[HIGH COURT OF AUSTRALIA.]

ASSOCIATED NEWSPAPERS LIMITED . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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SYDNEY, *Aug.* 30; *Sept.* 12.

Williams J.

War-time (Company) Tax—Capital employed—Holding company—Shares in subsidiary company acquired in exchange for shares issued by holding company—Subsidiary company liquidated—Assets distributed in specie to holding company—Tangible assets—Tangible assets received by holding company less than paid-up value of shares issued—Difference debited to goodwill and establishment—Goodwill—Whether acquired by purchase—War-time (Company) Tax Assessment Act 1940-1941 (*No.* 90 *of* 1940—*No.* 56 *of* 1941), *ss.* 19, 24.

Two companies, A and B, each of which companies carried on the business of publishing newspapers, journals, magazines and other publications, agreed to effect an amalgamation by the incorporation of the appellant company and the issuing of shares therein to their shareholders in exchange for the shares held by those shareholders in the A and B companies respectively. The appellant company eventually acquired all the shares in the A company and it issued in exchange for such shares 2,541,779 shares of £1 each. It also acquired all the shares, except five, in the B company. In 1937 the A company went into voluntary liquidation and the liquidator distributed the whole of the assets *in specie* to the appellant company as the holder of all the shares and thereafter the appellant company carried on the business of publishers previously carried on by the A company. There was not any reference in the appellant company's balance-sheets for the years 1937, 1938 and 1939 respectively to "goodwill." In August 1940, however, an account styled "goodwill and establishment" was opened in the books of the appellant company and debited with the sum of £1,682,920 14s. 8d. This figure was arrived at by deducting from £2,541,779, the paid-up value of the shares exchanged for shares in the A company, the sum of £858,858 5s. 4d., the value of the tangible assets received by the appellant company in the liquidation of the A company. Subsequently, this account was credited with the sum of £182,920 14s. 8d. and in the appellant company's balance-sheet as at September 1940, an item of "£1,500,000 goodwill and establishment" appeared as an asset.

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Held that the sum of £1,682,920 14s. 8d. should be treated as the prescribed value of an asset, namely goodwill, purchased by the appellant company within the meaning of s. 24 (2) (*d*) of the *War-time (Company) Tax Assessment Act* 1940-1941.

APPEAL from the Federal Commissioner of Taxation.

Associated Newspapers Ltd. appealed to the High Court against an assessment and an amended assessment made by the Federal Commissioner of Taxation under the *War-time (Company) Tax Assessment Act* 1940-1941 in respect of the taxable profit derived by the company during the year ended 28th September 1941.

The principal question was whether the sum of £1,682,920 14s. 8d. appearing in the goodwill and establishment account of the company was an asset purchased by the company within the meaning of s. 24 (2) (*d*) of the *War-time (Company) Tax Assessment Act* 1940-1941.

The appeal was heard by *Williams* J., in whose judgment the facts and relevant statutory provisions are sufficiently set forth.

Weston K.C. and *Kerrigan*, for the appellant.

Kitto K.C., *Hooke* and *Louat*, for the respondent.

Cur. adv. vult.

Sept. 12.

WILLIAMS J. delivered the following written judgment:—

This is an appeal by Associated Newspapers Ltd. against an assessment and amended assessment of that company for war-time (company) tax in respect of the period ended 28th September 1941. By the assessment, which is dated 22nd May 1942, the respondent fixed the capital employed at £1,661,510 and on that basis assessed the company for tax at £23,880 5s. 7d. On 16th July 1942, the company objected to this assessment on seven grounds. On 25th August 1943 the respondent allowed these grounds in the main but at the same time issued an amended assessment by which he fixed the capital employed at £936,694 and increased the tax to £76,925 19s. 4d. On 12th October 1943, the company objected to this amended assessment on six grounds. On 2nd December 1943, the respondent disallowed all these grounds, and the company, being dissatisfied with his decision, requested the Commissioner to treat the objection as an appeal and forward it to this Court. The respondent thereupon forwarded both sets of objections to this Court.

