TRANSVAAL ASSOCIATED HIDE AND SKIN MERCHANTS v COLLECTOR OF INCOME TAX BOTSWANA 29 SATC 97 1967(BCA)

Division: Court of Appeal Botswana
Judges: ROPER P, SCHREINER JA AND MAISELS JA
Date: 8 February and 23 May 1967

Income tax - Source - Company carrying on business in South Africa purchasing hides at abattoir in Botswana - Hides processed at abattoir by purchaser for purposes of curing and transportation - Dominant factor in accrual of income derived from sales of processed hides - To be found in processes making sale possible rather than in effecting sales -Source of income from sales to be located where such processes carried out - Double Taxation Agreement between Governments of United Kingdom and South Africa - Not applicable - Income Tax(Consolidated) Proclamation(Bechuanaland), 1959.

Appeal from a decision in the High Court of Botswana, dismissing an appeal against a decision of the Collector of Income Tax, Botswana.

Appellant was a company incorporated in the Republic of South Africa and having its head office in Johannesburg and a branch office in Pretoria. The management and control of the company were in Johannesburg.

The business of the company was the buying and selling of hides and skins and other by-products of livestock, such as hooves and horns. These articles were purchased at abattoirs where the animals were slaughtered, but the sales were effected from the offices of the company at Johannesburg and Pretoria and all payments for the produce sold were required to be made at Johannesburg.

Amongst the abattoirs at which the company made its purchases was that at Lobatsi, in Botswana (formerly Bechuanaland), where the company was the successful tenderer for the output of 'green' hides, that is, hides fresh from the slaughtered animals, for the years 1954 to 1965.

The company took delivery of the hides at the abattoir, but before they could be transported for delivery to any purchasers they had to be prepared for removal by a process of curing which prevented any damage to the hides by putrefaction

as the result of bacterial action. This process of curing consisted of washing the hides and salting them after which they were stacked in piles for a period of from eleven to twenty-one days. At the end of the period, the hides were de-stacked and any excess of salt shaken off. They were then sorted into grades by weight, length and quality, bundled and weighed, and were then ready to be despatched to purchasers when instructions were received from the selling offices.

The process of curing did not effect any change in the essential character of the hides and in fact the first step in the manufacture of leather by any purchaser consisted of soaking the cured hides in order to eliminate the salt and rehydrate them so as to restore them as closely as possible to the condition of a 'green' hide.

For the purposes of the work of curing and packing the company maintained at Lobatsi a staff of from twenty to thirty Africans, residents of Botswana, who carried out the work in a shed which was an extension of the abattoir buildings. This shed was originally placed at the disposal of the company by the abattoir authorities in consideration of the price fixed for the hides but from 1961 a substantive rental of R1,200 per annum was paid by the company for its use.

A European member of the company's staff paid periodical visits to Lobatsi to supervise the curing, bundling, storage and dispatch of the hides.

The Collector of Income Tax, Botswana, having assessed the company to income tax on the profits derived from the sale of the hides purchased by it at Lobatsi for the years 1956 to 1963, the company appealed against the assessments to the High Court of Botswana. That Court dismissed the appeal, holding that the processes carried out in Botswana had produced, or increased, value in the products which had resulted in the existence in the Territory of unrealized profits, which had been realized by the sales effected in the Republic of South Africa but had their source in Botswana.

Against this decision the company appealed on the grounds, firstly, that the income was not taxable in

Botswana because it was derived from a source in South Africa, and secondly and alternatively, that if the income was derived from a source in Botswana it was exempt from tax in Botswana by virtue of the provisions of paragraph(1) of Article III of the Double Taxation Agreement between the Governments of the United Kingdom and South Africa, which give relief from taxation in favour of enterprises in South Africa if they are not engaged in trade or business in Botswana through a permanent establishment in that Territory.

Held, dismissing the appeal with costs (Roper P. dissenting) that the processes carried out at Lobatsi in preparing the hides for sale and delivery were the dominant factors in the accrual to the appellant company of the income derived from the sales of the hides effected in South Africa and the source of that income was therefore to be found in Botswana.

Per Roper P., dissenting: the dominant factor in the accrual of the income was the exercise of the expert knowledge
required to conduct the business as a whole and to carry through the processes from purchase to sale, which was to be found in the office of the company in Johannesburg, and the source of the income was therefore to be found in South Africa and not in Botswana.

Held, further, that the provisions of the Double Taxation Agreement in question (if still applicable to Botswana) did not apply to the case of the appellant company inasmuch as the operations carried on by it in Lobatsi constituted the carrying on by it of a trade or business in the Territory of Botswana and the occupation of the premises leased gave it a permanent establishment in that Territory.

Held, further, per Maisels J.A., that the appellant company had failed to establish on a balance of probabilities that the source of the income in question was not Botswana and that the Collector's decision was wrong.

D. Gould, Q.C., with him *A.J. Swersky*, for the appellant:

A.C. Thompson, Q.C., with him *Wallington*, for the

respondent. *Cur. adv. vult*.

Postea (23rd May).

ROPER P: The appellant company is registered in the Republic of South Africa and has its head office in Johannesburg. It carries on business as a dealer in hides and skins, an important part of its business consisting in the purchase at abattoirs of hides and skins from freshly slaughtered animals, which it cures by salting, and sells to purchasers in South Africa and overseas. It has an issued share capital of R350,000.

From the year 1954 onwards it has purchased hides from the abattoir at Lobatsi. Its purchases there amounted in the period of eight years from 1955 to 1963 to roughly 20 per cent in value of its total purchases of skins and hides, the balance apparently having been purchased in the Republic.

It was assessed to income tax on the profits resulting from its purchases in Botswana in the tax years from June, 1956, to June, 1963, and appealed to the High Court of Botswana under section 54 of the Income Tax(Consolidated) Proclamation, 1959, against the assessment. The appeal was rejected, and an appeal is now brought to this Court on two main grounds, namely(1) that the income was not taxable in Botswana because it was derived from a source in South Africa and not in Botswana, and alternatively, (2) that the income was exempt from tax in Botswana by virtue of the provisions of paragraph(1) of Article III of the Double Taxation Agreement between the Governments of the United Kingdom and of South Africa.

