[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES (QUEENSLAND) . . . . . } APPELLANT;
RESPONDENT,

AND

FORD MOTOR COMPANY OF AUSTRALIA PROPRIETARY LIMITED . . . . } RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 28, 29; *Aug.* 6.

Latham C.J., Rich and McTiernan JJ.

Income Tax (Q.)—Company—Rate of tax—Capital of company—Deduction in respect of goodwill—Sale by Canadian company to Australian company—Exclusive right to sell certain products in Australia—Business not previously carried on in Australia by Canadian company—Business carried on for some years by Australian company—Deduction of whole amount representing goodwill—Transfer of trade marks—Trade Marks Act 1905-1936 (*No.* 20 *of* 1905—*No.* 75 *of* 1936), *sec.* 58—*The Income Tax Assessment Act of* 1936 (*Q.*) (1 *Edw. VIII. No.* 32), *sec.* 34.

Under sec. 34 (1) of *The Income Tax Assessment Act of* 1936 (Q.) the rate of income tax payable by a company is determined by the percentage which the profits of the company bear to the capital of the company invested in assets which were used during the year of income in the production of assessable income. Under sec. 34 (4) (*c*) of the Act, in determining the capital of the company for the purpose of the Act there may be deducted so much of the amount of any goodwill appearing as an asset in the company's accounts as in the opinion of the Commissioner should reasonably be deducted.

Prior to 1925 the system adopted for the marketing of Ford products in Australia was that the manufacturer, a Canadian company, sold the products to persons in Australia, who resold them. The Canadian company did not carry on business in Australia. By an agreement entered into in 1925 the

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Canadian company, in consideration of the sum of £400,000, agreed to sell to an Australian company the exclusive right to use in Australia the names "Ford" and "Ford Motor" in connection with motor cars, &c., the right to use the names "Ford" and "Ford Motor" as part of the name of the Australian company, and all trade marks then or thereafter registered in the Commonwealth in the name of the vendor in connection with Ford products and parts and the goodwill attached thereto, and agreed to supply Ford products exclusively to the Australian company. In 1929 the Canadian company by a document under seal assigned or purported to assign to, *inter alia*, the Australian company, the trade marks of the Canadian company registered in the Commonwealth in connection with Ford products, together with the goodwill of the particular goods in respect of which the trade marks had been registered. After 1925 the Australian company carried on a large business in Australia. In the yearly balance-sheet of the Australian company under the heading "Patents, Trade Marks, &c." and in the capital account of the Australian company under the heading "Patents, Trade Marks, &c.—Goodwill," there appeared the sum of £400,000. In ascertaining the capital for the purpose of determining the rate of tax payable by the Australian company in respect of the business carried on by it in Queensland in the year 1935, the Commissioner of Taxes (Q.), purporting to act pursuant to sec. 34 (4) (*c*) of *The Income Tax Assessment Act of* 1936, deducted the whole amount credited in the accounts of the company as the Queensland proportion of the asset "Patents, Trade Marks, &c.—Goodwill."

Held that although no goodwill passed to the Australian company by the purported transfer from the Canadian company, inasmuch as the Canadian company had not carried on business in Australia, there was a real goodwill attaching to the business of the Australian company, since it had carried on extensive operations since 1925 and had the exclusive right to market Ford products. In order to ascertain the capital of the company for the purposes of *The Income Tax Assessment Act*, the Commissioner was entitled to deduct only so much of the amount of goodwill as a reasonable person could regard as an amount "reasonably to be deducted", and was wrong in arbitrarily deducting the whole.

Held, also, by *Latham* C.J. and *Rich* J., that the transactions between the Canadian company and the Australian company were not effective to pass any interest in the trade marks of the Canadian company registered in Australia to the Australian company.

Decision of the Supreme Court of Queensland (Full Court): *Commissioner of Taxes* v. *Ford Motor Co. of Australia Pty. Ltd.*, (1941) Q.S.R. 233, reversed.

APPEAL from the Supreme Court of Queensland.