When the appeal first came on for hearing it was agreed that only the appeal against the amended assessment was before the Court,

but during the hearing it was agreed that the appeal should be argued on the basis that it was an appeal against both the assessment and the amended assessment.

Before referring to the objections it will be convenient to summarize briefly the nature of the evidence and the material facts. The evidence consists of a statement of facts, with the exception of pars. 24 and 26 which were withdrawn, a new par. 26, the documents exhibited or annexed and certain other documents and oral evidence.

The appellant company was incorporated in New South Wales on 9th September 1929. The first object stated in its memorandum of association was :—" To enter into and carry into effect either with or without modification an agreement which has already been prepared and is expressed to be made on the Ninth day of August, 1929, between Sun Newspapers Ltd. of the first part, S. Bennett Ltd. of the second part and Alexander Charles Wiseheart on behalf of a company to be formed (being this company) of the third part."

Sun Newspapers Ltd. and S. Bennett Ltd. were two companies which were carrying on the business of publishing newspapers, journals, magazines and other publications, the principal publication of the former company being a daily evening newspaper called the " Sun," and of the latter company a daily evening newspaper called the " News."

The agreement of 9th August 1929, after reciting that Sun Newspapers Ltd. and S. Bennett Ltd. were desirous of effecting an amalgamation and in furtherance thereof had agreed to secure the incorporation of the appellant having for its object amongst other things the acquisition, by purchase, exchange or otherwise of the shares in Sun Newspapers Ltd. and S. Bennett Ltd. respectively, provided that the appellant company, therein called the holding company, should be formed with a nominal capital of £5,000,000 divided into 5,000,000 shares of £1 each and that each shareholder in the " Sun," not being an employee shareholder, should be entitled to exchange the shares held by him in the " Sun " for shares in the holding company in the ratio of fifty-one shares in the holding company for every twenty shares held by him in the " Sun," and that each shareholder in the " News " should be entitled to exchange the shares held by him in the " News " for shares in the holding company in the ratio of three shares in the holding company for every two shares held by him in the " News." The agreement also provided that it was conditional upon the transfer to the holding company within three months after its incorporation of not less than three-fourths of the existing shares in the " Sun " and " News " respectively.

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Pursuant to this agreement, which was duly adopted by the appellant company, and certain other agreements entered into between the appellant company and the other two companies and certain other parties, the appellant company, before the close of its financial year ended on 28th September 1930, had acquired all the issued shares in the capital of Sun Newspapers Ltd. with the exception of 908 ordinary shares and 35,000 employees shares and in respect of the acquisition of these shares had issued to the vendors thereof 2,499,488 fully paid-up shares in its own capital and had also acquired all the shares in the capital of S. Bennett Ltd. with the exception of 705 shares and in respect of this acquisition had issued to the vendors thereof 636,422 fully paid-up shares in its own capital. Subsequently the 908 ordinary shares and 35,000 employees shares in Sun Newspapers Ltd. were also acquired by the appellant company and no further shares were issued by Sun Newspapers Ltd. before the date of its liquidation ; and 700 of the 705 shares in S. Bennett Ltd. were also acquired by the appellant company and no further shares were issued by S. Bennett Ltd. before the date of its liquidation. The total number of shares acquired by the appellant company in Sun Newspapers Ltd. in exchange for 2,541,779 of its own shares was 972,000 of £1 each paid to 18s., and 56,000 employees shares of 10s. each paid to 9s.

On 29th March 1937, Sun Newspapers Ltd. went into voluntary liquidation and on the same day passed the following extraordinary resolution, namely :—" that the liquidators in accordance with the provisions of article 125 of the articles of association of the company, be and they are hereby directed to transfer to Associated Newspapers Ltd. in specie or in kind all the assets of the company after first paying or making due provision for the payment of the debts of the company."

