COMMISSIONER FOR INLAND REVENUE v EPSTEIN 19 SATC 221

Division:	Appellate
Judges:	CENTLIVRES CJ, SCHREINER JA, VAN DEN HEEVER JA, HOEXTER JA AND FAGAN JA
Date:	25 May, 10 June 1954
Also cited as:	1954 (3) SA 689(A)

Income tax - Income - Source - Sale of goods in joint venture with foreign firm - Purchase of goods effected by taxpayer in Union - Sales negotiated outside the Union by foreign firm - Goods sold shipped directly by taxpayer to foreign purchasers - Payment by purchasers received by taxpayer in Union - Gross profits on sales shared equally between taxpayer and foreign firm - Share received by taxpayer the product of activities carried on by him within the Union -Such income derived from source within the Union - Section 7, Act 31 of 1941.

Appeal from a decision of the Transvaal Provincial Division (Dowling, J., and Bresler, A.J.) 1 dismissing an appeal from the Special Court for hearing Income Tax Appeals.

Respondent, who carried on business in Johannesburg as an agent of foreign firms, had entered into an agreement with a partnership carrying on business in Argentina under which respondent and the partnership were associated in the purchase of asbestos in the Union and its sale by the partnership in Argentina.

Under the terms of the arrangement included in this agreement, the partnership in Argentina found purchasers of asbestos in that country and then notified to the respondent the quantity and quality of asbestos required, the price which could be paid for it, and the producer who should be approached to supply it.

The respondent thereupon approached the producer designated and ascertained from him the quantity of the required quality available and its price f.o.b. This information was cabled to the partnership, which then concluded a sale in its own name to the prospective purchaser, on terms based upon this information.

On the conclusion of this sale by the partnership, its particulars were advised by cable to the respondent who was instructed to conclude a purchase from the producer in his own name on the terms and conditions quoted.

When respondent had concluded his purchase, he advised the partnership, which thereupon required the purchaser in Argentina to open a credit in favour of the respondent at a bank in the Union, covering the purchase price due by the purchaser in Argentina plus the cost of freight and insurance. When this credit had been established the respondent arranged in his own name for the shipment of the asbestos directly to the Argentine purchasers and paid all expenses in connection therewith.

The balance remaining of the amount of the credit after payment of the amount due to the producer and the costs of shipment was divided evenly between the respondent and the partnership. Each of the participants met his own costs and overhead expenses.

On one occasion when a shipment was made at a loss, the loss was borne by the respondent and the partnership in equal shares.

The Commissioner for Inland Revenue having included in respondent's taxable income the amounts received by him from these transactions during the years of assessment ended 30th June, 1946, and 30th June, 1947, respondent appealed against the assessments made upon him. The Special Court having allowed his appeal on the ground that the amounts so received were derived from a source outside the Union, the Commissioner appealed from that decision to the Transvaal Provincial Division of the Supreme Court.

The Transvaal Provincial Division dismissed the appeal, confirming the decision of the Special Court. On appeal:

Held, allowing the appeal (Schreiner, J.A., dissenting), that as the amounts received by the respondent constituted the return to him for the work and services rendered by him within the Union, they had been received by him from a source within the Union and had rightly been included in his assessments.

W. G. Trollip (with him *J.C.C. van Loggerenberg*), for the appellant: Even if *Sulley v The Attorney-General*, 157 E.R. 1364; *Grainger & Son v Gough*, [1896] A.C. 325; *Lovell & Christmas, Ltd. v Commissioner of Taxes*, [1908] A.C.

46, and *Commissioner of Taxes of Western Australia v D. and W. Murray*, 42 C.L.R. 332, are applicable in the determination of the source of income, under section 7 of Act 31 of 1941, they were wrongly applied to the facts of the present case. The basis of these decisions is that it is the contracts of sale which directly and immediately yield the profits and the place where these contracts were concluded is therefore the location of the profits. See *Lovell's case, supra*, at 52-3; *Commissioner of Taxes v Dunn & Co. Ltd.*, 1918 A.D. at 609-10. In the present case the sales in the Argentine preceded the purchases of the asbestos in the Union and it was therefore the latter event which directly and immediately yielded the profits. In any event, the above cases do not provide either a decisive or a proper test or a safe guide for determining the source of income under section 7 because the wording of the statutes in those cases is materially different. Also, in consequence of the wording in those statutes, the test or approach in those cases was to ascertain the place where the profits were made and the place where the trade or business that produced those profits was located, and for that purpose, the place where the sale contracts were concluded was
treated as decisive. Further, our courts have not regarded the place where sale contracts are concluded as being decisive of the source of profits under section 7. See *Millin v C.I.R.,* 1928 A.D. 207;2 *Overseas Trust Corporation, Ltd. v C.I.R.*, 1926 A.D. 444;3 *Kerguelen Sealing & Whaling Co., Ltd. v C.I.R.*, 1939 A.D. 487;4 *Rhodesia Metals Ltd.*

