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Judgment
23, 1965

IN THE PRIVY COUNCIL

No. 51 of 1964.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

BP AUSTRALIA LIMITED — Appellant

- and -

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA — Respondent

CASE FOR THE APPELLANT — Record

1. This is an Appeal (by special leave granted by Her Majesty in Council on the 3rd day of July 1964) from an Order of the Full Court of the High Court of Australia made on the 25th day of February 1964 dismissing the Appellant's appeal from the Order of His Honour Mr. Justice Taylor made on the 8th day of May 1961 whereby His Honour dismissed the Appellant's appeal under Sec. 187 of the Income Tax and Social Services Contribution Assessment Act 1936-1952 from the decision of the Respondent disallowing the Appellant's objection against an amended assessment to income tax and social services contribution in respect of income derived in the year of income ended on the 30th day of June 1952 (hereinafter called "the said year of income"). p.209 p.179

2. The issue in the case is whether the whole or part of certain expenditure incurred by the Appellant in the said year of income and amounting in all to the sum of £271,240 is allowable to it as a deduction from its assessable income in calculating its taxable income for the said

year of income for the purposes of the Income Tax and Social Services Contribution Assessment Act 1936-1952 of the Commonwealth of Australia (hereinafter referred to as "the Act"). The Appellant carries on business throughout the Commonwealth of Australia as a marketer of motor spirit and other petroleum products. A substantial part of such business consists of selling motor spirit and other petroleum products to retailers who operate service stations. Such retailers (hereinafter referred to as "service station operators") conduct at their respective premises the business of reselling motor spirit and other petroleum products and of providing related services to members of the public.

3. All but £671 of the said expenditure was expended principally in making individual payments to service station operators which payments formed part of the consideration for their undertaking that they would for a fixed term of years promote the sale of the Appellant's products and deal exclusively in certain brands of motor spirit approved of by the Appellant but a small portion was expended in making payments to other marketers of petroleum products who, together with the Appellant, formed a group of marketers (hereinafter together called "the Co-operating Companies"). Such payments were made for the purpose of adjusting as between the co-operating companies the total amounts paid by each of them to service station operators. The balance of such expenditure, namely £671, was expended by the Appellant in structural alterations to the service station premises of certain of such service station operators. It has not been contended on behalf

of either party that such adjusting payments or such expenditure on structural alterations should be treated differently from payments made directly to service station operators.

4. By section 6 of the Act the following terms are defined as follows :

> "allowable deduction" means a deduction allowable under the Act;
>
> "assessable income" means all the amounts which under provisions of the Act are included in the assessable income;
>
> "taxable income" means the amount remaining after deducting from the assessable income all allowable deductions.

Section 17 of the Act provides that income tax and social services contribution shall be levied and paid "upon the taxable income derived during the year of income".

Section 25(1) of the Act provides that the assessable income of a taxpayer who is a resident shall include "the gross income derived directly or indirectly from all sources" which is not exempt income.

Section 51(1) of the Act provides as follows:-

> "All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income".

5. In its return of income for the said year the Appellant, which was a resident within the

meaning of the Act, included in the amounts claimed by it as allowable deductions from its assessable income (inter alia) the said sum of £271,240. It also included in such amounts the sum of £55,819 expended by it in having painted in a uniform colour scheme the service station premises of service station operators who had in effect agreed to purchase all their requirements of motor spirit from the co-operating companies. Included in such sum was a small amount in respect of architects' fees associated with such painting.

6. The Appellant was on the 28th day of May 1953 assessed to tax by the Respondent in respect of income of the said year of income and the effect of that assessment was to allow as an allowable deduction the said sums of £271,240 and £55,819. Subsequently three successive amended assessments were made by the Respondent the first of which is not relevant to this Appeal; by the second amended assessment the Respondent on the 18th February 1954 disallowed the whole of each of the said sums of £271,240 and £55,819 as allowable deductions. The Appellant duly objected against this second amended assessment and claimed (inter alia) that it should be reduced by the allowance of the total sum of £327,059 as an allowable deduction pursuant to Section 51 of the Act or alternatively that a lesser amount consisting principally of the said sum of £55,819 should be allowed. The Respondent disallowed the Appellant's objection in whole. Before such appeal came on for hearing the Respondent by a third amended assessment on the 18th May 1959 allowed as a deduction the said sum of £55,819,

thereby leaving as still disallowed only the said sum of £271,240. The Appellant thereafter appealed to the High Court of Australia in its original jurisdiction pursuant to Section 187 of the Act.

