

## **C.I.T vs Kamalini Khatau on 9 May, 1994**

**Equivalent citations: 1994 AIR 2759, 1994 SCC (4) 308, AIR 1994 SUPREME COURT 2759, 1994 (119) CURTAXREP 16**

**Author: S.P Bharucha**

**Bench: S.P Bharucha, S.C. Agrawal**

PETITIONER:

C.I.T.

Vs.

RESPONDENT:

KAMALINI KHATAU

DATE OF JUDGMENT 09/05/1994

BENCH:

BHARUCHA S.P. (J)

BENCH:

BHARUCHA S.P. (J)

VENKATACHALLIAH, M.N. (CJ)

AGRAWAL, S.C. (J)

CITATION:

1994 AIR 2759

1994 SCC (4) 308

JT 1994 (4) 16

1994 SCALE (2) 976

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by S.P. BHARUCHA, J.- An interesting question arises in these appeals. It is this : Has the Revenue an option to assess and recover tax from either the trustees or the beneficiaries of a discretionary trust when the income thereof is distributed and received by the beneficiaries in the accounting year? The appeals have been heard together and may be disposed of by a common judgment, taking, as illustrative, the facts of the lead appeal (Civil Appeal No. 2145 of 1978, CIT, Gujarat, Ahmedabad v. Kamalini Khatau).

2. The relevant Assessment Year is 1969-70, the previous year being the calendar year 1968. The assessee was the beneficiary of 9 trusts. In respect of three of these she was the sole beneficiary, and there is no dispute about their income. In regard to the other six trusts, the assessee was one of the beneficiaries thereunder. In each of these six trust deeds the clause relevant for our purpose read thus:

"From and after the date hereof (i.e., the date of the Trust Deed) and during the periods mentioned in this clause, the Trustees may either accumulate the net income of the Trust or at their discretion pay the same to the persons as mentioned therein or to any one or more of them to the exclusion of others or other of them for their, his or her absolute use or benefit in such proportion and in such manner as the Trustees may in their absolute discretion think fit....."

During the accounting year relevant to the Assessment Year 1969-70 the assessee received the amounts set out hereafter. The amounts were received pursuant to the resolutions of the trustees to distribute the same from out of the income of the six trusts for the accounting year.

Name of the trust	Amount Rs
1. Geeta Mayour D. Trust No.	11600
2. Ambalal Sarabhai D. Trust No.	46200
3. Manorama Sarabhai (K. 8 D-Trust)	1000
4. Saraladevi Sarabhai (G. 15) D. Trust	1400
5. Manorama Sarabhai D. Trust No.	17300
6. Anand Sarabhai (J-9) D. Trust	500
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	18,000
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3. The assessee contended before the Income Tax Officer that the said amount of Rs 18,000 was not liable to be taxed in her hands. The payment of income under the said six trusts to any one or more of the beneficiaries thereof depended upon the discretion of the trustees; accordingly, the shares of the beneficiaries thereof were indeterminate and unknown. The income of the trusts was, therefore, taxable only in the hands of the trustees thereof, having regard to the provisions of Section 164 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The ITO rejected the assessee's contention and assessed the said amount of Rs 18,000 in her hands. In doing so he relied upon the provisions of Section 166 of the Act. The assessee preferred an appeal. The Appellate Assistant Commissioner affirmed the view taken by the ITO. The assessee preferred a second appeal before the Income Tax Appellate Tribunal. The Tribunal held that no part of the income of the said six trusts was receivable on behalf of or for the benefit of any of the beneficiaries thereof. The provisions of Section 164 were, therefore, attracted. The Tribunal rejected the Revenue's contention that Section 166 was applicable. Accordingly, the Tribunal allowed the assessee's appeal. At the behest of the Revenue, the Tribunal referred to the High Court of Gujarat for its opinion the following question:

"Whether, on the facts and in the circumstances of the case, various amounts totalling to Rs 18,000 received by the assessee out of the income of the six discretionary trusts are liable to be taxed in the hands of the assessee?"

4.A Division Bench of the High Court referred the matter to a larger Bench, and it was heard by a bench of three learned Judges. The order of the Tribunal was upheld by the majority judgment, the third learned Judge dissented. We shall have occasion to refer to the majority and dissenting judgments.