In Botswana a taxpayer's taxable income is arrived at by deducting exempted income and other kinds of receipts specified in the statute from the taxpayer's 'gross income'. 'Gross income' is so defined as to include the total amount received by or accrued to or in favour of the taxpayer, excluding certain receipts or accruals of a capital nature, 'from any source within the Territory or deemed to be within the Territory'.

In the South African statute, except for a slightly different arrangement of the words, the definition is the same and on any point relevant in this appeal there is no difference between the two statutes.

It appears from the Agreed Statement of Facts and certain evidence led in the High Court that the procedure followed by the abattoir authority was to call for tenders for the purchase of the whole of its output of green hides (i.e. hides fresh from the slaughtered animals), originally for quarterly or half-yearly and later for annual periods. The appellant was the successful tenderer throughout the years 1954 to 1965. For the purpose of curing and storing the hides the abattoir placed a shed on its premises at the disposal of the appellant for which the latter paid rental from 1961 onwards.

The process of curing consists of washing the hides then salting them and packing them in stacks. The stacks are left for a period of from 11

to 21 days, the hides are then de-stacked and any surplus salt is shaken off. They are then known in the trade as wet salted hides. They are sorted into weights, lengths and grades, bundled and weighed, and are then ready for dispatch to purchasers. For this work the appellant employs at Lobatsi twenty to thirty African daily-paid

employees, including, presumably, an African foreman, though this is not stated. Periodically a European employee at the appellant's head office visits Lobatsi for a few days at a time to supervise the curing of the hides and their bundling and dispatch. The curing of the hides does not alter their character in any way. The hides are sold to tanners for conversion into leather and the first step in that process is to soak them in order to eliminate the salt and restore the hide as closely as possible to the condition of a green hide. By soaking the wet salted hide is substantially restored to that condition, except that the veins and glands are recalcitrant to restoration, a matter of no apparent importance.

When a sale was effected the appellant would instruct one of its employees in Johannesburg to arrange for the dispatch of the parcel from Lobatsi to the purchaser. Where a parcel was sold to an overseas customer it would be dispatched from Lobatsi to Durban or to Lourenco Marques for shipment.

Decisions to tender, and on what terms, were made by the appellant at its head office in Johannesburg. The tenders put in by the appellant were submitted to the abattoir in Lobatsi, were accepted there, and the acceptance communicated to the appellant either by letter or by telegram confirmed by letter. In some cases the tenders or the tender prices were varied by negotiations between the appellant and the abattoir authority, either by correspondence or by negotiations in Lobatsi.

Payments for hides purchased by the appellant were made by cheques drawn upon the appellant's banking account in Johannesburg. Sales by the appellant of the cured hides were at all times made either in Johannesburg or at the appellant's branch business in Pretoria, and it was stipulated that payments were to be made by
purchasers in Johannesburg.

In coming to the conclusion that the sums in issue were taxable the learned Chief Justice based his decision upon *Commissioner of Taxes v Kirk* [1900] A.C. 588, and, more particularly, upon a passage in the judgment of the High Court of Australia in *Murray, Ltd. v Commissioner of Taxation*, 42 C.L.R. 332; Ratcliffe and McGrath, *Income Tax Decisions*, 1928-1930, p. 340, which was quoted in a dissenting judgment in *Commissioner for Inland Revenue v Epstein*, 1954(3) S.A. 689.1

The passage is as follows:

> 'In our opinion the place where the whole profits of such a business (that of wholesale softgoods warehousemen) is made is that 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 or profitable conduct of the business. But it does not follow that in order to determine where the profits were made it is proper to enquire into all the causes which in combination or succession operated to produce them. If it were possible to discover and discriminate among the innumerable factors which contribute to the profitable exercise of a trade and to assign locality

> to each of them, still no light would be thrown upon the place where profits were made. To attempt to appraise the relative efficiency or potency of the 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 character of the question, which is not why, but where the profits were earned. The case is not one in which operations in one place 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, unrealised profits exist in the territory whence they are transported for the purpose of sale.'

The learned Chief Justice expressly relied upon the last three sentences of the passage in support of his decision.

The notion of ' unrealised profits' appears to be well rooted in Australian income tax doctrine. In *Angliss & Co., Ltd. v Federal Commissioner of Taxation*, 46 C.L.R. 417: Ratcliffe and McGrath, *Income Tax Decisions*, 1930-1932, p. 253, Dixon J. said (at 270):

> 'Production of itself may create profit and . . . sale may be no more than the conversion of profit into money; the realisation of a profit already contained in the goods. What is true of production is doubtless true also of other operations in connection with commodities. By the treatment or preparation of goods, indeed possibly by their mere purchase at a low price, a gain may be obtained in one place before they are shipped or sold in another.'

The language used in these quotations from the *Murray* case and the *Angliss* case suggests that when (e.g.) value has been added to goods, or even when goods have been purchased at a low price, a profit or gain has actually been made, though it is only ' realised' when the goods are sold. If so understood it is in my view misleading. In *Commissioner of Taxation v Hillsdon Watts & Co.*, I Austr. I.T. Rep. 42, Latham C.J. referred to the so-called unrealized profit as a 'hypothetical' profit which can only come into real existence as part of an actual profit (i.e. a profit on the final result of the business operation). This seems the more realistic view.

