

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXA-
TION

} APPELLANT ;

AND

WILLIAMSON

RESPONDENT.

Income Tax (Cth.)—Assessable income—Deduction—Chemist’s business—Purchase—
Lease from vendor of shop in which business carried on—“Premium paid in
respect of land”—Goodwill—Nature—Local or personal—Attachment to land—
Income Tax Assessment Act 1936-1940 (No. 27 of 1936—No. 65 of 1940), ss.
 83, 88.

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 SYDNEY,
 Sept. 1, 3.
 Rich J.

Upon the sale of a chemist’s business the vendor granted to the purchaser a lease of the business premises and the purchaser paid £500 for the goodwill. The purchaser claimed to be entitled to deduct from his annual income a proportionate part of the £500 as being a premium within the meaning of s. 88 of the *Income Tax Assessment Act 1936-1940*.

Held that the deduction should be allowed.

APPEAL from the Board of Review.

By an agreement made on 31st July 1939 Henry Stanley Williamson agreed to purchase the goodwill, stock and fittings of a chemist’s business at Berala, New South Wales. The consideration for the sale of the goodwill fixed by the agreement was £500. The price for the stock was to be fixed by assessors, and the vendor agreed to grant a lease of the shop premises for five years, with the option of renewal for a further five years. The vendor undertook that during the currency of the lease he would not carry on the business of a chemist within three miles or be connected with or beneficially interested in any competing business within five miles. In the lease document the vendor covenanted that he would not during the term permit any property owned by him at Berala to be used for the business of a chemist.

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In his return for income tax purposes of income received during the year ended 30th June 1940, Williamson, under ss. 83 and 88 of the *Income Tax Assessment Act* 1936-1940, claimed a deduction of £96, as a proportionate part of the sum of £500 paid for the goodwill of the business.

The Commissioner disallowed the claim, but, on appeal, the Board of Review, by a majority, allowed it.

From that decision the Commissioner appealed to the High Court.

Dignam for the appellant. The goodwill now under consideration is personal in its nature. It is not attached to and is separable from the property. There is not any similarity between this case and the case of a hotel with a licence: See *West London Syndicate Ltd. v. Inland Revenue Commissioners* (1); *Muller & Co.'s Margarine Ltd. v. Inland Revenue Commissioners* (2); *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd.* (3); *Daniell v. Federal Commissioner of Taxation* (4); *Rosehill Racecourse Co. v. Commissioner of Stamp Duties (N.S.W.)* (5).

The respondent appeared in person.

Cur. adv. vult.

Sept. 3.

RICH J. delivered the following written judgment:—This is an appeal by the Commissioner from a decision of the Board of Review which is said to involve a point of law.

The owner of a chemist's business and of a shop at Berala in which it was being carried on agreed on 31st July 1939 to sell to the respondent the goodwill, stock-in-trade and fittings of the business, and to grant him a lease of the shop. By the agreement and by the subsequent memorandum of lease which was executed on 23rd August of the same year it was provided, *inter alia*, that the consideration for the sale of the goodwill should be £500 and that the lease should be for a period of five years at a rental of £1 15s. per week with a right of renewal for five years "at a reasonable rent to be mutually agreed upon by the parties." The vendor covenanted not during the term or any renewal to permit any property owned by him at Berala to be used as a chemist's shop, and not during the term to carry on a chemist's business or be connected with any competitive business at Berala or within a radius of three miles of the shop.

(1) (1898) 2 Q.B. 507.

(2) (1900) 1 Q.B. 310, at p. 322.

(3) (1901) A.C. 217, at p. 231.

(4) (1928) 42 C.L.R. 296.

(5) (1905) 3 C.L.R. 393.

Section 88 of the *Income Tax Assessment Act* 1936-1940 provides that where a taxpayer has paid any premium in respect of land, premises or machinery used for the purpose of producing assessable income, and in the year of income he is the lessee of the land, premises or machinery, a proportionate part of the amount of that premium, arrived at by distributing that amount proportionately over the period of the lease unexpired at the date when the premium was paid, shall be an allowable deduction. By s. 83 it is provided that "lease" where the premium is for or in connection with any goodwill means the lease of the land to which such goodwill is attached or connected, and "premium" means any consideration payable for or in connection with any goodwill attached to or connected with land a lease of which is granted, assigned or surrendered.

In respect of the income derived by the respondent during the year ended 30th June 1940 he claimed to be allowed a deduction of £96 as amortization of the £500 paid for the goodwill of the business. His claim was disallowed by the Commissioner on the ground that the consideration paid for the goodwill was a capital outgoing not connected with a goodwill attached to or connected with land. On appeal to the Board of Review the Board, by a majority, upheld the appeal, taking the view that the goodwill in question was clearly a local goodwill. The notice of appeal to this Court states as one of its grounds that the decision of the Board was erroneous in point of law, but it nowhere indicates what point of law is alleged to be involved in the determination by the Board of the question of fact, whether the goodwill of this particular chemist's business was or was not attached to or connected with the premises on which it was being carried on. Since, however, it has appeared during the course of the argument that the proper construction of ss. 83 and 88 is to some extent involved, I have thought it proper to entertain the appeal: Cf. *Ruhamah Property Co. Ltd. v. Federal Commissioner of Taxation* (1).

