[HIGH COURT OF AUSTRALIA.]

KOITAKI PARA RUBBER ESTATES LIMITED APPELLANT;

AND

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

H. C. OF A. 1941.

SYDNEY, *April* 9, 21.

Rich A.C.J., Starke, McTiernan and Williams JJ.

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), *secs.* 6, 23 (*n*).

A company incorporated in New South Wales and having its central control, management and trading there owned and worked rubber plantations in Papua which were managed by an officer of the company there resident.

Held that the company was not resident in Papua for the purpose of sec. 23 (*n*) of the *Income Tax Assessment Act* so as to be entitled to claim an exemption of so much of its income as was derived by it from the sale in Australia of the rubber produced in Papua.

Decision of *Dixon* J. (*ante*, p. 15) affirmed.

APPEAL from *Dixon* J.

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 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.

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Dixon J. held, on the facts, which are set forth in his Honour's judgment (1), that the company, admittedly resident in Australia, was not also resident in Papua so as to be entitled to the exemption claimed by it under sec. 23 (*n*) of the *Income Tax Assessment Act* 1936-1937: *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (2).

From that decision the company appealed to the Full Court.

Weston K.C. (with him *Bowen*), for the appellant. A company may be a resident for purposes of income tax in more than one place (*Swedish Central Railway Co. Ltd.* v. *Thompson* (3); *Egyptian Hotels Ltd.* v. *Mitchell* (4); *New York Life Insurance Co.* v. *Public Trustee* (5)). A company resides in a particular geographical unit if it there conducts an essential and substantial part of its trading operations (*Gasque* v. *Inland Revenue Commissioners* (6); *Swedish Central Railway Co. Ltd.* v. *Thompson* (7)). In *De Beers Consolidated Mines Ltd.* v. *Howe* (8) the facts were that the whole central control and management was in England; whether the company could at the one time be a resident of two or more countries was not considered, nor was what would be the test of dual residence considered. Similarly, in *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (9) the House of Lords did not consider what would be the test of a second or third residence. A test of residence is: Is the place one where substantial operations of the company are conducted? Applying that test the appellant company is a resident of the Territory of Papua.

Kitto, for the respondent. The test of "resident" in jurisdiction cases such as *New York Life Insurance Co.* v. *Public Trustee* (10) does not apply to taxation cases; the sense in which that word is used in jurisdiction cases is entirely different from that which it bears in the *Income Tax Assessment Act* (*Swedish Central Railway Co. Ltd.* v. *Thompson* (11)). It was affirmed in *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (12) that the test established in *De Beers Consolidated Mines Ltd.* v. *Howe* (13) is the only permissible test to determine residence for the purpose of taxation. A plurality of residence is only possible where the central management and

(1) *Ante*, pp. 16, 17.
(2) *Ante*, p. 15.
(3) (1925) A.C. 495, at pp. 499, 500, 502, 503, 519.
(4) (1914) 3 K.B. 118; (1915) A.C. 1022.
(5) (1924) 2 Ch. 101, at p. 120.
(6) (1940) 2 K.B. 80, at p. 85.
(7) (1925) A.C. 495.
(8) (1906) A.C. 455.
(9) (1929) A.C. 1.
(10) (1924) 2 Ch. 101.
(11) (1925) A.C., at p. 505.
(12) (1929) A.C., at pp. 25, 27.
(13) (1906) A.C., at p. 458.

control of the company is definitely and closely associated with each residence, that is, where the acts which partake of the character of central control and management are divided between two or more places (*Swedish Central Railway Co. Ltd.* v. *Thompson* (1)). None of the acts done by or on behalf of the appellant in Papua partook of the character of central control and management, therefore those acts do not establish residence by the appellant in Papua. In *San Paulo (Brazilian) Railway Co. Ltd.* v. *Carter* (2) the only question was: Was the business carried on in England? It is shown in *Levene* v. *Inland Revenue Commissioners* (3), *Inland Revenue Commissioners* v. *Lysaght* (4), *Gregory* v. *Deputy Federal Commissioner of Taxation (W.A.)* (5), and *Halsbury's Laws of England*, 2nd ed., vol. 17, pp. 376-379, that the word "residence" in relation to individuals is used in a non-technical, or inartificial sense: See also *Cooper* v. *Cadwalader* (6) and *James Wingate & Co.* v. *Webber* (7).

