[HIGH COURT OF AUSTRALIA.]

WATSON . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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1952.
SYDNEY, *April* 28; *May* 12.

Webb J.

SYDNEY, *Nov.* 17, 18.

1953.
MELBOURNE, *March* 10.

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

Taxation—Income tax—Sale of business—Goodwill—Inclusion in assessable income—Objection by taxpayer—Upheld by Board of Review—Appeal to High Court—Heard by single Justice—Decision—"Final and conclusive"—Appeal to Full Court of High Court—Competency—Income Tax and Social Services Contribution Assessment Act 1936-1952, (*No.* 27 *of* 1936—*No.* 4 *of* 1952), *ss.* 83, 84, 196—*Judiciary Act* 1903-1950, (*No.* 6 *of* 1903—*No.* 80 *of* 1950), *ss.* 18, 20, 34—*High Court Rules, Order LI*A, *r.* 13.

A Board of Review exercising the authority conferred by ss. 192 and 193 of the *Income Tax Assessment Act* 1936-1949 upheld a taxpayer's objection to the inclusion in his assessable income of an amount for goodwill included in the sale price of his business, reversed the decision of the Commissioner of Taxation, and directed that the assessment be amended in accordance with the board's decision. The commissioner appealed to the High Court pursuant to s. 196 (1) on the footing that the board's decision involved a question of law. That appeal was heard by a single Justice of the High Court who set aside the board's decision and restored the assessment. The taxpayer gave notice of appeal from the order of the Justice to the Full Court of the High Court.

Held, that the single Justice was the High Court within the meaning of s. 196 (3) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952, therefore his decision was "final and conclusive" and an appeal therefrom was not competent.

APPEAL from *Webb* J.

An objection was lodged on behalf of Arthur Sydney Watson against an assessment based upon income derived by him during the year ended 30th June 1942, on the grounds: (a) that he was not assessable as to the sum of £280 in respect of the sale of a business; (b) that that sum of £280 (less commission) was an

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accretion of capital and not subject to income tax; (c) that the business was not acquired with a view to re-sale at a profit; and (d) that that sum of £280 was not a premium paid for a lease.

The objection was disallowed whereupon the matter was, at the request of the taxpayer, referred to the Board of Review. The board allowed the taxpayer's claim and gave its reasons as follows:

1. In 1938, the taxpayer purchased (a) the goodwill (including the vendor's interest in newspaper and all other agencies), (b) tenant's fixtures, fittings, plant and chattels, and (c) stock, of a business in a town adjacent to a capital city for (i) £1,004 2s. 0d.; (ii) £809 15s. 3d., and (iii) £626 12s. 5d. respectively, being a total of £2,440 9s. 8d.

2. The newspaper agencies purchased by the taxpayer gave him the exclusive right to purchase wholesale the important daily newspapers and other periodicals published in the capital city, and to sell them retail in a prescribed area, namely, a section of the town, to the exclusion of all other persons, except his sub-agent.

3. Early in 1941 the taxpayer purchased the goodwill only, excluding fittings, stock, premises, lease, or any other assets whatsoever, of another newsagency from a deceased person's estate for £360 9s. 10d., and he then had the exclusive right, together with his right mentioned in par. 2 hereof, to purchase wholesale and to sell such newspapers and periodicals in the whole area of the town to the exclusion of all other persons except his sub-agent.

4. On 16th October 1941, the taxpayer agreed to sell the amalgamated newsagency business, the contract providing that possession should be given to the purchaser on 2nd November, 1941, or such other date as might be fixed by a firm of accountants mentioned in the contract.

5. Clause 2 of the contract provided that the vendor would sell and the purchaser would buy the goodwill of the business (including the vendor's interest in newspaper and all other agencies); such tenant's fixtures, fittings, plant and chattels on the premises as might be included in an inventory to be approved by the accountants mentioned in par. 4 hereof; and the stock on hand on the date of possession.

6. Clause 6 provided that the accountants should report to certain newspaper companies' offices the number of units of circulation which should, in the opinion of the accountants, be taken as the fair average weekly circulation of the business and the price of the goodwill should be the amount of the valuation thereof to be made by the newspaper companies on the basis of such calculation or such other basis as they thought fit.

7. Clause 7 provided that the price for the tenant's fixtures, fittings, plant, chattels and stock should be the valuation determined by the valuer appointed by the parties and approved by the newspaper companies.

8. Clause 10 (a) provided that the vendor should arrange for the purchaser to be accepted by the landlord as the tenant of the premises as from the date of completion, and that the purchaser should pay such reasonable expenses, if any, as might be incurred by the vendor in procuring such acceptance. The lease to be taken over by the purchaser under the contract had approximately five and a half years to run.

9. Clause 21 provided that the contract was subject to the newspaper companies intimating in writing to the accountants, on or before the date of completion, their approval of the purchaser and of the total purchase price to be paid under the contract.

10. The goodwill was valued in pursuance of the contract at £1,644 8s. 11d., the fittings at £1,058 5s. 0d., and the stock at £726 3s. 2d., making the purchase price £3,428 17s. 1d. No moneys other than the above amounts passed from the purchaser to the vendor as consideration under the contract.

11. The goodwill per thousand units of weekly circulation was calculated at £145 for the whole town area as follows:—That relating to the taxpayer's original area, acquired in 1938, had been determined by the newspaper companies at £150 per thousand units and was based on 8,000 units; that relating to the area subsequently acquired in 1941 had been determined by the newspaper companies at £130 per thousand units, and was based on 3,000 units. The average of these was taken for the amalgamated area, namely, 8,000 units at £150 per thousand equals £1,200, plus 3,000 units at £130 per thousand equals £390, total 11,000 units at £1,590, or £145 (in round figures) per 1,000 units (11,000 divided by 1,590) on an average. The accountants certified that the weekly units of circulation were 11,341 at date of sale and this figure multiplied by £145 per 1,000 gives a total of £1,644 8s. 11d. to the nearest penny. Each penny in the retail price of a newspaper was regarded as one unit, that is a threepenny newspaper would be regarded as three units.

