

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

THE COMMISSIONER OF TAXATION OF
THE COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

JUDITH STELLA MURRY

RESPONDENT

Commissioner of Taxation v Murry (B19-1997) [1998] HCA 42
16 June 1998

ORDER

1. *Appeal allowed.*
2. *The appellant pay the respondent's costs in this Court and in the Federal Court of Australia.*

On appeal from the Federal Court of Australia

Representation:

A H Slater QC with J A Logan for the appellant (instructed by Australian Government Solicitor)

R W Gotterson QC with G W O'Grady for the respondent (instructed by McCullough Robertson)

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CATCHWORDS

Commissioner of Taxation v Murry

Income tax - Capital gains - Exemptions - Goodwill - Disposal of taxi licence and shares - Whether disposal of a "business" that "includes, or includes an interest in, goodwill of the business" - Nature of goodwill - Sources of goodwill - Value of goodwill.

Words and phrases - "asset", "goodwill".

Income Tax Assessment Act 1936 (Cth), Pt IIIA, ss 160A, 160ZZR.

1 GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. The question in this appeal is whether the amount received on the disposal of a licence to operate a taxi, or some part of that amount, constituted a payment for goodwill for the purpose of Pt IIIA of the *Income Tax Assessment Act* 1936 (Cth) ("the Act").

2 By selling the taxi licence and certain shares, the taxpayer and her husband disposed of assets for the purposes of Pt IIIA of the Act. Pursuant to the provisions of that Part, the taxpayer realised a capital gain as a result of the transaction. The immediate issue is whether the taxpayer was entitled to an exemption of part of that gain in accordance with s 160ZZR of the Act. That exemption was available only where¹:

"a taxpayer disposes of, or of an interest in, a business ... being a disposal that includes, or includes an interest in, the goodwill of the business".

3 The appeal is brought by the Commissioner of Taxation against an order of the Full Court of the Federal Court². That Court (Beaumont and Drummond JJ, Kiefel J dissenting) dismissed an appeal by the Commissioner from a decision of the Administrative Appeals Tribunal which upheld an objection by the respondent ("the taxpayer") against an assessment of income tax by the Commissioner. The Tribunal held that, of \$220,000 paid for "shares, cab and licence", \$189,000 constituted payment for goodwill. The Tribunal accepted that the taxi was valued at \$6,000 and the shares³ at \$25,000 and found that the balance of \$189,000 paid for the licence was in fact paid for "goodwill". The taxpayer was therefore entitled to a 50 per cent exemption from capital gains tax.

4 In our opinion, the appeal should be allowed. Section 160A defines "asset" to include "goodwill", but neither Pt IIIA nor the Act generally attempts to give any special meaning to the term. Goodwill is inseparable from the conduct of a business. It may derive from identifiable assets of a business, but it is an indivisible item of property, and it is an asset that is legally distinct from the sources - including other assets of the business - that have created the goodwill. Because that is so, goodwill does not inhere in the identifiable assets of a business, and the sale of an asset which is a source of goodwill, separate from the business itself, does not involve any disposition of the goodwill of the business.

1 s 160ZZR(1)(a).

2 *Commissioner of Taxation v Murry* (1996) 68 FCR 156.

3 The shares were issued by Suncoast Pty Ltd, a taxi co-operative which operated on the Queensland Sunshine Coast. Membership of the co-operative "was a pre-requisite to the operation of a taxi in the area."

2.

- 5 In the present case the taxpayer and her husband did not dispose of a business within the meaning of the exempting provision⁴. Nor did they dispose of an interest in a business, being a disposition which included (or included an interest in) the goodwill of the business. The taxpayer and her husband sold a licence to use a taxi together with shares in a taxi co-operative company. Prior to this sale, the licence was leased to a Mr Gower who, at the time of sale of the licence, owned the vehicle with which the licence was identified. In so far as the licence gave a right to conduct a taxi business, the business was conducted by Mr Gower. The sale of the licence was not a disposition by the taxpayer of the goodwill of Mr Gower's business. Nor did it dispose of the goodwill of the business of the taxpayer and her husband in so far as that business involved the running of another taxi and the leasing of the licence which is the subject of this appeal.

The factual background

- 6 In 1987, Mrs Judith Murry, the respondent, and her husband conducted as partners what she described as a "taxi business". The business at that stage consisted of a single taxi, the licence for which had been purchased on the open market. In November 1987, the partners acquired a second taxi licence from the Queensland Department of Transport upon the payment of the sum of \$85,000. They also acquired shares in Suncoast Pty Ltd which were valued at \$15,000. The partnership leased the taxi licence to Mr Gower for a monthly fee. Mr Gower owned the vehicle which had the benefit of the partners' licence. In March 1992, the partners sold this second licence and the shares in Suncoast Pty Ltd to a Mr and Mrs Wilkins. At the same time, Mr Gower sold his vehicle to them. The "contract of sale" was on a form issued by the Department which was headed "APPLICATION FOR TRANSFER LICENCE/S TO HIRE - TAXIMETER CAB".
- 7 Item 1 of the form was addressed to the Commissioner for Transport and stated that the partners "being the holder/s of licence/s to hire taximeter ... in respect of the vehicle/s described hereunder, hereby apply for the transfer of the said licence/s to hire" to Mr and Mrs Wilkins. Item 2 was headed "DESCRIPTION OF VEHICLES AND PARTICULARS OF SALE". Among other matters, it contained the following statements:

4 s 160ZZR(1)(a).

3.

Sale price vehicle.....	\$6,000
Shares.....	\$25,000
Goodwill (Licence Value).....	\$189,000
Total sale price.....	\$220,000

An entry in the form identified Mr Gower as the owner of the vehicle.

8 Item 4 was headed "TRANSFEREE/S" and contained an application by Mr and Mrs Wilkins "for the transfer to me/us of licence/s to hire as detailed in Item 2 of this application".

9 As a result of this transaction and after taking into account the index provisions of the Act, the partnership realised a capital gain of \$6,130 on the shares and \$72,071 in respect of the licence. Mrs Murry's share of the capital gain on the licence was \$36,036. In her income tax return for the year ended 30 June 1992, she claimed that this sum was a receipt for the sale of the goodwill attaching to the licence and that, in accordance with s 160ZZR of the Act, she was entitled to a 50 per cent reduction of the capital gain. The Commissioner rejected her claim.

10 The learned Deputy President of the Tribunal said that it "became clear during the hearing that the gross operating profit of a taxi is largely dependent on how much the owner is prepared to commit him or herself to the business and the extent the vehicle is on the road plying for hire."⁵ In cross-examination, Mr Murry agreed with counsel "that it was not the *licence* which made the difference, but the skill of the driver" (emphasis added). The Deputy President said⁶:

"As I understand the taxi business, it involves (i) the right to ply for hire ... (ii) the right to substitute another licensee for valuable consideration ... and (iii) what [counsel for the Commissioner] refers to as 'the monopoly right' to operate a taxi in the specified area.

On that view, it seems to me that the taxi service operated by the taxpayer contains goodwill and what [counsel] refers to as a 'monopoly right' is, in reality, an attempt by Government to limit the number of licences in order to regulate and stabilise the market. It follows that the holder of a taxi licence not only obtains the right to exploit the licence by plying his or her cab for hire, but the advantage conferred by virtue of the monopoly, or, in the words

5 (1995) 32 ATR 1091 at 1093; 95 ATC 473 at 475.

6 (1995) 32 ATR 1091 at 1097; 95 ATC 473 at 479.

of Warrington J in *Hill v Fearis*⁷ 'the advantage, whatever it may be, which [the purchaser] gets by continuing to carry on and being entitled to represent to the outside world that he is carrying on a business which has been carried on for some time previously'. It is this 'composite' that the vendors enjoyed and which - the business carried on by them not coming to an end when they sold the shares, cab and licence - they intended the purchasers to possess and enjoy. If a taxi business cannot be operated without a licence - and that is made clear in the Transport Act - it seems to me to follow that the licence is so intimately connected with the business as to constitute part of the goodwill of the business."

The calculation of a net capital gain

- 11 Part IIIA of the Act requires the net capital gain of the taxpayer for the taxation year to be included in the taxpayer's assessable income for that year⁸. A net capital gain is the excess of the capital gains for the year over the available capital losses⁹. A capital gain accrues to a taxpayer when the consideration for the disposal of an asset exceeds the indexed cost base of the asset¹⁰. Any payment received in respect of the disposal is part of the relevant consideration¹¹. The indexed cost base is the indexed amount of the consideration given for the asset¹². Money paid to acquire the asset is part of that consideration¹³.

The nature of goodwill

- 12 As pointed out earlier in these reasons, s 160A defines "asset" to include "goodwill", but neither Pt IIIA nor the Act generally attempts to define goodwill. That is not surprising because, as Dawson J pointed out in this Court in *Hepples v*

7 [1905] 1 Ch 466 at 471.

8 s 160ZO.

9 s 160ZC.

10 s 160Z.

11 s 160ZD(1).

12 s 160ZH(2).

13 s 160ZH(4).

5.

