[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT;

AND

FRENCH . . . . . RESPONDENT.

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SYDNEY, *Aug.* 27, 28; *Nov.* 18.

Dixon C.J., McTiernan, Williams, Kitto and Taylor JJ.

Income Tax—Assessment—Exempt income—Engineer—Resident of State—Contract—Employed by company in State—Services rendered to company during three weeks in New Zealand—Payment therefor according to contract to credit of taxpayer's bank account in State—Liability to tax—Income derived "from a source out of Australia"—Income Tax and Social Services Contribution Assessment Act 1936-1951 (*No.* 27 *of* 1936—*No.* 48 *of* 1950) *ss.* 23 (*q*), 25 (1), 26 (*a*), 196—*Judiciary Act* 1903-1955, *s.* 18.

The respondent, a taxpayer resident in New South Wales, was employed with a company as an engineer under an oral contract and his salary was paid monthly into a Sydney bank account. The company which was incorporated in New South Wales and was registered in New Zealand as a company incorporated outside New Zealand carrying on business there, sent the respondent to New Zealand and for a short period he did work for the company there: he then returned to his work in New South Wales. The sum payable in respect of that period was included without distinction in two normal monthly payments of salary into his Sydney bank account. The appellant commissioner included the sum in the respondent's assessable income, and he objected that it was exempt from income tax under s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 being "income derived . . . from sources out of Australia, when that income is not exempt from income tax in the country where it is derived". It was agreed between the parties that the sum was income not exempt from income tax in New Zealand. The objection was disallowed by the appellant but was upheld by a board of review. The commissioner appealed to the High Court and a case was stated for the Full Court.

Held by *Dixon* C.J., *Williams* and *Taylor* JJ. that the sum paid to the respondent in respect of the period of service in New Zealand was income derived by him from a source outside of Australia within the meaning of s. 23 (*q*) of the Act; by *McTiernan* J. that it was not income so derived;

and by *Kitto* J. that the Court had not before it sufficient facts to enable the question to be decided.

Bennett v. *Marshall* (1938) 1 K.B. 591; *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (1953) A.C. 503; and *Commissioner of Taxation* v. *Cam & Sons Ltd.* (1936) 36 S.R. (N.S.W.) 544; 53 W.N. 172, referred to and discussed.

CASE STATED.

An assessment to income tax based on the income derived by Richard Oxley French during the year ended 30th June 1951, was objected to by the taxpayer on the ground that a certain sum of £110 " was not exempt income in New Zealand and should therefore be exempt from tax in Australia in accordance with s. 23 (*q*) of the *Income Tax Assessment Act*."

The objection was disallowed by the Federal Commissioner of Taxation, and upon a reference made at the request of the taxpayer, a Board of Review, by a majority, allowed the objection. Upon an appeal to the High Court *Taylor* J., at the request of the parties, stated a case which was substantially as follows:—

1. The respondent resides and (except as set out in pars. 3 and 5 hereunder) at all material times has resided in the State of New South Wales and he is and at all material times has been a " resident " within the meaning of that word in ss. 17 and 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951.

2. The respondent is and at all material times has been an employee of Colonial Sugar Refining Co. Ltd., a company incorporated in the State of New South Wales under the *Companies Act* 1936 of that State and hereinafter called the company. The company carries on business in the State of New South Wales. It also carries on business in some of the other States of Australia, Fiji and New Zealand, where it is registered under Pt. XII of the *Companies Act* 1933 (N.Z.) as a company incorporated outside New Zealand carrying on business within New Zealand.

3. The respondent served his apprenticeship with the company in New South Wales under an indenture entered into at Sydney in the said State on 15th July 1926. Since the completion of his apprenticeship he has been employed by the company as an engineer in pursuance of an oral contract made at Sydney between the respondent and the company. The respondent's service with the company has been mainly in the State of New South Wales except as follows:—(a) During the years 1932-1934 the respondent was employed at the company's Victoria mill in Queensland. (b) During the years 1936-1939 the respondent was employed at the company's Yarraville works in Victoria. (c) During each year since 1943 the

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respondent has spent two or three weeks in New Zealand as inspecting engineer for the company in its New Zealand business.

4. In pursuance of an arrangement made between the respondent and the company the company for many years past has paid the salary of the respondent monthly and such salary (less deductions for income tax, contributions to superannuation and other moneys) has been paid into an account kept by the respondent with a bank in Sydney.

5. In November 1950, the company sent the respondent to New Zealand there to perform, and between 22nd November and 8th December 1950, he did there perform services as an inspecting engineer for the company in its business in New Zealand. Upon the completion of those services the respondent returned to Sydney and continued his service with the company in New South Wales.

6. The salary payable by the company to the respondent in respect of the period during which he performed services in New Zealand as aforesaid amounted to £110 and was included in the following two monthly payments made by the company to the credit of the respondent's bank account in Sydney on the dates mentioned below, such payments representing salary (less deductions as set out in par. 4):—28th November 1950, £108 12s. 11d. ; 21st December 1950, £111 16s. 5d.

7. While he was in New Zealand as aforesaid the respondent drew from the company at its place of business in New Zealand certain moneys on account of his expenses in New Zealand which were adjusted with the company on the respondent's return to New South Wales.

8. By notice of assessment dated 9th May 1952, the appellant assessed the respondent to income tax upon his income for the year ended 30th June 1951, including the said sum of £110.

9. By letter dated 4th July 1952, the respondent objected to that assessment, contending that the said £110 " was not exempt income in New Zealand and should therefore be exempt from tax in Australia in accordance with s. 23 (*q*) of the *Income Tax Assessment Act* ".

10. By notice dated 25th November 1952, the appellant informed the respondent that he had decided to disallow the said objection.

11. By letter dated 27th November 1952, the respondent informed the appellant that he was dissatisfied with that decision and requested the appellant to refer the same to a Board of Review for review.

12. It was agreed between the parties for the purpose of the reference hereinafter mentioned and it is agreed between them for

the purpose of this case that the said sum of £110 was " not exempt from income tax " in New Zealand within the meaning of those words in s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951.

13. On 5th May 1954, the reference was heard by a Board of Review and on 9th June 1954, the Board of Review by a majority decision, allowed the respondent's objection.