7. The appeal against the disallowance of the said sum of £271,240 came before His Honour Mr. Justice Taylor and was dismissed by him on the 8th day of May 1961. The Appellant thereupon appealed to the Full Court of the High Court of Australia which on the 25th day of February 1964 dismissed the appeal. The majority of the Court consisting of McTiernan, Windeyer and Owen JJ. held that the deductions claimed were incurred on capital account and were properly disallowed by the Respondent, while the minority, consisting of Dixon C.J. and Kitto J. would have allowed the appeal, holding that the expenditure was incurred on revenue account and should have been allowed as a deduction by the Respondent.

p.164
p.190
pp.198 and 200
pp.182 and 191

8. The facts giving rise to the issues on this Appeal appear from the oral and documentary evidence tendered at the hearing before Taylor J. and set out in transcript of such evidence. These facts are summarised in paragraphs 9 to 16 of this Case.

9. The Appellant is one of a number of companies which are and were at all relevant times engaged in marketing petroleum products in Australia. A substantial proportion of all such products sold by the Appellant and its competitors was then and still is sold to the operators of service stations who in turn sell by retail to members of the public. Until the year 1951 the course of trade in the sale and distribution of such products was characterized

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by the existence of a large number of service stations each of which purchased supplies of petroleum products from a number of different marketers whose pumps and tanks were by arrangement installed at the operator's service station. Each operator thus offered for sale to the public a number of different brands of petroleum products. In the month of August 1951 the Appellant had pumps and tanks installed in about 4000 of such service stations.

p.5-6. 91

10. In August 1951 one of the Appellant's competitors which supplied a substantial part of the market announced that it would thenceforward supply its products only to service station operators who purchased their requirements exclusively from it. Very shortly thereafter others of the Appellant's competitors announced that they likewise were adopting such a policy, which became known as the "solo site service station" policy, and most of the Appellant's competitors put such a policy into operation shortly after those announcements were made.

p.8, 91 Exhibit "B" p.250

11. As a consequence each of a number of the Appellant's major competitors secured agreements with a large number of service station operators, who previously had purchased and resold the Appellant's products, whereby those operators agreed to purchase and resell only the products of that competitor. As a result those operators ceased to purchase the Appellant's products and required it to remove its pumps and tanks from their service stations. The effect of this upon the Co-operating Companies namely the Appellant and three other marketers of petroleum products

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which did not themselves initially adopt a solo site service station policy, was very damaging since it resulted in an immediate and increasing loss of customers and reduction in the volume of products sold by them. pp.11 and 18

12. In order first to reduce the loss of sales of its products and secondly to attempt to increase those sales in the circumstances created by the adoption by some of its competitors of a solo site service station policy the Appellant and the other Co-operating Companies late in August 1951 began to undertake at their own cost the painting of a number of service stations. They did so as an inducement to service station operators to continue to purchase and resell their products. pp.15,61, 97. Exhibit "C" p.251

13. By December 1951 it became apparent to the Appellant and to the other Co-operating Companies that the initial steps taken by them were inadequate to protect their markets for the sale of their products and that other competitors were offering financial inducements to service station operators and that they would be obliged to do likewise. Accordingly by February 1952 the Co-operating Companies began a policy of making payments to service station operators in return for undertakings which varied slightly from case to case but which provided generally that for a period of years they would purchase their supplies of petroleum products exclusively from the Co-operating Companies. As this basis of trading became established standard forms of agreement were arrived at. These agreements varied somewhat from State to State and from time to time but typical of them were two forms of agreement, described as Agreement C1 and Exhibit "C" p.283

pp.248 and 361

Standard Agreement No.1 (See Exhibits A(xxv) and E). It has not been contended that there was any significant difference in the terms of the various forms of agreement. The essence of these agreements was that the Appellant agreed to pay to the service station operator a sum of money and also to supply to him his requirements of the Appellant's products; in return the operator agreed to increase his sales of the Appellant's products to the best of his ability and to sell at his service station only those brands of motor spirit approved from time to time by the Appellant.