*Federal Commissioner of Taxation*¹⁴, "[g]oodwill' is notoriously difficult to define". One reason for this difficulty is that goodwill is really a quality or attribute derived from other assets of the business¹⁵. Its existence depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business. As Dixon CJ, Williams, Fullagar and Kitto JJ pointed out in *Box v Commissioner of Taxation*¹⁶, "[g]oodwill includes whatever adds value to a business, and different businesses derive their value from different considerations." Another reason is that courts have been called on to define and identify goodwill in greatly differing contexts. In some cases, the nature of goodwill as property may be the focus of the legal inquiry. In other cases, the value of the goodwill of a business may be the focus of the inquiry. And in still other cases, identifying the sources or elements of goodwill may be the focus of the inquiry. It is unsurprising that in these varied situations courts have defined goodwill in ways that, although appropriate enough in one situation, are inadequate in other situations.

13 Goodwill is also an accounting and business term as well as a legal term. The understanding of accountants and business persons as to the meaning of the term differs from that of lawyers. That has added to the difficulty of achieving a uniform legal definition of the term, particularly since accounting and business notions of goodwill have proved influential in the valuation of goodwill for legal purposes.

14 Australian accounting standards describe goodwill as comprising "the future benefits from unidentifiable assets which, because of their nature, are not normally individually brought to account."¹⁷ Some accounting theorists see goodwill as representing the difference between the present value of the future earnings of the

14 (1992) 173 CLR 492 at 519.

15 cf Slater, "The Nature of Goodwill", (1995) 24 *Australian Tax Review* 31.

16 (1952) 86 CLR 387 at 397.

17 Commentary, Approved Accounting Standard ASRB 1013: *Accounting for Goodwill*. The Commentary names market penetration, effective advertising, good labour relations and superior management as examples of these unidentifiable assets. The Commentary does not recognise goodwill as comprising any asset which is capable of being individually identified and recorded, such as a patent, licence or copyright.

business and the normal return on its identifiable assets¹⁸. Business people see goodwill as concerned with the notion of excess value, a notion colourfully expressed in the statement of an American funds manager that "[i]f you pay \$450 million for a TV station worth \$2.5 million on the books, the accounts call the extra \$447.5 million 'goodwill'¹⁹." Accountants adopt a similar approach in the case of purchased goodwill. Approved Accounting Standard ASRB 1013 states that:

"Goodwill which is purchased by the company shall be measured as the excess of the cost of acquisition incurred by the company over the fair value of the identifiable net assets acquired."

- 15 Originally, the legal definition of goodwill emphasised the patronage of the business. In *Cruttwell v Lye*²⁰, Lord Chancellor Eldon said that goodwill was "nothing more than the probability, that the old customers will resort to the old place." However, "a wider view soon prevailed"²¹. In *Churton v Douglas*²², Wood V-C said that goodwill was:

"every advantage - every positive advantage ... that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

This definition received the approval of Lord Herschell in *Trego v Hunt*²³. In the United States, Story in his book on partnership²⁴ defined goodwill as: "the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein".

18 Meigs and Meigs, *Accounting: The Basis for Business Decisions*, 8th ed (1990) at 402.

19 Lynch, *One Up on Wall Street*, (Simon and Schuster) (1989) at 210.

20 (1810) 17 Ves Jun 335 at 346 [34 ER 129 at 134].

21 *Box* (1952) 86 CLR 387 at 396.

22 (1859) Johns 174 at 188 [70 ER 385 at 391].

23 [1896] AC 7 at 17.

24 Story, *Commentaries on the Law of Partnership*, 5th ed (1859) at 158.

7.

- 16 One of the most cited definitions of goodwill for legal purposes in the Anglo-Australian legal world is found in the speech of Lord Lindley in *Inland Revenue Commissioners v Muller & Co's Margarine Limited*²⁵ where his Lordship said:

"Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own."

- 17 Lord Macnaghten gave another much cited definition of goodwill in the same case. His Lordship said²⁶:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade."

25 [1901] AC 217 at 235 cited by Dixon CJ, Williams, Fullagar and Kitto JJ in *Box* (1952) 86 CLR 387 at 396-397.

26 [1901] AC 217 at 223-224.

18 Earlier Lord Macnaghten had said²⁷:

"It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will - of course under the conditions attaching to property of that nature."

19 An equally useful judicial definition of goodwill is to be found in *Haberle Crystal Springs Brewing Co v Clarke*²⁸, a United States case, where Judge Swan pointed out that:

"A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess of value is nothing more than the recognition that, used in an established business that has won the favor of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them, and his privilege of continuing to deal with customers attracted by the established business, are property of value. This latter privilege is known as good will."

20 This definition comes close to achieving a synthesis between the legal, accounting and business definitions of goodwill. But it cannot be regarded as exhaustive. A business may have goodwill for legal purposes even though its trading losses are such that its sale value would be no greater than its "break-up" value. Once the courts rejected patronage as the touchstone of goodwill in favour of the "added value" concept, it might seem impossible for a business to have goodwill for legal purposes when its value as a going concern does not exceed the value of the identifiable assets of the business. But the attraction of custom still remains central to the legal concept of goodwill. Courts will protect this source or element of goodwill irrespective of the profitability or value of the business. Thus, a person who has sold the goodwill of a business will be restrained by injunction from soliciting business from a customer of the old firm²⁹ even though the value of that firm is no greater than the value of its identifiable assets.

27 [1901] AC 217 at 223.

28 30 F 2d 219 at 221-222 (2nd Cir) (1929) cited in Note, "An Inquiry into the Nature of Goodwill", (1953) 53 *Columbia Law Review* 660 at 661.

29 *Trego* [1896] AC 7.

21 Such considerations seem to make it impossible to achieve a synthesis of the legal and the accounting and business conceptions of goodwill. Accounting and business conceptions of the term emphasise the necessity for the business to have some value over and above the value of the identifiable assets. For that reason, the definition of goodwill by McHugh J in *Hepples*³⁰, which was much influenced by the accounting and commercial view of goodwill, should not be regarded as an accurate statement of the legal definition of goodwill.

22 The definitions of Lord Lindley, Lord Macnaghten and Judge Swan bring out the point that goodwill has three different aspects - property, sources and value³¹ which combine to give definition to the legal concept of goodwill. What unites these aspects is the conduct of a business. As Barwick CJ pointed out in *Geraghty v Minter*³², "goodwill is not something which can be conveyed or held in gross: it is something which attaches to a business. It cannot be dealt with separately from the business with which it is associated".

Goodwill as property

23 From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business³³ because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom." Goodwill is correctly identified as property³⁴, therefore, because it is the legal right or privilege to conduct a business in substantially the

30 (1992) 173 CLR 492 at 542: "[G]oodwill is the collective name for various intangible sources of the earnings of a business which are not able to be individually quantified and recorded in the accounts as assets of the business."

31 cf Note, "An Inquiry into the Nature of Goodwill", (1953) 53 *Columbia Law Review* 660 at 661; see Taylor, *Capital Gains Tax: Business Assets and Entities*, (1994) at 206.

32 (1979) 142 CLR 177 at 181. In the same case at 193, Stephen J said that goodwill was "inherently inseverable from the business to which it relates."

33 *Bacchus Marsh Concentrated Milk Co Ltd (in Liquidation) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 438.

34 *Potter v The Commissioners of Inland Revenue* (1854) 10 Ex 147 at 159 [156 ER 392 at 396]; *Muller* [1901] AC 217 at 223; *Bacchus Marsh Concentrated Milk* (1919) 26 CLR 410 at 438; *Bollinger v Costa Brava Wine Co Ltd* [1960] Ch 262 at 275.

same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business³⁵.

The sources of goodwill

- 24 The goodwill of a business is the product of combining and using the tangible, intangible and human assets of a business for such purposes and in such ways that custom is drawn to it. In *Federal Commissioner of Taxation v Williamson*³⁶, Rich J described the goodwill of a business as referable "in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it, and in part to the likelihood of competition, many customers being no doubt actuated by mixed motives in conferring their custom." It is common to describe goodwill as being composed of elements³⁷. However, goodwill is a quality or attribute that derives *inter alia* from using or applying other assets of the business. Much goodwill, for example, derives from the use of trade marks or a particular site or from selling at competitive prices. But it makes no sense to describe goodwill in such cases as composed of trade marks, land or price, as the case may be. Furthermore, many of the matters that assisted in creating the present goodwill of a business may no longer exist³⁸. It is therefore more accurate to refer to goodwill as having sources than it is to refer to it as being composed of elements. In *Muller*³⁹, Lord Lindley referred to goodwill as adding value to a business "by reason of" situation, name and reputation, and other matters and not because goodwill was composed of such elements.

(i) Typical sources of goodwill

- 25 Many of the sources of goodwill are not themselves property. Nor are they assets for accounting purposes. Thus, manufacturing and distribution techniques, the efficient use of the assets of a business, superior management practices and

35 *Smale v Graves* (1850) 3 De G & Sm 706 [64 ER 670]; *Wedderburn v Wedderburn* (1856) 22 Beav 84 at 104 [52 ER 1039 at 1047]; *Smith v Everett* (1859) 27 Beav 446 [54 ER 175]; *Robertson v Quiddington* (1860) 28 Beav 529 [54 ER 469]; *Hall v Barrows* (1863) 4 De G J & S 150 [46 ER 873]; *Muller* [1901] AC 217 at 224; *Commissioner of Taxation v Just Jeans Pty Ltd* (1987) 16 FCR 110.

