

HIGH COURT OF AUSTRALIA

Daniell

Vs.

Federal Commissioner of Taxation

(Knox C.J.)

30 July 1928

Knox C.J.

This is an appeal against an assessment to Federal income tax in respect of income derived during the financial year ending on 30th June 1926. The relevant facts are as follows:—The appellant is the owner in fee simple of land in Roma Street, Brisbane, on which is erected the Railway Hotel. Until his death in the year 1922 the appellant's husband had carried on the business of a licensed victualler in the said hotel, and after his death the appellant continued to carry on the same business continually until the granting of the lease hereinafter mentioned. During the period between 1st July 1922 and 30th June 1925 the appellant derived large profits—averaging about £4,500 per annum—from the carrying on of the said business. By agreement dated 14th July 1925 the appellant agreed to sell to Perkins & Co. Ltd. the unexpired term of the licence, and the goodwill, furniture, fixtures, fittings, cash registers, chattels and effects of the said hotel and a fourteen years' lease thereof for the sum of £30,000 payable by instalments extending over a period of twelve years with interest at the rate of 7 per cent per annum. The agreement provided for the execution of a lease of the hotel in a form which had been agreed upon. Clause 16 of the agreement was in the words following:—"The consideration for the said sale shall be allocated against the property purchased in the following amounts and proportions: Lease and goodwill, £27,405; furniture, fixtures, fittings, cash registers, chattels and effects, £2,500; balance of term of licence, £95: £30,000." In pursuance of this agreement a lease was executed on 3rd October 1925 by which the lessor, in consideration of £4,000 paid to her by the lessee and in further consideration of £26,000 agreed to be paid to her in manner hereinafter appearing and in further consideration of the covenants on the part of the lessee hereinafter contained, leased to the lessee the premises therein described for the term of fourteen years from 3rd August 1925 at the rental of £25 a week for the first seven years of the term and £30 a week for the remaining seven years of the term. The lease contained the following (among other) covenants on the part of the lessee: 1 (a) and (b) to pay the sum of £26,000 in the manner and at the times specified in the agreement with interest at the rate of 7 per cent; 1 (i) not to apply for the removal of the licence of the hotel to other premises without the consent in writing of the lessor; 1 (j) not to be party or privy to any act whereby the goodwill, trade or business of the premises might be prejudicially affected; 1 (r) not to do, permit or suffer anything whereby the licence might be or become forfeited, cancelled or withdrawn or the renewal thereof withheld; 1 (w) during the continuance of the term to apply for all licences necessary for carrying on the business of a licensed victualler on the demised premises; 3 (a) (iii.) to carry on the business of a publican on the demised premises.

During the financial year ending on 30th June 1926 the appellant received from the lessee, pursuant to the terms of the agreement and lease, the sum of £11,388 17s. 10d. in part payment of the

consideration of £30,000. The appellant, in her return for the purpose of Federal income tax for the said financial year, claimed that the price of the goodwill of the said business included in the sum of £27,405, stated in the agreement to be the consideration for lease and goodwill, amounted to £14,472; and that the total premium, fine or foregift or consideration in the nature of a premium, fine or foregift demanded and agreed to be given in connection with the grant of the said lease was therefore £12,933. The appellant further claimed that of the total sum of £11,388 17s. 10d. received by her during the financial year in question the proportion properly attributable to such premium, fine or foregift or consideration was the sum of £4,909 15s. The respondent rejected these claims and assessed the appellant to income tax on £10,404, being 27,405 30,000 of £11,388 17s. 10d., the amount payable as tax being £2,714 4s. 1d.

To this assessment the appellant objected on the grounds: "(1) that the said assessment is contrary to law and excessive in amount on the following grounds—(a) that the Commissioner has wrongly included in the said assessment as assessable income an amount paid to me by Perkins & Co. Ltd. in the said financial year as part of the price of the goodwill of the business of a licensed victualler sold by me to the said Company by an agreement dated 14th July 1925; (b) that the Commissioner in making the said assessment should have deducted from the actual sum of £11,388 17s. 10d. received by me from the said Company in respect of the said agreement such part thereof as is properly attributable to the price of the said goodwill; (c) that the amount received by me in part payment of the price of the said goodwill is not nor is any part thereof assessable income within the meaning of sec. 16 (d) of the Income Tax Assessment Act 1922-1925 or otherwise under the said Act."

The respondent disallowed the objection, and this appeal is brought from his decision.

The appellant admits that portion of the sum of £27,405 mentioned in the agreement was a premium, fine or foregift or consideration in the nature of a premium, fine or foregift demanded and given in connection with a leasehold estate within the meaning of sec. 16 (d) of the *Income Tax Assessment Act 1922-1925*. The question for decision is whether any, and if so what, part of that sum was paid or agreed to be paid otherwise than as a premium, &c., or consideration in the nature of a premium, &c., in connection with a leasehold estate. For the appellant it was said that some portion of this sum of £27,405 must have been attributable to the purchase of the goodwill of the business, and that that portion was not a premium, &c., in connection with a leasehold estate within the meaning of the Act. For the respondent it was said that in the case of premises used as a public-house the goodwill of the business is inseparable from the premises, and that on a lease of premises so used the goodwill necessarily passes to the lessee even if not expressly dealt with by the lease or agreement. If this contention be correct, the express mention of goodwill in the agreement as part of the subject matter covered by the consideration of £27,405 is of no importance, and the whole of that sum must be treated as consideration paid for the granting of the lease, and so assessable income by force of sec. 16 (d) of the Act. Mr. *Henchman* for the appellant relied on the decision in *West London Syndicate Ltd. v. Commissioners of Inland Revenue*^[1] in support of his argument. In that case the instrument under discussion was an agreement for the sale by the lessee of the lease of the premises occupied as a hotel and of the goodwill of the business carried on there. The consideration for the lease and goodwill was stated in the agreement to be a lump sum, and in a declaration of trust, which *Rigby* L.J. regarded as a contemporaneous document, the lease was treated as having no value. The Commissioners ruled that the agreement for the sale of the goodwill was an agreement for the sale of property other than lands, and that no portion of the amount expressed as consideration for the purchase of the lease and goodwill was shown to be attributable to the purchase of the lease, and assessed stamp duty accordingly on the whole amount as