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(In Liquidation) v Commissioner of Taxes, 1938 A.D. 282;5 1940 A.D. 432.6 Further still, the test or approach adopted in Sulley's case and the other cases, supra, does not accord with the principles laid down in *C.I.R. v Lever Bros. & another*, 1946 A.D. at 441, 452, 453, 459 7 and the distinction becomes clear by comparing the relative part of the judgment in *D. & W. Murray's* case*, supra,* with the judgments in the *Lever Bros.'* case, *supra*, where the first question asked is why were the profits earned, and then, the cause having been ascertained, the location thereof is fixed. The income of joint ventures or partnerships as such is not taxed under Act 31 of 1941 but the individual members thereof are taxed on the income that is received by or accrues to each therefrom. See section 67(7); *Sacks v C.I.R.*, 1946 A.D. 31.8 Regard must therefore be had to 'the originating cause' of the amounts received, not by the joint venture, but by respondent, as income. See section 7, *Lever Bros.'* case, *supra*, at 450. The originating cause of such income in respondent's hands was the making of the joint venture agreement with Hendrickse & Co. and the work which respondent did, under and in terms of the agreement; of *Lever Bros*.' case, *supra*, at 456. As the joint venture agreement was concluded in the Union and respondent's work thereunder was carried out in the Union, the source of such income in respondent's hands was in the Union. Alternatively, if it is the profits of the joint venture that must be regarded, the source of such profits was in the Union as the originating cause of those profits was the purchasing of the asbestos by respondent which took place in the Union, or, alternatively, the source of such profits was partly in the Union and partly in the Argentine, the Union source was the work and activities of respondent and as respondent's share of those profits accrued to him by virtue of that work and those activities, the source of the whole of that share was in the Union. Under section 7 it is possible to have a dual source of income; see *Commissioner of Taxation v Kirk*, [1900] A.C. 588; Rhodesia *Metals Ltd v Commissioner of Taxes*, 1940 A.D. at 436; Lever Bros.' case, supra, at 451, 454. In such a case that part of the income accruing from the Union source would have to be ascertained, but in the present case the joint venture agreement and the facts clearly determine that amount as being respondent's share of the profits. If the test laid down in the *Rhodesia Metals Ltd*. case, 1938 A.D. at 300; 1940 A.D. at 436, is still applicable in our law and is applied in the present case, the practical man would regard the real source of respondent's income as being in the Union.

D. Gould, Q.C. (with him *D. Spitz*), for the respondent: The question what tests have to be applied under our Act for the purpose of determining the source of income derived from trading in commodities in cases such as the present where the trading activities are divided between the Union

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and other countries, was left open by the Privy Council in *Rhodesia Metals Ltd v C.I.R.*, 1940 A.D. at 437, and has not been specifically determined by our courts. The test laid down by decisions under English, New Zealand and Australian revenue statutes, which was adopted by the court *a quo*, namely that the source of income in such cases is the place where the sales of the commodities are habitually concluded, though not the only test to be applied, is both valid and fundamental to the determination of the source of income under our Act in cases such as the present. Income is the gain derived from capital or from labour or from a combination of both. See *C.I.R v Lever Bros*., 1946 A.D. at 449, 457; *Coltness Iron Co. v Black*, 6 A.C. 315. It may be derived, *inter alia*, through the self-employment and self-utilization of both capital and labour in the pursuit of gain. See *Lever Bros*.' case, *supra*; la Brie, *The Meaning of Income in the Law of Income Tax*, p. 57. In this event the taxpayer is, from the practical standpoint, in business. 'Business' therefore covers a very wide range of activity since it includes every combination of capital and labour. In some cases the labour factor, which includes personal skill and wit, is dominant; in others, the capital factor. Where, therefore, the capital and the labour of the business are respectively employed in two different countries, the source of the income is, strictly speaking, located in neither country. But for purposes of income tax in such cases, the source of income is normally held to be located in the country where the dominant factor is to be found. See Gunn, *Income Tax*, 3rd ed., para. 341; *Rhodesia Metals Ltd*. case, 1938 A.D. at 290-1; *Davis v Commissioner of Taxes*, 1938 A.D. 301.9 Within the category of 'business' there exists the narrower connotation of 'trade', that is, a type of

business in which there is the prime element of purchase and sale of commodities. See la Brie, *supra*, at p. 63; *Grainger & Son v Gough*, [1896] A.C. at 345, and cf. Hannan & Farnsworth, *Principles of Income Taxation*, p. 152. See further *Forth Conservancy Board v I.R.C.*, [1931] A.C. at 545. A trade is carried on where a person habitually and as a matter of contract supplies money's worth for full money payment. See *Brighton College v Marriott*, [1925] 1 K.B. 312; Farnsworth, *Income Tax Case Law*, at pp. 15-17, 126. Ordinarily a continuity of transactions is essential to constitute a trade. See Farnsworth, *supra*, at p. 17. But in some cases an isolated transaction is sufficient. See *Stephan v C.I.R.*, 1919 W.L.D. at 7. In the broad sense, the income is the income of the trade as an organism. See *Graham v Green*, [1925] 2 K.B. at 40. But the dominant income-producing factors of a trade are the selling of commodities and the control of the trade itself. The mere employment of capital and the buying of goods for resale in themselves produce no income. See *Rhodesia Metals Ltd*. case, 1940 A.D. at 436; 'Some Aspects of Source of Income' (article by J. Lavine in *The Taxpayer*, vol. I, at p. 138). 'Trade' is the business of selling, with a view to profit. See *Grainger's* case, *supra*, at 345, 346, 336. For the purpose of determining whether a trade is

