(1942) 02 AHC CK 0013

Allahabad High Court

Case No: None

SYED MOHAMMAD ISA AND ANOTHER		APPELLANT
	Vs	
COMMISSIONER OF Income Tax.		RESPONDENT

Date of Decision: Feb. 17, 1942

Citation: (1942) 12 AWR 234 : (1942) 12 AWR 164 : (1942) 10 ITR 267

Hon'ble Judges: Panckridge, J; Collister, J; Braund, J; Bajpai, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

COLLISTER, J.-This is a reference u/s 66 (2) of the Indian Income Tax Act.

On the 31st January, 1935, K. B. Mohammed Isa was assessed to Income Tax on an income of Rs. 5,405. The original source of part of this income was agricultural property while the original source of the other part was non-agricultural property. On appeal the Assistant commissioner held that the income from non-agricultural property only was assessable, and this he found to be Rs. 1,848, Which is below the assessable minimum. I do not understand how precisely this figure was arrived at; but it is immaterial. Subsequently that Officers successor referred the matter to the Commissioner of Income Tax who, in the exercise of his revisionary powers u/s 33 of the Act, restored the Commissioner to refer five so-called question of law to this Court, but the Commissioner found that only one question of law arose. He accordingly referred the following question to this Court :

"Whether in the circumstances of the case the sums received by the applicant out of the income of the trusts either as remuneration for services rendered, as one of the trustees or in his capacity as a beneficiary could be regarded in his hands as agricultural income within the meaning of Section 2 (1) of the Income Tax Act? "

The Commissioner is of opinion that the question should be answered in the negative.

THere is a parallel reference in respect to the assessees brother, Syed Mohammed Umar; but we need not concern ourselves about that, for the Commissioner says that the facts and the question of law involved are identical. There was a third brother, but he is dead.

On the 7th September 1886 a man named Sheikh Karim Baksh made a Waqf-Alal-Aulad in respect to certain properties, and under the provisions of the trust-deed the assessee and his brothers-who are the sons of a daughter of the founders sisters son-ultimately became the multawallis. In paragraph 4 of the deed of trust it was provided that, after applying the income of the dedicated property to the purposes of the trust, the multawallis should "utilise the balance for their personal expenses." The trust property consisted of zamindari and house property.

On the 17th April 1906 one Sheikh Abdus Samad made a Waqf of similar character; and under this deed also the assessee and his brothers-who are the sisters sons of the founder-became the multawallis. In paragraph 3 it wasprovided that, after the purposes of the trust had been fulfilled, the mutawallis should appropriate "whether is saved from the profits of the trust property..... in lieu of their services." Here too the property dedicated was both agicultural and non agricultural.

A third deed of trust was executed by this same Abdus Samad on the 1st September 1908-but it is unnecessary to consider this truest because it involves no agricultural property.

In order that a proper answer be given to the question referred to us, I purpose first to ignore the income fro, house property; that is to say I shall deal with the trust-deeds of 7th September 1886 and 17th April 1906 on the footing that all the income is from agricultural and revenue paying property.

Section 4 (3) (viii) of the Act provides that agricultural income shall to be included in the total income of the person receiving it. In the case with is before us the assessee received the income in his capacity a mutawalli and, after discharging the obligations of the trust, he appropriated the balance to himself. Under the first trust deed, as we have already seen, he was authorized to utilise this balance e for his personal expenses and under the second trust-deed he was allowed to appropriate it in lieu of his services. The language used in the two trust-deeds is thus different; but I am inclined to think used in the two trust-deeds case was the same. The mutawalli was required to perform the functions of his office and, so long as he did so, he we entitled, in consideration for these services, to appropriate the residue of the profits. In each case he was beneficiary with an obligation attached to his enjoyment of the benefit. He had two capacities, one as mutawalli and the other as beneficiary. The question for determination is whether the assessee, when as beneficiary he appropriates the residue of the profits. In each case he was a

beneficiary he appropriated the money from the fund held by himself as mustawalli, he received it as agricultural income within the meaning of Section 4 (3) of the Act or whether, in the process of passing trough his hands as mutawalli into his hands as beneficiary, it lost its character of agricultural income; whether in other words, a new source was created, the effect of which was that the money which passed into his hands as beneficiary ceased to be agricultural income.

