[HIGH COURT OF AUSTRALIA.]

BROKEN HILL THEATRES PROPRIETARY LIMITED . . . . . } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1951-1952.

SYDNEY, 1951, *June* 8; *July* 6.

Williams J.

1952, *April* 4; *June* 2.

Dixon, C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Income Tax (Cth.)—Assessable income—Deduction—Motion picture theatre—Licence—Grant—Successful opposition—Legal expenses—Expenditure for purpose of eliminating competition—Outgoing of capital—Income Tax Assessment Act 1936-1948 (*No.* 27 *of* 1936—*No.* 44 *of* 1948), *s.* 51 (1)—*Theatres and Public Halls Act* 1908-1946 (*N.S.W.*) (*No.* 13 *of* 1908—*No.* 27 *of* 1946), *s.* 13A (1).

The appellant and other proprietors of motion picture theatres operating at Broken Hill successfully opposed an application made under the *Theatres and Public Halls Act* 1908-1946 (N.S.W.) for a licence in respect of other premises in Broken Hill, and thus for a period of twelve months procured immunity from competition. During the ten years ended 30th June 1948 five similar applications were opposed by the appellant, one of which was granted, three refused, and the other not proceeded with.

Held that the legal expenses incurred by the appellant were not recurrent expenditure on account of revenue but were an outgoing of capital within the meaning of s. 51 (1) of the *Income Tax Assessment Act* 1936-1948 and were therefore not deductible from assessable income.

British Insulated and Helsby Cables Ltd. v. Atherton (1926) A.C. 205 and *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (1938) 61 C.L.R. 337, applied.

Decision of *Williams* J. affirmed.

APPEAL from *Williams* J.

An objection was lodged on behalf of Broken Hill Theatres Pty. Ltd. against an assessment based upon income derived by that company during the year ended 30th June 1948, together with a claim that it should be reduced, on the grounds *inter alia* (i) that the commissioner was in error in not allowing legal expenses amounting to £270 12s. 6d. claimed by the company as a deduction from its assessable income of that year; (ii) that an amount of £270 12s. 6d. paid by the company during that year was for legal

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expenses which were necessarily incurred in the carrying on of the company's business for the purpose of producing assessable income; and (iii) that such legal expenses were not expenses of a capital nature.

A statement of the facts received in evidence was substantially as follows:—

1. Broken Hill Theatres Pty. Ltd., the abovenamed appellant (hereinafter called "the taxpayer") is a company duly incorporated on 12th September 1935, under the laws in force in the State of New South Wales and it has at all material times carried on in that State the business of motion picture exhibitors. A true copy of the memorandum and articles of association of the taxpayer was annexed.

2. The taxpayer has since March 1936 operated a motion picture theatre known as Johnson's Theatre, situated at 43 Oxide Street, in the City of Broken Hill, and has since October 1940 operated another motion picture theatre known as the Crystal Theatre, situated at 326 Crystal Street, in that City.

3. Johnson's Theatre was held by the taxpayer until 18th February 1946, under a lease for a term which expired on that date and thereafter as purchaser under an uncompleted contract for sale and that was still the position at 30th June 1948.

4. The Crystal Theatre at 26th May 1946 (the date of the application by Joseph Boulus referred to below) was held for a fixed term which was due to expire on 30th June 1955 and that was still the position at 30th June 1948.

5. At the time of that application there were in the City of Broken Hill, and had been since 1940, five motion picture theatres operating as follows:—(a) Johnson's Theatre showing pictures every night of the week except Sunday and on two or three days each week; (b) The Crystal Theatre showing pictures on Saturday evenings only; (c) The Ozone Theatre with a similar number of performances to those given by Johnson's Theatre; (d) The Metropole Theatre showing pictures on Wednesday and Saturday evenings only; (e) The Hillside Theatre showing pictures on Wednesday and Saturday evenings only.

6. The Broken Hill City Council, being the holder of a licence under the *Theatres and Public Halls Act* 1908-1946 (N.S.W.) which did not bear any indorsement under s. 13A (1) of the Act, transferred the licence to Joseph Boulus and on 13th January 1947 it was noted on the back of the licence that the Minister, in pursuance of s. 13 of the Act, had consented to the transfer and had caused Joseph Boulus to be registered as the holder of the licence.

