LIQUIDATOR, RHODESIA METALS LTD v COMMISSIONER OF TAXES, SOUTHERN RHODESIA
9 SATC 363

Division:	Appellate
Judges:	STRATFORD CJ, DE VILLIERS, DE WET AND TINDALL JJA AND FEETHAM AJA
Date:	22 March 1938
Also cited as:	1938 AD 282

Income tax - Company - Assets acquired for resale at profit - Voluntary liquidation - Sale by liquidator - Whether continuance and completion of scheme of profit making or disposal of assets in liquidation - Source - Companies resident in London - Purchase and sale of mining claims in Southern Rhodesia - Employment of capital where assets acquired - Income derived where capital employed - Section 5, Ordinance 20 of 1918, Southern Rhodesia.

Appeal from a decision of the High Court of Southern Rhodesia.

Appellant, the liquidator of a company incorporated in England, appealed to the High Court of Southern Rhodesia against an assessment for income tax made upon the company by the Commissioner of Taxes, Southern Rhodesia, in respect of the profits realised by the sale of certain mining claims.

One D., a director of companies resident in England, had acquired, *inter alia*, certain mining claims in Southern Rhodesia and certain other rights and

options in connection with other claims in the Colony. For the purpose of exploiting these assets D. promoted the flotation of two companies in England.

These companies were incorporated on the same day, the S. Company having a capital of £100,000 and the R. Company a capital of £10,000, of which £8,002 only was issued. In the R. Company D. held 1,600 shares.

To the S. Company D. sold for £37,500 420 of the claims which he had acquired and the company also acquired directly certain claims over which D. had obtained an option. To the R. Company D. sold for £5,000 1,010 claims and for a further consideration of 5s. ceded certain other valuable rights which he had acquired.

A few weeks later the S. Company increased its capital to £200,000 and four days after this operation had been effected, the R. Company went into voluntary liquidation. Thereupon the liquidator of the company offered to sell to the S. Company 1,110 claims owned by the R. Company for £150,000, to be satisfied by 150,000 shares in the S. Company. The S. Company accepted this offer. Thereafter the liquidator offered to sell to the S. Company all the remaining assets of the R. Company, including certain additional claims, and it was eventually agreed that the S. Company should take over all the assets of the R. Company, the consideration for all the claims transferred being £152,000, the balance of the assets being set off by the liabilities of the R. Company, which the S. Company agreed to assume.

The Commissioner of Taxes assessed the R. Company for Income Tax in respect of the sale of these 1,110 claims, and after allowing £6,000 as a deduction in respect of the acquisition and development of the claims, assessed tax upon the sum of £146,000.

To this assessment the appellant, as liquidator of the R. Company, took objection and lodged appeal on the grounds:-

(a) that the profit derived was an accrual of a capital nature, and

(b) that if the profit was income, it did not accrue from a source within Southern Rhodesia.

The High Court of Southern Rhodesia (HUDSON, J.) dismissed the appeal holding that the company was liable in respect of the profit made on the sale of the claims and that the amount of that profit, as assessed by the Commissioner, was correct.

On appeal, it was admitted on behalf of the appellant that the company had been formed to exploit and dispose of the claims which it had acquired and that the profit arising from the sale would have been chargeable with Income Tax had it been effected before the company went into liquidation, but it was contended that the profit to be taxable must be the result of the carrying on of the business of the company; that the company had ceased to carry on business when it went into liquidation and that the liquidator did not continue or complete that business, but merely liquidated the assets.

It was argued further, on behalf of appellant, that the sale was a sale of the whole of the company's undertaking, and as such a necessary and ordinary incident in the liquidation of the company, while in the absence of any allocation of any part of the purchase price to the claims sold, the ascertainment of the profit on that sale might be legally impossible.

On the second ground of appeal it was contended that as both the buying and

the selling companies were resident in London and the whole transaction of purchase and sale was carried out there, the source of the profit derived by the R. Company was in London and not in Southern Rhodesia.

Held, dismissing the appeal (DE VILLIERS, J.A., dissenting), that inasmuch as the claims had been bought by the R. Company with the object of reselling them at a profit, their sale by the company (though in liquidation) was the culminating step in the scheme of profit making for which they had been acquired and the resulting profit was accordingly taxable.

