[HIGH COURT OF AUSTRALIA.]

DICKENSON . . . . . APPELLANT;
APPELLANT,

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.
RESPONDENT,

H. C. OF A. 1957-1958.

SYDNEY, 1957, *Feb.* 8: *Nov.* 19, 20.

Taylor J.

1958, *April* 2.

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

Income Tax (Cth.)—Assessment—Income or capital—Business—Garage and service station—Petroleum products—Sale—Restriction to one brand of products—Agreement—Payment in consideration—Income Tax and Social Services Contribution Assessment Act, 1936-1952, (1936-1953), *ss.* 83, 88, 260.

In June 1952 the appellant was carrying on, upon land owned by him, the business of a garage and service station at which he sold many brands of motor spirit, motor lubricants and other petroleum products. Two payments, each of £2,000, made to the appellant on 30th June and 1st July 1952 respectively by a company which carried on the business of supplying wholesale petroleum products produced by it, were made as parts of a transaction between the appellant and the company whereby he agreed with the company, by way of several documents, including a lease by the appellant to the company of the land and a re-lease by it to them, to restrict, for a period of about ten years, the sales of those products at the garage and service station to the products of the company so long as the company provided supplies stipulated for. The appellant was also precluded by covenant from having other service station interests in the neighbourhood.

Taylor J., confirming the assessment of the Commissioner of Taxation, decided that the said payments should be included in the appellant's assessable income. Upon appeal,

Held, by *Dixon* C.J., *Williams* and *Kitto* JJ. (*McTiernan* and *Webb* JJ. dissenting) that the said payments were of a capital nature and did not form part of the appellant's assessable income.

Held, further, by *Dixon* C.J., *Williams* and *Kitto* JJ., that such payments were not liable to be brought to tax as payments in the nature of premiums within Div. 4, Pt. III of the *Assessment Act*, nor was the case one for the application of s. 260 of the Act.

Decision of *Taylor* J., reversed.

APPEAL from *Taylor* J.

The taxpayer, Robert William Dickenson, carried on upon land owned by him and situate at No. 141 Kingsgrove Road, Kingsgrove, a suburb of Sydney, the business of a garage and service station at which he sold several brands of motor spirit, motor lubricants and other petroleum products. In pursuance of an agreement made in 1952 the taxpayer agreed with the Shell Company of Australia Ltd. that he would only sell at his garage and service station motor spirit, motor lubricants and other petroleum products supplied to him by that company and would not permit the sale or consumption of other petroleum products at or upon the premises at Kingsgrove whilst the company provided the supplies stipulated for.

On 30th June 1952 and again on 1st July 1952 the company made to the taxpayer a payment of £2,000.

The Commissioner of Taxation included the first of these payments in the taxpayer's assessable income for the year ended 30th June 1952 and the second in his assessable income for the year ended 30th June 1953.

The taxpayer objected to these assessments on all of the following grounds so far as the first payment is concerned, and on grounds 1 to 6 inclusive so far as the second payment is concerned.

1. That the said sum of £2,000 which is described in the adjustment sheet which accompanied the said notice of assessment as " Amount received from Shell Co. of Aust. Ltd." does not constitute income which is assessable under any of the provisions of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 (1936-1953).

2. That the said sum of £2,000 did not constitute a " premium " for the purposes of Div. 4 of Pt. III of the said Act.

3. That the said sum of £2,000 represented a receipt of a capital nature which is not liable to tax under the said Act.

4. That the said sum of £2,000 was not a receipt of an income or revenue nature.

5. Alternatively, that the whole of the said sum of £2,000 did not constitute income which was assessable under the provisions of the said Act.

6. That no part of the tax or contribution levied on or charged against me in the said assessment is payable by me as the said Act is invalid unconstitutional and *ultra vires* the Parliament of the Commonwealth in that the said Act deals with more than one subject of taxation.

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7. That the issue of the said amended assessment is debarred by law.

8. That s. 170 of the said Act does not authorise the issue of the said amended assessment.

9. That the said amended assessment was not made to correct an error of calculation or a mistake of fact.

The commissioner disallowed the objections whereupon pursuant to a request by the taxpayer the objections were treated as appeals to the High Court.

The appeals came on for hearing before *Taylor* J.

The relevant facts and statutory provisions are sufficiently set out in the judgments hereunder.

Sir *Garfield Barwick* Q.C. and *J. D. O'Meally*, for the appellant.

R. Else-Mitchell Q.C. and *R. M. Hope*, for the respondent.

Cur. adv. vult.

Feb. 8, 1957.

The following written judgment was delivered by *Taylor* J.

In each of the income years which ended respectively on 30th June 1952 and 30th June 1953 the appellant received from the Shell Company of Australia Ltd. (hereinafter referred to as " Shell ") a sum of £2,000 and in assessments to income tax with respect to those years those sums were treated by the respondent as assessable income of the appellant. The appellant, however, maintains that they were received by him as capital and that to the extent to which his liability to tax was thereby increased the assessments are excessive. Accordingly these appeals are brought against the assessments pursuant to s. 197 of the *Income Tax and Social Services Contribution Assessment Act.*

At all material times the appellant was the proprietor of the Kingsgrove Service Station, a garage and service station conducted at Kingsgrove, a suburb of Sydney. The business premises were erected on land which belonged to the appellant and in the course of his business he sold petroleum products to the public and maintained a workshop for the repair of motor vehicles. The purchase and sale of petroleum products, however, constituted by far the greater part of his business and he dealt in the products of a number of different companies. Some of these were referred to in evidence as " Atlantic ", " Shell ", " Mobiloil ", " Castrol " and others were not specified by name. But some time before June 1952 circumstances required him to consider whether he should undertake to deal in one brand of products exclusively and, ultimately,

he decided that he would do so. Thereafter on 11th June 1952 he entered into an agreement with Shell whereby the latter agreed to sell and deliver at the appellant's service station, "at Shell's usual list prices to resellers, Shell Motor Spirit, Shell Lubricants and other Petroleum Products of Shell . . . as the buyer shall from time to time require for the purpose of his business", and whereby the appellant agreed "to purchase exclusively from Shell or its successors in business all petroleum and its products which shall be sold used or consumed at or upon the said premises". The appellant further undertook to purchase at least six thousand gallons of motor spirit and eighty gallons of automobile lubricants in every month during the continuance of the agreement. Clause 2 of the agreement then proceeded to express what, otherwise, might have been thought to be a matter of necessary implication. By this clause the appellant agreed not to permit the sale, use or consumption upon the said premises of any motor spirit, lubricants or other petroleum products other than such as should be supplied to him directly by Shell or its successors in business. This agreement was subject to the qualification that if, for any reason whatever, Shell should not be able to supply any petroleum or its products as required by the appellant, he should be at liberty, on written notice to Shell, to obtain such supplies as should be necessary for the conduct of his business but only during such time as Shell should be unable to supply. Reference should also be made to cll. 6 and 7 of the agreement. The former of these clauses provided that, subject as thereinbefore provided, the appellant should not purchase any petroleum or its products from any other person or corporation during the continuance of the agreement so long as Shell should be able to supply him with sufficient Shell products to satisfy his weekly requirements of petroleum and its products. The suggestion was made on behalf of the respondent that the prohibition erected by this clause was quite general and not limited to purchases for the purposes of the appellant's existing business. If this were so it would be of some importance in the case but, in my opinion, this view should be rejected; to my mind the clause is ancillary to those previously contained in the agreement and the prohibition extends only in respect of purchases to meet the requirements of the existing business. Clause 7 provided that the supply agreement should commence on 9th May 1952 and that it should continue for a period of ten years and, thereafter, until the expiration of three months' written notice given by either party to the other.

Upon the face of this agreement no moneys were payable by Shell to the appellant and, in fact, no moneys were so paid when it was

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executed. But some days later, on 30th June 1952 and 1st July 1952, two separate payments of £2,000 were made to the appellant. Each of the sums, it is claimed, were paid by Shell as the consideration for covenants by the appellant restricting his future activities as a reseller of petroleum products. These covenants were contained respectively, in two deeds, the dates of which correspond to the dates of the payments referred to. By the first deed it was recited that the appellant carried on a garage and service station business known as Kingsgrove Service Station and, thereafter, it was witnessed that, in consideration of the payment of the sum of £2,000 the appellant agreed and covenanted with Shell that he would not during a period of thirty calendar months from 30th June 1952, within a radius of five miles of the said service station as an owner, part-owner, partner, servant, employee, or as an agent, or as a director of any company, or otherwise, directly or indirectly, open or carry on or conduct or be engaged, concerned or interested in any other garage or service station unless and until arrangements satisfactory to Shell should have been made " whereby any such other garage or service station is or shall be operated and carried on in all respects as a garage and/or service station at and in respect of which the petroleum products of Shell or its successors in title should be exclusively bought sold and dealt in ". The second deed, which was executed on 1st July 1952, contained a covenant in similar terms except that the period to which the covenant refers is a period of thirty calendar months from 31st December 1954, that is to say, from the expiration of the period with which the first deed was concerned.