Ford Motor Co. of Australia Pty. Ltd., a company incorporated and having its principal place of business in Victoria, at all material

times carried on at Brisbane, Queensland, a motor assembly and sales business which related wholly to Ford motor products.

On 26th June 1925 an agreement in writing was entered into between Ford Motor Co. of Canada Ltd. and Ford Motor Co. of Australia Pty. Ltd., whereby, after reciting that the Canadian company had for some years past carried on the business, *inter alia*, of manufacturers, exporters, shippers and dealers of and in motor vehicles and of parts, accessories, &c. thereof and in particular all motor cars and trucks known as "Ford" motor cars and trucks used in the Commonwealth of Australia which had been manufactured and/or dealt in by the Canadian company and that a valuable and substantial goodwill was attached to the trade names of "Ford" or "Ford Motor" in the Commonwealth and to the trade in such cars and trucks and in the parts, accessories, &c. used in the manufacture, maintenance and working of such cars and trucks, it was agreed that the Canadian company should sell and the Australian company should purchase (*a*) the exclusive right to use in the Commonwealth of Australia the names "Ford" and "Ford Motor" in connection with motor cars and trucks and parts, accessories, &c. used in connection therewith; (*b*) the right to use in the Commonwealth the words "Ford" or "Ford Motor" as part of the name of the purchaser and to represent the purchaser as carrying on the business formerly carried on in the Commonwealth in Ford products and parts by the vendor; (*c*) all trade marks then or thereafter registered in the Commonwealth in the name of the vendor in connection with Ford products and parts and the goodwill attached thereto. The Canadian company also agreed to supply during a period of ten years Ford products exclusively to the Australian company and to determine agreements under which other persons had been selling Ford products in Australia.

The system adopted by the Canadian company prior to the date of the agreement with the Australian company was to sell the products manufactured by it to certain persons in Australia who were known as agents. Such agents resold the products so purchased. They were not agents authorized by the Canadian company to do any acts binding such company. The Canadian company did not sell goods in Australia or carry on business in the ordinary sense of the term.

On 13th May 1929 by a document under seal which recited that the Canadian company had for many years past carried on in Canada the business of manufacturers, exporters, shippers, dealers of and in motor vehicles of various descriptions and of parts, accessories,

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&c. and in particular of motor cars and trucks known as Ford motor cars and trucks and had in addition caused those products to be marketed in the Commonwealth and other parts of the world and had thereby acquired in the Commonwealth a substantial and valuable goodwill relating to the manufacture and marketing of those products and that in connection with the trade in those products in the Commonwealth the Canadian company registered in the Commonwealth several trade marks, the Canadian company assigned or purported to assign to a manufacturing company (Ford Manufacturing Co. of Australia Pty. Ltd.), Ford Motor Co. of Australia Pty. Ltd., and itself the trade marks together with the goodwill of the business concerned in the particular goods in respect of which the trade marks had been registered in so far as the goodwill related to the Commonwealth of Australia.

On 4th June 1935 by an agreement made between the Canadian company and Ford Motor Co. of Australia Pty. Ltd. the benefit and effect of the covenants contained in the agreement of 26th June 1925 were extended for a further period of ten years.

The sum of £400,000 mentioned in the agreement of 26th June 1925, being the consideration for the sale by the Canadian company to Ford Motor Co. of Australia Pty. Ltd., was duly paid and was entered in the balance-sheet of the Australian company as an asset under the title "Goodwill" and such entry continued until the year 1929, when it was altered in the balance-sheet to "Patents, Trade Marks, &c." In the balance-sheet for the year ended 31st December 1935 the amount was entered under this title. In the company's accounts for that year there appeared under the heading "Capital Account" and the sub-heading "Patents, Trade Marks, &c.—Goodwill," an amount of £400,000.

The Queensland Branch balance-sheet as at 31st December 1935 showed the Queensland proportion of the sum of £400,000, viz. £75,429, as "Patents, Trade Marks, &c." No patents were actually acquired by Ford Motor Co. of Australia Pty. Ltd.

