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determining whether appeals should be allowed to be brought by the Crown in such cases.

Special leave to appeal rescinded. Appellant to pay costs.

Solicitor, for appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for respondents, *James & Darbyshire*, Perth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONERS OF TAXATION (NEW SOUTH WALES) . . } APPELLANTS;

AND

MEEKS (PUBLIC OFFICER OF THE SULPHIDE CORPORATION LIMITED) . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 23, 26, 29.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Income Tax—Company—Taxable income—Profits—Source of income—Business carried on partly in New South Wales—Contract made abroad for sale of goods to be manufactured and delivered in New South Wales—Money paid in advance under contract—Cancellation of contract—Money retained by company—Income Tax (Management) Act 1912 (*N.S.W.*) (*No.* 11 *of* 1912), *secs.* 4, 10, 19 (2)*—*Income Tax Management (Amendment) Act* 1914 (*N.S.W.*) (*No.* 9 *of* 1914), *sec.* 3*.

* By sec. 4 of the *Income Tax (Management) Act* 1912 "income" is defined as meaning "income derived from any source in the State, and shall be deemed to exclude the incomes, revenues, and profits exempted from the operation of this Act by sec. 10"; "income derived from personal exertion" is defined as meaning "income consisting of the proceeds of any business, earnings, salaries, wages, fees, bonuses, pensions, or payments made upon superannuation or retirement from employment"; and "income derived from property" is defined as meaning "income derived from any source in the State other than from personal exertion." By sec. 10, as

A company incorporated in England, and having its registered office in London, conducted its Australian business at Melbourne in Victoria, and its practical operations of mining and treating and smelting ore at Broken Hill and Cockle Creek in New South Wales. By a contract made in London the company agreed to sell to purchasers a large quantity of concentrates produced from Broken Hill slimes, delivery of which was to be made at Broken Hill in instalments extending over a period of years. Pursuant to the contract the purchasers paid a sum of £63,000 in advance, but before any concentrates were delivered they made default in further payments which had become due. An agreement was then made in London by which the original contract was cancelled as from the date of the cancelling agreement, and the company were to be entitled to retain for their use all moneys which had been paid under the contract. No concentrates or slimes were ever appropriated, set apart, or treated by the company for the purchasers. Of the £63,000, the balance held by the company, after deduction of commission and brokerage, was £61,425.

Held, that for the purposes of the *Income Tax (Management) Act* 1912 (N.S.W.) and the *Income Tax Management (Amendment) Act* 1914 (N.S.W.), the £61,425 should be treated as profits from the business of mining and treating and smelting ore which was carried on by the company mainly, if not altogether, in New South Wales, and therefore that it should be brought into account in ascertaining the income of the company taxable under those Acts, subject, however, to the right of the company to show that portion of it was not attributable to the business which was carried on in New South Wales.

Decision of the Supreme Court of New South Wales: *In re Meeks*, 15 S R. (N.S.W.), 107, reversed.

APPEAL from the Supreme Court of New South Wales.

On an appeal by Alfred William Meeks, as Public Officer of the Sulphide Corporation Ltd., to the Court of Review from an assessment by the Commissioners of Taxation of the taxable income of the company for the year 1913, that Court stated a special case for the opinion of the Supreme Court, which was substantially as follows:—

"1. On 18th May 1914 the respondents," the Commissioners of Taxation, "served upon the appellant," Alfred Willliam Meeks,

amended by sec. 3 of the *Income Tax Management (Amendment) Act* 1914, it is provided that nothing in the Act is to apply to "(*g*) income derived from sources outside the State." Sec. 19 (2) provides that in the case of a taxpayer, other than certain insurance companies and certain owners or charterers of ships, "carrying on business both in and outside of the State his taxable income shall be deemed to be a sum which shall bear the same proportion to the net profits of such business as the assets of the business in the State bear to the total assets of the business: Provided that in any case under this sub-section the Commissioners may assess the actual income, and shall do so if required by the taxpayer."

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"who is the registered Public Officer of the Sulphide Corporation Ltd. (hereinafter called 'the appellant company') an assessment notice, assessing the amount of taxable income of the company derived from personal exertion, based on the income for the year 1913, as £345,433, and assessing the amount of tax payable by the appellant as such Public Officer as aforesaid at £17,271 13s.

"2. The said appellant duly and in accordance with the provisions of the *Income Tax (Management) Act* 1912 paid the amount of the tax as so assessed, and lodged and served on the respondents a notice of appeal to the Court of Review, whereby he claimed that the amount of the appellant company's taxable income was 284,008 only, and that the balance, the sum of £61,425, was not income of the appellant company in respect whereof the appellant company was liable to income tax on the grounds that the said sum of £61,425 was not income within the meaning of the Income Tax Management Acts 1912-1914, and was therefore not subject to income tax.

"3. The said appeal came on to be heard before me sitting as the Court of Review on 17th December 1914, in the presence of counsel for the appellant and the respondents.

"4. At the hearing the facts set forth in pars. 5 to 17 inclusive hereof were admitted as between the parties.

"5. The appellant company is a company duly incorporated in England, and its registered office is situate in London.

"6. The agents for the appellant company in Australia are the firm of Messrs. Gibbs, Bright & Co. (of which firm the appellant Meeks is a member), and the Australian business of the appellant company is conducted at the house of business of the said firm situate at Melbourne, in the State of Victoria, in which city the general manager of the appellant company also resides and has his place of business.

