S.C. affirmed post h. 241.

[HIGH COURT OF AUSTRALIA.]

KOITAKI PARA RUBBER ESTATES LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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SYDNEY, *Sept.* 11; *Nov.* 26.

DIXON J.

Income Tax (Cth.)—Company—Assessable income—Exemption—Rubber produced in Papua—Sale in Australia—Proceeds—"Produce of a territory of which he is a resident"—Plantation owned by company incorporated in Australia—Residence—Test—Central management and control—Income Tax Assessment Act 1936-1937 (*No.* 27 *of* 1936—*No.* 18 *of* 1937), *sec.* 23 (*n*).

Although a registered company may have more than one residence for the purpose of the *Income Tax Assessment Act* 1936-1937, a finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree, and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as residence of the superior or directing authority by means of which the affairs of the company are controlled.

Held, on the facts, that a company incorporated in New South Wales and having the central control, management and trading there, which owned rubber plantations in Papua which were managed by an officer of the company, was not also resident in Papua so as to be entitled to claim an exemption under sec. 23 (*n*) of the *Income Tax Assessment Act* 1936-1937 of so much of its income as was derived by it from the sale in Australia of the rubber produced in Papua.

APPEAL.

The Koitaki Para Rubber Estates Ltd., a company incorporated in New South Wales, owned rubber plantations in Papua. The rubber grown thereon was sold in Australia. The Federal Commissioner of Taxation, for the purpose of calculating the company's assessable income, took into account the proceeds of such

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sales and disallowed an objection by the company that sec. 23 (*n*) of the *Income Tax Assessment Act* 1936-1937 operated to exempt so much of its income as was derived by it from the sale in Australia of rubber produced in Papua.

The company appealed to the High Court.

The facts appear in the judgment hereunder.

Maughan K.C. and *Malor*, for the appellant.

Kitto, for the respondent.

Cur. adv. vult.

NOV. 26.

The following written judgment was delivered by :—

DIXON J. These are two appeals, heard together, against assessments for Federal income tax. They both depend upon the same question, namely, whether the appellant company is resident in the Territory of Papua.

The company, which is incorporated in New South Wales, owns rubber plantations in Papua. The rubber is sold in Australia, and the commissioner, for the purpose of calculating the company's assessable income, has taken into account the proceeds of such sales. To the inclusion of the proceeds of the sale of rubber the company objects on the ground that sec. 23 (*n*) of the *Income Tax Assessment Act* 1936-1937 operates to exempt so much of its income as is derived by it from the sale in Australia of rubber produced in Papua. Sec. 23 (*n*) includes among the descriptions of income exempt from income tax income derived by a resident of a territory or island in the Pacific Ocean, other than New Zealand, which is governed, controlled or held under mandate by the government of any part of the British Empire or by a *condominium* in which any part of the British Empire is concerned from the sale in Australia, by or on behalf of that person, of produce of the territory or island of which he is a resident. The commissioner has not denied that Papua is a territory which falls within this provision. He does not dispute the correctness of the view that, notwithstanding the special provision contained in sec. 7 with reference to the three territories of the Commonwealth in the Pacific Ocean, the words " government of any part of the British Empire " include the Commonwealth itself, and the further view that, notwithstanding the inclusion of Papua in the definition of " Australia " contained in sec. 6, the word " Australia " is used in sec. 23 (*n*) to mean the continent and Tasmania. What the commissioner does dispute is that the company is resident in the Territory of Papua.