Held, further, that both the allocation of consideration to the sale of the claims, and the determination of the ensuing profit by the court below were justified by the facts as disclosed by evidence;

Held, further, that as the main factors productive of the profit were the expenditure by the company of its capital in the purchase of the claims in Southern Rhodesia and the value of the claims so acquired, the income resulted from the employment of the company's capital in Southern Rhodesia and so had its source in that territory.

In dissenting, DE VILLIERS, J.A., held that the whole affair was a London financial transaction and that the profit realised was made in London and came into the hands of the selling company in London; the source therefore of the income derived was in London and not Southern Rhodesia.

STRATFORD CJ: The High Court of Southern Rhodesia dismissed an appeal from a decision of the Commissioner of Taxes disallowing an objection by the present appellant to an assessment of Income Tax made upon the Rhodesia Metals Ltd. in respect of the year ending 31st March, 1936. The judgment of the High Court is now before us on appeal.

A statement of the facts of the case is contained in the judgment of my brother TINDALL and affords a sufficient explanatory preface to these reasons. The profits which were assessed to tax were those made by the Rhodesia Metals Ltd., on the sale by its liquidator (the appellant) to St. Swithin's Ore and Metals Ltd., on the 5th March, 1936. By that agreement the St. Swithin's Co. bought the whole undertaking assets and goodwill of the Rhodesia Metals. I accept the learned Judge's apportionment of the consideration mentioned in that agreement. His inference was that the £152,000 was paid as consideration for all the claims sold by the appellant to St. Swithin's. The profit on these claims made by the Rhodesia Metals, therefore, was the sum of £152,000 less their cost of £6,000 which resulted in a taxable amount of £146,000. I did not understand Mr *Ramsbottom* to challenge this apportionment and valuation. His sole objection to the assessment was founded on the fact that the profit resulted not from a

sale by the company during its existence, but on the disposal of the whole undertaking of the company, which he said was a pure liquidation sale effected by the liquidator in pursuance of his duty as liquidator under the provisions of the Companies Law of Southern Rhodesia. Mr *Ramsbottom*, however, made an admission, which in my judgment he could not properly avoid making, that the claims in question were bought by the Rhodesia Metals with the object of reselling them at a profit and that, therefore, if sold by this company prior to its liquidation the resulting profit would have been made in the employment of its capital productively in a scheme of profit making. On this supposition it was admitted that the profit was taxable as income. This admission is in accord with the law applicable to such a transaction and is undeniably correct. It was on the fact that the sale was one in the process of liquidation and was accompanied by a sale of the remaining assets of the company that counsel relied so strongly. Mr *Ramsbottom*, in his adroit argument, put his contention - so I understood him - in this form: the profit to be taxable must be the result of the carrying on of business by the company; that the company had ceased to carry on business when it went into liquidation and that the liquidator did not continue or complete that business but merely liquidated the assets. In counsel's heads of argument I find the following: "In disposing of the assets of a company the liquidator in a voluntary liquidation may be continuing the business of the company during the winding up, or he may not. *Prima facie* a company ceases to carry on business when it goes into liquidation. *Prima facie* therefore the sale of assets by a liquidator is not an act done in the carrying on of the business of the company." Thus it appears that counsel did not rely upon a general proposition that a liquidator could not complete, on the company's behalf, a business transaction of the company but only on a *prima facie* inference which could be rebutted. The facts on which appellant relied were(1) that the sale was effected by the liquidator shortly after his appointment(2) that the entire undertaking was sold and(3) that no part of the purchase price was appropriated to any particular asset. Profits, it was said, are only taxable which are derived from the carrying on of a business or trade in a scheme of profit making. For this proposition the decision in *Commissioner of*