Two other instruments were also executed on 30th June 1952. The first of these was a memorandum of lease whereby the appellant leased the land upon which the garage was situated to Shell for a period of ten years from the date of the memorandum. The rent reserved by the lease was a yearly rental of £1,040 payable in advance by equal monthly payments of £86 13s. 4d. on the same day by memorandum of lease Shell sub-leased the premises to the appellant for a term commencing on 30th June 1952 and ending on 28th June 1962 at a yearly rental of £1,040 payable in advance by equal monthly payments of £86 13s. 4d. Both leases were registered at the same time on 10th October 1952.

It will be observed that the covenants set out in the deeds do not purport to relate to the appellant's future activities on the existing premises; those activities were already the subject of stipulations contained in the supply agreement and the covenants, in terms, related only to future possible activities of the appellant

elsewhere within the specified area and within the prescribed period. The payments which were made, it is said, were made exclusively for these covenants and, on this view, it is contended that the respondent was in error when he treated the two sums in question as assessable income of the years in which they were received. It is urged that it is nothing to the point that a few days before the deeds were executed the appellant had entered into an agreement which bound him to deal exclusively in Shell products at the Kingsgrove garage or that, at the time when the covenants were given, the lease and sub-lease of the premises were also granted. Nor, it was said, is it of the slightest consequence that it appears from the documents that, whilst Shell was prepared to pay substantial sums of money to secure covenants which, if valid, would restrict the appellant's activities in relation to possible future activities elsewhere, it paid nothing for the appellant's exclusive co-operation in relation to his existing and well-established business. The only consideration for the undertakings assumed by him under the supply agreement was Shell's qualified undertaking to supply his requirements for the existing business " at Shell's usual list prices to resellers " and a somewhat vague promise on the part of Shell to make available to him " such technical assistance as Shell for the time being extends to buyers of its products under this franchise ". The parties were, of course, free to make such arrangement or arrangements as they thought fit and if, upon the arrangements as made between them, the moneys in question were, in truth, capital their true character cannot be transformed by characterising some features of the arrangement as strange or curious. No doubt, the question of liability for income tax obtruded itself in the parties' negotiations and they were entitled, if such a course was possible, to order their affairs in such a way that the payments made to the appellant would not constitute assessable income in his hands and, in their attempt to do so, originality constituted no bar.

The respondent was careful to assert that it was not suggested that the various instruments were shams except in a very limited and, indeed, inaccurate sense to which reference will shortly be made. It is therefore, somewhat beside the point to ask whether it was likely that the appellant would have been prepared to tie himself to Shell in relation to his existing business for no consideration other than the promise of that company to supply his requirements at its usual list prices or whether Shell, whilst paying nothing for the appellant's acquiescence in this arrangement, would have been prepared to pay a large sum of money to secure a like tie

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with respect to some possible but remote future business or businesses. Nor is it very much to the point to inquire whether the appellant would have leased his premises to Shell unless it had been previously arranged that a sub-lease on precisely the same terms should immediately be granted. But that the bargain between the parties called for the execution, in addition to the supply agreement, of the deeds of covenant and the lease and sub-lease is beyond question. Nor can there be any doubt that the agreement of 11th June 1952 was but one aspect of a single transaction or, more accurately perhaps, but one of a number of interdependent transactions.

In evidence the appellant said that some months before 11th June 1952 he was approached by a representative of Shell and asked to become a " one-brand service station ". He took a long time to think about the proposal and representatives of Shell saw him on a number of occasions. When asked in cross-examination whether he inquired what benefits he might expect from such an arrangement he said he did not do so but he was told that it would be of advantage to him to handle one brand of product only; " it would save book-keeping and that sort of thing ". When asked whether, previously to the execution of the agreement of 11th June 1952, Shell had promised to make a payment of £4,000 to him he said, for a time, he could not be certain whether this took place before or after that date; " It was ", he said, " a long time ago ", and it was " beyond him to recall it ". He added that such a promise could have been made before that date but he could not be sure. I do not believe that the appellant's recollection is so defective. The amount ultimately paid—£4,000—was a substantial sum of money and the proposal that he should deal exclusively in Shell products was of paramount importance to him. Moreover the proposal made to him by Shell was by no means the only offer made to him for the evidence shows that other oil companies were in the market for his co-operation. But it appeared, ultimately, in cross-examination that the first sum mentioned to him by Shell was £1,000 and that this sum eventually grew to £4,000. How it came to grow to this sum he professes to be unable to remember though he thinks it may have taken some weeks to reach this figure. But he says that he does not really know. Perhaps, however, his evidence came near the truth when he admitted that in May 1952, at the time when he made his decision to deal exclusively in Shell products, he was told that upon signing some documents in due course he would receive £4,000. He did, however,

subsequently again assert that he had no recollection of when this was said.

I was not asked by counsel for the respondent to hold that the instruments to which reference has been made were mere shams in the sense that they were not intended by the parties to have legal force and effect, but it was urged upon me that they do not evidence, in its entirety, the arrangement made between Shell and the appellant; it was, it was contended, a condition of the bargain between the parties that all five instruments should be executed. Even apart from the oral evidence it would not, I should think, be too much of a hazard to guess that the execution of the supply agreement was conditional upon payment of a sum of £4,000 to the appellant either absolutely or upon the execution of some other document or documents. But the matter does not rest in speculation for, in my view, the oral evidence makes it quite clear that this was so. There is, I think sufficient in the admissions of the appellant to enable me to reach this conclusion for what it is worth but, even if there is not, it is impossible, upon the facts, to hold otherwise. Counsel for the appellant contended, however, that I must take the documents as I find them and regard them as independent dealings unless the contrary be proved. But the question whether the dealings were independent of one another or not is an issue of fact which, if it is material for the purposes of these appeals, must be established by the appellant. I merely add that to hold, in the circumstances of this case, that they were independent dealings would not only be erroneous but would give the lie to obvious reality.

To say that the various dealings between the parties were interdependent does not, of course, mean that the consideration for any one dealing must be regarded as part of the consideration for any of the others. Indeed even in a single instrument one may find separate considerations given for separate and distinct covenants. *Beak* v. *Robson* (1) was, of course, such a case and it is a simple matter to multiply illustrations of such cases. A person may, for instance, sell his business for a specified sum and at the same time agree to enter the employment of the purchaser at a specified salary. In such a case the stipulations which govern the rights of the parties may be found in one or in several instruments. Or A may agree to enter B's employment in a specified locality on condition that B will purchase A's existing residence for a specified sum. Again it is of no consequence whether the bargain is carried into effect by one or more instruments. If it be conceded in any

(1) (1943) A.C. 352.

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such case that the instrument or instruments under consideration govern the rights of the parties there will be no difficulty in attributing a character to the moneys paid in respect of the acquisition of the specified asset for the character of the asset and the nature of the dealing itself will readily determine this question. And the answer will be the same whether it arises in relation to a single instrument or several instruments. The same thing may be said where moneys are received upon the "sterilisation", as distinct from the realisation, of what is clearly capital. But cases may arise where difficulty will be experienced in attributing a character to the subject of a challenged dealing and in these cases it may be of importance to know whether the dealing stands by itself or is, in substance, part of a more extensive dealing. If it is then examination of the whole transaction may give a distinct colour to every part. For instance money paid in respect of a covenant by A that he will not compete with B for a specified period may be thought to assume an entirely different complexion when the covenant is found to be incorporated in an agreement for service whereby A has undertaken that he will, *during the same period*, work exclusively for B. But if it is found that the wider transaction covers the sale by A to B of an existing business preparatory to A entering into B's employment other matters will, no doubt, arise for consideration.

In the present case the deeds of 30th June and 1st July purport to evidence an obligation to pay money for the benefit of the covenants therein expressed. In form the covenants purport to prohibit future specified activities on the part of the appellant with respect to "any other garage or service station" conditionally, that is to say, unless and until "arrangements satisfactory to the covenantee have been made whereby any such other garage or service station is or shall be carried on in all respects as a garage and/or service station at and in respect of which the petroleum products of the covenantee or its successors in title are exclusively bought sold and dealt in". But when the covenants are examined in perspective they may perhaps be seen as one aspect of an arrangement whereby the appellant has undertaken to devote his energies exclusively to the marketing of Shell products not only at the Kingsgrove garage but also, during part of the same period, at any other garage or service station within a radius of five miles which he may acquire or in which he may become interested. The covenants, though expressed in a negative form, are not designed to prohibit the appellant from engaging in the business of conducting service stations but, rather, to ensure that if and when he does he will deal exclusively

in Shell products. In substance and effect they are but supplementary to the covenants contained in the supply agreement and in conjunction with that agreement, produce the substantial result already mentioned. This conclusion does not rest in any way upon the view that there was a collateral agreement making the execution of the supply agreement conditional upon the execution of the later instruments; it results rather from the character and substance of the obligations which that agreement and the deeds of covenant, in the circumstances, actually create.

