[HIGH COURT OF AUSTRALIA.]

O. GILPIN LIMITED . . . . . APPELLANT;
APPELLANT,

AND

THE COMMISSIONER FOR TAXATION FOR NEW SOUTH WALES . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 21, 22; *Dec.* 5.

Starke, Dixon and Williams JJ.

Income Tax (N.S.W.)—Assessable income—Company—"Chain stores"—Head office in another State—Retail shops in New South Wales—Control and management from head office—"Goods sold in this State in the course of a business carried on out of this State"—Profits—Income Tax (Management) Act 1936 (*N.S.W.*) (*No* 41 *of* 1936), *secs.* 18 (1) (*b*), 35 (*a*), 39.

Sec. 39 of the *Income Tax (Management) Act* 1936 (N.S.W.) provides:—"Where any goods are sold in this State in the course of a business carried on out of this State but in Australia by a person not being the manufacturer of the goods, one-half of the profit arising from the sale shall be deemed to be income derived in this State."

The taxpayer, a company incorporated in Victoria and registered in New South Wales as a foreign company, carried on the business of a draper and warehouseman in ninety-six retail shops, twenty-nine of which were situate in New South Wales. Its registered office was situate in Melbourne, where its central control and management was located. Goods or stock for the various shops in New South Wales were dispatched from Victoria and were sold by retail in such shops, which were staffed for that purpose. The prices at which such goods or stock might be sold were fixed and determined by the central management. All the costing and accounting was done in Melbourne.

Held that the goods sold in the shops in New South Wales were sold in the course of carrying on a business or businesses in that State; therefore, those profits did not come within the operation of sec. 39 of the *Income Tax (Management) Act* 1936, and the taxpayer was properly assessed to income tax in

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New South Wales in respect of the whole of the profit arising from the sale of goods in that State.

Decision of the Supreme Court of New South Wales (*Maxwell* J.) affirmed

APPEAL from the Supreme Court of New South Wales.

By an assessment dated 4th March 1938 made under the *Income Tax (Management) Act* 1936 (N.S.W.) in respect of the year ended 30th June 1937, the Commissioner for Taxation attributed to the sale of goods in New South Wales by the taxpayer, O. Gilpin Ltd., the whole of the profits, namely £33,120, realized upon such sale as income derived in New South Wales and therefore taxable in the sum of £3,726.

An objection by the taxpayer, on the grounds that the assessment was excessive and not in accordance with the Act as the taxpayer's head office was in Victoria and only one-half the profit made by its New-South-Wales branches should be subject to New-South-Wales taxes, was disallowed by the commissioner. The taxpayer, under sec. 233 of the Act, thereupon requested that the objection be treated as an appeal and forwarded to the Supreme Court of New South Wales.

The evidence given in support of the appeal was regarded as completely covering the taxpayer's activities and was in no respect challenged by or on behalf of the respondent commissioner.

The taxpayer was a company incorporated in Victoria and was registered in New South Wales as a foreign company under the *Companies Act* 1936 (N.S.W.). Its objects under its memorandum of association included the carrying on in Victoria, New South Wales and elsewhere of the trade or business of draper and warehouseman in all aspects. The taxpayer had fifty-nine shops in Victoria, twenty-nine in New South Wales, three in South Australia and three in Tasmania. Twenty-eight of the shops in New South Wales were owned by the taxpayer and one was occupied by it under a lease. The board of directors had the central control and management of all shops, and carried out their duties in Victoria, where the sole office in the ordinary business sense was situate. The shareholders were mainly Victorian, those in New South Wales being less than ten per cent of the total. All purchases were made in Victoria. The goods were bought in large quantities and were packed into requisite smaller quantities and dispatched to, *inter alia*, the twenty-nine shops in New South Wales. They were transported by the taxpayer in its own lorries. The shops were graded by the central management in Victoria and received quantities and standards of goods appropriate to the particular

grade. So far as the replacement of stock was concerned, the manageress of each shop filled in a standard form for so much as would bring the stock up to that which represented the grade of the shop. All accounts were kept at the head office. The total sales in any one shop were entered into the one sales account, as were the purchases into one purchase account, generally and not in respect of any particular shop. The prices for sale were fixed at the office in Melbourne, and, generally speaking, the manageresses of the shops were not allowed to vary the prices. Some records were kept at all the various shops. Sales were conducted over the counter in the way ordinarily adopted by retail shopkeepers. The goods were wrapped up in the shop, and in some (exceptional) instances were delivered away from the shop. The cash receipts were paid into a local bank for remittance to the credit of the taxpayer's account in Melbourne. Where rent was payable in respect of particular shop premises, the manageress of that shop paid that rent out of the takings. A staff of varying number was employed, and the wages of the whole of the staff were deducted from the takings of the pay day. Payment for petty expenses was made locally also out of the takings.

