[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXATION OF WESTERN AUSTRALIA . . . . Respondent, } Appellant;

AND

D. & W. MURRAY LIMITED . . . Appellant, Respondent.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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Perth, *Sept.* 11, 19.

Knox C.J., Rich and Dixon JJ.

Dividend Duties (*W.A.*)—*Assessment*—*Company*—*London head office*—*Branch in Western Australia*—*Softgoods business*—*Goods bought for branch by head office*—*Goods sold in Western Australia*—*Head office commission, expenses, discounts and rebates*—*Charges and credits to branch*—*Ascertainment of profits made in Western Australia*—*Deductions*—*Dividend Duties Act* 1902-1924 (*W.A.*) (*No.* 32 *of* 1902—*No.* 35 *of* 1924), *sec.* 6.

The *Dividends Duties Act* 1902-1924 (W.A.), by sec. 6, provides (1) that every company carrying on business in Western Australia shall forward to the Commissioner of Taxation a return setting forth the amount and details of "all profits made by such company in Western Australia" during the year, &c.; and (2) that "the Commissioner of Taxation shall thereupon assess the profits made by such company in Western Australia, and upon such assessment the company shall . . . pay to the Commissioner of Taxation a duty" based upon the "profits so assessed."

A company incorporated in England, carries on in Western Australia and other States of the Commonwealth the business of wholesale softgoods warehousemen. The head office, which is in London, buys and exports the goods required by its Australian branches. In the first instance each branch is debited, and the head office credited, with a charge of 5 per cent. upon the amount of the purchases for the branch, as being a fair and usual charge for the skill and judgment exercised and the work done by the head office in

selecting and buying the goods, packing them, arranging for freight and insurance, causing them to be shipped, and doing other necessary things. Every half-year the actual expenses incurred by the head office are calculated: and, if the total amount of the above-mentioned charge of 5 per cent. is greater than such expenses, the difference is then credited to the Australian branches in the proportion that their respective purchases made by the head office bear to the total of such purchases.

Held, that for the purposes of the *Dividend Duties Act* 1902-1924 the profit recovered or realized by the selling business conducted by the company in Western Australia was one profit, and was made wholly in Western Australia: the fact that it is swollen or increased because the expenditure abroad necessarily incurred for the purpose of earning it has been reduced by the business operations of the company abroad does not give to any part of the profit a locality outside Western Australia.

Held, therefore, that in assessing under the *Dividend Duties Act* 1902-1924 the profits made by the company in Western Australia, none of the following sums should be excluded: (1) the sum credited by the head office to the Western Australian branch as its proportion of the excess of the 5 per cent charged upon the purchase of all Australian branches over the actual London expenses: (2) the sum credited by the head office to the Western Australian branch which consisted of the amounts which the sellers of goods bought by the head office for that branch allowed by way of discount from the price for immediate payment of cash by the head office; (3) the sum credited by the head office to the Western Australian branch as its proportion of the rebates allowed to the head office upon charges for freight, storage and handling and upon insurance premiums in respect of shipment of goods to Western Australia.

Decision of the Supreme Court of Western Australia (Full Court) reversed.

APPEAL from the Supreme Court of Western Australia.

D. & W. Murray Ltd., being dissatisfied with the assessment of the Company by the Commissioner of Taxation of Western Australia under the *Dividend Duties Act* 1902-1924 (W.A.), for the year ending 19th January 1927, appealed by originating summons from such assessment to the Supreme Court under sec. 30 of the Act of 1902 as amended.

The appeal came on for hearing before *Draper* J., who stated, under sec. 31 of the Act, a case, which was substantially as follows, for the opinion of the Full Court of the Supreme Court:—

1. D. & W. Murray Ltd. (herein called the Company) is a company incorporated and registered in England, having its registered and head office and part of its directorate in London, and carries on the business of wholesale softgoods warehousemen through branches

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in the several States of the Commonwealth of Australia. The capital of the Company has been subscribed to and issued from its head office in London and the share register of the Company is located there.

2. To carry on the business of warehousemen the head office, in addition to the staff necessary to perform the statutory obligations of the Company and to do the necessary work pertaining to the head office, includes a buying organization and large staff which selects, purchases and pays for, in the United Kingdom, Europe and America, the requirements of its Australian branches and which also packs or secures the packing of the goods purchased and after the goods have been purchased and packed makes arrangements for securing that the goods are delivered to the port ready for shipment. Services as above are commonly performed by agents who are known as London buyers or as buying agents. Head office (London) in addition to purchasing goods for Australian branches also purchases goods for other companies and firms in Australia but does not make sales.

