[HIGH COURT OF AUSTRALIA.]

BERRY . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1953.

SYDNEY, *Oct.* 21, 28.

KITTO J.

Income Tax—Assessable income—Premium on lease—"Consideration in connection with" goodwill—Personal covenant not to compete in business with lessees—Goodwill not expressly assigned—Income Tax Assessment Act 1936-1946 (*No.* 27 *of* 1936—*No.* 6 *of* 1946), *ss.* 83, 84.

Upon the granting by him of a lease for the term of three years of certain land owned by him, upon which he conducted a motor service station and garage, and adjoining other land owned by him, the taxpayer received from the lessees the sum of £1,500 as consideration for a covenant by the taxpayer with the lessees against him undertaking or carrying on, or being engaged, concerned, or interested alone or in various other ways in the business of an automobile engineer or garage proprietor within the shire within which the land was situate, and against soliciting orders or seeking to obtain business, or permitting his business name or style to be used for such purpose by any party carrying on or about to carry on such business within the same area. There was not any express assignment of the goodwill of the taxpayer's business or of that business itself. Continuity in the conduct of the business on the premises was an important feature of the transaction.

Held that the sum of £1,500 so received by the taxpayer was "consideration in connection with" the goodwill acquired by the lessees and therefore was properly included in the taxpayer's assessable income as a premium received by him within the meaning of s. 84 of the *Income Tax Assessment Act* 1936-1946.

APPEAL.

The Federal Commissioner of Taxation disallowed an objection by the taxpayer against an assessment of the income tax and social services contribution payable by him in respect of income derived by him during the year ended 30th June 1946.

A Board of Review confirmed the commissioner's decision whereupon the taxpayer appealed to the High Court under s. 196 of the *Income Tax Assessment Act* 1936-1946.

H. C. OF A. 1953.

BERRY v. FEDERAL COMMISSIONER OF TAXATION.

Further facts and relevant statutory provisions appear in the judgment hereunder.

M. F. Hardie Q.C. (with him *L. K. Murphy*), for the appellant, referred to *Box* v. *Federal Commissioner of Taxation* (1); *Beak* v. *Robson* (2); *Higgs* v. *Olivier* (3); Case No. 62, *Commonwealth Taxation Board of Review Decisions* (N.S.), vol. 3, 375, at pp. 381, 389-391, 394; Case No. 44, *Commonwealth Taxation Board of Review Decisions* (N.S.), vol. 2, p. 241; *Commissioners of Taxation* v. *Trustees of St. Marks Glebe* (4).

K. W. Asprey Q.C. (with him *M. H. Byers*), for the respondent, referred to: *Box* v. *Federal Commissioner of Taxation* (5); *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Ltd.* (6); *Halsbury's Laws of England*, 2nd ed., vol. 32, p. 450, par. 732; *Federal Commissioner of Taxation* v. *Williamson* (7).

Cur. adv. vult.

Oct. 28.

The following written judgment was delivered by:—

KITTO J. This is an appeal, under s. 196 of the *Income Tax Assessment Act* 1936-1946, against a decision of a Board of Review confirming a decision by the Commissioner of Taxation to disallow an objection by the appellant against an assessment of the income tax and social services contribution payable by him in respect of income derived in the year ended 30th June 1946.

By the assessment in question a sum of £1,500 was included in the appellant's assessable income as being the amount of a premium received by him in the year of income, within the meaning of s. 84 of the Act. The commissioner regarded the sum as being "consideration for or in connection with any goodwill attached to or connected with land a lease of which (had been) granted" by the appellant, and as therefore satisfying the definition of "premium" contained in s. 83. That section defines the word to mean "any consideration in the nature of a premium fine or foregift payable to any person for or in connection with the grant or assignment by him of a lease, or any consideration for or in connection with the surrender of a lease, or for or in connection with any goodwill or licence attached to or connected with land a lease of which is granted, assigned or surrendered". The appellant's objection to

(1) (1952) 86 C.L.R. 387, at pp. 388, 392, 394, 395, 397, 400, 401.
(2) (1943) A.C. 352.
(3) (1952) 1 Ch. 311.
(4) (1902) A.C. 416, at p. 421.
(5) (1952) 86 C.L.R., at pp. 394-398.
(6) (1901) A.C. 217.
(7) (1943) 67 C.L.R. 561, at p. 565.

the assessment was put upon the ground (in effect) that the sum was received by him as consideration for nothing but a personal covenant against competing in business with persons to whom he had leased certain land, and that it was not in connection with any goodwill attached to or connected with the land.