5.It is convenient now to set out those provisions of the Act which have a bearing on the issue that we are called upon to decide. Section 4 imposes the charge; it says that where any Central Act enacts that income tax shall be charged for any assessment year at any rate, income tax at that rate shall be charged for that year, in accordance with and subject to the provisions of the Act, in respect of the total income of the previous year of every person. Section 5 defines the total income of a person resident in India to include all income from whatever source derived which-

(a)is received or is deemed to be received in India in such year by or on behalf of such person; or

(b)accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year:"

Chapter XV of the Act is entitled "Liability in Special Cases". Part B thereof sets out the general provisions applicable to representative assessee. Section 160 defines a representative assessee for the purposes of the Act to mean-

"(i) in respect of the income of a non-

resident specified in subsection (1) of Section 9, the agent of the non-resident, including a person who is treated as an agent under Section 163;

(ii)in respect of the income of a minor, lunatic or idiot, the guardian or manager who is entitled to receive or is in receipt of such income on behalf of such minor, lunatic or idiot;

(iii)in respect of income which the Court of Wards, the Administrator-General, the Official Trustee or any receiver or manager (including any person, whatever his designation, who in fact manages property on behalf of another) appointed by or under any order of a court, receives or is entitled to receive, on behalf or for the benefit of any person, such Court of Wards, Administrator-General, Official Trustee,receiver or manager;

(iv)in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise [including any wakf deed which is valid

under the Mussalman Wakf Validating Act, 1913 (6 of 1913)], receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees;

(v)in respect of income which a trustee appointed under an oral trust receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees."

At the relevant time-Section 161 read thus:

"Liability of representative assessee.- (1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.

\* \* \* (2)Where any person is, in respect of any income, assessable under this Chapter in the capacity of a representative assessee, he shall not, in respect of that income, be assessed under any other provision of this Act.

Section 162 entitles every representative assessee who, as such, pays any sum under the Act to recover it from the person on whose behalf it is paid or to retain an amount equal to the sum so paid out of moneys that are or may come to him in his representative capacity. As it stood at the relevant time, Section 164 read thus:

"Charge of tax where share of beneficiaries unknown.- (1) Subject to the provisions of sub-sections (2) and (3), where any income in respect of which the persons mentioned in clauses (iii) and (iv) of subsection (1) of Section 160 are liable as representative assesseees or any part thereof is not specifically receivable on behalf or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable (which persons are hereinafter in this section referred to as the beneficiaries) are indeterminate or unknown, tax shall be charged as if such income or such part thereof were the total income of an association of persons, or where such income or such part thereof is actually received by a beneficiary, then at the rate or rates applicable to the total income or total world income of the beneficiary if such course would result in a benefit to the Revenue."

Section 166 read thus:

"Direct assessment or recovery not barred.- Nothing in the foregoing sections in this Chapter shall prevent either the direct assessment of the person on whose behalf or

for whose benefit income therein referred to is receivable, or the recovery from such person of the tax payable in respect of such income."

6. We may now paraphrase, and thus emphasise, the provisions of Chapter XV that are most material to our discussion. By reason of Section 160 trustees appointed under a trust deed or will who receive or are entitled to receive on behalf or for the benefit of any person any income are representative assesseees in respect of such income. Under Section 161 every representative assessee is, as regards the income in respect of which he is a representative assessee, subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially and he is liable to assessment in his own name in respect thereof. Such assessment, however, is deemed to be made upon him only in his representative capacity and tax can be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. A representative assessee may not, in such capacity and in respect of income received by him as a representative assessee, be assessed under any provision of the Act other than Chapter XV. Section 164 sets out how tax is to be charged where the share of the beneficiaries is unknown. It applies when the persons mentioned in clauses

(iii) and (iv) of sub-section (1) of Section 160 are liable as representative assesseees. It, therefore, applies in the case of trustees who receive or are entitled to receive income on behalf or for the benefit of any person. Where income in respect of which the trustees are liable as representative assesseees "is not specifically receivable on behalf or for the benefit of any one person, or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown" tax shall be charged as if that income were the total income of an association of persons. Section 164 itself, therefore, sets out what a discretionary trust for the purposes of the Act is. A discretionary trust is a trust whose income is not specifically receivable on behalf or for the benefit of any one person or wherein the individual shares of the beneficiaries are indeterminate or unknown. The rate of tax payable by trustees upon the income of a discretionary trust is that which would be paid upon such income by an association of persons. Where, however, such income or a part thereof is actually received by a beneficiary, tax shall be charged thereon at the rate applicable to the total income of the beneficiary if this benefits the Revenue. Section 166 states that nothing in Sections 160 to 166 shall prevent the direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable or the recovery from such person of the tax payable in respect thereof.

