

1961

Present : Weerasooriya, J., and Sansoni, J.

COMMISSIONER OF INCOME TAX, Appellant, *and*
BADDRAWATHIE FERNANDO CHARITABLE TRUST, Respondent

S. C. 1 of 1959—Income Tax Case Stated

Income tax—Trust for charitable purposes—Can religious trust be included?—Meaning of expression “charitable purposes” prior to 1st April 1958—Income Tax Ordinance (Cap. 188), ss. 2, 7 (1) (c), 7 (1) (d)—Income Tax (Amendment) Act, No. 44 of 1958—Trusts Ordinance (Cap. 72), s. 99 (1).

By section 7 (1) (c) of the Income Tax Ordinance as amended by Ordinance No. 27 of 1934 :—

“There shall be exempt from tax the income of any institution or trust of a public character established solely for charitable purposes.”

Held, that the expression “charitable purposes” in section 7 (1) (c), read with the definition of charitable purpose” in section 2 prior to its amendment on 1st April 1959 by the Income Tax (Amendment) Act No. 44 of 1958, excluded from its ambit purposes for the advancement of religion or for the maintenance of religious rites and practices.

CASE stated under section 74 of the Income Tax Ordinance (Cap. 88) on the application of the Commissioner of Income Tax.

V. Tennekoon, Senior Crown Counsel, with *Mervyn Fernando*, Crown Counsel, for the Appellant.

H. V. Perera, Q.C., with *S. Nadesan, Q.C.*, and *N. Nadarasa*, for the assessee-respondents.

Cur. adv. vult.

March 3, 1961. WEERASOORIYA, J.—

This is a case stated under section 74 of the Income Tax Ordinance (Cap. 188) on the application of the Commissioner of Income Tax.

By deed No. 1388 dated the 30th January, 1952, one W. D. Fernando (since deceased) transferred to himself, his three sons, two daughters and another, as trustees of the Baddrawathie Fernando Charitable Trust, certain premises known as Urumutta Estate valued at Rs. 600,000/- and subject to a mortgage of Rs. 180,000/-. The Baddrawathie Fernando

Charitable Trust was constituted by a separate deed, No. 1389, executed by him at the same time. The following are the objects of the trust, as set out in clause 2 of that deed :—

- (a) to aid and assist in Ceylon and elsewhere causes identified with the advancement and propagation of the Buddha Dharma in particular ;
- (b) for the advancement of the teaching of Buddhist Philosophy and Buddhist Pali Scriptural Texts at recognised places of learning ;
- (c) for the maintenance of Buddhist rites and practices associated with the worship of the Triple Gem ;
- (d) for the endowment and maintenance of deserving pious Buddhist monks ;
- (e) for the maintenance and endowment of Buddhist Missionary enterprise in foreign lands, such as the propagation and preaching of the Buddha Dharma in foreign lands where Buddhism does not form the religion of the majority of the people, and
- (f) for any purpose beneficial or of interest to the Buddhist religion not falling within the preceding categories.

Clause 4 of deed No. 1389, in so far as is material to this case, provides that the trustees shall stand possessed of the trust estate upon trust :—

“ to apply the nett income thereof in discharge of the mortgage debt now existing in respect of the said ‘Urumutta Estate’ created by Mortgage Bond No. 2771 dated 14th August 1950 attested by J. S. Paranaivitana Notary Public and after the discharge and cancellation of the said mortgage debt, the Trustees shall stand possessed of the Trust Estate upon trust to apply the nett income thereof for and towards all or any of the objects of the Trust in such proportions as the Trustees shall in their absolute discretion think fit and thereafter to accumulate any income not required for the aforesaid purposes or any of them with power in the absolute discretion of the Trustees to invest such accumulation in immovable property or in securities expressly mentioned in section 20 of the Trusts Ordinance No. 9 of 1917 and to hold such accumulation and/or investment upon the Trust terms and conditions contained herein”

For the year of assessment 1952/53 the trustees were assessed to income tax on the income of the trust estate on the basis that such income was not exempt under section 7 (1) (c) of the Income Tax Ordinance inasmuch as the trust was not established solely for charitable purposes. One of the trustees unsuccessfully appealed against this assessment, first to the Commissioner of Income Tax and thereafter to the Board of Review.

