[HIGH COURT OF AUSTRALIA.]

MALAYAN SHIPPING COMPANY LIMITED . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1946.

MELBOURNE, *March* 20, 21.

SYDNEY, *April* 9.

Williams J.

Income Tax (Cth.)—Liability to taxation—"Resident"—Company not incorporated in Australia—Business, where carried on—Central management and control—Voting power of shareholders—Main shareholder resident in Australia—Company managed and controlled by him—Company's contracts negotiated by him—Income Tax Assessment Act 1936-1942 (*No.* 27 *of* 1936—*No.* 50 *of* 1942), *ss.* 6, 25.

A company was incorporated in Singapore upon the instructions of S., who carried on business in Melbourne. The registered office of the company was in Singapore. 2,500 shares were paid for and issued to S. Only two other shares were issued; these were paid for by S. but were issued as qualification shares to two nominees in Singapore whom S. appointed directors of the company and who declared that they held the shares in trust for S. and executed, and gave him, blank transfers of the shares. By the articles of association S. was appointed managing director of the company and was empowered to appoint and remove the other directors. The articles also provided that any resolution of the directors would be of no effect unless S. concurred therein and that the seal of the company should not be affixed to any instrument except by the authority of S. The only business done by the company in the relevant period was to charter a ship and sub-charter it to S. on a number of voyage charters. The charter of the ship by the company was effected in London by a charter party signed on the company's behalf by shipping agents there upon cabled instructions from S. As to the voyage charters, S. prepared and executed the necessary documents in Melbourne and forwarded them to Singapore for execution on behalf of the company. The company had bank accounts, opened on the instructions of S., in London, New York and Melbourne, but had none in Singapore. The hire of the ship was paid to the charterer by S. remitting the necessary sums out of the amounts owing by him to the company under the voyage charters. He did not remit to Singapore the balance due by him to the company under the voyage charters, but treated it as a loan to himself without interest and without security.

Held that even if the sub-charters were of the essence of the trading operations and were made in Singapore, the central management and control of the

operations was in Australia, and for this reason the company carried on business in Australia within the meaning of that phrase in the definition of "resident" in s. 6 of the *Income Tax Assessment Act* 1936-1942. Also that the forwarding of the charter and sub-charters to Singapore was a mere formality and the essence of the business was S.'s decision in Melbourne to charter and sub-charter the ship.

APPEALS under *Income Tax Assessment Act.*

These were appeals from assessments whereby the appellant company was assessed to Federal income tax in respect of its income derived during the years ending 30th June 1940, 1941 and 1942. The facts and the relevant statutory provisions sufficiently appear in the judgment hereunder.

Phillips K.C. and *Lewis*, for the appellant.

Ham K.C. and *Sholl*, for the respondent.

Cur. adv. vult.

April 9.

WILLIAMS J. delivered the following written judgment:—These are three appeals by Malayan Shipping Co. Ltd. against its assessment for Federal income tax in respect of its income derived during the years ending 30th June 1940, 1941 and 1942. The company was assessed in each of these years upon the basis that it was a resident of Australia within that portion of the definition of "resident" in s. 6 of the *Income Tax Assessment Act* 1936-1942, which defines resident to mean a company 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 resident in Australia. It is not necessary to refer to the evidence in any detail. It consists of certain admitted facts and a number of documents. The company was incorporated upon the instructions of Mr. H. M. H. Sleigh on 4th August 1939 at Singapore under the *Companies Ordinance* of the Straits Settlements. Mr. Sleigh was then carrying on and has ever since carried on business in Melbourne under the name of H. C. Sleigh as an importer, shipping agent and general merchant. The registered office of the company was situate in Singapore. Two thousand five hundred and two shares of the nominal capital of the company have been issued of which two thousand five hundred were issued to and paid for by Mr. Sleigh, and the other two were paid for by Mr. Sleigh but were issued as qualification shares to two nominees in Singapore whom Mr. Sleigh appointed directors of the company. These nominees declared that they held the shares in trust for Mr. Sleigh and executed and gave him blank transfers of the shares. Mr. Sleigh was appointed managing director

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of the company by the articles of association. He was also empowered by the articles of association to appoint and remove the other directors, and they further provided that any resolution of the directors was to be of no effect unless he or his alternate director concurred therein. The seal of the company could not be affixed to any instrument except by his authority. He also acted as managing agent for the company, receiving therefor a commission at the rate of $2\frac{1}{2}$ per cent on freight payable to the company.

The only business which the company did in the relevant years was to charter a Norwegian tanker called the *Elsa* under two time charters and to sub-charter this ship to Mr. Sleigh on ten voyage charters. The charter of the tanker by the company was effected by two charterparties made between the charterer and the company in London on 17th November 1939 and 21st April 1941. Each of these charterparties was signed on behalf of the company by shipping agents in London upon cabled instructions from Mr. Sleigh. The whole of the preliminary instructions to the shipping agents in London were given by Mr. Sleigh from Melbourne, and the first charterparty had been completed and the tanker delivered to the company at Bahrein before the directors of the company in Singapore had any knowledge of the business. The ten voyage charters between Mr. Sleigh and the company were entered into by Mr. Sleigh preparing and executing the necessary documents in Melbourne and forwarding them to Singapore to be executed on behalf of the company. The company never had a bank account in Singapore. It had bank accounts in London, New York and Melbourne. These accounts were opened upon Mr. Sleigh's instructions. The hire to the charterer was paid by Mr. Sleigh remitting abroad the necessary sums out of the amounts owing by him to the company under the voyage charters. He was unable on account of exchange control to remit the balance of these amounts to Singapore, so he arranged with himself to lend this balance to himself without interest and without security. The evidence proves that in the relevant years Mr. Sleigh exercised complete management and control over the business operations of the company. It also proves that in these years he exercised an equally complete management and control over the internal administration of the company.

