
(1987) 63 CTR 350 : (1987) 32 TAXMAN 133

Allahabad High Court

Case No: Wealth-tax Reference No. 108 of 1980

Waqf Haji Sheikh Karim
Bux

APPELLANT

Vs

Commissioner of
Income Tax

RESPONDENT

Date of Decision: March 11, 1987

Acts Referred:

- Wealth Tax Act, 1957 - Section 21, 21(4), 3

Citation: (1987) 63 CTR 350 : (1987) 32 TAXMAN 133

Hon'ble Judges: R.K. Gulati, J; K.C. Agrawal, J

Bench: Division Bench

Advocate: K.B. Bhatnagar, for the Appellant; Bharatji Agarwal, for the Respondent

Judgement

R.K. Gulati, J.

The present reference made by the Income Tax Appellate Tribunal u/s 27(1) of the Wealth-tax Act, 1957 (hereinafter referred to as "the Act"), arises out of the assessment of net wealth of the applicant, Haji Sheikh Karim Bux Trust (hereinafter referred to as "the waqf"). The statement of the case relates to the assessment year 1973-74. The corresponding valuation date is March 31, 1973. Two questions of law have been referred by the Tribunal for the opinion of this court. These questions are as under :

"1. Whether, on the facts and in the circumstances of the case, a mutawalli can be treated as a trustee in a valid deed of waqf and can be assessed to tax u/s 21 of the Wealth-tax Act, 1957 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the shares of the mutawallis were indeterminate and, therefore, they were assessable in terms of Clause (iv) of Sub-section (1) of Section 21 of the Wealth-tax Act, 1957 ?"

2. One Sri Sheikh Karim Bux executed a waqf perpetual indellah (i.e., in the name of God) on September 8, 1886 of his properties, valued at Rs. 1,03,150 which included zamindari property and houses specified and bounded, as given in Schedule-1 attached to the waqf deed.

3. Under the terms of the waqf deed, the waqf, Sri Karim Bux, was to be the first mutawalli. After his death, the management and administration of the waqf property is provided in columns 1 and 2 of the deed. It is admitted that on the corresponding valuation date, for the assessment year 1973-74, there were six mutawallis. Sri Syed Mohd. Hashim Rizvi is the managing mutawalli and the waqf is named as Waqf Hazi Sheikh Karim Bux. From the income out of waqf properties, under the deed, the mutawallis are required to make expenses on objects set out in the second schedule to the deed. Headwise details are as under :

Description of expenses	Quantum of expenditure
1. Expenses relating to mosque and musafirkhana, appertaining to the mosque situate in village Umarpur Niwan, Purgana Chail, together with expenses over the visitors to the mosque, other necessary expenses such as arrangements for water and farah, etc., repairs to the mosque and musafirkhana, and if any of them falls, its reconstruction	Any amount necessary.

2. Pay and subsistence for the teacher for the education of the children and others and any one desirous of education	Reasonable amount.
3. Seven Dogas with cotton to be made and distributed to the poor in winter	Reasonable amount.
4. Annual Maulood Sharif	Reasonable amount.
5. For persons staying in Mecca per details given below :	
(1) Saiyed Hashim, Syed Mahmood and Syed Ali, sons of Hasan Jamiluddin Matoof	Rs. 30
(2) Mohd. Tanseen" Matoof	Rs. 20
(3) Abu Bakar and Ali, sons of Mohd. Darvesh, deceased	Rs. 16
(4) Abdul Rahim, son of Hasan Ali, deceased	Rs. 14
(5) Sheikh Ahmad and Ramzani	Rs. 10
(6) Mohammad, son of Maharaban Khan	Rs. 10
	Rs. 100
6. Expenses on occasion of Id for the poor, etc.	Rs. 100

7. Pay and subsistence for Hafiz Quran at the mosque in the village, Niwan, for leading prayers for five times a day. Calling Azan five times and giving education to children desirous of reading Quran	Reasonable amount.
8. Repairs to the grave of Hazi Sheikh Ghulam Ali, deceased	According to need.
9. For the funeral expenses	According to need.

4. There are then certain payments amounting Rs. 795 in the aggregate which were to be distributed to certain individuals named in the second schedule.

5. By efflux of time, the persons who were residing permanently in Mecca and to whom Rs. 100 had to be paid as per schedule 2 are no longer alive. Similarly, other persons mentioned in schedule 2 to whom Rs. 795 had to be distributed as per that schedule had died on the corresponding valuation date. So nothing was paid to them either.