3. The head office also maintains an organization and staff for securing freight, effecting insurances, seeing that the goods are shipped and discharging the other services incidental to and necessary in connection with the transit of goods to Australia from the places of purchase. Services as above are commonly rendered by shipping, insurance and other brokers or agents.

4. To enable the head office to carry out its financial arrangements for the purchase and shipment of goods, the payment of dividends or for other purposes, the head office from time to time receives remittances from the Australian branches of moneys available or borrows money by means of bank overdraft, registered notes or deposits at call.

5. Manufacturers when making sales frequently allow trade discounts to purchasers and also grant terms of payment, and purchases are made subject to such trade discounts and terms, but after a purchase has been made special discounts (herein called "manufacturers' cash discounts") are in some cases allowed by manufacturers if the purchaser, instead of taking the usual trade

terms, is prepared to pay prompt cash, but whether such manufacturers' cash discounts are allowed or not and the amount thereof depend upon negotiations between the purchaser and the manufacturer. Whenever the head office thinks it wise to do so, and the matter rests entirely in the judgment and discretion of head office, it negotiates for and provides and pays such prompt cash, and by reason of such payment obtains the manufacturers' cash discount which is treated by the head office as a profit made by the head office in England.

6. In view of the large volume of freight and insurance business which the head office controls it is enabled, by giving its work exclusively to special shipping insurance companies and others, to obtain special rebates (herein called "London office credits") in connection with freight, insurance premiums and handling and other storage charges on goods before shipment, and such rebates are periodically allowed to and collected by head office.

7. The practice adopted in connection with the purchase of goods for the Australian branches is for each branch to advise the head office from time to time of its requirements, and the head office then arranges through its buyers for the selection and purchase in its own name of the goods required by the branch, and also arranges for the packing and shipment of such goods to the branch in question and the insurance thereof, and also pays for such goods and for all costs of and incidental to the transit to the port of shipment and also for freight, insurance and such other outgoings as may be necessary, and the total amount so expended is debited against the branch in question, and in addition the branch is debited with 5 per cent on the price paid by head office for the goods so purchased by the head office before adding packing charges or deducting manufacturers' cash discounts. This 5 per cent is a "buying commission" for the services referred to in par. 2, and represents, the Company contends, an expedient and reasonable method of calculating that part of the profits of the Company applicable to the buying operations carried on by head office in London. The Commissioner of Taxation contends that the amount is an addition to the cost price of the goods to the extent that such an amount is in excess of the cost of the services rendered by head office, and

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represents a claim to obtain a deduction for a sum in excess of the true cost price of the goods landed in Australia.

8. Wholesale merchants carrying on business in Australia and also retail merchants in a large way who purchase from Britain or other overseas vendors either have their own London offices or employ London or buying agents outside Australia who render for them the services which the head office of the Company renders to its branches as set out in par. 2 above, except that such agents do not pay for the goods purchased or for freight or meet any other outgoings. The shipment of goods may be attended to by such agent or done by independent brokers. It is essential that such wholesale or large retail merchants should have their own offices in London or employ a London or buying agent to perform the services of selecting and purchasing the goods required, and an agent so employed must be versed in Australian tastes and requirements and keep a staff of buyers who are in touch with those tastes and requirements, and the usual remuneration paid to an agent so employed is 5 per cent on the purchase price of the goods shipped and a refund of all out-of-pockets, and all such services are rendered and operations conducted and the remuneration therefor is earned outside of Western Australia.

9. The services rendered by the head office are essential services without which the business of the Company could not be carried on in Australia, and such services or similar services are essential to every business in Australia which deals wholesale with goods purchased outside Australia.

10. The expenses incurred by the head office, including the cost of maintaining the London or buying organization as well as London directors' salaries, interest and all outgoings, are debited against the 5 per cent buying commission charged as mentioned in par. 7 hereof, and the surplus of such buying commission still remaining to credit of head office is allocated and credited to the Australian branches at each half-yearly balance date in the proportions that their respective purchases made by head office bear to the total purchases made by head office.

11. The amounts received by head office in respect of manufacturers' cash discounts are credited to the branches on the debit

note which accompanies each shipment, and the amounts received for London office credits are allocated and credited to the Australian branches at each half-yearly balance date in the proportions that their respective purchases made by head office bear to the total purchases of head office.

12. The branch of the Company in Western Australia deals with the head office on the above lines, and balances its accounts for the year as on 19th January, and on 2nd April 1927 the Company forwarded to the Commissioner of Taxation a return under the *Dividend Duties Acts* 1902-1924 setting forth the amount and details of all profits made by the Company in Western Australia for the year ending 19th January 1927 and also forwarded a copy of the balance-sheet of the West Australian branch for that year, and in that balance-sheet set out the figures £5,529 11s. 9d. referred to in the next paragraph as profits made outside Western Australia.