7. On 26th May 1947 Joseph Boulus applied to the Theatre and Films Commission for an indorsement under s. 13A (1) specially authorizing the exhibition in the Town Hall of cinematograph films.

8. Objections to the granting of this application were lodged by the taxpayer and three other companies. The grounds stated in the taxpayer's objection were those set forth in s. 13D (5) (b) (i)-(v) of the *Theatres and Public Halls Act*, 1908-1946.

9. The said application was refused by the Theatre and Films Commission on 17th October 1947 and on 3rd November 1947 Joseph Boulus appealed to the District Court against that decision.

10. On 19th April 1948, in purported pursuance of the *Theatres and Public Halls Act* 1908-1946, the Colonial Secretary granted to Joseph Boulus a licence for the Town Hall for general entertainment purposes for a period of twelve months from 1st August 1947.

11. On 20th, 21st and 23rd April 1948 the appeal by Joseph Boulus to the District Court was in course of being heard and on the last-mentioned day, by consent of the parties, the hearing was adjourned to Sydney, to a date to be fixed.

12. The hearing of the appeal to the District Court was continued in Sydney on 29th June and concluded on 1st July 1948, the decision being reserved.

13. During the income year ended 30th June 1948 the taxpayer paid in respect of legal costs incurred in contesting in the District Court the application of Joseph Boulus as aforesaid the sum of £270 12s. 6d.

14. In the period from 1st July 1938 to 30th June 1948, besides the said application by Joseph Boulus, there had been five applications to the Theatre and Films Commission for indorsements pursuant to s. 13A (1) in respect of theatres in the City of Broken Hill and in each case there was an appeal to the District Court. Details of such applications were set forth, one application being granted, three applications being refused, and one applicant died before determination by the commissioner.

15. The taxpayer opposed each of such applications and incurred legal costs in connection therewith. Particulars of such legal costs are as follows :—

Income Year Ended	*Amount Paid.*
30th June 1940	£172 1s. 9d.
30th June 1941	£316 12s. 6d.
30th June 1942	£230 0s. 0d.
30th June 1944	£580 11s. 11d.

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16. When it opposed the application by Joseph Boulus the taxpayer reasonably believed there was the possibility that further applications might from time to time be made by the same or another applicant in respect of the same or another hall and that the taxpayer might think it expedient to oppose such applications or some one or more of them.

Further facts appear in the judgments hereunder and also in *Boulus* v. *Broken Hill Theatres Pty. Ltd.* (1).

The appeal was heard before *Williams* J.

N. H. Bowen and *R. Fox*, for the appellant.

W. J. V. Windeyer K.C. and Dr. *F. Louat*, for the respondent.

Cur. adv. vult.

July 6.

WILLIAMS J. delivered the following written judgment:— This is an appeal by Broken Hill Theatres Pty. Ltd. from its assessment for income tax under the provisions of the *Income Tax Assessment Act* 1936-1948 in respect of its income derived during the year ended 30th June 1948. The sole question at issue is whether the appellant is entitled under the provisions of s. 51 (1) of that Act to deduct from its assessable income for that year legal expenses amounting to £270 12s. 9d. In its income tax return the appellant in claiming the deduction stated that the legal expenses were for costs incurred in contesting in the District Court of Broken Hill the application of Mr. J. Boulus for an indorsement of the licence issued under the *Theatres and Public Halls Act* in respect of the Town Hall, Broken Hill, which, if granted, would have established in Broken Hill another motion picture theatre in opposition to the then existing motion picture exhibitors in that city. The appellant stated that the granting of this indorsement would have occasioned considerable loss to the company, both in the way of decreased income and increased expenditure.

The facts with respect to this litigation are set out in the report of the case *Boulus* v. *Broken Hill Theatres Pty. Ltd.* (1). The parties have agreed to treat these facts as part of the evidence on this appeal so that they need not be recapitulated. The legal expenses in dispute were those incurred by the appellant in the litigation up to 30th June 1948. The proceedings in the Supreme

(1) (1949) 78 C.L.R. 177, at pp. 177-181.

