[HIGH COURT OF AUSTRALIA.]

CALIFORNIAN OIL PRODUCTS LIMITED (IN LIQUIDATION) . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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SYDNEY, *Aug.* 2, 3, 7, 24.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Income Tax—Assessment—Assessable income—Company formed to carry on agency as specified in an agreement—Cancellation of agreement—Company wound up—Money paid in consideration of cancellation—Payment by instalments—Income or capital—"Proceeds of business carried on by taxpayer"—Proceeds of profit-making scheme—Goodwill—Licence—Income Tax Assessment Act 1922-1932 (*No.* 37 *of* 1922—*No.* 76 *of* 1932), *secs.* 4*, 16 (*d*)*, 93A.*

In consideration of the sum of £70,000, payable in ten equal half-yearly instalments, the taxpayer company agreed, in October 1928, with another company, to the cancellation of an agreement by which the taxpayer had been appointed, for a period of five years from 1st April 1928, the exclusive agent, within a defined area, of the other company for the sale of its products, and

The *Income Tax Assessment Act* 1922-1932 provides:—By sec. 4: "In this Act, unless the contrary intention appears . . . 'Assessable income' means (*a*) in the case of a resident—the gross income derived from all sources, whether in Australia or elsewhere . . . which is not exempt from income tax under the provisions of this Act . . . 'Income' includes . . . (*ba*) any profit arising from the . . . carrying on or carrying out of any profit-making undertaking or scheme . . . 'Income from personal exertion' or 'income derived by any person from personal exertion' means . . . the proceeds of any business carried on by the taxpayer . . . and any profit specified in paragraph (*ba*) of the definition of 'Income'." By sec. 16:—"The assessable income of any person shall include . . . (*d*) . . . any amount received . . . by way of consideration for the assignment or transfer of a lease, or for goodwill or a licence in respect of a business carried on on the leased property, or for surrendering a lease, goodwill or licence." By sec. 93A:—"Where under any contract agreement or arrangement . . . a person assigns, conveys, transfers or disposes of an income-producing asset on terms and conditions which include the payment for the assignment, conveyance, transfer or disposal of the asset by periodical payments which, in the opinion of the Commissioner, are really in the nature of income of the person assigning, conveying, transferring or disposing of the asset, that person shall be assessed to pay income tax upon those periodical payments."

covenanted that it would not thereafter directly or indirectly handle, trade or deal in products similar to those of the other company. The agency was the sole business carried on by the taxpayer, and upon the cancellation of the agreement it went into liquidation.

Held, that payments made on account of the sum of £70,000 were not profits or income earned in the course of the taxpayer's business, or as part of a profit-making scheme, but were of a capital nature and were not taxable under the *Income Tax Assessment Act* 1922-1932.

Glenboig Union Fireclay Co. v. *Commissioners of Inland Revenue*, (1922) 12 Tax Cas. 427 ; (1922) S.C. (H.L.) 112, applied.

CASE STATED.

On the hearing of an appeal to the High Court by Californian Oil Products Ltd. (In Liquidation) from an assessment of that company by the Federal Commissioner of Taxation for income tax for the year ended 30th June 1932, *Rich* J. stated a case, which was substantially as follows, for the opinion of the Full Court :—

1. This is an appeal by Californian Oil Products Ltd. (In Liquidation) from assessment of income tax for the financial year ended 30th June 1932 and based upon income derived in the year ended 30th June 1931.

2. The appellant company was incorporated under the New South Wales *Companies Act* 1899-1918 on 31st August 1925 with a nominal capital of £50,000 divided into 50,000 shares of £1 each. The company was established to carry on the business of indenting, importing, exporting, buying and selling, transporting, purifying, and generally dealing in, petroleum and benzine and all motor fuels, petroleum products and mineral oils and, *inter alia*, to undertake and transact all kinds of agency business.

3. On 31st August 1925 the appellant entered into an agreement with F. W. Williams & Co. Ltd. and the Construction Co. of Australia Ltd. (and Reduced) (companies incorporated under the New South Wales *Companies Act* 1899-1918) whereby for the consideration therein set forth F. W. Williams & Co. Ltd. agreed to provide an office and staff for and promote the business of the appellant and to hand over thereto the net proceeds of its sale of oil products purchased by it in the course of its operations under an agreement with Edgar Henry Garland and Francis Le Manquais Garland. It was further provided by the agreement that during the currency thereof F. W.

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Williams & Co. Ltd. should be deemed a trustee for the appellant of its rights title and interest under the agreement with Edgar Henry Garland and Francis Le Manquais Garland.

4. From the date of its incorporation until 1st April 1926 the appellant under and in accordance with the agreement carried on the business of purchasing through an American broker, importing into Australia and reselling the petroleum products of the Union Oil Co. of California, a company incorporated and carrying on business in the United States of America (hereinafter referred to as the "Union Co.").

5. On 1st April 1926 the Union Co. entered into an agreement with the appellant whereby the Union Co. agreed that it would, with certain exceptions, sell to the appellant exclusively all its petroleum products, lubricating oils and greases for delivery into the States of New South Wales, Victoria and Queensland. This agreement was entered into with the consent of Edgar Henry Garland and Francis Le Manquais Garland and of F. W. Williams & Co. Ltd.

6. The term of the agreement referred to in the preceding paragraph was for a period of five years commencing as and from 1st June 1926 subject to a proviso entitling either party after a period of three years had elapsed to cancel the same on ninety days' notice.

7. The appellant carried on its business under the agreement referred to in the preceding paragraph from 1st June 1926 until 30th April 1928.

8. In or about July 1926 the appellant pointed out to the Union Co. that it would be necessary to instal a system of bulk storage in order to compete effectively with the other oil companies, and the Union Co. arranged to send a representative to Sydney to confer with the appellant with a view to arriving at a decision as to the installation of a bulk storage system.