Taxes v Booysen's Estate (1918, A.D. at p. 595) was invoked. It will be seen what emphasis is put by counsel upon the phrase "carrying on a business." I pause here, therefore, to add a few words to what I have already said in the case of *Lace Proprietary Mines Ltd. v Commissioner of Inland Revenue*[1] recently decided. The phrase occurs in the English Income Tax Act but not in ours. To quote from *Booysen's* case (*supra* p. 595): "Now a company can only employ its capital in order to earn profit by embarking it in some enterprise or business which the company is formed to undertake. The line of enquiry under our Act, therefore, approaches so close to the English test that in a case like the one before us there is no practical difference" (per INNES, C.J.). To the first sentence of this extract we must rigidly adhere for it is an authoritative statement of our law by this Court. Nor can one deny that assistance and guidance can be sought and obtained from English decisions in almost all cases though they are pronounced upon the somewhat different language of the English Acts. The only point to which I would draw attention is the distinction between *the* business of a company and a business transaction of the company. The possible confusion is avoided by adhering to the words of the learned CHIEF JUSTICE quoted above: "*some* enterprise or business which the company was formed to undertake." In some of the English cases importance is attached to what is called "continuity" on which is founded the argument that one transaction cannot amount to the carrying on of a business (see the remarks on this matter in the *Lydenburg Platinum* case (1929, A.D. 145).[2] Therefore, in accordance with our own decisions it is better to put the following test question: "was the profit a gain made by an operation of business in carrying out a scheme for profit making?" (quoted from the *California Copper* case, 41 Sc. L.R. 694 by INNES, C.J., in *Overseas Trust Co. v Commissioner of Inland Revenue* (1926, A.D. at p. 453).[3] Now though the word "business" is used here, I see no objection to it, since we are concerned with the business transactions of a trading company - though, on occasions, with a single transaction only. After quoting the above test the learned CHIEF JUSTICE

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(in the *Overseas Trust Co.'s* case(*supra*), continued "then it is revenue derived from capital productively employed and must be income." These latter words are relevant to the alternative argument of appellant to be dealt with presently. To proceed with the first question, on the facts of the case it is axiomatic that the Rhodesia Metals Co. was formed for the purpose of acquiring these claims with a view to resale at a profit. They were sold at a profit, which profit enured to the company. But, urges counsel, the company never fulfilled its purpose, it met with an early death, its whole life's aim was frustrated; it died before it sold; thus its existence was abortive and meaningless. Now, in my judgment, the facts of the case establish beyond question that this company did exactly what it was designed to do - no more and no less. It was created by Sir Edmund Davis to buy these claims from him and to sell them to the St. Swithin's Co - this is precisely what it did, it accomplished the only purpose for which it was created. This conclusion can only be incorrect in law if the sale by the liquidator is never in law a sale by the company. I know of no authority for the proposition that a sale by a liquidator can never be regarded as a sale by the company. Indeed, in my view, a sale by a liquidator of a company in liquidation is a sale by the company. Its *persona* persists for such dying activities as the Companies Act permits, and one of these permitted activities is a sale of its assets. Therefore, I think, the discussion when and when not a liquidator is permitted to carry on the business of the company has nothing to do with our problem. The sale of these claims was a sale by the company (though in liquidation); the only question is whether it was effected in pursuance of the scheme designed when they were bought. If it was the culminating step in that scheme, there's an end of the matter. That the company contemplated and intended this sale is proved by its negotiations commenced before liquidation and merely concluded by the liquidator. The question is whether the sale by the company in liquidation was for the purpose of concluding the operation of profit making which was in hand, or was unrelated to that operation and merely a necessary step in liquidation. Presented with these two alternatives I unhesitatingly adopt the former on the evidence on record.

But Mr *Ramsbottom* pressed the further point that this was a

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sale of the company's whole undertaking. It was contended by counsel for respondent that the bearing of this fact on the question is twofold: (1) it is relevant to the enquiry which is discussed above, namely whether the sale was the final step of the profit making scheme, or purely a necessary and ordinary incident of liquidation, and(2) it may give rise to such difficulties or apportionment as would make it legally impossible to ascertain what profit was made on the sale of the particular asset. On the first point I would only add that the inference already drawn is not in this case weakened by the fact that in the final stage this was a sale of the whole undertaking. As to the second point, no difficulty of apportionment is presented by the facts of the case, for I entirely agree with the inferences and reasons of HUDSON, J., so clearly stated in his able judgment. The first ground of appeal therefore fails.