As I see the arrangement evidenced by the various instruments, therefore, the payments which the appellant received were received not for the sale or sterilisation of a capital asset but for his promise to conduct any extension of his existing business and any future business, within the specified area and within the specified period, in a particular way, that is to say, in the course of any such business to sell Shell products exclusively. Now if it appeared that Shell had paid the moneys in question to induce the appellant to devote his existing business exclusively to the marketing of its products there can be no doubt that the payments should be regarded as income. The payments would clearly appear not as the consideration for the sale or sterilisation of capital but as profit earned by the employment of the "profit-making structure" in a particular manner. The same conclusion would, I think, be inevitable if such moneys had been paid for a promise of more extensive co-operation on the part of the appellant, that is to say, a promise on his part to devote to the same purposes not only his existing business but any future activities on his part in the same field. And can the result be any different when the appellant says "I will, for a specified period, devote my existing business exclusively to the marketing of Shell products provided you undertake to satisfy my requirements for that business at your ordinary list prices and provided, also, that you pay me a sum of money to conduct any other service station which I may acquire during the same period within an area of five miles, on the same basis?" In each case the consideration is given in return for a promise that in the conduct of his business operations during that period he will deal exclusively in Shell products and, in my view, it is of no consequence whatever whether a promise of this character relates to current business operations or to both current and possible future operations of that character during the same period.

The argument against this view is that the restrictions imposed by the covenants upon the appellant's activities within the specified area and the specified periods constitute the sterilisation of capital

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and, with some little force, it is pointed out that their operation extends not only to garages and service stations of which the appellant may become the owner but also with respect to the employment of the appellant within the specified area. In the latter circumstances it is pointed out that he would not necessarily be in a position to ensure that Shell products should be sold exclusively at his place of employment. But quite apart from the fact that it is impossible to see in the circumstances of the case any basis upon which any restrictions might validly be imposed, it is clear that the covenants were designed to ensure, not that the appellant should forfeit his right to extend his existing business to other premises or to become interested in any other business of the same character, but, rather, that if either of these things should happen, the extended or new business should be conducted in the same manner as the existing business. And it is by no means fatal to the respondent's contention that the wide words of the covenant may, in terms, extend to businesses in which the appellant may not have a controlling interest. In substance the covenants appear as part of the arrangement which, though restrictive of the appellant's activities, is only restrictive because the substance of his promises was that he would conduct his existing business and any extension thereof or any new business of the same character which he might acquire or in which he might obtain an interest exclusively for the sale of Shell products. In my view this is the true character of the covenants under consideration and the receipts in question must be taken to have been receipts of income. This being so the appeals must be dismissed.

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

Sir *Garfield Barwick* Q.C. (with him *J. D. O'Meally*), for the appellant. The appellant was unwilling to restrict his trading activities unless he received payment for that restriction. The sums paid to him were not an incident of his trading at the garage. The money did not come from what were the normal sources of income of that business ; it was paid to restrict him from employing himself or his capital in the stated ways within the limits of space and time. This could never be regarded as a regular feature of such business. There could be no recurrence of it. The deed of covenant is completely unrelated to the premises. It is not conceded that there was merely one consideration for single promises

or a group of promises, but it is conceded that the various contemporaneous transactions were interdependent in the sense that if one of them had not taken place the others would not have taken place (*Beak* v. *Robson* (1)). The restriction is absolute and not conditional. The judge of first instance did not make a correct analysis of the document. The payment to the appellant is truly what it purports to be: it is a payment for a restriction on his activity, either on the use of his property or on his personal activities. [He referred to *Higgs* v. *Olivier* (2) and *Margerison* v. *Tyresoles Ltd.* (3).] In no relevant sense was the appellant employing his profit-making structure. Money received for a covenant to deal exclusively with a named person for a stated period and in a stated business, is clearly capital. The payment is a payment for foregoing the right to do what he, the appellant, chooses with himself and his money within the stated area and time (*Higgs* v. *Olivier* (2); *Margerison* v. *Tyresoles Ltd.* (4); *Glenboig Union Fireclay Co.* v. *Commissioners of Inland Revenue* (5); *Beak* v. *Robson* (1)). No part of the payment was a premium for a lease. The alternative ground is accepted that the consideration for £4,000 was for a promise not to sell anything but the company's products at the garage and service station. It is a payment not in the ordinary course of the running of the garage and service station; it is not paid by the people who provide the income of that business. No analysis of the transaction can warrant the conclusion that it is income.

R. Else-Mitchell Q.C. (with him *R. M. Hope*), for the respondent. Four grounds can be advanced to show that the amounts in question were income of the appellant: (1) All the documents were interdependent and the consideration is to be treated as paid for the obligations assumed in the supply agreement and in the lease as well as the covenants in the deeds. The receipt does not bear any capital character and is in the nature of a consideration received in the course of carrying on business from a supplier of products used in that business and pursuant to an arrangement for their mutual trading advantage. A business receipt constitutes income unless it can be shown that in fact it was a payment for some disposition of a capital character; (2) The covenants should be treated as being supplementary to the supply agreement and the consideration for the covenant as relating to the conduct of the appellant's

(1) (1943) A.C. 352.
(2) (1952) Ch. 311.
(3) (1942) 25 Tax. Cas. 59, at p. 67.
(4) (1942) 25 Tax. Cas. 59.
(5) (1922) 12 Tax. Cas. 427, at p. 463; (1922) S.C. (H.L.) 112, at p. 115.

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business or any extension thereof within the defined area; (3) Clause 6 of the supply agreement was not restricted to the premises but imposed a general obligation on the appellant not to purchase any petroleum products from any other person and for that reason the deeds of covenant did not advance the situation any further; and (4) The consideration in fact falls to be treated as a premium and liable to tax under ss. 83 and 84 of the *Assessment Act*. The real consideration for the payments of £2,000 was not the future prospect that the appellant might commence some other business, but was to gain the benefit of the trade at his existing business. The payment was made to a person carrying on business, in respect of his business activities, by a person with whom he had regular trade dealings and is thus a business receipt. Even a voluntary payment to a person who is carrying on a business will be a business receipt unless it is actuated by non-trading considerations (*The Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). The payments were actuated by trading considerations. On the material available here no capital asset was disposed of. The mere undertaking of a restrictive obligation is in no sense the disposal of a capital asset. A payment of this character, received by a dealer in the course of business in return for a covenant to sell a fixed or minimum quantity of products is, in substance, a reward for the exercise of the dealer's energies in selling that product. It is an anticipatory reward. A payment of this character received by a person in trade in return for a stipulation that he will deal exclusively in a particular product presents all the analogies of a retainer fee paid to people in business for the exclusive use of their services.

[DIXON C.J. referred to *Commissioner of Taxes (Vict.)* v. *Phillips* (2).]

The converse of that situation was dealt with in *Federal Commissioner of Taxation* v. *Dixon* (3). [He referred to *Cameron* v. *Prendergast* (4); *Thompson* v. *Magnesium Elektron Ltd.* (5); *Californian Oil Products Ltd. (In Liq.)* v. *Federal Commissioner of Taxation* (6); *Van Den Berghs Ltd.* v. *Clark* (7); *Bush, Beach & Gent Ltd.* v. *Road* (8); *Margerison* v. *Tyresoles Ltd.* (9); *Higgs* v. *Olivier* (10) and *Household* v. *Grimshaw* (11).]

(1) (1953) 86 C.L.R. 570, at pp. 621, 633.
(2) (1936) 55 C.L.R. 144.
(3) (1952) 86 C.L.R. 540, at pp. 563-568.
(4) (1940) A.C. 549, at pp. 563, 564.
(5) (1943) 26 Tax. Cas. 1.
(6) (1934) 52 C.L.R. 28, at pp. 45, 47, 49, 51.
(7) (1935) A.C. 431.
(8) (1939) 2 K.B. 524, at pp. 532, 533.
(9) (1942) 25 Tax. Cas., at p. 68.
(10) (1952) Ch., at pp. 316-321.
(11) (1953) 1 W.L.R. 710.

[DIXON C.J. referred to *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (1).