12. In a schedule of the same date as the contract of sale, the taxpayer estimated that, of the 11,000 units, 6,000 were sold in the shop, and that his average gross weekly takings were £154, of which £50 was from the sale of papers and periodicals.

13. The taxpayer actually received £279 17s. 1d. more for goodwill than he had paid in the aggregate in 1938 and 1941, under the circumstances mentioned in pars. 1 and 3 hereof.

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14. In his return of income for the twelve months ended 30th June, 1942, the taxpayer included as income the sum of £274 as "profits from sales of land, leases, shares, or other property, purchased for resale" and in a statement attached thereto he indicated that the amount was made up as follows:—

Goodwill at sale, 2/11/1941		£1,644
Goodwill at purchase, 2/1/1938	£1,004	
Goodwill purchased from . . . . agent, 9/3/1941	366	
		1,370
		£274

15. The commissioner increased the profit on the sale of goodwill to £280 and included that amount in the taxpayer's taxable income. The reason for the increase of £6 was because the taxpayer had claimed that he paid £366 for the goodwill from the deceased person's estate in 1941, whereas, in fact, the amount was only £360 (excluding shillings and pence).

16. The taxpayer, through his agents, then objected, *inter alia*, that he was not assessable on the £280 in respect of the sale of the business on the grounds that the £280 (less commission) was an accretion of capital and not subject to income tax; that the business was not acquired for re-sale at a profit; and that the £280 was not a premium paid for a lease.

17. The commissioner disallowed the objection and the taxpayer requested that the decision be referred to a board of review for review.

18. The commissioner's reasons for disallowing the taxpayer's claim (so far as they are relevant to the claim in respect of goodwill) were:—

(a) that the sum of £1,644 was a premium within the meaning of s. 83 (1) and was properly included in the assessable income;

(b) that the sum of £280 referred to by the taxpayer in his objection was part of the premium of £1,644 and was assessable income.

19. At the hearing certain other objections by the taxpayer outside the matter of goodwill were abandoned, and the review was confined solely to the question of whether the £280 was rightly included in the taxpayer's taxable income or not.

20. Section 83 (1) of the *Income Tax Assessment Act* defines "lease" as follows:—"'lease' when used in relation to a premium means the lease granted, assigned or surrendered, or where the premium is for or in connexion with any goodwill or licence means

the lease of the land to which such goodwill or licence is attached or connected ".

21. The same section of the Act defines " premium " as follows :— " ' 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 ; and where any of the foregoing considerations is payable in more than one amount each such amount shall be deemed to be a premium ".

22. The material words in the above definitions are :—

" ' lease ' when used in relation to a premium . . . where the premium is for or in connexion with any goodwill . . . means the lease of the land to which such goodwill . . . is attached ".

" ' premium ' means any consideration in the nature of a premium . . . payable to any person . . . for or in connexion with any goodwill . . . attached to or connected with land a lease of which is granted, assigned or surrendered ".

23. Three conditions must be fulfilled before the £280 can be a premium within the meaning of the above definitions : (1) the consideration in the nature of a premium must have been paid for goodwill ; (2) this goodwill must have been attached to the business premises, and (3) a lease of the land must have been granted, assigned or surrendered : see *Phillips* v. *Federal Commissioner of Taxation* (1).

24. There was no dispute that conditions (1) and (3) had been fulfilled in the present reference, and the evidence confirmed it. The £280 was part of the payment for goodwill, and a lease with approximately five and a half years to run was assigned to the purchaser.

25. With regard to condition (2) the evidence disclosed that the following general procedure was carried out in the reference under review :—

(i) The important daily newspapers have a Transfer Board on which there is a representative of each paper, and the board meets regularly for the purpose of selecting newsagents to take over the various agencies that are for sale.

(ii) An agent who wishes to dispose of a newsagency notifies the newspaper proprietors, on a specific form, and requests them to select a successor. The form contains a clause that the vendor is aware that it is not incumbent on the purchaser to continue to

(1) (1947) 75 C.L.R. 332.

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conduct the agency in his present premises. The taxpayer made such notification on 27th July 1941.

(iii) Persons who desire to purchase agencies sign a form addressed to the newspaper proprietors, containing conditions (*inter alia*) that the price must not exceed a price fixed by accountants selected by the newspaper proprietors; that no other consideration will pass directly or indirectly in connection with the acquisition of the agency; that the newspaper proprietors shall have the right to select a successor on re-sale, and that it is not incumbent on the successor to take over any lease of the agency premises. The purchaser from the taxpayer made such an application on 16th October, 1941.

(iv) When the Transfer Board approves of a prospective purchaser of an agency that is listed for sale it selects a firm of accountants, at whose offices the vendor and prospective purchaser attend and sign a contract in terms described in pars. 5 to 9 hereof. The contract so made between the taxpayer and the purchaser was dated 16th October 1941, the Transfer Board having approved of the purchaser.

Under the requirements of such a contract, the accountants then proceed to determine the number of units of circulation of the agency inside the blocked or prescribed area within which the agent has the exclusive right to sell the newspaper companies' publications, and outside of which he is restrained from selling such publications.

(v) The accountants check with the newspaper offices, usually for the period of the preceding six months, reduce the sales to penny units, and determine the average publications sold per week reduced to pennies. In the instant case, the weekly average for the twenty-six weeks from April to September, 1941, was 11,341.

