

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(STATUTORY ORIGINAL JURISDICTION)

**INCOME TAX REFERENCE APPLICATION No.  
172 OF 2001.**

**IN THE MATTER OF:**

An application under section 160(1) of the Income  
Tax Ordinance, 1984

**A N D**

**IN THE MATTER OF:**

The Commissioner of Taxes, Taxes Zone-1,  
Chittagong.

.... Applicant

-Versus-

Haji Mohammad Ali Meah Waqf Estate, 768,  
Askarabad D.T. Road, Chittagong.

..... Respondents.

Mr. S. Rashed Jahangir, D.A.G with  
Mr. Titus Hillal Rema, A.A.G. with  
Ms. Mahfuza Begum, A.A.G.

..... for the applicant.

No one appears

..... for the respondent.

**Present:**

**Ms. Justice Zinat Ara with  
Mr. Justice Sheikh Hassan Arif  
&  
Mr. Justice J.N. Deb Choudhury**

**Heard on: 10.05.2015 and  
Judgment on: 11.05.2015.**

**Sheikh Hassan Arif, J:**

This reference application under section 160 of the Income Tax Ordinance, 1984, at the instance of Commissioner of Taxes, Taxes Zone-1, Chittagong, has arisen out of an order dated 27.8.2000 passed by the Taxes Appellate Tribunal, Chittagong Bench, Chittagong in Income Tax Appeal No. 390 of 1999-2000 (Assessment year 1995-96).

Short back ground facts are that the assessee, Haji Mohammad Ali Meah Waqf Estate, submitted its income tax return before the Deputy Commissioner of Taxes, Circle-2, Taxes Zone-1, Chittagong (“the DCT” hereinafter) for the assessment year 1995-96 disclosing income from property held under waqf estate and claiming exemption of tax on the entire income of the waqf estate under section 44(1) read with paragraph 1 (1) of Part A of the Sixth Schedule to the Income Tax Ordinance, 1984 (“the said Ordinance”). As per the waqf deed, which created the said waqf, the income from the waqf property is to be spent for giving allowances to the descendants of the waqif as well as for religious and charitable purposes. According to the DCT, in computing the taxable income of the assessee, he deducted all statutory expenses along with the allowances paid to the descendants of the waqif of the waqf and so much of the religious and charitable expenses as found correct upon verification through inquiry. Thus, the DCT imposed income tax on the remaining income of the waqf-estate which was neither applied to religious or charitable purposes for the benefit of the public. Against the order of the DCT, the assessee filed an appeal before the Appellate Additional Commissioner of Taxes, Appellate Range-1, Taxes Appeal Zone-Chittagong (“the AACT”, in short) claiming that the entire income of the waqf property is entitled to be exempted from tax. However, the AACT upheld the said order of the DCT. The assessee then filed second appeal, being Income Tax Appeal No. 393 of 1999-2000, before the Taxes Appellate Tribunal, Chittagong Bench, Chittagong (“the Tribunal”, in short), whereupon I.T.R. Application No.172 of 2001 (Judgment dated 11.05.2015)

the Tribunal allowed the appeal and, thereby, exempted the entire income of the waqf property from the ambit of taxation purportedly under Section 44(1) read with paragraphs 1 and 2 of Part A of the Sixth Schedule to the said Ordinance. Being aggrieved, the Commissioner of Taxes, Chittagong preferred the instant reference application under Section 160 of the said Ordinance.

Initially, the question as posed in this reference application was as follows:

*“Whether on the facts and circumstances of the case the Taxes Appellate Tribunal was legally justified in holding the view that the income of the assessee will be non-taxable for income tax purpose as per provisions of section 44(1) read with paragraphs 1 and 2 of Part A of the Sixth Schedule of the Income Tax Ordinance, 1984.”*

The reference application was taken up for hearing by a Division Bench of the High Court Division presided over by her Lady-ship Ms. Justice Zinat Ara. At the time of hearing, the said Division Bench came across an earlier judgment of another Division Bench of the High Court Division presided over by Mr. Justice Mohammad Abdur Rashid in respect of the same Waqf Estate, though for different assessment years (Reference Application Nos. 170, 171 and 173 of 2001), wherein the said Division Bench had given full exemption to the said Waqf Estate from taxes by applying the said provisions, namely Section 44 (1) read with paragraph 1 and 2 of Part A of the I.T.R. Application No.172 of 2001 (Judgment dated 11.05.2015)