KITTO J. referred to *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (2).]

The moneys in question did not in fact possess a capital character. It is impossible reasonably to find that a business in which one restricts the brand of petrol or oil sold constitutes a disposal or sterilisation of capital assets. The respondent adopts what was said by the judge of first instance. [He referred to *Vancouver Malt & Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (3).] The provisions of cl. 6 of the agreement show that it is a general restriction on the purchase of petroleum products not restricted to the appellant's premises at Kingsgrove but having the effect that if he were to open other premises in the district he would be equally bound as to those premises. The view ultimately taken was that the provisions of the covenants were, in effect, an inseparable part of the scheme and were supplementary to the primary obligations in the supply agreement. These amounts constituted a premium or premiums liable to tax under Div. 4 of the Act: see ss. 83, 84. They were paid in connexion with the grant of the lease and they represented an amount falling within the definition of premium as a consideration for or in connexion with any goodwill attached to or connected with land, a lease of which was granted, and consequently they fall to be assessed as a premium (*Box* v. *Commissioner of Taxation* (4)). One does not have to find a transaction where there is a clear disposition of the goodwill in exchange for the money payment (*Berry* v. *Federal Commissioner of Taxation* (5)). The Court could treat this as a transaction which is open to attack under s. 260.

Sir *Garfield Barwick* Q.C., in reply. There is no evidence that this was a commutation of future discounts but there is evidence against such a suggestion. It is a very potent circumstance that upon assignment of the lease and a sale of the business a successor would be tied to the minimum quantity but would not get any of the £4,000. An illustration of commuting is to be found in *Commissioner of Taxes* (*Vict.*) v. *Phillips* (6). The other cases, even *Californian Oil Products Ltd.* (*In Liq.*) v. *Federal Commissioner of Taxation* (7) are illustrations of capitalising. This money could

(1) (1934) 51 C.L.R. 568.
(2) (1933) 49 C.L.R. 171.
(3) (1934) A.C. 181.
(4) (1952) 86 C.L.R. 387, at pp. 398, 399.
(5) (1953) 89 C.L.R. 653, at pp. 658, 659.
(6) (1936) 55 C.L.R. 144.
(7) (1934) 52 C.L.R. 28.

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not be regarded as other than a payment for a restriction on the appellant's future activities, and, hence, would not be income.

[WEBB J. referred to *Higgs* v. *Olivier* (1).]

The whole sum could not be attributed to the grant of the lease; there is no basis for apportionment; and it could not be regarded as paid at all in connexion with the grant of a lease. There is no material on which it could be said that the real transaction here was that the £2,000 was a premium within Div. 4.

Cur. adv. vult.

April 2, 1958.

The following written judgments were delivered:—

DIXON C.J. In my opinion each of the two sums of £2,000, combining to form substantially one receipt of £4,000, had the character of capital and not income. The documents embodying the transaction of which the receipt of this sum is the product, or perhaps one should say, an incident, have been described and discussed in the judgments of *Williams* J. and of *Kitto* J. which I have had the advantage of reading and with which I am in substantial agreement. I shall therefore do no more than state the essential reason which leads me to treat the transaction as one of capital. It appears to me that the sum or sums were paid as the *quid pro quo* for an effective tie of the appellant's business to one wholesale vendor of petrol. The appellant's business constituted a profit-yielding organisation of a definite structure under his control and he received the money as part of an inducement to change a feature in it. The feature to be changed was the use of a plurality of petrols and oils, and this was replaced by a restriction to the purchase and sale of the products of one company. The same inducement caused him to limit himself in what he might do elsewhere than at his then present business site. At the same time, of course, the business obtained some assurance of a supply from the single source. It may be that in a sense the sum of £4,000 was compensatory for the loss of future profits which the restriction might involve. It may be that it was meant as present payment by way of incentive to promote sales of the product derived from the single source. But if either or both of these elements formed part of the rationale of the payment, it amounted to a capitalisation of these elements. It is true that the restrictions were to operate only over limited periods but, once he had bound himself, a modification or readjustment of his business was effected. It could exist at the end of the term only in the altered form, although of course after five years he

(1) (1952) Ch. 311.

might consistently with the covenants start another business in the neighbourhood. But only by active steps could his present business be restored to its former character. There is nothing recurrent in the nature of the payment. It is not a normal or natural incident of carrying on such a business and it does not represent a purpose for which such a business is carried on. I think therefore that the sum ought not to be treated as a profit of the existing business.

As to the suggestion that the sum or sums constituted a premium payable on the grant of a lease within Div. 4 of Pt. III, it is enough to say that the lease and sub-lease formed no more than the mechanism to provide a legal foundation or assurance for the result for which the money was paid.

As to the suggested application of s. 260 of the *Income Tax and Social Services Contribution Assessment Act*, complicated, probably unnecessarily complicated, as the documents are, I do not think there is any warrant for the conclusion that they were designed to or did in fact lead to an avoidance of tax.

It is on these grounds stated succinctly that I think the appeals should be allowed.

McTIERNAN J. The appellant owned a garage and service station at Kingsgrove. The petrol and lubricants in which he dealt were of various brands, and were supplied to him by various oil companies. These included the Shell Company.

It appears that each of the companies had decided to organise service stations solely for distributing its own brands of petrol and petroleum products. Some, if not all, the companies made overtures to the appellant to secure his garage and service station for that purpose. The clear inference from the evidence is that the Shell Company, in the course of its negotiations, offered the appellant £1,000 to obtain exclusive rights in respect of his garage and, to ensure that they got these rights, raised the amount to £4,000.

On 30th June 1952, the appellant received from the Shell Company £2,000, and on 1st July of the same year the balance of the £4,000. The respondent included each of these sums in the assessable income of the financial year in which it was paid, on the basis that it was a receipt of income or a " premium ". The appellant objected to both assessments on the ground that each receipt was in the nature of capital, and was not a "premium ".

On an appeal from the assessments *Taylor* J. decided that each sum was a receipt of income and so was correctly included in the assessable income. The first question on the present appeal is whether these sums were receipts of income or capital.

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The substratum of the arrangement into which the Shell Company and the appellant entered is a series of instruments executed by them respectively. Two of these are memoranda of leases, both executed on 30th June 1952. One is a lease of the garage to the Shell Company for ten years at a yearly rental of £1,040, and the other a lease of the same premises by the company to the appellant for that period less two days at an equivalent rental. These memoranda of lease deal with the relations of the parties as lessor and lessee in turn, and need not be referred to in detail.

The other instruments are a " supply agreement " and two other deeds. Each of these contains restrictive covenants relating to the appellant's trade. A payment of £2,000 is annexed to each of these covenants. It is necessary to refer in some detail to the provisions of these three instruments. The " supply agreement " is expressed to have been made on 11th June 1952. It is sufficient to notice that the Shell Company thereby agreed to supply the appellant at the garage and service station at Kingsgrove with all the motor spirit, lubricants, and other petroleum products that he should require, and he agreed to buy from that company all goods of those descriptions that he dealt in at those premises, and undertook to purchase at least six thousand gallons of motor spirit and eighty gallons of automotive lubricants every month during the continuance of the agreement. The agreement is expressed to have been made on 11th June 1952 but to have commenced on 9th May 1952, and its term is fixed at ten years from that date, and thereafter until the expiration of three months' notice by either party. The first deed, which is expressed to have been made on 30th June 1952, contains a covenant whereby, in consideration of £2,000 then paid by the Shell Company to the appellant, he agreed that he would not, during a period of thirty months nor within five miles of the above-mentioned service station, as owner or otherwise, directly or indirectly carry on or be interested in any other garage and service station unless and until arrangements satisfactory to the Shell Company had been made to operate it as a business buying and selling the Shell Company's petrol and petroleum products exclusively.

The second deed was made on 1st July 1952, and contains a covenant in similar terms which is espressed to be in consideration of a sum of £2,000 then paid, and to operate for a period of thirty months from the expiry of the former restrictive covenant.

The respondent did not impugn these instruments as shams. Their form determines whether the two payments are in the nature of income or capital. According to their form, each of the sums

of £2,000 was paid in consideration of the covenant on the part of the appellant to which it relates, and not in consideration of anything in the " supply agreement ". It is upon that basis that the question whether in the hands of the appellant these payments are income or capital has to be decided.

The appellant in evidence said this : " The one brand was coming in and we were faced with the proposition of either becoming a Shell one-brand station—at the time we did not know what would be the outcome ; we thought it would be a one-brand Shell or a one-brand C.O.R., or one type of petrol or another. I preferred the Shell myself. We thought at the time that if we did not go for one particular brand then that particular brand would take away its pumps. If I had not gone to Shell, I understand Shell would have taken their pumps away, and I would have been left with something that was not so good."