In Zamindari of of Tiruvarur v. Commissioner of Income Tax I. L. R. (1929) Mad. 827, a Full Bench off High Court of madras held that the a pecuniary legacy bequeathed by a zamindar had to be paid by his executor out of agricultural income did not make the legacy an "agricultural income" within the meaning of Section 2 (1) of the Act. The judgment is very brief and no reasons are given for the decision.

In Sundrabai Saheb v. Commissioner of Income Tax, Bombay (1931) 5 I. T. C. 493, a widow was in receipt of an allowance by way of maintenance from the executor of her late husbands estate and she claimed-but did not prove-that the estate consisted of agricultural land. A Beach of the High Court of Bombay held that this allowance was liable to Income Tax, Beaumont C. J. observed :

"She is not given a part of the estate or a part of the income, but she is given out of the estate a monthly sum of Rs. 960. It may be payable out of the income or it may be payable out of the corpus and the mere fact that, if it is payable out of the income, that income, itself may not be subject to tax seems to me to be wholly irrelevant."

Another decision relied upon by the Advocate-General is Commissioner of Income Tax, Central and United Provinces v. Rani Sultanate Begam (1933) 9 Luck. 115 : 1 I. T. R. 379. In that case a maintenance allowance had provided for a widow by will our of her husbands estate but it is not clear whether it was to be paid exclusively out of the income or whether the corpus of the property was also liable. Subsequently there was compromise in an interpleader suit under which the lady accepted an annuity of Rs. 4,000 per mensem; and it was held that this allowance was not agricultural income within the meaning of Section 2 (1) (a) of the Act and was therefore not exempt from Income Tax u/s 4 (3) (viii). In that case the annuity was derived from the intervening compromise whereas in the case which is before us the bounty or remuneration or whatever it may be called is directly referable to the trust-deed; it merely passed under the terms of the instrument through the hands of the mutawalli into hands of the assessee after the obligations of the trust had been discharged.

In K. HABIBULLA Vs. RE., . there was scheme of administration which was embodied in a compromise decree and which defined the duties of the mutawalli of waqf and fixed his remuneration at a specific sum to be paid out of the waqf estate, the payment being conditional upon the proper discharge of his duties as mutawalli; and it was held by a Bench of the HIgh Court of Calcutta that this remuneration was

not exempt from Income Tax. Derbyshire, C. J., observes :

"The assessees remuneration is conditional upon his proper discharge of his duties as mutawalli and is remuneration for such work; it is money earned by performing his office, not rents and profits of agricultural land coming to his simply as a beneficiary under a settlement. Under those circumstances, I hold that the remuneration that he receives as mutawalli is remuneration for discharging the duties of his office and as such comer within Section 3 (2) (viii) of the Income Tax, Act, 1918, being a receipt arising from the exercise of his vocation, whether the fund from which he is paid comes originally from an agricultural source or not."

Panckridge, J., did not agree with this view. He says :

"I am inclined to the view that agricultural income does not lose its right to exemption because it can be brought under one of the heads of income set out in Section 6. To my mind the improtant thing is that the consent decree does not purport to province for payment of any rent or revenue to the assessee. What is provides for is the payment of a specified sum in currency. It is not necessary to decide what the position would be, if the decree provided that the assessee should be remunerated by the rents and profits of a portion of the waqf properties, or by proportion of the entire rent of the waqf properties. I am not, as at present advised, inclined to agree with the submission put forward on behalf of the Income Tax Department that rents payable to the assessee, under an arrangement such as I have mentioned, would not be entitled exemption. I think, it is significant, that under clause (15) of the scheme of arrangement the remuneration is payable from the waqf and not from rents and revenues of the waqf; that is to say, the assessee may appropriate to himself in discharge of his remuneration either income or corpus."

Upon the facts of the case this learned Judge argued with the conclusion of the learned Chief Justice, but not on identical grounds.