36 (1943) 67 CLR 561 at 564.

37 For example, Lord Macnaghten in *Muller* [1901] AC 217 at 224.

38 Examples are an advertising campaign that has finished or a patent that has expired.

39 [1901] AC 217 at 235.

good industrial relations with employees, may be sources of the goodwill of a business because they motivate service or provide competitive prices that attract customers. Yet they are neither property, nor assets for accounting purposes.

26 In some businesses, price and service may have little effect in attracting custom. The goodwill of such businesses may derive almost wholly from their location. This will often be the case where there is no nearby competitor and custom is drawn from nearby residents or those who must pass by the site of the business. The lack of competition resulting from an enforceable restrictive covenant may also enhance the goodwill of a business⁴⁰. The existence of statutory monopolies in respect of the products of a business such as patents or trade marks may also attract custom to an extent that is unachievable in similar businesses.

27 Goodwill may also be the product of expenditures rather than the use of assets⁴¹. Thus, money spent on advertising and promotions, although charged against annual earnings rather than capitalised, may generate brand, product or business name recognition that helps to generate revenue. And part at least of the moneys expended on wages, labour relations and customer services may result in creating goodwill for a business.

28 Goodwill may also be the product in whole or in part of circumstances external to the business or its locality. Thus, the revenues of a business may be largely due to imperfect or inefficient competition or extensive market penetration.

(ii) Legal protection of the sources of goodwill

29 To the extent that the proprietor of a business has the right or privilege to conduct the business in the manner and by the means which have attracted custom to the business, the courts will protect the sources of the goodwill of the business, so far as it is legally possible to do so. Consequently, a vendor of the goodwill of

40 *Box* (1952) 86 CLR 387 at 399.

41 In *Magna Alloys and Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 at 229 Brennan J notes:

"Though goodwill is a capital asset of a business it is frequently earned and maintained by the daily activities of those engaged in the business. The valuable if intangible asset of goodwill frequently grows out of activities the cost of which is a charge on revenue account".

See also *National Australia Bank Ltd v Federal Commissioner of Taxation* (1997) 151 ALR 225.

a business will not be permitted to derogate from his or her grant⁴² and may be restrained from directly soliciting custom from the old customers⁴³. Furthermore, a contract for the sale of the goodwill of a business will ordinarily transfer to the purchaser all those matters and things essential to the existence of the goodwill unless the terms of the contract or the surrounding circumstances indicate otherwise. Similarly, the mortgage of licensed premises and its goodwill entitles the mortgagee to the assignment of the licence⁴⁴. Where goodwill exists, its transfer, mortgage or protection will extend, so far as legally possible, to all the external and internal sources of the earnings of a business although many of them may not be able to be individually quantified and recorded in the accounts of the business.

(iii) The transfer of assets which are sources of goodwill

- 30 Care must be taken to distinguish the sources of the goodwill of a business from the goodwill itself. Goodwill is an item of property⁴⁵ and an asset in its own

42 *Trego* [1896] AC 7 at 19, 25; *Harrison v Gardner* (1817) 2 Madd 198 at 219 [56 ER 308 at 316].

43 *Trego* [1896] AC 7.

44 *Garrett v Licensing Justices of Division of St Marylebone, Middlesex* (1884) 12 QBD 620.

45 Some writers assert that, jurisprudentially, goodwill is no more a form of property than information (see, for example, Slater, "The Nature of Goodwill", (1995) 24 *Australian Tax Review* 31 at 31 who argues that goodwill is a property in the sense of being a quality or attribute but is "neither property nor any sort of right, whether incorporeal or otherwise. Rather it is, like value, a quality or attribute which results from the presence of rights, assets, legal persons or qualities, none of which themselves are goodwill." However, courts and the judges of appellate courts have recognised goodwill as property for so long that the question whether goodwill is property must be taken as settled in favour of the view that it is. Moreover, as we have pointed out, goodwill is property because it is the legal right or privilege of the proprietor of a business to conduct the business in a particular way and by particular means.

right. For legal⁴⁶ and accounting⁴⁷ purposes, it must be separated from those assets and revenue expenditures of a business that can be individually identified and quantified in the accounts of a business. Goodwill, as property, is "inherently inseverable from the business to which it relates"⁴⁸. That which can be assigned and transferred from the business may, while it is connected to the business, be a source of the goodwill of the business but cannot logically constitute any part of the goodwill of the business. To the extent that the law provides remedies for the protection of a severable asset of a business which is also a source of its goodwill, the right to the remedies arises from the legal properties of the asset and not from the existence of goodwill in the business. If the building from which a business is conducted is destroyed, the owner of the business will be able to exercise all the rights that inhere in the owner of a building that has been damaged by the conduct of a third person. In such a case, the owner will probably also have a right to damages for the injury to the goodwill of the business. But injury to the goodwill of the business is not to be confused with injury to the building.

- 31 It follows that the sale of an asset of a business does not involve any sale of goodwill unless the sale of the asset is accompanied by or carries with it the right to conduct the business. The sale of hotel premises, for example, may involve the sale of goodwill although the contract does not refer to goodwill⁴⁹. Similarly, the mortgage of land used as a business may involve the mortgage of the goodwill of the business although the mortgage does not mention goodwill⁵⁰. But the reason that is so is that, by necessary implication, the sale or mortgage of such a site includes the sale or transfer of the business conducted on the site. Unless a business is transferred to the person to whom an asset of the business is transferred, the transfer of the asset does not transfer any part of the goodwill of the business.

46 cf Cathro, "Goodwill: 'Now You See It, Now You Don't'", (1996) 25 *Australian Tax Review* 169 at 178-179.

47 Commentary, Approved Accounting Standard ASRB 1013: *Accounting for Goodwill*.

48 *Geraghty* (1979) 142 CLR 177 at 193; *Hepples* (1992) 173 CLR 492 at 542.

49 *Ex parte Punnett. In re Kitchen* (1880) 16 Ch D 226 at 233.

50 *Cooper v Metropolitan Board of Works* (1883) 25 Ch D 472 at 479-480; *Re Millar; Burns v E S & A Bank Ltd* (1952) 16 ABC 49.

The validity of that proposition was recognised by Lord Lindley in *Muller*⁵¹ when he said:

"The goodwill of a business usually adds value to the land or house in which it is carried on *if sold with the business*". (emphasis added)

32 When an asset of the business is sold and the business is not, the sale may reduce the value of the goodwill of the business. Nevertheless, the sale does not involve the disposition of the goodwill of the business or any part of it. "Goodwill", said Barwick CJ in *Geraghty*⁵² "in itself is indivisible, though its value, when realized, may be shared in proportions."

33 However, as discussed later in these reasons for judgment, the potential use of an asset which is transferred out of the business may give it a value which approximates to the value of the goodwill which the business derived from the use of the asset. Nevertheless, potential use is merely an attribute of an asset, while goodwill is property which is inseverable from a business. They are not to be equated for legal purposes, notwithstanding that in some cases the value of the goodwill of a business may be reliable evidence as to the value of the asset or its potential use.

(iv) *Commissioner of Taxation v Krakos Investments Pty Ltd*⁵³

34 The proposition that goodwill has no meaning or existence except in relation to a business was rejected by Hill J, with whose judgment von Doussa and O'Loughlin JJ agreed, in *Krakos*. In *Krakos*, the respondent had agreed to purchase a hotel business for a total consideration of \$840,000, of which \$420,000 was allocated in the contract to "goodwill value". The taxpayer had also granted the purchasers a five year lease of the premises. The Commissioner unsuccessfully contended before the Full Federal Court that the \$420,000 was to be treated as a premium paid for that lease and therefore assessable as a capital gain. The Full Court held that it was a payment for goodwill.

51 [1901] AC 217 at 235.

52 (1979) 142 CLR 177 at 181.

53 (1995) 61 FCR 489.

15.

- 35 After referring to the statements of Lord Macnaghten in *Muller*⁵⁴ that the "goodwill of a business is one whole" and that to exist it must be attached to a business, Hill J said⁵⁵:

"Whether this proposition is universally correct must be doubted. For example, a business may have both goodwill attaching to a name and goodwill attaching to premises. There seems no reason why each of these aspects of the goodwill of such a business could not be dealt with separately.

The different aspects of goodwill that have been recognised in the cases include site goodwill, personal goodwill and name goodwill. There may also be other kinds of goodwill such as monopoly goodwill".

- 36 The reasoning of his Honour has not been universally accepted⁵⁶. With respect, it erroneously identifies the concept of goodwill as property with the sources of the goodwill and does not distinguish between the potential use value of an asset of a business and the goodwill of the business that is derived from the use of that asset. Pushed to its logical conclusion, it must mean, as his Honour's judgment recognises, that goodwill is not an asset but a series of assets that inhere in other assets of a business. Such a conclusion contradicts the two fundamental premises of the law of goodwill, that is to say, that goodwill has no existence independently of the conduct of a business and that goodwill cannot be severed from the business which created it. Those premises have been accepted as fundamental by the House of Lords⁵⁷ and by this Court⁵⁸, and, statute apart, it is too late for them to be now called in question. Indeed, the claim that the totality of the assets of a business contain all or most of that which represents the goodwill of the business has led some accounting writers to argue that goodwill has meaning only in so far as it describes the benefits flowing from such immeasurables as good business management and the lack of competition by reason of monopolistic privileges. On this theory, most of the attributes of goodwill attach to specific

54 [1901] AC 217 at 224.