In these circumstances Mr. *Phillips* could not but admit that the central management and control of the company was concentrated in Mr. Sleigh and its voting power controlled by him and therefore by a shareholder resident in Australia. But Mr. *Phillips* contended that since the definition required that the company should be carrying on business in Australia and also that the central manage-

ment and control should be in Australia or the voting power of the company should be controlled by shareholders resident in Australia, the carrying-on of business could not refer to the control of the operations of business from which the profits arose but only to the actual operations themselves. He then referred to a long line of cases of the highest authority, several of which were cited in *O. Gilpin Ltd.* v. *Commissioner for Taxation* (*N.S.W.*) (1), in which it was held that where a business ordinarily consists of selling goods so that such contracts are of its essence, the trade is carried on where the contracts are habitually made. He then pointed out that the only business of the company in the relevant years was to charter the *Elsa* and to enter into profitable contracts of sub-charter with Mr. Sleigh, and contended that the contracts had been made in Singapore by the acceptance there by the company of Mr. Sleigh's offer to sub-charter the tanker, and that the company was not carrying on business in Australia within the meaning of the definition.

In the first place I am not prepared to accept Mr. *Phillip's* construction of the definition. In *Mitchell* v. *Egyptian Hotels Ltd.* (2) Lord *Parker of Waddington* said : " Where the brain which controls the operations from which the profits and gains arise is in this country the trade or business is, at any rate partly, carried on in this country." The purpose of requiring that, in addition to carrying on business in Australia, the central management and control of the business or the controlling shareholders must be situate or resident in Australia is, in my opinion, to make it clear that the mere trading in Australia by a company not incorporated in Australia will not of itself be sufficient to cause the company to become a resident of Australia. But if the business of the company carried on in Australia consists of or includes its central management and control, then the company is carrying on business in Australia and its central management and control is in Australia. If, on the other hand, a company incorporated elsewhere is merely trading in Australia and its central management and control is abroad, it does not become a resident of Australia unless its voting power is controlled by shareholders who are residents of Australia : cf. *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (3). It appears to me, therefore, that, even if Mr. *Phillips* is right in contending that the sub-charters were of the essence of the trading operations and were made in Singapore, the company was nevertheless a resident within the meaning of the definition. But I cannot attach this importance to the acceptance of the sub-charters in Singapore. The question where

(1) (1940) 64 C.L.R. 169.
(2) (1915) A.C. 1022, at p. 1037.
(3) (1941) 64 C.L.R. 241, at pp. 247, 251.

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business is carried on is in every case one of fact. In an ordinary commercial transaction neither party is bound prior to the making of the contract, so that it is the making of the contract which is of the essence of the transaction. Thus it has been held in many of the cases to which Mr. *Phillips* referred that the fact that a foreign company had an agent in England whose business it was to solicit orders and forward them to his principal for acceptance abroad did not cause the principal to exercise a trade in England. These cases would have been very much in point if Mr. Sleigh had been an ordinary agent in Australia of a company incorporated in Singapore independently managed and controlled, so that his offer to sub-charter the tanker would not have been binding until it had been accepted by the company ; but, as *Alkin* L.J. said in *F. L. Smidth & Co.* v. *Greenwood* (1), the question is " where do the operations take place from which the profits in substance arise ? " In the present case all the terms and conditions of the charterparties were prepared and the complete decision to sub-charter the tanker from the company was made by Mr. Sleigh in Melbourne. Under the articles of association he was entitled to contract with the company and to vote as a director to enter into such a contract. He, and he alone, could decide whether the company would accept his offer or not. A resolution of the directors to accept the charters and sub-charters could only be effective if he concurred, and the seal of the company could only be affixed thereto with his consent. He had the company in a vice. In these circumstances the forwarding of the charters and sub-charters to Singapore for acceptance by the company was a mere formality. The essence of the business was his decision in Melbourne to charter and sub-charter the tanker. It was this decision which in every substantial sense gave rise to the profits which the company made out of the sub-charters.

I find that the company was resident in Australia in the relevant years and that its income during these years was derived from a source in Australia. Some of this income was taxed under the *War Tax Ordinance* 1941 of the Straits Settlements, but it was not income derived from a source out of Australia, and is not therefore exempt from tax under s. 23 (*q*).

In my opinion the appeals fail.

Appeals dismissed with costs.

Solicitors for the appellant, *Moule, Hamilton & Derham.*

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

E. F. H.

(1) (1921) 3 K.B. 583, at p. 593.