P.C.
G[illegible]

Judgment
23, 1965

IN THE PRIVY COUNCIL No. 51 of 1964

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

FEB 1966

BETWEEN:

B.P. AUSTRALIA LIMITED
(Appellant) Appellant

- and -

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF
AUSTRALIA (Respondent) Respondent

CASE FOR THE RESPONDENT

RECORD

INTRODUCTION

1. This is an appeal (pursuant to special leave granted by Her Majesty in Council on the 3rd day of July 1964) from a majority judgment of the Full High Court of Australia, dated the 25th day of February 1964, disallowing an appeal by the Appellant from a judgment given on the 8th day of May 1961, by Taylor J. sitting in the original jurisdiction of the High Court of Australia. By his judgment Taylor J. disallowed an appeal by the Appellant taxpayer against an amended assessment of income tax and social services contribution in respect of the year of income ended the 30th day of June 1952. p.210 p.209 p.179 p.164-179

2. The question in issue is whether the Respondent Commissioner of Taxation wrongly disallowed pursuant to the Income Tax and Social Services Contribution Assessment Act 1936-1952 as a deduction from the Appellant's assessable income for the year in question, the sum of £271,240, that being the amount claimed as a deduction during the relevant year which was said to have been expended in or in connexion with the Appellant's activities to secure sites

for the sale of the Appellant's products.

3. In considering the facts giving rise to this question it is necessary to refer to the manner in which the Appellant conducted its business prior to and up to the relevant year in issue. At all material times the Appellant was engaged in the business of selling and distributing motor spirit to service station operators (who in turn sold that product to the public) in competition with other suppliers of motor spirit. For some years
p.5 l.19 prior to 1951 sales were made to service station operators mainly through "multi-pump" stations at which were installed tanks and pumps belonging to different competing oil companies and to which motor spirit was supplied by each of competing companies whose tanks and pumps were installed at any particular service station. Each operator thus offered to the public a choice of a number of
p.6 l.29 different brands of motor spirit. The pumps and
p.6 l.37 tanks remained the property of the oil companies concerned and were subject to the right of the service station operator to give notice (one
p.6 l.10 month) for them to be removed. In practice, the tanks were not removed, as there was in existence a trade convention by which a company which had received notice of removal would make its existing tanks on a particular site available to its successor.

p.250 l.9 4. On the 14th August 1951 one of the Appellant's competitors in the sale and distribution of motor spirit to service station operators - The Shell Company of Australia Limited - announced that it intended to introduce immediately "a solo site" scheme whereby it would supply its products only to service station operators who purchased their requirements exclusively from it. Shortly after
p.10 l.33 this move others of the Appellant's competitor oil companies put into operation similar schemes.

5. The Appellant decided to take steps to ensure that certain service station operators would sell only its products and those of certain other companies. In the case of the Appellant there were difficulties in the way of introducing a plan to induce selected service station operators to sell its products only. In the first place there was a
p.92 l.19 doubt whether its financial reserves in August 1951 were sufficient to finance such a plan, and
p.10 l.19 secondly it did not market any forms of lubricating oil which would be essential for an operator conducting a one-brand service station.

Accordingly it joined forces with three other oil companies in order to secure sites where their products might, in common, be resold to the public. The companies so joining forces were referred to as "the co-operating companies". p.11 l.7

6. At the outset it was decided to establish so-called "Independent" service stations and, initially, it was proposed that attempts should be made to secure the co-operation of service station operators at selected sites in continuing to purchase and resell the products of the co-operating companies by undertaking to paint, at the cost of those companies, the service station premises in certain standard distinguishing colours together with a display sign identifying each station as an "Independent Service Station", by which means it was thought that the operators would obtain the benefit of an extensive advertising programme which the co-operating companies had decided should be undertaken. Certain expenditure was laid out by the Appellant in connection with that scheme. p.15 l.20 p.40 l.37

Subsequently however, the Appellant and the co-operating companies decided to make financial payments in order to obtain trading ties with service station operators at selected sites. Accordingly by February 1952 and thereafter "financial assistance" (called "Development Allowances") was being paid to service station operators in the form of lump sum payments. p.21 l.42 p.27 l.41

8. For the purpose of providing the financial assistance called "Development Allowances" the Appellant in the year ending the 30th June 1952 entered into a considerable number of contracts with service station operators in several Australian States. These contracts were cast in a number of different standard forms but for the purposes of the case it was agreed that there was no significant difference. By the two forms of contract selected for the purpose of illustration :- p.30 l.19 p.247 l.1 p.247 l.18

(1) The Appellant undertook :-

(a) to pay to the service station operator a specified lump sum of money described as a "development allowance". (As Taylor J. found, there was no obligation on the service station p.247 l.12 p.249 l.2 p.176 l.31

operator to use the sum he received on the improvement of his site and, as Counsel for the Appellant said in opening, the operator simply got the amount and what he did with it was his business);

p.247 l.16
p.249 l.6

(b) to supply the operator's requirements of products marketed by the Appellant;

p.247 l.18
p.249 l.8

(c) to assist the operator to develop his business by providing him with a comprehensive merchandising plan as described in a brochure already in his hands.

(2) The service station operator :-

p.176 l.31

(a) was as above stated under no obligation to use in any particular way any sum of money paid to him;

(b) agreed :-

p.247 l.23
p.249 l.14

(i) to increase the sale of the Appellant's products to the best of his ability (but was not bound to purchase from the Appellant any or any stated quantity of its products);

p.247 l.25
p.249 l.16

(ii) to refrain from reaching any agreement, either verbal or in writing, with any other wholesale distributor of petroleum products;

p.247 l.28
p.249 l.19
p.249 l.22

(iii) to resell from his premises only the brands of motor spirit approved of by the Appellant from time to time (in one of the forms of contract, specifically referring to the products of the other co-operating companies as approved);

p.247 l.31
p.249 l.26

(iv) to permit the Appellant or its contractors to paint such part of his premises which the Appellant should consider as being ancillary to the sale of its products "to the company's standard colours";

p.247 l.35
p.249 l.30

(v) to make no alteration to the arrangements for a fixed and specified period of years; (which ranged from 3 to 10 years over the contracts entered into as hereinbefore referred to);

(vi) that if the business should be sold or otherwise transferred during the specified period of years a condition of such sale or transfer should be that the arrangement evidenced by the agreement should continue for the unexpired portion of the period. p.248 l.1 p.249 l.32