55 (1995) 61 FCR 489 at 496.

56 See Cathro, "Goodwill: 'Now You See It, Now You Don't'", (1996) 25 *Australian Tax Review* 169 at 177-179; Zumbo, "'Monopoly' Goodwill", (1997) 5 *Taxation in Australia* (red ed) 139 at 144.

57 *Muller* [1901] AC 217.

58 *Bacchus Marsh Concentrated Milk* (1919) 26 CLR 410; *Box* (1952) 86 CLR 387; *Geraghty* (1979) 142 CLR 177 at 193; *Hepples* (1992) 173 CLR 492.

assets: favourable location affects the value of land, the reputation of the business is inseparable from its trademarks and trade names and so on⁵⁹.

- 37 With the possible exception of some compensation cases, nothing in the case law, when it is properly understood, supports the proposition that the goodwill of a business is divisible and can be transferred in gross or as part of the transfer of an asset. It is true as Hill J points out in *Krakos* that the cases contain many statements referring to site goodwill, personal goodwill, name goodwill and monopolies giving rise to goodwill. But these descriptions of goodwill are used because, in particular contexts, they are helpful in explaining, for example, where goodwill is situated⁶⁰ or why some other asset has or has not been transferred with the goodwill of the business⁶¹ or why the transfer or mortgage of an asset also transfers or mortgages the goodwill of the business⁶² or why the goodwill of a business which has been sold arises from a monopoly and was not "attached to or connected with land a lease of which is granted assigned or surrendered"⁶³.

(v) The compensation cases

- 38 In some cases concerning the payment of compensation in respect of licensed premises, statements can be found that might suggest that the goodwill of the

59 See, for example, the discussion in Hendriksen & Van Breda, *Accounting Theory*, 5th ed (1992) at 640-641.

60 *Muller* [1901] AC 217.

61 *Rosehill Racecourse Company v Commissioner of Stamp Duties (NSW)* (1905) 3 CLR 393; *Tooth & Co Ltd v Commissioner of Stamp Duties* (1909) 9 SR (NSW) 652; *Federal Commissioner of Taxation v Williamson* (1943) 67 CLR 561 at 563-564.

62 *Ex parte Punnett* (1880) 16 Ch D 226; *Cooper* (1883) 25 Ch D 472; *Re Millar* (1952) 16 ABC 49.

63 *Phillips v Federal Commissioner of Taxation* (1947) 75 CLR 332 at 337; *Box* (1952) 86 CLR 387.

business is inseparable from the land on which the business is conducted⁶⁴. Furthermore, in *Daniell v Federal Commissioner of Taxation*⁶⁵, Knox CJ said:

"[M]y opinion is that while [goodwill] cannot be said to be absolutely and necessarily inseparable from the premises or to have no separate value, prima facie at any rate it may be treated as attached to the premises and whatever its value may be should be treated as an enhancement of the value of the premises."

However, as Lord Halsbury pointed out in *Muller*⁶⁶:

"In the case of a public-house, owing to the convenience of its situation and its being known as a favourite place of resort, the advantages of its situation are so mixed up with the goodwill of the business that, as a matter of fact, it may well be that it is very difficult to sever them, and to say how much is goodwill and how much is local situation. But those difficulties of fact will not necessarily make their separate existence impossible. In compensation cases, for instance, where a man is being turned out of his holding and has to be put into the same position, so far as compensation can do it, by money which is to be awarded to him, it is unnecessary to regard any such severance into the different elements which make up the advantages of his holding. He is to be compensated for the loss which he has sustained by the alteration of his premises, or the removal of his trade from those premises, and for the extent to which his business may be injured under the circumstances, and it would be quite unnecessary to consider how much he is to be allowed for each element".

39 In *Rosehill Racecourse Company v Commissioner of Stamp Duties (NSW)*⁶⁷, O'Connor J said of the compensation cases:

"In those cases, where the question was the assessment of compensation, no difficulty arose as to whether the goodwill was separable from the land,

⁶⁴ For example, *Jubb v The Dock Company at Kingston upon Hull* (1846) 9 QB 443 [115 ER 1342]; *White v Commissioners of H M's Works & Public Buildings* (1870) 22 LT 591; *Cooper* (1883) 25 Ch D 472; *West London Syndicate v Inland Revenue Commissioners* [1898] 1 QB 226.

⁶⁵ (1928) 42 CLR 296 at 302-303.

⁶⁶ [1901] AC 217 at 239.

⁶⁷ (1905) 3 CLR 393 at 410.

because what was assessed was the land with its potentialities, everything capable of going having gone with it. And as the goodwill could go with the land, that was assessed as part of the value of the land, and was to be considered as part of the value for which the owner had been compensated."

- 40 In *Minister for Home and Territories v Lazarus*⁶⁸, a case concerned with the unimproved value of land on which a business of licensed victualler was carried on, Isaacs and Rich JJ pointed out:

"If the goodwill of a business is personal only, it adds nothing to the value of the land. If it is attributable wholly or partly to the land, it *pro tanto* enhances its value, and that value is recoverable, not as goodwill *eo nomine* but as part of the value of the land."

- 41 This statement was cited with evident approval by Dixon J in *The Commonwealth v Reeve*⁶⁹. Dixon J went on to say⁷⁰:

"But perhaps a particular source of difficulty is the necessity of distinguishing between the ultimate measure of compensation and the factors, such as the value of the goodwill destroyed by an acquisition, which may be taken into consideration in making the determination. Ultimately what is to be found is the value to the owner of the interest taken. All the actual and potential advantages to the proprietor of the interest enter into that value to him. If the goodwill of his business is annexed inseparably to the interest, it may not be possible to disentangle the one from the other. But it is the money equivalent to him found to be contained in the interest expropriated that must be assessed. You cannot simply take the profits of the business and capitalize them at a rate of interest and directly add them to whatever is thought to be the value of the land or interest therein to one who purchases it for some other purpose. That is shown by *Pastoral Finance Association Ltd v The Minister*⁷¹. But you may be guided in your assessment of the value to the owner of his proprietary interest by weighing the effect such a consideration would have upon a person anxious to step into the owner's shoes in making his estimate of what he would give in order to do so and what effect it would

68 (1919) 26 CLR 159 at 166-167.

69 (1949) 78 CLR 410 at 427-428.

70 (1949) 78 CLR 410 at 428-429.

71 [1914] AC 1083.

have upon the owner in fixing an amount for which he would be ready to part with his interest."

42 Later his Honour said⁷²:

"It was plain that to take over the premises forming the coffee lounge was to take over the business or goodwill. In these circumstances the valuation of the goodwill might well be considered in point of fact, though not in point of law, to be decisive in the valuation of the interest of the plaintiffs which had been taken."

43 *Lazarus* and *Reeve* therefore do not support and indeed deny that the site goodwill of a business can be transferred without also transferring the business. They establish that, although the value of the site goodwill of a business may be a persuasive guide to the value of land on which a business is conducted, it is the potential use of the land and not the goodwill deriving from the use of the land that is valued in compensation cases concerned with the acquisition of that land.

(vi) The creation or acquisition of goodwill

44 The need to segregate the concept of goodwill as property from the sources that give rise to it is important in the field of capital gains covered by Pt IIIA of the Act. This is because capital gains tax is not payable in respect of assets acquired by a natural person before 20 September 1985⁷³ and disposed of on or after that date.

45 Once goodwill as property is recognised as the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business, it follows that a person acquires goodwill when he or she acquires that right or privilege. The sources of the goodwill of a business may change and the part that various sources play in maintaining the goodwill may vary during the life of the business. But, as long as the business remains the "same business"⁷⁴, the goodwill acquired or

72 (1949) 78 CLR 410 at 429-430.

73 s 160L(1).

74 cf *Avondale Motors (Parts) Pty Ltd v Federal Commissioner of Taxation* (1971) 124 CLR 97.

created by a taxpayer is the same asset as that which is disposed of when the goodwill of the business is sold or otherwise transferred⁷⁵.

46 In determining whether the "same business" is being carried on, the sources of the goodwill may have changed so much that, although the business is of the same kind as previously conducted, it cannot be said to be the same business. Hotels in the inner suburbs of Sydney provide an example, especially those in Paddington. For decades, many of these hotels drew their custom from the nearby locality. The goodwill of those hotels was site goodwill based on the residence of customers. Some years ago, some of these hotels, often with little change to their structural appearance, began to market themselves to people from a broader geographical area. Custom is no longer based on residence. The class of person patronising these hotels is completely different from what it was. Revenues are probably dramatically higher than they were before the change of marketing. In so far as site goodwill is a source of the present goodwill, it is of a different kind. While previously it derived from the proximity of residents to the hotel, it is now derived from the fact that the hotel is in the same locality as other hotels seeking to attract custom from patrons with the same interests. It is arguable that the goodwill asset of those hotels is not the same asset as it was two decades ago because it is not the same business as it was then.

