[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT;
RESPONDENT,

AND

W. ANGLISS AND COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 7, 8, 11, 12, 13; *Oct.* 1.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

War-time Profits Tax—Assessment—Business carried on in Australia and abroad—Goods exported from Australia to England—Goods with no saleable value in Australia—Sold at profit in England—Contracts made in England—Profits made in England—Profits transferred to Australia—Not taxable as war-time profits—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *sec* 15 (1).

A company incorporated in Victoria and having its principal works and head office in Victoria, with a branch office in London, exported preserved meats which it prepared in Australia to London, where they were sold at a profit, there being no market for them in Australia. The company also exported tallow, a small proportion of which was produced by the company's own operations, the remainder being bought by it in Australia. The contracts for the sale of the preserved meats and tallow were made and performed in England, but the net proceeds of the realization of the commodities exported by the company were brought to Australia.

Held, by *Rich*, *Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting), that, in ascertaining the liability of the company for war-time profits tax, no part of the moneys obtained by the sale outside Australia of preserved meats or tallow produced by the company which exceeded the value of the goods in Australia before exportation should be taken into account: and that no part of the money obtained from the resale outside Australia of tallow bought and not produced by the company ought, for the purposes of war-time profits tax, to be taken into account.

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Per Starke and *Evatt* JJ. :—(1) All of the transactions and operations of the company's exporting business were part of one undertaking conducted both here and abroad. (2) On the authority of *Commissioners of Taxation* v. *Kirk*, (1900) A.C. 588, some part of the profits of all such transactions and operations, including those which commenced with the purchase of tallow in Australia, arose from sources within Australia.

Per Evatt J. :—In the absence of a binding statutory direction the quantum of profit chargeable with tax should be ascertained neither (*a*) by estimating the value of the goods at the moment of their leaving Australia for the purpose of measuring "value added" within Australia nor (*b*) by adopting any rigid departmental formula, but (*c*) by examining all the transactions to their completion in order to ascertain the actual profit of the exporting departments of the business, and by fixing a percentage thereof as attributable to the operations conducted in Australia, paying due regard to all the circumstances.

Decision of the Supreme Court of Victoria (*Macfarlan* J.): *W. Angliss & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation*, (1931) V.L.R. 107, varied.

APPEALS from the Supreme Court of Victoria.

These were appeals by the Commissioner of Taxation from a decision of *Macfarlan* J. by which part of the profits obtained from sales in the United Kingdom of goods exported from Australia were excluded from the assessment of William Angliss & Co. Pty. Ltd. to war-time profits tax for the years ending 30th June 1918 and 1919, and the assessments were remitted for alteration to the Commissioner with directions relating to the accounts furnished by the taxpayer and to the ascertainment of the capital of the business.

The taxpayer carried on a large slaughtering, butchering and freezing business, supplying meat wholesale and retail, shipping meat overseas and to various parts of Australia and dealing in skins, tallow and the like. Its principal works and head office were situated in Victoria, but it had a branch in London, which not only conducted the business of selling in the United Kingdom the goods which it exported from Australia but also sold on commission for other principals and bought goods for shipment to Australia. During the War, from 1914 to 1918, the State of Victoria virtually requisitioned for the use of the Imperial Government the supply of carcasses of lamb and mutton not required for local consumption. There was, however, no ready market for carcasses of mutton and lamb which were below the standard demanded by the Government nor for the edible offal, such as livers, hearts, tongues, tripes and kidneys. But

little of the edible offal was consumed locally. The taxpayer cut up the inferior carcasses and preserved the meat by boiling it in cans. It cleaned the offal and placed it in trays in the freezing chamber, and then packed it in bags or cases. The preserved meats and offal were then shipped to the United Kingdom, where the taxpayer's London office found a profitable market for them. In addition the taxpayer shipped to London frozen beef, sometimes in carcass form but mostly as boned beef, where its London office sold it. The taxpayer also exported large quantities of tallow, which were disposed of in the same way; but of this only about a fourth part was produced by the taxpayer's own operations, the remaining three-fourths being bought by it in Australia. It was estimated that of its exports during the two years in question, 1st July 1917 to 30th June 1919, about 40 per cent consisted of tallow, about 12 to 14 per cent of frozen meat "sundries" and the remainder of preserved meats. For each separate parcel of goods shipped the taxpayer made up an invoice to the taxpayer's London office at the price which the goods were expected to realize when sold in the United Kingdom. For this amount a marine insurance policy was obtained and a bill of exchange was drawn on London. The draft was made payable to the taxpayer's order and was indorsed by it. The bill of lading, the insurance policy, the invoice and the draft were then lodged with the taxpayer's bank in Melbourne, which discounted the bill of exchange and placed the proceeds to the credit of the taxpayer's account at its Melbourne branch and debited the amount of the bill against its account at the bank's London branch. When the goods were sold in London the actual amount realized by the sale was placed to the credit of this account. The goods were sold by the London office at the discretion of the London manager, who acted upon his own responsibility. Usually the sales were made after arrival, although in some very few instances goods were sold in London actually before shipment. Evidence was given, which was accepted by the learned trial Judge, to the effect that neither the preserved meats which were exported nor the edible offal could have been sold in Australia whether for home consumption or for exportation. His Honor also held that the tallow had a value in Australia which was capable of ready ascertainment and which

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probably exceeded the cost of production. The Commissioner of Taxation assessed the Company in respect of war-time profits tax for the years ending 30th June 1918 and 1919 upon the basis that, the exported products having been sold for a certain price in London, the value in Victoria was to be computed by deducting from the London price the cost of freight, insurance and handling, and that the figure so calculated was the amount of profit derived in Australia. The Company objected to the assessments, which were forwarded to the Supreme Court by way of appeal.

The matter was heard by *Macfarlan* J., who made an order in each case on 17th December 1930 by which it was declared that no part of the profits derived by the Company from the sale of goods outside Australia were profits within the meaning of the *War-time Profits Tax Assessment Act* except the profits derived from the sale of tallow manufactured by the Company in Australia, and that the whole of the Company's capital was to be taken into account when making the assessment: *W. Angliss & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1).

From this decision the Commissioner now appealed to the High Court and the Company gave notice of cross-appeal.

Sir Edward Mitchell K.C. and *Eager*, for the appellant.

Wilbur Ham K.C. and *Russell Martin*, for the respondent.

Cur. adv. vult.

Oct. 1.

The following written judgments were delivered :—

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and am content to state my agreement with it and with the order proposed by him.

STARKE J. The Commissioner of Taxation has appealed against a decision of *Macfarlan* J. declaring that no part of the profits derived by the respondent, Angliss & Co. Pty. Ltd., in the financial years 1917-1918 and 1918-1919 from the sale of goods outside Australia were profits within the meaning of the *War-time Profits*

(1) (1931) V.L.R. 107.

Tax Assessment Acts of 1917-1918, save and except such part of those profits as were derived from the sale of tallow manufactured by it in Australia. By the combined effect of the *War-time Profits Tax Act* 1917 and the Assessment Act already referred to, a tax is levied on all war-time profits from any business, such as that carried on by the respondent, arising in any financial year after 13th June 1915. The profits shall be taken to be the actual profits arising in the accounting period from sources within Australia (sec. 15). And by sec. 10, the profits arising from any business shall be separately determined for the purposes of the Act, but shall be determined on the same principles as the profits and gains of the business are or would be determined for the purposes of Commonwealth income tax, subject to certain modifications which are here immaterial. The *Income Tax Acts* 1915-1918 levy a tax upon the taxable income derived directly or indirectly by every taxpayer from sources within Australia. Under the *War-time Profits Tax Assessment Acts*, however, it is the actual profits of a business arising from sources in Australia that are taxed. This is the subject of the tax, and the *Income Tax Acts* do not extend it. The expression "arising . . . from sources in Australia" indicates Australia as the quarter from which the profits originate. And in *Commissioners of Taxation* v. *Kirk* (1) the Judicial Committee treated it as equivalent to "arising or accruing from business operations carried on in Australia." But the principles of interpretation to be applied are not dissimilar, whether the words be, as in England, "annual profits or gains arising or accruing . . . from . . . any trade . . . exercised within the United Kingdom," or, as in New Zealand, "profits derived from or received in New Zealand," or, as in Victoria, "earned in or derived from Victoria" or "arising or accruing from any trade carried on in Victoria," or, as in Queensland, "earned in or derived directly or indirectly . . . in or from sources in Queensland" (*Grainger & Son* v. *Gough* (2); *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (3); *Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd.* (4); *Commissioner of Taxes* v. *Union Trustee Co. of Australia* (5)).

(1) (1900) A.C. 588, at p. 593.
(2) (1896) A.C. 325.
(3) (1908) A.C. 46.
(4) (1931) A.C. 224.
(5) (1931) A.C. 258.

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One rule deducible from the cases, according to the Judicial Committee in *Lovell's Case* (1), is that where the essence of the business ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit, then, for the purposes of taxing Acts such as are here under consideration, the business is carried on within the locality where such contracts are habitually made. The cases last mentioned are all applications of this rule; and so are the cases of *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation (N.S.W.)* (2) and *Commissioner of Taxation (W.A.)* v. *D. and W. Murray Ltd.* (3), in this Court. But, even as to this rule, the observations of the present Lord *Atkin* in *Smidth & Co.* v. *Greenwood* (4) should be recalled:—"There are indications in the case cited" (*Grainger* v. *Gough* (5)) "and other cases, that it is sufficient to consider only where it is that the sale contracts are made which result in a profit. It is obviously a very important element. . . . But I am not prepared to hold that this test is decisive. I can imagine cases where the contract of resale is made abroad, and yet the manufacture of the goods, some negotiation of the terms, and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here. I think that the question is, Where do the operations take place from which the profits in substance arise?"