Thereupon the liquidators of Sun Newspapers Ltd., having provided for the payment of the company's liabilities, delivered its movable assets to the appellant company and permitted the appellant company to enter into occupation and possession of its immovable assets and to carry on the business of proprietors, printers and publishers of the newspapers theretofore published by Sun Newspapers Ltd. under the names under which they had theretofore been published. The appellant company has since continued to carry on the business of printing and publishing these papers, and in addition now prints and publishes certain other periodicals.

In the balance-sheet of the appellant company as at 27th September 1936, which it sent to the respondent, its shares in Sun Newspapers Ltd. were shown at £2,520,623 8s. In its balance-sheets

as at 26th September 1937 and 25th September 1938 sent to the respondent these shares were shown at £2,541,779 less partial distribution of assets £162,703 4s. 7d., £2,379,075 15s. 5d. In its balance-sheet as at 24th September 1939 sent to the respondent these shares were shown at £2,541,779, less distribution of assets £837,716 13s. 9d., £1,704,062 6s. 3d. None of these balance-sheets contained any reference to goodwill. The appellant company also sent a balance-sheet to the respondent as at 29th September 1940. In this balance-sheet the item of £1,500,000 on the assets side of the balance-sheet was described as "goodwill." In the audited balance-sheet for that year for its directors and in its published balance-sheet for that year this item was described as "goodwill and establishment", which was as shown in the appellant's books of account. The entries relating to this item are as follows:—On 25th August 1940, the appellant company opened in its books an account styled "goodwill and establishment account" to which it then debited the sum of £1,682,920 14s. 8d. This figure was arrived at by deducting from the paid-up value of the shares in the appellant company exchanged for shares in Sun Newspapers Ltd. which was, as I have said, £2,541,779, the value of the tangible assets received by the appellant company in the liquidation of Sun Newspapers Ltd., namely, £858,858 5s. 4d. On 29th September 1940, the appellant company credited this account with £182,920 14s. 9d. by transferring this amount from its general reserve, leaving the amount to the debit of the account £1,500,000.

The *War-time (Company) Tax Assessment Act* 1940-1941 provides for the payment of tax on the profits of companies which exceed the statutory percentage of five per cent on the capital employed or deemed to be employed during the accounting period (in this case 29th September 1940 to 28th September 1941) (ss. 19 and 20). This Court has already held in *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) that the words "capital employed" refer to commercial capital. Section 24 of the Act provides an artificial criterion by which the amount of commercial capital is to be ascertained in the first instance, but this amount can be increased in accordance with s. 25 in the circumstances therein mentioned. Section 24 (1) provides that the capital employed in any particular period shall, for the purposes of the Act, be ascertained by adding the amounts referred to in pars. (*a*), (*b*), (*c*), (*d*) and (*e*). But, for the purposes of this appeal, pars. (*c*) and (*e*) can be disregarded. From the sum reached by this addition the amounts referred to in s. 24 (1) (i), (ii) and (iii) must be deducted.

(1) (1943) 67 C.L.R. 508.

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For the purposes of this appeal, the most material of these paragraphs is (i).