47 In the case of goodwill acquired from another person, the date of transfer will be the date on which the asset was acquired. More difficult questions arise in the case of goodwill created by a taxpayer in the course of conducting a new business. One difficulty in such a case is to identify the date when the goodwill was acquired. It is clear as a matter of legal principle that a business may have goodwill⁷⁶ although it is not shown in the accounts of the business⁷⁷. Another difficulty in the context of Pt IIIA is to identify the cost of acquiring the goodwill. However, it is unnecessary to examine this particular problem in this case, for we are of the view that the sale of the taxi licence in this case did not involve any disposition of goodwill.

75 cf Taylor, *Capital Gains Tax* at 212.

76 *Hepples* (1992) 173 CLR 492 at 542-543.

77 Accounting practice is not to recognise goodwill as an asset unless and until it is purchased.

The value of goodwill

48 Goodwill has value because it can be bought and sold as part of a business and its loss or impairment can be compensated for by an action for damages. An existing business is the *sine qua non* of goodwill which cannot exist independently of the business which created and maintains it. The value of the goodwill of a business is therefore tied to the fortunes of the business. It varies with the earning capacity of the business and the value of the other identifiable assets and liabilities. It is seldom constant for other than short periods.

(i) A profitable business

49 When a business is profitable and expected to continue to be profitable, its value may be measured by adopting the conventional accounting approach of finding the difference between the present value of the predicted earnings of the business and the fair value of its identifiable net assets. Admittedly this approach can cause problems in valuing goodwill for legal purposes because the identifiable assets need to be valued with precision. Particular assets, as shown in the books of the business, may be under or over valued and may require valuations of a number of assets and liabilities which may be difficult to value. However in a profitable business, the value of goodwill for legal and accounting purposes will often, perhaps usually, be identical.

(ii) Non-profitable business

50 In a business trading at a loss or with less than industry average profitability, there may be a marked difference between the value of goodwill for legal purposes and its value for accounting or commercial purposes. That is because goodwill for legal purposes includes everything that adds value to the business - "every positive advantage" as Wood V-C pointed out in *Churton v Douglas*⁷⁸. As a result, a business may have valuable goodwill in the eyes of the law although an accountant would conclude that the business either has no goodwill or that, if it has, it is of nominal value only. The value of such goodwill may be difficult to assess. Having regard to the likely future of the business, often it may have only nominal value. But in some cases, the value of the goodwill may be more than nominal. It may be the difference between the revenues generated by the relevant advantages and the operating expenses (other than a share of the fixed costs) incurred in earning those revenues.

78 (1859) Johns 174 at 188 [70 ER 385 at 391].

(iii) Goodwill derived from identifiable assets

51 Where the goodwill of a business largely derives from using an identifiable asset or assets, the goodwill of the business, as such, when correctly identified, may be of small value. That is because the earning power of the business will be largely commensurate with the earning power of the asset or assets. If the goodwill of a business largely depends on a trade mark, for example, and the trade mark is fully valued, the real value of goodwill can only reflect a value that is similar to the difference between the business as a going concern and the true value of the net assets of the business including the trade mark. A purchaser of the business will not pay twice for the same source of earning power. The purchaser will not pay a sum that represents the earning power of the trade mark and also a sum that represents the earning power of the business. Nevertheless, the earning power of the trade mark is unlikely to equal the earning power of the business.

52 When a trade mark is sold it will continue to be a source of goodwill for the business if the business continues. That is because the trade mark will have built up favourable custom which will or may continue after the trade mark is transferred or expired. Similarly, where goodwill is largely the product of the personality of the owner or one or more employees of a business, much of the goodwill of the business will disappear upon the cessation of the connection between that person or persons and the business. Nevertheless, habit may continue to draw custom although the owner or employee has no further connection with the business. These illustrations also show that, although the goodwill of a business may be derived from one or more sources, it can continue to exist notwithstanding that the sources of the goodwill have gone.

No goodwill was disposed of by the sale of the taxi licence

53 The decisive question in determining whether the exemption provided by s 160ZZR(1)(a) applies in the present case is whether the sale of the licence was effectively the sale of a business of the taxpayer and her husband or the sale of an asset of their business. Since goodwill is an indivisible item of property which is distinct from and does not inhere in the assets of a business, the taxpayer did not dispose of goodwill if she and her husband merely sold an asset of the business.

54 In his evidence, the taxpayer's husband, who had considerable experience in the industry, said "that the shares and the licence are regarded as the business". However, this statement is not decisive of the question whether they disposed of a business to Mr and Mrs Wilkins. Indeed, as a matter of law, Mr Murry's conclusion is incorrect. A business is not a thing or things. It is a course of conduct

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carried on for the purpose of profit and involves notions of continuity and repetition of actions⁷⁹.

55 The indicia of a taxi business are:

- (1) a licence to hire either generally or in a particular area;
- (2) a vehicle, the subject of that licence;
- (3) "get up" such as a taxi plate, a sign or signs advertising that the vehicle is a taxi, a sign or signs indicating when it is available for hire, a sign or signs indicating the name and telephone of a taxi co-operative through which bookings may be made and a distinctive and eye catching colour scheme;
- (4) a driver plying for hire.

56 The "get up" of the vehicle is the attractive force which brings in a great deal of the custom of a taxi business. In the case of pedestrians, it is the get up which directly attracts the attention of potential customers and causes them to hail and enter the taxi. The extent of the custom will vary with the number of passengers desiring the use of taxis and "the skill of the driver"⁸⁰ in finding the areas where they are likely to be. In the case of customers who book taxis, it is the various forms of advertising of the name and telephone number of the co-operative company which attract custom for the taxi. In such cases, the co-operative acts as the agent for each taxi driver and directs custom to that person when he or she is in the relevant locality.

57 These considerations show that a taxi licence is not itself a source of goodwill although it authorises the lawful conduct of a taxi business. The licence does not attract custom. It authorises conduct that in the ordinary course of events will attract custom. It is the "get-up" of a taxi, the advertising of the booking service conducted by its agent (the co-operative society) and "the skill of the driver" in seeking the best locations for intending passengers that attract custom to a taxi business. No doubt, because the number of licences is limited, the owner of a taxi business will probably obtain a greater share of patronage than he or she would if

79 cf *Truax v Corrigan* 257 US 312 at 342-343 (1921); *Smith v Anderson* (1880) 15 Ch D 247 at 258, 277-278.

80 (1995) 32 ATR 1091 at 1093; 95 ATC 473 at 475.

taxi businesses depended on market forces. But that does not mean that it is the licence that attracts the custom.

58 Immediately prior to the sale of the licence to Mr and Mrs Wilkins, the licence gave Mr Gower to whom it was leased the right to conduct a taxi business. That business may have had some goodwill because its "get up" and the use of telephone bookings attracted custom. But the goodwill of the business belonged to Mr Gower who owned the vehicle and used it to the exclusion of the taxpayer and her husband and either drove or hired someone to drive the taxi. The taxpayer had no interest in that business.

59 Prior to the sale, the taxpayer and her husband exploited the licence in another way. They exploited its economic potential by leasing it. In so far as the licence was relevant to their business, it produced rent. Their position was the same as the owner of shop premises who rents it to a person who then commences a business at the site. While the shop business exists, the goodwill of the business belongs to the shop proprietor. If the lease expires and is not renewed and the business ceases to exist, the goodwill comes to an end. A new lease to a person commencing a similar business from the premises may command a premium, but no part of the premium is paid for goodwill.

60 When the licence was issued to the taxpayer and her husband, no goodwill was attached to it. It gave them the right *to commence* a business. In that respect, they were in no different situation to a person issued with a licence to conduct a television or radio station or build a drive-in-theatre. Until the station or the theatre commences business, no goodwill can exist. If the taxpayer had commenced a taxi business, it may have developed goodwill. Such a business including its goodwill could have been sold along with the licence. The value of the goodwill, if it existed, might be assessed in a number of ways. However, the value of the goodwill of a taxi business, like the value of the goodwill of a money lending business, a mobile vending business, or a one person professional practice or trade is likely to be small.

61 Most of the custom of a taxi business is new custom. Repeat business is ordinarily accidental. That is not decisive against the existence of goodwill. But it is a powerful factor indicating that the business has no greater attraction than a similar business on its first day of operation. In *Muller*⁸¹, Lord Macnaghten said that goodwill "is the one thing which distinguishes an old-established business from a new business at its first start." The history, conduct, site or get up of a taxi business ordinarily provides few inducements to distinguish it from similar

81 [1901] AC 217 at 224.

businesses. A particular taxi business may attract a regular clientele; it may be connected with a network or co-operative which has a reputation for reliability or service; or it may employ highly skilled drivers who are able to generate above average earnings. Such advantages may give a particular taxi business goodwill because it has custom greater than the industry average. However, as with all those who sell goods or services that are virtually indistinguishable from the goods or services of others in a market and who have no special advantages over their competitors, above average industry earnings are difficult to achieve. And in the end, the value, as opposed to the existence, of goodwill for legal and commercial purposes is governed by the extent to which the earnings of a business exceed the norm.