The alternative argument for appellant is that the income was not derived from a source in Southern Rhodesia but from London. At the outset counsel submitted that respondent was faced with a dilemma. If, he argued, the profit was not derived from the carrying on of the business of the company there was an end of the matter in his favour, but if it was derived from the business then that business was clearly in London where the companies resided and where all the transactions were completed. Again it will be seen what emphasis the argument necessarily puts upon the definite article, and that it ignores the distinction between the general business of a person and one of his profitable business transactions, which may or may not be part of his main or general business. A company can, of course, carry on business in more places than one and in places where it has no residence (see *Rhodesian Railways and Others v Commissioner of Taxes* (1925, A.D. 438))[4] and, of course, the businesses may be of different kinds and unconnected with one another. In the present case we have to determine whether the profit was due to

the productive employment of the company's capital in Rhodesia or on the other hand to its organisation and connections or to its special aptitude or equipment or the special intelligence of its board - all of these being in the place where company resided, which was London. I accept unhesitatingly as a premise that in this case the capital of

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the company was employed in Rhodesia. Of its total capital of £10,000, five thousand were spent in the acquisition of the claims and two thousand odd in work done on them. The claims were in Rhodesia. Therefore, the risk of depreciation or the hope of appreciation was attached to the Rhodesian acquisition. In the case of a trading company employing the capital with which it starts for the purpose of trading, the remarks of INNES, C.J., in the *Overseas Trust Co*. case quoted above, clearly apply. But one must concede, I think, that the employment of capital may not be the dominant cause of the profit. What was instrumental in producing the profit in this case? Put shortly was it the capital employed or was it the brains of the company - under which latter term I include its special aptitude and equipment? To answer this we must look to the sequence of events and the facts appearing in the record. Behind the scene was Sir Edmund Davis; he originally acquired these claims and created the Rhodesia Metals Company and determined what it should do. We must assume that the sale to the St. Swithin's Company was an honest one and that it did not pay an excessive consideration for the assets it bought. Sir Edmund Davis might, therefore, if he had so chosen, have sold these valuable claims which he had himself acquired to the buying company and made the profit himself. Instead of this, for reasons of his own, he preferred to give the benefit of his valuable acquisition to the Rhodesia Metals. It was this fortunate and cheap purchase of the claim by Rhodesia Metals which enabled that company to make a profit. The question next arises: was this valuable acquisition due to the astuteness of the company or to the benevolence of Sir Edmund Davis? To hold the former would be equivalent to saying that the company outwitted Sir Edmund Davis - a manifest absurdity. The plain truth is that Rhodesia Metals made an extremely fortunate purchase in Rhodesia by employing its capital there. It makes no difference, in my judgment, whether its good fortune resulted from pure chance or from the goodwill of another. The case can be likened to that of a man in Johannesburg being told by a friend of a very favourable purchase to be made in claims in Rhodesia, if he is willing to risk his money there. If such person takes the advice, makes the purchase with his capital and realises a profit on resale, in my opinion the profit is made by the employment

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of his capital in Rhodesia. There is little assistance to be obtained from decisions on this question, but the implication from the reasoning of INNES, C.J., and SOLOMON, J.A., in the *Overseas Trust Co.'s* case(*supra*) is that if the purchase had been made of shares of a company operating in South Africa they would have come to a different conclusion as to the source of the income. In the circumstances of the present case I regard the fact that the companies were resident in London and that the contracts were made there as having very little, if any, bearing on this question of the source of the income.

The conclusion to which I come, therefore, is that the profit was made by the productive employment of the company's capital in Rhodesia; that this profit was income liable to tax and that it was derived from a source in Rhodesia.

The appeal is dismissed with costs.

