
(1991) 03 KL CK 0009

In the High Court Of Kerala

Case No : Income-tax Reference No's. 129 to 133 and 161 to 164 of 1988

Commissioner of Wealth-tax

APPELLANT

Vs

Mulam Club

RESPONDENT

Date of Decision : 13-03-1991

Acts Referred:

Income Tax Act, 1961 — Section 2(31)
Wealth Tax Act, 1957 — Section 2, 21AA, 3, 4

Citation : (1991) 99 CTR 124 : (1991) 2 ILR (Ker) 731 : (1991) 191 ITR 370

Hon'ble Judges : K.S. Paripoornan, J; K.P. Balanarayana Marar, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; P. Balachandran, for the Respondent

Judgement

K.P. Balanarayana Marar, J.—A common question arises in these references at the instance of the Revenue. The question is :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in finding that the assessee-club cannot be assessed in the status of an "individual" and that since an "association of persons" is not an assessable entity for the purpose of wealth-tax, it cannot be charged to wealth-tax ?"

2. The respondent is a members" club by name Sri Mulam Club, Thiruvananthapuram. The Wealth-tax Officer treated the club as an individual and subjected it to wealth-tax for the assessment years 1970-71 to 1978-79. On appeal, the Appellate Assistant Commissioner cancelled the assessment. On further appeal, the Income Tax Appellate Tribunal, upheld the order of the Appellate Assistant Commissioner holding that the members" club, being an association of persons, is not an individual and hence is not an assessable entity for the purpose of wealth-tax. It is, thereafter, at the instance of the Revenue that the question aforesaid was referred to this court for decision.

3. It is urged by learned counsel for the Revenue that the expression "individual"

in Section 3 of the Wealth-tax Act is wide enough to include an association of persons and the respondent-club being an association can be subjected to payment of wealth-tax. On the other hand, it is contended by learned counsel for the respondent that an association of persons is not an assessable entity and the word "individual" cannot be construed so as to include a body of individuals. In order to appreciate the rival contentions, it is appropriate to refer to Section 3 of the Wealth-tax Act (for short "the Act"). The section reads :

"Subject to the other provisions contained in this Act, there shall be charged for every assessment year commencing on and from the first day of April, 1957, a tax (hereinafter referred to as wealth-tax) in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in Schedule I."

4. The section imposes a charge for every year commencing on and after 1st day of April, 1957, of tax in respect of net wealth on the corresponding valuation date of every individual, Hindu undivided family and company. The contention of the Revenue is that members of a club formed a body of individuals and a body of individuals can be treated as an individual which is taxable u/s 3 of the Act. The Act does not contain any definition of person, but Section 2(31) of the Income Tax Act defines a "person". By that definition, "person" includes -

"(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not..."

5. The difference between the definition of a person contained in Section 2(31) of the Income Tax Act and the persons who are taxable u/s 3 of the Act has to be noted. An association of persons or a body of individuals, whether incorporated or not, comes within the definition of persons for the purpose of the Income Tax Act, whereas only three categories of persons are contemplated u/s 3 of the Wealth-tax Act, viz., an individual, Hindu undivided family and a company. In order to enable, the Revenue to subject the respondent to tax under the Act, the respondent has to be shown either as an individual or as a company.

6. "Company" as defined in Section 2(h) of the Act shall have the same meaning assigned to it as in Clause (17) of Section 2 of the Income Tax Act. This definition has been substituted by the Direct Tax Laws (Amendment) Act, 1987, for the following :

"(h) "company" means a company formed and registered under the Companies Act, 1966 (1 of 1956), and includes -

(i) ...

(ii) ...

(iii) any institution, association or body, whether incorporated or not and whether Indian or non-Indian, which the Board may, having regard to the nature and objects of such institution, association or body, declare by general or special order to be a company :

Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1st day of April, 1975, or on or after that date) as may be specified in the declaration :..."

7. The above clause was substituted by the Finance Act, 1975 (25 of 1975), with effect from April 1, 1975. The assessment year commencing from April 1, 1975, is also included in the assessment years under consideration in these references. For those years, an association or body can be subjected to wealth-tax provided the Board declares by general or special order that the association or body is a company. The Board referred to in this clause means the Central Board of Direct Taxes. The Revenue has not brought to our notice any order declaring the respondent-club as a company. The respondent cannot, therefore, be considered as a company for the purpose of Section 3 of the Act.