Weston K.C., in reply. The test of central management and control was not intended to be universal; it is not a complete guide (*Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (8)).

Cur. adv. vult.

April 21.

The following written judgments were delivered:—

RICH A.C.J. This is an appeal from the judgment of *Dixon* J. which denies that the appellant company is a resident of Papua within the meaning of sec. 23 (*n*) of the *Income Tax Assessment Act* 1936-1937.

The company owns and operates rubber plantations in Papua, the rubber from which is sold in Australia. The company objects to the inclusion of the proceeds of such sales in the assessment of its income, claiming that so much of its income is exempt under the section. The only provision in the section disputed by the commissioner is that the appellant is a resident of Papua. The question then which falls for determination is whether the appellant is such a resident. In *De Beers Consolidated Mines Ltd.* v. *Howe* (9) Lord *Loreburn* L.C. laid down the principle as the result of the cases that a company resides for the purposes of income tax where its real

(1) (1925) A.C., at p. 501.
(2) (1896) A.C. 31.
(3) (1928) A.C. 217.
(4) (1928) A.C. 234.
(5) (1937) 57 C.L.R. 774, at pp. 777, 778.
(6) (1904) 5 Tax Cas. 101.
(7) (1897) 3 Tax Cas. 569.
(8) (1929) A.C., at p. 12.
(9) (1906) A.C., at p. 458.

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business is carried on and " the real business is carried on where the central management and control actually abides." That is " a binding authority to-day " (*Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (1)).

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 " (*De Beers' Case* (2)). The statement of facts agreed upon by the parties sets out what they consider to be the material facts of the way in which the company carried on its business and they are sufficiently summarized by *Dixon* J. and he concludes from these facts that the company is not a resident of Papua. With that conclusion I agree. It is true that a company may reside in more than one place (*Swedish Central Railway Co. Ltd.* v. *Thompson* (3)). But the facts in the present case show conclusively, I think, that there is no divided control. The head and seat and dominant power is in Sydney. The corporate acts of the company whether done by the whole body politic or by the directors are performed at the registered office of the company in Sydney where all the directors and the majority of the shareholders reside. Sydney is the pivot or axis (nowadays a much misused word) on which the operations of the company hinge. There matters of policy and finance are determined and all the direction, control and management take place. There it has its life and being. In Papua the company's operations fall into an auxiliary or subordinate position of a purely local as opposed to a central nature. They consist in the growing, production, preparation and shipment to Sydney for sale of rubber from the plantations carried on by the company's manager in Papua under the supervision, direction and control of the Sydney office. The manner in which the cases relating to the residence of corporations have been influenced by analogy to the residence of individuals and the inferences to be drawn from the provisions of the Act itself have been discussed in the judgment of *Williams* J., which I have had the opportunity of reading and with which I agree. It is, therefore, unnecessary for me to cover the same ground.

The appeal should be dismissed with costs.

STARKE J. Under the *Income Tax Assessment Act* 1936-1937, the assessable income of a taxpayer, that is, a person deriving income, includes where the taxpayer is a resident the gross income derived

(1) (1929) A.C., at p. 25. (2) (1906) A.C., at p. 458.
(3) (1925) A.C. 495.

directly or indirectly from all sources, whether in or out of Australia, and where the taxpayer is a non-resident the gross income derived directly or indirectly from all sources in Australia, which is not exempt income. A person, for the purposes of the Act, includes a company. The Act extends to the Territories of Papua, Norfolk Island, and New Guinea, but does not apply to income derived by a resident of those territories from sources within those territories. Any taxpayer who is resident in a territory specified in the section is, for the purposes of payment and assessment of income tax on income derived from sources in Australia, deemed to be a resident of Australia : See sec. 7. Further, the following income is exempt from income tax : the income derived by a resident of any 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 sale in Australia by or on behalf of that person, of produce of the territory or island of which he is resident (Act, sec. 23 (*n*)).

The Koitaki Para Rubber Estates Ltd. is a company incorporated under the *Companies Act* of New South Wales, where is its registered office, and where, in the words of the cases, the central management and control of the company abides, and where also the majority of the shareholders reside. But its business is the production of rubber upon its plantations, which are in the Territory of Papua. The company's plantations are of considerable area, and it there employs a large number of persons under the control of a resident manager appointed by the company, who holds a power of attorney to manage, carry on, and conduct in Papua the property, affairs, and business of the company. The produce of the plantations is shipped to Sydney and there sold by the company through commission agents. The company claims that it is a resident of the Territory of Papua and therefore exempt from income tax in respect of income arising from the sale in Australia of the produce of its plantations in Papua.