7. Some analogous provisions of the Indian Income Tax Act, 1922, may also be noted. Section 40 stated that where the guardian or trustee of any person being a minor, lunatic or idiot was entitled to receive on behalf of such beneficiary or was in receipt on behalf of such beneficiary of any income, profits or gains chargeable under that Act, tax would be levied upon and recoverable from such guardian or trustee in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age or sound mind and in direct receipt of such income, profits or gains. More relevant are the provisions of Section 41, which read thus:

" Courts of Wards, etc.- (1) In the case of income, profits or gains chargeable under this Act which the Courts of Wards, the Administrator-General, the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees [appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise] (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person], the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee, receiver or manager [or 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:

Provided that where any such income, profits and gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate, but, where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons:

Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part.

(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."

8. We may now revert to the High Court's judgments. The majority judgment laid emphasis upon the word "charge" in the marginal note to Section 164 and upon the word "charged" in the body thereof. The charge created by Section 4 was in accordance with and subject to the provisions of the Act and it was held that, therefore, the charge in the case of the special class of representative assessee created by Section 164 prevailed over the charge created by Section 4. In cases falling under Section 164 one had to look only to its provisions rather than to the provisions of Section 161. The word "receivable" in the context in which it occurred in Section 164 indicated that it was the trust deed that one had to look at and not the actual exercise of discretion by the trustees in the course of the year. Section 166 permitted the direct assessment of the beneficiary when it could possibly be done under the provisions of Sections 160 to 169 in Chapter XV. What was crucial was not Section 166 but Section 164; because if, under Section 164, it was not open to the Revenue to proceed against the

beneficiary, it was not open to the Revenue to treat the income of the trust except as the income of a fictional association of persons. The last portion of Section 164 only gave an option as to rates at which the tax was to be levied. The interest of a beneficiary under a discretionary trust was merely his right to be considered by the trustees. Because of the impossibility to deal with income in such cases the legislature had made the special provision of Section 164. The question was, accordingly, answered by the majority judgment in the negative, that is, in favour of the assessee and against the Revenue.

9. The dissenting judgment noted that tax liability arose on the last date of an accounting year. It was, therefore, permissible to tax a beneficiary under a discretionary trust provided that, upon exercise of the discretion conferred upon the trustees under the trust deed before the last date of the accounting year in which the income was received, they had indicated that a part or the whole thereof was of the beneficial ownership of one or more of the beneficiaries. The money in question, so soon as the discretion was exercised in favour of one or more beneficiaries, was receivable by them in fulfilment of the disposition made by the trust deed and what was merely a right to be considered as a potential recipient of a benefit became a vested right to receive the income or part of it according to the exercise of the discretion by the trustees. The money in question, as soon as the discretion was exercised, was held in trust for the respective beneficiaries and they became entitled to receive the same. In other words, before the accounting year ended and the tax liability arose the beneficiaries were the persons in whom a vested right to receive and control the income arose. There was, therefore, no reason why, on principle, the resulting payment upon the exercise of discretion could not be taxed optionally in the hands of the beneficiaries for they were the persons in actual receipt and control of the income. Section 164 was no more than an enabling section similar to Section 161(1) and nothing more or less could be read therein. In cases covered by Section 161(1) the option could be exercised on the strength of the trust deed itself since the income in such cases was specifically receivable by the trustees on behalf of or for the benefit of a single beneficiary or, where there were more beneficiaries than one, the individual shares of the beneficiaries were determinate and known. So far as cases covered by Section 164 were concerned, the exercise of the option became possible only upon the discretionary trustees allocating amongst the beneficiaries the whole or part of the income in the exercise of their discretion during the accounting year for, upon the happening of such event, the income was received by the beneficiaries in fulfilment of the disposition made by the trust deed and such income became chargeable to tax in the hands of the beneficiaries in view of the provisions of Sections 4 and 5 of the Act. As regards the use of the word 'charge' in the marginal note and the body of Section 164 in contradistinction to the use of the expression "levied upon and recovered from" in Section 161, the difference in the choice of language was of no significance. The word 'charged' in Section 164 could only be construed as conveying the meaning "levied and recovered". Section 166 was attracted in cases covered by Section 164 where the beneficiaries had received the income or part thereof pursuant to the exercise of discretion by the trustees of a discretionary trust in the course of the same accounting year. Even assuming that the word 'receivable' in Section 164 had to be interpreted to mean receivable under the trust deed and that it was the trust deed that one had to look at, this interpretation did not come in the way of holding that even a discretionary beneficiary, pursuant to the exercise of discretion in his favour and upon his receiving his share of the income in the course of the accounting year in which it was received by the trustees, was liable to be assessed and taxed in respect thereof. The dissenting