TINDALL, J.A.: The appellant, the liquidator of Rhodesia Metals Ltd., a company incorporated in England, which I shall refer to as "Rhodesia Metals," was held liable by the High Court of Southern Rhodesia for income tax in the latter country in respect of the profit made on the re-sale of certain base metal mining claims situate in Southern Rhodesia, to St. Swithin's Ores and Metals Ltd., also an English company. It is necessary to mention the history of the transaction between the two companies. In 1934 R.H. Aldworth and S.J. Sauerman held 300 tungsten claims, known as the Sequel Mine, in the Mining District of Bulawayo. On 17th November, 1934, one Bayliss, as agent in Southern Rhodesia for Sir Edmund Davis, a director of companies in London, obtained an option from Aldworth and Sauerman giving the right to develop the said claims and to buy them for £38,000 in cash and 12 per cent. of the share capital of a company, with a nominal capital of not more than £100,000, to be formed to acquire or work the said claims. The agreement gave Davis the option to buy the said percentage of shares (12,000) at the price at which Aldworth and Sauerman might offer the said claims to any other person and provided also that if Aldworth and Sauerman during the following 25 years acquired any other tungsten claims in Southern Rhodesia and should wish to sell them, they should give Davis the option to buy them on the same terms as they

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might be able to obtain from any other person. During the year 1935 Davis, through his agent Bayliss, pegged a number of claims in the locality mentioned, some of these being within a radius of three miles from the centre of the 300 claims and others outside the said radius. I gather from the record that 420 of the claims so pegged were inside the said radius and that 1,010 were outside. In or about November, 1935, Davis promoted the flotation of the two companies above mentioned, each company being incorporated on 30th November, 1935. Each company was a private company and had the same chairman, Davis. The capital of St. Swithin's was £100,000 and that of Rhodesia Metals £10,000, part only of which latter amount, namely £8,002, was issued. In the share capital of Rhodesia Metals Davis held 1,600 shares and Prince's Street Nominees held 6,400 shares. Prince's Street Nominees

Ltd. also had a large holding in the capital of St. Swithin's. After the registration of these two companies Davis, on 5th December, 1935, sold the 420 claims to St. Swithin's for £37,500, of which sum Davis got only £17,500 himself as certain associates of his had an interest in the said claims. On the same date Aldworth and Sauerman sold directly to St. Swithin's the Sequel Mine claims (which had increased to 330) for £30,000 in cash and 12,000 shares in St. Swithin's, Davis having released the said claims from his option on 17th November, 1934. On 12th December, 1935, Davis sold the 1,010 claims outside the Sequel Mine radius to Rhodesia Metals for £5,000 in cash. On the same date Davis, for a nominal consideration of 5s., ceded to Rhodesia Metals the rights included, as above mentioned, in the option by Aldworth and Sauerman, in regard to the 12,000 shares and any further claims to be acquired. On 20th January, 1936, St. Swithin's increased its capital by an amount of £200,000. The evidence shows that the object of this increase of capital was to enable St. Swithin's to buy the 1,010 claims from Rhodesia Metals. Four days later, on 24th January, 1936, Rhodesia Metals went into voluntary liquidation, and the appellant, L.H. Weatherley, was appointed liquidator. On 5th February, 1936, the appellant offered to sell 1,110 claims to St. Swithin's for £150,000, to be satisfied by 150,000 shares in St. Swithin's. The latter company accepted that offer on 6th February. The record does not explain the discrepancy between the 1,010 claims bought by Rhodesia Metals and the 1,110 offered

by it. Thereafter on 28th February, 1936, the appellant wrote to St. Swithin's stating that Rhodesia Metals owned 1,800 further tungsten claims and possibly owned certain plant and machinery because the sale of 12th December, 1935, stated that Davis agreed to transfer 1,010 claims "and the said plant and machinery" (without mentioning any plant or machinery in the clause specifying the subject matter of the sale). The appellant stated further that possibly Rhodesia Metals might have certain liabilities in respect of claim licences, royalties and other dues and that it had £2,180 16s. 3d. in cash and the option rights ceded by Davis on 12th December, 1935, as above stated. Accordingly the appellant suggested that St. Swithin's should buy the whole undertaking of Rhodesia Metals. Following on this suggestion an agreement was entered into on 5th March, 1936, between Rhodesia Metals and the appellant, of the one part, and St. Swithin's of the other, in terms of which St. Swithin's bought the whole of the undertaking, goodwill and assets of Rhodesia Metals (including 1,290 claims), the agreement stating that part of the consideration was £152,000, to be satisfied as to £150,000 in shares in St. Swithin's and that as to the residue of the consideration St. Swithin's should pay the debts of Rhodesia Metals except the expenses of the liquidator in connection with the winding-up.

