

**(1964) 10 GUJ CK 0001**

**In the Gujarat High Court**

**Case No :** Expenditure-tax Reference No. 1 of 1963

Darshan Surendra Parekh

APPELLANT

Vs

Commissioner of Expenditure Tax, Gujarat

RESPONDENT

---

**Date of Decision :** 26-10-1964

**Acts Referred:**

Expenditure Tax Act, 1957 — Section 2, 4, 4(ii)

**Citation :** (1965) 57 ITR 592

**Hon'ble Judges :** J.M. Shelat, C.J.; Bhagwati, J

**Bench :** Division Bench

**Advocate :** N.A. Palkhivala, for the Appellant; J.M. Thakore, for the Respondent

---

## **Judgement**

Shelat, C.J.—This reference relates to the two assessments years 1958-59 and 1959-60 under the expenditure-tax Act, 1957, the previous years being the calendar years 1957 and 1958. The controversy between the parties arises on account of the Expenditure-tax Officer including two items of expenditure, namely Rs. 28,683, and Rs. 10,321, in computing the taxable for the assessment year 1958-59 and his including similarly, for the assessment year 1959-60 two sums of the same kind, namely, Rs. 19,285 and Rs. 7,951. The assessments were made in the status of a Hindu undivided family.

2. During the two relevant years, the karta of the Hindu undivided family was Surendra Mangaldas who died on October 19, 1961. while the appeals filed by him before the Appellate Tribunal were still pending. On his death, his sons, Darshan, the Present karta of the Hindu undivided family, continued the two appeals.

3. During the two assessment years, the Hindu undivided family consisted of the said Surendra, his second wife, Pratimaben, three sons and three daughters. Over and above the properties belonging to the Hindu undivided family, the deceased Surendra also held self-acquired and separate properties. It was found that from the income of is said separate property, he spent gross amounts of Rs.

3,34,259 in 1957 and Rs. 3,16,499 in 1958. The Expenditure-tax Officer computed the taxable portion of this expenditure at Rs. 28,683 and Rs. 19,285.

4. The first wife of the said Surendra died in 1947, leaving the said Darshan and two daughters, Ranna and Rajeshri, all the three of them being then minors. The family of Surendra mangaldas had received in all 4,587 shares of the Jubilee Mills Co. Ltd. on a partial partition of the parent hindu undivided family of Mangaldas Girdhardas. On receipt of these shares, they were allotted as follows :

Surendra Mangaldas ... 587 shares; Darshan ... 1,000 shares; Ranna ... 1,000 shares; Rameshchandrika (the first wife of Surendra) ... 2,000 shares;

5. On the death of the said Rameshchandrika in 1947, in the aforesaid 2,000 shares standing in her name were allotted as follows :

Darshan ... 333 shares; Rajeshri ... 1,334 shares; Ranna ... 333 shares;

6. The division and allotment of these shares was so made that whereas the said surendra got 587 shares each of the three children got 1,333 shares. Apart from these shares., the deceased Rameshchandrika has also certain cash which was distributed amongst the three children, namely, Darshan, Ranna and Rajeshri. By three trust settlements all dated February 26, 1948, the said surendra as the karta of the hindu undivided family, settled upon trust Rs. 30,000 for the benefit of the said Darshan and Rs. 50,000 each for the benefit of each of his said two daughters in the shape of certain shares in certain joint stock companies. All the three settlements of trust contained identical provisions, and therefore, it will be sufficient if we cite here clause 2(b) of the trust settlements in favour of the minor, Ranna, ads typical of the other settlements of trust. Clause (b) in the aforesaid settlement of trust runs as follows :

"To pay ,spent or apply the residue of the trust income to and after the said Ranna until she shall attain the age of twenty-one years for or towards the maintenance, education, advancement in life, religious ceremonies, marriage, welfare and benefit of the said Ranna in such manner as the trustee shall in their absolute and uncontrolled discretion deem fit and in applying the said residue of the trust income towards the aforesaid of the family to the said Ranna. PROVIDED FURTHER that in case the residue of the trust income shall not be sufficient for the purpose aforesaid the trustees shall have liberty and right to use and expend such portion of the corpus of the trust premises as they deem fit in their absolute discretion towards such maintenance, education, advancement in life, religious ceremonies, marriages, welfare and benefit as aforesaid."

