[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXATION (NEW SOUTH WALES) . . . . . } APPELLANT;
RESPONDENT,

AND

HILLSDON WATTS LIMITED . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1936, *Nov.* 30.

MELBOURNE, 1937, *Mar.* 23.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Income Tax (N.S.W.)—Assessment—Income—Source—"Not exclusively in the State"—Produce—Contracts of sale—Operations conducted within and without the State—Profits—Apportionment—Income Tax (Management) Act 1928 (*N.S.W.*) (*No.* 35 *of* 1928), *sec.* 28 (1).

The taxpayer, a company which carries on the business of wholesale nurserymen and seedsmen, buys from the Lord Howe Island Board of Control, at a price fixed annually by the board, Kentia palm seeds produced on the island. The taxpayer takes delivery of the seeds in Sydney, warehouses them, and there repacks them. The palm seeds are sold by the taxpayer to buyers abroad on c.i.f. and e. terms. There is no wholesale market for the seeds in New South Wales. Sales are effected in Europe and other countries by means of cables to likely buyers and sometimes unsolicited orders by cable or mail are received by it from buyers abroad. Sales so effected are carried out by shiping in Sydney proper packages of palm seeds and handing the bill of lading, drafts, and other usual documents to its bankers for presentation to the buyers. The bankers rarely discount the drafts and usually act as collecting bankers only. The taxpayer's transactions also include nursery seeds and plants produced by it, all of which are sold to buyers in other countries where there is a more profitable market than in New South Wales. The contracts are mostly made by offers submitted to probable buyers in those countries as in the sale of the palm seed. But certain offers are received and accepted by the

taxpayer in Sydney from buyers in terms of prices stated in catalogues previously distributed by the taxpayer in those countries.

Held that the source of the income derived by the taxpayer from the sales by it of the seeds and plants was not exclusively in New South Wales, and, therefore, the income should be apportioned under sec. 28 of the *Income Tax (Management) Act* 1928 (N.S.W.).

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

By a notice of objection dated 14th January 1931, the taxpayer, Hillsdon Watts Ltd., objected to an assessment made under the *Income Tax (Management) Act* 1928 (N.S.W.) by the Commissioner of Taxation for New South Wales in respect of income tax for the year ended 30th June 1928. The grounds of the objection were :— (*a*) that the tax charged was excessive ; (*b*) that no sufficient allowance had been made for ex-New South Wales and ex-Australian income ; (*c*) that the commissioner had wrongly taxed ex-New South Wales and ex-Australian income ; (*d*) that no sufficient allowance had been made for depreciation ; (*e*) that the assessment was not made in accordance with the *Income Tax Act* and Acts ; (*f*) that the income shown as ex-New South Wales and ex-Australian income on the return had been improperly and wrongfully disallowed and was not taxable. Upon the disallowance by the commissioner of these grounds of objection he, at the request of the taxpayer, treated the notice of objection as an appeal and forwarded it to the Supreme Court of New South Wales.

The question which arose for determination on that appeal was whether certain profits derived by the taxpayer from three classes of transactions were to any and if so to what extent income derived directly or indirectly from a source in New South Wales, and therefore taxable under the *Income Tax (Management) Act* 1928 (N.S.W.).

The first class of transactions related to the sale by the taxpayer of Kentia palm seed. This seed is grown on Lord Howe Island and is brought to Sydney and disposed of by the Lord Howe Island Board of Control, which fixes the price annually. It does not sell by retail, and there is no wholesale market for the palm seed in New South Wales. A witness called on behalf of the commissioner stated that there was in fact a small market for the seed in New

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South Wales after it was purchased from the Board of Control, but it was stated on behalf of the taxpayer that it did not know even of such a small market and that so far as the taxpayer was concerned it purchased wholly for sale abroad. After taking delivery from the board the taxpayer transported the seed to its premises at Mascot, Sydney, packed the seed in proper receptacles and disposed of it to buyers in other countries. Contracts were made by the taxpayer exclusively with overseas buyers. Such sales were made by means of the transmission of offers by cable or letter to prospective buyers in other countries who accepted them by the same means. The terms were always on a c.i.f. basis, delivery being given abroad for cash against documents. The governing director of the taxpayer said that in practically every instance the money was collected through the bank with which the documents were lodged, and he did not think that in the particular year of taxation there had been even one case of discounting of the bills in New South Wales.

The second class of transactions covered dealings in nursery seeds, and in some cases plants, produced by the taxpayer, all of which were sold in other States of the Commonwealth, or in New Zealand or South Africa, where there was a more profitable market than in New South Wales. In this class of transactions contracts were mostly made by offers submitted to probable buyers in other countries as in the sale of the palm seed. But certain offers were received by the taxpayer in Sydney from buyers in terms of prices stated in catalogues which the taxpayer had previously caused to be distributed in those other States and Dominions.