9. In or about October 1926 the appellant purchased certain lands at White Bay, Balmain, with a view to the erection thereon of bulk storage facilities. At the date of the purchase of the land there were erected thereon five cottages and two factories. The purchase price was £25,400, and in addition thereto the appellant incurred

an expenditure of £600 in legal, survey and other expenses of and incidental to the completion of the purchase.

10. In or about April 1927 Robert Everett Haylett, a representative of the Union Co., arrived in Sydney for the purpose of discussing with the representatives of the appellant the installation of a bulk storage system. In view of the very heavy expenditure involved in the construction of such a system it was decided that the Union Co. itself would undertake the responsibility of installing the system and it was tentatively arranged that the Union Co. or a local subsidiary thereof would acquire from the appellant the land purchased by the latter at White Bay, Balmain, and in anticipation of this the appellant, at the request of the representative of the Union Co., terminated the tenancies of the properties on the land and demolished the buildings erected thereon, and the representative of the Union Co. arranged for the purchase by a nominee on behalf of his company of certain lands adjoining the land purchased by the appellant.

11. On 30th June 1927 an agreement in writing was made between James Edward Grey and Robert Everett Haylett for and on behalf of Atlantic Union Oil Co. Ltd., a company about to be formed and registered under the *Companies Act* of New South Wales for the purpose of importing into Australia and marketing the petroleum products of the Union Co. (hereinafter referred to as the "Atlantic Co."), of the one part and the appellant of the other part whereby the Atlantic Co. appointed the appellant its sole agent for the sale of petroleum products and lubricating oils and greases from time to time manufactured or acquired or dealt in by the Atlantic Co. The agency created by the agreement (hereinafter referred to as the "agency agreement") was to comprise the whole of New South Wales except an area within a radius of thirty miles from the Sydney Town Hall and an area within a radius of thirty miles from the Newcastle Town Hall and the term thereof was for a period of five years from 1st April 1928. Under the agency agreement the appellant was to receive a remuneration arrived at on a percentage basis calculated in accordance with the detailed provisions contained therein and it was provided that the appellant could not, during the term of the agreement, deal in any petroleum products or

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lubricating oils or greases of any other party (except by the written consent of the company's board of directors or during times when the company (*a*) restricted or suspended, or (*b*) delayed or failed to deliver, those commodities.

12. At the date of the execution of the agency agreement the agreement referred to in par. 3 hereof between the appellant and the Union Co. was still in force and operation and the appellant was carrying on business of purchasing, importing into Australia and selling petroleum products in accordance with the terms thereof. A provision was made in the agency agreement that as from the date on which the Atlantic Co. notified the appellant that it was prepared to supply petroleum products and lubricating oils and greases all agreements in force between the appellant and the Union Co. for the supply of petroleum products and lubricating oils and greases to the appellant should cease to operate and to have any further force or effect. No formal notification was given in accordance with the agency agreement, but subsequent to the ratification of the agreement as hereinafter mentioned both parties thereto carried on business under the agency agreement.

13. The agency agreement provided that the appellant should not assign or permit to be assigned its agency rights thereunder or in any way permit such rights to pass to or be acquired by others.

14. The Atlantic Co. was duly incorporated under the *Companies Acts* of New South Wales on 4th October 1927 and by agreement dated 16th November 1927 between Grey and Haylett of the first part, the appellant of the second part, and the Atlantic Co. of the third part, the Atlantic Co. adopted and ratified the provisions of the agency agreement.

15. By agreement in writing dated 30th June 1927 Grey and Haylett as trustees for and on behalf of the Atlantic Co. about to be formed agreed to purchase and the appellant agreed to sell at or for the price of £36,050 the land situated at White Bay, Balmain, referred to in par. 9 hereof and by a further agreement of the same date between the parties it was provided that the land would be retransferred and conveyed back to the appellant in the event of the local municipal authorities refusing to grant permission for the same to be used for bulk storage of inflammable liquids or should

the Explosives Board refuse to allow inflammables to be stored within a certain area referred to in the agreement.

16. Both the local municipal authorities and the Explosives Board refused the necessary permits referred to in the preceding paragraph in or about September 1927, and as a result thereof the Atlantic Co. did not adopt the agreement referred to in the preceding paragraph for the sale and purchase of the land at White Bay, Balmain.

17. On or about 19th October 1927, an agreement was entered into between the appellant and F. W. Williams & Co. Ltd. whereby it was agreed that 10,000 shares in the appellant should be issued to F. W. Williams & Co. Ltd. at 1s. per share to be paid in cash on allotment and the balance when the appellant went into liquidation upon the terms and conditions as to dividends and otherwise as in the agreement set forth. Under the agreement provision was made for remuneration to F. W. Williams & Co. Ltd. until the agency agreement came into operation and that upon such agency agreement coming into operation the appellant should provide its own staff and organization. The agency agreement came into operation on or about 1st May 1928.

18. The appellant carried on business under the agency agreement from 1st May 1928 until 11th October 1928 on which date the appellant and the Atlantic Co. by agreement in writing cancelled the agency agreement.

19. By the agreement of 11th October 1928 (hereinafter called the "cancellation agreement") it was provided that the agency agreement should be cancelled by mutual consent and it was further provided that the Atlantic Co. should pay to the appellant the sum of £70,000 by ten half-yearly instalments of £7,000 each—the first payment to be made on 1st May 1929, with the proviso that on default in payment of any one instalment for a period of fifteen days the appellant could require payment of the whole of the moneys unpaid under the agreement.

20. It was further agreed in the cancellation agreement that the Atlantic Co. would purchase from the appellant the office lease of the appellant for the sum of £715 and the right, title, equipment and interest of the appellant in and to the "Springfield" service

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station at Darlinghurst and its lease thereof for the sum of £735, and all stock on hand at the service station consisting of petroleum products at cost price to the appellant.

21. Under the cancellation agreement the appellant covenanted that as from the date of the agreement it would not directly or indirectly handle or trade or deal in petroleum products of any kind.

