The purpose of construction or interpretation of statutory provision is no doubt to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than that which they carry in their ordinary grammatical sense, then the Courts are not concerned with the consequences of the interpretation, however, drastic or inconvenient the result, for, the function of the Courts is interpretation, not legislation."

167. In the case of M/s. Gulistan Cinema Co. 28 DLR 16 (AD) it was held that rule of interpretation of the Constitution and the Statute is the same.

168. In this regard I want to cite the decision of Director of Taxation and Excise Govt. of E. Pak. (now Bangladesh) vs. Mehedi Ali Khan Ponni 32 DLR (AD) 1980 138 wherein Chief Justice Kemal Uddin Hossain (as his Lordship then was) very succinctly made some observations which are relevant on the issue:

"Interpretation of Taxing Statute-Doctrine Of LAISSEZ FAIRE AND WELFARE ECONOMY in interpreting a taxing Statute a controversy often arises and learned authorities are cited in support of the proposition that a taxing Statute is to be construed strictly in favour of the subject. But this view though not abandoned in case of unresolved ambiguity, does no longer get the one-sided support from the judicial authorities. The view of strict construction prevailed at a time when the doctrine of LAISSEZ FAIRE AND WELFARE ECONOMY was the ruling principle of a economy of a State, but almost all the leading States of the World have long abandoned the doctrine and adopted welfare doctrine of economy. Even a country like England where the doctrine of LAISSEZ FAIRE and WELFARE ECONOMY originated has abandoned it in favour of welfare economy. The newly emerging nations like ours have mostly adopted the welfare doctrine."

His Lordship then rightly observed:

"In a fiscal or taxing Statute one has to look merely at what is clearly said therein, for there is no room for any intendment nor for any equity or for any presumption. In case of unresolved ambiguity, it may be interpreted favourably to the citizen but nothing more. The attempt of the Court in case of ambiguity is to be guided by principle of justice and fairness and to try to arrive at a true meaning of the word."

169. I have found no ambiguity of any kind to hold that charging of minimum tax upon firm and company as provided in section 16CCC of the Ordinance should be viewed being unreasonable.

170. Much emphasis have been given upon Article 7 of the Constitution of Bangladesh from the Bar in that the enactment of section 16CCC of the Ordinance violated the primacy and supremacy of the Constitution that all powers in the Republic belonging to the people and they are exercised on behalf of the People shall

be effected only under, and by the authority of this Constitution and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. My learned brother Justice Rahman accepted this argument viewing the same in juxtaposition with Article 26 of the Constitution that says laws inconsistent with the fundamental rights to be void.

171. To my interpretation Article 7 which is the awe inspiring mandate of the Constitution is specifically related to uphold the fundamental rights of the citizen. In no way it can form the basis of interpreting a fiscal Statute holding the same to be unconstitutional. The enactment in question has its bearing merely upon firm and company those who are doing business making profit and loss (as the case may be) certainly dealing with the public money, therefore, by any stretch of imagination it cannot be said that the imposition of minimum tax under section 16CCC is unjustified on the score that it has curtailing effect upon Article 7 of the constitution.

172. The discussions as made herein before and hereinafter would abundantly focus on the views that I expressed.

173. According to Maxwell, the function of a Court is to interpret a Statute according to the intent of the legislature and in doing so it must bear in mind that its function is *jus dicere*, not *jus dare*; meaning thereby, the words of a Statute must not be overruled by the judges, but the reform of the law must be left in the hands of the Parliament. This view finds support in the case of *Mohammad Ismail vs. State* 21 DLR (SC) 161 as it has already been quoted above.

174. In *Commissioner of Sales Tax vs. Parson Tools and Plant* (1975) 45 CC 22 it was held that the will of the legislature is the supreme law of the land and which demands absolute obedience. "Judicial power is never exercised", said Marshall CJ of the United States, "for the purpose of giving effect to the will of the Judges; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law." In the construction of the Statute Courts of Bangladesh are to ascertain the intention of the Parliament. The Courts of Bangladesh are to apply the law as expressed by the legislature.

175. In the case of *S.A. Haroon vs. Collector of Customs* 11 DLR (SC) 200 it was observed:

"All Rules of interpretation have been devised as aids to the discovery of the legislative intents behind an enactment. Where the words are plain and unambiguous, that intent can best be judged by giving full effect to the ordinary grammatical meaning of those words. But when this is not the case an attempt should be made to discover the true intent by considering the relevant provision in the context of the whole Act in which it appears and by having regard to the circumstances in which the enactment came to be passed. The previous state of the law, the mischief sought to be suppressed and the new remedy provided are relevant factor to be given due consideration."