"7. The practical operations of the appellant company in mining, treating and smelting ore are carried on at Broken Hill and Cockle Creek in the State of New South Wales.

"8. On 7th May 1912 the appellant company, through its agents Messrs. Gibbs, Bright & Co., entered in London into an

agreement in writing with one Knut Tillberg and the Hydraulic Power and Smelting Co. Ltd.

"9. On or before 7th June 1912 the buyers paid to the appellant company in London the sum of £47,250, in accordance with the terms of clause 4 (*a*) of the said agreement; and in January and February of the year 1913 the buyers paid to the appellant company a further sum of £15,750, in accordance with the terms of clause 4 (*b*) of the said agreement.

"10. The Hydraulic Power and Smelting Co. Ltd. made default in payment of the instalments payable under the said contract to the appellant company in March, April, and May 1913 respectively.

"11. The following correspondence (which was conducted in London) thereafter passed between the appellant company and the Hydraulic Power and Smelting Co. Ltd.:—

"From the Secretary of the Sulphide Corporation Ltd. to the Secretary of the Hydraulic Power and Smelting Co. Ltd.: 'Dear Sir,—I am instructed by my directors to call your attention to the fact that the instalments due to my company, under our contract of 7th May 1912, for the purchase of slime concentrates, have not been paid for the months of March, April, and May, and I have therefore to request that you will, without further delay, send me your cheque for £23,625, and at the same time inform me when you will be in a position to take delivery of the concentrates, of which, under the contract, you should have taken delivery in January last and succeeding months. My Board meet on Thursday next at 2.45, and I should be obliged if your reply to this letter could reach me before then.'—Dated 17th June 1913.

"From the Secretary of the Hydraulic Power and Smelting Co. Ltd. to the Secretary of the Sulphide Corporation Ltd.: 'Dear Sir,—In reply to your letter of the 17th instant, I am instructed by the committee of directors appointed in the matter to ascertain whether you would be prepared to cancel the contract for the delivery of slime concentrates dated 7th May 1912, and to relieve the Company and Mr. Knut Tillberg of all liability in connection therewith, in consideration of the sum of £63,000,

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which has been paid to your company in the terms of clause 4 of the contract referred to.'—Dated 18th June 1913.

"From the Secretary of the Sulphide Corporation Ltd. to the Secretary of the Hydraulic Power and Smelting Co. Ltd.: 'Dear Sir,—I am in receipt of your letter of the 18th instant, and in reply have to inform you that my company is not prepared to consider the question asked by you, as to cancellation of the contract, until your company puts forward the proposal in a definite form. I should be glad therefore to know for the information of my directors at their meeting this afternoon:—(1) Whether your company now asks us definitely to cancel the contract on the terms you state. (2) Whether your company will undertake to obtain Mr. Tillberg's concurrence in their request within one month from this date. In the event of your answering these questions in the affirmative, my Board agrees to take no further steps to enforce their contract pending their receipt from you of Mr. Tillberg's concurrence, when they will definitely reply to your proposal. Otherwise they must reserve to themselves full liberty of action.'—Dated 19th June 1913.

"From the Secretary of the Hydraulic Power and Smelting Co. Ltd. to the Secretary of the Sulphide Corporation Ltd.: 'Dear Sir,—In reply to your letter of even date, we beg to state definitely that we wish to cancel the contract for delivery of slimes concentrates, dated 7th May 1912, on the terms mentioned in our letter of yesterday's date. In this connection, we agree to undertake to obtain within one month from this date Mr. Tillberg's written concurrence in the Company's request for cancellation of the contract.'—Dated 19th June 1913.

"12. As the result of such correspondence, the parties to the said agreement of 7th May 1912 entered in London into an agreement" dated the 24th September 1913.

"13. The moneys which by the last-mentioned agreement were to be retained by the appellant company are the moneys referred to in paragraph 9 hereof, and the balance thereof, after deducting commission and brokerage, is the money in respect of which the respondents claim to assess the appellant company, and in respect of which the appellant appealed to the Court of Review as aforesaid.

"14. No slimes were ever appropriated, set apart, or treated by the appellant company for the buyers under the said contract in the first schedule hereto set forth, nor were any concentrates ever set apart, appropriated, or delivered to the said buyers, nor did the said buyers ever require the appellant company to appropriate or deliver to them any of the slimes concentrates contracted to be purchased by them as aforesaid.

"15. None of the moneys mentioned in pars. 9 and 13 hereof were ever received by or forwarded to any agent or officer or place of business or operations of the appellant company in New South Wales or in any other way received by the appellant company in New South Wales.

"16. In the report and balance sheet of the appellant company for the year 1st July 1912 to 30th June 1913, the said moneys appear as an item on the credit side of the profit and loss account for the said year.

"17. In the said report the said item is thus referred to:— 'The contract made with the Hydraulic Power and Smelting Co. Ltd. for the sale of slimes concentrates has been cancelled in consideration of a sum of £63,000 paid to us by the buyers, and modifications are now being made in the slime plant with a view to the production from our dump slimes of both lead and zinc concentrates by an improved method of flotation, which has been thoroughly tested during the last few months and gives very satisfactory results. It is hoped that this plant will commence work in January.'