The origin of this concept is to be found in the special circumstances prevailing in Australia, which is a federal State. Each of the constituent States has its own income tax legislation and in addition there are Commonwealth income tax laws. Some of the various formulae for the ascertainment of taxable income contained in this legislation are to be found in the *Angliss* case, at pp. 273-4 and 288 of the report in Ratcliffe and McGrath, and all of these differ in language, in greater or less degree, from the wording of the definition of

'gross income' contained in the Income Tax Proclamation, 1959, of Botswana, and from that of the South African Income Tax Act. To meet the case of businesses conducted in more than one of the States the principle followed in all of the Australian legislation is apparently to make taxable in each of the States concerned only that portion of the income of the business which is attributable to its business operations in the particular state. This appears from the following passage in the judgment of Latham C.J. in the *Hillsdon Watts* case (at 45):

> 'When profits from a trade are taxable under Case I. of Sched. D (*of the UK Income Tax Act of* 1911) either the whole profits are taxable or nothing is taxable. This fact may have influenced the Courts in deciding in certain cases that a trade is

> not exercised in the United Kingdom. The position is quite different under the ordinary provisions of Federal and State income tax Acts in Australia, where, in general, tax is imposed only upon income derived directly or indirectly from some source in the Commonwealth or the State, as the case may be. It has long been recognised that these provisions, apart altogether from any statutory provisions requiring apportionment, impose a tax not upon the whole income, if any part thereof is derived from the source mentioned, but only upon the part of the income shown to be so derived. This was decided in *Commissioner of Taxation v Kirk* [1900] A.C. 588 very soon after the introduction of income tax in Australia, and the same principle is apparent in all the judgments in *Commissioner of Taxation v Weeks*, 19 C.L.R. 568. Both of these cases relate to the income tax Acts of New South Wales. Thus English decisions upon English legislation expressed in different terms are not, in my opinion, of very great assistance in determining the interpretation of income tax Acts in Australia.

See also Evatt J. in the *Angliss* case at pp. 283-4 of the report in Ratcliffe and McGrath.

The principle of the Australian legislation in any case where business operations have been conducted partly in one and partly in another or other territories therefore is to break down the profit earned by the whole of the operations into the portions attributable to each of the territories concerned. This applies to businesses concerned with the purchase or sale of commodities as well as other types of business operations. The concept of unrealized profits arises from the application of that principle. An inquiry into the relative importance of the various factors
which may have contributed to the earning of the total profit is quite irrelevant in such an analysis, and therefore does not enter into the investigation. The approach of the Australian courts to the question of taxability in 'two-territory' cases is therefore different from that of the South African courts. For these reasons, in my opinion Australian decisions based upon the theory of unrealized profits are of little or no assistance in the present case, though they may afford some guidance in cases where the issue of apportionment arises.

The other authority relied upon by the learned Chief Justice was *Kirk's* case(*supra*). That case was concerned with the income tax laws of New South Wales, which form part of the body of Australian legislation discussed by Latham C.J. in the passage which I have extracted, above, from his judgment. It is no authority for the importation of the theory of unrealized profits into the income tax laws either of the United Kingdom or South Africa. It does appear, however, to have had considerable influence upon legal thought as to the proper construction of those laws.

In *C.I.R. v Lever Brothers*, 1946 A.D. 441,2 in a passage which has often been quoted and which it is not necessary to repeat, Watermeyer C.J., after a review of the authorities, expressed the view that the source of receipts of income was not the quarter whence they came, but the originating cause of their being received as income, and that this originating cause was the *quid pro quo* which the taxpayer gave in return for which he received them. In a later passage he said that the source of income was the business, capital, or service which was responsible for the earning of it.

This definition of 'source' is generally accepted, but, as was pointed out by Watermeyer C.J., after the activities which are the source of the income have been identified, the problem of locating them in order to ascertain where they are taxable may present considerable difficulty.

The method adopted by the South African courts in order to meet this difficulty is to examine the various factors which have entered into the earning of the income and decide, if possible, which was mainly responsible for it. Various expressions have been used in different cases to express this idea, such as 'the substantial source of the profit' or 'the dominant cause of the profit' or 'the main factors which brought about the profit' and these were summed up by Schreiner A.C.J. in *C.I.R. v Black*, 1957(3) S.A. 536,3 when he said:

> 'The Commissioner would be entitled to succeed in this appeal if he could show that the only true and reasonable conclusion on the facts found was that the dominant, or main, or substantial or real and basic cause of the accrual of income was to be found in Johannesburg.'

In my view therefore the task of this Court in the present case is to ascertain what was the dominant factor or real and basic cause responsible for the profits with which we are concerned.

Before discussing that question, however, I should refer to another matter which arises from the judgment

of Watermeyer C.J. The difficulty in locating the source of the income may arise from the fact that the activities which have produced the income have occurred in different countries, so that the source is located partly in one country and partly in another. This possibility was referred to by Lord Atkin in the Privy Council in the appeal in *Rhodesian Metals v Commissioner of Taxes*, 1940 A.D. 432, 4364 and it is also discussed by Schreiner J.A. in *C.I.R. v Epstein*(*supra*). Watermeyer C.J. said:

> 'Such a state of affairs may lead to the conclusion that the whole of a receipt, or part of it, or none of it, is taxable as income from a source within the Union according to the particular circumstances of the case, but I am not aware of any decision which has laid down clearly what would be the governing consideration in such a case.'

He thus left open the question whether in such cases the income should or should not be apportioned. The remarks of Schreiner J.A. in *Epstein's* case on the other hand suggest that apportionment should take place in such cases. The idea suggested in these passages has however, so far as I am aware, not been developed in any South African cases, and as apportionment is not an issue in the present case it need not be further considered.

Let me turn now to the question, what, if anything, can be said to be the dominant factor or the real and basic cause, in the making of the profit in this case. In a number of English and South African cases varying tests have been propounded for the purpose of answering questions as to the origin of profits in businesses concerned with the purchase and sale of commodities. Examples are:

Page 104 of 29 SATC 97

'Where the profits come home to the taxpayer' (*Sulley v A.G.* 157 E.R. 1364; *Grainger v Gough* [1896] A.C. 325).

'Where the contract for the sale of goods was concluded'; or 'where the goods are sold' (*Rhodesian Metals*, 1938 A.D. 299;5 *Kergeulen Sealing Co. v C.I.R.* 1939 A.D. 487;6 *Grainger v Gough*).

'Where the contracts which are the essence of the business of the taxpayer are habitually made' (*Lovell and Christmas v Commissioner of Taxes* [1908] A.C. 46; *Maclaine v Eccott* [1926] A.C. 424; *Rhodesian Metals*, 1938 A.D. 300).