The facts of that case are distinguishable, from the facts of the case which is now before us in two respects. In the first place the remuneration received by the mutawalli took its origin from a scheme of administration which was drawn up under a compromise decree; and in the second place the remuneration was payable either out of income or out of the corpus. In the present case the balance of the income from the zamindari property goes through the mutawalli to the beneficiary (who happen to be one and the same person) by virtue of an obligation imposed under the terms of the trust-deed itself upon the income of the property. The mutawalli is the channel through which the beneficiary received the money and the latter is to all intents and purpose the direct recipient. There is thus no change of source and no alteration in the character of the income; it remains agricultural income after it had passed into the hands of the beneficiary. In my opinion therefore the money received by the assessee-on the assumption that it all originated from

zamindari property-was agricultural income in hands of the assessee within the meaning of Section 2 (1) of the Act.

This finding, however, does not dispose of the reference, for in this particular case there are two classes of income, one from zamindari and the other from urban property. Presumably the two sets of income formed a composite fund in the hands of the mutawalli; it is not suggested that two separate funds were maintained by him and the payments therefrom were separately made and recorded. Assuming, therefore, that there was a composite fund for the income from zamindari and for the income from non-agricultural property, the question which falls for consideration is whether the agricultural income, having once passed into this common fund, lost its character as agricultural income and passed out of it as assessable income. In the case from Calcutta which I have already mentioned Panckridge, J., observed :

"I cannot think that the assessee can avoid taxation by selecting one source of the remuneration payable to him rather than the other. Although it is admitted that the properties of the waqf properties consist both of agricultural properties and urban properties. Again I cannot think that the mutawalli in such a case could escape tax by electing to take his remuneration from the rents of the agricultural properties alone, nor do I think that the law can contemplate any sub-division of his remuneration according to the proportion which the agricultural income of the waqf bears to the non-agricultural income."

For my own part I find it difficult to appreciate why the assessee should be penalised by having his whole bounty treated as assessable to Income Tax. Supposing there was a composite fund in the hands of a mutawalli containing agricultural income amounting to Rs. 10,000, and non-agricultural income amounting to Rs. 500, it would be exceedingly hard on the assessee beneficiary if the whole balance which he was entitled to appropriate after the purpose of the waqf were satisfied were to be treated as non-agricultural income. The Act makes no provision for such a case as the present and it seems to me that some equitable method must be evolved which will operate justly both as regards the assessee and as regards the Department. In my opinion the obvious method to apply is to treat the residue in the hands of the assessee as being composed of agricultural and non-agricultural income in the same ratio as the total of these two classes of income bore to each other at the time when they passed into the common fund. This method has the merit of simplicity and is eminently fair; and it contravenes no provision of law.

I would answer the reference in the terms proposed by my brother Braund, whose judgment I have had the advantage of seeing.

BAJPAI, J. - I have had the advantages of reading the judgments of my brethren Collister and Braund and find that I can add nothing useful to what has been said by them and I am in entire agreement with their view. I may, however, refer to the case

of Commissioner of Income Tax v. Sir Kameshwar Singh where at page 981 their Lordships of the Privy Council while discussing the 3rd sub-section of Section 4 of the Income Tax Act say :-

"The result, in their Lordships opinion, is to exclude agricultural income altogether form the scope of the Act, however or by whomsoever it may be received..... The exemption is conferred, and conferred indelibly on a particular kind of income and does not depend on the character of the recipient, contrasting thus with the exemption conferred by the same sub-section on the income of local authorities."

In the case before us nothing has happened to remove the indelible impression of the agricultural income received by the assessee as a mutawalli and then retained by him as a beneficiray.

BRAUND, J.-This is a reference by the Commissioner of Income Tax of the Central and United Provinces u/s 66 (2) of the Indian Income Tax Act (XI of 1922).

The assessee, one Khan Bhadur Syed Mohammad Isa, (hereinafter called the "assessee"), is a mutawalli under three instruments in the nature of waqf-names. Under the first of these which is dated the 7th September 1886, the Settlor Sheikh Karim Bux, divested himself of certain properties in Allahabad, partly agricultural and partly non-agricultural, and constituted a perpetual waqf of them. So far as the trusts of the waqf are concerned they may be shortly stated. After limiting the succession of mutawallis, of whom the assessee is now one, the Settlor by paragraph 4 directed them to keep down the Government revenue, expenses of management and litigation and other expenses out of the income, subject thereto to apply the income in making the payments for charitable and other purpose set out in the second schedule and finally, subject to both the foregoing trusts, to "utilise the balance for their personal expenses." There were at the material time two mutawalli of whom the assessee was one and in effect, therefore this ultimate trust of the residuary income of the properties amounted to a direction to divide the surplus income between themselves.