Court of New South Wales and in this Court occurred after that date. As appears from these facts objections to the granting of Boulus' application were lodged by the appellant, Ozone Theatres (B.H.) Pty. Ltd., South Broken Hill Music Hall Co. Ltd. and Johnson's Theatres Pty. Ltd. on the grounds mentioned in the report (1). It is not disputed that the sum of £270 12s. 9d. represents the share of the total costs incurred by the objectors up to 30th June 1948 attributable to the appellant.

The appellant operates two motion picture theatres at Broken Hill. It has since March 1936 operated a motion picture theatre known as Johnson's Theatre situated at 43 Oxide Street and has since October 1940 operated another motion picture theatre known as the Crystal Theatre situated at 326 Crystal Street. Johnson's Theatre was held by the appellant until 18th February 1946 under a lease for a term which expired on that date and thereafter as purchaser under an uncompleted contract for sale and this was the position on 30th June 1948. The Crystal Theatre on 26th May 1947, the date of Boulus' application, was leased for a term expiring on 30th June 1955 and this was still the position on 30th June 1948. At the time of the application there were in the city of Broken Hill, and had been since 1940, five motion picture theatres operating as follows:—(a) Johnson's Theatre showing motion pictures every night of the week except Sunday and on two or three days each week; (b) the Crystal Theatre showing motion pictures on Saturday evenings only; (c) the Ozone Theatre with a similar number of performances to those given by Johnson's Theatre; (d) the Metropole showing motion pictures on Wednesday and Saturday evenings only; and (e) the Hillside Theatre showing motion pictures on Wednesday and Saturday evenings only. Boulus' application was an application to the Theatre and Films Commission for an indorsement under s. 13A (1) of the *Theatres and Public Halls Act* 1908-1946 for a licence to authorize the exhibition in the Town Hall of cinematograph films. Since 1939 the appellant has opposed the granting of such a licence for theatres in the city of Broken Hill on five occasions and on each occasion has incurred legal costs in connection therewith. These occasions were an application by Peter Coochiroff and Ernie Johns on 22nd March 1939 for such a licence for the Crystal Theatre, and four applications by Salvatore Guide on 6th June 1939, 13th September 1940, 29th January 1943 and 10th December 1943 for such a licence for the Tivoli Theatre. The application for the Crystal Theatre was granted and this caused the appellant to

(1) (1949) 78 C.L.R., at p. 179.

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enter into the lease of that theatre already mentioned. The first three applications for the Tivoli Theatre were refused and the applicant died in the course of the fourth application. The appellant opposed Boulus' application on the grounds of opposition allowed by the *Theatres and Public Halls Act*, s. 13D (5) (b) (i) to (v), but it informed the respondent that its real objection was that the granting of the application would have adversely affected its business.

The profit and loss account of the appellant for the year ended 30th June 1948 shows that its income of £26,600 was almost completely derived from moneys paid for admission to its theatres and that two heavy items of expenditure were film hire, £4,786, and advertising, £1,633. These items were about its normal expenditure for these purposes. Boulus said in evidence in support of his application that if it was granted he could obtain films for exhibition and that he intended to spend a considerable sum of money on a superior type of chair to that used in the appellant's theatre, on air-conditioning (the appellant's theatres are not air conditioned) and on carpets. The appellant called as a witness its circuit supervisor Mr. Cooper, whose evidence I accept. He said that the seating capacity of Johnson's Theatre was 1,192 persons and of the Crystal Theatre 999 persons. He estimated the seating capacity of the Town Hall at 800 persons. He said that the average attendance at the appellant's theatres was two-thirds of their seating capacity. He also said that the competition of a new exhibitor of motion pictures would increase the amounts the appellant would have to pay for film hire and advertising. Its revenue was therefore threatened by a diminution in income due to loss of patronage and by this increased expenditure. Accordingly, as Mr. Cooper very fairly admitted to Mr. *Windeyer*, the appellant had for some time regarded the prevention of other motion picture theatres in the neighbourhood of its theatres as essential to the maintenance of its business.