14. The appellant thereupon appealed to the High Court from the decision of the Board of Review.

The question stated for the opinion of the Full Court was :— " Was the salary, which was paid to the respondent by Colonial Sugar Refining Co. Ltd. in respect of the period during which he performed services for the company in New Zealand (being the sum of £110), income derived by the respondent from a source out of Australia within the meaning of s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 ? "

J. D. Holmes Q.C. (with him *R. Ollerenshaw*), for the appellant. The appellant adopts the reasons of the dissenting member of the board. [He referred to *Colquhoun* v. *Brooks* (1) ; *Foulsham* v. *Pickles* (2) ; *Bennett* v. *Marshall* (3) ; *Bray* v. *Colenbrander* ; *Harvey* v. *Breyfogle* (4) ; *Liquidator, Rhodesia Metals Ltd.* v. *Commissioner of Taxes* (5) ; *Commissioner of Stamp Duties* (*N.S.W.*) v. *Pearse* (6) and *Hall* v. *Commissioner of Taxation* (7).] The question of the source of income in the case of an employment was particularly discussed in those cases. According to the English decisions the place where the work is done is an irrelevant consideration in determining what is the source of income of this character. The judgment of Sir *Wilfred Greene* M.R. in *Bennett* v. *Marshall* (8), where his Lordship considered *Colquhoun* v. *Brooks* (1) and *Foulsham* v. *Pickles* (9), was given full approval by the House of Lords in *Bray* v. *Colenbrander* ; *Harvey* v. *Breyfogle* (4). His Lordship distinguished trade and profession on the one hand and employment on the other hand for the very same purpose as now concerns this Court. Inquiry as to what services were performed as a condition precedent to the right to the said sum of £110 shows that part of the work was performed in New Zealand but most of it was done elsewhere. The respondent performed his services for the company wherever he was directed to perform them, and in this particular year of income he performed

(1) (1889) 14 App. Cas. 493.
(2) (1925) A.C. 458, at pp. 466, 468.
(3) (1938) 1 K.B. 591, at p. 611.
(4) (1953) A.C. 503.
(5) (1940) A.C. 774.
(6) (1954) A.C. 91.
(7) (1950) 67 W.N. (N.S.W.) 216.
(8) (1938) 1 K.B., at pp. 601, 602.
(9) (1925) A.C. 458.

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them for two weeks in New Zealand. He was paid his annual salary wherever he was working.

[DIXON C.J. referred to *Automatic Fire Sprinklers Pty. Ltd.* v. *Watson* (1).]

This appeal was brought primarily to have determined how far, if at all, the principles of the English cases on contracts of employment are applicable in determining the question of source of income under the local legislation. Such principles are applicable here notwithstanding differences in the legislation.

[TAYLOR J. referred to *Freeman* v. *Commissioner of Taxation (N.S.W.)* (2).]

The proximate source was the contract, for the reason that though under the contract no requirement to pay the salary arose until the services were performed nevertheless it was the employer's promise to pay that was the actual source of the income: the mere performance of the service of itself would not give rise to any right to payment without the contract.

[TAYLOR J. referred to *Foulsham* v. *Pickles* (3).]

Under the contract he will be paid only if he serves. The contract is the proximate, or the nearest factor in determining what is the source of the payment: the mere performance of the services without more would never give rise to payment.

[McTIERNAN J. referred to *Bennett* v. *Marshall* (4).]

Regard should be had to the locality of the contract and where the payment is to be made under the contract regard is not had to the place of performance of the services: see *Bennett* v. *Marshall* (5) and *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (6). The only case in which in this Court the matter was adverted to, and it was not determined, was *Robertson* v. *Federal Commissioner of Taxation* (7). *Commissioner of Taxation* v. *Cam & Sons Ltd.* (8) was decided on an Act which was concerned with the source of income being in New South Wales; it was confined to that place, and at the time *Nathan* v. *Federal Commissioner of Taxation* (9) was decided that was the situation of the Commonwealth Act. *Commissioner of Taxation* v. *Cam & Sons Ltd.* (8) was distinguished in *Hall* v. *Commissioner of Taxation* (10). That case is correct, but *Cam's Case* (8) is wrongly decided, particularly in the light of what has subsequently been

(1) (1946) 72 C.L.R. 435.
(2) (1956) 11 A.T.D. 21.
(3) (1925) A.C. 458.
(4) (1938) 1 K.B., at p. 603.
(5) (1938) 1 K.B. 591.
(6) (1953) A.C. 503.
(7) (1937) 57 C.L.R. 147, at pp. 150, 156, 158, 159, 161, 167.
(8) (1936) 36 S.R. (N.S.W.) 544; 53 W.N. 172.
(9) (1918) 25 C.L.R. 183.
(10) (1950) 67 W.N. (N.S.W.) 216.

said in *Bennett* v. *Marshall* (1) and *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (2). The income derived by a resident means income directly derived by a resident and not indirectly derived (*Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (3)). Alternatively, even if one looks at the matter more broadly than the English courts have done nevertheless the whole of the circumstances would have to be considered. The majority members of the Board did not do that in this case but said, wrongly, that the deciding factor was where the work was performed. If one is going to have regard to the place where the services are performed, then full effect must be given to the test as has been stated many times in this Court. Regard must be had to all the circumstances of the case and all of those circumstances must be given their due weight (*Studebaker Corporation of Australia Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (4); see also *Freeman* v. *Commissioner of Taxation* (*N.S.W.*) (5)). The question should be answered in the negative.

Sir *Garfield Barwick* Q.C. (with him *K. Holland*), for the respondent. On the agreed or admitted facts payment was to be made, and was made, in Sydney under the unwritten contract (par. 3). All concerned were thinking of this as being a contract in which the services were the actual consideration for the payment. Had it been otherwise the commissioner would have insisted on the introduction of the contract and even submitted argument that there was something in the nature of the contract which had become a feature. If it be that the appellant's complaint is that the board misapplied the right principle, the court being against him on his main point, then he has brought no material to this Court to say that the board misapplied those principles. The respondent does not concede, nor does the case state, that payment by the month was part of the contract of employment. The words "in pursuance of an arrangement" in par. 4 are used in contradistinction to his contract. The arrangement was made for some years past and the manner of the respondent's payment was that he was paid monthly by cheque into his bank account. If that is a critical fact in determining whether or not the board misapplied the right principle then it must be on the appellant to have brought those facts on which the Court can say that the board was wrong, because then it becomes merely a matter of determining what on a review of the facts is the conclusion of fact as to where the source of income

(1) (1938) 1 K.B. 591.
(2) (1953) A.C. 503.
(3) (1908) A.C. 46, at pp. 47, 52.
(4) (1921) 29 C.L.R. 225.
(5) (1956) 11 A.T.D., at pp. 45, 46.

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was. To the contrary, the question of law that is said to arise is as to whether so much of the salary received in Australia by an employee, resident in Australia, from an employer resident in Australia, in pursuance of the contract of employment made and usually performed in Australia, as was received in respect of a period during which he was temporarily performing services in New Zealand, under the contract, was income derived from a source out of Australia. That is the point of law. In cases of this sort close regard must be had to many very small ingredients. This is a case where the consideration for the pay is the work, but that the payment for any one day does not become due and payable until some later time, and it may be said by that later time other similar payments have become due resulting in an aggregate sum. The distinction between the sum to which the respondent became entitled by work on the hypothesis that it is pay for work done, and the £110 which he received, is an immaterial distinction. There is no accrual from day to day of anything. What is to be found is the source of the income.

