HIGH COURT OF JUSTICE (CHANCERY DIVISION)—18TH, 19TH AND 20TH OCTOBER, 1955

COURT OF APPEAL—7TH, 8TH, 9TH, 10TH AND 13TH FEBRUARY, 1956

HOUSE OF LORDS—13TH, 17TH AND 18TH DECEMBER, 1956, AND 14TH FEBRUARY, 1957

Firestone Tyre & Rubber Co., Ltd. (as agents for Firestone Tire & Rubber Co. of Akron, Ohio, U.S.A.)

v.

Lewellin (H.M. Inspector of Taxes)[1]

Lewellin (H.M. Inspector of Taxes)

v.

Firestone Tyre & Rubber Co., Ltd.

Income Tax, Schedule D—Non-resident company—Exercise of trade in United Kingdom—Agency—Sale of goods manufactured in United Kingdom by subsidiary and ordered from subsidiary by parent company's foreign customers.

The trade mark of Firestone tyres was owned by A, a foreign company with a world-wide organisation. The tyres were manufactured and sold in the United Kingdom by A's wholly-owned resident subsidiary B, which was assessed to Income Tax on that business, the percentage on exports hereinafter mentioned being brought into the receipts. A made agreements with distributors in other countries specifying the terms on which Firestone products would be supplied and binding them to keep on hand reasonable stocks and use their best endeavours to sell those products. These distributors were given a list of manufacturers, including B, who could fulfil orders; B was given a list of the distributors and was under contract to A to fulfil orders obtained abroad by A. In practice B received orders direct from the distributors, made delivery at a port in the United Kingdom and received payment, which was credited to A in the books of B after deducting costs plus 5 per cent.

The profits of the export trade were assessed to Income Tax under Case I of Schedule D for the years 1940–41 to 1944–45 on the alternative bases that it was carried on either by B on its own behalf or by A in the United Kingdom through the agency of B. On appeal to the Special Commissioners B contended that the trade of selling tyres to A's customers abroad was not carried on by B on its own behalf and not exercised by A in the United Kingdom or through B's agency, but that the fulfilment of each

[1] Reported (C.A.) [1956] 1 W.L.R. 352; 100 S.J. 262; [1956] 1 All E.R. 693; 221 L.T. Jo. 151; (H.L.) [1957] 1 W.L.R. 464; 101 S.J. 228; [1957] 1 All E.R. 561; 223 L.T. Jo. 116.

order by B involved a sale to A with delivery to A's orders. The Commissioners found that B held goods of its own at A's disposal and sold them on A's behalf to customers approved, and on terms imposed, by A. They concluded that A was through the agency of B exercising a trade in the United Kingdom, where the orders were received and fulfilled, the goods manufactured and payment received. Both parties demanded a Case but in the High Court the Crown abandoned the assessments on B as principal.

Held, (1) *that a trade was exercised in the United Kingdom of selling to distributors abroad under contracts made in the United Kingdom tyres manufactured therein and delivered therein to the purchasers against payment therein of the contract price;* (2) *that the Commissioners were fully entitled to conclude that the trade was exercised by A through the agency of B.*

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the Chancery Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 27th and 28th May, 1952, the Firestone Tyre & Rubber Co., Ltd. (hereinafter called "Brentford"), which carries on the business of tyre and rubber manufacturers at Great West Road, Brentford, Middlesex, appealed against two alternative series of Income Tax assessments made upon it for the years 1940–41 to 1944–45 inclusive.

2. The first series of assessments was made upon Brentford under Case I of Schedule D in respect of profits as tyre manufacturers as follows:

Year of assessment	Amount of assessment
1940–41	£5,000
1941–42	£5,000
1942–43	£5,000
1943–44	£5,000
1944–45	£10,000

The second series was made upon Brentford as agents for an American corporation, the Firestone Tire & Rubber Co. of Akron, Ohio, in the United States of America (hereinafter called "Akron"), in respect of agency profits as follows:

Year of assessment	Amount of assessment
1940–41	£10,000
1941–42	£10,000
1942–43	£10,000
1943–44	£10,000
1944–45	£10,000

These assessments were in addition to the assessments made upon Brentford in respect of its own business of tyre manufacturers referred to in paragraph 4 below.

The questions for determination before us were as follows:—

(*a*) whether Brentford itself was carrying on a trade on its own behalf of selling tyres to persons outside the United Kingdom; and, if not,

(*b*) whether Akron was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom; and, if so,

(*c*) whether that trade was carried on by Akron through the agency of Brentford.

3. Evidence was given by William Ernest Duck, chairman of Brentford, and Arthur William Edlin, secretary to Brentford. The facts admitted or proved before us are set out in paragraphs 4 to 13 below.

4. Akron, an American corporation registered in Akron, Ohio, is the head of a world-wide organisation consisting of a large group of corporations operating in America and in various parts of the world. Some of its associated and subsidiary corporations manufacture and sell tyres in the countries in which they are registered and others sell, in the countries in which they are registered, tyres which have been manufactured in America or by subsidiary corporations in other countries. For convenience, certain matters in regard to the business of the organisation carried on outside the United States of America have been conducted by other subsidiary companies of Akron but for the purposes of the determination of the appeal before us only it was agreed by both sides that Akron and any of its associated and subsidiary companies registered outside the United Kingdom should be treated as one person. Accordingly the references in the succeeding paragraphs to Akron embrace not only the principal company but also, where necessary, its associated subsidiary companies registered outside the United Kingdom.

Brentford is an English company registered in 1922 with an issued capital of £20,000 in £1 ordinary shares. This capital was increased to £140,000 in 1938. All the shares in Brentford are owned by Akron. The board of directors of Brentford consists of individuals resident in the United Kingdom with the exception of Mr. Harvey Firestone, the chairman of the board of directors of Akron, who is a director of Brentford and occasionally attends meetings of its directors.

Following its incorporation, Brentford's business consisted in the selling of Firestone tyres in the United Kingdom which had been manufactured in America. In 1928 a factory for the manufacture of tyres was built at Brentford, and from 1929 onwards, Brentford's business consisted by agreement with Akron of the manufacture and sale of tyres under the name of Firestone tyres in the United Kingdom. Brentford has been throughout duly assessed to Income Tax under Case I, Schedule D, in respect of this business. The trade mark in these tyres was owned by Akron and Brentford was therefore unable to sell them inside or outside the United Kingdom without the consent of Akron.

5. Firestone tyres which had been manufactured by Brentford were exported to customers outside the United Kingdom by agreement with Akron in accordance with the following arrangements. They were exported only to persons approved by Akron as "distributors" of Firestone tyres, who were required to sign an agreement with Akron. A copy of a specimen of this agreement made between a Swedish corporation and Akron, marked "A", is attached to and forms part of this Case(1).

Under this agreement dated 20th May, 1935, Akron granted to the Swedish distributor the exclusive right to sell Firestone tyres and accessories in Sweden and the latter undertook to buy, sell and distribute such Firestone branded products exclusively; to keep on hand reasonable stocks of these

(1) Not included in the present print.

products; and to use its best efforts to sell these products in Sweden but not elsewhere.

The distributor was entitled to buy Firestone products at prices set out in lists attached to the agreement subject to Akron's right to change the prices without notice. Akron undertook to make deliveries f.a.s. vessel and it was agreed that delivery to a carrier should constitute delivery to the distributor. The terms of Akron were 90 days' sight draft documents against acceptance.

Akron agreed that in the event of its reducing its billing prices it would credit the difference between the old and the new prices not only on goods in transit to but also on stocks held by the distributor. The distributor agreed that in the event of Akron increasing prices, the former would accept a debit for the difference in prices not only on goods in transit to but also on stocks held by it.

It was understood and agreed between the parties to the agreement that it was not to be construed as constituting the distributor as an agent of Akron for any purpose whatever.

The contract between the parties set out in the agreement was to become effective only when executed by the duly authorised representative of Akron at Akron in Ohio, it being agreed that the agreement was to be construed under the laws of the State of Ohio in the United States of America. It was also agreed that the terms of the agreement could not be altered, waived or modified, except by written endorsement thereon executed on behalf of Akron at Akron in Ohio.

At the hearing before us it was agreed between the parties to the appeal that this document could be taken as typical of the agreements entered into between Akron and its distributors outside the United Kingdom. These agreements are hereafter referred to as " master agreements ".

6. The foreign distributors who had entered into a master agreement with Akron were given lists of the corporations which manufactured Firestone products and were empowered to order these products in accordance with the terms of the master agreement from whichever manufacturing corporation they preferred. Brentford was included in the lists of corporations furnished by Akron to its distributors outside the United Kingdom.

Brentford was authorised by Akron to supply Firestone products outside the United Kingdom to distributors who had signed a master agreement with Akron and was supplied by the latter with lists of such distributors. Brentford did not seek orders from the distributors of Akron or employ travellers outside the United Kingdom but fulfilled by manufacture or from its existing stocks orders made upon it by the distributors in accordance with the terms and conditions laid down by Akron in the master agreements.

7. From 1929 to 1930 Brentford charged Akron the factory cost of the goods despatched to Akron's distributors and from 1930 to 1934 the factory cost of such goods plus a share of certain of Brentford's expenses. Following negotiations between the two corporations an agreement was drawn up on 8th February, 1936, regulating the fulfilment by Brentford on behalf of Akron of orders obtained in Europe and elsewhere by Akron. A copy of this agreement, marked " B ", is attached to and forms part of this Case[1].

8. By this agreement Brentford undertook to use its best endeavours to fulfil either by manufacture or from its existing stock all orders obtained

[1] Not included in the present print.

by Akron in Europe or elsewhere as and when requested to do so by Akron. Brentford also agreed upon receipt of such an order to forward the goods ordered to the purchaser and to give such instructions for payment of the purchase price as should be requested by Akron.

(In practice, however, Brentford continued to fulfil orders received by Brentford direct from the distributors, provided they appeared on the lists of authorised distributors supplied by Akron to Brentford as above-mentioned, without normally any further intervention by Akron.)

Akron in consideration of these services undertook to pay to Brentford a sum equal to the total cost price (as therein defined) of the goods supplied plus five per cent. thereof.

The agreement was to continue for a period of five years and thereafter until determined by either party. It has never been determined.

9. Until the outbreak of war in 1939, Brentford continued to supply goods to authorised distributors of Akron as ordered by them; to collect the moneys for these goods and to pay these into Akron's bank account in London. Transfers from this account to the United States of America were regularly made. Following the outbreak of the war money could not be remitted from the United Kingdom to the United States of America. Up to 30th November, 1939, all the moneys collected by Brentford from Akron's distributors were paid into a separate bank account and on that date the balance in this account was transferred to Brentford's own bank account. In its own books Brentford credited Akron with the amount so transferred.

