

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION      APPELLANT ;  
  
AND  
  
CONNOLLY      RESPONDENT.

*Income Tax (Cth.)—Assessable income—Premium on lease—Consideration “for or in connexion with any goodwill attached to, or connected with land”—Sale of business—Goodwill—Assignment of lease—Restrictive personal covenant—Onus of proof—Income Tax Assessment Act 1936-1947 (No. 27 of 1936—No. 63 of 1947), ss. 83 (1), 84 (1), 190 (b).*

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Section 83 (1) of the *Income Tax Assessment Act 1936-1947* provides that premium means, *inter alia*, “any consideration . . . for or in connexion with any goodwill . . . attached to or connected with land a lease of which is granted assigned or surrendered”. Section 84 (1) provides, *inter alia*, that : “The assessable income of a taxpayer shall include, in addition to rent, any premium received by him in the year of income”.

C. agreed to sell his retail business of a storekeeper and newsagent carried on in premises of which he was the lessee. The lease contained an option of renewal. The purchase price paid to C. included the sum of £500 for a restrictive personal covenant by C. that for a period of ten years he would not carry on a similar business within a radius of one mile of that sold. No express reference to goodwill was made in the agreement for sale. The lease and option of renewal were assigned by C. to the purchaser. No consideration was expressed for the assignment. The commissioner included the sum of £500 paid for the restrictive covenant in C.’s assessable income. The Board of Review allowed an appeal from the assessment.

*Held*, (1) that the sum of £500 paid to C. for the restrictive covenant was consideration paid in connection with the goodwill of the business ; (2) that C. carried the onus of proving that the goodwill of the business was not attached to or connected with the land and the Board of Review erred in allowing C.’s appeal, he having failed to produce any evidence to discharge the onus.

*Box v. Federal Commissioner of Taxation* (1952) 86 C.L.R. 387 distinguished.



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APPEAL under the *Income Tax Assessment Act* 1936-1947.

Thomas Hugh Connolly sold his retail business at Coolangatta, Queensland, for £2,500. The business was that of a storekeeper and newsagent conducted on land leased to Connolly, the lease containing an option of renewal. The purchase price of £2,500 included an amount of £500 paid to him by the purchaser for a personal restrictive covenant, that he would not without the consent of the purchaser for a period of ten years carry on or be directly or indirectly concerned, interested or employed in a similar business within a radius of one mile from the business the subject of the sale.

The Commissioner of Taxation included in Connolly's assessable income the sum of £500 as consideration paid for or in connection with goodwill attached to or connected with land. The taxpayer objected to the assessment and, upon the commissioner disallowing his objection, the matter was referred at the taxpayer's request to the Board of Review, which upheld the taxpayer's objection.

Against this decision the commissioner appealed to the High Court.

The facts are sufficiently set out in the judgment.

*G. A. G. Lucas*, for the appellant.

*A. R. J. Gilmour*, for the respondent.

*Cur. adv. vult.*

Sept. 4.

WEBB J. delivered the following written judgment:—

This is an appeal by the Commissioner of Taxation against a decision of the Board of Review allowing an objection by the respondent taxpayer to the inclusion in his assessable income of the sum of £500, being the consideration paid to the taxpayer for a restrictive covenant entered into by him on the sale of his retail business at Coolangatta in Queensland. The business was that of a storekeeper and newsagent. The shop in which the business was conducted was on land leased to the taxpayer, who also had the option of a renewal of the lease. The agreement for sale was entered into in January 1948 and was for a consideration of £2,500 made up as follows:—(1) £300 for the newsagency business, that is to say for a franchise to sell newspapers and periodicals in a defined area; (2) £625 for plant, fittings, fixtures, motor vehicles, chattels and effects; (3) £500 for a restrictive covenant by the taxpayer; and (4) £1,075 for stock on hand. There was no express reference to goodwill in the agreement for sale. The lease and the option of renewal of the lease were assigned by the taxpayer to the purchaser



of the business. No consideration was expressed for the assignment. The existing lease was for ten years from January 1942 and the option of renewal for a further ten years.

The restrictive covenant provided that in consideration of the sum of £500 paid by the purchaser to the taxpayer as a consideration for the covenant in restraint of trade the taxpayer covenanted with the purchaser that he would not without the consent of the purchaser for ten years either alone or as manager or assistant for any person or company carry on or conduct or be directly or indirectly concerned interested or employed in any capacity in the business of storekeeper or newsagent or permit his name to be used or employed in carrying on or in connection with any such business within a radius of one mile from the particular shop premises. A similar covenant was entered into by the son of the taxpayer for £1, but this has no bearing on the questions that arise here.

Mr. *Lucas* of counsel for the appellant commissioner submits that the £500 was consideration paid in connection with goodwill attached to or connected with the land within the meaning of s. 83 (1) of the *Income Tax Assessment Act* 1936-1947 and so was assessable income under s. 84.

Section 83 (1) provides that:—“ ‘premium’ means any consideration in the nature of a premium fine or foregift payable to any person for or in connexion with the grant or assignment by him of a lease, or any consideration for or in connexion with the surrender of a lease, or for or in connexion with any goodwill or licence attached to or connected with land a lease of which is granted, assigned or surrendered”. Section 84 provides that the assessable income of a taxpayer shall include, in addition to rent, any premium received by him in the year of income.

Mr. *Gilmour* of counsel for the respondent taxpayer submits that there is no appeal to this Court as only a question of fact is involved, that is, whether the £500 was paid for goodwill attached to or connected with the land; but that if a question of law is involved then s. 83 (1) does not extend to the sum of £500 as it was for personal goodwill only.