14. Initially the amount to be offered to the operator of a service station was related to the quantity of petrol expected to be purchased by him although the Co-operating Companies retained a discretion to offer more in any particular case. During the six months ending on the 30th day of June 1952 competition between marketers to secure exclusive sales to particular service stations became more intensive and in consequence it became necessary in many instances for the Co-operating Companies to offer financial inducements to operators which were equally as attractive as those made by other marketers.

pp.64 and 105.

p.22

15. The effect of the policy adopted by the Appellant and the other Co-operating Companies was that, although as a result of the actions of other competitors it had been required to remove its pumps and tanks from a total of just under 2000 service stations whose custom it had previously shared with other marketers, it and the other Co-operating Companies had by the 30th day of June 1952 secured, pursuant to

pp.95-96 Ex.F p.411

the foregoing agreements, the custom of 791 service station operators which it had not previously enjoyed.

16. By June 1952 the solo site service station system of trading was firmly established. An inherent feature of this system and of the nature of the agreements entered into by the Appellant is the need, as agreements expire, to negotiate new agreements with service station operators. To secure such agreements it is necessary to offer monetary inducements to these operators in order to retain them as customers for the Appellant's products. Such inducements have to compare favourably with those offered by other competing marketers.

17. Both before Taylor J. and on Appeal before the Full Court the principal arguments submitted on behalf of the Appellant were as follows :-

(a) The whole of the expenditure in question arose in the ordinary course of carrying on the Appellant's business of selling petroleum products and was part of the cost of marketing its products.

(b) Part of the day to day business of the Appellant was the obtaining of orders for its products and the expenditure in question was part of the cost of obtaining such orders.

(c) The expenditure gave rise to no assets of an enduring nature but was part of the ordinary recurring expenditure which by July 1952 had become an accepted feature of the business of marketing petroleum products.

(d) These were not payments made once and for

all, and all such payments were a recurrent feature of the conduct of the Appellant's business.

(e) The purpose and effect of the expenditure was to maintain and increase the volume of sales.

(f) The character of payments in the hands of service station operators, the recipients, is irrelevant to the character of those payments as expenditure by the Appellant.

(g) The nature of the business of petroleum marketing was such that there was then established a constantly recurring need for further like expenditure in payments to further operators and, as agreements come to an end and new agreements, involving new financial inducements paid to operators, were entered into to replace expired agreements.

(h) The whole of the expenditure possessed features characteristic of outgoings of a revenue nature in that they were recurring, created advantages which were only transitory in character and not of an enduring nature and were analogous to rebates on the price of products sold.

(i) The expenditure was not incurred in connection with any essential change in the Appellant's business structure; its business of marketing petroleum products remained unchanged, the only change being in the identity of some of its customers and in the quantities its customers purchased from it.

(j) The expenditure was not incurred in eliminating competition in the sale of

products, that competition remained in an acute form; the payments comprised in that expenditure were made not to competitors but to customers in order to secure their custom for a limited period in the future. These payments, being basically computed in relation to a customer's anticipated purchases of the Appellant's products, were in the nature of selling expenses.

(k) The Appellant did not, by its expenditure seek primarily to establish solo sites on which it would enjoy a monopoly of custom but sought rather to ensure that it would continue in the future to obtain an adequate volume of orders for its products.

18. On behalf of the Respondent the following principal arguments were submitted before Taylor J. and before the Full Court:-

(a) The whole of the expenditure in question was expended in the acquisition of capital assets in the form of a new business structure or a new form of goodwill or an enlargement of goodwill. The trade ties were themselves capital assets.

(b) The expenditure resulted in the exclusion of competitors from service stations and procured for the Appellant security of outlets for its products for terms of years, and these were advantages of an enduring character. The Appellant was buying off competition and meeting the threats to its business constituted by the activities of its competitors; once such competition was bought off the resultant freedom from competition was an enduring condition. The payments were to protect and extend the

business structure, and were therefore of a capital nature.