From 1st December, 1939, onwards it was agreed between Akron and Brentford that the proceeds of sales to Akron's distributors should be placed to the credit of a new banking account marked "Firestone Tyre & Rubber Company Ltd. Export Proceeds Account." At the end of each month the balance of that account was transferred to Brentford's own current account. The sums so transferred were, pursuant to the agreement, treated in Brentford's books as sums lent to or deposited with it by Akron.

10. From September, 1939, to April, 1942, the export of tyres from the United Kingdom was prohibited except by licence of the Board of Trade. Orders from Akron's distributors abroad could therefore be fulfilled by Brentford only if it was able to obtain a licence from the Board of Trade.

11. In April, 1942, the Ministry of Supply set up a tyre control section. By virtue of S.R. & O. 1942 No. 596, it was provided that with certain exceptions no person other than an authorised tyre depôt should acquire or dispose of or agree or offer to acquire or dispose of any tyre. The statutory order gave power to deal in tyres under the authority of and in accordance with a licence granted or a special or general direction issued by the Ministry of Supply.

The effect of the statutory order was to cancel all existing export licences and, until normal export shipments were resumed for passenger car tyres in 1947 and for larger tyres in 1948, all exports were made in accordance with allocations made by the tyre control and all goods which were sent abroad by Brentford were sent under and by the authority of a licence issued by the tyre control section of the Ministry of Supply. The tyres so exported by Brentford were sent either in response to an order originating

with an Akron distributor and authorised by the tyre control or else in pursuance of a direction by the Ministry of Supply to send tyres to a certain country. In the latter event the tyres were sent to the appropriate Akron distributor in that country if there was one. The only exception to this practice was that sales of tyres amounting to some £12,000 and £37,000 respectively were made to the Government of New Zealand and to the Free French delegation in London. These tyres were exported by the purchasers themselves.

The total sales abroad in the period with which this case is concerned was £782,000. Apart from the two items referred to above, amounting to £49,000, the whole of these sales were made to distributors of Akron. They were treated by Brentford as the fulfilment of orders obtained by Akron in accordance with the agreement of 8th February, 1936 (see paragraphs 7 and 8 of this Case), and the proceeds thereof less the cost of the goods plus five per cent. of that cost were credited to Akron in the books of Brentford. The amounts retained by Brentford, namely, the cost of the goods plus five per cent. of that cost, have already been brought into account in the assessments made upon it in respect of its own business.

12. Throughout the period concerned in this Case, sales were invoiced to the appropriate distributor in the name of Brentford and a sight bill of exchange on the distributor for payment in London was drawn in the name of Brentford. Brentford arranged for the shipment to the distributors of the tyres, etc., ordered by them from Brentford. In respect of each transaction Brentford furnished to Akron copies of the export invoice, the export manifest, the sight draft and the bill of lading. Akron was also notified by the bank when Brentford received payment for the goods. These documents and this information was sent for the purpose of enabling Akron to prepare their own sales ledgers. No sales ledgers for accounts of distributors outside the United Kingdom were kept by Brentford.

In the case of the relatively small sales to the New Zealand Government and the Free French Government, although the sales were made to agents in this country, Brentford regarded them as sales to persons outside the United Kingdom and as, therefore, coming within the scope of the agreement of 8th February, 1936. The proceeds of these sales less the factory cost plus five per cent. thereof were, in the books of Brentford, credited to Akron and not to the sales account of Brentford itself.

13. After the cessation of tyre control Akron and Brentford reverted to their pre-war practice, the only difference being that the proceeds of all sales to foreign distributors had to remain in London and could not be remitted to Akron in America.

14. It was argued on behalf of Brentford that:

(*a*) Brentford was carrying on as part of its own trade a trade of selling tyres to Akron and has already been assessed in respect thereof for the years in question; it was not carrying on, on its own behalf, a trade of selling tyres to the customers of Akron;

(*b*) Akron was not exercising in the United Kingdom a trade of selling tyres to customers outside the United Kingdom;

(*c*) in any event Brentford was not acting as the agent of Akron in relation to the sales in question; and

(*d*) that all the assessments to Income Tax made upon Brentford whether on its own behalf or as agent for Akron should be discharged.

15. It was contended on behalf of the Crown that:

(*a*) Brentford was carrying on on its own behalf a trade of selling tyres to customers outside the United Kingdom; or, alternatively,

(*b*) Akron was carrying on a trade in the United Kingdom through the agency of Brentford of selling tyres manufactured in the United Kingdom to customers outside the United Kingdom;

(*c*) Brentford was assessable to Income Tax under Schedule D accordingly.

16. We, the Commissioners who heard the appeal, gave our decision as follows:

(*a*) Having reviewed the evidence given before us we are satisfied that, in the years with which we are concerned, Brentford was not carrying on on its own behalf a trade of selling tyres to the customers of Akron. We therefore discharge the assessments made upon Brentford as tyre manufacturers for the years 1940–41 to 1944–45 inclusive.

(*b*) We now turn to the question whether in these years Akron was exercising a trade in the United Kingdom through the agency of Brentford.

We have found this a difficult question, not least because although in law Brentford is a separate person from Akron, in fact all the shares in the former are held by the latter and it is clear from the evidence that Brentford is a part of Akron's world-wide trading organisation.

(*c*) It seems to us that in the relevant years the arrangements subsisting between Akron and Brentford were as follows. By virtue of the agreement of 8th February, 1936, Brentford agreed to fulfil orders obtained by Akron when requested to do so by Akron. The orders to be fulfilled were limited to those from customers approved by Akron and these orders were to be fulfilled on terms laid down by Akron in master agreements executed outside the United Kingdom.

Brentford was authorised by Akron to fulfil orders coming from Akron's approved customers without any intervention by Akron and all the documents for the fulfilment of the orders were made out in the name of Brentford. Moreover the proceeds of the sales arising from the fulfilment of the orders were paid to Brentford in the United Kingdom. These sales moneys were paid into a special bank account and transferred to Brentford's bank account at the end of each month.

(*d*) We are unable to accept the proposition put forward on behalf of Brentford that the fulfilment of each order by Brentford involved a sale of goods to Akron with delivery to the latter's orders. It seems to us that the effect of the agreement of 8th February, 1936, and the course of the dealings between Akron and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell the same on Akron's behalf to customers approved of by Akron

and subject to terms imposed by Akron; and, further, to account to Akron for the proceeds of the sales less the cost of the goods sold plus five per cent.

(*e*) We further think that when Brentford received the moneys payable for the goods sold to Akron's customers it was collecting the price of the goods as such and that it later was able to appropriate these proceeds for its own purposes as loans from Akron.

(*f*) The authorities cited to us appear to show that while great importance attaches to the place where the contracts are made, there is no exhaustive test of what constitutes trading in the United Kingdom by a non-resident and that regard must be had to the whole of the circumstances in order to see where the operations take place from which the profits in substance arise (*F. L. Smidth & Co.* v. *Greenwood*, 8 T.C. 193, *per* Atkin, L.J., at page 204).

In the present case, although the master agreements by virtue of which the individual orders for goods were placed were executed outside the United Kingdom, the orders themselves were received and fulfilled in England, the goods ordered were manufactured in England and payment of the price of the goods was received in England. In all the circumstances we come to the conclusion that in the relevant years Akron was exercising a trade in the United Kingdom through the agency of Brentford.

(*g*) For these reasons we hold that the appeal fails in the case of the assessments made upon Brentford as agents for Akron for the years 1940–41 to 1944–45.

We leave the figures to be agreed.

The parties to the appeal subsequently agreed that on the basis of our decision the liability to Income Tax of Brentford as agent for Akron is as follows:

1940–41	...	...	...	...	£37,856
1941–42	...	...	...	...	£16,200
1942–43	...	...	...	...	£10,192
1943–44	...	...	...	...	£3,529
1944–45	...	...	...	...	£4,563

17. Immediately after the determination of the appeal dissatisfaction therewith as being erroneous in point of law was declared to us on behalf of the Company and on behalf of H.M. Inspector of Taxes and in due course both parties required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case I have stated and do sign accordingly.

W. E. Bradley, Commissioner for the Special Purposes of the Income Tax Acts.

[Mr. F. N. D. Preston, the other Commissioner who heard the appeal, has since retired from the public service.]

Turnstile House,
94-99, High Holborn,
London, W.C.1.
23rd November, 1953.

The cases came before Harman, J., in the Chancery Division on 18th, 19th and 20th October, 1955, when judgment was given in favour of the Crown, with costs, on the agency assessments, and against the Crown, with costs, on the assessments on the Company as principal.

Sir Frank Soskice, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Sir James Millard Tucker, Q.C., and Mr. G. G. Honeyman, Q.C., for the Company.

Harman, J.—The Firestone Tire & Rubber Co., a corporation established in the State of Maine in the United States of America, and having its headquarters at Akron in the State of Ohio—it has been called "Akron" throughout this case—is a very large organisation which has a world wide market for its tyres, Firestone tyres. In the case of this country it established here as long ago as 1922 a subsidiary Company which is the Appellant in this case, the Firestone Tyre & Rubber Co., Ltd. That is what we should call a wholly owned subsidiary of the American company. That Company registered under our law at first sold tyres under the Firestone brand in the United Kingdom, they having been manufactured in the United States, but after a time—I suppose owing to the increasing business—it was considered worthwhile putting up a factory here; and since 1928 the English Company, known in the argument as "Brentford", has been manufacturing and selling Firestone tyres in this country. It no doubt is a licensee of the Firestone trade mark, and maybe of patented or special processes emanating from the parent company. In respect of that trade it is a normal trading company in England, and pays tax in the ordinary way.

But that is not the whole of its trade. It also sells—to what extent I know not, but to a considerable extent—tyres abroad, on the continent of Europe, and receives the purchase money for those tyres which are sold at competitive prices. So far one would suppose that activity was only an extension of its English trade. Indeed, the Crown did make an assessment on the Company upon that footing, on the profits of its foreign trade. That assessment was rejected by the Income Tax Commissioners, and it has not been pursued here, the reason being that when the matter is further looked into that trade is not in any way a normal kind of trade for a company. For it appears that when Brentford sells these tyres at a competitive price to foreign customers it only retains of that price the cost plus a small over-riding commission, and it remits, so far as it is allowed to do so, the balance to its parent company in the United States. Consequentially it does not itself earn the normal profits of its trading activities.