The Supreme Court (*Maxwell* J.) held that sec. 39 of the Act had no application and dismissed the appeal.

From that decision the taxpayer appealed to the High Court.

Further material facts and the relevant statutory provisions appear in the judgments hereunder.

Eager K.C. (with him *Hooke*), for the appellant. Although the appellant company carries on business in the sense of transactions in New South Wales, it has not its central or any control and management in that State, nor has it voting power controlled by shareholders who are resident in New South Wales ; therefore the appellant company is a non-resident within the meaning of sec. 5 of the *Income Tax* (*Management*) *Act* 1936 (N.S.W.). Subdivision C of Part III. of the Act, which comprises secs. 31 to 51 inclusive, is a group of sections which provide the method of determining what is and what is not income derived from sources in New South Wales. The question which arises in this appeal is determined by sec. 39 ; if not, then it comes within the scope and operation of sec. 18. The condition upon which sec. 39 operates is the sale of goods within the State. So far as the appellant company is concerned only the act of sale and things directly connected therewith take place in New South Wales. Every other transaction and detail associated with the appellant's business, which is that of a merchant, is effected and arranged in another State. The selling of goods in a

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particular political territory is the exercise of a trade (*Grainger & Son* v. *Gough* (1)). The sale of goods is the carrying on of business (*Commissioner of Taxation (N.S.W.)* v. *Hillsdon Watts Ltd.* (2)). In the Act the legislature distinguishes between "business" and "a business." In the attribution of profit to the various sources all the intermediate transactions should be examined and according to the circumstances one may or may not attribute to the purchases and to some of the intermediate transactions part of that profit (*Commissioner of Taxation (N.S.W.)* v. *Hillsdon Watts Ltd.* (3); *Commissioners of Taxation* v. *Kirk* (4)), so that the sale is not the sole source of profit. The whole of the profit is not necessarily attributable to the place of sale in the different competing territories. Total profit may be attributable to different sources if the totality of the different stages which ultimately result in that profit contain particular transactions which give added value to the goods at various stages. In *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (5) it was held that there was no added value because the goods were offal for which there was not any market in Australia. Sec. 39 is not directed to the matter of quantum of sales; it is directed to sales systematically carried on so as to form all the trade from which income is derived. The main characteristic of the appellant's business is that it is a Victorian business. It is a single business carried on in the various States of the Commonwealth; it is not the business of a "chain" store.

E. M. Mitchell K.C. (with him *Leslie*), for the respondent. The question at issue is one of fact. The facts show that the appellant carries on a business of retail draper in New South Wales, and the sales made in New South Wales are made in the course of that retail business so carried on. Sec. 39 does not purport to attribute any sources of profit to the transactions; it is designed to give, if the conditions are complied with, a special concession to States within the Commonwealth as against countries outside the Commonwealth. The question is not: Where is the principal control? but: Where is the locality of the business situate in which the sales are made? The question of the place where a trade or business is exercised was considered in *Erichsen* v. *Last* (6), *Grainger & Son* v. *Gough* (1) and *Smidth & Co.* v. *Greenwood* (7). The appellant carries on in New South Wales the trade or business

(1) (1896) A.C. 325.
(2) (1937) 57 C.L.R. 36.
(3) (1937) 57 C.L.R., at p. 42.
(4) (1900) A.C. 588.
(5) (1931) 46 C.L.R. 417.
(6) (1881) 8 Q.B.D. 414.
(7) (1921) 3 K.B. 583.

of a retail draper (*Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (1); *Tarn* v. *Scanlan* (2)), and the sales made are sales made in the course of this retail drapery business. In *Maclaine & Co.* v. *Eccott* (3) and for the purpose of sec. 39 it is a question where the trade is exercised in the course of which the sale takes place. Each separate shop of the appellant's is a separate place of business.