Another rule, founded on *Commissioners of Taxation* v. *Kirk* (6), is that where the essence of the business is a whole set of operations, then the place where one operation is performed cannot be fastened on as the locality from which the whole of the profits are derived. As Lord *Davey* observed in *Kirk's Case* (7), all these operations "are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages" (*Commissioners of Taxation (N.S.W.)* v. *Meeks* (8); *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.)* (9); *Dickson* v. *Commissioner of Taxation (N.S.W.)* (10)). These

(1) (1908) A.C. 46.
(2) (1921) 29 C.L.R. 225.
(3) (1929) 42 C.L.R. 332.
(4) (1921) 3 K.B. 583, at p. 593 (and see (1922) 1 A.C. 417).
(5) (1896) A.C. 325.
(6) (1900) A.C. 588.
(7) (1900) A.C., at p. 592.
(8) (1915) 19 C.L.R. 568.
(9) (1923) 33 C.L.R. 76.
(10) (1925) 36 C.L.R. 489.

so-called rules, are, I think, nothing more than elements in the inquiry: Do the profits arise or accrue wholly or in part from business operations carried on in Australia—or in England, &c., as the case may be? Or—to use the phrase of Lord *Atkin*—where do the operations take place from which the profits in substance arise? The question in last resort is really one of fact (*Commissioners of Taxation* v. *Kirk* (1); *Nathan* v. *Federal Commissioner of Taxation* (2); *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation (N.S.W)* (3). Cf. *Mitchell* v. *Egyptian Hotels Ltd.* (4)). *Kirk's Case*, however, affords an important illustration of the solution of the question in complicated circumstances. It was the case of two companies carrying on the business of mining on the Broken Hill field in New South Wales, and selling their products in London or Melbourne, and receiving the moneys arising from sale. The Supreme Court of New South Wales (*Commissioners of Taxation* v. *Broken Hill Pty. Co.* (5)) held that income arising from sales was not taxable under the *Land and Income Tax Assessment Act of* 1895 because it was earned outside that State. *Owen* J., who delivered the judgment of the Court, said (6): "In *Tindal's Case* (7) the Chief Justice points out the distinction between the source of income and the source of the commodity which produces the income. In this case the commodity is the crude ore . . . derived from Crown lands under lease, but the source of the income is the trade or business of preparing for market and selling the refined ore, and that income is earned in the place where the profits come home." But the Judicial Committee observed that the fallacy in this judgment was in leaving out of sight the initial stages and fastening attention exclusively on the final stage in the production of income. (*Commissioners of Taxation* v. *Kirk* (8)). There were, their Lordships pointed out, four processes in the earning or production of the income (1): (1) the extraction of the ore from the soil, (2) the conversion of the crude ore into a merchantable product, which

(1) (1900) A.C., at p. 592.
(2) (1918) 25 C.L.R. 183, at pp. 189-190.
(3) (1921) 29 C.L.R., at p. 233.
(4) (1915) A.C. 1022.
(5) (1898) 19 N.S.W.L.R. 294.
(6) (1898) 19 N.S.W.L.R., at p. 302.
(7) (1897) 18 N.S.W.L.R. 378.
(8) (1900) A.C., at p. 593.

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was a manufacturing process, (3) the sale of the merchantable product and (4) the receipt of the moneys arising from sale. The real question, said the Judicial Committee, was whether any part of the income so arising was earned or produced in New South Wales. As to processes (1) and (2), the Judicial Committee held that "the income was earned and arising and accruing in New South Wales," because as to (1) it was derived from lands of the Crown held under lease, and as to (2) because if not within the meaning of "trade" as used in the Act it certainly was included in the words "any other source whatsoever in New South Wales." The question whether either company had any "income" within the meaning and operation of the Acts was therefore answered in the affirmative. Consequently, the companies were, to some extent, taxable in New South Wales, and that is the limit of the decision.

Tindal's Case (1) should also be noted. I take the facts from the headnote :—"Tindal, who lived in England, had certain meat-works in New South Wales, which were managed by his son, under his directions. The meat, when tinned, with the exception of a small quantity" sold in New South Wales, "and all the by-products, were shipped to Tindal in England, or to such places in Europe as he directed. When the meat arrived in England, it was packed and sold by Tindal." The case (clause 15) stated that there was no profitable market in New South Wales for tinned meats, and practically none was sold there—the only sales being small quantities occasionally sold to ships of war. If preserved meats were put upon the local market in such quantities as were produced by the meat-works they would find no market and be practically unsaleable. The Supreme Court held that the income was not taxable because it did not accrue from any trade carried on in New South Wales or from any source in New South Wales. The Judicial Committee overruled this judgment, and said that the question in the case, as in *Kirk's Case* (2), should have been : What income was arising or accruing to Tindal from the business operations carried on by him in New South Wales ? How, then, are the actual profits of a business from sources within Australia to be ascertained, when the business is carried on in Australia but the profits are partly the

(1) (1897) 18 N.S.W.L.R. 378. (2) (1900) A.C. 588.

result of transactions abroad? A simple solution of the problem is that there is only one business, and that is carried on in Australia. Part of the profit of the business is earned by means of transactions abroad, but that is not carrying on the business abroad. There is only one profit, and that profit flows from the business carried on in Australia. The source of the profit is, therefore, the business or business operation carried on in Australia. This view commended itself to *Higgins* J. in *Dickson's Case* (1). And compare *London Bank of Mexico and South America* v. *Apthorpe* (2). But it was rejected by this Court in the *Mount Morgan Case* (3) and in *Dickson's Case* because the implications of *Kirk's Case* (4) were opposed to it. Further, war-time profits tax is imposed on all war-time profits from any business: it assumes a business carried on in Australia, but that its actual profits may arise from sources within and without Australia. And it is only the profits arising from sources within Australia that are to be computed for the purposes of assessing the tax. Some other solution of the problem must, therefore, be sought.

Two decisons of mine were referred to during the argument. *Federal Commissioner of Taxation* v. *Lewis Berger & Sons (Australia) Ltd.* (5) was an appeal under the Income Tax Assessment Acts by the Commissioner of Taxation from a Board of Review. The Commissioner had assessed the taxpayer on the basis that income arose from a series of operations of which some were carried out in Australia, and others abroad. No objection was raised to this basis of assessment, but the Board reduced the amount of the assessment. No appeal lay to this Court from the decision of the Board unless some question of law was involved. In my opinion no question of law was involved in its decision, and, consequently, the appeal was incompetent. *Michell* v. *Commissioner of Taxation* (6) was also an appeal, this time by the taxpayer against an assessment to income tax made by the Commissioner of Taxation. Again the taxpayer had been assessed on the basis that income arose from a series of operations, some carried out in Australia and others abroad. No

(1) (1925) 36 C.L.R., at pp. 500-501.
(2) (1891) 2 Q.B. 378.
(3) (1923) 33 C.L.R. 76.
(4) (1900) A.C. 588.
(5) (1927) 39 C.L.R. 468.
(6) *Ante*, p. 413.

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objection was raised to this basis of assessment, but in allocating the income derived directly or indirectly from sources within Australia, the Commissioner applied a departmental rule called Income Tax Order 816, which could not, in my opinion, be supported. I held that no fixed rule or formula was possible, and that any apportionment or allocation of income between different localities was entirely one of fact, depending upon business judgment and experience applied to the facts of the case.

A New Zealand case, *Commissioner of Taxes* v. *Kauri Timber Co.* (1), was also referred to. The company was registered in Melbourne and had its head office there. It owned kauri forests in New Zealand, where it also had timber mills and depots. Its principal business in New Zealand was the conversion of timber trees into timber of various dimensions. It exported this timber, and some was manufactured abroad into doors, sashes and other articles. The Commissioner claimed to charge the company with the net profits ultimately made on kauri timber, wherever the same might be sold or paid for, or however it might be treated inside or outside New Zealand by the Company. But the claim was rejected, and the basic reason for its rejection is thus expressed: "In our opinion, such profits are not derived from the business of the Company in New Zealand, but from a separate and independent business carried on by it in Australia. The question is, are such profits earned or produced in New Zealand? and this question must be answered in the negative. The operations of the company with the exported timber take place wholly beyond the Colony, and such operations are not even necessary for the purpose of rendering the timber saleable as timber. They are resorted to merely in order to enable the company to derive a larger profit from the sale of the manufactured articles, whether in the shape of boards, or of doors or window-sashes, or furniture of any description, than it could derive from the timber in its condition when it leaves the shores of New Zealand. These operations are no part of the business of the company in New Zealand" (2). That decision does not, I think, touch the problem which now concerns this Court. Lastly, there is the case of *Commissioner of Taxation (W.A.)* v. *D. & W. Murray Ltd.* (3). A tax was

(1) (1904) 24 N.Z.L.R. 18. (2) (1904) 24 N.Z.L.R., at pp. 30, 31
(3) (1929) 42 C.L.R. 332.

imposed under the law of Western Australia upon all profits made in Western Australia by any company carrying on business there. A company incorporated in England carried on business in Western Australia. It bought goods in England, and forwarded them to Western Australia and sold them at a profit in the course of its business carried on in that State. The case was really a simple one. The business was carried on in Western Australia, the goods were sold and the profits realized there. Nevertheless the company contended that when the net profits arising from its operations of buying goods in England and selling them from its Western Australian warehouse had been calculated, they could not all be considered as earned or made in Western Australia: some part of them, it was said, must be regarded as produced by the buying or other operations in England and therefore attributable to a source outside Western Australia. The question, however, was essentially one of fact: was or was not the profit made in Western Australia? The case belonged to the type of which *Lovell's Case* (1) and *Studebaker's Case* (2) are illustrations, and the conclusion was well warranted that the business which yielded the profit was that carried on in Western Australia. But the Court sought to fortify its conclusion with the observations that "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 . . . 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" (3). I should have supposed from these passages, however, that if the respondent Company had produced or added value to a commodity in Australia, then the proceeds of realization of that commodity in England or elsewhere might be attributed, in part at least, to a source in Australia. It would be contrary to *Kirk's Case* (4) and to *Tindal's Case* (5), as there expounded, to say that the proceeds from the realization abroad of a commodity produced or added to in Australia cannot have a source in Australia because

(1) (1908) A.C. 46.
(2) (1921) 29 C.L.R. 225.
(3) (1929) 42 C.L.R., at pp. 346, 348
(4) (1900) A.C. 588.
(5) (1897) 18 N.S.W.L.R. 378.