It has often been pointed out that a company cannot in the ordinary sense reside anywhere and that in applying the conception of residence to a company it is necessary to proceed as nearly as possible upon the analogy of an individual : See *De Beers Consolidated Mines Ltd.* v. *Howe* (1) ; *Swedish Central Railway Co. Ltd.* v. *Thompson* (2) ; *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (3) ; *Australasian Temperance and General Mutual Life Assurance Society*

(1) (1906) A.C., at p. 458. (2) (1925) A.C., at p. 501.
(3) (1929) A.C. 1.

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Ltd. v. *Howe* (1). But the *Income Tax Assessment Act* itself indicates in sec. 6 the sense in which it uses the word " resident " in relation to a company: " ' Resident ' or ' resident in Australia ' means a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia." This provision, I agree, cannot be applied in terms to the provisions of sec. 23 (*n*), but it indicates, as I think, the elements which are of importance in applying the conception of residence to a company for the purposes of the *Income Tax Assessment Act* 1936-1937.

It is unnecessary for me to traverse again the " weary road of the tax cases." A company may be a " resident " for the purposes of *Income Tax Acts* and it may have more than one residence for the purposes of these Acts. A company resides " wherever it keeps house and does business." Accordingly the ascertainment of the residence of a company is mainly a question of fact. If its central management and control abide in a particular place, the company resides there for the purposes of income tax, but it does not follow that it has not a residence elsewhere. Thus in the present case it is clear that the company resides in New South Wales, but it may also reside in the Territory of Papua. Again, incorporation of the company does not, apart from special provisions such as are contained in the Acts, conclusively establish the residence of a company: it is a fact to be considered. *Swedish Central Railway Co. Ltd.* v. *Thompson* (2) was a case in which it was found that a company resided in England though the real control and management of the business of the company was in Sweden and only some formal administrative business was done in England by a local committee. It was said that the central management and control of a company might be divided and was in that case divided. But I do not suppose that this phrase means that some minor head office functions were performed in England, for the critical question was, did the company keep house and do business in England ? The fact of the registration in England, with the other circumstances found by the Commissioners for Special Purposes were, the Lord Chancellor declared, sufficient to enable them to arrive at their finding that the company resided in England.

In the present case, the company had an office in Papua, and was registered as a foreign company under the *Companies Ordinance* 1912-1936 (Papua). It acquired and worked large plantations there. It kept a manager and local staff there and also books of

(1) (1922) 31 C.L.R. 290, at p. 337. (2) (1925) A.C. 495.

account. And the local staff prepared and forwarded the produce of the plantations to Sydney for sale. These facts, apart from the incorporation of the company in New South Wales, which perhaps is balanced by the registration of the company in Papua, are stronger, I think, than the *Swedish Co.'s Case* (1), and afford ample material for concluding that the company kept house and did business in Papua and was resident there as well as in Australia.

But there is the provision in the *Income Tax Assessment Act* 1936-1937 which gives the legislative conception of residence as applied to a company for the purposes of income tax. It looks to the location of the incorporation of the company, the central management and control of the company, and the location of voting power of the shareholders. The appellant company in the case before the court was not incorporated in Papua, its central management and control was not there exercised, and the voting power of its shareholders was not located there. All these features, suggested by the Act itself, being absent in the present case, the court should, I think, conclude that the company was not resident in Papua or at least that it was not error on the part of the primary judge so to conclude.

Accordingly, the appeal should be dismissed.

McTIERNAN J. In my opinion, the judgment and reasons of *Dixon* J. are correct. I have read the judgments of the Acting Chief Justice and *Williams* J. and concur in them.

The appeal should be dismissed with costs.

WILLIAMS J. The material facts are stated in the judgment of *Dixon* J., and it is unnecessary for me to repeat them. I would only like to call attention, in addition, to the facts that throughout the relevant year the directors and the majority of the shareholders were resident in Australia and all general meetings were held at the registered office in Sydney.

As his Honour has pointed out, the facts establish that the appellant had a residence in New South Wales, and the only point in issue on the appeal is whether they are sufficient to show that it also had a residence in Papua, within the meaning of sec. 23 (*n*) of the Federal *Income Tax Assessment Act* 1936-1937. The sub-section is in the following terms: "(*n*) the income derived by a resident of any 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

(1) (1925) A C. 495.