Under the second waqf-nama, which is dated the 17th April, 1906, the Settlor, who in this case was Sheikh Abdus Samad, constituted a waqf consisting of both agricultural, and non-agricultural properties in the Allahabad district and, after limiting the succession of mutawallis under which the assessee at the material time held that office, declared certain trusts of the income under which, after limiting the succession of mutawalli under which the assessee at the material time held that office, declared certain trusts of the income under which, after payment of the Government revenue and management expenses and making various charitable and other payments, the residue of the income was to "be appropriate by the mutawalli or mutawalli at the time in lieu of their services."

It is not necessary to refer to the third waqf-nama because, for reasons which I shall presently explain, it is not now material. It is sufficient for the present purpose to

observe that under the first two assessments, the assessee became entitled under the settlement to, and received, the residuary income of the respective sets of waqf properties (in each case consisting of a mixed corpus of agricultural and non-agricultural properties) after satisfying the prior trusts of the income declared by the respective instruments of waqf. In the one case, he received this residue of the income "for personal expenses", and in the other case" in lieu of services".

To put the matter shortly, the Income Tax Officer assessed the assessee for the year in question (1932-33) to Income Tax on, inter alia, the sums be received in respect of the residuary income under each waqf. The assessee appealed to the Assistant Commissioner who held that the assessee was liable to tax only on "such part of the income form non agricultural sources as were received by him....." and reduced the assessment accordingly. Ultimately this reduced assessment was again revised by the Commissioner himself under his revisional powers and the original assessment of the Income Tax Officer was restored, on the ground that the assessee "would certainly be liable to be taxed on the income which he received as a remuneration for his services once the income materialized", not withstanding that in its origin the income out of which this "remuneration" was derived was in part produced by agricultural property and was, therefore, by derivation "agricultural income". The Commissioner appears to draw a distinction, which is no doubt for most purpose a sound distinction, between the capacity of the assessee as a mutawalli and his capacity as a "beneficiary" and on that ground brings into charge the income received by him "as remuneration for his labours irrespective of the source of the income once it has materialised". I think that in effect, the Commissioners contention may be stated by saying that he adopts the view that, once the income of the agricultural properties reached the hands of the assessee in his primary character as mutawalli, its character as "agricultural income" was exhausted and therefore when the residue, after satisfying the prior trusts, was appropriated by the assessee in his secondary capacity as beneficiary, it has ceased to be "agricultural income and had lost the protection of Section 4 (3) (viii) of the Income Tax Act.

I regret that I do not think that this is the correct view. Before examining the alternative view, however, it is desirable to refer to the terms of the residuary limitations of income. Neither is expressed to be a "salary, " nor do I think lit true to say, as the Commissioner has done, that either entitled the assessee to receive a specific sum" as remuneration for managing the trust property. It would, however, be idle to deny that the motive, or perhaps, the condition, of his receiving the share of residuary income at all was in both cases the performance of his duties as mutawalli, and indeed, in one case, it is expressed to be "in lieu of services". I must concede therefore, that the interest of the assessee is at any rate in the nature of remuneration, though hardly in strictness a "salary." But, in my view, this circumstance makes no real difference to the principle which we have to apply. Whatever the motive of the Settlors bounty towards the assessee or whatever the

condition attached to it, it does not alter the fact that, so long as the services were and are performed, the assessee was and will be, beneficially interested in the surplus income of the properties and was, and will be, a "beneficiary" in respect of that surplus under the trusts of the waqf. I wish to make this clear, because I am unable to accept it that the circumstance that the assessee is required to perform the service of a mutawalli by itself alters in any way in this case his intrinsic character as a "beneficiary" under the instrument of waqf. I think, therefore, that in both cases the assessee is entitled to be treated as a "beneficiary" and not as a servant of trust by contract. The position would, I think, have been quite different, had the assessee been a mere employee of the waqf by contract deriving a "salary" which was payable (ordinarily, at least) out of the income of the waqf properties.