'exercised within the United Kingdom' for purposes of income tax, 'the English courts have always attached great, almost overwhelming, importance to the question whether the contracts for the sale of goods out of which the profits arose were habitually made in the United Kingdom'. See *Wilcock v Pinto & Co*., 9 T.C. at 133; *Sulley v A-G*., 2 T.C. 149; *Grainger's* case, *supra*; *Maclaine & Co. v Eccott*, [1926] A.C. 424; *Nielson Anderson & Co. v Collins*, [1928] A.C. 34; *Morden Rigg & Co. v Monks*, 8 T.C. 450; Hannan & Farnsworth, *supra*, at pp. 307-13. The place where the contracts are made does not, however, provide a universal and decisive test. See *Smidth & Co. v Greenwood*, 8 T.C.
at 203-4. Another test applied in the English courts for determining the same question is the *situs* of control. See *San Paulo(Brazilian) Rly. Co. Ltd. v Carter*, [1896] A.C. 31; *Ogilvie v Kitton*, 5 T.C. 338. These decisions are applicable in determining the source of income derived from trade for the purposes of Act 31 of 1941. For the foregoing reasons the originating causes of source of income are the dominant factors of the trade, namely, the selling of commodities and the control of the trade and these factors are located at the place at which they occur. See *Rhodesia Metals Ltd*. case, 1938 A.D. at 299-300. Furthermore, the English decisions have been held to be applicable in determining the source of income under New Zealand and Australian statutes. See *Lovell & Christmas Ltd. v Commissioner of Taxes*, [1908] A.C. 46; *Commissioner of Taxes of Western Australia v Murray*, 42 C.L.R. 332. And our courts have already recognized that the tests laid down in the English decisions would, in suitable cases, be applicable in determining the source of income under our Act. The category of cases in which they would be so applicable has not, however, been judicially defined. See *Rhodesia Railways & others v Commissioner of Taxes*, 1925 A.D. at 463.10 *Rhodesia Metals Ltd*. case, 1938 A.D. at 297; *Overseas Trust Corporation Ltd. v C.I.R.*, 1926 A.D. at 454. The above tests are applicable in determining the source of income under our Act in all cases involving income derived from trade, that is income derived from the business of habitually buying and selling goods. If this is correct, *Millin's, Overseas Trust, Kerguelen Sealing* and *Rhodesia Metals* cases quoted for appellant are distinguishable and the tests therein laid down become inappropriate and inapplicable to a case such as the present one. Accordingly, the source of the income of the joint venture in the present case was in the Argentine inasmuch as all the sales of asbestos were concluded there and the control of the joint venture was located there. The fact that the sales by the joint venture preceded the purchases is immaterial. The profit arose exclusively from the sales; see *Grainger's* case, *supra*. In any event, the purchases were negotiated before the sales took place. If the source of the income of the joint venture was in the Argentine, it follows as a matter of law that the source of respondent's share of such income was also in the Argentine. The income of a partnership accrues to the partners jointly and the source

of each partner's share is the trade carried on by the partnership and not the partnership agreement. See *C.I.R. v Lever Bros. & another*, 1946 A.D. at 455, 459; 'Partnerships and Partners in Income Tax Law' (article in *The Taxpayer*, vol. II, pp. 63 and 82). A partner's share of the profits of a partnership does not represent remuneration for services rendered, as contended for appellant. Appellant's contention is based upon a suggested relationship between respondent and Hendrickse which is divorced from the facts; cf. *C.I.R. v Dunn*, 1918 A.D. at 614. Appellant's contention based on the apportionment of the profits in the present case is based on a misreading of *Kirk's* case, the effect of which was considered and interpreted in *Millin v C.I.R.*, 1928 A.D. at 216. See, too, *Commissioner of Taxes v D. & W. Murray*, 42 C.I.R. at 346; Gunn, *supra*, para. 341.

Trollip, in reply.

Cur. adv. vult.

Postea (10th
June).