Ford Motor Co. of Australia Pty. Ltd. duly furnished to the Commissioner of Taxes for the State of Queensland a return of its income for the income year 1935-1936, based on its transactions during the period 1st January to 31st December 1935.

Under sec. 34 (1) of the *Income Tax Assessment Act of* 1936 (Q.) the rate of income tax payable by a company is determined by the percentage which the profits of the company bear to the capital of the company invested in assets which were used during the year of income in the production of assessable income. In ascertaining

the capital of Ford Motor Co. of Australia Pty. Ltd. the Commissioner, purporting to act pursuant to sec. 34 (4) (*c*) of the Act, deducted from the total value of the Queensland assets an amount representing the Queensland proportion of goodwill. He determined the capital for the purposes of the Act as follows :—

	£
Total capital invested in company's total assets ..	1,217,051
Less goodwill	400,000
	817,051
Average total value of assets as per balance-sheet (less goodwill)	1,359,563
Average total value of Queensland assets (less Queensland proportion of goodwill)	236,452

Capital invested in Queensland business and used in production of profits liable to tax $= \frac{236452}{1359563}$ of £817,051 = £142,099.

The Commissioner assessed the company to income tax accordingly.

The capital applicable to the total Queensland assets including goodwill was £215,721, so that an amount of £73,622 was excluded on account of the Queensland proportion of goodwill. The case was argued throughout on the basis that the Commissioner had deducted the whole of the Queensland goodwill, though the company in its accounts attributed the sum of £75,429 to the Queensland goodwill.

The company objected to the assessment on the grounds that the amount deducted by the Commissioner in respect of goodwill should have been included in the capital for the purposes of determining the rate of tax and that in deducting that sum the Commissioner acted contrary to law and formed no *bona-fide* opinion as to whether the sum or any part thereof should be deducted. The objection was disallowed, whereupon the company requested that the objection be treated as an appeal and forwarded to a Court of Review for hearing and determination.

The appeal came on to be heard by *E. A. Douglas* J., sitting as a Court of Review, who found the following facts :—(*a*) That the respondent company was not carrying on business in Australia prior to 26th June 1925 ; (*b*) That such company could not have sold the

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goodwill of a business in Australia because such business and such goodwill did not exist; (*c*) That no goodwill appears as an asset in the accounts of the respondent company for the year 1935-1936 or for any year since the year 1929; (*d*) That the Commissioner of Taxes did form the opinion that the sum of £73,622 should reasonably be deducted as goodwill; (*e*) That such opinion was honest; (*f*) That such opinion was mistaken; (*g*) That the Commissioner had no sufficient material on the facts for forming such opinion. He held that the asset represented by the item of £400,000 was not goodwill and that consequently the Commissioner had no authority under sec. 34 (4) (*c*) of the *Income Tax Assessment Act of* 1936 to deduct any part of it from the capital of the company: *Ford Motor Co. of Australia Pty. Ltd.* v. *Commissioner of Taxes* (1).

At the request of the Commissioner of Taxes *E. A. Douglas* J. stated a special case for the opinion of the Full Court. The questions raised for the opinion of the Full Court were as follows:—

(1) Was I right in my decision that the appellant herein was not entitled under and by virtue of sec. 34 (4) (*c*) of *The Income Tax Assessment Act of* 1936 to deduct from the average amounts of capital and reserves of the respondent company ascertained in accordance with the provisions of sub-sec. 3 of sec. 34 of the said Act the sum of £73,622 or any part thereof being the Queensland proportion of the sum of £400,000 hereinbefore referred to?

If not, should the whole sum of £73,622 be deducted from the said capital and reserves or should any part of such sum be so deducted, and, if so, what part thereof?

(2) Were my findings: (*a*) That the appellant herein formed the opinion that the sum of £73,622 should reasonably be deducted as goodwill; (*b*) That such opinion was honest; (*c*) That the appellant had no sufficient material on the facts for forming such opinion; or any of them against the evidence and the weight of evidence?

(3) Was I right in finding and deciding that the appellant had no authority in law for forming such opinion?