9. Of the total amount of £271,240 claimed as an allowable deduction the sum of £270,569 was paid out by the Appellant for the purpose of providing to service station operators the financial assistance called "Development Allowances" in the manner hereinbefore described; the balance of £671 was expended in making structural alterations (£386) and performing concrete work (£285) on some of the sites occupied by operators who entered into agreements with the Appellant. Of the sum of £270,569 some part was paid direct to service station operators to obtain their co-operation and some part was paid to others of the co-operating companies under an agreement among the co-operating companies that the total expenditure incurred in obtaining reselling outlets in the manner set out above should be borne by them according to the ratio of their respective sales through reselling outlets during an earlier base period. The payments made by the Appellant to the other co-operating companies were made by way of adjustment after taking into consideration the amounts which they had expended and the amounts which the Appellant had expended. The Respondent makes no point of the fact that some part of the sum of £270,569 was paid direct to service station operators and some part by way of adjustment in the manner described. In summary the following sets out how the sum of £271,240 claimed as a deduction is made up : p.169 l.27 p.234 l.32 p.103 l.22

(a)	Development allowance payments direct to operators and by way of adjustment with co-operating companies	£270,569
(b)	Structural alterations	£ 386
(c)	Concreting	£ 285
		£271,240

10. As to the total amount of £271,240 which the Appellant claims to be an allowable deduction for

income tax purposes under the three heads set out above, the Appellant contends that the amounts represent deducible outgoings chargeable to revenue. The Respondent on the other hand contends that none of the amounts claimed is deductible, and that the payments were outgoings of capital or of a capital nature. Further as to all the amounts claimed as deductions by the Appellant, the Respondent contends that they are not outgoings incurred in gaining or producing assessable income nor are they necessarily incurred in carrying on a business for the purpose of gaining or producing such income.

11. In addition to the payments made by the Appellant in the year to the 30th June 1952 under the agreements for the provision of financial assistance called "Development Allowances" to service station operators, the Appellant also, in the same year, as a result of the circumstances arising in its trade from the development of the one-brand service station system as is described above, expended the sum of £607,843 in the purchase of service stations or of sites for service stations and laid out the sum of £144,205 in securing ties by the making of loans to service station operators. These amounts (which are not in question in this appeal) indicate the substantial character of the re-organization of marketing and distribution methods occasioned in the trade by the introduction of "solo site" trading.

pp.406-410
pp.405-406

STATUTORY PROVISIONS:

12. The main sections of the Income Tax and Social Services Contribution Assessment Act (hereinafter referred to as "the Act") material to the present case are :

(a) the definition of "allowable deduction" in Section 6(1) which is as follows :-

> "'allowable deduction' means a deduction allowable under this Act";

(b) the definition of "assessable income" in Section 6(1) which is as follows :-

> "'assessable income' means all the amounts which under the provisions of this Act are included in the assessable income";

(c) the definition of "taxable income" in Section 6(1) which is as follows :-

"'taxable income' means the amount remaining after deducting from the assessable income all allowable deductions";

(d) Section 17 which is as follows :-

"17. Subject to this Act, income tax and social services contribution at the rates declared by the Parliament shall be levied and paid for the financial year which commenced on the first day of July, One thousand nine hundred and fifty, and for each financial year thereafter, upon the taxable income derived during the year of income by any person, whether a resident or a non-resident."

(e) Section 25(1) which is as follows :-

"(1) The assessable income of a taxpayer shall include -

(a) Where the taxpayer is a resident -

the gross income derived directly or indirectly from all sources whether in or out of Australia and

(b) where the taxpayer is a non resident -

the gross income derived directly or indirectly from all sources in Australia -

which is not exempt income."

(f) Section 51(1) which is as follows :-

"51(1). 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."

THE RESPONDENT'S GENERAL CONTENTIONS:

13. The following are basic features of all forms of payments made by the Appellant :

(1) The payments were lump sum payments made once and for all.

(2) In return for the payments the Appellant secured a trading tie with the service station operator concerned.

(3) Some payments were used to effect improvements to the premises of operators, either by the Appellant or the operators, but, as Taylor J. found, the evidence showed that the operator "simply got the amount and what he did with it was his business". p.176 l.37

(4) The amount of the total payment was in each case determined solely by competition for the site between the competing oil companies.

(5) The payments were not determined by gallonage of motor spirit sold or to be sold from the site and were not equivalent to trade rebates or discounts.

14. All forms of payments and agreements between the Appellant and service station operators involved the following essential characteristics :-

(1) The securing of sites as retail outlets for the sale of the Appellant's products.

(2) The exclusion of the sale at the site of the products of any competitors not approved by the Appellant.

(3) The assurance that the Appellant's petrol tanks and pumps would remain on the site.

(4) Advertising rights for the Appellant on the site.

15. Further :-

(1) The expenditure did not constitute ordinary incidents of the conduct of the Appellant's business.

(2) The whole of the expenditure was for the acquisition of capital assets bringing into existence a new trading or business structure -

a change from one involving the use of multiple pump service stations with liability to lose tanks and competition on the site to one of tied stations, fewer of them, elimination of competition on the site and exclusive advertising. The trade ties thus obtained were capital assets of an enduring nature.

(3) The expenditure resulted in the exclusion of competition from other oil companies unless approved by the Appellant on the sites of the tied service stations, which resulted in security of outlets at least for a number of years and possibly indefinitely; this advantage was of an enduring nature or condition.

(4) The expenditure constituted the buying off of competition by its competitors (other than from its co-operating companies).

(5) The expenditure was not related in any real sense to purchases made from the Appellant; there was no obligation on the service station operator to purchase any required amount of motor spirit or gallonage, the determining factor being the amount of competition for the specific site; the expenditure was not therefore in the nature of a rebate or discount on purchases.

(6) The payments were made once and for all, there being no recurring element. Individual payments should be looked at separately.

(7) The Appellant by the payments obtained an enlargement of its goodwill - an enduring benefit.

(8) The payment in each case was in the hands of the service station operator a receipt of a capital nature, and as it also conferred an enduring benefit upon the Appellant, it was capital expenditure.

16. What the Appellant did was in effect to acquire by means of substantial payments outlets for the sale of its products. In a minute the payments were described as a mode of acquisition of service stations. In considering whether or not the payments were capital payments the basic considerations are the character of the p.431 l.1

advantage sought, the manner in which it is to be used, relied upon or enjoyed and the means adopted to obtain it (compare Dixon J. in Sun Newspaper Ltd. v. Federal Commissioner of Taxation 61 C.L.R. 337 at 363). In the present case all these considerations lead to the conclusion that the payments were capital payments. The character of the advantage sought and the manner in which it was to be used, relied upon or enjoyed were the obtaining of sites for the sale therefrom of only the brands of motor spirit approved of by the Appellant from time to time and ties with operators thereon, the means adopted were financial payments. The basic consideration is that the Appellant was buying these enduring benefits by financial payments. The fact that there was intense competition between oil companies for sites demonstrates that the ties were of considerable value. The fact that the price paid was determined by the competition for each site is also relevant as showing that the payments were not in the nature of rebates or discounts. But fundamentally, in determining whether the payments were of capital or a capital or a capital nature, the determining factor is the consideration that the Appellant purchased the enduring benefit of tied sites for the sale therefrom only of products approved by it from time to time.