Section 51 (1) of the *Income Tax Assessment Act* provides that all losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income. The meaning of this sub-section has been considered by this Court in two recent

cases, *Ronpibon Tin (N.L.)* v. *Federal Commissioner of Taxation* (1) and *Federal Commissioner of Taxation* v. *Green* (2). An outgoing is an outgoing within the meaning of the first limb of the subsection if it is incurred in the course of gaining or producing the assessable income in the sense that the occasion of the outgoing is to be found in what is productive of the assessable income or, if no assessable income is produced, would be expected to produce assessable income. It is an outgoing within the meaning of the second limb if the expenditure is necessarily incurred in the sense that it is clearly appropriate or adapted for producing assessable income. The sum of £270 12s. 9d. was, in my opinion, expended in the course of gaining or producing the assessable income of the appellant and the expenditure was appropriate or adapted for that purpose as it was expended to prevent a loss of patronage in its theatres and a consequential diminution in its revenue by the competition of a new and more comfortable motion picture theatre and it was expended to prevent the necessity of increased expenditure on film hire and advertising due to this competition. But outgoings only qualify as deductions to the extent to which they are not, *inter alia*, of a capital nature and the respondent contends that the expenditure in dispute was an outgoing of capital.

The question whether an outgoing is an outgoing of income or capital has arisen for decision in many cases and the problem has been found difficult of solution. Many tests have been propounded, the most favoured being that propounded by Viscount *Cave* L.C. in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (3): "when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital". That test has been used and discussed in many cases, including three cases which closely resemble the present case in that the essential purpose of the expenditure was to prevent the competition of another business with that of the taxpayer. These cases are *Collins* v. *Joseph Adamson & Co.* (4); *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners* (5); and *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (6). In all these cases the expenditure was held to be of a capital nature. In *Adamson's Case* and the *Sun*

(1) (1949) 78 C.L.R. 47, at pp. 55-57.
(2) (1950) 81 C.L.R. 313.
(3) (1926) A.C. 205, at pp. 213, 214.
(4) (1938) 1 K.B. 477.
(5) (1946) 1 All E.R., 68.
(6) (1938) 61 C.L.R. 337.

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Newspapers' Case the expenditure was partly incurred to acquire tangible capital assets. But the essential purpose of the expenditure was as I have stated. In the *Associated Portland Cement Manufacturers' Case* (1) no capital assets were acquired. Payments were made to retiring directors simply as consideration for covenants on their part not to engage in activities in competition with the taxpayer. Lord *Greene* M.R., referring to the test propounded by Viscount *Cave*, said (2) that the test, though not by any means exhaustive, was an extremely useful test and in many cases would give the clue to the right answer. The test was discussed by this Court in the *Sun Newspapers' Case*. *Latham* C.J. said :—" It is true that the payments did not result in obtaining a new capital asset of a material nature, but they did obtain a very real benefit or advantage for the companies, namely, the exclusion of what might have been serious competition. When the words ' permanent ' or ' enduring ' are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole " (3). *Dixon* J. said :—" The distinction between expenditure and outgoings on revenue account and on capital account corresponds with the distinction between the business entity, structure, or organization set up or established for the earning of profit and the process by which such an organization operates to obtain regular returns by means of regular outlay, the difference between the outlay and returns representing profit or loss " (4). His Honour pointed out that " Recurrence is not a test, it is no more than a consideration the weight of which depends upon the nature of the expenditure. Again, the lasting character of the advantage is not necessarily a determining factor " (5).

The expenditure now in dispute was, I think, an expenditure made once and for all and with a view to bringing into existence an advantage for the lasting benefit of the appellant's motion picture business. This business is of a kind which can only be carried on by persons who are licensed to exhibit motion pictures in particular theatres or halls. The less the number of licences the less the competition, and the better the opportunity for those privileged to possess licenses to carry on a profitable business. The defeat of any particular application for a new licence frees the existing exhibitors forever from the threat of new competition resulting from the success of that particular application. The application

(1) (1946) 1 All E.R. 68.
(2) (1946) 1 All E.R., at p. 72.
(3) (1938) 61 C.L.R., at p. 355.
(4) (1938) 61 C.L.R., at p. 359.
(5) (1938) 61 C.L.R., at p. 362.