(4) Were my findings: (*a*) That Ford Motor Co. of Canada Ltd. did not sell goods in Australia or carry on business in the ordinary sense of the term in Australia prior to 26th June 1925; (*b*) That Ford Motor Co. of Canada Ltd. were not carrying on any business in Australia prior to 26th June 1925; (*c*) That they could not have sold the goodwill of a business in Australia because such business and such goodwill did not exist; (*d*) That no goodwill appears as an asset in the accounts of the respondent company for the years

(1) (1940) Q.S.R. 342.

1935, 1936 or for any year since the year 1929 ; or any and which of them against the evidence and the weight of evidence ?

(5) (*a*) If such findings to questions 2 or 4 or any of them are not against the evidence and the weight of evidence is there any and what right of appeal on such findings ? (*b*) If there is such right of appeal should any and which of such findings be set aside ?

(6) Was I right in deciding that under the law in Australia no valid assignment of or agreement to assign the trade marks of Ford Motor Co. of Canada Ltd. was made by Ford Motor Co. of Canada Ltd. to the respondent company by the agreement of 26th June 1925 ?

(7) Was I right in deciding that assuming the Australian business with the goodwill of such business could have been transferred by Ford Motor Co. of Canada Ltd. to the respondent company, there was no agreement to that effect ?

(8) Was I right in deciding that the agreement of 26th June 1925 conveyed nothing and created an asset of no legal value ?

(9) Was I right in admitting the oral evidence of Neal John Rushbrook ?

(10) Was I right in allowing the appeal of the respondent company hereto, and in directing that the assessments appealed against should be set aside, and that a fresh assessment should be made ?

(11) By whom should the costs of and incidental to this appeal and the costs in the Court of Review be paid ?

The Full Court (*Macrossan* S.P.J. and *Philp* J., *Webb* C.J. dissenting) upheld the decision of *E. A. Douglas* J., and held further that even if the section were applicable the Commissioner could not reasonably have thought that the goodwill was valueless, and that accordingly he had not exercised the discretion entrusted to him by the Act. The Court answered the questions as follows :—(1) Yes. (2) (*a*) and (2) (*b*) Assuming that the appellant misunderstood the nature of his power and duty under sec. 34 (4) (*c*),—No. (3) Yes. (4) No. (5) This does not relate to any question arising on the review, and should not be answered. (6) Yes. (7) Yes. (8) No. (9) Yes. (10) Yes. (11) By the appellant : *Commissioner of Taxes* v. *Ford Motor Co. Pty. Ltd.* (1).

From that decision the Commissioner of Taxes appealed to the High Court.

P. L. Hart (with him *Fahey*), for the appellant. Once an item has appeared in the accounts of the company as goodwill the Commis-

(1) (1941) Q.S.R. 233.

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sioner of Taxes has power to deal with it as such. The intention of the legislature by sec. 34 (4) (*c*) of *The Income Tax Assessment Act of* 1936 was that if anything was reported as goodwill the section of the Act became applicable and the entries were conclusive evidence against the taxpayer. The respondent company was bound by the recitals in the agreements. Those recitals show that there is a goodwill attached to the name of Ford Motors and to the trade in motor cars and trucks. The respondent company acquired in perpetuity the valuable right to use trade names and patent rights. There was an assignment in gross of the trade marks to three persons. That was an attempt to split up goodwill between three companies, with the result that the assignment is bad and the registered trade marks should be expunged (*In re John Sinclair Ltd.'s Trade Mark* (1)). The assignment is invalid, unless the goodwill is included (*In re Berna Commercial Motors Ltd.* (2) ; *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (3) ; *In re Bennett* ; *Clarke* v. *White* (4)). If no goodwill was acquired from the Canadian company a *de-facto* goodwill grew up after 1925. The Commissioner can accept the *de-facto* goodwill as goodwill and make an assessment accordingly. That assessment is conclusive, and the burden of proof that the assessment is wrong is on the taxpayer.