17. All the payments were equivalent to actually purchasing the freehold of selling sites and are comparable with the following other capital expenditure by the Appellant :-

pp.406-410 (1) During the year in question, the Appellant purchased service station or sites for the same for £607,843.

pp.405-406 (2) During the year in question, the Appellant made loans to operators to secure ties amounting to £144,205.

18. Further, as Taylor J. found :-

p. 171, l.45 (1) There was intense competition among companies in the trade for what were thought to be "strategic" sites, and this competition was the vital factor in determining how much or how little it was necessary for any company to pay to secure a site.

p.172 l.1 (2) The amounts which were paid were determined by the intensity of the competition

and the lump sums which were paid were laid out by one or other of the competitors to secure the resultant advantage. In relation to sites in respect of which it secured ties the Appellant in conjunction with the other co-operating companies paid what competition demanded.

(3) The lump sums paid to service station operators by the Appellant (and its co-operating companies) were not paid either in form or in substance as the equivalent of trade rebates or discounts calculated on the basis of the estimated trade turn-over at each particular site. p.176 l.16

(4) The payments which were made had no real relation to gallonage and by no stretch of the imagination is it possible to assimilate them to the position of a trade rebate or discount. p.178 l.35

19. The payments and the agreements involved the bringing into existence of assets or advantages for the enduring benefit of the Appellant within the meaning of Viscount Cave's statement in British Insulated and Helsby Cables v. Atherton (1926) A.C. 205 at 213.

(1) The agreements in Victoria and New South Wales were in most instances for periods of 5 years or more. In New South Wales only 3 agreements were for less than 5 years and about 20 were for 10 years. The pattern in other States was similar. p.153 l.7 - p.154 l.13

(2) "Enduring" in this context does not mean "that the advantage which will be obtained will last forever": See per Taylor J. in B.P. Australia Limited v. Commissioner of Taxation citing Latham C.J. in Sun Newspaper Ltd. v. Federal Commissioner of Taxation 61 C.L.R. 337 at 355.

(3) The tie for the payment held to be a capital payment in Strick v. Regent Oil (1964) 1 W.L.R. 1166 was for 10 years.

(4) The benefit here obtained was of a more definite character and more readily identifiable as such than the asset or advantage recognised by Viscount Cave as

enduring in the Helsby Cables case (1926) A.C. 205 where the benefit was the goodwill of employees resulting from the establishment of a fund for their benefit - see per Taylor J. in B.P. Australia Ltd. v. Commissioner of Taxation.

(5) In any event all the lump sum payments whether used for capital improvements to the sites or otherwise were made once and for all and were not recurring. So far as payments pursuant to the "Development Allowance" agreements are concerned once a site had become tied to the Appellant the benefits were likely to endure indefinitely. Thus for example in a country town an oil company would often not need more than one site. Once a situation emerged in which each of the major companies had its own site, it would not be likely to be interested in acquiring a further site and accordingly the tied operator would tend to remain tied after his original agreement had run out. He would be unlikely to be able to obtain any consideration from any other company and, if he did not continue to take supplies from the company to which he was originally tied, he would be in danger of losing his whole business. Accordingly, the oil company to which he was originally tied would be in the stronger position and he would be wanting to remain with it. Thus, the benefits resulting from the original payments would be enduring.

p.53 ll.3-13 (6) The evidence was that there were not a great number of agreements renewed when their period ran out.

(7) Other examples of capital payments for advantages of limited periods are to be found in the following cases and judgments :-

Henriksen v. Grafton Hotels (1942) 2 K.B. 184 (C.A.) - The tenant of a hotel covenanted with the Landlord to pay all charges which might be imposed in respect of the licences. Charges in respect of monopoly value imposed in respect of the re-grant of the licences for 3 years were held capital in nature and not deductible. Du Parcq L.J. said at pages 195-6 :-

"It is true that the period for which the right was acquired in this case was three years and no more and a doubt may be raised whether such a right is, of 'enduring benefit' or 'of a permanent character'. These phrases, in my opinion, were introduced only for the purpose of making it clear that the 'asset' or 'right' acquired must have enough durability to justify its being treated as a capital asset ..... 'Permanent' is indeed a relative term and is not synonymous with 'everlasting'. In my opinion the right to trade for three years as a licensed victualler must be regarded as attaining to the dignity of a capital asset ..... ".

In Sun Newspapers Limited v. Federal Commissioner of Taxation (1938) 61 C.L.R. 337 at page 362, Dixon J. said :

"..... the lasting character of the advantage is not necessarily a determining factor. In John Smith & Son v. Moore (1921) A.C. 13, the coal contracts which Lord Haldane and Lord Sumner thought were acquired at the expense of capital had a very short term".

United Steel v. Cullington 23 T.C. 71 (C.A.) Payment to close down steel mills for 10 years held a capital payment.

20. By the payments and agreements the Appellant acquired or added to its "profit yielding subject" - per Dixon J. in Sun Newspaper Case 61 C.L.R. at 360 citing Lord Blackburn in United Collieries v. Inland Revenue Commissioners (1930) S.C.215 at 220, 12 T.C. 1248 at 1254.

21. The payments and agreements involved the acquisition of goodwill of sites or the enlarging of the Appellant's goodwill. Payment for the acquisition or enlargement of goodwill is a capital payment. Here the Appellant's goodwill was enlarged through the establishment of a large number of service stations selling and advertising the Appellant's brand of petrol to the exclusion of that of its competitors (other than its co-operating companies). Compare :-

United Steel v. Cullington 23 T.C. 71 - Payment of £180,000 to a competitive company to close down for 10 years held to be a capital payment.

Collins v. Joseph Adamson (1938) 1 K.B. 477 - Purchase price of another company to close it down held a capital payment.

Sun Newspaper Ltd. v. Federal Commissioner of Taxation 61 C.L.R. 337 - Payment for purchase of a competing newspaper company to close it down held a capital payment. The Respondent relies upon the whole of the reasons for judgment of Dixon J. in this leading case.

22. The payments and agreements were made for the purpose of the removal or prevention of trade competition on the site or to buy off opposition of other trade competitors on a site and were accordingly capital payments. The competition and opposition here bought off were the competition and opposition of other companies' products being sold at the sites.

Compare:-

Associated Portland Cement v. Kerr 27 T.C. 103 - Lump Sum payment to directors with expert knowledge to prevent them competing held a capital payment.

Collins v. Joseph Adamson (1938) 1. K.B. 477, above referred to.

Sun Newspaper Ltd. v. Federal Commissioner of Taxation 61 C.L.R. 337, above referred to.

23. The transactions in the present case may be regarded as joint ventures between the Appellant and the reseller for the selling of petrol secured by money payments. Payments for such purpose are essentially capital in nature.

Boyce v. Whitwick Collieries 18 T.C. 655 at 682 where there was a joint adventure in the supply of water to the Council.

