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**Court :** Kolkata

**Decided On :** Feb-12-1959

**Reported in :** [1961]42ITR322(Cal)

**Appellant :** Bullock

**Respondent :** Unit Construction Co. Ltd.

**Judgement :**

February 12. JENKINS L. J. The judgment which is about to be read by Romer L. J. is the judgment of the court.

ROMER L. J. The question on this appeal is whether three wholly owned subsidiary companies of Alfred Booth & Co. Ltd., namely, Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. (hereinafter collectively referred to as 'the subsidiaries'), were, in 1952 and 1953, resident in the United Kingdom for the purposes of section 20 of the Finance Act, 1953. The special commissioners held that they were, but their decision was reversed by Wynn-Parry J. on the ground that it was wrong in law. The unit Construction Co. Ltd., who are concerned to uphold the decision of the special commissioners, have appealed to this court against the judges order.

It was admitted on behalf of the Unit Construction Co. Ltd. before the commissioners that the subsidiaries were at all material times resident in East Africa. We think it is quite clear that this submission was rightly made; and as every possible step was taken, when the subsidiaries were incorporated in 1948

and 1949, to ensure beyond possibility of doubt that their residence should be regarded as being in East Africa, and as their articles of association were never altered, it would have been virtually impossible for the Unit Construction Co. to have contended to the contrary. As the judge observed in his judgment : 'Not only were all those companies registered in East Africa but they carried on business there; the members of the respective boards were resident there; and the articles of association provided in each case that the board meetings and general meetings of the company concerned could be held anywhere except in the United Kingdom.'

The fact that in 1952 and 1953 the subsidiaries were resident in East Africa is naturally somewhat embarrassing to the contention that in those years they were resident in the United Kingdom. It is not, however, in any way destructive of that contention because ever since the decision of the House of Lords in *Swedish Central Railway Co. Ltd. v. Thompson*, it has been well established that, for income-tax purposes, a company can simultaneously have two 'residences' in different countries. The view of the special commissioners that during the relevant period the subsidiaries could properly be regarded as resident relevant period the subsidiaries could properly be regarded as resident in the United Kingdom as well as in East Africa was based upon their finding that each of these companies was controlled and managed by the parent company, Alfred Booth & Co. Ltd., which is incorporated and resident in England. We find, 'the commissioners say in the stated case', that the position was at the material times that the boards of directors to the African Subsidiaries (who are the people one would have expected to find exercising control and management) were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control, and we find that the real control and management was being exercised by the board of directors of Alfred Booth & Co. Ltd. in London.... We find the controlling power and authority, which according to the constitution of each of the African subsidiaries is vested in its board of directors, is actually exercised, to a very substantial degree, by the board of Alfred Booth & Co. Ltd. in London.' The reasons for these findings, and the facts on which they are based, are stated with great care and clarity in the case, and there is no doubt but that the findings are fully warranted. The only question before the judge, as it is before us,

was whether those findings justified the commissioners conclusion in law that the subsidiaries had a residence in the United Kingdom. Having found as a fact that the controlling power and authority over the subsidiaries was actually exercised by the parent company in London the commissioners held, on their understanding of the authorities, that 'it is not necessary to go further and inquire whether such power and authority is exercised under the constitution of the company concerned by the officers to whom such constitution of the company concerned by the officers to whom such constitution gives it.' It is upon that issue of law that the judge differed from the special commissioners, and it is that issue which has been brought to this court for decision.

The question, in its briefest form, may be illustrated and posed as follows : Company A, resident in one country, is de facto, but not de jure, managed and controlled by company B, which is resident in another. Is a dual residence to be attributed to company A by reason of this de facto management and control The special commissioners in effect answered this question in the affirmative. The judge came to a different conclusion, and he expressed in a judgment with which we so wholly agree that we would be content to adopt it as our own, both in its reasoning and its language. Out of deference, however, to the arguments which were addressed to us by Mr. Heyworth Talbot and Mr. Creese for the taxpayer, we will state as shortly as possible in our own words the reasons why, as it seems to us, the appeal must fail.