CENTLIVRES CJ: The respondent is resident in Johannesburg where he carries on a business as agent for foreign firms, in addition to which he is associated in business with a partnership known as Hendrickse and Company which carries on business in Buenos Aires, Argentina. The respondent's association with that firm dates from 1944 when he met one of the members of the firm who was then on a visit to the Union. They

then entered into a verbal agreement which was to endure for a period of thirteen years. It was reduced to writing on 3rd March, 1947, and was signed at Johannesburg both by the respondent and by a member of Hendrickse and Company. The preamble to the agreement described Hendrickse and Company as the 'first parties' and the respondent as the 'second party'. The relevant clauses of the agreement are as follows:

'1. That this agreement shall take effect as from the 1st day of February, 1947, and shall continue for a period of ten(10) years from that date.

2. That the second party undertakes that all commodities exported by him during the period of this agreement to Central and South America shall be exported through the first parties exclusively, who hereby undertake that they will either purchase the said commodities themselves or will dispose of them as agents for the second party.

3. That the second party will import all commodities from Central and South America exclusively through the first parties, except in cases where he is already under an obligation to import through other agents.

4. That the profits made by the parties on the export and import of commodities under this agreement shall be pooled, and the first parties shall be entitled to one-half (½) of these profits and the second party to the other half. In ascertaining the said profits the overhead expenses of the parties shall not be taken into account. The first parties shall bear their own overhead expenses and the second party shall bear his own overhead expenses.

5. That the profits from time to time in the hands of either of the parties shall be payable by the one party on the demand of the other party.'

In the stated case the following particulars are given in regard to the carrying out of the arrangement under clause 2 of the agreement between Hendrickse and Company and the respondent, who is referred to in these particulars as the appellant:

'(a) Hendrickse and Company solicit orders from persons in the Argentine for the sale of asbestos to the latter;

(b) upon receipt by them of such an order, Hendrickse and Company cable to the appellant informing him of the particular type of asbestos required and instructing him as to which South African producer he has to approach with a view to obtaining the asbestos and what price he has to offer;

(c) the appellant approaches the producer so designated and ascertains from him the available quantity and the f.o.b. price of the type of asbestos required. If the producer quotes a f.o.b. price in excess of that offered by Hendrickse and Company, the appellant informs him of the price offered and a compromise is invariably reached;

(d) the appellant informs Hendrickse and Company by means of cable as to the outcome of his inquiries and, armed with this information, Hendrickse and Company in the Argentine conclude in their own name a sale of the asbestos to the person who placed the order (hereinafter referred to as "the purchaser");

(e) full particulars of the sale are cabled to the appellant by Hendrickse and Company who instruct him to conclude as between the appellant and the producer, a purchase of the asbestos on the basis, both as to the quantity and f.o.b. price, of the producer's previous quotation;

(f) the appellant effects the purchase in his own name and informs Hendrickse and Company thereof by cable;

(g) upon receipt of this advice, Hendrickse and Company call upon the purchaser in the Argentine to open a letter of credit in favour of the appellant and payable at a bank in the Union. The letter of credit is for the full amount of the purchase price due by the

purchaser plus the amount of the freight, and covers also the cost of insurance, if insurance is not arranged by the purchaser in the Argentine;

(h) when he receives the letter of credit from the bank, the appellant makes arrangements, through a firm of shipping agents, for the shipment of the asbestos direct to the purchaser in the Argentine;

(i) the asbestos is shipped in the name of the appellant as the consignor and all the shipping documents are made out in his name;

(j) by agreement between the appellant and the producer, the purchase price of the asbestos is payable

to the latter only upon receipt of the Government weighbridge certificate given at the point of embarkation whereas the letter of credit arranged by the Argentine purchaser is payable on production to the bank of the bill of lading;

(k) generally the appellant so arranges matters that he draws on the letter of credit before he pays the producer, but it happens on occasion that he has to pay the producer before he can draw against the letter of credit and in such a case payment to the producer is made out of the appellant's own funds or partly out of his own funds and partly out of moneys held by him on behalf of Hendrickse and Company in the circumstances set out above;

(l) the appellant never has any communication with the purchaser.'

No question arises under clause 3 of the agreement as the respondent has not as yet imported any commodity from Central or South America.

The amount of the profit and the division thereof under clause 4 of the agreement is effected as follows:

The respondent draws against the letter of credit referred to in para. (g) above to the full extent of the amount for which the asbestos has been sold in the Argentine and deducts therefrom the amount paid by him to the producer in respect of the purchase price of the asbestos. The difference between these two amounts represents the profit which is divided equally between the parties. The respondent renders a statement of account in respect of each transaction to Hendrickse and Company and remits to them in due course their half-share of the profit. The greater portion of Hendrickse and Company's share of the profit is remitted to them upon conclusion of the transaction and the balance thereof later. These transactions are operated through the respondent's own banking account.

It is to be noted that in the agreement no provision is made for the sharing of any losses but upon one occasion in 1947 a purchaser in the Argentine repudiated his contract after the asbestos had been shipped and payment had been made to the producer. Ultimately Hendrickse and Company sold the asbestos to the original purchaser but at a much lower figure than the original seller's price. The resultant loss was borne equally by the respondent and Hendrickse and Company.