62 Whatever the value of the goodwill of a particular taxi business, it is not identical with the price paid for the business or for the licence. That is because the licence has value independently of it being used in a taxi business of plying for hire. The licence is property. It can be sold independently of any business conducted in respect of it. In theory, the licence could have been sold in the present case for a substantial sum after its issue and before any business had commenced. The value of the licence would no doubt reflect the profits that could be earned from commencing a business of the kind which the licence authorised. But its sale would not involve any element of goodwill.

63 In the Full Court, Beaumont and Drummond JJ relied on *Box*⁸² to support their conclusion that the sale of the licence in the present case was a disposition of goodwill. But nothing in that case is inconsistent with the conclusion that the licence is not the source of the goodwill of a taxi business. Nor does anything in that case support the notion that the sale of a licence constitutes the sale of goodwill. In *Box*⁸³, Dixon CJ, Williams, Fullagar and Kitto JJ said:

"In the case of a monopoly such as letters patent, or an exclusive licence to sell a commodity only obtainable from the licensor, such as a newspaper, in a particular area, the real value of the goodwill would lie in the fact of sole ownership and, so far as it has a locality, would be situated in the area over which the monopoly extended".

64 This passage gives rise to three comments. First, it is concerned with the value of goodwill and with a situation where the licence is exclusive and there is no competitor for custom. In that respect, a monopoly is similar to, but more

82 (1952) 86 CLR 387.

83 (1952) 86 CLR 387 at 397.

protective of a business than, a restrictive covenant not to compete - which was the subject matter of the appeal in *Box*. Earlier their Honours had said⁸⁴:

"The £1,750 was paid as consideration for the vendor entering into the restrictive covenant. It was not paid directly for the purchase of goodwill. *But such a covenant enhances the value of the goodwill* because without it a vendor is not precluded from commencing a new business although he must not hold himself out as carrying on the old business or solicit its customers." (emphasis added)

65 Second, assuming that their Honours' statement that the locality of the goodwill would extend over the area of the monopoly was intended to mean that the exclusive licence or monopoly was a source of goodwill, it does not follow that all licences are a source of the goodwill of the businesses for which they are held. An exclusive licence to conduct a business in a particular area is indistinguishable from an absence of competition in that area. Because that is so, it may be that an exclusive licence not merely enhances the value of the goodwill of a business but should also be regarded as being a source of custom of the business. However, entry into a market cannot itself be a source of goodwill. And a non-exclusive licence, even a licence in an industry where the issue of licences is limited, is no more than a right to enter a market. Contrary to the conclusion of Drummond J in the Full Court, such a licence no more gives "the assurance of sharing in the available custom" than does entry into any market. In the ordinary course of events, any entrant into any market will initially share in the available custom. But whether the entrant stays long enough to develop goodwill will depend on whether the conduct of its business is such that it is able to continue to attract custom by reason of matters peculiar to the conduct of that business.

66 Third, in any event, nothing in *Box* suggests that the sale of a licence independently of a business involves the sale of goodwill⁸⁵. To the contrary, their Honours quoted the statement of Lord Lindley in *Muller*⁸⁶ that "[g]oodwill

84 (1952) 86 CLR 387 at 394.

85 In the Full Court, the majority thought that the taxpayer and her husband had sold a business. But, for the reasons that we have given what they sold were a number of assets which entitled the purchasers, in conjunction with the purchase of the vehicle owned by Mr Gower, to commence their own business.

86 [1901] AC 217 at 235.

regarded as property has no meaning except in connection with some trade, business, or calling."

Conclusion

67 A taxi licence is a valuable item of property because it has economic potential. It allows its holder to conduct a profitable business and it may be sold or leased for reward to a third party. But neither inherently nor when used to authorise the conduct of a taxi business does it constitute or contain goodwill. A licence is a pre-requisite to the conduct of many professions, trades, businesses and callings. But it is not a source of the goodwill of a business simply because it is a pre-requisite of a business or calling. Nor is the situation different when only a limited number of licences are issued for a particular industry.

68 For legal purposes, goodwill is the attractive force that brings in custom and adds to the value of the business. It may be site, personality, service, price or habit that obtains custom. But with the possible exception of a licence to conduct a business exclusive of all competition, a licence that authorises the conduct of a business is not a source of goodwill. A taxi licence therefore is simply an item of property whose value is not dependent on the present existence of a business. It is not and does not contain any element of goodwill.

69 There was disposal of the licence and the shares but there was no disposal of goodwill or of an interest in goodwill within the meaning of s 160ZZR.

70 The appeal should be allowed.

71 In accordance with the condition imposed on the grant of special leave, the appellant must pay the respondent's taxed costs of and incidental to this appeal and the special leave application and the costs in the Full Court of the Federal Court.

72 KIRBY J. The amount of trouble which the concept of goodwill has occasioned to revenue law (not to say in other areas of discourse) is remarkable. For this reason, I differ from the majority in this appeal with hesitation. The fundamental reason for the difference derives from my conception of how the relevant provisions in the *Income Tax Assessment Act* 1936 (Cth) ("the Act") were intended to operate in a situation such as the present.

73 For me, the solution to the problem before the Court is to be found in a consideration of the scheme of Pt IIIA of the Act (which, in part, makes provision for the taxation of capital gains as part of assessable income) rather than from a review of the way in which goodwill has been used in other legal and statutory contexts or explained by judges in their sometimes confusing and conflicting reasons. Necessarily, such reasons are addressed to the word in the particular context in hand. I have concluded that, on the better reading of the statutory provisions (which are all that are under our present scrutiny), the capital gain declared by the taxpayer was deemed to be reduced by half⁸⁷, as she asserted. It follows that, in my view, the appeal from the Full Court of the Federal Court of Australia⁸⁸ should be dismissed.

74 As mine is a minority opinion with no consequence for the outcome of this appeal or precedential value, I will state it as briefly as I can. I am assisted in doing so because the relevant factual matters are not in dispute. They, together with the applicable statutory provisions, are set out in the reasons of the majority. I accept those reasons for the purpose of stating the facts and the legislation. In the approach which I favour, the only questions for decision relate to the meaning of goodwill in the provisions of Pt IIIA of the Act and the characterisation of the facts as found by reference to goodwill as that word is to be understood in this context.

75 To explain how I part company with the majority, let me trace the reasoning which brings me to my differing conclusion.

The difficulty of defining goodwill

76 There is no definition of goodwill in Pt IIIA of the Act. The reason may be the great difficulty which has been experienced in formulating a definition of the concept⁸⁹. Almost a hundred years ago, the House of Lords declared that

87 The Act, s 160ZZR(1).

88 *Commissioner of Taxation v Murry* (1996) 68 FCR 156 per Beaumont and Drummond JJ; Kiefel J dissenting.

89 *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 519.

"goodwill" was "a thing very easy to describe, very difficult to define"⁹⁰. Because no special definition is offered, several principles of construction may be availed of to help ascertain the meaning of the word in this context. As an ordinary word of the English language, it should be given the meaning which it usually bears, appropriate to the particular context and purpose. Because two centuries of jurisprudence have now gathered around the word⁹¹, there will sometimes be imputed to the legislature an intention to use the word in the way in which courts have explained it in like contexts. However, since there are clear differences in judicial expositions of the ideas inherent in the notion of goodwill and since the context of Pt IIIA is in some ways special, ingenious arguments should ultimately take second place to "the application of ... common sense"⁹². Words chosen to explain the concept of goodwill in differing contexts and in relation to different statutory language will only be of limited help in the elucidation of the way in which the word is intended to be understood in the scheme of Pt IIIA of this Act.

Approach to the construction of provisions for tax relief

77 The introduction of capital gains tax provisions in 1986⁹³ brought about new problems for the meaning of the Act. There are various approaches that might be taken to ascertaining the meaning of a provision such as s 160ZZR of the Act which provides the relief to the taxpayer which she claims⁹⁴. Although the general purpose of taxation legislation is to raise revenue, a relieving provision, such as s 160ZZR, is designed, by definition, to lighten the burden cast upon the taxpayer. It may also be designed to achieve other social purposes. One, which was mentioned in the context of Pt IIIA, is the encouragement of small business, thought to be an important growth area for the provision of new employment opportunities: an objective of successive governments and parliaments of the Commonwealth. Provisions of this kind, affording relief to the taxpayer, have conventionally been treated as, to some extent, beneficial. It has been said that

90 *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 223 per Lord Macnaghten. In this sense goodwill is rather like unconscionability: *National Westminster Bank Plc v Morgan* [1985] AC 686 at 709; see also *Antonovic v Volker* (1986) 7 NSWLR 151 at 165.

91 See eg *Cruttwell v Lye* (1810) 17 Ves Jun 335 [34 ER 129]. See also *Smale v Graves* (1850) 3 De G & Sm 706 [64 ER 670]; *Morris v Moss* (1855) 25 LJ Ch NS 194; *Trego v Hunt* [1896] AC 7.

92 *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 227-228 per Lord James of Hereford.

93 *Income Tax Assessment Amendment (Capital Gains) Act* 1986 (Cth), s 19.

