

[1955] 27 ITR 279 (BOM)
HIGH COURT OF BOMBAY
Commissioner of Income-tax

v.

Breach Candy Swimming Bath Trust
CHAGLA, CJ. AND TENDOLKAR, J.
IT REFERENCE NO. 6 OF 1954
AUGUST 30, 1954

G.N. Joshi and P.R. Sunkersett *for the Applicant.*

N.A. Palkhiwala *for the Respondent.*

JUDGMENT

Chagla, CJ.—The assessee is the Breach Candy Swimming Bath Trust, an association of persons, and the main question that arises on this reference is whether the income derived by it from certain activities is exempt from tax.

Now, the property of this trust consists of securities and immoveable properties, and no question arises on this reference as to the liability of the trust to pay tax on that income, but when the assessee went in appeal before the Tribunal against this assessment, the contention that was put forward by counsel for the trust was that the trust was a mutual association and it was exempt from tax in respect of services rendered to its members. That contention was not pressed before the Tribunal, but a new contention was put forward that the trust being a charitable trust the income derived by the charitable trust was exempt from taxation. The Tribunal permitted the assessee to raise this point and answered it in its favour, and one of the questions that the Commissioner has asked the Tribunal to raise, and which has been referred to us, is:

"Whether the Tribunal is competent in law in permitting an assessee to raise a ground at the time of the hearing of the appeal—a ground which was not raised either before the Income-tax Officer or before the Appellate Assistant Commissioner, or in the grounds of appeal before the Appellate Tribunal?"

On this question rule 12 of the Appellate Tribunal Rules, 1946, is quite clear. The Tribunal has been given the authority to permit a new point to be raised provided that the party who is affected by the raising of this new point has been given sufficient opportunity of being heard on this point and the Tribunal in the statement of the case points out that when this point was raised the representative of the Department never asked for an adjournment to consider the question and the matter was argued without the appeal being adjourned and therefore in the opinion of the Tribunal the Department

was not denied sufficient opportunity of being heard on this new ground raised by the assessee.

Mr. Joshi has not pressed this first question and it is obvious that that question must be answered against the Commissioner.

But the real question is with regard to the income of the trust as a charitable institution. Now, the income in respect of which exemption is sought is income derived by the institution selling season tickets, tickets for daily admission, income made by the institution carrying on a bar and a restaurant and it is the surplus which is arrived at after debiting the necessary expenses in respect of the carrying on of these activities, and the question that we have to consider is whether this income is exempt from tax.

Now, in order to understand the various points urged before us it is necessary to look at the history of this institution and how it came to be set up. It seems that a trust deed was executed on the 3rd of February, 1876, between the Secretary of State for India in Council and the Municipal Corporation of the City of Bombay, by which deed the Municipality was given a plot of land on the foreshore at Breach Candy in Bombay and the object of the trust was the construction and maintenance of a salt water swimming bath for the use and benefit of European public of Bombay. The Municipality carried on this trust for some time and a salt water swimming bath was erected. Then a suit was filed in this Court under section 92 of the Civil Procedure Code, being Suit No. 1819 of 1935, and in that suit a scheme was framed by Mr. Justice Kania in relation to this trust, and in substance the scheme provided for the trust being administered by certain named trustees and not by the Municipality. Under the scheme certain powers were conferred upon the trustees and one of the important powers which is relevant for the purposes of this reference was to make provision for the supply of refreshments including alcoholic liquors to persons resorting to the bar. Now, it may be pointed out that at the time Mr. Justice Kania framed the scheme there was already a bar and a restaurant in existence, and this bar and this restaurant became vested in the trustees who were appointed under the scheme, and power was given to the trustees to carry on an activity which was already being carried on before this scheme was framed, and the main contention of Mr. Joshi on behalf of the Department is that looking to the scheme it is clear that the trust is not a charitable trust. It is urged that one of the objects of the trust is to supply refreshments including alcoholic , liquors to persons resorting to the bath and that object in no view of the case can be a charitable object. Mr. Joshi would be perfectly right if he could satisfy us that one of the objects of the trust was to supply refreshments to persons who went to the shimming bath, but, in our opinion, a clear distinction must be drawn between the object of the trust and the powers conferred upon the trustees of the trust which powers are