13. Such balance-sheet and return included all profits made by the said branch in respect of goods purchased by and through head office, but as before mentioned part of such profits (£5,529 11s. 9d.) were, the Company contends, earned in London by reason of services performed by the head office as aforesaid and derived as follows:— (a) From the purchasing operations of head office carried on in London and described as "buying commission," £1,301 12s. 6d.; (b) from the cash discounts (described as "manufacturers' cash discounts") received by head office from suppliers of goods on contracts made outside Australia by reason of financial operations performed by such head office outside Australia, £3,305 13s.; (c) from freight and insurance rebates and sundry income earned and received by head office outside Australia and for services rendered outside of Australia and described as "London office credits," £922 6s. 3d.: £5,529 11s. 9d.

14. The Commissioner of Taxation, purporting to assess the profits made by the Company in Western Australia for the year in question, struck out and disallowed the sum of £5,529 11s. 9d. as a profit made outside of Western Australia, and the Company contends that to that extent and by that amount the Commissioner assessed the profits of the Company made in Western Australia in excess of what such profits were. The Commissioner contends that

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the amount struck out was an over-claim by the Company in regard to the purchase price of the goods.

16. The Company contends that by reason of the facts aforesaid the sum of £5,529 11s. 9d., and/or some part thereof, is a profit made outside Western Australia and cannot be regarded as profits subject to taxation under the *Dividend Duties Acts*; and on the other hand the Commissioner contends that the whole of such sum represents profits made in Western Australia.

If the Court be of opinion that the whole of such sum is a profit made outside of Western Australia, then the said appeal shall be allowed.

If it be held that the whole of such sum is profit made in Western Australia, then the appeal of the Company against such assessment shall be dismissed.

If, however, the Court be of opinion that in connection with the services or operations of head office above referred to, or some or one or more thereof, profits have been made outside of Western Australia, then the Court shall remit the case to me to do therein as may be just.

17. By the consent of the parties the Court is to be at liberty to draw inferences whether of fact or of law.

Upon the case stated the Full Court of the Supreme Court (*Northmore* and *Draper* JJ., *Burnside* J. dissenting) held (a) that the whole of the sum of £3,305 13s. "manufacturers' cash discounts" referred to in par. 13 of the case stated was profit made by the Company outside Western Australia, and (b) that the whole of the sum of £922 6s. 3d. "London office credits" referred to in par. 13 of the case stated was profit made by the Company outside of Western Australia, and (c) that the whole of the sum of £1,301 12s. 6d. "buying commission" referred to in par. 13 of the case stated was not profit made by the Company in Western Australia, and that the question whether any part of such sum (if any) and if so how much of such sum was profit made by the Company in Western Australia be referred back for further consideration on the originating summons: And it was ordered that the assessment of the Commissioner of Taxation and against which the Company appealed be amended by striking out the said sums of £3,305 13s.

and £922 6s. 3d. inasmuch as the same were not profits made in Western Australia; and that the appeal be allowed accordingly. And it was further ordered that in reference to the sum of £1,301 12s. 6d. "buying commission" the matter be referred back to be dealt with under the originating summons to decide what should be done therein having regard to the opinion of this Court as above stated in reference thereto.

From this decision the Commissioner of Taxation now appealed to the High Court.

Downing K.C. (with him *Wolff*), for the appellant. Although the Company was incorporated in England and had its head office in London, it did not trade there. The only function of the London office was to purchase goods for sale in the various States of the Commonwealth. Where a business consists of buying in London and selling abroad, the profit resulting from the purchase there cannot be separated or distinguished from the profit made on the resale of the goods abroad; there is but one profit (*Sulley* v. *Attorney-General* (1), which case was further considered and applied in *Grainger & Son* v. *Gough* (2)). The object and effect of the Company's transactions in London were to bring the goods from there within the net of the business in Western Australia which was to yield the profit (*Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (3); *Smidth & Co.* v. *Greenwood* (4)). Trade is the business of selling with the view to profit goods which the trader has either manufactured or himself purchased. In the case of a manufacturer it is possible that some profit would arise at the place of manufacture, and an apportionment of profit might be necessary, if the manufactured goods were sold abroad. The essence of the business might then conceivably be a set of operations, each operation going to make up the total profit ultimately realized. This principle was recognized and applied in *Commissioners of Taxation* v. *Kirk* (5); *Commissioners of Taxation (N.S.W.)* v. *Meeks* (6); *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.)* (7). But no profit can

(1) (1860) 5 H. & N. 711.
(2) (1896) A.C. 325.
(3) (1908) A.C. 46.
(4) (1920) 3 K.B. 275, at p. 286, *per Rowlatt* J.
(5) (1900) A.C. 588.
(6) (1915) 19 C.L.R. 568.
(7) (1923) 33 C.L.R. 76.