judgment, therefore, answered the question that was posed in the affirmative, that is to say, in favour of the Revenue and against the assessee.

10. The learned Solicitor General appearing for the Revenue submitted that when income was received on behalf of a beneficiary of a trust, the beneficiary could be directly assessed under Section 5. The Act did not intend to levy tax except in relation to the person who received income beneficially. Sections 160 to 166 were enacted to take care of a situation where the recipient of the income was not the person entitled to the beneficial enjoyment thereof and they created the concept of a "representative assessee" as also the fiction that he received the income beneficially. At the same time, it was made clear that the representative assessee's liability did not extend beyond the limit of the direct assessee, implicitly recognising the liability of the direct assessee to be assessed. When the beneficiaries of a trust or their shares therein were indeterminate or unknown, the first part of Section 161 applied for the liability of the trustee of a discretionary trust flowed from Section 161. The second part of Section 161, namely, levy and recovery in like manner and to the same extent, was inherently inapplicable to the situation and it was here that Section 164 made special provision as to the status in which and the rate at which the tax was to be levied and recovered from the trustee. No judgment stated that the income of a trust must only be assessed in the hands of the trustee. What was stated was that where the assessment was made in the hands of the trustee, it could only be made in terms of the provisions of Sections 160 to 166, or the equivalent provisions of Sections 40 and 41 of the 1922 Act. Even where the trustee was taxed it was the beneficial interest which was taxed. There was and could be no dispute that in the case of a specific trust the Revenue could assess and recover the tax from the beneficiary even though the trustee was the first recipient of the income and had legal title thereto. On a parity of reasoning, there was no impediment to taxing the beneficiary of a discretionary trust when he had received the income in the accounting year. Section 161 made the representative assessee subject to the same duties, responsibilities and liabilities as if the income was received by him beneficially. It was necessary to create this fiction because it was never the object or intention of the Act to charge tax upon anybody other than the beneficial owner of the income. Having created the fiction of beneficial receipt, protection was given to the representative assessee by providing that the tax in his hands would be levied upon and recovered from him in the like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. It was implicit in this that the tax could be leviable upon and recoverable from the person represented by the representative assessee.

11. In the submission of Mr Salve, learned counsel for the assessee, Section 161 dealt generally with the taxation of all representative assessees, including trustees, whereas Section 164 was a special provision applicable to discretionary trusts and was a complete code which laid down not only the mode and manner of taxation but also prescribed the basis and extent of the charge of tax. Section 164, therefore, excluded the application of Section 161 wherever it became applicable on account of the existence of the circumstances therein mentioned. The assessment of beneficiaries even where their shares were unknown was unworkable because there could not be a fragmented assessment, partly on the trustees and partly on the beneficiaries. The tax was on the accrual of income upon the person who was in direct control thereof. The point at which the income was levied was when the income accrued to the trustees. The distribution of income did not clothe the sum received by the beneficiary with the character of income which could be taxed once again on its receipt. The



argument that there were two limbs to Section 161 was misconceived because the trustees were liable to tax as owners and a beneficial interest in the income was not a condition essential to make the income taxable. Any person in effectual control of income could be taxed thereon, the subsequent deployment being irrelevant. It was conceivable that in certain circumstances, e.g., in the case of a specific trust in which a specific beneficiary was in direct receipt or control of specified income, the beneficiary could be directly assessed on general principles. Section 166 only clarified that if, generally, in law a beneficiary could be assessed to tax then the provisions of Sections 160 to 165 would not by implication bar direct assessment.

