

Foll.
Bunc v
Transfield
PBM Pty Ltd
(1992) 112
FLR 189

Refd to
Barlow v
Helt-Muster
Pty Ltd (1997)
7 NTLR 34

Appl
AAT Case
12,551; AAT
Case 12,551
(1998) 37
ATR 1263

[HIGH COURT OF AUSTRALIA.]

GREGORY APPELLANT ;

AND

THE DEPUTY FEDERAL COMMISSIONER OF }
TAXATION (WESTERN AUSTRALIA) . } RESPONDENT.

H. C. OF A. *Income Tax (Cth.)—Assessment—Exemption—Northern Territory—Primary producer*
1937. —“ Resident ”—Residence in territory and also in Western Australia—*Income*
} *Tax Assessment Act 1922-1934 (No. 37 of 1922—No. 18 of 1934), sec. 5A.*
PERTH,
Oct. 5, 7.
Dixon J.

A taxpayer may be a resident of the Northern Territory within the meaning of sec. 5A of the *Income Tax Assessment Act 1922-1934* although he retains a residence in some other part of the Commonwealth.

The appellant carried on the business of pearl fishing from Broome, Western Australia. He subsequently established a similar business at Darwin, Northern Territory. He retained his home at Broome, but resided for a considerable part of each year at Darwin.

Held, on all the facts, that, although the appellant retained his residence at Broome, he had acquired the concurrent character of a resident of the Northern Territory within the meaning of sec. 5A of the *Income Tax Assessment Act 1922-1934*.

Semle : The period to be taken under sec. 5A of the *Income Tax Assessment Act 1922-1934* for the purpose of considering whether a taxpayer is a resident of the Northern Territory is the income year in respect of which a return is made, and not the financial year for which tax is assessed.

APPEAL from the Deputy Federal Commissioner of Taxation.

Ancell Clement Gregory carried on the business of pearl fishing at Broome in Western Australia, and in 1929 he entered into a similar business at Darwin, Northern Territory. After the year 1930 he went to Darwin regularly and found it necessary to remain

there for some considerable time. The duration of each period and the aggregate time that he stayed at Darwin in each year varied. In 1934 he was at Darwin nineteen weeks, and, although he had a dwelling at Broome, Western Australia, he was only there twenty-three weeks, whilst the rest of the year he was travelling in the East in connection with his business. After 1929 his headquarters were at Darwin, his fleet was stationed there, he engaged his men there, and the shell was landed, sorted, graded, weighed, packed, shipped, delivered and sold in Darwin. He had rented lodgings at Darwin and subsequently took a lease of a flat there. He kept a private motor car there, and had for several years been a member of various sporting clubs, and had a permanent reserved seat at the picture theatre. He was on the Commonwealth electoral roll for the Northern Territory, but not for Western Australia. He was assessed to Federal income tax for the financial year 1935-1936 in respect of the income derived by him from his business in the Northern Territory, and he objected to the assessment on the ground that he was entitled to exemption under sec. 5A of the *Income Tax Assessment Act* 1922-1934. The objection was disallowed, and, at his request, was forwarded to the High Court as an appeal against the assessment.

H. C. OF A.
1937.
GREGORY
v.
DEPUTY
FEDERAL
COMMISSIONER OF
TAXATION
(W.A.).

Downing K.C. and *Negus*, for the appellant. The appellant is a resident of the Northern Territory within the meaning of sec. 5A. Any person who acquires the quality of a resident and who carries on a business of primary production in the territory is within the exemption. If the word "resident" had a more restricted meaning and applied only to a permanent resident, the legislature would have said so. Sec. 4 gives an artificial meaning to the word "resident" so as to bring certain persons within the net of taxation, but that meaning has no relevancy here (*Robertson v. Commissioner of Taxation* (1); *Inland Revenue Commissioners v. Lysaght* (2); *Egyptian Delta Land and Investment Co. v. Todd* (3)).

Lappin, for the respondent. The appellant is a resident of Broome and therefore of Western Australia, and not of the Northern

(1) (1937) 57 C.L.R. 147.

(2) (1928) A.C. 234.

(3) (1929) A.C. 1, at p. 12.

H. C. OF A.
1937.
GREGORY
v.
DEPUTY
FEDERAL
COMMISSIONER OF
TAXATION
(W.A.).

Territory, and is not exempt from taxation under the section. He merely spends a very short time in the territory, where he has a branch of his business which has been established in Broome for many years.

DIXON J. delivered the following judgment :—

This appeal relates to a claim for exemption under sec. 5A of the *Income Tax Assessment Act 1922-1934*. The exemption is expressed in these words :—“ This Act shall not apply to any income derived from primary production in the Northern Territory of Australia by a resident of that territory prior to the first day of July, one thousand nine hundred and thirty-seven.”

The taxpayer is engaged in what is agreed to be primary production, pearl fishing. From that pursuit he derives income in the Northern Territory, for which he claims exemption. He also carries on pearl fishing from Broome in Western Australia, and he derives income therefrom.

The question to be decided is whether the taxpayer is a resident of the Northern Territory. His claim to exemption depends upon that question.