94 This question is discussed in Slater, "The Nature of Goodwill" (1995) 24 *Australian Tax Review* 31 at 54-55.

they "should not be narrowly construed and should be interpreted to promote the purpose or object underlying the relevant Act"⁹⁵. Each case must depend upon its own statutory language and apparent statutory purposes. However, I consider that the foregoing approach is the correct one. It is the approach which I would adopt to the relieving provisions of s 160ZZR, understood in their context and construed against the undisputed facts of this case.

The purpose: relief to small businesses

78 The precise purposes of s 160ZZR were not elaborated during argument by reference to the Minister's Second Reading Speech or the Explanatory Memorandum which accompanied the passage of the Bill introducing the provision into the Act. It was said that these were unhelpful and that, although some remarks made during the Parliamentary Debates were addressed to the construction, they fell outside permissible material. They were therefore not tendered.

79 Nevertheless, in *Commissioner of Taxation v Krakos Investments Pty Ltd*, Hill J, writing for the Full Court of the Federal Court, described s 160ZZR as having been "introduced to overcome small business objections to capital gains tax becoming payable on the full amount of a gain arising from the disposal of goodwill of a business"⁹⁶. That description, which is certainly consistent with the language and apparent purposes of the section, seems uncontroversial. Part IIIA included in assessable income defined capital gains⁹⁷. The purpose of s 160ZZR was to reduce, by a defined percentage, the amount of a taxable capital gain in the event of the disposal of a business, or interest in a business, where that disposal includes goodwill or an interest in goodwill. Initially the percentage of reduction was fixed at 20 percent. Its increase, with effect on disposals occurring after 26 February 1992, to 50 percent⁹⁸ was clearly intended, in the context (and by

95 *Plessey Australia Pty Ltd v Federal Commissioner of Taxation* (1989) 89 ALR 395 at 400. See also *Federal Commissioner of Taxation v Top of the Cross Pty Ltd* (1981) 37 ALR 623 at 633; *Penrith Rugby League Club Ltd v Commissioner of Land Tax* [1983] 2 NSWLR 616 at 622.

96 (1995) 61 FCR 489 at 492.

97 The scheme is described by Brennan J in *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 499.

98 *Taxation Laws Amendment Act (No 2) 1992* (Cth), ss 45(b), 67(11).

80 It is not really to the point to speculate on all of the social, economic or political reasons which may have lain behind this relief. But it is essential to appreciate the general statutory object if the scheme of Pt IIIA is to be accurately construed so as to give effect to the purpose of the Parliament¹⁰⁰.

105 [1901] AC 217 at 223-224. See also at 235 per Lord Lindley; *Box v Commissioner of Taxation* (1952) 86 CLR 387 at 396-397; cf *Phillips v Federal Commissioner of*
(Footnote continues on next page)

description finds resonances in the opinion of Fuller CJ, writing for the Supreme Court of the United States in *Metropolitan Bank v St Louis Dispatch Co*¹⁰⁶. It is also reflected in judicial discussions in other countries¹⁰⁷ and in Australia¹⁰⁸.

Goodwill may involve absence or reduction of competition

- 82 In many judicial analyses of the meaning of goodwill, the foregoing considerations have addressed attention to the extent to which there is an "absence of competition" in the particular market place where the goodwill is said to be operative. This may arise from a multitude of circumstances. They may include the nature and locality of the business, the costs and other impediments in setting it up¹⁰⁹ or the execution of a restrictive covenant to restrain any return to the neighbourhood by a previous owner¹¹⁰. But limitations on competition may also arise from a statutory licensing scheme which confers a right on the licensee to participate in a market where competition is confined to licence holders¹¹¹. In such a case, if goodwill is to enjoy a meaning apt to the small businesses affected by such licence schemes, the latter may be relevant to the source and quantification of the goodwill.

Taxation (1947) 75 CLR 332 at 336; *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 519-520, 523, 542-543.

106 149 US 436 at 446 (1893).

107 Including *India (S C Cambatta and Co Pvt Ltd v Commissioner of Excess Profits Tax)* AIR (48) 1961 SC 1010 at 1012, *New Zealand (Z v Z)* [1989] 3 NZLR 413 at 415, *South Africa (Protea Holdings Ltd v Herzberg)* [1982] 4 SALR 773 at 787 and *Canada (Dominion Dairies Ltd v Minister of National Revenue)* [1966] Ex CR 397 at 403-404; *Consumers Distributing Co Ltd v Seiko Time Canada Ltd* [1984] 1 SCR 583 at 606).

108 *Federal Commissioner of Taxation v Williamson* (1943) 67 CLR 561 at 564; *Conagra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302 at 312; *Commissioner of Taxation v Krakos Investments Pty Ltd* (1995) 61 FCR 489 at 496.

109 See *Federal Commissioner of Taxation v Williamson* (1943) 67 CLR 561 at 564; *Commissioner of Taxation v Krakos Investments Pty Ltd* (1995) 61 FCR 489 at 502.

110 *Box v Commissioner of Taxation* (1952) 86 CLR 387.

111 *Jack v Smail* (1905) 2 CLR 684 at 704; *Commissioner of Taxation v Krakos Investments Pty Ltd* (1995) 61 FCR 489 at 498; *Duncan v Ridd* [1976] 2 NSWLR 105 at 116-122. See also *Rosehill Racecourse Company v Commissioner of Stamp Duties (NSW)* (1905) 3 CLR 393.

83 As important to this case as consideration of Pt IIIA of the Act is the need to pay careful attention to the Queensland legislation under which the issue, renewal and transfer of taxi licences are regulated¹¹². Such licences afford to those who hold them oligopoly (sometimes referred to as "monopoly" or "semi-monopoly") interests which exclude competition with the "business" which holds the taxi licence in question in relation to the district or "licensed area"¹¹³ to which the authority, given by the licence, extends. The fact that a particular taxicab or driver might not enjoy the personal "goodwill" of identifiable taxi customers loyal to that particular driver is not conclusive. The "business" constituted by the vehicle, statutory licence and shares in the taxi cooperative etc does enjoy an undoubted, even guaranteed, absence of (or, more accurately, limitation upon) competition. To that extent the business enjoys the advantage of an "attractive force which brings in custom"¹¹⁴. The "attractive force" might not rest, as goodwill often does, upon warm feelings by the customers towards the particular business in question. But there must be many cases where goodwill depends not on the cheery faces of the officers and employees of the business but upon such considerations as the availability of the business when needed, as well as its proximity and convenience to customers. This is what the taxi business of the taxpayer offers. But it cannot offer it without the statutory licence which is the *sine qua non* of the business's goodwill.

Goodwill may go with monopoly or oligopoly rights

84 The absence of competition has, therefore, long been recognised as an element of business goodwill. Such recognition is virtually as old as judicial explorations of the concept of goodwill itself. It has been mentioned frequently when common law courts have turned to examine goodwill, usually in a revenue context¹¹⁵. A line of authority in this Court has recognised the importance to goodwill of licences, statutory or contractual, which confer on a particular licensee effective monopoly or oligopoly rights which might appreciate over time with the

112 *State Transport Act* 1960 (Q), ss 17, 18, 20 and *State Transport Regulations* 1987 (Q), Pt II, esp regs 14, 16, 21. The relevant legislation is set out in the reasons of Beaumont J in the Full Court. See (1996) 68 FCR 156 at 160-162.

113 *State Transport Regulations* 1987 (Q), reg 21.

114 *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 224.

115 See for example *Commissioner of Income-tax v B C Srinivasa Setty* AIR 1981 SC 972 at 974; *S C Cambatta and Co Pvt Ltd v Commissioner of Excess Profits Tax* AIR (48) 1961 SC 1010 at 1012.

growth of the relevant population and market¹¹⁶. This is not therefore a new notion. It is one which has been repeatedly and, as I think, realistically recognised by this Court and by individual members of it.

- 85 For my part, I see no error in the remarks of Hill J in *Krakos*. After reference to the authority in this Court which I have noted, his Honour concluded in words which I find entirely persuasive¹¹⁷:

"[C]ommon experience suggests that there is at least one other kind of goodwill. It has received some mention in the cases. I shall adopt here the name 'monopoly goodwill' to refer to it. Where a monopoly has been conferred upon a trader, that trader may develop a custom which is tied to that monopoly. One example is a patent. A process may be so unique that the mere ownership of a patent brings with it custom. In such a case the attractive force of the custom attaches to the patent. Similarly, where a statutory licence or monopoly has been conferred, that licence may come to have attached to it a type of goodwill, in the sense that it is the holding of the licence which attracts custom. For example, a Crown monopoly to sell a commodity such as salt may come to have a special value to its holder over and above the cost of obtaining the monopoly. Customers will revert to that trader not because of the name of that trader, the place from which he or she trades or some personal characteristic of the trader, but because of the statutory monopoly which the trader has. In such cases, as the High Court pointed out in *Box*¹¹⁸ ... 'the real value of the goodwill would lie in the fact of sole ownership and, so far as it has a locality, would be situated in the area over which the monopoly extended: *Phillips v Commissioner of Taxation*¹¹⁹".