Mr. Talbot submitted in support of his case the following three propositions : 1. The powers of shareholders as such do not invest them with central management and control of the companys business. 2. But where a company is a wholly-owned subsidiary the powers of the parent company with regard to the dismissal of directors and the provision of finance upon which the conduct of the subsidiarys business may depend put the parent company in a position to assume and exercise de facto the management and control assumes as exercise de facto of the management and the control of the subsidiarys business is a question of fact.

For our part we are prepared to accept each of these propositions as correct. The first of them is clearly established by the decision of the Court of Appeal in

Gramophone and Typewriter Ltd. v. Stanley Wynn-Parry J. referred to this case in his judgment and cited extracts from the judgments of Sir Herbert Cozens-Hardy M. R. and of Buckley L.J. We need not repeat them, but would refer only to a few passages from the judgment of Fletcher-Moulton L.J., which are perhaps of equal interest and relevance.

'This legal proposition', said the Lord Justice, 'that the legal corporator cannot be held to be wholly or partly carrying on the business of the corporation is not weakened by the fact that the extent of his interest in it entitles him to exercise a greater or less amount of control over the manner in which that business is carried on. Such control is inseparable from his position as a corporator and is a wholly different thing both in fact and in law from carrying on the business himself. The director and employees of the corporation are not his agents and he has no power of giving directions to them which they must obey... (The shareholders) course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself.'

Fletcher-Moulton, L. J. then proceeded to examine what he described as 'a more difficult question', namely, the position which arises when one individual owns the whole of the shares in a corporation which is permissible under German Law, or was at all events permissible when Stanley's case was recorded. He said : 'Treating it as an abstract proposition of law, I am of opinion that the acquisition of the whole of the shares of a corporation by one individual does not, of itself, alter the nature of his relationship to the corporation. His defacto control when he possesses 98 per cent. is probably complete from a practical point of view, and although it is, no doubt, rendered more so it is still of nature of a control exercised by corporators over the corporation, and does not make him and the corporation in any sense identical. the directors of the corporation do not become his agents. Their duties are still controlled by the rules and constitution of the corporation itself. Nor is this consideration one of the theoretical law only. The fact that the whole of the shares of the corporation are held by one individual at one moment by no means implies that they will be so at a future time; and the responsibility of

the directors and officers of the corporation is to the corporation itself, whatever be its composition at any moment as to the number of corporators. It would be no excuse to them, when called to account in the regular way and at the regular periods according to the constitution of the corporation, to plead that they obeyed the directions of the corporators at a particular moment (unless given in the manner prescribed by the constitution of the corporation) and on the strength of such directions failed to obey the corporate rules.'

If, then, authority were required to establish Mr. Talbots first proposition, one need go no further than Stanleys case to find it. Mr. Talbots third proposition is also correct; the question of de facto control, if it should be relevant in any case, must clearly be one of the fact. Mr. Borneman, for the Crown, was inclined to dispute of validity of Mr. Talbots second proposition on the ground that it was inconsistent with the judgments and decision in Stanleys case. A study of those judgments shows, however, in our opinion, that there is no such inconsistency, for they recognize that shareholders who holds sufficient shares in a company can de facto control its affairs by his ability to remove directors who disagree with his policy and to vote others into their places. The weakness of Mr. Talbots second proposition, to our mind, is not that it is inconsistent with authority but that it is irrelevant to the issue which falls to be decided.

Mr. Talbot was certainly able to point to passages in the judgments of judges who decided previous cases as supporting, at first sight, the view that the place in which is to be found the actual management or control of the companys business determines the residence of the company.

We will quote a few examples. In *De Beers Consolidated Mines Ltd. v. Howe* Lord Loreburn L.C. accepted and enunciated the principle that 'a company resides, for the purposes of income tax, where its real business is carried on.... and the real business is carried on where the central management and control actually abides.' Mr. Talbot naturally laid stress on the use by Lord Loreburn of the word 'actually'.