H.M. Inspector of Taxes, by way of alternative, which is the alternative pursued here, said: Very well, if that is not your trade, which I now agree it is not, it is a trade you do as agent for your principal Akron, and I am assessing you as such on the agency profits; to which it is retorted by Brentford: these are not agency profits, or if they are then they are not profits of a trade carried on within this country.

The tyres are made here; the tyres are sold here, and delivered to the purchaser here; the price is received here. All the aspects of a normal trade are going on, but it is said that the trade is exempt from tax because of the arrangements made between the parent company and its subsidiary;

(Harman, J.)

and that the English Company cannot be rightly described as the agent of the American company. Nor is the American company, if it is doing the business, doing the business in this country at all. These are startling propositions, brilliantly maintained by Sir James Tucker who performed Blondin-like feats of balance between Scylla on the one hand and Charybdis on the other. He maintained his equilibrium until the end and sat down safely, but while I admire, I do not accept the precarious logic of his submissions.

His main thesis was that the course of business postulated a sale by the Brentford Company, which had stocks of these tyres, to the American company at a price representing cost plus five per cent., and a further sale by the American company to the foreign dealer or distributor at the market price, that sale being the outcome of a contract not made here, and the test being, says he, where is the contract made? True, he says, the English Company, Brentford, is the agent to receive the purchase price. That is all it does. In delivering the tyres free on board ship it is not acting in any way as the agent; it is merely carrying out the contract of its sale to the American company. I do not accept that because it seems to me there is no evidence that there ever was such a sale at all, and I feel no necessity to postulate a sale which is merely a philosophical idea. The transaction can be explained without it.

In fact the course of business arises out of two agreements which are attached to the Case. One of them is an agreement between Akron and Brentford, and the other one between Akron and one of its foreign distributors. As the distributor's agreement, so to call it, is earlier in date than the other I will glance at it first. The distributor's agreement is made between Akron either in its own person or by one of its American subsidiaries—it does not matter, as was agreed—and the Swedish distributor. The distributor is given the exclusive right to sell within its area, which is Sweden, the products of Akron, and in turn agrees not to sell or distribute any other kindred products, and to keep a sufficient stock of Firestone products to meet the demands of the trade. Those in effect are two mutual negative obligations, one not to supply anybody else and the other not to distribute anybody else's goods. Prices are then fixed by lists which are attached to the agreement. Akron agrees to deliver against ninety days' sight drafts, and there are a number of details into which I need not, I think, go. Under clause 12 Akron is exempted from liability for delay or failure to make delivery in certain specified circumstances. In other words, those circumstances excepted, it is assumed there may be liability for failure to make delivery. The course of business there outlined was not in fact altogether fulfilled. Akron never by itself made any deliveries at all.

In order to find out what the course of business was one must look at the other agreement made between Akron and Brentford, which recites that the parties

> "are desirous of concluding an arrangement for the fulfilling by the English Company of orders obtained in Europe and elsewhere by the American Company".

Clearly, if that were the position, the English Company would be fulfilling orders obtained by and belonging to Akron, and could only be doing it as Akron's agent, as I see it. It is said that was not exactly the course of business, and I agree the question is whether what was done makes any difference to the position.

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By this second agreement Brentford agrees, as far as it can, to fulfil the orders for the European market "obtained by" the American company as and when so requested. The English Company may charge Akron with the cost, and keep five per cent. to cover overheads; the rest is to go to Akron. What in fact was done differed slightly from that, and was, as far as I understand it, this. Akron had these agreements with European distributors in various countries, and it supplied them with lists of manufacturers who would fulfil their orders, the English Company, Brentford, being one of them. Akron did not interfere any more, normally. The European distributor from time to time would send an order to one of the indicated manufacturers for its wants, and the English Company, if it could and if during the war it was allowed so to do by the Board of Trade or the tyre control, would fulfil the order. The order was fulfilled in England by delivering free on board ship at an English port, or alongside the ship; I am not quite sure which, but it does not matter—anyway, in England. The money was received by the English Company who recouped themselves for the cost and their five per cent., and in respect of the surplus held it to the use of the American company. It was taken as a loan in fact, but that is neither here nor there.

Upon that, what is the right conclusion? First of all, said Sir James Tucker, the contract was made directly the European distributor in Stockholm put into the post a letter to one of the authorised manufacturers ordering tyres, because that is what he was entitled to do under the distributor's agreement. Therefore, he says, the contract was made abroad. It was a contract no doubt made not with Akron in a sense because the acceptance was sent to the English manufacturers, but the English manufacturers must have been an agent of Akron for that purpose. I agree at once that a contract between Akron and the Swedish company was made when the letter was posted in Stockholm, but that was a contract under which Akron was not bound to deliver tyres but was bound to procure someone else to do so. It is the kind of contract which warranted that A, B or C would deliver the goods. The contract for the sale and purchase of the goods themselves was not made, in my view, until the letter from the Swedish distributors reached Brentford, and the latter Company either accepted it in writing or appropriated the goods in fulfilment of it; and that contract it seems to me was made in England. Therefore, if that be the case, the relevant contract was a contract made in England; and, if so, the trade was exercised in England.

Supposing I should be wrong about that and the relevant contract was that which was made between Akron and the Swedish company, even so it is not impossible to suppose that the trade was a trade exercised in England because the fulfilling of the order, the delivery of the goods and the payment for them were all done in England. Those may be matters of equal importance with the question of the formation of the contract. For that I rely on the statement in the case of *F. L. Smidth & Co.* v. *Greenwood*, 8 T.C. 193, at pages 199 to 204.

Supposing the business be done in England, whose business is it? In my judgment, when Brentford agrees to fulfil the orders of the Swedish company, it is making the contract as principal *vis-à-vis* the Swedish company,

(Harman, J.)

but I do not see that that precludes it from being in the position of an agent so far as regards Akron. In fact it is obliged by its agreement with Akron to fulfil these orders when they are given to it, and it does so because of these contractual relations with Akron, and on Akron's behalf and at its behest. Then it seems to me really idle to say that in those circumstances, even though the sale be a sale by Brentford of its own tyres, as they undoubtedly are its own tyres, that is not a sale which *vis-à-vis* Akron can be said to be done as Akron's agent. It is performing Akron's obligations to the Swedish company. Akron performs its obligations through its agent, the English Company. That is how Akron does its business in Sweden, and I think it would be shutting one's eyes to the facts to deny that in those circumstances there was a business of Akron's being carried on in this country by its agent, Brentford.

A great number of cases were cited to me in the course of the argument, and I hope I shall not be guilty of disrespect if I do not animadvert to them. This seems to be a case which has to be looked at on its facts. The Commissioners found as a fact that there was such an agency, and all I have to do is to see whether there was evidence to justify that finding. It seems to me that there was ample evidence, and I go further and say that I do not see how the Commissioners could have found otherwise. I therefore dismiss the appeal.

Sir Frank Soskice.—Dismissed with costs?

Harman, J.—Yes.

Sir James Tucker.—There are two appeals.

Harman, J.—The Crown's appeal is also dismissed with costs.

Sir James Tucker.—If your Lordship pleases. Both appeals dismissed with costs.

Harman, J.—Yes. You do not need any Order for set-off, do you?

Sir James Tucker.—No.

The Company having appealed against the decision on the agency assessments, the case came before the Court of Appeal (Lord Evershed, M.R., and Jenkins and Birkett, L.JJ.) on 7th, 8th, 9th and 10th February, 1956, when judgment was reserved. On 13th February, 1956, judgment was given unanimously in favour of the Crown, with costs.

Sir James Millard Tucker, Q.C., and Mr. G. G. Honeyman, Q.C., appeared as Counsel for the Company, and Sir Frank Soskice, Q.C., and Sir Reginald Hills for the Crown.

Lord Evershed, M.R.—It may be truly said as a general proposition that the bulk of those who are liable to pay Income Tax are the subjects of Her Majesty resident in the United Kingdom. But there are some few cases in which persons not subjects of Her Majesty, and not indeed resident in the United Kingdom, may pay the tax. Thus, to refer to the Income Tax Act

which is appropriate to this case, the Income Tax Act, 1918, Schedule D, Paragraph 1, of that Act provides:—

> "Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing . . . (iii) to any person, whether a British subject or not, although not resident in the United Kingdom . . . from any trade, profession, employment, or vocation exercised within the United Kingdom".

That tax liability of foreign non-residents is qualified and governed as regards assessment by certain of the General Rules—and again I refer only to those material to the present case—applicable to Schedules A, B, C, D and E. Of those Rules it will be sufficient to read Rules 5 and 10, which have assumed their present form as successors in title (as it were) of the original Income Tax Act, 1842, as amended by the Finance (No. 2) Act of 1915. Rule 5 says:

> "A person not resident in the United Kingdom, whether a British subject or not, shall be assessable and chargeable in the name of any such trustee, guardian, tutor, curator, or committee, or"

—and these are the more important words—

> "of any factor, agent, receiver, branch, or manager, whether such factor, agent, receiver, branch, or manager has the receipt of the profits or gains or not, in like manner and to the like amount as such non-resident person would be assessed and charged if he were resident in the United Kingdom and in the actual receipt of such profits or gains."

But Rule 10 says:

> "Nothing in these rules shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person carrying on the regular agency of the non-resident person or a person chargeable as if he were an agent in pursuance of these rules, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent."

From the Paragraph in Schedule D which I have read, and the two Rules, it follows that in the case of an attempt to tax, via a "regular" agent, a non-resident person, two requirements must be shown to be satisfied. First, the non-resident must be not merely trading with the United Kingdom but exercising, that is carrying on, a trade or profession within the United Kingdom; and, second, for the purposes of that trade there must be what is called an authorised person as regular agent of the non-resident trader.

The claim to Income Tax in the present case relates to the five tax years 1940–41 to 1944–45 inclusive. That was a period of severe war-time restriction in this country upon trading between the United Kingdom and foreign parts. That matter I have mentioned because it has, as will be seen, some bearing upon this case.

The non-resident sought here to be taxed is a company known as the Firestone Tire & Rubber Co., being a company incorporated, I think, in the State of Maine but having its principal place of business in the city of Akron in the State of Ohio in the United States. I will call that company, hereafter, "Akron".