22. At the date of the cancellation agreement no default had been committed thereunder by either party thereto nor were there any moneys payable by the Atlantic Co. to the appellant under the agency agreement except the sum of £1,500, being the amount of outstanding commission earned by the appellant on sales effected by it under the agency agreement up to 11th October 1928.

23. While carrying on its business the appellant made profits in the course of carrying on the same.

24. On 17th October 1928 it was resolved at a meeting of the directors of the appellant that an extraordinary general meeting of shareholders should be convened to consider the advisability of winding up. Such extraordinary general meeting was duly held on 14th November 1928 and a resolution of the shareholders was passed approving of the winding up of the company.

25. A further extraordinary general meeting of the shareholders was held on 11th December 1928 and an extraordinary resolution was passed in the following form : " That the company be wound up voluntarily and that George Randal Watt and Jonas Mynderse Coe Forsayth be and they are hereby appointed liquidators for the purpose of such winding up."

26. A further extraordinary general meeting of shareholders was held on 8th January 1929 and the resolution referred to above was duly confirmed as a special resolution.

27. The assets, totalling £51,323 5s. 11d., appearing on the appellant's balance-sheet as at 7th January 1929, the date of liquidation, represent the whole of the property of the appellant at that date other than any money it was entitled to receive from the Atlantic Co. under and by virtue of the cancellation agreement.

28. The asset shown as " White Bay Property "—£26,282 1s. 6d.—represents the cost to the appellant, as at the date of liquidation,

of the property acquired by the appellant in or about October 1926 for the purpose of the erection of a bulk storage depot.

29. The asset shown in the balance-sheet as "Plant A/c" —£184 19s. 1d.—represents three pumps purchased by the appellant in the United States of America and valued at cost. These pumps did not comply with the provisions of the *Weights and Measures Act* and, accordingly, a licence was refused in respect thereof. The pumps are still owned by the appellant but have no value other than for scrap purposes.

30. The asset shown as "F. W. Williams and Co. Ltd." represents as to the sum of £5,000 an advance made by the appellant in July 1928 repayable on three months' notice, and as to the balance of £13,827 4s. 4d. represents the balance of purchase money owing by F. W. Williams & Co. Ltd. in respect of the sale by the appellant to the former company of certain petroleum products prior to 1st May 1928.

31. The asset shown as "Sundry Debtors"—£4,280 5s. 3d.—represents book debts of the appellant in respect of sales made by it prior to 1st May 1928.

32. "Stock on hand" shown in the balance-sheet at the figure of £1,748 15s. 9d. represents stock at country depots. Owing to leakages and miscalculations this asset only produced on realization the sum of £148 14s. 4d.

33. At the date of the cancellation agreement there was a probability and the appellant anticipated that it would during the remainder of the term of the agency agreement, derive profit from the carrying out of the agency agreement.

34. From the date of its incorporation until the date of liquidation the appellant, through the agency of F. W. Williams & Co. Ltd. or directly, engaged in the business of buying and selling petroleum products and lubricating oils and greases exclusively.

35. The unimproved capital value of the land purchased by the appellant at White Bay, Balmain (referred to in par. 9 hereof), was assessed by the Valuer-General in September 1927 at £16,000. The assessment was made before any of the buildings on the land were demolished.

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36. In or about June 1929 the appellant sold to the Sydney Harbour Trust portion of the land at White Bay, Balmain, comprising the whole of the water frontage thereof for the sum of £5,000.

37. The improved capital value of the land (including that portion thereof as was sold to the Sydney Harbour Trust) was assessed by the Valuer-General in November 1929 at £12,250.

38. In October 1933 the Valuer-General assessed the balance of the land remaining after the sale to the Sydney Harbour Trust at the improved capital value of £8,475, which balance is being held by the liquidators of the appellant pending a market being available for the sale thereof.

39. The appellant made a return of its income for the year ended 30th June 1931 as required by the Act but did not include as assessable income the amount of £14,000 received by it under the agreement dated 11th October 1928 and referred to in clause 19 hereof.

40. The respondent assessed the income of the appellant and included in the assessment the sum of £14,000. Notice of the assessment dated 24th June 1932 was duly sent to the appellant.

41. The appellant paid the tax claimed in the assessment and by notice of objection dated 25th July 1932 duly objected to the assessment on the grounds, *inter alia* :—(1) That the sum payable in accordance with the agreement dated 11th October 1928 is in the nature of sale of goodwill or compensation and is not therefore assessable to income tax. (2) That the agreement dated 11th October 1928 included a covenant by the taxpayer to cease dealing in petroleum products, which dealing constituted the whole business of the taxpayer. Accordingly the agreement constituted, amongst other things, a sale of the whole of the taxpayer's business, and portion of the moneys payable under such agreement is attributable to capital as being compensation for the cessation of the company's business. (3) That as the agreement would necessarily put an end to the company's business portion of the moneys payable under such agreement was calculated by the taxpayer as referable to replacement of capital lost owing to depreciation of land and plant acquired for the purpose of carrying on and conducting such business. (4) That the sum of £70,000 and the instalments thereof were not received as the proceeds of carrying on a business but were received as a part and parcel of

a transaction for bringing the business of the taxpayer to an end and handing such business over as a going concern to the Atlantic Co. (5) That such sum of £70,000 and the instalments thereof were not acquired as the proceeds of property acquired by the taxpayer for resale at a profit but represented the proceeds of the realization of an asset which the taxpayer was disabled from selling. (6) That all the proceeds of the agreement are exempt from taxation, being the realization of a capital asset derived from the disposal of the business of the taxpayer as a going concern. (7) That all the proceeds of the agreement are exempt from taxation because such agreement was made with a view to the termination of the taxpayer's business and included the disposal of the goodwill of such business, including the extensive country-selling organization established in connection with and for the purpose of such business. (8) That the taxpayer is entitled to have deducted from the proceeds of the agreement, if the same are taxable, all the costs and losses incurred in establishing the taxpayer's business and in preparing to carry out its agency business, including a proper proportion of losses incurred by depreciation in values of lands acquired for the purpose of carrying on the business.