The section contemplates that the amount of capital employed by a company in its business will include the moneys paid up on its issued shares and accumulated profits and that these moneys will be found invested in the assets which constitute the company's commercial capital. It contains provisions to ensure that the amount of the capital employed will not be inflated by a company writing up its assets. The values attributed to the assets in the books of the company must therefore be examined in order to ascertain whether they comply with the values prescribed by s. 24 (2), and that sub-section must have been intended to prescribe values for all the assets that would appear in the books of a company such as the appellant in each accounting period with the exception of any capital, averaged over the accounting period, the income (if any) from which is not assessable income under the *Income Tax Assessment Act* (s. 24 (1) (ii)), and any capital invested in shareholdings in any other company (s. 24 (1) (iii)). The capital referred to in par. (iii) is omitted because the definition of " taxable profit " in s. 3 (1) provides that taxable profit means the amount remaining after deducting from the taxable income of the accounting period as assessed under the *Income Tax Assessment Act* (*b*) so much of any dividend received by a company in respect of its shareholdings in any other company as is included in the taxable income of the first-mentioned company of the accounting period. Amalgamations and reconstructions of companies could have occurred before the war and during the war. The object of an amalgamation is, either at once or in the future, to vest the assets of the companies which are to be wound up in order to carry out the amalgamation in an existing or new company, the shareholders in the companies which are to be wound up to exchange their shares in those companies for shares in the existing or new company. In the case of a reconstruction, a new company is formed to acquire the assets of an existing company, the shareholders in the latter company being given the right, which is usually exercised, to become shareholders in the former company. If the amalgamation takes the form of a sale of the assets of the existing companies to a new company, their cost to that company in money or money's worth can be readily ascertained for the purposes of s. 24 (*Craddock* v. *Zevo Finance Co. Ltd.* (1)). But an alternative method of amalgamation, achieving the same result and one that is commonly used in business (*Lever Bros. Ltd.* v. *Inland Revenue Commissioners* (2)),

(1) (1944) 1 All E.R. 566.

(2) (1938) 2 K.B. 518, at p. 524.

is, as in the present case, for the new company to acquire all the shares in the existing companies and then to wind them up, the new company, subject to the payment of their debts and the costs, charges and expenses of their winding up, acquiring their assets *in specie* (*In re Walker's Settlement*; *Corporation of the Royal Exchange Assurance* v. *Walker* (1)). It is obviously convenient, therefore, to construe the section if possible so as to make it apply to assets acquired by a new company in the same position as the appellant. With respect to this method the legal position may be shortly stated as follows:—In *Inland Revenue Commissioners* v. *Crossman* (2) Lord *Russell of Killowen* said:—"A share in a limited company is a property the nature of which has been accurately expounded by *Farwell* J. in *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (3). It is the interest of a person in the company, that interest being composed of rights and obligations which are defined by the *Companies Act* and by the memorandum and articles of association of the company." These were the rights which the appellant company acquired in Sun Newspapers Ltd. when it became the beneficial owner of the shares in that company. As such owner it was able at its will to exercise all those rights which the control of at least three-fourths of the voting power of a company confers upon its shareholders. In particular it was entitled either to allow Sun Newspapers Ltd. to continue to carry on business or to cause it to be wound up, and to obtain a transfer of the assets *in specie*. When, therefore, the appellant company purchased the whole of the shares in that company it purchased all the mass of rights incident to their ownership, and when, in the exercise of those rights, it chose to liquidate Sun Newspapers Ltd. and obtain a transfer of the assets, it thereby changed those rights into the ownership of the assets of that company.

The tangible assets which it acquired upon the distribution were of the value of £858,858 5s. 4d. But it is plain that the value of a business of printing and publishing a newspaper is not limited to the value of the tangible assets which are used for the purpose of its production. The purpose is to obtain a circulation which will, by receipts from sales and advertisements, make the publication of the newspaper profitable. Any sum spent on establishing a paper is profitably spent if such a circulation is thereby obtained (*Ammonia Soda Co. Ltd.* v. *Chamberlain* (4)). The fact that in 1929 the shares in Sun Newspapers Ltd. were selling on the market at 55s. shows that the value of the business was then far in excess of its tangible

(1) (1935) 1 Ch. 567, at p. 585.
(2) (1937) A.C. 26, at p. 66.
(3) (1901) 1 Ch. 279.
(4) (1918) 1 Ch. 266, at p. 284.

