

Bankruptcy Law and Practice in Malaysia,
and its Relevance to Tax Claims

En. V. Das

This paper makes a modest attempt to give an outline of bankruptcy and its application in Malaysia. The aim is to provide a general overview of bankruptcy and its implications on persons and companies. The paper is designed in line with the English Statute with modifications to suit local context.

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It will be seen that it is not the case if the principles are understood in conjunction with the law. There is always a light at the end of the tunnel.

The Dissertation is submitted with respect more as an independent work as to enable the public and private persons to know the relevance of bankruptcy law and its effect on the society and the individuals alike. In the first part, bankruptcy practice is shown with comprehensive coverage from its application and effect while in the second, the relevance to tax claims is briefly discussed. The author hopes that the study would help the subject in the knowledge of the true spectrum.

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This paper makes a modest attempt to give an outline of bankruptcy and its application in Malaysia. The aim is to provide a general concept of bankruptcy law and its implications on person and property concerned. The Act is designed in line with the English Statute with modifications to suit local context. There seems to be a general tendency to dismiss bankruptcy as the end of the road because of its limitations and psychological effect but on critical observation it will be seen that it is not the case if the principles are understood in conjunction with the law. There is always a light at the end of the tunnel.

The dissertation is submitted with respect more on an informative vein as to enable the public and private sectors to know the rudiments of bankruptcy law and its effect on the society and the individuals alike. In the first part, bankruptcy practice is shown with comprehensive insight into its application and effect while in the second, its relevance to tax claims is briefly discussed. The author ventures to hope that the study would help the subject to be understood in its true spectrum.

The conduct and the antecedent transactions of the debtor, his entitlement for discharge, the rights of creditors

1. The Bankruptcy Act No. 55 of 1967
2. The Bankruptcy (Amendment) Act 76 (A.364)
3. The Bankruptcy Rules, 1968
4. The Bankruptcy Rules (Amendment) 1978 - P.U. (A) 83

PART I1. Introduction:

Bankruptcy is an insolvent state of a person who is a debtor unable to pay his debts by his own money or property and who is adjudged a bankrupt by judicial process. Bankruptcy law has two primary objects. Firstly, it is designed to relieve a debtor from the pressure of his liabilities so as to enable him to start his life afresh and secondly, to vest all his property in the Official Assignee for equitable distribution among his creditors according to their rights.

The main principle is that the debtor upon adjudication is prevented from incurring further debts and is required by law to handover his property and assets which are vested in the Official Assignee for the benefit of the general body of creditors. Upon realisation of sufficient money either from the sale of his assets or from total payments made by him by an order of the Court so as to be able to meet fair percentage (usually 50%) of his total liabilities, the debtor is entitled to apply for discharge from past debts. He may also apply for discharge upon getting unanimous consent of the creditors on extenuating circumstances such as, insanity, terminal disease, total incapacity for contribution due to old age and on strict proof of evidence, the Court may consider such situation in its bankruptcy jurisdiction.

In Malaysia, bankruptcy law and practice is governed by the Bankruptcy Act, No. 55 of 1967¹ as amended by the Act, A.364 of 1976² and the procedure is regulated by the Bankruptcy Rules, 1969³ as amended by the Bankruptcy Rules (Amendment) 1978 - P.U.(A) No. 83 dated 30.3.1978⁴. The conduct and the antecedent transactions of the debtor, his entitlement for discharge, the rights of creditors

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and the public interest are taken into account in bankruptcy by an impartial Bankruptcy Court which is deemed to be the Court of Equity. The Court would give due regard to the report of the Official Assignee in bankruptcy.

Bankruptcy is a highly specialised subject which involves technical requirements in its procedure. It is quasi-penal process and as such, special care should be taken to comply with strict formalities.¹

Bankruptcy is one of the modes of execution in civil law. Usually, there are three modes of execution of the judgment of the Court. i) By writ of seizure and sale (commonly known as attachment) ii) Judgment-debtor summons which means an order for directions and monthly instalments on examination of the debtor in Court and iii) By way of bankruptcy proceedings.

2. Act of Bankruptcy:

In order to present a bankruptcy petition against a debtor, an act of bankruptcy must be available to a creditor. This is a basic requirement in bankruptcy proceedings. An act of bankruptcy is committed by a debtor in a number of categories specified in the Bankruptcy Act² but most common among them is non-compliance of a bankruptcy notice served on a debtor.