42. The respondent disallowed the objections and the appellant, being dissatisfied with the decision of the respondent, duly requested him to treat such objection as an appeal and to forward it to the High Court of Australia.

43. The appellant claims that the sum of £14,000 is not assessable income within the meaning of the *Income Tax Assessment Act* 1922-1930.

The questions reserved for the consideration of the Full Court were :—

(1) On the facts and matters hereinbefore set out am I at liberty to find that the half-yearly amounts of £7,000 payable under the agreement of 11th October 1928 or, alternatively, that part of such half-yearly amounts did not constitute assessable or taxable income of the appellant within the meaning of the *Income Tax Assessment Act* 1922-1930 ?

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(2) Is the Commissioner of Taxation entitled as a matter of law upon the materials included in the special case to a finding that the half-yearly amounts of £7,000 payable under the agreement of 11th October 1928 or that part of the half-yearly amounts did constitute assessable or taxable income of the taxpayer within the meaning of the *Income Tax Assessment Act* 1922-1930 ?

(3) Is the taxpayer entitled as a matter of law upon the materials included in the special case to a finding that the half-yearly amounts of £7,000 payable under the agreement of 11th October 1928 or, alternatively, that part of such half-yearly amounts did not constitute assessable or taxable income of the taxpayer within the meaning of the *Income Tax Assessment Act* 1922-1930 ?

Abrahams K.C. (with him *Hardie*), for the appellant. The consideration receivable by the appellant under the cancellation agreement was consideration for the destruction of the appellant's instrument of trade—its goodwill (*Rosehill Racecourse Co.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1)). The payment was for goodwill, which was the alternative to profits (*In re Spanish Prospecting Co. Ltd.* (2)), and was a payment for fixed capital as distinct from circulating capital (*Secretary of State in Council of India* v. *Scoble* (3)). The goodwill of the appellant's business comprised the capacity to carry on under the agency agreement: it was the surrendering for a sum of money the right the appellant had to carry on. One of the purposes of the cancellation agreement was the terminating of the appellant's business; therefore the proceeds of that agreement were, for the reasons shown in *Commissioner of Taxation for Western Australia* v. *Newman* (4) and *Hickman* v. *Federal Commissioner of Taxation* (5), not the proceeds of the carrying on of a business. Circulating capital is capital invested in stock, &c., purchased for sale, or disposal otherwise, in the course of the business (*John Smith & Son* v. *Moore* (6)). Whether capital is fixed capital or circulating capital depends upon the circumstances

(1) (1905) 3 C.L.R. 393, at p. 398.
(2) (1911) 1 Ch. 92.
(3) (1903) A.C. 299.
(4) (1921) 29 C.L.R. 484.
(5) (1922) 31 C.L.R. 232.
(6) (1921) 2 A.C. 13.

of the case (*Golden Horse Shoe (New) Ltd.* v. *Thurgood* (1)). Although, possibly, the amount receivable under the cancellation agreement was computed on the basis of profits which otherwise might have been earned, that amount is, nevertheless, capital and not income (*Glenboig Union Fireclay Co.* v. *Commissioners of Inland Revenue* (2)).

[STARKE J. referred to *De Grey River Pastoral Co.* v. *Deputy Federal Commissioner of Taxation* (*W.A.*) (3).]

There is nothing in the facts before the Court which would justify the Court in holding that the amount payable under the cancellation agreement is income in anticipation. *J. Gliksten & Son Ltd.* v. *Green* (4) was a case of circulating capital converted into money, and is, therefore, distinguishable. The amount receivable by the appellant was not a gain made in pursuance of a business operation in carrying out a scheme for profit-making (*Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (5) ; *Ruhamah Property Co.* v. *Federal Commissioner of Taxation* (6)). The agency agreement was the appellant's one asset, that is, it was its capital out of which it made its profits (*Collins* v. *Firth-Brearley Stainless Steel Syndicate Ltd.* (7)). The money receivable was merely " a change of investment."

[STARKE J. referred to *Chibbett* v. *Joseph Robinson & Sons* (8) and *R.* v. *B.C. Fir and Cedar Lumber Co.* (9).]

Chibbett's Case (10) was referred to in *Hunter* v. *Dewhurst* (11), where the question before the Court was whether certain compensation money was or was not assessable income. The test in compensation cases is : What was the nature of the asset damaged or destroyed having regard to the business of the person or company compensated ? *Anglo-Persian Oil Co.* v. *Dale* (12) is distinguishable because, having regard to its objects, the transaction in that case came within the scope of the company's business, and for that reason *Perrott* v. *Deputy Federal Commissioner of Taxation* (*N.S.W.*) (13) also is

(1) (1934) 1 K.B. 548, at pp. 563, 564.
(2) (1922) 12 Tax Cas. 427 ; (1922) S.C. (H.L.) 112.
(3) (1923) 35 C.L.R. 181.
(4) (1929) A.C. 381.
(5) (1933) 50 C.L.R. 268, at pp. 286, 289, 297, 298, 302.
(6) (1928) 41 C.L.R. 148.
(7) (1925) 133 L.T. 616, at pp. 622, 623 ; 9 Tax Cas. 520, at p. 574.
(8) (1924) 9 Tax Cas. 48, at p. 61 ; 132 L.T. 26, at p. 31.
(9) (1932) A.C. 441.
(10) (1924) 9 Tax Cas. 48 ; 132 L.T. 26.
(11) (1932) 16 Tax Cas. 605.
(12) (1932) 1 K.B. 124.
(13) (1925) 40 C.L.R. 450.

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distinguishable. The fact that the money is payable by instalments is immaterial (*Secretary of State in Council of India* v. *Scoble* (1)). It was not part of the appellant's business to sell or cancel agency agreements (*Collins* v. *Firth-Brearley Stainless Steel Syndicate Ltd.* (2) ; *Rees Roturbo Development Syndicate Ltd.* v. *Commissioners of Inland Revenue* (3)). The business carried on by the appellant was not in agency contracts, but under an agency contract, that is, the cancelled agreement.