24. The correctness of the decisions of Taylor J. and of the majority of the Full High Court are, it is submitted strongly reinforced by the reasons of the Court of Appeal in the recent decision in Strick v. Regent Oil Company Limited (1964) 1 W.L.R. 1166.

The following summary of the facts of the case is taken from the judgment of Lord Denning M.R. at pages 1172-1173 of the report :-

"There are three large suppliers of petrol in this country - Shell, Esso and Regent. Since the war there has been intense competition between them. Each of these three great companies has sought to get the owners of garages or filling stations to sell its brand of petrol only, and not to sell the brands of others. Each seeks to get the retailer to sell its brand of petrol exclusively. The competition is so intense that they call it an 'exclusivity war.' The retailers have not been slow to take advantage of this war between the giants. They have bid the one against the other. They ask each of the big companies: 'What will you pay me if I tie myself to your products?' In the early stages the inducement held out by each company was a simple rebate. The company would offer the retailer a rebate of a farthing or thereabouts on every gallon of petrol if he would promise to sell its brand to the exclusion of all others. The retailer would tie himself to the company offering the most rebate. Competition forced the rebates up. The next stage was that instead of a rebate, the company paid a sum in advance to the retailer each year according to the estimated gallonage for the coming year. So the retailer received cash in hand at the beginning of the year, and then at the end of the year the figure was adjusted up or down according to the gallonage actually supplied. The retailer would tie himself to the company offering the best advance payment. The third stage was, that instead of an advance for one year, the company paid a lump sum in advance for five or six years ahead; and this was adjusted up or down afterwards according to the gallonage sold. That was the stage reached in Bolam's case (1956) 37 T.C. 56 where Danckwerts J. held that these advance payments made by a company were payments of a revenue nature. They were not capital expenditure. They could be deducted by the company in calculating its profits for tax purposes.

We have now reached a further stage. Some of the retailers have taken even greater advantage of their bargaining position. They have extracted from the oil companies a sum in

advance which is not to be returned in any circumstances, and furthermore, in such a form that the retailers hope it will not be taxable in their hands. This form is known as 'lease-sublease'.

I will describe it by reference to one of the cases. FIRST, THE LEASE. Green Ace Motors Ltd. owned a garage and filling station in the Norwich Road, Ipswich. On June 11, 1956, Regent paid Green Ace Motors the sum of £5,000 which was described as 'paid by way of premium.' In return, Green Ace Motors demised to Regent the garage and filling station for 10 years from May 13, 1955, at a rent of £1 a year. The £5,000 was calculated in this way : It was estimated that Green Ace Motors would, during the 10 years, sell 1,200,000 gallons of petrol, and that the rebate on that gallonage would be at about 1d. a gallon. That comes to £5,000 over the 10 years. SECONDLY, THE SUBLEASE. On the same day, June 11, 1956, Regent sublet the property back again to Green Ace Motors. They subdemised it for 10 years less three days from May 13, 1955, at a rent of £1 a year. This sublease contained a specific covenant which tied Green Ace Motors to Regent. They covenanted that during the term of the sublease they would buy all their requirements of motor fuels from Regent and they would not sell any fuel except that supplied by Regent. They covenanted also to keep the premises open for the supply of fuel and not discontinue business or reduce the number of pumps. They could only assign the premises if they got a responsible person who would covenant to observe the tie. THIRDLY, ADDITIONAL PAYMENT. On the same day, June 11, 1956, Regent agreed that if during the 10 years Green Ace Motors bought from them more than 1,200,000 gallons, they would pay or allow by way of rebate a penny a gallon on every gallon over 1,200,000. In other words, if Green Ace Motors sold MORE than the estimated gallonage they were to receive extra payment. But there was no provision for any adjustment if they sold LESS than the estimated gallonage. There was no provision for a repayment of any part of the £5,000. Regent made similar agreements with the other owners of garages, but usually for longer terms of years and bigger payments. In some cases the sum paid was not described as a 'premium' but just as a 'sum'".

The case was heard by Mr. Justice Pennycuick who reversed the decision of the Special Commissioners of Income Tax that the payments were of a revenue nature. His Lordship held that the payments were of a capital nature. On appeal the Court of Appeal consisting of Lord Denning M.R. Danckwerts L.J. and Diplock L.J. held unanimously (confirming Pennycuick J.) that the payments were of a capital nature. Lord Denning M.R. at pages 1174-1175 said :-

> "Even if one looks at the transaction in a business sense one gets the same result. The payment was made so as to acquire an exclusive output for Regent's oil for a term of years. This was an asset of a permanent nature which would bring in revenue throughout the term." ..... Regent make a payment once and for all. In return they get an advantage which is of enduring benefit to Regent. It brings in revenue to Regent week after week, and month after month, from the petrol they supply to the retailer. I have no doubt this advantage is a capital asset and the payment for it is capital expenditure." ..... "These lump sums were not rebates. True it is they were calculated on the estimated gallonage, but the measure of a thing is not to be confused with the thing itself. The yardstick is different from the cloth which it measures. We must look at these lump sums as they really were, payments for a permanent asset in the shape of an exclusive output of Regent's product, and as such they were capital payments."

Danckwerts L.J. at pages 1175-1176 said :-

> "In two cases the lump sum is described as a 'premium' but in the other cases it is simply referred to as a sum of money." ..... "The real purpose of the transaction is, of course, to secure a tie, in the sense that the retailer and his petrol station are restricted to sale of Regent's products. This is an asset of commercial value in the fierce competition between the rival oil companies."

Diplock L.J. at pages 1176-1178 said :-

> "But this is a case in which the substance follows from the form. The purpose of acquiring the interest in land, the head lease, was that

there might be attached to it by means of the sublease to the dealer covenants by the dealer under which he would be compelled for the duration of the lease (which varied in the cases under consideration from 5 to 20 years) to buy his petrol exclusively from the taxpayer, Regent ....."It seems to me plain that it was a capital sum expended to secure an advantage of enduring benefit during the period of the head lease." ..... "What matters is whether or not they were moneys which were expended to obtain an enduring benefit for the trade, even though the benefit related only to a small part of the trade.

The reason I think that the commissioners have misunderstood or misapplied those citations is because in the next sentence they got on to say this : 'In our opinion these questions' - that is to say the questions they had extracted from Atherton's and Van den Bergh's cases - 'had to be answered having regard to the whole nature, extent and scope of Regent's trade, including the fact that the payments in question were not expected to secure an increase in Regent's share of the oil trade but only to maintain it.' - With the greatest respect that was an irrelevant consideration. If a trader acquires a capital asset in order to carry on trade to produce his stock-in-trade or to enable him to sell it, it matters not whether he does it in the hopes of extending his business or of maintaining that business."