Eager K.C., in reply.

Cur. adv. vult.

Dec. 5.

The following written judgments were delivered :—

STARKE J. O. Gilpin Ltd. is a company incorporated under the *Companies Act* 1915 of the State of Victoria and it is also registered as a foreign company in the State of New South Wales. Its business is that of a draper and warehouseman. The central management and control of its business is established in Victoria, where the company also keeps its accounts. The company has fifty-nine stores or shops in various towns in Victoria, twenty-nine in various towns in New South Wales, and others in South Australia and Tasmania. Goods or stock for the various shops in New South Wales are dispatched from Victoria. The goods or stock so dispatched from Victoria are sold by retail in the various shops in New South Wales, which are staffed for that purpose. But the prices at which such goods or stock may be sold are fixed and determined by the central management in Victoria.

The company was assessed to income tax in New South Wales in respect of its income there derived during the year ended 30th June 1937. The company claims that only one-half of the profit arising from the sale of its goods in New South Wales should be assessed to income tax as income derived in that State. Its claim is based upon sec. 39 of the *Income Tax (Management) Act* 1936 (N.S.W.), which is as follows :—"Where goods are sold in this State in the course of a business carried on out of this State but in Australia by a person not being the manufacturer of the goods, one-half of the profit arising from the sale shall be deemed to be income derived in this State." The company contends that its business is one and indivisible and is carried on in Victoria. But the fact remains that it carries on a retail business in each of its shops in New South Wales where its goods are sold and that such sales are in the course of the business carried on in those shops. It is not a fact that these sales are in the course of a business carried on out of New South Wales

(1) (1908) A.C. 46, at p. 53. (2) (1928) A.C. 34, at p. 48.
(3) (1926) A.C. 424, at p. 432.

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or are attracted by or should be attributed to such a business. They arise out of and should be attributed to the business carried on in New South Wales. Sales in New South Wales by travellers for or representatives of a business carried on out of New South Wales are doubtless covered by the section, and so may other cases which were suggested at the Bar. It is, however, a question of fact in each case whether goods are or are not sold in the course of a business carried on out of New South Wales.

The appeal should be dismissed.

DIXON J. Subdivision C of Part III. of the *Income Tax (Management) Act* 1936 (N.S.W.) (secs. 31 to 51) contains provisions for the ascertainment of taxable income from a business carried on partly in and partly out of the State of New South Wales. Sec. 39 is as follows: "Where goods are sold in this State in the course of a business carried on out of this State but in Australia by a person not being the manufacturer of the goods, one-half of the profit arising from the sale shall be deemed to be income derived in this State."

The question is whether this section ought to be applied in the assessment of the profits derived by the appellant company from the sale of goods over the counter in some twenty-nine retail stores or draper's shops which it conducts in country towns in New South Wales.

The company is incorporated under the law of Victoria and is controlled and managed from Melbourne. Its business consists in establishing and conducting draper's shops or stores in country towns in Australia. It has fifty-nine such shops in Victoria, twenty-nine in New South Wales, three in South Australia, and three in Tasmania. The essence of the business seems to be uniformity and system in the conduct of the retail shops, organization in the supply and distribution amongst them of the stock-in-trade from a central source in Melbourne and rigid and close control, by the company's administrative officers there, of the management of the shops, so that a minimum of discretion is required by or allowed to the person in charge of each shop, always a woman manager. It is claimed for the company that its business is remarkable for its concentration of control and management; that it is not simply a chain-store business but an inseverable system controlled from the centre in Melbourne without any delegation of authority or discretion. In no shop can the manager buy anything: everything, stock and supplies, must come from the company's warehouse in Melbourne, to which the company's wholesale purchases are all delivered. The goods are

distributed among the various shops by the company's motor transport vehicles. The shops are classified, and according to class the stock-in-trade in every one is uniform in quantity and description. The supplies are made so as to replace stock month by month. The costing and accounting is done in Melbourne. The staff are engaged and trained in Melbourne and sent to the shops. A shop manager has no general power of dismissal. Advertising is done from Melbourne. The goods are everywhere sold at the same standard price fixed from Melbourne. The shops, which, with a single exception, are owned by the company and not leased, are of a standard pattern and are designed in Melbourne. In the conduct of its business the company disregards State boundaries so far as it lawfully may.