An act of bankruptcy must be a personal act or default of the debtor.³ It cannot be committed through an agent of a person sought to be made bankrupt if such person is not cognizant of or has not authorised.⁴ A creditor shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded is available within six (6) months before the date of presentation of the petition.

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1. Williams and Muir Hunter on Bankruptcy (19th Edn.) P.39
 2. Section 3(1) of the Bankruptcy Act
 3. 1938 MLJ 130 Re Abdullah
 4. 1958 MLJ 239 Re Chop Yew Seng

A debtor in bankruptcy is deemed to include any person who has committed an act of bankruptcy and who is

- i) personally present in Malaysia;
- ii) ordinarily resided or had a place of residence in Malaysia;
- iii) carrying on business in Malaysia either personally or through an agent; and
- iv) member of a firm or partnership which carried on business in Malaysia.

It is no bar to commence bankruptcy proceedings against a person already adjudged bankrupt or who remains an undischarged bankrupt. A person may be made bankrupt any number of times concurrently, but however, if a person had already been adjudged bankrupt or he is an undischarged bankrupt, it does have an effect upon the rights with respect to property acquired by the bankrupt since his first bankruptcy and upon the Official Assignee who will become the Trustee and Creditor of the debts proved in earlier bankruptcy. Should the debtor die at any time after the petition has been presented, the proceedings may continue as if he were alive unless the Court otherwise orders. However, if he dies before the service of the petition, proceedings must be stayed.

A creditor must be in a position to issue execution on the judgment and if time has lapsed, he is not entitled to issue unless he has obtained leave of the Court. The creditor's debt must accrue before act of bankruptcy. Assignee of a judgment-debt is not a creditor and as such, he cannot issue bankruptcy notice unless he has obtained leave of the Court to issue execution.

A secured creditor has an unique position in bankruptcy.¹ He has the right and power over the property or chattels mortgaged, given and charged to him. Bankruptcy does not affect his power or right over the property so charged. However, in bankruptcy he is required to disclose to the Official Assignee the value of the security he holds against the bankrupt. He may exercise any of the three alternatives open to him under the rules.

1. Section 8(2) of the Bankruptcy Act and Rules 9-11 Schedule C.

- i) He can go ahead and realise his security to the extent of his claim and any excess must be paid to the Official Assignee;
- ii) If the realised amount is not sufficient, he may prove for the balance in bankruptcy; and
- iii) He can surrender the security to the Official Assignee and prove for the whole claim.

The Official Assignee may at anytime redeem the security on payment to the secured creditor of the assessed value.

A debt should be a liquidated sum payable immediately or at some certain future date, and it should be more than \$2,000 to support a petition. There are certain debts that will not support a petition such as, statute-barred debt (limitation), debt founded on illegal transactions or unenforceable debts, and money claimed under pending proceedings.

3. Bankruptcy Proceedings:

Bankruptcy proceedings are initially commenced by issue of bankruptcy notice in the prescribed form. It must be founded on a final order or judgment upon which execution may issue or execution has not been stayed. It must conform to the terms of the judgment or the order. Notice may issue on foreign judgments if registered under Reciprocal Enforcement of Judgments Act, No. 99¹ (Revised 72).

Two judgments cannot be included in one notice.² In other words, a creditor cannot combine two court judgments for less than \$2,000 for issue of notice.

Bankruptcy notice must give address of the creditor within the jurisdiction of the Court. Address given outside the jurisdiction is held to be invalid.³

Bankruptcy notice must state correct amount due as otherwise, it may not conform to the terms of the judgment. Excessive demand is bad in law and the notice would be held to be defective.⁴

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1. Reciprocal Enforcement of Judgments Act, No. 99 (Revised 72)
 2. Williams & Muir Hunter on Bankruptcy, 19th. Edn. P.36 (1977) 1 MLJ. 263 Re Michael Chong - Rule 91(2) Bankruptcy Rules, 1977
 3. (1957) MLJ. 87 Re Peter Wong - Williams 19th Edn. P.580
 4. (1968) 1 MLJ. 89 Re Arunasalam - Williams 19th Edn. P.33 (1973) 1 WLR. 733 Re Dunance

The principle is that actual amount due must be stated, There is however a proviso in Section 3 that the notice shall not be invalidated by reason only that the sum stated exceeds the actual amount due unless the debtor disputes the validity on the ground of mistake. Where part of the judgment debt has been paid, notice can only be issued for the balance due. Where a judgment is against several persons jointly, notice may issue against one without including the others. Notice may issue against a firm founded on a judgment, and upon non-compliance thereof, a joint act of bankruptcy will have been committed upon which receiving order may be made. However, judgment against partnership cannot be used to found a bankruptcy notice against an individual partner unless he was served with original writ in the suit or leave of the Court has been obtained.¹

Life of a bankruptcy notice is one month.² It should be served within that period. If it cannot be served, application may be made to the Court within that period for extension of time for service and if personal service is not possible, directions for substituted service may be asked for in the same application. A creditor may issue a second notice for the same debt if the time in the first notice has expired.