incidental to the carrying out of the object of the trust. Now, the only object of the trust, and that is perfectly clear both from the original indenture of trust and the scheme framed by the High Court, is the maintenance and construction of a salt water swimming bath at Breach Candy. The provision with regard to the supply of refreshments is a power conferred upon the trustees to exercise it or not according to their discretion in the carrying out of the object of the trust.

Now, the matter may be looked at from another point of view. It would be incumbent upon the trustees to carry out the object of the trust, but it is clear that it is not incumbent upon the trustees to provide for refreshments to those who resort to the bar. It would be open to them if for any reason they thought that it was not convenient to supply refreshments, to shut down the bar where refreshments are supplied and it could never be suggested, that if the trustees -stop supplying refreshments to those who resort to the bar they would be guilty of a breach of trust. Therefore, it is clear that the object of the trust is the maintenance of a swimming bath, but it is urged by Mr. Joshi that even so the maintenance of a swimming bath is not a charitable object. Now, it has often been said, and it is unnecessary to repeat it, that charity as denned under the Indian Income-tax Act is of much wider application than charity as under stood in English law under the Statute of Elizabeth. Under the Indian Income-tax Act "charitable purposes" is denned, and the definition is an inclusive definition, as "relief to the poor, education, medical relief and the advancement of any other object of general public utility ;"and the view taken has been that the expression "any other object of general public utility" is of the widest connotation. The Privy Council in *All India Spinners' Associations. Commissioner of Income-tax* [1944] [12 ITR 482](#) at p. 488, left it to Judges in India with their knowledge, of Indian conditions to form an opinion as to what is a matter of general public utility, but they did express their opinion that "purpose of general public utility" were very wide words, and the exact scope of these words may require on some other occasion very careful consideration. It may be pointed out that this was a case of All India Spinners' Association and although the Bombay High Court had held that the object of this association was not charitable the Privy Council reversed the view taken by the Bombay High Court and they came to the conclusion that the object was not merely the relief to the poor but also advancement of other purposes of general public utility.

The question, therefore, we have to consider is whether the setting up of a swimming bath is an object of general public utility. Now, a swimming bath to which the general public or a section of the public has access must be considered to be established for the promotion of health, and ordinarily any object which has for its purpose the promotion of public health must be an object of general public utility. Mr. Joshi has relied on a decision of the

English Court reported in *In re Nottage : Jones v. Palmer* [1895] 2 Ch. 649 for the purpose of contending that a trust for the purposes of giving recreation to the public or for the amusement of the public is not a charitable trust. When we look at the case, apart from the fact that this is a case which deals with the English law of charity, the facts are very different from the facts that we have to consider here. That was a case where a testator bequeathed a fund in trust to provide annually for ever a cup to be given to the most successful yacht of the season, stating that his object in giving the cup was to encourage the sport of yacht-racing, and it was this gift which was held to be not a charitable gift, and in the judgment of Lord Justice Rigby it is expressly pointed out that the Yacht Racing Association was a society of yacht-owners, the prizes were to be won by yacht-owners and the testator told them that his object in founding the prize was to encourage the sport of yacht-racing? Therefore here we have a case where the sole object was the encouragement of sports in which a very small section of the public would be interested and the giving of a prize which could not be won by any member of the public or any section of the public but only by a limited class, *viz.*, the yacht-owners. Lindley, L.J., in his judgment admits the difficulty of drawing the line between gifts which are charitable and gifts which are not charitable, but he is clearly of the opinion that every healthy sport which may be good for the nation like cricket, football, fencing, yachting, or any other healthy exercise and recreation, would not be a charitable object; and Lopes, L.J., at page 656 says;

"I am of opinion that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public."