[DIXON C.J. referred to *Commissioners of Taxation* v. *Kirk* (1).]

As presented to the board and as presented to this Court in the stated case, there is nothing peculiar in the contract of employment that is asserted to be relevant. According to English decisions the place of performance of the work is irrelevant but those decisions should not be applied. The place of payment is a strange thing to be treated as the source. When ascertaining the source of a person's wages, prima facie his wages are paid from work; the direct reason for the payment is that he has worked.

[DIXON C.J. referred to *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (2).]

The real service, as a matter of hard fact, was the fact that the respondent worked in New Zealand. The English cases are silent on the principal point. When considering this particular statute the English authorities are not compelling. Reference is made to the following cases because they are not on employment—they are on trading activities—but they all emphasise that the place where the activity takes place rather than the place where the company had its head office, or its executive staff, is the significant factor: *Federal Commissioner of Taxation* v. *Angliss & Co. Pty. Ltd.* (3); *Tariff Reinsurances Ltd.* v. *Commissioner of Taxes (Vict.)* (4); *Commissioner of Taxation (N.S.W.)* v. *Hillsdon Watts Ltd.* (5); *Federal*

(1) (1900) A.C. 588.
(2) (1908) A.C. 46.
(3) (1931) 46 C.L.R. 417.
(4) (1938) 59 C.L.R. 194.
(5) (1937) 57 C.L.R. 36, at pp. 51, 52, 54.

Commissioner of Taxation v. *United Aircraft Corporation* (1); *Nathan* v. *Federal Commissioner of Taxation* (2); *Liquidator, Rhodesia Metals Ltd.* v. *Commissioner of Taxes* (3) and *Diamond* v. *Commissioner of Taxes (Q.)* (4). Those authorities show that uniformly in this country, with respect to goods or the carrying on of a trade, the Court has placed emphasis on the place where the activity has taken place and has refused to treat it as irrelevant and, as in *Commissioner of Taxation* v. *Cam & Sons Ltd.* (5), the Full Court of New South Wales correctly allowed the place of the doing of the work to be a controlling circumstance, not merely a relevant but a controlling circumstance: see *Australian Machinery & Investment Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (6). The only exception is *Hall* v. *Commissioner of Taxation* (7) but that case was wrongly decided. Those authorities were on statutes of a totally different structure which should not be regarded as compelling with respect to the present statute.

J. D. Holmes Q.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:— Nov. 18.

DIXON C.J. I have had the advantage of reading the judgment prepared by *Williams* J. and I agree both in the conclusion and the reasoning of his Honour. There are however one or two additional observations which I should like to make, observations which may in a sense be by way of reservation. In the first place it is important to notice that Mr. French does not occupy an office as for example a director may be considered to do. The case is one, at all events we are so treating it, where month by month by doing his work in this or that place the employee earns his salary. It would I think be impossible to say that an ordinary artisan does not earn his pay where he does his work. Doubtless Mr. French is by no means an artisan but it is by the same reasoning that his case should be adjudged. It is thus entirely different from such a case as *Robertson* v. *Federal Commissioner of Taxation* (8) where a governing director of a Victorian company earning a substantial salary was abroad for a considerable time. Although the commissioner conceded that during his absence the source of his remuneration was outside

(1) (1943) 68 C.L.R. 525, at pp. 528, 529, 536, 538-540, 544, 545.
(2) (1918) 25 C.L.R. 183.
(3) (1940) A.C. 774.
(4) (1941) 6 A.T.D. 111.
(5) (1936) 36 S.R. (N.S.W.) 544; 53 W.N. 172.
(6) (1946) 8 A.T.D. 81.
(7) (1950) 67 W.N. (N.S.W.) 216.
(8) (1937) 57 C.L.R. 147.

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Australia I felt it desirable to express doubt about the correctness of the admission (1).

The difference is even greater of such a case as *Watson* v. *Commissioner of Taxation* (*W.A.*) (2) where the remuneration was earned by procuring a specified result which an accountant carrying on business in a given jurisdiction was commissioned to bring about. Because he journeyed into another jurisdiction in the course of his exertions to do so it did not follow that any part of the source of the remuneration was there located.

In the next place I wish to say that in *Robertson's Case* (3) I attempted to explain the considerations upon which the English cases decided upon case V of Schedule D of the *Income Tax Act* 1918 (Imp.) proceed and those decided on Schedule E since the amendment by the *Finance Act* 1922, s. 18 (1). I adhere to the views I there expressed and I think that for the purpose of the Commonwealth Act these decisions can have little or no bearing.

In the third place I desire to say that no case for an apportionment of income according to locality appears to exist upon the facts governing Mr. French's employment and none was suggested. I would reserve the question whether in considering the application of s. 23 (*q*) to some particular income apportionment may ever be possible.

Finally it should be noted that we are not concerned here with the question whether within the meaning of s. 23 (*q*) the salary earned by Mr. French in New Zealand was exempt from income tax in New Zealand. That is not put in issue; it is a matter that is conceded.

I agree that the question in the case stated should be answered: Yes.

McTIERNAN J. This case stated raises for decision by the Court a question under s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951. That section exempts from income tax income derived by a resident of Australia from sources abroad, if it is not exempt where derived. The taxpayer whom the case concerns is a resident of Australia. Under an oral contract made in Sydney he was employed as an engineer. By arrangement with his employers, they paid his salary monthly into his account at a bank in Sydney. In November 1950, while he was employed under the above-mentioned contract, the employers sent him to New Zealand to perform services as an inspecting engineer in their

(1) (1937) 57 C.L.R., at p. 150.
(2) (1930) 44 C.L.R. 94.
(3) (1937) 57 C.L.R. 147.

business which extended to that country. His right to salary while in New Zealand depended upon the terms of the oral contract of employment which he had entered into with his employers in Sydney. The taxpayer's work began in New Zealand on the 22nd November 1950 and was finished on 8th December 1950. Then he returned to his job in Sydney. The amount of salary, less proper deductions, to which he was entitled under the oral contract of employment, for the length of time he was in New Zealand, was £110. In November and December 1950 the employers made payments of salary to which the taxpayer was entitled under the contract of employment to his account at the bank in Sydney. These payments included £110, the amount of salary payable under the contract in respect of the period during which the taxpayer was in New Zealand. The only nexus which that portion of his salary had with New Zealand was that the employers paid it for the services which the taxpayer performed in that country. Its nexus with Australia was that the whole of the salary was, under the terms of the contract, paid in Sydney. The question for the opinion of the Court is in which country was the source of that income, the sum of £110, situated. The word, " source ", is a practical not a technical concept. What is exempted is income derived from sources out of Australia, if the conditions of the exemption are satisfied. The word " sources " is not, in my opinion, to be read as referring strictly to activities producing income. Any source, as such, from which profits, wages, salary or any other form of income derives is contemplated ; for example, a trade, profession or an employment. A trade, it is true, is based on activity by the trader; and a profession on activity by the professional man. Neither is attached to a specific contract. But employment arises from the contract of employment. It follows that different considerations arise when the question is what is the source of the employee's income or salary. Where he does his work is not necessarily the test. This was pointed out by Sir *Wilfred Greene* M.R. in *Bennett* v. *Marshall* (1). The discussion in that case on the correct criterion for finding the source of an employee's remuneration proceeded on fundamental principles.

