

(1949) 10 AHC CK 0009**Allahabad High Court****Case No:** Misc. Case No. 259 of 1947

S. Jawad Ali Shah

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: Oct. 10, 1949**Acts Referred:**

- Income Tax Act, 1922 - Section 2, 4(3)

Citation: AIR 1950 All 227 : (1950) 20 AWR 67 : (1950) 18 ITR 95**Hon'ble Judges:** Malik, C.J; Seth, J**Bench:** Division Bench**Advocate:** Z.H. Lari, for the Appellant; Gopalji Mehrotra, for the Respondent**Final Decision:** Allowed

Judgement

Malik, C.J.

This is a reference u/s 66 (1), Income Tax Act by the Income Tax Appellate Tribunal, Allahabad.

2. There is an ancient waqf in Gorakhpur, known as the Imambara Waqf. The history of the waqf has been briefly set out in the statement of the case. A gentleman of the name of Syed Roshan Ali Shah was in his time well known for his piety, and various items of property were, from time to time, made a waqf of for the maintenance of an Imambara which had been built by him at Gorakhpur. Syed Roshan Ali Shah died in 1818. He had, however, executed a tamliknama under which the property came into the hands of his nephew, Ahmad Ali Shah. Ahmad Ali Shah died in 1874, and he, in his turn, left a tamliknama of the year 1871 and the property came under that tamliknama to one, Wajid Ali Shah. Wajid Ali Shah died in 1915, and the property then came into the hands of the assessee, Jawad Ali Shah, who was his eldest son.

3. From the statement of facts, mentioned above, it would appear that there was no document executed in favour of the assessee. It was his case that Wajid Ali Shah, before he died, had nominated him as his successor. There was a litigation between

Jawad Ali Shah, the assessee, and the other heirs of Wajid Ali Shah, and the case was fought up to this Court. The decision of this Court in First Appeal No. 51 of 1918, connected with First Appeal No. 151 of 1918, dated 8th March 1922, is a part of the paper book which has been prepared for our use. As regards certain items of property, with the income from which we are now concerned, they were declared to be waqf property.

4. The assessee, Jawad Ali Shah, has been appropriating to himself about one-tenth of the total income from the Waqfs properties, and after the passing of the Muslim Waqfs Act (XIII [13] of 1936) the Chief Commissioner of Waqf has, under Section 4 (3) (e), fixed his pay at one-tenth of the total income. The income is mostly from village properties and from 1932-33 the question has cropped up almost every year, whether the assessee can be taxed for the income, derived by him out of the income of the trust properties as remuneration for his work as mutawalli. The assessee has been changing his grounds in his objections from year to year as appears to him best suited for his purpose. The assessments with which we are concerned are for the assessment years 1939-40, 1940-41, 1941-42, 1942-48, 1943-44, 1944-45. In these years the Income Tax Officer and the Appellate Assistant Commissioner held that the ten per cent. of the income, which the assessee has been getting as his remuneration for his work as mutawalli, was taxable income. Against the assessment orders the assessee filed an appeal before the Income Tax Appellate Tribunal. Before the Tribunal two main questions were raised, which were as follows : (1) what is the status of the appellant with reference to the waqf, and (2) whether the allowance or such portion of it as is derived from the agricultural properties is liable to Income Tax.

5. The assessee had at one stage claimed that he was a sajjadahnashin, but learned counsel has stated today that he does not wish to raise that point. The Tribunal had held that there was no evidence to show that the assessee was a sajjadahnashin and that it was not possible under the Mohammedan law that he could be considered as such. The appellate Tribunal came to the conclusion that the assessee was not a beneficiary. The Tribunal then considered the question whether 10 per cent. of the income received by the assessee as remuneration for his services could be taxable income or it was exempt from Income Tax on the ground that it was agricultural income. The appellate Tribunal decided against the assessee.