7. In accordance with the terms of the trust settlements, the trustees applied and paid to and the three children expended in 1957 in all Rs. 18, 249. The three children also spent a further a sum of Rs. 10,072 from the income derived from their own property. The Expenditure-tax officer computed the taxable portion of expenditure at Rs. 10, 321 for the account year 1957 and Rs. 7,951 for the account year 1958.

8. While computing the taxable expenditure of the Hindu undivided family for the account year 1957, the Expenditure-tax Officer included the said two sums of Rs. 28, 683 and Rs. 10,321 relying upon section 4(i) and (ii) as it stood at that time. Section 4 was subsequently amended by the Finance Act, 1958, and the amended section came into operation as from April 1, 1959. The amount of Rs. 28, 683 was the personal expenditure incurred by the said surendra from the out of the income of his separate properties and the other income of Rs. 10,321, consisted of the amounts expended by the children partly from income derived from the trust properties and partly from income derived by them from Expenditure-tax Officer relied on section 4(i) read with the definition of "dependent" u/s 2(g)(ii)(b) of the Act as also on the ground that all the expenses incurred by a karta. Whether as the karta or his personal capacity, must be regarded as expenses incurred by the individual family. For the inclusion of the second item of Rs. 10,321 he dependent upon clause (ii) of section 4. The Appellate Assistant Commissioner before whom the Hindu undivided family field appeals against these assessment orders, held that both the sums would be includible in the taxable expenditure of the hindu undivided family u/s 4(i) and that clause (ii) of section 4 would not apply, and confirmed to the tribunal when the revenue relief upon clause (i) of section 4 in respect of the item of Rs. 28,683 but in respect of the other item of Rs. 10,321 both clause (i) and clause (ii) were relied upon. On the other hand, the assessee contended that neither of these two clauses was applicable, for (I) the condition mentioned in the unamended clause (i) of section 4, namely, that the expenditure must be incurred in respect of any obligation or personal requirement of the assessee or any of his dependents, did not apply since that expenditure was not incurred for the assessee, namely, the Hindu undivided family, nor for any of its dependents, the karta not being a dependent of the Hindu undivided family as defined by section 2(g)(ii)(b); (2) that the second condition in clause (i), namely, that the expenditure must be such that but for its having been incurred by that other person it would have been incurred by the Hindu undivided family, was not established by the department; and (3) that even if the two sums were rightly included u/s 4(i)(a) a deduction of Rs. 20,000 instead of only of Rs. 5,000 as held by the Appellate Assistant Commissioner ought to have been granted.

9. Now, it is common ground that the amount of Rs. 28,683 was extended by the deceased Surendra from out of the income derived from his separate and self-acquired property. It was the case of the assessee that the said Surendra incurred the expenditure for his personal benefit and not for the benefit of the Hindu undivided family or any of its dependents and that there was no obligations on the assessee-family to meet those expenses incurred by the said Surendra. In his order, the Accountant Member of the tribunal has, however, observed that by the three children were not available to the tribunal. The department contended that they were not on record, but on behalf of the assessee-family it was stated that they were furnished by the family to the Expenditure-tax officer. In spite of these rival contentions, the tribunal does not

appear to have gone into the record or made any inquiry, nor was any finding given on the question whether, as claimed by the assessee, the expenditure was incurred by Surendra on himself. On behalf of the assessee however a specific question was raised before the Tribunal, namely, that even though the expenditure incurred by the said surendra can be said to be an expenditure incurred for personal the requirement, the second condition in clause (i) of the unamended section 4, namely, that the expenditure was such which but for the expenditure having been incurred by that other person, would have been incurred by the assessee-family, was not established by the department and that, therefore that reason the aforesaid amount of Rs. 28,683 could not be included in taxable expenditure of the assessee-family. In dealing with that question the tribunal appears to have taken the view that every expenditure incurred by the karta for his personal requirement would inevitably cover the aforesaid second requirements and upon that footing rejected the contention raised on behalf of the assessee-family. The two members of the Tribunal gave separate, though concurrent, judgments, and rejecting the contentions raised on behalf of the assessee-family dismissed both the appeals. The Accountant Member reasoned that under clause (i) of section 4, what was necessary was that the expenditure must be by a person other than the Hindu undivided family in respect of any personal requirement of any of its dependents, that the deceased Surendra, the individual, was a person other than the assessee. i.e., the Hindu undivided family, that he, as such other person had spent the amount for his personal needs or benefit and that though he was the karta, he must be held to be a dependent of the assessee-family. His reasoning appears to be that though a karta of a Hindu undivided family would not fall within the definition of a "dependent" u/s 2(g)(ii) of the Act, section 2 starts with the qualifying words "unless the context otherwise provisions of sections 5 and 6 of the act set out by him in his order, the said surendra though the karta of the Hindu undivided family, must be treated as a dependent of that family and therefore the expenditure incurred by him though for his personal requirement must be included in the taxable expenditure of the family. He held that the item of Rs. 10,321 though spent by the children from the income of the properties which were the subject-matter of the said trust settlements, was caught by the provisions of section 4(1). As regards the assessee's contention that a deduction of Rs. 20,000 and not of Rs. 5,000 only should be given, the Accountant Member observed that though more than one person may incur expenditure in circumstances set out in section 4(i), the expenditure incurred by all such persons has to be brought together and after all such expenditure is brought together, the excess over Rs. 5,000 is to be included, and rejected that contention. The President of the tribunal in his order observed that the tax u/s 3(i) was a tax on expenditure and subject to the other provisions of the act no question would arise about the nature of the source or sources of moneys from which the expenditure in question was incurred. The family as a unit can be possessed of property which can be distinguished from the property of which the owner is an individual, though that individual may happen to be a member of