Debtor may file an application to set aside a bankruptcy notice by affidavit on the ground that there is irregularity or bad service or part of the debt has been paid. Application may also be made on the ground for set-off.³

Bankruptcy Petition: There are two kinds of petition. i) creditor's petition and ii) debtor's petition. Normally, a petition is filed in the Court of the State in which the debtor has ordinarily carried on business or resided but under the provisions of the Courts of Judicature Act, 1964 a High Court has

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1. (1956) 22 MLJ. 99 Re Ang Kim Leong - Rule 91(4) Bankruptcy Rules
 2. Rule 96 - Sec. 45 Interpretation Act No. 23 of 1967
 3. (1977) 1 MLJ. 242 Soh Bok Yew vs Cindee Dev.

jurisdiction in Malaya. When orders are made, proceedings can be transferred to the respective Court in the State. Petition against a person residing in East Malaysia cannot be filed in the Court at Peninsular Malaysia because the High Court in Malaya and the High Court in Borneo have separate and distinct territorial jurisdiction. Statutory deposit of \$300 in the case of creditor's petition and \$100 in the case of debtor's petition is required to be paid to the Official Assignee before filing of the petition.

A creditor's petition must be personally served. If for some reason, service cannot be effected personally, application may be made for substituted service. There are two elements involved in the making of an order for substitute service. Firstly, the Court must satisfy itself that there exists a practical impossibility of actual service and secondly, it must be satisfied that the method of substituted service asked for is one which will in all reasonable probability be effective to bring to the knowledge of the proceeding to the debtor within the time limited for compliance. The Court may also order the service out of jurisdiction within such time and such manner as it thinks fit.

Adjournment: After expiration of one month from the date appointed for the first hearing, no further adjournment merely by consent of the parties shall be allowed, unless the debtor has given prior notice to show cause against the petition.¹ The principle behind the rule is not to hold bankruptcy on debtor's head to collect money on the fear of being adjudged bankrupt. The creditor cannot use the petition as a lever to secure preferential treatment.² The power vested in the Court under Section 93(2) to adjourn any proceedings upon such terms as it thinks fit is wholly discretionary and should be sparingly used. However, the first adjournment of the hearing may be for a period as the Court may deem fit to allow

1. Rule 127
2. (1972) 2 MLJ. 59 - Williams and Muir Hunter 19th Edn. P. 61

the parties to come for reconciliation.

The Court has power at any time after the presentation of a bankruptcy petition to stay any action.¹ The Court can appoint the Official Assignee as the Interim Receiver to protect the estate of debtor on such terms as may seem just.

Bankruptcy petition shall not be withdrawn without leave of the Court.

Receiving Order: Upon a bankruptcy petition, the Court may make a Receiving Order which would operate as a safety valve and protect the debtor's estate from the day it is pronounced. No action can be commenced against the debtor without leave of the Court.² Unlike an adjudication in bankruptcy, a receiving order does not divest the debtor of his property. The Official Assignee acquires no right or interest by virtue of the order but he has control over the property. His role would be to safeguard the property as the caretaker and to receive the revenue if any therefrom. The effect³ of a receiving order is that

- i) The Official Assignee is thereby constituted the receiver of the debtor's property;
- ii) No creditor who has debt provable in bankruptcy has any remedy against the person or property of the debtor; and
- iii) No creditor can convene or commence any action or other legal proceedings to enforce the debt.

Receiving Order made against a firm operates as a receiving order made against individual partners but no partner is adjudicated unless application is made for such adjudication. When receiving order is made all pending actions relating to money should be stayed. All remedies in personam are taken away from the creditor. The Court has discretionary power to rescind the receiving order.