6. On an application to state a case, the members of the Tribunal at first framed only one question for reference to us in these terms:

"Whether 1/10th of the income derived from agriculture and appropriated by the appellant for his personal use continued to be agricultural income and as such exempt from assessment."

When this draft statement of the case was sent to the assessee, he filed certain objections and as both members of the Tribunal, who had prepared the draft

statement, had left, their successors, instead of amending the original draft statement, made a supplementary statement and framed a second question as follows ;

"Whether the allowance received by the applicant from the waqf is received by him as a mutawalli or as a beneficiary."

7. Mr. Lari, on behalf of the assessee, has urged that the supplementary order of reference, as it has been called by the appellate Tribunal, was not sent to him again for his objections, if any. We do not think that was necessary. The Tribunal had prepared a statement of the case and had sent it to the assessee for his objections. The assessee sent his objections. The Tribunal heard counsel, considered the objections, and decided to accept the same. What the Tribunal then did was to re-frame the question to bring out better the intention of the assessee. There was no occasion, therefore, of sending the supplementary order of reference to the assessee for any further objections, This argument has been advanced mainly on the ground that the assessee is not now satisfied with the documents which have been included in the paper book sent to us. When the statement of the case was sent to the assessee for objections, the only paper that he wanted to be included was the judgment of this Court in First Appeal No. 51 of 1918, and the Tribunal has included that judgment as EX. D to the paper book sent to us. Learned counsel now wants that a number of wajib-ul-arzes and record of rights should also be included in these papers and he has complained that they have not been sent to us.

8. We have already said that no such request was made to the Tribunal and, therefore, the assessee cannot complain if those papers have not been included in the paper book.

9. The point for decision, to our minds, raises a very simple question. The question is whether the agricultural income received by a person entitled to receive it for his own benefit is exempt from taxation u/s 4, Sub-section (3), Clause (viii) or such income in whomsoever's hands it may be is also exempt. Section 4, Sub-section (3), Clause (viii) is as follows :

"(3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them :.....

(viii) Agricultural income."

10. A number of decisions of their Lordships of the Judicial Committee and a Full Bench decision of this Court have been placed before us. There can be no doubt that if a person has the right to receive the income and to retain it, such income is exempt from taxation if it is agricultural income. The decision of the question mainly depends on the answer to a further question, whether when the money came into the hands of the assessee, it could be said to have been received by him and whether he had the right to retain it. To explain that further, a person having an

interest in the property, whether he has legal interest or equitable interest, may in his own right receive the income either himself or through an agent, e.g., an owner, a mortgagee or a lessee or even a beneficiary gets the income in his own right and not for somebody else. If, on the other hand, an agent or a servant realises the income from an agricultural land, he is not really ranking that realisation in his own right, but he is receiving it on behalf of his principal or his master. Where, therefore, a mutawalli is a beneficiary, the agricultural income received by him is exempt from taxation: see Fall Bench decision of this Court in SYED MOHAMMAD ISA AND ANOTHER Vs. COMMISSIONER OF Income Tax.,. If, on the other hand, the assessee is not entitled to receive the income and he receives it on behalf of some one else it can hardly be said to be agricultural income received by him only because some money is payable to him under a contrast for the work done by him as an agent or a servant. In such a case he derives his income not from an agricultural source, but in lieu of the work done by him and the money so received cannot be said to be agricultural income received by him. It cannot be disputed that if the agent or servant gets a fixed salary even if that is payable only out of agricultural income, such salary is not exempt. The mere fact that the salary is fixed on a percentage basis should not make any difference. The whole of the income must be deemed to have been received by the principal, and it is the principal who must be deemed to have paid a part of the money to his servant in lieu of his services. It is not necessary in each case that the whole process of the servant or the agent first handing over the entire income to the master or the principal, and then the master or the principal paying a part of it to the servant or agent should be gone through.