'Where the capital of the taxpayer was productively employed' (*Commissioner of Taxes v Dunn*, 1918 A.D. 607; *Overseas Trust v C.I.R.*, 1926 A.D. 4447 see, however, *Rhodesian Metals*, 1940 A.D. 432).

In some of the cases cited the particular test was put forward in terms which suggested that it was the decisive and only test, but the true view is that none of these is in itself decisive; all the circumstances appertaining to the business operations of the taxpayer must be considered. Some of the circumstances mentioned, however, though not in themselves decisive, are of very great importance, for instance in particular, the place where the goods are ultimately sold, and the transaction relating to those goods thus closed off. This is because it is only by ultimate sale that any profit is realized. See on this point *Smidth v Greenwood* [1921] 3 K.B. 583: *Maclaine v Eccott* [1926] A.C. 424; *Firestone Tyre Co. v Lewellin* [1957] 1 All E.R. 561. In *C.I.R. v Epstein*, 1954(3) S.A. 689, 701, Schreiner J.A. said:

> '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'.

Also of great importance is the question where the contracts of the taxpayer are habitually made, for this identifies the place where the business or trade is being carried on.

Where the taxpayer's profit-earning activities have been carried on partly in one place and partly in another it is necessary to consider the whole of the activities and to decide whether those carried out at the one place or those in the other played the greater or more important part in the earning of the profit. The question of the source of this income is said to be 'a practical, hard matter of fact', or what 'a practical man would regard as a real source of income' (*Rhodesian Metals*, 1940 A.D. 432; *Lever Brothers*, 1946 A.D. 441). The 'practical man' is not further defined; but as he would need to have business experience and a grasp of income tax law and practice in order to decide such a question, it seems to me that in its practical application the phrase means nothing more or less than the judge, considering in a practical way all the factors in the earning of the profit. One of the most important elements in the inquiry would be, in my view, the nature of the respective functions of the personnel employed in the two places, and the degrees of skill

Page 105 of 29 SATC 97

required of and exercised by them. The place where the contracts of the taxpayer are habitually made owes much of its importance, in my view, to the consideration that the persons whose function it is to arrange the contracts play a major part in the earning of the profits.

In the *Angliss* case, which has certain affinities with this case, in a dissenting judgment Evatt J. suggested the following as questions to be considered in determining the source of profits:

> 'Where are the persons who are in general control of the business operations? Where are those who are exercising any particular control? What is the importance and skill attachable in a business sense to the things done in Australia and overseas respectively? What costs and outgoings were incurred here?

These questions, and particularly the first and third, appear to me to be very pertinent to the present case.

By way of parenthesis at this stage I should say that in discussing the principles to be applied I have had in mind the case of a two-country taxpayer engaged in a business of buying and selling commodities. In cases of a different type, for example where mining, manufacturing or farming activities are carried on in a country other than that in which the head office of the taxpayer is situated, different considerations may apply. The practical man, weighing the respective activities against one another, might well come to the conclusion that the skill and business management exercised at the head office were outweighed as income-earning factors by productive operations at the mine, factory or farm. But this is not that type of case.

To return to the present case, the learned Chief Justice took the view that by the curing of the hides at Lobatsi the taxpayer converted a raw material into a merchantable commodity; the essence of the operation was the production from a raw material of a marketable commodity; it was by the curing alone that he endowed the hides with any value at all, for were he not to do so the hides would be putrified and valueless. The other work done by the company, including the initial arrangements for the purchase of the hides and the subsequent profitable marketing thereof was brushed aside as being no more than contributory factors in the earning of the profit.

It is not correct to say that it was only by the curing that the hides were given any value at all. The green hides had a value, and of course the curing increased their value. But in the search for the dominant factor, or the real and basic cause, added value is not decisive. It is only one of the circumstances which the practical man must take into consideration, and the question of its weight may depend upon degree. It is true that the curing was a *sine qua non* of the whole business operation; but the same can be said of other steps in the process from purchase to sale of the hides, so that this is unimportant. It is also true that in order to participate in the Marketing Scheme established and controlled by the Meat Board in the Republic the appellant company was obliged to obtain registration as a curer. But this would not preclude it from dealing in hides and skins which it had not itself cured, and in fact an analysis of the purchases of the company which appears among the exhibits shows that a very considerable quantity of dry hides (which would not need to

be cured) was purchased by the company during the period with which this case is concerned. Although the company was a registered curer its business, as described in the agreed statement of facts, consisted of 'the buying and selling of hides and skins or other by-products of livestock, such as hooves and horns'. The 'essence of the business' of the company was not the curing of hides but the purchase and sale of hides, etc., with a view to profit.

The work done at Lobatsi consisted of washing the hides, shovelling salt on to them, stacking them, leaving them in stacks for a period of from 11 to 21 days, and then de-stacking them, sorting them, and packing them into bundles. This was a series of simple operations for which no great skill would be required, and in fact it was all done by a not very considerable number of daily paid native labourers. To describe such work as the production of a marketable commodity from raw material is in my view inaccurate, in view of the description in the agreed statement of facts of the process of curing and the subsequent treatment of the hides when in the hands of tanners, which is embodied in the opening portion of these reasons. It is not a process of manufacture, and it amounts to not much more than the preparation, preservation and packaging of stock-in-trade. A rough calculation from figures in one of the exhibits reveals that the costs incurred through these operations added only approximately five per cent to the cost price of the green hides.

These activities must be compared with those carried out at the company's head office in South Africa. At the hearing in the High Court the managing director of the company was called as a witness to describe the process of curing and also the subsequent selling of the hides by the company. On the latter aspect he said that skill was required in selling the hides; that one had to know the market; that different tanners needed different types of hides; that one had to know how to grade them for the purposes of the tanners; that there was a tremendous
amount of competition in overseas selling; that a lot of hides were sent all over the world; that to be successful one must have business acumen of the highest order; and that a large number of hide and skin merchants had 'gone down the drain' and had gone into liquidation. No evidence was led to controvert these statements; in fact the witness was not even cross-examined upon them by counsel for the Collector.