[STARKE J. referred to *Ramgopal* v. *Dhanji Jadhavji Bhatia* (4).]

Compensation for a partial cessation of business may be income, but not so where the whole asset is destroyed. In that event compensation is capital.

Sir *Thomas Bavin* K.C. and *A. M. Cohen*, for the respondent. The money receivable by the appellant under the cancellation agreement is the proceeds of the carrying on of a business within the meaning of sec. 4 of the *Income Tax Assessment Act*. Even if the money were, as contended by the appellant, receivable by it in consideration of its surrendering the goodwill of its business, it is taxable under sec. 16 (*d*) of the Act. If the money is receivable in respect of the sale of the appellant's business it is caught by sec. 93A of the Act because the business was an income-producing asset. The money is, in fact, the proceeds of a business carried on by the appellant ; that business was the business provided for in the agency agreement. The cancellation agreement was not in respect of the sale or transfer of any asset. The appellant was merely the distributing agent of the principal company and the cancellation agreement merely indicates a decision by the principal to withdraw the agency and to do the work itself. The nature of the transaction is similar to that involved in *Anglo-Persian Oil Co.* v. *Dale* (5). It is immaterial that the transaction was designed to terminate and had the effect of terminating the appellant's business. Profits made in such a transaction are taxable, as are also moneys paid for the surrendering of the right to make profits (*Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.* (6)). The substantial result of the cancellation

(1) (1903) A.C., at pp. 302, 303.
(2) (1925) 133 L.T. 616 ; 9 Tax Cas. 520.
(3) (1928) 1 K.B. 506, at pp. 510, 512.
(4) (1928) L.R. 55 Ind. App. 299.
(5) (1932) 1 K.B. 124.
(6) (1927) 12 Tax Cas. 927 ; 43 T.L.R. 476.

agreement is a total giving up by the appellant of its right to make profits. By withdrawing the agency the principal did not acquire anything from the agent, and the agent did not sell anything; therefore money paid under the cancellation agreement was paid for the loss of the earning powers under the agency agreement and is profit arising from the business carried on by the appellant, and, as such, is taxable (*Commissioners of Taxation (N.S.W.)* v. *Meeks* (1)).

[STARKE J. The point in that case was: What was the locality of the income ?]

The agency agreement was a contract of service. Money received, whether as compensation or otherwise, in respect of the termination or interruption of that service is taxable income (*R.* v. *B.C. Fir and Cedar Lumber Co.* (2); *J. Gliksten & Son Ltd.* v. *Green* (3); *Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (4)).

[STARKE J. referred to *Short Bros. Ltd.* v. *Commissioners of Inland Revenue* (5).]

Glenboig Union Fireclay Co. v. *Commissioners of Inland Revenue* (6) was discussed in *Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (4). From this aspect there is no difference in principle between the money receivable by the appellant under the cancellation agreement and the profits it would have made had the agency not been terminated. What is meant by, and included in, the expression " carrying on business " was dealt with in *Commissioners of Inland Revenue* v. *Korean Syndicate Ltd.* (7), and *South Behar Railway Co.* v. *Commissioners of Inland Revenue* (8). Income is deemed to have been derived in the year in which it is received (see sec. 19 of the Act). The decisions in *Chibbett* v. *Joseph Robinson & Sons* (9) and *Hunter* v. *Dewhurst* (10) depended upon circumstances peculiar to those cases and are not, therefore, of any assistance to the Court in this matter. What constitutes " goodwill " is shown in *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine Ltd.* (11). Under the agency agreement the appellant

(1) (1915) 19 C.L.R. 568, at pp. 579, 580.
(2) (1932) A.C., at p. 447.
(3) (1929) A.C., at p. 385.
(4) (1930) 16 Tax Cas. 67; (1931) S.C. 156.
(5) (1927) 12 Tax Cas. 955; 136 L.T. 689.
(6) (1922) 12 Tax Cas. 427; (1922) S.C. (H.L.) 112.
(7) (1921) 3 K.B. 258.
(8) (1925) A.C. 476, at pp. 483, 487.
(9) (1924) 9 Tax Cas. 48; 132 L.T. 26.
(10) (1932) 16 Tax Cas. 605.
(11) (1901) A.C. 217.

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had a right for five years to sell the products of the principal company. That right was a licence within the meaning of sec. 16 (*d*) of the Act (*Commissioner of Stamp Duties (N.S.W.)* v. *Yeend* (1)). Payments made annually are, prima facie, income. There is not any suggestion to the contrary in *Secretary of State in Council of India* v. *Scoble* (2). The money receivable by annual instalments by the appellant is receivable as commutation of trading profits which otherwise would have been earned under the agency agreement, and is, therefore, taxable (*Commissioners of Inland Revenue* v. *Northfleet Coal and Ballast Co.* (3)). The Court should disregard the " restrictive " clauses in the cancellation agreement, which, as framed, are too wide to be enforceable (*Vancouver Malt and Sake Brewing Co.* v. *Vancouver Breweries Ltd.* (4)), and should take cognizance only of the real substance of the transaction, which was the withdrawing of the agency and the commutation of possible future profits.

Abrahams K.C., in reply. The distinction drawn between *Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (5) and *Glenboig Union Fireclay Co.* v. *Commissioners of Inland Revenue* (6), serves to support the position taken up by the appellant. *Short Bros. Ltd.* v. *Commissioners of Inland Revenue* (7), *Commissioners of Inland Revenue* v. *Northfleet Coal and Ballast Co.* (3) and *Commissioners of Taxation (N.S.W.)* v. *Meeks* (8) are not applicable because in those cases the moneys involved were, in effect, damages under business contracts. The transaction was not the surrendering by the appellant of goodwill or of a licence within the meaning of sec. 16 (*d*) of the Act because here the matter was not associated with leasehold property.

Cur. adv. vult.