Real (with him *Stanley*), for the respondent. So far as the amount of £400,000 is concerned, no portion of it is attributable to goodwill and sec. 34 (4) (*c*) of *The Income Tax Assessment Act of* 1936 has no application. The term goodwill as used in the statute is a technical expression, and contemplates goodwill such as is purchased on a sale. Trade marks and trade names are not mentioned in the section, and goodwill flowing from them is not goodwill within the meaning of the statute. The Commissioner of Taxes in deducting the whole amount acted on a wrong principle and acted unreasonably. Because an entry was made in books as to goodwill the amount of that entry cannot necessarily be treated as goodwill. The oral evidence was admissible and showed that there was no goodwill which could be transferred by the agreement of 26th June 1925. The respondent company is not precluded by the recitals in the agreement from showing what were the true facts. The recitals do not operate by way of estoppel. The item £400,000, although it appears in the accounts of the company as goodwill, is

(1) (1932) 1 Ch. 598.
(2) (1915) 1 Ch. 414, at p. 421.
(3) (1921) 29 C.L.R. 225, at p. 233.
(4) (1899) 1 Ch. 316, at p. 321.

not goodwill. It represents the payment made for the right to sell Ford products. The Canadian company at no time carried on business in Australia, and consequently there is no goodwill which could be transferred to the respondent company (*La Société Anonyme Des Anciens Établissements Panhard et Lavassor* v. *Panhard Levassor Motor Co. Ltd.* (1)). The goodwill contemplated by the statute is goodwill which passes on the sale of a business and not an artificial goodwill. The Commissioner of Taxes has been unreasonable and has acted arbitrarily in fixing the amount of goodwill at £73,622. [Counsel referred to *In re Berna Commercial Motors Ltd.* (2).]

P. L. Hart, in reply. The Canadian company, although not actually carrying on business in Australia, marketed its products in Australia by means of agents. In this way there was a goodwill existing in Australia which was transferred to the respondent company. The company, when it commenced business, had the benefit of the exclusive right to sell Ford products, so that there must be some goodwill attached to the business.

Cur. adv. vult.

Aug. 6.

The following written judgments were delivered :—

LATHAM C.J. AND RICH J. This is an appeal from a decision of the Full Court of the Supreme Court of Queensland upon a special case stated by *E. A. Douglas* J., who was sitting as a Court of Review under the provisions of the Queensland *Income Tax Assessment Act of* 1936.

The rate of income tax payable by a company under the Act is determined by the percentage which the profits of the company bear to the capital of the company invested in assets which were used during the year of income in production of assessable income (sec. 34 (1)). If that percentage is high the rate of tax is high. If it is low the rate of tax is low—see Sixth Schedule to the *Income Tax Act of* 1936. It is therefore to the interest of a taxpaying company to claim that it has as large a capital as possible. The capital of the company for the purposes of the Act is to be ascertained (sec. 34 (3)) " by adding the amounts averaged over a full year of income of the capital and reserves of the company as set out hereunder, namely :—(*a*) the capital paid up in cash or value on all shares actually issued by the company ; (*b*) reserves and parts of reserves (including in such reserves amounts standing to the credit

(1) (1901) 2 Ch. 513. (2) (1915) 1 Ch. 414.

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of profit and loss account) invested in the business, and which have been created out of profits liable to tax or exempt from tax under this Act or under any previous income tax law of the State, except profits derived during the year of income or profits on which additional tax would be chargeable on distribution under sub-section two of section thirty-five of this Act, and deducting therefrom the amount of any item specified in sub-section four of this section."

Evidently in order to prevent inflation of capital for the purpose of reducing the rate of tax, the legislature has provided in sec. 34 (4) (*c*) that there shall be deducted from the capital of a company, *inter alia*, " so much of the amount of any goodwill, franchise issued under '*The Tolls on Privately Constructed Road Traffic Facilities Act of* 1931,' Order in Council, copyright, patent right or undertaking appearing as an asset in the company's accounts as in the opinion of the Commissioner should reasonably be deducted." The questions in this case relate to a deduction made by the Commissioner from the capital of the company in respect of goodwill.