(vi) The accountants also have the stock and the fittings valued separately, as is required under the agreement previously signed by the vendor and purchaser in their office. Stock and fittings in the present case were valued at the figures given in par. 10 hereof.

(vii) The newspaper companies inform the accountants of the value of goodwill with respect to the newsagency at a certain figure per 1,000 penny units of circulation. In this case it was £145.

(viii) The total consideration payable under the contract then comprises the determined value of stock and fittings plus the calculated value of goodwill, being the average number of weekly unit sales multiplied by the fixed value per thousand units as supplied by the newspaper companies.

(ix) The goodwill value per thousand units varies in different prescribed areas, but, once fixed for an area, it remains the same amount unless two areas are amalgamated, when a straight mathematical averaging formula is used, as indicated in par. 11 hereof.

(x) The basis of valuation was fixed many years ago for various agents and territories and varies between £80 and £150 per thousand units. The lower valuation is for areas in which there are many street sales and sub-agents, in which the agent must pay retainers and commission. The higher valuation applies to compact better-class areas in which the bulk of the sales are home deliveries, and there is little or no division of profits with sub-agents or street sellers.

(xi) In fixing the unit value of goodwill no regard is had to the number of sales made in the shop itself, when an agent obtains consent to move from one shop to a different shop in a prescribed area, no alteration is made in the unit value of goodwill; the unit value of goodwill is not affected whether shop premises are sold or leased with the newsagency for the prescribed area or not; nor is it affected by the turnover (if any) in the shop in respect of sales of goods other than newspapers and periodicals the subject of the agency.

(xii) The actual appointment of the agent is made by a country agent's agreement made with each newspaper company, which names the prescribed or "blocked" area for the particular agent, and under which the agent agrees, *inter alia*, not to dispose of, deliver or supply, directly or indirectly, beyond the area assigned to him; not to transfer the agency without the approval of the newspaper company; and not to appoint or supply an agent or sub-agent unless as required by the newspaper company. The country agents' agreement does not require the agent to carry on business in any particular shop. In the instant case, one only country agent's agreement, dated 3rd November 1941, was produced in evidence but it was indicated that the liaison between the newspaper companies was such that it would ensure that the terms of the agreement would be carried out with the other newspaper companies if no agreements were in fact signed with them. Counsel for the taxpayer stated at the hearing that the contract of sale and all other forms in the instant case were identical with those used in *Phillip's Case* (1), except for one clause (No. 7) in the form headed "Application for Selection", and so far as can be determined from a comparison with the report of *Phillip's Case* (1) counsel's statement is correct.

(1) (1947) 75 C.L.R. 332.

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26. In the present reference, we find as facts :—

(a) The total consideration that passed was £3,428 17s. 1d., of which £1,644 8s. 11d. was in respect of goodwill, the balance being the fair value of stock and fittings.

(b) The goodwill was paid solely for the transfer of the exclusive agency for newspapers and periodicals in the prescribed town area.

(c) The unit value of goodwill was determined by third parties without any regard whatsoever to :—

(i) the number of sales made in the shop itself ;

(ii) the location of the shop in the area ;

(iii) the existence or otherwise of an assignable lease, or the unexpired term of such lease of the shop premises ;

(iv) the existence or extent of any other business carried on in the shop premises.

(d) The goodwill was paid in respect of two amalgamated prescribed areas, one component having been transferred to the taxpayer solely as an exclusive newsagency without a shop or assets of any other description.

(e) The agreements between the agent and the newspaper companies did not require the agent to carry on business in any particular shop.

(f) A lease was assigned by the taxpayer, but he did not receive any premium or payment of any nature in respect of its transfer.

(g) It was not incumbent on the purchaser to continue to conduct the newsagency on the shop premises assigned to him by lease.

(h) In the event of subsequent sale of the newsagency, the purchaser could not make it incumbent on his successor to take over any lease of the shop premises.

27. We are of opinion that the real value of the goodwill transferred by the taxpayer lay in the appointment of the purchaser as the exclusive agent of the newspaper companies to purchase their newspapers and other publications wholesale and to sell them retail in the prescribed area, or, in other words, in the agent being the sole source of supply in that area : see *Phillips* v. *Federal Commissioner of Taxation* (1).

28. The goodwill followed from and was connected with the sole ownership (*Kennedy* v. *Lee* (2)), quoted in *Phillip's Case* (1), and in view of its method of calculation, and the general circumstances, we are of the opinion that, as Mr. Justice *Williams* stated in *Phillip's Case*, " The goodwill of this business was attached to the area within the boundaries of which it was confined. But

(1) (1947) 75 C.L.R. 332.

(2) (1817) 3 Mer. 441 [36 E.R. 170].

it was not in any way attached to any particular premises in that area " (1).

29. Therefore we are of opinion that the sum of £1,644 was not a premium within the meaning of s. 83 (1) of the Act in that it was not a premium payable to the taxpayer in connection with the assignment of a lease, nor was it goodwill attached to or connected with land, a lease of which was assigned. Consequently, the £280, being part of the £1,644, was not assessable income, and the taxpayer's claim should be allowed.

From that decision the Commissioner of Taxation appealed to the High Court. The appeal was heard by *Webb* J.

L. C. Badham Q.C. and *G. P. Donovan*, for the appellant.

J. D. Holmes Q.C. and *J. D. O'Meally*, for the respondent.

Cur. adv. vult.

May 12.

