

The Liquidator, Rhodesia Metals, Limited
(in liquidation) - - - - - *Appellant*

v.

The Commissioner of Taxes - - - - - *Respondent*

FROM

THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 27TH MAY, 1940

Present at the Hearing:

VISCOUNT MAUGHAM
LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD PORTER

[*Delivered by* LORD ATKIN]

This is an appeal from the Appellate Division of the Supreme Court of the Union of South Africa who affirmed a decision of Hudson J. in the High Court of Southern Rhodesia, dismissing an appeal by the liquidator of the appellant company from an assessment to income tax in the sum of £146,000 for the year ending 31st March, 1936. The assessment was made under the provisions of the Ordinance of Southern Rhodesia No. 20 of 1918. It is desirable to set out some of the sections of that Ordinance:—

“ Section 4 (1): There shall be charged, levied and collected throughout the Territory, subject to such conditions and to such exemptions and abatements as are hereinafter provided, an income tax, at the rate and calculated in the manner specified hereunder, in respect of any taxable income received by or accrued to or in favour of any person . . .

* * * * *

Section 5: For the purposes of this Chapter—

“ gross income ” means the total amount other than receipts or accruals proved by the taxpayer to be of a capital nature, received by or accrued to or in favour of any person in any year or period assessable under this Chapter from any source within the Territory or deemed to be within the Territory . . .

an amount shall be deemed to be derived from a source within the Territory if it is received by or accrues to or in favour of any person ordinarily resident in the Colony or whose principal place of business is situate therein or whose business is wholly or partly managed therefrom . . .

“ income ” means the amount remaining of the gross income of any person for any such year or period after deducting therefrom any amounts exempt from income tax in the hands of such person:

“ taxable income ” means the amount remaining after deducting from the income of any person all the amounts other than abatements allowed as deductions under this Chapter;

* * * * *

Section 10: Income shall be deemed to have accrued to any person from a source within the Territory, where it has been received by or has accrued to or in favour of such person by virtue of—

(1) any contract made within the Territory for the sale of goods, whether such goods have been delivered or are to be delivered in or out of the Territory;

(2) any service rendered or work or labour done in the carrying on in the Territory of any business, trade, profession or occupation . . .

Section 35: (12) (b) Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs in whole or in part anything within this Colony, and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business within this Colony and to have derived from a source within this Colony a proportionate part of any profit ultimately derived from the sale thereof outside of this Colony. The Commissioner shall have full discretion of determining such proportionate part.

(c) Nothing in paragraph (b) of this sub-section shall in any way affect the generality of the term “ carrying on business ” as used elsewhere in the Ordinance.”

Two questions arose on the appeal :—

1. Was the amount assessed in respect of a receipt proved by the taxpayer to be of a capital nature?
2. Was it an amount received from any source within the territory?

1. The first question was decided against the appellant by all the Judges in South Africa. It appears to be a question of fact and as there are concurrent findings in the High Court of Southern Rhodesia and in the Supreme Court of the Union, the only question that would arise would be was there evidence to support the findings. It is not necessary to state in detail the facts relating to this contention. It is sufficient to say that the appellant company was incorporated on 30th November, 1935, as a private company with nominal capital of £10,000 of which £8,002 was issued. The chairman and a large shareholder was Sir Edmund Davis. On the same day the St. Swithins Ores and Metals, Ltd., was incorporated as a private company with a nominal capital of £100,000. Sir Edmund Davis was also chairman and a large shareholder in this company. On 5th December, 1935,