8. The only question that falls for consideration is whether the respondent is an individual, That the respondent is a members" club, an unregistered association of persons, is not disputed. What a club is has been explained in Daly's Club Law, Seventh Edition, page 1. It is pointed out that the word "club" means :

"Essentially an association of individuals in a way that involves to some degree the factors of free choice (which connotes a power of exclusion), permanence, corporate identity and the pursuit as a common aim of some joint interest other than the acquisition of gain (or some mutual advantage directly connected with the acquisition of gain, such as those provided by membership of a professional society or trade union). It is the last-named qualification that distinguishes clubs from business or professional partnerships, and from trade unions and the like. Nevertheless, the mere fact that the acquisition of gain may be incidental to the true activities of an association does not appear to prevent the association from having the character of a club."

9. A members" club is, therefore, a voluntary association of persons joining together in accordance with the rules and bye-laws of the club for enjoyment of one another"s company and other facilities or for some other purposes.

10. The question whether a members" club is an association of persons and is liable to wealth-tax arose for consideration in Orient Club Vs. Commissioner of Wealth-tax, Bombay City-II, . The Bombay High Court held that the petitioner-club in that case which was an association of persons was not an individual for the purpose of the Wealth-tax Act and hence not an assessable entity as an

individual. It was also observed that there was no provision in the Wealth-tax Act which makes an association of persons like the petitioner-club an "individual". While holding so it was observed (at p. 706) :

"In so far as the unincorporated members' club is concerned, the legal position now appears to be well settled. An unincorporated members' club is a society of persons each of whom contributes to the funds out of which the expenses of conducting the society are paid. The contribution is generally made by means of entrance fees or subscriptions or both. The society is not a partnership because the members are not associated with a view to share the profits. It is not recognised as having any legal existence apart from the members of which it is composed. Every club is governed by rules which generally specify the purposes for which it is instituted and makes provisions as to the admission of members, payment of entrance fees and subscriptions, resignation and expulsion of members, the management of the affairs of the club, ordinary and extraordinary general meetings of members, alteration of the rules and making new rules, etc. The rules of the club form part of the contract among members in the case of a members' club, and the rights and the duties of the members as between themselves and the internal arrangements for carrying it on, depends upon the rules. Members are entitled to enjoy the use of the club premises, if any, and other privileges of the society in accordance with the rules so long as they duly pay the subscriptions and continue to be members. In an unincorporated members' club, there are usually trustees, appointed in pursuance of the provisions in the rules, in whom the property and assets of the club are vested in trust for the members for the time being and who are given power to invest the funds of the club, sometimes at their own discretion and sometimes according to the directions of the committee. In a non-proprietary club, the members for the time being are jointly entitled to all the property and funds and it is only on dissolution that the individual interest of the members becomes capable of realisation."

11. The Bombay High Court noticed the difference between the two concepts "association of persons" and "body of individuals". Particular reference was made to Section 4 of the Act which brings out a distinction between an individual and an association of persons. That section provides for computation of the net wealth of an individual. The section provides that, in computing the net wealth of an individual, there shall be included, as belonging to that individual, the value of assets which on the valuation date are held -- ...

"(iii) by a person or association of persons to whom such assets have been transferred by the individual, directly or indirectly, otherwise than for adequate consideration for the immediate or deferred benefit of the individual, his or her spouse or minor child (not being a married daughter) or both, or

(iv) by a person or association of persons to whom such assets have been transferred by the individual otherwise than under an irrevocable transfer, or..."

12. The Bombay High Court held that Sub-clauses (iii) and (iv) of Section 4(1)(a) would indicate that an association of persons contemplated by these clauses is independent of the individual which is treated as a taxable unit. Similar indication is there in Sub-section (5A) of Section 4 inserted by the Amending Act, Act 41 of 1975. That sub-section provides that the value of a gift of money from one person to another made by entries in the books of account maintained by the person making the gift or by an individual or a Hindu undivided family or a firm or an association of persons or body of individuals with whom or which he has business or other relationship shall be liable to be included in computing the net wealth of the person making the gift unless he proves to the satisfaction of the Assessing Officer that the money has actually been delivered to the other person at the time the entries were made. The Legislature was, therefore, not unaware of the phrase "association of persons" while enacting the Act and that is borne out from the provisions contained in Section 4 while dealing with the net income of an individual and also while introducing Sub-section (5A) in 1975. It is thus seen that whenever the Legislature wanted to use the words "association of persons", they had used the same in the Act. The omission of the phrase "association of persons" or the phrase "body of individuals" in Section 3 of the Act has, therefore, to be taken note of.