It is in respect of this sale that the Commissioner of Taxes assessed Rhodesia Metals for Income Tax. The amount assessed as taxable income, namely £146,000, was arrived at by deducting from £152,000 the cost of procuring and developing the assets sold and the costs of liquidation. The statutory declarations made for transferring the 1,290 claims to St. Swithin's state the consideration to be £2,000 in cash and the £150,000 in shares. The learned Judge drew the inference that the liabilities were estimated to balance the remaining assets, that the claims additional to those included in the offer of 5th February were put in at £2,000 and therefore that the price of all the claims was £152,000, and the Commissioner was entitled to take that amount as the basis on which to calculate the assessment of income tax. That view seems to me fully justified. The record does not disclose how the total amount of £6,000 deducted from the price of £152,000 was arrived at. We know, however, that Rhodesia Metals paid Davis £5,000 for 1,010 of the claims, and there is a statement in

the letter of appellant's Bulawayo attorneys that the cost of development work and boring for water "so far as our client is aware amounted to £2,156." We must take it that the deduction of £6,000 covered the cost of acquisition and of such development as took place, and the costs of liquidation. In the case stated by the appellant he did not challenge the amount if liability was established but contended that he was not liable to two grounds, firstly that the profit was an accrual of a capital nature and secondly that if it was income it did not accrue from a source within Southern Rhodesia.

In agreeing that the appeal must fail on both questions, I only wish to add my views on the source of the profit. The evidence before the Court, which was taken on commission, was that of the appellant, and of Davis, and it does not disclose a convincing reason on the part of Davis for disposing of the claims to two companies instead of one. His first answer was that there was an understanding between him and his associates and Aldworth and Sauerman that claims within the 3 miles radius should be acquired by the company to be formed and that he and his associates intended themselves to work the other claims, namely those sold to Rhodesia Metals. He had to admit, however, that he did not intend to work the claims as an individual but through the medium of a company to be formed. When it was put to him that, as he floated St. Swithin's, all the claims might have been sold to that company, his answer was that St. Swithin's had quite enough to develop and work. Then cross-examining counsel put it to him that about six weeks after the sale to Rhodesia Metals the outside claims were in fact sold to St. Swithin's. His answer was that by that time he had come to realise that, in order to obtain a fair share in the trade, it was desirable to have only one producer of the product in Rhodesia. He denied that the *modus operandi* was influenced by the considerations relating to income tax. The inference is irresistible that Davis had some reason, which he did not disclose, for making his profit through the two companies. In the case of the Sequel Mine claims he and his associates made a profit of about £19,646, being £37,500 less £17,854 (£8,000 plus £425 plus £9,429). In respect of the outside claims he got £5,000 from Rhodesia Metals, and when that company (in liquidation) sold to St. Swithin's, Davis, as a shareholder

in Rhodesia Metals, got £10,000 in cash and 20,000 shares out of the consideration of £150,000 shares which St. Swithin's had paid.

The learned Judge held that the operation of business by Rhodesia Metals which culminated in the sale to St. Swithin's consisted in acquiring claims in Southern Rhodesia and in developing them with the intention of creating a saleable asset, and that it was therefore clear that the business of Rhodesia Metals from which the profits arose was carried on there. The relevant words in sec 5 of the statute in question (Ord 20 of 1918) are "the total amount other than receipts or accruals of a capital nature, received by or accrued to or in favour of any person from any source within the Territory."

Mr *Ramsbottom*, on behalf of the appellant, argued that the buying and the selling of the claims by Rhodesia Metals constituted the dominant factor in the making of the profit, and that as those steps were taken in England, the source of the profit cannot be said to have been in Rhodesia. On the other hand, Mr *Stratford* argued that the income resulted from the employment of capital in Rhodesia and that, if it be assumed that Rhodesia Metals carried on business in London, the profit did not result from the investment of money in that business but from the investment of money in Rhodesia by the business or through the business.