The following written judgment was delivered by :—

WEBB J. Before and during the year 1941 the respondent taxpayer was a shopkeeper in Campbelltown, and sold, among other things, newspapers and periodicals, as well as tobacco, confectionery and ice cream. He disposed of the business in November 1941. His gross weekly takings at that time were £154, including £50 for newspapers and periodicals, £20 for tobacco, and £82 for other commodities. The sale price of this business was £3,428, including £1,644 expressed to be for " goodwill (including the vendor's interest in newspapers and other agencies) ". The balance was for fittings, plant and stock. But the respondent also had a lease of the premises with five and a half years to run. This lease was taken over by the purchaser of the business and apparently assigned to him, but for no consideration, or further consideration.

The appellant commissioner treated the £1,644 as a premium for or in connection with goodwill attached to or connected with land, and included £280 of the £1,644 in the assessable income of the respondent for the year ended 30th June 1943 (based on the income derived for the previous year), arrived at by deducting from £1,644 the sum of £1,364 made up of two amounts which the respondent had paid for the goodwill of the premises when he acquired it as the result of two transactions at different dates. In so doing the appellant commissioner relied on ss. 83 and 84 (1) of the *Income Tax Assessment Act* 1936-1942. The respondent

(1) (1947) 75 C.L.R., at p. 338.

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objected on the ground that the £1,644 was not a premium paid for goodwill attached to the land. If it was such a premium the assessment was correct. The Board of Review, to whom the objection was referred by the commissioner, upheld the objection, and the commissioner now appeals to this Court.

The evidence before the Board of Review was tendered here; but no further evidence was given. This evidence discloses that the purchaser was approved and the sale price fixed by a board representing the newspaper proprietors concerned, who, in accordance with their practice, had made that procedure a condition of the grant by them of the franchise consisting of the exclusive right to the respondent to purchase wholesale and to sell in the Campbelltown area the newspapers and periodicals produced by those proprietors. The sale price was fixed on the basis of units of circulation arrived at by taking into account not only the number of newspapers and periodicals sold but their respective prices. The price factor of this formula was controlled by the newspaper proprietors; but the sales and circulation factor was in fairness left by them to the newsagent, and its quantity depended in each case on his activities, including the wisdom of his choice of a shop, which would promote sales of the newspapers and periodicals if located in a busy section of the area, say near a railway station or post office. In this respect there is no difference between newspapers and periodicals and other commodities: in all cases there is the attractive force that brings in custom: *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Ltd.* (1), that is to say, goodwill attaches to land. The sale of other commodities in the shop ordinarily intensifies this attractive force and so increases the sales of each commodity.

Now the £1,644 for goodwill was based solely on the total number of units of circulation of the newspapers and periodicals in the Campbelltown area at the time of the sale of the business in November 1941, without any dissection of that total. No other consideration was entertained by the proprietors' board or their valuers. But, in fact, out of a total of 11,000 odd units of circulation, 6,000 were sold in the respondent's shop, 3,500 were delivered to his customers at their addresses, and 1,500 were sold by his sub-agents and by newsboys in the streets. However these details were wholly disregarded in arriving at the £1,644 for goodwill. It follows that the existence of the shop and its particular location within the area, whether favourable for news-vending or otherwise, the existence of the lease and its assignment, and the sales of

(1) (1901) A.C. 217, at p. 224.

other goods in the shop were all completely disregarded, and in fact there was positive evidence to that effect.

In view of this method of valuation of the goodwill, the respondent contends that the £1,644 could not have been a premium paid for goodwill attached to land. But I think the evidence falls short of what is required to establish that contention. Not only were 6,000 units of circulation sold in the shop, but the sales of part of the remaining 5,000 to sub-agents and to customers to whom deliveries were made at their addresses could also have been negotiated at the shop. Further the shop and its location could have accounted for the circulation reaching 11,000 odd units. Without the shop the total circulation might have been less. In the absence of proof to the contrary it must, I think, be assumed that the shop played a part in securing sales of the newspapers and periodicals. In any event the onus of proof was on the respondent (s. 190 (*b*)) and not on the commissioner. It was for the respondent to show that the total sales would have been as high without the shop, or if the shop contributed to the sales, then that this contribution was not to the extent of 11,000 odd units of circulation, but to a lesser, and to what, extent. This onus the respondent failed to discharge. Giving the evidence the fullest credence and its maximum effect, it does not preclude the probability or counter the assumption that the shop possessed an attractive force which brought in custom as regards newspapers and periodicals, that is to say, that goodwill attached to it in relation to newsvending: see *Inland Revenue Commissioners* v. *Muller & Co's Margarine Ltd.* (1); *Federal Commissioner of Taxation* v. *Williamson* (2).

I have not found it necessary to quote the evidence at length, or to make detailed findings. But I may say that I agree with the very comprehensive and clear statement in the first twenty-five paragraphs of the reasons of the Board of Review, and with the very full findings of fact in par. 26; but that I differ from the opinions expressed in pars. 27 to 29 inclusive.

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

The taxpayer appealed to the High Court in its appellate jurisdiction against that decision.

The relevant statutory provisions are sufficiently set forth in the judgment hereunder.

(1) (1901) A.C., at p. 224.

(2) (1943) 67 C.L.R. 561, at p. 564.