The company was formed in Sydney; it has its registered office there; Sydney is the place where its directors reside and meet and where the meetings of its shareholders are held. Its seal, minute-book, register of members and records are kept at its registered office. As its Sydney manager, it employs a practising accountant, and, subject to the board of directors, he and his staff do the work of the company in Sydney. The duties of secretary are performed by him, and his office is the company's registered office. At Port Moresby some book-keeping is necessarily done, but the general accounts of the company are kept in Sydney. The company's rubber plantations are at Koitaki, near Port Moresby, and they are managed by an officer of the company who resides in Papua. He acts under a power of attorney by which the company authorizes him to manage, carry on and conduct in Papua its property, affairs and business and confers upon him ample powers to that end. He has an office at Koitaki staffed by an assistant manager and a book-keeper. A large amount of labour is employed on the plantations, and it is all under his control. He sends, however, a weekly report of the working of the plantations to the chairman of directors in Sydney, and periodically he sends to the manager in Sydney for presentation to the directors reports setting out all particulars concerning the running of the plantations and the yield of rubber. From the books kept at Koitaki information is supplied to the Sydney manager to enable the writing up of the books in Sydney. All the rubber produced on the plantations, after being treated, prepared and baled in Papua, is shipped to Sydney and consigned to the company. The Sydney manager sells the rubber through a firm of selling agents in Sydney, who are remunerated by a commission. He hands them the documents relating to each shipment, and they take charge of all matters concerning the delivery and sale of the goods. They send account sales and a cheque for the net proceeds to the Sydney manager. The receipts are paid into the company's bank in Sydney, where its main bank account is kept. To cover working expenses at the plantations monthly remittances are made to the manager at Port Moresby, where another bank account is kept. This account is used only for the payments in of the remittances and the drawings for working expenses.

My conclusion from these facts is that the company is not a resident of the Territory of Papua.

That it is a resident of New South Wales admits of no doubt. It is there that the company is administered and controlled; it is where the directing power of the company's affairs and the centre of its trading alike abide; it is the place of the central control and

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management of the company and is the seat of the concern. The company does not disclaim residence in New South Wales. What it says is that it is also a resident of Papua.

It is now established that a company, like an individual, may reside in more than one place at the same time. Having regard to the nature of the tests in use for determining the place where a company was resident, some doubt existed whether it was possible for a company to be at one time resident in more than one country. But in *Swedish Central Railway Co. Ltd.* v. *Thompson* (1) the House of Lords held that a company might have more than one residence for the purposes of the *Income Tax Acts*. No doubt the possibility of an individual or a company establishing a residence in Papua although at the same time being a resident in Australia must be conceded in applying sec. 23 (*n*). Whatever may be the policy inspiring the exemption, the provision contains nothing to exclude a case of dual residence. The artificial definition of "resident" in sec. 6 relates only to residence in Australia, and, in any case, the paragraph governing the residence of companies is so framed that a company might be resident elsewhere because its central control and management were at a place outside Australia, and yet at the same time might be a resident of Australia either because it was incorporated here or because the shareholders controlling it resided here.

But, while I am prepared to admit that a company might be a resident of Papua although it was also a resident of Australia, I do not think that the appellant company is a resident of Papua. From the point of view of that territory it is simply an absentee owner of a rubber estate managed by an attorney under power in its name. The operations of the attorney are, of course, operations of the company. Doubtless the office is its office, the assistant manager and the female book-keeper are the company's servants, and the attorney under power is himself employed under a contract of service. The company is therefore carrying on by its servants the activities in Papua of growing, treating, packing and exporting rubber. It may be conceded, too, that in respect of the conduct of the plantations a full measure of responsibility is placed in the attorney or manager. But his responsibility, however full, is confined to what may broadly be described as the production and shipment of rubber and does not extend to the control of the general or corporate affairs of the company, to matters of policy or of finance. All control seems to me to be centred in Sydney, and, although the manager in Papua carries on the industrial or productive side of

(1) (1925) A.C. 495.

the company's business, as close a supervision is maintained from Sydney as distance allows and the course of operations in Papua is subject to direction from Sydney.

Since the decision in *Swedish Central Railway Co. Ltd.* v. *Thompson* (1), a great deal of difficulty has been felt as to the tests to be applied when a company claims that it is resident in more than one country. But, unless it can be said that a company is resident wherever it carries on productive or manufacturing operations on a substantial scale, I do not think that the appellant company should be considered a resident of Papua.

The better opinion, however, appears to be that a finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled.