25. Insofar as the payments were used to make structural alterations to tied service stations they were non-recurring lump sum payments and were of a capital nature. Two decisions support this submission - Boyce v. Whitwick Colliery Company Limited (1934) 18 T.C. 655 and Ounsworth v. Vickers Limited (1915) 3 K.B. 267. The first was a case in which a colliery and a council agreed that the colliery should supply the council with water for thirty years and the council should pay the colliery per annum one thirtieth of the cost of the capital works erected by the colliery, the property in the works to pass to the colliery at the end of the thirty year period. The council sought to deduct the payment of one thirtieth of the amount per annum as outgoings of revenue. The Court of Appeal held that they were capital payments on the premises of another person. In Ounsworth's

Case Rowlatt J. held that where a harbour authority had neglected the maintenance of a channel open to all shipping, and the respondents, a ship building firm, undertook in conjunction with the Harbour authority to dredge the channel and paid the cost of part of such dredging, such expenditure was capital expenditure carried out on a site which the respondent did not own. Further the provisions of Sections 54 to 62 of the Act dealing with depreciation strongly suggest that money spent on the making of structural improvements can never be an allowable deduction under Section 51 or otherwise although in certain cases depreciation can be claimed.

26. The Appellant claims that the payments were recurring and that this suggests that the payments were not capital payments.

However -

(1) The evidence is that there were not a great number of the agreements renewed. p.53 ll.3-13

(2) In any event, recurrence is not a test; it is no more than a consideration, the weight of which depends upon the nature of the expenditure (see per Dixon J. in Sun Newspaper case cited by Taylor J. in B.P. Australia Ltd. v. Commissioner of Taxation.

(3) It has been authoritatively decided that if a payment is otherwise capital in nature the fact of recurrence does not alter its character. See :-

Hinton v. Maden and Ireland Ltd. 38 T.C. 391. A shoe and slipper manufacturer purchased knives and lasts which were necessary to the conduct of its business. Thousands of them were purchased and they had a short life each. None the less the purchase price was held to be a capital payment.

Rorke v. Commissioner of Inland Revenue 39 T.C. 194. It was held that payments by a company engaged in open cast mining to land owners for the right to enter upon their land and as compensation for diminution in the value of the land were capital outgoings despite the inevitable necessity for recurring payments to other landowners

once the first land was exhausted. (See particularly at page 207). See also Stow Bardolph Gravel Co. v. Poole 35 T.C. 459 and Knight v. Calder Grove Estates 35 T.C. 447.

27. Taylor J. decided and the evidence clearly established :-

p.178 l.35 (1) The payments which were made had no real relation to "gallonage" and by no stretch of the imagination is it possible to assimilate them to the position of a trade rebate or discount.

p.172 l.1. (2) In relation to sites in respect of which it secured ties the Appellant paid what competition demanded. These considerations lead to the conclusion that the payments were capital in nature and not in the nature of rebates or discounts. See Glenborg Union Fireclay Co. v. Inland Revenue Commissioners 12 T.C. 427 at 464 per Lord Buckmaster; Green v. Favourite Cinemas 15 T.C. 390 at 394; Strick v. Regent Oil (1964) 1 W.L.R. 1166 at 1175. Further there was no obligation on the service station operator to purchase any required amount of petroleum products or gallonage.

The decision in Bolam v. Regent Oil (1956) 37 T.C. 56 is clearly distinguishable and was so regarded by the High Court. The payments there involved were the equivalent of a rebate and were related specifically to an amount calculated on the estimated amount of gallonage of petrol to be supplied during the currency of the agreement.

28. The decision of the High Court in Dickenson v. Commissioner of Taxation 98 C.L.R. 460 also supports the correctness of the decision of Taylor J. and the majority of the Full High Court in the present case. In that case the question at issue was the assessability to a service station operator of two sums of £2,000 each combining to form one receipt of £4,000 from the Shell Company of Australia Ltd. Whilst the form of the agreements used was not the same as those under consideration in this appeal, it is submitted the purpose of them was the same. The Full Court held the payments made by the Shell Company when received by the service station operator were of a capital nature and did not form part of the operator's taxable income. It is acknowledged that the character in which a payment is received by the recipient does not conclude the character in which it is paid by the

payer but it is submitted that it is significant that the High Court held that these payments when received were capital receipts and the characterisation of the payments is also very significant for the present appeal. Dixon C.J. said at page 474 "It may be that in a sense the sum of £4,000 was compensatory for the loss of future profits which the restriction might involve. It may be that it was meant as present payment by way of incentive to promote sales of the product derived from the single source. But if either or both of these elements formed part of the rationale of the payment, it amounted to a capitalisation of these elements." At page 491 of the report, Kitto J. expressed the view that "the ultimate result which the Shell Company sought was, of course, an increase in the sale of its products, but the actual transaction with which we are concerned was confined almost entirely to the exclusion of competitors from that part of the trade in petroleum products which would be done at the Appellant's garage", and at page 492 he remarked that it did not seem possible to regard the two payments made by the Shell Company as amounting to a rebate in advance against the price of the petroleum products to be purchased by the Appellant. Again at page 482 Williams J. said that "It was no doubt mainly to secure a monopoly for its products at that station that Shell paid the £4,000".

29. In a recent decision of Your Lordships' Board, Commissioner of Taxation v. Nchanga Consolidated Copper Mines Limited (1964) 1 A.E.R. 208 at page 212 : (1964) 2 W.L.R. 339 at page 345 Your Lordships in discussing the tests to be applied for deciding whether expenditure is made on behalf of revenue or capital said :

> "These phrases are of course used with intended reference to earlier judicial decisions that distinguish between capital and income for the purpose of assessing profit. Since a question of capital or income is always capable of giving rise to a question of law such a form of argument is unavoidable in any legal system that governs itself by appeal to precedent. Nevertheless, it has to be remembered that all these phrases, as, for instance 'enduring benefit' or 'capital structure' are essentially descriptive rather than definitive, and as

> each new case arises for adjudication and it is sought to reason by analogy from its facts to those of one previously decided, a court's primary duty is to inquire how far a description that was both relevant and significant in one set of circumstances is either significant or relevant in those which are presently before it."

The Respondent respectfully submits that when the decisions of the majority of the Full High Court and Taylor J. are looked at in this appeal, it is clear that their Honours' judgments were in accordance with these statements of Your Lordships' Board.

30. In any event the payments claimed as deductions by the Appellant do not come within the first part of Section 51(1) of the Act. They were not outgoings incurred in gaining or producing the Appellant's assessable income and were not necessarily incurred in carrying on a business for the purpose of gaining or producing such income. What the Appellant did was to make payments to acquire a favourable position from which to earn income or to enter into arrangements that would yield income. This does not fall within any part of the opening language of Section 51(1).

pp.164-178 JUDGMENTS IN THE HIGH COURT OF AUSTRALIA IN THIS APPEAL. JUDGMENT OF TAYLOR J.