Adjudication Order: Under the Act, at the time of making of a receiving order, the Court is empowered to adjudge a debtor bankrupt.⁴ The effect of an Adjudication Order is

1. Section 10 read with Rule 138; Williams: 19th Edn. P.78
 2. Williams 19th Edn. P.69 Section 8(1)
 3. Section 8
 4. Section 24

serious and far-reaching. Upon pronouncement of the order, the property of the debtor vests forthwith in the Official Assignee who may deal with the property as the situation demands for distribution among the creditors. Upon making of the Receiving and Adjudication Orders, the Official Assignee has control over person and property of the debtor, who is subject to his directions and who will have to submit to investigation of his affairs and to produce documents relating to his dealings with his property.

Consequence on adjudication: The effect of an adjudication order is that the property of the bankrupt becomes divisible among his creditors. It will result in disqualification of the bankrupt from holding or occupying certain public and private offices or position, namely, Member of Parliament, Trustee in Bankruptcy, Director of a Company¹, President of the Sessions Court, Magistrate, Member of Local Council or Municipal Council.² The disqualification may be removed if he obtains annulment or he is discharged with a certificate that his bankruptcy was caused by misfortune without any misconduct on his part.

Disabilities:

- i) An undischarged bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without previous sanction of the Official Assignee.
- ii) He shall once in six months submit to the Official Assignee an account of all his income and expenditure.
- iii) He shall not leave Malaysia without the permission of the Official Assignee or the Court.
- iv) He shall immediately report to the Official Assignee of all moneys or property which exceeds \$500 that has come to his possession since adjudication.
- v) He shall not without the permission of the Official Assignee enter into or carry on any business either alone or in partnership or become a director of any Company or either directly or indirectly take part in the management.

1. Section 125 of the Companies Act, 1965
2. Section 36

1. Section 105
2. Section 10

vi) He shall not without the permission of the Official Assignee engage in the management of any business run by his wife, son or relatives.

Contravention of any of the disabling provisions will render him to be deemed guilty of contempt of Court for which he may be punished. He is not, however, disabled from seeking employment to start his life anew.

Annulment: Annulment of adjudication¹ can only be considered on two grounds: i) that the debtor ought not to have been adjudged bankrupt; and ii) that it is proved to the satisfaction of the Court that all debts have been paid in full or where it appears to the Court that bankruptcy proceedings are pending in Singapore under its law and that distribution ought to take place in that country. The effect of the annulment is that the properties of the debtor will re-vest in or revert to him.

Statement of Affairs: Upon making of the Receiving and Adjudication Orders, a debtor is under duty to submit to the Official Assignee a statement of his affairs verified by an affidavit showing particulars of his assets, liabilities, creditors' names and addresses. This is a statutory requirement failure of which will render the debtor to be deemed guilty of contempt of Court.²

First Meeting of Creditors: The Official Assignee as soon as conveniently possible after the filing of the statement of affairs should convene the first creditors meeting when he will have to make a report of the situation which will include personal particulars of the debtor, his property, his disposition, his present capacity for payment or settlement of his debts, and debtor's antecedent transactions etc. The creditors may resolve on any matter pertaining to debtor's affairs at the meeting and may request the Official Assignee to take necessary

1. Section 105
2. Section 16

action for realisation of assets.

Public Examination: When the debtor's affairs have been sufficiently investigated, the Court shall hold a public examination of the debtor on application of the Official Assignee. The debtor will be examined as to his conduct, assets, antecedent transactions, causes of indebtedness and his capacity for settlement. The Official Assignee, creditors or their counsel will take part in the examination. No counsel for the debtor will be allowed to take part.¹

Scope of enquiry is not only limited to bankruptcy but also to related affairs pertaining to the debtor's estate. The debtor is under duty to answer all questions put to him. From the evidence adduced in the examination, further action may be contemplated in regard to debtor's affairs and property.

Composition or Scheme of Arrangement:² The debtor at any time after the Receiving and Adjudication Orders may offer a composition or scheme of arrangement for settlement. The terms of the offer will be put to the creditors at the first meeting or thereafter at a general meeting for consideration and if accepted, it will have to be confirmed by majority at the second meeting to be convened. Then application is made to the Court for approval of the composition or scheme of arrangement with the Official Assignee's report. If approved, the Court will annul and rescind the orders.