property which can be distinguished from the property of which the owner is an individual, though that individual may happen to be a member of such family. According to him, however these considerations would apply only to the question of holding of the property and possession of the income, but the question of expenditure has to be considered independently of the source of income for the purposes of the Expenditure-tax Act and, therefore, the only question that could arise would be about the meaning of the expenditure incurred by a Hindu undivided family and the expenditure of the family must mean the total of the expenditure incurred by each and every member of the family. According to the President, section 4, provides for the inclusion of certain amounts in computing the expenditure of an assessee liable to tax and the section being inclusive, the legislature intended that section to enlarge the scope of section 3 and provided for inclusion of the taxable expenditure of the Hindu undivided family. The President held that the claim of the assessee-family that the expenditure by the karta from out of his self-acquired and separate property could not be brought to tax in the assessment of the Hindu undivided family had not meaning and that claim must, therefore, be rejected.

10. As already stated, the dispute centers around the for sums in each of the two assessment years : (i) Rs. 28,683 incurred by the said surendra from income arising out of his separate property during the accounting year 1957 (assessment year 1958-59); (2) Rs. 10,321 consisting of the expenditure incurred by the three children from the income of the trust properties and from the income arising out of their personal properties during the account year 1958 (assessment year (1959-60); (3) Rs. 19,285 spent by the said surendra from income arising out of his separate properties for his personal benefit; and (4) Rs. 7,951 incurred by the children from income arising out of the said trust properties for their benefit and requirement. Since section 4 was amended and, so amended, came into force on April 1, 1959, it would be the amended section which would be applicable to the two items of expenditure incurred in the account year 1958 (assessment year 1959-60). This being the position, the four items will have to be examined separately in order to ascertain whether they fall within the scope of section 4 as it stood at the relevant time.

11. Section 2(c) defines the word "assessee" as meaning an individual or a Hindu undivided family by whom expenditure-tax or any other sum of money is payable under this act, and includes every individual or Hindu undivided family against whom any proceedings under this act has been taken for the assessment of his expenditure. Sub-clause (ii) of clause (g) of section, 2 which is material for the purpose of this reference, defines a "dependent" in relation to a Hindu undivided family and provides that where the assessee is a Hindu undivided family; (a) every coparcener other than the karta, and (b) any other member of the family who under any law or order or decree of a court, is entitled to maintenance, from the joint family property. Clause (h) of section 2 defines "expenditure" to mean any sum in money or money's worth, spent or disbursed or for the spending or disbursing of which a liability has been incurred by an assessee, and includes any

amount which under the provisions of this act is required to be included in the taxable expenditure. Lastly, "taxable expenditure" as defined by clause (o) means the total expenditure of an assessee liable to tax under this act. Clause (g) was amended by the Finance Act, 1958, but no change was made in that part of the definition of the word "dependent" vis-a-vis a Hindu undivided family. Section 4 as it stood prior to the amendment provided as follows :

"4. Unless otherwise provided in section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this act, namely :

(i) any expenditure incurred, whether directly or indirectly by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependents which, but for the expenditure having been incurred by that other person, would have been incurred by the assessee to the extent to which the amount of all such expenditure in the aggregate exceeds of Rs. 5,000 in any year;

(ii) any expenditure incurred by any dependent of the assessee for the benefit of the assessee or any of his dependent out of any gift, donation or settlement on trust or out of any other source made or created by the assessee, whether directly or indirectly."