In connection with his association with Hendrickse and Company the respondent renders no services and spends no money outside the Union.

Out of his transactions with Hendrickse and Company the respondent made a net profit of £2,707 in respect of the income tax year which ended on 30th June, 1946, and £5,074 in respect of the income tax year which ended on 30th June, 1947. In his determination of the respondent's liability for normal and super tax in respect of those years of assessment respectively the Commissioner included those amounts in the respondent's taxable income and income subject to super tax.

The respondent appealed to the Special Court on the ground that the amounts of £2,707 and £5,074 were not derived from a source within the Union and were accordingly not subject to tax in terms of the Income Tax Act. Before the Special Court the Commissioner contended that those amounts had been derived from a source within the Union.

The Special Court held that those amounts were derived from a source within the Argentine and not from a source within the Union. It accordingly ordered the assessments to be amended. The Commissioner appealed to the Transvaal Provincial Division which dismissed the appeal and he now appeals to this Court.

The question in issue in the present case is whether the gross profits which accrued to the respondent out of his transactions with Hendrickse and Company constituted 'gross income' as defined by section 7 of Act 31 of 1941. The answer to this question depends on whether those gross profits accrued 'from any source within the Union'. It was not contended on behalf of the Commissioner that the source was one 'deemed to be within the Union'.

The learned President of the Special Court based his judgment on the cases of *Sulley v The Attorney-General*, 157 E.R. 1364; *Grainger and Son v Gough*, [1896] A.C. 325, and *Lovell & Christmas Limited v Commissioner of Taxes*, [1908] A.C. 46. Dowling, J., who delivered the judgment in the Provincial Division, said that all those cases were reviewed in *Commissioner of Taxation of Western Australia v D. and W. Murray Limited*, 42 C.I.R. 332, and concluded by saying:

'I find the reasoning in this case compelling and convincing. The inquiry as to the source of the accrual of the amounts in issue is precisely the same as the inquiry as to the source of profits in the case of *D. and W. Murray Limited*.'

In view of the reliance placed on the above-mentioned cases by the courts *a quo* and by counsel for the respondent in this Court it becomes necessary to consider to what extent, if any, those cases may be regarded as persuasive authorities in relation to the facts of the present case.

In *Sulley v The Attorney-General*, *supra*, the appellant was a partner in a firm which carried on business in New York. He resided in England and bought goods there. None of these goods were resold in England; they were shipped to New York where the firm resold them at a profit. The

question was whether the appellant was liable to make a return of the whole of the profits earned by the firm by the export of goods from England and the sale of them in the United States, for the purpose of assessing the firm to income tax. *Vide* the report in the Court of Exchequer, 157 E.R. 1046 at 1049. That Court (Pollock, C.B., Martin, B., and Watson, B.) unanimously answered that question in the affirmative. The Exchequer Chamber (Cockburn, C.J., and five other judges) unanimously reversed the decision of the Court of Exchequer. In giving the judgment, Cockburn, C.J., said:

> 'The question is, whether there is a carrying on or exercise of the trade in this country. I think there is not, looking at the sense in which the term is used and having regard to the subject-matter of the statute. Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz. where his profits come home to him. That is where he exercises his trade . . . The profits which come home to this country as the share of the individual partner resident here are taxable; but as to the main profits which go into the pockets of the partners in America, we think they are not.'

Sulley's case would have been more in point if the Commissioner in the present case were seeking to tax the profits made on the resale of asbestos from the Union by Hendrickse and Company which is a foreign firm having its principal place of business in the Argentine. That is not the claim made by the Commissioner in the present case; the whole of appellant's business is carried on in the Union, and that seems to me to be where his share of the profits 'come home' to him.

In *Grainger and Son v Gough*, *supra*, it was held that a foreign merchant, who canvassed through agents in the United Kingdom for the sale of his merchandise to customers in the United Kingdom, did not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and deliveries of the merchandise to customers were made in a foreign country. Here again the Crown was seeking to tax a foreign merchant whose principal place of business was outside the United Kingdom and who did not sell any goods there.

The case of *Lovell & Christmas Limited v Commissioner of Taxes*, *supra*, was similar to the above two cases, which the Privy Council applied.

In the case of *Commissioner of Taxes of Western Australia v D. and W. Murray*, *supra*, a company which had its head office in England had a branch in Western Australia which sold goods consigned to them by the head office in England. It was not disputed that the company was liable to pay income tax on the profits it made on the sale of goods in Western Australia; what was in dispute was whether there should be excluded from the calculation of such profits certain credits made by the head office in London to the Western Australian branch. The High Court of Australia

held that those credits should not be excluded. I do not think that this case is of any real assistance in the present case.