The facts are these. Prior to 18th March 1946 the appellant was carrying on a successful business as the proprietor of a motor service station and garage at Narrabeen. He owned the freehold of the property on which the business was conducted. This property occupied a corner site on the main road leading from Manly to Palm Beach, and on it there was a garage building called the Narrabeen Lakes Garage, with a cottage at the rear. The business included general motor repair work and the selling of petrol and oil, accessories and spare parts as well as selling the gas and charcoal which were in demand while petrol rationing was in force. The customers of the business came from as far as Harbord in the south, Palm Beach in the north and Terrey Hills in the west. The appellant also owned the freehold of the adjoining property, on which there was a block of four shops and four offices, a residential flat, and a three-car garage suitable for use, but not in fact used, as a commercial garage. On 18th March 1946, the appellant and a Mr. and Mrs. Peck entered into a transaction which found expression in three written documents and a parole agreement. The documents included a memorandum of lease under the *Real Property Act* 1900 (N.S.W.) of the land on which stood the Narrabeen Lakes Garage and the cottage, and a hiring agreement by which the appellant hired to the Pecks certain specified articles forming part of the plant used in the garage business. The parole agreement was an agreement for the sale by the appellant to the Pecks of the stock on hand in the business, the plant not covered by the hiring agreement, and eight petrol tanks, for the total price of £2,045 8s. 7d. The remaining document was that under which the £1,500 was received by the appellant as consideration for the covenant on his part contained therein. Upon completion of the transaction, the appellant ceased, and the Pecks commenced, to carry on business in the demised premises. It is necessary now to refer to the contents of the three documents in a little more detail.

The memorandum of lease was for a term of three years from 18th March 1946, subject to an option of renewal, at a yearly rental payable by monthly instalments. It contained a covenant by the lessees that without the consent of the lessor they would not use the premises otherwise than as a motor garage, service station and dwelling, and a further covenant that they would carry

H. C. OF A. 1953.

BERRY v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

on upon the premises the business of a motor garage and service station and would keep open and use the business portion of the premises during the term for that purpose. Provision was made against any breach by the lessee of any statutory requirement whereby the right to continue the business of a motor garage and service station, or any licence or permit relating to the supply of goods to the subject premises reasonably required for the carrying on of such a business, might be rescinded restricted or impaired. There was an elaborate covenant by the lessee in relation to the supply of stock to the business premises. There was also a somewhat peculiar provision, contained in cl. 20 to which I shall refer in a moment.

The hiring agreement was for a term of three years, with a provision that, if the option of renewal in the lease should be exercised, the term of the hiring agreement should be likewise extended to coincide with the period of the extension of the lease or any further extension thereof. The agreement provided that the hirer (that is the Pecks) should be entitled to assign the benefit of the agreement to any assignee of the lease, or to mortgage his interest under the agreement to any mortgage of the leasehold.

The agreement in restraint of trade commenced with some recitals. The facts recited were, (1) that the Pecks had acquired the stock-in-trade and part of the plant of the business at Narrabeen formerly carried on by the appellant; (2) that the Pecks had also acquired a lease of the appellant's premises upon which the business was formerly carried on; (3) that the appellant, in addition to owning those premises, owned land adjoining them; (4) that the appellant was a skilled and experienced automobile engineer and garage proprietor; and (5) that the Pecks were desirous of ensuring their freedom from competition by the appellant in the business of an automobile engineer and garage proprietor. The agreement then set forth a covenant by the appellant with the Pecks, in consideration of £1,500 paid to him by them. The period of the covenant was ten years, subject to a proviso that the Pecks their executors or administrators or assigns should remain tenants of the appellant his executors administrators or assigns of the demised premises; and the benefit of the covenant was made assignable by the Pecks their executors administrators or assigns, but only to any successor of theirs in the tenancy of the premises. The covenant was against undertaking or carrying on, or being engaged concerned or interested alone or in various other ways in, the business of an automobile engineer or garage proprietor within the Shire of Warringah (which is the municipal area in which Narrabeen is situated), and against