(c) The payments were not within the first part of sec. 51(1) of the Act, but in any event were of a capital nature.

(d) In so far as payments were for effecting physical alterations or purchasing plant, they were for that reason of a capital nature.

(e) The payments were made once and for all. There was no recurring element. Individual payments should be looked at separately.

(f) The payments were not based on gallonage, the determining factor was competition.

(g) The payments were anterior to the sale or supply of petrol and therefore capital.

(h) The whole of the expenditure was, in the recipients' hands, of a capital nature and this was decisive of its true character, both as receipts and as outgoings.

19. An outline of the judgment of Taylor J. and of the Appellant's submissions thereon is as follows :

(a) His Honour reviewed the evidence concerning the course of trade in the sale and distribution of petroleum products in Australia before August 1951, the Appellant's business as a marketer of those products, the effect thereon of the changed trading methods of certain of its competitors after that date and the measures taken in consequence by the Appellant and the other Co-operating Companies. He also analysed the various forms of agreement which were entered into between it and various service station operators. His Honour then described the purpose and effect of such agreements as being

to secure for an agreed period a reselling outlet for the Appellant's products and those of the other Co-operating Companies.

It is submitted that a taxpayer's "purpose" in incurring expenditure is of little assistance in determining the nature of that expenditure if purpose is used in the sense of motive or object - see Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. 1964 2 W.L.R. 339 at 344 per Lord Radcliffe and the judgment of Dixon C.J. in the Appellant's appeal from the judgment of Taylor J. It is further submitted that in any event His Honour erred in describing the purpose and the effect of these agreements as he did. Neither their purpose nor their effect was to secure reselling outlets but rather to maintain and increase the volume of sales of the Appellant's products by ensuring that its customers, the service station operators, would, for a given term, continue to purchase from it.

His Honour's erroneous description of the purpose and effect of the agreements played a dominant part in his ultimate characterization of the outgoings in question as being on capital account; it led His Honour wrongly to regard such outgoings as incurred in the acquisition of assets of an enduring nature in the form of "reselling outlets".

(b) His Honour stated that the inevitable need for the Appellant to incur the expenditure in question threw little light upon its nature as having been incurred on income or capital account. He did not accept the submission that the market situation which developed after August 1951 resulted in the expenditure becoming an ordinary incident of the conduct of the Appellant's

business and discounted the value of the recurring nature of such expenditure as providing an indication of its character.

It is submitted that the expenditure in question amounted to no more than a cost of selling the Appellant's product and that the fact that the new sales methods employed at that time by the Appellant, due to unexpected incidents of marketing, resulted in a new type of expenditure did not alter the nature of expenditure and make it expenditure on capital account. The fact that such expenditure was of a recurring nature, while no more than an indication of its character, is nevertheless an important indication that it was of a revenue nature.

(c) His Honour rejected the Appellant's submission that the expenditure was not made with a view to creating an asset of enduring benefit and he concluded that the substance of the Appellant's arrangements with service station operators was not the obtaining of promises by the latter to remain as customers for a fixed period, but rather the obtaining of a trade tie, thereby excluding from sale on those operators' service stations for a period of years brands of motor spirit not approved of by the Appellant and thus obtaining freedom from competition on that site. This, said His Honour, was an asset or advantage for the enduring benefit of the Appellant's trade.

It is submitted that in so finding His Honour was giving effect to his initial erroneous characterization of the purpose and effect of the Appellant's agreements with service station operators referred to in (a) above. The correct view was, it is submitted, expressed in the

dissenting judgment of Kitto J, in the Full High Court when he said that the transaction differed in an important respect from one in which a trader takes from a potential competitor an agreement in restraint of trade; in such a case there is created for the promisee a more favourable situation in which to carry on his business, the elimination of the competitor being anterior to and not part of the trading and constituting the cost of a capital asset. The present case, said His Honour, was not one involving the creating of a situation in which to set about selling motor spirit; instead the expenditure secured the particular sales necessary for the satisfaction of a service station's requirement over a period. p.192 p.193

(d) His Honour then examined the character of the expenditure incurred in securing these trade ties and concluded that it was of a capital nature because the quantum of each payment was determined by reference to competition between marketers of petroleum products and not by the trading potentialities of particular service stations. His Honour concluded that such payments were therefore not the equivalent of trade rebates, on that ground distinguishing Bolam v. Regent Oil Co. Ltd. 37 T.C. 56., but were rather capital sums outlaid to secure trading ties for fixed periods.