Much attention was paid in argument to the decision of this Court in *Box v. Federal Commissioner of Taxation* (1). In that case the evidence showed that there was in fact no goodwill attached to the land. The business was a bakery which included a shop; but so few sales of bread took place in the shop or elsewhere on the premises that it could not be found that there was any goodwill attached to or connected with the land. In that case £1,250 was paid for

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fixtures; but it was agreed that for this £1,250 the purchaser should also be entitled to the goodwill of the business, among other things. There was in addition a restrictive covenant for which the consideration was expressed to be £1,750. Box covenanted not to carry on a bakery business within five miles of the Launceston Post Office during the period of the lease or any extension of it, or during the period of ten years following the exercise of an option to purchase. Although the £1,250 was expressly stated to be consideration for the goodwill, among other things, still *Dixon C.J.* and *Williams, Fullagar and Kitto JJ.* held that the £1,750 paid for the restrictive covenant was paid in connection with goodwill, and that the critical question then was whether the goodwill attached to the land. But that question could be answered only in the negative, because of the evidence that there were very few sales on the premises. *Taylor J.* said that as it was not suggested that the written agreement did not represent the real agreement between the parties or that the consideration for the covenant against competition was not bona fide attributable to the giving of the covenant he wished to reserve his views on the point that the sum in question was not consideration payable "in connection with" the goodwill of the business nor in connection with *any goodwill* attached to or connected with the land. His Honour based his judgment solely on the absence of goodwill attached to the land.

In coming to the conclusion that the £1,750 paid for the restrictive covenant was paid in connection with goodwill their Honours said: "The £1,750 was paid as consideration for the vendor entering into the restrictive covenant. It was not paid directly for the purchase of the goodwill. But such covenant enhances the value of the goodwill because without it a vendor is not precluded from commencing a new business although he must not hold himself out as carrying on the old business or solicit its customers" (1). Their Honours added: "The £1,750 was consideration paid in connection with the purchase of the goodwill of the business, so that the crucial question is whether this goodwill was attached to or connected with 86 Elphin Road" (where the bakery was situated (2)). Later their Honours said, referring to the £1,750: "It was paid to protect and enhance the value of that business so that the purchaser would be able to carry it on in the future in the same profitable manner as the vendor had previously carried it on without the risk of the vendor commencing or becoming engaged in a competing business. Goodwill includes whatever

(1) (1952) 86 C.L.R., at p. 394.

(2) (1952) 86 C.L.R., at p. 395.



adds value to a business, and different businesses derive their value from different considerations. The goodwill of some businesses is derived almost entirely from the place where they are carried on, some goodwills are purely personal, and some goodwills derive their value partly from the locality where the business is carried on and partly from the reputation built up around the name of the individual or firm or company under which it has previously been carried on . . . The Act does not provide for any apportionment of any sum paid for the goodwill of a business where the value of the goodwill may depend partly upon the business being carried on upon particular premises and partly upon other considerations. It would seem, therefore, that the whole of the consideration must form part of the assessable income if the situation of the premises of which the lease is granted or assigned is in any real sense an element in the value of the goodwill. Some premises have a site goodwill because the site has some particular advantage for carrying on a business as where premises adapted for a shop are situated in a position specially favourable for the business in a busy shopping area . . . Other premises may have acquired a site goodwill, as in the case of a retail store, because a profitable business has been carried on there for a number of years and people have become accustomed to resort to that site to do their business . . . Clearly this is a common case where the goods are sold and delivered only over the counter, and it might often be so where the goods can also be ordered by telephone or mail and the store delivers the goods to the purchaser" (1). Applying the reasoning in *Box's Case* (2), the £500 paid to the respondent taxpayer for the restrictive covenant must, I think, be regarded as consideration paid *in connection with goodwill*; and the critical question is whether there was goodwill attached to or connected with the land in this case. Now, on this question there was no evidence one way or the other, either before the Board of Review or before me. For this reason the taxpayer's position here is very different from that of the taxpayer in *Box's Case* (2) who proved by evidence that there was no goodwill attached to the land. Then what should the Board of Review have decided in the absence of evidence one way or the other? I think the answer is found in s. 190 (b) of the Act which provides that on a reference to a Board of Review or on an appeal to this Court or the Supreme Court the burden of proving that the assessment is excessive shall lie upon the taxpayer. To discharge the onus that rested on the respondent

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(1) (1952) 86 C.L.R., at pp. 397-398.

(2) (1952) 86 C.L.R. 387.



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taxpayer it was necessary for him to prove that there were no sales, or not enough sales, in the shop to warrant a finding that goodwill was attached to or connected with the land. This, it must be remembered, was a retail business as to which it was said in *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd.* (1): "That in some cases and to some extent goodwill can and must be considered as having a distinct locality is obvious . . . The goodwill of . . . a retail shop is an instance. The goodwill of a business usually adds value to the land . . . in which it is carried on if sold with the business; and so far as the goodwill adds value to the land or buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them" (2). See also *Federal Commissioner of Taxation v. Williamson* (3). I think then that the Board of Review was wrong in law in finding as they did in favour of the taxpayer who had the onus of proof and failed to produce evidence essential for its discharge; that this Court has the necessary jurisdiction to entertain the appeal; and that the appeal should be allowed and the commissioner's assessment affirmed.

The appeal is allowed, the decision of the Board of Review set aside and the assessment restored and affirmed. The respondent taxpayer will pay to the appellant commissioner his costs of this appeal.

*Appeal allowed. Decision of Board of Review set aside and assessment restored and affirmed. Respondent taxpayer to pay to appellant commissioner his costs of this appeal.*

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

Solicitor for the respondent, *W. T. King*.

B. J. J.

(1) (1901) A.C. 217.  
(2) (1901) A.C., at p. 235.

(3) (1943) 67 C.L.R. 561, at pp. 564-565.