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assets. When the appellant company accepted a distribution of the assets *in specie* it acquired the whole of this business. The evidence is that the shares which were changed into these assets were then worth 53s. 5d. The appellant company therefore received full value for the shares which it had distributed to the shareholders in Sun Newspapers Ltd. In a practical business sense the cost of the assets which the appellant company eventually received from Sun Newspapers Ltd. was the value of these shares. These assets included the cost of establishing the circulation of the "Sun" and the other papers and periodicals published by Sun Newspapers Ltd., or, in other words, of establishing a goodwill for the business, and, as a matter of commercial accountancy, the cost could only be distributed between the tangible and intangible assets by valuing the tangible assets and attributing the balance of the cost, as was done, to goodwill and establishment. The value of the shares in Sun Newspapers Ltd. showed that the establishment moneys had been well spent and this account should be treated, in my opinion, not as a balancing entry for moneys lost but as a valuable asset and therefore as goodwill. At the date, therefore, that the *War-time (Company) Tax Assessment Act* 1940-1941 came into force the books of the appellant company purported to show the amounts which the acquisition of the assets of Sun Newspapers Ltd. including goodwill had cost the company. In the case of goodwill, which is part of the fixed capital of a company (*Wilmer* v. *McNamara & Co. Ltd.* (1)), the books of the appellant company showed that the goodwill had cost £1,682,920 14s. 8d., but that this amount had been written down below cost by £182,920 14s. 8d. to £1,500,000. Where a company has acquired assets in this manner it is just as relevant to ascertain the cost of acquisition for many purposes of the *Income Tax Assessment Act* and of the *War-time (Company) Tax Assessment Act* as it is where the company has acquired them by purchasing the undertakings of the existing companies. For instance it is necessary to ascertain the cost of acquiring trading stock in order to give effect to s. 31 of the *Income Tax Assessment Act*, and of plant used to produce the assessable income to calculate depreciation under s. 56 (1) (*b*), and for the purposes of s. 24 (2) (*a*) and (*b*) of the *War-time (Company) Tax Assessment Act*. But s. 24 (2) (*d*) and (*e*) are the most important sub-sections on this appeal.

Section 24 (2) (*d*) provides, so far as material, that, where the asset is one in respect of which depreciation is not allowable under the *Income Tax Assessment Act* and which was purchased by the

(1) (1895) 2 Ch. 245, at p. 255.

company the cost of such asset is the prescribed value. Sub-section 2 (*e*) provides, so far as material, that where the asset is (i) goodwill; or (ii) a right in or under any copyright, letters patent, design, trade mark, trade name or secret process which has not been purchased by the company, the prescribed value is nil. The purpose of par. (*e*) would appear to be to prevent a company increasing its capital employed by attributing values to goodwill (and trade marks and trade names which are bound up with it) which it has acquired in the ordinary course of its business without the expenditure of money or money's worth, or to copyrights and letters patent which it has acquired because the author of the work was under a contract of service with the company or the invention was made or the secret process discovered by an employee in the course of his employment under such circumstances that he was a trustee of the invention or secret process for his employer.

Land and goodwill are both assets in respect of which depreciation is not allowable under the *Income Tax Assessment Act* within the meaning of par. (*d*). In the case of land purchased by a company the prescribed value for the purpose of the section is its cost. Unless, therefore, the acquisition of land by a company in a winding up under circumstances similar to those in the present case is a purchase, the Act contains no provision preventing a company writing up the value of such land in its books to any extent it sees fit in order to increase its capital employed, and s. 25 does not contain any means by which the Commissioner can apply to have such capital decreased. The word "purchase" in pars. (*d*) and (*e*) is, in my opinion, used in a commercial and not a technical sense, but in that sense the meaning can be wide enough in a proper context to include that which is acquired by a company for money or money's worth. It has been so construed in another commercial Act, namely the *Bankruptcy Act*, and applied to all cases where there has been a *quid pro quo* (*Hance* v. *Harding* (1); *Re Collins* (2))—Cf. *Inland Revenue Commissioners* v. *Port of London Authority* (3). It is necessary for the effective working of the section to give the word a wide meaning and the meaning must be the same in both paragraphs.

The most usual way for a company to acquire land would no doubt be to purchase it either for money or for money's worth, as for instance where the consideration is the allotment of fully paid shares. But one way of acquiring land would be by foreclosure. Presumably it was intended that the acquisition of land by foreclosure, which

(1) (1888) 20 Q.B.D. 732, at p. 739. (2) (1914) 112 L.T. 87, at p. 88
(3) (1923) A.C. 507.