The third class of transactions related to agricultural grass seed produced in New South Wales, but not by the taxpayer, and sold in the United States of America. The taxpayer some years ago arranged with a New York firm to sell this seed in America under a form of partnership agreement. The taxpayer purchased the seed always from merchants in Sydney, New South Wales, branded and prepared it for shipment and despatched the seed to the New York firm at cost price with expenses added. The seed was sold entirely at the discretion of the New York firm, the profits being equally divided. The proceeds of sale were generally collected by the New York firm, although, on occasion, it appeared that the taxpayer

collected the proceeds by drawing on the buyer direct. The selling arrangements were carried out in their entirety by the New York firm, and no part of those arrangements was carried out in New South Wales. It was not stated expressly that there was no market in New South Wales for this seed. The taxpayer, however, had always purchased it solely for dealings with the New York firm.

As to the first and second classes of transactions the judge of first instance found that the source of the income was wholly within New South Wales, and that the income, therefore, was wholly taxable under the *Income Tax (Management) Act* 1928.

With regard to the third class of transactions his Honour found that the income was derived partly from America and partly from operations in New South Wales, and made an order that it was subject to apportionment under the Act.

An appeal by the taxpayer to the Full Court of the Supreme Court was, by a majority, upheld as to the first and second classes of transactions, and was, by the whole court, dismissed as to the third class of transactions.

From that decision, so far as it related to the first and second classes of transactions, the commissioner appealed to the High Court. The taxpayer cross-appealed on the grounds that the Full Court was in error in holding that the provisions of sec. 28 of the *Income Tax (Management) Act* 1928 applied in respect of the profits derived from the first and second classes of transactions, and that that Court should have held that no part of the profits derived by the taxpayer from the three classes of transactions should have been included in the assessable or taxable income of the taxpayer.

The relevant provisions of the *Income Tax (Management) Act* 1928 (N.S.W.), are sufficiently set forth in the judgments hereunder.

Teece K.C. (with him *Hooton*), for the appellant. If a taxpayer cannot bring himself within one or other of secs. 27 and 28 of the *Income Tax (Management) Act* 1928, wherein express provision is made for special classes of income which may have a double source, then he must pay tax if the source of the income was in New South Wales. " Source " should be given the meaning given to that word

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in *Nathan* v. *Federal Commissioner of Taxation* (1). Sec. 27 only applies to persons who carry on a business both in and outside the State. The respondent's business was wholly carried on in the State, except perhaps that part of its business which related to the transactions in the United States of America. The sales were effected in the State and the property in the goods passed when they were placed on board under c.i.f. contracts (*Crozier, Stephens & Co.* v. *Auerbach* (2); *Chateau Tahbilk Pty. Co.* v. *Barrett* (3)). The mere fact that payment for those goods was forwarded from a place outside the State did not make that place the source of the profits or income (*Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (4)). The whole of the respondent's business operations was conducted in New South Wales (*Commissioner of Taxation* (*N.S.W.*) v. *Premier Automatic Ticket Issuers Ltd.* (5)). It does not follow that a person who establishes contact with customers in and exports goods to another country carries on business in that country (*Grainger & Son* v. *Gough* (6)). The operations from which the profits in substance arose took place in New South Wales (*Smidth & Co.* v. *Greenwood* (7)).

[EVATT J. referred to *Commissioners of Taxation* v. *Kirk* (8).]

That case, and also *In re Tindal* (9); *Commissioners of Taxation* (*N.S.W.*) v. *Meeks* (10) and *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (11), are distinguishable from this case because in those cases the business operations were carried on partly in one country and partly in another country.

Weston K.C. (with him *Roper*), for the respondent. It is incorrect to say that, unless the operations come within sec. 27 or sec. 28 of the Act, the whole of the moneys received must be subject to tax in New South Wales. Sec. 27 (*b*) only applies where other sections are not applicable. The power conferred upon the commissioner, if the particular case comes within sec. 27, is, *inter alia*, to apportion on the basis of sales or assets or any other way one of which is as provided in sec. 28.

(1) (1918) 25 C.L.R. 183.
(2) (1908) 2 K.B. 161.
(3) (1915) 32 W.N. (N.S.W.) 38.
(4) (1921) 29 C.L.R. 225.
(5) (1933) 50 C.L.R. 304, at p. 311.
(6) (1896) A.C. 325, at p. 335.
(7) (1921) 3 K.B. 583, at p. 593.
(8) (1900) A.C. 588.
(9) (1897) 18 L.R. (N.S.W.) 379; 14 W.N. (N.S.W.) 81.
(10) (1915) 19 C.L.R. 568.
(11) (1931) 46 C.L.R. 417.

[EVATT J. referred to *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (1).]