Now, here we have not a case where any sport is encouraged. Here we have not a case where activity is intended to amuse individuals or to lead to the recreation of individuals. The object of setting up the swimming bath especially in modern times is obviously to advance public health ; and, as we pointed out, one must not forget that access to this swimming bath is open to a section of the public. It is true that the only section of the public that could be benefited by this bath would be the European public in Bombay but it is well settled that an object of public utility need not be an object in which the whole of the public is interested. It is sufficient if a well defined section of the public benefits by the object, and the object of the trust in the case before us was to benefit clearly a defined section of the public living in Bombay.

It may then be suggested that it is not a charitable trust because the object was not to give the facility of swimming to the public free without any charge but the object was to set up a commercial institution which would

charge for the admission of every member of the public to the swimming pool and make profit out of running the institution. Now, on a casual consideration of the matter it may strike one that the most essential element of charity is to render service to the public without any charge or remuneration, but, as we shall presently point out, it is clear on the authorities that the eleemosynary element is not an essential element of charity. A settlor or a donor may make a charity by setting up an institution and also providing funds by which those who take advantage of the institution can do so without paying any charge; or we may have a case where the charity may not go to those limits and one may confine his charity to merely setting up the institution and providing that those who wish to take advantage of the institution must pay reasonable charges for the same. In both cases the setting up of the institution would be a charitable object if the institution serves a purpose of general public utility. The only essential factor to determine whether it is a charity or not would be whether there is any private gain by the setting up of the institution. If the gain derived by running the institution continues to be impressed with the trust which is a charitable trust, then it is immaterial whether the institution is run as a commercial institution or not, but if in the running of the institution profits are made and the profit goes to any private individual or if the institution is intended for any private gain, then undoubtedly the running of the institution could not be considered as being run for a charitable object. These principles have been clearly laid down in the two important cases of the Privy Council dealing with the question of charity under the Indian Income-tax Act. The first is the Tribune case reported in *In re Trustees of the Tribune* [1939] [7 ITR 415](#). In that case the owner of a press and a newspaper created a trust of that newspaper and the object of the trust was to maintain the liberal policy of the paper and to circulate the paper to the public, and the question that arose was whether the income of this press and newspaper was exempt from tax on the ground that the trust was a charitable trust, and the Privy Council held that it was a charitable trust. Now the Lahore High Court had held that this was not a charitable trust and one of the considerations which weighed with the High Court was that the Tribune newspaper charges its readers and advertisers at ordinary commercial rates for the advantages which it affords. The Privy Council points out that:

"As against this the evidence or findings do not disclose that any profit was made by the newspaper or press before 1918 and it is at least certain that neither was founded for private profit whether to the testator or any other person. By the terms of the trust it is not to be carried on for profit to any individual. It cannot in their Lordships' opinion be regarded as' an element necessarily present in any purpose of general public utility, that it should provide something for nothing or for less than it costs or for less than the ordinary price. An eleemosynary element is not essential even in

the strict English view of charitable uses. There seems to be no solid distinction to be taken under the phrase 'general public utility' between a school founded by a testator but charging fees to its pupils and a paper founded by a testator and sold to its readers. The purpose of providing the poor or the community in general with some useful thing without price or at a low price may doubtless be in itself a purpose of general public utility. But if another object be independently in itself of general public utility the circumstance that the testator's bounty was only in respect of the initial capital assets, or had only to meet a working loss temporarily and not permanently will not, necessarily at least, alter the character of the object."

And to the same effect are the observations of the Privy Council in *All India Spinners' Association v. Commissioner of Income-tax* [1944] [12 ITR 482](#) where their Lordships point out that the words "object of general public utility" should exclude the object of private gain such as an undertaking for commercial profit though all the same it would subserve general public utility. As in this case it is not suggested that any private gain is made out of the income of the undertaking carried on by the trust the mere fact that profits are made by the trust will not prevent the trust still being a trust having a charitable object.