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Australia, by or on behalf of that person, of produce of the Territory or Island, of which he is a resident."

Mr. *Weston's* main contention was that the appellant was a resident of Papua because it owned several plantations there on which it was growing rubber and so was engaged in carrying on there an essential and substantial part of its trading operations. In *Fry* v. *Burma Corporation* (1) Lord *Atkin* said: "'Trade' refers to the various activities of commerce—the winning and using the products of the earth, or multiplying the products of the earth and selling them, or manufacturing them and selling them, the purchase and sale of commodities, or the offering of services for a reward, such as conveyance and the like."

In *Swedish Central Railway Co. Ltd.* v. *Thompson* (2) the House of Lords finally decided that a corporation like an individual can have more than one residence.

I agree with Mr. *Weston*, that the House of Lords must have been satisfied that the facts were sufficient in law to prove that the company had a residence in England. For instance, Viscount *Cave* L.C. said that "it was hardly disputed that, assuming that a company can have two residences, there was sufficient material upon which that finding could be based" (3). But the facts in question do not assist Mr. *Weston's* contention because they were evidence, not of the carrying on of trading operations in England, but of the presence there of important elements in the determination of the locality of the central control and management of the company. These elements were its incorporation in England, the situation of its registered office, share register and the residence of the secretary in London, the keeping of the seal at the registered office, and regular meetings of a committee of the board of directors there.

The decisions relating to the ascertainment of the residence of corporations for income tax purposes have been affected by the desire to apply by analogy, as far as possible, the principles governing the determination of the residence of individuals.

The registration of a company, which brings it into existence, corresponds to the birth of an individual. The place of registration and the situation of the registered office are therefore strong circumstances to be taken into account in determining its residence. But the crucial test is to ascertain where the real business of the company is carried on, not in the sense of where it trades but in the sense of from where its operations are controlled and directed. It is the place of the personal control over and not of the physical operations

(1) (1930) 142 L.T. 609, at p. 615. (2) (1925) A.C. 495.
(3) (1925) A.C., at p. 505.

of the business which counts. This is shown by the statement which Lord *Halsbury* L.C. made in the *American Thread Co.* v. *Joyce* (1) cited by Lord *Sumner* in *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (2), "I myself have taken the same view of this, I think, some years before the *De Beers' Case* (3), and that view has been since, I think, adopted in this House more than once, that the real test, which, after all, is only a question of analogy—you cannot talk about a company residing anywhere—and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the company is really directed and carried on *in that sense.*"

Viscount *Cave* L.C. sums up the whole position in the *Swedish Railway Co's. Case* (4), where he says: "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."

The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode: See *Halsbury's Laws of England*, 2nd ed., vol. 17, pp. 376, 377.

In *Inland Revenue Commissioners* v. *Lysaght* (5) Viscount *Sumner* said: "Grammatically the word 'resident' indicates a *quality of the person charged* and is not descriptive of his property real or personal."

In England a *resident* is taxed in respect of all profits wherever arising whereas non-residents are only assessable in respect of profits arising in the United Kingdom (*Halsbury's Laws of England*, 2nd ed., vol. 17, p. 86). Many persons resident abroad and companies registered and controlled abroad carry on trade in England. The carrying on of such trade is not sufficient to make such a person or company resident there for the purpose of income tax although such a person or company may be "there" for the purpose of jurisdiction. In the *La "Bourgogne" Case* (6) the Earl of *Halsbury* L.C., referring to such companies, said that they are present in England for this purpose where "they hire an office, write up their name, and beyond all question stamp upon themselves and upon their place of business here the assumption that here they carry on their

(1) (1913) 6 Tax Cas. 163, at p. 165.
(2) (1929) A.C., at p. 25.
(3) (1906) A.C. 455.
(4) (1925) A.C., at the foot of p. 501.
(5) (1928) A.C., at p. 244.
(6) (1899) A.C. 431, at p. 433.