176. The Indian Supreme Court also echoed in the like manner in *Nasiruddin vs. Shita Ram* AIR 2003 (SC) 1543 and maintained:

"The Court's Jurisdiction to interpret a Statute can be invoked when the same is ambiguous. It is well known in a given case the court can iron out the fabric. It cannot change texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add to or subtract words to a Statute or read

something into it which is not there. It cannot re-write or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression 'shall or may' is not decisive for arriving at a finding as to whether Statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the Court will presume the intention of the legislature was that the provisions are mandatory in character."

177. Section 16CCC begins with a non-obstante clause confirming a mandatory implication of the provision. A non-obstante clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause.

178. Now I would like to dilate and diversify my deliberations upon few provisions of Ordinance and the Constitution which will further elucidate and fortify my interpretation on the issue. Section 2(34) of the Ordinance defines 'Income'. It enjoins--

"Income" includes--

- (a) any income, profits or gains, from whatever source derived, chargeable to tax under any provision of this Ordinance under any head specified in section 20;
- (b) any loss of such income, profits or gains;
- (c) the profits and gains of any business of insurance carried on by a mutual insurance association computed in accordance with paragraph 8 of the Fourth Schedule;
- (d) Any sum deemed to be income, or any income accruing or arising or received, or deemed to accrue or arise or to be received in Bangladesh under any provision of this Ordinance;

Provided....

179. Section 2(34) of the Ordinance does not employ any specific definition of income, only we find it as an inclusive law aiming some specific areas to be added and included in the category of income. In various pronouncements income has been defined in different ways. Their Lordships of the Privy Council in the case of *Shaw Wallace and Co.* MANU/PR/0012/1932 : AIR 1932 PC 138 said--

"Income is periodical monetary return coming with some sort of regularity from definite source likened pictorially to the fruit of a tree or the crop of a field."

180. This definition of income has been struck down to a great extent by the Privy Council in the subsequent judicial pronouncements. But under section 2(34) income includes any loss of income, profit or a gain of a business. According to sub-clause (b) loss of income, profit or gains arising from whatever source is chargeable to tax under section 20 of the Ordinance is also income. Loss is also included in the expression "Income" or "profits and gains" under charging section. In the case of *CIT vs. Kamar Chand vs. Prem Chand Ltd.* MANU/SC/0186/1960 : 40 ITR 106 (SC) it is

observed that it may be said in one sense that "profits and gains" is "plus income" and loss is "minus income". Thus loss is also income for the purpose of computation of total income.

181. Section 2(62) of the Ordinance on the other hand, defines "Tax" saying that tax means the income tax payable under this Ordinance and includes any additional tax, excess profit tax, penalty, interest, fee or other charges leviable or payable under this Ordinance. The word tax includes both income tax and super tax. It seems in order to relieve the superior Court from exercise in interpreting and giving the meaning to the word 'Tax' the meaning of the word made simpler by giving a definition to understand what tax really means in the context of income tax law in a given case.

182. On the other hand the word 'tax' has also been defined in art. 152(1) of the Constitution as follows:--

'Taxation' includes the imposition of any tax, rate, duty or impost, whether general, local or special, and 'tax' shall be construed accordingly. Thus the word 'tax' has been used in a comprehensive sense to include all money raised by taxation and includes those known as 'rates' or other charges levied by local authorities under statutory powers. A tax cannot be levied or collected merely by an executive fiat or action without there being a law to support the same. In the Indian jurisdiction there is a conflict of judicial opinion as to whether levy or collection of tax by usage is ruled out.

183. But there is no scope of any such conflict of opinion in Bangladesh as article 83 contains the expression by or under the authority of an Act of Parliament. Under article 83 not only the levy but also the collection of tax must be sanctioned by or under the authority of an Act of Parliament. The expression 'levy' includes creation of liability and fixation of its quantum and the expression collect refers to physical realization of tax.

184. In the case of A. Hannan vs. Collector of Customs LEX/BDHC/0074/1988 : 40 DLR 273 it was held by the High Court Division that fixation of rate of duty is a function which has to be performed by Parliament and this function cannot be delegated and this constitutional power cannot be shared with any body. This view of High Court Division was upheld by the Appellate Division while dismissing the Government Appeal by the special leave in Collector of Customs vs. A. Hannan 42 DLR (AD) 167. The language by or under the authority of an Act of Parliament in art. 83 shows that a tax can be levied by an Act of Parliament or by somebody else under the authority of an Act of Parliament. The imposition cannot exceed what the statute authorizes and the tax must fall within the four corners of the statute.