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G. E. Barwick Q.C. (with him *J. D. O'Meally*), for the appellant. There was nothing before *Webb* J. which could be the subject of an appeal. There was not any question of law involved. The Board of Review determined on the facts that the goodwill, that is of the agency, was not attached to the land and therefore, having in mind, *inter alia*, *Phillips* v. *Federal Commissioner of Taxation* (1), found for the taxpayer, but his Honour found on the facts before the board that the taxpayer had not discharged the onus, which was upon him, of negativing the possibility that some part of the goodwill was attached to the land. *Box* v. *Federal Commissioner of Taxation* (2) does not decide that the question whether the goodwill is attached to the land is a question of law, nor does it deny that that question is one of fact. The inference from a given set of admitted or found facts that the goodwill is attached to the land, is one of fact and is not in any sense a question of law. There was not any question that the transaction as written by the parties was colourable or a sham or that it was cloaking some other real transaction. The documents evidenced the actual transaction. The board found accurately in relation to the facts that the money was actually paid by the purchaser for the exclusive agency. The terms of that agency precluded him from paying for anything else. The terms of the agency negative the possibility of paying any sum for any other advantage of the business beyond the exclusive agency to sell newspapers. The amount payable can only be calculated in relation to the newspapers. No sum was paid for premium. The question of fact is: what was the sum of money in reality paid for? As to whether the goodwill was personal or local is a question of fact. The goodwill of the agency is attached to the area and not to the particular premises (*Phillips* v. *Federal Commissioner of Taxation* (3)). It is impossible to have any part of the goodwill attached to the site in the case of a newsagency conducted under these arrangements which control the prices. The goodwill is the goodwill of the agency—the agreement—not attached to the land. A test is: how much more could the owner of the land get for the land because there was a newsagency run on it if he did not own the newsagent's agreement? Precisely nothing. The price all flows out of the fact that there is a newspaper agency.

[DIXON C.J. Does s. 196 (3) of the *Income Tax Assessment Act* apply to the decision of *Webb* J., or does that mean the Full Court?]

It means the Full Court. Difficulties arise because if s. 196 (1) was not satisfied there was not any point of law; there would be an incompetent appeal.

(1) (1947) 75 C.L.R. 332.
(2) (1952) 86 C.L.R. 387.
(3) (1947) 75 C.L.R., at p. 338.

[DIXON C.J. referred to *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1).]

Perhaps I may be permitted to deal with that matter after I have disposed of the other question on the appeal, which is that if one had to treat the question not as one of fact but as an open question then the only conclusion to which one could come would be that no part of the goodwill of the newsagent's agreement, which is the thing that was really sold, was attached to the land or any part of it. Neither the land on which the shop is erected nor the lease of that land has any more value because of the newsagency. That is so because the goodwill is not attached to it. Section 196 of the Act corresponds to s. 51 of the former Act. The Court has purported to delegate, as it were, the initial hearing to a single justice. Section 34 of the *Judiciary Act* 1903-1950 must work on the situation because the Court still retained jurisdiction. The reference in s. 160 to the High Court means the Full Court and precludes any delegation, in which case the matter now before this Court would be an appeal from a justice who had wrongly entertained the matter. In those circumstances the hearing before that justice was not authorized and the Court can deal with it under s. 34 of the *Judiciary Act* 1903-1950. An appeal to the High Court, particularly where the Court has its own rule-making power, does not prevent the Court from doing what it has done—making a rule that a single justice may hear it as in the original jurisdiction and then that there be an appeal. This Court can review all the actitivies of a single justice under s. 34 of the *Judiciary Act* 1903-1950, and the appellant would complain of the activity of his Honour on the footing that there was nothing there in the way of a point of law. Section 15 of the Act does not adversely affect these submissions in any way; this appeal is quite a competent appeal.

L. C. Badham Q.C. (with him *G. P. Donovan*), for the respondent. The finding of the Board of Review in par. 26 (b) of its reasons, that the "goodwill was paid solely for the transfer of the exclusive agency for newspapers and periodicals in the prescribed town area" is not correct and cannot be supported in any way. Nor is there any evidence to support the finding in par. 26 (c) (i) that the unit value of goodwill was determined by third parties without any regard whatsoever to the number of sales made in the shop itself. The words "involve a question of law" in s. 196 of the *Income Tax Assessment Act* mean that where there is any question of law, whether it be an administrative tribunal or otherwise, if in

(1) (1931) A.C. 275; (1930) 44 C.L.R. 530.

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fact the conclusion which has been arrived at is not supportable as a matter of law, then an appeal will lie; and if the tribunal finds some fact on which it bases its decision, which fact is quite outside the possible deductions to be drawn from the evidence then a question of law is created. In order to come to the conclusion referred to in par. 27 of the board's reasons the members thereof had before them a number of facts, not facts varying in degree or which admitted of any question of degree, nor facts which could themselves necessarily suggest different things, but the question was whether or not the facts as found brought the case within s. 196. A conclusion is drawn in pars. 27-29 of those reasons from the view of the members of the board of the result of the evidence before them, as set out in par. 27, and then the result of their opinion as to the meaning of the term "premium" as used in s. 83 of the relevant Act, both or either of which involves a question of law. This case, so far as that broad test is concerned, comes within the dictum of Lord *Parker* in *Farmer* v. *Cotton's Trustees* (1). Taking that as being a correct test of what is a question of law, it is clear that the board could not have come to the conclusion they did. It was not a question whether some person had written something into a contract, the question arose whether that was or was not a premium within the meaning of ss. 83 and 84 of the Act. The matter was considered in *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (2). Here the facts have been found. The proper legal effect of a proved fact is essentially a question of law (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (3)). The findings in par. 26, other than (b) and (c) (i) are essentially findings necessarily involved in the members' appreciation of the meaning and applicability of s. 83 to the facts which they had so found, and their duty was to come to a conclusion on whether or not there was a premium paid in respect of the premises which were attached to or connected with the land. Paragraph 27 itself involves a question of law. The opinion there expressed is quite untenable on the evidence, and consequently it involves a question of law (*Bean* v. *Doncaster Amalgamated Collieries Ltd.* (4)).

[WILLIAMS J. referred to *Doncaster Amalgamated Collieries Ltd.* v. *Bean* (5).]