Consultative Committee: If the bankruptcy is a big one requiring serious consideration, a consultative committee may be appointed to advise the Official Assignee on matters relating to the administration of debtor's property.³

Arrest of debtor:⁴ The Court may by warrant addressed to any Police Officer or Officer of the Court cause a

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- 1. Section 17(5)
 - 2. Section 18
 - 3. Section 25
 - 4. Section 28

debtor to be arrested on following circumstances:

- i) if he is absconding, avoiding, being evasive, delaying or embarrassing proceedings against him;
- ii) if he is about to remove his goods or obstructing the process;
- iii) if he fails to attend any examination; and
- iv) if he is proved to have committed bankruptcy offence.

The only proviso is that bankruptcy notice must have been served on him previously. After his arrest, he may be released on a security bond with one or more sureties.

Administration of bankrupt's estate:

The Official Assignee shall forthwith after adjudication take possession of all deeds, books, documents etc. of bankrupt and other properties. The Court on his application will enforce acquisition and retention. If the assets consist of stocks and shares he will exercise the right to transfer them to the same extent as if the bankrupt might have done.

Bank, Treasury and other financial institutions shall pay and deliver all moneys or securities held by them on notice from the Official Assignee. He may apply for appropriation order for certain portion of the salary of civil servant for credit of the estate.

4. Doctrine of "Relation Bank" of Official Assignee's title:¹

Bankruptcy shall be deemed to have relation back to and commence at the time of act of bankruptcy being committed on which a receiving order is made. This doctrine confers considerable power on the Official Assignee who is under duty to examine and review all transactions of the bankrupt as from the commencement of the act of bankruptcy. If the property is subject to equity, the Official Assignee takes the property

1. Section 47

subject to such terms in equity. All assets or property of the bankrupt are vested in the Official Assignee except those held in trust. Tools of trade do not pass to him. After-acquired property and profits in business do pass to him.

Effect of bankruptcy on antecedent transactions:¹

An execution creditor is not entitled to retain the benefit of his execution as against the Official Assignee if the debtor is subsequently adjudged bankrupt unless he has completed the execution before the receiving order. Attachment should have been completed before notice of commission of any available act of bankruptcy.²

Fraudulent conveyance and voluntary settlement:

Any settlement of property if the settler becomes a bankrupt within two years after the date of settlement is absolutely void.³ Fraudulent preference itself is an act of bankruptcy. And if the settler becomes bankrupt subsequently within five years after the date of settlement is void against the Official Assignee unless the parties claiming under the settlement can prove that the settler was at the time able to pay all his debts without the aid of the property so settled.

"Settlement" includes any conveyance, transfer of property, bill, bond, note, security for any money of covenant for payment and any gift of money.

Every conveyance, transfer, charge and payment made to any creditor in preference over other creditors shall be deemed fraudulent and void as against the Official Assignee if the person is adjudged bankrupt within six months after the date.⁴

Bona fide transactions:

Certain transactions made bona fide in good faith

1. Section 50
2. (1975) 1 MLJ. 224 Re Kong Mun Cheong & Anor
3. Section 52
4. Section 53

and for valuable consideration before the date of the receiving order are protected.¹ Transactions done with no notice of commission of act of bankruptcy are also protected,

5. The Official Assignee:

The Official Assignee is a statutory officer appointed under the Act and judicial notice should be taken of his appointment. His duties as regards the debtor's conduct² and his powers to deal with debtor's property³ are specified in the Act. He has power to examine the proof of debt filed by a creditor and he can admit to rank for dividend or reject it in whole or in part giving grounds of rejection. An aggrieved creditor can appeal to Court by Notice of Motion.

6. Proof of debt:

Proving a debt in bankruptcy means filing a claim in prescribed form with supportive documents verified by an affidavit. A creditor cannot prove his debt incurred subsequent to bankruptcy. His remedy would be to obtain judgment in Court and enforce the judgment by bringing the debtor into second bankruptcy.

There can be no proof of interest as such accruing after receiving order.⁴

The Official Assignee and the Court has right to inquire into consideration of all judgments and can go behind such judgments in order to ascertain the consideration on which such judgments are based. Bankruptcy Court being the Court of Equity has always inquired into consideration of debts existed in equity and reject the proof even though judgment was obtained.⁵

Alimony is not provable in bankruptcy.

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1. Williams and Muir Hunter 19th Edn. P. 356; Section 54
 2. Section 72
 3. Section 73
 4. Williams and Muir Hunter 19th Edn. P. 534
 5. Williams and Muir Hunter 19th Edn. P. 57-58 - 167

Certain debts and liabilities such as, demand in the nature of unliquidated debts, damages arising otherwise than by reason of contract, damages in tort unless supported by final judgment, statute barred debts and illegal or immoral debts are not provable in bankruptcy.

