[HIGH COURT OF AUSTRALIA.]

WATERLOO PASTORAL COMPANY LIMITED APPELLANT;

AND

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

H. C. OF A 1946.

SYDNEY, *Sept.* 17, 19.

Williams J.

Referred to :- 84 C.L.R. 554

Income Tax—Assessable income—Exemption—"Income derived . . . from primary production in Northern Territory . . . by a resident of that Territory"—Pastoralist—Company—Residence—Test—Management and control—Income Tax Assessment Act 1936-1942 (*No.* 27 *of* 1936—*No.* 50 *of* 1942), *s.* 23 (*m*).

In order to determine whether a company is a "resident" of the Northern Territory for the purposes of s. 23 (*m*) of the *Income Tax Assessment Act* 1936-1942 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 where its operations are controlled and directed. It is the place of the personal control over and not of the physical operations of the business which is of importance.

A company, incorporated under the laws of the Northern Territory, had, since 1919, carried on in that Territory a pastoral business. The seal, register of members and minute book of the company had always been kept at its registered office in the Northern Territory, where its manager resided. Meetings of the board of directors were rare and were held sometimes in the Northern Territory and sometimes in Sydney, three such meetings having been held during the accounting period, all in Sydney. The annual general meetings were similarly held, the last five such meetings having been held in Sydney. The company's principal bank account was at the head office of a bank in Sydney but it had working accounts in the Northern Territory and elsewhere. The actual effective management and control of the business was entrusted to two of the directors, one of whom was very experienced in the management of pastoral businesses and made several visits each year to the company's stations. He there exercised a general supervision over the work carried on under the immediate and continuous supervision of the manager, including,

inter alia, the grading of the cattle for sale into fats and stores; the manner of mustering them for this purpose; the number of cows to be kept for breeding and to be speyed for fattening; the number of cattle to be sold and retained; the changes in the types and breeds of the livestock: and the nature of the improvements to be made. He collaborated with his co-director who visited the stations at least annually.

Held, on the facts, that the company was a resident of the Northern Territory within the meaning of s. 23 (*m*) of the *Income Tax Assessment Act* 1936-1942.

Koitaki Para Rubber Estates Ltd. v. *Federal Commissioner of Taxation*, (1940) 64 C.L.R. 15; (1941) 64 C.L.R. 241, referred to

APPEAL under *Income Tax Assessment Act*.

Waterloo Pastoral Co. Ltd. appealed to the High Court against its assessment for income tax under the *Income Tax Assessment Act* 1936-1942 in respect of income derived during the period of twelve months ended 31st October 1940 from its business as a pastoralist, on the ground that the income was exempt under the provisions of s. 23 (*m*) of the Act.

The appeal was heard by *Williams* J. in whose judgment the material facts and relevant statutory provisions are sufficiently set forth.

Weston K.C. (with him *Stuckey*), for the appellant.

Kitto K.C. (with him *Benjafield*), for the respondent.

Cur. adv. vult.

Sept. 19.

WILLIAMS J. delivered the following written judgment:—

This is an appeal by the Waterloo Pastoral Co. Ltd. against its assessment for Federal income tax under the *Income Tax Assessment Act* 1936-1942 in respect of income derived during the period of twelve months ended 31st October 1940. This period was accepted by the respondent in lieu of the usual accounting period of twelve months ended 30th June 1940. The appellant claims that this income was exempt under the provisions of s. 23 (*m*) of the Act. This section includes in the classes of exempt income "income derived prior to the first day of July one thousand nine hundred and forty-seven, directly and in the first place from primary production, . . . by a resident of that Territory." It is not disputed that the income in question was derived directly and in the first place from primary production in the Northern Territory. The sole question for determination is whether the appellant in the accounting period was a resident of that Territory.