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arise from the mere purchase of goods—that act, and acts of insuring and shipping the goods to the place where it was intended to sell them, were merely preparatory to the ultimate operation of selling, which was to yield the profit (*Commissioners of Taxation (N.S.W.)* v. *Meeks* (1)). The discount allowed by the manufacturer is a diminution of the price of the goods. The rebate allowed on the charges for insurance and freight should be applied to diminish the cost of those services. Neither discount nor rebate is a "profit." The amounts actually expended constitute the true cost. As regards the 5 per cent buying commission the Company cannot make a profit out of its own services (*Erichsen* v. *Last* (2)). It can only deduct from the proceeds of the sale the expenditure on those services. Therefore, as the actual cost was less by £1,301 12s. 6d. than the total amount of buying commission deducted, credit for that amount must be given to ascertain the profit made in Western Australia. The discounts and rebates must be applied to diminish the cost of the goods. The whole of the £5,529 11s. 9d. therefore represents profits made in Western Australia, and is accordingly taxable under the *Dividend Duties Act* 1902, sec. 6.

Sir Walter James K.C. and *J. P. Dwyer*, for the respondent. The *Dividend Duties Acts* require a search for that part of the profits made in Western Australia which is apportionable to England. There is no difference between the manufacturer and the buyer who afterwards sells the goods; after the sales are effected the profits are adjusted. The buying is done through London, and this is an essential portion of the organization. The profits were therefore not made wholly in Western Australia, but partly in London. These are separate and distinct operations, and apportionment has to be made. Services were rendered in London and these have to be dealt with in regard to the ultimate profit.

After apportioning the costs the expenses must be deducted; if the London house was treated as an independent buyer the 5 per cent commission would be allowed. All these charges are paid by the Western Australian business and therefore should be deducted. The principle in *Commissioners of Taxation* v. *Kirk* (3) should

(1) (1915) 19 C.L.R., at p. 588, *per Isaacs* J.

(2) (1881) 8 Q.B.D. 414.

(3) (1900) A.C. 588.

be applied although there was there a manufacture. Buying is as important commercially as manufacture. The discounts and rebates are the real *causa causans* of commensurate profits: the London office supplied the funds, and in the absence of London activities there would have been no profits here. These particular profits here are not connected with the rebates at all. They depend on the volume of business and are controlled by London, and therefore do not affect the Western Australian business. The gains are due to the exercise of trade and there can be no exercise of trade unless there are purchases. The totality of the operations in exercising the trade in Western Australia are assisted by the activities in England (*Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax* (*Q.*) (1); *Commissioners of Taxation* (*N.S.W.*) v. *Meeks* (2)). *Meeks's Case* is more applicable to this present case. In *Michell* v. *Commissioner of Taxation* (3) there was a half-and-half apportionment. These rebates, commissions, &c., do not refer to goods sold subsequently in Western Australia, and are therefore not referable to the activities there.

Downing K.C., in reply.

Cur. adv. vult.

Sept. 19.

THE COURT delivered the following written judgment:—

This is an appeal by the Commissioner of Taxation of the State of Western Australia from a judgment of the Supreme Court of that State given upon a case stated under sec. 31 of the *Dividend Duties Act* 1902-1924 (W.A.). By sec. 6 of this statute every company carrying on business in Western Australia is required in every year to forward to the Commissioner of Taxation a return setting forth the amount and details of all profit made by such company during the calendar year immediately preceding the return together with a copy of its balance-sheets for that period. The Commissioner must thereupon assess the profits made by such company in Western Australia, and the company then becomes liable to pay a tax of 1s. 3d. in the pound upon the profits so assessed.

(1) (1923) 33 C.L.R., at pp. 110-112. (2) (1915) 19 C.L.R. 568.
(3) (1927) 34 A.L.R. 25.

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The respondent is a company incorporated in England which carries on in Western Australia as well as in the other States of the Commonwealth the business of wholesale softgoods warehousemen. It made a return as for the year 1926 and forwarded its balance-sheets to the Commissioner, who assessed the profits which he considered the Company made in Western Australia during that year. The Company contends that he included three sums amounting to £5,529 11s. 9d. which were not "attributable" to its business operations in Western Australia and that its assessment should be reduced by this amount.