It is unnecessary to restate the facts. They appear clearly from the taxpayer's evidence, which is not contradicted and which I accept. It is enough to say that he began by residing in Broome, where he acquired a house which he has owned for many years. A time came when he found that pearl fishing from Darwin presented attractions as great as or greater than at Broome and he established himself at Darwin. He conducted operations at Darwin in an organized manner and upon a considerable scale, and, as time wore on, I think that he came to identify himself rather more with Darwin than with Broome. The development of his operations and interests in Darwin led him to live there for protracted periods.

The year of tax in respect of which the exemption is claimed upon this appeal is the financial year beginning on 1st July 1935 and ending on 30th June 1936. The assessment for that year of tax is based upon a return of the taxpayer's income derived in the calendar year 1934. I do not think that it is a matter of much importance in this case, but the question may be asked what period

should be taken under sec. 5A for the purpose of considering whether a taxpayer is a resident in the Northern Territory so that his income is exempt for a given financial year. Is it the financial year, the ordinary year of income preceding the financial year, or, in such a case as this, the year for which his returns of income for the financial year are accepted? I am inclined to think that it is the year for which the returns are accepted, but my conclusion would be the same for either of the other periods.

In the calendar year 1934 the taxpayer was in Darwin for a period which might be 131 days or 113 days. He was in Broome 161 days and he was engaged in travelling for business purposes for some seventy-three days. In 1933 he was about an equally long time in Broome and Darwin. In 1933 he was a less time in Darwin than in Broome. In Darwin he had arranged a place of residence, a dwelling. He arranged with his manager for the reservation of a room in his house and agreed to pay a definite sum of money for it. He kept a motor car in Darwin. He identified himself with the social life of Darwin. He had, of course, permanent and definite arrangements for his business activities in Darwin.

A question of much importance in the present case is whether the word "resident" in sec. 5A should be interpreted in the same way as similar expressions are interpreted in the British *Income Tax Acts*. I think that the answer is that the word should receive the same meaning and application as "person residing" and "ordinary resident" have been given in England. No technical or artificial meaning has been placed upon these expressions and parallel expressions under the British income tax law. But certain principles have been laid down by judicial decision for interpreting and applying the expressions. The well-settled interpretation of the words includes in their application a man who resides in two or more places. That was first settled in *Attorney-General v. Coote* (1). The same view has been adopted in *Cooper v. Cadwalader* (2), *Thomson v. Bensted* (3), *Pickles v. Foulsham* (4) and *Peel v. Inland Revenue Commissioners* (5). And finally the interpretation has been approved

H. C. OF A.
1937.
GREGORY
v.
DEPUTY
FEDERAL
COMMISSIONER OF
TAXATION
(W.A.).
Dixon J.

(1) (1817) 4 Price 183; 146 E.R. 433.

(2) (1904) 5 Tax Cas. 101.

(3) (1918) 7 Tax Cas. 137.

(4) (1923) 9 Tax Cas. 261.

(5) (1927) 13 Tax Cas. 443.

H. C. OF A.
1937.

GREGORY
v.
DEPUTY
FEDERAL
COMMISSIONER OF
TAXATION
(W.A.).

Dixon J.

by the House of Lords in *Levene v. Inland Revenue Commissioners* (1) and in *Lysaght's Case* (2).

In the present case I would not deny that the taxpayer had retained his residence in Broome in Western Australia. He had done nothing that would be enough to divest himself of the character of a resident of Broome which, speaking figuratively, clung to him from long association and usage, an association and usage which he had done nothing to dissolve or destroy. But I think he did most definitely acquire the concurrent character of a resident of Darwin. So far as intention plays a part, I think that his intention developed in the direction of making Darwin his chief and principal place of business activity and social life. Possibly his dwelling or housing arrangements in Darwin were less regular than in Broome, but the difference arose from the fact that he had long owned a house in Broome, and that he was unable to sell it and therefore lived in it. I think I am entitled to take into account the fact that he negotiated for and took a lease of a flat in Darwin although the lease was after the period with which the appeal is concerned. I take little notice of the fact that his daughter paid him visits at Broome and not in Darwin. That, I think, arose from the time at which her school holidays fell.

The matters on which I place most stress in deciding this question of fact are his business interests and the necessity of his presence in Darwin and the fact that in dividing his attention between two businesses he gave as much or more attention to Darwin and the kind of social and living arrangements that he made in Darwin. It is true that the most permanent arrangements were made outside this period. But the English cases show that events which occurred before and after a given period may be considered as throwing light on and disclosing the significance of habits and conduct within the period.

I hold that the facts of the case come within sec. 5A and that the taxpayer is entitled to succeed in his appeal. The appeal will be allowed, the assessment for the year will be set aside, there will be a declaration that the taxpayer is entitled to exemption under sec. 5A of the *Income Tax Assessment Act 1922-1934* in respect of

(1) (1928) A.C. 217, at p. 223.

(2) (1928) A.C., at p. 245.

income derived from pearl fishing in or from the Northern Territory, and with that declaration the assessment will be remitted to the Commissioner of Taxation for re-assessment.

The appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant, *Parker & Parker*.

Solicitor for the respondent, *A. A. Wolff* K.C. Crown Solicitor for Western Australia.

H. C. OF A.

1937.

GREGORY

v.

DEPUTY

FEDERAL

COMMISSIONER OF

TAXATION

(W.A.).