The alleged regular agent which is to be taxed on behalf of the non-resident Akron company is an English company known as the Firestone Tyre & Rubber Co., Ltd., whose factory and offices and place of business are at Brentford in the environs of London. That company I will refer to as "Brentford". Brentford is in fact wholly controlled, as the learned

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Judge pointed out, by Akron; but I agree of course with Sir James Tucker that you cannot disregard the effect of the separate legal entity which Brentford is; you cannot answer the question raised in this appeal by treating Brentford as though it were a mere emanation of Akron.

Having named the two corporations with which we are concerned, the questions which we have to decide in the sense that I have anticipated, after my reference to the Income Tax Act and the Rules, can now be restated in the terms in which I find them in paragraph 2 of the Case Stated.

> "The questions",

said the Commissioners,

> "for determination before us were as follows . . ."

—I leave out (*a*)—

> ". . . (*b*) whether Akron was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom; and, if so, (*c*) whether that trade was carried on by Akron through the agency of Brentford."

It is a trite observation that in every case which comes before the Courts the answer in the end must depend upon its particular facts. The facts of the present case are undoubtedly in many respects special and peculiar. As Sir James Tucker said, the old cases in which the question of taxing non-resident persons came before the Courts (for example, the cases compendiously referred to as the "champagne" cases) were cases, generally speaking, where the non-resident sold here in the United Kingdom goods made abroad; and it was in particular reference to the cases of that type that Lord Cave, L.C., in *Maclaine & Co.* v. *Eccott*, 10 T.C. 481, used language which has been quoted many times before, as it has been quoted in the present case, and which I will now read again from pages 574–5.

> "The question whether a trade is exercised in the United Kingdom is a question of fact, and it is undesirable to attempt to lay down any exhaustive test of what constitutes such an exercise of trade; but I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally) exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations; but the most important, and indeed the crucial, question is, where are the contracts of sales made?"

This case is on its facts very different in material respects from the type of case exemplified by the "champagne" cases. Indeed, in some respects it may be said to be the converse of them, since the goods here in question were made in the United Kingdom and were then sold abroad.

I turn to a statement of what I will call the Akron business. I find it in, and I cannot I think do better than quote it from, paragraph 4 of the Case Stated, which constitutes a finding of fact by the Commissioners.

> "Akron, an American corporation registered in Akron, Ohio, is the head of a world-wide organisation consisting of a large group of corporations operating in America and in various parts of the world. Some of its associated and subsidiary corporations manufacture and sell tyres in the countries in which they are registered and others sell, in the countries in which they are registered, tyres which have been manufactured in America or by subsidiary corporations in other countries."

Whether the particular company sought here to be taxed, Firestone Tire & Rubber Co., themselves manufacture tyres is not a matter which appears to be proved in evidence, but I assume—and I base myself upon

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the finding of the Commissioners—that this company is at any rate a member of, and an important member of, the general Akron organisation; and the business of that organisation is that of the marketing and distribution of Firestone tyres and other Firestone products. I observe that Firestone tyres are branded articles. The name Firestone, besides being in fact a trade mark, is part, and a valuable part, of the goodwill of Akron. I assume also that tyres which bear that mark as a guarantee of the reputation of Firestone are made in accordance with some particular process, whether patented or not, and that process again is part, and a valuable part, of the business undertaking and property of Akron.

The distribution of Firestone products outside the United States, and particularly in Europe, appears to be conducted by Akron through distributors under "distributor" agreements. I shall refer presently to the one which we have taken as a sample. But the substance of the obligation put upon such a distributor was that they were bound to promote the sales in their countries of Firestone products and not to sell any competing products themselves at the same time.

In order that such a distributor should get supplies, Akron have also established, as the Case, where I have quoted it, mentions, as part of their organisation controlled manufacturing companies, of which Brentford is one, whose function is to make Firestone tyres and Firestone products according to the strict directions and specifications of Akron, and to dispose of those tyres subject to, and only subject to, the terms imposed by Akron.

I will now refer to the distributor agreement which has been called the master agreement and is typical of the type of agreement made by Akron with its distributors. I will call it the Swedish master agreement, for it is made between the Firestone Tire & Rubber Co. and a company situated in Stockholm. It is desirable that I should read a certain amount of this agreement because a good deal of the argument has turned upon its true effect. The first clause is this:

> "The Company",

that is Akron,

> "hereby grants to the Distributor"

—I will call the distributor, "Sweden"—

> "upon the terms and conditions hereinafter mentioned, the exclusive right to sell Firestone branded . . ."

tyres, etc., in the territory of Sweden, and in consideration of that grant Sweden agrees to buy, sell and distribute such Firestone branded products exclusively, to keep on hand a sufficient stock to meet demand, and to use their best endeavours to promote the sale and distribution, etc.

Clause 2:

> "Prices: Subject to the Company's right . . ."

—that is Akron's right—

> ". . . to change prices . . . the Distributor shall be entitled to the prices . . ."

on the branded tyres as per attached lists. The lists in fact were not attached to our copy, but we understood from Sir James Tucker that, as

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is common I take it with most branded articles, there was a controlled price which Sweden had to pay and a controlled price at which Sweden had to sell. Then there was a provision for permitting Akron to change the prices.

Clause 3:

> "Deliveries: The Company . . "

—that is Akron—

> ". . . will make deliveries F.A.S. vessel provided always that the shipment shall weigh . . ."

so much.

> "Delivery to carrier shall constitute delivery to Distributor."

Clause 4:

> "Terms: The terms of the Company (Akron) shall be: 90 (Ninety) Days Sight Draft Documents Against Acceptance".

Then there are these provisions about changes in price which I can pass over, and a further obligation on the distributor to keep stocks on hand. I can pass to clause 9, which provides that Akron reserves the right to sell Firestone products to companies and others who customarily purchase their tyres in the United States, etc., even though such products may be shipped to the distributor's territory, that is Sweden.

Clause 12 says that Akron

> "shall not be liable for delays or failures to make delivery of goods ordered hereunder occasioned by war, fires, the elements, labor trouble, interruption or shortage of transportation facilities, inability to obtain goods, or from any cause beyond the control of the Company."

Clause 13:

> "It is understood and agreed that this Agreement is not to be construed as constituting the Distributor an Agent of the Company for any purpose whatever."

Clause 14:

> "The contract between the parties hereto is fully set forth in this Agreement and has been entered into under the considerations herein expressed and no others, and shall become effective only when executed by the duly authorized representatives of the Company at Akron, Ohio, it being agreed that this Agreement is to be construed under the laws of the State of Ohio in the United States of America";

and it is not to be altered or modified except by written endorsement, etc. There is a power of cancellation which is irrelevant.

Upon the face of it, it seems to me clear enough that the effect of that master agreement was, although it was implicit perhaps rather than clearly expressed, that Akron would itself sell to Sweden such tyres and other products as Sweden should require, or at least would provide the tyres, etc., that Sweden would require at the prices and subject to the other conditions contained in the agreement. I pause to observe that throughout the Case and in the other documents Sweden has been treated as and called a customer of Akron.

I now pass to the second master agreement, again a typical one of a kind, namely, the agreement between Akron and Brentford, which I will call the Brentford master agreement. That came into being in 1936, but, as the Case shows and as you can find from the judgment of the learned Judge, Brentford had been in existence for a good many years before that date. For present purposes I think none of the previous history matters.

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The Brentford master agreement was as follows:

> "1. In consideration of the payment by the American Company [Akron] hereinafter mentioned the English Company [Brentford] will from time to time use its best endeavours to fulfil either by manufacture or from its existing stocks all orders obtained in Europe or elsewhere by the American Company [Akron] as and when requested so to do by the American Company [Akron] 2. The American Company [Akron] shall upon each request being made forward to the English Company [Brentford] full particulars of such order 3. The English Company [Brentford] shall upon the receipt of such order with all possible dispatch forward the goods thereby ordered to the Purchaser and shall give such instructions for payment of the purchase price by the Purchaser as shall be requested by the American Company [Akron] 4. In consideration of the above mentioned services the American Company [Akron] will pay to the English Company [Brentford] in the manner hereinafter mentioned a sum equal to the cost price to the English Company [Brentford] of the goods supplied hereunder plus five per centum thereof."

Then the expression "cost price" is defined. Clause 5 provides for there being accounts between the parties. Clause 6 says that the agreement should continue for a period, but the fact is that it has continued ever since. It is to be noted, for what it is worth, that unlike the Swedish master agreement there is no provision here that nothing in the agreement should constitute for any purpose Brentford as the agent of Akron.

Upon the face of the document it is, I think, clearly contemplated that, when Akron receives from any of its customers or purchasers an order, it will or may pass that order on to Brentford for execution with such directions as to price and so on as it then gives. Brentford would be bound to execute it, or at least to use its best endeavours so to do.

The case then, upon the face of the documents, would be fairly analogous to the example given by Sir James of the man who desires to present to the lady of his choice a bunch of flowers, and orders them from a florist. The florist, not being able in fact to supply those flowers, will get another florist so to do, and the lady receives in due course the flowers in fact from the second florist. In that case, and I daresay the result would be similar if the arrangement had gone strictly according to the letter of the master agreement, it is at least probable that the second florist never enters into any contractual relations with the customer who orders the flowers.

But the fact is that things did not work out quite as the agreements, on the face of them, stated that they should. That I think undoubtedly was partly due to the English war-time controls which rendered Brentford unable to comply with any orders for tyres save such as the appropriate governmental authority either permitted or indeed directed them to do. The way in which the main difference in practice arose was this, that the orders were not sent to Akron by Sweden and then passed on to Brentford. They were sent direct to Brentford. It is not in doubt that the variation in procedure was authorised, and that in fact Akron gave to those customers or distributors a list of persons or firms in European and other countries to whom they could send, direct, their orders.

The method of business activity is again best found in the Case itself, and I think it desirable to read from the Case, particularly since one passage I am about to read constitutes a deliberate finding of fact. Paragraph 12 of the Case says as follows:

> "Throughout the period concerned in this Case . . ."

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—that is 1940 to 1946—

> ". . . sales were invoiced to the appropriate distributor in the name of Brentford and a sight bill of exchange on the distributor for payment in London was drawn in the name of Brentford. Brentford arranged for the shipment to the distributors of the tyres, etc., ordered by them from Brentford. In respect of each transaction Brentford furnished to Akron copies of the export invoice, the export manifest, the sight draft and the bill of lading. Akron was also notified by the bank when Brentford received payment for the goods. These documents and this information was sent for the purpose of enabling Akron to prepare their own sales ledgers. No sales ledgers for accounts of distributors outside the United Kingdom were kept by Brentford."