The important question is: Where were the contracts for the sale of the produce made? (*Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (2); *Grainger & Son* v. *Gough* (3); *Maclaine & Co.* v. *Eccott* (4); see also *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (5)). A contract can be made without the physical presence of a party or his agent. This can be done by using the ordinary commercial facilities, e.g., by letter, cable, telephone or radiogram. So far as the matter relates to the activities in the United States of America it is covered by the decision in *Sulley* v. *Attorney-General* (6). If *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (7), *Commissioner of Taxation* (*N.S.W.*) v. *Premier Automatic Ticket Issuers Ltd.* (8) and *Smidth & Co.* v. *Greenwood* (9) are applicable, they tend to support the respondent's case. Here the sales were effected outside New South Wales. Where there is no local market, and, as a consequence, the commodity is sold to purchasers in other countries, the whole of the profit accrues in those other countries (*Grainger & Son* v. *Gough* (10); *Maclaine & Co.* v. *Eccott* (4); *Angliss' Case* (2)). The cross-appeal is not pressed.

Teece K.C., in reply. The place where a contract is made depends upon where the legal obligations thereunder come into existence.

Cur. adv. vult.

1937, Mar. 23.

The following written judgments were delivered:—

LATHAM C.J. The question which arises upon this appeal is whether the whole or any part of three different kinds of income derived by the respondent company is income taxable as being derived directly or indirectly from any source in New South Wales or as being income under the *Income Tax* (*Management*) *Act* 1928

(1) (1935) 53 C.L.R. 534.
(2) (1931) 46 C.L.R. 417.
(3) (1896) A.C., at pp. 340, 341, 346.
(4) (1926) A.C. 424.
(5) (1908) A.C. 46.
(6) (1860) 5 H. & N. 711; 157 E.R. 1364.
(7) (1921) 29 C.L.R. 225.
(8) (1933) 50 C.L.R. 304.
(9) (1921) 3 K.B. 583.
(10) (1896) A.C., at p. 346.

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in respect of which tax is otherwise expressly made payable—see definition of " income " in sec. 4.

In the first place it is desirable to clear the ground by dealing with certain contentions which, in my opinion, are not relevant to the decision of the question before the court. In the course of the argument a number of English authorities have been cited. Scores of similar authorities may be found cited in *Halsbury's Laws of England* 2nd ed., vol. 17, pp. 92-95. The leading cases may perhaps be said to be *Sulley* v. *Attorney-General* (1), *Erichsen* v. *Last* (2) and *Grainger & Son* v. *Gough* (3). One of the recent authorities of this type is *Maclaine & Co.* v. *Eccott* (4). These cases decide that in the case of a trading business the making of contracts of sale in the United Kingdom constitutes the exercise of a trade in the United Kingdom, though the converse is not necessarily true. The result of the authorities is expressed in *Maclaine & Co.* v. *Eccott* in the following words of Viscount *Cave* L.C.:—" The question whether a trade is exercised in the United Kingdom is a question of fact, and it is undesirable to attempt to lay down any exhaustive test of what constitutes such an exercise of trade; but I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally) exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations; but the most important, and indeed the crucial, question is, where are the contracts of sale made ? " (5).

These cases deal with a particular question, namely, a question arising under Case I., Schedule D, of the Income Tax Act 1911 and corresponding earlier provisions. Under this Case tax is charged in respect of the profits arising from any trade exercised in the United Kingdom. The answer to the question whether a trade is

(1) (1860) 5 H. & N. 711; 157 E.R. 1364.
(2) (1881) 8 Q.B.D. 414.
(3) (1896) A.C. 325.
(4) (1926) A.C. 424.
(5) (1926) A.C., at p. 432.

exercised in a particular country does not, however, necessarily answer the question whether any part of certain income is derived directly or indirectly from sources within that country. There is no trade in goods apart from actual or possible sales. A person who simply manufactures goods and stores them up or gives them away is not exercising a trade. Thus the place where the contracts of sale are made is, in the case of a merchant's business, held to be the place where the trade is exercised. But it may nevertheless be true that part of the profit derived as a consequence of such sales is derived from a place other than that in which the trade is " exercised."

Further, when profits from a trade are taxable under Case I. of Schedule D either the whole profits are taxable or nothing is taxable. This fact may have influenced the courts in deciding in certain cases that a trade is not exercised in the United Kingdom. The position is quite different under the ordinary provisions of Federal and State income tax Acts in Australia, where, in general, tax is imposed only upon income derived directly or indirectly from some source in the Commonwealth or the State, as the case may be. It has long been recognized that these provisions, apart altogether from any statutory provisions requiring apportionment, impose a tax not upon the whole income if any part thereof is derived from the source mentioned, but only upon the part of the income shown to be so derived. This was decided in *Commissioners of Taxation* v. *Kirk* (1) very soon after the introduction of income tax in Australia, and the same principle is apparent in all the judgments in *Commissioners of Taxation (N.S.W.)* v. *Meeks* (2). Both of these cases relate to the income tax Acts of New South Wales. Thus English decisions upon English legislation expressed in different terms are not, in my opinion, of very great assistance in determining the interpretation of income tax Acts in Australia.