Knowledge of the market would of course be a vital element in the operations of the company, engaged as it was in a scheme of profit-making by the purchase of skins, their preparation for the market, and their sale on a market which according to the evidence was by no means easy or safe. In its handling of its operations at Lobatsi it would have to consider such matters as the price at which it could tender from time to time for the green hides, and the sums which it could afford to spend at Lobatsi on the curing operations, and it would be obliged to provide some supervision of those operations to ensure that the curing was properly done and the operations economically carried out. In order to sell the hides hereafter there would be the negotiations as to prices and conditions of sale which would have to be carried out before the skins

could be sold at a profit either on the local market or overseas. This is not routine work and it calls for expert knowledge and the exercise of a merchant's experience, judgment and skill in negotiations.

Apart from the very slight degree of expert knowledge required of the native labourers who washed, salted and stacked the skins, the whole of the expert knowledge required for the process from their purchase to ultimate sale was that of the company's officials at the head office in South Africa. The financing of the operations was done from the head office, which supplied the skilled direction and control of the whole of the business. A comparison of the respective skills of the native labourers at Lobatsi and the head office staff at Johannesburg can only be in favour of Johannesburg. It was in South Africa that the contracts of the company were habitually made, where the contracts for the sale of the hides were negotiated, and where payment was received by the company. That being so, in my view the source of the revenue was in South Africa and not in Botswana. I would therefore allow the appeal on the main ground.

As to the alternative ground of appeal I agree with the reasons of Maisels J.A. on this part of the appeal, and have nothing to add.

As the majority of the Court takes the view that the judgment should be upheld the appeal must be dismissed with costs.

SCHREINER J.A.: I have read the judgments of my brethren, and agree with the conclusion and reasons of my brother Maisels. On double taxation I have nothing to add, and on the source of the income but little.

Apportionment being inapplicable for the reasons given by Maisels J.A., it is necessary to choose between the country where the hides were cured and the country where they were sold. In such a situation, it has been held that the dominant (or main or substantial or real and basic) cause of the accrual of the income must be sought. Other ways of putting the matter have been used but they are all governed by the consideration that, since it is impossible to frame a precise and generally applicable legal test, the question must always be one of fact.

No doubt selling the cured hides is necessary to bring an income to hand, so that it might be said of the sales, as much as of the curing, that they are a *causa sine qua non* of the accrual of the income. But the place where a *causa sine qua non* exists cannot be decisive of the place of the origin of the income, for there may be a number of *causa sine qua non*. One must look for something more - something like the dominance or basicality used in the abovementioned list of expressions; or like what I venture to call the highest, or higher, degree of essentiality.

When all the activities giving rise to the income consist of buying and selling, the country where the sales were made is generally held to be the source of the trading profit. But one can imagine cases where there is an unlimited market for the goods at a fixed price and the only business problem is to find sellers of the goods. In such cases the country where the goods were bought, if it was different from that in which they were sold, might properly be held to have been the source of the profit.

But the present case is not a simple one of purchase and sale.

It is more like a case where ore is mined and treated in one country and sold in another, or where goods are manufactured in one country and sold in another. It would be unreasonable and artificial to attribute the origination of the profit wholly to the sales, which in the end produced the money. Before the sale of any parcel of mined and treated ore or of manufactured goods takes place it is natural to say, as was substantially said by Dixon J. in *Angliss's* case, 1931 Ratcliffe & McGrath 252 at 270, that there is an unrealized profit in the ore or the goods which the sale only turns into cash.

In the present case the green hides in the abattoir are like unmined or untreated ore or the raw material of the manufacturer. Cured hides are like mined and treated ore or manufactured goods. It is true that curing is a relatively simple process and that before the tanner uses the wet salted hides he restores them, as far as possible, to their former green condition. But this does not go to the root of the matter. Curing is quite different from such steps as storing or transporting which, though sometimes required by custom or contract, are not in general essential to the buying and selling of goods. Whether, as in the Republic of South Africa, you must be a registered curer before you may buy green hides, or whether, as in Botswana, or anywhere else, you must, from the self-destructive nature of the green hides, have available the means to cure them before in practice you can buy them (save, of course for future delivery, giving time to provide the means), it seems clear that curing is the really vital element in the hide and skin dealer's business.

In such a business there is no need to have elaborate selling offices - a room, and a telephone would suffice - nor need the offices be situated in any particular place. But sufficient curing facilities there must be; and they must be situated at the site of the abattoirs.

Expertness in studying markets and knowing when and where to sell is no doubt important. They are important in all sorts of business, including that of the mine-owner or the manufacturer, and their presence or absence may make all the difference between success and failure. But the dealer in hides and skins need not be an expert marketer. He has brought a merchantable article into existence and can make an income by selling it, though a smaller one if he is an inexpert marketer than if he were expert. But it is clear that he could not gain a cent of profit unless he possessed and used the means for curing the green hides that he bought.

The characteristic feature of a hide and skin merchant's business is not that he buys and sells goods but that he cures hides and skins which he is thus enabled to sell. It makes no difference whether the curing of the

hides in country A and their sale in country B is a large or small part of his total business, for it is the income from that part, big or small, that is in issue. It could not matter whether the taxpayer's business in the Republic of South Africa were to shrink to nothing or multiply itself enormously - these things would be irrelevant to what happens to the Botswana hides.

It seems to me that the curing of the green hides is more truly essential to the gaining of profit than the sale of the wet salted hides. Once

the green hides have been cured they are there to be dealt with commercially - to be sold, given in pledge or otherwise turned to account. But if they have not been cured they immediately disappear from the world of commerce like snow on the desert's face.

In my view, the curing is dominant over the selling. It is more basic, or more truly the main or substantial or real and basic cause of the accrual of the income.

I do not find it necessary to resort to the onus that rests on the taxpayer, though that certain reinforces the case for the Collector.

The appeal must be dismissed with costs.

MAISELS J.A.: The appellant, a company incorporated in the Republic of South Africa, objected to assessments to tax for the years 1956 to 1963 inclusive, made by the Collector of Income Tax.