12. There was an Explanation to this section, but it is not necessary to cite that Explanation as it bears no relevance to the question involved in this reference. As aforesaid, section 4 was amended by the Finance Act of 1958, and as amended runs as under :

"Unless otherwise provided in section 5 of the following amounts shall be included in computing the expenditure of an assessee liable to tax under this act namely" :

(i) any expenditure incurred, whether directly or indirectly, by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependents to the extent to which the amount of all such expenditure in the aggregate exceeds of Rs. 5,000 in any year.

13. Where the assessee is an individual, any expenditure incurred by any dependent of the assessee, and where the assessee is a Hindu undivided family, any expenditure incurred by any dependent from or out of any income or property transferred directly or indirectly to the dependent by the assessee.

14. As will be seen the amendment dropped the words in the original clause (i) of section 4, viz., "which, but for the expenditure having been incurred by that other person, would have been incurred by the assessee", and clause (ii) substituted a somewhat different phraseology.

15. As regards the amounts of Rs. 28,683 and Rs. 19,285, incurred by the said surendra in the account years 1957 and 1958 the question that really arises for

out consideration is whether in a case where a Hindu undivided family holds family properties and incurs expenditure for the family out of income derived from such properties and the karta of such a family also holds separate and self-acquired properties and incurs personal expenditure, so as to charge the Hindu undivided family on the aggregate expenditure. There is no doubt that under the Hindu law, though a joint and undivided Hindu family holds family properties, a member of such family, while continuing to be joint with the other members, can also hold independently of the others his own self-acquired and separate properties and would be assessed under the Income Tax Act as a separate entity from his Hindu undivided family in respect of the income derived by him from his self-acquired and separate properties. The expenditure-tax recognises this position, for section 3, which is the charging section in the Act, provides that expenditure-tax shall be charged at the rates specified in the schedule to the act in respect of expenditure incurred by an individual or a Hindu undivided family. Therefore, the Act recognises two assessable entities, an individual and a Hindu undivided family.

16. It is common ground that apart from section 4, there is no other provisions in the Act under which the amounts in question could be brought to tax. it is also an undisputed fact that the joint family possessed properties of considerable value and the karta was also possessed of self-acquired and separate properties of considerable value from the income out of which the spent large amounts.

17. Taking the item of Rs. 28,683 incurred during the account year 1957, it would be section 4, as it stood prior to the amendment, which would apply, if that were to be included in the taxable expenditure of the Hindu undivided family it would be necessary for the department to show that (i) it was incurred by a person other than the assessee i.e., the Hindu undivided family (2) that it was incurred in respect of an obligation or personal requirement of the assessee i.e., the Hindu undivided family or any of its dependents I and (3) that it was such that but for it having been incurred by that other person, it would have been incurred by the Hindu undivided family. There can be no doubt that the first condition is fulfilled because the expenditure undoubtedly was incurred by a person other than the Hindu undivided family. Equally, there can be no doubt that it was not an expenditure in respect of any obligation of or the requirement of the Hindu undivided family. The question then which remains for consideration is whether the said Surendra, the then karta of the Hindu undivided family, can be said to be a dependent of the assessee-family for whose personal requirement this expenditure was incurred. Under sub-clause (ii) of section 2(g) there are two classes of persons who are dependents in the case of a Hindu undivided family, (i) every coparcener other than the karta, and (2) any other member of the family who under any law or order or decree of a court is entitled to maintenance from the family property. It is clear that the definition deals with two categories of persons, first the coparceners and second all other members of the family, prima facie, those who are not coparceners. This is clear from the words "any other member of the family" in sub-clause (ii)(b) of clause (g) of section 2, such

as unmarried daughters. Prima facie, therefore, under sub-clause (ii)(a) of clause (g), the karta being expressly excepted is not a dependent of a Hindu undivided family.