Aug. 24.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND DIXON J. The taxpayer is a company incorporated under the laws of New South Wales. It was registered on 31st August 1925 and went into liquidation on 11th December 1928.

(1) (1929) 43 C.L.R. 235, at pp. 244 *et seq.*
(2) (1903) A.C. 299.
(3) (1927) 12 Tax Cas. 1102.
(4) (1934) 150 L.T. 503.
(5) (1930) 16 Tax Cas. 67; (1931) S.C. 156.
(6) (1922) 12 Tax Cas. 427; (1922) S.C. (H.L.) 112.
(7) (1927) 12 Tax Cas. 955.
(8) (1915) 19 C.L.R. 568.

Its directors resolved upon a winding up on 17th October 1928 after entering into an agreement with the Atlantic Union Oil Co. Ltd., by which, in consideration of £70,000 payable in ten equal half-yearly instalments, it cancelled an agreement with that company appointing the taxpayer company its exclusive agent for five years in New South Wales for the sale of petrol, kerosene and lubricating oils and greases. The agreement of cancellation contained provisions under which the Atlantic Union Oil Co. agreed to pay the taxpayer company a sum of £715 as the surrender value of the lease of the latter's office and another sum of £735 as the price of a local service station. It also contained a provision by which the taxpayer company covenanted that it would not thereafter directly or indirectly handle, trade or deal in petroleum products of any kind.

The question for decision is whether instalments of the sum of £70,000 form part of the assessable income of the taxpayer in the year in which they are received.

In our opinion they do not form part of its assessable income because they are not of an income nature and they do not fall within any of the special provisions of the *Income Tax Assessment Act* 1922-1932 making liable to taxation receipts, which, otherwise, would not be considered income. This conclusion is based upon the substantial nature of the transaction which produced the sum of £70,000. It was, in our opinion, not an incident in the carrying on of the taxpayer company's trade, but the relinquishment and abandonment of the only business which the company conducted. That business consisted in substance of the distribution in New South Wales of petrol and other mineral oil commodities produced by the Union Oil Co. of California. When the taxpayer company was brought into existence, a New South Wales company called "F. W. Williams & Co. Ltd." had acquired the right to exercise the agency of the Union Oil Co. of California in New South Wales and two other States. Another company, called Construction Co. of Australia, appears to have arranged to find £10,000 for the carrying on of the agency upon terms of receiving a share of the profits. The immediate purpose of forming the taxpayer company was evidently the effectuation of this arrangement. The relations of these companies with one another and with the new company

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were regulated by an agreement and by the new company's articles of association. Its shares were divided into two classes. Ten thousand £1 shares of one class were allotted to the Construction Co. and fully paid for in cash. Ten thousand shares of the second class were allotted to F. W. Williams & Co. Ltd., but not more than 1s. a share was payable thereon except in the event of a winding up. The profits of the company were made divisible, not in proportion to the amount of capital paid upon the shares but in proportion to the number of shares held. The directors consisted of a representative of the Construction Co. and a representative of F. W. Williams & Co. Ltd.

The agreement required the taxpayer company to advance £10,000 to F. W. Williams & Co. Ltd. to enable it to carry on the agency which F. W. Williams & Co. Ltd. was to exercise as trustee for the taxpayer company. The net proceeds were to be paid over to the taxpayer company and were to be applied in the first instance in discharge of the advance and of any subsequent advances. The agency was carried on under these arrangements for a short time only. On 1st April 1926, the taxpayer company entered into a direct agreement with the Union Oil Co. of California by which, for a period of five years from 1st June 1926, the Oil Co. agreed to sell to it exclusively its products for delivery into New South Wales and the two other States and the taxpayer company agreed to purchase from the Oil Co. its entire requirements of gasoline motor spirit and kerosene and at least half its requirements of lubricating oil and grease. Before this agreement had been in operation for two years, the Oil Co. decided to form a company in New South Wales for the importation of its products from America. A company was incorporated under the law of New South Wales on 4th October 1927. It was called the "Atlantic Union Oil Company Ltd." Before its formation an agreement was made between trustees on its behalf and the taxpayer company, by which the Atlantic Union Oil Co. Ltd. was to appoint the taxpayer company its sole agent for its merchandise in New South Wales for five years from 1st April 1928. The terms of the agency, which was *del credere*, entitled the agent to a percentage remuneration but precluded it

from dealing with merchandise manufactured or supplied by any other person unless in specified exceptional circumstances.

After its incorporation the Atlantic Union Oil Co. Ltd. adopted this agreement, which came into operation on 1st May 1928. An agreement was made between the taxpayer company and F. W. Williams & Co. Ltd., which had continued to supply its working organization, that when the new agency came into operation the taxpayer company should provide its own staff and organization and that 10,000 more shares of £1 should be allotted to F. W. Williams & Co. Ltd. on the same terms as before. Apart from the 20,000 £1 shares paid up to 1s. thus issued, the company appears to have issued 43,000 £1 shares fully paid up in addition to the 10,000 £1 shares issued on its foundation to the Construction Co.

After the new agency agreement had been in operation for six months, the Atlantic Union Oil Co. Ltd., presumably because it wished to undertake the distribution as well as the importation of its parent company's products, negotiated with the taxpayer company the agreement by which in consideration of the sum of £70,000 the agency agreement should be cancelled.

The powers taken by the taxpayer company in its memorandum of association were ample to enable it to undertake other activities besides the selling of petrol and petroleum products, but, admittedly, it did not do so. The actual business which it established and carried on was confined to dealing, under the successive arrangements we have described, with the goods produced by the Union Oil Co. of California. The contract of agency conferred for a term of years upon the taxpayer company rights by the exercise of which it might or would have been able to earn profits. But the profits would have arisen from the exertions of the taxpayer company in disposing of the Union Oil Co.'s merchandise. They would have consisted in the net amount of the percentage commission paid as remuneration for the services that it actually performed as agent. The contract operated to secure to the taxpayer company definite advantages. It gave an opportunity of performing those services for a period of time which was both certain and lengthy at a fixed remuneration likely to be profitable. But the company did not, as consistently with its objects it might have done, carry on a business

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of making contracts with customers and performing them. Its business consisted exclusively in marketing in parts of Australia the products of the Union Oil Co. The cancelled contract of agency constituted its authority for five years to carry on that business.