might be granted or it might be refused. Expenditure in opposing the application would be of the same nature whether the opposition succeeded or failed (*Southwell* v. *Savill Bros. Ltd.* (1)). The essential purpose of the opposition is to restrict the number of persons licensed to carry on the business to a minimum. The success of the opposition to the grant of a new licence would benefit what *Dixon* J. described in the passage cited (2) as "the business entity, structure, or organization set up or established for the earning of profit" or what Lord *Greene* in the *Associated Portland Cement Manufacturers' Case* (3) described as the goodwill of the business. Experience has shown that applications for further licences to exhibit motion pictures at Broken Hill are made from time to time and it is, no doubt, in the business interests of the appellant to make a practice of opposing them. But this does not make the costs of doing so in any true sense a recurring expenditure of the business. Such expenditure is the regular outlay required to gain or produce the assessable income such as film hire, advertising, rent, salaries and wages and such like. Adapting what *Rich* J. said in the *Sun Newspapers Case* (4), the expenditure "is not an incident, whether normal or unusual, of the regular conduct of the organization for earning profits. The purpose was to buy out opposition and secure so far as possible a monopoly. The fact that the benefit was not perpetual does not deprive it of its capital attributes". Expenditure of this nature is in each case made once and for all to remove a particular threat to the prosperity of the business structure as a whole. The fact that further applications may be made in the future for new licences does not destroy the nature of the advantage to be derived from the defeat of any particular application. *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation* (5) was also cited, but to my mind there is the same distinction between that case and the present case as it seemed to me (6) existed between that case and *Collins' Case* (7), the *Associated Portland Cement Manufacturers' Case* (8) and *Sun Newspapers Case* (9).

For these reasons I am of opinion that the expenditure in dispute is an outgoing of capital and the order I make is that the appeal be dismissed with costs.

From that decision the appellant appealed to the Full Court of the High Court.

(1) (1901) 2 K.B. 349.
(2) (1938) 61 C.L.R., at p. 362.
(3) (1946) 1 All E.R., at p. 71.
(4) (1938) 61 C.L.R., at p. 347.
(5) (1946) 72 C.L.R. 634.
(6) (1946) 72 C.L.R., at p. 655.
(7) (1938) 1 K.B. 477.
(8) (1946) 1 All E.R. 68.
(9) (1938) 61 C.L.R. 337.

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G. E. Barwick Q.C. (with him *N. H. Bowen*), for the appellant. The legal costs incurred by the company in opposing Boulus' application for a licence were a loss or outgoing incurred in the gaining or producing of assessable income; they were not expenditure of a capital nature. Expenditure of this kind is an incident of this type of business. It does not relate to the profit-yielding subject matter but to the process of earning. The company's profit-earning organization was the same after the opposition as before: see *Theatres and Public Halls Act* 1908-1946, ss. 13A, 13B, 13D. The company has an annual licence for each of its theatres with an indorsement permitting it to exhibit motion pictures. The indorsement will be renewed if the licence is renewed, but there is not any right to renewal of the licence. The expenditure in question is recurrent in type and small in amount. After it was made there was nothing acquired and nothing added to what the company already had. It related directly to turnover and to cost of turnover. In *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) the taxpayer's capital organization was in jeopardy; in this case the taxpayer's capital organization was not in jeopardy; only its turnover was in jeopardy. The deduction is liable in accordance with the principle applied in *Hallstrom's Case* and, indeed, its licence would not be inconsistent with the reasoning in the dissenting judgment of *Dixon* J. (as he then was) in that case. The decision in *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (2) has no application to the facts of the present case. The important features which were present in the *Sun Newspapers' Case* are listed by *Dixon* J. in his judgment in that case and a number of the important features so listed are absent from this case.