The mortgage debt was not fully discharged until the 16th November, 1956. The income of the trust estate for the period 1st April, 1956, to the 16th November, 1956, was Rs. 37,300/-, and for the period 17th

November, 1956, to the 31st March, 1957, Rs. 21,879/-. The trustees were assessed to income tax for the year of assessment 1957/58 on the income of these two periods. One of the trustees appealed to the Commissioner of Income Tax against the assessment to income tax amounting to Rs. 11,350/- in respect of the latter period. The Commissioner, acting under section 72 of the Income Tax Ordinance, referred the appeal to the Board of Review for decision. The Board of Review allowed the appeal, and the present case stated is against the decision of the Board.

The questions of law submitted for the opinion of this Court in the case stated are—

- (1) Whether the income of the trust created by deeds Nos. 1388 and 1389 is exempt from income tax under section 7 (1) (c) of the Income Tax Ordinance.
- (2) Whether the words “charitable purposes” in section 7 (1) (c) include religious purposes such as are indicated in deed No. 1389 dated 30.1.52.
- (3) Can the trust be regarded in law as having been established solely for charitable purposes in view of clause 4 of deed No. 1389 which stipulates that the income of the trust property was firstly to be applied for the discharge of the mortgage debt then existing.

In considering these questions, the provisions of the Income Tax Ordinance which call for notice are paragraphs (c) and (d) of section 7 (1) and the definition of “charitable purpose” in section 2. As originally enacted, paragraphs (c) and (d) of section 7 (1) read as follows—

“7 (1) There shall be exempt from tax—

- (a)
- (b)
- (c) any income derived from property held under trust or other legal obligation for religious or charitable purposes in so far as such income is applied for such purposes within the Island ;
- (d) the income of a religious or charitable institution derived from voluntary contributions and applied solely to religious or charitable purposes within the Island.”

These paragraphs were subsequently repealed by the Income Tax Amendment Ordinance, No. 27 of 1934, and the following new paragraphs substituted therefor—

- (c) the income of any institution or trust of a public character established solely for charitable purposes ;
- (d) the income of any religious body or institution whether established under any instrument in writing or not.”

Paragraphs (c) and (d) have since then undergone further legislative changes with which we are, however, not concerned for the purposes of this case. The first two questions in the case stated refer to section 7 (1) (c) as substituted by Ordinance No. 27 of 1934, and any reference hereinafter in this judgment to section 7 (1) (c) will be to the substituted section 7 (1) (c) unless otherwise stated.

The expression “ of a public character ” used in section 7 (1) (c) to qualify the word “ trust ”, as well as the equivalent expression “ for the benefit of the public or any section of the public ” in section 99 (1) of the Trusts Ordinance (Cap. 72), appear to be statutory adaptations of the concept of English law that “ a purpose is not charitable unless it is directed to the public benefit ”—*per* Lord Simonds in *Oppenheim v. Tobacco Securities Ltd.*¹ Senior Crown Counsel Mr. Tennekoon, who appeared for the Commissioner of Income Tax, did not deny that the several purposes specified in paragraphs (a) to (f) of clause 2 of the trust deed No. 1389 are religious purposes or that they are directed to the public benefit as well. Hence it is not necessary to consider the arguments advanced before the Board of Review on behalf of the Commissioner of Income Tax (and rejected by the Board) that the purposes specified in paragraph (f) cannot be regarded as directed to the public benefit and are, therefore, not charitable purposes. Question (1), which, perhaps, was formulated as a separate question in view of this argument, does not now arise for decision except on the basis of the answers to Questions (2) and (3).

