

**ROBINSON v COMMISSIONER OF TAXES
32 SATC 41**

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Division: Transvaal Provincial
Judges: DE VILLIERS JP, MASON J and BRISTOWE J
Date: 20 and 25 April; 3 October 1917
Also cited as: 1917 TPD 542

Income tax - Exemption in favour of non-residents - Residence - Meaning of - Former resident in South Africa with large business interests in Union spending two and a half years in Union for purpose of watching over such interests - Houses occupied as temporary homes during stay - Claim to be regarded as non-resident - Onus of proving non-residence upon taxpayer - Not discharged - [Section 5\(f\)](#), Act [28 of 1914](#).

Appeal from a decision of the Special Court, established in terms of the Income Tax Act, No [28 of 1914](#).

Appellant, who had been born in South Africa in 1840 and had carried on business in South Africa and acquired large interests there, had removed with his family to England in 1889 and had lived there from that date.

The extent of his interests in South Africa made it necessary for him to return there for varying periods at irregular intervals and on some of these visits he was accompanied by his family.

In 1891 he purchased a house in Wynberg, which he still owned at the date of his appeal and in 1894 he purchased a house in England. This he sold in 1914,

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removing thereafter to a house which he held under lease and which constituted the home of himself and his wife and family and housed his furniture and art collections.

The house in Wynberg was not occupied from the years 1907 to 1916 and was placed in the hands of agents for sale, but at the date of the appeal had not been sold.

In view of the disturbed conditions in South Africa in 1915, appellant came out in 1915 to watch over his financial interests and at the date of the hearing of his appeal was still in the country. He was accompanied by his daughter and on arriving lived with her in a rented house in Muizenberg until the end of 1916, and in March, 1917, furnished six rooms in his house in Wynberg and was living there with her at the date of his appeal.

During the period of two and a half years during which he had been living in South Africa appellant had travelled largely about the Union in connection with his business interests. He, however, regarded the house leased in England as his home and intended to return there as soon as his business interests allowed him to do so.

Appellant had large holdings in Cape Government stock the interest on which was exempted from liability for income tax in the case of holders not residing in the Union in terms of [section 5\(f\)](#) of the Income Tax Act, No [28 of 1914](#). Appellant claimed that he was entitled to the benefits of this exemption in respect of the interest received by him.

The Commissioner of Taxes having refused to allow the exemption claimed by the appellant, appellant appealed against the assessment made on him to the Special Court established in terms of the Income Tax Act, 1914. That Court dismissed his appeal.

On appeal from that decision:

Held, dismissing the appeal, that the term 'residence' as used in the Income Tax Act, 1914, must be given its ordinary meaning and that having regard to the facts that appellant has occupied houses in the Union very much like an ordinary resident who does not desire to set up a permanent establishment and had fixed no specific date as the limit of his stay, it was difficult to say that he had not been resident in South Africa for the two and a half years preceding his appeal and consequently he had not discharged the onus which lay upon him of proving that he had not been resident in the Union during the tax year in question.

Per Bristowe J.: Residence means a man's home or one of his homes for the time being. If a man sets up an establishment in a country and lives there at intervals he is resident in that country, however many similar residences he may have elsewhere and irrespective of whether the establishment is for a defined period or his intention is to prolong the arrangement for an indefinite period exceeding the limits of a casual visitation. In the case of physical presence without the setting up of an establishment, if the intention is to prolong that presence

beyond the possible limits of a casual visit and that intention is not abandoned, that intention would also constitute residence.

S. Solomon (with him *J.P.R. van Hoytema*) for the appellant: *J. Stratford, K.C.* (with him *C.E. Barry*), for the respondent.

Cur. adv. vult.

Postea (3rd October).

DE VILLIERS JP: I have read the judgments of my brothers Mason and Bristowe, in which I concur, and have nothing to add.

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MASON J (After dealing with a question submitted by the Special Court which had been settled by a decision of the Transvaal Provincial Division in an earlier case, proceeded:)

The other question in this appeal was whether the Commissioner rightly assessed the appellant for £26,765 in respect of interest received by him on certain Cape Government Stocks. The appellant claimed exemption under sec5(f) of the Principal Act as a person not residing in the Union. The facts on which the Special Court upheld the Commissioner's view that the appellant was resident in the Union are set forth in the stated case, but by the consent of counsel they have been supplemented by an affidavit of the appellant directed to answering certain questions put by the Court. The appellant was born in South Africa in 1840 and lived here continuously until 1889, when he went with his family to England, where he has since lived, visiting South Africa at frequent intervals. He has very large interests in South Africa at the time of the hearing before the Special Court; they have made it necessary for him to return here for varying periods and at irregular intervals coinciding with times of political or financial stress in the country. During some of these visits he was accompanied by his family. He purchased a house at Wynberg in 1891, which he has been trying to sell; it was not occupied for nine years prior to 1916. There is no evidence that he has any business interests outside South Africa. He came out here in February, 1915, on account of the disturbed state of affairs and in conjunction with his financial interests, and has travelled very largely about the Union, but he has during portions of the period from February, 1915, to the end of 1916 lived with his daughter in a rented house at Muizenberg. The exact nature of his tenancy is not stated in the findings of the Special Court; apparently he paid for every month that he occupied the house, but the occupation was not continuous. During March of this year he had furnished six rooms of the Wynberg house out of the twenty-four and has lived there with his daughter, though the house is still in the agent's hands for sale. The further affidavit of the appellant makes it abundantly clear that his main residence and his furnished home are in England. He bought a house in Park Lane in 1894 and sold it again in 1914.