Now, it is urged by Mr. Palkhiwala that the case would fall under section 4(3)(ia) because the conditions laid down in that section are satisfied. In order that the conditions of that sub-section should be satisfied we must have an income derived from business carried on behalf of a religious or charitable institution. The second condition is that the income of the business must be applied solely to the purposes of the institution, and the third condition is that the business is carried on in the course of the carrying out of a primary purpose of the institution. We are not concerned with the alternative to this condition which is "the work in connection with the business is mainly carried on by the beneficiaries of the institution." It is urged by Mr. Palkhiwala that this business is carried on by the trust or on behalf of the trust by the trustees, that no part of the income is diverted to any purpose other than the purpose of the institution, and the business of supplying refreshments is carried on in the course of the carrying out of the primary purpose of the institution which is the maintenance of a swimming pool. We are in agreement with Mr. Palkhiwala that supplying refreshments to those who attend the swimming pool would not be an activity unconnected with the purposes of the institution, and the sole object of the scheme in conferring the power upon the trustees to supply refreshments and to make arrangements for refreshments was to carry on an activity which is intimately connected with the primary object and purpose of the trust. But there are certain serious difficulties in the way of applying this sub-section to the facts of this case. It is pointed out by Mr. Joshi that when

the Legislature used the expression that the business must be carried on on behalf of a religious or charitable institution, the intention was that the business must not be an integral activity of the trust itself or the charitable or religious institution itself, and in this case it is pointed out that the business of supplying refreshments and selling admission tickets is an integral activity of the trust itself and it is not a separate or separable activity carried on behalf of the institution. The other serious difficulty in the way of applying this section on which Mr. Joshi rightly relies is that this subsection requires, before the income can be exempt from taxation, that the income should be applied solely to the purposes of the institution. Now, in section 4(3)(i) the Legislature has in mind the clear distinction between applying the income and setting apart the income for application. What has happened in the case before us is that the surplus income which is sought to be taxed has been carried to the reserve fund, but it continues as a surplus income and has not been applied for any purpose of the institution. Mr. Palkhiwala says that, such an interpretation would make it impossible for any income to escape tax as falling under section 4(3)(ia). In the first place it is pointed out that an income is never ascertained till the end of the year and the trustees would never know what the income is so that they should apply to any purpose of the trust. The other difficulty that is pointed out is that it is only after all the purposes of the trust are satisfied that there is a surplus and it is in regard to that very surplus income exemption is sought, but on Mr. Joshi's contention whenever there is a surplus income which is not spent for the purposes of the trust, that income cannot claim exemption under section 4(3)(ia). Our object, therefore, should be to give an interpretation to section 4(3)(ia) and 4(3)(i) which removes these difficulties and anomalies and which is an interpretation which reconciles clauses (i) and (ia) and presents a fairly complete and coherent picture of this aspect of the Income-tax Act. Now, it seems to us that section 4(3)(i) deals with property which is held under trust or other legal obligation from which an income is derived, and the property may be even business which may be settled on trust or which may be an integral part of the trust. If that is the position and if the trust is wholly for religious or charitable purposes, then no difficulty whatsoever would arise with regard to the income of any property whether it is business or other property. In this very case if the case were to fall under section 4(3)(i) then admittedly the trust is wholly for religious or charitable purposes and whatever income is derived by this trust, whether it is from securities or from immovable property or from business, would be income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and therefore exempt from tax. There is no difficulty in taking the view that a business may be property held under trust for the purposes of this sub-section because the Privy Council in the *Tribune's* case (*supra*) did hold that the business of running the newspaper Tribune was property held under trust for a charitable object.