Sixth Schedule to the said Ordinance. Thereupon, the Division Bench presided over by her Lady-ship Justice Zinat Ara, upon considering the said earlier decision and some decisions of the superior Courts as relied upon by the Tribunal below, expressed its disagreement with the said earlier decision of the High Court Division vide order dated 13.02.2013 in particular referring to the proviso to paragraphs 1 and 2 of the said Sixth Schedule, Part A. In doing so, the said Division Bench further expressed the view that paragraphs 1(1) and 2 of Part A of the Sixth Schedule should be read with the proviso to the said two paragraphs and, in which case, only the part of income of a waqf estate which ensured for the benefit of public would get complete exemption of tax and the part which did not ensure for the public benefit would not be entitled to such exemption. Accordingly, the said Division Bench, by the same order, referred the instant reference application to the Hon'ble Chief Justice of Bangladesh in view of the provisions under Chapter VII of the Supreme Court (High Court Division) Rules, 1973 for referring the point of difference to a Full Bench of the High Court Division. By the same order dated 13.02.2013, the said Division Bench framed the following legal questions:

*“Whether on the facts and circumstances of the case the Taxes Appellate Tribunal was legally justified in holding the view that the income of the assessee, a private religious trust (waqf), is wholly tax exempted as per provision of section 44(1) read with paragraphs 1(1) and 2 (proviso), Part “A” of*

*the Sixth Schedule to the Income Tax Ordinance, 1984 although part of its income does not ensure for the benefit of the public.”*

Accordingly, the Hon'ble Chief Justice has constituted this Full Bench for disposal of the said reference application and the questions involved therein. Thereafter, this Full Bench has taken up this reference application for hearing and heard only Mr. S. Rashed Jahangir, learned Deputy Attorney General (DAG), representing the Commissioner of Taxes (the applicant), as no one has appeared for the assessee waqf estate.

In the course of hearing, learned DAG has made almost the same submissions as made before, namely that the proviso to paragraphs 1 and 2 of Part A of the Sixth Schedule to the said Ordinance is an integral part of the said provisions and no interpretation of the said provisions can be given ignoring the said proviso. According to him, if the said provisions of paragraphs 1 and 2 are read along the said proviso, the entire income of a private religious trust like the assessee should not be entitled to get full tax exemption and only that part of the income should get tax exemption which is used for the benefit of the public. In other words, according to the learned DAG, that part of the income of the waqf estate which is applied or set apart for the betterment and benefit of the waqif and his descendants will not get tax exemption in view of the provision of the said proviso. Learned D.A.G further argues that though the Tribunal below gave full I.T.R. Application No.172 of 2001 (Judgment dated 11.05.2015)

exemption relying on two decisions of our superior courts, namely the decisions of the *Director of Taxation & Excise, Government of East Pakistan Vs. Mehdi Ali Khan Panni, reported in BTD (1979)-90 (“Panni’s Case”)* and *Commissioner of Taxes vs. Ghaus-i-Pak-i-Azam Welfare Trust, 36 DLR(AD)(1984)-166 (“Ghaus-i-Pak’s case”)*, the ratio decided in those cases are not applicable in the facts and circumstance of the present case in that the same were decided on different facts and on different contexts. Drawing our attention to the said earlier judgments of a Division Bench presided over by his Lordship Mr. Justice Mohammad Abdur Rashid, learned DAG argues that in deciding those reference applications their lordships probably relied upon the case referred to by the Bar, namely the case of *Commissioner of Taxes vs. Saifuddin Ahmed Siddique, 32 DLR (AD)-190*. According to him, this case also does not apply in the facts present case as because the proviso to the said paragraphs 1 and 2 was not an issue in that case and was not considered at all.