consideration payable on the sale of property other than land. The majority of the Court (*A. L. Smith and Rigby* L.J.J.) held that goodwill was property other than lands, that the goodwill of the business of a hotel was not inseparable from the premises in which the business was carried on and must have some value, and that on the facts of that case there was nothing to show that the Commissioners were wrong in attributing to the sale of the goodwill the whole of the consideration allocated to the lease and goodwill. *Vaughan Williams* L.J. dissented, accepting the opinions expressed by *Jessel* M.R. in *Ex parte Punnett*[2], by *Pollock* C.B. in *Potter v. Commissioners of Inland Revenue*[3] and by *Cotton* L.J. in *Cooper v. Metropolitan Board of Works*[4], that the goodwill of the business carried on in premises used as a public-house was attached to the premises and was in its nature a mere enhancement of their value. He could find in the facts of the case no evidence of an intention to deal with the goodwill separately from the hotel. In the case of *Muller & Co.'s Margarine Ltd. v. Commissioners of Inland Revenue*[5], the decision in the *West London Syndicate Case*[6] was discussed. *Collins* L.J.[7] pointed out that in the *West London Syndicate Case* there were facts which rebutted "the prima facie presumption that the goodwill was annexed to the premises"; and *Vaughan Williams* L.J.[8], after pointing out that there were in the *West London Syndicate Case* many circumstances to lead to the conclusion that the parties had in fact severed the goodwill from the premises, said that in the case then before the Court there was nothing to lead him to suppose that the parties had any intention of severing the goodwill from the business premises to which it was prima facie annexed. *A. L. Smith* L.J. did not refer to the *West London Syndicate Case* but held that on the facts of *Muller's Case* the goodwill was inherent in the business premises. The decision of the Court of Appeal in *Muller's Case* was affirmed by the House of Lords[9]. The Lord Chancellor said[10]:—"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."

If, having regard to the decisions and dicta in these cases, I am at liberty to express an opinion on the abstract question whether the goodwill of a licensed victualler's business is separable from the premises in which it is carried on, my opinion is that while it 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. In the present case the question at issue must be considered in the light of sec. 39 (1) (b) of the Act, which provides that in proceedings on appeal against an assessment to income tax the notice of assessment shall be prima facie evidence that the amount and all particulars of the assessment are correct. The assessment treats the whole sum of £27,405 as consideration for the granting of the lease, and the onus of proving that it was not so rested on the appellant. In my opinion the appellant has failed to discharge that onus. There is no evidence that the goodwill as a separate item formed the subject of negotiations between the parties; on the contrary, the consideration for the lease and goodwill is stated in the agreement as a lump sum, and in the lease the whole sum is referred to as consideration for the granting of the lease. There is no evidence that the hotel was a residential hotel, as the hotel in the *West London Syndicate Case*[11] appears to have been. On the contrary, I should infer from the balance-sheet attached to the return—especially the item cash sales, which represents about 90 per cent of the gross takings—and from the insignificant value attached to the furniture in the agreement, namely, £2,500, that the main source of the profits of the business was the bar trade, the success of which must, to a great extent, if not entirely, depend on the situation of the premises in which the business was carried on. The case put forward for the appellant is that the value of the goodwill should be ascertained by the

method usually adopted in estimating the value of the goodwill of an ordinary commercial business—if any particular method can be said to be usually adopted for that purpose; and the only facts alleged in support of that view were that the business had been successfully conducted for many years by the appellant and her husband, and that the net profits of the business during the three years immediately preceding the sale amounted to £14,472. In my opinion the evidence does not establish either that the goodwill of the business regarded as property separate and apart from the premises on which it was carried on had, or that the parties treated it as having, any definite or appreciable value. In this view of the facts there is no reason for setting aside the assessment which I am bound by the Act to treat as *prima facie* correct.

Mr. *Henchman* for the appellant invited me, if I should be of opinion that the goodwill had no separate value, to state my conclusion upon the evidence as to the value to be attributed to the goodwill on the assumption that it must be treated as having a separate value independent of the premises and as having been sold at a price corresponding to that value, in order that the whole matter might be finally disposed of by the Full Court if an appeal were taken from my decision.

[His Honor then dealt with the value of the goodwill accordingly; but, as there has been no appeal from his decision, his remarks with respect to the evidence given by the witnesses and his conclusion therefrom are omitted from this report.]

For the reasons I have given, I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, McGregor, McGregor, Given & Capner.

Solicitor for the respondent, W. H. Sharwood, Crown Solicitor for the Commonwealth, by Chambers, McNab & McNab.

[1] [\(1898\) 2 Q.B. 507.](#)

[2] [\(1880\) 16 Ch. D. 226.](#)

[3] [\[1854\] EngR 645](#); [\(1854\) 10 Ex. 147](#), at p. 157.

[4] (1883) 25 Ch. D., at p. 479.

[5] [\(1900\) 1 Q.B. 310.](#)

[6] [\(1898\) 2 Q.B. 507.](#)

[7] (1900) 1 Q.B., at p. 321.

[8] (1900) 1 Q.B., at pp. 322-323.

[9] [\(1901\) A.C. 217.](#)

[10] (1901) A.C., at p. 239.

[11] [\(1898\) 2 Q.B. 507.](#)

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