13. The Bombay High Court had followed a decision of the Gujarat High Court in *Orient Club Vs. Wealth-tax Officer, Circle IV, Ward-K, Ahmedabad*. The petitioner therein was Oriental Club, an unregistered association of persons. The Gujarat High Court held that the petitioner-club, an association of persons, is not an individual for the purpose of the Wealth-tax Act and hence not an assessable entity as an individual. It is observed that the Legislature has given a clear indication that an association of persons is not an assessable entity covered by the word "individual" in Section 3 of the Wealth-tax Act and that is clear on a reading of Rule 2(1) of the Wealth-tax Rules, 1957, along with Section 4(1)(b) of the Act. Rule 2 prescribes the manner in which the interest of an individual member in property held by an association of persons is to be valued and, under Sub-rule (1) of Rule 2, the value of the interest of a person in an association of persons in which he is a member shall be determined in the manner provided in Sub-rule (1). The court observed that sections 5 and 21 of the Act give a positive indication that the word "individual" covers trustees of a trust and Section 2(h) (iii) and Section 4(1)(b) read with Rule 2 of the Wealth-tax Rules give a negative indication that the word "individual" in Section 3 does not cover a body of individuals or an association of persons.

14. The Calcutta High Court has also taken the same view. A question arose as to whether the Royal Calcutta Turf Club is an individual for the purpose of Section 3 of the Wealth-tax Act. In the decision in *Royal Calcutta Turf Club Vs. Wealth Tax Officer, "B" Ward VIII and Others*, it was held that the club was an unincorporated members' club and that, even if it is assessable to tax under any other statute, it cannot be assessed under the Wealth-tax Act. It was also held that the members' club, being an association of persons, would not be an

individual entity for the purpose of the Act and, as such, is not chargeable to wealth-tax in view of the specific provisions of the charging section, viz., Section 3 of the Act. It was further held that a members' club is not a juristic entity but is only an association of persons who come together for social intercourse and recreation, but not absolutely for gain. It was observed that the corporate identity of a members' club is not to be confused with corporate status.

15. A different view is seen taken by the Madras High Court in *Coimbatore Club v. WTO* [1985] 153 ITR 172. The petitioner therein was a members' club functioning under the rules and bye-laws framed by the members. The notices u/s 17 of the Wealth-tax Act were issued to the club and the club was called upon to deliver returns of its net wealth for the years in question. The club disclaimed liability to pay tax stating that it did not fall within the categories of assessable units or entities mentioned in Section 3 of the Act. The Madras High Court disagreed with the view of the Bombay and Gujarat High Courts and held that the expression "individual" occurring in Section 3 of the Act would take in a plurality of individuals which in turn would include a body or group of individuals forming a single collective unit knit together by ties of common aims and joint interest and not any profit motive but owning property.

16. This decision was followed by the Madras High Court in *State Bank of India Officers Association Vs. Commissioner of Wealth-tax*, Agreeing with the view of the Division Bench decisions in *Orient Club Vs. Commissioner of Wealth-tax*, *Bombay City-II*, and *Willingdon Sports Club Vs. C.B. Patil*, 3rd Additional Wealth-tax Officer, "G" Ward, Bombay and another, the Bombay High Court in the decision in *Bombay Cricket Association Vs. B.R. Sonkar*, 1st, Wealth-tax Officer and another, held that the Bombay Cricket Association is not liable to pay wealth-tax on its assets. The Bombay High Court has expressed the same view in the decision in *CWT v. Rashtriya Swayam Sewak Sangh* [1988] 171 ITR (Short Notes of Cases) p. iii.