In my opinion the rule enumerated in *Bennett* v. *Marshall* (2) for guidance on such a matter is not peculiar to the legislation which was there under consideration and can be safely acted on in the present case. The reasoning of the Court of Appeal was approved by the House of Lords in *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (3). What was argued by the Attorney-General for the Crown

(1) (1938) 1 K.B. 591 ; see particularly pp. 602, 603.

(2) (1938) 1 K.B. 591.

(3) (1953) A.C. 503.

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in those appeals was, in effect, argued for the taxpayer in the present case. He contended this: "One must look at the substance of what produces the income, and that is the employee's work. The most unnatural thing to judge by is where the employee is paid his money; the most natural thing is where he does the job" (1). These arguments were not accepted by the House of Lords. Their Lordships approved of the following propositions: "'. . . in the case of an employment the locality of the source of income is not the place where the activities of the employee are exercised but the place either where the contract for payment is deemed to have a locality or where the payments for the employment are made, which may mean the same thing'" (2). In my opinion these propositions govern the present case. Accordingly I answer the question stated for the opinion of the Court, "No".

WILLIAMS J. *Taylor* J. has stated a case under s. 18 of the *Judiciary Act* 1903-1955 for the opinion of the Full Court in an appeal by the Commissioner of Taxation of the Commonwealth of Australia under s. 196 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 from a decision of the Board of Review No. 3 upon the reference of an objection to that board by the respondent Richard Oxley French to the inclusion by the appellant in his assessable income of £110 derived during the year ended 30th June 1951.

The facts can be briefly stated. The taxpayer was at all material times a resident of New South Wales and was employed as an engineer under an oral contract by the Colonial Sugar Refining Co. Ltd., a company incorporated in New South Wales which carries on business in that State and in some of the other States of Australia, Fiji and New Zealand, where it is registered under Pt. XII of the *Companies Act* 1933 (No. 29) of New Zealand as a company incorporated outside New Zealand carrying on business within New Zealand. During each year since 1943 the respondent has spent two or three weeks in New Zealand as inspecting engineer for the company in its New Zealand business. In pursuance of an arrangement made between the respondent and the company, the company for many years past has paid the salary of the respondent monthly and such salary (less deductions for income tax, contributions to superannuation and other moneys) has been paid into an account kept by the respondent with a bank in Sydney. In the month of November 1950, the company sent the respondent to New Zealand there to perform, and between 22nd November and 8th December

(1) (1953) A.C., at p. 506. (2) (1953) A.C., at p. 511.

1950 he did perform services as an inspecting engineer for the company in its business in New Zealand. Upon the completion of those services the respondent returned to Sydney and continued his service with the company in New South Wales. The salary payable by the company to the respondent in respect of the period during which he performed the services in New Zealand amounted to £110 and was included in two monthly payments made by the company to the credit of the respondent's bank account in Sydney on 28th November 1950 and 21st December 1950.

By notice of assessment dated 9th May 1952, the appellant assessed the respondent to income tax upon his income for the year ended 30th June 1951, including the sum of £110. The respondent objected to the assessment contending that this sum " was not exempt income in New Zealand and should therefore be exempt from tax in Australia in accordance with s. 23 (*q*) of the *Income Tax Assessment Act* ". The appellant disallowed the objection and it was referred to the Board of Review. The Board of Review by a majority upheld the objection. It was agreed between the parties for the purpose of the reference to the Board of Review and it is agreed between them for the purposes of the case stated that the sum of £110 was " not exempt from income tax in New Zealand within the meaning of those words in s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 ". The question asked in the case stated is " Was the salary, which was paid to the respondent by Colonial Sugar Refining Co. Ltd. in respect of the period during which he performed services for the company in New Zealand (being the sum of £110) income derived by the respondent from a source out of Australia within the meaning of s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951? ".

Section 25 (1) of the *Income Tax and Social Services Contribution Assessment Act* provides that the assessable income of a taxpayer shall include—(*a*) where the taxpayer is a resident—the gross income derived directly or indirectly from all sources whether in or out of Australia and (*b*) where the taxpayer is a non-resident—the gross income derived directly or indirectly from all sources in Australia, which is not exempt income. Section 23 of the same Act provides that the following income shall be exempt from income tax—" (*q*) income derived by a resident from sources out of Australia, where that income is not exempt from income tax in the country where it is derived . . . ". It will be seen that the amount involved in the appeal is small but the case is apparently a test case brought to decide the question whether in the case of a contract of employment

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the source of income is the place where the services are rendered or where the services are paid for. The general principle of law relating to contracts of employment is clearly established. It is thus stated by *Dixon* J., as he then was, in *Automatic Fire Sprinklers Pty. Ltd.* v. *Watson* (1): " A contract for the establishment of the relation of master and servant falls into the same general category of agreements to pay in respect of the consideration when and so often as it is executed, and is, therefore, commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act. It is, of course, possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service. Indeed that is, in effect, what the Duke of Westminster persuaded the majority of the House of Lords he had done in *Inland Revenue Commissioners* v. *Duke of Westminster* (2). But, to say the least, it is not usual. The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by breach. See *Archard* v. *Hornor* (3) ; *Snelling* v. *Lord Huntingfield* (4) ; *Smith* v. *Hayward* (5); *Fewings* v. *Tisdal* (6); *Emmens* v. *Elderton* (7), more particularly the advice of *Crompton* J. to the House; *Brace* v. *Calder* (8); *Petrie* v. *Mac Fisheries Ltd.* (9) " (10).