These objections were disallowed by the Collector, and an appeal to the High Court against the Collector's decision was dismissed.

The matter is now before us on appeal from the High Court.

The facts, which were common cause, are conveniently set out in the judgment of Weston C.J - the learned Judge referring to the appellant as the taxpayer - as follows:

'The taxpayer has its registered office in Johannesburg where its management and control abides. The taxpayer's business is the buying and selling of hides and skins and other by-products of livestock such as hooves and horns. It started to buy hides in Bechuanaland in 1954. The abattoir at Lobatsi from time to time called for tenders for the purchase of its output of this by-product of its operations, and in all cases during the material period the taxpayer was the successful tenderer. Decisions to tender and the terms on which the tenders were to be made were arrived at by the taxpayer either by telegram confirmed by letter, or by letter, and payments for hides thus purchased were made by cheque drawn on the taxpayer's banking account in Johannesburg.

The hides bought by the taxpayer were hides as they come off the beasts and are known in the trade as "green hides". It is not possible to dispose of these by way of sale to tanneries and others requiring to make leather except after the process known as "curing", for green hides, like some wines, will not travel. This process consists of spraying the green hides with salt and stacking them. The stack is constructed by folding some of the hides after salting and arranging them to form an outer perimeter. Within this perimeter hides are laid, not folded, and salted, one on top of the other. The salted green hides are kept in the stack for a period of from eleven to twenty-one days to complete the process. No machinery is required or is used in the process.

The purpose of curing is the preservation of the hide by the prevention of putrefaction as a result of bacterial action. Preservation is achieved by the application of salt in the manner described, which, by osmosis, penetrates the hide, dissolves certain soluble proteins, more particular globular proteins, in the hide and inhibits bacterial action. During the process of curing the hide sheds a considerable amount of water and loses on balance 19 per cent of its weight. The salt has no effect on the collagen fibres contained in the hide. The curing does not alter the essential character of the hide. It is a process whereby, simply, the dissolved salt penetrates the pores and membranes of the hide.

After curing, the wet salted hides - as the green hides after curing by this method are called in the trade - are sorted into grades and bundled and stored ready for despatch to the ultimate purchaser. It appears that the first step in the manufacture of leather by such purchaser consists in soaking the wet salted hides in order to eliminate the salt and to rehydrate the hide with the object of restoring it as closely as possible to the condition of a green hide.

The curing, handling and storage of the hides bought by the taxpayer were carried out in this country, and the abattoir made accommodation available to the taxpayer in Lobatsi for these purposes. The accommodation consisted of a shed with a concrete floor and corrugated iron roof supported by concrete pillars and with brick walls and it represented an extension of the premises to the abattoir building itself. No rent was paid by the taxpayer to the abattoir for the use of the shed before 1961, but in consideration of such use and certain other services rendered by the abattoir to the taxpayer the price to be paid for the hides was enhanced by a premium calculated in a manner which it is unnecessary to detail here. At all times the shed was under the exclusive control of the taxpayer where it employed from twenty to thirty African employees,

residents of Bechuanaland. These
employees were under the control of the taxpayer and periodically a European based at the head office of the taxpayer in the Republic visited Lobatsi to supervise the curing of the hides and their bundling, storage and despatch. These visits were each of a few days duration. From 1961 onwards the taxpayer paid the abattoir a rental of R1,200 per annum for the shed.

All sales by the taxpayer of wet salted hides cured at Lobatsi were made by the taxpayer either in Johannesburg or at its branch business in Pretoria and payment was stipulated to be made by the purchaser in Johannesburg. When a sale was effected, instructions would be given by the taxpayer in Johannesburg to one of its employees to arrange for despatch of the parcel sold from Lobatsi to the purchaser. These sales were either to tanneries in the Republic or overseas and a small quantity of hides was sold by the taxpayer to purchasers in this country. The fulfilment of orders to tanneries overseas was effected by the despatch of the hides from Lobatsi to Durban or Lourenco Marques, without further treatment for shipment.'

There is one further matter to which I think reference should be made. It appears from an agreed statement of facts handed in at the hearing before the High Court that the appellant in addition to buying the hides and skins is what is known in South Africa as a 'registered curer'. Indeed, it is only because the appellant is a registered curer that it is able under a marketing scheme in force in South Africa to purchase in that country hides and skins from registered livestock agents who represent the farmers, that is, the producers. It is clear, therefore that in South Africa curing is an essential part of the appellant's business.

It seems clear, too, that in the case of the hides and skins purchased by the appellant in this country and sold elsewhere that curing was likewise an essential part of the appellant's business.

The appellant contends that the income derived by it from the transactions which are referred to in the judgment of Weston C.J. (*supra*) is not liable to tax on the grounds that it was not derived from a source within this country. As in *M, Ltd. v Commissioner of Taxes*, 1958 3) S.A. 18(SR),8 numerous decisions were cited to the Court on the subject of the source of income. As Murray C.J. pointed out in that case at 20:

'These decisions are in agreement on at least one point, viz. that the problem of locating that source is a matter which presents considerable difficulty. The source of income according to the authorities is not a legal concept, nor does the Statute contain any definition of the term:

"Source means something which the practical man would regard as a real source of income. The ascertainment of the actual source is a practical matter of fact." (*Rhodesian Metals, Ltd. v Commissioner of Taxes*, 1940 A.D. 432,9 where Lord Atkin in the Privy Council quoted with approval an extract to this effect from the

dissenting judgment of De Villiers J.A. in the court below, such extract being a quotation from *Nathan v Federal Commissioner of Taxes*, 25 C.L.R. 183.) Income, as pointed out by Schreiner J.A. in *C.I.R. v Lever Bros. and another*, 1946 A.D. 44110 at 458, is earned by a taxpayer from other persons(a) because he renders them services or(b) because they have the use of his property or(c) because he carried on in the world of commerce and industry profit producing activities involving in various combinations the transfer of the ownership in property or the grant of its use or the rendering of services. The word "source" in the Act does not denote the quarter from which the money is received by the taxpayer, but the originating cause of the receipt, i.e. the particular activity of the taxpayer which earns the money (*Overseas Trust Co., Ltd. v C.I.R.*, 1926 A.D. 444,11 as explained by Watermeyer C.J. in *Lever's* case(*supra*) at 453)'

Mr *Gould* for the appellant contended correctly, it seems to me, that in the case of a business which involves a multiplicity of activities, the source or originating source of the income is normally all the activities of the business in combination. The business, as Mr *Gould* put it, is in effect an organism, and each of its activities contributes in some measure to its financial results. Cp. e.g. *M, Ltd. v Commissioner of Taxes*(*supra*) at 22-4.