In *American Thread Co. v. Joyce Hamilton J.*, after referring to Lord Loreburns test in that *De Beers* case, said 5 : This test, the real business is carried on where the central management and control actually abides does not differ to my mind in

substance from the tests mentioned in earlier cases, such as the conduct and management, the head and brain of the trading adventure in the San Paulo (Brazilian) Railway Co. v. Carter, or the expression which has not been uncommonly used by commissioners the head and seat and directing power or the affairs, but owing to its being compact and precise, it appears to me to be the convenient one of adoption.'

In the same case on appeal to the House of Lords Lord Halsbury said that the real test 'which, after all, is only a question of analogy - you cannot talk about a company residing anywhere - and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the company is really directed and carried on in the sense'. This exposition by Lord Halsbury of the test to be applied was referred to by Lord Sumner in Egyptian Delta Land and Investment Co. Ltd. v. Todd, and he said : 'This expression of opinion can only mean that for both British and foreign companies alike the test is where on the facts (including among all the others the fact of incorporation here or there) the company's business is really directed and carried on.'

Relying on such judicial utterances as these, and there are others to like effect, Mr. Talbot contends that on the findings of the commissioners it is clear that the central management and control of the subsidiaries actually abides in London and it is from there that their business is really directed and carried on. Mr. Borneman, however, met this contention and, in our opinion, successfully met it, in two ways. First, he said that the scope and significance of judgments can only be truly assessed in the light of the facts of the particular cases in which they are delivered. This, of course, is undeniably true. All the judgments to which we have referred, and on which Mr. Talbot relied, were delivered in what we might call ordinary cases, and there is no reason at all to suppose that the judges had in mind such a case as the present in which de jure management is vested in one company whilst de facto control is vested in another. In none of the relevant authorities was so special a case referred to in argument or adverted to in the judgments. Judicial language is only authoritative in so far as it is directed to the particular subject-matter which is present to the speaker's mind; and, whatever its

apparent width, it has no force, even persuasive, outside the limits of its intended application. Accordingly the passages from the various judgments and speeches to which we have referred and on which Mr. Talbot sought to rely do not, in our opinion, advance the taxpayers case. The second point which Mr. Borneman took is, we think, equally well founded. He submitted that it is a legitimate assumption that, whatever judges may have said with regard to acts or other elements which may determine residence such acts or elements were envisaged as being regular and not irregular, constitutionally lawful and not unlawful. We think this must prima facie be so and the relevance of the consideration arises very directly in relation to article 67 of Tables in the First Schedule to the Companies Ordinance of Kenya, 1933. This article, which was incorporated in the articles of association of each of the subsidiaries, provides (so far as material) that 'the business of the company shall be managed by the directors, who may... exercise all such powers of the company as are not, by the Ordinance, or by these articles, required to be exercised by the company in general meeting'. If, submitted Mr. Borneman, and as the special commissioner have found, the business of the company was in fact being managed by the parent company and not by the subsidiaries own directors, the provisions of article 67 were being wholly disregarded; and an act such as that, the flouting of a term of a subsidiary company's constitution, can never have been judicially contemplated as being a guide to the residence of that company. In other words, says Mr. Bornman, where the judges have referred to the place where the central management and control is to be found, they mean the constitutional management and control and nothing else. As we say, we accept that submission, and the result of accepting it is that, inasmuch as under the constitutions of the subsidiaries their management and control was vested in their directors in Kenya and in them alone, there is no warrant in the authorities for attributing to the subsidiaries a second residence in England by reason of the usurpation of the directing power by the parent company. The conclusion that only constitutional, and therefore authorised, management and control are relevant to an inquiry as to the residence of a company and control are relevant to an inquiry as to the residence of company seemed to the judge, as it seems also to us, to be strongly broke out by the judgment of this court in *Union Corporation Ltd. v. Inland*

Revenue Commissioners. In the course of that judgment there appears the following passage, which Wynn-Parry J. cited : 'The company may be properly found to reside in a country where it really does business, that is to say where the controlling power and authority which; according to the ordinary constitution of a limited liability company is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found.'