Then in the statement of the conclusions paragraph 16 (*c*) of the Case said:

> "It seems to us that in the relevant years the arrangements subsisting between Akron and Brentford were as follows. By virtue of the agreement of 8th February, 1936,"

—that is the Brentford master agreement—

> "Brentford agreed to fulfil orders obtained by Akron when requested to do so by Akron. The orders to be fulfilled were limited to those from customers approved by Akron and these orders were to be fulfilled on terms laid down by Akron in master agreements executed outside the United Kingdom. Brentford was authorised by Akron to fulfil orders coming from Akron's approved customers without any intervention by Akron and all the documents for the fulfilment of the orders were made out in the name of Brentford. Moreover the proceeds of the sales arising from the fulfilment of the orders were paid to Brentford in the United Kingdom. These sales moneys were paid into a special bank account and transferred to Brentford's bank account at the end of each month."

It may be said that, since there was difficulty in transmitting money from the United Kingdom to America, the amounts for which Brentford were accountable to Akron were treated as though they were loans by Akron to Brentford.

I will dispose first of all of two particular transactions, namely, supplies of Firestone tyres first to the Government of New Zealand and, second, to the Government of France in Great Britain, the so-called Free French Government. These two orders covered goods to the value of £49,000 out of a total of goods with which this case is concerned amounting to £728,000. The supplies to the New Zealand and Free French Governments were not in fact in accordance with the Akron/Brentford arrangements or the Akron master agreements; they were directed by the British Government. They were, however, treated by Brentford *quoad* Akron as though they had been within the scope of the master agreements; and the Crown has in fact—no one can say that it was not fair and just so to do—been content to treat them as though they were *in consimili casu* with the whole of the rest of the transactions. I say no more about those particular orders.

To illustrate my judgment let me take an imaginary order coming from Stockholm, Sweden, for, say, a thousand tyres. They send direct to Brentford an order for the supply of one thousand Firestone tyres. Brentford having regard to the terms of the Brentford master agreement may not have been bound to accept it, and, indeed, having regard to the war-time controls, might not have been able to accept it; but I am supposing the case that Brentford accepts the order. It supplies all the tyres, and in accordance now with the terms of the written master agreement it delivers them free alongside ship, and that constitutes delivery to Sweden. For the rest, the transaction is, as between Brentford and Sweden, in all respects governed by the dictates of Akron in accordance with the Swedish master agreement, that is to say all the details as to the price to be charged, the method of collection, delivery, etc.

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What then, on a true analysis, is the result of a transaction taking that form? Sir James Tucker has said: of two things, one. Either, first, the sole trading operation was an operation between Sweden on the one hand and Brentford on the other, an English contract, becoming in due course an English sale; the arrangement between Brentford and Akron about the subsequent apportionment of the purchase price collected is something altogether outside the scope of the trading operation; it therefore follows, as night the day, that Akron is not trading or carrying on a trade within the United Kingdom. Or, second, a contract upon the giving by Sweden of the order comes into existence, a new contract between Sweden and Akron, or alternatively a contract between Brentford and Akron, with the purpose or having the effect that the thousand tyres which are to be delivered to Sweden become the property of Akron. In either case there is a point of time when the property passes to Akron, and from that time forward the transaction is exclusively governed by the terms of the Swedish master agreement, which is an agreement made out of England and governed by the laws of the State of Ohio; and therefore it follows also that Akron is not carrying on a trade within the United Kingdom at all.

As the argument developed, of the two horses, if I may use a substantial variation of the metaphor which Harman, J., used, Sir James Tucker rode the former rather harder than the latter; though I think that when he opened the case, and, as I noted from the judgment of Harman, J., when he put his case in the Court below, he presented as the favourite the second of the two horses. Certainly the way in which Sir James put the case has all the attractions of simplicity. I think, for myself, that it is too simple, and that when the matter is more closely examined very severe difficulties are found to confront Sir James Tucker on both heads of his argument, difficulties which form rocks like the rocks of Scylla and Charybdis to which Harman, J., alluded. In my judgment Harman, J., came here to a correct conclusion, for I think that neither of Sir James Tucker's propositions can on examination be established.

First, to revert to my imagined simple case, I think that upon the order being given by Sweden and accepted by Brentford there arises between Brentford and Sweden a contract of sale made in England, a contract which according to the Sale of Goods Act becomes a sale when, in accordance with the other arrangements, the tyres are delivered by Brentford free alongside ship. I reject, as did the learned Judge, the notion that there arose at some point of time what I think was aptly described by Harman, J., as a philosophical contract between Brentford and Akron sufficient to pass the property in those tyres from Brentford to Akron before delivery. It is I think possible —the learned Judge assumed it was the fact, but I do not myself go so far— that when Sweden sends its order to Brentford there also arises a subsidiary contract, that is subsidiary to the Swedish master agreement, between Sweden and Akron on the footing that, properly construed, the Swedish master agreement operated as a continuing offer by Akron to sell or to provide tyres, that offer being accepted when Sweden gives an order for tyres in pursuance of and in reliance upon it. I think that if such a fresh contract comes into existence it would occupy a very subsidiary and ancillary position. If, for example, to go back again to my case, Brentford committed some default, having accepted the order, I think that on my analysis Sweden would be

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entitled to sue Brentford for breach of contract. I think it may be that Sweden could also sue Akron under the Swedish master agreement for having failed to provide the tyres; and it may also be that Sweden could set up against Akron what I have called a subsidiary and ancillary contract also; but having stated as best I can the effect of that supposed breach I think it will be seen at once that on my analysis any such contract between Akron and Sweden is of a purely incidental character.

But its possibility has I think some aspects of danger about it for Sir James, and for this reason. We do not know the exact arrangements whereby communications passed, and were intended to pass, between Sweden and Akron. Assuming that there was by the Swedish master agreement a continuing offer, it may be that acceptance, so as to create contractual relations, must first be communicated to the offerer, and that it would not suffice to create a contract that Sweden merely put the order in the Swedish post office box. If that is right then the communication in the case I suppose was—and Sir James I think conceded as much—made not to Akron direct but to Brentford, and Brentford must at least be the agent of Akron to receive communication of the acceptance, with the possible result, I say no more, that, even on the alternative which Sir James put forward as his number two, there would arise a contract with Akron in England because the acceptance of the offer was communicated to Akron via its agents in England. I need not, however, pursue further that aspect of it. It suffices, in my judgment, to state, as I have done, that on the happening of the case I am supposing of Sweden sending an order for tyres to Brentford, there came into existence in England a contract for sale between Brentford and Sweden.

Then, if that is so, is Akron carrying on a trade within the United Kingdom? In my judgment it is. In my judgment the typical English contract of sale between Brentford and Sweden which I have supposed is an incident, and an incident deliberately contrived, of Akron's business of marketing and distributing Firestone branded tyres in England and in Europe, and indeed in every country of the world. I do not repeat all the matters which I have previously mentioned as to the nature of the articles which are supplied, but merely state compendiously by way of reminder that Firestone tyres are branded proprietary articles of the Akron organisation.

My conclusion does not involve the proposition that Brentford, instead of being an independent legal entity, is a mere branch of Akron; but Brentford, though a separate entity, is in fact wholly controlled by Akron, and in the making of what may be described as Akron proprietary branded articles it acts under the close direction of Akron in all respects, and in selling those articles to Akron's customers it does so on terms fixed by Akron so that after allowing Brentford its costs and a percentage thereon the whole of the profits on the transactions go to Akron.

We were referred in the course of the argument, as was the learned Judge, to *Weiss, Biheller & Brooks, Ltd.* v. *Farmer,* 8 T.C. 381. That, putting it quite briefly, was a case in which a Dutch company, which manufactured gas mantles in the Netherlands, made a business arrangement with an English company for the distribution and marketing of its gas mantles here. The substance of the arrangement was that the Dutch company sold the gas mantles first to the English company, the two acting as principals, vendors and purchasers, and then the English company sold them again to customers in England, again acting as principal, as vendor. Ultimately the

profits of those transactions were divided between the Dutch and the English companies, in certain proportions. I do not suggest that case is entirely parallel with the present case, and the reference in the somewhat obscurely worded agreement between the Dutch company and the English company to *del credere* certainly lends much force to the view that the English company was, in some respects at any rate, regarded as an agent of the Dutch company. But the case does, I think, show, and it is an illustration of the principle, that the fact that the English company, when it sells particular goods, sells them as a principal to the customers, does not negative a proposition that the parent company, from which in some sense or another the goods emanated, may not equally be carrying on or exercising a trade within the United Kingdom. I think that the case which I have mentioned was rightly regarded by Harman, J., as lending some support to the view which he formed.

There remains the third and final question. If Akron is carrying on this trade within the United Kingdom, then, for the purposes of General Rules 5 and 10 which I have read, is Brentford its "regular" agent? To my mind the answer to that question must be in the affirmative. If the conclusion is right that Akron is trading in the United Kingdom, then it must be doing so through someone's agency, since admittedly Akron is not itself here, nor are any of its officers, nor has it got here any branch or office. Indeed, as I understood him, Sir James did not really argue otherwise than that, given the premise that Akron was exercising a trade here and doing so by means of or as a result of Brentford's sale transactions, Brentford really must be treated as a regular agent within the terms of Rule 10. There certainly could not be any doubt, having regard to the Brentford master agreement, that if Brentford is for this purpose an agent at all it certainly is a regular agent and not merely, to use the phrase to be found in the cases, an irrelevant agent.

The view of the case which I have taken makes it unnecessary for me to discuss the further question also debated before us, namely, whether, on the assumption that contracts for sale to Sweden of tyres were contracts with Akron made outside the United Kingdom and governed by United States law, still Akron was trading here, that is exercising a trade within the United Kingdom, because so many incidents of the performance of the contract (for example, delivery, receipt of the purchase price, etc.) take place here: in other words, the point that the exceptional facts of this case take the matter out of the general rule enunciated by Lord Cave, L.C., in *Maclaine & Co.* v. *Eccott*[1] in the passage which I have already cited. The learned Judge was inclined to the view that an affirmative answer should be given to that question, that the case was one so exceptional in its facts that he could invoke, to support his answer, the language used, for example, by Atkin, L.J., in the earlier case of *F. L. Smidth & Co.* v. *Greenwood,* 8 T.C. 193, at page 204, where the learned Lord Justice said:

> "I think that the question is, where do the operations take place from which the profits in substance arise?"