31. In the present case the primary Judge, Taylor J. decided in favour of the Respondent.

p.165 l.16 - p.169 l.48 (1) He first 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 methods brought about by the action of the Appellant's competitors, after that date, and the measures taken by the Appellant and the Co-operating companies.

p.169 l.49- p.172 l.20 (2) He then analysed the various forms of agreement which were entered into between the Appellant and the service station operators. His Honour described the purpose and effect of such agreements as

p.171 l.39 > "to secure for the agreed period a reselling outlet for the appellant's products and those of the companies co-operating with it from time to time. That such a tie, to use a

neutral word, was of considerable value in the circumstances of the trade is beyond dispute for the evidence shows that there was intense competition among companies in the trade for what were thought to be "strategic" sites, and further, that this competition was the vital factor in determining how much or how little it was necessary for any company to pay to secure a site in this manner."

(3) His Honour stated that the inevitable need that the Appellant should incur the expenditure in question was not of much help in solving the problem whether the expenditure which was actually incurred was of a revenue or capital nature. He rejected the Appellant's submission that payments of the character in question became for all practical purposes an ordinary marketing cost which in accordance with general principles ought to be borne by revenue. p.172 l.30 - p.173 l.31

He went on to say that this contention loses sight of the fact that although the pattern of trading changed so much and so quickly the resulting situation might have been met at the Appellant's option either by capital expenditure or revenue expenditure or by a combination of both. He said :

"It is difficult to understand why 'development Allowances' should be characterized as revenue expenditure solely on the ground that the changed trading conditions made multiple outlays of that description necessary to secure trade ties. Emphasis was of course laid upon what was called the 'recurring' nature of the expenditure but as was said in Sun Newspapers Limited v. The Federal Commissioner of Taxation (61 C.L.R. 337) : p.173 l.16

> 'Recurrence is not a test, it is no more than a consideration the weight of which depends upon the nature of the expenditure' (per Dixon J., as he then was, at p.362)."

In my view the answer to the problem must be sought in a closer examination of the purpose, effect, and, ultimately, the character of the payments in question."

(4) He rejected the Appellant's submission that the language of Viscount Cave in British p.173 l.32 - p.174 l.41

Insulated and Helsby Cables Ltd. v. Atherton (1926) A.C. 205 did not apply as the expenditure was not made with a view to bringing into existence any asset or advantage for the enduring benefit of the Appellant's trade. He observed :

p.173 l.49 p.174 l.3

"But the contention does much less than justice to those arrangements ..... In terms, the contractual arrangements did not bind any service station operator to purchase any, or any stated quantity of, motor spirit from the appellant though it is beyond doubt that it was contemplated that purchases would be made and the operator's promise to increase the sales of C.O.R. products to the best of his ability proceeds on this basis. But the real substance of the arrangements is to be found in the exclusion from sale on the subject premises of brands of motor spirit other than those approved of by the appellant. To the extent specified in the contract an operator was bound to suffer 'a substantial or enduring detraction from pre-existing rights'

Dickenson v. Federal Commissioner of Taxation (98 C.L.R. 460 at 492). The appellant did not, of course, succeed to these rights but it seems clear to me that it did obtain a great deal more than the contention under consideration acknowledges. First of all, it was implicit that the payment in each case was intended to secure that the appellant's pumps and tanks should remain on the subject premises undisturbed for the period agreed upon. Secondly, it was implicit that the appellant's product would be sold on the site for that period and finally, by the stipulation that no brands of motor spirit other than those approved by the appellant should be sold on the site, substantial freedom from competition on each selected site was secured to the appellant for periods extending from three to ten years. To say, as the appellant does, that this was neither an asset nor an advantage for the enduring benefit of its trade would be, in my view, to give the lie to a great number of decisions since Viscount Cave's dictum was first promulgated. 'Enduring' in this context does not mean 'that the advantage which will be obtained will last forever' ".

p.175 ll.5-37

(5) His Honour then examined the character of the expenditure incurred in securing the trade

ties and concluded it was of a capital nature because although the value of the tie in relation to any particular site bore some relation to its trading potential, the quantum of each amount paid was determined by the intensity of the competition and the lump sums which were paid were laid out by one or other of the competitors to secure the resultant advantage for periods of years. He said :

> "If there were nothing more in the case I should entertain no doubt that expenditure so made by the appellant was expenditure of a capital nature in spite of the fact that there was a multiplicity of payments during the relevant year", p.175 l.27

but the Appellant contended that the expenditure was the equivalent of trade rebates or discounts calculated on the basis of the estimated trade turnover at each particular site.

(6) His Honour then rejected the Appellant's submission that the payments made by it represented trade rebates or discounts, because the Appellant took into account the "gallonage" factor in deciding what amount it thought economical to expend to secure a tie. He examined the Appellant's claim in this regard and found that although "gallonage" was one of the factors in determining whether any particular proposal should be entertained the "gallonage" factor played no greater part than this and found on the evidence that the lump sums paid were not paid either in form or substance as the equivalent of trade rebates or discounts. The quantum of each payment was determined by reference to the competition between the oil marketers. p.175 l.37 - p.178 l.49

> "There is no doubt that the 'price' fluctuated with competition and it was the degree of competition and the 'strategic' nature of the site which finally determined the amount to be paid; and, as Mr. Scruton observed in cross-examination 'the longer it went on the more educated the resellers were to the amount that could be made'". p.177 l.23

He concluded therefore that the decision in Bolam v. Regent Oil Co. Ltd. 37 T.C. 56 was

not applicable and was distinguishable from the present case :

p.178 l.34

> "To my mind there is a clear distinction between that case and the present case. In this case the payments which were made had no real relation to 'gallonage', and by no stretch of imagination is it possible to assimilate them to the position of a trade rebate or discount. Each was paid in a lump sum for the purpose of securing a trade tie for a period of years and the amount paid was in my opinion a capital outgoing for the purpose of obtaining the resultant advantage. That being so and in spite of the fact that a great many of such payments became necessary in the changed circumstances of the trade at the relevant time it is, I think, impossible to regard them as outgoings having a revenue character and they were properly disallowed by the Commissioner"

p.178 ll.49-54 (7) His Honour considered the residual amount of £671 bore the same character, and dismissed the appeal.

pp. 182-200 JUDGMENTS IN THE FULL COURT

32. In the Full Court there was a division of opinion. The majority, consisting of McTiernan, Windeyer and Owen JJ. held that the deductions claimed were incurred on account of capital and were properly disallowed and dismissed the appeal. The then Chief Justice Sir Owen Dixon and Kitto J. took a contrary view and held that the deductions were incurred on account of revenue and should have been allowed by the Respondent and they would have allowed the appeal.

pp.182-190 33. The decision of the then Chief Justice (who dissented)

p.182 l.19 - p.189 l.34 (1) His Honour after reviewing the facts stated that the actual nature and amount of the expenditure was more important in determining its character than the motives which led those who made the expenditure to adopt a particular form or course of business.