H. C. OF A. 1946.

WATERLOO PASTORAL CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

The company was incorporated under the laws of the Northern Territory on 24th October 1919 and has ever since carried on the pastoral business of breeding cattle for sale as fats and stores upon a large leasehold area comprising about four thousand square miles situated in the Northern Territory. This area comprises two adjoining areas known as Waterloo and Limbunyah stations. The main homestead, where the manager resides, is on Waterloo, and there is a sub-manager on Limbunyah. The registered office of the company has always been situated in the Northern Territory and the seal and register of members and minute book of the company have always been kept at the registered office. The articles of association provide that the number of directors shall not be less than two or more than five. There have sometimes been five and sometimes four directors.

In the accounting period the directors were E. J. Bowater, chairman, A. S. Bingle, A. G. de L. Arnold, W. G. Middleton (until 6th September 1940), and J. Melville (from 6th September 1940). All these directors were resident in Sydney. Mr. Bowater was first appointed a director in succession to the previous chairman of directors, C. W. Conacher (who had died) on 19th March 1938, and became the chairman of directors after the annual general meeting of the company on 31st August 1939. Mr. Bingle, who is very experienced in the management of pastoral businesses, was first appointed a director of the company on 28th February 1939. Prior to his appointment he had visited the stations and made himself familiar with the nature of the company's business.

Meetings of the board of directors were rare and were held sometimes in the Northern Territory and sometimes in Sydney. In the accounting period there were three meetings all held in Sydney. The only general meetings of the company have been the first statutory meeting and the subsequent annual general meetings. These have been held sometimes in the Northern Territory and sometimes in Sydney. In the accounting period and in the previous four years the meetings were held in Sydney.

Up to and including the accounting period the company had never paid a dividend. It had carried on business for many years at a loss but made a profit in 1939 and a further profit in the accounting period. Its principal bank account was at the head office of a bank in Sydney. It had working accounts in the Northern Territory and elsewhere.

The rainy season in the Northern Territory finishes at the end of March, and active work on the stations, including the mustering of the cattle, the branding of the calves, the sale of fats and stores, and the making of any improvements commences in April. Mr. Bingle, since becoming a director, has regularly visited the company's stations about April and whenever necessary in the subsequent months and has exercised a general supervision over the work on the stations carried on under the immediate and continuous supervision of the manager. In the accounting period he made four visits to the stations. Mr. Bingle appears to have been appointed a director to undertake the active duties previously performed by Mr. Moray who lived in the Northern Territory and resigned from the board of directors on the same date that Mr. Bingle was appointed. Since 1940 Mr. Bowater has also made annual visits to the stations.

There was a period when neither Mr. Bingle nor Mr. Bowater was able to make these visits on account of the military situation.

Messrs. Bowater and Bingle both gave evidence from which it is apparent that the actual effective management and control of the pastoral business of the company was entrusted to them (just as in the past it had been entrusted to Messrs. Conacher and Moray). This is borne out by the minutes of the meetings of the board of directors which show that the business transacted there was ordinarily confined to formal matters of company routine. It is clear from the evidence, if evidence is required, that a pastoral business in the Northern Territory can only be effectively carried on by experienced pastoralists who either live on the property or regularly visit it and see the condition of the country and of the stock for themselves. The profits of the company were derived from the sale of its fat and store cattle. The grading of the cattle for sale into fats and stores, the manner of mustering them for this purpose, the number of cows to be kept for breeding and to be speyed for fattening, the numbers of cattle to be sold and retained, the changes in the types and breeds of livestock carried, and the nature of the improvements to be made are all questions which could only be finally determined on the spot.

The evidence shows that the actual management of the pastoral business of the company was left to Messrs. Bowater and Bingle in the accounting period. They consulted in Sydney but their decisions were only tentative. It was necessary for Mr. Bingle to make his visits to the stations before it could be determined whether these decisions should be given effect to or should be modified due to local

H. C. OF A. 1946.

WATERLOO PASTORAL CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

conditions. The ultimate operative decisions had to be made on the stations themselves.