It follows, therefore, that in those cases in which all the activities of a business are performed in the same country, the determination of the locality of the source presents no problem. As Mr *Gould*, however, points out the position is different when the activities of a person are performed in two or more countries. In such cases, it would appear that the locality of the source must be determined by reference to those of the activities which constitute 'the dominant or main or substantial or real and basic cause' of the accrual of the income. Cp. *Commissioner for Inland Revenue v Black*, 1957(3) S.A. 536 (A.D.).12

On the facts of the present case, there would appear to be a good deal to be said for the view that the income should be apportioned between Botswana and South Africa; cp. the remarks of Schreiner J.A. in *Commissioner for Inland Revenue v Epstein*, 1953(3) S.A. 68913 at 700 (A.D.). But the Income Tax Proclamation, No 81 of 1959, applicable to this country contains no provisions for apportionment. Moreover, the appellant in its objection to the assessments made no claim that the income should be apportioned , and it is limited to the grounds stated in its notice of objection, cp. section 54(3) of Proclamation 81 of 1959. No more, therefore, need to be said on the question of apportionment.

Which, then, of the activities of the appellant constitute the 'dominant or main or substantial or real and basic cause' of the accrual of income? Mr *Gould* contended that the evidence of the managing director of the appellant company (which was not challenged in the court *a quo*, or for that matter in this Court) established that in the selling of hides, business acumen of the highest order is required. One has to know the market, and according to the evidence, many hide and skin merchants have failed in their businesses, presumably because of

their failure to exercise the necessary business acumen. I have no doubt that this is so.

Page 112 of 29 SATC 97

The hides were sold, as stated above, to tanneries in South Africa and overseas and in a small number of cases to purchasers in Lobatsi. But all these sales were effected at the appellant's offices in Johannesburg or Pretoria. However, I think it is clear on the authorities that the place where the contract of sale is concluded is not decisive of
the source of profits. Cp., e.g., *Rhodesian Metals, Ltd. v Commissioner of Taxes,* 1938 A.D. 202[14] and 1940 A.D. 432,[15] (*supra*) at 22 *Firestone Tyre Company, Ltd. v Lewellin* [1957] 1 All E.R. 561 at 568. Indeed, as was pointed out by Dixon C.J. in *Commissioner of Taxes v Hillsdon Watts, Ltd*., A.I.T.R. 42 at 46, when it becomes necessary to determine what are the sources of income, it is a mistake to concentrate on 'the final stage' in the operations which bring in the money which constitutes the gross income. Cp. also *Commissioner of Taxation v Kirk* [1900] A.C. 588 at 593.

Nonetheless, as is pointed out by Schreiner J.A. in *Epstein's* case(*supra*) at 701, as between two countries in one of which goods are bought and in the other of which they are sold, the combined transaction 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 profit. However, in my opinion, the present is not a case which can be decided on this simple basis, for to do so would be to overlook the business of a curer of hides which was carried on by the appellant in Lobatsi, and but for which there would have been no hides to sell anywhere. Mr *Gould* indeed put it that the curing was a *causa sine qua non* of the accrual of the income, but he said 'the same can be said of several of the appellant's other activities, for example, the buying and selling of the hides'. He submitted that the curing, therefore, formed one of the links in the chain of causation, but did not in itself constitute the *causa causans*.

That may be so, but even if that be the case, it does not seem to me to conclude the inquiry in favour of the appellant for the Court is still left with the question posed above, namely, what are the 'dominant or main or substantial or real and basic causes' of the accrual of the appellant's income? I have read and, I hope, considered fully the many decisions to which Mr *Gould* in his helpful argument referred us. But in the end, as Murray C.J. pointed out in *M, Ltd.'s* case(*supra*) at 23, each case depends on its own facts. During the relevant years the appellant expended on the purchase of hides from all sources the sum of R14,954,055, of which R2,904,994 was incurred in the purchase of hides in Bechuanaland. This, in my view, constituted a substantial part of its business, but it did much more than merely purchase these hides in Bechuanaland. By during them there, it rendered them merchantable. Curing is and was just as much a part of its business as selling the hides and certainly as essential a part of its business. Indeed, it could not sell without curing. So that on the one hand one has the fact that the appellant bought, paid for, cured, stored and transported hides, all in and from Bechuanaland. On the other hand, it negotiated the sale of the hides in South Africa.

Page 113 of 29 SATC 97

Giving all due weight to the skill required in selling, it would, in my opinion, be ignoring the factors to which I have referred to say that the place where the contracts of sale were concluded is decisive as to the source of income. In my opinion, the source of the appellant's income is to be found in its activities in Bechuanaland, rather than in South Africa.

There is, perhaps, another way of looking at this matter:

The appellant having been assessed, the provisions of section 53 of the Income Tax Proclamation come into play. This section reads:

> 'The burden of proof that any amount is exempt from or not liable to any tax chargeable under this or any subsequent Proclamation or is subject to any deduction or set-off shall be upon the person claiming such exemption, non-liability deduction or set-off, and upon the hearing of any appeal from any decision of the Collector, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.'