18. It is true that definition section commences with the words "unless the context otherwise requires". The definition, therefore, would not apply if there is anything in section 4 in the context which the definition is to be registered or treated as inapplicable. But there is nothing in section 4 which so requires. On the contrary, there are indications in the Act which show that the legislature did not wish to include a karta of a Hindu undivided family amongst the dependents of such a family. Thus, in section 6, which provides for certain deductions, clause (c) of sub-section (I) provides for deduction in case of an expenditure incurred by the assessee (i) if he is an individual, in respect of his marriage or the marriages of any of his dependents, and (2) if the assessee is a Hindu undivided family. It will be noticed that clause (2) here does not use the word "dependent" for the legislature wanted to grant deduction in respect of marriage expenses of all the members of a Hindu undivided family, whether they are coparceners or not, and therefore, the legislature wishing to grant deduction for marriage expenses of all the members of the Hindu undivided family refrains from using the word "dependent". The expenses of marriage of the karta also had to be expressly provided for, for otherwise he not being a dependent, the family would not be entitled to a deduction. A similar provision is made in clause (f) of section 6(1) for the karta not being a dependent, expenditure made for him by the family had to be expressly provided for. Clause (g) is yet another illustration which shows that the legislature was conscious of the fact that a karta not being a dependent of a Hindu undivided family, his educational expenses had to be expressly provided for deduction. In clause (h) of section 6(1) also, the basic allowance of Rs. 30,000 in the case of a Hindu undivided family is allowed of Rs. 3,000 for every coparcener besides the karta. These provisions show that whenever the legislature wanted to give benefit in respect of an expenditure incurred for the karta, it has refrained from using the word "dependent" which word it uses whenever the assessee is an individual and not a Hindu undivided family, for otherwise the karta would not be included as he is not a dependent of the Hindu undivided family. This fact shows that the legislature has kept in mind the distinction which it has made in the definition clause between the karta and the other coparceners. As we have already stated, there is nothing in the context of section 4, that this distinction should not be observed for the purposes of that section. That being the position, the karta is not a dependent and the expenditure of Rs. 28,683, not being for the assessee family, nor for any of its dependents, cannot fall under clause (i) of section 4.

19. The learned Advocate-General agreed that sub-clause (ii) of clause (g) of section 2 deals with two categories of persons, coparceners, and other members of a Hindu undivided family, but contended that though under (a) all coparceners are dependents and the karta is excepted as a dependent, he would fall under (b) as he is undoubtedly a member of the family who, together with the

members of the family, is entitled under the Hindu undivided law for maintenance from the joint family properties. This construction, however, does not appear to be correct for at least two reasons. The first reason is that sub-clause (ii) of clause (g) first deals with coparceners and, while dealing with them, excludes a karta from the dependents of the family. The reason seems to be that a karta being the head of the family and being in charge of the family properties and the income derived from them and also having the power of expending such income and even of disposal of the family properties, would not be correctly called a dependent while the other coparceners not having such powers would, though jointly owning family properties, have to look to the karta for the family expenses. The second reason is that the legislature could not have intended to include the karta as a dependent in (b) along with the other members of the family, for if it intended to regard the karta as a dependent, it would not have obviously excluded him as a dependent under (a) and there would have been no necessity of dividing the constituents of the family into coparceners and other members. It would have been sufficient in that case to have said that all the members of the Hindu undivided family are dependents of the family. The learned Advocate-General then argued that clause (i) of section 4 includes expenditure incurred by a person other than an assessee, in the present case, the Hindu undivided family, for the personal requirement of the family or any of its dependents. The contention was that since the expenditure for the personal requirement of the other coparceners is made includible, there was no reason why the expenditure incurred for personal requirement of the karta should have been excluded, therefore, the words "any of his dependents" must in the context include the karta. But the Act provides an artificial definition of the word "dependent" and since the definition expressly excludes the karta from its scope, it would not be possible to give a go-bye to the definition for the purpose of section 4 unless, as we have said, there is something in that section which, makes it incumbent to exclude the definition. There is nothing in section 4 which does so and nothing in its context which excludes or disregards the definition. Even if it is possible to say that an expenditure is for the personal requirement of the family, expenditure incurred for a karta and for his requirement as such as would be expenditure incurred for the family requirement, and therefore, can at least be said to be family expenses. But an expenditure which a karta incurs for his own personal requirement as distinguished from expenditure incurred as part of the family expenses cannot be included in the family expenditure.

20. Reliance, however, was placed by the learned Advocate-General on clauses (i) and (k) of section 5 which deals with exemptions. But these clauses would not seem to assist him, for under clause (j) a gift or a donation or a settlement on trust by an assessee, whether an individual or a Hindu undivided family, would take away that part of the property or income as the case may be out of the property or income of the assessee, and that being so, exemption is given in respect of such expenditure. Under clause (k) the legislature has granted as a matter of policy exemption in respect of premiums paid on life insurance policies