The decision of Question (2), which is the substantial issue in this case, turns on the true construction of the expression “ charitable purposes ” in section 7 (1) (c) of the Income Tax Ordinance in the light of the following definition of “ charitable purpose ” in section 2 : “ “ charitable purpose ” includes relief of the poor, education, and medical relief ’. The three objects specified in this definition, while undoubtedly charitable in the legal sense, do not comprise all the objects which are now generally regarded as falling within that expression. In *Income Tax Special Purposes Commissioners v. Pemsel*², Lord Macnaghten classified charity in its legal sense as consisting of trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads. This classification of charity is incorporated in section 99 (1) of the Trusts Ordinance which is as follows :—

‘ The expression “ charitable trust ” includes any trust for the benefit of the public or any section of the public within or without the Island of any of the following categories—

- (a) for the relief of poverty ; or
- (b) for the advancement of education or knowledge ; or

¹ (1951) 1 A. E. R. 31.

² (1891) A. C. 531.

- (c) for the advancement of religion or the maintenance of religious rites and practices ; or
- (d) for any other purposes beneficial or of interest to mankind not falling within the preceding categories.'

It was contended for the respondent that notwithstanding the omission of religious purposes from the definition of "charitable purpose" in section 2 of the Income Tax Ordinance, the use of the word "includes" in the definition shows that the purposes mentioned therein are not exhaustive. The Board of Review not only accepted this contention but also stated as their view that the expression "charitable purposes" in section 7 (1) (c) comprises "all purposes coming within the well recognised legal definition of that term"; and they, accordingly, accepted the further contention for the respondent that a purpose for the advancement of religion or for the maintenance of religious rites and practices is included in the expression. If I may say so with respect, I do not agree with this view.

It will be noted that in defining "charitable purpose" in section 2 of the Income Tax Ordinance the draftsman left out entirely the purposes mentioned in category (c) of the definition of a charitable trust in section 99 (1) of the Trusts Ordinance (namely, the advancement of religion or the maintenance of religious rites and practices) while, of the purposes which, though not specifically mentioned, may be regarded as falling under category (d), he selected only medical relief, and omitted the others. It is difficult to conceive of the draftsman having been oblivious of the provisions of section 99 (1) of the Trusts Ordinance, which is the earlier Ordinance, when he came to define "charitable purpose" in section 2 of the Income Tax Ordinance. I do not doubt, therefore, that these omissions were deliberate. I think that the definition of "charitable purpose" in section 2 was intended to exclude from its ambit the advancement of religion or the maintenance of religious rites and practices. I am confirmed in this opinion by the distinction drawn in section 7 (1) (c), as originally enacted, between religious and charitable purposes, which were treated as separate categories. Section 7 (1) (c) drew a distinction between a religious and a charitable institution. In view of these distinctions it would have been incongruous if "charitable purpose" in section 2 was defined as including religious purposes. I am not impressed by the argument that after the amendments to the original sections 7 (1) (c) and 7 (1) (d) by Ordinance No. 27 of 1934, to which I have already drawn attention, the definition of "charitable purpose" in section 2, though remaining unaltered, assumed a new signification which it did not bear prior to the amendments.

We were referred by learned counsel on both sides to various definitions in section 2 where the word "includes" is used in different senses. Although the word "means" is used in some of the definitions, the word

“includes” appears to be used in other instances as the equivalent of “means”—see, for example, the definition of “Commissioner”, “receiver”, “trade” and “trustee”. The word is also sometimes used in an extensive sense, as in the definition of “business”, “Ordinance” and “person”. The lack of uniformity in the sense in which the word “includes” is used in section 2 renders it unsafe, in my opinion, to construe the meaning of the word in the definition of “charitable purpose” by reference to the meaning which it bears when used in the definition of other terms.