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is an acquisition for value, should be included in the purchase of land within the meaning of par. (*d*). The section appears to contemplate that a cost can be attributed to every acquisition of assets comprised in the paragraph for value, because it is necessary in every case to ascertain the cost for the purpose of the section. Otherwise the capital employed cannot be ascertained by the machinery of s. 24, and, unless it is first ascertained under that section, it cannot be increased under s. 25. The necessity of approaching the construction of Taxation Acts in a business and not in a technical manner under the somewhat analogous circumstances of a partnership has been recently stressed by the House of Lords in *Income Tax Commissioners for City of London* v. *Gibbs* (1); *Latilla* v. *Inland Revenue Commissioners* (2). The Imperial Parliament has recognized that the acquisition of at least ninety per cent of the shares in the capital of a company is from this point of view the acquisition of the beneficial ownership of its assets: See the Acts referred to in *Lever Bros. Ltd.* v. *Inland Revenue Commissioners* (3) and *Curzon Offices Ltd.* v. *Inland Revenue Commissioners* (4). In the last-mentioned case *Goddard* L.J. said:—"If company A, which owns the whole or practically the whole of the shares in company B, conveys a property in which company A has a beneficial interest to company B, there is no real change in the beneficial interest at all: there is, of course, a change in form and a change in law, but the beneficial interest really remains where it was" (5).

By the *Land Tax Assessment Act* 1910-1940 the Commonwealth Parliament has itself taxed shareholders in companies which own land on the basis that when they purchase shares in such companies they become in substance, like partners, the beneficial owners of the land in proportion to their interests in the paid-up capital of the company (*Morgan* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (6)).

In the present case the appellant company in the first instance acquired shares in Sun Newspapers Ltd. Although it became the holder of all the shares in that company it did not acquire as a shareholder any proprietary interest in the assets of the company which continued to belong to the separate entity, the company (*Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co.* (*Great Britain*) *Ltd.* (7); *Macaura* v. *Northern Assurance Co. Ltd.* (8); *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue* (9)), and the ownership of the assets continued in the company after it went into liquidation (*Inland Revenue Commissioners* v. *Burrell* (10)).

(1) (1942) A.C. 402.
(2) (1943) A.C. 377, at pp. 383, 384.
(3) (1938) 2 K.B. 518.
(4) (1944) 1 All E.R. 606.
(5) (1944) 1 All E.R., at p. 607.
(6) (1912) 15 C.L.R. 661.
(7) (1916) 2 A.C. 307, at p. 338.
(8) (1925) A.C. 619.
(9) (1940) A.C. 127.
(10) (1924) 2 K.B. 52, at p. 67.

Mr. *Weston* urged me to treat the transaction from beginning to end as a purchase of shares and nothing else. But I find it impossible to dispose of the appeal on that basis because, although the transaction commenced in that way, at the date the Act came into force, the appellant company was no longer a shareholder in Sun Newspapers Ltd., but was the owner of the assets it had received in the liquidation. But, for the reasons already given, I am of opinion that it can be regarded as having purchased the goodwill (and the copyrights which are included in the same account) within the meaning of s. 24 (2) (*d*) at the cost of £1,682,920 14s. 8d.

In the assessment the respondent treated the sum of £1,500,000 as a loss upon the realization of shares held by the appellant company in Sun Newspapers Ltd. and set it off against the accumulated profits of the company. As this loss exceeded the value of the accumulated profits the respondent refused to allow the appellant any amount under s. 24 (1) (*b*). In the amended assessment the respondent treated this sum as goodwill which had not been purchased by the appellant company within the meaning of s. 24 (2) (*e*).