17. There is thus a sharp cleavage of opinion between the Madras High Court on the one hand and the High Courts of Bombay, Calcutta and Gujarat on the other. The majority of the High Courts have expressed the opinion that "individual" in Section 3 of the Act does not include an association of persons. The Madras High Court has relied on the decision of the Supreme Court in *The Commissioner of Income Tax, Madhya Pradesh and Bhopal Vs. Sodra Devi*, . The Supreme Court held that the word "individual" has not been defined in the Act (Indian Income Tax Act, 1922) and there is authority for the proposition that the word "individual" does not mean only a human being, but is wide enough to include a group of persons forming a (natural) unit. The decision in *Wealth Tax Officer, Calicut Vs. C.K. Mammed Kayi* (since deceased) through his Lrs, *Shri T.M. Pocker and Others*, was also relied on by the Madras High Court. In that case, a question arose whether *Mappilla Marumakkathayam* tarwads of North Malabar -- Muslim undivided families governed by the *Mappilla Marumakkathayam Act* (Madras Act 17 of 1939)--fall within the expression "individual" and are assessable to tax u/s

3 of the Wealth-tax Act, 1957. The Supreme Court held that the term "individual" in Section 3 of the Act includes within its ambit Mappilla Marumakkathayam tarwads and they are well within the purview of the taxing provisions of the enactment. It was observed that the term "individual" in Section 18(2) of the General Clauses Act, 1897, can be read in plural and as such would include a body or group of individuals like a Mappilla tarwad. Considerable reliance was placed by learned counsel for the Revenue on the decision in *Wealth Tax Officer, Calicut Vs. C.K. Mammed Kayi* (since deceased) through his Lrs, Shri T.M. Pocker and Others, in support of his contention that an association of persons also comes within the definition of individual in Section 3 of the Act. But the question whether an "association of persons" and a "body of individuals" are also included within the word "individual" occurring in Section 3 of the Act did not arise for consideration before the Supreme Court. The Bombay High Court, in *Orient Club Vs. Commissioner of Wealth-tax, Bombay City-II*, had dealt with the decision in *Wealth Tax Officer, Calicut Vs. C.K. Mammed Kayi* (since deceased) through his Lrs, Shri T.M. Pocker and Others, and observed that that decision was concerned with the taxability of Mappilla Marumakkathayam tarwads which undoubtedly were undivided families but were non-Hindus and the question was whether a non-Hindu undivided family was covered by the word "individual" in Section 3 of the Act. In this connection, the Bombay High Court in *Orient Club Vs. Commissioner of Wealth-tax, Bombay City-II*, observed :

"If the decision in *Wealth Tax Officer, Calicut Vs. C.K. Mammed Kayi* (since deceased) through his Lrs, Shri T.M. Pocker and Others, is carefully read, it is difficult to spell out a general proposition from that decision that the word "individual" in Section 3 of the Wealth-tax Act includes all groups of individuals. The decision, in our view, appears to be an authority for the limited proposition that the term "individual" in Section 3 includes group of individuals like Marumakkathayam tarwad". This is also clear from the concluding portion of the judgment which reads as follows (P. 314) ;

"For all these reasons we hold that the term "individual" in Section 3 of the Act, includes within its ambit Mappilla Marumakkathayam tarwads and they are well within the purview of the taxing provisions of the enactment."

18. As observed by the Bombay High Court in *Orient Club Vs. Commissioner of Wealth-tax, Bombay City-II*, the observations of the Supreme Court referring to an "individual" as including persons knit together by an agreement have to be considered in the light of the fact that Section 4 specifically refers to an "association of persons" as contradistinguished from the "individual" which is treated as a taxable unit. After referring to the two decisions of the Supreme Court which have given a wider meaning to the word "individual", the Bombay High Court observed that the width of the interpretation was limited by a consideration of the meaning with reference to a Hindu or non-Hindu undivided family. We are in respectful agreement with the observations of the Bombay High Court. It has also to be remembered that the scope of Section 4 of the Act and

the reference to an "association of persons" as distinguished from an "individual" was not considered by the Supreme Court in *Wealth Tax Officer, Calicut Vs. C.K. Mammed Kayi* (since deceased) through his Lrs, *Shri T.M. Pocker and Others*, . That decision is, therefore, of rib assistance to the Revenue.