In this view of the case section 4(3)(ia) would only apply to an activity which was not an integral activity of the trust itself. If the trustees carried on a business which was not part of the property of the trust, then only that income of the business would be exempt from taxation which was applied solely to the purposes of the institution. If such a business made a profit, and only part was spent for religious or charitable institution and the other part was kept in surplus or in reserve, then the part which was kept in surplus or reserve would be liable to tax. Therefore the Legislature, as far as section 4(3)(ia) was concerned, looked upon a business falling under this sub-section as something independent of the trust itself ; and looking upon that business as something independent of the trust itself, it naturally wanted to tax the income of that business to the extent that that income was not applied solely to the purposes of the charitable or religious institution. If we take this view of section 4(3)(i) and 4(3)(ia), then no difficulty would be experienced in the way of the trustees who were carrying on the activity as a part of the trust itself and which activity made profits which the trustees may keep in reserve, in order to strengthen the financial position of the institution. As such income would fall under first part of section 4(3)(i), no question could then arise of that income being necessarily applied for the purposes of the institution in order to earn exemption under section 4(3)(ia).

But Mr. Joshi says that it is not open to us to consider this aspect of the matter because the only question that is submitted to us by the Tribunal is whether the income of the three relevant years is exempt under section 4(3)(ia) of the Indian Income-tax Act or on the ground raised by the assessee, and Mr. Joshi says that if the case of the assessee does not fall under section 4(3)(ia) then he must fail in the reference and he must pay tax on the income. Now, in our opinion, the real object of making a reference, stating a case, and raising questions is to bring out the real controversy between the department and the assessee, "so that the High Court under its advisory jurisdiction can give an opinion on which the Tribunal can act; and there can be no dispute that the High Court has ample jurisdiction to alter and reformulate questions submitted by the Tribunal in order to bring out the real controversy between the parties. Now, what is the real controversy between the parties in this case? The contention of the assessee is that it is not liable to pay tax on the income derived from certain activities carried on by the trust because the trust is a charitable institution, and the contention of the department is that this income is not exempt from tax. Therefore, what we have to consider is, looking to the provisions of the Income-tax Act, whether this income is or is not exempt from tax. It is not necessary for the assessee to suggest under what particular section of the Act the income is exempt. That is a matter of a legal argument which can always be advanced in this Court. Therefore, the proper question which the Tribunal should have framed and submitted to us was whether this particular

income is exempt from taxation. It would be open to the Tribunal in the statement of the case to point out under which section in its opinion it is exempted. But we would not be bound necessarily to take the same view as the Tribunal. In order to uphold the exemption it' would be open to us if that question was raised to say that although we do not agree with the Tribunal that the income is exempt under the particular provision of the law on which the Tribunal has relied it is still exempt from taxation under some other provision. We cannot accept Mr. Joshi's contention that our jurisdiction is confined within such narrow bounds as to permit us only to decide whether the exemption falls under section 4(3)(ia) or not and if our view is that it does not fall under section 4(3)(ia), even though the assessee may be entitled to exemption under some other provision of law, it is not open to us to express that opinion. It is true that before we decide whether the assessee is entitled to exemption under some other provision of the law all the necessary facts must be before us. It would not be possible for us to exercise our advisory jurisdiction without a proper statement of the case, and if any facts are not stated which would be necessary to be stated in order to decide the real controversy between the parties we could call for a supplemental statement of the case, but it is not suggested by Mr. Joshi that in this case all the necessary facts are not stated. Therefore, what we have to decide is whether on the facts stated the assessee is entitled to exemption from tax, under the relevant provision of the Income-tax Act, and if we come to the conclusion that the relevant provision of the Income-tax Act is section 4(3)(i) and not section 4(3)(ia), it is open to us to do so under our advisory jurisdiction. Therefore, in our opinion, this is a case which does not fall under section 4(3)(ia) but under section 4(3)(i). In our opinion the income in respect of which the assessee claims exemption is an income derived from an activity or a business which is held in trust wholly for a charitable purpose, and therefore that income need not be included in the total income of the assessee.

We, therefore, answer question (2), after reframing it by deleting from it the words "under section 4(3)(ia) of the Income-tax Act or on the ground raised by the assessee", in the affirmative.