The Company's head office in London, where its directors meet, carries out the operations of buying and exporting the goods required by its various Australian branches for the purpose of the business which they conduct in the several States. In the accounts of the Company of the dealings between the head office and each Australian branch, the branch is in the first instance debited, and the head office credited, with a charge of 5 per cent upon the amount of the purchases for the branch. This is considered to be a fair and usual charge for the skill and judgment exercised and the work done by the head office in selecting and buying the goods, packing them, arranging for freight and insurance, causing them to be shipped, and doing whatever else is required. At the end of every half-year the actual expenses incurred by the head office, including the cost of maintaining the London or buying organization as well as the amount of the London directors' salaries, interest and all other outgoings, are calculated. If the total amount of the 5 per cent "buying commission" is greater than this sum the difference is credited to the Australian branches, at each half-yearly balance date, in the proportion that their respective purchases made by the head office bear to the total of such purchases.

In the year 1926 a sum of £1,301 12s. 6d. was credited to the Western Australian branch as its proportion of the excess of the 5 per cent upon the purchase of all Australian branches over the actual London expenses. This is the first of the three sums which the Company contends should have been excluded in calculating the profit made by the Company in Western Australia. The sum does not, of course, represent any actual profit or revenue or receipt

of the Company. It is only a credit on account of, and in reduction of, a debit made by one of the Company's houses against another. No doubt, after the debit of 5 per cent on purchases is reduced by such a credit, the reduced amount roughly represents the actual expenses incurred by the Company in buying and exporting goods for sale here by the branch in question. To ascertain accurately the actual cost attributable to the goods of the particular branch, a dissection of the expenditure of the head office would be necessary; but it is not unlikely that over any considerable period of time there would be little difference in the results produced by the two methods. The respondent Company recognizes that this is the true character of the credit of £1,301 12s. 6d., and its contention is not based upon the view that the sum is an English receipt or forms an item of revenue gained in England. It concedes that in computing the profits made by the Company by acquiring goods in England and selling them in Western Australia, the credits and debits between the houses would be disregarded and the true net cost only of purchasing the goods and exporting them to Western Australia would be allowable as a deduction from the receipts in Western Australia. But the Company says that when the net profits arising from the Company's operations of buying goods in England and selling them from its Western Australian warehouse have been calculated, they cannot all be considered as earned or made in Western Australia. Some part of them, it says, must be regarded as produced by the buying and other operations in England, and therefore as "attributable" to a source outside Western Australia. To ascertain how much of the profits are "attributable" to the business in Western Australia the respondent Company desires to deduct the whole 5 per cent on purchases from the profits, and not merely that amount reduced by the credit of £1,301 12s. 6d. as the Commissioner has done. It says that the whole 5 per cent "represents an expedient and reasonable method of calculating that part of the profits of the Company applicable to the buying operations carried on by the head office in London." The second of the three sums composing the amount of £5,529 11s. 9d. which the respondent Company wishes to exclude from its profits made in Western Australia, is a sum of £3,305 13s. credited by the head

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office to the Western Australian branch. This sum consists of the amounts which in 1926 the sellers of goods bought by the head office for the Western Australian branch allowed by way of discount from the price for immediate payment in cash. The manufacturers often sold goods to the head office upon terms, or were prepared to do so. When the head office, instead of taking the usual trade terms, paid prompt cash, it was frequently able to obtain a discount. Whether it obtained any and, if so, what discount depended upon negotiations between it and the seller. When it obtained such a discount it was credited to the branch on the debit note which accompanied the shipment of goods. The contention of the respondent Company is that these discounts were obtained by the use of the Company's capital in London and by the exertions and the judgment of the staff in the head office. Therefore, the contention is, the increase in net profit caused by the saving in expenditure so effected is "attributable" not to operations in Western Australia but to those in London. The third of the three sums which the respondent Company seeks to exclude in the ascertainment of Western Australian profits is an amount of £922 6s. 3d., consisting of rebates upon charges for freight, storage and handling, and upon premiums for insurance, paid in respect of shipments of goods to Western Australia in 1926. These rebates the head office was enabled to obtain by reason of the large volume of freight and insurance business which it controlled. By giving its custom to special shipping, insurance and other companies it obtained periodical allowances by way of rebate. These it collected, and at each half-yearly balance date it allocated and credited the total to the Australian branches in the proportion that their respective purchases made by the head office bore to the total purchases made by the head office. When such a credit is set against the amount with which the branch has been debited during the half-year for freight, storage and handling and for insurance, the balance roughly represents the net expenditure of the Company upon these charges in respect of the goods of the branch. Again it should be observed that an accurate ascertainment of the actual net amount to be charged against the branch for its goods would necessitate a dissection—this time a dissection and allocation of the rebates.

The respondent Company contends: first, that the rebates form an actual item of gross revenue earned in London by the use of the capital there and by the aggregation of the Company's dealings, so that it is derived from operations outside Western Australia; second, that if the amount credited, on account of rebates, to the Western Australian branch be thrown against the expenditure upon freight, storage and handling charges, and insurance in respect of the goods shipped to that branch, so as to reduce the amount of that expenditure, the consequent increase in the net profit from the trade in Western Australia is not attributable to the operations carried on there, but to what was done in London.