p.189 l.34 - p.190 l.12 (2) His Honour said that the changes in the conduct of the Appellant's selling business seem to be of a more or less enduring character but

he went on to say that as he understood the matters in issue the company was engaged in its activities to obtain a definite market among the public by one means or another and was doing so in the course of conducting its business of disposing of petrol which it was able to acquire or import. He said :

> "I do not think it was acquiring a capital asset or doing any more than so conducting its business on revenue account as to increase it and make as certain as it could that its business was continuing and also would continue, if possible, to expand. For my part I cannot think that all the course adopted changed the character of the transactions of the company from those of a continual attempt to establish its product in a consumers' market and to meet all the obstacles which arose in a long and rather troubled period to obtaining a reputation for its product". p.190 l.1

(3) His Honour did not think there was any specific expenditure in increasing its plant, machinery or any other element in the profit-earning instrument under its control. He could not see any sufficient ground of a distinct or specific nature for saying that the expenditure was of a capital nature. Accordingly, he thought the appeal should be allowed. p.190 ll.12-19

It is respectfully submitted that His Honour's judgment is in error for the reasons given throughout this Case and because :-

(a) He overlooked the basic consideration which was stressed by Taylor J. that the objective or the purpose being to sell the company's products, that objective could have been achieved by way of capital payments or by way of revenue payments.

(b) He confined his decision to the question of objective which was to sell the company's products, but he did not give consideration to the mode of achieving the objective nor to the lasting benefit achieved.

(c) He erred in saying the objective or purpose of the selling of the Company's products demonstrated that the payments were revenue payments.

(d) He erred in confining himself to looking

at what was the business activity of the company and saying that the company wanted to extend or maintain its business or sales and not going on to consider the means by which the company achieved this objective, and what benefit the company thereby achieved : such as, was it a permanent or enduring benefit?

(e) He failed to advert at all to the real purpose of the transactions, that is, that they were to secure a tie, in the sense that the retailer and his service station were restricted to the sale of the Appellant's products or of the products of the co-operating companies. This was an asset of commercial value particularly in the light of the fierce competition which prevailed between the rival oil companies. That is, he failed to look at the aspect of the advantage obtained - the obtaining of goodwill or the buying off of competition, and he failed to appreciate that this was an enduring advantage.

(f) He failed to appreciate that the acquisition of solo sites amounted to a complete reorganization and change in the structure of the Appellant's trade.

(g) His Honour's statement that "there is no dispute that the sum represents expenditure in advancing or promoting the sales of petrol nor indeed that an increased volume of selling business followed" is not correct because it was contended that the payments did not fall within the first part of Section 51(1) and the evidence did not justify a conclusion that the increased volume of selling business followed.

p.190 ll.22-36 34. The decision of McTiernan J. (one of the majority)

McTiernan J. agreed in all respects with the views expressed by Taylor J. and said that the findings of fact were supported by the evidence; that Taylor J. correctly applied the criteria laid down in the decided cases for distinguishing between payments on income and capital accounts respectively.

pp. 191-197 35. The decision of Kitto J. (who dissented)

p.191 ll.19-21 (1) His Honour said the relevant facts had been stated by Taylor J. in his judgment, and that he need not repeat them.

(2) He said that the choice to be made in describing the expenditure in question was

(i) as expenditure "upon establishing replacing and enlarging the profit-yielding subject, the profit making machine" or

(ii) as expenditure "though unusual, for a purpose falling within the conduct of the trade."

(3) He said the first view could be supported either by regarding the expenditure by the Appellant as the purchase of freedom from competition on a particular site or as the cost of purchasing or equipping itself with a new market in the place of one which had been destroyed or was being destroyed by the actions of competitors, it being assumed that once a service station ranged itself with an oil company it would be likely to remain with that company more or less permanently. His Honour rejected these two bases. p.191 l.29 - p.192 l.35

(4) He rejected the first basis because he said the Appellant was not eliminating competition in order to create a more favourable situation in which to carry on his trade but on the contrary the undertaking given by the service station operators was only the negative side of the substantial positive advantage which the Appellant obtained, namely that the Appellant would secure the particular sales which would be necessary for the satisfaction of the service station's requirements of the period. Thus the expenditure was part and parcel of the business of effecting sales of its products and was prima facie part of the cost of selling the goods and not a capital expenditure. p.192 l.41 - p.193 l.41

(5) As to the second basis His Honour said that the change in the wholesale trade in motor spirit from the old system of multi-pump service stations to the new "solo" system meant that every oil company, if it wanted to sell motor spirit to service stations in future, had to accept the necessity of spending money, not at the beginning once and for all, but at the beginning and from time to time, to ensure p.192 l.42 - p.197 l.24

that it would receive from as many service stations as possible the whole of their orders for limited periods. The expenditure by the oil company to get its quota of stations during the months in which the market was in the throes of arranging itself initially was simply part of the expenditure to which that company's participation in the new system committed it as a regular feature of its selling activities. The advantage obtained was not a new market, not a new framework within which to carry on trade for the future, nor was it an addition to goodwill, but was the practical assurance of receiving bundles of orders for motor spirit in the future. Thus "gallonage" was not a governing factor in deciding or fixing the amount of expenditure, but only a factor to be taken into account with the monopoly obtained, in fixing the amount to be paid in the cost of obtaining orders for the spirit to be supplied during the relevant term of the agreement. It seemed to His Honour therefore that from an accounting point of view the sums paid for the securing of orders made them a marketing cost.

p.197 ll.25-35 (6) His Honour then referred to the principles stated by Dixon J. (as he then was) in the Sun Newspapers case, to be considered in deciding the capital or income nature of expenditure and came to the conclusion that the outgoings in question were not of a capital nature but were of the nature of trading expenses, to be allowed for in the ascertainment of the profits from the carrying on of the Appellant's business.

It is respectfully submitted that His Honour's judgment is in error for the reasons given throughout this Case and because :

(a) He assumed that the payments would recur whereas the evidence was that there were not a great number of the agreements renewed. In any event, "recurrence" is not a test, it is no more than a consideration the weight of which depends on the nature of the expenditure. Further even if there had been recurrence, that would not point against the conclusion that the payments were of a capital nature.

(b) He overlooked the significance of the fact that the payments made were lump sums to secure and tie service station operators which were enduring benefits in the sense of permanent assets in that once a service station became tied it

would tend to continue to remain so, as once a site was acquired in a settled area, in competition with other oil marketers, the re-seller's advantage had disappeared.

(c) Decisive circumstances to which His Honour did not give proper significance were that :-

(i) by the acquisition of sites valuable rights were acquired for the sale of the Appellant's products to the exclusion of the sales of the products of competitors (other than its co-operating companies) on those sites;

(ii) the acquisition of sites amounted to the buying off of competition for a period of years;

(iii) the acquisition of sites gave the Appellant freedom from the competition of competitors' products (except as above) being sold on the sites and this amounted to a complete re-organisation and change in the structure of the Appellant's trade;

(iv) by the acquisition of sites the Appellant obtained the goodwill of the selling sites and thus enlarged its goodwill by having service stations selling only its products or products approved by it.