It should be noted that the cases of *Sulley and Lovell & Christmas Limited, supra*, were, according to the report of *Liquidator Rhodesia Metals Limited (In Liquidation) v Commissioner of Taxes*, [1940] A.C. 774,11 strongly relied on by appellant's counsel but the Judicial Committee of the Privy Council pointed out at pp. 788-9 (pp. 435-6 of 1940 A.D.) that

> 'decisions on the words of one Statute are seldom of value in deciding on different words in another Statute: and that different business operations may give rise to different taxing results. If the charging words of the English Statute are looked at, "(i) annual profits or gains arising to any person, (ii) residing in the United Kingdom from any trade wherever carried on, and(iii) whether (or not) resident in the United Kingdom from any trade exercised within the United Kingdom": they are obviously different from the Southern Rhodesian charging words, "total amount (other than capital) received by any person from any source within the Territory". It is desirable also to
> point out that at any rate for different taxing systems income can quite plainly be derived from more than one source even where the source is business.'

A lengthy argument was addressed to us on behalf of the respondent on the source of income from business and on the source of income from trade, the contention being that within the category of 'business' there exists the narrower connotation of 'trade', i.e. a type of business in which there is the prime element of purchase and sale of commodities. However appropriate these distinctions may be in interpreting English income tax legislation, they seem to me to be out of place in considering the proper interpretation to be placed on the definition of 'gross income' in section 7 of our Act, which definition makes no mention of business or trade.

The most recent cases in this Court on the question are *Commissioner for Inland Revenue v Lever Brothers and another*, 1946 A.D. 441,12 and *Boyd v Commissioner for Inland Revenue*, 1951(3) S.A. 525 (A.D.).13 In the former case Watermeyer, C.J., reviewed a large number of cases and on p. 454 indicated that it was probably an impossible task to formulate a definition which would furnish a universal test for determining when an amount 'is received from a source within the Union'. I may add that the Legislature, which was probably aware of the difficulty in defining the phrase 'source within the Union', gave no definition. Consequently it is for

the courts to decide on the particular facts of each case whether 'gross income' has or has not been received from a source within the Union. On p. 450, Watermeyer,

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C.J., said that the inference which he thought should be drawn from the decided cases

> 'is that the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income, and that the originating cause is the work which the taxpayer does to earn them, the *quid pro quo* which he gives in return for which he receives them. The work which he does may be a business which he carries on, or an enterprise which he undertakes, or an activity in which he engages and it may take the form of personal exertion, mental or physical, or it may take the form of employment of capital either by using it to earn income or by letting its use to someone else.'

The views of Watermeyer, C.J., find support in what Solomon, C.J., said in the case of *Millin v Commissioner for Inland Revenue*, 1928 A.D. 207.14 In that case Mrs Millin wrote books in the Union and granted to her publishers in England the right of printing and publishing her novels in Great Britain and elsewhere, they undertaking to pay her a percentage of the price of the books as royalties. It was held that the source of the whole of her income was the Union. At p. 216 Solomon, C.J., said:

> 'It was the exercise of her wits and labour that produced the royalties. They were employed in the Union, and it matters not, on the analogy of the *Overseas Trust* case, that the grant to her publishers of the right to publish her book was contained in a contract made in England. Her faculties were employed in the Union both in writing the book and in dealing with her publishers, and, therefore, on the test applied in the cases cited, the source of the whole of her income would be in the Union.'

Applying what Solomon, C.J., said in *Millin's* case - which was not referred to in the judgments of the Special Court and the Provincial Division - to the facts of the present case there can, in my opinion, be no doubt that the respondent's profits in connection with his dealings in asbestos were received from a source within the Union. He carries on business in Johannesburg. He renders no services and spends no money outside the Union in connection with his association with Hendrickse and Company and he uses his own banking account for the purpose of financing the transactions in respect of asbestos. All of the activities of the respondent were carried on in the Union and it was as a result of these activities that he earned the profits which the Commissioner now seeks to tax. It therefore follows that those profits were received from a source within the Union.

It was debated at the Bar whether the association of the respondent with Hendrickse and Company was that of a partnership. It is unnecessary to decide what their legal relationship was. I shall assume that they were associated as partners. Under the Income Tax Act, 1941, a partnership,

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unlike a legal *persona* such as an incorporated or registered company, is not regarded as a legal entity for the purposes of assessment. Section 67(7) provides that separate assessments shall be made upon partners. Even on the assumption I have made, the source of the respondent's profits derived from his association with Hendrickse and Company was within the Union, whatever the source of the profits accruing to Hendrickse and Company may have been. In taxing the respondent the Legislature looks at his activities and ascertains whether those activities were exercised within the Union; if they were, then he is taxable in respect of any profits resulting from such activities. It may be said that when there is a partnership the members of which carry on their business activities in two different countries, the income of the partnership is derived from two sources and that when one of the partners carries on his business activities in the Union his income from the partnership is derived from a source within the Union while the income of the other partner is derived from a source in a foreign country. For the income which the partner, who carries on his business activities in the Union, receives is the *quid pro quo* for the services he renders in the Union to the partnership.