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there is no profitable market here or because the finished commodity is sold exclusively outside Australia. Indeed, if such a doctrine were true, much of the foreign trade of businesses carried on in Australia would fall outside the limits of the present taxing Acts. *Murray's Case* (1)—or rather the observations there made—were regarded, I think, by *Macfarlan* J. in the light of a rule of law, whereas the matter which he had to consider was, in truth as already indicated, a question of fact, namely, what profits were arising or accruing to Angliss & Co. Pty. Ltd. from the business operations carried on by it in Australia ? This brings me to the facts of the present case.

The Court should act on its own conclusions of fact. It is in as good a position as the trial Judge where, as here, the issue depends on the inference to be drawn from truthful evidence. If it depended on the credibility of witnesses, then the Court should be guided by the opinion of the Judge who saw and heard them. 1. The appellant is a company incorporated and registered under the *Companies Act* of Victoria. It carried on a large business in Australia, part of which consisted in shipping abroad large quantities of meat in various forms, and large quantities of tallow. 2. The head and seat and directing power of the Company were situate in Australia. 3. Of the export business of the Company:—(*a*) Forty per cent was represented by tallow; of this seventy-five to eighty-five per cent was bought in Australia for resale in London, and fifteen to twenty-five per cent was the result of boiling-down operations carried on by the Company in Australia. (*b*) Twelve to fourteen per cent was represented by offal; this consisted of hearts, livers, tongues, kidneys, hoofs, horns, &c., cleaned, frozen and packed in Australia. (*c*) Forty-eight per cent was represented by preserved meats. The carcasses were, in Australia, boned, cut into strips, put in cans, and preserved by boiling in the cans. 4. Except, perhaps, in the case of tallow, there was no market or demand in Australia for the commodities the subject of the respondent's export business, and they were unsaleable here. 5. But during the War period the commodities could be readily and profitably disposed of beyond Australia. 6. Accordingly, the commodities were shipped

(1) (1929) 42 C.L.R. 332.

abroad, mainly to the United Kingdom, and sold under contracts made abroad. 7. Transport and financial arrangements in connection with the shipments were made in Australia. Freight and insurance were arranged here, and banking accommodation in the shape of advances against shipments was obtained here. 8. The net proceeds of the realization abroad were brought home to Australia. One matter is clear, namely that the respondent had but one business. Part of that business was the preparation or production in Australia of merchantable commodities from the carcasses of sheep and cattle, and then securing the sale of them abroad. Every operation of the business was carried on in Australia, if we except the sale of the commodities which was effected exclusively outside Australia. But *Kirk's Case* (1), and other cases already referred to, establish that the sale of the commodity outside Australia is not decisive of the source of the production of income or profit. The observations in *Commissioner of Taxation* v. *D. & W. Murray Ltd.* (2) have, I fear, led *Macfarlan* J., in this case, into the fallacy condemned by the Judicial Committee in *Kirk's Case*—namely, leaving out of sight the initial stages of the respondent's operations and fastening attention exclusively on the final stage in the production of income or profit. In my opinion it is wrong, and in flat contradiction of *Kirk's Case* and other cases, to assert that no actual profit arose or accrued to the respondent in respect of its export trade from the business operations carried on in Australia, or, to use the words of the statute, "from sources within Australia," because there was no market here or because the sales were, and could only be, effected outside Australia. The quantum is another matter. The methods adopted by the Commissioner and set out in the transcript were abandoned, or at all events cannot be supported.

But I adhere to the view that no rigid rule or formula can be adopted, and that the question is one of fact, depending upon business judgment and experience as applied to each particular case. There would, I think, be little injustice in the case now before us if the proceeds of the realization of the commodities exported by the respondent were brought into its trading account, and the charges of production, transport, insurance, exchange and realization

(1) (1900) A.C. 588. (2) (1929) 42 C.L.R. 332.

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debited. It would then be for the respondent, as in *Meeks' Case* (1), to establish a case for apportioning the net proceeds by attributing any part of them to a source outside Australia. But this aspect of the case has never been considered.

In my opinion, the appeal should be allowed, and the case remitted to the Supreme Court of Victoria for rehearing.

Dixon J.

DIXON J. These are appeals by the Commissioner of Taxation from a decision of *Macfarlan* J. by which part of the profits obtained from sales in the United Kingdom of goods exported from Australia were excluded from the taxpayer's assessment of war-time profits for the years ending 30th June 1918 and 1919 and the assessments were remitted for alteration to the Commissioner with directions relating to the accounts furnished by the taxpayer and to the ascertainment of the capital of the business. The undertaking of the taxpayer was large and included slaughtering, butchering and freezing, supplying meat wholesale and retail, shipping meat overseas and to various parts of Australia and dealing in skins, tallow and the like. Its principal works and head office were situated in Victoria, but it had a branch in London which not only conducted the business of selling in the United Kingdom the goods which it exported from Australia but also sold on commission for other principals and bought goods for shipment to Australia. During the War the State of Victoria virtually requisitioned for the use of the Imperial Government the supply of carcasses of lamb and mutton not required for local consumption. As a result the suppliers of carcasses were provided with an assured market at a fixed price, and it is said that in their competition for sheep and lambs for slaughter they offered prices too high to allow of any great profit. But there was no ready market for carcasses of mutton and lamb which were below the standard demanded by the Government nor for the edible offal, e.g., livers, hearts, tongues, tripes, kidneys. Little of the edible offal was consumed locally and most of it was ordinarily boiled down to make tallow or fertilizer. The taxpayer, however, turned to better account the inferior carcasses and much of the edible offal. It cut up the carcasses and preserved

(1) (1915) 19 C.L.R. 568.

the meat by boiling it in cans. It cleaned offal and placed it in trays in the freezing chamber and then packed it in bags or cases. The preserved meats and the offal were then shipped to the United Kingdom, where the taxpayer's London office found a very profitable market for them. In addition, frozen beef, sometimes in carcass form but mostly as boned beef, was shipped by the taxpayer to London, where its London office sold it. The taxpayer also exported large quantities of tallow which were disposed of in the same way, but of this only about a fourth part was produced by the taxpayer's own operations, the remaining three-fourths being bought by it in Australia. It was estimated that of its exports during the two years in question, 1st July 1917—30th June 1919, about 40 per cent consisted of tallow, about 12 to 14 per cent of frozen meat "sundries" and the remaining 46 to 48 per cent of preserved meats; but this estimate appears to neglect the boned and carcass beef—perhaps because it was inconsiderable. For each separate parcel of goods shipped the taxpayer made up an invoice to the taxpayer's London office at the price which the goods were expected to realize when sold in the United Kingdom. For this amount a marine insurance was obtained and a bill of exchange was drawn on London. The draft was made payable to the taxpayer's order and was indorsed by it. The bill of lading, the insurance documents, the invoice and the draft were then lodged with the taxpayer's bank in Melbourne, which discounted the bill of exchange and placed the proceeds to the credit of the taxpayer's account at its Melbourne branch and debited the amount of the bill against its account at the bank's London branch. When the goods were sold in London the actual amount realized by the sale was placed to the credit of this account. The goods were sold by the London office at the discretion of the London manager, who acted upon his own responsibility. Usually the sales were made after arrival, although in some very few instances goods were sold in London actually before shipment. Evidence was given, which was accepted by the learned Judge, to the effect that neither the preserved meats which were exported nor the edible offal could have been sold in Australia whether for home consumption or for exportation. It may seem strange that goods for which there was in the United Kingdom great demand and a ready sale

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at high prices should be unsaleable in Australia, or unsaleable at a price exceeding the cost of production, as the learned Judge has found. But it must be remembered that the demand in the United Kingdom had been set up or given importance by war conditions; that no practice had developed of buying in Australia from London; that there were no buyers in Australia for export; that shipping and business generally were affected by the War; and that the material from which the goods could easily be prepared existed in abundance in Australia and was in fact treated as waste by all save two or three who, like the taxpayer, possessed the means and the enterprise to take it to the market where it was needed. At any rate the evidence that the "sundries" or offal and the preserved meats could not have been sold or sold profitably within Australia remained uncontradicted and unanswered. The Commissioner contented himself with a suggestion of counsel that, in the nature of things, it could not be so, and made no attempt to show by evidence or even by cross-examination that in Australia the commodities had any value in exchange. *A priori* reasoning as to what must have been the course and state of a trade cannot be admitted as a substitute for evidence, but all the considerations which might appear to tell against his conclusion were examined by the learned Judge before he reached it. He rightly found no ground for supposing that the amount at which the goods were invoiced represented an f.o.b. value in Australia. There is nothing strange in the bank discounting bills of exchange drawn for a value which the goods would not possess until arrival. Even if the standing of the customer was not in itself enough and the bank looked to the goods for its security, the advance was made against a bill of lading and a policy of marine insurance for the full amount. One way or another the bank would receive what the goods produced outside Australia, and their value in Australia was of no consequence to it. From the point of view of the taxpayer, insurance to the amount for which the goods would sell at the place of destination was the only means of obtaining a full indemnity. Indeed, the almost universal adoption of valued policies upon goods is the result in part of the rule that open policies entitled the assured to no more than cost, expenses of shipping and charges for insurance. The

learned Judge's finding that no value could be attached to the preserved meats and the "sundries" in Australia beyond their cost of production appears to me to be right. Tallow, on the other hand, was freely bought in Australia by the taxpayer, and the learned Judge accordingly held that it had a value here in exchange which probably exceeded the cost of production. This value, moreover, was capable of ready ascertainment. His Honor made no separate finding as to the value of the boned beef or the carcass beef which the taxpayer exported. That commodity seems to have received little attention at the hearing and, whether negligible or not, it was neglected upon this appeal.