The appellant further said that he accepted the Shell Company's proposal to make his business a " one-brand station " in order to guarantee to himself supplies of a suitable motor spirit and oil products. According to the evidence, the Shell Company made concrete driveways at the appellant's garage and kept it painted.

The evidence of the circumstances that arose in the trade makes it reasonable to conclude that it was for the mutual advantage of the appellant's and the Shell Company's trade to enter into the arrangement based on the above-mentioned instruments. As stated above, the appellant undertook by the " supply agreement " to order six thousand gallons of petrol a month. The evidence shows that subsequently the sales exceeded 12,000 gallons a month. It is correct to assume that in the circumstances there was no real possibility of the appellant's becoming interested at any foreseeable time in a " one-brand " station within five miles of the Kingsgrove garage that would be tied to a rival of the Shell Company. On the evidence the sum of £4,000 cannot be held to be in the nature of a capitalisation of profits expected to be lost over the total period of the restrictive covenants by reason of their operation. *Taylor* J. was of opinion that the real point of those covenants is not so much their restrictive effect as that they result in the appellant being concerned in nothing but a Shell " one-brand " service station, if he should choose to extend his business interests as a trader in petroleum products beyond the Kingsgrove garage.

In my opinion this is a tenable view, and its result is that the sum of £4,000 bears the stamp of income because it is income arising from the appellant's trade. *Taylor* J. rested his view on the condition in each of the covenants modifying the restriction

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which it creates. But even if the covenants ought to be regarded as essentially restrictive, I am unable to see that the sum of £4,000 is compensation for a capital loss. The argument for the appellant depends upon an analogy between the surrender or sterilisation of a capital asset and a restrictive covenant relating to trading.

The Master of the Rolls observed in *Higgs* v. *Olivier* (1) that the analogy may exist in the case of " a restrictive covenant of a substantial character " (2). He distinguished the case of a covenant by a trader to give up his trade for life from " a restriction of a very limited or partial character ", and said that the consideration for the latter might be more easily regarded as taxable than the consideration for the former. The Master of the Rolls added this : " But between the two extremes there is a large area, and for myself I am disposed to think that within that area it may well be a matter of degree. In so far as it is a matter of degree it would be, I think, a question of fact " (1).

The covenant in question in that case was limited, but it was held to be " a substantial piece out of the ordinary scope of the professional activities which were otherwise open to (the taxpayer)". The decision turned upon the question whether, in the view taken of the extent of the restriction, it could be said that the payment came to him " in the ordinary course of his profession ". It was held that it could not, and therefore it was outside the taxing provision. The present question does not, of course, depend upon any such provision. It is : whether the sums of £2,000 belong to the category of income or capital ?

The restrictive covenants now in question operated concurrently with the " supply agreement " but only for a total period of five years. They are confined to a limited area, that within a radius of five miles from the service station conducted as a " Shell one-brand Station ". The supply agreement provides for the supply to the appellant of all the petrol, oil, and other petroleum products that he requires for the purposes of his trade. According to his evidence, he preferred the Shell Company's brands of such goods to those of other companies, and he regarded his arrangement with the Shell Company as guaranteeing to him supplies suitable for the trade he was carrying on. It cannot be presumed that he had not entered into the arrangement with the Shell Company, and had he declined to have a tie with any oil company, he would have been able to obtain supplies of all the brands of petrol, oils, and other petroleum products in which he had been dealing. (What the respective quantities of those brands were is not shown by the evidence.)

(1) (1952) Ch. 311.

(2) (1952) Ch., at p. 318.

The question whether the result of the restrictive covenants was to curtail a substantial portion of the trade open to the appellant cannot be determined merely on the wording of the covenant. It is a question of fact whether a substantial part of those activities was cut off by the restrictive covenants. The substance of his trade remained the same, that is to say, a service station in which motor vehicles were repaired and petrol, lubricants, and other goods used in connexion with motor vehicles were sold. The onus is on the appellant to prove that the circumstances and accidents of these two payments of £2,000 do not present them as receipts of income. The only basis before the Court for deciding whether the restrictive covenants cut off a substantial portion of his trade was that he was limited, within the prescribed period and area, to dealing in the brands of petrol and petroleum products by the Shell Company, except when the company might be unable to supply them to him.

It is consistent with the terms of the covenants, read in the light of the circumstances proved by the evidence, that the restrictive effect of the covenants on the appellant's trading activities was very limited, and that the limitation that they imposed on him was an ordinary incident of his trade. In this view, both the payments of £2,000 are trade receipts of an income character. I find it unnecessary to enter upon any other question which was raised by the appeal. In my opinion, the decision of *Taylor* J. was right. The appeals, in my opinion, should be dismissed.

WILLIAMS J. These appeals relate to two payments, each of £2,000, made to the appellant by the Shell Company of Australia Ltd. (hereinafter called Shell), the first on 30th June 1952 and the second on 1st July 1952. The Commissioner of Taxation included the first of these payments in the assessable income of the appellant for the year ended 30th June 1952 and the second in his assessable income for the year ended 30th June 1953. Appeals from the assessments to this Court pursuant to s. 197 of the *Income Tax and Social Services Contribution Assessment Acts* 1936-1952 and 1936-1953, were dismissed by *Taylor* J. The taxpayer has now appealed to the Full Court.

In June 1952 the taxpayer was carrying on upon land he owned at 141 Kingsgrove Road, Kingsgrove, a suburb of Sydney, the business of a garage and service station under the name of the Kingsgrove Garage and Service Station at which he sold many brands of motor spirit, motor lubricants and other petroleum products. The two payments in issue were made as parts of a transaction between the taxpayer and Shell whereby he agreed to

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restrict the sales of these products at the service station to the products of Shell or in other words to convert the service station into what is known as a one-brand service station. In order to carry out the transaction five documents were entered into between the parties:

(1) an agreement, which may be referred to as the supply agreement, made on 11th June 1952 whereby Shell agreed to sell and deliver at the service station at its usual list prices to resellers Shell motor spirit, Shell lubricants, and other petroleum products of Shell as the buyer should from time to time require for the purposes of his business, and the buyer agreed to purchase exclusively from Shell all products of this kind which should be sold used or consumed at or upon the premises and not to permit the sale use or consumption there of any motor spirit, lubricants or other petroleum products other than such as should have been supplied to him directly by Shell or its successors in business. The appellant promised to buy from Shell at least six thousand gallons of motor spirit and eighty gallons of automotive lubricants in every month during the continuance of the agreement (subject to a proviso if for any reason Shell was unable to supply him). Clause 6 of the agreement provided that the appellant subject as thereinbefore provided should not purchase any petroleum or its products from any other person or corporation during the continuance of the agreement so long as Shell should be able to supply it with sufficient Shell products to satisfy its weekly requirements of petroleum and its products, but nothing therein contained should prevent Shell from selling petroleum or its products to any other person or corporation to be used for any purpose whatsoever. The agreement provided that it should commence on 9th May 1952 and continue for ten years and thereafter until the expiration of three months written notice given by either party to the other:

(2) and (3) a memorandum of lease and a memorandum of sub-lease each dated 30th June 1952 whereby the appellant leased the land upon which the service station is erected to Shell for ten years at the yearly rental of £1,040 payable monthly and Shell sub-leased the premises to the appellant for the same period less two days at the same rental. The sub-lease contains a covenant by the appellant duly to observe and perform the covenants and agreements entered into by him in the supply agreement of 11th June 1952 or any extension variation or renewal thereof or any substituted agreement for the sale and purchase of petroleum products:

(4) a deed executed by the appellant on 30th June 1952 whereby in consideration of the payment to him of £2,000 (the first of the

sums in issue on the appeals) the appellant covenanted with Shell that he would not during a period of thirty calendar months from the date thereof within a radius of five miles of the service station as an owner, part-owner, partner, servant, employee or as an agent or as a director of any company or otherwise directly or indirectly open or carry on or conduct or be engaged concerned or interested in any other garage or service station unless and until arrangements satisfactory to the covenantee had been made whereby any such other garage or service station is or should be operated and carried on in all respects as a garage and/or service station at and in respect of which the petroleum products of the covenantee or its successors in title are exclusively bought sold and dealt in:

(5) a deed executed on 1st July 1952 whereby in consideration of the sum of £2,000 (the second sum in issue on the appeals) the appellant entered into a covenant with Shell in the same terms as the previous covenant for the period of thirty calendar months from 30th December 1954.