For these reasons I am of opinion that the appeal should be allowed with costs in this Court and in the Provincial Division and that the order made by the Special Court should be altered so as to read 'appeal dismissed'.

SCHREINER, J.A.: I will take as my starting point the statement of Watermeyer, C.J., in *Commissioner for Inland Revenue v Lever Brothers and another*, 1946 A.D. 44115 at 450, that

> 'the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income'.

The learned Chief Justice went on to use language which might suggest that the source is always where the taxpayer himself does or has done the acts which result in his receiving the income, but that cannot have been the
Chief Justice's intention. For example, if he is being taxed in respect of dividends it is not material where he bought the shares or where he keeps the share certificates. (*Boyd v Commissioner for Inland Revenue*, 1951(3) S.A. 525 (A.D.).16) The learned Chief Justice went on to point out that the work that the taxpayer does may be

> 'a business which he carries on, or an enterprise which he undertakes, or an activity in which he engages, and

it may take the form of personal exertion, mental or physical, or it may take the form of employment of capital . . .'

In the present case we are concerned with receipts which are the profits of a business, the business of buying asbestos in South Africa and selling it in Argentina.

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This is an appropriate point at which to emphasize again that our Income Tax Act treats the residence of the taxpayer, for present purposes, as irrelevant. Equally is it irrelevant where he, generally speaking, carries on business or where his principal place of business is situated. What is very relevant and may be crucial is where he carries on the business from which the income in question is derived. And, since a business may be carried on through partners or other agents the place where the taxpayer's income originates is not where he himself personally exerts himself, assuming that he does so, but where the business profits are realized.

I do not think that it makes any difference whether one describes Hendrickse and Company (I shall call the firm 'Hendrickse') and the respondent as partners or as co-adventurers or by some other name. For all relevant purposes they were partners in the usual meaning of that term; it makes no difference, in my view, that each paid his own overhead expenses. Where a partnership makes profits by buying goods in one country and selling them in another the position seems to me to be no different, for present purposes, from the case of a single merchant who does the same thing. Where his profits originate does not in any way depend on whether he spends all or most of his time in one country or in the other, or indeed on whether he ever visits either of them. Here the partnership of Hendrickse and the respondent bought asbestos in South Africa through the South African partner and sold it in Argentina through the Argentine partner. For present purposes it would have made no difference if from time to time they had changed places. The transactions in both countries were the transactions of both partners and the income which each received originated in the same place, wherever that might be.

The question, therefore, is whether the business from which the profits were derived produced those profits in South Africa or in Argentina. Theoretically there are two other possibilities - that the business produced all its profits in both countries or that it produced part of its profits in each country. It would no doubt be possible for an Income Tax Act to be so framed as to tax the whole of the profits flowing from the purchase and sale of goods if any part of the double transaction were carried on within its frontiers. But there is no indication in the provisions of our Act that such is its effect. It provides, after all, for a tax on income, not for a licence on businesses. In regard to the suggestion of apportionment, this, in the absence of any statutory guide to its operation, would be practically unworkable in a case of this kind. Where work has been done in producing or improving raw material which is sold elsewhere by the same person, it might be possible to apportion, and even in a case like the present, had there in the tax years been profits from the purchase of Central and South American goods and their sale in South Africa there might also have been room for the principle. The matter was discussed in *Millin v Commissioner for Inland Revenue*, 1928 A.D. 207,17 where at pp. 218-19 *Lovell & Christmas*

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v. Commissioner of Taxes, [1908] A.C. 46, was quoted as confirming the view that in the earlier case of *Kirk*

'the Privy Council did not decide that, wherever any process in the earning of profits was carried on, some portion of the income was taxable in the country in which the process was carried on'.

In the present case there would, it seems, be no justification for attempting to apportion the profits between Argentina and South Africa.

As between two countries in one of which goods are bought and in the other of which they are sold, the combined transactions resulting in a profit, such authority as exists is strongly if not uniformly in favour of the view that it is the country in which the goods are sold that is the country of origin of the profit. It is true that there is no case in this Court that has so decided and there are at least two from which by drawing an analogy a different basis can be supported. The first of these is *Millin v Commissioner for Inland Revenue*, *supra*. That was not a case of buying and selling goods. Although, as was pointed out, the income was derived not only from writing books but also from selling the copyright in return for royalties, the latter was merely a method of gaining recompense for the skill and industry of the author. The other case is *Rhodesia Metals Ltd. v Commissioner of Taxes*, 1938 A.D. 282,18 which was confirmed, for somewhat different reasons, by the Privy Council, 1940 A.D. 432.19 Lord Atkin, in giving the judgment of the Judicial Committee, expressed a doubt at p. 436 whether the words 'productive employment of capital', which had been used by Stratford, C.J., in this Court, really help to define the situation, and proceeded,

'Is capital productively employed in the place where it purchases stock which is profitably sold elsewhere; or in the place where the stock which now represents the capital is sold; or for purposes of the test must both purchases and sales occur in the same place; or is it sufficient that the place of the direction of the employment of the capital in purchasing or selling should denote where the capital is productively employed?'