185. Article 60 provides that Parliament shall by law confer on the local government bodies power to impose tax for local purposes. There is no reason to hold that the word 'tax' in art. 83 and art. 60 has been used in different senses. It is thus abundantly clear that 'tax' can be levied and collected by the government and local government bodies. The Constitution has used the expression 'tax' in a wide sense as can be seen from the definition given Art. 152(1).

186. Article 80 of Chapter II of the Constitution deals with legislative and financial procedure. Article 80(1) states--"Every proposal in parliament for making a law shall be made in the form of a Bill. Article 81(1) further states-in this part 'Money Bill' means a Bill containing only provision dealing with all or any of the following matters--"(a) The imposition-regulation, alteration, remission or repeal of any tax." Article 81(3) enjoins--"Every money Bill shall, when it is presented to the President for his assent, bear a certificate under the hand of the Speaker that it is a Money Bill,

and such certificate shall be inclusive for all purposes and shall not be questioned in any Court." Lastly. Article 83 concluded by saving--" No tax shall be levied or collected except by or under the authority of an Act of Parliament Pronouncement."

187. Section 16CCC came into force as a 'Money Bill' by the Finance Act 2011. Therefore, it cannot be said that the section was inserted in the Ordinance not in accordance with law. Consequently, legality of the Finance Act inserting section 16CCC in the Ordinance cannot be questioned. It has been done totally within the Constitutional domain and competence. It shall certainly be construed in its restricted Constitutional imposition. In other words an Act of Constitutional exercise is the result of introduction of section 16CCC in the Ordinance. It cannot be, in any manner be inferred that the provisions of section 16CCC is against the spirit of Article 7 read with Article 26 of the Constitution.

188. In the case of Sheikh Abdus Sabur vs. Returning Officer 41 DLR (AD) 30 leave was granted to consider the question whether the bar of disqualification under section 7(2)(g) of the Union Parishad Ordinance for seeking election is hit by the equality provision under Article 27 of the Constitution. By an unanimous decision the Appellate Division dismissed the appeal holding Article 27 of the Constitution does not operate as a bar in that regard.

Article 27 of the Constitution enshrined that all citizens are equal before law and are entitled to equal protection of law.

Justice Afzal while concurring with Shahabuddin, J observed,

"A law cannot be struck down merely because it fails to spell out the particular objective of a provision in the legislation itself. In the instant case the impugned clause (g) was brought in by the Local Government Laws (Amendment) Act 1987 (Act XXIII of 1987) apparently for the purpose of providing an additional disqualification for a person seeking election to an Union Parishad. For the purpose of withstanding a Challenge to its Constitutionality as being violative of Article 27 it has to stand the test of justification for being attached to Local Government body election only...the Court will presume the Constitutionality of a Statue until shown otherwise."

189. Justice Bhagwati in the case of R.K. Garg vs. Union of India MANU/SC/0074/1981 : AIR 1981 SC 2138 reiterated that "the presumption of Constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation"

190. Bhagwati, J further observed that--"Laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There, may be crudities inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid."

191. Further the Constitution does not permit the Court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of Legislature or executive, provided these authorities do not transgress their Constitutional limits or statutory powers. Besides the fundamental principle of State Policy cannot be Judicially enforceable: Kudrat

Elahi Panir vs. Bangladesh 44 DLR (AD) 319.

192. In my assessment section 16CCC of the Ordinance is not only provision which is to be ranked as a beneficial Statute, but it is also for the betterment of the nation at large. To my mind striking the said provision down shall amount to a travesty of law and a judicial extravaganza certainly indulge in excesses.

193. Tax evaders are enemy to the tax system. It is the duty of the Government to take administrative and legislative measures to combat tax evasion. Tax evasion happens in many ways including the misreporting of income and expenses, manufacturing of books of accounts, concealment of assets and liabilities etc. Apart from tax evasion, tax payers device various tax avoidance schemes in collaboration with accountants, tax advisors and other related parties. Such tax evasion and avoidance erodes tax base and hampers revenue collection thereby bringing serious threat to the fiscal health of a country.