If documents (4) and (5) can be regarded as independent agreements and not interdependent with the other three documents and forming parts of the same transaction there could be little doubt that the two sums of £2,000 would be of a capital nature. They were paid on successive days, admittedly, so that if they were taxable, they would be split up between two years of income, but they were really one lump sum paid in consideration of the appellant entering into the restrictive covenants they contain. It was contended for the respondent that there was no consideration for the covenants because the appellant had, before they were entered into, by cl. 6 of the service agreement already entered into an even wider agreement for a longer term relating to the same subject matter. But his Honour held, rightly in my opinion, that this clause, read in the light of the supply agreement as a whole, related only to the mutual obligations of the appellant and Shell with respect to the sale and supply of Shell products at the Kingsgrove service station. The words "it" and "its" when first used in the clause would seem naturally to refer to the Kingsgrove service station at which Shell had agreed to deliver its products. Even if his Honour was wrong, cl. 6 of the supply agreement and the covenants in the deeds differ so widely in their operation that it would be quite impossible to say that they cover the same subject matter. The question could certainly arise whether the covenants may not be void as being in restraint of trade, but that is not a question with which we are concerned in these appeals. Upon the appeals they should be treated as valid. But it is clear

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that the two deeds are not independent documents, that they are interconnected with the other three documents, and that each of the five documents forms part of the one transaction. It could hardly be suggested that Shell would have been prepared to pay the appellant £4,000 simply to secure the covenants contained in the deeds if Shell had not been able to secure the supply agreement. The substance of the transaction taken as a whole is that the appellant promised Shell that for a period of at least ten years he would sell only Shell products at the Kingsgrove service station and he also promised Shell that, for a period of five years, within a radius of five miles from that station, he would not become interested or concerned directly or indirectly in any business of a service station other than a station where the products of Shell were exclusively sold. The £4,000 was in terms paid in consideration of the second promise, but that promise would have been of no benefit to Shell without the first promise. The appellant was engaged and engaged only in running the business of the Kingsgrove service station when the transaction as a whole was entered into, and it was no doubt mainly to secure a monopoly for its products at that station that Shell paid the £4,000. The covenants not to be interested in a competing business within the prescribed area were plainly ancillary and incidental to this promise. No other conclusion could reasonably be reached from a perusal of the documents themselves read in the light of the surrounding circumstances but the matter is not left to inference because the appellant, whilst indicating a preference for Shell if he had to choose between the rival brands, made it clear that he was very dubious as to the wisdom of tying himself to any one company and it would appear that before he succumbed an initial offer by Shell of £1,000 had to be increased to £4,000.

But even when the whole of the documents are treated as part of the one transaction, it is difficult to see how the £4,000 can lose its capital nature. *Taylor* J. held that this sum was income because, as I understand his reasons, he considered that, when the transaction was considered as a whole, the deeds of covenant though negative in form were affirmative in substance. Together they constituted an agreement by the appellant to sell Shell products and the two sums of £2,000 were intended to be part of the remuneration which he would derive from doing so. In other words they formed part of the receipts of the business of the proprietor of a service station which the appellant was carrying on and were of the same character as the profits derived from the sale of the Shell products. The definition of income from personal exertion in the

Assessment Act includes "the proceeds of any business carried on by the taxpayer", but these proceeds would only include receipts which have the character of income according to ordinary usages and concepts except where the Act states or indicates an intention to the contrary: *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (1). When this test is applied, treating the whole of the documents as part of the one transaction, nothing appears to make the £4,000 income. The covenants in the deeds did not oblige the appellant to make any purchases of petroleum products from Shell, they only obliged him not to purchase or be interested in the purchase of any products of that character from anyone else. The covenants are negative in form and substance. The only positive promise to purchase such products from Shell is the promise in the supply agreement to purchase at least six thousand gallons of motor spirit and eighty gallons of automotive lubricants from Shell in every month during the continuance of the agreement. Where a person agrees to restrict his personal activities and the use of his capital, the consideration he receives for doing so may be income or capital. If the consideration takes the form of recurring payments, these payments may well be considered to be a *quid pro quo* for the profits the covenantee would have made if he had not withdrawn from such activities and be income: *Margerison* v. *Tyresoles Ltd.* (2); *Thompson* v. *Magnesium Elektron Ltd.* (3); *Commissioner of Taxes (Vict.)* v. *Phillips* (4). But where the consideration takes the form of a lump sum, so that it appears to represent a *quid pro quo* for giving up a substantial sphere of activity which would otherwise be open to the covenantee, it would prima facie be capital: *Beak* v. *Robson* (5); *Hose* v. *Warwick* (6); *Higgs* v. *Olivier* (7). In the present case there is nothing to indicate that the £4,000 was compensation for the additional profits the appellant would have made if he had continued to sell other brands than Shell. On the contrary, both the appellant and Shell probably hoped that the appellant would be able to sell more motor spirit and other petroleum products by selling a single brand than he had previously sold when he was selling all brands. But at least it can be said that the appellant was dubious about this and there is nothing to show that the true consideration for the £4,000 was not his promise not to sell or to be interested in selling other brands.

(1) (1946) 73 C.L.R. 604.
(2) (1942) 25 Tax. Cas. 59.
(3) (1943) 26 Tax. Cas. 1.
(4) (1936) 55 C.L.R. 144.
(5) (1943) A.C. 352.
(6) (1946) 27 Tax. Cas. 459, at p. 472.
(7) (1952) Ch. 311.

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Counsel for the respondent contended that the £4,000 should be considered to be a premium paid by Shell to the appellant on the grant of the ten years' lease of the Kingsgrove land by the appellant to Shell. The material provisions of the *Assessment Act* in relation to this submission are those contained in Div. 4 of Pt. III of the *Assessment Act* 1936-1951. The amendments made to s. 83 of the principal Act by s. 15 of the *Income Tax and Social Services Contribution Assessment Act* No. 90 of 1952, do not apply in relation to a consideration received or paid under an agreement made not later than 31st December 1952 for the grant, assignment or surrender of a lease of land or under an agreement for the sale of goodwill or the assignment of a licence in connexion with such an agreement. The appellant was not assessed under this division. He was assessed on the basis that the two sums were income from personal exertion. But if the two sums are premiums, the Court could, under s. 199 of the *Assessment Act*, order the assessments to be amended. But there is no evidence upon which the two sums could be held to be premiums. The payments were made at the same time as the appellant granted the lease of the service station to Shell but for a different consideration and that is all that appears. Premiums in Div. 4 include any consideration for or in connexion with any goodwill attached to or connected with the land a lease of which is granted. But there is no evidence that the two sums of £2,000 or any part thereof were paid for such a consideration. There may well have been a considerable goodwill attached to the land on which the service station is erected. But Shell was not leasing the land in order to obtain the benefit of that goodwill for itself. Otherwise it would not have sub-leased the land back to the appellant on the same day. Shell only wanted to benefit from the goodwill attached to the land in the sense that the larger the sales of motor spirits and other petroleum products at the service station, the larger would be the orders it would receive for its products. But that benefit would have been obtained by Shell without any lease and sub-lease of the land so long as the service station remained tied to it. The whole purpose of the lease was to enable Shell to grant the appellant a sub-lease and thereby to make the tie effective not only against the appellant but also against any assignee of the sub-lease.

Counsel for the respondent made a last-minute attempt to invoke s. 260 of the *Assessment Act*. This section was not relied upon before *Taylor* J. It was not at first relied upon before us. If it became material, a serious question would arise whether the respondent should be allowed to invoke the section at such a late stage.

If it had been relied upon before *Taylor* J. it may be that some evidence might have been led upon this issue. But, as the evidence now stands, the section could not help the respondent because, if the deeds of covenant are treated as void against the commissioner, there will remain simply two sums each of £2,000 paid by Shell to the appellant, which, when the transaction as a whole is examined, are of a capital character.

The appeals should be allowed.