The matter, to my mind, resolves itself into two questions, to the first of which the circumstance that the corpus from which the income was originally derived was a mixed corpus consisting of both "agricultural" and "non-agricultural" properties is immaterial. Assuming that the whole of the corpus has been "agricultural" and the entire income of the waqf had, in its origin, been "agricultural income" one asks first whether in the circumstances the mutawalli, who is entitled under the trusts of the Settlement to the surplus income after keeping down the prior trusts, can be said to receive that surplus income still in its character as " agricultural Income", or whether it has undergone some change and lost that character before it is appropriated, or retained, by him beneficially. I can see no reason why it should have lost its character as "agricultural income". Nor can I perceive why the fact that the Settlor has chosen to make it dependent on the mutawalli continuing to discharge the duties of the office should have changed its character. For the purpose of handling the income of the waqf properties, the mutawalli is, in my view, indistinguishable from any ordinary trustee. Wherever the legal estate may technically be vested, the duty of the mutawalli was to collect and receive the income, to pay out of it prior charges and to distribute the residue to the ultimate beneficiaries. Nor can it make the least difference that the mutawalli himself occupied both positions. The result was merely that, instead of paying over the ultimate surplus income to a third person, he appropriated and retained it to himself.

We have been referred to a number of authorities both in support and in oppositions to his view. In the case of Zamindari of Tiruvarur v. The Commissioner of Income Tax three Judges of the Madras HIgh Court too the view without giving fully their reasons for it, that a pecuniary legacy expressed to be payable out of agricultural income is not itself "agricultural income". In Sundrabai Sahib v. Commissioner of Income Tax, Bombay, two Judges of the Bombay High Court have held that an annuity by way of maintenance had, notwithstanding that it was paid out of agricultural income, lost its character. It is possible, I think, that some distinction may be capable of being drawn between an executor charged with the administration of an estate and a mutawalli who merely acts as the recipient of the income of a dedicated corpus, and between a legacy or annuity, created by a will,

and a mere surplus of the income of an estate which the trustee or mutawalli has nothing to do but to pass on or retain. I do not think it necessary to venture, even if I would, to differ from these two cases. The third case to which the learned Advocate-General has referred is Commissioner of Income Tax v. Rani Saltanat Begam, in which a lady was entitled to maintenance out of an estate, it not being specified whether she was entitled to it out to income or corpus and compromised her claim for an annuity of Rs. 4,000 a month. Here again it was held that the annuity had lost its character as "agricultural income". But that, with respect, I find it easy to understand on the ground that the source of the annuity was the compromise agreement which had intervened and created it de novo. It was not a mere handing on of the income, or of part of the income, of settled property under the terms of the settlement itself.

I venture to think that the case of In re Habibulla in the Calcutta High Court is more helpful in the circumstances of the present case. Here a mutawalli had become by sanction of the Court entitled to a monthly "salary" of Rs. 2,500 a month and the question was the same as the one with which I am now dealing-whether, the original source of it being agricultural income, it was itself "agricultural income". This case was obiviously a far stronger one from the point of view of the Commissioner than the one now before us, in which the mutawalli is entitled not to a fixed sum, but to the surplus of the available income itself after the other charges on it have been satisfied. While the learned Chief Justice of the Calcutta High Court found it impossible to regard this "salary" as being itself "agricultural Income", notwithstanding its source, Mr. Justice Panckridge was inclined to the opposite view. He says :- "I am inclined to the view that agricultural income does not lose its right to exemption because it can be brought under one of the heads set out in Section 6....."