W. J. V. Windeyer Q.C. (with him Dr. *F. Louat*), for the respondent. The decision of *Williams* J. was correct. None of the so-called "tests" of whether an outgoing is of an income or a capital character is really a decisive test. They are indicia rather than criteria. The weight to be given to any one must depend upon all the circumstances of the particular case: see per *Dixon* J. in *Sun Newspapers' Case* (3). In fact the expenditure in this case was not of a recurring character. Moneys had been paid on other occasions to prevent competition by the opening of other theatres. The application in respect of the Town Hall was, however, made once only. Expenditure to buy out a competitor has been held

(1) (1946) 72 C.L.R. 634.
(2) (1938) 61 C.L.R. 337.
(3) (1938) 61 C.L.R., at p. 362.

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to be of a capital character. It is immaterial whether the money be paid to buy out or, by legal proceedings, to knockout threatened competition. *Hallstroms' Case* is distinguishable.

G. E. Barwick Q.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, FULLAGAR AND KITTO JJ. In our opinion the decision of *Williams* J. in this case was right. We do not see how his Honour could have reached any other conclusion consistently with the principles laid down in the cases and particularly in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (1) and *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (2) : see especially the judgment of *Dixon* J. in the latter case.

In the present case, by reason of the provisions of the *Theatres and Public Halls Act* 1908-1946 (N.S.W.), the successful opposition to Boulus's application procured an immunity from competition for no more than twelve months. And the statement of agreed facts shows that, in the period from 1st July 1938 to 30th June 1948, no less than five other similar applications were made, each being opposed by the taxpayer company. In one case the application was granted, in three cases it was refused, and in the fifth the applicant died before his application was dealt with. On the strength of these facts it was argued that the business of the taxpayer company at Broken Hill was of a special character and that the opposing of such applications ought to be regarded as an ordinary incident of the carrying on of such a business from year to year. The recurrent character of expenditure has been said more than once to be an element which may throw light on the question whether that expenditure is or is not an outgoing of a capital nature. But, in our opinion, the expenditure in the present case cannot be regarded as " recurrent " in the relevant sense. At the time when it was made, nobody could say whether Boulus or anybody else would or would not make another application in two or five or ten years' time. The expenditure in connection with each application between 1938 and 1948 was made on a particular and isolated occasion. Similar occasions might or might not arise in the future. Experience might suggest a probability that similar occasions would arise, but no such consideration could affect the essential nature of the expenditure, which was incurred in each case for the purpose of preserving and protecting the company's

(1) (1926) A.C. 205. (2) (1938) 61 C.L.R. 337.

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business. In the *Sun Newspapers' Case* (1) *Dixon* J. said:— "Recurrence is not a test, it is no more than a consideration the weight of which depends on the nature of the expenditure". His Honour proceeded: "Again, the lasting character of the advantage is not necessarily a determining factor." The recurrence of a threat of competition was less likely in the *Sun Newspapers' Case* than in this case, but it was none the less a present possibility.

It was much emphasized in argument that no new asset was brought into existence by the company's expenditure, that "the defeat of the application did not clothe the appellant with any fresh right" (per *Williams* J. in *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation* (2)). But this was true in what is regarded as the leading case on the subject, the *British Insulated Cables Case* (3). And *Dixon* J. in *Hallstroms' Case* (4) gives several other instances in which the expenditure brought no tangible asset into existence and gave the taxpayer no new right, and yet was held to be an outgoing of a capital nature. The advantage of being free from Boulus's competition and of all other competition for twelve months is just the very kind of thing which has been held in many cases to give to moneys expended in obtaining it the character of capital outlay. The taxpayer may indeed, and did before *Williams* J., strongly rely on the decision of the majority in *Hallstroms' Case* as supporting its appeal, but *Williams* J., who was a party to that decision, did not regard it as an obstacle to his conclusion in the present case. If the decision were to be regarded as governing such a case as the present it would be difficult to reconcile it with the *British Insulated Cables Case* and a number of other generally accepted decisions. We would add that we all think as *Dixon* J. thought in *Hallstroms' Case* (4) that, on the facts as stated, the decision of *Lawrence* J. in *Southern* v. *Borax Consolidated Ltd.* (5) cannot be supported.

It was said that, if Boulus's application had succeeded, the taxpayer company would have been faced with increased expenditure in the matter of hire of films and in the matter of advertising. Such matters, however, appear to be mere incidents of that competition which it was the object of the opposition to Boulus's application to exclude, and to have no real bearing on the nature of the expenditure incurred in the course of that opposition.