In the present case the services which earned the remuneration of £110 were rendered in New Zealand and the whole of the reasoning in the previous decisions of this Court relating to the meaning of the word " source " would lead to the conclusion that the source of this income was in New Zealand where the services were rendered and the income earned and not in Sydney where the salary was paid. This was the opinion of the majority of the Board of Review upon the reference where the relevant decisions of this Court are cited. None of them is a direct decision upon the source of the income in the case of a contract of employment. They all relate to the source of income derived from the carrying on of a trade or

(1) (1946) 72 C.L.R. 435.
(2) (1936) A.C. 1.
(3) (1828) 3 Car. & P. 349 [172 E.R. 451].
(4) (1834) 1 C.M. & R. 20, at p. 26, note *b* [149 E.R. 976, at p. 978].
(5) (1837) 7 Ad. & E. 544 [112 E.R. 575].
(6) (1847) 1 Ex. 295 [154 E.R. 125].
(7) (1853) 4 H.L.C. 624 [10 E.R. 606].
(8) (1895) 2 Q.B. 253, at p. 263.
(9) (1940) 1 K.B., at pp. 269, 270.
(10) (1946) 72 C.L.R., at p. 465.

business. They are referred to in *Federal Commissioner of Taxation* v. *United Aircraft Corporation* (1). They are based upon the principle that the source of income is " a practical hard matter of fact " (2), " something which a practical man would regard as a real source of income " (2) and this view has been adopted by the Privy Council in *Liquidator, Rhodesia Metals Ltd.* v. *Commissioner of Taxes* (3). The result is that income may be derived from more than one source where it is derived from trade or business activities carried on in more than one place and may have to be apportioned for the purposes of taxation between the sources. If the principle of these decisions is applied to a contract of employment it would seem to require the conclusion that the locality of the source of the income must be the place where the duties of the employment are performed and that where these duties are performed in more than one place the income is derived from more than one source.

In two Australian decisions this conclusion has been reached. One is the decision of the Full Supreme Court of New South Wales in *Commissioner of Taxation* v. *Cam & Sons Ltd.* (4) and the other that of the Full Supreme Court of Queensland in *Diamond* v. *Commissioner of Taxes (Q.)* (5). To the contrary is that of the Supreme Court of New South Wales, *Herron* J., in *Hall* v. *Commissioner of Taxation* (6) where his Honour adopted the meaning placed upon the word " possessions " in the phrase " income arising from possessions out of the United Kingdom " in Case V of Schedule D of the *Income Tax Act* 1918 (Imp.) in relation to a contract of employment. This Act broadly stated taxed a resident in the United Kingdom upon the whole of his income wherever the source may be but this general liability was subject to a partial exemption under Case V in the case of income derived wholly from such possessions. The word " possessions " has been given a very wide meaning. It has been held to include contracts of employment where the locality of the income arising from the employment is entirely outside the United Kingdom. The resident is taxed upon only so much of the income of such a possession as is received in the United Kingdom from remittances payable in the United Kingdom or in certain other specified ways: *Colquhoun* v. *Brooks* (7); *Foulsham* v. *Pickles* (8); *Bennett* v. *Marshall* (9); *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (10). Those cases have decided that

(1) (1943) 68 C.L.R. 525.
(2) (1943) 68 C.L.R., at p. 537.
(3) (1940) A.C. 774.
(4) (1936) 36 S.R. (N.S.W.) 544; 53 W.N. 172.
(5) (1941) Q.S.R. 218; 6 A.T.D. 111.
(6) (1950) 67 W.N. (N.S.W.) 216.
(7) (1889) 14 App. Cas. 493.
(8) (1925) A.C. 459.
(9) (1938) 1 K.B. 591.
(10) (1953) A.C. 503.

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in the case of a contract of employment the locality of the source of the income for the purposes of Case V is not the place where the duties of the employee are performed but the place where payment for the employment is made. But " decisions on the words of one statute are seldom of value in deciding on different words in another statute " (1) per Lord *Atkin*, delivering the judgment of the Judicial Committee in *Liquidator, Rhodesia Metals Ltd.* v. *Commissioner of Taxes* (2), and it would be quite wrong to attempt to determine the meaning of the word " source " when used in the Australian *Income Tax and Social Services Contribution Assessment Act* by applying to that word the meaning placed upon " income arising from possessions out of the United Kingdom " in Case V of Schedule D of the *Income Tax Act* (Imp.) where the " possession " was a contract of employment. However general the statements in the judgments and the speeches in those cases may be, they relate to legislation widely different from the Australian legislation. Case V provides for a resident in the United Kingdom being taxed only upon the income arising from possessions outside the United Kingdom which is remitted to the United Kingdom and this provision clearly indicates that the income arising from such a possession must be income which is capable of being remitted to the United Kingdom or in other words income which has been paid to the resident outside the United Kingdom. As *Jordan* C.J. pointed out in *Cam's Case* (3) this feature of Case V was strongly relied upon by their Lordships in *Foulsham* v. *Pickles* (4). See the speech of Viscount *Cave* (5), that of Lord *Dunedin* (6) and that of Lord *Buckmaster* (7). Lord *Cave* said : " there are no words in the rule which can comprise money arising and payable here " (5). In view of this provision it is not surprising that their Lordships should have held in the case of a contract of employment under which an employee worked abroad, but was paid for his services in the United Kingdom, that the locality of the source of income was where the payment was made, or that in the converse case, where the employee worked in England but was paid abroad the source of income was outside the United Kingdom. To have held that the locality of the " possession " was where the services were rendered would have led to the quandary whether in the case of an employee who worked abroad but was paid in the United Kingdom, the whole income was taxable because it had reached the United Kingdom although it never had been remitted from abroad or the whole of the income should be exempt

(1) (1940) A.C., at p. 788.
(2) (1940) A.C. 774.
(3) (1936) 36 S.R. (N.S.W.) 544 ; 53 W.N. 172.
(4) (1925) A.C. 458.
(5) (1925) A.C., at p. 464.
(6) (1925) A.C., at p. 466.
(7) (1925) A.C., at p. 468.

because, although it had reached the United Kingdom, it had never been remitted. The Australian scheme is altogether different from the English scheme. Under the *Income Tax and Social Services Contribution Assessment Act* a resident of Australia is taxed upon his income derived from all sources other than upon exempt income. One class of exempt income is that described in s. 23 (*q*). The purpose of this sub-section is to exempt from tax income which is not exempt income in the country where it is derived or in other words to prevent double taxation. Provided it is derived from a source out of Australia and is taxable there, it is exempt from Australian tax wherever it is paid to the Australian resident and whether it is remitted to Australia or not. In *Bennett* v. *Marshall* (1), *Romer* L.J., after pointing out that as regards a trade the question of the locality of the "possession" that arose under Case V had been decisively solved and solved in the way one would have expected it to be solved, that is by having regard to the place where the business was done, that is, the place where the trade was carried on, said that he would have expected to find that in the case of an employment the locality of the source of income was the place where the employment was actually carried on by the employee, that is to say, the place where the activities of the employee were exercised because "I should have thought it would be held consistently with the cases relating to trade that the activities of the employee were the source of the income which he derived from his employment" (2). It is interesting to note that this inconsistency has now been removed by the *Finance Act* 1956 (Imp.), Pt. II. There is no difficulty under the Australian Act in holding that, as in the case of a trade or business, so in the case of a contract of employment, the source of the income is where the duties of the employee are performed and that where they are performed in more than one place there should be an apportionment.