I that is the true view, as, with great respect, I am inclined myself to think it is, then it completely disposes of the Commissioners finding that, because of its character as remuneration, it has lost its character as agricultural income. As I have already said, the case before us is a much stronger one in the taxpayers favour than was this Calcutta case and I think myself, without venturing to suggest which of the learned Judges may have been right in the Calcutta case on its particular facts, that in the present case in which a mere surplus of the same income that was receivable by the assessee as mutawalli wa retained by him as beneficiary, there has been no such change in it as can have alteread its essential character. It was in my view, still "agricultural income" when it reached the hands of the assessee as beneficiary. In a case in our own Court (In re Makund Sarup (1928) 50 ALL. 495. three learned Judges considered whether a mortgagee, who was a professional money-lender and who, having taken a usufructuary mortgage of property had at once leased it back again to the mortgagor in consideration of an annual rent charge which covered both principal and interest was assessable to Income Tax or not on the rent. The property was ancestral property and it was successfully contended that the rent charged was

itself agricultural income being still derived out of agricultural property. This case is a very strong one for the purposes of showing that a merely technical change of form is insufficient to deprive income of its agricultural character. The late Sir Shah Sulaiman says that the "income received by a usufructuary mortgagee is really agricultural income, though it just happens to be also a return for the capital invested by him." The learned Judges refused to treat it as profits of the money-lending business, although it no doubt might justly be regarded as the produce of the business as well as being agricultural income. The case is a strong one, I think to illustrate the principle that income does not alter its character merely because it changes its form, and to that extent but no further, it is helpful in the present case. To the same effect is another money-lending case (Commissioner of Income Tax of Bihar and Orissa v. Maharajadhirau of Darbhanga (1935) 62 I. A. R 215 : 3 I. T. R. 305. The same principle appears to underlie this case as well.

The second of the two questions to which this reference has been given rise is in my view the more difficult. It involves considering the effect of the income in this case being produced by a mixed corpus consisting of both agricultural and non-agricultural property. The difficulty is this. The prior trusts of income are limited to take effect on the whole income irrespective of its source. The fund of income in the hands of the mutawalli forms one fund, out of the whole of which the prior trust have to be satisfied irrespective of its source. Now, how is it possible to say out of what particular part of this income fund, the prior charges have been satisfied? And, if it is not possible to do that, how can the residue or surplus be attributed to the agricultural rather than to the non-agricultural income or in what proportions is to be so attributed? In other words, is it possible, as a practical matter to identify what is left? If it is no possible, then the result can be suggested that, on the mixing up of the income fund, it lost its identify altogether and cannot afterwards recover it, because it is practically impossible to disentangle it again. Mr. Justice Panckridge, though the point did not actually arise, drew attention in the Calcutta case to which I have already referred to this difficulty which might arise where the income funds was mixed for the purpose of satisfying the prior trusts. He says :-

Although it is admitted that the properties of the waqf are entirely agricultural, yet there may be cases where the waqf properties consist both of agricultural properties and of waqf properties. Again, I cannot think that the mutawalli in such a case could escape tax by electing to take his remuneration from the rents of the agricultural properties alone, nor do I think that the law can contemplate any sub-division of his remuneration according to the proportion which the agricultural income of the waqf bears to the non-agricultural income."

I agree with the learned Judge that this does present a difficulty. It is obviously impossible that it should be left to the beneficiary himself to elect to discharge the prior trusts out of that part of the mixed income fund which attracts tax and to appropriate the part which does not attract tax to his own interest. That would, in

effect, be permitting the assessee to determine whether he would pay Income Tax or not. More-over, in ninetynine cases out of a hundred cases of this kind, there is, of course, no conscious payment out of one part of the fund rather than out of the other. I should, however, desire to reserve my view in a case, should ever one occur, in which a mutawalli actually segregated one part of the fund from the other. It is, I think, equally impossible to accept the view that the taxing authority can elect which part of the mixed fund to attribute to the prior trusts anc which to attribute to the beneficial interest, for that conversely, would be permitting the taxing authority to determine whether Income Tax should be paid or not. The difficulty is a real one, as the learned Judge has pointed out. But I venture respectfully to think that he has suggested the true answer, though he has himself rejected it. In my view, it is consistent both with practical good sense and with established principal of law and equity that the prior charges on the mixed income fund should be apportioned between the component parts thereof ratably and in consequence that the surplus which remains should be ratably attributed to agricultural and non-agricultural income. To take the simplest case, I will suppose that the mixed income fund is composed as to half of agricultural income and as to half of non-agricultural income. In that case, half the prior charges would be borne by each kind of income and it follows that of what remains half would still be agricultural income and other half non-agricultural income.