WEBB J. These are two appeals from decisions of *Taylor* J. disallowing appeals by the appellant taxpayer against assessments to income tax and social services contribution for the years ended 30th June 1952 and 30th June 1953, respectively. The appeals arose out of the inclusion by the respondent commissioner in the assessable income of the taxpayer for each of these two years of the sum of £2,000. These two sums were paid to the taxpayer by the Shell Oil Co. under the following circumstances: In May or June 1952 the taxpayer, a garage and service station proprietor in the Sydney suburb of Kingsgrove, who sold various brands of petrol and other petroleum products and who owned the freehold of the land on which this business was conducted, agreed with the Shell company to sell that company's petroleum products exclusively. Thereupon the following documents were executed—(1) An agreement, referred to in the argument as the supply agreement, dated 11th June 1952 between the taxpayer and the Shell company whereby, *inter alia*, the company agreed to sell and deliver at the taxpayer's garage and service station at Kingsgrove at the company's usual list prices its petroleum products as required by the taxpayer's business; and the taxpayer agreed to purchase exclusively from the company for sale or consumption at the Kingsgrove premises specified minimum monthly requirements during the continuance of the agreement (cl. 1). The taxpayer agreed not to permit sale or consumption of other petroleum products at or upon the Kingsgrove premises whilst the company provided the supplies stipulated for (cl. 2). In consideration of the taxpayer observing these terms the company granted him a non-exclusive right of selling Shell products under its trade marks and agreed to make available to him technical assistance extended by the company to other buyers under the same franchise (cl. 4). The taxpayer also agreed not to buy petroleum products from any other source whilst the company was able to supply them (cl. 6). This agreement was to commence on 9th May 1952 and to continue for ten years and thereafter until the expiry of three months' notice

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by either party (cl. 7); (2) A lease by the taxpayer to the company of the Kingsgrove premises dated 30th June 1952 for ten years from that date at a yearly rental of £1,040 payable in advance in equal monthly instalments; (3) A sub-lease of the same premises by the company to the taxpayer from 30th June 1952 to 28th June 1962 on the same terms as to rent and containing, *inter alia*, a covenant to carry out the supply agreement of 11th June 1952 and any variation "and in every way possible to promote extend and develop the sale of the products mentioned in such agreement" (cl. 2 k); (4) A deed of covenant dated 30th June 1952 between the same parties that in consideration of £2,000 then paid the taxpayer would not during thirty months from that date within five miles of the Kingsgrove premises as owner part-owner servant employee or agent or as a director of any company or otherwise directly or indirectly open or carry on or conduct or be engaged or concerned or interested in any other garage or service station "unless and until arrangements satisfactory to the covenantee have been made whereby any such other garage or service station is or shall be operated and carried on in all respects as a garage and/or service station at and in respect of which the petroleum products of the covenantee or its successors in title are exclusively bought sold and dealt with"; (5) A deed of covenant dated 1st July 1952 between the same parties and in the same terms except that the period of thirty months begins 31st December 1954.

I assume for the purposes of my reasons for judgment that these documents state the facts and that the real question is as to the proper inferences and conclusion to be drawn from the facts and the documents.

Taylor J. rejected the suggestion made by counsel for the commissioner that cl. 6 of the supply agreement contained a prohibition against all purchases, whether for the taxpayer's existing business at Kingsgrove or for any future business elsewhere. His Honour thought that this provision in cl. 6 was merely ancillary to those relating to the Kingsgrove business. I respectfully agree. But his Honour proceeded to say that the covenants, though expressed in negative form, were not designed to prohibit the taxpayer from engaging in the business of conducting garage or service stations elsewhere, but rather to ensure that if and when he did so he would deal exclusively with Shell products; and that in substance and effect the covenants were supplemental to the covenants in the supply agreement. I am not prepared to take a different view, having regard more particularly to the covenant in the deeds of 30th June 1952 and 1st July 1952 against the taxpayer becoming

interested in any other garage or service station within the specified area or periods unless and until arrangements satisfactory to the company had been made for the sale of Shell products at any such other garage or service station. Whilst it is true that this qualification of the covenant at the instance of the company neither adds to nor detracts from the absolute nature of the covenant and its legal effect as between the parties, seeing that the parties can at any time agree to qualify even the most absolute covenant, still this particular qualification does, I think, reveal plainly enough the purpose of the payments each of £2,000 to have been, not to provide consideration for the sale or for the sterilisation of a capital asset of the taxpayer, or otherwise for a limitation or modification of the taxpayer's profit-earning structure, but to provide consideration for the employment in a particular way of that structure as erected by the taxpayer from time to time within the specified area and periods. He was at liberty to open up or become engaged or employed in business of the same kind elsewhere so long as the company was satisfied, having secured the full protection of its interests in his extended operations, to permit him to do so. In other words the two payments each of £2,000 were made for the services of the taxpayer in selling at Kingsgrove and thereabouts the petroleum products of the company exclusively; and so like *Taylor* J. I am unable to say that the commissioner was wrong in treating the two payments as assessable income and not as capital receipts of the taxpayer.

I would dismiss the appeals.

KITTO J. These appeals concern the inclusion by the Commissioner of Taxation of a sum of £2,000 in the appellant's assessable income of the year ended 30th June 1952 and a similar sum in his assessable income of the year ended 30th June 1953.

The two sums were paid to the appellant by the Shell Company of Australia Ltd., one on 30th June 1952 and the other on 1st July 1952. The circumstances were these. The appellant was the registered proprietor of an estate in fee simple in certain land upon which was erected a garage and service station. He there carried on a business which, until the relevant events occurred, included the selling of the petroleum products of a variety of companies. About May 1952 the Shell Company opened negotiations with him to the end that his service station might become a one-brand station, dealing exclusively in Shell products. Agreement was reached, and the parties gave effect to it by executing five documents and making and accepting the payments now in question.

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It is conceded that the documents were all interdependent in the sense that none would have been executed without the others. The first document, for some reason, was executed as early as 11th June 1952 and was expressed to commence a month earlier still, on 9th May 1952. It was to continue for ten years and thereafter until determined by three months' notice by either party. By this agreement the Shell Company bound itself to sell and deliver at the appellant's premises, at the company's usual list prices to resellers, Shell products as the appellant should from time to time require for his business; but this was subject to a provision enabling the Shell Company to annul the contract if it should be prevented from selling or delivering the products by any of a number of causes, including any unexpected or exceptional cause or any reason beyond its control. The appellant agreed to purchase a minimum quantity of motor spirit and lubricants every month, and he also agreed (putting it broadly) not to permit the sale, use or consumption upon his premises of any petroleum products not supplied directly by the Shell Company, and not to purchase any petroleum products from anyone else so long as that company should be able to supply sufficient Shell products to satisfy his weekly requirements. The Shell Company granted the appellant "a non-exclusive right" of selling Shell products under their registered trade marks or trade names, and agreed to make available to the appellant "such technical assistance as Shell for the time being extends to buyers of its products under this franchise".

Then, on 30th June 1952 three documents were executed: a memorandum of lease by which the appellant leased his premises to the Shell Company for ten years from that date at a yearly rental of £1,040 payable by monthly payments in advance of £86 13s. 4d.; a memorandum of lease by which the Shell Company sub-leased the premises to the appellant for the same term less two days at the same yearly rental payable by identical instalments; and a deed of covenant expressed to be made in consideration of the sum of £2,000 then paid by the Shell Company to the appellant. On the next day the parties executed the fifth document, which was another deed of covenant, expressed to be made in consideration of a second sum of £2,000 paid by the Shell Company to the appellant.

All the documents of 30th June and 1st July 1952 need to be considered closely. The lease from the appellant to the Shell Company contained nothing which need be remarked upon, but the sub-lease back to the appellant contained covenants by the appellant designed to ensure the preservation of the premises as a garage and service station, and covenants by him duly to observe and perform

his covenants and agreements in the supply agreement of 11th June 1952 or any extension variation or renewal of or agreement in substitution for that agreement, and in every way possible to promote extend and develop the sale of the products mentioned in that agreement. There was also a covenant against assigning, sub-letting, parting with possession, mortgaging or pledging, and a provision for re-entry by the lessee in a variety of events, including the neglect or failure of the lessee for one month to perform or observe any of the covenants of the lease, and including also the cesser or determination of the supply agreement or any extension variation or renewal thereof, or any other agreement in substitution therefor. " Lessee " was defined to include the appellant's successors in title.

The supply agreement and the two memoranda of lease formed together the means by which the appellant's premises were effectually tied to the Shell Company for a substantial period of years. What did the appellant get for submitting his premises to the tie ? So far as these three documents are concerned, he got very little. The Shell Company's promise to supply the petroleum products required for his business was subject to a large qualification, and was at least as much in the Shell Company's interest as in his. The non-exclusive right to sell Shell products under their trade marks and trade names was no real concession to him, for the Shell Company wanted its products so sold, and the more extensively the better. The promise of technical assistance was, if not meaningless, at least hardly worth weighing in the scales.

But the position in regard to the two deeds of covenant was exactly the reverse. The appellant received under them £4,000 and gave little in return. He entered into two restrictive covenants for consecutive periods, but they were covenants of doubtful validity and still more doubtful practical value to the Shell Company. The first deed of covenant recited that the appellant owned and carried on a garage and service station business. That business (and not the appellant's premises) it proceeded to call " the said premises ". It contained a covenant by the appellant, in consideration of the first payment of £2,000, in these terms : " that he will not during a period of thirty (30) calendar months from the date hereof within a radius of five (5) miles of the said premises as an owner part-owner partner servant employee or as an agent or as a director of any company or otherwise directly or indirectly open or carry on or conduct or be engaged concerned or interested in any other garage or service station unless and until arrangements satisfactory to the covenantee have been made whereby any such other garage or service station is or shall be operated and carried on in

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all respects as a garage and/or service station at and in respect of which the petroleum products of the covenantee or its successors in title are exclusively bought sold and dealt in . . . ." The second deed of covenant contained the same recital as the first, and, like the first, it defined the expression " the said premises " to mean the appellant's business. It recited the making of the first deed of covenant, and contained a covenant by the appellant, in consideration of the second payment of £2,000, in the same terms as the former covenant except that the period was thirty months from 31st December 1954.