The majority of the Supreme Court (*Northmore* and *Draper* JJ., *Burnside* J. dissenting) held that all three sums should be excluded, subject, however, to this qualification, namely, they considered that the Commissioner was not bound to adopt 5 per cent as a proper apportionment for ascertaining the profits attributable to the buying operations in London, but could adopt some other standard, and they referred that item back. We are unable to agree in this conclusion. We think that none of these sums should have been excluded in ascertaining the profits made by the respondent Company in Western Australia.

The business of wholesale softgoods warehousemen, which the respondent carries on, depends for its profits or gains upon the sale of softgoods bought or acquired for that purpose. Profits are ascertained by comparing on the one side the amount representing the total of (1) the value of stock on hand at the beginning of an accounting period, (2) the cost of purchases and (3) the expenses of conducting the undertaking in the meantime, with the amount representing (a) the value of stock on hand at the end of the period, and (b) the amount recovered by the sale of the commodities on the other side. This means that the profits are obtained and recovered by selling the goods. In our opinion the place where the whole profit of such a business is made is that where the goods are sold. It is, of course, true that buying the goods is a necessary part of a business of this kind, which derives its profits from selling them. It is also true that skill and judgment in buying are or may be essential to the successful or profitable conduct of the business.

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But it does not follow that in order to determine where the profits were made it is proper to inquire into all the causes which, in combination or in succession, operated to produce them. If it were possible to discover and discriminate among the innumerable factors which contribute to the profitable exercise of a trade and to assign locality to each of them, still no light would be thrown upon the place where profits were made. To attempt to appraise the relative efficacy or potency of these contributory factors, when and if ascertained, and to distribute the profit accordingly among the localities to which the factors have been assigned, is to lose sight of the true nature of the question, which is not why, but where, the profits were earned. The case is not one in which operations in one place have produced a merchantable commodity, or have given or added value to things, marketed in another. In such cases value or wealth has been produced or increased and is contained in disposable assets. In other words, unrealized profits exist in the territory whence they are transported for the purpose of sale. There is as much reason why stock on hand as at a given place should be taken into a commercial account at a value for the purpose of ascertaining profit in a locality, as there is why stock on hand as at a given point of time should be taken into account at a value for the purpose of ascertaining profit during a period.

In *Commissioners of Taxation* v. *Kirk* (1) it was evident that some part of the value or wealth converted into money by the operations or transactions out of New South Wales had been brought into existence in New South Wales and was contained in the commodity before it was shipped. The profit made in New South Wales was real but unrealized. In *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax* (*Q.*) (2) *Rich* and *Starke* JJ., whose opinions prevailed, both held that the gold content of the blister copper had been disposed of by the taxpayer for a consideration which consisted, not only of the money price, but also of the right to receive or share in any profits derived from the exportation for sale of an equivalent amount of gold. *Rich* J. said that he agreed that the price of £4 4s. 2d. per ounce did not include the right to premiums obtainable on the gold when exported, and that

(1) (1900) A.C. 588. (2) (1923) 33 C.L.R. 76.

this right was retained by the taxpayer (1). He emphasized the importance of this by the questions which he propounded as requiring an answer, if, contrary to this view, the gold were sold outright to the refining company, and the right to export the gold and get the premium abroad was not reserved (2). *Starke* J. said that a stipulation of the agreement between the taxpayer and the refining company made "it plain that the appellant retained for its own benefit all the value of the gold content of its blister copper beyond the price mentioned in the agreement" (3). This was a valuable right or privilege obtained by the taxpayer. In computing the income derived from the production and disposal of blister copper with its content of precious metal, the reservation or acquisition of this valuable right or privilege could not be left out of the account. The additional money afterwards received as a result of the exercise of the right or privilege necessarily represented in part the value at which the right or privilege itself should be taken into account.

In *Dickson* v. *Commissioner of Taxation (N.S.W.)* (4) the taxpayer retained or obtained, when it disposed of its gold, the right to the premiums to be derived from export and sale abroad under the same scheme. *Isaacs* J. and *Rich* J., who, with *Starke* J., constituted the majority whose views prevailed, each collected from the case stated facts which connected the money realized abroad with the operations conducted in New South Wales, and considered the case indistinguishable from that of the Mount Morgan Gold Mining Co. *Starke* J. said (5) :—"The arrangement for the sale of coin or bullion was but a final stage of the company's operations, which aimed at the realization of the full value of the gold content of the auriferous ore or stone extracted by it from the earth, in New South Wales. It was . . . merely incidental to the main purpose of the business of the company and a conventional way of carrying it out." The Court's order declared that the sum obtained as a result of selling gold abroad "should be apportioned as between New South Wales and places outside New South Wales for the purpose of ascertaining

(1) (1923) 33 C.L.R., at p. 104.
(2) (1923) 33 C.L.R., at p. 105.
(3) (1923) 33 C.L.R., at pp. 111-112.
(4) (1925) 36 C.L.R. 489.
(5) (1925) 36 C.L.R., at p. 511.