In *Overseas Trust Corporation v Commissioner for Inland Revenue* (1926, A.D. 444).5 INNES, C.J., stated that the source of origin of income may be said generally to be the location of the business, capital or service which produces the income and that capital which produces profit is located where it is employed. The main factors which brought about the profit which Rhodesia Metals made were the capital it spent in buying the claims from Davis, the value of the claims so acquired and the activities of Davis as chairman of both companies in getting St. Swithin's to increase its capital and to buy the claims from Rhodesia Metals at such a large profit to the latter company. There is no evidence to show that the claims were not valuable nor is there any proof that Davis, the chairman of Rhodesia Metals, used his position as chairman of St. Swithin's to induce the latter company to pay an extravagant price for the claims in order to benefit the shareholders

of Rhodesia Metals, of the capital of which Davis held nearly a quarter. Naturally these two points, though they might have assisted the case of Rhodesia Metals on the question of "source," could not be suggested by counsel for the two appellants who called Davis as the main witness. And such suggestion was not made by cross-examining counsel. In such absence of evidence to the contrary it is reasonable to infer the other shareholders in St. Swithin's would not have subscribed the further capital of £200,000 without evidence that the claims were valuable. It is true that Davis's profit on the sale of the claims to Rhodesia Metals was comparatively small. But the inference is that, for reasons known to himself, he had planned to make the profit at a later stage and the flotation of Rhodesia Metals was a necessary part of the plan. It is clear that Rhodesia Metals was not floated to work the claims; for the nominal capital of £10,000 must obviously have been inadequate. The two companies were incorporated on the same day, and the inference is that when Davis promoted the flotation of Rhodesia Metals he must have contemplated the disposal of the claims at a profit by Rhodesia Metals. Accordingly the comparatively small price paid by Rhodesia Metals for the claims is no criterion of their value. The correct interpretation of the facts, in my judgment, is that Rhodesia Metals employed its capital in buying cheaply a valuable asset situate in Rhodesia and it resold the asset at a large profit in London. The purchase and the sale by Rhodesia Metals took place in London where, also, Davis carried out his activities in floating the companies and bringing about the ultimate profitable sale of the claims. But from those facts it does not follow that the transactions in London were the real cause of the profit made. No doubt the ability and experience of Davis were important factors; but in my view the dominant factor in, the true origin of, the profit was the value of the claims. I hold, therefore, that Rhodesia Metals, in buying and developing the claims and selling them at a profit, employed its capital in Rhodesia.

Mr *Ramsbottom* relied on a series of English cases, of which *Grainger & Son v Gough* (1896, A.C. 325) and *Lovell & Christmas Ltd. v Commissioner of Taxes* (1908, A.C. 46) are examples, in support of the contention that, where the business consists of buying and selling, the business is located where the sales take

place, and therefore the source of the profit is at such place. I do not think that these decisions necessarily apply to the present case. In *Grainger & Son v Gough* the words in the statute were "from any trade exercised within the United Kingdom." Under the Rhodesian statute the inquiry is concerned with the "source" of the profit. In the circumstances of a particular case the origin of the profit may be the country where the asset realised is situated. The present, in my judgment, is such a case.

I agree that the appeal fails.

DE WET, J.A., and FEETHAM, A.J.A., concurred.

DE VILLIERS, J.A.: I feel constrained to differ from the majority of the Court. I agree with the views expressed by the CHIEF JUSTICE with regard to the appellant's contention in para. 16 of the stated case; though it is indeed unnecessary for me to say anything about that contention in the view which I take as to the contention in para. 17. Now para. 17 raises the question of the "source" of the Rhodesia Metals' profits, viz., the sum of £146,000. The

company (through the liquidator) bought certain tungsten claims from Sir Edmund Davis, and resold them, at a profit, to the St. Swithin's Company. The contracts of purchase (from Davis), and sale (to St. Swithin's Company), were both entered into in London. The capital (£5,000) which Rhodesia Metals employed in order to make the profit was *ab initio* situated in London, and was paid over by it to the St. Swithin's Company in London. The purchase price (£152,000) was received by it in London. The profit (£146,000) was made by it in London. In so far as it (Rhodesia Metals) can be said to have carried on any "trade" or "business" during its brief existence, such trade or business was carried on in London. There are two, and only two, things connecting the transaction with Southern Rhodesia, viz. (a) the fact that the tungsten claims were situated in Rhodesia, and(b) the fact that Rhodesia Metals spent some £2,000 in developing those claims. Mr *Stratford*, in the course of his clear and able argument, has emphasised these two factors, and certainly made the most of them that could be made. I cannot, however, regard these two factors as forming (either singly or together) the dominant causes of the profit made by Rhodesia Metals. I take,