In the view which I have taken it is unnecessary for me to discuss that matter, and I therefore prefer, for my part, to express no conclusion about

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(1) 10 T.C. 481, at pp. 574–5.

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it; but for the reasons which I have earlier given I think Harman, J., came to a correct conclusion, and I would dismiss this appeal.

Jenkins, L.J.—I agree. I need not repeat at length the facts stated in the Case, or refer again in detail to the distributor agreement or the agreement of 8th February, 1936, between Akron and Brentford.

The question whether Akron was during the relevant years exercising a trade within the United Kingdom through the agency of Brentford is a question of fact, which the Special Commissioners have answered in the affirmative, and their decision upon that question, as the tribunal of fact, is not to be disturbed on appeal, unless the facts as found by them are incapable in law of supporting such decision.

Sir James Tucker has argued before us with his usual persuasive force that on the facts found, and on a proper appreciation of the legal effect of the distributor agreement and the 1936 agreement, and of the course of dealing between Akron and Brentford and the various distributors whose orders were dealt with by Brentford, the only proper conclusion as a matter of law is that Akron was not at any material time exercising a trade within the United Kingdom, or at all events was not exercising a trade within the United Kingdom through the agency of Brentford.

The effect of Sir James's argument may, I think, fairly be thus summarised :—

(i) Akron and all the distributors whose orders for tyres are material to the case were resident outside the United Kingdom, and the distributor agreement entered into between Akron and each of these distributors was made outside the United Kingdom;

(ii) Each of the distributor agreements amounted to a standing offer by Akron to supply the distributor concerned with tyres as and when ordered by such distributor. If the terms of the distributor agreements had been strictly adhered to, the distributors would have given their orders for tyres to Akron, and each such order would have constituted an acceptance of Akron's standing offer, and thus have given rise to a contract between Akron and the distributor concerned for the sale by the former to the latter of the tyres ordered—see Pollock on Contracts, 13th edition, at page 141. The acceptance would be complete on the despatch by the distributor in his own country by post or cable of his order for tyres. The contract would thus be made in the distributor's country of residence, that is to say, outside the United Kingdom;

(iii) If the terms of the distributor agreements had been strictly adhered to, the position under the 1936 agreement between Akron and Brentford would have been that, as and when contracts for the sale of tyres by Akron to distributors were concluded in the way above described, Akron, if so minded, would have passed them to Brentford to carry out under the 1936 agreement; and thereupon, as between Brentford and Akron, Brentford would have been bound, so far as they were able, to fulfil those contracts on the terms as to remuneration and otherwise contained in that agreement;

(iv) It follows that, if the terms of the distributor agreements had been strictly complied with, Akron might well have been carrying on a trade of selling tyres to distributors outside the United Kingdom, but could not have been exercising that trade within the United Kingdom because all the contracts for the sale of tyres would have been made outside the United

Kingdom; and the balance of authority is strongly in favour of the view that a merchanting trade, that is to say a trade concerned with the sale of goods, is, generally speaking, carried on in the place where the contracts are made—see, for example, *Maclaine & Co.* v. *Eccott,* 10 T.C. 481, *per* Lord Cave, L.C., at page 574. The fact that a non-resident trader, who has made a contract outside the United Kingdom with another non-resident for a sale of goods to the latter, obtains those goods from a trader resident in the United Kingdom is not enough to displace the general rule so as to make the trade of either non-resident a trade exercised within the United Kingdom—see *Sulley* v. *Attorney-General,* 2 T.C. 149, and the distinction drawn by Lord Herschell in *Grainger & Son* v. *Gough,* 3 T.C. 462, at page 467, between trading with a country and carrying on trade within a country;

(v) The fact that the strict terms of the distributor agreements were departed from in practice, both before and after the date of the 1936 agreement, so as to allow distributors to order any tyres they required from any listed manufacturer of Firestone tyres selected by them, does not affect the above conclusion. The distributor's order addressed to any listed manufacturer equally raised a contract made outside the United Kingdom between Akron and the distributor concerned immediately upon the despatch by letter or cable of the distributor's order, the listed manufacturers simply playing the rôle of agents empowered to receive such orders on Akron's behalf;

(vi) If the foregoing submissions in their application to the practice actually followed are wrong, and the effect of that practice was to make an order for tyres addressed to Brentford an offer requiring the acceptance of Brentford in England, so that the contract in each case was made in this country, that does not make good the contention that Akron was exercising a trade within the United Kingdom; for on this footing the contracts were contracts with Brentford for the sale by Brentford to the distributors concerned of Brentford's tyres, not Akron's tyres, and the trade exercised in the United Kingdom was Brentford's, not Akron's. This merely resuscitates the Crown's abandoned claim that Brentford was carrying on on its own account the trade of selling tyres to persons resident outside the United Kingdom, and cannot assist the case for the Crown on the present appeal;

(vii) In any case and on any view of the matter the tyres supplied or sold by Brentford to distributors outside the United Kingdom were Brentford's own tyres, not Akron's, as appears from the terms of the 1936 agreement; and it is a legal impossibility for a person to sell his own goods as agent for another—see the distinction drawn in *W. T. Lamb & Sons* v. *Goring Brick Co., Ltd.,* [1932] 1 K.B. 710, between the relationships of vendor and purchaser and principal and agent. It follows that Brentford cannot have been selling its own tyres to distributors as agent for Akron, and it follows further that Brentford must either have been selling on its own account to distributors outside the United Kingdom, a theory which, as appears above, cannot advance the case for the Crown, or else must be regarded as having been selling to Akron, at a price corresponding to the rate of remuneration fixed by the 1936 agreement, the tyres required by Akron to fill contracts made by Akron outside the United Kingdom with non-resident distributors. In neither

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alternative could it be held that Akron was exercising a trade within the United Kingdom, and Brentford have already been assessed to the whole of the tax which would be payable on the footing that they, as part of their own trade, were selling to Akron.

In my judgment, whatever the position might have been if the terms of the distributor agreements had been strictly adhered to, Sir James's argument breaks down on the course of dealing actually followed. An order placed by a distributor direct with Brentford as one of the listed manufacturers of Firestone tyres could at most only create a contract between the distributor and Akron to the effect that the distributor would purchase, and Akron would cause the manufacturer to sell to the distributor, the tyres ordered on the terms and conditions of the distributor agreement. There was no privity of contract between distributor and manufacturer *quoad* the distributor agreement, and it is, I think, quite impossible to hold that the mere placing of an order with any one of the listed manufacturers would, without more, oblige that manufacturer to deliver the tyres ordered. As between the distributor and the listed manufacturer the matter must have been one of offer and acceptance, that is to say an order placed by the distributor with the manufacturer and accepted by the latter. The order and its acceptance would alone constitute the effective contract under which the distributor could call upon the manufacturer to deliver the tyres ordered, and would be bound on his own part to take and pay for them. Such contracts in the case of Brentford would be made in England as the place of acceptance. On applying this view of the contractual position to the facts found, it appears that during the material period Brentford was selling to distributors abroad under contracts made in the United Kingdom tyres manufactured by Brentford in the United Kingdom, and deliverable in the United Kingdom to the purchasers thereof against payment in the United Kingdom of the contract price ; and, furthermore, was in fact effecting delivery of and receiving payment for such tyres in the United Kingdom. It further appears upon reference to the 1936 agreement that Brentford were under contract with Akron to do these things as services to Akron in return for a stipulated remuneration, subject to which all profits arising were to belong to Akron.

In these circumstances I am of opinion that there was ample evidence to justify the Special Commissioners in concluding, as they did, that Akron during the relevant years was exercising a trade in the United Kingdom through the agency of Brentford. Moreover, I cannot regard this conclusion as displaced by the circumstance that the tyres sold by Brentford were Brentford's and not Akron's. This seems to me to be mere machinery which did not affect the substance of the relationship of Akron and Brentford in regard to the trade in question, which in my view was Akron's trade carried on by Brentford on behalf of and for the benefit of, or in other words as agent for, Akron.

I think the argument for the Crown on the question of agency derives some assistance from *Weiss, Biheller & Brooks, Ltd.* v. *Farmer,* 8 T.C. 381.

I entirely agree with the views as to the relations between Akron and Brentford thus expressed by the Special Commissioners in paragraph 16 (*d*) of the Case:

> " We are unable to accept the proposition put forward on behalf of Brentford that the fulfilment of each order by Brentford involved a sale of goods to Akron with delivery to the latter's orders. It seems to us that the effect of the agreement of 8th February, 1936, and the course of the dealings between Akron

and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell the same on Akron's behalf to customers approved of by Akron and subject to terms imposed by Akron; and, further, to account to Akron for the proceeds of the sales less the cost of the goods sold plus five per cent."

I am accordingly of opinion that the Special Commissioners and the learned Judge came to a right conclusion in this matter, and I would dismiss this appeal.

Birkett, L.J.—I agree with the two judgments which have just been delivered, and to anybody who has listened to both of them it is quite plain, I think, that there is very little that can possibly be added, and it may possibly be said that there is nothing which need be added. Nevertheless, I should just like in a sentence or two to express my own view about the proper answer to this case.

When Sir James Millard Tucker opened this case, within his opening sentences he said that there were two questions, and two questions only, for the determination of the Court. The first question, of course, was whether the company which we have agreed to call " Akron ", the American master company, was exercising a trade within the United Kingdom. The second question was this: Was Brentford, that is the wholly owned subsidiary of Akron in this country, the authorised regular agent of Akron for that purpose?

Quite clearly the first question is a question of the greatest importance. If that is answered in the affirmative: Yes, Akron, you are carrying on a trade within the United Kingdom, the second question really becomes rather academic on the facts of this case. But everybody agreed that the answer to that question, propounded by Sir James and discussed for several days in this Court, depended upon the view taken of the facts in the case.

We had many authorities cited to us. As Sir James said, this question of non-resident firms and corporations carrying on business within the United Kingdom had been a matter of very fierce dispute in days past, and, indeed, had been the subject of many decisions which were cited to us. He said, with an air of slight surprise, it was curious that after a long interval of time the ancient question, which all had thought to be settled by these authorities, was raised again.

But the facts of this case are extremely unusual, and many of the cases which were cited to us were cited to try to bring those facts within decisions which the Courts had laid down. I am not going through all those. Let me take one illustration only. Sir James said that this question whether or not a non-resident trader is exercising a trade within the United Kingdom can be decided by this test, and it is a test that is a crucial and a practical test. The test is where are the contracts of sale which are in question made. He cited in support of that the views of Lord Herschell and Lord Watson and the concurring speech of Lord Macnaghten in *Grainger & Son* v. *Gough*[1]. That is your test. Where are the contracts made? It is not enough, for example, that in the facts of this case you will hear the payment was to be made in England; it is not enough that delivery was to be made in England; it is not enough that orders for tyres were received in England.