6. The Wealth-tax Officer assessed the waqf through the managing mutawalli in the status of an individual. The assessment was made u/s 21(4) and the net wealth assessable was determined by computing the value of the waqf properties. Before the Wealth-tax Officer as well as before the Appellate Assistant Commissioner of Wealth-tax, the assessment was resisted on two grounds, namely, that the waqf was predominantly for public purpose of a charitable or religious nature, and, therefore, it was exempt from tax u/s 5(1)(i) of the Act. In the alternative, the assessment should have been made u/s 21(1) and not under Sub-clause (4) of Section 21. The ground was that all the mutawallis should have been treated as separate assesseees and Section 21(4) did not apply to the facts of the present case. These contentions were rejected by both the authorities.

7. When the matter came before the Income Tax Appellate Tribunal, the first ground was given up. Instead, an entirely new plea was raised. It was argued that when a waqif dedicates his property to the waqf, his own right with regard to the waqf property is extinguished. The property thereafter is detained in perpetuity for God. It is tied up to God. It is, however, not owned by God for a Muslim God is impersonal. He is neither a person nor an individual and so he cannot own any property under the Mohammadan

law. The mutawalli looks after the waqf property as its manager and procurator but the property never vests in him. He is unlike a trustee, for a trustee is the legal owner of the property whereas a mutawalli has no ownership rights. The waqf property cannot be assessed to wealth-tax u/s 3 of the Wealth-tax Act, 1957.

8. The alternative contention as raised before the first two authorities was also pressed before the Tribunal. The Income Tax Appellate Tribunal rejected these contentions and confirmed the assessment order on these points.

9. It is in this background, the aforesaid two questions have been referred to us.

10. The learned counsel appearing on behalf of the assessee reiterated before us the submissions that were advanced before the Income Tax Appellate Tribunal. We were referred to Sections 3 and 2(m) of the Act. Section 3 is the charging section. It is under this section that "Wealth-tax " is charged on the net wealth of every individual, Hindu undivided family and company for every assessment year (corresponding to the valuation date) at the rate or rates specified in Schedule 1.

11. "Net wealth" is defined in Section 2(m) to mean "the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date."

12. It is argued that under this section, it is the net wealth of every individual, Hindu undivided family and company alone that can be subjected to wealth-tax. As the Almighty is neither an individual, Hindu undivided family or company, he is not a taxable entity under the Wealth-tax Act, 1957.

13. The waqf property, according to learned counsel, could not be taxed even vicariously through the mutawallis for the mutawallis did not own the waqf properties: they merely managed them. As such, they could not possess the character of representative capacity nor could in law a mutawalli be a representative of God. It is said that no assessment independently of the charging section is possible even through the mutawalli u/s 21 in respect of waqf properties. In any case, the word "trustee" as used in Section 21 of the Act must be construed, according to the assessee's counsel, in its strict legal meaning as understood in the Indian Trusts Act. Thus understood, a mutawalli could not be treated as a trustee. Our attention was also invited to the expression "including a trustee under a valid deed of waqf" used in Section 21 of the Act. It is contended that this expression would not cover within its scope the case of a mutawalli. This distinction was maintained on the ground that a mutawalli of a waqf does not hold the properties on behalf of the beneficiaries which is an essential condition for the application of Section 21 whereas the trustee does so. Accordingly, it is argued that Section 21 has no application. To put it briefly, the argument is that even if Section 3 applies, taking Section 21 into account, no

valid assessment is possible.

14. On the second question, it is argued that the shares of the mutawallis who are also beneficiaries under the waqf are determinate and known. The provisions of Section 21(4) are not applicable to the assessee's case. Thus, the assessment, if at all, could only be made u/s 21(1) of the Act.

15. We have carefully considered the various contentions raised on behalf of the assessee and may now proceed to decide them.

16. The term "waqf" literally means detention. The legal meaning of "waqf", according to Abu Hanifa, is detention of the specific thing in the ownership of the waqif or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects" (see Mulla's Principles of Mohammadan Law, eighteenth edition).

17. The Privy Council in *Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar*, AIR 1922 PC 123, have explained the concept of trust under the Mohammadan law as under (at page 127):

"But the Mohammadan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam ; and means " the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is waqf..... the right of the waqf is extinguished and the ownership is transferred to the Almighty..... But.....nor the mutawalli has any right in the property belonging to the waqf; the property is not vested in him and he is not a "trustee" in the technical sense."