Since the assessee-waqf estate is not represented by any learned advocates, we have extensively examined the relevant provisions of law and tried our level best to find out the best case scenario for the assessee in the context of the relevant provisions of law. It appears that though a Division Bench of the High Court Division earlier decided similar issues in Reference Application Nos. 170, 171 and 173 of 2001 in respect of different assessment years of the same assessee, the conclusion was not reached by making elaborate

discussions of law and facts involved therein. Upon reading the judgment of the said Division Bench, in particular the judgment dated 28.08.2007 passed in Reference Application No. 173 of 2001, it appears that the learned advocate representing the assessee-waqf estate referred to two decisions of our superior courts, namely *Md. Yaqub Vs. Ali Muhammad, 10 DLR (W.P. Lah, 1958), p-27 and Commissioner of Taxes vs. Saifuddin Ahmed, 32 DLR (AD)-190*. According to the learned advocate for the assessee in that case, the assessee should get full exemption of taxes relying on the ratio of those decisions. Upon hearing the learned advocates, their Lordships affirmed the decision of the Tribunal giving full exemption to the assessee without making any exercise of examining those decisions as well as the relevant provisions of law, in particular the proviso to paragraph 1 and 2 of Part A of the Sixth Schedule to the Income Tax Ordinance, 1984.

Be that as it may, since the matter is now before us, we will endeavour to examine the said relevant provisions as well as those cases. There is no dispute that the assessee-waqf estate is a Waqf-ul-Awlad, a waqf created mainly for the purpose of care and maintenance of the waqif and his descendants. For tax purposes, these types of waqf estate have always been regarded as private religious trust [*see the observation at page 113 of Panni's case-BDT (1979), page-90*]. For better understanding and ready reference, the

said relevant provisions, as was existing at the relevant time of assessment, are quoted below:

***Section 44 of Income Tax Ordinance, 1984.***

*“44. Exemption-(1) Notwithstanding anything contained in this Ordinance, any income or class of income or the income of any person or class of persons specified in Part A of the Sixth Schedule shall be exempt from the tax payable under this Ordinance, subject to the limits, conditions and qualifications laid down therein and shall be excluded from the computation of total income under this Ordinance.”*

**“THE SIXTH SCHEDULE**

**PART A**

**EXCLUSIONS FROM TOTAL INCOME.**

*(see section 44(1))*

*1. (1) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto*

-----  
-----

*2. Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purpose:*



Provided that nothing contained in paragraph 1 or 2 shall operate to exempt from the provisions of this Ordinance that part of the total income of a private religious trust which does not ensure for the benefit of the public.

(Underlines supplied to give emphasis)

Thus, it appears from a mere reading of the paragraph 1(1) of Part A of the Sixth Schedule that, according to the said provision, the concerned Waqf Estate is entitled to full exemption of tax. Upon reading the decision of **Panni's case**, **Ghaus-i-Pak-i-Azam's case** and **Muhammad Yaqub's case**, it is also clear that the purpose of Waqf-ul-Awlad, created for the benefit of the Waqif and his descendants, is recognized as a religious purpose in Muslim Law which does not make any distinction between private waqf and public waqf. Therefore, if we read paragraph 1 of Part A of the Sixth Schedule in isolated way, we will have no option but to give the full exemption to the assessee though some parts of the income of the assessee were applied or set apart for the maintenance and betterment of the descendants of the Waqif. However, in the instant case, we are not dealing with the Muslim law. Here, we are dealing with fiscal law as mandated by the Income Tax Ordinance, 1984. Therefore, while we read paragraph 1(1) of Part A of the Sixth Schedule, we cannot overlook the entire provision under the said Part A. Thus, when we examine the entire provisions, it is clear that paragraph-1 of Part A is conditioned upon by a proviso which has been quoted above. Though the said proviso is placed after

paragraph 2 of Part A under the Sixth Schedule, it clearly mentions that the same is applicable to paragraph 1 as well.

Again, when a provision of a statute is appended by a proviso, no judge can ignore that proviso while interpreting the said provision. According to Mr. Mahmudul Islam's 'Interpretation of Statutes and Documents', Mullick Brothers (see page-176);

*“A proviso is a clause added to an enactment to qualify or to create an exception to what is in the enactment. It has an over-riding effect on the provision to which it is appended. Ordinarily a proviso is not to be construed as stating a general rule. Proviso to a group of sections cuts down the meaning of the group. It excepts out of a preceding enacting part of a statute something which but for the proviso would have been within the enacting part”.*

Again, as stated by Lush Justice in **Mullins V. Treasurer of Survey, (1880) 5 QBD 170, at p-173**—“When one finds a proviso to a section *the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.*”  
*In the words of Justice Hidayatullah in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, AIR 1961, SC 1596, P. 1690*—“As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, - - - - -  
 - - - - -”.