"18. On these facts I decided that the said sum of £61,425 was taxable income of the appellant company within the meaning of the Income Tax (Management) Acts 1912-1914, and dismissed the appellant's appeal.

"The question for the determination of the Court is whether the said sum of £61,425 is taxable income of the appellant company within the meaning of the *Income Tax (Management) Act* 1912 and the *Income Tax Management (Amendment) Act* 1914."

The material provisions of the agreement of 7th May 1912, in which the Sulphide Corporation Ltd. are referred to as "the

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sellers," and Knut Tillberg and the Hydraulic Power and Smelting Co. Ltd. are referred to as "the buyers," were as follows:—

"1. The sellers agree to sell and the buyers to purchase 30,000 tons per annum of Broken Hill slimes concentrates produced from Broken Hill slimes for a period of four years from 1st January 1913.

"2. The average grade of the concentrates shall be not less than 20 ounces silver, 20 per cent. lead, and 30 per cent. zinc per ton.

"3. Subject to clause 9 hereof, delivery of the said concentrates shall be made at the times and in the manner following:—

"(*a*) Delivery of the first 30,000 tons of concentrates shall be taken by the buyers between 1st January and 30th June 1913, in parcels not exceeding 5,000 tons each month: Provided always that in the event of the buyers desiring to take delivery at any time during 1912 and of such desire shall give to the sellers at their registered office in London not less than six weeks' previous notice in writing, then the sellers shall make delivery to the buyers accordingly, but in that case it is agreed that production and delivery must be continuous from the date of commencement for six months then next ensuing.

"(*b*) Delivery of the second 30,000 tons of concentrates shall be taken by the buyers during the period 1st January to 30th June 1914.

"(*c*) Delivery of the third parcel of 30,000 tons of concentrates shall be taken by the buyers during the period 1st January to 30th June 1915.

"(*d*) Delivery of the fourth parcel of 30,000 tons of concentrates shall be taken by the buyers during the period 1st January to 30th June 1916: Provided that deliveries of concentrates under this agreement shall be limited to 120,000 tons, and there shall be no obligation on either sellers or buyers to sell or buy an additional quantity.

"4. (*a*) The buyers shall pay to the sellers on or before the 7th June 1912 the sum of 17s. 6d. per ton on 54,000 tons of slimes, being part payment of the purchase

price in accordance with clause 6 hereof for the first 30,000 tons of concentrates above-mentioned, and the balance of the said purchase price shall be paid in accordance with clauses 6 and 7 hereof upon taking delivery of each parcel of concentrates in the period 1st January to 30th June 1913, or in such earlier period as the buyers may elect to take deliveries in accordance with clause 3 (*a*) hereof.

"(*b*) The buyers shall similarly pay on account for the second, third, and fourth parcels of 30,000 tons of concentrates respectively above mentioned by monthly payments in the periods January to June 1913, 1914 and 1915 respectively, at the rate of 17s. 6d. per ton on 9,000 tons of slimes each month of the period, and the balance of the purchase price shall be paid in accordance with clauses 6 and 7 hereof upon taking delivery of each parcel of concentrates at the time provided in this agreement.

"5. Upon each payment at the rate of 17s. 6d. per ton of slimes as aforesaid the sellers shall give to the buyers a certificate that they hold the quantity of slimes to which that payment related at the buyers' order subject to payment on delivery of concentrates produced therefrom of the balance due to the sellers

. . . .

"7. Deliveries shall be made to the buyers in bags on trucks at Broken Hill, and payments shall be made by them in cash in Melbourne at the end of each month for the balance due in respect of the quantity delivered during the month, to the extent of 95 per cent. of the *pro formâ* invoices rendered by the sellers, based on the sellers' assays and based on the average metal values of the month. Adjustments as to assays of *pro formâ* invoices will be made at the close of the month succeeding that of the month of delivery, or in case of reference, as soon as the result of such reference is ascertained."

The material portion of the agreement of 24th September 1913, in which the agreement of 7th May 1912 is referred to as the "principal agreement," was as follows:—

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"Whereas the parties hereto have agreed to cancel the principal agreement and all subsequent agreements (if any) on the footing that as from the date hereof the same shall be at an end, and all moneys paid to the said Sulphide Corporation Ltd. thereunder shall be retained by it Now it is hereby agreed as follows:—The principal agreement and all subsequent agreements (if any) subsisting between the parties hereto are hereby cancelled from the date hereof, and the said Sulphide Corporation Ltd. shall be entitled to retain for its own use all moneys paid thereunder, and none of the parties shall have any claim against the other or others in respect of anything done, or omitted to be done, under the principal agreement or any subsequent agreement."

The particular sum of £61,425 appeared on the credit side of the balance sheet of the company under this heading:—"By amount received from the Hydraulic Power and Smelting Co. Ltd. under contract for slimes concentrates, since cancelled—less commission and brokerage."

The Full Court by a majority (*Gordon* and *Ferguson* JJ., *Pring* J. dissenting) answered the question in the negative: *In re Meeks* (1).

From that decision the Commissioners now appealed to the High Court.

Brissenden, for the appellants.

Langer Owen K.C. and *Clive Teece*, for the respondent.

During argument reference was made to *Commissioners of Taxation* v. *Kirk* (2); *San Paulo (Brazilian) Railway Co.* v. *Carter* (3); *Commissioners of Taxation* v. *Armstrong* (4).