According to Lord Watson in *Dilworth v. Commissioner of Stamps and Dilworth v. Commissioner for Land and Income Tax*¹, “includes” is a word which is “very generally used in interpretation clauses to enlarge the meaning of words or phrases occurring in the body of a statute, and when it is so used these words or phrases must be construed as comprehending not only such words as they signify according to their natural import but also those things which the interpretation clause declares they shall include”. Applying this *dictum* to the present case, and having regard to the definition of “charitable purpose” in section 2 of the Income Tax Ordinance, the expression “charitable purpose” in section 7 (1) (c) would mean purposes appertaining to the relief of the poor (being the primary or ordinary meaning of the expression) and also education and medical relief which, though not within the primary or ordinary meaning, the definition declares that the expression shall include; but there would appear to be no ground for extending the expression further, so as to include religious purposes as well.

With effect from the 1st April, 1959, the following new definition of the expression “charitable purpose” in section 2 was introduced by the Income Tax (Amendment) Act, No. 44 of 1958:—

“charitable purpose” means a purpose for the benefit of the public or any section of the public in or outside Ceylon of any of the following categories:—

- (a) the relief of poverty;
- (b) the advancement of education or knowledge;
- (c) the advancement of religion or the maintenance of religious rites and practices or the administration of a place of public worship;
- (d) any other purpose beneficial or of interest to mankind not falling within any of the preceding categories.’

In this new definition, so radically different from that which it replaced, the word “means” is used instead of the word “includes”, and all the categories of a charitable trust in section 99 (1) of the Trusts Ordinance have been brought within the expression “charitable purpose”. I am unable to derive from the terms of the new definition any assistance in the elucidation of the particular point under consideration, which is,

¹(1899) A. C. 99.

what meaning should be given to “charitable purposes” in section 7 (1) (c) in the light of the definition of “charitable purpose” in section 2 as it stood prior to the 1st April, 1959.

In my opinion Question (2) should be answered in the negative. It follows that Question (1) also has to be answered in the negative. As for Question (3), this does not seem to arise for decision because, in view of the answer to Question (2), none of the objects in clause 2 of deed No. 1389 are charitable purposes. I may state, however, that in regard to this question learned Senior Crown Counsel contended that the trust was established once and for all when deed No. 1389 was executed, and that even if the objects in clause 2 of it constitute charitable purposes, the directions in clause 4 that the nett income of the trust property must be applied towards the discharge of the mortgage debt before the income could be applied to all or any of the objects as set out in clause 2, took away from the trust the essential quality of being one established solely for charitable purposes. A similar argument was considered in *Commissioner of Income Tax v. Trustees of the Abdul Gaffor Trust*¹, where the clause in the trust deed specifying the objects of the trust contained a proviso that during the lifetime of the grantor the trustees shall apply the nett rents, profits, dividends and income for such purposes and in such manner as he may in his absolute discretion direct, whether such purposes fell within the objects specified earlier or not; and the question that arose was whether the income of the trust property in respect of a period subsequent to the grantor's death was exempted from tax under section 7 (1) (c). My brother H. N. G. Fernando expressed the view in that case (in a judgment with which my brother Sinnetaimby agreed) that “the language in section 7 (1) (c) is only intended to denote a trust having for the time being legal effect or operation, its purposes being solely charitable”.

In the case before us, since the mortgage debt has been wiped out, the directions in clause 4 of deed No. 1389 relating to the application of the income towards the discharge of the mortgage debt are now not operative and should be ignored in considering the present legal effect of the deed; and they no longer, in my opinion, stand in the way of the trust being construed as one established solely for charitable purposes provided, of course, the purposes in clause 2 are charitable purposes, which (for the reasons already stated) I hold they are not.

In accordance with the decision of Questions (1) and (2) the trustees are liable to pay income tax amounting to Rs. 11,350/- for the year of assessment 1957/1958 on the income from the trust property for the period 17th November, 1956, to the 31st March, 1957.

The respondent will pay the appellant's costs of the proceedings in this Court.

SANSONI, J.—I agree.

Appeal allowed.

¹ (1958) 60 N. L. R. 361.