The respondent company carries on business throughout Australia. It made a return of income derived in the calendar year 1935. In the company's accounts for that year there appears under the heading " Capital Accounts " and the sub-heading " Patents, Trade Marks, &c., Goodwill " an amount of £400,000. (This entry was not observed in the proceedings before the case reached this Court.) Of this amount of £400,000 the Commissioner estimated an amount of £73,622 as representing the proportion of the capital (as ascertained for the purposes of the Act) which represented " Queensland goodwill." Purporting to act under sec. 34 (4) (*c*) he deducted the whole of this amount from the capital of the company. The case has been argued by both parties upon the basis that, though the proportion of the sum of £400,000 attributed in the company's accounts to the Queensland business was £75,429, the Commissioner in deducting £73,622 has deducted the whole of the amount of the Queensland goodwill. The calculation of the Commissioner reaching this result appears in Exhibit 3 to the special case—letter dated 18th May 1939. *E. A. Douglas* J. held and the Full Court upon a case stated agreed by a majority (*Macrossan* S.P.J. and *Philp* J., *Webb* C.J. dissenting) that in fact this amount did not represent goodwill and that the Commissioner was not entitled to make any deduction under the provisions mentioned. It was further held that, even if the section was applicable the Commissioner could not reasonably have thought that the goodwill was valueless, and that accordingly he had not exercised the discretion entrusted

to him by the Act. The Commissioner has appealed to this Court.

The special case states that on 26th June 1925 a Canadian company, Ford Motor Co. of Canada Ltd., sold to the respondent, Ford Motor Co. of Australia Pty. Ltd., by an agreement under seal, (*a*) the exclusive right to use in the Commonwealth of Australia the names "Ford" and "Ford Motor" in connection with motor cars &c. and parts; (*b*) the right to use those names as part of the name of the Australian company; and (*c*) all present and future trade marks registered in Australia in the name of the Canadian company in connection with Ford products and parts "and the goodwill attached thereto." The consideration for the sale was £400,000, which was duly paid. The Canadian company also agreed to supply during a period of ten years Ford products exclusively to the Australian company and to determine agency agreements under which other persons had been selling Ford products in Australia. A recital stated that "a substantial and valuable goodwill is attached to the trade names of 'Ford' and 'Ford Motor' in the said Commonwealth and to trade" in Ford cars, parts, &c.

On 13th May 1939 the Canadian company purported to assign by a document under seal to three assignees certain trade marks "together with the goodwill of the business concerned in the particular goods in respect of which the said trade marks have been respectively registered in so far as the goodwill relates to the Commonwealth of Australia." The assignees were a manufacturing company (Ford Manufacturing Co. of Australia Pty. Ltd.), the respondent company, which is a marketing company, and the assignor itself—the Canadian company. This agreement contained a recital to the effect that as the Canadian company had for many years carried on business in Canada in manufacturing, exporting, shipping and dealing in motor cars, &c. and had "in addition caused the said products to be marketed in the Commonwealth of Australia and" (had) "thereby acquired in the Commonwealth of Australia a substantial and valuable goodwill relating to the manufacture and marketing of such products."

On 4th June 1935, by an agreement under seal made between the Canadian company and the Australian company, the covenants in the agreement of 1925 were extended for a further period of ten years. This agreement recited that by the 1925 agreement the Canadian company had sold goodwill to the Australian company.

These various recitals, striving to establish by strong assertion the existence of a goodwill in Australia belonging to the Canadian

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company, are relied upon by the Commissioner to show that goodwill was assigned to the respondent company by the Canadian company. The company, which made the agreements containing these recitals, now contends that no goodwill was assigned by the agreements. The Commissioner was not a party to the agreements and cannot rely upon the recitals by way of estoppel. They can be used against the company as admissions, but they are not conclusive against the company. The company is at liberty to show, if it can, that in fact the Canadian company did not own any goodwill in Australia and that accordingly the agreements were ineffective to assign any such goodwill. Verbal evidence for this purpose was admitted and, in our opinion, rightly admitted.