The decision in *De Beers Consolidated Mines Ltd.* v. *Howe* (2) had been taken as authoritatively restating the tests which had long before been laid down in *Cesena Sulphur Co. Ltd. and Calcutta Jute Mills Co. Ltd.* v. *Nicholson* (3) for determining whether a company was resident in a country, tests which had been already applied by the House of Lords in *San Paulo (Brazilian) Railway Co. Ltd.* v. *Carter* (4). In the *De Beers Case* (5) Lord *Loreburn* said :—" In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. . . . The decision of *Kelly* C.B. and *Huddleston* B. in the *Calcutta Jute Mills* v. *Nicholson* (3) and the *Cesena Sulphur Co.* v. *Nicholson* (3), now thirty years ago, involved the principle that a company resides for the purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides. It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading."

(1) (1925) A.C. 495.
(2) (1906) A.C. 455.
(3) (1876) 1 Ex. D. 428.
(4) (1896) A.C. 31.
(5) (1906) A.C., at p. 458.

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The *De Beers Case* (1) provides a possible example of facts upon which dual residence might be ascribed to the company. De Beers Consolidated Mines Ltd. won diamonds in South Africa and sold them in or from London. The company was controlled by three life governors and sixteen ordinary directors. Of this body, two life governors and nine ordinary directors resided in the United Kingdom and one life governor and six ordinary directors in Cape Colony. A board met at Kimberley and another in London. The more important task of controlling the diamond market fell upon the latter board, and in most things it imposed its will upon the former. The company was, however, incorporated in South Africa and had its registered or head office at Kimberley. *Phillimore* J., in the King's Bench Division (2), said that, upon a review of the various considerations he had mentioned, he would come to the conclusion, if it were necessary to find that the company had one residence only, that its residence was within the United Kingdom, where its business of control was carried on, even though its principal physical labours were abroad, as was the case in *San Paulo (Brazilian) Railway Co. Ltd.* v. *Carter* (3). But, he went on to say, he did not think it necessary to determine that the only residence of the company was in the United Kingdom. His Lordship then referred to a dictum of *Channell* J. in *Goerz & Co.* v. *Bell* (4) to the effect that it was possible that a company might have two residences.

After the *De Beers Case* (1) and before the decision in *Swedish Central Railway Co. Ltd.* v. *Thompson* (5) the House of Lords reaffirmed on three occasions the test laid down in the former case by Lord *Loreburn*. In *American Thread Co.* v. *Joyce* (6) Lord *Haldane* said :—" The only other question—the question of law—is that of residence. That question was before this House in *De Beers Consolidated Mines* v. *Howe* (1). That case decided that a person resided for the purpose of the income-tax assessment at the place where his real business was carried on ; that is to say where the control and management of the company abides." In *New Zealand Shipping Co. Ltd.* v. *Thew* (7), where again there were two boards of directors, one in London and one in New Zealand, and, because the former controlled the financial and administrative business, the United Kingdom was held to be the place of residence, Lord *Buckmaster* said :—" In the *De Beers Case* (1) it was stated that you must find out what is the chief seat

(1) (1906) A.C. 455.
(2) (1905) 2 K.B. 612, at pp 631, 632.
(3) (1896) A.C. 31.
(4) (1904) 2 K.B. 136, at p. 146.
(5) (1925) A.C. 495.
(6) (1913) 108 L.T. 353, at p. 354.
(7) (1922) 8 Tax Cas. 208, at p. 229.