Sir Edmund Davis, who was entitled to a number of tungsten mining claims in Southern Rhodesia sold a number of them to the St. Swithin's company for £37,500; and on 12th December, 1935, he sold certain other of his mining claims to the Rhodesia Metals company for £5,000 cash. On 20th January, 1936, the St. Swithin's company increased its capital by an amount of £200,000. On 27th January, 1936, at an extraordinary general meeting of the company, a special resolution was passed that Rhodesia Metals be wound up voluntarily. Mr. Weatherley was appointed liquidator. The company in the short space of its existence had spent £2,000 in development work on the claims in Southern Rhodesia. On 5th February, 1936, the liquidator wrote to St. Swithin's company offering to sell the company's mining claims for £150,000 to be satisfied in fully-paid shares, an offer which St. Swithins accepted by a letter next day. On 28th February, 1936, the liquidator wrote to St. Swithins stating that he had discovered that the company was entitled to further mining claims, and was subject to possible liabilities in respect of claims, royalties, etc., and offered in substitution for the former agreement to sell the whole undertaking of the company including £2,180 in cash, subject to its liabilities, for cash and shares. On 3rd March, 1936, St. Swithins wrote offering to buy the whole undertaking as offered for £152,000 payable as to £150,000 in fully-paid shares and £2,000 in cash, and on 5th March, 1936, by special resolution of the members of Rhodesia Metals it was resolved to accept the offer. The transaction was duly completed and the mining claims transferred on the register from Southern Rhodesia to the St. Swithins company. *Prima facie* the sale by a liquidator of the whole undertaking of a company would result in a capital asset: but in the view of Hudson J. the Rhodesia Metals had acquired the claims as an operation of business for the purpose of developing and selling them in furtherance of a scheme of profit-making. In the view of the learned Judge the liquidation and the offer of sale by the liquidator merely formed part of the original scheme of profit-making: and the amended offer of the sale of the whole undertaking was in the circumstances an immaterial variation of the business operation. As seen by Stratford C.J. it was the culminating step in the scheme designed when the claims were bought and was made for the purpose of concluding the operation of profit-making which was on hand when the liquidation was commenced. There appears to be ample evidence upon which the learned Judges in South Africa could come to the conclusion which they reached on this issue, and on this point the appeal must fail.

2. It was, however, strenuously urged throughout the appeal here as in South Africa that the price received was not a receipt from a source in Southern Rhodesia. The respondent, it was said, was faced with a dilemma. The contention is that this was a capital sum: if so the tax is clearly not exigible. But if it was not a capital sum it was only because it was the result of a business operation:

if so the only source is the business: and the place where the business is carried on is the source of the profit made by the business: and as there can only be one source for one business profit you have only to see where the business was carried on which earned that profit: and that place is England where the head seat and directing power was situate and where both the contracts of purchase and sale were made and where the consideration for the sale was in fact received. In support of the contention, numerous cases founded on the various Income Tax Acts, English, Australian, New Zealand and South Africa, were cited chiefly as to business in buying and selling commodities such as *Lovell & Christmas v. Commissioner of Taxes* [1908] A.C. 46 (New Zealand), *Maclaine v. Eccott* [1926] A.C. 424 (England), *Studebaker Corporation v. Commissioner of Taxation for New South Wales* (1921) 29 C.L.R. 225 (Australia) and two South African cases, *Commissioner of Taxes v. Dunn*, S.A. Law Reports [1918] A.D. 607 and *Overseas Trust Corporation v. Commissioner for Inland Revenue*, S.A. Law Reports [1926] A.D. 444.

Their Lordships have no criticisms to make of any of those decisions, but they desire to point out 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 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. For instance, in the case of the business of a railway company whose railway is situate abroad, as in *Sao Paulo (Brazilian) Railway Co., Ltd. v. Carter* [1896] A.C. 31, while the English company may be assessed in England on the whole of its profits because it carries on part of its business there, yet it could not be doubted that so much of the profits of the business as were in fact earned from running the railway in Brazil were derived from exercising a business in Brazil: and still less could it be doubted that the sums received by the company in Brazil were received from a source in Brazil. In the present case their Lordships do not find it necessary to formulate a definition which will afford a universal test of when an amount is “received from a source within the territory”. A doubt may be expressed whether the words borrowed by Stratford C.J. from Innes C.J. in the *Overseas Trust* case (*supra*) “productive employment of capital” really help to define the situation. 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? Perhaps in other words it may be said does it mean more than carrying on business in a place? Their Lordships incline to the view quoted with approval from Mr. Ingram's work on Income Tax by Mr. Justice de Villiers in his dissenting judgment: "Source means not a legal concept but something which a practical man would regard as a real source of income"; "the ascertaining of the actual source is a practical hard matter of fact." At any rate, in the present case whatever may be the right view of the source of receipts derived from trading in commodities, their Lordships find themselves dealing with a case where the sole business operation of an English company is the purchase of immovable property in Southern Rhodesia and its development in that territory for purposes of transfer in that territory at a profitable price. The company never adventured any part of its capital except on that or those immovables. As a hard matter of fact the only proper conclusion appears to be that the company received the sum in question from a source within the Territory, viz., the mining claims which they had acquired and developed there for the very purpose of obtaining the particular receipt.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

In the Privy Council

THE LIQUIDATOR, RHODESIA METALS,
LIMITED (IN LIQUIDATION)

vs.

THE COMMISSIONER OF TAXES

DELIVERED BY LORD ATKIN

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