(1) 3 T.C. 462.

(Birkett, L.J.)

All that does not really matter. The crucial test, laid down in the cases, is where are the contracts made; and of course, in support of that argument, he was concerned to show that the contracts with which we are concerned were made abroad.

The agreement between Akron and the firm in Sweden, which we have agreed to call "Sweden", the distributor agreement between Akron and Sweden, in substance said: We, Akron, the American company, will provide you in Sweden with Firestone tyres. You shall have the exclusive right to sell Firestone tyres throughout Sweden—and nobody else. We shall provide them for you, in consideration for which you will undertake to buy your tyres only from us. Sir James thereupon said that means, although the word is not used: We will sell you all the tyres, and that means Akron is saying to Sweden by this agreement: We agree to sell, and you agree to buy; and therefore the contract is made abroad.

Then Sir James said that by a clause of the agreement made with Brentford which was an agreement subsequently entered into: We arranged with Brentford merely to supply those goods which we had sold. In support of that argument it was really necessary to say that at some moment before the delivery of the order to Sweden there had been somehow and in some form a sale of the tyres from Brentford to Akron. If a thousand tyres were ordered by Sweden, and the order was sent direct to Brentford, and then Brentford sent the thousand tyres, they were in fact the tyres of Akron; and it was all done in pursuance of a non-resident making a contract outside the United Kingdom.

I am bound to say that, as the argument developed and as its effect developed, it seemed almost impossible to maintain that position, for at some subsequent date—one was never given any very clear view about how it had happened—there was a modification of the written agreement which had been made between Akron and Brentford. The agreement had specified in the beginning:

> "Whereas the parties hereto are desirous of concluding an arrangement for the fulfilling by the English Company of orders obtained in Europe and elsewhere by the American Company",

and by clause 2:

> "The American Company shall upon each request being made forward to the English Company full particulars of such order",

which seemed to forecast the course of business would have been that Sweden would say to Akron: I want a thousand tyres, and Akron therefore under the agreement would say to Brentford: Here are particulars of an order which we desire you to fulfil on the terms we have agreed in this agreement as to payment, price, delivery and so on. But there came a moment when that was clearly modified, because we had to deal with the case upon this footing. There was no such communication between Sweden and Akron. There was undoubtedly the original agreement made between Akron and Sweden, the distributor agreement, from which everything else flowed, but apart from that it was pretty well safe to say that Akron did nothing except to receive the main profit on the transaction, because all that really happened was that Sweden sent direct in this case to Brentford. Although it was entitled, if it cared, to send to any other particular subsidiary company of Akron, it sent in this case to Brentford; and Brentford thereupon fulfilled the order. If the order was for a thousand tyres Brentford, without any reference to Akron, sent a thousand tyres; they delivered them free alongside ship according to

the terms of the agreement; they charged prices which Akron had laid down that they should charge; they received the money in the form which Akron had laid down they should receive it; they accounted for the property in the manner in which Akron had desired they should so account; and they retained for themselves five per cent. upon the cost price which had been laid down in the agreement for the services they had rendered in the matter.

It is true in substance to say that, apart from entering into the original agreement and receiving the profits on every transaction which arose out of it, Akron did nothing; and therefore it seemed, at least to me, to be quite impossible to maintain the position which Sir James was taking up, that this was a contract made abroad, that was the crucial test, and that delivery and price did not really matter in the result, and we ought to say therefore that there was no trading within the United Kingdom. The view which I myself held was that this particular form of trading was clearly a trade within the United Kingdom. When Brentford received an order for a thousand tyres it was an order which was being given by Sweden to Brentford, and Brentford could either accept or reject that order; but the contract which was made between Sweden and Brentford was one which I think was clearly made in England; and that contract in that form and in that way was devised and designed, I think, by Akron as part of its world-wide trade.

The Case Stated has set out, I think quite admirably, the position in paragraphs 4 and 5, which I do not propose to read at length.

> "Akron, an American corporation registered in Akron, Ohio, is the head of a world-wide organisation consisting of a large group of corporations operating in America and in various parts of the world."

If you are going to look at the facts of the case, that I think is one of the over-riding and over-mastering facts which enters into every subsequent stage of the matter. Akron is the head and the trunk of all the vast organisation, and Brentford a wholly owned subsidiary of that head, on the terms of the documents before us doing that which Akron has devised and designed that it should do.

> "Some of its associated and subsidiary corporations manufacture and sell tyres"

—as, indeed, did Brentford—

> "in the countries in which they are registered and others sell, in the countries in which they are registered, tyres which have been manufactured in America or by subsidiary corporations in other countries. For convenience, certain matters in regard to the business of the organisation carried on outside the United States of America have been conducted by other subsidiary companies of Akron . . . Brentford is an English company registered in 1922 with an issued capital of £20,000 in £1 ordinary shares. This capital was increased to £140,000 in 1938. All the shares in Brentford are owned by Akron. The board of directors of Brentford consists of individuals resident in the United Kingdom with the exception of Mr. Harvey Firestone, the chairman of the board of directors of Akron, who is a director of Brentford and occasionally attends meetings of its directors."

Then it gives the history of that company, which formerly used to sell the tyres manufactured in America, but then it became an economic, commercial proposition for the company to make the tyres here, and so they did. They were doing it admittedly in this case.

(Birkett, L.J.)

My Lord the Master of the Rolls has pointed out that the thing sold was a branded article, Firestone tyres, trade mark no doubt, patents no doubt and processes no doubt all belonging to the thing sold called a Firestone tyre, and Brentford could not sell to anybody that particular tyre without the consent of Akron because Akron was the owner of that very valuable thing which made the distinctive Firestone tyre. Here was a distributor agreement made between Akron and Sweden. Sweden sent this contract for this very thing, these Firestone tyres, to Brentford, and whilst it would be possible to analyse it in a little more detail it is not necessary because it has already been done. But it seems to me so plain that this is a contract between Sweden and Brentford, devised and designed by Akron, the over-riding master company. It is quite true, as the Master of the Rolls has said, that one must always recognise that it has a separate and a distinct entity of its own, but it was part of the regular business of Akron that this trade which we have been analysing in this case should go on. It was part of their world-wide organisation. As I have pointed out, the real profits of that trade went to Akron. The only money retained above cost price was five per cent., expressly stated to be for services to be rendered. All the elements of delivery price and so on were made in this country, and I cannot doubt that the answer to the first question: Does Akron exercise a trade within the United Kingdom?, must be given quite clearly and firmly as: Yes.

With regard to the second question I really have nothing to add because my Lord has pointed out that if that answer is right, that Akron is carrying on a trade within the United Kingdom, it must be trading through Brentford. It is not suggested that there would be anybody but Brentford, and I should hold myself that in those circumstances it follows that Brentford here was the regular authorised agent for that purpose of Akron. I feel this question should be answered in that way. I think the judgment of Harman, J., was right, and that this appeal should be dismissed.

Sir Reginald Hills.—The appeal will be dismissed with costs?

Lord Evershed, M.R.—Mr. Honeyman?

Mr. G. G. Honeyman.—I cannot object to that.

Lord Evershed, M.R.—Appeal dismissed, with costs.

Mr. Honeyman.—I am instructed on behalf of the Appellants to ask your Lordship, if the Appellants are so advised after a consideration of the judgments which have just been delivered, for leave to appeal to the House of Lords. I accept that so far we have not been successful in any of the Courts before which we have come, but on the other hand this is a matter of some considerable importance. As Sir James pointed out, and as I think your Lordship mentioned in your judgment, this is the first case where there has been a sale by a non-resident of goods manufactured in the United Kingdom.

Lord Evershed, M.R.—Is it the first case to come before the Courts where Her Majesty's Inspector of Taxes is a member of what (you may not quite agree) is commonly called the weaker sex?

Mr. Honeyman.—That distinguishing feature I regret I had not noticed, but it is the very first case of its type.

Lord Evershed, M.R.—Sir Reginald, have you anything to say?

Sir Reginald Hills.—One generally leaves this matter to the Court. The only point one can mention is that your Lordship did say it was determined on the actual facts of this case.

(*The Court conferred.*)

Lord Evershed, M.R.—Yes, we give leave.

The Company having appealed against the above decision, the case came before the House of Lords (Lords Morton of Henryton, Radcliffe, Tucker and Cohen) on 13th, 17th and 18th December, 1956, when judgment was reserved. On 14th February, 1957, judgment was given unanimously in favour of the Crown, with costs.

Mr. G. G. Honeyman, Q.C., and Mr. David Wilson appeared as Counsel for the Company, and Sir Frank Soskice, Q.C., and Sir Reginald Hills for the Crown.

Lord Morton of Henryton.—My Lords, in this case I agree with the conclusions successively reached by the Special Commissioners, Harman, J., and the Court of Appeal, and I can state my reasons very briefly.

Three companies were concerned in the transactions giving rise to this appeal. They are (1) the Firestone Tyre & Rubber Co., Ltd., which carries on the business of tyre and rubber manufacturers at Great West Road, Brentford, Middlesex; (2) the Firestone Tire & Rubber Co., of Akron, Ohio, in the United States of America; (3) a company named Aktiebolaget A. Wiklunds Maskin & Velocipedfabrik, carrying on business, *inter alia,* as a distributor of tyres at Stockholm, Sweden. These three companies have been referred to in the Courts below as "Brentford", "Akron" and "Sweden", and I shall adopt the same convenient course.

The events giving rise to this appeal are fully set out in the Case Stated and are summarised in the judgment of Lord Evershed, M.R. I gratefully accept his summary and shall not repeat it. The questions for determination before the Special Commissioners were (*a*) whether Brentford itself was carrying on a trade on its own behalf of selling tyres to persons outside the United Kingdom; and, if not, (*b*) whether Akron was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom, and, if so, (*c*) whether that trade was carried on by Akron through the agency of Brentford. The Special Commissioners answered question (*a*) in the negative and the Crown has not sought to contest this decision, so your Lordships are only concerned with questions (*b*) and (*c*).

The relevant provisions of the Income Tax Act, 1918, are as follows: the Income Tax Act, 1918, Schedule D, Paragraph 1, provides:

> "Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing . . . (iii) to any person, whether a British subject or not, although not resident in the United Kingdom . . . from any trade, profession, employment, or vocation exercised within the United Kingdom".