Income which is received by a person may be the result of a whole series of operations conducted in different countries. When it becomes necessary to determine what are the sources of the income it is a mistake to concentrate attention on " the final stage " in the operations which actually brings in the money which constitutes

(1) (1900) A.C. 588. (2) (1915) 19 C.L.R. 568.

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the gross income (*Commissioners of Taxation* v. *Kirk* (1)). In that case the Judicial Committee of the Privy Council considered a provision of the New South Wales *Land and Income Tax Assessment Act* of 1895 which charged tax upon incomes derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown or arising to any person from any sources whatsoever in New South Wales. The Act also provided that no tax should be payable in respect of income earned outside the Colony of New South Wales. Certain Broken Hill mining companies—(*a*) extracted ore from the soil; (*b*) manufactured it into a merchantable product; (*c*) sold the product; and (*d*) received the moneys arising from the sale. It was held that, notwithstanding that the finished products were sold exclusively outside New South Wales, the companies derived income which was subject to tax under the provisions mentioned. It was said that all the four operations mentioned were necessary stages which terminated in money and that the income was the money resulting less the expenses attendant upon all the stages. It was pointed out that English cases such as *Sulley* v. *Attorney-General* (2) and *Grainger & Son* v. *Gough* (3) dealt with the question of exercising a trade and not with the question of the sources from which the profits were derived. The decision in *Kirk's Case* (4) was that income was earned from the two processes of extracting the ore from the soil and manufacturing it into a merchantable product. The decision therefore rendered it necessary to determine what part of the income could properly be attributed to processes carried on within New South Wales. As already stated, the decision lays down the principle that where income is the result of a whole series of operations conducted in different countries and it becomes necessary to determine what are the sources of income, it is a mistake to concentrate on the final stage which actually brings in the money.

The first question which arises in the present case relates to Kentia palm seed. The findings of the learned judge of first instance show that the respondent company purchased Kentia palm seed in New South Wales from the Lord Howe Island Board of Control which has an office in Sydney. There is no market for Kentia palm seed

(1) (1900) A.C., at p. 593.
(2) (1860) 5 H. & N. 711; 157 E.R. 1364.
(3) (1896) A.C. 325.
(4) (1900) A.C. 588.

in Australia. It is all sold abroad. The company then communicated with probable purchasers in Europe and elsewhere, making offers of the seed at c.i.f. prices. When the offers were accepted by cable or by correspondence and the replies accepting the offers were received, the company packed seed and shipped it from New South Wales. Subsequently the documents were presented to the purchasers and were delivered to them in return for payment. A bank was used by the company for the purpose of collecting the payments which were made by the overseas buyers.

In my opinion what was done in New South Wales plainly made some contribution to the ultimate profit and therefore at least some portion of the profit actually made must be regarded as income derived from a source in New South Wales. In my opinion it is a mistake to say that, because the contracts of sale are made in foreign countries, the whole income is derived from sources in those countries. Such a conclusion would be inconsistent with the reasoning in *Kirk's Case* (1).

Nor am I able to reach the conclusion that the whole income is derived from sources in New South Wales. If the contracts of sale had not been made overseas there would have been no income at all. The existence of an apparently select number of purchasers was the element which made it commercially worth while to undertake the preliminary work in New South Wales of buying the seed, packing it, and despatching it. It may further be noted that the actual payment of the price was made abroad to the collecting bank in exchange for documents. Some portion of the ultimate profit must be attributed, in my opinion, to foreign sources and some of it to a source in New South Wales.

If this is so then sec. 28 (1) of the *Income Tax (Management) Act* 1928 applies. Sec. 28 (1) is as follows :

" Whenever—

(*a*) by reason of the manufacture, extraction from the earth, winning, production or purchase of any goods, substance, product, or commodity in the State and their sale outside the State ; or

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

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(*b*) by reason of successive steps of extraction, winning, production, or manufacture in and outside the State; or

(*c*) by reason of the making of contracts in the State and their performance outside the State, or vice versa; or

(*d*) for any other like reason

the source of any income is not exclusively in the State, that income shall be apportioned between its source in the State and its source outside the State in such manner as shall be determined by the commissioner."

It is unnecessary to inquire whether the particular facts bring this case within (*a*), (*b*), (*c*) of that section because, if they do not, the case falls under (*d*)—"for any other like reason." Thus the commissioner must apportion the actual profit as best he can so as to attribute a proper proportion of it to a source in New South Wales.