12. There are three judgments of this Court which have a bearing on these appeals. In *C.R. Nagappa v. CIT* the assessee had executed several trust deeds settling specific properties for the benefit of his minor children. Under each deed he had settled certain properties for the benefit of a named minor child and had vested the properties in four trustees, namely, himself, his two wives and a married daughter. Under each of the trust deeds a portion of the income was to be utilised immediately for the benefit of the beneficiary and the balance was to be accumulated and handed over to the beneficiary upon a stated date. It was contended on behalf of the appellant that the Income Tax Officer was bound to assess the income under each trust deed separately in the hands of the trustees as representative assessee and, by reason of Section 161(2), was incompetent to assess the income in the hands of either the appellant or the beneficiaries. This Court held that it was implicit in the terms of Section 161(1) that the Income Tax Officer could assess a representative assessee as regards the income in respect of which he was a representative assessee, but he was not bound to do so. He could assess either the representative assessee or the person represented by him, 1 (1969) 73 ITR 626: AIR 1969 SC 888 : (1969) 1 SCR 979 and this was expressly so enacted in Section 166. The Income Tax Officer could assess the person represented in respect of the income of the trust property and the appropriate provisions of the Act relating to the computation of his total income and the manner in which the income was to be computed would apply to such assessment. The Income Tax Officer could also assess the representative assessee in respect of that income and limited to that extent and tax could be levied and recovered from the representative assessee to the same extent as it was leviable upon and recoverable from the person represented by him. The contention raised by the appellant's counsel that since the trustees were assessable in respect of the income of the beneficiaries under Section 161(1), that income could not by virtue of Section 161(2) be assessed in the hands of the beneficiaries was contrary to the plain terms of Section

166. Section 161(2) did not purport to deny the Income Tax Officer the option of assessing the income in the hands of the person represented by the representative assessee. It merely enacted that when a representative assessee was assessed to tax in the exercise of the option of the Revenue, he could be assessed only under the provisions of Chapter XV and under no other provisions of the Act. It was pointed out that Section 161(2) had been enacted to remove the conflict of judicial opinion which had arisen in regard to the interpretation of the analogous provisions of Sections 40 and 41 of the 1922 Act. The observations of Chagla, C.J., of the Bombay High Court in the case of *CIT v. Balwantrao Jethalal Vaidya*<sup>2</sup> which dealt with the scheme of Section 41 of the 1922 Act, were approved. They read:

"... it is clear that every case of an assessment against a trustee must fall under Section 41, and it is equally clear that, even though a trustee is being assessed, the assessment must proceed in the manner laid down in Chapter III.... Section 41 only comes into play after the income has been computed in accordance with Chapter 111. Then the question of payment of tax arises and it is at that stage that Section 41 issues a mandate to the Taxing Department that, when they are dealing with the income of a trustee, they must levy the tax and recover it in the manner laid down in Section 41."

The same considerations applied to the interpretation of Section 161(2). It merely enacted that when income was assessed in the hands of a representative assessee in his own name the assessment would be deemed to be made upon him in the representative capacity only and tax could be levied and recovered in the manner provided in Section 161(1).

13. In *Jyotendrasinhji v. S.I. Tripathi*<sup>3</sup> a Bench of two learned Judges of this Court founded their judgment principally upon *Nagappa case*<sup>4</sup> and concluded that by virtue of Section 166 the Revenue had an option in the case of the income of a discretionary trust either to make an assessment upon the trustees or to make an assessment upon the beneficiaries.