The question whether the profits obtained by the sales in the United Kingdom should come into the assessment depends upon sec. 15 (1) of the *War-time Profits Tax Assessment Act* 1917-1918, which provides that, subject to the Act, the profits shall be taken to be the actual profits arising in the accounting period from sources in Australia. An attempt was made on behalf of the Commissioner to use sec. 10 of the Act for the purpose of applying to the assessment of war-time profits the criterion of territoriality expressed by sec. 10 of the *Income Tax Assessment Act* 1915-1918, which speaks of "income derived directly or indirectly . . . from sources within Australia." If the words "derived directly or indirectly" include more than the words "arising from," as perhaps some of the observations in *Nathan* v. *Federal Commissioner of Taxation* (1) suggest, then it is enough to say they do not establish a principle for the determination of the profits that are brought into charge by sec. 15 (1) of the *War-time Profits Tax Assessment Act* 1917-1918. The expression "profits . . . arising . . . from sources within Australia" must be applied unaided by the *Income Tax Assessment Act*. But it is suggested that in ordinary speech the business in Australia would be described as the source of the profits made by the sales in London; and it is said that the word "source" connotes rather remoteness than propinquity of causation. In his judgment in *Dickson* v. *Commissioner of Taxation* (*N.S.W.*) (2) *Higgins* J. said "In my opinion, the word 'source,' when its metaphorical basis is considered, connotes the very contrary of that which is proximately antecedent"; and

(1) (1918) 25 C.L.R. 183.

(2) (1925) 36 C.L.R., at p. 506.

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he gives the example of a river. But the stream begins at the source and when income or profits come into existence at the conclusion of a series of operations so that none arise unless and until the operations are completed, the whole may be said to be the source. Moreover, the *War-time Profits Tax Assessment Act* is concerned with a business and taxes its profits (*McKellar* v. *Federal Commissioner of Taxation* (1)), so that when sec. 15 (1) limits the profits of the business brought into charge to those arising from sources in Australia, it implies that a single business may derive its profits from more than one source and that some of the sources may be within and some outside Australia. Further, the view expressed by *Higgins* J. is inconsistent with the actual judgment of the Court in *Dickson's Case* (2), which directed an apportionment. In that case *Starke* J. said that the essence of the business of the taxpayer was a whole set of operations from production to realization. "Consequently, the place where one operation is performed cannot be fastened upon as the locality from which the whole income is derived . . . a sale is only one stage of a series of operations which together result in the income, and to regard it as the direct source of income is to leave out of sight the initial and other stages of those operations" (3). This language applies to the present case. It may be objected, however, that if all the operations together constitute one source, then the source is not within the territory because some of its component parts are outside Australia: a source is not within if it is partly in and partly out. The logical character of this objection may be confessed, but its consequence is avoided by recognizing that production of itself may create profit and that sale may be no more than the conversion of profit into money: the realization of a profit already contained in the goods. What is true of production is doubtless true also of other operations in connection with commodities. By the treatment or preparation of goods, indeed, possibly by their mere purchase at a low price, a gain may be obtained in one place before they are shipped or sold in another. The intending exporter may already have in his hands goods with a surplus value representing profit quite independently

(1) (1922) 30 C.L.R. 198.
(2) (1925) 36 C.L.R. 489.
(3) (1925) 36 C.L.R., at pp. 500, 501.

of any further operation which he conducts elsewhere. When the functions of production and distribution are combined in one business, political boundaries may make it necessary to distinguish between the profits derived from each, and in spite of the fact that both profits are represented by the proceeds of the goods arising from sale, it may yet remain possible to discriminate between them and ascertain the profit upon production.

Under the Federal *Income Tax Assessment Acts* no legislative guide in the performance of this task existed between the year 1918, when sec. 23 of the Act of 1915-1918 was repealed, and the year 1928, when sec. 16c of the Act of 1922-1930 was enacted. But in the case of the *Commissioner of Taxation (W.A.)* v. *D. & W. Murray Ltd.* (1) it became necessary to examine the cases in which an apportionment had been authorized or made, and an explanation was given of what was and what was not involved in that much abused and perhaps misunderstood expression. To that explanation I adhere, and I think it necessary to add only that in *Commissioners of Taxation (N.S.W.)* v. *Meeks* (2), which is not discussed in *D. & W. Murray's Case*, the Court affirmed an order which made the taxpayer liable for tax upon the full amount there in question.

It remains only to apply to the facts of this case the principles stated in *D. & W. Murray's Case* (1), which do not differ in substance from those adopted in *Commissioner of Taxation* v. *Kauri Timber Co.* (3). The application of these principles reduces the question of most importance in the present case to one of fact, namely, what amount of the moneys realized by the sale of the goods in the United Kingdom represented value in exchange or money's-worth which existed in Australia independently of the exterritorial operations of the taxpayer? To this question the learned Judge addressed himself, and he answered it by finding, in effect, that no such value or money's-worth existed in the "sundries" or preserved meats beyond the cost of production, and in the tallow beyond the prices at which the tallow was bought and sold in Australia at or about the times of shipment. This finding appears to me to be supported by the evidence, and it ought not to be disturbed. It follows from

(1) (1929) 42 C.L.R. 332. (2) (1915) 19 C.L.R. 568.
(3) (1904) 24 N.Z.L.R. 18.

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it that the profits realized by the sale of " sundries " and preserved meats arose from sources out of Australia. The prices at which tallow was bought and sold in Australia determine the profit from that commodity arising from sources in Australia ; but for practical purposes manufactured tallow need only be taken into account, because it does not appear that the respondent bought tallow below the prices ruling at the time of shipment. The taxpayer had continued a system of accounts which, whatever may have been the reason for its first adoption, did nothing to aid the taxpayer in establishing the exterritoriality of the gains now in question, and when in November 1922 the accounts were reconstructed it was found impossible to ensure complete accuracy in assigning every sale in London to a precise date before or after the 30th June in each year. But evidence was given which the trial Judge found satisfactory that every precaution to obtain correctness was taken which remained possible, and his Honor included in his order a declaration that the accounts were the only accounts to be considered in ascertaining the profits. This declaration must operate in many ways which were unintended, and goes beyond its purpose. It is desirable that the order should be confined to establishing by declarations the exact findings made and leaving the Commissioner to reassess consistently with them. The Commissioner will thus be enabled to reconsider, if he thinks it of any material importance, the capital of the business, part of which he has attributed to a locality outside Australia upon a basis which is clearly wrong. The contention made on behalf of the Commissioner that the notice of objection to the original assessment for the year ending 30th June 1918 was insufficient appears to me to be answered by the fact that he accepted and considered it, and obtained all the information for the purpose of doing so. It appears clearly enough from a scrutiny of the correspondence and of the amended assessments that the Commissioner determined to disallow the objection, but he does not appear to have given formal notice of his decision ; for I do not consider notice of an amended assessment amounts to sufficient notice of a decision on objection. But the taxpayer required the Commissioner to transmit the objection as an appeal, and it is conceded that we are to regard this as having been done. I think

that both original assessments and both amended assessments were before the Supreme Court on appeal.

I think that the orders should be varied and that otherwise the appeals should be dismissed with costs.

EVATT J. These two appeals and cross-appeals from the Supreme Court of Victoria (*Macfarlan* J.) raise some questions of considerable interest and importance, and will determine the extent of the liability of the respondent Company under the Commonwealth statute called the *War-time Profits Tax Assessment Act* 1917-1918. During the two financial years 1917-1918 and 1918-1919 the Company undertook a series of operations which terminated in the payment into its London bank account of the proceeds of the sale in places oversea of a large quantity of its merchandise. How should this system of transactions be regarded for the purpose of assessing the respondent's war-time profits tax ?

At all material times the Company carried on a large undertaking within Australia. It was incorporated under the Victorian *Companies Act*. The first four sub-clauses of the objects clause of its memorandum of association sufficiently describe its activities during the taxation years under review. Its business included that of slaughtermen, butchers (wholesale, retail and export), the manufacture, preparation and sale within and without Australia of small goods and prepared meats, and the purchase of all such products in their finished state as well as of all materials required for their manufacture. It had cold-storage works, selling the commodities there produced, and it also dealt with, manufactured, and exported hides, skins and tallow.

In the course of and for the purposes of this varied business, large quantities of meat, tallow and other products were manufactured, treated, or purchased in Australia, shipped overseas and sold there during the two relevant years. In this export business the Company had to employ, in addition to its Australian staff and operators, some full-time servants in London, who entered into the various contracts of sale without special reference to Australia. The general management was, however, in the hands of its directors here, and the operations performed before the goods left Australia

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included slaughtering, boxing, boiling-down, cleaning, freezing, packing, casing, tinning and labelling, and, of course, the use of plant, labour and raw materials.

Macfarlan J. has made a convenient summary of this export business (1).

> "It is shown," he says, "that (1) Forty per cent was represented by tallow. Of this tallow, seventy-five to eighty-five per cent was bought here for resale in London. The remaining twenty-five to fifteen per cent of the tallow was obtained here by the Company from the firm's own boiling-down operations of the offal and fat from animals slaughtered. (2) From twelve to fourteen per cent of the export business was represented by what is known as offal. This consisted of hearts, liver, tongues, kidneys, hoofs, horns, &c. These were cleaned, frozen and packed here, and shipped to England. (3) The remaining forty-eight per cent of the export business consisted of what is known as preserved meat. Mutton carcasses were requisitioned by the State, provided they came up to a certain standard. Inferior mutton carcasses, however, and also such beef as was exported, were boned and cut into strips, put into cans, and preserved here by boiling in cans after the latter had been sealed. Only a very small quantity of the beast was shipped (in the form of 'quarters' or 'bones') to Great Britain."

Whilst the goods were in Australia, invoices were made out, the value or price of each parcel included being based upon the ruling prices in London. After shipping arrangements had been made, the invoices, bills of lading and appropriate policies of insurance were taken to the respondent's bank in Melbourne. A bill of exchange for the amount representing the estimated London price was drawn, payable to the order of the Company and by it indorsed. This, together with the other documents, was given to the bank, which immediately discounted the bill and credited the Company with the money in Melbourne. As each parcel consigned was sold in London, the amount realized was placed against a corresponding debit at the London branch of the bank.