When the commissioner does this he should not, in my opinion, estimate hypothetical profits at any stage independently of the actual profit at the final stage. He should take the actual profit as his basis and assign some portion of it to a source in New South Wales. It is doubtless the case, as a general rule, that the treatment or packing of goods in a particular manner increases the value of the goods so that a profit may have been made in the treatment and packing—the profit being the difference between the cost of creating the added value and the amount of the added value. Where a business involves dealing with goods in this way, market prices may provide a standard which makes it possible to estimate the net added value and to regard it as income derived in the place where the treatment and packing take place. But this will not always be the case, and it may be that no profit at all can be attributed to the treatment and packing. I have said that "a profit may have been made." I use this expression advisedly, because, if there is no room for the existence of such a profit in the final result, that profit cannot be regarded as a real profit derived from the operations of treating and packing. If, for example, the goods were ultimately sold at a loss, I conceive that it could not be contended that nevertheless income had been derived from intermediate operations such as growing or manufacturing or treating or packing or transporting. The question of the source from which the income comes can only

arise if there really is taxable income (being gross income less a smaller cost of producing it) which is available for theoretical distribution among various sources. If there is no such income in the final result, no question arises as to the derivation of portions thereof. Thus, in my opinion, an unrealized profit at one stage of a series of operations, which operations culminate in sale, is in the strict sense never in itself taxable as income. It is easy to imagine a case where, at the time of despatch from Australia, goods appear to include an unrealized profit, but where they are ultimately lost or destroyed or sold at a loss. In such a case any hypothetical profit is also destroyed, because it can come into real existence only as part of an actual profit which enters into taxable income. In the case of *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (1) there were very special findings of fact that the goods exported could not have been sold in Australia for home consumption or for exportation, and that no value existed in the goods at the moment of exportation beyond the cost of production. The decision in *Angliss' Case* (1) depends entirely upon these findings. There are no such findings in this case and there is no evidence upon which such findings could be supported. In my opinion, therefore, the decision in *Angliss' Case* (1) has no direct bearing upon the decision which ought to be given in this case.

Questions are also submitted with respect to the sale of nursery products in New South Wales and sold in other States of the Commonwealth, South Africa and New Zealand. The contracts of sale are sometimes made by offers sent by the company and accepted outside the State and sometimes by offers received by the company and accepted by the company in New South Wales by the despatch of goods or otherwise. For reasons which I have already stated in relation to the Kentia palm seed, I am of opinion that part of this income is derived from New South Wales and that the commissioner should apportion it under sec. 28.

The third type of transaction relates to agricultural grass seed. This seed is purchased in New South Wales, packed and shipped to New York. The New York firm which shares the profits on the transactions with the respondent makes all selling arrangements in

(1) (1931) 46 C.L.R. 417.

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America. In this case also I regard it as clear that the income of the New South Wales company is derived partly from a source in New South Wales and that therefore the commissioner should apportion it under sec. 28.

The appeal and the cross appeal should be dismissed.

RICH J. The appeal and cross-appeal depend upon the construction of sec. 28 of the *Income Tax (Management) Act* 1928 of New South Wales. Two classes of transaction are involved. The production in the State of plants and seeds and their sale in and outside the State are part of the business carried on by the taxpayer. But another part of the business is the importation of Kentia palm seeds and their subsequent re-sale abroad for shipment from Sydney on c.i.f. & e. terms and conditions. The business was carried on in Sydney and in both cases sales abroad were effected by cable and correspondence. Each side claims that neither case is one for apportionment under the provisions of sec. 28. The taxpayer claims that the sales for export from New South Wales constitute a source of income exclusively outside the State. The Commissioner contends that they constitute a source of income exclusively in the State. Sec. 28 is not well drawn. It is not enough that the transaction should fall within pars. (*a*), (*b*) or (*c*). It is not governed by the section unless it also can be truly said of it that it is a source not exclusively in the State. Then by its reference to the source of the same income in the State and the source outside the State the section shows that the draftsman regarded a larger source as capable of separation into two or more subsidiary sources of income. This confusion of terms makes the section a little difficult to construe and apply. But its obvious purpose is to overcome the difficulty of assigning income arising from transactions extending out of the State in some of their steps or stages to a locality either in or out of the State. This court has many times faced the difficulty in the absence of such a section, e.g., *Mount Morgan Gold Mining Co. Ltd.* v. *Commissioner of Income Tax (Q.)* (1); *Dickson* v. *Commissioner of Taxation (N.S.W.)* (2); *Commissioner of Taxation (W.A.)* v. *D. & W. Murray Ltd.* (3); *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (4). I think that, wherever a series of steps is

(1) (1923) 33 C.L.R. 76.
(2) (1925) 36 C.L.R. 489.
(3) (1929) 42 C.L.R. 332.
(4) (1931) 46 C.L.R. 417.

necessarily taken before the income they are designed to produce arises in the hands of the taxpayer and some of these necessary steps take place abroad and the others within the State, sec. 28 applies. It is in this sense that the section uses the expression "source of any income not exclusively in the State." I regard both transactions now in question as of that description. For these reasons I agree in the conclusion of the majority of the Supreme Court. But I do not think that the form in which the order is drawn up is a desirable one. So far as material it does no more than "uphold" the appeal from *Maxwell* J. as to the "non-partnership transactions." This makes it necessary for those who are to apply the order to discover what are "non-partnership transactions" and leave them at large as to the next steps to be taken. I think there should be a declaration to the effect that the income of the taxpayer derived from buying and selling Kentia palm seed for resale in and export to other States and abroad and its income derived from the production of nursery plants and seeds in New South Wales and their sale in or for export to other States and abroad should be apportioned under the provisions of sec. 28 of the Act. With that declaration I would set aside the assessment and remit it to the commissioner to enable him to make the apportionment so that the taxpayer may then have the reassessment reviewed if it wishes to do so.