7. Distribution of property:

Subject to costs of administration, fees and expenses, the Official Assignee will declare and distribute dividends amongst creditors whose claims have been admitted to rank for dividend. Distribution will be done

- i) firstly, on priority or preferential claims such as land tax, income tax, wage claims, EPF and workman compensation;
- ii) Crown claims; and
- iii) all other claims will be paid 'Pari Passu'.

The bankrupt is entitled to surplus if any after payment in full of all his debts.

Dividend cannot be attached not being a debt due from the Trustee.¹

8. Discharge of the bankrupt:²

A bankrupt may at any time after being adjudged apply to Court for an order of discharge and the Court shall appoint a day for hearing of the application. It shall not be heard until Public Examination of the bankrupt is concluded. The Court shall take into consideration the Official Assignee's report with regard to bankrupt's conduct and affairs. The Court shall either

- i) refuse the order; or

1. William and Muir Hunter, 19th Edn. P. 410
 2. Section 33

1. Section 32
 2. Sections 81, 90
 3. Section 92

- ii) suspend operation of the order; or
- iii) suspend the operation until a dividend of not less than 50% has been paid; or
- iv) grant an order subject to conditions.

Discharge may be considered if bankrupt's assets are of value of more than 50% of the amount of his total liabilities.

Effect of order of discharge:¹

An order of discharge shall not release the bankrupt from any debt due to the Government.

It shall not release him from any debt or liability incurred by means of fraud or fraudulent breach of trust.

It shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made joint contract.

Otherwise, it will release the bankrupt from all debts provable in bankruptcy.

9. Jurisdiction and Powers of the Court:²

The High Court shall be the Court having jurisdiction in bankruptcy. The Court shall have full power to decide all questions whether of law or of fact which may arise in any case of bankruptcy. Scope of power is unlimited. The debtor, creditors, the Official Assignee and parties to the case are all subject to the jurisdiction.

10. Appeals:

The Court may review, rescind or vary any order made by it under its bankruptcy jurisdiction almost without limit.³

1. Section 35

2. Sections 81, 90, 91 and 93

3. Section 92

Any aggrieved party may appeal on any order made in bankruptcy.

11. Reciprocal provisions relating to Singapore:

The High Court and the officers thereof shall in all matters of Bankruptcy Act in aid and be auxilliary to the Court of Singapore so long as the law requires its Courts to act in aid and be auxilliary to the Court of Malaysia.¹

12. Administration in bankruptcy of insolvent deceased estate:

The Court may make an order of administration in bankruptcy of any deceased debtor on being satisfied that there is reasonable probability that the estate will be sufficient for payment of debts owing by the deceased.² The petition must be served on the legal representative.

13. Bankruptcy offences and fraudulent debtors/creditors:

There are number of bankruptcy offences mentioned in the Act.³ No prosecution shall be commenced by any person other than by or on behalf of the Public Prosecutor, except with the written consent of the Official Assignee or by order the Court.

14. Formal defects:

No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity unless the Court is of opinion that substantial injustice has been caused by such defect or irregularity.⁴

15. The Official Receiver:

The Official Assignee by virtue of his office is

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- 1. Section 104
 - 2. Section 122
 - 3. Section 109 - 115
 - 4. Section 131

also the Official Receiver under the Companies Act¹ and he is responsible for the liquidation and winding-up of Companies. He is appointed initially as the provisional liquidator and later, after the Company's affairs have been sufficiently investigated, and statement of affairs filed, he may be appointed the liquidator if there is no nomination for appointment of an approved liquidator. A list of approved liquidators is published by the Government.

The winding-up of a Company may be either²

- a) by the Court; or
- b) voluntary.

The Court may, in the case of winding-up by the Court, appoint an approved liquidator after his consent in writing has been obtained and filed or appoint the Official Receiver as the liquidator.

The liquidators in both cases, either voluntary winding-up or winding-up by the Court are under duty to submit their statements of accounts and report on the position of the Company to the Official Receiver once in every six months.

16. The Trade Unions Regulations and the Societies Act:³

Under the provisions of the Trade Unions Ordinance and the Societies Act, the Official Assignee is entrusted with the responsibility of winding-up of a Trade Union or a Society whose registration has been cancelled or who has been deregistered under the law.