If the facts are found by the relevant tribunal, and a conclusion is drawn from the facts by the tribunal, and that conclusion involves

(1) (1915) A.C. 922, at p. 932.
(2) (1950) 81 C.L.R. 188.
(3) (1941) 65 C.L.R. 150, at p. 154.
(4) (1944) 2 All E.R. 279.
(5) (1946) 2 All E.R. 642.

the application of some legal principle or provisions of an Act, that is not a question of fact only, it is a question of at least mixed fact and law. The conclusions of the board, as stated in pars. 27 and 29 of the reasons, amount to conclusions of law. The documents and the facts do not bear out the conclusion that the item £1,644 was paid for the goodwill of the agency. Clause 2 of the agreement provides that " the vendor will sell and the purchaser will buy free from encumbrance ", not the right in the franchise or the goodwill of the agency in that sense as submitted on behalf of the taxpayer, but the goodwill including several other items specifically referred to in that clause. The site of the agency business was a very material matter. If in fact, as was said, the greater part of the sales were made in the shop, it is an inescapable conclusion that a large proportion of those sales must have been due to the situation of the shop. The restrictive covenant in cl. 20 of the agreement would not be necessary if, as suggested on behalf of the taxpayer, there were a right and franchise. It is not a right or a franchise, but a business, with all the indicia that a business contains. On the documents of sale it is impossible to limit the sale. The newspaper business or newspaper agency comprised a comparatively small part of the business done at the shop. The commissioner's view that this was attached to or connected with the land is correct. It is a matter in respect of which no evidence whatever is required if regard be had to the nature of the building. *Phillips* v. *Federal Commissioner of Taxation* (1) does not impinge on this case, and takes it right outside the ambit of this case altogether. This is a clear example, by reason of the nature of the business, of a site goodwill (*Box* v. *Federal Commissioner of Taxation* (2)).

[DIXON C.J. The question does arise whether *Webb* J. was right in placing the burden on the taxpayer and, if he was wrong, whether you can get even as far as that on the material which you chose to place before him.]

His Honour came to the conclusion that, prima facie, the location of the business had an influence which was advantageous to the conduct of the business. The evidence shows that that was the position. The commissioner is entitled to maintain a conclusion on any ground at all. There was not merely a failure on the part of the taxpayer to discharge the onus upon him but the evidence was such that the tribunal could not come to any other conclusion. Nearly all businesses are, to an extent, dependent on locality (*Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Ltd.* (3)). The subject goodwill was " to an extent dependent on locality ".

(1) (1947) 75 C.L.R., at pp. 334, 336.
(2) (1952) 86 C.L.R. 387.
(3) (1901) A.C. 217, at pp. 223, 231.

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G. E. Barwick Q.C., in reply. The question is: did the taxpayer receive any consideration for any goodwill or licence attached to land for which a lease was granted—for or in connection with any goodwill. It cannot be said with complete legal accuracy that the whole consideration was a consideration for the whole goodwill of the business. The effect of cll. 2 and 6 of the agreement for sale, and having regard to the use of the word "thereto" in cl. 6, is that cl. 2 is quite silent on any question of price for goodwill, and cl. 6 clearly applies to the price of the goodwill of the agency agreement only. Clause 6 supports the view that the correct conclusion is that the amount fixed by the accountants was paid for the exclusive right, and for nothing else. It is then inevitable that the consideration paid for that goodwill was not paid for a goodwill which was annexed to the land. Under this contract the price which was paid for the goodwill cannot be considered the price of the goodwill of the whole business. To assert to the contrary would conflict with *Phillips* v. *Federal Commissioner of Taxation* (1). The contract in that case contained exactly the same terms as the contract in this case. There is neither any finding nor any evidence that the whole goodwill was attached to the land. There is not any evidence to show that there was any site goodwill. The meaning of a site goodwill in relation to s. 83 (1) of the *Income Tax Assessment Act* 1936, as amended, was considered in *Box* v. *Federal Commissioner of Taxation* (2). The site does not "form a real element in the value of the business". In this matter there is not any point of law which is made the ground of an appeal. The observations of Lord *Parker* in *Farmer* v. *Cotton's Trustees* (3) were not meant to be universally true. In many instances the finding of a fact in express terms in a statute does not amount to a finding of law, but merely a finding of fact (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (4); *Inland Revenue Commissioners* v. *Lysaght* (5)).

[DIXON C.J. referred to s. 196 (3) and *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (6); affirmed *sub nom. Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (7).]

The appeal is not to the appellate jurisdiction of the Court; it becomes the original jurisdiction. That being so the Court itself must be able to say it will be taken in the first instance by a Justice, and then s. 34 of the *Judiciary Act* 1903-1950 will work automatically. The statute sends the matter to the original jurisdiction of the High Court, and if a justice assumes the jurisdiction of the

(1) (1947) 75 C.L.R. 332.
(2) (1952) 86 C.L.R. 387.
(3) (1915) A.C., at p. 932.
(4) (1915) A.C. 433, at p. 466.
(5) (1928) A.C. 234.
(6) (1926) 38 C.L.R. 153.
(7) (1931) A.C. 275; (1930) 44 C.L.R. 530.

High Court in respect of it, an appeal will lie under s. 34 of the *Judiciary Act* from his judgment, unless the view be taken that s. 34 has been amended by the *Income Tax Assessment Act*. An appeal would lie independently of that Act, under s. 34 of the *Judiciary Act* if, not having jurisdiction, a justice assumed jurisdiction.