It is submitted that in considering the effect of competition upon the quantum of payments made by the Appellant His Honour confused the measure of the payment with its motive; in fact the evidence disclosed that gallonage was one factor taken into consideration in determining the quantum of a payment but even if this had not been the case this would not in itself be

an indication that the payments were on capital account; it would amount to no more than the absence of one indication of the revenue nature of the payments. It is further submitted that His Honour misunderstood the basis of the decision in Bolam's case and that it is not capable of being distinguished from the Appellant's appeal.

p.190 20. In the Full High Court McTiernan J. in his reasons for judgment stated that the judgment of Taylor J. was correct but did not express any separate reasons.

21. An outline of the judgment of Windeyer J. and of the Appellant's submissions thereon is as follows :-

pp.198-199 (a) His Honour said that as he agreed with Taylor J's. conclusion he need add very little. He said that the character of a questioned item of expenditure must depend primarily on its purpose and that regard ought therefore to be had to what was sought to be acquired rather than to the form or mechanics of the transaction.

It is submitted that, for the reasons stated in paragraph 19(a) hereof, this emphasis upon purpose in the sense of motive is erroneous and that it led His Honour to a mistaken view of the character of the Appellant's expenditure. It is submitted that the manner in which an advantage is acquired may properly be decisive in determining whether the cost of acquisition is a capital cost or is, instead, an outgoing on revenue account.

(b) His Honour agreed with Taylor J. that the payments made by the Appellant were made to secure for agreed periods a reselling

outlet for its products, and that by each arrangement it obtained for a substantial period, and he supposed with a prospect of renewal thereafter, something which was to become part of the structure within which and by reason of which it carried on its business.

It is submitted that, in common with Taylor J., His Honour wrongly characterized the transaction involved in the arrangements in question as the obtaining of an "outlet" whereas in fact what was obtained was a certainty of customers' orders for a period in the future. His Honour's view involves confusing the service station operator's retail trade with the wholesale trade of the Appellant.

22. Owen J. in his judgment in the Appellant's appeal referred to and relied on his reasons for judgment in the case of Vacuum Oil Company Pty. Ltd. v Commissioner of Taxation 37 A.L.J.R. 372. stating that he could see no material distinction between the Appellant's appeal and that case. That case was an appeal by Vacuum Oil Company Pty. Ltd. (hereinafter called "Vacuum") to the Full Court from the dismissal by Taylor J. of its appeal against its assessment to income tax for the year of income ended on the 30th day of June 1953. The question involved in that case was whether the Commissioner of Taxation was correct in disallowing in whole as an allowable deduction from Vacuum's assessable income expenditure incurred by it and which fell into three general categories as follows :-

p.200

(a) expenditure on minor structural alterations to service stations, the operators of which had agreed to purchase supplies of motor

spirit exclusively from Vacuum together with small associated outgoings.

(b) periodical payments made or credited monthly to service station operators who observed the terms of agreements made by them with Vacuum whereby they agreed to purchase all their requirements of motor spirit from it which payments it set off or credited against the operators' liability to make monthly payments to it in repayment of principal moneys and interest due in respect of loans made by it to such operators.

(c) periodical payments paid annually to service station operators who observed the terms of agreements made by them with Vacuum whereby they agreed to purchase all their requirements of motor spirit from the Appellant.

23. An outline of the judgment of Owen J. in
p.204 the Vacuum case, so far as relevant to the Appellant's case, and of the Appellant's submissions thereon is as follows :

(a) After reviewing the facts and summarizing the provisions of the various documents, His Honour agreed with the view of Taylor J. that the estimated "gallonage" for any particular service station was no more than a factor, and no doubt an important factor, in deciding what sum it would be economically sound to lend or pay to the particular operator.