But his son took a lease on behalf of the appellant, though in his own name, of another house in Park Lane, the rental of which the appellant pays, which he has furnished and in which his art treasures are stored, and which is the home of himself and his wife and family. His household staff is maintained at the present time, and the house is occupied by his wife whenever she is in London. The appellant intends to return to England as soon as his business interests allow him to do so.

So that the real question at issue is whether the appellant has not also established a second and subsidiary residence in South Africa. His counsel admitted that a man might have two residences. It is a generally accepted principle that the word 'residence' has no fixed legal definition, but must be interpreted according to its ordinary meaning and the context in which it is found: *Buck v Parker* (1908 T.S. 1100); *Beedle & Co. v Bowley* (12 S.C. 401). So far as the Union Income Tax Acts are concerned the word not only appears in subsec(f) of sec 5 but

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also in subsec(i) of the same section, where however it is coupled with the word 'permanently'. Does this differing phraseology indicate that any merely casual and temporary abode in a place constitutes residence for the purposes of the income tax? That is contrary to the meaning of residence not only in the accepted use, but also as defined in the various legal authorities and judicial decisions (*Dicey's Conflict of Laws*, 2nd ed., pp. 83 and 776). In subsec(i) the words 'permanently resident in the Union' seem to mean residence which is not merely the consequence of the person being a foreign consul or a member of his staff. They do not, I think, involve in sec 5(f) the adoption of anything different from the usual meaning of the word. The English Income Tax Acts (see *Income Tax Act, 1842*, par.39) contain an express provision that a person actually in the United Kingdom for some temporary purpose for a less period than six months shall not be chargeable as a resident. There is no such provision in the Union Income Tax Acts, and from this absence it was argued on the one hand that even a short stay in the Union for a temporary purpose would constitute residence, and on the other that abode for however long a period without any intention of establishing some home was not residence under our Statute. Both views derive support from the judgments in *Lloyd v Inland Revenue* (21 S.L.R. 482). The Lord President (Lord Inglis) considered that but for the express exemption residents even for temporary purposes would have been subjected to the tax. Lord Shand, however, held that having regard to this provision and other references in the Act ordinary residence was intended, and this view seems in accord with the other judgments.

Much stress has been laid on behalf of the Government on the large business interests which the appellant has in South Africa and his consequently frequent visits to this country, but it was pointed out in *Beedle & Co. v. Bowley* that a man might well carry on business personally in one place and yet reside in another. In most of the cases referring to residence the setting up or maintaining of some kind of establishment or home appears as the main

criterion of residence: [*Inland Revenue v Cadwallader* (42 S.L.R. 117); *Lloyd's case*; *Attorney-General v Coote* (4 Price 183, and 18 R.R. 692)].

There are of course many instances in which a man resides permanently in a country although he has no home in the ordinary acceptance of the word, but the present is not one of that class. The appellant according to the accepted evidence only came out to South Africa for the purpose of attending to special business and intended to return to England when that was completed. If he had been able to finish his business within a month or two, probably it would not have been contended that he had acquired residence in the Union. As was pointed out in *Cadwallader's case*, occupation does not become residence if it is for some temporary purpose and temporary purpose is distinguished from occupation in pursuance of regular habits. The case of *Turnbull v Solicitor of Inland Revenue* (42 S.L.R. 15) illustrates this point. There a merchant who had resided for many years in Madras and who carried on his business and lived there, came almost every year to see his wife and family in England; it was held that he was not resident in England. But then he was not in fact in England during the tax year. None of