L. C. Badham Q.C., by leave. In reference to ss. 187 and 190 of the *Income Tax Assessment Act*, the matter in this case was referred to a board of review. That board decided in a certain way and the commissioner appealed to this Court in its original jurisdiction. In such circumstances the object of s. 190 must be that the onus which lies upon the taxpayer of satisfying the particular tribunal that the case presented by him is correct must continue because otherwise the position would arise that the taxpayer in the original, that is first, hearing would have the onus cast upon him, and then that a proceeding taken from that proceeding is an original proceeding and it is a re-hearing, the onus would shift because it is called in some sections, by loose wording, an appeal. The onus is upon the taxpayer. It would be an extraordinary construction to put on s. 190 that upon a re-hearing, the onus of proof, simply by some statutory provision, would shift from side to side. On this aspect *Webb* J. was correct.

Cur. adv. vult.

March 3, 1953.

THE COURT delivered the following written judgment:—

This is an appeal from an order of *Webb* J. made in the purported exercise of the jurisdiction conferred on this Court by s. 196 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952. The merits of the appeal depend upon the construction and application of ss. 83 and 84 of the *Income Tax Assessment Act* 1936-1952. The taxpayer during the year of income ended 30th June, 1942, sold a newsagent's business which he conducted at Campbelltown. Portion of the total price of the business included a consideration for or in connection with goodwill. The commissioner regarded this consideration as a premium within the definition of that word contained in s. 83 (1) and accordingly included it in the taxpayer's assessable income. The taxpayer being dissatisfied in this respect with the assessment lodged with the commissioner an objection in writing in accordance with s. 185. The commissioner disallowed the objection under s. 186 and the taxpayer being

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dissatisfied with the decision requested the commissioner pursuant to s. 187 to refer the decision to a Board of Review for review. The Board of Review exercising the authority conferred by ss. 192 and 193 gave a decision in writing under s. 195 upholding the taxpayer's objection and reversing the decision of the commissioner. The board directed that the assessment be amended in accordance with their decision. The commissioner thereupon appealed to the High Court pursuant to s. 196 (1) from the whole of the decision of the board on the footing that it involved a question of law. The appeal came before *Webb* J. who set aside the decision of the Board of Review and restored the assessment. The taxpayer then gave notice of appeal from the order of *Webb* J. to the Full Court of the High Court. The question arises whether such an appeal lies from the order of *Webb* J. It necessarily arises because sub-s. (3) of s. 196 provides that a decision of the High Court on an appeal from the Board of Review shall be final and conclusive. The objection that no appeal lay was not taken by the commissioner and his counsel addressed no argument to the Court upon the question. That, however, does not relieve the Court of the responsibility of applying s. 196 (3). Section 196 is as follows :

196. (1) The commissioner or taxpayer may appeal to the High Court from any decision of the board which involves a question of law.

(2) The board shall, upon the request of the commissioner or taxpayer, refer to the High Court any question of law arising before the board.

(3) The decision of the High Court on such appeal or reference shall be final and conclusive.

On behalf of the taxpayer it was submitted that sub-s. (3) of s. 196 did not prevent an appeal. The contention was that until the jurisdiction of the High Court, both original and appellate, had been exhausted, the decision of the High Court did not become final and conclusive within the meaning of the sub-section. Alternatively, it was contended that when sub-s. (3) referred to the High Court, it meant the Full Court of the High Court with the consequence that *Webb* J. had no jurisdiction to hear the appeal sitting as a single justice. On this view it was suggested that the High Court should, in the exercise of its appellate powers, set aside his decision as made without authority.

The constitutional basis of the authority of the Board of Review lies in its character as an administrative body having the duty of reconsidering or reviewing the assessments of the commissioner

but not exercising any part of the judicial power of the Commonwealth: *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1), affirmed *sub nom. Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2). The appeal, therefore, given to the commissioner or taxpayer by s. 196, must be a proceeding in the original jurisdiction of the High Court. Although called an appeal it is a proceeding which, for the first time, brings into the Court a question between the Crown represented by the commissioner and the subject called upon to pay tax, that is to say a matter arising under a law of the Commonwealth under s. 76 (ii.) of the Constitution. Section 15 of the *Judiciary Act* 1903-1950 provides that the jurisdiction of the High Court may, subject to the provisions of this Act, be exercised by one or more justices sitting in open Court. By s. 20 of the *Judiciary Act* the appellate jurisdiction is, for the most part, to be exercised by the Full Court. But, except in applications under s. 74 of the Constitution, which must under s. 22 of the *Judiciary Act* be determined by a Full Court, it is generally true that the original jurisdiction of the High Court is exercisable by a single judge. It may, of course, be exercised by the Full Court either as a result of a reference under s. 18 of the *Judiciary Act* or as a result of an orginal proceeding coming before it by some other form of procedure. But prima facie it is exercised by a single judge. When s. 196 (3) speaks of the High Court, it is difficult to understand why it should not mean the High Court properly constituted in any manner for exercising the original jurisdiction. The *Judiciary Act* always speaks of the High Court independently of the manner in which it is constituted and uses the Full Court to mean the Full Court of the High Court. There appears to us to be no ground for construing the High Court as meaning the Full Court of the High Court. Whether an appeal from the Board of Review is heard by the Full Court must depend upon the manner in which the Court itself decides to exercise the jurisdiction. Under Order LIA., r. 13 of the *High Court Rules* the appeal is to be heard subject to s. 18 of the *Judiciary Act* before a single justice by way of an original hearing. This rule appears to us to be quite valid. When s. 196 (3) provides that the decision shall be final and conclusive, it appears to us to mean that there shall be no further appeals. If the question before the single judge merits the consideration of the Full Court, it is open for either party to request him to refer it to the Full Court and, unless he considers the matter to be one of fact or otherwise

(1) (1926) 38 C.L.R. 153.

(2) (1931) A.C. 275; (1930) 44 C.L.R. 530.

