ORIGINAL

IN THE HIGH COURT OF AUSTRALIA.

Australian Machinery and Investment Company Limited

v.

The Deputy Commissioner of Taxation

REASONS FOR JUDGMENT.

Delivered at Sydney

on Friday, 23rd June, 1944.

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ORIGINAL

AUSTRALIAN MACHINERY AND INVESTMENT COMPANY LIMITED

v.

THE DEPUTY COMMISSIONER OF TAXATION

JUDGMENT. RICH J.

This appeal from an assessment under the Income Tax Assessment Act 1936-1937 was heard on the admissions of the parties and on the oral evidence of E. Watkinson, who was Governing Director of the Appellant Company during the relevant time. The appeal relates only to the financial year 1936/1937. Questions of principle were argued and at the request of Counsel I reserved any question of quantum.

The Appellant Company, which is registered in Victoria, acquired interests in certain lands in Western Australia which were supposed to contain minerals. It floated twenty-seven subsidiary companies which were registered in Western Australia, and to each of these it sold and transferred some of these lands. The lands and the expenses of floatation of the companies had cost the Appellant company £52,836/5/8, and it received from the companies in payment twenty-seven parcels of fully paid shares of the total nominal value of £3,377,148.

The Appellant company, then in England, sold these shares to seven English companies, from which it received as consideration £481,945/2/0 in cash, shares of a nominal value of £1,075,000, and options to take up shares to the nominal value of £1,247,500.

The Appellant company sold a large proportion of the shares and options acquired by it from the seven English companies, and, as a result, its assets, according to its accounts, increased in value during the years 1933 and 1936 by £1,643,979/0/7 (Aus).

It also transferred to two English companies, the Kookaburra company and the Austmac company, such of the shares in the seven English companies as it had not itself sold, and also certain other shares belonging to it, and received in exchange shares in the two companies.

The Appellant company had certain other mining properties in Western Australia. It disposed of these to three Western Australian companies, the Lalla Rookh company, the Comet company, and the King

of Creation company. The properties so disposed of had cost it £10,553/9/9, £44,754/2/6 and £19,000 respectively, and it received in respect of them fully paid up shares of the nominal value of £42,000, £60,000 and £25,000 respectively. It sold the Lalla Rookh shares in England for £42,000 and the Comet shares in England for £60,000. It took up 40,000 shares in the King of Creation company, paying £40,000 for them, and sold them to an Australian company for £40,000.

The Appellant company also entered into a considerable number of other transactions, both in Western Australia and in England, which it is unnecessary to particularise for the purposes of the matters which have so far been argued before me.

In England, the Appellant company has been assessed to income tax on the footing that it had carried on a trade in the United Kingdom, and was assessable on the profits arising therefrom. It was assessed on profits alleged to arise from the sale in England of the shares in the Western Australian companies to the seven English companies. On appeal to the Commissioners in England it was held that the par value of those shares must be deducted as the cost to the company of those shares, and on this basis there had been no profit. This decision is the subject of an appeal which has not yet been heard.

The questions which have been argued before me are whether all or any part of any income which accrued to the company by virtue of these transactions was derived from sources within or out of Australia, and whether any part of such income which was derived from a source out of Australia was not exempt from income tax in the country in which it was derived, so as to be exempt from Australian income tax by virtue of section 23 (q) of the Income Tax Assessment Act, 1936.

On the admissions of fact, I am of opinion that the Appellant company was engaged in the business of trading in shares: Commissioner of Taxes v. Melbourne Trust Ltd., 1914 A.C. 1001. Owning lands in Western Australia, it sold them to Western Australian companies for shares, and thus acquired a large number of shares which werelocally situated in Australia: Brassard v. Smith, 1925 A.C. 371; R. v. Williams, 1942 A.C. 541. It has not been contended that any actual profit was made on this transaction.

Having thus equipped itself with a large stock in trade of shares, it entered the English market, and began its operations there

by selling the shares at prices which included shares in certain English companies. In determining the source of any income which may have resulted from the sales, it must be remembered that "source" in this sense is not a legal concept but something which a practical man would regard as a source. Legal concepts may enter into the question, but the ascertainment of source is "a practical hard matter of fact:" Nathan v. Federal Commissioner, 25 C.L.R. 183 at 189-190; Federal Commissioner of Taxation v. United Aircraft Corporation, 68 C.L.R. 525, at pp. 537, 538; Liquidator, Rhodesia Metals Ltd. v. Commissioner of Taxes, 1940 A.C. 774 at 789. I feel no doubt that if a person, trading in wares which are locally situated in one country, makes a profit by selling them in another country, the source of his profit is in part the wares and in part the contracts of sale, and the locality of the source is in part the locus of the wares and in part the locus of the contracts; cf. Maclaine & Co. v. Eccott, 1926 A.C. 424 at 432-2; Commissioner of Taxation (N.S.W.) v. Hillsdon Watts Ltd., 57 C.L.R. 36. If a person resident in Australia set up a business of acquiring areas of land in Australia and cutting them up into building lots which, through the medium of an agent, he proceeded to sell at a profit in England to prospective immigrants, it could hardly be contended that the resultant income was derived from a source wholly out of Australia. Shares in Australian companies (unless on a register outside Australia) are, in the contemplation of the law, just as much locally situated in Australia as is Australian land. How any income derived from such sales should be distributed between the different local elements of the source is a question of fact, upon which no argument has been addressed to me: cf. Federal Commissioner of Taxatio v. Lewis Berger & Sons (Australasia) Ltd., 39 C.L.R. 468; Michell v. Federal Commissioner of Taxation, 46 C.L.R. 413.

To the extent to which any income was derived from the sale by the Appellant company in England of the Western Australian shares to the seven English companies, I am of opinion that the proportion of that income which should be treated as derived froma source in England is not exempt from taxation in England and is therefore exempt in Australia, irrespectively of whether any income tax is in fact

demanded in England: Texas Co. (Australasia) Ltd. v. Federal Commissioner of Taxation, 63 C.L.R. 382.

As regards the other transactions of the Appellant company which are referred to in the admissions of fact, on the material contained in those admissions and the arguments which have been addressed to me, I am not at present in a position to say anything more definite than that, to the extent to which the company derived income by trading in England in shares in English companies or other property not situated in Australia, it is not liable to Australian income tax if that income is not exempt from income tax in England.

If, at this stage, decisions are desired upon any other specific points, appropriate questions should be formulated, and the facts relevant to the questions segregated and stated.

In these circumstances I shall stand the appeal over for further consideration with liberty to either party to apply.