On these facts the company maintains that, in its shops in New South Wales, it sells goods in the course of a business carried on in Victoria and that accordingly sec. 39 applies and its assessment for New-South-Wales income tax should be upon one-half only of the profit arising from such sales.

In my opinion this contention is erroneous. The section applies when a taxpayer's business is fixed and established outside New South Wales but by correspondence, by agents, by commercial travellers or by other descriptions of representatives, sales are made within New South Wales. It is not possible exhaustively to state the application of the provision, but these are typical examples. The section does not apply to a retailselling business conducted in shops or stores in the State simply because they are organized, controlled, and supplied with goods from outside the State, however systematized and disciplined the undertaking may be. In the towns in New South Wales the shops stand containing a stock of goods. At every shop the company carries on the business of a retail draper by selling the stock it contains to the customers who use the shop. Outwardly and ostensibly a shopkeeper's business is conducted in New South Wales. The arrangements for the supply of the goods, the locality of the source, the interconnection of the shops, and the administration of them all as part of a whole upon a common plan do not make the ostensible business any the less actual. The goods are sold in the course of a business, perhaps of twenty-nine businesses, carried on in New South Wales.

In my opinion the appeal should be dismissed with costs.

WILLIAMS J. This is an appeal from a decision of the Supreme Court of New South Wales that the appellant company is liable to pay New-South-Wales income tax on the whole of the profits made

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from the sale of goods in twenty-nine shops in which it carried on the business of a retail draper in New South Wales during the financial year ending 30th June 1937. The appellant objected that only half of these profits was subject to tax. The Commissioner disallowed the objection, and the company appealed to the Supreme Court. The appeal was heard by *Maxwell* J., who dismissed it with costs.

The material facts are set out in his judgment, and it is unnecessary to recapitulate them. The appellant is incorporated in Victoria, but it is registered as a foreign company in New South Wales under the provisions of sec. 61 of the New-South-Wales *Companies Act* 1936. It carries on the business of a retail draper. Its registered office is situated in Melbourne, where its central control and management is located. It carries on this business in ninety-four retail shops, twenty-nine of which are situated in New South Wales. The freehold of all except one of these twenty-nine shops is owned by the company. The relevant statute is the New-South-Wales *Income Tax* (*Management*) *Act* 1936. The appellant is a non-resident within the meaning of sec. 5 of the Act, so that under sec. 18 (1) (*b*) its assessable income is the gross income derived directly or indirectly from all sources in the State. If the matter stopped there, it would be clear that the whole of the profits in question would be taxable. Part III., Subdivision C, of the Act relates to business carried on partly in and partly out of the State. Sec. 32 gives instances in which goods are deemed to be sold in the State. Sec. 35 (*a*) provides that except as provided in the subdivision where goods are sold in the State by any person, the whole of the profit arising from the sale shall be deemed to be income derived in the State. Sec. 39, on which the appellant relies, is in the following terms: "Where goods are sold in this State in the course of a business carried on out of this State but in Australia by a person not being the manufacturer of the goods, one-half of the profit arising from the sale shall be deemed to be income derived in this State."

It claims that the business of the company is one and indivisible; and that, having regard to the extent of the general control exercised in Melbourne over each particular shop, the business of each shop is partly carried on in Melbourne and the goods which are sold in the New-South-Wales shops are sold in the course of a business carried on outside that State. I cannot agree with this contention. The contracts of sale, the payments for the goods and the delivery thereof are all made at the shops in New South Wales. In the case of a merchant the main test to determine where the business is being carried on is to ascertain where the contracts of sale are

habitually made: See *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (1); *Maclaine & Co.* v. *Eccott* (2); *Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd.* (3); *Commissioner of Taxation (N.S.W.)* v. *Hillsdon Watts Ltd.* (4). Applying this test to the present case it is clear that the appellant is carrying on a business or series of businesses in New South Wales; the goods in question were sold in the course of that business or businesses. Sec. 39 is therefore inapplicable and the whole of the profits are taxable under sec. 18 (1) (*b*) and sec. 35 (*a*) of the Act.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *W. A. Gilder, Son & Co.*

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

J. B.

(1) (1908) A.C. 46.
(2) (1926) A.C. 424.
(3) (1931) A.C. 224.
(4) (1937) 57 C.L.R., at p. 42.