Cur. adv. vult.

(1) 15 S.R. (N.S.W.), 107.
(2) (1900) A.C., 588.
(3) (1896) A.C., 31.
(4) 1 S.R. (N.S.W.), 48.

The following judgments were read:—

GRIFFITH C.J. The Sulphide Corporation is a joint stock company registered in England, which carries on its practical operations, consisting of mining and treating and smelting ore, at Broken Hill and at Cockle Creek, both places being in New South Wales. The magnitude of their undertaking may be inferred from the facts appearing in the case. The Corporation also, of course, disposes of the products of those operations. On 7th May 1912 the Corporation through its London agents entered into a contract in writing with one Tillberg and the Hydraulic Power and Smelting Co. Ltd. for the sale to them of 120,000 tons of Broken Hill slimes concentrates. Delivery was to be made to the purchasers in bags on trucks at Broken Hill, and was to be taken by them in instalments, the delivery of the first 30,000 tons being taken by them between 1st January and 30th June 1913 in parcels not exceeding 5,000 tons per month. The purchasers were to make large payments in advance on account of the price, a certificate being given by the sellers upon each payment that they held the slimes to which the payment related to the buyers' order subject to payment of the balance on delivery of the concentrates produced therefrom. The first payment was to be made on or before 7th June 1912, and others from time to time as stipulated.

Between the date of the contract and the end of February 1913 the purchasers made payments in advance to the extent of £63,000, but they did not take delivery of any of the concentrates, and none were in fact ever delivered under the contract. All the payments were made outside of New South Wales. Default having been made in further payments, negotiations between the parties were carried on in London, which resulted in a written agreement, signed there on 24th September 1914, and described as supplemental to the contract of 7th May 1912, itself described as "the principal agreement," in the following terms:—"The principal agreement and all subsequent agreements (if any) subsisting between the parties hereto are hereby cancelled from the date hereof, and the said Sulphide Corporation Ltd. shall be entitled to retain for its own use all moneys paid thereunder, and none of the parties shall have any claim against the

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other or others in respect of anything done, or omitted to be done, under the principal agreement or any subsequent agreement."

A sum of £61,425, representing the £63,000 already mentioned less commission and brokerage, apparently incurred in England, was entered as an item on the credit side of the balance sheet of the Corporation for the year 1st July 1912 to 30th June 1913, forming part of total credits amounting to over £350,000, of which a sum of £285,600 represented the balance of profits on working account, and the appellants claim that this sum of £61,425 is taxable income within the meaning of the New South Wales Income Tax Acts. The respondent contends that it is not, and the Supreme Court by majority have so held. The question formally submitted for decision is whether that sum is taxable income, which I understand to mean whether the sum of £63,000 is to be brought into account as income subject to permitted deductions.

By the *Income Tax (Management) Act* 1912 the term "income" means, "income derived from any source in the State." It is not disputed that the sum of £63,000 is income. The question for determination is whether that sum, received and retained under the circumstances already stated, was income derived from a source in New South Wales, as contended by the appellants, or from a source outside of New South Wales, as contended by the respondent. His contention is that the true source of the income was the agreement of 24th September 1913, which was entered into and wholly performed outside of New South Wales, or, alternatively, the contract of 7th May 1912, which was also entered into and performed, so far as it was performed at all, outside of New South Wales.

Dr. *Brissenden* first contended that the money when paid was paid as the price of goods to be delivered, and that upon receipt of it by the vendors it became irrevocably fixed with the character of income earned in New South Wales, subject of course to such deductions as are permitted in respect of the cost of earning it.

I cannot accept this view. In my opinion the Income Tax Acts do not interfere with the rights of parties to such an agreement to rescind it by mutual consent even after payment

of the price. If an agreement is *bonâ fide* rescinded and the parties are relegated to their original position, there is in fact nothing that can any longer be regarded for the purpose of the taxation of income as a receipt of money. But this does not dispose of the matter. The sum in question was, beyond all doubt, received in the first instance under and by reason of the contract of 7th May 1912. That contract was one made by the Corporation for the purpose of and in the course of its business of smelting ores and selling the product, which business was, except as regards the selling, carried on in New South Wales.

The Act uses the word "source" in connection with income to denote a concept to which locality can be attributed. The first question for determination, therefore, is what was the source from which this income was derived. The next question is what is the locality of that source. Without attempting to give an exhaustive definition, I am of opinion that, when a person or company carries on in the State of New South Wales the business of dealing with natural products for the purpose of preparing them for use, or of extracting from them other products, and then disposing of the ultimate product by way of sale, any income arising from contracts entered into in the ordinary course of that business for disposing of those products, wherever the contracts themselves are made, has its source, in part at least, in the business undertaking. In another sense the source may be said to be the capital embarked in the undertaking, which in this case must be very large. In either view there can be no doubt that the locality of the source is the place where the undertaking is carried on, in this case of New South Wales.

The only question, therefore, remaining to be determined is whether the sum of £63,000 in question is income arising from the contract of 7th May, which was a contract entered into by the Corporation in the ordinary course of its business undertaking in New South Wales.

It was, as already said, received in the first instance under and by reason of that contract, and the Corporation was bound to take it into account accordingly as a business receipt.