It may be assumed that, in estimating the sum to be paid to the taxpayer company for the cancellation of the contract, both it and the Atlantic Union Oil Co. were guided by their opinion of what the future profits would be. But it is fallacious to treat a sum as income because it is measured by reference to a loss or deprivation of future income or earnings (cf. *Glenboig Union Fireclay Co.* v. *Commissioners of Inland Revenue* (1); *Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (2)). Lord *Buckmaster* said in the *Glenboig Union Fireclay Co.'s Case* (3): "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test." Sums of money paid by way of damages, compensation or indemnity for a loss of profit incurred in the course of carrying on an enterprise or undertaking may, no doubt, be considered income, because they are part of the profits derived from carrying on the business, although they are occasioned by unusual or exceptional circumstances or events (see *R.* v. *B.C. Fir and Cedar Lumber Co.* (4)). In *Short Bros. Ltd.* v. *Commissioners of Inland Revenue* (5), sums of compensation were paid to shipbuilders' firms for the cancellation of contracts for ship construction and these sums were held to be profits of the trade. Lord *Hanworth* speaking of one such sum said:—"The element of futurity, the postponement of payments, may have a reflex effect upon the actual sum to be paid, but it seems to me a refinement to describe the operation in respect of which the £100,000 was paid as being for the purpose of liquidating or giving the present value of a future prospective profit. It seems to be simply the sum paid in order that, as a matter of business, the responsibility and liability under the contract should be terminated and the business should be free to engage in others. Looked at from this point of view it appears

(1) (1922) 12 Tax Cas. 427, at p. 463.
(2) (1930) 16 Tax Cas. 67, at pp. 72, 75; (1931) S.C. 156.
(3) (1922) 12 Tax Cas., at p. 464.
(4) (1932) A.C. 441.
(5) (1927) 12 Tax Cas. 955; 136 L.T. 689.

clear that the sum received was received in ordinary course of business, and that there was not in fact any burden cast upon the company not to carry on their trade. It was not truly compensation for not carrying on their business: it was a sum paid in ordinary course in order to adjust the relation between the shipyard and their customers" (1).

In the present case the sum in question was paid as the consideration for the termination of the agency which constituted the only business carried on by the taxpayer company. It was "truly compensation for not carrying on their business." It comes within the principles expressed by *Rowlatt* J. in *Chibbett* v. *Joseph Robinson & Sons* (2) when he said: "A payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all." It is not within the qualification of that statement made by Lord *Macmillan* in *Dewhurst's Case* (3), which, in effect, was that, if the payment represents deferred or contingent remuneration for services performed, the payment "does not necessarily cease to be remuneration for services because it is payable when the services come to an end."

Like *Short's Case* (4), *Commissioners of Inland Revenue* v. *Northfleet Coal and Ballast Co.* (5) related to compensation for the loss of profits incurred in the course of carrying on the business by the termination of one particular, although a very important, contract of a kind which it was the company's business to make. (Cf. *Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (6).)

In our opinion the payments on account of the sum of £70,000 are of a capital nature. They are not part of "the proceeds of any business carried on by the taxpayer" within the definition of "income from personal exertion" in sec. 4 of the *Income Tax Assessment Act* 1922-1932. We think such payments are not a profit arising from the carrying out of any profit-making undertaking or scheme within par. (*ba*) of the definition of "income" in that section; and cf. *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (7). We are altogether unable to agree with the argument

(1) (1927) 12 Tax Cas., at p. 973.
(2) (1924) 9 Tax Cas., at p. 61.
(3) (1932) 16 Tax Cas., at p. 653.
(4) (1927) 12 Tax Cas. 955; 136 L.T. 689.
(5) (1927) 12 Tax Cas. 1102.
(6) (1930) 16 Tax Cas. 67; (1931) S.C. 156, and see particularly Lord *Sand's* judgment.
(7) (1933) 50 C.L.R. 268.

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made for the Commissioner of Taxation upon sec. 16 (*d*) to the effect that the consideration for the cancellation of the contract of agency was an amount received for surrendering a goodwill or licence. The contract of agency is neither goodwill nor a licence. Sec. 93A, which was also relied upon, does not appear to us to have any application to the transaction.

In our opinion the questions in the special case should be answered as follows:—(1) Yes. (2) No. (3) Yes. Costs in the appeal.

STARKE J. The facts are fully set out in the case stated by *Rich* J. for the opinion of this Court. The substance of the matter is that by force of an agreement dated 16th November 1927, adopting and ratifying an agreement of 30th June 1927, the Atlantic Union Oil Co. Ltd. (hereinafter called the principal) appointed the Californian Oil Products Ltd. (hereinafter called the agent) sole agent for the sale of petroleum products and lubricating oils and greases from time to time manufactured or acquired or dealt in by the principal, during a period of five years from 1st April 1928 to 31st March 1933, in the territory of New South Wales, excepting certain specified areas. The remuneration payable to the agent, and the other terms and conditions of the agency, are set forth in detail in the agreements, and need not be here repeated. By an agreement dated 11th October 1928, between the principal and the agent, the agreement of 16th November 1927 was cancelled. In consideration of such cancellation, the principal agreed to pay to the agent the sum of £70,000, payable by ten equal half-yearly instalments, without interest, of £7,000 each, the first of such instalments to be paid on 1st May 1929, and the remaining instalments to be paid at successive intervals thereafter of six months each. The agent covenanted that, as from the date of the signing of the cancellation agreement, it would not directly or indirectly handle or deal in petroleum products of any kind. And each of the parties released the other from all claims of every kind other than those arising under and by virtue of the provisions of this agreement. The Commissioner of Taxation assessed the agent to income tax in respect of the sum of £14,000 received by it under the agreement of 11th October 1928

during the year which ended on 30th June 1931. The question is whether he was right in so doing.