by an assessee, whether an individual or a Hindu undivided family. There is, therefore, nothing in either of these two clauses which renders the definition of a "dependent" in section 2(g) either inconsistent or anomalous. The learned Advocate-General then railed upon some of the clauses of section 6 and pointed out that under clause (a)(i), taxes in respect of conveyance for the personal use of an assessee or any of his dependent are excluded from the deduction allowed thereunder. He urged that it cannot be that though taxes paid on conveyance intended for the use of any of the dependents are included in the taxable expenditure, they are not to be included if the conveyance is intended for the use of the karta. But a distinction is made between the two expenditures by the legislatures for its own reasons and it cannot for that reason, be said that an anomaly results from such a distinction. But apart from that, it would seem that if a conveyance is possibly regarded as an expenditure for the personal requirement of the family and is, therefore, not excluded from deduction. But clause (c) of section 6(1) clearly brings out that the legislature applied the definition of a "dependent" as provided in section 2(g) to this section also. Clause (c) grants a deduction of marriage expenses and expressly provides that in the case of a Hindu undivided family, deduction is applicable to expenditure incurred in marriage of the karta and every member of the family, whether such member is a coparcener or not. If the learned Advocate-General were to be right in his contention that sub-clause (b) of section 2(g) includes a karta as a dependent obviously it would not have been necessary to make a separate provision for the expenses of the marriage of the karta. The same thing is to be found in clause (f) of section 6(1). Clause (g) of section 6(1) also brings about the same result, for it provides for deduction in respect of education for all the members of the family. If that clause has used the word "dependent" a karta would have been excluded, but as the legislature wanted to provide for the educational expenses of a karta, it deliberately used the words "any member of the family" instead of the words "any of the dependents". These clauses thus clearly show that the legislature had clearly in mind the fact that the definition of "dependent" applies to these two sections and that unless the expenditure on a karta was expressly provided for, the family would not get the benefit of the exemption or deduction under clause these two sections. Therefore, instead of assisting the learned Advocate-General. these sections assist Mr. Palkhivala.

21. There is another reason also why this item cannot be included in the taxable expenditure of the Hindu undivided family. Clause (i) of section 4 contemplates an expenditure incurred by a person other than an assessee and that expenditure has to be in respect of an obligation or personal requirement of an assessee or any of his dependents. In other words, the clause contemplates that the person expending is a different person from the one for whom he spends, i.e., an assessee or, any of his dependents. It would, therefore, appear that the expenditure incurred by a person other than assessee as his expenditure for his personal requirement and not as an expenditure, for the benefit of an assessee or any of his dependent is not includible under this clause in the expenditure of

the assessee-family. This conclusion, which we are inclined to accept, finds support from the fact that u/s 4, the expenditure incurred by a person other than an assessee is presumably made includible in the expenditure incurred by an assessee because the legislature seems to have thought that since the assessee is saved from incurring that expenditure which, but for the fact that the other person had incurred it, the assessee would have to incur, it is but fair and equitable that the assessee should bear the burden of the tax in respect of the such expenditure. The legislature also seems to intend to prevent expenses incurred indirectly by an assessee by making an arrangement for other persons to incur expenses for tank assessee or any of his dependents. It would, therefore, appear that the expenditure incurred by a person other than an assessee, not for the assessee or any of his dependents but for himself is taxable expenditure of that other person and not that of the assessee. The person who spends is the person other than an assessee but the person for whom he spends is either the assessee or any of his dependents and, therefore, unless the expenditure in question is one incurred for an assessee or any of his dependents, it would not be includible u/s 4(i). This position is clear from the fact that under clause (i), all expenditures are not includible. The only expenditure which can be includible an expenditure is the one which is in respect of an obligation or personal requirement of an assessee or any of his dependents. If the department desires to include an expenditure incurred by a person other than an assessee, it is for the department to show that it was incurred by the karta in respect of an obligation of the Hindu undivided family or any personal requirement of any of its dependents. The learned Advocate-General argued that the assumption underlying this construction that the spender and the person in respect of whom the expenditure is incurred must be different persons is not warranted by section 4, for if such a construction were adopted, it would be adding words in clause (i) of section 4, namely, "any of the dependents other than the dependent incurring such expenditure". The argument is of course based, on the footing that a karta is included in the expression "dependent". He also urged that such a construction would also lead to evasion of tax, for it would be possible for a Hindu undivided family to make gifts from its properties make an arrangement in such a way that income derived from such gifts would be used for the requirement of the dependents. But the answer to this contention appears to us to be clear. As regards the first argument, the words in clause (i) "by any person other than the assessee" indicate that the person who incurs the expenditure must mean a person other than the person for whom he incurs that expenditure. That expenditure is made includible in the family's taxable expenditure for the reason that the family is thereby saved from incurring that expenditure and, therefore, it is but fair that it should bear the tax on such expenditure. The answer to the second argument also is equally clear because when a Hindu undivided family makes a gift or donation of part of its property, that part of the property ceases to be its property and any income from such property ceases to be its income. If therefore, any expenditure is incurred from such income, it must be regarded as the expenditure of the donee and the donee must bear the tax. It is not possible to