The Appellant refers to its submissions in paragraph 19(d) hereof.

(b) His Honour considered that the fact that the obtaining of trade ties became necessary because of the circumstances of the trade

did not assist in characterizing the nature of the expenditure.

In this regard the Appellant refers to its submissions in paragraph 19(b) hereof and says that this circumstance assists in characterizing the payments as an ordinary outgoing in the conduct of the trade.

(c) His Honour said that the difficulty in characterizing an outgoing as being on capital or revenue account lay in the fact that no criterion had been or could be laid down which would enable the question to be answered with certainty in all circumstances. He said that a number of tests had been suggested, none of which could be conclusive; they were indications rather than tests. His Honour regarded all types of outgoing in issue in Vacuum's appeal as of a recurring nature, but said that when the nature of the advantages gained by it as a result of such expenditure were examined the balance seemed to him to tilt in favour of the view that the outgoings were of a capital nature. Vacuum's payments were made in return for the operators' undertaking to deal exclusively in its products and to give it exclusive advertising rights on the sites for a substantial period and the carrying into effect of those undertakings. p.207

The purpose or effect of the expenditure seemed to His Honour to have been to add valuable, even if intangible, assets of a lasting character to the profit earning organization. p.208

It is submitted that His Honour should have regarded the recurring nature of the

outgoings as a further strong indication that these outgoings were on revenue account and that in common with Taylor J. he was led into error in his ultimate characterization of those outgoings as on capital account for the reasons submitted in paragraph 19(a) hereof and because he overlooked the fact that procuring orders from customers is part of the ordinary day to day conduct of a wholesaler's business

24. Dixon C.J., in his judgment reviewed the evidence and stated that the actual nature and amount of expenditure was more important in determining its character than were the motives

p.186 leading to the adoption of the particular course of business. He said that the decision should depend upon an understanding of what the various items of expenditure represented rather than upon general considerations. Since the expenditure was incurred in promoting sales of petrol, it prima facie formed part of the year's marketing expenditure and was an allowable deduction. The Appellant, His Honour said, had always been and would in the future be engaged in a continuous process of business expenditure which involved the cost of selling its petrol in whatever way seemed suitable from time to time. In all the unexpected incidents of marketing throughout the pre-war, war time and post war years it was clear that the Appellant, in the course of conducting its business, was trying, by various means, to obtain a definite public market for its products and was not acquiring a capital asset nor doing more than so conducting its business on revenue account as to increase it and to make as certain as it could that its business was expanding and would continue to expand. The particular methods of

the Appellant in question in the appeal did not change the character of its transactions from those of a continual attempt to establish its product in a consumer's market and to obtain a reputation for that product; no expenditure in increasing any element in the profit earning instrument under its control was involved.

25. Kitto J, in his judgment, stated as follows:-

(a) The choice was between treating the Appellant's expenditure as expenditure in establishing, replacing and enlarging the profit yielding subject or profit making machine or as being for a purpose falling within the conduct of the trade. The former view could be supported either by regarding the expenditure as the purchase of freedom from competition at particular service stations or as the cost of purchasing a new market to replace one being threatened by the actions of competitors, it being assumed that a service station once acquired as an exclusive customer would be likely so to continue at the expiration of the term of the agreement. His Honour did not regard the Respondent's contention as justified on either of these two bases.

(b) A marketing company was not eliminating competition so as to create a future favourable trading situation as does a trader who purchases from a potential competitor an undertaking not to compete. On the contrary an operator's undertaking not to purchase competitors' products was only the negative side of the positive advantage which the marketer secured by its expenditure, namely that the operator's

custom would, for a given period, go to the marketer. The expenditure was thus part of the process of effecting sales of its products and was prima facie part of the cost of selling those products and not a capital outlay.

p.193 (c) As to the second basis, His Honour said that, while there had been a radical change in the wholesale trade in petrol and while the payments in question formed part of the Appellant's endeavour to cope with the resulting threat to its trade, he did not find any justification for regarding the payments as final in character having the practical effect of providing for the Appellant's business a new basis of operation. The change in the wholesale trade to the new "solo site" system meant that every oil company if it wanted to sell petrol to service stations had to accept the necessity of spending money, not at the beginning once for all, but at the beginning and from time to time to ensure that it would receive from as many service stations as possible the whole of their orders for limited periods.