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business." Such a presence here has been referred to in many cases as being "residence" in England (*La "Bourgogne" Case* (1); *Okura & Co. Ltd.* v. *Forsbacka Jernverks Aktiebolag* (2); *New York Life Insurance Co.* v. *Public Trustee* (3)), but, as *Buckley* L.J. pointed out in *Actiesselskabet Dampskib 'Hercules'* v. *Grand Trunk Pacific Railway Co.* (4), "in Order IX., rule 8, which relates to service upon corporations, there is no such expression as 'reside' or 'carry on business,'" and the court has "only to see whether the corporation is 'here'; if it is, it can be served." He went on to say "the best test is to ascertain whether the business is carried on here and at a defined place." If such a person or company has agreed to pay a debt or the company has a local share register in England, the locality of the debt or share is there (*New York Life Insurance Co.* v. *Public Trustee* (3); *English, Scottish and Australian Bank Ltd.* v. *Inland Revenue Commissioners* (5); *Brassard* v. *Smith* (6)). But residence in this sense of carrying on physical business operations has never been held to make such a person or company liable to pay income tax as a person resident or ordinarily resident in England. Such a person or company is only assessed as a non-resident carrying on a trade in England (*Attorney-General* v. *Alexander* (7); *Erichsen* v. *Last* (8); *Maclaine & Co.* v. *Eccott* (9); *Tarn* v. *Scanlan* (10); *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 92).

In *Swedish Central Railway Co. Ltd.* v. *Thompson*, in the Court of Appeal (11), *Pollock* M.R. said:—"The service cases may be disregarded with reference to income tax. It is a question of presence in those cases rather than of residence." In the House of Lords (12) Viscount *Cave* L.C. said: "I do not cite the decisions as to the residence of a company for the purpose of founding of jurisdiction, because they relate to a different subject matter; but, so far as they go, they point to the same conclusion" (i.e. that a company may have more than one residence). The distinction between these different subject matters was fully explained in the dissenting judgment of *Isaacs* J. in *Australasian Temperance and General Mutual Life Assurance Society Ltd.* v. *Howe* (13). In order that a company may acquire a residence in two countries for the purposes of income tax, therefore, the central management and control must be divided between

(1) (1899) A.C., at p. 433.
(2) (1914) 1 K.B. 715, at p. 718.
(3) (1924) 2 Ch. 101.
(4) (1912) 1 K.B. 222, at p. 227.
(5) (1932) A.C. 238.
(6) (1925) A.C. 371.
(7) (1874) L.R. 10 Ex. 20.
(8) (1881) 8 Q.B.D. 414.
(9) (1926) A.C. 424.
(10) (1928) A.C. 34.
(11) (1924) 2 K.B. 255, at p. 261.
(12) (1925) A.C., at p. 505.
(13) (1922) 31 C.L.R., at pp. 315-321.

such countries so as to "abide" in them both. The company through the central control is then metaphorically speaking bodily present and residing by analogy in both countries.

In the present case the facts showed that the whole of the central control and management abided in Australia, and I agree, therefore, with *Dixon* J., that the appellant had only one residence, namely in New South Wales.

I am also of opinion that, apart from the authorities, a consideration of the sub-section itself and the Act as a whole leads to the same conclusion.

If the Parliament had intended to exempt from income tax the profits on produce grown in Papua and sold in Australia by anyone wherever resident, carrying on business in Papua, the sub-section would have been differently expressed. The inclusion in the sub-section of the requirement that it must be income derived *by a resident of the territory* from a sale in Australia by or on behalf of that person of the produce of the territory of which he is a resident shows an intention that the taxpayer must be an actual resident of Papua. An individual who lived in Australia, and owned a plantation in Papua, controlled by a manager, could not be said to be a resident of Papua. The appellant is in an analogous position to such an individual.

The sub-section seems to me to show an intention on the part of the legislature to encourage not the mere increase of primary production in Papua, but the actual settlement there of persons and companies engaged in such pursuits. In order to comply with this intention an individual would need to have a real home in the territory, which he inhabited, at least periodically; and a company to transact there habitually a substantial part of the business done by its central control and management.

The definition of "resident" or "resident of Australia" means (sec. 6) in the case of a corporation, "a company which is incorporated in Australia, or which, not being incorporated in Australia carries on business in Australia, *and* has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia." This definition, apart from making incorporation in Australia in itself decisive of residence, follows substantially the principles for determining residence established by the English authorities. It is to be specially noted that the carrying on of business in Australia by a company incorporated abroad is not *by itself* sufficient to make such a company a resident of Australia. It is therefore difficult to believe that the Parliament

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intended to make carrying on business in Papua by a company incorporated and controlled and managed in Australia sufficient to constitute residence there.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Sly & Russell.*

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

J. B.