This conclusion is assisted by the fact that s. 6 of the Australian Act contains a definition of income from personal exertion and also a definition of income from property. These definitions were inserted in the Act so that the respective incomes might be taxed at different rates and in the relevant year—that is the year of income ended 30th June 1951—income derived from property was taxed at a higher rate than income derived from personal exertion. Section 6 of the *Income Tax and Social Services Contribution Assessment Act* provides that, unless the contrary intention appears, "income from personal exertion" or "income derived from personal exertion" means income consisting of earnings, salaries, wages,

(1) (1938) 1 K.B., at pp. 612, 613. (2) (1938) 1 K.B., at p. 613.

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commissions, fees, bonuses, pensions, superannuation allowances, retiring allowances and retiring gratuities, allowances and gratuities received in the capacity of employee or in relation of any services rendered, the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person, any amount received as a bounty or subsidy in carrying on a business, the income from any property where that income forms part of the emoluments of any office or employment of profit held by the taxpayer, and any profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale or from the carrying on or carrying out of any profit-making undertaking or scheme, but does not include—(*a*) interest, unless the taxpayer's principal business consists of the lending of money, or unless the interest is received in respect of a debt due to the taxpayer for goods supplied or services rendered by him in the course of his business; or (*b*) rents or dividends; and that "income from property" or "income derived from property" means all income not being income from personal exertion. For the purposes of s. 25 (1) of the Act the locality of the source of "income from property" or "income derived from property" must be the place where the property is situated. For the same purposes the locality of the source of income derived from personal exertion in the capacity of employee or in relation to any services rendered surely must be where such personal exertion took place, and the locality of the source of the proceeds of any business where the activities of the business are carried on. The definition of income from personal exertion includes the income from any property where that income forms part of the emoluments of any office or employment of profit held by the taxpayer, and the inclusion of this income as income from personal exertion indicates that the locality of the source of this income would be where the taxpayer performed the duties of the office or employment and not where the property was situated from which the income was derived. The definition of income from personal exertion also includes any profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale or from the carrying on or carrying out of any profit-making undertaking or scheme. This provision is consequential upon s. 26 (*a*) of the Act which includes such profits in the assessable income of a taxpayer. Apart from s. 26 (*a*) such profits or at least profits from the sale of any property acquired for the purpose of profit-making by sale might have been considered to be a capital profit. The locality of the source of such a profit would ordinarily be where the property is situated. But as it is

placed in the category of income from personal exertion the source of the profit may well be where the activities which produced it were performed. Be this as it may, the determination of its true locality, even if it be the place where the property is situated, can throw no real light on the question of the locality of the source of income derived from what may truly be described as income from personal exertion in the sense that it is the personal exertion which produces the income whether that personal exertion be exertion in the capacity of an employee or in the rendering of services or in the carrying on of a business. In these two cases the real source of the income in any practical sense must be the place where this personal exertion takes place.

Applying these principles the locality of the real source of the income of £110 was in New Zealand and the question in the case stated should be answered " Yes ".

KITTO J. I agree that the decisions of the House of Lords and the Court of Appeal to which we have been referred cannot be regarded as authorities on the construction of the Act we have here to consider. They are decisions on legislation very different in its terms and very different in its plan. The conceptions to which they give effect have been evolved in consequence of an important step in construction which was taken by the House of Lords in the case of *Colquhoun* v. *Brooks* (1) for the purpose of harmonising particular provisions of that legislation. In that case the expression " income arising from possessions out of the United Kingdom " was construed as referring to all that is possessed, in the widest sense of that word, out of the United Kingdom, and which is a source of income: see per Lord *Herschell* (2) and Lord *Macnaghten* (3). In the universe of discourse thus created, discussion as to the identification of the " source " of income has necessarily put aside as irrelevant anything which, though it might be within the meaning of the word " source " in a different context, is not something which a person may be considered to " have " (Lord *Macnaghten's* word). So the profits of a trade or profession are held to be income from a possession; not because the work done to produce each individual item of income in the trade or profession is regarded as a possession which is a source of that item of income, but because the trade or profession itself—the business or practice, " the general state of activity " as Sir *Wilfred Greene* M.R. called it in *Bennett* v. *Marshall* (4)—is a possession and a source of income.

(1) (1889) 14 App. Cas. 493.
(2) (1889) 14 App. Cas., at p. 508.
(3) (1889) 14 App. Cas., at p. 516.
(4) (1938) 1 K.B., at p. 603.

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In *Foulsham* v. *Pickles* (1) the same reasoning was applied to an employment, largely because the relevant Act itself linked employments with trades and professions as a source of income. It is important to note that it was the employment, as distinguished from any specific work done in it, which was held to be the possession; and I venture to think that it would not have been consistent with the cases relating to trade, although *Romer* L.J. in *Bennett* v. *Marshall* (2) thought that it would be, to hold that the activities exercised by the employee were the source (in the relevant sense) of the income derived from his employment. The great difficulty that has arisen is in the next step; granted that the employment is the possession which is the source of the income, what feature of the employment gives it the character of a possession out of (i.e. wholly out of) the United Kingdom? The decisions upon which the commissioner has mainly relied in the present case, namely *Bennett* v. *Marshall* (3) and *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (4), are addressed to that question. They have denied that the place where the employee's services have been performed is relevant, and have selected as the crucial factor the agreed place for payment of the remuneration, or, as perhaps one should say in the language of *Romer* L.J. in the former of the two cases "the place either where the contract for payment is deemed to have a locality or where the payments for the employment are made, which may mean the same thing" (5). But even after those decisions, the Royal Commission on the Taxation of Profits and Income found it necessary to say in its report presented to Parliament in June 1955 (*Cmd.* 9474) at p. 93: "But it has been made plain to us that it is extremely difficult to say whether an employment which contains elements of a foreign character is or is not to be treated as a foreign possession for this purpose. There is no statutory rule. In the absence of one the Courts have had to treat each question as one of fact and to decide it according to the balance of what seem to be the relevant considerations. . . . In our view the place in which the work is done is much the most important single test of the locality of an employment, though it is the one to which the courts have hitherto given least weight, if indeed they have not treated it as having no weight at all."

We are here concerned with a provision, s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 (Cth.), which uses the word "source", in relation to the derivation

(1) (1925) A.C. 458.
(2) (1938) 1 K.B., at p. 613.
(3) (1938) 1 K.B. 591.
(4) (1953) A.C. 503.
(5) (1938) 1 K.B., at pp. 613, 614.

of income, in a context completely unaffected by the notion of a "possession". One has not to start, as under the United Kingdom legislation, with the conception that in the case of income from an employment the employment is the source of the income, so that the problem is to attribute a locality to the employment. The Australian Act, in such provisions as ss. 23 (*q*) and 25, assumes that it is possible to identify, with respect to every amount of income, some activity event or thing which may properly, though metaphorically, be described as the source from which that income has been derived; and it is settled by undoubted authority that to select for the description one out of all the many elements which, as a matter of history, have together culminated in the derivation is a practical task to be performed on substantial considerations.