appreciate how such a transaction can be justly characterised as an evasion of the tax. If the construction suggested by the learned Advocate-General were to be accepted, then it would lead to double taxation on the same expenditure, one in the hands of the donor and the other in the hands of the donee. It is true that if the legislature makes an express provision hereunder double taxation results, a court of law construing such a provision must accept such a result. But, in the absence of such a provision, courts would lead against such a result of double taxation. But the learned Advocate-General reply was that such double taxation is in fact contemplated in this Act and he illustrated his contention by giving the following example : A Hindu undivided family makes a gift in favour of the coparcener. That coparcener incurs expenditure from income arising from the gift for his son who is a coparcener in his own right in that Hindu undivided family. In such a case, the expenditure would be taxed in the hands of both of the income who incurs the expenditure as also the Hindu undivided family, the donor, as the expenditure is incurred for the personal requirement of the son who is one of the dependents of the Hindu undivided family u/s 2(g). Therefore, he argued, that the mere fact that double taxation might result would not necessarily mean that we should accept the construction of Mr. Palkhivala that the spender must be different from the person for whom he incurs that expenditure. In the illustration given by the learned Advocate-General the person who incurs the expenditure no doubt is different from the dependent of the Hindu undivided family for whom the expenditure is incurred, and, if section 4(i) were to be the only provision in the Act, the result would be double taxation in respect of the same expenditure. But the legislature seem to have realized the consequence which would follow in such a case from the provisions of section 3 and section 4(i) and therefore, has provided in clause (i) of section 5 an exemption in cases where an expenditure is incurred by an assessee by way of a gift, donation or otherwise for the benefit of any other person.

22. As a further argument, Mr. Palkhivala argued that so far as the amount of Rs. 28,683 is concerned, the department that but for the expenditure having assumed that a karta is a dependent, that but for the expenditure having been incurred by the Karta, it would have been incurred by the assessee, i.e. the Hindu undivided family. However, in the view that we take of the meaning of the word "dependent", it is not necessary to go into this part of the argument and, therefore, it does not necessary for us to give a meaning to the words "personal requirement of the assessee", or decide whether such personal requirement would cover a case where, but for the expenditure having been incurred by that other person, it would have been incurred by the assessee-family.

23. As regards the item of Rs. 10,321, it will have to be seen whether that item falls under clause (i) or clause(ii) or both. It would seem that the two clauses deal with different categories other than an assessee and for the benefit of the assessee or any of his dependents. Therefore, the expenditure incurred by any of the dependents for his own personal requirement would not seem to fall under clause (i), there being a clear distinction between the spender, who is the person

other than the assessee, and the person or persons for whom he spends, namely, an assessee or any of his dependents. It is not in dispute that this item consisted partly of the amounts, spent by the beneficiaries under the three trusts from the income derived from the trust properties and partly from the income of properties which are the separate properties of the three children. Therefore, this expenditure was incurred by each of the three dependents of the assessee-family on himself or herself and not for the family or for any of its dependents, keeping the distinction in mind between the person who spends and the person for whose benefit or requirement it is incurred,

24. Does the item of Rs. 10,321 then fall under clause (ii) of section 4 ? Under that clause, as the expenditure was incurred in the assessment year 1958-59, the expenditure must be by a dependent of the assessee for the benefit of the assessee or any of his dependents and must be out of any gift, donation or settlement on trust, etc., made or created by the assessee directly or indirectly. It would seem that the reason for including such expenditure in the family's taxable expenditure is that though the assessee has made or created a gift, donation or trust, if the expenditure from out of such gift is incurred by the dependent done for the benefit of the assessee or any of his dependents, it is the assessee who derives the benefit of such expenditure and it is again but fair that the assessee should bear the burden of the tax. It must also have been appreciated by the legislature that an assessee might desire to reduce his expenditure or the expenditure for his dependents by creating a trust or by making a gift in favour of his dependents and by spending from the income arising from such gift or trust for his benefit or his dependents and thus seek to reduce the incidence of tax upon him. Clause (ii), therefore, seems to have been enacted to prevent such a loophole. Therefore, it is clear that the expenditure contemplated under clause (ii) is one of which owners to the benefit of the person other than the one who spends. If the dependent incurring an expenditure spends it on himself or for his personal requirement, there is obviously no saving of the expenditure by the family and, therefore, there is no valid reason why that expenditure should be included in the expenditure of the assessee. In our view, this item, therefore, does not fall either under clause (i) or clause (ii) of section 4 and would be includible in the expenditure of the dependent and not of the Hindu undivided family.