first, the money spent in developing the claims. It is common cause that this money was not spent with the object of enhancing the value of the claims for the purposes of a resale, nor did the expenditure actually enhance the value. It did not, therefore, in my opinion, enter into the question at all. I may say, however, that even if it had enhanced the value to some extent, this would have been a case for apportionment, in my opinion. As to the fact that the tungsten claims were situate in Southern Rhodesia, I cannot regard that as a factor of prime importance in the present case, or as a "dominant" factor.

There are, broadly speaking, two species of sources, viz. (1) the productive employment of capital and(2) manual or intellectual labour. In the present case the second species may be left out of account, for Rhodesia Metals did not gain the profit by labour. I shall therefore take it (subject to what I shall say later) that Rhodesia Metals made the profit of £146,000 by the productive employment of capital (that is to say, the sum of £5,000). Then the sole question is, *where* was the capital employed? In my opinion it was employed in London. It was in London before the transactions in questions took place. It never left London. It did not travel to Southern Rhodesia in order to fertilize the tungsten claims or in order to cause them to produce a profit. It remained throughout in London. The tungsten claims did not appreciate in value between the dates of buying and selling; no revenue was derived from the tungsten claims nor was any ore or metal extracted from them by Rhodesia Metals. In short, the tungsten claims contributed nothing whatsoever to the profit. Had they appreciated in value between the date when Rhodesia Metals bought them, and the date when it sold them, the case would have been quite different; but clearly there was no enhancement in value between the two dates. Everything else connected with the profit-making took place in London, as I have pointed out, and the profit (£146,000) actually came into the hands of Rhodesia Metals in London. Indeed, to put it shortly, the whole affair was a London financial transaction. To use the phraseology of SEARLE, J., in *Commissioner of Revenue v Dunn* the profit sprang from something carried on or *effected* in London; the *origin* of the profit was in London (1918, A.D. at p. 610). Therefore if it be taken that the profit in this case was made by

the productive employment of capital, the "source" of such profit was in London. I wish, however, to emphasize the importance in a case like the present, of the place where the contract of sale was concluded, as a factor in determining the "source" of the profit. There is a class of cases in which the profit is made not so much by means of the capital employed, as by a single transaction of buying and selling (or rather by a single transaction of *selling*, for it is by the sale that the profit is made). In this class of cases the capital, though momentarily employed, is, so to speak, in the background. It plays a minor role. Indeed, it need not exist in a concrete form at all; for instance, in stock exchange transactions, the speculator may make a large sum without using any money; actually he may be a penniless man. In this class of cases the place where the sale took place seems to me to be a most important factor in determining the source. Indeed in Ingram's work on *Income Tax* (pp. 77, 78) it is said that in some cases the place where the transaction was entered into is not a mere factor, but may be utilized as an independent (i.e. as the sole) test. "That is the more so," says the learned author, "where the contracts form the essence of the business." Now in the present case, it will appear from what I have said that, in my opinion, the contracts of purchase and sale in London formed the essence of the business, and were the source of the profit.

For all these reasons I am of opinion that the "source" of the profits made by Rhodesia Metals was in London. As has been said by Australian Courts, "the question (as to the 'source') must be decided as a practical matter of fact - taking the substance of the transaction - and disregarding the form." "Source means, not a legal concept, but something which a practical man would regard as a real source of income"; "the ascertainment of the actual source is a practical hard matter of fact." (See *Ingram's* work, p. 66.) I have tried so to regard the present case, and have come to the conclusion that the substantial source of the profit made by Rhodesia Metals was in England and not in Southern Rhodesia. It follows that in my opinion the profit is not subject to Rhodesian Income Tax, and that the appellant's contention, set forth in para. 17 of the stated case, should be upheld.

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Footnotes

1 9 SATC 349 (*supra*).
2 4 SATC 8.
3 2 SATC 75.
4 1 SATC 133.
5 2 SATC 71.