(Lord Morton of Henryton.)

General Rule 5 provides:

> "A person not resident in the United Kingdom, whether a British subject or not, shall be assessable and chargeable in the name of . . . any factor, agent, receiver, branch, or manager, whether such factor, agent, receiver, branch, or manager has the receipt of the profits or gains or not, in like manner and to the like amount as such non-resident person would be assessed and charged if he were resident in the United Kingdom and in the actual receipt of such profits or gains."

General Rule 10 provides:

> "Nothing in these rules shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person carrying on the regular agency of the non-resident person or a person chargeable as if he were an agent in pursuance of these rules, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent."

It is clear that, if Akron was carrying on the trade in question through the agency of Brentford, the agency was a "regular" one within the meaning of General Rule 10, and Counsel for the Appellants did not seek to rely upon that Rule.

The first stage in considering questions (*b*) and (*c*) is to determine whether the trade in selling tyres to persons outside the United Kingdom, with which this appeal is concerned, was exercised within the United Kingdom. My Lords, I cannot doubt that it was so exercised, in view of the facts as to the course of dealing set out in the Case Stated and in particular in paragraphs 6 to 12 inclusive.

Jenkins, L.J., states the result of this course of dealing, in language which I entirely accept, as follows(1):

> "An order placed by a distributor direct with Brentford as one of the listed manufacturers of Firestone tyres could at most only create a contract between the distributor and Akron to the effect that the distributor would purchase, and Akron would cause the manufacturer to sell to the distributor, the tyres ordered on the terms and conditions of the distributor agreement. There was no privity of contract between distributor and manufacturer *quoad* the distributor agreement, and it is, I think, quite impossible to hold that the mere placing of an order with any one of the listed manufacturers would, without more, oblige that manufacturer to deliver the tyres ordered. As between the distributor and the listed manufacturer the matter must have been one of offer and acceptance, that is to say an order placed by the distributor with the manufacturer and accepted by the latter. The order and its acceptance would alone constitute the effective contract under which the distributor could call upon the manufacturer to deliver the tyres ordered, and would be bound on his own part to take and pay for them. Such contracts in the case of Brentford would be made in England as the place of acceptance. On applying this view of the contractual position to the facts found, it appears that during the material period Brentford was selling to distributors abroad under contracts made in the United Kingdom tyres manufactured by Brentford in the United Kingdom, and deliverable in the United Kingdom to the purchasers thereof against payment in the United Kingdom of the contract price; and, furthermore, was in fact effecting delivery of and receiving payment for such tyres in the United Kingdom."

The next stage is to consider whether there was evidence to justify the Special Commissioners in finding that during the relevant years Akron was exercising the trade in question through Brentford as its agent. My Lords, in my view this question must be answered in the affirmative. Having regard to the course of dealing pursued by the parties there were only two views open for consideration by the Special Commissioners. One was that Brentford was exercising the trade on its own behalf; the other was that Akron was exercising the trade through Brentford as its agent. The Special

(1) *See* page 134 *ante*.

(Lord Morton of Henryton.)

Commissioners rejected the first view and accepted the second, and in my opinion they were right. It is true that the goods sold belonged to Brentford and not to Akron, but this fact does not show conclusively that Brentford was selling the goods on its own behalf and not as agent: see *Weiss, Biheller and Brooks, Ltd.* v. *Farmer*, 8 T.C. 381. Each case has to be determined having regard to all the facts, and the other facts in the present case were strongly in favour of the view expressed by the Special Commissioners. I agree with their summary of the position, as set out in paragraph 16 (*d*) of the Case Stated:

> "It seems to us that the effect of the agreement of 8th February, 1936, and the course of the dealings between Akron and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell the same on Akron's behalf to customers approved of by Akron and subject to terms imposed by Akron; and, further, to account to Akron for the proceeds of the sales less the cost of the goods sold plus 5 per cent."

In his helpful argument for the Appellants, Mr. Honeyman rightly referred your Lordships to a number of other cases, but the view that I take makes it unnecessary to refer to any of them. I can see no good reason for disturbing the determination of the Special Commissioners, and I would dismiss the appeal with costs.

Lord Radcliffe.—My Lords, I agree that the appeal ought to be dismissed. I believe that all your Lordships are of the same opinion. Since the assessments in question cover the revenue years 1940–41 to 1944–45, it is perhaps time that the litigation with regard to them should come to an end. It will be some consolation to the Appellants, when the tax is paid, to know that none of the four Courts by whom their case has been heard has differed from the others in the decision given, nor has there been a dissentient voice here or in the Court of Appeal: and this despite a full and careful presentation on the Appellants' behalf of all the arguments that might lead to a contrary result.

In my view what needs to be said has already been said in the other Courts and in the speech of my noble and learned friend on the Woolsack. I propose to say, therefore, only in the briefest way where it is that I think that the Appellants' argument breaks down.

The question before the Special Commissioners was whether the American company, styled Akron in the Case Stated, was exercising a trade within the United Kingdom. I omit for the moment the subsidiary question whether, if so, the English company styled Brentford was its regular agent for the purpose of assessment.

The question whether a trade has been exercised within the United Kingdom is a question of fact in this sense, that, although the law must rule whether any given set of facts can amount to such an exercise or cannot but amount to such an exercise, it is for the Special Commissioners, within those limits, to decide in the particular case before them whether a trade has or has not been so exercised. That done, there remains only the question whether they made any error of law in the decision that they came to. I do not myself take the view that this distinction is of any special importance in the present case, since the weight of the Appellants' argument rested in any event on a legal proposition, the proposition that,

(Lord Radcliffe.)

where the trade sought to be assessed was what was called a "pure" merchanting business, the place at or in which the goods merchanted were "sold" determined in law the site of the exercise of the merchanting trade itself. The second step in the argument was that the sales the profits of which were now being assessed were made outside the United Kingdom because the master agreement between Akron and its Swedish distributor, out of which arose the orders given to Brentford by the latter, was not itself made within the United Kingdom or, alternatively, because those orders, originating in Sweden, brought about American/Swedish sales despite the not unimportant part allotted to Brentford in the course of dealing.

My Lords, no one can doubt that in considering what are the legal requirements of the phrase "trade exercised within the United Kingdom" Courts of law have ruled that the place where sales or contracts of sale are made is of great importance when it is a merchanting business that is in question. They have not gone so far as to seek to substitute this test (which under the conditions of international business and modern facilities of communication is capable of proving a somewhat ingenuous one) for the statutory duty to inquire whether a trade is or is not exercised within the United Kingdom. I should be doing an injustice to the arguments of the Counsel for the Appellants if I said that he submitted that they had. But he rightly reminded us that more than once the place where the contract is made has been spoken of as the "crucial" test or, again, as the "most vital" element.

Speaking for myself, I do not find great assistance in the use of a descriptive adjective such as "crucial" in this connection. It cannot be intended to mean that the place of contract is itself conclusive. That would be to rewrite the words of the taxing Act, and could only be justified if there was nothing more in trading than the act of sale itself. There is, of course, much more. But, if "crucial" does not mean as much as this, it cannot mean more than that the law requires that great importance should be attached to the circumstance of the place of sale. It follows, then, that the place of sale will not be the determining factor if there are other circumstances present that outweigh its importance or unless there are no other circumstances that can. Since the Courts have not attempted to lay down what those other circumstances are or may be, singly or in combination, and it would be, I believe, neither right nor possible to try to do so, I think it true to say that, within wide limits which determine what is a permissible conclusion, the question whether a trade is exercised within the United Kingdom remains, as it began, a question of fact for the Special Commissioners. In my opinion, therefore, Harman, J., in the High Court and Lord Evershed, M.R., in the Court of Appeal were well founded in laying stress on the observation of Atkin, L.J., in *F. L. Smidth & Co.* v. *Greenwood,* 8 T.C. 193, at pages 203–4:

> "The contracts in this case were made abroad. But I am not prepared to hold that this test is decisive. I can imagine cases where the contract of re-sale is made abroad, and yet the manufacture of the goods, some negotiation of the terms, and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here. I think that the question is, where do the operations take place from which the profits in substance arise?"

Now, in the present case the sales from which trading arose were the dealings by virtue of which Brentford disposed of Firestone tyres to the Swedish distributor in response to the orders received from the latter. It is, I think, the major fallacy of the Appellants' argument that it seeks to determine the locality of this trading by the locality which the law would attribute to the master agreement between Akron and that distributor.

(Lord Radcliffe.)

In my opinion, the master agreement has very little, if any, significance for this purpose. It was important, of course, for other purposes. It was one of the basic treaties upon which the international organisation of Akron was built up. It settled many particulars of the terms of trade upon which would take place the dealings of those who were to come within the operational range of that organisation. But it did not itself constitute the contracts of sale the locality of which was to be so important in deciding whether Akron was carrying on any trade inside the United Kingdom. The sales to look at for that purpose were the dealings which took place in the course of trade between Brentford and the Swedish distributor, and those dealings consisted of invitations to trade received by Brentford in England, the manufacture or appropriation of stock in England in response to those invitations, the delivery of the stock free alongside vessel in England in discharge of the order, and the receipt of the payment in a bank in England. Those operations constituted the exercising of a trade in England. The Special Commissioners thought that it was Akron's trade, not Brentford's, and I do not see why we should disagree with them.

I think that the trading situation is accurately described by the Special Commissioners in paragraph 16 (*d*) of the Case Stated:

> "It seems to us that the effect of the agreement of 8th February, 1936, and the course of the dealings between Akron and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell the same on Akron's behalf to customers approved of by Akron and subject to terms imposed by Akron; and, further, to account to Akron for the proceeds of the sales less the cost of the goods sold plus 5 per cent."

There is nothing in law that prevents such a finding being made. It is a very natural description of the course of trading that was pursued. But, if so, the Special Commissioners were fully entitled to their conclusion that Akron was trading in the United Kingdom during the years of assessment and that Brentford had constituted themselves their regular agents for the purpose of this trade. The latter point seems to me to be involved almost of necessity in the reading of the facts which I have set out above.

I would dismiss the appeal.

Lord Tucker.—My Lords, I agree that the appeal should be dismissed for the reasons which have been stated by my noble and learned friends.

Lord Cohen.—My Lords, I agree that the appeal should be dismissed, and cannot usefully add any further reasons of my own.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the appeal dismissed with costs.

The Contents have it.

[Solicitors:—Lovell, White & King; Solicitor of Inland Revenue.]

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