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what portion of the said sum was income derived from any source in the said State or earned in the said State" (1). We do not think this, or the somewhat similar declaration in the *Mount Morgan Co.'s Case* (2), meant to start an investigation into the comparative virtue, as causes contributing to final profit, of the many factors in New South Wales and abroad which determined the financial success of the taxpayer's operations. The apportionment directed appears to us rather to contemplate the ascertainment of the actual profit earned but unrealized in New South Wales, which was represented in the money sum afterwards recovered abroad.

In *Commissioner of Taxation* v. *Lewis Berger & Sons (Australia) Ltd.* (3), decided by *Starke* J., goods were produced in Australia and sold in New Zealand. The learned Judge treated the Board of Review's determination of the amount of Australian profit as involving no point of law. Here again commodities, stock-in-trade, were produced, and they contained profit represented in the sums afterwards realized. In *Michell* v. *Commissioner of Taxation* (4) the same learned Judge dealt with a case in which buying was perhaps one of the principal Australian operations of the taxpayer who, however, here treated, classified and otherwise prepared for sale some of the goods which he bought. The question, what amount of the sum recovered abroad represented income derived directly or indirectly from sources in Australia was decided as a matter of fact. The facts, so far as they appear from the report of the case, suggest that what the taxpayer did in Australia resulted here in a real enlargement or enhancement of value contained in the goods before exportation which was consequently included in the prices they realized in Europe. We do not understand his Honor to direct his observations to anything but the very difficult problem of determining this amount.

In the case now to be decided the respondent Company's business operations conducted in England by its head office consisted only in buying. They neither gave nor added value to the things which were purchased. There were no unrealized profits brought into existence, and contained in the goods when exported from England.

(1) (1925) 36 C.L.R., at p. 512.
(2) (1923) 33 C.L.R. 76.
(3) (1927) 39 C.L.R. 468.
(4) (1927) 34 A.L.R. 25.

The case is, we think, governed by the principles established by *Sulley* v. *Attorney-General* (1), and the many cases which follow that authority. It is true that these cases were decided upon a provision which taxed persons not resident in the United Kingdom "for and in respect of the annual profits or gains arising or accruing . . . from any profession, trade, employment, or vocation exercised within the United Kingdom" (16 & 17 Vict. c. 34, sec. 2, Sched. (D), and 8 & 9 Geo. V. c. 40, Sched. D, clause 1 (*a*) (iii.), sec. 1). But refined distinctions ought not to be drawn between the forms of expression used in legislation dealing with this subject and directed to discriminate between extra-territorial and intra-territorial profits or income. Moreover, these authorities proceed upon a principle and not upon the particular meaning of words or expressions. Their application to enactments *in pari materia* is fully authorized by the Privy Council in *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (2). In *Sulley's Case*, a full statement of the facts of which is set out in the special verdict (3), the Crown sought to tax the profits and gains arising from a business of general merchants carried on in New York and at Nottingham. The business done in the house at Nottingham consisted in purchasing goods in England and shipping them for exportation to New York, and doing things ancillary to the exportation, such as packing the goods. The business done in the house in New York consisted in selling the goods, and other goods purchased in France, Germany and America. "The goods . . . are in no case manufactured or resold in England prior to their shipment and exportation, nor is any profit made by the . . . co-partnership by means of any manufacture or resale of goods in England; the profits of the . . . co-partnership, in respect of goods purchased in England, consisting entirely of the increase in price or value obtained by the resale in America of such goods so purchased in England and exported as above mentioned" (4). *Cockburn* C.J., in delivering the judgment of the Exchequer Chamber, said:—"The question is, whether there is a carrying on or exercise of a trade in this country. I think there is not, looking at the sense in which the term is used and having regard to the

(1) (1860) 5 H. & N. 711.
(2) (1908) A.C. 46.
(3) (1859) 4 H. & N. 769, at p. 771.
(4) (1859) 4 H. & N., at pp. 772-773.