There is no need to form any concluded view as to whether these covenants were void as being in unreasonable restraint of trade. Suffice it to say that to the legal advisers of the Shell Company it must have been obvious that if proceedings should ever be contemplated a serious question of validity would almost certainly arise. What is meant by the reference above to the practical value of the covenants to the Shell Company is simply this. A number of rival petroleum companies were engaged in competing endeavours to get garages bound to the selling of their respective petroleum products. It seems obvious that in each case the important thing from their point of view was the garage and not the proprietor. That is not to say that there is no personal goodwill at all in connexion with a business of selling petrol and oil. But if, in the case of the appellant's business for example, the Shell Company could get the premises effectually tied to it for ten years, it had very little to fear from the possibility of the appellant's being able to assign his sub-lease (so far as that could be done consistently with the covenant on the subject) and starting a new business selling rival products within a five mile radius—very little more, indeed, than it had to fear from the possibility of any other member of the community opening or being interested in such a business. It seems incredible that the two covenants, covering only five years between them, were considered by either side to be worth by themselves £4,000. The appellant, in giving evidence, did not suggest it. The correct conclusion seems to be that the £4,000 was really the substantial consideration paid to the appellant for the benefits which the Shell Company got from the entire transaction to which the five documents gave effect. It was the only benefit of much substance which the appellant received, and it took him a period of some weeks, from the time when the Shell Company made its first suggestion to him about making his business an exclusively Shell business, to raise the figure from £1,000 to £4,000.

The inference seems clear that the deeds of covenant, though no doubt genuinely intended to operate according to their terms, were a means adopted (perhaps inspired by a reading of *Beak* v. *Robson* (1)) in order to throw the money consideration in the transaction against restrictive covenants in the hope that thereby it might be given, or given more certainly than otherwise would be the case, a capital flavour. Not that any dishonesty was practised ; but the only reasonable explanation of what was done seems to be that accountants, or lawyers, or both, considered that a transaction which might possibly be held to make the £4,000 liable to income tax in the appellant's hands if carried out in some ways would or might make it free of income tax if carried out in the way that was adopted. Attention, it would seem, may even have been given to the possibility that if the transaction took some possible forms the £4,000 might be taxable under Div. 4 of Pt. III of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 (Cth.) as a premium in connexion with the grant of the lease by the appellant to the Shell Company. It is not easy to explain on any other basis the odd piece of draftsmanship in the deeds of covenant by which the area of the restriction is measured from " premises " which are defined as the appellant's business, so that no reference to the leased premises appears in these deeds.

However this may be, it is plain enough that the case should be decided on the basis of fact that the two payments of £2,000 were part and parcel of the whole transaction evidenced by the five documents. The learned judge of first instance took this view, but he reached the conclusion that the payments were in the nature of income because their substantial purpose was not to pay the appellant for entering into negative covenants but was to induce him to devote his energies and the resources of his business to increasing the sale of Shell products. With great respect, I do not feel able to reach the same conclusion. The transaction as a whole if looked at from the appellant's point of view, was, I think, in essence restrictive. The ultimate result which the Shell Company sought was, of course, an increase in the sales of its products ; but the actual transaction with which we are concerned was confined almost entirely to the exclusion of competitors from that part of the trade in petroleum products which would be done at the appellant's garage.

The problem that arises under the United Kingdom income tax legislation in cases of this general description was touched upon by the Master of the Rolls in *Higgs* v. *Olivier* (2), when he said :

(1) (1943) A.C. 352.

(2) (1952) Ch. 311.

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"I think Sir Frank Soskice was disposed to agree that, if a trader, or a professional man, for a money consideration covenanted to give up his trade or profession for the rest of his life, then it would be difficult to say that the money received was 'profits or gains accruing or arising from his trade or profession'. On the other hand, it is not difficult to see that a restriction of a very limited or partial character might less easily be taken out of the ambit of the taxing provision. One example in the argument was that of an actor who covenanted for a limited period not to act for one particular company out of a large number. I myself gave the example of an actor who covenanted for a limited period not to act under his own or well-known stage name. But between the two extremes there is a large area, and for myself I am disposed to think that within that area it may well be a matter of degree" (1). Much the same may be said, I think, in relation to the Commonwealth Act, though its conceptions are by no means the same as those of the United Kingdom Act and it is possible that such a case as *Higgs* v. *Olivier* (2) might have to be decided against the taxpayer if it arose under the Commonwealth Act. In the area to which the Master of the Rolls referred as lying between the two extremes, cases must often arise in which it is difficult to be sure whether they fall on this side of the dividing line or on that. But a lump sum payment for a restriction of a garage and its proprietor to one brand of petroleum products for a period of ten years, effectuated by means of a lease and sub-lease of the premises as well as by personal covenants, seems in the nature of a sale price for a substantial and enduring detraction from pre-existing rights. The restriction does not strike my mind as an obligation undertaken incidentally to the carrying on of the business. Rather does it take a substantial piece out of the ordinary scope of the business activities to which otherwise the appellant might apply himself and for which he might use his premises—to adapt some words of the Master of the Rolls (3). The consideration for it was paid to the appellant in two sums but was otherwise non-recurring. Although the two deeds of covenant related to an aggregate period of only five years, there is nothing in the case to suggest any likelihood that at the end of that period further payments would be made in consideration of further similar covenants. All things considered, the two payments savour much more of capital than of income. I should add that it does not seem possible to regard them as amounting to a rebate in advance against the price of petroleum products to be purchased by the appellant

(1) (1952) Ch., at p. 318.
(2) (1952) Ch. 311.
(3) (1952) Ch., at p. 319.

from the Shell Company, for there is nothing to suggest that the parties attempted to make any calculation by reference to probable sales, or that they ever regarded the £4,000 as related in any way to such sales.

There remains a question as to whether the £4,000 should be treated, for the purposes of assessing the appellant's income tax, as a premium included in his assessable income by the operation of s. 88 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 (Cth.). Having regard to the relevant portions of the definition of " premium " in s. 83 (1), the question is whether each payment of £2,000 was a consideration in the nature of a premium fine or foregift payable to the appellant for or in connexion with the grant by him of the lease to the Shell Company.

Upon consideration I think that the payments cannot be forced into that mould, and not even with the assistance of s. 260. Without that assistance it is clearly impossible to affirm either that they had the nature of a premium fine or foregift or that they were payable for or in connexion with the grant of the lease. But suppose that s. 260 applies, so that the deeds of covenant are to be treated as being void as against the commissioner ; and suppose also that it is legitimate then to infer that the payments were in the nature of consideration for the appellant's entering into the supply agreement, his granting the lease to the Shell Company, and his accepting the sub-lease back. These hypotheses seem to put the case at its highest in the commissioner's favour. In the situation which they produce the payments, though not in any sense " for " the grant of the lease, might no doubt be described as to some extent connected with the grant of the lease. But they were in truth no more closely connected with that than with the execution of the supply agreement and the sub-lease. They were really payable in connexion with the whole machinery by which the desired tie to the Shell Company was accomplished, and not with any one part of that machinery considered by itself. To attribute to them the nature of a premium fine or foregift in connexion with the grant of a lease would be to get them quite out of perspective.

I have come to the conclusion for these reasons that the amounts in question ought not to be treated as included in the appellant's assessable income, and that the appeals should be allowed.

Appeal allowed with costs. Order appealed from discharged. In lieu thereof allow the appeal from the assessment with costs. Declare that no part of the sum of £2,000 *mentioned in the*

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notice of objection is assessable income of the taxpayer derived during the year of income ended 30th June 1952. Set aside the assessment and remit the same with this declaration to the Commissioner of Taxation for re-assessment.

Appeal allowed with costs. Order appealed from discharged. In lieu thereof allow the appeal from the assessment with costs. Declare that no part of the sum of £2,000 mentioned in the notice of objection is assessable income of the taxpayer derived during the year of income ended 30th June 1953. Set aside the assessment and remit the same with this declaration to the Commissioner of Taxation for re-assessment.

Solicitors for the appellant, *Sly & Russell.*

Solicitor for the respondent, *H. E. Renfree,* Crown Solicitor for the Commonwealth.

J. B.