That evidence showed that the Canadian company did not at any time carry on business in Australia. It follows that that company had no goodwill to transfer to the respondent and accordingly did not transfer any goodwill to the respondent. All the learned Justices of the Supreme Court agreed in this view, and it is not necessary to restate at length the reasons which support it. We refer only to what Lord *Macnaghten* said in *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine Ltd.* (1): "Goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business." The Australian company acquired by the agreements valuable selling rights and rights to exclusive supply in relation to commercial products of high reputation—but these contractual rights did not constitute goodwill.

We agree with *Webb* C.J., however, that this conclusion is not decisive in this case. The questions before this Court relate to the income year 1935. The fact that the company acquired or did not acquire an asset of a particular kind at a particular date does not in itself show whether or not it owned an asset of that kind at a later date. An asset previously acquired may have disappeared, or the company may have become possessed of an asset otherwise than by means of assignment from another person. The company has been carrying on a large business in Australia since 1925. It has the valuable and exclusive right to market Ford products. In 1935 the profits in Queensland as returned by the company for income-tax purposes amounted to £51,483. There must be a real goodwill attaching to such a business.

As already stated, an item £400,000 for "Patents, Trade Marks &c.—Goodwill" appears in the company's accounts for the relevant year. We agree that it would be open to the company to show that

(1) (1901) A.C. 217, at p. 224.

in fact it possessed no goodwill if it could do so. But the company does not by showing that it did not acquire a goodwill by assignments in 1925 and 1929 also show that it had no goodwill in 1935. The accounts for 1935 refer to the assets of the company existing in that year. The company in its correspondence with the Commissioner rightly contends (though for another purpose) that in sec. 34 (4) (*c*) "'Accounts' obviously means the accounts relating to the period in question since in the course of trade one item may increase in value and another diminish, and a similar amount may from time to time represent different assets."

As an amount for goodwill appears as an asset in the company's accounts for the relevant year the Commissioner is entitled to make a deduction under sec. 34 (4) (*c*) of so much of the amount of the goodwill as in his opinion should reasonably be deducted. If the company in fact has a goodwill there can be no doubt that this section is applicable. If in fact the company had no goodwill, whatever may appear in its accounts, this provision would appear not to be applicable; but it is not necessary to decide this question in the present case.

An amount appears in the accounts as an amount of goodwill under a heading "Patents, Trade Marks, &c." The company owns no patents. There was no assignment of trade marks in 1925, but only an agreement to assign. The "assignment" of trade marks in 1929 purported to be an actual assignment of certain registered trade marks. Sec. 58 of the *Trade Marks Act* 1905-1936 (Commonwealth) provides: "A trade mark when registered may be assigned and transmitted only in connexion with the goodwill of the business concerned in the particular goods or class of goods in respect of which it has been registered and shall be determinable with that goodwill." A registered trade mark, the existence and transferability of which depend entirely upon the statute, can be assigned *only* if the statutory requirement is satisfied. The Canadian company purported in 1929 to assign registered trade marks "together with the goodwill of the business concerned in the particular goods" in respect of which the trade marks had been registered. But the company did not carry on any business in Australia and it did not own the goodwill of any business in Australia. Accordingly the "assignment" was ineffectual to transfer any trade marks (*Lacteosote Ltd.* v. *Alberman* (1)).

Thus the respondent company owns neither patents nor trade marks, and the amount of £400,000 in the accounts must be regarded as representing only goodwill. If the company made a mistake in

(1) (1927) 2 Ch. 117, at pp. 127, 128.

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including in this amount an estimate of the value of trade marks which it was thought to own, it may make its submissions to the Commissioner.

The Commissioner is entitled to make a deduction from the amount of capital only of so much of the amount of goodwill appearing in the company's accounts as in his opinion should reasonably be deducted. This provision does not subject a taxpayer to an arbitrary, fanciful or capricious decision of the Commissioner (*Australasian Scale Co. Ltd.* v. *Commissioner of Taxes (Q.)* (2)).

