
(1978) 09 AHC CK 0057

In the Allahabad High Court

Case No : Income-tax References No's. 844 and 845 of 1971

Haji Abdul Hamid

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-09-1978

Acts Referred:

Income Tax Act, 1922 — Section 15A, 2(6AA), 41, 41(2)

Citation : (1980) 122 ITR 1000

Hon'ble Judges : Satish Chandra, C.J.;C.S.P. Singh, J

Bench : Division Bench

Advocate : R.K. Gulati, Adf, for the Appellant; A. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

C.S.P. Singh, J.—The Income Tax Appellate Tribunal, " D " Bench, Allahabad, has referred the following two questions for the opinion of this court :

" 1. Whether, on the facts and in the circumstances of the case, the assessee is entitled to any " earned income relief " on the share of income, received by him from the business which is the subject matter of the waqf, in his capacity as beneficiary ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Officer having made an assessment u/s 41(1) of the Indian Income Tax Act, 1922, on the waqf of which the assessee was the mutawalli, was not competent to assess the assessee as a beneficiary under the provisions of Section 41(2) of the Act on the ground, inter alia, that the provisions of Sections 41(1) and 41(2) are alternate ? "

2. The assessment year in question is the year 1961-62. The dispute centres round the income derived by the assessee as a beneficiary from a waqf. This waqf was created by the assessee's grandfather, Haji Lal Mohammad, by a deed dated March 14, 1942. Under this deed, the assessee and his brother, Haji Abdul Shakoor, were the beneficiaries and the properties forming the subject-matter of

the waqf was the biri business, styled as " Haji Lal Mohammad Biri Works ". Originally, Haji Lal Mohammad and his wife were the mutawallis; but later they, by deed dated February 13, 1947, surrendered their rights, and Haji Abdul Hamid became the sole mutawalli, and continued as such during the relevant period. As both Haji Abdul Shakoore and Haji Abdul Hamid had half share each in the income from the business covered by the waqf, they were assessed as beneficiaries of the waqf business. In the assessment year in question, the income derived by the waqf was computed; but, no tax was assessed thereon. The income from the waqf was included half and half in the individual assessment of the two brothers, Haji Abdul Hamid and Haji Abdul Shakoore. The assessee objected to the inclusion of this income on two grounds. Firstly, that as the income had been assessed in the hands of the waqf, it could not be included in the assessment of the assessee. The other ground was that as the income was earned income, he was entitled to " earned income relief ". Both these contentions have been rejected by the assessing authorities.

3. It is convenient to dispose of the second question first. Although the second question gives the impression that the income had been assessed in the hands of the waqf in the sense that not only was the income computed, but also brought to tax, it is common ground that no tax was imposed on this income. All that was done was that the business income of the waqf was computed by the ITO. The answer to this depends on the phraseology of Section 41 of the Act. The relevant Section 41(1) runs :

"41. (1) In the case of income, profits or gains chargeable under this Act.....any trustee.....(including the trustee or trustees under any waqf deed which is valid under the Mussalman Waqf Validating Act, 1913), are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such.....trustee or trustees, in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly :.....

(2) Nothing contained in Sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable or the recovery from such person of the tax payable in respect of such income, profits or gains."

4. The words of Section 41 of the Act speak for themselves. Under this provision, the ITO can either assess the trustee in the same manner and to the same amount as the beneficiaries or make a direct assessment on the beneficiaries. In the present case, no tax was imposed on the waqf. All that has been done is that the income from the business has been computed. In such a situation, the ITO could have recourse to Section 41(2) of the Act, which he did. The decision of the Andhra Pradesh High Court in the case of Barium Chemicals Ltd. Vs. Income Tax Officer, is directly in point. To the same effect is the decision in the case of C.R. Nagappa Vs. Commissioner of Income Tax, , decided by the Supreme Court. The

decision of the Bombay High Court in the case of Trustees of Chaturbhuj Raghavji Trust Vs. Commissioner of Income Tax, Bombay City II, does not help the assessee's contention, for, in that case, the income had been assessed in the hands of the beneficiary and also taxed. It was, in these circumstances, that the Bombay High Court held that it was not permissible for the department to tax the same income in the hands of the trustees.

5. Coming now to the first question. As the dispute relates to " earned income relief " on the share of income received by the assessee from the business it is necessary in this connection to refer to Section 15A and Section 2(6AA) of the Indian I.T. Act, 1922. Section 15A runs thus :

" The tax shall not be payable by an assessee in respect of such portion, if any, of the earned income included in his total income as is directed by the annual Central Act fixing rate or rates of tax for any year to be deducted in making an assessment for that year..... "

6. Section 2(6AA) defines " earned income " as :

" Any income of an assessee who is an individual, Hindu undivided family, unregistered firm or other association^ of persons not being a company....