soliciting orders, or seeking to obtain business, or permitting his business name or style to be used for such purpose by any party carrying on or about to carry on such business within the same area.

It is clear that the £1,500 was not consideration "for" any goodwill. The assessment can be sustained only if it was consideration "in connection with" some goodwill which was attached to or connected with the leased premises. That there was such a goodwill immediately before the appellant and the Pecks entered into their transaction on 18th March 1946, there is no doubt. The appellant's business was substantial on its repair side, and it was selling an average of about 2,000 gallons of petrol a week. The site, the appellant said in evidence, was a very good one for passing trade, and he agreed that a purchaser by merely going into the business, would get sales of petrol, gas, accessories and parts similar to those which he himself was making. The appellant's counsel rightly conceded that in these circumstances a substantial factor in the goodwill of the business as it stood immediately before the relevant transaction was the situation of the premises.

Now it is true that there is not to be found in any of the three documents or in the parole agreement any express assignment of the goodwill of the appellant's business or of that business itself. But the business did not come to an end when the appellant ceased to carry it on; and the goodwill, so far as it was independent of matters personal to the appellant, did not evaporate. They accrued to the Pecks. There was no interval during which the demised premises stood unused for the purposes of a garage and service station business. Indeed, as the covenants of the lease make clear, it was an important feature of the transaction that there was to be continuity in the conduct of that business on the premises; and the giving of the lease, the assignment of some of the plant together with the stock-in-trade and the oil tanks, and the hire of the rest of the plant, could have had no other result than to place the Pecks substantially in the appellant's shoes so far as the business was concerned. That the transaction was effectual to pass to the Pecks so much of the goodwill of the appellant's business as did not depend upon the appellant's presence in it, seems to me to be clear: cf. *England* v. *Downs* (1); *Commissioners of Inland Revenue* v. *G. Angus & Co.* (2); *Federal Commissioner of Taxation* v. *Williamson* (3).

I do not think that cl. 20 of the memorandum of lease militates against this conclusion. Perhaps it had better be set out in full.

(1) (1842) 6 Beav. 269 [49 E.R. 829].
(2) (1889) 23 Q.B.D. 579, at p. 594.
(3) (1943) 67 C.L.R. 561, at pp. 563-565.

H. C. OF A. 1953.

BERRY v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

" The present goodwill of the subject premises shall be deemed to be the property of the Lessor and the Lessee shall do nothing to impair or injure the same and shall not mortgage or charge the same in any way other than in his right as lessee of the subject premises and in particular shall not do any act or transfer or surrender any right, license or permit which may be issued to him from time to time as lessee of the subject premises and which may give to him any right, permit or license from any competent authority to carry on the business of a motor garage and service station upon the subject premises or to receive supplies of petrol, oil, tyres or other goods required for trading in so far as any such right, license or permit shall be issued to the lessee as occupier of the subject premises. Provided that the lessor hereby covenants that his retaining the present goodwill of the business carried on prior to the date hereof shall in no way restrict the lessee from engaging in a like business whether as principal servant or agent of another at any time and in any place and in so doing to canvass any customer of the said business or of the lessor nor shall there be any restriction on the right of the lessee to continue to enjoy the benefits of any trade agreement entered into by him during the term hereof or of any extension hereof nor to assign the benefit of any such agreement to any other person or to otherwise deal with as he sees fit such goodwill as he the lessee shall acquire by his own efforts whilst conducting the business of a motor garage and service station upon the subject premises ".