Eveshed M. R., who read the judgment of the court, then referred to a passage from the judgment of Sir Owen Dixon in the Australian case of *Koitaki Para Rubber Estates Ltd. v. Federal Commissioners of Taxation*. We will, however, refer to the judges conclusion, on the matter, with which we respectfully and entirely agree : 'In my view this passage is conclusive of the question before me. In the first place, the words of the Master of the Rolls, that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company is vested in its board of directors, and the exercise of that power and authority is to some substantial degree to be found, indicate to my mind that he was contemplating only an exercise of authority which could properly be exercised within the framework of the constitution of the company concerned. This conclusion is, I think, inevitable when one considers the phrase used by Dixon J., the superior or directing authority. In the context authority must have a narrower meaning than power. It must connote something which has been regularly established, and because of that regular establishment is entitled and able to exercise direction. To my mind, the board of the parent company cannot fall within the phrase superior or directing authority. As such it has no authority over the boards of the African subsidiaries. True those boards may accept the instructions of the board of the parent company; but they are not bound to do so. It may be that they do accept instructions, because failure to do so would result in dismissal, but acceptance in fact of such instructions does not mean that the board of the parent company have authority to give the instructions. As I have said, they have no such authority. It must follow, to my mind, that in applying the test adumbrated by the Masters of the Rolls no weight or attention can be given to the activities of the board of the parent company in relation to Unit and the African subsidiaries for the purpose of considering whether or not any of them are resident in the United Kingdom. In the result it cannot be said that any part of the superior and directing

authority of these companies can be said to exist in the place claimed as a residence, namely, the United Kingdom. Further, even if authority could be regarded as being synonymous with power, the word power in the context would have to be read as power regularly exercised.'

We should perhaps make a brief reference to two cases upon which Mr. Talbot and Mr. Creese respectively placed some reliance. The first was *Scottish Co-operative Wholesale Society Ltd. v. Meyer*. In that case a company formed a subsidiary and caused its own nominees to be appointed on to the board of directors. These nominees exercised their powers in the interest of the parent company and to the detriment of the subsidiary to such an extent that the latter's business came virtually to a standstill. Some minority shareholders accordingly presented a petition under the Companies Act, 1948, section 210, for an order on the parent company to purchase their shares. The House of Lords held they were entitled to the relief sought and that, to quote from the headnote, the parent company 'had acted towards the minority shareholders of the (subsidiary) company in an oppressive manner and that this conduct through the nominee directors of the company, who were also directors of the society, amounted to conduct of the affairs of the company, since the transactions of the two could not be separated.' We do not think that case is of any assistance. It shows that de facto control of a company's business from outside can constitute an oppressive conduct of its affairs for the purpose of section 210, but that is far removed from showing that such control can affect the company's 'residence'. The second case was *Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd.* In that case one of the questions in debate was, in substance, whether a company which was incorporated in England but whose shareholders (save one) and directors were Germans resident in Germany could sue in this country in time of war between the two countries. Lord Parker of Waddington, with the concurrence of other of the Law Lords, expressed the view that (to quote again from the headnote) 'the character of individual shareholders cannot of itself affect the character of the company; but the enemy character of individual shareholders and their conduct may be material on the question whether the company's agents or the persons de facto in control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies.' We cannot ourselves

see how that view, or any of the speeches of their Lordships in that case, have any bearing on the effect on the residence of a company of its business being carried on under extraneous control. The only matter which their Lordships were discussing was the extent to which the character of an English company (British on the one hand or enemy on the other) should be determined by the character of those who de fact controlled its affairs.

It only remains to say that for the reasons which we have explained, and which are in substance the same as those expressed in the judges judgment, this appeal, in our opinion, fails and must be dismissed.

Appeal dismissed.

Leave to appeal to House of Lords.

Solicitors : Herbert Smith & Co. : Solicitor of Inland Revenue.

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