DIXON J. An appeal and cross-appeal are brought to this court by the Commissioner of Taxation and a taxpayer respectively from a decision of the Supreme Court of New South Wales holding that two classes of transaction forming part of the taxpayer's business fall within sec. 28 (1) of the *Income Tax (Management) Act* 1928 of New South Wales. A third class of transaction was dealt with by the judgment of the Supreme Court, but neither party appeals from that part of the decision.

Sec. 28 (1) is as follows:

Whenever—

(*a*) by reason of the manufacture, extraction from the earth, winning, production or purchase of any goods, substance, product, or commodity in the State and their sale outside the State; or

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(*b*) by reason of successive steps of extraction, winning, production, or manufacture in and outside the State ; or

(*c*) by reason of the making of contracts in the State and their performance outside the State, or vice versa ; or

(*d*) for any other like reason

the source of any income is not exclusively in the State, that income shall be apportioned between its source in the State and its source outside the State in such manner as shall be determined by the commissioner."

The commissioner's appeal is based upon the contention that in each of the two classes of transaction the source of income is entirely inside New South Wales so that sec. 28 (1) does not apply. The taxpayer's cross-appeal is based on the contention that the provision is inapplicable for precisely the opposite reason, namely, that in both cases the source of income is entirely outside New South Wales.

The taxpayer is a company carrying on in New South Wales the business of wholesale nurserymen and seedsmen. The business includes the production of plants and seeds within the State and their sale within and out of the State. But it also includes the purchase and resale of seeds as merchandise. The first class of transaction with which the appeal is concerned belongs to the latter category. The company buys from the Lord Howe Island Board in Sydney, Kentia palm seeds produced on the island. The seeds are delivered to the company in Sydney which there warehouses them and repacks them. The company resells them to buyers abroad on c.i.f. & e. terms. The board's selling price is made known annually and the company effects sales in Europe and elsewhere by means of cables to likely buyers and sometimes receives unsolicited orders by cable or mail from buyers abroad who have dealt with it or know it by reputation. Presumably it usually buys against orders. The company carries out the c.i.f. & e. sales by shipping in Sydney proper packages of Kentia palm seeds and handing the bill of lading, insurance policy, invoice and draft to its bankers for presentation to the buyers. The bankers rarely discount the drafts and usually act as collecting bankers only.

It may be that, if the question of the place where the c.i.f. & e. contracts of sale are made were closely investigated, it would be

found that the place of final acceptance was Sydney. But even so the transactions would fall within par. (*c*) of sec. 28 (1) and consist of the making of contracts in the State and their performance outside the State. For I think that the paragraph extends to performance part of which is outside the State; and the presentation of the shipping and insurance documents to the buyer is an essential part of the performance of a c.i.f. contract. On the other hand, if the place of final acceptance was abroad so that the contracts of sale were not made within New South Wales, the transactions would fall within par. (*a*) of sec. 28 (1) as sales outside the State of goods purchased within the State. The sub-section is so expressed that it is not enough that a transaction or operation from which income is derived falls within one of the descriptions contained in pars. (*a*), (*b*) or (*c*). It applies only when for that reason or for some other like reason the source of the income so derived is not exclusively within the State.

It is contended that, for the purpose of determining whether sec. 28 (1) applies at all, the question, where is the source of the profit of such transactions, should be decided independently of sec. 28 (1) and by reference to the same considerations as are applied under legislation which makes no provision for a discretionary apportionment but which appears to suppose that some one territorial locality may be fixed as the place where any single profit arises.

The commissioner contends that, if such a test is used, that place would be held to be New South Wales, because there the taxpayer carried on business and took all the measures by which the profit was obtained.

On the other hand, the taxpayer company, accepting for the purposes of the cross-appeal the same test of the applicability of sec. 28 (1), contends that the opposite consequence follows. The company says that the place of profit is that where the buyer received the goods or the documents of title representing them, and paid the price, the place where in reality the sale of goods was initiated and completed.