The Commissioner has in the present case deducted the whole amount of £73,622 attributable to the Queensland share of the Australian goodwill. There is no reason to doubt the honesty of the Commissioner, but it is impossible to regard such a deduction as representing what any reasonable person could regard as an amount reasonably to be deducted. The goodwill of the company must obviously have some real value, and we agree with the learned Justices of the Full Court that the Commissioner should seek to ascertain the real value of the goodwill and make a deduction of what in his opinion is the excess value attributed to it in the accounts of the company.

The questions in the special case should be answered as follows :— Question 1 : First part : The Commissioner was entitled to deduct so much only of the said sum of £73,622 as in his opinion should reasonably be deducted. Second part : See answer to first part. Question 2 : (*a*) Yes. (*b*) and (*c*) In view of answer to 2 (*a*), no answer. Question 3 : Yes. Question 4 : (*a*) : No. (*b*) : No. (*c*) : No. (*d*) : Yes. Question 5 : Not necessary to answer. Question 6 : Yes. Question 7 : Yes. Question 8 : The said agreement created contractual rights in the respondent which were of value but did not convey any property to the respondent. Question 9 : Yes. Question 10 : Yes.

The result is that the appeal should be allowed, but it should be held that the Commissioner was wrong in arbitrarily deducting the whole amount of £73,622 from the capital of the company. The company has throughout contended that the Commissioner was not entitled to make any deduction on account of goodwill. On this part of the case the Commissioner has succeeded. The Commissioner has throughout contended that he was entitled to deduct the whole amount of £73,622 on account of goodwill. On this part of the case the company has succeeded. In the circumstances it will be proper to make no order as to costs in this Court or in the Courts below.

(2) (1935) 53 C.L.R. 534, at pp. 555, 557.

Question 11 should be answered accordingly.

The order of the Full Court upon the special case is set aside and the special case with the answers stated is remitted to *E. A. Douglas* J. so that he may make an order in conformity with this judgment.

McTIERNAN J. I agree that the capital account of the taxpayer company should, for the purposes of fixing the rate of taxation under sec. 34 of the *Income Tax Assessment Act of* 1936, be made up on the basis that no goodwill of any business of the Ford Motor Co. of Canada passed to the taxpayer and I agree that there should not be left out of consideration in making up such capital account the question whether the taxpayer company had in the year of taxation a valuable goodwill which it acquired since it began to carry on business. So far I agree with the judgment that has been given. But I should like my further concurrence subject to this reservation that the taxpayer should not be precluded from showing, if it can, that it has an interest in any one or more of the trade marks or trade names of the Canadian company and that such interest is included in the conglomerate item, "Patents, Trade Marks, &c.," mentioned in the balance-sheet.

Appeal allowed. Order of Full Court set aside. Special case with following answers remitted to E. A. Douglas J. so that he may make an order in conformity with the judgment of this Court.

Answers to questions in special case :—

Question 1 : *First part : The Commissioner was entitled to deduct so much only of the sum of* £73,622 *as in his opinion should reasonably be deducted.*

Second part : See answer to first part.

Question 2 (*a*) : *Yes. The opinion formed by the appellant was not an opinion which he was authorized to form and give effect to under sec.* 34 (4) (*c*) *of the Income Tax Assessment Act.*

Question 2 (*b*) *and* (*c*) : *In view of answer to* 2 (*a*), *no answer.*

Question 3 : *Yes.*

Question 4 : (*a*) : *No.*
(*b*) : *No.*
(*c*) : *No.*
(*d*) : *Yes.*

Question 5 : *Not necessary to answer.*

Question 6 : *Yes.*

Question 7 : *Yes.*

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Question 8 : *The said agreement created contractual rights in the respondent which were of value but did not convey any property to the respondent.*
Question 9 : *Yes.*
Question 10 : *Yes.*
Question 11 : *There should be no order as to such costs.*
No order as to costs of appeal to this Court.

Solicitor for the appellant, *W. G. Hamilton*, Crown Solicitor for Queensland.

Solicitors for the respondent, *Thynne & Macartney*.

B. J. J.