(b) which is chargeable under the head " Profits and gains of business, profession or vocation " where the business, profession or vocation is carried on by the assessee or, in the case of a firm, where the assessee is a partner actively engaged in the conduct of business, profession or vocation.....

and includes any such income which, though it is the income of another person, is included in the assessee's income under the provisions of this Act, but does not..... "

7. In the assessment year in question, under the relevant Finance Act, assesseees were entitled to " earned income relief ". However, in order that an assessee should qualify for " earned income relief ", it had to be income which was chargeable under the head " profits and gains of business " and the business should have been carried on by the assessee. As in the assessment of the share income received from the waqf, the incomes have been taxed u/s 41, it is necessary to refer to that provision also. We have already extracted Section 41 while answering question No. 2. The discussion may be confined to the case of a waqf under the Mussalman Waqf Validating Act, 1913. A beneficiary of a wakf would be entitled to " earned income relief " in respect of the income received from a business carried on by the trustee of the waqf, in case the business can be treated as being carried on his behalf. The Supreme Court in the case of Commissioner of Income Tax, Kerala and Coimbatore Vs. Puthiya Ponmanichintakam Wakf Manager P.P. Ayesha Bi Bi, had occasion to consider the position of a trustee under a waqf with reference to Section 41 of the Act. Their Lordships observed as follows (p. 176) :

".....under the Mohamedan law the properties dedicated under a waqf deed

belong to the Almighty ; it is only in the ideal sense, for the mutawalli in the name of the Almighty utilises the income for the purposes and for the benefit of the beneficiaries mentioned therein.....property does not vest in the mutawalli, for he is merely a manager and not a trustee in the technical sense."

Section 41, however, equates the mutawalli of a waqf to the trustee. Nevertheless, as Section 41 contains the word " on behalf of any person " it means that the mutawalli receives the income on behalf of the beneficiaries.

This being so, the beneficiaries are the primary assesseees, as is also apparent from Section 41(2) and Section 41(1), for, under these provisions, the ITO is entitled to make a direct assessment on the beneficiaries, but if he chooses to assess the trustees, he has to assess the income in the same manner as an assessment on the beneficiaries is made. Although under the general law trustees hold the property in their own right and not on behalf of the beneficiaries [See W. O. Holdsworth v. State of U. P. JT[1957] 33 472 (SC), it is apparent that Section 41(1) treats the income received by the trustees as income received on behalf of the beneficiary by using the words " are entitled to receive on behalf of any person ". With this background we may now consider as to whether the two beneficiaries were entitled to " earned income relief ". That the income taxed in their hands, was from the business carried on by the mutawalli, i.e., Haji Abdul Hamid, is not in doubt. Further, the waqf business was being carried on by Haji Abdul Hamid. Thus, if this income has been taxed in the hands of Haji Abdul Hamid as trustee of the waqf, he would have been entitled to "earned income relief ", as all the conditions of Section 2(6AA) would be fulfilled, viz., the income would be chargeable under the head " profits and gains of business ", which was being carried on by the trustee. In a similar situation dealing with the case of trustees appointed by a Hindu, in the case of CIT v. P. Krishna Warier : [1970]75ITR154(SC) , their Lordships of the Supreme Court held that as the business was being carried on by the trustees, even though he had no beneficial interest in the income, the income would be earned income. The question is whether " earned income relief " can be denied to beneficiaries of a waqf, when a direct assessment is made on them. It has been already noticed that while assessing a trustee the assessment has to be made in the same manner as it would be made on a beneficiary. Now, while making the assessment, the ITO has not only to compute the income but has also to find out the source from which the income is received. The source has to be determined with reference to the beneficiaries, as Section 41 requires the assessment to be made " in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable ". We have already seen that the Supreme Court, in the case of trustees carrying on business, has held that they are entitled to " earned income relief " on the basis that the income was referable to business being carried on by the trustees. It is difficult to see how income, which is chargeable under the head "profits and gains of business " in the hands of the trustees, alters its character when it is received by the beneficiaries. The income received by the

beneficiaries retains its original character as to its source, as the trustee carries on the business and earns the income on behalf of the beneficiaries. His position, in view of Section 41, is that of an agent of the beneficiaries.

There is another aspect of this matter. u/s 2(6AA), " earned income relief " is permissible not only in cases where such earned income is directly charged on the person earning that income, but is also given to persons in whose income such income is included. Thus, even if it be assumed that the income received by the trustee from the waqf is the trustee's income, inasmuch as this income is included in the income of beneficiaries, and as it is derived from business, which business at least in the Case of Haji Abdul Hamid was being carried on by him, Haji Adbul Hamid would be entitled to " earned income relief ".

8. We were referred to a decision of this court in the case of this very assessee for an earlier year where, on a difference of opinion between two learned judges of this court, a third learned judge took the view that the income assessed in the hands of the assessee would be income from other sources, and as it did not arise from the personal exertion of the beneficiaries, the beneficiaries were not entitled to earned income relief. That decision is Haji Abdul Hameed Vs. Commissioner of Income Tax, . With respect, we are unable to subscribe to this view on account of the decisions of the Supreme Court referred to earlier.

9. The first question is, accordingly, answered in the affirmative. So far as the second question is concerned, inasmuch as it gives the impression that an assessment had already been made on the trustees, which is not the case, it is refrained as under :

" Whether, on the facts and in the circumstances of the case, the assessment on the beneficiaries u/s 41(2) was valid ? "

10. The second question as refrained is answered in the affirmative. In view of the partial success and failure of the parties, they are directed to bear their own costs.

11. These answers will govern ITR reference No. 845 of 1971.