The way in which the company actually dealt in its accounts with the expenditure in question does not appear from the state-

(1) (1938) 61 C.L.R., at p. 362.
(2) (1946) 72 C.L.R. 634, at p. 655.
(3) (1926) A.C. 205.
(4) (1946) 72 C.L.R., at p. 650.
(5) (1941) 1 K.B. 111.

ment of agreed facts or from the evidence. And we do not think that anything could turn on it. We have to interpret a particular section (s. 51) of the *Income Tax Assessment Act* 1936-1948, and it would be nothing to the point to say that the company could properly, or did in fact, debit the expenditure in question to its profit and loss account for the income year in question. It has been said that the deductibility of such expenditure cannot depend on whether it succeeded in attaining its object or failed of its object: see *Southwell* v. *Savill Bros. Ltd.* (1). From an accounting point of view, however, it would seem that much would depend on whether the expenditure were successful or unsuccessful in the attainment of its object. If it were unsuccessful, the only proper course, one supposes, would be to debit it to profit and loss for the year in which it was incurred. If it were successful, one would suppose that either of two courses could be quite properly adopted. It could be debited to profit and loss for the year in which it was incurred—a course which would probably be preferred by a prosperous and prudently managed company. Or it could appear in the balance sheet as an asset—an asset of the same kind as "Preliminary Expenses", which often appears on the assets side of the first and many subsequent balance sheets of a company. If the latter course were adopted, the "asset" could be written off out of profits over a period which would vary according to circumstances. The present case is a case of successful expenditure, and the amount of the expenditure could, one supposes, quite properly appear on the assets side of the company's balance sheet for the year in which it was incurred. In a future case of unsuccessful expenditure it may be worth while to bear in mind what was said by the late Dr. *Hannan* in his work *Principles of Income Taxation*, at p. 333. The learned author wrote:—"The fact that a particular outgoing could not properly appear in anything but a Profit and Loss Account may help to decide that it should be allowed as a deduction from the incomings of a trade".

The appeal should be dismissed.

WEBB J. I would dismiss this appeal.

I am unable to see why heavy legal expenses incurred in resisting the licensing of a new theatre which, if it came into existence, would impair or destroy the business of an existing theatre, should be capital expenditure in one town and revenue expenditure in another. I think that the propensity of persons in a town to seek such licences cannot turn what would otherwise be a capital

(1) (1901) 2 K.B. 349.

H. C. OF A. 1951-1952.

BROKEN HILL THEATRES PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Webb J.

outlay into revenue expenditure in that town, and that evidence of such propensity is inadmissible for that purpose. But if it is admissible then it reveals in this case that applications for new licences repeatedly failed. That is not surprising, as the refusal of a licence not only gives immunity for a year certain, but is likely to ensure immunity for a longer period, though not permanently. It is true that, say, the cost of painting business premises is usually a revenue expenditure, although such cost may be heavy and painting is required only every four or five years. Still it is so required as a matter of course. But ordinarily that is not the case with legal expenses incurred in resisting new licences. It cannot at any time be predicted with certainty that applications for new licences will be made in the near future, and that legal expenses will be incurred in resisting them, simply because there is nothing in law to prevent such applications. The provision for annual applications for licences, if desired, imposes a limit on such applications: it does not render them more likely to succeed than if they could be made at any time.

Hallstroms Pty. Ltd. v. *Federal Commissioner of Taxation* (1) is, I think, distinguishable, as *Williams* J. held. The extension of the patent in that case would have been for a fixed period of years. The life of the patent, like that of a coat of paint, would be of definite duration and known in advance. But forecasts as to the probable fate of applications for theatre licences would be in the region of speculation and beyond the scope of evidence. Expenditure in preventing the extension of a patent in so far as it would tend to protect for a definite period of years the income of the business making the article formerly patented would be regarded as revenue expenditure. But expenditure in preventing a new licence for an indefinite period might properly be claimed to be for the protection of the business as a whole, and so be treated as capital expenditure.

Appeal dismissed with costs.

Solicitors for the appellant, *Kevin Ellis & Co.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1946) 72 C.L.R. 634.