2 (1958) 34 ITR 187 (Bom) 3 1993 Supp (3) SCC 389 : (1993) 201 ITR 611

14. In *CWT v. Trustees of H.E.H. Nizam's Family (Remainder Wealth) Trust*<sup>4</sup> this Court was dealing with provisions of the Wealth Tax Act, 1957, analogous to Sections 160 to 166 of the Act and Sections 40 and 41 of the 1922 Act. Section 21 (1) of the Wealth Tax Act stated that in the case of assets chargeable to tax thereunder which were held, inter alia, by a trustee appointed under a trust deed, wealth tax "shall be leviable upon and recoverable from the trustee ... in the like manner and to the same extent as it would be leviable upon and recoverable from the person on whose behalf the assets are held..... Sub-section (2) stated that nothing contained in sub-section (1) would prevent either the direct assessment of the person on whose behalf the assets were held or recovery from him of the tax payable in respect thereof. This was a case in which the late Nizam of Hyderabad had created several trusts. For the purposes of the judgment it was sufficient that the provisions of what was called "the family trust" were referred to. By the trust deed the Nizam had transferred a corpus of rupees nine crores to the trustees to be nationally divided into 175 equal units, of which 166 1/2 units were allotted to the relations mentioned in the second schedule to the trust deed in the manner specified therein, the number of units allocated to each relation being mentioned there. The Wealth Tax Officer assessed only the value of 13 units in the hands of the trustees and the value of the other units in the hands of the representative beneficiaries. The matter reached the High Court upon a reference by the Income Tax Appellate Tribunal and thereafter this Court. The question that was considered was whether assessment could be made on the trustees under Section 3 apart from and without reference to Section 21. The answer was seen to depend upon the true meaning and effect of Sections 3 and 21 and the interrelation between them. Section 3 was the charging section and it levied the charge of wealth tax on the net wealth of the assessee on the relevant valuation date. Net wealth was defined in Section 2(m) to mean-

"....the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date."

It was clear from this definition that any property, wherever located, "belonging to" the assessee on the relevant valuation date would be includable in the net wealth of the assessee assessable to wealth tax. An argument was advanced on behalf of the trustees that assets held by a trustee in the trust for others could not be said to be assets "belonging to" the trustee so as to be included in his net wealth. The assets so held were not the trustee's property in any real sense. They were the property of the beneficiaries and the beneficiaries were the true owners. The trustee could not, therefore, be assessed to wealth tax in respect of the trust properties 4 (1977) 3 SCC 362 1977 SCC (Tax) 457 : (1977) 108 ITR 555 under Section 3. It was for this reason, went the argument, that special provision had to be made in Section 21 for assessing the trustee and hence assessment on the trustee could only be made in accordance with such special provision. Prima facie, this Court observed, there seemed to be force in the argument but it was not thought necessary to express any final opinion since there was an alternative argument advanced on behalf of the assessee which left no room for doubt. For this purpose it was assumed that the trustee of a trust could be assessable in respect of the trust properties under Section 3 even in the absence of Section 21. But Section 3 imposed the charge of wealth tax subject to the other provisions of the Act and these other provisions included Section 21. Section 3 was, therefore, made expressly subject to Section 21 and had to yield to that section insofar as the latter made special provision for the assessment of a trustee of a trust. Section 21 was mandatory in its terms. It was clear on a combined reading of Sections 3 and 21 that whenever assessment was made on a trustee, it had to be made in accordance with the provisions of Section 21. Every case of assessment on a trustee would necessarily fall under Section 21 and he could not be assessed apart from and without reference to that section. To take a contrary view, giving option to the Revenue to assess the trustee under Section 3 without following the provisions of Section 21, would be to refuse to give effect to the words "subject to the other provisions of this Act in Section 3", to ignore the maxim "generalalia specialibus non derogant" and to deny mandatory force and effect to the provisions of Section 21. The court noted that in Nagappa case<sup>1</sup> the observations of Chagla, C.J., quoted above had been approved and the court went on to state that the same consideration must apply in the interpretation of Section 161(2). It had, therefore, to be held uncontroversial that whenever a trustee was sought to be assessed that assessment had to be made in accordance with Section 21. It had also to be noted that the assessment which was to be made on a trustee under Section 21 was an assessment in a representative capacity. It was really the beneficiaries who were sought to be assessed in respect of their interest in the trust properties through the trustees. Section 21 provided that in respect of the trust properties held by a trustee wealth tax could be levied upon him in the like manner and to the same extent as it would be leviable on the beneficiary for whose benefit the trust properties were held. This provision could apply only where the trust properties were held by the trustee for the benefit of a single beneficiary or, where there were more beneficiaries than one, the individual shares of the beneficiaries in the trust properties were determinate and known. Where such was the case wealth tax could be levied on the trustee in respect of the interest of any particular beneficiary under the trust properties in the