19. None of the decisions cited at the *Commissioner of Wealth-tax Vs. George Club*, has considered the scope and effect of Section 21AA of the Wealth-tax Act. That section was inserted by the Finance Act, 1981, with effect from April 1, 1981. In the Memo Explaining the Provisions in the Finance Bill, 1981, the reasons for the proposed amendments to the Wealth-tax Act and measures for countering tax avoidance are dealt with in paragraphs 77 to 92. They are contained at pages 106 to 108 of [1981] 128 ITR 107. We are concerned with paragraphs 84 to 88. Paragraph 84 says that an association of persons is not charged to wealth-tax on its net wealth and that, under the Wealth-tax Act, 1957, individuals and Hindu undivided families are taxable entities. After noticing that some taxpayers are increasingly resorting to the creation of associations of persons without defining the shares of the members with a view to avoiding proper tax liability, the measures to counter tax avoidance are mentioned in paragraph 86 which reads thus (see [1981] 128 ITR 107:

"In order to counter such attempts at tax avoidance through the creation of multiple associations of persons without defining the shares of members, the Bill proposes to make provision in the Wealth-tax Act in order to provide that such associations will be liable to tax in the like manner and to the same extent as an individual citizen of India and resident in India at the rates specified in Part I of Schedule I or at the rate of 3 per cent. whichever course would be more beneficial to the Revenue. For this purpose, the shares of the members of the association of persons will be regarded as indeterminate or unknown if such shares are not ascertainable at the time of the formation of the association or at any time thereafter."

20. Section 21AA was thus introduced by the Finance Act, 1981. Sub-section (1) of that section reads :

"Where assets chargeable to tax under this Act are held by an association of persons, other than a company or co-operative society, and the individual shares of the members of the said association in the income or assets or both of the said association on the date of its formation or at any time thereafter are indeterminate or unknown, the wealth-tax shall be levied upon and recovered from such association in the like manner and to the same extent as it would be leviable upon and recoverable from an individual who is a citizen of India and resident in India for the purposes of this Act,--

(a) at the rates specified in Part I of Schedule I ; or

(b) at the rate of three per cent., whichever course would be more beneficial to the Revenue."

21. The scope and effect of the sub-section have been elaborated in the Department Circular No. 308 dated June 29, 1981 [see [1981] 131 ITR 119]. That circular explains the measures to plug loopholes for tax avoidance through the medium of associations of persons wherein shares of the members are indeterminate or unknown. The section was amended by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989, and by the Finance Act of 1989. Section 21AA is thus in operation from the assessment year 1981-82, but it is, not applicable up to and inclusive of the assessment year 1980-81. In these references, we are concerned with the assessment years up to 1978-79. Section 21AA cannot, therefore, be resorted to by the Revenue for assessing the wealth of the respondent for the years under dispute in these references.

22. The Department was thus aware that only individuals and undivided families were taxable entities under the Wealth-tax Act, 1957, before the introduction of Section 21AA in the Act. It is mentioned in the Memo Explaining the Provisions in the Finance Bill, 1981, that an association of persons is not charged to wealth-tax on its net wealth. The Legislature had drawn a distinction between an individual in Section 3 and an association of persons in Section 4 of the Act. That an "association of persons" will not come within the charging provision contained in Section 3 of the Act was also known to the Department. That has been manifested by the Memo in the Finance Bill, 1981, referred above and by the insertion of Section 21AA by which the assets of an association of persons other than a company or cooperative society or society registered under the Societies Registration Act or under any other law corresponding to that Act in force in any part of India are chargeable to tax under the Act.

23. In the decision in Commissioner of Wealth-tax Vs. George Club, the Andhra Pradesh High Court was considering the scope of Section 21AA. That section was introduced by the Finance Act of 1981 and is applicable for the assessment year 1981-82. In these references, we are concerned only with the assessment up to the assessment year 1978-79. That decision is, therefore, of no help to decide the question referred to us.

24. It is thus clear that the assets of an association of persons are not chargeable u/s 3 before the insertion of Section 21AA in the Act. In the circumstances, we agree with the view expressed by the High Courts of Bombay, Calcutta and Gujarat that an association of persons is not an individual for the purpose of wealth-tax and hence not an assessable entity as an individual. There is no other provision in the Wealth-tax Act which makes an association of persons an "individual" before the introduction of Section 21AA. With respect, we disagree with the view of the Madras High Court for the reasons mentioned by us earlier.

25. In the view that we have taken, we hold that the respondent-club is an association of persons and not an individual for the purpose of the Wealth-tax Act and hence not an assessable entity as an individual for the assessment years 1970-71 to 1978-79. The question referred to us is, therefore, answered in the

affirmative, i.e., in favour of the assessee and against the Revenue.

26. A copy of the judgment under the seal of the court and signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Kochi.