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subject matter of the statute. Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade" (1). Further: "The profits of the firm in America do not accrue in respect of any trade carried on in this country, but in respect of the trade carried on in New York, where the main business is conducted" (2). It is to be noticed that in the argument of Mr. *Mellish* (as he then was) for the firm, which *Willes* J. found of such assistance, he said:—"Where the business consists of buying here and selling abroad, the profit resulting from a purchase here cannot be separated or distinguished from the profit made on the resale of the goods abroad; in fact there is but one profit. Possibly, in the case of persons manufacturing goods here and selling them abroad, there might be a profit on the manufacture capable of being distinguished from the profit on the sale" (3). This statement anticipates the effect of the decisions since given.

The principle of this decision has been applied by the House of Lords (e.g., *Grainger & Son* v. *Gough* (4); *Greenwood* v. *F. L. Smidth & Co.* (5); *Maclaine & Co.* v. *Eccott* (6); and cp. *Tarn* v. *Scanlon* (7)). It has been adopted by the Privy Council and applied where "the business which yields the profit is the business of selling goods on commission" (*Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (8)). It was recognized in this Court in the case of the Mount Morgan Co. There *Starke* J. said (9):—"The Acts do not contemplate going further back for the purpose of taxation than the locality of the business operations from which profits are directly derived. If contracts form 'the essence of the business' (*Lovell's Case* (10)), then, for the purpose of determining the locality from which the income is derived, you look no further back than the place where the contracts are made."

(1) (1860) 5 H. & N., at p. 717.
(2) (1860) 5 H. & N., at p. 718.
(3) (1860) 5 H. & N., at pp. 711-712.
(4) (1896) A.C. 325, and see at pp. 340-341.
(5) (1922) 1 A.C. 417, affirming (1921) 3 K.B. 583 (C.A.) and (1920) 3 K.B. 275 (*Rowlatt* J.).
(6 (1926) A.C. 424.
(7) (1928) A.C. 34.
(8) (1908) A.C., at p. 52.
(9) (1923) 33 C.L.R., at p. 110.
(10) (1908) A.C., at p. 51.

We think the profit recovered or realized by the selling business which the respondent Company conducts in Western Australia is one profit, and is made wholly in Western Australia. The fact that it is swelled or increased because the expenditure abroad necessarily incurred for the purpose of earning it, has been reduced by the business operations of the Company abroad does not give to any part of the profit a locality outside Western Australia. It may show that one of the causes why profits were made in Western Australia consisted in things done abroad. It does not show that any of the profits were made where these things were done.

There remains for consideration the separate argument advanced for the respondent Company in respect of the rebates obtained from shipping, insurance and other companies, to the effect that they formed an actual item of gross revenue earned in London. This argument seeks to avoid the application to this item of the views we have expressed, by denying that it forms part of the money realized upon the sale of the goods and assigning to it the character of revenue derived abroad from operations abroad. We do not think this is its true character. We think that in a proper ascertainment of the profits of the business in Western Australia the rebates would be thrown against the expenditure or payments in respect of which they were made and received, and therefore treated as a mere diminution of expenses. It is to be noticed that we are not here dealing with an artificial statutory method of determining profits such as one by which gross receipts from sources within a territory are to be taken as a base from which deductions are to be made. The *Dividend Duties Act* 1902-1924 (W.A.) simply requires an ascertainment of "profits." (See *Lawless* v. *Sullivan* (1).)

We think the appeal should be allowed.

Appeal allowed with costs. Order of the Supreme Court discharged. Question answered: The Court is of opinion that the whole of the sum of £5,529 11*s.* 9*d. mentioned in the special case is profit made in Western Australia.*

(1) (1881) 6 App. Cas. 373.

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The respondent's appeal to the Supreme Court dismissed with costs including the costs of the special case.

Solicitor for the appellant, *J. L. Walker*, Crown Solicitor for Western Australia.

Solicitors for the respondent, *Stone, James & Co.*

[HIGH COURT OF AUSTRALIA.]

TURNER AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

GENERAL MOTORS (AUSTRALIA) PROPRIETARY LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 29, 30.

MELBOURNE, *Oct.* 7.

KNOX C.J., ISAACS, and DIXON JJ.

Trade Names—Similarity calculated to deceive—Business reputation—Passing off—Delay by party seeking relief—Laches—Acquiescence—Form of injunction.

An American manufacturer of cars with a trade reputation in Australia marketed them in Australia through agents whose operations it controlled by means of a subsidiary company. It determined to form a new company in Australia to be called by a name based on its own, which would here assemble its cars and put them on the market. It advertised its intention to do so and actually formed the company, which commenced to erect a factory. It did not, however, assign any of its goodwill to the new company, nor did the subsidiary company. The defendants thereupon commenced to trade in secondhand cars under a name resembling both that of the new company and that of the American company, and in premises painted with signs which would be read as implying that the establishment was a branch or depot of a business.