(d) In failing to recognize the significance of the enduring benefits obtained from the payments he overlooked the significance of Viscount Cave's dictum approved by Latham C.J. in Sun Newspapers Ltd. v. Federal Commissioner of Taxation (61 C.L.R. at page 355) that "enduring" does not mean "that the advantage which will be obtained will last forever."

36. The decision of Windeyer J. (one of the majority) — pp.198,199

(1) His Honour was in agreement with the facts and their legal effect as discussed by Taylor J, and desired to say very little. — p.198 ll.3-7

(2) He said after referring to decided cases on the question whether expenditure is capital or revenue that the character of a questioned item of expenditure must depend primarily upon its purpose and regard ought to — p.198 l.8 - p.199 l.18

be had to what it was sought to acquire in relation to the taxpayer's business; in other words what the particular taxpayer got for his money, rather than how he got it, is important.

(3) He agreed with Taylor J. that the payments were made to secure for the agreed period a reselling outlet for the Appellant's products. p.199 ll.19-23

(4) The Appellant met a new situation in trading by setting up a system of tied service stations and by such arrangements obtained for a substantial period "and I would suppose with a prospect of renewal thereafter", something that was to become part of the structure, organization or framework within which and by means of which the Appellant carried on its business. p.199 ll.29-47 p.199 l.43

(5) In saying this he said that the price of securing the "outlets" was to some extent based on a factor of "gallonage" as it was called, but this factor did not to his mind alter the character of the advantages the Appellant obtained or their significance for the future conduct of its business. He accordingly dismissed the appeal. p.199 ll.24-29 p.199 l.48

37. The decision of Owen J. (one of the majority) p.200

Owen J. referred briefly to the facts as stated by Taylor J. with which he agreed, and stated he saw no material distinction between this case and that of the Vacuum Oil Company Pty. Ltd. and for the reasons he gave in that case he dismissed the appeal herein. The appeal by Vacuum Oil Company Pty. Ltd. was also an appeal from Taylor J. which considered whether amounts paid, (in the year ending 30th June 1953) for the purposes of inducing service station operators to buy petroleum products exclusively from that company were allowable deductions from the assessable income for the year in question. The Vacuum Case was heard by the same Full Court of the High Court as in the present appeal. His Honour said in his judgment in this case :-

"It is sufficient to say that the amount represents lump sum payments made to service station operators in return for which those operators bound themselves for periods ranging from three to ten years to deal only in brands of petrol approved by the appellant and three

other companies with which it was associated in its efforts to secure or retain outlets for its products. In a few isolated cases the tie was not an exclusive one, the operator undertaking that eighty per cent of his petrol requirements would consist of approved brands."

In the Vacuum case His Honour said :- pp.200-209

(1) That the difficulty in characterising an outgoing as on capital or revenue account lay in the fact that no definite criterion has been or can be laid down which would enable that question to be answered with certainty in all circumstances. He said a number of tests have been suggested none of which could be conclusive; they were no more than indications of the category into which a particular outgoing should be placed. p.207 ll.31-41

(2) He then referred to the statement of Dixon J. (as he then was) in the Sun Newspapers Case (61 C.L.R. 337 at pages 359-363) and said in considering the test questions of degree must inevitably arise. However he considered that one important test was "the character of the advantage sought and in this its lasting qualities may play a part" (as per Dixon J. in Sun Newspapers Case Supra). p.207 l.42 - p.208 l.9 p.208 ll.8,9

(3) He said the purpose or effect of the expenditure added valuable, even if intangible, assets of a lasting character to the profit earning organisation. In the present case he accordingly dismissed the appeal. p.208 l.46 - p.209 l.9

38. CONCLUSION

The Respondent therefore submits that the decision of Taylor J. and of the Full Court of the High Court was correct and should be affirmed for the following among other

R E A S O N S

(1) The reasons of the majority of the Full Court and Taylor J. were right and the reasons of Dixon C.J. and Kitto J. were incorrect.

(2) The decisions of the majority of the Full Court and Taylor J. are in accordance with well established and well known

principles laid down by the decisions of Your Lordship's Board, the House of Lords and the High Court.

(3) The decisions of the majority of the Full Court and Taylor J. accord with the reasoning of Your Lordship's Board in the Nchanga Case.

(4) The reasoning in the recent decision of the Court of Appeal in Strick v. Regent Oil strongly supports the correctness of the majority in the High Court and of Taylor J. 10

(5) The payments were all lump sum payments payable in advance with no refund to be made as part of a deal to secure and tie a service station operator for a period of years and were clearly of a capital nature.

(6) The said payments were for ties which were enduring benefits in the sense of permanent benefits in that once a service station operator became tied to the Appellant, it would tend to continue to remain tied. 20

(7) The Appellant by the payment of the lump sums acquired valuable rights to have retail outlets for a period of years at least plus the exclusion from the sites of any of its competitors' products (unless approved by it) and the assurance that its tanks and pumps would remain on the sites, and advertising rights.

(8) These rights were enduring for the periods agreed upon and were likely to continue to endure thereafter. 30

(9) Such benefits or rights are clearly the obtaining of capital advantages and are within the concept of Viscount Cave's dictum in the Helsby Cables Case.

(10) The payments were not paid as the equivalent of trade rebates or discounts on gallonage sold or to be sold and as such were distinguishable from the payments in Bolam's case, where the payments were adjusted up or down according to gallonage sold. 40

(11) The quantum of the payments made fluctuated with the competition for a particular site, and the strategic nature of the site determined the quantum of the payment.

(12) The payments involved the acquisition of goodwill of sites. The Appellant acquired the goodwill of reselling sites which enlarged its goodwill generally.

(13) The payments were for the purpose of the removal or prevention of trade competitors on the sites or to buy off opposition of other trade competitors on a site.

(14) Not many of the agreements were renewed so the question of recurrence does not really arise in this case, but to the extent that Kitto J. referred to it as a factor it is submitted particularly that even if there had been recurrence :- p.53 ll.3-13

(a) it does not point against the conclusion that the payments were of a capital nature, when the benefits obtained and the means of obtaining them are looked at;

(b) recurrence is not a test, it is no more than a consideration, the weight of which depends upon the nature of the expenditure, and

(c) as the majority of agreements were not renewed, the payments were made once and for all.

(15) The amount of £671 was expended for capital outlay on operator's sites.

(16) The expenditure was made by the Appellant in increasing the profit earning structure, organization or framework under its control.

(17) None of the payments fell within the first part of Section 51(1) of the Act.

C.I. MENHENNITT

R.J. GILBERT

No.51 of 1964

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

B.P. AUSTRALIA LIMITED .... Appellant

- and -

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA Respondent

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CASE FOR THE RESPONDENT

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