As an abstract proposition, there can be no doubt that a particular goodwill may be local or personal or partly one and partly the other. Its character depends on the nature of the business or the circumstances. It is local to the extent to which the trade connection depends on the place in which the business is carried on, for example, where there is only one hotel in a place the connection may be for all practical purposes entirely local. It is personal to the extent to which it is the personality, ability and good reputation of the trader that attract the trade and not the place where it is carried on. To the extent to which the goodwill is local it is attached to and cannot

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(1) (1928) 41 C.L.R. 148, at pp. 151, 155.

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be severed from the land on which the business is carried on (*Tooth & Co. Ltd. v. Commissioner of Stamp Duties* (1)). To the extent to which it is personal it is only accidentally associated with the land, and may be severed from it and dealt with separately (*Rosehill Racecourse Co. v. Commissioner of Stamp Duties (N.S.W.)* (2)).

Goodwill has been said to be "the attractive force which brings in custom" (*Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd.* (3)). Hence, to determine the nature of the goodwill in any given case, it is necessary to consider the type of business and the type of customer which such a business is inherently likely to attract as well as all the surrounding circumstances. Now, customers vary. In *Whiteman Smith Motor Co. Ltd. v. Chaplin* (4) the types were zoologically classified into cats, dogs, rats and rabbits. The cat prefers the old home to the person who keeps it, and stays in the old home although the person who has kept the home leaves, and so it represents the customer who goes to the old shop whoever keeps it, and provides the local goodwill. The faithful dog is attached to the person rather than to the place; he will follow the outgoing owner if he does not go too far. The rat has no attachments, and is purely casual. The rabbit is attracted by mere propinquity. He comes because he happens to live close by and it would be more trouble to go elsewhere. These categories serve as a reminder that the goodwill of a business is a composite thing referable in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it, and in part to the likelihood of competition, many customers being no doubt actuated by mixed motives in conferring their custom.

But in the present case the Court has little concern with the inherent nature of goodwill. It has to deal with a claim to a deduction based on a contention that the taxpayer paid a premium of £500 in respect of land of which he is lessee, because he paid it for goodwill attached to or connected with the land which was leased to him; and the question is whether the goodwill for which he paid was in fact connected with the land. Hence the Court is not concerned with what the lessor had, but with what he parted with to the respondent. Now, when a business is being carried on upon premises and a new-comer proposes to obtain a lease of them from the owner of the business for the purpose of using them for the same class of business, the likelihood that customers who have resorted to the premises in the past will continue to do so is ordinarily an

(1) (1909) 9 S.R. (N.S.W.) 652; 26 W.N. 162.

(2) (1905) 3 C.L.R. 393.

(3) (1901) A.C. 217, at p. 224.

(4) (1934) 2 K.B. 35, at pp. 42, 49.

important matter for the new-comer, and makes it worth his while to pay something extra in respect of this likelihood. When, in such a case, the business is a retail business possessing no special features, and part of the consideration is expressed to be paid for the goodwill, *prima facie*, if there be nothing more, the goodwill referred to is the local goodwill attached to the premises. This is so because, by virtue of such a transaction, whether the goodwill be specially mentioned or not, in the absence of some special provision it necessarily goes with the premises and the seller is bound to do nothing positive except hand the premises over. Different considerations would arise if the contract contained an agreement by the seller of the goodwill to introduce the buyer personally to customers and to use his best endeavours to induce them to confer their custom upon him. It might then be that the premium should be regarded as being in part paid for the acquisition of any personal goodwill enjoyed by the seller in respect of the business. But it does not follow from the mere fact that the seller warrants not to let other premises of his to competitors or not to compete himself. A promise to do nothing to attract away from the premises old customers who might otherwise be disposed to patronize them is different in kind from a promise to endeavour to detach the seller's personal goodwill from himself and transfer it to the buyer. In the present case, there is no evidence that the business had any significantly special features. It was an ordinary chemist's shop, and, assuming that there was any personal goodwill attached to the former owner, the contract makes no provision for the buyer acquiring or paying anything in respect of that. It is true that in the contract the goodwill is mentioned in one paragraph and the lease in another and a separate consideration of £500 is attributed to the goodwill, but no significance can be attached to this. If the case of *West London Syndicate Ltd. v. Inland Revenue Commissioners* (1) (distinguished *Muller & Co.'s Margarine Ltd. v. Inland Revenue Commissioners* (2)) should be regarded as deciding that such provisions have the effect of severing local goodwill from the premises to which it is attached, I am, with all respect, unable to agree with it. The existence of local goodwill attached to premises is a matter of fact depending on the propensities of customers, and these propensities are not affected by writing words on pieces of paper. The relevant sections of the Act expressly contemplate the payment of a special premium for goodwill which is nevertheless still regarded as attached to land. I am also of opinion that no significance is to be attached to the

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(1) (1898) 2 Q.B. 507.

(2) (1900) 1 Q.B., at pp. 320-322.

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fact that the agreement of 31st July 1939 was subsequently implemented by the execution of the formal memorandum of lease.

For these reasons I am of opinion that the appeal should be dismissed.

Appeal dismissed. Assessment of taxable income reduced by £96. Appellant to pay the respondent's costs, if any, of the appeal and of the proceedings before the Board of Review.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.