The language of this clause is a little puzzling, but the reference to the lessee's mortgaging or charging the goodwill of the premises " in his right as lessee of the subject premises ", the general preoccupation of the clause with the lessee's carrying on of the business of a motor garage and service station, and the terms of the proviso, all combine to suggest, to my mind, that the parties were recognizing that the Pecks would necessarily succeed to the goodwill of the appellant's business so far as it did not depend upon considerations personal to him, and that they were concerned to provide, first, that at the end of the term that goodwill should be recognized as reverting to the appellant as his own property, but, secondly, that the Pecks should be entitled to treat as theirs any goodwill created by themselves which they might find to be severable from the premises. So understood, the clause does not weaken, but tends rather to confirm, the view I have stated.

The question, then, is whether the consideration received by the appellant for his covenant against competition answers the description of " any consideration in connection with " the goodwill

which the Pecks thus acquired. Mr. *Hardie* contended that a consideration could not be said to be " in connection with " a goodwill unless it was received for a part of that goodwill. I am unable to accept that view. The words " for or in connection with " imply that a consideration may satisfy the definition as being " in connection with " one of the subjects mentioned, although not " for " it. Now, while it is true that a payment cannot be described as a consideration " for " anything but that which is given in exchange for it, to speak of a consideration being " in connection with " an item of property parted with is to use language quite appropriate to the case of a payment received as consideration " for " something other than the property in question, so long as the receipt of the payment has a substantial relation, in a practical business sense, to that property. A consideration may be " in connection with " more things than that " for " which it is received.

In the present case, it is undeniable that the £1,500 was consideration in connection with that factor in goodwill which, because it was personal to the appellant, did not enure for the benefit of the Pecks upon their taking over the appellant's business. If that were all that it could properly be described as being " in connection with ", clearly the amount would not be consideration in connection with goodwill attached to or connected with the land. The assumption that that is all that such a payment can be described as being " in connection with " seems to me to be the foundation of a good deal that has been said from time to time concerning the definition. But the purpose of such a payment is to protect, and indeed to provide a valuable addition to, that residue of the goodwill which remains after the outgoing owner has subtracted from it the element which is personal to him. That is to say that the payment, regarded as a consideration for what it procures from the recipient—as a consideration, that is, for the benefit of the recipient's restrictive covenant—is consideration for a benefit accruing to the goodwill of the business in the hands of the payer. In a word, while it is not received for parting with the goodwill, it is consideration for adding to it. A consideration which has this character cannot well be denied the description of " a consideration in connection with " the goodwill.

The consideration in question in this case gained for the business which the Pecks took over an immunity from the personal competition of a potential business rival whose restrictive covenant was specially worth paying for, not only because of his personal characteristics and former association with the business, but also because of his ownership of an adjacent property capable of being

H. C. OF A. 1953.

BERRY v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

used for a competing business. In my opinion no more is needed to make it consideration in connection with the goodwill of that business as it existed when shorn of the personal factor which the appellant had formerly supplied.

It may well be that that remaining goodwill included elements arising from considerations other than the situation of the premises, such as licenses or the benefit of trade agreements. But even so, as I have shown, it depended in no small degree upon the situation of the premises, and it was therefore a goodwill which, considered as an entirety, was attached to or connected with the land. And even if, contrary to my view, that part of it which did not derive from the land should be considered as separated out and ignored for present purposes, that which remains, the local or site goodwill as it may be called, must clearly be a goodwill attached to the land, and I can see no reason to doubt that every pound of the £1,500 was consideration in connection with that goodwill just as surely as it was also consideration in connection with the goodwill not attached to the land. As the Court pointed out in *Box* v. *Commissioner of Taxation* (1) the Act does not provide for any apportionment of a sum paid for or in connection with a goodwill the value of which depends partly on the premises and partly on other considerations.

For these reasons I am of opinion that the commissioner and the Board of Review came to the correct conclusion in this case. I must therefore dismiss the appeal with costs.

Order accordingly.

Solicitor for the appellant, *H. Wilshire Webb.*

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

J. B.

(1) (1952) 86 C.L.R. 387, at p. 398.