In one view the case may be regarded as one of a sum of money received in the course of business in respect of which no

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appreciable expense that can be attributed to earning it was incurred. In that view the whole of it, except the commission and brokerage already deducted, is clear profit. In another view the agreement of 24th September may be regarded as an agreement by which each of the parties exonerated the other from further performance of the obligations of the original contract, and the purchasers under that contract agreed to pay, and the Corporation agreed to accept, as liquidated damages a sum equal to that already paid in respect of the price. I am disposed to think that the latter is the preferable view of the facts.

In my opinion, damages received as compensation for non-performance of a business contract stand on the same footing as the profits for the loss of which the damages are paid. It cannot, therefore, make any difference in principle whether the money is actually earned as profit, ascertained by deducting expenses from receipts, or paid as compensation for the loss of the opportunity of earning that profit, or, in the latter case, whether the amount of compensation is assessed by a jury or by mutual agreement.

In my judgment, therefore, the source from which the income in question was derived was the business undertaking of the Corporation, the operations of which were mainly, if not altogether, carried on in New South Wales. It follows that the sum of £63,000 was derived mainly, if not altogether, from a source in that State, and must be brought into account as income so derived.

If the Corporation can establish a case for apportioning it, by attributing any part of it to a source in England, where the Corporation is registered, or in Victoria, where it conducts some business operations, the Commissioners will no doubt give effect to their representations.

The appeal should therefore be allowed.

ISAACS J. It is not disputed or disputable that the sum of £63,000 in question is income of some kind; but is it taxable under the New South Wales Act of 1912, and, if so, is it taxable in whole or in part? It has been regarded in the special case as either wholly free or wholly liable; that is the question raised by the special case, and, strictly speaking, having regard to sec.

32, it is the only question to be answered. *Kirk's Case* (1) was treated in argument as if it determined the liability of the whole sum to taxation, had the contract of 7th May 1912 been normally fulfilled, and as if the sole problem presenting itself was simply whether the contract of 24th September 1913, though intercepting the normal fulfilment of the earlier contract, yet left the payment with its original character, or whether it essentially changed the source of the right to the £63,000 from an equivalent for concentrates locally derived from New South Wales, to an equivalent for a personal right of compensation not locally situated in New South Wales, but attached to the Sulphide Corporation Ltd. for breach of the earlier contract, this equivalent right coming into existence in London exclusively, where the contract was made, and by reason of that contract alone.

I think this statement puts in their fullest force the rival contentions as they were presented.

Kirk's Case does not decide so much as was assumed, probably from the way in which the headnote is worded.

The only income that is taxed under the Act of 1912 is "income derived from any source in the State." That income is divided by the Act into two classes, viz., "income derived from personal exertion" and "income derived from property." The first "means" (not "includes") income consisting of the proceeds of any business, earnings, salaries, wages, fees, bonuses, pensions, and payments made upon superannuation or retirement from employment. The latter means income derived from any source in the State other than from personal exertion, that is, any other than the sources previously enumerated. It is clear that the only possible relevant head of "personal exertion" is "business," which, besides bearing its own natural meaning, is defined to "include" any profession, trade, employment, or vocation. The division has a double importance, first because it helps to elucidate the present contest, and also because it may in any given case affect the amount of tax. See Schedule to Act No. 24 of 1911. If, for instance, the sum here in question is the produce of "property," higher taxation results than if it be the produce of "business."

(1) (1900) A.C., 588.

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Isaacs J.

It will be convenient at this point to see just what *Kirk's Case* (1) did decide, because so much has been attached to it, and as I think still attaches to it, though from a totally different aspect from that from which it was regarded. The judgment of the Supreme Court in that case had followed *Tindal's Case* (2), which determined that the fact of the company making all its contracts outside New South Wales was the decisive factor excluding the whole of its income from local taxation. That impliedly involved the position that the whole of the income, as it arose eventually from business contracts, was "business" income and nothing else. Now, the question in the special case in *Kirk's Case*, as Lord *Davey* is careful to point out in the opening sentence of the judgment (3), was whether the companies had *any* income in 1897 taxable in New South Wales —and not whether *all* the income arising from their contracts was taxable in the State. His Lordship (4) speaks of the profit of the business being "to some extent taxable income there"; and he says (5) that so far as related to two of the processes the income was certainly earned and arising and accruing in New South Wales—as to the first process, under sub-sec. 3 as derived from lands of the Crown, and as to the second, under sub-sec. 4 as arising "from any other source whatsoever." Then, after referring to *Tindal's Case*, he says (5):—"The question in that case, as here, should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony"—that is, what apportionment should be made attributable to New South Wales. And it is because the Privy Council divide the operations of the company into those operations which are carried on in the State, and those which are not, that the observation is made that the fallacy of the Supreme Court judgment existed in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income (5). Lord *Davey* says (6):—"Their Lordships are, therefore, of opinion that the first question stated in the special case on each of these appeals

(1) (1900) A.C., 588.
(2) 18 N.S.W.L.R., 378.
(3) (1900) A.C., 588, at p. 590.
(4) (1900) A.C., 588, at p. 592.
(5) (1900) A.C., 588, at p. 593.
(6) (1900) A.C., 588, at p. 594.

should have been answered in the affirmative, and that is all they are called upon to say."