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1. Section 4(1) of the Companies Act, 1965 - 'Official Receiver'
 2. Section 211
 3. Regulation 38 Trade Union Regulations 1959 and Societies Act.
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TAX CLAIMS IN RELATION TO BANKRUPTCY AND LIQUIDATION

1. Tax claims are deemed to be debts due to the Government. As such, they enjoy priority over other debts and preference will be given for the claim up to 31st of December next before the date of the receiving order and not exceeding in the whole one year's assessment.¹ In other words, in the distribution of bankrupt's property, one year's assessed tax immediately next before the date of the receiving order will be paid in priority. The balance, if any, will be admitted to rank for dividend with other debts. However, in English Courts, it was held that the creditor (Revenue Dept.) was entitled to select for preferential treatment its 'best year' which may not well be the year immediately preceding the date of the receiving order.²

2. An order of discharge shall not release the bankrupt from any debt due to the Government.³ If the bankrupt's estate is able to pay 50% of the admitted claim on discharge, he is still liable to pay the remaining amount due on the tax. His liability in balance may be guaranteed by an order of Court by way of judgment being entered at the time of discharge or by way of security bond with sureties to be approved by the Court and acceptable to the Government, for settlement.

3. In the case of tax claim, the Court cannot entertain a challenge to the proof which involves going behind or re-opening the assessment on which it is based nor can the debtor or other person interested question the petition debt of the Government if founded on the tax assessment.⁴ However, where the assessment is alleged to be excessive or should not have been made on the ground that the bankrupt has had no income, the Official Assignee may refer the

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1. Section 43(1)(b) Bankruptcy Act
 2. Williams and Muir Hunter on Bankruptcy 19th Edn. P.209 (1951) Ch. 225 CA Re Pratt
 3. Section 35(1)
 4. Williams, 19th Edn. P.170: (1889) 2 QBD.145 Re Calvert

matter to the Income Tax Office with the request for review and the Office may in its discretion allow re-examination of the case.

4. With regard to the bankruptcy procedure in making excessive demand in the Bankruptcy Notice, in a case (before the PC) where the Comptroller of Income Tax was concerned in regard to a bankruptcy notice not complying with Sec. 7(1) of the Courts of Judicature Act, 1964 and the said notice was reported to have had a formal defect in the form of excessive demand, it was held that the notice was defective as it did not comply with the legal requirement but as that was a formal defect which could not reasonably mislead a debtor upon whom it was served, it was validated by Section 131 of the Bankruptcy Act.¹

5. Capital Gains Tax:

Arrears of Capital Gains Tax are also accorded the same priority as the income tax as it is deemed to be a debt due to the Government. As such, it becomes a preferential debt under Section 43(1)(b) of the Bankruptcy Act. In any event, it is provided in the Real Property Gains Tax Act, 1976 that the tax is payable notwithstanding proceedings,² (which may have broader meaning assigned to it in regard to civil or criminal proceedings).

6. Tax claims against a Company in liquidation enjoy the same kind of preference over other debts as in the case of bankruptcy.

7. Corporation Tax:

The Liquidator is responsible for the payment of corporation tax in respect of profits made by the Company up to the commencement of the liquidation and when the business is continued, in respect of the profits earned during the period.³ The debts which are

1. (1970) 1 MLJ. 233 Rengasamy Pillai vs Comptroller of Income Tax
2. The Real Property Gains Tax Act, 1976; Section 38
3. Sales' The Law Relating Bankruptcy, Liquidations & Receivership 6th Edn. P.269

given priority in the event of the liquidation have preference over the rights of debenture-holders under a floating charge and the receiver must make provision for the payment.

8. Tax claim in voluntary winding-up:

In a dispute as to the tax payable by a Company in voluntary winding-up, where the Company had lodged an appeal against the assessment with the Income Tax Board of Review and at the same time applied for stay of the writ of claim filed by the Income Tax Office, it was held that the aggrieved tax payer should pay his tax first and then present his arguments against the assessment before the Board.¹

9. In another case, where the assets of the Company in voluntary liquidation not sold for five years after the decision to liquidate, the question arose as to whether the profits or gain from the assets are subject to development tax. It was held that so long as the liquidator was trading within the meaning of the Companies Act, the gain or profits from the trade would be taxable.²

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1. (1978) 2 MLJ 182 Comptroller of Income Tax vs B.S. Pte. Ltd.
2. (1968) 2 MLJ 96 Re Kwong Lee Co. Ltd.