same manner and to the same extent as it would be leviable upon the beneficiary and in respect of such interest in the trust properties the trustee would be assessed in a representative capacity as representing the beneficiary. This did not mean that the Revenue could not make a direct assessment on the beneficiary in respect of the interest in the trust property which belonged to him. The beneficiary would always be assessable in respect of his interest in the trust properties since such interest belonged to him and the right of the Revenue to make direct assessment on him in respect of such interest stood unimpaired by the provisions enabling assessment to be made on the trustee in a representative capacity. Subsection (2) made this clear. What was important to note was that in either case what was taxed was the interest of the beneficiary in the trust properties. Where the beneficiaries were more than one and their shares were indeterminate or unknown the trustee would be assessable in respect of their total interest in the trust properties. Obviously in such a case it was not possible to make direct assessment on the beneficiaries in respect of their interest in the trust properties because their shares were indeterminate or unknown and that is why it was provided that the assessment could be made on the trustee as if the beneficiaries for whose benefit the trust properties were held were an individual. The beneficial interest was treated as if it belonged to one individual beneficiary and assessment was made on the trustee in the same manner and to the same extent as it would be made on such fictional beneficiary. In this case too it was the beneficial interest which was assessed to wealth tax in the hands of the trustee.

15. It may be added that this Court in the case of *CWT v. Kripashankar Dayashanker Worah*<sup>5</sup> has held that Section 21(1) of the Wealth Tax Act, 1957, was analogous to Section 41 (1) of the 1922 Act, the only difference being that whereas the former dealt with assets the latter dealt with income and, subject to this difference, the two provisions were identically worded. Hence, the decisions rendered under Section 41(1) of the 1922 Act had a bearing upon the interpretation of Section 21 (1) of the Wealth Tax Act.

16. Mr Salve drew our attention to the judgment of this Court in *CWT v. Arvind Narottam*<sup>6</sup> where the trust deed provided for payment to the beneficiary of a minimum sum and left it to the discretion of the trustees whether or not any further distribution of income should be made. There were similar provisions in relation to the corpus of the trust. The court held that only the minimum guaranteed income could be said to be the property of the beneficiary. On the distribution of the accumulated balance at the end of the stipulated period, there was no right in the beneficiary to receive any part thereof; it was open to the trustees to ignore him altogether and they could pay it to such other members of the family as they chose. It was, therefore, held that it was only the capitalised value of the interest of the assessee that had to be included in his net wealth.

17. Both sides cited some English decisions but we do not think it profitable to refer to them for what we are really concerned with is the interpretation of the language employed in the relevant provisions of the Act.

18. As the judgments of this Court referred to above lay down, a representative assessee may be assessed in respect of income received by him as such and tax recovered from him thereon only under and in the 5 (1971) 2 SCC 570: (1971) 81 ITR 763 6 (1988) 4 SCC 11 3 : 1988 SCC (Tax) 477 manner provided by the provisions in the statute dealing with representative assessees. A trustee

may, therefore, be assessed in respect of the income of the trust and tax recovered from him thereon only under and in the manner provided by Sections 160 to 166 of the Act. The question then is : Is the trustee of a discretionary trust liable to be taxed in respect of the income of the trust and tax recovered from him thereon by reason of the provisions of Section 164 alone or has Section 164 to be read with the other provisions dealing with representative assessee, viz., Sections 160 to 163 and 165 and 166? In other words, is, as Mr Salve contended, Section 164 a code in itself dealing with all matters relating to a discretionary trust?

19.To begin with, the trustee even of a discretionary trust is, by reason of the terms of Section 160, a representative assessee. Section 161 (1) sets out the liability of a representative assessee. Its first part makes him subject, as regards the income in respect of which he is a representative assessee, to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and he is made liable to assessment in his own name in respect thereof. The second part affords protection to the representative assessee; it states that such assessment shall be deemed to be made upon him only in his representative capacity and also that tax may be levied upon and recovered from him only in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. Section 161(2) gives the representative assessee a further measure of protection by making it explicit that "he shall not in respect of that income be assessed under any other provisions of this Act". This is of significance for "any other provisions of this Act" must plainly mean any provision of the Act other than Section 161.

