

1968 Present : H. N. G. Fernando, C.J., and Weeramantry, J.

Mrs. M. CROOS RAJ CHANDRA, Appellant, and
COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 4/1965—*Income Tax Case Stated No. BRA 323*

Income Tax Ordinance (Cap. 242), as amended by Income Tax (Amendment) Act—Section 9 (A) (3)—Profits of a business—Meaning of expression “carried on in the course of the actual carrying out of a primary purpose”—Section 2 (c) (d)—“Charitable institution”—“Charitable purpose”—Whether the word trustee includes an executor who is a trustee—Income Tax Ordinance (Cap. 242), ss. 2, 26 (1).

A testator, by his last Will and testament of 14th December 1899, set apart for specified charitable purposes large extents of agricultural land. He directed his executors to work and improve these lands and expend the income for the charitable purposes. One of the specified charitable purposes was the provision of dowries to necessitous girls.

Held, (i) that the Will created a “charitable institution” for “charitable purposes” within the meaning of section 2 (c) (d) of the Income Tax Ordinance (Cap. 242) as amended by the Income Tax (Amendment) Act.

(ii) that, for the purposes of the amending Act, the word trustee includes an executor who is a trustee.

(iii) that the management of the agricultural properties was not business “carried on in the course of the actual carrying out of a primary purpose” of the trust within the meaning of section 9 (A) (3) of the Income Tax Ordinance as amended by the Income Tax (Amendment) Act. The income, therefore, derived from the trust from agricultural property or any part of it was not exempt from tax in terms of section 9 (A) (3).

CASE stated under the Income Tax Ordinance.

H. W. Jayewardene, Q.C., with Annesley Perera and Mark Fernando, for the assessee-appellant.

R. S. Wanasundera, Senior Crown Counsel, for the respondent.

Cur. adv. vult.

August 17, 1968. WEERAMANTRY, J.—

One John Leo de Croos by his last will and testament No. 4691 of 14th December 1899 set apart for charitable purposes some large extents of agricultural land belonging to him. He directed his executors to work and improve these lands, manage them in a husband-like manner and expend the income for the charitable

purposes specified by him. These purposes included the provision of dowries to poor girls irrespective of religion, nationality, caste or class, the dowry in each case to be between Rs. 100 and Rs. 1,000 at the discretion of the executors.

For the years of assessment 1959/60, 1960/61, and 1961/62, assessments of income tax were made on the assessee as trustee of the trust so set up. The assessee appealed against these assessments to the Board of Review raising *inter alia* the question whether the income of the trust was exempt from income tax in terms of section 7 C (3) of the Income Tax Ordinance as amended by the Income Tax (Amendment) Act No. 44 of 1958. This section now appears as section 9 (A) (3) of the Income Tax Ordinance as amended by the Income Tax (Amendment) Acts.

The Board of Review held against the assessee on this question and our opinion is sought on two matters of law, namely whether the income derived by the trust from agriculture is exempt from tax under section 7 C (3) of the Income Tax Ordinance or under the 3rd proviso to section 26 (1). Only the first of these two heads of exemption was relied on by the assessee.

The statutory provision referred to is as follows :—

“If the profits of a business carried on by a charitable institution are applied solely to a charitable purpose of that institution and either the business is carried on *in the course of the actual carrying out of a primary purpose of that institution* or the work in connection with the business is mainly performed by beneficiaries of that institution, such profits shall be exempt from the tax.”

I have italicised the words which particularly concern us in the case.

The expressions “charitable institution” and “charitable purpose” have been defined in the amending Act. The first of these expressions has been defined as meaning the trustee or trustees of a trust or a corporation or an unincorporate body of persons established for a charitable purpose only or engaged solely in carrying out a charitable purpose (section 2 (c) of the Income Tax (Amendment) Act Cap. 242). The trust in question would therefore be a charitable institution for the purpose of this section. The expression “charitable purpose” has also been defined in terms comprehensive enough to include the purpose of this trust.

Some difficulty would appear at first sight to be created by the definition of trustee appearing in the original Ordinance. The expression is there defined as including any trustee, guardian,

curator, manager or other person having the direction, control, or management of any property on behalf of any person but as excluding executors from the class of trustees. The definition in the main Ordinance expressly states however that it applies only unless the context otherwise requires (section 2). The context in which the word trustee appears in the definitions in the amending Ordinance seems to require an interpretation other than in the sense of the definition contained in the main Ordinance and we therefore proceed on the footing that for the purpose of the amendment, the word trustee includes an executor who is a trustee. The view that the trustee in this case is a charitable institution for the purpose of the definition we are considering therefore remains unaffected.