(d) It was significant that monopoly rights were acquired only for limited periods and by its expenditure the marketer would not secure any enduring share of the total market for its products. The need to obtain renewals or extensions of agreements with operators would be continuous, involving continual effort and expenditure to which thenceforth the marketer was committed as a regular feature of selling activities. Accordingly His Honour concluded that the

Appellant neither acquired a new market or a new framework within which to carry on business for the future; nor did it add to goodwill by buying off competition, but it was instead, by its expenditure, buying future orders for its products. The fact that the trading potentialities of particular service stations was a guiding though not a governing, factor in fixing the quantum of payment to operators supported the view that the expenditure was from the marketer's viewport a cost of obtaining orders for the marketer's products. Such expenditure would, as a matter of accounting, be a marketing cost.

(e) For these reasons he concluded that the outgoings by the Appellant were not of a capital nature but were of the nature of trading expenses and accordingly allowable as deductions and he would have allowed the appeal.

26. The Appellant refers to the submissions set out in paragraph 17 of this Case and submits that the conclusions of Taylor J. and of the majority of the Full Court are erroneous for the following main reasons :-

1. Their Honours failed to pay proper regard to the nature of the various items of expenditure.
2. Each of the items of expenditure was incurred in the course of and for the immediate purpose of promoting the sale of the Appellant's products.
3. Each of the items was a means of assuring a regular flow of orders for the Appellant's products from a large number of its customers.

4. Their Honours wrongly regarded the expenditure as directed to acquiring an asset of an enduring character in the form of a restraint on service station operators preventing them from purchasing supplies from the Appellant's competitors. They thus confused a payment to a competitor to induce him not to compete, with a payment or concession to a customer to induce him to buy or to continue buying or to buy more.

5. No asset of an enduring character in any relevant sense was obtained.

6. The advantage obtained was in the nature of orders for products for future delivery over an agreed period to a regular customer. As expenditure to secure such orders it was a revenue outgoing.

7. No monopoly rights or freedom from competition in any relevant sense were obtained by the Appellant by virtue of the payments made by it to service station operators.

8. The majority wrongly concentrated on the restraint on the operator from buying from others, whereas the true significance of the agreements is to be found in the positive obligation to buy from the Appellant which they create and which reveals the revenue nature of the payment.

9. The amount of payments made to each service station operator was determined having regard (inter alia) to the value to the Appellant of the orders for its products which such expenditure would purchase and this is a strong indication that the payments are of a revenue nature.

10. The expenditure is not one to be made once and for all, but is of a recurring nature and part of the ordinary expenses of marketing.

11. The period of the agreements or any individual agreement provides no indication of an asset of an enduring character in any relevant sense. The majority were wrong in attributing significance to this aspect and in not regarding the system of trading as a whole as showing the recurring need for such expenditure.

12. The majority's conclusion that the expenditure was directed to obtaining "outlets" which were capital assets, involves a confusion between the wholesale trade of the Appellant and the retail trade of its customers, the service stations operators. They wrongly treated the service stations as sites from which the Appellant sold its products.

13. The expenditure was incurred in the course of and for the purpose of securing sales of the Appellant's products and formed part of the cost of such sales.

14. The submissions referred to in paragraph 17 are correct and should have been accepted by the High Court.

15. The case is not distinguishable from the decision in Bolam v. Regent Oil Co. 37 T.C.56 which was rightly decided.

16. The reasons of the majority are inconsistent with the decision of the Privy Council in Commissioner of Taxation v. Nchanga Consolidated Copper Mines Ltd. (1964) 2 W.L.R. 339.

17. The judgments of Dixon C.J. and Kitto J. are correct for the reasons which they give. A

K.A. AICKIN

N.M. STEPHEN

No.51 of 1964

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT

OF AUSTRALIA

BP AUSTRALIA LIMITED
Appellant

- and -

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF
AUSTRALIA
Respondent

CASE FOR THE APPELLANT

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