Pausing here for a moment it should be noted that the directions as to the purchases of asbestos came from Argentina; it was Hendrickse, the expert dealer in asbestos, who was really in control. Lord Atkin

concluded by saying that whatever might be the right view of the source of receipts derived from trading in commodities the business operation in that case was quite a different one.

I do not think that any of the other South African cases approaches nearer to the present problem than do these two. On the other hand the overseas cases which were cited to us carry a great weight of persuasive

authority, and authority which, once it is clear that we are seeking the source of a profit derived from buying and selling goods, bears directly upon the question before us. In *Sulley's* case, 157 E.R. 1046 and 1364, Sulley himself was taxable because he was resident in England, that being in accordance with the British Act. The other partners were in the same position as Hendrickse and, if I am right in thinking that the respondent stands on exactly the same footing as Hendrickse, the case is directly in point. It was approved in *Grainger v Gough*, [1896] A.C. 325, where at p. 341 Lord Watson referred to it as having recognized that there may be transactions of a foreign merchant in the United Kingdom so intimately connected with his business abroad that without them it could not be carried on successfully which would nevertheless not constitute a carrying-on of a trade in the United Kingdom. And the buying of goods in the United Kingdom for sale abroad, as in *Sulley's* case, provides an illustration of such situations (cf. *Smidth v Greenwood*, [1921] 3 K.B. 583 at 593-4). Dowling, J., in the present case was impressed by the reasoning in *Commissioner of Taxation of Western Australia v Murray Limited*, 42 C.L.R. 332. It is unnecessary to examine in detail the facts or the legislative provisions there in question. The taxpayer was a company buying soft goods in London and selling them in Western Australia, tax being payable on 'all profits made in Western Australia'. In deciding that certain sums were included in such profits the High Court of Australia said, in the passage quoted by Dowling, J.,

> 'In our opinion the place where the whole profit of such a business is made is where the goods are sold. It is, of course, true that buying the goods is a necessary part of a business of this kind, which derives its profits from selling them. It is also true that skill and judgment in buying are or may be essential to the successful and profitable conduct of the business. But it does not follow that in order to determine where the profits were made it is proper to inquire into all the causes, which, in combination or in succession, operated to produce them. If it were possible to discover and discriminate among the innumerable factors which contributed to a profitable exercise of a trade and to assign locality to each of them, still no light would be thrown upon the place where the profits were made. To attempt to appraise the relative efficacy or potency of these contributory factors, when and if ascertained, and to distribute the profit accordingly among the localities to which the factors have been assigned, is to lose sight of the true nature of the question, which is not why, but where, the profits were earned. The case is not one in which operations in one place have produced a merchantable commodity, or have given or added value to things marketed in another. In such cases value or wealth has been produced or increased and is contained in disposable assets. In other words, unrealized profits exist in the territory whence they are transported for purpose of sale.'

The last few sentences are interesting in connection with the application of *Millin's* case, *supra*. I agree with Dowling, J., in finding the above statement a clear and convincing exposition of principles which seem to rest in good sense and, in the absence of statutory provision to the contrary, to be applicable wherever the question is where profits are made or, to use again the language of Watermeyer, C.J., where is to be found the originating cause of the profits being received as income.

It remains to refer to a factor relied upon on behalf of the appellant. It appears from the stated case that in practice the contracts of sale were effected in Argentina before the corresponding purchases were made in South Africa. The contention was advanced that, whatever may be the usual position, the profits in this case were made not by selling goods at a profit but by buying them at a discount. But I do not think that this difference in practice goes to the root of the matter. Essentially the profit in all such cases is the surplus of money that comes from the sale at a higher figure than the purchase price. In *Maclaine and Company v Eccott*, [1926] A.C. 424, I gather from the statement of facts at p. 425 that in some of the transactions under investigation the sales preceded the purchases of the goods to meet those sales. No distinction was, however, made between the cases, and, with respect, I think rightly. Various factors of convenience might decide whether firm contracts should be made first at one end of the profit-making transactions or at the other, but the fundamentals would in either case be the same.

In my view the conclusion reached by the Special Court and the Transvaal Provincial Division was the correct one, and I would dismiss the appeal with costs.

VAN DEN HEEVER, J.A., HOEXTER, J.A., and FAGAN, J.A., concurred in the judgment of CENTLIVRES, C.J.

Footnotes

1 19 SATC 143. 2 3 SATC 170. 3

2 SATC 71.
4 10 SATC
363. 5 9 SATC
363. 6
11 SATC
244. 7 14 SATC
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8 13 SATC
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10 1 SATC
133. 11 11 SATC
244. 12 14 SATC
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366. 14 3 SATC
170. 15 14 SATC
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17 3 SATC 170.
18 9 SATC 363.
19 11 SATC 244.