The assessee must in order to qualify for the exemption set out in this sub-section show that the income in respect of which he seeks exemption is the profit of a business "carried on in the course of the actual carrying out of a primary purpose" of the trust. The question before us then is whether the management of agricultural properties is business "carried on in the course of the actual carrying out of a primary purpose" of the trust. The primary purpose of the trust is clearly constituted, by its charitable objects such as the provision of dowries to necessitous girls.

It is submitted to us on behalf of the assessee that the management of these agricultural properties is an undertaking carried on in the course of the actual carrying out of this purpose, inasmuch as the testator has imposed a duty on his executor of managing these properties and of using their income for the specified charitable purposes. It is submitted that these charitable purposes cannot be fulfilled unless the properties are managed and income derived therefrom, so that the management is something done in the course of carrying out this primary purpose of the trust.

It seems to us that had this been the intention of the legislature it could very clearly have so stated by using the expression "for the purpose of" instead of "in the course of". No doubt the words "in the course of" may in certain contexts be given a somewhat liberal interpretation so as to gather in matters not literally occurring "in the course of" the object or proceeding to which the words relate. An illustration which readily comes to mind from the sphere of delict is that of a taxi-driver on his way home for lunch, who may in a sense be said to be acting "in the course of" his employment for the purpose of fixing liability on his employer for tortious acts committed during this period. Such an interpretation does not however seem appropriate when what is alleged to be done "in the course of" providing dowries for

poor girls is the management of an agricultural land. It seems moreover that should such an interpretation of the expression "in the course of" be even remotely possible, it is completely shut out by the word "actual" which occurs immediately before the words "carrying out of the primary purpose". The word "actual" carries with it the idea of a physical identification of the activity in question with the carrying out of the primary purpose of the charity; and no such identification is conceivable between the provision of dowries to poor girls and the management of an agricultural property. The word "actual" has been designedly used by the legislature to emphasise that what it contemplates is not the carrying out in a notional sense or by way of a figure of speech but the *actual* carrying out. A workman on his way to and from lunch may in a manner of speaking be said to be acting "in the course of" carrying out his employment but by no stretch of language could be said to be "in the course of the actual carrying out" of his employment.

It seems to us therefore that the assessee fails both on account of the words "in the course of" and on account of the word "actual" occurring in the statute, to both of which expressions we must attach their ordinary meaning.

Indeed, if the assessee's contention is to succeed the words from "and either" up to the word "institution" as appearing in the sub-section would be rendered virtually inoperative, and such a view is clearly untenable.

The type of business contemplated by this legislation is not difficult to visualize. The running of booksellers shops in pursuance of the object of diffusing religious literature¹, or the running, by trustees of a temperance organisation, of a canteen serving non-alcoholic drinks² would furnish illustrations of the type of business contemplated, if the proceeds are applied solely to such purpose. With more pointed reference to the purpose of this charity one may visualise an information bureau in regard to the girls in a particular district conducted as an aid to the trustees in arriving at their decisions. Should such a bureau earn income by providing information to any member of the public, such income, if devoted to the charitable purpose of the trust, would no doubt be exempt in terms of this provision. There is a clear identification between the carrying on of such businesses and the carrying out of the purposes of the trusts in question, which is totally lacking as between the management of an agricultural property and the provision of dowries to poor girls.

¹ *Konstam, Income Tax, 12th ed., S. 311.*

² *Trustees of the Dean Leigh Temperance Canteen v. Commissioner of Inland Revenue (1958) 38 Tax Cas. 315.*

The type of exemption contemplated is perhaps best understood in the light of the decision in *Brighton College v. Marriott*¹. In that case a public school was taken over by a company the principal object of which was to provide a general education in conformity with the doctrines of the Church of England—an object admittedly charitable. The surplus income was devoted to the improvement of the school and could not in any way be divided among the members of the Company. It was nevertheless held that the company was carrying on a trade and that the surplus of receipts over expenditure was not exempt from taxation under section 37 (1) (b) of the Income Tax Act, 1918 and section 30 of the Finance Act, 1921 which was the legislation then prevailing.

By the Income Tax Act, 1918, income tax was chargeable under Schedule D in respect of the annual profits or gains arising or accruing to any person (including a corporation) from any trade, profession, employment or vocation. Section 37 of the Act granted exemption from tax under Schedule D in respect of any yearly interest or other annual payment forming part of the income of any charity. Section 30 of the Finance Act, 1921 granted further exemptions from income tax under Schedule D in respect of the profits of a trade carried on by any charity if the work in connection with the trade was mainly carried on by beneficiaries of the charity and the profits were applied solely to the purposes of the charity—a provision corresponding to the second head of exemption in section 9 (A) of our Act.