The books of the Company were entered up in accordance with the course of business described. A sales account was kept, in which entries were made relating to each parcel shipped as though it had been sold to the bank in Melbourne. At the same time, a debit was entered in a shippers' ledger account. After sale in London, the account sales were sent to Australia and credit entries in the shippers' ledger account were then made. It was in conformity with this method of book-keeping that the returns required for

(1) (1931) V.L.R., at p. 111.

the purposes of taxation were prepared and furnished by the Company, and, as a consequence, actual assessments were made by the Commissioner upon the same footing.

During the relevant time the exporting branch of the Company made considerable profits. The evidence shows that the goods were in great demand during the war period, and consignments were disposed of immediately they arrived in England. The purchasers included the British Government. Even after the Armistice in November 1918, London prices remained fairly constant until the middle of 1919. It was not until near the end of 1919 that the volume of sales became affected to any great extent.

On the other hand, the demand in Australia for home consumption was at all material times negligible. If the products had been marketed here for such purpose, great quantities would have been unsaleable. It does not follow that the products did not have considerable value before they left Australian waters. The evidence on the point is here set out without further comment.

Mr. Ham—Q. You heard the question; had they been thrown on the Australian market during the relevant years, do you consider they would have been sold at a profit? A. No, certainly not; a great quantity would have been destroyed.

Sir Edward Mitchell—Q. Supposing someone could send them to the London market; do you say they would not have bought to send them there? A. That might apply to some extent, but not to the bulk of it.

Q. Why not if there was such a big demand?

His Honor—Q. Supposing someone bought them locally for sale abroad?

Sir Edward Mitchell—Q. For sale anywhere?

His Honor—They would not have done it for the pleasure of destroying them.

Sir Edward Mitchell—Q. In a condition ready for shipment; why would not anyone, with this demand on the other side of the world compete with them? A. So far as preserved meats and meat sundries are concerned he would have to be a man with works to preserve and freeze.

Q. You have got them to a stage ready for shipment to the other side where there is a demand. Supposing some misfortune happened to your firm and it was necessary to sell these goods; would not someone buy them? A. Someone might, but we were operating the business and no one else.

Q. People here would know the demand existed in the other place? A. The same thing would apply to any commodity such as wheat or flour.

Q. I think so—If there was a demand which could be satisfied.

His Honor—Q. I suppose you were acquainted with the salesmen here of Australian meat products in London. Was there anyone here who had the facility for selling in London which you had? A. There were two other firms.

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Q. What was to prevent them from buying ? A. The point is that they did not operate ; if they thought they could have handled it they would have been in the same business themselves.

Q. So there was, in effect, no demand ? A. Yes.

Sir Edward Mitchell—Q. You did not offer any of it for sale, which was made up for shipment ? A. No.

Whilst excellent results were obtained during the two years because of the Company's enterprise in exploiting the overseas market, it must not be forgotten that the income realized abroad represented a comparatively small part of the business transacted to completion within the Commonwealth itself.

I have summed up the conclusions of *Macfarlan* J. as follows :—

(1) That no part of the profits derived from the sale of goods outside Australia (except tallow manufactured by the respondent in Australia) were subject to tax under the *War-time Profits Tax Assessment Act* 1917-1918.

(2) That none of the profits of an export business which consists in buying here and selling in London, can be regarded as derived from sources within Australia, and, therefore, none of the profits of the Company arising from operations ending in the sale abroad of tallow purchased in Australia were brought into charge.

(3) In the case of preserved meats, there was no local market either for consumption in Australia or for export. Although the treatment here made the goods more suitable for export, the value thus added to them was not greater than the cost of obtaining such value. There was, therefore, no profit whatever arising from sources within Australia.

(4) In the case of offal, there was, in a sense, " value added " by what was done in Australia in selection, preparation, and treatment, but, in the absence of evidence of a local market for consumption here or for export, it was impossible to say that the " added value " was greater than the cost of the process involved. It followed that none of these transactions were taxable.

(5) In the case of manufactured tallow, however, the Company's tallow purchases in Australia proved the existence of a local market for export. This purchase price exceeded the costs of manufacture and treatment. Wealth was therefore " added here " to the manufactured tallow, and the difference between the costs and

market price in Australia was the true measure of profits brought into charge.

The respondent Company filed notices of cross-appeal in respect of the series of transactions at the end of which its manufactured tallow was sold abroad, contending that such operations constituted a business "the essence of which" was the making of contracts of sale outside Australia. The main appeal is that of the Commissioner of Taxation, who challenges the whole of the judgment and orders of the Supreme Court.

With certain exceptions which are not material, all businesses "deriving profits from sources within Australia" come within the range of the *War-time Profits Tax Assessment Act* (sec. 8). Sec. 15 (1) of the Act expresses the subject matter of taxation as "the actual profits arising in the accounting period from sources within Australia." The subject matter of income taxation under the *Income Tax Assessment Act* 1915-1918 was "taxable income derived directly or indirectly by every taxpayer from sources within Australia." It was, therefore, as necessary for income tax purposes as for those of war-time profits tax, to show the existence of "sources within Australia." The phrase "directly or indirectly" in the *Income Tax Assessment Act* is related to the word "derived," and not to the word "sources." It follows that the problem in the present case is not affected by sec. 10 (1) of the *War-time Profits Tax Assessment Act* so far as it introduces into the scheme of taxing war-time profits the "principles" then applicable in respect of Commonwealth income tax.

For many years taxation by reference to "source" or "sources" of income or profits has been a feature of fiscal legislation in Australia. The principle was adopted from pre-Federation days when the limitation of colonial legislative jurisdiction to things done within its own borders was more frequently stressed than nowadays. In the case of a business which was conducted partly within and partly without a colony, it was thought reasonable that taxation should be directed to that part of its income or profits of which a real business connection with the colony could be predicated. Accordingly, we find in the New South Wales statute of 1895 that the word "source" was used, apparently in order to

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describe acts and things done in the Colony which could be regarded as leading to the "income" sought to be taxed. The words "arising," "accruing," and "derived" seem to have been employed so as to indicate the relationship of the "income" brought within the charge to "sources" of the business within New South Wales.

"Income" seems to have been depicted as a flowing stream fed from time to time and from place to place by the various operations and transactions of the business, which were the sources and tributaries of the stream. It would appear to follow that what the New South Wales Legislature was seeking to designate as a "source" consisted of those operations or transactions which, themselves taking place within the Colony, terminated in the receipt of income either within or without it. In the case of a two-territory business, the ideas sought to be conveyed were, first, that acts and transactions of a business here might lead to income-receipts abroad and, secondly, that, if they did so, some portion of those income-receipts was referable to "sources" here.

But an opposing view was put forward, resting upon the foundation of the well known English cases of *Sulley* v. *Attorney-General* (1) and *Grainger* v. *Gough* (2). This view found clear recognition in the three decisions of the Supreme Court of New South Wales, known as *Re Tindal* (3) and the two *Commissioners of Taxation* v. *Broken Hill Pty. Co.* cases (4). The opinion there expressed was that, where goods were produced here and sent to England by an Anglo-Australian business, the sales and payment therefor being also made in England, none of the profits made had any source whatever in New South Wales. It was said that the Colony was merely "the source of the commodity which produces the income," not "the source of the income" itself; that "the income of the company is earned where the profits come home"; and that "whilst the station or the meat-works are the source of the tinned meat, &c., the true source of the appellant's income is his London trade, the place where he sells the commodity in which he deals" (5).

The principles implicit in these statements have so often and so

(1) (1860) 5 H. & N. 711; 157 E.R. 1364.
(2) (1896) A.C. 325.
(3) (1897) 18 N.S.W.L.R. 378.
(4) (1898) 19 N.S.W.L.R. 294 and 301.
(5) (1897) 18 N.S.W.L.R., at pp. 388, 389.

recently been contended for, that it is of assistance to examine the English decisions which the New South Wales Supreme Court considered to be so closely analogous in dealing with questions of "source" taxation.

In *Grainger* v. *Gough* (1) it was decided that a wine merchant whose chief place of business was in France, did not come within Schedule D of the *Income Tax Act* 1853, as a non-resident who had made profits "from . . . any trade . . . exercised within the United Kingdom." Louis Roederer, the merchant, kept his stock of wine in France and none of it in England; and although Grainger & Son, who were wine merchants carrying on business in London, regularly transmitted to France orders for wine received from English customers, these orders were accepted, and the contracts therefore made, in France. What was done in England by and on behalf of Roederer was merely the solicitation of custom as "ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods" (i.e., France) (2).

Lord *Watson* was of opinion that *Sulley* v. *Attorney-General* (3) could be regarded as deciding that the purchasing of stock in Great Britain with the view of trading in it elsewhere, did not "of itself" constitute trading in Great Britain, if the department of the business "from which profits or gains are directly realized is carried on in another country" (4).

Grainger v. *Gough* (1), therefore, was based upon the finding that Roederer, the French wine merchant, was not engaged in trade within the United Kingdom. Similarly, in *Sulley's Case* (3) it was determined that the acts in England of the partner of the American business did not amount to the exercise of a trade, "having regard to the subject matter of the statute" (5). In each case a finding in the contrary direction would have exposed the individuals affected to taxation of a very drastic character, bearing no relation whatever to the degree of importance of things done by them in the United Kingdom alone. In the New South Wales statute of 1895 the Legislature had before it the more moderate scheme of

(1) (1896) A.C. 325.
(2) (1896) A.C., at p. 336, per Lord Herschell.
(3) (1860) 5 H. & N. 711; 157 E.R. 1364.
(4) (1896) A.C., at p. 341.
(5) (1860) 5 H. & N., at p. 717; 157 E.R., at p. 1367.

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taxing a concern or the income it derived from operations of the business within the Colony and not from business elsewhere conducted.

That this was the object of the latter statute was made clear by the Judicial Committee in the appeal from the decision of the Supreme Court in the two *Broken Hill Cases* (1) already referred to (*Commissioners of Taxation* v. *Kirk* (2)). Lord *Davey*, who had been a party to the decision of the House of Lords in *Grainger* v. *Gough* (3), delivered the Privy Council's judgment. In the result the judgments of the Supreme Court in the two *Broken Hill Cases* were reversed, and the earlier decision in *Tindal's Case* (4) was overruled. The language and scheme of the 1895 statute bear such a resemblance to those of the *War-time Profits Tax Assessment Act*, and the decision in *Kirk's Case* is, therefore, of such importance, that some account of the three cases mentioned is essential.