It is now well enough settled that the profits arising from carrying on or carrying out any trade or business by a taxpayer, or any scheme of profit-making, are assessable to income tax (*Ruhamah Property Co.* v. *Federal Commissioner of Taxation* (1); and cf. *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (2); *Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd. (In Liquidation)* (3)). The argument for the appellant is that the sum of £14,000 assessed to income tax did not accrue to the agent in carrying on or carrying out any trade or business or any scheme of profit-making, or as a reimbursement of or damages in lieu of the profits which the agent would have earned under the agreement, but was compensation for a loss of opportunity to earn profits; in other words, that the sum of £14,000 did not represent a receipt in the nature of profits or income, but a receipt in the nature of capital. Now the £70,000 mentioned in the agreement is payable on the terms that the agent shall not pursue its agency; it is deprived of its right to carry on its agency and earn remuneration or income therefrom; its right under the agreement of 16th November 1927 has been "sterilised and destroyed." The case of *Glenboig Union Fireclay Co.* v. *Commissioners of Inland Revenue* (4), makes it clear, I think, that a payment made in such circumstances cannot be regarded as a profit or income earned in the course of business, or as part of a profit-making scheme. It represents a capital and not an income receipt. It may be that the sum was calculated on a basis of profits, but, as Lord *Buckmaster* observed in the *Glenboig Union Fireclay Co.'s Case* (5), "it is unsound to consider the fact that the measure, adopted for the purpose of seeing what the total amount should be, was based on considering what are the profits that would have been earned." The line of demarcation between cases on the one side and the other is neatly stated in the report of the argument in the case of *Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (6), and the important cases are there collected in a footnote. But the decision

(1) (1928) 41 C.L.R., at p. 151.
(2) (1914) A.C. 1001, at p. 1009.
(3) (1931) A.C. 224, at p. 231.
(4) (1921) S.C. 400; (1922) 12 Tax Cas. 427; (1922) S.C. (H.L.) 112.
(5) (1922) S.C. (H.L.), at p. 115; 12 Tax Cas., at p. 463.
(6) (1930) 16 Tax Cas. 67; (1931) S.C. 156.

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in the *Glenboig Union Fireclay Co.'s Case* (1) renders further consideration of the matter unnecessary.

The questions should be answered :—(1) Yes. (2) No. (3) Yes.

EVATT AND MCTIERNAN JJ. In our opinion the questions should be answered as follows :—(1) Yes. (2) No. (3) Yes.

Although the objects for which the appellant was incorporated covered a very wide scope, the only business which it carried on was the distribution of products for the propulsion and lubrication of motor vehicles under the terms of the agreements, described in the special case, which it entered into from time to time. By these agreements it procured the right to sell the products of the Union Oil Co. of California. It is unnecessary to set out in detail the terms of the various agreements under which the appellant carried on such business, nor the terms of the agreement of 11th October 1928 whereby the last of such agreements was cancelled. The agreement which was thereby cancelled was entered into on 16th November 1927 between the appellant and the Atlantic Union Oil Co., which had been incorporated in New South Wales to import and distribute the products of the Union Oil Co., and by this agreement the Atlantic Union Oil Co. appointed the appellant as its sole agent for a defined area in New South Wales for a period of five years from 1st April 1928.

The agreement of 11th October 1928 provided for the cancellation of the earlier agreement in consideration of the payment by the Atlantic Oil Co. of £70,000 by ten half-yearly instalments of £7,000 and the appellant covenanted that, as from the signing of the agreement it would not directly or indirectly handle, trade or deal in petroleum products of any kind. The main contention of the Commissioner is that two sums of £7,000 which the appellant received in the year ended 30th June 1931 pursuant to the agreement of cancellation answer the description of " the proceeds of any business carried on by the taxpayer," which is contained in sec. 4 of the *Income Tax Assessment Act* 1922-1932. The Commissioner also relied upon par. (*ba*) of the definition of " income " in the Act. These sums are part of the moneys paid in consideration of the appellant's agreeing to cancel the agreement under which it carried

(1) (1922) S.C. (H.L.) 112 ; 12 Tax Cas. 427.

on its business. In our opinion neither description relied on by the Commissioner includes the moneys now in question. Such moneys are not the proceeds of the business carried on by the appellant. The only business which it carried on was the disposal of the commodities mentioned in the agreement of 16th November 1927 pursuant to the terms thereof. There is no evidence that the appellant ever carried on the business of making and disposing of agency contracts, and the case is therefore distinct from *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (1). (Cf. *Chibbett* v. *Joseph Robinson & Sons* (2), per *Rowlatt* J.)

If it be true, as contended, that the sum of £70,000 is the estimated amount of profits which would have been derived by the appellant from carrying on its agency business for the remainder of the agreed period, it does not follow that such money represents the proceeds of carrying on such business. The adoption of this method of calculating the value of the agency is insufficient to impress the sum with the character of income. In truth and in substance the sum of £70,000 is the amount agreed to be paid in consideration of the termination and liquidation of the agency as distinct from the mere restriction of the appellant's trading activities. No part of the £70,000 is therefore assessable income within the meaning of sec. 4 (*Glenboig Union Fireclay Co.* v. *Commissioners of Inland Revenue* (3); *Burmah Steam Ship Co.* v. *Commissioners of Inland Revenue* (4)).

There is no substance in the argument that sec. 16 (*d*) of the *Income Tax Assessment Act* can operate to bring the sum in question within the definition of assessable income.

Questions in the special case answered as follows: —(1) *Yes.* (2) *No.* (3) *Yes. Costs in the appeal.*

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.

(1) (1933) 50 C.L.R. 268.
(2) (1924) 9 Tax Cas., at p. 61.
(3) (1922) 12 Tax Cas., at p. 463.
(4) (1930) 16 Tax Cas. 67, at pp. 72, 75.