20.Section 164 states that where any income in respect of which a trustee is liable as representative assessee is not specifically receivable on behalf or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or part thereof is receivable are indeterminate or unknown, tax shall be charged as if such income were the total income of an association of persons or where such income or part thereof is actually received by a beneficiary, then at the rate applicable to the total income of the beneficiary if such course benefits the Revenue. Put differently, Section 164 states that tax shall be levied upon the income of a discretionary trust as if it were the total income of an association of persons, except that if it or part of it is actually received by a beneficiary it or that part of it becomes chargeable to tax at the rate applicable to the total income of the beneficiary if that course is beneficial to the Revenue. Section 164 does not create a charge on the income of a discretionary trust. The word " charged" in the context in which it is used in Section 164 means only "levied". Section 164 does not make the trustee of a discretionary trust liable to assessment or the recovery of tax on the income of the trust. Section 164 harks back to Section 161 when it refers to "persons... liable as representative assessee". It is Section 161, therefore, which has to be read to make the trustee even of a discretionary trust liable to assessment and recovery of tax on income received by him as a trustee. Further, Section 161, as pointed out above, protects the representative assessee by stating that assessment upon him shall be deemed to be only in his representative capacity, by mandating that tax can be levied upon and recovered from him only in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him and by stating that he may not be assessed under any other provisions of the Act. Section 164 does not give any of these protections, as, clearly, they must be given to all representative assessee.

21.The liability of a trustee of a discretionary trust to be assessed to tax in respect of its income and to recovery thereof is created by Section 161 and it also states that he is not liable to such assessment under any other provisions of the Act. Section 164 set out only how such tax shall be charged when the income is not distributed and when the income is distributed.

22.It does appear, therefore, that Section 164 cannot be read as being a code in itself applicable to the taxation of the income of a discretionary trust. Consequently, it cannot be held that the beneficiary of a discretionary trust, even he has received its income in the accounting year, cannot be taxed thereon because Section 164 does not provide for such contingency. The principle contention raised by Mr Salve on behalf of the assessee must, accordingly, be rejected.

23.Why, then, should the beneficiary of a discretionary trust stand on a footing different from that of the beneficiary of a specific trust? It is true that the language of Section 166 does not avail the Revenue because it states that Sections 160 to 165 do not prevent "either the direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable, or the recovery from such person of the tax payable in respect of such income". The section is clearly clarificatory. It does not empower any assessment or recovery by itself. It only makes it clear that Sections 160 to 165 do not bar the direct assessment of the person on whose behalf or for whose benefit the income is receivable or the recovery from such person of the tax payable thereon, provided that is permissible under any other provisions of the Act. Even so, since the word used in Section 166 is "receivable" it cannot apply to a discretionary trust for it cannot be said that the income thereon is "receivable" for one or more beneficiaries, it being left to the discretion of the trustees whether or not the income should be distributed to one or more of the beneficiaries or not at all. But that is not to say that the beneficiary of a discretionary trust, because he does not fall within the ambit of Section 166, may not be assessed upon income received by him and tax recovered from him thereon if that is permissible under any other provisions of the Act for, as aforesaid, Section 166 is merely clarificatory. Section 5 of the Act defines the total income of any person to include income received by him or received on his behalf or which accrues or arises to him. A person may be directly assessed in respect of such income. The income of a discretionary trust which is within the accounting year distributed to and received by the beneficiary would, therefore, be subject to assessment in his hands and tax thereon would be recoverable from him. Such income would squarely fall within the broad sweep of total income under Section 5 and the beneficiary would be liable to assessment and recovery of tax thereon under Section 4.

24.In Nagappa case' this was clearly stated. It was said that it was implicit in the terms of Section 161(1) that the Income Tax Officer could assess a representative assessee as regards the income in respect of which he was a representative assessee, but he was not bound to do so. He could assess the representative assessee or the person represented by him. It must also be remembered, as was said in the case of the Nizam's Family Trust<sup>4</sup>, that when a trustee is assessed to tax upon the income of the trust it is "really the beneficiaries who are sought to be assessed in respect of their interest in the trust properties through the trustee". In the absence of an express provision it is difficult to hold that the beneficiaries of a discretionary trust are not liable to be assessed in respect of their interest in the trust properties even when such interest is identified in the accounting year and that the trustees who represent them alone are so liable so that tax can be recovered only from them.

25. We hold, accordingly, that the Revenue has the option to assess and recover tax from either the trustees or the beneficiaries of a discretionary trust in respect of such income thereof as has been distributed and received by the beneficiaries in the course of the accounting year.

26. The appeals are allowed. The judgment (of the majority) under appeal is set aside. The references are answered in the manner aforesaid.

27. There shall be no order as to costs.