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to be unsuitable for the consideration of the Full Court, doubtless he would make an order under s. 18 of the *Judiciary Act*. This has been a frequent practice. The suggestion that until the appellate power of the High Court is also exhausted, sub-s. (3) does not apply would, in effect, deprive it of any practical application. It would make it mean no more than that an appeal should not lie to the Privy Council except as of grace.

It is true that s. 34 of the *Judiciary Act* provides that the High Court shall, except as provided by that Act, have jurisdiction to hear and determine appeals from all judgments whatsoever of any justice or justices, exercising the original jurisdiction of the High Court whether in Court or Chambers. The section does not add to s. 73 (i.) of the Constitution. Section 73, of course, contains the words " with such exceptions and subject to such regulations as the Parliament prescribes ". The real function of s. 196 (3) appears to be to make such an exception in order to protect the taxpayer from further litigation and to that end to prevent an appeal from the decision of the High Court, if the matter has been treated as one proper to be referred to a Board of Review. There is a marked contrast when the taxpayer appeals to the High Court in the first instance from the commissioner under s. 187 (*b*). In that case the order of a single judge of the High Court is made final and conclusive, except as afterwards provided in the Act, and s. 200 expressly gives an appeal to the commissioner or the taxpayer to the High Court in its appellate jurisdiction from the order made by the single judge. When s. 196 (2) empowers the board to refer a question of law to the High Court there is no reason to treat the expression " High Court " as meaning the " Full Court " to the exclusion of a single judge.

No real support for the conclusion that s. 196 (3) applies only after an appeal has been heard from a single judge by the Full Court is given by our decision in the *Minister of State for the Army* v. *Parbury Henty and Co. Pty. Ltd.* (1). The Court decided in that case that in s. 39 (2) (*a*) the decision of the Supreme Court of the State there made final and conclusive, except so far as an appeal may be brought to the High Court, meant the decision of the Supreme Court after its full powers had been exercised and not a decision of the single judge of the Supreme Court. But the reasons for that conclusion began with the known purpose of the provision, which was to bring Federal questions into the High Court so that an appeal to the Privy Council would only lie from a decision of the High Court, and then subject to s. 74 and only in the exercise of the prerogative.

(1) (1945) 70 C.L.R. 459.

That purpose would be completely satisfied if s. 39 (2) (*a*) related only to the ultimate decision of the Supreme Court after processes by appeal within the Supreme Court had been exhausted and the Order in Council allowing an appeal to the Privy Council applied only to a decision of the Full Court of the Supreme Court. None of these considerations which were regarded as justifying that interpretation of s. 39 (2) (*a*) has any application to s. 196 (3).

The conclusion that the decision of the single judge upon an appeal from a Board of Review is final and conclusive obtains some support from the history of the provision. That history is a curious one. What has become a Board of Review was first established by Act No. 31 of 1921, the *Income Tax Assessment Act* 1921 under the name of Board of Appeal. By sub-s. (8) of s. 38 inserted in the *Income Tax Assessment Act* 1915-1918 an appeal was given to the High Court in its appellate jurisdiction from a decision of the Board of Appeal. This provision was repeated in s. 51 (8) of the *Income Tax Assessment Act* 1922. The provisions were, however, held invalid as attempting to give the Board of Appeal, as it was then called, part of the judicial power of the Commonwealth: *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1). One of the reasons relied upon by the Court for the conclusion that the board was given part of the judicial power of the Commonwealth was that an appeal was given to the High Court in its appellate jurisdiction and not in its original jurisdiction. To overcome the effect of this decision the Board of Appeal was replaced by an administrative Board of Review and provisions much in their present form were introduced by s. 12 of the *Income Tax Assessment Act* 1925 No. 28. By s. 51 which was inserted in the Act of 1922 by this Act, a sub-section was included enabling the commissioner or taxpayer to appeal to the High Court from any decision of the board which, in the opinion of the High Court, involved a question of law. Nothing was said about the decision of the High Court being final and conclusive. Obviously, the provision meant the original jurisdiction of the High Court and the framers of the Act must have become very conscious of the distinction between the appellate jurisdiction and the original jurisdiction. It was, of course, common knowledge that the original jurisdiction was normally exercised by a single judge. Then by s. 22 of the *Income Tax Assessment Act* 1927 No. 32, words were added to the end of sub-s. (6) of s. 51. The words added were these: "and the Board shall, upon the request of the Commissioner or a taxpayer, refer to the High Court any question of law arising before the Board

(1) (1925) 35 C.L.R. 422.

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and the decision of the High Court thereon shall be final and conclusive". It may be conjectured that the framers of this amendment did not intend that the words "final and conclusive" should refer back to the decision of the Court on an appeal mentioned in the original provision so amended. Probably they did not do so grammatically. When, however, these provisions were redrafted in the consolidation of 1936, the provision was split up and in sub-s. (3) the words "shall be final and conclusive" were expressly attached to the words "such appeal" as well as to the word "reference". The result was that while under the Act of 1922-1935, if an appeal from the Board of Review was brought in the first instance to a single judge, an appeal would lie under s. 34 of the *Judiciary Act* and s. 73 (i.) of the Constitution from his order to the Full Court, yet the first decision of the High Court became final and conclusive under s. 196 (3). The Act of 1936 was not only a consolidation but a reconsideration of many provisions of the *Income Tax Assessment Act*, and it may be assumed that the framers of the Act of 1936 thought it was better that the taxpayer should not be exposed to so many legal proceedings.

For these reasons we are of opinion that the appeal from *Webb* J. is not competent.

Appeal struck out as incompetent. No order as to costs.

Solicitors for the appellant, *McMaster, Holland & Co.*

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

J. B.