Section 6 of the *Income Tax Assessment Act* defines a resident of Australia in the case of a company to include, *inter alia*, a company which is incorporated in Australia, and Mr. *Weston* contended that this implies an intent in the Act that a company incorporated in the Northern Territory should by the mere act of incorporation become a resident there within the meaning of s. 23 (*m*). But I cannot agree with this contention. The definition is expressly confined to residents of Australia and I cannot discover any indication of intention in the Act to make it applicable to residents in s. 23 (*m*) or (*n*) of the Act. I am of opinion that the meaning of resident companies in these sections must be determined in accordance with the principles laid down by the House of Lords in the cases of which the *Swedish Central Railway Co. Ltd.* v. *Thompson* (1) and *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (2) are the latest. These cases were recently discussed by this Court in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (3), and by *Dixon* J. in *The North Australian Pastoral Co. Ltd.* v. *Federal Commissioner of Taxation* (4). In the last mentioned case the company also carried on a pastoral business in the Northern Territory and the facts were very similar to the present facts, but Mr. *Kitto* contended that the reasoning of *Dixon* J. was inconsistent with the reasoning in the cases in the House of Lords and in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (3). If I thought that there was substance in this contention I would prefer to refer this appeal to the Full Court rather than differ from *Dixon* J., but I see no reason for coming to a different conclusion. I adhere to what I said in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (5) that, "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 of the business which counts." A company can only have more than one residence where this control and direction is divided so that it is exercised to some extent from more than one

(1) (1925) A.C. 495.
(2) (1929) A.C. 1.
(3) (1940) 64 C.L.R. 15; and on appeal, p. 241.
(4) (1946) 8 A.T.D. 121.
(5) (1941) 64 C.L.R. 241, at pp. 248, 249.

place. In most instances a company resides where its board of directors habitually meets for the purpose of conducting the business of the company. But it was pointed out by Lord *Loreburn* L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe* (1) (where the company was incorporated and owned mines in South Africa), in a passage which has been frequently cited, that the question where the real control abides " is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading."

Accordingly in that case and in other cases where the central management and control was held to be where the board met, the Court was careful to examine the proceedings at the meetings to be sure that the board did in fact supervize the business of the company. So in *De Beers' Case* Lord *Loreburn* said, " the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations " (2). An earlier case was *The American Thread Co.* v. *Joyce* (3). There a company incorporated and with cotton mills in the United States was held to be resident in England because the central management and control was vested in extraordinary meetings of the board, the board regularly held such meetings in England, and constantly exercised such management and control at these meetings.

The board of the appellant had power under the articles of association to require that all important decisions should be subject to its confirmation, and it could have met regularly and exercised this control instead of leaving these decisions to Messrs. Bowater and Bingle. But to exercise this control effectively it would have been necessary for the directors to visit the stations and meet there because so many of these decisions could only be made on the spot.

For these reasons I am of opinion that the company was resident in the Northern Territory, whether or not it was also resident in Sydney. I can see nothing inconsistent between this conclusion and that of *Dixon* J. in the *North Australian Pastoral Co. Ltd.* v. *Federal Commissioner of Taxation* (4) and the cases in the House of Lords and the decision of this Court in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (5). In the last case a different

(1) (1906) A.C. 455, at p. 458.
(2) (1906) A.C., at p. 459.
(3) (1913) 6 Tax Cas. 163.
(4) (1946) 8 A.T.D. 121.
(5) (1941) 64 C.L.R. 241.

H. C. OF A. 1946.

WATERLOO PASTORAL CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

conclusion was reached by applying the same principles to different facts.

The appeal must be allowed and the assessment set aside with costs.

Appeal allowed. Assessment set aside. Respondent to pay costs of the appellant.

Solicitors for the appellant, *A. G. de L. Arnold & Co.*

Solicitor for the respondent, *G. A. Watson*, Acting Crown Solicitor for the Commonwealth.

J. B.