18. We are concerned with the assessment of waqf properties in the hands of mitawallis. The procedure for such assessment is provided u/s 21 of the Act. Assuming that Section 3 in terms does not apply to the Almighty as contended before us, nevertheless the question is whether assessment with regard to the waqf property can be made on the mutawalli, if not on God. Is there any provision to that effect under the Act ? To put it in another way, the question is whether the assessment can be sustained independently of Section 3. It is significant to note that Section 3 by its opening words imposes the charge " subject to the other provisions " of the Act. Section 3, therefore, must give way if the assessment can be sustained with reference to any other provisions of the Act. This question is no longer res integra. The Supreme Court in [The Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad Vs. Trustees of H.E.H. Nizam's Family Hyderabad](#), :

"But Section 3 imposes the charge of wealth-tax "subject to the other provisions" of the Act and these other provisions include Section 21. Section 3 is, therefore, made expressly subject to Section 21 and it must yield to that section in so far as the latter makes special provision for assessment of a trustee of a trust."

19. The validity of assessment has, therefore, to be judged with reference to Section 21 of the Act. This section provides for assessment in those cases where the assets are held not by the individual of whom they are the net wealth, but by other persons. The assessment under this section is made in the hands of those persons who are known as "representative assessees" and the assessment is described as "vicarious assessment". Section 21 is mandatory in terms and contains special provisions. This section as it stood at the material time provided as follows :

"In the case of assets chargeable to tax under this Act, which are held by a court of wards or an administrator-general or an official trustee or any receiver or manager or any other person, by whatever name called, appointed under any order of a court to manage property on behalf of another, or any trustee appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise (including a trustee under a valid deed of waqf), the wealth-tax shall be levied upon and recoverable from the court of wards, administrator-general, official trustee, receiver, manager or trustee, as the case may be, in the like manner and to the same extent as it would be leviable upon and recoverable from the person on whose behalf or for whose benefit the assets are held, and the provisions of this Act shall apply accordingly."

20. A plain reading of the aforesaid provision shows that there are various persons enumerated in this section who can be assessed in respect of estate belonging to others. Some of them are statutory officers, like official trustee, administrator-general, court of wards, etc., in whom title to the estate vests statutorily and their functions are governed by the respective statutes. The other category is like the receiver or a manager or any other person by whatever name called, appointed by a court or competent authority to manage the estate of another. There is yet another class of persons like guardians in the case of a minor or lunatic, etc. (See Section 20(3)).

21. We are not concerned with any of these categories. We are concerned with "trustees" who are appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise including a trustee, appointed under a valid deed of waqf.

22. Shorn of inapplicable words of Sub-section (1) of Section 21 and so far as relevant for our purpose, the section would read as follows :

" In the case of assets chargeable to tax under this Act, which are held by any trustee appointed under a trust declared by a duly executed instrument in writing, whether testamentary or otherwise (including a trustee under a valid deed of waqf), the wealth-tax shall be levied upon and recoverable from the court of wards..... in the like manner and to the same extent as it would be leviable upon and recoverable from the person on whose behalf or for whose benefit the assets are held....."

23. In order that these provisions may apply to a trustee, the trust must be one which is declared by a duly executed instrument in writing. The objection of the assessee is that the expression "trustee" would not cover the case of a mutawalli. We do not agree. In our opinion, there is nothing sacrosanct in the word "trustee" used in this section. It has been used in general terms and not in the sense in which the term is understood under the English law or under the Indian Trusts Act. We are inclined to place a broad, rather than a narrow construction on the word "trustee" used in this section. As observed by the Supreme Court, a mutawalli of a waqf, although not a trustee in the true sense of the term, is still bound by the various obligations of a trustee (See [Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan](#), . The words within brackets, namely, "including a trustee under a valid deed of waqf", in our opinion, will undoubtedly include a mutawalli within the meaning of the term "trustee".

24. The argument that the position of a mutawalli is different from that of a trustee, the two cannot be equated, for, in the case of the "trustee", property vests in him, while in the case of a mutawalli, it is not so, is not well-founded. The question of vesting is not germane to the issue nor can the law of waqf under the Mohammadan law be imported in the construction of Section 21 of the Act. The matter has been put beyond doubt by the Supreme Court in [Commissioner of Income Tax, Madras Vs. Managing Trustees, Nagore Durgha, Nagore](#), . This case arose u/s 41 of the Indian Income Tax Act, 1922, which is in pari materia to the provisions with which we are concerned. The Supreme Court observed (at page 324):

"The doctrine of vesting is not germane to this contention. In some of the enumerated persons in the section, the property vests and in others, it does not vest, but they only manage the property...The common thread that passes through all of them is that they function legally or factually for others : they manage the property for the benefit of others. That the technical doctrine of vesting is not imported in the section is apparent from the fact that a trustee appointed under a trust deed is brought under the section though legally the property vests in him. In the case of a Muslim waqf, the property vests in the Almighty ; even so, the mutawallis are brought under the section. A reasonable interpretation of the section is that all the categories of persons mentioned therein are deemed to receive the income on behalf of another person or persons or manage the same for his or their benefit."