Not only does this appeal to me as the fair and sensible solution, but it is, I think, supported by sound principle. As I view it, the collection and mixture of the income fund in the hands of the assessee as the mutawalli in the first place was for the purpose of creating an aggregate fund on which the payment of the primary trust of income could be charged. As each item of income was received, it was charged first with the satisfaction of the prior trusts and the whole fund; and every part of it was so charged. But when these trusts were satisfied the purpose of the mixed fund ceased and, in my view, there is nothing inconsistent with well recognized principles that, the purpose having ceased, the fund should in equity be deemed to have resumed its original elements. This is the foundation of the well known principle of Ackroyd v. Smithson (1780) 1 Bro. C. C. 503. And an apportionment of the outgoings between the two elements of mixed fund is equally consistent with established equitable principles where charges have to be met out of a mixed mass of pure and impure personality the residue of which is deemed subsequently to devote in the original form. (See Curtis v. Hutton; Roberts v. Walker, and Jessopp v. Watson).

I can see no reason why the same principles should not be applicable in the present case and why the expense, cost of litigation and the charitable and other outgoings, should not be deemed to have been discharged ratably out of the agricultural and non-agricultural income leaving the residue to resume its normal character in the same proportions. This involves in all cases a calculation which is both possible and easy over any given period and produces a result which is eminently just. I venture to think that this is the proper solution in the present case and, consistently both

with convenient practice and sound principle, the result should be that, after discharging the prior trusts, the remaining surplus of the income fund in the hands of the mutawalli ought to be attributable to agricultural and non-agricultural income respectively in the same proportions as those two elements bore to each other in the first place. The result of this will be that the prior trusts will have been satisfied ratably out of the agricultural and non-agricultural income. Moreover, in the view that I have thought it right to take upon the first question, that proportion of the surplus income which is attributable under the foregoing calculations to agricultural income will resume its character and will be appropriated to himself by the mutawalli in his capacity as a beneficiary still in its character of agricultural income.

As regards the third of the waqf-namas in respect of which the present question has been raised, I think it has been included by mistake. The facts seem to be that non-agricultural property only was settled by this waqf-nama and accordingly, no question can arise in respect of the immunity from Income Tax of the recipient of any part of its income.

The actual question which has been propounded to this Full Bench is :-

"Whether in the circumstances of the case the sums received by the applicant out of the income of the trusts either as remuneration for services rendered as one of the trustees or in his capacity as a beneficiary could be regarded in his hands as agricultural income within the meaning of Section 2 (1) of the Income Tax Act? "

The answer that I would, accordingly, give is :-

"In the circumstances of the case, so much of the sums received by the applicant which represent his share of surplus income in the year of assessment under the waqf-nama, dated 7th September 1886, and the waqf-nama dated 17th April 1906, as bears the same proportion to the whole of such sums received by him as aforesaid as the agricultural income of the waqf properties respectively by him as aforesaid as the agricultural income of the waqf properties respectively bore to the non-agricultural in come of the waqf properties in the year of assessment must be regarded in his hands as agricultural income within the meaning Section 2 (1) of the Income Tax Act."

Thus would I answer the reference to us.

ORDER.

The Order of the Court was as follows :-

The answer to the question referred to us is :-

"In the circumstances of this case so much of the sums received by the applicant which represent his share of surplus income in the year of assessment under the waqf-nama, dated 7th September 1886, and the waqf-nama, dated 17th April 1906, as bears the same proportion to the whole of such sums received by him, as

aforesaid as the agricultural income of the waqf properties respectively bore to the non-agricultural income of the waqf properties in the year of assessment must be regarded in his hands as agricultural income within the meaning of Section 2 (1) of the Income Tax Act."

The assessee is entitle to the cost of the reference and we fix the fee of the Advocate-General at Rs. 200. Let a copy of our judgment be sent to the Commissioner of Income Tax under the seal of the Court and the signature of the Registrar.

This judgment will govern the reference in respect to Syed Mohammad Umar also.

Reference answered accordingly.