In my opinion the basis of these rival contentions is a mistaken view of the purpose and operation of sec. 28 (1). In the absence of such a provision, when a single profit is recovered as a result of

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operations which extend beyond the political boundary of the taxing State, the profit must be considered as arising on one side of the boundary rather than another. If it is possible to ascertain how much of the profit is obtained although in an unrealized form at successive stages of the operations, the sum realized may be dissected and separate parts of it attributed accordingly to the places where the respective stages of the operations are completed. If this cannot be done and the total profit recovered is an inseparable whole obtained as the indiscriminate result of the entirety of the operations, the locality where it arises must be determined by considerations which fasten upon the acts more immediately responsible for the receipt of the profit (See *Commissioner of Taxation (W.A.)* v. *D. & W. Murray Ltd.* (1); *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (2)). The purpose of sec. 28 (1) appears to me to be to place within the determination of the commissioner, subject to the Court of Review, the apportionment of profits contained in moneys recovered as the result of operations not absolutely confined to the State, whether or not, apart from that sub-section, it would be possible to dissect the profit and to trace part of it to an unrealized or unconverted profit obtained in one territory, while other parts were attributable to operations in another territory. It is true that the expression " the source of any income " is used in sec. 28 (1), and in legislation containing no provision for apportionment this expression has been considered to be satisfied by ascribing the whole profit to one locality. But the figurative expression " source of the income " is vague and indefinite. In sec. 28 (1) itself the expression is again employed and in what must necessarily be a varying sense. For the sub-section first speaks of *the* source, that is, the one source, not being exclusively in the State, and then speaks of a source within and another outside the State. Again, according to the definition of income in sec. 4 " any source in the State " is enough to bring the income within the Act. In spite of the difficulty caused by the use of the word " source," I think sec. 28 (1) should be interpreted as I have stated.

The transactions of the company in Kentia palm seeds involve operations which go beyond the boundaries of New South Wales.

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

(2) (1931) 46 C.L.R. 417.

The sale terminating abroad in the presentation of the shipping documents and the receipt by the collecting bank of the money are parts of the transaction as essential as the purchase, packing and shipment of the seed in Sydney. These transactions, in my opinion, fall within sec. 28 (1).

The facts relating to the second of the two classes of transaction are not very distinctly proved. The income arose from the sale to purchasers in New Zealand, South Africa and in other States of the Commonwealth of products of the company's nursery in New South Wales and of a few other commodities bought in New South Wales for resale. The course of business is stated somewhat vaguely, but it seems reasonably clear that in many transactions the place of payment was abroad and that, if the actual place of sale was not abroad, the making of the contract included steps which occurred outside New South Wales. I think that this class of transaction falls also within sec. 28 (1).

For these reasons I am of opinion that the decision of the majority of the Supreme Court is correct.

The actual order made by the Full Court does not appear to me to be so expressed as to give effect to the taxpayer's rights under sec. 28 (1) and sec. 52 of the *Income Tax (Management) Act* 1928. I think it should be varied by declaring that the two kinds of transaction in question fall within sec. 28 and by setting aside the assessment in order to enable the commissioner to reassess and make an apportionment under sec. 28. The taxpayer company will then be able to appeal to a Court of Review if it is dissatisfied with the apportionment.

Otherwise I think the appeal and cross-appeal should be dismissed with costs and the costs set off.

EVATT J. The only difficulty of this appeal arises in connection with the Kentia palm seed transactions. The question is whether, in relation to those transactions, sec. 28 (1) of the *Income Tax (Management) Act* 1928 applies so as to invest the commissioner with the duty of determining the manner of apportioning the taxpayer's income between New South Wales and sources outside the

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State. That duty arises only if it appears that the source of the income from the dealings in the seeds " is not exclusively in the State."

The commissioner (who is the present appellant) contends that the sole territorial source of such income is New South Wales. And there is practical weight in the observations of *Maxwell* J. that, in relation to the seed transactions, " everything that the company did was done in Sydney," and of *Jordan* C.J. (who agreed with him) that " no one on behalf of the company ever budged from New South Wales, or did anything outside New South Wales in relation to the making or performance of the contracts."

In *Commissioner of Taxation (N.S.W.)* v. *Premier Automatic Ticket Issuers Ltd.* (1), the court found that a sum of money received by a company had been derived wholly from a New South Wales source. There it appeared from the facts that none of the material negotiations or transactions which took place outside the State were conducted by the taxpayer itself, and that the business of the taxpayer was entirely confined to New South Wales. As I had occasion to say, difficulties in the apportionment of income receipts by reference to locality sources

> " can hardly arise where the business operations and transactions are conducted by the taxpayer exclusively within one territory. In such cases, it is not possible to affirm that its business income is derived from sources outside the territory where alone the business is conducted " (2).

In ascertaining the territorial sources of income derived from personal exertion, it is necessary to ascertain where the material efforts *of the taxpayer* were in fact exerted. I have discussed the general principles in *Federal Commissioner of Taxation* v. *Angliss & Co. Pty. Ltd.* (3) and *Commissioner of Taxation (N.S.W.)* v. *Premier Automatic Ticket Issuers Ltd.* (1).