The subject of taxation defined in the New South Wales statute of 1895 was the annual income of the taxpayer (a) " arising or accruing to any person, wheresoever residing, from any . . . trade . . . carried on in New South Wales," (b) derived or arising from certain other specified sources, or (c) " arising or accruing . . . from any other source whatsoever in New South Wales." No tax was payable in respect of " income earned outside the Colony of New South Wales." There was no provision in the statute for apportioning (as between New South Wales sources and sources outside New South Wales) the income of a business carried on both in and outside the Colony.

It was in 1897 that the Full Court of the Supreme Court of New South Wales decided the case of *In re Tindal* (4). The facts there admitted bear a resemblance to those of the present case. A partnership conducted cattle stations and meat-preserving works in New South Wales. The senior member of the firm resided in London, where he had offices and warehouses. He there carried on an agency business in tinned meat including meat manufactured at the meat-preserving works of the firm in New South Wales but extending to the sale of the products of other concerns. The meats,

(1) (1898) 19 N.S.W.L.R. 294 and 301.
(2) (1900) A.C. 588.
(3) (1896) A.C. 325.
(4) (1897) 18 N.S.W.L.R. 378.

together with such by-products as hides, tallow and bones, were shipped from New South Wales to London.

The taxation returns sent in showed the operations of the cattle station properties. A separate return showed the result of the meat-preserving business. The latter return included figures based on "the value of the produce shipped away" to London by the meat-preserving business. There was no profitable market in New South Wales for tinned meats in any quantity. The sales there were consequently negligible, and it was admitted that "if preserved meats were put upon the local" (New South Wales) "market in such quantities as are produced by the meat-works they would find no market and would be practically unsaleable" (Special Case, par. 15).

In the results shown on the return dealing with the meat-preserving business, the value of the products was calculated upon Sydney prices only and the Taxation Commissioners objected to this course. They contended also that there was one and not several businesses conducted by the taxpayer.

It appeared also that the station cattle were chiefly used for the purpose of the meat-preserving works, but, in addition, large quantities of cattle had to be purchased here for slaughtering. The preserved meats were tinned in New South Wales but labelled and cased for trade purposes in London, where the sales were effected on the sole responsibility of the senior partner, who received and retained the purchase-money. In addition to the stock, some materials for the meat-works were purchased in New South Wales but other materials were purchased in London and imported. In order to pay for the cattle purchased and for the expenses, such as wages and purchases of materials incurred in New South Wales, bills were drawn upon the senior partner in London.

On these facts the Supreme Court held that none of the taxpayer's income sprang from sources in New South Wales, and that the principles of *Sulley's Case* (1) and of *Grainger* v. *Gough* (2) applied to the 1895 statute.

In the following year the Supreme Court decided the two *Broken Hill Cases* (3), and negatived any liability of two Broken Hill mining

(1) (1860) 5 H. & N. 711; 157 E.R. 1364.
(2) (1896) A.C. 325.
(3) (1898) 19 N.S.W.L.R. 294 and 301.

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companies to pay income tax under the same New South Wales Act of 1895. The first company was registered in the Colony of Victoria, where it had its head office and board of directors. There was a branch office or local board in London, and an office in Broken Hill, New South Wales, under the control of the mine manager. The operations carried on at Broken Hill were those of mining, and the bulk of the ore was raised and treated there, although considerable quantities were also treated at Port Pirie, South Australia. There was further treatment at Port Pirie of the silver lead bullion and concentrates produced by the treatment at Broken Hill. The products were sold either in London or in Melbourne, and none within the then Colony of New South Wales. It was admitted that many of the products were saleable in New South Wales but not at prices so profitable as under the existing course of business.

In the case of the second Broken Hill (Block 10) Company the ore was treated at Broken Hill only, but all the sales were effected outside New South Wales.

In both the *Broken Hill Cases* (1) it was attempted by the Taxation Commissioners to distinguish *Tindal's Case* (2) upon the ground that the statute expressly included within the subject of taxation "income derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown," and the Broken Hill mines were in fact leasehold lands held from the Crown. But the Court decided that the cases came within sec. 27 (3) of the Act, which provided that no tax was payable in respect of income earned outside the Colony.

> "We can see no difference in principle," said *Owen* J. in delivering judgment, "between this case and *Tindal's Case* (2). The income in each case is earned outside the Colony. In *Tindal's Case*, the cattle were bought in this Colony, and the meat-works were also here, but, because the products of the meat-works were shipped to London, and there finished for the market and sold, and the profits received in London, it was held that the income was earned outside the Colony, and, therefore, exempt from taxation" (3).

The Supreme Court also decided that the case of the second Broken Hill Company was governed by the decision in *Tindal's Case* (2).

> "In this case," said *Owen* J., "the commodity is the crude ore, and that no doubt is derived from Crown lands under lease, but the source of the

(1) (1898) 19 N.S.W.L.R. 294 and 301.
(2) (1897) 18 N.S.W.L.R. 378.
(3) (1898) 19 N.S.W.L.R., at p. 301.

income is the trade or business of preparing for market and selling the refined ore, and that income is earned in the place where the profits come home" (1).

The leading points of Lord *Davey's* judgment on appeal are capable of being thus stated:—

(1) The facts admitted in *Tindal's Case* (2) and in each of the two *Broken Hill Cases* (3) established the existence of "business operations" or "a business" within the Colony.

(2) The judgments of the Full Court in each of the three cases were fallacious "in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income" (4).

(3) It was wrong to suppose "that the income was not earned in New South Wales because the finished products were sold exclusively outside the Colony" (5).

(4) The question for decision in the case of a business carried on partly within and partly without New South Wales was "what income was arising or accruing . . . from the business operations carried on . . . in the Colony" (4).

(5) Some portion of the income of the Broken Hill companies and of Tindal was earned in the Colony although all the sales of the products of the three businesses took place outside the Colony.

Part of the argument in the present appeal makes it necessary to refer to three other decisions pronounced by the Privy Council since the decision in *Kirk's Case* (6).

In *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (7) it was decided under a New Zealand statute that certain profits of the appellants did not constitute "income derived from business," which was defined so as to include "profits derived from or received in" New Zealand. Lovells' were commission agents for the sale of dairy produce and carried on business in London. New Zealand owners of produce consigned their produce for sale by Lovells' in the English market. The latter had one full-time employee in New Zealand and another employee used to visit the Dominion yearly in order to make arrangements with dairying companies for consignments to London

(1) (1898) 19 N.S.W.L.R., at p. 302.
(2) (1897) 18 N.S.W.L.R. 378.
(3) (1898) 19 N.S.W.L.R. 294 and 301.
(4) (1900) A.C., at p. 593.
(5) (1900) A.C., at p. 592.
(6) (1900) A.C. 588.
(7) (1908) A.C. 46.

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and for credits. All of the appellants' earnings sought to be taxed were obtained from the sales on commission in England, the proceeds of sale being remitted to the New Zealand owners, less commission and expenses.

What was done by the two employees of the appellants in New Zealand was analogous to the soliciting of custom by Roederer's English "agent" in *Grainger's Case* (1). The Privy Council regarded the arrangements entered into in New Zealand as "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" (2), and that business was properly described as "the business of selling goods on commission in London" (3).

Lovells' business really consisted in and consisted of the selling of their principals' goods in London, the resulting commission on purchase-money being the consideration for effecting the sales. Other than as a seller of goods on commission, they were not in trade at all. The references in Sir *Arthur Wilson's* judgment to *Grainger* v. *Gough* (1) and *Sulley* v. *Attorney-General* (4) indicate that the broad ground of the decision of the Judicial Committee was that the appellants did not carry on any real business at all in New Zealand. If so, they could not be held liable locally in respect of "income derived from business." The "course of business" was fully described in the judgment, and one of the arguments for the appellants was that their connection with New Zealand was too remote to constitute a carrying on of business within the Colony. No business could produce "profits" with a New Zealand source or locality unless the business or part of it was being there conducted. And that fact was negatived.

The other two decisions to be referred to are those recently given by the Judicial Committee in the two *Bawra Cases* (5). The effect of these cases seems to have been misunderstood.

The Queensland case (*Commissioner of Taxes* v. *Union Trustee Co. of Australia* (6)) turned on the provisions of a Queensland statute imposing a tax upon "only such income as is derived

(1) (1896) A.C. 325.
(2) (1908) A.C., at p. 53.
(3) (1908) A.C., at p. 52.
(4) (1860) 5 H. & N. 711; 157 E.R. 1364.
(5) (1931) A.C. 224 and 258.
(6) (1931) A.C. 258.

directly or indirectly from a source locally situate in Queensland" (1). Liability under the Victorian statute attached to companies wheresoever incorporated, and whether their head office or principal place of business was in Victoria or elsewhere. But the income chargeable there with tax consisted of "the profits earned in or derived in or from Victoria by such company" during the taxation year.

In the Victorian case (*Commissioner of Taxes* v. *British Australian Wool Realisation Association Ltd.* (2)) the Judicial Committee held that the B.A.W.R.A. Ltd. (in liquidation), although incorporated in Victoria, was not liable to be charged with income tax in respect of any part of the proceeds of the realization of its surplus wool outside Australia or of the commission earned by it in realizing wool belonging to the Imperial Government. In the Queensland case (3) it was decided that no part of the moneys distributed to a wool-grower resident in Queensland by the same Victorian company (Bawra), in respect of shares allotted to him on the formation of that company in 1921, had any source in Queensland or could be reckoned as part of his income for the purposes of the local statute.

Lord *Blanesburgh*, in the Victorian appeal (2), explained the unprecedented circumstances leading to the formation of the Association and the unique character of the realization committed to it by the Imperial and Commonwealth Governments. Such realization "became a matter of arranged State policy," "a great transaction of State," in contrast to a "commercial operation" (4). In the circumstances there was no element of business or trade in the concern, and it was regarded as doing no more than realizing the large but fixed capital assets vested in it.