From the above observations of the authors and judges, it is clear that when a provision is qualified by a proviso that provision has to be interpreted along with the said proviso as well. Thus, upon reading of paragraph 1(1) of Part A of the Sixth Schedule alongwith the said proviso (though placed under paragraph 2), we have no option but to conclude that the part of total income of a private religious trust which does not ensure for the benefit of public cannot be entitled to get exemption of taxes under Section 44 read with Part A of the Sixth Schedule to the said Ordinance.

While holding above view, we have also considered and examined the earlier decisions of the superior Courts of this sub-continent including the case of *Md. Yaqub Vs. Ali Muhammad and others*, 10 DLR (W.P. Lah. 1958)-27, *Commissioner of Taxes vs. Ghaus-i-Pak-i-Azam Welfare Trust*, 36 DLR(AD)(1984)-166, *Director of Taxation & Excise, Government of East Pakistan Vs. Mehdi Alil Khan Panni*, BTD (1979)-90 and *Commissioner of Tax vs. Saifuddin Ahmed*, 32 DLR (AD)-190.

**Md. Yaqub's case** did not arise from income tax dispute, rather it was regarding attachment of waqf property. In that case, a Single Bench of the Lahore High Court held that maintenance of waqif and his children in accordance with the dictate of the waqf deed is recognized in Hanafi law as religious and charitable purpose. **Ghausi Pak's case**

was also on a different context. In that case, while interpreting Section 4 (3)(i) of the then Income Tax Act, 1922, the issue was whether a launch-business run by the waqf estate could be termed as a business run in the course of carrying out of a religious or charitable purpose of the trust. The Appellate Division answered in the negative and held that the waqf estate would not get any exemption of tax unless the business had been run in the course of carrying out of a religious or charitable purpose of the trust. Therefore, the above cases are not relevant in deciding the issues in the instant application.

**Panni's case** was relating to different statute on different context and has no manner of application in the parent case. **In Saifuddin Ahmed's case**, the waqf estate set apart 2/3<sup>rd</sup> of its income from properties for charitable and religious purposes and sought exemption under Section 4 (3) (i) of the then Income Tax Act, 1922. Income tax authority imposed tax on the same on the ground that the same was not expended in the concerned year by the assessee. The Appellate Division held that the said part of income would get exemption on the ground that though it was not expended, if was set apart for being expended for religious purposes. Thus, this case also has no manner of application in the present case.

As stated above, we do not disagree with the proposition that Muslim Law does not distinguish between private waqf and public waqf. However, when we interpret the concerned fiscal law, namely the Income Tax Ordinance, 1984, which has clearly made a provision not to give exemption to that part of the income of a private religious trust which does not ensure public benefit, we are inclined to hold that the ratio in the above mentioned decisions does not have any relevance in the facts and circumstances of the present case.

In view of above facts and circumstances of the case and reasons stated above, we are of the view that the earlier decisions in respect of the same assessee in Reference Application Nos. 170, 173 and 173 of 2001 given by a Division Bench presided over by his Lordship Mr. Justice Mohammad Abdur Rashid was not given considering the said relevant proviso to paragraph 1 and 2 of Part A of the Sixth Schedule, though in those applications the DCT and AACT specifically referred to the said proviso as in the present case. Therefore, we humbly cannot agree with the said decision. Our considered view is that the part of income of a private religious trust (Waqf), which is not applied or set apart for the benefit of public but is

applied or set apart for the benefit of waqif and his descendants, is not entitled to get exemption of tax.

In that view of above, our answer to the question referred to in this reference application is in the negative, i.e. in favour of the revenue and against the assessee.

The Registrar, Supreme Court of Bangladesh is directed to take steps under Section 161(2) of the Income Tax Ordinance, 1984.

---

**(Sheikh Hassan Arif,J)**

**Zinat Ara, J:**

I agree

**J.N. Deb Choudhury, J:**

I agree