For the reasons already given the respondent, to my mind, fell into error, in his treatment of this sum in both the assessment and the amended assessment, and this ground is sufficient to dispose of the appeal, but, as the case may go further, I shall refer briefly to the other main ground urged by Mr. *Weston* which is numbered 6 in the objections to the amended assessment. This objection reads as follows :—

"The company and I made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment of the company and me to the war-time (company) tax for the year ended 28th September 1941, and the Commissioner assessed the company and me to such tax for the said period after such disclosure by assessment No. F 122/9313, notified to the company by notice of assessment dated 22nd May 1942, and the said assessment notified on 25th August 1943 amended the said assessment notified on 22nd May 1942 in manner hereinafter indicated, and if valid the said amendment would increase the liability of the company and me and the said amendment was not made to correct any error in calculation or a mistake of fact and therefore the said amendment is invalid and of no effect.

The particular in which the later assessment amended the earlier assessment was that the earlier assessment treated a certain sum of £1,500,000 as a loss on shares and the said later assessment treated the same sum not as a loss on shares but as expended in acquiring goodwill but not by way of purchase and the Commissioner in the

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said later assessment treated the capital employed in the relevant period as otherwise ascertained as reduced by the said sum of £1,500,000."

In support of this objection Mr. *Weston* relied on s. 170 (3) of the *Income Tax Assessment Act*, which is incorporated in the *War-time (Company) Tax Assessment Act* by s. 34 of that Act. It was in connection with this objection that the oral evidence was tendered on behalf of the appellant and on behalf of the respondent. Mr. *Kitto* objected to this evidence, and it was admitted subject to objection, but I am of opinion that the evidence was admissible. As I said during the argument it is not clear to my mind, in view of the wide powers conferred upon the Court upon an appeal by s. 199 of the *Income Tax Assessment Act*, that the sub-section applies where a taxpayer, instead of accepting the assessment as correct, objects to it and the Commissioner then issues an amended assessment against which there is an appeal to the Court. But, assuming that it does apply in the present case, and accepting, as I do, the evidence tendered on behalf of the appellant of what took place at the interview on 29th May in preference to the evidence tendered on behalf of the respondent, I agree with Mr. *Kitto* that the mistake which the respondent made by his responsible officers in the assessment was one of fact and not of law. The evidence shows that in the Department there were two views with respect to the entry in the appellant's books relating to the £1,500,000. The Department in Sydney considered that it was an entry made to balance a loss on the realization of the shares, while the Department in Canberra considered that it represented an asset in the shape of a valuable goodwill. The difference of opinion whether the entry represented a loss or an asset was to my mind a difference on a pure question of fact. The appellant company objected to the assessment based on the assumption that it was a loss, and the respondent, rightly to my mind, gave effect to that objection. The amended assessment was based on the alternative assumption that the entry represented not a loss but an asset. It was therefore made to correct a mistake of fact and was not avoided by s. 170 (3).

But for the reasons already mentioned I am of opinion that the appeal should succeed and that an order should be made that the assessment and amended assessment be set aside with costs, and that the respondent be at liberty to reassess the appellant company for war-time (company) tax for the year ended 28th September 1941 giving effect to the objections to the assessment which he allowed and treating the sum of £1,682,920 14s. 8d. to the credit of goodwill and establishment in the books of the appellant company

as the prescribed value of an asset purchased by the company within the meaning of s. 24 (2) (*d*) of the *War-time (Company) Tax Assessment Act* 1940-1941.

Appeal allowed with costs. Order that the assessment and amended assessment be set aside, and that the respondent be at liberty to reassess the appellant company for war-time (company) tax for the year ended 28th September 1941, *giving effect to the objections to the assessment which he allowed and treating the sum of* £1,682,920 14*s.* 8*d. to the credit of goodwill and establishment in the books of the appellant company as the prescribed value of an asset purchased by the company within the meaning of s.* 24 (2) (*d*) *of the War-time (Company) Tax Assessment Act* 1940-1941. *Liberty to apply.*

Solicitors for the appellant, *Minter, Simpson & Co.*

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

J. B.