But the Privy Council went further and determined, in the second place, that "even if this fund was a taxable profit of the Association . . . it was not brought into charge by reason of the fact that no part of it was earned in or derived in or from Victoria" (5). And this view applied both to the proceeds of realization and to the sums received by way of commission on the realization abroad by

(1) (1931) A.C., at p. 264.
(2) (1931) A.C. 224.
(3) (1931) A.C. 258.
(4) (1931) A.C., at p. 248.
(5) (1931) A.C., at p. 254.

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the Association of the wool of the Imperial Government. It is, of course, only this second aspect of the case which relates to the questions brought forward during the course of the present appeal.

On what grounds were the assumed profits of the company denied a source or derivation either in Victoria or in Queensland? The facts leading to this finding were :—

(*a*) Prior to the incorporation of the company in Victoria in 1921 the entire property in the surplus wool had passed, by sale from the different wool-growers, to the Imperial Government and the growers had been paid in full (1).

(*b*) The company's title to all the wool it sold was derived mediately or immediately from the Imperial Government (2).

(*c*) " No part of any surplus wool which the Association realized by sale had, in its hands, in any true sense an Australian source. The place where the wool was originally grown had become an accident " (2).

(*d*) The selection of Melbourne as the place of incorporation and registration was, in the circumstances, of an accidental character, and the Australian board was not really responsible for any operation of realization (3).

(*e*) The British board, operating outside Australia, regulated the quantities of wool to be marketed, made all contracts of sale and made them outside Australia, made all deliveries and received all payments outside Australia, gave explicit directions as to the quantity and quality of the Association wool stored in Australia to be exported, and insured the wool in transit (1).

(*f*) " No part of the profit-earning operations of the Association were carried out in Victoria . . . " (4), and " no part of its business . . . was conducted by the Association " in Queensland (2).

These two Bawra decisions were given in respect of two statutes, the material terms of which differed from the New South Wales statute dealt with in *Kirk's Case* (5). There was in each case a finding that none of the income of Bawra was attributable to business carried on by it in Australia, and, therefore, none of the

(1) (1931) A.C., at pp. 262, 254.
(2) (1931) A.C., at p. 262.
(3) (1931) A.C., at p. 254.
(4) (1931) A.C., at p. 255.
(5) (1900) A.C. 588.

profits made had any real source or derivation in Queensland or in Victoria. Nothing done in the way of business here led to the receipt of moneys abroad, and, on the assumption that a business of realization was being conducted, it was not conducted within Australia. Lord *Blanesburgh* treats this part of the case as an application of the principle of *Grainger* v. *Gough* (1) and *Lovells' Case* (2). The principle could apply to the present case, if, and only if, the respondent Company's export business, or any severable part of it, was found to be not conducted within Australia at all.

The Commonwealth statute, which has to be applied in the present case, commands the ascertainment, not of the profits "made within Australia" during the accounting period, but of those "arising . . . from sources within Australia." The problem is not to discover *where* the profits of the business have come into existence, but whether profits, *when and wheresoever made*, have been derived from acts performed within Australia. Or, putting the question more directly, have the operations and transactions of the business within Australia produced actual profits here or elsewhere?

One is tempted to employ words indicative of cause and effect, e.g., the profits of the business were "caused" by the relevant business transactions, the operations within Australia "caused" or "contributed to" the profits of the concern. The root idea, however, is not completely conveyed by such language. Of course the "profits" of a business are greatly affected, and, in one sense, "caused," by happenings external to the concern. A multiplicity of events such as the statutory awards of Courts or Boards fixing wages or salaries of employees, existing facilities for production and distribution, consumers' needs and demands, price-fixing legislation, plays an important part in the gains ultimately earned. For present purposes, such external events must be regarded, solely as motiving business transactions.

Putting on one side such external events and regarding a business from within, it is not accurate to say that its transactions and operations "cause" its profits. The language of causation suggests that profits may be treated in complete abstraction from the dealings of the business. The ordinary form of a profit and loss account

(1) (1896) A.C. 325. (2) (1908) A.C. 46.

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illustrates the fact that profits are not so much " caused by " the operations of the business, as they are an expression in terms of money of the relation between a number of those very operations. The transactions recognized in the statement of this relation are those which represent the coming in or the going out of money or money's-worth. This does not fully represent the actual account, because trading stock at the beginning and end of the period under examination must be valued. But there, also, a sale of the trading assets may be assumed at each point.

" Profits," therefore, are not " caused by " the actual or assumed transactions which come into the account: they are rather a function of all those transactions. It is not receipts from sales alone, still less contracts of sale alone, which are the determinant of business profits. It is impossible to infer from either or both of such components of a business, whether there is a resultant profit or loss. Money receipts are one element in the account and no more. All outgoings from the business (and, perhaps the contracts which precede them) are equally a component of business profits or losses.

Indeed, the true relationship of profits to the business seems to be most accurately expressed in the statutory concept of " source," for profits do flow from the operation and transactions of the business as sources, and, at the same time, they are but those very transactions, writ small and accurately related. In the relationship between business transactions and business profits, the words " sources " and " arising " succeed in conveying the concept of identity as well as that of cause.

It has been assumed in this reasoning that it is possible to apply the notion of locality to a business. The assumption is, I think, well founded. It is in this connection that the English decisions on the exercise of a trade within the United Kingdom are most useful. One can ascertain the *locus* or *loci* of the business by paying due regard to the places where its various operations are conducted.

But where it is clear that the one business is being carried on in two territories, the sales of goods in one place being the completion in a business sense of production, purchase, and export, in and from another, it does not follow that the " profits " of the business can be regarded as having one locality or two localities. For profits

as such can have no locality. Difficulties arise even in saying of a two-locality business that its profits are " made in " both localities. As there is only one business, and therefore one profit, there is a natural tendency to say that all the profit, has been " made in " the locality where sales are made. But it would seem that this view conceals a greater error than that of treating the profits as made partly in each territory.

In the two-locality business we are considering, there does not seem to be any fallacy in regarding the sales abroad as a " source " of income, and, indirectly, a " source " of profit; or in regarding the purchase, production or manufacture within Australia as a source of profit also. In other words, the profits of the concern make up one profit but arise from sources within both territories. This conclusion was deemed applicable to business " income " in *Kirk's Case* (1). Its truth is more easily reached in the case of business " profits."

If, therefore, a territorial law limits the subject of taxation to profits arising from sources within that territory, it would seem to be necessary, in the case of a two-territory business, to divide the actual profits into those which arise from such sources and those which do not. This result was, I think, impliedly recognized in *Kirk's Case* (1), the New South Wales statute there under consideration not expressly directing the division of income. The necessity for a similar division would seem to exist under the *War-time Profits Tax Assessment Act*, for the general scheme of that statute is not distinguishable.

In my opinion, therefore, the following three propositions of law apply to the assessment of business profits under the *War-time Profits Tax Assessment Act*:—

(1) There must be " sources within Australia," i.e., transactions and operations performed which amount to the carrying on of the business or part of it within Australia. This is illustrated by *Lovells'* (2) and the two *Bawra Cases* (3).

(2) The fact that (*a*) the contracts of sale, (*b*) the deliveries of goods thereunder, and (*c*) the payment of the price by purchasers,

(1) (1900) A.C. 588. (2) (1908) A.C. 46.
(3) (1931) A.C. 224 and 258.

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are all made without Australia, does not compel the exclusion of such transactions from consideration in assessing the profits of a two-locality business (*Kirk's Case* (1)).

(3) Where the business operations abroad are the termination of business operations conducted here, the latter as well as the former are " sources " of any actual profits shown in account after the transactions are completed, and the profits of the business arise to some extent from " sources " within Australia (*Kirk's Case* (1)).

There are two other important questions which arise in the present appeal. The first is whether the second of the three propositions just stated must be limited to businesses which are engaged within Australia in the primary or secondary production of goods subsequently sold abroad, or whether the proposition is of general application. The second question, not unrelated to the first, is what method should be adopted for assessing the amount of business profits arising from sources within Australia.

An opinion was expressed by this Court in *D. & W. Murray's Case* (2) that, in the case of a two-territory business, which purchased goods in England, and sold them in Western Australia, the " place where " the whole profit was made was " that where the goods are sold " (3). A distinction was advanced between businesses of such character and those where manufacturing or other operations in Australia—

> " 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 " (4).

The actual question which arose for decision in the case referred to was the assessment of business profits " made in " the State of Western Australia. That is not the same question as that of assessing what part of the income or profits of a two-territory business has arisen from sources within one of such territories. The respondent, however, relies strongly on the discussion of prior decisions of this Court which was entered upon in *D. & W. Murray's Case* (2), and contends that, although the Company may be taxable

(1) (1900) A.C. 588.
(2) (1929) 42 C.L.R. 332.
(3) (1929) 42 C.L.R., at p. 345.
(4) (1929) 42 C.L.R., at p. 346.

in respect of operations ending in sales abroad of goods to which value has been "added" in Australia, it is not taxable at all in respect of similar operations if "all that has been done" here is to buy at profitable prices for the purposes of marketing overseas. The matter is of importance in the present appeal because part of the respondent's exported tallow was not manufactured but purchased in Australia. Notwithstanding *D. & W. Murray's Case* (1), the question is open for consideration.

In my opinion, *Kirk's Case* (2) established a principle of general application, and did not depend upon the fact that the taxpayer "added" value to the goods before they left New South Wales to be sold outside the Colony. In *Tindal's Case* (3) it appeared that the preserved meats were practically unsaleable in New South Wales. *Cohen* J., who was a party to the decision of the Full Court in that case, was not disinclined to the opinion that income with a local source would have arisen, and been taxable in New South Wales, if the products could have been sold profitably within the Colony. Such opinion is not distinguishable from that expressed in *D. & W. Murray's Case* (1). *Cohen* J. must have regarded the facts of the case stated in *Tindal's Case* as negativing the existence of "unrealized profits" in New South Wales. If the respondent's argument is sound, the actual decision in *Tindal's Case* was probably correct, because none of the business income was realizable in the Colony.