25. In view of the aforesaid rule, the assessee's contention must be rejected.

26. Another argument of the assessee that with a dedication of property to the waqf, it vests in the Almighty, and, therefore, the mutawalli does not hold such property on behalf of, or for the benefit of, the beneficiaries is equally misconceived. Technically, it is true that property vests in the Almighty but it is in an ideal sense only. In reality, the property is held for the benefit of his creatures, that is, the beneficiaries. The true position of a mutawalli has been explained by the Supreme Court in [Commissioner of Income Tax, Kerala and Coimbatore Vs. Puthiya Ponmanichintakam Wakf Manager P.P. Ayesha Bi Bi](#),

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"Under the Mohammadan law, the moment waqf is created, all rights of property pass out of the wakif and vest in the Almighty. The property does not vest in the mutawalli, for he is merely a manager and not a trustee in the technical sense. Though waqf property belongs to the Almighty, the practical significance of that concept is explained in *Jewun Doss Sahoo v. Shah Kubeer-ood-deen* [1840] 2 MIA 390, thus :

"Wakf" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures."

27. In the aforesaid case, it was also held that Section 41(1) provides for a vicarious assessment in order to facilitate the levy and collection of Income Tax from a trustee in respect of the income of the beneficiaries. For the purpose of Section 41, the mutawalli is treated as "a trustee" and on the analogy of a trustee, he holds the property for the benefit of beneficiaries. The contention that in a case of waqf, the property is held for the Almighty and not for any person was rejected by saying that Section 41 in specific terms treats the mutawalli as a trustee, though he is not so in the technical sense under the Mohammadan law.

28. The aforesaid decision was given under the Indian Income Tax Act but will equally be applicable to the interpretation of Section 21 of the Act. The only difference between Section 41 of the Indian Income Tax Act, 1922, and Section 21 of the Act is that whereas the former deals with income, the latter deals with assets. Subject to this difference, the two provisions are identically worded (see [Commissioner of Wealth-tax, Bihar and Orissa Vs. Kripashankar Dayashanker Worah](#), .

29. In view of the aforesaid, we hold that a mutawalli can be treated as a trustee in a valid deed of waqf and can be assessed to tax u/s 21 of the Wealth-tax Act, 1957.

30. This brings us to the second question. Before we deal with this question, it may be stated that in the question referred, there appears to be a typographical error. The question refers to Clause (iv) of Sub-section (1) of Section 21 of the Wealth-tax Act, 1957. The correct reference should be Sub-section (4) of Section 21. The question referred, therefore, has to be framed so as to read in the following manner:

"Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the shares of the mutawallis were indeterminate and, therefore, they were assessable in terms of Sub-section (4) of Section 21 of the Wealth-tax Act, 1957 ?"

31. The controversy under this question is whether the shares of beneficiaries are indeterminate or unknown and, consequently, the assessment was correctly made under Section 21(4) of the Act.

32. In order to appreciate the rival contentions of the parties, it is necessary to read the relevant provisions of Sub-sections (1) and (4) of Section 21 of the Act, We have already extracted above, the provisions of Sub-section (1) of Section 21. The provisions of Sub-section (4) of that section so far as relevant to this case are as under :

"(4) Notwithstanding anything contained in this section, where the shares of the persons on whose behalf or for whose benefit any such assets are held are indeterminate or unknown, the wealth-tax shall be levied upon and recovered from the court of wards, administrator-general, official trustee, receiver, manager, or other person aforesaid as if the persons on whose behalf or for whose benefit the assets are held were an individual who is a citizen of India and resident in India for the purposes of this Act, and "

33. Now, under Sub-section (1) of Section 21, amongst others, one consequence that flows is that as many assessments are contemplated on the trustees as there are beneficiaries with determinate and known shares, either by separate orders or by one order demarcating separately, the tax due in respect of each beneficiary. However, Sub-section (2) gives an option to the assessing officer in the cases falling under Sub-section (1) to raise direct assessment in the hands of beneficiaries instead of assessing the representative assessee. Sub-section (4) has to be read along with Sub-sections (1) and (2) and comes into play, the essential ingredients being that shares of the beneficiaries are indeterminate or unknown.