It is safe to say that the source, in the sense in which the Act uses the word, of income which consists of salary or wages must often be the work done by the employee to earn that income. I should say that whenever a specific amount of remuneration has been paid to an employee for specific work which he has done—a case of piecework is the obvious example—the only practical view that can well be taken is that the work is the source of the remuneration. But I should not subscribe to the sweeping proposition that in every case of employment the source of the wages or salary paid in respect of a particular period is to be found in work done by the employee in that period. I think it must depend on the circumstances, and most of all on the terms of the employment. It is not always true that an employee's remuneration is earned by particular work that can be identified, or indeed by any work at all. Very often, of course, the right to remuneration depends upon the doing of work, but whether that is so in a particular case is a question depending on the terms of the particular contract: *O'Grady* v. *M. Saper Ltd.* (1). In respect of contracts making remuneration payable independently of the actual performance of service, I should not be prepared to say that it can never be right to regard the employer's obligation to provide the remuneration as the source from which the remuneration is derived. And what is one to say of cases where remuneration is payable for a period in which the employee is not bound even to be ready and willing to work? I have in mind cases in which wages are payable during a time of illness, as, for example, during sick leave provided for in industrial awards or in public service regulations, and cases in which wages are payable in respect of public holidays, or periods of annual leave

(1) (1940) 2 K.B. 469, at p. 473.

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or of long service leave. What is the source of the income in these cases? It seems to me that the practical answer may often be that the source is to be found in the obligation of the employer to make the relevant payments, and accordingly that the locality of the source is the place where, by the express or implied agreement of the parties, the employer was bound to perform that obligation. In the majority of cases, no doubt, that place will coincide with the place where the employee usually performs his service, but cases may readily be imagined in which it will not. Where, for instance, a ship's officer earns his salary by service rendered over an area remote from his employer's place of business, it may be that the source of his income for a period of work should be identified with the locality of his service in that period; but, even where that is so, I should think that the source of an amount of salary paid to the officer in respect of a period of leave may well be at the place, e.g. a place of business of the employer, from which it was agreed, expressly or by implication from words or conduct, that the payment should be made. Cf. Lord *Morton's* comment in *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (1) upon an observation of the Master of the Rolls in *Bennett* v. *Marshall* (2). I should add that I am not satisfied that in every case it is right to split up a continuous and coherent course of service according to the periods of time for which it has carried the employee to this place or that, to treat an entire payment of remuneration as if it were composed of separate amounts proportionate to such periods of time, and to regard each such amount as derived from a separate source. No doubt it is often in accordance with practical realities to do so; but is it necessarily right to do so where, for instance, an employee whose work is substantially confined to one place has to go to another place on an exceptional occasion or for a brief period for an incidental or subsidiary purpose? I am not prepared to hold as a matter of law that it can never be true in such a case that the whole remuneration ought to be regarded as derived from a source at the one place.

The main purpose of the case now before us is, I gather, to obtain a ruling upon the broad question whether, under s. 23 (*q*), the performance of an employee's service is always and necessarily irrelevant in determining the source of the remuneration. That purpose will be served if we hold, as in my opinion we should, that in many cases the performance of the service is relevant and may indeed be decisive. But the question actually propounded asks specifically whether a portion of certain salary paid to the respondent by his employer, namely a portion which the parties have

(1) (1953) A.C., at p. 513. (2) (1938) 1 K.B. 591.

joined in describing as payable in respect of a period during which the respondent performed certain services in New Zealand, was income derived by him from a source out of Australia, within the meaning of s. 23 (*q*). To be in a position to answer that question we need, I think, to know more of the facts. At least we should know enough of the terms of the employment to be able to decide whether the respondent's right to remuneration depended upon the actual performance of services. I am not sure that the possibility should be left unexplored that what the respondent did in New Zealand was merely incidental to the performance of his work in Australia, and that, when regard is had to the performance of his service generally, together perhaps with the express or implied agreement of the parties as to the place for payment of his salary, the most practical conclusion may not be that no part of the salary should be attributed to a source out of Australia. I describe it only as a possibility. The proceeding before us is a case stated, and we have no authority to give a decision based upon inferences or reached by a weighing of probabilities.

In my opinion we have not enough material to enable us to answer the question asked, and the case should go back so that further information may be obtained.

TAYLOR J. The broad question, as I see it, in this case is whether we are to accept the view that the territorial "source" of an employee's wages or salary is to be ascertained by reference to the place where he performs his duties and not—except in special circumstances—by reference to the place where he receives payment of his remuneration or where the contract of service was made. The problem is by no means simple for the expression "source", in the context in which it is used in s. 23 (*q*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1950, may be thought equally appropriate to denote, in the case of wages and salary, either the contract pursuant to which remuneration of that character has become payable or the services by which it has been earned. And when one is concerned with ascertaining the territorial source of such remuneration the expression may, in addition, be appropriate to denote the place where, pursuant to the contract of service, wages or salary have become payable and have been paid.

Decisions of the English courts have, in general, tended to reject the place where an employee's services are rendered as the place in which his salary or wages are derived and they have observed a distinction between the problem which arises in such cases and

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that which arises in cases where it is sought to ascertain the territorial source of the income of a business or trade. In *Bennett* v. *Marshall* (1) the Master of the Rolls said: "I think it is just to observe that there is an inherent difference between a trade and a profession on the one hand and an employment on the other when one is considering the essential question which is to be looked at—namely, what is the source of the income? Trades and professions are, so to speak, based on activity, either by the persons carrying on the trades or the persons carrying on the professions. A trade or profession is not attached to some specific contract, and, accordingly, in such a case it is impossible to put a finger on a particular contract as the source of the income . . . . But in the case of employment different considerations arise. Employment arises from a contract of employment and, therefore, there is what there is not in the other cases, some definite contract to which to look when inquiring into the source of the income which it is sought to charge. I should have thought, therefore, that in the case of employment the contract is the first thing which must be looked at to find out the answer to the question raised in any particular case of employment: Is it or is it not income derived from a source out of the United Kingdom?" (2) (See also *Colquhoun* v. *Brooks* (3); *Foulsham* v. *Pickles* (4) and *Bray* v. *Colenbrander*; *Harvey* v. *Breyfogle* (5).) As has been said already, however, these cases were decided pursuant to legislative provisions vastly different from that with which we are concerned and, though some of the reasoning appearing in them may appear to be apposite, I agree that it is doubtful whether it provides a solution for the problem with which we are confronted.

What we are concerned to identify is the source from which the respondent derived his salary for the period from 28th November 1950 to 21st December 1950, that being the period during which he was required to perform duties for his employer in New Zealand.