This section is in all material respects identical with section 82 of the South African Income Tax Act. The effect of the section is that an amount received by the taxpayer on which an assessment has been made by the Collector is taxable unless the taxpayer shows that it is not income. (See *Ochberg v Commissioner for Inland Revenue*, 1951 A.D. 215[16] *Commissioner for Inland Revenue v Goodrick*, 1942 O.P.D. 1,[17] *Reliance Land and Investment Company*(*Proprietary*) *Limited v Commissioner for Inland Revenue*, 1946 W.L.D. 171.[18]

In my opinion the appellant has failed to establish on a balance of probabilities that the source of the income in question in this case was not Botswana and that the Collector's decision was wrong.

In my view, therefore, the first contention raised by the appellant fails.

It was further contended, on behalf of the appellant, that it was exempt from tax in Bechuanaland by reason of the provisions of of paragraph(1) of Article III of the Double Taxation Agreement between the Government of Great Britain and Northern Ireland and the Government of the Union of South Africa, as notified in High Commissioner's Notice No 70 of 1959. In terms of section 68(2) of the Income Tax Proclamation arrangements such as those made in this Double Taxation Agreement 'shall, so far as they relate to immunity, exemption or

relief in respect of the Bechuanaland Protectorate Income Tax, have effect as if enacted in this Proclamation, but only if and for so long as such arrangements, so far as they relate to immunity, exemption or relief in respect of Income Tax levied or leviable in the other country have the effect of law in that country'.

Mr *Gould* contended that as the Double Taxation Agreement is still in force, the Income Tax Proclamation must be taken to be amended *pro tanto*, i.e. to the extent to which it is necessary to give effect to the Agreement. I shall assume this to be so, although I am in some doubt whether agreements of this nature should not be considered merely as inter-governmental arrangements which afford the resident of a state

relief as against his own state in cases where he is taxed in the other state and in his own state, and not as affording the non-resident exemption from taxes for which he would be liable in terms of the taxation laws of the state of which he is a non-resident. Indeed, Article X read with Article XII of the Agreement would seem to show that this is the real purpose of an agreement of this nature.

Article X reads:

'(1) Where Union tax is payable in respect of profits derived from sources within the Union by a person ordinarily resident in Bechuanaland, Bechuanaland shall either impose no tax on such profits, or, subject to such provisions (which shall not affect the general principle hereof) as may be enacted in Bechuanaland, shall allow the Union tax as a credit against any Bechuanaland tax payable in respect of such profits.

'(2) Where Bechuanaland tax is payable in respect of profits derived from sources within Bechuanaland by a person ordinarily resident in the Union, the Union shall either impose no tax on such profits, or, subject to such provisions (which shall not affect the general principle hereof) as may be enacted in the Union, shall allow the Bechuanaland tax as a credit against any Union tax payable in respect of such profits.'

And Article XII reads:

'Any taxpayer who shows that the action of the taxation authorities of the two Governments has resulted in double taxation with respect to the taxes referred to in this Agreement, may lodge a claim with the taxation authority of the territory in which he resides. Should the claim be upheld, the taxation authority of that territory may come to an agreement with the taxation authority of the other territory with a view to avoidance of the double taxation.'

However, I shall assume that Mr *Gould's* contention that this Agreement now forms part of the Income Tax Laws of this country, in so far as non-residents are concerned, is correct.

Paragraph (1) of Article III upon which he relies, reads:

'The industrial or commercial profits of an enterprise of one of the Governments shall not be subject to tax in the territory of the other Government unless the enterprise is engaged in trade or business in the other territory through a permanent establishment in that other territory. If it is so engaged tax may be imposed on those profits by the other territory but only on so much of them as is attributable to that permanent establishment.'

Mr *Gould* contends, firstly, that the appellant was not engaged in business in Bechuanaland, and, secondly, that it did not have a permanent establishment there. With regard to the first contention, I would refer to the oft-quoted dictum of Jessel M.R. in *Smith v Anderson*, 15 Ch. D. 258, that 'Anything which occupies the time and attention and labour of a man for the purpose of profit is business'. In my opinion, the activities of the appellant, as set out above, show that it was engaged in business in Bechuanaland. Subsections(3) and(4) of Article III read:

'(3) No portion of any profits arising from the sale of goods or merchandise by an enterprise of one of the Governments shall be attributed to a permanent establishment situated in the territory of the other Government by reason of the mere purchase of goods or merchandise within the territory of that other Government.

'(4) Profits derived by an enterprise of one of the Governments from sales, under contracts concluded in the territory of that Government, of goods or merchandise stacked in a warehouse or depot in the other territory for convenience of delivery and

not for purposes of display shall not be attributed to a permanent establishment of the enterprise in that other territory notwithstanding that the offers of purchase have been obtained by an agent of the enterprise in that territory and transmitted by him to the enterprise for acceptance.'

It is to my mind clear that the activities of the appellant went beyond the mere purchase of goods or the storing of goods in a warehouse for the convenience of delivery.

As to whether the appellant had a permanent establishment in Botswana, I think the word 'permanent' is used

in contradistinction to a merely temporary or occasional use of premises for purposes of trade or business. So looked at, the fact that since 1954 the appellant occupied a shed at a rental first established by way of a premium on the hides purchased by it, and since 1961, at a rental of R1,200 per annum, establishes, to my mind, that the appellant's occupation of the premises was not temporary or occasional, but was permanent.

Again, if one regards the word 'permanent' as meaning 'indefinitely continuing', as suggested by Mr *Gould*, relying on *Federal Commissioner of Taxes v Austin*(1932) 48 C.L.R. 601, the facts which I have just set out establish, in my opinion, that occupation by the appellant of the premises was one which should be described as 'indefinitely continuing'. In my judgment, therefore, the contentions raised on behalf of the appellant, based on the Double Taxation Agreement, also fail.

I would dismiss this appeal.

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Footnotes

1 19 SATC 221. 2 14 SATC 1.
3 21 SATC 226. 4 11 SATC 244. 5 9 SATC 363. 6 10 SATC 363. 7 7 SATC 71.
8 22 SATC 27. 9 11 SATC 244.
10 14 SATC 1.
11 2 SATC 71.
12 21 SATC 226.
13 19 SATC 221.
14 9 SATC 363.
15 11 SATC 244.
16 6 SATC 1.
17 12 SATC 279.
18 14 SATC 47.