If, therefore, the contract of 7th May 1912 had been normally carried out, *Kirk's Case* (1) would have been in point to this extent, that *some* of the £63,000 would certainly have been taxable, and perhaps all. Some of it would have been taxable because, even if the test of "business" failed, the mere fact of the ultimate sale of the product in the way of business did not prevent the operation of the words "income derived from property." But *Kirk's Case* would not have been any warrant for saying that, without apportionment in some way, the whole of the £63,000 was taxable as derived from a source in New South Wales. That is the very point the Privy Council took such abundant care to prevent anyone believing they decided.

The contract of 7th May 1912 was not normally performed. It was partly performed by the purchaser paying £63,000 under clause 4 as part payment of the purchase price for the concentrates represented by 72,000 tons of slimes, and intended to be delivered.

Whether the vendors on their part fulfilled the terms of clause 5 in giving a certificate that they held the 72,000 tons of slimes at the buyers' orders, subject to the stipulated balance payment, we do not know. It is not stated in the case, and, therefore, we are unable to assume it. We are not in a position on the special case to draw any inference of fact whatever. We do not even know whether the obligation to give such a certificate is a usual provision in their contracts.

My reasons for so holding are fully stated in the *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (2).

But it is distinctly stated (par. 14 of the special case) that no slimes or concentrates were ever appropriated, set apart or treated, or delivered to the buyers.

So that we have to accept the position that nothing was done under the contract except the part payment of £63,000. Default having been made in any further payments, written negotiations took place between the Corporation seller and the Company

(1) (1900) A.C., 588. (2) 16 C.L.R., 591, at pp. 621 *et seqq.*

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buyer with a view to the cancellation of the contract. As evidence of circumstances in which the parties were on 24th September 1913, that correspondence may be looked at; but as any guide to the construction of the contract itself of that date, the correspondence must be ignored.

The contract of September is clear, and in the result it amounts to this: the sum of £63,000, having been paid under the contract of May, is not to be disturbed; but that contract is cancelled as from 24th September 1913, and the parties absolve each other from any further or other rights under it. The £63,000, in other words, is to lie where it is; and no claim is to be made, relative either to the past or the future, by either party against the other.

The construction given to the contract by the majority of the Supreme Court was that it treated the sum of £63,000 then resting in the hands of the vendors, as being compensation for breach of contract (*per Gordon* J.), or as the consideration for cancelling the contract (*per Ferguson* J.). It was no more the consideration for cancelling the contract than was any other term of the later agreement; and, stating it in the most favourable way possible for the buyers, it was damages for total breach of contract.

But even so, how does that, even allowing the cancellation agreement was made outside New South Wales, *ipso facto* determine that the source of the income was wholly outside the State?

If, following *Kirk's Case* (1), the Commissioners were relying solely on "property" as the source, I would agree with the contention that the money was not taxable. Although at the moment of payment, and up to the date of cancellation, the payment was contractually as in part payment for concentrates to be delivered, and although any person might have said up to that time the source was the transfer in New South Wales of property produced in New South Wales, yet that was provisional only, because all the vendors so far had given was their promise to deliver. If by subsequent transactions the facts ultimately turned out differently, and the expectation was not fulfilled, the provisional basis disappeared.

(1) (1900) A.C., 588.

The property to be transferred was not specific; it never came into existence, so far as we know; it certainly was never identified or identifiable; in any case it was never parted with to the buyers, and, whatever the property may have been, it is either retained entirely by the vendors, or has been disposed of to others. This claim of the Commissioners cannot, in my opinion, be rested on the fact that the goods intended to be delivered were to be produced and delivered in this State. If a professional singer were to engage in London to sing for a season in Sydney for £10,000, of which £5,000 was at once paid down, and if a week afterwards the contract were cancelled on the terms that the £5,000 so paid should be retained, I cannot see how it could be taxed in New South Wales as the produce of personal exertion in this State. And on this point there is no distinction of principle that I can perceive between that case and the present. Up to that point I agree with the respondent.

But there is another phase which received no attention. It appears from the case, that the Sulphide Corporation Ltd. carries on business, its Australian business being "conducted" in Melbourne—while its "practical operations" are carried out in New South Wales. No direct statement is made as to whether the practical operations referred to in the special case are, or are not, a component part of the same "business" as that "conducted" in Melbourne. If I had to rely on the statement in the special case alone, I should have some difficulty in knowing whether the finding is that those practical operations are part of, or are antecedent to, the business from which the profits arise, and probably I should, as intimated during the argument, feel the necessity of some further statement by the Court of Review. But I understand the parties agree that the case means that those operations are an essential part of the business itself, and not merely collateral operations, however intimately connected with, and necessary as a preliminary condition of, that business. That at once gets over the difficulty which, to my mind, is really at the root of this case, and brings it within the category of such cases as are referred to in *Kirk's Case* (1), where, as the Privy Council said (2), "a business is admittedly carried on in

(1) (1900) A.C., 588.

(2) (1900) A.C., 588, at p. 594.

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this country"—that is, in the taxing country. As to whether the real management and control of the business is situate in London or Melbourne does not appear, and is immaterial, as it is not in New South Wales. Its business is therefore carried on partly within and partly outside of the State. The making of contracts of sale is, in this view, only the final stage of the business transacted, the other stages being equally essential portions of the business itself, and not merely preparatory steps necessary, but collateral, to the entry upon the company's business. It is a necessary assumption of law, unless *ultra vires* is suggested, that all these steps are authorized by the Constitution of the company.