11. If by an arrangement between the principal and agent, the agent is entitled to retain the income of one village out of the income of say ten villages it may be possible to say that as the agent has the right to realise or receive the income and retain it, it is exempt from Income Tax. But there is a difference, though a fine one, between an agent realising the income for his own benefit and realising it on behalf of his master and being allowed to keep a part of it as his remuneration.

12. It has been held by their Lordships of the Judicial Committee in the case of AIR 1943 20 (Privy Council) that where a mutawalli gets a fixed remuneration for his services, even if the property mostly consists of revenue paying land, the money in the hands of the assessee is taxable income and is not exempt as being agricultural income. It is true that their Lordships did not in that case express any opinion on the question whether the same result would follow if the mutawalli's remuneration had been fixed by way of a fractional part of the income of the waqf estate, or by a percentage commission. Their Lordships did not express any final opinion, because the point did not arise before them though in the judgment of one of the learned Judges of the Calcutta High Court an opinion was expressed that the result would have been different if the mutawalli was to get a fixed proportion of the income and not a fixed amount as salary : See K. HABIBULLA Vs. RE.,

13. The only other case which deals with this question is Premier Construction Co., Ltd. v. Commr. of Income Tax, Bombay City In that case the assessee got a fixed minimum salary of Rs. 10,000 a year, and if 10 per cent. of the profits made in any year exceeded Rs. 10,000, then the assessee was to get a remuneration calculated at a certain percentage upon the total profits made. The profits in that case were mostly derived from agricultural land. After having noticed the previous decisions of the Judicial Committee, their Lordships summarized the law as follows :

"In their Lordships" view the principle to be derived from a consideration of the terms of the Income Tax Act and the authorities referred to is that where an assessee receives income, not itself of a character to fall within the definition of agricultural income contained in the Act, such income does not assume the character of agricultural income by reason of the source from which it is derived, or "the method by which it is calculated. But if the income received falls within the definition of agricultural income it earns exemption, in whatever character the assessee receives it."

14. We have already said that it having been held by the Tribunal that the entire property was waqf property, the income from the agricultural land, though it may have been realised by the mutawalli, must be deemed to have been received by the principal for whom he was acting, that is, in this case God Almighty. No doubt the mutawalli was entitled to get 10 per cent. as his pay. The mutawalli having realised the entire income on behalf of his principal, it must be held that the principal, in lieu of his services and as remuneration, paid him 10 per cent. out of the money realised by and in the hands of the assessee. We fail to see how in such circumstances the money in the hands of the assessee could be called agricultural income.

15. Learned counsel for the assessee has urged that his character was really not of a mutawalli and the 10 per cent. that he was getting was not in lieu of his services. But we are not entitled to go behind the facts that have been found by the Tribunal. Moreover, on the statement of facts made by learned counsel himself it is clear that the assessee could not have got this money as a beneficiary. It was admitted that there was no provision in any deed, nor is there any evidence of any oral direction by the waqif that the descendants or the nominees of Syed Roshan Ali Shah were to be beneficiaries of a part of the income. We do not know under what authority the mutawalli was getting 10 per cent. in lieu of his services, but learned counsel has stated that he was getting it under some usage. But whatever might have been the position before, now the position has been perfectly clarified by the amount having been fixed u/s 4, Sub-section (3), Clause (e), Muslim Waqfs Act as the pay of the mutawalli. Under that clause the Commissioner of Waqfs is required to fix the pay of the mutawalli of each waqf if the waqf is not exempt u/s 2. Section 2 relates to waqfs, which are known as private waqfs. In this case learned counsel for the assessee has given us the fact that the Chief Commissioner of Waqfs has, relying on the old usage, fixed the pay of the mutawalli at 10 per cent. of the total income.

16. Our answers, therefore, to the two questions referred to us are : (1) The one-tenth of the income payable to Syed Jawad Ali Shah as his remuneration for services rendered as mutawalli is not except from assessment. (2) The assessee receives this allowance in his capacity as a mutawalli and not as a beneficiary.

17. The assessee must pay the costs of this reference, which we fix at Rs. 300.