But the Privy Council considered *Tindal's Case* (3) fully in *Kirk's Case* (2), and must be taken to have overruled it. This fact tends to rebut the suggestion of *Cohen* J. that income would accrue or arise from a source in New South Wales if value was "added" to goods before they crossed the territorial limits of the Colony. On the contrary Lord *Davey's* judgment seems to regard two points as decisive:—(1) Have the operations in New South Wales, together with the operations outside it, produced income? (2) If so, some of the income must flow from the operations within New South Wales.

Kirk's Case (2) with its logical implications, I regard—

(1) as establishing the general principle that, in all businesses conducted within and without Australia, there are sources of income or

(1) (1929) 42 C.L.R. 332.
(2) (1900) A.C. 588.
(3) (1897) 18 N.S.W.L.R. 378.

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profit here, although the business operations do not terminate until sales of goods are effected abroad,

(2) as negativing the doctrine that the locality of sales, or receipts from sales, is the sole determinant of the " source " or " sources " of income or profit,

(3) as rejecting the view that the unity of a business, and the fact that there is only one business profit, negative the existence of " sources " of profit within the two territories in which the business is conducted,

(4) as inconsistent with the argument that, unless the cost of production of goods in Australia is exceeded by their value at the moment of leaving Australia, none of the profits derived from their sale abroad have any " source within Australia " (or, the amount of profit arising from " sources within Australia " is nil).

It follows that, if a business is conducted by purchasing profitably within Australia and selling profitably abroad, it derives part of its profits from sources within Australia. This conclusion is supported, not only by long New South Wales practice in connection with both Commonwealth and State income taxation, but by a number of decisions including that of *Starke* J. in *Michell* v. *Commissioner of Taxation* (1) and that of the Full Court of New South Wales in *W. P. Martin & Co.* v. *Commissioners of Taxation* (1917), reported in *Ratcliffe & McGrath's Income Tax Decisions*, at pp. 160 *et seqq.* (19). Unless clearly directed by statute, one is naturally loath to hold that, under the very general terms of the *War-time Profits Tax Assessment Act*, Australian businesses are liable to taxation if they produce for export, but are entirely free from liability if they purchase for export. Of course the extent of liability is an entirely different question.

Moreover, businesses which produce within Australia cannot always be separately grouped from those which buy within Australia. The enterprise conducted by the respondent Company illustrates the point. It sold tallow in the London market at profitable prices. Tallow was made in Australia and tallow was bought in Australia to satisfy the same demand. If value within Australia is important, the value of the tallow on board ship here was the same whether the

(1) *Ante*, 413.

respondent manufactured it or purchased it. Both series of transactions were part and parcel of the same business undertaking.

If we omit the transactions in purchased and manufactured tallow, the decision of the Supreme Court was that, because no value was " added " which exceeded the actual cost of treating the products whilst they were in Australia, the profits appearing after their sale abroad did not arise to any extent from sources here. It cannot be disputed that it is possible, by valuing goods at a given moment, and making a number of approximations, to conclude whether a " profit " has been shown up to that moment by a business. In normal times the value of merchantable goods at the time they are leaving Australian waters, is governed by overseas parity. The ordinary result of the adoption of the principle applied by the learned Judge would be that all or nearly all of the taxpayer's final profits would be taxable here, although none of the sales of goods were made until after arrival abroad. This result seems to be strangely inconsistent with the general scheme of source taxation.

Valuation of the goods at the territorial limits of the Commonwealth for the purpose of ascertaining profits derived from Australian sources, depends upon the hypothesis that the goods should then be removed from all further consideration. In my opinion, this method is contrary to the statute, which directs the assessment of " actual profits arising . . . from sources within Australia," and not of hypothetical profits made by the business before its goods leave Australia. It does not avoid double taxation and may greatly increase the burden of it.

It would appear that the statute is most clearly obeyed by first determining, upon ordinary accountancy principles, the amount of profits made by the business if all of it or any department of it has been conducted both within and without Australia. Where part of the business is entirely conducted within Australia, the profits of such part will conveniently be ascertained separately. So too, where its export business consists (say) of selling its own products and of also selling its Australian purchases, the profits appertaining to each series of operations may be separately assessed in order to facilitate subsequent apportionment.

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The last general question is what part of the actual profits of the export business or department thereof has arisen from the business transactions and operations within Australia appertaining to such business or department. This question is one of fact, and, in the absence of statutory direction, one can only say that all the circumstances of the particular concern and the transactions appertaining to it must be considered. Where are the persons who are in general control of the business operations? Where are those who are exercising any particular control? What is the importance and skill attachable in a business sense to things done in Australia and overseas respectively? What costs and outgoings were incurred here?

These are some of the matters which would naturally come up for consideration. The quantum of profits derived from Australian sources might vary in different classes of businesses, in businesses which cannot be classified, and even in businesses belonging to the same class. No such formula as was rejected by *Starke* J. in *Michell's Case* (1), or adopted by the Commissioner here, should be followed. Precise mathematical adjustment is impossible. In disputed cases the proper tribunal will adjudge fairly, and pay due regard to all the circumstances of the particular business. Problems presenting a similar difficulty in the application of clear general principle have often to be determined by judicial bodies. So far as I know, the apportionment of profits by reference to "sources" has always been made in the way mentioned, where Australian legislatures have been silent as to the formula to be followed. The difficulty of the task has not deterred the various tribunals from performing it.

For the reasons given I have come to the following conclusions of law and fact in the present case:—

(1) All of the business operations and transactions of the respondent which terminated in money receipts from the sale abroad of its goods, were part of one business undertaking; none of them should be treated as a separate business consisting in the making of contracts of sale in England. *Lovells'* (2) and the two *Bawra Cases* (3) are quite distinct from the present.

(1) *Ante*, 413. (2) (1908) A.C. 46.
(3) (1931) A.C. 224 and 258.

(2) Some part of the profits resulting from all the series of operations, which commenced in Australia and ended in the receipt of purchase-moneys in England, arose from sources within Australia.

(3) The series of operations, which commenced with the purchase of tallow in Australia and terminated in the receipt of the proceeds of its sale in London, must be considered, because the profits of this part of the export business also arose in part from sources within Australia. Such part of the export business may, however, be separately regarded for the purpose of the division referred to in par. 8, *infra*.

(4) The difference between the value of the respondent's goods at the moment they left Australian territory and the costs of producing them within Australia, is not the measure of the " actual profits arising " from " sources within Australia." This method of valuation at the territorial limits results in hypothetical profits made whilst its goods are within Australian territory, and it is, in my opinion, inconsistent with the criticism of *Tindal's Case* (1) by the Privy Council (2).

(5) If such territorial valuation is the correct method, I am of opinion, having regard to (*a*) the evidence already set out, (*b*) the transactions with the bank in Australia, (c) the condition of the London market, and (*d*) the correspondence between prices realized in London and those anticipated in Australia, that the value of the products when they left Australia was their probable sale price in London, less the costs of getting them to that market.

(6) Assuming, again, that such territorial valuation is the correct method, I am of opinion that the value on board ship in Australia of tallow purchased here, was the same as that of similar tallow manufactured in Australia.

(7) The formula adopted by the Commissioner for ascertaining the amount of the respondent's profits arising from sources in Australia cannot be accepted.

(8) In order to ascertain, with reference to the respondent's export business, the profits which arose from sources within Australia, the operations should be examined to their completion. The actual profits from the series of transactions (*a*) in purchased tallow and

(1) (1897) 18 N.S.W.L.R. 378. (2) (1900) A.C. 588.

H. C. OF A. 1931.

FEDERAL COMMISSIONER OF TAXATION v. W. ANGLISS & CO. PTY. LTD.

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(*b*) in manufactured and prepared products, should be separately assessed, and a percentage of (*a*) and (*b*) should be fixed by the Supreme Court or by this Court, having regard to all the circumstances of each part of the export business.

In view, however, of the opinion of the majority of the Court, it is not necessary or desirable that I should state my own view as to what part or percentage of the actual profits arising from the export operations, is brought into charge.

It follows from what has been said that the quantum of the respondent Company's liability in respect of the tallow, manufactured by it here and sold abroad, has not been correctly measured by the learned Supreme Court Judge, who adopted the method of valuation at the territorial limits of Australia. The amount of taxation payable in accordance with such method would, I think, exceed the proper amount payable in respect of this part of the business. For this reason, a cross-appeal by the respondent against this part of the decision of the Supreme Court was justified.

The appeals should be allowed, the orders of the Supreme Court wholly discharged, and the cases remitted for the purpose of determining liability in accordance with the principles expressed in this opinion.

McTIERNAN J. The judgment of my brother *Dixon* completely expresses the opinion which I have formed. I do not deem it necessary to add anything beyond saying that I agree that the appeals should be dismissed with costs, subject to the variation in the judgments in the Court below.

Vary the judgments appealed from by substituting the following declaration and order. Declare that in ascertaining the actual profits of the respondent's business arising in the accounting periods of twelve months ended 30th June 1918 *and* 1919 *from sources in Australia no part of the moneys obtained by the sale in the United Kingdom or elsewhere outside Australia of commodities exported by the respondent from Australia ought to be taken into account which exceeds the value of the goods in Australia*

before exportation. Declare that the value of "sundries" or offal and preserved meat in Australia before exportation was not greater than the cost of production. Declare that no part of the money obtained from the resale in the United Kingdom or elsewhere outside Australia of tallow bought and not produced by the respondent and exported by it from Australia ought for the purposes aforesaid to be taken into account. Declare that the apportionment of the capital of the respondent's business made in the assessments appealed from is wrong and contrary to law. Set aside both assessments wholly and let the Commissioner be at liberty to make new assessments in lieu thereof consistent with this judgment. Otherwise dismiss the appeals. Confirm the orders as to costs. Appellant to pay the costs of the appeals to this Court.

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Pavey, Wilson & Cohen.*

H. D. W.