It follows that the contract of May 1912 was a contract made as part of the company's business, covering, at all events partly, New South Wales, upon which profit might be expected. When the opposite party committed a breach, either partial or entire, one of the company's rights in respect of that contract was to obtain damages for the breach. But that, whether ascertained by a jury or by agreement, would only be one way of estimating the interest of the company in that contract, which was one of its business assets, and so placing the company in the same position pecuniarily as if the contract has been performed. In *Wertheim* v. *Chicoutimi Pulp Co.* (1) Lord *Atkinson*, for the Privy Council, said:—"It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed." And just as this may be done by a tribunal, so the parties may do it for themselves—whether they do it by what the House of Lords in the *Clydebank Case* (2) and the Privy Council in *Public Works Commissioner* v. *Hills* (3) call a "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation," that is, by fixing the amount of liquidated damages in the original contract, or whether they do it by a post-estimate, as it is assumed they did in the present instance, by a subsequent agreement. But that depends on

(1) (1911) A.C., 301, at p. 307. (2) (1905) A.C., 6.
(3) (1906) A.C., 368, at pp. 375-376.

whether the contract itself is a "source in New South Wales," as distinguished from the goods the subject matter of the contract. If it be part of the business of the company carried on in New South Wales, though not wholly there, then in whole or in part the income is derived from such a source. The point is, I think, virtually settled by a case which I have found since the argument, viz., *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (1). That was a New Zealand case decided on appeal by the Judical Committee. It turned on these words in the New Zealand Act: "profits derived from or received in New Zealand from such business." The company, an English company, made certain profits by way of commission, deducted by them from moneys received in London under agency contracts of sales effected in London of goods brought from New Zealand as a result of transactions made by them in that Colony. The Privy Council held that the profits were actually made in London and were not taxable notwithstanding the earlier transactions in New Zealand. *Kirk's Case* (2) was cited among others. Though the language of the English Income Tax Acts and that of the New Zealand Act were not identical, it was considered there was sufficient similarity in substance to make the English decisions authoritative as to the question involved. And as to the question involved here, I can see no reason why the principle of *Lovell's Case* should not be applied.

The whole result of this case depends in my opinion upon the applicability of the principles of *Lovell's Case* to the present case.

There is no doubt that case decides that where such contracts as that of May 1912 are habitually made, there a trade or business is carried on for income tax purposes. That was based on the principle that "the trade or business in question in such cases"—that is, such as *Grainger* v. *Gough* (3)—"ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or

(1) (1908) A.C., 46. (2) (1900) A.C., 588.
(3) (1896) A.C., 325.

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business is carried on within the meaning of the Income Tax Acts, so as to render the profits liable to income tax" (1). Further on say their Lordships: "The decisions do not seem to furnish authority for going further back, for the purpose of taxation, than the business from which profits are directly derived, and the contracts which form the essence of that business."

Now, in my opinion, what is meant by those observations is this: where a business is carried on of which contracts are "the essence," then you look to the place where those contracts are made. And, if antecedent operations, whether manufacture, or purchase, or requests, are not part of "the essence" of the business carried on, but preparatory only, then, however necessary they may be to the very existence of the business, they are not part of it, in the sense at all events required for income tax purposes. In applying the principles enunciated in *Lovell's Case* the judgment proceeds (2):—"In the present case their Lordships are of opinion that the business which yields the profit is the business of selling goods on commission in London." And it is pointed out that the earlier arrangements entered into in New Zealand were "transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit."

In the present case, the slimes, when acquired by the Corporation, however they are acquired, are not resold in their natural state, but the sales contemplated are of these slimes concentrated, so that the "practical operations" of the company, and the effective fulfilment of the business transactions conducted in Melbourne, take place in New South Wales. No doubt it is in view of these considerations that the parties interpret the special case as stating one composite business, including the whole set of operations, official and practical, neither set being exclusively the "essence" of the business. Therefore, when the principle of *Lovell's Case*—namely, that one must look at a contract as part or not part of a business carried on in the locus of the tax—is applied to the present case, it is impossible to exclude the £63,000 entirely from taxation.

That, as I have said, is all the answer which the special case

(1) (1908) A.C., 46, at p. 51. (2) (1908) A.C., 46, at p. 52.

strictly calls for, but at the parties' desire, I would add the following.

It is equally impossible, in my opinion, to include the whole £63,000, that is, without apportionment of some kind as between New South Wales and places outside New South Wales. I do not think that difficulty is at all met by the deductions, because they apply to taxable income, which, in the gross, is wholly attributable to this State. Deductions from a gross sum, in order to arrive at a net sum, are entirely distinct from apportionment of the gross sum itself, or of the net sum when found.

Now, in *Tindal's Case* (1) the question ought to have been, said Lord *Davey* in *Kirk's Case* (2), "what income was arising or accruing to Tindal from the business operations carried on by him in the Colony."