25. It is true, as was pointed out by the learned Advocate-General that the amount of Rs. 10,321 was spent partly out of the income of the trust and partly from income arising from separate properties of the three children, and further that it was spent for their education. It is, therefore, possible to say that if the children had not spent that amount on their education, it would have been spent by the Hindu undivided family. The contention of the learned Advocate-General however, was that if the amount can be said to have been incurred by the trustees, it would be an expenditure falling under clause (i) as the trustees are persons other than the Hindu undivided family and the expenditure would be for the personal requirement of its dependents and is an expenditure which, but

for its having been incurred by the trustees, would have been incurred by the family. But under the deeds of, trust, the trustees are under an obligation to hand over the income to the beneficiaries and the beneficiaries would have the right to enforce that obligation. The trustees, therefore, cannot be said to have incurred that expenditure and the three beneficiaries must be treated as having incurred that expenditure. Since the expenditure was incurred by them for their personal requirements from out of their own income clause (i) of section 4, in the view we have taken, would not apply. If at all it applies, it would be the second clause that would apply. But there also, the learned Advocate-General has to face the same difficulty, for, in our view, the expression "any of his dependent" any of his dependents" therein used must mean a dependent other than the dependent who incurs the expenditure.

26. Coming now to the assessment year 1959-60, the two items involved are Rs. 19,285 incurred by the karta, surendra and Rs. 7,951 by the three children from out of the income of the trust properties. For this year, it would be the amended section 4 which would apply. In clause (i) of section 4, the only change made was the deletion of the words "which, but for the expenditure having been incurred by that person, would have been incurred by the assessee." But the requirement that it must be in respect of any obligation or personal requirement of an assessee or any one of his dependents is still retained and, therefore, that requirement has to be shown as having been fulfilled. The clause remaining as it was before it was amended except for the deletion of the words above quoted, the reasons which we have given would apply with equal force to this item also, the deletion not affecting those reasons. Clause (ii) of section 4, as amended also would not apply, firstly, because the expenditure having been incurred by the karta, it not be a dependent, and secondly, because it is not out of the income or property transferred by the Hindu undivided family to such a dependent of the family. As regards the item of Rs. 7,951, clause (i) in our view would not apply, for the person expending the amount did not spend it for the assessee-family or any of his dependents, but the dependents spent it on themselves and for their requirement. Clause (ii) also would not apply, for the trust properties cannot be said to have been transferred, directly or indirectly, to the three children. Clause (ii) contemplates a transfer either of the income or of property, whether directly or indirectly. Even if it is indirectly transferred, there must at any rate be an element of transfer, either of income or of the property. In the case of a settlement of trust, the transfer is to the trustees and not to the beneficiaries. But it is possible to transfer indirectly as when A wishes to transfer indirectly to C, might first transfer it to B and B in his turn then transfers it to C. That, in any event, is not the case here, Even in the case of a gift or a donation or settlement on trust of income only, the transfer would be of the income, that is to say, the income must first accrue to the transferor and it is such an income which is the subject-matter of the transfer. That is also not the case here. The instant case is one of transfer of an asset which is an income-yielding asset. But that asset is transferred not to any dependent or dependents of the Hindu

undivided family, but to the trustees who hold that asset for the beneficiaries. The deed of settlement is a document of transfer made by and between the settlor and the trustees and not between the settlor and the beneficiaries and, therefore, it is a transferred directly made to the trustees and no question of any indirect transfer arises in this case. Therefore, in our view, clause (ii) also would not apply.

27. None of the four items of expenditure therefore, can be included in the family's assessment for either of the two assessment years. So far as question No. 3. is concerned, Mr. Palkhivala, stated before us that he was not pressing that question and, therefore, that question would need no answer, Our answer, therefore, to the two remaining questions are :

Question No. 1 - In the negative;

Question No. 2 - In the negative.

The same will be our answers in respect of the assessment for the assessment year 1959-60.

The Commissioner will pay to the assessee the costs of this reference.