- 86 To deny such "monopoly goodwill" to a business for which it is relevant and to sever and assign it solely to the licence which permits the monopoly (or quasi monopoly) rights involves a characterisation that is, in my respectful view, neither necessary nor sensible. More to the point, it is not one which is required by Pt IIIA bearing in mind the purpose of s 160ZZR to provide the small business taxpayer with a particular form of tax relief.

¹¹⁶ See eg *Rosehill Racecourse Company v Commissioner of Stamp Duties (NSW)* (1905) 3 CLR 393. See also *Box v Commissioner of Taxation* (1952) 86 CLR 387 at 397.

¹¹⁷ (1995) 61 FCR 489 at 498.

¹¹⁸ (1952) 86 CLR 387 at 397.

¹¹⁹ (1947) 75 CLR 332.

Characterisation requires attention to relevant legislative purposes

87 Although this is a matter upon which minds may differ, and although it is ultimately a question of characterisation of facts for the purposes of Pt IIIA, I consider it to be artificial to divorce the statutory licence, with its oligopoly rights, granted to the taxpayer in this case, from the business which that licence permits and for which it is absolutely essential. The business is the conduct of a taxi service within a given district of Queensland protected from competition (by intruders) in that district by a legislative scheme. Those who acquire such licences clearly acquire a most valuable business asset. It acquires value because it carries with it an intangible benefit essential to the business which it permits, namely the operation of a taxicab in the district for which the licence is issued. In my respectful view, the approach of the Commissioner in viewing the licence as a mere enhancement in value of other business assets is inconsistent with the recognition in Pt IIIA of the Act that, for its purposes (whatever may be the case more generally) goodwill is one of a number of forms of property. In this context, uniquely, it is included in the meaning of an "asset". It is to be recognised, as such, as a form of incorporeal property. It is possible to criticise these notions and to protest, against the background of general judicial exposition about the nature of goodwill, that they create difficulties because they involve erroneous assumptions¹²⁰. Perhaps at a theoretical level they do. However, these are protests to which the judges must turn deaf ears. Their duty is to give effect to the purpose of the Parliament as expressed in the language which it has chosen. It is not to stamp on that language preconceptions about the meaning of goodwill which have been formulated in other and different contexts and to achieve distinguishable legislative purposes.

Policy considerations for a broad view of goodwill

88 There are many reasons for adopting the broad view about goodwill in this context which found favour in the Administrative Appeals Tribunal¹²¹ and with the majority of the Full Court of the Federal Court¹²². Not only does such an approach achieve what I take to be the purpose of Pt IIIA. It is in harmony with the fundamental notion that goodwill means every positive advantage which is acquired by an owner in carrying on a business¹²³. It is wrong, in my opinion, to take a narrow view of the nature of goodwill in the present context, not least because of the changing ways in which small businesses, including trans-national

¹²⁰ See eg Slater, "The Nature of Goodwill" (1995) 24 *Australian Tax Review* 31; cf Cathro, "Capital Gains Tax" (1996) 25 *Australian Tax Review* 129.

¹²¹ (1995) 32 ATR 1091; 95 ATC 473.

¹²² *Commissioner of Taxation v Murry* (1996) 68 FCR 156.

¹²³ See *Churton v Douglas* (1859) Johns 174 at 188 [70 ER 385 at 391].

businesses, are now performed under a multitude of franchise and other licensing agreements, treaties and other legal rights¹²⁴. It is also wrong because it introduces a serious gulf between the notions of goodwill which are held by economists and accountants (on the one hand) and those which lawyers insist upon (on the other). One accounting text, for example, has expressly singled out the holding of a taxi licence as constituting "the major portion of the goodwill of that business"¹²⁵. When, in revenue law, judges reach results which are out of harmony with economic analysis and accounting expertise, it is time for them to reconsider their preconceptions about the requirements of the legislation¹²⁶. Especially is this so where those requirements are found to produce results which involve conclusions which seem at odds with common sense.

- 89 One such conclusion, as it respectfully seems to me, is that the taxpayer in this appeal (the respondent) had "no interest" in the subject "taxi business" so that the "goodwill" is found to have belonged exclusively to the driver who owned the vehicle and used it. Owning the vehicle did not permit that driver to use it as a taxi or for hire. Indeed, he was forbidden by law from doing so without the licence which belonged to the taxpayer. To characterise that licence as a severable asset of the business in the context of Pt IIIA of the Act fails to recognise the special meaning of "goodwill" in that context. That meaning takes its colour from the purpose of s 160ZZR(1) being to provide relief to a taxpayer disposing of a business or an interest in a business. If the benefits of a statutory licence which assure a market share that brings in custom were not to be regarded as part of the incorporeal property constituting the goodwill of a business for which that licence was necessary, it was for the Parliament to say so expressly. Far from excluding the advantages of such licences from the ambit of goodwill under Pt IIIA of the Act, the inclusion of "goodwill" in the definition of "asset" in s 160A (at the beginning of the Part) lends force to the taxpayer's suggestion that, in this context, "goodwill" is to be given a broad, and not a narrow, meaning.

The lease of the taxi licence

- 90 The fact that the taxi licence was leased to another person (Mr Gower) does not preclude its being a source of goodwill. One can readily imagine instances in which an asset which is leased out accrues in value through an increase in goodwill. A franchisor, having leased premises to a franchisee for a number of years, could reasonably expect his or her business to have gained value, as a result of an

¹²⁴ See eg Terry and Giugni, "Freedom of Contract, Business Format Franchising and the Problem of Goodwill" (1995) 23 *Australian Business Law Review* 241.

¹²⁵ *Yorston, Smyth and Brown: Advanced Accounting*, 10th ed (1988) at 164.

¹²⁶ cf Richardson, "The Impact and Influence of Accounting and Economic Principles on Taxation Law" (1998) 4 *New Zealand Journal of Taxation Law and Policy* 18.

increase in goodwill. Once it is accepted that goodwill can be gained whilst the asset is in the hands of the lessee, it seems absurd to conclude that such an increase would not accrue to the benefit of the lessor in the event that the lease was terminated.

Other issues

91 In the Federal Court, the taxpayer raised a challenge to the competency of the appeal from the Administrative Appeals Tribunal which, if good, would have required rejection of the Commissioner's appeal which is confined to a question of law¹²⁷. That point was unanimously determined against the taxpayer in the Full Court¹²⁸. It was not reagitated before this Court. I shall assume that it was correctly decided.

92 A significant part of the Commissioner's argument before this Court at first related to a suggestion that the taxpayer was not entitled to the benefits of s 160ZZR(1) for the reason that she had not "dispose[d] of, or of an interest in, a business" within that sub-section. It was pointed out that when the taxpayer and her husband transferred (with the necessary consents) the licence and shares that went with this particular taxicab, they retained two other taxicabs and the licences, shares and other "get up" which went with them. It was submitted that s 160ZZR(1) of the Act only had operation, according to its terms, where the taxpayer disposed of the entirety of his or her business or, where disposing of an interest in a business, thereafter continued in the business in a partnership or other relationship with the purchaser. There are various problems with this submission, not least that the Act refers to "a business", not "the business". In the end, however, the Commissioner accepted that this point had not been litigated in the Federal Court, nor expressly raised in the grounds of appeal to this Court. The point was therefore conceded, somewhat reluctantly, in favour of the taxpayer. I am content to accept that concession. However, at some future time, in the approach which I favour, it would have been necessary to return to the point in a case where it had been properly litigated.

Conclusion: the capital gain was deemed to be reduced

93 The taxpayer disposed of a business within s 160ZZR(1), being the business of operating a taxicab in accordance with the taxi licence in question. Subject to taking a number of steps, all of which were duly taken, it was the taxpayer's right to dispose of the business. Without the statutory licence, there would have been no such business still less one to be disposed of. With it, the business enjoyed the oligopoly protection of access to a market of customers for taxis in the Sunshine

127 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44(1).

128 *Commissioner of Taxation v Murry* (1996) 68 FCR 156 at 166-167, 173, 179.

Coast district of Queensland. Inherent in that business was therefore an element of goodwill being that which derived from the exclusion by the licensee of further competitors. To that extent the business with the licence offered the "attractive force which brings in custom". This has conventionally been a feature of goodwill in other contexts. Whatever doubts might otherwise have existed about the application of that notion to this context, they are dispelled by a consideration of the context in which s 160ZZR appears. Key factors to be borne in mind include (1) that s 160ZZR is a relieving provision, intended to afford small business owners a measure of relief from capital gains tax; (2) that a broad view of goodwill accords with the terms of s 160A; and (3) that such an approach is more in keeping with the way in which the term is understood by economists and accountants.

- 94 In the context, therefore, the appreciation over time in the value of the taxpayer's assets included the component of goodwill which was protected by the licence. It was not, properly characterised, a separate asset of the business. It was the very essence, cause and entitlement that made the business possible, without which it would have been unlawful.

Order: appeal dismissed

- 95 The taxpayer was therefore entitled to relief under s 160ZZR(1). The Administrative Appeals Tribunal and the majority of the Full Court of the Federal Court were right to so determine. I would dismiss the appeal.
- 96 In accordance with the terms imposed on the grant of special leave, the appellant must pay the respondent's taxed costs of and incidental to this appeal and the special leave application and the costs in the Full Court of the Federal Court.