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these cases, however, deal with circumstances such as are present here: as the proviso imposing liability on those who stay more than six months irrespective of the character of the residence prevents a similar question arising in England. The appellant came out to attend to his business interests in this country; he has remained already 2½ years in South Africa; he fixes no definite time for his return but anticipated on the 17th August, 1917, that his business matters would be disposed of within a few months and that he would then be able to return to England. He has occupied houses here very much like an ordinary resident who does not desire to set up a permanent establishment. There is nothing in any of the evidence to show that he ever fixed upon any specific time as the limit of his stay. Do these facts then constitute residence? Or has his abode in South Africa developed into residence, and if so at what time did mere bodily presence become legal residence under the Act? In *Bowie's case* (16 Ch.D. 486) actual bodily presence for a continuous period in a place was considered by the Judge to be residence there, and in *Beedle & Co. v Bowley* the establishment of a home was regarded as the governing factor. Both of these elements are present in this case, coupled with the personal conduct of the business affairs over a long period. The appellant, however, urges strongly that he has always had the intention of returning to his real and permanent home in England, and that it is his intention which entitles him to say that he is not resident in the Union. But so far as the bare fact goes, apart from questions of intention, it is difficult to say that the appellant has not been residing in South Africa for the last 2½ years. It is said that in determining the meaning of the word 'residence' regard must be had to the object of the Act and the context in which the word appears. These tests are not easy to apply in the present case. The general principle of our Income Tax is that the source of income and not the mere residence of the inhabitant should determine liability, but this special exception is introduced in favour of non-residents who hold Government stocks, clearly to popularize them as investments. But where a person has been living all this time in the country and has had the benefit of its government for himself, his property and business, there seems no *a priori* reason for exempting him from taxation.

The appellant's case bears considerable resemblance to that of *Pittar v Richardson*, decided by the King's Bench Division in July last (116 L.T.R. 823) in which the meaning of the words 'ordinarily resident' in the Military Service Act 1916 was discussed. A South African had gone to England in May, 1914, for certain special purposes; his business and his home were in Boksburg; the war detained him unexpectedly; he did not intend residing permanently in England, but meant to return to South Africa when the war was over, but meantime he married and furnished three rooms in a house which his wife bought. It was held that these facts amply justified a finding that he was ordinarily resident in England.

Having regard to these considerations and to all the circumstances of the case, the appellant does not seem to have discharged the onus which lay upon him of proving that he was not resident in the Union during the tax year in question. There is nothing in the evidence to

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differentiate that period from the whole period of his stay. He was living where he chose in a rented house as if it were his home, then as now; he was engaged in his business then as now; the date of his return seems to have been as uncertain then as now.

BRISTOWE J: I agree with the judgment of my brother Mason; but I desire to add a few words on the question of residence.

The authorities are clear that residence is a word which varies in meaning according to the circumstances under which it is used. There are however certain considerations which may afford a guide to its interpretation. In the first place, it is not synonymous with domicile. Nor is it necessarily permanent. Nor is it exclusive. But on the other hand a mere passer-by or casual visitor is not a resident, although in a sense he may be said to reside during the period of his visit. Perhaps the best general description of what is imported by residence is that it means a man's home or one of his homes for the time being; though exactly what period or what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule. Clearly physical presence for a prolonged period would constitute residence. And conversely if physical presence is entirely wanting even though an establishment is maintained for a man's family, residence would as a rule be negatived: *Turnbull v Solicitor of Inland Revenue* (42 Scot. L.R. 15). Again the maintenance of an establishment coupled with intermittent or occasional dwelling is sufficient to

constitute residence; see *Inland Revenue v Cadwallader* (ibid. 117), where a man who took a shooting box for three years and lived there two months in each year was held to be resident. *Attorney-General v Coote* (18 R.R. 692) was a somewhat similar case. There the defendant leased a house in London indefinitely and lived there a few months in every year, and it was considered that he was resident.

It appears therefore that if a man sets up an establishment in a country and lives there at intervals he is resident in that country; however many similar residences he may have elsewhere. And the result is the same whether the establishment is for a defined period or whether the intention expressed or to be implied from the circumstances is to prolong the arrangement for a period exceeding the limit (whatever that may be) of casual visitation. If the case is one of physical presence without an establishment a similar test must be applied. When the intention is to prolong the presence beyond the possible limits of a casual visit, and that intention is not abandoned, it seems to me that that intention would constitute residence, the intention of course being gleaned from all the circumstances of the case.

In the present case the intention of Sir Joseph is not in dispute. He intended to live in Africa as long as the business which he came to attend to required his presence. Whatever may have been his anticipation it is quite clear that in point of fact the business called for his presence for a lengthened period. Two and a half years have already elapsed and when it will be completed is still uncertain. It cannot therefore be said that when Sir Joseph came to South Africa in February, 1915, there was any valid ground for supposing that he would be able to return for at least two or three years. If he had formed the definite intention of living

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here for that period and had carried that intention into effect, it can hardly be disputed that he would have been resident here. I cannot see that it makes any difference whether he intended to reside for a given period or whether he intended to reside until the happening of a certain event which did not happen and could not reasonably have been expected to happen during that period. The legal effect must I think be the same in each case.

Now two and a half years in a country cannot be called a temporary or casual visit. I think it is residence. In my opinion therefore the appellant does not come within sec 5(f) of the Income Tax Act 1914.