194. Supreme Court of India in the case of Pooran Mal etc. vs. Director of Inspection AIR 348 (1974) SCR (2) 704 observed:

"One cannot possibly ignore how such evasions eat into the vitals of the economic life of the community. It is a well known fact of our economic life that huge sums of unaccounted money are in the circulation endangering its very fabrics. In a country which has adopted high rates of taxes a major portion of the unaccounted money should normally fill the government coffers. Instead of doing so it distorts the economy. Therefore, in the interest of the community it is only right that the fiscal authorities should have sufficient powers to prevent tax evasion."

195. In the face of widespread tax evasion by company and big non-company taxpayers, and in order to overcome "zero taxation", reduce tax inequality among corporate taxpayers (if some companies pay tax and others do not, there becomes a uneven tax treatment among them) and to ensure revenue adequacy, governments in many countries introduced the concept of Alternative Minimum Tax (AMT) where taxpayers need to pay a minimum amount of tax if the tax liability under regular method falls short of a minimum amount of tax. This Alternative Minimum Tax (AMT) concept is introduced for various reasons:

Under section 16CCC, tax department compares between taxation under regular method and taxation under alternative method. If tax liability calculated in regular method is higher than the tax liability calculated in alternative method, tax under regular method will prevail. On the other hand, if tax liability calculated in regular method is lower than the tax liability calculated in alternative method, tax under alternative method will prevail. Therefore, taxpayer's tax liability is absolutely "single". In calculating tax liability under 16CCC, any tax paid in advance, at source or under section 74 is duly given credit. Moreover, when any income of a taxpayer falls under the ambit of final settlement of tax liability section 82C tax, that income does not come under the ambit of section 16CCC. Thus, there is absolutely no scope for double taxation under section 16CCC.

196. Under section 16CCC, tax liability of taxpayers is calculated under regular method and alternative method (i.e. 0.3% of gross receipt). If the tax liability, as calculated under regular method falls short of the tax calculated under alternative method (i.e. 0.3% of gross receipt), alternative tax will prevail.

197. The writ petitioners appear to have completely misconceived and misconstrued

section 20 of the Ordinance, and the very concept of alternative minimum tax. Section 16CCC is fully consistent with the objective of the Ordinance, fully congruent with all other provisions of the tax law, and fully in line with international best tax practice.

198. Imposition of minimum tax is a modern tax concept. As a member of global tax community, Bangladesh also adopted this modern tax concept of alternative minimum tax, in the name of 'Minimum Tax'.

199. In the line with global best practice, minimum tax concept was first introduced in Bangladesh by Finance Act, 1997 for non-company taxpayers. For company tax payers minimum tax concept was introduced by Finance Act, 2006 inserting section 16CC in the Ordinance which was subsequently omitted by the Finance Act, 2008 and thereafter by Finance Act, 2011 section 16CCC was introduced making the same applicable upon a firm having a gross receipt of more than Taka 50 Lakh or a company tax payer and is charged @ 0.30% on 'gross receipts.'

200. Minimum tax has long been but part of the fiscal law both in Bangladesh and in other countries including India, Pakistan, USA, Singapore, Korea, France, Austria, Malaysia, Latvia, Colombia, Nigeria, Madagascar, Panama. Honduras, Tunisia, Senegal Island, and Ivory Coast.

201. By introducing section 16CCC no object of the Ordinance and the Constitution has been infringed. It is an excellent piece of enactment goes with the contemporary fiscal World and their practice. Certainly some unscrupulous fraction out of our larger tax payers have been stopped by introducing a minimum tax paying system under the said law in an assessment year. Legislature did the right thing at the right moment. Before parting I would once again pronounce the salutary remark of Lord Denning with resounding effect that-

"Silence is not an option when things are ill done". *Re vs. Metropolitan Police Commissioner* (1968) 2 All ER 319.

(All the underlinings are mine)

202. In the result, all the Rules are discharged without any order as to costs. The order of stay granted at the time of issuance of the Rules are hereby recalled and vacated. The respondents are directed to take steps in accordance with law forthwith.

Md. Ashraful Kamal, J.

I have had the advantage of going through the judgments proposed to be delivered by my Lord Mr. Justice A.F.M. Abdur Rahman and my Lord Mr. Justice Md. Ashfaul Islam. I concur with the judgment and order passed by my Lord Mr. Justice Md. Ashfaul Islam.

Order of the Court.

By the majority decisions, let these Rules Nisi be discharged. However, there shall be no order as to costs. The stay granted earlier in different writ petitions are hereby recalled.

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