of management and the centre of trading of the company in order to ascertain what is its real residence." In *Bradbury* v. *English Sewing Cotton Co. Ltd.* (1) Viscount *Cave* L.C. said that the company was resident in England where (in Lord *Loreburn's* language) the seat and directing power of the affairs of the company were located and its chief operations, both in the United Kingdom and elsewhere, were controlled, managed and directed. Lord *Wrenbury* (2) again quoted the statement of Lord *Loreburn* in the *De Beers Case* (3), "a company resides where the central management and control actually abides," a statement originally made in the same form (even to the singular verb) by *Kelly* C.B. in the *Cesena Sulphur Co.'s Case* (4). In the *Swedish Central Railway Co.'s Case* (5) the place of control was Sweden; it was there that the directors and the shareholders held their meetings and where the dividends were paid. But the company was incorporated in England, had its seal, its registered office, and its register of shareholders there. Its secretary lived in London and a committee of directors met there to affix the seal to instruments, to deal with transfers of shares and to sign cheques on the company's London bank account. Its balance sheet was made up and audited in London. The Commissioners of Inland Revenue found that the company was resident in England. The House of Lords upheld this decision on the ground that a company might have two places of residence and the Swedish Central Railway Co. was resident in Sweden and in England. But Viscount *Cave* L.C. clearly stated that the reason was that there was a division between the two countries of the "central management and control." He said, speaking of the *Cesena Sulphur Co. and Calcutta Jute Mills Cases* (4):—"The effect of this decision is that, when the central management and control of a company abides in a particular place, the company is held for purposes of income tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence: See *Cooper* v. *Cadwalader* (6); and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence" (7). Lord *Dunedin* and Lord *Sumner* concurred. Lord *Buckmaster* was less specific but said nothing inconsistent with Lord *Cave's* view. Lord *Atkinson* dissented on the

(1) (1923) A.C. 744, at p. 753.
(2) (1923) A.C., at p. 765.
(3) (1906) A.C., at p. 458.
(4) (1876) 1 Ex. D. 428.
(5) (1925) A.C. 495.
(6) (1904) 5 Tax Cas. 101.
(7) (1925) A.C., at p. 501.

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ground, as he expressed it, that " if the true rule be, as Lord *Loreburn* said, that the residence is where ' the central management and control abides,' then, unless a thing can have two or three different and separate centres, it would appear to me to be quite impossible, according to the ordinary use of language, that ' the central control and management of a company ' can at the same time abide in two or more different and separated places " (1). It is evident that Lord *Cave's* answer to this view was that control and management might be concentrated in the hands of a number of persons whose operations were not confined within the political boundaries of one country.

In *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (2) the House of Lords rejected the contention that incorporation in England and the fulfilment of the statutory requirements which follow are alone sufficient to constitute residence when the administration of the company's affairs and its business are all carried on abroad. Lord *Sumner*, in whose opinion Lord *Atkinson* concurred, laid great weight upon active operations as opposed to passive compliance with and support from the law of a country—" The test of taxable residence for any company has been settled to be the carrying on of a business here and not the bare operation of the *Companies (Consolidation) Act* " (3). But he did not mean to emphasize the exercise of trade or the production of goods at the expense of management and control, as appears from his citation (4) of the foregoing passage from Lord *Cave's* judgment in the *Swedish Central Railway Co.'s Case* (5) and his repeated references to Lord *Loreburn's* statement (6). Lord *Buckmaster*, in the course of his judgment (7), speaks of seeking the residence of a company by examining its seat of business. Lord *Warrington of Clyffe* said : " In *De Beers Consolidated Mines* v. *Howe* (8) it was decided in this House that in the case of a company registered abroad the test of residence is where it really keeps house and does its real business, and the real business is carried on where the central management and control actually abides " (9).

From these passages it would seem to be proper to conclude that residence of a company depends upon the existence within the country for which it is claimed of some part at least of the superior administration or control of the company's general affairs. This view is adopted in *Konstam* on *Income Tax*, 7th ed. (1936), p. 93,

(1) (1925) A.C., at p. 508.
(2) (1929) A.C. 1.
(3) (1929) A.C., at p. 16.
(4) (1929) A.C., at p. 17.
(5) (1925) A.C., at p. 501.
(6) (1929) A.C., at pp. 22, 25, 26, 29.
(7) (1929) A.C., at p. 37.
(8) (1906) A.C. 455.
(9) (1929) A.C., at pp. 41, 42.

and is maintained in a full and able argument by Dr. *Farnsworth* in his book *The Residence and Domicil of Corporations*: See particularly at pp. 110, 111 and 118, 120. But in any case I am of opinion that the appellant company has not become a resident of the Territory of Papua.

Appeals dismissed with costs.

Solicitors for the appellant, *A. J. McDonald & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.