Here one of two methods must be employed, altogether apart from deductions. Sec. 19 of the Act provides in sub-sec. 1 for the businesses of owners or charterers of ships, and of insurance companies, where those businesses are carried on partly within and partly outside New South Wales. Then, says sub-sec. 2:— "In the case of any other taxpayer carrying on business both in and outside of the State his taxable income shall be deemed to be a sum which shall bear the same proportion to the net profits of such business as the assets of the business in the State bear to the total assets of the business: Provided that in any case under this sub-section the Commissioners may assess the actual income, and shall do so if required by the taxpayer." So far it is apportionment. Then the same sub-section goes on to make special provision for deductions. Either that sub-section is applicable and may be applied, or in the event of its not being applicable, or being objected to by either party, the actual income must be found by some practical distribution and means of ascertainment, which has not yet been done.

My opinion, therefore, is that the sum of £63,000 was apportionable between New South Wales and any other places outside New South Wales where the business was carried on, and in itself taxable accordingly, and as income the produce of personal exertion, subject to all proper deductions.

(1) 18 N.S.W.L.R., 378. (2) (1900) A.C., 588, at p. 593.

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Formally my opinion is that this appeal should be allowed.

GAVAN DUFFY J. The respondent company is incorporated in England, but the Australian business is conducted in Melbourne. The practical operations of the company, which consist of mining, treating and smelting ore, are carried on in New South Wales. These operations include the production of slimes and their purification so as to produce concentrates. On 7th May 1912 the company in London entered into an agreement to sell and deliver a quantity of slimes concentrates to the purchasers. Delivery under the agreement was to be made at Broken Hill in New South Wales during periods extending over a space of four years. Part payment for the concentrates to be delivered during the year 1913 was to be made before 7th June 1912, and part payment for the concentrates to be delivered in 1914 was to be made by monthly payments between 1st January and 30th June 1913. A ton of slimes would not, of course, produce a ton of concentrates, but some less quantity, and the part payment in each case was to be made at the rate of 17s. 6d. a ton on the quantity of slimes necessary to produce the stipulated quantity of concentrates.

The contract provided that from time to time, as part payment was made, the purchasers should be entitled to a certificate that the quantity of slimes to which the payment related was held at their order, subject to payment of the balance due under the contract on delivery of the concentrates produced from such slimes. The purchasers did not take delivery of any concentrates, but on or before 7th June 1912 they paid the sum of £47,250 on 54,000 tons of slimes, being part of the price of the concentrates to be delivered in 1913, and in January and February 1913 a further sum of £15,750, being part of the price of the concentrates to be delivered in 1914—making a total of £63,000. This total appears as an item on the credit side in the balance sheet of the respondent company for the year ending 30th June 1913, but reduced, by deducting various charges, to the sum of £61,425. The entry runs thus: "By amount received from the Hydraulic Power and Smelting Co. Ltd. under contract for slimes concentrates, since cancelled—less commission and brokerage—£61,425."

The words "since cancelled" in this entry, refer to an agreement made in London between the respondent company and the purchasers on 24th September 1913. Its effect, in my opinion, was to permit the respondent company to retain the sums it had received as part payment, and to release all parties from any other or further obligation under the contract of 7th May 1912. The moneys which the respondent company had received as part payment for concentrates still constituted part payment, the character of the payment was not altered, but no further payment could be enforced by the seller, nor could delivery of the goods be enforced by the purchasers.

The question asked by the special case is whether the said sum of £61,425 is taxable income of the appellant company within the meaning of the *Income Tax (Management) Act* 1912 and the *Income Tax Management (Amendment) Act* 1914.

It was assumed before the learned Judge who stated the case, and before the Supreme Court, that if any part of this sum was taxable income it must all be so, subject to any deduction to be made for the cost of earning it; but during the argument my brother *Isaacs* pointed out that the proper inquiry, in view of the definition of income contained in sec. 4 of the *Income Tax (Management) Act* 1912, was whether the whole or any part of it was income derived from any source in the State of New South Wales, and that on investigation of the facts it might appear that some part of it was such income and some was not. Is this sum of £61,425 or any part of it derived from any source in the State of New South Wales? In my opinion it is derived immediately from the contract of 7th May 1912, under which the part payment for the concentrates was made and under which the concentrates were to be produced and delivered in New South Wales, and mediately from the ordinary conduct of the company's business as a manufacturer and vendor of concentrates, and of that part of it—namely, the mining operations, the subsequent treatment of the product, and the delivery or transit for delivery of that product in the final shape of concentrates—which is carried on in New South Wales. Apparently the whole gross gain or profit arising out of the transaction is derived from a source in the State of New South Wales. It is

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the price actually paid under the contract for material to be mined and treated in New South Wales, and as such it is a gross profit made in the ordinary course of that part of the respondent's business which is carried on in New South Wales. It would, in my opinion, be such a gross profit whether it was paid as the price of the concentrates or in settlement of the respondent company's claims under the cancelled contract and as the price of a release to the purchasers. In either view it would be earned by the respondent company in the course of the conduct of its business in New South Wales. It may be that some of the gain is attributable to operations conducted by the respondent company outside New South Wales, and it may be that a further sum should be deducted for the cost of earning the £63,000. If the respondent desires to raise these questions the facts can be inquired into, and any necessary adjustment can be made under the relevant provisions of the *Income Tax (Management) Act* 1912.

Appeal allowed. Order appealed from discharged. Appeal to the Supreme Court from Court of Review dismissed with costs. Respondent to pay costs of this appeal.

Solicitor, for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for the respondent, *Norton, Smith & Co.*

B. L.