The view to which I have come is that *Commissioner of Taxation (N.S.W.)* v. *Premier Automatic Ticket Issuers Ltd.* (1) is distinguishable from this part of the present case, owing to the fact that, as a regular part of its business, the present taxpayer completed the transactions of sale outside the State of New South Wales. The significance of the company's presentation abroad of the shipping

(1) (1933) 50 C.L.R. 304.
(2) (1933) 50 C.L.R., at p. 311.
(3) (1931) 46 C.L.R. 417.

documents and of its receipt of payment abroad cannot be ignored, and some part of the income had a foreign source. It is true that, in the typical instance of approved customers abroad, the relative importance of the transactions abroad may be very small, and this aspect was sufficiently emphasized in the practical conclusions drawn by *Jordan* C.J. and *Maxwell* J. But such conclusions go rather to the extent than the existence of sources abroad, and, no doubt, will be borne in mind when the time comes to apportion the income between New South Wales and abroad.

On the other disputed portions of the respondent's income, I think the judgment of the Supreme Court is right.

The appeal and cross-appeal should be dismissed.

McTIERNAN J. The substantial question to be decided is whether sec. 28 of the *Income Tax (Management) Act* 1928 as amended applies to the income gained by the respondent in its transactions in Kentia palm seed and in nursery products which are fully described in preceding judgments.

In the Full Court of New South Wales there was a difference of opinion as to the operation of this section. *Jordan* C.J. was of opinion that it did not prescribe a new criterion for determining the source of income; but where it is determined independently of the section that income has a "multiple source" because of the matters set forth in sec. 28, this section provides for the apportionment of the income between its source inside the State and its source outside the State. The learned Chief Justice reached the conclusion that the source of the respondent's income gained in both transactions was exclusively in New South Wales. *Davidson* J. rebutting the view that despite sec. 28 the question must still be determined whether for any reason the source of the income is or is not exclusively within the State said: "But the reasons stated in the section itself are so comprehensive that it is difficult to imagine any other and it would appear that when they do exist it is assumed that there is a dual source of income." The Chief Justice observed that the legislation was silent as to this result which *Davidson* J. ascribes to necessary intendment. *Jordan* C.J. said: "It provides for the apportionment of income between its source in the State and its

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source outside the State whenever the income having a multiple source is derived *inter alia* by reason of the purchase of any goods in the State and their sale outside the State or by reason of the making of contracts outside the State and their performance in the State: but it does not say that whenever such transactions occur some part of any profit derived by them must be deemed to be derived from a New South Wales source and some from a source outside New South Wales." How fragmentary the legislation in this view would be is demonstrated by what according to the Chief Justice follows from such a construction: "It leaves the question whether in any particular case there was in fact any profit referable to the New South Wales element or to the foreign element in the transaction to be determined as one of fact." The vexed character of such a question, in the view of *Street* J., who substantially agreed with *Davidson* J., would render it a very likely assumption that the legislature would take into consideration the question of laying down its own criteria. His Honour said:—"The determination of such a question without any such legislative guidance in view of the complexity is one which must present many difficulties and in which one would expect to find close refinement of reasoning by different courts in different cases. The question has been a vexed one for many years and the courts have encountered great difficulties in dealing with it." After a close examination of the section *Street* J. found in it strong implications supporting this very reasonable supposition of legislative intention. Referring to sec. 28 (1) (*d*) his Honour said:—"The section is peculiar in that 1 (*d*) is an *ejusdem generis* clause, leaving its exact application at large, but obviously designed to meet cases similar to those dealt with in the three preceding sub-sections. It is peculiar to find such a clause in an Act of Parliament, and to my mind its use carried the implication that the legislature intended to prescribe a complete and exhaustive criterion which would enable it to be determined in every case whether income was to be deemed to be derived exclusively from a source within the State or whether there was a source both within and without the State."

Both *Davidson* and *Street* JJ. decided that sec. 28 was applicable to both transactions. In my opinion the reasoning of the majority

of the court in support of the construction which they placed on the section is correct, but in view of the cogent reasoning of the learned Chief Justice it is not without hesitation that I have come to this conclusion. I agree that the respondent's transactions in Kentia palm seed and in nursery products both fall within sec. 28 (1) of the *Income Tax (Management) Act* 1928 of New South Wales.

The appeal and the cross-appeal should be dismissed.

Appeal dismissed with costs. Cross-appeal dismissed with costs. Costs to be set off. Order of Full Court of Supreme Court varied by adding a declaration that the income of the taxpayer derived from buying and selling Kentia palm seed for resale in and export to other States and abroad and its income derived from the production of nursery plants and seeds in New South Wales and their sale in or for export to other States or abroad should be apportioned under the provisions of sec. 28 *of the Income Tax (Management) Act* 1928 *of the State of New South Wales. Assessment set aside and remitted to commissioner.*

Solicitor for the appellant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *J. W. Maund & Kelynack.*

J. B.