These provisions did not clearly cover the case of a business carried on by a charity in the course of actually carrying out its objects and this decision highlighted the need for a further head of exemption to provide for such a case. The legislature therefore enacted the necessary provision by section 247 of the Act of 1927, in terms which have been taken into the first head of exemption under our section, and are now re-enacted in section 448 (1) (C) of the English Income Tax Act of 1952.

The *Brighton College* case therefore illustrates the type of business which the exemption we are now considering would cover and clearly brings out the need for a coincidence between the carrying on of the business and the carrying out of the primary purpose of the charity.

It is of interest to observe, though it does not in any way affect this conclusion, that the Ceylon provision came upon our statute book in entirely different circumstances from its English counterpart. Whereas in England this provision was introduced in order

¹ 1926 A. C. 192 H. L.

to create an additional head of exemption, in Ceylon it came in as a limitation of the exemption existing under the earlier law, for prior to its enactment section 7 (1) (D) Income Tax Ordinance provided a liberal exemption in respect of the income of any institution or trust of a public character established solely for charitable purposes. The exemption was unqualified and therefore covered all cases where a trust established solely for a charitable purpose carried on a business and earned profits thereby.

A brief reference is called for, in conclusion, to the corresponding tax provisions in India, in view of the stress laid by the assessee on certain decisions of the Indian High Courts.

In India section 4 (3) (1) of the Income Tax Act of 1922 provided *inter alia* that the Act was not applicable to any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes.

However, by Act 7 of 1939 a further clause was inserted after clause 4 (3) (1) and numbered 4 (3) (1a), which provided that income derived from a business carried on on behalf of a religious or charitable institution would be exempt from tax when the income was applied solely to the purposes of the institution, and

- (a) a business was carried on in the course of the carrying out of a primary purpose of the institution, or
- (b) the work in connection with the business was mainly carried on by beneficiaries of the institution.

It will be seen that this new sub-section, corresponding to the section we are now considering was introduced without any repeal of the general exemption previously prevailing and without any indication that it was intended in any way to narrow down the scope of that general provision. Both sections therefore existed side by side and when questions arose as to whether a particular business fell within the limited exemption in section 4 (3) (1a), there was always the general exemption in section 4 (3) (1) on which the assessee could fall back, as the word "property" in section 4 (3) (1) was considered to include a business or share in a business. Thus in *C. G. S. Stores v. I. T. Commissioner*¹, it was held that what had already been included in section 4 (3) (1) had not in any way been removed by the insertion of the additional clause in 4 (3) (1a), which should be considered rather as an addition to the list of exemptions. So also in *Commissioner of Income Tax v. Breach Candy Swimming Bath Trust*², although the court had some difficulty in bringing the

¹ 1944 A. I. R. Lahore 465.

² 1955 A. I. R. Bombay 250.

business in question within the scope of section 4 (3) (1a) it nevertheless held the income to be exempt from tax as it would fall under section 4 (3) (1).

By way of contrast it will be seen that in Ceylon the general exemption contained in section 7 (1) (d) of the Income Tax Act was repealed by section 8 of the Income Tax (Amendment) Act and that the provision we are now considering was inserted as part of a new section numbered 9 (A). When therefore an item of income does not fall within the strict terms of the head of exemption we are now considering, there is no possibility of falling back upon the provisions of a general exempting clause.

The further question whether, in the application of section 4 (3) (1a), there should be a restriction to businesses which are an integral activity of the trust itself, is apparently the subject of divided authority in India. In the *Breach Candy Swimming Bath Trust* Case already referred to, the view was taken that section 4 (3) (1a) was restricted to a business which was integral activity of the trust itself. This view was however departed from in *J. K. Trust, Bombay v. Commissioner of Income Tax*.¹

It is not necessary however to go further into this matter for the reason that the Indian provision under consideration in these cases did not contain the word "actual" which appears in the Ceylon enactment. There can be little doubt that had the word "actual" appeared in this Indian provision the view that the business need not be an integral activity of the trust may well have been modified.

For these reasons, the Indian authorities cited have not created any difficulty in the way of the view we have formed, namely, that there should be a close identification between the carrying on of the business and the carrying out of the primary purpose of the trust. We therefore answer the question whether income derived from the trust from agricultural property or any part of it is exempt from tax in terms of section 7 (C) (3) (now section 9 (A) (3)) in the negative. It is not necessary for us to answer the question whether exemption is available under the 3rd proviso to section 26 (1) of the Income Tax Ordinance as this ground of exemption was not relied on by the assessee at the hearing before us.

In the circumstances of this case we make no order as to the costs of this reference.

H. N. G. FERNANDO, C.J.—I agree.

Appeal dismissed.

¹ 1958 A. I. R. Bombay 191.