Both the word "source" and the word "derived", have been the subject of observation and discussion in our own courts over a long period. A variety of cases has made it clear that the word "derived", in the context in which it is used in s. 23 (*q*), is not a term of art and that it may be treated as synonymous with "arising" or "accruing". (See for instance, *Commissioner of Taxation* v. *Kirk* (6) and per *Barton* J., in *Harding* v. *Federal Commissioner of Taxation* (7).) And the "source" from which income of any particular description may be said to arise or accrue is a question

(1) (1938) 1 K.B. 591.
(2) (1938) 1 K.B., at pp. 602, 603.
(3) (1889) 14 App. Cas. 493.
(4) (1925) A.C. 458.
(5) (1953) A.C. 503.
(6) (1900) A.C. 588.
(7) (1917) 23 C.L.R. 119, at p. 131.

of fact to be resolved by considerations of a practical nature. As was said in *Nathan* v. *Federal Commissioner of Taxation* (1) " the legislature in using the word 'source' meant, not a legal concept, but something which a practical man would regard as a real source of income " (2). Perhaps it is fair comment to say that these observations throw little light on the immediate problem of selecting one factor rather than another as indicative of the source of an employee's wages or salary. But I venture to think that practical considerations would lead one to conclude, for instance, that the source of a tradesman's wages is to be found in the place where he works whether as an employee or in the course of his own business. That is the place where he earns his living and in a very real and practical sense the source of his income is to be found in that place whether he is entitled to be paid there or elsewhere. Nor can I see any distinction in principle between such a case and the ordinary case of any employee, whether remunerated by wages or salary, when, pursuant to his contract of employment and in accordance with his master's requirements, he is required to earn his remuneration in some place other than that in which he was engaged or where his remuneration is payable. I do not, of course, mean to suggest that cases do not exist or may not arise where special circumstances will invest these latter factors with added weight and, perhaps, transform them into deciding factors. As *Jordan* C.J. observed in *Commissioner of Taxation* v. *Cam & Sons Ltd.* (3) : " Where income is derived from wages or salary, again the source has several factors. Personal exertion may be involved in negotiating and obtaining the contract of employment, in performing the stipulated services, and in obtaining payment for them. In the present instance, for example, in the case of all the men concerned, in a very real sense it may be said that the source of their wages consisted of the three elements of getting the job, doing it, and getting paid for it. Which of these factors is the most important element of the source in any given case depends upon the facts of that case " (4). In that case the learned Chief Justice of the Supreme Court saw nothing special in the circumstances of the employment under consideration and treated the place where the employees' services were rendered as determining the territorial source of the wages paid in respect of those services. He said: " In the ordinary course of the employment of a seaman, such as is now under consideration, where there is nothing special, either in the circumstances of the contract of employment or in the payment, and

(1) (1918) 25 C.L.R. 183.
(2) (1918) 25 C.L.R., at p. 189.
(3) (1936) 36 S.R. (N.S.W.) 544 ; 53 W.N. 172.
(4) (1936) 36 S.R. (N.S.W.), at p. 548 ; 53 W.N., at p. 173.

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where the work is both done and paid for in the ordinary course, the all-important factor is the doing of the work; and the contract of employment and the payment are relatively insignificant and formal elements. But this is not necessarily so with respect to all wages or salary. In the case of an appointment to a sinecure, the engagement and the payment may be the only significant factors. In the case now before us, the engagement and the payment took place, and part of the work was done, in New South Wales, but the bulk of it was done outside New South Wales. The source of the wages was thus partly within and partly without the State " (1).

I agree with his Honour's observations and if, as the statute requires, I am compelled to select as the source of an employee's remuneration either the locus of the contract of service, or, the place where remuneration is payable thereunder, or, the place where the services are performed which give rise to the right to remuneration I am content to conclude that, in the absence of special circumstances, this third element should be chosen.

Accordingly, were it not for two other matters which present themselves the case might be disposed of at once by saying that the amounts in question were derived from sources out of Australia. The facts of the case, however, may be thought to raise for consideration the question whether it is necessary to make the qualification that if an employee is required to perform in some country other than that in which he is usually employed some insignificant or formal duty it would be wrong to conclude that his income was derived from more than one source (see per *Jordan* C.J. in *Cam's Case* (2)). But I do not think that upon the facts as they appear in the case stated the respondent's service in New Zealand should be treated as falling within this category. He worked there for some sixteen days and a not inconsiderable sum is attributed to his service there.

The second matter arises out of the fact that, apparently, the respondent's salary was payable to him by monthly payments at the end of each month. Paragraph 6 of the case stated, however, relates that " The salary payable by the company to the respondent in respect of the period during which he performed services in New Zealand as aforesaid amounted to £110 and was included in the following two monthly payments made by the company to the credit of the respondent's bank account in Sydney on the dates mentioned below:—28th November 1950, £108 12s. 11d.; 21st

(1) (1936) 36 S.R. (N.S.W.), at p. 548; 53 W.N., at p. 173.

(2) (1936) 36 S.R. (N.S.W.), at pp. 548, 549; 53 W.N., at pp. 173, 174.

December 1950, £111 16s. 5d." I take this statement to mean that, of the total of payments made in respect of the months of November and December 1950, the sum of £110 was attributable to the period during which the respondent performed his duties in New Zealand. In strictness it cannot be said that his services in New Zealand created any right to wages; his right to the monthly payments arose only when he completed each monthly period of service. Accordingly it may be said that these two monthly payments not only accrued to the respondent under a contract made in Sydney and that the payments were made there, but, also, that each monthly sum became payable in respect of a period of service partly within and, partly, out of Australia. That is to say that each payment was made as one sum for the whole of the respondent's services during each of those two months. It has, however, been necessary to deal with much the same kind of problem in relation to the apportionment of business income earned by activities partly in one country and partly in another. In such cases it has been the practice to make an apportionment and I see no reason why the same principle should not be applicable in the case of income which consists of salary or wages. It was adopted without question by *Jordan* C.J. in *Cam's Case* (1) his Honour remarking that: "It is well established that, where the criterion of liability to tax is derivation from a source in the State, and income is derived from a multiple source, it must be apportioned, and only so much of it as is attributable to the source within the State is liable to be taxed" (2). The learned Chief Justice, no doubt, thought that the necessity of attributing income of the character under consideration to particular territorial sources made apportionment not only appropriate but inescapable. I agree and accordingly think that the question raised by the case should be answered in the affirmative.

Question in the case stated answered: Yes. The costs of the case stated to be dealt with by the judge disposing of the appeal.

Solicitor for the appellant, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.

(1) (1936) 36 S.R. (N.S.W.) 544; 53 W.N. 172.

(2) (1936) 36 S.R. (N.S.W.), at p. 548; 53 W.N., at p. 173.