34. In such a situation, the mode and manner of assessment is provided in Sub-section (4) of Section 21. The assessment under these provisions is contemplated in the hands of representative assessees only. The shares of beneficiaries being indeterminate and unknown, he is assessed in respect of their total beneficial interest in the trust properties for it is not possible to make direct assessment on the beneficiaries in respect of their individual interest. The aggregate beneficial interest of the beneficiaries is grouped in one hand as if it belongs to one individual beneficiary. The assessment is made on the trustee in the same manner and to the same extent as it would be on such fictional beneficiary. Under this clause, it is the beneficial interest which is assessed to wealth tax in the hands of representative assessee and not the corpus of the trust properties.

35. Before proceeding further, it must be stated that the charge of wealth-tax is in respect of the net wealth on the relevant valuation date and is an annual charge. Therefore, whether the shares are determinate or indeterminate, must be with reference to the relevant valuation date. Whether the assessment in a given case should be under Sub-section (1) or Sub-section (4) of Section 21 will depend upon the enquiry as to who are the beneficiaries in respect of the remainder on the relevant date and whether their shares are determinate or known.

36. Bearing these principles in mind, we now proceed to examine the case on the second question. The Income Tax Appellate Tribunal has referred to Clause 4 of the waqf deed in its order. The relevant portion of that clause provides as under :

" The income from the waqf property shall first be utilised for payment of revenue and other Government dues, expenses over the case, other village expenses in respect of the waqf zamindari property, repairs to or reconstruction of the waqf houses aforesaid. Thereafter, the remaining income shall first be utilised to meet the expenses mentioned in schedule II for the purpose of which the waqf has been created and whatever income remains thereafter shall be utilised by them for their personal expenses in equal shares."

37. The relevant portion of the second schedule together with the nature of expenses has already been extracted above in the earlier part of this judgment. On a combined reading of the aforesaid clause and the second schedule, it is evident that after providing for the expenses in Clause 4 of the deed, the balance of the waqf income was to be distributed among the mutawallis in equal proportion. This much was conceded by the learned senior standing counsel appearing on behalf of the Department. In fact, there was no dispute on this point before the tax authorities. The Tribunal has held that the shares of the mutawallis were indeterminate and unknown because of the built-in scheme in the waqf deed. The bone of contention is, the discretion of the mutawallis to spend any amount on their sweet will, on the objects at serial numbers 1 to 7 specified in the second schedule. The argument is that because of the indeterminateness of the amount for expenses in turn, makes the remainder income indeterminate and unknown which is to be distributed among the mutawallis. It is urged that one cannot predicate unless the entire year is over, as to what would be the remainder income which would be divided among the mutawallis. In the present case, according to the Department, mutawallis have been assigned two roles, one is that of mutawallis, i.e., the manager, and another that of the beneficiaries. Mutawallis have been directed to manage the waqf and to incur expenses out of the waqf income as they may like and in their discretion and to appropriate the rest amongst themselves. From this, it is concluded that the respective shares of the beneficiaries are not ascertainable and known. The Income Tax Appellate Tribunal has upheld these contentions and have held that the provisions of Section 21(4) are attracted.

38. In our opinion, the view taken by the Income Tax Appellate Tribunal cannot be sustained. The case set up by the Revenue is plainly erroneous. As observed earlier, wealth-tax is charged on the net wealth as on the relevant valuation date. Whether the shares of the persons or beneficiaries are indeterminate or unknown, the position must be judged on the relevant valuation date. The learned standing counsel could not dispute that on the last day of the year (that is, on the corresponding valuation date), both the income liable to be divided among the mutawallis and their respective shares therein were known and ascertainable. The fact that on a given point during the currency of the year, the amount of income liable to be distributed among the mutawallis could not be predicated in advance is of no consequence. It is irrelevant for determination of the question whether the shares of the mutawallis are indeterminate or unknown. The waqf clearly says that after meeting the expenses, the balance income will be distributed equally among the mutawallis. On the relevant valuation date, the number of beneficiaries was ascertainable and so also their shares and the balance income to be distributed

among themselves. The assessment u/s 21(4) was thus not justified.

39. For the reasons that have appealed to us, we hold that the Income Tax Appellate Tribunal was not justified in taking the view that the shares of the mutawallis were indeterminate and, therefore, they were liable for assessment under Sub-section (4) of Section 21 of the Act.

40. Accordingly, we answer question No. 1 in the affirmative, against the assessee and in favour of the Department. Question No. 2 is answered in the negative, in favour of the assessee and against the Department.

41. In view of the divided success, there shall be no order as to costs.